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Victims of Crime

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September 11, 2008

The Honorable Ricardo H. Hinojosa
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Proposed 2009 Priorities

Dear Judge Hinojosa:

The newly-created Victims Advisory Group (VAG) writes to recommend priorities for the United States Sentencing Commission (the Commission) to consider in the next amendment cycle. We greatly appreciate the Commission's establishment of VAG and the opportunity to serve in this important capacity. Thank you for reaching out to us. We hope to provide advice that will help the Commission better understand the needs of victims and the impact that the Commission's work has on victims.

Because VAG was established very recently, our current comments are brief. Our overarching recommendation, however, is that the Commission closely examine the relationship of victims to each of its priorities in the coming amendment cycle. With respect to specific priorities, we submit the following comments for your consideration.

Alternatives to Incarceration

VAG supports the consideration of alternatives to incarceration but recommends that, in addition to offender-related issues, deliberate attention be given to the potential impact on and benefits to victims. Some alternatives have the potential to address victim needs and interests while providing appropriate sanctions and interventions for offenders. For example, alternatives that require restitution to the victim(s) both provide some recompense to the victim for his or her suffering and benefit the offender by holding him or her accountable.

Several members of VAG attended the Commission's recent symposium on alternatives to incarceration and were pleased to note the attention given to offender accountability.

Restitution

VAG strongly urges that the Commission prioritize restitution as a part of sentencing both in recommendations regarding legislation and in amendments to the federal sentencing guidelines. A variety of statutes and guidelines already address restitution, but there is much confusion regarding the circumstances under which restitution is mandatory and under which it is left to the discretion of the court. Further, victims should be informed not only about the possibility of restitution, but how to request that the court consider it whenever it is a potential sanction at sentencing. Additionally, the sanction of restitution should be a meaningful part of the sentence; i.e., there should be effective collection of the sanction to the extent possible. Enforcement of the sanction will also avoid re-victimizing the victim through failure to collect court-ordered restitution.

Training

Expanded training on application and interpretation of the sentencing guidelines is sorely needed. It should include training for probation officers, judges, and others on the experiences and needs of victims (including an understanding of crime-related trauma) as well as victim rights. Ideally, it would help individuals involved in sentencing understand victims better, be more comfortable with them and their role in the criminal justice process, and comprehend the ways that their work, and sentencing, might address victim needs and rights. The training should also address issues of particular interest to underserved victim populations; e.g., providing meaningful notice to victims who are not English-speaking, particularly in Indian country where the language may be unwritten. The full implementation of newly enacted §6A1.5 regarding victims' rights in relationship to the sentencing process should be a priority.

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Analysis of the Guidelines

VAG strongly urges that the sentencing guidelines be analyzed from the perspective of their impact on victims, including how §6A1.5 directs other guidelines and statutes be applied: What are the implications of the guidelines for victims? How do they serve the needs of victims? What is missing? What inconsistencies might there be? What possibilities for positive victim engagement might exist? Such an analysis would help the Commission more fully understand the impact of its work on victims of crime and could highlight opportunities to address inconsistencies and omissions in the protection of victims' rights

Harm Caused to Victims

The guidelines should be reviewed to ensure that they truly reflect the harm suffered by victims, regardless of physical injury or monetary loss.

In the 20 years since the guidelines were originally enacted, the types of cases being prosecuted in federal court have changed dramatically. Much of the change can be attributed to the explosive growth in technology that has produced such crimes as identity theft, cyber stalking, and a variety of fraudulent schemes. These crimes harm victims in ways that cannot be measured in financial loss or physical harm but, nevertheless, can be devastating to victims who may feel

fear or suffer from poor credit or loss of privacy. VAG recommends that the Commission undertake a study of current guidelines to ensure that they reflect the actual harm to victims produced by a criminal act.

Definition of Victim

VAG recommends that the Commission reconsider the definition of victim in §2B1.1 which limits victims to those “who sustained any part of the actual loss” or “any individual who sustained bodily injury as a result of the offense.” This definition excludes many individuals who suffer in ways that are not readily measured in dollars lost or physical harm suffered and fails to recognize that many victims suffer other forms of severe harm.

It excludes, for example, the cyber-stalking victim who suffers fear, loss of privacy, and impairment of his or her ability to move about freely, among other harms. It excludes the victim of identity theft who suffers significant impairment of his or her credit record and may also suffer psychological trauma and loss of privacy. Current guidelines produce the anomalous result that an identity thief who victimizes hundreds of victims will not receive a sentence that reflects the harm to those victims unless it can be measured in dollars and cents. The definition of victim under 2B1.1 should be amended to address this issue.

Resolution of Conflicts among Judicial Circuits

VAG encourages the Commission to continue to resolve conflicting interpretations of the guidelines by the federal courts, particularly with respect to issues affecting victims. For example, conflicts among the circuits regarding the applicability of enhancement provisions that depend on the “number of victims” have produced widely disparate results for victims, as demonstrated by the following:

A defendant who preys upon the credit of a large number of people who were ultimately reimbursed by their credit companies does not qualify for the “number of victims” enhancement provided by the U.S. Sentencing Guidelines, the U.S. Court of Appeals for the Fifth Circuit decided July 28. Two days later, the Second Circuit rejected defendants’ argument that an individual who is reimbursed for his or her economic loss does not qualify as a “victim” for purposes of the guidelines enhancement. (*United States v. Conner*, 5th Cir., No. 06-50218, 7/28/08, and *United States v. Abiodun*, 2d Cir., No. 06-5335-cr, 7/30/08)

The guideline governing thefts and frauds provides, at U.S.S.G. § 2B1.1 (b) (2), a number of boosts to offense level depending on the number of “victims.” The commentary to the guideline defines “victim” as including “any person who sustained any part of the actual loss. ...” It defines “actual loss” as “the reasonably foreseeable pecuniary harm that resulted from the offense.” The commentary further explains that “Pecuniary harm” means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.”

Other circuits that have interpreted the guideline are divided as to how to count heads when defrauded individuals are ultimately reimbursed for their losses. In *United States v. Icaza*, 492 F.3d 967, 81 CrL 552 (8th Cir. 2007), the Eighth Circuit addressed a similar situation and held that individual stores that are part of a corporate chain that bears all losses associated with thefts from the stores do not count as individual "victims" for purposes of Section 2B1.1(b)(2).

The Sixth Circuit reached the same conclusion in a case involving thefts from numerous individual accounts at a few banks. *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005). The *Yagar* court, however, expressly left open the possibility that an individual who is ultimately reimbursed can qualify as a "victim" if he or she is not reimbursed as promptly as the victims in the case before it.

The Eleventh Circuit took a different approach in *United States v. Lee*, 427 F.3d 881 (11th Cir. 2005). In that case, the defendants used personal checks drawn upon closed bank accounts to pay off mortgages and purchase expensive automobiles. The Eleventh Circuit decided that those businesses that were able to recoup their losses through repossession or foreclosure should still be counted as victims because they incurred a pecuniary loss at some point.

Closing

The VAG appreciates the opportunity to express its concerns to the Commission and looks forward to working with the Commission on sentencing guidelines issues that are critical to victims of crime. Please call upon us for further information, clarification, or advice.

Sincerely,

Mary Lou Leary
Chair, Victims Advisory Group
Douglas Beloof
Russell Butler
Montie Deer
Pat Sekaquaptewa
Howard Zehr
Victims Advisory Group

cc: Hon. Ruben Castillo, Vice Chair
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