VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

February 10, 2016

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

RE: Written Testimony for the Response to Compassionate Release and Conditions of Supervision: Advisory and Advocacy Groups Panel

Dear 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 compassionate release policy priorities under §1B1.13 and supervisory release under §§5B1.3 and 5D1.3 in the Federal Sentencing Guidelines. The VAG urges the Commission to adopt changes made to these proposed amendments with regard to the impact on victims as we describe in greater detail below.

I. Compassionate Release Needs to Address the Notice Concerns to Crime Victims

The VAG recommends in the draft policy statement under §1B1.13 that a reference to 18 U.S.C. §3771 be included with regard to the potential release of any prisoner under the compassionate release criteria. The Commission offers guidance to the trial court as to what it should consider in determining whether to grant the Bureau of Prisons motion. However, absent from the text in §1B1.13 or the Application Notes was any reference to 18 U.S.C. §3771, affording victims

numerous rights when a district court contemplates such a motion - most specifically the right to notice and the right to be heard at a proceeding addressing release.

In addition, the VAG recommends that the Commission adopt a definition of progressive illness. The VAG assumes that this provision is intended to address the inmate who is suffering from an illness or injury that, although not terminal, truly diminishes his ability to function in prison. Without a definition of "progressive illness," however, this could be applied to a defendant with any illness that is progressive, although does not rise to the degree of seriousness the amendment intends (such as psoriasis or manageable arthritis). To avoid such a misapplication, the VAG recommends keeping the original version in the Application Note 1(A)(ii) which requires that the "defendant is suffering from a permanent physical or medical condition or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care with the environment of a correctional facility and for which conventional treatment promises not substantial improvement."

Finally, the VAG recommends adding additional language to the §1B1.13(2) Policy Statement to include:

(2) *the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. §3142(g), and notice is required to any victim under §18 U.S.C. §3771.*

II. Conditions of Probation and Supervised Released

The VAG recommends to the Commission the following changes under §5B1.3 and 5D1.3 Conditions of Probation and Supervised Release. First, under §5B1.3(c)(3), the proposed amendment includes the *mens rea* of " knowingly." While the boundaries of districts which mirror state boundaries may be unproblematic for a defendant to know, many other federal district boundaries are not clear and some are even expansive. As such, a defendant will always be able to claim he did not know he was outside the district. Therefore, it should be incumbent upon the defendant not to leave his jurisdiction knowingly, and not the probation officer's responsibility to later prove the defendant knew he was outside the district. As a result, the VAG supports the existing language under §5B1.3(c)(1). This language incentivizes a defendant to be clear about his or her travel limitations, consistent with the purpose of these amendments. It also restores the protection the existing language provides. The existing language includes a prohibition on travelling to "other specified geographical areas" such as victim locations of work or residences. This should be a standard condition of probation and is essential for victim safety.

Second, under §5B1.3(c)(12), the VAG recommends using the existing language instead of the proposed amendment. The proposed amendments allow a probation officer who determines a defendant is a risk to third parties to require the defendant to inform the third party and to verify with the third party that the defendant informed them of the risk. However, the proposed amendment eliminates this requirement from "shall" to "may" as well as eliminates the requirement that the probation officer "make such notification" independently. The VAG believes that victims' interests are more protected in having probation officers retain the authority to not only check with third parties but also notify third parties of the risk the defendant poses.

Finally, the Commission seeks comment on whether §5D1.3(c)(15), which states that the defendant "shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines or special assessments." The proposed amendment would remain a standard condition under §5D1.3(c)(14). The VAG recommends this section should remain a standard condition. This clearly would benefit victims under the standard language scenario than as a specific condition.

Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of Compassionate Release and Conditions of Probation and Supervision. We hope that our collective views will assist the Commission in its deliberations on these 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 2016

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

March 9, 2016

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

RE: Written Testimony for the Response to the Proposed Amendments regarding Child Pornography and the Split Circuits.

Dear 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 regarding Offenses Involving Unusually Young and Vulnerable Minors under §3A1.1(b)(1) and Issues Relating to the Tiered Enhancement for Distribution in §2G2.2 The VAG urges the Commission to adopt certain changes made to these proposed amendments with regard to the impact on victims as we describe in greater detail below.

I. Offenses Involving Unusually Young and Vulnerable Minors

The VAG recommends that the Commission adopt the recommendations from the proposed amendments which were set forth from the Fifth and Ninth Circuit cases in *United States v. Wright*, 373 F. 3d 935 (9th Cir.2004) and *United States v. Jenkins*, 712 F.3d 209 (5th Cir. 2013). The VAG, therefore, supports the Commission's proposed amendments regarding young and vulnerable minors. The amendment will recognize circumstances where due to minors' extreme

youth and small physical size they are especially vulnerable compared to most minors under the age of 12 years old. This will allow courts to consider other factors regarding the victim's size and status and not just focus solely on the victim's age to define vulnerability. This is especially important for infants and toddlers who are among the most vulnerable of victims and the harm to them is unique and profound.

The sexual images produced by offenders are more aptly labeled "images of child sexual abuse" in that they memorialize actual abuse of children. Such images of unusually young victims cause specific and particular harms which should be accounted for in sentencing. The Department of Justice reports "an increase in the number of images depicting very young children, including toddlers and infants".[1] As this Commission has previously noted, producers of images of child sexual abuse "may target young victims because they are pre-verbal and unable to report their abuse. They are also less likely to recognize inappropriate touching." [2] As such, it is inaccurate to say that these offenders target victims because of their characteristics of being less than 12 years old. Perpetrators select these victims because they are so very young that they are helpless and unable to object, defend themselves, or even to report their abuse. Indeed, many of these victims may be pre-verbal.

Furthermore, because of this vulnerability, these images are even more egregious and children risk more severe victimization. The Canadian Centre for Child Protection recently conducted a study of the images referred to their cybertipline (Cybertip.ca). In January of this year they reported that as the age of the children in the images decreases, the level of intrusiveness of the sexual acts increases.[3] Moreover, these images may stay in cyber space for infinitum long after the child has grown older. Therefore while a very young victim may not remember the abuse or exploitation, the child will learn of it and be re-traumatized.

Among the purposes of the Sentencing Guidelines is to administer a just sentence that reflects the nature of the offense.[4] An offender who produces child sexual abuse images by assaulting a defenseless and helpless victim causes a different type of social harm. Allowing a sentencing judge to acknowledge that egregious victimization furthers the purpose of a just and fair sentence. In addition, this amendment will help the sentencing judge focus on both specific and general deterrence, both of which are stated goals of sentencing.

The same analysis is accurate for the possessor of such images as well. As Michelle Collins from the National Center for Missing and Exploited Children (NCMEC) testified before the Commission in 2012,

> [T]here has always been a demand for pornographic images of very young children. This demand fuels the production of these images. These victims are often pre-verbal and therefore more isolated from the outside world. As a result, there may be fewer

[1] www.justice.gov/criminal-ccos/childpornography

[2] USSC Report on Child Pornography Offenders, at 108 (Dec. 2012)

[3] Child Sexual Abuse Images on the Internet, a Cybertip.ca Analysis (January 2016)

[4] 18 U.S.C. 3553

opportunities for their abuse to be detected. For this reason, CVIP continues to receive many seized images of infants and toddlers who have not yet been identified.[5]

II. Issues Relating to the Tiered Enhancement of Distribution of Child Pornography)

The VAG recommends that the Commission follow the Fifth, Tenth and Eleventh Circuits with regard to the 2-level Distribution Enhancement under Subsection (b)(3)(F). These circuits have held that defendants who use a file sharing program regardless of whether they did so purposefully, knowingly or negligently deserve the enhancement. These courts do not impose an additional burden on the government to prove a defendant intended distribution. Accordingly, the courts recognize the reality that defendants who use file sharing programs are actively aware of all the contents in their program as that is why they adopted the program: to share child sexual abuse images. As this Commission noted four years ago, "a user who downloads a P2P network application typically has an ability to control the extent to which that user's files are shared."[6] Offenders utilize peer to peer platforms because they provide a decentralized system through which offenders can expend their "currency" of child sexual abuse images to obtain further images. That is why they use these platforms. Requiring the government to prove independently the defendant's specific *mens rea* of the distribution of a specific image when he utilized this platform ignores the exact reasons why the offenders adopt the platform.

These platforms harm victims in unique ways. The peer-to-peer file sharing programs that defendants utilize to distribute images of sexual abuse actually perpetuate the repeated trade of victims' image. This has been demonstrated in many law enforcement investigations. Because victims suffer an additional harm when these platforms are used- increased circulation of their images - and offenders use these platforms for the very reason of trading in child sexual abuse images, offenders should be sentenced accordingly.

The VAG also recommends that the Commission follow the Fifth Circuit with regard to the 5- level distribution enhancement under §2G2.2(b)(3)(B). The VAG is concerned with the proposed definition of distributed in "exchange for any valuable consideration." The VAG supports the broad definition of a "thing of value" to encompass anything of valuable consideration. This includes the common practice of bartering or sharing of pornographic materials being received and exchanged in consideration for the material. The current definition has been settled precedent for some time. See *U.S v. Geiner* 498 F.3d 1104 (10th Cir, 2007) and *U.S v. Burman*, 666 F.3d 1113 (8th Cir, 2012), which allow for considering those circumstances where the defendant has obtained a gain such as increased downloads, access to more pictures, or access to other child pornography networks. Indeed, these two circuits note that this is a commonly accepted meaning of the current language of the guidelines. Furthermore, this interpretation still requires the government to establish that the defendant expected something of value in return for the images.

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[5] http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Collins.pdf

[6] U.S.S.C. Report to Congress: Federal Child Pornography Offenses, at 50 (Dec. 2012)

Moreover, when the sharing is done in order to obtain more images the social harm is even greater, for example, the subject child's image is being used to drive a market for sexual abuse of other children. This method of trading images affords victims the "indelible knowledge that the images of her abuse remain in circulation on the open internet and are treated as a species of currency by pedophiles."[7] It is also a greater harm for society because it further injects these images into the massive digital marketplace, thereby further expanding the circulation of the images. Therefore, the use of P2P networks alone demands an enhancement as it more accurately accounts for the harm sustained by the victim and more accurately characterizes why the defendant distributed the images.

The proposed amendments too narrowly define the scope of "valuable consideration" with respect to trading child pornographic material for the specific purpose of obtaining something of value from that other person. This means defendants will claim that they are not obtaining a gain because there wasn't a specific gain in the trade. The language of the definition further suggests a burden on the government to prove an explicit agreement existed between the offender and the recipient of his traded images. Such a standard is unrealistic in the climate of peer to peer communities, whose very structure is predicated upon non-centralized and somewhat anonymous sharing of material. The VAG is concerned that these definitions will excuse or perpetuate barter business of child pornography that defendants currently use to share their materials.

Conclusion

The VAG appreciates the opportunity to address the victim related issues in relation to the impact of offenses involving unusually young and vulnerable minors and issues relating to the tiered enhancement for distribution of child pornography. We hope that our collective views will assist the Commission in its deliberations on these 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
March 2016

[7] *United States v. Schultz*, No. 14-10085-RGS, 2015 WL 5972421, at *3 (D. Mass. Oct. 14, 2015)