

# VICTIMS ADVISORY GROUP

*A Standing Advisory Group of the United States Sentencing Commission*



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United States Sentencing Commission  
One Columbus Circle, N.E.  
Suite 2-500, South Lobby  
Washington, D.C. 20002

**RE: Request for Comment on Proposed Amendments to the Sentencing Guidelines**

Dear Members of the Commission:

**Introduction**

The Victims Advisory Group (“VAG”) appreciates the opportunity to provide information to the Sentencing Commission (“Commission”) regarding its proposed amendments to the Sentencing Guidelines (“Guidelines”). Our views reflect detailed consideration of the proposals by our members who represent the diverse community of victim survivor professionals from throughout the nation. These members work with a variety of victim survivors of crime in all levels of litigation and include: victim advocates, prosecutors, private attorneys, and legal scholars. During the VAG’s consideration of the proposals, two overriding themes emerged. First, the Guidelines must reflect the bedrock principle of our sentencing system of individualized sentencing which accurately captures for both offenders and victim survivors the nature of the offense, the character of the offender, and the scope of the harm caused. Second, the Commission cannot exceed its authority to disrupt settled Supreme Court precedent or Congressional enactments. When either of these maxims is violated, which is the case with many of these proposals, victim survivors’ legal rights are compromised and they suffer further harm.

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## **7. Simplification of Three Step Process**

The Sentencing Commission seeks comment on its two-part proposed amendment that includes removing in its entirety one of only three steps that currently help ensure proper sentences, and creating an entirely new Chapter 6. The amendment is under the guise of “simplification.”

As a threshold matter, the VAG is not opposed to the concept of simplifying the Guidelines. Ensuring that federal courts can readily navigate sentencing guidelines to ensure sentences account for the gravity of the offense suffered by crime victims, as defined by the federal Crime Victims’ Rights Act (CVRA) 18 U.S.C. § 3771(e)(2) (persons “directly and proximately harmed as a result of the commission of a Federal offense.”), is laudable. Pursuant to the CVRA, crime victims are afforded a number of rights implicated in any proposal to alter federal sentencing. Among these are the rights to protection (a)(1), the right to be reasonably heard (a)(4), the reasonable right to confer with the attorney for the government, the right to full and timely restitution (a)(6), the right to proceedings free from unreasonable delay (a)(7), and the right to be treated with fairness and with respect for their dignity and privacy. To abide these rights, any simplification must be characterized by certain components: (1) clarity and transparency and (2) retention of current protections of victim survivor rights and interests.

Unfortunately, with these points in mind, the VAG cannot support the current proposal. First, this proposal is premature. This proposal raises serious questions that require much more research and study. Second, as written, the proposal may compromise victim survivors’ existing protections and undermine the goals of the Guidelines. Finally, the VAG has concerns about the Commission’s authority to engage in some of these measures and would be directly contradicting Congress.

### **A. The Proposal is Premature**

As stated, simplification may be a positive endeavor for the Commission. The VAG is confused, however, at the speed and lack of study underlying this proposal. The sheer magnitude of the change proposed should give everyone pause. Deleting an entire section and claiming that shifting something from a “departure” to “additional consideration” is not merely a

rhetorical shift. The VAG is unaware of research that has been done that reveals exactly how these changes will unfold in practice. While in 2022, the Commission noted simplification was a long term goal, the VAG is unaware of extensive reports or studies on proposals in 2022.<sup>120</sup> To promulgate such a significant change without any real indication of how it will impact existing protections is the opposite of transparency and leaves the VAG concerned that victim survivor rights and interests will be undermined. Further, without such study and alternative proposals, the VAG simply cannot recommend that this approach to “simplification” is the best approach.

### **B. Some Specific Concerns – The Amendments are Not Neutral and Appear to Harm Victims**

The VAG is concerned and seeks further comment and study from the Commission on how this change would affect victim survivors. Because of the scope of the over 500 pages of change, the VAG is unable to identify or comment upon every potential concern. That being said, we will attempt to try to highlight some.

The Commission states that the deletion of the steps outlined in §1B1.1(b) that implicate Chapter 5 parts H and K and the reclassification of them, as “general considerations” in a new Chapter 6 would be neutral. Notably, however, the Commission’s own wording gives pause. The Commission notes that the departures “would be retained *in more generalized language*” (emphasis added) as they shift to “additional considerations.” Basic statutory/rule interpretation that every lawyer and court abide tells us that differently phrased things have different meanings. So, as written, the changes actually cannot be deemed neutral without detailed interrogation. By way of example, the text located in §§ 5H1.1 – 5H1.12 is more than just a list, it has language explaining the relevance of the factors. More specifically, it gives courts guidance on how each factor can be used. For example, § 5H1.2, entitled Education and Vocational Skills, states:

Education and vocational skills *are not ordinarily relevant in determining whether a departure is warranted*, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. *See §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Education and vocational skills may be relevant in *determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.*(emphasis added)

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<sup>120</sup> United States Sentencing Commission, Annual Report (2022), at 7.

This language gives courts explicit direction: (1) education and vocational skills should not ordinarily be considered for departures; (2) they are an express guideline factor if a defendant has misused his training or education to facilitate a crime; (3) they may be relevant to determining conditions of release or probation and public safety. That text clearly limits use of this information. However, the proposed Chapter 6 simply lists education and vocational skills as characteristics that “*may be relevant.*”<sup>121</sup> There is no direction regarding how to consider that relevance nor guidance limiting its use as is within the original language. Such is not a neutral change. The change takes a factor that is explicitly not to be used to depart from a sentence and opens up its usage to do exactly that.

Another example is drug or alcohol dependence. The Guidelines currently state:

[d]rug or alcohol dependence or abuse ordinarily *is not a reason for a downward departure*. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4)).<sup>122</sup>

The proposed Guideline § 6A1.2 contains none of this limiting language but simply states drug or alcohol dependence “may be relevant.”<sup>123</sup> This is a substantive change allowing a judge to consider such dependence without limit- which is radically different from the text “is not a reason for a downward departure,” as the Guidelines now read.

The same is true for nearly all of the relevant Guidelines in Chapter 5 Part H. Currently they contain language informing and limiting how to use the information whereas the new proposed Guidelines leave consideration completely open to each judge.<sup>124</sup> Such a change simply cannot properly be deemed “neutral” and will result in disparities.

Of more concern is the complete elimination of departures directly tied to victims currently found in §5K. The Commission proposes to eliminate “nearly all” of this chapter. For example, courts would no longer be directed that it is proper to depart upward due to Death (5K2.1), Physical Injury (5K2.2), Extreme Psychological Injury (5K2.3), use of Extreme

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<sup>121</sup> Proposed S6A1.2.

<sup>122</sup> § 5H1.4

<sup>123</sup> Proposed §6A1.2

<sup>124</sup> As will be discussed *infra*, there is also a more significant concern when dealing with crimes against children and sex crimes which Congress specifically excluded from downward departures.

Conduct (5K2.8), Public Welfare (5K2.14), etc. These are among the most common reasons given to depart upward.<sup>125</sup> The VAG is concerned that this will disproportionately affect victim survivors. While it is true that the amount of upward departures is less than downward departures in the post *Booker* era, the existence of these departures convey to judges that such aggravating aspects of a case are valid and likely influence them in their decisions to vary from the Guidelines upward or downward under 18 U.S.C. §3553. They contextualize variances for judges.

While the Commission asserts these are all neutral changes designed only to simplify, the VAG simply cannot endorse this approach without each change being more clearly studied and the impact of the changes detailed. By way of a small detour for an example - for a victim to meaningfully confer with the attorney for the government in a case, as is their right under the CVRA, and to meaningfully be heard at sentencing, a victim needs to know what the Guidelines are telling the court to consider and how. If the amendments move forward every victim consulting with every Assistant United States Attorney will be in the dark due to the lack of clarity and transparency and, therefore, will not have a meaningful consultation with the government.

While the Commission did publish general statistics about the percentage of cases that include departures and whether they were upward or downward, the VAG thinks the public could benefit from a much more in-depth analysis. The VAG is concerned that this will disproportionately affect crimes with victims. Of the 9 primary sentencing guidelines listed as most frequently involving departures, 7 of them involve victims including narcotics distribution, firearms offenses, theft, alien smuggling, robbery, and child pornography.<sup>126</sup> The VAG would like further study on the types of crimes and numbers of victims affected by these and all the proposed changes.

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<sup>125</sup> Other Departure Reasons Given by Sentencing Courts, <https://www.ussc.gov/education/backgrounders/2024-simplification-data>. While the Commission does include language in Proposed §6A1.3 that these factors “may be relevant,” that is not the same as directing the court that these factors are appropriate for an upward departure. Such a change is not neutral.

### **C. Some Specific Concerns – The Commission Lacks This Authority**

The Commission has also requested comment on its authority to adopt such a radical change to the Guidelines. The VAG agrees this is a valid concern and the Commission should engage in a long study of its authority to do so. Specific to victims of crime, however, the VAG believes the Commission lacks the authority to make certain changes. While this list is not exhaustive, if these sorts of legal violations are in the proposal, it signals there are likely others and the Commission should engage in a close study of Congressional mandates.

In 2003 Congress enacted the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act). Congress was expressly concerned with judges inappropriately departing downward in cases involving children and sexual violence. To address this problem, Congress bypassed the Commission and legislatively diminished the abilities of courts to engage in such a practice which disproportionately affected women and girls and favored men. Not only did it pass legislation statutorily designed to prevent courts from doing so, it drafted specific amendments to the Sentencing Guidelines. Indeed, the Guidelines note this significant problem in §5K2.0 Commentary stating,

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the “PROTECT Act”, Public Law 108–21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.<sup>127</sup>

More specifically, the PROTECT Act legislatively required specific language resisting downward departures in §5K2.0. The proposal appears to simply delete that legislation.

The proposal seems to have eliminated that direction in the commentary of the Guideline affecting Trafficking in Material Involving the Sexual Exploitation of a Minor.<sup>128</sup> Similarly, in the Guidelines affecting Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor;

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<sup>127</sup> § 5K2.0 Commentary note 5.

<sup>128</sup> § 2G2.2.

Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor have all been substantively changed by Congress and the Commission has simply deleted these provisions. The Commission cannot eliminate an Act of Congress. Yet, it has replaced the commentary permitting an *upward* departure if ten or more minors are involved to a comment that such “may be relevant.”<sup>129</sup>

Additionally, by the Commission’s deletion of § 5H, the Commission has removed the PROTECT Act’s specific limitation on these factors, specifically noting they could not be used to depart downward in cases involving children or sexual offenses.<sup>130</sup> These are specific directives and amendments to the Guidelines ordered by Congress found in Section 408 of the PROTECT Act entitled “Sentencing Reform.” This proposal raises serious questions as to whether the Commission has the authority to delete them from the law when Congress directly authored them. More study is needed.

Notably, the PROTECT Act allowed courts to decrease the defendant’s offense level pursuant to a disposition program. The Commission has *not deleted that component favorable to defendant, but specifically included it in the new Guideline §3F1.1*. In addition to the above arguments about authority, such an inclusion of the one provision favorable to defendants in the proposal and the elimination of all those unfavorable raises questions of the claimed neutrality of the proposal.

These proposals also have implications for the rights of crime victims in 18 U.S.C. §3771. This is a congressionally passed statute that the Commission does not have the authority to delete or compromise. Yet, as discussed supra, it seems to have done so by eliminating the opportunity of a meaningful consultation with the government. Similarly, these proposals are in tension with Federal Rule of Criminal Procedure 32. This rule gives specific directives for the PSR and the parties about departures during sentencing. Again, it is unclear whether the Commission can contradict the Rule.<sup>131</sup> The VAG believes the authority and the practicality of how these interact needs to be studied more for two reasons. First, the Commission may be

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<sup>129</sup> §2G1.3.

<sup>130</sup> E.g., § 5K2.22, § 5H1.1, § 5H1.4, § 5H1.6, § 5K2.13, § 5K2.20

<sup>131</sup> Just last year the VAG urged the Commission to require courts to notify victims of hearings regarding Extraordinary and Compelling Relief. The Commission fell short of requiring this notice, presumably because it believed it lacked the authority. In this instance, then, the Commission should have the same position that it cannot do something in the Guidelines that conflicts with the Rules.

acting far outside its authority. Second chaos may ensue in sentencing proceedings as courts, victims, and parties seek to reconcile these amendments and their contradiction with federal law.

**Conclusion**

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission and to share Victim perspectives on the sentencing process. It respectfully requests the Commission to stay within its authority, avoid defraying individualized sentencing, and respect the rights of victim survivors.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Mary Graw Leary". The signature is written in a cursive, flowing style with some loops and flourishes.

The Victims Advisory Group  
Mary Graw Leary  
Chair

cc: Advisory Group Members