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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: 2006 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 amplify our March 15 testimony on policy for sentence reduction in cases presenting "extraordinary and compelling reasons" pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).¹ In our testimony we noted that the Commission's proposed guidelines amendments on this subject did not contain "the criteria to be applied and a list of specific examples," as contemplated by 28 U.S.C. § 994(t). Following our testimony, Judge Castillo invited us to submit specific language for the Commission's consideration, and we are pleased to do so.²

As noted in our March 15 testimony, 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

¹ In addition to this comment letter, the ABA is submitting a second, separate statement on the issue of "Chapter Eight – Privilege Waiver" in response to the Commission's request for comments pursuant to the Notice of Proposed Amendments, Request for Public Comment, and Notice of Public Hearings for the amendment cycle ending May 1, 2006, published at 71 Fed. Reg. 4782-4804 (January 27, 2006).

² The ABA has taken no position on the sentence reduction authority applicable to "three strikes" cases in subsection (ii) of § 3582(c)(1)(A). While our proposed policy statement includes a provision referring to subsection (ii) cases, this provision is copied verbatim from the Commission's proposed policy statement. We assume that any expansion of the authority in subsection (ii) to non-three-strikes cases, as suggested by the Commission in its request for comment, would necessarily have to rely on some statutory ground other than subsection (ii) itself.

“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.”

Section 3582(c)(1)(A)(i), enacted as part of the original 1984 Sentencing Reform Act, contains a potentially open-ended safety valve authority whereby a court may at any time, upon motion of the Bureau of Prisons (“BOP”), reduce a prisoner’s sentence to accomplish his or her immediate release from confinement. The only apparent limitation on the court’s authority under this provision, once its jurisdiction has been established by a BOP motion, is that it must find that “extraordinary and compelling reasons” justify such a reduction. As part of its policy-making responsibility under the 1984 Act, the Commission is directed to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A), if in its judgment this would “further the purposes set forth in § 3553(a)(2).” See 28 U.S.C. §§ 994(a)(2)(C), 994(t). In promulgating any such policy, the Commission is directed by § 994(t) to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” The only normative limitation imposed on the Commission by § 994(t) is that “Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”

The Commission’s proposal to implement the directive in § 994(t) consists of a new policy statement at USSG § 1B1.13. The proposed policy reiterates the statutory bases for reduction of sentence under § 3582(c)(1)(A)(i), including the limitation in § 994(t) on consideration of rehabilitation as grounds for sentence reduction. However, it 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 this 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) and because 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.

We believe the text of § 994(t) requires the Commission to develop general policy on the criteria for sentence reduction under § 3582(c)(1)(A)(i), rather than to defer to case-by-case decision-making by the BOP. We also believe that a sentencing court must make an independent determination as to whether sentence reduction is warranted in a particular case.

To assist the Commission in carrying out the mandate of § 994(t), and in response to Judge Castillo's invitation, we have drafted 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. Our proposed policy statement would also make several other changes in the language of the Commission's proposal, as discussed in our March 15 testimony: it would 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.

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, eight specific examples of extraordinary and compelling reasons, all of which find support in the legislative history of the 1984 Act, in past administrative practice under this statute, and in the history of and practice under 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; or 8) where the defendant's rehabilitation while in prison has been extraordinary. We propose further that neither changes in the law nor rehabilitation should, by themselves, be sufficient to justify sentence reduction.

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

Respectfully submitted,

Robert D. Evans

Robert D. Evans

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 Director of the Bureau of Prisons has determined that 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 and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).
- (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 so as to fall under 18 U.S.C. § 3582(c)(2).

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 or could not have been taken into account by the court in imposing the sentence;
 - (e) the defendant would have received a significantly 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; or
 - (h) the defendant's rehabilitation while in prison has been extraordinary.
- 2) "Extraordinary and compelling reasons" 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).