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Honorable Ricardo H. Hinojosa
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

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders to comment on the proposed amendments pertaining to the Transportation Act, the Intelligence Reform and Terrorism Prevention Act of 2004, False Registration of Domain Names, Miscellaneous Laws, Application Issues, Obstruction of Justice Circuit Conflicts, Privilege Waiver, Crime Victims' Rights, and Reductions in Terms of Imprisonment Based on Bureau of Prisons Motion.¹

We incorporate by reference the comments we submitted regarding proposed amendments pertaining to Steroids (see letter dated February 28, 2006); Immigration (see written and oral testimony, February 21 and March 6, 2006); Firearms (see letter dated March 9, 2006); Intellectual Property (see letter dated August 3, 2005); and Obstruction of Justice in terrorism investigations (see letter dated October 7, 2005).

We thank you for the opportunity to comment and hope that our input is useful.

I. Transportation Act

Section 4210 of the Transportation Act creates a new offense at 49 U.S.C. § 14915 for failure to give up possession of household goods, defined as “the knowing and willful failure, in violation of a contract” to deliver or unload household goods, with a maximum penalty of two years. The Commission proposes to implement 49 U.S.C. § 14915 by referring it to § 2B1.1. Section 2B1.1 covers offenses involving theft, embezzlement, property destruction, fraud and deceit. This Class E Felony is essentially

¹ Thanks to Assistant Federal Defenders Randy Alden, Alan DuBois, Beverly Dyer, Corey Endo, Lisa Freeland, Steve Jacobson, Esther Salas, and Fredilyn Sison for their assistance in preparing these comments.

a civil contract breach that Congress criminalized. A violation occurs merely by failure to deliver; no theft or destruction of property, fraud or deceit is required. Disputes between trucking companies and individuals are typically resolved and household items returned, causing no lasting harm.

A first offender who failed to deliver \$125,000 worth of household goods (a reasonable estimate for a middle class household), though later returned, would, if the court interpreted the “intended pecuniary harm” to be the value of the property not delivered in compliance with the contract, be punished by 21-27 months, at the statutory maximum, and the same as an embezzler or thief who permanently stole \$125,000. In many cases, the guideline sentence would exceed the statutory maximum. In short, the punishment would be disproportionate to the offense. The appropriate solution would be to promulgate a new guideline for this unique offense with a graduated table that goes no higher than two years. Alternatively, the Commission should promulgate an application note in § 2B1.1 stating that in cases under 49 U.S.C. § 14915, the loss is “actual loss” as defined in Application Note 3(A)(i).

The Commission requests comment on whether, and if so how, it should implement section 7121 of the Transportation Act. Section 7121 amends 49 U.S.C. § 5124, which already criminalizes knowing and willful violations, to increase the maximum penalty to ten years if a release of hazardous materials occurs and results in death or serious bodily injury. Congress did not direct the Commission to increase penalties, and rightly so.

Under the current guideline, § 2Q1.2, which provides for a 9-level increase for a substantial likelihood of death or serious bodily injury and a 2-level increase for any violation of 49 U.S.C. § 5124, a release of hazardous materials resulting in death or serious bodily injury results in a base offense level of 23, 25, 27, 29, 31 or 33. In Criminal History Category I, the corresponding guideline ranges are 46-57 months, 57-71 months, 70-87 months, 87-108 months, 108-135 months, and 135-168 months. Thus, we think it is obvious that the Commission should not increase penalties under the guideline. If anything, the Commission should reduce the 9-level increase for a substantial likelihood of death or serious bodily injury, and provide for a 9-level increase if death or serious bodily injury actually results.

II. Intelligence Reform and Terrorism Prevention Act of 2004

A. Section 5401: 8 U.S.C. § 1324

Section 5401 of the Act added a new subsection (a)(4) to 8 U.S.C. § 1324 as follows:

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

- (A) the offense was part of an ongoing commercial organization or enterprise;
- (B) aliens were transported in groups of 10 or more; and
- (C)(i) aliens were transported in a manner that endangered their lives; or
- (ii) the aliens presented a life-threatening health risk to people in the United States.

The Commission proposes three options. Option One would create a specific offense characteristic that would add 2 levels if “the defendant was convicted under 8 U.S.C. § 1324(a)(4).” Option Two would create a specific offense characteristic that would add 2 levels if “the offense was part of an ongoing commercial organization or enterprise.” One version of Option Three would provide for a potential upward departure if “the defendant was convicted under 8 U.S.C. § 1324(a)(4).” The other version of Option Three would provide for a potential upward departure if “the offense was part of an ongoing commercial organization or enterprise.”

Option Two and the latter version of Option Three would be contrary to congressional intent, on the face of the statute which requires that all three requirements are met, and in the legislative history which rejected a prior version that would have enhanced the sentence if any one of the requirements was met. See H. Rep. No. 108-724, § 3041. We recommend a potential upward departure if “the defendant was convicted under 8 U.S.C. § 1324(a)(4).”

As to the Issue for Comment, the Commission should not define “ongoing commercial organization” in a vacuum. It should wait until fact patterns develop and it appears that a definition is necessary based, for example, on an unfair interpretation by the courts or a circuit split.

B. Section 6702: 18 U.S.C. § 1038(a)

Section 6702 creates a new offense at 18 U.S.C. § 1038(a), entitled “False Information and Hoaxes,” prohibiting “conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute” a variety of violations of the law ranging from minor firearms offenses to aircraft piracy,² and prohibiting “a false statement, with intent to convey false or misleading information, about the death, injury, capture, or disappearance of a member of the Armed Forces” during a war or armed conflict. The maximum penalties are 5 years, 20 years if serious bodily injury results, or life if death

² *i.e.*, Title 18, chapter 2 (destruction of aircraft or motor vehicles, violence at international airports, fraud involving aircraft parts), 10 (biological weapons), 11B (chemical weapons), 39 (explosives and combustibles), 40 (explosive materials), 44 (firearms), 111 (shipping), or 113B (terrorism); 42 U.S.C. § 2284 (sabotage of nuclear facilities or fuel); Title 49 §§ 46502 (aircraft piracy), 46504 (use of dangerous weapon in assaulting or intimidating flight crew member or attendant), 46505(b)(3) (explosive or incendiary device on aircraft) or (c) (weapon or explosive on aircraft willfully or with reckless disregard for human life), 46506 (commission of homicide or attempted homicide on an aircraft), or 60123(b) (damaging or destroying pipeline facility).

results. Most convictions would be subject to a maximum punishment of five years, since it is unlikely that serious bodily injury or death would result from a hoax or false information.

The proposed amendment would refer an offense under 18 U.S.C. § 1038(a) to § 2A6.1. It is inappropriate to equate a hoax or false statement with a threat. A threat, at minimum, is a “statement that *expresses* an *intent* to inflict bodily harm,” in addition to being susceptible to reasonable belief.³ Based on our experience, many of these offenses are going to involve mentally unstable people who either believe that some disaster is afoot or who think that the hoax is a joke. A false report that a neighbor or estranged spouse is a convicted felon or drug user and possesses a gun would also be subject to prosecution under 18 U.S.C. § 1038(a). Many of these offenses, in other words, will be akin to a harassing telephone call, which has a base offense level of 6 rather than 12 if it “did not involve a threat to injure a person or property.” § 2A6.1(a)(2).

If the Commission is going to include hoaxes and false statements in a threats guideline, it should likewise distinguish it from a threat by providing for a lesser base offense level, or an invited downward departure, if the offense did not involve an expression of intent to injure a person or property. We suggest two alternatives:

Defenders’ Option One would amend § 2A6.1(a)(2) as follows:

- (2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E), or 18 U.S.C. § 1038, that did not involve a threat to injure a person or property.

Defenders’ Option Two would create an application note stating as follows:

If the defendant is convicted of an offense under 18 U.S.C. § 1038 that did not involve a threat to injure a person or property, a downward departure may be warranted.

We strongly object to the proposal to create a cross reference to §2M6.1 for conduct “evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D).” This would permit “relevant conduct” which could have been but was not charged, was dismissed, or of which the defendant was acquitted, rather than the offense of conviction, to increase the sentence dramatically based on a mere preponderance of the evidence. Title 18 U.S.C. § 2332a prohibits, *inter alia*, “threaten[ing]” to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), which is punishable by imprisonment for life (or the death penalty), and is already referenced to §2M6.1. If the government obtains a conviction under 18 U.S.C. § 2332a for a threat to use a weapon of mass destruction, the guideline range will be determined under §2M6.1. If the government does not obtain

³ United States v. Fulmer, 108 F.3d 1486, 1495 (1st Cir. 1997).

such a conviction, a cross reference to that guideline is not currently and should not be made available. Nothing in Section 6702 suggests that the Commission should “implement” the new hoax statute by creating a cross reference for a threat to use weapons of mass destruction. Thus, we fail to see why the Commission would expand the most criticized and constitutionally suspect features of the Guidelines.⁴ See Blakely v. Washington, 542 U.S. 296, 306 (2004).

C- F. Sections 6803, 6903, 6905, 6906: 18 U.S.C. §§ 832, 2332g, 2332h, 175c

Part C of the proposal would reference the new offense in 18 U.S.C. § 832 to § 2M6.1. This new offense includes participating in or providing “material support or resources” to a nuclear or weapons of mass destruction program or attempting or conspiring to do so, with a statutory maximum of 20 years, and also development, possession, threats to use, or use of a radiological weapon, with a statutory maximum of life. “Material support or resources” is defined to include a broad range of support or resources,⁵ which (as indicated by the lower statutory maximum) defines much less serious conduct than developing or using a radiological weapon. Yet, under § 2M6.1, a person who was convicted of conspiring to provide material support or resources to such a program (for example, by providing lodging to a relative involved in developing a nuclear weapon), would be punished exactly the same as the person who actually developed or used the weapon. Since this offense is new and it is difficult to predict the fact patterns to which it may be applied, we recommend that the Commission promulgate an Application Note providing for downward departure as follows:

If the defendant was convicted under 18 U.S.C. § 832(a), a downward departure may be warranted if the offense level overstates the seriousness of the offense.

⁴ American College of Trial Lawyers, Proposed Modifications to the Relevant Conduct Provisions of the Federal Sentencing Guidelines, 38 Am. Crim. L. Rev. 1463 (2001); Kate Stith & Jose Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 140, 159 (1998); David Yellen, Illusion, Illogic and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403, 425-54 (1993); Kevin R. Reitz, Sentencing Facts: Travesties of Real Offense Sentencing, 45 Stan. L. Rev. 523, 524 (1993); Pamela B. Lawrence & Paul J. Hofer, An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3, Federal Judicial Center, Research Division, 10 Fed. Sent. Rep. 16 (July/August 1997); Paul J. Hofer, Implications of the Relevant Conduct Study for the Revised Guideline, 4 Fed. Sent. Rep. 334 (May/June 1992).

⁵ “Material support or resources” is defined in 18 U.S.C. § 2339A(b) as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”

Parts C, E and F of the proposal would reference the new offenses in 18 U.S.C. §§ 832, 2332h and 175c to § 2M6.1. The first two statutes include threats to use radiological weapons or dispersal devices; the third includes threats to use the variola virus. At present, § 2M6.1(a)(4) provides for a base offense level of 20 if the offense involved a threat to use a list of weapons or materials if there was no intent or ability to carry out the threat. Though “nuclear weapon” in this list probably includes a “radiological weapon” (as in § 832(c)) and might include a “radiological dispersal device” (as in § 2332h), and “biological agent” probably includes the variola virus (as in § 175c), it would be clearer if “radiological weapon,” “radiological dispersal device,” and “virus” were specifically added to § 2M6.1(a)(4).

Part D would reference the new offense in 18 U.S.C. § 2332g to U.S.S.G. § 2K2.1. This offense includes a threat to use a rocket, missile, launching device or parts, but § 2K2.1 would result in an offense level of at least 31 even if there was no intent or ability to carry out the threat. See § 2K2.1(a)(5), (b)(3)(A). This is in stark contrast to § 2M6.1(a)(4), which provides for a base offense level of 20 for threats under those circumstances involving equivalent weapons and materials. Thus, we recommend that the Commission amend § 2K2.1(b)(3)(B) to provide for a 2-level rather than a 15-level increase under those circumstances:

- (B) a destructive device other than a destructive device referred to in subdivision (A), or a threat to use a destructive device referred to in subdivision (A) that did not involve any conduct evidencing an intent or ability to carry out the threat, increase by two levels.

III. False Registration of Domain Name

Section 204(b) of Pub. L. 108-482 directs the Commission to “review and amend the sentencing guidelines and policy statements to ensure that the applicable guideline range for a defendant convicted of any felony offense *carried out online* that may be facilitated through the use of a domain name registered with materially false contact information is sufficiently stringent to deter commission of such acts,” and, specifically, to “provide sentencing enhancements for anyone convicted of any felony offense *furthered* through knowingly providing or knowingly causing to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used *in connection with* the violation.”

The proposed amendment would create a new Chapter Three adjustment, whenever a “statutory enhancement under 18 U.S.C. § 3559(f)(1) applies,” of 1, 2, 3 or 4 levels.

18 U.S.C. § 3559(f)(1) provides for an increased statutory maximum (the lesser of doubling the maximum or an additional seven years) if a defendant who is “convicted of a felony offense (other than an offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that

domain name in the course of that offense.” Under (f)(2), “falsely registers” means “registers in a manner that prevents the effective identification of or contact with the person who registers.”

We have two concerns with the proposal. First, while it incorporates the requirement of a felony and the statutory definition of “falsely registers,” it omits certain requirements from the statutory directive, italicized above. The Commission should not go further than Congress required. Second, it does not exclude the possibility that this adjustment would apply in addition to an adjustment for obstruction of justice, resulting in impermissible double counting. U.S.S.G. §2B1.1, Application Note 8(C) addresses an analogous double counting concern by precluding the addition of an adjustment for Obstruction of Justice where an enhancement for Sophisticated Means per §2B1.1(b)(9) has already been applied.

We believe that a one-level enhancement is an appropriate adjustment for this conduct and is consistent with the overall scheme of the Guidelines Manual. To add two levels would suggest that the conduct in question was as serious as: (1) the possession of a dangerous weapon (including a firearm) during a controlled substance offense (see U.S.S.G. §2D1.1(b)(1)); (2) causing bodily injury during a robbery (see U.S.S.G. §2B3.1(b)(3)(A)); (3) making a threat of death during the course of a robbery (see U.S.S.G. §2B3.1(b)(2)); (4) using a minor to commit a crime (see U.S.S.G. §3B1.4); (5) using body armor to commit a crime (see U.S.S.G. §3B1.5); and (6) reckless endangerment during flight (see U.S.S.G. §3C1.2), to name just a few examples.

We recommend the following replacement language:

If (1) a statutory enhancement under 18 U.S.C. § 3559(f)(1) applies, (2) the felony offense was carried out online, and (3) the felony offense was furthered through knowingly falsely registering a domain name, increase by 1 level. If the conduct that forms the basis for an adjustment under this section is the only conduct that forms the basis for an adjustment under Section 3C1.1, do not apply that adjustment under Section 3C1.1.

IV. Miscellaneous Laws

A. Section 9(A): 18 U.S.C. § 1369

The Veterans’ Memorial Preservation and Recognition Act of 2003, section 2, codified at 18 U.S.C. § 1369(a), prohibits the destruction of veterans’ memorials and establishes a ten-year maximum sentence. The proposed amendment would (1) refer violations of the new offense to USSG §§ 2B1.1 (Theft, Property, Destruction, and Fraud) and 2B1.5 (Theft of, Damage to, or Destruction of Cultural Heritage Resources), and (2) establish an enhancement of two, four, or six levels if the offense involved a national cemetery or veteran’s memorial.

The Commission should use a uniform two-level enhancement rather than raising it (for both national cemeteries and veterans' memorials) to four or six levels. The Commission previously determined that a two-level increase was appropriate for offenses involving the property of a national cemetery. See USSG §§ 2B1.1(b)(6), 2B1.1(b)(2). Both the Veterans' Cemetery Protection Act, which called for a two-level enhancement for property offenses against cemeteries, and the Veterans' Memorial Preservation and Recognition Act, were enacted by Congress to punish offenders who willfully injure or destroy protected property of the United States. Congress did not instruct the Commission to increase penalties for either national cemeteries or veterans' memorials. No explanation is offered for an increased enhancement. Sentences are too high already; they should not be increased without a congressional directive or very compelling reason.

B. Section 9(B): 7 U.S.C. § 7734

The Plant Protection Act of 2002 increased the maximum penalties available for certain violations of 7 U.S.C. § 7734. Specifically, the Act increased the maximum penalty for knowingly importing or exporting plants, plant products, biological control organisms, and like products for distribution or sale "in violation of this chapter" to five years for the first offense and ten years for any subsequent offense. The Act did not change the maximum one-year penalty for other knowing violations of Title 7 and other offenses involving documents covered by Title 7.

In response to the legislative change, the Commission has proposed two options. Option One would increase the base offense level to either 8 or 10; Option Two would provide for an upward departure.

We believe the current reference to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), which has a base offense level of 6, is sufficient and object to both proposed options. Although Congress increased the maximum punishment for such offenses, Congress did not instruct the Commission to increase the applicable guideline ranges. When Congress decides that an increase in the guideline range is necessary, it passes legislation suggesting or mandating such an increase. Congress has not done so here and thus the Commission should make no change.

The proposed amendment is unnecessary because the guideline already provides for an upward departure if "death or bodily injury, extreme psychological injury, property damage or monetary loss resulted." USSG § 2N2.1, comment. (n.3). Sentencing courts therefore have the means to increase the sentence in unusual circumstances. Moreover, because the guidelines are now advisory, see United States v. Booker, 125 S. Ct. 738 (2005), courts have the flexibility to increase the sentence if the movement of the plants resulted in some greater harm other than those addressed in the departure provision. See 18 U.S.C. § 3553(a)(1) (instructing courts to consider "nature and circumstances of the offense"); § 3553(a)(2)(A) (instructing courts that sentence must "reflect the seriousness of the offense").

If the Commission believes it is necessary to adopt one of the two proposed options, Option Two is more appropriate, for the reasons the Commission stated: “because of the expected infrequency of plant protection offenses and because it provides the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis.”

In addition to imposing unnecessary rigidity, Option One would also lead to unnecessarily severe sentences. Individuals convicted of violating the Plant Protection Act are likely to be first-time offenders. Increasing the base offense level from a six to a ten would increase the guideline range, for an individual with a criminal history category I, from 0-6 months to 6-12 months. Such an increase would contravene the Commission’s mandate to “insure that guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” 18 U.S.C. § 994(j).

C. Section 9(D): 18 U.S.C. § 1841

The Unborn Victims of Violence Act of 2004 created a new offense, codified at 18 U.S.C. § 1841, for causing death or serious bodily injury to a fetus while engaging in conduct that violates one of several enumerated statutes. The statute provides that the maximum penalty for the offense shall be the penalty “for that conduct had that injury or death occurred to the unborn child’s mother.” 18 U.S.C. § 1841(a)(2)(A). In cases where the person “intentionally kills or attempts to kill the unborn child that person shall be punished under sections 18 U.S.C. §§ 1111 [murder], 1112 [manslaughter], and 1113 [attempted murder or manslaughter].” 18 U.S.C. § 1841(a)(2)(C).

The proposed amendment refers violations of 18 U.S.C. § 1841(a)(1) to USSG § 2X5.1 (Other Offenses), which instructs courts to apply “the most analogous offense guideline.” Thus, if the defendant is convicted under 18 U.S.C. § 1841(a)(1), the court would apply the guideline that covers the conduct the defendant is convicted of having engaged in, as that conduct is described in 18 U.S.C. § 1841(a)(1) and listed in 18 U.S.C. § 1841(b).

We object to the proposed upward departure provision set forth in proposed Application Note 2(B). This proposal states that “an upward departure may be warranted if the offense level under the applicable guideline does not provide an adequate sentence to account for the death of or serious bodily injury to the child in utero.”

The upward departure provision is contrary to Congress’s intent. A violation of the Unborn Victims of Violence Act “does not require proof that . . . the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying crime was pregnant” or proof that “the defendant intended to cause the death of, or bodily injury to, the unborn child.” 18 U.S.C. §§ 1841(a)(2)(B)(i) and (ii). In all circumstances other than the intentional killing or attempted killing of the unborn child, which is covered separately by 18 U.S.C. § 1841(a)(2)(C), Congress mandated that the

punishment for the new offense be the same as that provided under Federal law had the injury or death occurred to the child in utero's mother. See 18 U.S.C. § 1841(a)(2)(A). Thus, the enhancement is contrary to Congress's intent. Again, the Commission should not encourage higher sentences than Congress intended or required.

Moreover, in light of the nature of the offense, a defendant convicted under 18 U.S.C. § 1841(a)(1) will likely be exposed to emotional and other volatile influences at sentencing. The proposed invitation for an upward departure is objectionable because of the risk that these influences might provoke inappropriately harsh sentences. Finally, given the highly-charged nature of the offense, the proposed upward departure provision would invite unwarranted sentencing disparities among different defendants in different districts sentenced by different judges with different views.

We strongly oppose the proposed upward departure.

D. Section 9(E): Proposed Guideline § 2X5.2

Title 18 U.S.C. § 3559(a)(6) classifies as a Class A misdemeanor an offense punishable by one year or less but more than six months. The Commission has proposed guideline USSG § 2X5.2 to apply to five new Class A misdemeanor offenses⁶ -- one of which, the Social Security Administration Act, 42 U.S.C. § 1129, we have been unable to locate on Westlaw or <http://thomas.loc.gov/> -- and any Class A misdemeanor not referenced to a more specific Chapter Two guideline.

Proposed § 2X5.2 provides a base offense level of six and a specific offense characteristic of two for subsequent convictions under the same provision of law as the instant offense of conviction.

We believe that a base offense level of four, rather than six, is appropriate, consistent with guidelines for other Class A misdemeanors. See, e.g., USSG § 2B2.3 (base offense level 4 for criminal trespass); § 2D2.1(a)(3) (base offense level 4 for simple possession of certain controlled substances and list I chemicals); § 2J1.5 (base offense level 4 for material witness's failure to appear at misdemeanor trial); § 2P1.2 (base offense level 4 for providing or possessing certain contraband in prison); § 2T1.7 (base offense level 4 for failing to deposit collected taxes in trust account as required after notice); § 2T2.2 (base offense level 4 for regulatory offenses); § 2T3.1 (base offense level 4 for smuggling if tax loss did not exceed \$100).

⁶ As listed in the Synopsis, these are (1) the interstate movement of animals for fighting, in violation of 7 U.S.C. § 2156; (2) the corrupt and forcible interference with the administration of the Social Security Administration Act committed by threats of force, in violation of 42 U.S.C. § 1129(a); (3) illegal tampering with a consumer product, in violation of 18 U.S.C. § 1365(f); (4) the misuse or illegal disclosure of DNA analyses, in violation of 42 U.S.C. § 14133; and (5) the knowing capture of an image of an individual's "private area" without that person's consent and under circumstances in which the person has a reasonable expectation of privacy, in violation of 18 U.S.C. § 1801.

No explanation is given as to why some Class A misdemeanors should be subject to a base offense level 1 ½ times higher than that for other Class A misdemeanors. As the Commission points out, many misdemeanors not covered by another Chapter Two guideline are regulatory violations. Moreover, a base offense level of four would, and should, reflect the fundamental difference between a misdemeanor and a felony.

The proposed two-level SOC for subsequent offenses would import the unwise policy in the immigration area of double counting criminal history into a broad range of Class A misdemeanors. This would foster litigation, and the Commission has not offered any justification for it.

We do not believe that the Commission should reference any Class A misdemeanors currently referenced to a guideline with a lower base offense level to proposed § 2X5.2, and have not identified any Class A misdemeanors not currently referenced in Appendix A that should be included in Appendix A and referenced to proposed §2X5.2.

Again, with sentences that are already too severe and the BOP 40% overcapacity, we do not believe that the Commission should be raising penalties absent a congressional directive or a very compelling reason to do so.

V. Application Issues

A. Cross Reference to Second Degree Murder Guideline in § 2D1.1

The Commission proposes adding another cross reference to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Possession with Intent to Commit These Offenses; Attempt or Conspiracy) to permit courts to apply § 2A1.2 (Second Degree Murder) in drug cases in which the conduct involved is second degree murder if the resulting offense level is greater than that determined under the drug guideline.

We oppose any expansion of unconvicted conduct because it is unfair and only serves to transfer sentencing power to the government. The resulting guideline range would be severe -- 20 years to life, depending on criminal history -- based on a mere preponderance of the evidence. If death results and the conduct does not amount to first degree murder, the court can use its discretion to increase the sentence commensurate with the seriousness of the offense and other relevant factors. See 18 U.S.C. § 3553(a). Again, we strongly urge the Commission not to expand one of the most pernicious aspects of the Guidelines, criticized by most participants, disinterested observers, and the Supreme Court. See Blakely v. Washington, 542 U.S. 296, 306 (2004).

B. § 3C1.3 (Offenses Committed While on Release)

The Commission proposes eliminating § 2J1.7 and moving the three-level enhancement for cases in which the statutory sentencing enhancement at 18 U.S.C. §

3147 applies, to a new Chapter Three Adjustment, § 3C1.3 (Offenses Committed While on Release), but eliminating important commentary protective of defendants' rights.

Without explanation, the proposal would eliminate the commentary explaining, based on the legislative history, that the sentence must be consecutive but that there is no requirement as to any minimum term. The commentary should be retained. Otherwise, some courts (but not others) will believe that a substantive change was intended, when that is not the case. This will complicate sentencings by requiring the parties and courts to try to divine the meaning of the change, resulting in different interpretations, and unwarranted disparity.

Without explanation, the Commission proposes to eliminate the commentary stating that the enhancement may be imposed "only in the case of a conviction for a federal offense that is committed while on release on another federal charge." This commentary is consistent with the statutory definition of "offense." See 18 U.S.C. § 3156(a)(2). As above, eliminating it would create confusion and unwarranted disparity. The commentary should be retained.

The proposal would also eliminate the commentary requiring "sufficient notice to the defendant by the government or the court," claiming that a majority of courts have found that there is no notice requirement for 18 U.S.C. § 3147 to apply. This is not correct. Three circuits have squarely held that the statutory enhancement may not be applied unless the court gave the defendant specific warning *in the pretrial release order* of potential enhancement under 18 U.S.C. § 3147. See United States v. Cooper, 827 F.2d 991, 994 (4th Cir. 1987); United States v. Onick, 889 F.2d 1425, 1434 (5th Cir. 1989); United States v. DiCaro, 852 F.2d 259, 264-65 (7th Cir. 1988). Five circuits have held that pre-release notice is not required but that *pre-sentence* notice is required by the Guideline and/or the Due Process Clause. United States v. Kentz, 251 F.3d 835, 840-41 (9th Cir. 2001) (citing guideline and due process); United States v. Hecht, 212 F.3d 847, 849 (3^d Cir. 2000) (citing guideline) (Alito, J.); United States v. Bozza, 132 F.3d 659, 661 (11th Cir. 1998) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Browning, 61 F.3d 752, 757 (10th Cir. 1995) (citing guideline and opportunity to prepare and defend against the enhancement); United States v. Feldhacker, 848 F.2d 293, 299 (8th Cir. 1988) (citing guideline and due process). The Second Circuit has not decided if pre-release notice must be given, but recognized that notice must be given before sentencing. United States v. Vazquez, 113 F.3d 383, 389-90 (2^d Cir. 1997). The Sixth Circuit has stated in *dicta* that pre-release notice was not required, and declined to decide whether pre-sentence notice was required because the defendant waived the argument. United States v. Lewis, 991 F.3d 322, 324 (6th Cir. 1993).

Particularly in light of the Appendi to Booker line of cases, the Commission should not eliminate any notice requirement when a *majority of circuits has held that pre-sentence notice* is required by the Guideline or both the Guideline and the Due Process Clause and *no circuit has ever held that pre-sentence notice is not required*. This, of course, makes sense, because a defendant must prepare to defend himself against an

allegation of an entirely separate offense. Instead, the Commission should change the sentence to read as follows:

An enhancement under 18 U.S.C. § 3147 may be imposed only if the defendant is given sufficient notice prior to sentencing, and applies only in the case of a conviction for a federal offense committed while on release on another federal charge.

Defendants do not always receive notice, see Lewis, supra, and this enhancement is not covered by Rule 32(h). As with elimination of the other commentary noted above, elimination of the notice provision could be interpreted as meaning that no pre-sentence notice need be given, and will create confusion, unfairness, and unwarranted disparity.

VI. §3C1.1 (Obstruction of Administration of Justice) Circuit Conflicts

We have a number of serious concerns about the Commission's proposed amendments to U.S.S.G. § 3C1.1. An enhancement for obstruction of justice should apply when the purpose of the conduct is to obstruct or impede the investigation, prosecution or sentencing of the offense of conviction, the defendant's relevant conduct or a closely related offense. In other words, it should apply only to conduct which is intended to thwart the truth-seeking function of the proceeding. It should not apply to obstructive conduct related to administrative or ancillary matters, such as pre-investigation conduct not directed at thwarting the investigation itself, to perjury in a civil proceeding between private parties, or to misrepresentations on CJA applications, since such conduct does not have the purpose or potential to impede the investigation or subvert the outcome of the case. Dishonesty of this sort may be dealt with through denial of the acceptance of responsibility reduction or through the district court's discretionary choice of sentence either within or outside the advisory guideline range. Therefore, we support the addition of language which makes it clear that, in order for the obstruction enhancement to apply, the conduct must have been "intended to prevent or hinder the investigation, prosecution, or sentencing" of the offense of conviction. For the reasons below, we oppose expanding the reach of the obstruction enhancement to include conduct that occurs before the onset of an official investigation, to non-governmental civil proceedings or to CJA applications. The current guideline, which limits the enhancement to post-investigation conduct, provides a clear, bright-line rule for courts to follow.

By contrast, the proposed amendment would open up an essentially unlimited range of conduct for courts to scrutinize for some sign of obstructive intent. Such an inquiry would present a host of evidentiary and epistemological problems. How would a court go about determining whether an act was intended to hinder an investigation that did not exist at the time the act was committed? Does a defendant who hides questionable bookkeeping decisions from an employer to avoid being fired commit obstruction, even if no criminal investigation has begun and the defendant is unaware of the relevant law? Does the defendant have to know that an investigation is likely or merely that there is a possibility the conduct will be investigated? Can obstruction take

place before the crime if, for instance, the defendant lays the groundwork for an alibi or obtains false identification in case of apprehension?

The problem with expanding the enhancement to pre-investigation conduct is the inevitable dilution of the bond between the allegedly obstructive conduct and the offense, as well as the difficulty of accurately discerning an obstructive intent in pre-investigative conduct which may have been motivated by a host of factors at the time it occurred, but will invariably be viewed through the distorting lens of post-conviction hindsight (and the preponderance of the evidence standard) at sentencing. Though some courts have criticized the temporal requirement contained in the current guideline, even they have recognized it serves a purpose. For instance, the Sixth Circuit has noted that it served “to require, at least in an indirect sense, a nexus between the acts of obstruction and the crime of conviction. With no causal link to the crime of conviction, obstructive conduct could conceivably include acts wholly unrelated to the crime of conviction or conduct that should have been the subject of separate criminal charges.” United States v. Baggett, 342 F.3d 536, 542 (6th Cir. 2003).

The temporal requirement also serves to limit the reach of what could otherwise be an extraordinarily broad enhancement. Offenders hide their loot, destroy their disguises, discard their weapons. All of these acts are part and parcel of the offense itself, but arguably "obstructive" in the sense that they make discovery of the crime more difficult. Rare is the criminal who does not attempt to cover his tracks in some way. Absent some means of singling out defendants who act with the specific purpose of obstructing justice, the §3C1.1 enhancement could be applied in almost every case. Requiring that the obstructive conduct take place after the investigation began is the most reasonable and reliable way of ensuring that the enhancement captures something more than the offense conduct itself.

Simply put, the balance struck by the existing guideline is the proper one. The Commission has considered this issue in the past and decided that the obstruction enhancement should be limited to post-investigation conduct. This rule has the value of clarity, simplicity and ease of application. In any case where a court sees a clear instance of pre-investigation obstruction, it may upwardly depart or impose a non-Guideline sentence. There is no need to amend the current Guideline.

In addition, the Commission should limit any consideration of perjury during the course of a civil proceeding to material matters in proceedings brought by or involving a governmental agency. While issues involved in an action brought by an administrative agency might be closely related to those later involved in a criminal case, a civil lawsuit between private parties typically involves issues unrelated to criminal justice. Therefore, perjury occurring in a civil suit should not be the subject of an obstruction of justice enhancement even if facts at issue in the lawsuit overlap with conduct required to prove a criminal offense. Cf. United States v. Kirkland, 985 F.2d 535, 537-38 (11th Cir. 1993) (U.S.S.G. § 3C1.1 inapplicable to obstructive conduct occurring during internal bank audit). In addition, perjury should not be considered obstruction unless it pertains to

material issues that hinder the investigation, prosecution or sentencing in the case. The proposed requirement that the perjury “pertain” to the offense of conviction is too broad.

We recommend that subsection (b) of application note 4 be amended to read:

- (b) committing, suborning, or attempting to suborn perjury regarding material evidence in the case, including during the course of a civil proceeding brought by or involving a government agency and pertaining to conduct constituting the offense of conviction.

To limit its otherwise overly broad application, application note 6, which defines “material” evidence or information, should be amended to replace the phrase “the issue under determination” with “an issue under determination affecting the investigation, prosecution or sentencing of the offense of conviction.”

Making false statements on a financial affidavit in order to obtain court-appointed counsel does not warrant an obstruction enhancement because that conduct is not aimed at impeding justice or at affecting the outcome of the case. Instead, it affects only the allocation of resources. In United States v. Khimchiachvili, 372 F.3d 75, 80 (2d Cir. 2004), the Second Circuit rejected an enhancement for a false CJA financial affidavit, describing “a common sense definition of what constitutes obstruction of justice [as] conduct that willfully interferes with or attempts to interfere with the disposition of the criminal charges against a defendant.” Continuing, the court stated:

An enhancement for obstruction is therefore only warranted “if the court finds that the defendant willfully and materially impeded *the search for justice in the instant offense*.” Or, as we have written, the “conclusion that obstruct,’ in this context, relates to anything that can make it more difficult to carry out a just result in a criminal case [is] erroneous as a matter of law.” For a defendant’s conduct to qualify as obstruction of justice, it must have the “potential to impede” the investigation, prosecution, or sentencing of the defendant. It cannot simply be a misrepresentation.

Id. (citing United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (emphasis added in Khimchiachvili); United States v. Stroud, 893 F.2d, 504, 507 (2d Cir. 1990); and United States v. McKay, 183 F.3d 89, 95 (2d Cir. 1999)). Of the circuits that have considered this issue, the Second Circuit’s decision is the most extensively reasoned. Compare United States v. Hernandez-Ramirez, 254 F.3d 841, 843-44 (9th Cir. 2001); United States v. Ruff, 79 F.3d 123, 125 (11th Cir. 1996). As the Second Circuit explained, the defendant did not want to pay for a lawyer, but “[h]e was not seeking to prevent justice or even delay it.” Id. The Second Circuit recognized that “[w]hat happened here may amount to fraud” and that it was “reprehensible,” “possibly deserving a higher sentence,” but that it nonetheless did not require an enhancement for obstruction of justice. Id.

The misrepresentation of financial information to obtain appointment of counsel is even less apt to have any affect on the outcome of the case than other behavior not

subject to the obstruction enhancement, such as lying about drug use while on pretrial release, providing false identification to the police upon arrest, or fleeing from arrest. See § 3C1.1, comment. (n.5). It is in no way similar to conduct that typically constitutes obstruction of justice by attempting to alter the outcome of a case, such as destroying evidence, tampering with witnesses, or lying on the stand about facts necessary to prove a criminal offense, or to delay justice, such as failure to appear at a court hearing. Id., comment. (n.4).

Moreover, many defendants who are potentially eligible for court-appointed counsel complete financial affidavits shortly after arrest and without access to their bank statements and other financial records, increasing the risk of mistakes that may be construed as intentional. In addition, requiring a court to enhance the sentence for obstruction of justice where a defendant misrepresented assets to obtain court-appointed counsel creates a conflict of interest between counsel and the defendant. Finally, a court can easily remedy a defendant's understatement of assets by ordering the defendant to repay amounts used to appoint counsel under the Criminal Justice Act.

Therefore, the Commission should not list making false statements on a financial affidavit in order to obtain court-appointed counsel under application note 4 as proposed. Instead, that conduct should be listed under application note 5, as an example of conduct that does not justify an enhancement for obstruction.

VII. Privilege Waiver

We join in the comments of the Practitioners' Advisory Group. While we do not represent organizations, we believe that the current commentary contributes to the undue pressure placed on organizations by the government to waive the attorney-client and work product privileges, and thus threatens those fundamental basics of our adversary system and the right to counsel.

VIII. Crime Victims' Rights

This proposal would add a new guideline, § 6A1.5, stating that “[i]n any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and any other provision of Federal law pertaining to the treatment of crime victims,” with “crime victim” defined as in 18 U.S.C. § 3771(e).

The Crime Victim Rights Act (CVRA) reflects a careful balancing of the rights of defendants, the discretion of prosecutors, and new rights for victims. The Commission should therefore strictly adhere to the statutory language. Requiring the court “in any case” to ensure that the crime victim is afforded the statutory rights departs from the statute, which states that “[i]n any *court proceeding* involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a).” Beyond that, the statute states that “[o]fficers and employees of the Department of Justice and other departments and agencies of the United States engaged

in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).” The Federal Rules Advisory Committee has interpreted this to mean that the government is in charge of giving notice of proceedings.⁷ Another good reason for the Commission to strictly adhere to the statutory language is that the Rules Committee has not yet even published for comment its rules implementing the CVRA.

The phrase “and any other provision of Federal law pertaining to the treatment of crime victims” should be deleted. It is undefined and undefinable. It could be interpreted by victims and their counsel in unexpected and unforeseeable ways to enforce “rights” that may not exist in the CVRA, inviting litigation, an undue burden on the courts, and either disappointment for victims or unwarranted incursions on defendants’ rights. The phrase should be deleted.

We suggest the following substitute:

A crime victim, as defined in 18 U.S.C. § 3771(e), shall be afforded the rights described in 18 U.S.C. § 3771(a).

IX. Reductions in Term of Imprisonment Based on Bureau of Prisons Motion

The proposed amendment is the Commission’s first attempt to provide guidance for court consideration of Bureau motions to reduce sentences based on extraordinary and compelling reasons as provided in 18 U.S.C. § 3582(c)(1)(A)(i). We applaud that attempt and offer suggestions which we believe may improve the initial draft and respond more definitively to the congressional directive in 28 U.S.C. § 994(t). We also respond to the issues for comment regarding release after age 70 pursuant to 18 U.S.C. § 3582(c)(1)(A)(ii). First, we offer some background regarding the “extraordinary and compelling” reduction statute.

A. Background of Reduction for “Extraordinary and Compelling Reasons”

Many people who work in the federal criminal justice system are unfamiliar with this statute. It is little known and little utilized. However, some of us have learned of it after a client, already sentenced, inquires whether some radical change of circumstance can qualify him or her for some relief or reduction of sentence. Sometimes, the circumstance is some sort of family emergency, sometime a matter of life or death, sometime concern about the welfare of a child, which the prisoner can only assist with if released early. Initially, the provisions of 18 U.S.C. § 3582(c)(1)(A)(i) appear to offer relief, if the situation truly appears compelling and extraordinary. However, that hope is quickly dashed when we learn that the BOP only rarely makes the motion and then only when a prisoner is about to die or is completely incapacitated. This state of affairs and unduly cramped usage of the statute could be altered by this Commission’s policy

⁷ Report to Standing Committee at 5-6 (December 8, 2005), <http://www.uscourts.gov/rules/Reports/CR12-2005.pdf>.

statement. The policy statement should reflect congressional intent that the mechanism be used, however rarely, to address a variety of post-sentencing developments.

Prior to the advent of the Sentencing Reform Act and the Sentencing Guidelines, the federal criminal justice system used indeterminate sentences and a parole model in which various factors, including progress toward rehabilitation, would result in release on parole before the term of a sentence expired. The sentencing court could impose a mandatory minimum period to be served of up to one third of the sentence before parole eligibility. 18 U.S.C. § 4205(b)(1) (repealed effective Nov. 1, 1987). In that system, Congress allowed the Bureau of Prisons to move the court, at any time post-sentence, for a reduction of a minimum time before parole eligibility. 18 U.S.C. § 4205(g) (repealed effective Nov. 1, 1987). This motion was not confined to extraordinary and compelling circumstances and could even be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the courts in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system which provided more certainty, finality and uniformity.⁸ However, Congress also recognized that post-sentencing developments might provide appropriate grounds to reduce a sentence. Using §4205(g) as a model for the mechanism, the SRA provided a way to adjust a sentence if necessary to accommodate post-sentence developments, which is codified in 18 U.S.C. § 3582(c)(1)(A)(i):

The court may not modify a term of imprisonment once it has been imposed except that-

(1) in any case-

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and 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), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that-

(ii) extraordinary and compelling reasons warrant such a reduction;

Congress also mandated that the United States Sentencing Commission, created by the SRA, promulgate policy statements regarding how that section should operate and what should be considered extraordinary and compelling:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

⁸ See, generally, Mistretta v. United States, 488 U.S. 361, 363-370 (1989).

28 U.S.C. § 944(t).

The legislative history of these provisions demonstrates that Congress intended this release motion as a way to account for changed circumstances. The Senate Judiciary Committee's Report, the authoritative source of legislative history on the SRA, said, in pertinent part:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment....the bill...provides...for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification of reducing a term of imprisonment in situations such as those described.⁹

B. History of Sentence Reductions

Despite the broad language of the statutory provision, the BOP has historically used §3582(c)(1)(A)(i) only to seek release of dying inmates. See, Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT. R. 188, 2001 WL 1750559 (Vera Inst. Just.) (2001). Originally, BOP policy allowed consideration of release when death was predictable within six months. In 1994, the policy was amended to include other serious medical situations where disease resulted in markedly diminished public safety risk and quality of life. Although there is nothing in the statute or in the BOP policy statement to disqualify a reduction based on something other than medical condition of the inmate, the BOP has never acted on any other basis.

During the first two decades of the SRA, the Sentencing Commission has not responded to the congressional directive to issue policy statements and give examples of extraordinary and compelling reasons. A Vice Chairman of the Commission opined that the lack of policy statements might be partly responsible for the BOP's narrow use of this provision:

Without the benefit of any codified standards, the Bureau, as turnkey, has understandably chosen to file very few motions under this section. It is not unreasonable to assume, however, that Congress may have envisioned compelling and extraordinary circumstances to encompass more than a terminally ill individual with a nonviolent criminal record.

⁹ S.Rep.No.225, 98th Cong., 1st Sess. 37-150 at p. 55, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373.

John Steer and Paula Biderman, Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences, 13 Fed. Sent. R. 154, 2001 WL 1750551 (Vera Inst. Just.). The actual numbers collected and appended to Ms. Price's article reflect extremely rare usage of the § 3582 reduction through 2000. The numbers for 2001 through 2004 continue to be quite low despite a growing prison population.¹⁰

C. The Proposed Amendment; Extraordinary and Compelling Reasons

The Commission's proposed amendment provides a first step and a structure for a policy statement regarding 18 U.S.C. § 3582(c)(1)(A) reductions. However, it does not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons, nor does it provide examples as required by statute. 28 U.S.C. § 944(t). We believe the Commission should tackle this admittedly difficult task and we provide our suggestions for doing so below, along with other comments on the draft. Luckily, there is already a very good model for addressing these difficult issues in the Appendix of Ms. Price's previously cited article (copy attached).

First, as a drafting matter, proposed U.S.S.G. § 1B1.13(1)(A) should be amended to state "reasons" in the plural, as in the statute, instead of singular. Otherwise, this drafting change would alter the clear intent of the statute to allow consideration of multiple reasons and their combination as opposed to one single reason. In the alternative, the Commission could adopt the language in Ms. Price's proposal, which is to add a defining statement as follows:

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

This option has the advantage of clearly restating the statutory intent that reasons may be plural, to prevent a mechanistic approach to this broadly worded provision.

Second, the proposed draft, in § 1B1.13(2), requires that the person not be a danger. This imports the statutory requirement of 18 U.S.C. § 3582(c)(1)(A)(ii) and applies it to §3582(c)(1)(A)(i) as well. As a practical matter, this expanded requirement will probably have little effect, since it is difficult to envision the BOP moving to reduce a sentence and release a prisoner who is still dangerous. In our experience, the BOP takes great care to eliminate any prisoners from early release consideration if they are considered a danger to the community. However, we believe the proposal should insert the word "present" before the word "danger" in order to assure the proper interpretation stated in the Synopsis, *i.e.*, that the person is "no longer" a danger.

Third, the Synopsis states that the policy statement creates a rebuttable presumption when there is a BOP motion. Presumably, this refers to proposed Application Note 1A, where the only definition of "extraordinary and compelling reasons" appears. The actual language used--"shall be considered as such"-- does not

¹⁰ The 2001 through 2004 figures received from BOP are attached.

appear to operate to create a rebuttable presumption. If that is what is intended, it should be stated simply and in those words. More importantly, this definition provides no guidance whatsoever to the Bureau of Prisons in making their determination, which is the whole purpose of the policy statement and Congress' directive to the Commission.

We believe that providing only a circular definition of extraordinary and compelling reasons, i.e. they presumptively exist when BOP makes a motion, does not comport with the Commission's directive from Congress. We suggest that such reasons should be broadly defined to include all basic post-sentencing changes that could support a reduction, as was intended by Congress. These should not be limited to terminal illness or other extreme medical conditions of the inmate, as has been BOP policy.

Again, Ms. Price's article contains a description of extraordinary and compelling reasons in the proposed policy statement:

An "extraordinary and compelling reason" is a reason that involves a situation or condition that—

- (1) was unknown to the court at the time of sentencing;
- (2) was known to or anticipated by the court at the time of sentencing but that has changed significantly since the time of the sentencing; or
- (3) the court was prohibited from taking into account at the time of sentencing but would no longer be prohibited because of changes in applicable law.

This proposed language covers the basics of changed conditions or circumstances which could support a reduction of sentence consistent with the SRA and the guidelines. As previously outlined, the §3583(c)(1)(A)(i) provision was placed in the Act to allow some safety valve for post-sentencing changed circumstances. Congress clearly understood that in enacting a determinate sentencing system, there had to be some outlet for compelling changed circumstances after sentencing. This definition provides a flexible model which does not unduly emphasize or confine itself to extreme illness of the inmate. It would allow the court to consider facts or law which changed after sentencing and which present a compelling case for a reduction of the sentence.

Finally, we believe that the Commission should provide a non-exclusive list of examples of what could qualify as extraordinary and compelling reasons. Again, the list proposed in Ms. Price's article appears to offer an excellent starting place in an application note:

The term "extraordinary and compelling reason" includes, for example, that—

- (A) the defendant is suffering from a terminal illness that significantly reduces life expectancy;
- (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (C) the defendant is experiencing deteriorating physical or mental health as a result of the aging process;

- (D) the defendant has provided significant assistance to the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated co-defendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

These examples do not purport to be exhaustive, but can provide some guidance as to possible categories of changed circumstances which could provide extraordinary and compelling reasons for a reduction in sentence.

D. Issues for Comment

The Commission solicits comment regarding whether the suggested policy statement regarding release of those over 70 years old who have already served 30 years should be expanded to include those sentenced under statutes other than 18 U.S.C. § 3559(c). Further, the Commission asks whether, if so, certain offenses should be excluded, such as terrorism or sexual offenses involving minors.

Extending the possibility of release for aged inmates to sentences outside of 3559(c) sentences would be good policy.¹¹ There are many other statutes which provide for extremely long, even life terms, e.g., the drug statutes found in 21 U.S.C. § 841(b)(1)(A). As the Commission has concluded, risk of recidivism drops dramatically after age 50, and surely even more dramatically after age 70.¹² With increased sentence severity over the past twenty years has come an aging prison population, with medical problems, and little risk of re-offense.¹³ It has been estimated that housing an elderly prisoner costs \$60,000 annually.¹⁴ It would make just as much sense to expand the release possibility to other cases.

¹¹ This portion of the statute was passed in 1994 as part of the "Three Strikes" legislation creating life sentences in § 3559(c), which is the only reason it was restricted to those sentenced under that statute.

¹² U.S. Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 & Exhibit 9.

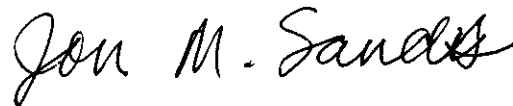
¹³ U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2003 8 (85% increase in inmates 55 or older since 1995), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf>; U.S. Department of Justice, Bureau of Justice Statistics, Medical Problems of Inmates (1997) (48% of federal inmates age 45 or older reported medical problems), <http://www.ojp.usdoj.gov/bjs/pub/ascii/mpi97.txt>.

¹⁴ Sentencing Project, Aging Behind Bars: "Three Strikes" Seven Years Later (August 2001) 12, <http://www.sentencingproject.org/pdfs/9087.pdf>.

If the expansion were available, it would be unnecessary and unduly broad to exclude certain offenses from the operation of the policy as a categorical matter. The statute and policy statements requiring a current lack of dangerousness fully address the concerns about public safety implicit in the issue for comment. After 30 years served and with defendants over 70 years old, there would be little reason to categorically exclude any conviction, so long as the current lack of dangerousness requirement remains.

Thank you for considering our comments, and please let us know if we can be of any further assistance.

Very truly yours,

 A handwritten signature in cursive that reads "Jon M. Sands".

 Handwritten initials "by ABE" enclosed in a hand-drawn oval.

JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines
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AMY BARON-EVANS
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cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Edward F. Reilly, Jr.
Commissioner *Ex Officio* Michael J. Elston
Judith Sheon, Acting Staff Director
Pam Barron, Deputy General Counsel
Paula Desio, Deputy General Counsel

3582 Cases – 2001 through 2004

The figures are below...all are for medical reasons. The contact with the US Atty may be done at the institution but is usually handled in Central Office.

	2001	2002	2003	2004
# Rec'd in Central Ofc*	34	38	46	33
# Rec'd & Approved	25	24	25	16
# Rec'd & Denied	4	6	11	12
# Rec'd & Died w/o decision or before release	4	7	9	5
* requests were withdrawn	1	1	1	0

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EDITORS' NOTES

During the closing year of the Clinton presidency, the Federal Sentencing Reporter's editors began planning an Issue focusing on the relationship between the pardon power and federal sentencing policy. When President Clinton dramatically issued 177 pardons and commutations on his final morning in office, and controversy ensued over the process he followed and many of the offenders who gained his favor, we expanded the questions we wanted authors to consider. This double issue, the first in FSR's history, brings together scholars, practitioners, journalists and policy makers in a thoughtful examination of the background, purposes and problems of the ancient practice of clemency, its modern trends and differing ideas concerning its future.

This Issue also includes a rich collection of statutory, historical and contemporary resources in its Appendix. Indeed, some readers may choose to study the relevant regulations and background materials in the Appendix before digging into the articles themselves. Among other documents, readers may wish to examine the careful study of the interplay and contrast between pardon practice and federal parole administration that is excerpted from a 1939 Justice Department survey. The contemporary news sources provide snapshots of public reaction in the wake of President Clinton's last-minute pardons and commutations. The final chapters of those stories are still being written in the form of continuing investigations. As usual, history will have the last word.

This Issue on the pardon power would not have happened without the hard work and dedication of Margaret Love, who joined us as a Guest Editor. Having served as United States Pardon Attorney from 1990 to 1997 under Presidents Bush and Clinton, she brought to this Issue an expertise and a perspective on pardons significantly informed by her years in the Justice Department. FSR's editors are most grateful for her many contributions.

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The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)



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While many people are familiar with the Guidelines safety valve, a lesser-known provision tucked away in the federal criminal code has the potential to be an even more powerful way to relieve the incarceration pressure. Title 18, Section 3582(c)(1)(A) allows a court, upon the motion of the Director of the Bureau of Prisons, to reduce a sentence for "extraordinary and compelling" reasons. The Sentencing Commission has an important, but unfilled, role to play in this process. If it follows Congress's intent, the Commission can breathe life into § 3582(c)(1)(A) and make it a meaningful safety valve in a wide range of cases.

On June 25, 2001, Families Against Mandatory Minimums (FAMM), urged the Sentencing Commission to promulgate a policy statement, pursuant to 28 U.S.C. § 994(t), to guide judges considering sentence reduction motions based on "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). FAMM took this action after learning that such sentence reduction are quite rare, and are generally made only when the prisoner is close to death.

Today, the absence of a guided post-sentencing safety valve means that many cases presenting compelling reasons for sentence reduction are not brought to the courts, but funneled, if pursued at all, through the executive clemency process. Reliance on the President's commutation power to handle such cases is no longer necessary since Congress established in § 3582(c)(1)(A) a method by which the Bureau of Prisons and the courts can address them. That section authorizes courts, with guidance from the Commission, to grant relief in appropriate cases. FAMM's proposal that the Commission provide such guidance is appended to this article.

A. Authority for Post-Conviction Sentence

Modification under the SRA

The Sentencing Reform Act (SRA) and the guideline sentencing system it established are premised upon the view that judicial sentencing discretion should be structured and not eliminated. Congress was not seeking to establish a mechanical system devoid of human judgment, but a system in which the exercise of discretion was guided and controlled. While one of Congress's goals was to ensure the finality of sentences, Congress also recognized that sometimes other considerations are important enough to warrant changing a sentence that has otherwise become final.

The SRA provides several ways of modifying an otherwise final sentence. It amended Rule 35 of the Federal

Rules of Criminal Procedure to authorize the court, upon motion of the government, to reduce a sentence to reflect substantial assistance to the government rendered by a defendant after imposition of sentence. It also provides two methods for modifying an otherwise final sentence requiring some action by the Commission. One, set forth in § 3582(c)(2), authorizes the court to reduce a sentence where the Sentencing Commission has reduced the guideline range applicable to the defendant. The motion for reduction of sentence may be made either by the defendant or by the Director of the Bureau of Prisons (BOP), and any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." The Commission is independently required to issue such guidance by 28 U.S.C. § 994(u), and it has complied with that mandate by promulgating and from time to time amending § 1B1.10.¹

The second method for modifying an otherwise final sentence that involves the Commission is set forth in § 3582(c)(1)(A). That provision authorizes the court, upon motion of the Director of the Bureau of Prisons, to reduce a sentence if the court finds that "extraordinary and compelling reasons warrant such a reduction." As under its companion provision (c)(2) discussed above, the court must find that the reduction is consistent with "applicable policy statements issued by the Sentencing Commission." The Commission is similarly directed to issue such guidance by 28 U.S.C. § 994(t). To date, the Commission has not done so.

B. Criteria for Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)

Although 18 U.S.C. § 3582(c)(1)(A) speaks of "extraordinary and compelling reasons," in practice the Director of the Bureau of Prisons has moved for a reduction only on behalf of terminally ill prisoners, or, in recent years, on behalf of some whose "disease resulted in markedly diminished public safety risk and quality of life."² We believe that Congress intended a broader application than that. The plain language of 28 U.S.C. § 994(t) and the legislative history of 18 U.S.C. § 3582(c)(1)(A) evidence a congressional intent that the statutory term "extraordinary and compelling" should embrace a variety of circumstances arising after a sentence becomes final, including not simply changes in an inmate's circumstances but also changes in the law.

The congressional mandate in 28 U.S.C. § 994(t) calls for a policy statement that must contain "the criteria to be applied and a list of specific examples." The

only limitation placed upon the Commission by this section is that "rehabilitation alone shall not be considered an extraordinary and compelling reason." Clearly Congress intended that rehabilitation was a legitimate consideration to be taken into account in deciding whether a case presented extraordinary and compelling reasons, even if it had to be combined with some other factor or characteristic. There is nothing to suggest that the other factor had to be a terminal illness, or indeed illness of any sort.

The Senate Judiciary Committee's Report on the SRA—the authoritative source of legislative history for the SRA—states:

The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.... The bill ... provides ... for court determination, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

The distinction in the Senate Report between "severe illness" and "other extraordinary and compelling reasons" demonstrates that non-medical considerations may constitute appropriate grounds for release, consistent with the overall congressional goal that these provisions act as a safety net held by the court.

The value of the forms of "safety valves" contained in this section lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.

C. Bureau of Prisons Policy and Practice under 3582(c)(1)(A)

Despite the broad authority contemplated by Congress, in the absence of guidance from the Commission, the Bureau of Prisons, as noted above, has generally limited motions under § 3582(c)(1)(A) to cases where the death of the prisoner is imminent.⁷ There is no requirement, however in the BOP's own policies and regulations that such motions be so limited.

In 1994 the BOP revised its internal guidance to

executive staff, expanding the classes of cases eligible for early release consideration.⁸ The Bureau had previously confined its motions to those on behalf of terminally ill inmates within six months of death. In the memorandum, Director Hawk advised the staff that the BOP had extended the outer limit of life expectancy to twelve months. Of greater significance, she noted that estimated life expectancy was "a general guideline, not a requirement."

As we have further reviewed this issue, it has come to our attention that there may be other cases that merit consideration for release. These cases still fall within the medical arena, but may not be terminal or lend themselves to a precise prediction of life expectancy.

The BOP Memorandum sets forth factors to consider when evaluating which cases to present to the court (*i.e.*, nature and circumstance of the crime, inmate characteristics and propensity to reoffend, the inmate's age, risk to the public, etc.). It also presents some guidance based on the nature and severity of the prisoner's illness and sets out three, presumably non-exhaustive examples. They include prisoners with debilitating diseases that clearly limit daily activity and for which conventional treatment is insufficient, those whose condition is terminal but not calculably so, and those who require organ transplantation. This more expansive reading of the power, while still narrower than Congress intended, is consistent with congressional intent as revealed in the legislative history of § 3582(c)(1).

Bureau of Prisons published regulations contemplate that sentence reduction motions may be brought in cases not involving medical considerations. The Bureau of Prisons regulation setting out the procedures for seeking and submitting requests under § 3582 and its "old law" predecessor, 18 U.S.C. § 4205(g), discusses grounds other than the prisoner's health for seeking a BOP motion to reduce sentence for extraordinary and compelling reasons. For example, under 28 C.F.R. § 571.61, entitled "Initiation of request—extraordinary and compelling circumstances," the Bureau directs that the prisoner's request include, *inter alia*, proposed plans upon release, including the proposed residence, how the prisoner will support him or herself, and "if the basis for the request involves the inmate's health, information on where the inmate will receive medical treatment, and how the inmate will pay for such treatment." The regulation thus assumes that some extraordinary and compelling circumstances warranting a motion need not be based on the prisoner's health. The BOP process for handling such motions seems to confirm that sentence reduction motions under § 3582(c)(1)(A) may be made on non-medical grounds. The applicable regulations provide for the review of

such motions by the Warden, the Regional Director, the General Counsel, "and either the Medical Director for medical referrals or the Assistant Director, Correctional Programs Division for non-medical referrals"⁵

Clearly, if medical and terminal considerations were the only permissible bases for sentence reductions, the specific provision for alternative routing of "non-medical referrals" would be superfluous.

D. Conclusion

The legislative history and the plain language of the SRA amply demonstrate that Congress intended the courts to entertain motions under 18 U.S.C. § 3582 (c)(1)(A) for a variety of circumstances considered so extraordinary and compelling that they warrant a reduction of sentence. The BOP regulations recognize that, despite current practice, such extraordinary and compelling reasons are not limited to medical concerns. But a policy statement from the Commission is needed to provide courts considering motions for sentence reduction with the guidance that Congress directed. That policy statement should embrace a definition of "extraordinary and compelling" flexible enough to account for a variety of post-sentence developments that merit relief. That is what Congress intended.

Notes

¹ § 1B1.10, p.s. authorizes a reduction in the term of imprisonment when the Commission has determined that a particular amendment to the Sentencing Guidelines is retroactively applicable. Such retroactive amendments are listed in subsection (c), and only those listed amendments can be the basis for a motion seeking a reduction in sentence under 18 U.S.C. § 3582 (c)(2).

² 18 U.S.C. § 3582 (c)(1)(A) also authorizes a sentence reduction motion for a prisoner who is at least 70 years old, has served at least 30 years on a sentence imposed under 18 U.S.C. § 3559(c), and the Director of the Bureau of Prisons has determined that the prisoner is no longer a danger to the safety of any other person or the community. This provision, specifically applicable only to "three strikes" offenders, was added to § 3582(c)(1)(A) in 1994 by Pub. L. 103-322.

³ See Chart: Bureau of Prisons Compassionate Releases, 1990-2000 (attached as Exhibit I), prepared by the Bureau of Prisons Office of Congressional Affairs (on file with the author).

⁴ "The most important legislative history for the Act [SRA] is found in the report of the Senate Judiciary Committee on the Comprehensive Crime Control Act of 1983 [S.Rep. No.225, 98th Cong., 1st Sess. 37-150, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3220-3373]." Criminal Div., U.S. Dept't of Justice, Prosecutors Handbook on Sentencing Guidelines and Other Provisions of the Sentencing reform Act of 1984, at 83 (Nov. 1, 1987), reprinted in THOMAS W. HUTCHISON & DAVID YELLEN, FEDERAL SENTENCING LAW AND PRACTICE SUPPLEMENTAL Appendix 11 (1989). The quote in the text appears at page 55 of the Senate Report.

⁵ *Id.* at 121.

⁶ As John Steer & Paula Biderman point out in their article: "[w]ithout the benefit of any codified standards, the Bureau [of Prisons], as turnkey, has understandably chosen to file very few motions under this section." John Steer and Paula Biderman, *Impact the Federal Guidelines on the Presidential Power to Commute Sentences*, 13 FED. SENT. REP. 155 (2001)

⁷ Memorandum from Kathleen M. Hawk, Director, Federal Bureau of Prisons (July 22, 1994) (BOP Memorandum) (on file with author).

⁸ 28 C.F.R. § 571.62 (a) (emphasis supplied). See a 28 C.F.R. § 571.62 (a)(3) (directing that the General Counsel "solicit the opinion of either the Medical Director or the Assistant Director . . . depending on the nature of the basis of the request") and 28 C.F.R. § 571.62 (c) (stating that "[i]n the event the basis of the request is the medical condition of the inmate, staff shall expedite the request at all levels.")

Exhibit I

FAMM Proposal for Policy Guidance under 18 U.S.C. § 3582 (c)(1)(A)

§ 1B1.13

Reduction in Term of Imprisonment as a Result of Motion by 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 the court determines that—

(1) either—

(A) an extraordinary and compelling reason warrants the reduction; or

(B) the defendant (i) is at least 70 years old, (ii) has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559 for the offense or offenses for which the defendant is imprisoned, and (iii) the Director of the Bureau of Prisons has determined, considering the factors set forth in 18 U.S.C. § 3142(g), that the defendant is not a danger to the safety of any other person or to the community; and

(2) such reduction is consistent with this policy statement and the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(b) An "extraordinary and compelling reason" is a reason that involves a situation or condition that

(1) was unknown to the court at the time of sentencing;

(2) was known to or anticipated by the court at time of sentencing but that has changed significantly since the time of sentencing; or

(3) the court was prohibited from taking into account at the time of sentencing but would

longer be prohibited because of changes in applicable law.

An "extraordinary and compelling reason" may consist of several reasons, each of which alone is not extraordinary and compelling, that together make the rationale for a reduction extraordinary and compelling.

Commentary

APPLICATION NOTE:

The term "extraordinary and compelling reason" includes, for example, that --

- (A) the defendant is suffering from a terminal illness that significantly reduces the defendant's life expectancy;
- (B) the defendant's ability to function within the environment of a correctional facility is significantly diminished because of a permanent physical or mental condition for which conventional treatment promises no significant improvement;
- (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 the government to a degree and under circumstances that was not or could not have been taken into account at the time of sentencing or in a post-sentencing proceeding;
- (E) the defendant would have received a significantly lower sentence had there been in effect a change in applicable law that has not been made retroactive;
- (F) the defendant received a significantly higher sentence than other similarly situated codefendants because of factors beyond the control of the sentencing court;
- (G) the death or incapacitation of family members capable of caring for the defendant's minor children, or other similarly compelling family circumstance, occurred.

Rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.

Background: Under 18 U.S.C. § 3582(c)(1)(A), the court, upon motion of the Director of the Bureau of Prisons, can reduce the term of imprisonment if the court determines that (1) the reduction is warranted by extraordinary and compelling reasons or (2) the defendant is at least 70 years old and has served 30 years in prison on a sentence imposed under 18 U.S.C. § 3559(c) for the offense for which the defendant is imprisoned and the Director of the Bureau of Prisons has determined that the defendant is not a danger to the safety of another person or the community. The Commission is directed by 28 U.S.C. § 994(f) to "describe what should be con-

sidered extraordinary and compelling reasons for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), including the criteria to be applied and a list of specific examples." This policy statement implements 28 U.S.C. § 994(f).

Exhibit II
Bureau of Prisons Compassionate Releases 1990-2000

Year	Number	Summary of Releases of Releases Granted
1990	11	Inmates with life expectancy less than twelve months
1991	10	Inmates with life expectancy less than twelve months
1992	16	Inmates with life expectancy less than twelve months
1993	28	Inmates with life expectancy less than twelve months
1994	23	Inmates with life expectancy less than twelve months
1995	22	Inmates with life expectancy less than twelve months
1996	23	Inmates with life expectancy less than twelve months
1997	13	Inmates with life expectancy less than twelve months
1998	22	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Significant Mental Impairment secondary to attempted suicide)
1999	27	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. advanced cirrhosis of the liver, total care stroke patient)
2000	31	Included inmates with life expectancy of less than twelve months, or with life expectancy of greater than twelve months if disease resulted in markedly diminished public safety risk and quality of life (i.e. Alzheimer's Disease, Significant Mental Impairment)

John