

VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission



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

RE: VAG's Response to the Proposed Amendments to the Sentencing Guidelines

Dear Members of the Commission:

The Victims Advisory Group (VAG) appreciates the opportunity to provide written response to the Commission on the proposed amendments regarding §1B1.10, career offender guidelines, and the proposed amendments responding to recent legislation. Pursuant to its duties outlined in §1 of the VAG's Charter, the VAG has reviewed the proposals and consulted with its membership regarding the impact of these proposals on crime victims. The VAG urges the Commission to consider the specific concerns addressed below especially regarding the impact on victims.

I. Proposed Amendment Number One: §1B1.10

a. Part A: Koons v. United States

The proposed amendment, while focusing on the appropriate sentence for convicted defendants, has implications for crime victims. Crime victims, as well as the criminal justice system as a whole, have an interest in the finality of sentences. *E.g., Johnson v. United States*, 544 U.S. 295, 309 (2005). To that end, the VAG prefers the Commission adopt Option 2 because it appears to support the interest of finality of sentences most accurately.

The VAG understands the proposed amendment to be primarily focused on defendants and involves resentencing due to changes in the guidelines and not individual defendant's requests regarding their crimes or their impact. Nonetheless, the VAG is concerned that none of the options include any form of notice to the crime victim. Therefore, the VAG suggests the

Commission provide notice to any victims prior to a sentencing change of the potential for a reduction and all other relevant information, notice to any victims subsequent to a sentencing change of the details of the change, and a reasonable opportunity to be present and heard at any hearing regarding resentencing. *See*, 18 U.S.C. 3771(a). Victims have a right to be made aware of any change in the sentence of a defendant and such a provision would assist in achieving that outcome. *Id.*

b. Part B: Resolution of Circuit Split

Similar to the proposed amendment in Part A, the VAG recognizes the limited impact on victims for this amendment. To that end, it expresses the consistent preference for finality of sentencing mentioned above. Similarly, it further suggests the Commission include the appropriate requirement of notice to victims and opportunity to be heard regarding a change in a defendant's sentence. *Id.*

II. Proposed Amendment Number Two: Career Offender

a. Part A: §4B1.2 Modified Categorical Approach

The VAG supports the proposed amendment to reject the categorical approach in determining whether a prior conviction is a “crime of violence” or a “controlled substance offense” for purposes of applying the career offender guideline under §4B1.1. The VAG agrees that a sentencing court should “consider the conduct that formed the basis of the conviction.” Furthermore, the VAG supports providing structure to the sentencing court by limiting the sources to be considered in analyzing that conduct. Such an approach promotes accuracy and consistency in sentencing. Moreover, it also avoids the need for “mini-trials” within a sentencing which can re-traumatize a victim of a prior offense.

b. Part B: Meaning of Robbery

The VAG supports Option 2 of the proposed amendments as it proposes a definition most commonly understood as robbery and consistent with the common law. Additionally, this definition most accurately reflects the experience of the victim of robbery who is compelled to depart with property due to any force or threatened force.

c. Part C: Inchoate Offenses

The VAG supports the amendment of the first paragraph of Sub-option 2B that provides that conspiring to commit a crime of violence is a crime of violence, and no additional examination of the overt act is necessary. Such an approach most accurately characterizes the prior offenses of a defendant to aid a sentencing court. While the VAG does not feel that controlled substance offenses are victimless crimes, on this proposal the VAG takes no position on the Commission's proposed amendments to either include or exclude overt acts for a proper assessment of convictions for conspiracy to commit a controlled substance offense.

d. Part D: Definition of Controlled Substance Offense

While the VAG does not believe controlled substance offenses constitute victimless crimes, it does not take a position on this amendment due to the limited impact on victims.

III. Proposed Amendments Number Three: Miscellaneous

a. FDA Reauthorization Act of 2017

The VAG does not take a position on this amendment due to its limited impact on victims.

b. FAA Reauthorization Act of 2018

The VAG does not take a position on this amendment due to its limited impact on victims.

c. Allow States and Victims to Fight Online Sex Trafficking

The VAG agrees that the proposed revisions are appropriate and the selected base offense levels adequate when read in the context of increases when an aggravated form of the offense is the offense of conviction.

The VAG believes that §4B1.5 should be amended to account for 18 U.S.C. 2421A. This statute addresses a defendant who “owns, manages, or operates an interactive computer service...or conspires or attempts to do so, *with the intent to promote or facilitate the prostitution of another person*” (emphasis added). Such a defendant is intentionally engaging in a crime of sexual exploitation and his actions should be included as a “covered sex crime.” If convicted of the aggravated nature of this offense, a defendant engaged in the above activity and actually caused the prostitution of 5 or more people or acted “*in reckless disregard* of the fact that such conduct *contributed to sex trafficking*” (emphasis added). Such a defendant possesses the mens rea of intentionally promoting prostitution of 5 or more people or recklessly disregarding that the people sexually exploited through its platform were victims of sex trafficking. These offenses are correctly considered sex crimes and are not similar to the distinctly different offense of transmitting information about a minor. Therefore, they should be treated as sex crimes.

For the same reasons, a conviction under 18 U.S.C. 2421A should not be excluded from the definition of sex offense under §5D1.2. These crimes intentionally promote or facilitate the sexual exploitation of others and are appropriately labeled sex crimes and enveloped by §5D1.2.

d. Grouping of Offenses Covered by §2G1.3

The VAG agrees with the proposed amendment to exclude §2G1.3 offenses from grouping under §3D1.2. Such an amendment promotes accuracy and consistency throughout the Guidelines.

e. Policy Statement on Shock Incarceration Programs

The VAG does not take a position on this amendment due to its limited impact on victims.

IV. Proposed Amendments Number Four: Technical

The VAG does not take a position on these amendments due to their technical nature and limited impact on victims.

Conclusion

The VAG appreciates the opportunity to comment upon the victim related issues regarding the Commission's proposed amendments. We hope that our collective views will assist the Commission in its deliberations on these important matters of public policy.

Should you have any questions or require any clarification regarding the suggestions, the VAG welcomes such an invitation to dialog further on these matters.

As always, we remain,

Respectfully,

A handwritten signature in black ink, appearing to read "Mary Graw Leary". The signature is fluid and cursive, with the first name "Mary" being the most prominent.

Mary Graw Leary
Victims Advisory Group

cc: Advisory Group Members