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## **USSG §1B1.13 TESTIMONY** **February 15, 2023**

POAG appreciates the opportunity to respond to the proposed amendment to USSG §1B1.13 and to provide comment regarding the proposed revised list of “extraordinary and compelling reasons.” This guideline is unique in that it is not a matter of scoring a specific offense characteristic or determining a criminal history calculation. It is a guideline that was developed based upon the directives under 28 U.S.C. § 994(t) that recognized the importance of empathy for the infirm who are suffering from dire health issues and life circumstances. For those who were not given a life sentence, but their health issues have unfortunately given them an end-of-life trajectory, the sentence imposed effectively becomes a life sentence unless their case is reassessed using the criteria set forth under USSG §1B1.13. In that spirit, POAG unanimously supports the expansion of this guideline to allow defendants to directly request relief from the Court, thus reducing the steps necessary to obtain relief, which is especially relevant given the need for expedience is often a factor.

POAG recognizes that USSG §1B1.13 bears a heavy burden as it seeks to provide direction and consistent application, yet allow for sufficient, expeditious discretion to address cases that present with unique factors or a combination thereof, including the previously unforeseen issues related to the Covid-19 pandemic. With the amendment to 18 U.S.C. § 3582(c)(1)(A), these types of heartfelt issues have become and will remain an issue the Court will be tasked to address with increased frequency moving forward. For these reasons, POAG favors amending USSG §1B1.13 given its renewed significance in our system of sentencing.

With regard to subsection (b)(1)(C) pertaining to medical issues that require specialized or long-term care, POAG believes that language appropriately broadens the type of medical conditions that would qualify as extraordinary and compelling beyond the already existing medical criteria now set forth under subsection (b)(1)(A). POAG believes this proposed amendment expands the Court’s discretion to give due consideration to the vast type of unique and unforeseen medical issues that did not

previously meet the criteria set forth under now section (b)(1)(A). The proposed language is written in such a way that it recognizes individuals suffering from certain medical conditions experience symptoms with varied severity and at different stages of the disease.

With regard to subsection (b)(1)(D) pertaining to infectious diseases, POAG also believes such an amendment fully captures the heart of the issue presented by the ongoing concerns with Covid-19. While POAG discussed some concerns that this may result in regional disparity, POAG unanimously believes that such an amendment would put the Bureau of Prisons in a better position to address any future medical emergencies and fulfill their responsibility to protect those who are in their custody.

With regard to subsection (b)(3) pertaining to family circumstances, POAG did not have a strong opinion on that listed criterion beyond recognizing that the family circumstances presented within that subsection are often issues that are present at the time of sentencing. As such, this amendment could potentially cast a wider net than was intended by this guideline and would potentially present difficulty in determining which case warrants a reduction when the circumstances are not uncommon. POAG discussed other factors that may be relevant, including the type of relationship the inmate had with their child before imprisonment, whether the inmate emotionally or financially supported their child, and whether the family circumstances remain unchanged and were known to the Court at the time of sentencing. POAG also believes the offense of conviction should be included as a factor, especially if the instant offense involved a sexual abuse offense. However, POAG also entrusts the Court will consider such factors in the event they serve as a basis for compassionate release.

With regard to subsection (b)(4) pertaining to a new category of “extraordinary and compelling reasons” for inmates who are victims of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody, POAG expressed concern with this well-intended attempt to remedy a tragic situation by way of a sentencing amendment. This proposed amendment is unique in that it requires the Court to essentially find that another crime has been committed. POAG questioned if an allegation would be sufficient or what documentation would be required to address this issue in order to preclude any concerns with exploitation or false allegations. POAG also discussed concern that this amendment gives the appearance that sexual and physical assaults of inmates by correctional officers will be a fact of incarceration such that there needs to be an amendment to USSG §1B1.13 in order to account for that harm. Ideally, this issue can be better addressed within our correctional system to mitigate the need for such an amendment, including the deterrent effect of the newly enacted statute under 18 U.S.C. § 2243(c).

However, if this proposed criteria is adopted, POAG recommends that the term “sexual assault” be defined in order to ascertain whether any sexual act would qualify, such as “sexual act” as defined in 18 U.S.C. § 2246, or if the conduct would need to meet a certain statutory definition, such as aggravated sexual abuse as defined in 21 U.S.C. § 2241 or sexual abuse as defined in 21 U.S.C. § 2242. POAG also recommends clarifying language be included regarding the use of force or coercion given that correctional officers are in a position of authority. Further, POAG inquires if the reference to “serious bodily injury” is inclusive and pertains to both instances of sexual assault and physical abuse, or if it is intended to only apply to instances of physical abuse. According to USSG §1B1.1, comment (n.1(m)), “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242. If the reference to

“serious bodily injury” does pertain to sexual assault offenses, then it would be then clear that the sexual assault would need to meet the criteria under 21 U.S.C. §§ 2241 or 2242. POAG also foresees the argument that pregnancy should be considered “serious bodily injury” and suggests the Commission provide guidance on their intent with regard to how inmate pregnancy should be considered. Additionally, POAG was unanimously opposed to extending the proposed (b)(4) provision to inmate-on-inmate sexual or physical assaults. As noted above, POAG has concerns about collusion and false allegations when this is an issue that can be better addressed within our correctional system with the goal of mitigating such victimization of inmates by other inmates.

And finally, POAG unanimously opposes the provisions pertaining to changes in the law set forth in the proposed subsection (b)(5) be adopted. POAG believes there should be a clear line between the statutes and guidelines intended to address matters of compassionate release related to defendant’s personal characteristics and life circumstances and the statutes and guidelines intended to address changes in the law and retroactive sentencing provisions. Implicit in retroactive sentencing reductions and other changes to the law is the concept that some attribute of the law resulted in an unjust outcome. There are already mechanisms within our system to address retroactive sentencing issues and such an amendment would essentially function to allow unlimited discretionary retroactivity based on inequity resulting from changes in the law. The terminology used appears extremely broad, such that any inmate impacted by any change in the law, in any jurisdiction, could directly seek judicial relief. The current structures in place for such reductions under 18 U.S.C. § 3582 and 28 U.S.C. § 2255(f) and (h) have triggering mechanisms, timeframes, and request limitations in place. The intended structure and provisions of these statutes prevent an influx of repeated requests emanating from the most nuanced changes in the law. No such limitations are included under the proposed (b)(5) language. Under the proposed (b)(5) language, if that relief were not granted, the defendant could renew their request upon another nuanced change in the law, regardless of the spuriousness of the claim. Given the speed at which the law changes and the disparities of interpretation amongst the many circuits, the amendment of (b)(5) into this section would undoubtedly overwhelm the judicial process with a significant number of requests, that once denied, could be renewed time after time based on new guidelines, case law, or statutory adjustments, creating an environment of perpetual requests for discretionary retroactivity. The Commission noted in the First Step Act – Drug Offenses that 1,987 defendants in fiscal year 2021 could have received guideline safety valve under the disjunctive approach to the proposed amendment to the criteria of USSG §5C1.2(a) and an additional 4,111 under a conjunctive approach to the same guideline. That is one change, on one issue, in one year, wherein the change is foreseeable. With each and every change, every inmate potentially impacted, as well as those not impacted but seeking a review of their sentence, would be eligible and encouraged to file subsequent compassionate release motions. There is no finality to the sentence with this proposed process. Further, a genuine assessment of the impact of any of the aforementioned changes to the law would require litigation by the parties to determine if and to what extent the sentence was truly impacted. When one considers the numbers of defendants and the various changes in the law that occur regularly, it quickly becomes apparent that retroactivity of this nature would be overwhelming to the judicial system.

Additionally, the Commission expressed concern that the retroactive powers expressed under USSG §1B1.10 could be placed in tension by the (b)(5) language of §1B1.13, and the Commission inquired how to balance these. POAG shares the Commission’s concern and does not think a balance between the powers under USSG §1B1.10 and the proposed language at (b)(5), as written, can be established. POAG recommends keeping that retroactivity exclusively under USSG §1B1.10, so as to reduce confusion, avoid disparity, and prevent the prospect of overwhelming the system.

As for the three options related to subsection (b)(6), POAG favors Option 3, primarily because it tracks the language in the current criteria set forth in USSG §1B1.13, comment. (n. 1(D)), which applies in cases in which “The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through (3).” In the alternative, Option 1 with a similar (1) through (3) restriction would provide a clearer directive of the types of factors that could be considered, yet broadens the criteria to circumstances that are similar in nature to the established criteria. POAG was also in favor of the Commission providing examples of circumstances that constitute “extraordinary and compelling reasons” in a non-exhaustive list, including circumstances that would not qualify. For instance, in the event the Commission determines changes in the law are not an allowable basis under USSG §1B1.13, POAG recommends it explicitly be noted that such is the case, especially because 18 U.S.C. § 3553(a) is an all-encompassing part of the equation and includes factors such as the need for the sentence imposed to provide just punishment for the offense and the need to avoid unwarranted sentencing disparities. As a matter of general comment, POAG notes that the position taken within this testimony is based upon POAG’s understanding that compassionate release, up to the point of the current amendment cycle, was geared toward the health and family circumstances of the defendant. Therefore, POAG remains focused on the long-standing intent of this guideline. With these recommended amendments, POAG believes USSG §1B1.13 would be structured in such a way that it provides established eligibility parameters, yet entrusts our Courts with the necessary discretion as they continue their work in making an individualized assessment of each compassionate release motion.