

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

Russell P. Butler, Chair



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July 25, 2014

United States Sentencing Commission
One Columbus Circle, N.E.
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Washington, D.C. 20002

RE: Notice of proposed priorities for the Amendment cycle ending May 1, 2015.

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, 2015. Victims are an integral part of the criminal proceedings and have the right to be treated with respect and fairness. Generally 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. Economic Crimes such as Identity Theft, Fraud and Property Destruction continues to hamper Crime Victims.

Commission tentative priority:

(2) Undertaking a multi-year study of § 2B1.1 (Theft, Property Destruction, and Fraud) and related guidelines, including examination of the loss table, the definition of loss, and role in the

offense; (B) a study of offenses involving fraud on the market; (C) a study of antitrust offense, including examination of the fine provision in §2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors); and (D) consideration of any amendment to such guidelines that may be appropriate in light of the information obtained from such studies.

The multi-year review should include a focus on economic impact on crime victims as a result of the Fraud, Identity Theft or Property theft. A dollar amount of restitution only provides a numerical value of loss but does not take into consideration the total economic impact of the loss. For example, a \$50,000 loss to a major million dollar corporation will have a different economic impact than a retiree on a fix income, even though the dollar loss is the same. Economic Impact should be given consideration in this review.

II. Re-sentencing Process

Commission tentative priorities:

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

The VAG is concerned that if the current practice of the Department is followed, that both the Commission's existing policy statement as well as the Crime Victims' Rights Act, 18 U.S.C. § 3771, will be violated to the detriment of crime victims. As such, the Commission should provide explicit direction to ensure that there is a directive that assures compliance with the applicable guidelines and statute.

The applicable policy statement §6A1.5 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.

(d) Enforcement and Limitations.—

(1) Rights.— The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(3) Motion for relief and writ of mandamus.— The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of

enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.— In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) Limitation on relief.— In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim’s right to restitution as provided in title 18, United States Code. (Emphasis added) Further Fed. R. Crim. P. 32 (i) (4) (B) expressly provides, “**Before imposing sentence, the court** must address any victim of the crime who is present at sentencing and **must permit the victim to be reasonably heard.**” (Emphasis added)

If a victim is unaware that there is going to be a resentencing, a victim will have no knowledge of the sentencing proceeding and the court will not permit the victim to be reasonably heard as required. In the context of a federal habeas challenge where there may not be a court hearing, the court has determined that victims can be heard by filing appropriate documents with the court. The court in *Pann v. Warren*, 2010 U.S. Dist. LEXIS 72234 (E.D. Mich. July 19, 2010) indicated:

The parties disagree about whether the Court’s consideration of this habeas case in chambers (assuming there is no public court hearing) constitutes a “public proceeding in the district court involving release.” The Court agrees with the Applicants that such is the case. Court records in habeas proceedings are generally accessible to the public. **Most habeas cases are resolved on the pleadings without in-court hearings. To preclude crime victims from submitting documents to the court in support of their right to be heard in a habeas proceeding would effectively preclude them from being heard at all in most cases. The Court thus concludes that the Applicants, as crime victims, have a right to be heard under the CVRA.** (emphasis added)

Similarly, to deny victims timely notification and an opportunity to be heard regarding § 3582 motions, would effectively deny victims the right to be heard regarding sentencing and release.¹ Ignoring victims in the course of the process not only violates the express language of the law, but also the spirit of the law to allow victims to be notified and heard.

If amendments to the guideline provisions governing the current sentence for an offender provide for (or allow) re-sentencing , the VAG respectfully also requests that the Sentencing Commission consider providing the resentencing court with specific directives with respect to victims and their obligation to accord those rights under law.

¹ While the court may not rule on the retroactivity determination regarding sentence and release in open court, the proceeding is not closed or sealed to the public. Proceedings should be open to allow victims to exercise their rights under law. *See e.g. In re Simons*, 567 F.3d 800 (6th Cir. 2009).

Victims' rights violations go far beyond the mere legal impact on victims of crime. Crime victims can be profoundly traumatized or re-traumatized by difficulties raised by the cases against their offenders.

What science tells us about the neurobiology of trauma is that sudden, unexpected developments in a crime victim's case can re-awaken deeply troubling memories, among other impacts. Re-traumatization has both physical and psychological effects, including shock, stress, depression, an inability to sleep or concentrate or work, chaos in relationships, etc. Sometimes re-traumatization can have even more profound physical or psychological impact on a crime victim.

The reason why victims' rights were enshrined in law in the first place was to minimize these negative effects on victims' lives. Crime victims are damaged by the crime, to a greater or lesser degree depending on the nature of the offense and the victim's life circumstances. But the very definition of the word "victim" means that they had no control over what happened to them and that it was hurtful. The greater the lack of control and the more serious the crime, the greater the potential for harmful trauma effects on the victim.

Worse, we know that a sort of negative psychological bond often is formed between victim and offender. The offender, through no choice on the part of the victim, is now a permanent part of the victim's life. This is often profoundly intrusive, debilitating, and unwanted.

What victims need most is information, stability, and, often, supportive services. After any degree of danger, what they need is safety. After any criminal intrusion into their lives, what they need is security. The prison sentence served by the offender often provides a helpfully stable emotional structure around which victims rebuild their lives.

Regarding the possibility of profound injury occurring to a victim when a case is re-opened, perhaps the United States Supreme Court said it best in their ruling in *Calderon v. Thompson*, 523 U.S. 538, 556 (1998), the justices found (Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. ... To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," ... an interest shared by the State and the victims of crime alike.)

III. Stay Away Orders

Commission Tentative Priority:

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

Offenses Committed in Violation of Lawful Requirement to Stay Away from a Victim.

In addressing the recent Violence Against Women Act (“VAWA”) amendments, the VAG became aware of an inconsistency in the treatment of crimes committed while the offender is subject to a lawful requirement to stay away from a victim. Pursuant to Section 2A2.2(b)(5) involving aggravated assault, a 2 level increase is required if the offense involved the violation of a court protective order. For other guidelines including for other assaultive conduct, there is no increase if the offense involved a violation of a court protective order. Moreover, a similar increase should occur if there was a lawful condition for the offender to stay away from a victim under lawful authority. (e.g. a parole commission, trial authority, or a military authority.)

For consistency in measuring the aggravation of weighing a violation of a stay away order of a victim, the Commission should review the appropriate guidelines to see if the enhancement related to violating a no contact provision should:

- Become a Title 3 enhancement applicable to all crimes;
- Alternatively, become an enhancement for other offenses; and
- Be expanded from court protection orders to other lawful requirements to stay away.

IV. Child pornography related provisions

Commission tentative priority:

(10) 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; and (B) possible development of guidelines amendments on the issue of victim restitution in light of Paroline v. United States. __ US__, 134 S.Ct. 1710 (2014).

VAG continues to support the bipartisan efforts of Congress to address the concerns the Supreme Court raised in Paroline. To that extent, The United States Senate introduced, *The Victim Restitution Improvement Act* to give child pornography victims the tools necessary to seek restitution from those responsible for perpetuating the crime. The Commission will also have important data collection responsibilities in the wake of the Paroline decision especially tabulating how much restitution child pornography victims are receiving in the wake of the Supreme Court's new guidelines. The VAG urges the Commission to pay particular attention to data collection about restitution in the near future.

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 2014

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To the United States Sentencing Commission

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May 15, 2014

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Commission Planning Session for FY 2015 Amendment Cycle

Chairman Saris and Members of the Commission:

The Victims Advisory Group (VAG) is pleased to offer our recommendations for the Commission's upcoming planning session to discuss the FY 2015 amendment cycle to include the following:

1. Provide Clarifying Guidance on the Treatment of Crime Victim

The VAG believes that the Commission should consider providing additional clarification about the treatment of crime victims in the sentencing process. The Commission's current policy statement on the issue (§ 6A1.5) does nothing more than instruct the Court to follow the applicable laws protecting crime victims' rights. But the Commission could do more by explaining how victims' rights are to be protected during the sentencing process. Consistency in treating victims in accordance with law would provide a more uniform access to justice.

2. Offenses Committed in Violation of Lawful Requirement to Stay Away from a Victim

In addressing the recent Violence Against Women Act ("VAWA") amendments, the VAG became aware of an inconsistency in the treatment of crimes committed while under the subject of a lawful requirement to stay away from a victim. Pursuant to Section 2A2.2(b)(5) involving aggravated assault, a 2 level increase is required if the offense involved the violation of a court protective order. For other guidelines including for other assaultive conduct, there is no increase if the offense involved a violation of a court protective order. Moreover, a similar increase should occur if there was a lawful

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For consistency in measuring the aggravation of weighing a violation of a stay away order of a victim, the Commission should review the appropriate guidelines to see if the enhancement related to violating a no contact provision should:

- Become a Title 3 enhancement applicable to all crimes;
- Alternatively, become an enhancement for other offenses; and
- Be expand from court protection orders to other lawful requirements to stay away.

3. Allow Tribal Convictions to Receive Full Consideration in the Sentencing Process

The VAG notes that under Chapter 4, PART A, a tribal convictions cannot be used to calculate the criminal history category, but they can be considered under §4A1.3 for an upward departure. The VAG understands that tribal convictions are not uniformly available and included in PSRs. The VAG urges the Commission to determine how tribal convictions can be uniformly made available so that judges will have more complete information to determine whether the court should impose an upward department where appropriate. Moreover, the VAG urges the Commission to allow tribal convictions the same full faith and credit as state convictions. The tribal convictions process has undergone significant revision and defendants are provided due process. As such, the Commission should provide that tribal convictions with the full faith and credit as the conviction of other legal sovereigns within the United States.

The failure to accord full faith and credit has a disparate impact to victims of crime in Indian Country as offenders do not receive the same serious sentence considering the defendant's past criminal conduct. For example, domestic violence cases involving Native American women are reported to be more than double the national average. Low prosecution rate of certain cases and sentencing disparities continue to be reported. The inability to use tribal court convictions under the criminal history category presents a major obstacle to accurately represent a history of domestic violence where tribal defendants may have a history of prior domestic violence to the same victim or other similarly situated victims. Therefore, the VAG urges the Commission to allow tribal convictions to receive the same criminal history computation as state convictions.

Conclusion

We ask the Commission to consider these issues during their Commission Planning Session. The VAG offers our collective expertise in working with staff and the Commission to develop appropriate policy to address these issues that are important to having justice for all. We look forward to working with the Commission to insure that the needs and concerns of crime victims are fully considered.

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

Respectfully,

Victims Advisory Group
May 2014