

**Testimony Before The United States Sentencing Commission**

**February 17, 2016**

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

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

### **1. Background**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>8</sup> The Commission’s policy-making authority under §§ 994(a)(2) and 994(t) is discussed at pp. 13-15 *infra*.

<sup>9</sup> It is true that the Justice Department has in the past been resistant to this Commission’s policy-making authority. *See* Elston letter, *supra* note 4 (stating that because Congress gave BOP the power to control which particular cases will be brought to a court’s attention, “it would be senseless [for the Commission] to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them.”). At the same time, as former Commissioner John Steer wrote in a 2001 article, “Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section.” *See* John R. Steer & Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT’G REP. 154, 157 (2001). One example of the Justice Department following the Commission’s lead is its 2013 endorsement of exigent family circumstances in the 2013 revision of the BOP program statement (though we know of no case in which this criterion has provided a basis for relief).

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

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

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

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<sup>10</sup> S. Rep. Sen. Rep. 98-225 at 121 (98th Cong., 1st Sess.) (1984).

<sup>11</sup> *Id.* at 55.

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

<sup>13</sup> *Id.* at 179.

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

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

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

<sup>15</sup> Current § 1B1.13 defines a “permanent physical or medical condition” warranting sentence reduction as one that “substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.” See Application Notes, (A)(ii). In contrast, the BOP program statement requires that eligibility for sentence reduction based on “debilitated medical condition” requires an individual to be “completely disabled” and “totally confined to a bed or chair” or “confined to a bed or chair more than 50% of waking hours.” See BOP PROGRAM STATEMENT 5050.49, *supra* note 6, at § 3(b).

<sup>16</sup> See notes 6 and 7, *supra*.

anything, the statutory scheme would seem to require BOP's program statement to track the Commission's policy, rather than vice versa.<sup>17</sup>

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

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

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

#### **a. Illness and disability**

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

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<sup>17</sup> See note 9, *supra*.

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

<sup>19</sup> We suggest that "terminal illness" replace "terminal, incurable disease," since "incurable" seems redundant and "disease" seems at least unduly limiting if not inapt.



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

#### **b. Age-related reasons**

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

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

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<sup>20</sup> We suggest that the definition in (IV) would seem to cover the territory, since “deteriorating mental or physical health related to the aging process” ought to include a “chronic or serious medical condition related to the aging process.”

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

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

**c. Exigent family circumstances**

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

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

We see no need for a definition of “incapacitation” in connection with (vi). For (vii) we recommend that the definition be simplified, and based upon Medicaid’s functional eligibility criteria for long-term care.<sup>22</sup>

**d. Rehabilitation**

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

**e. Other changed circumstances warranting sentence reduction**

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

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<sup>22</sup> Based on the Medicaid criteria, we propose the following definition:

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

*See Functional Requirements*, LONGTERMCARE.GOV, <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements> (last visited Feb. 8, 2016); Marshall E. Kelley & Susan M. Tucker, *Elements of a Functional Assessment for Medicaid Personal Care Services*, CLASS TECHNICAL ASSISTANCE BRIEF SERIES, Spring 2011, No. 5 (The Scan Foundation), available at [http://www.thescanfoundation.org/sites/default/files/TSF\\_CLASS\\_TA\\_No\\_5\\_Medicaid\\_Assessment\\_FINAL.pdf](http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FINAL.pdf).

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

**f. Foreseeability**

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

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

<sup>24</sup> We recommend the following as a new 1.(C):

“Extraordinary and compelling reasons” may be found where the defendant’s circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant’s confinement, without regard to whether the changes could have been anticipated by the court at sentencing.

#### **4. The Inspector General's Report on Aging Prisoners**

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

#### **5. Commission Authority in Sentence Reduction Matters**

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

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

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

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

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

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<sup>26</sup> See note 12, *supra*.

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

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

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

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<sup>27</sup> See notes 6 and 7, *supra*.

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

Proposed Amendment:

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

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment ~~(and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment)~~ if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

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

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

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

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

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

*Commentary*

*Application Notes:*

*1. Application of Subdivision (1)(A)*



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

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

~~(ii) The defendant has an incurable, progressive illness~~

~~(iii) The defendant has suffered a debilitating injury from which he or she will not recover.~~

~~(iv) The defendant meets the following criteria—~~

~~(I) the defendant is at least 65 years old;~~

~~(II) the defendant has served at least 50 percent of his or her sentence;~~

~~(III) the defendant suffers from a chronic or serious medical condition related to the aging process;~~

~~(IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and~~

~~(V) conventional treatment promises no substantial improvement to the defendant's mental health or physical condition.~~

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

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

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

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

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

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

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

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

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

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

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

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

(B)- “Extraordinary and compelling reasons” sufficient to warrant a sentence reduction exist whenever the defendant’s circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant’s confinement, without regard to whether the changes could have been anticipated by the court at sentencing

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

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\* See <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements/>;  
[http://www.thescanfoundation.org/sites/default/files/TSF\\_CLASS\\_TA\\_No\\_5\\_Medicaid\\_Assessment\\_FIN\\_AL.pdf](http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FIN_AL.pdf).

(C) “Extraordinary and compelling reasons” sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; provided rehabilitation of the defendant alone shall not constitute an “extraordinary and compelling reason” warranting sentence reduction pursuant to this section.

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

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

Background: The Commission is authorized by 28 U.S.C. § 994(a)(2) to develop policy for sentence reduction under § 3582(c)(1)(A), and in doing so to “describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples.” See 28 U.S.C. § 994(t). This section provides that “rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.” This policy statement implements 28 U.S.C. §§ 994(a)(2) and (t).

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

Proposed Amendment:

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

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

- (a) (1) (A) extraordinary and compelling reasons warrant the reduction; or
    - (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;
  - (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
  - (3) the reduction is consistent with this policy statement.
- (b) When a term of imprisonment is reduced by the court pursuant to the authority in 18 U.S.C. § 3582(c)(1)(A), the court may reduce the term of imprisonment to one it deems appropriate in light of the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner, including to time served. In its discretion, the court may but is not required to impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment, provided that any new term of supervision shall be in addition to the term of supervision imposed by the court in connection with the original sentencing.

*Commentary*

*Application Notes:*

*1. Application of Subdivision (1)(A)*

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

- (i) *The defendant has been diagnosed with a terminal illness and has a life expectancy of 18 months or less.*
- (ii) *The defendant (I) is suffering from a chronic or progressive illness or medical condition, or from a permanent physical or mental disability, or is experiencing deteriorating mental or physical health related to the aging process, that (II) substantially diminishes his or her ability to function in a correctional environment;*
- (iii) *The defendant is at least 65 years old, and has served at least 10 years or 75 percent of his or her sentence.*

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

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

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

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

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

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

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

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\* See <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/functional-requirements/>;  
[http://www.thescanfoundation.org/sites/default/files/TSF\\_CLASS\\_TA\\_No\\_5\\_Medicaid\\_Assessment\\_FIN\\_AL.pdf](http://www.thescanfoundation.org/sites/default/files/TSF_CLASS_TA_No_5_Medicaid_Assessment_FIN_AL.pdf).

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

(B) *"Extraordinary and compelling reasons" sufficient to warrant a sentence reduction exist whenever the defendant's circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant's confinement, without regard to whether the changes could have been anticipated by the court at sentencing*

(C) *"Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; provided rehabilitation of the defendant alone shall not constitute an "extraordinary and compelling reason" warranting sentence reduction pursuant to this section.*

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

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

Background: *The Commission is authorized by 28 U.S.C. § 994(a)(2) to develop policy for sentence reduction under § 3582(c)(1)(A), and in doing so to "describe what should be considered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), including the criteria to be applied and a list of specific examples." See 28 U.S.C. § 994(t). This section provides that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." This policy statement implements 28 U.S.C. §§ 994(a)(2) and (t).*