United States Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

March 18, 2016

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 2016 Amendments and Related Issues

Dear Chief Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we submit the following comments in response to the Commission's proposed amendments published on January 8, 2016. As you know, the PAG submitted written testimony on two topics in advance of the Commission's recent public hearings. For ease of reference we attach that testimony, which addressed the issues of **§ 1B1.13 (Reduction in Term of Imprisonment)** and **Immigration**.

In this letter, we address (i) **Conditions of Probation and Supervised Release,** (ii) **Child Pornography Circuit Conflicts**; and (iii) **Miscellaneous Amendments**. We begin with some additional thoughts on the **§ 1B1.13 (Reduction in Term of Imprisonment)** proposal.

Section 1B1.13 (Reduction in Term of Imprisonment)

The PAG presented testimony on the proposed amendment of USSG § 1B1.13 at the Commission's hearing on February 17. We write on the subject here for two reasons: to respond to the position taken by the Justice Department at the February 17 hearing, and to emphasize the importance of including in § 1B1.13 a fair and manageable set of criteria for sentence reduction on grounds of age and illness.

In its testimony submitted prior to the February 17 hearing, the Justice Department emphasizes the "concurrent" responsibility of the Bureau of Prisons and the sentencing court for reducing a defendant's sentence under § 3582(c)(1)(A)(i), and fails to recognize any independent role for the Commission in establishing standards for such sentence reductions. Thus, it elides the judiciary's responsibility for making sentencing policy under 28 U.S.C. § 994(t) with the executive's responsibility for administering that policy, assigning both to itself. Moreover, the "concurrency" to which the Justice Department letter refers is largely theoretical, since BOP has

never filed a motion that the court did not grant. This is not the scheme Congress envisioned in enacting the 1984 Sentencing Reform Act, including the "safety valve" in § 3582(c)(1)(A)(i).

It is true that a court may not reduce a particular prisoner's sentence unless BOP makes a motion, and it is also true that in many cases BOP will be in the best position to judge whether a particular defendant is eligible for relief. But the fact that BOP controls access to courts does not mean that BOP should also control the criteria for judicial action. Yet this would be precisely the result of amending § 1B1.13 "to state that 'extraordinary and compelling reasons' exist under the circumstances described in the relevant Program Statement of the Federal Bureau of Prisons." For the Commission to concede this point on practicalities would be for it to abandon the standard-setting role Congress entrusted to it, in keeping with its overarching concern to "keep[] the sentencing power in the judiciary where it belongs."[1] In writing the Commission out of the statutory scheme, the Justice Department would make the executive rather than the judiciary effective custodian of the sentencing power in determining what constitutes grounds for sentence reduction under § 3582(c)(1)(A)(i).

It may be, as the Department's testimony asserts, that BOP will decline to bring cases back to court that do not comport with the range of considerations set forth in its Program Statement, considerations that the PAG believes include many that are appropriately the province of the court not the corrections department. It may even be that the Justice Department will refuse to recognize or comply with whatever policy the Commission promulgates, though this seems to us unlikely. Rather, we believe that well-developed and manageable standards for judicial action, duly promulgated by the Commission in accordance with law, will in time be accepted by the Justice Department as the appropriate standard for executive action. BOP will still choose the cases to bring to court, but it will do so pursuant to Commission-developed standards.

Accordingly, we hope that the Department's current assertion of unilateral executive authority will not dissuade the Commission from carrying out the judicial standard-setting function Congress envisioned for it. We believe that by fully exercising its policy-making authority under § 994(t), the Commission will encourage the Department to apply those policies consistently in the exercise of its gatekeeping function.

Our second point is that no area of sentencing policy is more critical at this time than that relating to ill and aging prisoners, in terms of economy as well as humanity. We believe that Congress would be particularly receptive to an expansion of sentence reduction policy affecting individuals who have grown old in prison and pose no public safety risk, and who are suffering from a range of age-related illnesses and disabilities that are difficult and costly for the government to manage. It may be that the Commission will wish to conduct additional research into the effects of age-related illness and disability in a prison environment, and fine tune recidivism data for this population. However, we see no reason for the Commission to delay a

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[1] S. Rep. Sen. Rep. 98-225 at 121 (98th Cong., 1st Sess.) (1984).

clearer articulation of the policy in § 1B1.13 relating to the specific points made in our February 17 testimony.

Thus, for example, we believe it unnecessary and inappropriate to compel aging prisoners who are ill or disabled to serve a particular portion of their sentence before they may be considered for early release. We also concur with the Inspector General's recommendation that aging prisoners with short sentences should not be excluded from relief by limiting eligibility to those who have served ten years in prison. Finally, we urge the Commission to make only modest amendments in the provisions of § 1B1.13 that relate to illness and disability, which we believe are substantially more efficient and humane than the detailed, confusing and overly restrictive requirements of the BOP Program Statement.

Finally, in order to discourage BOP from further restricting defendants' eligibility for relief by applying criteria that are properly the province of the court under 18 USC § 3553(a), we urge the Commission to include a provision in § 1B1.13 stating that the Director of BOP should not withhold a motion if the defendant meets any of the criteria listed as "extraordinary and compelling reasons" in § 1B1.13.

Conditions of Probation and Supervised Release

The PAG supports the Commission's proposal to revise, clarify, and rearrange the conditions of probation and supervised release. Changes that make the conditions more focused, precise, and easier to understand will increase the likelihood that defendants will successfully serve a term of probation or supervised release, and will provide defendants with clear notice of the conditions they are to observe.

Proposed Addition of a Mens Rea Standard

The Commission has proposed several revisions that would: insert an explicit *mens rea* standard for several conditions; transfer certain conditions from "standard" to "special" and vice versa; modify language in several conditions; delete paragraph (8) of the "standard" conditions list (a controlled substance condition that would be redundant in light of the proposed amendments); and add two new provisions to the "special" conditions – one related to the use or possession of alcohol, the other to support of dependents.

The PAG welcomes the addition of a specific and explicit *mens rea* standard to several of the conditions. The conditions to which this *mens rea* standard would be added otherwise can be construed as strict liability conditions, a result that would unfairly punish an individual who breaches a condition unknowingly or unintentionally. By adding language prohibiting only knowing violations, the Commission will eliminate this risk and protect against inadvertent violations that should not result in sanction or penalty.

Movement and Modification of Conditions

The Commission also seeks comment about: (1) the bracketed options in paragraph (3) of the "special" conditions, in particular which bracketed option is appropriate and what, if anything, should be said about an offender's legitimate invocation of the Fifth Amendment privilege against self-incrimination; and (2) whether the standard condition requiring a defendant to notify the probation officer of any material economic change should be made a special condition or remain a standard condition.

The PAG generally supports clarification, movement, and modification of the conditions, with two exceptions. In addition, the PAG recommends an additional revision that would make several of the "standard" conditions "special," in keeping with the statutory requirements for the imposition of conditions of probation and supervised release.

First, the proposed revision would add "standard" condition (13) (modified from a portion of former "standard" condition (3)) to both §§ 5B1.3 and 5D1.3 and provide that the "defendant must follow the instructions of the probation officer related to the conditions of supervision." This condition is vague and would give probation officers almost unfettered discretion to determine whether additional, potentially significantly grounds for violation exist or whether more restrictive embellishments of conditions should be imposed post-sentence. The terms of probation and supervised release should be determined by a judge at sentencing, not by a probation officer. Conferring such broad discretion on the probation officer is contrary to the law.[2] While probation officers certainly may provide instruction and guidance about court-imposed conditions of release, it is those conditions of release, and not such instructions, which should be the basis for determining whether or not a violation has occurred. Consequently, this proposed "standard" condition should not be added. [3]

Second, the proposed "special" condition that a "defendant must not use or possess alcohol" is overbroad. That proposed condition would, by the proposed amendments, fall within a modified "substance abuse" "special" condition, and would prohibit the use or possession of alcohol if "the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol." It does not provide for any connection between alcohol use and the offense.[4] It also would impose a blanket prohibition on possession, use, or consumption

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[2] *See United States v. Thompson*, 777 F.3d 368, 382 (7th Cir. 2015).

[3] Standard condition 3 presently provides "the defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer." U.S.S.G. §§ 5B1.3(c)(3), 5D1.3(c)(3), We have the same objection to the last clause of this existing condition.

[4] *See United States v. Kappes*, 782 F.3d 828, 849 (7th Cir. 2015) (finding that the imposition of a condition requiring that the defendant "refrain from excessive use of alcohol" was error

of alcohol under any circumstances if the court had reason to believe the defendant in the past was an abuser of narcotics or other controlled substances but not alcohol, even if the defendant had successfully completed treatment with respect to narcotics or controlled substances. And it would impose a blanket prohibition on possession, including presumably constructive possession, or use even if the defendant needed a restriction prohibiting only heavy or binge drinking.

To address this overbreadth, the PAG recommends narrowing this proposed modified condition consistent with the approach and language referenced by the Seventh Circuit in *Kappes*.[5] The Commission could provide guidance in an Application Note as part of the Commentary to §§ 5B1.1 and 5D1.1 that explains that any specific weekly or other restriction should be tailored to the individual and his or her history of abuse of alcohol, narcotics or controlled substances.

Finally, although it is not part of the Commission's proposed amendments, the PAG encourages the Commission to make a number of the currently "standard" conditions "special" conditions. The Commission is contemplating the changes under consideration because of a raft of Seventh Circuit decisions acknowledging that one-size-fits-all conditions are not in keeping with the objectives of 18 U.S.C. §§ 3563(a), 3583(d), and 3553(a).[6] These statutes providing for imposition of conditions of probation and supervised release require that any condition be "reasonably related" to the specified § 3553(a) factors and "involve[] no greater deprivation of liberty than is reasonably necessary" to serve the purposes of sentencing.[7] A long list of "standard" conditions is almost always imposed in nearly every case, without consideration of the history and characteristics of the defendant and without any specific findings that the imposition of such conditions comport with these statutes. The easiest way to remedy this problem and provide guidance to judges that will result in compliance with the statutes is to make several of the "standard" conditions "special."

More specifically, the PAG recommends that the Commission make the following "standard"[8] conditions "special"

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because, *inter alia*, there was a "lack of any apparent connection between alcohol use" and the offense).

5 *Kappes* discusses a 15 drink-per-week limitation as an example of a more specific restriction associated with "binge drinking or heavy drinking," which provides clearly defined, specific notice. 782 F.3d at 849.

6 *See, e.g.*, *United States v. Bryant*, 754 F.3d 443, 444-45 (7th Cir. 2014); *Kappes*, 782 F.3d at 846.

7 *See* 18 U.S.C. §§ 3563(b) and 3583(d).

8 These are taken from the proposed amended list of "standard" conditions set forth in the

- (3) knowingly leaving the federal judicial district;
- (5) residence approved by the probation officer and notification of living arrangements changes;
- (6) home visits by probation officer;
- (7) employment requirement;
- (8) knowing interaction with those engaged in criminal activity;
- (11) agreements with law enforcement; and
- (12) disclosure of risk to person or organization;

Making these "standard" conditions "special" will allow defendants to focus on compliance with provisions that really matter and not piled-on conditions that are not tailored to their history, characteristics, and offense. A long list of unnecessarily imposed "standard" conditions makes compliance burdensome and decreases the likelihood of successful reintegration into the community. It also increases the likelihood of technical violations that reduce a defendant's likelihood of successful reintegration. Making these discretionary "standard" conditions "special" also will allow probation officers to better manage supervision by focusing on compliance with only those conditions that fit the offender and offense, so that probation officers will be better able to facilitate reintegration into the community instead of spending time on technical violations of conditions that have no bearing on successful reintegration. Conditions should be tailored to the needs and responsiveness of the individual, and not employed as part of a one-size-fits-all rubber stamp.

Comment Issue 1: Truthful Answers and the Fifth Amendment Privilege

The Commission seeks comment on the bracketed options in paragraph (3) of the "standard" conditions, which would become paragraph (4) under the proposed amendment providing as follows: "The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer." Specifically, the Commission seeks comment on the policy implications and Fifth Amendment implications of each of the bracketed options, and asks which option is appropriate and whether the Commission should clarify that legitimate invocation of the Fifth Amendment privilege against self-incrimination shall not be considered a violation.

Of the bracketed options, the PAG recommends the Commission adopt the phrase "be truthful when responding to" and not adopt the phrase "answer truthfully." The Supreme Court has recognized that "the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege."[9] The requirement that a defendant "answer truthfully" implies that a defendant's probation or supervised release will be revoked or

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proposed amendments.

[9] *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

some penalty imposed unless a defendant answers and responds substantively to a probation officer's inquiry.[10] It also implies that probation or supervised release is conditioned upon waiving Fifth Amendment privileges.[11] The requirement that a defendant "be truthful when responding," on the other hand, proscribes only false statements without implying incorrectly that waiver of the right to silence is a condition of probation or supervised release. Consequently, the PAG recommends use of that phrase and opposes use of a requirement that the defendant "answer truthfully."

The proposed condition should include language clarifying that legitimate invocation of the Fifth Amendment privilege against self-incrimination should not be considered a violation of probation or supervised release. This would better reflect the import of *Murphy* and help prevent compulsion of statements in violation of the Fifth Amendment. It would constitute an accurate description of the law and avoid confusion or improper sanctioning of defendants for the lawful exercise of a fundamental constitutional right.

Consequently, the PAG urges the Commission to amend new paragraph (4) to read: "The defendant must be truthful when and if responding to the questions asked by the probation officer. The legitimate invocation of the Fifth Amendment privilege against self-incrimination shall not be considered a violation of this condition."

Comment Issue 2: Material Change to Economic Circumstances

The Commission seeks comment on whether the condition requiring a defendant to "notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitutions, fines, or special assessments" should remain a "standard" condition or made a "special" condition of supervised release. The PAG recommends that the Commission make this a "special" condition so that it continues to be imposed in appropriate cases on a case-by-case basis, but is not generally recommended in all cases. In many cases there is no restitution or fine owed and the special assessment is paid immediately. A change that shortens the long list of "standard" conditions while still providing for the imposition of this condition where appropriate would be a welcome change, and would not compromise the ability to invoke and apply this condition when a defendant owes restitution, a fine, or an unpaid special assessment.

The PAG Recommends that the Commission Add Language to the Commentary to §§ 5B1.2 and 5D1.3

In addition to the proposed changes the Commission has outlined, the PAG encourages the Commission to add language to the Commentary applicable to §§ 5B1.2 and

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[10] *See* 782 F.3d at 850 (discussing the concerns implicated by such a condition).

[11] *See id.*

5D1.3 to provide guidance to attorneys, probation officers, and judges consistent with *United States v. Kappes*.[12] The Seventh Circuit set forth three sentencing principles in *Kappes* related to the imposition of conditions of supervised release,[13] and the third of those principles should be incorporated into Commentary to §§ 5B1.2 and 5D1.3 as a new Application Note 2 because, in the experience of the PAG, participants in the sentencing process are not mindful of the statutory requirements applicable to the imposition of conditions of probation or supervised release. The recommended Application Note would be derived almost verbatim from *Kappes* and read as follows:

> *2. Subsection (b) and the Imposition of Discretionary "Standard" and "Special" Conditions.---Conditions of [probation[14]] [supervised release[15]], including "standard" conditions, must be (a) appropriately tailored to the defendant's offense, personal history and characteristics; (b) involve no greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, protection of the public, and rehabilitation; and (c) sufficiently specific to place the defendant on notice of what is expected.[16]*

Insertion of this Application Note will help remind attorneys, probation officers, and sentencing judges that the statutory requirements of 18 U.S.C. §§ 3563(b) and 3583(d) apply to the imposition of conditions of probation and supervised release. While subsection (b) of §§ 5B1.3 and 5D1.3 provides guidance similar to this proposed Application Note, it does not address the issue of notice discussed in *Kappes* and other decisions, and it is helpful to summarize these factors in the manner in which they are summarized in *Kappes* for participants in the sentencing process.

Adding this Application Note will also help eliminate the frequent problem that discretionary conditions of probation or supervised release are imposed automatically or as an afterthought, without adequate – or any – regard for the specific offense, offender, and objectives of punishment. That "certain non-administrative conditions are labeled 'standard' does not render them immune from the requirements that they be adequately supported, tailored to the particular case and defendant, and not vague or overbroad."[17] In the experience of the PAG,

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[12] 782 F.3d at 847-48.

[13] *Id.* at 842-49. Although *Kappes* discusses these principles in the context of supervised release, they are equally applicable to the imposition of probation.

[14] Commentary to follow § 5B1.3.

[15] Commentary to follow § 5D1.3.

[16] *Kappes*, 782 F.3d at 847-48.

[17] *Id.* at 848.

imposing conditions without adequate consideration of the factors set forth in the proposed Application Note creates a higher probability of a breach of conditions that bear no relation whatsoever to the offense and objectives of sentencing. The effectiveness of specific conditions is blunted by heaping inapplicable conditions upon the defendant in addition to the ones that truly matter. Stated another way, the imposition of a laundry list of automatically-invoked conditions renders less meaningful those conditions that will best provide for successful deterrence, rehabilitation, and re-entry. Conditions of probation and supervised release are an important aspect of sentencing, but rote imposition of conditions without regard to their effectiveness makes them less likely to serve the purposes of sentencing. Conversely, careful consideration of conditions that are tailored to the offense and offender makes those conditions more likely to accomplish the purposes of sentencing.

Finally, the PAG notes that proposed conditions of probation and supervised release are not set forth uniformly in every district in the Probation Office's Presentence Report (PSR). As a result, defense counsel, prosecutors and the sentencing court often confront these proposed conditions for the first time, if at all, at the sentencing hearing itself. The PAG respectfully suggests that the Commission add commentary recommending that such conditions be set forth in the PSR so that the parties and the sentencing court will have a greater opportunity to consider them thoughtfully and tailor them to the particular case and defendant

Conclusion: The PAG Supports the Proposed Revisions

The PAG is grateful that the Commission is considering amendments that will clarify the conditions of probation and supervised release and make it easier for defendants to understand and adhere to conditions. The goal of these changes, as reflected in the PAG's comments, should be to increase the likelihood that defendants successfully serve a term of probation or supervised release while fairly apprising them of the conditions they are to observe using language that will be easier for them to understand both at sentencing and upon release, which is sometimes many years later.

Child Pornography Circuit Conflicts

Offenses Involving Unusually Young and Vulnerable Minors

The PAG opposes the amendment proposed by the Commission that would permit the application of the "vulnerable victim" enhancement in cases where an enhancement has already been applied due to the young age of the victim (either under 16 or under 12 years of age).

Rather, the PAG proposes that, should the Commission decide that there is increased culpability for those offenders convicted of offenses in which very young children are involved, an additional age-related enhancement should be added to the production and non-production guidelines. By way of example only, the amendment to the guidelines might provide for a 6-level enhancement if the offense involved a minor who had not attained the age of two.

The PAG believes that this approach would result in less disparity in sentencing than the approach currently proposed by the Commission.

The PAG is mindful of the Commission's 2012 Study of Federal Child Pornography Offenses. The study emphasizes that technological advances in the Internet and computer technologies have resulted in the growth of internet-based child pornography. The PAG further recognizes the finding of the 2012 Study that the typical child pornography possessed and distributed by federal child pornography offenders depicts prepubescent children engaging in graphic sex acts, often with an adult male, and that approximately one-quarter of offenders possess one or more images depicting the sexual abuse of a child two years old or younger. Thus, should the Commission elect to respond to this evidence-based change in the type of child pornography currently possessed by offenders by increasing the penalty for possession of pornography involving very young children, the PAG suggests doing so on an age-related basis consistent with the current tiered enhancements.

The danger of the Commission's proposed amendment is disparate interpretations of whether "a minor's extreme youth and small physical size made the minor especially vulnerable." This disparity of interpretation is illustrated in the split in the Circuits noted by the Commission. A bright line age-related enhancement addresses the problem identified in the 2012 Study and minimizes disparate interpretations of a vague standard.

Because the PAG is proposing a tiered approach based on age, the vulnerable victim enhancement should not be applied. Accordingly, the PAG suggests the following language for paragraph 2 of the Commentary:

> *Interaction of Age Enhancement (Subsection (b)(1) and Vulnerable Victim (§3A1.1(b)) – If subsection (b)(1) applies, §3A1.1(b) does not apply unless the minor was unusually vulnerable for reasons unrelated to age (such as mental slowness or physical disability). See §3A1.1, comment (n.2). Extreme youth and small physical size are not appropriate characteristics for application of §3A1.1, nor are any other age related characteristics or characteristics that are proxies for age. If the defendant knew or should have known about the mental or physical disability unrelated to age, apply §3A1.1(b).*

The 2-level Distribution Enhancement at Subsection (b)(3)(F)

The PAG agrees with the Commission's proposal to provide that the 2-level enhancement of subsection (b)(3)(F) requires "knowing" distribution by the defendant. This amendment is consistent with the Commission's findings in the 2012 Study that the guidelines should be updated to reflect recent changes in technology concerning distribution and use of a computer and reflect offenders' use of modern computer and Internet technologies such as P2P file-sharing programs. The amendment appropriately requires a culpable mental state rather than merely punishing an act.

The 5-level Distribution Enhancement at Subsection (b)(3)(B)

The PAG also agrees with the Commission's proposal to clarify that the 5-level enhancement of subsection (b)(3)(B) requires that the defendant distributed in exchange for valuable consideration such as other child pornographic material, preferential access to child pornography or access to a child. Once again, this amendment is consistent with the Commission's findings in the 2012 Study that the guidelines should be updated to reflect recent changes in technology to reflect offenders' use of open-file sharing technology. The amendment appropriately differentiates culpability based on whether the defendant had a specific purpose to share pornography in exchange for valuable consideration, rather than merely using an open file-sharing program.

Miscellaneous Amendments

PART A. <u>USA FREEDOM Act of 2015</u>

Issue for Comment No. 1:

A. <u>Amendments to 18 U.S.C. § 831</u>:

Section 831 of Title 18, United States Code, was amended in several respects to (a) include a prohibition against carrying, sending or moving nuclear material into or out of a country, (b) widen the statute's reach to include stateless persons whose habitual residence is in the United States, (c) include offenses committed on board a vessel subject to the jurisdiction of the United States or on board an aircraft that is registered under United States law, and (d) include offenses committed in an attempt to compel the United States to do or abstain from doing any act, or that constitutes a threat directed at the United States.

<u>1. Appendix A (Statutory Index).</u>

Currently, Appendix A (Statutory Index) references 18 U.S.C. § 831 to §2M6.1 of the guidelines. The Commission proposes no change to Appendix A relative to 18 U.S.C. § 831. The PAG agrees with this proposal. The PAG submits that §2M6.1 (with the recommended amendment proposed below) would adequately address all of the offense conduct proscribed by

18 U.S.C. § 831.

2. Proposed Amendment to §2M6.1.

The Commission's Preliminary Proposed Amendments do not recommend any amendment to §2M6.1 to address the amended provisions of 18 U.S.C. § 831. The PAG notes, however, that the new statutory amendment raises offense conduct not previously addressed in § 831:

> *(7) the offense is committed in an attempt to compel the United States to do or abstain from doing any act, or constitutes a threat directed at the United States.*
>
> *18 U.S.C. § 831(c)(7).*

Section 2M6.1(a)(1) provides in pertinent part:

> 1. Base Offense Level 42 "*if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;*"[18]
>
> 2. Base Offense Level 20, if the offense involved a threat to use a weapon of mass destruction, but did not involve any conduct evidencing an intent or ability to carry out the threat.[19]
>
> 3. Base Offense Level 28, if the offense conduct does not fit within the above two scenarios; [20]

The second clause of new § 831(c)(7) (*"constitutes a threat directed at the United States,"*) is adequately addressed by §2M6.1(a)(4), which provides for Base Offense Level 20 "if the offense involved a threat directed against the United States, but did not involve conduct evidencing an intent or ability to carry out the threat," and §2M6.1(a)(2) if the offense involved such threat and also involved conduct evidencing an intent or ability to carry out the threat.

Neither §2M6.1 nor any other guideline, however, directly addresses the language of the first clause of new 18 U.S.C. §831(c)(7) ("*committed in an attempt to compel the United States*

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[18] USSG. §2M6.1(a)(1)

[19] USSG §2M6.1(a)(4)

[20] USSG. §2M6.1(a)(2); §2M6.1(a)(3) addresses convictions under 18 U.S.C. § 175b, which is not applicable for our analysis.

to do or abstain *from doing any act"*). The PAG anticipates there may be inconsistent interpretation by courts of whether an act seeking *"to compel the United States to do or abstain from doing any act"* would be considered:

> (i) an act "*committed with intent to injure the United States,"* as addressed by §2M6.1(a)(1), or,
> (ii) a *"threat" to use a weapon of mass destruction,* as addressed by §2M6.1(a)(4).

The words *"compel," "injure"* and *"threat"* cover a wide range of conduct, and conduct charged as *"compelling"* the United States to act (or abstain from acting) may not necessarily fit within the scope of *"injure"* or *"threat."* Accordingly, courts and practitioners will find it difficult in evaluating whether *"compelling the U.S. to do or abstain from doing any act"* merits a Base Offense Level 42, 28, or 20.

The PAG recommends that §2M6.1 be amended to address the language of the first clause of 18 U.S.C. § 831(c)(7). In evaluating how to amend §2M6.1, it must be noted that the conduct described by 18 U.S.C. § 831(c)(7) is only proscribed if the person also commits the conduct described in subsection (a) of § 831, that is, uses nuclear material to cause serious bodily injury and/or unlawfully uses or takes nuclear material. Therefore, the PAG considers acts covered by § 831(c)(7) to be of sufficient seriousness as to warrant application of §2M6.1(a)(1), reserved for the most serious offense conduct. Therefore, the PAG recommends that §2M6.1(a)(1) be amended to include a new subsection (a)(1)(C) and (a)(1)(D) as follows:[21]

§2M6.1

<u>Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy</u>

(a) Base Offense Level (Apply the Greatest)

*(1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization; or (C) to intimidate a population, or (D) to compel a government or an international organization to do or to abstain from doing acts;*

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[21] The recommended amendment to §2M6.1(a)(1) includes the clauses *"intimidating a population"* and *"compel . . . an international organization."* As will be discussed below in the section addressing several other newly enacted crimes, the clauses *"intimidating a population"* and *"compel . . . an international organization"* are included in the recommended amendment in order to address the new offenses in 18 U.S.C. §§ 2280a & 2281a.

3. Recommended Amendment to Commentary to §2M6.1.

As noted above, the words *"compel," "injure"* and *"threat"* cover a wide range of conduct, and conduct charged as *"compelling"* the United States to act (or abstain from acting) may not necessarily fit within the scope of *"injure"* or *"threat."* In the same manner as has been done in the Commentary to USSG §§ 2A2.2 & 2A6.1 (commentary includes factors to consider in evaluating degree of harm), the PAG recommends that the Commission study the sentences arising out of these types of cases to determine whether the Commentary to §2M6.1 should be amended to outline factors that would assist courts and practitioners in evaluating which subsection should apply given the particular conduct at issue.

B. Amendments to 18 U.S.C. §§ 2280, 2281 & 2332b(g)(5)(B):

Sections 2280, 2281 & 2332b(g)(5)(B) of Title 18, United States Code, were amended in several respects to add and provide clarity to definitions, add various administrative provisions, and/or add certain exceptions to §§ 2280 and 2281. The PAG submits that the amendments to each section do not materially alter the crimes otherwise addressed in §§ 2280, 2281 & 2332b(g)(5)(B) to the extent that any change should be made to existing guidelines. Appendix A (Statutory Index) of the Guidelines currently references §§ 2280, 2281 and 2332b to multiple guideline sections. Current references in Appendix A adequately address each of the new amendments to §§ 2280, 2281 and 2332b(g)(5)(B).

C. New Statute 18 U.S.C. § 2280a:

Section 2280a of Title 18, United States Code, *"Violence against Maritime Navigation and Maritime Transport involving Weapons of Mass Destruction,"* was created by the USA FREEDOM Act. The Commission's Preliminary Proposed Amendments relative to 18 U.S.C. § 2280a do not alter any Chapter 2 guideline provision, and only amend Appendix A (Statutory Index) to add references to numerous Chapter 2 sections. For several reasons, the PAG disagrees with the Commission's preliminary proposal, and instead recommends the following changes.

1. Amendment to Appendix A:

The Commission's Preliminary Proposed Amendments addresses § 2280a's new offenses by referencing them in Appendix A (Statutory Index) to numerous Chapter 2 guidelines.[22] For

[22] Sections 2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault); 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially

several reasons listed below, the PAG submits that these numerous references are unnecessary and would lead to confusion and inconsistent application of guidelines. Instead, and for reasons described below, the PAG recommends that Appendix A reference only §§2M5.3, 2M6.1 *(with the PAG's recommended amendment outlined above)*; 2X1.1, 2X2.1, and 2X3.1.

There are four general forms of conduct addressed by § 2280a:

(1) Acts Committed with Intent to Affect a Population or Government:

(a) Committing acts involving weapons of mass destruction on, against, or through the use of a maritime ship, in order to intimidate a population or to compel a government to do or to abstain from doing acts;[23]

(b) Threats to commit the acts described in (a), above, with apparent determination and will to carry the threat into execution;[24]

(c) Using a maritime ship to transport explosive or radioactive material that is intended to be used to intimidate or cause serious injury or death weapons to a population or government;[25]

(2) Injures or Kills a Person in Commission of Offenses:
The injury or death to a person in connection with commission or attempted commission of certain offenses described in § 2280a;[26]

(3) Transportation of Weapons of Mass Destruction:
Using a maritime ship to transport biological, chemical or nuclear weapon, other nuclear explosive device, or any equipment or material knowing it is intended to be used in, contributes to the design or manufacture of, or significantly contributes to the delivery of a nuclear explosive device or biological or chemical weapon;[27]

Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting from Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

[23] 18 U.S.C. § 2280a(a)(1)(A): for the purpose of intimidating or compelling a population or government, committing an act on, against or through the use of a maritime ship involving the use of explosive or radioactive material, biological, chemical, nuclear weapon or explosive device.

[24] 18 U.S.C. § 2280a(a)(2).

[25] 18 U.S.C. § 2280a(a)(1)(B)(i).

[26] 18 U.S.C. § 2280a(a)(1)(D).

[27] 18 U.S.C. §§ 2280a(a)(1)(B)(ii) – (B)(v).

(4) Transportation of a Person to Evade Prosecution:
Using a maritime ship to transport another person who has committed one of the above-described offenses, and intending to assist that person to evade criminal prosecution.[28]

The PAG submits that each of these four forms of conduct is properly addressed in the following sections.

a. Offense Conduct Described in Numbers (1) & (2), above:

Section 2M6.1 (as revised with the PAG's recommended amendment to §2M6.1(a)(1)) covers all of the offense conduct described in numbers (1) and (2), above. That is, the offense conduct proscribed by 18 U.S.C. §§ 2280a(a)(1)(A), (a)(1)(B)(i), (a)(1)(D), & (a)(2) would be adequately addressed by §2M6.1, as amended.

b. Offense Conduct Described in Numbers (3) & (4), above:

Section 2M6.1 does not address the form of offense conduct described in numbers (3) and (4), above (i.e., transportation of weapons of mass destruction and transportation of a person to evade prosecution). Section 2M5.3, however, addresses the same type of described conduct for both of those offenses. Specifically, §2M5.3 addresses offenses that proscribe the provision of material support or resources in connection with terroristic activity.[29] Therefore, the PAG submits that the offense conduct described in numbers (3) and (4), above (i.e., the offenses proscribed in 18 U.S.C. §§ 2280a(a)(1)(B)(ii) – (B)(v) & 18 U.S.C. § 2280a(a)(1)(C)) be referenced to §2M5.3.

c. Attempt and Conspiracy:

Section 2280a(a)(1)(E) includes an express provision for attempt and conspiracy. The PAG submits that § 2280a should also be referenced to §§2X1.1, 2X2.1 and 2X3.1.

d. Economic Loss:

As noted above, the Commission's Preliminary Proposed Amendment recommends a reference to §2B.1, which addresses economic loss. Presumably, this reference is contemplated in the event there is property damage or destruction as a result of the offense conduct. The PAG submits that the gravamen of the offenses charged in § 2280a is the possession, use, or threat to use weapons of mass destruction, as opposed to property damage. The nature and seriousness of

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[28] 18 U.S.C. § 2280a(a)(1)(C).

[29] *See, e.g.,* 18 U.S.C. § 2283, *Transportation of Explosive, Biological, Chemical, or Radioactive or Nuclear Materials,* and 18 U.S.C. § 2284, *Transportation of Terrorists.*

§ 2280a's proscribed offense conduct is more appropriately addressed by §§2M5.3 and 2M6.1, as noted above.

Accordingly, the PAG recommends that new offenses in § 2280a be referenced in Appendix A (Statutory Index) only to the following Chapter Two Guidelines: 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) *(with the PAG's recommended amendment)*; 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

2. Amendment to §2M6.1:

For the reasons set forth above, the PAG submits that §2M6.1 (as revised by the PAG's recommended amendment) and §2M5.3 would address all of the substantive offense conduct now charged in 18 U.S.C. § 2280a. As noted above, the PAG recommends that §2M6.1(a)(1) be amended to include a new subsection (a)(1)(C) & (a)(1)(D), as set forth above.

3. Recommended Amendment to Commentary to §2M6.1.

As noted above, the PAG recommends that the Commission study the application of this guideline to determine the extent to which the Commentary to §2M6.1 should be amended to outline factors that would assist courts and practitioners in evaluating which subsection should apply given the particular conduct at issue.

D. New Statute 18 U.S.C. § 2281a:

Section 2281a of Title 18, United States Code, *"Additional Offenses Against Maritime Fixed Platforms,"* was created by the USA FREEDOM ACT. The Commission's Preliminary Proposed Amendments relative to 18 U.S.C. § 2281a do not alter any Chapter 2 guideline provision, and only amend Appendix A (Statutory Index) to add references to numerous Chapter 2 sections. The PAG recommends several changes to the proposed amendments.

1. Amendment to Appendix A:

Just as with § 2280a, discussed above, the Preliminary Proposed Amendments address § 2281a's new offenses by referencing them in Appendix A (Statutory Index) to numerous Chapter 2 guidelines.[30] The offense conduct language of § 2281a is closely analogous to that charged in §

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[30] Sections 2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault); 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.4 (Arson); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting from Mishandling Hazardous or

2280a, except that § 2281a addresses the same type of conduct committed on, against or from a fixed maritime platform, and proscription of criminal acts of transportation of persons or weapons of mass destruction is not included in § 2281a. For the same reasons described for § 2280a, above, the PAG submits that reference to all of the multiple Chapter 2 guidelines listed above is unnecessary and would lead to confusion and inconsistent application of guidelines; also, the PAG submits that §2M6.1 (as amended to include subsections (a)(1)(C) and (a)(1)(D)) and §5M2.3 adequately address the offense conduct charged in 18 U.S.C. § 2281a.

Section 2281a(a)(1)(C) includes an express provision for attempt and conspiracy. The PAG submits that § 2281a should also reference §§2X1.1, 2X2.1 and 2X3.1.

As with § 2280a, the Proposed Amendment relative to § 2281a recommends a reference to §2B.1, which addresses economic loss. Presumably, this reference is contemplated in the event there is property damage or destruction as a result of the offense conduct. The PAG submits that the gravamen of the offenses charged in § 2281a is the possession, use, or threat to use weapons of mass destruction using or against maritime fixed platforms. The nature and seriousness of the offense conduct is more appropriately addressed by §§2M5.3 and 2M6.1, as noted above, and should not include a reference to §2B1.1.

Accordingly, the PAG recommends that new offenses in § 2281a be referenced in Appendix A (Statutory Index) only to the following Chapter Two Guidelines: 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

2. Recommended Amendment to §2M6.1:

For the same reasons expressed with respect to § 2280a, above, the PAG recommends that §2M6.1 be amended to include the subsections (a)(1)(C) and (a)(1)(D).

3. Recommended Amendment to Commentary to §2M6.1.

As noted above, the PAG recommends that the Commission amend the Commentary to §2M6.1 to outline factors that would assist courts and practitioners in evaluating which subsection should apply given the particular conduct at issue.

E. New Statute 18 U.S.C. § 2332i:

Section 2332i of Title 18, United States Code, *"Acts of Nuclear Terrorism,"* was created by the USA FREEDOM Act. The Commission's Proposed Amendment relative to 18 U.S.C. §

Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy).

2332i does not alter any Chapter 2 guideline provision, and only amends Appendix A (Statutory Index) to add references to numerous Chapter 2 sections. The PAG recommends several changes to the proposed amendment.

1. Amendment to Appendix A:

Just as with §§ 2280a and 2281a, discussed above, the Commission's Preliminary Proposed Amendment addresses § 2332i's new offenses by referencing them in Appendix A (Statutory Index) to numerous Chapter 2 guidelines.[31] The offense conduct language of §§ 2332i is analogous to that charged in §§ 2280a and 2281a, except that proscription of criminal acts of transportation of persons or weapons of mass destruction is not included in § 2332i. For the same reasons expressed for §§ 2280a and 2281a, above, the PAG submits that reference to all of the multiple Chapter 2 guidelines listed in the Commission's preliminary proposal is unnecessary and would lead to confusion and inconsistent application of guidelines.

Section 2281a(a)(1)(C) also includes an express provision for attempt and conspiracy. The PAG submits that Appendix A (Statutory Index) be revised to reference §§2X1.1, 2X2.1 and 2X3.1 for 18 U.S.C. § 2332i.

Accordingly, the PAG recommends that new offenses in § 2332i be referenced in Appendix A (Statutory Index) only to the following Chapter Two Guidelines: 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

2. Amendment to §2M6.1:

For the same reasons recommended for other new statutes, the PAG recommends that §2M6.1 be amended to include subsections (a)(1)(C) and (a)(1)(D).

3. Recommended Amendment to Commentary to §2M6.1.

As noted above, the PAG recommends that the Commission study sentences imposed under §2M6.1 to determine whether the Commentary needs to be amended to outline factors that would assist courts and practitioners in evaluating which subsection should apply given the particular conduct at issue.

Issue for Comment No. 2.

For the reasons described above, the PAG submits that base offense levels, specific offense characteristics and departure provisions of §§2M5.3 and 2M6.1 (as revised by the PAG's

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[31] Sections 2A6.1 (Threatening or Harassing Communications); 2K1.4 (Arson); 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities); and 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

recommended amendment) adequately account for the offense conduct enacted in 18 U.S.C. §§ 2280a, 2281a & 2332i. Also, for the reasons described above, the Commission's Preliminary Proposed Amendments to Appendix A (Statutory Index) are over inclusive and could lead to confusion and inconsistent application of the guidelines. The PAG recommends that Appendix A (Statutory Index) be revised as described above.

Finally, given the nature and seriousness of the offense conduct addressed by the USA FREEDOM Act, the analogous nature of such conduct to previously proscribed conduct, and the minimal guideline amendments that would be necessary, the PAG recommends that the Commission not defer action in response to these new offenses.

PART B. BIPARTISAN BUDGET ACT of 2015

Issue for Comment No. 1:

Part B of the proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. No. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively). The three amended statutes are currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B1.1 (Theft, Property Destruction, and Fraud). The Act added new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes. For each of the three statutes, the new subdivision provides that whoever "conspires to commit any offense described in any of [the] paragraphs" enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

Part B amends Appendix A (Statutory Index) so that §§ 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

As stated above, the Commission is considering amendments to reflect new conspiracy offenses under 42 U.S.C. §408, 1011, and 1383a to 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).

The PAG submits that the guidelines covered by the proposed amendment adequately account for these new conspiracy offenses. Accordingly, the PAG does not suggest any revisions to the Commission's Preliminary Proposed Amendment to account for these offenses.

Issue for Comment No. 2.

A. PAG's Recommendations Regarding Amendments to §2B1.1

The three amended statutes are currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B1.1 (Theft, Property Destruction, and Fraud). The amended §2B1.1 includes "basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting ..., insider trading, transactions in stolen goods, and simple property damage or destruction."[32] Pursuant to §2B1.1(b)(9), the following Specific Offense Characteristics would appear to apply to the amended statutes:

> *If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.*

The Application Notes to §2B1.1 already provide guidance as to how the guideline should apply to the amended statutes:

> *"Government health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by federal or state government. Examples of such programs are the Medicare program, the Medicaid program, and the CHIP program.*

In view of the existing Commentary, the PAG submits that the current guidelines are sufficient to determine applicability of the amendments.

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[32] USSG. Part B - Basic Economic Crimes (November 1, 2014).

The PAG continues to believe that "substantial and real change" to USSG §2B1.1 is appropriate. [33] Short of a "major re-envisioning" of USSG §2B1.1, the PAG suggests that the amendments should provide a wider range of adjustments for mitigating role. Specifically, additional Commentary would be appropriate to address situations where the defendant plays a limited role in the scheme that bears little relationship to the loss.

B. PAG's Recommendation regarding Amendment to Commentary to §3B1.3 Abuse of Position of Trust or Use of Special Skill

The PAG recommends that the Commission amend the Commentary to §3B1.3 to provide guidance that would assist courts and practitioners in evaluating whether the enhancement should apply to the amended statutes.

The guideline provides:

§3B1.3. Abuse of Position of Trust or Use of Special Skill

*If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).*

The amended statute provides that "*any person who receives a fee in connection with providing services related to a disability determination, including a claimant representative, translator, or current or former Social Security Administration emplo*yee" or "*any physician or other medical provider who submits or causes to be submitted medical evidence in connection with a disability determination*" are both categories of potential defendants to whom USSC §3B1.3 might apply. The PAG suggests that the Commission should provide Commentary clarifying that a position of authority or trust must be strictly construed to mean only those persons having professional or managerial discretion. Such a clarification would appropriately limit the application of the enhancement to the defendants who "*significantly facilitated the commission or concealment of the offense.*"

Courts applying §3B1.3 have appropriately required not merely that the defendant's position allowed them special access or opportunity or lack of supervision, but also that s/he hold some sort of professional or managerial discretion. Neither access nor opportunity to commit a crime is equated with special authority. For example, the enhancement was held not to apply to a

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[33] See Letter to The Hon. Patti B. Saris, dated July 29, 2014.

federal immigration officer who stole application fees and destroyed applications because her mere access to the money and applications did not put her in a position of authority.[34]

In addition the PAG suggests that the Commission consider adding commentary clarifying that the abused position of authority or trust must be directly related to the charged conduct. For example, the Second Circuit found §3B1.1 to be inapplicable in a case involving a high ranking executive who was convicted of fraud in connection with a government contract he negotiated for his employer. The Court held that the two-level enhancement did not apply because even though the defendant held a level of trust vis-à-vis his own employer, no such enhanced authority or trust existed between the executive and NASA.[35] Such a clarification in the context of the amended statute would make clear that the two-level enhancement should not apply, for example, to a claimant's representative who does not have a position of trust vis-à-vis the Social Security Administration, despite the fact that s/he might have a position of trust vis-à-vis the claimant.

In sum, the PAG submits that the above-described amendments to §3B1.3 are necessary to avoid over-application of the two-level enhancement, particularly in view of the expanded statutory maximum punishment for the amended statutes.

PART C. ***18 U.S.C. § 1715 (Firearms as Nonmailable Items)***

Issue for Comment:

A. Commission's Preliminary Proposed Amendments:
The Commission's preliminary proposal is to amend §2K2.1(a)(8) as follows:

(a) Base Offense Level (Apply the Greatest):

. . .

(7) ***12****, except as provided below; or*

(8) ***6****, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or § 1715*.[36]

Section 2K2.1 addresses the *"Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition."* Rather

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[34] *U.S. v. Spear*, 491 F.3d 1150 (10th Cir.) (2007).

[35] *U.S. v. Broderson*, 67 F.3d 452 (2d Cir. 1995).

[36] USSG. §2K2.1(a)(7) & (a)(8) (Commission's proposed amendment highlighted).

than allow offenses under 18 U.S.C. § 1715 to fall within the general Base Offense Level 12 provided by §2K2.1(a)(7), however, the Commission proposes that offenses under § 1715 fall within those limited number of offenses which warrant Base Offense Level 6.

B. <u>PAG's Recommendation regarding Base Offense Level</u>.

For several reasons, the PAG concurs that offenses under 18 U.S.C. § 1715 should be referenced to §2K2.1(a)(8).

The PAG notes the following in analyzing the nature and seriousness of the offense conduct proscribed by 18 U.S.C. § 1715:

1. The statutory maximum for violations of § 1715 is two years;
2. Section 2K2.1 provides graduated offense levels if the offense conduct involved aggravating circumstances;
3. An analogous criminal statute proscribing the more serious crime of mailing explosives carries a 20-year statutory maximum yet provides for a Base Offense Level 12.[37]
4. If adopted, the PAG recommends below an amendment to §2K3.2 that would permit courts to consider additional aggravated conduct.

C. <u>PAG's Recommendation regarding Appendix A (Statutory Index).</u>

The Commission's Preliminary Proposed Amendment provides only for reference to §2K2.1, as amended. The PAG submits that offenses under 18 U.S.C. § 1715 also be referenced to §2K3.2, *Feloniously Mailing Injurious Articles.* Offenses under 18 U.S.C. § 1716, *Injurious Articles as Nonmailable* (governing the mailing of poison, switchblade knives and ballistic knives) are referenced to §2K3.2. The PAG recognizes that the offense of mailing unmailable firearms may be committed with the intent to kill or injure a person or property. Reference to §2K3.2 would allow courts to account for such conduct without the need for departure or variance.

Accordingly, the PAG recommends that §2K3.2 be amended as follows:

§2K3.2.
<u>Feloniously Mailing Injurious Articles</u>

(a) Base Offense Level (Apply the Greater)

[37] 18 U.S.C. § 1716, referenced to USSG §2K1.3(a)(5).

(1) *If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or*

(2) *If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).*

Commentary

Statutory Provision: 18 U.S.C. §§ 1715 & 1716 (felony provisions only).

Background: With respect to offenses under 18 U.S.C. § 1716, this guideline applies only to its felony provisions. The Commission has not promulgated a guideline for the misdemeanor provisions of § 1716.[38]

D. Appendix A (Statutory Index).

The PAG recommends that Appendix A (Statutory Index) be amended to reference offenses under 18 U.S.C. § 1715 to §§2K2.1 and 2K3.2.

PART D. Technical Amendment to §2T1.6

Commission's Preliminary Proposed Amendment:

The Commission's preliminary proposal is to amend §2T1.6 to remove the sentence "*The offense is a felony that is infrequently prosecuted*." from the Background section of §2T1.6. The PAG concurs with this proposed amendment.

[38] USSG §2K3.2 (with proposed amendments highlighted).

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 for the 2016 amendment cycle. We look forward to an opportunity for further discussion as the proposed changes are finalized.

Respectfully submitted,

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Testimony Before The United States Sentencing Commission

February 17, 2016

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Written Testimony on Proposed Amendment of Policy Statement on Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons, USSG § 1B1.13

My name is Margaret Love. I am pleased to have the opportunity to testify today on behalf of the Practitioners Advisory Group on the proposed amendment of the Commission's policy statement on "Reduction in Term of Imprisonment as a result of Motion by Director of Bureau of Prisons," USSG § 1B1.13. As one of the Commission's four standing advisory groups, the PAG provides the perspective of lawyers in the private sector who represent individuals and organizations convicted and sentenced under federal criminal law. I have been a nonvoting member of the PAG since its formation, and I have participated in preparing each of PAG's submissions to the Commission on this sentence reduction issue in the past three years.

1. **Background**

By way of background, in its letter of July 27, 2015, PAG urged the Commission to make amendment of § 1B1.13 a priority for this amendment cycle based on two concerns: 1) the continued paucity of motions proposing sentence modification for "extraordinary and compelling reasons" filed with courts by the Director of BOP under 18 U.S.C. § 3582(c)(1)(A)(i) in the past two years, despite a broadening of BOP's applicable program statement in August 2013 as part of the Justice Department's "Smart on Crime" initiative;[1] and 2) the possibility that the Commission's own policy statement in § 1B1.13 might be partly responsible for the Department's continued reluctance to bring cases back to court under this beneficent and cost-effective statute.

PAG believes judicial authority to modify sentences under § 3582(c)(1)(A) should be used generously in a broad range of situations, in light of changing societal views about the purpose of

[1] The small number of sentence reduction motions filed in the past year, as reported in the recent report of the Charles Colson Task Force, seems particularly surprising in light of the Department's active promotion of the Administration's clemency initiative during this period, in which the President acting alone has reduced nearly twice as many prison sentences as all 94 district courts combined. *See* TRANSFORMING PRISONS, RESTORING LIVES, FINAL RECOMMENDATIONS OF THE CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS 47, note xxiii (January 2016).

incarceration, which PAG shares, as well as widespread concern about over-incarceration and the efficacy of lengthy prison terms. We note also the cost of incarcerating an aging prison population, the emerging bipartisan consensus that reducing prison sentences yields benefits in public safety,[2] and changes in federal sentencing laws and policies that may be difficult to apply retroactively. The Administration has sought to address many of these systemic concerns through the president's pardon power, which we find problematic on several grounds.[3]

In the past, the Justice Department has objected to a more generous use of the judicial sentence reduction authority in § 3582(c)(1)(A)(i) on grounds that this would violate principles of determinacy.[4] But a failure to provide an easily accessible safety valve may subvert the legitimacy of any sentencing system. And, the premise of the Federal Sentencing Reform Act is that sentence length should be determined by courts, not by executive agencies. A policy designed to enable the sentencing court to decide whether a particular defendant's sentence should or should not be reduced for "extraordinary and compelling reasons" is entirely consistent with the principles on

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[2] *See, e.g.,* PEW CHARITABLE TRUSTS, MOST STATES CUT IMPRISONMENT AND CRIME (2015), *available at* http://www.pewtrusts.org/~/media/assets/2015/01/pspp_imprisonment_crime.pdf?la=en.

[3] We believe there are institutional as well as practical concerns raised by relying on executive clemency to deal with what has been recognized by this Administration as a systemic problem of overly-long federal sentences. There are philosophical objections as well. *See* Daniel J. Freed and Stevenson L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT'G REP. 119, 124 (2001) (arguing that clemency is ill suited to address shortcomings in the legal system or substitute for law reform); *see also* Margaret Love, *Clemency is Not the Answer*, THE CRIME REPORT (July 16, 2015), http://www.thecrimereport.org/viewpoints/2015-07-our-approach-to-clemency-needs-a-reset. It seems significant in this regard that the authority in § 3582(c)(1)(A)(i) was initially enacted in 1976 as part of the Parole Reorganization Act, see 18 U.S.C. § 4205(g), to circumvent the slow and unreliable pardon process. *See United States. v. Diaco*, 457 F. Supp. 371, 372 (D.N.J., 1978) (motion filed to reduce sentence in light of unwarranted disparity among co-defendants; statement of Director of BOP explaining that the new procedure offered an alternative to submitting an application for clemency to the President through the Office of the Pardon Attorney); *United States v. Banks*, 428 F. Supp. 1088, 1089 (E.D. Mich. 1977) (sentence reduced because of exceptional adjustment in prison; same statement by BOP Director).

[4] *See* Letter from Michael Elston, Senior Counsel to the Assistant Attorney General, Criminal Division, to Commission Chair Hinojosa (July 14, 2006) [*hereinafter* Elston letter] (broadening eligibility for judicial sentence reduction under § 3582(c)(1)(A)(i) is "an open-ended invitation to second-guess the legislative decision to abolish parole").

which federal sentencing law is based, whereas a policy that effectively keeps such decisions away from the court arguably undermines those principles.[5]

We have no doubt that federal judges would embrace a more fulsome interpretation of the "extraordinary and compelling" standard and would respond affirmatively if more motions were filed by the Justice Department under authority of § 3582(c)(1)(A)(i). Indeed, it is our understanding that no court has ever denied such a motion. This in turn suggests that the real locus of decision-making under this statute has been the Justice Department in the exercise of its gatekeeping function, not the courts. That Justice plays a role reserved by law to courts is further evidenced by the fact that the eligibility criteria set forth in the applicable BOP program statement include many factors that are committed to the sentencing court,[6] including whether a defendant poses a public safety risk.[7]

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[5] It is significant in this regard that when the American Law Institute incorporated a "changed circumstances" judicial sentence reduction mechanism into its revision of the sentencing articles of the Model Penal Code, it omitted the corrections department as gatekeeper based on concerns about the federal experience. *See* MODEL PENAL CODE: SENTENCING, Tentative Draft No. 2, § 305.7 (March 25, 2011) ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons").

[6] *See* BUREAU OF PRISONS, BOP PROGRAM STATEMENT 5050.49, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G), at § 7 (August 12, 2013) [*hereinafter* BOP PROGRAM STATEMENT 5050.49]. The BOP program statement requires correctional officials to factor into every decision whether to file a motion, considerations such as the nature and circumstances of the defendant's offense, criminal and personal history derived from the PSR, comments from victims, and "[w]hether release would minimize the severity of the offense." These offense-related considerations are quintessentially assigned to the court under 28 U.S.C. § 3553(a), and not to the Justice Department. *Cf. Setser v. United States*, 566 U.S. __ , 132 S. Ct. 1463, 1469 (2012) (holding that the power to run sentences consecutively or concurrently lies with the Judicial Branch, since "the Bureau is not charged with applying § 3553(a)").

[7] It does not appear that the Department is authorized, when deciding whether "extraordinary and compelling reasons" exist in a particular defendant's case, to take into account whether the defendant is "a danger to the safety of any other person or the community, as provided under section 3142(g)." That responsibility is assigned to the Director of BOP only under § 3582(c)(1)(A)(ii), which governs sentence reduction for certain repeat violent offenders sentenced to mandatory life under 18 U.S.C. § 3559(e). Of course the BOP Director will generally be in the best position to advise the court considering a sentence reduction motion about the defendant's present public safety risk based on his or her disciplinary history while incarcerated, but public safety considerations should not be a basis for declining to bring a case to court.

If the Commission were to defer to the BOP program statement in its policy-making role, it would further shrink the role of courts under § 3582(c)(1)(A)(i) and avoid its own responsibility under 28 U.S.C. §§ 994(a)(2) and (t).[8] As it is, we respectfully suggest that the broadly-stated criteria in current § 1B1.13 have encouraged an overly restrictive administration of this potentially potent statute. We are persuaded that if the Commission were to promulgate a policy designed to make greater use of this sentence reduction authority, it would soon be reflected in the Justice Department's policies and practices.[9]

The amendments to § 1B1.13 currently proposed by the Commission, modeled as they are on criteria in the BOP program statement, will further entrench the unavailability of relief. The sentence reduction authority in § 3582(c)(1)(A)(i) is likely to be invoked more generously by the Department of Justice only if this Commission leads the way with a clear and enforceable policy statement drafted with that end in mind. The more specific the policy, the less likely it is to result in unwarranted disparity in judicial responses to government motions. With this background, we turn to the specific issues on which the Commission has asked for comment.

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[8] The Commission's policy-making authority under §§ 994(a)(2) and 994(t) is discussed at pp. 13-15 *infra*.

[9] It is true that the Justice Department has in the past been resistant to this Commission's policy-making authority. *See* Elston letter, *supra* note 4 (stating 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."). At the same time, as former Commissioner John Steer wrote in a 2001 article, "Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section." *See* John R. Steer & Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT'G REP. 154, 157 (2001). One example of the Justice Department following the Commission's lead is its 2013 endorsement of exigent family circumstances in the 2013 revision of the BOP program statement (though we know of no case in which this criterion has provided a basis for relief).

2. **Should § 1B1.13 be amended and, if so, should it closely track the BOP program statement?**

PAG believes the Commission should amend § 1B1.13 to develop further criteria and examples of "extraordinary and compelling reasons" warranting sentence reduction. Congress intended §3582(c)(1)(A)(i) to apply broadly, "regardless of the length of sentence, in the unusual case in which a defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the prisoner's confinement."[10] The legislative history also mentions "severe illness" and "unusually long sentences" as circumstances potentially warranting sentence reduction.[11] This authority was described as a "safety valve" that "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[12]

The Commission was charged under 28 U.S.C. § 994(t) with "describ[ing] the 'extraordinary and compelling reasons' that would justify a reduction of a particularly long sentence imposed pursuant to proposed 18 U.S.C. § 3582(c)(1)(A)."[13] Section 994(t) imposes only one limit on the Commission's policy-making authority, which is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." That explicit limitation carries with it the implicit recognition that a defendant's rehabilitation may be relevant to, if not determinative of, a court's decision on sentence reduction, and that other factors, many indeed, can comprise a spectrum of "extraordinary and compelling" reasons.

[10] S. Rep. Sen. Rep. 98-225 at 121 (98th Cong., 1st Sess.) (1984).

[11] *Id*. at 55.

[12] *Id*. at 121. As previously noted, the authority in § 3582(c)(1)(A)(i) was initially enacted to enable the Justice Department to expedite early parole consideration in cases it would otherwise have recommended to the president for executive clemency. The authority was carried forward with slight modifications as part of the Sentencing Reform Act of 1984, giving the Commission authority to establish policy for its exercise, but with no indication that Congress considered revising the procedure for bringing cases before the sentencing court.

[13] *Id*. at 179.

As we detail in the following section, the current Commission policy in § 1B1.13 should be revised to removing limiting language that may have discouraged greater use of this authority by the Justice Department, and amplified to make it easier to identify deserving cases. We also believe it should recognize additional types of changed circumstances constituting "extraordinary and compelling reasons" warranting early release. The policy should specify the criteria to be applied for each reason and include specific examples, as required by § 994(t), to facilitate administration of the statute both by the Justice Department and by the courts. It should add a provision making clear that "extraordinary and compelling reasons" need not have been unforeseeable at the time of sentencing in order to provide a basis for early release. In order to make its policy more easily enforceable, it should specify that the Director of BOP should not withhold a motion under § 3582(c)(1)(A)(i) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in § 1B1.13.

In amending § 1B1.13, the Commission should not closely track the criteria for sentence reduction in BOP's program statement, which are in many respects even more limiting than those in the current § 1B1.13.[14] Moreover, tracking the BOP program statement may imply the Commission's endorsement of the ways in which its criteria are elaborated, further limiting the situations in which the Department will bring a case back to court. The program statement's functional definition of disability, discussed in the following section, is but one example of this.[15] In addition, the program statement requires BOP to take into account issues related to the crime of conviction that are the province of the court under 28 U.S.C. § 3553(a), and to the defendant's public safety risk, also committed to the court under § 3582(c)(1)(A)(i).[16] If

[14] Because the language in the Commission's proposed amendment of § 1B1.13 parallels BOP's program statement, this will be readily apparent from our closer analysis of its specific provisions in the following section.

[15] Current § 1B1.13 defines a "permanent physical or medical condition" warranting sentence reduction as one 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." *See* Application Notes, (A)(ii). In contrast, the BOP program statement requires that eligibility for sentence reduction based on "debilitated medical condition" requires an individual to be "completely disabled" and "totally confined to a bed or chair" or "confined to a bed or chair more than 50% of waking hours." *See* BOP PROGRAM STATEMENT 5050.49, *supra* note 6, at § 3(b).

[16] *See* notes 6 and 7, *supra*.

anything, the statutory scheme would seem to require BOP's program statement to track the Commission's policy, rather than vice versa. [17]

In developing its list of "extraordinary and compelling reasons" warranting early release, PAG believes that the Commission should act with an eye toward what we earlier described as changing societal views about over-incarceration and sentence length, views that are in turn reflected in changes in sentencing laws and policies and a growing recognition that the federal prison population must be substantially reduced. We are convinced that the Commission can encourage a larger role for this statute in reducing prison sentences with vigorous and creative policy-making. Developing specific examples of cases in which a motion would be appropriate, as required by § 994(t), would be helpful in this regard. The clearer and more specific the Commission's guidance, the more likely it is to be applied uniformly by the courts in particular cases.

3. Specific Criteria in the Proposed Revision of § 1B1.13

We turn now to specific comments on the revised criteria for "extraordinary and compelling reasons" that the Commission has proposed for inclusion in the Commentary to § 1B1.13. A document appended to this testimony shows how we would modify the criteria proposed by the Commission.[18]

a. Illness and disability

While the Commission's proposed formulation for terminal illness in (i) seems generally acceptable,[19] we believe that subsections (ii) and (iii) should be both broader and more specific

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[17] *See* note 9, *supra*.

[18] We also suggest a stylistic modification of the black letter of § 1B1.13 to clarify the court's authority to make particular modifications to a sentence under this authority. We have not attempted to develop specific examples of each of the criteria we propose, but would be happy to do so if the Commission would find that helpful.

[19] We suggest that "terminal illness" replace "terminal, incurable disease," since "incurable" seems redundant and "disease" seems at least unduly limiting if not inapt.

in describing the type of non-terminal illness and disability that would warrant release. The proposed language in these subsections, which tracks the BOP program statement, limits eligibility for sentence reduction to illness that is progressive, and to disability resulting from an injury. We propose that (ii) should extend to any severe illness that is "chronic or progressive;" that (iii) should extend to any physical or mental disability; and that the two sections should be combined and qualified by a diminished ability to function in a correctional environment. We recommend that the Commission develop specific examples of illness and disability that would warrant early release.

b. Age-related reasons

The Commission's proposed policy statement contains two age-related provisions, one (iv) related to physical and mental deterioration, and the other (v) related to chronological age alone. The criteria for age-related medical conditions seem both too restrictive and too general. Ideally, we think that the reason relating to age-related mental and physical deterioration should be combined with the two other criteria related to non-terminal illness and disability, and that all three of these categories be qualified by a functional standard that is similar to the one in current § 1B1.13. At the very least, we recommend that subsections (III) and (IV) of (iv) be combined and simplified,[20] and that (V) be eliminated, since it could be interpreted to disqualify any aging person for whom "conventional treatment" (which we assume refers to prison treatment) might result in "improvement."

Both of the age-related provisions require that the individual have served a specific amount of time, which we believe is unduly limiting. When the qualifying sentence length is expressed in terms of percentages, it appears to rule out anyone serving a life sentence, or a term of years so long that it is effectively a life sentence. Where sentence reduction is based on an aging individual's deteriorating mental or physical health, requiring him or her to have served a specific number of years seems particularly inappropriate.

[20] We suggest that the definition in (IV) would seem to cover the territory, since "deteriorating mental or physical health related to the aging process" ought to include a "chronic or serious medical condition related to the aging process."

However, where release would be based on chronological age alone, with no accompanying mental or physical deterioration, we believe it reasonable to require an individual to have served some portion of his or her sentence. Specifically, we propose that (v) be amended to delete the final three words, which would have the effect of requiring individuals sentenced to less than 10 years to be eligible for release after serving 75% of their sentence, as recommended in the May 2015 report of the Justice Department's Inspector General on aging prisoners.[21] We would broaden the OIG recommendation to permit any individual, including someone serving a life sentence to qualify after serving a minimum of 10 years. A court considering sentence reduction may determine that a particular prisoner should not be released based upon the seriousness of his or her offense, as reflected in a lengthy prison term, but that is not an appropriate decision for the Justice Department to make.

We take no position on the recommendation in the May 2015 OIG report that "aging" be defined as 50 and older.

c. Exigent family circumstances

In addition to reasons relating to severe illness, disability, and advancing age, § 1B1.13 has for many years recognized that certain exigent family circumstances may warrant release, specifying the "death or incapacitation of the only family member capable of caring for the defendant's minor child" as an "extraordinary and compelling reason." In the 2013 amendment to its program statement, BOP endorsed and broadened the category of exigent family circumstances as an "extraordinary and compelling reason" warranting release, and we recommend that the Commission now broaden them further. Specifically, we recommend that (vi) not be limited to the death or incapacitation of a family member caregiver, and that (vii) not be limited to the defendant's spouse or registered partner, but extended to any member of the defendant's immediate family.

[21] *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 1-2 (May 2015) [*hereinafter* OIG REPORT ON AGING].

We see no need for a definition of "incapacitation" in connection with (vi). For (vii) we recommend that the definition be simplified, and based upon Medicaid's functional eligibility criteria for long-term care.[22]

d. Rehabilitation

Section 994(t) provides that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." Because this wording indicates that rehabilitation in combination with other compelling considerations may rise to the level of an "extraordinary and compelling reason," PAG recommends that the Commission include "rehabilitation" as a basis for sentence reduction in Application Note 1(A), with the caveat that it must be considered in combination with other qualifying criteria.

e. Other changed circumstances warranting sentence reduction

A policy statement submitted to the Commission by the American Bar Association in 2007, which was endorsed by PAG and several other organizations testifying today, recommended that the Commission include a number of additional changed circumstances relating to the defendant's sentence itself as "extraordinary and compelling reasons" making continued confinement inequitable. These include changes in sentencing laws not made retroactive, discovery of new information or evidence, mistakes of fact or law that cannot be corrected by the courts, and unwarranted disparity among similarly situated co-defendants.

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[22] Based on the Medicaid criteria, we propose the following definition:

> "Incapacitation" means a disabling condition or long term illness that requires long-term service and support that would meet Medicaid's functional eligibility criteria for long term care, including assistance performing activities of daily living, such as bathing, dressing, using the toilet, transferring to or from a bed or chair, caring for incontinence, or eating.

See Functional Requirements, LONGTERMCARE.GOV, http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements (last visited Feb. 8, 2016); Marshall E. Kelley & Susan M. Tucker, *Elements of a Functional Assessment for Medicaid Personal Care Services*, CLASS TECHNICAL ASSISTANCE BRIEF SERIES, Spring 2011, No. 5 (The Scan Foundation), *available at* http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FINAL.pdf.

PAG finds nothing in the text or legislative history of § 3582(c)(1)(A) to suggest that a court's authority to reduce a sentence should be limited to reasons relating to the defendant's personal circumstances. Considering the origins of this authority as a supplement to the pardon power, there appears to be no reason why its use should not be expanded to cover more of the traditional grounds for clemency.[23] We therefore confirm our earlier position that conviction-related reasons are potentially valid grounds for sentence reduction. While it may be argued that these reasons are not within the competence of the Bureau of Prisons to administer, no more so are the reasons presently in its program statement relating to family exigency. In any case, BOP could easily call upon other parts of the Department for advice on questions relating to the defendant's sentence.

f. Foreseeability

In amending § 1B1.13, PAG recommends that the Commission clarify that the "extraordinary and compelling reasons" warranting sentence reduction need not have been unforeseen at the time of sentencing. The requirement in the BOP program statement that a particular reason "could not reasonably have been foreseen by the court at the time of sentencing" has been interpreted by BOP to keep from the court many cases where illness or disability was present in an attenuated form at the time of sentencing. If applied literally, this requirement would rule out advanced age entirely as a basis for sentence reduction. If an individual meets the criteria for sentence reduction, it is up to the court and not the Justice Department to deny relief. We propose that this clarification be added to the Application Notes following the list of "extraordinary and compelling reasons."[24]

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[23] In light of the Administration's interest, evidenced by its clemency initiative, in reducing sentences that are longer than would be imposed under current sentencing laws and policies, and the practical limitations of the pardon process as a vehicle for reviewing the many thousands of applications that have been filed, these sentence-related "extraordinary and compelling reasons" would be a significant feature of an amended § 1B1.13. As previously noted, there are also institutional and philosophical reasons why judicial sentence modification is preferable to clemency. *See* note 2, *supra*.

[24] We recommend the following as a new 1.(C):

> "Extraordinary and compelling reasons" may be found 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 the changes could have been anticipated by the court at sentencing.

4. The Inspector General's Report on Aging Prisoners

The Commission asked for comment on whether it should address issues raised by the May 2015 OIG report on "compassionate release" for aging prisoners, or whether it should defer action during this amendment cycle to consider any possible changes that might be made to the BOP program statement in response to this OIG report. As the preceding discussion indicates, we believe the Commission should incorporate into § 1B1.13 some of the recommendations made by the OIG on advanced age as a basis for sentence reduction. However, we see no basis for the Commission to defer action in the expectation that BOP may soon amend its program statement to incorporate the OIG recommendations. We note that while BOP agreed with the OIG recommendation that the criteria concerning aging prisoners "should be further considered and evaluated," it undertook only to "raise the issue with stakeholders for further discussion." We are aware of no plans underway to amend the BOP program statement.[25] In any case, we believe that the Commission should take the lead in developing progressive policy recommendations on sentence reduction based on advanced age, which can be administered by the Department and by the courts, whether or not the BOP program statement is amended.

5. Commission Authority in Sentence Reduction Matters

The Commission asked for comment on whether, in revising § 1B1.13, it should invoke its general authority under 28 U.S.C. § 994(a)(2) to promulgate policy statements to further the purposes of sentencing as well as § 994(t). We believe that § 994(a)(2) contains the Commission's general policy-making authority, while § 994(t) describes how that general authority ought to be exercised by courts in connection with the sentence modification authority in § 3582(c)(1)(A). Accordingly, while we do not regard it as legally necessary, the Commission may wish to add § 994(a)(2)(C) as the source of authority for §1B1.13.

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[25] The OIG report noted that "BOP's actions are partially responsive to the recommendation," and asked BOP "to provide minutes of meetings between the BOP and other relevant stakeholders to discuss this topic, copies of BOP data or other BOP information reviewed by the BOP and the other stakeholders in the course of their deliberations, and the results of the deliberations, by July 31, 2015." OIG REPORT ON AGING, *supra* note 21, at 65-66. We do not know if this has been done.

The Commission also requested comment on whether it could provide that "the Director of BOP should not withhold a motion under § 3582(c)(1)(A)(1) if a defendant meets any of the circumstances listed [in § 1B1.13] as 'extraordinary and compelling reasons.'" We do not read this as asking whether the Commission could compel an executive branch official to file a motion in any particular case, which seems doubtful. Rather, we interpret the Commission's question to ask whether it should include in §1B1.13 a provision addressing the respective authority of the Commission and the Department of Justice in connection with developing policy for administering the statutory scheme. We agree that this would be desirable.

Under §§ 994(a)(2) and (t), the Commission is responsible in the first instance for determining what reasons are "extraordinary and compelling" and what criteria are to be applied in deciding their applicability in particular cases. Under § 3582(c)(1)(A)(i), the Justice Department is responsible for applying the Commission's criteria in particular cases for purposes of authorizing the BOP Director to file a motion to bring a case before the court. The court then makes the final decision whether the sentence should be reduced, taking into account both the Commission's policy under § 1B1.13 and the purposes of sentencing set forth under 18 U.S.C. § 3553(a). When Congress invested judges with authority to reduce sentences in accordance with policy established by this Commission, it could not have intended the Justice Department to be able to withhold from judicial review cases meeting criteria that the Commission formulated pursuant to the mandate of 28 U.S.C. § 994(t). In effect, the Justice Department would then be both making policy for sentence reduction and executing it. That is fundamentally inconsistent with the expressed intent of Congress that the sentence reduction authority in § 3582(c)(1)(A)(i) be a "safety valve" which "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[26]

It would therefore contravene the statutory scheme for the Justice Department to operate under different or more restrictive criteria for bringing a case back to court than those established by the Commission. It would be equally inconsistent with Congress' intent for Justice Department officials to base decisions affecting eligibility for sentence reduction on considerations that are

[26] *See* note 12, *supra*.

nowhere specified in Commission policy, and are instead within the purview of the courts under § 3553(a) or § 3582(c)(1)(A), such as the nature and circumstances of an offense that may have taken place many years before, or a defendant's present public safety risk.[27] The Commission's authority to make policy for sentence reduction would be ineffective if the Justice Department were under no obligation to recognize or apply it, and the court's authority to reduce a sentence in appropriate cases would be frustrated if cases meeting the Commission's criteria were withheld from it.

Accordingly, PAG believes that if a particular defendant's case presents "extraordinary and compelling reasons" as set forth in Commission policy, it would be legally problematic for the Justice Department to decline to bring that case back to court. We therefore propose for inclusion in the Application Notes a provision stating that the Director of BOP should not withhold a motion if the defendant meets any of the criteria listed as "extraordinary and compelling reasons" in § 1B1.13. If the Commission develops a detailed set of criteria, and a range of examples applying these criteria, the Justice Department could be held accountable for applying the Commission's general policy in particular cases. In this fashion, by fully exercising its policy-making authority under § 994(t), the Commission would encourage the Department to apply its policies consistently in the exercise of its gatekeeping function.

In closing, we wish to thank the Commission for making this matter a priority, and for giving us an opportunity to offer our views on it.

[27] *See* notes 6 and 7, *supra*.

Practitioners Advisory Group Proposed Policy on Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)(i) (Feb. 10, 2016)

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

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 ~~(and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment)~~ if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(a) (1) (A) extraordinary and compelling reasons warrant the reduction; or

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

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

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

(b) 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 Notes:

1. Application of Subdivision (1)(A)

(A) Extraordinary and Compelling Reasons. *Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances set forth below:*

(i) The defendant ~~(I)~~ has been diagnosed with a terminal ~~, incurable disease;~~illness and ~~(II)~~ has a life expectancy of 18 months or less.

~~(ii) The defendant has an incurable, progressive illness~~
~~(iii) The defendant has suffered a debilitating injury from which he or she will not recover.~~
~~(iv) The defendant meets the following criteria—~~

~~(I) the defendant is at least 65 years old;~~
~~(II) the defendant has served at least 50 percent of his or her sentence;~~
~~(III) the defendant suffers from a chronic or serious medical condition related to the aging process;~~
~~(IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and~~
~~(V) conventional treatment promises no substantial improvement to the defendant's mental health or physical condition.~~

(ii) The defendant (I) is suffering from a chronic or progressive illness or medical condition, or from a permanent physical or mental disability, or is experiencing deteriorating mental or physical health related to the aging process, that (II) substantially diminishes his or her ability to function in a correctional environment;

(iii~~v~~) The defendant ~~(I)~~ is at least 65 years old, ~~;~~ and ~~(II)~~ has served at least 10 years or 75 percent of his or her sentence. ~~, whichever is greater.~~

(iv~~vi~~) The death or incapacitation of the ~~family member~~ caregiver of the defendant's child;

~~["Incapacitation" means the family member caregiver suffered a severe injury or suffers from a severe illness that renders the caregiver incapable of caring for the child.~~ ["Child" means an individual who has~~d~~ not attained the age of 18 years.]

(v~~ii~~) The incapacitation of a member of the defendant's immediate family ~~spouse or registered partner~~ when the defendant would be the only available caregiver for the immediate family member~~spouse or registered partner~~.

~~["Incapacitation" means the spouse or registered partner (I) has suffered a serious injury or suffers from a debilitating physical illness and the result of the injury or illness is that the spouse or registered partner is completely disabled,~~

~~meaning that the spouse or registered partner cannot carry on any self-care and is totally confined to a bed or chair; or (II) has a severe cognitive deficit, caused by an illness or injury, that has severely affected the spouse's or registered partner's mental capacity or function but may not be confined to a bed or chair. "Spouse" means an individual in a relationship with the defendant, where that relationship has been legally recognized as a marriage, including a legally-recognized common-law marriage. "Registered partner" means an individual in relationship with the defendant, where the relationship has been legally recognized as a civil union or registered domestic partnership.]~~

["Incapacitation" in this section means a disabling condition or long term illness that requires long-term service and support that would meet Medicaid's functional eligibility criteria for long term care, including assistance performing activities of daily living, such as bathing, dressing, using the toilet, transferring to or from a bed or chair, caring for incontinence, or eating.][*]

(vi) The defendant would have received a lower sentence under a subsequent change in applicable law or policy that was not made retroactive;

(vii) The defendant's sentence was based upon a significant mistake of law or fact, or was significantly higher than similarly situated codefendants because of factors beyond the control of the sentencing court, for which there is no other legal remedy;

(viii) The defendant's rehabilitation while in prison has been extraordinary.

(~~viii~~ix) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i)~~, (ii), and (iii)~~ through (viii)

(B) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction exist whenever 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 the changes could have been anticipated by the court at sentencing

~~Rehabilitation of the Defendant. — Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).~~

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[*] *See* http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements/; http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FINAL.pdf.

(C) "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 rehabilitation of the defendant alone shall not constitute an "extraordinary and compelling reason" warranting sentence reduction pursuant to this section.

2. Application of Subdivision (3) —Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

3. BOP Motion -- Because a reduction may only be granted upon formal motion of the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A), the Director should not withhold such a motion if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in §1B1.13.

Background: The Commission is authorized by 28 U.S.C. § 994(a)(2) to develop policy for sentence reduction under § 3582(c)(1)(A), and in doing so 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." See 28 U.S.C. § 994(t). 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(a)(2) and (t).

Practitioners Advisory Group Proposed Policy on Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A)(i) (Feb. 10, 2016)

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

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), to the extent that they are applicable, the court determines that—

(a) (1) (A) extraordinary and compelling reasons warrant the reduction; or

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

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

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

(b) 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 Notes:

1. Application of Subdivision (1)(A)

(A) *<u>Extraordinary and Compelling Reasons</u>. Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances set forth below:*

(i) The defendant has been diagnosed with a terminal illness and has a life expectancy of 18 months or less.

(ii) The defendant (I) is suffering from a chronic or progressive illness or medical condition, or from a permanent physical or mental disability, or is experiencing deteriorating mental or physical health related to the aging process, that (II) substantially diminishes his or her ability to function in a correctional environment;

(iii) The defendant is at least 65 years old, and has served at least 10 years or 75 percent of his or her sentence.

(iv) The death or incapacitation of the caregiver of the defendant's child;

[“Child” means an individual who has not attained the age of 18 years.]

(v) The incapacitation of a member of the defendant's immediate family when the defendant would be the only available caregiver for the immediate family member.

{“Incapacitation” in this section means a disabling condition or long term illness that requires long-term service and support that would meet Medicaid's functional eligibility criteria for long term care, including assistance performing activities of daily living, such as bathing, dressing, using the toilet, transferring to or from a bed or chair, caring for incontinence, or eating.][*]

(vi) The defendant would have received a lower sentence under a subsequent change in applicable law or policy that was not made retroactive;

(vii) The defendant's sentence was based upon a significant mistake of law or fact, or was significantly higher than similarly situated codefendants because of factors beyond the control of the sentencing court, for which there is no other legal remedy;

(viii) The defendant's rehabilitation while in prison has been extraordinary;

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[*] *See* http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements/; http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FINAL.pdf.

(ix) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i) through (viii)

(B) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction exist whenever 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 the changes could have been anticipated by the court at sentencing

(C) "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 rehabilitation of the defendant alone shall not constitute an "extraordinary and compelling reason" warranting sentence reduction pursuant to this section.

2. <u>Application of Subdivision (3) —</u>Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

3. <u>BOP Motion --</u> Because a reduction may only be granted upon formal motion of the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A), the Director should not withhold such a motion if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in § 1B1.13.

<u>Background</u>: The Commission is authorized by 28 U.S.C. § 994(a)(2) to develop policy for sentence reduction under § 3582(c)(1)(A), and in doing so 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." See 28 U.S.C. § 994(t). 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(a)(2) and (t).

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

March 16, 2016

KNUT S. JOHNSON

On Behalf of the Practitioners Advisory Group

PUBLIC HEARING ON IMMIGRATION

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My name is Knut S. Johnson, and I am a federal criminal defense lawyer in San Diego, California. I am currently the Criminal Justice Act representative for the Southern District of California and was previously employed by Federal Defenders of San Diego, Inc. I am also an adjunct professor at the University of San Diego, School of Law, where I teach Criminal Procedure II.

I am pleased to have the chance to testify on behalf of the Sentencing Commission's Practitioners Advisory Group ("PAG"). As members of one of the Commission's three standing advisory bodies, we at the PAG appreciate the opportunity to provide the perspective of those in the private sector who represent individuals and organizations investigated and charged under the federal criminal laws.

In general, the proposed amendments will increase the guideline range for the vast majority of alien smuggling defendants and for the illegal reentry defendants with the least serious prior records. Many illegal reentry defendants with more serious records will have their guideline ranges reduced.

I. <u>Proposed Amendment to §2L1.1 (Alien Smuggling)</u>

The Commission is considering amending § 2L1.1 and its policy statement to address concerns of the DOJ that this guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors.

The Commission has proposed two alternative options for raising the § 2L1.1(a) base offense level for ordinary alien smuggling from 12 to 16: either to increase all ordinary smuggling crimes from 12 to 16 (Option 1); or to increase the base offense level to 16 if the defendant "smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization" (Option 2). The PAG respectfully believes that there is no demonstrated need for increasing the base offense level, particularly in light of existing options that already address the

Commission's concerns. For these reasons, the PAG urges the Commission to adopt neither option.

The Commission's most recent statistics show that the vast majority of offenders who are sentenced under § 2L1.1 are sentenced *at or below* the existing guideline range, and that the *government requested the below-guideline sentence* in a high majority of such cases. Thus, there is little reason to believe that application of § 2L1.1 of the current guideline range fails to reflect appropriate sentences. In other words, an across-the-board increase from base offense level 12 to base offense level 16 as suggested by Option 1 belies current sentencing practice. Furthermore, Congress has authorized mandatory-minimum sentences for certain immigration offenses, such as alien-smuggling for financial gain. 8 USC § 1324(a)(2)(B)(ii). Thus, Option 1 is also unnecessary in light of mandatory minimum sentences.

The second option (Option 2) would increase the base offense level to 16 if the defendant "smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization." This option would unnecessarily increase the sentence for ordinary smuggling events and is unnecessary in light of existing provisions of the USSG.

Almost all alien smuggling events arguably include an "ongoing smuggling organization." The General Accounting Office noted that, "The types of smugglers can range from opportunistic business owners who seek cheap labor to well-organized criminal groups that engage in alien smuggling, drug trafficking, and other illegal activities." "Combating Alien Smuggling: Opportunities Exist to Improve the Federal Response," GAO report number GAO-05-305, June 29, 2005.

It is also the experience of PAG members who practice in border districts that a significant number of migrants who have entered the United States without inspection have cases that included most of the following: an organizer outside of the United States, a person at the United States border on the Mexican side of the border, a guide across the border, a "stash house" with one or more people watching the aliens, and one or

more smugglers who take the alien through internal checkpoints and into the United States. Moreover, the foot guides are often recruited from among the illegal reentrants and given a reduction in the smuggling fee for acting as a guide.

Thus, whether a defendant is a foot guide at the border, a driver inside the United States, a smuggler at the border with an alien hidden in a vehicle, or a person at a stash house, a defendant in an ordinary smuggling case would be subject under option 2 to an increase to a level 16. Option 2 would, therefore, increase the guideline range for an ordinary smuggling event, while Commission statistics show that both the government and the courts view these cases as less serious than the existing guidelines suggest. In effect, increasing sentences under Option 2 is akin to the former practice of treating all drug couriers as necessarily having a significant role within a drug trafficking organization.

The PAG believes that the more sensible solution is to apply existing enhancements to increase the guidelines range where appropriate. For instance, a defendant convicted of a §1324 offense is eligible for any increase of 2 or 4 levels for role in the offense under USSG §3B1.1. Under that adjustment, any "organizer or leader" of a smuggling venture that included 5 or more participants would have an adjusted offense level of 16. Also, schemes to smuggle six or more aliens will still receive a 3 to 9 level upward adjustment under §2L1.1(b)(2).

Should the Commission choose to adopt the amendment, the PAG respectfully recommends it be a slightly revised version of Option 2. The PAG would revise Option 2 to increase the base offense level to 16 only for offenses where the defendant as part of an ongoing commercial organization smuggled, transported, or harbored a minor who the defendant *knew* was unaccompanied by the minor's parent or grandparent; otherwise, a base offense level of 12 would apply. The PAG also recommends making the enhancement at § 2L1.1(b)(4) inapplicable to offenses involving a base offense level of 16 to avoid duplicate-counting.

Second, the Commission has proposed to amend § 2L1.1(b)(4) to make the enhancement offense-based (with a *mens rea* requirement). The PAG encourages the Commission to adopt an offense-based enhancement with a *mens rea* requirement, because the current enhancement applies even when a defendant did not know that the individual being smuggled, transported, or harbored is a minor. However, the PAG believes the *mens rea* requirement should also apply to the defendant's knowledge of the alien's age. As such, the PAG would propose to amend § 2L1.1(b)(4) to state that "If the offense involved smuggling, transporting, or harboring an unlawful alien who the defendant knew was a minor and who the defendant knew was unaccompanied by the minor's parent or grandparent, increase by **2** levels."

Third, the Commission has proposed to revise the definition of "minor" for purposes of the "unaccompanied minor" enhancement at § 2L1.1(b)(4) from minors under the age of 16 to minors under the age of [18]. The PAG respectfully believes this change is unnecessary, and may lead to unreasonably harsh sentences. In light of the fact that certain countries, such as Mexico, allow individuals who are 16 or older to work without a parent's permission, it seems unjustifiably harsh to increase a defendant's sentence for smuggling, transporting, or harboring an unlawful alien who is 16 or older who may be fully emancipated in his or her home country and travelling to the United States to continue working.

Fourth, the Commission has proposed to amend the § 2L1.1 commentary to clarify that "serious bodily injury," included in subsection (b)(7)(B), has the meaning given to that term in the § 1B1.1 (Application Instructions) Commentary, which states that "serious bodily injury is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law." The PAG supports this clarification, which would call for a four-level increase for any case involving criminal sexual abuse.

The Commission has bracketed the possibility of adding an upward departure provision for instances where the "offense involved the smuggling, transporting, or harboring of six or more minors who were unaccompanied by their parents or grandparents." The PAG believes that an upward departure on such grounds would be inadvisable because this offense behavior is adequately addressed through the existing 3-level increase applicable to offenses that involved the smuggling, transporting, harboring of six or more unlawful aliens and the existing 2-level increase applicable to offenses where the defendant smuggled, transported, or harbored a minor who was unaccompanied by that minor's parent or grandparent.

Finally, the Commission has invited comment on whether the clarification that §2L1.1(b)(7)(B) (four level increase for serious bodily injury) "adequately accounts for cases in which the offense . . . involved sexual abuse of a [smuggled] alien . . ." With the clarification that if "the offense involved . . . criminal sexual abuse" then the increase for "serious bodily injury" applies, the PAG believes that the four level increase adequately accounts for the conduct.

II. Proposed Amendments to §2L1.2 (Illegal Reentry)

The Sentencing Commission proposes to amend U.S.S.G. § 2L1.2. The PAG supports the current proposal in general but proposes some changes. If the Commission will entertain modifications to the proposed amendment, the PAG has three proposals:

A. First Proposal

The PAG believes that the base offense level should be left at 8 for those with no prior immigration convictions, rather than increasing it to 10. While the amendment proposes raising the base offense level from 8 to 10, there does not appear to be any empirical support for such an increase. By increasing the base offense level, the Commission increases the offense level for defendants who otherwise have no triggering prior convictions, meaning the change will increase sentences for the illegal reentry defendants having

the least egregious conduct without empirical evidence demonstrating its necessity.

For instance, a base offense level of 8 results in a Guidelines range of 0–6 months for a first-time offender, which seems to better reflect the culpability and average sentence of someone who commits illegal reentry without any aggravating facts; a range of 6–12 months—the resulting Guidelines range at a base offense level of 10—does not. Of course, any offender sentenced for illegal reentry will not receive an early release to a Community Corrections Center or to home detention. In addition, increasing the sentence range for these offenders will likely result in U.S. Probation having to prepare Pre-Sentence Reports for a large number of offenders – and the accompanying costs – that would otherwise require only a Criminal History Report.

Thus, the PAG recommends a two-level increase to 10 for a defendant with a single prior illegal reentry conviction, and a base offense level of 12 for a defendant who has two or more prior illegal reentry convictions. The Commission's proposed change will affect *all* illegal reentry defendants, but it will *disproportionately* harm defendants with no criminal history, the lowest level offenders.

B. Second Proposal

The PAG thinks that the amendments should not include the enhancement for pre-removal misdemeanor convictions that now exists under § 2L1.2(b)(1)(E). The amendment provides a two-level increase for defendants who (before or after their first removal) have "three or more convictions for misdemeanors involving drugs, crimes against the person, or both." As it is written, the guideline is unclear and will lead to sentencing disparities. Should the Commission proceed with this amendment, the PAG respectfully requests the Commission propose a more objective sentencing rubric.

It is not clear how to apply this section or whether the categorical approach applies to determine if the prior conviction qualifies. *Compare Almanza-Arenas*, 809 F.3d 515, 521-28 (9th Cir. 2015) (*en banc*) (applying

categorical approach to determine whether a predicate conviction is a "crime *involving* moral turpitude") (emphasis added) *with Nijhawan v. Holder*, 557 U.S. 29, 33 (2009) (applying circumstance-specific approach to determine whether a predicate conviction "*involves* fraud or deceit in which the loss to the . . . victims exceeds $10,000) (emphasis added). If the categorical approach no longer applies, there is no reason to use it for this one provision.

If the categorical approach does not apply, and some sort of case-specific inquiry is required, that will inevitably require significant research and investigation into the nature of the client's prior misdemeanor convictions. That work will necessarily create litigation and confusion in a Guideline that is now otherwise relatively straightforward. For the rare defendant who has numerous misdemeanor convictions, that fact can be addressed through a Guidelines departure.

Furthermore, the phrase "involving" will cause undue confusion and litigation over when an offense "involves" drugs and/or crimes against a person. For instance, may a sentencing court, under this amendment, look to acquitted or dismissed counts to determine whether the count of conviction "involves" drugs and/or crimes against a person? As the Supreme Court noted in *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013),

> A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations.

The Commission noted Judge Owen's concurrence in *Almanza-Arenda v. Lynch*, __ F. 3d __, 2015 WL 946297, at *8-*9 (9th Cir. Dec. 28, 2015), that the 'categorical approach' "will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal

judges reviewing thousands of criminal state laws and certain documents to determine if an offense is 'categorically['] [a predicate offense]. . ." Determining whether an offense "involved" drugs and/or a crime against a person will likewise cause unnecessary and often inconsistent decisions that result in different results in different courts based on the same facts. The Commission, should it wish to enhance based on misdemeanor priors should look to a more objective approach, such as sentence based enhancements for misdemeanor priors.

C. Third Proposal

The Commission should consider increasing the length of sentences that trigger enhancements under § 2L1.2(b)(1) & (2) and/or looking to the time actually served in custody. Currently, the proposed amendment calls for an 8-level enhancement for a prior conviction (before or after removal) that resulted in a sentence of 24 months or more. We recommend a tiered system increasing the length of the triggering sentence starting at 5 years.

For many defendants, depending on the jurisdiction in which their prior was adjudicated, there is no meaningful difference in the underlying facts of prior convictions where the client receives a 13-month sentence or a 24-month sentence. That means that defendants who have non-aggravated felonies who currently receive only a 4-level enhancement will receive an 8-level enhancement under the proposed scheme, depending on where they were previously convicted.

Also, it makes little sense to impose four extra levels—and the 1-to-3 years of extra *federal* custody time that comes along with it—because the state conviction was two years, instead of one. However, the PAG believes that there is a meaningful difference in the seriousness of an underlying offense when a defendant receives a 4, 6, or 10-year sentence. Those sentences seem to be reserved in most states (and in federal court) for particularly aggravated crimes. It is those crimes that support an enhancement.

Moreover, the Commission should consider using the length of a defendant's *prior custody* rather than the length of the *sentence* imposed. The time a prisoner serves for a particular sentence varies wildly from state to

state. Thus, judges in some states may impose a 48-month sentence knowing that a typical prisoner will serve only 24 months for that sentence. However, in another state a judge may sentence an identical defendant to a 30-month sentence because in that state a 30-month sentence will result in 24 months of custody. Thus, using the time actually served in custody rather than the sentence imposed may create greater uniformity[1] and fairness when sentencing offenders with identical priors from different states.

D. The Guidelines Should Not Include Alternative Base Offense Levels or Invited Upward Departures for Multiple Prior Deportations

The Commission asked whether the Guidelines should consider multiple "deportations and orders of removal" to apply alternative base offense levels. The Commission proposes a departure for prior removals "not reflected in prior convictions under 8 U.S.C. §§ 1253, 1325(a), or 1326." The PAG opposes the use of removals or orders of removal to increase the recommended guideline sentence.

First, this proposal would lead to additional punishment for otherwise law abiding migrants who may have been subject to vague and difficult to defend "expedited removal" and "reinstatement of removal." Second, this proposal would require counsel to investigate the legal and factual background of every immigration contact, increasing case complexity, time, and cost. Thus, already complex § 1326 litigation would be made unnecessarily much more complex and time consuming.

E. Mitigation and Aggravation

The Commission has invited comment on the existing aggravating factors and what mitigating factors it should incorporate into §2L1.2. The PAG believes that § 2L1.2 adequately accounts for aggravating factors.

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[1] The Commission has noted that increasing "certainty and uniformity" are among the goals of the Sentencing Reform Act. *See*, Special Report to the Congress, U.S. Sentencing Commission (August 1991).

However, the PAG believes that the following mitigating factors could be addressed by adjustments or departures:

- Time served in state custody for probation violations due to deportations (see, below F. DEPARTURE FOR TIME SERVED)
- Entering the United States for unusually compelling reasons, such as to see a dying relative.
- Paying taxes and owing property. A segment of those who have entered the United States illegally pay taxes (federal, state, and local) and own real property. However, few if any will ever receive any government related benefits (such as social security or Medicare).

F. Departure for Time Served

The Commission has asked for comment on whether the Commentary adding a departure for time spent in state custody should be deleted. The PAG believes that the Commission should keep that Commentary and should expand it to include, in some circumstances, time spent in state custody before being located by immigration authorities. Actual cases illustrate why this departure should remain and why it should be expanded.

In SD Cal. Case 09 cr 02001-GT a state court twice violated a defendant's probation for failing to appear at the probation office *after* his deportation to Guatemala, stating in the Minutes: "Defendant fails to appear without sufficient cause." The defendant served several years for those violations. Also, the defendant's sentence under the guidelines was nearly doubled because of these two priors (which would not have counted but for the probation violations for being deported).

Likewise, SD Cal. Case 13 cr 00273-BEN the defendant suffered a 2001 conviction followed by a deportation. The defendant then had her probation revoked and a bench warrant issued because she failed to report to her probation officer. Because of that revocation she received additional

time in custody. But for the additional time and the revocation, the 2001 conviction would not have counted.

In both cases (and in others not mentioned) defendants received state custody for being deported (and not being able to report because of the deportation). In addition, in those cases because of the probation revocation proceedings (for not being able to report after deportation) priors that would have been too stale to count added years to the defendants' guidelines ranges. In such cases the court should be able to depart downward.

III. Conclusion

I would like to thank you, on behalf of the PAG, for providing us with this opportunity to provide input on amending these guidelines. We look forward to helping the Commission and the Staff in any way that we can.

Sincerely,

Knut S. Johnson