
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

19-1153, 19-1172, 19-1177, 19-1344 & 19-1345

CRIMINAL

UNITED STATES OF AMERICA,

Appellee,

v.

MARK P. CARTER, ET AL.

Appellants.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA
HONORABLE JOHN A. JARVEY, U.S. DISTRICT COURT CHIEF JUDGE*

**BRIEF OF THE HUMAN TRAFFICKING INSTITUTE
AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFF-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

The Human Trafficking Institute (“Institute”) is a nonprofit nonstock corporation. The Institute does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), this *amicus curiae* brief was authored and funded solely by the Human Trafficking Institute (“Institute”). This brief was not authored, in whole or in part, by a party’s counsel in this matter. Furthermore, no party or party’s counsel contributed money to fund the preparation or submission of this *amicus curiae* brief, nor did any person outside of the Institute contribute money to fund the preparation or submission of this brief.

The Insitute sought the consent of all parties in this case in the filing of the proposed *amicus curiae* brief. The government has consented to the filing of this brief, however defense counsel has not. Thus, pursuant to Federal Rule of Appellate Procedure 29(a)(2)-(3), the Institute has attached a motion for leave to file, seeking the Court’s leave in filing the attached *amicus curiae* brief.

The Institute exists to decimate modern slavery at its source by empowering criminal justice systems to stop human traffickers. The Institute’s leadership has extensive experience investigating and prosecuting human trafficking crimes throughout the United States. This experience includes briefing and arguing for sentences under the U.S. Sentencing Guidelines and addressing legal issues surrounding human trafficking penalties. In addition, the Institute created and

maintains a comprehensive database of federal human trafficking cases and publishes the *Federal Human Trafficking Report* each year, which details key findings about federal human trafficking cases and trends. The *Federal Human Trafficking Report* includes data on sentencing in federal sex trafficking cases.

Given the Institute's expertise in and experience with sentencing in federal sex trafficking cases, the Institute is specially situated to aid in the Court's consideration of the legal questions surrounding the base offense level in this case. The Institute aims to clarify that Congress intended defendants convicted of conspiracy to commit sex trafficking to be punished severely, like defendants convicted of the substantive offense. Furthermore, the Institute aims to highlight the intent of the U.S. Sentencing Commission, as demonstrated through the framework of the U.S. Sentencing Guidelines, to apply the same base offense level for conspiracy offenses as that of the substantive offense. For these reasons, the Institute respectfully requests that the Court accept this *amicus curiae* brief.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's application of 34 as the appropriate base offense level from which to fashion a sentence for a sex trafficking conspirator pursuant to 18 U.S.C. § 1594(c) for two reasons.

First, as illustrated by the legislative history and explained herein, Congress expressly recognized the severity of the offense and intended to punish sex trafficking crimes—including conspiracy—accordingly. Congress has expressed this intent since its enactment of the Trafficking Victims Protection Act of 2000, when it prescribed a harsher sentence for sex trafficking crimes under 18 U.S.C. § 1591 than for forced labor violations under 18 U.S.C. § 1589. Between 2000 and 2008, however, no sex trafficking-specific conspiracy statute existed and the offense was charged using 18 U.S.C. § 371, the general federal conspiracy statute, which carries only a five-year maximum sentence. In 2008, Congress signaled its intent to remedy this disparity and ensure that the sentencing for sex trafficking conspiracies was on par with substantive offenses when it enacted § 1594(c), which created a sex trafficking-specific conspiracy statute for substantive offenses under § 1591, and effectively replaced the need to charge sex trafficking conspiracies using the general federal conspiracy statute. Adopting the defendants’ argument for the application of a base offense level of 14 would contradict this statutory scheme and Congressional intent by leading not only to a lesser punishment for conspiracy to commit sex trafficking than conspiracy to commit forced labor, but also a less severe sentence than prescribed by the general conspiracy statute, thus rendering the enactment of § 1594(c) useless.

Second, this Court should affirm the District Court's application of a base offense level of 34 based on the U.S. Sentencing Commission's express guidance that, with very few exceptions, conspiracy offenses be sentenced on par with substantive offenses in order to achieve the U.S. Sentencing Guidelines' purpose of promoting certainty and fairness when determining an appropriate sentence. Even with respect to the narrow exceptions, the Sentencing Guidelines indicate a base offense level the same as, or similar to, the conspiracy's substantive offense. Thus, a base offense level of 34 is more akin to the Sentencing Guidelines' severe penalties for conspiracy crimes and should be used over a base offense level of 14 to promote uniformity among the Sentencing Guidelines' suggested sentences for similar conduct.

For these reasons, the Court should apply a base offense level of 34 when sentencing defendants convicted of conspiracy to commit sex trafficking under § 1594(c) to ensure all sex traffickers are held accountable for their crimes.

ARGUMENT

Affirming a base offense level of 34 for conspiracy to commit sex trafficking convictions is consistent with Congressional intent that sex traffickers be severely punished and in line with the U.S. Sentencing Commission's

framework for punishing conspiracy offenses and its express purpose in promoting fairness and certainty in sentencing.

I. Adopting a Base Offense Level of 14 Would Frustrate Congress’s Intent in Enacting 18 U.S.C. § 1594(c).

In determining the appropriate base offense level for a defendant convicted of conspiracy to commit sex trafficking under 18 U.S.C. § 1594(c), this Court should consider Congress’s intent when holding sex traffickers accountable under the Trafficking Victims Protection Act (TVPA). *See United States v. R.L.C.*, 503 U.S. 291, 298 (1992) (advising courts to seek to ascertain Congressional intent where there is ambiguity in a statute or its application). The statutory construction of the TVPA, in conjunction with the legislative history of § 1594(c), highlight Congress’s express recognition of the severity of human trafficking crimes and its intention to punish sex trafficking offenses – including conspiracy – accordingly. Adopting a base offense level of 14 would subvert the statutory scheme of the TVPA and frustrate Congress’s overall purpose in enacting § 1594(c).

A. Adopting a Base Offense Level of 14 Contradicts a Statutory Scheme that Punishes Sex Trafficking Crimes More Severely Than Forced Labor.

Since the enactment of the Trafficking Victims Protection Act (TVPA) in 2000, Congress has expressed its intent to prescribe a harsher sentence for sex

trafficking crimes under 18 U.S.C. § 1591 than forced labor violations under 18 U.S.C. § 1589. Under the TVPA, the federal sex trafficking statute, § 1591, imposes a mandatory minimum sentence of 10 years for convictions involving trafficking victims between the ages of 14 and 18 and a mandatory minimum sentence of 15 years for convictions involving force, fraud, or coercion or victims under the age of 14. 18 U.S.C. § 1591(b) (2000). In comparison, the TVPA does not impose a mandatory minimum sentence for defendants convicted of forced labor under § 1589, but instead, subjects forced labor defendants to a “term of imprisonment not more than 20 years” so long as the crime did not result in death or involve kidnaping, aggravated sexual abuse, or attempt to kill.

18 U.S.C. § 1589(d) (2000).

These differences in statutorily-prescribed punishments are reflected in the U.S. Sentencing Guidelines, which impose a higher base offense level for sex trafficking convictions than for forced labor convictions. Defendants convicted of sex trafficking under § 1591 are sentenced at a base offense level of 34 or 30, depending on the age of the victim(s) and whether the crime involved the use of force, fraud, or coercion. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(a)(1) (U.S. SENTENCING COMM’N 2018) (applying a base offense level of 34 to § 1591(a) convictions punishable under § 1591(b)(1) because force, fraud, or coercion was used against a minor victim or the victim was a minor under

the age of 14 years at the time of the offense); U.S. SENTENCING GUIDELINES MANUAL § 2G1.3(a)(2) (U.S. SENTENCING COMM’N 2018) (applying a base offense level of 30 to § 1591(a) convictions punishable under § 1591(b)(2) because the victim was a minor between the ages of 14 and 18 years and no force, fraud, or coercion was used). In comparison, defendants convicted of forced labor under § 1589 are sentenced at a base offense level of 22. U.S. SENTENCING GUIDELINES MANUAL § 2H4.1(a)(1) (U.S. SENTENCING COMM’N 2018).

It makes logical sense that convictions for conspiracy to commit these substantive offenses should also be punished in a manner that reflects Congress’s intent to punish sex trafficking crimes more severely than forced labor crimes. It is well settled, both by statute and the Sentencing Guidelines, that forced labor conspiracies be punished “in the same manner as a completed violation” of § 1589, thus warranting a base offense level of 22 for conspiracy to commit forced labor. 18 U.S.C. § 1594(b) (2000); U.S. SENTENCING GUIDELINES § 2H4.1(a)(1) (U.S. SENTENCING COMM’N 2018). Accordingly, applying a base offense level of 34 in this case would be consistent with the statutory scheme and promote Congress’s intent to prescribe a harsher punishment for sex trafficking crimes than forced labor crimes.

By requesting a base offense level of 14, the defendants are asking this Court to punish sex trafficking conspirators with far less severity than forced labor

conspirators. To do so, this Court would have to conclude that, although Congress prescribed a more severe sentence for substantive sex trafficking offenses than forced labor offenses, Congress intended to punish conspiracy to commit these crimes in the exact opposite manner.

B. Adopting a Base Offense Level of 14 Undermines Congress’s Intent to Punish Sex Trafficking Conspirators with Severity.

In addition to the statutory construction of the Trafficking Victims Protection Act (TVPA), the evolution of Congress’s response to sex trafficking conspiracies through the enactment of 18 U.S.C. § 1594(c) supports a base offense level of 34. When initially signed into law in 2000, the TVPA did not include a specific provision that criminalized sex trafficking conspiracies. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). Instead, sex trafficking conspirators were charged under the general federal conspiracy statute, 18 U.S.C. § 371, which restricts the penalty for a conspiracy offense to a maximum sentence of five years’ imprisonment. 18 U.S.C. § 371 (1994).

Congress sought to resolve this vast sentencing discrepancy in 2008 with the William Wilberforce Trafficking Victims Protection Reauthorization Act. In an effort to “enhance measures to combat trafficking in persons,” the 2008 Reauthorization of the TVPA included § 1594(c), a provision specifically

addressing conspiracy to commit sex trafficking under 18 U.S.C. § 1591. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008). Congress added § 1594(c) to a section of the TVPA originally entitled “Strengthening Prosecution and Punishment of Traffickers,” H.R. Rep. No. 106-939, at 26 (2000), illustrating its intent to strengthen accountability for those who conspire to exploit vulnerable individuals for commercial sex. 18 U.S.C. § 1594 (2008). In passing § 1594(c), Congress distinguished conspiracy to commit sex trafficking from other conspiracy offenses under § 371, eliminating the five-year maximum sentence for sex trafficking conspirators and empowering courts to impose a sentence of “any term of years or for life, or both.” 18 U.S.C. § 1594(c) (2008).

Thus, to adopt a base offense level of 14, this Court would have to find that when Congress enacted § 1594(c), it intended to punish sex trafficking conspiracies less severely than when previously charged under the general conspiracy statute that the 2008 amendments effectively replaced. Per the U.S.S.G. Sentencing Table, a base offense level of 14 prescribes a sentence ranging from 15 months to 46 months, depending on a defendant’s applicable criminal history category. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing table (U.S. SENTENCING COMM’N 2018). Even under the most severe criminal history category, the longest sentence that a base offense level of 14 warrants is 46 months

– less than four years. Accordingly, if this Court adopts a base offense level of 14, a defendant convicted of conspiracy to commit sex trafficking under § 1594(c) will be subject to a sentence less severe than a defendant charged with conspiracy to commit sex trafficking under the general federal conspiracy statute, § 371, which could be punished by up to 60 months’ imprisonment. This result would undermine Congress’s intent in enacting § 1594(c) – to strengthen the prosecution and punishment of sex trafficking crimes.

II. Adopting a Base Offense Level of 14 Subverts the U.S. Sentencing Guidelines’ Framework for Punishing 18 U.S.C. § 1594(c).

In addition to frustrating Congressional intent, adopting a base offense level of 14 would contravene the U.S. Sentencing Guidelines’ framework for punishing conspiracy offenses and undermine the Sentencing Guidelines’ express purpose of promoting certainty and fairness in sentencing. *See* 28 U.S.C. § 991(b)(1)(B) (2006); 18 U.S.C. § 3553(a)(6) (2006) (establishing that the aim of the Sentencing Guidelines is to “provide certainty and fairness” by “avoid[ing] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”).

A. Adopting a Base Offense Level of 14 Would Contradict the U.S. Sentencing Commission’s Guidance for Sentencing 18 U.S.C. § 1594(c) Offenses.

The U.S. Sentencing Commission has provided clear guidance that, with very few exceptions, conspiracy offenses should be sentenced on par with substantive offenses. When setting the base offense level for a conspiracy conviction, U.S. Sentencing Guideline § 2X1.1 – the guideline that applies to the vast majority of conspiracy crimes – directs courts to apply “[t]he base offense level from the guideline for the substantive offense.” U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(a) (U.S. SENTENCING COMM’N 2018). This provision applies to all conspiracy offenses, unless the U.S. Sentencing Guidelines expressly cover a conspiracy crime within a separate guideline section. *Id.* Because the Sentencing Guidelines do not expressly include 18 U.S.C. § 1594(c) convictions within another guideline section, this Court must follow § 2X1.1(a) and apply the same base offense level for conspiracy to commit sex trafficking as that of the substantive sex trafficking offense. *See* U.S. SENTENCING GUIDELINES MANUAL app. A (U.S. SENTENCING COMM’N 2018) (providing a list of federal statutes and their corresponding guideline sections, which does not include § 1594(c)).

As discussed above, the base offense level for substantive sex trafficking offenses is governed by U.S. Sentencing Guideline § 2G1.1 or § 2G1.3, which afford a base offense level of either 34 or 30 depending on the means used in

commission of the offense and the age of the victim(s) exploited. Here, § 2G1.1, the guideline applicable in this case, sets a base offense level of 34 for substantive sex trafficking offenses involving the use of force, fraud, or coercion. Thus, under the clear direction of § 2X1.1, conspiracy to commit that substantive offense should be sentenced in accordance with the same base offense level – 34.

The Sentencing Commission underscores its application of this framework through Sentencing Practice Specialists and published training resources, which exist to “assist judges, probation officers, law clerks, prosecutors, defense attorneys, and others in understanding and applying the guidelines.” *Guidelines Training Materials*, U.S. SENTENCING COMMISSION, <https://www.ussc.gov/education> (last visited August 1, 2019). These resources clarify that § 1594(c) convictions should be sentenced according to the same base offense level as a substantive 18 U.S.C. § 1591 conviction.

Specifically, in 2018, the Sentencing Commission published a “Sentencing Practice Talk”¹ on the “Base Offense Level for ‘Conspiracy’ Offenses” in which a

¹ “Sentencing Practice Talk” is a podcast series published by the Sentencing Commission’s Office of Education & Sentencing Practice to inform those interested in federal sentencing on guideline application issues and “to aid those involved in federal sentencing in the proper application of the guidelines.” *Sentencing Practice Talk*, U.S. SENTENCING COMMISSION, https://www.ussc.gov/education/training-resources/sentencing-practice-talk#USSC_SPT_Ep2 (last visited July 24, 2019).

Senior Education and Sentencing Practice Specialist, Rachel Pierce, discussed how to calculate the appropriate base offense level for conspiracy to commit sex trafficking under § 1594(c). Episode 2: Base Offense Level for “Conspiracy” Offense, UNITED STATES SENTENCING COMMISSION (Sept. 2018) (downloaded at <https://www.ussc.gov/education/training-resources/sentencing-practice-talk#NaN>). Relying on the framework of § 2X1.1 discussed above, the sentencing specialist concluded that the correct base offense level under the Sentencing Guidelines for a § 1594(c) conviction is 34 or 30, depending on whether the substantive offense was punishable by 18 U.S.C. § 1591(b)(1) or § 1591(b)(2).

Furthermore, the Sentencing Commission also operates a HelpLine that “assists practitioners in applying the guidelines.”² On July 17, 2019, the Human Trafficking Institute contacted the Sentencing Commission’s HelpLine for guidance in calculating the proper base offense level for a § 1594(c) conviction. Peter Madsen, Education and Sentencing Practice Specialist at the Sentencing Commission, reiterated the framework of § 2X1.1, also concluding that the proper base offense level for § 1594(c) is 34.

² *Contact Us*, UNITED STATES SENTENCING COMMISSION, <https://www.ussc.gov/about/who-we-are/organziatin/contact-us> (last visited July 24, 2019).

Thus, adopting a base offense level of 34 for § 1594(c) convictions is consistent with the Sentencing Guidelines' framework and in accordance with the Sentencing Commission's guidance.

B. Adopting a Base Offense Level of 14 Contradicts the Express Purpose of the U.S. Sentencing Guidelines to Provide Certainty and Fairness in Sentencing.

Finally, a base offense level of 34 is more akin to the U.S. Sentencing Guidelines' severe penalties for conspiracy crimes and should be used over a base offense level of 14 to promote uniformity among the Sentencing Guidelines' suggested sentences for similar conduct. As in the present case, traffickers convicted of 18 U.S.C. § 1594(c) often commit similar criminal conduct as those convicted of the substantive offense,³ so fairness requires they be subject to similar sentencing ranges. This is true beyond the trafficking context as well and explains the Sentencing Guidelines' framework in U.S. Sentencing Guideline § 2X1.1 that punishes conspiracy offenses at the same base offense level as the substantive offense. Even the handful of conspiracy crimes that fall outside of § 2X1.1, which

³ Indeed, in 2018, 32.1 percent of federal defendants convicted of § 1594(c) were also convicted of at least one count of § 1591(a). Human Trafficking Institute Database (unpublished). Moreover, of traffickers who pleaded guilty to § 1594(c), the government initially charged 80.3 percent with the substantive offense. Human Trafficking Institute Database (unpublished). Although not every trafficker who was initially charged with § 1591(a) was convicted of that charge, the facts on the record often indicated they committed the offense, as they do in this case.

are listed in Appendix A of the Sentencing Guidelines, require base offense levels that are the same as, or comparable to, the sentencing ranges for convictions of the substantive offense.⁴ In fact, there are no crimes under the Sentencing Guidelines that come close to affording a conspiracy conviction a base offense level 20 steps lower than that of the substantive offense.

Though the Sentencing Guidelines initially direct courts to apply the same base offense level for conspiracy convictions as that of the substantive offense, they then distinguish conspiracy offenses from that of the substantive crime by affording a three-level reduction from the base offense level for defendants convicted of conspiracy. U.S. SENTENCING GUIDELINES MANUAL § 2X1.1(b)(1)

⁴ See U.S. SENTENCING GUIDELINES MANUAL § 2A1.5 (U.S. SENTENCING COMM’N 2018) (setting a base offense level for conspiracy to commit murder at 33, but increasing to the same base offense level as first degree murder, attempted murder, or assault with intent to commit murder if death of the victim, attempted murder, or assault with intent to commit murder results); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (U.S. SENTENCING COMM’N 2018) (joining conspiracy to commit various drug-related offenses with the substantive offenses in the same guideline provision, thus suggesting the same application of the base offense level); U.S. SENTENCING GUIDELINES MANUAL § 2H1.1 (U.S. SENTENCING COMM’N 2018) (instructing that conspiracy to commit offenses involving individual rights apply the greatest base offense level possible, including that “offense level from the guideline applicable to any underlying offense”); U.S. SENTENCING GUIDELINES MANUAL § 2M6.1 (U.S. SENTENCING COMM’N 2018) (including conspiracy to commit offenses involving nuclear, biological, and chemical weapons within the substantive offense guideline, thus applying the same base offense level); U.S. SENTENCING GUIDELINES MANUAL § 2T1.9 (U.S. SENTENCING COMM’N 2018) (suggesting that conspiracy to impede, impair, obstruct, or defeat tax be sentenced using the same base offense level as its substantive offense, or a base offense level of 10, whichever is greater).

(U.S. SENTENCING COMM’N 2018). This framework promotes the Sentencing Guidelines’ purpose of fairness by subjecting defendants convicted of similar conduct to comparable sentencing ranges, while still accounting for the difference between conspiracy convictions and those of the substantive offense.

Accordingly, the starting point for sentencing someone convicted of conspiracy to commit a crime punishable under 18 U.S.C. § 1591(b)(2) should be a base offense level of 34—like the substantive offense—rather than 14, which could result in a drastically lower sentence for the same or similar conduct.

In conclusion, accepting the defendants’ argument requires this Court to ignore the Sentencing Guidelines’ general framework for punishing conspiracy offenses, dismiss the U.S. Sentencing Commissions’ guidance for sentencing § 1594(c) crimes, and undermine the Sentencing Guidelines’ express purpose of fairness by adopting a base offense level for a conspiracy offense that is significantly lower than that of the substantive offense, a result that exists within no other criminal context under the Sentencing Guidelines. For these reasons, this Court should apply a base offense level of 34 when sentencing defendants convicted of conspiracy to commit sex trafficking under § 1594(c).

CONCLUSION

For the reasons stated above, this Court should affirm the district court's sentencing order.

Dated: August 9, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,564 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: August 9, 2019
Kyleigh E. Feehs

s/ Kyleigh E. Feehs

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I certify that on August 9, 2019, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Eighth Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that: (1) all required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: August 9, 2019
Kyleigh E. Feehs

s/ Kyleigh E. Feehs
