FEDERAL DEFENDER
SENTENCING GUIDELINES COMMITTEE

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February 22, 2024

Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Public Comment on 2024 Proposed Amendments #2 (Youthful Individuals), #3 (Acquitted Conduct), and #7 (Simplification)

Dear Judge Reeves:

The Federal Public and Community Defenders are pleased to provide our views on the Sentencing Commission's proposed 2024 amendments. Enclosed are Defenders' comments on three of the proposed amendments. We will present our comments on additional proposed amendments next week, in the form of witness statements.

Following are our enclosed comments on:

Proposal 2: Youthful Individuals

Proposal 3: Acquitted Conduct

Proposal 7: Simplification

We appreciate the Commission considering our views and look forward to continuing to work together to improve federal sentencing policy.

Very truly yours,

Heather Williams
Federal Defender
Chair, Federal Defender Sentencing
Guidelines Committee

Enclosures

cc (w/encl.): Hon. Luis Felipe Restrepo, Vice Chair
Hon. Laura E. Mate, Vice Chair
Hon. Claire Murray, Vice Chair
Hon. Claria Horn Boom, Commissioner
Hon. John Gleeson, Commissioner
Hon. Candice C. Wong, Commissioner
Patricia K. Cushwa, Commissioner *Ex officio*
Jonathan J. Wroblewski, Commissioner *Ex officio*
Kenneth P. Cohen, Staff Director
Kathleen C. Grilli, General Counsel

Federal Public and Community Defenders
Comment on Simplification of Three-Step Process
(Proposal 7)

February 22, 2024

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The proposal titled "Simplification of Three-Step Process" holds tremendous promise. Federal Public and Community Defenders support eliminating "departures" from the Guidelines Manual, as a matter of sound policy and also a legal necessity given the Supreme Court's description of the post-*Booker* legal framework for determining federal sentences.

However, Defenders have serious concerns about the proposal as it stands. It maintains all departure language currently in the Guidelines Manual, by recharacterizing departure-related considerations as § 3553(a) considerations. This raises several concerns, including:

- *The proposal elevates identified factors over other, unidentified factors.* The considerations that are elevated in this proposal were copied from departure-related provisions that were each created in a particular historical context and, as § 3553(a) factors, don't make sense. But the overarching concern is that a court's § 3553(a) analysis can encompass *any* relevant information, and looks different in every case.[1] The Commission cannot, and should not try to, reduce this analysis to a list.

- *The proposal weaves § 3553(a) considerations into the guideline-range-calculation provisions in Chapters Two through Five.* This is confusing and threatens to conflate the sentencing process into a single, guideline-focused exercise, contrary to Supreme Court precedent and contrary to how the proposed §1B1.1 explains the new process is meant to work.

- *The proposal diminishes § 3553(a) and makes it vulnerable to shifting policies.* We presume that this proposal is intended to clarify § 3553(a)'s primacy in the sentencing process and acknowledge judicial discretion, updating the Guidelines Manual in line with Supreme Court precedent. This is an important goal. But the proposal diminishes § 3553(a) by treating it less like an overarching framework for sentencing that instructs courts to determine a sentence that's sufficient

[1] *Pepper v. United States*, 562 U.S. 476, 487 (2011) (explaining that sentencing courts are "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue" (internal quotation marks omitted)).

> but not greater than necessary to serve the purposes of our criminal justice system—just punishment, deterrence, protection of the public, and rehabilitation—and more like a checklist.

Happily, the proposal's problems are easily solved. The proposal deletes more language than it adds, and Defenders agree with essentially all the proposed deletions. Generally, the Commission should simply delete without adding. Deleting departure language without reworking it into a new context better aligns the Manual with the appropriate sentencing process and has the added benefit of genuine simplification.

Our comment proceeds as follows: Section I discusses broad principles and concerns, explaining why the Commission should eliminate "departures" as a concept but should not attempt to provide substantive guidance on § 3553(a)'s individualized analysis beyond the language of the statute and Supreme Court caselaw interpreting the statute. We further explain that, if the Commission delays eliminating departures entirely this year, we would implore the Commission to at least delete nearly all of Chapter One, Part A, and Chapter Five, Parts H and K2, as proposed.

Section II gets into the weeds. We address the proposed amendments chapter-by-chapter, to show how the Commission can entirely eliminate departures this amendment cycle, without creating new problems. The focus is on moving forward with deleting departure provisions, but not adding new § 3553(a)-focused provisions—again, not going beyond the statute's terms and the Supreme Court's guidance. Section II suggests substitute language wherever appropriate and discusses four current departure provisions (§4A1.3 and in commentary to §§2L1.2, 5C1.1, and 5G1.3) that require special treatment.

We have designed our suggestions to be outcome-neutral: we are not asking the Commission to elevate factors that would reduce sentences and delete factors that would increase them. We offer modifications to the Commission's proposal that we hope all stakeholders can accept. We presume that all stakeholders would benefit from a Guidelines Manual that acknowledges what has been true since 2005: calculating the guideline range is just one part of a process that must always remain focused on determining a sentence for an individual that is sufficient, but not greater than necessary, to further the purposes of sentencing.

I. The Commission's "Simplification" proposal presents an opportunity to update the Guidelines Manual in light of *Booker* and its progeny.

A. The time has come for the Commission to eliminate "departures" from the Manual.

Federal Public and Community Defenders raised concerns about departures long ago—when *United States v. Booker*[2] was still relatively new. As our witness told the Commission in 2009:

> Sentencing is needlessly complicated if the court feels compelled to examine restrictive policy statements regarding departures first before moving on to § 3553(a), which then overrides the restrictions.[3]

Fifteen years later, this is still a problem.

It is time—or, perhaps, long past time—for the Commission to eliminate departures from the Sentencing Guidelines Manual. Since *Booker*, the Supreme Court has never elevated "departures" above other considerations. To the contrary, that Court has held that a Commission pronouncement that a particular factor cannot serve as a basis for departure need not impact a court's § 3553(a) analysis, under which the court can—and may be required to—rely on that very factor.[4]

Post-*Booker*, the Supreme Court has described sentencing holistically. Section 3553(a)'s "overarching provision" instructs courts "to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing."[5] In determining the appropriate sentence under this framing, "the court should consider a number of factors, including 'the nature and circumstances of the offense,' 'the history and characteristics of the

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[2] 543 U.S. 220 (2005).

[3] Statement of Alan Dubois & Nicole Kaplan on behalf of Fed. Defenders to the U.S. Sent'g Comm. on The Sentencing Reform Act of 1984: 25 Years Later, at 17 (Feb. 10, 2009) ("Statement of Dubois & Kaplan").

[4] *See Pepper*, 562 U.S. at 500–01.

[5] *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). This "broad command" is often called the "parsimony principle." *Dean v. United States*, 581 U.S. 62, 67 (2017).

defendant,' 'the sentencing range established' by the Guidelines, 'any pertinent policy statement' issued by the Sentencing Commission . . ., and 'the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'"[6]

The Supreme Court has described the determination of sentence as involving two, not three, steps:

1) The district court begins by "'correctly calculating the applicable Guidelines range.'"[7]

2) The court "must then consider the arguments of the parties and the factors set forth in § 3553(a)."[8]

Although calculating the guideline range is the first step, the Supreme Court has "reject[ed]" any invitation to "elevate . . . § 3553(a) factors above all others."[9] Indeed, after considering the Guidelines Manual, a court is free to reject the Commission's sentencing advice outright, based on a disagreement with the policies underlying that advice.[10]

Given this settled law, the Manual's three-step process, elevating "departures" above other considerations, is anachronistic. Further, the Manual's substantive departure provisions are problematic. Provisions that declare various matters not relevant to sentencing, or relevant only if present to an unusual degree, if read literally, encourage judges to determine sentences unlawfully.[11] Provisions that invite departures aren't much better: they function like prohibitions, by prohibiting departures for individuals who

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[6] *Kimbrough*, at 111.

[7] *Peugh v. United States*, 569 U.S. 530, 536 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

[8] *Id.* There is a third step, but it's related to appellate review rather than determination of the sentence: The court "must explain the basis for its chosen sentence on the record." *Id.*

[9] *Pepper*, 562 U.S. at 504.

[10] *See Spears v. United States*, 555 U.S. 261, 265–66 (2009); *Kimbrough*, 552 U.S. at 110.

[11] *See, e.g.*, USSG §5K2.0 and the entirety of Chapter Five, Part H.

do not fit strict criteria.[12] Moreover, the encouraged departures are far too complicated and also largely irrelevant in a post-*Booker* world.[13]

Tellingly, the origin of "departures" is found in § 3553(b)(1), which explains that a court "shall" impose a guideline-range sentence "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."[14] Section 3553(b), of course, is the provision that the Supreme Court in *Booker* "excised" from the statute.[15] Quite astoundingly, §5K2.0 ("Grounds for Departure") still—nearly 20 years after *Booker*—instructs courts to consider whether a departure may be warranted under the excised § 3553(b).[16]

To be sure, Defenders are apprehensive about eliminating departures. As discussed below, we don't think data can accurately distinguish outside-the-guideline-range sentences where judges relied on Commission-endorsed "departures" from sentences where judges relied on § 3553(a) factors. And even if accurate data existed, it would be impossible to know whether or how

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[12] *See, e.g.*, USSG §2D1.1, comment. (n. 27(E)(ii)) ("[T]here may be cases in which a substantially greater quantity of a synthetic cannabinoid is needed to produce an effect on the central nervous system similar to the effect produced by a typical synthetic cannabinoid in the class, such as JWH-018 or AM-2201. In such a case, a downward departure may be warranted."); USSG §4A1.3, comment. (n. 3(A)(i)) (explaining that a downward departure from the criminal history category may be warranted where, for example, "[t]he defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period").

[13] *See id.* Section 4A1.3 is extremely complicated, and it is that section's most specific, complex provisions that are the least relevant. Notably, §4A1.3(b)(3)(A) strictly limits downward departures for individuals labeled as career offenders, although judges can, and often do under § 3553(a), impose significantly-below-guideline sentences in career-offender cases because §4B1.1 calls for sentences that are simply too harsh. *See* USSC, FY 2022 *Quick Facts: Career Offenders* 2 (2023).

[14] 18 U.S.C. § 3553(b)(1). *See also* USSG §1A1.4(b) (Departures).

[15] *Booker*, 543 U.S. at 259. While *Booker* excised (b)(1) and "had no occasion to give explicit consideration" to (b)(2), "[t]here is no principled basis for distinguishing subsection 3553(b)(1) from 3553(b)(2) with respect to the rationale of *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005).

[16] USSG §5K2.0(a)(1)(A), (a)(2)(A), (b).

eliminating departures might change judges' habits.[17] There is a possibility that some judges will misapprehend the elimination of departures as an instruction from the Sentencing Commission to impose guideline-range sentences without deviation.

But after careful consideration, we think eliminating departures is unlikely to change sentencing outcomes. In most sentencing proceedings, departures hardly get mentioned: the process already centers on calculating the guideline range and then addressing other § 3553(a) factors, as the Supreme Court has instructed. When judges do rely on departures, it is generally not *because* they are departures, but because they describe something relevant to sentencing (and would be under § 3553(a), regardless).[18] Judges differ in how they treat departures, but this is a reason to eliminate departures, not keep them: to eliminate any unwarranted disparities that may arise from this differing treatment.

So, while some judges and practitioners may find the elimination of departures jarring, it is time for the Commission to update the Guidelines Manual to comply with applicable law. To avoid misunderstanding, though, the Commission should clearly explain in its "Reason for Amendment" that the elimination of departures is not meant to discourage courts from imposing sentences above or below the guideline range based on individual circumstances, whether those circumstances used to be relevant to an old departure provision or not. To the contrary, eliminating departures is intended to *encourage* courts to comply with § 3553(a)'s mandate for individualized sentencing. At the same time, in guideline text in both Chapter One and the new Chapter Six, the Commission needs to very clearly articulate § 3553(a)'s demand for an individualized sentencing process under

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[17] It is our understanding that the Commission intends its Simplification proposal to be outcome-neutral; the proposal is intended to rationalize the Manual's description of the sentencing process, not increase or decrease sentences.

[18] For example, a drug-trafficking case that targeted an individual with substance-abuse disorder who'd never had access to treatment and committed the offense only to support his habit might currently get a downward departure under §5K2.0 (aggravating or mitigating); but the circumstances could be seen as mitigating without §5K2.0. And a case resulting in death might currently get a departure §5K2.1; but a death would factor heavily into sentencing no matter what.

which the guideline range is (while important) only one of many factors to consider in determining a just-sufficient sentence.

B. The Manual should set out § 3553(a)'s framework for sentencing, without attempting to substantively guide courts' § 3553(a) analyses.

While Defenders have essentially no concerns with the Simplification proposal's deletions, we have grave concerns with most of the additions—that is, the additional language purporting to guide courts' § 3553(a) analyses.[19] We support adding new language to Chapter One and Chapter Six that accurately describes § 3553(a)'s statutory framework for sentencing. But the Commission should stop there.

As it stands, the proposal takes all the circumstances addressed in departure provisions and recharacterizes them as § 3553(a) considerations. It does this in Chapters Two through Five by creating a new category of § 3553(a) considerations that is nested within commentary but set apart from other commentary with the label "Additional Offense Specific Characteristics" or "Additional Characteristics." (This comment will refer to these new categories, collectively, as "AOSCs.") It does this in the new Chapter Six by creating two new sections, §§6A1.2 and 6A1.3, listing circumstances that may factor into a court's § 3553(a) analysis.

In this section, we first explain that the blanket recharacterization does not work: departure language is inappropriate for the new context. Then we explain that the Commission should not attempt to find replacement language. It should leave the individualized § 3553(a) analysis to the courts.

1. A "departure" is entirely different from a court's § 3553(a) analysis, and the conversion of departures into § 3553(a) considerations falls flat.

Departures are creatures of the old mandatory-guideline system. The idea was that courts could only deviate from the applicable guideline range if there existed "'an aggravating or mitigating circumstance of a kind, or to a

[19] We, of course, support the Commission's proposal to maintain and update guidance regarding "Substantial Assistance" (USSG §5K1.1) and "Early Disposition Program" (currently, USSG §5K3.1; proposed as USSG §3F1.1).

degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'"[20]

Since *Booker*, the Manual's departure provisions have been advisory, but they remain tethered to the guideline rules. The Commission created these provisions based on judgments about what guideline ranges did or did not account for. Here are just a few examples, from permitted departures:

- §2D1.1, Application Note 10: upward departure where "using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense." The Commission added this departure when it decided to no longer base LSD weight calculations on carrier weight, presumably to ensure that this decision would not create a windfall for large-scale dealers.[21]

- §2M5.2, Application Note 1: downward departure where the offense conduct posed no risk of harm "to a security or foreign policy interest of the United States." The Commission added this provision when amending the guideline "to better distinguish the more and less serious forms of offense conduct covered."[22]

- §5K2.3: upward departure where "a victim or victims suffered psychological injury much more serious than that normally resulting from commission of the offense." This, like all 5K departures, is crafted to address an *exceptional* circumstance, which would not have factored into the guideline calculation.

In addition to specific departures identifying unusual circumstances, like the above, there are less specific departures covering, generally, aggravating or mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."[23]

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[20] *See* USSG §1A1.4(b) (quoting 18 U.S.C. § 3553(b)).

[21] *See* USSG App. C, Amend. 488 (Nov. 1, 1993).

[22] USSG App. C, Amend. 337 (Nov. 1, 1990).

[23] §5K2.0(a)(1); *see also, e.g.,* USSG §2A3.2 comment. (n. 6) (where the offense level "substantially understates" the seriousness of the offense); USSG §2B5.3, comment. (n. 5) (where "the offense level determined under this guideline substantially understates or overstates the seriousness of the offense").

But whether specific or general, all departures are a creature of the guidelines—born of them and existing solely in relation to them.

A court's § 3553(a) analysis is different: it is framed not by the guidelines but by the goal of determining a sentence that is sufficient, but not greater than necessary, to meet the purposes of sentencing. The court must consider "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[24] And the § 3553(a) inquiry is "'broad in scope [and] largely unlimited either as to the kind of information [the court] may consider, or the source from which it may come.'"[25]

This inquiry need not—and should not—be tethered to the guidelines. A court may consider circumstances that did not factor into a guideline and use that information in deciding whether to impose a sentence within, or above or below, the guideline range. But the court may also consider circumstances that *did* factor into a guideline and decide to weigh them differently or give them no weight at all. Or, it may reject a guideline categorically because it disagrees with the Commission's policy choices.[26]

What's more, most departure-related considerations are not the sorts of factors that Defenders see courts relying on in their § 3553(a) analyses. Certainly, courts rely on general personal characteristics like "age," which is addressed in USSG §5H1.1, but not in the restrictive manner that §5H1.1 calls for. And even the most Manual-bound judges understand that they must consider characteristics like age under § 3553(a), without needing further guidance. As another example, if a large-scale LSD trafficker is being sentenced, a court may well reason that his guideline range is too low under the circumstances. But that court is extraordinarily unlikely to factor into its § 3553(a) analysis the Commission's 1990 decision to exclude carrier weight from the guideline calculation, *see* §2D1.1, Application Note 10; it will simply reason its way to an appropriate sentence.

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[24] *Pepper*, 562 U.S. at 487 (citation omitted).

[25] *Concepcion v. United States*, 597 U.S. 481, 482 (2022) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)).

[26] *Peugh*, 569 U.S. at 536; *Spears*, 555 U.S. at 265–66; *Kimbrough*, 552 U.S. at 110–11.

2. More broadly, the Commission should not attempt to enumerate considerations for courts' § 3553(a) analyses.

Defenders' concerns about the Simplification proposal go beyond the problems associated with its blanket repurposing of departure provisions as § 3553(a) considerations. More fundamentally, it would be folly to attempt to make a list of potential § 3553(a) considerations—period.

First, the § 3553(a) analysis is not amenable to list-making. The Supreme Court has emphasized that § 3553(a) requires consideration of every convicted person as an "individual" and every case as a "unique" study in human failings.[27] Also, the information that a judge can consider when engaging in this endeavor is "largely unlimited."[28] Defenders can attest to the fact that our clients are, without exception, unique and complicated individuals—like all of us. When judges conduct § 3553(a) analyses as the Supreme Court has instructed—and in our experience, most do—they assess our clients as whole people and consider their offenses as tragic errors of judgment that were impacted by personal and larger forces and that, in turn, have impacted others (*e.g.*, family members, victims, and communities).[29]

The Commission, in contrast with judges, writes rules in the abstract; it cannot know what circumstance might be relevant in any given case among the tens of thousands of cases that are prosecuted in federal court each year.[30] And it certainly cannot know about unique constellations of distinct

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[27] *Pepper*, 562 U.S. at 487 (citation omitted).

[28] *Concepcion*, 597 U.S. at 482 (citation omitted).

[29] As one judge has explained, "[n]o two defendants or offenses are identical, and the number of factors that may appropriately affect a sentence is virtually unlimited, as are the weights that may be properly placed on such factors." Hon. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 Mich. J. Race & L. 295, 304 (2013); *see also*, *e.g.*, *Concepcion*, 597 U.S. at 491 (referring to the "'long' and 'durable' tradition that sentencing judges 'enjoy discretion in the sort of information they may consider' at an initial sentencing proceeding") (quoting *Dean*, 581 U.S. at 66) (bracket omitted)).

[30] *See Rita v. United States*, 551 U.S. 338, 357–58 (2007) ("The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."); *Gall*, 552 U.S. at 51 ("The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case.") (quoting Brief for Federal Public and

circumstances that might not seem meaningful, or even relevant, on their own, but together in a particular case can help reveal a sentence that would be sufficient, but not greater than necessary, to further the goals of just punishment, deterrence, protection of the public, and rehabilitation.

Second, any list of § 3553(a) considerations would elevate listed considerations above others. The lists the Commission has proposed, both through the AOSCs and in Chapter Six, do not purport to be exhaustive—nor could they.[31] But any list, even a non-exhaustive list, will by its nature enhance the prominence of the items listed, and the likelihood that those items are considered, over items not listed. Thus, there is serious tension between the Supreme Court's discussion of the "largely unlimited" information on which courts may rely at sentencing and a list that attempts to enumerate some of what courts may rely on at sentencing.[32] Also, if the Commission invites courts to consider certain circumstances (and not others) in their § 3553(a) analyses, this could substantively distort sentencing outcomes in ways we can't possibly predict.

Third, any list of § 3553(a) considerations would be vulnerable to policy shifts. If the Commission ever attempts to collect and publish a list of § 3553(a) considerations, it is inevitable that future Commissions will continue to debate what should get listed, which would make courts' § 3553(a) analyses vulnerable to shifting policies. With § 3553(a), Congress and the Supreme Court have already set the policy, and Article III judges must implement that policy through the individualized sentencing process.

Community Defenders et al. as *Amici Curiae* Supporting Petitioner at 16, *Gall v. United States*, 552 U.S. 38 (2007) (No. 06-7949)).

[31] Until November 2003, when the Commission further narrowed departure provisions in light of the PROTECT Act, the Commission acknowledged that "[c]ircumstances that may warrant departure from the guideline range . . . 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." §5K2.0 (2002). One popular resource for defense attorneys is a collection of caselaw by Michael R. Levine titled "171 Easy Mitigating Factors." *See* https://sentencing.typepad.com/files/toc-for-171-easy-mitigating-factors-august-1-2023.docx (table of contents, showing that the collection is over 180 pages long). Even this collection does not purport to be exhaustive as to mitigating factors and it does not attempt to collect aggravating factors.

[32] *Concepcion*, 597 U.S. at 482 (citation omitted).

Defenders close this section where we began it: Although we are gravely concerned with the proposal to enumerate potential § 3553(a) considerations, we are pleased that the Simplification proposal emphasizes and elevates the § 3553(a) analysis in the Guidelines Manual (in Chapter One and the new §6A1.1). We simply ask that discussion of the § 3553(a) analysis hew to the statutory language and Supreme Court guidance.

C. At a minimum, the Commission should use this opportunity to delete most of Chapter One, Part A, and Chapter Five, Parts H and K2.

We do not know what all stakeholders think of the Commission's Simplification proposal. But we suspect some may express alarm—perhaps at the idea of converting departures to § 3553(a) considerations, but perhaps just at the proposal's length and scope. They may ask the Commission to slow down and turn this into a longer project.

Defenders suspect that some stakeholders may react this way because it was our initial instinct. However, we are too concerned with the disconnect between § 3553(a) (and post-*Booker* caselaw interpreting § 3553(a)) and the Guidelines Manual's discussion of the sentencing process. So, we have engaged with the proposal. And having engaged, we think the proposal has enormous potential. The elimination of departures will require a shift in thinking for judges, probation officers, and practitioners who still elevate departures over § 3553(a), but that shift is needed.

Substantive changes to the proposal are needed (detailed in Section II), but we hope the Commission can eliminate departures this year. If, however, the Commission decides *not* to move forward with eliminating departures altogether this year, at a minimum, it should delete most of Chapter One, Part A, and also Chapter Five, Parts H and K2, as proposed, to better align the Guidelines Manual with post-*Booker* sentencing law and practice. Deleting these sections of the Manual is not all that is needed; much more can be done to update and simplify the Manual, and future reforms should also aim to make the guidelines less harsh. But deleting these anachronistic sections is a start.

1. Anachronistic history and process: Chapter One

We agree with the Commission's proposal to delete nearly all of Chapter One, Part A. When judges and practitioners open the Guidelines Manual, the first thing they find is an introduction that was promulgated in 1987—nearly 40 years ago. The section's historical account is not a neutral, academic history of federal sentencing. Indeed, we have concerns starting with the very first line of "The Statutory Mission":

> The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.[33]

Neither 18 U.S.C. § 3553(a) nor 28 U.S.C. §§ 991 or 994 refer to "incapacitation"; they refer to "protect[ing] the public from further crimes of the defendant."[34] Incapacitation is one tool for protecting the public, but incapacitation is not itself the goal; protecting the public is the goal.[35] And while the lengthiest sentence possible will always serve the goal of incapacitation, lengthy sentences often do not protect the public.[36]

From here, the "Original Introduction" describes the Guidelines Manual's origins and its operation, from the vantage point of a pre-*Booker* world. It is not until page 14 that the Manual acknowledges that the mandatory-guideline system it just detailed is no longer reality.[37] This is in a

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[33] USSG §1A1.2 (The Statutory Mission).

[34] 18 U.S.C. § 3553(a)(2)(C); *see also* 28 U.S.C. §§ 991(b)(1)(A) & (2) (citing § 3553(a)(2)), and 994(a)(2), (g) & (m) (citing same).

[35] *See Dean*, 581 U.S. at 67–68 ("Take the directive that a court assess 'the need for the sentence imposed . . . to protect the public from further crimes of the defendant.' § 3553(a)(2)(C). Dean committed the two robberies at issue here when he was 23 years old. That he will not be released from prison until well after his fiftieth birthday because of the § 924(c) convictions surely bears on whether . . . still more incarceration is necessary to protect the public.").

[36] *See* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 220 & n.163–64 (2019) (discussing studies showing that "longer sentences lead to *increased* recidivism after release").

[37] *See* USSG §1A2.

section, "Continuing Evolution and Role of the Guidelines," that was added in 2008 without public notice and comment.[38] In 2009, Defenders raised objections, including, among other things, that the new section described a three-step process that was "not at all what the statute says and is contrary to what the [Supreme] Court has said."[39]

Federal Public and Community Defenders recognize that, even in a post-*Booker* world, the Sentencing Guidelines still matter. As the Supreme Court said in *Peugh v. United States*, they "anchor" the sentencing process.[40] However, the current Chapter One's recitation of history and discussion of sentencing law and process (including the guidelines' role in that process) are outdated and incomplete, and should be deleted without delay.

2. Anachronistic departure restrictions: Chapter 5, Parts H and K2

The last time the Sentencing Commission proposed significant amendments to Chapter Five's departure provisions was during the 2009–10 cycle.[41] Defenders recommended back then, as now, that the Commission delete 5H and 5K2, which were designed to restrict judicial discretion and have no place in the post-*Booker* scheme.[42] The Commission made some changes in 2010 but did not reconsider its approach. Indeed, although the Commission added introductory commentary to 5H acknowledging *Booker*, it also advised (and still advises):

> Although the court must consider 'the history and characteristics of the defendant,'. . . in order to avoid

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[38] Statement of Dubois & Kaplan, *supra* note 3, at 34.

[39] *Id.* at 34–39.

[40] 569 U.S. at 549.

[41] *See* USSC, Notice of Final Priorities 3–4 (Sept. 3, 2009); USSC, Notice of Proposed Amendments 18–29 (Jan. 14, 2010). The Commission has identified big changes regarding departures as a priority since then. *See* USSC, Notice of Final Priorities 4–5 (Sept. 2, 2010); USSC, Notice of Final Priorities 5 (Aug. 14, 2014). But until now, it has not followed through by proposing amendments.

[42] *See* Statement of Thomas W. Hillier II & Davina Chen on behalf of Fed. Defenders to the U.S. Sent'g Comm on The Sentencing Reform Act of 1984: 25 Years Later, at 36 (May 27, 2009).

> unwarranted sentencing disparities the court should not give them excessive weight."[43]

Fifteen years later, and nearly 20 years post-*Booker*, this remark on individualized sentencing should have no place in the Guidelines Manual.

It has been clear at least since *Gall* that courts are to factor into their sentencing determinations all relevant matters, regardless of whether the Commission encourages, prohibits, or limits consideration of a particular matter.[44] The Supreme Court underscored this in *Pepper*, in holding that a district court at resentencing was right to consider post-sentencing rehabilitation, notwithstanding that the Manual then prohibited it as a ground for departure.[45] The sentencing court's freedom to consider, and rely upon, all relevant matters is essential to its ability to consider every convicted person as an "individual" and every case as "unique."[46]

At best, the various provisions in 5H and 5K2 that prohibit, discourage, or limit (generally, where something is not present in an

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[43] USSG App. C, Amend. 739 (Nov. 1, 2010); USSG ch. 5, pt. D, introductory comment. This line well encapsulates the general philosophy of 5H and 5K2: restricting judicial discretion in service of reducing disparities. But then, a difference in sentencing outcome that is based on individualized factors related to the individual being sentenced and the offense is not an unwarranted disparity; it is a *warranted* disparity. *Cf. Gall*, 552 U.S. at 55 (recognizing that sentencing courts should avoid "unwarranted similarities" in the sentences of defendants who committed the same offense but are not similarly situated). Further, time and again, Defenders have pointed out that it was following the implementation of the mandatory guideline system and mandatory minimum statutes that the most pernicious disparity (racial) grew out of control. *See* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 116, 135 (2004). We have also long explained that judicial discretion can *reduce* disparities, by reducing the disparate effects of mandatory-minimum sentences, charging decisions, and guidelines that have baked-in disparities (like the career offender guideline). *See* Statement of Carol A. Brook on behalf of Fed. Defenders to the U.S. Sent'g Comm on The Sentencing Reform Act of 1984: 25 Years Later, at 19–23 (Sept. 10, 2009).

[44] *See Gall*, 552 U.S. at 56–58 (2007) (affirming a below-guideline sentence that was based largely on matters that the guidelines either prohibited or limited as grounds for departure).

[45] *See Pepper*, 592 U.S. at 499–505.

[46] *Concepcion*, 597 U.S. at 492.

"unusual" or "exceptional" way) departures based on particular factors, are at this point irrelevant: courts can (and do) consider any of these factors under § 3553(a).[47] At worst, these provisions encourage judges to act contrary to settled law. They were *designed* to restrict judicial discretion in a pre-*Booker* system.[48] Post-*Booker*, and with the Supreme Court repeatedly explaining that judicial discretion is essential to individualized sentencing under § 3553(a), the Commission should strike these provisions.

Unlike provisions prohibiting or restricting departures, provisions in 5H and 5K2 that *permit* certain departures do not contradict settled law. But they do not promote courts' consideration of the broadest possible information relevant to sentencing. To the contrary, they discourage such consideration by narrowly defining permissible bases for departure. Also, nearly all the permitted departures are aggravating—not mitigating[49] —contributing to a guideline system that is oft-criticized as a "one-way upward ratchet."[50]

The Commission can and should delete Chapter Five, Parts H and K2 in their entirety this amendment cycle, to ensure that the Guidelines Manual is consistent with Supreme Court precedent holding that courts must consider any and all relevant circumstances when determining a sentence

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[47] *See, e.g., United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005) ("Johnson's framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*. It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory.").

[48] The Guidelines Manual's initial prohibited departures were based on 28 U.S.C. § 994(d) and (e), which the Commission seems now to agree was meant only to place restrictions on the Commission in setting guideline ranges, not to place restrictions on judges. *See* USSC, *Proposed Amendments to the Sentencing Guidelines* 520–21 (Dec. 26, 2023). Further restrictions were generally added in response to courts permitting departures. *See* USSC, *Simplification Draft Paper, Departures and Offender Characteristics* Pt. II(B)(3) (1996). That is, at least during the mandatory-guideline period, when judges indicated that a factor outside the guideline system was relevant to sentencing, the Commission would respond by restricting reliance on that factor.

[49] *See* USSC, *Compilation: Departure Provisions* (2023).

[50] *See, e.g.,* Frank O. Bowman, III, *The Federal Sentencing Guidelines: Some Valedictory Reflections Twenty Years After* Apprendi, 99 N.C. L. Rev. 1341, 1361 (2021).

that is sufficient, but not greater than necessary, to further the goals of sentencing.

If the Commission decides *only* to delete 5H and 5K2 this year (with or without deletion of most of Chapter One, Part A), to prevent anyone from misapprehending this as a move *away from* individualized sentencing, we would still ask the Commission to clearly explain in its "Reason for Amendment" that the elimination of departure provisions is not intended to discourage courts from deviating from guideline ranges. And we would still ask the Commission to also describe in the text of the Manual § 3553(a)'s demand for individualized sentencing.

D. The Commission has the authority to promulgate the simplification amendment as modified by Defenders' chapter-by-chapter suggestions.

The Commission has asked for comment on whether its Simplification proposal is consistent with federal law. Federal Public and Community Defenders' comments on the proposal are largely motivated by a desire to help the Commission align the Guidelines Manual with current law. If the Commission were to adopt the Simplification proposal as modified by Defenders' suggestions, we would have no concerns about its compliance with federal law.

28 U.S.C. §§ 994 and 995. The Commission has specifically asked about the Commission's enabling statutes, which we assume relates to two issues: (1) whether the Commission is authorized to provide guidance regarding courts' individualized § 3553(a) analysis; and (2) whether the Commission can delete departure provisions in Chapter 5, Part H, that arose out of directives in § 994.[51]

Regarding the first potential issue, we question whether the Commission can insert itself into courts' § 3553(a) analyses. Under

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[51] Defenders' general discussion about deleting departure provisions without adding anything in their place might raise questions about § 994(n)'s directive regarding "substantial assistance" and/or § 994(j)'s directive regarding "first offender[s]." But, as noted above, we agree with the Commission's proposal to leave §5K1.1 (Substantial Assistance) where it is. And below, we explain how the Commission can preserve the language in USSG §5C1.1, Application Note 10(B), that is needed to comply with § 994(j).

§ 995(a)(22), Congress authorized the Commission to perform functions as "required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18." Certainly, the Commission can accurately describe courts' § 3553(a) responsibilities. However, creating lists of factors for consideration under § 3553(a) may *inhibit* courts' ability to meet their responsibilities, for the reasons discussed above: it would diminish § 3553(a)'s individualized sentencing process, elevate listed considerations above others, and make the § 3553(a) framework vulnerable to shifting policies. Section 3553(a) demands that judges consider "every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."[52] Any substantive advice the Commission provides would speak in the abstract, and could not address the nearly limitless factors that could arise in any particular case.

Regarding the second potential issue, § 994(d) and (e) pose no obstacle. As the Commission recognizes in its proposed new Chapter Six's introductory commentary, Congress's directives in § 994(d) and (e) govern what the Commission may take into account in formulating guidelines, not what courts may consider at sentencing. Beyond constitutional prohibitions related to racial bias and the like, there is "no limitation" on "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."[53]

Other congressional directives. No other directive prevents the Commission from eliminating departures. The Guidelines Manual contains hundreds of departure provisions. A small percentage are related to uncodified congressional directives but the terms of those directives either do not require the departure provisions that were adopted or, if they do, they don't require the provisions adopted to persist in perpetuity.

The overwhelming majority of departure provisions related to congressional directives were never required. On many occasions, Congress

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[52] *Pepper*, 562 U.S. at 487 (citation omitted).

[53] 18 U.S.C. § 3661; *see also Concepcion*, 597 U.S. at 494 ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.").

issued a general directive, instructing the Commission to take some action "if appropriate," or to "consider" particular factors, or used other permissive language; and, in response, the Commission chose to adopt departure language.[54] On other occasions, the Commission created or amended guideline text according to a directive and, at the same time, added departure language as a matter of discretion (such as to implement a direction that the Commission account for aggravating or mitigating circumstances that might justify exceptions to the rules).[55] There is no reasonable argument that the Commission cannot delete these sorts of provisions outright.

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[54] *See, e.g.,* USSG §2A3.1 comment. (n. 6) (upward departure where a "victim was sexually abused by more than one participant," related to the Violent Crime Control and Law Enforcement Act of 1994 ("VCCA"), Pub. L. No. 103-322, § 40112(a)(4), 108 Stat. 1796 (1994) ("The Commission shall review and promulgate amendments to the guidelines, if appropriate, to enhance penalties if more than 1 offender is involved in the offense.")); USSG §2B1.1 comment. (n. 21(B)) (upward departure applicable where disruption of critical infrastructure has a "debilitating impact" on certain national interests, related to the Homeland Security Act of 2002, Pub. L. No. 107-296, § 225(b), 116 Stat. 2136 (2002) (directing the Commission to consider various "factors and the extent to which the guidelines may or may not account for them," including "whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure")); USSG §2D1.1 comment. (n. 18(A)) (upward departure applicable where the guideline does not "account adequately for the seriousness of the environmental harm or other threat to public health or safety," related to the Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 303(a), 110 Stat 3099 (1996) (directing the Commission to "determine whether the Sentencing Guidelines adequately punish" certain offenses)).

[55] *See, e.g.,* USSG §2B1.1 comment. (n. 21(D)) (downward departure applicable where the defendant was actually a victim of a disaster, related to the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 5(a)(1), 121 Stat. 2556 (2008) (directing the Commission to "provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under [42 U.S.C. § 5170] or an emergency declaration under [42 U.S.C. § 5191]")); USSG §2X7.2 comment. (n. 1) (upward departures applicable where the defendant engaged in certain criminal activities involving a submersible or semi-submersible vessel, related to the Drug Trafficking Vessel Interdiction Act of 2008, Pub. L. No. 110-407, § 103, 122 Stat 4296 (2008) (directing the Commission to promulgate guidelines for the crime created in that Act and, in doing so, to account for any aggravating or mitigating circumstances that "might justify exceptions" including the repeated use of a submersible vessel or semi-submersible vessel to facilitate other felonies)).

At the other end of the spectrum, there is the PROTECT Act of 2003.[56] Section 401(b) of that Act directly amended §5K2.0 by creating subsection (b), prohibiting departures in specified cases based on any unenumerated factor. Section 401(b) also created §5K2.22 (offender characteristics as grounds for departure in certain sex offense cases) and amended §§5K2.20 (aberrant behavior), 5H1.6 (family ties and responsibilities), and 5K2.13 (diminished capacity), in each case prohibiting departures based on personal characteristics in specified cases.[57] These changes related to § 401(a) of the Act, which created 18 U.S.C. § 3553(b)(2), *statutorily* prohibiting departures in specified cases.[58]

Booker abrogated these PROTECT Act subsections; thus the Commission can, *and should without delay*, remove the resulting Chapter Five provisions from the Guidelines Manual. True, *Booker*'s remedy saved the PROTECT Act's direct amendments to Chapter Two guidelines, Chapter Three's acceptance-of-responsibility adjustment, and Chapter Four's pattern enhancement, by rendering those guidelines advisory only.[59] But one cannot read the Act's Chapter Five amendments as advisory only because those provisions do nothing other than instruct judges that they *must treat as mandatory* guideline ranges in specified cases.

Since *Booker*, PROTECT Act-related departure provisions have continued to exist in the Manual, but based only on the post-*Booker* idea of *departures* versus *variances*: these provisions prohibit and strictly limit departures under the Guidelines Manual but not variances outside the Manual. But when Congress enacted the PROTECT Act there was no such thing as a "variance." The PROTECT Act's departure provisions prohibited judges from imposing below-guideline sentences; they did not call for a convoluted three-step sentencing process that ultimately permits any reasonable sentence. Thus, *Booker* already nullified PROTECT Act § 401(b) as Congress enacted it, and the Commission has the authority to delete the departure provisions promulgated under § 401(b).

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[56] Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003).

[57] *Id.* at § 401(b).

[58] *See id.* at § 401(a).

[59] *See id.* at § 401(g) & (i).

There is an *additional* reason the Commission is permitted to delete the PROTECT Act departure provisions: Congress directed only that these provisions be "add[ed]" to the Manual, not retained in perpetuity. This is true generally of directives (as discussed below) but, with the PROTECT Act, Congress said as much. Section 401(j)(2) of the Act says that the Commission "shall not promulgate any amendment" that is "inconsistent with" the § 401(b) amendments or add any new downward departures to Chapter Five, Part K, "*[o]n or before May 1, 2005*."[60] In contrast, § 401(j)(3) says of *another* of the Act's subsections (§ 401(i), which amended §§4B1.5, 2G2.4, and 2G2.2) that the Commission could make further amendments but not if they would lower sentencing ranges, *without time limitation*. And § 401(j)(4) says of *still another* of the Act's subsections (§ 401(g), which amended §3E1.1) that "*[a]t no time* may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section."[61] The date before which the PROTECT Act prohibited the Commission from amending § 401(b)'s mandated departure provisions—May 1, 2005—passed nearly 19 years ago. Thus, the Act's plain language authorizes the Commission to now do away with those provisions, to reflect current law and practice.

Going back to the spectrum of Congressional directives, on just a few occasions, Congress issued a specific directive to the Commission and, in response, the Commission implemented the directive by way of departure. Defenders have identified just three—or perhaps only two—departure provisions falling in this category[62]:

1) The Violent Crime Control and Law Enforcement Act of 1994 directed the Commission to exercise "its authority to make . . . amendments" to "ensure" that "the applicable guideline range for a defendant convicted of a crime of violence against an elderly victim is sufficiently stringent to deter such a crime, to protect the public from additional crimes of such a defendant, and to adequately reflect the heinous nature of such an offense"; and that, in carrying out this directive, it should "ensure" that

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[60] (emphasis added).

[61] (emphasis added).

[62] We acknowledge that we might have inadvertently missed other, similar provisions, but our discussion would apply to any such provision.

"the guidelines provide enhanced punishment for a defendant convicted of a crime of violence against an elderly victim who has previously been convicted of a crime of violence against an elderly victim."[63] In response, the Commission found that "the penalties currently provided generally appear appropriate" but it decided to permit an upward departure if both the current offense and a prior offense involved *any* vulnerable victim, "regardless of the type of offense."[64] *Arguably, this does not belong in this category because, from the start, Congress granted the Commission discretion to review existing guidelines to "ensure" that they were sufficient to accomplish stated purposes. We include it here just to be safe.*

2) A different section of the same Act directed the Commission to "amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a crime of violence (as defined in section 924(c)(3) of title 18, United States Code) or a drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code) if a semiautomatic firearm is involved."[65] In response, the Commission found after study that it would not be appropriate to amend guideline ranges based on possession of a semiautomatic firearm, because "semiautomatic firearms are used in 50–70 percent of offenses involving a firearm," so "offenses involving a semiautomatic firearm represent the typical or 'heartland' case."[66] Instead, it created §5K2.17, permitting an upward departure for possessing a semiautomatic firearm capable of accepting a large-capacity magazine in connection with any crime coming within §4B1.2.[67]

3) The Violence Against Women and Department of Justice Reauthorization Act of 2005 directed the Commission to "make appropriate amendments . . . to assure that the sentence

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[63] VCCA, *supra* note 54, at § 240002(a) & (b)(3).

[64] USSG App. C, Amend. 521 (Nov. 1, 1995) (Reason for Amendment).

[65] VCCA, *supra* note 54, at § 110501(a).

[66] USSG App. C, Amend. 531 (Nov. 1, 1995) (Reason for Amendment).

[67] *See id.*

> imposed on a defendant who is convicted of a Federal offense while wearing or displaying insignia and uniform received in violation of [18 U.S.C. § 716] reflects the gravity of this aggravating factor."[68] In response, the Commission explained that § 716 is a "Class B misdemeanor which is not covered by the guidelines"; so instead, it created §5K2.24, providing for an upward departure in *any* case if the "defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716."[69]

In each of these situations, the Commission from the start recognized that it has discretion. The Commission recognized its authority to implement the directive by way of departure, rather than guideline amendment, and it also expanded upon Congress's concerns.

What is important for our purposes is that the language of the above directives says nothing about retaining the provisions once they are created (in whatever form the Commission has chosen), as did the PROTECT Act's § 401(j)(4), discussed above, regarding § 401(g). They instruct the Sentencing Commission to amend the Guidelines Manual ("make . . . amendments" to "ensure"; "amend"; "make appropriate amendments") but do not, by their plain language, tie the Commission's hands beyond the making of those amendments. They are not codified as permanent law.[70] Thus, having promulgated departure provisions to comply with Congress's directives to account for various aggravating considerations, the Commission may now—many years later—account for other considerations (including *Booker*'s sea change in federal sentencing law) and take further actions as appropriate.[71]

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[68] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1191(c), 119 Stat. 2960 (2006).

[69] USSG App. C, Amend. 700 (Nov. 1, 2007) (Reason for Amendment).

[70] Defenders grant that directives that are codified, as in § 994, require ongoing compliance. *See About Classification of Laws to the United States Code*, Off. of L. Revision Counsel, U.S. Code, https://uscode.house.gov/about_classification.xhtml (last visited Feb. 19, 2024) (explaining that "the United States Code contains only the general and permanent laws of the United States").

[71] PROTECT Act § 401(j) shows that Congress understands that the Commission, after complying with a directive to amend the Manual, has discretion

To be sure, there are other solutions for these three—or perhaps just two—provisions. Thus, if the Commission is concerned that any of the rarely used, idiosyncratic departure provisions enumerated above (or any similar provision that Defenders might have missed) pose a barrier to finally updating the Guidelines Manual in light of *Booker* and its progeny, it can address such provision as needed, individually.[72] But there is no need for special treatment: The Commission, having complied with the relevant directives, is not powerless to amend the provisions as needed to reflect developments in both the legal landscape and human knowledge.

E. The Simplification proposal, as modified by Defenders, promises to make data collection more accurate and more useful for policy-makers and stakeholders.

Defenders developed our positions on the Simplification proposal based on our own experience, internal conversations, and surveys, along with our review of Supreme Court caselaw. The Commission collects data on departures, but our experiences raise concerns that the available data inaccurately captures whether outside-the-guideline-range sentences are based on guideline-approved departures versus § 3553(a)-focused variances. At sentencing hearings, the distinction between "departures" and "variances" has become largely irrelevant. Also, there is a disconnect between these hearings and the information that is captured on "Statement of Reasons" (SOR) forms that serve as the basis of the Commission's data.

In our experience, sentencing proceedings these days focus on § 3553(a) factors, not departures. And the line between departures and variances is blurry; this is illustrated by Commission data showing that "mitigating circumstances" is the top reason for departure (beyond substantial assistance and fast track).[73] Whether a below-range sentence based on "mitigating

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to make further amendments impacting the matter. Otherwise, Congress would not have seen the need to prohibit further actions regarding specified directives.

[72] For example, §3A1.1 Application Note 4 could be amended to state that an additional upward adjustment may be warranted in the specified circumstance (without using the term "departure" or creating an AOSC). And while the Commission is at it, the specified circumstance could be more narrowly tailored to elderly victims and crimes of violence, which is all that the directive mentioned.

[73] USSC, *Supplemental Data: 2024 Proposed Amendment Relating to Simplification* (2024). Relatedly, the 2022 Sourcebook shows that the most common

circumstances" gets recorded as a "departure" or a "variance" has more to do with the habits of judicial staff who fill out the forms than with judges' reasons for imposing a sentence. Indeed, the Commission's recently released data report on departures surprised individuals in several districts identified as departure-heavy, who report that sentencing proceedings focus on § 3553(a) factors, not Commission-endorsed departures.

Responding to the Commission's Issue for Comment #8, Defenders are hopeful that eliminating departures, which would necessitate significant reworking of the SOR form, could dramatically improve data accuracy and usefulness. Currently, the SOR form is preoccupied with distinguishing between departures and variances, making it long and complicated (and thus more prone to user variation and error), although the distinction between departures and variances, again, has become largely irrelevant.

Further, the Commission's reporting of data that is captured in SOR forms, focused on distinguishing between departures and variances, makes the resulting reports less, not more, helpful to practitioners and stakeholders. Defenders' 2019 annual letter to the Commission criticized the Commission's decision to stop releasing data that would clearly show the total number of below- and above-guideline sentences for each guideline.[74] Since 2019, sentences have been reported as "under the Guidelines Manual" or "Variances," with sentences involving *any* departure reported as "under the Guidelines Manual." But a sentence based on a departure (even if one assumes the "departure" box was properly checked) is more like sentence based on a variance than a within-guideline sentence. The number of "departures" and "variances" from a particular guideline, together, may reveal that the guideline is not appropriately calibrated.[75] The Commission's data reports, in contrast, obscure for policy-makers and stakeholders how the guidelines are actually functioning.[76]

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reason given for departures (other than substantial assistance and fast track) and variances is "history and characteristics of the defendant." *See* USSC, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 43 & tbl. 44 (2023).

[74] *See generally* Letter from Michael Caruso on behalf of the Fed. Defenders to the U.S. Sent'g Comm (Oct. 10, 2019).

[75] *See id.*

[76] Take, for example, the Sentencing Commission's Quick Facts on Career Offenders: it tells us that 45.2% of career offenders were sentenced "under the

Defenders recognize that it is the Administrative Office of the Courts (AO), not the Sentencing Commission, that produces the Statement of Reasons form. But in a world without departures, we expect the AO will dramatically simplify and shrink the form. And for sentences outside the guideline range, Defenders, at least, will urge the AO to focus on the most important questions for policy-makers and stakeholders. When a sentence falls outside the guideline range, did the applicable guideline result in a range that would be too low or two high for most defendants, or that does not account for the most relevant factors? Or, was the sentence based on a mandatory-minimum or a binding plea agreement? Or, was the sentence based on individualized circumstances?

If and when the Commission eliminates the concept of departures, and the AO amends the Statement of Reasons form to reflect that, we expect that data submitted to the Commission will be more accurate and consistent, and the Commission's data reports can be clearer and more useful.

Guidelines Manual." USSC, *2022 Quick Facts: Career Offenders* 2 (2022). But this does not mean that 45.2% of career offenders were sentenced within the guideline range—far from it. One must go to the end of this document, past the graphics, to learn that only 20.2% of individuals labeled as a "career offender" actually get a within-guideline sentence. And the document nowhere provides the total number of *below-guideline* sentences, which Defenders determined (using the Sentencing Commission's raw data) in Fiscal Year 2022 was 79.2%. This number raises alarm bells. The Commission's Quick Facts muffles those bells.

II. Defenders' comments and suggestions: chapter-by-chapter

This section may look, at first glance, long and complicated. But our suggestions are designed to simplify, not complicate, the Simplification proposal. All our suggestions fall into just a few categories:

- We urge the Commission to move forward with deleting language, as proposed, related to departures.

- In Chapter One and the new Chapter Six, we support adding language accurately describing courts' § 3553(a) responsibilities. These chapters address the framework for sentencing and the court's ultimate sentencing determination, as distinguished from chapters focused on calculating guideline ranges. Thus, they are ideal locations for accurately describing § 3553(a)'s framework. However, discussion of § 3553(a) should hew closely to its statutory language and Supreme Court guidance. And Chapter Six should not attempt to enumerate specific § 3553(a)-related considerations.[77]

- In Chapters Two through Five, we oppose creating AOSCs—a new category (by whatever name) of specific factors that are set out and listed for § 3553(a) consideration. More generally, we oppose adding § 3553(a)-focused language to these chapters, to avoid conflating a court's duty to calculate and consider the guideline range with its duty to consider other factors.[78] In nearly every instance where the Commission has proposed AOSC language, the departure language can be deleted and nothing added in its place. In just four places, Defenders have identified departure language that plays a special role, in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3. With each of these, we have suggested how the Commission can eliminate departure language while retaining necessary guidance, to avoid creating new problems, in a sentencing-outcome-neutral way.

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[77] The new Chapter Nine (Sentencing of Organizations) presents the same issue, at §9C5.1.

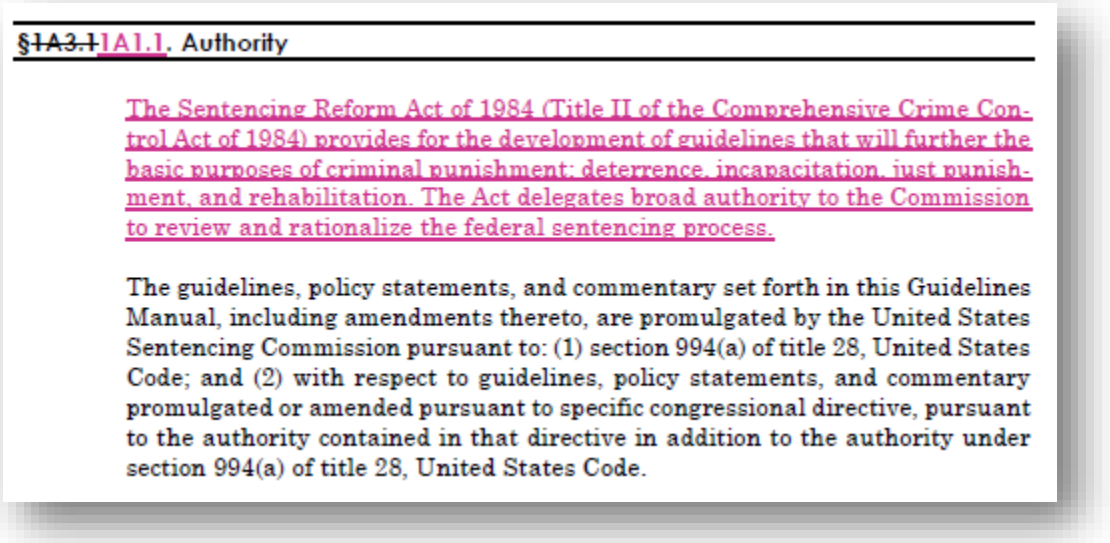
[78] AOSCs also arise in the new Chapter Eight (Violations of Probation and Supervised Release) and Chapter Nine, and we have the same concerns.

A. Chapter One: Accurately describing the sentencing framework

1. Chapter One, Part A

As discussed, Defenders support all proposed deletions in Chapter One, Part A. Also, we have no concerns regarding Part A's amended introductory language, referencing the Commission's authority and mission, and noting that historical materials are moving to Appendix D.

We do suggest slightly different language for what would become §1A1.1. This is the section as proposed by the Commission:



~~§1A3.1~~1A1.1. Authority

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

First, as discussed in Section I.C.1., above, the Sentencing Reform Act of 1984 nowhere refers to "incapacitation"; rather, it refers to "protect[ing] the public from further crimes of the defendant."[79] Further, Defenders think it is essential that this introductory section more clearly describe the § 3553(a) framework for sentencing.[80] Here is our proposed language (only the first sentence is new):

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[79] 18 U.S.C. § 3553(a)(2)(C); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat 1837 (1984).

[80] This necessarily includes § 3553(a)'s parsimony principle. *See Kimbrough*, 552 U.S. at 111 (explaining that a court "appropriately frame[s] its final determination

> *§1A1.1. Authority*
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> *Section 3553(a) of Title 18 provides that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.*[81] *The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the purposes of sentencing. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.*
>
> *The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.*

This starts the section—and the Manual—by identifying the sentencing court's overarching statutory mission, placing the Sentencing Commission's authority and mission within this larger context.

2. Chapter One, Part B

In Part B of Chapter One, Defenders again support the deletions. We also support the proposed new text (and commentary) for §1B1.1—the section of the Manual that most directly explains what the Commission is doing in its Simplification proposal, in that it eliminates "departures" as an intermediate step between calculating the appropriate guideline range and determining the sentence.

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in line with § 3553(a)'s overarching instruction to 'impose a sentence sufficient, but not greater than necessary'" (citation omitted)).

[81] Our suggestion reorders these purposes from how they appear in the proposed §1A1.1, to avoid any suggestion that the Commission is making a judgment about the relative importance of the purposes of sentencing. By keeping the purposes in the order that Congress listed them, the Commission maintains neutrality.

We suggest *additionally* creating an introduction for §1B1.1, before subsection (a), to frame all the subsections. Here is our suggested language:

> *According to 18 U.S.C. § 3553(a), the overarching goal of sentencing is to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. To guide sentencing courts in this endeavor, § 3553(a) enumerates seven factors to be considered, including (at § 3553(a)(4) and (a)(5)) consideration of the guideline range and applicable policy statements. Thus, § 3553(a) is understood as providing for a two-step process: first the court calculates the guideline range, then it considers that range and applicable policy statements in the context of a larger analysis of all the statutory sentencing factors, to determine the appropriate sentence.*

As with §1A1.1, this ensures judges understand that § 3553(a)'s "overarching instruction" frames the entire sentencing process and it gives context for §1B1.1's description of a two-step process. In addition, by clearly explaining that consideration of the guideline range and applicable policy statements are two of seven sentencing factors that all must be considered (as relevant) at sentencing, this language may help to dispel any misapprehension that the Commission's goal in eliminating departures is to insist that courts impose sentences within the guideline range.

As for the other proposed changes in Chapter One, Part B, we have just three concerns:

- Proposed §1B1.3, creating "Additional Offense Specific Considerations." For the reasons discussed above (and also below), Defenders object to converting "departures" into AOSCs. There is no reason the Commission cannot simply delete §1B1.3's departure language.

- Proposed §1B1.4 Background, explaining that Chapter Six "details factors which generally are not considered in the calculation of the guideline range." Assuming that the Commission does not adopt the proposed §§6A1.2 and 6A1.3, as Defenders very strongly urge, this sentence should be deleted.

- Proposed §1B1.7, referring to "additional considerations for the court to take into account in determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a)." Assuming that the Commission does not move forward with its proposal to enumerate considerations relevant to § 3553(a) factors as AOSCs, again, as Defenders very strongly urge, the Commission should either delete this sentence or change it to something like: "Second, the commentary may provide additional guidance in determining the appropriate sentence."

B. Chapter Two: Streamlining and simplifying

1. Generally

Defenders strongly oppose the portion of the Simplification proposal recharacterizing what are currently potential departures in Chapter Two as AOSCs. As discussed, creating lists of factors for consideration under § 3553(a) may inhibit courts' ability to meet their § 3553(a) responsibilities. Also, scattering § 3553(a) considerations throughout the portions of the Manual that are devoted to calculation of the guideline range (Chapters Two through Five) muddles the guideline calculation with the § 3553(a) analysis, which need not, and should not, be tethered to the guidelines.

In addition, converting departures into AOSCs throughout Chapter Two is anything but simple. Inevitably, there will be litigation about whether and how district courts are to factor AOSCs into their guideline calculations and larger § 3553(a) analyses. Indeed, given the uncertainty around this new category, if a client is harmed by a court's elevation of an AOSC above other factors (or the opposite—a court's failure to elevate an AOSC above other factors), a defense attorney may feel obligated to litigate the matter.

Further, many of the new AOSCs do not make sense. Currently, some departures are identified in the context of commentary that elucidates a particular point. Under the proposal, these departures are now consolidated at the end of the section, without context, which is confusing.[82] Also, many of

[82] *Compare, e.g.*, USSG §2K1.3 comment. (n.11) (departure coming after explanation of what offenses §2K1.3(b)(3) and (c)(1) do not cover), *with* Proposed Amendment at §2K1.3 AOSC 1(E) (no explanation).

the AOSCs are quite specific (*e.g.*, §2G2.1 ("more than ten minors")), which made sense as a departure but not as a § 3553(a) factor.

And the AOSCs that *do* make sense are wholly unnecessary. Many of the AOSCs suggest, generally, that a court might consider whether a guideline understates or overstates the seriousness of the offense. Courts are already required to consider this—in every case. Most AOSCs describe more specific circumstances, but relating to broader aggravating or mitigating matters that judges already know are highly relevant: number and/or vulnerability of victims (or lack of victims); harm to or endangerment of victims or the community; mens rea; culpability and role; and criminal livelihood and sophistication. These matters are addressed in nearly every case in which they arise—including but not limited to the specific factual circumstances that the Manual highlights—without the need for a departure or an AOSC.[83]

To summarize, Chapter Two's AOSCs add bulk and complexity to the Guidelines Manual, but not useful guidance. Fixing the problems created by this new category is easy: go forward with deleting the various departures scattered around Chapter Two and do not add the new AOSC language. Below, we discuss one guideline (§2L1.2) that has two departure provisions requiring more nuanced treatment; but treating those provisions differently would not impede the project of ridding the Manual of departure provisions that are generally obsolete and/or unnecessary.

If the Commission deletes the AOSCs, the Commission will need to update Chapter Two's introductory commentary, which, as proposed, reads:

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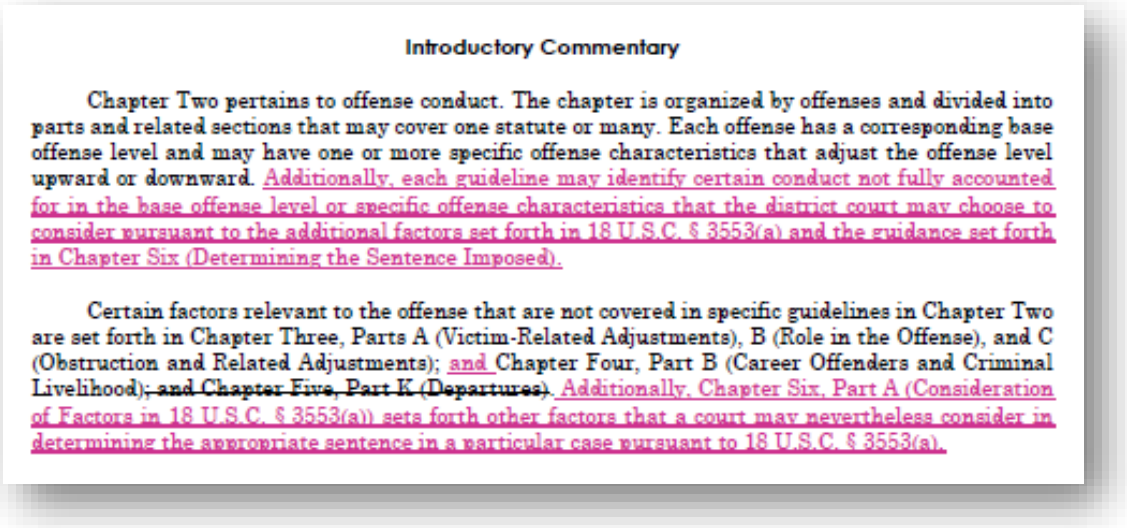
[83] For example, in a firearms case, there is no possibility the sentencing court would not consider, *e.g.*, that the offense posed a substantial risk of death, or that it involved more than 200 firearms or large quantities of armor-piercing ammunition. *See* Proposed Amendment at §2K2.1, Additional Offense Specific Characteristics (aggravating factors related to the offense). But then, the court would also surely consider that an offense involved just *one* round of armor-piercing ammunition, or that the offense posed no risk to anyone.



Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Additionally, each guideline may identify certain conduct not fully accounted for in the base offense level or specific offense characteristics that the district court may choose to consider pursuant to the additional factors set forth in 18 U.S.C. § 3553(a) and the guidance set forth in Chapter Six (Determining the Sentence Imposed).

Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); and Chapter Four, Part B (Career Offenders and Criminal Livelihood); ~~and Chapter Five, Part K (Departures)~~. Additionally, Chapter Six, Part A (Consideration of Factors in 18 U.S.C. § 3553(a)) sets forth other factors that a court may nevertheless consider in determining the appropriate sentence in a particular case pursuant to 18 U.S.C. § 3553(a).

We suggest the following, working from the current introductory language:

> *Introductory Commentary*
>
> *Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); and Chapter Four, Part B (Career Offenders and Criminal Livelihood).~~; and Chapter Five, Part K (Departures).~~*
>
> *The Sentencing Commission has endeavored to create guidelines that will promote the purposes of sentencing. However, guidelines are not capable of accounting for all potentially aggravating and mitigating circumstances that may present in a case. And they may, in individual cases, call for a sentence that is too high or too low. As addressed in Chapter Six, ultimately, it is for the sentencing court to determine what sentence in an individual case is sufficient, but not greater than necessary, to comply with the purposes of sentencing.*

This language would ensure that judges do not perceive the deletion of departures as a judgment that the guidelines account for everything or that the appropriate sentence is always a guideline-range sentence.[84]

To tie up loose ends, Defenders have identified one Chapter Two provision in which the Commission has proposed adding new language that does not create an AOSC: §2A1.1 Application Note 2. We have no concerns with this. Also, we are not concerned with the many technical changes in Chapter Two (and throughout the Manual) that update cross-references and the like. Our concern is with the creation of a new category (AOSCs) that elevates particular factors for a court's § 3553(a) analysis.

2. Section 2L1.2

Section 2L1.2 has two departure provisions that require special treatment. In response to the Commission's Simplification proposal, we surveyed Federal Public and Community Defenders to get a sense of how the different districts use departures, and whether any departures play a critical role in day-to-day sentencing.[85] This process has led us to conclude that although we object to recharacterizing departures as § 3553(a) considerations, and we think that most departure-related provisions can simply be deleted outright, §2L1.2 needs a bit more attention.

In some border districts, where most illegal-reentry cases are prosecuted, Defenders report that judges consider one or both of §2L1.2's first two potential departures in a large percentage of illegal-reentry cases. This could indicate that § 2L1.2 is not appropriately calibrated, which could be added to the Commission's list of priorities in the future. For now, though, we worry that simply deleting all of §2L1.2's departure provisions could significantly alter illegal-reentry sentencing outcomes, although we understand that the Commission's Simplification proposal is intended to provide for a simpler, more rational sentencing process, not change outcomes.

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[84] This point is so important that it bears repeating, which is why we are suggesting related language in multiple places, and also asking the Commission to explain the matter in its "Reason for Amendment."

[85] That is, departures other than §5K1.1 (substantial assistance) and §5K3.1 (fast track), which everyone agrees play a critical role. The Commission in its proposal has rightly treated these departures differently than others.

Also, both departure provisions play a unique role. Section 2L1.2's first departure provision (currently at Application Note 6), based on the seriousness of a prior offense, plays a role similar to §4A1.3, which Defenders also identify as requiring special attention (discussed below). This departure provision is necessary because §2L1.2's offense-level calculation is driven largely by criminal history—more particularly, by prior sentence length. When the Sentencing Commission in 2016 amended §2L1.2 to focus on prior sentence length, as a rough proxy for offense seriousness, the Commission presumably recognized that this change would incorporate disparate state sentencing practices into the Guideline calculus and could be both over- and under-inclusive.[86] Consequently, the Commission encouraged departures, similar to §4A1.3. In both situations, the guidance plays a critical role.

The second departure, related to time spent in state custody (currently at Application Note 7), plays a role similar to §5G1.3's "discharged sentence" departure, which Defenders also identify as requiring special attention (discussed below). In many cases, immigration officials find the person when he is incarcerated for another offense, but the government waits to initiate prosecution until the person is released, often after years of incarceration. Recognizing that "the amount of time a defendant serves in state custody after being located by immigration authorities may be somewhat arbitrary," and could result in a sentence that is greater than necessary, the Commission created this departure provision to help judges determine when it is appropriate to adjust a sentence to account for time served in state custody.[87]

However, Defenders remain uncomfortable with the current proposal to recharacterize §2L1.2's departure provisions as § 3553(a) considerations. Thus, we propose modifying that section's first two departure provisions in order to delete references to "departures," while keeping the guidance where it is.[88] Here are our suggested amendments, working from the current departure language:

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[86] *See* USSG App. C, Amend. 802 (Nov. 1, 2016).

[87] *See* USSG App. C, Amend. 787 (Nov. 1, 2014) (Reason for Amendment).

[88] Section 2L1.2's third departure provision (currently Application Note 8, related to cultural assimilation) is helpful for our clients, but not in a way that is unique or distinct from the myriad other departure provisions addressing

> *6. ~~Departure Based on~~ Seriousness of a Prior Offense.—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a ~~departure~~ sentence above or below the applicable guideline range may be warranted.*
>
> *7. ~~Departure Based on~~ Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense~~,~~ and the time served is not covered by an adjustment under §5G1.3(b) ~~and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case~~, the court may consider whether a ~~departure~~ sentence below the applicable guideline range is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. ~~Any such departure~~ The ultimate sentence should be fashioned to achieve a reasonable punishment for the instant offense.*

These modest amendments to §2L1.2's first two departure provisions would allow the Commission to realize its goal of eliminating departures and simplifying the Guidelines Manual, while avoiding both the problems related to enumerating § 3553(a) considerations and the problems that could arise from deleting this guidance outright.

C. Chapter Three: More streamlining, and creating a home for "fast track"

The proposed amendments to Chapter Three do not raise any new concerns. In several places, Chapter Three raises precisely the same concern

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aggravating and mitigating circumstances. Thus, Defenders are not advocating for special treatment of that one.

as Chapter Two. The proposal recharacterizes all of Chapter Three's current departure provisions as "Additional Considerations" for courts' § 3553(a) analyses—again, for simplicity, AOSCs. In Chapter Three, Defenders are satisfied that the Commission can delete all the current departure language outright, without creating new AOSC language.[89]

Last, but not least, the proposal places "Early Disposition Program"—better known as "fast track"—in Chapter 3, at §3F1.1. We do not object to this move or to the updated language. Indeed, this location makes sense, coming as it does after §3E1.1 (Acceptance of Responsibility).

D. Chapter Four: Preserving a safety valve

Chapter Four again presents the problem of AOSCs (recharacterizing departure provisions as § 3553(a) considerations)—in commentary to §§4A1.2, 4B1.2, and 4C1.1. For the same reasons articulated above, in these provisions, Defenders urge the Commission to move forward with deleting the departure language, but we object to recharacterizing departure language as § 3553(a) language. These deletions should simply be deletions.

But §4A1.3 is different.

Section 4A1.3 is one of the most common departures—possibly *the* most common departure—other than §§ 5K1.1 and 5K3.1.[90] Or at least, the portion of §4A1.3 addressing a situation in which Chapter Four's criminal history rules either under- or over-represent the seriousness of the individual's history may be the most common departure. And Defenders think this is for a good reason: Chapter Four's complex, rigid, points-based system demands that there be a safety valve for situations where the rules produce a result that, for whatever reason, is too high or too low to reflect the seriousness of the criminal history of the individual being sentenced.

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[89] As with Chapter Two, we found one addition of new language that does not purport to set out a category of considerations for the § 3553(a) analysis, at proposed §3D1.2 (Background commentary), and we have no objection to it.

[90] For what it's worth, the Commission's recent data report shows that "criminal history issues" are the second-most cited departure provision (excluding §§ 5K1.1 and 5K3.1), which supports what Defenders report from around the country: §4A1.3's "under-represents or over-represents" provision plays an important role. *Supplemental Data*, *supra* note 73.

Therefore, Defenders do not think it would make sense here (as it does elsewhere) to simply delete the departure language and add nothing in its place. At the same time, we have concerns about the proposed amended §4A1.3. First, §4A1.3 should not purport to address § 3553(a) factors. It addresses the operation of the Guidelines Manual: whether Chapter Four's rules result in a criminal history category that does not fit the particulars of an individual's history. Ultimately, §4A1.3 can help a court determine a sentence that is sufficient but not greater than necessary, and facts related to criminal history may be relevant in the § 3553(a) analysis. But §4A1.3 is about something more particular than that.

Second, the proposed §4A1.3 identifies examples of aggravating and mitigating circumstances that are so specific that they are confusing, rather than helpful. This is not surprising, since the language comes from old departure provisions. Subsection (a)'s prefatory language suggests that judges have discretion to apply §4A1.3 any time a criminal history category under- or over-represents the seriousness of a particular individual's criminal history. But then the examples—limited to such circumstances as "similar misconduct established by a civil adjudication or by a failure to comply with an administrative order" and "two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period"—strongly suggest that judges shouldn't exercise their full discretion after all.

Here is our suggested language:

> *§4A1.3 Inadequacy of Criminal History Category (Policy Statement)*
>
> *If the defendant's criminal history category substantially under- or over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, the court should consider whether to impose a sentence above or below the applicable guideline range.*

This is simple, neutral, and accomplishes what is needed: encouraging courts to consider (although not necessarily impose) a sentence outside the guideline range where the criminal history category is incongruent with the particulars of the prior offenses underlying that category.

In accord with this proposed language, we also suggest the following amendment to §4A1.3's proposed background commentary (working from the proposed language):

> *This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. This policy statement recognizes that ~~consideration of whether additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not adequately reflect the seriousness of the defendant's criminal history or likelihood of recidivism is appropriate in determining the appropriate sentence to impose pursuant to 18 U.S.C. §3553(a).~~ in some circumstances, where additional aggravating or mitigating factors established by reliable information indicates that the criminal history category assigned does not appropriately reflect the seriousness of the defendant's criminal history or likelihood of recidivism, it may be appropriate to consider a sentence above or below the applicable guideline range.*[91]

E. Chapter Five: Ridding the Manual of guidance that contradicts settled law and clarifying calculation rules without creating a new category related to § 3553(a)

Chapter Five's ten parts do very different work, from Part A's establishment of the Sentencing Table to Part K's policing of departures, and the Commission's proposed amendments also do very different work. In response:

(1) Defenders support the wholesale deletion of 5H and 5K other than §§5K1.1 and 5K1.2;

(2) We are pleased that the Commission has left "substantial assistance" substantively alone, in §5K1.1, along with §5K1.2; and

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[91] As with Chapter Two and Chapter Three, Chapter Four contains one proposal to add language that does not purport to create a new category of considerations or comment on a court's § 3553(a) analysis (§4B1.4 Application Note 2). Again, we have no concerns with this.

(3) In the earlier parts of Chapter Five, we have distinct concerns regarding §§5C1.1 and 5G1.3, but they are easily resolved.

1. Chapter Five, Parts H and K2

This comment has already thoroughly explained why the Sentencing Commission should delete Chapter Five, Parts H and K2—without delay, even if it does not adopt the other parts of its Simplification proposal this amendment cycle. Defenders will use this opportunity to remind the Commission, one more time, of the need to include in its "Reason for Amendment" a clear explanation of why the Commission is eliminating departures from the Manual (if it goes that far) or why it is deleting 5H and 5K2 (if it stops there), and also the need to add language to the text of the Manual regarding § 3553(a)'s demand for individualized sentencing.

Defenders are pleased that the Commission has proposed maintaining the language of §§5K1.1 and 5K1.2 with only minor changes, and leaving these provisions where they are.

2. Chapter Five's other parts

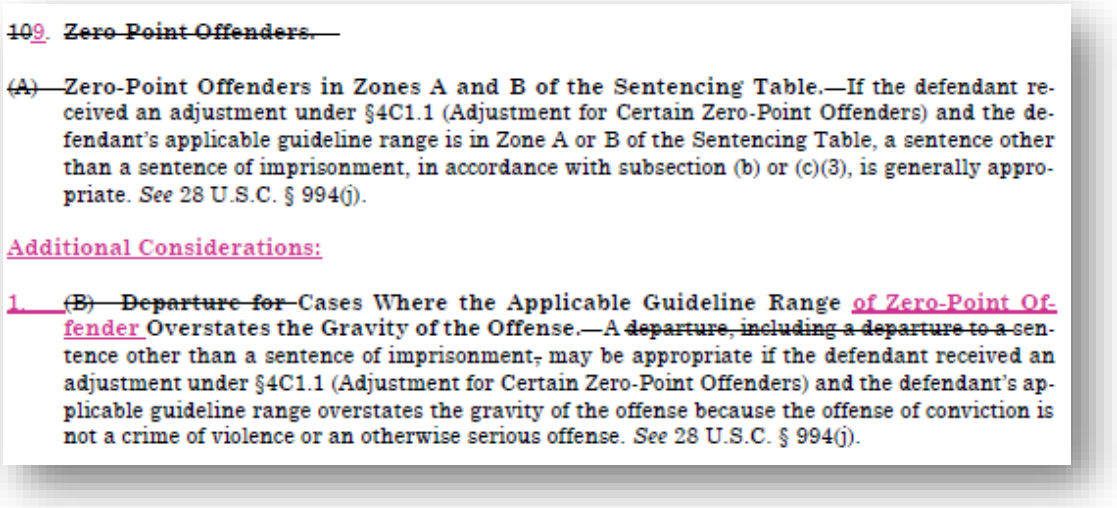
The first seven parts of Chapter Five (A–G) all relate to the technical work of calculating guideline ranges and determining sentencing options under the guidelines—as the proposed new chapter title helpfully describes, with each section doing quite different work.

Nearly all the amendments to Chapter Five, Parts A through G, are deletions, and we agree with nearly all of those. In §5E1.2, the Commission has proposed a new AOSC, which should be deleted, along with the departure provision it is based on (currently Application Note 4). Similarly, in both §§5C1.1 and 5G1.3, the Commission has proposed converting departure provisions to AOSCs. In 5C1.1, the first departure provision can be deleted outright. But §5C1.1's second departure provision and 5G1.3's two departure provisions require special treatment. Our concerns and suggestions for how to resolve each of these are distinct.

a. Section 5C1.1: guidance related to "Zero-Point Offenders"

Section 5C1.1's first departure provision (currently at Application Note 6), regarding "specific treatment purpose," can simply be jettisoned. Its

second departure provision, though, related individuals with zero criminal history points (currently at Application Note 10), is different. This is not the "Zero-Point Offender" guideline adjustment, which appears at §4C1.1. Rather, this provision encourages courts to consider a sentence other than imprisonment for individuals who qualify for that adjustment (regardless of what "zone" they fall into). Here it is, as proposed:



~~10~~9. ~~**Zero-Point Offenders.—**~~

~~(A)~~ **Zero-Point Offenders in Zones A and B of the Sentencing Table.**—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. *See* 28 U.S.C. § 994(j).

Additional Considerations:

1. ~~(B) **Departure for**~~ **Cases Where the Applicable Guideline Range** of Zero-Point Offender **Overstates the Gravity of the Offense.**—A ~~departure, including a departure to a~~ sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. *See* 28 U.S.C. § 994(j).

The Commission created § 5C1.1's "Zero-Point Offenders" departure provision pursuant to a continuing statutory directive: 28 U.S.C. § 994(j), regarding 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."[92] Therefore, this provision cannot be deleted outright.

Fortunately, it is simple to remove the departure language from Application Note 10(B) (to be renumbered 9(B) once Note 6 is deleted as proposed) without creating a new category. It is just a matter of amending the current Note 10(B). Here is our suggested amendment (working from the current departure language):

> *10. Zero-Point Offenders.—*
>
> *(A) Zero-Point Offenders in Zones A and B of the Sentencing Table.—If the defendant received an adjustment under §4C1.1*

[92] *See* USSG App. C, Amend. 821, Reason for Amendment (Nov. 1, 2023).

(Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. See 28 U.S.C. § 994(j).

(B) ~~Departure for~~ Cases Where the Applicable Guideline Range Overstates the Gravity of the Offense.—A ~~departure, including a departure to a~~ sentence below the guideline range, including a sentence other than ~~a sentence of~~ imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. See 28 U.S.C. § 994(j).

b. Section 5G1.3: guidance related to a related terms of imprisonment

Section 5G1.3 addresses the relationship of the sentence being imposed to an undischarged or anticipated term of imprisonment—whether the new sentence should be concurrent or consecutive, and how the new sentence might be adjusted for time served on the old sentence. The section's two departure provisions provide guidance that is very much needed, and Defenders worry that simply deleting it would change sentencing outcomes in the cases to which it applies.

The issue is that §5G1.3 provides useful guidance on how courts should account for other, related sentences, but it is incomplete. Its invited departures (currently at Application Note 4(E) and 5) fill the gaps.[93] The first departure provision explains that a court may impose a sentence below the guideline range to account for an undischarged term of imprisonment for an

[93] This is regarding a topic (when the BOP will not account for sentence credit, such that an adjustment is needed) that often confuses judges and practitioners. Indeed, courts have felt compelled to grant sentence reductions under 18 U.S.C. § 3582(c)(1)(A) in some cases where they learned that the BOP calculated the sentence differently than anticipated, resulting in a longer sentence than necessary. *See, e.g.*, *United States v. Comer*, 2022 WL 1719404, *5 (W.D. Va. May 27, 2022); *United States v. Castillo*, 2021 WL 1781475, at *3 (D. Conn. Feb. 22, 2021).

offense that involves *partially* overlapping conduct.[94] The second provision provides that a court may impose a sentence below the guideline range to account for a *discharged* prison term.[95]

Both of these provisions, together with the guideline text, help "to ensure that the combined punishment is not increased unduly by the fortuity and timing of separate prosecutions and sentencings."[96] This scheme also reduces the likelihood that an individual feels compelled to plead guilty, rather than exercise his right to trial, simply to avoid duplicative punishment. It would appear that the Commission already recognizes the importance of such guidance: it provides similar guidance in §2L1.2's commentary, discussed above, and also in §5K2.23 (Discharged Terms of Imprisonment).

The situation here is unique in that, given the role that this guidance plays, the best way to eliminate the departure language would be to add to the guideline's *text*. Here is our suggested amendment (working from the current guideline text):

> *§5G1.3. Imposition of a Sentence on a Defendant Subject to a~~n~~ ~~Undischarged~~ Related Term of Imprisonment or Anticipated State Term of Imprisonment*
>
> *(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.*
>
> *(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:*

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[94] USSG §5G1.3 comment. (n. 4(E)).

[95] §5G1.3 comment. (n. 5).

[96] §5G1.3 comment. (n. 4(E)). This statement is made in Application Note 4(E), but the same reasoning would apply to departures under Note 5.

> *(1) the court shall adjust the sentence for any period of imprisonment already served on the ~~undischarged~~ term of imprisonment if it is undischarged, and may adjust the sentence for any period of imprisonment already served on the term of imprisonment if it is discharged, if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and*
>
> *(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of ~~the~~ any undischarged term of imprisonment.*
>
> *(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.*
>
> *(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment, and the court may adjust the sentence for any period of imprisonment already served, to achieve a reasonable punishment for the instant offense.*

This language is intended to be neutral; it is designed only to accomplish in §5G1.3's text what was previously accomplished through the text and departure provisions, together.[97]

Alternatively, the Commission could amend the existing departure language to swap out "downwardly depart" and "downward departure" for "sentence below the applicable guideline range" or "adjustment," or something of that nature. However, here, it makes more sense to delete the departure language and provide the guidance through guideline text.

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[97] We have identified one place where a conforming amendment would need to be made to commentary, to account for the possibility of an adjustment based on a discharged term of imprisonment. *See* §5G1.3 comment. (n. 2(C)(iii)) ("undischarged").

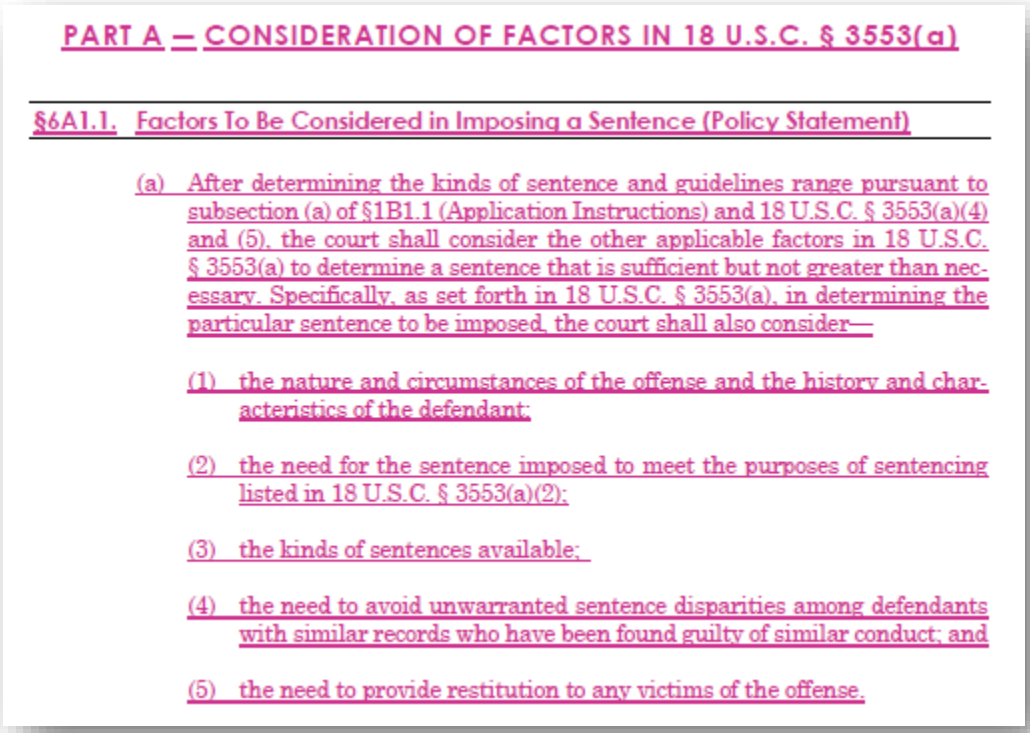
F. Chapter Six: Ensuring that the purposes of sentencing, as they relate the individual, are paramount

By this point in our comment, Defenders' position on the proposed Chapter Six should be clear. We are thrilled that the Commission proposes to set out a new chapter dedicated to "Determining the Sentence" and to the § 3553(a) analysis. We are hopeful this will help ground courts' sentencing decisions in § 3553(a)'s statutory framework and ensure that all understand that the applicable guideline range is one of many factors for consideration. This is already the law, and the Guidelines Manual will better reflect current law when it includes a Chapter Six that is dedicated to the full § 3553(a) analysis.

The devil is in the details. Most importantly, as discussed above, we object to the proposed §§6A1.2 and 6A1.3. The Commission should not comment on how district courts should apply § 3553(a)'s sentencing factors to individual cases other than the factors the Commission was designed to control: § 3553(a)(4) and (a)(5). The circumstances that may be relevant to a court's § 3553(a) analysis are effectively limitless, and depend on the unique circumstances of each case. Fixing §§6A1.2 and 6A1.3 is easy: delete them.

The proposed new §6A1.1, in contrast to §§6A1.2 and 6A1.3, should stay. It does something important: it gets § 3553(a) into the Manual, in the context of a chapter that is devoted to the court's ultimate determination of the appropriate sentence, rather than calculation of the guideline range.

Here is §6A1.1 as proposed by the Commission:



PART A — CONSIDERATION OF FACTORS IN 18 U.S.C. § 3553(a)

§6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)

(a) After determining the kinds of sentence and guidelines range pursuant to subsection (a) of §1B1.1 (Application Instructions) and 18 U.S.C. § 3553(a)(4) and (5), the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient but not greater than necessary. Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

We do not object to this language per se, but we suggest that §6A1.1 more clearly and fully describe § 3553(a), including its prefatory language[98]:

> *§6A1.1. Factors To Be Considered in Imposing a Sentence (Policy Statement)*
>
> *(a) Under 18 U.S.C. § 3553(a), a court at sentencing "shall impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation. In determining a sentence that meets this standard, § 3553(a) sets forth seven factors for consideration.*
>
> *Two of the seven factors are determined under Chapters 1–5 of this Guidelines Manual: applicable guidelines (§ 3553(a)(4)) and pertinent policy statements (§ 3553(a)(5)). After calculating the*

[98] Our suggested language is different enough from the proposed §6A1.1 that we present it entirely in red, as a new version of §6A1.1.

applicable guideline range and considering it along with pertinent policy statements according to Chapters 1–5, the court must consider the other factors, as they relate to the unique case at hand, in order to determine a sentence that is sufficient but not greater than necessary.

Specifically, as set forth in 18 U.S.C. § 3553(a), in determining the particular sentence to be imposed, the court shall also consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed to meet the purposes of sentencing listed in 18 U.S.C. § 3553(a)(2);

(3) the kinds of sentences available;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(5) the need to provide restitution to any victims of the offense.

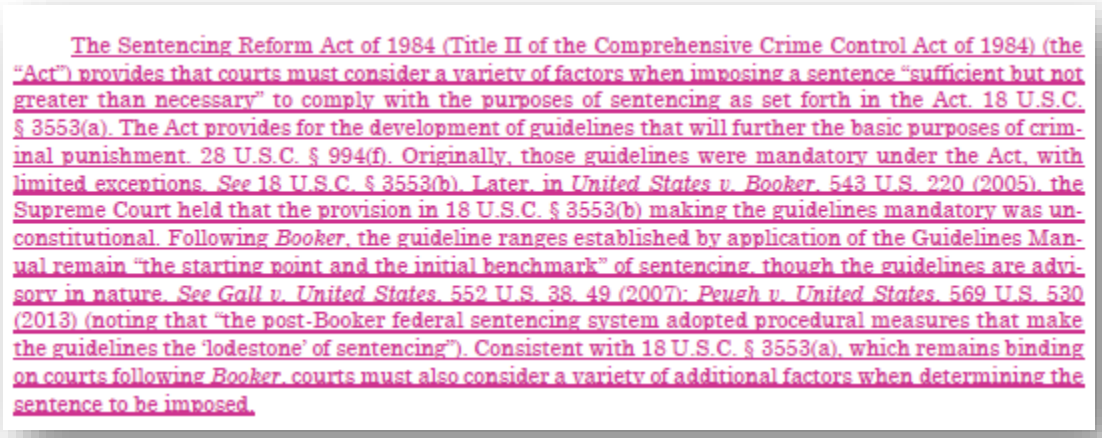
There would be no need for any commentary to this version of §6A1.1 because its text thoroughly explains how § 3553(a) operates.

Working backward through the new Chapter Six, once §§6A1.2 and 6A1.3 are deleted, and §6A1.1 is amended, the Commission would need to update the chapter's proposed introductory language:

- At a minimum, because §§6A1.2 and 6A1.3 would be deleted, most of the last paragraph of the proposed introductory language would need to be deleted, starting with "This chapter provides examples of factors…"
- Defenders further recommend deleting all the language after the first paragraph. The lengthy discussion of the fact that § 994(d) and (e) constrain the Sentencing Commission, not courts, seems designed to explain why the Commission decided that it was authorized to include the factors enumerated in § 994(d) and (e)

in its proposed new §§6A1.2 and 6A1.3, which we have marked for deletion.[99]

Here, then, is the first paragraph of the introductory commentary, which is all that would remain under the above suggestions:



The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") provides that courts must consider a variety of factors when imposing a sentence "sufficient but not greater than necessary" to comply with the purposes of sentencing as set forth in the Act. 18 U.S.C. § 3553(a). The Act provides for the development of guidelines that will further the basic purposes of criminal punishment. 28 U.S.C. § 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. *See* 18 U.S.C. § 3553(b). Later, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b) making the guidelines mandatory was unconstitutional. Following *Booker*, the guideline ranges established by application of the Guidelines Manual remain "the starting point and the initial benchmark" of sentencing, though the guidelines are advisory in nature. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *Peugh v. United States*, 569 U.S. 530 (2013) (noting that "the post-Booker federal sentencing system adopted procedural measures that make the guidelines the 'lodestone' of sentencing"). Consistent with 18 U.S.C. § 3553(a), which remains binding on courts following *Booker*, courts must also consider a variety of additional factors when determining the sentence to be imposed.

Defenders have distinct concerns with this paragraph. We assume the Commission intends, with its Simplification proposal, to put § 3553(a) at the center of Chapter Six and, thus, at the center of the determination of sentence. But the above discussion does not accomplish this, because it describes only the Supreme Court's post-*Booker* statements about the continuing importance of the Guidelines Manual and none of that Court's statements about a sentencing court's ability—indeed, its obligation, if the facts of the case warrant it—to deviate from the Manual.

Below is our suggested language. Other than the sentences lifted from the Commission's current proposal, we quote the Supreme Court directly (just to be clear about where our language comes from):

> *The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) (the "Act") "contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing,*

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[99] This discussion could be repurposed for the "Reason for Amendment," related to the fact that Chapter Five will no longer prohibit or discourage courts from considering the factors listed in § 994(d) and (e).

including 'to reflect the seriousness of the offense,' 'to promote respect for the law,' 'to provide just punishment for the offense,' 'to afford adequate deterrence to criminal conduct,' and 'to protect the public from further crimes of the defendant.'"[100]

The Act provides for the development of guidelines that will further these purposes. 28 U.S.C. § 994(f). Originally, those guidelines were mandatory under the Act, with limited exceptions. See 18 U.S.C. § 3553(b). Later, in United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the provision in 18 U.S.C. § 3553(b), making the guidelines mandatory, was un-constitutional. Following* Booker*, the guideline ranges established by application of the Guidelines Manual are advisory in nature, and "the district court must consider all of the factors set forth in § 3553(a) to guide its discretion at sentencing."*[101]

Under the advisory-guideline scheme, the applicable guideline range and pertinent policy statements remain "the starting point and the initial benchmark" of sentencing.[102] *After correctly calculating and considering the guideline range, the "district court must then consider the arguments of the parties and the factors set forth in § 3553(a)."*[103] *In doing so, the "district court 'may not presume that the Guidelines range is reasonable'; and it 'may in appropriate cases impose a non-Guidelines sentence based on disagreement with the Sentencing Commission's views.'"*[104] *Under § 3553(a), sentencing courts are*

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[100] *Kimbrough*, 552 U.S. at, 101 (quoting § 3553(a)); *see also Dean*, 581 U.S. at 67 ("[Section 3553(a)'s list of factors is preceded by what is known as the parsimony principle, a broad command that instructs courts to 'impose a sentence sufficient, but not greater than necessary, to comply with' the four identified purposes of sentencing: just punishment, deterrence, protection of the public, and rehabilitation.").

[101] *Peugh*, 569 U.S. 536; *see also Pepper*, 562 U.S. at 490 ("Accordingly, although the 'Guidelines should be the starting point and the initial benchmark,' district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'") (quoting *Gall*, 552 U.S. at 49–51).

[102] *Peugh*, 569 U.S. at 536 (quoting *Gall*, 552 U.S. at 49).

[103] *Id.* (citing *Gall*, 552 U.S. at 49–50).

[104] *Id.* (quoting first *Gall*, 552 U.S. at 50, then *Pepper*, 562 U.S. at 501 (which was in turn citing *Kimbrough*,, 552 U.S. at 109–110)) (internal brackets omitted).

> *permitted to "consider the widest possible breadth of information about a defendant," in order to "ensure[] that the punishment will suit not merely the offense but the individual defendant."*[105]

This introductory commentary, along our suggested §6A1.1, serves as a fitting end for the Guidelines Manual's most important chapters. Chapter One introduces the framework for sentencing, including where the Guidelines Manual come into it, then sets out rules for using the Manual. Chapters Two through Five govern the calculation of guideline ranges. Chapter Six then reminds courts of the framework for sentencing and explains to courts how the Supreme Court has described their duty to consider the guideline range as one factor among others and ultimately determine a sentence that is just sufficient for the particular individual being sentenced.

G. Chapters Seven through Nine: Related changes

In Chapters Seven through Nine, the majority of the proposed amendments are essentially technical: *e.g.*, renumbering, updating cross-references, and eliminating departure-related language. In these chapters, Defenders have concerns regarding the following:

- Section 8B1.4: Same concern regarding the conversion of departures to AOSCs, as throughout the Manual. The Commission can simply delete the departures.

- Section 9A1.2: The proposed new §9A1.2(b)(5) cross-references provisions that Defenders have recommended either deleting or restructuring; if the Commission accepts our recommendations, this subsection will need to be rewritten or deleted.

- Section 9C2.8: Same concern regarding the conversion of departures to AOSCs, as throughout the Manual. Federal Public and Community Defenders represent individuals, not organizations. But with that disclaimer, we do not know of any reason the Commission cannot simply delete the "pattern of illegality" departure in the commentary to §9C2.8.

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[105] *Pepper*, 562 U.S. at 488 (citation omitted); *see also Concepcion*, 597 U.S. at 492 (emphasizing this point).

- Section 9C5.1: This new provision mirrors the new Chapter Six as proposed: it converts departure-related language (which the Commission has proposed deleting in the preceding sections) into a new list of § 3553(a) considerations. Again, Defenders are not experts regarding sentencing of organizations. But we are hopeful that the Commission takes our concerns about Chapter Six to heart. And if so, we presume it would need to make similar changes to the proposed new §9C5.1.

III. Conclusion

Defenders have suggested many changes to the Commission's Simplification proposal, but we want to be clear: we are eager to move forward with the proposal. For this reason, we have combed through the proposal line-by-line and suggested changes that will ensure any amendment that the Commission promulgates would accomplish its goals, without creating new problems. We have aimed to present modifications to the Simplification proposal that could be acceptable to all stakeholders.

This Comment has gotten quite granular in suggesting changes to the Simplification proposal, so we will repeat the bullets from above, as a reminder that all our suggestions fall into just a few categories:

- We urge the Commission to move forward with deleting language, as proposed, related to departures. At a minimum, the Commission should delete Chapter One, Part A, and Chapter 5 Parts K and H, as proposed.

- In Chapter One and the new Chapter Six, we support adding language accurately describing courts' § 3553(a) responsibilities. These chapters address the framework for sentencing and the court's ultimate sentencing determination, as distinguished from chapters focused on calculating guideline ranges. Thus, they are ideal locations for accurately describing § 3553(a)'s framework. However, discussion of § 3553(a) should hew closely to its statutory language and Supreme Court guidance. And

Chapter Six (along with Chapter Nine) should not attempt to enumerate specific § 3553(a)-related considerations.[106]

- In Chapters Two through Five (as well as Seven and Eight), we oppose creating AOSCs—a new category (by whatever name) of specific factors that are set out and listed for § 3553(a) consideration. More generally, we oppose adding § 3553(a)-focused language to these chapters, to avoid conflating a court's duty to calculate and consider the guideline range with its duty to consider other factors.[107] In nearly every instance where the Commission has proposed AOSC language, the departure language can be deleted and nothing added in its place. In just four places, Defenders have identified departure language that provides essential guidance, in §§2L1.2, 4A1.3, 5C1.1, and 5G1.3. With each of these, we have suggested how the Commission can eliminate departure language while retaining necessary guidance, to avoid creating new problems, in a sentencing-outcome-neutral way.

We look forward to discussing the Commission's Simplification proposal at the upcoming hearing, and to answering questions about our suggestions for making the proposal workable for this amendment cycle.

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[106] The new Chapter Nine (Sentencing of Organizations) presents the same issue, at §9C5.1.

[107] AOSCs also arise in the new Chapter Eight (Violations of Probation and Supervised Release) and Chapter Nine, and we have the same concerns.