

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

Russell P. Butler, Chair



T. Michael Andrews
Jennifer Bishop-Jenkins
Paul G. Cassell
Kimberly Garth-James
James R. Marsh
Virginia C. Swisher

July 15, 2013

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

RE: Notice of proposed priorities.

Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) believes the Commission should address the matters referenced below during the amendment cycle ending May 1, 2014. Victims are an integral part of the criminal proceedings and have the right to be treated with respect and fairness. Generally and throughout criminal justice proceedings, victims have the right to be treated with fairness and with respect. 18 U.S.C. § 3771 (a) (8). In a criminal proceeding such as the computation of sentences, victims have the reasonable right to be heard. 18 U.S.C. §3771 (a) (4). Regarding restitution, victims have the right to full and timely restitution. 18 U.S.C. §3771 (a) (6). The sentencing guidelines should reflect a strategic policy that proactively implements the legislative intent regarding the rights of crime victims that includes providing victims with their participatory rights and restitution.

I. Restitution vis-à-vis violations of conditions of probation and supervised released.

Commission tentative priority:

(7) Undertaking a multi-year review of federal sentencing practices pertaining to violations of conditions of probation and supervised release, including possible consideration of amending the policy statements in Chapter Seven of the Guidelines Manual.

An order of restitution will be entered at the time of sentencing or in a special hearing within a set time period following sentencing. The multi-year review should include a focus regarding violations for the non-payment of restitution. The VAG respectfully recommends consideration of adding a policy statement concerning the non-payment of restitution as a violation which would provide guidance as to an appropriate response by the sentencing court. Consideration could be given to input from the identified victim(s) concerning the impact of the non-payment and how orders of restitution might be modified to more effectively address this issue. Input from the probation officer concerning any proactive steps taken by the offender to hide assets or provide false financial information may also be appropriately solicited by the court.

II. Resentencing proceedings

Commission tentative priorities:

(13) Consideration of any miscellaneous guideline application issues coming to the Commission's attention from case law and other sources.

(8) Possible consideration of amending the policy statement pertaining to "compassionate release," §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).

Recent Supreme Court decisions including *United States v. Peugh* and *Miller v. Alabama* have caused the VAG to start researching the practices related to re-sentencing proceedings. In addition to case law, cases may be resentenced for other reasons including a reduction in term of imprisonment as a result of a motion by the Director of the Bureau of Prisons.

§6A1.5 regarding "Crime Victims' Rights (Policy Statement)" provides

In any case involving the sentencing of a defendant for an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771 and in any other provision of Federal law pertaining to the treatment of crime victims.

No commentary is provided regarding §6A1.5.

There is a need to explain particularly in a resentencing hearing what a court is required to do to "ensure that the crime victim is afforded the rights." Without appropriate guidance for courts to know what to do in resentencing cases, the Congressional intent to have victims' rights is not provided consistently and uniformly in District Courts across the country.

III. VAWA related provisions

Commission tentative priority:

(10) Implementation of the Violence Against Women Reauthorization Act of 2013, Pub. L. 113B4, and any other crime legislation enacted during the 112th or 113th Congress warranting a Commission response.

The 2013 Violence Against Women Reauthorization Act (VAWA 2013) emphasizes the seriousness of offenses related to dating violence, domestic violence, sexual assault, and stalking. (VAWA Offenses) These VAWA Offenses are serious crimes that need to concomitantly be treated as serious crimes. The Commission should review not only the calculation of the guidelines for federal offense related to VAWA Offenses, but also how the Guidelines reflect a defendant's history of committing VAWA Offenses.

The VAG respectfully requests a review of Chapter 2, PART A and Chapter 3, PART A to insure that the provisions of the VAWA legislation are incorporated into existing guideline calculations for offenses against persons, either within the base offense level computation or as a specific offense characteristic if the charged offense is covered by existing guidelines in Chapter 2 or under the victim related adjustments under Chapter 3, PART A.

We note that under Chapter 4, PART A, tribal convictions, foreign convictions and consideration of the issuance and/or violation of protective orders neither can be used to calculate the criminal history category, nor in regard to calculate the offense level. The Commentary under 4A1.2 (h) directs the court that tribal convictions and foreign convictions may not be counted for criminal history calculation, but that they may be considered under the upward departure provision at 4A1.3. Regarding VAWA Offenses however, the VAG respectfully request the Commission's evaluation of tribal convictions, foreign convictions and consideration of the issuance and/or violation of protective orders in Chapter 2 and Chapter 3. The VAG believes that at least regarding prior VAWA Offenses findings, the guidelines calculations should appropriately and adequately weigh the defendant's history as part of the implementation of the VAWA 2013 provisions.

IV. Child pornography related provisions

Commission tentative priority:

(12) Continuation of its work with Congress and other interested parties on child pornography offenses to implement the recommendations set forth in the Commission's December 2012 report to Congress, titled Federal Child Pornography Offenses, and to develop appropriate guideline amendments in response to any related legislation.

Research has ascertained that the federal courts are not implementing 18 U.S.C. § 3509 related to sentencing, at least with regards to child pornography offenses.

18 U.S.C. § 3509(f) provides in part

.... A guardian ad litem appointed under subsection (h) shall make every effort to obtain and report information that accurately expresses the child's and the family's views concerning the child's victimization. A guardian ad litem shall use forms that permit the child to express the child's views concerning the personal consequences of the child's victimization, at a level and in a form of communication commensurate with the child's age and ability.

And 18 U.S.C. § 3509(h)(2) provides in part

A guardian ad litem may attend all the depositions, hearings, and trial proceedings in which a child participates, and make recommendations to the court concerning the welfare of the child. The guardian ad litem may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. (The extent of access to grand jury materials is limited to the access routinely provided to victims and their representatives.)

The Commission as part of any changes related child pornography offenses to should address whether guardians ad litem are being appointed in child pornography cases and if not why this does not occur. Moreover, the Commission should related to sentencing, undertake to determine whether guardians ad litem have appropriate access to reports and they are afforded and provide to the courts information for the court to determine just sentences. A guardian ad litem in working with the child victim may have relevant information under §6A1.3 and §6B1.4 that the court should consider. However, the court may not have full and complete information to correctly determine the guidelines and an appropriate sentence if no guardian ad litem is appointed or the guardian did not have access to applicable reports, evaluations and records.

Conclusion

We ask the Commission to explore and address the points referenced by the VAG in the next amendment cycle. 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 suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
July 2013