



U.S. Department of Justice

Criminal Division

Office of Policy and Legislation

Washington, D.C. 20530

February 22, 2024

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Judge Reeves:

This letter responds to the United States Sentencing Commission's request for comment on its proposed amendments to the Federal Sentencing Guidelines and issues for comment published in the Federal Register on December 26, 2023.¹ We thank you, the other Commissioners, and the Commission staff for being responsive to the Justice Department's sentencing priorities and to the needs and responsibilities, more generally, of the Executive Branch.

While the published amendments address important issues of federal sentencing policy, we note two critical issues of national importance they do not address: the epidemics of fentanyl poisoning and firearms violence. We continue to believe the Commission has a role to play in dealing with these pressing public safety matters, and we think they demand the Commission's attention. And we echo the sentiments expressed in the Deputy Attorney General's letter, submitted separately in response to the Commission's request for comment.

We look forward to working with you during the remainder of the amendment year on all the published amendment proposals and to continued collaboration in the years to come to improve public safety and further the cause of justice for all.

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¹ U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary*, 88 Fed. Reg. 89142, 89143 (Dec. 26, 2023), available at [Federal Register : Sentencing Guidelines for United States Courts](#).

III. Simplification of the Three-Step Process

a. *Summary*

The Department supports simplification of the Guidelines, but we think it must be done through a meticulous, deliberative, and fully researched process to ensure both its legality and effectiveness. We are concerned with the speed at which this proposal is moving and that it is happening without adequate consideration of the numerous legal and policy issues it raises. We are especially concerned that portions of the Commission’s amendment conflict with express congressional directives and will cause confusion over a judge’s authority to fashion an appropriate sentence pursuant to all the factors listed in 18 U.S.C. § 3553(a). Given the scope of this amendment and its legal vulnerabilities, we encourage the Commission to defer consideration of the proposal until it can carefully and fully review its effects and the implicated legal issues.

Before the Supreme Court’s decision in *United States v. Booker*,¹⁸ judges were required to impose sentences within the sentencing ranges prescribed by the Guidelines, except under narrow and specifically defined circumstances.¹⁹ In the pre-*Booker* sentencing regime, departures were vital to the integrated structure of the Guidelines.²⁰ A sentencing judge granted a “departure” when it invoked the discretion under the mandatory guidelines regime to sentence outside the applicable guideline range under specified circumstances.²¹

Booker invalidated the mandatory features of the Guidelines, allowing judges to exercise discretion to impose a sentence outside the applicable guidelines range regardless of the presence or absence of departure authority. Departures and variances are distinct, though very similar,

¹⁸ 543 U.S. 220 (2005).

¹⁹ 18 U.S.C. § 3553(b)(1) (excised by *Booker*, 543 U.S. at 259).

²⁰ *United States v. Rivera*, 994 F.2d 942, 948-50 (1st Cir. 1993).

²¹ See, e.g., USSG §4A1.3 (authorizing departures when a defendant’s criminal history score inadequately reflects the defendant’s prior criminal conduct); USSG §5K2.0 (permitting departures based on relevant circumstances that the Guidelines have overlooked entirely or have accounted for insufficiently).

concepts in the post-*Booker* sentencing scheme. Although they may lead to the same result – a sentence outside the applicable guidelines range – a variance and departure reach that result in different ways. A variance is a sentence imposed outside the guidelines range when the judge determines, for a reason independent of the guidelines or Guidelines Manual, that a sentence within that range will not adequately further the purposes reflected in 18 U.S.C. § 3553(a).²² A departure, by contrast, is a sentence imposed outside the applicable guideline range²³ for a reason described in the Guidelines Manual, including the departure provisions.²⁴

We agree with the Commission that, as a general matter, judges use departures less frequently than variances.²⁵ Nonetheless, it is still critical for the Commission to carefully analyze the legal and practical implications of the proposal before enacting it. The proposed amendment is comprehensive – removing even the mention of departures in commentary – essentially requiring republication of the entire Guidelines Manual as part of the amendment.²⁶ Given the proposal’s scope and structure, there are serious legal and policy questions raised by it and many potential unintended consequences. Until those questions and consequences are more fully explored, we think the Commission should not move forward.

b. Conflicts with Congressional Directives, Federal Statutes, and the Federal Rules of Criminal Procedure

One of our primary concerns with the proposal is that portions of it conflict or appear to conflict with express congressional directives and other legislative enactments. For example, Section 401(b) of the PROTECT Act,²⁷ which amended the Guidelines addressing departures and below-guideline sentences for crimes against children and sexual offenses, is not mentioned or analyzed.²⁸ That provision directly inserted a new subsection (b) into §5K2.0 to clarify the limits of downward departures in these cases.²⁹ It also created a new policy statement in the Guidelines (§5K2.22) delineating the circumstances in which a judge could use a defendant’s age and serious physical impairment as a ground for a downward departure. It required that “[d]rug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines” in such cases.³⁰ The Act directly amended §5K2.20 (aberrant behavior) to limit departures on those grounds in these cases.³¹ And it included language in §5H1.6 barring a downward departure in such cases based on family ties and responsibilities and community ties.³² Finally, it amended §5K2.13 to state that a judge could not depart downward on the

²² See *Gall*, 552 U.S. at 49–50.

²³ App. n. 1(F) USSG §1B1.1.

²⁴ *Irizarry v. United States*, 553 U.S. 708, 714 (2008).

²⁵ U.S. SENT’G COMM’N, [Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines](#) at 123 (noting that “courts have been using departures provided under step two of the three-step process with less frequency in favor of variances”).

²⁶ U.S. SENT’G COMM’N, [Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines](#) at 121-621.

²⁷ Pub. L. No. 108-21, § 401(b) (2003).

²⁸ Most of the limitations expressly apply to a defendant convicted of an “offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code.” *Id.* §§ 401(b)(2), (3), (4), (5).

²⁹ *Id.* § 401(b)(1).

³⁰ *Id.* § 401(b)(2).

³¹ *Id.* § 401(b)(3).

³² *Id.* § 401(b)(4).

grounds of diminished capacity in these types of cases.³³ Taken together, these amendments sought – by creating one policy statement and making specific amendments to several other policy statements – to set the limits on the use of downward departures in certain cases on certain grounds (age; serious physical impairment; drug, alcohol, or gambling dependence; aberrant behavior; family ties and responsibilities and community ties; and diminished capacity). There are Commission policies on non-guideline sentences that are acceptable and some that are not. But the changes from the PROTECT Act reflect deliberate policy choices made by Congress, and the current Guidelines include these congressionally mandated amendments.

The Commission’s proposed amendment disregards Congress’s directives in the PROTECT Act. It eliminates §§5K2.0, 5K2.22, 5K2.20, 5H1.6, and 5K2.13 entirely, including the language that Congress specifically directed be part of the Guidelines Manual as policies of the Commission. It does so without acknowledging the PROTECT Act or explaining how the amendment is consistent with it. Of course, judges, as part of their § 3553(a) analysis, may disagree with these aspects of the PROTECT Act, as they may disagree with Commission’s policy statements generally.³⁴ And Congress may subsequently amend one or more of these portions of the Act. Currently, however, Congress, through federal law, has specifically and directly authored portions of the Guidelines Manual. Judges must consider all of the § 3553(a) factors in imposing sentences, and those factors include the Guidelines’ policy statements. The proposed amendment does not explain how the Commission may set aside those congressional directives consistent with the legal requirements of the PROTECT Act and § 3553(a).

There are other legal questions raised by the proposed amendment, questions related to the interplay of the Guidelines with federal statutes and rules of procedure that specifically reference departures.³⁵ Before moving forward, we think the Commission must rigorously research all these legal issues.

c. Parts of the Proposed Amendment Conflict with the Mandate of § 3553(a)

We also are concerned that the Commission’s proposed amendment will create confusion and intrude on sentencing judges’ authority – and requirement – to fashion an appropriate sentence under § 3553(a), and that it in part conflicts with § 3553(a). Since *Booker*, judges have enjoyed broad discretion in evaluating and accounting for the factors under 18 U.S.C. § 3553(a).³⁶ This is based on the statute’s requirement that the sentencing judge consider “the nature and circumstances of the offense and the history and characteristics of the defendant.” Moreover, in § 3661, Congress clearly provided that “no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing

³³ *Id.* § 401(b)(5).

³⁴ *See, e.g., United States v. Herrera-Zuniga*, 571 F.3d 568, 585-86 (6th Cir. 2009) (collecting cases).

³⁵ *See, e.g.*, 18 U.S.C. § 3742; Fed. R. Crim. P. 11, 32.

³⁶ *See, e.g., Beckles v. United States*, 580 U.S. 256, 263 (2017) (“Yet in the long history of discretionary sentencing, this Court has ‘never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.’” (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005))); *see also United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) (“The decision about how much weight to assign a particular sentencing factor is ‘committed to the sound discretion of the district court.’” (quoting *United States v. Williams*, 526 F.3d 1312, 1322 (11th Cir. 2008) (quotation marks omitted))).

an appropriate sentence.”³⁷ Similarly, the Supreme Court has “long recognized that sentencing judges exercise a wide discretion in the types of evidence they may consider when imposing sentence and that [h]ighly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.”³⁸

The Commission’s proposed amendment to §1B1.1, however, appears to add requirements to § 3553(a). It appears, for instance, to shape a judge’s sentencing discretion by *requiring* the judge to “consider as a whole the additional factors identified in 18 U.S.C. § 3553(a) and the guidance provided in Chapter Six to determine the sentence that is sufficient, but not greater than necessary” (emphasis added). Similarly, the proposed commentary to §1B1.1 “*instructs* courts to consider guidance provided by the Commission in Chapter Six.”³⁹ The new Chapter Six mandates and limits the factors a judge may consider as part of the § 3553(a) analysis. Such a policy statement is not content-neutral compared to the current Guidelines (as the Commission says it is aiming for with the amendment), and also seeks to impose new obligations on the sentencing judge which may exceed the Commission’s authority and will sow confusion.⁴⁰

The proposed Chapter Six amendments similarly seek to limit or shape the judge’s sentencing discretion. For example, the policy statement in proposed § 6A1.3 states that, in “considering the nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1), the following factors, *if not accounted for in the applicable Chapter Two guideline*, may be relevant” (emphasis added).⁴¹ Proposed §9C5.1 (addressing the nature and circumstances of an organization’s offense in determining an organization’s guideline fine range) contains similar language. This language implies that certain factors are not relevant as part of the § 3553 analysis if they were already accounted for in the Guidelines. These and other policy statements sprinkled through the hundreds of pages of the proposed amendment limit judges’ discretion at the § 3553 stage of the sentencing process. They are at odds with the statutory mandate in § 3553(a)(1) that the judge consider “the history and characteristics of the defendant” and with the statutory mandate in § 3661 that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”

³⁷ 18 U.S.C. § 3661.

³⁸ *Williams*, 337 U.S. at 246-47.

³⁹ U.S. SENT’G COMM’N, “[Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines, at 151 \(proposed\)](#) §1B1.1 Application Background (emphasis added)).

⁴⁰ *See, e.g., LaBonte*, 520 U.S. at 753 (“the Commission, however, was not granted unbounded discretion.”).

⁴¹ Section 3553(a)(5) requires the sentencing court to consider “any pertinent policy statement . . . issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under § 994(p) of title 28).” Even assuming that the policy statements in Chapter Six fall under § 3553(a)(5), the Commission’s proposed policy statements create confusion about how they interact with the full range of § 3553(a) factors. They also, as described here, are not content-neutral.

The calculation of the advisory guideline range and the judge’s § 3553(a) analysis are two separate steps in the sentencing process.⁴² A judge considers the application of departures in the process of calculating the applicable sentencing guideline range – something consistent with the Commission’s traditional authority. That focus on the Guidelines also respects a judge’s authority to weigh the § 3553(a) factors and the broad range of evidence that it may consider when fashioning a sentence. At that point, practitioners may argue, and judges are free to determine, how much weight to give any facts under § 3553(a), even if the Guidelines include those facts as an “additional offense specific consideration.” Listing factors that a judge may consider as part of the § 3553(a) analysis intrudes on the authority of the sentencing judge to determine a sentence pursuant to § 3553(a) and directly conflicts with the statute, in many places. These are serious legal questions that go to the Commission’s authority and the constitutional balance the Supreme Court reached in *Booker*. They demand careful legal analysis by the Commission before effectuating the proposal.

It is also unclear why the proposed amendment highlights certain factors for § 3553(a) consideration but not others. The proposed new Chapter Six includes detailed lists of factors for a judge to evaluate when considering a defendant’s individual circumstances and the nature and circumstances of the offense.⁴³ Aside from a general reference to the factors under § 3553(a)(2),⁴⁴ however, the proposed new chapter does not meaningfully address promoting respect for the law; providing just punishment; affording adequate deterrence to criminal conduct; and protecting the public from further crimes of the defendant.⁴⁵ For example, the Commission has not provided guidance about how a judge should consider a significant increase in shootings or fentanyl overdose deaths when considering defendants whose offenses are driving those outcomes. By contrast, it lists many factors relating to employment or skills. Including some factors but omitting others may cause confusion among litigants and judges about how to “impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)” of § 3553(a).

Similarly, the proposed revisions are not content neutral when compared with the current Guidelines Manual. For example, the proposals removed, or at least deemphasized, the specifics of a defendant’s prior convictions. Those specifics – which are separate from the criminal history calculation – suggest that whether a defendant has committed similar offenses repeatedly or tends to use violence when committing those offenses is relevant in imposing a sentence. Such details often are critical to understanding a defendant’s “history and characteristics” pursuant to § 3553(a)(1). The proposed Chapter Six does not appear to mention these considerations. Moreover, the criminal history commentary in Chapter Four, where it was once discussed, has been edited to no longer refer to such circumstances explicitly. Indeed, these sentences seem to

⁴² See, e.g., *United States v. Adorno-Molina*, 774 F.3d 116, 126 (1st Cir. 2014) (describing variances as “non-Guidelines sentences that result from the sentencing judge’s consideration of factors under 18 U.S.C. § 3553”); *United States v. David*, 682 F.3d 1074, 1077 (8th Cir. 2012) (“factors that have already been taken into account in calculating the advisory Guidelines range can nevertheless form the basis of a variance”). See also, e.g., *United States v. Smart*, 518 F.3d 800, 808 (10th Cir. 2008) (explaining that courts are “allowed to contextually evaluate each § 3553(a) factor, including those factors the relevant guideline(s) already purport to take into account”).

⁴³ U.S. SENT’G COMM’N, “[Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines](#) at 652 (proposed §§6A1.2, 6A1.3).

⁴⁴ U.S. SENT’G COMM’N, “[Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines](#) at 651-52 (proposed §6A1.1(a)(2)).

⁴⁵ 18 U.S.C. § 3553(a)(2).

have been deleted: “For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious.”

The amendment also makes many changes to portions of Chapter Two that describe when departures may be appropriate despite the Commission’s intent not to “expand or contract the scope and content of those provisions.” For example, Application Note 1 of §2A1.2 states, “[i]f the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted.” Similar departure language appears in the commentary to §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2, 2K1.4, and others. The proposed amendment replaces those changes with the more neutrally-phrased, “[i]n determining the appropriate sentence to impose pursuant to 18 U.S.C. § 3553(a), evidence that the defendant’s conduct was unusually heinous, cruel, brutal, or degrading to the victim may be relevant.”⁴⁶ Again, similar language appears throughout the proposed amendment.⁴⁷ In moving from the current language to the proposed language, the Commission removes the notion that the judge should consider an above-guideline sentence. And although some portions of the proposed amendment use bolded headers such as “Aggravating Factors Relating to the Offense”⁴⁸ before including this language, not all such proposed text has it.⁴⁹ Additionally, the proposal removes examples throughout the commentary.

These proposed changes and the resulting questions will impose a serious cost on litigants and courts. They also will create confusion at the pretrial, plea negotiation, sentencing, and appellate stages. As the parties work through those questions (including, among others, how proposed Chapter Six interacts with the courts’ discretion under § 3553), that litigation will impose additional burdens. Judges and practitioners understand the concept of departures and how they fit into the sentencing process. Caselaw has developed for decades to ensure that departures are handled uniformly. Although the Guidelines can be tailored and adjusted to address changes in the law and other needs, such a wholesale restyling – particularly in such a short period of time – should not proceed without far more extensive legal and operational consideration.

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⁴⁶ U.S. SENT’G COMM’N, [Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines](#) at 184 (proposed Note 1 of §2A1.2).

⁴⁷ *See, e.g.*, U.S. SENT’G COMM’N, [“Reader Friendly Version of Proposed Amendments to the Federal Sentencing Guidelines”](#) at 187 - 256 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B1.5, 2B3.2).

⁴⁸ *See, e.g., id.* at p.185, 217, 242, 279, 393 (proposed §§2A1.4, 2B1.1, 2B1.5, 2D1.1, 2K2.1).

⁴⁹ *See, e.g., id.* at 187, 191, 197, 211, 213, 254, 389 (proposed §§2A2.2, 2A2.4, 2A3.2, 2A5.3, 2A6.1, 2B3.2, 2K1.4).

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to discussing all of this further with you.

Sincerely,

/s/ JW

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