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BEFORE THE UNITED STATES SENTENCING COMMISSION

**REGIONAL HEARING ON THE TWENTY-FIFTH ANNIVERSARY
OF THE SENTENCING REFORM ACT OF 1984
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COMMUNITY IMPACT PANEL

My name is Susan Smith Howley, and I am the director of public policy for the National Center for Victims of Crime (“National Center”), a national nonprofit resource and advocacy organization for victims of crime. For almost 25 years, the National Center has worked to advance the rights and interests of crime victims, and in particular has advocated for meaningful and enforceable rights within the criminal justice process.

The National Center appreciates the invitation to appear before this panel to offer our suggestions regarding changes to the federal sentencing system. Our recommendations will address the role of the federal sentencing guidelines, proposed amendments to those guidelines, and suggestions for changes to relevant statutes and the Federal Rules of Criminal Procedure with regard to the rights and interests of crime victims. Many of our recommendations overlap, as provisions in the guidelines are designed to implement statutes and court rules.

The role of the federal sentencing guidelines in federal sentencing

From the perspective of the nation’s crime victims, the federal sentencing guidelines are important for their ability to promote predictability and consistency in the sentencing process. In so doing, the guidelines help to instill public confidence in the fairness of the federal criminal justice system.

The guidelines also have the ability to further the implementation of the rights of crime victims to be informed, present, and heard throughout the sentencing process; to receive restitution from convicted offenders; and to be treated with fairness, dignity, and respect. Such rights have been adopted and expanded upon for more than two decades, through such legislation as the Victim and Witness Protection Act of 1982,¹ Victims of Crime Act of 1984,² the Victims’ Rights and Restitution Act of 1990,³ the Violent Crime Control

¹ Pub. L. No. 97-291, 96 Stat. 1248 (1982).

² Pub. L. No. 98-473, ch. XIV, 98 Stat. 1837 (1984).

³ Pub. L. No. 101-647, tit. V, 104 Stat. 4789 (1990).

and Law Enforcement Act of 1994,⁴ the Antiterrorism and Effective Death Penalty Act of 1996,⁵ the Victims' Rights Clarification Act of 1997,⁶ the Crime Victims' Rights Act of 2004,⁷ and various legislation targeting specific victim populations, such as child victims, victims of human trafficking, domestic violence victims, sexual assault victims, and victims of identity theft.⁸

Suggestions for changes to the sentencing guidelines

Guideline § 5D1.2, Term of Supervised Release

The National Center encourages the Commission to consider changes to the federal sentencing guidelines that promote the ordering and collection of victim restitution to the fullest extent possible.

Furthermore, the guidelines should promote the enforcement of restitution orders as an integral part of a criminal sentence. Restitution is an appropriate part of any sentence as it both provides direct recompense to the victim for the harm caused through the criminal act and benefits the criminal justice system by holding the offender directly accountable for that harm.

The payment of victim restitution is a mandatory condition of supervised release under Guideline § 5D1.3. Unfortunately, the term of supervised release as set out in Guideline § 5D1.2 is often insufficient to permit the full payment of restitution. Therefore, we recommend that courts be permitted to extend the term of supervised release for the purpose of collecting restitution.⁹ The payment of restitution is part of the criminal sentence. Therefore, the court should not relinquish authority over the defendant until that sentence is fulfilled.

As the Sentencing Commission and others examine alternatives to incarceration, it is important to ensure that any sentence that includes the payment of victim restitution be meaningful.

Guideline § 5E1.1, Restitution

There remains confusion regarding when restitution is mandatory and when it is discretionary. Victims, too, are often unclear about whether restitution can be ordered

⁴ Pub. L. No. 103-322, 108 Stat. 1796 (1994).

⁵ Pub. L. No. 104-132, tit. II, 110 Stat. 1214 (1996).

⁶ Pub. L. No. 105-6, 111 Stat. 12 (1997).

⁷ Pub. L. No. 108-405, tit. I, 118 Stat. 2260 (2004).

⁸ As examples, see the Trafficking Victim Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (2000); the Justice for Victims of Terrorism Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996); and the Identity Theft Penalty Enhancement Act, Pub. L. 108-275, 118 Stat. 831 (2004).

⁹ We recognize that this recommendation would likely necessitate a statutory change, and have included that recommendation below.

and how they are to request restitution. The Sentencing Commission should extend the commentary to this section to promote the ordering of restitution.

Guideline § 6B1.1, Plea Agreement Procedure (Policy Statement)

The National Center also urges the Sentencing Commission to consider changes relating to the victim's right to be heard at the entry of a plea agreement. Guideline § 6B1.1, Plea Agreement Procedure (Policy Statement) and commentary should be amended to specifically incorporate the victim's right to be heard. The Crime Victims' Rights Act gives victims "The right to be reasonably heard at any public proceeding in the district court involving ... plea." For this right to be meaningful, victims must be heard before the court has made a final decision whether to accept or reject the proposed plea agreement.

Victim input at this stage serves the interests of the court, as well as the interests of victims. A victim's statement of the harm caused by the criminal offense is clearly relevant to the court's decision whether to approve the agreement, and may also be relevant to the extent to which the court may rely on the parties' stipulation of facts under Guideline § 6B1.4. Similarly, the victim's opinion regarding the appropriateness of the agreement, while it cannot be solely determinative as to the question of whether to accept a proposed agreement,¹⁰ should be relevant to the court's consideration of whether the agreement serves the interests of justice. The statement of the victim may also include information regarding safety concerns or the need for restitution, both of which are important considerations for the court.

The guideline should also to ensure that the victim's right to input is honored in each case. If that right is violated, the Crime Victims' Rights Act provides for redress, stating that under limited circumstances a victim "may make a motion to re-open a plea or sentence" when the right to be heard was denied.¹¹ However, preventing such a violation in the first place is preferable to attempting to create a remedy.

To prevent violation of the right to input, the guideline or commentary could require the court to explore whether the victim was informed of the proceeding and the nature of the plea agreement, whether the victim is present and wishes to make a statement, or whether the victim has submitted a written or electronic statement. In the event that the victim has not been afforded his or her rights to be informed, present, and heard, the court should reschedule the proceeding.

The commentary should also provide guidance regarding the form such victim input can take. In many federal cases, particularly those involving fraud or the use of technology, victims may be located at a great physical distance from the court. Commentary should encourage flexibility in the form of victim input to allow the fullest opportunity for crime victims to exercise their right to be heard. Means of communication could include

¹⁰ See section 3771(d)(6), "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction."

¹¹ § 3771(d)(5).

written input, oral in person input, input through closed circuit television from a remote site, videotaped testimony, or other form of input.

Guideline § 6A1.5, Crime Victims' Rights (Policy Statement)

The guidelines include a general statement that “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.”

The Commission should expand the commentary to this provision to provide additional guidance regarding the implementation of the victims' rights. Such commentary regarding how judges are to incorporate the victims' rights provisions of the Crime Victims' Rights Act in the sentencing process and in determining the application of the guidelines would promote uniformity in the implementation of those provisions.

General comments

In addition to the changes outlined above, we urge the Commission to revisit the guidelines in their entirety to ensure that victims' rights are incorporated wherever appropriate and to ensure that courts can consider any harm caused to victims. Consideration of harm should not be limited to physical harm or financial loss. With the growing rates of cybercrime, identity theft, stalking that involves the use of technology, and similar crimes, victims may sustain emotional harm related to the loss of privacy, fear of future harm to their credit, or other emotional toll.

Recommendations regarding the Federal Rules of Criminal Procedure as they relate to sentencing

Rule 11, Pleas

Just as the guideline regarding Plea Agreement Procedure should be updated to include the victims' right to be heard, so, too, should Rule 11 of the Federal Rules of Criminal Procedure. The National Center recommends adding a subsection (b)(4) to Rule 11, regarding the receipt of input from the victim of the offense regarding the impact of the offense and the victim's opinion of the plea agreement. While Federal Rule 60(a)(3) does address the victim's right to be heard by repeating the victim's statutory right under the Crime Victims' Rights Act,¹² the victim's right to be heard at a plea agreement should be specifically incorporated into Rule 11, which sets out the procedures for receipt, consideration, and acceptance of plea agreements. More than a dozen states already give victims the clear right to be heard in court at the presentation of a plea agreement.¹³

¹² 18 U.S.C. 3771(a)(4). “The court must permit a victim to be reasonably heard at any public proceeding in the district court concerning release, plea, or sentencing involving the crime.”

¹³ See, as examples, AZ Rev. Stat. § 13-4423 (2008) and AZ Rule Crim. P. 17.4; Colo. Rev. Stat. § 24-4.1-302.5 (2008); Conn. Gen. Stat. § 54-91c (2008) ; Florida Fla. Stat. § 960.001 (2008) Idaho Code Ann. §

As noted above, the victim has a limited right to seek to reopen a plea proceeding if he or she was denied the right to be heard. Affirmative action by the court to ensure compliance with this right at the plea hearing is preferable to any remedy that might be provided following violation of this right. Many states have amended their law to require the court to ask the prosecutor whether the victim was advised of the substance of the plea agreement, the date and time of the hearing on the plea, and the victim's right to be heard.

For example, Indiana's law provides that a court may only consider a plea recommendation on a felony charge if the prosecutor has complied with requirements to notify the victim of the recommendation and of the victim's right to be present and address the court when the recommendation is presented.¹⁴ Thus, the actions of court ensure compliance with the victim's right to be heard regarding a proposed plea agreement.¹⁵

Rule 28, Interpreters

Rule 28 regarding the use of interpreters should be expanded to guarantee the availability of interpreters for all crime victims and witnesses.

Immigrant communities must have confidence in the criminal justice system if they are to report crimes and cooperate as witnesses. The ability to understand criminal justice proceedings is essential if they are to develop such confidence.

In general, recent immigrants are less likely to report crime.¹⁶ As a result, they may be particularly vulnerable to crime. The reluctance to report may be due to many factors, including the immigration status of the victim or cultural impediments such as lack of trust in a working criminal justice system. It is crucial that victims and witnesses understand the criminal justice process so that they can have confidence in the fairness and legitimacy of the system.

19-5306 (2008); Kan. Stat. Ann. § 22-3436 (2008); La. Rev. Stat. § 46:1844(K) (2008); Me. Rev. Stat. Ann. tit. 17-A, § 1173 (2008) Minn. Stat. § 611A.0301 (2008) Miss. Code Ann. § 99-43-33 (2008) Mo. Rev. Stat. § 557.041 (2008) R.I. Gen. Laws § 12-28-4.1 (2008). Additional states require the prosecutor to consult the victim regarding the plea and disclose the victim's opinion regarding the plea agreement in court. See for example S.D. Codified Laws § 23A-7-9 (2008); Wash. Rev. Code § 9.94A.431 (2008).

¹⁴ Burns Ind. Code Ann. §§ 35-35-3-2, § 35-35-3-5(a) (2008).

¹⁵ See also La. Rev. Stat. § 46:1844(K) (2008) "At all critical stages of the prosecution [defined to include presentation of the plea agreement], if the victim or designated family member has registered with the appropriate law enforcement or judicial agency and is present, the court shall determine if the victim or designated family member wishes to make a victim impact statement. If the victim is not present, the court shall ascertain whether the victim or designated family member has requested notification and, if so, whether proper notice has been issued to the victim or designated family member, in accordance with Subsection B of this Section, by the clerk of court or by the district attorney's office. If notice has been requested and proper notice has not been issued, the court shall continue the proceedings until proper notice is issued."

¹⁶ See Robert C. Davis and Edna Ferez, "Immigrant Populations as Victims: Toward a Multicultural Criminal Justice System," *NIJ Research in Brief*, (May 1998).

Rule 32, Sentencing and Judgment

Rule 32, which sets out procedures for the imposition of sentence, should be amended to provide for disclosure of the presentence report to the victim prior to the sentencing hearing.¹⁷ Such disclosure would provide an opportunity for the victim to review for accuracy the portions relating to the victim impact and the need for restitution, and would allow the victim an opportunity to address those issues as part of the victim's statement at sentencing. Providing such information can also give the victim confidence that the court is considering a range of issues relating to the appropriate sentence.

Adequate protections already exist in the rule to ensure that certain information is kept confidential.¹⁸

Statutory changes relating to federal sentencing

As alluded to above, the National Center recommends that statutes setting the periods for probation and supervised release be extended to permit the collection of restitution.

When Congress passed the federal Mandatory Victims Restitution Act of 1996,¹⁹ it intended to “ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due” as well as “to ensure that the offender realizes the damage caused by the offense and pays the debt owed to the victim as well as to society.”²⁰ Unfortunately, it is clear that this promise has gone unfulfilled. Official estimates of uncollected federal criminal debt—most of it restitution owed to victims of crime—have topped \$50 billion.²¹

¹⁷ As an example, the court might look to Florida law: “Upon request, the state attorney shall permit the victim, the victim's parent or guardian if the victim is a minor, the lawful representative of the victim or of the victim's parent or guardian if the victim is a minor, or the victim's next of kin in the case of a homicide to review a copy of the presentence investigation report prior to the sentencing hearing if one was completed. Any confidential information that pertains to medical history, mental health, or substance abuse and any information that pertains to any other victim shall be redacted from the copy of the report. Any person who reviews the report pursuant to this paragraph must maintain the confidentiality of the report and shall not disclose its contents to any person except statements made to the state attorney or the court.” Fla. Stat. § 960.001(1)(g)(2) (2008).

¹⁸ Fed. R. Crim. P. 32(d)(3) states that “The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;
(B) any sources of information obtained upon a promise of confidentiality; and
(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.”

¹⁹ Pub. L. 104–132, title II, subtitle A (§201 et seq.), 110 Stat. 1227 (1996).

²⁰ S. Rpt. No.104-179, at 24 (1995).

²¹ Testimony of U.S. Senator Byron Dorgan before the U.S. House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Hearing on Legislation to Improve the Collection of Federal Court-Ordered Restitution, April 3, 2008, available at <http://judiciary.house.gov/hearings/pdf/Dorgan080403.pdf>.

Collecting restitution is of great importance to victims of crime. Some of the most heartbreaking restitution cases, particularly prevalent at the federal level, involve elderly victims who have lost large sums of money to fraud. The crime robs them not only of their financial assets but also of their sense of security and even their ability to remain independent and live in their own homes. The ensuing depression and stress may lead to a steep decline in their physical health. For these victims, restitution may preserve their future.

Even for victims who have not lost their life savings, restitution for the harm they sustained is important as they rebuild their lives. Repayment of their financial losses, including property losses, can be crucial in helping to repair the damages incurred as a result of the offense. It is also important as a tangible demonstration that the state and the offender recognize that the harm was suffered by the victim and that amends will be made.

One factor currently limiting the collection of federal restitution is the relatively short duration of post-conviction supervision of federal offenders. Conditions of probation and supervised release typically include the payment of restitution, but the statutory periods of such supervision are inadequate to ensure the full collection of restitution in many cases.

The U.S. Code sets the following authorized terms for probation:

- (1) for a felony, not less than one nor more than five years;
- (2) for a misdemeanor, not more than five years; and
- (3) for an infraction, not more than one year.²²

It provides similar terms for supervised release following imprisonment:

- (1) for a Class A or Class B felony, not more than five years;
- (2) for a Class C or Class D felony, not more than three years; and
- (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.²³

These statutes should be amended to provide extended supervision for the limited purpose of collection of restitution.

Several states follow this approach. For example, Arizona and Maryland allow probation to be extended for the purpose of collecting restitution.²⁴ At the parole stage, several states allow an extension of parole without providing a maximum extension.²⁵ Kentucky's law is clearest on this point: "Any statute relating to the length of parole supervision notwithstanding, the parole for a person owing restitution shall be until the

²² 18 U.S.C. § 3561 (2009).

²³ 18 U.S.C. § 3583 (2009).

²⁴ Ariz. Rev. Stat. § 13-902 (2008) (up to an additional five years for a felony or two years for a misdemeanor); Md. Code Ann. Crim. Proc. § 6-222 (2008) (up to five years for cases arising out of Circuit Court, three years for District Court cases).

²⁵ Colo. Rev. Stat. § 17-2-201 (2008); Wyo. Stat. Ann. § 7-13-421 (2008).

restitution is paid in full, even if this would lengthen the period of supervision beyond the statutory limit of parole supervision or the statutory limit for serving out the sentence imposed.”²⁶

Extension of supervision is clearly warranted to ensure compliance with the court’s sentence. Payment of restitution is not merely a condition designed to promote the successful reintegration of the defendant but instead is an integral part of the sentence for the offense, directly reflective of the harm that resulted from the offender’s conduct.

Conclusion

The National Center commends the Commission for holding this series of field hearings and for its desire to strengthen the Sentencing Guidelines and related statutes and court rules. We appreciate the opportunity to comment and stand ready to provide any additional assistance.

²⁶ Ky. Rev. Stat. Ann. § 439.563 (2008).