United States
Sentencing Commission

Practitioners Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

July 15, 2013

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

RE: Response to Request for Comment on Proposed Priorities

Dear Judge Saris:

On behalf of the Practitioners Advisory Group (PAG), we respectfully submit this letter in response to the Commission's request for comments on possible proposed priorities for the amendment cycle ending May 1, 2014. In this letter, we address the following priorities identified in the Commission's public announcement: (1) statutory mandatory minimum penalties; (2) drug offense guidelines; (4) economic crimes and Section 2B1.1; (6) recidivism; (8) compassionate release under Section 1B1.13; and (12) child pornography offenses.

Priority 1: Statutory Mandatory Minimum Penalties

We applaud the Commission's continued focus on ways to reduce the severity and disproportionality of mandatory minimum penalties. As Justice Breyer powerfully summarized over a decade ago:

> Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. . . . They rarely reflect an effort to achieve sentencing proportionality – a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. . . . They rarely are based upon empirical study. . . .

Harris v. United States, 536 U.S. 545, 570-71 (2002) (concurring opinion), *overruled by Alleyne v. United States*, __ U.S. __ (2013) (noting that mandatory minimums empower the prosecution "to require the judge to impose a higher punishment than he might wish") (citation omitted).

We note as well the more widespread recognition in recent years that the proliferation of statutory mandatory minimums has had far-ranging harmful effects on the criminal justice system. Within just the past few months, legislation with bipartisan support has been introduced in both houses of Congress that would allow federal district judges to sentence below statutory mandatory minimums if the court determines that doing so is needed to avoid violating 18 U.S.C. Sec. 3553(a) (setting forth the goals and considerations relating to punishment). *See, e.g.,* The Justice Safety Valve Act of 2013, S. 619.

The PAG has consistently opposed the proliferation and severity of punishments imposed by mandatory minimums. We applauded the Commission's 2011 Report to the Congress on Mandatory Minimum Criminal Penalties in the Federal Criminal Justice System, and we continue to support many of the Recommendations to Congress set forth in the Report. Among other things, the PAG continues to support broadening the availability of the safety valve beyond the drug context, and supports efforts such as the Justice Safety Valve Act that we believe would represent a dramatic improvement in the current sentencing regime.

While certain important changes can only come from Congress, one significant aspect of mandatory minimums that we believe can be addressed by the Commission is expanding the availability of the current version of the safety valve. Specifically, we again suggest as a priority that the Manual be amended to ensure that *all* defendants receive the protection provided under Section 1B1.8 when they endeavor to comply with the safety valve's requirement that "not later than the time of the sentencing hearing, the defendant has truthfully provided the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." § 5C1.2(a)(5).

As currently drafted, the Manual leaves to the government the power to invoke Section 1B1.8's protection against the adverse use of information that a defendant discloses in his or her effort to provide the government, in a truthful manner, all information and evidence that was part of relevant conduct. That is, the safety valve provision creates the default that information disclosed in an effort to qualify for the safety valve "may be considered in determining the applicable guideline range," with an exception "where the use of such information is restricted under the provisions of §1B1.8 (use of certain information)." Because "subsection (a)(5) does not provide an independent basis for restricting the use of information disclosed by the defendant," the defendant is unprotected unless the government has made available to the defendant an "agree[ment] to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant."

As private practitioners, we and our colleagues know of many instances where a defendant is willing to tell everything he or she knows about the offense and all relevant conduct, yet the government is not interested in pursuing a cooperation agreement. For example, the government may learn through an attorney proffer that the defendant was only a bit player in a conspiracy who knows too little to be in a position to provide what would qualify as substantial assistance in the investigation or prosecution of another. Or the government may not believe it needs an additional witness to prove what the defendant knows. Thus, the government may have no motivation to offer the Section 1B1.8 protections found in a typical cooperation agreement in the very cases where a safety valve was intended: a defendant who is willing and able to tell all that he or she knows but will be unable to qualify for a substantial assistance departure. This problem could be avoided by amending the safety valve commentary to include the protections of Section 1B1.8 in any case where the defendant attempts in good faith to satisfy the requirement of Section 5C1.2(a)(5).

Priority 2: Drug Offense Guidelines

The PAG supports the Commission's decision to consider a possible amendment to the Drug Quantity Table in Section 2D1.1 across drug types. As PAG has explained previously, the drug guidelines—with their heavy emphasis on drug amount—do a poor job of achieving proportionality among the different levels of culpability in drug cases. And they can lead to recommended sentence ranges that are significantly higher than those for persons of comparable culpability in non-drug cases. We look forward to working with the Commission on this and other ideas for reforming the drug guidelines.

Priority 4: Economic Crimes and Section 2B1.1

The PAG continues to believe that Section 2B1.1 (Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, and Offenses Involving Fraud or Deceit) is in need of significant revision. We urge the Commission to complete its comprehensive review of Section 2B1.1 and related economic crime guidelines with an eye ultimately to a substantial overhaul of that Section.

Section 2B1.1's skewed emphasis on loss amount and that Section's multiple and overlapping upward offense level enhancements for specific offense characteristics – many of which can be imposed on a strict liability basis without regard to a defendant's knowledge or intent – too often result in unduly severe guidelines ranges that do <u>not</u>:

(a) fairly or accurately measure a defendant's culpability or seriousness of the offense or, conversely, mitigating factors;

(b) take fully into account existing empirical research or the experience of sentencing judges; and, as a result,

(c) further the objectives of affording just punishment, adequate deterrence and protection of the public from further crimes of the defendant.

As sentencing judges and respected commentators have noted: (a) while the amount of fraud "loss" is the driver of the offense level for offenders, loss is a highly imperfect measure of the seriousness of the offense;[1] and (b) the specific offense characteristics itemized in Section 2B1.1 yield a "false precision" because they are "closely correlated" – both with each other and with loss – thereby giving independent weight to factors for which loss was already a proxy and disproportionately increasing Guideline ranges.[2]

The PAG continues to believe that sentencing ranges generated by application of the current version of Guideline Section 2B1.1 – the result of a steady ratcheting up since 1989 – do not reflect accurately either the empirical data or national experience.[3] Empirical research regarding white collar offenders shows little or no difference between the deterrent effect of

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[1] *See, e.g., United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing "the inordinate emphasis that the Sentencing Guidelines place in fraud on the amount of actual or intended financial loss" without any explanation of "why it is appropriate to accord such huge weight to [this] factor[ ]"); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 427-28 (S.D.N.Y. 2004) (The amount of loss is often "a kind of accident" and thus "a relatively weak indicator of [ ] moral seriousness . . . or the need for deterrence.").

[2] *See* Frank O. Bowman III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 Fed. Sent. R. 167, 170, 2008 WL 2201039, at *6-7 (Feb. 2008) (Any case involving a corporate officer and a multimillion-dollar fraud will almost always trigger application of multiple offense-level enhancements that have the effect of punishing the defendant over and over for the same basic thing – conducting a big fraud in a corporate setting."); *see also* Samuel W. Buell, *Overlapping Jurisdictions, Overlapping Crimes: Reforming Punishment of Financial Reporting Fraud*, 28 Cardozo L. Rev. 1611, 1648- 49 (2007) (factors such as sophisticated means and large number of victims "double-count because they are captured by other enhancements or by the loss calculation."); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011) ("the loss table often overstates the actual harm suffered by the victim," and "[m]ultiple, overlapping enhancements also have the effect of 'double counting' in some cases," while "the guidelines fail to take into account important mitigating offense and offender characteristics."); Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985, at *11 (1999) ("false precision").

[3] *Compare* U.S.S.G., Ch. 1, intro., pt. 4(d) (1987) (Regarding the economic crimes guideline, the U.S.S.C. explained in 1987 that "the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.").

probation and that of imprisonment.[4] The Commission's own research on recidivism indicates recidivism rates decline relatively consistently as age increases. Among all offenders under age 21, the recidivism rate is 35.5 percent, but offenders over age 50 have a recidivism rate of 9.5 percent. Similar findings apply to defendants with no criminal history, greater education and prior stable employment.[5] Of course many of these attributes are common to large numbers of white collar offenders.[6]

Feedback from sentencing judges – institutional actors who are very well situated to evaluate the usefulness of a sentencing Guideline – shows that in fiscal year 2012, sentences *below the Guideline range* were imposed in almost half of all cases (47.2%) in which the primary sentencing Guideline was Section 2B1.1 (22% were government-sponsored, 25.2% were non-government sponsored).[7] This suggests that a significant portion of the District Court bench sees a disconnect between the sentences prescribed by Section 2B1.1 and the fundamental requirement of Section 3553(a) to impose sentences that are 'sufficient, but not greater than necessary' to comply with its objectives." As for national experience, many courts have recognized the problem of multiple overlapping specific offense characteristics and have granted departures or variances to correct for that problem.[8]

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[4] *See* David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 Criminology 587 (1995). "[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders." Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007); *see generally* Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* 1 (2010) available at http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf.

[5] U.S.S.C., *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* at 10, Exh. 9 (May 2004).

[6] U.S.S.C., *2012 Sourcebook of Federal Sentencing Statistics* at Tables 6 (age: 50.4% of fraud offenders are over age 40), 8 (education: 54% of fraud offenders have "some college" education).

[7] U.S.S.C., *2012 Sourcebook of Federal Sentencing Statistics* at Table 28. By contrast, sentences above the Guideline range occurred in only 2.3% of cases for which the primary sentencing Guideline was Section 2B1.1.

[8] *See, e.g.*, *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004) (subsequently vacated in light of *Booker*) (upholding departure to mitigate effect of "substantially overlapping 39 enhancements" at the high end of the fraud sentencing table); *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008) (guidelines in security fraud cases "are patently absurd on their face" due to the "piling on of points" under § 2B1.1); *United States v. Adelson*, 441 F. Supp. 2d 506, 510 (S.D.N.Y. 2006) (guidelines in fraud cases have "so run amok that they are patently absurd on their face," and describing enhancement

The PAG urges the Commission to explore amendments that would expressly incorporate into the economic crimes guidelines factors that would prevent overreliance on loss, such as motivation(s) for committing the crime, the extent to which the offender personally profited or intended to gain from the crime, the offender's level of participation in, and knowledge of, the scheme, and the nature and extent of actual impact on actual victims.

In our experience there are still too many cases where 2B1.1's focus on both the magnitude of a fraud (loss table) and some of its methods (SOCs) result in piling on or double counting. We continue to believe that the Commission can achieve substantial benefits by providing sentencing courts with further guidance on how to avoid unduly harsh results from a mechanical application of Section 2B1.1.

Priority 6: Recidivism

The Commission's proposed priorities include a "continuation of its comprehensive, multi-year study of recidivism." The PAG continues to support this essential priority, which will provide valuable data and opportunities to reduce the human and financial costs associated with recidivism and overuse of incarceration.

As the Commission itself has recognized, "the appeal of alternatives to incarceration has continued to increase in the wake of reports of the ever-growing prison population."[9] In recent years, criminal justice stakeholders from across the federal system – judges, prosecutors, defenders, pretrial services officers, and probation officers – have collaborated to identify factors that correlate with recidivism and have worked together to develop and expand alternatives to incarceration that are premised, in part, on reduced likelihood of recidivism. Some of these programs exist at the "front-end" of the process: after pleading guilty to certain less serious offenses, certain eligible offenders may avoid jail time by completing programs that involve counseling in the areas of substance abuse, anger management, and employment opportunities. After successfully completing these programs, graduating defendants may be permitted to withdraw their guilty pleas and avoid serving a prison sentence. Other programs exist at the "back-end," such as allowing participants to receive early termination from supervised release by completing an intensive program of counseling and treatment.

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for "250 victims or more," along with others, as "represent[ing], instead, the kind of 'piling-on' of points for which the guidelines have frequently been criticized").

[9] *See* United States Sentencing Commission, "Alternative Sentencing in the Federal Criminal Justice System" (2009) [hereinafter "Alternative Sentencing"], http://www.ussc.gov/Research/Research_Projects/Alternatives/20090206_Alternatives.pdf. The Commission's past work in analyzing alternatives to incarceration makes the Commission well suited to study different options for different offenders.

The Commission's ongoing study will provide important guidance to criminal justice stakeholders as they design and implement both types of programs: so-called "diversion" programs and reentry. Particularly crucial will be the Commission's empirical data regarding the efficacy of the various design features of these programs: the appropriate eligibility criteria for offenders; the optimal mix of sanctions; and the optimal type and level of involvement of court personnel, probation officers, and treatment providers. The PAG also continues to encourage the Commission to study and report on federal and state[10] programs already in place that provide for pretrial diversion or deferred adjudication; for example, the "Federal First Offender Act," 18 U.S.C. § 3607(a), authorizes a disposition of prejudgment probation for misdemeanor drug possessors who have no prior drug convictions. The Commission's study will assist in determining whether Congress should expand the authority in § 3607(a) to additional offenses and will inform the design of other deferred adjudication programs around the country.

In this same vein, the Commission should also consider the impact on recidivism of collateral consequences from a criminal conviction. Though several states have recently pioneered methods of relief from collateral consequences,[11] the federal system continues to lack judicial mechanisms for post-conviction relief, such as expungement, sealing, or reducing absolute barriers to employment. In the PAG's experience, access to employment and housing are the best predictors of successful reentry, and unemployment and homelessness dramatically increase the likelihood of a return to crime. The PAG therefore encourages the Commission to study and report on post-sentence relief mechanisms in the federal system.

Finally, as the PAG noted last year, alternatives to incarceration are effective only when viewed as actual alternatives in fact. In the past, the Commission has noted that a significant percentage of offenders in Zones A and B do not receive the non-custodial sentences for which they are eligible.[12] We encourage the Commission to address this phenomenon by updating its

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[10] *See* Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT'G. REP. 6 (2009) (Nineteen states authorize expungement or sealing of the entire case record following successful completion of probation where judgment has been deferred, and another six states authorize withdrawal of the guilty plea and dismissal of the charges upon successful completion of a period of probation, but make no provision for expungement or sealing). Since this article was written, several more states have implemented deferred adjudication mechanisms.

[11] *See* National Employment Law Project, "State Reforms Promoting Employment of People With Criminal Records: 2010-2011 Legislative Round-Up" (December 2011), http://www.nelp.org/page/-/SCLP/2011/PromotingEmploymentofPeoplewithCriminalRecords.pdf?nocdn=1.

[12] *See* Alternative Sentencing at 3 (noting that federal courts most often impose prison for offenders in each of the sentencing table zones "[d]espite the availability of alternative sentencing options for nearly one-fourth of federal offenders").

prior research[13] on the use of alternatives to incarceration. This study should account for the disparate outcomes correlated with citizenship status, as well as the effect of offense type, offender characteristics, and criminal history. In the PAG's experience, district judges are not always aware of the many options available to them when sentencing Zone A and Zone B offenders, or do not regard those options as meaningful. The Commission ought to consider avenues, including language in the Guideline Manual, for educating district courts about the availability of programs and the circumstances in which non-custodial sentences for Zone A and B offenders are appropriate. Commentary reminding judges that non-custodial sentences for those in Zones A and B may often be "sufficient, but not greater than necessary" to achieve the purposes of sentencing would constitute an easy first step toward reducing federal prison overcrowding and wasteful incarceration of offenders for whom incarceration increases the risk of recidivism.

Priority 8: Reduction in Term of Imprisonment under Section 1B1.13

The PAG urges the Commission to adopt as a priority potential amendments to U.S.S.G. § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), to give additional guidance to courts and to the Bureau of Prisons considering prisoner requests for sentence reduction under 18 U.S. C. § 3582(c)(1)(A)(i). Despite the dramatic increase in the federal prison population in the past 20 years, the number of motions filed each year under this authority has remained relatively constant.[14] Even the promulgation of 1B1.13 in 2006 and its substantial amendment in 2007 appear to have had little or no effect so far on the number or type of actions taken under this early release authority, one of the few in federal sentencing law. This is largely because the Bureau of Prisons has been unwilling to file the motion necessary to trigger the court's jurisdiction unless a prisoner is terminally ill and within months of death, or severely and permanently incapacitated.[15] In this regard, BOP has refused to recognize or utilize the broader range of medical and non-medical circumstances set forth in

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[13] *See generally id.*

[14] The number of motions for sentence reduction under § 3582(c)(1)(A)(i) filed each year between 1992 and 2012 is set forth in *The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons* 35 (Human Rights Watch and Families Against Mandatory Minimums, 2012), http://www.hrw.org/reports/2012/11/30/answer-no.

[15] *See The Answer is No, supra* at 32-35. A recent report of the DOJ Inspector General found that BOP's administrative process is so cumbersome and confusing that many cases meeting its stringent criteria are never brought to the court's attention. *See* Office of the Inspector General, U.S. Department of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* 53 (April 2013) ("[T]he existing BOP compassionate release program is poorly managed and . . . its inconsistent and ad hoc implementation has likely resulted in potentially eligible inmates not being considered for release. It has also likely resulted in terminally ill inmates dying before their requests for compassionate release were decided.")

1B1.13, adhering instead to the cramped interpretation of its authority that informed its practices prior to 2006.[16]

The PAG believes that BOP's narrow interpretation and limited exercise of its authority under § 3582(c)(1)(A)(i) have frustrated Congress' intent to make courts primarily responsible for deciding whether to reduce a prisoner's sentence for "extraordinary and compelling reasons."[17] The Inspector General of the Justice Department has recently criticized BOP's administration of the statute as lacking clear standards, and urged its expansion.[18] The fact that some courts have granted relief to prisoners even without a BOP motion (despite jurisdictional limits on their authority to do so), underscores the need for the Commission to act.[19]

The PAG believes that while BOP has operational responsibility for bringing eligible cases to court for decision, this cannot mean that BOP is free to adopt an administrative policy that forecloses a court's consideration, on a categorical basis, of a wide variety of situations that the Commission itself has determined may present "extraordinary and compelling reasons." The

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[16] *See The Answer is No, supra* at 27 (BOP officials assert that USSC policy is "not binding on them," and that "DOJ is unwilling to accept as grounds for compassionate release the breadth of circumstances that the USSC accepts"). In commenting on the Commission's proposed revision of 1B1.13 in 2006, the Department of Justice explained that BOP's policy was to seek sentence reduction only where a prisoner "has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the [prisoner's] ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others." Letter from Michael Elston, Senior Counsel to the Assistant Attorney General, U.S. Department of Justice, to Ricardo Hinojosa, Chair, U.S. Sentencing Commission, July 14, 2006, reprinted in the Appendix to *The Answer is No, supra*. The 2006 Elston letter warned the Commission against adopting any policy inconsistent with BOP's narrow interpretation of its authority: "At best, such an excess of permissiveness in the policy statement would be a dead letter, because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies." It seems that efforts by BOP since 2006 to draft a less restrictive policy on sentence reduction under § 3582(c)(1)(A)(i) have been vetoed by the Department of Justice. *See The Answer is No, supra* at 23, 27.

[17] With rare exceptions, a prisoner who has sought to file sentence reduction motions directly with the court has been turned away based on the government's argument that courts lack authority to reduce a sentence absent a motion from BOP. *See The Answer is No* at 68-74.

[18] *See* Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program, supra* at i (April 2013) ("BOP does not have clear standards on when compassionate release is warranted, resulting in ad hoc decision making," and it should consider "expanding the use of the compassionate release program . . . to cover both medical and non-medical conditions for inmates who do not present a threat to the community and who present a minimal risk of recidivism.").

[19] *See The Answer is No* at 74, n. 205.

development of policy for sentence reduction motions is a responsibility that Congress entrusted to the Commission under § 994(t), not to BOP or the Department of Justice. Just as federal prosecutors are bound to comply with the Commission's lawfully-promulgated policies in connection with imposition of the original sentence, so too the Department and its agencies, including BOP, must comply with the Commission's lawfully promulgated policies in connection with reduction of that sentence. While BOP may interpret Commission policy as it applies in particular cases, it cannot in advance declare entire parts of that policy a "dead letter" and substitute its own policy instead.[20]

We understand that BOP may have recently expanded its interpretation of the medical grounds that may justify seeking a reduction in sentence under 3582(c)(1)(A)(i).[21] Nonetheless, it appears that this new policy remains more restrictive than the medical grounds specified in the Application Notes to 1B1.13. Moreover, it does not address geriatric issues apart from illness and injury, or exigent family circumstances, or any other non-medical "extraordinary and compelling reasons" potentially warranting consideration for sentence reduction. Additional and more specific policy guidance from the Commission should serve to encourage BOP to further broaden its policy in medical cases and to develop a policy in non-medical areas as well, and generally to bring more sentence reduction applications to the courts for decision, rather than effectively deciding their merits itself.

The PAG believes that clarification by the Commission of the general criteria for sentence reduction under § 3582(c)(1)(A)(i) will produce a fairer and more efficient use of this important early release authority. As in 2006, we recommend discussion in 1B1.13 of the basic premise of "changed circumstances" that informs the idea of "extraordinary and compelling

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[20] *See* 2006 Elston letter, *supra* note 16.

[21] *See* memorandum dated April 29, 2013 from the BOP General Counsel to Chief Executive Officers ("Guidance for Use of The Bureau of Prisons' Reduction in Sentence Authority for Medical Cases"). The April 29 memorandum explains that reduction in sentence may be considered for prisoners "who have been diagnosed with a terminal incurable disease whose life expectancy is eighteen (18) months or less," and those who have "an incurable, progressive illness or who have suffered a debilitating injury from which they will not recover."

> For inmates in this category, we will consider a RIS if the inmate is either completely disabled, meaning he or she cannot carry on any self-care and is totally confined to bed or chair, or is capable of only limited self-care and is confined to a bad or chair more than 50% of waking hours. Our review will also consider any cognitive deficit of the inmate.

The April 29 memorandum goes on to explain that the foreseeability requirement in BOP's regulations may not apply where there has been a "significant deterioration" of a prisoner's medical condition or a "recurrence of a disease (otherwise believed cured or in remission)."

reasons."[22] We also recommend making the examples of such reasons in the Application Notes more specific and easier to apply. In particular, we propose separating reasons relating to physical or mental infirmity from reasons relating to advanced age, rather than grouping them in a single paragraph. See ¶ (1)(A)(ii).[23] We also suggest that the Commission reconsider other proposals made by the PAG in 2006 but not adopted, such as allowing consideration of more than one compelling reason in determining eligibility for sentence reduction, including post-sentencing changes in the law and extraordinary rehabilitation while in prison.[24]

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[22] In 2006, we joined with other organizations (including the American Bar Association, the Federal Community and Public Defenders, and Families Against Mandatory Minimums) in proposing 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). *See* Proposed Policy Statement dated July 12, 2006, submitted by the American Bar Association (hereinafter "2006 Proposed Policy Statement").

[23] *See* 2006 Proposed Policy Statement at 1(c)("the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process").

[24] *See* 2006 Proposed Policy Statement at (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.

We note that the Application Notes currently recognize the provision in 28 U.S.C. § 994(t) that "rehabilitation of the defendant alone is not, by itself, an extraordinary and compelling reason." At the same time, § 994(t) also appears to contemplate that rehabilitation may at least be considered as a factor in assessing the totality of a defendant's circumstances, and we therefore suggest that rehabilitation should be listed among the "extraordinary and compelling reasons" set forth in ¶ 1(A) of the Application Notes. We proposed in 2006 that changes in the law should also fall into the category of reasons that by themselves should not be sufficient to constitute "extraordinary and compelling reasons" warranting sentence reduction.

Finally, we suggest that the Commission make clear in Section 1B1.13 that changes in a defendant's circumstances need not have been unforeseen at the time of sentencing.[25] This last point is especially important because judges have been prohibited in many cases under mandatory sentencing provisions from taking into account such compelling circumstances as a defendant's serious illness or disability, or the serious illness or disability of the sole caregiver of a defendant's minor children.[26]

Priority 12: Child Pornography Offenses

The PAG applauds the Commission on its comprehensive work reflected in its report to Congress entitled *Federal Child Pornography Offenses* (the "Report"). The Report will undoubtedly be of enormous assistance to the courts in better understanding the nature of child pornography offenses as well as crafting sentences consistent with the parameters set forth at 18 U.S.C. § 3553(a). As the Report is the first step in what likely will be a fundamental overhaul of Section 2G2.2, and at least some substantive changes to Section 2G2.1, the PAG believes it is of paramount importance for the Commission to give courts and practitioners additional guidance in the interim with respect to these guidelines as it continues to study how best to amend them.

Accordingly, the PAG recommends that the Commission seek emergency amendment authority from Congress to delete Section 2G2.2 until that time the Commission is able to promulgate a new guideline consistent with the findings of the Report and its continuing research and input from academics and legal practitioners. Such a request is consistent with prior Commission action when recommending fundamental changes to a particular guideline. *See,*

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[25] The legislative history of § 3582(c)(1)(A)(i) indicates only that Congress intended the sentence reduction authority to be available whenever there is a "fundamental change" in a prisoner's circumstances, and does not support the further requirement heretofore imposed by BOP that such a change not be foreseen by the court at sentencing. A defendant relatively healthy in the early stages of a disease might have become bedridden in its later stages, just as a defendant relatively fit and healthy when sentenced in his early seventies might have become a geriatric invalid ten years later. We are gratified to see that BOP now appears to recognize this in the April 29, 2013 policy statement described in note 21 supra.

[26] The American Law Institute's revision of the Sentencing Articles of the Model Penal Code may be a useful reference point. *See* Discussion Draft # 2, § 305.7 ("Modification of Prison Sentences in Circumstances of Advanced Age, Physical or Mental Infirmity, Exigent Family Circumstances, or Other Compelling Reasons") (March 25, 2011). The Reporter's Note (pp. 103-109) contains numerous citations to state statutes and policies providing for sentence reduction in the specified circumstances. The ALI declined to interpose a corrections authority as gatekeeper for courts considering compelling cases for sentence reduction based largely on testimony about BOP's administration of 3582(c)(1)(A)(i). *See id*. at 101 ("the Federal Bureau of Prisons has filed so few motions for reduction of sentence as to render the federal compassionate-release provision a virtual nullity").

e.g., U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* at 9 (May 2007)(seeking "emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines" that the Commission had recommended to Congress).

As it stands, the continuing validity of Section 2G2.2, as well as portions of Section 2G2.1, have been called into question by the Report. The Commission noted, after all, that "[t]he current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application." U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* xxi (2012). The Commission has made clear its intent to substantively revise Section 2G2.2.

Thus, it is unclear whether Section 2G2.2, at the very least, still is to be accorded any weight by the Courts, or even be considered. Courts might use the Report to disregard Section 2G2.2 completely, or, as has occurred in at least one reported case, simply disregard selected portions of Section 2G2.2. *See United States v. Abraham*, 2013 U.S. Dist. LEXIS 69151, *20-27 (D. Neb. 2013) (imposing a modified Section 2G2.2 framework based upon the Report: holding that for all future cases, the presumptive base offense level will be 20, the enhancement for use of a computer will never be applied and the enhancement for number of images will be "recalibrate[d] . . . to the realities of today"). Continued application of Section 2G2.2 in its current form, of course, will contribute not only to increase unwarranted sentencing disparity, but also uncertainty in sentencing given that courts now are imposing sentences within the range dictated by Section 2G2.2 a mere 32.3% of the time, which is by far the lowest compliance rate of any major offense category. *See* U.S. Sentencing Comm'n, *2012 Sourcebook of Federal Sentencing Statistics* tbl. 28 (reporting 50.5% within guideline sentences under § 2B1.1, 42.4% under § 2D1.1, 50.5% under § 2B1.1, 61% under § 2K2.1, and 54.5% under § 2L1.2).

That the report already is having a significant impact not only on district courts, but on appellate courts, is evident. *See, e.g.*, *United States v. Robinson*, 714 F.3d 466, 468 (7th Cir. 2013) (referencing the Report in support of finding that distribution enhancement requires proof defendant knew files could be downloaded by others). Thus, the PAG believes the most prudent approach is for the Commission to provide definitive guidance to the Courts by removing Section 2G2.2 in its current iteration as soon as practicable via emergency amendment authority. Such an action will make it clear to the Courts and practitioners that Section 2G2.2 is in the process of being overhauled, and that the (current) iteration of that guideline no longer is effective. *See, e.g.*, U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* at 9 (May 2007) ("Emergency amendment authority would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.").

In the interim, Courts will be able to sentence child pornography offenses as if no such guideline existed pursuant to Section 2X5.1. This approach, after all, is most consistent with the very purpose of the Report inasmuch as "most stakeholders in the federal criminal justice system

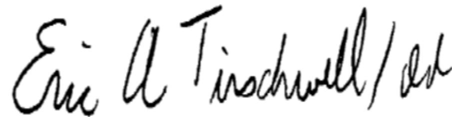
consider the non-production child pornography sentencing scheme to be seriously outmoded." U.S. Sentencing Comm'n, *Report to Congress: Federal Child Pornography Offenses* iii (2012).

Finally, the PAG encourages the Commission to hold regional hearings on child pornography offenses and sentencing considerations. Live testimony from stakeholders in various regions of the country will greatly assist the Commission in obtaining the most useful evidence and commentary as it continues its important work in revising and re-promulgating a new guideline for non-production child pornography offenses.

CONCLUSION

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

Sincerely,



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