



AMERICAN BAR ASSOCIATION

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On behalf of the

American Bar Association

Before the

United States Sentencing Commission

Washington, D.C.
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Mr. Chairman and Members of the Commission:

Good morning. My name is Stephen Saltzburg. I am the Wallace and Beverley Woodbury University Professor at the George Washington University Law School. It was my privilege and honor to serve as the Attorney General's ex officio representative on the U.S. Sentencing Commission from 1989 to 1990.

The American Bar Association is the world's largest voluntary professional organization, with a membership of over 400,000 lawyers including a broad cross-section of prosecuting attorneys and criminal defense counsel, judges and law students worldwide. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Karen Mathis to reaffirm the ABA's position on the Commission's obligation to give policy guidance to courts considering sentence reduction motions for "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)A)(i), and our resulting concerns about USSG § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

Before addressing my remarks to this subject, let me note and reiterate the ABA's concerns that I expressed when I testified at the Commission's November 14, 2006 hearing. We urge that the Commission recommend, as it did on May 1, 1995, that Congress amend federal drug laws to eliminate the differences between sentences imposed for crack and powder cocaine offenses. The American Bar Association has not

departed from the position that it took in 1995, and the Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and that the Commission should promulgate guidelines that treat both types of cocaine similarly.

It is important that I emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

I. ABA Policy on Sentence Reduction in Extraordinary Situations

As noted in our prior submissions to the Commission on the issue of sentence reduction policy,¹ the ABA strongly supports the adoption of 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

¹ My testimony supplements and reaffirms our testimony of March 15, 2006, and our letters of March 25 and July 12, 2006. Most recently, we commented on the issues raised by § 1B1.13 in a letter dated March 12, 2007, and resubmitted, with one modification, the proposal for Section 1B1.13 that was included with our July 12, 2006 letter.

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.” Against this background of strong and consistent support by the ABA for expanded use of judicial sentence reduction authority in extraordinary circumstances, it is a privilege to address the Commission on this subject.

II. Statutory and Regulatory Background

The extraordinary sentence reduction authority in § 3582(c)(1)(A)(i) was enacted as part of the original 1984 Sentencing Reform Act (SRA), continuing 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 be "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 old law 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. For example, the BOP regulations in effect at the time provided that “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.”²

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).³ In recent years, BOP has filed motions almost exclusively in cases where a prisoner was within

² *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). 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 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).

³ *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.”).

months or even weeks of death.⁴ 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.⁵

⁴ 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.

⁵ 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 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

III. Comments on USSG § 1B1.13

In its request for comment, the Commission asked a number of specific questions about possible amendments to USSG § 1B1.13. The ABA responded to those questions in our letter dated March 12, 2007. At this time I will confine my testimony to the more general issues raised by the Commission's policy on sentence reduction, as reflected in USSG § 1B1.13.

Our principal concern, as we have previously noted, is that USSG § 1B1.13 does little more than recite the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), and does not include "the criteria to be applied and a list of specific examples" that are required by § 994(t). Instead, the policy contemplates that courts considering sentence reduction motions should simply defer to the judgment of the Bureau of Prisons on a case-by-case basis: "A determination by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of section (1)(A)." We find this approach problematic because it fails to satisfy the mandate of § 994(t) that the Commission should establish general policy guidance for courts considering sentence reduction motions 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

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."

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 shape the Commission's policy-making role through the particular sentence reduction motions it files, it is quite another thing for the Commission to abdicate that role entirely.⁶

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.⁷ The proposed policy statement, appended to this testimony, would also make several other changes in the language of § 1B1.13 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.

⁶ Our objection to BOP's proposed changes to 28 CFR Parts 571 and 572 (note 5, *supra*) is based in part upon what we argue is their usurpation of the Commission's policy-making function, and the resulting frustration of the courts' sentence reduction authority.

⁷ The draft policy statement appended to this testimony 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 believe the situation described in new subsection (h) 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").

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:

- where the defendant is suffering from a terminal illness;
- 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;
- where the defendant is experiencing deteriorating physical or mental health as a

- consequence of the aging process;
- 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;
 - where the defendant would have received a significantly lower sentence under a subsequent change in applicable law that has not been made retroactive;
 - where the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;
 - 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;
 - here 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; or
 - 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 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.

I 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 Department of Justice raised these concerns in its letter of July 12, 2006, and I believe they are ones that deserve a careful and considered response. I would emphasize that the ABA does not support a return to a parole system, and I do not believe that this statute in any way implicates any such routine administrative method of early release. Far from it. This is a statutory release authority that may be invoked only in “extraordinary and compelling” circumstances involving a fundamental change in circumstances since sentencing. Moreover, it is entirely dependent upon a motion filed by the government. I 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.

At the same time, we also believe that Congress intended this Commission to be responsible for promulgating the general policy guidance within which the government exercises its discretion on a case-by-case basis. This is an important distinction. And we are confident 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 equally 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.⁸

⁸ 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).

My final comment relates to the letter submitted by the Department of Justice dated July 12, 2006, commenting on proposed USSG § 1B1.13. This letter states that any policy the Commission adopts that is inconsistent with what it describes as BOP's current sentence reduction policy will be greeted as a "dead letter."⁹ 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."

It seems that the DOJ letter has put BOP's policy cart before the Commission's horse. To be sure, 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. But 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 under its policy-making authority 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

⁹ The BOP sentence reduction policy announced in the DOJ letter was recently proposed as an amendment to BOP's regulations. See note 4 supra. It 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 represents a significant curtailment of the policy reflected in BOP's existing regulations.

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 policy-making role avoids.¹⁰

I very much appreciate this opportunity to comment on the proposed policy, and hope that these comments will be helpful.

¹⁰ To the extent BOP's proposed limitation of sentence reduction motions to two narrow classes of medical cases (see note 5, *supra*) 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 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.

American Bar Association
Proposed Policy Statement

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

- (a) Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the court determines that –
 - (1) either –
 - (A) extraordinary and compelling reasons warrant such a reduction; or
 - (B) the defendant (i) is at least 70 years old, and (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(e) for the offense or offenses for which the defendant is imprisoned;
 - (2) the defendant is not a present danger to the safety of any other person or to the community pursuant to 18 U.S.C. § 3142(g)(4); and
 - (3) the reduction is consistent with this policy statement.
- (b) “Extraordinary and compelling reasons” may be found where
 - (1) the defendant’s circumstances are so changed since the sentence was imposed that it would be inequitable to continue the defendant’s confinement; or
 - (2) information unavailable to the court at the time of sentencing becomes available and is so significant that it would be inequitable to continue the defendant’s confinement; or
 - (3) the court was prohibited at the time of sentencing from taking into account certain considerations relating to the defendant’s offense or circumstances; the law has subsequently been changed to permit the court to take those considerations into account; and the change in the law has not been made generally retroactive.
- (c) When a term of imprisonment is reduced by the court pursuant to the authority

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

Commentary

Application Note:

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

- 1) The term “extraordinary and compelling reasons” includes, for example, that –
 - (a) the defendant is suffering from a terminal illness;
 - (b) the defendant is suffering from a permanent physical or mental disability or chronic illness that significantly diminishes the prisoner’s ability to function within the environment of a correctional facility;
 - (c) the defendant is experiencing deteriorating physical or mental health as a consequence of the aging process;
 - (d) the defendant has provided significant assistance to any government entity that was not adequately taken into account by the court in imposing or modifying the sentence;
 - (e) the defendant would have received a lower sentence under a subsequent change in applicable law that has not been made retroactive;
 - (f) the defendant received a significantly higher sentence than similarly situated codefendants because of factors beyond the control of the sentencing court;
 - (g) the defendant has experienced an extraordinary and compelling change in family circumstances, such as the death or incapacitation of family members capable of caring for the defendant’s minor children;
 - (h) 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; or

- (i) the defendant's rehabilitation while in prison has been extraordinary.
- 2) "Extraordinary and compelling reasons" sufficient to warrant a sentence reduction may consist of a single reason, or it may consist of several reasons, each of which standing alone would not be considered extraordinary and compelling, but that together justify sentence reduction; *provided that* neither a change in the law alone, nor rehabilitation of the defendant alone, shall constitute "extraordinary and compelling reasons" warranting sentence reduction pursuant to this section.
- 3) "Extraordinary and compelling reasons" may warrant sentence reduction without regard to whether or not any changes in the defendant's circumstances could have been anticipated by the court at the time of sentencing.

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