



United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: 2018 Guideline Amendment Priorities

Dear Members of the U.S. Sentencing Commission,

We at Organizing Neighborhood Equity (ONE DC) write to strongly urge the Commission to consider the policy proposal titled 'Sentencing Modification For Offenders Serving Non-Statutory Terms of Life Imprisonment Imposed Under The Mandatory United States Sentencing Guidelines' and make it a priority during the Commission's 2018 Amendment cycle. ONE DC supports this proposal as it is another responsible step towards responsible reform of the criminal justice system.

Thank you for your consideration of these comments.

Sincerely,

POLICY PROPOSAL

Re: Sentencing Modification For Offenders Serving A Non-Statutory Term Of Life Imprisonment Imposed Under The Mandatory United States Sentencing Guidelines

The Sentencing Reform Act of 1984 modified the definition of what constituted a life sentence in the federal system.^{1/} As of November 1, 1987, a federal prisoner sentenced to a term of life imprisonment **was not** scheduled for release.^{2/} This prospective policy change would potentially effect a small class of federal prisoners who were sentenced under the Sentencing Reform Act and sentenced before the Supreme Court's decision in United States v. Booker,⁵⁴³ U.S. 220 (2005) which had the effect of rendering the United States Sentencing Guidelines effectively advisory. Particularly, this policy proposal would apply to that small class of federal prisoners serving life sentences imposed pursuant to the Mandatory Sentencing Guidelines and whose total offense level, viz., the offense level after the application of all adjustments and departures, was 43 or greater.

i. Basis For Policy

Each year the United States Sentencing Commission publishes the Sourcebook of Federal Sentencing Statistics ('Sourcebook'). In the Sourcebook, the Sentencing Commission ascribed a life sentence varying definitions from 360 months in the initial editions of the Sourcebook to 470 months in those editions issued after 1993.^{3/} It is important to underscore that those courts that have acknowledged,

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1. See 18 U.S.C. 4205(a)(providing for possibility of parole for federal prisoner who has served ten years of a life sentence), repealed by Comprehensive Crime Control Act of 1984, Pub. L. No.98-473.
 2. See, e.g., United States v. Lee, U.S. Dist. LEXIS 140626 (D.Mont. 2016)(stating that "as there is no parole in the federal system, life means life."); Campbell v. United States, 2011 U.S. Dist. LEXIS 34034 (D.S.Caro. 2011)("Life [in the federal system] means life, which means [the defendant] never gets out of jail); United States v. Loyal, 2015 U.S. Dist. LEXIS 180630 (D. Ariz. 2015)(same); United States v. Sears, 2008 U.S. Dist. LEXIS 20674 (D. Kan. 2008)(same)
 3. See 2001 Sourcebook, Appx. A ("Life sentences are assigned a prison length of 470 months, based on a U.S. Census Bureau average life expectancy by age of federal defendants at sentencing); 2004 Sourcebook, Appx. A (Prior to fiscal year 1993, the Commission defined life sentences as 360 months. However, to reflect life expectancy of federal criminal defendants more

this numerical equivalency of what amount of months corresponds to a life sentence have correctly noted that the Sentencing Commission's assignment of the numerical equivalency was not intended to limit the sentencing court's discretion to impose an 'actual life' sentence if the total offense level is 43 or greater but was instead meant to provide the sentencing court with a numerical point of reference.^{4/}

Where a sentencing court is generally unrestricted in considering the 470 month equivalent of a life sentence as a point of reference under the post-Booker advisory Sentencing Guidelines in determining whether an 'actual life' sentence or some lesser sentence is sufficient but not greater than necessary to satisfy the sentencing goals of 18 U.S.C. § 3553(a)(2), the discretion of a sentencing court in a similar situation under the Mandatory Sentencing Guidelines would have been constrained pursuant to 18 U.S.C. § 3553(b)(1), repealed by Booker, rendering the court unable to consider the 470 month point of reference and compelling the imposition of an 'actual life' sentence. Thus, even though the Sentencing Commission had indeed provided a numerical equivalency for what constituted a life sentence during the period in which the Sentencing Guidelines functioned as mandatory, this equivalency was rendered superfluous by virtue then-valid § 3553(b)(1).

This policy is intended to harmonize the aforementioned incongruity that existed under the Mandatory Sentencing Guidelines. Specifically, the policy would provide the sentencing court the opportunity in the first instance to determine whether a sentence that corresponded with the equivalency of a life sentence (or some sentence greater than that amount but less than an 'actual life' sentence) would be a punishment that is sufficient but not greater than necessary under § 3553(a) for an individual who was sentenced to 'actual life' under the Mandatory Sentencing Guidelines and had a total offense level of 43 or greater.

ii. Relationship of Policy to 18 U.S.C. § 3582(c)(2)

The policy proposal would be cognizable under § 3582(c)(2). Pursuant to § 3582(c)(2), the jurisdiction of a district court to modify a sentence

3. (continued):

precisely and to provide more accurate length of imprisonment information, life sentences are now defined as 470 months."); see also Variable Codebook for Individual Offender, United States Sentencing Commission ("470 months = life sentence").

4. Multiple courts have endorsed the use of the 470 month point of reference in determining whether an 'actual life' sentence or some other sentence would be appropriate under § 3553(a). See United States v. Christensen, 582 F.3d 860 (8th Cir.2009); United States v. Nelson, 491 F.3d 344 (7th Cir.2007); United States v. Breton, 740 F.3d 1 (1st Cir.2014); United States v. Keller, 413 F.3d 706 (8th Cir.2005); United States v. Camacho, 631 Fed.Appx. 285 (6th Cir.2015); United States v. Shuler, 598 F.3d 444 (8th Cir.2009); United States v. Raplinger, 555 F.3d 687 (8th Cir. 2008).

is properly invoked under § 3582(c)(2) if the defendant has been sentenced to a term of imprisonment "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Under this policy proposal, the sentencing range of an individual who was sentenced to a term of life under the Mandatory Sentencing Guidelines based on a total offense level of 43 or greater would have his sentencing range lowered for purposes of applying § 3582(c)(2). In particular, the ceiling of the individual's Guidelines range would still be life but the base of the sentencing range would become the numerical equivalency of what the Sentencing Commission deemed constituted a life sentence (according to the Sourcebook) at the time that the sentence of life was originally imposed.

iii. Eligibility For Relief Under The Policy

To qualify for relief under this policy, the individual must: (1) currently be serving a sentence of life that was imposed prior to the Supreme Court's decision in Booker; and (2) the life sentence must have been imposed pursuant to the Sentencing Guidelines meaning that the individual's total offense level was 43 or greater.^{5/} If the individual satisfied these prerequisites, the district court could exercise its discretion under § 3582(c)(2) and sentence the individual to a term less than 'actual life' but not less than the equivalent of a life sentence at the time that the sentence was originally imposed.^{6/}

Any individual serving a 'statutory sentence' of life imprisonment is not eligible for relief under this policy. A 'statutory life' sentence is defined as a sentence pursuant to an offense that prescribed a mandatory penalty of life imprisonment upon conviction thereunder. The following is a non-exhaustive list of examples of statutes that prescribe mandatory life sentences upon conviction:

- 18 U.S.C. § 924(c)(1)(C)(ii)(second or subsequent conviction for machinegun, destructive device, firearm silencer or muffler)

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5. An individual also qualifies for relief under this policy if he was convicted on multiple counts—none of which prescribed a statutory maximum of life—and had a total offense level of 43 or greater (under the Mandatory Sentencing Guidelines) and the sentencing court through its application of USSG § 5G1.2(d) imposed the sentences for those counts to be served consecutively and the combined sentence was greater than the Sentencing Commission's equivalency for life at the time that the sentence was originally imposed.
 6. See USSG § 1B1.10(b)(2)(A)(noting that the court "shall not reduce the defendant's term of imprisonment under § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range[.]")

- 18 U.S.C. § 1091(a)(1)(killing in furtherance of genocide)
- 18 U.S.C. § 1111 (first degree murder)
- 18 U.S.C. § 1118(a)(murder by a federal prisoner serving life)
- 18 U.S.C. § 1201 (kidnapping resulting in death)
- 18 U.S.C. § 1203 (hostage taking resulting in death)
- 18 U.S.C. § 1651 (piracy)
- 18 U.S.C. § 1652 (piracy by a U.S. citizen)
- 18 U.S.C. § 1653 (piracy against U.S. by an alien)
- 18 U.S.C. § 1655 (piracy in the form of an assault on a commander)
- 18 U.S.C. § 1661 (robbery ashore by a pirate)
- 18 U.S.C. § 1959(a)(1)(murder in aid of racketeering)
- 18 U.S.C. § 1958 (murder-for-hire if death results)
- 18 U.S.C. § 2113(e)(bank robbery related offenses if death results)
- 18 U.S.C. § 3559(c)(1)(federal 3 strikes)
- 21 U.S.C. § 841(b)(1)(A)(filing of information pursuant to 21 U.S.C. § 851 alleging that defendant has 2 prior felony drug convictions)
- 21 U.S.C. § 848(b)(continuing criminal enterprise)

iv. Public Safety

The public safety concerns associated with this policy are minimal. To be sure, many of the individuals who qualify for a sentence modification under this policy will have served an average of 33.5 years before they are released. Hence, many of these individuals will be in their 50s and 60s upon release—an age which, according to the Sentencing Commission, renders them significantly less likely to recidivate.^{7/}

7. See U.S.S.C., Measuring Recidivism: The Criminal History Computation of the FSG, @12-13 (noting that persons of advanced age, statistically speaking, are less likely to reoffend); Robert Weisberg et al., Stanford Criminal Justice Center, Life in Limbo: An examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole, Sept. 2011, @ 17 ("For most offenses—and in most societies—crime rates rise in the early teenage years, peak during the mid-to-late teens, and subsequently decline dramatically

Furthermore, as with the determination of an individual's eligibility for relief under other retroactive amendments, it is the district court who is in the best position to review the entire record in deciding whether a modification of the previously imposed sentence is warranted. If, in the exercise of its discretion, the district court deems that the individual's serious criminal history,^{8/} the seriousness of the instant offense,^{9/} or negative institutional adjustment,^{10/} are indicative of the notion that the individual's release would endanger the public the court will take the appropriate action.

7. (continued):

not only are most violent crimes committed by people under 30, but even the criminality that continues after that declines dramatically after age 40 and even more so after age 50.").

8. See United States v. Valentine, 2008 U.S. Dist. LEXIS 44962 (D.D.C. 2008) (citing the defendant's extensive criminal history as the basis for its denial of § 3582(c)(2) motion); United States v. Battle, 2017 U.S. Dist. LEXIS 71025 (E.D. N. Caro. 2017) (same); United States Surine, 2013 U.S. Dist. LEXIS 199073 (M.D. Pa. 2013) (same); United States v. Rader, 2017 U.S. Dist. LEXIS 12759 (E.D. Tenn. 2017) (same); United States v. Carey, 2015 U.S. Dist. LEXIS 4484 (E.D. Kent. 2015) (same)
9. See United States v. Butler, 130 S. Supp. 3d 317 (D.D.C. 2015) (citing the seriousness of the defendant's instant offense as the basis for its denial of the § 3582(c)(2)); United States v. Boyd, 2015 U.S. Dist. LEXIS 68905 (E.D. Kent. 2015) (same); United States v. Cooper, 2016 U.S. Dist. LEXIS 42122 (N.D. Ind. 2016) (same); United States v. Burch, 2017 U.S. Dist. App. 5738 (11th Cir. 2017) (same)
10. See United States v. David, 2010 U.S. Dist. LEXIS 143772 (D.D.C. 2010) (citing the defendant's negative institutional as the basis for its denial of the § 3582(c)(2) motion); United States v. Braswell, 2014 U.S. Dist. LEXIS 185144 (D. Alaska 2014) (same); United States v. Boyd, 2013 U.S. Dist. LEXIS 107164 (D. Iowa 2013) (same); United States v. Patterson, 2012 U.S. Dist. LEXIS 28519 (D. Minn. 2012) (same); United States v. Hines, 2016 U.S. Dist. LEXIS 149747 (D. Illin. 2016) (same); United States v. Burgner, 2017 U.S. Dist. LEXIS 8844 (E.D. Tenn. 2017) (same); United States v. Simpson, 2016 U.S. Dist. LEXIS 32441 (E.D. N.Y. 2016) (same)

CONCLUSION

A life sentence is the second most severe penalty that may be imposed in the federal criminal justice system. "Courts ... must exercise that power only in a small number of cases after the deepest thought and reflection."¹¹ Consistent with these statements, the Sentencing Commission has long provided an equivalency to furnish the sentencing court with a point of reference to consider in lieu of this severe penalty. Congress—through § 3553(b), constrained the sentencing court's ability to exercise that deep thought and reflection under the Mandatory Sentencing Guidelines before imposing this harsh penalty. This policy would restore the sentencing court's ability in a small number of cases to revisit this severe penalty and determine in the exercise of its discretion an appropriate punishment under § 3553(a).

11. See United States v. Ulbricht, 858 F.3d 71 (2d Cir.2016)