

# New Commutation Guidance Presents Opportunities For Relief

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A petition for commutation (reduction) of sentence represents a possible — though difficult — avenue for relief for individuals convicted of crimes who have exhausted their opportunities for appellate remedies. Recent developments, however, provide new reasons for potential commutation petitioners to be hopeful.

The U.S. Department of Justice recently issued new guidance on when the president will consider granting commutation petitions. Deputy Attorney General James Cole has called for the submission of commutation petitions where the petitioners (1) are serving sentences which, by operation of law, would likely have been substantially less if sentenced today, (2) are nonviolent, low-level offenders without ties to large-scale criminal organizations, (3) have served at least 10 years of their sentence, (4) do not have significant criminal history, (5) have demonstrated good conduct in prison, and (6) have no history of violence. Much of the focus has centered on relief for nonviolent drug defendants sentenced under unfair mandatory-minimum laws. But these guidelines present an opportunity for anyone fitting these criteria — those convicted of white collar crimes, for example, should consider how these factors would apply to them.

This article discusses the commutation process, the recent new guidelines issued by Deputy Attorney General James Cole, and the opportunity that it presents.

## Overview of The Commutation Process

Convicted individuals who have no further appellate opportunities<sup>[1]</sup> should consider whether a petition for commutation of sentence is viable. These petitions are essentially pleas for mercy and fairness — they do not generally attack the facts surrounding the conviction as they pertain to questions of guilt or innocence.

The president of the United States has the power to commute the sentence of a person convicted of a federal crime. Commutation petitions are submitted to the Office of the Pardon Attorney. The Office of the Pardon Attorney then reviews and investigates the petition, including potentially

seeking the input of the relevant United States Attorney Office, and seeking the input of the sentencing judge, ultimately presenting it to the president along with a recommendation whether the petition should be granted or denied.

The United States Attorneys' Manual contains some guidance on when commutation of sentence may be appropriate. For example, it identifies traditional grounds for considering commutation such as "disparity or undue severity of sentence," "critical illness or old age," and "meritorious service rendered to the government by petitioner, e.g., cooperation with investigative or prosecutive efforts that has not been adequately rewarded by other official action."<sup>[2]</sup> A combination of these and other "equitable factors" may also help support a commutation petition.<sup>[3]</sup>

Given the political ramifications of the commutation process and the large number of potential petitioners it comes as little surprise that commutation petitions are "long shots." But the Obama administration's new guidelines and commitment to the process presents new reasons for optimism.

## **New Guidance**

In recent months, public remarks by Deputy Attorney General James Cole have provided new guidance for those considering commutation petitions. In remarks delivered on Jan. 30, 2014,<sup>[4]</sup> Deputy AG Cole explained that commutation "may be available in certain circumstances, including when an individual has a clean record in prison, does not present a threat to public safety and has been sentenced under out of date laws that have since changed, and are no longer seen as appropriate."

In his Jan. 30 remarks, Deputy AG Cole focused on potential relief for "low-level, nonviolent drug offenders who remain in prison, and who would likely have received a substantially lower sentence if convicted of precisely the same offenses today. This is not fair, and it harms our criminal justice system." He ended his speech with a call for members of the bar to assist in identifying strong candidates for commutation, and by pledging that "[g]oing forward, the federal Bureau of Prisons will begin advising inmates of the opportunity to apply for sentence commutation."

On April 23, Deputy AG Cole provided more concrete (and broader) commutation guidance and announced a new initiative to encourage qualified federal inmates to seek commutation.<sup>[1]</sup> The present initiative is open to candidates who meet six announced criteria:

1. they must be "currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today";
2. "are nonviolent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels";
3. "have served at least 10 years of their sentence";

4. “do not have a significant criminal history”;
  5. “have demonstrated good conduct in prison”; and
  6. “have no history of violence prior to or during their current term of imprisonment.”
- Deputy AG Cole announced additional features of the new initiative, including detailing additional lawyers to the Pardon Attorney’s Office on a temporary basis.

## **New Opportunities**

Without a doubt, much of the present initiative has focused on drug defendants, where sentencing unfairness has been stark. For example, in December 2013, President Obama commuted the sentences of eight individuals serving sentences for crack cocaine offenses — a fact that Deputy AG Cole mentioned in his remarks. Each of these individuals had served more than 15 years in prison, and most of them were serving life sentences. For years, the law provided for a 100:1 crack-to-powder cocaine sentencing disparity — individuals convicted for crack cocaine offenses received substantially longer sentences than those sentenced for cocaine offenses, despite the fact that these are two forms of the same drug. Following the Fair Sentencing Act of 2010, the crack-to-powder cocaine disparity was reduced to 18:1.

But the administration has indicated that its recent initiative is not focused solely on crack cocaine defendants (such as those whose sentences were commuted in December 2013), but rather on individuals who satisfy the newly announced criteria. In this "revitalized" commutation environment, not only should those sentenced under unfair drug laws consider how the new guidance might apply to them, but so too should those convicted of other crimes.

For example, this new guidance conceivably presents an opportunity for individuals convicted of white collar crimes — many such individuals will be a fit for the lack of criminal history, good conduct, and nonviolent criteria. And whether the petitioner has served 10 years is simply a function of time.

However, it will be important for potential petitioners convicted of white collar crimes to develop an argument why they “currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today.” One starting point is whether an individual was sentenced pre-*United States v. Booker*[5]. *Booker* invalidated the mandatory application of the sentencing guidelines. Especially in instances where the sentencing judge may have expressed some misgivings but felt bound to sentence harshly, there may be an opportunity to develop facts and law that might satisfy the first criterion. The application of sentencing enhancements should also be evaluated in developing an argument that will satisfy the first criterion.

There can be no doubt that a petition for commutation is a difficult road. But the recent government

guidance provides reasons for potential petitioners to be more optimistic, and avenues in which to develop arguments.

—By Chas Short, Carlton Fields, P.A.

*Chas Short is an associate in Carlton Fields' Miami office.*

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[1] Available at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140423.html>.

[1] See USAM §1-2.113 (noting that commutation requests are not “generally accepted from persons who are presently challenging their convictions or sentences through appeal or other court proceeding.”).

[2] USAM §1-2.113.

[3] *Id.*

[4] Available online at <http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html>.

[5] 543 U.S. 220 (2005). All Content © 2003-2014, Portfolio Media, Inc.

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