

VICTIMS ADVISORY GROUP

To the United States Sentencing Commission

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Response to Request for Comments on Retroactivity

Chairman Saris and Members of the Commission:

The Commission has solicited public comment on the issue of retroactivity with respect to drug offenses. The Victims Advisory Group (VAG) is pleased to offer our comments on this topic with our group's specific focus on crime victims' issues. Our comments do not address whether or not there should be retroactivity. Rather our comments address what should occur regarding victims assuming that the Commission determines that there will be any retroactivity and if there are any identifiable victims associated with any inmate who may be subject to retroactivity regarding sentencing and release. It is important to remember that victims are real people. Any retroactivity decrease to an offender's sentence, can and will make victims feel that the harm to the victims is minimized. Advance notification to victims and the opportunity to be heard demonstrates that victims are important and their interests will not be ignored by the justice system that must provide justice to all.

I. RESEARCH SHOULD BE CONDUCTED TO ASERTAIN IDENTIFIABLE VICTIMS

Preliminarily, the VAG recommends that further research be conducted to ascertain how many of the offenses will have an identifiable victim. The VAG believes that there may be several ways to identify if there are victims to the offenses. First, there may be queries that can be run to determine if there are factors under the guidelines that would indicate that there is a

victim.¹ Second, the Department of Justice in their Victim Notification System (VNS) should have specific victims associated with specific offenders.

II. VICTIMS' RIGHTS WILL BE DENIED UNLESS AFFIRMATIVE DIRECTIVES ARE PROVIDED

From research obtained from Commission staff from the Department of Justice regarding the Department's notification to victims during an 18 U.S.C. § 3582(c)(2) motion for reduction of sentence, the VAG's understanding is that:

1. Unless there is a public hearing (which there usually is not), the victim will not receive notice of the § 3582 motion.

2. If the motion is granted, the victim will receive notice when the offender is due to be released from the Bureau of Prisons. The notification will include an explanation why the release date is earlier than anticipated.

3. Contrary to 18 U.S.C., § 3771 (a) (5), the victim will not have any reasonable right to confer with the Government in the case related to the resentencing if the victim receive no advanced notice.

The motions that will be filed under § 3582 will be filed in public court proceedings. There is little or no reason that any § 3582 motion should be determined in a closed court proceeding. The societal interest in having open criminal justice proceedings is a compelling one that is enshrined in the First Amendment. A lack of a public hearing does not equate to a closed court proceeding. *infra*. Further, Fed. R. Crim. P. 43(b)(4) provides that a defendant need not be present when a proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)(2). The lack a requirement for the defendant to be present likewise does not mean the proceeding is a closed court proceeding.

Following the status quo which will occur if there is no affirmative action by the Commission will deny victims regarding their rights under law. Clear Commission directives to judges regarding victims' rights is in accord with the mandate of federal law for courts to ensure the rights of victims. *infra*.

III. THE RESENTENCING PROCESS SHOULD INSURE TIMELY AND PROPER NOTIFICATION TO IDENTIFIED VICTIMS FOR THE VICTIMS TO BE REASONABLY HEARD IN CONFORMANCE WITH FEDERAL LAW.

¹ e.g. If the original guideline calculations were completed under PART D of Chapter 2, (especially §§2D1.1, 2D1.2, and 2D1.7) and included the use of a cross reference and/or special instruction for a victim related enhancement under PART A (§§3A1.1 – 3A1.3) and/or PART B (§3B1.4) of Chapter 3 OR, if any victim related enhancement under Part A or PART B of Chapter 3 was adopted, there is likely an identifiable victim.

The VAG is concerned that if the current practice of the Department is followed, that both the Commission's existing policy statement as well as the underlying statute will be violated to the detriment of crime victims. As such, the Commission will need to have explicit direction to ensure that there is a directive that assures compliance with the applicable guidelines and statute.

The applicable policy statement §6A1.5 provides,

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.

18 U.S.C. § 3771 provides in pertinent part,

(a) Rights of Crime Victims.— A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) **The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.**
- (3) **The right not to be excluded from any such public court proceeding,** unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) **The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.**
- (5) **The reasonable right to confer with the attorney for the Government in the case.**
- (6) The right to full and timely restitution as provided in law.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights Afforded.—

(1) In general.— **In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a).** Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record. ...

(B) Enforcement.—

(i) In general.— These rights may be enforced by the crime victim or the crime victim’s lawful representative in the manner described in paragraphs (1) and (3) of subsection (d). ...

(c) Best Efforts To Accord Rights.—

(1) Government.— Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.— The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a). ...

(d) Enforcement and Limitations.—

(1) Rights.— The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(3) Motion for relief and writ of mandamus.— The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.— In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

(5) Limitation on relief.— In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code. (Emphasis added)

Further Fed. R. Crim. P. 32 (i) (4) (B) expressly provides, “**Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.**” (Emphasis added)

If a victim is unaware that there is going to be a resentencing, a victim will have no knowledge of the sentencing proceeding and the court will not permit the victim to be reasonably heard as required. In the context of a federal habeas challenge where there may not be a court hearing, the court has determined that victims can be heard by filing appropriate documents with the court. The court in *Pann v. Warren*, 2010 U.S. Dist. LEXIS 72234 (E.D. Mich. July 19, 2010) indicated

The parties disagree about whether the Court's consideration of this habeas case in chambers (assuming there is no public court hearing) constitutes a “public proceeding in the district court involving release.” The Court agrees with the Applicants that such is the case. Court records in habeas proceedings are generally accessible to the public. **Most habeas cases are resolved on the pleadings without in-court hearings. To preclude crime victims from submitting documents to the court in support of their right to be heard in a habeas proceeding would effectively preclude them from being heard at all in most cases. The Court thus concludes that the Applicants, as crime victims, have a right to be heard under the CVRA.** (emphasis added)

Similarly to deny victims to be notified and heard regarding § 3582 motions, would effectively deny victims the right to be heard regarding sentencing and release.² Ignoring victims from the process not only violates the express language of the law, but also the spirit of the law to allow victims to be notified and heard.

If amendments to the guideline provisions governing the current sentence for an offender are allowed to be retroactive, the VAG respectfully also requests that the Sentencing Commission consider providing the resentencing court with specific directives with respect to victims and their obligation to accord those rights under law.

² While the court may not rule on the retroactivity determination regarding sentence and release in open court, the proceeding is not closed or sealed to the public. Proceedings should be open to allow victims to exercise their rights under law. *See e.g. In re Simons*, 567 F.3d 800 (6th Cir. 2009).

IV. THE RESENTENCING PROCESS SHOULD REQUIRE NOTIFYING IDENTIFIABLE VICTIMS AND PROPERLY CONSIDERING AND WEIGHING VICTIM IMPACT TO DETERMINE WHETHER THERE SHOULD BE A RETROACTIVE MODIFICATION AND IF SO, WHAT EXTENT, IF ANY, SHOULD THE EXTENT OF THE MODIFICATION BE ALLOWED.

The Commission should adopt directives requiring that courts overseeing the resentencing process should make every effort to insure proper and timely notification has been made to all identified victims of the offense prior to completion of the resentencing process.

The court should include directives requiring consideration of the victim's circumstances and the weighing any victim impact in determining the offender's eligibility for resentencing and the extent of the modification to the original sentence.

With appropriate guidance from the Commission, courts will follow that law and avoid an ad hoc implementation that will likely inconsistently provide for victim input as provided by law.

V. CONSEQUENCES OF NOT PROVIDING VICTIMS' RIGHTS

Victims' Rights violations go far beyond the mere legal impact on victims of crime. Crime victims can be profoundly traumatized or re-traumatized by difficulties raised by the cases against their offenders.

What science tells us about the neurobiology of trauma is that sudden, unexpected developments in a crime victim's case can re-awaken deeply troubling memories, among other impacts. Re-traumatization has both physical and psychological effects, including shock, stress, depression, an inability to sleep or concentrate or work, chaos in relationships, etc. Sometimes re-traumatization can have even more profound physical or psychological impact on a crime victim.

The reason why victims' rights were ensconced in law in the first place was to minimize these negative effects on victims' lives. Crime victims are damaged by the crime, to a greater or lesser degree depending on the nature of the offense and the victim's life circumstances. But the very definition of the word "victim" means that they had no control over what happened to them and that it was hurtful. The greater the lack of control and the more serious the crime, the greater the potential for harmful trauma effects on the victim.

Worse, we know that a sort of negative psychological bond often is formed between victim and offender. The offender, through no choice on the part of the victim, is now a permanent part of the victim's life. This is often profoundly intrusive, debilitating, and unwanted.

What victims need most is information, stability, and, often, supportive services. After any degree of danger, what they need is safety. After any criminal intrusion into their lives, what

they need is security. The prison sentence served by the offender often provides a helpfully stable emotional structure around which victims rebuild their lives.

While the VAG is not commenting on the merits of retroactive changes in these prison sentences, we are calling attention to the potential for harmful physical or emotional consequences in the lives of some crime victims who may be affected by such changes. If such retroactive changes are made, victims need to be identified, carefully but immediately contacted and given as much information as possible. Preparations must be made to offer them support services where needed.

Perhaps the United States Supreme Court said it best regarding indicating profound injury may occur to a victim when a case is reopened. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. ... To unsettle these expectations is to inflict a profound injury to the "powerful and legitimate interest in punishing the guilty," ... an interest shared by the State and the victims of crime alike.) If retroactivity is allowed, victims should be fully informed and heard to minimize any re-victimization.

CONCLUSION

Retroactivity may be a controversial subject and individuals may have many strong views before the Commission. The VAG appreciates and thanks the Commission for considering our views on its proposed action regarding retroactivity. In a similar manner in an individual case, there may be multiple views many of which may be expressed to the court. Individual judges in individual cases should have the opportunity to hear from victims so that they have full information to make the best decision in accord with the victim's right to be reasonably heard.

We look forward to working with the Commission to insure that the needs and concerns of crime victims are fully reflected in directives that will be issued if the Commission allows for retroactivity. Should you have any further questions or require any clarification regarding the suggestions, please feel free to contact us.

Respectfully,

Victims Advisory Group

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