

# VICTIMS ADVISORY GROUP

*A Standing Advisory Group of the United States Sentencing Commission*



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United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002

## **RE: VAG's Suggested Priorities for 2022**

Dear Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written suggestions to the Commission on priorities for the 2022 year. The VAG's membership includes experts from across the country on victim issues. Many of the members work directly with victims either as advocates, attorneys with non-profit organizations, or private attorneys representing victims of crime. Pursuant to its duties outlined in §1 of the VAG's Charter, the VAG offers the following to assist the Commission in determining its priorities. The following suggestions emerge from VAG members assessing issues they observe that negatively impact victims throughout the country.

### **Introduction**

In recent years the focus of some national dialog has been on examining the criminal justice system and proposing reforms to increase fairness for those involved. The VAG supports all efforts to improve the criminal justice system that increase its fairness, ensure its accuracy for all stakeholders, and eliminate inequities. Crime victims are a diverse group of key stakeholders in this conversation. It has been documented<sup>1</sup> - and the VAG has directly observed through its members' work - that some crime victims are often ignored in this discussion. This occurs either by failing to seek victim input on proposed reforms, ignoring the challenges victims face in the criminal justice system, failing to recognize the negative consequences some proposed reforms have on victims, failing to recognize the broad diversity of victim positions, or failing to

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<sup>1</sup> *E.g.*, Sarah Martinson, *Victims' Voices Left Out of Criminal Justice Reform*, Law 360 (April 18, 2021).

recognize and protect the *rights* afforded them through federal legislation. “Criminal justice reform should be implemented while keeping in mind that all crime victims have rights under the Crime Victims’ Rights Act.”<sup>2</sup> Those rights include, but are not limited to (1) the right to be reasonably protected from the accused; (2) the right to reasonable notice of certain court proceedings; (3) the right to not be excluded from most court proceedings; (4) the right to be reasonably heard at certain public proceedings; (5) the right to confer with the government attorney; (6) the right to full restitution; (7) the right to proceedings free from delay; (8) the right to be treated with fairness and respect for the victim’s dignity and privacy; (9) the right to notice of a plea and deferred prosecution agreements; and (10) the right to notice of the aforementioned rights and statutory rights and services.<sup>3</sup>

These federal rights are located within the Crime Victims’ Rights Act (CVRA) and today every state has either statutory or constitutional rights for victims. The very crux of the CVRA’s purpose is essential to modern concepts of a functional working justice system: to “encourage crime victim participation in the criminal justice process.”<sup>4</sup> With that as a backdrop, the VAG respectfully asks the Commission to prioritize the following areas.

## 1. Restitution and Fines

Restitution and fines both serve important purposes in sentencing. Courts, however, often conflate them. The VAG has separate concerns about both which it asks the Commission to consider.

Crime imposes a serious cost on society in general and victims in particular. Recent research notes that while the number of crimes may be decreasing over the last decades, the cost of those crimes is increasing with estimates in the billions of dollars annually.<sup>5</sup> As significant as they are, these figures do not address the intangible costs of crime commonly experienced by victims.

### a. Restitution

Congress has repeatedly noted the importance of restitution. The purpose of restitution is to restore victims to the place where they stood prior to their victimization. Notwithstanding the aforementioned cost of crime that victims directly bear, the VAG has observed courts frequently fail to order restitution. However, victims have a *right to full restitution*. It is the belief of the VAG that the practice of waiving financial obligations to the victim is becoming far too commonplace and is done with a focus on the defendant and little regard for the victim. The VAG, therefore, requests this section of the Guidelines be adjusted to minimize these instances of restitution waivers when such waivers are possible. Such revisions could include a presumption of payment, placing the burden on the offender to prove their inability to pay, providing a list of factors which a court must consider to determine whether an offender is truly

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<sup>2</sup> Id. Victims’ rights are not limited to the CVRA, but also are included in other statutes including, but not limited to, the Mandatory Victims Restitution Act, the Trafficking Victims Protection Act, and the Survivors’ Bill of Rights.  
<sup>3</sup> 18 U.S.C. 3771.

<sup>4</sup> *U.S. v Minard*, 856 F.3d 555 (8<sup>th</sup> Cir. 2017); *U.S. v Stevens*, 239 F.Supp. 3d 417, 422 (D.Conn. 2017).

<sup>5</sup> Miller, T., Cohen, M., Swedler, D., Ali, B., & Hendrie, D. (2021), Incidence and Costs of Personal and Property Crimes in the USA, 2017, *Journal of Benefit-Cost Analysis*, 12(1), 24-54.

unable to pay that include the impact of that failure to pay on the victim; and recognize that per victims' rights the victim must be actually notified of any hearing in which the offender is seeking to decrease or eliminate the financial component of their sentence. The VAG believes such measures would minimize situations where restitution is unnecessarily waived.

b. Fines

Fines are intended to be an alternative or additional form of punishment, but also exist to deter crimes. Although the VAG recognizes the complexity of the use fines as a component of a sentence, it also notes that fines are often the primary funding source for crime victim funds. These funds are essential sources of services and relief for victims. While the VAG recognizes that some of the operational statutes and Guidelines allow for the limiting of fines related to a defendant's ability to pay, it also notes that any waivers of fines negatively and directly affect victims of crime. As with restitution, the VAG asks the Commission to recognize this impact in any action and implore Congress to take action that reflects this harm to victims when fines are waived.

## **2. Early Release of Convicted Offenders**

Two important legal principles are indicated with this issue. First, one of the purposes of sentencing reform and the Guidelines themselves was finality and uniformity of sentences. Secondly, victims have the right to notice of public proceedings regarding the release of offenders as well as the right to be heard.<sup>6</sup> Yet, these basic bedrocks of sentencing have been challenged in recent years in connection with increases in early release from incarceration.

These concepts are essential to many stakeholders in the criminal justice system, especially crime victims. Being a victim of a federal crime is traumatic in itself and marks the beginning of a series of events over which the victim has little control. Indeed, it is this lack of control over proceedings, continuances, limitations of trials that contribute to the re-traumatization that so often accompanies victim experiences within the criminal justice system. The ability to directly address the court regarding sentencing and the knowledge that after sentencing is over the case has come to its end are extremely important to victims and their recovery.

In recent years both of these values have been eroded. While compassionate release has existed for many years, its implementation and use did not jeopardize victim rights. Policy Statement §1B1.13 provided specific guidance to courts on whether to grant it and this guidance seemed to address the importance of finality of sentencing and the true goal of compassionate release – to grant an early release in extraordinary circumstances such as extreme illness or the death of a primary caretaker of a child.

In 2018 the First Step Act provided offenders the opportunity to file for such release directly and not rely on the Bureau of Prisons to file the request.<sup>7</sup> This led to an average decrease of

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<sup>6</sup> 18 U.S.C. 3773.

<sup>7</sup> 18 U.S.C. 3582(c)(1)A).

sentences by nearly five years and, in the wake of the COVID-19 pandemic a twelvefold increase in the granting of compassionate release.<sup>8</sup>

The VAG understands and accepts the narrow goal of compassionate release and the First Step Act's relationship to that provision. However, several concerns have arisen in the victim community as to its implementation. In many instances victims are not notified of the potential or actual release of the offender, thus denying them the right to that notice, to self-protection, to be heard, and to respect for their dignity. Secondly, "[i]n the absence of an amended policy statement to provide guidance, there was considerable variability in the application of 18 U.S.C. § 3582(c)(1)(A) across the country."<sup>9</sup> Some courts have found themselves not bound by § 1B1.13 because it still references the motion being filed by the Director of the Bureau of Prisons. Consequently, they have expanded the purpose of compassionate release well beyond its intended meaning to allow for release for a myriad of other reasons. In effect, they have reinstated a form of parole that no longer exists and is in contravention to the Guidelines. This error is compounded because they have done so with no notice to victims to afford them the opportunity to be heard or to prepare for their personal safety – all after a sentence has been stated as final.

The VAG asks the Commission to consider as a priority amending § 1B1.13 to make clear that it applies to all petitions for compassionate release including those filed directly by offenders, that its purpose relates to truly extraordinary circumstances within the scope only of external factors such as terminal illness, the death of a child's primary caregiver, or an offenders inability to provide self-care in prison due to age. Furthermore, it recommends that the Commission make clear that these decisions should be made at public proceedings, that victims have a right to actual notice of the proceedings, and that they also have the right to be heard regarding the petitions and to be protected from offenders.<sup>10</sup> Such measures will restore the original purpose of compassionate release, purpose of finality of sentencing, and rights of victims.

### **3. Bipartisan Safer Neighborhood Act**

Much national discussion has emerged regarding the relative decrease in crime nationally since the 1980's. However, Congress recently acknowledged and addressed the increase in firearm violence and its devastating effects on communities. Firearm offenses are not only destructive of communities, some research has noted their disproportionate impact on communities of color and poverty.<sup>11</sup> Congress directed the Commission to promulgate the necessary Guidelines to

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<sup>8</sup> U.S. Sentencing Comm'n, *Compassionate Release the Impact of the First Step Act and COVID-19 Pandemic*, 5, 38 (March 2022).

<sup>9</sup> *Id.* at 4, 19-20.

<sup>10</sup> E.g., Nathan Baca and Becca Knier, 'Failed by the System' The Life and Death of DC Stalking Victim, Sylvia Matthews (Feb. 28, 2022)(documenting the murder of a stalking victim after the early release of her murderer originally sentenced to several years in prison), available at <https://www.wusa9.com/article/news/investigations/sylvia-matthews-michael-garrett-stalking-murder-investigation/65-8342ecc3-84cb-43a5-af72-79dee8129e65>.

<sup>11</sup> Gun Violence is a Racial Justice Issue, BradyUnited (2022), available at <https://www.bradyunited.org/issue/gun-violence-is-a-racial-justice-issue>.

reflect the legal changes in the Bipartisan Safer Neighborhoods Act which addresses, *inter alia*, straw purchases and firearm trafficking.<sup>12</sup>

The VAG asks the Commission to consider doing so with an understanding that the trafficking of firearms as well as the straw purchasing of them should not be perceived as a crime without harm to victims and society. Rather, communities are victimized when offenders engage in illegal sales or possession of firearms. Such crimes decrease the sense of safety for communities and such sales are illegal because they often create a pathway for people at risk of violence to obtain firearms. Notably, Congress recognized the social harm of these crimes and did not require that the illegal transactions directly result in a crime of violence. To the contrary, by focusing on these particular crimes Congress recognized that society is harmed in numerous ways by ease of access to firearms such as creating a pathway to firearms for offenders that must be closed, decreasing the safety of communities, and facilitating violence by providing extreme ease of access to firearms. It is essential, then, for communities and victims of crime to know that these black markets for firearms so heavily utilized by offenders are shut down. This can only happen if the Guidelines reflect the serious nature of these transactions and the effects they have on communities.

#### **4. Human Trafficking**

The problem of human trafficking in the United States is well known and the devastating consequences of this form of victimization against the most vulnerable is well documented. Recently the International Labor Organization documented that incidences of forced labor and modern slavery have increased globally to 50 million victims worldwide.<sup>13</sup> Many members of the VAG have been involved in human trafficking cases and believe a component of this continued growth in human trafficking is the lack of deterrent sentencing. It is the view of the VAG that sentencing provisions fail to accurately consider the gravity of the offense. While the crime of child sex trafficking carries with it a mandatory minimum sentence reflected in the Guidelines, the base offense levels when a victim is over the age of 18 are low. Similarly, the consequence of this are that the sentences fail to capture the gravity of these particularly exploitive offenses, the role the purchaser of victims plays in increasing the trafficking of human beings, and the uniquely pernicious harms of exploiting another through this crime. The VAG asks the Commission to consider reviewing trafficking offense guidelines for accurately accounting for the harm with a particular focus on when the victim is over 18 years of age.

#### **5. Presentence Reports and Other Procedural Concerns**

One of the many benefits of the modern sentencing system is the creation of the Presentence Report. This document affords offenders the opportunity to place before the court information relevant to their life experiences, but also critically gives victims an opportunity to provide essential information to the court about the offenders, the offenses, and their impact. Offenders and the government have the opportunity to both review the report prior to the hearing and to make corrections. However, victims do not have the opportunity to review the report. The VAG

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<sup>12</sup> Bipartisan Safer Neighborhoods Act, Pub.L. 117-159 (June 25, 2022).

<sup>13</sup> Int'l Labour Org., Global Estimates of Modern Slavery (2022).

has observed through its work with victims that victims must have access to these reports for several reasons.

First, when a victim attends a hearing he or she does not know what the Court has been told in the report about the offense itself, the victim, or any history. The victim has a right to be meaningfully heard at sentencing. “It is hard to see how victims can meaningfully provide ‘any information’ that would have a bearing on the sentence without being informed of the Guidelines calculations that likely will drive the sentence and reviewing the document that underlies those calculations.”<sup>14</sup> Furthermore, the victim’s comments cannot be as meaningful if he or she has less information than all the other parties. Secondly, the victim also does not know if the author of the presentence report accurately documented the victim’s statements. Members of the VAG recount situations in which this information is simply incorrect, but they do not learn of it until after sentencing. Incorrect information should not be considered by a court at sentencing, yet there is no mechanism for a victim to ensure his or her information has been accurately conveyed.

The entire goal of the Presentence Report specifically and the Guidelines generally is to produce an accurate sentence based on relevant conduct and specific actions. Only one person knows certain information - the victim - and the victim should have the opportunity, just as the offender does, to ensure the information provided is accurate and to object if it is not.

This problem is not unrelated to a different concern of the VAG – the endorsing of victims’ legal counsel when victims have representation. The VAG recognizes a criminal proceeding is not a civil trial and that the victim is not a named party. However, the victim has been recognized as an essential stakeholder in a criminal proceeding. Notwithstanding their statutory rights, these rights continue to not be recognized in many courts.<sup>15</sup> A useful tool for victims at times has been counsel (pro bono and otherwise) assisting them in navigating the process and ensuring their rights are recognized. Even when courts recognize such representation, the VAG has noticed that their appearances are not docketed, endorsed by the Court, nor are they provided notice of proceedings or important filings. The members of the VAG note the tremendous difference it makes to smoothly recognizing victims’ rights when that practice is properly observed.

The VAG recognizes the Commission does not control the Federal Rules of Criminal Procedure or the local procedural rules. However, the VAG notes this growing problem – particularly with the lack of access to the Presentence Report - and its negative effect on the goals of sentencing. It asks the Commission to utilize its authority to make recommendations to Congress, the Supreme Court, the Judicial Conference, and the Standing Committee on Rules<sup>16</sup> and recommend that these provisions change such that the work of the Commission to effectuate accurate sentences can be realized more fully.

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<sup>14</sup> Paul Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims’ Rights Act*, 2005 B.Y.U. L. Rev 835, 894-895 (2005).

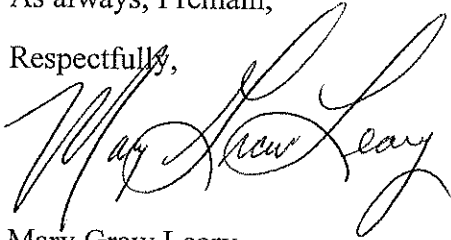
<sup>15</sup> *E.g.*, When “Mandatory” Does Not Mean Mandatory: Failure to Obtain Restitution in Federal Human Trafficking Prosecutions, *The Human Trafficking Legal Institute* (2014).

<sup>16</sup> *See*, Rules Enabling Act, 28 U.S.C. §§ 2071-2077.

The VAG appreciates the opportunity to share some of these suggestions with the Commission as it determines its priorities. We look forward to our work together with you. Should you have any further questions or require any clarification regarding the suggestions, the VAG welcomes such an invitation to dialog further on these matters.

As always, I remain,

Respectfully,

A handwritten signature in cursive script that reads "Mary Graw Leary". The signature is written in black ink and is positioned to the right of the word "Respectfully,".

Mary Graw Leary  
Chair  
Victims Advisory Group

cc: Advisory Group Members