

**Federal Public and Community Defenders
Comment on Sexual Abuse Offenses Amendments
(Proposal 9)**

March 14, 2023

Federal Public and Community Defenders, along with our CJA colleagues, represent 80 to 90 percent of all individuals prosecuted in federal court. We are deeply concerned about the safety and wellbeing of our clients (and others) in federal custody. And we appreciate that the Commission seeks to address the epidemic of sexual misconduct in BOP and other custodial settings. Our testimony laid out the reasons that the Commission should stay its hand instead of drastically increasing the §2A3.3 BOL.¹ In this comment, we address matters that were raised at the February 2023 hearing on this topic.

We note that this is not the first time DOJ's mismanagement of its staff has prompted it to seek an increase in punishment. Despite previous upward ratchets to the §2A3.3 guideline and § 2243(b) statutory penalties over the years, the well-documented sex abuse problem in BOP has persisted for decades. The DOJ OIG issued a report in 2005 on the sex abuse problem within BOP.² In 2007, DOJ requested an additional increase to §2A3.3's BOL; the Commission then raised §2A3.3's BOL from 12 to 14.³ Sixteen years later,

¹ We incorporate by reference the written testimony of Heather E. Williams, submitted for the recent hearing. ("Williams Test.") It is attached to this Comment.

² See U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* 3 (2005), <https://bityl.co/H97T> ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff."). This report followed the 1999 GAO report that also documented sexual misconduct in BOP. See Gov't Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), ("1999 GAO Report"), <https://bityl.co/HAFo>.

³ Section 401 of the PROTECT Act directed, among other things, that the "Commission shall amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b)." Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003). In 2004, DOJ urged a two-level increase in the §2A3.3 BOL, arguing, without an empirical basis, that "the 2A3 guidelines should be increased to maintain proportionality with the increases in the 2G guidelines," and recommended raising the BOL from 9 to 12. Deborah Rhodes, DOJ Comments Regarding 2004 Proposed Amendments at 13 (Mar. 1, 2004), <https://bit.ly/3ZYDVEh>. The Commission accordingly raised the §2A3.3 BOL from 9 to 12 in 2004, citing to the PROTECT Act. See USSG App. C, Amend 664 (Nov. 1, 2004), <https://bit.ly/3mCyZXk>. In 2007, DOJ requested that the Commission raise the BOL to 20. See Benton Campbell, DOJ Comments Regarding 2007 at 6 (March 30, 2007), <https://bit.ly/3l7UOxM>. Instead, the Commission raised the BOL to 14, noting that "section 207 of the Adam Walsh Act increased the statutory maximum term of imprisonment under 18 U.S.C. § 2243(b) from 5 years to 15 years for the sexual abuse of a person in official detention or under custodial authority." USSG app. C, Amend. 701 (Nov. 1, 2007), <https://bit.ly/3YG641W>.

DOJ and BOP have still not meaningfully addressed the ongoing misconduct within their own facilities,⁴ yet DOJ asks again for an increase in severity of punishment, without adequately explaining why this time it will be different.

The Commission asked genuinely good questions at the hearing. And certain misstatements by DOJ's witness at the hearing underscore the importance of pausing to gather data and accurate information.

I. DOJ and BOP have the power to prevent this conduct.

Despite the significant body of literature to the contrary, at the February 24, 2023 hearing, the DOJ witness speculated that the well-accepted research on deterrence might not apply in the specific context of §2A3.3 cases because prison employees are a discrete community to whom DOJ could broadcast a guideline increase through “supervisory channels.”⁵

Although this argument is contradicted by the well-established body of general deterrence literature,⁶ DOJ's emphasis on the “special context” of employee-driven sexual assaults does contain one kernel of insight: it highlights that DOJ and BOP are in a unique position to prevent this conduct from occurring in the first place.

DOJ cannot implement surveillance and management policies in every public space in the nation to prevent unknown future crimes such as robbery. By contrast, it could utilize the “supervisory channels” in its own facilities to curb the epidemic of abuse and culture of impunity that pervade them.

⁴ This problem requires BOP to make sweeping systemic policy and culture changes—changes they claim to be working to implement. *See Williams Test. supra* note 1 at 3; *see also* Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons*, at 1 (2022), <https://bit.ly/H9sF> (“Senate Sexual Abuse Report”); U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), <https://bit.ly/GxJW> (“DOJ Sexual Abuse Report”).

⁵ *See* Oral Testimony of Principal Associate Deputy Attorney General Marshall Miller (Feb. 24, 2023), <https://bit.ly/3Jz23bt> (“Miller Test.”).

⁶ *See* Daniel S. Nagin, Deterrence, *Reforming Criminal Justice Vol 4: Punishment, Incarceration, and Release*, Vol. 4 20 (2017), <https://bit.ly/3LhOxdj>.

Yet even though BOP already has the ability to closely monitor its employees, thoroughly surveil the premises, and implement systems to prevent this epidemic of abuse, it has failed to do so for decades.⁷ Both Congress and the DOJ Working Group have recently emphasized that BOP still has far to go to effectively implement those systems.⁸ DOJ should focus on implementing these systemic controls using their supervisory channels to keep victims safe, not on pursuing enhancements to the sentencing guidelines which have yet to deter misconduct.⁹ DOJ's unsupported deterrence argument serves only to illustrate the troubling institutional focus on punishment instead of front-end prevention to keep our clients safe in custody.¹⁰

⁷ See 1999 GAO Report at 2 (recommending that BOP “develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons.”).

⁸ See Williams Test., *supra* note 1 at 8–10 (summarizing recommended institutional reforms in BOP). See also Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, AP (Feb. 6, 2022), <https://bitly.co/GxJ2>.

⁹ See *id.* DOJ's witness also relayed an anecdote about the former FCI Dublin chaplain prosecuted in *United States v. Highhouse*, who told his victim that he would face only a “slap on the wrist.” According to DOJ's witness, this comment showed “awareness in the population that there are light penalties applicable here.” But DOJ's own sentencing memorandum in *Highhouse* does not support this argument; that memorandum shows that the chaplain was referring to employment consequences, not criminal penalties. Gov't Sent. Memo., *United States v. Highhouse*, 4:22-cr-00016 ECF 23 at 5 (N.D. Cal. Aug. 24, 2022); See also Miller Test., *supra* note 5. Indeed, the *Highhouse* sentencing memo underscores our basic point: employees at FCI Dublin were immersed in a culture of impunity because—in an institution where the PREA compliance officer was himself a sexual abuser—there was no *certainty* or *speed* in detection and consequences. Impunity at Dublin, and elsewhere in federal corrections, flows from culture, not any defect in §2A3.3.

¹⁰ It also wholly ignores the nearly one-third of §2A3.3 cases sentenced in the past 10 years that did not happen in BOP prisons. This analysis was performed in part using data extracted from the Commission's “Individual Offender Datafiles” spanning fiscal years 2012 to 2021, combined with publicly available information in charging documents obtained via PACER. The Commission's “Individual Offender Datafiles” are publicly available for download on its website. See USSC, Commission Datafiles, <https://bitly.co/HBGG>. Of the 65 cases sentenced nationwide under primary guideline §2A3.3 between fiscal years 2012 and 2021, charging documents indicate that roughly one-third involved conduct that occurred in a non-BOP facility

The DOJ's highest priority should be a commitment to protecting our clients, and of course all of BOP's charges, from sexually abusive corrections employees and law enforcement officers, but its statements to the Commission during the February 24, 2023 hearing, belie that commitment. The Commission could, for example, ensure that victims of sexual misconduct are able to get speedy sentence reductions via § 3582(c)(1)(A). But the DOJ remains focused on criminal prosecution, instead of quickly removing our clients out of harm's way.¹¹ As addressed in our testimony, a reactive punishment increase should not be the first response.

Prior to making any changes to §2A3.3's BOL, we urge the Commission to pause and let DOJ and BOP implement the changes they have promised. DOJ has also pledged to prioritize prosecutions, which could increase the certainty of apprehension and result in more data. In the meantime, the Commission can take other actions outside of drastically raising the BOL.¹²

II. There is a need for additional, accurate data collection.

We have asked the Commission to engage in additional data collection and analysis instead of imposing a dramatic, unstudied increase to §2A3.3's

such as DOJ or DHS-contracted private jails, immigration detention facilities, tribal jails, or military facilities. *See* USSC, Commission Datafiles, <https://bitly.co/HBGG>.

¹¹ DOJ's request comes despite significant problems in how BOP handles complaints of sexual abuse. At the hearing, the DOJ witness and chair of the Working Group tasked with addressing this type of misconduct within BOP, could not answer Vice Chair Murray's question regarding the timeline for administrative complaints. *See* Miller Test., *supra* note 5. But, the recent Senate Report found that the BOP Office of Internal affairs, which investigates staff misconduct, found has an 8,000-case backlog, with some reports pending for more than five years. *See* Senate Sexual Abuse Report, *supra* note at 3.

¹² *See* Williams Test., *supra* note 1 at 6 ("the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm's way") (citing Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent'g Rep. 12 (2022), <https://bitly.co/GzMJ>).

base offense level.¹³ And certain incorrect statements by DOJ's witness at the hearing showed why accurate data collection is critical.

First, at the February 24, 2023 hearing, the DOJ witness stated twice, incorrectly, that “upward departures have been occurring at an unusually high rate with respect to this guideline, over the last 5 years” and that “over the last five years 25% of [2A3.3] cases have involved upward departures.”¹⁴ This claim—like the broader impression the DOJ tried to convey that most judges generally find §2A3.3 too lenient—is not factually supported:

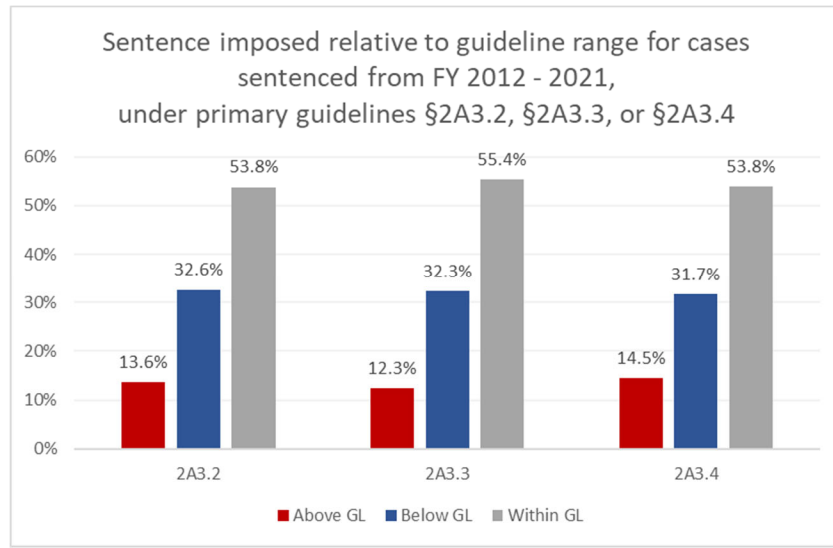
- Of the 22 cases sentenced under primary guideline §2A3.3 in the past five fiscal years, 18% involved upward departures, not 25%.¹⁵
- Although DOJ pointed to the elevated upward departure rate compared to the pool of all federal offenses, over the past ten fiscal years, the distribution of sentences in §2A3.3 cases are not outliers compared to similar sex abuse guidelines, as the following figure illustrates:¹⁶

¹³ For an individual in Criminal History Category I, increasing §2A3.3's base offense level from 14 to 22 would result in a jump of advisory guideline range from 15–21 months to 41–51 months; in other words, it would increase the low end by 173% and the high end by 143%.

¹⁴ Miller Test., *supra* note 5.

¹⁵ It is possible there was confusion between cases with a count of conviction under § 2243(b), as opposed to cases sentenced under primary guideline §2A3.3. This analysis was performed using data extracted from the Commission's “Individual Offender Datafiles” spanning fiscal years 2017 to 2021. The Commission's “Individual Offender Datafiles” are publicly available for download on its website. USSC, Commission Datafiles, <https://bitly.co/HBGG>. And a slightly greater percentage of §2A3.3-as-primary-guideline cases received a within-guidelines sentence (55%) than the percentage of within guidelines sentence (49%) across all cases sentenced nationwide from FY2017 to FY2021. *Id.*

¹⁶ See USSC, Commission Datafiles. This figure shows the distribution of sentence placement relative over the past 10 fiscal years, compared to its neighbors in the Manual, §2A3.2. (Sexual Abuse of a Minor) and §2A3.4. (Abusive Sexual Contact).



The Defenders also agree with the Practitioners Advisory Group (“PAG”), whose Chair noted that the §2A3.3 guideline encompasses a broad range of conduct and statutes of conviction. In fact, out of the 65 cases sentenced under primary guideline §2A3.3 cases over the past ten fiscal years, eight cases involved a sole substantive count of conviction under 18 U.S.C. § 1001, without a recorded conviction under § 2243(b).¹⁷ The cases also encompassed a wide range of statutes beyond § 2243(b).¹⁸

Likewise, the DOJ witness was confused as to where these offenses originate, stating that “almost all of these cases” involved BOP employees. But a review of the facts alleged in those 65 cases reveals that although nearly two-thirds of the cases arose out of BOP facilities, the rest originated in other facilities, including private contract jails and immigration detention centers.¹⁹ And the new subsection, § 2243(c), will encompass a broad range of potential offense conduct, settings, and actors.

¹⁷ See USSC, Commission Datafiles.

¹⁸ The 65 cases also included convictions under 18 USC § 1001 (falsification or false statement), 18 USC § 1153 (Major Crimes Act offenses), 18 USC § 1791 (contraband in prison), 18 USC § 2244(a)(4) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities if doing so would violate § 2243(b)), 18 USC § 2244(b) (knowingly engaging in sexual contact without permission in certain prisons or custodial facilities). And, as PAG points out, §2A3.3 is also indexed to 18 USC § 113(a)(2) in Appendix A of the Manual.

¹⁹ See *supra* note 10.

Second, the Commission should also gather more information on the interplay between the current guideline and the other proposed amendments. At the hearing, questions were also raised regarding proportionality between this guideline and its neighbor, §2A3.2 (Sex abuse of a minor). While it is a complex issue, we agree with the PAG: §2A3.3 covers a wide variety of conduct, much of which is simply different in kind from sexual abuse of a minor. This is reflected in the wide range of sentences under §2A3.3, and more study is needed to determine the proper calibration for the range of offense conduct that falls within §2A3.3.

Third, we know nothing about the offenses sentenced under § 2243(c), the new subsection indexed to §2A3.3.²⁰ The Commission should wait for the forthcoming GAO report. It should also undertake a careful analysis of sentencing for these new offenses. In addition, the DOJ witness promised to “come back with data across the board” which could also assist the Commission in its study.

In sum, Defenders urge the Commission to gather and closely evaluate the data on these offenses, as well as how §2A3.3 interacts with other relevant guidelines. Defenders urge an approach that pauses the reactive ratchet, focuses on empirical evidence, and acknowledges the importance of prevention over after-the-fact punishment.

²⁰ The subsection is so new that not only does the Commission public dataset have no information, but also an attempt to perform a PACER reports search by citation of any criminal cases brought under the new § 2243(c) subsection in 12 of the busiest districts in the country (S.D. Tex.; W.D. Tex.; D. Ariz.; S.D. Cal.; D.N.M.; C.D. Cal.; S.D.N.Y.; E.D.N.Y.; D.D.C.; S.D.Fl.; and D.P.R.) on March 4, 2023, could not be completed because there was no search by citation drop-down menu option for § 2243(c) offenses, unlike the older § 2243(a) and (b) subsections.

**Before the United States Sentencing Commission
Public Hearing on the Sexual Abuse Offenses
Amendments**

Statement of Heather E. Williams,
Federal Public Defender for the Eastern District of California,
on Behalf of the Federal Public and Community Defenders

February 24, 2023

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**Statement of Heather E. Williams
Federal Public Defender for the Eastern District of California
on Behalf of the Federal Public and Community Defenders
Before the United States Sentencing Commission
Public Hearing on the Sexual Abuse Offenses Amendments
February 24, 2023**

Honorable Chair Reeves, Vice Chairs and Distinguished Commissioners:

I. Introduction

In January, I got an email from one of my District's CJA Panel lawyers. He had a female client facing sentencing and, given she's from Sacramento, he meant to ask the sentencing judge for a recommended prison designation of FCI Dublin, the nearest federal Bureau of Prisons (BOP) women's facility. The email, entitled "*Dublin Prison also called 'Rape Club'.*" originated from his out-of-custody client who was highly concerned for her own safety if sentenced to prison. The email included several links to articles describing reported abuses by prison employees and one link to a Department of Justice (DOJ) press release describing the December 2022 guilty verdicts against a former FCI Dublin prison warden for sexual abuse of women held in custody.¹

Defenders are in a unique position in responding to this horrific issue. It easily could have been one of my clients asking the heartbreaking question: will I be safe in prison? Defenders frequently represent people who have been—or will be—victimized by prison guards, jail staff, or law enforcement, and we bear firsthand witness to the devastation and trauma wrought by these experiences. No person sentenced to federal prison should be punished

¹ See Chandra Bozelko, *When a prison is known as the 'rape club,' our justice system has a credibility problem*, USA Today (Dec. 17, 2022), <https://bitly.co/H5GO>; Bob Egelko, *Advocates, employees say abuses at Dublin prison will continue without 'real changes'*, S.F. Chron. (Dec. 12, 2022), <https://bitly.co/H5GT>; Lisa Fernandez, *Dozens of women detail rape and retaliation at Dublin prison, real reform is questioned*, KTVU FOX 2 (updated Sept. 25, 2022), <https://bitly.co/H5GY>; Press Release, U.S. Dep't of Just., *Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates* (Dec. 8, 2022), <https://bitly.co/H5Ge>; Ray J. Garcia, *Former warden at female prison known as 'rape club' guilty of sexually abusing women behind bars*, L.A. Times (Dec. 8, 2022), <https://bitly.co/H5Gm>.

with a regime of terror and abuse. People should never emerge from prison more broken than when they entered.

But what we know from representing both victims and those accused of crimes is that the best way to protect people—like the woman whose email landed in my inbox—from being preyed on while in prison is to change the institutional culture of the federal correctional system. Ratcheting up penalties does not advance that goal.

II. The DOJ has abdicated its duty to protect the safety and health of those in its custody and care.

There is an epidemic of federal correctional officers sexually abusing and sexually terrorizing people in their custody. This represents the DOJ's moral failure to protect those in its care.² Over the past three years, the scope and severity of this misconduct has emerged in horrifying detail. These reports eventually prompted government oversight action, including the

² My remarks focus primarily on the well-documented abuse and neglect within the BOP. But the culture of carceral cruelty and abuse in government-run and contracted facilities extends well beyond the BOP. *See, e.g.,* Seth Freed Wessler, *The Justice Department Will End All Federal Private Prisons, Following a 'Nation' Investigation*, *The Nation* (Aug. 18, 2016), <https://bit.ly.co/GzLQ> (describing investigation documenting “more than two dozen questionable deaths and widespread medical negligence” in private federally contracted prisons); Southern Poverty Law Center, et al., *Shadow Prisons: Immigrant Detention in the South* at 4 (2016), <https://bit.ly.co/GzKt> (describing how the “immigrant detention system is . . . rife with civil rights violations and poor conditions. . . .”); Eillen Martinez, et al., *‘They Treat Us Like Dogs’: ICE’s Medical Negligence & Abuse*, *MedPage Today* (Feb. 27, 2022), <https://bit.ly.co/GzL3> (documenting pervasive abuse in immigration detention); American Civil Liberties Union, *Sexual Abuse in Immigration Detention*, <https://bit.ly.co/GzL8> (interactive map of sexual abuse complaints unearthed through ACLU’s FOIA requests); University of Washington, Ctr. for Hum. Rts., *Conditions at the NWDC: Background, Methodology, and Human Rights Standards*, <https://bit.ly.co/H9r0> (documenting “key areas where conditions . . . at [Northwest Detention Center] diverge from . . . international human rights standards”); U.S. Dep’t of Just., Off. of the Inspector Gen., *Audit of the U.S. Department of Justice’s Oversight of Non-Federal Detention Facility Inspections* at 4, 6 (2013), <https://bit.ly.co/H1ma> (finding U.S. Marshal Service (USMS) failed to provide adequate oversight to “ensure a safe, secure, and humane environment for federal detainees housed in non-federal facilities”); Seth Freed Wessler, *Inside the US Marshals’ Secretive, Deadly Detention Empire*, *Mother Jones* (Nov.-Dec. 2019), <https://bit.ly.co/H1vm> (noting former DOJ official’s report that the USMS operates with “an attitude of indifference,” leaving local “jails to do what they will”).

United States Senate Permanent Subcommittee on Investigations' December 2022 report, which found that "BOP employees sexually abused female prisoners in at least *two-thirds* . . . of federal prisons that have held women over the past decade."³ The accounts from FCI Dublin reveal the ingrained culture of sexual exploitation and abuse of people in federal custody.

Federal corrections is septic with a problem that has been known and documented for decades.⁴ The problem is fundamentally cultural; late last year, a Deputy Attorney General working group, convened to investigate sexual misconduct within the federal correctional system, concluded that the federal correctional system is plagued by a "culture of permissiveness toward staff misconduct and retaliation against victims who report abuse."⁵

Disturbing institutional facts bear this out. BOP's Office of Internal Affairs, responsible for investigating staff misconduct, has an 8,000-case backlog, with some reports pending for more than five years.⁶ The process for handling reported misconduct under the Prison Rape Elimination Act (PREA) is a failure. The DOJ has, at times, assigned PREA complaint investigations to correctional staff who were themselves sexually assaulting women in their care.⁷

Victims brave enough to speak out do so at a cost. At FCI Dublin, officials retaliated against women who reported sexual assault by placing

³ See Staff Rep. S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs., *Sexual Abuse of Female Inmates in Federal Prisons* at 1 & Ex. 1 (2022) (emphasis added), <https://bit.ly.co/H9sF> (hereinafter *Senate Sexual Abuse Report*).

⁴ See U.S. Dep't of Just., Off. of the Inspector Gen., *Deterring Staff Sexual Abuse of Federal Inmates* at 3 (2005), <https://bit.ly.co/H97T> ("The OIG has investigated hundreds of allegations of sexual abuse of inmates by BOP staff.").

⁵ U.S. Dep't of Just., *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons* at 6 (2022), <https://bit.ly.co/GxJW> (hereinafter *DOJ Sexual Abuse Report*). Congress agrees. See Senate Sexual Abuse Report at 3; see also Press Release, Sen. Dick Durbin, Statement on Resignation of Director Carvajal from Federal Bureau of Prisons (Jan. 5, 2022), <https://bit.ly.co/GxPO> ("For years, the Bureau of Prisons has been plagued by corruption, chronic understaffing, and mismanagement.").

⁶ Senate Sexual Abuse Report at 3.

⁷ Michael Balsamo & Michael R. Sisak, *AP investigation: Women's prison fostered culture of abuse*, Associated Press (Feb. 6, 2022), <https://bit.ly.co/GxJ2>.

them in solitary confinement.⁸ At FMC Carswell, women who reported sexual abuse were placed in solitary confinement or received “diesel therapy”—where they were placed on transports and relocated from Carswell to a another facility, potentially hundreds of miles away from their families.⁹ Time and again, the media has unearthed evidence of federal correctional employees pressuring incarcerated people not to report sexual abuse.¹⁰ These problems stem from failures of investigation, procedure, and integrity, not a failure of the sentencing guidelines to adequately punish.

Discovery of this sexual abuse epidemic has occurred amidst other significant institutional failures. A series of reports issued by the DOJ’s Office of Inspector General (OIG) paint a damning picture of neglect and mismanagement in federal corrections:

- Numerous OIG reports describe how the federal prison system catastrophically failed to protect individuals in its care from the ravages of Covid-19;¹¹

⁸ *Id.* (describing how woman reporting her prison sexual assault was “punished with three months in solitary confinement and a transfer to a federal prison in Alabama”).

⁹ Kaley Johnson, *Exclusive: Fort Worth Carswell women’s prison plagued by sexual abuse, cover-ups*, Fort Worth Star-Telegram (Sept. 2, 2022), <https://bit.ly.co/GxNf>.

¹⁰ Balsamo & Sisak, *supra* note 7.

¹¹ See, e.g., U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complex Butner* at ii (2021), <https://bit.ly.co/H25Z> (describing numerous violations of BOP and Centers for Disease Control and Prevention (CDC) guidance concerning social distancing, quarantining, personal protective equipment (PPE) use, and use of home confinement authority); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Milan* at ii (2021), <https://bit.ly.co/H25j> (describing failures of social distancing and appropriate PPE use); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complex Coleman* at ii-iii (2021), <https://bit.ly.co/H25p> (describing numerous deficiencies including failures to provide basic sanitation products to incarcerated individuals and refusing to allow staff to wear face coverings until three months into the pandemic); U.S. Dep’t of Just., Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Institution Terminal Island* (2021), <https://bit.ly.co/H25z> (documenting numerous failures to follow CDC and BOP guidance, resulting in catastrophic Covid-19 outbreak within FCI Terminal Island);

- A 2018 OIG report documents systemic failure to provide appropriate therapeutic care to women with histories of trauma;¹² and
- A 2017 OIG report reflects systematic abuse and neglect of people held in custody who struggle with mental illness. According to this report, these individuals are often warehoused in restrictive housing units for months—or even years. Only “3 percent of the BOP’s sentenced inmate population” receive regular mental health treatment, despite the fact that “45 percent of federal inmates ha[ve] symptoms or a recent history of mental illness.”¹³

Nor does the federal correctional system respond to outside auditors or oversight. In 2019, the OIG placed BOP under an “ongoing policy development review” because of what it termed “*significant delays* in the

U.S. Dep’t of Justice, Off. of the Inspector Gen., *Remote Inspection of Federal Correctional Complexes Oakdale and Pollock* at ii (2020), <https://bitly.co/H26D> (identifying “numerous failures in Oakdale officials’ response to the COVID-19 outbreak”); *see generally* Meg Anderson & Huo Jingnan, *As COVID spread in federal prisons, many at-risk inmates tried and failed to get out*, NPR (Mar. 7, 2022), <https://bitly.co/H26H> (documenting BOP’s deficient Covid-19 response and the resulting pain, suffering, and death).

¹² As the OIG again found, even though “[r]esearch . . . recommends that female inmates undergo trauma treatment early during incarceration,” the federal correctional system elected to “assign[] only one staff member at each institution to offer” trauma treatment, meaning it “may not be able to provide its trauma treatment program to all eligible female inmates until late in their incarceration, or ever.” U.S. Dep’t of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons’ Management of Its Female Inmate Population* at i (2018), <https://bitly.co/GxND> (hereinafter *OIG Report on Incarcerated Women*).

¹³ U.S. Dep’t of Just., Off. of the Inspector Gen., *Review of the Federal Bureau of Prisons’ Use of Restrictive Housing for Inmates with Mental Illness* at ii (2017), <https://bitly.co/GxN9> (hereinafter *OIG Report on Mental Illness*). This report goes on to explain that the BOP cannot even “accurately determine the number of inmates who have mental illness” because of widespread reporting failures: “institution staff do not always document mental disorders.” *Id.* And overreliance on restrictive housing continues unabated. Indeed, it has gotten even worse over time. *See* U.S. Dep’t of Just., *Department of Justice Efforts to Ensure that Restrictive Housing in Federal Detention Facilities is Used Rarely, Applied Fairly, and Subject to Reasonable Constraints, and to Implement Other Legal Requirements and Policy Recommendations* at 6 (2022), <https://bit.ly/3S99999> (finding that “restrictive housing placements have increased by 29% since . . . 2016. . .”).

resolution of *multiple* OIG recommendations related to revising or creating BOP policies concerning various correctional and safety issues.”¹⁴

The simple reality, as Senator Jon Ossoff put it, is the federal correctional system is “horribly dysfunctional.”¹⁵ Only by implementing substantial institutional reforms, believing reported abuse when those held in custody are the reporters, and thoroughly and timely investigating claims of misconduct can the DOJ redress these failures and begin to meet the minimum standard of care for our clients and others in its custody. Meanwhile, the only effective way to protect individuals from future abuse and neglect in prison is to responsibly reduce our federal prison population—moving everyone we possibly can out of harm’s way.¹⁶

III. The Sexual Abuse Offenses amendments

The proposed Sexual Abuse Offenses amendments emerge from this backdrop of correctional and law enforcement dysfunction. The Commission proposes three changes:

- 1) update the guidelines to incorporate two new criminal statutes—18 U.S.C. § 250 (referenced to §2H1.1 and addressing *Offenses Involving Individual Rights*) and § 2243(c) (referenced to §2A3.3 and addressing *Criminal Sexual Abuse of an Individual in Federal Custody*);

¹⁴ U.S. Dep’t of Justice, Off. of the Inspector Gen., *Impact of the Failure to Conduct Formal Policy Negotiations on the Federal Bureau of Prisons’ Implementation of the FIRST STEP Act and Closure of Office of the Inspector General Recommendations* at 1 (2021) (emphases added), <https://bitly.co/GxNt>.

¹⁵ Chloe Folmar, *Senate group to examine federal prison system after corruption, abuse allegations*, The Hill (Feb. 17, 2022), <https://bitly.co/GxPk>.

¹⁶ See generally Stephen R. Sady, *Advice to New Commissioners: The U.S. Sentencing Commission Should Address the Failure of the Bureau of Prisons to Adequately Implement Statutes that Reduce Prison Time*, 35(1) Fed. Sent’g Rep. 12 (2022), <https://bitly.co/GzMJ>.

- 2) add a blanket 8-level increase to §2A3.3's base offense level (BOL) from 14 to 22, more than doubling the recommended advisory guideline range;¹⁷ and
- 3) add a cross reference from §2A3.3 to §2A3.1 (*Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse*) “[i]f the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242).”

We object to the proposed 8-level increase to §2A3.3's BOL.¹⁸ The grotesque rate of sexual abuse against people in custody indicts the ingrained culture of abuse and neglect in federal detention. But reflexively increasing penalties will not deliver what is most desperately needed: swift and immediate intervention to move victims to a place of safety and to provide care, followed by a timely and thorough investigation. There is no reliable, objective study or evidence that these guideline changes would protect people in prison from further abuses. To the contrary, our country's historic instinct to address every crisis by ratcheting up criminal penalties gives the United States the ignominious distinction of having the highest incarceration rate per capita in the world, without commensurate public safety gains.¹⁹

The proposed BOL increase is no solution to federal corrections' systemic cultural dysfunction. This amendment may distract from measures the federal correctional system needs to undertake. It is unlikely to deter

¹⁷ Under the current §2A3.3, the recommended advisory guideline range for an individual in Criminal History category I is 15-21 months. *See* USSG, Ch. 5, Part A. Under the proposed amendment, that range will leap to 41-51 months, meaning the advisory range will call for sentences approximately 250% longer than it does now.

¹⁸ This increase has its origins in the DOJ's most recent annual letter to the Commission. *See* DOJ Annual Letter to the U.S. Sentencing Commission at 21-22 (Sept. 12, 2022).

¹⁹ *See* Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2022* (Mar. 14, 2022), <https://bit.ly.co/H24g> (“The U.S. locks up more people per capita than any other nation, at the staggering rate of 573 per 100,000 residents.”); *see also* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1319-20 (2005) (describing institutional dynamics making “the guidelines a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense judgments of frontline sentencing professionals who apply the rules”).

future abuse. And it is inconsistent with this Commission's duty to fashion evidence-based, deliberative responses to "carry out an effective, humane, and rational sentencing policy."²⁰

A. Addressing the sexual violence epidemic within DOJ institutions requires systemic institutional reform.

As both the DOJ and Congress have repeatedly recognized, federal corrections need to be overhauled.²¹ To address the overlapping crises within federal corrections, the DOJ must undertake systemic institutional reform by:

- 1) recruiting, properly training, and supervising rehabilitation-focused staff;²²
- 2) fixing the federal correctional system's dilapidated and unsafe infrastructure;²³

²⁰ 28 U.S.C. § 995(a)(20).

²¹ See, e.g., Majority Staff, H. Subcomm. on Nat'l Security of the Comm. on Oversight & Accountability, Mem. on Independent Investigations and Employee Discipline at the Bureau of Prisons 1 (Jan. 2, 2019), <https://bit.ly.co/GxJK> (describing "ample opportunity for misconduct to be glossed over and retaliation and intimidation to prevail"); Senate Sexual Abuse Report at 3; DOJ Sexual Abuse Report at 2 (recommending the BOP "chang[e] the culture and environment in BOP facilities" to prevent sexual abuse); see also OIG Report on Incarcerated Women at i-ii (finding systematic failures to provide appropriate programming, including trauma care, to incarcerated women); OIG Report on Mental Illness at i-ii (finding systematic failures to appropriately care for people with mental illness).

²² See *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 7 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), <https://bit.ly.co/HAF7> (acknowledging as inadequate the mere five weeks of formal training for new federal correctional officers); *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov't Affs.*, 117th Cong. 3 (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), <https://bit.ly.co/HAF7> (explaining that ending epidemic of sexual violence within federal corrections "begins with changing the culture and environment in Bureau facilities").

²³ See DOJ Sexual Abuse Report at 9 (federal correctional system needs significant technological upgrades and to overhaul their video monitoring and retention system to keep incarcerated people safe); *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 7 (statement

- 3) implementing policies that empower people in prison to assert their rights and get help from their attorneys;²⁴ and
- 4) reducing our prison population.

Doubling down on punishment through a sweeping, dramatic enhancement to §2A3.3's BOL won't do anything to accomplish these critical cultural and policy changes. Instead, consistent with its statutory obligations,²⁵ the Commission should recommend specific changes to our federal correctional system's nature and capacity, including:

- Increased community-based corrections use;
- Increased sentence reduction eligibility and availability under the Residential Drug Abuse Program (RDAP) by allowing individuals with detainers to participate, maximizing the length of sentence reductions, increasing community corrections participation in RDAP, and

of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22, <https://bitly.co/GxNz> ("Infrastructure within many [BOP] facilities is rapidly deteriorating and in need of extensive work and repairs to maintain safe, secure, and functioning correctional institutions.").

²⁴ The DOJ must empower the people it imprisons to report staff misconduct, and the federal correctional system needs to listen to and believe those people when they do so. The Deputy Attorney General has recently recognized BOP "should adopt an early-intervention approach that identifies warning signals and enables and rewards reporting." DOJ Sexual Abuse Report at 6. Nor is this recommendation new. In fact, over twenty years ago, the Government Accountability Office (GAO) made similar recommendations to BOP. Government Accountability Office, *Women in Prison: Sexual Misconduct by Correctional Staff* 2 (1999), <https://bitly.co/HAFo> ("We are making a recommendation to the Director, BOP, to develop systems and procedures for monitoring, analyzing, and reporting allegations of staff-on-inmate sexual misconduct in federal prisons."). But more is needed. The DOJ also needs to facilitate confidential and easily accessible communication lines between people in prison and their attorneys, who can bring abuse and neglect to the DOJ's attention. Too often, attorney/incarcerated client communication difficulties result because facilities lack private phone, mail, or email options for such privileged and sensitive communications.

²⁵ *See* 28 U.S.C. § 994(g) (The Commission "shall make recommendations concerning any change or expansion in the nature or capacity of [penal, correctional, and other] facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter.").

eliminating mere firearm possession as disqualification for RDAP sentence reductions;²⁶

- Eliminating sentence computation rules that create longer sentences based on:
 - 1) refusals to provide pretrial custody credit for time spent in immigration detention;
 - 2) failures to award pretrial custody credit for state concurrent sentences; and
 - 3) failures to award good time credits for time in state custody on partially concurrent sentences;²⁷ and
- Maximizing the First Step Act’s Earned Time Credit program implementation.

Overcrowded prisons create conditions for abuse, neglect, and impunity.²⁸ To keep people safe, the Commission should prioritize measures to ensure that nobody remains in prison longer than absolutely necessary.

²⁶ The firearm- and detainer-based disqualifications appear nowhere in the statute and are simply BOP policy decisions. *See Jacks v. Crabtree*, 114 F.3d 983, 985 n.2 (9th Cir. 1997) (DOJ’s concession that individuals serving time for firearm possession “are eligible under section 3621(e)(2)(B)” for the RDAP reduction); BOP Program Statement 5331.02, Early Release Procedures Under 18 U.S.C. § 3621(e) at 5 (March 16, 2009), <https://bit.ly.co/HBEE> (precluding individuals with detainers from obtaining early release through RDAP).

²⁷ *See Sady, supra* note 16, at 17 (describing the federal correctional system’s sentence computation rules that—in a manner “inconsistent with the relevant statutes”—serve to “increase[] sentences by failing to count time in official detention, by creating de facto consecutive sentences, and by failing to provide good time credits for the concurrent portion of federal sentences served in state custody”).

²⁸ *See Morag MacDonald, Overcrowding and its impact on prison conditions and health*, 14(2) Int’l J. of Prisoner Health 65, 65 (2018), <https://bit.ly.co/GxOS> (“Overcrowded prisons can lead to insanitary, violent conditions that are harmful to the physical and mental well-being of prisoners.”); Stephanie Baggio, et al., *Do overcrowding and turnover cause violence in prison?*, 10 Frontiers in Psychiatry 1, 3 (Jan. 2020), <https://bit.ly.co/GxOR> (“Reduction of prison overcrowding and turnover appear critical to reduce prisoners’ vulnerability. . . .”); *see also Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 6 (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), *supra* note 22

B. The proposed 8-level increase to §2A3.3's base offense level will not deter sexual assault.

In contrast to the systemic interventions described above, the proposed 8-level increase to §2A3.3's BOL will not effectively deter future abuse. The general deterrence benefit of "severe prison terms, specifically, is quite limited."²⁹ As the DOJ's National Institute of Justice has explained, "increasing the severity of punishment does little to deter crime"—"[t]he certainty of being caught is a vastly more powerful deterrent."³⁰

This applies with special emphasis to sexual assault perpetrated by correctional or law enforcement personnel, for whom the consequences from detection and prosecution are already severe. As a class, law enforcement and correctional employees who commit sexual assault already face catastrophic punishment once their conduct is discovered:

- 1) losing their profession,
- 2) the lifelong collateral consequences of a federal felony conviction, and
- 3) potentially, an even more ruinous status transformation from correctional officer to sex offender.³¹

Instead, law enforcement and correctional officers commit sexual abuse crimes because the culture of corrections doesn't take those offenses seriously, and because they know—based on institutional failures to investigate these crimes—that it is highly unlikely they will be caught. To prevent sexual abuse of people in prison, the focus must be on increasing "the

(anticipating "capacity deficits of 3,054 for medium security male facilities and 1,743 for low security male facilities" as of September 29, 2022).

²⁹ Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 821 (2016) ("The lost deterrence function in lengthening sentences is also likely due, to a significant degree, to the recognition from behavioral law and economics studies that offenders often are not rational thinkers who carefully measure the benefits of their actions against potential distant or long-term legal consequences.").

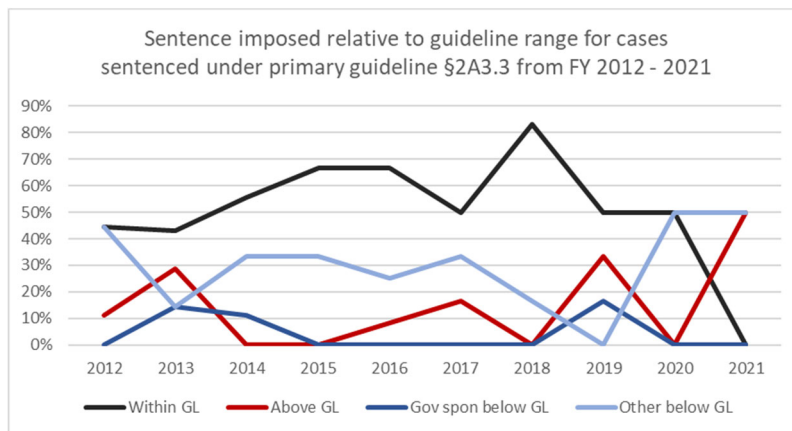
³⁰ U.S. Dep't of Just., Nat'l Inst. of Just., *Five Things About Deterrence* at 1 (May 2016), <https://bityl.co/GxO2>.

³¹ See *United States v. Fuentes*, 856 F. App'x 533, 534 (5th Cir. Aug. 18, 2021) ("[A]n offense under § 2243(b) is a 'sex offense' under SORNA.").

certainty of being caught,” not “the severity of punishment.”³² Further enhancing the guidelines punishment—over and above the current sentencing range and the other profoundly life-altering consequences that flow from a § 2243 conviction—is unnecessary.

C. The proposed increase fails to discharge the Commission’s obligation to devise a rational sentencing system through a deliberative, evidence-based approach.

Finally, the Commission should not adopt the proposed amendment to §2A3.3’s BOL because it does not represent a careful, evidence-based, deliberative approach to this guideline. Historically, §2A3.3—which covers an enormous range of conduct—has been infrequently applied.³³ As such, sentences under §2A3.3 vary substantially. From FY2012 through FY2021, roughly 55% of cases sentenced under primary guideline §2A3.3 received a within-guidelines sentence, 32% received a below-guidelines sentence, and 12% of cases received an above-guidelines sentence.³⁴



These data do not support categorically increasing §2A3.3’s BOL by 8 levels. Instead, they suggest differing conduct that can result in radically different sentences. Before amending §2A3.3, the Commission must conduct a

³² See *Five Things About Deterrence*, *supra* note 30.

³³ According to data extracted from the Commission’s “Individual Offender Datafiles” spanning fiscal years 2012 to 2021, only 65 cases were sentenced under primary guideline §2A3.3. The Commission’s “Individual Offender Datafiles” are publicly available for download on its website. USSC, Commission Datafiles, <https://bityl.co/HBGG>.

³⁴ See *id.*

more searching, prospective study of the cases to which §2A3.3 applies and the sentences imposed under it.

This is particularly true given the enormous Congressional-, Executive-, and Commission-driven changes coming to §2A3.3.

Congress recently enacted two new criminal statutes—18 U.S.C. §§ 250 and 2243(c). Limited sentencing information exists for prosecutions under either of these statutes. But that will change: Congress, in enacting these new offenses, required the Attorney General to document the “number of reports made, during the previous year, to Federal law enforcement agencies regarding persons engaging in a sexual act while acting under color of law,” and the GAO to provide “a report on any violations of section 2243(c) of title 18.” Both reports are due March 15, 2023. These reports will provide important information that the Commission should carefully consider before increasing §2A3.3’s BOL.

The Executive, too, promises significant action in this arena. The DOJ recently indicated it plans to prioritize prosecutions of correctional and law enforcement personnel who perpetrate sexual abuse, meaning the Commission should soon have significantly more sentencing data on sentences imposed under §2A3.3.³⁵ As of August 2022, BOP has a new director, Collette Peters, who has promised to prioritize cultural change.³⁶ Instead of intervening to try to redress federal correctional dysfunction through a likely ineffectual change to §2A3.3’s BOL, the Commission should hold back and ensure that accountability remains squarely on those who are truly responsible for fixing this problem: the DOJ and the federal correctional system itself.

Finally, the Commission has proposed indexing § 2243(c) to §2A3.3 and expanding §2A3.3’s title to expressly cover *Criminal Sexual Abuse of an*

³⁵ DOJ Sexual Abuse Report at 2-3.

³⁶ See *Sexual Abuse of Female Inmates in Federal Prisons: Hearing Before the S. Perm. Subcomm. on Investigations of the Comm. on Homeland Sec. & Gov’t Affs.*, 117th Cong. 3, *supra* note 22 (committing to “changing the culture and environment in Bureau facilities”).

Individual in Federal Custody.³⁷ If implemented, this expansion of §2A3.3 has the potential to significantly change the pattern of cases sentenced directly under it.

Given the enormous variety in sentences imposed under §2A3.3 so far (i.e., before adding § 2243(c) convictions) and the significant changes to §2A3.3's underlying statutory, enforcement, and guideline regimes either already enacted or in the works, this is not the time to adopt a blanket, 8-level increase to §2A3.3's BOL. Instead, the Commission should forebear from increasing §2A3.3's BOL until it has thoroughly examined these changes' impact on §2A3.3 sentencings, so it can ensure any amendment to §2A3.3 is careful, deliberative, and evidence based.³⁸

III. Conclusion

The only realistic way to keep people safe from the enormous perils of federal incarceration—including the intolerable risk of sexual assault by correctional officers—is to decrease the criminal legal system's reflexive reliance on lengthy incarceration and to change the institutional culture of federal corrections.

We therefore welcome this cycle's amendments recognizing the wrongheadedness of imprisoning people by default instead of as a last resort. And we oppose any proposed amendments that will further our country's position as world leader of mass incarceration.

As to §2A3.3's proposed BOL 8-level increase from 14 to 22, we encourage the Commission to defer any decision until more information is available. Thank you for inviting me to testify before you again.

³⁷ 18 U.S.C. § 2243(c)—which criminalizes sexual abuse “of an individual in federal custody”—provides that “[w]hoever, while acting in their capacity as a Federal law enforcement officer, knowingly engages in a sexual act with an individual who is under arrest, under supervision, in detention, or in Federal custody, shall be fined under this title, imprisoned not more than 15 years, or both.”

³⁸ See *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (“[T]he Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.”) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).