



AMERICAN BAR ASSOCIATION

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On behalf of the

American Bar Association

Before the

United States Sentencing Commission

Washington, D.C.
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on

Proposed Guidelines Amendment on
Reduction of Term of Imprisonment Based on
Bureau of Prisons Motion under 18 U.S.C. § 3582(c)(1)(A)(i)

Mr. Chairman and Members of the Commission:

I am Margaret Love, and I am a lawyer in private practice in Washington, D.C.

I am a past chair of the ABA Criminal Justice Section Committee on Corrections & Sentencing, and I served as a reporter for the ABA Justice Kennedy Commission. I am currently Consulting Director of the ABA Commission on Effective Criminal Sanctions, the Kennedy Commission's successor entity. Between 1990 and 1997 I served in the Justice Department as Pardon Attorney of the United States. I welcome the opportunity to testify before you concerning the proposed policy statement on Reduction of Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A)(i). I appear today at the request of the President of the American Bar Association, Michael S. Greco. The American Bar Association is the world's largest voluntary professional association, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The American Bar Association continually works to improve the American system of justice and to advance the rule of law in the world.

At the outset let me express our appreciation for the Commission's willingness to tackle the issues raised by § 3582(c)(1)(A), which are concededly somewhat unfamiliar in a guidelines context, but critical to the fair operation of the system as a whole. Our comments will be confined to subsection (i) of § 3582(c)(1)(A), which addresses sentence reduction for "extraordinary and compelling reasons." The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii).

I. ABA Policy

The ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "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, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." It also urged the Department of Justice to make greater use of the federal sentence reduction authority in § 3582(c)(1)(A)(i), and asked this 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." Against this background of strong and

consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances, it is a privilege to address the Commission on this subject for the first time.¹

II. The Commission’s Proposed Policy Statement

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act (“SRA”), contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons (“BOP”), reduce a prisoner’s sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court’s authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find “extraordinary and compelling reasons” to justify such a reduction.

As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would “further the purposes set forth in § 3553(a)(2).” *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” The only normative limitation imposed on the

¹ In 1993 the Commission invited comments on whether the guidelines should be amended to provide authority for sentence modification under § 3582(c)(1)(A) in the case of older, infirm defendants who do not pose a risk to public safety. *See* 58 Fed. Reg. 67536 (Dec. 21, 1993). (At that time, § 3582(c)(1)(A)(ii) had not yet been enacted.) The question whether more general policy for sentence reduction should be adopted has been on the Commission’s list of priorities since 2004, but we believe that this is the first time comments have been invited.

Commission is that “Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”

The Commission’s proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed new policy statement restates the statutory bases for reduction of sentence under § 3582(c)(1)(A), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. But it does not include “the criteria to be applied and a list of specific examples” of what might constitute “extraordinary and compelling reasons,” as explicitly required by § 994(t). To assist the Commission in carrying out this statutory mandate, we will suggest some specific criteria for determining when a prisoner’s situation warrants sentence reduction, and give some specific examples of situations applying these criteria.

Before turning to the criteria and examples, we would raise a concern about proposed USSG § 1B1.13(2), which requires the court, before reducing a sentence, to determine that the prisoner “is not a danger to the safety of any other person or the community, as provided in 18 U.S.C. § 3142(g).” This requirement, imported from the “three strikes” provision of § 3582(c)(1)(A)(ii), might be applied to render many otherwise worthy cases ineligible for consideration by the court. It is certainly appropriate for a court to determine whether a prisoner is presently dangerous when making a decision to reduce his or her sentence, particularly where, as here, reduction of sentence will accomplish the prisoner’s immediate release. But we question whether § 3142(g) , which governs pretrial release, is the appropriate source of standards in a

context that may be many years removed from the original offense. Thus, for example, § 3142(g)(1) requires consideration of the nature and circumstances of the offense of conviction, “including whether the offense is a crime of violence or involves narcotic drug,” and § 3142(g)(2) refers to “the weight of the evidence against the person.” It seems particularly inappropriate to infer present dangerousness from the mere fact that the underlying offense “involves narcotic drug.” Even § 3142(g)(3), which requires the court to consider of “the history and characteristics of the person,” may not always be relevant to a finding of dangerousness in this context. We believe that it would be sufficient to refer only to § 3142(g)(4), which requires consideration of “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.”

We also note what may be simply a drafting error in proposed USSG § 1B1.13(1)(A), which requires the court to find sentence reduction warranted by “an extraordinary and compelling reason.” The use of the singular might suggest that a court must base its determination on a single reason that is both extraordinary and compelling, and discourage reliance on several factors in combination as justification for sentence reduction. Over and above the fact that § 3582(c)(1)(A)(i) uses the plural “reasons,” the prohibition in 28 U.S.C. § 994(t) on basing a decision on rehabilitation “alone” evidences Congress’ intent to allow consideration of several factors in combination. We therefore recommend that the section be modified to track the statutory language, “extraordinary and compelling reasons.”

III. Criteria and Examples

We now turn to the criteria and specific examples of extraordinary and compelling reasons warranting sentence reduction.

A. Criteria

There are two primary criteria for identifying cases in which a sentence reduction under § 3582(c)(1)(A)(i) will be appropriate.² One derives from the black letter directive that a court should “consider[] the factors set forth in § 3553(a), to the extent that they are applicable.” The other is the caveat in the legislative history that eligibility depends upon a prisoner’s circumstances having fundamentally changed since sentencing. *See, e.g.*, S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with “the unusual case in which the defendant’s circumstances are so changed . . . that it would be inequitable to continue the confinement of the prisoner”); *id.* at 55 (reduction in sentence may be “justified by changed circumstances”). The first criterion ties sentence reduction decisions to the factors considered in imposing sentence in the first instance, “to the extent they are applicable.” The second makes clear that § 3582(c)(1)(A)(i) is not to serve as a backdoor way for a court to revise a sentence that has been properly imposed.

Changed circumstances warranting sentence reduction might relate to the particulars of a prisoner’s situation or condition, or they might arise from changes in the

² In addition to § 3582(c)(1)(A), the SRA provides only two other ways in which a court can modify an otherwise final sentence: § 3582(c)(1)(B) recognizes the court’s authority to reduce a sentence upon a government motion under Rule 35 of the Federal Rules of Criminal Procedure, and § 3582(c)(2) authorizes the court to reduce a sentence where this Commission has reduced the applicable guidelines range and made the change retroactive.

law since the prisoner was sentenced, even if those changes are not made generally retroactive so as to fall under § 3582(c)(2). A court might consider several changed circumstances together, no one of which by itself would warrant sentence reduction, but which combined would be sufficient to make out a case for release.³ Thus, for example, if the court were precluded from taking into account certain conditions at the time of sentencing, but the law was subsequently changed to permit such consideration, the government could suggest, and a court could properly find, that this change (perhaps in combination with extraordinary rehabilitation or poor health) constituted an “extraordinary and compelling reason” supporting sentence reduction.

We are mindful that BOP interprets § 3582(c)(1)(A)(i) and its old law analogue 18 U.S.C. § 4205(g) more narrowly, and will consider filing a motion only “in extraordinary or compelling circumstances that could not reasonably have been foreseen by the court at the time of sentencing.” 28 C.F.R. § 571.60; Program Statement 5050.46 (May 19, 1998), http://www.bop.gov/policy/progstat/5050_046.pdf. But if a prisoner’s circumstances have so fundamentally changed since sentencing that the sentence imposed is no longer just, we see no reason for the further requirement that the change not have been foreseeable to the court. For example, if a prisoner had a chronic illness at the time of sentencing that was likely to be eventually disabling, there is no reason why the

³ See the proposal for policy guidance from Families Against Mandatory Minimums published as an exhibit to Mary Price, “The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A),” 13 Fed. Sent. Rptr. 188, 191 (2001)(“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.”).

government should not be able to bring the case back to court years later if in fact the disability materialized.

We also understand that BOP has in recent years invoked the court's authority under § 3582(c)(1)(A)(i) only in medical cases, and has coined the term "compassionate release" to describe sentence reduction under this statute. But neither the text of the statute nor its legislative history supports such a restrictive policy. *See* S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 5 (statute available to deal with "the unusual case in which the defendant's circumstances are so changed, *such as* by terminal illness, that it would be inequitable to continue the confinement of the prisoner"); *id.* at 55 (changed circumstances warranting sentence reduction would include "cases of severe illness, [and] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). The use of terminal illness as one example ("such as") of an extraordinary and compelling reason in the first quoted passage, and the distinction drawn between "severe illness" and "other extraordinary and compelling circumstances" in the second, demonstrate that Congress expected the statute to be available in circumstances other than those involving the prisoner's medical condition.

Indeed, BOP's own regulations recognize that sentence reduction may be sought for both medical and non-medical reasons. *See* 28 C.F.R. § 571.61 (directing prisoner to describe plans upon release, including where he will live and how he will support himself and, "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment"); *Id.* at § 571.62(a) through (c)(describing a

process by which sentence reduction requests based on medical reasons are reviewed by BOP's Medical Director, and non-medical cases are reviewed by the Assistant Director for Correctional Programs).

As a matter of what may only be historical interest, BOP has not always followed such a restrictive policy in seeking judicial sentence reduction. Following the original enactment of judicial sentence reduction authority in 1976, BOP filed motions in a broad range of equitably compelling circumstances. *See, e.g., U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner's sentence reduced to minimum term because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(sentence reduced because of exceptional adjustment in prison). In the *Banks* case, the Director of the Bureau of Prisons noted:

Prior to the passage of the Parole Commission and Reorganization Act [in 1976], applications for relief in cases of this type had to be processed through the Pardon Attorney to the President of the United States. The new procedure offers the Justice Department a faster means of achieving the desired result.

428 F. Supp. at 1089. *See also U.S. v. Diaco*, 457 F. Supp. at 372 (same). Until 1994, BOP's regulations on sentence reduction motions for both old and new law prisoners provided that "The section may be used, for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill."⁴

⁴ 28 C.F.R. § 572.40, 45 Fed. Reg. 23366 (April 4, 1980). In 1994, BOP promulgated a rule specifically applicable to sentence reduction for new law prisoners, 28 C.F.R. § 571.60, but applied the same standards and procedures to sentence reduction motions for both old and new law sentences. No examples were given in the regulations, but the Federal Register notice stated that "Releases have been most often applied where the inmate is terminally ill." 59 Fed. Reg. 1238-01 (January 7, 1994).

In summary, we recommend that the criteria for filing sentence reduction motions be: 1) that the circumstances under which sentence was originally imposed must have fundamentally changed; and 2) the grounds for reducing the sentence could have been properly considered in imposing sentence in the first instance. Changes in the law as well as changes in a prisoner's personal circumstances may be considered, and several changes may be considered in combination. It should not matter whether or not the changes could have been foreseen by the court, and it is not necessary that the changed circumstances relate to the prisoner's medical condition.

B. Specific examples:

We turn now to examples of extraordinary and compelling circumstances arising after imposition of sentence. In addition to terminal illness, sentence reduction might be warranted by an incapacitating injury or illness that diminishes a prisoner's quality of life and public safety risk; by old age coupled with infirmity; by the death or incapacitation of the only family members capable of caring for the prisoner's minor children; by unwarranted disparity of sentence among codefendants; by changes in applicable law that are not made retroactive; and by unrewarded service to the government. Any of these circumstances, as well as rehabilitation, may justify sentence reduction when considered in combination, as long as they could have been properly considered in imposing the sentence in the first instance.⁵ Whether or not they will in fact justify sentence reduction depends in the first instance upon the government's opinion of the equities of the case overall.

⁵ We find much to commend in the formulation of these and other specific examples given in the proposal for policy guidance from Families Against Mandatory Minimums, note 3 *supra*.

For example, if a prisoner becomes permanently and substantially disabled while in prison, whether as the result of an accident or illness or intentional injury, this could constitute an “extraordinary and compelling reason” justifying release. Or, if a prisoner has served a substantial portion of the sentence imposed, and has become infirm as a result of aging, these reasons might in combination be considered “extraordinary and compelling” so as to warrant a reduction of sentence and early release. A third scenario might involve a prisoner with an exemplary record of rehabilitation who is near the end of her sentence, who becomes the sole source of care for minor children upon the death of her spouse and/or parents.

Lest the universe of possible equitable grounds for sentence reduction begin to seem vast and unmanageable, so that the statute could undercut the core values of certainty and finality in sentencing, it may be comforting to remember that the court’s jurisdiction in these cases is entirely dependent upon the government’s decision to file a motion. We believe that the government can be counted upon to take a conservative course and recommend sentence reduction to the court only where a prisoner’s circumstances are truly extraordinary and compelling. By the same token, the government may find it useful to have the option of making a mid-course correction if the penalty originally imposed appears unduly harsh or unjust.⁶ In this regard, BOP’s

⁶ David Zlotnick has analyzed a group of five commutations granted by President Clinton six months before the end of his term, pointing out that in four of the five cases the prosecutor either supported or had no objection to the grant. David M. Zlotnick, “Federal Prosecutors and the Clemency Power,” 13 Fed Sent. R. 168 (2001). Professor Zlotnick argues that “there are sound reasons for federal prosecutors to support clemency petitions in a variety of circumstances,” including to reward cooperation, to compensate for unwarranted disparity, for changes in the law, and to recognize rehabilitation.

decision to move the court will necessarily be informed not just by its perspective as jailer, but also by the broader law enforcement perspective of the Justice Department of which it is a part.

Because motions under § 3582(c)(1)(A)(i) necessarily reflect the government's priorities and serve the government's interest, we would commend to the Commission the criteria for equitable reduction in sentence that the Department of Justice itself has identified in the United States Attorneys Manual as grounds for commutation of sentence. Section 1-2.113 of the USAM states that commutation may be recommended in cases involving "disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g. cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action." The USAM section goes on to say that "a combination of these and/or other equitable factors may also provide a basis for recommending commutation in the context of a particular case." Particularly in light of the original clemency-related rationale for giving the court sentence reduction authority in 1976, as explained by the Director of BOP in the *Banks* and *Diacio* cases, *supra* p. 10, it seems appropriate that the circumstances identified as sufficient for the government to support presidential commutation of sentence should be deemed sufficient for the government to support judicial sentence reduction well.

Conclusion

On a personal note, let me say that when I served as Pardon Attorney I frequently had cases brought to my attention where fundamental changes in a prisoner's situation made continued imprisonment seem both inappropriate and unjust. In the early 1990's, it became Justice Department policy to refer such cases to BOP for handling under § 3582(c)(1)(A)(i), rather than commend them to the president for commutation of sentence, as such cases had historically been handled. But BOP was hesitant to exercise its authority, even where the United States Attorney did not object, and even where the sentencing judge indicated an interest in reducing the sentence. (Indeed, I have seen cases in which a judge affirmatively asked BOP to file a motion, to no avail.) In the years since I left the Department, BOP's reluctance to file sentence reduction motions has become institutionalized.⁷ If steps are not taken to encourage BOP to view its responsibilities more broadly, the courts' sentence reduction authority may atrophy just as the president's pardon power has atrophied.⁸

⁷ Since 1990 BOP has filed an average of 22 sentence reduction motions each year under § 3582(c)(1)(A)(i), almost all in terminal illness cases, and it is our understanding that no court has ever denied such a motion. The highest number of motions filed in any year was 31 in 2000, and since then the number of sentence reduction motions has been decreasing despite a continuing increase in BOP's population, and in 2005 only 18 motions were filed. While in the mid-1990s some motions were filed in non-terminal cases involving significant and permanent physical disability or mental impairment (including Alzheimers Disease) in the past five years almost all of those for whom BOP filed a motion have been within weeks of death. No statistics are available on the number of petitions denied at the institutional or regional level, but prisoners are generally advised by their case managers that it is pointless to file a petition unless they are imminently terminal, and then only if their offense is nonviolent. A situation was recently brought to my attention in which a prisoner had fallen from his top bunk at a medium security institution, and sustained such severe spinal cord injuries that he was permanently paralyzed and quadriplegic. Although this man had served eight years of a ten-year sentence, and although his family had made provision for his care at home, he was told by his case manager that he had no chance of being approved for sentence reduction because he was not in imminent danger of death.

⁸ In his five years in office, President Bush has commuted just two prison sentences. Both grants were issued in May 2003, to individuals who were elderly and infirm, and within six months of release in the ordinary course.

It is likely, as Vice Chairman Steer suggested in a 2001 law review article, that BOP's reluctance to invoke the court's sentence reduction authority more frequently stems from the absence of codified standards and policy guidance from this Commission, as well as from BOP's modest view of its own role as that of turnkey.⁹ We therefore urge the Commission to give explicit policy guidance in this area, to spell out the statutory criteria and to give "specific examples" of situations warranting sentence reduction, so that the statute can begin to function as the "safety valve" that Congress intended it to be.

⁹ See John Steer and Paula Biderman, "Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences," 13 Fed. Sent. R. 154 (2001).