

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

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March 19, 2013

United States Sentencing Commission
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Response to Request for Comments on 2013 Priorities

Chairman Saris and Members of the Commission:

The Commission has circulated for public comment amendments in seven different areas. The Victims Advisory Group (VAG) is pleased to offer our comments on those proposed amendments. Because our group's focus on crime victims' issues, we will focus our comments on those amendments that most directly affect crime victims.

Acceptance of Responsibility

The Victims Advisory Group (VAG) recommends that the Commission resolve the Circuit split issue with explicit guidance that the courts have the ultimate discretion regarding whether to grant the third acceptance of responsibility point. We side with those circuits who have concluded that the acceptance of responsibility decision cannot narrowly focus solely on whether the Government was forced to prepare for trial or on whether the Government has, for its own reasons, decided to make such a motion. Instead, in our view, there must be a holistic determination that the defendant has truly and sincerely accepted responsibility for his crime, especially where victims in some cases are threatened by defendants following their arrest, contrary to behavior indicating acceptance of responsibility. The defendant may want to obstruct justice. In other cases, a defendant who has stalked a victim may contact the defendant even after the defendant has been arrested. From the perspective of a victim, there are a multitude of issues that a court should consider when determining whether a defendant has accepted responsibility. A motion by the Government and concurrence by the defendant should not bind the court from its obligations to determine the correctness of the motion.

Similarly when a court considers a stipulation, the court has an independent obligation to determine whether there is a legal and factual basis for the stipulation. By analogy, §6B1.4 (d) provides that “The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing.” In the commentary, it indicates,

Even though stipulations are expected to be accurate and complete, the court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information.

In light of all these facts, the Commission should provide clarity to resolve the circuit split in a manner that requires the court to provide a justice sentence and not one that requires a court to follow a request that may be contrary to law and fact. Before a convicted defendant’s guideline range is reduced, the ultimate question should remain whether the defendant has truly and sincerely accepted responsibility for his crime.¹

Counterfeit Military Goods and Services

With regard to the Commission’s proposed Guidelines change concerning counterfeit military goods and services, we appreciate the Commission’s efforts to differentiate between crimes that involve impairment of a protected trademark as opposed to those that involve products that may in turn harm others – i.e., those that may create additional victims of the crime. Our instinct is that that such situations recur with sufficient frequency that it would be useful to have a specific Guideline dealing with the situation, rather than to rely on a mere statutory cross-reference. Thus, we would prefer that the Commission adopt one of the three options specifically detailing an enhancement (i.e., Options 1 through 3) rather than the cross-reference (Option 4).

As between Option 1, 2 and 3, we see no reason to restrict the enhancement to cases that could involve victims in the Armed Services (i.e., Options 1 and 2) as opposed to the enhancement that recognizes that victims could exist not only in the Armed Services but also in other situations (i.e., Option 3). Option 3 would require an enhancement if “[the defendant knew] the offense involved a good or service used to maintain or operate a critical infrastructure; or used by or for a government entity in furtherance of the administration of justice, national defense, or national security” In connection

¹ While our comments have focused on the relatively narrow “circuit splitting” issues that the Commission has asked for comment on this year, we wanted to alert the Commission that the VAG will be asking it to next year consider as part of its Priorities List a broader reconsideration of the acceptance of responsibility guideline, § 3E1.1. As currently written, that Guideline has very little focus on crime victims and much focus on administrative efficiency (i.e., providing incentives for guilty pleas). Without minimizing the role that administrative efficiency plays in the criminal justice system, we think that there is room for more victim-centered considerations as part of the acceptance of responsibility calculation.

In particular, while the guideline enumerates eight, non-exclusive considerations for part of the calculus, only one of the eight involve the crime victim – and that consideration (whether restitution has been paid) does so only indirectly. We believe that the Guideline could benefit from including additional considerations that relate to the victim. As one example, we believe that the Guideline should encourage judges to consider whether a defendant has made a public statement of remorse to the victim. Even in cases where defendants are remorseful, many victims never learn about this remorse. As another example, the Guidelines could further encourage judges to consider whether defendants have indicated a willingness to participate in a restorative justice process. Here again, this is something not covered by the current formulation the Guideline and possible expansion would be worth the Commission’s time to consider.

with the commentary, this provision would extend to such things as not only the military, but also selling counterfeit arts involving water and electrical supplies. Such broad coverage is preferable to one that narrowly focuses on risk to the armed services.

The Commission has bracketed language about whether the defendant “knew” that the counterfeit product was involved in critical infrastructure or other important functions. While this language slightly narrows the enhancement, on balance we believe that such language is appropriate. An important function of the Sentencing Guidelines is to insure that more culpable defendants are treated more harshly than less culpable defendants. An important component of culpability assessments is the defendant’s mental state. A defendant who knows that he or she is selling a counterfeit part that is part of critical infrastructure is far more culpable than someone who lacks such knowledge. Therefore, we think this mental state requirement is a useful function. The Justice Department can confirm whether we are correct or not on a related point: We think that in most cases where critical infrastructure is involved, the defendant can be readily shown to have known the nature of the counterfeit product. Thus, this requirement will not prevent the enhancement from applying in most cases of counterfeit critical infrastructure products; its operation will thus be restricted to relatively unusual situations where the defendant was unaware of the full harm of what he was doing. This is precisely the kind of distinction that sentencing guidelines should make.

With regard to whether the enhancement should be a 2-level or 4-level enhancement, we recommend a 4-level enhancement. A defendant who has knowingly offended with counterfeit goods and services involving critical infrastructure has committed a much more serious offense than one who has simply been involved with “widgets” and services that have no such use. A mere 2-level enhancement does not fairly reflect that culpability difference.²

Counterfeit Drugs

With regard to the proposed changes on the guidelines concerning the sale of counterfeit drugs, we believe the situation recurs with sufficient frequency that a specific guideline is preferable to a mere statutory cross-reference. Thus, we prefer Option 1 or Option 2 over Option 3 (the cross-reference).

As between Option 1 and Option 2, we believe Option 2 is preferable. This option would set a base level of 12 for counterfeit drugs and an additional four-level enhancement for situations that involve a conscious or reckless risk of death or serious bodily injury. Where a defendant has consciously created risk, he is far more culpable than in other situations. This Guideline enhancement appropriately reflects that fact through its enhancement. Culpable risk creation of very serious outcomes – i.e., death or serious bodily injury – should receive stringent treatment by the guidelines. To be sure, the Guideline could – and should – call for a departure when such an outcome actually occurs and a victim is actually physically harmed or there is extreme psychological injury. But consciously creating the risk of such an outcome is bad enough itself that, even where other circumstances prevent the outcome from occurring, an enhanced guideline level is appropriate.

² We would also like to flag an additional issue for the Commission to perhaps consider in future amendment cycles. Under Option 3 (or, indeed, under any of the options), the Guidelines fail to distinguish between situations where there has been a conscious or reckless risk created with regard to a small number of persons as to situation where the defendant has created a risk to a large number of persons. We suggest that the Commission may wish to consider enhancements for unusually large number of victims being placed at risk for this and other guidelines, as is done elsewhere in the Guidelines. See, e.g., U.S.S.G. § 2B1.1(b)(2) (large number of victim enhancement for fraud).

Intentionally Adulterating Drugs

The Commission has presented two options for handling the crime of intentionally adulterating drugs: either create a new base offense level for defendants convicted of offenses under § 333(b)(7) or include offenses under § 333(b)(7) in the statutory index. We see no need to reinvent the wheel here. The offenses of tampering with consumer products covered by 18 U.S.C. § 1365(a), (e) and of intentionally adulterating drugs are similar in salient characteristics, particularly the fact that both offenses “typically pose[] a risk of death or serious bodily injury to one or more victims.” U.S.S.G. § 2N1.1, App. Note 1. Accordingly, we urge the Commission to select Option 2.

If the Commission follows Option 1, we encourage it to include the bracketed language in the cross-reference to fraud table to ensure adequate punishment of more serious offenders.

Conclusion

We want to thank the Commission for considering our views on its proposed amendments. We look forward to working with the Commission to insure that the needs and concerns of crime victims are fully reflected in the Sentencing Guidelines.

Should you have any further questions or require any clarification regarding the issues detailed above, please do not hesitate to contact us.

Respectfully,

Victims Advisory Group

March 2013