AMERICAN BAR ASSOCIATION

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On behalf of the

**American Bar Association**

Before the

United States Sentencing Commission

Washington, D.C.
March 20, 2007

Mr. Chairman and Members of the Commission:

I am Stephen A. Saltzburg, etc.

I am here today to testify on behalf of the American Bar Association (ABA) and its over 400,000 members, on issues that are presently before the Commission, including its proposed policy guidance on sentence reduction motions for "extraordinary and compelling reasons" under USSG § 1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). 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.

**I. ABA Policy**

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." 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.

**I. 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 tine 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."[1]

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).[2] In recent years, BOP has filed motions almost exclusively in cases where a prisoner was within months or even weeks of death.[3] At the same time, BOP's own formal operating policy

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[1] *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).

[2] *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.").

[3] 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.

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.[4]

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

[4] 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 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."

The Commission has asked a number of quite specific questions about proposed USSG 1B1.13 in its request for comments, and we 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 this proposed policy.

Our principal concern, as we have previously noted, is that the proposed policy 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 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 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 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 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.[5] Our proposed policy

[5] 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

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.

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

Application Note, and renumbering old subsection (h) as subsection (i).

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;[6] 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

[6] 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").

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.[7]

My final comment relates to the letter submitted by the Department of Justice dated July 12, 2006, commenting on the Commission's proposed policy implementing § 3582(c)(1)(A)(i). 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."[8] 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

[7] *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).

[8] This sentence reduction policy, announced for the first time in the DOJ letter and recently proposed as an amendment to BOP's regulations, see note 4 supra, 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.

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]

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

[9] To the extent BOP's proposed limitation of sentence reduction motions to two narrow classes of medical cases (see note 4, 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.