

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION
ON PROPOSED AMENDMENTS TO THE GUIDELINES

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Chair, Practitioners Advisory Group

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Good Morning, my name is Natasha Sen, and on behalf of the Practitioners Advisory Group, I thank you for the opportunity to provide testimony to the Commission regarding three proposed amendments to the U.S. Sentencing Guidelines that the Commission is currently considering. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We appreciate the Commission's willingness to consider our positions on the Commission's proposed amendments to the Guidelines.

My testimony will address the PAG's positions on proposed amendments regarding: (1) motions for compassionate release; (2) the use of acquitted conduct in calculating a defendant's guidelines range; and (3) offenses where law enforcement or correctional officers sexually abuse individuals in their care, custody or supervision.

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III. Proposed Amendment to U.S.S.G. §2A3.3, Sexual Abuse of a Ward

The PAG supports the revisions under Part A of the Commission’s proposed amendment to §2A3.3 as these appear to be technical changes to make the guideline consistent with recently enacted legislation.

With respect to Part B of the proposed amendment, the PAG appreciates the Department of Justice’s request that the sexual abuse offense guideline be amended based on its investigation that identified “troubling incidents of horrific sexual abuse [of federal detainees] by BOP staff.”⁸ The PAG agrees that offenses involving BOP staff sexually assaulting detainees in BOP or other facilities is not sufficiently punished under the current Guidelines scheme, but the PAG believes that the Commission’s current proposal sweeps too broadly. As a result, the PAG cannot support this well-intentioned proposal.

The proposed amendment would increase the base offense level by 8 levels, from 14 to 22, for all offenses where §2A3.3 is applied. The reason for the proposed change is to account for, and appropriately punish, the particular harms caused to those who are sexually assaulted by law enforcement officers and correctional personnel while in their custody. Congress enacted new legislation targeting this particular conduct, which is found at 18 U.S.C. § 2243(c).

⁷ See, e.g., Prohibiting Punishment of Acquitted Conduct Act of 2021, 117 S.601.

⁸ Letter from Deputy Attorney General L. Monaco to Judge C. Reeves at 2 (Oct. 17, 2022).

The proposed amendment, however, is not narrowly tailored to address crimes committed by law enforcement officers and correctional personal who sexually assault persons in their custody. In addition to applying to law enforcement officers and correctional personnel, this proposed guideline, if adopted, will apply to defendants convicted of crimes defined by 18 U.S.C. § 2243(b) (commission of a sexual act by a guardian on an officially detained ward) and 18 U.S.C. § 113(a)(2) (assault with intent to commit another felony).

The impact of this amendment is dramatic. For individuals in criminal history category I, the bottom of the guideline range would increase from 15 months (base offense level 14) to 41 months (base offense level 22). This is a 173% increase in the lowest term of incarceration. Thus, under the proposed amendment, defendants who are not law enforcement officers or correctional personnel will face substantially increased sentences, not based on the circumstances of their particular offense, but because the applicable guideline is amended to account for the particularly egregious conduct of a discrete population of offenders that fall within the purview of §2A3.3.

The PAG suggests that the Commission consider a narrower approach that addresses the specific conduct at issue. For example, creating a specific offense characteristic that provides an enhancement for those defendants convicted under the new statute, 18 U.S.C. § 2243(c).

Part B of the proposed amendment also proposes a cross-reference in §2A3.3 to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). The impact of the proposed amendment would be substantial. A defendant's base offense level would increase from 14 to a minimum of 30. In criminal history category I, that would alter the lower end of the guideline range from 15 months to 97 months, a greater than six-fold increase.

The basis for this proposed change is to bring §2A3.3 in line with §2A3.2, which already contains this cross-reference. Superficially, it appears to make sense to have both §2A3.3 and §2A3.2 cross-reference §2A3.1 if there are facts establishing that criminal sexual abuse as defined in 18 U.S.C. § 2241 or § 2242 occurred. There are, however, qualitative differences between crimes against minors under the age of 16, the harm that §2A3.2 targets, and crimes against wards (who may be adults), the harm targeted by §2A3.3. Minors cannot consent to any sexual act with an adult by virtue of their age. Adults, even wards, can consent in some circumstances. The Commission already recognizes these differences – the base offense level for crimes sentenced under §2A3.2 is 4 points higher (18) than those sentenced under the current version of §2A3.3 (14).

The PAG believes that additional guidance would be necessary if §2A3.3 is amended to include the cross-reference to §2A3.1. As currently designed, the PAG cannot support either part of the proposed amendment.