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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Attention: Public Affairs – Priorities Comment

Re: Public Comment on Notice of Proposed Priorities for Amendment Cycle Ending May 1, 2010 – Proposed Priority # 7 (Review of Departures)

Dear Judge Saris:

On behalf of the Federal Public and Community Defenders, and pursuant to 28 U.S.C. § 994(o), we offer the following comments on the Commission's Proposed Priority # 7 for the 2012 amendment cycle.

I. Proposed Priority #7: Review of Departures

The Commission states as a priority continuing its review of departures within the guidelines, including Parts H and K of Chapter 5, and the extent to which statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure.

A. If the Commission wants judges to use departures, it should invite them.

District court and appellate judges have long reported that restrictions on mitigating offender characteristics are a primary failing of the guidelines.[1] Countless witnesses advised the Commission at its regional hearings in 2009 and 2010 that mitigating offender characteristics are

[1] USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines*, Executive Summary (2003) ("Both district and circuit court judges were most likely to indicate" that "fewer" of the guidelines "maintain[ed] sufficient flexibility to permit individualized sentences," or "provid[ed] defendants with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner where rehabilitation is appropriate.").

relevant to the purposes of sentencing.[2] Large majorities of judges informed the Commission in its 2010 survey that the mitigating factors its policy statements deem never or "not ordinarily relevant" are in fact "ordinarily relevant,"[3] and that the policy statements are inadequate, too restrictive, and inconsistent with § 3553(a).[4]

In the 2009-2010 amendment cycle, in response to decreased use of departures, the Commission sought comment on whether changes should be made to its policy statements regarding age, § 5H1.1; mental and emotional conditions, § 5H1.3; physical condition, appearance, physique, drug or alcohol dependence or abuse, and gambling addiction, § 5H1.4; military, civic, charitable or public service, employment-related contributions, and other prior good works, § 5H1.11; and lack of youthful guidance and disadvantaged upbringing, § 5H1.12. The Defenders presented extensive evidence showing that each of these factors is relevant to the purposes of sentencing, urged the Commission to: (1) delete statements prohibiting or discouraging factors not listed in 28 U.S.C. § 994(d) (appearance, physique, gambling addiction, military, civic, charitable or public service, employment-related contributions, and other prior good works, and lack of youthful guidance and disadvantaged upbringing); (2) delete the prohibition on personal financial difficulties and economic pressures on a trade or business in § 5K2.12; and (3) state that age, mental and emotional conditions, physical condition, and drug or

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[2] *See, e.g.*, Transcript of Hearing Before the U.S. Sent'g Comm'n, Denver, Colo., at 281-82, 301-02 (Oct. 20, 2009) (remarks of Hon. Joan Ericksen); *id*. at 289-90, 295-96 (remarks of Hon. Robert Pratt); *id.* at 91-92 (remarks of Hon. Thomas Marten); *id.* at 107-08 (remarks of Kevin Lowry, Chief U.S. Probation Officer); *id.* at 318-20 (remarks of Raymond Moore); Statement of Alan Dubois and Nicole Kaplan, Hearing Before the U.S. Sent'g Comm'n, at 44-45, 47-50 (Feb. 10, 2009); Transcript of Hearing Before the U.S. Sent'g Comm'n, Atlanta, Ga., at 53-54 (Feb. 10, 2009) (remarks of Thomas Bishop, Chief U.S. Probation Officer); Statement of Thomas W. Hiller, II and Davina Chen, Hearing Before the U.S. Sent'g Comm'n, at 35-37 (May 27, 2009); Transcript of Hearing Before the U.S. Sent'g Comm'n, Stanford, Cal., at 284-86, 357-59 (May 27-28, 2009) (remarks of Thomas W. Hillier II); *id*. at 360-62 (remarks of Davina Chen); *id.* at 168 (remarks of Chris Hansen, Chief U.S. Probation Officer); Transcript of Hearing Before the U.S. Sent'g Comm'n, New York, NY, at 331 (July 10, 2009) (remarks of Hon. Donetta W. Ambrose); Statement of Michael Nachmanoff Before the U.S. Sent'g Comm'n, New York, N.Y., at 22-25 (July 9, 2009); Transcript of Hearing Before the U.S. Sent'g Comm'n, Chicago, Ill., at 104-05 (Sept. 9, 2009) (remarks of Hon. Philip Simon); Statement of Carol Brook Before the U.S. Sent'g Comm'n, at 26-33 (Sept. 10, 2009); Statement of Julia O'Connell Before the U.S. Sent'g Commission, Austin, Tex., at 4-10 (Nov. 19, 2009); Statement of Heather Williams Before the U.S. Sent'g Commission, Phoenix, AZ, at 35, 39-40 (Jan. 21, 2010).

[3] USSC, *Results of Survey of United States District Judges January 2010 through March 2010*, tbl.13 (education (48%), vocational skills (41%), employment record (65%), family ties and responsibilities (62%), community ties (49%), employment-related contributions (47%), post-sentencing rehabilitative efforts (57%), post-offense rehabilitative efforts (70%), lack of guidance as a youth (49%), disadvantaged upbringing (50%)).

[4] *Id*.tbl. 14.

alcohol dependence or abuse "may be relevant to a decision to depart if such a departure would advance one or more purposes of sentencing."[5]

The Commission amended the policy statements to state that age, mental and emotional conditions, and military service "may be relevant" if "present to an unusual degree and distinguish the case from the typical cases covered by the guidelines." Drug or alcohol dependence or abuse, rather than "not relevant," is now "ordinarily not" relevant and a departure may be appropriate in some cases to accomplish a specific treatment objective.

The Commission amended the Introductory Commentary to Chapter 5, Part H to generally disapprove of all offender characteristics, stating that their consideration might create "unwarranted disparities," that courts "should not give them excessive weight," and that their "most appropriate use" is not for imposing a sentence outside the guideline range but for sentencing within the guideline range, even though the guidelines do not include these factors and a wealth of empirical research shows them to be highly relevant.

If the Commission is interested in inviting departures, we stand ready to provide the evidence demonstrating that offender characteristics are relevant to the purposes of sentencing and that their consideration *avoids*, and does *not* create, unwarranted disparity.

B. The Commission should adopt an accurate interpretation of 28 U.S.C. § 994(d) and (e).

The Commission proposes reviewing "the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence." We again urge the Commission to revise what appears to be its current interpretation of 28 U.S.C. § 994(d) and (e) to accurately reflect Congress's intent.

Congress directed the Commission to establish "categories of offenses" and "categories of offenders . . . for use in the guidelines and policy statements governing . . . the nature, extent, place of service, or other incidents of an appropriate sentence." 28 U.S.C. § 994(c) and (d).

Congress directed the Commission in 28 U.S.C. § 994(d) to consider the relevance of eleven offender characteristics in "establishing categories of offenders": age, education, vocational skills, mental and emotional condition, physical condition, drug dependence, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence on criminal activity for a livelihood.

Congress considered all eleven factors listed in 994(d) as potentially relevant to all aspects of the sentencing decision, with one narrow exception. Congress directed the Commission in 28 U.S.C. § 994(e) to "assure that the guidelines and policy statements, *in recommending a term of imprisonment or length of a term of imprisonment*, reflect the general

[5] *See* Statement of Margy Meyers and Marianne Mariano on Behalf of the Federal Public and Community Defenders Before the U.S. Sent'g Comm'n at 19, 43-80 (Mar. 17, 2010).

inappropriateness of considering" five of those factors: "the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant." The Senate Report stated: "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." S. Rep. No. 98-225, at 175 (1983).

Section 994(e) was one of three provisions reflecting Congress's judgment that prison was not an effective means of rehabilitation and should not be used to warehouse the disadvantaged.[6] The Supreme Court recently stated in interpreting the other two provisions: "Section 994(k) bars the Commission from recommending a 'term of imprisonment'—a phrase that again refers both to the fact and to the length of incarceration—based on a defendant's rehabilitative needs. And § 3582(a) prohibits a court from considering those needs to impose or lengthen a period of confinement when selecting a sentence from within, or choosing to depart from, the Guidelines range." *Tapia v. United States*, 131 S. Ct. 2382, 2390 (2011).

Thus, the Commission was not to recommend imprisonment over probation or a longer prison term based on the defendant's lack of education, vocational skills, employment, or stabilizing ties, but "each of these factors may play other roles in the sentencing decision." S. Rep. No. 98-225, at 174 (1983). "[T]hey may, in an appropriate case, call for the use of a term of probation instead of imprisonment."[7] The Senate Report gave several specific examples of how these characteristics may be relevant to mitigate sentences.[8]

Congress "emphasized" that it had "describe[d] these factors as 'generally inappropriate,' rather than always inappropriate to the decision *to impose a term of imprisonment or determine its length*, in order to permit the Sentencing Commission to evaluate their relevance, and to give them application in particular situations found to warrant their consideration."[9] Congress "encourage[d] 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

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[6] *See* 28 U.S.C. § 994(k); 18 U.S.C. § 3582(a); S. Rep. No. 98-225, at 31, 38, 40, 76-77, 95, 119, 171 & n.531 (1983).

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

[8] *See id.* at 172-73 ("need for an educational program might call for a sentence to probation" with a program to provide for rehabilitative needs if imprisonment was not necessary for some other purpose of sentencing); *id.* at 173 (same regarding vocational skills); *id.* (same regarding employment); *id.* at 171 n. 531 ("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"); *id.* at 173 n.532 ("a defendant's education or vocation would, of course, be highly pertinent in determining the nature of community service he might be ordered to perform as a condition of probation or supervised release"); *id.* at 174 (family ties and responsibilities may indicate, for example, that the defendant "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").

[9] *Id.* at 175 (emphasis added).

intelligent and dispassionate analysis; and on this basis to recommend, *with supporting reasons*, the fairest and most effective guidelines it can devise."[10]

The Commission did not include in the guideline rules any of the factors listed in § 994(d) other than role in the offense and the aggravating factor of criminal history. And despite the fact that the Commission omitted the other § 994(d) factors from the rules, it deemed age, education, vocational skills, mental and emotional condition, physical condition, employment record, family ties and responsibilities, and community ties to be "not ordinarily relevant" for purposes of departure, and deemed drug dependence to be "not a reason for imposing a sentence below the guidelines."[11] The Commission did not limit its disapproval to the § 994(e) factors, and did not limit its disapproval of the § 994(e) factors to choosing prison over probation or a longer prison term based on rehabilitative needs, as Congress intended.

The Commission gave no official reason for these actions and has given varying unofficial reasons. At the outset, the Commission did not rely on § 994(e) as the reason for the policy statements deeming education, vocational skills, employment record, family ties and responsibilities, and community ties "not ordinarily relevant." Nor did Justice Breyer say that § 994(e) required the Commission to deem these factors "not ordinarily relevant" when he unofficially explained that the Commission had omitted from the formal rules most of the factors "which Congress suggested that the Commission should, but was not required to, consider."[12] According to Justice Breyer, the decision not to "take formal account" of offender characteristics listed in § 994(d) other than criminal history was one of several "'trade-offs' among Commissioners with different viewpoints" when "the Commission deviated from average past practice."[13] Much later, Justice Breyer said that the decision to omit mitigating offender characteristics was due "to the difficulty in determining which offender characteristics should be used," and was "intended to be provisional and [] subject to revision in light of Guideline implementation experience." [14]

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[10] *Id*. (emphasis added).

[11] USSG § 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition, drug dependence), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), p.s. (1987); *see also* USSG ch. 5, pt. H, intro. comment.

[12] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 & n.98 (1988).

[13] *Id.*

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

In 1990 the Commission amended the introductory commentary to Chapter 5H to "clarify" that these policy statements were *required* by § 994(e).[15] In 1996, Commission staff advised that Congress intended an "asymmetrical approach" so "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."[16]

In addition to this mix of varying and shifting views, another theory emerged. Section 994(d) directs the Commission to "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of the defendant."[17] In 1991, some members of the Commission suggested that the policy statements disapproving education, vocational skills, employment, family responsibilities, community ties, and the need to provide educational or vocational training "help to 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 as to which the statute mandates neutrality."[18]

In response to a court decision holding that a disadvantaged childhood could justify a downward departure,[19] the Commission issued a policy statement asserting that a defendant's "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing" are "not relevant" grounds for departure.[20] No official reason was given, but members of the Commission said unofficially that the Commission was "concerned" that such a departure could "potentially be applied to an extremely large number of cases" on the basis of "socioeconomic background and other personal characteristics that Congress clearly intended the guidelines to

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[15] USSG ch. 5, pt. H, intro. comment. (Nov. 1, 1990); USSG, App. C, amend. 357 (Nov. 1, 1990) ("clarify[ying] the relationship of 28 U.S.C. § 994(e) to certain of the policy statements" and describing the directive as "requir[ing]" the Commission to assure that the guidelines and policy statements reflected the "general inappropriateness" of considering these characteristics "*in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment*"). *Compare* 28 U.S.C. § 994(e) (Commission "shall assure 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 five factors).

[16] *See* Simplification Draft Paper, Departures and Offender Characteristics, Part II(B)(2) & II(E)(3) (Nov. 1996), http://www.ussc.gov/Research/Working_Group_Reports/Simplification/index.cfm.

[17] 28 U.S.C. § 994(d).

[18] William W. Wilkins Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Disparity Problem*, 2 Crim. L.F. 355, 370-71 (1991).

[19] *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), *reported as amended at* 956 F.2d 203 (9th Cir. 1992).

[20] USSG § 5H1.12, p.s.; USSG App. C, amend. 466 (Nov. 1, 1992); William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guidelines Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 84 (1993) (stating that *Floyd* "directly precipitated this Commission action").

place off limits."[21] Thus, it appears that because the Commission recognized that a departure on this basis would *benefit* defendants who are disadvantaged, it prohibited judges from recognizing any distinction between defendants raised in poverty and neglect and those raised in privilege. This decision was based on the demographic factors as to which Congress directed the Commission to exercise neutrality, and it had an *adverse* impact on the poor and on any defendant who lacked guidance as a youth.

We believe that the directive regarding neutrality in § 994(d) has been misread in certain instances. Congress did not mean that sentences under the guidelines could not be based on particular factors because they occurred more or less frequently in one race, gender, ethnicity, or socioeconomic class or another. If that were so, virtually no factor could be considered, and nearly every aggravating factor in the Manual would violate the neutrality directive. Rather, the Commission was to recommend consideration of factors that were "relevan[t] to the purposes of sentencing."[22]

Under disparate impact analysis, discrimination is shown by evidence of a practice that has a disproportionate adverse impact on a certain group *and* is not consistent with legitimate purposes.[23] As the Supreme Court recently observed, "[a] defendant's race or nationality may play no *adverse* role in the administration of justice, including at sentencing." *Pepper v. United States*, 131 S. Ct. 1229, 1240 n.8 (2011) (emphasis added). Requiring or denying consideration of factors on the basis of group impact alone elevates race, ethnicity, sex, or socioeconomic status to explicit considerations, in violation of the directive that the guidelines and policy statements be entirely neutral regarding those characteristics.[24]

The Commission has made clear that disparate impact is a problem only if the guideline in question fails to advance the purposes of sentencing, as laid out explicitly in its Fifteen Year Review:

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[21] *Id*. at 84-85 & n.112.

[22] *Id*. at 175.

[23] *See* 42 U.S.C. 2000e-2(k) (disparate impact under Title VII is established only where the practice causes a disparate impact and the challenged practice is not job-related and consistent with business necessity); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[24] *Cf., e.g., Ricci v. DeStefano*, 129 S. Ct. 2658, 2675-79 (2009) (holding that the city lacked an "objective, strong basis in evidence" to discard test results with a "significant statistical disparity" because there was no evidence that the tests were "not job related and consistent with business necessity"); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (school districts failed to show use of racial classification in student assignment plans was necessary to achieve stated goal of diversity and thus violated Equal Protection Clause); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 500 (1989) (city's race-conscious set-aside program violated the Equal Protection Clause because city lacked strong basis in evidence to conclude that race-conscious action was necessary to remedy identified discrimination).

> Unwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing. Membership in a particular demographic group is not relevant to the purposes of sentencing, and there is no reason to expect [that] the *average* sentence of different demographic groups are the same or different. As long as the individuals in each group are treated fairly, average group differences simply reflect differences in the characteristics of the individuals who comprise each group. . . . Sentencing rules that are needed to achieve the purposes of sentencing are considered fair, even if they adversely affect some groups more than others. But if a rule has a significant adverse impact and there is insufficient evidence that the rule is needed to achieve a statutory purpose of sentencing, then the rule might be considered unfair toward the affected group.[25]

The Commission concluded that mandatory minimums and certain guidelines "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."[26]

With respect to mitigating offender characteristics, however, a *beneficial* impact on members of a certain race, ethnicity, gender, or economic class appears to have been viewed as improper without regard to whether the factor advances the purposes of sentencing. Under that approach, offenders who are at low risk to reoffend because they have an education, an employment record and stabilizing ties, offenders who have overcome adversity and obtained education and steady work, and offenders who could be rehabilitated if they were given needed treatment or training, are all denied consideration of those highly relevant factors.

We think that this approach is unfair and incorrect. The Commission should interpret 28 U.S.C. § 994(d)'s instruction to the Commission to "assure that the guidelines and policy statements are entirely neutral" to mean that "[a] defendant's race or nationality may play no *adverse* role in the administration of justice, including at sentencing." *Pepper*, 131 S. Ct. at 1240 n.8 (emphasis added). For example, a judge may not *increase* a defendant's sentence based on his inability to pay restitution, but may impose a *reduced sentence* to further the legitimate goal of providing restitution by allowing the defendant to work.[27] A judge may not *refuse to impose a lower sentence* because of *bias against* members of certain demographic groups,[28] but may consider the *unjustified adverse* racial impact of a rule *in reducing a sentencing*.[29]

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[25] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113-14 (2004) (emphasis in original).

[26] *Id*. at 135.

[27] *United States v. Burgum*, 633 F.3d 810, 815-16 (9th Cir. 2011).

[28] *United States v. Leung*, 40 F.3d 577, 585-87 (2d Cir. 1994).

In sum, the Commission should take this opportunity to accurately describe § 994(e) as requiring the Commission to assure that the guidelines reflected the general inappropriateness of considering a defendant's *lack* of education, skills, employment or stabilizing ties in choosing prison over probation or a longer prison term, and to abandon any reading of § 994(d)'s instruction to assure that the guidelines and policy statements are neutral as to demographic factors as support for prohibiting or discouraging relevant mitigating factors.

C. Policy statements and commentary that may be confused as applying to variances are contrary to statute and Supreme Court law, and should be corrected.

Section 3553(b) required courts to sentence within the guideline range unless the court found a circumstance of a kind or degree that was not adequately taken into consideration by the Commission in formulating the guidelines, to be determined by considering only the guidelines, policy statements and commentary. The policy statements and commentary, in turn, disfavored sentences outside the guideline range in general,[30] and prohibited and disapproved sentences outside the guideline range on many specific grounds.[31] Section 3553(b) and its incorporation of policy statements and commentary did not permit departures in every case, made them unavailable in most cases, and limited them to specified circumstances. Section 3553(b) was therefore incompatible with the Court's constitutional holding, and had to be excised. *United States v. Booker*, 543 U.S. 220, 234-35, 245, 259 (2005).

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[29] *Kimbrough v. United States*, 552 U.S. 85 (2007).

[30] USSG ch. 1, pt. A(1)(4)(b) ("each guideline carv[es] out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes," allowing departure only "[w]hen a court finds an atypical case" or "an unusual case," which will be a "rare occurrence"); USSG § 5K2.0(a)(1), (a)(2)(A), (a)(3) (relying on § 3553(b) as departure standard); *id.* § 5K2.0(a)(2)(B) (permitting departure in "the exceptional case" for circumstances not identified in the guidelines); *id.* § 5K2.0(a)(4) (permitting departure for factors deemed "not ordinarily relevant" only "if such offender characteristic or other circumstance is present to an exceptional degree"); *id.* § 5K2.0 cmt. (n.3(A)(ii)) (departures based on "unidentified circumstances" "will occur rarely and only in exceptional cases"); *id.* § 5K2.0 cmt. (n.3(B)(i)) (departures under § 3553(b) for a circumstance present "to a degree not adequately taken into consideration in the guidelines" "will occur rarely and only in exceptional cases"); *id.* § 5K2.0 cmt. (n. 3(C)) (departures based on factors deemed "not ordinarily relevant" "should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree," and "[d]epartures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases").

[31] *See* USSG §§ 5H1.1 (age), 5H1.2 (education and vocational skills), 5H1.3 (mental and emotional conditions); 5H1.4 (physical condition, drug or alcohol dependence or abuse, gambling addiction), 5H1.5 (employment record), 5H1.6 (family ties and responsibilities), 5H1.7 (role in the offense), 5H1.11 (military, civic, charitable, or public service; employment-related contributions; record of prior good works), 5H1.12 (lack of guidance as a youth), 5K2.12 (personal financial difficulties, economic pressures on a trade or business), 5K2.19 (post-sentencing rehabilitative efforts), 5K2.20 (aberrant behavior).

Over six years later, the Guidelines Manual continues to cite and rely on § 3553(b) in its policy statements and commentary as the controlling law for departures,[32] defines "departure" as "the imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence,"[33] and suggests that the policy statements restricting departures based on offender characteristics apply to variances.[34]

In 2010, the Defenders recommended, in light of Supreme Court law, that the Commission amend the definition of "departure" in § 1B1.10 to make clear that it applied only to departures under the guidelines' framework, and that the Commission amend the then existing introductory commentary to Chapter Five Part H, which had long referred to sentences "outside the applicable guideline range," to make clear that it pertained only to "departures."[35] The Commission did not amend the definition of "departure" in § 1B1.10, and, without publishing the language for comment, amended the introductory commentary to Chapter 5, Part H in a manner that, if taken literally, would suggest that it restricts variances under § 3553(a).

The introductory commentary to Chapter 5, Part H states that its "purpose is to provide sentencing courts with a framework for addressing specific offender characteristics."[36] It instructs judges that "in order to avoid unwarranted sentencing disparities," the "most appropriate use" of offender characteristics is "not as a reason to sentence *outside the applicable guideline range*," but to "determin[e] the sentence within the guideline range," and that they should not be given "excessive weight."[37] Further, the commentary says that the policy statements addressing age, mental and emotional condition, and physical condition "indicate that these characteristics may be relevant in determining whether a sentence *outside the applicable guideline range* is warranted," and that "[t]hese specific offender characteristics may warrant a sentence *outside the applicable guideline range* if the characteristic . . . is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."[38] And it says that the policy statements addressing education, vocational skills, employment record, family ties and responsibilities, and community ties "indicate that these characteristics are not

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[32] *See* USSG ch. 1, pt. A, subpts. (1)(2) & (1)(4)(b); *id.* § 5K2.0(a)(1)(A), (a)(2)(A) & cmt. (nn.2(A), 3(A)-(B)); *id.* § 6B1.2 cmt.; *id.* ch. 8 intro. comment.

[33] USSG § 1B1.1 comment. (n.1(E)).

[34] USSG, ch. 5, pt. H, intro. comment. (2010).

[35] *See* Statement of Margy Meyers and Marianne Mariano Before the U.S. Sent'g Comm'n, at 41-43, 87-90 (Mar. 17, 2010).

[36] *See* USSG, ch. 5, pt. H, intro. comment. (2010).

[37] *Id*. (emphasis added).

[38] *Id.* (emphasis added).

ordinarily relevant to the determination whether a sentence should be *outside the guideline range*."[39]

Not only does this commentary say that offender characteristics should generally not be used to sentence "outside the applicable guideline range," but the policy statements in Chapter 5 Part H are governed by § 5K2.0,[40] which is based on the now excised § 3553(b) and the Commission's "heartland" interpretation of that statute,[41] and both the introductory commentary and the policy statements themselves use the "heartland" language.

Taken literally, the new commentary would appear to cabin judges' discretion with the same restrictions that made the guidelines mandatory before *Booker*. This would be contrary to § 3553(a), which requires courts to consider "the history and characteristics of the defendant," and contrary to § 3661, which requires that "[n]o 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."[42]

It would also be contrary to Supreme Court law. The Court recognizes that the guidelines do not properly account for most offender characteristics, *Rita v. United States*, 551 U.S. 338, 357 (2007); *id.* at 364-66 (Stevens, J., concurring), and has made clear that a district court should disregard the Commission's policy statements when they prohibit or discourage consideration of factors that are relevant to the purposes of sentencing and the court's duty to impose a sentence that is sufficient but not greater than necessary to achieve those purposes. *Gall v. United States*, 552 U.S. 38, 51, 53-60 (2007); *Pepper v. United States*, 131 S. Ct. 1229, 1242-43, 1247 (2011). Courts may not decline to consider or give effect to other § 3553(a) factors based on policy statements, and must instead give weight to the relevant § 3553(a) purposes and factors. *See Gall*, 552 U.S. at 56-60; *Pepper*, 131 S. Ct. at 1242-43, 1243-44, 1249-50. Courts of appeals

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[39] *Id*. (emphasis added); *see also id*. ("[T]hese circumstances are not ordinarily relevant to the determination of whether a sentence should be *outside the applicable guideline range*, [but] they may be relevant to this determination in exceptional cases." (emphasis added)).

[40] Offender characteristics "identified in Chapter Five, Part H . . . as not ordinarily relevant in determining whether a departure is warranted may be relevant . . . only if such offender characteristic . . . is present to an exceptional degree." USSG § 5K2.0(a)(4). A "departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree," and departures based on a combination of such circumstances "should occur extremely rarely." *Id.* comment. (n.3(C)). The "court may not depart" based on the circumstances prohibited in §§ 5H1.12 or 5H1.4. *See* USSG § 5K2.0(d)(1). Factors that "may be relevant" under Chapter 5 Part H do not appear to be directly governed by § 5K2.0, but use the "heartland" language. *See* USSG §§ 5H1.1, 5H1.3, 5H1.11 ("may be relevant" if "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines").

[41] USSG § 5K2.0(a)(1) & comment. (backg'd.); *Id.* comment. (n.2(A) & (3)); USSG ch. 1, pt. A(1)(4)(b).

[42] Section 3661, first enacted in 1970 and re-codified in the Sentencing Reform Act of 1984, embodies the "principle that 'the punishment should fit the offender and not merely the crime.'" *Pepper v. United States*, 131 S. Ct. at 1240 (quoting *Williams v. New York*, 337 U.S.241, 247 (1949)).

may not require that a circumstance be "extraordinary" or "exceptional" or "unique" for purposes of a variance, *see Gall*, 552 U.S. at 47, 49, 52, as that would come "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Id*. at 47. Nor may district courts presume that the guideline sentence is appropriate. *Nelson v. United States*, 129 S. Ct. 890, 891 (2009); *Gall*, 552 U.S. at 50; *Rita*, 551 U.S. at 351. Instead, the sentencing judge must "make an individualized assessment based on the facts presented" and determine their appropriate weight in light of the purposes of sentencing. *Id*. at 50, 51-52; *Pepper*, 131 S. Ct. at 1242-43.

We assume that the Commission did not mean to suggest that Chapter Five Part H applies to variances, but the new commentary may give the impression that it does. The Commission should therefore revise the commentary to make clear that the commentary itself and the policy statements in Chapter 5H apply only to the decision whether to "depart" within the guidelines' framework and do not control variances under § 3553(a). The Commission should likewise amend each policy statement that continues to state that it applies to any sentence outside the guideline range. *See* USSG §§ 5H1.6, 5K2.0(b), 5K2.1, 5K2.2, 5K2.3, 5K2.4, 5K2.5, 5K2.6, 5K2.7, 5K2.8, 5K2.9, 5K2.10, 5K2.11, p.s. We also again urge the Commission to revise Application Note 1(E) to § 1B1.1 to say that the term "departure" as used in § 1B1.1 applies only for purposes of the "departure" provisions of the Guideline Manual.[43]

D. The three-step procedure at § 1B1.10 should be amended to accurately reflect Supreme Court law.

We have previously expressed concern that the three-step process now set forth at § 1B1.1 states that courts must consider the Commission's policy statements under Chapter 5H and K even when not raised by a party, and that it appears to improperly elevate the Commission's policy statements, which often prohibit or restrict departure, above the other factors, purposes, and parsimony command under § 3553(a).[44] We renew our concerns and urge the Commission to revise the guideline to accurately reflect Supreme Court law and actual practice.

1. § 1B1.1(b)

Subsection (b) states that the sentencing judge "shall consider" in every case all of the restrictive and prohibitive policy statements and commentary in Parts H and K of Chapter Five, and also search the Manual for other policy statements or commentary "that might warrant consideration in imposing sentence," when no party asks for a departure or otherwise raises a policy statement. Subsection (b) thus purports to require judges to consider and prioritize restrictive and prohibitive departure policy statements and commentary when none are raised and

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[43] *See* Statement of Tom Hillier and Davina Chen Before the U.S. Sent'g Comm'n, Stanford, Calif., at 37 & Appendix (May 27, 2009); Statement of Margy Meyers and Marianne Mariano Before the U.S. Sent'g Comm'n, at 89-90 (Mar. 17, 2010).

[44] *See* Statement of Raymond Moore Before the U.S. Sent'g Comm'n, *The Sentencing Reform Act: 25 Years Later*, Denver, Colo., at 20-22 (Oct. 21, 2009); Statement of Margy Meyers and Marianne Mariano Before the U.S. Sent'g Comm'n, at 87-88 (Mar. 17, 2010).

no departure is requested, including the new introductory commentary to Chapter 5H instructing judges that offender characteristics should generally not be used to sentence outside the guideline range.

In its Reason for Amendment, the Commission said that it was adopting the process followed by the majority of courts.[45] But neither the Supreme Court nor any court of appeals requires sentencing judges to consider departures when not raised, and even more important, courts may not be *required* to consider or elevate policy statements and commentary that discourage or prohibit departures, or that appear to discourage or prohibit variances. Such a requirement is contrary to Supreme Court law.

For the reasons that follow, we urge the Commission to amend § 1B1.10(b) to accurately reflect current law, as follows (proposed changes underlined):

> *If raised by a party or on the court's own motion, the court may consider a pertinent policy statement in Parts H or K of Chapter Five, Specific Offender Characteristics and Departures, and any other pertinent policy statements or commentary in the guidelines that might warrant a departure. See 18 U.S.C. § 3553(a)(5); Rita v. United States, 551 U.S. 338, 344, 351 (2007).*

a. District courts may not be required to consider policy statements or commentary prohibiting or discouraging departures or other sentences outside the guideline range.

Sentencing is an adversary process. *See Rita*, 551 U.S. at 351; *see also Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) ("In our adversary system, . . . in the first instance and on appeal, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). Thus, other than "calculating" the guideline range in every case, the issues the court must address are driven by the parties, and the court may raise an issue on its own motion. The judge must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," then "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate," "then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party," then "adequately explain the chosen sentence." *Gall*, 552 U.S. at 49-50.

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[45] USSG App. C, Amend. 741 (Nov. 1, 2010) (Reason for Amendment). This three-step process originated with the Commission, not the courts, as part of an effort immediately after *Booker* to require or persuade the courts to give the guidelines "substantial weight." *See* 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 Jud. Comm.*, 109th Cong. 3-4 (Feb. 10, 2005); U.S. Sent'g Comm'n, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 42 (2006); 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, 18 (Mar. 16, 2006).

The parties may argue that a "departure" is appropriate under the Commission's policy statements, *Rita*, 551 U.S. at 344, 351, *or* may argue for a variance, for example, because "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations," or "the Guidelines reflect an unsound judgment," or the Guidelines "do not generally treat certain offender characteristics in the proper way," or "the case warrants a different sentence regardless."[46] *Id.* at 351, 357. Where a party raises "nonfrivolous reasons" for a sentence outside the guideline range, the judge must address them, explaining why he has accepted or rejected them. *Id*. at 357. Where the court imposes a guideline sentence, it must show that it "considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id*. at 356-57. Judges may not be compelled to raise or address arguments not raised by a party. *Gall*, 552 U.S. at 54.

In *Gall*, the Court pointedly rejected the notion that the Commission's policy statements must be consulted and considered when not raised. It approved a variance based on a number of factors the guidelines' policy statements prohibited or deemed not ordinarily relevant,[47] without even addressing the conflicting policy statements or requiring district courts to address them. *Compare Gall*, 552 U.S. at 53-60 (not discussing policy statements and approving of the "weight" the judge gave the mitigating factors in the case), *with id.* at 69-70 (arguing that district courts should be required to give "weight" to the policy statements) (Alito, J., dissenting).

b. Policy statements that restrict or prohibit departures may not be elevated above relevant individualized factors, the purposes of sentencing, and the parsimony command.

The Supreme Court's recent decision in *Pepper v. United States*, 131 S. Ct. 1229 (2011) demonstrates that policy statements are not to be prioritized above the factors, purposes and parsimony command under § 3553(a). There, as in *Gall*, the Court demonstrated that the proper inquiry is whether the history and characteristics of the defendant are relevant to the purposes of sentencing and bear on the overarching duty to impose a sentence that is sufficient, but not greater than necessary, to satisfy those purposes. *Id*. at 1242-43. The Court found that Pepper's

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[46] "The judge made clear that Rita's argument for a lower sentence could take *either* of two forms: First, Rita might argue *within the Guidelines' framework*, for a departure . . . on the ground that his circumstances present an 'atypical case' that falls outside the 'heartland' to which the United States Sentencing Commission intends each individual Guideline to apply. Second, Rita might argue that, independent of the Guidelines, application of the sentencing factors set forth in 18 U.S.C. § 3553(a) warrants a lower sentence." *Rita*, 551 U.S. at 344 (first emphasis added, second emphasis in original).

[47] The Court approved of the district court's variance based on voluntary withdrawal from a conspiracy, age and immaturity, and rehabilitation through education, employment, and discontinuing the use of drugs. *Cf.* USSG §§ 5H1.1, 5H1.2, 5H1.4, 5H1.5, p.s. While voluntary withdrawal from a conspiracy 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), p.s.

post-sentencing rehabilitation was highly relevant to the factors, purposes and overarching parsimony command under § 3553(a). *Id.* at 1242-43.

After reaching this conclusion, the Court addressed an argument raised by *amicus* appointed to defend the court of appeals' judgment. *Amicus* argued that the judgment could be upheld because consideration of post-sentencing rehabilitation was "inconsistent with" the Commission's policy statement, § 5K2.19, p.s. The Court rejected this argument, not only because the policy statement rested on wholly unconvincing policy rationales, *id.* at 1247, but because policy statements may not be "elevate[d]" above other § 3553(a) considerations, *id*. at 1249. Instead, the court must "give appropriate weight" to Pepper's post-offense rehabilitation.[48] *Id*. at 1250.

In sum, *requiring* consideration of policy statements as a second step in sentencing is contrary to the procedure directed by the Supreme Court. This, of course, does not mean that departures are obsolete or off limits. It means that courts may consider departures if raised, but may not be required to consider policy statements when not raised, and may not elevate them above other considerations when they are raised. Section 1B1.1(b) purports to instruct judges regarding their duties under § 3553(a), a statute administered by the courts, not the Commission. It does so in a manner contrary to the Supreme Court's interpretation of that statute, but this is something the Commission cannot do. *Neal v. United States*, 516 U.S. 284, 290 (1996) ("[T]he Commission does not have the authority to amend the statute we construed in *Chapman*.").

c. None of the cases cited in support of the process adopted by the Commission held that a district court was required to consider policy statements when not raised.

When the Commission amended § 1B1.10 in 2010, it said that it was resolving a "circuit conflict" regarding the sentencing process, and that it was adopting "the three-step approach followed by the majority of circuits." USSG App. C, Amend. 741 (Nov. 1, 2010). But none of the cases cited by the Commission in support of the amendment had adopted a rule requiring district courts to consider possible grounds for departure when no party argued for departure. Rather, the majority of courts had reasonably held that departures remain a viable sentencing tool after *Booker*.[49] Most important, the courts of appeals have held, complying with Supreme Court

[48] If *amicus* had not raised the policy statement in the Supreme Court, the Court would not have addressed it. *See Greenlaw*, 554 U.S. at 243 ("[I]n the first instance and on appeal, . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.").

[49] Five of the cases cited in support of the amendment involved review of an actual departure decision by the district court or a specific request for departure, and so emphasized that departures (and the traditional rules applying to them) remain relevant. *United States v. Selioutsky*, 409 F.3d 114, 119-20 (2d Cir. 2005) (where defendant sought, and the district court granted, a downward departure based on extraordinary family circumstances, remanding for resentencing because the district court had not made adequate findings to support the departure); *United States v. Jackson*, 467 F.3d 834, 840 (3d Cir. 2006) (where defendant sought a downward departure based on extraordinary acceptance of responsibility (in addition to a variance on other grounds), district court was still required to follow circuit precedent in responding

law, that district courts are *not* required to consider policy statements regarding departures unless raised by a party,[50] and may *not* use policy statements to deny a variance under the purposes and

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to the departure request, and because it could be inferred that the court considered the request and denied it, its decision was not reviewable); *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006) (where district court expressly considered and denied departure, explaining that departures remain relevant after *Booker* and reaffirming that the court of appeals may not review the denial of departure, as under pre-*Booker* caselaw); *United States v. Robertson*, 568 F.3d 1203, 1209 (10th Cir. 2009) (where pre-sentence report identified ground for upward departure, noting that "some circuits regard the Guidelines' departure provisions as superfluous post-*Booker*," reaffirming the "vitality" of departures without describing any particular process to be followed, and reviewing the district court's decision to depart upward under its traditional four-part test for factual and legal error); *United States v. Jordi*, 418 F.3d 1212, 1213 (11th Cir. 2005) (where government sought upward departure, reviewing whether the district court correctly applied the law regarding the requested departure, and holding that the district court erred in believing that it could not depart on the ground requested). The other four involved neither review of a departure decision nor review of a request for departure, and merely recited in passing the relevance of departures after *Booker*. *See United States v. Dixon*, 449 F.3d 194, 203-04 (1st Cir. 2006) (not reviewing a departure decision or request for departure, but stating in passing that district court still considers "applicable departures"); *United States v. Moreland*, 437 F.3d 424, 432-33 (4th Cir. 2006) (not reviewing a departure decision or request for departure, and noting that "the continuing validity of departures in post-*Booker* federal sentencing proceedings has been a subject of dispute among the circuits," and stating its belief "that so-called 'traditional departures' – *i.e.*, those made pursuant to specific guideline provisions or case law – remain an important part of sentencing even after *Booker*"); *United States v. Tzep-Mejia*, 461 F.3d 522 (5th Cir. 2006) (not reviewing a departure decision or request for departure, but stating that "[p]ost-*Booker* case law recognizes three kinds of sentences," one of which is a sentence that "includes an upward or downward departure as allowed by the Guidelines"); *United States v. Hawk Wing*, 433 F.3d 622, 627 (8th Cir. 2006) (not reviewing district court's upward departure under § 4A1.3 because defendant did not challenge the application of the guideline rules, and stating that district court must still "decide if a 'traditional departure' is appropriate under Part K or § 4A1.3").

[50] *See, e.g.*, *United States v. Diosdado-Star*, 630 F.3d 359, 362-66 (4th Cir. 2011) (where pre-sentence report identified grounds for departure but district court did not consider a departure and instead proceeded directly to the § 3553(a) analysis, earlier decision suggesting that courts must "first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law" before considering a variance was overruled by *Rita* and *Gall*); *United States v. McGowan*, 315 Fed. App'x 338, 341-42 (2d Cir. 2009) (where neither party requested a departure, rejecting defendant's argument that court should have *sua sponte* considered potentially available departures: "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 necessary under *Gall*"); *United States v. Mejia-Huerta*, 480 F.3d 713, 716, 721, 723 (5th Cir. 2007) (where government did not request an upward departure, holding that the district court did not err by failing to consider an applicable departure provision before varying upward); *United States v. Martinez-Barragan*, 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"); *United States v. Moton*, 226 Fed. App'x 936, 939-40 (11th Cir. 2007) (while courts are required to "calculate correctly the sentencing range prescribed by the Guidelines," they are not required to "apply departures under § 4A1.3 even when

factors set forth in § 3553(a).[51] If it were otherwise, as § 1B1.1(b) suggests, the policy statements and the guidelines would once again be binding.

Finally, § 1B1.1(b) is entirely impractical if taken literally. When nearly every policy statement addressing a mitigating factor discourages, restricts, or prohibits consideration of it for purposes of imposing a sentence outside the guidelines, it would be a waste of time for judges to peruse the Manual only to discover that it tells them not to consider factors the Supreme Court tells them they must consider.

For all of these reasons, the Commission should revise subsection (b) to make clear that it applies only when a departure policy statement is raised by a party, and to clarify that the policy statements and commentary referenced in subsection (b) pertain only to departures.

2. § 1B1.1(c)

We have also expressed concern about subsection (c), which states: "The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole." While we appreciate the Commission's effort to recognize that courts are required to follow § 3553(a), this language does not appear in the statute or in any decision of the Supreme Court (or a court of appeals), and diminishes the importance of the governing law by characterizing the entire constitutionally required sentencing framework as "factors . . . taken as a whole." The framework is important because it ensures that the guidelines are not treated as mandatory or presumptively appropriate. The guidelines are advisory, and thus constitutional, only because the sentencing judge *must* impose a sentence that is "sufficient, but not greater than necessary" to satisfy the purposes of

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neither party requests that it do so," and suggesting that such a requirement would make the policy statement "mandatory").

[51] *See, e.g.*, *United States v. Powell*, 576 F.3d 482, 499 (7th Cir. 2009) (district court erred in declining to take account of defendant's age and poor health based on policy statements); *United States v. Simmons*, 568 F.3d 564, 567-70 (5th Cir. 2009) (abandoning prior precedent requiring courts to follow policy statements in light of *Gall* and *Kimbrough*); *United States v. Harris*, 567 F.3d 846, 854-55 (7th Cir. 2009) (district court erred in failing to consider defendant's significant health problems under § 3553(a) despite policy statement requiring "extraordinary" impairment); *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (district court erred in declining to consider defendant's advanced age, prior military service, health issues, employment history, and lack of criminal history in reliance on policy statements because "standards governing departures do not bind a district court when employing its discretion" under § 3553(a)); *United States v. Hamilton*, 323 Fed. App'x 27, 31 (2d Cir. 2009) (district court "had discretion to consider the policy argument disagreeing with the Guidelines' refusal to consider age and its correlation with recidivism" and "abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines."); *United States v. Blackie*, 548 F.3d 395, 399 (6th Cir. 2008) ("[A] policy statement does not automatically limit or confine the scope of a sentencing judge's considerations."); *United States v. Martin*, 520 F.3d 87, 93 (1st Cir. 2008) (where government pointed to policy statement disapproving consideration of family circumstances to "blunt" the evidence presented, such policy statements "are not decisive as to what may constitute a permissible ground for a variant sentence in a given case").

sentencing, and *must* consider matters other than the guidelines, including factors not included in the guidelines and factors disapproved by the policy statements.[52]

The purpose of § 1B1.1 is, of course, to provide "application instructions" regarding the guideline rules and policy statements. It cannot properly interpret or characterize or change the meaning of a statute directed to the courts and interpreted by the Supreme Court. In adding a brief recognition of the courts' duty to impose sentence in compliance with § 3553(a), the Commission should at most say the following (proposed change underlined):

The court shall then <u>determine the sentence in accordance with 18 U.S.C. § 3553(a).</u>

This language would properly leave to the courts the determination of what it means to sentence "in accordance with" the governing statute.

II. Conclusion

As the Commission pursues its priorities for the 2011-2012 amendment cycle, we stand ready to provide the evidence demonstrating that offender characteristics are relevant to the purposes of sentencing and that their consideration *avoids*, and does *not* create, unwarranted disparity. We remain hopeful that the Commission will revise its view of § 994(d) and (e) to reflect congressional intent, and will clarify that its policy statements regarding departures do not apply to variances and need only be considered when raised by a party. We look forward to working with the Commission and its staff during the upcoming amendment cycle.

Very truly yours,

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[52] *See Booker*, 543 U.S. at 245, 261; *Kimbrough v. United States*, 552 U.S. 85, 93 (2007) (district court is "required by § 3553(a)" to consider the "nature and circumstances of the offense" and the "history and characteristics" of the defendant); *id*. at 101 (determination of the sentence is "appropriately framed . . . in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the sentencing goals advanced in § 3553(a)(2)"); *id*. at 90 ("[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."); *Gall*, 552 U.S. at 59 (the "Guidelines are only one of the factors to consider when imposing sentence."); *Pepper*, 131 S. Ct. at 1242.

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