The defendant filed a petition for certiorari and the Solicitor General has been ordered to respond.

**Case #3: Fifth Circuit, Northern District of Texas**

The defendant pled guilty to illegal re-entry after deportation. The guideline range was 21-27 months. According to the PSR, the defendant had several prior DWI convictions and one arrest for sexual assault of a minor that had been dismissed, and there were no known mitigating or aggravating factors to support a departure. At sentencing, without notice, the judge imposed a 120 month sentence based on the defendant's DWI convictions, and because, according to the judge, the defendant would have been convicted of sexual assault of a minor but the victim moved back to Mexico. There was nothing in the PSR about the circumstances of the sexual assault charge or why it was dismissed. Where the judge got the information is unknown.

This case is on appeal.

**Case #4: Fifth Circuit, Northern District of Texas**

The defendant was indicted for conspiracy to import more than 5 kg. of cocaine and 100 kg. of marijuana, to which he pled guilty. Probation stated in the PSR that the defendant or others were responsible for 155 kg. of cocaine and over 19,000 pounds of marijuana. The defendant objected. A hearing was held at which an FBI agent testified to admittedly uncorroborated hearsay statements of informants and entirely unspecified sources, attributing approximate numbers of "loads" of marijuana of approximate weights, and estimates of numbers of deliveries or purchases of estimated quantities, to the defendant or others. Each of the alleged loads, purchases and deliveries to which the agent testified amounted to a smaller quantity than that stated in the PSR. The agent also testified that the defendant agreed to purchase 50 kg. of cocaine from an undercover agent, but acknowledged that the defendant had called in advance to say he only wanted 5 kg. and that he appeared with only enough money for 2 kg., a seemingly clear-cut instance of a defendant intending to purchase and being reasonably capable of purchasing 2 kg., not 50 kg. The district court overruled all of the defendant's objections and sentenced him to 327 months in prison based on the full amount stated in the PSR.

The court of appeals rejected the defendant's argument that the quantity the district court used to sentence him was not supported by a preponderance of reliable evidence because the defendant did not show "that the information in the Presentence Report (PSR) concerning the drug quantities involved in the offense was 'materially untrue, inaccurate, or unreliable.'" *United States v. Murietta-Maldonado*, 111 Fed. Appx. 253 (5th Cir. 2004). The sentence was not unreasonable because when a judge imposes a sentence "within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines." *United States v. Murietta-Maldonado*, 161 Fed.Appx. 374 (5th Cir. 2006).

The defendant filed a petition for certiorari and the Solicitor General was ordered to respond.

**Case #5: Fifth Circuit, Western District of Texas**

A courier caught driving less than 50 kg. of marijuana across the border on one occasion pled guilty to importation and possession of marijuana with intent to distribute. The probation officer multiplied the amount seized times three to "estimate" the defendant's "relevant conduct" at 150 kg., based on the defendant's statement to the border patrol that he had driven across the border twice before. There was no physical evidence, testimony or admission by the defendant to support the probation officer's speculation that he had ever carried any marijuana over the border before. Because the defendant could not disprove the probation officer's estimate, the district court accepted it, resulting in a sentence twice as long as the sentence for the marijuana seized in the offense of conviction. The case is on appeal.

**Case #6: Third Circuit, Middle District of Pennsylvania**

The defendant was charged with and pled guilty to being a felon in possession of a firearm. He had used the gun to shoot a man who was in the process of kidnapping his mother at gunpoint, and who brandished the gun at the defendant when the defendant told him to let his mother go. The man died from the gunshot wound. The defendant voluntarily spoke to police and handed over the gun. Because of the circumstances, he was not charged with murder or any kind of homicide. After the defendant pled guilty to the felon in possession charge, the probation officer "found" that he had committed first degree murder, calculated his base offense level at 43, and recommended the statutory maximum. The defendant has not yet been sentenced.

**Case # 7: First Circuit, Rhode Island**

The defendant was charged in Count I with being a felon in possession, in Count II with carjacking, and in Count III with possession of a firearm in furtherance of carjacking under 924(c). The felon in possession charge was based on a firearm in the defendant's possession on the day of his arrest. The carjacking and 924(c) charges were based on shifting versions of a story two former friends of the defendant told police regarding an altercation they had had with the defendant the day before his arrest. The defendant planned to go to trial, intending to discredit his former friends' description of events by showing, *inter alia*, that one of them pulled a gun on him, and that in any event their stories did not establish the elements of carjacking.

On the day scheduled for trial, the defendant's former friends did not appear, the prosecutor said he had "lost contact" with them, the carjacking and 924(c) counts were dismissed, and the defendant pled guilty to the felon in possession charge. The guideline range for the offense of conviction was 30-37 months. The prosecutor provided a version of the absent witnesses' allegations to the probation officer, which was duly recorded and used in the PSR to add 23 points to the offense level and to increase the guideline range tenfold. The court imposed the statutory maximum of 120 months based on a cross-reference to the dismissed carjacking offense based on a sanitized version of the absent witnesses' uncross-examinable hearsay statements presented by a police witness.

The First Circuit had no trouble affirming, as there was nothing before it to indicate just how unreliable the hearsay was, demonstrating that it is easier to obtain a conviction without witnesses than with them.

**Case # 8: Sixth Circuit, Western District of Tennessee**

A 49-year-old married father with no criminal history and a solid twenty-year employment history was convicted of possessing cocaine base with intent to distribute. The jury acquitted him of possessing a firearm in connection with that offense.

Relying on acquitted conduct, the district court imposed a two-level enhancement based on the presence of a hunting rifle in the same room with the drugs. There was no dispute the defendant was a hunter. However, the defendant could not prove that it was "clearly improbable" that the firearm was connected to the offense. In this way, the guidelines invite the use of acquitted conduct, since a defendant may be acquitted of possessing a firearm "during and in relation to" a drug trafficking crime under 924(c), but required at sentencing to prove that it was "clearly improbable" that the firearm was connected to the offense.

In addition, the court found by a preponderance of the evidence that the drug weight was 5.6 grams, based on the testimony of a law enforcement agent that she tested for the presence of cocaine in and weighed only four of the eighteen packets found in the defendant's trailer and estimated from there. Her only explanation for not testing and weighing all eighteen packets was that it was "standard procedure."

This case is on appeal.

**Case #9: Ninth Circuit, District of Montana**

The defendant was charged with and pled guilty to depredation of government property. He temporarily stole a Bureau of Indian Affairs (BIA) law enforcement vehicle, after an officer left the vehicle running in the front of a house where the defendant and others were socializing late at night. The defendant left the house, got into the running vehicle, drove it a short distance, got out of the vehicle, and allowed it to roll down a hill.

The offense of conviction -- depredation of government property -- resulted in a 12-18 month guideline range under U.S.S.G. § 2B1.1, including an enhancements for loss amount (the damage from the accident) and for an official victim pursuant to U.S.S.G. § 3A1.2. The probation officer, however, deemed the guideline range to be 97-121 months, by applying a cross reference to U.S.S.G. § 2K2.1 based on her finding that the defendant stole a firearm.

The BIA officer had two firearms in his vehicle, but the defendant did not know they were there, much less intend to steal them. The discovery produced by the government did not mention a firearm. The government's offer of proof, filed as a pleading prior to the defendant's guilty plea and recited orally at the change of plea hearing, did not refer to a firearm. Rather, the probation officer interviewed the BIA officer, and learned that he stored his 12 gauge shotgun in an

overhead compartment and an AR15 in a rear compartment. No one suggested that the defendant knew that the firearms were in the vehicle. Nonetheless, the probation officer determined that the defendant stole the firearms, and that he possessed them in connection with the offense of conviction.

The district court followed the probation officer's recommendation and applied the U.S.S.G. § 2B1.1(c) cross-reference to § 2K2.1. It then used the guns to set the base offense level and enhanced the guideline range pursuant to § 2K2.1(b)(5), because, according to the probation officer, the defendant possessed the firearms in connection with his offense of conviction. Instead of the 12-18 month guideline sentence the defendant's lawyer told him to expect, the defendant was sentenced to 97 months in prison.

The case is being appealed.

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July 14, 2006

Honorable Ricardo Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

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

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding the proposed amendment creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(I), and to respond to the further request for comment issued with that proposed amendment.

On March 13, 2006, we submitted written testimony on this and several other proposed amendments to the Sentencing Guidelines prior to the March 15 public hearing covering those proposals. We pointed out that the proposed policy statement did not address a portion of the statutory mandate of 28 U.S.C. § 994(t), which 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." We proposed language addressing those requirements and other concerns in our submission and append a copy of the portion of that letter dealing with this amendment for your convenience.

Subsequently, the Commission adopted the proposed amendment as it was, but added language to the commentary that the amendment was a first step and the Commission intended to developed further criteria and examples as required by the statute. Further, the Commission issued another request for comment on the amendment for possible use in the 2006-2007 amendment cycle.

Since that time, the Defenders have consulted with other interested groups to develop a proposed policy statement which addresses the need for criteria and examples and responds to other aspects of the Commission's request for comment. The American

Bar Association (ABA) has revised the proposed policy statement it previously submitted in March of this year after consultation and input from Defenders and others. We believe this proposal does an excellent job of addressing the issues and providing the guidance needed by the courts and the Bureau of Prisons (BOP). We endorse the ABA proposal and attach a copy of it to this submission.

The proposed policy statement provides a model which allows sentence reductions in extraordinary situations where changed circumstances compel the conclusion that a reduction is appropriate. It does not confine itself to cases of terminal illness, as has been the practice of the BOP in making the motions in the past. It allows the Court flexibility regarding the extent of reduction, depending on the circumstances at issue. The government remains the gatekeeper inasmuch as the guideline only applies after a motion by BOP.

We believe adoption of the proposed policy statement will fill a gap in the federal criminal justice system in accordance with congressional intent. By making 18 U.S.C. § 3582(c)(1)(A)(I) a part of the Sentencing Reform Act, Congress intended to allow sentence reductions after consideration of compelling and changed circumstances after sentencing. The ABA proposal fulfills the congressional mandate for criteria and examples and provides a proper structure for exercise of the sentencing court's discretion.

Thank you for your consideration of our comments and please let us know if we can be of further assistance.

Very truly yours,

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee
AMY BARON-EVANS
ANNE BLANCHARD
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Michael J. Elston
Judith Sheon, Staff Director
Pam Barron, Deputy Counsel
Paula Desio, Deputy Counsel

*Revised 7/12/06*

# American Bar Association

***Proposed Policy Statement***

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

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

(1) either –

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

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

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

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

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

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

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

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

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

Commentary

Application Note:

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

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

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

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

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

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

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

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

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

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

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

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

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

**Excerpt from March 13, 2006 Letter**

## IX. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

The proposed amendment is the Commission's first attempt to provide guidance for court consideration of Bureau motions to reduce sentences based on extraordinary and compelling reasons as provided in 18 U.S.C. § 3582(c)(1)(A)(i). We applaud that attempt and offer suggestions which we believe may improve the initial draft and respond more definitively to the congressional directive in 28 U.S.C. § 994(t). We also respond to the issues for comment regarding release after age 70 pursuant to 18 U.S.C. § 3582(c)(1)(A)(ii). First, we offer some background regarding the "extraordinary and compelling" reduction statute.

### A. Background of Reduction for "Extraordinary and Compelling Reasons"

Many people who work in the federal criminal justice system are unfamiliar with this statute. It is little known and little utilized. However, some of us have learned of it after a client, already sentenced, inquires whether some radical change of circumstance can qualify him or her for some relief or reduction of sentence. Sometimes, the circumstance is some sort of family emergency, sometime a matter of life or death, sometime concern about the welfare of a child, which the prisoner can only assist with if released early. Initially, the provisions of 18 U.S.C. § 3582(c)(1)(A)(i) appear to offer relief, if the situation truly appears compelling and extraordinary. However, that hope is quickly dashed when we learn that the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. This state of affairs and unduly cramped usage of the statute could be altered by this Commission's policy statement. The policy statement should reflect congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could even be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the courts in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system which provided more certainty, finality and uniformity.1 However, Congress also recognized that post-sentencing developments might provide appropriate

1 See, generally, Mistretta v. United States, 488 U.S. 361, 363-370 (1989).

grounds to reduce a sentence. Using §4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments, which is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

> The court may not modify a term of imprisonment once it has been imposed except that-
>
> (1) in any case–
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that–
>
> (ii) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the United States Sentencing Commission, created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 944(t).

The legislative history of these provisions demonstrates that Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of legislative history on the SRA, said, in pertinent part:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described.2

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2 S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

## B. History of Sentence Reductions

Despite the broad language of the statutory provision, the BOP has historically used §3582(c)(1)(A)(i) only to seek release of dying inmates. See, Mary Price, The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A), 13 FED. SENT. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001). Originally, BOP policy allowed consideration of release when death was predictable within six months. In 1994, the policy was amended to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. Although there is nothing in the statute or in the BOP policy statement to disqualify a reduction based on something other than medical condition of the inmate, the BOP has never acted on any other basis.

During the first two decades of the SRA, the Sentencing Commission has not responded to the congressional directive to issue policy statements and give examples of extraordinary and compelling reasons. A Vice Chairman of the Commission opined that the lack of policy statements might be partly responsible for the BOP's narrow use of this provision:

> Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.). The actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through 2000. The numbers for 2001 through 2004 continue to be quite low despite a growing prison population.3

## C. The Proposed Amendment; Extraordinary and Compelling Reasons

The Commission's proposed amendment provides a first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions. However, it does not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons, nor does it provide examples as required by statute. 28 U.S.C. § 944(t). We believe the Commission should tackle this admittedly difficult task and we provide our suggestions for doing so below, along with other comments on the draft. Luckily, there is already a very good model for addressing these difficult issues in the Appendix of Ms. Price's previously cited article (copy attached).

First, as a drafting matter, proposed U.S.S.G. § 1B.1.13(1)(A) should be amended to state "reasons" in the plural, as in the statute, instead of singular. Otherwise, this drafting change would alter the clear intent of the statute to allow consideration of

3 The 2001 through 2004 figures received from BOP are appended.

multiple reasons and their combination as opposed to one single reason. In the alternative, the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

> An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

This option has the advantage of clearly restating the statutory intent that reasons may be plural, to prevent a mechanistic approach to this broadly worded provision.

Second, the proposed draft, in § 1B1.13(2), requires that the person not be a danger. This imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to §3582(c)(1)(A)(i) as well. As a practical matter, this expanded requirement will probably have little effect, since it is difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. In our experience, the BOP takes great care to eliminate any prisoners from early release consideration if they are considered a danger to the community. However, we believe the proposal should insert the word "present" before the word "danger" in order to assure the proper interpretation stated in the Synopsis, i.e., that the person is "no longer" a danger.

Third, the Synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. Presumably, this refers to proposed Application Note 1A, where the only definition of "extraordinary and compelling reasons" appears. The actual language used--"shall be considered as such"-- does not appear to operate to create a rebuttable presumption. If that is what is intended, it should be stated simply and in those words. More importantly, this definition provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission.

We believe that providing only a circular definition of extraordinary and compelling reasons, i.e. they presumptively exist when BOP makes a motion, does not comport with the Commission's directive from Congress. We suggest that such reasons should be broadly defined to include all basic post-sentencing changes that could support a reduction, as was intended by Congress. These should not be limited to terminal illness or other extreme medical conditions of the inmate, as has been BOP policy.

Again, Ms. Price's article contains a description of extraordinary and compelling reasons in the proposed policy statement:

> An "extraordinary and compelling reason" is a reason that involves a situation or condition that–
> (1) was unknown to the court at the time of sentencing;
> (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or

(3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

This proposed language covers the basics of changed conditions or circumstances which could support a reduction of sentence consistent with the SRA and the guidelines. As previously outlined, the §3583(c)(1)(A)(i) provision was placed in the Act to allow some safety valve for post-sentencing changed circumstances. Congress clearly understood that in enacting a determinate sentencing system, there had to be some outlet for compelling changed circumstances after sentencing. This definition provides a flexible model which does not unduly emphasize or confine itself to extreme illness of the inmate. It would allow the court to consider facts or law which changed after sentencing and which present a compelling case for a reduction of the sentence.

Finally, we believe that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the list proposed in Ms. Price's article appears to offer an excellent starting place in an application note:

> The term "extraordinary and compelling reason" includes, for example, that–
> (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
> (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
> (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;
> (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
> (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
> (F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
> (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

These examples do not purport to be exhaustive, but can provide some guidance as to possible categories of changed circumstances which could provide extraordinary and compelling reasons for a reduction in sentence.

**D. Issues for Comment**

The Commission solicits comment regarding whether the suggested policy statement regarding release of those over 70 years old who have already served 30 years

should be expanded to include those sentenced under statutes other than 18 U.S.C. § 3559(c). Further, the Commission asks whether, if so, certain offenses should be excluded, such as terrorism or sexual offenses involving minors.

Extending the possibility of release for aged inmates to sentences outside of 3559(c) sentences would be good policy.4 There are many other statutes which provide for extremely long, even life terms, e.g., the drug statutes found in 21 U.S.C. § 841(b)(1)(A). As the Commission has concluded, risk of recidivism drops dramatically after age 50, and surely even more dramatically after age 70.5 With increased sentence severity over the past twenty years has come an aging prison population, with medical problems, and little risk of re-offense.6 It has been estimated that housing an elderly prisoner costs $60,000 annually.7 It would make just as much sense to expand the release possibility to other cases.

If the expansion were available, it would be unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter. The statute and policy statements requiring a current lack of dangerousness fully address the concerns about public safety implicit in the issue for comment. After 30 years served and with defendants over 70 years old, there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains.

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4 This portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which is the only reason it was restricted to those sentenced under that statute.

5 U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 & Exhibit 9.

6 U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2003 8 (85% increase in inmates 55 or older since 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf; U.S. Department of Justice, Bureau of Justice Statistics, Medical Problems of Inmates (1997) (48% of federal inmates age 45 or older reported medical problems), http://www.ojp.usdoj.gov/bjs/pub/ascii/mpi97.txt.

7 Sentencing Project, Aging Behind Bars: "Three Strikes" Seven Years Later (August 2001) 12, http://www.sentencingproject.org/pdfs/9087.pdf.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Food and Drug Administration
Rockville MD 20857

August 29, 2006

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

**Attention: Public Affairs - Priorities Comment**

Dear Mr. Courlander:

Each year since 2003 the United States Food and Drug Administration (FDA) has requested the United States Sentencing Commission to include on its list of priorities amendments to the sentencing guidelines that govern certain violations of the Federal Food, Drug, and Cosmetic Act (FDCA). We are writing to respectfully request once again that the Commission review the sentencing guidelines applicable to certain FDA offenses. I am attaching the letter that FDA submitted in 2004 which details FDA's concerns and the reasons that FDA believes that guideline amendments are needed.

Although we believe that all of the amendments discussed in the attached letter are important, we would like to highlight the need for amendments to address certain violations of the Prescription Drug Marketing Act (PDMA), which amended the FDCA to provide for stricter controls on the distribution of prescription drugs and drug samples. The PDMA prohibits, among other things, wholesale distribution of prescription drugs without a license; the sale, purchase, or trading of prescription drug samples and coupons; and reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States. 21 U.S.C. §§ 331(t), 353(c), 353(e)(2)(A), and 381(d). These violations pose a significant risk to the public health and increase the risk that counterfeit drugs will be dispensed to American consumers. As explained in more detail in the attached letter, the current guidelines do not account for the increased statutory penalties for these offenses. FDA believes that strengthening the guidelines applicable to these offenses would significantly help FDA's efforts to protect the integrity of the prescription drug supply in this country.

We appreciate the efforts that the Commission has undertaken in the past year to address the lack of a guideline governing offenses involving human growth hormone, and we have plans to meet with Commission staff in the near future to further discuss this issue. More and more frequently, offenders who illegally distribute or possess with intent to distribute human growth hormone in violation of 21 U.S.C. § 333(e) also illegally distribute anabolic steroids. Accordingly, FDA now believes that human growth hormone offenses should be addressed by amending U.S.S.G. § 2D1.1, which would allow the quantities of anabolic steroids and human growth hormone to have cumulative effect. We look forward to continuing our work with the Commission to draft an appropriate guideline to address human growth hormone offenses.

[907]

Please contact Sarah Hawkins, Associate Chief Counsel, by telephone at (301) 827-1130 or by email at sarah.hawkins@fda.hhs.gov if you have any questions or if there is any assistance that FDA can provide regarding these or other matters.

Sincerely,

Margaret O'K. Glavin
Associate Commissioner
for Regulatory Affairs
U.S. Food and Drug Administration

cc: Terry Vermillion, Director, Office of Criminal Investigations, FDA
Sheldon Bradshaw, Chief Counsel, FDA
Sarah Hawkins, Associate Chief Counsel, FDA

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Rockville MD 20857

July 27, 2004

Michael Courlander
Public Affairs Officer
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Attention: Public Affairs-Priorities Comment

Dear Mr. Courlander:

I am writing on behalf of the U.S. Food and Drug Administration (FDA) to respectfully request that the United States Sentencing Commission amend its list of proposed priorities to include consideration of amendments to the sentencing guidelines that govern certain violations of the Federal Food, Drug, and Cosmetic Act (FDCA). This letter reiterates many of the points made by Associate Commissioner John Taylor in his letter to the Commission dated July 31, 2003. As explained in more detail below, FDA believes that the current guideline at Section 2N2.1 is too lenient and does not adequately address some serious criminal violations of the FDCA. In this letter, I will discuss the public health significance of FDA's criminal enforcement efforts, identify specific problem areas in the guideline, and suggest amendments.

FDA regulates the manufacture, labeling, and distribution of food, human and animal drugs, medical devices, and biologics. These products, which collectively account for approximately 25 percent of every dollar spent by American consumers, are critical to everyday life in our country. Physicians and consumers rightfully expect that the products they dispense and consume will be safe and effective and will bear adequate and accurate labeling.

In support of its public health mission, FDA presents a wide variety of criminal cases for prosecution. Many of them involve serious offenses with the potential to cause great harm to large segments of our society. These cases include the sale of unapproved, ineffective, and sometimes harmful drugs and devices to treat HIV, cancer, arthritis, and other serious diseases; failure by drug and device manufacturers to report product failures and adverse events; and the distribution of food contaminated with potentially life-threatening bacteria. Several recent investigations have involved the sale of products marketed as "all natural" dietary supplements that contained significant amounts of the active ingredients of prescriptions drugs, such as Viagra and Cialis, or the banned substance ephedrine hydrochloride, without declaring these ingredients on the label. FDA also investigates the illegal sale of dangerous substances as street drug alternatives and "rave" drugs to teenagers for recreational use--which often results in deaths, sexual assaults, and medical complications--and the sale of dangerous designer steroids to enhance athletic performance.

Also, a significant number of FDA's criminal investigations involve unlawful wholesale distribution and diversion of prescription drugs. Frequently, these cases involve the distribution of prescription drugs from unknown sources that are repackaged and relabeled to appear to be genuine, FDA-approved products. Recent cases targeted wholesale distributors of drugs intended to treat schizophrenia and bipolar disorder. Illegal repackaging resulted in the bottles containing different drugs or different strength drugs than stated on the label. Another investigation involved the sale of counterfeit Pergonal and Metrodin (injectable fertility drugs) tainted with active bacteria and endotoxins. Prescription drug diversion offenses can result in the dispensing of misbranded and otherwise substandard prescription drugs to consumers, provide avenues for counterfeit drugs to enter the marketplace, and thwart the ability of the manufacturers and public health authorities to conduct effective recalls.

Such offenses undermine the safety and integrity of the Nation's supply of food, drugs, medical devices, and biologics. In the case of counterfeit, misbranded, unapproved, and adulterated drugs, unsuspecting patients may be harmed by the very medications they are taking to treat their diseases. In these cases, consumers are not getting the health benefits they rightfully expect from their medications. For example, their blood pressure or cholesterol may not be controlled or their depression may not be treated because their medications are counterfeit. Or they may be unwittingly taking unapproved drugs that are not therapeutically equivalent to the U.S.-approved products proven to provide the claimed benefits that consumers have come to expect from their drugs. In other instances, patients facing the hopelessness of a debilitating or terminal illness may forego FDA-approved treatments in favor of unapproved and ineffective treatments. We are fearful that unless the guidelines are amended to treat these types of offenses more seriously than is currently the case, criminal offenders will not be deterred. The high profit margin often outweighs the minimal sentences that may be imposed when an offender is prosecuted.

In general, any violation of the FDCA is a misdemeanor punishable, without the need to show criminal intent, by a maximum prison term of 1 year under 21 U.S.C. § 333(a)(1). A violation of the FDCA committed with the intent to defraud or mislead either consumers or a government agency, or that is a second conviction under the FDCA, is a felony with a maximum prison term of 3 years under 21 U.S.C. § 333(a)(2). Certain FDCA offenses that involve prescription drugs are 10-year felonies under 21 U.S.C. § 333(b)(1). Offenses involving the distribution of human growth hormone are punishable by up to 5 years in prison under 21 U.S.C. § 333(e)(1), or up to 10 years if the offenses involve distribution to a person under 18 years of age under 21 U.S.C. § 333(e)(2).

FDCA offenses are governed by two sections of the guidelines. Section 2N2.1 provides for a base offense level of six, with no enhancements for specific offense characteristics. Section 2B1.1 applies if the offense involves fraud. This section also provides for a base

offense level of six but includes enhancements for specific offense characteristics, most notably incremental increases of the base level for crimes involving losses that exceed $5,000.

FDA believes that the primary guideline, Section 2N2.1, inappropriately treats some FDCA violations as minor regulatory offenses. This guideline applies to offenses with statutory maximum sentences ranging from 1 to 10 years. However, as noted, Section 2N2.1 does not include enhancements for specific offense characteristics to account for the wide range of offenses that it addresses. In addition, Section 2N2.1 does not provide for any enhancements to address the public health purposes of the FDCA. Therefore, FDA believes Section 2N2.1 should be amended to ensure that all criminals who endanger the public health by violating the FDCA receive appropriate punishment.

**Particular Concerns with the Existing Guidelines and Suggested Amendments**

## I. Offenses with Higher Statutory Penalties

Most violations of the FDCA are felonies with a 3-year maximum sentence if the offense is committed with an "intent to defraud or mislead." However, certain FDCA offenses are felonies whether or not the offense involves fraudulent intent, and some of these offenses have statutory maximum sentences that exceed 3 years. The current guideline at Section 2N2.1 fails to account for these offenses that warrant more significant penalties without requiring a showing of fraud.

### A. Certain Prescription Drug Marketing Act Offenses

The Prescription Drug Marketing Act of 1987 (PDMA) prohibits, among other things, the unlicensed wholesale distribution of prescription drugs; the sale, purchase, or trading of prescription drug samples and coupons; and the reimportation by anyone other than the manufacturer of prescription drugs manufactured in the United States [see 21 U.S.C. §§ 331(t), 353(c), 353(e)(2)(A), and 381(d)]. Congress enacted these prohibitions because it found that such conduct created, as stated in H. Rep. No. 100-76 at 2 (1987), "an unacceptable risk that counterfeit, adulterated, misbranded, subpotent, or expired drugs will be sold to American consumers."

These PDMA prohibitions are an important tool to combat the large-scale distribution of counterfeit or substandard prescription drugs. Unlicensed wholesale distributors of prescription drugs are less likely than legitimate licensed wholesalers to store and handle prescription drugs properly and are more likely to purchase prescription drugs from disreputable sources that sell counterfeit, misbranded, adulterated, or expired drugs. Sellers of prescription drug samples typically repackage the drugs to remove any indication that the drugs are not intended for sale and, in the process, mislabel the drugs with inaccurate lot numbers, expiration dates, and, in some cases, the wrong drug name or strength.

Because of the public health risk posed by these PDMA offenses and the importance of protecting the integrity of the Nation's prescription drug supply, Congress made these offenses felonies without requiring proof that the defendants acted with intent to defraud or mislead, as is required for most other FDCA felonies. And, unlike other FDCA violations that have a maximum penalty of 3 years in prison, Congress provided for a maximum prison sentence of 10 years for these PDMA offenses [21 U.S.C. § 333(b)(1)].

The guidelines, however, do not distinguish between these PDMA offenses and other FDCA violations under Section 2N2.1. The guidelines treat all FDCA offenses the same and provide for a base offense level of six. The higher maximum penalties for these PDMA offenses generally come into play *only* when there is evidence of fraud *and* significant pecuniary loss under Section 2B1.1(b)(1). It is difficult to prove fraud because buyers and sellers are often complicit in the offense, and, even when the government can prove fraud, it is difficult to demonstrate substantial pecuniary loss, because the buyers and sellers involved in the fraud often do not retain records pertaining to the illegal drug distributions.

In FDA's view, the current guidelines do not carry out the intention of Congress: to provide significant penalties for these PDMA offenses without requiring a showing of fraud. FDA believes that an amendment to Section 2N2.1 to provide for a higher base offense level (e.g., 12-14) for these PDMA offenses, with incremental increases based on the quantity or dollar value of the drugs involved in the offense, would better reflect congressional intent and significantly increase the effectiveness of the PDMA as a means to protect the integrity of the Nation's prescription drug supply.[1]

**B. Second Offense Felonies**

Under 21 U.S.C. § 333(a)(2), a second conviction for violating the FDCA is a felony punishable by up to 3 years imprisonment, even absent a showing of intent to defraud or mislead. Without a showing of fraud, however, the prior FDCA conviction will likely have no effect under the current guidelines because it will not have resulted in a sentence of imprisonment (see U.S.S.G. § 4A1.1). The prior FDCA conviction probably would not increase a defendant's criminal history category, and Section 2N2.1 does not provide for any increase of the base offense level for a second FDCA conviction, even though Congress made a second FDCA offense a felony.

The guidelines should be amended to include a specific offense characteristic under Section 2N2.1 for repeat FDCA offenders. FDA believes that an increase of six levels for a prior FDCA

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[1] To give greater effect to this and the other suggested amendments, we believe that Section 2N2.1(b)(1) also should be amended to provide that Section 2B1.1 would apply only if the resulting offense level would be greater than the offense level under Section 2N2.1.

conviction, with an increase of two levels for each additional unrelated prior FDCA conviction, would be appropriate.

### C. Human Growth Hormone Offenses

Under 21 U.S.C. § 333(e), it is unlawful knowingly to distribute, or to possess with intent to distribute, human growth hormone for any use not approved by FDA. The statutory maximum penalty for violating this provision is 5 years in prison under 21 U.S.C. § 333(e)(1). When the offense involves distribution to a person under age 18, the statutory maximum increases to 10 years in prison under 21 U.S.C. § 333(e)(2). The Commission has not yet promulgated a guideline to cover these human growth hormone offenses (see U.S.S.G. § 2N2.1, comment (n.4). As a result, it is unclear how the offenses will be treated under the guidelines. This lack of clarity undermines the goals of uniformity, transparency, and deterrence. In recent years, FDA has investigated an increasing number of cases involving the distribution of human growth hormone for unapproved uses. We request that the Commission promulgate a guideline to address such offenses. An amendment to Section 2N2.1 that provides for a higher base offense level [e.g., 12-14, for violations of 21 U.S.C. § 333(e)] with incremental enhancements based on the quantity or dollar value of human growth hormone involved in the offense, and a separate enhancement for offenses that involve a person under 18 years of age, would adequately address the conduct.

## II. Offenses that Do Not Involve Fraud

FDCA cases frequently arise in which prosecutors cannot prove intent to defraud or mislead to establish felony liability. Misdemeanor violations of the FDCA encompass a wide range of conduct, from record-keeping offenses to the willful distribution of dangerous products that could seriously injure or kill consumers. Section 2N2.1, which provides for a base offense level of six with no enhancements, is inadequate to address the wide-ranging degrees of culpability that may occur in FDCA misdemeanors. Despite the lack of provable fraud, the conduct addressed in most FDCA misdemeanor prosecutions warrants more significant punishment than is available under the current guidelines, either because of the defendant's state of mind or a significant risk to the public health, or both.

An example is a wholesale distributor who sells counterfeit or diverted prescription drugs but claims not to have known that the drugs were counterfeit or diverted. In such cases, it is often difficult to prove that the distributor acted with intent to defraud and mislead, even though such distributors often deliberately choose not to verify the legitimacy of the drugs under circumstances where the source is highly suspicious.[2] This lack of fraud (or difficulty proving it)

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[2] If the distributor acted in good faith and had no reason to believe that the drugs were counterfeit, he would not be subject to criminal penalties under the FDCA [see 21 U.S.C. § 333(c)(5)].

in no way undercuts the potentially serious public health consequences caused by a wholesale distributor who recklessly distributes drugs of unknown origin to an unsuspecting public. The distributor's willful blindness endangers the public by ignoring the risk that counterfeit or otherwise substandard prescription drugs may enter the retail market.

Another type of misdemeanor offense that we believe warrants more significant punishment than is available under the current guideline is the distribution of dangerous or ineffective drugs for the treatment of disease. Even when these offenses do not involve fraud, they often involve substantial risk to the public health, take advantage of patients who are desperate for a cure, and are perpetrated by defendants who are aware that their conduct is unlawful. For example, FDA's Office of Criminal Investigations has investigated the illegal sale of DNP (a notoriously deadly product commonly used as a pesticide) as a weight-loss drug and cancer treatment. If a defendant sells DNP openly, it may be difficult to prove fraud sufficient to establish felony liability, even in those cases where the defendant is aware of the illegality of his conduct.

In the foregoing types of cases, the sentence will be governed by Section 2N2.1, with a base offense level of six and no enhancements for specific offense characteristics. FDA believes that Section 2N2.1 should be amended to provide for stiffer sentences for misdemeanor offenses that --while not involving demonstrable fraud--involve reckless, knowing, or willful conduct, a significant risk to the public health, or both. The amendments should enhance the offense level based on the defendant's level of criminal intent by, for example, enhancing the offense level for reckless, knowing, and willful conduct. These enhancements would serve to distinguish knowing, reckless, and willful offenses from those involving mere negligence or no criminal intent whatsoever.

In addition, enhancements based on the risk of harm created by the offense conduct, similar to the enhancements for likelihood of serious bodily injury used in the guidelines for environmental offenses, would be appropriate in certain cases [see, e.g., U.S.S.G. § 2Q1.3(b)(2)]. Enhancements for risk of harm or serious bodily injury would serve to distinguish mere technical, regulatory offenses from those with the potential to cause significant harm to the American public. Appropriate amendments would ensure that misdemeanor offenses involving, for example, the distribution of counterfeit drugs that lack active ingredients or the sale of ineffective or toxic drugs for the treatment of cancer would be treated more seriously than offenses involving mere record-keeping or regulatory violations that pose no cognizable risk to the public health. The amendments could provide for different levels of enhancement depending on the nature of the risk and the number of people placed at risk. Such enhancements, together with enhancements based on the defendant's culpable state of mind, would help provide an appropriate range of punishment for the wide range of conduct that falls under the misdemeanor provisions of the FDCA.

**Conclusion**

For the above reasons, FDA believes that the guidelines applicable to FDCA offenses should be amended to establish offense levels that reflect the serious nature of the conduct, promote deterrence, and address offenses with differing levels of culpability and disregard for the public health. At the Commission's request, FDA will provide any assistance and input to help draft appropriate amendments. If you have any questions regarding this matter, please contact Associate Chief Counsel Sarah Hawkins by telephone at (301) 827-1130 or by e-mail at sarah.hawkins@fda.gov.

Sincerely,

Lester M. Crawford, D.V.M., Ph.D.
Acting Commissioner of Food and Drugs

cc: John M. Taylor, III, Associate Commissioner for Regulatory Affairs, FDA
Terry Vermillion, Director, Office of Criminal Investigations, FDA
Sarah Hawkins, Associate Chief Counsel, FDA
Jonathan Wroblewski, Office of Policy and Legislation, DOJ
Eugene Thirolf, Office of Consumer Litigation, DOJ

Doc: Linda\Lcourlander - Sentencing

Drafted: Shawkins
Cleared: Dtroy, Jtaylor, ASachdev
Edits: Lhuntington
Cleared: Shawkins 7-16-04

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

September 1, 2006

United States Sentencing Commission
ATTN: Public Affairs-Priorities Comment
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Sir or Madam:

This letter responds to the Federal Register notice, dated August 4, 2006, which sought comments on priority policy issues for the Federal sentencing guidelines (Guidelines). As discussed below, this letter requests a modification of the definition of the term "loss" in the Guidelines in order to promote prosecution of fraud that occurs in connection with obtaining certain governmental contracts.

*Statement of the Issue*

Congress established in section 15(g) of the Small Business Act the goal that 23% of all Federal government contracts be awarded to small businesses. 15 U.S.C. § 644(g). In setting this objective, Congress has advised as follows:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government ... be placed with small-business enterprises ... to maintain and strengthen the overall economy of the Nation. [15 U.S.C. § 631(2)(a) (emphasis added)].

In addition, the Small Business Act states that "the power to let Federal contracts ... can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital." 15 U.S.C. § 631(2)(d)(1)(v). Thus, Congress also established goals in section 15(g) of the Act that certain percentages of government contracts be awarded to women-owned businesses, minority-owned businesses and other disadvantaged businesses.

As a result, a large number of government contracts are reserved only for small businesses or disadvantaged businesses. However, there are numerous occasions when companies fraudulently obtain these set-aside contracts by misrepresenting that they meet the

criteria established by Small Business Administration (SBA) to be a small or disadvantaged business. These misrepresentations not only deprive contracting opportunities for legitimate small or disadvantaged businesses, they also undercut the national priorities reflected in the above-quoted statutory language. Although the SBA Inspector General has vigorously investigated this type of fraud and referred a number of cases for prosecution, many Federal prosecutors are reluctant to accept these cases because of the perception that the Government has not experienced any financial loss. If the company that misrepresented its status performs the contract satisfactorily, as is often the case, the Government has obtained the goods and services that it bargained for.

The SBA Office of Inspector General has discussed this problem with a Federal prosecutor who specializes in procurement fraud. This prosecutor advised that the problem could be alleviated by a change in the Guidelines under the Special Rules for determining loss in Application Note 3(F) of Section 2.B.1.1. Many of the Special Rules in that Note define loss in connection with fraudulent schemes for which it may be difficult to quantify the victim's actual financial loss, but which, nonetheless, cause societal harm. Although it may be similarly difficult to quantify the actual financial loss that results from small business contracting fraud, we believe that such fraud undermines the national priorities identified in the Small Business Act and that a special rule in the Guidelines is needed to enhance prosecution. Therefore, we request a revision of Section 2.B.1.1 of the Guidelines to include the following new Application Note 3(F)(viii):

> (viii) Small and Disadvantaged Business Procurement.--In a case involving a contract with the Federal Government for the procurement of goods or services that is obtained through a fraudulent representation that the defendant was a "small business concern," a "qualified HUBZone small business concern", a "socially and economically disadvantaged small business concern", a "small business concern owned and controlled by women", or a "small business concern owned and controlled by service disabled veterans", as those terms are defined in sections 3 and 8 of the Small Business Act, loss shall include the amount paid for the goods or services, with no credit provided for the value of those goods or services.

*Citations*

15 U.S.C. § 631(2). This section of the Small Business Act explains the rationales for providing preferences in government contracting.

15 U.S.C. § 632. This section of the Small Business Act defines a small business concern and other disadvantaged businesses.

15 U.S.C. § 637. This section of the Small Business Act defines a socially and economically disadvantaged small business concern, and states the policy of the United States to provide maximum practicable opportunities for disadvantaged businesses to perform Federal contracts.

15 U.S.C. § 644(g). This section of the Small Business Act sets forth governmental goals for the award of contracts to small or disadvantaged businesses.

15 U.S.C. § 645(d). This section of the Small Business Act criminalizes misrepresentations of status when competing for contracts set aside for small or disadvantaged businesses.

*Why the Commission Should Make This Issue a Priority*

As discussed above, when government contracts intended to benefit small or disadvantaged businesses are diverted to ineligible contractors through fraud, the legitimate individual businesses that are deprived of these contracting opportunities are not the only victims. This fraud also does considerable harm to national economic policy goals. The proposed addition to the Sentencing Guidelines would give more appropriate weight to the true harm caused by this type of contract fraud and improve the opportunities for prosecution of this fraud. Effective prosecution will serve as a deterrent of future small business contract fraud. Therefore, we respectfully request that you include language like that recommended above in the next revision of the Sentencing Guidelines.

Please do not hesitate to contact Glenn Harris, Counsel to the Inspector General, at 202-205-6862 if there are any questions or if additional information is required.

Sincerely,

Eric M. Thorson
Inspector General

Anthony Mattoccia
Associate Deputy Administrator for
Government Contracting and Business
Development

**From:** <John_Dean@cacp.uscourts.gov>
**To:** <RUSTY@ussc.gov>
**Date:** 8/23/2006 1:49:00 PM
**Subject:** 2X3.1 - Accessory After the Fact

Rusty,

Long time no speak!! How are you doing? I truly don't know where the time has gone!! I'm back doing presentence work after a long stint in supervision. Most glad to be back, no doubt!! In that regard, I wanted to bring something to your attention regarding the 2X3.1 - Accessory after the fact guideline. I believe this guideline needs to be reviewed and consideration given to creating a special category to account for underlying offense conduct that involves the murder of a police officer. Where 2X3.1 has a special section to account for terrorist offenders and their activities, i.e., Section (a)(3)(C), but no such provision exist for street gangs that kill a law enforcement officer. By limiting the upper offense level to 30, as this guideline calls for, the seriousness of the offense and the accessory after the fact conduct of a gang member in support of the gang member who killed the police officer is diminished. In many respects, organized street gangs are nothing more than local terrorist who pose significant, ongoing threats against the community but especially towards law enforcement personnel who attempt to stop organized street gangs' drug, weapons, intimidation, assault, and murder activities. Well, I hope this guideline will get some reconsideration as it applies to law enforcement personnel.

Take care and all the best.

PS. I was going to tell you a joke with this email, but then I thought perhaps I'll just tell you in person when I see you one of these days!!

John B. Dean
U. S. Probation Office
Los Angeles - Presentence
213.894.7577

**From:** <Tim_Searcy@tnmp.uscourts.gov>
**To:** <pubaffairs@ussc.gov>
**Date:** 8/24/2006 12:36:22 PM
**Subject:** Suggestion for Consideration - Simplification of Scoring Criminal Histories

As opportunities allow for additional changes to be considered, especially in the area of simplification, here is an idea for the scoring of criminal histories.
We experience a lot of wasted time in trying to decipher local and state judgments that frequently are silent or insufficient to make a clear scoring decisions. Examples include sentences expressed in percentages, judgements entered as "time served" with no other information, and cumulative confusion caused by circular revocations/sanctions of supervision etc.

So here is my idea:

Score all felony "crimes of violence" and "drug trafficking offenses" -- 3 points. [Use same definitions at 4B1.2].

Score all other felonies -- 2 points.

Score all misdemeanor convictions -- 1 point.

This is an area that needs dramatic simplification. A lot of wasted energy in time and resources could be saved. Secondly, I believe this simplification procedure would dramatically reduce disparities in sentence differences across state and local jurisdictions. Thanks again for all you do!

Tim Searcy
Senior U.S. Probation Officer

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AMERICAN BAR ASSOCIATION

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July 12, 2006

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Proposed Amendments to the Sentencing Guidelines: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write in response to the Commission's request for comments on the proposed policy statement submitted to Congress on May 1, 2006, for reduction of a term of imprisonment in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

On March 15 of this year we testified before the Commission on this proposed policy statement, and pointed out that it did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, at the invitation of Judge Castillo, on March 28 we submitted proposed language for a policy statement describing specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and giving specific examples of situations where these criteria might apply. Our March 28 submission would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

The Commission now has requested specific suggestions for appropriate criteria and examples of extraordinary and compelling reasons for reduction of a term of imprisonment, as well as guidance regarding the extent of any such reduction and modifications to a term of supervised release.

We stand by the proposed criteria and examples in our March 28 submission, which we believe would appropriately implement the congressional mandate to the Commission in 28 U.S.C. § 994t. We incorporate herein the contents of both the March 15 testimony and the March 28 letter, which are attached. We underscore the concern, expressed in both documents, that Congress intended the Commission to develop detailed general

policy guidance for courts considering motions under § 3582(c)(1)(A)(i), and courts to make independent judgments pursuant to this policy, rather than simply to defer to case-by-case decision-making by the Bureau of Prisons, as contemplated in the Commission's May 1 policy statement.

The only issue on which the ABA has not in the past expressed a position is the extent of any sentence reduction authorized by § 3582(c)(1)(A)(i), and the court's authority to modify a term of supervised release. We believe that Congress intended a court to have discretion under this section to reduce a term of imprisonment to whatever term it deems appropriate in light of the particular reasons put forward for the reduction. For example, it would be appropriate for a court to reduce a term of imprisonment to time served where sentence reduction is sought because the prisoner is close to death. (It appears that reduction to time served is ordinarily what is sought in a BOP motion, since almost all of the cases it has brought over the past 20 years involve imminent death.) On the other hand, where reduction of sentence is sought on grounds of, *e.g.*, disparity or undue severity, or a change in the law not made retroactive, it would be appropriate for the court to be guided by the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner.*

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

We have revised the policy statement submitted with our March 28 letter to add a new provision on the scope of the court's sentence reduction authority, and on its power to substitute a period of supervised release for the unserved portion of the prison term. We have also made several additional revisions in light of comments received from members of the Practitioners Advisory Group, the Federal Defenders, and other interested practitioner groups. The amended policy statement, dated July 12, 2006, is attached hereto.

I also reiterate comments made in our March 15 testimony about the limits of a court's authority under this statute, to allay concerns that it could undercut the core values of certainty and finality in sentencing embodied in the federal sentencing guidelines scheme. The court's jurisdiction under § 3582(c)(1)(A)(i) is entirely dependent upon the government's decision to file a motion. We believe that the government can be counted

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* *Cf. U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978) (federal prisoner's sentence reduced under predecessor statute to minimum term because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977) (sentence reduced to time served because of exceptional adjustment in prison).

upon to take a careful course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling, and that Congress plainly intended the sentencing court to have authority to respond to such a recommendation. Indeed, the government may find it useful to have specific guidance from the Commission about the options for making a mid-course correction where the term of imprisonment originally imposed appears unduly harsh or unjust in light of changed circumstances. We are confident that BOP's decision to file a motion with the court will be informed not just by its perspective as jailer, but also by the broader perspective of the Justice Department of which it is a part.**

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

Respectfully submitted,

Robert D. Evans

Robert D. Evans

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

*Revised 7/12/06*

# American Bar Association

*Proposed Policy Statement*

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

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

(1) either –

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

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

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

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

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

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

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

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.

(c) When a term of imprisonment is reduced by the court pursuant to the authority

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

Commentary

Application Note:

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

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

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

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

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

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

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

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

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

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

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

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

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

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Pursuing Justice

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March 28, 2006

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Proposed Amendments to the Sentencing Guidelines: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to amplify our March 15 testimony on policy for sentence reduction in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).[1] In our testimony we noted that the Commission's proposed guidelines amendments on this subject did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, Judge Castillo invited us to submit specific language for the Commission's consideration, and we are pleased to do so.[2]

As noted in our March 15 testimony, the ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to

[1] In addition to this comment letter, the ABA is submitting a second, separate statement on the issue of "Chapter Eight – Privilege Waiver" in response to the Commission's request for comments pursuant to the Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006, published at 71 Fed. Reg. 4782-4804 (January 27, 2006).

[2] The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). While our proposed policy statement includes a provision referring to subsection (ii) cases, this provision is copied verbatim from the Commission's proposed policy statement. We assume that any expansion of the authority in subsection (ii) to non-three-strikes cases, as suggested by the Commission in its request for comment, would necessarily have to rely on some statutory ground other than subsection (ii) itself.

"develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate." In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence "in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering." It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to "promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances."

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act, contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons ("BOP"), reduce a prisoner's sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court's authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find that "extraordinary and compelling reasons" justify such a reduction. As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The only normative limitation imposed on the Commission by § 994(t) is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

The Commission's proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed policy reiterates the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. However, it does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i) and because it contemplates

that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission.

We believe the text of § 994(t) requires the Commission to develop general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than to defer to case-by-case decision-making by the BOP. We also believe that a sentencing court must make an independent determination as to whether sentence reduction is warranted in a particular case.

To assist the Commission in carrying out the mandate of § 994(t), and in response to Judge Castillo's invitation, we have drafted language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply. Our proposed policy statement would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

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

We then propose, as part of an application note, eight specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner's ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher

sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant's minor children; or 8) where the defendant's rehabilitation while in prison has been extraordinary. We propose further that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

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

Respectfully submitted,

Robert D. Evans

# American Bar Association

*Proposed Policy Statement*

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

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

(1) either –

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

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

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

(3) the reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

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

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

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

(3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant's offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and, the change in the law has not been made generally retroactive so as to fall under 18 U.S.C. § 3582(c)(2).

Commentary

Application Note:

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

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

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

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

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

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

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

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

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

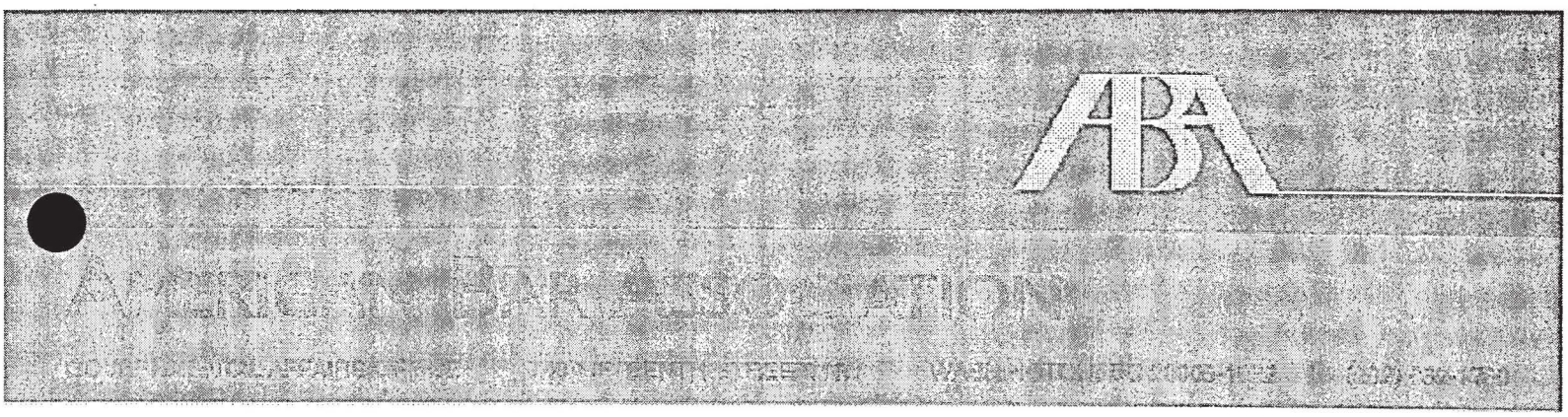
(h) the defendant's rehabilitation while in prison has been extraordinary.

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

3) "Extraordinary and compelling reasons" may warrant sentence reduction

without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

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



**Margaret Colgate Love**

On behalf of the

**American Bar Association**

Before the

United States Sentencing Commission

Washington, D.C.
March 15, 2006

on

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

Mr. Chairman and Members of the Commission:

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

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

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

## I. ABA Policy

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

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

## II. The Commission's Proposed Policy Statement

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

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

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

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

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

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

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

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

## III. Criteria and Examples

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

### A. Criteria

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

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

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

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

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

[3] See the proposal for policy guidance from Families Against Mandatory Minimums published as an exhibit to Mary Price, "The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)," 13 Fed. Sent. Rptr. 188, 191 (2001)("An 'extraordinary and compelling reason' may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.").

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

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

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