

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

March 18, 2014

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

Response to Request for Comments on 2014 Amendments

Chairman Saris and Members of the Commission:

The Commission has requested public comment for the proposed amendments. The Victims Advisory Group (VAG) is pleased to offer our recommendations as enumerated below. Preliminarily, the VAG incorporates by reference the attached written testimony and oral comments by VAG Chairman Russell Butler, at the public hearing on *Implementing the Violence Against Women Reauthorization Act of 2013*, on February 13, 2014 which included the importance of breaking down geographical barriers especially those victim related crimes occurring in Indian Country. As the Commission has heard, the VAG strongly supports the recognition of violations of court protection orders from offenses involving state and federal court orders of protection, but also to tribal and military orders of protection for all variations of assault.

The VAG Further Recommends and Supports the Following Amendments and Comments:

- 1) ***Sec. 113(a)(7) Assault Resulting in Substantial Bodily Injury to Spouse, Intimate Partner, or Dating Partner (5-Year Maximum)***

The VAG supports the 4-level enhancement so that it applies not only to a case in which the offense resulted in substantial bodily injury to an individual who has not attained the age of 16 years, but also to a case in which the offense resulted in substantial bodily injury to a spouse or intimate partner or dating partner.

Before enactment of the Act, section 113(a)(7) applied to assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, and it provided a statutory maximum term of imprisonment of 5 years. Section 113(a)(7) is referenced in Appendix A (Statutory Index) to §2A2.3.

§2A2.3 provides for a 4-level enhancement if the offense results in substantial bodily injury to an individual who has not attained the age of 16 years. The Act expanded section 113(a)(7) so that it also applies to assault resulting in substantial bodily injury to a spouse or intimate partner or dating partner. The proposed amendment to §2A2.3 should proportionally establish the enhancement at 4-levels.

2) Issue for Comment:

Cross Referencing to include Assault with Intent to Commit Certain Sex Offense

There are a variety of provisions in the guidelines that apply when the conduct involves a sex offense or attempted sex offense. To what extent should these provisions also apply when the conduct involves an assault with intent to commit a sex offense? How, if at all, should the Commission amend the guidelines to clarify whether or not these provisions apply when the conduct involves an assault along with intent to commit a sex offense? The VAG supports that cross-references should apply to the following provisions because normally an assault is more serious conduct than the underlying "attempted sex offense" which forms the basis of the guideline.

§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in section 2241 or 2242), a cross reference to §2A3.1 applies. See §2A3.2(c)(1).

§2A3.1 and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), if the offense involved "conduct described in" section 2241(a) or (b) or 2242, an enhancement or a higher base offense level applies. See §§2A3.1(b)(1), 2A3.4(a).

§2A4.1 (Kidnapping, Abduction, Unlawful Restraint), if the victim was "sexually exploited," an enhancement of 6 levels applies. See §2A4.1(b)(5).

§2J1.2(b)(1)(A), an enhancement applies if (among other things) the defendant was convicted under 18 U.S.C. § 1001 and the statutory maximum term of eight years' imprisonment applies because "the matter relates to" a sex offense under chapter 109A.

§4B1.5, certain provisions apply if the instant offense of conviction is a "covered sex crime." That term is defined in Application Note 2 to include (among other things) an offense, perpetrated against a minor, under chapter 109A.

§5D1.2(b), certain provisions apply if the offense is a "sex offense." That term is defined in Application Note 1 to include (among other things) an offense, perpetrated against a minor, under chapter 109A.

(3) 47 U.S.C. § 223 (Obscene or harassing telephone calls)

This proposed amendment addresses offenses under 47 U.S.C. § 223 (Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications), which were modified by the Act. Section 223(a) and set forth a range of prohibited acts involving communication that is obscene or that is made with intent to harass, or both. A person who commits any of these acts is subject to a maximum term of imprisonment of two years. Among other things, the Act clarified that communication with the intent to annoy is not prohibited by section 223(a). Three of the prohibited acts in section 223(a) are referenced in Appendix A (Statutory Index) to §2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens). Other prohibited acts in section 223(a) are not referenced in Appendix A. The

proposed amendment provides Appendix A references for these offenses. The VAG supports this conforming amendment.

(4) 18 U.S.C. § 2423 (Transportation of minors)

This proposed amendment addresses offenses under 18 U.S.C. § 2423 (Transportation of minors), which were modified by the Act. Section 2423 contains four offenses, each of which prohibits sexual conduct with minors.

1. Subsection (a) prohibits transporting a minor with intent that the minor engage in prostitution or criminal sexual activity. The offense provides a mandatory minimum term of imprisonment of 10 years and maximum of life. It is referenced in Appendix A (Statutory Index) to §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).
2. Subsection (b) prohibits traveling in interstate or foreign commerce for the purpose of "illicit sexual conduct," which is defined in subsection (f) to mean a criminal sexual act with a minor. It provides a statutory maximum term of imprisonment of 30 years. It is referenced in Appendix A to §2G1.3.
3. Subsection (c) prohibits traveling in foreign commerce and engaging in "illicit sexual conduct". The Act expanded this provision to also cover residing in a foreign country and engaging in "illicit sexual conduct". It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A. The proposed amendment would amend Appendix A to reference section 2423(c) to §2G1.3.
4. Subsection (d) prohibits any person from, for the purpose of commercial advantage or private financial gain, arranging, inducing, procuring, or facilitating the travel of a person for "illicit sexual conduct". It provides a statutory maximum term of imprisonment of 30 years. It is not referenced in Appendix A.

The proposed amendment would amend Appendix A to reference section 2423(d) to §2G1.3. The VAG support the proposed amendments which reflect the seriousness of these offenses and the vulnerable minor victims of these crimes and will help protect children by providing a longer period of incarceration.

(5) Issue for Comment: Supervised release recommendations when the Defendant is convicted of Failure to Register as a Sex Offender.

The Commission seeks comment on supervised release for defendants convicted under section 2250. Under section 2250(a), a defendant who fails to register as a sex offender shall be imprisoned for not more than 10 years. Under section 2250(c), an individual who fails to register under section 2250(a) and commits a crime of violence shall be imprisoned for not less than 5 years and not more than 30 years, in addition to and consecutive to the punishment for violating section 2250(a).

When a defendant is convicted of such an offense, the court is required by statute to impose a term of supervised release of at least five years and up to life. See 18 U.S.C. § 3583(k). What term of supervised release should the guidelines provide? In particular, should the guidelines provide for a term of supervised release of:

- (A) not less than five years and up to life;
- (B) not less than five years and up to life, with a life term recommended;
- (C) precisely five years; or
- (D) some other option?

The VAG recommends option (B) especially where a previously convicted and sentenced sex offender has not only failed to register as a sex offender but also has committed a crime which indicates his propensity to commit future criminal acts thereby putting the community and victims further at risk. Sex crimes are notoriously underreported and under-prosecuted. The defendants in these scenarios are especially at risk of further recidivism and require close and constant monitoring to help other children from becoming future victims.

Conclusion

We ask the Commission to consider these recommendations for the proposed Amendments to the Sentencing Guidelines. 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
March 18, 2014

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To the United States Sentencing Commission

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February 13, 2014

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

RE: Written Testimony in Response to the Violence Against Women Reauthorization Act of 2013 (VAWA)

Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide oral testimony to the Commission in response to the proposed amendments to address the Violence Against Women Reauthorization Act of 2013. Preliminarily, attached and incorporated in this testimony is the statement from VAG member Jennifer Bishop Jenkins describing her personal victimization related to strangling and suffocation. By and through our Chair, Russell Butler, the VAG sets forth the following principles that we urge the Commission to adopt as tenants for the VAWA related changes:

I. THE ENHANCEMENTS SHOULD APPLY TO ALL CASES

One of the questions posed by the Commission (Page 22, Item 1) was whether the guidelines should be amended only to address crimes committed by a spouse, intimate partner, or dating partner regarding strangling, suffocation, and attempting to strangle or suffocate or whether the guidelines should be amended to any cases where strangling, suffocation, and attempting to strangle or suffocate occurs. The VAG strongly believes that any harm to a victim equally impacts a victim regardless of any relationship to the offender and therefore it should be an enhancement to any crime. Whether any victim sustained bodily injury, substantial bodily injury, strangling, suffocation, or an attempt of strangulation or suffocation, that conduct is an

enhanced impact on the victim regardless of whether the victim was a spouse, intimate partner, or dating partner.

A. The Commission Should Select Option 2 of the Amendments to 2A2.3

Reflecting the policy that the harm is the harm and it applies regardless of the any status between the offender and the victim, the VAG urges the Commission to adopt Option 2 of the proposed amendments to 2A2.3.

II. STRANGLING, SUFFOCATION, AND ATTEMPTING TO STRANGLE OR SUFFOCATE IS A SEPARATE HARM FROM BODILY INJURY, SERIOUS BODIDILY INJURY, SUBSTANTIAL BODILY INJURY, AND PERMANENT OR LIFE-THREATENING BODILY INJURY ¹

Victims may often receive multiple harms from a crime. For example, a victim may receive a broken arm and also be strangled or suffocated. Victims may also suffer the fear of the use or brandishing of a firearm. When multiple harms occur, these harms should not be aggregated but instead be individually referenced to reflect the actual harms that a victim has been subjected. The Commission should not minimize either the bodily related harm or the strangulation or suffocation harms by aggregating the separate and distinct acts into one harm.

A. The Commission Should Select Option 2 of the Amendments to 2A2.2

B. The Commission Should Select Option 1 of the Amendments to 2A6.2

C. The Commission Should Sect Option 1 of the Amendments to Appendix A to Provide Offenses under Section 113(a)(8) with a Reference to 2A6.2

Reflecting the policy that the harm from strangling, suffocation, and attempting to strangle or suffocate is separate and distinguishable from the harm from any level of bodily injury, the VAG urges the Commission to adopt the options that reflect that strangling, suffocation, and attempting to strangle or suffocate is a separate harm from the bodily injury related harms.

III. OFFENSES INVOLVING VIOLATIONS OF COURT PROTECTION ORDERS SHOULD REFLECT NOT ONLY TO STATE AND FEDERAL COURT ORDERS OF PROTECTION, BUT ALSO TO TRIBAL AND MILITARY ORDERS OF PROTECTION UNDER 2A2.2(a)(5) AND OTHER SIMILAR GUIDELINES INCLUDING 2A2.1, 2A2.3, AND 2A6.2

Under 2A2.2 (a)(5), if an offense involved the violation of a court protection order, a 2 level offense increase is warranted. The policy behind having a consequence for not following a lawful order expresses that lawful orders are to be followed and respected. When an individual

¹ 2A2.2 (b)(3)(B) uses the term “serious bodily injury” and 2A2.3(b) uses the term “substantial bodily injury.”

violates a lawful order, there should be a meaningful enhancement where the violation of a lawful order results in a federal crime.

- A. An increase for a violation of a court protection order should likewise be applicable to other assault related offenses including 2A2.1, 2A2.3, and 2A6.2 or to constitute a new 3A1.6 victim-related adjustment when an offender commits an offense when subject to a lawful prohibition not to contact the victim.
- B. A lawful prohibition from a tribal or military authority not to contact a victim shall be provided the same status of a state or federal order.

The violation of a protection order guideline should not just apply to the guideline involving aggravated assault, but to other crimes both greater and lesser than aggravated assault, especially in Indian Country. According to the Department of Justice Tribal Statistics, American Indians are 2.5 times more likely to experience sexual assault crimes compared to all other races and one in three Indian women reports having been raped during her lifetime. Disobeying a lawful command demonstrates disrespect to authority and such conduct is similar in nature to obstruction of justice and as such it should have more severe consequences than the mere committing of the offense.

State and federal courts are not the only entities with the legal authority to limit contact between individuals. Tribal and military authorities likewise have the ability to set lawful prohibitions. Just as when orders of state and federal court are violated, the guidelines should reflect an appropriate enhancement when these lawful directions are ignore and federal crimes occur. It is not a good public policy result to allow crimes that occur within our borders be blurred by bureaucracy.

IV. SUPERVISED RELEASE SHOULD BE REQUIRED TO HELP REASONABLY PROTECT VICTIMS

One of the questions posed by the Commission (Page 22, Item 2) involved supervised release in cases involving domestic violence. (including stalking, intimate partner, and dating violence cases) 18 U.S.C. 3771(a)(1) provides crime victims with “The right to be reasonably protected from the accused.”

- A. The Guidelines should be amended to reflect that courts shall require conditions of release in domestic violence, stalking, intimate partner, and dating violence cases that will reasonably protect the victim from the accused as required under 18 U.S.C. 3771(a)(1).

The guidelines under 6A1.5 already require that the “court shall ensure that the crime victim is afforded the rights described in 18 U.S.C. § 3771. However, 6A1.5 is so general in nature, that expressly amending 5D1.1 to reference the obligation of the court to set conditions of supervised release that will reasonably protect the victim will more effectively implement the Congressional intent beyond the general policy statement to ensure victims’ rights.

V. PROVIDING EXAMPLES IN THE COMMENTARY TO CLARIFY WHEN AN UPWARD DEPARTURE MAY BE WARRANTED IN DOMESTIC VIOLENCE, DATING VIOLENCE, INTIMATE PARTNER, AND STALKING RELATED OFFENSES

The VAG notes that under Chapter 4, PART A, tribal convictions, foreign convictions and consideration of the issuance and/or violation of protective orders cannot be used to calculate the criminal history category. Similarly, relevant past conduct between the offender and the victim and the offender and the victim's family may not be relevant conduct for the criminal offense.

However, 4A1.3 (a) provides:

(a) UPWARD DEPARTURES.—

(1) STANDARD FOR UPWARD DEPARTURE.—If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.—The information described in subsection (a) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

The VAG request that 4A1.3 and its Commentary be amended to reflect appropriate examples related to domestic violence, dating violence, intimate partner violence, and stalking cases. In these cases, there may be tribal, foreign, and military criminal convictions, civil adjudication, and violations of administrative orders that could establish the basis for an upward departure. Appropriate examples would clarify when it would be appropriate for the court to consider an upward departure in domestic violence, dating violence, intimate partner violence, and stalking cases.

Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the Violence Against Women Reauthorization Act of 2013 amendments. We hope that our collective views will assist the Commission in its deliberations on this important matters of public policy.

Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group
February 2013