United States Sentencing Commission

Written Testimony

Victims Advisory Group

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I. Introduction

The Victims Advisory Group ("VAG") appreciates the opportunity to provide information to the Sentencing Commission ("Commission") regarding its proposed amendments to the Sentencing Guidelines ("Guidelines"). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim-survivor professionals from throughout the nation. These members work with a variety of victim-survivors of crime in all levels of litigation and include victim advocates, prosecutors, private attorneys, and legal scholars. We offer testimony concerning the two proposed amendments below and will provide written commentary addressing other proposed amendments.

II. Circuit Court Conflict Regarding §3E1.1(b)

The VAG understands the Commission's effort to address a circuit split regarding the permissible bases to withhold a motion for a one level reduction under §3E1.1(b).[1] However, the VAG opposes this approach to address the circuit court split for three reasons. First, this proposed amendment does not achieve its stated purpose. Furthermore, its language is so broad it categorically precludes appropriate withholding of the §3E1.1(b) reduction, which is a decision best left to a case by case analysis. Finally, this breadth fails to consider the victim experience of several pretrial motions and risks harm to victim interests.

The Commission's goal with this proposed amendment is to "set forth a definition of the term 'preparing for trial' that provides more clarity on what actions typically constitute preparing for trial *for the purposes of §3E1.1(b)*."[2] This proposal fails to meet these goals. The purpose of §3E1.1(b) is to allow the *government* the discretion to move for a one level reduction if a defendant has (1) been timely; (2) permitted the *government* to avoid preparing for trial; and (3) permitted the *government* and the court to allocate resources efficiently.[3] The amount of work necessary for trial or motion preparation varies from case to case, and only the prosecution knows if the work completed has avoided extensive efforts to prepare for trial. Some cases have such complex fact patterns, lengthy lists of witnesses, and traumatized victims in need of gentle preparation or other characteristics, that preparation for certain pretrial motions requires months of labor. For example, organized crime, terrorism, multiple victim or witness cases,

[1] Longoria v. United States, 141 S.Ct. 978, 979 (2021) (Sotomayor, J., dissenting) ("The Sentencing Commission should have the opportunity to address this issue in the first instance, once it regains a quorum of voting members.")
[2] Proposed Amendment: Circuit Conflicts, at 60 (February 2, 2023)(emphasis added).
[3] U.S.S.G §3E1.1(b); United States v. Collins, 683 F.3d 697, 707 (2012)(noting both government interests in avoiding trial preparation, in efficient allocation of government resources and "legitimate government interests which justify withholding of a §3E1.1(b)").

multiple state sex trafficking prosecutions all require significant preparation for pretrial discovery, venue, dismiss, and suppression motions. These resources can include multiple witness interviews, obtaining experts, study of technical evidence prior to motions, securing witnesses, and a myriad of other efforts to prepare for trial. Their extent turns on the facts, charges, and issues in a case.

The proposed amendment replaces this fact specific inquiry with a categorical rule that fails to appreciate the individuality in each case and utilizes the metric of *when* a motion is litigated, rather than the type of motion litigated and the facts of the case. By using phrases such as "actions taken close to trial' and "early pretrial proceedings," the proposed amendment has chosen a temporal measure for determining whether a pretrial motion demands similar resource expenditure to preparing for trial. This is simply not an accurate measure. As noted above, some substantive motions determinative of the case can occur "early" in the process. Such motions may require significant amounts of preparation and work with witnesses and experts to survive a motion to dismiss, to suppress evidence, or provide discovery of highly sensitive information. A court cannot know the quantity of work that went into such preparation, what the negotiations were between the prosecutor and defense counsel, or the extent of work occurring among witnesses, advocates, and prosecutors in preparation for and/or participation in such motions.

The circuit courts that have concluded otherwise have suggested that preparation for trial is determined through only what *documents* have been drafted, not what resources have been utilized.[4] However, strong trial preparation includes investigation and witness engagements to present a case to a judge or jury.[5] Such work can demand many more resources than drafting voir dire motions and jury instructions.[6] Each case is distinct and in some cases, much less preparation is needed for such pretrial motions than for others. That is the basis for Congress's amendment to §3E1.1(b) affording the government the discretion to file the motion for the reduction.[7] Congress asserted that the "[g]overnment is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial."[8]

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[4] Some courts have also concluded that allowing the government to deny a reduction based on a defendant's filing a motion to suppress evidence is improper because it amounts to punishing a defendant for asserting his constitutional rights. Such is an insufficient constitutional claim. While a defendant may disagree with the government's reasoning, it must establish the government's decision was motivated by unconstitutional reasons to prevail. United States v. Drennon, 516 F.3d 160, 163 (3d Cir. 2008).
[5] *E.g., Id.* at 161. (Defendant denied an adjustment under§3E1.1(b) after evidentiary hearing during which government called three witnesses).
[6] United States v. Delaurier, 237 Fed. Appx 996, 998 (5th Cir 2007)(holding that district court did not err in denying motion for one point reduction when the government had to "spend considerable time and effort, defending the motion to suppress, and the defendant had not demonstrated an improper motive behind that decision.")
[7] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act"). Pub. L. No. 108–21, §401(g), 117 Stat. 650, 671–72 (2003).
[8]U.S.S.G. §3E1.1, app. note 6; Drennan, 516 F.3d at 161-162.

Secondly, the proposed amendment is also far too broad to achieve its objective of clarity.[9] The proposed amendment states "preparing for trial" means "substantive preparation" and is ordinarily indicated by actions "taken close to trial." The terms "substantive preparation" and "close to trial" are not only flawed because of their temporal reliance, but are also ambiguous. All trained attorneys likely believe their motion and trial preparations are all "substantive preparation." In the context of §3E1.1(b), the amount of substantive preparation will turn on the amount and type of work completed. Similarly, "close to trial" is ambiguous and very fact specific. Actions taken several months prior to trial – such as locating and interviewing witnesses in a complex gang prosecution with significant amounts of challenges finding victims or witnesses can be considered "close to trial." Similarly, preparing detailed timelines and exhibits to organize evidence for complex motions well before trial could be "close to trial" in once sense. Whereas, in a less complex case, "close to trial" could be understood as a more narrow time frame. The phrases vary from case to case, are subjective, and do not provide clarity.

Finally, the proposed amendment fails to consider the victim experience. While many pretrial motions require limited input from victims, others require extensive work with victims. This demands resources of the prosecutors, investigators, and advocates to build a relationship of trust, prepare and inform victims, and litigate necessary protections for victim and witness potential testimony. Not only does that increase the resource expenditure from the government, it also may burden the victims emotionally and financially, and can be traumatizing. When motions require much from victims or witnesses, the prosecution should, and indeed was entrusted by Congress, to determine that the additional point reduction is unwarranted.

The reality experienced by many of the victims the VAG members serve is that the use of pretrial motions negatively affects victims. In many cases – particularly crimes of violence where the defendants know the victims or witnesses - the facts are not in dispute and a defense tactic becomes one of attrition wherein the defense seeks to convey to the victim or witness that it is not worth the emotional trauma to continue to participate in the trial. Such efforts can include motions where a victim might have to testify such as motions to suppress identification, various pretrial motions regarding child sexual abuse, sexual assault, domestic violence, human trafficking, etc.[10] They can also include motions where a victim need not testify but the motion threatens to expose such personal information that they require substantial work

[9] Proposed Amendments to §3E1.1, 60 (2023)("It would set forth a definition of the term 'preparing for trial' that provides more clarity….").
[10] E.g., Drennon, 576 F.3d at161 (3d Cir.2008)(Defendant denied a §3E1.1(b) reduction after an evidentiary hearing during which government called three witness/victims.").

with a victim. Even if a victim need not testify, defendants sometimes use discovery motions to intimidate a victim by seeking private information.[11]

The current language of the proposed amendment would exclude such motions from the category of preparation for trial. Such exclusions could harm victims in that they risk being subjected to motions that are designed to re-traumatize and/or intimidate them or require substantial preparation for them. When such occurs, it should remain at the discretion of the prosecutor to decide whether such efforts were the type of efforts that caused an inefficient expenditure of resources.

The proposed definition is not the appropriate one to address this complex issue. The VAG believes it is unworkable to create a definition of what is or is not substantive trial preparation. No blunt instrument can categorically be utilized for an inquiry that is by its very nature a case-by-case inquiry. Furthermore, it is an inquiry that can only be done by the prosecutor engaged in the actual preparation who is aware of the relevant witnesses, a necessary burden to respond to the motions, the effect of the motions on victim survivors, and the merit of the motions.

The relevant assessment is not the timing of the motion. Rather it is the resources needed to respond and the emotional toll on the witnesses and survivors. That toll requires resources from the government to sustain victims through the criminal litigation process. As such, the VAG opposes this proposed amendment.

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[11] Responding to Stalking: A Prosecutor's Guide to Stalking, Stalking Prevention, Awareness, and Resource Center, at 21 ("An increasingly popular defense tactic is to make demands for discovery of private information about the victim—often, information that is not in the possession or control of the prosecution. These demands for discovery, or subpoenas *duces tecum*, … amount to a fishing expedition in the hopes of learning something that can be used to undermine the victim's credibility. Such unwarranted demands for private victim information serve to discourage victims from reporting crimes and from continuing to participate in the criminal justice process…."); Witness Intimidation: Meeting the Challenge, Aequitas, at 14 (2013)(Noting that a common defense tactic includes filing motions to invade "the privacy of a victim by seeking personal or confidential information that has no possible relevance to the proceedings, or seeking unwarranted psychiatric or physical examinations of the victim may cause that victim to cease all cooperation with the proceedings or even to go into hiding to avoid the intrusiveness of the defense investigation."); Prosecuting Alcohol Facilitated Sexual Assault, American Prosecutors Research Center, at 25 (2003)(noting a common defense tactic is to file motions intended "to harass and intimidate the victim" including motions requesting a psychological examination of the victim, access to a victim's counseling records, or attempts to pierce the rape shield laws.)