



Office of the Deputy Attorney General
Washington, D.C. 20530

October 17, 2022

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:

Please accept my personal congratulations to you and your fellow commissioners on your confirmation to the U.S. Sentencing Commission and the commencement of this new amendment year. The work of the Commission is critical to both improving public safety and ensuring that our federal criminal justice system is fair and just to all. We are eager to work with the Commission over the coming months to address the many issues it faces, and we pledge our full support for your work.

I write to reinforce and supplement the priority areas that we identified in our September 12th annual report to the Commission. We were gratified that the Notice of Proposed 2022-23 Priorities issued by the Commission at the end of September included many of those pressing issues. The policy agenda the Commission has identified is substantial and reflects the range of the Commission's statutory responsibilities, including implementing critical legislation, overseeing the systemic health of the federal sentencing system and its structural elements, resolving circuit conflicts, addressing individual guidelines in need of reform, studying sentencing practices, and more. We recognize that this amendment year is abbreviated and that the Commission cannot address every important issue this year. Nonetheless, I write to emphasize the importance of two pressing areas that the Commission is well-situated to address immediately.

A. Sexual Abuse by Federal Corrections Employees and the Need to Strengthen Section 2A3.3

The Department believes that it is critically important for the Commission this year to review – and strengthen – the guideline provisions for sexual abuse committed by federal corrections employees against those in their custody, and to implement guideline provisions for new sexual misconduct statutes that were recently enacted under the 2022 Reauthorization of the Violence Against Women Act (VAWA) and took effect on October 1, 2022.¹

¹ See 18 U.S.C. § 2242(3) (Sexual Abuse via Lack of Consent or Coercion); 18 U.S.C. § 2243(c) (Sexual Abuse of An Individual in Federal Custody); and 18 U.S.C. § 250 (Civil Rights Offenses Involving Sexual Misconduct).

Over the last eighteen months, at my direction, the Department has engaged in an in-depth review of the operations of the Federal Bureau of Prisons (BOP), including the appointment of a new BOP Director, Colette Peters. We have identified troubling instances of horrific sexual abuse by BOP staff. We shared examples in our September 12th report to the Commission, and we will provide more information to you if it would be helpful.

Our responsibility to those in federal custody demands that we take every action we can to eliminate sexual abuse. Individuals in custody deserve to be safe and secure, particularly from abuse and harm at the hands of BOP's own employees. Director Peters and I are working to implement an array of policy and operational changes to address the problem. But Director Peters and I strongly believe that accountability and deterrence are key elements of any effective strategy to eliminate sexual abuse, including accountability and deterrence through criminal prosecution and proportionate sentencing where warranted.

In that vein, I have instructed United States Attorneys to make prosecution of sexual abuse by federal correctional employees a top priority. And I am asking the Commission to take up the issue of sentencing policy for these offenses this year, as the current guidelines dramatically understate the severity of the sexual abuse conduct at issue.

As we stated in our 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 and are at odds with the statutory maximum penalties provided by Congress and the far more onerous guidelines that apply to other comparable sex offenses. Under Section 2A3.3, the base offense level for such offenses is level 14, which corresponds to a sentencing range of only 15 to 21 months imprisonment for a defendant in the lowest criminal history category.² The absence of enhancements or upward adjustments in Section 2A3.3 to address egregious offenses in the prison setting leaves applicable guideline ranges inadequate. As we stated in our annual report, the large gap between the default sentence under the applicable guideline and the maximum penalty provided by Congress lays bare the failure of this guideline to achieve the sentencing objectives set forth in 18 U.S.C. § 3553(a). Our annual report provides more detail about our request, as well as our recommendation that the Commission consider several new statutes enacted as part of the 2022 VAWA Reauthorization Act to determine the appropriate and necessary updates to the guidelines for those provisions. We can provide further information as you need it.

I am writing and asking you to take up this issue because it is a vitally important element of the Department's work to overhaul the BOP so that it meets its dual responsibility to provide a safe, secure, and humane prison environment and to assist offenders in returning to their communities as productive and law-abiding members. We hope you will consider this request and include this issue in your notice of final priorities.

² Most, if not all, defendants prosecuted under this statute are federal employees, who by nature of their occupation and conditions of employment, will not have a criminal history.

B. The Bipartisan Safer Communities Act and the Need to Amend Section 2K2.1

We were gratified that the Commission identified as a priority for this amendment year not only implementation of the recently enacted Bipartisan Safer Communities Act (BSCA) but also making “any other changes that may be warranted to appropriately address firearms offenses.” As you know, during the pandemic, the country has seen a rise in homicides, aggravated assaults, and firearms offenses more generally, and the Attorney General and I have instituted a number of initiatives to address violent crime. The BSCA is an element of the solution, and a full review of the sentencing guidelines for firearms offenses and the reform of Section 2K2.1 are necessary.

The Department therefore asks the Commission to undertake a broader review of Section 2K2.1 at the same time it reviews the guideline to implement the BSCA, rather than wait to consider other important revisions. As described more fully in the materials attached as Appendix A and Appendix B, the Department encourages the Commission to simplify this oft-confusing guideline, by converting several factors that affect the base offense level (including the type of weapon and recidivism enhancements) into specific offense characteristics. The Department also encourages the Commission to address several pressing national problems, including firearms without serial numbers known as ghost guns, transfers of firearms to minors, and the dangers posed by domestic abusers who possess guns and those who repeatedly engage in firearm offenses. Finally, we encourage the Commission to eliminate the categorical approach from this particular guideline (while continuing to encourage the Commission to eliminate the categorical approach from the guidelines entirely).

We look forward to working with the Commission during the remainder of the amendment year to craft amendments to Section 2K2.1 that will adequately and fully address the problem the country is facing and the significant flaws in current sentencing policy concerning firearms offenses.

Thank you for considering these comments. We look forward to working with you and the entire Commission – in this amendment year and beyond – to address the issues we raise here and to improve federal sentencing policy more generally. Together, we think we can make the federal criminal justice system more just and our fellow citizens more safe.

Sincerely,



Lisa O. Monaco
Deputy Attorney General

Attachments

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