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William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008

Introduction

I appreciate the opportunity to appear before the Sentencing Commission to discuss important sentencing issues related to the recently enacted Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). My testimony will focus on three issues:

First, the directive to the Commission to review alien harboring guidelines where the harboring is in furtherance of prostitution and where the defendant is an organizer, leader, manager, or supervisor; second, the guidelines applicable to the new fraud in foreign labor contracting offense; and third, other sentencing implications of the TVPRA. The Department will also submit more detailed written comments on these issues in response to the proposed amendments and issues for comment published in January in the Federal Register.

The sentencing issues raised by the Act are many and complex and deserve a complete review by the Commission. We think this review should include consultations with victim and advocacy groups, prosecutors, defense lawyers, and others as well as a full analysis of recent trafficking cases and related immigration cases. Given the recency of the enactment of the Act, we believe it may be appropriate for the Commission to continue work on the sentencing issues raised by the Act beyond the current amendment year, with a goal of completing implementing guidelines in the next amendment year.

Alien Harboring in Furtherance of Prostitution

Section 222 of the TVPRA directs the Commission to review the alien harboring guidelines and amend them, if appropriate, where the harboring is in furtherance of prostitution and the defendant is an organizer, leader, manager, or supervisor. The guidelines at §§2G1.1 and 2G1.3 take an appropriately graduated approach to prostitution-related offenses, applying different severity levels to different prostitution-related crimes – including interstate transportation for prostitution, importation of aliens for prostitution, sex trafficking of minor, and sex trafficking by force, fraud, or coercion – according to the level of harm involved and culpability of the offender.

The most egregious offenses, such as those involving the use of force, fraud, or coercion or the commercial sexual exploitation of a minor, are appropriately sentenced at

higher levels. As the degree of coercion or the vulnerability of the victim increases, so does the applicable offense level. For example, in *United States v. Carreto*, multiple defendants pled guilty to recruiting young, uneducated Mexican women and girls from impoverished backgrounds, smuggling them into the United States, and forcing them to engage in prostitution by threatening and beating them. The traffickers in that case also controlled their victims by holding the victims' children in Mexico. Three defendants were sentenced, respectively to 50, 50, and 25 years' imprisonment for multiple offenses of sex trafficking. These cases carry a base offense level of 34.

In contrast, cases involving interstate transportation for prostitution in violation of the Mann Act and importation of adults for prostitution in violation of 8 U.S.C. § 1328, which are not based on proof of the use of force, fraud, or coercion carry a base offense level of 14 under §2G1.1. In these cases, the defendants often recruit women into prostitution, facilitate their travel and transportation, and profit from their prostitution activities. Although this conduct is deplorable – promoting prostitution and exploiting vulnerable women who have few economic alternatives – it does not involve the use of force, fraud, or coercion criminalized under the sex trafficking statute; nor does it involve the exploitation of minors. This conduct thus differs from the conduct that defines human trafficking crimes.

Even further along the spectrum, in contrast to Mann Act and § 1328 offenses, alien harboring crimes under 8 U.S.C. § 1324 often involve sheltering or concealing undocumented persons in locations such as homes or businesses. Often, however, unlike defendants convicted of Mann Act or international importation offenses, alien harboring defendants are not implicated in facilitating interstate or international travel for the specific purpose of prostitution. The level of prostitution-related criminal intent and the extensiveness of the criminal conduct is therefore lower than in many Mann Act or §1328 importation cases.

While the entire spectrum of these federal commercial sex- and immigration-related offenses involve serious criminal conduct that must be vigorously prosecuted and punished by substantial sentences, an appropriate sentencing scheme should recognize distinctions between these different types of offenses regarding the degree of criminal intent and the extensiveness of the criminal conduct.

The graduated approach of the current guidelines recognizes that while all forms of commercial sexual exploitation are reprehensible and warrant significant sentences, the more vulnerable the victims and the more brutal the forms of physical and psychological coercion, the more elevated the offense level should be. The congressional directive asks the Commission to reconsider the alien harboring guideline, §2L1.1, for offenses where the harboring is in furtherance of prostitution and the defendant is an organizer, leader, manager, or supervisor.

Alien harboring offense levels begin at level 12, only two levels below the level 14 applicable to some commercial sex offenses, such as interstate transportation for

prostitution in violation of the Mann Act (18 U.S.C. § 2421) or importing an alien for immoral purposes (8 U.S.C. § 1328).

In a sense, this limited two-level disparity--placing alien harboring offense levels slightly below the Mann Act and importation offense levels and further below the sex trafficking offense levels--is appropriate. This is so, first, because convictions for interstate transportation and importation for prostitution involve not just knowledge, but *specific, deliberate intent* to further prostitution, while alien harboring convictions require no such proof of specific, deliberate intent.

Secondly, interstate transportation and international importation tend to involve more extensive and elaborate criminal conduct than localized acts that could constitute alien harboring, such as conduct on the part of a landlord. Thus, in the case of adults, the current two-level disparity between alien harboring and certain commercial sex offenses is limited in magnitude and arguably appropriate.

Nonetheless, alien harboring that furthers prostitution involves increased criminality and additional negative societal impact as compared to ordinary alien harboring. So, in this sense, some increase in offense level, through the addition of a specific offense characteristic under § 2L1.1 would be appropriate where the defendant plays a role as an organizer, leader, manager, or supervisor.

In cases involving prostituted minors, the disparity between harboring and commercial sex offenses is more pronounced, because offense levels applicable to prostitution of minors begin at level 24. To address this disparity, we suggest the Commission consider adding an additional enhancement to §2L1.1 pertaining specifically to the prostitution of minors.

A significant advantage of making any adjustments within the framework of §2L1.1, rather than by cross-reference, would be to preserve the applicability of Specific Offense Characteristics under the alien harboring guidelines. The current alien harboring guidelines significantly increase the offense level according to the number of aliens harbored and prior immigration offenses. The offense levels resulting from these specific offense characteristics can equal or exceed some commercial sex offense levels. Adding Specific Offense Characteristics instead of a cross-reference ensures that increases based on prostitution-related conduct are applied *in addition to* and not *instead of* important immigration-related enhancements.

Adjusting the §2L1.1 guideline to bring it into closer conformity with commercial sex offense guidelines would serve the interests in punishing like conduct in a like manner, while appropriately preserving relevant distinctions between alien harboring for prostitution and other commercial sex crimes that involve higher degrees of criminal intent, more extensive interstate or international conduct, and more egregious forms of exploitation. This recommendation thus provides for “appropriately different sentences for criminal conduct of differing severity,” in accordance with the aims of the guidelines.

Fraud in Foreign Labor Contracting

The new fraud in foreign labor contracting offense, 18 U.S.C. § 1351, makes it unlawful to fraudulently recruit, solicit, or hire an employee from outside the United States for employment within the United States. As the plain language and legislative history make clear, this statute reaches forms of labor exploitation through fraud that do not involve sufficient coercion to establish a human trafficking offense in violation of Chapter 77.

For example, as noted in the legislative history of § 1351, “exploitative employers and recruiters have lured heavily-indebted workers to the United States,” and although not engaging in coercive conduct tantamount to human trafficking, have subjected the defrauded workers to deplorable conditions, as the workers faced “bankruptcy because of brokerage charges and debt incurred in their home country in reliance on the recruiters’ false promises.” This crime has a five-year statutory maximum, as compared to the twenty-year statutory maximum penalty for forced labor. Accordingly, § 1351 offenses should carry offense levels lower than Chapter 77 offenses such as forced labor and document servitude.

Section 1351 is codified in Chapter 63, suggesting the possibility of applying fraud guidelines such as § 2B1.1. However, those guidelines focus significantly on financial loss, without addressing conduct relating to worker exploitation. To better address the worker exploitation conduct often involved in such offenses, the offense could be indexed to §2H4.2, which applies to other worker exploitation offenses, and has a base offense level of 6, similar to the level 6 or 7 applicable to many fraud offenses. Additional enhancements could be added to address numbers of workers and the use of coercive conduct. Alternatively, the new offense could be indexed to §2H4.1, with a lower base offense level of applicable only to the fraud in foreign labor contracting crime.

Other Sentencing Implications of the TVPRA of 2008

Several other amendments to Chapter 77 may warrant revision of the sentencing guidelines. The new offenses of obstructing enforcement of trafficking statutes, which are codified within the statutes criminalizing the underlying trafficking offenses, could be indexed along with the substantive trafficking violations themselves, as was the case with the pre-existing obstruction provision within 18 U.S.C. § 1581. Alternatively, they could be indexed to the §2J1.2 guideline for obstruction of justice.

While other statutory amendments do not specifically require amendments to the guidelines, the Department, in its written submission, respectfully notes several potential areas of clarification, including updating the language of §2H4.1 in several places to encompass all Chapter 77 offenses sentenced thereunder, in place of the outdated “peonage or involuntary servitude” language.

Finally, the Commission may at some point wish to consider whether an enhancement should be added to §2H4.1 to address the number of victims held. Currently, this offense conduct is noted only as a potential basis for an upward departure.

Conclusion

We appreciate the opportunity to address the Commission and we appreciate the Commission's attention to these issues.