No More Math Without Subtraction:
Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors

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The Federal Sentencing Guidelines consist of rules adding up months and years of punishment based on aggravating factors, and policy statements prohibiting or discouraging subtraction based on mitigating factors. After nearly twenty-five years of sustained but impotent criticism of the Sentencing Commission's math-without-subtraction system, the Supreme Court, in *Booker v. United States*, 543 U.S. 220 (2005), and subsequent decisions, ruled that the Commission's rules and policy statements are no longer mandatory. Instead, judges *must* now consider all relevant mitigating factors and *must* impose a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing. The Court recommended that the Commission learn from the sentencing data and statements of reasons that result from the new system and revise its guidelines and policy statements accordingly.

From early 2009 to early 2010, the Commission held regional hearings throughout the country to hear the views of judges, lawyers, probation officers and academics on the new system and, important to the Commission, how it could remain relevant. Countless witnesses advised the Commission, among other things, that mitigating factors *are* relevant to the purposes of sentencing, and that it should either relegate its restrictive policy statements to a historical note or affirmatively recognize that mitigating factors are relevant.

In a recent survey, large majorities of judges informed the Commission that the mitigating factors that its policy statements deem "never" or "not ordinarily relevant" are in fact "ordinarily relevant."[1] In fiscal year 2010, judges varied (and occasionally departed) below the guideline range in 17.8% of cases.[2] The government sought sentences below the guideline range in 21.4% of cases based on cooperation or fast track, and in an additional 4% of cases for other reasons.[3]

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[1] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl. 13 (2010), [hereinafter USSC, *2010 Survey of Judges*], *available at* http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

[2] USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. N (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm.

[3] *See supra* note 1.

Concerned by data showing that departures are becoming obsolete in favor of variances,[4] the Commission proposed issues for comment regarding whether and how certain offender characteristics should be relevant to departure.[5] After massive public comment and testimony,[6] the result is partly smoke and mirrors and partly an effort to control variances. New Introductory Commentary to Chapter 5, Part H acknowledges the existence of *Booker* and § 3553(a), but admonishes judges not to give offender characteristics "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range.[7]

Age, mental and emotional conditions, physical condition, physique, and military service, formerly deemed "not ordinarily relevant," now "may be relevant," but the standard for when factors "may be relevant" focuses not on the purposes of sentencing, but on presence to an "unusual degree" that distinguishes the case from "typical" cases sentenced under the guidelines, the same standard for factors deemed "not ordinarily relevant" before the PROTECT Act.[8] This theory is unsound because it pre-supposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances. It continues to promote math without subtraction and unwarranted

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[4] The Commission was concerned about "an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances." 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). During the first three quarters of 2010, judges relied on departures alone in 2% of cases, departures in combination with § 3553(a) in 1.1% of cases, and § 3553(a) in 14.5% of cases. *See supra* note 2.

[5] *See* Notice of proposed amendments and request for comment, 75 Fed. Reg. 3525 (Jan. 21, 2010). The Commission requested comment on whether it should amend policy statements regarding age, mental and emotional conditions, physical condition, physique, drug or alcohol dependence or abuse, military service, and lack of guidance as a youth.

[6] USSC, Public Hearing Agenda, Mar. 17, 2010, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Agenda.htm; USSC, Public Comment Letters Received by the United States Sentencing Commission In Response to Request for Public Comment, http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[7] *See* Notice of submission to Congress of amendments to the sentencing guidelines effective November 1, 2010, 75 Fed. Reg. 27,388, 27,389-91 (May 14, 2010); USSG, App. C, Amend. 741 (Nov. 1, 2010).

[8] *Compare* 75 Fed. Reg. 27,388, 27,390-91 (May 14, 2010); USSG, App. C, Amend. 739 (Nov. 1, 2010) (factors "may be relevant" if "individually or in combination with other offender characteristics, [they] are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines") *with* USSG §5K2.0 (2002) ("an offender characteristic or other circumstance that is, in the Commission's view, 'not ordinarily relevant' . . . may be relevant . . . if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines").

uniformity by requiring a distinction from "typical" defendants who are sentenced under harsh guidelines that do not take individual mitigating characteristics or circumstances into account.

Drug or alcohol dependence, formerly "not relevant," is now "not ordinarily relevant."[9] A need for substance abuse or mental health treatment may be a reason for a limited downward departure from Zone C to Zone B, but it does not apply to defendants in Zone D, the vast majority of federal defendants; it applies to a very small number of defendants most of whom, according to a Commissioner, are not likely to be in need of treatment.[10] Contrary to the plain language of § 3553(a) and the Supreme Court's decisions, the Commission "advises" that judges "shall" consider its policy statements, whether a "departure" is raised by a party or not, *before* considering § 3553(a), the governing sentencing law.[11]

Fortunately, judges are required to follow the framework set forth in § 3553(a) and the Supreme Court's decisions. Under this framework, judges *must* consider all mitigating factors that are relevant to any purpose of sentencing, are free to ignore or reject contrary policy statements, and need not consider "departures" unless raised by a party. This paper builds on our work during the regional hearings and recent amendment cycle to convince the Commission to either delete its policy statements or bring them in line with current "knowledge of human behavior as it relates to the criminal justice system." 28 U.S.C. § 991(b)(1)(C). It sets forth a number of reasons why judges should *vary* from the guideline range based on mitigating factors that the policy statements continue to prohibit or discourage, and reject the Guideline Manual's math-without-subtraction approach.

Part I explains how the Supreme Court's decisions, and the governing statute, 18 U.S.C. § 3553(a), require that mitigating factors be considered and contrary policy statements ignored. This point may seem obvious by now, but it deserves renewed attention, given some appellate courts' continued reference to policy statements as though they are instructive or even entitled to weight, the Commission's recent amendment to the Application Instructions at § 1B1.1 to improperly suggest that its policy statements take precedence over § 3553(a), and its revamping of the Introductory Commentary to Chapter 5, Part H to generally discourage consideration of mitigating factors, contrary to current Supreme Court law.

Part IV collects the relevant legislative history, information regarding past practice, and amendment history for each of the Commission's policy statements

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[9] 75 Fed. Reg. at 27,390; USSG, App. C, Amend. 739 (Nov. 1, 2010).

[10] *Id.*; U.S. Sent'g Comm'n, Transcript of Public Hearing 27-31 (Mar. 17, 2010), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100317/Hearing_Transcript.pdf

[11] 75 Fed. Reg. at 27,392-93; USSG, App. C, Amend. 741 (Nov. 1, 2010).

prohibiting or discouraging a mitigating factor, as well as empirical research, sentencing statistics, and judicial decisions supporting consideration of the factor. If all you need is empirical research, statistics or caselaw to support a variance based on one of these factors, or if you need to go further and deconstruct a particular policy statement, go to Part IV.

Parts II and III are for hardcore historians who want to know (or need to explain to a judge) how exactly the Commission created its math without subtraction system through policy statements, divorced from congressional intent, reason, empirical evidence, and (now) the law. To that end, Part II explains how the Commission's policy statements are contrary to the system envisioned by Congress in the Sentencing Reform Act of 1984 (SRA) and its legislative history. Part III shows generally how the Commission's policy statements offer little or no useful advice to judges because they were promulgated largely without reason and contrary to past practice, empirical data and national experience.

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OVERVIEW

The Sentencing Commission has often said that it is not possible to write a single set of guidelines that take into account all factors that are potentially relevant to sentencing decisions.[12] The Commission, however, has constructed the guideline rules of a vast, complicated, and heavily weighted array of aggravating factors. At the same time, it has excluded most mitigating factors from the rules, and used policy statements to prohibit or discourage their consideration as grounds for departure.

Before the Guidelines were made law, judges routinely considered all information, aggravating and mitigating, about the offense and the offender. It was understood that "the punishment should fit the offender and not merely the crime."[13] Congress expected this to continue, and codified this principle in the Sentencing Reform Act of 1984 (SRA): "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Congress also encouraged the Commission to include all relevant aggravating and mitigating offense and offender characteristics in the guidelines.[14] It directed the Commission to guard against the inappropriate use of incarceration for defendants who lacked the advantages of education, employment, and stabilizing ties, but encouraged the use of those factors for a variety of other purposes, and did not direct the Commission to place any factors off limits as a basis for leniency.[15] Judges were to impose a sentence different in kind or length from the guideline sentence when it failed adequately to take into account the purposes and factors set forth in § 3553(a).[16] The Commission was not to second guess judicial decisions but to learn from them in revising the guidelines.[17]

The original Commission did not follow these instructions, and also "deviated from average past practice," when judges considered a wide variety of mitigating

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[12] *See* USSG, Ch. 1, Pt. A(4)(b); USSG § 5K2.0, comment. (backg'd); USSC, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (2003) [hereinafter USSC, *2003 Downward Departure Report*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Departures/200310_RtC_Downward_Departures/departrpt03.pdf.

[13] *Williams v. New York*, 337 U.S. 241, 247 (1949).

[14] 28 U.S.C. § 994(c), (d); S. Rep. No. 98-225, at 171-75 (1983).

[15] 28 U.S.C. § 994(e); S. Rep. No. 98-225, at 172-75 (1983).

[16] 18 U.S.C. § 3553(b) (as enacted by Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984)); S. Rep. No. 98-225, at 51-53, 75 (1983).

[17] 28 U.S.C. § 994(o); S. Rep. No. 98-225, at 178 (1983).

factors.[18] As then-Judge and Commissioner Breyer explained, some Commissioners argued that mitigating factors such as age, employment history, and family ties should be included in the guideline rules, but they were not, as one of a number of "'trade-offs' among Commissioners with different viewpoints."[19] The original Commission did not include all "the offender characteristics which Congress suggested that [it] should,"[20] but instead "compromised" by promulgating offender characteristic rules that "look primarily to past record of convictions" to increase punishment.[21] All other offender characteristics were left out of the guidelines.[22] The original Commission included only two mitigating factors in the guideline rules—role in the offense, USSG § 3B1.2, and acceptance of responsibility, USSG § 3E1.1. Justice Breyer later explained that the decision to omit offender characteristics other than criminal history was "intended to be provisional and [] subject to revision in light of Guideline implementation and experience."[23]

For reasons that have never been explained, the very first set of Guidelines, through policy statements, deemed age, educational and vocational skills, mental or emotional conditions, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" as grounds for departure.[24] Drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business were prohibited grounds.[25]

Over the ensuing years, only a small handful of mitigating offense circumstances were added to the guideline rules,[26] no mitigating offender characteristics were added to

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[18] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-19 (1988) ("A fourth kind of compromise embodied in the Guidelines . . . involve[ed] 'trade-offs' among Commissioners with different viewpoints . . . . Such compromises normally took place when the Commission deviated from average past practice . . . . One important area of such compromise concerns 'offender'characteristics.") [hereinafter Breyer, *Key Compromises*].

[19] *Id*. at 19-20.

[20] *Id*. at 19-20 & n.98.

[21] *Id*. & n.96.

[22] Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed. Sent'g Rep. 180, 1999 WL 730985 *5 (Jan./Feb. 1999).

[23] *Id*.

[24] USSG §§ 5H1.1, 5H1.2, 5H1.3, 5H1.4, 5H1.5, 5H1.6, p.s. (Nov. 1, 1987).

[25] USSG §§ 5H1.4, 5K2.12, p.s. (Nov. 1, 1987).

[26] *See* USSG §§ 2D1.1(b)(11) (two-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decreases if defendant receives mitigating role adjustment), 2L1.1(b)(1) (three-level decrease if alien smuggling offense

the rules, and the Commission placed further prohibitions and restrictions on mitigating factors as grounds for departure through policy statements.[27] Further adding to the imbalance, the Commission, beginning with the initial set of guidelines, encouraged numerous upward departures.[28] The commentary to USSG § 1B1.4 acknowledged that "Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline system" (citing 18 U.S.C. § 3661), and also that the Commission had disregarded that statute: "Some policy statements, do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. *See, e.g.*, Chapter Five, Part H (Specific Offender Characteristics)."[29] Chapter Five, Part H prohibits and limits only mitigating factors. The Commission made no apology for its one-way punitive approach or its violation of congressional intent.

When the guidelines were mandatory, the courts were required to follow the Commission's severe guideline rules and policy statements restricting leniency. Section 3553(b) provided that in determining whether the Commission had "adequately taken into consideration" a factor (in kind or degree), the courts were limited to the Commission's "guidelines, policy statements, and official commentary." The Commission lobbied Congress for this provision so that whether it had adequately

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involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

[27] As of November 1, 2010, the following policy statements prohibit downward departure under all or some circumstances: USSG §§ 5H1.4 (gambling addiction), 5H1.7 & 5K2.0 (d)(3) (role in the offense), 5H1.10 (race, sex, religion, socioeconomic status), 5H1.12 (lack of youthful guidance, disadvantaged upbringing), 5K2.0(b) (sex crimes, crimes against children), 5K2.0(c) (multiple circumstances), 5K2.0(d)(2) (acceptance of responsibility), 5K2.0(d)(4) ("not ordinarily relevant" factors not present to an "exceptional degree"), 5K2.0(d)(5) (restitution as required by law), 5K2.12 (personal financial difficulties, economic pressures on a trade or business), 5K2.19 (post-sentencing rehabilitation), 5K2.13 (diminished capacity), 5K2.16 (voluntary disclosure), 5K2.20 (aberrant behavior). The following policy statements deem, either expressly or indirectly, certain factors "not ordinarily relevant" under all or some circumstances: USSG §§ 5H1.1 (age), 5H1.2 (education, vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition, physique, drug and alcohol dependence), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.11 (military, civic, charitable, employment-related contributions and similar good works), 5K2.10 (victim's conduct), 5K2.12 (coercion and duress). USSG § 4A1.3(b)(2)(B) prohibits departures criminal history departures for "armed career criminals" and "repeat and dangerous sex offenders against minors," and USSG § 4A1.3(b)(2)(A) and (b)(3) limit the extent of criminal history departures for both first offenders and career offenders. Under Application Note 6 to § 5C1.1, a judge may grant a departure from Zone C to Zone B in order to impose a nonincarcerative sentence so that the defendant can participate in drug or mental health treatment outside of prison if certain conditions are met.

[28] *See* USSG §§ 5K2.0(a), 4A1.3(a), 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.5, 5K2.6, 5K2.7, 5K2.8, 5K2.9, 5K2.14, 5K2.17, 5K2.18, 5K2.21, 5K2.24.

[29] USSG § 1B1.4, comment. (backg'd).

considered a factor, as revealed by its actual deliberations, could not be challenged in court.[30]

The Supreme Court corrected this unbalanced and unfair approach in *United States v. Booker*, 543 U.S. 220 (2005), by excising § 3553(b), making § 3553(a) the governing law, and reinstating mitigating "history and characteristics" of the defendant and "nature and circumstances" of the offense as principal factors that sentencing courts must consider. The Court further clarified in *Rita v. United States*, 551 U.S. 338 (2007), that sentencing judges need not adhere to a guideline sentence that does not treat offender characteristics properly under § 3553(a). *Id*. at 357. Although various factors are "not ordinarily considered under the Guidelines," section 3553(a)(1) "authorizes the sentencing judge to consider" these factors. *Id*. at 364-65 (Stevens, J., joined by Ginsburg, J., concurring). The Court dispelled any doubt as to whether the Commission's policy statements must be accorded any weight in *Gall v. United States*, 552 U.S. 38 (2007), where it upheld a variance based on a number of factors the guidelines' policy statements prohibited, *i.e.*, voluntary withdrawal from a conspiracy, or deemed "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.[31] *Id*. at 51-60.

In *Gall*, the Court did not address the Commission's conflicting policy statements at all, or impose a requirement on district courts to explain their disagreement with them. However, defense counsel and judges may go further and explicitly critique the Commission's policy statements when, as shown in this paper, they are not based on past practice, empirical data or national experience. *Kimbrough v. United States*, 552 U.S. 85, 96-97, 101-02, 109-11 (2007). A district court "may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views," and "[t]hat is particularly true where . . . the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011). Courts of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge," *Rita*, 551 U.S. at 347, or substitute their own judgment for that of the district court. *Gall*, 552 U.S. at 51-52.

In sum, judges are free to ignore or reject a policy statement prohibiting or disfavoring departure because it fails to treat the defendant's characteristics properly under § 3553(a), *Rita*, 551 U.S. at 357, or because the policy statement is simply not "pertinent," *Kimbrough*, 552 U.S. at101 (quoting § 3553(a)(5)), or "where . . . the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes," *Pepper*, 131 S. Ct. at 1247. Importantly, a judge may not deny a

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[30] *See* Part II.D.2, *infra*.

[31] *See* USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5. While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. *See* USSG § 5K2.0(d)(2).

below-guideline sentence based on a factor that is relevant to one or more purposes of sentencing simply because one of the Commission's policy statement asserts that the factor is never or not ordinarily relevant. *Pepper*, 131 S. Ct. at 1242, 1247-48 (holding that the court of appeals cannot place a categorical bar on considering post-sentencing rehabilitation, as it may be "highly relevant" to the factors and purposes set forth in §3553(a)), regardless of the Commission's policy statement to the contrary); *see also, e.g.*, *United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009); *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009); *United States v. Hamilton*, slip op., 323 Fed. App'x 27, 31 (2d Cir. 2009).

There should now be no question that judges not only may, but *must*, consider all mitigating factors brought to their attention by the defendant in determining an appropriate sentence. This may seem like old news, and the data and case law indicate that this is largely so. But some courts still indicate that the Commission's restrictive policy statements must be considered and possibly even followed.[32]

This approach has been fostered by the Commission. The Guidelines Manual continues to cite 18 U.S.C. § 3553(b) though it was excised by the Supreme Court over six years ago.[33] In a newly revised section of the Manual addressing the "Continuing Evolution and Role of the Guidelines," and now in the Application Instructions, the Commission promotes a "three-step" sentencing procedure, not found in the Supreme Court's cases, which states that its policy statements, listed at § 3553(a)(5), *shall be* considered in all cases and suggests that they take precedence over § 3553(a) in its

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[32] *See, e.g.*, *United States v. Irey*, 612 F.3d 1160, 1218-19 (11th Cir. 2010) (en banc) (quoting a number of policy statements restricting consideration of mitigating factors and stating that by varying below the guidelines, the district court "effectively ignored them all"); *United States v. Stall*, 581 F.3d 276, 288-89 & n.6 (6th Cir. 2009) (referring to it as an "open question" in the circuit whether the district court must consider and follow the policy statements, and citing § 5H1.6 as guidance on whether the district court could consider the defendant's family circumstances); *United States v. Carter*, 530 F.3d 565, 577 (7th Cir. 2008) (reversing district court judge who declined to impose a below-guideline sentence based on public service because he had been "put on notice" at a conference on the guidelines that if he "departed" for a reason without basis in the guidelines, Congress would enact mandatory minimums); *United States v. Omole*, 523 F.3d 691, 698-700 (7th Cir. 2008) (reversing below-guideline sentence based on defendant's young age (20) and lack of serious involvement with the law, citing pre-*Gall* caselaw for the propositions that a "variant sentence based on factors that are particularized to the individual defendant may be found reasonable, but we are wary of divergent sentences based on characteristics that are common to similarly situated offenders," that "the judge's exercise of discretion . . . represent[s] a disagreement with Congress about the appropriateness of a sentence for a given crime," and that "judges are not allowed to simply ignore the guidelines ranges."); *United States v. Renner*, 281 Fed. App'x 529 (6th Cir. 2008) ("Because Renner's medical condition is not ordinarily a relevant ground for imposing a lower sentence under the Guidelines unless it 'is present to an exceptional degree,' the failure to reduce his sentence on the basis of his health-either sua sponte or through a motion for downward departure-was not an abuse of discretion.").

[33] *See* USSG § 5K2.0(a), (b) & comment. (nn.2, 3, 4).

entirety.[34] Several of the policy statements that prohibit or discourage consideration of mitigating factors still purport to apply not only to downward "departures" but to any sentence below the guideline range, and the Commission added commentary in 2010 to suggest that all its policy statements restricting or prohibiting consideration of mitigating offender characteristics for purposes of "departure" also apply to any sentence below the guideline range.[35] Provisions that encourage reliance on aggravating factors to impose above-guideline sentences are not limited to "departures" but refer to any above-guideline sentence.[36]

We recommend that defense counsel generally not rely on the Commission's policy statements regarding "departures" unless they clearly apply to the facts in the case, and raise them only in addition to an argument for a "variance." At the same time, defense counsel should be fully prepared to demonstrate that any given policy statement is not based on empirical evidence, is contrary to sentencing purposes, and is either not explained at all or its explanation is "wholly unconvincing." On their face and in light of their history, the policy statements appear to be nothing more than an effort to prevent judicial discretion and much-needed leniency. Thus, every argument for a below guideline sentence should be framed as a "variance" within the § 3553(a) structure. If in the rare case a "departure" happens to apply, follow up by pointing out that even the Sentencing Commission recognizes this as a ground for leniency. Know your judge, however. Some judges, for whatever reason, prefer to call any below-guideline sentence a "departure."

I. Under § 3553(a) and Supreme Court Decisions, Relevant Mitigating Factors Must Be Considered and Contrary Policy Statements Disregarded.

A. The Judge Must Now Consider Relevant Mitigating Factors, Despite Any Contrary Policy Statement.

Judges must now consider the characteristics of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for "departure" or any other purpose.[37] *See* 18 U.S.C. § 3553(a)(1), § 3661. This

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[34] New application instructions effective November 1, 2010 state that after calculating the guideline range, the court "shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures," and the court "shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." USSG § 1B1.1 (Application Instructions) (Nov. 1, 2010).

[35] *See* USSG, Chapter 5, Part H, Introductory Commentary; USSG §§ 5H1.6, 5K2.0(b), 5K2.0, comment. (n.3(C)); 5K2.10, 5K2.11.

[36] *See* USSG §§ 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.5, 5K2.6, 5K2.7, 5K2.8, 5K2.9.

[37] *See Rita*, 551 U.S. at 364-65 (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well) (Stevens, J., concurring).

principle was first demonstrated in practice in *Gall v. United States*, 552 U.S. 38 (2007). There, the Court upheld a non-guideline sentence in which the judge imposed a sentence of probation based on circumstances of the offense and characteristics of the defendant which the guidelines' policy statements prohibit, *i.e.*, voluntary withdrawal from a conspiracy,[38] or deem "not ordinarily relevant," *i.e.*, age and immaturity, and self rehabilitation through education, employment, and discontinuing the use of drugs.[39] *Id.* at 51-60. In approving the factors upon which the judge relied, the Court made no mention of these policy statements. Thus, *Gall* makes clear that there is no need to *prove* in every case that a contrary policy statement is not based on "empirical data and national experience," *cf. Kimbrough*, 552 U.S. at 109. But as *Pepper* has recently demonstrated, it is advisable to be *prepared* to do so, and, of course, to *respond* to any argument that a policy statement prevents consideration of a relevant circumstance.

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Court held that the Eighth Circuit erred in categorically barring district courts from considering post-sentencing rehabilitation at resentencing after remand. Recognizing that Congress "expressly preserved the traditional discretion of sentencing courts" to consider a largely unlimited scope of relevant information, the Court ruled that post-sentencing rehabilitation may be "highly relevant to several of the § 3553(a) factors," such as the history and characteristics of the defendant as well as the need for deterrence, incapacitation, and to provide needed educational or vocational training or other correctional treatment. *Pepper*, 131 S. Ct. at 1242. In Pepper's case, there was "no question" that Pepper's post-sentencing rehabilitation was relevant to his history and characteristics, shedding light on his likelihood of committing further crimes, suggesting a diminished need for treatment, and "bear[ing] directly on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing." *Id.* at 1242-43.

Although the court of appeals did not rely on a policy statement as a reason for categorically prohibiting consideration of post-sentencing rehabilitation under § 3553(a), the *amicus* appointed by the Supreme Court to defend the Eighth Circuit's judgment (which the government declined to do) argued that USSG § 5K2.19, which prohibits consideration of a defendant's post-sentencing rehabilitative efforts, "should be given effect" as an exercise of the Commission's "core function." *Id.* at 1247. With the issue raised squarely before it, the Court analyzed the Commission's rationale for the policy statement and found it "wholly unconvincing." *Id.* at 1247; *see also id.* at 1254-55 (Breyer, J., concurring) (agreeing that "[t]he Commission offers no convincing justification" for prohibiting post-sentencing rehabilitation"); *id*. at 1258 ("this outcome would not represent my own policy choices" because "postsentencing rehabilitation can

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[38] While voluntary withdrawal from a conspiracy is a factor that may be considered in determining whether to grant a two-level reduction for acceptance of responsibility, *see* USSG § 3E1.1, comment. (n.1(b)), acceptance of responsibility is a prohibited ground for departure. *See* USSG § 5K2.0(d)(2).

[39] *See* USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5.

be highly relevant to meaningful resentencing") (Thomas, J., dissenting). The Court emphasized that "[a] district court may in appropriate cases impose a non-Guideline sentence based on a disagreement with the Commission's views. … That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Id.* (citing *Kimbrough*, 552 U.S. at 101.[40]

Pepper expressly demonstrates not only how a particular mitigating factor may in fact be "highly" relevant to a number of § 3553(a) factors, but also how a policy statement's rationale may be "wholly unconvincing" and thus particularly open to valid policy disagreements. Given that the policy statement was not addressed by any court until *amicus* raised it in the Supreme Court, *Pepper* also demonstrates the importance of being able to prove, whenever necessary, that a policy statement fails to serve the purposes of sentencing, is not based on past practice or empirical evidence, and has no convincing rationale. The means for doing so are in this paper.

B. The Commission's Three-Step Procedure is Contrary to Supreme Court Law, the Law of the Circuits, and Actual Practice.

Some courts still appear to believe that the Commission's restrictions on consideration of mitigating factors must be considered and perhaps even followed. This approach has been fostered by the Sentencing Commission's promotion of a three-step sentencing procedure that purports to elevate its policy statements over the governing sentencing statute and which played a prominent role in the Commission's campaign after *Booker* to ensure that the guidelines and policy statements would be accorded "substantial weight." That history is worth telling, as it reveals the origin and premises of the three-step process now embodied in USSG § 1B1.1, and the Commission's goal in promoting it.

In February 2005, the Commission appeared before the House Judiciary's Subcommittee on Crime and claimed that the guidelines incorporate the sentencing purposes and factors that § 3553(a) directs judges to consider.[41] The Commission asserted that "the factors the Commission has been required to consider in developing the Sentencing Guidelines are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a)," and that the Commission

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[40]For a more thorough discussion of the Court's analysis, see *infra*, Part IV (setting forth the history of §5K2.19 (Post-sentencing Rehabilitation)).

[41] Testimony of Judge Ricardo H. Hinojosa, *Implications of the* Booker/Fanfan *decisions for the federal sentencing guidelines: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the J. Comm.*, 109th Cong. 4 (Feb. 10, 2005) [USSC 2005 Testimony]. The Commission pointed to no evidence in any guideline or reason for amendment that the Commission had actually considered the purposes and factors set forth in § 3553(a) or included them in any guideline.

"has considered the factors listed at § 3553(a)."[42] As a result, the Commission argued, the guidelines should be given "substantial weight."[43] The Commission also told Congress that "appellate caselaw is already developing" to hold that "prior to imposing a sentence, sentencing courts must consider the guideline range calculations *and departure policy statements*," relying on cases that said no such thing.[44]

Immediately thereafter, the Commission launched a nationwide training program to disseminate its position to judges, probation officers, and prosecutors in presentations and written materials.[45] The training program "explain[ed] how the sentencing guidelines reflect Congress' objectives in the SRA and that the guidelines accordingly should be given substantial weight." It also "describe[d] federal sentencing under *Booker* as a 3-step process,"[46] which, according to the Commission, required judges to determine the appropriate sentence by following three steps in this order: (1) consider the calculated guideline range, (2) then consider the policy statements, which generally prohibit and restrict consideration of mitigating factors, (3) and then consider the sentencing purposes and factors under § 3553(a).[47]

By April 2005, the Eighth Circuit had adopted a three-step process much like the one taught by the Commission, *see United States v. Haack*, 403 F.3d 997, 1002-03 (8th Cir. 2005), which soon served as the basis for reversing a below-guideline sentence in large part because the district court did not consider and give "significant weight" to the Commission's policy statements, *see United States v. Hodge*, 469 F.3d 749, 755-57 (8th Cir. 2006) ("[T]he district court failed to consider the policy statements promulgated by the Sentencing Commission, which are relevant factors that should have received significant weight under § 3553(a)(5), separate and apart from considering the advisory Guidelines range under § 3553(a)(4).").[48] According to the court, "[a]lthough the district court was not considering a downward departure, the policy statements, as directed by § 3553(a)(5), remain relevant to the determination of a reasonable sentence," and "[w]e have held that drug addiction is not a proper basis for sentencing a defendant below the

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[42] *Id.* at 4.

[43] *Id.*

[44] *Id.* at 3.

[45] U.S. Sent'g Comm'n, Post-*Booker* Guidelines Training 2006, Tab 1 ("guidelines consider" each listed purpose and factor), Tab 7 (containing Testimony of Hinojosa, J., February 10, 2005), on file with authors; U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (2006), http://www.ussc.gov/booker_ report/Booker_Report.pdf [*Booker* Report"].

[46] *Booker* Report at 42.

[47] USSC 2005 Testimony at 1-2

[48] At the time, the Commission's policy statement stated that "[d]rug or alcohol dependence is not a reason for a downward departure." USSG § 5H1.4 p.s.

advisory Guidelines range, absent extraordinary circumstances." *Id.*; *see also United States v. Beal*, 463 F.3d 834, 837 (8th Cir. 2006) (reversing a downward variance based on over-representation of criminal history, in part because the policy statement on departures for over-representation "d[id] not support the extent of the variance in this case").

Meanwhile, the Commission "assisted the Judicial Conference" in revising the Statement of Reasons form that must be submitted to the Commission for every sentencing.[49] The new form, issued in June 2005 as approved by the Commission, is intended to "capture more accurately the courts' reasons for imposing sentences outside the advisory guideline range,"[50] but does not actually do so. Instead, the form embodies the Commission's "three-step" process, requiring judges first to indicate whether the sentences is "within an advisory guideline range," a departure "from the advisory guideline range for reasons authorized by the sentencing guidelines manual," or "a sentence outside the advisory sentencing guideline system." Only in the very last section does the form refer to § 3553(a), if the sentence is "outside the advisory guideline system." However, instead of providing boxes to indicate specific reasons, as it does for "authorized" departures, the form gives judges the option of checking one or more of an undifferentiated list of statutory subsections under § 3553(a), such as "the nature and circumstances of the offense and the history and characteristics of the defendant" or "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment."[51] There is no option to indicate that the court found relevant a factor prohibited or discouraged by the policy statements, or disagreed with a guideline as a categorical matter. After the revised Statement of Reasons form was issued, the Commission "highlight[ed]" the form in its training program "and encourage[ed] the courts to use the new form."[52]

On March 16, 2006, the Commission appeared again before the House Judiciary Committee's Subcommittee on Crime to propose a legislative response to *Booker* that would accord the guidelines "substantial weight." This time, it claimed that "[m]any courts have adopted, *as the Commission teaches*, a three-step approach to determine federal sentences under the framework set forth in *Booker*,"[53] though it cited only two Eighth Circuit cases, in both of which the government moved for a substantial assistance departure.[54] The Commission also cited a proposed amendment to Rule 11(b)(1)(M),

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[49] USSC 2005 Testimony at 5; *Booker* Report at 39 & App. A.

[50] *Booker* Report at 8.

[51] *Id.*

[52] *Booker* Report at 42.

[53] Testimony of Judge Ricardo H. Hinojosa, United States v. Booker: *one year later, chaos or status quo?: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security Jud. Comm.* 109th Cong. 1-2 (Mar. 16, 2006) (emphasis added) ["USSC 2006 Testimony"].

[54]USSC 2006 Testimony at 1.

claiming that the Judicial Conference had "adopted this approach" and that the rule was intended "to correspond to the three-step approach to sentencing,"[55] though it did no such thing.[56] And it "applaud[ed]" efforts to "impose uniformity with respect to the statement of reasons form," which it said would "capture all the nuanced aspects of sentencing in a post-*Booker* world,"[57] though it clearly would not.

The Commission again asserted that "the factors set forth in 3553(a)(2) . . . are a virtual mirror image of the factors sentencing courts now are required to consider under *Booker* and 18 U.S.C. § 3553(a),"[58] and that "the sentencing guidelines embody all of the applicable sentencing factors for a given offense and offender," now citing an Eleventh Circuit decision which had repeated verbatim what the Commission had said at the 2005 hearing.[59] If codified, the three-step process would ensure that the guidelines would be accorded "substantial weight."[60]

In 2007, the Commission filed an *amicus* brief in *Rita v. United States*,[61] in which it tied together its three-step process, its training program, and the revised Statement of Reasons form in support of an appellate presumption of reasonableness for within guideline sentences.[62] There, it claimed that the guidelines incorporate all "legally relevant" factors and that they "account for the history and characteristics of the defendant."[63] The Court rejected this contention, saying at most that the guidelines

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[55] *Id.* at 1 n.4.

[56] *Booker* Report at 42, n.237; *see* Committee on Rules of Practice and Procedure of the Judicial Conference, Proposed Amendments and Request for Comment 138-39 (Aug. 2005). The amendment to Rule 11 was intended "to incorporate the analysis" of *Booker* for purposes of plea hearings, *id.* at 139, by removing the previous reference to a judge's obligation to apply the guidelines (and its discretion to depart) and replacing it with reference to the court's obligation to consider the guideline range, possible departures, and all of the sentencing purposes and factors under § 3553(a). It would not (and, as promulgated, does not) require judges to consider *sua sponte* the Commission's policy statements when not raised by a party, or to consider those policy statements before considering the other factors under § 3553(a).

[57] USSC 2006 Testimony at 4.

[58] *Id.* at 2.

[59] *Id.* at 2 n.7 (citing *United States v. Shelton*, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005)).

[60] *Id.* at 18.

[61] *See* Brief for the U.S. Sentencing Comm'n as *Amicus Curiae* in Support of Respondent, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754).

[62] *Id.* at 15 n. 13.

[63] *Id.* at 13, 20, 23 & n.16.

"*seek* to embody the § 3553(a) considerations," and that, when a judge independently reaches the same sentence recommended by the Commission, "it is fair to assume that the Guidelines . . . reflect a *rough approximation* of sentences that *might* achieve § 3553(a)'s objectives." *Rita v. United States*, 551 U.S. 338, 350 (2007). Justice Stevens specifically pointed out that "[t]he Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics." *Id.* at 364-65 (Stevens, J., concurring).

The Court also rejected the Commission's three-step process, instead saying that the court **"**begins by considering the pre-sentence report and its interpretation of the guidelines," and then, subject to "thorough adversarial testing," the district court "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heart-land' to which the Commission intends individual Guidelines to apply," or "perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations" or "because the case warrants a different sentence regardless." 551 U.S. 338, 51; *see also id*. at 350 ("The sentencing courts . . . may depart (either pursuant to the Guidelines *or*, since *Booker*, by imposing a non-Guidelines sentence)." (emphasis added)). Thus, judges may consider a departure *or* a variance *or* both, if raised by the parties and in light of their arguments. *Id*. at 351.

Yet, in the very next amendment cycle, the Commission amended Part A of the Introduction to the *Guidelines Manual* by adding a section entitled "Continuing Evolution and Role of the Guideline." USSG Ch. 1, Pt. A(2). This new commentary, which "supplements the original introduction with an updated discussion of the role of the guidelines, their evolution, and Supreme Court case law,"[64] was not published for comment.[65] It states that the district court "must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and *then* the factors under 18 U.S.C. § 3553(a)," inaccurately citing the Supreme Court's decision in *Rita* as the source of this "three-step" process. *See id.* (citing *Rita v. United States*, 551 U.S. 338, 351, 127 S. Ct. 2456, 2465 (2007)). The Commission continued to promote this three-step procedure in its training sessions.[66]

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[64] 73 Fed. Reg. 26,924, 26,931 (May 9, 2008).

[65] The Commission is not required to publish for comment commentary, policy statements, or amendments thereto because, unlike guidelines, they never were supposed to be binding. *See* 28 U.S.C. § 994(x). However, the Commission has said previously that "because the Commission values public input, the Commission traditionally attempts to solicit public comment, even when not required to do so." *See* USSC, *Report to the Congress: MDMA Drug Offenses, Explanation of Recent Guideline Amendment* 4 (May 2001).

[66] U.S. Sentencing Commission, Federal Sentencing Guidelines Training Program (2008) (on file with authors) (guideline range should be calculated first, Commission's policy statements on "departures" should then be consulted, and then a "variance" may be considered under § 3553(a)).

In May 2010, the Commission amended § 1B1.1 (Application Instructions) to explicitly set forth a "three-step process" for arriving at the appropriate sentence. This guideline, using mandatory language, instructs courts as follows:

> (1) "The court shall determine the kinds of sentences and the guideline range" by following eight detailed steps and considering the relevant provisions as "appropriate" or "applicable";
>
> (2) "The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence"; and
>
> (3) "The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."

The text and Reason for Amendment suggest that this means judges are to peruse the Manual for policy statements prohibiting and discouraging consideration of mitigating factors even if not raised by a party: "After determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. . . . A 'variance' . . . is considered by the court only after departures have been considered." USSG, App. C, Amend. 741 (Nov. 1, 2010). At the same time, the Commission amended the Introductory Commentary to Chapter 5, Part H, which judges are purportedly required to consider in every case at step 2 of the three-step process to tell judges not to give offender characteristics "excessive weight" and that their "most appropriate use" is "not as a reason to sentence outside the applicable guideline range," but to determine the sentence within the guideline range. *See* USSG, ch. 5, pt. H, intro. cmt. (2010); *id.* ("[T]he policy statements indicate that these characteristics are not ordinarily relevant to the determination whether a sentence should be *outside the guideline range*.").

This is an inaccurate characterization of the law and highly impractical. To suggest that policy statements regarding departure apply to variances is simply wrong, as is the suggestion that they must be searched out and consulted as a second step in sentencing when not raised by a party. It would also be a monumental waste of time and judicial resources because the departure policy statements are so rarely pertinent or helpful. Taken at face value, the Commission's instructions would require judges in every case to peruse all of its policy statements, only to find that they prohibited or discouraged consideration of factors *required* to be considered by statute, § 3553(a).

"In our adversary system, . . . in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Sentencing is now an adversary proceeding, driven by the arguments of counsel, not the instructions of the Commission (except in calculating the guideline *range*). What the Supreme Court has actually said is

that the district court, after calculating the applicable guideline range, "may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." *See Rita*, 551 U.S. at 351. The only arguments the sentencing judge is required to address are the nonfrivolous arguments *raised* by the parties. *Id*. at 357 ("a party . . . argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way-or argues for departure"). Indeed, the Court set out a very different three-step procedure that reflects its adversary nature: First, "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Second, "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Third, explain. *Gall*, 552 U.S. at 49-50.

The Commission's third step, "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole," does not exist in the law and denigrates the law by ignoring the individual factors, purposes, and parsimony command of § 3553(a) and relegating the statute in its entirety to an afterthought. Under § 3553(a) as written and the Court's decisions, district courts must consider all of the relevant facts and purposes under § 3553(a), and must impose a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. 18 U.S.C. § 3553(a); *Rita*, 551 U.S. at 348; *Gall*, 552 U.S. at 51; *Kimbrough*, 552 U.S. at 101. The parsimony principle does appear in revised § 1B1.1, but it is relegated to the background commentary.

The Commission also said that the majority of circuits have adopted its "three-step" procedure, and that it was resolving a circuit split.[67] But this is not accurate. At the time of the amendment, no circuit court required a district court to consider policy statements discouraging and prohibiting departure when not raised, or if raised, to do so before the § 3553(a) factors. At most, the majority of courts held that departures remain viable after *Booker*, and that district courts should consider departures and variances separately, and should consider departure motions first, *if a departure is raised*. *See, e.g.*, *United States v. Wise*, 515 F.3d 207, 216 (3d Cir. 2008).[68] In contrast, the Seventh

[67] USSG, App. C, Amend. 741 (Nov. 1, 2010) (Reason for Amendment).

[68] *See, e.g.*, *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (describing district court's sequential consideration of departures before variances, but only departures that were "proposed"); *United States v. McGowan*, 315 Fed. App'x 338, 341-42 (2d Cir. 2009) (where neither party requested a departure, and the defendant argued on appeal that the court should have *sua sponte* considered and applied potentially available departures, rejecting the argument: "That some of the facts considered by the court could also have been potential bases for Guidelines departures, and that the court chose to impose a non-Guidelines sentence without determining precisely which departures hypothetically could apply, does not create procedural error."); *United States v. Hawes*, 309 Fed. App'x 726, 732 (4th Cir. 2009) (unpublished) (any requirement to consider a guideline departure before considering a variance "no longer appears

Circuit said that departures are "obsolete," but it meant only for purposes of appellate review for reasonableness,[69] and courts in that district continued to grant departures at a rate higher than the national average.[70] Even courts that had sometimes enforced a three-step process similar to the Commission's, *see, e.g.*, *United States v. Hodge*, 469 F.3d 749, 755-57 (8th Cir. 2006), abandoned it after *Gall.*[71] So there was no circuit split to resolve. Instead, the three-step process represents the Commission's continuing goal to require judges to give greater weight to the guidelines and policy statements.

Indeed, contrary to the Commission's suggestion, a number of courts expressly rejected the argument that a district court must *sua sponte* consider the Commission's policy statement before considering a variance.[72] As the Eleventh Circuit put it:

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necessary under *Gall*"); *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006) (where the defendant requested (and the district court denied) a downward departure, explaining that a district judge is required to consider "whether a Chapter 5 departure is appropriate" as part of calculating the applicable guideline range); *United States v. Sierra-Castillo*, 405 F.3d 932, 939 (10th Cir. 2005) (in a case in which the defendant requested a downward departure, stating that "consult[ing] the Guidelines . . . . necessarily includes consideration of these Guideline departure provisions); *United States v. A.B.*, 529 F.3d 1275, 1287 (10th Cir. 2008) (questioning whether its decisions in fact "required rigid adherence to this three-step approach" and recognizing that to the extent that the court had addressed departures, its concern was not with a rigid temporal order, but only "whether Guidelines departures were still a viable tool after *Booker*—that is, whether *Booker* rendered Guidelines departures obsolete"); *United States v. Beltran*, 545 F.3d 894, 901 (10th Cir. 2008) (when a defendant seeks both departure and variance, "[a]s long as the court takes into account all of the relevant considerations, the order in which it does so is unimportant").

[69] *United States v. Rainey*, 404 Fed. App'x 46, 57 (7th Cir. 2010). What the Seventh Circuit actually said was that "framing [an appellate challenge to a non-guideline sentence] as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*." *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

[70] *See* U.S. Sent'g Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* tbl.N-7 (showing 5.3% rate of departures in the Seventh Circuit versus 3.1% national average). In fact, the rate of non-guideline sentences styled in whole or part as judicial departures has generally *increased* after *Booker* in the Seventh Circuit, from 4.1% in 2005 to 5.3% in 2010. Clearly, courts in the Seventh Circuit continue to view departure analysis as appropriate in cases *in which a departure is raised*.

[71] *United States v. Washington*, 515 F.3d 861 (8th Cir. 2008); *United States v. Spotted Elk*, 548 F.3d 641, 670 (8th Cir. 2008).

[72] *See, e.g.*, *United States v. Mejia-Huerta*, 480 F.3d 713-19, 721, 723 (5th Cir. 2007) (setting forth a three-step process by which departures are to be considered as part of the 'guideline calculation" and before variances, but where government did not request an upward departure in any defendant's case, holding that the district court did not err by failing to consider an applicable guideline provision before varying upward); *United States v. Gibson*, 2010 U.S. App. LEXIS 19166 (5th Cir. Sept. 14, 2010) (where government did not request a departure, no plain error where district court did not consider applicable departure provision before imposing upward variance).

> It is true that we [have] said that *Booker*'s requirement that district courts "consult" with the guidelines "at a minimum, obliges the district court to calculate correctly the sentencing range prescribed by the Guidelines." However, that statement is a far cry from a clear rule requiring that district courts apply departures under § 4A1.3 even when neither party requests that it do so. [That statement] simply "requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before *Booker*."

United States v. Moton, 226 Fed. App'x 936, 939-40 (11th Cir. 2007). The court suggested that to require district courts to consider *sua sponte* the Commission's departure policy statement would make that provision effectively mandatory. *Id.* This, of course, is exactly why the Commission misconstrued statements by some courts of appeals indicating nothing more than that a district court should consider a departure policy statement if a departure is raised.[73]

Even if there had been a circuit split, the Commission has no authority to resolve a circuit split over the meaning of a federal statute, a task that belongs to the Supreme Court. *Braxton v. United States*, 500 U.S. 344, 347 (1991). The Commission's only authority is to resolve conflicts over the interpretation of the guidelines and commentary themselves. *Id.* at 348; *Buford v. United States*, 532 U.S. 59, 66 (2001).

In short, the Commission's three-step procedure is not found in the Supreme Court's decisions or § 3553(a). The "Guidelines are only one of the factors to consider when imposing sentence." *Gall*, 552 U.S. at 59. The guidelines, "formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90. "The statute, as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing." *Id*. at 101.

Moreover, "departure" is a "term of art" applicable to a "narrow category of cases" that were authorized by the now-excised § 3553(b). *Irizarry v. United States*, 128 S. Ct. 2198, 2202 (2008). While departures are certainly *allowed*, it is not permissible to *deny* a request for an outside-guideline sentence because a policy statement prohibits or discourages departure on that basis. This is a necessary corollary of the Court's decision, on constitutional grounds, to make the guidelines advisory. *Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue."). Moreover, any policy statement that is inconsistent with

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[73]The Fourth Circuit recently recognized that, to the extent that its earlier decisions may have suggested that a district court must first consider a requested departure before deciding whether to vary from the guideline range, it was overruled by *Gall* and *Rita*. *See United States v. Diosdado-Star*, 630 F.3d 359, 366 (4th Cir. 2011).

§ 3553(a) is trumped by the statute, which *requires* relevant mitigating factors to be considered. *See* 28 U.S.C. § 994(a).[74]

The data show that after *Booker*, *Gall* and *Kimbrough*, "departures" are rarely used.[75] Judges have informed the Commission that this is because its policy statements are not relevant or too restrictive.[76] Rather than make the policy statements relevant, the Commission has attempted to require judges to consider them even when no party has raised them. *See* USSG, App. C Amend. 741 (Nov. 1, 2010) (Reason for Amendment) (noting the Seventh Circuit's statement that departures are "obsolete" and claiming that the amendment "resolves a circuit conflict").

The Supreme Court's recent decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011), proves that a district court is required to consider a policy statement only when it is raised by a party, and may do so *after* considering the relevance of a mitigating factor under § 3553(a). In 2006, the district court in *Pepper* resentenced the defendant after the government's successful appeal. At resentencing, the defendant asked the court to vary downward under § 3553(a) to account for his post-sentencing rehabilitative efforts. The government opposed the variance, pointing to the policy statement at § 5K2.19 (in addition to circuit law which preceded the Commission's policy statement), which prohibits consideration of post-sentencing rehabilitation for purposes of *departure*. The district court considered the government's arguments, but nevertheless granted a downward variance under § 3553(a) based in part on the defendant's post-sentencing rehabilitation. The government appealed, and the Eighth Circuit reversed, ruling that the district court abused its discretion by considering the defendant's post-sentencing rehabilitation. *United States v. Pepper*, 486 F.3d 408, 412-413 (8th Cir. 2007). Although the government raised the policy statement at § 5K2.19 regarding departures in its brief (arguing that its rationale should also apply to variances), the court of appeals relied on circuit precedent holding that post-sentencing rehabilitation is an "impermissible factor" under § 3553(a). The Supreme Court granted certiorari and reversed and remanded for reconsideration in light of *Gall*, but the Eighth Circuit did not change its position. *United States v. Pepper*, 552 F.3d 949, 953 (8th Cir. 2008).

When the case made its way to the Supreme Court for the second time in 2010, the government conceded that post-sentencing rehabilitative efforts are indeed relevant to sentencing under § 3553(a). The Court appointed an *amicus* to defend the judgment of

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[74] *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993) (statutes trump guidelines).

[75] In FY 2004, 5.2% of sentences were non-government-sponsored below-guideline sentences, all of which at the time were downward "departures." *See* USSC, 2004 Sourcebook, Table 26A. During FY 2010, judges relied on departures alone in 2.1% of cases, departures in combination with § 3553(a) in 1.1% of cases, and § 3553(a) in 14.7% of cases. *See* USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. N (2010), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm.

[76] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 14 .

the Eighth Circuit, who argued (among other things) that § 5K2.19 is a "clear and unequivocal" statement made in the exercise of the Commission's "core function," and "should be given effect" under § 3553(a). *Pepper*, 131 S. Ct. at 1247. In response, Pepper, and the Federal Defenders also as *amicus*, argued that the policy statement is unsound and set forth extensive evidence that it was not based on empirical evidence or national experience. *See* Part IV, *infra* (deconstructing the policy statement at § 5K2.19).

The Supreme Court *first* analyzed whether post-sentencing rehabilitation is relevant to the § 3553(a) factors and sentencing purposes and concluded that it is plainly relevant to several factors in general and that it was in fact relevant to the appropriate sentence for Mr. Pepper in particular. *Id.* at 1243 ("[T]he Court of Appeals' ruling prohibiting the District Court from considering any evidence of Pepper's postsentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives in §§ 3661 and 3553(a)."). Only after the Court's analysis of the relevance of the factor under § 3553(a) was complete did the Court turn to the policy statement raised by *amicus*. The Court then rejected the Commission's rationale for the policy as "wholly unconvincing." *Id.* at 1247. Clearly, if there had been no policy statement raised in *Pepper*, the Court would not have considered it. *See Greenlaw v. United States*, 554 U.S. at 243 ("[W]e rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbiter of matters the parties present.").

In sum, policy statements regarding factors for departure (or, as some of the policy statements say, any sentence outside the guideline range) are not a required "second step" of sentencing procedure. An argument for departure is merely one argument the court may consider, if made. Policy statements regarding departures are not required to be considered in every case, and are not required to be considered even when their subject matter applies to the offense or offender, as demonstrated in *Gall*. They do not take precedence over § 3553(a)(1), (a)(2) or (a)(3) or (a)(6). *Pepper*, 131 S. Ct. at 1249 (rejecting invitation to "to elevate" § 3553(a)(5) above other § 3553(a) factors).[77]

Although in practice, the new Application Instructions will not have any real impact in most courtrooms (since it is rarely consulted), it should be monitored and challenged in the event it causes judges to return to an incorrect and more restrictive view of the sentencing framework and process set forth in § 3553(a) and the Supreme Court's decisions.

C. The Amended Introductory Commentary to Chapter 5, Part H Is Contrary to Supreme Court Law.

Until now, the Introductory Commentary to Chapter 5, Part H of the *Guideline Manual* was a relatively benign passage. A new version, effective November 1, 2010,

[77] For other inaccuracies in amended USSG Ch. 1, Part 1, Subpart 2, *see* Defender Letter to the U.S. Sentencing Commission at 28-31 (September 8, 2008), *available at* http://www.fd.org/pdf_lib/USSC_Priorities_ltr_with_appendix_9.8.08.pdf.

reflects the Commission's cross-purposes of trying to remain relevant but continuing to discourage meaningful consideration of offender characteristics. The new Introductory Commentary sets forth a new "framework" for considering offender characteristics that emphatically discourages their consideration as a general matter, contrary to Supreme Court law and § 3553(a). This subpart sets forth a brief history of the Introductory Commentary to Chapter 5, Part H, with special focus on the 2010 amendments.

1. Initial promulgation

When the guidelines were promulgated in 1987, the Introduction to Chapter 5, Part H stated simply:

> Congress has directed the Commission to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. 994(d).

52 Fed. Reg. 18,046, 18,102 (May 13, 1987); USSG,ch. 5, pt. H, intro. cmt. (1987). That is, Congress encouraged the Commission to include relevant offender characteristics in the guidelines. The Commission did not do so and, as discussed in detail in Part IV, *infra*, promulgated policy statements deeming each mitigating factor listed by Congress in 28 U.S.C. § 994(d) to be "not" or "not ordinarily" relevant for purposes of departure.

2. 1990-2003 amendments

In 1990, the Commission amended the Introductory Commentary by adding a second paragraph, stating:

> In addition, 28 U.S.C. § 994(e) requires the Commission to assure that the guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

USSG, App. C, Amend. 357 (Nov. 1, 1990). The Reason for Amendment stated simply that the amendment "clarifies the relationship of 28 U.S.C. § 994(e) to certain of the policy statements." *Id.* It did not explain or provide any analysis of the "relationship" between this directive and the policy statements that restrict or discourage those factors, leaving for inference the desired conclusion that its policy was driven or required by Congress's directive. As discussed in depth below in Part II.B.2, the directive meant that the Commission was "to guard against the inappropriate use of incarceration for those defendants who *lack* education, employment, and stabilizing ties," *not* that the presence or absence of these factors were inappropriate grounds for leniency.[78]

[78] S. Rep. No. 98-225, at 174-75 (1983) (emphasis added).

In 1991, the Commission first expanded on the list in § 994(e) by discouraging consideration of physical appearance, including physique, in § 5H1.4, and adding § 5H1.11 to discourage consideration of good works (military, civic, charitable, or public service and employment-related contributions). At that time, it also amended the Introductory Commentary to state that, although it had deemed a factor "not ordinarily relevant" to the determination whether a sentence should be outside the guideline range, it does "not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release)." USSG, App. C, Amend. 386 (Nov. 1, 1991). That is, the Commission acknowledged that these factors may be "ordinarily" relevant, but only for the limited purpose of deciding where within the guideline range the appropriate sentence should be.

In 1994, the Commission added two sentences at the end of this section regarding factors deemed "not ordinarily relevant":

> Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. See § 5K2.0 (Grounds for Departure).

USSG, App. C, Amend. 508 (Nov. 1, 1994). At the same time, it amended § 5K2.0 to state that, although a factor has been deemed "not ordinarily relevant" to departure, it may nevertheless be relevant "if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing." *Id.* This language was drawn from the Introduction to the Manual, USSG, ch. 1, pt. A(1) § 4(b), which stated that the "Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes," and that

> when a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

Id. Courts had used this language as the standard for departures based on factors deemed "not ordinarily relevant," with the leading case written by then-judge Breyer. *See United States v. Rivera*, 994 F.2d 942, 947 (1st Cir. 1993) (Breyer, C.J.).

In 2003, as part of its PROTECT Act clamp-down on departures, the Commission addressed departures based on a combination of factors that are not in themselves exceptional, amending the Introductory Commentary to add that a factor deemed "not ordinarily relevant" may nevertheless be relevant "if a combination of such

circumstances makes the case *an exceptional one*, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure)." USSG, App. C, Amend. 651 (Oct. 27, 2003) (emphasis added). At the same time, it amended § 5K2.0 to use the term "exceptional," stating that an offender characteristic or other circumstance identified as "not ordinarily relevant" to departure "may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree." *Id.* It is unknown whether these changes, standing alone, had any measurable effect on departures, but it is worth noting that the rate of non-government sponsored departures in fiscal year 2002 was approximately 6.7%, and by 2004, the rate had gone down to 5.2%.[79] The Introductory Commentary then read in its entirety as follows:

> **Introductory Commentary**
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> The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics 'have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence' and to take them into account only to the extent they are determined to be relevant by the Commission.
>
> The Commission has determined that certain circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for

[79] In 2002, the Commission reported a 16.8% rate of downward departures "other" than for substantial assistance. *See* USSC, *2002 Sourcebook of Federal Sentencing Statistics*, tbl. 26 (2002). The Commission later reported that at least 40% of these "other downward departures" were sought by the government. *See* USSC, *2003 Downward Departure Report*, *supra* note 12, at 60. By 2004, the Commission was reporting the distinction, and reported that rate of non-government sponsored departures had gone down to 5.2%. *See* USSC, *2004 Sourcebook of Federal Sentencing Statistics*, tbl. 26A (2004).

> departure and is present in the case to a substantial degree. See § 5K2.0 (Grounds for Departure).
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> In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

USSG, ch. 5, pt. H, intro. cmt. (2004).

3. 2010 amendments

The Introductory Commentary to Chapter 5, Part H was completely overhauled effective November 1, 2010. The Commission once again set forth the directives to the Commission relating to offender characteristics at 28 U.S.C. § 994(d) and (e), and added an express acknowledgment of Congress's directive *to the courts* to consider the history and circumstances of the offender at 18 U.S.C. § 3553(a)(1). The rest of the commentary can be fairly described as a lengthy exposition on why offender characteristics should be considered only sparingly and preferably only to impose within-guideline sentences. It ends with a promise to give real guidance to courts regarding offender characteristics, as the independent expert body envisioned by the SRA, sometime in the future. *See* USSG, ch. 5, pt. H, intro. cmt. (2010).

Without parsing the entire amended commentary, a few new concepts and admonitions by the Commission deserve attention. Recall that the Commission undertook a "review of departures" due to the decreased use of departures in favor of variances under § 3553(a). *See* 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). The implication, supported by numerous comments and discussions during the regional hearings in 2009 and 2010, is that the Commission would like to see judges "come back to" departures as a method of imposing sentences outside the guideline range rather than rely on § 3553(a). In other words, the Commission would like its policy statements to be relevant to the question of offender characteristics.[80] One might think that with this goal

[80] One of the common themes throughout the regional hearings was whether and how the guidelines could continue to be relevant after *Booker*. *See, e.g.*, Transcript of Public Hearing Before the United States Sentencing Comm'n, Atlanta, Georgia, at 13 (Feb. 10, 2009) (Remarks of Judge Ruben Castillo, Vice Chair) (stating his view that a primary purpose of the regional hearings was to hear how "to make these guidelines better, to make them relevant to sentencing processes"); Transcript of Public Hearing Before the United States Sentencing Comm'n, Chicago, Illinois, at 150 (Sept. 9, 2010) (Remarks of Judge William K. Sessions III, Vice Chair) ("[H]ow to make the guidelines relevant in the future. And there is a real question as to whether the guidelines will continue to be relevant."); *id.* at 153 (Remarks of Commissioner Beryl Howell) ("I just want to echo my fellow Commissioners' remarks thanking you for your comments and joining us in our exploration of thinking more broadly about how to keep the guidelines relevant and what we can do to improve them."); *id.* at 162 (Remarks of Commissioner Dabney Friedrich)

in mind, the Commission would invite judges to consider, for purposes of departure, those offender characteristics shown to be relevant to the purposes of sentencing. Instead, the Commission took pains to pretend that, contrary to popular understanding, "specific offender characteristics are taken into account in the guidelines in several ways," citing various upward enhancements and upward adjustments, as well as a lone downward adjustment for acceptance of responsibility (which is limited to three levels with one level controlled by the prosecutor). Of course, this does not address the real issue, which is that the guidelines do not take *mitigating* factors into account, and its policy statements, including those in Chapter 5, Part H, prohibit or discourage their consideration.

The Commission now refers to Part H as a "framework" for approaching offender characteristics. It acknowledges § 3553(a) and *Booker*, but primarily as background for its point that judges should avoid "unwarranted disparity," failing to recognize that its math-without-subtraction system creates unwarranted uniformity and unwarranted severity. The commentary now states that "the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the guideline range, the type of sentence (*e.g.*, probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table and various other aspects of an appropriate sentence." *See* USSG, ch. 5, pt. H, intro. cmt. (2010). It further instructs, in the interest of avoiding unwarranted disparity, that judges should not give "the history and characteristics of a defendant" under § 3553(a) "excessive weight." *Id.* Finally, it states:

> To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, [s]ee 18 U.S.C. 3553(a)(6), 28 U.S.C. 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be the [']starting point and the initial benchmark.' Gall v. United States, 552 U.S. 38, 49 (2007).

Id.

The Commission then describes three categories of offender characteristics. In the first category are those that Congress "has prohibited," meaning those characteristics regarding which Congress directed that the guidelines should be entirely neutral (race, sex, national origin, creed, religion, and socio-economic status), and those that the Commission "has determined should be prohibited" (such as post-sentencing rehabilitation, gambling addiction in general, and lack of youthful guidance).

The second category is comprised of those offender characteristics listed by Congress in 28 U.S.C. § 994(d) but not listed in § 994(e), i.e., age, mental and emotional

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(asking whether, if courts "can disagree with any policy statement, . . . [c]an [the Commission] continue to be relevant with the existing guidelines we have?").

condition, physical condition, and role in the offense. The Commission explains that some "may be relevant in determining whether a sentence outside the applicable guideline range is warranted," but only if "the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

The third category are the offender characteristics listed in § 994(e), education, vocational skills, employment record, family ties and responsibilities, and community ties, described by the Commission as those that "Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. *See* 28 U.S.C. 994(e)." Removing its former suggestion that the Commission has independently determined that the characteristics are not ordinarily relevant to *departure*, the Commission now states that "the policy statements indicate that these characteristics are not ordinarily relevant to the determination whether a sentence should be *outside the guideline range*."

Notably, the Commission does not acknowledge that some offender characteristics, such as physique and military service, do not fit in any of the three categories because they are neither addressed by Congress nor deemed prohibited by the Commission. And as more fully explained below in the relevant sections addressing age, mental and emotional condition, physical condition (including physical appearance and physique), and military service, although the Commission amended the relevant policy statements to state that these factors "may be relevant" to departure, it uses the same standard for factors that were deemed "not ordinarily relevant" before the PROTECT Act. *Compare, e.g.*, USSG § 5H1.1 (2010) *with* USSG, App. C., Amend. 508 (Nov. 1, 1994).

By instructing judges that "the history and characteristics of the defendant" are not to be given "excessive weight," the commentary is contrary to *Gall*, which stands for the clear proposition that a district court's discretion under § 3553(a) includes determining the appropriate weight to accord such information. *See Gall v. United States*, 552 U.S. 38 (2007) (affirming the district court's determination of the weight to be given certain offender characteristics and reversing the Eighth Circuit's decision second-guessing those weights). It is also contrary to *Pepper*, in which the Court expressly held that a district court may vary below the guideline range based on any relevant mitigating factor, regardless of a contrary policy statement and particularly when the Commission's rationale for promulgating the policy statement is "wholly unconvincing." 131 S. Ct. 1229, 1249 (2011) (rejecting invitation to elevate § 3553(a)(5)'s direction to courts to consider policy statements above other § 3553(a) factors).

Because the amended commentary purports to create a new framework designed to cabin judges' discretion, and now especially in light of *Pepper*, it remains important that defense attorneys, judges, and anyone interested in sound sentencing policy are aware of the history of these policy statements, their continued unsoundness, and the lack

of relationship between them and a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. Parts II and III set forth a detailed history of the Commission's treatment of mitigating offender characteristics, contrary to the Sentencing Reform Act, past practice, national experience, and empirical evidence. Part IV builds on that general history and deconstructs each individual policy statement addressing a mitigating offender characteristic.

II. The Commission Acted Contrary to the SRA in Prohibiting and Discouraging Consideration of Mitigating Factors.

Under current Supreme Court law, the fact that the Commission acted contrary to the SRA in its restrictions on mitigating factors is not at all necessary to the judge's determination that those restrictions are no longer relevant. *See* Part I, *supra*. However, it may be useful for some judges to know that the Commission fundamentally deviated from Congress's vision of individualized sentencing and the constructive evolution of the guidelines.

A. Summary

By its terms, the Sentencing Reform Act demonstrates that Congress did not intend the Commission to put mitigating factors off limits for consideration by judges in either "guidelines" or "policy statements." Rather, Congress intended that the Commission would incorporate relevant mitigating factors into the "guideline" rules. In carrying out that directive, the Commission was to subject all kinds of factors to intelligent and dispassionate analysis, and on that basis to recommend, with supporting reasons, the fairest and most effective "guidelines" possible. The only caveats were that the guidelines and policy statements were to be entirely neutral as to certain constitutionally prohibited factors, and that factors indicating disadvantage were not to be used to recommend prison over a non-prison sentence or a longer prison.

Congress intended that judges would impose a sentence different than that recommended by the "guidelines" whenever they found that a mitigating factor covered by the broad terms of § 3553(a)(1) existed in the case that was not adequately reflected (in kind or degree) in the applicable "guideline" rules, which should result in a different sentence in light of the purposes of sentencing set forth in § 3553(a)(2). The Commission was not to second guess these judicial decisions but instead was to use them to revise the "guidelines." To the extent the "guidelines" did not adequately account for mitigating factors, judges would impose sentences different in kind or length from those recommended by the "guidelines." This combination of judicial discretion and evolution of the "guideline" rules would ensure fair and individualized sentencing, and reduce unwarranted disparity and unwarranted uniformity.

Instead, the Commission *did* second guess judges by prohibiting and discouraging consideration of mitigating factors, through "policy statements." In doing so, it suppressed the data and information that it was required to use in revising the guidelines and that it was required to collect and disseminate to the criminal justice community.

The Commission's own subsequent research demonstrates that these factors are relevant to the purposes of sentencing. Nonetheless, many of these factors are still deemed never or not ordinarily relevant. Those that, as of November 1, 2010, "may be relevant" must be "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines," a requirement that has nothing whatsoever to do with the purposes of sentencing.

B. Statutory Directives to the Commission

1. Congress directed the Commission to promulgate "guidelines" and "policy statements" for distinct purposes, none of which was to prohibit or discourage consideration of mitigating factors.

By the terms of the SRA, neither "guidelines" nor "policy statements" were to be used to restrict consideration of mitigating factors. In 28 U.S.C. § 994(a)(1), Congress told the Commission to promulgate "guidelines" regarding (A) "whether to impose a sentence to probation, a fine, or a term of imprisonment," (B) "the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment," (C) whether the defendant should be "placed on a term of supervised release after imprisonment, and if so, the appropriate length of such a term," and (D) "whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively."

In 28 U.S.C. § 994(a)(2), Congress told the Commission to issue "policy statements" addressing (A) forfeiture, notice to victims, restitution, (B) conditions of probation and supervised release, (C) modification of conditions or term of probation, fine, term of imprisonment, (D) imposition of a fine, (E) authority to accept or reject a plea, and (F) furloughs, prerelease community or home confinement.

The Senate Report explained:

> The sentencing *guidelines* will recommend to the sentencing judge an appropriate kind and range of sentence for a given category of offense committed by a given category of offender. The guidelines will be supplemented by *policy statements* that will address questions concerning the appropriate use of the sanctions of criminal forfeiture, order of notice to victims, and order of restitution and the use of conditions of probation and post-release supervision.

S. Rep. No. 98-225, at 51 (1983) (emphasis supplied).

Nothing in the SRA told the Commission to promulgate guidelines or policy statements affirmatively prohibiting or discouraging sentences different in kind or length from those recommended by the "guidelines." *See generally* 28 U.S.C. §§ 991-998.

2. Congress directed the Commission to ensure that the "guidelines" and "policy statements" were entirely neutral as to certain invidious factors and that they did not recommend a prison sentence or a longer prison term based on factors indicating disadvantage.

Congress gave the Commission three directives regarding the use of offender characteristics in establishing "categories of defendants" in "guidelines" and "policy statements" governing the nature of the sentence (*i.e.*, probation, fine, or imprisonment), the extent of the sentence (*i.e.*, size of fine, length of probation, imprisonment, supervised release), and the incidents of the sentence (*i.e.*, conditions of probation, supervised release, or imprisonment).

First, Congress directed that the Commission "shall consider whether the following matters, among others with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they are relevant" -- age, education, vocational skills, mental and emotional condition to the extent such condition mitigates the defendant's culpability or is otherwise plainly relevant, physical condition including drug dependence, previous employment record, community ties, role in the offense, criminal history, degree of dependence on criminal activity for a livelihood. 28 U.S.C. § 994(d)(1)-(11). In explaining this provision, the Senate Report said that the

> Commission is required to determine whether and to what extent each factor might be pertinent to the question of the kind of sentence that should be imposed; the size of a fine or length of a term of probation, imprisonment, or supervised release; and the conditions of probation, supervised release, or imprisonment.

S. Rep. No. 98-225, at 171 (1983).

Second, Congress directed the Commission to assure that the guidelines and policy statements were "entirely neutral as to the race, sex, national origin, creed and socioeconomic status of offenders." 28 U.S.C. § 994(d). The Senate Report explained:

> The Committee added [this] provision to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example, to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training. Indeed, *in the latter situation, if an offense does not warrant imprisonment for some other purpose of sentencing, the Committee would expect that such a defendant would be placed on probation with appropriate conditions to provide needed education or vocational training*. This qualifying language in subsection

> (d), *when read with the provisions in proposed Section 3582(c) of Title 18 and 28 U.S.C. 994(k), which precludes the imposition of a term of imprisonment for the sole purpose of rehabilitation, makes clear that a defendant should not be sent to prison only because the prison has a program that "might be good for him."*

S. Rep. No. 98-225, at 171 & n.531 (1983) (emphasis supplied). In other words, the Commission was not to affirmatively recommend preferential treatment *because of* wealth or membership in a preferred race, gender or religion. The Commission was to provide for probation for poor, uneducated or unemployable defendants for the purpose of rehabilitation if prison was not necessary for some other purpose of sentencing, *e.g.*, to protect the public. There was no directive to prohibit leniency for any defendant.

Third, Congress directed the Commission to "assure that the guidelines, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general inappropriateness of considering education, vocational skills, employment record, family ties and responsibilities, and community ties." 28 U.S.C. § 994(e) (emphasis supplied). For each factor, the Senate Report explained that the factor is "generally inappropriate in determining *to sentence a defendant to a term of imprisonment* or in determining *the length of imprisonment*." S. Rep. No. 98-225, at 172-74 (1983) (emphasis supplied). It explained the purpose of this subsection as follows:

> The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who lack education, employment, and stabilizing ties.

Id. at 175. And further:

> As discussed in connection with subsection (d), each of these factors [listed in § 994(e)] may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.

Id. at 174-75.

This means that the factors listed in § 994(e) should not be used to choose prison over probation, or a lengthier prison term. As Commission staff concluded in a Simplification Draft Paper, the legislative history supports an "asymmetrical reading of the statute – in other words, that these factors should not increase a defendant's likelihood of being sentenced to prison but may increase a defendant's likelihood of being sentenced to probation."[81]

[81] *See* Simplification Draft Paper, Departures and Offender Characteristics, Part II(B)(2) & II(E)(3), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/DEPART.HTM.

3. Congress directed the Commission to include mitigating factors in the "guideline" rules based on "intelligent and dispassionate analysis" with "supporting reasons."

The Senate Report made clear that the Commission was to subject all factors to careful study:

> It should be emphasized, however, that the Committee decided to describe these factors [listed in § 994(e), *i.e.*, education, vocational skills, employment record, family ties and responsibilities, and community ties] as "generally inappropriate," rather than always inappropriate, to the decision to impose a sentence of imprisonment or determine its length [because] the Committee believes that it is important to encourage the Sentencing Commission to *explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise*. There are sufficient checks built into the system to avoid aberrations, and thus the guidance in this subsection is cautionary rather than proscriptive.

S. Rep. No. 98-225, at 175 (1983) (emphasis supplied).

In discussing the mitigating factors listed in subsections (d) and (e), Congress identified some of the ways in which they would be relevant to the purposes of sentencing and made suggestions as to how they might be reflected in "guidelines" governing type and length of sentence or "policy statements" governing the incidents of sentences. Congress in no way intimated that these factors should be placed off limits for leniency, and indeed suggested they may call for a sentence of probation, an intermittent sentence, or community service. *Id.* at 171-75.

4. Congress directed the Commission to revise the "guidelines" in light of judicial decisions imposing sentences different from those recommended by the "guidelines."

Congress intended the courts to impose sentences different from the kind or range recommended by the *guidelines* based on mitigating or aggravating factors not adequately reflected in the *guidelines*, and that the Commission would then revise the *guidelines* to reflect those sentencing decisions:

> If the judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the *guidelines* and that should result in a sentence different from that recommended in the *guidelines*, the judge may sentence the defendant outside the guidelines. A sentence that is above the guidelines may be appealed by the defendant; a sentence that is below the guidelines may be

> appealed by the government. The case law that is developed from these appeals may, in turn, be *used to further refine the guidelines*.

S. Rep. No. 98-225, at 51-52 (1983) (emphasis supplied).

The directives to the Commission, set forth in Title 28, said nothing about curtailing departures. The only reference to departure in any section of the SRA, though it did not use the word "departure," was in 18 U.S.C. § 3553(b). That provision, as enacted on October 12, 1984 and as in effect when the Guidelines became effective November 1, 1987, allowed the court to impose a sentence of a different kind or length than that "referred to in subsection (a)(4)" when "the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."[82] The kind and length of sentence "referred to in subsection (a)(4)" was that "established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1),"[83] *i.e.*, in the "guideline" rules.[84] Section 3553(b) did *not* tell the courts to determine whether to impose a sentence different in kind or length than that referred to in subsection (a)(4) based on "policy statements." Policy statements were referred to in subsection (a)(5) and issued pursuant to § 994(a)(2) for the purposes set forth therein, which did not include regulating departures.[85] The courts were to determine whether to impose a sentence different in kind or length than that referred to in subsection (a)(4) based on the purposes and factors set forth in § 3553(a). *See* Part II.C, *infra*.

In sum, Congress told judges to determine whether a circumstance was adequately considered by the Commission in formulating the "guidelines," a defined term that did not include "policy statements." "Guidelines" and "policy statements" are two different things, intended to address different issues, none of which was to restrict or prohibit departures. *See* 28 U.S.C. § 994(a)(1) and § 994(a)(2). Nothing in the SRA told the Commission it should discourage or prevent departures. *See generally* 28 U.S.C. §§ 991-998. Instead, Congress told the Commission to review and revise the "guidelines" in light of "comments and data coming to its attention." 28 U.S.C. § 994(o). In explaining this duty, the Senate Report stated as follows:

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[82] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Pub. L. No. 98-473 § 212(a) (Oct. 12, 1984).

[83] Pub. L. No. 98-473 § 212(a) (Oct. 12, 1984) (codified at 18 U.S.C. § 3553(a)(4)).

[84] *Id*. § 217(a).

[85] *Id*.

> Subsection [(o)] requires the Commission continually to update its guidelines and to consult with a variety of interested institutions and groups. . . . [T]his subsection [will] provid[e] effective oversight as to how well the guidelines are working. The oversight *would not involve any role for the Commission in second-guessing individual judicial sentencing actions either at the trial or appellate level. Rather, it would involve an examination of the overall operation of the guidelines system to determine whether the guidelines are being effectively implemented and to revise them if for some reason they fail to achieve their purposes*.

S. Rep. No. 98-225, at 178 (1983) (emphasis supplied).

In addition, the Commission was to engage in extensive research by systematically collecting, studying and disseminating empirical evidence of sentences actually imposed, and the relationship of such sentences to all of the factors set forth in section 3553(a) and their effectiveness in meeting the purposes of sentencing. *See* 28 U.S.C. § 995(a)(12)-(16). Congress considered this "extensive research and data collection and dissemination authority" to be "essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." S. Rep. No. 98-225, at 182 (1983).

It would, of course, be impossible to determine anything about the relationship of sentences actually imposed to the factors set forth in § 3553(a)(1) or their effectiveness in meeting the purposes set forth in § 3553(a)(2) if judges could not consider those factors and purposes. *See* Part III.C, *infra*.

C. Statutory Directives to Judges

In 18 U.S.C. § 3551(a), Congress directed judges to "sentence[] in accordance with the provisions of this chapter [18 U.S.C. §§ 3551-3586] so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all of the circumstances of the case." In explaining § 3551(a), the Senate Report said:

> [It] is designed to focus the sentencing process upon the objectives to be achieved by the federal criminal justice system and to encourage the employment of sentencing options, such as probation, fines, imprisonment, or combinations therof, in a fashion tailored to achieve these multiple objectives. . . . Each of the four stated purposes should be considered in imposing sentence in a particular case. . . . The Committee believes that section 3551 provides the basis for achieving considerable

> flexibility in the formulation of an appropriate sentence for each particular case. The combination of this section, . . . the purposes of sentencing set forth in section 3553(a)(2), and the provisions for sentencing guidance set forth in section 3553 . . . should permit enough flexibility to individualize sentences according to the characteristics of the offense and the offender, while at the same time resulting in the imposition of sentences that treat offenders consistently and fairly.

S. Rep. No. 98-225, at 67-69 (1983).

In 18 U.S.C. § 3553(a), Congress directed that judges "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2),"[86] *i.e.*, "the need" for just punishment in light of the seriousness of the offense, respect for law, deterrence, protection of the public from further crimes of the defendant, and rehabilitation in the most effective manner, and "in determining the particular sentence to be imposed, shall consider" the nature and circumstances of the offenses, the history and characteristics of the defendant, the kinds of sentences available by statute, the kinds of sentences and sentencing ranges set forth in "guidelines" issued "pursuant to section 994(a)(1)," any pertinent "policy statement" issued "pursuant to section 994(a)(2)," the need to avoid unwarranted disparities among similarly situated defendants, and the need to provide restitution. In explaining § 3553(a), the Senate Report said:

> Subsection (a) sets out the factors a judge is *required* to consider in selecting the sentence to be imposed in a particular case. This applies to both the appropriate type of sentence . . . and the severity of the sentence. . . . *All of these considerations and others the judge believed to be appropriate would* . . . help the judge to determine whether there were circumstances or factors that were not taken into account in the sentencing *guidelines* and that call for the imposition of a sentence outside the applicable guideline. . . .
>
> The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to *require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case*.

S. Rep. No. 98-225, at 75, 77 (1983) (emphasis supplied).

In 18 U.S.C. § 3553(b), as enacted on October 12, 1984 and as in effect when the Guidelines became effective November 1, 1987, judges were not to impose the sentence

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[86] The parsimony clause was added to the SRA in an amendment that was borrowed from H.R. 6012 § 2, 98th Cong., 2d Sess. (1984), proposed by Senator Mathias, and formally sponsored by Senator Thurmond. *See* 130 Cong. Rec. 29,870 (1984). It is not mentioned in the Senate Report because it was added later.

referred to in the "guidelines" issued "pursuant to section 994(a)(1)" if they found that "an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described."[87] S. Rep. No. 98-225, at 51-52 (1983). In explaining § 3553(b), Congress said that it "provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines. A particular kind of circumstance, for example, might not have been considered by the Commission at all because of its rarity, or it might have been considered only in its usual form and not in the particularly extreme form present in a particular case." *Id.* at 78-79.

In sum, Congress did "not intend that the Guidelines be imposed in a mechanistic fashion" or "to eliminate the thoughtful imposition of individualized sentences." *Id.* at 52. "Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences." *Id*. "[T]he sentencing judge has an *obligation* to consider all relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id*. (emphasis supplied). To determine the "appropriate type of sentence (e.g., fine, probation, imprisonment, or a combination thereof)," and the "severity of the sentence," the "bill requires the judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing." *Id*. (citing § 3553(a)). "The judge is directed to impose sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender." *Id*. at 53. "Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines." *Id*. at 52 (citing § 3553(b)).

In other words, the judge was to (1) consider every pertinent offense circumstance and offender characteristic covered by § 3553(a)(1); (2) determine whether a pertinent circumstance was taken into account by the applicable "guideline"; and (3) if the circumstance was not included in the applicable guideline at all or not to the degree present in the case and the judge concluded that it should result in a non-guideline sentence in light of the purposes of sentencing set forth in § 3553(a)(2), the judge would impose a sentence different in kind or severity than recommended by the applicable guidelines. This was to contribute to the development of responsible "guidelines," because the Commission would review and revise the "guidelines" to reflect actual sentencing determinations by sentencing judges as to what sentences best complied with the purposes set forth in § 3553(a)(2) in consideration of all pertinent factors under § 3553(a)(1).

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[87] "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Pub. L. No. 98-473, § 212(a) (Oct. 12, 1984).

D. The Commission Acted to Suppress Judicial Discretion.

1. The Commission unilaterally decided that it could prevent departure based on a given factor simply by saying it had adequately considered it.

On the one hand, the Commission seemed to understand the intended structure described above, as indicated in commentary to Part K of Chapter 5 in the initial set of guidelines sent to Congress May 13, 1987:

> The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge. Similarly, the court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines (*e.g.*, as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.[88]

The Commission went on to give three examples of aggravating factors, all demonstrating that it understood that the lynchpin of the determination whether a factor was "adequately taken into consideration by the Commission in formulating the guidelines" was whether or not it was present in both kind and degree in the "guidelines" applicable to the case at hand.[89]

By this logic, courts should have been free to depart based on any mitigating circumstance because, with two exceptions and only to a limited degree, *see* USSG §§

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[88] 52 Fed. Reg. 18,046, 18,103 (May 13, 1987).

[89] First, disruption of a governmental function "would have to be quite serious to warrant departure from the guidelines when the offense of conviction is bribery or obstruction of justice," but "when [a] theft caused disruption of a governmental function, departure from the applicable guideline more readily would be appropriate." Second, physical injury would not warrant departure in a robbery case because the robbery guideline includes an adjustment based on extent of injury, but departure may be warranted if several people were injured because the robbery guideline "does not deal with injury to more than one victim." Third, a factor listed in one guideline but not in the applicable guideline may be an appropriate basis for departure: "For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations," so "if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason." *Id*. at 18,103-04.

3B1.2 (mitigating role), § 3E1.1 (acceptance of responsibility), no mitigating circumstances were present in the guidelines.

But the Commission took a different approach to mitigating circumstances. As passed in the Sentencing Reform Act of 1984 on October 12, 1984, 18 U.S.C. § 3553(b), stated:

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.[90]

Selectively quoting from § 3553(b) as it was enacted two and a half years previously, the Commission floated the theory that it could bar departures simply by asserting that it had adequately considered a factor:

> The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance . . . that was not adequately taken into consideration by the Sentencing Commission . . .". 18 U.S.C. 3553(b). *Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure*.[91]

The Commission then said that it had not exercised this purported power in the initial set of guidelines, except with respect to certain factors. It said that, beyond these exceptions, it did not intend to limit bases for departure (at least in the initial Guidelines Manual) in "an unusual case" (obliquely referring to the many factors that it had already deemed "not ordinarily relevant"):

> In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. . . . Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4 [drug or alcohol dependence], and the last sentence of § 5K2.12 [personal financial difficulties and economic pressures on a trade or business], list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.[92]

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[90] Pub. L. No. 98-473 § 212(a) (Oct. 12, 1984).

[91] *See* 52 FR 18,046, 18,050 (May 13, 1987) (emphasis supplied).

In explaining "this departure policy," the Commission described an internally inconsistent plan that simultaneously recognized that it was required to incorporate into the "guideline" rules those factors that the *courts* found to be relevant, but asserted that it would decide when "departures should and should not be permitted," thus potentially shutting down the sentencing data and reasons that would tell the Commission which factors to incorporate in the guideline rules, and which guidelines were in need of adjustment. The Commission recognized, consistent with the SRA, that the courts had the "legal freedom to depart," and that the purpose was to provide data so that the Commission could incorporate into the guideline rules the factors the courts had found to be relevant. It acknowledged that it did not do so in the initial set of guidelines, but said that it would do so in the future pursuant to its duty to review and revise the guidelines. Departures would eventually not occur very often because mitigating and aggravating factors would be incorporated into the guideline rules. The Commission then shifted to a very different concept, stating that it would specify when departures were not permitted, and that, "in principle," it could do so simply by stating that it had adequately considered the factor.[93]

The first Commission acknowledged that it did not rely on the purposes of sentencing in designing the guidelines, but claimed to have used an "empirical approach" based on data "estimating pre-guidelines sentencing practice."[94] But the Commission made no attempt to estimate the impact of mitigating offender characteristics on past

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[92] *Id*.

[93] The Commission admitted that it had not incorporated relevant sentencing factors into the "initial set of guidelines" because of "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision" and because "its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates," which it said contained "impressionistic accounts." But "it need not do so" in "the initial set of guidelines" because it was "empowered by law to write and rewrite guidelines, with progressive changes, over many years." "[D]espite the courts legal freedom to depart from the guidelines, they will not do so very often . . . because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time." If "the guidelines do not specify an augmentation or diminution," this was "because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense." Apparently because the Commission's data "at the present time" was "imperfect" and "impressionistic," "the initial set of guidelines" did not specify *any* diminutions. "Rather than rely heavily at this time on impressionistic accounts, the Commission believes it is wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification." However, the results of the data would not necessarily be incorporated into the "guidelines" but would be used to prohibit departures: "By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to . . . specify precisely where departures should and should not be permitted." *Id*.

[94] USSG, Ch. 1, Pt. A(1)(3) (Original Introduction to the Guidelines Manual, The Basic Approach) (2009).

sentences, although such factors were routinely considered before the guidelines,[95] and Congress directed the Commission to include all relevant offender characteristics in the guidelines.[96] The Commission collected no data on offender characteristics other than drug use, and no data on mitigating factors about the offense other than role in the offense. All of the other factors whose impact was estimated were aggravating factors about the crime.[97] The Commission never explained why it failed to measure the importance of mitigating offender characteristics on past sentencing practice.[98] It appears that it was a foregone conclusion that such factors would not be permitted.

Since the initial set of guidelines, as the guidelines have been increased nearly every amendment cycle, only a small handful of mitigating offense circumstances have been added to the guidelines,[99] no mitigating offender characteristics have been added to the guidelines, and the Commission has prohibited, discouraged or restricted consideration of most imaginable mitigating factors for purposes of departure through policy statements.

2. The Commission secured legislation, after the guidelines went into effect, permitting it to dictate limits on departure through policy statements and to prevent courts from examining the adequacy of its consideration.

In hindsight, it seems clear that the Commission wished to bar factors from consideration for departure simply by saying it had "adequately considered" them, without providing any explanation why or what evidence or input it considered. The

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[95] *See Williams v. New York*, 337 U.S. 241, 247 (1949) (the "fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant – if not essential" to sentencing, because "the punishment should fit the offender and not merely the crime."); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 18-19 (1988).

[96] 28 U.S.C. § 994(d).

[97] *See* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 27-39 (1987) (tables listing factors), http://www.fd.org/pdf_lib/Supplementary%20 Report.pdf.; *id*. at 18 n.59 ("not all relevant data items were requested and coded"); *id*. at 22-23 n.64 (acknowledging that a "factor's relative importance for sentencing" was estimated only for factors related to the offense).

[98] Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 61-62 (1998).

[99] *See* USSG §§ 2D1.1(b)(11) (two-level decrease if defendant meets safety valve criteria), 2D1.8(a)(2) (four-level decrease based on role in the offense), 2D1.11(a) (decreases if defendant receives mitigating role adjustment), 2L1.1(b)(1) (three-level decrease if alien smuggling offense involved only defendant's spouse or child), 2L2.1(b)(1) (same for immigration document offense).

Commission feared that the phrase, "not adequately taken into consideration by the Sentencing Commission," would allow the courts to examine the nature and extent of its actual deliberations. On October 22, 1987, the Chair of the Commission testified before the Senate Judiciary Committee that the departure standard set forth in § 3553(b) as already enacted,[100] was too "subjective," and also that it might result in the Commission's members and records being subpoenaed so that courts could evaluate whether it had "adequately considered" factors in formulating the guidelines.[101] When an agency makes no formal findings, as was the Commission's practice from the outset, "the only way there can be effective judicial review is by examining the decisionmakers themselves."[102]

The Commission proposed that § 3553(b) be amended to replace the courts' authority to determine whether the Commission had "adequately considered" a factor with a prohibition on departure on any ground "expressly addressed" in the Commission's "guidelines, policy statements, or official commentary," unless the Commission had expressly invited departure if the factor was present.[103] The proposed amendment would "make absolutely clear" that the departure inquiry was limited to the "four corners" of the Guidelines Manual.[104]

The House explained:

> If the adequacy of the Sentencing Commission's deliberative process is the determining factor, then testimony from members of the Sentencing Commission, and its records, would be relevant to a court's determination of whether to depart under section 3553(b). The Sentencing Commission is concerned at that prospect, fearing that its members and records will frequently be subpoenaed.

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[100] As enacted in the Sentencing Reform Act of 1984 on October 12, 1984, 18 U.S.C. § 3553(b), stated: "The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." Pub. L. No. 98-473 § 212(a) (Oct. 12, 1984).

[101] *Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary*, 100th Cong., 1st Sess., at 29-30 (Oct. 22, 1987).

[102] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420-21 (1971), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

[103] *Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary*, 100th Cong., 1st Sess., at 30-31 (Oct. 22, 1987).

[104] *Id*. at 32.

> To address that concern, the Sentencing Commission suggested an amendment to section 3553(b) providing that, "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." The other body adopted that suggestion . . .[105]

This provision, proposed by the Commission itself, did not just protect it from subpoenas for information about its deliberations, but gave it new power to dictate limits on departure that it previously did not have. Section 3553(b) as enacted in 1984 required judges to examine the "guidelines" referred to in subsection (a)(4) to see for themselves if a factor was "adequately taken into consideration." Under the Commission's proposal, judges would be required, for the first time, to look to policy statements and commentary, where the Commission could, and already had, deemed various factors to be never or not ordinarily relevant, without explanation. Because judges could look *only* to the guidelines, policy statements and commentary to determine whether the Commission had adequately considered a factor, the less the Commission said about *why* it had deemed a factor never or not ordinarily relevant, the more difficult it would be for courts to determine whether the Commission's consideration was in fact "adequate."

Senator Biden asked why such a change was necessary. The Commission responded by reiterating what it wanted, stating that the change would "more properly" focus on "whether such a factor was or was not 'taken into account' or 'included' within the calculus of factors built into a particular Sentencing Guideline," would "limit [the courts'] consideration to the 'four corners' of the Commission's published Guidelines, policy statements and commentary," and would prevent "discovery requests for background Commission documents and subpoenas of Commissioners and staff (in order to determine the adequacy of Commission consideration given to a particular factor)."[106] Senator Biden also asked, with respect to the Commission's policy statement § 5K2.0 requiring "unusual circumstances" for departure, "isn't it true that the only standard for departure is the standard set forth by Congress in the statute we are discussing?" The Commission's answer to this was again non-responsive, asserting that the Commission would tell the courts and litigants in its policy statements and commentary when a factor had or had not been adequately considered.[107]

Congress declined to confine departures to those invited by the Commission and, at the insistence of the House in an effort to maintain judicial discretion, added language directing courts to depart if they found a circumstance "of a kind, or to a degree" not

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[105] *See* 133 Cong. Rec. H10014-02, 1987 WL 947069 (Cong. Rec.), Section-By-Section Analysis, Section 3, November 16, 1987.

[106] *Sentencing Commission Guidelines: Hearing Before the S. Comm. on the Judiciary*, 100th Cong., 1st Sess., at 85-86 (Oct. 22, 1987).

[107] *Id*. at 85-87.

adequately considered by the Commission in formulating the guidelines.[108] However, the following sentence was added: "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

The bill was enacted on December 7, 1987 (after the guidelines went into effect on November 1, 1987) and § 3553(b) then read as it did until it was excised by the Supreme Court in 2005:

> The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.[109]

The practical effect was exactly what the Commission sought in the first place. The final sentence not only protected it from subpoenas for information about its deliberations but gave it the power to dictate precisely when departures were and were not allowed by confining judges to the "four corners" of the *Guidelines Manual*. This could not possibly have been what the full Congress intended,[110] for it ensured

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[108] *See* 133 Cong. Rec. H10014-02, 1987 WL 947069 (Cong. Rec.), Section-By-Section Analysis, Section 3 & Statement of Mr. Conyers (Nov. 16, 1987).

[109] Pub. L. No. 100-182, § 3 (Dec. 7, 1987).

[110] Regarding the revised § 3553(b), the House Judiciary Committee stated: "Like the second determination required by section 3553(b) – whether the circumstance should result in a sentence different from that called for by the guidelines – a determination whether the guidelines 'adequately' take a circumstance into consideration is subjective. The term 'adequately' in section 3553(b) is relative and requires that the court compare the circumstance as taken into account in the guidelines with the circumstance present in the case. Such a comparison cannot be made in the abstract by the Sentencing Commission, but can only be made by the court in the context of the particular case." 133 Cong. Rec. H10014-02, 1987 WL 947069 (Cong. Rec.), Section-By-Section Analysis, Section 3 & n.12 (Nov. 16, 1987). Four individual Senators held varying different views. Senator Hatch alone approved the extreme position originally sought by the Commission, stating that factors disapproved for departure by the Commission in policy statements or official commentary are implicitly present in the negative in every guideline, and that departure based on such factors was inappropriate. *See* Joint Explanation of Senators Biden, Thurmond, Kennedy, and Hatch on S. 1822, 133 Cong. Rec. S16644-03 (Nov. 20, 1987), 1987 WL 948067 (Cong. Rec.). Senators Biden and Kennedy were not much better, stating that the court could depart if it "finds that the case before it contains a circumstance that was not included within the applicable guidelines, or one that was included within the applicable guidelines but not in the unusual or extreme form that is present in the case before the court." *Id*. Senator Thurmond

unwarranted disparity as Congress understood it, and it prevented the guidelines from evolving through a collaborative process between the Commission and judges. That is, however, essentially how the Commission and the courts of appeals proceeded from then on. The Commission responded to judicial departures by prohibiting or discouraging those bases for departure, without explanation of any kind. The courts of appeals enforced these unexplained policy statements, and judges succumbed.[111] Thus, while judges were always nominally directed to impose sentences in compliance with § 3553(a), they were in fact required to impose the guideline sentence, whether or not it complied with § 3553(a), based on unexplained policy statements.

3. The Commission used policy statements to place mitigating factors off limits with little or no explanation.

The Commission did not just fail to include mitigating factors that were rare, or that occurred in an extreme form, in the "guidelines," *see* S. Rep. No. 98-225, at 78-79 (1983), but used "policy statements" to put factors off limits *because* they were *common* and in *all* of their forms.

Of the factors listed in 28 U.S.C. § 994(d)(1)-(11), only role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood were included in the formal guideline rules. With no explanation, the original Commission deemed the rest to be "not ordinarily relevant in determining whether a sentence should be *outside the guidelines*," or, as to drug dependence or alcohol abuse, "not a reason for imposing a sentence *below the guidelines*." *See* USSG §§ 5H1.1-5H1.6 (1987) (emphasis supplied). This, of course, was not what Congress directed the Commission to do, *i.e.*, do not recommend prison or a longer prison sentence based on factors indicating disadvantage, and use mitigating factors to recommend a short sentence or a sentence of probation if the purposes of sentencing other than rehabilitation do not require prison. *See* S. Rep. No. 98-225, at 172-75 (1983). "To construe a provision clearly intended to prohibit heavier sentences for people lacking family ties as prohibiting lighter sentences for such people is imputing to Congress an intent it has not manifested." *United States v. Floyd*, 945 F.2d 1096, 1010-11 (9th Cir. 1991), *reported as corrected at*, 956 F.2d 203 (9th Cir. 1992), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc).

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said only that the limitation to guidelines, policy statements and official commentary "was added for the protection of the Sentencing Commission" against "being subpoenaed." *Id*.

[111] For explanations of why and how the courts succumbed, see Marc L. Miller & Ronald F. Wright, *Your Chaetin' Heart(Land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 765-809 (1999); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 273-89 (1993); Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1222 (1999); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 Nw. L. Rev. 1441, 1455-71 (1997).

Pursuant to the last sentence of § 994(d), the Commission stated that race, sex, national origin, creed and socioeconomic status "are not relevant in the determination of a sentence." *See* USSG § 5H1.10, p.s. (1987). The original Commission also placed "personal financial difficulties and economic pressures upon a trade or business" completely off limits to lower a sentence, stating that it had considered this factor, but provided no supporting reasons: "The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence." USSG § 5K2.12, p.s. (1987). As noted above, the original Commission also prohibited "drug or alcohol dependence" as a reason for a sentence "below the guidelines," but encouraged it as a basis for an increased term and additional conditions of supervised release. USSG §5H1.4, p.s. (1987). This, it said, was because "[s]ubstance abuse is highly correlated to an increased propensity to commit crime." *Id.* This ignored Congress's statement that drug dependence should not be considered in deciding whether to incarcerate a defendant, but "might cause the Commission to recommend that the defendant be placed on probation in order to participate in a community drug treatment program, possibly after a brief stay in prison, for 'drying out,' as a condition of probation." *See* S. Rep. No. 98-225, at 173 (1983). The Commission also disregarded past practice, when judges regarded drug use as a mitigating factor in drug trafficking cases.[112]

Later, the Commission also prohibited "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing," USSG § 5H1.12, p.s., "addiction to gambling," USSG §5H1.4, p.s., "post-sentencing rehabilitative efforts," USSG § 5K2.19, p.s., acceptance of responsibility, USSG § 5K2.0(d)(2), p.s., role in the offense, USSG § 5K2.0(d)(3), p.s., the decision to plead guilty or enter into a plea agreement, USSG § 5K2.0(d)(4), p.s., and fulfillment of restitution obligations only to the extent required by law, USSG § 5K2.0(d)(5), p.s., among others,[113] usually with no explanation. *See* Part IV.

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[112] USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* at 36 (1987) [hereinafter USSC, *Supplementary Report*], http://www.fd.org/pdf_lib/Supplementary %20Report.pdf. In May 2010, the Commission took the very modest step of changing "drug abuse or dependence" from an entirely prohibited factor to one that is "not ordinarily relevant," and acknowledged that treatment outside of prison may be appropriate in some cases, though excluding defendants in Zone D and so long as certain requirements are met. See USSG, App. C, Amend. 739 (Nov. 1, 2010); 75 Fed. Reg. 27,388 (May 14, 2010). See Part IV for a fuller discussion of these amendments.

[113] Also prohibited are diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants, USSG § 5K2.13, p.s., and a single aberrant act if the defendant had any "significant prior criminal behavior" even if so remote or minor that it is uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum, involved serious bodily injury or death, or the defendant discharged or otherwise used a firearm, USSG § 5K2.20, p.s.

4. The Commission's "heartland" standard, appearing nowhere in the SRA, further stunted judicial discretion to question the adequacy of the Commission's consideration.

The Commission's "heartland" standard worked in tandem with the limitation to the four corners of the *Guidelines Manual* to mean that any factor mentioned in the manual was by definition "adequately considered." The "heartland" concept first appeared in a single sentence in the Original Introduction to the *Guidelines Manual*. In 1994, it was added to the Commission's general departure policy statement along with the following: "In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range."[114]

In other words, a guideline or policy statement—no matter how inadequately considered or how misguided—was to be followed unless there were facts in the case that made it "unusual" or "atypical" compared to cases sentenced within the guideline range. The "heartland" theory assumes that all typical and usual factors are included in the guidelines and assigned appropriate weight. In fact, the guidelines include many typical aggravating factors that are accorded too much weight (*e.g.*, drug quantity, loss amount), or that may not justify additional punishment at all (*e.g.*, multiple overlapping factors in fraud cases). At the same time, the guidelines exclude, prohibit and discourage the vast majority of typical mitigating factors (*e.g.*, family ties and responsibilities, education, employment, disadvantage).

The "heartland" concept presumed that the mere appearance of a factor in the Manual—whether required to calculate the guideline range or placed off limits for departure by a policy statement—reflected "adequate consideration." The courts of appeals and then the Supreme Court,[115] embraced the "heartland" theory, and judges could not question the adequacy of the Commission's considerations or whether a different sentence "should result" to satisfy the legitimate purposes of punishment.[116]

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[114] USSG § 5K2.0, comment. (backg'd.) (1994); USSG App. C, amend. 508 (Nov. 1, 1994).

[115] *Koon v. United States*, 518 U.S. 81 (1996).

[116] *See* Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1255-67 (1999); Kate Stith, T*he Hegemony of the Sentencing Commission*, 9 Fed. Sent'g Rep. 14, 17 (1996);

"As a result, judges never became seriously involved in developing a common law of sentencing," and they "never played an important role in improving the supposedly evolutionary guidelines."[117]

III. The Commission's Policy Statements Offer Little or No Useful Advice to Judges Because They Were Promulgated Largely Without Reason and Contrary to Past Practice, Empirical Data, and National Experience.

Section 3553(a)(1) requires judges to consider "the history and characteristics of the defendant." Yet the Commission's policy statements expressly limit consideration of many of those characteristics and offer no explanation why. These restrictive policy statements were promulgated contrary to past practice, empirical data and national experience. As Justice Stevens put it in his concurrence in *Rita*, the Commission "has not developed any standards or recommendations" for many individual characteristics, but "[t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider," even though they are "not ordinarily considered" under the Guidelines. *Rita*, 551 U.S. at 364-65 (Stevens, J., concurring). Consequently, they provide little or no useful advice to judges. *Kimbrough v. United States*, 552 U.S. 85, 109-110 (2007); *Rita*, 551 U.S. 349-51.

A. Past Practice

Before the guidelines became law, individualized mitigating factors were widely used and had a substantial impact on sentences. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 18-19 (1988); Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 (1999).

B. The Commission Promised to Revisit Offender Characteristics in the Future.

After numerous public hearings held during 1986 and 1987, and after receiving extensive public comment from experts and practitioners regarding how the Commission should treat the offender characteristics listed by Congress in 28 U.S.C. § 994(d) and (e), the initial Commission decided that it would restrict, limit, discourage, and prohibit most mitigating circumstances. At the time, the Federal Defenders expressed grave concern that that the Commission's decision was in conflict with Congress's intent, setting forth many of the same points made here in this paper.[118] The Commission explained,

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[117] Ronald F. Wright & Marc L. Miller, *Empty Heart, Vibrant Corpus*, 12 Fed. Sent'g Rep. 86, 88 (1999).

[118] *See, e.g.*, Comments of the Federal Defenders on the Revised Draft Sentencing Guidelines, at 32 (Mar. 11, 1987) ("[The factors listed in § 994(e)] were not supposed to be used to put uneducated unskilled or unemployed defendants in jail but they were supposed to be used to keep such defendants out of jail in appropriate cases in order to provide them with needed

however, that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to the sentencing decision" and that, at least for the initial set of guidelines, "it need not do so." USSG, ch. 1, pt. A § 4(b) (1987). This was because the Commission is a "permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years." *Id*. It promised to "monitor[] when courts depart from the guidelines" and "analyze[] their stated reasons for doing so," so that "over time, [the Commission] will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted." *Id.*[119]

Some have described the Commission's initial policy regarding departures based on offender characteristics as perhaps "understandable," given the extensive list of issues the Commission was directed to address, and given that the initial guidelines were "crafted under difficult and highly time-constrained circumstances."[120] But the Commission has never revisited its initial departure policy, except to add to the list of restrictions and prohibitions. As set forth in the next Subpart, these decisions have deprived the Commission of the very input it promised to monitor and use to improve the guidelines.

C. By Prohibiting and Restricting Consideration of Mitigating Factors, the Commission Stifled the Data and Information It Was Required to Collect, Use and Disseminate.

Among other things, Congress directed the Commission to avoid *unwarranted* disparities among similarly situated defendants, 28 U.S.C. § 991(b)(1)(B), to maintain sufficient flexibility to permit individualized sentences, *id*., to reflect advancement in knowledge of human behavior, 28 U.S.C. § 991(b)(1)(C), and to measure the degree to

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rehabilitative programs and services. What the Commission has done . . . is forbid the very thing that Congress intended to provide Rather than tell the judge that education and vocational skills are not relevant in choosing among different types of sentences permitted by guideline the guidelines should tell the judge that these factors may be relevant in determining the length or type of sentence within the guidelines and in sentencing below the guidelines if the defendants criminality is related to his lack of skills and education and without danger to the community he could benefit from probationary sentence that includes an appropriate available rehabilitative program."), *available at* http://www.src-project.org/wp-content/pdfs/public-comment/ussc_publiccomment_198703/0001950.pdf.

[119] The need to provide more "accurate guidelines" was changed in 1990 to a need "to refine the guidelines." USSG, App. C, Amend. 307 (Nov. 1, 1990). The Commission said that this was not a "substantive change," but it could be viewed as part of the Commission's early effort to "soft-pedal any empirical claims about guidelines," which "changed over time to stronger claims about the inherent validity of the guidelines." Marc L. Miller and Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing* Justice, 2 Buff. Crim. L. Rev. 723, 762-63 (1999).

[120] Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 858 (1992).

which the guidelines are effective in meeting the purposes set forth in section 3553(a)(2). 28 U.S.C. § 991(b)(2). In aid of these goals, the Commission was to engage in extensive research by systematically collecting, studying and disseminating empirical evidence of sentences actually imposed, the relationship of such sentences to the purposes of sentencing, and their effectiveness in meeting those purposes. *See* 28 U.S.C. § 995(a)(12)-(16). It was to "review and revise" the guidelines in light of this data, "determin[ing] whether the guidelines are being effectively implemented" and "revis[ing] them if for some reason they fail to achieve their purposes," without "second-guessing individual judicial sentencing actions." *See* 28 U.S.C. § 994(o); S. Rep. No. 98-225, at 178 (1983).

By prohibiting and restricting consideration of mitigating factors, the Commission not only second guessed judicial decisions and shut off individualized sentencing, but deprived itself and the system as a whole of information regarding (1) whether defendants were or were not similar, (2) advancement in knowledge of human behavior, (3) the relationship of sentences imposed to the factors set forth in § 3553(a), and (4) the effectiveness of sentences imposed in meeting the purposes set forth in § 3553(a)(2). The Commission acknowledges the "lack of good data on all legally relevant considerations that might help explain differences in sentences," which "is especially severe regarding circumstances that might justify departure from the guidelines," because "[d]ata are collected on the reasons for departure in cases that receive one, but whether the same circumstances are present in cases that do *not* receive a departure is not routinely collected."[121] In other words, the Commission prohibited and discouraged departures, so courts did not grant them, so the Commission did not collect or use the relevant information. As a result, a sentencing judge, who sentences hundreds of defendants each year, is likely to have more information than the Commission. *See Gall*, 552 U.S. at 52 n.7.

After *Booker*, the Commission said that when judges "forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose . . . a sentence outside the applicable guideline range," the SRA's goal of "uniformity" is not met.[122] But the SRA does not call for "uniformity." Rather, it seeks to avoid both unwarranted disparity among similarly situated defendants and unwarranted uniformity among differently situated defendants. *See* 28 U.S.C. § 991(b)(1)(B); 18 U.S.C. § 3553(a)(1), (6); *Gall*, 552 U.S. at 55 (approving judge's consideration of "the need to avoid unwarranted *similarities* among other co-conspirators who were not similarly situated") (emphasis in original).

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[121] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 119 (2004) [hereinafter USSC, *Fifteen Year Review*], *available at* http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

[122] USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* iv (2006).

Unprincipled uniformity requires offenders to be treated alike because the guidelines say so, even when they differ in respects that are relevant to the purposes of sentencing in ways the guidelines fail to take into account. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 83-84 (2003). "Unwarranted disparity is different treatment that is unrelated to our legitimate sentencing goals, or uniform treatment that fails to take into account differences among offenders that are relevant to our purposes and priorities." *See* Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker*, 38 Ariz. St. L.J. 425, 442 (2006). "Disparity-talk" is often used "as a cover to further restrict judicial discretion, empower prosecutors, and pursue harsher sentences divorced from any comprehensive philosophy of punishment." *Id*. at 447. But there is less true disparity when judges exercise their discretion to impose sentences that reflect all relevant § 3553(a) factors. *Id*. at 456-57, 462.

D. Inaccurate Data Collection and Reporting Contributed to Passage of the Feeney Amendment and the Resulting Further Restrictions on Departures.

The inaccurate attribution of a significant number of government-initiated downward departures to judges, not corrected until it was too late, contributed to passage of the Feeney Amendment in 2003. The Justice Department and certain members of Congress claimed that the rate of non-substantial assistance departures had risen from 9.6% in 1996 to 14.7% in 2001. *See* 149 Cong. Rec. S5113-01, 5128. The Commission had been reporting all non-substantial assistance downward departures together, reporting a rate of 18.1% in 2001. After the PROTECT Act was passed, the Commission reported that at least 40% of those departures were initiated or acquiesced in by the government, and that judges otherwise departed in, at most, 10.9% of cases in 2001. *See* U.S. Sentencing Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* iv-v, 60 (2003). This led to substantial further restrictions on mitigating factors. *See* Part IV.

E. The Commission Has Never Justified Its Prohibitions and Restrictions on Consideration of Mitigating Factors.

The Commission's reasons, or more often lack of reasons, for prohibiting or discouraging consideration of mitigating factors is discussed in connection with each individual policy statement in Part IV, *infra*. In addition, Justice Breyer wrote about the Commission's choices regarding offender characteristics at the inception of the Guidelines, and the Commission attempted to explain those choices in an *amicus* brief filed in support of the government in *Rita* and *Claiborne*.

1. Justice Breyer's 1988 account: No explanation

In his 1988 article explaining how the guidelines were developed, then Judge and Commissioner Breyer said that the Commission's treatment of offender characteristics

"deviated from average past practice" as the result of "'trade-offs' among Commissioners with different viewpoints."[123] "The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure."[124] Some "argued that factors such as age, employment history, and family ties should be treated as mitigating factors."[125] However, based on arguments regarding "fairness" and "uncertainty as to how a judge would actually account for the aggravating and/or mitigating factors," the Commission adopted "offender characteristics rules [that] look primarily to past records of conviction," but "do not take formal account of . . . the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider."[126]

Much is missing from this account. Most notably, it makes no mention whatsoever of the policy statements that affirmatively deemed age, education, vocational skills, mental and emotional condition, physical condition, employment record, and family ties "not ordinarily relevant," and prohibited consideration of drug dependence, alcohol abuse, personal financial difficulties, and economic pressures on a trade or business. The Commission did not just leave these out of the formal rules, such that judges would see that they were not included in those rules and impose a non-guideline sentence if appropriate, as Congress intended. *See* 18 U.S.C. § 3553(b) (1984). Rather, the Commission affirmatively curtailed below-guideline sentences through policy statements, *see* 28 U.S.C. § 994(a)(2); S. Rep. No. 98-225, at 51 (1983), and then lobbied Congress to include a provision in § 3553(b) that would confine judges to those policy statements. *See* 18 U.S.C. § 3553(b) (Dec. 7, 1987). The fact that Justice Breyer did not mention any of this suggests that there was nothing defensible to say.

2. The Commission's 2007 account: Disingenuous explanations

In an *amicus* brief filed in support of the government in *Rita* and *Claiborne*, arguing for a mandatory presumption of reasonableness for guideline sentences, the Commission strained to explain its exclusion of mitigating factors from consideration in imposing below-guideline sentences. These explanations are not found in the policy statements themselves or the official Reasons for Amendment.

First, the Commission claimed that the guidelines had been "informed by data collected from hundreds of thousands of past sentencing decisions and extended, rigorous debate between all sectors of the criminal justice system," and a "continually evolving

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[123] Breyer, *Key Compromises*, *supra* note 18, at 19.

[124] *Id*.

[125] *Id.*

[126] *Id*. at 20.

process based on experience and empirical study, producing polices that 'reflect, to the extent practicable, advancement of knowledge of human behavior as it relates to the criminal justice process'."[127] But the Commission curtailed consideration of mitigating circumstances knowing that this was a deviation from past practice.[128] Its restrictions on mitigating factors are contrary to feedback from the courts and practitioners before and after *Booker* and the Commission's own research.[129] In its *amicus* brief, the Commission claimed that "[s]entencing judges have been a particularly valuable source of information."[130] But judicial feedback was stifled by the Commission's policy statements, and all available information demonstrates that mitigating factors are relevant to the sentencing decision.[131]

Second, the Commission used race to explain its rejection of consideration of a wide range of offender characteristics, including education, vocational skills, employment record, family ties and responsibilities, and community ties.[132] *Amici* Federal Public and Community Defenders and National Association of Criminal Defense Lawyers had argued that offender characteristics relevant to the statutory purposes are discouraged or prohibited by the Commission's policy statements.[133] The Commission attempted to justify this by tying these factors to the need to reduce unwarranted disparity, including racial discrimination, as set forth in the directive to assure neutrality as to "race, sex, national origin, creed, and socioeconomic status."[134] Citing an article by former Commissioners and staff, the Commission explained that it "endeavored 'to

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[127] Brief for the United States Sentencing Commission as *Amicus Curiae* in Support of Respondent at 4, 5, *Claiborne v United States* and *Rita v. United States*, 551 U.S. 338 (2007) [hereinafter USSC *Amicus* Brief], *available at* http://www.ussc.gov/Legal/Court_Decisions/Amicus_Curiae_Briefs/20070122_Claiborne_Rita_Amicus_Brief.pdf.

[128] Breyer, *Key Compromises*, *supra* note 18, at 18-19 ("A fourth kind of compromise embodied in the Guidelines . . . involve[ed] 'trade-offs' among Commissioners with different viewpoints . . . . Such compromises normally took place when the Commission deviated from average past practice . . . . One important area of such compromise concerns 'offender'characteristics.").

[129] *See* Part III.B, *supra*; Part III.F, *infra*; Part IV, *infra*.

[130] USSC *Amicus* Brief at 11.

[131] *See* Part III.C, *supra*; Part III.F, *infra.*

[132] USSC *Amicus* Brief at 21-22.

[133] Brief of Federal Public and Community Defenders as Amicus Curiae Supporting Petitioners, *Rita v. United States*, 551 U.S. 338 (2007), *available at* http://www.fd.org/pdf_lib/Claiborne%20Rita%20FPCD%20NAFD%20amicus.pdf; Brief of National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioners, *Rita v. United States*, 551 U.S. 338 (2007), *available at* http://www.fd.org/pdf_lib/NACDL%20final%20brief%20Rita%20Claiborne.pdf.

[134] USSC *Amicus* Brief at 21 (citing 28 U.S.C. § 994(d)).

ensure that other considerations, possibly associated with a defendant's race or personal status, are not used to 'camouflage' the improper use of those factors.'"[135] The Commission continued: "Thus, the Commission decided to prohibit or discourage consideration of certain other offender characteristics, such as 'lack of youthful guidance.'"[136] Here, the Commission cites another article by former Commissioners, although no claim about a relationship between consideration of "lack of youthful guidance" and racial disparity is found in the article.[137] In fact, the Commission prohibited consideration of a defendant's lack of youthful guidance *not* out of concern with racial disparity, but, as the cited article explained, in response to a Ninth Circuit holding that a disadvantaged childhood could be a mitigating consideration justifying a downward departure.[138] The Commission gave no official reason or citation to any evidence for this amendment,[139] but, as the cited article explained, was concerned that it could "potentially be applied to an extremely large number of cases."[140] Thus, although the Commission recognized the manifest relationship between disadvantage and crime, it imposed a policy on the courts prohibiting them from recognizing any distinction relevant to sentencing purposes between defendants brought up in privilege and those born into poverty and neglect. Given the correlation between disadvantaged upbringing and minority status, consideration of this factor as a basis for downward departure would likely have *reduced* the gap in average sentences between whites and racial minorities, a gap which grew dramatically under the mandatory guidelines because of structural disparity built into the guidelines.[141]

Third, the Commission argued, "even putting aside Congress's specific instructions" to ensure neutrality as to race, sex, national origin, creed, and socioeconomic status, and to reflect the "general inappropriateness" of education, vocational skills, employment record, family ties and responsibilities, and community ties (which the Commission attempted to tie to race), Congress "generally delegated" to the

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[135] *Id.* (citing William W. Wilkins, Phyllis J. Newton, and John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim. L. F. 355, 368 (1991)).

[136] *Id*. at 21.

[137] William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & L. Rev. 63 (1993).

[138] *Id.* at 84 (citing *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991) (corrected opinion reported at 956 F.2d 203 (9th Cir. 1992), *overruled on other grounds*, 990 F.2d 501 (9th Cir. 1993) (en banc)).

[139] Nor did it give any reason for the amendment when it was promulgated. *See* USSG, App. C, Amend. 466 (Nov. 1, 1992).

[140] *Id*. at 84-85.

[141] USSC, *Fifteen Year Review*, *supra* note 121, at 116, 135.

Commission the job of choosing, "on a uniform basis," which of 11 factors would have any relevance.[142] Utterly ignoring the legislative history demonstrating that Congress did not intend that mitigating factors be excluded on a "uniform basis" and that the Commission was required to subject all such factors to "intelligent and dispassionate analysis . . . with supporting reasons," *see* Part II.B.2 & 3, *supra*, the Commission simply declared: "Because Congress expressly entrusted such questions to the Commission, it is presumptively reasonable for a district court to follow the Commission's decisions."[143] As Justice Stevens put it in his concurrence in *Rita*: "The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics," but "[t]hese are . . . matters that § 3553(a) authorizes the sentencing judge to consider," even though they are "not ordinarily considered under the Guidelines."[144]

Fourth, in arguing for a mandatory presumption of reasonableness for guideline sentences, the Commission made promises that it has since failed to keep. It represented that it was "actively looking at some of the issues raised [by analysis of post-*Booker* cases] and has made addressing those issues part of its priorities for the 2006-2007 amendment cycle and beyond."[145] As its sole example, the Commission said that in 2004, it had "completed an empirical study of recidivism rates and first offenders, the results of which provided an additional basis for reconsideration of the Guidelines' treatment of criminal history. Accordingly, the Commission included a review of criminal history as one of its final priorities in the 2006-2007 amendment cycle."[146] As detailed in Part III.F, *infra*, the Commission's empirical study demonstrated that a host of individualized factors predict reduced recidivism. The Commission took no action, and now that the litigation has concluded, the issue has largely been dropped from the Commission's list of priorities.[147] In 2010, the Commission eliminated recency points under § 4A1.1 because judges often point to recency points as a reason to depart and because research showed that the consideration of recency "only minimally improves" the ability of the criminal history score to predict recidivism. *See* USSG App. C, Amend. 742 (Nov. 1, 2010). Yet, those factors that are known to *reduce* recidivism remain discouraged or prohibited today.

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[142] USSC *Amicus* Brief at 22-23 (citing 28 U.S.C. § 994(d), (e)).

[143] *Id*. at 23.

[144] *Rita*, 551 U.S. at 364-65 (Stevens, J., concurring).

[145] USSC *Amicus* Brief at 10.

[146] *Id.* at 10 n.7.

[147] *See* USSC, Notice of Final Priorities, 73 Fed. Reg. 54,878 (Sept. 23, 2008); USSC, Notice of Final Priorities, 43 Fed. Reg. 46,478 (Sept. 9, 2009); USSC, Notice of Final Priorities, 74 Fed. Reg. 54,699 (Sept. 8, 2010).

F. The Sentencing Data and Research Demonstrate that Mitigating Factors *Are* Relevant to the Purposes of Sentencing.

A plurality of judges surveyed in 2002 said that the guidelines infrequently met the goal of maintaining sufficient flexibility to permit individualized sentences, or of providing needed training, care or treatment in the most effective manner.[148] Once freed of the constraints of mandatory guidelines and policy statements, the courts have much more freely relied on mitigating factors. During fiscal year 2010, 17.8% of sentences were below the guideline range, as compared to 5.2% in FY 2004.[149]

Responding to the Commission's 2010 survey of judges, large majorities of judges said that mitigating factors, including many restricted, discouraged, and prohibited by the Commission, should be considered "ordinarily relevant" to the question whether to impose a sentence below the guideline range.[150] Overall, 59% of judges said that the mitigating factors listed in the survey should be "ordinarily relevant" to the determination of a sentence outside the guideline range. These include age (67%), mental condition (79%), emotional condition (60%), physical condition (64%), employment record (65%), family ties and responsibilities (62%), stress related to military service (64%), civic, charitable, or public service (60%), prior good works (62%), diminished capacity (80%), voluntary disclosure of offense (74%), post-sentencing rehabilitative efforts (57%), post-offense rehabilitative efforts (70%), aberrant behavior (74%), exceptional efforts to fulfill restitution obligations (75%), undue influence related to affection, relationship, or fear of other offender(s) (58%), disadvantaged upbringing (50%), lack of guidance as a youth (49%), community ties (49%), alcohol dependence (47%), drug dependence (49%), and education (48%).[151] In contrast, very few judges said that any factor is "never relevant," with the *highest* percentage being 12% for an aggravating factor, dependence on criminal livelihood.[152] In that same survey, a significant majority of judges said that they do not rely on departure provisions because the Manual does not contain a provision that adequately addresses the reason or because the Commission's policy statements are too restrictive.[153]

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[148] USSC, *Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II, *available at* http://www.ussc.gov/Research/Research_Projects/Surveys/200303_Judge_Survey/judsurv.htm.

[149] *See* USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl. N (2010); USSC, *2004 Sourcebook of Federal Sentencing Statistics*, Table 26A. These percentages do not include below-guideline sentences based on a government motion not based on substantial assistance, some of which are based on mitigating factors and which compose now 4.0% of all cases.

[150] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

[151] *Id.*

[152] *Id.*

[153] *Id.* tbl. 14.

At the Commission's regional hearings during 2009 and 2010, judges repeatedly said that the guidelines often recommend punishment that is too severe,[154] and urged the Commission to listen to them and consider the sentencing data to revise the guidelines downward.[155] They emphasized that consideration of offender characteristics is essential to determining fair and effective sentences.[156]

The Commission's research demonstrates that age, current or previous marriage, employment history, educational level, abstinence from drug use, first offender status, being a drug or fraud offender, and receiving a sentence of probation or a split sentence all predict a reduced risk of recidivism.[157] Note that this research, which is neither a guideline nor a policy statement nor official commentary, could not be used by judges under the plain terms of § 3553(b). The Supreme Court has now excised § 3553(b), and has approved reliance on both Commission studies, *see Kimbrough v. United States*, 552 U.S. 85 (2007) (crack reports), and relevant materials from other sources. *See Gall v. United States*, 552 U.S. 38, 57-58 (2007) (studies on brain development).

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[154]*See, e.g.*, Transcript of Public Hearing, Atlanta, Georgia, at 133 (Judge Presnell); Transcript of Public Hearing, Stanford, California, at 70, 81 (Judge Winmill); Transcript of Public Hearing, Chicago, Illinois, at 19 (Judge Holderman); Transcript of Public Hearing, New York, New York, at 377 (Judge Dearie); *id*. at 328 (Judge Ambrose); Transcript of Public Hearing, Denver, Colorado, at 263 (Judge Gaitan); Transcript of Public Hearing, Austin, Texas, at 14-16 (Judge Cauthron).

[155] *See* Transcript of Public Hearing, Stanford, at 82, 85 (Judge Winmill); *id*. at 89 (Judge Lasnik); Transcript of Public Hearing, New York, at 362 (Judge Gertner); *id*. at 124 (Judge Woodcock); Transcript of Public Hearing, Austin, at 222 (Judge Jones); *see also* Transcript of Public Hearing, New York, at 460-61 (Professor Barkow) (If "judges are not complying with [a guideline], then I view that as a fire alarm for the field that there is something wrong with the guideline.").

[156] Transcript of Public Hearing, Stanford, at 46-47 (Judge Walker); *id*. at 81-82 (Judge Winmill); Transcript of Public Hearing, Chicago, at 33, 37 (Judge Carr); *id*. at 91 (Judge McCalla); *id*. at 105 (Judge Simon); Transcript of Public Hearing, Denver, at 64, 91-92 (Judge Marten); *id*. at 292 (Judge Gaitan); *id*. at 297-98 (Judge Pratt); *id*. at 301-02 (Judge Ericksen); Transcript of Public Hearing, Austin, at 11-13 (Judge Cauthron); *id*. at 23-24 (Judge Starrett); *id*. at 256 (Judge Holmes).

[157] *See* USSC, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004) [hereinafter USSC, *Measuring Recidivism*], *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf; USSC, *Recidivism and the First Offender* (May 2004) [hereinafter USSC, *First Offender*], *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf; USSC, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 4, 2005) [hereinafter USSC, *Salient Factor Score*], *available at* http://www.ussc.gov/Research/Research_Publications/Recidivism/20050104_Recidivism_Salient_Factor_Computation.pdf.

IV. Individual Deconstruction of the Commission's Policies on Mitigating Factors: History, Empirical Research, Sentencing Data, and Caselaw

This section sets forth the SRA legislative history (if any) for each policy statement addressing mitigating factors, its original form, notable amendments and the reasons for each (if any), any relevant empirical research, sentencing data and judicial decisions. Because some information applies to more than one policy statement, there is some repetition in a number of sections. The intent is for each section to stand alone without need for reference to the other sections. You can use the empirical research, sentencing data and judicial decisions in each section to support a variance on the basis of the factor. If necessary, you can use the history in each section to deconstruct the policy statement. Ordinarily, deconstruction should not be necessary because § 3553(a)(1) and § 3661 *require* the sentencing court to consider mitigating facts and circumstances.

§ 5H1.1 Age

Legislative History

Congress was concerned about youthful offenders receiving sentences that were harsher (or less harsh) than those for similarly situated adult offenders under youthful offender laws which the SRA repealed. "[W]hile consideration of youth in determining the appropriate sentence may be justified, the consideration should be employed in a much more rational and consistent way than it is today," and thus the Commission was required to "consider, in promulgating the sentencing guidelines and policy statements, what effect age – including youth, adulthood, and old age – should have on the nature, extent, place of service, or other incidents of an appropriate sentence." S. Rep. No. 98-225, at 172 (1983). Congress had no concern that young offenders should be sentenced *more* severely than adults, or that older offenders should be sentenced *more* severely than middle-aged offenders. Congress noted that 28 U.S.C. § 994(j) was "a recognition that a youth first offender, who has not committed a serious crime, ordinarily should not receive a sentence to imprisonment" at all. *Id.* at 120.

Initial Policy Statement

Rather than demonstrate that it had considered age in a rational and consistent manner, or provide guidance to courts on how to do so, the Commission promulgated the following policy statement as part of its initial set of guidelines:

> Age is not ordinarily relevant in determining whether a sentence should be outside the guidelines. Neither is it ordinarily relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. Age may be a reason to go below the guidelines when the offender is elderly and infirm and where a form of punishment (e.g., home confinement) might be equally efficient as and less costly than incarceration. If, independent of the consideration of age, a defendant is

> sentenced to probation or supervised release, age may be relevant in the determination of the length and conditions of supervision.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.1 (Nov. 1, 1987).

In its original form, the policy statement generally restricted consideration of age as "not ordinarily relevant" to determining whether the sentence should be outside the guideline range or for determining the type of sentence to impose when the guidelines allow for a sentence other than straight incarceration. The policy statement allowed for an exception when the defendant was "elderly *and* infirm *and* where a form of punishment (e.g. home confinement) might be equally efficient as and less costly than incarceration." (Emphasis added.) Although the guideline did not directly say so, age could be relevant to determining the sentence *within* the guideline range.

Amendments

In 1991, the Commission amended § 5H1.1 to make clear that the term "age" includes "youth." It also removed the restriction on its relevance to determining the type of sentence to impose when the guidelines allowed for sentencing options, and included a reference to § 5H1.4 (Physical Condition), as it "may be related to age." As shown below, §5H1.4 contains restrictions on consideration of physical condition, suggesting through reference further limitations. It also removed the language stating that if the court determines that a term of probation is the appropriate sentence independent of age, then age may be relevant to the length and conditions of probation. USSG App. C, Amend. 386 (Nov. 1, 1991).

The Commission explained that the amendment was part of an overall revision to Part H intended to address "inconsistencies and ambiguities" contained in this and other provisions in Part H. *See* 56 Fed. Reg. 1846 (Jan. 17, 1991) (proposed amendment and reason). As an example, the Commission pointed to the fact that the previous version of § 5H1.1 did not explain exactly how age might be relevant to the length and conditions of probation. *Id.* As ultimately promulgated, this amendment also made clear that although the Commission views age as not ordinarily relevant for downward departures, this provision "does not mean that the Commission views [age] as necessarily inappropriate to the determination of the sentence within the applicable guideline range." *See* USSG App. C, Amend. 386 (Nov. 1, 1991) (Reason for Amendment).

In a 1993 article, the Commission's then-Chair Judge William W. Wilkins, Jr. and General Counsel John R. Steer explained that the Commission promulgated Amendment 386 in response to (and in support of) appellate decisions in which courts disapproved of basing a downward departure on a defendant's youth. Wilkins & Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash & Lee L. Rev. 63, 83 (1993) (explaining that the Commission was responding to court decisions). One of the three decisions cited as examples was a decision by Judge Wilkins himself. *See id.* at 83 n.105 (citing *United States v. Summers*, 893 F.2d 63 (4th Cir. 1990)). Another of the three cases relied on that same decision. *See United States v.*

White, 945 F.2d 100, 102 (5th Cir. 1991). Not one of the three courts disapproved of basing a downward departure on the defendant's youth as a matter of independent policy analysis. Rather, each simply construed the terms of § 5H1.1 as they were written in 1987 to discourage departures based on youth.

In 1992, the Commission published a request for comment on whether Chapter 5, Parts H and K should be amended to authorize downward departures where the defendant's "advanced age, (*e.g.* age 60 or older) has reduced the defendant's risk of recidivism." *See* 57 Fed. Reg. 90 (Jan. 2, 1992). Reflecting the Commission's awareness of the relationship between age and recidivism, which was demonstrated by the Commission's own later studies,[158] such an amendment would have loosened the restriction on the relevance of old age, which was otherwise tied to infirmity. However, the Commission was also considering prohibiting any such "old age" departure if the defendant was a "major drug trafficker" or had a history of violent offenses, and also requiring the defendant to serve a substantial portion of his sentence before getting any break for being old and having a reduced risk of recidivism. *Id.* The Commission did not provide any information to support the notion that drug trafficking or past violent offenses lessen the correlation between increasing age and reduced recidivism. In any event, this potentially beneficial idea was abandoned, leaving the requirement that a defendant be elderly *and* physically infirm before age could be relevant in determining the type of sentence to impose, which, as limited by reference to § 5H1.4, survives to this day.

In 2004, the Commission amended the provision to use the phrase "whether a departure is warranted" rather than "whether a sentence should be outside the applicable guideline range." USSG, App. C, Amend. 674 (Nov. 1, 2004). This amendment was meant to conform the language to that of the departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). As a result, § 5H1.1 *by its terms* does not apply in determining whether to sentence outside the guideline range in any manner not designated as a "departure." Section 5H1.1 is merely advisory with respect to departures, and does not apply at all to the court's consideration of a variance based on age. Put another way, § 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission's policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements, including the defendant's youth at the time of the offense.

In January 2010, the Commission requested comment regarding whether the guidelines are adequate as they apply to offender characteristics addressed by five policy statements, including age under § 5H1.1. *See* 75 Fed. Reg. 3525, 3529-30 (Jan. 21,

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[158] USSC, *Measuring Recidivism*, *supra* note 157note 157, at 12 (finding that "[r]ecidivism rates decline relatively consistently as age increases").

2010). For each characteristic addressed by these five policy statements, the Commission asked whether the factor is relevant to the "in/out question," *i.e.*, whether to sentence a defendant to prison or probation and whether such a condition is relevant to the length of imprisonment. Apparently alluding to its earlier *post hoc* claim that it placed factors off limits because judges might consciously (or unconsciously) rely on offender characteristics in a discriminatory manner, *see* Part III.E.2, *supra*, the Commission also asked whether the factor could be "used as a proxy for one or more of the 'forbidden factors'" and "if so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant." *Id.*

With respect to age in particular, the Commission asked if it should amend § 5H1.1 and, if so, how. It asked whether youth might be "a reason to decrease a sentence to reflect the view that younger offenders are less accountable for their actions, or increase the sentence to reflect a view that younger offenders are more likely to recidivate" *Id.* at 3,530. It asked whether an offender's "advanced age [should] be a reason to increase the sentence to reflect a view that older offenders should be more responsible, or a reason to decrease the sentence to reflect a view that older offenders are less likely to recidivate" *Id.*

In response to the "proxy" question, the Federal Defenders explained (just as the Commission has done previously with respect to *aggravating* factors), that the possibility of demographic differences in the consideration of age is not a cause for concern so long as judges consider the factor in order to further a legitimate purpose (or purposes) of sentencing, as they are required to do by statute, and do not refuse to consider the factor for discriminatory reasons, which is not likely and nearly impossible to prove.[159] They pointed out that "sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency

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[159] *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 49-54 (Mar. 17, 2010) (attached to, and incorporated by reference in, Letter from Margy Meyers to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010 (Mar. 22, 2010)) (discussing the "proxy" question at length), *available at* http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf; *see also* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* at xii (1995) (emphasizing that disproportionate impact alone is not a reason to change policy if the policy itself is justified by sentencing purposes) [hereinafter USSC, *1995 Cocaine Report*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/199502_RtC_Cocaine_Sentencing_Policy/index.htm; USSC, *Fifteen Year Review*, *supra* note 121, at 113-14 ("Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others.").

All public comment on the 2010 proposed amendments and issues for comment is available on the Commission's website at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group."[160]

The Defenders urged the Commission to amend § 5H1.1 to say that age may be relevant to departure if it advances one or more purposes of sentencing, citing legislative history and the extensive empirical data, judicial feedback, and policy research set forth below.[161] They pointed out that, with a single exception in fiscal year 2008, courts uniformly viewed age as mitigating, citing it 699 times as a reason for a below guideline sentence, nearly a third of the time sponsored by the government. [162]

The Probation Officers Advisory Group generally recommended that the Commission amend the guidelines "to clarify that the court should consider [the] factor[], either alone or in combination, to determine the appropriate sentence for a particular defendant."[163]

The Practitioners Advisory Group did not address age in particular, but addressed generally the factors addressed by the five policy statements at issue. It noted that the Commission's policy of discouraging or prohibiting consideration of offender characteristics "is at a minimum confusing" in light of the overarching mandate to judges in § 3553(a) to consider the history and characteristics of a defendant and the companion language in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" that may be considered for purposes of sentencing.[164] It stated that the inconsistency "damages the coherence and legitimacy of the current sentencing regime," and further noted that the Commission had failed "to explain the penological and other bases for the Commission's determinations that the specified characteristic [is] 'ordinarily not' or 'never' relevant to departure analysis."[165]

For the specific offender characteristics under consideration, the Practitioners Advisory Group recommended that the Commission remove the words "not ordinarily"

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[160] Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 53 (Mar. 17, 2010).

[161] *Id.* at 54-61.

[162] *Id.* at 54-55 (citing the Commission's FY2008 dataset). Age was cited only once as a reason to go above the guideline range, but that instance may have been a coding error, as the defendant in that case was 32 years old, neither young nor old. *See id.*

[163] *See* Letter from the Probation Officers Advisory Group to the U.S. Sentencing Commission, at 3 (Feb. 3, 2010).

[164] *See* Letter from Practitioners Advisory Group to the U.S. Sentencing Commission, at 7 (Mar. 22, 2010).

[165] *Id.* at 8.

or "not relevant."[166] It also suggested that, "to the extent that the PAG's proposed language . . . might 'open the floodgates' to departures" and "might undermine the Sentencing Reform Act's goal of reducing disparities between similarly situated defendants," the Commission might add the following language:

> The sentencing court should consider whether the defendant's history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.[167]

This is the correct interpretation of what it means to avoid unwarranted disparity, focusing on *different* history and characteristics among defendants, not on whether certain history and characteristics are "typical" or "unusual" among the defendant population. (The Practitioners Advisory Group did not say where this additional language would go, or whether the "history and characteristics" referred to in it would include criminal history or role in the offense, which would explain the reference to "aggravating" circumstances.)

The National Association of Criminal Defense Lawyers noted that "[b]oth the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that [the five factors at issue] are relevant both when taking into consideration the length of a proposed sanction as well as its form."[168] It strongly urged the Commission "to delete the phrase 'not ordinarily' from the wording of these policy statements."[169] With respect to youth in particular, it pointed out that "more youthful defendants generally are amenable to corrective regimens to lower their risk of recidivism such as job training and educational programs. In contrast, long terms of incarceration during their formative years likely will increase their chances of recidivism and lower their ability to find meaningful, gainful and lawful employment."[170]

Regarding older defendants, NACDL noted that they "generally have health-related issues that often require intense medical supervision that the Bureau of Prisons in many cases cannot fully handle."[171] It noted their lower risk of recidivism, and the fact

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[166] *Id.*

[167] *Id.* at 10.

[168] Written Statement of Cynthia Hujar Orr on behalf of the Nat'l Assoc. of Criminal Defense Lawyers before the U.S. Sentencing Comm'n Re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment, at 2 (Mar. 17, 2010).

[169] *Id.*

[170] *Id.*

[171] *Id.*

that long terms of imprisonment "end up being *de facto* life sentences": "Shorter prison terms or alternatives to imprisonment altogether can still achieve the purposes of 18 U.S.C. § 3553(a) without resort to the needless cost of imprisonment for elderly offenders."[172]

U.S. Representatives John Conyers and Robert C. "Bobby" Scott wrote to "encourage the Commission to now revise its policy statements" based on judicial feedback, the Commission's own data, extensive comments and information received during the seven regional hearings, and the research of "government agencies and renowned experts."[173] As they put it:

> Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that that defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.[174]

With respect to the "proxy" question, they noted that "consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others."[175] They noted that by permitting departures based on offender characteristics that would benefit members of all groups, "the Commission might help to reduce any demographic differences in sentencing."[176]

Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, wrote to specifically endorse the consideration of youth: "[Y]outh of a defendant should be available as a potential reason to impose a downward departure, reflecting the view that younger offenders may be less accountable for their actions."[177]

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[172] *Id.*

[173] Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Commission, at 2 (Apr. 6, 2010).

[174] *Id.*

[175] *Id.* at 2-3 (citing USSC, *Fifteen Year Review*, *supra* note 121, at 113-14)).

[176] *Id.*

[177] Letter from Patrick Leahy, Chairman, Committee on the Judiciary, at 2 (Mar. 22, 2010).

In contrast to these numerous comments supporting an amendment to state that age may be relevant to departure, Jonathan Wroblewski, the Department of Justice's *ex officio* member of the Commission and writing on behalf of the Department of Justice, said that the Department is "extremely cautious about any revision to the guidelines related to offender characteristics."[178] Despite the accumulated feedback from judges over the course of the history of the guidelines that offender characteristics are relevant to sentencing, the Commission's own research, and the extensive empirical research entered into the record during the regional hearings and in response to the request for comment, the Department claimed that the Commission "had not provided an administrative record that would justify delving into this area."[179] It expressed concerns that the consideration of offender characteristics would inject "uncertainty" into the sentencing process, and also raised the specter of racial and ethnic disparity.[180] According to the Department, sentences should be "determined largely by the offense committed and the offender's criminal history."[181]

And in stark contrast to its previous positions on just about any given amendment that would increase sentences (many of which it proposed), the Department urged the Commission to take its time to study the factors individually "over the coming years," and to engage in "rigorous study and review" as "the best way to address these kinds of issues."[182] (This of course ignores the mounds of rigorous study and review that has already been done and that has already been presented to the Commission over the course of many years.)

Notably, the Department did *not* say that any of these factors are *not* relevant to sentencing. Instead, it beat the drum of speculative "unwarranted disparity." Its only recommendation for the 2010 amendment cycle was that the Commission "reaffirm" that "offenders who commit similar offense be treated similarly" and "indicate that offender characteristics (outside of criminal history) generally should not drive sentencing outcomes."[183] Of course, the Department provided no evidence that this approach would best serve the purposes of sentencing. The Department, as always, promoted unwarranted uniformity.

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[178] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 8 (Mar. 22, 2010).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 9.

[183] *Id.* at 8.

Finally, a group of Republican Congress members, headed by Lamar Smith and Jeff Sessions, wrote to say that these five factors "are rightly excluded from the sentencing calculus" and are "not relevant either in making the 'in/out' decision or in determining the length of incarceration." However they provided no particular reasons or evidence for this assertion as it might relate to a defendant's age, or to any of the other factors.

In May 2010, the Commission sent to Congress a proposed amendment to § 5H1.1 that acknowledges the potential relevance of age to the appropriate sentence, but is otherwise weighed by enough conditions and caveats to raise substantial doubts about the practical significance of the changes. *See* 75 Fed. Reg. 27,388, 27,390 (May 14, 2010). The revised policy statement states that age "may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." USSG § 5H1.1, p.s. (effective Nov. 1, 2010).

As its reason, the Commission explained that the amendment "is the result of a review of the departure provisions," undertaken "in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances." 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). As its reason for adopting this new departure standard, it stated only that it "adopted [it] after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges." *Id.* It did not describe the "recent federal sentencing data," or explain what principles it drew from the case law, public comment and testimony, or judicial feedback. Nor did it explain why or how this standard furthers any policy goal or purpose of sentencing.

In any event, with this change, the Commission has arguably opened a window for a small category of downward departures based on age. The window is quite narrow, however, because the Commission also placed as a condition on departure that the defendant's age be "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

This theory is entirely unsound because it pre-supposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances. It continues to promote unwarranted uniformity by requiring a distinction from "typical" defendants who are sentenced under harsh guidelines that do not take individual mitigating characteristics or circumstances into account.

Thus, despite the massive evidence presented to it regarding the current state of knowledge regarding age it relates to the criminal justice system, *see* 28 U.S.C. § 991(b)(1)(C) (directing the Commission to establish policies and practices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice system"), the Commission merely transformed a "discouraged" factor

requiring presence to an "exceptional" degree for a departure, *see* USSG § 5K2.0(a)(4), into an "encouraged" factor that must be present to "an unusual degree" and "distinguishes the case from the typical cases covered by the guidelines." It is difficult to imagine the practical difference between these standards. Indeed, before 2003, the Commission used the same standard now applying to departures under § 5H1.1 for any offender characteristic that it deemed "not ordinarily relevant," except that it has now replaced the term "heartland" with the term "typical."[184]

Fortunately, by its terms, the policy statement continues to apply only to "departures." Moreover, § 3553(a)(1) requires full consideration of age as a mitigating factor. The conditions placed on consideration of age under USSG § 5H1.1 do not apply to the court's consideration of age under § 3553(a).

Empirical Research

Youth. More than 20% of federal offenders committed their offense at age twenty-five or younger.[185] Youth is relevant to the purposes of sentencing.

First, the young are less culpable than the average offender and have a high likelihood of reforming in a short period of time. *Roper v. Simmons*, 543 U.S. 551, 567, 569-70 (2005). Current scientific research on brain development demonstrates that the region of the brain governing judgment, reasoning, impulse control, and the ability to accurately assess risks and foresee consequences is not fully formed until the early to mid-twenties.[186] Research shows that adolescents and youths are more susceptible to

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[184] *Compare* USSG § 5K2.0 (2002) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.") *with* USSG § 5H1.1, p.s. (effective Nov. 1, 2010); 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) ("Age (including youth) may be relevant in determining whether a departure is warranted, if considerations based on age . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.").

[185] *See* USSC, *2008 Federal Sentencing Statistics*, tbl. 6 & App. A (2008) (reporting defendants' age at sentencing).

[186] *See* Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Science 105-09 (June 2004) (reporting results of longitudinal study for the National Institutes on Health on brain development in adolescents showing that the prefrontal cortex, the "executive" part of the brain important for controlling reason, organization, planning, and impulse control, does not fully mature until the early twenties); Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rate*, Wash. Post, Feb. 1, 2005 at A01 (study shows "that the region of the brain that inhibits risky behavior is not fully formed until age 25"); United States Department of Justice, Office of Juvenile and Delinquency Prevention, *Annual Report*, at 8 (2005), *available at* www.ncjrs.gov/pdffiles1/ojjdp/212757.pdf (confirming that adolescents "often use the emotional part of the brain, rather than the frontal lobe, to make decisions" and "[t]he parts of the brain that govern impulse, judgment, and other characteristics may not reach

peer pressure to engage in risky behavior than adults age 24 and older.[187] And research shows that the young have a unique capacity to reform.[188] In short, adolescents and young adults are less culpable for their actions, and their tendency to engage in illegal activity is short-lived. "The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Roper*, 543 U.S. at 570 (internal quotation marks and citation omitted).

Second, the punishment that adolescent and young adult offenders endure is harsher than that suffered by adults.[189] Adolescents and young adults are at particular risk of rape and other violence by other prisoners and staff.[190] Even in juvenile facilities,

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complete maturity until an individual reaches age 21 or 22"); National Institute of Health, Publication 4929, *The Teenage Brain: A Work In Progress* (2008), *available at* http://www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml.

[187] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Developmental Psych. 625, 632 (2005).

[188] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1011-14 (2003); Robert J. Sampson & John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, 39 Crime & Delinquency 396 (1993); Brief of the Council of Juvenile Correctional Administrators, National Association for Juvenile Correctional Agencies, National Juvenile Detention Association, National Partnership for Juvenile Services, American Probation and Parole Association, and International Community Corrections Association as *Amici Curiae* In Support of Petitioners, *Graham v. Florida* (U.S. No. 08-7412), at 15-27 (discussing studies).

[189] Young defendants who are currently age 18 or older are designated or moved to an adult BOP facility. *See* U.S. Dep't of Justice, Federal Bureau of Prisons, Program Statement 5216.05. Those who are currently under the age of 18 are (1) designated to a juvenile facility (under contract with BOP) where they can be housed with youthful offenders serving state imposed adult sentences, or (2) housed with adults in a community corrections center if ordered to a community corrections center as a condition of probation, or (3) housed in a BOP adult facility if the institution can ensure that there will be no regular contact with adults. *Id.* BOP has no adult facilities that can ensure that there will be no regular contact with adults. Researchers have found it difficult to learn from BOP how many juveniles are in BOP custody or where they are placed. *See* Neelum Arya and Addie C. Rolnick, *A Tangled Web of Justice: American Indian and Alaska Native Youth in Federal, State, and Tribal Justice Systems* at 26, *available at* http://www.campaignforyouthjustice.org/documents/CFYJPB_TangledJustice.pdf; Juveniles in Adult Prisons and Jails: A National Assessment at 36 (2000), U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, http://www.ncjrs.gov/pdffiles1/bja/182503.pdf. BOP reports that the majority are Native Americans. *See* Juveniles in the Bureau, *available at* http://www.bop.gov/inmate_programs/juveniles.jsp.

[190] Based on surveys of correctional officers in state and federal adult facilities regarding what they found to be substantiated reports of inmate-on-inmate sexual violence, the Bureau of Justice Statistics reports that "victims were on average younger than perpetrators," and that the victims

they are often victimized by staff and sometimes by other inmates.[191] Being a target of sexual aggression in prison results in a seventeen-fold increase in the likelihood of attempted suicide.[192] Young persons are often protected from abuse by being isolated in solitary confinement, but solitary confinement itself increases the risk of suicide twelve-fold,[193] and also discourages reporting of staff abuse.[194] A prison sentence that would destroy a young person is greater than necessary to achieve any purpose of sentencing.

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were under the age of 25 in 44% of all incidents in 2006 and 53% of all incidents in 2005. *See* Bureau of Justice Statistics Special Report, Beck, Harrison and Adams, *Sexual Violence Reported by Correctional Authorities, 2006* at 4, Aug. 2007, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf. The under-25 age group comprises only about 20% of all state and federal prisoners. *See* Bureau of Justice Statistics, West and Sabol, *Prison Inmates at Mid-Year 2008 – Statistical Tables*, Table 17 (Mar. 2009). *See also* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. Crim. L. & Criminology 127, 164-66 (2002) (citing studies showing that in prison populations in which the average age was 29, the average age of rape victims was 21 or 23); Human Rights Watch, *No Escape: Male Rape in U.S. Prison*, Ch. IV (2001) ("Young or youthful-looking inmates are at particular risk of rape."); National Council on Crime and Delinquency, *Fact Sheet: Youth Under 18 in the Adult Criminal Justice System* (June 2006) ("Youth are at greater risk of victimization and death in adult jails and prisons than in juvenile facilities."), *available at* http://www.nccd-crc.org/nccd/pubs/2006may_factsheet_youthadult.pdf; Stephen Donaldson, *The Rape Crisis Behind Bars*, New York Times Dec. 29, 1993 at A11 (activist who eventually died from AIDS contracted in prison rape, stating, "I soon learned that victims of prison rape were, like me, usually the youngest, the smallest, the nonviolent, the first-timers and those charged with less serious crimes"); Kevin N. Wright, *The Violent and Victimized in Male Prison*, 16 J. of Offender Rehabilitation 1, 6, 22 (1991) (victims of physical, and in particular, sexual assault, in male prisons "tend to be [ ]small, young, and . . . lack mental toughness and are not 'street-wise' ... appear to be less involved in a criminal culture before incarceration and to have less institutional experience"); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 Stan. L. Rev. 1541, 1545 (1992) ("Rape in prison occurs brutally and inevitably . . . [o]ften, the younger, smaller, or less streetwise inmates are the victims."); *see also* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in Adult Prisons and Jails: A National Assessment*, at 7-8 (Oct. 2000) (citing high risk of suicide, violent victimization, and sexual assault by older inmates and staff), *available at* http://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

[191] In 2008-09, 10.8% of youths held in juvenile facilities reported sexual victimization by staff, and 2% reported sexual victimization by another youth. Of the 25,550 youths reporting victimization, 4,920 were 15 or younger, 6,150 were 16, 7,410 were 17, and 8,080 were 18 or older. *See* Beck, Harrison & Guerino, U.S. Department of Justice, Bureau of Justice Programs, *Bureau of Justice Special Report*: *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, Table 8 (Jan. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf.

[192] Daniel Lockwood, *Prison Sexual Violence* 68 (1980).

[193] "An unexpected result . . . was that juveniles were often held in solitary confinement, leading to a suicide rate for juveniles held twelve times that of juveniles not held." H.R. Rep. 102-756, H.R. Rep. No. 756, 102nd Cong., 2nd Sess. 1992, 1992 WL 184552, 1992 U.S.C.C.A.N. 4229 (Leg. Hist.).

Third, prison increases the risk of recidivism for the young and can unnecessarily destroy an otherwise law-abiding life. Prison exposes less serious offenders to more serious offenders, breaks family ties, and significantly reduces the ability to earn a living legally.[195] In contrast, "[t]he relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."[196] Exposing young offenders to "more experienced inmates … can influence their lifestyle and help solidify their criminal identities."[197] Indeed, recidivism rates are higher for young offenders who are convicted and sentenced as adults than for those adjudicated in juvenile courts.[198]

Youth should not be a reason for upward departure to reflect a view that younger offenders are more likely to recidivate. This would make no sense, since prison increases the likelihood of recidivism, and the vast majority of young offenders age out of risky behaviors.[199] A Commission study shows that 35.5% of offenders under 21 and 31.9% of offenders between 21 and 25 recidivated within 24 months (including minor supervised release and probation violations), but that this dropped to 23.7-23.8% for offenders age 26-35.[200] The criminal history rules add more than enough time to incapacitate and

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[194] U.S. Dep't of Justice, Office of the Inspector General, Evaluation and Inspections Division, *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates* at 55 (Sept. 2009), *available at* http://www.justice.gov/oig/reports/plus/e0904.pdf.

[195] *See* Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 Criminology & Public Policy 589, 614-16 (2007); *see also* USSC, Staff Discussion Paper, *Sentencing Options under the Guidelines* 19 (1996) (recognizing imprisonment has criminogenic effects including "contact with more serious offenders, disruption of legal employment, and weakening of family ties").

[196] Shirley R. Klein *et al*., *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002).

[197] Vieraitis, *supra* note 195, at 593.

[198] Richard E. Redding, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?* (Aug. 2008), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf; Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services* (Nov. 30, 2007), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm.

[199] Steinberg & Scott, *supra* note 188, at 1014 ("Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.").

[200] USSC, *Measuring Recidivism*, *supra* note 157, Exhibit 9.

punish young offenders. According to the Commission, the criminal history rules reflect not only the likelihood of recidivism, but a theory of just deserts that regards repetition as reflecting increased culpability.[201]

Older age. The U.S. Parole Commission has long included age as part of its salient factor score because it is a validated predictor of recidivism risk.[202] Although the initial Commission recognized the empirical relationship between age and recidivism risk, it made a policy decision to exclude age from the initial guidelines, with the suggestion that it might revisit the issue. USSG, Ch. 4, Pt. A, intro. comment. ("While empirical research has shown that other factors are correlated highly with the likelihood of recidivism, *e.g.* age and drug abuse, for policy reasons they were not included here *at this time*." (emphasis added)).

More recently, the Commission has identified increased age as a powerful predictor of reduced recidivism that was not included in the Guidelines.[203] As reported by the Commission, "[r]ecidivism rates decline relatively consistently as age increases," from 35.5% for offenders under age 21, down to 12.7% for offenders age 41 to 50, and down to 9.5% for offenders over age 50.[204]

The cost of incarcerating prisoners age 50 and older has been estimated to be two to four times that of the general inmate population.[205] "In addition to the economic costs of keeping older prisoners incarcerated, it is important to consider whether the infringement upon the liberty interest of an older prisoner who is no longer dangerous is justified."[206]

The same prison sentence for an older offender often amounts to harsher punishment than that for a middle-aged offender. For one thing, the sentence is a greater

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[201] USSG §4A.1, intro. comment., pt. A; USSC, *Supplementary Report*, *supra* note 89, at 41.

[202] USSC, *Salient Factor Score*, *supra* note 157, at 1, 8 & n.29.

[203] *Id.* at 8, 13-15

[204] USSC, *Measuring Recidivism*, *supra* note 157, at 12 & Exhibit 9.

[205] U.S. Dep't of Justice, National Institute of Corrections, *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 11 (2004) (*Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*), *available at* http://www.nicic.org/pubs/2004/018735.pdf; Oklahoma Department of Corrections, *Managing Increasing Aging Inmate Populations* (Oct. 2008), *available at* http://www.doc.state.ok.us/adminservices/ea/Aging%20White%20Paper.pdf.

[206] William E. Adams, *The Incarceration of Older Criminals: Balancing Safety, Cost, and Humanitarian Concerns*, 19 Nova L. Rev. 465, 466 (1995) [hereinafter *Incarceration of Older Criminals*].

proportion of an older offender's remaining life, and can amount to a life sentence.[207] For another, the various life and health problems of inmates before and during incarceration "accelerate their aging processes to an average of 11.5 years older than their chronological ages after age 50."[208] They suffer increased rates of chronic and terminal illnesses, and collateral emotional and mental health problems.[209] Offenders who committed their first crime after the age of 50 "have problems adjusting to prison since they are new to the environment, which will cause underlying stress and probable stress-related health problems," and are "easy prey" for more experienced inmates.[210]

The Bureau of Justice Statistics reports that 60% of federal prisoners age 45 or older in 2004 reported a current medical problem, including diabetes, heart disease, hypertension, stroke, tuberculosis, hepatitis, cancer and paralysis, and 22.9% had had surgery since admission. In addition, 33.8% had one or more impairments in mobility, hearing, vision, speech, learning or mental functioning.[211] Older inmates with medical problems are less likely to recidivate than healthy inmates of the same age.[212] Older inmates with health problems suffer greater punishment than the average inmate, particularly because the Bureau of Prisons often fails to provide adequate medical treatment.[213]

Judicial Decisions and Sentencing Data

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[207] *See* Hannah T.S. Long, *The "Inequality" of Incarceration*, 31 Colum. J. L. & Soc. Probs. 321, 343-44 (1998) (suggesting that prison sentences be adjusted for life expectancy due to age and illness).

[208] *See Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 10; *see also id*. at 8-9.

[209] *Id*. at 10.

[210] *Id*.; *see also* Elaine Crawley & Richard Sparks, *Older Men in Prison: Survival, Coping, and Identity*, in The Effects of Imprisonment 343, 346-47 (Alison Liebling & Shadd Maruna eds., 2005) (for older prisoners who are unfamiliar with prison culture, "the prison sentence represents nothing short of a disaster, a catastrophe, and, in consequence, they are often in a psychological state of trauma").

[211] Laura Maruschak, *Medical Problems of Prisoners*, Bureau of Justice Statistics, Tables 1, 2, 4 (Apr. 2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mpp.pdf.

[212] *Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, at 7.

[213] An audit by the Office of the Inspector General found that Bureau of Prisons facilities often do not provide preventive services recommended in BOP guidelines, that chronic conditions and medication side effects often are not monitored, that unqualified persons may be providing services, and that performance levels for the treatment of conditions including diabetes, HIV and hypertension were often below target levels. *See* U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *The Federal Bureau of Prisons' Efforts to Manage Health Care* (Feb. 2008), *available at* http://www.justice.gov/oig/reports/BOP/a0808/final.pdf.

In *Gall*, the Supreme Court approved a district court's reliance on scientific research regarding brain development in the young to vary from the guidelines, without mentioning the Commission's policy statement. *See Gall v. United States*, 552 U.S. 38, 58 (2007) ("[I]t was not unreasonable for the District Judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future."). Other courts are following suit. *See, e.g.*, *United States v. Garate*, 538 F.3d 1026 (8th Cir. 2008) (on remand for reconsideration in light of *Gall*, holding that the district court did not abuse its discretion by considering, among other factors, the defendant's age (19) and lack of maturity to impose a below-guideline sentence in a case involving interstate travel to engage in sex with a minor); *United States v. Stern*, 590 F. Supp. 2d 945 (N.D. Ohio 2008) (conducting a review of the scientific literature on the question of teenage brain development and concluding that "there is compelling evidence that the judicial system's longstanding principle of treating youth offenders differently than adult offenders is justified in part based on the unformed nature of the adolescent brain.").

Courts also consider older age as a reason to sentence below the guidelines. *See, e.g.*, *United States v. Martinez*, Crim. No. 99-40072, 2007 WL 593629 (D. Kan. Feb. 21, 2007) (notifying counsel considering non-guideline sentence based, in part, on defendant's age, referencing recidivism reports showing increased age and first offender status show decreased likelihood of recidivism); *United States v. Ruiz*, Crim. No. 04-1146-03, 2006 WL 1311982 (S.D.N.Y. May 10, 2006) (noting several courts have imposed non-guideline sentences for defendants over 40 based on markedly reduced recidivism, citing recidivism study); *United States v. Cannaday*, No. 08-172, 2009 WL 1587183 (E.D. Wis. June 5, 2009) (citing the Commission's report showing that "recidivism tends to decline among those around defendant's age" and imposing a two-year sentence that was likely below the applicable guideline range, but was sufficient no matter what the proper guideline range was); *United States v. Panyard*, No. 07-20037, 2009 WL 1099257 (E.D. Mich. Apr. 23, 2009) ("[T]his is Defendant's sentence the Court considers, not that of all other potential future offenders, and Defendant's very low personal likelihood of recidivism supports a reasonable variance.").

Before *Gall* and *Kimbrough*, the Fifth Circuit reversed a twenty-year, below guideline sentence for failure to apply a guideline enhancement, suggesting in the process that it was error for the district court to base its sentence on a disagreement with the Commission's policy statement on age. *See United States v. Simmons*, 470 F.3d 1115 (5th Cir. 2006). On remand for resentencing (even after *Gall* and *Kimbrough*), the district court concluded that it did not have the authority to consider its earlier disagreement with the policy statement and sentenced the defendant to the guideline sentence of life in prison. On appeal again, the Fifth Circuit vacated the sentence, finding that the "district court unduly limited its own discretion" because it "mistakenly thought itself restricted by our suggestion that age might be a factor to depart downward only when a defendant is elderly." *United States v. Simmons*, 568 F.3d 564, 569-70 (5th Cir. 2009). The court made clear that a district court's disagreement with the Commission's policy statement

on age is relevant under § 3553(a). *Id.* at 569. ("Consideration of a policy statement is among the factors under Section 3553(a). Disagreement with the policy should be considered along with other factors.").

In *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009), the Eighth Circuit vacated a guideline sentence because the district court erred in its conclusion that the defendant's advanced age, among other factors, could not be a reason for downward variance. *Id.* at 831.

In fiscal year 2010, age was cited as a reason to sentence below the guideline 779 times, or in approximately 5.7 % of cases receiving a sentence below the guideline range. USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, 25B (2010).[214]

In the Commission's most recent survey of judges, 67% said that age is "ordinarily relevant" in determining whether to depart or vary.[215]

For more judicial decisions, see David Hemingway & Janet Hinton, *Departures and Variances* 23-24, 60-61 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/ DeparturesandVariances2apt.jgh.pdf.

§ 5H1.2 Education and Vocational Skills

Legislative History

Congress directed the Commission to consider the relevance of education and vocational skills in formulating the guidelines and policy statements, and to take them into account to the extent they are relevant. 28 U.S.C. § 994(d)(2) and (3). As a restriction on the Commission's general consideration, Congress further directed the Commission to ensure that the guidelines and policy statements, "in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education [or] vocational skills . . . of the defendant." 28 U.S.C. § 994(e); *see also* 28 U.S.C. § 994(k) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.").

What Congress meant was that the Commission was to ensure that *lack* of education or vocational skills would not be a factor in the guidelines' recommendation of a sentence of imprisonment or of a longer prison sentence. S. Rep. No. 98-225, at 175 (1983). In particular, Congress expected that "the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the

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[214] The Sourcebook and the Commission's most recent data can be found on the Commission's website, www.ussc.gov.

[215] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

purposes of sentencing, even in a case in which the Guidelines might otherwise call for a short term of imprisonment. . . . Clearly, education considerations will play an important role in such determinations as the conditions of probation or supervised release, the nature of the prison facility to which an offender is sent, and the type of programs to be made available to an offender in prison." *Id*. at 172-73.

With respect to a defendant's vocational skills, Congress said that the "considerations for the Commission, including the restrictions of subsection (e), are similar to those for the education factor." *Id.* at 173. A "defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service . . . as a condition of probation or supervised release." *Id.* at 172-73.

Initial Policy Statement

Despite Congress's expectation that education and vocational skills would play a role at sentencing, the Commission did not take them into account in the guideline rules and promulgated instead, as part of the initial set of guidelines, a policy statement that categorically discouraged the consideration of these factors in the ordinary case or otherwise increased the sentence or restricted employment:

> Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type or length of community service.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.2 (Nov. 1, 1987).

As originally promulgated, the policy statement discouraged the consideration of education and vocational skills either for purposes of a departure (which might then allow for sentencing options other than imprisonment) or for purposes of determining the type of sentence when the guidelines provide sentencing options. The factors could be relevant, however, as a guideline factor used to *increase* a guideline range under Chapter 3 if the defendant "misused special training to facilitate criminal activity." The factor might also be relevant to *restrict* the defendant's activities so that a special skill cannot be utilized "for public protection." This latter provision appears to have been drawn from courts' statutory power to impose conditions of probation or supervised release intended to protect the public from the continuation or repetition of illegal activities through the

defendant's occupation, profession or business. *See* 18 U.S.C. § 3563(b)(5); *see also* S. Rep. No. 98-225, at 96-97 (1983). But Congress also indicated that any restrictions on employment under the statute must "bear[] a reasonably direct relationship to the conduct constituting the offense." *See* 18 U.S.C. § 3563(b)(5); USSG § 5F1.5 (Occupational Restrictions) (incorporating the requirement of a relationship between the occupation and the offense conduct for purposes of conditions of supervision or probation). Section 5H1.2 does not incorporate that requirement.

The Commission also determined that education and vocational skills might be relevant in determining the length and conditions of supervision "for rehabilitative purposes" or for determining the type of community service, but only if the defendant was initially sentenced to probation or supervision *independent* of these factors. USSG § 5H1.2 (Nov. 1, 1987).

Amendments

As with § 5H1.1 (Age), the Commission eliminated in 1991 the restriction on consideration of education and vocational skills for determining the type of sentence to be imposed when the guidelines provide sentencing options. The Commission retained the language allowing courts to consider education and vocational skills with respect to rehabilitation and community service while on probation or supervised release, as well as encouraging restrictions on the use of special skills for public protection. *See* USSG, App. C, Amend. 386 (Nov. 1, 1991). This amendment was part of the effort to bring consistency to the treatment of factors in Part H, and to clarify that "unless expressly stated, these policy statements do not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range." *Id.* (Reason for Amendment).

In 2004, the Commission amended the provision to use the phrase "whether a departure is warranted" rather than "whether a sentence should be outside the applicable guideline range." USSG, App. C, Amend. 674 (Nov. 1, 2004). This amendment was meant to conform its language to the set of departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). Thus, § 5H1.2 is not only advisory after *Booker*, but by *its terms* does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a "departure." Put another way, § 3553(a)(1) requires the sentencing court to fully consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission's policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements

Empirical Research

The Commission's own research shows that educational attainment is relevant to risk of recidivism. Overall, recidivism rates decrease with increasing educational level (no high school, high school, some college, college degree).[216] Courts should consider varying from the advisory guideline range when the defendant's educational level predicts a lower rate of recidivism.

Further, evidence-based research shows that post-offense educational and vocational training is correlated to lowered risk of recidivism.[217] One "problem-solving" court in the federal system has implemented an intensive supervision program that includes educational and vocational training as a condition of supervised release, resulting in significantly reduced rates of recidivism. *See* USSC, *Symposium on Alternatives to Incarceration* 22-24 (testimony of Chief Probation Officer Doug Burris, E.D. Mo.) (reporting that the district's employment program has resulted in a 33% reduction in recidivism rates); *see also id.* at 238-39 (testimony of Judge Jackson, E.D. Mo.) (reporting that the district's revocation rate as "lower than the circuit and the national rates"), *available at* http://www.ussc.gov/SYMPO2008/NSATI_0.htm.

Judicial Decisions and Sentencing Data

Courts are instructed to impose a sentence that furthers the statutory purpose of "provid[ing] the defendant with needed educational or vocational training in the most effective manner." *See* 18 U.S.C. § 3553(a)(2)(A)-(D). In fiscal year 2010, educational and vocational skills were cited as a reason for imposing a sentence below the guideline range in 261 cases, or approximately 1.9% of cases in which a below guideline sentence was imposed.[218] In addition, the "need to provide educational or vocational training / medical care" was one of the most often cited reasons for imposing a sentence below the guideline in cases in which the court imposed a sentence below the guideline based either wholly or in part on § 3553(a), occurring in 17.8% of those cases.[219] District courts have started to recognize that a defendant's need for education or vocational training "will be better served if Defendant serves a period of probation and home detention than if Defendant is incarcerated." *See, e.g.*, *United States v. Rowan*, No. 06-3231, 2007 WL 127739 (E.D. Pa. Jan. 10, 2007).

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[216] USSC, *Measuring Recidivism*, *supra* note 157, at 12 & Ex. 10.

[217] *See* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates*, Exs. A.1 & 4 (2006), *available at* www.wsipp.wa.gov/rptfiles/06-10-1201.pdf (setting forth a comprehensive review of programs that have demonstrated an ability to reduce recidivism, which includes educational programs both prison- and community-based); *see also* Washington Institute for Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, tbl. 1 (2009) (presenting the findings from the 2006 study, including some revisions since its publication), *available at* http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf.

[218] USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A & 25B (2010).

[219] *Id.* tbls. 25A & 25B.

The Ninth Circuit has indicated that a condition of probation or supervised release that encourages the defendant to pursue education is "reasonably related to . . . rehabilitation, prevention of recidivism, and protection of the public from future crimes." *United States v. Vega*, 545 F.3d 743, 748 (9th Cir. 2008).

In the Commission's most recent survey of judges, 48% said that education is "ordinarily relevant" to the consideration of a departure or variance.[220]

§ 5H1.3 Mental and Emotional Conditions

Legislative History

Congress charged the Commission with considering the relevance, in formulating guidelines and policy statements, of mental and emotional conditions "to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant." 28 U.S.C. § 994(d). In explaining this provision, Congress suggested that the Commission "might conclude that a particular set of offense and offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment." S. Rep. No. 98-225, at 173. Although Congress believed that "[c]onsideration of this factor might lead the Commission to conclude in a particularly serious case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting," *id.*, this did not suggest that the Commission should recommend a longer prison term because of a mental or emotional condition, but only that the Commission might not recommend that the court lower a sentence to probation in a particularly serious case. Congress could not have meant that the Commission should recommend, or that judges should choose, prison or a longer term of prison for the purpose of treatment. *See* 28 U.S.C. § 994(k) ("the Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed . . . medical care"); 18 U.S.C. § 3582(a) (directing the court, "in determining whether to impose a term of imprisonment" and if so, for how long, to "recognize[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation").

Indeed, Congress created special protections and procedures for addressing the need to protect the public from offenders with mental illness, which do not apply at sentencing. *See* 18 U.S.C. §§ 4244-4247 (setting forth the mechanisms, procedures, and protections for sentences "in lieu of" a term of imprisonment or a longer term of imprisonment for persons suffering from a mental disease or defect and presenting a danger to the public); *see United States v. Comstock*, 130 S. Ct. 1949, 1960-61*26-27 (2010) (describing the history and procedural requirements of the provisions authorizing "the civil commitment of individuals who are both mentally ill and dangerous").

Initial Policy Statement

[220] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

Interestingly, an early draft of the guidelines proposed in February 1987 did not restrict the relevance of mental and emotional conditions, but instead recognized, as did Congress, that there exist mental and emotional conditions "that mitigate a defendant's culpability" and referred the court to "the general provisions in Chapter 2" (relating to offense conduct) for discussion of those mitigating conditions. 52 Fed. Reg. 3920 (Feb. 6, 1987) (§ D313). In those provisions was a section addressing "diminished capacity," which provided for a maximum downward departure of four levels "[i]f the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" and requiring that the departure "reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public." *Id.* (§ Y218).

In any event, this open-ended reference to culpability as being mitigated by mental and emotional conditions was short-lived. The policy statement ultimately sent to Congress provided as follows:

> Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the guidelines, except as provided in the general provisions in Chapter Five. Mental and emotional conditions, whether mitigating or aggravating, may be relevant in determining the length and conditions of probation or supervised release.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.3 (Nov. 1, 1987).

Notably, the section entitled "general provisions" in Part K of Chapter 5 did not mention mental and emotional conditions, though § 5K2.13 provided for a downward departure for diminished mental capacity, which included several restrictions similar to those originally proposed. As a result, mitigating mental conditions were off the table for purposes of departures *except* under limited circumstances (discussed *infra*). Mitigating *emotional* conditions were off the table in their entirety for purposes of departure, which is not what Congress intended when it directed the Commission to determine their relevance with respect to lowered culpability in general. As Judge Gertner has recently recognized, "[a]doption of this policy represented a major change in course in criminal law, as it devalued the importance of *mens rea* – an element that had been an important factor in sentencing for more than a century." *United States v. Shore*, 143 F. Supp. 2d 74, 78 & n.11 (D. Mass. 2001) (citing Jack B. Weinstein, *The Denigration of Mens Rea in Drug Sentencing*, 7 Fed. Sent'g Rep. 121 (1994)).

The Commission also included the concept of an "aggravating" mental or emotional condition as possibly relevant to determining the length and conditions of probation or supervised release, with the example given that the court might require mental health treatment. Instead of recommending that "probation with a condition of psychiatric treatment, *rather than imprisonment*," may be appropriate, as Congress suggested, S. Rep. No. 98-225, at 173 (1983) (emphasis supplied), the Commission

recommended that mental and emotional conditions might call for additional conditions or a longer term of probation or supervised release. Again, this provision is entirely disconnected from Congress's suggestion that *mitigating* mental or emotional condition might lead the Commission to suggest probation so that the defendant can receive psychiatric treatment.

2004 Amendment

In 2004, the Commission amended § 5H1.3 to use the phrase "whether a departure is warranted" rather than "whether a sentence should be outside the applicable guideline range." USSG, App. C, Amend. 674 (Nov. 1, 2004). This amendment was meant to conform its language to the set of departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). Thus, § 5H1.3 *by its terms* does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a "departure." *See United States v. Limon*, 273 Fed. Appx. 698 (10th Cir. Apr. 3, 2008) ("Consequently, § 5H1.3 clearly applies to departures and not to a variance under 18U.S.C. § 3553(a), which is at issue here."). Moreover, § 3553(a)(1) requires the sentencing court to fully consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). In *Gall*, the Court made no mention of the Commission's policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements.

2010 Amendment

In January 2010, the Commission requested comment regarding whether the guidelines are adequate as they apply to five specific offender characteristics, one of which was mental and emotional conditions. 75 Fed. Reg. 3525, 3529-30 (Jan. 21, 2010). For each of these characteristics, the Commission asked whether the factor is relevant to the "in/out question," *i.e.*, whether to sentence a defendant to prison or probation and whether such a condition is relevant to the length of imprisonment. Apparently alluding to its earlier *post hoc* claim that it placed certain factors off limits because judges might consciously (or unconsciously) rely on offender characteristics in a discriminatory manner, *see* Part III.E.2, *supra*, it asked whether the factor could be "used as a proxy for one or more of the 'forbidden factors'" and "if so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?" *Id.*

With respect to mental and emotional conditions in particular, the Commission asked if it should amend § 5H1.3 and, if so, how. It asked whether a mental or emotional condition, such as antisocial personality disorder, might be a reason to increase a sentence. It also asked whether mental or emotional condition might be a reason to decrease a sentence (for example, "if the mental or emotional condition could more effectively be treated outside of prison). *Id.* at 3530. Finally, it asked how § 5H1.3

should interact with § 5K2.13 (Diminished Capacity) and § 5K2.12 (Coercion and Duress) in cases in which a mental or emotional condition was a factor in the commission of the offense. *Id.* at 3530-31.

In response to the "proxy" question, the Federal Defenders explained (just as the Commission has done previously with respect to *aggravating* factors) that the possibility of demographic differences in the consideration of mental and emotional conditions is not a cause for concern so long as judges consider the factor in order to further a legitimate purpose (or purposes) of sentencing, as they are required to do by statute, and do not refuse to consider the factor for discriminatory reasons, which is not likely and nearly impossible to prove.[221] They pointed out that "sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group."[222]

With respect to mental and emotional conditions in particular, the Defenders urged the Commission to amend § 5H1.3 to say that mental and emotional conditions are or may be relevant to departure, citing the legislative history and the extensive empirical data, judicial feedback, and policy research set forth below.[223] They pointed to the Commission's 2008 dataset as evidence that courts overwhelmingly view mental and emotional conditions as mitigating. However, in light of data indicating that a very small number of judges have considered mental illness as a reason to increase a sentence, the Defenders specifically requested that the Commission follow the Tenth Circuit's lead and "encourage sentencing courts to consider that civil commitment procedures will be available if the defendant continues to pose a considerable risk to the public after confinement." *See United States v. Pinson*, 542 F.3d 822, 838 (10th Cir. 2008).

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[221] *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 49-53 (Mar. 17, 2010) (attached to, and incorporated by reference in, Letter from Margy Meyers to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010 (Mar. 22, 2010)) (discussing the "proxy" question at length), *available at* http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf; *see also* USSC, *1995 Cocaine Report*, *supra* note 159, at xii (emphasizing that disproportionate impact alone is not a reason to change policy if the policy itself is justified by sentencing purposes); USSC, *Fifteen Year Review*, *supra* note 121, at 113-14 ("Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others.").

All public comment on the 2010 proposed amendments and issues for comment is available on the Commission's website at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[222] Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 53 (Mar. 17, 2010).

[223] *Id.* at 61-68.

The Probation Officers Advisory Group generally recommended that the Commission amend the guidelines "to clarify that the court should consider [the] factor[], either alone or in combination, to determine the appropriate sentence for a particular defendant."[224]

The Practitioners Advisory Group did not address mental and emotional conditions in particular, but addressed generally the several offender characteristics at issue. It noted that the Commission's policy of discouraging or prohibiting consideration of offender characteristics "is at a minimum confusing" in light of the overarching mandate to judges in § 3553(a) to consider the history and characteristics of a defendant and the companion language in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" that may be considered for purposes of sentencing.[225] It stated that the inconsistency "damages the coherence and legitimacy of the current sentencing regime," and further noted that the Commission had failed "to explain the penological and other bases for the Commission's determinations that the specified characteristic [is] 'ordinarily not' or 'never' relevant to departure analysis."[226]

For the specific offender characteristics under consideration, the Practitioners Advisory Group recommended that the Commission remove the words "not ordinarily" or "not relevant."[227] It also suggested that, "to the extent that the PAG's proposed language . . . might 'open the floodgates' to departures" and "might undermine the Sentencing Reform Act's goal of reducing disparities between similarly situated defendants," the Commission might add the following language:

> The sentencing court should consider whether the defendant's history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.[228]

This is the correct interpretation of what it means to avoid unwarranted disparity, focusing on *different* history and characteristics among defenders, not on whether certain

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[224] *See* Letter from the Probation Officers Advisory Group to the U.S. Sentencing Commission, at 3 (Feb. 3, 2010).

[225] *See* Letter from Practitioners Advisory Group to the U.S. Sentencing Commission, at 7 (Mar. 22, 2010).

[226] *Id.* at 8.

[227] *Id.*

[228] *Id.* at 10.

history and characteristics are "typical" or "unusual" among the defendant population. (The Practitioners Advisory Group did not say where this additional language would go, or whether the "history and characteristics" referred to in it would include criminal history or role in the offense, which would explain the reference to "aggravating" circumstances.)

The National Association of Criminal Defense Lawyers noted that "[b]oth the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that [the five factors at issue] are relevant both when taking into consideration the length of a proposed sanction as well as its form."[229] It strongly urged the Commission "to delete the phrase 'not ordinarily' from the wording of these policy statements."[230] It further suggested that the Commission insert language into § 5H1.3 "to the effect that alternatives to imprisonment should be strongly considered where they may be more cost effective, but also more effective in meeting the goals of rehabilitation."[231] An alternative or shorter prison term should be considered "to facilitate participation in programs that can address these offenders' medical, psychological, and physical needs." [232]

U.S. Representatives John Conyers and Robert C. "Bobby" Scott wrote to "encourage the Commission to now revise its policy statements" based on judicial feedback, the Commission's own data, extensive comments and information received during the seven regional hearings, and the research of "government agencies and renowned experts."[233] As they put it:

> Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that that defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.[234]

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[229] Written Statement of Cynthia Hujar Orr on behalf of the Nat'l Assoc. of Criminal Defense Lawyers before the U.S. Sentencing Comm'n Re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment, at 2 (Mar. 17, 2010).

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Commission, at 2 (Apr. 6, 2010).

[234] *Id.*

With respect to the "proxy" question, they noted that "consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others."[235] They noted that by permitting departures based on offender characteristics that would benefit members of all groups, "the Commission might help to reduce any demographic differences in sentencing."[236]

In contrast to these numerous comments supporting language that would state that mental and emotional conditions are relevant to departure, Jonathan Wroblewski, the Department of Justice's *ex officio* member of the Commission and writing on behalf of the Department of Justice, said that the Department is "extremely cautious about any revision to the guidelines related to offender characteristics."[237] Despite the accumulated feedback from judges over the course of the history of the guidelines that offender characteristics are relevant to sentencing, the Commission's own research, and the extensive empirical research entered into the record during the regional hearings and in response to the request for comment, the Department claimed that the Commission "had not provided an administrative record that would justify delving into this area."[238] It expressed concerns that the consideration of offender characteristics would inject "uncertainty" into the sentencing process, and it raised the specter of racial and ethnic disparity.[239] According to the Department, sentences should be "determined largely by the offense committed and the offender's criminal history."[240]

And in stark contrast to its previous positions on just about any given proposed amendment that would increase sentences (many of which it proposed), the Department urged the Commission to take its time to study the factors individually "over the coming years," and to engage in "rigorous study and review" as "the best way to address these kinds of issues."[241] (This of course ignores the mounds of rigorous study and review already done and already presented to the Commission over the course of many years.)

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[235] *Id.* at 2-3 (citing USSC, *Fifteen Year Review*, *supra* note 121, at 113-14)).

[236] *Id.*

[237] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 8 (Mar. 22, 2010).

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *Id.* at 9.

Notably, the Department did *not* say that any of these factors are *not* relevant to sentencing. Instead, it beat the drum of speculative "unwarranted disparity." Its only recommendation for the 2010 amendment cycle was that the Commission "reaffirm" that "offenders who commit similar offense be treated similarly" and "indicate that offender characteristics (outside of criminal history) generally should not drive sentencing outcomes."[242] Of course, the Department provided no evidence that this approach would best serve the purposes of sentencing. The Department, as always, promoted unwarranted uniformity.

Finally, a group of Republican Congress members, headed by Lamar Smith and Jeff Sessions wrote to say that these five factors "are rightly excluded from the sentencing calculus" and are "not relevant either in making the 'in/out' decision or in determining the length of incarceration." However they provided no particular reasons or evidence for this assertion as it might relate to mental and emotional conditions, or to any of the other factors.

In May 2010, the Commission sent to Congress a proposed amendment to § 5H1.3 that acknowledges the potential relevance of mental and emotional conditions, but weighed with enough conditions and caveats to raise substantial doubt about its practical effect. *See* 75 Fed. Reg. 27,388, 27,392 (May 14, 2010). The revised policy statement states that mental and emotional conditions "may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." *See* USSG § 5H1.3, p.s. (effective Nov. 1, 2010). The reference to § 5K2.13 (Diminished Capacity) has been changed from an exception to the policy statement to an additional (and independent) source of guidance.

The Commission also added language stating that "[i]n certain cases, a downward departure may be appropriate to accomplish a specific treatment purpose," citing Application Note 6 to § 5C1.1 (Imposition of a Term of Imprisonment).[243]

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[242] *Id.* at 8.

[243] At the same time, the Commission "clarifie[d] and illustrate[d]" the zone departure under that application note to expressly include treatment for mental illness, explaining that "[s]ome public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates, and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public." 75 Fed. Reg. 27,388, 27,389 (May 14, 2010). Although departures under this note do not appear to require the mental illness to be present to "an unusual degree," the departure is expressly limited to offenders falling in Zone C of the Sentencing Table, authorizes a departure to Zone B only, and requires a finding that the defendant "suffers from a significant mental illness" and that "the defendant's criminality is related to the treatment problem to be addressed." *Id.*

As its reason for amending § 5H1.3, the Commission explained that it "is the result of a review of the departure provisions," undertaken "in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances." 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). As its reason for amending the departure standard, the Commission stated only that it "adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges." *Id.* It did not describe what the "recent federal sentencing data" showed or explain what principles it drew from the case law, public comment and testimony, or judicial feedback. Nor did it explain why or how this standard furthers any policy goal or purpose of sentencing.

In any event, with these changes the Commission has arguably opened a window for a small category of downward departures, and guideline-sanctioned alternative sentences, based on mental or emotional conditions. The window is quite narrow for departures under § 5H1.3, however, because the Commission also placed as a condition on departure that the mental or emotional condition be "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

The theory underlying this condition is entirely unsound because it pre-supposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances. It continues to promote unwarranted uniformity by requiring a distinction from "typical" defendants who are sentenced under harsh guidelines that do not take individual mitigating characteristics or circumstances into account.

Thus, despite the massive evidence presented to it regarding the current state of knowledge regarding mental and emotional conditions as they relate to the criminal justice system, *see* 28 U.S.C. § 991(b)(1)(C), the Commission merely transformed a "discouraged" factor requiring presence to an "exceptional" degree for a departure, *see* USSG § 5K2.0(a)(4), into an "encouraged" factor that must be present to "an unusual degree" and "distinguishes the case from the typical cases covered by the guidelines." It is difficult to imagine the practical difference between these standards. Indeed, before 2003, the Commission used the same standard now applying to departures under § 5H1.3 for any offender characteristic that it deemed "not ordinarily relevant," except that it has now replaced the term "heartland" with the term "typical."[244]

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[244] *Compare* USSG § 5K2.0 (2002) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.") *with* USSG § 5H1.3 (effective Nov. 1, 2010); 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) ("Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.").

Fortunately, by its terms, the policy statement continues to apply to "departures" only. Moreover, § 3553(a)(1) requires full consideration of mental and emotional conditions as mitigating factors. The conditions placed on consideration of mental and emotional conditions under USSG § 5H1.3 do not apply to the court's consideration of those factors under § 3553(a).

Empirical Research

Mental illness is often conflated with criminality. As the availability of hospital beds for the severely mentally ill has declined, the rate of mentally ill persons in jails and prisons has increased.[245] In 2006, an estimated 45% of federal prisoners had a mental health problem, either measured by recent history or by reported symptoms.[246] In one study, 28.7% of inmates were diagnosed with antisocial personality disorder, often co-occurring with a substance use disorder.[247] Other studies estimate a much higher rate.[248] Antisocial personality disorder, like many other mental illnesses, can be treated and managed.[249]

Commission data show that the percentage of defendants with mental illness is approximately the same regardless of criminal history category, *see* USSC, *Recidivism and the First Offender*, at 8 (2004), suggesting that mental illness does not indicate an

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[245] E. Fuller Torrey, M.D., *et al.*, Treatment Advocacy Center, *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States* 2-4 (2010).

[246] Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Mental Health Problems of Prison and Jail Inmates* 1 (Rev. Dec. 2006).

[247] Bernadette M. M. Pelissier & Joyce O'Neil, *Antisocial Personality and Depression Among Incarcerated Drug Treatment Participants*, at 2; *see also* Bonita M. Veysey & Gisela Bichler-Robertson, *Prevalence Estimates of Psychiatric Disorders in Correctional Settings*, 2 Nat'l Comm'n on Corr. Health Care 57 (Apr. 2002) (predicting prevalence rate of 21-28% among federal prisoners), *available at* http://www.ncchc.org/pubs/pubs_stbr.vol2.html.

[248] *Id.* at 7 (study of federal inmates found that 38% of male drug dependent inmates had diagnoses of ASPD), *available at* www.bop.gov/news/research_projects/published_reports/drug_treat/oreprcormor10.pdf.

[249] Extensive clinical guidelines address the treatment and management of persons with antisocial personality disorder**.** National Collaborating Centre for Mental Health, *Antisocial Personality Disorder: Treatment, Management, and Prevention* (Jan. 2009), *available at* the National Guideline Clearinghouse, www.guideline.gov**.** Both U.S. Probation and the Federal Bureau of Prisons target for treatment the anti-social attitudes, beliefs, and behaviors associated with ASPD. Such treatments include cognitive-behavioral therapy, as well as therapeutic communities. *See* Federal Bureau of Prisons, *Annual Report on Substance Abuse Treatment Programs FY 2008,* at 607 (Jan. 2009); Melissa Alexander, Scott WanBenschoten & Scott Walters, *Motivational Interviewing Training in Criminal Justice: Development of a Model Plan*, 72 Federal Probation 61, 62 (2008) (discussing results of study showing that offenders with ASPD who were exposed to motivational interviewing accomplished greater treatment gains than those who were not).

increased risk of recidivism. In any event, recent studies indicate that therapeutic mental health court programs designed to treat mental disorders as an alternative to longer prison sentences can reduce recidivism rates.[250] The Council of State Governments Justice Center recently released a report that summarizes the kind of community mental health treatment programs proven to work.[251] Often a mentally ill defendant's need for special attention is confused with increased risk, when the factors used to predict recidivism for these defendants is the same as for all defendants.[252]

Inmates with mental problems are far more likely to have been physically or sexually abused.[253] Child abuse and neglect can cause chemical changes in the brain and nervous system. Studies involving abused and neglected children show that "abused individuals were 1.8 times more likely to be arrested for a juvenile offense, 1.5 times more likely to be arrested as an adult, and 1.35 times for likely to be arrested for a violent crime." Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DePaul L. Rev. 847 (2007). Studies also show that abuse can be in the form of neglect only and "need not involve actual physical injury to do lasting damage to the developing brain." *Id.* at 849.

> [E]xposure to stress early in life – specifically, to inadequate or abusive parenting – changes in emotional circuitry of the brain and the neuroendocrine mechanisms underlying allostasis [the inherent flexibility that allows functions such as rate and respiration to increase or decrease to counter potentially destabilizing events] in enduring and often compromising ways.

Id. at 849, 855, 861 (concluding that "the criminal justice system would be better served if child welfare laws, policies, sentencing guidelines, and treatment approaches were informed by a better understanding of the impact of abuse and neglect on the human brain").

A defendant with a mental condition cannot be assured that BOP will provide needed treatment. *See, e.g.*, *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000)

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[250] *See* Dale E. McNiel, Ph.D. & Renée L. Binder, M.D, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 16 Am. J. Psychiatry 1395-1403 (2007); Ohio Office of Criminal Justice Services, *Research Briefing 7: Recidivism of Successful Mental Health Court Participants* (April 2007).

[251] *See* Council of State Governments Justice Center, *Improving Outcomes for People with Mental Illness Under Community Corrections: A Guide to Research Informed Policy and Practice* (2009).

[252] *Id*. at 15.

[253] Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Mental Health Problems of Prison and Jail Inmates* 5 (Rev. Dec. 2006) (reporting that in 2006, state prisoners and jail inmates with mental health problems were two to three times more likely to report being physically or sexually abused in the past).

(finding no abuse of discretion where the district court found that the BOP's letter was merely a form letter trumpeting the BOP's ability to handle medical conditions of all kinds" and concluded that imprisonment posed a substantial risk to the defendant's life). A recent audit by the Office of the Inspector General reported that at a number of institutions, the BOP "did not provide required medical services to inmates," which including failing to monitor inmates with chronic care conditions and failing to properly monitor inmates for psychotropic medical side effects. [254] At several institutions, BOP has allowed medical practitioners to perform medical services without valid authorizations, proper privileges or protocols, increasing "the risk that the practitioners may provide medical services without having the qualifications, knowledge, skills and experience necessary to correctly perform the services."[255]

Judicial Decisions and Sentencing Data

Impaired mental functioning is "inherently mitigating," *see Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004), and plainly relevant to culpability. Indeed, in death penalty cases, it is *unconstitutional* to disallow the consideration of mitigating mental health evidence. *See Payne v. Tennessee*, 501 U.S. 808, 822 (1991). Similarly, counsel's failure to investigate and present mitigating mental health evidence constitutes ineffective assistance of counsel. *See Porter v. McCollum*, 130 S. Ct. 447 (2009) (relating to the defendant's post-traumatic stress disorder stemming from his military service in Korea).

In the noncapital context, courts have recognized that a sentence of imprisonment for defendants with mental conditions can be counterproductive to achieving the purposes of sentencing. *See, e.g.*, *United States v. Polito*, 215 Fed. App'x 354, 356 (5th Cir. 2007) (unpublished) (after *Gall*, affirming a sentence of probation in a child pornography case imposed in part because a term of imprisonment would interrupt the defendant's mental health treatment); *United States v. Clark*, No. 07-123, 2008 WL 2940527 (E.D. Wis. July 25, 2008) (where guidelines called for a term of imprisonment for 18-24 months in a drug case, court sentenced to four years of probation a middle-aged defendant who became addicted to cocaine after a series of family tragedies, serious medical problems, and the loss of her long-held job, with conditions that she participate in drug testing and treatment, and a mental health treatment program); *United States v. Repp*, 466 F. Supp. 2d 788, 791 (E.D. Wis. 2006) (where guidelines called for sentence of 10-16 months of imprisonment in a copyright infringement case, recognizing the defendant's severe anxiety as a mental condition militated against prison and sentencing defendant to probation with a condition of mental health treatment); *see also United States v. Duhon*,

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[254] *See* U.S. Dep't of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care*, at 32-34 (2008), *available at* www.justice.gov/oig/reports/BOP/a0808/final.pdf.

[255] *Id.* at 48-49.

541 F.3d 391 (5th Cir. 2008); *United States v. Taylor*, 2007 2008 WL 2332314 (S.D.N.Y.).[256]

In fiscal year 2010, courts specifically cited mental and emotional conditions as a reason to sentence below the guidelines in 601 cases, representing 4.4% of all cases in which a sentence below the guidelines was imposed. USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, 25B (2010). In the large majority of them, the court relied on 18 U.S.C. § 3553(a) rather than departure analysis. *Id.*

In the Commission's most recent survey of judges, 79% said that mental condition is "ordinarily relevant" to the consideration of departure or variance, 60% said the same about emotional condition, and 80% said that diminished capacity should be "ordinarily relevant."[257]

Mitigating Only

Care must be taken, as severe mental and emotional conditions can present courts with a tempting reason to *increase* a sentence above the guideline range. Fortunately, at least a few courts of appeals have cautioned district courts that doing so is at odds with the purposes of sentencing and the structure of the SRA.

The Tenth Circuit explained that if a defendant is so severely mentally ill that he presents a danger to society, civil commitment is the proper mechanism for protecting the public, not upward departure. *See United States v. Pinson*, 542 F.3d 822, 838 (10th Cir. 2008). The federal civil commitment statute, 18 U.S.C. § 4246, provides for further commitment of a "person in the custody of the Bureau of Prisons whose sentence is about to expire" who "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." An upward departure based on mental illness "in effect circumvents the civil commitment procedure and the procedural and substantive protections that go along with it: specifically, the clear and convincing evidence standard is replaced by the lower, preponderance of the evidence standard." *See Pinson* at 838. And it is a less precise measure of dangerousness, because it takes place before the defendant has received treatment during incarceration. *Id.* (citing Note, Booker, *The Federal Sentencing Guidelines, And Violent Mentally Ill Offenders*, 121 Harv. L. Rev. 1133, 1144 (2008) ("To impose post-prison civil commitment, the state is required to prove an offender's continuing dangerousness by clear and convincing evidence, whereas an above-Guidelines prison sentence relies on a possibly unreliable prediction of what the offender's mental health will be at the end of the Guidelines sentence.")). Although the court affirmed the upward departure in that case, it "encourage[d] sentencing courts to

[256] For more judicial decisions regarding mental conditions, see David Hemingway & Janet Hinton, *Departures and Variances* 44-50 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[257] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

consider that civil commitment procedures will be available if the defendant continues to pose a considerable risk to the public after confinement." *Id.*

The Seventh Circuit has similarly cautioned that a finding of diminished capacity under § 5K2.13 (linked by cross-reference to the general policy statement on mental and emotional conditions under § 5H1.3), even if it points to increased recidivism, cannot be a reason to increase a sentence:

> To use a finding of diminished capacity as an aggravating factor for sentencing purposes misunderstands the relationship between U.S.S.G. § 5K2.13 and 18 U.S.C. § 3553(a). The principle purposes of a criminal sentence are to further goals of retribution, deterrence, and incapacitation. . . . A person who cannot understand the wrongfulness of his actions or control his actions due to a reduced mental capacity is less culpable and less able to be specifically deterred than a person who is not mentally ill, and a long sentence for such a defendant may not served the purposes of sentencing. For these reasons, § 5K2.13 gives judges the discretion to reduce sentences for defendants suffering from diminished capacity. A finding of diminished capacity could also lead to the conclusion that the most effective way of incapacitating the defendant and preventing him from committing further crimes is to provide needed medical care outside a prison setting. The potentially greater risk of recidivism of recidivism in a defendant with diminished capacity can be addressed through different means such as psychological treatment or monitoring. It is a misunderstanding of diminished capacity to suggest that because reduced mental capacity would make recidivism more likely, an increased sentence would be necessary.

United States v. Portman, 599 F.3d 633, 638 (7th Cir. 2010). Given that § 5K2.13 by its terms authorizes *only* downward departures, this extended discussion should not have been necessary. But if you find yourself faced with a judge tempted to rely on an ordinarily mitigating offender characteristic, such as a mental illness or condition, as a reason to sentence above the guidelines, this decision provides additional support to convince the judge not to do so.

§ 5H1.4 Physical Condition, Including Drug Dependence and Alcohol Dependence or Abuse; Gambling Addiction

Legislative History

Congress directed the Commission to consider, in formulating the guidelines and policy statements and in determining the "nature, extent, place of service or other incidents of an appropriate sentence," the relevance of "physical condition, including drug dependence." 28 U.S.C. § 994(d)(5). As explained by the Senate Committee, drug dependence "generally should not play a role in the decision whether or not to incarcerate the offender," but that the Commission might recommend probation in order for the

defendant to participate in a community drug treatment program, possibly with an initial brief stay in prison for "drying out." S. Rep. No. 98-225, at 173 (1983). The Committee also explained that "other health problems" might lead the Commission to recommend probation "in certain circumstances involving a particularly serious illness." *Id.* Such a recommendation would be "consistent with proposed section 3582(c) permitting the Director of the Bureau of Prisons to petition the court for a reduction of a term of imprisonment in a compelling case, such as terminal cancer." *Id.*

Among other purposes, judges must consider the need for the sentence imposed "to provide the defendant with needed . . . medical care . . . *in the most effective manner*." 18 U.S.C. § 3553(a)(2)(D). In addition, Congress instructs judges, in determining whether to impose a term of imprisonment and, if so, for how long, to keep in mind that "imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a).

Initial Policy Statement

As originally promulgated, § 5H1.4 provided that physical condition is not ordinarily relevant for determining either whether to sentence outside the guideline range or where to sentence a defendant within the guideline range, USSG § 5H1.4 (Nov. 1, 1987), and that drug dependence and alcohol abuse are *never* a reason for a departure "below the guidelines," based on what it summarily described as a high correlation between "substance abuse" generally and propensity to commit crime, *id.* The provision implicitly allowed for drug dependence and alcohol abuse to be considered for sentencing *above* the guidelines. The full policy statement provided as follows:

> Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.
>
> Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.
>
> This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.4 (Nov. 1, 1987).

As applied to drug cases in particular, this policy statement was contrary to past practice, when the fact that a defendant used drugs was considered to be a mitigating factor in cases involving the sale of cocaine and heroin. *See* USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements*, at 36 tbl. 1(b) (1987). In addition, Congress referred to drug dependence only, and did not mention drug abuse or alcohol dependence or abuse. Yet, rather than promulgate a policy statement to address drug dependence as a physical condition that might be considered in determining the incidents of an appropriate sentence in the appropriate case, as Congress intended, the Commission promulgated a provision that apparently equated "drug dependence" with "substance abuse" without any explanation, prohibited its consideration for downward departures in light of vague information about "substance abuse," and even implicitly suggested that an upward departure for drug dependence might be appropriate. None of these decisions was explained.

Amendments

In 1991, the Commission amended § 5H1.4 to eliminate the restriction on the consideration of physical condition in determining where to sentence within the guideline range, but left the rest in place. USSG, App. C, Amend. 386 (Nov. 1, 1991). The Commission also revised the suggestion that a sentence "other than imprisonment" might be appropriate for a defendant with an extraordinary physical condition, referring instead to a sentence "below the applicable guideline range, *e.g.*, in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." *Id.* In addition, the Commission has made the following substantive changes:

Alcohol dependence

In 1991, the Commission amended the second paragraph of § 5H1.4 to add alcohol "dependence" (now in addition to "abuse") as a prohibited factor. The Commission gave no reason for the amendment, except that it was for "clarity and consistency." *Id.* (Reason for Amendment). Presumably, the change was to make consistent a prohibition on both drug and alcohol dependence, rather than on drug dependence alone. This change was not supported by empirical analysis or evidence of past practice.

Physical Appearance, Including Physique

In 1991, the Commission amended § 5H1.4 to state that physical "appearance, including physique" is not ordinarily relevant. *Id.* As its reason for the amendment, the Commission summarily stated that it "sets forth the Commission's position that physical appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range." However, when the Commission initially proposed the amendment, the Commission was more forthcoming about its motivation for the amendment, revealing that it was intended to clamp down on certain judicial decisions with which it subjectively disagreed. It said that "[i]n several

cases, court[s] have departed based on the defendant's *alleged* vulnerability to sexual assault in prison due to youthful appearance and slender physique." 56 Fed. Reg. 1846 (Jan. 17, 1991) (emphasis added). The Commission did not name the cases that triggered the amendment, but not long before in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), the Second Circuit upheld a downward departure based on the defendant's "potential for victimization" due to his "diminutive size, immature appearance and bisexual orientation." *Id.* at 601. The record in that case included a description of the defendant's actual experience with victimization in the prison setting, which had prompted officials to plan to place him in solitary confinement as protection. *Id.* at 601. In affirming the downward departure, the court of appeals noted that "the severity of the defendant's prison term is exacerbated by his placement in solitary confinement as the only means of segregating him from other inmates." *Id.* at 603.

In the Commission's general discussion of departures in the introduction to the guidelines, it promised that it would monitor departures by the courts and "analyze stated reasons" for them so that the Commission will be able to create "more accurate" guidelines over time. *See* USSG, Ch.1, Pt. A (4)(B). Yet, rather than view departures like the one in *Lara* as an important mechanism for receiving feedback from the courts regarding the overall operation of the guidelines, *see* 28 U.S.C. § 994(o), the Commission simply amended the guideline in order to stamp them out. Because it did not provide any analysis that would support its decision or make clear that by discouraging physique as a ground for downward departure it did not necessarily intend to discourage consideration of a defendant's extreme vulnerability to abuse in prison, the Commission invited courts to view the amendment as discouraging both. *See, e.g.*, *United States v. Maddox*, 48 F.3d 791, 798 n.10 (4th Cir.1995) (relying in part on the Commission's discouragement of "physique" to reverse the district court's decision, based on the defendant's "slight" physique and other factors, to depart downward for extreme vulnerability). This amendment not only demonstrates that the Commission failed to engage in the kind of examination initially promised, but also represents just the sort of "second-guessing [of] individual judicial sentencing actions" that Congress specifically said the Commission was not to do. *See* S. Rep. No. 98-225, at 178 (1983).

The Supreme Court recognized that the Commission likely amended § 5H1.4 in response to *Lara*, *see Koon v. United States*, 518 U.S. 81, 107 (1996), but narrowly read its discouragement of "physique" not to address the broader issue of abuse in prison. *Id.* ("The Commission did not see fit . . . to prohibit consideration of physical appearance in all cases, nor did it address the broader category of susceptibility to abuse in prison.").

Gambling addiction

In 2003, as part of a comprehensive amendment "continuing the Commission's work in the area of departures" (which meant substantially reducing the incidence of departures in response to the PROTECT Act), the Commission amended § 5H1.4 to add that addiction to gambling is not a reason for a downward departure in any case. USSG App. C, Amend. 651 (Oct. 27, 2003). As its reason, the Commission said only that it

"determined that addiction to gambling is never a relevant ground for departure." *Id.* (Reason for Amendment).

This new prohibition was published only four days before its effective date, and was not published for comment.[258] It appears to expand on a provision in the PROTECT Act, which enacted a new policy statement at § 5K2.22 allowing for downward departures under §5H1.4 in cases involving child crimes and sexual offenses *except* for impairments based on drug, alcohol, or gambling dependence or abuse. Pub. L. No. 108-21, § 401(b). The Commission did not explain why it decided to expand this prohibition to *all* cases. Moreover, this categorical prohibition conflicted with the decisions of many courts that gambling addiction was an appropriate ground for downward departure. *See United States v. Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000) (recognizing several courts' consideration of addiction to gambling, and holding that the district court did not abuse its discretion to grant a downward departure based compulsive gambling under § 5K2.13); *United States v. Liu*, 267 F. Supp. 2d 371, 372 (E.D.N.Y. 2003) (departing downward based on defendant's diminished capacity resulting from addiction to gambling); *United States v. Harris*, No. S192 Cr. 455, 1994 U.S. Dist. LEXIS 17366, , 1994 WL 683429, at *3-4 (S.D.N.Y. Dec. 6, 1994) (pointing out that the American Psychiatric Association has recognized pathological gambling as an "impulse control disorder"); *United States v. Iaconetti*, 59 F. Supp. 2d 139, 146 (D. Mass. 1999). In addition, because the Commission did not explain itself, it is not clear whether it intended the prohibition to cover "pathological gambling" or "compulsive gambling," terms that are often used interchangeably with "addiction to gambling." In any event, none of this history was analyzed or even acknowledged by the Commission when it prohibited gambling addiction in its entirety from consideration under § 5H1.4.

At the same time, the Commission also amended the provision to use the term "departure" to denote a sentence outside the guidelines. USSG, App. C, Amend. 651 (Oct. 27, 2003). As a result, the provision by its terms does not apply to restrict or prohibit a court from relying on physical condition, physique, drug dependence, or gambling addiction for purposes of sentencing a defendant outside the guideline range under § 3553(a). Thus, § 5H1.4 is not only advisory after *Booker*, but by *its terms* does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a "departure." Put another way, § 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission's policy statements regarding departures, although it upheld

[258] The Commission relied on the "good cause" exception to the notice and comment requirement under 5 U.S.C. § 553(b) & (d)(3), incorporated by reference in 28 U.S.C. § 994(x) and governing the Commission's amendment process. The Commission found "good cause" to dispense with notice and comment because "the extensive nature of these amendments, and limited Commission resources made it impracticable to publish the amendments in the Federal Register within the otherwise applicable 30-day period." *See* 68 Fed. Reg. 60,154, 60,154 (Oct. 21, 2003).

a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements.

2010 Amendment

In January 2010, the Commission requested comment regarding whether the guidelines are adequate as they apply five specific offender characteristics, one of which was "physical condition, including drug dependence." 75 Fed. Reg. 3525, 3529-30 (Jan. 21, 2010). For each of the five characteristics, the Commission asked whether the factor is relevant to the "in/out question," *i.e.*, whether to sentence a defendant to prison or probation and whether such a condition is relevant to the length of imprisonment. Apparently alluding to its earlier *post hoc* claim that it placed factors off limits because judges might consciously (or unconsciously) rely on offender characteristics in a discriminatory manner, *see* Part III.E.2, *supra*, it asked whether the factor could be "used as a proxy for one or more of the 'forbidden factors,'" [259] and "if so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?" *Id.*

With respect to physical condition in particular, it asked if it should amend § 5H1.4 and, if so, how. It further asked whether "physical condition or addiction" should be a reason to decrease a sentence (for example, "if the physical condition or addiction could more effectively treated outside of prison" or "if the physical condition renders the offender so infirm that home confinement may be sufficient?), or a reason to increase a sentence (for example, "if the addiction increases the risk of recidivism). *Id.*

In response to the "proxy" question, the Federal Defenders explained (just as the Commission has done previously with respect to *aggravating* factors) that the possibility of demographic differences in the consideration of any of these factors is not a cause for concern so long as judges consider the factor in order to further a legitimate purpose (or purposes) of sentencing, as they are required to do by statute, and do not consider it for discriminatory reasons, which is not likely and nearly impossible to prove.[260] They

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[259] The Commission uses the term "forbidden factor" to refer to the factors listed at 28 U.S.C. § 994(d), which directs the Commission to ensure that the guidelines and policy statements "are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

[260] *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 49-53 (Mar. 17, 2010) (attached to, and incorporated by reference in, Letter from Margy Meyers to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010 (Mar. 22, 2010)) (discussing the "proxy" question at length), *available at* http://www.fd.org/pdf_lib/ FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf; *see also* USSC, *1995 Cocaine Report*, *supra* note 159, at xii (emphasizing that disproportionate impact alone is not a reason to change policy if the policy itself is justified by sentencing purposes); USSC, *Fifteen Year Review*, *supra* note 121, at 113-14 ("Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others.").

pointed out that "sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group."[261]

With respect to physical condition in particular, the Federal Defenders urged the Commission to amend § 5H1.4 to say that physical condition, including drug dependence, may be a reason to depart if it advances one or more purposes of sentencing, citing legislative history and the extensive empirical data, judicial feedback, and policy research set forth below.[262] They pointed out that, with a single exception in fiscal year 2008, courts uniformly viewed physical condition, including drug dependence, as mitigating. The Federal Defenders also urged the Commission to amend § 5H1.4 to state that physical appearance, including physique, may be relevant to departure, and to delete the prohibition on considering a defendant's addiction to gambling. For both requests, they cited extensive evidence in support.

The Probation Officers Advisory Group recommended that the Commission amend the guidelines "to clarify that the court should consider [the] factor[], either alone or in combination, to determine the appropriate sentence for a particular defendant."[263]

The Practitioners Advisory Group did not address physical condition in particular, but generally addressed the five policy statements at issue. It noted that the Commission's policy of discouraging or prohibiting consideration of offender characteristics "is at a minimum confusing" in light of the overarching mandate to judges in § 3553(a) to consider the history and characteristics of a defendant and the companion language in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" that may be considered for purposes of sentencing.[264] It stated that the inconsistency "damages the coherence and legitimacy of the current sentencing regime," and further noted that the Commission had failed "to explain the penological and other bases for the Commission's determinations that the specified characteristic [is] 'ordinarily not' or 'never' relevant to departure analysis."[265]

All public comment on the 2010 proposed amendments and issues for comment is available on the Commission's website at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[261] Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 53 (Mar. 17, 2010)

[262] *Id.* at 68-75.

[263] *See* Letter from the Probation Officers Advisory Group to the U.S. Sentencing Commission, at 3 (Feb. 3, 2010).

[264] *See* Letter from Practitioners Advisory Group to the U.S. Sentencing Commission, at 7 (Mar. 22, 2010).

[265] *Id.* at 8.

For the specific offender characteristics under consideration, the Practitioners Advisory Group recommended that the Commission remove the words "not ordinarily" or "not relevant."[266] It also suggested that, "to the extent that the PAG's proposed language . . . might 'open the floodgates' to departures" and "might undermine the Sentencing Reform Act's goal of reducing disparities between similarly situated defendants," the Commission might add the following language:

> The sentencing court should consider whether the defendant's history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.[267]

This is the correct interpretation of what it means to avoid unwarranted disparity, focusing on *different* history and characteristics among defendants, not on whether certain history and characteristics are "typical" or "unusual" among the defendant population. (The Practitioners Advisory Group did not say where this additional language would go, or whether the "history and characteristics" referred to in it would include criminal history or role in the offense, which would explain the reference to "aggravating" circumstances.)

The National Association of Criminal Defense Lawyers noted that "[b]oth the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that [the five factors at issue] are relevant both when taking into consideration the length of a proposed sanction as well as its form."[268] It strongly urged the Commission "to delete the phrase 'not ordinarily' from the wording of these policy statements."[269] It further suggested that the Commission "incorporate language into the Guidelines that would direct the sentencing judges to strongly consider alternatives to imprisonment or shorter prison terms to facilitate participation in programs that can address these offenders' medical, psychological, and physical needs.[270]

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[266] *Id.*

[267] *Id.* at 10.

[268] Written Statement of Cynthia Hujar Orr on behalf of the Nat'l Assoc. of Criminal Defense Lawyers before the U.S. Sentencing Comm'n Re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment, at 2 (Mar. 17, 2010).

[269] *Id.*

[270] *Id.*

U.S. Representatives John Conyers and Robert C. "Bobby" Scott wrote to "encourage the Commission to now revise its policy statements" based on judicial feedback, the Commission's own data, extensive comments and information received during the seven regional hearings, and the research of "government agencies and renowned experts."[271] As they put it:

> Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that that defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.[272]

With respect to the "proxy" question, they noted that "consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others."[273] They noted that by permitting departures based on offender characteristics that would benefit members of all groups, "the Commission might help to reduce any demographic differences in sentencing."[274]

In contrast to these numerous comments, Jonathan Wroblewski, the Department of Justice's *ex officio* member of the Commission and writing on behalf of the Department of Justice, said that the Department is "extremely cautious about any revision to the guidelines related to offender characteristics."[275] Despite the accumulated feedback from judges over the course of the history of the guidelines that offender characteristics are relevant to sentencing, the Commission's own research, and the extensive empirical research entered into the record during the regional hearings and in response to the request for comment, the Department claimed that the Commission "had not provided an administrative record that would justify delving into this area."[276] It expressed concerns that the consideration of offender characteristics would inject

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[271] Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Commission, at 2 (Apr. 6, 2010).

[272] *Id.*

[273] *Id.* at 2-3 (citing USSC, *Fifteen Year Review*, *supra* note 121, at 113-14)).

[274] *Id.*

[275] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 8 (Mar. 22, 2010).

[276] *Id.*

"uncertainty" into the sentencing process, and also raised the specter of racial and ethnic disparity.[277] According to the Department, sentences should be "determined largely by the offense committed and the offender's criminal history."[278]

And in stark contrast to its previous positions on just about any given amendment that would increase sentences (many of which it proposed), the Department urged the Commission to take its time to study the factors individually "over the coming years," and to engage in "rigorous study and review" as "the best way to address these kinds of issues."[279] (This of course ignores the mounds of rigorous study and review that has already been done and that has already been presented to the Commission over the course of many years.)

Notably, the Department did *not* say that any of these factors are *not* relevant to sentencing. Instead, it beat the drum of speculative "unwarranted disparity." Its only recommendation for the 2010 amendment cycle was that the Commission "reaffirm" that "offenders who commit similar offense be treated similarly" and "indicate that offender characteristics (outside of criminal history) generally should not drive sentencing outcomes."[280] Of course, the Department provided no evidence that this approach would best serve the purposes of sentencing. The Department, as always, promoted unwarranted uniformity.

A group of Republican Congress members, headed by Lamar Smith and Jeff Sessions wrote to say that these five factors "are rightly excluded from the sentencing calculus" and are "not relevant either in making the 'in/out' decision or in determining the length of incarceration." However they provided no particular reasons or evidence for this assertion as it might relate to physical condition, or to any of the other factors.

In May 2010, the Commission sent to Congress a proposed amendment to § 5H1.4 that acknowledges the potential relevance of physical condition or appearance, including physique, but is otherwise weighed by enough conditions and caveats to raise substantial doubts about the practical significance of the changes. *See* 75 Fed. Reg. 27,388, 27,390-91 (May 14, 2010). The revised policy statement states that physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." *See* USSG § 5H1.4, p.s. (effective Nov. 1, 2010).

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[277] *Id.*

[278] *Id.*

[279] *Id.* at 9.

[280] *Id.* at 8.

It also amended the policy statement to state that "drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure," when previously it stated that this factor "is not a reason for a downward departure." *Id.* In other words, drug and alcohol dependence or abuse was changed from a "prohibited factor" to a "discouraged" factor for departure purposes.

The Commission also added language stating that "[i]n certain cases, a downward departure may be appropriate to accomplish a specific treatment purpose," *id.*, citing newly revised Application Note 6 to § 5C1.1 (setting forth grounds for departure to accomplish a treatment purpose, including for a defendant who is "an abuser of narcotics, other controlled substances, or alcohol," but with various restrictions and conditions).

The Commission left standing its prohibition on considering a defendant's addiction to gambling.

As its reason for these changes, the Commission explained that the amendment "is the result of a review of the departure provisions," undertaken "in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances." 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). As its reason for amending the departure standard in particular, the Commission stated only that it "adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges." *Id.* It did not describe what the "recent federal sentencing data" showed or explain what principles it drew from the case law, public comment and testimony, or judicial feedback. Nor did it explain why or how this standard furthers any policy goal or purpose of sentencing. [281]

With these changes, the Commission has arguably opened a window for a small category of downward departures based on physical condition, including physique. The window is quite narrow, however, because the Commission also placed as a condition on departure that the defendant's physical condition or appearance be "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

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[281] At the same time, the Commission "clarifie[d] and illustrate[d]" the zone departure under Application Note 6 to USSG § 5C1.1 (Imposition of a Term of Imprisonment) to expressly include treatment for a drug or alcohol abuse, explaining that "[s]ome public comment, testimony, and research suggested that successful completion of treatment programs may reduce recidivism rates, and that, for some defendants, confinement at home or in the community instead of imprisonment may better address both the defendant's need for treatment and the need to protect the public." 75 Fed. Reg. 27,388, 27,389 (May 14, 2010). However, the departure is limited to offenders falling in Zone C of the Sentencing Table, authorizing a departure to Zone B only and requiring a finding that the defendant "is an abuser of narcotics, other controlled substances, or alcohol" and that "the defendant's criminality is related to the treatment problem to be addressed." *Id.*

The theory underlying this requirement is entirely unsound because it presupposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances. It continues to promote unwarranted uniformity by requiring a distinction from "typical" defendants who are sentenced under harsh guidelines that do not take individual mitigating characteristics or circumstances into account.

Thus, for physical condition and physique, the Commission merely transformed a "discouraged" factor requiring presence to an "exceptional" degree for a departure, *see* USSG § 5K2.0(a)(4), into an "encouraged" factor that must be present to "an unusual degree" and "distinguishes the case from the typical cases covered by the guidelines." It is difficult to imagine the practical difference between these standards. Indeed, before 2003, the Commission used the same standard now applying to departures under § 5H1.4 for any offender characteristic that it deemed "not ordinarily relevant," except that it has now replaced the term "heartland" with the term "typical."[282]

For drug and alcohol dependence, the change may be a bit more significant, as the factor has been moved from the "prohibited" category to the "discouraged" category, and as the Commission has highlighted a departure provision in the commentary to § 5C1.1. These changes may encourage judges to consider the factor for departure more than they might have in the past, but the factor remains discouraged for no reason.

Overall, however, the changes are quite modest, given the evidence presented to it regarding the current state of knowledge regarding physical conditions, including physique and substance abuse, as they relate to the criminal justice system, *see* 28 U.S.C. § 991(b)(1)(C).

Fortunately, by its terms, the policy statement continues to apply to "departures" only. Moreover, § 3553(a)(1) requires full consideration of physical condition as a mitigating factor. The conditions placed on the consideration of physical condition, and the prohibition on the consideration of gambling addiction, under § 5H1.4 do not apply to the court's consideration of these factors under § 3553(a).

Empirical Research

Drug dependence

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[282] *Compare* USSG § 5K2.0 (2002) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.") *with* USSG § 5H1.4, p.s. (effective Nov. 1, 2010); 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) ("Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance . . . is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.").

Drug addiction is an illness, "a brain disease that can be treated." [283] A host of current studies show the efficacy and cost savings of drug treatment as an alternative to incarceration and as a method to reduce crime. *See, e.g.*, Elizabeth Drake *et al.*, Washington State Institute of Public Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State* (2009) (drug treatment in prison reduces recidivism by 6.5% and results in $12,715 in net benefits per participant, while treatment-oriented supervision reduces recidivism by 17.9% and results in $19,118 in net benefits per participant);[284] Nat'l Institute on Drug Abuse, National Institutes of Health, *Principles of Drug Abuse Treatment for Criminal Justice Populations* (2006) (concluding that "treatment offers the best alternative for interrupting the drug abuse/criminal justice cycle for offenders with drug abuse problems. . . . Drug abuse treatment is cost effective in reducing drug use and bringing about associated healthcare, crime, and incarceration cost savings" because every dollar spent toward effective treatment programs yields a $4 to $7 dollar return in reduced drug-related crime, criminal costs and theft);[285] Susan L. Ettner et al., *Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment "Pay for Itself*?", Health Services Res., 41(1), 192-213 (2006) (for every $1 spent on drug treatment, $7 is saved in general social savings, primarily in reduced offending and also in medical care); Doug McVay, Vincent Schiraldi, & Jason Ziedenberg, Justice Policy Institute Policy Report, *Treatment or Incarceration: National and State Findings on the Efficacy of Cost Savings of Drug Treatment Versus Imprisonment* at 5-6 *(*March 2004) ("Dollar for dollar, treatment reduces the societal costs of substance abuse more effectively than incarceration does.");[286] *see also id.* at 18 ("A prison setting is ill-suited for the most effective approach to persistent drug abuse, which consists of a broad framework of substance abuse counseling with "job skill development, life skills training, [and] mental health assessment and treatment.").

At the Commission's recent Symposium on Alternatives to Incarceration, evidence-based research was presented to show that properly matched treatment programs for addicted offenders are effective in reducing recidivism. *See* USSC, *Symposium on Alternatives to Incarceration*, at 34 & Taxman-8 (July 2008).

The Sentencing Project recently reviewed the evidence on drug courts, which address addiction through drug treatment "instead of solely relying upon sanctions through incarceration or probation," and reported that graduates of drug court programs,

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[283] Nat'l Institute on Drug Abuse, Nat'l Institutes of Health, U.S. Dep't of Health & Human Services, *Drugs, Brains, and Behavior: The Science of* Addiction ii (2007), *available at* http://www.drugabuse.gov/scienceofaddiction/sciofaddiction.pdf.

[284] Available at www.wsipp.wa.gov/rptfiles/09-00-1201.pdf.

[285] Available at www.nida.nih.gov/PDF/PODAT_CJ/PODAT_CJ.pdf.

[286] Available at http://www.justicepolicy.org/article.php?list=type&type=98.

are "less likely to be rearrested than persons processed through traditional court mechanics." *See* Ryan S. King & Jill Pasquarella, The Sentencing Project, *Drug Courts: A Review of the Evidence* 1, 5 (2009) (collecting findings of drug court evaluations); *see also* GAO Report to Congressional Committees, *Adult Drug Courts, Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* 45-46, 73-74 (2005) (recidivism rates were 10-30% lower for drug court participants and saved $1000 to $15,000 per participant); C. West Huddleston, III, *et al.*, Nat'l Drug Court Institute, *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States* 6-8 (2008) (offenders who participate in drug court programs have a significantly lower rate of recidivism (ranging from 7% to 29%) and save substantial costs (ranging from $4,700 to $12,000 per participant)).

In a recent bulletin distributed to the state's criminal justice stakeholders, the Missouri Sentencing Advisory Commission highlighted the fact that even for chronic substance abusers with a history of previous incarcerations, probation with community drug treatment reduces recidivism. *See* Missouri Sent'g Advisory Comm'n, *Smart Sentencing*, Vol. 1, Issue 4 (July 20, 2009). In fact, while all offenders benefit from community drug treatment, offenders with serious substance abuse or with extensive criminal history benefit *more* from community drug treatment than offenders with moderate substance abuse or no prior criminal history. *Id.* (recidivism for offenders on probation in community drug treatment was reduced by 11% overall and 16% for those with serious substance abuse).

To the extent that drug addiction may be linked to an increased propensity to commit crimes, the answer is not a longer term of incarceration but treatment and rehabilitation. *See Smart Sentencing*, *supra*, at 2-3. Moreover, current research does not support the theory that a longer term of incarceration will reduce the risk that an offender will commit further crimes. A study involving federal white-collar offenders in the pre-guideline era found no difference in deterrent effect even between probation and imprisonment.[287] That is, offenders given terms of probation were no more or less likely to reoffend than those given prison sentences.

In a recent study of drug offenders sentenced in the District of Columbia, researchers tracked over a thousand offenders whose sentences varied substantially in terms of prison and probation time.[288] The results showed that variations in prison and

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[287] *See* David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995); *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.").

[288] Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, __ Criminology ___ (forthcoming May 2010), electronic copy available at http://ssrn.com/abstract=1477673.

probation time "have no detectable effect on rates of re-arrest."[289] In other words, "at least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior."

The Bureau of Prison's 500-hour residential drug treatment program RDAP is underutilized and disqualifies those who could benefit from treatment.[290] First, it does not make eligibility determinations early enough to send prisoners to available programs. In addition, BOP has promulgated inappropriate practices regarding who is an eligible prisoner, disqualifying persons who have not used substances within a year of custody even when it was because the addicted person had been complying with pretrial release conditions.[291] On the other hand, in one instance we know of, BOP deemed a client of the Federal Defender Office for the District of Massachusetts, who was on the waiting list for RDAP, ineligible for the program because he used drugs while in prison.[292] These are the very individuals who most need the program.[293]

BOP also excludes from RDAP inmates convicted of nonviolent offenses but who have prior convictions for certain "crimes of violence," no matter how stale and despite the fact that Congress intended to preclude RDAP only for those whose *instant* offense was violent.[294] Similarly, BOP disqualifies gun possessors from early release

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[289] *Id.* ("Those assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame.").

[290] *See* Prepared Statement of Stephen R. Sady, *Federal Bureau of Prisons Oversight Hearing: The Bureau of Prisons Should Fully Implement Ameliorative Statutes to Prevent Wasted Resources, Dangerous Overcrowding, and Needless Over-Incarceration*, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary (July 21, 2009), available at http://or.fd.org/Sady/written%20stmt%20july%202009.pdf.

[291] *See Salvador-Orta v. Daniels*, 531 F. Supp. 2d 1249, 1252 (D. Or. 2008).

[292] BOP lists the use of alcohol or drugs as a ground for expulsion from RDAP. 28 C.F.R. § 550.53(g)(3).

[293] "Individuals trying to recover from drug addiction may experience a relapse, or return, to drug use. . . . Monitoring drug use [during treatment]. . . provides opportunities to intervene to change unconstructive behavior—determining rewards and sanctions to facilitate change, and modifying treatment plans according to progress." National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations, available at* http://www.drugabuse.gov/PODAT_CJ/principles/.

[294] 18 U.S.C. § 3621(e)(2)(B) ("The period a prisoner *convicted of a nonviolent offense* remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons . . . .") (emphasis added). The Ninth Circuit recently held that the BOP violated the Administrative Procedure Act by excluding a prisoner serving time for drug trafficking from early release based on a 1970 manslaughter conviction. *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009) ("The administrative record before us is devoid of any contemporaneous rationale for

consideration. Recently, it added arson and kidnapping as prior offenses disqualifying an inmate for early release programs.[295]

Physical condition

A recent audit by the Office of the Inspector General found systemic deficiencies in the Bureau of Prisons' delivery of health services and that the Bureau of Prisons in fact does not always provide adequate treatment for chronic conditions, does not properly monitor side effects of medication, allows possibly unqualified providers to render medical services, and does not meet its performance target levels on treatment of serious conditions including diabetes and HIV.[296]

Persons with serious or chronic medical conditions and housed at a federal medical center often serve their prison terms many thousands of miles away from family members. Studies show that supportive family connections predict reduced recidivism,[297] while breaking up families leads to increased recidivism.[298]

Gambling addiction

Pathological or compulsive gambling is a diagnosable mental health disorder[299] that is the subject of intense research regarding its prevalence, biological basis, social

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the BOP's promulgation of a rule categorically excluding inmates with certain prior convictions from early release eligibility.").

[295] *See* BOP Policy Statement 5331.02 (March 16, 2009).

[296] *See* U.S. Dep't of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison's Efforts to Manage Inmate Health Care* ii-xix, 32-34 (2008), *available at* www.justice.gov/oig/reports/BOP/a0808/final.pdf.

[297] Kimberly Bahna, *"It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271, 285 (1994) (prisoners who have supportive families are less likely to recidivate); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) ("The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.").

[298] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005), *available at* http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality.").

[299] The criteria for pathological gambling, classified as an impulse control disorder, are set forth in at section 312.31 of American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition [DSM-IV]. It provides:

impact, and treatment. A 1999 study done by Harvard Medical School's Division on Addictions showed that approximately 1% of the adult population can be classified as having a pathological problem associated with an addiction to gambling. Shaffer, H.J., Hall, M.N. & Vander Bilt, J., *Estimating the prevalence of disordered gambling behavior in the United States and Canada: A research synthesis*, 89 Am. J. of Public Health 1369-76 (1999). In 2000, Harvard Medical School created the Institute for Research on Pathological Gambling and Related Disorders, which engages in scientific research on the individual, social, medical and economic burdens caused by pathological gambling.

The mission of the National Council on Problem Gambling (NCPG) is "to increase public awareness of pathological gambling, ensure the widespread availability of treatment for problem gamblers and their families, and to encourage research and programs for prevention and education," and lists resources on its website at www.ncpgambling.org.

The National Center for Responsible Gaming collects leading studies on treatment of compulsive gambling. [300]

In an effort to reduce recidivism and prison overcrowding, Louisiana has enacted a voluntary diversion program offering gambling addiction treatment rather than prison time for first or second offenders who have committed nonviolent crimes such as theft,

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Persistent and recurrent maladaptive gambling behavior as indicated by five (or more) of the following:

(1) is preoccupied with gambling (e.g., preoccupied with reliving past gambling experiences, handicapping or planning the next venture, or thinking of ways to get money with which to gamble)
(2) needs to gamble with increasing amounts of money in order to achieve the desired excitement
(3) has repeated unsuccessful efforts to control, cut back, or stop gambling
(4) is restless or irritable when attempting to cut down or stop gambling
(5) gambles as a way of escaping from problems or of relieving a dysphoric mood (e.g., feelings of helplessness, guilt, anxiety, depression)
(6) after losing money gambling, often returns another day to get even ("chasing" one's losses)
(7) lies to family members, therapist, or others to conceal the extent of involvement with gambling
(8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling
(9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling
(10) relies on others to provide money to relieve a desperate financial situation caused by gambling

[300] The NCRG is a national organization that funds research that helps increase understanding of pathological and youth gambling and find effective methods of treatment for the disorder. *See* http://www.ncrg.org.

forgery, issuing worthless checks, and failure to pay child support that can be directly related to compulsive gambling.[301]

In short, there is a massive body of research and information available to counter the Commission's unsupported policy that an "addiction to gambling" is not relevant to sentencing.

Physique

Because "[p]hysical force, or the threat of physical force, is the most common element of coercion used in prison rape," physical build is a "particularly strong indicator of whether a prisoner will be victimized."[302]

Judicial Decisions and Sentencing Data

Since *Booker* was decided, courts have increasingly turned away from § 5H1.4 as a controlling analysis for whether physical condition or substance dependence or abuse is a mitigating factor.

Drug dependence and substance abuse

Courts cited drug dependence or alcohol abuse as a reason to impose a sentence below the guideline range under § 3553(a) in 205 cases in fiscal year 2008 (compared to 14 straight departures in the same year),[303] in 304 cases in fiscal year 2009 (compared to no departures in the same year),[304] and in 315 cases in fiscal year 2010 (compared to 20 straight departures in the same year).[305]

As Congress suggested, a drug dependent defendant may be placed on probation in order to participate in a community drug treatment program. S. Rep. No. 98-225, at 173 (1983). In *Gall*, the defendant's addiction to drugs and alcohol helped to explain his criminal activity; he was waging a successful battle against it, and the district court made treatment a condition of his probation. *Gall*, 374 F. Supp. 2d at 762, 763 n.4. The Supreme Court affirmed the district court's sentence of probation, noting the district

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[301] *See* the 20th Judicial District Attorney's Office website at http://www.felicianasda.org/diversion.html (describing the pretrial diversion program), last visited on October 15, 2010; *see also* Matthew Penix, *Compulsive gambling surges*, New Orleans City Business (Dec. 18, 2006) (describing the widespread use of the program and its benefits).

[302] *See* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference*," 92 J. Crim. L. & Criminology 127, 167 (2002).

[303] *2008 Sourcebook*, tbl. 25.

[304] *2009 Sourcebook*, tbls. 25, 25A, & 25B.

[305] *2010 Sourcebook*, tbls. 25, 25A, & 25B.

court's observation that the defendant's offenses "appeared 'to stem from his addictions to drugs and alcohol.'" *Gall v. United States*, 552 U.S. 38, 57 (2007). The Supreme Court did not mention USSG § 5H1.4.

As another district court judge has explained:

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992). On the other hand, the relationship between drug rehabilitation and crime is clear. If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting. Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

United States v. Perella, 273 F. Supp. 2d 162, 164 (D. Mass. 2003).

In a case involving a defendant addicted to methamphetamine, Senior Judge Merritt of the Sixth Circuit strongly suggested that sentencing courts should reject the prohibitions and restrictions of § 5H1.4 as unsound policy:

> The Guidelines violate § 3553 by forbidding consideration of addiction and most other significant mitigators. Part H of the Guidelines on "Specific Offender Characteristics" states that "Drug or alcohol dependence or abuse is not a reason for a downward departure" and forbids consideration in the sentencing process. (§ 5H1.4.) . . . It is ironic that the Sentencing Commission thinks that juries are capable of taking mitigators into account but judges are not. In other areas of analysis of criminal responsibility -- for example, death penalty jurisprudence -- the Constitution forbids the use of a sentencing process that proscribes the consideration of addiction and other mitigators by the sentencer. Therefore, in a case like this, the Guidelines are not a reliable or even a rational guide to sentencing. If the federal judiciary is to impose just sentences after *Booker*, it must extricate itself from the prevailing mind set under the Guidelines that includes almost all conceivable enhancements and aggravators while excluding from consideration almost all significant mitigating circumstances.

United States v. Eversole, 487 F.3d 1024, 1036-37 (6th Cir. 2007) (Merritt, J., dissenting) (internal citation omitted).

In its recent survey of judges, 49% said that drug dependence is "ordinarily relevant" to the consideration of a departure or variance, and 47% said the same about alcohol dependence.[306]

Physical condition

According to the Commission's published data, in fiscal year 2008 courts specifically cited physical condition under § 5H1.4 as a reason for granting a sentence below the guideline range in 522 cases, representing 5.7% of cases in which a sentence below the guideline range was imposed, either as a departure or a variance.[307] Of those cases, less than a third depended on departure analysis alone.[308] In fiscal year 2010, the total number increased to 680, or 5.0% of cases in which a below guideline sentence was imposed. Less than *one-fifth* of these below-guideline sentences depended on departure analysis.[309]

Courts recognize that the Bureau of Prisons cannot always assure adequate treatment. *See, e.g.*, *United States v. Martin*, 363 F.3d 25 (1st Cir. 2004) (affirming downward departure where the Bureau of Prisons could not assure adequate treatment for the defendant's Crohn's disease); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000) (holding that it was not an abuse of discretion to grant a downward departure under § 5H1.4 where the government's only evidence that the Bureau of Prisons would adequately treat the defendant's medical condition was merely a "form letter trumpeting the BOP's ability to handle medical conditions of all kinds"); *see also United States v. Pineyro*, 372 F. Supp. 2d 133 (D. Mass. 2005).

Of course, the need to provide treatment in the most effective manner is not the only purpose of sentencing. Judges recognize that a defendant's medical condition may increase the relative severity of imprisonment as a form of punishment, making it more onerous and possibly even fatal. They understand how to strike a balance among the statutory purposes of sentencing on a case-by-case basis. For example, Senior District Judge Kane of the District of Colorado engaged in that balancing process to sentence a

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[306] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

[307] USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, & 25B (2008). According to the dataset from which this information was drawn, however, courts actually cited physical condition 700 times, and vulnerability to abuse in prison, which is often related to physique, 18 times. USSC FY 2008 Monitoring Datafile, on file with the Sentencing Resource Counsel. In addition, for purposes of variance, courts often simply check the box on the Statement of Reasons that corresponds to § 3553(a)(1) rather than specify a § 5H factor. So these numbers, and the numbers for any other factor addressed by a policy statement, likely understate the actual rate at which judges consider this factor.

[308] *Id.2008 Sourcebook*, tbl. 25.

[309] USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, & 25B (2010).

defendant with chronic medical conditions to one day in prison and lifetime supervised release in a child pornography case where the advisory guideline range was 97 to 120 months' imprisonment. *United States v. Rausch*, 570 F. Supp. 2d 1295, 1305 (D. Colo. 2008).

There, the defendant was in extremely poor health, under severe dietary restrictions, suffering severe effects from a colostomy, on kidney dialysis and in dire need of a kidney transplant. As it commonly does in cases involving defendants with severe or chronic illness, the government claimed that the BOP could provide needed medical treatment and kidney transplant surgery. In support, it provided an affidavit by the Assistant Director, Health Services Division and Medical Director of the Bureau of Prisons, asserting that organ transplant and related care for inmates "is available" and that the BOP would pay for such services if the BOP finds that a transplant is appropriate. *Id.* at 1302.

Counsel for Mr. Rausch showed, however, that eligibility for a kidney transplant through BOP would be, in fact, subject to non-medical considerations such as funding, available space, or "correctional issues." *Id.* at 1306. She further showed that although Mr. Rausch was on the kidney transplant list, his eligibility would be suspended once placed in BOP custody, and remain so until BOP approved the transplant through its own administrative process, which is not guaranteed and would involve additional evaluation and approval by the only medical center to whom it refers organ transplant surgery. *Id.* at 1301-03. If and when a transplant was ever approved, Mr. Rausch likely would have been dead.

While acknowledging the "grievous" nature of the offense, Judge Kane explained that the purposes of sentencing and criteria of § 3553(a)

> may clash, and not all apply in each case. The criteria also point to individuated considerations: No one size fits all. The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one -- one that is decent, appropriate and deserved under all attendant circumstances.

Id. at 1305. The judge found that Mr. Rausch's "extremely poor health and the complexity of his needs for medical care," which the government had not shown BOP could or would meet in the most effective manner, "override any value that further imprisonment would have." *Id.* at 1308. He concluded that the sentence imposed was "strongest penalty I can exact without putting [the defendant's] life at substantial risk." *Id.*

Judge Kane did exactly what he is directed to do by Congress. He considered the purposes of sentencing under § 3553(a), including the need to "provide the defendant with needed . . . medical care . . . *in the most effective manner*," 18 U.S.C. § 3553(a)(2)(D) (emphasis added), to arrive at a sentence that is not greater than necessary. He recognized that while BOP may in theory be able to provide needed medical services,

in reality it may not be able to do so "in the most effective manner" and that, as a result, a term of imprisonment would be too severe.

In addition, a defendant's physical condition is relevant to sentencing when it reduces the likelihood of recidivism due to infirmity. *See United States v. Jimenez*, 212 F. Supp. 2d 214, 219-20 (S.D.N.Y. 2002) (deciding to grant a downward departure where the defendant's unusual post-offense medical condition, while perhaps treatable by the Bureau of Prisons, "seriously erodes her capacity to threaten society" and "reduces, to an exceptional degree, the applicability of other rationales for punishment – incapacitation, specific deterrence, and rehabilitation").[310]

In the Commission's recent survey of judges, 64% said that physical condition is "ordinarily relevant" to the consideration of a departure or variance.[311]

Gambling addiction

The prohibition on gambling addiction has been ignored by some courts. In *United States v. Peterson*, 363 F. Supp. 2d 1060 (E.D. Wis. 2005), the sentencing judge relied on 18 U.S.C. § 3553(a) and *Booker* to impose a sentence of one day in prison and five years of supervised release in a case in which the defendant defrauded a bank of over $80,000 to fuel a gambling addiction. There, the defendant had been in counseling for his addiction and had been progressing well. The guidelines called for 12 to 18 months in prison, but the court imposed the below-guideline sentence so that the defendant could continue to work and pay restitution in light of the directives to the court in § 3553(a)(7) to consider the need to provide restitution to the victim of the offense, and in § 3553(a)(2)(D) to provide defendant with needed treatment in the most effective manner. *Id.* at 1062-63. The court did not mention § 5H1.4.

In a case involving convictions for health care fraud and embezzlement, the Ninth Circuit affirmed a variance from 30-37 months' imprisonment to one day of imprisonment followed by three years' supervised release (to be partially served in a community confinement facility), so that the defendant could continue to work and receive treatment for his mental health issues and gambling addiction. *See United States v. Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008). The court relied on *Gall* and did not mention the Commission's prohibition on the consideration of a defendant's addiction to gambling.[312]

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[310] For more judicial decisions regarding a defendant's medical condition or need for medical care, see David Hemingway & Janet Hinton, *Departures and Variances* 16-17 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[311] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

[312] For more judicial decisions, see David Hemingway & Janet Hinton, *Departures and Variances* 49-50 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

In the Commission's recent survey of judges, 39% said that gambling addiction is "ordinarily relevant" to the consideration of a departure or variance, while only 10% said that it is "never relevant."[313]

Physique

Physical appearance, including physique, can mean that a sentence of imprisonment, or a particularly long one, is unnecessarily cruel. Physique is precisely the type of evidence that establishes deliberate indifference to prison rape under the Eighth Amendment. *See Farmer v. Brennan*, 511 U.S. 825 (1994); *Wilson v. Wright*, 998 F. Supp. 650 (E.D. Va. 1998); *see also Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980). Federal judges, familiar with the Eighth Amendment standard for deliberate indifference and the typical victim profile for prison abuse, have taken physical size and appearance into account at sentencing. *See United States v. Lara*, 905 F.2d 599, 601 (2d Cir. 1990).

Even after the Commission prohibited consideration of physique in 1991, courts continued to consider a defendant's extreme vulnerability to abuse in prison due to physical appearance and small size. For example, in *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992)**,** the Eighth Circuit upheld the district court's downward departure based on a physical impairment which made him "exceedingly vulnerable to possible victimization and resultant severe and possibly fatal injuries." *Id.* at 1277. And in *United States v. K.*, 160 F. Supp. 2d 421 (E.D.N.Y. 2001), the district court deferred sentencing to promote rehabilitation after identifying as a ground for downward departure the fact that the defendant was "extremely small-boned and feminine looking" and after having noted the documented relationship between small size and physical appearance to vulnerability to abuse in prison. *Id.* at 443-44, 446-47.

The Ninth Circuit recently vacated a sentence and reversed for resentencing so that the district court could address under § 3553(a) the defendant's argument that his argument that "he has suffered abuse and will face abuse in prison due to his transgender status." *United States v. Gutierrez-Romero*, 288 Fed. App'x 380, 381 (9th Cir. 2008). In *United States v. Meillier*, 650 F. Supp. 2d 887 (D. Minn. 2009), the district court imposed a below-guideline sentence of one day in prison where the defendant, convicted of possessing child pornography, was shy, mildly mentally retarded, and of "small physical stature." As the court explained, although it has "not hesitated" to impose lengthy prison sentences in many such cases, *id.* at 899-900, sentencing this particular defendant to a prison sentence of even a few weeks "is the equivalent of sentencing him to be physically and sexually abused. When the defendant cannot protect himself because of his mental retardation and small physical stature, such a sentence would be inhumane." *Id.* at 898. "[T]hose convicted of crimes – even crimes as heinous as possessing child pornography—are human beings, and no two human beings are alike." *Id.* at 900.

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[313] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

In fiscal year 2008, susceptibility to abuse in prison was cited as a reason for a sentence below the guideline range in 18 cases.[314] Interestingly, in its recent survey of judges, the Commission did not ask judges if they think vulnerability to abuse in prison is relevant to the consideration of a departure or variance.[315]

§ 5H1.5 Employment Record

Legislative History

Congress charged the Commission to consider the relevance of "previous employment record" in formulating its guidelines. 28 U.S.C. § 994(d). Congress also specifically directed the Commission to assure that the guidelines reflect the "general inappropriateness of considering . . . employment record" in recommending a term of imprisonment or length of imprisonment. *Id.* § 994(e). Again, Congress wanted the Commission to make sure that the guidelines did not have the effect of recommending prison (as opposed to a nonprison alternative) or recommending a longer term of imprisonment based on a *lack* of employment record. S. Rep. No. 98-225, at 175 (1983). As explained by the Committee, these considerations are "similar to those for the education and vocational skill of the defendant." *Id.* at 173. Thus, Congress envisioned that employment record, like education and vocational skills, might call for a sentence of probation. *Id.* at 172-73.

Initial Policy Statement

If the Commission had been faithful to congressional intent, it would have promulgated a policy statement that directed judges not to consider lack of employment record as a reason to impose a sentence of imprisonment, but that it may be a reason to impose probation with a requirement that the defendant get a job or build employment skills. The Commission also could have directed judges to consider previous employment record as a factor that may warrant a downward departure or a nonprison sentence based on empirical evidence suggesting that employment is correlated with reduced recidivism.[316] Instead, the Commission promulgated a policy statement that discouraged the consideration of previous employment record in a manner that all but assured a sentence of imprisonment even when an alternative would be otherwise adequate to meet the purposes of sentencing:

> Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment

[314] USSC FY 2008 Monitoring Datafile, on file with the Sentencing Resource Counsel.

[315] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

[316] USSC, *Measuring Recidivism*, *supra* note 157, at 12 & Ex. 10.

> record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.5 (Nov. 1, 1987).

Amendments

In 1991, the Commission deleted the restriction on considering employment record for purposes of determining where within the sentencing range the sentence should fall, and clarified how employment record may be relevant in determining the conditions of probation or supervised release by giving the example that employment might be relevant in determining "the appropriate hours of home detention." *See* USSG, App. C, Amend. 386 (Nov. 1, 1991). The amended policy statement then read:

> Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.
>
> Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).

Id.

In 2004, § 5H1.5 was amended to refer to "departures" rather than to sentences "outside the applicable guideline range." USSG, App. C, Amend. 674 (Nov. 1, 2004). This amendment was meant to conform its language to the set of departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). Thus, § 5H1.5 by *its terms* does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a "departure." Put another way, § 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission's policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements

As a result, courts that rely on § 5H1.5 to deny a variance – or to affirm the denial of a variance – are wrong. *See, e.g.*, *United States v. Zuniga*, 2008 U.S. App. LEXIS 1745 (9th Cir. Jan. 22, 2008) (citing § 5H1.5 and stating, without analysis, that "Defendant's work history . . . [is] not extraordinary and therefore provide[s] no particular support for a sentence outside the Guidelines range.").

Empirical Research

The Commission's own studies demonstrate that stable employment in the year prior to arrest is associated with a lower risk of recidivism.[317]

Judicial Decisions and Sentencing Data

In a recent case involving convictions for health care fraud and embezzlement, the district court cited as one of several mitigating factors the defendant's "history of strong employment" in granting a variance from 30-37 months' imprisonment to one day of imprisonment followed by three years' supervised release (to be partially served in a community confinement facility), in part so that the defendant could continue to work. *See United States v. Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008). The Ninth Circuit affirmed, relying on *Gall* and without mentioning the Commission's policy.

In a case involving heroin trafficking, the Tenth Circuit affirmed a below-guideline sentence under 18 U.S.C. § 3553(a) of one year and a day in prison, plus a year of home confinement and five years of supervised release, where the guidelines called for a sentence of 63-78 months. *See United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008). Among other things, the district court considered the defendant's stable employment history as evidence that he was unlikely to reoffend. *Id.* at 1148-49.

The Eighth Circuit vacated a within-guideline sentence in a methamphetamine case, remanding it to the district court to consider the defendant's request for a downward variance based, in part, on his employment history. *United States v. Chase*, 560 F.3d 828, 821-32 (8th Cir. 2009) (stating that employment history is a "factual bas[i]s that would warrant a downward variance" and that it felt obligated to "iterate that the standards governing departures do not bind a district court when employing its discretion with respect to variances").

The Third Circuit sitting *en banc* affirmed a below-guideline sentence of probation, community service, restitution, and fine on a conviction for tax evasion, which was based in part on the defendant's employment record. *United States v. Tomko*, 562 F.3d 558, 571 (3d Cir. 2009) (*en banc*) ("This variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating" the defendant, "while also factoring in his substantial wealth as a reason for imposing a fine far above the Guidelines."). And in a case involving a felon-in-possession conviction, where the defendant brandished the firearm under threatening circumstances, the Third Circuit affirmed a variance below the guideline range based in part on the defendant's "long history of gainful employment." *United States v. Fogle*, 331 Fed. App'x 920, 924 (3d Cir. 2009).[318]

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[317] *See* USSC, *Measuring Recidivism*, *supra* note 157, at 12 & Ex. 10.

[318] For more judicial decisions, see David Hemingway & Janet Hinton, *Departures and Variances* 38-39 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

In fiscal year 2010, employment record was cited as a reason for a sentence below the advisory guideline range in 822 cases, representing 6.0% of all cases in which the court imposed a sentence below the guideline range. USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, & 25B (2010). Of these, more than four-fifths involved only a variance under § 3553(a).

In the Commission's recent survey of judges, 65% said that employment record is "ordinarily relevant" to the consideration of a departure or variance.[319]

§ 5H1.6 Family Ties and Responsibilities

Legislative History

Congress charged the Commission to consider the general relevance of family ties and responsibilities and community ties and to take them into account to the extent relevant, and specified that the guidelines should reflect that the general inappropriateness of considering family ties and responsibilities as reason for imposing a term of imprisonment. 28 U.S.C. § 994(d)(7)-(8), (e); S. Rep. No. 98-225, at 175 (1983). As explained by the Senate Judiciary Committee, these provisions together left ample room for the Commission to "conclude that, for example, a person whose offense was not extremely serious but who should be sentenced to prison should be allowed to work during the day, while spending evenings and weekends in prison, in order to be able to continue to support his family." S. Rep. No. 98-225, at 174 (1983).

Initial Policy Statement

The Commission interpreted these directives not by encouraging probation or other nonincarcerative sanctions so that the defendant could continue to meet family responsibilities, but by promulgating a policy statement that discouraged the consideration of family ties and responsibilities as forming the basis of a sentence outside the guideline range. The original policy statement read as follows:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.6 (Nov. 1, 1987).

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[319] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

Note that the Commission allowed consideration of family ties and responsibilities for purposes of determining restitution and fines or if a defendant was sentenced to probation or supervision, but only if the defendant has "complied with" or "met" these responsibilities.

Amendments

In 1991, as part of several amendments throughout Part H enacted for "clarity and consistency," the Commission eliminated the express statement that family ties and responsibilities may be relevant to the length and conditions of supervised release. USSG, App. C, Amend. 386 (Nov. 1, 1991). The amended policy statement read as follows:

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.
>
> Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

In 2003, as part of the PROTECT Act, Congress directly amended § 5H1.6 by prohibiting consideration of family ties and responsibilities and community ties for purposes of a sentence below the guideline range for certain offenses involving minor victims and other sex offenses. *See* USSG, App. C, Amend. 649 (Apr. 30, 2003); Pub. L. No. 108-21, § 401(b)(4). Not long after, the Commission revisited § 5H1.6 to add commentary further restricting the consideration of family ties and responsibilities, as part of its "continuing work" regarding departures and in response to Congress's general directive in the PROTECT Act to amend the guidelines to substantially reduce the incidence of downward departures. USSG, App. C, Amend. 651 (Oct. 27, 2003) (Reason for Amendment). These restrictions require the court to consider a non-exhaustive list of circumstances in determining whether a departure is warranted: the seriousness of the offense, the family's involvement in the offense, and the danger to the family as a result of the offense. *Id.* For departures based on loss of caretaking or financial support, the Commission further *required* the court to find the presence of four circumstances using rigorous analysis, which were designed to limit departures on this ground. *Id.* One of those circumstances was that the loss of support must "substantially exceed[] the harm ordinarily incident to incarceration for a similarly situated defendant." So, for example, financial "hardship or suffering" due to the absence of a caretaker "is of a sort ordinarily incident to incarceration." *Id.*

With these amendments, § 5H1.6 then read as follows:

§ 5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted.

In sentencing a defendant convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.[320]

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

Commentary

Application Note:

1. Circumstances to Consider. –

(A) In General. In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

(B) Departures Based on Loss of Caretaking or Financial Support. A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

[320] The Commission inadvertently omitted this paragraph from the Federal Register Notice, but included it in the *Supplement to the 2002 Guidelines Manual*.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

USSG App. C, Amend. 651 (Oct. 27, 2003); USSG § 5H1.6 (2003). The Commission explained that it "determined that these heightened criteria are appropriate and necessary in order to distinguish the hardship or suffering that is ordinarily incident to incarceration from that which is exceptional." *Id.* It provided no empirical support or other policy-based rationale for this determination.

Notably, these new restrictions appear in commentary only. Although the Supreme Court held in 1993 that commentary is binding on the court unless it conflicts with a statute, *Stinson v. United States*, 508 U.S. 36, 45, 47 (1993), that analysis arguably no longer controls. The SRA does not expressly authorize the Commission to issue commentary, though Congress did refer to commentary in § 3553(b). *See Stinson v. United States*, 508 U.S. 36, 41 (1993).[321] When the Supreme Court in *Booker* excised § 3553(b)(1) from the SRA,[322] it removed from the Act any authority for the Commission to promulgate commentary, [323] and any direction to sentencing courts to consider commentary.[324]

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[321] There, Congress directed courts to consider "official commentary" in determining departures, *i.e.*, "whether a circumstance was adequately taken into consideration" by the Sentencing Commission. 18 U.S.C. § 3553(b).

[322] *See United States v. Booker*, 543 U.S. 220, 245 (2005) (excising § 3553(b)(1) and § 3472(e) in order to remedy the Sixth Amendment violation created by the mandatory nature of the guidelines).

[323] In 2003, the Commission created a new guideline, § 1A1.1, that cites 28 U.S.C. § 994(a) as the Commission's authority to promulgate commentary. While that section expressly authorizes the Commission to promulgate guidelines and policy statements, it does not authorize commentary. *See* 28 U.S.C. § 994(a).

[324] Courts have subsequently found that *Booker* excised by implication a similar reference in § 3553(b)(2). *See, e.g.*, *United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n. 54 (5th

Also in 2003, the Commission removed the reference to "community ties" from the first paragraph of § 5H1.6, which applies to all offenses except sex offenses and offenses involving minor victims, with the intent to "eliminate[e] community ties as a separate ground for departure." USSG, App. C, Amend. 651 (Oct. 27, 2003) (Reason for Amendment). By removing the factor from § 5H1.6, the Commission transformed the factor into one not taken into consideration by the guidelines or policy statements, and therefore subject to a court's consideration as a ground for departure under § 5K2.0(2)(B) (providing for departures based on unidentified circumstances that are present in the exceptional case).

In 2004 the Commission amended the first paragraph of § 5H1.6, which generally applies to all offenses, to use the term "departure" rather than "outside the applicable guideline range." USSG, App. C, Amend.674 (Nov. 1, 2004). This amendment was meant to conform its language to the set of departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). Thus, *by its terms* the first paragraph of § 5H1.6 generally does not apply at all in determining whether to sentence outside the guideline range in any manner not designated as a "departure." Put another way, § 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Indeed, in *Gall*, the Court made no mention of the Commission's policy statements regarding departures, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements

However, the Commission did not amend the *second* paragraph, relating to sex offenses and offenses involving a minor victim, and which was directly inserted by Congress as part of the PROTECT Act to prohibit courts from considering family ties and responsibilities and community ties "in determining whether a sentence should be below the applicable guideline range." Under current law, however, the judge must consider the characteristics of the of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for "departure" or any other purpose. *See Rita v. United States*, 551 U.S. 338, 365 (2007) (Stevens, J., concurring) (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well). Thus, while courts may not be permitted to *depart* in such cases under this policy statement, it is not permissible for a court to deny a request for an outside-guideline sentence because a Commission policy statement purports to prohibit a court from doing so.

Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (*en banc*).

Empirical Research

Commission studies show that recidivism rates are lower for defendants who are or were ever married, even if divorced. *See* USSC, *Measuring Recidivism*, *supra* note 157, at 11 & Exhibit 9. Other studies show that supportive family connections predict reduced recidivism,[325] while breaking up families leads to increased recidivism.[326]

Judicial Decisions and Sentencing Data

In 2003, a majority of district court judges indicated in a survey that more emphasis was needed on family ties and responsibilities. *See* Linda Drazga Maxfield, Office of Policy Analysis, USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*, Chapter II (Mar. 2003), *available at* www.ussc.gov. It was in the same year that survey was issued, however, that Congress enacted the PROTECT Act and the Commission amended § 5H1.6 to make the departure provision governing family ties and circumstances more restrictive.

Since *Booker* was decided, there has been a marked shift away from departure analysis for considering family ties and responsibilities, with courts increasingly relying on *Booker* and 18 U.S.C. § 3553(a) to avoid the restrictions in § 5H1.6 relating to family ties and responsibilities. In 2003, for example, courts cited family ties and responsibilities 430 times as a reason for downward departure, or in 8.8% of cases in which a nongovernment-sponsored downward departure was granted.[327] By fiscal year 2008, courts cited family ties and responsibilities as a reason for a departure in only 182 cases in which a downward departure was granted, or just under 2% of all cases in which sentence below the guidelines was imposed.[328] However, free of the constraints of strict departure analysis, courts cited family ties and responsibilities as a reason for sentencing below the guideline range in cases in which a sentence below the guideline was imposed under *Booker* and 18 U.S.C. § 3553(a) in another 883 cases, almost five times as many

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[325] Kimberly Bahna, *"It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. Rev. 271, 285 (1994) (prisoners who have supportive families are less likely to recidivate); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) ("The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures.").

[326] The Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005) ("The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."), *available at* http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf

[327] *See* USSC, *2003 Sourcebook of Federal Sentencing Statistics*, tbl. 25A (2003).

[328] USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbl. 25, 25A & 25B (2008).

cases, for a total rate of 11.7% of all cases in which a below-guideline sentence was imposed.[329]

In fiscal year 2009, courts cited family ties and responsibilities in 12.9% of cases in which a below-guideline sentence was imposed, again with the majority relying on § 3553(a) rather than § 5H1.6.[330] And in fiscal year 2010, the rate was 12.3%, also with the vast majority under § 3553(a).[331] Of all the specific mitigating factors addressed in Chapter 5 of the *Guidelines Manual*, family ties and responsibilities are cited *most often* for imposing a sentence below the guidelines.

As one recent court of appeals recognized, *Gall* "indicates that factors disfavored by the Sentencing Commission may be relied on by the district court in fashioning an appropriate sentence." *United States v. Munoz-Nava*, 524 F.3d 1137, 1148 (10th Cir. 2008). There, the Tenth Circuit upheld the district court's consideration of the defendant's family circumstances in a heroin trafficking case despite the restrictions of § 5H1.6, recognizing the district court's "institutional advantages and giv[ing] due deference to [its] § 3553(a) determinations." *Id.* In *United States v. Martin*, the First Circuit affirmed a below-guideline sentence in a career offender case based, in part, on family circumstances, rejecting the government's arguments based on § 5H1.6. *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008) ("[S]uch policy statements normally are not decisive as to what may constitute a permissible ground for a variant sentence in a given case.").

Courts are also untangling the Commission's conflation of the culpability of the defendant with the impact of imprisonment on the defendant's dependents. In *United States v. Schroeder*, 536 F.3d 746 (7th Cir. 2008), the court stated that "extraordinary family circumstances can constitute a legitimate basis for imposing a below-guidelines sentence." *Id.* at 755. However, the court explained that the fact that a defendant's criminal conduct was the cause of a family's hardship is "obvious" and "not dispositive":

> When a defendant presents an argument based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant's absence on his family members. The defendant's responsibility for the adverse effects of his incarceration is not the determinative issue. If it were, there would never be an occasion on which the court would be justified in invoking family circumstances to impose a below-guidelines sentence.

Id. at 756 (citation omitted). In support, the court cited a 1992 decision from the Second Circuit, *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992), which explained that the "rationale for a downward departure here is not that [the defendant's] family

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[329] *Id.*

[330] *2009 Sourcebook*, tbls. 25, 25A & 25B.

[331] *2010 Sourcebook*, tbls. 25, 25A & 25B.

circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Id.* at 129. The Seventh Circuit's emphasis away from culpability (and the seriousness of the offense) and toward the effect of incarceration on the defendant's family, with a citation to a 1992 case from the Second Circuit, suggests that the restrictive commentary to § 5H1.6 is unconvincing. [332]

Finally, the effect of removing community ties from § 5H1.6 was to reduce the number of guideline departures based on that ground. In fiscal years 2007, 2008, 2009, and 2010, community ties were not cited as a reason to depart in any case, down from 0.4% of all reasons for departure in 2003.[333] Nevertheless, in 2007 courts continued to find community ties to be relevant, exercising their discretion to sentence defendants below the guideline range under *Booker* and 18 U.S.C. § 3553(a) at the same rate as before the factor was removed from § 5H1.6. *2007 Sourcebook*, tbl. 25B.[334] And in 2010, community ties were cited as a reason for a sentence below the guidelines outside of strict departure analysis in 186 cases, or 1.4% of cases in which a below-guideline sentence was imposed.[335]

The Third Circuit sitting *en banc* affirmed a below-guideline sentence of probation, community service, restitution, and fine on a conviction for tax evasion, which was based in part on the defendant's community ties. *United States v. Tomko*, 562 F.3d 558, 571 (3d Cir. 2009) (*en banc*) ("This variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating" the defendant, "while also factoring in his substantial wealth as a reason for imposing a fine far above the Guidelines.").

In the Commission's recent survey of judges, 62% said that family ties and responsibilities is "ordinarily relevant" to the consideration of a departure or variance.[336]

§ 5H1.7 Role in the Offense

Legislative History and Initial Promulgation

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[332] For more judicial decisions, see David Hemingway & Janet Hinton, Departures and Variances 24-25 (Sept. 2009), available at http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[333] *See* USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbls. 25 & 25A (2007); USSC, *2008 Sourcebook*, tbls. 25 & 25A; *2003 Sourcebook*, tbl. 25A.

[334] In 2008, "community ties" does not appear as a separate reason for a below-guideline sentence based on 18 U.S.C. § 3553(a) and *Booker*, although this may be due to the fact that for 2008, the Commission increased from 47 to 75 the number of cases in which a reason is cited before it will be listed as a separate reason given. *See 2008 Sourcebook*, tbl. 25B n.1.

[335] *2010 Sourcebook*, tbls. 25A & 25B.

[336] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

Congress directed the Commission to consider the relevance of "role in the offense" and to take it into account to the extent that it has relevance. 28 U.S.C. § 994(d)(9). As initially promulgated, § 5H1.7 simply stated that the role in the offense "is relevant in determining the appropriate sentence," citing Part B of Chapter 3, which described the circumstances for a limited adjustment for role in the offense and stated that in any other case, no adjustment to the offense level was allowed for role in the offense:

> A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B, (Role in the Offense).

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.7 (Nov. 1, 1987).

Thus, neither the original policy statement nor the Chapter Three guidelines restricted, by their terms, consideration of role in the offense for purposes of *departure*.

Amendments

In 1999, Commission staff reported that average time served had doubled since the guidelines' inception, noted evidence that lengthy prison terms were being served by offenders with little risk of recidivism and without deterrent value, and recommended an evaluation of whether prison resources were being used effectively.[337] The year before, Justice Breyer had given a speech in which he criticized the "false precision" created by the guidelines, and called upon the Commission to "know when to stop," to "act[] forcefully to diminish significantly the number of offense characteristics," to "broaden[] the scope of certain offense characteristics, such as 'role in the offense,'" and to move in the direction of "greater judicial discretion" in order to provide "fairness and equity in the individual case."[338]

Despite Justice Breyer's plea, the Commission amended § 5H1.7 in 2003 to put an end to using role in the offense as a basis for departure by adding that a defendant's role in the offense "is not a basis for departing from that range," USSG, App. C, Amend. 651 (Oct. 27, 2003), and added a citation to new subsection (d) of § 5K2.0, which specified that a defendant's role in the offense, among other things, was a "prohibited departure." This amendment was not required or suggested by the PROTECT Act, but was "in addition to the departure prohibitions in § 5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act." *Id.* (Reason for Amendment). The Commission stated simply that role in the offense is "never [an] appropriate ground for departure" for reasons that were unexplained, other than that this was part of the

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[337] Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 Fed. Sent. Rep. 12, 1999 WL 1458615 (July/August 1999).

[338] Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 14 Crim. Just. 28, 35 (Spring 1999) (reprinting speech given in November 1998 at the University of Nebraska College of Law).

Commission's ongoing work to "substantially reduce the incidence of downward departures." *Id*.

In the same year that the Commission amended § 5H1.7 to prohibit consideration of role in the offense for downward departures, courts had relied on role in the offense to grant a departure in 53 cases, representing 1% of the reasons given for all departures,[339] and there were no upward departures based on inadequate reflection of role in the offense. Although not a large number, it might have signaled to the Commission that courts believe that the Commission had not adequately taken role in to offense into account as a mitigating factor in some cases. Indeed, the Commission recognizes that departures can indicate that the guidelines need to be revised and refined to reflect the feedback from the courts. *See* USSG, ch. 1 pt. A(1), § 4(b) ("By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted."). If it had followed its own vision here, it could have revised the guideline in Chapter 3 governing adjustment for role in the offense so that it better addresses the degrees of culpability recognized by courts in some cases. As a result, the departure rate would have been reduced, which in turn would have advanced the Commission's goal, and Congress's directive, to reduce the rate of departures. Instead, the Commission just wiped out the option in its entirety, contrary to data and national experience.

Moreover, as the only guideline that subtracts points based on reduced personal culpability, § 3B1.2 (Mitigating Role) is too restrictive and does not appear to have an empirical basis. First, the two- to four-level reduction often does little to offset both the size of quantity-based aggravating factors and other cumulative and often duplicative upward adjustments.[340] Second, it appears the Commission capped the mitigating role adjustment at four levels, *see* § 3B1.2(a), because if it were greater, sentences would fall below the mandatory minimum sentence in a large number of drug cases.[341] As a result, both the limitation on role reduction in § 3B1.2 and the prohibition on any further reduction through departure under § 5H1.7 are not the product of any rational policy regarding culpability, but the product of the Commission's decision to link the drug guideline to the mandatory minimums. *Gall*, 552 U.S. at 46 n.2 ("[T]he Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes.").

Judicial Decisions and Sentencing Data

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[339] USSC, *2003 Sourcebook of Federal Sentencing Statistics*, at 56, tbl. 25A (2003).

[340] *See, e.g.*, *United States v. Cabrera*, 567 F. Supp. 2d 271, 272-73 (D. Mass. 2008) ("[D]eductions for a defendant's minor role . . . are limited and do not come close to offsetting the high quantity-driven offense level.").

[341] USSC, *Fifteen Year Review*, *supra* note 121, at 48-49.

Despite the restrictions in the Guidelines, courts continue to sentence below the guideline range based on role in the offense, with raw numbers and rates having increased since *Booker* was decided in 2005. In the period following *Booker* in fiscal year 2005, "mule/role in the offense" was cited as a reason for sentencing below the guidelines in 164 cases.[342] In fiscal year 2008, "mule/role in the offense" was cited as a reason to sentence below the guidelines in 281 cases, representing approximately 3% of cases in which a below-guideline sentence was granted, whether styled as a departure or a variance.[343] In 2009, courts cited "mule/role in the offense" as a reason for a sentence below the guidelines in 429 cases, or in 3.6% of the cases in which a below-guideline sentence was imposed, with the vast majority relying on § 3553(a).[344] And in 2010, courts cited "role in the offense" as a reason for a below guideline sentence in 521 cases (3.8%).[345]

In *United States v. Whigham*, No. 06cr10328, 2010 U.S. Dist. LEXIS 125845 (D. Mass. Nov. 30, 2010), Judge Gertner observed that the guidelines' role adjustments "are often minimal – two or three points – and hardly offset the substantial impact of quantity in the other direction," which "may or may not be consistent with the defendant's actual role in the offense." *Id.* at *14-15 (citing Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules*, 40 Am. Crim. L. Rev. 19, 70-72 (2003)). As she explained, "[t]he Guidelines undervalue just how minor a crack dealer's role is." This was evidenced by the circumstances presented in the case, in which the defendant with severe mental deficiencies was a street dealer who "did not even have a consistent source or supply of drugs" and made little or no money. "[W]hile crack dealers like Whigham are de facto at the bottom of the drug hierarchy, the Guidelines do not treat them as such." Exercising her authority to disagree with the Commission's policy on departures based on role, Judge Gertner took the defendant's minor role into account under § 3553(a). *Id.* at * 21-22

For a collection of other judicial decisions, see David Hemingway & Janet Hinton, *Departures and Variances* 27-29 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

In its recent survey of judges, the Commission did not ask judges if they think role in the offense should be a relevant consideration for departure or variance.[346] But

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[342] USSC, *2005 Sourcebook of Federal Sentencing Statistics*, at 284-85 tbls. 25, 25A, 25B & 25C (2005).

[343] *2008 Sourcebook*, tbls. 25, 25A, & 25B. Commission data do not show how many of these cases involved drug trafficking.

[344] *2009 Sourcebook*, tbls. 25, 25A, & 25B.

[345] *2010 Sourcebook*, tbls. 25, 25A, & 25B.

[346] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

47% said that the "range of adjustments based on role in the offense should be increased (*i.e.*, allow adjustments for role in the offense greater than 4 levels)."[347]

§ 5H1.8 Criminal History

Legislative History and Initial Policy Statement

Congress directed the Commission to consider the relevance of criminal history in formulating the guideline rules. 28 U.S.C. § 994(d). Chapter Four of the initial guidelines set forth the rules for calculating a defendant's criminal history score, and included a provision allowing for departures based on criminal history when the defendant's criminal history category does not adequately represent the seriousness of prior offenses. USSG § 4A1.3 (Nov. 1, 1987) (Adequacy of Criminal History). The Commission also included the following policy statement:

> A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four, (Criminal History).

52 Fed. Reg.18,046 (May 13, 1987); USSG § 5H1.8 (Nov. 1, 1987).

Amendments

Departures based on criminal history became a common feature of guideline practice, and by 2003, criminal history was cited as a reason for downward departure in 1,079 cases, representing 22% of all cases in which a non-government initiated downward departure was granted. *See 2003 Sourcebook*, tbl. 25A. As part of its work on reducing the rate of departures in response to section 401(m) of the PROTECT Act directing the Commission to reduce the rate of departures, the Commission amended § 5H1.8 in 2003 to specify that the only grounds for departure based on criminal history are set forth in § 4A1.3. *See* USSG, App. C, Amend. 651 (Oct. 27, 2003).

At the same time, the Commission revised § 4A1.3, clarifying its standards and adding prohibitions and limitations on downward departures for certain offenders. In particular, it prohibited downward departures based on criminal history for defendants who qualify as Armed Career Criminals under § 4B1.3 and for persons found to be repeat and dangerous sex offenders against minors under § 4B1.5. *See* USSG, App. C, Amend. 651 (Oct. 27, 2003). As its reason, the Commission stated simply that it "determined that such offenders should never receive a criminal history-based downward departure." *Id.* (Reason for Amendment).

The Commission also limited the extent of departures for career offenders under § 4B1.1 by providing that any such departure cannot exceed one level. *Id.*; *see* USSG

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[347] *Id.* tbl. 9.

§ 4A1.3(b)(3)(A). The Commission gave no reason for this amendment. The impact of this amendment with respect to the criminal history rules in general is not the topic of this paper,[348] but it is important to note that this amendment, like every amendment to Part H of Chapter 5, operated to further restrict the consideration of an offender characteristic as part of the sentencing process.

In 2006, the Commission included a review of criminal history as one of its final priorities in the 2006-2007 amendment cycle.[349] The Commission took no action, however, and the issue has largely been dropped from the Commission's list of priorities.[350] The only exception is that in 2010, the Commission eliminated recency points under § 4A1.1 because judges often pointed to recency points as a reason to sentence below the guideline range and because research showed that the consideration of recency "only minimally improves" the ability of the criminal history score to predict recidivism. *See* 75 Fed. Reg. 27,388, 27,393 (May 14, 2010).

Empirical Research

The Commission has published three reports on recidivism, acknowledging that the criminal history rules were never based on empirical evidence.[351] Moreover, although the Commission based its criminal history rules in large part on the Parole Commission's Salient Factor Score (SFS), the Commission's various deviations from the SFS (not based on empirical evidence) resulted in a Criminal History Category that is a worse predictor of recidivism than the Parole Commission's SFS.[352] For example, the predictive power of USSG § 4A1.1(f), which adds one point for a prior crime of violence that was not counted under § 4A1.2 because it was found to be "related to" another crime of violence, is statistically insignificant.[353]

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[348] For a more extensive discussion of the career offender guideline, see Amy Baron-Evans *et al*., *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39 (2010) (also available at www.fd.org).

[349] USSC, Notice of Final Priorities, 71 Fed. Reg. 56,578 (Sept. 27, 2006).

[350] *See* USSC, Notice of Final Priorities, 73 Fed. Reg. 54,878 (Sept. 23, 2008); USSC, Notice of Final Priorities, 43 Fed. Reg. 46,478 (Sept. 9, 2009); USSC, Notice of Final Priorities, 74 Fed. Reg. 54,699 (Sept. 8, 2010).

[351] *See* USSC, *Measuring Recidivism*, *supra* note 157; USSC, *First Offender*, *supra* note 157; USSC, *Salient Factor Score*, *supra* note 157.

[352] USSC, *Salient Factor Score*, *supra* note 157, at 12.

[353] *Id.*, at 7, 11, 15. It should be noted that the concept of "related cases" in § 4A1.2 was replaced in 2006 by the concept of a "single sentence." *See* USSG § 4A1.2(a) (2008). The effect of this change on the Commission's recidivism data is not known. As a result, it remains fair to say that the extra point under § 4A1.1(f) has no known empirical basis.

The Commission has also found that the inclusion of non-moving traffic violations in the criminal history score may adversely affect minorities "without clearly advancing a purpose of sentencing" (regardless of the defendant's race) and "there are many other" such possibilities. USSC, *Fifteen Year Review*, *supra* note 121, at 134. Many courts and commentators have recognized, and many studies have shown, that African Americans are stopped by the police and charged only with traffic offenses in disproportionate numbers, often called "driving while black."[354]

The same Commission research showing that recency points under § 4A1.1(e) "only minimally improves" the ability of the criminal history score to predict recidivism, *see* USSG, App. C, Amend. 742 (Nov.1, 2010), appears to show the same thing for status points under § 4A1.1(d). *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 90 (Mar. 17, 2010), *supra* note 159, at 90-93.

Judicial Decisions and Sentencing Data

Despite § 5H1.8, criminal history issues now represent the most often cited reason for imposing a sentence below the advisory guideline range. In fiscal year 2010, criminal history issues were cited in a whopping 91% of cases in which a downward departure was granted, by far the reason cited most often for a downward departure. *See* USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbl. 25 (2010) (representing 43.8% of all reasons given for a downward departure).[355] At the same time, criminal history issues were cited in 61% of cases in which the court granted a downward departure with *Booker* and § 3553(a), and in 16.4% of cases in which the court granted a variance. *See id.* tbls. 25A & 25B. Taken together, courts cited criminal history issues as a reason for imposing a below-guideline sentence in approximately 28.5% of all cases in which a below-guideline sentence was imposed. Unfortunately, the Commission does not further break down its data to show which criminal history rules most often lead judges to sentence below the guidelines. But these general data, in the form of feedback from the courts, should signal to the Commission that its criminal history rules do not further the purposes of sentencing and need attention. It is interesting to note that the overall rate of below guideline sentences based in whole or in part on criminal history issues increased by 1% from fiscal year 2009, even after recency points were eliminated

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[354] *E.g.*, *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 954 (9th Cir. 2003); *Washington v. Lambert*, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996); *Smith v. City of Gretna Police Dep't*, 175 F. Supp. 2d 870, 874 (E.D. La. 2001); *Martinez v. Village of Mount Prospect*, 92 F. Supp. 2d 780, 782 (N.D. Ill. 2000); *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998); *see also, e.g.*, David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. Minn. L. Rev. 425 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 341-52 (1998); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & Pol'y 291, 296 (1997).

[355] Courts often cite multiple reasons for granting a downward departure.

For a collection of cases in which judges sentenced below the guidelines based on criminal history issues, *see* David Hemingway & Janet Hinton, *Departures and Variances* 8-12 (Sept. 2009), available at http://www.fd.org/pdf_lib/Departuresand Variances2apt.jgh.pdf.

§ 5H1.9 Dependence Upon Criminal Activity for a Livelihood

Congress directed the Commission to consider the relevance of the defendant's "degree of dependence upon criminal activity for a livelihood." 28 U.S.C. § 994(d)(11). The Commission promulgated the following policy statement:

> The degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence. See Chapter Four, Part B (Career Offenders and Criminal Livelihood).

52 FR 18,046 (May 13, 1987); USSG § 5H1.9 (Nov. 1, 1990).

This provision has not been substantively amended since it was promulgated. An in-depth analysis of the career offender provision at § 4A1.2 is set forth in a companion paper and provides numerous grounds for requesting a sentence below the career offender guideline.[356] For a collection of cases in which judges sentenced below the career offender guideline, see David Hemingway & Janet Hinton, *Departures and Variances* 8-12 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt. jgh.pdf.

§ 5H1.10 Race, Sex, National Origin, Creed, Religion and Socio-Economic Status

Legislative History

Subsection (d) of § 994 specifically directs the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders." As explained by the Senate Judiciary Committee, this provision was added "to make it absolutely clear that it was not the purpose of the list of offender characteristics set forth in subsection (d) to suggest in any way that the Committee believed that it might be appropriate, for example to afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." S. Rep. No. 98-225, at 171 (1983). The Committee added, however, that "the requirement of neutrality . . . is not a requirement of blindness." *Id.* at 171 n.530.

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[356] *See* Amy Baron-Evans *et al*., *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39 (2010) (also available at www.fd.org).

The initial set of guidelines stated simply that "[t]hese factors are not relevant in the determination of a sentence."

52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5H1.10 (Nov. 1, 1987).

This policy statement has not since been amended.

Empirical Research

While Congress directed the Commission to enact guidelines that are "entirely neutral as to the race, sex, national origin, creed, and socio-economic status of offenders," it did not say, as the Commission did, that these factors "are not relevant" at sentencing in the individual case. In other words, a *court* is not statutorily prohibited from considering these factors to the extent that they have been shown to be relevant to the selection of a sentence that is sufficient, but not greater than necessary, to satisfy the purposes of sentencing with respect to a particular defendant.

For example, the Commission's own study indicates that women recidivate at a lower rate than men. USSC, *Measuring Recidivism*, *supra* note 157, at 11 & Exhibit 9. The Commission has also shown that the career offender guideline adversely affects African-American drug offenders. *See Fifteen Year Review*, *supra* note 121, at 133 (showing that African-American offenders constituted 26 percent of offenders sentenced under the guidelines in 2000, but were 58 percent of offenders sentenced under the career offender provision, due mostly to the "inclusion of drug trafficking crimes in the criteria qualifying offenders for the guideline").

The Commission has recognized that the crack guidelines, which result in sentences that are too severe in light of the seriousness of the offense, disproportionately impact minorities, *see* USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (2007), and that the two-level decrease to that guideline enacted in 2007 is "neither a permanent nor a complete solution." 72 Fed. Reg. 28,558, 28,573 (May 21, 2007). It has recognized that certain offenses against the person disproportionately impact Native American defendants,[357] and the criminal history rules in general disproportionately impact black and Hispanic defendants. [358]

In 2006, the Sentencing Project conducted a study of the federal prison population and found that "African Americans now serve virtually as much time in prison for a drug offense (57.2 months) as whites do for a violent offense (58.8 months)." The Sentencing

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[357] *See* USSC, *Report of the Native American Advisory Group* (2003).

[358] USSC Monitoring Datafile FY2008 (on file with Sentencing Resource Counsel). In fiscal year 2008, white defendants made up 55.6 % of those falling in Criminal History Category I, while black defendants made up only 30.6%. Similarly, white defendants made up 9.4% of those falling in Criminal History VI, while black defendants made up 21.1%.

Project, *The Federal Prison Population: A Statistical Analysis*, at 2 (2006), *available at* www.sentencingproject.org/pdfs/federalprison.pdf. Even more recently, the same organization reported that while African-Americans represent approximately 12% of the total population, and between 11.5% and 14.9% of all regular drug users in the years from 2000 to 2005, they represent 42.9% of drug offenders in federal prison. Marc Mauer, The Sentencing Project, *The Changing Racial Dynamics of the War on Drugs* 6-8 (2009).[359] As explained there,

> [a] wealth of research demonstrates that much of this disparity is fueled by disparate law enforcement practices. In effect, police agencies have frequently targeted drug law violations in low-income communities of color for enforcement operations, while substance abuse in communities with substantial resources is more likely to be addressed as a family or public health problem.

Id. at 2.

After a detailed review of similar evidence, the Commission itself recognized that the career offender guideline disproportionately impacts African-Americans, perhaps because they are at higher risk of conviction for a drug trafficking offense than similar white drug traffickers. USSC, *Fifteen Year Review*, supra note 121, at 133-34. And its own recidivism studies show that the recidivism rate for career offenders whose prior offenses are drug offenses "more closely resembles the rates for offenders in the lower criminal history categories in which they *would* be placed under the normal criminal history scoring rules." *Id.* at 134. In light of this, the Commission asked whether "the career offender guideline, especially as it applies to repeat drug traffickers, clearly promotes an important purpose of sentencing." *Id.* It concluded that mandatory minimums, the career offender guideline, and perhaps other guideline rules "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation," and that attention should be turned to "asking whether these new policies are necessary to achieve any legitimate purpose of sentencing." *Id.* at 135.

Judicial Decisions

As Congress recognized, neutrality does not require blindness. When a judge considers these characteristics in a manner that does not *adversely* impact the defendant, such as to impose a lower sentence, it cannot be said that the judge "discriminates" based

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[359] Although there is not reliable data on the race of drug sellers, "[p]ersons who use drugs [] generally report that they purchased their drugs from someone of their own race. Therefore, if drug use is roughly proportional to the overall population, drug selling rates are likely to be in that range as well." Marc Mauer, The Sentencing Project, *The Changing Racial Dynamics of the War on Drugs*, at 8 & n.6 (April 2009) (citing K. Jack Riley, *Crack, Powder Cocaine, and Heroin: Drug Purchase and Use Patterns in Six U.S. Cities*, National Institute of Justice, December 1997).

on an improper factor. *See Washington v. Davis*, 426 U.S. 229, 242 (1976) (an equal protection violation requires proof of "an *invidious* discriminatory purpose") (emphasis added); *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) ("A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively *against* a particular class of persons . . . with a mind so unequal and *oppressive*' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (emphasis added)). When a judge considers one of these characteristics as a mitigating factor, perhaps to correct the adverse effect of a guideline that does *not* serve the purposes of sentencing (such as the career offender guideline), no other class of defendants is adversely affected. Sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another.

In *United States v. Malone*, 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008), Judge Cohn cited the Commission's discussion of the disproportionate impact of the career offender guideline on African-Americans to explain his downward variance on remand, which had been reversed by the Sixth Circuit but before *Kimbrough*. Judge Cohn imposed the same downward variance as before, but now based on a disagreement with the career offender guideline, explaining that "to return defendant to prison to serve additional time would punish him greater than necessary to achieve the objectives of sentencing, and would in the words of the Commission have 'an unwarranted impact on [the] minority groups (of which he is a member) without clearly advancing a purpose of sentencing.'"

In *United States v. Howe*, 543 F.3d 128 (3d Cir. 2008), the Third Circuit affirmed a downward variance based in part of the defendant's regular church attendance.

Judge Tjoflat of the Eleventh Circuit recently recognized that "a party might challenge the criminal history category the court has set by proffering evidence on characteristics such as gender, race and ethnicity, employment status, educational attainment, and marital status that the Commission did not consider in establishing the categories of offenders." *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (Tjoflat, J. specially concurring in part and dissenting in part). He pointed to the Commission's research on recidivism, and expressed doubt that 28 U.S.C. § 994(d), as a directive to the Commission, limits the ability of the district court to consider these offender characteristics when relevant to a purpose of sentencing. *Id.* at n.53.

§ 5H1.11 Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works

Background

Before the guidelines were promulgated, mitigating offender characteristics such as military service were recognized as relevant,[360] and often had a significant impact on

[360] *See* Nora V. Demleitner, Douglas A. Berman, Marc L. Miller & Ronald F. Wright, *Sentencing Law and Policy: Cases, Statutes, and Guidelines* 94-98 (2d ed. 2007).

the ultimate sentence.[361] After the guidelines were promulgated, courts continued to consider military service. For example, a Maryland district court considered the prior exemplary military service of a postal employee charged with theft of mail matter as relevant, both under 18 U.S.C. § 3553(a) and as a matter of due process, ultimately departing from the guideline range to sentence him to probation. *See United States v. Pipich*, 688 F. Supp. 191, 193 (D. Md. 1988). The court noted the "lack of any discussion of military history" in the administrative record of the Sentencing Commission and explained a person's military record

> reflects the nature and extent of that person's performance of one of the highest duties of citizenship. An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.

Id.; *see also United States v. McCaleb*, 908 F.2d 176, 179 (7th Cir.1990) (defendant's military record might, under some circumstances, warrant a downward departure); *United States v. Neil*, 903 F.2d 564, 566 (8th Cir.1990) (military service may warrant a downward departure "in an unusual case").

However, in 1990, the Fourth Circuit rejected a defendant's argument for a lower sentence based on the defendant's employment-related contributions to the community and prior good works. *United States v. McHan*, 920 F.2d 244, 248 (4th Cir. 1990). The court concluded that Part H of Chapter 5 – specifically the provisions relating to community ties and socio-economic status – already evidenced that the Commission had considered the factors the defendant relied on and deemed them ordinarily irrelevant. *Id.* Similarly, the Third Circuit refused to consider military service as a potential ground for departure in *United States v. Chiarelli*, 898 F.2d 373 (3d Cir. 1990).

Initial Promulgation

In 1991 (the very next amendment cycle, the Commission added a new policy statement to discourage departures based on "military, civic, charitable, or public service; employment-related contributions; and similar prior good works." The full policy statement read as follows:

> Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in

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[361] *See* Marc Miller & Ronald Wright, *Your Cheatin' Heart (land): The Long Search for Administrative Sentencing Justice*, 2 Buff. Crim. L. Rev. 723, 757 n.76 (1999).

> determining whether a sentence should be outside the applicable guideline range.

56 Fed. Reg. 22,762 (May 16, 1991); USSG, App. C, Amend. 386 (Nov. 1, 1991).

Providing no reasons, the Commission stated simply that this new provision "sets forth the Commission's position that military, civic, charitable, or public service, employment-related contributions, and record of prior good works are not ordinarily relevant" in determining whether a departure is warranted. USSG, App. C, Amend. 386 (Nov. 1, 1991) (Reason for Amendment). In a later article, Judge Wilkins and John Steer, General Counsel for the Commission, explained that the district court decisions involving departures based on good works or positive contributions "played a prominent role in the issuance of this policy statement" and that the new policy statement was intended to promote uniformity in sentences:

> [The] continued litigation involving these issues influenced the Commission to issue this new policy statement. The subsequent apparent decrease in appellate cases involving a departure for these reasons suggests that the policy statement effectively communicated Commission intent that departures based on offender "good citizen" characteristics rarely would be appropriate.

William Wilkins & John Steer, *The Role of Sentencing Guideline Amendments in Reducing Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 n.107 (1993).

2010 Amendment

In January 2010, the Commission requested comment regarding whether the guidelines are adequate as they relate to the factors addressed by § 5H1.11. *See* 75 Fed. Reg. 3525, 3529-30 (Jan. 21, 2010). The Commission asked whether the factors are relevant to the "in/out question," *i.e.*, whether to sentence a defendant to prison or probation and whether such a condition is relevant to the length of imprisonment. Apparently alluding to its earlier *post hoc* claim that it placed certain factors off limits because judges might consciously (or unconsciously) rely on offender characteristics in a discriminatory manner, *see* Part III.E.2, *supra*, it asked whether the factors could be "used as a proxy for one or more of the 'forbidden factors,'" [362] and "if so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?" *Id.*

With respect to the factors addressed by § 5H1.11 in particular, it asked if it should amend § 5H1.11 and, if so, how. *Id.* at 3531. It further asked whether "military service [should] be a reason to decrease a sentence" (for example, "to reflect a view that

[362] The Commission uses the term "forbidden factor" to refer to the factors listed at 28 U.S.C. § 994(d), which directs the Commission to ensure that the guidelines and policy statements "are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

an exemplary military record reflects courage, loyalty, and personal sacrifice that a sentencing court should take into account"), and "conversely," whether it should "be a reason to increase the sentence" (for example, to reflect a view that the offender is a role model "who should have known better"). *Id.* It also asked whether civic or charitable contributions should "be a reason to decrease the sentence to reflect the view that credit should be given for past good deeds or that past good deeds predict that the defendant will continue to add value to the community when not in prison," and if so, if there should be a threshold "level of contributions that should be demonstrated before a decrease in sentence is warranted." *Id.*

In response to the "proxy" question, the Federal Defenders explained (just as the Commission has done previously with respect to *aggravating* factors) that the possibility of demographic differences in the consideration of any of these factors is not a cause for concern so long as judges consider the factor in order to further a legitimate purpose (or purposes) of sentencing, as they are required to do by statute, and do not refuse to consider a factor for discriminatory reasons, which is not likely and nearly impossible to prove.[363] They pointed out that "sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group."[364]

With respect to § 5H1.11 in particular, the Federal Defenders urged the Commission to delete it. They noted that the factors addressed in § 5H1.11 are not listed in 28 U.S.C. § 994(d), so the Commission is under no express statutory duty to address them. They further demonstrated that the factors are relevant to the purposes of sentencing, citing the extensive empirical data, judicial feedback, and policy research set forth below. They pointed out that in fiscal year 2008, courts uniformly viewed these

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[363] *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 49-53 (Mar. 17, 2010) (attached to, and incorporated by reference in, Letter from Margy Meyers to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010 (Mar. 22, 2010)) (discussing the "proxy" question at length), *available at* http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf; *see also* USSC, *1995 Cocaine Report*, *supra* note 159, at xii (emphasizing that disproportionate impact alone is not a reason to change policy if the policy itself is justified by sentencing purposes); USSC, *Fifteen Year Review*, *supra* note 121, at 113-14 ("Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others.").

All public comment on the 2010 proposed amendments and issues for comment is available on the Commission's website at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[364] Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 53 (Mar. 17, 2010).

factors as mitigating, having not once cited any of them for a sentence above the guidelines.[365]

The Probation Officers Advisory Group recommended that the Commission amend the guidelines "to clarify that the court should consider [the] factor[], either alone or in combination, to determine the appropriate sentence for a particular defendant."[366]

The Practitioners Advisory Group did not address military service or other good works in particular, but generally addressed the five policy statements at issue. It noted that the Commission's policy of discouraging or prohibiting consideration of offender characteristics "is at a minimum confusing" in light of the overarching mandate to judges in § 3553(a) to consider the history and characteristics of a defendant and the companion language in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" that may be considered for purposes of sentencing.[367] It stated that the inconsistency "damages the coherence and legitimacy of the current sentencing regime," and further noted that the Commission had failed "to explain the penological and other bases for the Commission's determinations that the specified characteristic [is] 'ordinarily not' or 'never' relevant to departure analysis."[368]

For the specific offender characteristics under consideration, the Practitioners Advisory Group recommended that the Commission remove the words "not ordinarily" or "not relevant."[369] It also suggested that, "to the extent that the PAG's proposed language . . . might 'open the floodgates' to departures" and "might undermine the Sentencing Reform Act's goal of reducing disparities between similarly situated defendants," the Commission might add the following language:

> The sentencing court should consider whether the defendant's history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.[370]

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[365] *Id.* at 75-78.

[366] *See* Letter from the Probation Officers Advisory Group to the U.S. Sentencing Commission, at 3 (Feb. 3, 2010).

[367] *See* Letter from Practitioners Advisory Group to the U.S. Sentencing Commission, at 7 (Mar. 22, 2010).

[368] *Id.* at 8.

[369] *Id.*

[370] *Id.* at 10.

This is the correct interpretation of what it means to avoid unwarranted disparity, focusing on *different* history and characteristics among defendants, not on whether certain history and characteristics are "typical" or "unusual" among the defendant population. (The Practitioners Advisory Group did not say where this additional language would go, or whether the "history and characteristics" referred to in it would include criminal history or role in the offense, which would explain the reference to "aggravating" circumstances.)

The National Association of Criminal Defense Lawyers noted that "[b]oth the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that [the factors at issue] are relevant both when taking into consideration the length of a proposed sanction as well as its form."[371] It strongly urged the Commission "to delete the phrase 'not ordinarily' from the wording of these policy statements."[372] With respect to the factors addressed by § 5H1.11, NACDL stated that "these factors certainly are relevant to considering the merits of a downward departure in the course of 'individualizing' a sentence, especially pursuant to the dictates of 18 U.S.C. § 3553(a)(1)."[373]

Judge Robert Holmes Bell of the U.S. District Court for the Western District of Michigan, who was confirmed in 1987 just months before the guidelines went into effect, wrote to say that the tension between the Commission's policy statements that certain offender characteristics are "not relevant" or "ordinarily not relevant" and the statutory directive to the courts to consider the defendant's history and characteristics resulted in a "grave injustice" "graphically illustrated" by *United States v. Crouse*, 38 F.3d 832 (1994). In that case, the Sixth Circuit reversed the sentence imposed by Judge Bell of 12 months' home confinement and a $250,000 fine for a defendant convicted of a conspiracy involving orange juice made from concentrate that included ingredients disallowed by regulation. The court held that the defendant's community ties, civic and charitable deeds, and prior good works were not "of a sufficiently unusual kind or degree that warranted a departure." Judge Bell indicated that he remains deeply troubled by the appellate court's decision, and stated that he is "confident, as a member of the Criminal Law Committee of the United States courts, that if 'Evidence Based Practices' were surveyed and statistical analysis employed of those, like Mr. Crouse, whose extensive record of public service is documented, the need for incarceration in lieu of alternatives would be significantly diminished."[374]

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[371] Written Statement of Cynthia Hujar Orr on behalf of the Nat'l Assoc. of Criminal Defense Lawyers before the U.S. Sentencing Comm'n Re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment, at 2 (Mar. 17, 2010).

[372] *Id.*

[373] *Id.* ("To hold that these factors are not ordinary relevant … appears to be facially inconsistent with the Sentencing Reform Act.").

[374] Letter from Hon. Robert Holmes Bell, U.S. District Judge, to the U.S. Sentencing Commission (Mar. 1, 2010).

U.S. Representatives John Conyers and Robert C. "Bobby" Scott wrote to "encourage the Commission to now revise its policy statements" based on judicial feedback, the Commission's own data, extensive comments and information received during the seven regional hearings, and the research of "government agencies and renowned experts."[375] As they put it:

> Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that that defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.[376]

With respect to the "proxy" question, they noted that "consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others."[377] They noted that by permitting departures based on offender characteristics that would benefit members of all groups, such as disadvantaged upbringing, "the Commission might help to reduce any demographic differences in sentencing."[378]

Arizona State University College of Law Professor Carissa Byrne Hessick wrote to urge the Commission to recognize prior good works as a mitigating factor. Citing evidence and other policy research, she explained that prior good works were "considered historically at sentencing" and provide important information about a defendant's culpability and recidivism potential. She suggested that "recognizing prior good works as a mitigating sentencing factor would provide consistency across the Guidelines," which already account for the defendant's prior *bad* acts through criminal history and other aggravating factors. Finally, she suggested that the Commission "assign[] a particular weight" to prior good works in order to "promote uniformity."[379] To her letter, Professor Hessick attached her article, *Why Are Only Bad Acts Good Sentencing*

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[375] Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Commission, at 2 (Apr. 6, 2010).

[376] *Id.*

[377] *Id.* at 2-3 (citing USSC, *Fifteen Year Review*, *supra* note 121, at 113-14)).

[378] *Id.*

[379] Letter from Carissa Byrne Hessick to the U.S. Sentencing Commission (Mar. 17, 2010).

Factors?, 88 B.U.L. Rev. 1109 (2009), which discusses the historical and policy reasons for considering prior good works in great detail.

In contrast to these numerous comments urging the Commission to recognize the relevance of prior good works, Jonathan Wroblewski, the Department of Justice's *ex officio* member of the Commission and writing on behalf of the Department of Justice, said that the Department is "extremely cautious about any revision to the guidelines related to offender characteristics."[380] Despite the accumulated feedback from judges over the course of the history of the guidelines that offender characteristics are relevant to sentencing, the Commission's own research, and the extensive empirical research entered into the record during the regional hearings and in response to the request for comment, the Department claimed that the Commission "had not provided an administrative record that would justify delving into this area."[381] It expressed concerns that the consideration of offender characteristics would inject "uncertainty" into the sentencing process, and also raised the specter of racial and ethnic disparity.[382] According to the Department, sentences should be "determined largely by the offense committed and the offender's criminal history."[383]

And in stark contrast to its previous positions on just about any given amendment that would increase sentences (many of which it proposed), the Department urged the Commission to take its time to study the factors individually "over the coming years," and to engage in "rigorous study and review" as "the best way to address these kinds of issues."[384] (This of course ignores the mounds of rigorous study and review that has already been done and that has already been presented to the Commission over the course of many years.) With respect to veterans who have suffered traumatic brain injuries in particular, the Department suggested that the Commission "hold a hearing on this issue, complete thorough research and administrative study, and then issue relevant information to the federal courts to assist in appropriate cases."[385]

Notably, the Department did *not* say that any of these factors are *not* relevant to sentencing. Instead, it beat the drum of speculative "unwarranted disparity." Its only recommendation for the 2010 amendment cycle was that the Commission "reaffirm" that "offenders who commit similar offense be treated similarly" and "indicate that offender

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[380] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 8 (Mar. 22, 2010).

[381] *Id.*

[382] *Id.*

[383] *Id.*

[384] *Id.* at 9.

[385] *Id.*

characteristics (outside of criminal history) generally should not drive sentencing outcomes."[386] Of course, the Department provided no evidence that this approach would best serve the purposes of sentencing. The Department, as always, promoted unwarranted uniformity.

Finally, a group of Republican Congress members, headed by Lamar Smith and Jeff Sessions wrote to say that these five factors "are rightly excluded from the sentencing calculus" and are "not relevant either in making the 'in/out' decision or in determining the length of incarceration." However they provided no particular reasons or evidence for this assertion as it might relate to military service or other good works, or to any of the other factors.

In May 2010, the Commission sent to Congress a proposed amendment to § 5H1.11 that acknowledges the potential relevance of military service, but weighed with enough conditions and caveats to raise substantial doubts about its practical significance. 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). The revised policy statement states that military service "may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines." USSG § 5H1.11, p.s. (effective Nov. 1, 2010).

Otherwise, the policy statement continues to state that civic, charitable, or public service, employment-related-contributions and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

As its reason, the Commission explained generally that the amendment "is the result of a review of the departure provisions," undertaken "in part, in response to an observed decrease in reliance on departure provisions in the Guidelines Manual in favor of an increased use of variances. 75 Fed. Reg. 27,388, 27,391 (May 14, 2010). As its reason for amending the departure standard in general, the Commission stated that it "adopted this departure standard after reviewing recent federal sentencing data, trial and appellate court case law, scholarly literature, public comment and testimony, and feedback in various forms from federal judges." *Id.* It did not describe what the "recent federal sentencing data" showed or explain what principles it drew from the case law, public comment and testimony, or judicial feedback. Nor did it explain why or how this standard furthers any policy goal or purpose of sentencing.

As its reason for changing the standard for military service in particular, the Commission stated that it "determined that applying this standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing." *Id.* at 27,391 (citing *Porter v. McCullom*, 130 S. Ct. 447, 455 (2009)). Although the Commission acknowledged that military service has traditionally been viewed as mitigating, it did not explain why it requires a defendant's

[386] *Id.* at 8.

military service to be present "to an unusual degree" (not required by any tradition) before it can mitigate a guideline sentence.

In any event, with these changes, the Commission has arguably opened a window for a small category of downward departures based on military service. The window is quite narrow, however, because the Commission also placed as a condition on departure that the defendant's military service be "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."

The theory underlying this requirement is entirely unsound because it pre-supposes that the guidelines take into account regularly occurring mitigating characteristics and circumstances. It continues to promote unwarranted uniformity by requiring distinction from "typical" defendants who are sentenced under harsh guidelines that do not take individual mitigating characteristics or circumstances into account.

Thus, despite the massive evidence presented to it regarding the current state of knowledge regarding age it relates to the criminal justice system, *see* 28 U.S.C. § 991(b)(1)(C) (directing the Commission to establish policies and practices that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice system"), the Commission merely transformed a "discouraged" factor requiring presence to an "exceptional" degree for a departure, *see* USSG § 5K2.0(a)(4), into an "encouraged" factor that must be present to "an unusual degree" and "distinguishes the case from the typical cases covered by the guidelines." It is difficult to imagine the practical difference between these standards. Indeed, before 2003, the Commission used the same standard now applying to departures under § 5H1.1 for any offender characteristic that it deemed "not ordinarily relevant," except that it has now replaced the term "heartland" with the term "typical."[387]

Fortunately, by its terms, the policy statement continues to apply to "departures" only. Moreover, § 3553(a)(1) requires full consideration of military service and other good works as mitigating factors. The conditions placed on consideration of these factors under USSG § 5H1.11 do not apply to the court's consideration of them under § 3553(a).

Empirical Research, Judicial Decisions, and Sentencing Data

In fiscal year 2008, judges cited military service, charitable works, or good deeds as a reason for sentencing below the guideline range in 135 cases, or in 1.4% of all the

[387] *Compare* USSG § 5K2.0 (2002) ("[A]n offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines.") *with* USSG § 5H1.11, p.s. (effective Nov. 1, 2010); 75 Fed. Reg. 27,388, 27,390 (May 14, 2010) ("Military service may be relevant in determining whether a departure is warranted, if the military service. . . is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.").

cases in which a below-guideline sentence was imposed.[388] In fiscal year2009, judges cited military service, charitable works or good deeds as reason for sentencing below the guidelines in 173 cases, or in 1.4% of cases in which a below-guideline sentence was imposed. [389] In fiscal year 2010, it was cited in 186 cases, also 1.4% of such cases.[390] These rates represent an increase from fiscal year 2006 (expressly cited in only 0.6% of all cases in which a sentence below the guidelines was imposed),[391] and an even further increase from fiscal year 2003, when these factors were not cited in any case as a reason for departing below the guideline range.

Military service. In the American court system, there is a long and continuing tradition of viewing military service as evidence of reduced moral culpability, dating "back to at least the Civil War."[392] The Supreme Court recently emphasized that "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Porter v. McCollum*, 130 S. Ct. 447, 455 & n.8 (2009) (finding that the Florida Supreme Court "unreasonably discounted the evidence of Porter's . . . military service" and holding that trial counsel's failure to uncover and present evidence of the petitioner's military service, among other factors, constituted ineffective assistance of counsel); *see also Rita v. United States*, 551 U.S. 338 (2007) (Stevens, J., concurring) (recognizing the relevance of military service to sentencing and expressing the view that the district court made a "serious omission" in failing to expressly mention the defendant's military service in explaining the sentence imposed). A significant percentage of federal prisoners have a history of military service.[393]

Senior District Judge Kane of the District of Colorado, testifying before the Commission at its regional hearing in Denver, emphasized the need for the criminal justice system to account for military service and its physical and mental consequences.[394] As he pointed out, veterans returning from combat often suffer post-

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[388] USSC, *2008 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A & 25B (2008).

[389] *2009 Sourcebook*, tbls. 25, 25A & 25B.

[390] *2010 Sourcebook*, tbls. 25, 25A & 25B.

[391] USSC, *2006 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, 25B & 25C (2006).

[392] Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U.L. Rev. 1108, 1116-19 (2008) (demonstrating that the practice of showing leniency to veterans "dates back to at least the Civil War").

[393] *See* Margaret E. Noonan & Christopher J. Mumola, Bureau of Justice Statistics, Dep't of Justice, *Veterans in State and Federal Prison* (2004) (reporting that just under 10% of federal prisoners have a history of military service).

[394] *See* Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Denver, Colorado, at 70-72 (Oct. 20, 2009) (Judge Kane).

traumatic stress disorder, *see Porter*, 130 S. Ct. at 451 n.4, traumatic brain injury or other mental conditions.[395] Long and multiple deployments to combat zones place massive amounts of stress on military personnel and their families. A recent study of National Guard troops found that previously deployed soldiers were more than three times as likely as soldiers with no previous deployments to screen positive for post-traumatic stress disorder, more than twice as likely to report chronic pain, and more than 90% more likely to score below the general population norm on physical functioning.[396]

Studies also suggest that military veterans are less likely to recidivate than other offenders. [397]

In *United States v. Howe*, 543 F.3d 128, 139 (3d Cir. 2008), the Third Circuit affirmed, over the government's objection, a below-guidelines sentenced justified in part by the defendant's twenty years of military service followed by honorable discharge. In the process, the court rejected the government's argument that any military service must be "exceptional" as "not suitable to our review of a district court's analysis under § 3553(a)." The court pointed out that "the Supreme Court included military service as a reason to affirm the district court's below-Guidelines sentence" in *Kimbrough*, where it noted that the defendant "had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps." *See Kimbrough v. United States*, 552 U.S. 85, 110 (2007). And in *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009), the Eighth Circuit vacated a within-guideline sentence, holding that the district court erred in its conclusion that the defendant's prior military service, among other factors, could not form the basis of a downward variance without running afoul of § 3553(a). *Id.* at 831; *see also United States v. Lamoreaux*, 422 F.3d 750, 756 (8th Cir. 2005) (approving consideration of prior military service as a factor supporting a downward variance).

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[395] *See id*; *see also* RAND Center for Military Health Policy Research, *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery* xxi (Tanielian & Jaycox, eds. 2008) (reporting that up to one-third of all military personnel, including the Nation Guard and reserve troops, come home from Iraq and Afghanistan with mental health problems, including post-traumatic stress disorder, depression, and other serious disorders).

[396] Anna Kline, PhD, *et al.*, *Effects of Repeated Deployment to Iraq and Afghanistan on the Health of New Jersey Army National Guard Troops: Implications for Military Readiness*, 100 Am. J. Pub. Health 276-83 (2010); *see also* Thom Shaker, *Army Is Worried by Rising Stress of Return Tours to Iraq*, New York Times (Apr. 6, 2008) (reporting that an official Army survey of soldiers' mental health showed that "[a]mong combat troops sent to Iraq for the third or fourth time, more than one in four show signs of anxiety, depression or acute stress").

[397] *See* Christopher Mumula, Bureau of Justice Statistics, U.S. Dep't of Justice, *Veterans in Prison or Jail* 14 (2000); *see also* Brief for National Veterans Legal Services Program & Veterans for America as *Amici Curiae* Supporting Petitioner at 8 n.5, *Rita v. United States*, 551 U.S. 338 (2007).

Courts now regularly find that military service support downward variances. *See, e.g.*, *United States v. Panyard*, No. 07-20037, 2009 WL 1099257 (E.D. Mich. Apr. 23, 2009) (finding that defendant's military service, during which he served on a destroyer during the first Gulf War, was granted Top Secret clearance by the Navy, and received several awards for his service supported a downward variance); *United States v. Hughes*, No. 09-5259, 2010 WL 1029279 (6th Cir. Mar. 22, 2010) (affirming downward variance based, in part, on the defendant's military service); *United States v. Fogle*, 331 Fed. App'x 920, 924 (3d Cir. 2009) (affirming a variance below the guideline range based in part on the defendant's long period of military service).

Good works. Historical accounts suggest that judges have traditionally viewed good works as a mitigating factor: "A 1644 report by the clergy to the Massachusetts General Court noted that judges should have discretion to mitigate an offender's sentence 'in the case of good public servants."[398] And as any defense attorney can attest, defendants of all backgrounds and socioeconomic status can have a history of good works or other community contributions. Even if it could be shown that the presence of good works in a defendant's history is more common for defendants of higher socieoeconomic status, courts should not hesitate to consider these factors when they are relevant to the purposes of sentencing out of a misplaced concern that other demographic groups may not be able to benefit in the same way. As Professor Hessick writes, "[i]f a system is willing to tolerate a certain amount of race and class effects [through aggravating factors], there is no reason to think that those effects should be permitted for aggravating factors but not for mitigating sentencing factors."[399]

After *Gall*, district courts can avoid the restrictive language of § 5H1.11 to consider good works and charitable contributions under § 3553(a). *See United States v. Thurston*, 544 F.3d 22, 26 (1st Cir. 2008) (on remand from the Supreme Court in light of *Gall*, affirming a downward variance based good works where, before *Gall*, the court had vacated the sentence because the good works were not sufficiently "exceptional"); *see also United States v. Panyard*, No. 07-20037, 2009 WL 1099257 (E.D. Mich. Apr. 23, 2009) (finding that the "[d]efendant's acts of kindness, generosity and good deeds appear to span years" support a variance); *United States v. Nowak*, 2007 WL 528194, 2007 U.S. Dist. LEXIS 10936, *8 n.1 (E.D. Wis. Feb. 15, 2007) (varying below the guidelines based in part on the defendant's involvement in a community organization and noting that "now that the guidelines are advisory, the court is required to consider [community involvement] under § 3553(a)(1)").

The Third Circuit sitting *en banc* affirmed a below-guideline sentence of probation, community service, restitution, and fine on a conviction for tax evasion, which was based in part on the defendant's "extensive charitable works." *United States v. Tomko*, 562 F.3d 558, 571 (3d Cir. 2009) (*en banc*) ("This variance took into account his

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[398] *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Sentencing Factors?*, 88 B.U. L. Rev. 1109, 1116 (2008).

[399] *Id.* at 1161.

negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating" the defendant, "while also factoring in his substantial wealth as a reason for imposing a fine far above the Guidelines.").[400]

In the Commission's recent survey of judges, 64% said that "stress related to military service" is "ordinarily relevant" to the consideration of departure or variance, while 60% said the same about civic, charitable or public service. Sixty-two percent said prior good works are "ordinarily relevant."[401]

§ 5H1.12 Lack of Guidance as a Youth and Similar Circumstances

Initial Policy Statement

In 1991, the Ninth Circuit held that lack of youthful guidance was a valid basis for downward departure, recognizing that it "may have led a convicted defendant to criminality." *United States v. Floyd*, 945 F.2d 1096, 1101 (9th Cir. 1991), *reported as corrected at* 956 F.2d 203 (9th Cir. 1992). In that case, the defendant had been abandoned by parents at a young age. In reaching its conclusion, the court discussed at length the relevant provisions of the Sentencing Reform Act, the directives to the Commission, congressional intent, the "background rule" at USSG § 1B1.4 (to consider every characteristic unless already determined), and the clear mandate of 18 U.S.C. § 3661 that "no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." *Id.* at 1101-02. In other words, the court explained its decision with clarity and precision, tying it to the purposes of sentencing and reconciling it with Congress's concern that the guidelines should not relegate to prisons persons without education and family ties.

In the very next amendment cycle, the Commission added a new policy statement prohibiting the court from considering "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds" as grounds for a departure. USSG, App. C, Amend. 466 (Nov. 1, 1992). The policy statement read as follows:

> Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted.

USSG § 5H1.12 (Nov. 1, 1992). As its reason, the Commission simply stated: "This amendment provides that the factors specified are not appropriate grounds for departure." *Id.* (Reason for Amendment).

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[400] For more judicial decisions, see David Hemingway & Janet Hinton, Departures and Variances 39-40 (Sept. 2009), available at http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[401] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

In a subsequent article, then-Chair William W. Wilkins, Jr. and General Counsel John Steer acknowledged that the Ninth Circuit's decision in *Floyd* "directly precipitated this Commission action." William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash & Lee L. Rev. 63, 84 (1993). The authors explained there that a number of factors contributed to the Commission's disapproval of the court's consideration of "lack of youthful guidance":

> Among them was a concern that this particular label, amorphous as it is, potentially could be applied to an extremely large number of cases prosecuted in federal court, thereby permitting judges wide discretion to impose virtually any sentence they deemed appropriate (within or below the guidelines). The unwarranted disparity that could result from such a wide-open path around the guidelines was inconsistent with SRA objectives as the Commission understood them. Moreover, departures predicated on this factor could reintroduce into the sentencing equation consideration of a defendant's socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to place off limits.

Id. at 84-85. As with other amendments intended to stamp out judicial discretion, this amendment – along with both the official and unofficial reasons given for it – demonstrates that the Commission did not examine judges' reasons for granting departures before prohibiting them as a categorical matter. Given the concern about the factor being applied "in an extremely large number of cases," it is clear that even the Commission understood the manifest relationship between disadvantage and crime. Yet, rather than examine the sentencing policy as a whole in response to this judicial feedback, the Commission simply placed it off limits. As such, this amendment amounts to "second-guessing [of] individual judicial sentencing actions," something Congress specifically said that the Commission should not do. *See* S. Rep. No. 98-225, at 178 (1983).

Moreover, if the prohibition is in fact based on socioeconomic status, then it runs afoul of Congress's directive that policy statements must be "entirely neutral" regarding socioeconomic status. 28 U.S.C. § 994(d).

2010 Amendment Cycle

In January 2010, the Commission requested comment regarding whether the guidelines are adequate as they relate to the offender characteristics addressed by five policy statements, including § 5H1.12. *See* 75 Fed. Reg. 3525, 3529-30 (Jan. 21, 2010). The Commission asked whether the characteristics are relevant to the "in/out question," *i.e.*, whether to sentence a defendant to prison or probation, and whether such a condition is relevant to the length of imprisonment. Apparently alluding to its earlier *post hoc* claim that it placed factors off limits because judges might consciously (or unconsciously) rely on offender characteristics in a discriminatory manner, *see* Part III.E.2, *supra*, it asked

whether the factors could be "used as a proxy for one or more of the 'forbidden factors,'"[402] and "if so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?" *Id.*

With respect to lack of guidance as a youth and similar circumstances in particular, it asked if it should amend § 5H1.12 and, if so, how. *Id.* at 3531. It specifically asked whether "lack of guidance as a youth [should] *not* be a reason to decrease the sentence" (for example, "to reflect a view that many or most offenders may be able to demonstrate some lack of guidance or disadvantaged upbringing"). *Id.* (emphasis added). It further asked if "physical abuse, emotional abuse, or sexual abuse suffered as a child [should] be a reason to decrease a sentence under this policy statement or elsewhere in Chapter Five, Part H." *Id.*

With respect to the "proxy" question in general, the Federal Defenders explained (just as the Commission itself has explained with respect to *aggravating* factors) that the possibility of demographic differences in the consideration of any of these factors is not a cause for concern so long as judges consider the factor in order to further a legitimate purpose or purposes of sentencing, as they are required to do by statute, and do not refuse to consider it for discriminatory reasons, which is not likely and nearly impossible to prove.[403] They pointed out that "sentencing is not a zero sum game where a shorter sentence for one defendant means a longer sentence for another. It is not fair to deny a defendant leniency based on a relevant characteristic because that characteristic occurs more frequently in a particular racial or socioeconomic group."[404]

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[402] The Commission uses the term "forbidden factor" to refer to the factors listed at 28 U.S.C. § 994(d), which directs the Commission to ensure that the guidelines and policy statements "are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders."

[403] *See* Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 49-54 (Mar. 17, 2010) (attached to, and incorporated by reference in, Letter from Margy Meyers to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission Re: Comments on Proposed Amendments to the Sentencing Guidelines Issued January 21, 2010 (Mar. 22, 2010)) (discussing the "proxy" question at length), *available at* http://www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20Mariano_FINAL.pdf; *see also* USSC, *1995 Cocaine Report*, *supra* note 159, at xii (emphasizing that disproportionate impact alone is not a reason to change policy if the policy itself is justified by sentencing purposes); USSC, *Fifteen Year Review*, *supra* note 121, at 113-14 ("Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others.").

All public comment on the 2010 proposed amendments and issues for comment is available on the Commission's website at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20100317/index.cfm.

[404] Testimony of Margy Meyers and Marianne Mariano Before the U.S. Sentencing Comm'n, at 53 (Mar. 17, 2010).

With respect to § 5H1.12 in particular, the Federal Defenders urged the Commission to delete it. They noted that lack of guidance as a youth and similar circumstances are not listed in 28 U.S.C. § 994(d), so the Commission is under no express statutory duty to address them. They further demonstrated that the factor is relevant to the purposes of sentencing, citing the extensive empirical data, judicial feedback, and policy research set forth below. They pointed out that in fiscal year 2008, courts cited lack of youthful guidance 109 times. [405]

The Probation Officers Advisory Group recommended that the Commission amend the guidelines "to clarify that the court should consider [the] factor[], either alone or in combination, to determine the appropriate sentence for a particular defendant."[406]

The Practitioners Advisory Group did not address lack of youthful guidance in particular, but generally addressed the five policy statements at issue. It noted that the Commission's policy of discouraging or prohibiting consideration of offender characteristics "is at a minimum confusing" in light of the overarching mandate to judges in § 3553(a) to consider the history and characteristics of a defendant and the companion language in § 3661 that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" that may be considered for purposes of sentencing.[407] It stated that the inconsistency "damages the coherence and legitimacy of the current sentencing regime," and further noted that the Commission had failed "to explain the penological and other bases for the Commission's determinations that the specified characteristic [is] 'ordinarily not' or 'never' relevant to departure analysis."[408]

For the specific offender characteristics under consideration, the Practitioners Advisory Group recommended that the Commission remove the words "not ordinarily" or "not relevant."[409] It also suggested that, "to the extent that the PAG's proposed language . . . might 'open the floodgates' to departures" and "might undermine the Sentencing Reform Act's goal of reducing disparities between similarly situated defendants," the Commission might add the following language:

> The sentencing court should consider whether the defendant's history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which

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[405] *Id.* at 75-78.

[406] *See* Letter from the Probation Officers Advisory Group to the U.S. Sentencing Commission, at 3 (Feb. 3, 2010).

[407] *See* Letter from Practitioners Advisory Group to the U.S. Sentencing Commission, at 7 (Mar. 22, 2010).

[408] *Id.* at 8.

[409] *Id.*

> such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.[410]

This is the correct interpretation of what it means to avoid unwarranted disparity, focusing on *different* history and characteristics among defendants, no on whether certain history and characteristics are "typical" or "unusual" among the defendant population. (The Practitioners Advisory Group did not say where this additional language would go, or whether the "history and characteristics" referred to in it would include criminal history or role in the offense, which would explain the reference to "aggravating" circumstances.)

The National Association of Criminal Defense Lawyers noted that "[b]oth the Commission's own research as well as a plethora of independent, objective, and empirically driven research uniformly and consistently demonstrates that [the factors at issue] are relevant both when taking into consideration the length of a proposed sanction as well as its form."[411] It strongly urged the Commission "to remove all language" suggesting that lack of guidance as a youth is "simply not relevant at all . . . when considering a departure. "[412] It further stated that for "those offenders who have lacked guidance as a youth, these factors certainly are relevant to considering the merits of a downward departure in the course of 'individualizing' a sentence, especially pursuant to the dictates of 18 U.S.C. § 3553(a)(1)."[413]

U.S. Representatives John Conyers and Robert C. "Bobby" Scott wrote to "encourage the Commission to now revise its policy statements" based on judicial feedback, the Commission's own data, extensive comments and information received during the seven regional hearings, and the research of "government agencies and renowned experts."[414] As they put it:

> Judges should be permitted to depart when they find, under the circumstances of the particular case, that departure is warranted because one or more characteristics of the defendant mitigates his or her culpability, indicates a reduced risk of recidivism, means that that

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[410] *Id.* at 10.

[411] Written Statement of Cynthia Hujar Orr on behalf of the Nat'l Assoc. of Criminal Defense Lawyers before the U.S. Sentencing Comm'n Re: Proposed Amendments to the Sentencing Guidelines and Issues for Comment, at 2 (Mar. 17, 2010).

[412] *Id.*

[413] *Id.* ("To hold that these factors are not ordinary relevant … appears to be facially inconsistent with the Sentencing Reform Act.").

[414] Letter from John Conyers, Jr., Chairman, Committee on the Judiciary and Robert C. "Bobby" Scott, Chairman, Subcommittee on Crime, Terrorism, and Homeland Security, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Commission, at 2 (Apr. 6, 2010).

> defendant will suffer greater punishment than is necessary, or requires treatment or training that can most effectively be provided in the community.[415]

With respect to the "proxy" question, they noted that "consideration of any factor, aggravating or mitigating, that is relevant to one or more purposes of sentencing, is justified and warranted, even if the factor occurs more or less frequently in some racial or socioeconomic groups than others."[416] They noted that by permitting departures based on offender characteristics that would benefit members of all groups, such as disadvantaged upbringing, "the Commission might help to reduce any demographic differences in sentencing."[417]

Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, wrote to say that he would "welcome changes in the sentencing regime that would allow judges to consider lack of youthful guidance."[418]

In contrast to these numerous comments urging the Commission to recognize the relevance of prior good works, Jonathan Wroblewski, the Department of Justice's *ex officio* member of the Commission and writing on behalf of the Department of Justice, said that the Department is "extremely cautious about any revision to the guidelines related to offender characteristics."[419] Despite the accumulated feedback from judges over the course of the history of the guidelines that offender characteristics are relevant to sentencing, the Commission's own research, and the extensive empirical research entered into the record during the regional hearings and in response to the request for comment, the Department claimed that the Commission "had not provided an administrative record that would justify delving into this area."[420] It expressed concerns that the consideration of offender characteristics would inject "uncertainty" into the sentencing process, and also raised the specter of racial and ethnic disparity.[421] According to the Department,

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[415] *Id.*

[416] *Id.* at 2-3 (citing USSC, *Fifteen Year Review*, *supra* note 121, at 113-14)).

[417] *Id.*

[418] Letter from Senator Patrick Leahy, Chairman, United States Senate Committee on the Judiciary, to William K. Sessions III, Chair, U.S. Sentencing Commission, at 2 (Mar. 22, 2010).

[419] Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Dep't of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 8 (Mar. 22, 2010).

[420] *Id.*

[421] *Id.*

sentences should be "determined largely by the offense committed and the offender's criminal history."[422]

And in stark contrast to its previous positions on just about any given amendment that would increase sentences (many of which it proposed), the Department urged the Commission to take its time to study the factors individually "over the coming years," and to engage in "rigorous study and review" as "the best way to address these kinds of issues."[423] (This of course ignores the mounds of rigorous study and review that has already been done and that has already been presented to the Commission over the course of many years.)

Notably, the Department did *not* say that any of these factors are *not* relevant to sentencing. Instead, it beat the drum of speculative "unwarranted disparity." Its only recommendation for the 2010 amendment cycle was that the Commission "reaffirm" that "offenders who commit similar offense be treated similarly" and "indicate that offender characteristics (outside of criminal history) generally should not drive sentencing outcomes."[424] Of course, the Department provided no evidence that this approach would best serve the purposes of sentencing. The Department, as always, promoted unwarranted uniformity.

Finally, a group of Republican Congress members, headed by Lamar Smith and Jeff Sessions wrote to say that the factors addressed by these five policy statements "are rightly excluded from the sentencing calculus" and are "not relevant either in making the 'in/out' decision or in determining the length of incarceration." However they provided no particular reasons or evidence for this assertion as it might relate to lack of guidance as a youth, or to any of the other factors.

The Commission did not amend § 5H1.12. *See* 75 Fed. Reg. 27,388 (May 14, 2010). It did not give any reason or refer to it in any way.

Empirical Research

Research shows that a disadvantaged upbringing, whether in poverty or not, is highly relevant in any number of ways. The Department of Justice identifies as risk factors for childhood delinquency and later adult criminal behavior to include delinquent peer groups, family antisocial behavior, parental psychopathology, hyperactivity, poor parenting, and maltreatment.[425]

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[422] *Id.*

[423] *Id.* at 9.

[424] *Id.* at 8.

[425] *See* U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Risk and Protective Factors of Child Delinquency* (2003).

Child abuse and neglect can cause chemical changes in the brain and nervous system. Studies involving abused and neglected children show that "abused individuals were 1.8 times more likely to be arrested for a juvenile offense, 1.5 times more likely to be arrested as an adult, and 1.35 times for likely to be arrested for a violent crime." Debra Niehoff, *Ties that Bind: Family Relationships, Biology, and the Law*, 56 DePaul L. Rev. 847 (2007). Studies also show that abuse can be in the form of neglect only and "need not involve actual physical injury to do lasting damage to the developing brain." *Id.* at 849.

> [E]xposure to stress early in life – specifically, to inadequate or abusive parenting – changes in emotional circuitry of the brain and the neuroendocrine mechanisms underlying allostasis [the inherent flexibility that allows functions such as rate and respiration to increase or decrease to counter potentially destabilizing events] in enduring and often compromising ways.

Id. at 849, 855, 861 (concluding that "the criminal justice system would be better served if child welfare laws, policies, sentencing guidelines, and treatment approaches were informed by a better understanding of the impact of abuse and neglect on the human brain").

Young people who grow up without role models, in terrible schools, with absent parents or parents who introduce them to crime end up disconnected from mainstream society, often fighting a "pervasive sense of hopelessness" and simply not understanding how to "navigate the mainstream society." *See* Erik Eckholm, *Plight Deepens for Black Men, Studies Warn*, New York Times, Mar. 20, 2006.

For many of these defendants, acquiring basic life skills and job skills would better serve the purposes of sentencing than a long prison term.

Judicial Decisions and Sentencing Data

Even before *Booker*, courts considered *extreme* child abuse as falling outside the prohibition of § 5H1.12 and providing a ground for downward departure. *See, e.g.*, *United States v. Ayers*, 971 F. Supp. 1197, 1200-01 (N.D. Ill. 1997) (distinguishing "exceptionally cruel . . . psychological and emotional abuse" constituting "a form of sadistic torture" from the generalized lack of guidance or neglect that § 5H1.12 prohibits as a basis for departure); *see also United States v. Rivera*, 192 F.3d 81, 84-85 (2d Cir. 1999) (noting that several circuits have "held that a downward departure may be appropriate in cases of extreme childhood abuse" and citing cases").

After *Booker*, there is no longer any need to show extreme abuse or neglect to avoid the prohibitions of § 5H1.12, and courts have begun to consider disadvantaged youth or lack of guidance as a youth as a factor for sentencing below the guideline range. *See, e.g.*, *United States v. Mapp*, No. 05-80494, 2007 WL 485513 (E.D. Mich. Feb. 9, 2007) (imposing a sentence of 30 months where guideline range was 84-105 months, in

part the result of a variance based on the "defendant's family challenges as a youth" and defendant argued that he lacked the "requisite love, support, or educational guidance"); *United States v. Howe*, No. 08-6541, 2010 WL 1565505 (6th Cir. April 21, 2010) (recognizing that a district court judge can depart *or* vary downward based on a defendant's traumatic childhood, and that a variance under § 3553(a) is not constrained by a finding of extraordinariness).[426]

Consideration of this factor at sentencing is more common than caselaw suggests. Before 2009, the Commission did not publish the number of times judges cited lack of youthful guidance as a reason for imposing a sentence below the guideline range. However, in fiscal year 2008, lack of youthful guidance was cited 109 times as a reason for sentencing below the guideline range.[427] In fiscal year 2009, when the factor appeared for the first time in the Commission's Sourcebook, "lack of youthful guidance/tragic or troubled childhood" was cited 104 times under § 3553(a) as a reason for sentencing below the guideline range.[428] In 2010, it was cited in 149 cases.[429]

CHAPTER 5, PART K

§ 5K1.1 Substantial Assistance to Authorities

Initial Promulgation

In 1986, Congress amended the SRA to add a provision authorizing courts to impose a sentence below the statutory minimum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Pub. L. No. 99-570, § 1007(a), *codified at* 18 U.S.C. § 3553(e). Under this subsection, the court's authority to sentence a person below the mandatory minimum requires a government motion. In addition, a sentence under this subsection "shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. § 994]." *Id.*

At the same time, Congress charged the Commission with "assur[ing] that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by the

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[426] For more judicial decisions, see David Hemingway & Janet Hinton, *Departures and Variances* 41-43 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[427] *See* USSC FY2008 Monitoring Datafile (on file with Sentencing Resource Counsel); *see also* Written Testimony of Margy Meyers and Marianne Mariano On Behalf of the Federal Public and Community Defenders Before the United States Sentencing Commission, at 46 (Mar. 17, 1010), *available at* www.fd.org/pdf_lib/FPD_Testimony%20of%20Meyers%20and%20 Mariano_FINAL.pdf.

[428] *2009 Sourcebook*, tbl. 25B.

[429] *2010 Sourcebook*, tbls. 25 & 25B.

statute as the minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Pub. L. No. 99-570, § 1008, *codified at* 28 U.S.C. § 994(n). Implementing this provision, the Commission promulgated a policy statement to guide courts in determining the extent of any reduction based on substantial assistance.

As originally promulgated, § 5K1.1 authorized judges to "depart from the guidelines" upon motion of the government "stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person." 52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5K1.1 (Nov. 1, 1987). The Commission also set forth several factors for consideration, including "the government's evaluation of the assistance rendered." *Id.* The Commission also instructed courts in commentary that "substantial weight should be given to the government's evaluation of the extent of the defendant's assistance." *Id.*

Notably, the Commission conditioned *all* departures based on substantial assistance on a government motion, not just those that would allow the court to sentence below the statutory minimum sentence. This was not required by statute or any directive to the Commission. The Commission did not give any reason for requiring a motion for a departure that would not result in a sentence below the statutory minimum.

Amendments

In 1989, the Commission deleted the language allowing a departure if the government's motion states that the defendant made a "good faith effort" to provide substantial assistance, requiring instead that the defendant actually provide substantial assistance. USSG, App. C, Amend. 290 (Nov. 1, 1989). The Commission explained that the change was to clarify the Commission's intent that "departures under this policy statement be based upon the provision of substantial assistance," not "only a willingness to provide such assistance" as the use of "good faith" might have been interpreted to mean. *Id*. (Reason for Amendment). As described by one court, however, this amendment "markedly narrowed a defendant's eligibility" for a motion under § 5K1.1. *United States v. Gerber*, 24 F.3d 93, 96 (10th Cir. 1994). As a result, the court rejected the Commission's assertion that the amendment was merely "clarifying." *Id.* (reading the amendment as substantive and therefore subject to *ex post facto* analysis).

In 1992, the Commission collaterally impacted departures under § 5K1.1 by amending § 1B1.8 (Use of Certain Information) to allow courts to consider information obtained during proffers to deny or limit a downward departure for substantial assistance, and it did so seemingly based on one Commissioner's disagreement with a panel decision from his court. Previously, § 1B1.8 provided that information provided as part of a cooperation agreement could not be used to increase a sentence when the government agreed not to use it. USSG § 1B1.8(a) & comment. (n.1) (1991). Based on this language, the majority in *United States v. Malvito*, 946 F.2d 1066, 1068-71 (4th Cir. 1991), reversed the district court because it refused to grant a § 5K1.1 reduction because of information revealed during the defendant's proffers about the extent of his drug

dealing. The majority reasoned that the district court's consideration of the information obtained in the proffer in determining whether to grant a § 5K1.1 departure violated the express policy in §1B1.8 that information given in a proffer will not be used to increase a defendant's sentence. The majority explained that in addition to frustrating the guidelines' policy not to use information used in cooperation agreements, allowing district court's to refuse a § 5K1.1 departure based on information obtained in a proffer would mean that "an important and common investigative tool would lose some potency" because a defendant will "face[] a Hobson's choice between losing a 'substantial assistance' departure by (i) telling so much that the district court denies the departure because of the information he reveals and (ii) telling too little, being caught in it, and losing the government's recommendation." *Id.* at 1068. The court declined to endorse "this pointless dilemma." *Id.*

Judge William W. Wilkins, Jr., then-Chair of the Sentencing Commission, dissented, noting that "[w]hile, from a policy standpoint, one could argue the merits of the result reached by the majority, greater countervailing policy considerations and careful analysis of section 1B1.8 lead me to conclude that the result does not stand on solid ground." *Id.* at 1069 (Wilkins, J., dissenting). According to Judge Wilkins, the majority improperly relied on the sentence in the commentary to § 1B1.8, which stated that a "defendant should not be subject to an increased sentence by virtue of that cooperation." USSG § 1B1.8 comment. (n.1) (1991). He explained that all of the various provisions and commentary to § 1B1.8, read in "harmony" and in light of sentencing policy, should lead to the logical conclusion that information obtained as part of a cooperation agreement cannot be used against the defendant in calculating the guideline range or to increase a sentence as part of a departure, but can be considered in determining whether to grant or deny a discretionary departure under § 5K1.1. *Id.* at 1069-70 (Wilkins, J., dissenting).

In the very next amendment cycle, the Commission amended § 1B1.8 to reflect Judge Wilkins' views. Language was added in the guideline, now at subsection (a)(5), to expressly allow the consideration of information received as part of a cooperation agreement for purposes of determining "whether, or to what extent, a downward departure from the guidelines is warranted"; to remove the language in Application Note 1 relied on by the majority in *Malvito* and providing that information provided as part of a cooperation agreement could not be used to increase a sentence when the government agreed not to use it; and to add to that same note the Commission's "corollary" policy:

> [I]nformation prohibited from being used to determine the applicable guideline range shall not be used to increase the defendant's sentence above the applicable guideline range by upward departure. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether , and to what extent, a downward departure is warranted ... under §5K1.1.

USSG, App. C, Amend. 441 (Nov. 1, 1992); *see* USSG § 1B1.8(b)(5) & comment. (n.1) (2009). As its official reason, the Commission stated only that the amendment "clarifies the operation of the guideline."

Judicial Decisions and Sentencing Data

Government-sponsored departures under § 5K1.1 continue to have a substantial impact on federal sentencing, representing the largest percentage of downward departures in any category. In fiscal year 2010, such departures were granted in 11.5% of all cases. *2010 Sourcebook* at tbl. N. In contrast, downward departures not identified as government-sponsored were granted in only 3.1% of cases. *Id.*

Wide differences in the rate of § 5K1.1 departures exist among districts, even in the same circuit. For example, for fiscal year 2010, courts in the Fourth Circuit granted § 5K1.1 departures in only 4.1% of cases in Eastern District of Virginia, while in the Eastern District of North Carolina, courts granted such departures in 35.5% of cases.[430] In the Ninth Circuit, the rates of § 5K1.1 departures in districts without fast-track ranged from 8.1% in Nevada to 29.5% in Hawaii.[431] In the Eleventh Circuit, courts granted § 5K1.1 departures in 8.6% of the cases in the Southern District of Florida, and in 25.5% in the Middle District of Alabama.[432] In the Eighth Circuit, courts granted § 5K1.1 departures in 1.7% of cases in South Dakota, and in 24.4% of cases in Minnesota.[433]

Notably, these differences are generally not mirrored in the rate of downward departures not identified as government-sponsored,[434] which means that they likely result from the inconsistent exercise of prosecutorial discretion and the varying ability of defendants to provide assistance, not the institutional predilections of different districts. Indeed, the Commission has acknowledged that there are "irregular and inconsistent policies and practices among the various districts" for employing substantial assistance departures. *See* USSC, *Fifteen Year Review*, *supra* note 121, at 103-06. And unlike the inevitable (and warranted) disparities resulting from a judge's exercise of discretion to grant variance based on the characteristics of an individual offender under § 3553(a), which must be adequately explained as part of the public record, a prosecutor's exercise of discretion is generally not subject to review or explanation.

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[430] USSC, *2010 Sourcebook of Federal Sentencing Statistics*, tbl. 26 (2010).

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] *Id.* For example, in the Middle District of Alabama, where courts granted § 5K1.1 departures in 33.9% of cases, courts imposed nongovernment-sponsored sentences below the guideline range in only 7.0% of cases, well below the national average.

Disparity resulting from prosecutorial practices

Before *Booker*, courts generally held that disparities in sentencing resulting from legitimate prosecutorial practices, such as plea bargaining, withholding of use immunity under § 1B1.8, or availability of fast track disposition, is not a proper basis for departure.[435] Since *Gall* and *Kimbrough*, courts have applied *Kimbrough* to hold that disparity resulting from policy-based prosecutorial discretion can be a basis for sentencing below the guideline range. *See, e.g.*, *United States v. Rodriguez*, 527 F.3d 221, 229 (1st Cir. 2008) (concluding that "consideration of fast-track disparity is not categorically barred as a sentence-evaluating datum within the overall ambit of 18 U.S.C. § 3553(a)"); *United States v. Arrelucea-Zamudio*, 581 F.3d 142, 150-51 (3d Cir. 2009) (courts can consider fast-track disparity in non-fast-track district under § 3553(a)); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010) (same); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010) (revisiting its precedent and holding that sentencing judges are permitted to consider a facially obvious disparity created by fast-track programs among the totality of § 3553(a) factors considered).

Motion requirement

As noted above, the Commission crafted § 5K1.1 to require a government motion for *any* departure based on substantial assistance, not just those that result in a sentence below the statutory minimum. Neither § 3553(e) nor 28 U.S.C. § 994(n) requires a motion for ordinary downward departures, and the Commission's decision to require a motion for every departure based on cooperation has never been justified on any policy basis. Several courts of appeals have indicated that sentencing courts may take cooperation into account without a government motion. *See United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009); *United States v. Jackson*, 296 Fed. App'x 408, 409 (5th Cir. 2008); *United States v. Arceo*, 535 F.3d 679, 688 & n.3 (7th Cir. 2008); *United States v. Doe*, 218 Fed. App'x 801, 805 (10th Cir. 2007); *United States v. Fernandez*, 443

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[435] *See United States v. Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam) (rejecting the defendant's argument that he would have been eligible "for a downward departure based on the sentencing disparity which arises from differing prosecution and plea-bargaining practices among federal districts"); *United States v. Armenta-Castro*, 227 F.3d 1255, 1257 (10th Cir. 2000); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 978 (9th Cir. 2000) (en banc); *United States v. Bonnet-Grullon*, 212 F.3d 692, 709-10 (2d Cir. 2000). Similarly, a prosecutor's decisions about attributing differing drug amounts to codefendants based on whether they entered a plea or went to trial was not a proper basis for departure. *United States v. Rodriguez*, 162 F.3d 135, 153 (1st Cir. 1998), *cert. denied*, 526 U.S. 1152 (1999). Generally, courts have found that disparities in sentences among codefendants resulting from a routine exercise of prosecutorial discretion are unsuitable for departure. *See United States v. Meza*, 127 F.3d 545, 549 (7th Cir. 1996) (finding codefendant disparity resulting from "proper application" of the Guidelines was not a basis for departure); *United States v. Epley*, 52 F.3d 571, 584 (6th Cir. 1995) (denying departure where coconspirator "made a good deal with the authorities" and received a lower sentence); *United States v. Ellis*, 975 F.2d 1061, 1066 (4th Cir. 1992) (holding that absent prosecutorial misconduct a district court may not depart downward based on disparity between codefendant sentences).

F.3d 19, 35 (2d Cir. 2006); *United States v. Lazenby*, 439 F.3d 928, 933 (8th Cir 2006). And Commission data shows that in fiscal year 2010, courts relied on cooperation without a motion to sentence below the guidelines in 429 cases, or approximately 3.1% of cases in which a sentence below the guidelines was imposed and not identified as government-sponsored, despite the language of § 5K1.1 (up from 1.9% in 2009). *See 2010 Sourcebook*, tbls. 25 & 25B.

Further, as noted by Judge Gertner, the motion requirement places unfettered discretion in the control of the prosecutor, whose decisions are unreviewable:

> Inexplicably, [the defendant's] efforts were not enough for the government. And that decision – to forgo a § 5K1.1 motion – is dispositive. Even post *Booker*, § 5K1.1 is the realm of the prosecutor's judgment, not the court's. And, while a court's decisions must be public, detailed, on the record, and subject to appeal, the government's decision to decline § 5K1.1 status does not. All that we know is that the government – or a committee of the prosecutor's office – has refused to move for a substantial assistance departure. We are not authorized to second-guess that decision.[436]

In the Commission's recent survey of judges, 54% agreed that the Commission should amend § 5K1.1 to allow judges to sentence below the guideline range based on the defendant's substantial assistance, even if the government does not make such a motion.[437]

Cooperation immunity

In some districts, such as the Northern District of Iowa, the U.S. Attorney's Office generally does not grant immunity under §1B1.8. There (and unlike most other districts), cooperation agreements provide that any self incriminating information given by the defendant during proffer sessions with government agents will be used against the defendant at his sentencing, which in turn impacts whether the government makes a motion under § 5K1.1. Before *Booker*, the Eighth Circuit held that a district court could not depart downward to account for the district-by-district disparity caused by differing prosecutorial practices. *See United States v. Buckendahl*, 251 F.3d 753, 758 (8th Cir. 2001) (discussing the disparity but reversing the district court's decision to grant a downward departure to account for it). In reversing the downward departure based on the disparate unavailability of use immunity granted in *Buckendahl*, the Eighth Circuit noted that the Commission has, in at least two instances, amended particular guidelines to respond, in part, to disparities in sentences that have resulted from prosecutorial practices. *See* USSG, App. C, Amends. 365 & 506. Thus, while the Commission has

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[436] *United States v. Germosen*, 473 F. Supp. 2d 221, 226 (D. Mass. 2007).

[437] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

recognized its power to intervene, it has failed to do so with respect to the widely disparate prosecutorial policies.

After *Booker*, the same district judge granted a variance for the same reason, finding that it was appropriate to eliminate unwarranted disparity as compared with over ninety other districts that gave the benefit of protection under § 1B1.8. *See United States v. Blackford*, 469 F.3d 1218, 1220 (8th Cir. 2006). The Eighth Circuit reversed again, stating that the "Commission intended a decision about entering into [§ 1B1.8] agreements to be left to the prosecutor's discretion," and that while "*Buckendahl* addressed the use of downward departures to *circumvent* disparities created by the Government's discretionary use of § 1B 1.8 agreements, its logic applies equally to the use of variances." This, the court said, was "a broad-based policy enunciated by the Commission, and a sentencing court's disagreement with such a policy is an improper factor upon which to base a variance." *Id*. at 1220-21 (emphasis supplied).

The premise of both *Buckendahl* and *Blackford* – that prosecutorial disparity is warranted and may not be corrected by judges – is in obvious conflict with § 3553(a)(6) and subsequent Supreme Court law.[438] But the Eighth Circuit has not yet revisited the issue since *Kimbrough* was decided, and the Commission has not clarified its position on this source of disparity.

District courts are now empowered to examine the extent to which a guideline range fails to achieve just punishment as applied in the individual case, which includes an examination whether the resulting sentence results in "unwarranted disparity" as a result of prosecutorial practices relating to cooperation. 18 U.S.C. § 3553(a)(6).

§ 5K2.0 Grounds for Departure

Initial Policy Statement

As originally promulgated, § 5K2.0 was an unstructured paragraph setting forth the Commission's general policy regarding departures. This view made clear that the Commission understood that "[c]ircumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance." USSG § 5K2.0 (Nov. 1, 1987). Accordingly, the Commission provided in this early provision that "the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'" *Id.* "Where the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is

[438] *See Rita v. United States*, 551 U.S. 338, 350-51 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United* States, 552 U.S. 85 (2007); *Spears v. United States*, 129 S. Ct. 840 (2009); *Nelson v. United* States, 129 S. Ct. 890, 891-92 (2009).

warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the *offense of conviction*." *Id.* (emphasis added).

The Commission further explained that "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing," but that the provisions in Part K "seek[] to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. *Id.* Finally, the Commission specified that "[h]arms identified as a possible basis for departure from the guidelines should be taken into account only when they are relevant to the *offense of conviction*, within the limitations of § 1B1.3." *Id.* (emphasis added).

Early Amendments

In 1990, the Commission amended § 5K2.0 to make "various editorial and clarifying changes," which included changing all references to the "offense of conviction" to "offense." USSG, App. C, Amend 358 (Nov. 1, 1990**)**. In a similar change, the Commission eliminated the limitation on the consideration of "harms" only if they are relevant to the offense of conviction under § 1B1.3. The Commission explained that the provision was "unclear and overly restrictive." *Id.* In other words, at the same time the Commission discouraged or outright prohibited almost every mitigating factor that Congress suggested might be relevant and that had been historically relevant at sentencing (and that judges continue to find relevant), the Commission also made sure that there was no language in § 5K2.0 that could have the possible effect of limiting or restricting *upward* departures through the operation of relevant conduct rules.

In 1994, the Commission amended § 5K2.0 to "provide guidance as to when an offender characteristic or other circumstance (or combination of such characteristics or circumstances) that is not ordinarily relevant to a determination of whether a sentence should be outside the applicable guideline range." USSG, App. C, Amend. 508 (Nov. 1, 1994). The policy statement was amended to state that an offender characteristic that is not ordinarily relevant "may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing." *Id.* In new commentary, the Commission also added that the Commission "does not foreclose the possibility of an extraordinary case" distinguished by a combination of circumstances not ordinarily relevant and that do not individually distinguish the case enough to warrant a departure. *Id.* The Commission expressed its belief that such cases would be "extremely rare." *Id.*

In 1998, the Commission revised § 5K2.0 to reflect the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996). *See* USSG, App. C, Amend. 585 (Nov. 1, 1998). As amended, the policy statement read as follows:

§5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines,

> but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.
>
> Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

In commentary, the Commission opted to quote *Koon* regarding the sentencing court's discretionary authority to depart even in cases where the Commission has discouraged consideration of a factor, as well as the sentencing court's institutional advantage over the court of appeals in making the refined assessment required from criminal sentencing. *Id.* (explaining that "in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court" and that district courts "have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do" (quoting *Koon* at 98)).

PROTECT Act Amendments

In 2003, Congress directly amended § 5K2.0 regarding child crimes and sex offenses by providing that, "[u]nder 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that [] has been affirmatively and specifically identified as a permissible ground for downward departure in the sentencing guidelines and policy statements." PROTECT Act, Pub. L. No. 108-21, § 401(b) (Apr. 30, 2003); USSG, App. C, Amend. 649 (Apr. 30, 2003). The Act also contained a set of instructions to the Sentencing Commission regarding departures in general. Section 401(m) directed the Commission, among other things, to review the grounds for downward departures authorized by the guidelines and policy statements and to "promulgate . . . appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures is substantially reductions."

In response to this directive, the Commission substantially revised § 5K2.0. First, the Commission restructured the policy statement "to set forth more clearly the standards governing departures in order to facilitate and emphasize the analysis required by the court." USSG, App. C, Amend. 651 (Oct. 27, 2003). This meant tracking more closely the language of 18 U.S.C. § 3553(b), providing that in cases involving offenses other than offenses against a minor and sex offense, the court may depart downward if there "exists a . . . mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."

The Commission also deleted the language in the commentary taken from *Koon* regarding the district court's discretion and institutional advantage over appellate courts, stating that it had been "effectively overruled" by the *de novo* standard of review enacted by PROTECT Act at 18 U.S.C. § 3742. *Id.* (Reason for Amendment). The PROTECT Act served to support the Commission's reemphasis that circumstances warranting departure under § 5K2.0 "should be rare." USSG § 5K2.0 comment. backg'd (2010).

Although the PROTECT Act did not require it, the Commission amended § 5K2.0 to prohibit several grounds for departure in addition to those already prohibited. As a result, courts are now prohibited under § 5K2.0 from departing based on (1) the defendant's acceptance of responsibility; (2) the defendant's aggravating or mitigating role in the offense; (3) the defendant's decision to plead guilty or enter into a plea agreement; and (4) the defendant's fulfillment of restitution only to the extent required by law. *Id.* § 5K2.0(d). The Commission stated simply that it "determined that these circumstances are never appropriate ground for departure." USSG, App. C, Amend. 651 (Oct. 27, 2003) (Reason for Amendment). In addition, the Commission listed the prohibitions already set forth in other policy statements, adding to them the new prohibition on considering a defendant's addiction to gambling under § 5H1.4, also not required by the PROTECT Act, discussed *supra*. *Id.*

Section 5K2.0 was also revised to restrict departures based on a "combination of factors." *See* USSG § 5K2.0(c). As a result, a court is authorized to depart from the guideline range based on multiple circumstances only if each of the circumstances is one identified in the guidelines as a permissible ground for departure. Unlike Congress's amendment related to sex offenses and offenses against minors (which allows departures only if the departure is affirmatively identified in Part K of Chapter 5), for purposes of the "combination" departure, the Commission permits judges to consider grounds it has deemed "not ordinarily relevant" under Part H. *Id.*

During Congress's consideration of the PROTECT Act, then-Commission Chair Diana Murphy testified that, based on the data available to the Commission in the fall of 2001, the overall rate of downward departures not based on substantial assistance was 18.1%. *See Oversight of the U.S. Sentencing Commission: Are the Guidelines Being Followed?: Hearing Before the Subcommittee on Criminal Justice Oversight of the Senate Judiciary Committee*, 106th Cong., 2d Sess. 39 (2000) (statement of Judge Diana E. Murphy). However, in a later report to Congress, submitted at the same time it amended § 5K2.0 in Amendment 651 to further restrict and prohibit downward departures in all cases, the Commission acknowledged that the national departure rate of 18.1% did not fully reflect the differing rates by region or district, or "discuss in detail the impact of significantly increasing immigration caseloads in southwest border districts on the national departure rate." USSC, *2003 Downward Departure Report*, *supra* note 12, at 57.

In fact, the majority of districts (60.6%) had departure rates of ten percent or lower. *Id.* at 32. An additional 25.5% had rates between ten and twenty percent. *Id.* In

addition, departure rates had increased the most for drug and immigration offenses, which together made up 57.8% of cases in fiscal year 2001. *Id.* at 38. Downward departure rates for drug offenses, which made up 40.3% of cases in fiscal year 2001, had tripled to 17.1% since 1991 (as compared to a doubling of the rate for most other offenses). Rates of downward departure in immigration offenses had increased by 1,171% to 35.6%, accounting for one-third of all downward departures. *Id.* at 38, 41-42. Clearly, downward departures for these cases, and in immigration cases in particular, had a disproportionate impact on the national rate of departures, such that "if southwest border districts are eliminated from consideration, that national rate of increase in the departure rate is substantially the same during the pre-*Koon* and post-*Koon* eras, and actually declines during the most recent year for which such data is available." *Id.* at 55.

The Commission also acknowledged that the national rate of 18.1% did not distinguish between departures initiated, sponsored, or agreed to by the government, such as departures under a fast-track program or a plea agreement. According to the report, excluding government-initiated downward departures from the national rate yielded an overall departure rate of only 10.9%, "substantially lower than the 18.1 percent overall downward departure rate" that Commissioner Murphy had testified to before Congress. *Id.* at 60. As the Commission explained, "the extent to which sentencing courts depart *sua sponte* or without the agreement of the government may not be as great as perceived." *Id.* at 59. [439]

Not only did it acknowledge that the PROTECT Act was premised on the Commission's misleading data, but the Commission also stated in this report its belief that the new standard of *de novo* review on appeal and the new requirement that the court state its reasons for a departure in writing would have the effect of reducing the rate of departures. *Id.* at ii, 9-10. Further, the Commission had only just that year amended § 2L1.2, the guideline governing illegal reentry cases, in an effort to reduce the rate of departures and could not yet tell what the impact of those changes might be. *Id.* at 17. Yet, rather than use this information to explain to Congress that further amendments may not be necessary to effectuate the goal of the PROTECT Act, or to amend the guidelines in a manner that would reduce departures due to reasoned refinement of a particular guideline provision (such as criminal history or role in the offense), the Commission opted to slash, seemingly at random, the grounds for departure for all cases under the policy statement in § 5K2.0. The Commission did not explain why the new limitations and prohibitions in Amendment 651 advanced the development of sentencing policy. Instead, it appears that the Commission amended § 5K2.0 simply in order to reduce the raw number of downward departures, not because of any particular policy or empirical reason for doing so.

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[439] In its annual report of sentencing statistics for 2003, the Commission reported that the rate of non-government sponsored or initiated downward departure was actually only 7.5%. USSC, *2003 Sourcebook of Federal Sentencing Statistics*, tbl. 26A (2003).

In 2010, the Commission amended § 5K2.0(d)(1) to reflect that drug dependence is no longer a prohibited factor under § 5H1.4. *See* 75 Fed. Reg. 27,388, 27,391 (May 14, 2010).

Judicial Decisions and Sentencing Data

Despite its restrictions and limitations, § 5K2.0 continues to function as a significant source of authority for judges to take mitigating circumstances into account, even as formal departures.

In fiscal year 2004, although the overall rate of non-government-sponsored downward departures fell to 5.0%, courts cited § 5K2.0, or "general mitigating circumstances," as a top reason for granting a downward departure, relying on it in 23.5% of cases receiving a non-government-sponsored downward departure.[440]

Since *Booker* was decided, the rate of cases involving downward departures has now dropped to 3.1 %,[441] but courts continue to cite § 5K2.0 as a top reason for departure. In fiscal year 2007, courts cited § 5K2.0 as a reason in 18.8% of cases in which a downward departure was granted.[442] In fiscal year 2010, courts cited § 5K2.0 in 24% of cases in which a downward departure was granted.[443] In other words, even through the narrow straits of § 5K2.0, courts continue to inform the Commission that the guidelines do not adequately account for mitigating circumstances.

Another significant, and growing, form of judicial feedback regarding the inadequacies of the guidelines' treatment of mitigating circumstances, including the inadequacies of § 5K2.0, is the number and variety of reasons that courts give to vary below the guidelines under *Booker* and 18 U.S.C. § 3553(a), avoiding the constraints of formal departure analysis altogether. In fiscal year 2006, courts granted downward *variances* in 7.3% of cases, and in 2007 the rate rose to 8.1%.[444] In fiscal year 2008, the rate further rose to 10.1%, with a concomitant decrease in the rate of formal downward departure.[445] In fiscal year 2009, courts granted downward variances in 12.9% of

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[440] USSC, *2004 Sourcebook of Federal Sentencing Statistics* tbl. 25 (pre- and post-*Blakely*) (2004).

[441] *2010 Sourcebook* tbl. N.

[442] *2007 Sourcebook* tbls. 25 & 25A.

[443] *2010 Sourcebook* tbls. 25 & 25A.

[444] USSC, *2006 Sourcebook of Federal Sentencing* Statistics, tbl. N (2006); *2007 Sourcebook*, tbl. N.

[445] *2008 Sourcebook* tbl. N. The rate of non-government sponsored downward departure fell to 3.3%.

cases.[446] In fiscal year 2010, courts granted downward variances in 14.7% of cases.[447] While the rate of downward departures has remained relatively constant since 2008, the rate of variances has steadily increased.

Child Crimes and Sex Offenses

Based on 18 U.S.C. § 3553(b)(2)(A)(ii), USSG § 5K2.0(b) prohibits a "sentence below the range established by the applicable guidelines" in cases involving child crimes and sex offenses unless it has been affirmatively and specifically identified as a permissible ground for downward departure. By its terms, then, the provision purports to apply not just to departures, but to any sentence below the guideline range. Under current law, however, the judge must consider the characteristics of the of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for "departure" or any other purpose. *See Rita v. United States*, 551 U.S. 338, 364-65 (2007) (Stevens, J., concurring) (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well). Thus, it is not permissible for a court to deny a request for an outside-guideline sentence because a Commission policy statement purports to prohibit a court from doing so.

In any event, courts have found that *Booker* excised by implication the mandatory provisions in § 3553(b)(2). *See, e.g.*, *United States v. Hecht*, 470 F.3d 177, 181 (4th Cir. 2006); *United States v. Shepherd*, 453 F.3d 702, 704 (6th Cir. 2006); *United States v. Jones*, 444 F.3d 430, 441 n.54 (5th Cir. 2006); *United States v. Grigg*, 442 F.3d 560, 562-64 (7th Cir. 2006); *United States v. Selioutsky*, 409 F.3d 114, 116-18 (2d Cir. 2005); *United States v. Yazzie*, 407 F.3d 1139, 1145-46 (10th Cir. 2005) (*en banc*).

In *United States v. Potts*, 566 F. Supp. 2d 525 (N.D. Tex. 2008), the court recognized that "the mandatory aspects [of § 5K2.0(b)] have no applicability in the context of imposing a non-Guideline sentence at variance from the calculated sentencing range." In *United States v. Meillier*, 650 F. Supp. 2d 887 (D. Minn. 2009), the court acknowledged that § 5K2.0 would prohibit a departure, but that under § 3553(a)(1), the defendant's limited intellectual functioning, among other characteristics, "weighs heavily against imposing a substantial prison sentence in this case." *Id.* at 897.

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[446] *2009 Sourcebook* tbl. N. The rate of non-government sponsored downward departure remained relatively constant at 3.0%.

[447] *2010 Sourcebook* tbl. N. The rate of non-government sponsored downward departure remained relatively constant at 3.1%.

§ 5K2.10 Victim's Conduct

Initial Policy Statement

A victim's wrongful conduct is one of only four encouraged bases for downward departures.[448] As originally sent to Congress, USSG § 5K2.10 provided that "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." 52 Fed. Reg. 18,046 (May 13, 1987); USSG § 5K2.10 (1987). The Commission provided five factors for the court to consider "in deciding the extent of a sentence reduction":

> (a) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;
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> (b) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;
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> (c) The danger reasonably perceived by the defendant, including the victim's reputation for violence;
>
> (d) The danger actually presented to the defendant by the victim; and
>
> (e) Any other relevant conduct by the victim that substantially contributed to the danger presented.

Id. The Commission added that the provision "usually would not be relevant in the context of non-violent offenses," except in "unusual circumstances." *Id.* As an example of nonviolent offense that might nevertheless warrant a reduced penalty based on the victim's conduct, the Commission described a person who steals or destroys property in retaliation for an "extended course of provocation and harassment." *Id.* It also provided that it would "not ordinarily apply" in the context of offenses involving criminal sexual abuse."

Amendments

This policy statement has been amended only once, as part of the amendments implementing the PROTECT Act in October 2003 and aimed solely at reducing the rate of downward departure. First, the Commission added that the court should not only consider the factors in determining *the extent* of the reduction, but also "*whether* a sentence reduction is warranted." USSG, App. C, Amend. 651 (Oct. 27, 2003). The Commission did not give any reason for this change. The Commission also added a sixth factor for the court to consider in determining whether and to what extent a departure is

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[448] The others are USSG § 5K2.11 (Lesser Harms), § 5K2.12 (Coercion and Duress), and § 5K2.13 (Diminished Capacity).

warranted: "The proportionality and reasonableness of the defendant's response to the victim's provocation." *Id.* The Commission did not give any specific reason for adding this factor, though it recognized it as an added limitation.[449]

At the time of this amendment, several circuits had read the terms of § 5K1.10 to "manifest a concern for proportionality" in order to reverse a downward departure or uphold the district court's denial of a downward departure under § 5K1.10 based on the court's view that the defendant's response to the victim's misconduct was disproportionate.[450] Although the Commission does not mention this line of cases in its Reason for Amendment, it appears that the Commission amended § 5K1.10 in part to conform with those decisions, which of course also had the effect of further limiting the availability of a sentence reduction under § 5K1.10 in all circuits.

But the Commission did not stop with proportionality, also including in this amendment a "reasonableness" factor for the court to consider in deciding whether and to what extent to grant a departure based on the victim's conduct. In doing so, the Commission went well beyond any court's concern. The circuit courts finding a proportionality concern in § 5K2.10 never said anything about a concern that the defendant's response to the victim's misconduct must be both proportionate *and* reasonable. Moreover, the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), makes clear that a district court has the discretion to depart downward based on the victim's misconduct even in cases involving a quintessentially unreasonable response on the part of a defendant.

In *Koon*, the defendant police officers were convicted of using excessive force under color of law when they severely beat and injured an intoxicated suspect who had been seized after fleeing in a high-speed car chase. *Id.* at 87-88. In order to convict the defendants, the jury necessarily found that the defendants' actions constituted an unreasonable seizure in violation of the Fourth Amendment. *Id.* at 87-88, 103-05; *see Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating the standard for excessive force cases). In other words, the offense conduct at issue was *by definition* "unreasonable." The Supreme Court held that the district court did not abuse its discretion to grant the downward departure based on the victim's provocative conduct. *Id.* at 105.

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[449] USSC, *2003 Departure Report*, *supra* note 12, at vi, 76.

[450] *See United States v. Shortt*, 919 F.2d 1325, 1328 (8th Cir. 1990) (stating that "[a] concern for the proportionality of the defendant's response is manifested by the terms of § 5K2.10" and reversing the District Court's downward departure); *United States v. Morin*, 80 F.3d 124, 128 (4th Cir.1996) (same); *Blankenship v. United States*, 159 F.3d 336, 339 (8th Cir. 1998) (stating that § 5K2.10 "manifests a concern for proportionality in the defendant's response."); *United States v. Paster*, 173 F.3d 206, 212 (3d Cir. 1999); *United States v. Harris*, 293 F.3d 863, 872-73 (5th Cir. 2002) ("Taken as a whole, Section 5K2.10 evinces a concern that the offense behavior be not excessively disproportionate to the provocation."); *United States v. Mussayek*, 338 F.3d 245, 256 (3d Cir. 2003) (acknowledging the concern for proportionality evinced by the other circuits, and explaining those courts' "reasoning makes sense, as it would be exceedingly difficult to apply § 5K2.10 to a situation in which the offense behavior was excessively disproportional to the victim's misconduct").

Yet, the Commission slipped the "reasonableness of the defendant's response" into the § 5K2.10 equation without setting forth any analytical relationship to the purpose underlying the policy statement. It is possible that the Commission added a reasonableness component in order to conform § 5K2.10 with § 5K2.12, which allows for departures based on an imperfect coercion or duress defense and has always included a reasonableness component. *See* USSG § 5K2.12 (1987); *see also infra* (discussing § 5K2.12). But § 5K2.12 directs courts to consider reasonableness in determining *the extent* of the departure, not *whether* to grant one in the first place, as § 5K2.10 now does. *See ibid*.

Notably, the Commission has not amended § 5K2.10 so that it applies only to departures, as it did with so many other policy statements in 2003. By it terms, then, it purports to govern below-guidelines sentences that are not styled as departures. Under current law, however, the judge must consider the characteristics of the of the defendant and the circumstances of the offense in reaching an appropriate sentence, despite the fact that the Commission may have prohibited, discouraged or limited consideration of such factors for "departure" or any other purpose. *See Rita v. United States*, 551 U.S. 338, 364-65 (2007) (Stevens, J., concurring) (Although various factors are "not ordinarily considered under the Guidelines," § 3553(a)(1) "authorizes the sentencing judge to consider" these factors and "an appellate court must consider" them as well). Thus, it is not permissible for a court to deny a request for an outside-guideline sentence because a Commission policy statement purports to either prohibit or restrict the court regarding a particular factor.

Judicial Decisions and Sentencing Data

The rate of departure based on § 5K2.10 has always been exceedingly low,[451] but since the 2003 amendment further restricting its availability, departures based on victim's conduct have all but vanished. According to Commission data, for fiscal years 2006 and 2007, courts granted sentence reductions based on the victim's conduct in too few cases to merit listing as a reason, whether styled either as a departure or a variance.[452] The reason similarly does not appear in the Commission's 2010 statistics.[453]

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[451] *See, e.g.*, USSC, *1996 Sourcebook for Federal Sentencing Statistics*, tbl. 25 (1996) (departing based on victim's conduct in 29 cases, representing 0.6% of all downward departures); USSC, *1999 Sourcebook for Federal Sentencing Statistics*, tbl. 25 (1999) (departing based on victim's conduct in 27 cases, representing 0.3% of all downward departures); USSC, *2000 Sourcebook for Federal Sentencing Statistics*, tbl. 25 (2000) (departing based on victim's conduct in 30 cases, representing 0.3% of all downward departures); USSC, *2001 Sourcebook for Federal Sentencing Statistics*, tbl. 25 (2001) (departing based on victim's conduct in 24 cases, representing 0.2% of all cases in which the court's reasons for departing downward were available).

[452] USSC, *2006 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, 25B, 25C (2006); USSC, *2007 Sourcebook of Federal Sentencing Statistics*, tbls. 25, 25A, 25B, 25C (2007).

[453] *2010 Sourcebook*, tbls. 25, 25A & 25B.

In granting these few departures, courts have not engaged in extensive analysis since *Booker*. In *United States v. Huff*, 514 F.3d 818, 819 (8th Cir. 2008), the district court granted a two-level downward departure under § 5K2.10 to a defendant convicted of being a felon in possession of a firearm and who had "exhibited the firearm" based on the victim's contribution to the offense.

In *United States v. LaVallee*, 439 F.3d 670, 702 (10th Cir. 2006), the district court granted a two-level downward departure based in part on the victim's conduct. There, the defendant, a prison guard, assaulted an inmate and was convicted of conspiracy to violate the inmate's rights. The court granted the departure under § 5K2.10 based on the fact that the inmate had written several letters to a female officer containing sexually explicit remarks and threatened the defendant when he was being escorted to a disciplinary unit as a result of the letters. *Id.* at 678 & n.1, 702.

In *United States v. Dunn*, No. 4:08-387, 2009 WL 4723284 (M.D. Pa. Dec. 9, 2009), the district court granted a downward departure under § 5K2.10 and § 5K2.12 (Coercion and Duress) even though the defendant inflicted disabling injuries on a verbally provoking victim (though with an extensive reputation for violence) who was unable to defend himself because he was in hand restraints.

§ 5K2.12. Coercion and Duress

Initial Policy Statement

As originally promulgated, USSG § 5K2.12 permitted a court to impose a sentence below the applicable guideline range "[i]f the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." 52 Fed. Reg. 18,046 (May 13, 1987)**;** USSG § 5K2.12 (Nov. 1, 1987). The original Commission instructed courts that the extent of the decrease "should depend on" two factors: (1) the "reasonableness of the defendant's actions" and (2) "the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be." *Id.* The Commission further explained that, in order to warrant a departure, coercion will be "sufficiently serious . . . only when it involves a threat of physical injury, substantial damage to property or similar injury from the unlawful action of a third party or from a natural emergency." *Id.* Finally, the Commission stated, without further explanation, that it "considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence." *Id.*

Often referred to as an "imperfect defense" departure, § 5K2.12 was quickly interpreted as manifesting the Commission's "obvious[] inten[t]" to "provide a broader standard of coercion as a sentencing factor than coercion as required to prove a complete defense at trial." *See, e.g.*, *United States v. Cheape*, 889 F.2d 477, 480 (3d Cir. 1989). To prove a complete defense at trial for justification (the unitary standard used

interchangeably with coercion and duress),[454] the defendant must show, among other things, a "well-grounded apprehension" of death or serious bodily injury, that he had "no reasonable, legal alternative to violating the law," and that a "direct causal relationship may be reasonably anticipated" between the criminal act and the avoidance of the threatened harm.[455] As such (and unlike § 5K2.10), requiring the court to consider the "reasonableness" of the defendant's actions under § 5K2.12 bears a principled relationship to its animating logic.

Although § 5K2.12 generally encourages a downward departure based on an imperfect coercion or duress defense, it prohibits departures based on personal financial difficulties or economic pressures on a trade or business. It is true that economic duress has traditionally never been accepted as an affirmative defense to a criminal charge,[456] but it is not clear why the Commission prohibited consideration of personal financial difficulties or economic pressures as a mitigating factor at sentencing. At least some state courts have said that economic duress can be a legitimate mitigating factor. *See, e.g.*, *Illinois v. Turner*, 619 N.E.2d 781 (Ill. App. Ct. 1993); *Colorado v. Fontes*, 89 P.3d 484, 486 (Colo. Ct. App. 2003) ("[E]conomic necessity may be an important issue in sentencing . . . ."). In Tennessee, one of the statutory mitigating factors is whether the defendant "was motivated by a desire to provide necessities for the defendant's family or the defendant's self." *See* Tenn. Code. Ann. § 40-35-113(1), (7) (2006). And as early as 1995, a circuit court judge suggested that the Commission identify as a relevant offender characteristic his or her "motive in committing the offense, *e.g.*, pure greed or some economic necessity." *See* John M. Walker, Jr., *Is the Commission Fulfilling its*

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[454] *See United States v. Butler*, 485 F.3d 569, 572 n.1 (10th Cir. 2007) (explaining that "[c]ourts have used the terms duress, necessity, and justification interchangeably" and collecting cases); *see also United States v. Cotto*, 347 F.3d 441, 446 (2d Cir. 2003) ("[T]he same logic that animates the defense [of coercion] also animates § 5K2.12"); *United States v. Pinto*, 48 F.3d 384, 389 (9th Cir. 1995); *United States v. Nicholson*, No. 2:01cr41, 2008 WL 345897, at *57 (E.D. Va. Feb. 7, 2008) (explaining that "the legal principles governing a justification defense . . . are relevant because U.S.S.G. § 5K2.12 regards "circumstances not amounting to a complete defense").

[455] *Butler*, 485 F.3d at 572 (quoting *United States v. Vigil*, 743 F.2d 751, 755 (10th Cir. 1984) (setting forth elements of justification defense); *United States v. Nicholson*, 2008 WL 345897, at *20-21 (same); *accord United States v. Sachdev*, 279 F.3d 25, 29 (1st Cir. 2002) (requiring district court considering a departure to "objectively determine whether a reasonable person in defendant's position would perceive there to be a threat").

[456] *See, e.g.*, *State v. Gann*, 244 N.W.2d 746, 752-53 (N.D. 1976) (holding that the trial court did not err in refusing to instruct the jury on economic duress); *Harris v. State*, 486 S.W.2d 573, 574 (Tex. Crim. App. 1972) ("Economic necessity is no justification for a positive criminal offense."); *State v. Moe*, 24 P.2d 638, 640 (Wash. 1933) ("Economic necessity has never been accepted as a defense to a criminal charge."); *United States v. Palmer*, 458 F.2d 663 (9th Cir. 1972) (defendant's belief that he had to enter the United States to give a deposition or else face financial ruin was not a defense to illegal reentry).

Mandate?: A Review of the Sentencing Commission's 1994 Annual Report, 8 Fed. Sent'g Rep. 106 (Sept./Oct. 1995).

The Commission's failure to provide any reason or policy basis for this decision, combined with evidence that at least some states have come to the opposite conclusion, provide a basis for challenging § 5K2.12's prohibition against considering economic duress at sentencing as unsound policy.

Amendments

As part of the amendments implementing the PROTECT Act in 2003 and aimed at reducing the number of downward departures, the Commission added a third factor upon which the extent of departure should depend: "the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved." USSG, App. C, Amend. 651 (Oct. 27, 2003). It gave no specific reason for this amendment or how it is to be applied, referring to in its contemporaneous report to Congress simply as another limitation on departures as part of the Commission's efforts to reduce the rate of departures in response to the PROTECT Act.[457] Unlike victim's conduct under § 5K2.10, however, it does not appear that any courts suggested that proportionality should be part of the analysis for a departure based on coercion or duress. Moreover, a defendant is not required to make a showing of proportionality to be entitled to a jury instruction for the affirmative defense of justification. *See, e.g.*, *United States v. Butler*, 485 F.3d 569, 572 (10th Cir. 2007) (setting forth the requirements for a justification instruction).

It may be that the Commission simply wanted the language of § 5K2.12 to "match" the language for departures for victim's conduct under § 5K2.10. As a result of the 2003 amendments, each provision now requires the court to consider both the reasonableness and the proportionality of the defendant's offense conduct, though proportionality under § 5K2.12 is a consideration only for determining *the extent* of the departure, not for determining *whether* to grant the departure, as it is under § 5K2.10.

In 2004, the Commission amended § 5K2.12 to replace the phrase "decrease the sentence below the applicable guideline range" with "depart downward." USSG, App. C, Amend. 674 (Nov. 1, 2004). As a result, § 5K2.12 by its terms applies only to the question whether and to what extent a *departure* is warranted, not whether a variance is warranted.

Sentencing Data

Historically, courts have cited coercion and duress as a reason for departing downward in a very small number of cases. For example, in fiscal year 1995, courts cited coercion and duress as a reason for downward departure in 61 cases, representing just

[457] USSC, *2003 Downward Departure Report*, *supra* note 12, at 76.

under 2.0% of cases in which the defendant received a downward departure.[458] In 1997, courts did so in 59 cases, representing approximately 1% of cases in which the defendant received a downward departure.[459]

In 2005, courts cited coercion and duress as a reason for sentencing below the guideline range, either as a departure or a variance, in only 43 cases.

In 2008, courts cited coercion and duress as a departure in only 22 cases. *2008 Sourcebook* tbl. 25. However, it is not clear whether the reason was cited in additional cases under 18 U.S.C. § 3553(a), as the Commission did not provide information regarding reasons cited fewer than 75 times. *Id.* tbl. 25C & n.1. The same is true for 2010, when courts cited coercion and duress as a departure only 26 times, but the Commission did not report reasons given for a below-guideline sentence under § 3553(a) that were cited fewer than 100 times. *2010 Sourcebook*, tbls. 25 & 25B.

Judicial Decisions

It does not appear that any judge has discussed the Commission's decision to add a proportionality requirement to § 5K2.12 as part of its implementation of the PROTECT Act. In one post-amendment case, Judge Nancy Gertner applied the new language to grant a departure based on coercion and duress in a case involving a Guatemalan woman convicted of drug trafficking. *See United States v. Jurado-Lopez*, 338 F. Supp. 2d 246 (D. Mass. 2004). There, the defendant's husband and parents had been shot by unknown perpetrators. Against this backdrop, she was later locked in room by drug dealers and forced to insert into her rectum 23 pellets containing 250 grams of heroin. *Id.* Judge Gertner found that the defendant's actions in committing the offense "seem 'reasonable' and 'proportional' to the coercion that she experienced." *Id.* at 254 (granting a departure from level 25 to level 13).

In *United States v. Dunn*, No. 4:08-387, 2009 WL 4723284 (M.D. Pa. Dec. 9, 2009), the district court granted a four-level downward departure under § 5K2.10 and § 5K2.12 where the defendant was provoked by the victim's threats to "bash in" the defendant's face, though it did not separately analyze the departure under § 5K2.12.

§ 5K2.13 Diminished Capacity

Legislative History

Congress charged the Commission with considering the relevance, in formulating guidelines and policy statements, of mental and emotional conditions "to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant." 28 U.S.C. § 994(d). In explaining this provision, Congress suggested that the Commission "might conclude that a particular set of offense and

[458] USSC, *1995 Annual Report*, tbl. 30.

[459] USSC, *1997 Sourcebook of Federal Sentencing Statistics*, tbl. 25 (1997).

offender characteristics called for probation with a condition of psychiatric treatment, rather than imprisonment." S. Rep. No. 98-225, at 173 (1983). On the other hand, "[c]onsideration of this factor might lead the Commission to conclude in a particularly serious case, that there was no alternative for the protection of the public but to incarcerate the offender and provide needed treatment in a prison setting." *Id.*

Initial Policy Statement

As discussed *supra* with respect to § 5H1.4, the Commission determined that mental and emotional conditions are not ordinarily relevant to determining whether a sentence should be outside the guideline range except as provided in § 5K2.13, which allowed a downward departure "[i]f the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants" and to "reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public." 52 Fed. Reg. 18,046; USSG § 5K2.13 (1987). With these limitations, § 5K2.13 represented one of the few encouraged grounds for downward departure.

The Commission did not define "non-violent offense" or provide examples of "non-violent offenses" as guidance. Some courts turned to the definition of "crime of violence" under § 4B1.2, the career offender provision, and held that a defendant convicted of a "crime of violence" were necessarily precluded from a departure based on diminished capacity. *See, e.g.*, *United States v. Poff*, 926 F.2d 588 (7th Cir. 1991) (*en banc*). Others concluded that an offense that meets the definition of "crime of violence" may still be "non-violent" as the term is used in § 5K2.13. *See United States v. Chatman*, 986 F.2d 1446, 1452-53 (D.C. Cir. 1993). In *Chatman*, for example, the defendant was convicted of unarmed bank robbery under circumstances devoid of actual violence or threat of violence, having handed the teller a note asking for money. *Id.* The court held that this was factually a non-violent offense, and the district court had the discretion to depart downward based on diminished capacity, despite that bank robbery is a categorical "crime of violence" under the career offender provision. *Id.* at 1452. After an extended discussion of the different policy considerations underlying § 5K2.13 and the career offender provision, the court concluded that § 5K2.13 "refers to those offenses that, in the act, reveal that a defendant is not dangerous, and therefore need not be incapacitated for the period of time the Guidelines would otherwise recommend." *Id.*

The Commission also left "significantly reduced mental capacity" undefined in the original policy statement. In *United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997), the Court of Appeals for the Third Circuit engaged in extended analysis of the animating forces behind the concept of mental capacity as a mitigating factor (lenity and compassion) and concluded that courts must be able to consider both a defendant's cognitive capacity *and* volitional capacity. *See id.* at 548. The court noted the possible relevance of medical literature regarding certain medical diagnoses, and remanded the case to the district court to consider whether the defendant, who was convicted of

possession of child pornography, suffered from a volitional defect that contributed to the offense.

Amendments

In 1998, the Commission completely revised § 5K2.13 to address the circuit conflict regarding whether a court can depart downward based on diminished capacity if the defendant committed a "crime of violence" as defined by the career offender guideline at § 4A1.2. The Commission amended the provision to add that the court "may not depart below the applicable guideline range if . . . the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence." USSG, App. C, Amend. 583 (Nov. 1, 1998). The Commission described this as "a compromise approach to the circuit conflict." *Id.* (Reason for Amendment). The Commission did not define "actual violence" or "serious threat of violence."

Recognizing that this new language "falls far short of offering the courts a bright line rule here," *see United States v. Bradshaw*, No. 96cr485, 1999 WL 1129601, at *3 (N.D. Ill. Dec. 1, 1999), some courts looked to the Commission's Reason for Amendment as support for finding that that the new language was clearly intended to render a substantive change in the guideline and to allow departures even for offenses that would otherwise qualify as a "crime of violence" under § 4B1.2. *See, e.g.*, *id.* (finding that under the amended version, an unarmed bank robbery involving a note saying "this is a stickup" was not a "serious threat of violence"); *see also United States v. Sam*, 467 F.3d 857, 861 (5th Cir. 2006) (noting that the amendment was intended to resolve a circuit split and reversing the district court for failing to consider the facts and circumstances of a bank robbery, which did not involve any overt violence). Other courts continue to cite without analysis pre-amendment caselaw holding that a defendant convicted of a "crime of violence" as defined under § 4B1.2 is categorically precluded from a departure under § 5K2.13. *See United States v. Petersen*, 276 F.3d 432 (8th Cir. 2002); *see also United States v. Gibbs*, 237 Fed. Appx. 550, 567 (11th Cir. 2007). Although even the government abandoned that position in at least one later case, *see United States v. Woods*, 364 F.3d 1000, 1001 (8th Cir. 2004) (noting the government's concession in that case), the issue remains clouded by inexact analysis by some courts that ignore the purpose of the amendment and create categorical exclusions, particularly with respect to the concept of a "serious threat of violence."[460]

Also as part of the 1998 amendment, the Commission added an application note defining "significantly reduced mental capacity" as meaning

[460] *See United States v. Sims*, 428 F.3d 945, 964 (10th Cir. 2005) (noting that the court had previously found a serious threat of violence "inherent" in the offense of possession of a firearm, and affirming, with references to 18 U.S.C. § 16 and USSG § 4B1.2, the district court's conclusion that enticing a fictitious minor/FBI agent to engage in sexually explicit acts categorically involves a "serious threat of violence").

> the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

See USSG, App. C, Amend. 583 (Nov. 1, 1998). It said that the definition was "in accord with the decision in [] *McBroom*." *See* USSG, App. C, Amend. 583 (Nov. 1, 1998) (Reason for Amendment), and cited that court's conclusion that both kinds of impairments should be considered. The Commission did not otherwise discuss the court's analysis or explain the amendment, which had the unstated effect of affirming the availability of downward departures based on diminished capacity in child pornography cases, as *McBroom* was just such a case. But without engaging in any independent policy analysis, discussing relevant psychological or medical literature, or citing empirical studies to support the change, the Commission left § 5K2.13 especially vulnerable to congressional action.

In 2003, Congress directly amended § 5K2.13 to prohibit downward departures based on diminished capacity for offenses involving minors and sex offenses. USSG, App. C, Amend. 649 (May 30, 2003). In addition, as part of its work implementing the PROTECT Act and to reduce the number of downward departures across the board, the Commission further amended § 5K2.13 to add a causation element and require, as a condition of eligibility, that the significantly reduced mental capacity "contributed substantially to the commission of the offense." USSG, App. C., Amend. 651 (Oct. 30, 2003). The Commission did not give any particular reason for this amendment except its general goal of reducing the raw numbers of departures.

In 2004, the Commission amended the language of § 5K2.13 to specify that it governs whether a "downward departure" is warranted, rather than whether the court may impose a sentence "below the applicable guideline range." *See* USSG, App. C, Amend. 674 (Nov. 1, 2004). The Commission described this amendment as a "conforming change" made "as a result of departure amendments previously made in furtherance of the [PROTECT Act]." *Id.* Reason for Amendment. Thus, § 5K2.13 by its terms does not apply to restrict or prohibit a court from relying on diminished capacity that mitigates culpability or is otherwise plainly relevant to sentence a defendant outside the guideline range under § 3553(a).

Judicial Decisions and Sentencing Data

Child pornography offenses

Courts have not been categorically averse to granting downward departures based on diminished mental capacity in cases involving child pornography. In *United States v. Silleg*, 311 F.3d 557, 563 (2d Cir. 2002), the Second Circuit held that "the diminished capacity of a defendant in a child pornography case may form the basis for a downward departure where the requirements of section 5K2.13 are satisfied." *See also United States*

v. McBroom, 124 F.3d 533 (3d Cir. 1997); *United States v. Goossens*, 84 F.3d 697, 700-02 (4th Cir. 1996).

In *United States v. Polito*, 215 Fed. App'x 354 (5th Cir. 2007) (unpublished), the Fifth Circuit affirmed a sentence of probation with one year of home confinement in a case involving a college student's possession of child pornography that took place in 1999. There, the defendant had been diagnosed with anxiety disorder, depression, and bipolar disorder, and the district court found, among other things, that his "mental condition prohibited him from acting rationally." *Id.* at 356.

And in *United States v. Tanasi*, No. 02cr0096, 2004 WL 406724 (S.D.N.Y. Mar. 8, 2004), the district court granted a substantial downward departure based on diminished capacity in a case involving the transmission of child pornography to an undercover agent. There, the court found that the defendant "exhibited obsessive and compulsive behavior: spending up to 3 days a week for hours online looking at pornography, collecting and transmitting thousands of pornographic images, transmitting live images of himself having sex through video conferencing, making obscene phone calls, and spending much of his daily life 'thinking, fantasizing, and daydreaming about sexual encounters.'" *Id.* at *9-11. The court found that the defendant's obsessive and compulsive behavior rendered him unable to control his conduct and there was no evidence he was a sexual predator or ever was involved sexually with a child. *Id.*

This remained true even after Congress amended § 5K2.13 to make the departure unavailable in such cases. In *United States v. Lighthall*, 389 F.3d 791, 797 (8th Cir. 2004), the Eighth Circuit affirmed a substantial downward departure based on diminished capacity in a similar case, rejecting the government's argument that the district court should have relied on the PROTECT Act amendments as a policy "touchstone."

In any event, even with sex and child offenses removed from the equation, and with the added requirement that the defendant's "significantly reduced mental capacity contributed substantially to the commission of the offense," courts continue to cite diminished capacity as a ground for downward departure, though in a smaller number of cases.[461] Even more significant, at least one court has granted, on remand from the Supreme Court after *Gall*, a downward variance under 18 U.S.C. § 3553(a) in a child pornography case, based on the defendant's diminished mental capacity despite Congress's prohibition in § 5K2.13. *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145 (D. Neb. Sept. 8, 2008) (concluding that "the court can still consider

[461] For example, in fiscal year 2001, diminished capacity was cited in 286 cases, or just under 3% of cases in which courts gave a reason for granting a downward departure. *2001 Sourcebook of Federal Sentencing Statistics*, tbl. 25 (2001). In 2007, it was cited in 128 cases in which a downward departure was granted, or 4.6% of such cases. *See 2007 Sourcebook of Federal Sentencing Statistics*, tbls. 25 & 25A (2007). In 2008, courts cited diminished capacity in only 95 cases in which a downward departure was granted, but still representing 3.8 % of such cases. *2008 Sourcebook*, tbls. 25 & 25A. And in 2010, courts cited diminished capacity in only 70 cases. *2010 Sourcebook*, tbls. 25 & 25A.

Grinbergs's mental capacity . . . insofar as it is relevant to the § 3553(a) factors," and finding "that the defendant's mental condition, in conjunction with his adolescent mind-set and extremely low self-esteem, contributed to the offense").

Voluntary use of drugs

In *United States v. Garcia*, 497 F.3d 964 (9th Cir. 2007), the Ninth Circuit vacated the defendant's sentence of 360 months for conspiracy to distribute methamphetamine because the sentencing judge had erroneously concluded "that it did not have the discretion to consider [the defendant's] alleged diminished mental capacity due to drug addiction, because voluntary drug addiction is precluded as a basis for a downward departure under the Guidelines." *Id.* at 971. In vacating the sentence, the court explained that "[j]ust because a consideration was improper under the mandatory Guidelines regime does not mean that it is necessarily improper under the advisory Guidelines regime." The court held that "district courts are not prohibited in all circumstances from considering a defendant's drug addiction in choosing a reasonable sentence." *Id.* at 972; *see also United States v. Matheny***,** 450 F.3d 633, 641 (6th Cir. 2006) (acknowledging without disapproval the sentencing court's statement "that it considered, pursuant to § 3553(a)(1), the fact that Matheny had his drug addiction since childhood").

Regarding the relationship of drugs and criminal conduct, Judge Gertner has explained:

> The status of being addicted has an ambiguous relationship to the defendant's culpability. It could be a mitigating factor, explaining the motivation for the crime. It could be an aggravating factor, supporting a finding of likely recidivism. Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics in Federal Sentencing*, 66 S. Cal. L. Rev. 367, 385 (1992).

United States v. Perella, 273 F. Supp. 2d 162, 164 (D. Mass. 2003).

In *United States v. Whigham*, No. 06cr10328, 2010 U.S. Dist. LEXIS 125845 (D. Mass. Nov. 30, 2010), Judge Gertner emphasized that after *Booker*, she is "obliged to look critically at the Guidelines in relationship with to the purposes of sentencing." *Id.* at *25. Examining § 5K2.13, she found "another Guideline without explanation, data, or justification." *Id.* She found that the defendant's severe mental deficits "certainly had a substantial bearing on his behavior, even if exacerbated by his addictions," and that it "should be considered in fashioning his punishment." *Id.*

Violent offenses

In *United States v. Tom*, 327 Fed. App'x 93 (10th Cir. 2009), the Tenth Circuit affirmed a below-guideline sentence (after having previously vacated the same sentence before *Gall*) in a case involving a conviction for second-degree murder, where the district

court considered the defendant's reduced mental capacity under § 3553(a), finding that the defendant was "'borderline mentally retarded' and, as a result, 'reacted impulsively and did what he was told to do.'" *Id.* at 96. The district court found the defendant's mental deficiencies to be a "mitigating factor that significantly reduces his moral culpability and distinguishes him from those who do not suffer from similar deficiencies." *Id.* (internal quotation marks omitted).

Mitigating Only

The Seventh Circuit recently cautioned that a finding of diminished capacity under § 5K2.13, even if it points to increased recidivism, cannot be a reason to *increase* a sentence:

> To use a finding of diminished capacity as an aggravating factor for sentencing purposes misunderstands the relationship between U.S.S.G. § 5K2.13 and 18 U.S.C. § 3553(a). The principle purposes of a criminal sentence are to further goals of retribution, deterrence, and incapacitation. . . . A person who cannot understand the wrongfulness of his actions or control his actions due to a reduced mental capacity is less culpable and less able to be specifically deterred than a person who is not mentally ill, and a long sentence for such a defendant may not served the purposes of sentencing. For these reasons, § 5K2.13 gives judges the discretion to reduce sentences for defendants suffering from diminished capacity. A finding of diminished capacity could also lead to the conclusion that the most effective way of incapacitating the defendant and preventing him from committing further crimes is to provide needed medical care outside a prison setting. The potentially greater risk of recidivism of recidivism in a defendant with diminished capacity can be addressed through different means such as psychological treatment or monitoring. It is a misunderstanding of diminished capacity to suggest that because reduced mental capacity would make recidivism more likely, an increased sentence would be necessary.

United States v. Portman, 599 F.3d 633, 638 (7th Cir. 2010). Given that § 5K2.13 by its terms authorizes *only* downward departures, this extended discussion should not have been necessary. But if you find yourself faced with a judge tempted to rely on an ordinarily mitigating offender characteristic for purposes of sentencing above the guidelines, this decision provides support to convince the judge not to do so.

Generally

In *United States v. Gapinski*, 561 F.3d 467 (6th Cir. 2009), the Sixth Circuit vacated a below-guideline sentence and remanded for resentencing where the district court failed to consider the defendant's argument for a lower sentence under § 3553(a) based on his diminished capacity due to ADHD. *Id.* at 478.

In *United States v. Cherry*, 314 Fed. App'x 563 (4th Cir. 2009), the Fourth Circuit affirmed a below-guideline sentence where the district court denied the defendant's motion for downward departure under § 5K2.13 because the defendant could not meet its requirements, but nonetheless varied downward under § 3553(a) based in part on his mental condition. *Id.* at 564.[462]

In the Commission's recent survey of judges, 80% said that diminished capacity is "ordinarily relevant" to the consideration of departure or variance.[463]

Empirical Research

For a full discussion of the relationship between substance abuse and the purposes of sentencing, see the section above addressing § 5H1.4 (Physical Condition). For the relationship between mental conditions and the purposes of sentencing, see the section above addressing § 5H1.3 (Mental and Emotional Conditions).

§ 5K2.16 Voluntary Disclosure of Offense

Initial Promulgation

In 1991, the Commission proposed adding a new policy statement to provide that a sentence below the guideline range may be warranted "[i]f the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise." *See* 56 Fed. Reg. 1846 (Jan. 17, 1991). The provision would not apply, however, "where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent." *Id.*

The Commission voted to add the policy statement in slightly amended form, which expanded the exception so that it would also not apply "where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct." *See* USSG § 5K2.16 (1991). The impetus for this additional ground for downward departure is not clear from the original proposal or the ultimate Reason for Amendment, which states simply that the amendment sets forth a new policy statement "regarding a mitigating factor that may warrant a downward departure." USSG, App. C, Amend. 420 (Nov. 1, 1991). It did not otherwise provide any reason for adding this mitigating factor, its origins, or the policy goals underlying it.

Before the addition of § 5K2.16 to the Guidelines, courts had held that they had the authority under § 5K2.0 to depart downward, beyond that contemplated by § 3E1.1, based on the defendant's acceptance of responsibility before an offense was discovered,

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[462] For more judicial decisions, see David Hemingway & Janet Hinton, Departures and Variances 46-49 (Sept. 2009), available at http://www.fd.org/pdf_lib/DeparturesandVariances2apt.jgh.pdf.

[463] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

such as by voluntarily "undertaking to inform her clients of her misdeeds and to arrange full restitution prior to the commencement of the Government's investigation," *United States v. Gerard*, 782 F. Supp. 913, 915 (S.D.N.Y. 1991), or by voluntarily surrendering to the authorities soon after a warrant was issued, *see United States v. Crumb*, 902 F.2d 1337, 1339-40 (8th Cir. 1990). Because the departure was based on the fact that the Guidelines did not adequately take voluntary disclosure into account, courts did not require any special timing or limit the departure to those offenses that would not likely have been discovered absent voluntary disclosure.

Once § 5K2.16 was added to Chapter 5, courts relied on its express terms (and a certain amount of guessing regarding the Commission's policy reasons for enacting the provision) to deny departure requests based on voluntary disclosure where the defendant could not show that the offense was unlikely to be discovered without voluntary disclosure. *See, e.g.*, *United States v. Brownstein*, 79 F.3d 121, 123 (9th Cir. 1996) (§ 5K2.16 does not apply to individuals who simply confess their involvement in a crime already known to the authorities); *United States v. Rosario*, 134 F. Supp. 2d 661, 665-66 (E.D. Pa. 2001) ("Since [the defendant's] role in the crime was likely to be discovered – albeit not as expeditiously – even if he had not voluntary disclosed the information himself, a departure under section 5K2.16 is not warranted); *see also United States v. Thames*, 214 F.3d 608 (5th Cir. 2000) (finding no error in denial of departure where bank robbery had already been "discovered" and defendant was already a suspect in that crime due to an informant's tip).

In *United States v. Besler*, 86 F.3d 745 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit engaged in an extensive discussion of the possible policy reasons underlying § 5K2.16. Although it agreed with the defendant that § 5K2.16 closely relates to a defendant's culpability, it concluded that culpability is not the only focus of the policy statement. *Id.* at 747-48. According to the court, the plain language of the policy statement evidences the Commission's intent to "focus on both the defendant's state of mind and the benefit derived by the Government of receiving information otherwise undiscoverable." In addition, the defendant's disclosure must have been "motivated by guilt" and not merely by his or her fear of being discovered. *See id.* at 747.

And in *United States v. Aerts*, 121 F.3d 277 (7th Cir. 1997), the same court affirmed a denial based on its view that in addition to conserving judicial resources and rewarding defendants who accept responsibility for their crimes, a "perhaps primary" goal served by § 5K2.16 "is that of alerting the authorities to offenses that are unlikely to be discovered otherwise." *Id.* at 281. The court upheld the district court's determination that departure under § 5K2.16 is not available to defendants convicted of bank robbery because bank robberies are generally known to the public when they are committed, rather than undiscovered. *Id.* at 279-80.

Not only did § 5K2.16 have the effect of constricting courts with respect to a downward departure based on an individual defendant's voluntary disclosure of an offense, it may also reflect unwarranted disparity as compared to similarly situated corporate defendants. At the same time that the Commission added § 5K2.16, it also

added Chapter 8 to the Guidelines, governing the sentencing of organizations, including corporations. By these provisions, corporations are rewarded for voluntarily disclosing offenses before threat of disclosure or government investigation. As part of the calculation of the "culpability score" for an organization, the sentencing court is instructed to subtract five levels from the offense level "[i]f the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct." USSG § 8C2.5(g) (1991). Unlike § 5K2.16, however, § 8C2.5(g) contains no requirement that the offense was otherwise unlikely to be discovered by authorities in order for the reduction to apply. In other words, the Commission set a higher standard for finding mitigation in the act of voluntary disclosure by individual offenders than by corporations.

In 2002, the Commission announced that it would be considering, as part of its two-year priorities, amendments pertaining to "policies for voluntary disclosure of offense conduct by defendants (§ 5K2.16 (Voluntary Disclosure of Offense)) and related guidelines." 67 Fed. Reg. 56,612, 56,613 (Sept. 4, 2002). However, no substantive changes were ever proposed or adopted.

In 2004, the Commission amended § 5K2.16 to apply specifically to "downward departures" only. As a result, a court need not follow its limitations in reaching its final sentence under 18 U.S.C. § 3553(a).

Survey of Judges

In the Commission's recent survey of judges, 74% said that voluntary disclosure of the offense is "ordinarily relevant" to the consideration of departure or variance.[464]

§ 5K2.19 Post-Sentencing Rehabilitative Efforts (Policy Statement)

In 2000, the Commission added a policy statement prohibiting downward departure at resentencing for post-sentencing rehabilitative efforts, even if exceptional. The policy statement, which has not since been amended, reads as follows:

> Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1)).

65 Fed. Reg. 26,880, 26,899 (May 9, 2000); USSG, App. C, Amend. 602 (Nov. 1, 2000).

[464] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

The Commission explained that the policy statement "was prompted by the circuit conflict regarding whether sentencing courts may consider an offender's post-offense rehabilitative efforts while in prison or on probation as a basis for downward departure at resentencing following an appeal." *Id.* Reason for Amendment. As noted by the Commission, the First, Second, Third, Sixth, Ninth and D.C. Circuits had each held that post-sentencing rehabilitative efforts could be considered as grounds for downward departure at resentencing.[465] The Commission did not set forth the reasoning of these courts.

In contrast, the Eighth Circuit held in *United States v. Sims*, 174 F.3d 911 (8th Cir. 1999), that the district court lacked authority to depart downward based on post-sentencing rehabilitation at resentencing. The court reasoned that the other circuits' rule contributes to unwarranted disparity, undermining the Sentencing Reform Act's goal as stated at 28 U.S.C. § 991(b)(1)(B), because it

> creates a situation in which a few lucky defendants, simply because of a legal error in their original sentencing, receive a windfall in the form of a reduced sentence for good behavior in prison. Other defendants, with identical or even superior prison records, would be required to serve the entirety of their original sentence with only the limited good-time credits available under 18 U.S.C. § 3624.

Id. at 912. The court further reasoned that allowing courts to depart downward at resentencing would intrude on "the statutory authority granted to the Bureau of Prisons to award limited good-time credits to prisoners who show 'exemplary compliance with institutional disciplinary regulations.'" *Id.* at 513 (citing 18 U.S.C. § 3624(b)(1)). The Commission set forth the Eighth Circuit's reasoning in some detail.

Rather than resolve the conflict in favor of the majority of circuits considering the question, the Commission adopted the reasoning of the lone Eighth Circuit and "determined that post-sentencing rehabilitative efforts should not provide a basis for a downward departure when resentencing a defendant initially sentenced to a term of imprisonment." USSG, App. C, Amend. 602 (Nov. 1, 2000). The Commission explained that

> such a departure would (1) be inconsistent with policies established by Congress under the Sentencing Reform Act, including the provisions of 18 U.S.C.3624(b) for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those few who gain the opportunity to be resentenced *de novo*, while others, whose rehabilitative efforts may have been more substantial, could not benefit simply because they chose not to

[465] *United States v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000); *United States v. Core*, 125 F.3d 74 (2d Cir. 1997); *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997); *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999); *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998); *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998).

> appeal or appealed unsuccessfully. Additionally, prohibition on downward departure for post-sentencing rehabilitative efforts is consistent with Commission policies expressed in § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Id. (Reason for Amendment). In doing so, the Commission ignored the reasoning of the other circuits, which was based in the policies underlying the Sentencing Reform Act and which served as feedback regarding sound sentencing policy. 28 U.S.C. § 994(o). For example, the Second Circuit had pointed out that the Sentencing Reform Act recognizes that "[t]he successful rehabilitation of a criminal, is a valuable achievement of the criminal process, . . . requiring sentencing courts to consider the need for the sentence imposed . . . to provide the defendant with needed educational and vocational training . . . or other correctional treatment.'" *United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997) (citing 18 U.S.C. § 3553(a)(2)(D)). And the D.C. Circuit had pointed out that

> [a]ny disparity that might result from allowing the district court to consider post-conviction rehabilitation, however, flows not from [the defendant] being 'lucky enough' to be resentenced, or from some 'random' event, but rather from the reversal of [one of his] conviction[s]. The Sentencing Reform Act seeks to eliminate not all sentencing disparities, but only 'unwarranted' disparities. . . . . Distinguishing between prisoners whose convictions are reversed on appeal and all other prisoners hardly seems "unwarranted."

United States v. Rhodes, 145 F.3d 1375, 1381 (D.C. Cir. 1998) (citing 18 U.S.C. § 3553(a)(6); 28 U.S.C. § 991(b)(1)(B); *id.* § 994(f)). The Sixth Circuit went even further, expressly discussing and rejecting each point made by the government and the Eighth Circuit in *Sims*. *See United States v. Rudolph*, 190 F.3d 720, 723-27 (6th Cir. 1999).

Perhaps most significant, the Commission also failed to recognize that the Eighth Circuit's ruling in *Sims* was ultimately premised on a flawed interpretation of its own precedent regarding the law-of-the-case doctrine. In *Sims*, the Eighth Circuit pointed to two of its prior decisions holding that a court may hear on remand any relevant evidence that *it could have heard* at the first sentencing on an issue that was reversed. *Sims*, 174 F.3d at 913. From that statement, the court in *Sims* drew the negative implication that district courts may not consider evidence that did not exist (and therefore could not have been heard) at the original sentencing, including an issue that was not (and could not have been) decided on appeal. But the cases cited by *Sims* address the law of the case doctrine and the scope of arguments and evidence that a district court may consider regarding issues that were actually decided by the court of appeals. *See United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992); *United States v. Behler*, 100 F.3d 632 (8th Cir. 1996).[466]

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[466] Specifically, these cases stand for the proposition that a district court may reconsider de novo any issue left open by the court of appeals, including any new evidence and arguments that it could have heard at the initial sentencing on that issue, but that it may not hear fresh evidence or argument on an issue that was decided by the court of appeals. *See Cornelius*, 968 F.2d at 705-06 (holding that district court could consider on remand any evidence regarding whether defendant

Neither case addresses whether a district court may consider evidence that did not exist at the time of the initial sentencing, much less evidence regarding an issue that was not (and could not have been) decided by the court of appeals. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); *United States v. Vanhorn*, 344 F.3d 729, 731-32 (8th Cir. 2003) (same). Indeed, other Eighth Circuit decisions allowed a district court to consider evidence that did not exist at the time of the initial sentencing,[467] in keeping with the broad principle that a sentencing judge is free "to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence." *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) ("[T]he punishment should fit the offender and not merely the crime.") (internal quotation marks omitted); *see also Wasman v. United States*, 468 U.S. 559, 572 (1984) ("[F]ollowing a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.").

In addition, the rule the Eighth Circuit inferred in *Sims* is inconsistent with the law of other circuits that at a resentencing, a "court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000). In *United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), for example, the Second Circuit made clear that even within the constraints of a limited remand, a district court may consider events occurring after the initial sentencing, such as the death of a spouse, that implicate issues not decided at the initial sentencing – e.g., the appropriateness of a departure based on extraordinary family circumstances.[468] Similarly, in *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001), the

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qualified as an Armed Career Criminal because district court's previous determination on that issue had been reversed and remanded for reconsideration, but it could not hear new evidence and arguments regarding whether defendant qualified as a career offender, as district court's determination on that issue had been affirmed); *Behler*, 100 F.3d at 635 (holding that district court could not, under law of the case and scope of the remand, consider fresh evidence and arguments regarding drug quantity calculation, which had been affirmed).

[467] *United States v. Walker*, 920 F.2d 513, 518 (8th Cir. 1995) (describing district court's consideration at resentencing of evidence of defendant's rehabilitation in prison); *United States v. Durbin*, 542 F.2d 486, 489-90 (8th Cir. 1976) ("[I]t was within the discretion of the district court to consider events occurring subsequent to the appellant's original sentencing.") (citing *Williams v. New York*, 337 U.S. 241, 247 (1949) ("Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.")).

[468] *See also United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) (even under a limited remand, district court may consider "an issue [that] became relevant only after the initial appellate review," such as defendant's rehabilitation since original sentencing); *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (upholding district court's consideration on remand of evidence that defendant murdered confidential informant to prevent him from testifying, stating that "even where the appellate court remands a case with specific limiting instructions, such a mandate does not 'preclude' a departure based on intervening circumstances"); *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (district court erred in declining to consider

Seventh Circuit emphasized that even its limited remand order "did not preclude the judge's consideration of extraordinary unforeseen events occurring after the original sentencing, events not before us when we remanded the case, to the extent they bore on the sentence." *Id.* at 670 (citing *Pearce*).[469]

Similarly, it is inconsistent with the Eighth Circuit own view of the cases cited in *Sims*. In *United States v. Stapleton*, 316 F.3d 754 (8th Cir. 2003), the Eighth Circuit upheld an obstruction of justice enhancement imposed at resentencing based on the probation officer's report to the judge that the defendant made faces at him during the resentencing hearing. Citing the same caselaw it cited in *Sims* but interpreting it correctly, the court explained that only "issues decided by the appellate court become the law of the case," and that "Stapleton's obstructive conduct at resentencing was simply not an issue in the prior appeal because he had not yet committed it." *Id.* at 757. *Stapleton* constitutes an admission that post-sentencing information is relevant, and exposes the Eighth Circuit's prohibition against post-sentencing rehabilitation as an arbitrary one-way ratchet based on an alleged legal principle that does not exist.[470]

Yet it was the Eighth Circuit's rule in *Sims* that the Commission adopted. In essence, the Commission granted to the Department of Justice what it had been unable to achieve in the courts, and the Commission did so without discussing or even recognizing the Sixth Circuit's extensive policy analysis in *Rudolph* or the fundamental flaw in the Eighth Circuit's legal premise.

Inconsistent with USSG § 1B1.10

The Commission's 2008 amendment to USSG § 1B1.10, the policy statement addressing sentence reductions under 18 U.S.C. § 3582(c) based on retroactive guideline amendments, further demonstrates the unsoundness of its general prohibition on considering post-sentencing rehabilitation as a mitigating factor within the guidelines framework in ordinary resentencing proceedings. As noted above, the Commission justified the prohibition on considering post-offense rehabilitation as a mitigating factor at resentencing in part because such a prohibition was "consistent with Commission

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rehabilitation between first and second sentencing); *United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997) (district court may consider post-sentencing rehabilitation).

[469] *See also United States v. Bell*, 280 Fed. App'x 548, 550 (7th Cir. 2008) (affirming district court's consideration of evidence of events occurring while case was on appeal for purposes of finding aggravating factor that did not previously exist).

[470] *See also United States v. Walker*, 920 F.2d 513, 518 (8th Cir. 1995) (describing district court's consideration at resentencing of evidence of defendant's rehabilitation in prison); *United States v. Durbin*, 542 F.2d 486, 489-90 (8th Cir. 1976) ("[I]t was within the discretion of the district court to consider events occurring subsequent to the appellant's original sentencing.") (citing *Williams v. New York*, 337 U.S. 241, 247 (1949) ("Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.")).

policies under § 1B1.10." USSG, App. C, Amend. 602 (Nov. 1, 2000) (Reason for Amendment). Although the Commission did not specify which policies it meant, the language of §1B1.10 at the time may have suggested that in § 3582(c)(2) proceedings, courts should determine whether and to what extent to reduce the sentence based on the facts as they existed at the time the defendant was sentenced.[471] Not long before, however, a panel of the Eighth Circuit had held, over a dissent, that its ruling in *Sims* (prohibiting consideration of post-sentencing rehabilitation in ordinary resentencings) did not apply in proceedings under § 3582(c)(2) and that in those proceedings courts could depart below the guideline range based on post-sentencing rehabilitation. *See United States v. Hasan*, 205 F.3d 1072 (8th Cir. 2000), *rev'd en banc*, 245 F.3d 682 (8th Cir. 2001). The Commission did not mention this decision in its Reason for Amendment, but it was aware of the decision and concerned about it.[472]

To the extent that the Commission was concerned that its policies in § 1B1.10 were not clear, as they were not to the *Hasan* panel, it could have amended § 1B1.10 to explicitly say that a court may consider only evidence that was available at the original sentencing for purposes of § 3582(c)(2). But whatever the policy suggested in § 1B1.10, it did not apply to ordinary resentencing proceedings. In those proceedings, pursuant to the law of every circuit, courts were (and are) permitted to take new facts into account in calculating or departing from a guideline range.[473]

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[471] *See* USSG §1B1.10(b) ("court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced"); id., comment. (n.2) (2000) ("court shall substitute only the [retroactive] amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.").

[472] See U.S. Sent'g Comm'n, Transcript of Public Hearing, at 100-01 (Mar. 23, 2000). After §5K2.19, p.s. went into effect, a split en banc Eighth Circuit reversed the panel's decision, noting that "as the Guidelines read today, a district court is expressly prohibited from considering post-sentencing rehabilitative conduct" as a basis for departure at any kind of resentencing. *Hasan*, 245 F.3d at 689 (citing new §5K2.19, p.s.).

[473] *United States v. Quintieri*, 306 F.3d 1217, 1230 (2d Cir. 2002), (even within the constraints of a limited remand, a district court may consider events occurring after the initial sentencing, such as the death of a spouse, that implicate issues not decided at the initial sentencing – e.g., the appropriateness of a departure based on extraordinary family circumstances); *United States v. Buckley*, 251 F.3d 668, 670 (7th Cir. 2001), (emphasizing that even its limited remand order "did not preclude the judge's consideration of extraordinary unforeseen events occurring after the original sentencing, events not before us when we remanded the case, to the extent they bore on the sentence") (citing Pearce); *see also United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (upholding district court's consideration on remand of evidence that defendant murdered confidential informant to prevent him from testifying, stating that "even where the appellate court remands a case with specific limiting instructions, such a mandate does not 'preclude'a departure based on intervening circumstances"); *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (district court erred in declining to consider rehabilitation between first and second sentencing); *United States v. Core*, 125 F.3d 74, 78 (2d Cir. 1997) (district court may consider post-sentencing rehabilitation); *United States v. Bell*, 280 Fed. App'x 548, 550 (7th Cir. 2008) (affirming district

In any event, the policy of § 1B1.10 is now strikingly *inconsistent* with § 5K2.19. When the Commission amended § 1B1.10 to make the amendment to the crack guidelines retroactive, the Commission also amended the policy statement to add that courts may consider the "post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment" as a factor in determining whether and to what extent a sentencing reduction is warranted. USSG, App. C, Amends. 712 & 713 (Mar. 3, 2008); USSG § 1B1.10, comment. (n.1(B)(iii)) (2008). With this change, a defendant's post-sentencing conduct is not only relevant at a resentencing under § 1B1.10, but also operates as an *aggravating* factor because courts rely on it to deny or limit a reduction in the term of imprisonment, even though the Commission has reduced the applicable guideline range retroactively to the original sentencing. *See, e.g.*, *United States v. Young*, 555 F.3d 611, 613-15 (7th Cir. 2009) (affirming denial of a motion to reduce sentence under § 3582(c)(2) and § 1B1.10 where the district court relied on thirteen incidents of misconduct, most of which involved a refusal to follow prison officials' orders and two involved fighting). In other words, the court is now instructed to calculate the amended guideline range that is applicable *nunc pro tunc* and then to either deny a reduction altogether or resentence to a term of imprisonment above the amended range based on the defendant's post-sentencing conduct.[474]

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court's consideration of evidence of events occurring while case was on appeal for purposes of finding aggravating factor that did not previously exist); *see, also, e.g.*, *United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (district court may consider post-sentencing rehabilitation at ordinary resentencing); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (same); *United States v. Bradstreet*, 207 F.3d 76, 81-83 (1st Cir. 2000) (same); *United States v. Lloyd*, 469 F.3d 319, 324 (3d Cir. 2006) (same); *United States v. Sally*, 116 F.3d 76, 80 (3d Cir. 1997) (same); *United States v. Scott*, 194 Fed. App'x 138, 140 (4th Cir. 2006) (same); *United States v. Reinhart*, 442 F.3d 857, 859 (5th Cir. 2006) (affirming higher sentence on remand based in part on defendant's conduct while incarcerated); *Puente v. United States*, 676 F.2d 141, 145 (5th Cir. 1982) ("[I]t is common practice in resentencing to take into consideration events and conduct occurring subsequent to the original sentence.") (citing *Pearce*) (internal quotation marks omitted); *United States v. Jones*, 489 F.3d 243, 252-53 (6th Cir. 2007) (district court may consider post-sentencing rehabilitation on remand); *United States v. Rudolph*, 190 F.3d 720, 723-27 (6th Cir. 1999) (same); *United States v. Butler*, 221 Fed. App'x 616, 617-18 (9th Cir. 2007) (same); *Green*, 152 F.3d at 1207 (same); *United States v. Jones*, 114 F.3d 896, 897 (9th Cir. 1997) (upholding consideration of evidence that did not exist at time of initial sentencing showing that defendant's financial situation had improved) (citing *Pearce*); *United States v. Roberts*, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999)1999 WL 13073, at **6-7 (district court may consider post-sentencing rehabilitation); *United States v. Rhodes*, 145 F.3d 1375, 1381 (D.C. Cir. 1998) (same); *id.* at 1377-78 (unless expressly directed otherwise, at resentencing district courts may consider "only such new arguments or new facts as are made newly relevant by the court of appeals' decision – whether by the reasoning or by the result," but a defendant is not held to have "waived an issue if he did not have reason to raise it at his original sentencing").

[474] Although it is true that § 1B1.10 can be read to mean that post-sentencing rehabilitation may support a court's decision to reduce a term of imprisonment, the Commission instructs judges to limit the reduction to the minimum of the amended guideline range or to a reduction comparable to any downward departure at the time of the original sentencing. *See* USSG §1B1.10 (b)(2)(A)-(B). As a result, post-sentencing rehabilitation cannot function as a basis for a sentence below the

In effect, the Commission has taken the position that post-sentencing conduct can be considered as an *aggravating* factor allowing for sentences above the applicable guideline range for those resentenced under § 1B1.10, but cannot operate as a *mitigating* factor allowing for sentences below the applicable guideline range for those "lucky" enough to be resentenced because their original sentence was illegal.

Judicial Decisions and Sentencing Data

After *Booker*, most circuit courts addressing the issue recognized that a district court is no longer categorically precluded by § 5K2.19 from considering a defendant's post-sentencing rehabilitation, and either require or permit consideration of post-sentencing rehabilitation. *See United States v. Hernandez*, 604 F.3d 48, 53-55 (2d Cir. 2010) (district court procedurally erred by failing to consider post-sentencing rehabilitation); *United States v. Jones*, 489 F.3d 243, 252-53 (6th Cir. 2007) (evidence of post-sentencing rehabilitation lends support to downward variance but district court gave it sufficient weight in sentencing at bottom of guideline range); *United States v. Arenas*, 340 Fed. App'x 384, 386 & n.2 (9th Cir. 2009) (district court permitted but not required to consider post-sentencing rehabilitation); *United States v. Lloyd*, 469 F.3d 319, 324-25 & n.5 (3d Cir. 2006) (stating that it "would not hold that a court never could consider a defendant's post-sentencing rehabilitation efforts when resentencing" following a limited *Booker* remand, but that post-sentence rehabilitative efforts should affect the sentence only in "an unusual case"; not addressing issue for purposes of an ordinary resentencing); *United States v. Aitoro*, 446 F.3d 246, 255 n.10 (1st Cir. 2006) (district court may consider post-sentencing rehabilitative efforts such as enrollment in employment classes on ordinary remand, though "skeptical" whether appropriate on limited *Booker* remand); *United States v. Scott*, 194 Fed. App'x 138, 140 (4th Cir. 2006) (affirming sentence imposed on *Booker* remand; noting that district court considered defendant's post-sentencing rehabilitation).

Only the Eighth and Eleventh Circuits persisted in holding that district courts are categorically precluded from considering post-sentencing rehabilitative efforts after *Booker*. The Eleventh Circuit held in 2006 that district courts are precluded from considering post-sentencing conduct under § 3553(a), *see United States v. Lorenzo*, 471 F.3d 1219 (11th Cir. 2006) (reversing variance based on post-sentencing rehabilitation in part because USSG §5K2.19 prohibits its consideration), though at least one later panel recognized that "there is a question as to whether *Lorenzo* continues to be good law in light of [*Booker*, *Rita*, *Kimbrough*, *Gall*, and *Spears*]," *see United States v. Smith*, No. 09-13307, 2010 WL 1048819 (11th Cir. Mar. 22, 2010).

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applicable amended guideline range under § 1B1.10. The Supreme Court recently held that the Commission has the power to bind judges' discretion through this policy statement for § 3582(c)(2) proceedings. *Dillon v. United States*, 130 S. Ct. 2683 (2010). In any event, the policies expressed in §1B1.10, p.s., which apply only to the Congressional "act of lenity" embodied in § 3582(c)(2), *id.* at 2692-93, have nothing to do with ordinary resentencing proceedings.

And the Eighth Circuit, clinging fast to the "lucky defendant" analysis in *Sims* (and its incorrect analysis of its own precedent, as discussed above), reiterated that "evidence of [a defendant]'s post-sentence rehabilitation is not relevant" under § 3553(a) and thus an "impermissible factor" warranting reversal if considered. *See United States v. Pepper*, 486 F.3d 408, 413 (8th Cir. 2007); *United States v. Jenners*, 473 F.3d 894, 899 (8th Cir. 2007); *United States v. McMannus*, 496 F.3d 846, 852 n.4 (8th Cir. 2007). Throughout several years of litigation, the court did not budge from this position, even on remand from the Supreme Court in light of *Gall*, *see United States v. Pepper*, 518 F.3d 949 (8th Cir. 2008); *United States v. Pepper*, 570 F.3d 958, 965 (8th Cir. 2009). Nor did the court mention the policy statement at § 5K2.19.

Meanwhile, in the Commission's survey of judges conducted in May 2010, 57% said that post-sentencing rehabilitative efforts are "ordinarily relevant" to the consideration of departure or variance, and only 6% said that they are "never relevant.[475]

Pepper v. United States. In August 2010, the Supreme Court granted *certiorari* in *Pepper* to decide whether the Eighth Circuit erred when it deemed post-sentencing rehabilitation an "impermissible factor" under § 3553(a). For the first time in the course of several years of litigation, including a previous remand by the Supreme Court in light of *Gall*, the government finally conceded that post-sentencing rehabilitation is a permissible ground for a downward variance under § 3553(a). As a result, the Court appointed a private lawyer as *amicus* to represent the judgment of the Eighth Circuit.

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court held that the Eighth Circuit could not categorically bar a district court from considering post-sentencing rehabilitation at resentencing after remand. The Court reasoned that such evidence may be "highly relevant to several of the § 3553(a) factors," such as the history and characteristics of the defendant as well as the need for deterrence, incapacitation, and to provide needed educational or vocational training or other correctional treatment. *Pepper*, 131 S. Ct. at 1242. And in Pepper's case, there was "no question" that his post-sentencing rehabilitation was relevant to his history and characteristics, shedding light on his likelihood of committing further crimes, suggesting a diminished need for treatment, and "bear[ing] directly on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing." *Id.* at 1242-43.

In response to the argument by *amicus* that USSG § 5K2.19 "should be given effect" as an exercise of the Commission's "core function," *id.* at 1247, the Court examined the Commission's rational for the policy statement and rejected it as "wholly unconvincing." First, regarding the Commission's view that departures based on post-sentencing rehabilitation would be "inconsistent" with BOP's system of awarding good-time credit, the Court said that "a sentencing reduction based on postsentencing rehabilitation can hardly be said to be 'inconsistent with the policies' underlying an

[475] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

award of good time credit [] because the two serve distinctly different penological interests." *Id.* at 1248. It noted that good-time credit does not affect the length of the sentence imposed and can be revoked at any time before the date of release from prison, while a sentence reduction based on post-sentencing rehabilitation "changes the very terms of imprisonment." *Id.* 1248 n.14. The Court also pointed out the obvious fact that the BOP has no authority to award good time credit to a defendant, like Mr. Pepper, whose rehabilitative efforts occurred after he had served his original sentence but whose case was remanded for resentencing after a successful government appeal. *See id.* at 1236, 1238.

The Court next rejected the Commission's view that considering post-sentencing rehabilitation would "inequitably benefit only those who gain the opportunity to be resentenced *de novo*." The Court explained that such "disparity arises not because of arbitrary or random sentencing practices, but because of the ordinary operation of appellate sentencing review." *Id.* at 1238. In short, "[a] district court may in appropriate cases impose a non-Guideline sentence based on a disagreement with the Commission's views. … That is particularly true where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted." *Id.* (citing *Kimbrough*, 552 U.S. at 101); *id.* at 1254-55 (Breyer, J., concurring) (agreeing that "[t]he Commission offers no convincing justification" for its policy statement).

Pepper thus expressly demonstrates not only how a particular mitigating factor may in fact be "highly" relevant to a number of § 3553(a) considerations, but also how a policy statement's rationale may be "wholly unconvincing" and thus particularly vulnerable to valid policy disagreements by district courts.

§ 5K2.20 Aberrant Behavior (Policy Statement)

Congress directed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C. § 994(j). As a result of the Commission's definition of "serious offense," as manifest through the structured assignment of offense levels and system of zones, it quickly became "clear that the Commission's decisions led to a far higher incarceration rate for non-violent first offenders than had been the pattern pre-Guidelines." *See United States v. Germosen*, 473 F. Supp. 2d 221, 227 (D. Mass. 2007); *see also* USSC, *Alternative Sentencing in the Federal Criminal Justice System* 12 (2009) (explaining that "sentencing zone ultimately determines whether offenders are sentenced to alternatives").

The Commission recognized that its definition of "serious offense" and the operation of the guidelines would preclude probation for some offenders whose conduct might not warrant imprisonment. In the Introduction to the Guidelines, the Commission acknowledged that it "has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures." *See* USSG ch. 1, pt. A(1),

intro. comment. § 4(d). Courts seized on this language to create a downward departure on the ground that the defendant's offense conduct represented "aberrant behavior." A circuit conflict soon emerged, with the majority of courts holding that a departure on this ground required a "spontaneous, thoughtless, single act involving lack of planning."[476]

Under the minority view, "single acts of aberrant conduct" could include multiple acts to be reviewed in the totality of the circumstances.[477] Under the minority view's test,, courts considered a number of factors with the overall goal being to determine whether "the conduct in question must truly be a short-lived departure from an otherwise law-abiding life": (1) degree of spontaneity; (2) amount of planning; (3) the singular nature of the criminal act; (4) the defendant's criminal record; (5) psychological disorders from which the defendant was suffering at the time of the offense; (6) extreme pressures under which the defendant was operating, including the pressure of losing his job; (7) letters from friends and family expressing shock at the defendant's behavior; (8) the defendant's motivations for committing the crime; (9) the level of pecuniary gain the defendant derives from the offense; (10) the defendant's charitable activities and prior good deeds; (11) his efforts to mitigate the effects of the crime; and (12) the defendant's employment history and economic support of his family.[478]

Initial Promulgation

In 2000, the Commission requested comment on whether "for purposes of downward departure from the guideline range a 'single act of aberrant behavior' (Chapter 1, Part A, § 4(d)) includes multiple acts occurring over a period of time." The Commission explained that it was "interested in exploring an alternative approach to the majority and minority views" and asked for comment regarding what guidance it should give the court, should it adopt a departure provision in Chapter 5. It asked, for example, if "such a departure [should] be precluded for a defendant convicted of certain offenses, such as crimes of violence," citing 28 U.S.C. 994(j). 65 Fed. Reg. 7080, 7090 (Feb. 11, 2000).

At a hearing held on March 23, 2000, the Commission discussed various options put forth regarding departures for aberrant behavior and whether the Commission should preclude such departures for those convicted of a crime of violence or serious drug

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[476] *See United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994); *see also United States v. Glick*, 946 F.2d 335 (4th Cir. 1991); *United States v. Williams*, 974 F.2d 25 (5th Cir. 1992); *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991); *United States v. Withrow*, 85 F.3d 527 (11th Cir. 1996); *United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996).

[477] *See United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *Zecevic v. U.S. Parole Comm'n*, 163 F.3d 731 (2d Cir. 1998); *United States v. Takai*, 941 F.2d 738 (9th Cir. 1991); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991).

[478] *Zecevic*, 163 F.3d at 734-35.

trafficking offense, or with at least one criminal history point. The defender representatives urged the Commission to adopt a totality of the circumstances test, to trust judges to exercise guided discretion and not to preclude the departure based on certain classes of offenses or prior criminal history.[479] They pointed out that a person could have committed a "crime of violence" through an unarmed bank robbery by handwritten note, or a drug trafficking offense as a mule.[480] They pointed out that a defendant could have criminal history points based on state convictions for driving on a suspended license several years earlier, and argued that a criminal history of that nature should not categorically preclude a downward departure for aberrant behavior. They recounted the story of a defendant convicted of illegal reentry who had returned in order to donate an organ to a dying relative. Finally, they proposed a new option, which listed several factors for the court to consider in weighing the totality of the circumstances, drawn largely from *Zecevic v. United States Parole Comm'n*, 163 F.3d 731 (2d Cir. 1998).[481]

The Department of Justice, on the other hand, urged "tight control" over any such departures, favoring the "single, spontaneous, thoughtless act" test.[482] However, the representative who testified at the hearing stated that he did not believe the Department was taking the position that violent crimes should be categorically precluded from departures based on aberrant behavior. In fact, he and at least two Commissioners agreed that some crimes of violence, such as manslaughter, might be the most obvious examples

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[479] Transcript of Public Hearing before the U.S. Sentencing Comm'n (Mar. 23, 2000) (testimony of Jon Sands and A.J. Kramer), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20000323/0323hringtranscript.pdf (unpaginated).

[480] *Id.*

[481] *Id.*; s*ee also* Letter from Jon Sands to Hon. Diana E. Murphy, Chair (Mar. 10, 2000), reprinted at 12 Fed. Sent. Rep. 140 (Nov./Dec. 1999), proposing the following language:

> § 5K2.13. Aberrant Behavior (Policy Statement)
>
> a) The court may sentence below the applicable guideline range if the facts and circumstances of the case indicate that the defendant's offense was aberrant behavior. In determining whether the defendant's offense was aberrant behavior, the court shall consider the nature and circumstances of the offense and the history and characteristics of the defendant. The factors that the court may consider in making that determination include (1) the singular nature of the offense; (2) the degree of spontaneity and amount of planning that went into the offense; (3) the defendant's criminal record; (4) the defendant's employment history and activities in the community; (5) whether the defendant suffered from a psychological disorder at the time of the offense, and the nature and extent of any such disorder; (6) the pressures under which the defendant was operating; (7) the defendant's motivation for committing the offense; (8) the opinion of family, friends, and others who know the defendant concerning the defendant's behavior; and (9) the defendant's efforts to mitigate the effects of the offense.

[482] *Id.* (testimony of Charles Tetzlaff)

of a crime of violence that exemplify aberrant conduct.[483] The Department's position coincided with the position of the Criminal Law Committee of the Judicial Conference on both points, which "unanimously suggest[ed] that there is no inconsistency in a defendant engaging in aberrant conduct that involves violence."[484]

Perhaps even more interesting, the Criminal Law Committee urged the Commission to adopt the more narrow, "single, spontaneous, thoughtless act" test at a time when the Committee was chaired by Judge Wilkins of the Fourth Circuit. Judge Wilkins was the chair of the Sentencing Commission at its inception, and was still the chair in 1991 when he wrote the opinion for the Fourth Circuit in *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991). There, the defendant moved to recuse Judge Wilkins on the ground that he was chair of the Sentencing Commission, but his motion was denied. *Id.* The court, led by Judge Wilkins, reversed the district court's decision to grant a downward departure for aberrant conduct. *Id.* at 338. Nine years later its decision in *Glick* was featured in the analysis of the Criminal Law Committee in its letter to the Commission regarding aberrant conduct.[485]

In the end, the Commission promulgated a new policy statement at § 5K2.20 allowing departures based on aberrant behavior "in an extraordinary case," based on a "compromise" definition of "aberrant behavior" and including various restrictions and conditions. As originally promulgated, the policy statement read as follows:

> A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

USSG, App. C, Amend. 603 (Nov. 1, 2000); USSG § 5K2.20 (2000).

In an application note, the Commission defined "aberrant behavior" as "a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation

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[483] *Id.*

[484] *See* Letter from William W. Wilkins, Jr., Chair of the Criminal Law Committee of the Judicial Conference to Hon. Diana E. Murphy re: Proposed Amendments to the Guidelines (Mar. 10. 2000), *reprinted at* 12 Fed. Sent'g Rep. 144 (Nov./Dec. 1999).

[485] *Id.*

by the defendant from an otherwise law-abiding life." USSG § 5K2.20 comment. (n.1) (2000). A "serious drug trafficking offenses" was limited to those offenses under title 21, (other than simple possession) that result in the imposition of a mandatory minimum sentence because the defendant does not meet the safety valve criteria under § 5C1.2. For example, a defendant whose guideline range was below the statutory mandatory minimum but was determined to be an organizer or leader could not benefit from the safety valve provision and would receive the mandatory minimum, and would also be ineligible for a downward departure under new § 5K2.20.

In another application note, the Commission listed several factors that the court may consider in determining whether to depart downward based on aberrant conduct: the defendant's mental and emotional conditions, employment record, record of prior good works, motivation for committing the offense, and efforts to mitigate the effects of the offense. *Id.* comment. (n.2) (2000).

The Commission explained that rather than adopt either test used by the courts, it adopted a definition of "aberrant behavior" that is "more flexible" than the "single, spontaneous, thoughtless act" test. *See* USSG, App. C, Amend. 603 (Nov. 1, 2000) (Reason for Amendment). It rejected the "totality of the circumstances" test, concluding that it was "overly broad and vague." *Id.* Instead, it adopted a test that "slightly relaxed" the "single act rule in some respects" while providing "guidance and limitations." *Id.* As explained by the Commission, the terms "'single criminal occurrence' and 'single criminal transaction' will be somewhat broader than 'single act,'" but that this expansion would in turn be limited to offenses that were committed without significant planning, of limited duration, and that represent a marked deviation by the defendant from an otherwise law-abiding life. The Commission acknowledged that these three characteristics functioned as categorical limitations because they "must, at a minimum" be present before a court can depart for aberrant behavior, but explained that it "chose these characteristics after reviewing case law and public comment that indicated some support for the appropriateness of these factors." The Commission did not point to any public comment in particular, nor did it point to any empirical evidence regarding risk of recidivism for those defendants categorically excluded or included, or any other concept tied to the purposes of sentencing.

Although § 5K2.20 was intended to ease somewhat the majority of courts' emphasis on a single *act*, with these three prerequisites, the Commission chose a test that did not much differ as a practical matter from the "single spontaneous act" test, except that it even more clearly restricted the availability of the departure and it now applied in every circuit.

For example, as stated by the Seventh Circuit, the "single spontaneous act test" required an "abnormal or exceptional" deviation from an otherwise law-abiding life, without "substantial planning," and not spread out over an extended period of time in a "continued reflective process." *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990). Similarly, the Commission's test required that the offense "(A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked

deviation by the defendant from an otherwise law-abiding life," USSG § 5K2.20 comment. (n.1) (2000). Thus, it is hardly surprising that courts have interpreted these prerequisites in much the same manner as they did before the amendment.[486] Some courts even continue to cite and rely on the "spontaneous and thoughtless act" test to conclude that a defendant did not meet § 5K2.20's threshold.[487] And despite its obligation under 28 U.S.C. § 994(o) periodically to review and revise the guidelines in light of the work of the courts, *see Braxton v. United States*, 500 U.S. 344, 348 (1991), the Commission has not acted to correct these courts' continued reliance on a standard it chose not to adopt.

The Commission also "place[d] significant restrictions on the type of offense and the criminal history of the offender that can be considered for this type of departure." First, the Commission prohibited a downward departure for aberrant behavior if the offense "involved serious bodily injury or death" or the defendant "discharged a firearm or otherwise used a firearm or a dangerous weapon." The Commission explained that these restrictions "reflect a Commission concern that certain offense conduct is so serious that a departure premised on a finding of aberrant behavior should not be available to those offenders who engage in such conduct." USSG, App. C, Amend. 604 (Nov. 1, 2000) (Reason for Amendment). Yet even the representative of the Department of Justice

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[486] *See, e.g.*, *United States v. Boeka*, No. 8:06-CR-115, 2006 WL 3780400 (D. Neb. Dec. 20, 2006) ("Although [the defendant's offense was clearly a single act that was a marked deviation from an otherwise law-abiding life, [he] has not satisfied the requirement that the offense was committed 'without significant planning.' The evidence shows that the defendant planned the event for at least a day and took several affirmative steps in pursuit of the scheme."); *United States v. Castellanos*, 355 F.3d 56, 60 (2d Cir. 2003) (holding that "[s]pontaneity is not determinative, but it is a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of section [5K2.20] has been met," and affirming the district court's determination that a defendant who qualified for the safety valve but had been given "a week's notice" to consider whether she would participate in the drug transaction and then lied on the stand at trial about the duration of her involvement did not qualify for the reduction); *United States v. Locke*, No. 03-CR-198-1, 2003 WL 22287352, at **9-10 (N.D. Ill. Oct. 1, 2003) (concluding that even if the "spontaneous act" test had been abrogated by § 5K2.20 (which it doubted), the requirement that the crime not involve significant planning precluded a downward departure in a bank fraud case involving a single transfer of money from the bank to a coworkers bank account); *see also, e.g.*, *United States v. Groos*, No. 06-CR-420, 2008 WL 5387852 (N.D. Ill. Dec. 16, 2008) (relying on the Seventh Circuit's pre-amendment test, as stated in *United States v. Bradley*, 196 F.3d 762, 771 (7th Cir. 1999) (requiring conduct to "be something in the nature of a spontaneous, sudden, or unplanned act"), and *United States v. Carey*, 895 F.2d 318, 325 (7th Cir. 1990)).

[487] *See, e.g.*, *United States v. Hillyer*, 457 F.3d 347, 352 (4th Cir. 2006) (citing a pre-amendment Fourth Circuit case for the proposition that "[a] single occurrence or transaction of aberrant behavior suggests a 'spontaneous and seemingly thoughtless act[ion]'" and reversing the district court's downward departure based on "aberrant behavior" because the defendant could not satisfy that threshold test); *United States v. Bueno*, 443 F.3d 1017, 1023 (8th Cir. 2006) (citing a pre-amendment Eighth Circuit case to hold that "[t]he offense must have been more than something out of the defendant's character; it must have been a spontaneous and thoughtless act").

recognized that an offense resulting in death, such as manslaughter, could represent an archetypical case of aberrant behavior.

The Commission also precluded the departure for any defendant with more than one criminal history point, regardless of the nature of the prior conviction, and for any defendant with a prior federal or state "felony conviction," even if it was not counted under Chapter Four. As a result, the departure would be categorically unavailable for persons whose prior convictions were for minor offenses, such as driving on a suspended license or careless driving, as well as for a defendant convicted of a state misdemeanor punishable by over one year (but for which he received no jail time) and committed twenty years earlier. The Commission explained that these restrictions "reflect a Commission view that defendants with significant prior criminal records should not qualify for a departure premised on the aberrant nature of their current conduct." *Id.* The Commission did not otherwise explain or offer empirical evidence to support its "view" that every criminal history involving more than one point, and every offense punishable by more than one year, no matter how minor, unrelated, or remote, is always so "significant" that no later conduct can ever be deemed "aberrant."

Finally, the Commission included in commentary several factors for courts to consider in determining whether the court should depart on the basis of aberrant conduct: (A) mental and physical conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense, and (E) efforts to mitigate the effects of the offense." The Commission explained that it "recognize[d] that a number of other factors may have some relevance in evaluating the appropriateness of a departure based on aberrant conduct" and that it included "some of the relevant factors identified in the case law and public comment." As constructed, however, the policy statement relegated these factors to an application note, to be considered in the court's discretion only after the prerequisites are met. In addition, the Commission left out several other factors, both considered by courts and suggested in public comment, without giving any reason for choosing those that it did.

The PROTECT Act Amendments

In 2003, as part of the PROTECT Act, Congress directly amended § 5K2.20 to exclude defendants convicted of offenses involving minors and sex offenses, but otherwise left the policy statement unchanged. *See* Pub. L. No. 108-21, § 401(b)(3); USSG, App. C, Amend. 649 (Apr. 30, 2003). At the same time, however, Congress instructed the Commission to amend the guidelines to substantially reduce the number of departures in general. Pub. L. No. 108-21, § 401(m). In response to congressional pressure, the Commission further amended § 5K2.20, four days before its effective date, to emphasize the restrictions already in place and to add new restrictions, none of which was required or even suggested by Congress, and none of which was published for public comment.[488]

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[488] The Commission relied on the "good cause" exception to the notice and comment requirement under 5 U.S.C. § 553(b) & (d)(3), incorporated by reference in 28 U.S.C. § 994(x) and governing the Commission's amendment process. The Commission found "good cause" to dispense with

First, the Commission moved the restrictions contained in the definition of "aberrant conduct" from commentary to the guideline itself, now styled as a set of "requirements" and intended to give greater prominence to their strict nature. *See* USSG, App. C, Amend. 651 (Oct. 27, 2003) (Reason for Amendment); USSG § 5K2.20(b) (2003). Second, the Commission expanded the definition of "drug trafficking offense" in order to "expand[] the class of drug trafficking defendants prohibited from consideration for a departure." Under the new definition, a "serious drug trafficking offense" means "any controlled substance offense under title 21, United States Code, other than simply possession under 21 U.S.C. § 844), that provides a mandatory minimum term of imprisonment of five years or greater, regardless of whether the defendant meets the [safety valve] criteria of § 5C1.2." *Ibid.* The Commission gave no reason for this change.[489]

In addition, the Commission eliminated the need for a prior conviction to preclude a departure, so that a defendant with merely "any other significant prior criminal *behavior*, regardless of whether the conviction or significant prior criminal *behavior* is countable under Chapter Four" is prohibited from receiving a downward departure based on aberrant conduct. *Ibid.* (emphasis added). The Commission provided no reason, empirical information, or policy basis for this change.

The Commission also provided a new application note to "guide" courts. That guidance provides categorically that "repetitious or significant, planned behavior does not meet the requirements of subsection (b)." As an example, the Commission states that "a fraud scheme generally would not meet such requirements because such a scheme usually involves repetitive acts, rather than a single occurrence or single criminal transaction, and significant planning." *Ibid.* The Commission provided no empirical support for this assertion.

The reasons the Commission gave for these amendments and all of the amendments in Amendment 651 were general: to "continue [its] work in the area of departures" and to "implement" Congress's directive in the PROTECT Act instructing it to reduce the incidence of departures. But even the Commission recognized that one way to achieve that goal would be to adjust the guidelines themselves in order to take into account the factors that trigger downward departures, which would in turn have the effect of making a departure unnecessary to achieve the goals of sentencing. In fact, in July

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notice and comment because "the extensive nature of these amendments, and limited Commission resources made it impracticable to publish the amendments in the Federal Register within the otherwise applicable 30-day period." *See* 68 Fed. Reg. 60,154, 60,154 (Oct. 21, 2003).

[489] *See United States v. Germosen*, 473 F. Supp. 2d 221, 223 (D. Mass. 2007) ("Nothing in the Guideline text, the application notes, or the commentary, indicated why this group was excluded or even how the exclusion was related to the statutory purposes of sentencing.").

2003, the Commission requested comment on whether it should follow this path.[490] Of course, this approach would have required the Commission to examine frequent grounds for departure and their incidence relative to certain offenses and to amend individual guidelines to better account for recurring mitigating circumstances. Instead, it adopted a slash-and-burn approach, eliminating and restricting departures without providing any reasons, as it did with § 5K2.20.

Yet, even this approach did not satisfy the Department of Justice, which continued to pressure the Commission to eliminate *entirely* all departures based on aberrant behavior. At its public meeting on October 8, 2003, the Department's *ex officio* Eric H. Jaso criticized the Commission at length regarding its PROTECT Act amendments. In particular, he criticized the Commission's decision to codify an aberrant behavior departure in Chapter 5 as "questionable at best." He further reminded the Commission that the initial version of the PROTECT Act would have eliminated aberrant behavior departures (along with others), and that the authority Congress ultimately delegated to the Commission to reduce the number of departures was the result of a compromise. In the Department's view, "the Commission had failed to comply with Congress's directive."

In the very next amendment cycle, the Commission requested comment "whether the departure provision in § 5K2.20 (Aberrant Behavior) should be eliminated (and departures based on characteristics described in § 5K2.20 should be prohibited) and whether those characteristics instead should be incorporated into the computation of criminal history points under § 4A1.1 (Criminal History Category)." *See* 68 Fed. Reg. 75,340, 75,377 (Dec. 30, 2003). The Commission further asked whether there are "circumstances or characteristics, currently forming the basis for a departure under § 5K2.20, that should be treated within § 4A1.1 instead, particularly for first offenders." 68 Fed. Reg. 75,340, 75,377 (Dec. 30, 2003). No action was taken.

Sentencing Data

The Commission has suggested that its policy statement addressing aberrant conduct implements, at least in part, the directive at 28 U.S.C. § 994(j) regarding first offenders. *See* USSG Ch. 1, Pt. A(1), intro. comment. § 4(d). Although the rate of below-guideline sentences based on aberrant conduct is relatively high compared to all the reasons given for downward departure, it is far lower than the rate federal offenders who fall in Criminal History Category I, which includes those with zero or criminal history points and those who had never even been previously arrested. For example, in 2000, when the Commission enacted its "compromise" policy statement in § 5K2.20, courts cited as a reason for downward departure that the "offense conduct was an isolated

[490] *See* 68 Fed. R. 39,173, 39,175 (July 1, 2003) ("Should the Commission provide for a downward adjustment (or, in the case of criminal history, a reduction in criminal history points) in lieu of a downward departure for any factor or downward departure basis, or for a combination of factors and/or downward departures bases, described in paragraphs (1) through (4) above, or for any other mitigating factors the Commission should more fully take into account in the guidelines?").

incident" in 818 cases in which a downward departure was granted, representing 9.2% of those cases. In that same year, there were 59,846 federal defendants sentenced, which means that in only 1.4 % of all cases, courts found that the defendant's aberrant conduct warranted a departure. Yet, 43.3% of defendants had zero criminal history points, a substantial proportion of whom likely had never even been previously arrested. USSC, *2000 Federal Sentencing Statistics*, tbl. 20 (2000); *see also* USSC, *Recidivism and the First Offender*, at 5 (May 2004) (showing that roughly 40% of citizen offenders sentenced in fiscal year 1992 had zero criminal history points and just under 30% had never been previously arrested).

In fiscal year 2007, well after *Booker* was decided and when courts were no longer bound by the limitations and exclusions contained in §5K2.20, aberrant behavior was cited in only 162 cases, or 2.1% of cases in which a sentence below the guideline range was imposed. *See 2007 Sourcebook* at tbls. 25, 25A, & 25B. In contrast, 38.8% of all offenders sentenced received zero criminal history points. Similarly, in fiscal year 2008, courts cited aberrant behavior in 224 cases, or 2.5% of cases in which they imposed a below-guideline sentence. *2008 Sourcebook* at tbls. 25, 25A, & 25B. Although courts cited 18 U.S.C. § 3553(a) in the majority of cases (85), it appears that the restrictions on aberrant conduct continue to influence courts in refusing to consider aberrant conduct. In the same year, 38.7% of all offenders received zero criminal history points.

And in fiscal year 2010, courts cited aberrant behavior in only 236 cases, or 1.7% of cases in which a below guideline sentence was imposed. *2010 Sourcebook*, tbls. 25, 25A, & 25B. In the same year, 35.4% of all defendants received zero criminal history points. *Id.* tbl. 20.

In the Commission's recent survey of judges, 74% said that aberrant behavior is "ordinarily relevant" to the consideration of departure or variance.[491]

Judicial Decisions

Although aberrant behavior "is relevant to both culpability and likelihood of recidivism,"[492] the Commission has systematically restricted its relevance at sentencing, both on its own and in response to congressional pressure. Because the Commission has never demonstrated an empirical relationship between the limits and exclusions in § 5K2.20 and the purposes of sentencing under 18 U.S.C. § 3553, there is no basis for courts to assume that § 5K2.20 reflects sound policy as applied in any given case.

In 2007, Judge Nancy Gertner was faced with a defendant convicted of a drug trafficking offense with a five-year mandatory minimum, an offense that categorically excluded him from benefiting from § 5K2.20 despite the clearly aberrant nature of his

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[491] USSC, *2010 Survey of Judges*, *supra* note 1, at tbl. 13.

[492] Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 Am. Crim. L. Rev. 19, 85 (2003).

conduct. Relying on her authority under *Booker*, Judge Gertner engaged in a critical analysis of § 5K2.20, examining the underlying congressional concerns animating the policy, its legislative history, and various studies regarding recidivism and the first offender, including studies by the Commission itself. *See United States v. Germosen*, 473 F. Supp. 2d 221, 224, 227-30 (D. Mass. 2007).[493] She noted that, in adopting this policy statement, the Commission

> did not study the relationship between the varying court definitions of aberrant behavior and the statutory purposes of sentencing, *e.g.* the kinds of offenders to whom the judicially created departures would apply and their recidivism rates. It did not evaluate alternatives to incarceration for non-violent first offenders. In fact, one searches in vain for much legislative history of the aberrant behavior Guideline at all, let alone any mention of the purposes of sentencing in the application notes.

Id. at 228. Finding that "[n]owhere in the Guidelines is there any indication of why this exclusion makes sense, or comports with the purposes of sentencing," she decided not to follow it, crafting a sentence that "reflects the policies of the sentencing reform act far better than the exclusionary language of § 5K2.20." *Id.* at 230.

However, most courts will not engage in a *sua sponte* examination of this policy statement. As with every other guideline or policy statement, defense counsel must challenge the lack of empirical evidence or other policy basis underlying the restrictions in § 5K2.20 to avoid summary rejection of a request to ignore them and grant a variance under *Booker*. *See, e.g.*, *United States v. Guerrero-Marquez*, No. CR 07-1050, 2007 WL 5685113 (D.N.M. Dec. 13, 2007) (in a case involving a conviction for drug trafficking, rejecting unsupported request for a sentence below the guideline range based on aberrant behavior where § 5K2.20 does not allow a departure); *United States v. Maisonet*, 493 F. Supp. 2d 255, 265 (D.P.R. 2007) (Gertner, J.) ("I cannot exercise my discretion unless I have the evidence to do so. Put otherwise, I am Guidelines-bound, for the most part, when the advocates (and to a lesser degree, Probation) are Guidelines-bound. While I have independent obligations to enforce a just sentence, in the final analysis, this is an adversary system.").

In a second degree murder case, the Tenth Circuit affirmed a below-guideline sentence based in part on the "aberrational nature of the offense." *United States v. Tom*, 327 Fed. App'x 93, 97 (10th Cir. 2009) (citing U.S.C. § 3553(a)(1) & (a)(2)(C)). The court rejected the government's argument that the district court's reliance on this factor

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[493] *See* Michael Edmund O'Neill, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. Rev. 291 (2001) (showing a difference in the recidivism rates of real first offenders as compared to other defendants in Criminal History Category I); USSC, *Salient Factor Score*, *supra* note 157, at 15 (showing that minimal or no prior involvement with the criminal justice system is a powerful predictor of a reduced likelihood of recidivism); USSC, *First Offender*, *supra* note 157 ((first offenders are more likely to be involved in less dangerous offenses, and more likely to be employed and to have dependants).

(and some others) constituted reversible error because it is "in tension with certain policy statements discouraging departures, and that these policy statements should have been considered under § 3553(a)(5)." *Id.* As the court stated, "[t]he simple answer to this contention is that the general policy statements apply to departures, but the district court has a freer hand when it comes to variances and may consider these factors as part of the nature and circumstances of the offense and the history and characteristics of the defendant in fashioning a reasonable sentence consistent with the overall objectives of § 3553(a)." *Id.* at 97-98.

For more judicial decisions, *see* David Hemingway & Janet Hinton, *Departures and Variances* 32-34 (Sept. 2009), *available at* http://www.fd.org/pdf_lib/Departuresand Variances2apt.jgh.pdf.

§ 5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses

As part of the PROTECT Act, Congress directly added a new policy statement at § 5K2.22 addressing certain offender characteristics for defendants convicted § 1201 involving a minor (kidnapping), and any offense under § 1591 (sex trafficking of children or by force, fraud or coercion), or chapters 71 (obscenity), 109A (sexual abuse), 110 (sexual exploitation and other abuse of children) or 117 (transportation for illegal sexual activity) of title 18. For these offenses, courts are authorized to consider age as a reason to impose a sentence below the applicable guideline range "only if and to the extent permitted by §5H1.1" and for extraordinary physical impairment "only if and to the extent permitted by §5H1.4." Pub. L. No. 108-21, § 401(b)(2), 117 Stat. 650 (2003); USSG, App. C., Amend. 649 (Apr. 30, 2003). Also for these offenses, "[d]rug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines." *Id.*

In 2004, the Commission amended § 5K2.22 to replace its references to sentences "below the applicable guideline range" with departure terminology. USSG, App. C, Amend. 674 (Nov. 1, 2004). As a result, the policy statement by its terms does not apply to determinations regarding the appropriate sentencing under § 3553(a). Courts must fully consider all mitigating characteristics under § 3553(a)(1).

§ 5K2.23 Discharged Terms of Imprisonment

Background

The Sentencing Reform Act grants district courts the discretion to order that a sentence run concurrently or consecutively to an undischarged term of imprisonment. *See* 18 U.S.C. § 3584(a). That discretion is in turn guided by the factors set forth in 18 U.S.C. § 3553(a), which includes consideration of the guidelines. *See id.* § 3584(b); *id.* § 3553(a)(4)(A), (5). Congress directed the Commission to include, as part of the guidelines, a "determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively." 28 U.S.C. § 994(a)(1)(D). In response

to this directive, the Commission promulgated USSG § 5G1.3 to guide a district court in determining whether a sentence should run concurrently or consecutively to an undischarged term of imprisonment. Because the terms of § 5G1.3 directly impact the availability of a downward departure for *discharged* terms of imprisonment, they are briefly recounted here.

Before 2003, USSG § 5G1.3(b) mandated that an undischarged term of imprisonment that resulted from "offense(s) that have been fully taken into account in the determination of the offense level for the instant offense" is to be served concurrently with the sentence for the instant offense. USSG § 5G1.3(b) (2002). In an application note, the Commission elaborated that sentences imposed under § 5G1.3(b) are to be adjusted downward to fairly account for periods of imprisonment already served for conduct "taken into account in determining the guideline range for the instant offense if the court determines that period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons." *Id.* comment. (n.2) (2002). In another application note, the Commission suggested that in those cases in which subsection (b) would have applied except that the other term of imprisonment had already been discharged, "a downward departure is not prohibited" and "any departure should be fashioned to achieve a reasonable punishment for the instant offense." *Id.* comment. (n.7) (2002). As stated by the Supreme Court in 1995, the purpose of § 5G1.3(b) is to "mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Witte v. United States*, 515 U.S. 389, 405 (1995).

The Commission did not define "fully taken into account." In interpreting the phrase, courts recognized that the purpose of § 5G1.3(b) "is to prevent [] double-counting, thereby ensuring that 'punishments approximate the total penalty that would have been imposed had the sentences for the different offenses been imposed at the same time (*i.e.*, had all of the offenses been prosecuted in a single proceeding).'" *United States v. Garcia-Hernandez*, 237 F.3d 105, 109 (2d Cir. 2000) (quoting *Witte v. United States*, 515 U.S. 389, 404-05 (1995)). With this in mind, and having to grapple with the little guidance offered by the Commission, several courts treated a prior offense as "'fully taken into account' if and only if the Guidelines provide for sentencing as if both the offense of conviction and the separate offense had been prosecuted in a single proceeding." *Id.* at 109 (internal quotation and alteration omitted). Under this approach, only a separate offense operating to increase the applicable offense level as relevant conduct to the offense of conviction was considered "fully taken into account," whereas a separate offense operating to affect the offense level under the career offender provision in USSG § 4B1.1 or for possession of firearms after a prior conviction in USSG § 2K2.1 was not considered "fully taken into account." *See id.* at 110 (collecting cases). Applying this concept, the Second Circuit in *United States v. Garcia Hernandez* held that an undischarged sentence operating to increase the offense level for illegal reentry under USSG § 2L1.2 would not be "fully taken into account." *Id.*

Other courts took a broader approach, also in light of the purpose of § 5G1.3(b) as described by the Supreme Court in *Witte*. For example, in *United States v. Caraballo*, 200 F.3d 20, 27 (1st Cir. 1999), the First Circuit stated that not only was § 5G1.3(b)

triggered by a prior offense that actually increased the defendant's offense level as relevant conduct, but that it was also triggered when the prior offense conduct "impacted (or could have impacted) the defendant's offense level or criminal history category." *Id.*

And in *United States v. Fuentes*, 107 F.3d 1515 (11th Cir. 1997), the Eleventh Circuit held that so long as a prior offense satisfied the test as relevant conduct under § 1B1.3 as part of the same course of conduct, common scheme or plan, it did not matter that the government manipulated the calculation of relevant conduct in the PSR (by deliberately not including the conduct subject to state prosecutions) in an effort to avoid triggering § 5G1.3(b). There, the government argued that because the relevant state conduct was not part of the guideline calculation, it was not "fully taken into account" and § 5G1.3's mandate for concurrent sentences did not apply. The court disagreed, concluding that the "'fully taken into account' requirement of section 5G1.3(b) is satisfied when the undischarged term resulted from an offense that section 1B1.3 requires to be included as relevant conduct, regardless of whether the sentencing court actually took that conduct into account." *Id.* at 1522. In an extensive discussion, the court reasoned that "such manipulation by the Government [is] contrary to both the letter and spirit of the guidelines," which "were written to prevent the Government from manipulating indictments and prosecutions to increase artificially a defendant's sentence or sentences for the same criminal conduct." *Id.* at 1523. The court pointed to the Commission's acknowledgment that it "'has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation.'" *Id.* (quoting USSG, Ch. 1, Pt. A, intro. comment. § 4(a)).

Initial Promulgation

In 2003, the Commission amended § 5G1.3(b) to clarify that it applies "only to prior offenses that are relevant conduct to the instant offense of conviction and that resulted in an increase in the offense level for the instant offense." USSG, App. C, Amend. 660 (Nov. 1, 2003). The Commission explained that the amendment "addresses conflicting litigation regarding the meaning of 'fully taken into account,'" citing *Garcia-Hernandez* and *Fuentes* as examples. The Commission did not mention the purpose of the provision or what the Supreme Court had to say about it, set forth any policy reason or analysis for the new rule, or explain how this rule is tied the purposes of sentencing under the Sentencing Reform Act. Thus, without any reason, the Commission chose the narrowest interpretation and the one allows the government to manipulate the outcome and artificially increase sentences in a manner that at least one court saw as contrary to the understood purpose of § 5G1.3(b).

To bring it full circle, the restrictive language of the amended § 5G1.3(b) also controls the availability of a departure for a *discharged* term of imprisonment. In 2003, the Commission added a new policy statement at § 5K2.23 regarding the effect of discharged terms of imprisonment. New § 5K2.23 provided that the court was allowed to impose a sentence "below the applicable guideline range" if the defendant had already served a term of imprisonment when § 5G1.3 would have required concurrent sentences had the completed term of imprisonment been undischarged. *See United States v. Parker*,

512 F.3d 1037, 1040 (8th Cir. 2008) (recognizing that the terms of § 5G1.3 restricting a departure for an undischarged term of imprisonment also restrict a departures for a discharged term of imprisonment).

Amendment

In 2004, the Commission amended the provision to use the phrase "downward departure" rather than "sentence below applicable guideline range." USSG, App. C, Amend. 674 (Nov. 1, 2004). This amendment was meant to conform the language to that of the departure amendments made in furtherance of the PROTECT Act. *See id.* (Reason for Amendment). As a result, § 5K2.23 *by its terms* does not apply in determining whether to sentence outside the guideline range in any manner not designated as a "departure." In sum, § 5K2.23 is merely advisory with respect to departures, and does not apply at all to the court's consideration of a variance based on age. Put another way, § 3553(a)(1) requires the sentencing court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant," and the statute trumps any guideline or policy statement to the contrary. *See Stinson v. United States*, 508 U.S. 36, 38, 44, 45 (1993); *United States v. LaBonte*, 520 U.S. 751, 757 (1997). In *Gall*, the Court made no mention of the Commission's policy statements regarding departure, although it upheld a probationary sentence based on factors that are prohibited or deemed not ordinarily relevant by such policy statements.

Judicial Decisions and Sentencing Data

In fiscal year 2010, discharged terms of imprisonment were cited as a reason for granting a downward departure in 23 cases. *See 2010 Sourcebook*, tbl. 25. In contrast, available Commission data seem to suggest that courts are not turning to 18 U.S.C. § 3553(a) to avoid the restrictions of § 5K2.23, as a discharged term of imprisonment was not cited as a reason in fiscal year 2010 as grounds for a *variance*. *See id.* tbls. 25A & 25B.[494]

In any event, courts will stick closely to the departure analysis so long as defense counsel relies solely on § 5K2.23. Yet, as with other restrictions and prohibitions in Chapter 5, because the policy statement only applies to departures, it does not control the question whether a sentence below the guideline might be warranted under § 3553(a). *See United States v. Jones*, 445 F.3d 865, 869 & n.5 (6th Cir. 2006) (recognizing that the policy underlying § 5K2.23 "would also be pertinent under § 3553(a)(2)(A) (requiring the court to consider the need for the sentence imposed to provide just punishment for the

[494] This data should be viewed with some caution, however. Table 25B, which sets forth the reasons given for sentencing below the guidelines under § 3553(a), includes an "Other" category, comprised of 2,383 unlisted reasons, which represent 5.9% of the total number of reasons given. *Id.* tbl. 25B. In this category is placed any reason that was cited "fewer than 100 times among relevant cases." *Id.* n.1. In other words, courts *could have* cited discharged terms of imprisonment as a reason for sentencing below the guideline (and despite the restrictions in 5K2.23) in 99 cases, which would be more than the number of times a departure was granted.

offense) and (2)(B) (requiring the court to consider the need for the sentence imposed to afford adequate deterrence to criminal conduct)"); *id.* at 873 (Moore, J., dissenting) ("[E]ven if USSG § 5K2.23 was not applicable, Jones's already-served prison time for the same conduct should have been considered, as the majority acknowledges, as part of the assessment of other § 3553(a) factors, including the need for the sentence to impose a "just punishment," 18 U.S.C. § 3553(a)(2)(A), and the need for the sentence to provide "adequate deterrence to criminal conduct," id. § 3553(a)(2)(B)").

Given the history of this policy statement, a structural challenge to the restrictions promulgated in 2003 may prove even more fruitful, especially in those circuits whose broad reading of the earlier language had been overruled by the amendment.