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Rabbi Moshe C. Horn, J. D.

on behalf of the
ALEPH INSTITUTE

before the
UNITED STATES SENTENCING COMMISSION
Washington, D.C.

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"You shall do no unrighteousness in judgement"
Leviticus 19:15

"A judge should always envision himself as having
a sword hanging just overhead . . . when rendering judgement"
Talmud

Good morning honorable commissioners.

I am before you today representing the Aleph Institute. A non-profit organization which for the past twelve years has been working with federal and state inmates throughout the country. Our programs are ecumenically based and include in-prison counseling and religious services as well as intensive retreats and educational lectures and presentations. We work with offenders at all stages of criminal proceedings both pre-sentence and post conviction. We thank G-d for our success in offering Federal courts and correctional agencies community based punishment programs for sentenced offenders. The alternative programs incorporate community service projects designed to sensitize the offender of their societal duties and includes rigorous instruction in doctrines dedicated to moral and ethical behavior.

I am the Prison Program director and General Counsel for the organization for the past four years. Each year I work with hundreds of offenders and their families. I help them cope with the trauma of their prosecution and subsequent punishment. I also foster their realization that they are fortunate to be punished; they develop a resolve to become a better individual from their experience and help others to stay on a proper societal path. I stand before this prestigious Commission to offer a hindsight view of the effect the Federal Sentencing Guidelines has had on our criminal justice system. A view not ordinarily entertained by my honored colleagues of the many legal associations present today. All of us as members or officers of the legal profession have a duty to the citizens of this country to protect their welfare by punishing criminals in a manner that effects retribution and deterrence. But, we must not lose sight of the fact that we have a duty to the offender who is a human being and also a component of the community, he deserves a some iota of respect surely more than being classified as an integer on a chart.

The U.S. Sentencing Commission is charged in its establishing policies and practices for the federal Criminal Justice System to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process . . ." 28 USC § 991 (b)(1)(c).

For every offender in prison there are family members, dependents, employees and many other individuals who suffer also. Our communal duty extends to these victims also. I appeal to the honorable commissioners to take a more active role in bringing the human element back into sentencing. As it states in the Talmud, "one who destroys the life of another is as if he destroyed the entire world; one who saves the life of another is as if he had saved the entire world" (Tractate Sanhedrin 37a)

The many offenders I meet are disoriented by the amorphous style of sentencing we have developed. Any sentencing goal trying to be relayed in practice simply flies over the heads of offenders when their individuality is bypassed to detach them from the actions they performed.

The comments on the amendments herein presented are focused toward a more balanced administration of justice which is based on the premise that the federal Sentencing Guidelines are designed to guide a federal judge's authority and not

usurp it.

Re: Amendments 1, 34, & 35

In the pursuit of justice one should not put the defendant in a position that condemns them without examining the totality of the circumstances. Criminal conduct should be in the purview of the court which is empowered to fully investigate the matter as provided by the constitutional provisions insuring fair adjudication. To bring past conduct for which a defendant was acquitted into an unrelated sentencing proceeding is shocking to the conscience. Therefore, it is urged that option one of amendment 35 of the proposed amendments from the Practitioners Advisory Group be adopted in accordance with the constitutional provisions of due process and prevention of "double Jeopardy" claims. Furthermore, amendment 34 relating to past conduct that was admitted by a defendant should likewise not be considered under Guideline §1B1.3 unless independent elements are established to substantiate the conduct is relevant to the instant case before the court. The Commission must bear in mind that an overwhelming majority of cases involve defendants who are advised to plead guilty in the interests of expediting the administration of justice. If conduct a defendant pleads guilty to can automatically be held relevant, then a chilling effect on guilty pleas will be effected forcing many cases to trial which could have been summarily disposed. This will create a burden on an already overburdened criminal justice system.

Re: Amendments 8, 9, 39, 48, & 60

It is urged that the commission reexamine the substantial reliance on the factual conduct used to determine the applicability of a minimal role adjustment. The mens rea and/or foreseeability of the defendant regarding the parameters of the criminal activity is a critical factor for the court to examine. There are cases where the overt acts of a defendant indicate a minimal role in the offense but evidence of the defendant's intent to be a ready, willing and able participant in the future management or execution of the criminal scheme should surely prevent delegating the defendant a mitigating role. Similarly, if the facts place the defendant in a more accountable role his inability to foresee the full consequences of his actions should be a factor to consider. Therefore, we recommend that within amendment 8, the commentary note 3 should be merged with note 6 and the language in note 3, "in addition, although not determinative . . ." should be stricken. This will make the critical factor, "a defendant's lack of knowledge or understanding of the scope and structure of the criminal activity . . ." a characteristic that is ordinarily associated with a mitigating role. It is also recommended that option two, within note 7, should be adapted. This will reflect a proper understanding that the defendant's factual interest in an outcome may illustrate they are not culpable for the full accountability of the offense.

Re: Amendments 24, 31 and 47

Ordinarily, within Jewish Law there is a negative view on informers and informing ("You shall not go about as a talebearer" Leviticus 19:16). However, that applies to

providing false information or information that serves no purpose of protecting others from harm. There is an obligation on every person, especially within the Jewish faith, to "eradicate the evil from thy midst" and bring to the attention of authorities any danger to the welfare of the community. (see *People v. Drelich* 506 N.Y.S. 2nd 123 where a Rabbi heard a confession of a murderer from his congregation and was compelled by Jewish Law to testify against the individual at subsequent proceedings in accordance with Judaic doctrines, Clergy privilege held not to apply.) We must not deter an individual's unfettered adherence to values he holds dear when he punishes evil and eradicates violent crime through their unilateral assistance to the governmental authorities. I as a rabbi and member of the Jewish faith find it reprehensible that criminal proceedings center on criminal agents drafted by the prosecution and guided by them to decide what form and manner their societal duty will be manifest. §5K1.1 assistance letters and information should not be vested only in the prosecutor but there should be provisions which allow law enforcement officers to summarily submit an evaluation to the court, relaying a more an objective view on the value of the assistance. Clearly, a judicial authority is in a better position to differentiate between assistance rendered due to ethical and moral beliefs as opposed to assistance rendered due to personal motives and gains. Evidence from law enforcement officials will tend to show the candor and sincerity of assistance rendered as opposed to solely relying on the prosecutor who has the dual interest of convicting the defendant and obtaining evidence for other convictions.

Allow me to take this opportunity to appeal to the Commission to take action and reiterate to the Congress their long standing position calling for the repeal of mandatory minimum sentences. 'Equal justice for all' never meant to apply to equalizing all crimes but to equalizing the judicial treatment of all individual criminals who require special attention to their needs and circumstances. We can not uniformly categorize crimes without suffering a severe inequality of justice. "The uniformity produced . . . would not conform to most understandings of equal justice. Equality does not mean sameness . . . treating unlike cases alike - can violate rather than promote equality." Alschuler, Albert W. *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, University of Chicago Law Review. Vol. 58 Num. 3 (Summer 1991)

Re: Amendments 25 and 36

Standards of fairness dictate that the prosecutor should disclose all relevant facts, circumstances and characteristics which apply to the application of the sentencing guidelines. Such is in conformance with constitutionally accepted principles of due process and ethical behavior of a prosecutor (which includes a duty to the welfare of the defendant) as has been held in *Brady v. Maryland* and *US v. Rosa*

Re: Amendments 29 and 30

It is important to recognize that every defendant presents a unique set of characteristics tending to show any criminal disposition, ability to rehabilitate, and propensity to be a law abiding citizen. It is critical that a court examine the character of the defendant very carefully (see *US v. Duarte* 901 F2nd 1498 where the Ninth

Circuit held the District Court erred in ignoring the contents of character letters "for purposes of determining the appropriate sentence within the applicable guideline range." *Id.* at 1501). Although §5I1.1 - 12 indicate specific offender characteristics which are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range . . ." (emphasis added) The language not ordinarily relevant has been construed to hold "that the guidelines do not categorically prohibit a judge from departing on the basis of offender related characteristics, whether enumerated in the guidelines or not." *US v. Mogel* 956 F2nd 1555, at 1561 (11th Cir. 1992).

The statutory purpose of the sentencing guidelines is to "[maintain] sufficient flexibility to permit individualized sentences when warranted by mitigating . . . factors not taken into account in the establishment of [the guidelines]" 28 USC § 991 (b)(1)(b). It has always been the congressional intent to vest wide discretion to a sentencing judge in fashioning a sentence (see Senate Report no. 225, 98th Cong. 2d. Sess. 52). Amendment 29 should be revised to include language instructing a court to openly examine offender characteristics and render discretionary decisions as to the role each characteristic should or should not have in the sentencing process. The Commission should foster the execution of judicial discretion and clarify that it was never the Commission's intent to fossilize judicial practice. (see *US v. Concepcion* 795 FSupp 1262 (EDNY 1992) where the Honorable Judge Weinstein did not engage the "temptation [to] simply skirt these underlying [sentencing] concerns and entrust the task of punishment to the federal Sentencing guidelines . . . Congress has directed the federal courts to impose penalties 'not greater than necessary' to achieve the the statutorily defined purposes of sentencing. 18 USC §3553 (a)(2). *Id.* at 1296

The Commission should not limit this amendment to the sole factors enumerated in §5I1.1 but should consider adding language which takes into account post crime rehabilitation, family dependence and impact, illness of the defendant and various other factors traditionally envisioned as mitigating factors in sentencing. The fact that irreparable harm may occur to the defendant if incarcerated is also a critical factor of sentencing. Clarification within §5I1.1 is required to include cases where the socio-economic condition should be a factor in sentencing, because it is a stressing environment, in some cases amounting to duress. It is amazing to many individuals such as myself, who work with offenders, to note that the Guidelines completely ignore post ameliorative conduct on the part of the offender. Rehabilitation should be introduced as accepted terminology in the sentencing process and a more enlightened approach to criminal justice should be formulated. As one guiding factor a federal judge introduced, "a defendant's commitment to religious study and moral improvement may appropriately be taken into account in deciding whether to depart from the guidelines." Weinstein, J. "Alternative Punishments Under the New Federal Sentencing Guidelines," 1 Fed. Sent. Rep. 96, at 101 (1988)

The guidelines language in Chapter One, Part A, 4(b) contains language in the third paragraph which solely focuses on the characteristics of the offense and not the offender. This paragraph should be revised to be in tandem with the previous paragraph that a sentencing court may find the circumstances of the offense relative to the offender may require a departure given the facts of a particular case.

Re: Amendment 52

This amendment fails to take into account a stated purpose of sentencing namely "to provide the defendant with needed educational and vocational training, medical care or other correctional treatment in the most effective manner." 28 USC §3553 (a)(2)(D). The amendment should be revised to take into account alternative modalities of punishments such as boot camps, house arrest, community service, and other punitive measures which capitalize on the productive potential of the offender and eases the burden society has to bear for the costs of incarceration. "A sentence of imprisonment 'is not an appropriate means of promoting correction and rehabilitation . . . ' 18 USC§3582 (a); S. Rept. 98-225 at 76-77;119. and the commission is instructed to 'insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ' 28 USC §994 (K)" Feinberg, K. "The Federal Guidelines and the Underlying Purposes of Sentencing," 3 Fed. Sen. Rep. 326 (May/June 1991)

Amendment 52 should be revised and expanded to reflect successful options developed by correctional institutions and those agencies working with judicial authorities to positively impact offenders. These proposed revisions would reflect the attitude of the newly appointed Attorney General Janet Reno who stated before her confirmation hearings that she will seek alternative modes of punishment for first time offenders. The three ranges of the sentencing table should be changed to include other options other than the draconian condition of confinement in order to reflect the modern trend.

Re: Amendment 56

We strongly urge adoption of this amendment as it encourages remorse and fosters a positive step towards contrition and repentance for past misdeeds.