

April 6, 2007

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

Re: 2007 Proposed Amendments to the Sentencing Guidelines: Sentence
Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)(i)

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write to respond to questions raised by members of the Commission in the course of our March 20 testimony on policy for sentence reduction in cases presenting “extraordinary and compelling reasons” pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). One question relates to the possibility of litigation resulting from adoption of standards and examples; other questions relate to specific examples given in the Application Note section of our proposed USSG § 1B1.13.

Litigation: As Professor Saltzburg acknowledged in his March 20 testimony, it is possible that prisoner lawsuits would result if the Commission adopts policy for sentence reduction motions that is more expansive than that currently followed by the Bureau of Prisons (BOP). He also noted, however, that the possibility of litigation is not an appropriate basis for the Commission’s continued non-compliance with the clear legal mandate of 28 U.S.C. § 994(t). Congress will consider the Commission’s proposed policy before it takes effect. BOP may be persuaded by whatever policy is promulgated by the Commission to bring its own procedures into conformity, a salutary result that would make litigation unnecessary. If BOP resists, however, and if prisoner lawsuits do result, it would alert Congress to the problem, at which point Congress would have an opportunity to decide whether to resolve it through legislation or leave its resolution to the courts.

We would add that the courts are fully capable of managing and deciding any lawsuits that may result. Just recently, the ABA House of Delegates called on Congress to reconsider the contrary conclusion that led to its 1996 enactment of the Prison Litigation Reform Act, legislation that has now been widely criticized as having gone too far in blocking prisoner access to courts.

Moreover, that this particular Justice Department and Bureau of Prisons may resist bringing motions of the sort Congress contemplated is not a sufficient reason for the Commission's failure to comply with the requirements of 28 U.S.C. § 994(t).

Specific Examples: Members of the Commission raised questions about two of the specific examples of “extraordinary and compelling reasons” in our proposed Application Note to USSG § 1B1.13. The examples are where “the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence,” and where “the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive.” The evident concern in both cases was whether, given that both of these situations are addressed in specific provisions of other laws or rules, it is fair to infer that Congress intended courts to address them separately under § 3582(c)(1)(A)(i) as “extraordinary and compelling reasons.”

While we agree that most situations involving assistance to the government and retroactivity can be addressed under other laws or rules, there are some that cannot. In those situations, where relief is not otherwise available, we believe Congress intended the government to be able to invoke the remedial power of courts under § 3582(c)(1)(A)(i).

1. Assistance to the Government: Rule 35 permits the government to move the sentencing court for a reduction of sentence in a defined set of situations involving assistance to the federal government in the investigation and prosecution of another. But Rule 35 would not permit sentence reduction where a federal prisoner's assistance is not directly connected to a federal investigation or prosecution,¹ including where a federal prisoner assists a state.² Rule 35 also does not permit the court to reduce a sentence when its jurisdictional requirements are not met.³

2. Changes in the Law: The Commission may determine under § 3582(c)(1)(B) whether changes in the guidelines will be retroactive on a categorical basis, which it does in some cases but not others. But it does not follow that Congress intended § 3582(c)(1)(B) to be the exclusive vehicle through which the Commission should deal

¹ *Example:* Tensions have been building at a federal corrections facility. One day, a fight breaks out and in the midst of the melee, a prisoner takes the opportunity to attack a BOP guard with a shank that he has concealed. Another prisoner intervenes, disarms the attacker, and saves the guard's life. His testimony is not needed by the government to prosecute the attacker. His act of courage in saving the guard's life goes unrewarded.

² *Example:* Female inmates in state prison are harassed by male guards. Federal inmates are housed in this facility due to overcrowding in federal facility. Guard ultimately rapes one inmate and attempts to rape a federal inmate. He is charged by the state and the federal inmate agrees to assist the state in investigating and prosecuting him. She testifies and her testimony is essential to his conviction. She does not qualify for a Rule 35 motion because her assistance did not assist the federal government in the investigation and prosecution of another.

³ *Example:* A defendant has been cooperating with the government in its investigation of others at substantial risk to her own safety, and she has been told that the government will request a sentence reduction. However, as a result of a prosecution error, the Rule 35 motion was not timely filed, and the court therefore has no power to comply with the government's request. The defendant's cooperation therefore goes unrewarded.

with questions of guidelines retroactivity, particularly where case-by-case decision-making is more appropriate. Moreover, a change in the law may be (and is required to be under our proposal) accompanied by some other “extraordinary and compelling reason,” such as extraordinary rehabilitation or changes in family circumstances.

In addition, guidelines changes are not the only kinds of “changes in the law” that should provide an occasion for considering a sentence reduction. Other relevant changes may be accomplished by congressional action or court ruling. The so-called “safety valve” provision, 18 U.S.C. § 3553(f), is a good example.⁴ Congress did not give this provision retroactive effect, in part because of difficulties of administration, including litigation of the facts required to qualify for the reduction. But considerations of efficiency are not of concern in the context of a motion under § 3582(c)(1)(B) since the government controls when a sentence reduction may be sought.

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

Respectfully submitted,

A handwritten signature in black ink that reads "Denise A. Cardman". The signature is written in a cursive, flowing style.

Denise A. Cardman
Acting Director

⁴ *Example:* A first-time offender cooperated fully with the government and was sentenced to a 10-year mandatory minimum prison term. Subsequently, Congress enacted a new law authorizing a “safety valve” exception to the mandatory minimum for first offenders who fully cooperated. Even before reporting to prison, the defendant had taken extraordinary steps to overcome her drug addiction, and has continued her exemplary rehabilitation while incarcerated. If more were necessary, her husband has been seriously injured in an automobile accident, requiring placement of her three small children in foster care.