Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 27, 2015

Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002

RE: Response to Request for Comment on Proposed Priorities

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we respectfully submit this letter in response to the Commission's request for comments on possible proposed priorities for the amendment cycle ending May 1, 2016. In this letter, we address the following priorities identified in the Commission's public announcement: (1) mandatory minimums; (2) continuing study of the overall guidelines structure post-*Booker*; (3) statutory and guidelines definitions related to the nature of prior convictions; (5) immigration offenses; (6) recidivism; (7) probation and supervised release; and (8) child pornography offenses.

We begin our letter with an item that is not on the Commission's list: Reduction of a term of imprisonment under USSG § 1B1.13. As explained below, we strongly urge the Commission to make this important part of the Guidelines Manual a priority. Amendment of § 1B1.13 to broaden the number of inmates eligible for a sentence reduction upon motion of the Bureau of Prisons would have significant beneficial effects consistent with the various goals of sentencing.

Proposed Additional Priority: Reduction in Term of Imprisonment under Section 1B1.13

In 2013 and 2014 the Commission included on its list of potential priorities for the upcoming amendment cycle consideration of changes to USSG § 1B1.13 ("Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons"). In both years the PAG urged the Commission to amend this policy statement, in order to provide further guidance to courts and the Department of Justice in evaluating prisoner requests for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). In neither year did the Commission include § 1B1.13 in its notice of proposed amendments or request for public comment. This year, § 1B1.13 does not appear on the Commission's published list of tentative priorities.

Again this year, and with added urgency, the PAG asks the Commission to make consideration of amendments to § 1B1.13 a priority in its coming amendment cycle. In past years the Commission may have decided against making a priority of its policy on sentence reduction because of changes the Justice Department was either considering or had recently made in its own relevant internal policies, to conform them more closely to provisions of § 1B1.13.[1] Last year we noted that the rate of filings had gone up slightly in 2013 and the first half of 2014, but that the long-term impact of the new policy was yet to be determined. We are concerned to learn that the rate of filings since the new policy was adopted in August 2013 has reverted to the pre-2013 level.[2]

We are particularly struck by the fact that since August 2013 only 18 prison sentences have been reduced pursuant to this authority based on advanced age, despite the fact that 19% of the federal prison population is defined by the Justice Department's own criteria as "aging."[3] In this regard, we note that the Department's eligibility standard for age-related sentence reduction was recently criticized by its own Inspector General as unnecessarily rigorous.[4] The small

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[1] In July 2013 the Department of Justice opposed the Commission's making § 1B1.13 a priority for the 2014 amendment cycle because "the Department is in the midst of reviewing and modifying aspects of the RIS [reduction in sentence] Program." BOP Policy Statement 5050.49 was modified in August 2013, bringing certain non-medical grounds for sentence reduction, notably those relating to the aging process, somewhat closer to those set forth in § 1B1.13. The Department did not comment on the Commission's proposal to address the subject of sentence reduction as a priority for the 2015 amendment cycle.

[2] The Department reported on May 5 of this year, in response to an article about its Inspector General's report on aging prisoners cited in note 3 *infra*, that a total of 138 motions for sentence reduction had been filed since BOP Policy Statement 5050.49 was amended in August 2013, of which 18 were filed on grounds of the aging criteria set forth in that policy. *See* https://www.themarshallproject.org/2015/05/06/older-prisoners-higher-costs. Our letter of July 29, 2014 to the Commission stated in note 20 that data provided to us by BOP indicated that 61 motions for sentence reduction were filed in 2013 and 40 were filed through the first half of 2014, which means that only 37 motions were filed between June 2014 and May 2015.

[3] *See* note 2, *supra*, and DOJ Inspector General, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons 1-2 (May 2015) ("IG Aging Report").

[4] *See* IG Aging Report at iii:

> *Aging inmates could be viable candidates for early release, resulting in significant cost savings; but BOP policy strictly limits those who can be considered and, as a result, few have been released.* Over a year ago, the Department concluded that aging inmates are generally less of a public safety threat and the BOP announced an expanded compassionate release policy to

number of motions filed on grounds of aging may be partially explained by the fact that Justice Department policy sets a higher substantive bar for agency action than Commission policy sets for judicial action.[5] Moreover, Justice Department policy involves correctional officials in making decisions affecting eligibility that are either institutionally inappropriate or unwarranted by the terms of the statute. The PAG believes that the factors included in these decisions are properly considered instead by a court.[6] We believe that when Congress invested judges with

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> include them as part of the Attorney General's "Smart on Crime" initiative. However, the Department significantly limited the number of inmates eligible for this expanded release policy by imposing several eligibility requirements, including that inmates be at least age 65, and we found that only two inmates had been released under this new provision. According to institution staff, it is difficult for aging inmates to meet all of the eligibility requirements of the BOP's new provisions. Our analysis shows that if the BOP reexamined these eligibility requirements its compassionate release program could result in significant cost savings for the BOP, as well as assist in managing the inmate population.

The IG report found that only two prisoners had been released for reasons relating to age in the first year under the new August 2013 standard, with only 16 more during the next six months. *See* note 2, *supra*.

[5] *See* IG Aging Report at 13 ("unlike the new BOP policy, the USSG policy statement applies to inmates of all ages, not just those age 65 and older, and it does not require inmates to have served a minimum percentage of their sentence").

[6] *See* PAG Letter to the Commission (July 29, 2014) at 15-16. Here are just a few of the ways in which the DOJ policy is more restrictive than the Commission's, imposing unwarranted restrictions on the types of cases that the Department will bring before courts:

- DOJ permits a motion to be brought only if the particular reason for it "could not reasonably have been foreseen by the court at the time of sentencing," a criterion that could be broadly interpreted to render ineligible many cases where illness and aging were present in an attenuated form at the time of sentencing.

- DOJ's policy requires elderly prisoners with medical conditions to have served at least 50% of their sentence.

- DOJ's policy requires a prison warden to determine whether releasing a prisoner to care for a child is in the best interest of the child, a matter within the institutional competence of a court but not of a correctional official.

- DOJ policy requires correctional officials to factor into every one of its sentence reduction decisions considerations that seem more properly the province of the

the discretion to apply the Commission's policy statement in reviewing motions, it did not intend to leave the Justice Department free to withhold from judicial review cases meeting criteria that the Commission formulated pursuant to the mandate of 28 U.S.C. § 994(t).

The PAG believes that the Justice Department's lack of recent progress in broadening administration of the sentence reduction authority in § 3582(c)(1)(A)(i) should be a matter of concern to the Commission. The paucity of motions filed in court in the past 18 months is particularly surprising in light of the Department's active participation in the Administration's clemency initiative during this same period of time, in which the President acting alone has reduced more than twice as many prison sentences as all 94 district courts combined. If the Department has been willing to recommend to the President that he commute more prison sentences than any president since the 1960s, while projecting dozens if not hundreds more such actions in the next 18 months, it is hard to understand why it has been so slow to bring cases presenting similar "extraordinary and compelling" equities back to court for similar relief.[7]

But what we think ought to be of greater concern to the Commission is the strong possibility that its own policies are at least equally responsible for the minuscule number of sentence reduction motions filed in the past two years. We respectfully suggest that the standards in § 1B1.13, in lending themselves to an overly-restrictive application, have facilitated the Department's neglect of this beneficent and cost-effective authority.

For example, the standard for age-related sentence reduction in § 1B1.13 is substantially more exacting than the one the PAG recommended to the Commission in 2006.[8] The standard recommended by PAG ("experiencing deteriorating physical or mental health as a consequence of the aging process") does not include the final narrowing phrases found in 1B1.13 ("that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement"). Other criteria borrowed by § 1B1.13 from the ABA policy statement relating to illness and disability were similarly and, in our view, unfortunately narrowed. The standards in

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sentencing court under § 3553(a), such as the prisoner's offense of conviction, his criminal and personal history, comments from victims, and "[w]hether release would minimize the severity of the offense."

[7] We note in this regard that the grounds for relief set forth in the Commentary to §1B1.13 include any "extraordinary and compelling reason other than, or in combination with the reasons" more particularly described.

[8] *See* Proposed Policy Statement dated July 12, 2006, submitted by the American Bar Association and endorsed by the Federal Community and Public Defenders, and Families Against Mandatory Minimums, as well as by PAG. A slightly revised version of the 2006 policy statement dated March 9, 2007 is attached, along with an explanatory letter from the ABA dated March 12, 2007.

§ 1B1.13, incorporated almost verbatim into BOP Program Statement 5050.49 by the August 2013 amendments, have evidently resulted in even fewer cases being brought back to court than under pre-2013 policy.[9]

In summary, we believe that it is no longer appropriate or, indeed, responsible for the Commission to defer consideration of possible amendments to § 1B1.13. We believe that the underutilization of the sentence reduction authority in § 3582(c)(1)(A)(i) reflects shortcomings in the Commission's policy, as well as flaws in its execution by the Justice Department.[10] In the past decade the law reform community has taken up the task of reconciling a perceived need for mid-course sentence corrections with principles of determinate sentencing.[11] The PAG believes the time is right for the Commission to undertake a comprehensive review of a policy originally promulgated almost a decade ago, and not amended since 2007. Accordingly, the PAG strongly urges the Commission to make consideration of § 1B1.13 a priority for the coming amendment cycle.

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[9] Courts are not resisting sentence reductions under § 3582(c)(1)(A)(i). We are aware of no instance where a court has ever denied a motion brought by the Department under that provision; in fact, we know of a few cases where a court acted on its own without waiting for the government to take the initiative. *See, e.g., United States v. Sims*, CR-486-80 (S.D. Ga. 2011); *United States v. Myers*, CR 03-120-02 (D. N.J. 2011).

[10] We note that some have sought to diminish the importance of the Commission's role in providing applicable policy statements, by claiming that the Justice Department, as necessary movant for a reduction in sentence motion, must have the authority to define what reasons are sufficiently extraordinary and compelling. The PAG believes that such a view is not an accurate description of the allocation of roles between the courts and the Executive under the Sentencing Reform Act, nor is it a valid reason for the Commission to relinquish its congressionally-delegated role. The Act envisions that the Commission will articulate standards and considerations for determining which reasons for release are sufficiently extraordinary and compelling to warrant a reduction in sentence within the meaning of § 3582(c)(1)(A), and that BOP will be responsible for identifying prisoners eligible for release under the Commission's standards and considerations, and for bringing those prisoners to the attention of the courts. The PAG believes that the statutory scheme is best understood in this bifurcated fashion, as opposed to one potentially involving a conflict of policy-making roles between the Executive and Judicial branches. As with the Sentencing Guidelines themselves, the Commission is responsible for developing policy and the Justice Department is responsible for proceeding in a manner that does not frustrate the policy or encroach on the role of courts.

[11] *See* Model Penal Code: Sentencing, §§ 305.1, 305.6, 305.7, Tentative Draft No. 2 (Mar. 25, 2011); *see also* Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. Tol. L. Rev. 859 (2011).

Priority 1: Mandatory Minimums

The PAG urges the Commission to continue its work in reducing or eliminating the use of mandatory minimum sentencing, a practice that ties the hands of judges and often leads to excessive terms of incarceration. Specifically, the PAG urges that the Commission make a priority the following:

(1) continued examination of the scope and severity of statutory mandatory minimum penalties,

(2) expansion of qualifying factors for "safety valve" consideration under 18 U.S.C. § 3553(f) and § 5C1.2 of the Guidelines, and

(3) urging elimination of mandatory "stacking" of penalties under 18 U.S.C. § 924(c).

The PAG is not alone in its opposition to mandatory minimum statutes. Our position is in line with those who work in the criminal justice system every day, with both houses of Congress, and with the President. On June 17, 2015, 130 former federal prosecutors, federal judges, state attorneys general, and other former high-ranking law enforcement officials from across the country called on Members of Congress to pass federal sentencing reform on minimum mandatory penalties.[12] As noted in their letter to the chairs and ranking members of the U.S. House and Senate judiciary committees, "[i]ndividuals most likely to receive a [federal] mandatory minimum sentence were street-level dealers, not serious and major drug dealers, kingpins, and importers."[13] Of the 22,000 federal drug offenders sentenced last year, "only seven percent had a leadership role in the crime and 84 percent did not possess or use guns or weapons."

These facts demonstrate quite plainly that mandatory minimums are inconsistent with the intent of the law that created many of them: the Anti-Drug Abuse Act of 1986 ("ADAA"). The Commission's 2011 report to Congress on mandatory minimums recognized that the ADAA was supposed to apply mandatory minimums to kingpins, *i.e.*, "the masterminds who are really

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[12] *See* http://www.constitutionproject.org/documents/former-judges-and-prosecutors-back-federal-sentencing-reform-2/

[13] *See* http://www.constitutionproject.org/wp-content/uploads/2015/06/SSA-letter_6-16-2015.pdf.

running these operations. . ."[14] But statistics demonstrate that this purpose has been frustrated. Long terms of incarceration for the vast majority of mid-level couriers, distributors and dealers has little impact on public safety. While imprisonment may temporarily disrupt a drug market, the "replacement effect"—whereby new recruits quickly replace those imprisoned for mid-level roles—negates the impact of incarceration on drug price, availability, or related crime.[15]

Recently, President Obama called upon all persons involved in our system of government to re-examine these policies and statutes that lead to draconian sentences of imprisonment, and particularly re-examination of the sentencing of non-violent offenders.[16] As noted by the President, the 2.26 million people incarcerated in America are "more than the top 35 European countries combined." The current minimum mandatory structure causes significant economic hardship on the country. Over the past three decades, our spending on federal incarceration has increased 1,100 percent, and federal incarceration and detention costs have doubled in the last 10 years.[17]

More importantly, however, the statistics demonstrate the intolerable and disproportionate impact such structure has on racial minorities. As stated by the President, in "far too many cases, the punishment simply does not fit the crime." On the day before he gave this speech, President Obama commuted 46 sentences of persons convicted of federal drug trafficking crimes.[18]

Several bipartisan bills pending in Congress focus directly on the reduction or elimination of minimum mandatory sentences:

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[14] *See* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24 (Oct. 2011) (quoting Senate Minority Leader Robert Byrd).

[15] *See, e.g.,* Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980—1996*, 26 Crime & Just. 17, 57 (1999) ("Incarceration of even three hundred thousand drug offenders does little to reduce drug sales through deterrence or incapacitation as long as the drug market can simply recruit replacements.").

[16] "Remarks by the President at the NAACP Conference" (July 14, 2015). https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

[17] http://www.constitutionproject.org/wp-content/uploads/2015/06/SSA-letter_6-16-2015.pdf.

[18] White House Statement, "President Obama Grants Commutations" (July 13, 2015) https://www.whitehouse.gov/the-press-office/2015/07/13/president-obama-grants-commutations.

- "The Smarter Sentencing Act of 2015" was introduced in both the U.S. Senate (S. 502) and the U.S. House of Representatives (H.R. 920), on February 12, 2015.

- "The Sensenbrenner-Scott Over-Criminalization Task Force Safe, Accountable, Fair, Effective Justice Reinvestment Act of 2015" (H.R. 2944), was introduced June 25, 2015.

- "The Recidivism Clarification Act" (H.R. 1254), introduced in March 4, 2015.

Although their details differ, they are consistent in the general proposition that significant reform is needed to alleviate the impact of minimum mandatory penalties, increase the availability of safety valve provisions, and narrow the applicability of mandatory and consecutive penalties for gun possession under 18 U.S.C. § 924(c). In sum, the proposed bills seek the following:

- eliminating minimum mandatory penalties for lower or mid-level drug offenders who are non-violent;

- conversely, limiting application of minimum mandatory penalties to organizers/leaders/managers and supervisors of drug enterprises involving 5 or more drug traffickers;

- expanding eligibility of safety valve reductions, including:

  - removal of the current gun possession disqualifier;

  - eligibility for persons committing the crime as a result of mental illness, serious substance abuse or addiction, trauma suffered while serving on active military duty, or victimization stemming from abuse or domestic violence; and

  - expansion of eligibility to those with 2 or 3 criminal history points; and

- correcting the "stacking" problem in 18 U.S.C. § 924(c), to provide the sentencing court the option of making sentences for weapon violations run concurrently with, rather than consecutively to, the underlying drug trafficking crime; and limiting the current "stacking" of multiple gun possession events to true recidivists (*i.e.*, those whose prior gun convictions became final before committing the second or successive Section 924(c) offense).

The PAG supports the Commission's work with Congress on these and other initiatives to bring about meaningful reform in the area of mandatory minimums.

Priority 2: Continuing Study of Overall Structure of Guidelines post-*Booker*

Appropriately Accounting for Role, Culpability and Relevant Conduct. The PAG strongly supports the Commission's continuing study of new and different approaches to appropriately account for each defendant's role, culpability and relevant conduct. While some modest progress along these lines was made in the last amendment cycle, we continue to urge the Commission to consider a much larger reconceptualization of the guidelines that would place primary focus on individual culpability and *mens rea* and not on simplistic (even if more easily measured) factors such as loss or drug quantity. We believe the ABA Task Force Report on the Reform of Federal Sentencing for Economic Crimes presents a sound and workable framework that could be expanded beyond economic crimes to the guidelines more broadly. We also agree with the Commissioners who recently have acknowledged that concerns about tying punishment more closely and proportionately to culpability is an issue that the Commission should address across the guidelines manual for all offenders. The PAG looks forward to working with the Commission and other stakeholders to advance this critical reconsideration and recalibration of the overall structure and approach of the Guidelines post-*Booker*.

Alternatives to Incarceration. The PAG strongly supports the Commission's efforts to encourage the use of alternatives to incarceration. The Commission has observed that "the appeal of alternatives to incarceration has continued to increase in the wake of reports of the ever-growing prison population."[19] Recognizing the importance of alternative sentences,[20] the Commission updated its findings in 2015 and reported that amidst calls for reductions in the nation's skyrocketing incarceration rate, courts are imposing alternative sentences at a decreasing rate. Despite the Supreme Court's decision in *Gall v. United States,* which reinforced sentencing courts' discretion to vary below the sentencing ranges recommended by the guidelines, federal courts are declining to utilize alternatives to incarceration, even where they have the discretion to do so.[21] The PAG supports addressing this seemingly anomalous trend.

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[19] Courtney Semisch, United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (Jan. 2009). http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20090206_Alternatives.pdf

[20] Courtney Semisch, United States Sentencing Commission, *Alternative Sentencing in the Federal Criminal Justice System* (May 2015).

[21] *Id.*

President Obama and lawmakers on both sides of the aisle support criminal justice reform that will address prison overuse and curb excessive sentences. Expanding alternatives to incarceration will advance those objectives.[22]

As a starting point, we suggest the Commission collect and distribute information about existing alternative sentencing programs that are designed and intended to result in sentences that do not include prison terms, including community supervision programs, deferred adjudication, deferred sentencing and diversion options, and community-based treatment. Some of these programs, which are currently employed in a few districts, have incorporated into the federal system approaches that have been successfully utilized by state courts. In many instances, defendants entering these programs are diverted from the criminal justice system entirely because the charges against them are dismissed upon successful completion of the program.

For example, *United States v. Leitch,* 2013 WL 753445 (E.D.N.Y. 2013), describes two programs established in the Eastern District of New York: a presentence drug court, and a program that provides for intensive presentence supervision of youthful offenders. The opinion notes that other programs have been initiated by courts in California, Connecticut, Illinois, South Carolina, Washington and others. These programs were developed through collaborations among representatives from the U.S. District Courts, U.S. Attorney's Office, Federal Defenders and Pretrial Services. The PAG suggests that the Commission recommend that every district implement or at least consider developing similar programs.

Another example that the PAG suggests is worthy of study and expansion is the "Federal First Offender Act," 18 U.S.C. § 3607, which authorizes a disposition of prejudgment probation for misdemeanor drug possessors who have no prior drug convictions. A study by the Commission could assist in determining whether Congress should expand the authority in § 3607(a) to additional offenses, and inform the design of other deferred adjudication programs around the country. Similarly, effective state programs can serve as useful models to be applied to appropriate federal offenders.[23]

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[22] It also is likely to reduce the incidence of recidivism, as discussed in "Priority 6: Recidivism," *infra.*

[23] See Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication As a Way of Avoiding Collateral Consequences*, 22 Fed. Sent'g. Rep. 6, 8 & nn. 21-22 (2009) (twenty states authorize expungement or sealing of the entire case record following successful completion of probation where judgment has been deferred, and another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing). Since this article was written, several more states have implemented deferred adjudication mechanisms. *See also* "Priority 6: Recidivism," *infra*, for additional discussion about these programs.

The PAG also encourages the Commission to consider guideline amendments to provide for noncustodial sentences when appropriate, especially within Zones A and B. In the past, the Commission has noted that a significant percentage of offenders in Zones A and B do not receive the non-custodial sentences for which they are eligible.[24] Consistent with the directive of 28 USSG § 994(j) that "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense…," the PAG encourages the Commission to consider issuing commentary or a policy statement reminding judges of the availability of non-custodial sentencing options for offenders in Zone A and B, and commentary or a policy statement further defining categories or examples of cases that merit imposition of a non-incarceration sentences (*e.g.*, probation, half-way house, community service) upon appropriate fact-finding by the sentencing court pursuant to 28 U.S.C. § 994(j).

Another action that the Commission should consider is modifying the zones contained in the Sentencing Table to increase the universe of defendants for whom a sentence other than imprisonment would be permitted under the guidelines. Such a revision would better allow courts to fashion individualized sentences that are "sufficient, but not greater than necessary,"[25] to meet the statutory purposes of sentencing including the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[26] By expanding Zone C or collapsing Zones B and C, the guidelines can provide for community and home confinement alternatives to a greater number of offenders.[27]

In its most recent report on alternative sentencing, the Commission has reported data that raises concerns about the lower rates at which alternative sentences are imposed on Black and Hispanic offenders. The Commission has found that sentencing alternatives were more often

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[24] *See* U.S. Sentencing Comm'n, *Alternative Sentencing in the Federal Criminal Justice System* at 3 (2009) (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders"), available at: http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf.

[25] 18 U.S.C. § 3553(a).

[26] 18 U.S.C. § 3553(a)(1)(D).

[27] J.P. Hanlon, et al., American Bar Ass'n, Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing, 24 Crim. Just. 26 (2010).

imposed for White offenders than for other groups of offenders: "Black and Hispanic offenders consistently were sentenced to alternatives less often than White offenders." The PAG requests that the Commission study the reasons for this trend.

In addition, the Commission should consider issuing a policy statement advising courts to consider whether criminal history is accorded undue weight in the determination of whether an alternative sentence is appropriate. Such a policy statement would encourage a more nuanced interpretation of how criminal history impacts the decision to utilize alternative sentences. While this tendency to limit alternative sentences to defendants with minor or no prior criminal history may be appropriate where criminal history is in fact a reliable predictor of future criminal behavior, courts should also take into account whether criminal history may be given undue weight in, for example, communities where policing practices may result in frequent law enforcement interventions with minority populations. In such communities, an accumulation of criminal history points for low-level crimes may result in a criminal history that overstates the offender's likelihood to engage in criminal behavior.

Priority 3: Statutory and Guidelines Definitions Related to Nature of Defendant's Prior Conviction

The PAG supports the Commission's continued efforts to evaluate and modify the definitions appearing throughout the Guidelines Manual that relate to the nature of a defendant's prior conviction. These definitions can affect the defendant's criminal history score as well as the offense level. The PAG believes the Commission should focus on the following two items as part of this priority.

1. The Commission should promote more consistent and fair treatment for defendants with prior drug offenses. The term "controlled substance offenses," as defined in 21 U.S.C. § 841(b)(1), encompasses a broader category of offenses than does the same term as used in the firearms guideline, § 2K2.1, and the career offender guideline, § 4B1.2. For example, a felony conviction for simple drug possession (*i.e.*, without any intent to distribute) could qualify as a predicate offense that enhances the statutory mandatory minimum under 21 U.S.C. § 841(b)(1), but that same conviction does not qualify as a predicate offense for purposes of §§ 2K2.1 or 4B1.2. These definitions also differ from the definition for similar terms such as "drug trafficking offense" in § 2L1.2 and "serious drug offense" in § 4B1.4. The PAG suggests that the Commission use a common term for each of these Guidelines provisions and that it encourage Congress to amend § 841(b)(1) to eliminate simple possession convictions from the definition of "controlled substance offenses." By making uniform use of the definition found in § 4B1.4, the Commission could reduce the likelihood that a somewhat minor drug offense will have a drastic impact on a defendant's sentence.

2. The Commission needs to decide whether and how to react to the Supreme Court's recent decision in *Johnson v. United States*, 576 U.S. __ (June 26, 2015). *Johnson* held that the residual clause of 18 U.S.C. § 924(e) is unconstitutionally vague. The career offender and firearms guidelines use similar phrasing. Because *Johnson* was decided on constitutional

grounds, it extends to those guidelines provisions. While the Commission waits to see whether Congress will amend § 924(e) to replace the residual clause with a different statutory provision, the Commission should simply conform the guidelines to be consistent with the current state of law on the statutory side. This is easily accomplished by removing the residual clause language from the Manual for the time being.

The Commission should not seek to replace the current guidelines language until the opportunity for a statutory response has passed. Changing the guidelines language prematurely could very well end up aggravating the existing problem of inconsistencies between what the statute and the guidelines dictate for similarly situated defendants. This would be especially true if the Commission takes one approach to replacing the residual clause and Congress chooses a different replacement. Thus, the PAG suggests that § 4B1.2 be modified to read:

> "Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "crimes of violence" if that offense (A) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device).

Under the approach suggested by the PAG, the Commission could then take up other possible revisions to this definition after Congress has decided whether to amend the statute in reaction to *Johnson*.

Priority 5: Immigration Offenses

The PAG believes that the results of the Commission's recent study underscore that substantial and real change is needed to USSG § 2L1.2, applicable to illegal re-entry offenses.[28] As currently drafted, the guideline's offense level is driven principally by a defendant's prior convictions, providing for offense level enhancements of 4, 8, 12 and 16 levels depending on whether a defendant had been convicted previously, the nature of the conviction, and the length of the sentence imposed. But commentators have repeatedly pointed out that the prior conviction

[28] *See* U.S. Sentencing Comm'n , *Illegal Reentry Offenses* 11 (2015) ("the Illegal Reentry Report"), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf.

sentencing enhancements were not based on empirical research, and bear little relationship to the offense of illegal re-entry.[29]

By enhancing the offense level based upon prior convictions, § 2L1.2 effectively double counts an illegal reentry defendant's criminal history, which is already adequately accounted for in Chapter Four of the Guidelines. While double counting has been tolerated by courts, no other guideline places so much weight on criminal history in the offense level, no matter how remote the prior conviction. *See, e.g.*, *United States v. Santos-Nuez*, No. 05 CR. 1232 (RWS), 2006 WL 1409106 at *6 (S.D.N.Y. May 22, 2006) ("Nowhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction."); *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055-56 (9th Cir. 2009) ("Although it may be reasonable to take *some* account of an aggravated felony, no matter how stale, in assessing the seriousness of an unlawful reentry into the country, it does not follow that it is inevitably reasonable to assume that a decades-old prior conviction is deserving of the same severe additional punishment as a recent one.") (Emphasis in original).

Additionally, the enhancements themselves are too broad,[30] and the data gathered by the Commission in its recent study make clear that the enhancements result in sentences that most courts view as too severe. When a 16-level enhancement was applied, courts sentenced defendants within the guidelines range only 31.3% of the time, as opposed to 92.7% of the time when there was no enhancement.[31] Indeed, the greater the enhancement, the more judges varied

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[29] *See, e.g.*, Doug Keller, *Why the Prior Conviction Sentencing Enhancements in Illegal Re-entry Cases are Unjust and Unjustified (and Unreasonable Too)*, 51 B.C. L. REV. 719 (2010); *United States v. Galvez-Barrios*, 355 F. Supp. 2d 958, 961-62 (E.D. Wis. 2005) (citing Robert J. McWhirter & Jon M. Sands, *A Defense Perspective on Sentencing in Aggravated Felon Re-entry Cases,* 8 Fed. Sen. Rep. 275 (Mar/Apr.1996) and James P. Fleissner & James A. Shapiro, *Sentencing Illegal Aliens Convicted of Reentry After Deportation: A Proposal for Simplified and Principled Sentencing*, 8 Fed. Sen. Rep. 264, 268 (Mar./Apr.1996)).

[30] For instance, the 16-level enhancement applies to, among other things, all "crimes of violence," and the 8-level enhancement applies to all "aggravated felonies," even though these broad categories cover wildly disparate conduct. *See, e.g.*, *United States v. Perez-Nunez*, 368 F. Supp. 2d 1265, 1269 (D.N.M. 2005) (noting that the Guidelines definition of "crime of violence" would "subject defendants convicted of everything from murder, rape, and sexual abuse of a minor to simple assault, to the same 16 level enhancement in calculating the proper sentencing range.").

[31] *See* Illegal Reentry Report at 11.

from the guidelines. *Id*. (32.8% within range for 12-level enhancement, 46.7% within range for 8-level enhancement, 52.5% within range for 4-level enhancement).[32]

The severe sentences generated by USSG § 2L1.2 are particularly problematic given that noncitizens have a more difficult time once incarcerated, as they are not eligible for camp designation,[33] or halfway house placement.[34] Beyond that, illegal re-entry defendants invariably spend at least several months following their sentence in immigration custody, for which they receive no credit from the BOP.

The PAG urges the Commission to re-design § 2L1.2 so that a defendant's illegal re-entry sentence is determined principally by his or her motivation for returning and his or her subsequent conduct. Mitigating factors could include the defendant's family ties in this country,[35] length of residency in the United States, degree of assimilation, and work history. Aggravating factors could include any criminal record following re-entry, or repeated violations of the immigration laws.

Given that 26% of all federal sentencings are for illegal re-entry, and in nearly one-quarter of these cases, defendants received a 16-level enhancement, *see* Illegal Reentry Report at 8, 11 (2015), addressing and recalibrating the illegal re-entry guideline could have a substantial effect in addressing growing concerns about prison overcrowding and the ever increasing cost of mass incarceration.[36]

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[32] For example, assuming an average criminal history category III, and a base level of 8 with a 16-level enhancement, an illegal reentry offense is on par with crimes such as using an explosive to destroy an aircraft or a state or government facility, USSG §2K1.4, and exceeds the base offense level for offenses including reckless manslaughter, USSG §2A1.4, aggravated assault, USSG §2A2.2, abusive sexual contact, USSG §2A3.4, and robbery, USSG §2B3.1. There is no justification for punishing these crimes similarly.

[33] *See, e.g.*, Bureau of Prisons, Program Statement, Inmate Security Designation and Custody Classification, P5100.08 Ch. 5, p.9 (9/12/2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf.

[34] *See,* Bureau of Prisons, TRIAD Drug Treatment Evaluation Project, Final Report of Three-Year Outcomes: Part 1 70 (2000), available at http://www.bop.gov/resources/pdfs/TRIAD/TRIAD_CH_4.pdf.

[35] *See* Illegal Reentry Report at 25 (noting that 49.5% of offenders had at least one child living in the United States, and 67.1% had other relatives in the United States).

[36] *See* Letter from Lanny A. Breuer Assistant Attorney General & Jonathan J. Wroblewski, Director, Office of Policy and Legislation, to Hon. Patti B. Saris, Chair, U.S. Sentencing Comm'n 5-6 (July 23, 2012).

Priority 6: Recidivism

The PAG continues to support the Commission's recidivism priority, which will provide valuable data and opportunities to reduce the human and financial costs associated with the overuse of incarceration and the impact of that overuse on recidivism.

The PAG believes that reliable study of recidivism data will yield reforms that ultimately reduce the incidence of recidivism, and that reduced recidivism will in turn spur additional reform by allowing precious criminal justice resources to be employed more efficiently and effectively. The Commission is uniquely suited to gather data that will help lawmakers and judges measure risk factors of recidivism; to use that data to make recommendations that will result in more purposeful and effective punishment; and to provide judges with guidance and the necessary tools in the Guidelines Manual to reduce the risk of recidivism through the imposition of punishment that is not excessive, unnecessary, or likely to increase the risk that an offender will re-offend. The Commission's study of alternatives to incarceration, discussed earlier, necessarily overlaps with the Commission's work to reduce recidivism, and the PAG encourages the Commission to use the data and analysis collected and developed in the course of the Commission's work on recidivism to develop effective alternatives to incarceration.

In our letter regarding priorities last year (dated July 29, 2014), we provided recommendations to the Commission to reduce the overuse of incarceration for offenders who present a low risk of recidivism. Overuse of incarceration for low-risk offenders increases the likelihood of recidivism, especially when those low-risk offenders are sentenced to terms of incarceration that result in prolonged detachment from family, employers, and their community.[37] A term of incarceration that severs the connections between an offender and a stable support network increases the likelihood that the offender will resort to criminality upon release.

The task, of course, is to identify low-risk offenders and sentence them in a manner that keeps those offenders' connections to their family, potential employment, and community intact while reserving scarce reentry resources for the higher risk offenders who need them most in order to successfully avoid a return to crime. The PAG encourages the Commission to gather reliable data and develop methods to better identify low-risk offenders, especially those convicted of non-violent offenses with minimal prior criminal history, so that those offenders can

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[37] *See, e.g.*, Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* at 7 (2010) (discussing research results and citing Thomas Orsagh and Jong-Rong Chen, "The Effect of Time Served on Recidivism: An Interdisciplinary Theory," Journal of Quantitative Criminology, 4(2):155-171 (1988)), available at: http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.

receive sentences that maintain their ties to stable support. The PAG is hopeful that increased use of "front end" and "back end" programs can increase the likelihood that both low- and high-risk offenders will not re-offend. Toward that end, the PAG has two additional recommendations (in addition to those presented in the PAG's July 29, 2014 letter) that will increase the likelihood that these objectives are attained.

1. "Front End" Metrics and Programs

The Commission should explore alternatives to incarceration that are premised, in part, on reducing the likelihood of recidivism. It is the PAG's hope that the Commission will study the effectiveness of these programs and make recommendations that the most effective should be used more frequently for appropriate offenders. Some of these programs exist at the "front-end" of the process. The Commission should study these "front end" programs and recommend their use for low-risk offenders.

Existing programs provide helpful models. Some "front end" programs require offenders to plead guilty to a less serious offense, with the prospect of avoiding any imprisonment by successfully completing programs that involve counseling in the areas of substance abuse, anger management, or employment opportunities. After successfully completing these programs, graduating defendants may be permitted to withdraw their guilty pleas and avoid serving a prison sentence. These offenders maintain supportive connections to their communities and the essential support they need to eliminate the destructive influences that increase the likelihood they will re-offend, and they do not incur the stigma of a conviction that would deprive them of employment opportunities. And the system does not incur the human and financial cost of incarcerating these offenders. Despite the success of these programs, they are not widely used and are unavailable to offenders in far too many places. The Commission should study these programs and undertake efforts to encourage their use more often and in more judicial districts throughout the United States.

One underutilized "front end" measure—pretrial diversion—is extremely successful with appropriate offenders. Prosecutors in some United States Attorneys' Offices use pretrial diversion as a tool to avoid needless incarceration or stigmatization of appropriate offenders.[38]

[38] The United States Attorneys Manual ("USAM") provides the parameters of the program, and excludes those who are "1. Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution; 2. A person with two or more prior felony convictions; 3. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or 4. Accused of an offense related to national security or foreign affairs." USAM 9-22.100. For offenders who are not excluded but "against whom a prosecutable case exists," United States Attorneys have discretion to divert prosecution following the procedures in USAM at 712. *See also* USAM 9-27.250 (encouraging prosecutors to consider an "adequate, non-criminal alternative to prosecution" for a person who has

In the PAG's experience, prosecutors who utilize pretrial diversion with low-risk offenders have seen decreased recidivism by those offenders. These offenders do not suffer the stain of a conviction or the trauma and detachment of incarceration if they successfully complete diversion. The pretrial diversion program is used in some districts but not others. In addition, programs and mechanisms similar to pretrial diversion, such as non-prosecution agreements (NPA's) and deferred prosecution agreements (DPA's), are often used in lieu of prosecuting corporations in districts in which pretrial diversion is underemployed. As a consequence, corporations more often avoid collateral consequences with an NPA or DPA that does not result in a conviction but that reduces the likelihood of recidivism, while similarly-culpable individuals suffer the consequences of a conviction and incarceration and the concomitant increased likelihood of recidivism.

The Commission should start by identifying those districts in which pretrial diversion is employed and those in which it is not. The Commission could also study the incidence of recidivism among pretrial diversion participants including corporations that avoid prosecution through entry into an NPA or DPA. The Commission could use the resulting data to identify the factors that contribute to decreased recidivism among pretrial diversion participants, publish the results of the data analysis, and encourage the Department of Justice to expand the use of pretrial diversion programs across the United States. If the data supports the conclusion that corporations that enter into NPAs and DPAs rarely recidivate, the Commission could encourage the application of NPA and DPA principles to individuals who are appropriately suited to pretrial diversion. The Commission's data collection and analysis would allow the Commission to provide additional guidance to prosecutors to identify an increased percentage of appropriate participants who might otherwise present an increased risk of recidivism resulting from conviction and needless incarceration if not afforded the opportunity for pretrial diversion, and conversely, appropriate participants for whom pretrial diversion decreases the likelihood of recidivism.

2. "Back End" Metrics and Programs

In addition to the "front end" programs that are likely to decrease the likelihood of recidivism, the Commission should study "back-end" programs that could contribute to an offender successfully re-entering the community and avoiding a return to crime.

One effective back-end program that remains underutilized is allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment. With the President and Congress discussing the allocation of

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committed a federal offense but for whom some remedy other than a criminal sanction is appropriate).

increased resources toward reentry programs, study of these programs and measures utilized in the various state systems can provide for the most effective use of these resources on both low and higher-risk offenders who are re-entering their communities.

The PAG has found that a common barrier to successful reentry and re-integration into the community—and to a greater likelihood of recidivism—is the stigma of conviction and the impact it can have on an offender's ability to obtain employment, housing, and appropriate and supportive social integration. Expungement is one mechanism to eliminate the barrier of a stigmatizing conviction for appropriate offenders. Although there is not a federal expungement statute, expungement relief lies within the equitable discretion of the district courts, to be applied where appropriate on a case-by-case basis.[39]

A recent expungement opinion—*Doe v. United States*—highlights the "wide-ranging" negative effects from a conviction that expungement can eliminate to allow an offender to "reenter society successfully."[40] The *Doe* opinion identifies factors pertinent to expungement consideration, including the age of the conviction, whether it was a non-violent offense, whether the offender was a minor participant with no prior criminal history, whether the offender lived a law-abiding life after conviction, and the age of the offender.[41] The PAG encourages the Commission to incorporate in the Guidelines Manual reference to the possibility of expungement for offenders with the appropriate characteristics, including those identified in *Doe*, to eliminate the barriers to successful reentry discussed in the *Doe* opinion for offenders who should qualify for expungement relief. In the PAG's experience, addressing the stigma of conviction for appropriate offenders would dramatically increase the likelihood of successful reentry and reduce the likelihood of recidivism for these offenders.

The PAG is hopeful that Commission's ongoing study will generate helpful guidance to criminal justice stakeholders as they design and implement both types of programs: diversion programs and reentry programs. If the Commission gathers and analyzes empirical data measuring the efficacy of the various design features of these programs, that data will facilitate implementation of programs that reduce recidivism. The data will illuminate the most effective design features of these programs, including the most appropriate eligibility criteria for offenders; the optimal mix of sanctions; and the optimal type and level of involvement of court personnel, probation officers, and treatment providers.

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[39] *See United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

[40] *Doe v. United States*, No. 14-MC-1412 (E.D.N.Y. May 21, 2015), available at: http://ccresourcecenter.org/wp-content/uploads/2015/05/Doe-v-US.pdf.

[41] *See id.*

Priority 7: Probation And Supervised Release

For the reasons set forth in the PAG's July 29, 2014, letter to the Commission during the last amendment cycle, the PAG supports the Commission's review of federal sentencing practices pertaining to imposition and violations of conditions of probation and supervised release, including possible consideration of amending the relevant provisions in Chapter Five and Seven of the Guidelines Manual (the "Probation And Supervised Release Review"). The PAG continues to believe that this is an "enormously important area of sentencing policy" and "making a priority of probation and supervised release revocation data, practice, and policy" is essential to an effective sentencing system.[42]

Last year, the PAG sought a review of practices related to probation and supervised release, and we explained that "more robust data" regarding these issues was necessary. *Id.* at 10. For this reason, the PAG is especially pleased that in fiscal year 2014, the Commission undertook the Probation And Supervised Release Review.[43] The PAG is further pleased that the Commission has taken concrete steps in furtherance of the Probation and Supervised Release Review. For instance, we applaud the Commission's publication in February 2015 of its *Results of 2014 Survey of United States District Judges: Modification and Revocation of Probation and Supervised Release*. In our view, this survey is an important step in the Commission's review.

The PAG urges the Commission to continue the Probation and Supervised Release Review, and to focus its efforts on both supervised release revocation, and the implementation, conditions and monitoring of offenders sentenced to supervised release terms. We look forward to continuing to work with Commission on this critical initiative.

Priority 8: Child Pornography

The PAG continues to recommend that the Commission promulgate a new guideline consistent with the findings of the Commission's December 2012 *Federal Child Pornography Offenses* Report to Congress ("the Child Pornography Report"). The Commission recognizes, and the PAG agrees, that the special offense characteristics set forth in USSG § 2G2.2(b)(2)-(7) are outdated, no longer useful, and in need of revision. For the past several years there has been

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[42] PAG Letter To Commission (July 29, 2014) at 10.

[43] *See* "Statement Of Honorable Patti B. Saris, Chair United States Sentencing Commission, Before The Subcommittee On Financial Services And General Government Of The Committee On Appropriations Of The United States Senate" (March 24, 2015).

"widespread inconsistent application" of § 2G2.2 with the median sentence for child pornography offenses imposed now 40.1% below the guideline range.[44]

The number of child pornography prosecutions is increasing and the average sentence length is rising, despite increasing variances. As of the end of fiscal year 2014, federal courts on their own initiative (*i.e.* excluding government-sponsored departure for USSG § 5K1.1 motions and the like) imposed below-guideline sentences 44% of the time in child pornography cases, while they imposed within-guideline sentences only 31.2% of the time. *2014 Sourcebook, supra,* at Table 27. And this has been a consistent, continuing trend since 2006.

Courts have begun to disregard part or all of § 2G2.2. *See, e.g., United States v. Abraham,* 944 F. Supp. 2d 723, 731-35 (D. Neb. 2013) (imposing a modified § 2G2.2 framework based upon the Child Pornography Report: holding that for all future cases, the presumptive base offense level will be 20, the enhancement for use of a computer will never be applied, and the enhancement for number of images will be "recalibrate[d] . . . to the realities of the day"); *see also United States v. Klear,* 3 F. Supp. 3d 1298 (M.D. Ala. Feb. 21, 2014) (following the *Abraham* court's modified § 2G2.2 framework based upon the Child Pornography Report). In reaching its decision, the *Abraham* court relied on several cases highlighting the ineffectiveness of § 2G2.2 and its outdated/unfair enhancement guidelines: *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010), *United States v. Henderson*, 649 F.3d 955 (9th Cir. 2011), *United States v. Dorvee,* 616 F.3d 174 (2d Cir. 2010), and United States v. Diaz, 720 F.Supp.2d 1039 (E.D. Wis. Jun. 30, 2010) (collecting dozens of cases in which the courts have declined to impose sentences within the range this guideline recommends). *Abraham* has received no negative treatment.

The PAG believes that action is needed. We agree with the Commission that "most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously outmoded." Child Pornography Report at iii.

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[44] *See* U.S. Sentencing Comm'n, *Preliminary Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2014 Data* at Table 12.

CONCLUSION

On behalf of our members, who work with the Guidelines on a daily basis, we appreciate the opportunity to offer the PAG's input on the proposed priorities for the upcoming amendment cycle. We look forward to an opportunity for further discussion over the coming months.

Sincerely,

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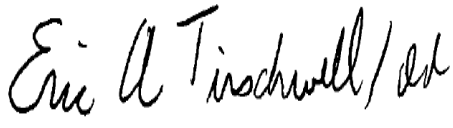

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March 12, 2007

Honorable Ricardo H. Hinojosa
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United States Sentencing Commission
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Re: Request for comment on criteria for sentence reduction under USSG 1B1.13

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write in response to the Commission's request for additional comments regarding appropriate criteria for sentence reduction under recently promulgated Section 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter supplements and reaffirms our testimony of March 15, 2006, our letters of March 15 and July 12, 2006. We also reaffirm and resubmit as an attachment to this letter, with one amendment, the proposal for Section 1B1.13 that was included with our July 12, 2006 letter. Finally, we take this opportunity to comment on the Justice Department's letter to Chairman Hinojosa on this subject, dated July 14, 2007 ("DOJ letter").

As noted in our prior submissions to the Commission, 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 Section 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."

I. Statutory and Regulatory Background

Section 3582(c)(1)(A)(i) was enacted as part of the original 1984 Sentencing Reform Act (SRA), and continues an authority first granted courts in the 1976 Parole Commission and Reorganization Act. See 18 U.S.C. § 4205(g)(1980). This authority permits a court at any time, upon motion of the Bureau of Prisons (BOP), to reduce a prisoner's sentence to accomplish his or her immediate release from confinement. The only apparent limitations on the court's authority under § 3582(c)(1)(A)(i), once its jurisdiction has been invoked by a BOP motion, is that it must find 1) "extraordinary and compelling reasons" to justify such a reduction, and 2) that the reduction is "consistent with applicable policy statements issued by the Sentencing Commission."

The legislative history of the SRA establishes that Congress intended the judicial sentence reduction authority in § 3582(c)(1)(A)(i) to be broadly construed, consistent with the then-existing sentence reduction authority, to allow a court to address "the unusual case in which the defendant's circumstances are so changed… that it would be inequitable to continue… confinement. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at 5. See also *id.* at 55 (reduction may be justified for "changed circumstances" including "severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction. . . ."). In continuing the courts' ability to entertain and act on sentence reduction motions filed by BOP, Congress signaled its intention to permit sentence reduction in a variety of circumstances, not simply those involving a prisoner's medical condition. *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). *See also* 28 C.F.R. § 572.40, 45 Fed. Reg. 23366 (April 4, 1980)("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.").[1]

[1] The law giving BOP authority to petition the court for sentence reduction was originally designed to expedite situations that theretofore had required an application for executive clemency to be submitted to

In connection with continuing the courts' extraordinary sentence reduction authority in response to motions filed by BOP, the SRA directed this Commission to promulgate general policy for the guidance of courts considering such motions that would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). Such policy must "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." § 994(t). The only normative limitation imposed on the Commission in its policy-making under § 994(t), other than the general purposes of sentencing embodied in § 3553(a)(2), is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

Over the years, in the absence of policy guidance from this Commission, BOP has tended to take a conservative view of its responsibilities under § 3582(c)(1)(A)(i). *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)("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). In recent years, BOP has filed motions almost exclusively in cases where a prisoner was within months or even weeks of death.[2] At the same time, BOP's own formal operating policy has contemplated a broader application for the statute. Until 1994, BOP's operating policy for filing sentence reduction motions, under both 3582(c)(1)(A)(i) and the old law authority § 4205(g), explicitly contemplated invoking a court's authority "if there is an extraordinary change in an inmate's personal or family situation" as well as in situations in which "an inmate becomes severely ill." *See* 28 CFR § 572.40, *supra*.

When BOP revised its sentence reduction regulations in 1994, it continued to apply the same policy to both old and new law prisoners, and emphasized that "the standards to evaluate the early release remain the same." 28 C.F.R. § 571.61, *et seq.*; 59 Fed. Reg. 1238 (Jan. 7, 1994). Significantly, the 1994 regulations underscored the propriety of petitioning courts in both medical and non-medical cases. *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "*if* the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment.") (emphasis added); *id.* § 571.62(a)–(c) (describing different procedures for medical and non-medical requests from prisoners). That the Justice Department has now proposed more restrictive guidelines for the operation of BOP's discretion cannot wipe away 30 years of contrary regulatory interpretation.[3]

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the President through the Office of the Pardon Attorney. *See U.S. v. Banks, supra*, 428 F. Supp. at 1089 (statement of Director of BOP explaining that the new procedure offered the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco, supra*, 457 F. Supp. at 72 (same).

[2] According to figures provided by BOP, it has filed between 15 and 25 motions under § 3582(c)(1)(A)(i) annually since the year 2000. As far as we are aware, no motion has been denied during this time period.

[3] BOP has recently proposed revisions to 28 CFR Parts 571 and 572 (re-titled "Sentence Reduction for Medical Reasons") that would for the first time place categorical limits on BOP's ability to bring sentence reduction motions. *See* 71 Fed. Reg. 76619-01 (Dec. 21, 2006)("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our

II. Prior Comments on Proposed USSG § 1B1.13

We have previously commented, in letters dated March 25 and July 12, 2006, on the Commission's proposal to implement the directive in § 994(t) in a new policy statement at USSG § 1B1.13. For convenience, we summarize those comments here. Our principal concern is that the proposed policy simply recites the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), but does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)."

We find the Commission's proposed approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i). Rather, it contemplates that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission. But the text of § 994(t) plainly requires the Commission to enunciate general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than defer to case-by-case decision-making by the BOP. While we do not doubt that, as a practical matter, BOP may frustrate the Commission's policy-making role through limiting the sentence reduction motions it files in both quantity and kind, it is quite another thing for the Commission to abdicate that role entirely.

To assist the Commission in carrying out the mandate of § 994(t), we have submitted draft language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply.[4] Our proposed policy statement would also make several other changes in the language of the Commission's proposal, to make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

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authority under these statutes and our current policy." *See* 71 Fed. Reg. at 76619-01. Without some more extended attempt to reconcile the broad statutory language of § 3582(c)(1)(A)(i) with the crabbed new eligibility criteria, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or 18 U.S.C. § 4205(g), much less on the authority Congress intended to give courts under these statutes, or the Commission under 28 U.S.C. § 994(t). In our comments on the rule we point out that: "It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present 'extraordinary and compelling reasons,' and that have in the past been thought to present them."

[4] The draft policy statement submitted with this letter differs from the version dated July 12, 2006, only in adding a new subsection (h) to the list of "extraordinary and compelling reasons." in the proposed Application Note, and renumbering old subsection (h) as subsection (i).

We propose three criteria for determining when "extraordinary and compelling reasons" justify release: 1) where the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing; 2) where information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or 3) where the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

We then propose, as part of an application note, nine specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, or in past administrative practice under this statute or its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; 8) where the defendant's sentence was based upon a mistake of fact or law so significant that it would be inequitable to continue the defendant's confinement, and for which there is no other legal remedy;[5] or 9) where the defendant's rehabilitation while in prison has been extraordinary.

Finally, we propose that neither changes in the law nor a prisoner's rehabilitation should, by themselves, be sufficient to justify sentence reduction.

As to the scope of a court's sentence reduction authority, we believe that Congress intended a court to have authority to reduce a term of imprisonment to whatever term it deems appropriate in light of the particular reasons put forward for the reduction. For example, it would be appropriate for a court to reduce a term of imprisonment to time

[5] This eighth example of an "extraordinary and compelling reason" has been added to the policy statement since the July 12, 2006 draft as a new subsection (h), old subsection (h) having been renumbered as (i). We believe this situation is one contemplated by subsection (b)(2) of the policy statement ("information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement").

served where sentence reduction is sought because the prisoner is close to death. (It appears that reduction to time served is ordinarily what is sought in a BOP motion, since almost all of the cases it has brought over the past 20 years involve imminent death.) On the other hand, where reduction of sentence is sought on grounds of, *e.g.*, disparity or undue severity, or a change in the law not made retroactive, it would be appropriate for the court to be guided by the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner. *See, e.g., U.S. v. Diaco, supra* (sentence reduced to minimum term in case involving disparity); *U.S. v. Banks, supra* (sentence reduced to time served in case involving extraordinary rehabilitation).

In reducing a term of imprisonment, a court may (but is not required to) substitute a term of community supervision equivalent to the original prison term. A 2002 amendment to § 3582(c)(1)(A)(i) makes clear that the court in reducing a term of imprisonment "may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." We believe that any period of supervised release originally imposed would remain in effect over and above any additional period of supervision imposed by the court, since the court's power to reduce a sentence under this statute extends only to the term of imprisonment.

We would like to take this opportunity to reiterate comments made in our March 15, 2006, testimony about the limits of a court's authority under this statute, to allay concerns that it could undercut the core values of certainty and finality in sentencing embodied in the federal sentencing guidelines scheme. The court's jurisdiction under § 3582(c)(1)(A)(i) is dependent upon BOP's filing a motion. We believe that the government can be counted upon to take a careful course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling. Yet we also believe that the government will find it useful to have guidance from the Commission about the options available to it for making a mid-course correction where the term of imprisonment originally imposed appears unduly harsh or unjust in light of changed circumstances. We are confident that BOP's decision to file a motion with the court will be informed not just by its perspective as jailer, but also by the broader perspective of the Justice Department of which it is a part.[6]

III. Additional Comments on Proposed USSG § 1B1.13

In response to the six specific questions in the Commission's current request for additional comments on proposed USSC § 1B1.13, we submit the following:

[6] *Cf.* David M. Zlotnick, "Federal Prosecutors and the Clemency Power," 13 Fed Sent. R. 168 (2001)(analyzing five commutations granted by President Clinton six months before the end of his term, in four of which the prosecutor either supported clemency or had no objection to the grant).

1) Fundamental change in circumstances: The legislative history of § 3582(c)(1)(A)(i) confirms that Congress intended the sentence reduction authority to be available wherever there is a "fundamental change" in a prisoner's circumstances, whether or not that change could have been anticipated by the court at sentencing. A fundamental change might involve a circumstance that was known to or anticipated by the court at the time of sentencing, or it might not. It might also involve a change in the law giving a court new authority to consider certain factors, or reducing the applicable guidelines range.

2) Medical cases: A "fundamental change" in circumstances could relate to a prisoner's medical condition, including serious disability or chronic illness, as well as impending death. The fact that a prisoner's condition is diagnosed as terminal is of course a classic basis for early release, but we urge the Commission not to attempt any further definition of eligibility based on terminal illness by a qualification like "life expectancy of less than 12 months." Any particular life expectancy estimate that is more than a few weeks is generally both arbitrary as a matter of medical diagnosis and difficult to administer. Indeed, while the "less than 12 months" has long been the test applied by BOP, it is our understanding that in the vast majority of federal sentence reductions cases in recent years the prisoner died within weeks of release, not months.

3) Non-medical cases: Examples of "extraordinary and compelling reasons" should not be limited to medical conditions. We stand by the legal analysis in our prior letters, and by the examples of "extraordinary and compelling reasons" in the proposed policy statement submitted last July.

4) Combinations of reasons: More than one reason may be considered in combination. Congress explicitly intended such a combination approach where a prisoner's rehabilitation is concerned, in providing that rehabilitation "alone" would not be sufficient to warrant sentence reduction. *See* 28 USC § 994(t).

5) BOP discretion: BOP should have the latitude to seek a sentence reduction authority in its discretion, and courts should have authority to grant a BOP motion, even if that particular reason put forward is not one specifically identified in the Commission's policy document. Historically, the Justice Department has invoked the court's sentence reduction authority in extraordinary sensitive cases where it was not otherwise possible to accomplish a prisoner's immediate release from confinement.

6) Judicial discretion: Sentencing courts should have discretion to consider reasons other than those that may be advanced by the Bureau of Prisons in support of a motion to reduce a particular defendant's sentence. Once a court has jurisdiction over a case by virtue of a BOP motion, it has both the authority and the responsibility to consider all of the facts and circumstances may bear upon the appropriateness of a sentence reduction, in light of the statutory standard of "extraordinary and compelling reasons."

IV. The DOJ Letter

The DOJ letter referenced at the beginning of this letter warns the Commission that any policy it adopts that is inconsistent with what it describes as BOP's current sentence reduction policy will be a "dead letter." This sentence reduction policy, announced for the first time in the DOJ letter and recently proposed as an amendment to BOP's regulations,[7] would categorically restrict the circumstances in which the Bureau of Prisons will move for sentence reduction to two narrow classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." This policy would represent a significant curtailment of the policy reflected in BOP's existing regulations, which the DOJ letter makes little effort to justify. The DOJ letter minces no words in explaining that, because Congress gave BOP the power to control which particular cases will be brought to a court's attention, "it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them."[8]

We think the DOJ letter has put BOP's policy cart before the Commission's horse. While BOP has operational responsibility for carrying out the Commission's policy-making role under 28 U.S.C. § 994(t) through case-by-case decision-making, this cannot mean that BOP is free to adopt an administrative policy that forecloses a court's consideration, on a categorical basis, of a wide variety of situations that the Commission has determined may present "extraordinary and compelling reasons." The development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under § 994(t), not to BOP or the Department of Justice. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the original sentence, so too is the Department and its agencies, including BOP, bound to comply with the Commission's lawfully promulgated policies in connection with reduction of that sentence. While BOP is free to interpret and apply Commission policy as it deems most appropriate in particular cases, in its discretion, it cannot in advance declare that policy a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position on the primacy of the Commission's role avoids.[9]

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[7] *See* note 3, *supra.*

[8] The letter's dire forecasts about the consequences of the Commission's deviating from the BOP operating policy in terms of wasted judicial and executive time and resources, or in terms of management of prisoner populations, seem at the least overblown. BOP retains operational responsibility for determining whether a particular case satisfies the test of "extraordinary and compelling" within the general policy framework established by the Commission.

[9] To the extent BOP's decision to limit sentence reduction motions to two narrow classes of medical cases would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of

We appreciate the opportunity to provide these comments and hope that they will be helpful.

Respectfully submitted,

Denise A. Cardman

constitutional concerns. The ABA's position on the Commission's authority to promulgate general policy for courts considering sentence reduction motions would avoid these concerns as well.

American Bar Association

Proposed Policy Statement

§ 1B1.13 Reduction in Term of Imprisonment Upon Motion of Director of the Bureau of Prisons (Policy Statement)

(a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –

(1) either –

(A) extraordinary and compelling reasons warrant such a reduction; or

(B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and

(3) the reduction is consistent with this policy statement.

(b) "Extraordinary and compelling reasons" may be found where

(1) the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement; or

(2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant's confinement; or

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been

changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

(c) When a term of imprisonment is reduced by the court pursuant to the authority in 18 U.S.C. § 3582(c)(1)(A), the court may reduce the term of imprisonment to one it deems appropriate in light of the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner, including to time served. In its discretion, the court may but is not required to impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment, provided that any new term of supervision shall be in addition to the term of supervision imposed by the court in connection with the original sentencing.

Commentary

Application Note:

Application of subdivisions (a)(1)(A) and (b):

1) The term "extraordinary and compelling reasons" includes, for example, that –

(a) the defendant is suffering from a terminal illness;

(b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility;

(c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;

(d) the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence;

(e) the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive;

(f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;

(g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children;

(h) the defendant's sentence was based upon a mistake of fact or law so significant that it would be inequitable to continue the defendant's confinement, and for which there is no other legal remedy; or

(i) the defendant's rehabilitation while in prison has been extraordinary.

2) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.

3) "Extraordinary and compelling reasons" may warrant sentence reduction without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

Background: The Commission is directed by 28 U.S.C. § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. § 994(t).