VICTIMS ADVISORY GROUP

A Standing Advisory Group of the United States Sentencing Commission

February 3, 2025

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington D.C. 20008-8002

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 a diverse community of victim survivor professionals from throughout the nation. Our current members work with a variety of crime victim survivors in all levels of litigation and include: crime victims, victim lawyers from non-profit organizations, private lawyers, former federal and state prosecutors, victim advocates on local and national levels, and retired federal probation officers.

Three propositions always underline the VAG's consideration of the Commission's proposals and the VAG's duty to provide to the Commission its views on the Commission's

activities and work. First, victim survivors are harmed by criminal offenders and seek to have that harm righted in a fair and just manner. Second, victim survivors are important stakeholders in the federal criminal court process, possessing federal legal rights under the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, that must be respected and enforced. Third, will the proposed amendments, if approved by the Commission, be applied retroactively which application will reopen victim survivor wounds from the harm suffered, require victim survivor notification and the right to be heard, and may undermine victim survivor faith in the fairness, justice and finality of the federal criminal court process?

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.

From these bases, the VAG respectfully submits our comments for your consideration.

CAREER OFFENDER

The VAG agrees with the Commission that the "categorical approach" is unwieldy and has led to "odd" and "arbitrary" results. *See, e.g., U. S. v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017); *U. S. v. McCollum*, 885 F.3d 300, 309–14 (4th Cir. 2018) (Traxler, J., concurring).

The VAG supports determining whether a prior offense constitutes a "crime of violence" by looking at a defendant's actual offense conduct, rather than the elements of the state crime by which it is charged.

The VAG disagrees, however, with the Commission's suggested solution. A deluge of litigation will result from the Commission's proposed narrowing of § 4B1.2, leading to the very arbitrary outcomes the Commission seeks to dispel.

1. **"Controlled Substance Offense" Definition § 4B1.2**

The VAG advises the Commission to not adopt its proposed exclusion of state controlled substance offenses from the § 4B1.2(a) definition of "Controlled Substance Offense."

The Commission asserts that many stakeholders recommended the exclusion of prior state controlled substance offenses. These stakeholders must be among the fold whose goal is

the simple decrease of penal consequences for criminal offenders. Significantly, the Commission does not explain how excluding prior State offenses will help the sentencing court assess the true character of the offender when imposing a lawful sentence for the current offense. Instead, the Commission's proposed exclusion creates two separate and unequal categories of offenders with prior drug convictions: (1) those whose prior "actual conduct" may be ignored as long as they were convicted in a state court; and (2) those whose prior "actual conduct" must be considered if they were convicted in federal court.

This creation of two separate categories of defendants appears to lack any rationale. It will result in the very sorts of "odd" and "arbitrary" outcomes that the Commission seemingly seeks to avert. The exclusion of state drug offenses undermines the Commission's stated interest in establishing an "actual conduct" standard. Similarly situated offenders who have committed the same underlying conduct (e.g., possession with intent to distribute controlled substances) but who were convicted in different jurisdictions will be subject to separate and unequal sentencing standards. Those who, by luck or chance, were prosecuted in State court rather than federal court will get the unfair windfall of being spared from the career offender enhancement. Meanwhile, offenders who have committed fewer prior drug offenses but whose prior offenses were federally prosecuted will be subject to higher sentencing schemes. The VAG imagines that even the many stakeholders that recommended exclusion of state court drug offenses would not be in favor of federal offenders being disproportionately punished by virtue of the venue in which they were charged.

As important stakeholders with recognized statutory rights in the federal criminal court process, victims deserve fair, just and predictable outcomes in the criminal justice process. Communities, also real victims of the burgeoning drug pandemic, are equally victimized by dangerous drugs, like fentanyl and methamphetamine, regardless of whether the drug traffickers were previously convicted in state or federal court. The Commission's proposed segregation into two categories of drug offenders will subvert the principles of parity among similarly situated offenders, leading to diminished faith of victims in the court process.

The proposed exclusion of prior state controlled substance offenses does not just affect current controlled substance abuse sentences but eliminates those prior State offenses from §

4B1.1 Career Offender consideration in any current federal prosecution, regardless of the type of crime, thereby also impacting a wide range of victims.

Additionally, the exclusion of State controlled substance offenses calls into question the use of the term "felony" throughout the Guidelines. "Felony" is defined as "any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year", U.S.S.G. § 2B2.3, App. n. 1. ""*Felony conviction*" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed," U.S.S.G. § 2K1.3, App. n. 2(C). These two definitions do not exclude state crimes. The proposed amendment of § 4B1.2, however, does. Apparently recognizing this incongruity, the Commission proposes striking the defining words "federal or state" before the word "conviction" from its existing definition of "Prior Felony Conviction" (currently defined at § 4B1.2(e)(4) with the proposed new definition at § 4B1.2(d)). This proposed fix removes clarity about the meaning of a "conviction", leaving it vague and open to litigation. This proposed fix also will make the proposed amendment internally inconsistent since the definition in proposed § 4B1.2(d) will be different from the definition in § 2K1.3, App. n.1 2(C) by that omission of "federal or state," although both definitions appear in the same proposed amendment.

As to the effect on prosecutions, the VAG envisions that the exclusion of prior state drug convictions from the § 4B1.2 definition of "controlled substance offense" may lead federal prosecutors to decline to prosecute repeat drug traffickers if the defendant's prior convictions were limited to state offenses. With no "Career Offender" consideration available in a federal prosecution, federal prosecutors may consider those prosecutions not worthwhile, pushing them to state prosecutors with lesser resources.

The VAG strongly recommends that the proposed amendment to exclude prior state drug offenses from the § 4B1.2 definition of "Controlled Substance Offense" be rejected. The proposed exclusion undermines the interests of justice and creates two separate and unequal classes or categories of offenders.

2. § 4B1.2: "Crime of Violence" Definition

As noted above, the VAG, on behalf of victims who have been harmed, fully supports the Commission adopting a definition of "crime of violence" that will focus on the defendant's "actual conduct" in the prior offense rather than the "categorical approach" which focuses on a legal analysis of the different elements of the statutory section under which a defendant was previously convicted.

a. The Definitions of "Force" and "Actual or Threatened Force"

The VAG observes that the Commission makes a distinction in its proposed language between the definitions of "force" and "actual or threatened force," which definitions affect victims. In proposed § 4B1.2(b)(1), the proposed language includes a parenthetical in the definition of "force" at § 4B1.2(b)(1)(A): "The use, attempted use, or threatened use of physical force *(i.e., force capable of causing physical pain or injury to another person)* against the person of another[.]" (emphasis added). In no other place in the Guidelines does the VAG find that the Commission attaches this limitation of "force capable of causing physical pain or injury to another person" to the use of the word "force."

This wording certainly comports with the United States Supreme Court's definition of "physical force" in *Stokeling v. United States*, 139 S. Ct. 544 (2019). But it is slightly broader than the Commission's description of "actual or threatened force" in its definition of "Robbery," which is defined in the 2024 Guidelines Manual § 4B1.2 as "force that is sufficient to overcome a victim's resistance." *See* § 4B1.2(e)(3) and § 2L1.2, App. (n.2), which wording also comports with *Stokeling*.[1]

The current § 4B1.2(e)(3) wording the Commission now proposes to carry over for new language for § 4B1.2(b)(1)(C): "The phrase "actual or threatened force" refers to force that is

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[1] This clause was added to § 4B1.2(e)(3) and § 2L1.2, App. (n.2), as part of an approved amendment redefining "robbery" by the Commission's 2023 amendments to Career Offender. [Proposed Amendments to the Sentencing Guidelines, January 12, 2023, Proposed Amendment: Career Offender, Part B, p.19-22], citing *Stokeling v. United States*, 139 S. Ct. 544 (2019). *Stokeling* concludes that: "[P]hysical force," or "force capable of causing physical pain or injury," *Johnson [v. United States]*, 559 U.S. [133], at 140, 130 S.Ct. 1265 [2010], includes the amount of force necessary to overcome a victim's resistance. " *Stokeling*, 139 S. Ct. 544, 555.

sufficient to overcome a victim's resistance." This wording is also replicated in the new definition of "Robbery" in proposed amendments for: § 2K1.3, App. (n.2(A)(ii)(IV)); § 2K2.1, App. (n. 3(A)(ii)(IV)); § 4A1.2(p)(2)(D); § 4B1.4, App. (n. 3(A)(ii)(IV)); § 5K2.17, p.s., App. (n. 1(B)(iv)); and § 7B1.1, p.s., App. (n. 2(B)(iv)).

Stokeling, supra, with its reference to *Johnson v. United States,* addresses the common law definition of "physical force." The VAG believes that the Commission's adoption of these common law definitions should provide sentencing courts with adequate direction to guide the courts' determination of the defendant's actual conduct in crimes of violence. The VAG also wants to be certain that the adoption of these definitions in no way shifts the focus to whether the victim of a prior offense suffered physical pain or sufficiently resisted the offender's criminal conduct.

b. Sexual abuse of a minor and statutory rape § 4B1.2(b)(1)(b)

The VAG strongly discourages the exclusion of certain acts of sexual abuse of a minor and statutory rape from the proposed definition of "crime of violence" in § 4B1.2(b)(1)(B). That proposed section reads:

> (B) A sexual act with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent). *However, conduct constituting sexual abuse of a minor and statutory rape is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.*

Proposed § 4B1.2(b)(1)(B) (emphasis added).

The VAG's reading of 18 USC §2241(c) is that section applies only to minors under the age of twelve (and would therefore exclude all sexual abuse and statutory rape against minors ages 12 to 17) and further is limited to sexual acts occurring only in the "special maritime and territorial jurisdiction of the United States or federal prison." The Commission offers no rationale as to why sexual abuse of a minor and statutory rape offenses, other than those fitting in these narrow 18 USC §2241(c) parameters, should be excluded from the definition of "crime

of violence" for Career Offender purposes under § 4B1.2(b)(1)(B). This proposed exclusion is harmful to victims and should not be part of the Guidelines.

To best respect victims of sexual offenses, fully address the Commission's desire to include victims of sexual abuse of a minor and statutory rape, and to properly hold accountable defendants with prior sex offense convictions, the VAG asks the Commission to adopt the following modification to proposed § 4B1.2(b)(1)(B):

> (B) A sexual act or sexual contact with a person where the person does not consent or gives consent that is not legally valid (such as involuntary, incompetent, or coerced consent), and includes ~~However,~~ conduct constituting sexual abuse of a minor and statutory rape. ~~is included only if the defendant engaged in conduct that constitutes (i) an offense described in 18 U.S.C. § 2241(c), or (ii) an offense under state law that would have been an offense under 18 U.S.C. § 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.~~

With this suggested change, VAG will support an amendment creating new § 4B1.2(b)(1)(B).

c. **§§ 4B1.2(b)(2) and (3)**

The VAG has no objection to the proposed amendments for §§ 4B1.2(b)(2) or (3), regarding Covered Inchoate Offenses and Determination of Whether an Offense is a "Crime of Violence," respectively.

d. **§ 4B1.2(b)(4)**

The VAG asks the Commission to make an addition of "Police reports, trial transcript or other documents, with an opportunity for the defendant to object to their reliability" to the proposed § 4B1.2(b)(4), Sources of Information, from which the government may make a prima facie showing that a prior offense is a "crime of violence." Proposed § 4B1.2(b)(4) reads:

> (4) SOURCES OF INFORMATION.—In making a prima facie showing that the offense is a "crime of violence," the

> government may only use the following sources of information from the record:
>
> (A) The charging document.
>
> (B) The jury instructions and accompanying verdict form.
>
> (C) The plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the guilty plea was confirmed by the defendant.
>
> [(D) The judge's formal rulings of law or findings of fact.
>
> (E) The judgment of conviction.
>
> (F) Any explicit factual finding by the trial judge to which the defendant assented.]
>
> (G) Any comparable judicial record of the sources described in paragraphs (A) through (F).

Proposed § 4B1.2(b)(4).

The suggested addition will provide a more comprehensive actual conduct view of prior convictions, with an opportunity for the defendant to object to the documents' reliability. The VAG's concern is that the proposed description of "Sources of Information," to make a *prima facie* showing is too restrictive, focusing on records that may not exist in certain jurisdictions. Additionally, the proposed § 4B1.2(b)(4) list is intended for a categorical or modified categorical approach, which this proposal is designed to move away from when not required by statute, like the Armed Career Criminal Act (ACCA), 18 U.S.C. 924.

The Commission's proposed list expands on the list from *Shepard v. United States*, 544 U.S. 13 (2005):

> We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

544 U.S. 13, 26.

Shepard addresses application of the categorical approach to determine whether, for purposes of the ACCA, the defendant's prior state burglary convictions met the requirement of

a violent felony. As a categorical approach case, the Commission may differentiate *Shepard* from the Commission's proposed actual conduct analysis of the sources of information upon which the government may use to make a *prima facie* showing that a prior conviction is a "crime of violence." Given that the Commission proposes inclusions of bracketed subsections (D), (E) and (F), the Commission appears already willing to expand the *Shepard* list.

Since the Commission's actual conduct proposal is not an ACCA categorical approach, the VAG suggests that there may be room to consider these other sources of information. Justice O'Connor, in dissent in *Shepard*, would have found, in absence of the listed sources, that the complaint application and police report, which were present in the court record, corroborated the criminal complaint and that the defendant did not deny that his prior guilty pleas were consistent with the facts detailed in those documents. *Shepard*, 544 U.S. 13, 30-35, (O'Connor, J., dissenting).

The VAG is not asking for mini-trials as to whether prior convictions are crimes of violence in actual conduct analysis. Rather, the VAG simply is asking for an expansion of the sources of information that can be used for a *prima facie* showing that furthers the Commission's actual conduct direction.

The VAG recognizes that, within the context of statutory interpretation of the ACCA, *Shepard* further ruled "The rule of reading statutes to avoid serious risks of unconstitutionality, see *Jones [v. United States, 526 U. S. 227]*, at 239, therefore counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea." *Shepard*, 544 U.S. 13, 25-26. Since the Commission's actual conduct proposal is not governed by the ACCA, this statutory interpretation concern may not have direct application.

The VAG asks the Commission to include the addition. In doing so, proposed § 4B1.2(b)(4) will help victims by stopping some violent recidivists avoid additional punishment based solely on the record keeping of where they were convicted of prior crimes of violence.

3. **§ 4B1.2(c): Limiting Prior Convictions to Sentences Receiving Points under §4A1.1**

The Commission offers no explanation for restricting the current language of § 4B1.2(c), which begs a question of the reason for proposed Options 1, 2 and 3, with their included sub-

options. The VAG, consequently, asks the Commission to reject each option. The VAG finds that each of the three proposed options undermine the sentencing court's ability to accurately capture the character of the offender being sentenced by imposing far-reaching exclusions of prior convictions that otherwise properly may be considered by the sentencing court.

Options 2 and 3 exclude the consideration of a defendant's prior convictions based not on the defendant's prior actual conduct but only on the length of sentence imposed or the length of sentence served for that prior conviction. With these exclusions, the sentencing court is precluded from considering a defendant's actual conduct underlying those prior convictions and will consequently lack a full picture of the defendant's character, a consideration that is required under 18 U.S.C. § 3553(a)(1). Victims and communities will be harmed and will question why the courts lack concern over a repeat offender.

Sub-options 1B, 2B and 3B each treat defendants with prior controlled substance convictions differently than defendants with prior crime of violence convictions without explanation for the difference.

The VAG respectfully asks the Commission to reject all three options.

FIREARMS OFFENSES

The VAG supports a sentencing scheme that holds accountable those convicted of firearms offenses and deters future offenders. Indeed, such purposes are enshrined in federal statute. *See*: 18 U.S.C. § 3553(a)(2)(A) (just punishment); (B) (deterrence); (C) (public safety). Mass shootings in the United States continue to skyrocket, deeply affecting communities and families. Accordingly, the VAG supports the Commission's proposed amendment regarding Machinegun Conversion Devices.

A. Machinegun Conversion Devices.

The VAG supports both options of the Commission's proposed amendment regarding Machinegun Conversion Devices (MCDs).

The Commission explains that currently § 2K2.1 does not cover MCDs as the "firearm" definition in § 2K2.1, comment., (n. 1), only references firearms described in 18 U.S.C. § 921(a)(3), which does not include MCDs.

Option 1 will correct this problem in § 2K2.1 by including a reference to 26 U.S.C. § 5845(a), which does covers MCDs, in its definition of "firearm": "For purposes of this guideline, "firearm includes any firearm described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a)." Proposed § 2K2.1.

Option 2 alternately will correct the problem by specifying firearms are "(as described in 18 U.S.C. § 921(a)(3) or 26 U.S.C. § 5845(a))" in Proposed §§ 2K2.1(b)(1), (4), (5), (6), (7) and (c).

Upon the Commission's suggestion that Option 2 has the equivalent result of Option 1 but highlights the policy decision as to whether the definition expansion applies to all relevant provisions, the VAG prefers Option 2 which appears to offer the more detailed application.

***B. Mens Rea* For Stolen Firearms And Firearms With Modified Serial Numbers**

The VAG notes that this proposed amendment to 2K2.1(b)(4) is handled in a slightly different form in Part A, Option 2, above. If Part A, Option 2, is approved then there seems no need for this Part B.

On the other hand, if Part A, Option 1, is approved, or Part A, Options 1 and 2 are not approved, the VAG will defer to the Commission on this Part B.

CIRCUIT COURT CONFLICTS

A. Circuit Conflict Concerning the "Physically Restrained" Enhancement at §2B3.1(b)(4)(B)

The VAG urges the adoption of Option 1, amending § 2B3.1(b)(4)(B) to reflect the sensible interpretation proffered by the First, Fourth, Sixth, Tenth, and Eleventh Circuits, which have held that restricting a victim from moving at gunpoint qualifies for an enhancement. *See, e.g., United States v. Wallace*, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, "at close range," and was commanded to "look straight ahead into the gun and not to move"); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where "two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery"); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit

has "rejected the notion of a 'physical component' limitation as inapt" and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); *United States v. Miera*, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); *United States v. Deleon*, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant "pointed a gun at the cashier while demanding money" but never "actually touched the cashier").

Because the direct threat of serious bodily injury or death achieves the same ends as the physical restraint through bondage or force (incapacitation of the victim through coercion), Option 1's proposed amendment best mirrors the drafters' intent and achieves greater justice and protection for crime victims.

B. **Circuit Conflict Concerning Meaning of "Intervening Arrest" in §4A1.2(a)(2)**

The VAG will defer to the Commission as this proposed amendment does not appear to have substantial impact for victims.

SIMPLIFICATION OF THREE-STEP PROCESS

The Sentencing Commission seeks comment on its proposed amendment eliminating sentencing "departures," [2] the middle step of the current three-step process the Guidelines

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[2] "Departure" is defined:

> "***Departure***" means (i) for purposes other than those specified in clause (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "***Depart***" means grant a departure. "***Downward departure***" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the

provide to assist federal sentencing courts impose proper sentences. By eliminating departures, the Commission will reduce the Guidelines to a two-step process. First, the court calculates the applicable guideline range and determines the kind of sentence. Second, the court will "consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole."

The 2024-2025 Simplification proposal is identical in its end to the Commission's 2023-2024 Simplification proposal to eliminate departures, although there are vast differences in their means to that end.

As a threshold matter, the VAG is not opposed to the concept of simplifying the Guidelines. Making it easier for federal courts to navigate sentencing guidelines is in the interest of crime victims. [3] Victims need to know that sentences imposed are proper and fair while accounting for the gravity of the offense suffered by the victims.

Pursuant to the Crime Victim Rights Act (CVRA), 18 U.S.C. § 3771, crime victims are afforded a number of rights regarding federal sentencing. Among these are: the right to protection, § 3771(a)(1); the right to be reasonably heard § 3771(a)(4); the reasonable right to confer with the attorney for the government, § 3771(a)(5); the right to full and timely restitution, § 3771(a)(6); the right to proceedings free from unreasonable delay, § 3771(a)(7), and the right to be treated with fairness and with respect for their dignity and privacy, § 3771(a)(8). To honor 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.

> guideline sentence. "***Depart downward***" means grant a downward departure.
> "***Upward departure***" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "***Depart upward***" means grant an upward departure.

Guidelines § 1B1.1, App. n. 1(F).

[3] Victims are persons "directly and proximately harmed as a result of the commission of a Federal offense." Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771(e)(2).)

The VAG completely agrees with the Commission that, as an aspect of sentencing, "District courts are [...] required to fully and carefully consider the additional factors set forth in 18 U.S.C. § 3553(a), which include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant[.]" New proposed language § 1B1.1, Background. This proposed wording fits squarely with the broad statutory requirement 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 an appropriate sentence."

18 U.S.C. § 3661.

With these principles in mind, and like last year, the VAG must advise the Commission that it does not support the current proposal as written. First, because the VAG believes that the current proposal removes critical guidance for the sentencing courts to fully and carefully consider "the nature and circumstances of the offense and the history and characteristics of the defendant," as required by 18 U.S.C. § 3553(a)(1). The removal of critical guidance will undermine victim survivor rights and victim survivor sense of a fair and just process. Second, the VAG believes that some of the Commission's proposed eliminations from the Guidelines are outside the Commission's legal authority and directly contradicts Congress.

A. The Proposed Amendment Removes Critical Guidance for the Sentencing Courts.

The VAG follows the Commission's concern that post-*Booker* [*United States v. Booker*, 543 U.S. 220 (2005)] courts have been using departures provided under step two of the three-step process with less frequency and in favor of variances.[4] The second step of the three-step process is the consideration of departures. The Commission believes that since departures are less frequently used that eliminating departures will simplify the Guidelines.

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[4] A "departure" is considered different from a "variance." A "variance" in the Guidelines three-step process is described as "a sentence that is outside the guidelines framework" after departures are considered. *See Irizarry v. United States*, 553 U.S. 708, 709-716 (2008).

However, the primary approach in this proposal appears to be the elimination of every section and every sentence in which the word "departure' appears. In VAG's opinion, this broad scale approach also removes critical guidance from the Guidelines for the sentencing courts to consider fully and carefully "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). Part of the VAG's concerns for this year's proposals are driven by concerns raised last year so we will start there.

1. The 2024 Simplification Proposal

Last year, the Commission's Simplification proposal included deleting the second step of the three-step process outlined in §1B1.1(b), which directly implicated Chapter 5, Parts H and K. The proposal then reclassified the majority of Chapter 5, Parts H and some of Part K, as a list of names in a new proposed § 6A1.2(a), designated as Factors Relating to Individual Circumstances (Policy Statement). That proposed § 6A1.2(a) read "In considering the history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1), the following factors may be relevant:" and then simply listed twenty-one factors by name with no explanation. Gone were the explanation as to how those factors may be considered relevant by the sentencing court. As an example, the VAG cited to proposed §6A1.2(a)(2) and (3) listed factors "Education" and "Vocational Skills", respectively, and then contrasted how the current Guidelines § 5H1.2, entitled Education and Vocational Skills, described their potential relevance:

> 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.*

§ 5H1.2 (emphasis added).

Were the Commission to remove the departure clause of the first paragraph, the wording still gives courts explicit guidance that: (1) education and vocational skills may be

relevant if a defendant has misused his training or education to facilitate a crime; and (2) they may be relevant to determining conditions of release or probation and public safety. That text clearly provides the sentencing court with guidance on how to apply the relevant information, and not just for consideration of a term of supervised release or probation. It also helps protect victims as it gives the court guidance as to the relevancy for sentencing of the misuse of training or education and for the consideration of public safety. However, last year's proposed Chapter 6 simply listed Education and Vocational Skills by name alone as characteristics that *"may be relevant"* without any guidance regarding how to consider that relevance.

Another example the VAG cited last year is Drug or Alcohol Dependence. The Guidelines currently state:

> Drug 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)).

§ 5H1.4 (emphasis added).

Last year's proposed Guideline § 6A1.2(a)(7) simply listed "Drug or Alcohol Dependence" without any further explanation. Like Education and Vocational Skills, were the Commission to remove the departure clause, the wording still gives the sentencing court explicit guidance as to the correlation between drug and alcohol dependence and the increased propensity to commit crime. This may be a relevant factor of importance to a judge applying 18 U.S.C. § 3553(a)(1). While substance abuse programs may seem like common sense, maintaining the explanation of that correlation between substance abuse and crime also gives the court a context for protecting victims from future crime.

While these are just two examples, similar discussion may be had with most other Chapter 5, Parts H and K, factors listed in last years proposed § 6A1.2(a).[5]

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[5] *See* Age (§ 5H1.1); Mental and Emotional Conditions (§ 5H1.3); Diminished Mental Capacity (§ 5K2.13); Physical Condition (§ 5H1.4); Gambling Addiction (§ 5H1.4); Previous

Significantly, many § 5K2 criteria were included in last year's proposed § 6A1.3, Factors Relating to the Nature and Circumstances of the Offense (Policy Statement) *with* explanations as to how they may be relevant, these included Death (§ 5K2.1); Extreme Physical Injury (§ 5K2.2); Extreme Psychological Injury (§ 5K2.3); Abduction or Unlawful Restraint (§ 5K2.4); Extreme Conduct (§ 5K2.8); Weapons and Dangerous Instrumentalities (§ 5K2.6); Semiautomatic Firearms Capable of Accepting Large Capacity magazine (§ 5K2.17); Property Damage or Loss (§ 5K2.5); Disruption of a Governmental Function (§ 5K2.7); Public Welfare (§ 5K2.14); Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§ 5K2.24); Criminal Purpose (§ 5K2.9); Victim's Conduct (§ 5K2.10); Lesser Harms (§ 5K2.11); Coercion or Duress (§ 5K2.12); Dismissed or Uncharged Conduct (§ 5K2.21); Voluntary Disclosure of Offense (§ 5K2.16); Discharged Terms of Imprisonment (§ 5K2.23); and Violent Street Gangs (§ 5K2.18).

Why guidance to relevancy was provided for last year's proposed § 6A1.3(a), Factors Relating to the Nature and Circumstances of the Offense (Policy Statement), but not for § 6A1.2(a) Factors Relating to Individual Circumstances (Policy Statement), was not explained.

2. <u>The 2025 Simplification Proposal</u>

The significance of looking at last year's proposal is that the VAG was deeply concerned that the Commission ineffectively moved important 5H criteria to a new Chapter 6 without providing any explanation as to its relevance for the sentencing court's consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

Instead of correcting that problem, this year's Simplification proposal goes in the opposite direction and entirely deletes Chapter 5, Part H. In so deleting, factors that Congress

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Employment Record (§ 5H1.5); Family Ties and Responsibilities (§ 5H1.6); Lack of Guidance as a Youth and Similar Circumstances (§ 5H1.12); Role in the Offense (§ 5H1.7); Degree of Dependence Upon Criminal Activity for a Livelihood (§ 5H1.9); Military Service (§ 5H1.11); Civic, Charitable or Public Service (§ 5H1.11); employment Related Contributions (§ 5H1.11); Record of Prior Good Works (§ 5H1.11); Aberrant Behavior (§ 5K2.20).

delineated in 28 U.S.C. 944(d) [6] that the Commission historically considered to be relevant for the sentencing court's consideration of the history and characteristics of the defendant, are now gone.

A few Chapter 5, Part H, factors, Substance Abuse (current § 5H1.4), Mental and Emotional Conditions (current § 5H1.3), Education and Vocational Skills (current § 5H1.2) and Employment Record (current § 5H1.5), with significantly narrowed language and applied only to determining terms of probation or supervised release, appear in new proposed wording to §§

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[6] 28 U.S C. 944(d) reads:

> **(d)**The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents [sic] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—
> **(1)** age;
> **(2)** education;
> **(3)** vocational skills;
> **(4)** mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
> **(5)** physical condition, including drug dependence;
> **(6)** previous employment record;
> **(7)** family ties and responsibilities;
> **(8)** community ties;
> **(9)** role in the offense;
> **(10)** criminal history; and
> **(11)** degree of dependence upon criminal activity for a livelihood.
>
> The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

5B1.1 and 5D1.1. *See* new proposed § 5B1.1. App. n. 3(B), (D), (E) and (F), and new proposed § 5D1.1, App. n. 3(E), (F) and (G).

While probation and supervised release may be appropriate and important aspects of sentencing, by limiting these considerations to only probation or supervised release considerations, the Guidelines implicitly send a message that these factors, and the others now entirely eliminated, are no longer relevant to the sentencing court's 18 U.S.C. 3553(a)(1) consideration. This despite the broad nature of the information that a court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Without the Guidelines guidance from Chapter 5 Part H, even if clauses using the word "departure" were struck, considerations of factors relating to "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), will be completely open to each judge and will result in disparities harmful to victims and outside the Commission's avowed purpose "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. 3553(a)(6).

Equally disturbing is the proposal to delete §§ 5K2.0 through 5K2.24, [7] most of which contain information relevant to crimes committed on victims and all of which are directed to "the nature and circumstances of the offense." *See* 18 U.S.C 3553(a)(1). The VAG recognizes that Chapter 5, Part K, is entitled "Departures," of which the Commission wants to be rid. The VAG acknowledges that some of these grounds are described in current Part K as proper to consider for "upward departures." But the grounds themselves address information that will be helpful to the sentencing court in its 18 U.S.C 3553(a)(1) consideration of the "the nature and circumstances of the offense" even were the word "departure" removed.

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[7] This deletion includes: Death (§ 5K2.1); Extreme Physical Injury (§ 5K2.2); Extreme Psychological Injury (§ 5K2.3); Abduction or Unlawful Restraint (§ 5K2.4); Property Damage or Loss (§ 5K2.5); Weapons and Dangerous Instrumentalities (§ 5K2.6); Disruption of a Governmental Function (§ 5K2.7); Extreme Conduct (§ 5K2.8); Criminal Purpose (§ 5K2.9); Victim's Conduct (§ 5K2.10); Lesser Harms (§ 5K2.11); Coercion or Duress (§ 5K2.12); Diminished Capacity (§ 5K2.13); Public Welfare (§ 5K2.14); Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (§ 5K2.17); Violent Street Gangs (§ 5K2.18); Aberrant Behavior (§ 5K2.20); Dismissed or Uncharged Conduct (§ 5K2.21); and Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§ 5K2.24).

The VAG is concerned that this deletion will disproportionately affect victim survivors. The continued existence of these grounds will remind judges that such aggravating aspects of a case are relevant and may be considered as relevant by them under 18 U.S.C. §3553(a). These grounds contextualize what are primarily victim-centered aspects of the nature and circumstances of the offense. Their deletion, as proposed, just like the proposed deletion of Chapter 5, Part H, implicitly sends a message that these grounds are no longer relevant to the sentencing court's 18 U.S.C. 3553(a)(1) consideration. This despite the broad nature of the information that a court "may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661.

Without the Guidelines guidance from Chapter 5 Part K, even if clauses using the word "departure" are struck, consideration of factors relating to "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), will be completely open to each judge and will result in disparities harmful to victims and outside the Commission's avowed purpose "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. 3553(a)(6).

In 2022, the Commission announced that simplification was a long-term goal. In 2023-2024, the Commission made its first Simplification proposal, to which it received much input, but ultimately failed to approve. The changes made for the 2024-2025 proposal are more disturbing to the VAG for how they will affect victims. More study by the Commission is requested. Instead of providing greater guidance for the courts in sentencing, the VAG believes the current Simplification proposal, as written, provides less guidance and will lead to sentencing disparities.

With less guidance from the Guidelines, a victim's CVRA rights to meaningfully confer with the attorney for the government in a case, and to be meaningfully heard at sentencing, will be lessened as the Assistant United States Attorney will be less able to predict how the court may sentence.

The VAG respectfully asks the Commission to not adopt this Simplification proposal.

C. The Commission Lacks Legal Authority for Some of this Proposed Amendment

The Commission requested comment on its authority to adopt this Simplification amendment to the Guidelines. Just as last year, the VAG believes the Commission lacks the authority to make certain changes.

The Commission has a legal duty when promulgating its guidelines and policy statements to be "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. 994(a). [8]

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 that judges inappropriately departed 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 disproportionally affected women and girls and favored men. Not only did Congress pass legislation statutorily designed to prevent courts from doing so, but Congress also drafted direct amendments to the Sentencing Guidelines.

The Guidelines reference the PROTECT Act in §5K2.0, Background:

> 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. [9]

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[8] This clause, broadening the scope of statutory compliance by the Commission, was amended into 18 U.S.C 994(a), by Sec. 401(k) of the PROTECT Act, *infra.*

[9] § 5K2.0, Background.

Specifically, through the PROTECT Act Congress directly amended the Policy Statements found at §§ 5K2.0(b), 5K2.13(4), 5K2.20(a) and added in its entirety 5K2.22. [10] The 2025 Simplification proposed amendment deletes all of these § 5K2 (Policy Statement) direct legislative amendments. The VAG opines that this deletion is beyond the Commission's legal authority since deletion of legislatively direct amendments to the Guidelines is not "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. § 994(a). The VAG believes that Congress must act to eliminate these statutory requirements before the Commission may. Leaving the direct legislative amendments in place, as required by 28 U.S.C. § 994(a), while deleting others will make the Guidelines confusing and prompt litigation in federal criminal cases.

The VAG respectfully asks the Commission to not adopt this Simplification proposal at this time to allow further research and possible discussion with Congress.

Conclusion

The VAG appreciates the opportunity to comment upon these proposals. The VAG takes seriously its commitment to advise the Commission, share victim perspectives on the sentencing process and respect the rights of victim survivors.

Respectfully yours,

The Victims Advisory Group
Christopher Quasebarth, Chair

cc: Advisory Group Members

[10] *See* Backgrounds for §§ 5K2.0, 5K2.13, 5K2.20 and 5K2.22.