

United States Sentencing Commission

Written Testimony

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February 2023



I. Introduction

The Victims Advisory Group (“VAG”) appreciates the opportunity to provide information to the Sentencing Commission (“Commission”) regarding its proposed amendments to the Sentencing Guidelines (“Guidelines”). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from around the country. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars.

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II. Sexual Abuse Offenses

A. Sexual Abuse Offenses While Committing Civil Rights Offenses

Sexual violence is among some of the most egregious forms of victimization – causing physical, psychological and emotion harms for both victim survivors and their families. Often sexual offenders seek vulnerable victims as targets of their criminal activity. The American criminal justice system recognizes that crimes in general and sexual crimes in particular vary in their form and severity, treating crimes committed against the vulnerable more egregiously. Although these offenders seek out victims wherever they can be found, whether that is in their own home or in their work environment, some target the uniquely vulnerable such as children, subordinates, those dependent on the offender for shelter or food, those under government care, custody or control. These crimes have increased in severity and the law provides for increased punishment to be proportional to the harm caused.

The new statute addressing sexual abuse in the context of civil rights violations has a vast range of punishment with an inadequate penalty at its lowest end given the gravity of sexually contacting a person incapable of consent and completely vulnerable to the offender. A base offense level that reflects the seriousness of such an offense is appropriate, and should be similar to those base offense levels in other types of offenses addressing the sexual abuse of those unable to legally consent. Those in the custody or control of law enforcement are entitled to the highest level of care.

If 18 U.S.C. § 250 is the offense of conviction, § 2H1.1 should be amended to reflect a higher base offense level, in order to reflect that crimes involving sexual abuse will be treated with the understanding that those who prey on uniquely vulnerable victims should pay a higher penalty than those who do not. The VAG recommends a base offense level increase of at least 7 levels, from a 12 to a 19, in

order to address these concerns. Additional offense characteristics and enhancements should include higher penalties for serious bodily injury and the threat of force.

B. Criminal Sexual Abuse of a Ward or Person In Custody

Addressing sexual violence must be a priority in any criminal justice system. Victims of sexual violence often suffer ill effects like increased suicidal ideation, drug and alcohol abuse, difficulty in forming emotional attachments, and many other mental health issues. Vindicating victims' rights after they suffer such crimes is paramount. Those in the care, custody and control of the government are analogous to child victims in that they have no ability or capacity to meaningfully consent to sexual activity, and are uniquely vulnerable to the offenders of those who would abuse them. The VAG agrees with the Department of Justice that the statutory penalty for 18 U.S.C. § 2243(c) is quite severe but is not reflected appropriately in the Guidelines. The Guidelines in § 2A3.3 currently call for a base offense level that equals barely a year in custody, while the statutory maximum is a 15-year custodial sentence. The Commission should consider raising the base offense level to reflect the seriousness sexual violence requires. Widening this gap, there are also no enhancements for especially egregious cases, effectively conveying to courts there is virtually no reason to sentence offenders to long custodial sentences regardless of the level of violence or injury that accompanied the offense. Additionally, the lack of enhancements completely fails to account for the circumstances of each victim of this crime. The government has a duty of care to those in its custody, regardless of the circumstance that brought about that custodial situation.

In contrast, other federal sexual abuse crimes have far higher base offense levels. 18 U.S.C. § 2241 ("Aggravated sexual abuse") and 18 U.S.C. § 2242 ("Sexual abuse"), have base offense levels of 30 and 32, respectively, if the victim is in custody. While those offenses have an element of coercion, it is clear that anyone already a ward or in custody of the government is in a far inferior power position and thus, consent of any kind cannot be legally recognized because the coercion is already present in the systemic situation which provides the locus for the sexual abuse. Sexual abuse and violence cannot ever be tolerated, and Congress has now seen fit to criminalize "knowingly engage(ing) in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody," essentially expanding the prohibition on sexual abuse of a ward to all federal law enforcement, and not just inside federal facilities.¹ This change is recognition that society will not, and should not, tolerate sexual abuse of any kind by anyone within federal jurisdiction. Therefore, a base offense of 25 is far more appropriate than 14. The Commission should also consider an abuse of trust enhancement for § 2A3.3. This will

¹ 18 U.S.C. § 2243(c).

ensure that courts properly evaluate the power differential between offender and victim in a meaningful way. Additionally, rather than applying cross references, adding enhancements for actions involving serious injury and/or threat of force would address those particularly egregious cases of sexual abuse inside the same Guideline, which promotes a less complex sentencing scheme.