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Via Electronic Mail

United States Sentencing Commission
One Columbus Circle, NE
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Washington, D.C. 20002 8002
Attention: Public Affairs – Priorities Comment

October 16, 2022

Comments on Proposed 2022-2023 Priorities of the United States Sentencing Commission

Dear Members of the Commission:

We write with great enthusiasm about the United States Sentencing Commission (the "Commission") being fully constituted and moving ahead with the important business of providing critical guidance in the area of federal sentencing. We are hopeful that future amendments to the Sentencing Guidelines will continue to effectuate a national shift from overreliance on punishments that have fueled mass incarceration in this country to a broader availability of alternatives to incarceration as well as reduced periods of confinement when incarceration may be required.

Of the 12 proposed priorities delineated by the Commission, we comment here on three, as we wish to share particular input on why these should be priorities for the Commission's next amendment cycle and why Guideline amendments should be adopted for each. These are priorities relating to (1) the **compassionate release** guideline, 1B1.13 (Priority 1), (2) implementing the statutory directive of **28 U.S.C. § 994(j)** (Priority 8), and (3) **court-sponsored diversion and alternatives-to-incarceration programs** (Priority 12). All three priorities, if pursued as suggested below, would directly aid the Commission in achieving its goal of considering measures that would "reduc[e] costs of incarceration and overcapacity of prisons."[1]

Our organizations—the Center for Justice and Human Dignity and the Aleph Institute—have an abiding interest in supporting the Commission's work, especially insofar as it results in a less rigid and reflexive use of incarceration and a more robust consideration of alternative forms of punishment that will produce optimal outcomes for defendants, their families, their communities, crime victims, the criminal legal system, and society as a whole.

[1] https://www.ussc.gov/policymaking/federal-register-notices/federal-register-notice-proposed-2022-2023-priorities.

The Center for Justice and Human Dignity

The Center for Justice and Human Dignity ("CJHD")[2] is a nonprofit organization whose mission is to reduce incarceration in the United States while improving conditions for those imprisoned and working in the prison system. CJHD promotes human dignity and shared safety while keeping in mind the needs of victims, system-impacted people, and society at large. Alongside diverse partners, the Center works with judges and prosecutors on ways to expand the use of alternatives to incarceration; with correctional leaders on the conditions of confinement; and with policymakers on legislative reforms to the criminal legal system. In an upcoming 2023 summit, CJHD plans to convene hundreds of key stakeholders and advocates to discuss and formulate strategies for implementing innovative sentencing practices in the criminal legal system.

CJHD is closely guided by the expertise of its steering committee, comprised of 20 former and sitting federal judges. CJHD's founding board provides additional criminal justice expertise, and includes the Honorable Larry D. Thompson, Counsel, Finch McCranie LLP and former U.S. Deputy Attorney General; the Honorable Nancy Gertner, Senior Lecturer, Harvard Law School and former U.S. District Judge; and the Honorable Jeremy D. Fogel, Executive Director of the Berkeley Judicial Institute, former U.S. District Judge, and former Director of the Federal Judicial Center.

The Aleph Institute

The Aleph Institute ("Aleph")[3] served as the incubator for CJHD's formation. Aleph was founded in 1981 and has a decades-long history of working with judges, legislators, executive branch officials (including prosecutors and prison officials), academics, and legal practitioners in the area of criminal legal reform. Aleph was honored to have been a part of the bipartisan effort resulting in the passage of the First Step Act of 2018.

In 2016, Aleph convened a high-level Alternative Sentencing Key Stakeholder (ASKS) summit at the Georgetown Law Center, featuring nearly 200 current and former leaders and senior government officials serving in the criminal legal system. And in 2019, Aleph co-hosted (with Columbia Law School) a second summit on Alternatives to Incarceration—titled "Rewriting the Sentence"—to examine the tremendous changes taking place in the alternatives to incarceration arena. This summit was attended by approximately 300 criminal legal stakeholders, including federal and state judges, prosecutors, defense counsel, probation and pretrial officers, individuals directly affected by incarceration, advocacy groups, and other key stakeholders in the criminal legal system. The attendance of 25 federal judges from across the country was funded by the Federal Judicial Center. The two-day event featured 80 speakers,[4] and included panel discussions

[2] https://www.cjhd.org.
[3] https://www.aleph-institute.org.
[4] Speakers included Hon. New York State Attorney General Letitia James; Congressmen Hakeem Jeffries of New York and Doug Collins of Georgia; Hon. State's Attorney Marilyn Mosby of Baltimore, MD; Hon. Virginia Phillips, Former Chief U.S. District Judge for the Central District of California; Hon. Rodney Ellis, Commissioner of Harris County, TX; Hon. Esther Salas, U.S. District Judge for the District of New Jersey; Hon. Leo Sorokin, District Judge for the District of Massachusetts; Vincent Schiraldi, Co-Director of the Columbia Justice Lab; Hon. Larry Krasner,

on innovative sentencing practices nationwide, restorative justice, the role of mercy in our system, the merits of risk assessment tools, pretrial justice, and other contemporary topics in criminal legal reform.

Aleph has submitted alternative sentencing recommendations in dozens of criminal cases around the country. In many of them, the judge imposed a below-guideline sentence, (and in some cases, a non-prison sentence), based at least in part on considerations set forth in Aleph's submissions. Most frequently, courts in these cases rely upon defendants' genuine expressions of remorse and acceptance of responsibility, their prior service to their community, the damage that would be visited upon their family members were the defendant to be imprisoned, and their willingness to make amends. These are among the very factors that support the expanded use of alternatives to incarceration, especially for defendants who do not pose a risk to public safety.

Aleph's work has been lauded by many well-known jurists. For example, Michael B. Mukasey, former United States Attorney General and Chief Judge of the United States District Court for the Southern District of New York, has said that "Aleph has historically upheld the goals of sentencing by urging prudence to protect society, and humanity to recognize that it is people we are sentencing." Similarly, the late Jack B. Weinstein, former Chief Judge of the United States District Court for the Eastern District of New York, expressed his appreciation for Aleph thus: "They have retaught us by word and act that each person in prison is entitled to full dignity and a chance for spiritual fulfillment. For some at least, and this includes the sentencing judges, Aleph's compassionate work makes it possible to better bear and resist the horrors of the excessive and cruel imprisonments that prevail in our society." Louis Freeh, former Director of the Federal Bureau of Investigation and U.S. District Judge for the Southern District of New York, also has extolled Aleph: "For [decades], Aleph has been championing and delivering justice to people who have been overlooked or forgotten by the rule of law, giving them hope, relief from suffering, and the chance to improve their lives and fortunes. Both these individuals and the Nation are the beneficiaries of Aleph's goodness and mission."

Comments on Priority 1 (Compassionate Release)

Priority 1 contemplates potential amendments to Guideline 1B1.13 (compassionate release) in order to (1) implement the First Step Act, and (2) further describe what should be considered an "extraordinary and compelling reason" for compassionate release. These proposed changes are much needed and, through no fault of the Commission, overdue.

The First Step Act, enacted in December 2018, brought about a significant change in federal law relating to compassionate release. Under that statute, motions for compassionate release are no longer the exclusive province of the Bureau of Prisons ("BOP"); for the first time, defendants were granted the right to make such motions on their own behalf, after satisfying certain BOP administrative exhaustion requirements. Moreover, the FSA reaffirmed that such motions may be

District Attorney of Philadelphia; Hon. Nancy Gertner, Professor of Law at Harvard Law School and former U.S. District Judge for the District of Massachusetts; Matthew Charles, a fellow at Families Against Mandatory Minimums and the first beneficiary of the First Step Act; and Representative Roger Goodman, Chair of the House Public Safety Committee of the Washington State Legislature.

granted based on the presence of *any* "extraordinary and compelling" reason justifying such relief, not limited to grounds based on the defendant's age or length of prison time served, or any other circumstance. The only partial exception is that a defendant's post-sentencing rehabilitation alone may not support compassionate release, but it *may* properly be relied upon along with other factors in granting such relief.

The compassionate release guideline, 1B1.13, became effective in 2006 and was last amended substantively in 2016. However, because the Commission has lacked a quorum until recently, it has not had occasion to further amend this Guideline to implement the First Step Act, or to provide any additional guidance for this important component of federal sentencing law, which the United States Congress has aptly called a crucial "safety valve" for defendants facing exceptional circumstances warranting a sentence reduction.[5]

For these reasons, the Commission should implement these much-needed reforms to the compassionate release guideline at the earliest opportunity. Such reforms should include the following:

(1) Amending 1B1.13 to reflect the FSA's directive that a court may reduce a term of imprisonment term under 18 U.S.C. § 3582(c)(1)(A) and 1B1.13 either upon motion by the BOP Director *or* the defendant himself or herself. Correspondingly, amending Application Note 4 to clarify that a sentence reduction under 1B1.13 may be made upon a motion by either the BOP Director or the defendant, and not (as is now stated) "only upon motion" by the BOP Director.

This is not to say that BOP authority to move on behalf of an individual should be constrained; to the contrary, the BOP presently has the authority to actively expand its role in initiating compassionate releases and should continue to be encouraged to do so, as 1B1.13's Application Note 4 already does. Indeed, one reason Congress chose to allow individuals their own path to the courts is in recognition of the BOP's historic, extreme reluctance to pursue such relief for defendants in its custody. *See* Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, before the U.S. Sentencing Commission concerning "Compassionate Release and the Conditions of Supervision" (Feb. 17, 2016) (describing 2013 and 2015 Inspector General reviews that revealed "serious issues with how the compassionate release program was run," including that "BOP's compassionate release program had been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being aware of the program and not being considered for release, and terminally ill inmates dying before their requests were decided"); https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 (Marshall Project reporting that BOP supported only 0.1% of all compassionate release applications submitted to it in 2020 and early 2021).

(2) Amending Application Note 1(D) to 1B1.13 to clarify that a court may grant compassionate release for reasons other than, or for reasons in combination with those

[5] *See* S. Rep. No. 98-225, 55–56, 121 (1983).

described in Notes 1(A-C), as determined by the Court—and not (as is now stated) as determined by the BOP Director. Given that the BOP Director no longer is the exclusive permissible movant for compassionate release, the BOP Director's views about what constitutes an "extraordinary and compelling" reason justifying such relief should not be a threshold requirement of 1B1.13. In this regard, such an amendment should affirm that compassionate release is not limited to the criteria set forth in the BOP's internal Program Statement (5050.50), which does not include a "catch-all" category of extraordinary and compelling reasons justifying relief. For that reason, the Program Statement is inconsistent with section 3582(c)(1)(A)(i), which expressly provides for such relief without any limitation based on a defendant's age, medical condition, or family circumstances.

(3) Consider providing additional guidance on what may constitute an "extraordinary and compelling" reason for granting compassionate release, and encouraging a more capacious application of that standard. A non-exhaustive list of such factors could include the following:

- A post-sentencing change in sentencing law relevant to a defendant's case but not expressly made retroactive in its application. Such changes could include changes to statutory penalties, Guideline enhancements, or "safety valve" eligibility under 18 U.S.C. 3553(f). This proposal would help effectuate the Congressional intent to make compassionate release available in "some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment." *See* S. Rep. 98-225, at 55-56. By including this factor, the Commission would resolve an inter-circuit conflict concerning whether such sentencing law changes can serve as a basis for compassionate release. *See United States v. Chen*, 48 F.4th 1092, 2022 WL 4231313, at * 4-5 (9th Cir. 2022) (discussing circuit court conflict over this issue).

  To put into perspective the necessity for this change, consider that on January 28, 2022, two district courts were presented with petitions by federal prisoners serving mandatory life sentences that, today, would not apply due to non-retroactive changes in the law. *Compare United States v. Gamboa*, 2022 WL 275528 (S.D. W.Va. Jan. 28, 2022) (reducing sentence to new mandatory minimum of 25 years) *with United States v. Walker*, 2022 WL 263441 (N.D. Ind. Jan. 28, 2022) ("The Court understands Defendant's Section 401 argument. It might even agree with the conclusion Defendant reaches. But the Seventh Circuit does not so agree."). Only one of the district courts had the authority to grant compassionate release; the other was in a circuit that forbade consideration of this factor. One petitioner's sentence was reduced, while the other will remain incarcerated for the rest of his life. The Commission can, and should, rectify this unjust inconsistency by providing that courts have authority, in appropriate circumstances, to rely on such a change in sentencing law when deciding whether to grant compassionate release.

- Amending Application Note 1(C)(i) to provide that the need for a defendant to care for a child (or children) of any age—rather than (as is now stated) only a "minor" child—should be a basis for compassionate release. This change would recognize the critical

role that many parents play in a child's life, regardless of age. For example, the need to care for an 18-year-old with severe addiction issues, or an adult child with developmental disabilities, should qualify a defendant for relief if the other criteria of 1B1.13, and 18 U.S.C. § 3553(a), are satisfied.

- Amending Application Note 1(C)(ii) to provide that the incapacitation of a defendant's spouse, registered partner, *or parent* should be a basis for compassionate release, when the defendant is a necessary provider of care for the incapacitated individual. As with adult children, in our society individuals are frequently called upon to provide care for their mothers or fathers so that they can receive their essential life necessities, especially as they get older. There is no persuasive reason not to include such situations among those that are eligible for relief under the compassionate release guideline.

- Amending Application Note 1(A)(ii)(1) to provide that courts may find an extraordinary and compelling reason to exist when a defendant's serious medical condition is caused, or exacerbated, by the level or quality of treatment received during the defendant's term of incarceration, regardless of whether they are expected to recover from that condition. Over the years, there have been many instances when, due to inadequate treatment by prison officials, defendants' medical conditions have become terminal or significantly debilitating. *See, e.g., United States v. Beck*, 425 F. Supp. 3d 573 (M.D.N.C. 2019) (defendant developed stage 3 breast cancer due to prison's failures; motion for compassionate release granted); *United States v. Lindell*, 517 F. Supp. 3d 1141 (D. Haw. 2021) (defendant lost vision due to prison's failures; motion for compassionate release granted). Compassionate release can provide an effective mechanism for remedying such injustices, while simultaneously ensuring that surviving defendants can avail themselves of much-needed adequate medical care.

- Consider specifying that other factors, such as disproportionality among co-defendants, illegal sentences, and other significant sentencing inequities may rise to the level of an "extraordinary and compelling" reason justifying a grant of compassionate release.

Comments on Priority 8 (Section (994(j))

Priority 8 calls for the Commission to consider, as a priority, proposed amendments to address 28 U.S.C. § 994(j), which directs the Commission to "insure that the 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…." This statutory directive, issued in 1984, was addressed briefly in the Guidelines' introductory commentary in 1987 and, to our knowledge, has not been addressed by the Commission since. And yet that very same commentary recognizes that "sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies"—an accurately predictive statement, given the mass incarceration that has enveloped the nation since the Guidelines were first promulgated, and the serious questions that have been raised about the effectiveness of incarceration as punishment, especially for less serious offenses. Robust implementation of section 994(j) is therefore long overdue.

To begin, the Commission should consider making explicit what is already implicit in its designation of certain sentencing ranges as with Zones A, B, and C of the sentencing table: that defendants within those zones ought to be given sentences at the lower end of the sentencing spectrum. Given that the highest range within those zones is only 12-18 months' imprisonment, it would be entirely reasonable for the Commission to make clear that if such a defendant is also a first-time offender who was not convicted of a crime of violence, then that defendant should ordinarily receive a non-prison sentence. Such guidance would help effectuate Congress's clear preference for non-prison sentences for defendants at the lower end of the culpability scale, while reserving to courts the ability to impose a prison sentence in an unusual case where circumstances required greater punishment.

Such judicial discretion also would weigh against any categorical exclusion of an offense as being "serious." Rather, this determination ought be made only after a thorough consideration of all of the factors pertaining to the offense in question, including but not limited to the length of time during which the offense was committed; the resulting injury or loss; the defendant's role in the offense; the defendant's motivation in committing the offense; and any mitigating circumstances that may have contributed to or caused the conduct constituting the offense, including extenuating circumstances not amounting to a complete legal defense.

Comments on Priority 12 (Court-Sponsored Diversion and Alternatives-to-Incarceration Programs)

Priority 12, which focuses on court-sponsored diversion and alternatives-to-incarceration programs, is another urgent imperative for the Commission. Our organizations strongly support a significant expansion of these programs because they provide a much-needed vehicle for treating eligible defendants in a manner that is far more likely to achieve better outcomes for all the various stakeholders in our criminal legal system.

In 2017, the Commission reported that approximately 4,000 state court programs were operating to provide a range of alternative sentencing approaches, with drug courts constituting half or more of such programs.[6] But at the federal level, we are aware of only 24 districts that have active specialty courts, out of a total of 94 districts nationwide. As the Honorable Frederic Block, United States District Judge for the Eastern District of New York, put it at the 2019 Aleph summit: "Rehabilitation is the goal, or should be—[so] where are the other 70 district courts that have not yet embraced any concept of alternatives to sentencing?"

While further study of these programs may yield additional relevant information to the Commission, there already is an ample record of how these programs operate in jurisdictions across the country and their capacity to bring positive changes in federal sentencing. As a recent study of ATI programs in seven major federal jurisdictions noted, "[s]everal districts that have been at the forefront of implementing ATI programs sought to contribute to the knowledge base concerning these programs. As a result, the pretrial offices of the districts of New Jersey (NJ),

[6] *See* U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Court Programs* (Sept. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf.

Southern District of New York (NY-S), Eastern District of New York (NY-E), Central District of California (CA-C), Northern District of California (CA-N), Eastern District of Missouri (MO-E), and the probation and pretrial services office of Illinois Central (IL-C) collaborated on a research effort that quantifies the association of ATI program participation with short-term outcomes."[7] The study found that people who completed the programs were significantly less likely to be rearrested during the supervision period; significantly less likely to receive a prison sentence than the control population (23 percent compared with 81 percent), and that people who participated in the programs, irrespective of completion status, were employed for a greater percentage of their days under supervision and tested positive for illicit substances less frequently than the comparison group.[8] The report persuasively summarized the implications of this study, from the perspective of critical participants in these programs—members of federal Pretrial Services offices across the country:

> This "wake-up call" in the criminal justice system at large ha[s] led leaders in the pretrial profession to understand the unique opportunity they have to improve our criminal justice system, so that public safety is ultimately enhanced; that is, pretrial professionals see an opportunity to be part of the solution as opposed to part of the problem. Pretrial services is uniquely situated to assess defendants, advocate for suitable alternatives to detention pending disposition for all but the highest-risk defendants and use the pretrial period to begin rehabilitation. Alternative to incarceration programs are one way that federal pretrial services can make a meaningful difference in stemming the tide of mass incarceration, while making a positive difference in defendants' lives, which ultimately leads to safer communities and healthier future generations.[9]

Plainly, many components of our nation's judicial system have accepted and endorsed such programs as suitable vehicles for alternative sentencing. For good reason: these programs recognize how much progress can be made by defendants seeking to repair harms or self-rehabilitate before the disposition of a case, even to the extent that a judge may decide in an appropriate case not to impose a sentence of incarceration. The Commission should do its part to encourage the use of such programs in appropriate cases, including by adding language to its guidance to that effect.

For these reasons, we advocate an amendment to the Guidelines expressly authorizing a downward departure for defendants who successfully complete a court-supervised alternative sentencing program. Such an amendment would provide an appropriate opportunity for leniency for defendants who qualify for these programs and thereafter demonstrate—to the sentencing court's satisfaction—that they abided by the program's requirements, received any necessary treatment, made any necessary amends, and do not require imprisonment as an additional sanction.

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[7] *See* Kevin T. Wolff, Laura M. Baber, Christine Dozier, and Roberto Cordeiro, *A Viable Alternative? Alternatives to Incarceration across Seven Federal Districts*, United States Pretrial Services, April 15, 2019, at 5, *available at* https://www.nyept.uscourts.gov/sites/nyept/files/QL%20-%20ATIStudyFullReport%282019%29.pdf (the first study of federal ATI programs using seven well-developed examples).

[8] *Id.* at 8-9.

[9] *Id.* at 12.

The amendment also could include alternatives to formal diversion programs that achieve similarly positive outcomes. One example of this, which CJHD and Aleph strongly support, is when a judge decides to defer the sentencing of certain defendants to allow them to pursue rehabilitation (on their own or with support) as well as other measures (relating to education, employment and other aspects of their lives), even if they do not qualify for a formal, district-wide diversion program. In these cases, the judge can take into account a far more robust record of the defendant's post-offense conduct up until the time of sentencing and, if circumstances show that the defendant is deserving of a non-prison sentence, the court should be able to downwardly depart from the applicable Guideline range (if necessary, based on what that range is) in order to achieve that outcome.

Conclusion

We appreciate the Commission's compressed timeframe for this amendment cycle and the number of potential priorities already identified, and are grateful for the excellent initial priorities the Commission is considering this year. We further encourage the Commission to build on its portfolio in the coming years to consider additional Guideline amendments and policy statements that expand the use of non-carceral, and otherwise less punitive, approaches to federal sentencing in appropriate cases. We stand ready to provide additional support to the Commission, in any capacity that will be most useful to its Members.

Respectfully,

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