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March 12, 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: Request for comment on criteria for sentence reduction
under USSG 1B1.13

Dear Judge Hinojosa:

On behalf of the American Bar Association (ABA) and its over 400,000 members, I write in response to the Commission's request for additional comments regarding appropriate criteria for sentence reduction under recently promulgated Section 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). This letter supplements and reaffirms our testimony of March 15, 2006, our letters of March 15 and July 12, 2006. We also reaffirm and resubmit as an attachment to this letter, with one amendment, the proposal for Section 1B1.13 that was included with our July 12, 2006 letter. Finally, we take this opportunity to comment on the Justice Department's letter to Chairman Hinojosa on this subject, dated July 14, 2007 ("DOJ letter").

As noted in our prior submissions to the Commission, the ABA strongly supports the adoption of sentence reduction mechanisms within the context of a determinate sentencing system, to respond to those extraordinary changes in a prisoner's situation that arise from time to time after a sentence has become final. In February 2003, the ABA House of Delegates adopted a policy recommendation urging jurisdictions to "develop criteria for reducing or modifying a term of imprisonment in extraordinary and compelling circumstances, provided that a prisoner does not present a substantial danger to the community." The report accompanying the recommendation noted that "the absence of an accessible mechanism for making mid-course corrections in exceptional cases is a flaw in many determinate sentencing schemes that may result in great hardship and injustice, and that "[e]xecutive clemency, the

historic remedy of last resort for cases of extraordinary need or desert, cannot be relied upon in the current political climate.”

In 2004, in response to a recommendation of the ABA Justice Kennedy Commission, the ABA House urged jurisdictions to establish standards for reduction of sentence “in exceptional circumstances, both medical and non-medical, arising after imposition of sentence, including but not limited to old age, disability, changes in the law, exigent family circumstances, heroic acts, or extraordinary suffering.” It also urged the Department of Justice to make greater use of the federal sentence reduction authority in Section 3582(c)(1)(A)(i), and asked this Commission to “promulgate policy guidance for sentencing courts and the Bureau of Prisons in considering petitions for sentence reduction, which will incorporate a broad range of medical and non-medical circumstances.”

I. Statutory and Regulatory Background

Section 3582(c)(1)(A)(i) was enacted as part of the original 1984 Sentencing Reform Act (SRA), and continues an authority first granted courts in the 1976 Parole Commission and Reorganization Act. See 18 U.S.C. § 4205(g)(1980). This authority permits a court at any time, upon motion of the Bureau of Prisons (BOP), to reduce a prisoner’s sentence to accomplish his or her immediate release from confinement. The only apparent limitations on the court’s authority under § 3582(c)(1)(A)(i), once its jurisdiction has been invoked by a BOP motion, is that it must find 1) “extraordinary and compelling reasons” to justify such a reduction, and 2) that the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.”

The legislative history of the SRA establishes that Congress intended the judicial sentence reduction authority in § 3582(c)(1)(A)(i) to be broadly construed, consistent with the then-existing sentence reduction authority, to allow a court to address “the unusual case in which the defendant’s circumstances are so changed... that it would be inequitable to continue... confinement. See S. Rep. No. 225, 98th Cong., 1st Sess. 37-150 at 5. See also *id.* at 55 (reduction may be justified for “changed circumstances” including “severe illness [or] other cases in which other extraordinary and compelling circumstances justify a reduction. . . .”). In continuing the courts’ ability to entertain and act on sentence reduction motions filed by BOP, Congress signaled its intention to permit sentence reduction in a variety of circumstances, not simply those involving a prisoner’s medical condition. See, e.g., *U.S. v. Diaco*, 457 F. Supp. 371 (D.N.J., 1978)(federal prisoner’s sentence reduced to minimum term because of unwarranted disparity among codefendants); *U.S. v. Banks*, 428 F. Supp. 1088 (E.D. Mich. 1977)(sentence reduced because of exceptional adjustment in prison). See also 28 C.F.R. § 572.40, 45 Fed. Reg. 23366 (April 4, 1980)(“The section may be used, for example, if there is an extraordinary change in an inmate’s personal or family situation or if an inmate becomes severely ill.”).¹

¹ The law giving BOP authority to petition the court for sentence reduction was originally designed to expedite situations that theretofore had required an application for executive clemency to be submitted to

In connection with continuing the courts' extraordinary sentence reduction authority in response to motions filed by BOP, the SRA directed this Commission to promulgate general policy for the guidance of courts considering such motions that would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). Such policy must "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." § 994(t). The only normative limitation imposed on the Commission in its policy-making under § 994(t), other than the general purposes of sentencing embodied in § 3553(a)(2), is that "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

Over the years, in the absence of policy guidance from this Commission, BOP has tended to take a conservative view of its responsibilities under § 3582(c)(1)(A)(i). *See, e.g.,* John R. Steer and Paula Biderman, *Impact of the Federal Sentencing Guidelines on the Presidential Power to Commute Sentences*, 13 Fed. Sent. Rptr. 154, 157 (2001) ("Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section."). In recent years, BOP has filed motions almost exclusively in cases where a prisoner was within months or even weeks of death.² At the same time, BOP's own formal operating policy has contemplated a broader application for the statute. Until 1994, BOP's operating policy for filing sentence reduction motions, under both 3582(c)(1)(A)(i) and the old law authority § 4205(g), explicitly contemplated invoking a court's authority "if there is an extraordinary change in an inmate's personal or family situation" as well as in situations in which "an inmate becomes severely ill." *See* 28 CFR § 572.40, *supra*.

When BOP revised its sentence reduction regulations in 1994, it continued to apply the same policy to both old and new law prisoners, and emphasized that "the standards to evaluate the early release remain the same." 28 C.F.R. § 571.61, *et seq.*; 59 Fed. Reg. 1238 (Jan. 7, 1994). Significantly, the 1994 regulations underscored the propriety of petitioning courts in both medical and non-medical cases. *See* 28 C.F.R. § 571.61 (directing prisoner to describe release plan and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment.") (emphasis added); *id.* § 571.62(a)–(c) (describing different procedures for medical and non-medical requests from prisoners). That the Justice Department has now proposed more restrictive guidelines for the operation of BOP's discretion cannot wipe away 30 years of contrary regulatory interpretation.³

the President through the Office of the Pardon Attorney. *See U.S. v. Banks, supra*, 428 F. Supp. at 1089 (statement of Director of BOP explaining that the new procedure offered the Justice Department a faster means of achieving the desired result.); *U.S. v. Diaco, supra*, 457 F. Supp. at 72 (same).

² According to figures provided by BOP, it has filed between 15 and 25 motions under § 3582(c)(1)(A)(i) annually since the year 2000. As far as we are aware, no motion has been denied during this time period.

³ BOP has recently proposed revisions to 28 CFR Parts 571 and 572 (re-titled "Sentence Reduction for Medical Reasons") that would for the first time place categorical limits on BOP's ability to bring sentence reduction motions. *See* 71 Fed. Reg. 76619-01 (Dec. 21, 2006) ("Reduction in Sentence for Medical Reasons"). In its introduction to the proposed new rule, BOP states that it "more accurately reflects our

II. Prior Comments on Proposed USSG § 1B1.13

We have previously commented, in letters dated March 25 and July 12, 2006, on the Commission's proposal to implement the directive in § 994(t) in a new policy statement at USSG § 1B1.13. For convenience, we summarize those comments here. Our principal concern is that the proposed policy simply recites the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), but does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the Commission appears to propose that courts considering sentence reduction motions should defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)."

We find the Commission's proposed approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for sentence reduction under § 3582(c)(1)(A)(i). Rather, it contemplates that any policy for implementation of § 3582(c)(1)(A)(i) would emerge only in a case-by-case process controlled by the Bureau of Prisons, and not in a general rule-making by the Commission. But the text of § 994(t) plainly requires the Commission to enunciate general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than defer to case-by-case decision-making by the BOP. While we do not doubt that, as a practical matter, BOP may frustrate the Commission's policy-making role through limiting the sentence reduction motions it files in both quantity and kind, it is quite another thing for the Commission to abdicate that role entirely.

To assist the Commission in carrying out the mandate of § 994(t), we have submitted draft language for a policy statement that describes specific criteria for determining when a prisoner's situation warrants sentence reduction under § 3582(c)(1)(A)(i), and gives specific examples of situations where these criteria might apply.⁴ Our proposed policy statement would also make several other changes in the language of the Commission's proposal, to make clear that the court in considering sentence reduction should concern itself only with a defendant's present dangerousness, and that the court could properly rely on several factors in combination as justification for sentence reduction.

authority under these statutes and our current policy." *See* 71 Fed. Reg. at 76619-01. Without some more extended attempt to reconcile the broad statutory language of § 3582(c)(1)(A)(i) with the crabbed new eligibility criteria, we will not assume that BOP intended to opine on its own legal authority under either § 3582(c)(1)(A)(i) or 18 U.S.C. § 4205(g), much less on the authority Congress intended to give courts under these statutes, or the Commission under 28 U.S.C. § 994(t). In our comments on the rule we point out that: "It is perfectly true that courts will have no opportunity to act upon motions under § 3582(c)(1)(A)(i) if BOP chooses not to bring any. But it is another thing for BOP to announce a formal regulatory policy that forecloses consideration by courts of a wide variety of situations that might be thought to present 'extraordinary and compelling reasons,' and that have in the past been thought to present them."

⁴ The draft policy statement submitted with this letter differs from the version dated July 12, 2006, only in adding a new subsection (h) to the list of "extraordinary and compelling reasons." in the proposed Application Note, and renumbering old subsection (h) as subsection (i).

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

We then propose, as part of an application note, nine specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, or in past administrative practice under this statute or its old law predecessor, 19 U.S.C. § 4205(g). These reasons are: 1) where the defendant is suffering from a terminal illness; 2) where the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner’s ability to function within the environment of a correctional facility; 3) where the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process; 4) where the defendant has provided significant assistance to any government entity that was not or could not have been taken into account by the court in imposing the sentence; 5) where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive; 6) where the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court; 7) where the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant’s minor children; 8) where the defendant’s sentence was based upon a mistake of fact or law so significant that it would be inequitable to continue the defendant’s confinement, and for which there is no other legal remedy;⁵ or 9) where the defendant’s rehabilitation while in prison has been extraordinary.

Finally, we propose that neither changes in the law nor a prisoner’s rehabilitation should, by themselves, be sufficient to justify sentence reduction.

As to the scope of a court’s sentence reduction authority, we believe that Congress intended a court to have authority to reduce a term of imprisonment to whatever term it deems appropriate in light of the particular reasons put forward for the reduction. For example, it would be appropriate for a court to reduce a term of imprisonment to time

⁵ This eighth example of an “extraordinary and compelling reason” has been added to the policy statement since the July 12, 2006 draft as a new subsection (h), old subsection (h) having been renumbered as (i). We believe this situation is one contemplated by subsection (b)(2) of the policy statement (“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”).

served where sentence reduction is sought because the prisoner is close to death. (It appears that reduction to time served is ordinarily what is sought in a BOP motion, since almost all of the cases it has brought over the past 20 years involve imminent death.) On the other hand, where reduction of sentence is sought on grounds of, *e.g.*, disparity or undue severity, or a change in the law not made retroactive, it would be appropriate for the court to be guided by the facts of the particular case, the government's recommendation, and information provided by or on behalf of the prisoner. *See, e.g., U.S. v. Diaco, supra* (sentence reduced to minimum term in case involving disparity); *U.S. v. Banks, supra* (sentence reduced to time served in case involving extraordinary rehabilitation).

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

We would like to take this opportunity to reiterate comments made in our March 15, 2006, testimony about the limits of a court's authority under this statute, to allay concerns that it could undercut the core values of certainty and finality in sentencing embodied in the federal sentencing guidelines scheme. The court's jurisdiction under § 3582(c)(1)(A)(i) is dependent upon BOP's filing a motion. We believe that the government can be counted upon to take a careful course and recommend sentence reduction to the court only where a prisoner's circumstances are truly extraordinary and compelling. Yet we also believe that the government will find it useful to have guidance from the Commission about the options available to it for making a mid-course correction where the term of imprisonment originally imposed appears unduly harsh or unjust in light of changed circumstances. We are confident that BOP's decision to file a motion with the court will be informed not just by its perspective as jailer, but also by the broader perspective of the Justice Department of which it is a part.⁶

III. Additional Comments on Proposed USSG § 1B1.13

In response to the six specific questions in the Commission's current request for additional comments on proposed USSC § 1B1.13, we submit the following:

⁶ *Cf.* David M. Zlotnick, “Federal Prosecutors and the Clemency Power,” 13 Fed Sent. R. 168 (2001)(analyzing five commutations granted by President Clinton six months before the end of his term, in four of which the prosecutor either supported clemency or had no objection to the grant).

1) Fundamental change in circumstances: The legislative history of § 3582(c)(1)(A)(i) confirms that Congress intended the sentence reduction authority to be available wherever there is a “fundamental change” in a prisoner’s circumstances, whether or not that change could have been anticipated by the court at sentencing. A fundamental change might involve a circumstance that was known to or anticipated by the court at the time of sentencing, or it might not. It might also involve a change in the law giving a court new authority to consider certain factors, or reducing the applicable guidelines range.

2) Medical cases: A “fundamental change” in circumstances could relate to a prisoner’s medical condition, including serious disability or chronic illness, as well as impending death. The fact that a prisoner’s condition is diagnosed as terminal is of course a classic basis for early release, but we urge the Commission not to attempt any further definition of eligibility based on terminal illness by a qualification like “life expectancy of less than 12 months.” Any particular life expectancy estimate that is more than a few weeks is generally both arbitrary as a matter of medical diagnosis and difficult to administer. Indeed, while the “less than 12 months” has long been the test applied by BOP, it is our understanding that in the vast majority of federal sentence reductions cases in recent years the prisoner died within weeks of release, not months.

3) Non-medical cases: Examples of “extraordinary and compelling reasons” should not be limited to medical conditions. We stand by the legal analysis in our prior letters, and by the examples of “extraordinary and compelling reasons” in the proposed policy statement submitted last July.

4) Combinations of reasons: More than one reason may be considered in combination. Congress explicitly intended such a combination approach where a prisoner’s rehabilitation is concerned, in providing that rehabilitation “alone” would not be sufficient to warrant sentence reduction. *See* 28 USC § 994(t).

5) BOP discretion: BOP should have the latitude to seek a sentence reduction authority in its discretion, and courts should have authority to grant a BOP motion, even if that particular reason put forward is not one specifically identified in the Commission’s policy document. Historically, the Justice Department has invoked the court’s sentence reduction authority in extraordinary sensitive cases where it was not otherwise possible to accomplish a prisoner’s immediate release from confinement.

6) Judicial discretion: Sentencing courts should have discretion to consider reasons other than those that may be advanced by the Bureau of Prisons in support of a motion to reduce a particular defendant’s sentence. Once a court has jurisdiction over a case by virtue of a BOP motion, it has both the authority and the responsibility to consider all of the facts and circumstances may bear upon the appropriateness of a sentence reduction, in light of the statutory standard of “extraordinary and compelling reasons.”

IV. The DOJ Letter

The DOJ letter referenced at the beginning of this letter warns the Commission that any policy it adopts that is inconsistent with what it describes as BOP's current sentence reduction policy will be a "dead letter." This sentence reduction policy, announced for the first time in the DOJ letter and recently proposed as an amendment to BOP's regulations,⁷ would categorically restrict the circumstances in which the Bureau of Prisons will move for sentence reduction to two narrow classes of medical cases: 1) cases in which a prisoner is terminally ill with a life expectancy of less than a year; and 2) cases in which a prisoner has a debilitating medical condition that "eliminates or severely limits the inmate's ability to attend to fundamental bodily functions and personal care needs." This policy would represent a significant curtailment of the policy reflected in BOP's existing regulations, which the DOJ letter makes little effort to justify. The DOJ letter minces no words in explaining 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."⁸

We think the DOJ letter has put BOP's policy cart before the Commission's horse. While BOP has operational responsibility for carrying out the Commission's policy-making role under 28 U.S.C. § 994(t) through case-by-case decision-making, 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 has determined may present "extraordinary and compelling reasons." The 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 is the Department and its agencies, including BOP, bound to comply with the Commission's lawfully promulgated policies in connection with reduction of that sentence. While BOP is free to interpret and apply Commission policy as it deems most appropriate in particular cases, in its discretion, it cannot in advance declare that policy a "dead letter" and substitute its own. Because the Commission is an agency of the judicial branch, any effort by an executive branch agency to usurp or frustrate its statutory policy-making functions would raise concerns of constitutional dimension, concerns that the ABA's position on the primacy of the Commission's role avoids.⁹

⁷ See note 3, *supra*.

⁸ The letter's dire forecasts about the consequences of the Commission's deviating from the BOP operating policy in terms of wasted judicial and executive time and resources, or in terms of management of prisoner populations, seem at the least overblown. BOP retains operational responsibility for determining whether a particular case satisfies the test of "extraordinary and compelling" within the general policy framework established by the Commission.

⁹ To the extent BOP's decision to limit sentence reduction motions to two narrow classes of medical cases would make it impossible for the courts to consider and act in other classes of cases, medical and non-medical, in which Congress intended them to have the ability to act, it raises the same kinds of

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

Respectfully submitted,

Denise A. Cardman

constitutional concerns. The ABA's position on the Commission's authority to promulgate general policy for courts considering sentence reduction motions would avoid these concerns as well.