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TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION BY JAMES R. MARSH ON MARCH 6, 2024

Proposed Amendments to the Sentencing Guidelines: Addressing Child Sexual Abuse and Acquitted Conduct

Child sexual abuse (“CSA”) is a public health crisis affecting 1 in 5 girls and 1 in 13 boys in the United States, or 3.7 million children every year.¹ An extensive body of research shows that CSA victims are traumatized in ways that are distinguishable from victims of other crimes. The traumatic effects of CSA are complex and individualized, and they impact victims throughout their lifetime.² CSA victims are more likely to experience poly-victimization than victims of any other crime.³

These children are at particularly high risk of lasting physical, mental, and emotional harm. Many CSA victims suffer in silence for decades before they disclose their traumatic experiences.⁴ Disclosure of CSA for criminal prosecution is an especially difficult and emotionally challenging process for children. In order to disclose the shameful and intimate details surrounding CSA, a child victim must first understand that they were abused, decide whether they want to be considered a victim, and then consciously decide to cooperate with a prosecution in the criminal justice system. It is a complex, difficult, and often daunting decision.

It is not surprising then that an estimated 70–95% of CSA victims never report their abuse to law enforcement. Of the 5–30% of victims who do disclose their abuse and exploitation, only 29% of those cases proceed to prosecution.⁵ Add this to the unique challenges of prosecuting CSA crimes beyond a reasonable doubt and it is astounding that perpetrators are ever convicted and justice ever obtained for child victims.

The case of *United States v. Hayward*, 359 F.3d 631 (3d Cir. 2004), is a good example of what I regard as a typical federal CSA case. In *Hayward*, a cheerleading coach was charged and indicted in a two-count indictment: Count One charged Hayward with transporting two females under age 18 in interstate and foreign commerce with the intent to engage in illegal sexual activity in violation of 18 U.S.C. § 2423(a). Count Two charged Hayward with transporting a female in interstate and foreign commerce with the intent to engage in illegal sexual activity in violation of 18 U.S.C. § 2421.

The facts of this case are painfully typical of what we see in CSA prosecutions. Suffice it to say that Coach Hayward took six teenage cheerleaders on a trip to London, England where he plied them with alcohol in a nightclub. After dozing off with two 16-year-old and one 17-year-old cheerleaders, Hayward joined V-14, V-15, and V-18 in an adjoining room. Once inside, Hayward directed the girls to push two of the three single beds together where he ultimately pulled down V-15's shirt and fondled her breasts. While he was fondling V-15, Hayward forced V-14 to kiss him. V-14 testified that Hayward pushed her head toward his penis. Sometime later, Hayward removed his pants and placed V-14's and V-18's hands on his penis and forced them to masturbate him to ejaculation. After V-14 reported Coach Hayward to a cheerleading judge

the next day, Scotland Yard investigated and performed tests on semen samples found on the clothing worn by V-14 and V-18. DNA testing established that there was only one chance in a billion that a semen sample taken from the girls' clothing was not Hayward's semen.

A jury convicted Hayward of Count One, finding that he had violated Section 2423(a) with respect to V-14 and V-15. Hayward was acquitted of Count Two, which charged him with violating Section 2421 with respect to V-18.

Coach Hayward was resentenced during which the district court considered the conduct underlying both counts and sentenced him to 78 months which was the top of the applicable guideline range. *United States v. Hayward*, 177 F. App'x 214 (3d Cir. 2006). Citing *United States v. Booker*, 543 U.S. 220 (2005), *Witte v. United States*, 515 U.S. 389 (1995), and *United States v. Watts*, 519 U.S. 148 (1997), the Third Circuit found "no error by the District Court in considering the conduct of which Hayward was acquitted." *Hayward*, 177 F. App'x at 215.

Evidentiary barriers often present a major obstacle to prosecutors from seeking a sentence that would appear to be more appropriate if all relevant conduct, including acquitted conduct, were proven at trial or supported by a preponderance of evidence at sentencing. Like cases of adult rape, in cases of CSA, physical evidence is present for fewer than 5% of the victims.⁶ Further, CSA is a crime that occurs in secret so there are generally no corroborating witnesses. As a result, in practice, decisions to prosecute are frequently made based on the victim's disclosure alone.⁷

Rather than a discreet event, disclosure is a process that tends to be incremental and often includes denials, omissions, and recantations.⁸ Such challenges help explain why CSA crimes are frequently resolved by a plea deal

rather than trial.⁹ Of course, even if a case goes to trial, there is no guarantee that it will result in a conviction. Children's memory of traumatic events and ability to provide a coherent narrative becomes a critical element in a trial and disclosure barriers often make CSA victims ineffective witnesses. Thus, alleged perpetrators are often acquitted of their most serious charges not because the harm to the victim did not occur but because the government was unable to meet their burden of proof beyond a reasonable doubt.

In a system that increasingly appears to prioritize the rights of the accused over reducing the risk of harm to victims, prohibiting a judge's consideration of acquitted conduct in making sentencing decisions will create yet another barrier to justice for the victims of these serious crimes. Research shows that when victims are given the opportunity to provide information about the full scope of harm they endured because of criminal conduct, it can improve their overall opinion of the criminal justice system and may aid victims' ability to recover in the aftermath of the crime.¹⁰

Furthermore, courts that understand the full magnitude of the criminal act and the gravity of its impact can avoid minimizing poly-victims victimization histories (i.e. treating them as simply victims of sexual abuse when they are also often victims of trafficking and other crimes). Thus, where there exists a preponderance of evidence that harm to a victim has occurred, justice requires that courts consider all harm in determining the appropriate consequences consistent with the social goal of ensuring justice for child victims while preventing future offenses.

¹ See *Preventing Child Sexual Abuse*, CDC.gov, available at <https://bit.ly/3wDj9AS>; D. Finkelhor, et. al., *Prevalence of child exposure to violence, crime, and abuse: Results from the Nat'l Survey of Children's Exposure to Violence*, 169(8) JAMA PEDIATRICS 746 (2015); G. Moody et. al., *Establishing the international prevalence of self-reported child maltreatment: a systematic review by maltreatment type and gender*, 18(1164) BMC PUBLIC HEALTH (2018); M. Stoltenborgh et. al., *A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World*, 16(2) CHILD MALTREATMENT 79 (2011); N. Pereda, et. al., *The prevalence of child sexual abuse in community and student samples: A meta-analysis*, 29 CLINICAL PSYCH. REV. 328, 334 (2009).

² See Hoskell, L. & Randall, M., *The Impact of Trauma on Adult Sexual Assault Victims*, JUSTICE CANADA 30 (2019), available at <https://bit.ly/433kI7c>; see also R. Anda, et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARACH PSYCHIATRY CLIN. NEUROSCIENCE 174, 175 (Nov. 2005).

³ Heather Turner, Sherry Hamby, Victoria Banyard, *Poly-victimization: Childhood Exposure to Multiple Forms of Victimization* (National Children's Advocacy Center, 2013).

⁴ Hunter, S., *Disclosure of child sexual abuse as a life-long process: Implications for health professionals*, 32(2) AUSTRALIAN & NEW ZEALAND J. OF FAM. THERAPY 159, 164 (2011); Ramona Alaggia et al., *Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)*, 20 TRAUMA VIOLENCE ABUSE 260, 279 (2019), available at <https://bit.ly/3v0imcP>

⁵ D. Finkelhor et al., *Sexually Assaulted Children: National Estimates and Characteristics*, US Dept. of Justice, Office of Justice Programs (2008), available at <https://bit.ly/3wGcgyG>.

⁶ R. Campbell, et al., *Predicting Sexual Assault Prosecution Outcomes: The Role of Medical Forensic Evidence Collected by Sexual Assault Nurse Examiners*, 36 CRIMINAL JUSTICE AND BEHAVIOR 712 (2009).

⁷ *Id.*

⁸ *Supra* n. 3.

⁹ According to the United States Sentencing Commission, more than 97.5% of federal criminal cases were resolved by plea agreement in fiscal year 2022. Of the 2.5% of cases that do proceed to trial, it is quite likely that only a small fraction result in acquitted charges and of those some likely involve sex offenses like *Hayward*. Respectfully, given the small number of cases, this is one area where the Commission should gather additional data to ascertain the exact nature of acquitted charges to help guide this important decision.

<https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/Table11.pdf>.

¹⁰ Erez, E., & Roberts, J., *Victim participation in the criminal justice system*. In R. C. Davis, A. Lurigio, & S. Herman (Eds.), *Victims of crime* (2nd ed., chap. 17). Thousand Oaks: Sage. (2007).