FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, AZ 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 12, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Comments on Proposed Amendments Relating to Drug Offenses

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders on the proposed amendments relating to drug offenses (including crack but not including 21 U.S.C. § 960a) that were published on January 30, 2007.

I. New Offenses Under the Combat Methamphetamine Epidemic Act of 2005

A. Using a Facilitated Entry Program to Import Methamphetamine, §§ 2D1.1, 2D1.11

The Commission has published for comment a proposal for sentencing defendants who use a facilitated entry program (e.g., FASTPASS) to import methamphetamine in violation of 21 U.S.C. § 865. The proposal would amend U.S.S.G. §§ 2D1.1 and 2D1.11 to add a two-level enhancement for a conviction under 21 U.S.C. § 865. It would also add an application note instructing courts how to impose the sentence so as to ensure that the portion of the sentence relating to the enhancement will be served consecutively. The proposal appears to implement Congress's intent and adequately reflects the seriousness of the offense.

In response to Issue for Comment 3(a), the increase should not be more than two levels and there should not be a minimum offense level. A defendant who imports methamphetamine and is not a minor or minimal participant is already subject to a two-level enhancement under § 2D1.1(b)(4). Proposed § 2D1.1(b)(5) would add another two-level increase for using a facilitated entry program in order to do so, thereby resulting in a four-level increase for any such defendant. Similarly, those in charge of any vessel that uses a facilitated entry program to commit a methamphetamine-related offense would

receive a four-level increase and a minimum offense level of 28 (in addition to the number of levels specified in the Drug Quantity Table) under the combined effect of §2D1.1(b)(2) and proposed § 2D1.1(b)(5).

Issue for Comment 3(b) asks whether the proposed enhancement should be expanded to reach defendants who are not convicted of methamphetamine-related offenses. It should not. 21 U.S.C. § 865 was enacted as part of the Combat Methamphetamine Epidemic Act of 2005. *See* Pub. L. 109-177, Title VII, section 731. The statute specifically applies only to defendants who use facilitated entry programs to commit offenses involving methamphetamine or the chemicals required to manufacture it. By requiring a conviction under § 865, the proposed enhancement is properly limited to methamphetamine-related cases, which is what Congress intended. *See* 151 Cong. Rec. H11279-01, H11309 (Dec. 8, 2005) ("This section of the conference report creates an added deterrent for anyone who misuses a facilitated entry program to smuggle methamphetamine or its precursor chemicals."). Given Congress' clear intent to target only defendants who use facilitated entry programs to import methamphetamine, there is no reason to expand the enhancement to reach offenses involving other drugs.

Issue for Comment 3(c) asks whether the Commission should amend § 3B1.3 to require a two-level increase for offenses that involve use of a facilitated entry program. Such an amendment would double count the offense conduct for convictions under 21 U.S.C. § 865, once under §§ 2D1.1 or 2D1.11 and again under § 3B1.3. One increase in Chapter Two is sufficient. Moreover, there is no justification for amending § 3B1.3 to reach any offense that involves use of a facilitated entry program. Congress has suggested no such broad concern, and such an amendment would stretch § 3B1.3 well beyond its meaning. Section 3B1.3 is intended to reach defendants who hold a position of public or private trust characterized by a special skill or by professional or managerial discretion. *See* 3B1.3, comment. (n. 1). People authorized to use a facilitated entry program do not have any special skill and do not exercise any discretion whatsoever. Nor are they subject to any less scrutiny than other travelers. Facilitated entry programs simply permit participants to reduce the amount of time they spend when entering the United States by providing much of the information required by U.S. Customs ahead of time. See United States Customs and Border Patrol, Secure Electronic Network for Travelers Rapid Inspection (SENTRI) available at http://www.cbp.gov/xp/cgov/travel/frequent_traveler/sentri/sentri.xml. In other words, the programs do not reduce border requirements for participants but merely provide an administratively easier method for meeting them. Program participants continue to be held to the same standards as all other travelers, including being subject to further inspection at border crossings. *See id.* There is no principled basis for concluding that use of a facilitated entry program is equivalent to holding a position of trust or having a special skill.

B. Manufacturing, Distributing or Possessing Methamphetamine on Premises Where a Minor Is Present or Resides, § 2D1.1

In addition to 21 U.S.C. § 865, section 734 of the Combat Methamphetamine Epidemic Act of 2005 created 21 U.S.C. § 860a, which provides an additional penalty for

manufacturing, distributing, or possessing with intent to manufacture or distribute methamphetamine on premises in which an individual who is under the age of 18 years is present or resides.

The Commission has proposed two alternatives for sentencing defendants convicted under § 860a. Option One would maintain the six-level enhancement with a floor of 30 under § 2D1.1(b)(8)(C) for any defendant who manufactured methamphetamine under circumstances that created a substantial risk of harm to the life of a minor, and would add a two-level enhancement for any defendant convicted under § 860a where the offense conduct did not create such a risk. Option Two would add an enhancement of six levels or to level 29 (whichever is greater) for § 860a convictions involving manufacturing or possessing with intent to manufacture, and an enhancement of two or three levels or to level 15 (whichever is greater) for § 860a convictions involving distributing or possessing with intent to distribute. Under the second option, the actual risk of harm to the minor would be irrelevant.

Issues for Comment 2. Both proposals are appropriately based on the offense of conviction and not relevant conduct rules. Relevant conduct (contrary to its original purpose) permits prosecutors to control sentencing, creates unwarranted disparity, results in unfairness, and is the primary source of criticism of the Guidelines. The Commission only recently announced that it was going to reconsider the relevant conduct rules. It should not add new unconvicted offenses to the Guidelines.

The proposed enhancements are also properly limited to the methamphetamine offenses addressed by § 860a, rather than covering all drug offenses. The Commission should not create new sentence enhancements not directed or even suggested by Congress. As discussed in Part I(A), *supra*, the Combat Methamphetamine Epidemic Act of 2005 is specifically focused, according to both the statutory language and the legislative history, on offenses involving methamphetamine.

Sentence enhancements solely for methamphetamine-related offenses are nothing new. In section 102 of the Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Congress specifically directed the Commission to add what is now § 2D1.1(b)(8)(C) only for crimes involving the manufacture of amphetamine and methamphetamine. *See* Methamphetamine and Club Drug Anti-Proliferation Act of 2000, Pub. L. 106-310 (Dec. 16, 2000). It did so because of the drugs' unique manufacturing process, which involves combining chemicals in a manner that is unstable, volatile, highly combustible, and leaves toxic residue behind. *See* H.R. Rep. 106-878 (Sept. 21, 2000). Nothing in any subsequent legislation, including the Combat Methamphetamine Epidemic Act of 2005, has suggested that Congress believes § 2D1.1(b)(8)(C) should be expanded to reach other drugs. Nor has there been any suggestion that sentences for drug offenses are generally too low; to the contrary, the Commission's own reports reflect that, if anything, the drug guidelines are too harsh. There is thus no need and no justification to expand either § 2D1.1(b)(8)(C) or the proposed § 860a-based enhancements to apply to offenses involving any drug other than methamphetamine.

With respect to the specific proposals, we believe that Option One, which focuses on the actual risk of harm to a minor resulting from the manufacturing process, is more consistent with congressional intent and better reflects appropriate distinctions in culpability. It would result in significant increases in cases where a minor is actually put at substantial risk by the manufacturing process, which is the specific harm that Congress intended § 860a's enhanced penalties to address. *See* H.R. Conf. Rep. No. 333, 109th Cong., 1st Sess. 2005, 2006 U.S.C.C.A.N. 184, 208. It would also permit variations depending on the risk of harm attendant to the crime. For § 860a convictions involving possession or distribution, or where the defendant manufactured methamphetamine in such a way as to not create a substantial risk of harm, Option One permits a two-level enhancement, which is consistent with § 860a.

We oppose Option Two because it does not permit courts to take into account the risk of harm to the minor when sentencing a defendant convicted under § 860a conviction. Option Two would require a floor of 29 for any defendant convicted under § 860a of manufacturing or possessing with intent to manufacture methamphetamine. Given that § 860a does not require either that the minor actually be present during the commission of the crime or that the defendant knew that a minor was present or resided on the premises, the 29-level floor would vastly overstate the potential seriousness of the offense in many cases and would create unwarranted uniformity. Suppose, for example, there are two defendants, each with a criminal history category of I, who are each convicted under § 860a of manufacturing between 2.5 and 5 grams of methamphetamine. The first defendant committed the crime in an acquaintance's house while the minor resident was on vacation. The second defendant committed the crime while the minor resident was in the room. Under Option Two, these defendants would be treated equally, despite the clear differences in their culpability and the risk to the respective minors.

Option Two is explicitly premised on the assumption that manufacturing methamphetamine "poses an inherent danger to minors" in all cases. This assumption is not justified in all cases. As § 2D1.1, comment. (n. 20) recognizes, the danger posed by manufacturing methamphetamine can vary significantly depending upon numerous factors, including the quantity of chemicals or toxic substances, the manner in which such substances were stored and/or disposed, the duration of the offense, the extent of the operation, the location of the laboratory, and the number of people placed at substantial risk of harm. Unwarranted uniformity and other unintended consequences of lumping a variety of cases together should be avoided.

Additional Issues. Although not addressed in the Issues for Comment section, the Commission has also proposed to raise sentences for ketamine across the board by eliminating the 20-level cap in the Drug Quantity Table for ketamine, a Schedule III drug. This proposal appears to have been based on the mistaken assumption that ketamine distribution is covered under § 860a. *See* 72 Fed. Reg. 4372-01, 4390 (Jan. 30, 2007) (proposing to eliminate offense level cap for ketamine because "[i]f a defendant is convicted under 21 U.S.C. § 860a for distributing ketamine, however, the defendant is subject to a statutory maximum of 20 years"). As noted above, § 860a applies only to manufacturing and distributing offenses involving "methamphetamine, or its salts,

isomers, or salts of isomers." *See* 21 U.S.C. § 860a. Ketamine does not fall within those categories and hence is not covered under § 860a. It may be that the Commission intended to refer to § 841(g), which does cover ketamine and which carries a twenty-year statutory maximum for convictions under that particular statute. The proposed amendments addressing § 841(g) are discussed in Part II, *infra*.

II. Using the Internet to Distribute Date Rape Drugs, § 2D1.1

Section 201 of the Adam Walsh Act created a new offense at 21 U.S.C. § 841(g), prohibiting knowing use of the Internet to distribute a date rape drug to any person knowing or with reasonable cause to believe either that the drug would be used in the commission of criminal sexual conduct or that the person is not an authorized purchaser as defined by the statute. The Commission has proposed three options for sentencing defendants convicted under § 841(g). Under Option One, the sentence would increase by either two or four levels for a § 841(g) conviction. Option Two would impose a four-level increase if the defendant was convicted of knowing or having reasonable cause to believe that the drug would be used in the commission of criminal sexual conduct. Option Three would impose a six-level increase and a floor of 29 if the defendant knew the drug would be used to commit criminal sexual conduct, a three-level increase and a floor of 26 if the defendant had reasonable cause to believe the drug would be so used, and a two-level increase for all other § 841(g) convictions. Issue for Comment 1 seeks input on these proposals or alternative methods.

Option One is unsatisfactory because it is overbroad and would create unwarranted disparity. This option would require an enhancement for a defendant convicted under § 841(g)(1)(B) of using the Internet to distribute a date rape drug to an unauthorized purchaser. However, distributing drugs to unauthorized purchasers is the basis of every distribution charge. Section 2D1.1 already results in substantial sentences for unauthorized sales of date rape drugs over the Internet,[1] including a two-level enhancement for distributing a controlled substance through mass marketing over the Internet. *See* 2D1.1(b)(5). Accordingly, sentences under § 841(g)(1)(B) should not be subject to additional enhancement, particularly in light of the Commission's priority of simplifying the Guidelines.

Option Three is unsatisfactory because it too would require a two-level enhancement for distributing a date rape drug to an unauthorized purchaser under § 841(b)(1)(B). In addition, Option Three's increases and minimum offense levels would result in excessive sentences and unwarranted uniformity. A defendant in Criminal History I convicted under § 841(g)(1)(A) of selling even one pill classified as a date rape drug or one unit of a drug analogue would be subject to a minimum offense level of 26 (63-78 months in CHC I) or 29 (87-108 months in CHC I). A minimum sentence of 5 ¼

[1] *See, e.g.*, DEA Press Release, *Missouri Mother and Son Are Sentenced to Lengthy Prison Terms on Drug Conspiracy Charges* (Jan. 30, 2004) (reporting sentences of 168 months and 100 months for selling date rape drugs over the Internet), available at http://www.dea.gov/pubs/states/newsrel/stlouis013004.html.

to 9 years for distributing a single unit of a drug over the Internet would overstate the seriousness of the offense.

Defenders' Proposal. We propose that the Commission adopt a variant of Option Two, which would not add an enhancement for defendants convicted under § 841(g)(1)(B) for distributing a date rape drug to an unauthorized purchaser. For defendants who fall under the "criminal sexual conduct" aspect of § 841(g), we propose that the Commission use the following language:

> If the defendant was convicted under § 841(g)(1)(A), increase by 2 levels.

A 2-level increase would sufficiently reflect the increased culpability of defendants convicted under § 841(g)(1)(A). *Accord* U.S.S.G. § 2D1.1(e)(1) (requiring 2-level increase under § 3A1.1(b)(1) where defendant committed or attempted to commit a sexual offense against another by distributing a controlled substance to that individual). Any defendant who distributed the drug by using the Internet to solicit a large number of purchasers would receive an additional 2-level increase under § 2D1.1(b)(6).

If, however, the Commission wishes to distinguish between the greater culpability of a defendant who acted with knowledge and the lesser culpability of a defendant who acted "with reasonable cause to believe," we propose the following language:

> If the defendant was convicted under § 841(g)(1)(A) and (i) knew that the date rape drug was to be used to commit criminal sexual conduct, add 3 levels, or (ii) had reasonable cause to believe that the drug would be used to commit criminal sexual conduct, add 1 level.

Again, the additional enhancement under § 2D1.1(b)(6) would apply if the defendant distributed the drug by using the Internet to solicit a large number of purchasers.

The Commission should not provide a cross reference to the criminal sexual abuse guidelines for defendants convicted under 21 U.S.C. § 841(g)(1)(A) first, because a defendant convicted under 21 U.S.C. § 841(g)(1)(A) did not commit criminal sexual abuse, and second, because defendants should not be sentenced for crimes of which they were not convicted.

Additional Issues. Ketamine is listed along with gamma hydroxybutyric acid ("GHB") and flunitrazepam in § 841(g)'s definition of a "date rape drug." Accordingly, selling ketamine over the Internet in violation of § 841(g) is subject to a 20-year statutory maximum. Ketamine, however, is a Schedule III drug, which is different from both GHB (Schedule I) and flunitrazepam (Schedule IV[2]). As such, unlike GHB and flunitrazepam, the number of levels added in the Drug Quantity Table is capped at 20.

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[2] Although flunitrazepam is a Schedule IV substance, it is treated the same as a Schedule I depressant under 21 U.S.C. § 841(b)(1)(C) and is subject to significantly higher offense levels under U.S.S.G. § 2D1.1.

The Commission should not remove this cap for ketamine. When Congress enacted § 841(g), it was fully aware that ketamine is a Schedule III drug and that guideline sentences for ketamine-related offenses are capped. Congress has been very clear when it intends to generally increase penalties for offenses involving date rape drugs. It did not do so here.

In 1996, Congress amended 21 U.S.C. § 841(b)(1)(C)[3] to include flunitrazepam, which increased the statutory maximum to twenty years, or thirty years with a prior felony drug conviction. *See* Drug-Induced Rape Prevention and Punishment Act of 1996, Pub. L. 104-305, 110 Stat. 3807, 3807-08 (Oct. 13, 1996). At the same time, Congress directed the Commission to ensure "that the sentencing guidelines for offenses involving flunitrazepam reflect the serious nature of such offenses." *See id.*

In 2000 and 2003, Congress took identical steps with respect to GHB. *See* Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106-172, 114 Stat 7, 9 (Feb. 18, 2000). First, it amended § 841(b)(1)(C) to include GHB, thereby increasing the statutory maximum for GHB offenses to twenty years (or thirty with a prior), and directed the Attorney General to reclassify the drug. *See id.* at 8-9. Then it directed the Commission to "consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them." *See* Illicit Drug Anti-Proliferation Act of 2003, Section 608(e)(2), Pub. L. 108-21, 117 Stat 650, 691-92 (April 30, 2003).

Here, when passing § 841(g), Congress did not indicate any dissatisfaction with ketamine sentences generally, nor did it amend § 841(b)(1) to provide for harsher treatment of ketamine. Ketamine stills falls under § 841(b)(1)(D), which carries a statutory maximum of five years' imprisonment (ten with a prior). *See* 21 U.S.C. § 841(b)(1)(D). Congress did not direct that ketamine be reclassified as a Schedule I or Schedule II substance, which would have had the effect of both increasing the statutory maximum under § 841(b)(1) and removing the 20-level cap (which applies only to Schedule III drugs). And it did not issue any directive to the Commission to review or amend the ketamine guidelines.

The federal drug laws have been repeatedly criticized as the primary cause of prison overcrowding. A large part of that criticism has been focused on the Guidelines, which often require lengthy sentences for nonviolent offenders, which are not connected to the risk of recidivism or dangerousness. As a matter of policy, the Commission should not raise drug sentences when there is no directive and no need to do so. That general principle is particularly applicable here, where Congress has explicitly increased sentences for other date rape drugs but has said nothing about raising ketamine sentences.

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[3] The offense levels set forth in § 2D1.1(c) are based on the statutory penalties for the drug as set forth in 21 U.S.C. § 841(b)(1). *See* U.S.S.G. § 2D1.1 application note 10 ("The Commission has used the sentences provided in, and equivalencies derived from, the statute (21 U.S.C. § 841(b)(1)) as the primary basis for the guideline sentences.").

Even if removing the cap for convictions under § 841(g) involving ketamine were justified, which it is not, there is no basis for raising ketamine sentences across the board, as the proposed amendment would do. A simpler and more rational approach would be to withdraw the proposed amendments to the Drug Quantity and Drug Equivalency Tables, and instead add an application note to § 2D1.1 stating:

> In any case in which a defendant is convicted of violating 21 U.S.C. § 841(g) by distributing ketamine, the Drug Quantity Table levels and quantities for Schedule III substances should not be used for purposes of determining the offense level. Instead, ketamine should be treated under the Drug Quantity Table as though it is a Schedule I or II Depressant for purposes of determining the offense level for the § 841(g) violation.

We emphasize, however, that even this step is unnecessary. We oppose any change to the ketamine guideline.

III. Crack/Powder Cocaine Disparity

The Commission has offered to receive additional comments on the proper approach to remedying the disparate treatment of crack and powder cocaine under the Guidelines. We continue to urge the Commission to amend the Guidelines to remove the unwarranted and unjustifiable 100:1 ratio for cocaine and crack sentences, and to replace it with a retroactive guideline establishing a 1:1 ratio that ensures equal penalties for equal amounts of crack and powder cocaine.[4] In addition, we urge the Commission to follow Judge Sessions' suggestion and add a downward adjustment or a recommended downward departure for successful completion of a drug treatment program.

There is no justification for maintaining the disparity between crack and powder cocaine sentences. The disparity has had a detrimental effect on families and communities and increased exponentially the costs of our criminal justice and penal systems. As stated by Senators Kennedy, Hatch and Feinstein in a recent amicus brief to the Supreme Court, "the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine - a ratio currently incorporated in the sentencing guidelines - demonstrate that the guidelines do not always reflect objective data or good policy." *See* Br. of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein, *Claiborne v. United States*, 2007 WL 197103, *21

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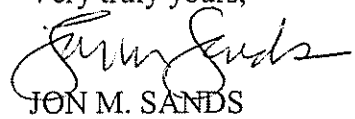
[4] We incorporate by reference all of the letters and testimony provided by us to the Commission in the past year in support of our position on this issue. *See* Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Follow-Up on Commission Priorities (Nov. 27, 2006); Testimony of A.J. Kramer Before the United States Sentencing Commission Public Hearing on Cocaine and Sentencing Policy (Nov. 14, 2006); Letter from Jon M. Sands to Hon. Ricardo Hinojosa Re: Proposed Priorities for 2006-2007 (July 19, 2006); Letter from Jon M. Sands to Hon. Ricardo H. Hinojosa Re: Report on Federal Sentencing Since *United States v. Booker* (Jan. 10, 2006).

(Jan. 22, 2007). Noting that the crack-powder disparity would be a principled basis for a sentence below the guideline range, the Senators stated, "Attention to this problem . . . is long overdue." *Id.* at **27-28. It is time for the Commission to repair this injustice.

We hope that these comments are useful to the Commission. Please do not hesitate to contact us if you have any questions or concerns, or would like any additional information.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Louis Reedt, Acting Deputy Director for the Office of Research and Data
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel

FEDERAL PUBLIC DEFENDER
District of Arizona
850 West Adams Street, Suite 201
PHOENIX, ARIZONA 85007

JON M. SANDS
Federal Public Defender

(602) 382-2700
1-800-758-7053
(FAX) 382-2800

March 13, 2007

Honorable Ricardo H. Hinojosa
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: § 1B1.3 Reduction in Term of Imprisonment Upon Motion of Director of Bureau of Prisons (Policy Statement)

Dear Judge Hinojosa:

We write on behalf of the Federal Public and Community Defenders regarding additional Commission action on the new guideline provision, U.S.S.G. § 1B1.13, creating a policy statement governing reduction of prison terms based on extraordinary and compelling reasons pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), and to respond to the further request for comment issued in January, 2007.[1]

We previously submitted written testimony regarding the proposed policy statement on March 13, 2006. On July 14, 2006, we submitted additional comment pursuant to the Commission's request. In the latter submission, we joined several other groups in supporting a proposed policy statement, submitted by the ABA, which addressed the statutory mandate of 28 U.S.C. § 994(t), stating that the Commission:

> 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.

[1] We thank Steven Jacobson, AFPD, District of Oregon, for his assistance in preparing these comments.

We continue to support the ABA proposal as the best response to this statutory mandate. We offer some background as context and then respond to the Government's recent positions and to the questions in the Commission's request for comment.

I. Background

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 district 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 be made based on prison overcrowding.

The Sentencing Reform Act of 1984 (SRA) established a determinate sentencing system with sentencing guidelines to aid the court in establishing an appropriate sentence. The parole system, and the rehabilitative model it embodied, were rejected in favor of a system intended to provide more certainty, finality and uniformity.[1] However, Congress also recognized that post-sentencing developments could 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. This section of the SRA 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-
>
> (i) extraordinary and compelling reasons warrant such a reduction;.

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

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[1] See, generally, *United States v. Mistretta*, 488 U.S. 361, 363-370 (1989).

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions of 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.

28 U.S.C. § 994(t).

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

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term or 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.[2]

Thus, the plain language of the statute and the legislative history describe a reduction in sentence based on changed circumstances, to be decided upon by the court after motion by the Bureau of Prisons, using standards set forth by the Sentencing Commission and the factors set forth in 18 U.S.C. § 3553(a). Nothing in this legislation delegated to the Bureau of Prisons the authority to define compelling and extraordinary circumstances more narrowly than the statute or the Sentencing Commission.

II. Government Response to U.S.S.G. § 1B1.13

In the face of Commission inaction on the mandate of 28 U.S.C. § 994(t), commentators have noted that the Bureau of Prisons rarely made motions for reduction.[3]

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[2] 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.

[3] 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); 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.) (2001).

However, BOP rules clearly contemplated both medical and non-medical reasons and did not purport to narrow the statutory terms. The program statement in place from 1980 to 1994 (covering both pre- and post-SRA sentences) instructed staff to file motions "in particularly meritorious or unusual circumstances which could not have reasonably been foreseen by the court at the time of sentencing," including "if there is an *extraordinary change in an inmate's personal or family situation* or if an inmate becomes severely ill." 28 C.F.R. § 572.40 (1980) (emphasis added); *see* 45 Fed. Reg. 23365-66 (Apr. 4, 1980). The BOP amended the program statement in 1994, updating it with references to the legislative language of § 3583, "extraordinary and compelling circumstances," but maintaining the same broad standards and including medical and non-medical cases. 28 C.F.R. § 571.61, *et seq.*, 59 Fe. Reg. 1238 (Jan. 7, 1994); *see* USDOJ-BOP, Program Statement 5050.44, *Compassionate Release: Procedures for Implementation of 18 U.S.C. 3582(c)(1)(A) & 4205(g)* (Jan. 7, 1994) (emphasizing "the standards to evaluate the early release remain the same," though prison overcrowding eliminated as an appropriate basis).

Once the Sentencing Commission entered the arena by adopting the policy statement in U.S.S.G. § 1B1.13 in 2006, the executive branch reacted in two ways. First, the Department of Justice submitted a letter on July 14, 2006, which warned that the Commission should not adopt a policy for granting motions broader than the Department's standards for filing such motions:

> The policy statements adopted by the Sentencing Commission for granting motions under 18 U.S.C. § 3582(c)(1)(A)(i) cannot appropriately be any broader than the Department's standards for filing such motions. . . . It would be senseless to issue policy statements allowing the court to grant such motions on a broader basis than the responsible agency will seek them. . . . At best, such an excess of permissiveness in the policy statement would be a *dead letter* because the Department will not file motions under 18 U.S.C. § 3582(c)(1)(A)(i) outside the circumstances allowed by its own policies.

DOJ Lt. p. 4 (emphasis added). The letter advocated that reductions should only be entertained in a narrow range of medical situations:

> the inmate for whom the reduction in sentence is sought has a terminal illness with a life expectancy of one year or less, or a profoundly debilitating (physical or cognitive) medical condition that is irreversible and irremediable and that has eliminated or severely limited the inmate's ability to attend to fundamental bodily functions and personal care needs without substantial assistance from others;

DOJ Lt. p. 1. Of course, as is apparent from the previous discussion, nothing in the statutory language or history, nor in the BOP rules, narrowed "extraordinary and compelling reasons" to such a small subset of medical-only cases.

The BOP then, more recently, published new proposed rules outlining exactly such a narrowing of cases in which sentence reductions would be sought. 71 Fed. Reg. 245, pp.76619-76623 (Dec. 21, 2006). Claiming that the new regulations would "more accurately reflect our authority under these statutes and our current policy," the rules rename the section "Reduction in Sentence for Medical Reasons," and confine action to cases involving terminal illness with less than a year to live or the near-vegetative state described in the DOJ letter above.

The DOJ position and BOP's proposed rule-making action are misguided for several reasons. First, Congress, while making the reduction dependant on motion of the BOP, clearly delegated authority to set standards and policy for these sentence reductions to the Sentencing Commission. The process for doing so is set forth in the SRA and includes instructing all the participating players in the criminal justice system to provide their input and expertise to the Commission during the rule making process. The executive agencies are specifically mentioned as one of the key organizations that

> shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted and otherwise assessing the Commission's work.

28 U.S.C. § 994(o). This appears to be the only congressionally approved mechanism for transmitting the Bureau of Prisons' concerns and proposals to the Sentencing Commission. It also provides the mechanism for the other essential players in the federal sentencing system – the United States Probation Office, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and the Federal Public Defenders – to provide their input on the question. The amendment would then be subject to approval by the Commission and acquiescence by Congress under 28 U.S.C. § 994(p).

Nothing in the statutory scheme delegates to the Bureau of Prisons authority to limit or construe "extraordinary and compelling" beyond its plain meaning. The task of formulating the standards and providing examples was expressly delegated by Congress to the Sentencing Commission in the same statute that provided the Bureau of Prisons with a mechanism for making its suggestions to the Sentencing Commission regarding guideline amendments.

In addition, the narrowing proposed by the government has no basis in the statute or legislative history. As already described above, Congress clearly contemplated changed circumstances more broadly than end of life or near-vegetative state standards proposed by the government. The statutory scheme delegated the job of coming up with standards and examples to the Commission, then delegated to the sentencing court, the decision making power to rule on the motion after consideration of the statutory factors in 18 U.S.C. § 3553(a).

Unilateral narrowing of eligibility by the government not only misconstrues the statute, but usurps authority delegated to the judicial branch, creating a Separation of Powers problem. Declaring anything the Commission does to define "extraordinary and compelling reasons" as a *dead letter* if it is broader than the government's chosen standard serves to highlight the reversal of the proper roles and the constitutional violation that reversal embodies.

To avoid this problem and properly implement the statute, the power to move for sentence reductions should be broadly construed. The structure of the statute provides a gate-keeping function to the Bureau of Prisons. Whenever a factor arises that is arguably within the definition of "extraordinary and compelling reasons," the Bureau of Prisons should notify the court by motion so the sentencing judge can make the ultimate determination of whether a sentence reduction is appropriate, implementing the § 3553(a) factors that sentencing judges are very experienced in applying in every federal sentencing. This system does not work, either statutorily or constitutionally, unless the Bureau of Prisons implements its authority to notify the court in a very broad manner.

Under the statute, if the Bureau of Prisons is prejudging whether the sentence reduction should be granted, it substitutes its judgment for that of the court. Unless the notifications are very broad, allowing for some denials by sentencing judges, some cases in which "extraordinary and compelling" circumstances exist will not be before the sentencing judge. A restrictive view of when the § 3582(c) authority should be exercised compromises the statutory scheme. Even worse, Separation of Powers is violated when an executive body, faced with "extraordinary and compelling" circumstances, fails to provide the sentencing judge with the opportunity to make the ultimate judgment whether the sentence reduction is appropriate under the statute and § 3553(a). In whatever form the Bureau of Prisons addresses the implementation of § 3582(c), the power to file motions should be broadly and liberally construed in order to faithfully carry out the statutory scheme and to avoid unconstitutional limitations on judicial authority.

III. Further Comment and Response to Questions

Our positions on most of the questions posed in the current "Issue for Comment" are obvious from our previous submissions and the positions set forth above. We support the ABA proposal defining a broad range of circumstances which can provide extraordinary and compelling reasons and warrant a reduction in sentence. Examples should include a broad range of medical and non-medical circumstances and should not be limited to end-of-life releases.

There are medical conditions that, while not producing imminent death, make continued incarceration serve none of the purposes of sentencing under 18 U.S.C. § 3553(a). For example, a prisoner who suffers a non-life threatening stroke that forecloses the type of conduct that led to incarceration in the first place; a debilitating disease that makes an otherwise harmless prisoner easier to care for in the community than in the prison; crippling injuries such as an amputation or paralysis that both limit dangerousness

and render the prisoner vulnerable to other prisoners. Further, the requirement that the person be almost dead is far too limiting based on the constellation of potential circumstances surrounding a terminal illness.

There are also non-medical changes of circumstances which Congress contemplated and could clearly warrant relief under the statute. Such circumstances could include acts of heroism by prisoners; positive conduct in the prison or assistance to authorities that, although not permitting a Rule 35 motion, expose the prisoner to mistreatment and ostracism within the prison; family circumstances, such as death of a spouse leaving the prisoner as the only care giver for children, or a child dying and needing the prisoner present for care giving at the end of life. Further, rehabilitation in combination with other factors may render circumstances extraordinary and compelling from the negative inference in 28 U.S.C. § 994(t) (stating that rehabilitation "alone" is not sufficient).

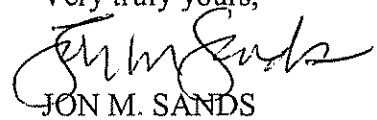
We submit that the Commission should take a "combination" approach referred to in the question for comment, allowing the court to consider more than one reason, each of which is, alone, less than extraordinary and compelling, but that, taken in combination, are. This approach not only makes inherent sense, but is suggested by the statutory provision stating that rehabilitation alone is not sufficient.

Also, as implied in the last question for comment, the policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state.

Finally, in light of the way in which the executive branch is attempting to narrow the definition of extraordinary and compelling reasons without deference to standards set by Congress or the Sentencing Commission, we believe the Commission should provide a statement of the correct roles in its policy statement. The policy statement should provide that the Bureau of Prisons' role is that of a gate-keeper, which should implement Congressional and Commission-set standards for extraordinary and compelling reasons by broadly bringing motions when such reasons appear to be present, allowing the courts to exercise their authority to decide whether a reduction is warranted, after considering the policy statements and the § 3553(a) factors. This is the appropriate balance and the way in which a Separation of Powers violation will be avoided.

Thank you for your consideration of our comments.

Very truly yours,



JON M. SANDS
Federal Public Defender
Chair, Federal Defender Sentencing Guidelines Committee

AMY BARON-EVANS
ANNE BLANCHARD
SARA E. NOONAN
JENNIFER COFFIN
Sentencing Resource Counsel

cc: Hon. Ruben Castillo
Hon. William K. Sessions III
Commissioner John R. Steer
Commissioner Michael E. Horowitz
Commissioner Beryl A. Howell
Commissioner Dabney Friedrich
Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Benton J. Campbell
Tom Brown, Assistant General Counsel
Judy Sheon, Staff Director
Ken Cohen, Staff Counsel