

**United States Sentencing Commission
Public Hearing – March 17, 2009**

**Testimony of Karen E. Stauss, Esq.
Managing Attorney and Policy Counsel
Polaris Project**

Chairman Hinojosa and distinguished members of the Commission:

Thank you for this opportunity to comment on the sentencing guidelines connected to crimes in the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008.

My name is Karen Stauss and I am the Managing Attorney and Policy Counsel for Polaris Project, a national anti-human trafficking organization that provides direct assistance to survivors of human trafficking; operates the HHS-funded national human trafficking hotline; engages in public outreach and policy advocacy at the federal and state levels; and provides training and technical assistance to federal and state law enforcement agencies, social service providers, and other stakeholders in the fight to combat human trafficking. I have represented survivors of human trafficking as an advocate for victim witnesses in their interactions with the criminal justice system and in their immigration-related applications. I was in close contact with Congressional staff during the drafting of the TVPRA, and have also worked with state policymakers on anti-trafficking legislation in dozens of states in recent years.

The human trafficking crimes established under the TVPA and subsequent reauthorizing laws generally prohibit exploitation of a person's labor, services or commercial sex acts for profit through the use of force, coercion or fraud. Any inducement *of a child* to engage in commercial sex acts is sex trafficking, even without proof of force, coercion or fraud. The TVPA crimes encompass both sex trafficking and labor trafficking, and affect victims who are U.S. citizens, lawful permanent residents and foreign nationals. These crimes do not require any movement of people, either interstate or international. The heart of the crimes lies in the overcoming of another person's will for one's own profit.

I am pleased to make recommendations on the following issues for comment:

- A. Directive to the Commission regarding alien harboring (part of 8 USC § 1324) in furtherance of prostitution

The directive applies to those convicted of harboring in furtherance of prostitution when they are the "organizer, leader, manager or supervisor" of the "criminal activity". It appears ambiguous whether "criminal activity" refers to the immigration crime, i.e. harboring, or to the prostitution. It is our strong view that the criminal activity referred to here is the prostitution, not the harboring. Members of Congress and other supporters of the TVPRA did not aim to strengthen immigration crimes or to target smuggling rings through this law, but rather to enforce laws against human traffickers and to protect people, including undocumented persons, from exploitation and abuse. Consider the case of harboring "organized" by a family member, such as a sister of the alien. The sister may simply host the alien and hold no power over her, and the alien may then independently engage in prostitution. While the harboring technically may be said to be in furtherance of prostitution, it would be a strange and unintended result if the sister would be sentenced more harshly than otherwise for harboring simply because the alien used the situation to engage in prostitution.

This is more easily understood in the context of earlier drafts of the TVPRA. The version that first passed the House of Representatives would have federally criminalized virtually all crimes involving prostituting

another person, but the Senate version did not do so largely out of a desire to keep federal resources focused on human trafficking crimes involving force, fraud or coercion. This harboring in furtherance of prostitution provision represents a compromise that was intended to increase the penalty for many though not all instances of pimping, including specifically those that involve undocumented persons, due to the inherent power imbalance between the pimp and the victim due to the victim's undocumented status.

Indeed, harboring an undocumented person in order to exploit that person in prostitution is a serious crime that is often committed simultaneously with sex trafficking by force, fraud or coercion. Nonetheless, proving the force or coercion necessary to convict under the sex trafficking crime is often difficult, and therefore many sex traffickers are prosecuted or convicted under Mann Act crimes (entailing interstate transport for immoral purposes), 8 USC § 1324 (harboring and other immigration violations) or 8 USC § 1328 (entailing importation for immoral purposes) instead of under the sex trafficking crime. The listed provisions cover many though not all pimping crimes.

For example, in a series of raids on Korean massage parlor-front brothels in the Washington area, Polaris Project identified nearly half of the women on the premises as victims of human trafficking. However, the U.S. Attorney was only able to achieve convictions under other crimes. In some cases this is because the trafficker's exercise of power and control is hidden and because the victims are fearful or otherwise unwilling or unable to testify effectively. The victims often tell us they are very unhappy with the living conditions and depressed and traumatized because of the continuous stream of commercial sex with different men. The traffickers intentionally take advantage of the victims' undocumented status and exploit their pre-existing fears of deportation and of immigration agents. Even without voicing direct threats, traffickers create a coercive environment in which women feel they have no choice but to continue in the situation against their will.

Accordingly, harboring should reference § 2L1.1 and a Special Offense Characteristic (SOC) should be added to § 2L1.1: adding 2 points to the base 12 when the crime involves organizing, leading, managing or supervising prostitution; and adding 4 points if the crime involves fraud, for a potential total of 18. § 2L1.1's potential total index of 18 would be consistent with § 2G1.1 (promoting commercial sex) in cases involving fraud. (Both Guidelines include relatively equivalent SOCs for threats and coercion.) An alternative would be to reference § 2G1.1, but § 2L1.1 is preferable because § 2L1.1 has several other SOCs that should be taken into account in harboring situations.

B. New Offenses

Benefitting financially from peonage, slavery and trafficking in persons (18 USC § 1593A)

Both sex trafficking and labor trafficking are crimes against the person that entail physical and psychological violence and threats, resulting from a fundamental disregard of the victim's human dignity. These crimes result not only in physical harm but in long-lasting psychological trauma to the victim. But unlike some other crimes against the person, the underlying motive for these crimes is personal enrichment. In other words, the underlying crime entails potential destruction of another human being's autonomy and welfare for profit. A person that benefits financially, knowing that someone else is doing the dirty job of committing the underlying crime, deserves equal punishment. The financial profiteer has the same knowledge and intent to harm the victim and the same motive of profit that drives and enables the network of traffickers.

Accordingly, financial benefit from participating in a venture that engages in violations of 18 USC §§ 1581(a), 1592, or 1595(a)* or of 18 USC §1589 should apply Guideline 2H4.1, as suggested by the statutory language that "these crimes shall be punished in the same manner as a completed violation."

There is precedent for applying the same guideline as the underlying crime. The already existing “financial benefit” crime contained within 18 USC § 1591 – sex trafficking of a minor or by force, fraud or coercion – applies the same guideline as the underlying crime. The reason for the new “financial benefit” crimes in the TVPRA is to create the same broad avenues for prosecuting members of labor trafficking networks as already exist for sex traffickers.

*Technical note: the reference in new § 1593A to 18 USC §1595(a), which is not a criminal offense but creates a civil cause of action, may be in error. The intent may have been to reference 18 USC § 1590.

Fraud in foreign labor contracting (8 USC §1351)

Those who engage in fraud in foreign labor contracting are the first link in the chain of many human trafficking cases. Even when the recruiter does not actively intend that the recruit end in a trafficking situation, the recruiter knowingly places the recruit in a situation of incredible vulnerability to human traffickers. I have had many Asian clients who are not actually brought to the United States by traffickers, but by unscrupulous recruiters who swindled them out of tens of thousands of dollars. When they arrive in the United States with no job actually lined up and with this large debt, they then become very vulnerable to traffickers who exploit their knowledge of the large debt as a way to control the victims.

Polaris Project favors referencing § 2H4.1 but is comfortable with another Guideline that would allow significant punishment of fraud in foreign labor contracting, including potentially the Guidelines referenced by the Migrant and Seasonal Agricultural Workers Protection Act with a fraud-related SOC.

C. Other Modifications to Chapter 77

Conspiracy and obstruction crimes added to existing Chapter 77 offenses

In order to function effectively, organized criminal networks depend on the involvement of multiple actors engaged in a wide range of criminal activities. Those involved in the conspiracy, including those who may protect the criminal network by covering up and obstructing investigation, are crucial to enabling this brutal crime and should be punished accordingly when they knowingly do so.

Accordingly, conspiracy to violate 18 USC §§ 1581, 1583, 1589, 1590, and 1592 should reference Guideline 2H4.1, and 18 USC § 1591 should reference Guidelines 2G1.1, 2G2.1 or 2G1.3, as suggested by the statutory language that “these crimes shall be punished in the same manner as a completed violation.” Similarly, obstruction should reference the same Guideline 2H4.1 as the underlying crime.

Financial benefit crimes added to 18 USC §1589

Please see above under “B. New Offenses.” As noted, the original § 1591 (sex trafficking) created by the Trafficking Victims Protection Act of 2000 had already criminalized financially benefiting.

Drug use or addiction

I note that the Chairman’s Explanatory Statement characterizes preying on mental illness and drug use or addictions as a form of coercion equivalent to human trafficking. We recommend adding those factors as a SOC to 2G1.1, 2G2.1, 2G1.3, and 2H4.1.

Mr. Chairman and Commissioners, thank you again for the opportunity to comment on the sentencing guidelines referenced by human trafficking crimes.

- Karen E. Stauss, Esq.