U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General *Washington, D.C. 20530*

February 12, 2016

The Honorable Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Chief Judge Saris:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on January 15, 2016.[1] We thank the members of the Commission, and the staff, for being responsive to the sentencing priorities of the Department of Justice and to the needs and responsibilities more generally of the Executive Branch. We look forward to working with you during the remainder of the amendment year on all of the published amendment proposals, and in the years to come.

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[1] U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines*, Fed. 81 Reg. 10 (Jan. 15, 2016).

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U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT PUBLISHED IN THE FEDERAL REGISTER ON JANUARY 15, 2016.

1. **Department of Justice Comments on Proposed Amendments and Issues for Comment on Compassionate Release**

The Commission requests comment on a proposed amendment to the Policy Statement at §1B1.13, relating to reductions of sentence pursuant to 18 U.S.C. § 3582(c). In general, the Department of Justice recommends that the policy statement's specification of "extraordinary and compelling reasons" warranting a reduction of sentence be equated to the criteria in the relevant Program Statement of the Federal Bureau of Prisons (BOP, or the Bureau), and advises that the Sentencing Commission has no legal authority to provide that the Bureau of Prisons must or should file motions for reduction of sentence.

Our responses to the specific issues for comment follow, inserted after the text of each issue as it appears in the solicitation of comments.

[Issue 1] The Commission seeks comment whether any changes should be made to the Commission's policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Should the Commission amend the current policy statement describing what constitutes "extraordinary and compelling reasons" and, if so, how?

The Department of Justice recommends amending the Policy Statement to state that "extraordinary and compelling reasons" exist under the circumstances described in the relevant Program Statement of the Federal Bureau of Prisons (*i.e.*, Program Statement 5050.49).

Under 18 U.S.C. § 3582(c)(1)(A)(i), the court, "upon motion of the Director of the Bureau of Prisons," may reduce a sentence if it finds that extraordinary and compelling reasons warrant such a reduction. The statute requires the concurrence of both the sentencing court and the Bureau of Prisons before a sentence can be reduced – the Bureau of Prisons must decide that seeking such a reduction is warranted and, upon motion of the Bureau, the court must decide that granting the requested reduction is warranted.

Given the required joint action of the Bureau of Prisons and the sentencing court to reduce a sentence, harmonizing the criteria they apply in their respective decision-making is appropriate. With respect to the Bureau of Prisons, consistent criteria ensure that the Bureau will not pointlessly process and file sentence reduction motions which the court is unable to grant, and that the Bureau will have discretion to file a sentence reduction motion in the full range of circumstances in which the court could grant such a motion. With respect to the court, consistent

criteria ensure that the court will have discretion to grant any sentence reduction motion that the Bureau files, and that the court is not confusingly instructed that it may grant motions under circumstances in which the Bureau would not file them.

The textual proposal in the Commission's solicitation attempts to achieve these results by adding a definition of "extraordinary and compelling reasons" in the Commentary to the Policy Statement that is based on portions of the language in BOP Program Statement 5050.49.[2] However, this approach to making the same criteria apply is unsuccessful for reasons discussed below in connection with Issue 4. The Department believes that, instead, cross-referencing the Program Statement as providing the applicable criteria will achieve the desired result with the greatest certainty and simplicity.

[Issue 2] Should the list of extraordinary and compelling reasons in the Guidelines Manual closely track the criteria set forth by the Bureau of Prisons in its program statement? Should the Commission develop further criteria and examples of what circumstances constitute "extraordinary and compelling reasons"? If so, what specific criteria and examples should the Commission provide? Should the Commission further define and expand the medical and non-medical criteria provided in the Bureau's program statement?

The criteria for "extraordinary and compelling reasons" in the Guidelines Manual should be fully consistent with those in the Bureau of Prisons' Program Statement. A perceived need for further elaboration may result from the solicitation's effort to make the Program Statement's criteria apply by incorporating a truncated version in the §1B1.13 Commentary, which differs from the actual criteria of the Program Statement, as we explain in connection with Issue 4 below. Incorporating the Program Statement criteria by reference, as opposed to an inadequate effort to reproduce them textually in the Commentary, avoids the problem. The degree of detail and wealth of guidance regarding relevant factors in the Program Statement would then obviate the need for the Commission to develop further criteria and examples or to further define and expand the applicable medical and non-medical criteria.

Further, the criteria in the Program Statement were developed following, and took account of, the Commission's Policy Statement in §1B1.13. If the Commission in the future wishes to expand the criteria beyond the Program Statement, we believe it should be done through a collaborative process with the Department of Justice so that the Department's Program Statement and the Commission's Policy Statement are aligned. In comparison, the idea of unilaterally expanding the criteria beyond those adopted by the Bureau of Prisons, in the sense of authorizing reductions in sentence under circumstances in which the Bureau of Prisons would not seek such a reduction, is highly problematic in light of the law's requirement of joint Executive and Judicial action to reduce a sentence.

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[2] http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf.

By way of background, the reduction-in-sentence provision of 18 U.S.C. § 3582(c)(1)(A) was enacted as part of the Sentencing Reform Act of 1984, which created the current federal sentencing system. The Act abolished parole and enacted a system reflecting "truth in sentencing" principles, which involves determinate sentences informed by the sentencing guidelines the Commission issues. The general design and purpose of the Act was to ensure that time served by an inmate would normally be close to the prison term prescribed by the court in sentencing, subject to narrow exceptions, including principally the 15% annual good conduct credit under 18 U.S.C. § 3624(a)-(b). The basic features of this system have remained until the present.

In creating a system in which time served should normally approximate to the prison term in the sentence, Congress saw a need for limited "safety valves" to allow departures from this principle in certain unusual circumstances. These safety valves come with built-in constraints to ensure that they will not be misused as backdoor means for reintroducing parole-like early release mechanisms and undermining the determinate sentencing system. With respect to 18 U.S.C. § 3582(c)(1)(A), the Committee Report explained:

> "The first "safety valve" applies . . . to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner. In such a case, under subsection (c)(1)(A), the Director of the Bureau of Prisons could petition the court for a reduction in sentence, and the court could grant a reduction if it found that the reduction was justified by "extraordinary and compelling reasons" and was consistent with applicable policy statements issued by the Sentencing Commission."[3]

As the Report's description explained, § 3582(c)(1)(A) explicitly provides several safeguards against overuse. Three of these operate through the Judiciary – (i) sentences cannot regularly be reduced by the court, but only in circumstances involving "extraordinary and compelling reasons," (ii) even in the presence of "extraordinary and compelling reasons," the judicial decision to reduce the prison term is a matter of discretion under the statute, which says that the court "may" reduce the sentence after considering the statutory factors affecting sentences under 18 U.S.C. § 3553(a), and (iii) the reduction must be consistent with applicable policy statements issued by the Sentencing Commission, a Judicial Branch agency as provided in 28 U.S.C. § 991(a).

Congress did not deem it sufficient, however, to rely exclusively on these internal constraints within the Judiciary, and instead required the concurrence of the Executive Branch

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[3] S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983).

that an inmate's prison term should be reduced as a prerequisite to such a reduction. This is reflected in the statute's authorization of the court to reduce the prison term only "upon motion of the Director of the Bureau of Prisons." Given the law's requirement of Executive action to initiate the reduction in sentence process under § 3582(c)(1)(A), the courts have summarily rejected inmates' applications for such reductions without the affirmative endorsement of the Bureau of Prisons or against the Bureau's judgment.[4]

The difference in this regard between § 3582(c)(1)(A) and another "safety valve" appearing in § 3582(c)(2) is instructive. The latter provision allows the court to reduce a sentence based on a subsequent lowering of the guidelines range, "upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion," after considering the statutory factors affecting sentences and consistent with applicable policy statements issued by the Sentencing Commission.

Because of § 3582(c)(2)'s limitation to circumstances in which the guidelines range is lowered, it carries no potential for undermining the determinate sentencing system comparable to the vaguer "extraordinary and compelling reasons" standard of § 3582(c)(1)(A). Rather, § 3582(c)(2) is essentially a mechanism for achieving greater consistency in sentences over time as the guidelines system evolves. In this context, Congress was satisfied that the intra-Judiciary constraints specified in the statute provide sufficient control. In the potentially more open-ended context of § 3582(c)(1)(A), Congress's judgment was to the contrary, making the custodial executive agency's decision that an inmate should be released a necessary prerequisite for initiating the process that may lead to such a reduction.

Against this background, the idea that the Commission's criteria may authorize reductions in sentence under circumstances in which the Bureau of Prisons would not seek them sits uneasily with § 3582(c)(1)(A)'s requirement of a "motion by the Director of the Bureau of Prisons" to initiate the process. It might be thought that such a discrepancy would at worst be harmless, for if the Bureau does not file reduction-in-sentence motions in additional circumstances identified by the Commission as "extraordinary and compelling," then the courts cannot actually reduce sentences in these circumstances, given § 3582(c)(1)(A)'s requirement of a motion by the Bureau to initiate the process. Realistically, however, if the Program Statement and Policy Statement are not aligned, litigation will result claiming that the Bureau of Prisons must revise its standards to conform to the greater breadth of the Sentencing Commission's

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[4] *See, e.g., Crowe v. United States*, 430 F. App'x 484 (6th Cir. 2011); *United States v. Smartt*, 129 F.3d 539, 541 (10th Cir. 1997); *Share v. Krueger*, 553 F. App'x 207 (3d Cir. 2014); *Taylor v. Hawk-Sawyer*, 39 F. App'x 615 (D.C. Cir. 2002); *Todd v. Federal Bureau of Prisons*, 31 F. App'x 833 (5th Cir. 2002); *United States v. Greenwood*, 322 F. App'x 693, 694 (11th Cir. 2009); *United States v. Powell*, 69 F. App'x 368 (9th Cir. 2003); *United States v. Ayala*, 351 F. App'x 147 (8th Cir. 2009); *United States v. Clavielle*, 505 F. App'x 597 (7th Cir. 2013); *United States v. Ellis*, 527 F.3d 203, 205 (1st Cir. 2008); *United States v. Bansal*, 409 F. App'x 663 (4th Cir. 2011); *United States v. Moore*, 586 F. App'x 801, 803 (2d Cir. 2014).

standards, or that the Bureau of Prisons must apply those standards rather than its own standards in deciding whether to file motions. Inmates frequently ask courts to grant them § 3582(c)(1)(A) reductions of sentence, notwithstanding the Bureau's judgment that they are unsuitable for early release, as the cases cited above illustrate. Differences between the Sentencing Commission's criteria and the Bureau of Prisons' criteria would encourage increased litigation of this nature, unnecessarily burdening both the courts and the government, and potentially creating confusion regarding the legal standards for seeking, entertaining, and granting sentence reductions under § 3582(c)(1)(A). The application of consistent criteria by the Judiciary and the Executive avoids these problems.

Finally, it is important to examine the relationship between the Bureau's Program Statement and §1B1.13 in relation to reductions of sentence based on terminal illness. The current §1B1.13 Commentary refers to "terminal illness" without further definition, while the Program Statement, at page 3, refers to persons diagnosed with terminal, incurable diseases whose life expectancy is 18 months or less. Without such a clarification, "terminal illness" is overly broad.

Everyone eventually dies from some disorder or infirmity of the body, if not sooner from accident or injury. A person may have a medical condition that will predictably result in his demise in the long-term – for example, 10 or 20 years in the future – but that does not mean that he presently suffers serious debilitation as a result, much less that he is "terminally ill" as that notion is ordinarily understood. A terminally ill person is someone who is actively dying. Under the common medical understanding of the concept, it refers to expected mortality within six months. For purposes of 18 U.S.C. § 3582(c)(1)(A), the Department of Justice initially understood terminal illness as involving expected mortality within six months, and subsequently broadened that to expected mortality within a year. The 18-month prognosis period in the current Program Statement is a further expansion.

The Program Statement's 18-month standard is already a broad definition, one that goes beyond the current unelaborated reference to "terminal illness" in the §1B1.13 Commentary, if that term is understood in conformity with the prevalent definition involving expected mortality within six months. The Department rejects the notion that the criteria needs to be broadened even further and without specificity.

[Issue 3] In addition, the Commission seeks comment on how, if at all, the policy statement at §1B1.13 should be revised to address the recommendations in the OIG report. Should the Commission adopt the recommendations in the OIG report as part of its revision of the policy statement at §1B1.13? Should the Commission expand upon these recommendations to revise the Bureau's requirements that limit the availability of compassionate release for aging inmates? Alternatively, should the Commission defer action on this issue during this amendment

cycle to consider any possible changes that the Bureau of Prisons might promulgate to its compassionate release program statement in response to the OIG report?

The Commission should respond to the OIG report by accepting our recommendation to incorporate by reference the criteria of the Bureau of Prisons Program Statement. That will result automatically in the applicability of all changes made in the Program Statement by the Bureau based on the OIG report, with no need for other action by the Commission.

[Issue 4] Finally, the Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The Commission also has authority to promulgate general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). See 28 U.S.C. § 994(a)(2)(C). Under this general authority, should the Commission further develop the policy statement at §1B1.13 to provide additional guidance or limitations regarding the circumstances in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? For example, should the Commission provide that the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as "extraordinary and compelling reasons" in §1B1.13?

The Commission should adopt by reference the standards and criteria of the Bureau of Prisons' Program Statement. As explained in connection with Issue 2 above, this would obviate any need for the Commission to provide additional guidance or limitations.

The second question posed is whether the Commission should issue a directive that the Bureau of Prisons is to file a motion for sentence reduction whenever there are "extraordinary and compelling reasons" as the Commission defines them. We have explained in the discussion of Issues 1 and 2 above that – (i) § 3582(c)(1)(A) requires the concurrent judgment of the custodial agency (Bureau of Prisons) that an inmate is suitable for early release as a prerequisite to the judicial granting of such release, and (ii) § 3582(c)(1)(A) embodies a legislative judgment that the Sentencing Commission's policy statements and other intra-Judiciary measures are an insufficient basis for reducing sentences in the absence of such concurrence by the Executive Branch. The notion that the Commission can usurp the Bureau of Prison's decision-making authority and compel the Bureau to seek inmates' release against its judgment conflicts with these aspects of the law.

It is also apparent for many additional reasons that Congress did not confer such authority on the Commission. Starting with the language of § 3582(c)(1)(A), it states that the court, upon motion by the Bureau of Prisons, may reduce a prison term if it finds that extraordinary and compelling reasons warrant such a reduction. By the terms of the provision, the requirement of extraordinary and compelling reasons is a constraint on the court's authority to reduce sentences. The provision says nothing about the circumstances under which the Bureau of Prisons may, should, or must file a motion seeking a sentence reduction, leaving that matter to the Bureau's discretion. Of course, the Bureau would have no occasion to file such a motion in a case which it did not regard as involving "extraordinary and compelling reasons," since there is no point in filing a motion that the court could not grant. But that is a practical consideration that leads the Bureau not to file futile motions. It entails no authority for the Commission to direct the Bureau to file motions.

Turning to the relevant provision in the Sentencing Commission's statutes, 28 U.S.C. § 994(t) states that the Commission, in promulgating general policy statements regarding the sentencing modification provisions in 18 U.S.C. § 3582(c)(1)(A), "shall describe what should be considered extraordinary and compelling reasons for sentence reduction." Section 994(t) contemplates only a policy statement affecting the judicial determination. Under 18 U.S.C. § 3582(c)(1)(A), it is the court that has to find "extraordinary and compelling reasons" and it is the court that has the authority to grant a "sentence reduction." Section 994(t) does not require or authorize issuance of a policy statement stating when motions for sentence reduction should be filed, which is the Bureau of Prisons' function under the statute.

The same point appears from the concluding language of § 3582(c)(1)(A), which requires that sentence reductions be consistent with applicable Sentencing Commission policy statements. The language does not say "and that *such a motion* [by the Bureau of Prisons] is consistent with applicable policy statements issued by the Sentencing Commission." It says "and that *such a reduction* [by the court] is consistent with applicable policy statements issued by the Sentencing Condition." Thus, it is manifest in § 3582(c)(1)(A) itself, as it is in 28 U.S.C. § 994(t), that the policy statement authority of the Sentencing Commission in relation to § 3582(c)(1)(A) concerns the exercise of judicial discretion in granting motions for reduction of sentence, not the exercise of executive discretion in filing such motions. Moreover, even if "such a reduction" were somehow misread as meaning "such a motion," the resulting requirement that the motion be "consistent with" the Sentencing Commission's definition of "extraordinary and compelling reasons" would mean at most that a sentence-reduction motion cannot be filed in a case in which "extraordinary and compelling reasons" as defined by the Sentencing Commission are absent. It would create no affirmative obligation or presumption that a motion is to be filed when such reasons are present.

The difference between § 3582(c)(1)(A) and the adjacent, concurrently enacted provisions of § 3582(c)(2) is instructive in this regard. The latter provision states that the court may reduce a term of imprisonment, where the Commission has subsequently lowered the sentencing range, "upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion." As indicated in our discussion above of Issue 2, § 3582(c)(2) shows that Congress knew full well how to authorize reductions of sentence based on determinations of the Judicial Branch, without the concurrence of the Executive, and so provided explicitly when that was the legislative intent. If Congress's intent had been the same in § 3582(c)(1)(A), no doubt Congress would have used the same language as in § 3582(c)(2) for that purpose. Congress's use of different language in § 3582(c)(1)(A), requiring initiation of the process by an Executive Branch agency, entails that the requirement cannot lawfully be circumvented by a Judicial Branch agency's purporting to commandeer the actions of the Executive agency.

In addition to referring to 28 U.S.C. § 994(t), the solicitation mentions the Commission's general authority under § 994(a)(2)(C) to issue policy statements "regarding application of the guidelines or any other aspect of sentencing or sentencing implementation . . . including the appropriate use of . . . the sentence modification provisions set forth in section[ ] . . . 3582(c) . . . of title 18." This provision is not reasonably understood as conferring authority on the Commission over the Bureau of Prisons under 18 U.S.C. § 3582(c) because § 3582(c) does not give the Bureau of Prisons authority to "modif[y]" sentences – that is a judicial function – and because 28 U.S.C. § 994(t) states more specifically what the Commission's policy statements relating to § 3582(c)(1)(A) are to provide. As discussed above, that does not include directions to the Bureau of Prisons to file motions for sentence reduction.

By way of comparison, the general language at the start of 28 U.S.C. § 994(a)(2) empowers the Commission to issue policy statements that affect the exercise of judicial discretion in applying the sentencing guidelines and other aspects of sentencing. This does not mean that the Commission can issue policy statements that tell the government what sentences the government should seek. Section 994(a)(2)(C) more specifically empowers the Commission to issue policy statements regarding the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c), which in part authorize reducing sentences, on motion of the government, based on substantial assistance in the investigation or prosecution of another person.[5] This does not mean that the Commission can issue policy statements that tell the government when it should file Rule 35(b) motions for sentence reduction based on substantial assistance. By the same token, 28 U.S.C. § 994(a)(2)'s reference to policy statements about the appropriate use of the sentencing modification provisions does not convey authority for the Commission to issue policy statements that tell the Bureau of Prisons when it should file motions for sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

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[5] *See* 18 U.S.C. § 3582(c)(1)(B); Fed. R. Crim. P. 35(b).

Considering the matter more broadly, the idea of authority for the Sentencing Commission to require the Bureau of Prisons to seek reductions of sentence stands the statutory scheme on its head in two ways. First, the Sentencing Commission's definition of extraordinary and compelling reasons, which at most constitutes a ceiling on judicial discretion to reduce sentences, would become a floor below which the Bureau of Prisons could not go, requiring that a motion be filed if a threshold requirement for granting such a motion is met. Second, it would effectively read "upon motion of the Director of the Bureau of Prisons" out of the statute, construing the statute as if it said "upon motion of the Sentencing Commission, the court may reduce the sentence if it finds extraordinary and compelling reasons." That is the practical effect if the Bureau of Prisons is reduced to an agent of the Sentencing Commission, required to seek reductions of sentence in whatever circumstances the Sentencing Commission specifies.

We see no significance in the Commission's framing its question to ask about the Commission's providing that the Bureau of Prisons "should" – rather than "shall" or "must" – file motions for reduction under circumstances specified by the Commission. Were the Commission to issue a policy statement providing when the Bureau "should" file sentence-reduction motions, inmates for whom the Bureau refused to file motions would go to court themselves and argue that the Bureau had improperly refused their request for a motion and should be compelled to grant it. In support of the claim, they would point to the Commission's misinterpretation of 18 U.S.C. § 3582(c) and 28 U.S.C. § 994(a)(2)(C) as giving the Commission authority in relation to the Bureau of Prisons as well as the courts, and the Commission's provision that the Bureau "should" seek a reduction of sentence under circumstances specified by the Commission.

Hence, the hedged wording of the solicitation ("should") does not ameliorate the resulting practical concerns. Nor does it materially change the legal analysis or its conclusion. As explained above, the statutes commit the discretion to seek (or not seek) reductions of sentence under 18 U.S.C. § 3582(c)(1)(A) to the Bureau of Prisons, not to the Judicial Branch. There is no legal authority for the Commission to direct the Bureau's exercise of this discretion, or to create a presumption in favor of the Bureau's filing a motion for sentence reduction under circumstances specified by the Commission despite the Bureau's judgment that the inmate is not suitable for early release.

Consideration of the Commission's efforts to influence the exercise of Executive discretion in other contexts substantiates these concerns. The present solicitation of comment inquires whether the Commission should provide that the Bureau of Prisons "should not withhold a motion" under circumstances listed by the Commission. The Commission has used the same language in relation to §3E1.1(b), which authorizes an additional 1 level reduction for acceptance of responsibility, upon motion of the government, in certain circumstances.

Assuming that the Commission could validly instruct the government in relation to acceptance of responsibility motions under §3E1.1(b), no implication follows that it can do the same in relation to motions under 18 U.S.C. § 3582(c)(1)(A). In that instance, not only did there exist a circuit split suggesting that failure to sign an appeal waiver was an inappropriate basis to withhold a §3E1.1(b) motion, but the Commission conducted a thorough statutory examination and noted that its amendment was proper only because its "study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1." [6] In contrast, there is no legislative support for the Commission's specifying circumstances in which the Bureau of Prisons should file a § 3582(c)(1)(A) motion. The law requires a motion by the government under § 3582(c)(1)(A) to limit such sentence reductions to cases involving Executive concurrence, which forecloses the Commission's attempting to circumvent or undermine that requirement.

The Commission has also used similar language to instruct the government in the Commentary to the Policy Statement at §6B1.2, relating to standards for acceptance of plea agreements. That language is also distinguishable in that it characterizes itself as mere advice – a "recommendation" – and states expressly that it does not create any rights for defendants. No such disclaimer appears in the instant solicitation's question whether the Commission should provide that the Bureau of Prisons "should not withhold" a § 3582(c)(1)(A) motion whenever any circumstance listed by the Commission exists, or in the parallel language of the current §3E1.1(b) Commentary, which has been judicially interpreted as mandatory.[7]

Turning to other practical concerns, the definition of "extraordinary and compelling reasons" set forth in the Commission's proposed amendments omits a host of important limitations and considerations appearing in the Bureau of Prisons' Program Statement 5050.49 that ensure the authority to seek reductions of sentence will be exercised responsibly and appropriately. As a result, there would be horrific consequences if Congress' reservation of the authority to seek early release to the Bureau of Prisons were replaced with a mandate by the Commission to file motions for such release whenever there are "extraordinary and compelling reasons" as the Commission proposes to define them. For example, the Bureau could be required to seek the release of such inmates as Robert Hanssen, Aldrich Ames, and Bernard Madoff if they developed the medical or familial conditions described in the proposed policy statement commentary as "extraordinary and compelling." The following differences between the standards the Bureau of Prisons applies and those the Commission proposes are noteworthy:

(i) The Bureau's Program Statement, at the top of page 5, qualifies the geriatric release conditions by generally excluding inmates who were age 60 or older when sentenced

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[6] USSG App. C, Amend. 775, *Reason for Amendment* (Nov. 1, 2013).

[7] *United States v. Torres-Perez*, 777 F.3d 764, 768 (5th Cir. 2015).

if their current conviction is listed in the Categorization of Offenses Program Statement. This limitation does not appear in the Sentencing Commission's proposal.

(ii) There are differences in the medical release conditions, i.e., those concerning inmates with incurable, progressive illnesses or debilitating injuries from which they will not recover. The Sentencing Commission proposal refers to such inmates without qualification, so the Bureau of Prisons would have to apply for early release for all of them, if the Commission's proposed conditions were made a mandatory basis for motions by the Bureau. In contrast, the Bureau's Program Statement, on page 3, limits the inmates in this category for whom a reduction in sentence "should" be considered (versus just "may") to those who are completely disabled, or capable of only limited self-care and confined to a bed or chair more than 50% of waking hours.

(iii) The Sentencing Commission proposal identifies as an extraordinary and compelling reason, without qualification, the death or incapacitation of the family member caregiver of the defendant's child. The effect is nonsensical in many cases when abstracted from the surrounding context in the Bureau of Prison's Program Statement. It would potentially entail, for example, seeking the release of inmates in this circumstance even if the inmate has no intention or capacity to care for the child if released, or even if putting the child in the inmate's custody would be dangerous to the child. In contrast, the Program Statement on pages 5 through 7 contemplates a searching inquiry to ensure that release of the inmate to care for the child is in the best interests of the child, including that the deceased or incapacitated caregiver was the only family member capable of caring for the child, that the inmate has the means to care for the child immediately upon release, and that the inmate is a fit and safe caretaker for the child.

(iv) Similar points apply regarding the condition about incapacitation of the inmate's spouse or registered partner when the inmate would be the only available caregiver for the spouse or registered partner. The Program Statement, on pages 8 through 10, contemplates verification that the inmate is a capable, fit, and safe caretaker for the disabled spouse or partner. The Sentencing Commission proposal requires nothing of this nature.

(v) With respect to all determinations whether there are sufficient reasons for seeking a reduction of sentence, the Bureau's Program Statement, on page 10, provides for consideration of a list of factors, including such matters as the nature and circumstances of the offense, criminal history, comments from victims, personal and disciplinary history, length of sentence and amount of time served, age, release plans,

and whether release would minimize the severity of the offense. Nothing comparable appears in the Sentencing Commission's proposal.

Because of these differences, it would be improper for the Commission to state that the Bureau of Prisons shall or "should" file sentence reduction motions whenever the defendant meets any of the circumstances listed in the Commission's proposal, or to "encourage" the Bureau to file a motion whenever any of them are present. That would amount to saying that the Bureau should seek sentence reductions in many circumstances in which it would be unwarranted, or even absurd, to do so.

Finally, beyond the serious statutory and practical concerns recounted above, we must point out the constitutional dimensions of the issue posed by the Commission's question. The Bureau of Prisons is an agency of the Executive Branch of the government, subordinate to the Attorney General and exercising a portion of the executive power of the United States that the Constitution vests in the President. The Bureau's filing of motions for sentence reduction under § 3582(c)(1)(A) is an exercise of the executive power. The commandeering of that executive function by a Judicial Branch agency (the Sentencing Commission) raises an obvious question of consistency with the constitutional separation of powers.

In upholding the Sentencing Commission's general constitutionality, the Supreme Court emphasized that the Commission's rules concern the exercise of a judicial function – "the consistent responsibility of federal judges to pronounce sentence" – and that "in placing the Commission in the Judicial Branch, Congress cannot be said to have aggrandized the authority of that Branch or to have deprived the Executive Branch of a power it once possessed."[8] The same rationale is not available to support an attempt by the Sentencing Commission to issue a directive to an Executive agency regarding its initiation of litigation seeking the reduction of sentences. However, since it is plain as a statutory matter that the Commission has no such authority, it is unnecessary to pursue the constitutional question further at this time.

2. Bureau Of Prisons Overview of the Current Compassionate Release Reduction in Sentence Program

Description of the Program

As discussed above, the BOP statutory authority for granting compassionate release/reduction in sentence (RIS) is found in 18 U.S.C. § 3582(c)(1)(A)(i), and permits a judge to modify a term of imprisonment, upon motion of the Director of the BOP, when "extraordinary

[8] *See United States v. Mistretta*, 488 U.S. 361, 391, 395 (1989).

and compelling" reasons warrant such a reduction.[9] The goal of the program is not to reduce prison overcrowding or the prison population generally. These objectives are addressed by the Department's support for lowered guideline penalties for drug trafficking offenses, the Department's Smart on Crime charging policy, by the Clemency Initiative, and by the Department's support for legislation currently pending before the United States Congress. Instead, the Department views the RIS authority as an opportunity to release offenders who do not pose a danger to the community and who are near death, incapacitated, or face other extraordinary and compelling circumstances warranting early release. The Bureau has used this authority for many years, and through the Department's Smart on Crime initiative and our own policy changes, we made broad expansions to the policy in August 2013.

When reviewing a RIS request, the Bureau considers both medical and non-medical circumstances. Inmates seeking a medical RIS must meet one of the following criteria:

- Diagnosed with a terminal, incurable disease and having a life expectancy that is eighteen (18) months or less.
- Suffering from an incurable, progressive illness, or having suffered from a debilitating injury from which the inmate will not recover. For inmates in this category, the BOP will consider a compassionate release if the inmate is either completely disabled, meaning he or she cannot carry on any self-care and is totally confined to a bed or chair, or is capable of only limited self-care and is confined to a bed or chair more than 50% of waking hours.

Non-medical RIS requests may be granted:

- to elderly inmates meeting certain criteria regarding age, length of time served, and, in some cases, medical impairments relating to age;
- in circumstances in which there has been the death or incapacitation of the family member caregiver of an inmate's child; or
- in circumstances in which the spouse or registered partner of an inmate has become incapacitated.

The RIS request review process begins at institutions when, ordinarily, an inmate makes a written request to the Warden. Usually, a committee comprised of various institution staff members reviews the request and makes a recommendation for the Warden to consider. If the Warden agrees with the recommendation, the request is sent to the BOP's Central Office for review and final disposition. At the Central Office, depending on the type of request, it is

[9] Regulatory language is found in 28 C.F.R. § 571.60 *et seq.* BOP's RIS policy is found in Program Statement 5050.49. Title 18, United States Code, section 4205(g) is the RIS controlling authority for inmates whose offenses occurred prior to November 1, 1987.

reviewed by the Correctional Programs Assistant Director, the Medical Director, the General Counsel and the Director.

If the inmate is subject to the Victim and Witness Protection Act of 1982, the BOP notifies and solicits comments from victims and witnesses regarding an inmate's possible release and considers this information in determining whether to recommend a RIS to a sentencing judge. The BOP also consults with the United States Attorney responsible for the criminal prosecution regarding an inmate's possible release and considers their opinion when determining whether to recommend a RIS to a sentencing judge.

For all RIS requests, the following factors are considered by the BOP:

- nature and circumstances of the inmate's offense;
- criminal history;
- comments from victims and witnesses where applicable;
- all unresolved detainers;
- supervised release violations;
- institutional adjustment (e.g., work assignments, programming);
- disciplinary infractions;
- personal history derived from the PSR;
- length of sentence and amount of time served (this factor is considered with respect to proximity to release date or Residential Reentry Center (RRC) or home confinement date);
- inmate's current age;
- inmate's age at the time of offense and sentencing;
- inmate's release plans (e.g., employment, medical, financial); and
- whether release would minimize the severity of the offense.

When reviewing RIS requests, these factors are neither exclusive nor weighted.

Additionally, for each RIS request, the BOP considers whether the inmate's release would pose a danger to the safety of the community. Specifically, the BOP reviews the inmate's ability or likelihood to re-offend; any benefit to remaining in prison, such as completing a drug or sex treatment program; and the availability of an appropriate release plan (e.g., a release residence or nursing home availability, absence of warrants and detainers). The United States Attorney's Office then files a motion with the court on behalf of the Director of the BOP for the release of the inmate. If the judge approves the motion, he or she will issue an order for the inmate's RIS and the inmate will be released and usually begin serving a term of supervised release.

RIS Statistics

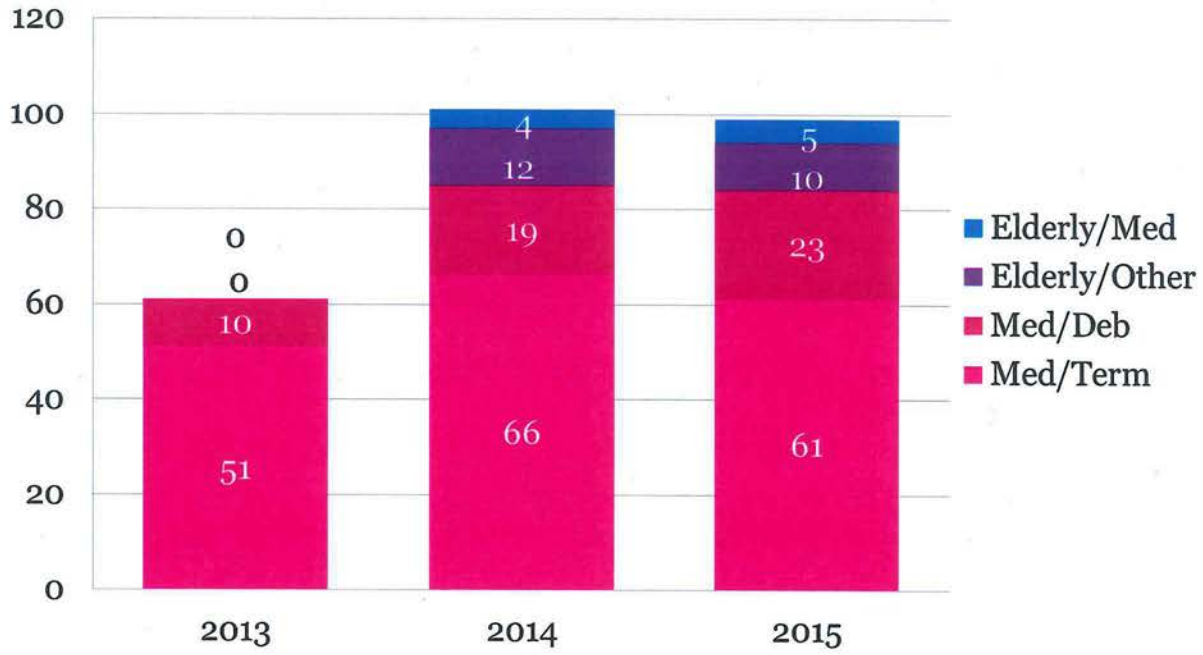
Regarding RIS requests filed at institutions, from August 2013 to December 2015,[10] there has been an overall decrease in the requests received. BOP facilities have received 3142 RIS requests in this time period. More specifically, 1,374 were received from August 2013 to December 2013, 1,077 were received in 2014, and 691 were received in 2015. Graph 1, below, shows the specific types of RIS requests filed each year.

Graph 1. RIS Requests Filed At Facilities since August 2013

In 2013, the BOP Director approved 61 RIS requests (51 terminal requests and 10 debilitative requests). In 2014, 101 requests were approved (66 terminal requests, 19 debilitative requests, 12 elderly-other requests, and 4 elderly-medical requests). In 2015, the Director approved 99 requests (61 terminal requests, 23 debilitative requests, 10 elderly-other requests, and 5 elderly-medical requests). These RIS approvals are depicted in Graph 2, below.

[10] Electronic tracking of all RIS requests began in August 2013.

Graph 2. RIS Approvals by Year.



It is important to note that RIS provisions by their very nature are only applicable to a small percentage of Bureau inmates. Simply put, the Bureau does not house a large percentage of inmates with significant medical concerns or disabilities. Less than one percent (about 1,600) of the Bureau population has been identified as medical care level IV, our highest care level reserved for our most seriously ill inmates. Many of those individuals are neither terminal nor debilitated, but rather are undergoing treatment for conditions from which they will recover. While older inmates are more likely to have health conditions requiring full-time assistance than younger inmates, the vast majority – about 97 % – of older federal inmates are generally healthy and capable of self-care.

BOP prisoner data also undermines the assumption that older inmates arrived to prison at relatively young ages and grew old while in federal custody. Less than 1% of older inmates began their current sentences at or before reaching age 35. Furthermore, almost 60% of our older population began serving their sentence *after* age 50.

Finally, BOP prisoner data suggest that BOP should be continue to be cautious in administering the RIS program: among other things, 41% of inmates 50 and over were convicted of drug offenses, 13.5% were convicted of sex offenses, 12% were convicted of fraud, bribery, or extortion, and 11.8% were convicted of weapons or explosives offenses. [11] A large percentage (36.3%) of these inmates also have serious criminal histories (category IV or higher). Notably, BOP data also suggests that older inmates convicted of drug offenses cannot always be described

[11] Data as of December 26, 2015.

as low-level participants. Although the data and resulting estimates are imperfect, we estimate that inmates age 50 and over convicted of drug offenses have a mean and median Base Offense Level (BOL) of around 32.6 and 34, respectively.[12] As the Commission is well aware, cases with such high BOLs often represent very serious drug trafficking offenses. These considerations, in many instances, weigh heavily against a reduction in sentence due to the seriousness of the inmate's offense and public safety concerns.

Conditions of Supervision

The Commission requests comment on proposed amendments to USSG §§ 5B.1.3 and 5D.1.3, relating to conditions of, respectively, probation and supervised release. In general, the Department of Justice – (i) recommends revising the mandatory condition concerning compliance with the Sex Offender Registration and Notification Act (SORNA), (ii) opposes weakening the standard condition requiring truthful response to the probation officer's questions, (iii) opposes eliminating the standard conditions on refraining from excessive use of alcohol and meeting family responsibilities, and (iv) recommends further consideration of the formulation of other standard and special conditions.

The proposed amendments include a number of improvements and we appreciate the Commission's effort to revise and clarify the conditions of supervision. We are, however, concerned that some aspects of the changes would weaken existing conditions to the detriment of effective supervision, reentry, and public safety. Areas of concern include the following:

- The mandatory condition concerning compliance with SORNA, as currently formulated, is inconsistent with applicable law. The condition should be revised to track the statutory provisions it implements.

- Alternative language in the proposal regarding truthful response to the probation officer's questions is unsupported by applicable law and would have adverse consequences for effective supervision and law enforcement. The existing condition requiring a defendant to answer truthfully all questions asked by the probation officer should be retained without dilution.

- The condition requiring a defendant to refrain from excessive use of alcohol should be retained as a standard condition. Concerns that the condition is overly vague can be addressed through revision rather than by eliminating it as a standard condition.

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[12] These figures may overestimate the true value of the BOL, because of the lag in the release of USSC monitoring data, which we use to match to BOP data. [13] *See, e.g.*, *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009); *United States v. Felts*, 674 F.3d 599, 603-05 (6th Cir. 2012); *United States v. Elkins*, 683 F.3d 1039, 1046 (9th Cir. 2012); *United States v. Whitlow*, 714 F.3d 41, 47-48 (1st Cir. 2013).

- The condition requiring a defendant to support dependents and meet other family responsibilities should be retained as a standard condition. Here, too, concerns about vagueness can be addressed by revising the condition instead of eliminating it as a standard condition.

- In addition, the Department has recommendations for improving the formulation of a number of conditions, including those relating to unauthorized departure from the district, reporting changes in residence and employment, visits by the probation officer, refraining from criminal association, and sex offender treatment.

Before turning to particular issues, we note a general concern about the way revision of these conditions has been approached and the Commission's observation that the proposed amendment "is informed by a series of opinions issued by the Seventh Circuit in recent years." The Seventh Circuit's decisions, in the Department's view, have generally been overly restrictive in this area. Uncritical reliance on the recent decisions of one court creates the risk of a "race to the bottom," in which the most restrictive decisions relating to permissible supervision conditions are transformed into nationwide policy, even though the decisions may not constitute sound law or policy and may diverge from the views of other courts. Moreover, even assuming the Seventh Circuit's recent cases articulate a number of sound principles, care must be taken to ensure that the measures adopted in response do not go beyond what those cases require. As we explain below, a number of the amendments in the Commission's proposal do go beyond even the Seventh Circuit decisions they are said to be based on.

Our detailed comments follow.

A. Compliance With the Sex Offender Registration And Notification Act

Sections 5B1.3(a)(9) and 5D1.3(a)(7), which concern compliance by sex offenders with SORNA, are incoherent in that they establish disparate requirements for defendants in states in which the requirements of SORNA "do not apply" and states in which the requirements of SORNA "do apply." SORNA is a federal law and its requirements apply to sex offenders in all states, regardless of whether the state in which they reside has implemented SORNA's requirements in its registration program.[13]

The formulation of these conditions and the accompanying Application Note reflect a misunderstanding of the law on this point. In addition, for the class of states in which SORNA's

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[13] *See, e.g.*, *United States v. Gould*, 568 F.3d 459, 463-66 (4th Cir. 2009); *United States v. Felts*, 674 F.3d 599, 603-05 (6th Cir. 2012); *United States v. Elkins*, 683 F.3d 1039, 1046 (9th Cir. 2012); *United States v. Whitlow*, 714 F.3d 41, 47-48 (1st Cir. 2013).

requirements purportedly "do not apply," the conditions improvise a non-SORNA set of registration requirements, based on provisions that formerly appeared in the predecessor laws to SORNA. But as noted, there is no such thing as a state in which SORNA's requirements do not apply, and the predecessor provisions relied on have not existed since SORNA repealed them several years ago.[14]

Confusion may also lie in the fact that, occasionally, a state may refuse to register a sex offender who is required by SORNA to register, on the ground that state law does not require the particular type of sex offender to register and state registration authorities are unwilling to register the defendant based on the federal law requirement if it is not backed up by the state registration law. In such a case, the sex offender is not held liable for failing to register under SORNA because the sex offender cannot force the state to register him and SORNA does not criminalize sex offenders' failure to do the impossible. *See* 18 U.S.C. § 2250(b) (defense to liability for SORNA violations if uncontrollable circumstances prevented the sex offender from complying). But cases of this nature are rare and they do not mean that SORNA is inapplicable in any state. They merely reflect the fact that SORNA's criminal provision, 18 U.S.C. § 2250, excuses an individual sex offender from complying with SORNA's registration requirements where such compliance is impossible.

The drafters of these conditions may also have been confused by certain features of 18 U.S.C. § 4042(c), which generally requires notice by federal authorities to state and local law enforcement and registration agencies regarding the release of sex offenders to their areas. Paragraph (2) in § 4042(c) includes requirements affecting the probation offices. One such requirement is notice, by the supervising probation officer or in a manner specified by the Director of the Administrative Office of the United States Courts, relating to residence and post-release changes in residence for probationers and other supervisees required to register under SORNA. This notice requirement may oblige the probation offices to keep track of the residences of sex-offender supervisees during their supervision so that the required notifications to state and local authorities can be made. But the standard supervision conditions about residence and reporting changes of residence, appearing in proposed §§ 5B1.3(c)(5) and 5D1.3(c)(5), will independently require supervisees to provide that information to their probation officers, and notification by the probation offices to state and local authorities under § 4042(c)(2) about sex offenders' residences is supplementary to—not a substitute or replacement for—SORNA's requirement that sex offenders register with the jurisdictions in which they reside. Accordingly, there is nothing in § 4042(c) that suggests that SORNA "does not apply" in certain states or calls for the creation of a variant registration scheme for such states.

Section 5B1.3(a)(9) would be correct if formulated as follows: "if the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall

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[14] *See* Pub. L. 109-248, §§ 129, 141(g).

comply with the requirements of that Act (*see* 18 U.S.C. 3563(a))." Likewise, § 5D1.3(a)(7) would be correct as follows: "if the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (*see* 18 U.S.C. 3583(d))." This formulation tracks the statutory language of these mandatory conditions, appearing in 18 U.S.C. § 3563(a)(8) and the third sentence of 18 U.S.C. § 3583(d), and correctly reflects the law.

B. Answering Truthfully

An existing standard condition states in part that the defendant "shall answer truthfully all inquiries by the probation officer." The amendments propose two options for retaining this condition in some form: either "the defendant must answer truthfully the questions asked by the probation officer" or "the defendant must be truthful when responding to the questions asked by the probation officer."

The first option is somewhat narrower than the existing condition, referring to the defendant's response to the probation officer's questions rather than his response to "all" the probation officer's questions. This alteration, which could be read as a substantive reduction in the defendant's obligations, is unwarranted. The condition should read: "the defendant must answer truthfully all questions asked by the probation officer."

The second option is significantly narrower than the existing condition, eliminating any requirement to respond to any questions asked by the probation officer, and providing only that the supervisee cannot lie if he chooses to answer. In the Department's view, this is bad policy and bad law. Because effective supervision requires that supervisees must have a general duty to truthfully answer all probation officers' questions, this option must be rejected.

The Commission's questions in the solicitation of comment indicate a concern that some narrowing of this condition may be necessary to avoid conflict with the constitutional right against compelled self-incrimination:

The Commission seeks comment on the bracketed options in paragraph (3) of the "special" [should be: standard] conditions, which would become (4) under the proposed amendment. Specifically, the proposed amendment brackets whether the defendant should "answer truthfully" the questions of the probation officer or, instead, should "be truthful when responding to" the questions of the probation officer. The Commission seeks comment on the policy implications and the Fifth Amendment implications of each of these bracketed options. Which option, if any, is appropriate? Should the Commission clarify that an offender's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this special condition?

In the Department's view, there is no basis as a matter of law for narrowing the existing condition or affirmatively advising supervisees that they may invoke their Fifth Amendment privilege and refuse to answer the probation officer's questions.

First, imposing a general obligation to respond truthfully to a supervision officer's questions does not conflict with the right against compelled self-incrimination.[15] In *Minnesota v. Murphy*, 465 U.S. 420 (1984), the Supreme Court reversed a lower court decision excluding incriminating responses by a supervisee who "was under court order to respond truthfully to his [probation officer's] questions" because "the general obligation to appear and answer questions truthfully did not convert [the supervisee's] otherwise voluntary statements into compelled ones."[16] The Court explained that the supervisee's situation is the same in this regard as that of a trial or grand jury witness, who is generally charged with responding truthfully but may refuse to answer particular questions without penalty on the ground of potential self-incrimination.[17]

Second, there is no requirement that a probationer be affirmatively advised of his Fifth Amendment right against self-incrimination.[18] So long as a condition of probation merely requires a probationer to appear and answer truthfully, rather than requiring the probationer to "choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent," there is no Fifth Amendment concern.[19] Because the current condition requiring that the defendant "shall answer truthfully all inquiries by the probation officer" does not "attach an impermissible penalty to the exercise of the privilege against self-incrimination,"[20] it should not be altered.

In addition, beyond being without legal foundation, restricting the condition to answer all questions truthfully, or interjecting *Miranda*-like cautions about self-incrimination into the supervision context, is bad policy. Doing so could curtail questioning of, or response by, supervisees regarding offenses they have committed. Such questions can bear significantly on present supervision needs, in that they relate to the likelihood of recidivism, any necessary

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[15] *See Minnesota v. Murphy*, 465 U.S. 420 (1984).
[16] *Id.* at 425, 427.
[17] *See id.* at 427-40; *id.* at 431 ("the probation officer could compel Murphy's attendance and truthful answers").
[18] *See id.* at 431 ("we decline to require [such warnings] here since the totality of the circumstances is not such as to overbear a probationer's free will" in the non-custodial situation of a compelled meeting with a probation officer); *id.* at 432 ("the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality").
[19] *Id.* at 436. *Cf. id.* at 435 ("if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution").
[20] *Id.* at 437.

restraint or treatment, and the defendant's compliance with the mandatory condition against committing additional offenses. Moreover, inquiry about supervisees' offenses furthers the public interest in detecting crimes and bringing perpetrators to justice. *Minnesota v. Murphy* illustrates both of these points. In that case, the probation officer's questions about the supervisee's commission of a rape-murder prior to the supervision period were relevant to his current treatment needs, and the questions elicited a confession by the supervisee that was used in convicting him of the offense.[21]

Against this background, making changes in the language of the condition that would appear to narrow the defendant's obligations and requiring admonitions relating to self-incrimination are damaging in two ways:

First, probation officers may be reticent to ask supervisees about crimes they may have committed, believing that doing so is inappropriate or unlawful. As a result, information important to immediate supervision needs and to the interest in securing convictions may not be sought.

Second, there may be an adverse impact on supervisees' willingness to respond. Considering again the facts of *State v. Murphy*, the supervisee in that case, directed to be truthful in all matters, gave an honest answer to the probation officer's inquiry about his commission of a rape-murder prior to his supervision.[22] In contrast, a federal supervisee, subject only to a limited condition, or affirmatively advised that he need not answer incriminating questions, might say nothing in such a situation. As the Supreme Court has recognized, "'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted."[23] "Admissions of guilt are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[24]

Despite the absence of any reason to restrict this condition as a matter of law or policy, the Commission may have been misled by dictum in *United States v. Kappes*,[25] which noted that the defendant had raised a self-incrimination objection to the existing "truthful response" condition but declined to decide the issue. The Seventh Circuit, however, reached the same objection and rejected it in a subsequent decision. In *United States v. Douglas*,[26] the defendant was subject to the condition that he must "truthfully and completely answer all verbal questions of the probation officer."[27] The court rejected the defendant's Fifth Amendment challenge to

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[21] 465 U.S. at 422-25; *see State v. Murphy*, 380 N.W.2d 766 (Minn. 1986).

[22] *See* 380 N.W.2d at 768-71.

[23] *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

[24] *Moran*, 475 U.S. at 426 (internal quotation marks and citation omitted).

[25] 782 F.3d 828, 850 (7th Cir. 2014).

[26] 806 F.3d 979 (7th Cir. 2015).

[27] *Id.* at 985.

this condition, noting that the Supreme Court had decided the issue in *Minnesota v. Murphy*.[28] Accordingly, there is no colorable ground for weakening or qualifying this condition.

C. Refraining from Excessive Use of Alcohol

Tracking 18 U.S.C. § 3563(b)(7), an existing standard condition requires that supervisees "refrain from excessive use of alcohol." The Commission's proposal would eliminate this now-standard condition. A special condition, appearing in §§ 5B1.3(d)(4) and 5D1.3(d)(4), would require alcohol abstinence. The latter condition, however, would apply only if the court has reason to believe that the defendant is a substance abuser, and only if the court believes that the defendant's condition requires complete abstinence from alcohol. Further, the conjunction of the alcohol-abstinence condition with a substance abuse program condition in §§ 5B1.3(d)(4) and 5D1.3(d)(4) could discourage the imposition of alcohol restrictions unless the supervisee is also required to participate in a substance abuse treatment or testing program.

The standard condition requiring defendants to refrain from excessive use of alcohol should be retained, for without it, one of the largest factors contributing to criminal behavior would be left unaddressed in the standard conditions. People are apt to commit crimes when they are intoxicated because alcohol disrupts thought and emotion, mutes inhibition, and promotes heedlessness of consequences. Hence, the risk that supervisees may re-offend if allowed to drink excessively is a general concern, not just a concern in cases in which it is known that a diagnosable alcohol problem caused or contributed to past criminal conduct.[29] Excessive alcohol use is also at odds with other conditions, including those relating to employment and family support obligations, and it is generally antithetical to a sober, responsible, and crime-free lifestyle. If the probation officer discerns that a supervisee's alcohol use is interfering with the supervisee's rehabilitation and reentry, there should be a basis in the conditions for calling the supervisee to account and insisting on better behavior.

While there has been some judicial criticism of this type of condition as overly vague,[30] the level of clarity that would be required in a criminal statute of general applicability is not necessarily the level required for a supervision requirement imposed on convicted inmates for purposes of promoting rehabilitation. Congress does not appear to have believed that a general prohibition on excessive alcohol use is too vague, stating in 18 U.S.C. § 3563(b)(7) that "[t]he court may provide . . . that the defendant . . . refrain from excessive use of alcohol." A supervisee concerned that his drinking might be considered excessive can address the concern by

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[28] *Id.* at 987; *see id.* (condition was proper because it did not eliminate defendant's right to invoke the privilege against self-incrimination).

[29] *See* U.S. Department of Justice, Bureau of Justice Statistics, *Alcohol and Crime* (1998), www.bjs.gov/content/pub/pdf/ac.pdf (documenting widespread involvement of alcohol in crime)

[30] *See, e.g.*, *United States v. Siegel*, 753 F.3d 705, 715-16 (7th Cir. 2014).

reducing or stopping his consumption of alcohol. If in doubt, the supervisee can ask the probation officer whether his present or intended level of alcohol use is excessive, and the probation officer can assess whether the extent or circumstances of the supervisee's alcohol use are likely to interfere with his rehabilitation.

Moreover, the decisions criticizing conditions against excessive alcohol use as vague have not proposed that such conditions be eliminated, but rather that they be more clearly defined.[31] If the Commission shares the vagueness concern, a more appropriate response would be to retain the standard condition but with more specific definition as the judicial decisions suggest.

Alternatively, and in our view preferably, the vagueness concern could be addressed by retaining this standard condition recast as follows: "The defendant must follow any instructions of the probation officer to limit or refrain from the use of alcohol." This would enable probation officers to assess whether the extent of alcohol use by their supervisees is interfering with their rehabilitation or compliance with other supervision conditions, and to issue remedial instructions. Moreover, we do not believe that empowering probation officers to control the extent of drinking by their supervisees is excessive, just as it is not excessive to empower probation officers to control where their supervisees reside, as provided in proposed §§ 5B1.3(c)(5) and 5D1.3(c)(5) in the amendments.

D. Meeting Family Responsibilities

An existing standard condition requires supervisees to support their dependents and meet other family responsibilities, tracking the language of 18 U.S.C. § 3563(b)(1), which says that the court may require that the defendant "support his dependents and meet other family responsibilities." The proposal removes this condition. The proposal substitutes a special condition in §§ 5B1.3(d)(1) and 5D1.3(d)(1), which essentially covers supporting dependents and complying with child-support orders. That proposed language, however, does not reach cases of non-financial dereliction, such as a supervisee who does not take care of his children or care for a sick spouse.

The removal of the broader reference to "meet[ing] other family responsibilities" is troubling. The law says that "[t]he court may provide . . . that the defendant . . . support his dependents and meet other family responsibilities," placing this condition first in the list of discretionary conditions. 18 U.S.C. § 3563(b)(1). It stands to reason that being a responsible family member, including meeting the full range of legal and social obligations to one's children, spouse, and parents, is conducive to rehabilitation and should be promoted as an aspect of supervision. Moreover, even if the reference to meeting "other family responsibilities" were

[31] *See United States v. Thompson*, 777 F.3d 368, 376 (7th Cir. 2015); *Kappes*, 782 F.3d at 849.

thought to be intolerably vague, that would not warrant eliminating the condition as opposed to revising it. We recommend maintaining this standard condition as follows: "The defendant must meet any legal obligation to support or make payment toward the support of any person, and must follow any instructions of the probation officer about meeting other family responsibilities."

E. Formulation Issues in Several Conditions

i) Visits

A current standard condition provides that the defendant "shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer." Under the Commission's proposal, this would be changed to say: "The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view."

The language authorizing visits "at any time" should be retained, to make it clear that supervisees are subject to visits at unexpected times and thus there are no safe harbors for engaging in prohibited conduct. This would further the sentencing objectives of deterrence, crime prevention, and rehabilitation.

The authorization for probation officers to seize prohibited items on visits comes with the proviso that the officer may only seize things "that he or she observes in plain view." The proviso amounts to a notice to the supervisee to hide any prohibited items when the probation officer comes to visit. The "plain view" restriction does not necessarily apply as a legal matter, because the supervisee may consent to a broader search, or may be a sex offender subject to the special search allowances of §§ 5B1.3(d)(7)(C) and 5D1.3(d)(7)(C). Nor does this language seem necessary for the benefit of probation officers, who are assumed to know the legal constraints on searching supervisees' premises. Accordingly, while the corresponding current condition also includes "plain view" language, it may be appropriate to consider whether it should be retained in the context of a general revision of the conditions. Without the "plain view" language, this part of the condition could say simply that the probation officer must be permitted to take any items prohibited by supervision conditions.

Finally, the language "permit[ting] the probation officer to take any items prohibited by the conditions of the defendant's supervision" may be insufficiently broad to encompass the full range of items that probation officers should be permitted to take. For example, consider a probation officer who observes plastic packets of white powder in a supervisee's home that

cannot be definitively identified as illegal drugs without laboratory analysis, or observes packaged goods whose number and character suggest (but do not prove) that they are stolen. Or consider a probation officer supervising a person convicted for fraud offenses, who observes on a home visit bank statements or receipts that may provide evidence that the supervisee is committing similar crimes. Should the probation officer be allowed to take such items for further investigation? If so, the condition might appropriately refer to items relevant to determining compliance with supervision conditions, not just those prohibited by supervision conditions.

ii) Reporting changes in residence and employment

The proposed conditions about reporting changes in residence and employment have been revised based on comments the Justice Department provided to the Administrative Office of the U.S. Courts, but the editing is incomplete. The final sentence in each of these conditions should read as follows: "If notifying the probation officer *at least 10 calendar days* in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change."

iii) Not leaving the judicial district without permission

The proposal would add a scienter requirement ("knowingly") to the condition prohibiting departure from the judicial district without permission. The proposed amendments do not, however, add a scienter requirement to all conditions, and it is not apparent how the Commission chose the conditions to which to add a scienter requirement. For example, the proposed standard condition about not owning, possessing, or having access to firearms, ammunition, destructive devices, or other dangerous weapons is not modified to say that the supervisee cannot *knowingly* have such items within his domain.

United States v. Kappes[32] stated that the condition against leaving the judicial district without permission "would be improved by explicitly adding a scienter requirement," but it did not say that such an explicit requirement is necessary. Including express scienter requirements, in this condition and others, could encourage supervisees to keep themselves ignorant of matters bearing on compliance so as to limit their liability for violations. For example, if the condition only prohibits knowingly leaving the judicial district without permission, a supervisee who wishes to roam without constraint would have reason not to ask the probation officer whether a contemplated trip goes outside the district's boundaries.

Accordingly, we think scienter language should not be added to this condition.

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[32] 782 F.3d at 849-50.

iv) Prohibition on associating with criminals

The current condition states that the defendant "shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer." The proposed change is: "The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer."

The proposed revision of the condition inconsistently says "*knowingly* communicate or interact" in the second sentence but not the first sentence. The inconsistency should be resolved by saying simply "communicate or interact" in both sentences. The Seventh Circuit decisions on which the proposed revision appears to be based criticized the lack of a scienter requirement with respect to an associate's criminality, but did not propose adding a scienter requirement with respect to communication or interaction with such a person.[33] As a practical matter, there is little likelihood of a supervisee's unwittingly communicating or interacting with a person whom he knows to be a criminal, and no real risk that a supervisee will be uncertain about what he must do to comply if this aspect of the condition lacks express scienter language.

We also question the need for, and advisability of, adding express scienter language in other parts of this condition. As with the condition restricting departure from the judicial district, supervisees could be encouraged to deliberately keep themselves ignorant of the criminality of people they associate with and it is unclear whether the proposed knowledge requirement would be satisfied in such cases.

v) Sex offender treatment condition

This special condition requires participation in a sex offender treatment program. Our primary concern is that, in many cases, a sexual deviance evaluation is not completed before sentencing. As a result, the probation officer may not have the ability to recommend—and the sentencing court may not have the ability to impose—appropriate conditions related to possible sexual offense treatment and risk. Furthermore, the reliability of such evaluations may depend on how the evaluation is done and what risk assessment tools are used (including, for example, polygraphs).

Accordingly, in any case where the court has concerns about the defendant's need for sex offender restrictions or treatment, it should be clear that the court can, in addition to considering the offense conduct, order an evaluation and require the defendant to follow the parameters of

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[33] *See Kappes*, 782 F.3d at 848-49; *Thompson*, 777 F.3d at 376-77.

treatment required by the probation officer and driven by the evaluation, utilizing all valid assessment and treatment tools.

To that end, we recommend allowing probation officers and sex offender treatment providers to work together to customize an evaluation and treatment plan for each inmate, which may include the use of any or all appropriate tools. Further, we recommend adding "successfully complete" to the requirement that the defendant participate in treatment. Addressing the "participate" requirement, the Tenth Circuit stated that it "strongly encouraged" the sentencing court to be more specific:

> "Despite the use of the word 'participate' in the Sentencing Guidelines, we believe that defendants would have better notice of what is required of them, and justice would be better served, if district courts more clearly stated the requirements of participation. For instance, courts have crafted terms of supervised release that require the defendant to 'participate in and successfully complete' a treatment program, *See United States v. Kreitinger*, 576 F.3d 500, 505 (8th Cir. 2009), or to 'participate in a mental health program specializing in sexual offender treatment approved by the probation officer, and abide by the rules, requirements and conditions of the treatment program,' *see United States v. Taylor*, 338 F.3d 1280, 1283 (11th Cir. 2003)."[34]

Consequently, we recommend recasting this condition as follows:

"(A) A condition requiring the defendant to – (i) participate in a sex offender evaluation and, if warranted by the evaluation, to participate in and successfully complete a sex offender treatment program approved by the United States Probation Office; (ii) participate in polygraph, plethysmograph, and visual response testing as part of participation in the evaluation and treatment program as required; and (iii) pay the costs of the evaluation and treatment program if financially able."

vi) Changes in economic circumstances notification (§ 5D1.3(c)(14))

We have addressed earlier the Commission's first "issue for comment," relating to the standard condition requiring truthful response to the probation officer's questions. The second "issue for comment" is as follows:

The Commission seeks comment on the standard condition of supervised release in § 5D1.3(c)(15), which states that the defendant "shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's

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[34] *United States v. Metzener*, 584 F.3d 928, 935 (10th Cir. 2009).

ability to pay any unpaid amount of restitution, fines, or special assessments." Under the proposed amendment, this would remain a standard condition and would be redesignated as subsection (c)(14). The Commission seeks comment on whether this condition should be made a special condition rather than a standard condition.

In the Department's view, this condition should be retained as a standard condition because it applies to defendants generally. While some defendants are not subject to restitution, fines, or special assessments, the use of "any" addresses that concern. Changing the condition to a special condition would increase the chance that a court inadvertently omits it. Notification about such changes in economic circumstances is a mandatory condition of probation, *see* 18 U.S.C. § 3563(a)(7), and the same requirement should be imposed in relation to supervised release.

–APPENDIX –

RIS Data Update (1-28-2016)

RIS Requests Filed at Facilities since August 2013

Please note, data collection for RIS requests at facilities began in August 2013. From August 2013 to December 2015, BOP facilities have received 3142 RIS requests. More specifically, 1374 were received from August 2013 to December 2013, 1077 were received in 2014, and 691 were received in 2015. The 1374 requests received from August to December 2013 consisted of 1027 medical requests, 216 elderly requests, 116 child caregiver requests, and 15 spouse/registered partner requests. The 1077 requests received in 2014 consisted of 553 medical requests, 206 elderly requests, 136 child caregiver requests, 34 spouse/registered partner requests, and 148 "other" requests. The 691 requests received in 2015 consisted of 448 medical requests, 137 elderly requests, 46 child caregiver requests, 23 spouse/registered partner requests, and 37 "other" requests. This resulted in a total of 2028 medical requests, 559 elderly requests, 298 child caregiver requests, 72 spouse/registered partner requests, and 185 "other" requests, received by BOP facilities from August 2013 to December 2015.

RIS Considerations in Central Office

In 2013, the BOP Director approved 61 RIS requests, and the Director/Office of General Counsel (OGC) denied 15 RIS requests. In 2014, the Director approved 101 requests, and the Director/OGC denied 121 requests. In 2015, the Director approved 99 requests, and the Director/OGC denied 117 requests. This resulted in a total of 261 approvals and 253 denials from 2013 to 2015.

RIS Approvals

In 2013, the Director approved 51 terminal requests and 10 debilitative requests. In 2014, the Director approved 66 terminal requests, 19 debilitative requests, 12 elderly-other requests, and 4 elderly-medical requests. In 2015, the Director approved 61 terminal requests, 23 debilitative requests, 10 elderly-other requests, and 5 elderly-medical requests.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working with you and the other commissioners to refine the sentencing guidelines, to make them more effective, more efficient, and fair.

Sincerely,

Michelle Morales
Acting Director, Office of Policy and Legislation

cc: Commissioners
Ken Cohen, Staff Director
Kathleen Grilli, General Counsel