U.S. Department of Justice

Criminal Division

Office of Policy and Legislation *Washington, D.C. 20530*

February 15, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

On behalf of the U.S. Department of Justice, we submit the following views, comments, and suggestions regarding the proposed amendments to the Federal Sentencing Guidelines and issues for comment approved by the U.S. Sentencing Commission on January 12, 2023, and published in the Federal Register on February 2, 2023.[1] This letter addresses the proposals and issues for comment regarding First Step Act—Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A), Acquitted Conduct, and Sexual Abuse Offenses. We will submit a second letter on the remaining matters before the Commission's March meeting. This letter also serves as the Department's written testimony for the Commission's upcoming hearing on February 23, 2023.

We thank the members of the Commission and the staff for being responsive to the sentencing priorities of the Department of Justice and to the needs and responsibilities, more generally, of the Executive Branch. We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come.

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[1] U.S. Sentencing Comm'n, *Sentencing Guidelines for United States Courts*, 88 Fed. Reg. 7180 (Feb. 2, 2023).

U.S. DEPARTMENT OF JUSTICE VIEWS ON THE PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES AND ISSUES FOR COMMENT APPROVED BY THE U.S. SENTENCING COMMISSION ON JANUARY 12, 2023, AND PUBLISHED IN THE FEDERAL REGISTER ON FEBRUARY 2, 2023.

1. Department of Justice Comments on Proposed Amendments and Issues for Comment on Compassionate Release

The Commission requests comment on proposed amendments to the policy statement at §1B1.13, relating to reductions of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), commonly known as "compassionate release."

The Department welcomes the Commission's decision to prioritize this issue for review, and we encourage the Commission to use this opportunity to establish a clear compassionate release policy. Section 994(t) of Title 28, United States Code, requires the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Since the statutory provision was amended in the First Step Act of 2018, most courts have held that the Commission's existing policy statement on compassionate release is outdated and inapplicable and have thus operated without Commission guidance. The Commission's own data—and a review of federal district and appellate court decisions—show that without that guidance, disparities in sentencing outcomes have occurred and will continue to occur. The Department therefore encourages the Commission to clearly articulate in the Guidelines the circumstances where compassionate release is appropriate.

The Department supports many of the articulated criteria in the proposed policy statement that will expand the availability of compassionate release. The Department agrees, for instance, that compassionate release may be warranted, in appropriate cases, in response to a public health emergency. Likewise, the Department believes that in appropriate cases, compassionate release should be available for victims of sexual misconduct in prison, so long as that misconduct has been established by an administrative or legal proceeding. As stated previously in litigation, however, the Department's position is that Section 3582(c) does not authorize courts to reduce sentences based on a nonretroactive development in sentencing law. Consistent with that position, the Commission should reject the proposed "changes in law" provision.

The Department also supports the adoption of a "catch-all" provision. Option 1, which tracks the enumerated criteria for compassionate release, best comports with the Department's litigating position. This approach would hew to Congress's statutory mandates, thus providing appropriate guidance to courts while still granting them discretion to identify new extraordinary and compelling reasons similar in kind to the specific circumstances already identified. This approach would reduce the uncertainty, circuit conflicts, and sentencing disparities that have proliferated in the absence of any binding policy statement.

Our responses to the specific issues for comment follow, and we welcome the opportunity to continue to engage with the Commission on this matter.

A. Background

Under 18 U.S.C. § 3582(c)(1)(A)(i), a court may reduce a sentence based on "extraordinary and compelling reasons," after consideration of the 18 U.S.C. § 3553(a) sentencing factors, if such a reduction is consistent with "applicable" policy statements of the Sentencing Commission. Section 3582(c)(1)(A)(i) was adopted as part of the bipartisan Sentencing Reform Act of 1984, which abolished parole in favor of a system in which a defendant's term of imprisonment was determined by a judge, applying presumptive sentencing guidelines, at a public sentencing hearing. [2] Congress entrusted the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). It provided that "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

The Commission's relevant policy statement, §1B1.13, has traditionally defined "extraordinary and compelling" reasons to include a terminal illness, serious physical or mental health concerns, and age-related physical or mental deterioration. *See* USSG §1B1.13 (2018). The Commission has also recognized that such health and safety concerns may extend to family members, and thus has permitted defendants' release so that they can provide for their minor children, incapacitated spouse, or domestic partner. *Id.* The policy statement also permits the Bureau of Prisons (BOP) to identify additional "extraordinary and compelling" reasons. In developing its program statement, the BOP has likewise identified such health and safety concerns for defendants and their families. *See* Bureau of Prisons (BOP) Program Statement 5050.50.[3]

Before 2018, a court could only reduce a sentence upon motion by the BOP Director. *See* 18 U.S.C. § 3582I(1)(A)(i) (2017). But in the First Step Act of 2018, Congress amended Section 3582(c)(1)(A) to allow defendants to file motions directly with courts. *See* Pub. L. No. 115-391, Tit. VI, § 603(b)(1), 132 Stat. 5239. Because the Commission lacked the requisite quorum to update the compassionate release policy statement to reflect the procedural changes made by the First Step Act, most courts of appeals have held that the current policy statement is inapplicable to defendant-filed motions. *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022) (collecting cases); *but see United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021). Recent caselaw, discussed below, has thus focused on whether particular circumstances are "extraordinary and compelling" within the meaning of the statutory term.

B. Defining "Extraordinary and Compelling Reasons" to Include Additional Medical and Family Circumstances

The Department agrees that the Commission should expand the definition of "extraordinary and compelling reasons" in the policy statement, including to address additional circumstances affecting the health and safety of defendants and their families. We recommend,

[2] In 2002, Congress modified Section 3582(c)(1)(A)(i) to permit a court reducing a sentence to "impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment." *See* Pub. L. 107-273.

[3] *Available at* https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

however, some minor changes to the Commission's proposals to provide greater clarity to courts and the BOP.

i. Medical Circumstances of the Defendant

The Department agrees that compassionate release may be warranted where a defendant faces a risk of serious medical complications in connection with public health emergencies. Consistent with this position, during the COVID-19 pandemic, the Department agreed that release was appropriate for many at-risk defendants.

The Department suggests, however, some minor clarifications to the proposed "infectious disease" provision:

- The Department recommends changes to proposed §1B1.13(b)(1)(D)(i) to make clear that the purpose of this provision is to address any future outbreak of disease that is similar in severity to the COVID-19 pandemic, rather than routine seasonal outbreaks, such as the annual cold and flu season, or an outbreak of a less serious disease, such as chickenpox. We believe the Commission should clarify that the provision applies when "the defendant is housed at a correctional facility affected or at <u>imminent</u> risk of being affected by (I) an ongoing <u>and extraordinary</u> outbreak of infectious disease."

- The Department understands that the Commission intends for the infectious-disease provision to apply where the defendant's correctional facility is affected by (or at risk of being affected by) an infectious disease or public health emergency and where, because of the "medical circumstances of the defendant," the defendant is at "increased risk" of adverse outcomes as compared to other individuals who contract the disease, based on the inmate's personal medical circumstances (such as a compromised immune system). To avoid rendering §1B1.13(b)(1)(D)(i) superfluous, the Department does not understand the Commission's proposal to turn on the increased public health risk an inmate may face, when compared to the non-prison population, solely by virtue of the defendant's incarceration. The Department thus recommends that §1B1.13(b)(1)(D)(ii) be amended to read: "<u>due to personal medical risk factors and custodial status</u>, the defendant is at increased risk of suffering severe medical complications or death as a result of exposure to the outbreak of infectious disease or the public health emergency. . ."

ii. Family Circumstances of the Defendant

The Department also agrees that there may be additional circumstances, beyond those provided for in the current Guidelines, when release is warranted because of family circumstances. The Department recommends, however, that the Commission provide further guidance as to what constitutes an "immediate family member," as federal regulatory definitions of that term vary widely. *Compare* 29 C.F.R. § 780.308 (defining "immediate family" to include parents, spouses, children, and those similarly situated, such as step-children and foster children) *with* 40 C.F.R. § 170.305 (defining "immediate family" to include grandparents, aunts/uncles, nieces/nephews, and cousins). The former definition is more consistent with the historical understanding of the compassionate release provision and other federal caregiving laws,

including the Family and Medical Leave Act, which governs care for parents, spouses, and children. The Department also notes that defendants should have the burden of establishing the family relationship in question. Certain familial bonds, such as parent-child and spouse, can be established with official, verifiable documentation, such as a birth certificate or marriage license. While the Department supports expanding this category to include other persons with whom the defendant has a relationship similar to that of an immediate family member, the proposed amendment will make it much more difficult for the government and courts to verify the relationship for compassionate release purposes. We therefore recommend that the Commission specify that compassionate release may be available where "the defendant establishes" the applicable circumstances and familial relationships as well as significant ties.

Moreover, the Department presumes that proposed provision 3(D) (for "circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member") applies only when "the defendant would be the only available caregiver," as otherwise provision 3(D) could effectively eliminate that "only available caregiver" requirements of provisions 3(B) and 3(C). The Department suggests clarifying as such—

> "The defendant <u>establishes</u> circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member <u>when the defendant would be the only available caregiver for the individual in question</u>."

C. <u>Commission "Victim of Assault" Proposal</u>

The Department takes very seriously allegations that individuals have suffered sexual and physical abuse at the hands of correctional officers or other BOP employees or contractors while in custody. The Department is committed to preventing abuse in the federal prison system, providing care for those individuals who have nonetheless suffered abuse, and prosecuting those responsible. In July 2022, Deputy Attorney General Lisa O. Monaco issued a memorandum identifying deep concerns about such misconduct and convening a working group of senior Department officials to review the Department's approach to rooting out and preventing sexual misconduct by BOP employees. That working group issued a report on November 2, 2022, outlining recommendations for immediate action, and areas for further review, to better protect the safety and wellbeing of those in BOP custody and better hold accountable those who abuse positions of trust. The Department continues to implement those recommendations to improve our prevention of, and response to, abuse in prison.

The Department agrees that, in certain circumstances, a sentence reduction may be warranted for an individual who suffered sexual assault, or physical abuse resulting in serious bodily injury, committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody. Indeed, the government has sought reductions for victims of this type of abuse, pursuant to Federal Rule of Criminal Procedure 35(b), where the victim has provided substantial assistance in investigating or prosecuting corrections officers who have abused them. The Department believes that compassionate release also may be appropriate, in

certain circumstances, for individuals who are the victims of sexual misconduct perpetrated by BOP employees, and the Director of the Bureau of Prisons has made clear that she will consider moving for a sentence reduction on that ground.

The Department, however, has some concerns about the Commission's current proposal. First, the proposed amendment does not currently cover circumstances where a corrections officer directs another individual—including an inmate—to perpetrate an assault, nor does it cover other individuals who may abuse a federal inmate in their custody or control. Second, under the current proposal, district courts deciding compassionate release motions could be asked to assess the validity of allegations of criminal misconduct without the benefit of an investigation. This may inadvertently hinder the Department's ability to hold perpetrators accountable, secure justice, and vindicate the rights of victims.

The Department therefore recommends that the Commission consider permitting reduction only after misconduct has been independently substantiated—such as after there has been a criminal conviction, an administrative finding of misconduct, or a finding or admission of liability in a civil case.[4] Permitting compassionate release hearings only after the completion of other administrative or legal proceedings will help ensure that allegations are more fairly adjudicated, prevent mini-trials on allegations, and reduce interference with pending investigations and prosecutions. Moreover, it will help resolve questions about the scope of the term "sexual assault," as release must be predicated on a finding of wrongdoing.

We would thus suggest the following language:

> "While in custody for the offense of conviction, the defendant was a victim of sexual assault, or physical abuse resulting in serious bodily injury, that was committed by, or at the direction of, a correctional officer or other employee or contractor of the Bureau of Prisons ~~while in custody,~~ or other individual who had custody or control over the inmate, as established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case."

D. Commission Proposal to Include "Changes in Law" as an Enumerated "Extraordinary and Compelling" Reason

The Commission proposes language that would permit courts to reduce a sentence whenever "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." The Department appreciates the concerns underlying this proposal and is concerned about equity in the criminal justice system, including as it pertains to unusually long sentences. However, the Department has taken the position in numerous court filings that Section 3582(c)(1)(A)(i) does not authorize sentence reductions based on nonretroactive changes in sentencing law.

[4] The Department recognizes that there may be rare circumstances where these limitations are not appropriate—such as where the perpetrator of misconduct dies before any administrative proceeding or prosecution is complete. In such circumstances, relief through a catchall provision (discussed below) may be appropriate.

In particular, the Department has repeatedly argued in litigation that the fact that a change in sentencing law is not retroactive is not "extraordinary" within the meaning of the statute.[5] Five courts of appeals have agreed.[6] And although four courts of appeals permit a court to consider non-retroactive changes in sentencing law in combination with other extraordinary and compelling reasons,[7] those circuits nevertheless hold that "the mere fact" that the defendant's sentence may be lower if the defendant were sentenced today "cannot, standing alone, serve as the basis for a sentence reduction."[8] The Commission's "changes in law" proposal could be understood to conflict with even those more permissive courts of appeals, if it were to permit reductions based on the mere fact that sentencing law had changed.

The Commission's proposal thus conflicts with the Department's interpretation Section 3582(c)(2). To be sure, the decisions discussed above were made in the absence of a binding policy statement. While the Supreme Court has left open whether the Commission might receive deference on its interpretation of the statute, *DePierre v. United States*, 564 U.S. 70, 87 (2011), it has also clearly held that the Commission cannot contravene the statute's plain text. *United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("Broad as [the Commission's] discretion may be, however, it must bow to the specific directives of Congress."); *Stinson v. United States*, 508 U.S. 36, 38 (1993). None of the circuits that hold changes in law cannot establish "extraordinary and compelling" circumstances have suggested that the statutory term is ambiguous. And in the face of unambiguous text, the Commission's directives "must give way." *LaBonte*, 520 U.S. at 757.

At the same time, the Department appreciates the policy concerns animating the Commission's proposal. The Department of Justice supports legislation to make certain statutory penalty changes—particularly those set forth in Sections 401 and 403 of the First Step Act—retroactive. And the Department would support legislation permitting district courts to reconsider the longest sentences for certain defendants who have rehabilitated and demonstrated readiness for reentry into society, with appropriate restrictions on timing and filing that are absent from Section 3582(c)(1)(A)(i).

But the Department has concerns about using compassionate release as the mechanism to address these concerns for several reasons. First, this proposal risks undermining the principles of finality and consistency that are the hallmarks of the Sentencing Reform Act. The Commission's proposal could be understood to allow defendants to move for compassionate release any time there is any change in law, including when any court decision—even one that is not from the Supreme Court and therefore does not definitively settle the issue—arguably affects any aspect of the conviction or sentencing; they could reapply for compassionate release the day after denial; and they could continue to reapply without limit. Second, and relatedly, a

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[5] *See, e.g.*, Brief in Opposition, *Jarvis v. United States*, No. 21-568 (Dec. 8, 2021); Brief in Opposition, *Tomes v. United States*, No. 21-5104 (Nov. 29, 2021); Brief in Opposition, *Gashe v. United States*, No. 20-8284 (Nov. 12, 2021); *see also* U.S. Supplemental En Banc Brief, *United States v. McCall*, No. 21-3400 (6th Cir. May 11, 2022).
[6] *See United States v. McCall*, 56 F.4th 1048, 1050 (6th Cir. 2022) (en banc); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021)).
[7] *See United States v. Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022); *Ruvalcaba*, 26 F.4th at 28 (1st Cir. 2022); *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020).
[8] *Ruvalcaba*, 26 F.4th at 28 (quotations omitted); *see McGee*, 992 F.3d at 1048; *McCoy*, 981 F.3d at 287; *Chen*, 48 F.4th at 1100.

compassionate-release mechanism without further guardrails or procedural protections would seriously affect the victims of crime and adversely affect the ability of many victims to move beyond the criminal conduct they experienced. Third, the burden on the judicial system would be immense. If the Commission were to endorse the availability of a sentence reduction based solely on changes in law, it may prompt a flood of motions on such basis.[9] In addition to the impact on victims and the court system overall, an unmanageable volume of motions could lead to delays in courts being able to adjudicate and grant meritorious motions. Fourth, the proposal will lead to widespread sentencing disparities, as the Commission's proposal will exacerbate the conflict among the courts of appeals on the statutory scope of Section 3582(c)(1)(A)(i).

Finally, in the list of "Issues for Comment," the Commission has recognized the tension between the "changes in law" proposal and the specific, limited mechanisms the Sentencing Reform Act provided for reducing otherwise-final sentences. Section 3582(c)(2) of Title 18—adopted as part of the Sentencing Reform Act, at the same time as Section 3582(c)(1)(A)—permits courts to reduce a sentence in light of a Guidelines amendment, so long as the reduction is consistent with Commission policy statements. The relevant policy statement, §1B1.10, permits reductions based only on those Guidelines amendments that the Commission expressly designates as applying retroactively, precludes consideration of any other changes in the application of the Guidelines, and, absent certain specific exceptions, precludes the court from reducing the sentence below the newly applicable Guidelines range, even if the defendant previously received a below-Guidelines sentence. *See* USSG §1B1.10. By contrast, courts face no such constraints when considering a compassionate release motion. If the Commission adopts the "changes in law" proposal—or, as explained below, Options 2 or 3—it will essentially eliminate the restrictions that Section 3582 and §1B1.10 place on sentence reductions predicated upon a Guideline amendment. Section 1B1.13, then, would on its face permit courts to reduce a sentence regardless of whether it was based upon a retroactive Guidelines amendment; to consider changes other than those set forth in the amendment; and to impose a sentence below the newly applicable Guidelines range. *Cf.* 18 U.S.C. § 3582(c)(2); USSG §1B1.10.

E. Commission Proposals Regarding Additional "Extraordinary and Compelling" Reasons

The Department agrees with the Commission's proposal to grant courts authority to identify additional extraordinary and compelling circumstances not expressly enumerated in Section 1B1.13. As we have learned in the last few years, it can be difficult, if not impossible, to predict what will constitute extraordinary and compelling circumstances in the future, and courts should have the flexibility to identify new extraordinary and compelling circumstances that are within the scope of their statutory authority to reduce sentences.

Option 1, which limits extraordinary and compelling reasons to those similar in nature and consequence to the list of enumerated reasons, comports with the Department's view of the Commission's authority, so long as the Commission does not adopt the "changes in law"

[9] The fact that a large majority of these motions might be denied, and that courts could develop rules for addressing successive motions that abuse the authority to seek relief, will not change the fact that being compelled to consider and address these motions will impose a significant burden on victims and on courts.

provision proposed in subsection (b)(6). Unlike the remaining options, Option 1 makes clear that Section 3582(c)(1)(A) does not permit reductions based on disagreement with an applicable mandatory term of imprisonment, challenges to a conviction or sentence, or changes in sentencing law. By contrast, Options 2 and 3 of the Commission's proposal purport to grant courts broad authority to identify additional "extraordinary and compelling" circumstances.

Of the Commission's proposals, Option 1 also best provides guidance to courts and the Bureau of Prisons in evaluating compassionate release motions. Unlike Options 2 and 3, Option 1 (without the "changes in law" provision) would help to reduce, if not eliminate, circuit conflicts over the scope of statutory authority under Section 3582(c)(1)(A). The courts of appeals agree that a district court cannot reduce a sentence if such a reduction is inconsistent with the policy statement. If the Commission were to adopt a policy statement that does not include such reasons, it would preempt the statutory question and resolve the circuit conflict. Options 2 and 3, meanwhile, make it more likely that courts will continue to grant compassionate release to modify sentences in ways that exceed statutory limits on district courts' authority.[10]

F. Additional Guidance Regarding Victims' Rights

Finally, the Department suggests that the Guidelines provide additional guidance to courts regarding victims' rights to be notified, heard, conferred with, and treated with dignity and respect during any proceeding related to compassionate release, including where consistent with the Crime Victims' Rights Act, 18 U.S.C. § 3771(a). Currently, the proposed amendment does not address victims and their important interests. While not all victims will wish to be heard, the Department encourages the Commission to require courts to afford victims that opportunity before granting any motion for compassionate release. In particular, the Commission should consider amending Section 1B1.13 to include the following provision:

> NOTICE TO VICTIMS – Before granting any motion for compassionate release, the court must provide reasonable notice to any victims and provide them an opportunity to be heard unless the victim has requested not to be informed of any possible reduction in sentence pursuant to this provision.

* * *

On the following page is a redline of the Commission's published amendment proposal. It shows the difference between the Commission version (which has changes itself) and the Department's recommended approach. It keeps the shading/strike-throughs from the Commission proposal, adds strike-throughs wherever we would strike the Commission's proposed language, and adds additional blue shading where we suggest adding new language. The Department welcomes the opportunity to continue engaging with the Commission as it considers appropriate changes.

[10] The Department would welcome the opportunity to work with the Commission to fashion alternatives that address those concerns.

PROPOSED AMENDMENT:

§1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

(a) IN GENERAL.—Upon motion of the Director of the Bureau of Prisons or the defendant ~~under~~ pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or
(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

(b) EXTRAORDINARY AND COMPELLING REASONS.—Extraordinary and compelling reasons exist under any of the following circumstances or a combination thereof:

(1) MEDICAL CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.}*

(B) {The defendant is— (i) suffering from a serious physical or medical condition, (ii) suffering from a serious functional or cognitive impairment, or (iii) experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide selfcare within the environment of a correctional facility and from which he or she is not expected to recover.}*

(C) The defendant is suffering from a medical condition that requires long-term or specialized medical care, without which the defendant is at risk of serious deterioration in health or death, that is not being provided in a timely or adequate manner.

(D) The defendant presents the following circumstances—

(i) the defendant is housed at a correctional facility affected or at imminent risk of being affected by (I) an ongoing and extraordinary outbreak of infectious disease, or (II) an ongoing public health emergency declared by the appropriate federal, state, or local authority;

(ii) due to personal medical risk factors and custodial status, the defendant is at increased risk of suffering severe medical complications or death, as a result of exposure to the ongoing outbreak of infectious disease or the ongoing public health emergency described in clause (i); and

(iii) such risk cannot be mitigated in a timely or adequate manner.

(2) AGE OF THE DEFENDANT.—The defendant (A) is at least 65 years old; (B) is experiencing a serious deterioration in physical or mental health because of the aging process; and (C) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.}*

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The death or incapacitation of the caregiver of the defendant's minor child or ~~minor children~~ the defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.}**

(B) {The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.}*

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant ~~presents~~ establishes circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member, when the defendant would be the only available caregiver for the individual in question.]

[(E) For the purposes of this policy statement, an immediate family member is a parent, child, spouse, step-parent, step-child, foster parent, foster child, or registered partner.]

[(4) VICTIM OF ASSAULT.—While in custody for the offense of conviction, the defendant was a victim of sexual assault, or physical abuse resulting in serious bodily injury, that was committed by, or at the direction of, a correctional officer or other employee or contractor of the Bureau of Prisons ~~while in custody~~or other individual who had custody or control over the inmate, as established by a conviction in a criminal case, an administrative finding of misconduct, or a finding or admission of liability in a civil case.]

~~[(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.]~~

[Option 1:

(~~6~~5) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)]~~[(5)]~~.]

[Option 2:

~~(6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]~~

[Option 3:

~~(6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]~~

(c) {REHABILITATION OF THE DEFENDANT.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.}*

(d) NOTICE TO VICTIMS – Before granting any motion for compassionate release, the court must provide reasonable notice to any victims and provide them an opportunity to be heard unless the victim has requested not to be informed of any possible reduction in sentence pursuant to this provision.

2. Department of Justice Comments on Proposed Amendments and Issues for Comment on Acquitted Conduct

The Commission has proposed an amendment to the Guidelines limiting the use of acquitted conduct in determining the Guidelines range. Consistent with federal statutes, the proposal would continue to allow district courts to consider acquitted conduct when determining where within the applicable Guidelines range to sentence a defendant and whether a departure (or, *a priori*, a variance) is warranted. *See* 18 U.S.C. § 3661 ("[N]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

For the reasons set forth below, the Department does not believe the Commission can practicably exclude acquitted conduct from the definition of relevant conduct. If the Commission nonetheless proceeds with the amendment, the Department believes the definition of acquitted conduct should be amended.

A. Background

The Supreme Court has long recognized judges' broad discretion to impose sentences based on facts found by a preponderance of the evidence at sentencing. *See, e.g., United States v. Watts*, 519 U.S. 148, 157 (1997) ("a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as the conduct has been proven by a preponderance"); *Alleyne v. United States*, 570 U.S. 99, 116 (2013) ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment"). The Court in *Watts* reiterated its holding in *Williams v. New York,* that "[h]ighly relevant—if not essential to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics" and that "[n]either the broad language of section 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Watts*, 519 U.S. at 151-52 (quoting *Williams,* 337 U.S. 241, 247 (1949)).

Since *Watts*, the Court has continued to affirm that there are no limitations on the information concerning a defendant's background, character, and conduct that courts may consider in determining an appropriate sentence. Curtailing the consideration of acquitted conduct at sentencing would be a significant departure from longstanding sentencing practice. *See Watts*, 519 U.S. at 152 (noting that even "[u]nder the pre-Guidelines sentencing regime, it was well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted") (internal citations omitted).[11]

Section 3553(a) of Title 18, United States Code, meanwhile, requires judges to consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant" in imposing a "sufficient, but not greater than necessary" sentence. Congress recognized and codified the broad availability of information for judges in imposing sentence in Section 3661, which directs that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

B. The Commission's Proposal Would Be Difficult for Courts to Administer

Consistent with Supreme Court precedent, the commentary to §1B1.3 currently provide that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." Likewise, §6A1.3 specifies that "[i]n resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Citing 18 U.S.C. § 3661 and the Court's decision in *Watts*, the commentary to that provision explains that "a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."

The Commission's proposed amendment would make three changes to the Guidelines and the commentary. It would –

- add a new subsection (c) to §1B1.3, in the Guidelines text, prohibiting consideration of acquitted conduct as relevant conduct under §1B1.3 "unless such conduct was admitted by the defendant or was found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction";

[11] The Supreme Court has also recognized the constitutionality, under the advisory Guidelines regime, of judicial factfinding within the prescribed statutory range established by the jury verdict. *See, e.g., Alleyne v. United States*, 570 U.S. 99, 116 (2013) (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); *United States* v. *Booker*, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (noting that nothing in the Court's history suggests that it is "impermissible for judges to exercise discretion—taking into consideration various factors relating to both offense and offender—in imposing a judgement *within the range* prescribed by statute) (emphasis in the original); *see also* 18 U.S.C. § 3661.

- define acquitted conduct, in the Guidelines text, as, "conduct (*i.e.*, any acts or omission) underlying a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion under the applicable law of a state, local, or tribal jurisdiction"; and

- amend the commentary to §6A1.3 (Resolution of Disputed Factors), by adding that "[a]cquitted conduct, however, generally, shall not be considered relevant conduct for the purposes of determining the guideline range;" remove the reference to *United States v. Watts* and edit other caselaw references; affirm the preponderance standard; and affirm the use of acquitted conduct to determine "the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted. *See* §1B1.4."

The Department does not believe that the Commission can practicably prohibit the consideration of acquitted conduct in determining the Guidelines range. Though well intentioned, the Commission's proposal will unduly restrict judicial factfinding, create unnecessary confusion and litigation burdening the courts, and result in sentences that fail to account for the full range of a defendant's conduct.[12] As the Supreme Court recognized in *Watts*, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of reasonable doubt as to his guilt." *Watts*, 519 U.S. at 149. Jury verdicts reflect a finding of whether the elements of a charge were established beyond a reasonable doubt but not necessarily whether a defendant did or did not commit certain acts. Indeed, jury verdicts are usually opaque. Because there is no administrable way to define "acquitted conduct," the Department fears that this provision will invite litigation on its application and inconsistency as differing interpretations emerge.

As an initial matter, if adopted, the proposed definition of acquitted conduct would create challenges in parsing the acts and omissions that can and cannot be considered by a sentencing court. Defining acquitted conduct as conduct "*underlying a charge of which the defendant has been acquitted"* will prove difficult to administer, especially for complex cases involving overlapping charges, split or inconsistent verdicts, or acquittals based on technical elements unrelated to a defendant's innocence.[13] The Department is particularly concerned about cases in which the charges are linked together, as in cases involving conspiracy, false statements, civil rights, sexual abuse, and firearms charges.

More specifically, the Commission's proposal fails to account for an acquittal unrelated to the defendant's innocence as to the conduct at issue—for example, an acquittal based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue,

[12] Indeed, the Department has explained in litigation why the use of acquitted conduct at sentencing is constitutionally sound, and why an alternative approach would "be unsound as a practical matter." *See* Brief in Opposition, *McClinton v. United States*, No. 21-1557 (October 28, 2022).

[13] We appreciate the Commission's inclusion of "*a charge"* to recognize that triers of fact decide charges, not conduct, and we recognize that the phrase "*underlying a charge"* adopts the same language as used in *Watts* and other cases. But those cases were broadly describing acquitted conduct, not distinguishing it from other relevant conduct.

a jurisdictional element, or the conduct occurring outside the statute of limitations. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and cases involving particularly vulnerable victims who may not report a crime until long after the offense was committed. Under the current Guidelines, courts may treat the substantive conduct underlying a charge for which the defendant was acquitted as relevant conduct as to other offenses of conviction, so long as the court believes that evidence established by a preponderance of the evidence. The court thus has discretion to consider conduct underlying an acquittal that rested on technical grounds, while always retaining authority to disregard the conduct if the evidence is insufficient or if the conduct was insufficiently related to the offense of conviction. The Commission's proposal would strip courts of that discretion, categorically prohibiting courts from considering this conduct for purposes of determining the Guidelines range.

The Commission's proposal also fails to sufficiently address split or inconsistent verdicts where the conduct underlying a count of acquittal is relevant conduct for a count of conviction but does not necessarily satisfy the elements of the count of conviction. Often in civil rights cases, juries may convict a defendant of an obstruction of justice offense, *e.g.*, violations of 18 U.S.C. §§ 1001, 1512(b)(3), 1519, but acquit on the substantive civil rights offense. Under the current regime, the substantive conduct would be appropriately considered relevant conduct if the court finds it was proved by a preponderance of the evidence. Under the Commission's proposal, the substantive conduct would be excluded from consideration in determining the Guidelines range because the elements of the substantive offense were not necessarily "found by the trier of fact beyond a reasonable doubt; to establish, in whole or in part, the instant offense of conviction," *i.e.*, obstruction of justice.

Finally, the Department does not believe that the Commission's proposed exclusion of conduct "*admitted by the defendant or [that was] found by the trier of fact beyond a reasonable doubt to establish, in whole or in part, a violation of the instant offense of conviction*" adequately addresses this concern. The Department appreciates this effort to address overlapping verdicts. But this language will be difficult to administer, as the sentencing court is typically not the trier of fact, and the proposal will require the sentencing court to make a factual finding about the basis for a jury verdict. It is unclear how a court could make this inquiry because verdicts generally only include findings on charges, not particular facts. Even if the sentencing court could discern the jury's factual finding with respect to certain conduct, it would need to make a legal determination whether the conduct at issue "underl[ies] a charge of which the defendant has been acquitted" or "establish[es], in whole or in part, the instant offense of conviction." There is ambiguity regarding what a court should do when the conduct falls in both of those boxes. Ultimately, the Department worries that this difficult exercise will result in litigation regarding what the trier of fact found proven beyond a reasonable doubt.

C. A Narrower Definition

Were the Commission to proceed with excluding acquitted conduct from relevant conduct, the Department would recommend a narrower definition of acquitted conduct that would include: (1) specific exceptions, and (2) clarify the definition to reduce administrability concerns, while retaining the Commission's proposed standard. Because some circuits have

questioned the authority and validity of certain provisions of the Sentencing Guidelines commentary, the Department also recommends moving the commentary in §6A1.3 regarding the permitted use of acquitted conduct to the text of §1B1.3.

While these changes will not fully resolve the Department's administrability concerns, changes to the definition of acquitted conduct would better account for overlapping, split, or inconsistent verdicts. The Department's recommended changes are underlined below.

1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(C) Acquitted Conduct. (1) Limitation. Acquitted Conduct shall not be considered relevant conduct for the purposes of determining the guideline range. Acquitted conduct may be considered in determining the sentence to impose within the Guidelines range, or whether a departure or a variance from the Guidelines is warranted. *See* §1B1.4 (Information to be Used in Imposing a Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)).

(2) Definition of Acquitted Conduct. For the purposes of this guideline, "***acquitted conduct"*** means conduct (*i.e.*, any acts or omissions) underlying the elements of a charge of which the defendant has been acquitted by the trier of fact or upon a motion of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or an analogous motion of acquittal under the applicable law of a state, local, or tribal jurisdiction, except that it does not include any conduct (*i.e.*, any acts or omissions):

A) admitted by the defendant or that underlies the elements of a charge of which the defendant has been convicted, including lesser included offenses or related counts; or

B) that the trier of fact found the defendant committed beyond a reasonable doubt, as established by a special verdict form or by a judge's statement after a non-jury trial; or

C) underlying the elements of a charge for which the defendant was acquitted based on the court's determination, by a preponderance of evidence, that the defendant was acquitted for a reason unrelated to his conduct, such as the government's failure to establish venue, prove a jurisdictional element, or overcome an affirmative defense based on the statute of limitations.

The Department recommends changing the language to refocus the sentencing court's inquiry from what the trier of fact found to what the evidence at trial established.

- To account for split or inconsistent verdicts, the Department proposes amending the definition of acquitted conduct to capture acts or omissions "underlying the elements of a charge of which the defendant been acquitted," while also proposing in Subsection A an exception for conduct that "underlies the elements of a charge of which the defendant has been *convicted*." This proposal will help clarify that the Commission's proposal is not intended to prevent a sentencing court from considering conduct underlying the elements of a charge for which the defendant was

convicted, and thus which a jury necessarily found beyond a reasonable doubt. The Department also recommends moving the limitation proposed in (c)(1) to the definition of acquitted conduct in (c)(2) for greater clarity.

- Subsection B accounts for cases where a special verdict form or a judge's statement after a non-jury trial reflects the trier of fact's findings as to specific acts or omissions.

- Subsection C accounts for circumstances in which the evidence at trial otherwise establishes that the defendant committed the acts or omissions in question, but the defendant was acquitted of a particular count because of a technical or non-substantive limitation. This language would allow courts to consider conduct underlying a count of acquittal when the court determines that the acquittal was unrelated to the defendant's factual innocence and instead was based on failure of proof at trial on a technical element of the offense, including, but not limited to, venue, a jurisdictional element, or the conduct occurring outside the statute of limitations. Allowing for the consideration of conduct otherwise proven beyond a reasonable doubt addresses cases involving particularly vulnerable victims who may not report an offense until after the statute of limitations has run.

To ensure that limiting a sentencing court's ability to consider acquitted conduct in determining the Guidelines range does not unintentionally limit the ability of a victim to be "reasonably heard" under 18 U.S.C. § 3771(a)(4) or unduly limit the court's discretion to consider any information concerning the conduct of a defendant, we recommend adding to the commentary of §1B1.13 the following provision:

> "Nothing in this section or in §1B1.4 shall limit the rights of a victim under 18 U.S.C. § 3771, or the court's discretion to consider any information concerning the background, character, and conduct of a defendant, including to hear from a person who at any time in the prosecution was considered a victim under § 3771. *See* 18 U.S.C. § 3661.

3. Department of Justice Comments on Proposed Amendment and Issues for Comment on Sexual Abuse Offenses

As the Deputy Attorney General urged in her letter to the Commission last fall, it is critically important for the Commission to strengthen the provisions addressing sexual abuse committed by federal corrections employees against those in their custody, and to implement sentencing Guidelines for new sexual misconduct statutes that were enacted as part of the Violence Against Women Reauthorization Act of 2022 (VAWA 2022). The Department appreciates that the Commission has identified this issue as a priority for this amendment year.

The Department strongly supports the Commission's proposed amendments to §2A3.3. As explained in more detail below, the Department believes that accountability and deterrence are key elements of any effective strategy to eliminate sexual abuse in prison, including through criminal prosecution and proportionate sentencing. As the Department stated in its annual report,

the current Guideline provisions applicable to sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b), are insufficiently punitive in light of the egregious conduct at issue. The Commission's proposed amendment would take a significant step towards addressing that concern.

The Department also supports the Commission's proposed amendment to §2H1.1, which would apply to violations of 18 U.S.C. § 250, the newly enacted statute providing a graduated penalty structure for civil rights offenses involving sexual misconduct. As explained below, the Department will charge 18 U.S.C. § 250 in conjunction with a substantive civil rights offense, and it therefore agrees that both offenses of conviction should be governed by the same Guidelines provision. The Department likewise supports the Commission's proposed amendment to §2A3.3 so that it addresses violations of 18 U.S.C. § 2243(c), another newly enacted provision under VAWA that makes it a crime for a federal law enforcement officer to knowingly engage in a sexual act with someone under arrest, under supervision, in detention, or in federal custody. Because this statute criminalizes the same sexual misconduct that 18 U.S.C. § 2243(b) criminalizes for federal corrections employees, it should be governed by the same Guidelines provision.

A. <u>The Commission's Proposed Amendments to Raise the Base Offense Level of §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts)</u>.

The Department frequently uses 18 U.S.C. § 2243(b) to prosecute federal corrections employees who sexually assault incarcerated individuals, typically within Bureau of Prisons (BOP) or federally contracted facilities. The statute specifically applies to conduct that involves sexual acts, as defined by 18 U.S.C. § 2246(2),[14] as opposed to sexual contact, as defined by 18 U.S.C. § 2246(3).[15] Each violation of Section 2243(b) carries a maximum penalty of 15 years in prison.

Section 2A3.3, the Guidelines provision applicable to convictions under Section 2243(b) currently carries a base offense level of 14. This base offense level is rarely increased, as the two specific offense characteristics in §2A3.3 rarely apply, and few Chapter Three adjustments apply to the typical Section 2243(b) case. For example, application note 4 of §2A3.3 currently directs courts not to apply an adjustment for Abuse of Position of Trust or Use of a Special Skill. *See* USSG §3B1.3 ("If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels."). Because these defendants—who are largely BOP employees—typically

[14] "The term 'sexual act' means (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2).

[15] "The term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(3).

do not have a criminal history, the base offense level drives the final recommended Guidelines range of either 15 to 21 months after conviction at trial or 10 to 16 months after a guilty plea.[16]

The Department of Justice supports the Commission's proposal to increase the base offense level for this offense from 14 to 22. In the Department's view, the current base offense level of 14 and the corresponding Guidelines ranges of 15 to 21 months (after trial) or 10 to 16 months (after guilty plea) are inadequate to account for this egregious criminal conduct. When corrections officers sexually abuse individuals entrusted to their custody and care, they exploit the defenseless and abuse the public trust. These Guidelines ranges are also grossly disproportionate to the statutory maximum penalty of 15 years in prison.

Sentencing courts have likewise found that §2A3.3 offense levels fail to account for defendants' conduct and culpability. For example, in August 2022, a prison chaplain from FCI-Dublin in the Northern District of California pleaded guilty to sexual abuse of a ward, abusive sexual contact, and false statements based on his sexually assault of an inmate over a nine-month period and then lying to federal agents about his conduct. The defendant's recommended Guidelines range was only 24 to 31 months. In granting an upward variance and imposing an 84-month sentence, the judge stated he "was amazed when [he] saw what the guidelines range for this conduct is. It seems radically inconsistent with the actual nature of the harm done." *United States v. James Highhouse*, 12-cr-16-HSG (N.D. Cal. August 31, 2022). He highlighted the unique vulnerability of inmate victims:

> The defendant relied on the inherent coercion that came with this victim and the other victims being inmates at a prison. He essentially preyed on women who could not consent and were not free to say no. And beyond that, the defendant used his position as a chaplain to further the coercion and predation that he committed in this offense.

Id. The judge also noted that he could not "think of a case in which [the Court had] ever varied upward, but this case strikes me as that case." *Id.* (excerpts of the transcript of the sentencing proceeding are attached as an Appendix to this letter).

This concern is longstanding and oft repeated, across courthouses and circuits. In 2008, a judge sitting in the Northern District of Texas sentenced a priest from FMC-Carsville for two Section 2243(b) violations. At that time, the maximum penalty for each violation was five years in prison, and the applicable Guidelines range was 10 to 16 months. In varying upward and imposing a sentence of 48 months, the court noted that "the nature and circumstances of the offense are surprisingly heinous and shocking, especially so given the relatively gentle guideline range produced by the total offense level and the criminal history category. The offenses, while euphemistically described in the information and the statute as sexual abuse of a ward, are actually rape and sodomy." *United States v. Vincent Inametti*, 07-cr-171-Y (N.D. Tex. May 5, 2008); *see also United States v. Hosea Lee*, 5:21-cr-00084-DCR-MAS (E.D. Ky. August 1, 2022) (district court granted an upward variance and imposed an 80-month sentence on a BOP

[16] Where a defendant clearly demonstrates acceptance of responsibility—for example, through a plea of guilty—the offense level is decreased by two to level 12, triggering a Guidelines range of 10 to 16 months for a defendant in criminal history category I.

corrections officer who abused four victims while serving as a drug treatment specialist); *United States v. Grimes*, 18-cr-00069 (S.D. W. Va. Jan. 2019) (district court varied upward and imposed a sentence of 120 months in prison where the advisory Guidelines range was 27 to 33 months in prison for a conviction on four counts of 18 U.S.C. § 2243(b) and two counts of 18 U.S.C. § 2244(a)(4) involving multiple victims); *United States v. Mullings*, 713 F. App'x 46, 47 (2d Cir. 2017) (unpublished) (court affirmed an upward variance as substantively reasonable where the district court imposed an 84-month sentence for one count of violating 18 U.S.C. § 2243(b), where the advisory Guidelines range was 12 to 18 months).

As this precedent reflects, the Commission should increase the base offense level of §2A3.3 for three main reasons: (1) To appropriately distinguish offenses involving sexual acts under Section 2243(b), *i.e.*, penetration and oral sex, from offenses involving sexual contact under 18 U.S.C. § 2244, *i.e.*, touching and groping; (2) To close the gap in how the Guidelines treat violations of Section 2243(b) and other sex offenses; and (3) To reflect the seriousness of the conduct and fully implement congressional intent, as marked by Congress's decision to raise the statutory maximum for this offense twice in the past twenty years.

i. The Guidelines Currently Fail to Distinguish Between Corrections Officers Who Commit Sexual Acts and Those Who Commit Sexual Contact

The Guidelines currently recommend the same sentencing range for corrections officers who engage in sexual contact (groping or touching) as they do for corrections officers who engage in sexual acts (penetration or oral sex). Corrections officers in BOP facilities who engage in sexual contact with inmates violate 18 U.S.C. § 2244(a)(4), a statute punishable by up to two years in prison. Under the applicable guideline, §2A3.4, the offense level is 14, which reflects a base offense level of 12 with a two-level increase because the victim is in the custody, care, or under supervisory control of the defendant. Thus, as currently written, the Guidelines recommend the same sentence for a defendant who commits a touching or groping offense as it does for a defendant whose offense involves penetration or oral sex.

This parity is unjustifiable. To be sure, all sexual misconduct is serious, and victims may experience trauma regardless of the nature of the misconduct. Congress has recognized, however, the self-evident distinction in severity between the offenses, which is reflected in the significantly greater statutory maximum penalty for sexual acts —15 years—than the two-year maximum penalty for sexual contact. The Guidelines should similarly reflect that distinction.[17]

[17] The appropriate solution is to increase the base offense level for offenses involving sexual acts rather than to lower the base offense level for offenses involving sexual contact. A range of 15 to 21 months in prison is a minimally adequate range for unwanted touching, groping, and fondling in a custodial setting. This aligns with Congressional intent. As part of the VAWA reauthorization, Congress recently enacted 18 U.S.C. § 250, which makes all forms of civil rights offenses involving sexual misconduct a felony. This predominantly affects sexual assaults committed by those acting under color of law in violation of 18 U.S.C. § 242, many of which previously were misdemeanors. With the passage of Section 250, Congress has recognized the severity of sexual assault committed by those with authority.

ii. The Guidelines Treat Sexual Abuse of a Ward Markedly Different than Other Forms of Sexual Abuse

The base offense level for sexual abuse of a ward, §2A3.3, is disparately lower than the levels established by the Guidelines provision that governs the other two federal sexual abuse statutes involving adult victims, 18 U.S.C. § 2241 (aggravated sexual abuse) and § 2242 (sexual abuse), where the base offense level is at least 32 where the victim is in custody. *See* USSG §2A3.1. To be sure, violations of those other sexual abuse statutes involve additional conduct elements, *e.g.*, physical force, threats of physical harm, incapacitation, or proof of coercion. Nonetheless, a 16- to18-level difference in base offense levels between §2A3.1 and §2A3.3 is unwarranted.

Such a large disparity fails to capture the inherently coercive nature of the prison environment and the power that corrections employees wield over inmates. These dynamics enable a corrections employee to abuse a victim, often without needing to resort to physical violence, threats, or overt coercion. As the Department's prosecutions bear out, the victims—who are mostly women—are often prior victims of sexual abuse or suffer from mental health issues. Frequently, they do not speak English or battle drug addiction. Abusive BOP employees, who often have access to these histories, may exploit these vulnerabilities in targeting victims. And in the Department's experience, victims are less likely to report their abuse for fear of losing access to privileges and vital services like drug treatment, psychological or spiritual counsel, or access to vocational training. Indeed, in some instances, the very BOP employees who provide those lifelines, *i.e.*, the drug treatment counselor, the education specialist, the prison chaplain, are the ones committing the abuse. Moreover, inmate-victims of sexual abuse also fear that if they report abuse, they will be transferred to another facility farther from their family or placed in the Special Housing Unit (SHU) to protect them from retaliation. Corrections employees can exploit these dynamics and commit sexual assault without employing physical force or expressly threatening their victims.

It is also useful to compare the current base offense level for sexual abuse of a ward to the base offense level for sex trafficking by force, fraud, or coercion in violation of 18 U.S.C. § 1591(b)(1). Like sexual abuse of a ward, sex trafficking often involves an inherently coercive setting that enables a perpetrator to establish control over a vulnerable victim without having to resort to physical violence. The base offense level for such an offense is 34, pursuant to §2G1.1(a)(1), which corresponds to a Guidelines range of 151 to 188 months for a defendant without a criminal history—far greater than the 15 to 21 months applicable to a standard violation of 18 U.S.C. § 2243(b). Increasing the base offense level for sexual abuse of a ward to 22 will more appropriately account for the seriousness of the offense.

iii. An Increase in the Base Offense Level to 22 Implements Congressional Intent to Reflect the Seriousness of Sexual Abuse of Those in Custody.

The legislative history of the past twenty years reflects Congress's view that sexual abuse by corrections employees is a serious offense. From 1987 to 2003, the base offense level under §2A3.3 was 9. Thereafter, Congress directed the Commission to "ensure that the Guidelines adequately reflect the seriousness of the offenses under 18 U.S.C. § 2243(b)." *Prosecutorial*

Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21, Section 401. In response, the Commission raised the base offense level to 12 in 2004, though, at the time, the statutory maximum for a violation of Section 2243(b) was only one year. Two years later, Congress raised the statutory maximum penalty to five years in prison as part of the 2005 reauthorization of VAWA. Pub. L. 109–162, Sec. 1177 (Increased Penalties and Expanded Jurisdiction for Sexual Abuse Offenses in Correctional Facilities). Later that same year, Congress passed the Adam Walsh Child Protection and Safety Act of 2006, again increasing the statutory maximum penalty for violations of Section 2243(b), this time to its current maximum penalty of 15 years in prison. Pub. L. 109–248, Section 207 (Sexual Abuse of Wards).

Yet, to date, the Commission has not kept pace with the substantial increases in the statutory maximum penalty for Section 2243(b) violations. In 2007, the Commission raised the base offense level for sexual abuse of a ward by two levels, to its current level at 14. At the same time, the Commission prohibited the applicability of the two-level adjustment for Abuse of Position of Trust, pursuant to §3B1.3, essentially nullifying the increase of the base offense level. *See* USSG Appendix C, Amendment 701. In effect, the Sentencing Commission has held the Guidelines range constant, even as Congress has increased the penalty for a violation of 18 U.S.C. § 2243(b) from one year to five years to 15 years in prison. It should use this opportunity to better align the Guidelines with the statutory maximum.

B. The Commission's Proposed Amendments to Amend §2A3.3 to Cross Reference §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)

The Department supports the Commission's proposed amendment to include in §2A3.3 a cross reference to §2A3.1 for offenses with aggravating factors, and as the Department previously urged in its annual report, it encourages the Commission to also make applicable the Abuse of Position of Trust adjustment under §3B1.3. As discussed above, there are currently few applicable specific offense characteristics and adjustments to the offense level for sexual abuse of a ward. The Department believes the absence of enhancements or upward adjustments in §2A3.3 leaves the Guidelines range inadequate to address more egregious offenses in the prison setting.

The Commission's proposed cross reference would take a significant step towards addressing those concerns. Like the proposed increase in the base offense level, the cross reference would treat all violations of 18 U.S.C. § 2243 the same for Guidelines purposes, regardless of whether the violation is based on a victim's status as a minor or in custody. For good reason—Congress has determined that victims of these offenses cannot consent based on their statuses, and aggravating factors such as the use of physical force should thus apply equally to both categories.

The proposed amendments to §2A3.3 will not only provide more just punishment but also should help deter future misconduct. Deterrence is particularly important where law enforcement officers abuse their authority, as they occupy positions that give them "the freedom to commit a difficult-to-detect wrong." *United States v. Hirsch*, 239 F.3d 221 (2d Cir. 2001). That is all the more true with respect to sexual misconduct, which is often hard to detect, particularly where the victims are abused by those with authority over them and fear they will not be believed. In

United States v. Highhouse, for example, a prison chaplain abused multiple victims who sought spiritual counseling, telling one victim that even if she did report him, he would merely get "a slap on the wrist." In the Department's experience, lengthier sentences tend to change the culture in individual prisons and deter future misconduct. The proposed amendments to §2A3.3 will help send the message that corrections employees who sexually abuse inmates will face serious consequences.

For similar reasons, we recommend that the Commission revisit the complete unavailability of the Abuse of Position of Trust adjustment under §3B1.3 in sex crimes cases involving federal corrections staff, as well as other government actors. Section 3B1.3 directs a two-level increase where a defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. But the application notes for §2A3.3 currently prohibit application of this enhancement in all sexual abuse of a ward cases,[18] apparently because the victim's custodial status and the defendant's misuse of authority are already factored into the base offense level. We believe this across-the-board limitation on the abuse of trust enhancement in such cases is unwarranted and unjust. There are particular circumstances where the enhancement is warranted and not redundant of the base offense level or other applicable enhancements. *Highhouse* is a case in point—the defendant there was not only a correctional officer, but also a prison chaplain, and he exploited that particular position of trust, as well as the faith of victims, to facilitate his crimes. *See supra* 19-20 (describing this case). Where a special position of trust is exploited for the offense—beyond the abuse of trust performed by any officer who abuses victims in their custody or control—a §3B1.3 enhancement is necessary and appropriate to properly calibrate the offense level. The Department would be pleased to provide the Commission additional examples and propose application note language that limits applicability of the enhancement to situations involving particularly egregious abuses of trust.

C. The Commission's Proposed Amendments to Reference Offenses Under 18 U.S.C. § 250 to §2H1.1 (Offenses Involving Individual Rights)

The Department supports the Commission's proposal to include 18 U.S.C. § 250 among the civil rights offenses governed by §2H1.1. Section 250 is a penalty statute that makes offenses involving nonconsensual sexual acts or sexual contact committed under color of law felonies. Prior to the enactment of 18 U.S.C. § 250, most sexual assaults committed by those acting under color of law were misdemeanors under 18 U.S.C. § 242 because the most common felony statutory enhancements—*i.e.*, causing bodily injury, using a dangerous weapon, or using physical force to commit a sexual act—are not common in sexual assaults perpetrated by law enforcement and others acting under color of law.

The substantive offenses to which Section 250 applies—found in Chapter 13 of Title 18 and at 42 U.S.C. § 3631 (the criminal portion of the Fair Housing Act)—are already governed by §2H1.1. Because §2H1.1(a)(1) cross references "the offense level from the offense guideline applicable to any underlying offense," when violations of these statutes involve either sexual abuse or abusive sexual contact, they fall under §2A3.1 (Criminal Sexual Abuse) and §2A3.4

[18] *See* §2A3.3, Application Note 4; *see also* §2H1.1, Application Note 5, §2A3.1(b)(3), Application Note 3(B), and §2A3.4, Application Note 4(B).

(Abusive Sexual Contact), respectively. Because 18 U.S.C. § 250 only increases the maximum penalties of such substantive violations, it should be governed by the same provisions of the Guidelines as the substantive offenses.

Section 250 brings parity to the sentencing scheme for civil rights offenses involving sexual misconduct and other federal sexual abuse crimes. Section 250's graduated sentencing structure largely tracks the sentencing schemes of 18 U.S.C. § 2241 (aggravated sexual abuse), § 2242 (sexual abuse), and § 2244 (abusive sexual contact). It likewise follows that the statute should be governed by the same Guidelines provisions as those Chapter 109A offenses, which is accomplished by the cross reference to §2A3.1 and §2A3.4 in §2H1.1.

D. The Commission's Proposed Amendments to Reference 18 U.S.C. § 2243(c) to §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts).

The Department agrees that a violation of 18 U.S.C. § 2243(c) (sexual abuse of an individual in Federal custody) should be governed by Guidelines §2A3.3, the same provision of the Guidelines that governs 18 U.S.C. § 2243(b) (sexual abuse of a ward). They criminalize similar conduct—sexual abuse of someone in government custody. Enacted as part of the 2022 VAWA Reauthorization, Section 2243(c) expands liability for sexual abuse beyond the prison walls by applying where victims are under arrest, under supervision, or otherwise in detention. Like Section 2243(b), the maximum penalty for a violation of Section 2243(c) is 15 years in prison. Thus, it is appropriate for §2A3.3 to govern convictions under Section 2243(c) and provide a base offense level of 22.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We very much look forward to continuing our work together. We continue to believe that a strong, consistent, and balanced federal sentencing system is important to improving public safety across the country and furthering justice.

Sincerely,

Jonathan J. Wroblewski

Jonathan J. Wroblewski
Director, Office of Policy and Legislation
Criminal Division
U.S. Department of Justice
ex-officio Member, U.S. Sentencing Commission

cc: Commissioners
Kenneth Cohen, Staff Director
Kathleen Grilli, General Counsel

APPENDIX

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable HAYWOOD S. GILLIAM, JR., Judge

UNITED STATES OF AMERICA,	)	**Judgment & Sentencing**
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 22-00016HSG
	)	
JAMES THEODORE HIGHHOUSE,	)	Pages 1 - 60
	)	
Defendant.	)	Oakland, California
_____	)	Wednesday, August 31, 2022

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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EVAN L. HAMLING, ATTORNEYS AT LAW

Reported By:
Raynee H. Mercado
CSR. No. 8258

Proceedings reported by electronic/mechanical stenography; transcript produced by computer-aided transcription.

Wednesday, August 31, 2022 2:26 p.m.

P R O C E E D I N G S

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THE CLERK: Your Honor, we're calling CR22-00016, the United States of America versus James Theodore Highhouse.

Please step forward and state your appearances for the record, please.

MS. GOLD: Good afternoon, Your Honor. My name is Fara Gold on behalf of the United States.

MR. DORENBAUM: Good afternoon, Your Honor. Jaime Dorenbaum for Mr. Highhouse, who is present and out of custody.

THE COURT: Good afternoon.

THE PROBATION OFFICER: Good afternoon, Your Honor. Katrina Chu with U.S. Probation.

THE COURT: All right. Good afternoon to all counsel and Ms. Chu.

We're here for a sentencing hearing in this matter as well. And I have reviewed the presentence investigation report that was disclosed on August 18th, as well as the sentencing memorandum and motion for upward departure or variance filed by the United States, which attached a number of victim impact statements from victims LI, TM, and WP.

I also have reviewed the sentencing memorandum filed on Mr. Highhouse's behalf.

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appropriate way to go, although I think that to -- excuse me -- it's a 5K2.0 and 3553(b) allows a departure for sex offenses. So I think it could be a departure, although I think it's properly -- or it's better suited for a variance.

THE COURT: All right. Fair enough. I will table -- I'll table that question. I think the least thorny way to address it would be in a variance if that's the direction I decided to go.

Any motion for departure on the defendant's part, Mr. Dorenbaum?

MR. DORENBAUM: No, Your Honor.

THE COURT: All right. So I'm then required under Section 3553(a) to consider a number of factors to arrive at a sentence that is sufficient but no greater than necessary to accomplish the objectives of the sentencing law, taking into account the nature and circumstances of the offense, the history and characteristics of the defendant, the need to avoid unwarranted sentencing disparities, and the types of sentences available. I can consider factors such as the seriousness of the offense, the need to foster respect for the law, the need to impose just punishment, the need to accomplish both general and specific deterrence, and accommodate the potential for rehabilitation.

So as is my usual practice, I'll share with you my impressions of -- of those factors. And then I'll hear from

the parties.

With respect to the nature and circumstances of the offense, it's hard to come up with the right words to describe how egregious an abuse of these victims this was.

The record here shows that for a period of around nine months, the victim to which the defendant pled guilty to abusing engaged in coerced sexual assault, oral sex, and coerced sexual intercourse with some form of coerced sexual activity essentially at least weekly, escalating from groping to fondling through forced oral sex and forced sexual intercourse.

And so the frequency of this conduct is clearly something that contributes to my view that the offense was exceptionally serious. Unspeakably serious.

It also is clear from the record that the defendant relied on the inherent coercion that came with this victim and the other victims being inmates at a prison. He essentially preyed on women who could not consent and were not free to say no.

And beyond that, the defendant used his position as a chaplain to further the coercion and predation that he committed in this offense.

It's clear from the record that a number of victims had significant past trauma including sexual assault. They were incredibly vulnerable. They came to the defendant for

counseling because of his position as a religious leader, and instead he used that authority to commit the abuse. And one of the victims even reports that the defendant referenced Bible stories and verses as part of the pressure to coerce the victim into the sexual acts that were committed here.

And the victim also says that the defendant told her that no one would believe her if she told someone because no one would question a chaplain. So this was -- whether or not the abuse of position of trust enhancement under the guidelines formally applies, there's no question that the record shows that this offense was the result of very direct abuse of both the defendant's position as a prison official and, in particular, an abuse of the vulnerability of women who came to him for spiritual counseling and instead were abused.

And I note that a number of other victims have come forward with very similar accounts of sexual abuse, physical sexual abuse, sexual language, and emotional abuse by asking clearly inappropriate sexually-related questions. So this was part of a far-ranging pattern.

It is also very significant to me that when confronted by federal investigators, the defendant lied on multiple occasions and denied what he did. He blamed the victims and he characterized them as manipulative or grandiose storytellers when in fact they were telling the complete truth.

And he made up a story about the victim being the initiator of the criminal sexual contact, which was false. And then he even recanted that story and went back to his original false claim that he never had any sexual contact with the victim. And that is, in my view, a significantly aggravating factor as well.

So just to summarize all of that, it's very clear to the Court that this offense was an egregious abuse of the public trust that comes with serving in a correctional institution. The defendant violated the oath that he swore to uphold the Constitution and fulfill his duty as a public servant. And that egregious abuse, as the letters and other materials submitted by the victims make clear, had devastating consequences for physically and emotionally vulnerable women and has caused them lasting and devastating harm. And their statements speak very clearly to that.

And as I mentioned, some of the victims had been prior victims of sexual assault which only increases the depth of the trauma that the defendant's crimes inflicted on them.

With respect to the history and characteristics of the defendant, I think the record is fairly characterized as mixed in many ways. The defendant had no prior criminal record. He served in the military in Afghanistan and Iraq and received a number of commendations for his service there. It appears undisputed that has been diagnosed with post traumatic stress

disorder based on that service.

And so all of that is in many ways a jarring contrast to the crimes for which the defendant now stands here for sentencing.

I did also find the court's findings from the family law case involving the defendant and his wife -- I believe it was a custody case -- troubling. And obviously it's one thing if there are allegations and parties have different perspectives on what happened, but there were actual findings at paragraph 130 that are -- paragraphs 130 and 131 that were recounted in which the family court actually found that there was overwhelming evidence that there was considerable risk to the minor if she had continued contact with the defendant here, and made a number of findings based on the record before it about some very disturbing things that were reported by the defendant's daughter.

And that is something that the Court also has to take into account in assessing the nature and circumstances or history and characteristics of this defendant in assessing the nature of the need for protection of the public going forward.

Now, here the question of sentencing disparity is again an interesting one in that, as I said, I was amazed when I saw what the guidelines range for this conduct is. It seems, as the government is pointing out and the Probation Department is essentially agreeing, radically inconsistent with the actual

nature of the harm done in terms of the frequency, the seriousness of the offense, and all the factors that I just talked about.

So on the one hand, sentencing disparity, you know, always tends in some general sense to cut toward a guideline sentence, but on the other hand, I think here the particular facts including the sheer number of instances of abuse, not all of which could even be cataloged and charged, I think the government had to pick some number, but it's clear based on the record that there were many more instances of this sort of abuse, that it just strikes me that the guidelines here substantially underrepresent the seriousness of the conduct.

I can't think of a case in which I've ever varied upward, but this case strikes me as that case.

And then finally in terms of promoting respect for the law, accomplishing just punishment and accomplishing general and specific deterrence, all of those weigh heavily on my mind and weigh in favor of a substantial sentence of imprisonment.

And the fact that the defendant was reported as saying something to the effect of, "Well, if you report me anyway I'll just get a slap on the wrist," I think speaks to what appears -- and this is not in the record in this case -- but appears to have been a culture of the rat at Dublin. And it is important that the world see that this egregious conduct carries egregious and serious consequences in terms of

penalty.

So with that, I will hear from counsel for the United States, I'll hear from counsel for Mr. Highhouse.

And, Mr. Highhouse, you'll have the opportunity to say anything that you would like.

Now, obviously the government and the Probation Department are asking for not just a variance but a many multiples of the guidelines range. And I will be interested to understand as best I can what the basis in the record is for the departure or the variance of the magnitude that's being requested because, you know, I'm sure everyone would agree it's an unusual request. And the request may be unusual and appropriate given the factors that I've talked about, but I am interested to understand the basis for the conclusion that the recommended upward variance is sufficient but no greater than necessary, which is what I'm charged to determine in a circumstance like this.

Ms. Gold.

MS. GOLD: Yes, Judge. Before I start argument, I just want to acknowledge that there's an open phone line for interested parties and specifically the victims to call in. So I just want to acknowledge those that are likely on the phone. I wasn't able to confirm, but I do know that we reached out to them.

I'm going to refer to them with first names if that's okay

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THE DEFENDANT: Yes, Your Honor. I'd like to express my apology and regret to the victim, to the government, and to the Court. I'm deeply sorry. And I regret to be in this position, and I regret putting anyone in a place of harm and sincerely apologize. And I ask for forgiveness.

Thank you.

THE COURT: All right. Thank you.

All right. Anything further before I impose sentence?

MS. GOLD: No, Your Honor.

MR. DORENBAUM: No, Your Honor.

THE COURT: All right.

I'll begin where I started at the beginning of the hearing, which is I can't recall seeing an instance in which there's such a disconnect between the guidelines range that is prescribed for an offense and the severity of the conduct actually at issue here.

And I really do take government counsel's point that capping essentially the consideration under the guidelines at six instances just radically under-accounts for the seriousness of a circumstance like this which is systematic, knowing, predatory conduct over a long period of time that is enabled by the inherent power imbalance between the defendant and a prison inmate, and is a function of the fact that they are both legally incapable of consenting and, as a practical matter, incapable of truly consenting.

It's not going too far to say that this is rape in the way that the government counsel put it.

And so I do have a policy disagreement with the guidelines in that regard. It's just -- in a circumstance like this one, it's clear to me that the guidelines range does not adequately capture the seriousness of the offense and adequately accomplish the objectives of Section 3553(a), including the protection of the public, imposing just punishment, and accomplishing general and specific deterrence.

The difficult question then becomes what is the principal basis for arriving at a number. It's helpful to understand the mathematical basis behind the government's proposal and the Probation Department's proposal.

And ultimately I'm in agreement with the recommendation of the Probation Department that an 84-month sentence is sufficient but no greater than necessary to account for the exceptional severity of this offense. And that is a substantial upward variance. It's almost three times the high end of the guidelines range.

And that decision is justified by the fact, as we've talked about at length here, the systematic nature of the conduct, the length of time that the conduct occurred, the number of instances of abuse, sexual assault and rape, the involvement of multiple victims who were also inmates at Dublin and were subjected to the same sort of abuse. And in

at least one instance, another victim was subjected to sexual intercourse three to five times. Others were asked obviously grossly inappropriate sexual questions.

The overall record here is of sustained predatory behavior against traumatized and defenseless women in prison.

So I am confident and comfortable that an upward variance of the degree that we have talked about and that the Probation Department recommends is sufficient but no greater than necessary to accomplish those objectives.

And I respect the recommendation the United States has made. I respect the arguments that the defense has made. I gave you all the time to be heard fully because this is an important issue to have fully vetted.

But ultimately on -- and I do take the government's point, too, that by definition, you would think that prison officials will not have prior records. That is something that hadn't occurred to me, but it's true.

So this is somewhat different circumstance than a Criminal History Category I might normally be because, by definition, it's hard to believe that someone with a Criminal History Category VI could ever be in this position.

But regardless, I do take the point that this is possibly the only -- the first time that the defendant was caught. But on balance and in light of the undisputed PTSD that the defendant has -- which, just to be very clear, and I think the

government put this exactly right, that is not an explanation, it's not an excuse, it's not something that I view as in the nature of "I couldn't help myself" -- I think that the defendant made a lot of statements like that -- and I think that those have to be absolutely rejected.

The idea that "These were temptresses and I was in a position where I didn't do a good enough job of staying out of temptation's way," that is absolutely something I reject.

But in terms of deciding this question of what is sufficient but no greater than necessary under the circumstances and viewing the defendant in the context of his entire life, as I'm required to do, I am of the view that a seven-year sentence is sufficient. It is serious. It's appropriately serious. And it is, in my view, the correct balance, taking all the factors that I'm required to consider into account.

And so consistent with that finding, I will impose sentence as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that James Theodore Highhouse is hereby committed to the custody of Bureau of Prisons to be imprisoned for a term of 84 months.

This term consists of 84 months on Counts One, Two, and Five, and 24 months on Counts Three and Four, all counts to run concurrently.

And I take it, Ms. Chu, that is still an accurate statement with the -- even with the correction.

THE PROBATION OFFICER: Yes, Your Honor.

THE COURT: All right.

Upon release from imprisonment, the defendant shall be placed on supervised release for a total term of three years. This term consists of three years on each of Counts One through Four and one year on Count Five, all terms to run concurrently.

Within 72 hours of release from the custody of Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall comply with the standard conditions that have been adopted by this Court, except that the mandatory drug testing provision is suspended, and shall comply with the following additional conditions including that the defendant must comply with the third-party risk notification.

Now I know on that issue there's been recent Ninth Circuit law, and I trust that the notification language has been modified or conformed to that?

THE PROBATION OFFICER: So, Your Honor, I believe our office is working on that because the J and C is a court document. We've been considering different options. But what

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don't, I'm sure the government will move for immediate remand, and that's something I would strongly consider.

So between now and your self-surrender date, be certain to comply scrupulously with all of the terms of your release.

THE DEFENDANT: (Nods head.)

THE COURT: Do you agree?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Is there anything further for today?

MS. GOLD: No. Thank you, Your Honor.

THE PROBATION OFFICER: No, Your Honor. Thank you.

MR. DORENBAUM: Thank you.

(Proceedings were concluded at 3:59 P.M.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.

Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Monday, September 5, 2022