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).

* * *

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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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