Primer

Departures and Variances

Prepared by the
Office of the General Counsel

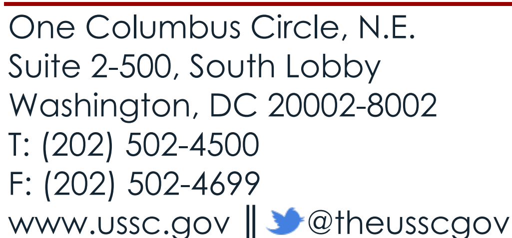
DISCLAIMER

The Commission's legal staff publishes this document to assist in understanding and applying the sentencing guidelines. The information in this document should not be considered definitive or comprehensive. In addition, the information in this document does not necessarily represent the official position of the Commission on any particular issue or case, and it is not binding on the Commission, the courts, or the parties in any case. To the extent this document includes unpublished cases, practitioners should be cognizant of Fed. R. App. P. 32.1, as well as any corresponding rules in their jurisdictions.

Want to learn more about relevant statutes, case law, and guidelines on a specific topic? The Commission's legal staff offers a series of primers to assist in understanding and applying the sentencing guidelines on the following topics—

- Aggravating and Mitigating Role Adjustments
- Antitrust Offenses
- Categorical Approach
- Offenses Involving Commercial Sex Acts and Sexual Exploitation of Minors
- Computer Crimes
- Crime Victims' Rights
- Criminal History
- Departures and Variances
- Drug Offenses
- Economic Crime Victims
- Fines for Organizations
- Firearms Offenses
- Immigration Offenses
- Intellectual Property Offenses
- Loss Calculation under §2B1.1
- Relevant Conduct
- Retroactive Guideline Amendments
- RICO Offenses
- Selected Offenses Against the Person and VICAR
- Sexual Abuse and Failure to Register Offenses
- Supervised Release

Learn more at https://www.ussc.gov/guidelines/primers.



UNITED STATES SENTENCING COMMISSION
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002
T: (202) 502-4500
F: (202) 502-4699
www.ussc.gov || @theusscgov

This document was produced and published at U.S. taxpayer expense.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. GENERAL PRINCIPLES 1

- A. Procedure of the Sentencing Court 2
- B. Notice Requirements 3
- C. Review of Sentences on Appeal 3

III. DEPARTURES 5

- A. Generally 5
- B. Departures Based on Inadequacy of Criminal History Category 5
  - 1. Upward Departures 6
  - 2. Downward Departures 7
  - 3. Written Reasons 8
  - 4. Criminal History Variances 9
- C. Departures Based on Substantial Assistance to Authorities 10
  - 1. Section 5K1.1—Substantial Assistance to Authorities (Policy Statement) 10
    - a. Generally 10
    - b. Statement of reasons 11
    - c. Motion requirement 11
    - d. District court review 11
  - 2. Section 5K1.2—Refusal to Assist (Policy Statement) 13
- D. Other Grounds for Departure (Chapter Five, Parts H and K) 13
  - 1. Generally 13
  - 2. Multiple Grounds for Departure 15
  - 3. Requirement of Specific Reasons for Departure 16
  - 4. Child Crimes and Sex Offenses 16
  - 5. Prohibited Grounds for Departure 16
    - a. Section 5H1.10—Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement) 17
    - b. Section 5H1.12—Lack of Guidance as a Youth and Similar Circumstances (Policy Statement) 17
    - c. Section 5H1.4—Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement) 17
    - d. Section 5K2.12—Coercion and Duress (Policy Statement) 18
    - e. Section 5K2.0(d)—Prohibited Departures 18

6. Encouraged Grounds for Departure 19
   a. Section 5H1.9—Dependence upon Criminal Activity for a Livelihood (Policy Statement) 19
   b. Section 5K2.1—Death (Policy Statement) 20
   c. Section 5K2.2—Physical Injury (Policy Statement) 20
   d. Section 5K2.3—Extreme Psychological Injury (Policy Statement) 21
   e. Section 5K2.4—Abduction or Unlawful Restraint (Policy Statement) 22
   f. Section 5K2.5—Property Damage or Loss (Policy Statement) 22
   g. Section 5K2.6—Weapons and Dangerous Instrumentalities (Policy Statement) 22
   h. Section 5K2.7—Disruption of Governmental Function (Policy Statement) 23
   i. Section 5K2.8—Extreme Conduct (Policy Statement) 23
   j. Section 5K2.9—Criminal Purpose (Policy Statement) 24
   k. Section 5K2.10—Victim's Conduct (Policy Statement) 24
   l. Section 5K2.11—Lesser Harms (Policy Statement) 25
   m. Section 5K2.12—Coercion and Duress (Policy Statement) 26
   n. Section 5K2.13—Diminished Capacity (Policy Statement) 26
   o. Section 5K2.14—Public Welfare (Policy Statement) 27
   p. Section 5K2.16—Voluntary Disclosure of Offense (Policy Statement) 28
   q. Section 5K2.17—Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement) 28
   r. Section 5K2.18—Violent Street Gangs (Policy Statement) 29
   s. Section 5K2.20—Aberrant Behavior (Policy Statement) 29
   t. Section 5K2.21—Dismissed and Uncharged Conduct (Policy Statement) 30
   u. Section 5K2.23—Discharged Terms of Imprisonment (Policy Statement) 31
   v. Section 5K2.24—Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement) 31
   w. Section 5K3.1—Early Disposition Programs (Policy Statement) 32
7. Discouraged Grounds for Departures 32
   a. Section 5H1.1—Age (Policy Statement) 33
   b. Section 5H1.2—Education and Vocational Skills (Policy Statement) 33
   c. Section 5H1.3—Mental and Emotional Conditions (Policy Statement) 34
   d. Section 5H1.4—Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement) 34
   e. Section 5H1.5—Employment Record (Policy Statement) 35
   f. Section 5H1.6—Family Ties and Responsibilities (Policy Statement) 35
   g. Section 5H1.11—Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement) 37

8. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (§5K2.22) ... 37

E. Encouraged Departures Within Individual Guidelines ... 38

1. Application Note 21 to §2B1.1 (Theft, Property Destruction, and Fraud) ... 38
2. Application Note 27 to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) ... 38
3. Application Note 11 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) ... 40
4. Application Notes 6, 7, and 8 to §2L1.2 (Unlawfully Entering or Remaining in the United States) ... 40
5. Application Note 2 to §3B1.1 (Aggravating Role) ... 41
6. Application Note 7 to §5C1.1 (Imposition of a Term of Imprisonment) ... 41
7. Application Note 1 to §5D1.1. (Imposition of a Term of Supervised Release) ... 41

IV. VARIANCES ... 42

A. General Principles ... 42

B. 18 U.S.C § 3553(a) Factors ... 42

1. Section 3553(a)(1) ... 42
2. Section 3553(a)(2) ... 44
3. Section 3553(a)(3) ... 45
4. Section 3553(a)(4), (5) ... 46
5. Section 3553(a)(6) ... 46
6. Section 3553(a)(7) ... 47
7. Totality of Section 3553(a) Factors ... 47

C. Variances Based on Policy Disagreement with the Guidelines ... 47

I. INTRODUCTION

This primer discusses guideline provisions and case law addressing some of the most commonly applied grounds for departure from a defendant's guideline range. It also addresses issues relating to variances outside the guideline range. Although the primer identifies some of the key cases and concepts related to sentencing departures and variances, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. GENERAL PRINCIPLES

Unless otherwise prohibited by law, a sentencing court may consider, without limitation, any information concerning the background, character, and conduct of a defendant when imposing sentence.[1] Such information may be considered when imposing a sentence within the applicable guideline range and when determining whether, and to what extent, to sentence outside the guideline range.[2] A court may impose a sentence outside the otherwise-properly-calculated guideline range through either a departure or a variance.

A departure is: (i) the imposition of a sentence outside the guideline range; (ii) a sentence that is otherwise different from the guideline sentence; or (iii) 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.[3]

A variance is a sentence imposed outside the applicable guideline range based upon the statutory sentencing factors found at 18 U.S.C. § 3553(a). As explained by the Ninth Circuit:

> A "departure" is typically a change from the final sentencing range computed by examining the provisions of the Guidelines themselves. It is frequently triggered by a prosecution request to reward cooperation . . . or by other factors that take the case "outside the heartland" contemplated by the Sentencing Commission when it drafted the Guidelines for a typical offense. A

---

1 *See* U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.4 (Nov. 2018) [hereinafter USSG] (Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)); *see also* 18 U.S.C. § 3661 (Use of information for sentencing). One exception to this rule is where the defendant agrees to cooperate with the government and the government, in exchange, agrees that self-incriminating evidence will not be used against the defendant. *See* USSG §1B1.8 (Use of Certain Information).

2 *See* USSG §1B1.4, comment. (backg'd.).

3 USSG §1B1.1, comment. (n.1(F)); *see also* United States v. Gutierrez, 635 F.3d 148, 151–53 (5th Cir. 2011) (reaffirming holding of *United States v. Mejia-Huerta*, 480 F.3d 713, 723 (5th Cir. 2007), that where a sentence is a variance and not a departure, the court is not required to comply with or consult the methodology established in §4A1.3 [Departures Based on Inadequacy of Criminal History Category (Policy Statement)]).

"variance," by contrast, occurs when a judge imposes a sentence above or below the otherwise properly calculated final sentencing range based on application of the other statutory factors in 18 U.S.C. § 3553(a).[4]

As discussed below, it is important to understand the differences between departures and variances. Courts have observed that a sentence imposed pursuant to a departure, rather than a variance, is technically a within-guideline sentence—that is, one "imposed pursuant to the departure provisions of the policy statements in the [g]uidelines."[5] A sentence that is "neither within the applicable [g]uidelines range nor imposed pursuant to the departure authority in the Commission's policy statements" is a non-guidelines sentence imposed through a variance.[6] Though one may question the need to distinguish between the two types of sentences, the distinction can become important for, among other reasons, appellate review of the sentence.[7]

A. Procedure of the Sentencing Court

A sentencing court must follow the three-step process set forth by the Supreme Court in *Gall v. United States*.[8] First, the court must properly determine the guideline range.[9] Second, the court must determine whether to apply any of the guidelines' departure policy statements to adjust the guideline range.[10] Third, the court must consider all the

---

[4] United States v. Rangel, 697 F.3d 795, 801 (9th Cir. 2012) (citing United States v. Cruz-Perez, 567 F.3d 1142, 1146 (9th Cir. 2009)).

[5] United States v. Crosby, 397 F.3d 103, 111 n.9 (2d Cir. 2005), *abrogated on other grounds by* United States v. Fagans, 406 F.3d 138 (2d Cir. 2005).

[6] *Id.*; *see also* United States v. Jacobs, 635 F.3d 778, 782 (5th Cir. 2011) ("The Guidelines set out a three-part framework for the imposition of sentences . . . . The district court's authority to impose a departure emanates from 18 U.S.C. § 3553(b)(1) and, in turn, in Chapter 5, Part K of the Guidelines . . . . By contrast, if after completing the Guidelines' three-step process the district court 'imposes a sentence that is outside the guidelines framework, such a sentence is considered a "variance".' The district court's authority to impose a variance is discretionary and stems from 18 U.S.C. § 3553(a).").

[7] *See, e.g.*, United States v. Kemp, 530 F.3d 719, 723 (8th Cir. 2008) (discussing the "significant procedural error" made by the district court in failing to specify the basis and reason for the sentence imposed).

[8] 552 U.S. 38, 49 (2007) (the district court should begin all sentencing proceedings by correctly calculating the applicable guideline range, and "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."); *see also* USSG §1B1.1(a)–(c).

[9] *Gall*, 552 U.S. at 49; 18 U.S.C. § 3553(a)(4).

[10] *Gall,* 552 U.S. at 50; 18 U.S.C. § 3553(a)(5); *see also* United States v. Lofink, 564 F.3d 232, 241–42 (3d Cir. 2009) (district court's failure to rule on the defendant's departure arguments constitutes procedural error); United States v. McBride, 434 F.3d 470, 477 (6th Cir. 2006) (guideline departures are still a relevant consideration for determining the appropriate guideline sentence); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005) ("[T]he application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered."); United States v. Selioutsky, 409 F.3d 114, 117–18 (2d Cir. 2005) (A "sentencing judge must consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable Guideline range and available departure authority. The sentencing judge may then impose either a Guidelines sentence or a non-Guidelines sentence." (internal citations omitted)). *But see* United States v. Diosdado-Star, 630 F.3d 359, 362–66 (4th Cir. 2011) (district court did not procedurally err in varying upward without first

factors set forth in 18 U.S.C. § 3553(a) as a whole, including whether a variance is warranted.[11] If the court decides that a variance is warranted, it must ensure there is sufficient justification to support the degree of the variance imposed.[12]

B. Notice Requirements

Basic notions of due process underlie the procedural requirements in federal sentencing.[13] For example, Federal Rules of Criminal Procedure 32(h) provides that before departing from an otherwise-appropriately-calculated guideline range, the court must give reasonable notice to the parties of the nature of that departure, unless the grounds have already been identified in the presentence report or a party's prehearing submission.[14] In contrast, the Supreme Court has held that no advance notice of a variance is required.[15] However,

> [s]ound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Government. The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial.[16]

C. Review of Sentences on Appeal

Appellate courts use a two-step process to review federal sentences.[17] First, they ensure that the district court committed no significant procedural error, such as failing to

---

considering departure provisions).

[11] *Gall*, 552 U.S. at 50; *see* USSG §1B1.1(c); *see also* United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005) ("If the court imposes a sentence outside the guideline range, it should explain its reasons for doing so."); United States v. Stone, 432 F.3d 651, 655 (6th Cir. 2005) ("District courts . . . must . . . sentence defendants by taking into account all of the relevant factors of 18 U.S.C. § 3553, as well as the Guidelines range.").

[12] *Gall*, 552 U.S. at 50.

[13] *See* Burns v. United States, 501 U.S. 129, 137–38 (1991) (the "Court has readily construed statutes that authorize deprivations of liberty . . . to require that the Government give affected individuals both notice and a meaningful opportunity to be heard"), *abrogated on other grounds by* United States v. Booker, 543 U.S. 220 (2005).

[14] Fed. R. Crim. P. 32(h); *see also* USSG §6A1.4; *Burns*, 501 U.S. at 130; United States v. Dozier, 444 F.3d 1215, 1217–18 (10th Cir. 2006) (district court erred in failing to give defendant notice of possible ground for upward departure as required by Rule 32(h)).

[15] *See* Irizarry v. United States, 553 U.S. 708 (2008).

[16] *Id.* at 715–16.

[17] *Gall*, 552 U.S. at 51.

calculate (or improperly calculating) the guideline range. Second, they consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard, taking into account the totality of the circumstances, including the extent of any variance from the guideline range. The appellate court's role, therefore, is to determine whether the sentence is both: (i) procedurally sound (the procedural reasonableness requirement); and (ii) falls within a broad range of reasonable sentences (the substantive reasonableness requirement).[18]

A district court's decision to deny a guideline departure is not reviewable so long as the district court "was aware of and understood its discretion to make such a [g]uideline-based departure."[19] Calculation of the guideline sentence, including any guideline-based departures, is only the first step in sentencing, "for the court must also consider the [section] 3553(a) factors before making its ultimate decision" that the defendant's sentence is reasonable.[20] While district courts must base departures on guideline factors, "many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court—with greater latitude—under section 3553(a)."[21]

The Supreme Court has held that courts of appeal may, but are not required to, apply a presumption of reasonableness to a within-guideline sentence that reflects a proper application of the sentencing guidelines.[22] Some circuits have adopted an explicit presumption of reasonableness for within-guideline sentences while other circuits have rejected it.[23]

---

[18] *See id.*; *see also, e.g.*, United States v. Tomko, 562 F.3d 558, 568 (3d Cir. 2009) ("Ultimately, '[t]he touchstone of "reasonableness" ' is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a)." (citation omitted)).

[19] United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006); *see also* United States v. Frokjer, 415 F.3d 865, 874 (8th Cir. 2005); United States v. Kornegay, 410 F.3d 89, 98 (1st Cir. 2005).

[20] United States v. Mickelson, 433 F.3d 1050, 1055 (8th Cir. 2006).

[21] *McBride*, 434 F.3d at 476; *see also* United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (collecting cases) (while "[p]olicy statements issued by the Sentencing Commission are, of course, pertinent to sentencing determinations even under the now-advisory guidelines . . . such policy statements normally are not decisive as to what may constitute a permissible ground for a variant sentence in a given case."); United States v. Andrews, 447 F.3d 806, 812 (10th Cir. 2006) ("While the guidelines discourage consideration of certain factors for downward departures, *Booker* frees courts to consider those factors as part of their analysis under § 3553(a).").

[22] Rita v. United States, 551 U.S. 338 (2007). *But see* Nelson v. United States, 555 U.S. 350 (2009) (sentencing court may not presume a guideline sentence is reasonable); Spears v. United States, 555 U.S. 261 (2009) (district courts may vary categorically based on well-reasoned policy disagreements with the guidelines which are grounded in § 3553(a) factors).

[23] The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits have adopted the presumption. *See, e.g.*, United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Smith, 881 F.3d 954, 960 (6th Cir. 2018); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Kristl, 437 F.3d 1050, 1053–54 (10th Cir. 2006) (per curiam); United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006).

III. DEPARTURES

A. GENERALLY

Departures provide authorized adjustments to a sentencing range within the guideline system.[24] As Congress acknowledged in the Sentencing Reform Act, and as the *Guidelines Manual* itself explicitly states, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision."[25] Departures, therefore, perform "an integral function in the sentencing guideline system."[26] Departures help provide courts with a way to impose an appropriate sentence in exceptional circumstances. They also maintain the statutorily mandated "flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[27] Running against this flexibility are admonishments, such as in the PROTECT Act,[28] that departures should be rare.[29] The *Guidelines Manual* cautions they should apply only in the "atypical" case lying outside the "heartland" of conduct covered by the guidelines.[30]

B. DEPARTURES BASED ON INADEQUACY OF CRIMINAL HISTORY CATEGORY

In recognition that "the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur,"[31] §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) provides for both upward and downward departures based on the inadequacy of the otherwise applicable criminal history category.[32]

---

24 To further understand the role of departures in the guidelines, see USSG Ch.1, Pt.A(1)(4)(b). Additionally, the *Guidelines Manual* includes a List of Departure Provisions located after the Index. Finally, the Commission publishes a *Compilation of Departure Provisions*. *See* U.S. SENT'G COMM'N, 2016 COMPILATION DEPARTURE PROVISIONS, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Departure_Provisions.pdf.

25 USSG Ch.1, Pt.A(1)(4)(b); USSG §5K2.0, comment. (backg'd.); 18 U.S.C. § 3553(b).

26 USSG §5K2.0, comment. (backg'd.).

27 *Id.*; 28 U.S.C. § 991(b)(1)(B).

28 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (the "PROTECT Act").

29 § 401(m)(2)(A) (the Commission should "ensure that the incidence of downward departures are substantially reduced"). Enacted as part of the so-called "Feeney Amendment," whose *de novo* standard of review for departures in section 401(d)(1) was held unconstitutional by *United States v. Booker*, 543 U.S. 220, 260–61 (2005).

30 USSG Ch.1, Pt.A(1)(4)(b) (using the term "heartland" as a reference to the "set of typical cases embodying the conduct that each guideline describes.").

31 USSG §4A1.3, comment. (backg'd.).

32 *See also* USSG §5H1.8.

1. Upward Departures

An upward departure may be warranted under §4A1.3 "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[33]

The court may use the following information as the basis for an upward departure regarding the defendant's criminal history:

(A) Prior sentence(s) not used in computing the criminal history category (for example, sentences for foreign and tribal offenses).[34]

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.[35]

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.[36]

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.[37]

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.[38]

---

[33] USSG §4A1.3(a)(1); *see also* United States v. Gant, 663 F.3d 1023, 1030 (8th Cir. 2011) (exhibits submitted in support of upward departure not sufficiently reliable for §4A1.3(a)(1) where they describe activity only tangentially related to defendant and no criminal conduct).

[34] USSG §4A1.3(a)(2)(A); *see also* USSG §4A1.3, comment. (n.2(A)(i)) (listing, as an example, a case in which the defendant received "previous foreign sentence for a serious offense."); United States v. Weisser, 417 F.3d 336, 350–51 (2d Cir. 2005) (proper for district court to consider defendant's previous parole violations); United States v. Chesborough, 333 F.3d 872, 874 (8th Cir. 2003) (affirming district court's decision to upwardly depart based in part on the large number of criminal convictions too old to be counted as part of the defendant's criminal history); United States v. Simmons, 343 F.3d 72, 78 (2d Cir. 2003) (affirming the district court's decision to depart where defendant had numerous Canadian convictions).

[35] USSG §4A1.3(a)(2)(B); *see also* USSG §4A1.3, comment. (n.2(A)(ii)) (listing, as an example, a case in which the defendant received "a prior consolidated sentence of ten years for a series of serious assaults.").

[36] USSG §4A1.3(a)(2)(C); *see also* USSG §4A1.3, comment. (n.2(A)(iii)) (listing, as an example, a case in which the defendant committed a "similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding."); United States v. Beltramea, 785 F.3d 287, 289 (8th Cir. 2015) ("[T]he district court was within its discretion to find [the defendant] 'is at a high likelihood to recidivate based on his history and pattern of cheating people out of money, [and] knowingly making false statements to achieve his ends.' "); United States v. Zelaya-Rosales, 707 F.3d 542, 546 (5th Cir. 2013) ("Such information may include, but is not limited to, '[p]rior similar misconduct established by a civil adjudication.' ").

[37] USSG §4A1.3(a)(2)(D); *see also* USSG §4A1.3, comment. (n.2(A)(iv)) (listing, as an example, a case in which the defendant committed the instant offense "while on bail or pretrial release for another serious offense.").

[38] USSG §4A1.3(a)(2)(E); *see also* United States v. Allen, 488 F.3d 1244, 1258 (10th Cir. 2007) (sentencing court cannot depart upward based on uncharged, unrelated misconduct); United States v. Rice, 358 F.3d

However, "[a] prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement."[39]

Section 4A1.3 also provides guidance for the extent of an upward departure. In general, the court should use as a reference, "the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's."[40]

When applying an upward departure from Category VI, "the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case."[41] When determining whether an upward departure from Criminal History Category VI is warranted, the court should "consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record."[42]

2. Downward Departures

Section 4A1.3 also provides that a downward departure may be warranted "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."[43] Such a departure may be warranted "if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to

---

1268, 1276–77 (10th Cir. 2004) (district court cannot use similar uncharged conduct to increase both the defendant's offense level and as a basis for a departure under §4A1.3), *judgment vacated on other grounds by* 543 U.S. 1103 (2005); United States v. Hunerlach, 258 F.3d 1282, 1286–87 (11th Cir. 2001) (same).

[39] USSG §4A1.3(a)(3).

[40] USSG §4A1.3(a)(4)(A); *see also* United States v. Sullivan, 853 F.3d 475, 480 (8th Cir. 2017) (per curiam) (error to depart from Criminal History Category II to Criminal History Category VI without adequate explanation as to why VI was appropriate and why categories in between were not sufficient); United States v. Azure, 536 F.3d 922, 932 (8th Cir. 2008) (district court abused its discretion when it upwardly departed from Criminal History Category I to Category VI without attempting "to assign hypothetical criminal history points to the conduct that did not result in convictions," and not discussing "intermediary categories II, III, IV, or V before deciding on category VI"); United States v. Valdes, 500 F.3d 1291, 1292 n.1 (11th Cir. 2007) (per curiam) (under §4A1.3, if a sentencing judge wishes to depart upwards due to a defendant's criminal history, the court must "explicitly consider" the next criminal history category up and make a determination as to whether that range is appropriate).

[41] USSG §4A1.3(a)(4)(B).

[42] USSG §4A1.3, comment. (n.2(B)); *see also* United States v. King, 627 F.3d 321, 323–24 (8th Cir. 2010) ("The length and scope of the career that lands the criminal under the career-offender guideline are appropriate grounds for departure"); United States v. Walker, 284 F.3d 1169, 1173 (10th Cir. 2002) ("[N]othing in the Guidelines supports a degree of upward departure based solely on the number of prior convictions . . . . Upon remand the district court must 'precisely lay out [its] reasoning and analysis as to why [it is selecting] a particular degree of departure.' ").

[43] USSG §4A1.3(b)(1).

the instant offense and no other evidence of prior criminal behavior in the intervening period."[44]

For career offenders within the meaning of §4B1.1 (Career Offender), the guideline limits the extent of a downward departure to one criminal history category.[45]

Section 4A1.3 prohibits "[a] departure below the lower limit of the applicable guideline range for Criminal History Category I."[46] The guideline also prohibits a downward departure of any amount for "(i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)."[47]

Section 4A1.3 also provides that

> [a] defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).[48]

3. Written Reasons

With respect to both upward and downward departures under §4A1.3, the court is required to specify in writing the reasons for departure, as described below. Furthermore, remand is appropriate when the district court fails to adequately explain the basis for its departure.[49]

---

[44] USSG §4A1.3, comment. (n.3).

[45] USSG §4A1.3(b)(3)(A).

[46] USSG §4A1.3(b)(2)(A); *see also, e.g.*, United States v. Atondo-Santos, 385 F.3d 1199, 1200 n.1 (9th Cir. 2004) (downward departure for first-time offender not warranted as guidelines already take that factor into account).

[47] USSG §4A1.3(b)(2)(B).

[48] USSG §4A1.3(b)(3)(B).

[49] *See* United States v. Wallace, 461 F.3d 15, 42–43 (1st Cir. 2006) ("Thus, even assuming that some departure in criminal history category is justified here, 'we are unable to evaluate responsibly the reasonableness of the extent of the court's departure absent explication, which we observe might include at least an indication of why a one category increase is inadequate' in this case." (quoting United States v. Pratt, 73 F.3d 450, 453–54 (1st Cir. 1996))); *see also* United States v. Pujayasa, 654 F. App'x 976, 978 (11th Cir. 2016) (per curiam) ("The district court committed procedural error by failing to adequately explain the sentence in a way that permits meaningful appellate review.").

(1) *For an upward departure*: The court must specify the reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.[50]

(2) *For a downward departure*: The court must specify the reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.[51]

Regarding the degree and level of explanation a sentencing court must provide when departing from the otherwise applicable guideline range, the circuit requirements vary. For example, the Second Circuit has held that where the reasons for departure are fully explained, "a mechanistic, step-by-step procedure is not required."[52] The Eighth Circuit allows the sentencing court to choose any method so long as it is not inconsistent with the guidelines, while the Tenth Circuit requires a "reasonable methodology hitched to" the guidelines.[53]

4. Criminal History Variances

It is important to keep in mind that courts may *vary*, rather than *depart*, from the guidelines and thus avoid the strict requirements of §4A1.3 altogether in imposing an outside-the-guidelines sentence based on the inadequacy of the defendant's criminal history category.[54] However, as discussed above, the sentencing court must still adequately explain the variant sentence being imposed pursuant to the instructions set forth in *Gall* concerning section 3553(a).[55]

[50] USSG §4A1.3(c)(1).

[51] USSG §4A1.3(c)(2).

[52] United States v. Simmons, 343 F.3d 72, 78 (2d Cir. 2003).

[53] United States v. Hurlich, 348 F.3d 1219, 1222 (10th Cir. 2003); United States v. Gonzales-Ortega, 346 F.3d 800, 803–04 (8th Cir. 2003).

[54] *See, e.g.*, United States v. Mejia-Huerta, 480 F.3d 713, 723 (5th Cir. 2007) ("We reiterate for emphasis that §4A1.3 applies only to *departures*-based on unrepresentative criminal history—not to *variances*."); *see also infra* Section IV (Variances).

[55] *See supra* Section II(A) (Procedure of the Sentencing Court); *see also* United States v. Carter, 564 F.3d 325, 328 (4th Cir. 2009) (discussing *Gall* and noting that "failing to adequately explain the chosen sentence—including any deviation from the Guidelines range" constitutes procedural error by the sentencing court).

C. Departures Based on Substantial Assistance to Authorities

1. Section 5K1.1—Substantial Assistance to Authorities (Policy Statement)

a. Generally

A defendant's assistance to authorities in the investigation of criminal activities has long been recognized, in practice and by statute, as a mitigating sentencing factor.[56] Section 5K1.1 provides for a downward departure from the guidelines if the government files a motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[57] The amount of the reduction "shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following":[58]

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;[59]

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;[60]

(3) the extent of the defendant's assistance;[61]

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;[62]

(5) the timeliness of the defendant's assistance.[63]

Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutory mandatory minimum.[64]

---

[56] USSG §5K1.1, comment. (backg'd.).

[57] USSG §5K1.1.

[58] USSG §5K1.1(a).

[59] USSG §5K1.1(a)(1) and comment. (n.3) (district court should give "substantial weight" to the government's evaluation of the extent of the defendant's assistance, "particularly where the extent and value of the assistance are difficult to ascertain."). *But see* United States v. Pizano, 403 F.3d 991, 996 (8th Cir. 2005) (court not bound by the government's recommendation as to how far to depart); *see also* United States v. Grant, 493 F.3d 464, 467 (5th Cir. 2007) (same); United States v. Milo, 506 F.3d 71, 77 (1st Cir. 2007) (same).

[60] USSG §5K1.1(a)(2).

[61] USSG §5K1.1(a)(3).

[62] USSG §5K1.1(a)(4).

[63] USSG §5K1.1(a)(5).

[64] USSG §5K1.1, comment. (n.1).

A reduction under this policy statement must "be considered independently of any reduction for acceptance of responsibility."[65]

b. Statement of reasons

While the court is afforded "latitude" in reducing a defendant's sentence based upon "variable relevant factors," the court must "state the reasons for reducing a sentence" for substantial assistance under §5K1.1.[66] This statement can be made *in camera* and under seal to protect the safety of the defendant or to avoid disclosure of an ongoing investigation.[67]

c. Motion requirement

If the government wishes to sponsor a departure from the guideline range based on the defendant's cooperation, it must make a motion under §5K1.1. A departure from a statutory mandatory minimum penalty for cooperation requires a motion under 18 U.S.C. § 3553(e).[68] The motion can be made after remand for resentencing.[69] Where the mandatory minimum exceeds the guideline range, courts have consistently found that the statutory mandatory minimum is the required starting point for a §5K1.1 departure.[70]

d. District court review

The Supreme Court explained in *Wade v. United States* that the government has the power, but not the duty, to file a motion under section 3553(e) or §5K1.1 when the defendant has provided substantial assistance.[71] Although the district court's authority to grant a departure for substantial assistance is conditioned on the government's motion, a district court may review the government's refusal to make a substantial assistance motion, if such refusal was (1) prompted by an unconstitutional motive, such as the defendant's race or religion, or (2) not rationally related to a legitimate government interest.[72] To

---

[65] USSG §5K1.1, comment. (n.2).

[66] USSG §5K1.1, comment. (backg'd.); 18 U.S.C. § 3553(c).

[67] USSG §5K1.1, comment. (backg'd.).

[68] Melendez v. United States, 518 U.S. 120, 125 (1996).

[69] United States v. Mills, 491 F.3d 738, 742 (8th Cir. 2007) (18 U.S.C. § 3742(g) does not bar the government's motion; however, absent unconstitutional motive, government was free to withhold the motion).

[70] *See, e.g.*, United States v. Koons, 850 F.3d 973, 977 (8th Cir. 2017); United States v. Diaz, 546 F.3d 566, 568 (8th Cir. 2008) (noting agreement among the First, Third, Fourth, Sixth, Seventh, and Eleventh Circuits).

[71] 504 U.S. 181 (1992); *see also* United States v. Mullins, 399 F.3d 888, 889–90 (8th Cir. 2005) ("[T]he government has no duty to make [a substantial assistance] motion unless it has entered into a plea agreement with the defendant that creates such a duty." (quoting United States v. Wolf, 270 F.3d 1188, 1190 (8th Cir. 2001))).

[72] *Wade*, 504 U.S. at 185–86; United States v. Perez, 526 F.3d 1135, 1138 (8th Cir. 2008).

obtain an evidentiary hearing, the defendant must make a " 'substantial threshold showing' that the government's refusal to make a substantial assistance motion was premised on an improper motive."[73] Some circuits have held that it is unconstitutional for the government to withhold a substantial assistance motion to penalize a cooperating defendant for taking his own case to trial.[74] Other decisions hold that substantial assistance plea agreements create a quasi-contractual obligation for the government to act in good faith, even in circumstances that would not meet *Wade* requirements.[75] A departure under §5K1.1 and 18 U.S.C. § 3553(e) can be based only on substantial assistance, not on other section 3553(a) factors.[76] Although a district court's decision not to depart is not reviewable on appeal unless the court was unaware of its power to do so, the sentence as a whole can be reviewed for reasonableness.[77]

---

73 *Perez*, 526 F.3d at 1138 (quoting *Mullins*, 399 F.3d at 889–90).

74 *See* United States v. Khoury, 62 F.3d 1138, 1142–43 (9th Cir. 1995) (remand warranted where government refused to make a §5K1.1 motion as retaliation for exercise of constitutional right to a jury trial); United States v. Paramo, 998 F.2d 1212, 1218–21 (3d Cir. 1993) (remanding where it was ambiguous whether district court knew it had authority to depart downward "if it found that the government withheld a [§]5K1.1 motion to penalize [the defendant] for proceeding to trial."); *see also* United States v. Easter, 981 F.2d 1549, 1555 (10th Cir. 1992). *But cf.* United States v. Murphy, 591 F. App'x 377, 387 (6th Cir. 2014) ("[P]rosecutors should exercise caution in declining to file substantial-assistance motions in connection with a defendant's decision to go to trial"). A panel of the Eleventh Circuit issued an opinion joining the Third and Ninth Circuits; however, the full court vacated that decision *sua sponte*, holding that the posture of the case did not require them to reach the issue of whether the government can withhold a motion based on the defendant's exercising his jury trial right. *See* United States v. Dorsey, 554 F.3d 958, 960–61 (11th Cir. 2009), *vacating and superseding* 512 F.3d 1321 (11th Cir. 2008).

75 *See, e.g.*, United States v. Reeves, 296 F.3d 113, 115 (2d Cir. 2002) (where the plea agreement provides that the government will file a §5K1.1 motion, the court "may review the agreement in good faith to see if the government has lived up to its end of the bargain." (citing United States v. Leonard, 50 F.3d 1152, 1157 (2d Cir. 1995))); United States v. Doe, 233 F.3d 642, 644 n.2 (1st Cir. 2000) (the "good faith consideration standard . . . articulated in *United States v. Garcia*, 698 F.2d 31, 35 (1st Cir. 1983), remain[s] good law after *Wade*." (citing United States v. Alegria, 192 F.3d 179, 187 (1st Cir. 1999))). *But see, e.g.*, United States v. Gates, 461 F.3d 703, 710–11 (6th Cir. 2006) (a claim based on bad faith with respect to prosecutorial misconduct for not filing a §5K1.1 motion is not reviewable); United States v. Aderholt, 87 F.3d 740, 742 (5th Cir. 1996) ("If the Government retains sole discretion to file the [§5K1.1] motion, its refusal to file is reviewable only for unconstitutional motives such as the race or religion . . . .").

76 *See, e.g.*, United States v. Livesay, 525 F.3d 1081, 1085 (11th Cir. 2008) (sentencing court committed "*Gall* procedural error" when it based the extent of a §5K1.1 departure on an impermissible consideration that did not pertain to cooperation); United States v. A.B., 529 F.3d 1275, 1285 (10th Cir. 2008) (district court had authority under § 3553(e) to depart below the mandatory minimum, but "was without authority to go further below the statutory minimum based upon § 3553(a) factors" after granting the substantial assistance departure); United States v. Desselle, 450 F.3d 179, 182 n.1 (5th Cir. 2006) (joining the majority of circuits in holding that the extent of a §5K1.1 or § 3553(e) departure must be based solely on assistance-related concerns); United States v. Pepper, 412 F.3d 995, 998–99 (8th Cir. 2005) (collecting cases concluding that "only assistance-related matters may be considered when determining the length of a departure pursuant to [§5K1.1]").

77 *See, e.g.*, United States v. Berni, 439 F.3d 990, 992 (8th Cir. 2006) ("The fact that an advisory Guidelines determination involves a section 5K1.1 departure does not shield the overall sentence from our review for reasonableness.").

Courts generally have held that when the government refuses to file a substantial assistance motion under §5K1.1, the defendant cannot recast his claim as a request for a departure under §5K2.0 because the Commission already has taken a defendant's substantial assistance into consideration in formulating the guidelines.[78] However, even absent a government motion for a substantial assistance reduction, a district court may consider a defendant's cooperation as a possible basis for a variance under section 3553(a)(1).[79] Additionally, in some circuits, assistance to local or state law enforcement agencies—if not taken into account under §5K1.1—may provide a basis for a downward departure pursuant to §5K2.0.[80]

2. *Section 5K1.2—Refusal to Assist (Policy Statement)*

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.[81] However, a defendant's refusal to assist authorities may be considered in sentencing *within* the guideline range.[82]

D. Other Grounds for Departure (Chapter Five, Parts H and K)

1. *Generally*

In accordance with §5K2.0 (Grounds for Departure (Policy Statement)), a court may depart from the applicable guideline range if it finds an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the

[78] *See, e.g.*, United States v. Solis, 169 F.3d 224, 227 (5th Cir. 1999) (a district court "has no more authority to depart for substantial assistance under § 5K2.0 that it has under § 5K1.1."); United States v. Alegria, 192 F.3d 179, 189 (1st Cir. 1999) (court did not err in refusing to depart downward based on the defendant's cooperation because "a defendant's assistance to the prosecutor cannot serve as the basis for a section 5K2.0 departure."); In re Sealed Case, 181 F.3d 128, 140–41 (D.C. Cir. 1999) (en banc) (section 5K2.0 does not provide an independent source of authority for substantial assistance departures); United States v. Abuhoura, 161 F.3d 206, 210 (3d Cir. 1998) (substantial assistance is taken into account in §5K1.1 and "must be considered as a factor mentioned in the Guidelines and not as an unmentioned factor.").

[79] *See* United States v. Robinson, 741 F.3d 588, 599–601 (5th Cir. 2014) ("[A] sentencing court's failure to recognize its discretion to consider a defendant's cooperation under § 3553(a)(1) is a significant procedural error.").

[80] *See, e.g.*, United States v. Truman, 304 F.3d 586, 591 (6th Cir. 2002) ("[W]hen a defendant moves for a downward departure on the basis of cooperation or assistance to government authorities which does not involve the investigation or prosecution of another person, USSG §5K1.1 does not apply and the sentencing court is not precluded from considering the defendant's arguments solely because the government has not made a motion to depart.").

[81] USSG §5K1.2; *see also* United States v. Burgos, 276 F.3d 1284, 1290 (11th Cir. 2001) ("Penalizing [the defendant] for refusing to cooperate in the case against her husband simply does not achieve any of the goals set forth in section 3553(a)(2), and, consequently, exceeds the district court's sentencing discretion.").

[82] *See* United States v. Gaynor, 167 F. App'x 346 (4th Cir. 2006) (per curiam) (discussing circuit disagreement on this issue); United States v. Klotz, 943 F.2d 707 (7th Cir. 1991).

Sentencing Commission in formulating the guidelines that . . . should result in a sentence different from that described."[83]

As discussed in Chapter 1, Part A of the *Guidelines Manual*:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.[84]

In cases other than child crimes and sex offenses (discussed below), the court may depart (either up or down) from the guideline range in the following situations:

(1) If there exists in a case circumstance of a *kind* not adequately taken into consideration in determining the applicable guideline range.[85]

Such circumstances include the encouraged departures (discussed below)—some of which are found in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)—and some of which are found in specific guideline provisions.[86]

Such circumstances also include the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence. Such circumstances are intended to be rare.[87]

---

[83] USSG §5K2.0(a)(1); *see, e.g.*, United States v. O'Georgia, 569 F.3d 281 (6th Cir. 2009) (reversing upward departures for (i) obstruction of justice based on defendant's pursuit of meritless appeals and frivolous motions (§5K2.0), (ii) disruption of governmental functions based on delays occasioned by defendant's deceptions of physicians to manipulate court (§5K2.7), and (iii) delays occasioned by defendant's relocation out of jurisdiction (§5K2.0); upholding upward departures (i) for extensive planning in commission of offense (§5K2.0), (ii) use of false identities to conceal offense over a period of twenty years (§5K2.9), and (iii) under-representation of defendant's criminal history (§4A1.3)); United States v. Vasquez, 279 F.3d 77, 82–83 (1st Cir. 2002) (possible adverse consequences faced by defendant, as deportable alien, during incarceration for being alien found in U.S. after having been deported, or to certain rehabilitative programs, did not constitute grounds for downward departure under §5K2.0; consequences were adequately taken into consideration by §2L1.2, the guideline under which defendant was sentenced, since only persons who would have been sentenced under guideline were deportable aliens).

[84] USSG Ch.1, Pt.A(1)(4)(b).

[85] USSG §5K2.0, comment. (n.3(A)).

[86] USSG §5K2.0, comment. (n.3(A)(i)).

[87] USSG §5K2.0, comment. (n.3(A)(ii)).

(2) If there exists in a case circumstances present to a *degree* not adequately taken into consideration in determining the applicable guideline range.[88]

This includes the exceptional case in which the court determines that a circumstance already taken into account in the guideline is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.[89]

(3) If there exists in a case offender characteristics or other circumstances that are not ordinarily relevant but are present in an exceptional degree.[90]

This includes the discouraged departures (discussed below), which are found in Chapter Five, Part H (Specific Offender Characteristics).[91]

2. Multiple Grounds for Departure

A court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which otherwise independently suffices as a basis for departure, only if:

(1) such offender characteristics or other circumstances, taken together, make the case exceptional; and

(2) each such offender characteristic or other circumstance is—

(A) present to a substantial degree*;* and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.[92]

---

[88] USSG §5K2.0, comment. (n.3(B)(i)).

[89] USSG §5K2.0, comment. (n.3(B)(ii)).

[90] USSG §5K2.0, comment. (n.3(C)).

[91] *Id.*

[92] USSG §5K2.0(c); *see, e.g.*, United States v. Bogdan, 284 F.3d 324, 329–30 (1st Cir. 2002) (reversing a downward departure where all the factors the district court relied on were either discouraged or already taken into account by the guidelines and where none of the factors were present, either individually or in combination, in some exceptional degree); United States v. Moskal, 211 F.3d 1070, 1075 (8th Cir. 2000) (affirming an upward departure where: embezzlement involved a large number of vulnerable victims; defendant manipulated these victims to gain their trust; defendant employed a number of methods to defraud his victims; defendant's conduct damaged the law firm's goodwill and standing in the legal community; and defendant's conduct adversely impacted the legal profession and justice system); United States v. Decora, 177 F.3d 676, 678–79 (8th Cir. 1999) (although court relied on, for downward departure, factors not ordinarily relevant—education, employment record, family and community responsibility—these factors were present in an unusual degree not adequately taken into consideration by the Sentencing Commission); United States v. Iannone, 184 F.3d 214, 231 (3d Cir. 1999) (affirming an upward departure based on five factors that, alone, would not justify a departure but, in combination, the factors made the case very unusual

3. *Requirement of Specific Reasons for Departure*

Section 5K2.0 requires a sentencing court that departs from the applicable guideline range to state, as required by 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, state those reasons with specificity in the written judgment and commitment order.[93]

4. *Child Crimes and Sex Offenses*

Downward departures under §5K2.0 are limited in cases of child crimes and sex offenses.[94] Downward departures are only allowed in those cases where the court finds that there exists a mitigating circumstance of a kind, or to a degree, that:

(1) is listed in Part K of Chapter Five as a permissible ground of downward departure in these sentencing guidelines and policy statements;[95]

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines;[96] and

(3) should result in a sentence different from that described.[97]

Thus, downward departures based on grounds not listed in Part K of Chapter Five are prohibited in child crimes and sex offenses. Upward departures are allowed in these cases even if the departure basis is not mentioned in the guidelines or is found somewhere other than Part K of Chapter Five.

5. *Prohibited Grounds for Departure*

Section 5K2.0(d) also includes several factors (discussed below) that the court cannot take into account as grounds for departure: any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of 5H1.4 (Physical Condition, Including Drug or Alcohol

---

and justified a two-level departure).

93 USSC §5K2.0(e); *see also* United States v. Nuzzo, 385 F.3d 109, 120 (2d Cir. 2004) (on remand, district court must adhere to the requirements of the PROTECT Act to state in open court, "with specificity in the written order and judgment," reasons for imposing a sentence outside the guidelines).

94 USSG §5K2.0(b).

95 USSG §5K2.0(b)(1).

96 USSG §5K2.0(b)(2).

97 USSG §5K2.0(b)(3).

Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress),[98] as well as several other prohibited grounds.

a. Section 5H1.10—Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

The policy statement in §5H1.10 provides that the factors listed in the title—race, sex, national origin, creed, religion, and socio-economic status—are not relevant in the determination of a sentence.[99]

b. Section 5H1.12—Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Section 5H1.12 provides that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted."[100]

c. Section 5H1.4—Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Section 5H1.4 provides that drug or alcohol dependence or abuse is not ordinarily a reason for downward departure.[101] Further, the policy statement explains that substance

---

98 USSG §5K2.0(d)(1).

99 USSG §5H1.10. *Compare* United States v. Hall, 677 F. App'x 554, 555–56 (11th Cir. 2017) (per curiam) (district court plainly erred when it considered religion at sentencing, demonstrated by the fact that "[r]eligion was a focal point of the colloquy" and the court twice called defendant a "demon"), *and* United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001) (district court erred by departing downward based on defendant's cultural heritage; finding that defendant was more likely to participate in boyfriend's criminal activities because, as a Mexican woman, she was expected to submit to his will, was really the joinder of gender and national origin, both prohibited grounds for consideration in sentencing), *with* United States v. Adebimpe, 649 F. App'x 449, 453 (9th Cir. 2016) (court did not improperly consider status as immigrant where it credited defendant for overcoming struggles associated with immigrating but found that he had committed significant fraud), United States v. Cavallo, 790 F.3d 1202, 1238 (11th Cir. 2015) (district court did not impermissibly consider defendant's sex when imposing sentence for mortgage fraud, notwithstanding judge's comment that defendant came "from the old school, where the man took the hit so that the lady in his life did not"; remark was gesture of kindness, not act of sex discrimination), *and* United States v. Floyd, 458 F.3d 844, 851 (8th Cir. 2006) (rejecting defendant's argument that she was entitled to a downward departure because she was a "law-abiding and God-fearing citizen").

100 USSG §5H1.12; *see also* United Stated v. Godinez, 474 F.3d 1039, 1043 (8th Cir. 2007) (upholding denial of a downward departure sought because the defendant "lost his father at the age of twelve, was unable to attend school, and remained illiterate until late adolescence."); United States v. Dyck, 334 F.3d 736, 743 (8th Cir. 2003) (reversing a downward departure given because the defendant's "Mennonite upbringing left him ignorant and uneducated to the 'ways of the world' " as inconsistent with §§5H1.10 and 5H1.12). *But see* United States v. Rivera*,* 192 F.3d 81, 84–85 (2d Cir. 1999) (while "the Guidelines foreclose any downward departure for lack of youthful guidance . . . a downward departure may be appropriate in cases of extreme childhood abuse.").

101 USSG §5H1.4; *see also, e.g.*, United States v. Williams, 891 F.2d 962, 965 (1st Cir. 1989) (reversing a downward departure based on defendant's addiction to drugs). Section 5H1.4's policy statement regarding

abuse is "highly correlated to an increased propensity to commit crime," and recommends "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))."[102] Similarly, "where a defendant who is a substance abuser is sentenced to probation," the policy statement "strongly recommend[s] that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4))."[103] In cases where §5C1.1, Application Note 7, is applicable, "a downward departure [from Zone C to Zone B] may be appropriate to accomplish a specific treatment purpose."[104] However, a court may not impose a longer sentence solely to make the defendant eligible for drug treatment programs in prison.[105]

d. Section 5K2.12—Coercion and Duress (Policy Statement)

Section 5K2.12 provides for a departure if the defendant committed the offense "because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense," but specifies that "personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure."[106]

e. Section 5K2.0(d)—Prohibited Departures

Section 5K2.0(d) further provides that the court may not depart from the applicable guideline range based on:

(1) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility) cannot support a departure.[107]

---

physical conditions is discussed in Section III.D.5.d, *infra*.

[102] USSG §5H1.4.

[103] *Id.*

[104] This application note describes circumstances in which a departure from the sentencing options available for Zone C to the sentencing options available for Zone B may be appropriate to achieve substance abuse or mental health treatment in a community setting. USSG §5C1.1, comment. (n.7).

[105] *See* Tapia v. United States, 564 U.S. 319, 334–35 (2011) ("[T]he court may have calculated the length of Tapia's sentence to ensure that she receive certain rehabilitative services. And that a sentencing court may not do. As we have held, a court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation."); *see also* United States v. Manzella, 475 F.3d 152, 161 (3d Cir. 2007) (district court erred when it "set the length of [the defendant's] prison term" so the defendant "would be eligible for the Bureau of Prison's 500-hour drug treatment program").

[106] USSG §5K2.12; *see also*, *e.g.*, United States v. Cotto, 347 F.3d 441, 445 (2d Cir. 2003) ("If section 5K2.12 is to be accorded meaningful status, as the Sentencing Commission obviously intended, we must read it as providing a broader standard of coercion as a sentencing factor than coercion as required to prove a complete defense at trial." (quoting United States v. Cheape, 889 F.2d 477, 480 (3d Cir. 1989))).

[107] USSG §5K2.0(d)(2).

(2) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.[108]

(3) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court).[109]

(4) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).[110]

(5) Any other circumstance specifically prohibited as a ground for departure in the guidelines.[111]

6. *Encouraged Grounds for Departure*

If a special factor is encouraged, the court may use it as a basis for a departure, but only if the applicable guideline does not already take the factor into account, or if the factor is present to an exceptional degree.[112]

a. Section 5H1.9—Dependence upon Criminal Activity for a Livelihood (Policy Statement)

Section 5H1.9 states that "the degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence."[113]

---

108 USSG §5K2.0(d)(3); *see also* USSG §5H1.7 (defendant's role in the offense is relevant in determining the applicable guideline range but is not a basis for departing from that range).

109 USSG §5K2.0(d)(4).

110 USSG §5K2.0(d)(5). *Compare* United States v. Carlson, 498 F.3d 761, 766 (8th Cir. 2007) (simply liquidating part of a retirement account and borrowing from friends is not an "extraordinary" effort) *and* United States v. O'Malley, 364 F.3d 974, 981 (8th Cir. 2004) (reversing the district court's departure because the defendant's efforts did not constitute "extraordinary restitution," even though he "must have gone to great lengths to have a cashier's check for $459,047.02 readily available for tender at the sentencing hearing"), *with* United States v. Oligmueller, 198 F.3d 669, 672 (8th Cir. 1999) (upholding departure for extraordinary restitution where defendant made voluntary payments a year prior to indictment, often worked sixteen-hour days on his farm to raise the money, took on a second job, turned over his life insurance policy and his wife's certificate of deposit, and gave up his home).

111 USSG §5K2.0(d)(6).

112 USSG §5K2.0(a)(4).

113 USSG §5H1.9.

b. Section 5K2.1—Death (Policy Statement)

Under §5K2.1, "[i]f death resulted, the court may increase the sentence above the authorized guideline range."[114] The policy statement provides a number of factors the court should take into consideration when determining the extent of such a departure. The court, for example, "must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation."[115]

The policy statement also encourages consideration of both the number of fatalities and manner of death. The extent of the increase should depend on "the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury."[116]

c. Section 5K2.2—Physical Injury (Policy Statement)

Section 5K2.2 provides for an increase above the authorized guideline range if significant physical injury resulted.[117] The extent of the increase ordinarily should depend

---

[114] USSG §5K2.1; *see also, e.g.*, United States v. Montgomery, 550 F.3d 1229, 1236 (10th Cir. 2008) (defendant's emotional and physical abuse of his wife, his knowledge that she had previously attempted suicide, his attempt to keep her from taking antidepressants, and his threat to take their son from her, "all indicate that her suicide by his [illegally possessed] weapon was reasonably foreseeable" to him); United States v. Mousseau, 517 F.3d 1044, 1048–49 (8th Cir. 2008) (affirming an upward departure under §5K2.1 where the victim died one day after the defendant provided the victim with methamphetamine, and finding that even though the defendant did not intend to harm the victim, it was "clear that her actions were very dangerous and that she disregarded a known risk by giving an unknown substance, suspected to be a narcotic, to a minor to ingest."); *see also* United States v. Moreno-Ruiz, 671 F. App'x 250, 251 (5th Cir. 2016) (per curiam) (district court did not err in applying §2L1.1(b)(6) enhancement for creating a substantial risk of death or bodily injury and also departing upward under §5K2.1).

[115] USSG §5K2.1; *see also, e.g.*, United States v. Terry, 142 F.3d 702, 708–09 (4th Cir. 1998) (district court erred by failing to consider the factors listed in §5K2.1, and not making any finding as to the defendant's state of mind); United States v. Davis, 30 F.3d 613, 615–16 (5th Cir. 1994) (the "only 'mandatory' language in the section is that the judge 'must' consider matters that 'normally distinguish among levels of homicide,' such as state of mind." (quoting United States v. Ihegworo, 959 F.2d 26, 29 (5th Cir. 1002))).

[116] USSG §5K2.1; *see also* United States v. Rodriguez, 553 F.3d 380, 396–97 (5th Cir. 2008) (affirming an upward departure, in addition to enhancements for number of aliens and a single death, where 18 additional migrants were killed during an alien smuggling conspiracy); United States v. Van Metre, 150 F.3d 339, 356 (4th Cir. 1998) (kidnapping guideline does not take into account scenario where victim was kidnapped for the purpose of sexual assault and defendant only later formed intent to murder her).

[117] USSG §5K2.2; *see also* United States v. Singleton, 917 F.2d 411, 414 (9th Cir. 1990) (district court must make specific findings that the injury is "something more than the ordinary scratches, scrapes, and bruises that a person would suffer in almost any minor scuffle."). *But see* United States v. Baker, 339 F.3d 400, 404–06 (6th Cir. 2003) (facts did not support an upward departure for physical injury because "[a]ppalling as the defendants' conduct and its consequences were by the standards of any civilized person, it is no extreme outlier within the universe of robberies resulting in permanent or life-threatening injuries, for surely every such robbery is appalling.").

on "the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked."[118] In general, the same considerations apply to this policy statement as in §5K2.1—namely, the extent of injury and the extent to which it was knowingly intended or risked.[119] Application of §5K2.2 does not preclude an enhancement under §2A2.2(b)(3)(C) (for permanent or life-threatening injury under the aggravated assault guideline).[120]

d. Section 5K2.3—Extreme Psychological Injury (Policy Statement)

If a victim or victims "suffered psychological injury much more serious than that normally resulting from commission of the offense," §5K2.3 allows the court to increase the sentence above the authorized guideline range.[121] The extent of the increase ordinarily should depend on "the severity of the psychological injury and the extent to which the injury was intended or knowingly risked."[122] Section 5K2.3 states that under normal circumstances, psychological injury would be sufficiently severe to warrant application of this adjustment only "when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns."[123]

---

[118] USSG §5K2.2.

[119] *See* United States v. Gillispie, 929 F.3d 788, 790 (6th Cir. 2019) (affirming upward departure where defendant intended or knowingly risked injury to the victim by supplying him with fentanyl); United States v. Jones, 30 F.3d 276, 288 (2d Cir. 1994) (affirming the district court's decision to depart upward in a drug trafficking conspiracy case in which the defendant planned, for days, the shooting of an undercover police officer which resulted in massive internal injuries; sentencing guidelines did not adequately take into consideration the intentional and indifferent nature of the defendant's acts).

[120] *See* United States v. Reyes, 557 F.3d 84, 86–87 (2d Cir. 2009) (per curiam) (enhancement under §2A2.2(b)(3)(C) and an upward departure under §5K2.2 were warranted; nothing in the guidelines or in statutory law preclude the application of both provisions in the same case).

[121] USSG §5K2.3. *Compare* United States v. Begaye, 635 F.3d 456, 464–65 (10th Cir. 2011) (comparative evidence—*i.e.*, evidence of the psychological injury actually suffered by the victim and the psychological injury normally resulting from the commission of the same offense—is unnecessary in every case to support a departure under §5K2.3), United States v. Hefferon, 314 F.3d 211, 228 (5th Cir. 2002) (affirming a departure in a child sex offense where the victim's doctor testified that the victim will suffer long-term psychological effects, such as lack of trust—especially of adults—that are excessively severe, and where the doctor indicated that the victim's trauma was the most severe of anybody she had ever worked with), *and* United States v. Yellow, 18 F.3d 1438, 1442–43 (8th Cir. 1994) (affirming a departure where the defendant was convicted of raping his younger brother, who suffered from cerebral palsy, and younger sister, and the record included expert testimony regarding the severity and likely duration of psychological harm suffered by the victims), *with* United States v. Bond, 22 F.3d 662, 671–72 (6th Cir. 1994) (reversing the district court's decision to depart because, as a result of the bank robbery, "the tellers suffered anxiety for several weeks after the robbery; but this would not be unusual for any victim of an armed bank robbery."), *and* United States v. Lasaga, 328 F.3d 61, 64–67 (2d Cir. 2003) (reversing a departure under this policy statement where the district court did not make the additional finding that the victim suffered much more serious harm than normally would be the case).

[122] USSG §5K2.3.

[123] *Id.*

e. Section 5K2.4—Abduction or Unlawful Restraint (Policy Statement)

The court may upwardly depart if a person was "abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime."[124]

f. Section 5K2.5—Property Damage or Loss (Policy Statement)

Section 5K2.5 provides for an upward departure if the "offense caused property damage or loss not taken into account within the guidelines."[125] The extent of increase ordinarily should depend on "the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction."[126]

g. Section 5K2.6—Weapons and Dangerous Instrumentalities (Policy Statement)

Section 5K2.6 provides for an upward departure if "a weapon or dangerous instrumentality was used or possessed in the commission of the offense."[127] The increase ordinarily should depend on "the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others."[128]

---

[124] USSG §5K2.4; *see also* United States v. Barragan-Espinoza, 350 F.3d 978, 982 (9th Cir. 2003) (in drug distribution conspiracy, three-level upward adjustment under §5K2.4 was not erroneous where district court found defendant held victim against her will and forced her to carry drugs in her bra, conduct which was not alleged in or directly related to, charges in the indictment).

[125] USSG §5K2.5; *see also* United States v. Thomas, 62 F.3d 1332, 1347 (11th Cir. 1995) (remanding upward departure under §5K2.5 where advanced fees on fraudulently obtained loans never secured by client "were not substantially in excess of the typical fraud case . . . as to render the Guidelines' considerations of circumstantial damages inadequate."); United States v. Dayea, 32 F.3d 1377, 1382 (9th Cir. 1994) (section 5K2.5 provides for departures based on property damage or loss, not other harms, such as consequential financial damages to a victim's widow).

[126] USSG §5K2.5.

[127] USSG §5K2.6; *see also, e.g.*, United States v. Peeples, 879 F.3d 282, 289 (8th Cir. 2018) (affirming upward departure under §5K2.6 and enhancement under §2K2.1(b)(6) where defendant fired shot into floor of home and into apartment below "[b]ecause the enhancements account for two distinct harms"); United States v. Bond, 22 F.3d 662, 673 (6th Cir. 1994) ("[R]obbers discharge firearms during robberies specifically to frighten the victims, to ensure cooperation with their demands, and to facilitate escape; the factors articulated by the district court do not deviate substantially from that norm.").

[128] USSG §5K2.6.

h. Section 5K2.7—Disruption of Governmental Function (Policy Statement)

If the defendant's conduct resulted in a "significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected."[129] Departure from the guidelines, however, "ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference."[130]

i. Section 5K2.8—Extreme Conduct (Policy Statement)

Under §5K2.8, if "the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct."[131] Examples of such conduct include "torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation."[132] Section 2A3.1

---

[129] USSG §5K2.7; *see also, e.g.*, United States v. Archambault, 344 F.3d 732, 736 (8th Cir. 2003) (Native American Tribal District was a recognized governing authority of the Standing Rock Sioux Tribe—a sovereign entity under federal law—and, because the defendant's arson caused many of the members of the community to lose their source of transportation for three months, affirmed the district court's decision to depart); *see also* United States v. Saani, 650 F.3d 761, 765–66, 771 (D.C. Cir. 2011) (holding that the government is not required to establish a direct link between the defendant's misconduct and the alleged disruption; it does not require that the disruption be of any particular type or consequence).

[130] USSG §5K2.7; *see also, e.g.*, United States v. Cole, 357 F.3d 780, 783–84 (8th Cir. 2004) (reversing the district court's decision to depart in a case in which the defendant transmitted a threat in interstate commerce by making a bogus threat of an anthrax attack on a school because the specific offense characteristics of §2A6.1 already provided for an increase in the base offense level if governmental functions are substantially disrupted). *But see* United States v. Regueiro, 240 F.3d 1321, 1325 (11th Cir. 2001) (per curiam) (affirming the district court's decision to depart in a case involving conspiracy to defraud the United States, conspiracy to commit money laundering, and money laundering because every time one of the nurses from the 100 groups the defendant organized fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide care to eligible patients).

[131] USSG §5K2.8.

[132] USSG §5K2.8; *see also, e.g.*, United States v. Wallace, 605 F.3d 477, 479 (8th Cir. 2010) (per curiam) (affirming an upward departure where the defendant imprisoned and prostituted a mentally disabled young woman and committed such acts as inflicting injuries upon the victim with knives and cigarettes, forcing the victim to drink urine, and forcing the victim to perform acts of bestiality); United States v. Baker, 339 F.3d 400, 406 (6th Cir. 2003) (affirming an upward departure in a bank robbery case where the defendant shot a bank security guard after he had raised his arms to surrender, kicked his wounded body until he passed out, and shot him again when he came to); United States v. Bonetti, 277 F.3d 441, 449–50 (4th Cir. 2002) (affirming an upward departure where the defendant, convicted of harboring an illegal alien, brought the victim to the United States, and for 15 years kept control of her visa and passport, kept her in virtually slave-like conditions, did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her); United States v. Johnson, 144 F.3d 1149, 1150 (8th Cir. 1998) (affirming an upward departure where the defendant threatened the victim and a male co-worker with a sawed off shotgun and forced them to disrobe, repeatedly forced the female victim to perform oral sex, penetrated her digitally

(Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) encourages an upward departure under §5K2.8 if a victim was sexually abused by more than one participant.[133]

j. Section 5K2.9—Criminal Purpose (Policy Statement)

Under §5K2.9, if "the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct."[134]

k. Section 5K2.10—Victim's Conduct (Policy Statement)

Section 5K2.10 allows the court to reduce the sentence below the guideline range "to reflect the nature and circumstances of the offense" if the victim's wrongful conduct contributed significantly to provoking the offense behavior.[135] To determine whether to depart and to what extent, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence.[136]

---

and with his penis, left her lying naked on the floor, and threatened to kill her if she called the police); United States v. Clark, 45 F.3d 1247, 1252–53 (8th Cir. 1995) (affirming an upward departure in a carjacking case in which the defendant held a gun to the victim's head, traveled around with the victim still in the car, robbed him, and repeatedly told him he was going to die); *see also* United States v. Begaye, 635 F.3d 456, 469 (10th Cir. 2011) (comparative evidence—*i.e.*, evidence of the defendant's conduct and the conduct of a "typical" perpetrator—is unnecessary to support a departure under §5K2.8); United States v. Hanson, 264 F.3d 988, 998–99 (10th Cir. 2001) (upward departure for extreme conduct may be imposed even when the victim is dead or unconscious when the conduct occurs).

[133] USSG §2A3.1, comment. (n.6); *see also, e.g.*, United States v. Queensborough, 227 F.3d 149, 159 (3d Cir. 2000) (affirming an upward departure where the defendant and a codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched), *abrogation on other grounds as recognized by* United States v. Dahmen, 675 F.3d 244, 247–48 (3d Cir. 2012).

[134] USSG §5K2.9; *see also, e.g.*, United States v. Wallace, 461 F.3d 15, 40–41 (1st Cir. 2006) (a district court must show a nexus between the offense and the other criminal activity to support a departure under §5K2.9); *Hanson*, 264 F.3d at 997 (affirming district court's refusal to depart based on the defendant's commission of a robbery in the course of a murder for which he was convicted because robbery is one of the issues that distinguishes first and second degree murder under the guidelines, and an upward departure based on a factor that distinguishes the crime in such a fashion is inappropriate).

[135] USSG §5K2.10; *see also, e.g.*, United States v. Mussayek, 338 F.3d 245, 253 (3d Cir. 2003) (for a downward departure under this policy statement, victim's misconduct must have significantly contributed to provoking the defendant's offense behavior, and the provoked offense must be proportional to the provoking conduct).

[136] *See* United States v. Paster, 173 F.3d 206, 211 (3d Cir. 1999) (conduct of the victim—admitting to the defendant that she had between 40 and 50 affairs—is not the type of violent, wrongful conduct that warrants

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation.[137]

The policy statement provides that victim misconduct is generally not sufficient to depart under this provision in the context of criminal sexual abuse cases (found in Chapter Two, Part A, Subpart 3). Further, the provision does not generally permit a departure in the context of non-violent offenses. One example of an exception, however, is if the victim engaged in "an extended course of provocation and harassment" that led the defendant to steal or destroy property in retaliation.[138]

l. Section 5K2.11—Lesser Harms (Policy Statement)

Section 5K2.11 allows for a reduced sentence if the defendant committed a crime to avoid a perceived greater harm, "provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing."[139]

Similarly, if the defendant's conduct does "not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue," a departure may be warranted. The policy statement lists as examples the following behavior: "a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program."[140]

---

a departure).

[137] USSG §5K2.10; *see also Paster*, 173 F.3d at 211(conduct of the victim did not warrant the response by the defendant—stabbing her 16 times).

[138] USSG §5K2.10.

[139] USSG §5K2.11.

[140] *Id.*; *see also, e.g.*, United States v. Carvell, 74 F.3d 8, 13 (1st Cir. 1996) (reduced sentence under §5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide); United States v. Lewis, 249 F.3d 793, 795 (8th Cir. 2001) (lesser harms rationale of §5K2.11 permits a sentencing court to depart for violations of the statute barring the making of a false statement in connection with the acquisition of a firearm where the firearm at issue was an heirloom that the defendant inherited from his father). *But see* United States v. Carrasco, 313 F.3d 750, 754 (2d Cir. 2002) (defendant was not entitled to a lesser harm departure because a deported alien reentering the country illegally, even without intent to commit a crime, has committed the act the statute prohibits); United States v. Rojas, 47 F.3d 1078, 1081–82 (11th Cir. 1995) (district court erred by granting a downward departure under §5K2.11 to a defendant convicted of knowing possession of unregistered firearms based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens, a motive dissimilar to the "traditional" departure categories for §5K2.11, such as hunting, sport shooting, and protecting the home); United States v. Riley, 376 F.3d 1160, 1167–68 (D.C. Cir. 2004) (the mere absence of an unlawful purpose does not warrant a departure under §5K2.11).

m. Section 5K2.12—Coercion and Duress (Policy Statement)

Section 5K2.12 allows the court to depart downward if the defendant committed the offense because of "serious coercion, blackmail or duress, under circumstances not amounting to a complete defense."[141] The extent of the "imperfect duress" departure should depend on "the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be."[142] Courts generally look for a threat of physical injury, substantial damage to property, or similar unlawful acts of a third party or from a natural emergency.[143]

n. Section 5K2.13—Diminished Capacity (Policy Statement)

Section 5K2.13 provides for a downward departure if: (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.[144]

The extent of the departure "should reflect the extent to which the reduced mental capacity contributed to the commission of the offense."[145] Significantly reduced mental

---

[141] USSG §5K2.12; *see also, e.g.*, United States v. McKeever, 824 F.3d 1113, 1126 (D.C. Cir. 2016) (remanding case where district court failed to consider defendants' entrapment claim that police introduced guns into conspiracy to trigger five-level enhancement under §2B3.1(b)(2)); United States v. Bala, 236 F.3d 87, 91 (2d Cir. 2000) (agreeing with the Fourth, Eighth, and Ninth Circuits that " 'imperfect entrapment,' described as 'aggressive encouragement of wrongdoing, although not amounting to a complete defense,' is a proper ground for downward departure at sentencing pursuant to [] § 5K2.12."); United States v. Amor, 24 F.3d 432, 439–40 (2d Cir. 1994) (affirming a departure where the district court found that the defendant would not have purchased and altered the firearm but for the threats he received and the shots fired at his vehicle).

[142] USSG §5K2.12.

[143] *See, e.g.*, United States v. Cotto, 347 F.3d 441, 446–47 (2d Cir. 2003) (generalized fear of a third party, based solely on knowledge of that third party's violent conduct toward others rather than on any explicit or implicit threat, was insufficient to constitute the unusual or exceptional circumstances warranting a departure under §5K2.12); United States v. Sachdev, 279 F.3d 25, 29–30 (1st Cir. 2002) (affirming district court's decision not to depart where defendant claimed that he committed the offense—cashing bad checks—because he had felt threatened to repay money invested by a former friend in his business; §5K2.12 departure ordinarily requires a threat of physical harm, either explicit or implicit).

[144] USSG §5K2.13; *see also, e.g.*, United States v. Bosa, 817 F.3d 645, 651 (9th Cir. 2016) (affirming district court's refusal to grant departure where district court found defendant's reduced mental capacity resulted in part from the voluntary use of illegal drugs, and where defendant "used deliberate and intelligent methods of carrying out the offense"); United States v. Durham, 645 F.3d 883, 889 (7th Cir. 2011) (reports failed to show defendant could not understand the wrongfulness of his conduct, or a connection between conduct and mental capacity, and such connection cannot be assumed); United States v. Crocket, 330 F.3d 706, 713 (6th Cir. 2003) (affirming diminished capacity departure, noting that "impairment does not mean total absence of reason").

[145] USSG §5K2.13.

capacity means "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."[146]

A departure for diminished capacity is prohibited where:

(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants;

(2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence;[147]

(3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public;[148] or

(4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18 of the United States Code.[149]

o. Section 5K2.14—Public Welfare (Policy Statement)

Section 5K2.14 provides for an upward departure if "national security, public health, or safety was significantly endangered."[150] The extent of the departure should "reflect the nature and circumstances of the offense."[151]

---

[146] USSG §5K2.13, comment. (n.1).

[147] *See, e.g.*, United States v. Woods, 364 F.3d 1000, 1001 (8th Cir. 2004) (per curiam) (bank robbery committed by intimidation but no weapon is still a "serious threat of violence"); United States v. Dela Cruz, 358 F.3d 623, 624–25 (9th Cir. 2004) (defendant convicted of making telephonic bomb threats was ineligible for a departure under §5K2.13 because the crime involved a serious threat of violence); United States v. Bowe, 257 F.3d 336, 347 (4th Cir. 2001) (defendant did not satisfy the criteria set forth in §5K2.13, which prohibits departure if the offense involved actual violence or a serious threat of violence).

[148] *See* United States v. Davis, 264 F.3d 813, 816 (9th Cir. 2001) (although defendant suffered from an extraordinary mental disease, his substantial criminal history demonstrated a need for incarceration to protect the public and therefore precluded a §5K2.13 departure).

[149] USSG §5K2.13.

[150] USSG §5K2.14.

[151] *Id.*; *see also, e.g.*, United States v. Singer, 825 F.3d 1151, 1157–58 (10th Cir. 2016) (section 5K2.14 enhancement was proper and not double counting where defendant convicted of involuntary manslaughter had extremely high blood alcohol level and entered into chase with police after hit and run); United States v. Bell, 303 F.3d 1187, 1193 (9th Cir. 2002) (possession of deadly chemicals and nerve agents); United States v. Cole, 357 F.3d 780, 784 (8th Cir. 2004) (a real, as opposed to empty, threat must be present); United States v. Leahy, 169 F.3d 433, 444 (7th Cir. 1999) (defendant's possession of ricin qualified for departure under §5K2.14 given the substance's high toxicity, undetectable nature, incurable effects, and instability).

p. Section 5K2.16—Voluntary Disclosure of Offense (Policy Statement)

Section 5K2.16 allows for a downward departure if "the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise."[152] The policy statement lists, as an example of such conduct, an offense where a "defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered."[153]

A departure under this policy statement is not warranted, however, "where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct."[154]

q. Section 5K2.17—Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

The guidelines additionally provide that an upward departure may be warranted if the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense.[155] The extent of the departure depends upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case.[156]

Section 5K2.17 defines "semiautomatic firearm capable of accepting a large capacity magazine" as "a semiautomatic firearm that has the ability to fire many rounds without

---

[152] USSG §5K2.16; *see also* United States v. Roberts, 313 F.3d 1050, 1055 (8th Cir. 2002) (departure unavailable where disclosure occurred in the course of investigation); United States v. Besler, 86 F.3d 745, 747 (7th Cir. 1996) (error to grant departure without finding that offense of conviction would not have been discovered absent defendant's disclosure).

[153] USSG §5K2.16; *see also* United States v. Lovaas, 241 F.3d 900, 902–03 (7th Cir. 2001) (departure under §5K2.16 only applies when a defendant is motivated by guilt and discovery is unlikely).

[154] USSG §5K2.16; *see also* United States v. Aerts, 121 F.3d 277, 281 (7th Cir. 1997) (an additional, perhaps primary, goal served by §5K1.16 is alerting the authorities to offenses unlikely to be otherwise discovered); United States v. Brownstein, 79 F.3d 121, 123 (9th Cir. 1996) (plain language thus does not support defendant's contention that the policy statement should apply to individuals who simply confess their involvement in a crime already known to the authorities).

[155] USSG §5K2.17. In cases involving an offense of conviction referenced to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), an upward departure may not be necessary, as that guideline punishes this particular offense characteristic by setting higher base offense levels for individuals possessing firearms of this nature. *See* United States v. Shelton, 905 F.3d 1026, 1032 (7th Cir. 2018) (discussing the meaning and propriety of "double counting").

[156] USSG §5K2.17; *see also* United States v. Philiposian, 267 F.3d 214, 218 (3d Cir. 2001) (section 5K2.17 applies to a defendant who merely possesses a high-capacity, semiautomatic weapon; amount of the increase depends on the degree to which the nature of the weapon increased the likelihood of death or injury).

reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm."[157]

r. Section 5K2.18—Violent Street Gangs (Policy Statement)

"If the defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted."[158] This departure provision is intended "to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends."[159] The provision does not apply, however, in a case "in which 18 U.S.C. § 521 applies, but no violence is established" as it is expected that the guidelines "will account adequately for the conduct."[160]

s. Section 5K2.20—Aberrant Behavior (Policy Statement)

Section 5K2.20 allows for a downward departure in an "exceptional case" that meets certain requirements and is not prohibited due to the presence of certain circumstances.[161] The departure is only available if the defendant committed a single criminal occurrence or single criminal transaction that:

(1) was committed without significant planning;

(2) was of limited duration; and

(3) represents a marked deviation by the defendant from an otherwise law-abiding life.[162]

Put another way, the departure is not available if the offense involved "[r]epetitious or significant, planned behavior."[163]

---

[157] USSG §5K2.17.

[158] USSG §5K2.18

[159] *Id.*

[160] *Id.*

[161] USSG §5K2.20(a); *see also, e.g.*, United States v. Sims, 428 F.3d 945, 965 (10th Cir. 2005) (reversing departure for aberrant behavior given defendant's "well-planned, detailed scheme over the course of several months to entice and rendezvous with minor girls, as well as what seems to be repeated distribution of child pornography"); United States v. Smith, 387 F.3d 826, 835 (9th Cir. 2004) (district court's belief that it could not depart based on aberrant behavior was clearly erroneous where the crime lasted for only five or ten minutes and many letters of support were submitted on behalf of defendant indicating that the defendant had lived an exemplary life prior to the crime, and that the crime represented a departure from her normal way of life).

[162] USSG §5K2.20(b).

[163] USSG §5K2.20, comment. (n.2); *see also* United States v. Castellanos, 355 F.3d 56, 60–61 (2d Cir. 2003) (spontaneity, though not determinative, is a relevant and permissible consideration when treated as one factor in evaluating whether the three-pronged test of §5K2.20 has been met). *But see* United States v.

In deciding whether to depart, the court may consider the defendant's:

(1) mental and emotional conditions;

(2) employment record;

(3) record of prior good works;

(4) motivation for committing the offense; and

(5) efforts to mitigate the effects of the offense.[164]

However, the court may not depart if:

(1) The offense involved serious bodily injury or death.

(2) The defendant discharged a firearm or otherwise used a firearm or a dangerous weapon.

(3) The instant offense of conviction is a serious drug trafficking offense.

(4) The defendant has either of the following:

  (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or

  (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.[165]

Further, a defendant convicted "of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18 of the United States Code" is prohibited from receiving a departure under this policy statement.[166]

t. Section 5K2.21—Dismissed and Uncharged Conduct (Policy Statement)

A court may depart upward "to reflect the actual seriousness of the offense" based on "conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any

---

Gonzalez, 281 F.3d 38, 47 (2d Cir. 2002) ("[S]pontaneity cannot be considered in connection with the requirement that aberrant behavior be of limited duration. Spontaneity of behavior and behavior of limited duration simply are not the same.").

164 USSG §5K2.20, comment. (n.3).

165 USSG §5K2.20(c).

166 USSG §5K2.20(a).

other reason; and (2) that did not enter into the determination of the applicable guideline range."[167] Courts have held that the government must prove the dismissed or potential charge by a preponderance of the evidence.[168]

u. Section 5K2.23—Discharged Terms of Imprisonment (Policy Statement)

A downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense.[169] The departure "should be fashioned to achieve a reasonable punishment for the instant offense."[170]

v. Section 5K2.24—Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

Section 5K2.24 allows for an upward departure "[i]f, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716."[171]

---

[167] USSG §5K2.21; *see also* United States v. White Twin, 682 F.3d 773, 777–78 (8th Cir. 2012) (district court may impose an upward departure for dismissed or uncharged conduct, in order to reflect the actual seriousness of the offense based on conduct underlying a charge dismissed as part of a plea agreement that did not otherwise enter into the determination of the guideline range). *But see* United States v. Stephens, 373 F. App'x 457, 462–63 (5th Cir. 2010) (per curiam) (district court did not properly compute upward departure under §5K2.21 to account for uncharged § 924(c) conduct).

[168] *See* United States v. Smith, 681 F.3d 932, 936 (8th Cir. 2012) (*Booker* only prevents a judge from using judicially found facts to sentence a defendant outside of the statutory maximums; upward departure for uncharged conduct under §5K2.21 found by preponderance of the evidence not error); United States v. Azure, 536 F.3d 922, 933 (8th Cir. 2008) ("[A]lthough the quantum of proof is less than the beyond-a-reasonable-doubt formulation used at trial, the burden of proof remains unchanged at sentencing: the government bears the burden.").

[169] USSG §5K2.23; *see also* United States v. Sayer, 748 F.3d 425, 436 (1st Cir. 2014) (section 5K2.23 "permits a reduction accounting for time served on prior convictions if two conditions are met: (1) the prior offense was based on conduct relevant to the defendant's federal crime; and (2) the prior offense increased the [g]uidelines offense level for the federal crime.").

[170] USSG §5K2.23; *see also* United States v. De La Cruz, 897 F.3d 841, 846 (7th Cir. 2018) (reaffirming that a §5K2.23 reduction is entirely discretionary and only appropriate when employed to achieve reasonable punishment for the instant offense); United States v. Hilario, 449 F.3d 500, 501 (2d Cir. 2006) (per curiam) (district court did not abuse its discretion in denying an additional downward departure for time served in a foreign prison on the basis of defendant's "speculative assertion that he would have earned good time credit in a BOP prison had he served his time in such a facility.").

[171] USSG §5K2.24. "[T]he term 'official insignia or uniform' means an article of distinctive clothing or insignia, including a badge, emblem or identification card, that is an indicium of the authority of a public employee." 18 U.S.C. § 716(c)(3).

w. Section 5K3.1—Early Disposition Programs (Policy Statement)

"Upon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."[172]

Early disposition, or fast-track, programs were previously available in only certain districts. On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of such programs, stating that fast-track programs were "properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases."[173]

The existence of fast-track programs in some, but not all, districts generated a significant circuit conflict about whether a district court may vary based on this disparity.[174] On January 31, 2012, the Deputy Attorney General issued a memorandum authorizing all districts to create fast-track programs for illegal reentry offenses.[175] Fast-track disparity continues to be a subject of sentencing litigation.[176]

7. Discouraged Grounds for Departures

The Commission identified, consistent with Congress's instruction in the Sentencing Reform Act, certain specific offender characteristics that are never to be considered in fashioning an appropriate sentence in a case.[177] In addition, Chapter Five, Part H lists those factors that the Commission has deemed either potentially relevant or not ordinarily relevant to the determination of whether to depart from the guideline range. Unless stated, however, these factors are not necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of appropriate conditions of probation or supervised release. If the special factor is discouraged under the

---

[172] USSG §5K3.1.

[173] Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Just. to U.S. Att'ys 1 (Sept. 22, 2003), https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-092203.pdf.

[174] *Compare* United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009) (sentencing judge has discretion to consider a variance under the totality of the § 3553(a) factors, rather than one factor in isolation, on the basis of a defendant's fast-track argument; such a variance would be reasonable in an appropriate case), *with* United States v. Gomez-Herrera, 523 F.3d 554, 562 (5th Cir. 2008) ("[B]ecause any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)"). *See also* United States v. Ramirez, 675 F.3d 634, 641–42 (7th Cir. 2011) (setting forth the circumstances in which a district court would need to explain why it was rejecting a fast-track disparity argument); *infra* Section IV(C) (Variances Based on Policy Disagreements with the Guidelines).

[175] Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just. to U.S. Att'ys (Jan. 31, 2012), https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf.

[176] *See, e.g.*, United States v. Anaya-Aguirre, 704 F.3d 514, 517–18 (7th Cir. 2013) (reviewing fast-track disparity landscape).

[177] *See* USSG Ch.5, Pt.H, intro. comment.

guidelines, it can only be a basis for departure if the factor is present in the case to an "exceptional degree."[178]

a. Section 5H1.1—Age (Policy Statement)

Section 5H1.1 provides that age (including youth) "may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[179] If the defendant is elderly and infirm, however, and "where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration," age may be a reason to depart downward.[180]

b. Section 5H1.2—Education and Vocational Skills (Policy Statement)

Education and vocational skills "are not ordinarily relevant in determining whether a departure is warranted."[181] Courts have rejected arguments for an upward departure based on finding that the defendant held public office or was a "gifted, talented individual."[182] Courts also have rejected downward departures based on the defendant's high intelligence or hardship caused to the defendant's community or employees.[183]

---

[178] USSG §5K2.0(a)(4).

[179] USSG §5H1.1.

[180] *Id. But see* United States v. Bullion, 466 F.3d 574, 575–77 (7th Cir. 2006) (affirming upward variance "to be kept out of circulation until [the defendant] is safe" based on a "frightening criminal history," while acknowledging that "the tendency to commit crimes, violent and otherwise, diminishes with age"); United States v. Brooke, 308 F.3d 17, 23–24 (D.C. Cir. 2002) (affirming denial of departure based on defendant's age (82) and physical condition, concluding that home confinement would not be effective punishment because defendant had a history of drug dealing in his home, and that his impairment was not extraordinary); United States v. Crickon, 240 F.3d 652, 656 (7th Cir. 2001) (affirming the district court's decision not to depart based on age in a case involving a 60-year-old man; without supporting medical evidence, defendant's assertion that he would die in prison was not persuasive); United States v. Tocco, 200 F.3d 401, 435 (6th Cir. 2000) ("[I]t is possible 'that an aged defendant with a multitude of health problems may qualify for a downward departure . . . [but] such downward departures are rare' "; requiring, on resentencing, that the district court "obtain independent and competent medical evidence to determine the extent of [the defendant's] infirmities and the prison system's ability or inability to accommodate them." (quoting United States v. Johnson, 71 F.3d 539, 545 (6th Cir. 1995))).

[181] USSG §5H1.2.

[182] United States v. Burch, 873 F.2d 765, 768 (5th Cir. 1989); *see also, e.g.*, United States v. Chandler, 732 F.3d 434, 439 (5th Cir. 2013) (defendant's status as police officer at time of offense, standing alone, is insufficient to justify upward variance).

[183] *See, e.g.*, United States v. McClatchey, 316 F.3d 1122, 1131 (10th Cir. 2003) ("The fact that a defendant cares for a family member with a mental or physical disability is not by itself sufficient to make the circumstances 'exceptional.' ").

Education and vocational skills may, however, "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."[184]

c. Section 5H1.3—Mental and Emotional Conditions (Policy Statement)

Mental and emotional conditions "may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[185] In extreme circumstances, a court may depart downward where extreme childhood abuse caused mental and emotional conditions that contributed to the commission of the offense.[186] However, there must be a causal connection between the defendant's impaired emotional or mental condition and the criminal conduct.[187]

Section 5H1.3 further provides that where §5C1.1, Application Note 7 (downward departure to allow for non-custodial treatment options) is applicable "a downward departure may be appropriate to accomplish a specific treatment purpose."[188] Mental and emotional considerations also may be relevant in determining the conditions of probation or supervised release, for example, participation in a mental health program.[189]

d. Section 5H1.4—Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."[190] If the defendant

[184] USSG §5H1.2.

[185] USSG §5H1.3.

[186] *See, e.g.*, United States v. Brady, 417 F.3d 326, 333 (2d Cir. 2005).

[187] *Id.* at 333–35.

[188] USSG §5H1.3.

[189] *Id.*; *see also* USSG §§5B1.3(d)(5) and 5D1.3(d)(5) (discussing mental health program participation as conditions of probation and supervised release).

[190] USSG §5H1.4; *see also* United States v. Parish, 308 F.3d 1025, 1032–33 (9th Cir. 2002) (affirming, in a child pornography case, a departure where defendant was susceptible to abuse in prison based on his stature, naiveté, and the nature of the offense); United States v. Graham, 83 F.3d 1466, 1481 (D.C. Cir. 1996) (extreme vulnerability to abuse in prison may justify a downward departure). *But see* United States v. Devegter, 439 F.3d 1299, 1306–07 (11th Cir. 2006) (departure for physical infirmity unnecessary where sentencing already had been delayed to permit surgery to correct impairment); United States v. Castillo, 430 F.3d 230, 241 (5th Cir. 2005) ("[A] defendant's HIV-positive status alone does not constitute an extraordinary medical condition warranting a downward departure under §5H1.4"); United States v. Carr, 271 F.3d 172, 176–77

can be properly cared for by the prison system, the district court should not depart.[191] The court must make specific findings if it wants to depart based on extraordinary physical impairment.[192]

e. Section 5H1.5—Employment Record (Policy Statement)

Section 5H1.5 provides that the defendant's employment record is "not ordinarily relevant in determining whether a departure is warranted," but that the record "may be relevant in determining the conditions of probation or supervised release (*e.g.*, the appropriate hours of home detention)."[193] Courts have affirmed downward departures based on the defendant's employment record in extraordinary cases.[194]

f. Section 5H1.6—Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. Such factors are only a basis for departure in extraordinary cases.[195]

(4th Cir. 2001) (declining to review the district court's refusal to depart based on the defendant having AIDS).

191 *See* United States v. Coughlin, 500 F.3d 813, 818 (8th Cir. 2007) (reversing a downward departure despite the defendant's poor health where the record did not show that "imprisonment would subject [the defendant] to more than the normal inconvenience or danger"); United States v. Krilich, 257 F.3d 689, 693 (7th Cir. 2001) ("[O]lder criminals do not receive sentencing discounts" unless the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it); United States v. Albarran, 233 F.3d 972, 979 (7th Cir. 2000) (reversing the district court's decision to grant a downward departure because the defendant did not present any evidence regarding why his physical condition would preclude him from being incarcerated and cared for properly by the prison).

192 *See, e.g.*, United States v. Persico, 164 F.3d 796, 806 (2d Cir. 1999) (in request for reversal of sentence for allegedly insufficient sentencing hearing, defendant did not establish his medical circumstances had materially changed since the guilty plea, where government established prison staff was able to provide sufficient care; "The standards for a downward departure on medical grounds are strict."). As above, §5H1.4 further provides that drug or alcohol dependence ordinarily is not a reason for a downward departure. *See supra* Section III.D.5.c. Additionally, where §5C1.1, Application Note 7 (departure to allow for community treatment options) is applicable, "a downward departure may be appropriate to accomplish a specific treatment purpose." USSG §5H1.4.

193 USSG §5H1.5.

194 *See, e.g.*, United States v. Jones, 158 F.3d 492, 498–99 (10th Cir. 1998) (considering the effect the defendant's incarceration would have on his prospects for future employment in a very economically depressed community).

195 USSG §5H1.6; *see also, e.g.*, United States v. King, 201 F. Supp. 3d 167, 171 (D.D.C. 2016) (downward departure to three years' probation with condition of evening home confinement with location monitoring was appropriate where defendant was sole caretaker of seven-year-old daughter who would otherwise become a ward of the state); United States v. Bueno, 549 F.3d 1176, 1182 (8th Cir. 2008) (affirming a departure down to a term of probation based on finding that defendant's wife's lupus and rheumatoid arthritis constituted extraordinary family circumstances, but that the extent of the departure "stretches the allowable downward departure under §5H1.6 to its very limits"); United States v. Spero, 382 F.3d 803, 805 (8th Cir. 2004) (a situation in which one parent is critical to a child's well-being qualifies as an exceptional

Family responsibilities that are complied with, however, "may be relevant to the determination of the amount of restitution or fine."[196] In determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances:

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.[197]

The commentary limits the court's ability to depart based on the loss of caretaking or financial support of the defendant's family. In addition to the factors listed above, the ability to depart depends on the presence of the following factors:

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

---

circumstance justifying a downward departure); United States v. Reyes-Rodriquez, 344 F.3d 1071, 1075–76 (10th Cir. 2003) (to qualify for a departure based on family ties and responsibilities, defendant must be the only individual able to provide the assistance the family member needs); United States v. Leon, 341 F.3d 928, 932 (9th Cir. 2003) (affirming the district court's departure based on defendant's indispensable role in caring for his wife, who recently had her kidney removed due to renal cancer and who had been diagnosed as being at risk of committing suicide if she were to lose her husband to death or incarceration); United States v. Louis, 300 F.3d 78, 84 (1st Cir. 2002) (district court did not err in refusing to grant a departure based on the defendant's family ties and responsibilities in a case in which the defendant argued that because his son was biracial, it was important for the parent of color to be present and involved in the son's life); United States v. Pereira, 272 F.3d 76, 83 (1st Cir. 2001) ("As long as there are feasible alternatives of care that are relatively comparable to what the defendant provides, the defendant cannot be irreplaceable.").

[196] USSG §5H1.6.

[197] USSG §5H1.6, comment. (n.1(A)).

(iv) The departure effectively will address the loss of caretaking or financial support.[198]

Family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range if the defendant was convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18 of the United States Code.[199]

g. Section 5H1.11—Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is "present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."[200]

Section 5H1.11 further provides that "civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."[201] But, courts have allowed such departures when the defendant's community service was extraordinary.[202]

8. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (§5K2.22)

Section 5K2.22 provides special rules for offenses involving a minor victim under section 1201 (Kidnapping), an offense under section 1591 (Sex trafficking of children or by force, fraud, or coercion), an offense under chapter 71 (Obscenity), 109A (Sexual abuse),

---

[198] USSG §5H1.6, comment. (n.1(B)).

[199] USSG §5H1.6.

[200] USSG §5H1.11; *see also* Porter v. McCollum, 558 U.S. 30, 43 (2009) (per curiam) ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . . ."). However, such departures are not automatic. *See, e.g.*, United States v. Theunick, 651 F.3d 578, 592 (6th Cir. 2011) (affirming district court's refusal to depart based on military and public service, in part because defendant's position of authority as police chief facilitated the offense).

[201] USSG §5H1.11.

[202] *See, e.g.*, United States v. Huber, 462 F.3d 945, 952 (8th Cir. 2006) (affirming a downward departure for a defendant who had loaned money to neighbors and fellow farmers in need, saving farms from foreclosure); United States v. Cooper, 394 F.3d 172, 177 (3d Cir. 2005) (allowing a downward departure for community service that was "hands-on" and likely had a dramatic and positive impact on the lives of others); United States v. Canova, 412 F.3d 331, 359 (2d Cir. 2005) (affirming a downward departure for an ex-Marine who, as a volunteer firefighter, had rescued a three-year-old from a burning building, delivered three babies, and administered CPR to persons in distress).

110 (Sexual exploitation and other abuse of children), or 117 (Transportation for illegal sexual activity and related crimes), of title 18 of the United States Code.

Relevant Factors

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.[203]

E. Encouraged Departures Within Individual Guidelines

The following is a non-exhaustive list of places within individual guidelines where departures are encouraged.

1. *Application Note 21 to §2B1.1 (Theft, Property Destruction, and Fraud)*

Application Note 21(A) to §2B1.1 states that in cases "in which the offense level determined under this guideline substantially understates the seriousness of the offense," an upward departure may be warranted.[204] The Application Note then lists non-exhaustive factors the court may consider in determining whether a departure is warranted. Similarly, a downward departure may be warranted where the offense level "substantially overstates the seriousness of the offense."[205] Upward and downward departures may be appropriate in specific situations as well, including where an offense results in a substantial disruption to critical infrastructure[206] or when the offense involves an extension or overpayment of disaster relief benefits that were legitimately received in the first place.[207]

2. *Application Note 27 to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)*

Application Note 27 to §2D1.1 provides five potential departure bases. First, a downward departure may be warranted "[i]f, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the

[203] USSG §5K2.22.

[204] USSG §2B1.1, comment. (n.21(A)).

[205] USSG §2B1.1, comment. (n.21(C)).

[206] USSG §2B1.1, comment. (n.21(B)) (upward departure).

[207] USSG §2B1.1, comment. (n.21(D)) (downward departure).

defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent."[208]

Second, there may be "an extraordinary case" in which an offense's drug quantity is so high that it merits a departure above a base offense level 38, the highest quantity.[209] For example, an offense involving a quantity ten times higher than a level-38-triggering quantity might justify a departure, as would certain quantities of substances with a maximum base offense level below 38.[210]

Third, an upward departure may be appropriate if a trafficked controlled substance had an "unusually high purity."[211] The departure is intended to be used when an unusual purity level may be "probative of the defendant's role or position in the chain of distribution."[212] The departure is not available for PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone because the guideline itself already addresses those substances' purities.[213]

Fourth, guidance is provided in cases involving synthetic cathinones regarding the potential need for either an upward or downward departure depending on the potency of the substance at issue and how much is needed to produce an effect on the central nervous system akin to that created by a typical synthetic cathinone.[214]

And lastly, upward and downward departures may be warranted in unusual circumstances in cases involving synthetic cannabinoids.[215] For example, while synthetic cannabinoids are usually trafficked in combination with some sort of base material, in cases where they are not, an upward departure may be warranted.[216]

---

[208] USSG §2D1.1, comment. (n.27(A)).

[209] USSG §2D1.1, comment. (n.27(B)).

[210] *Id.*

[211] USSG §2D1.1, comment. (n.27(C)).

[212] *Id.*; *see, e.g.*, United States v. Cones, 195 F.3d 941, 944 (7th Cir. 1999) ("The Note makes a different point: that higher purity is often associated with a higher position in the distribution network, which may justify a higher sentence."); United States v. Iguaran-Palmer, 926 F.2d 7, 10 (1st Cir. 1991) (basing affirmance on purity departure because other factors bolstered finding of higher role in conspiracy).

[213] USSG §2D1.1, comment. (n.27(C)).

[214] USSG §2D1.1, comment. (n.27(D)).

[215] USSG §2D1.1, comment. (n.27(E)).

[216] USSG §2D1.1, comment. (n.27(E)(i)).

3. *Application Note 11 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)*

Application Note 11 to §2K2.1 states that an "upward departure may be warranted in any of the following circumstances: (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machine guns, destructive devices), military type assault rifles, non-detectable ('plastic') firearms (defined at 18 U.S.C. § 922(p)); (C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (D) the offense posed a substantial risk of death or bodily injury to multiple individuals."[217]

4. *Application Notes 6, 7, and 8 to §2L1.2 (Unlawfully Entering or Remaining in the United States)*

Application Note 6 to §2L1.2 provides that either an upward or downward departure may be appropriate in cases involving a sentencing enhancement for prior criminal conduct in which the offense level "substantially understates or overstates the seriousness of the conduct underlying the prior offense."[218] Possible reasons include, for example, that the length of the sentence imposed does not reflect the seriousness of the prior offense or that the defendant served substantially less time than what was originally imposed for the prior offense.[219]

Application Note 7 provides for a downward departure to reflect all or part of the time the defendant served while in state custody.[220] Such a departure should be considered only where it is not likely to increase the risk to the public from further crimes of the defendant. When considering whether such departure is appropriate, courts should consider, among other things: (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.[221]

Application Note 8 provides that a downward departure based on cultural assimilation in an illegal reentry case may be appropriate where (A) the defendant formed

---

[217] USSG §2K2.1, comment. (n.11).

[218] USSG §2L1.2, comment. (n.6).

[219] *Id.*

[220] USSG §2L1.2, comment. (n.7).

[221] *Id.*

cultural ties to the United States from having continuously resided in the United States from childhood, (B) the reentry was motivated by cultural ties, and (C) a departure is unlikely to increase the risk of further crimes of the defendant.[222] The application note provides a nonexclusive list of seven factors that the court should consider in determining whether a departure is warranted.[223]

5. Application Note 2 to §3B1.1 (Aggravating Role)

Pursuant to §3B1.1, an offender's offense level may be increased by two, three, or four levels where the defendant was an organizer, leader, manager, or supervisor of one or more other criminally responsible participants.[224] Application Note 2 to §3B1.1 provides for a potential upward departure where an individual "did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization."[225]

6. Application Note 7 to §5C1.1 (Imposition of a Term of Imprisonment)

Application Note 7 to §5C1.1 states that a downward departure from the sentencing options authorized by the guidelines for Zone C to the sentencing options for Zone B[226] may be appropriate to accomplish a specific treatment purpose in cases where the court finds (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.[227] Factors the court must consider in determining whether such a departure is appropriate are also noted.

7. Application Note 1 to §5D1.1. (Imposition of a Term of Supervised Release)

Application Note 1 to §5D1.1 allows the court to depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.[228]

---

[222] USSG §2L1.2, comment. (n.8).

[223] *Id.*

[224] USSG §3B1.1.

[225] USSG §3B1.1, comment. (n.2).

[226] Zone C provides that at least half of the minimum term must be satisfied by a term of imprisonment whereas Zone B allows for all or most of incarceration to be handled by intermittent confinement, such as home detention. USSG §5C1.1, comment. (n.7).

[227] *Id.*

[228] USSG §5D1.1, comment. (n.1).

IV. VARIANCES

A. General Principles

A variance under 18 U.S.C. § 3553(a) outside the guideline range provided for in the *Guidelines Manual* should occur after consideration of all relevant departure provisions.[229] Courts have held that variances are not subject to the guideline analysis for departures.[230] In some situations, a prohibited ground for departure may be a valid basis for a variance.[231] Variances are not subject to notice requirements applicable to departures (see discussion above). A court may grant a departure and a variance in the same sentence (*e.g.*, a departure for substantial assistance and a variance for the defendant's history and characteristics). In sum, the ability to vary preserves district courts' ultimate ability to impose, regardless of what the guideline range is found to be, a sentence that it views is "sufficient, but not greater than necessary"[232] to serve the goals of sentencing.[233]

B. 18 U.S.C § 3553(a) Factors

1. Section 3553(a)(1)

The nature and circumstances of the offense and the history and characteristics of the defendant

Courts have varied under section 3553(a)(1) based on defendants' criminal history[234]

---

[229] Gall v. United States, 552 U.S. 38, 49 (2007).

[230] *See, e.g.*, United States v. Fumo, 655 F.3d 288, 317 (3d Cir. 2011) ("Although a departure or a variance could, in the end, lead to the same outcome . . . it is important for sentencing courts to distinguish between the two, as departures are subject to different requirements than variances."), as amended (Sept. 15, 2011); United States v. Grams, 566 F.3d 683, 686–87 (6th Cir. 2009) (per curiam) (In contrast to a departure, "a 'variance' refers to the selection of a sentence outside of the advisory Guidelines range based upon the district court's weighing of one or more of the sentencing factors of § 3553(a)."); United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1220 n.4 (10th Cir. 2008) (departures and variances are analytically distinct); United States v. Miller, 479 F.3d 984, 986–88 (8th Cir. 2007) (holding that a district court's conflation of departure and variance analyses was error, but finding it harmless error because the sentence was not unreasonable).

[231] *See, e.g.*, United States v. Chase, 560 F.3d 828, 832 (8th Cir. 2009) (departure precedents do not bind district courts with respect to variance decisions but may be considered "persuasive authority").

[232] 18 U.S.C. § 3553(a).

[233] *See, e.g.*, United States v. Ausburn, 502 F.3d 313, 327 (3d Cir. 2007) (sentencing court has "discretion to craft an appropriate sentence falling anywhere within the range of punishments authorized by Congress").

[234] *See, e.g.*, United States v. Santiago-Gonzalez, 825 F.3d 41, 49 (1st Cir. 2016) (affirming upward variance where defendant had "extensive criminal history" not counted in his criminal history score and did not qualify as a career offender due to a technicality); United States v. Rosales-Bruno, 789 F.3d 1249, 1263 (11th Cir. 2015) ("Under substantive reasonableness review, we have repeatedly affirmed sentences that included major upward variances from the guidelines for defendants with significant criminal histories that the sentencing courts weighed heavily."); United States v. Hilgers, 560 F.3d 944, 947 (9th Cir. 2009) (affirming upward variance based on the defendant's extensive criminal history, his similar conduct in the past, and that he was essentially a "con man" who cheated his mother); United States v. Ruvalcava-Perez, 561 F.3d 883, 886 (8th Cir. 2009) (affirming upward variance where the defendant had a history of violence

and various personal characteristics.[235] Some circuits have stated that a defendant's deportability may be considered as a variance factor.[236] In addition, defendants' health problems have been grounds for a variance,[237] as have family circumstances.[238]

In addition, courts have varied upward or downward from the guideline range to reflect the nature of the offense.[239] Moreover, in cases where a defendant has provided

---

against women, had a long and extensive violent history, and exhibited a "total disregard for the law.").

[235] *See, e.g.*, United States v. Sprague, 370 F. App'x 638, 646 (6th Cir. 2010) (affirming a sentence twice as long as advisory guideline range, based in part on the likelihood of re-offending; noting the defendant was a child sexual predator "who has been actively seeking additional victims"); United States v. Autery, 555 F.3d 864, 874 (9th Cir. 2009) (affirming downward variance in child pornography case because in part the defendant did not fit the profile of a pedophile, had no history of substance abuse, no interpersonal instability, was motivated and intelligent, and had continuing support of his family); United States v. Huckins, 529 F.3d 1312, 1319 (10th Cir. 2008) (affirming downward variance based on defendant's lack of significant criminal history, depression at the time of the offense, lack of repeat offending post-arrest, significant self-improvement while waiting to be prosecuted, and because the defendant was 20 years old when he committed the crime); United States v. Davis, 537 F.3d 611, 617 (6th Cir. 2008) (court "may account for a defendant's age at sentencing," but remanding for resentencing because the defendant's age (70) compared to the age at which he committed the crime (56) did not warrant downward variance); United States v. Howe, 543 F.3d 128, 139 (3d Cir. 2008) (affirming downward variance based on defendant's 20 years of military service, honorable discharge, and remorse); United States v. McBride, 511 F.3d 1293 (11th Cir. 2007) (per curiam) (affirming downward variance where the defendant's history of abuse and abandonment by his parents to be one of the worst ever seen).

[236] *See, e.g.*, United States v. Thavaraja, 740 F.3d 253, 263 (2d Cir. 2014) (court may account for "uncertainties presented by the prospect of removal proceedings and the impact deportation will have on the defendant and his family."); United States v. Flores-Olague, 717 F.3d 526, 535 (7th Cir. 2013) ("[C]ourt is well within its prerogatives and responsibilities in discussing a defendant's status as a deportable alien."); United States v. Morales Uribe, 470 F.3d 1282, 1287 (8th Cir. 2006) ("[N]eed to protect the public from a defendant may be reduced in a case where, upon immediate release from incarceration, the Government will deport the defendant.").

[237] *See, e.g.*, United States v. Almenas, 553 F.3d 27, 37 (1st Cir. 2009) (affirming downward variance based on defendant's combination of physical and mental disabilities); United States v. Myers, 503 F.3d 676, 687 (8th Cir. 2007) ("The district court did not abuse its discretion in finding that a shorter period of incarceration, with mental health treatment and supervised release, is the most effective sentence.").

[238] *See, e.g.*, United States v. Martin, 520 F.3d 87, 93 (1st Cir. 2008) (affirming downward variance based in part on "the support that the defendant stood to receive from his family [and] personal qualities indicating his potential for rehabilitation"); United States v. Muñoz-Nava, 524 F.3d 1137, 1148 (10th Cir. 2008) (record supported finding extraordinary family circumstances; defendant cared for his eight-year-old son as a single parent and had elderly parents with serious medical problems); United States v. Lehmann, 513 F.3d 805 (8th Cir. 2008) (per curiam) (affirming downward variance where the court found that a prison sentence would negatively affect the defendant's disabled young son); United States v. Carter, 510 F.3d 593, 602 (6th Cir. 2007) (court did not abuse its discretion by not varying based on exceptional family circumstance; court reasonably concluded that defendant's absence would be mitigated by his wife's presence at home and the family's continued receipt of substantial healthcare, housing, and sustenance benefits).

[239] *See, e.g.*, United States v. Martinez-Armestica, 846 F.3d 436, 447 (1st Cir. 2017) (affirming variance where defendant's conduct "went beyond the ordinary conduct proscribed by the statute" to include "repeated, threatening use of firearms" and "[r]ather than simply brandishing a weapon, [defendant] pointed the gun directly at one of the carjacking victims, holding it against her head."); United States v. Lente, 759 F.3d 1149, 1164–65 (10th Cir. 2014) (affirming a sentence 236.8% above the advisory guideline range, which did not: adequately account for the multiple deaths caused by the defendant's conduct; reflect the defendant's

substantial assistance to the government, some courts have varied under this section even if the government did not file a motion for a downward departure under §5K1.1. [240]

2. Section 3553(a)(2)

The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Courts have varied under section 3553(a)(2) based on the need to protect the public from further crimes of the defendant.[241] In addition, courts have varied, both upward and

extreme recklessness by driving with a blood alcohol level almost three times the legal limit; underrepresented the defendant's criminal history; and failed to address the defendant's continued post-conviction substance abuse and criminal conduct); United States v. Whitehead, 532 F.3d 991, 993 (9th Cir. 2008) (per curiam) (affirming downward variance in counterfeit access device case because in part the defendant's crime "[di]d not pose the same danger to the community as many other crimes."); United States v. Dehghani, 550 F.3d 716, 723 (8th Cir. 2008) (affirming upward variance because the seriousness of the defendant's conduct—obsession with child pornography; exposing his children to such pornography; physical sexual contact with a minor; threatening the judge, jail personnel, and others; and attempting to manipulate and obstruct the criminal justice system—outweighed any mitigating factors); United States v. Pauley, 511 F.3d 468, 474–75 (4th Cir. 2007) (affirming downward variance based in part on findings that the defendant was less culpable than others seeking to produce child pornography).

[240] *See* United States v. Robinson, 741 F.3d 588, 599 (5th Cir. 2014) ("[A] sentencing court has the power to consider a defendant's cooperation under § 3553(a), irrespective of whether the Government files a §5K1.1 motion."); *see also* United States v. Landrón-Class, 696 F.3d 62, 77 (1st Cir. 2012) ("[A]ccordingly we join our sister circuits [in holding that] . . . in determining the appropriate sentence within the guidelines, or in varying from the guidelines, a sentencing court has discretion to consider the defendant's cooperation with the government as a § 3553(a) factor, even if the government has not made a [§]5K1.1 motion for a downward departure."); United States v. Leiskunas, 656 F.3d 732, 737 (7th Cir. 2011) (court "may consider a defendant's cooperation with the government as a basis for a reduced sentence, even if the government has not made a § 5K1.1 or Rule 35 motion."); United States v. Massey, 663 F.3d 852, 858 (6th Cir. 2011) (court "retains the discretion to take into account a defendant's cooperation as a § 3553(a) mitigating factor" (citing United States v. Petrus, 588 F.3d 347, 356 (6th Cir. 2009))); United States v. Doe, 398 F.3d 1254, 1260 (10th Cir. 2005) ("The government's decision not to file a §5K1.1 motion does not prevent the district court from fully considering a defendant's assistance to the government in deciding whether to depart upward or in calculating the appropriate degree of departure . . . [a] §5K1.1 motion represents the government's endorsement of a *downward* departure from the applicable Guideline range. It 'does not speak to the factors the court may consider when sentencing within the guidelines.' " (quoting United States v. Bruno, 897 F.2d 691, 694 (3d Cir. 1990))).

[241] *See, e.g.*, United States v. Tristan-Madrigal, 601 F.3d 629 (6th Cir. 2010) (affirming upward variance to protect the public in light of defendant's "persistent" illegal reentries and DUI convictions); United States v. Seay, 553 F.3d 732, 742 (4th Cir. 2009) (affirming upward variance based in part on the need to protect the public; court found the defendant "had become increasingly dangerous over the years, progressing from possessing a knife to possessing a gun in connection with his stalking practices."); United States v. Grossman, 513 F.3d 592, 597 (6th Cir. 2008) (affirming downward variance; court "accounted for § 3553(a)'s concerns that the sentence protect society and deter future criminal conduct" through extensive counseling and treatment and an extensive period of supervised release"); United States v. Gillmore, 497 F.3d 853, 859 (8th Cir. 2007) (affirming upward variance based on defendant's danger to herself and the public in light of

downward, in order to provide just punishment for the offense[242] or reflect its seriousness.[243]

3. Section 3553(a)(3)
The kinds of sentences available

In *Tapia v. United States*, the Supreme Court held that "[s]ection 3582(a) precludes sentencing courts from imposing or lengthening a prison term to promote an offender's rehabilitation."[244] Sentencing courts may, however, discuss "opportunities for rehabilitation within prison or the benefits of specific treatment or training programs."[245] Some courts have varied downward to permit access to counseling or treatment programs.[246]

---

her personal characteristics and brutal nature of her crime).

[242] *See, e.g.*, United States v. Anderson, 533 F.3d 623, 633 (8th Cir. 2008) (affirming downward variance based on "other ways [] the defendant had suffered atypical punishment such as the loss of his reputation and his company, the ongoing case against him from the Securities and Exchange Commission and the harm visited upon him as a result of the fact that his actions brought his wife and friend into the criminal justice system").

[243] *See, e.g.*, United States v. Kane, 552 F.3d 748, 755 (8th Cir. 2009) (reversing downward variance based in part on the seriousness of the offense, where the defendant repeatedly restrained and compelled her nine year old daughter to submit to the sexual gratification of a pedophile in exchange for the defendant's receipt of $20), *judgment vacated by* 562 U.S. 1267 (2011), *adhered to in part on reconsideration by* 639 F.3d 1121 (2011); United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc) (affirming upward variance based on finding that firearm smuggling is more serious and more harmful when done in New York City than in rural or suburban areas and on the greater-than-average need to achieve strong deterrence); United States v. Ofray-Campos, 534 F.3d 1, 43 (1st Cir. 2008) (reversing significant upward variance where court's stated grounds, that defendant possessed "powerful weapons" as a "triggerman" and was involved with violence linked with the narcotics conspiracy, were not compelling enough to support the extraordinary variance).

[244] 564 U.S. 319, 332 (2011).

[245] *Id.* at 334.

[246] *See, e.g.*, United States v. Ruff, 535 F.3d 999, 1003 (9th Cir. 2008) (affirming variance to one day of imprisonment plus three years' supervised release with a condition of twelve months and one day served at a corrections center that would permit the defendant to participate in work release, receive counseling, and make visits to his young son); *see also* United States v. Gilliard, 671 F.3d 255, 259 (2d Cir. 2012) ("[N]otwithstanding discussion of rehabilitation in the record, there was no error where the sentence length was based on permissible considerations, such as criminal history, deterrence, and public protection."); *cf.* United States v. Garza, 706 F.3d 655, 662 (5th Cir. 2013) (vacating substantially above-guideline revocation sentence where "rehabilitative needs were the dominant factor in the court's mind").

4. Section 3553(a)(4), (5)

The guideline sentence and any pertinent policy statement issued by the Sentencing Commission

In deciding whether or not to vary, the district court must consider, but is not bound by, the applicable guideline range.[247] Courts refer to the guidelines as a benchmark when varying either upward or downward.[248]

5. Section 3553(a)(6)

The need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct

Most courts hold that section 3553(a)(6) looks to "*national* disparities, not differences among co-conspirators."[249] However, in certain cases, the sentencing court may look to codefendant disparity when fashioning a reasonable sentence.[250] In particular, the Supreme Court held in *Gall v. United States*, that the district court properly "considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated."[251]

---

[247] *See, e.g.*, United States v. Hammons, 558 F.3d 1100, 1103–04 (9th Cir. 2009) (outlining this standard); *see also* United States v. Ruelas-Mendez, 556 F.3d 655, 658 (8th Cir. 2009) (district court not "forbidden to consider the guidelines and the need to avoid unwarranted sentence disparities when exercising its discretion;" to the contrary, "the governing statute directs the sentencing court to consider these matters as two factors among several in the sentencing process.").

[248] *See, e.g.*, United States v. Almenas, 553 F.3d 27, 37 (1st Cir. 2009) (appropriate for court to consider severe guideline penalties for crack cocaine offenses against competing mitigation concerns when imposing below-guideline sentence); United States v. Scott, 529 F.3d 1290, 1305 (10th Cir. 2008) (affirming upward variance where the court stated "it would have imposed an even higher sentence absent the benchmark provided by the Guidelines, thereby satisfying its obligation to give weight to the Guidelines"); United States v. Williams, 524 F.3d 209, 215 (2d Cir. 2008) ("The displacement of the Sentencing Guidelines at the threshold, because of a 'personal policy' to conform the sentence to one that would have been imposed in a proceeding in the City of Yonkers, cannot be reconciled with 18 U.S.C. § 3553(a), which provides that '[t]he court, in determining the particular sentence to be imposed, shall consider' the Sentencing Guidelines.").

[249] United States v. Fry, 792 F.3d 884, 892 (8th Cir. 2015) (collecting cases for same).

[250] United States v. Conatser, 514 F.3d 508, 522 (6th Cir. 2008).

[251] 552 U.S. 38, 55 (2007); *see also* United States v. Reyes-Santiago, 804 F.3d 453, 457, 468–69 (1st Cir. 2015) (remanded as unreasonable because "the rationale offered by the district court for the substantial disparity"—by a wide margin—between the defendant's sentence and those of the higher ranking co-conspirators, including the conspiracy leader and the career offender, was not supported by the record); United States v. Hayes, 762 F.3d 1300, 1308–09 (11th Cir. 2014) (vacating, as substantively unreasonable, a downward variance to three concurrent probationary terms where other participants were sentenced to terms of imprisonment); United States v. Statham, 581 F.3d 548, 556 (7th Cir. 2009) (Seventh Circuit is "open in all cases to an argument that a defendant's sentence is unreasonable because of a disparity with the sentence of a co-defendant, but such an argument will have more force when a judge departs from a correctly calculated Guidelines range to impose the sentence."); United States v. Smart, 518 F.3d 800, 804 (10th Cir. 2008) ("[I]t is clear that codefendant disparity is not a per se 'improper' factor"); United States v. Zapata, 546 F.3d 1179, 1194 (10th Cir. 2008) ("[A] disparity among co-defendants is justified 'when sentences are dissimilar because of a plea bargain.' "); United States v. Phinazee, 515 F.3d 511, 520 (6th Cir. 2008) (sentencing disparities justified by differences in criminal histories and departures for substantial

6. Section 3553(a)(7)

The need to provide restitution to any victims of the offense

Courts have varied under section 3553(a)(7) in recognition of what restitution amount was ordered, if any.[252]

7. Totality of Section 3553(a) Factors

While any of the above factors alone could justify a variance, courts also vary upon consideration of the factors in section 3553(a) in combination.[253] In addition, certain statutes require the sentence for a particular offense to run consecutively to that for the predicate offense. For example, 18 U.S.C. § 924(c) requires a consecutive term of imprisonment for using a firearm in connection with a violent or drug trafficking crime. In *Dean v. United States*, the Supreme Court held that, in determining the appropriate sentence on a predicate count, sentencing courts also may account for the mandatory consecutive term.[254]

C. Variances Based on Policy Disagreement with the Guidelines

Courts also have discretion to vary based on policy disagreements with the guidelines. One notable area of disagreement historically had been based on the vast differences between the quantities of crack cocaine and powder cocaine that triggered the same sentencing result. In *Kimbrough v. United States*, the Supreme Court held that it is not "an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to

---

assistance); United States v. Martin, 520 F.3d 87, 94 (1st Cir. 2008) ("[D]istrict courts have discretion, in appropriate cases, to align codefendants' sentences somewhat in order to reflect comparable degrees of culpability—at least in those cases where disparities are conspicuous and threaten to undermine confidence in the criminal justice system."); United States v. Bras, 483 F.3d 103, 114 (D.C. Cir. 2007) (disparity between the defendant's sentence and that of his codefendant was warranted because the defendant and his codefendants "did not hold comparable positions" in the conspiracy, and defendant did not provide substantial assistance in the investigation).

[252] *See, e.g.*, United States v. Orlando, 553 F.3d 1235, 1240 (9th Cir. 2009) (approving court's finding that "a fine was particularly appropriate for a tax evasion crime where restitution is not ordered.").

[253] *See, e.g.*, United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009) (court "has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast track argument, and [] such a variance would be reasonable in an appropriate case."); United States v. Nesbeth, 188 F. Supp. 3d 179 (E.D.N.Y. 2016) (varying based on consideration of collateral consequences of conviction and sentence as an appropriate § 3553(a) factor, and discussing divergent circuit case law.).

[254] 137 S. Ct. 1170 (2017).

achieve [section] 3553(a)'s purposes, even in a mine-run case."[255] Thus, a court may consider the crack/powder cocaine disparity when imposing sentence.[256]

Courts of appeal have expanded the rationale of *Kimbrough* to include variances based on policy disagreements with the child pornography,[257] career offender,[258]

---

[255] 552 U.S. 85, 110 (2007). The Court reaffirmed its holding in *Spears v. United States*, 555 U.S. 261 (2009) (per curiam), stating that "with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect." *Spears*, 555 U.S. at 264. According to the Court, the point of *Kimbrough* was "a recognition of district courts' authority to vary from the crack cocaine guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Id.* The *Spears* Court held that "[t]o the extent the above quoted language has obscured *Kimbrough*'s holding, we now clarify that district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines." *Id.* at 265–66. According to the Court, "[a]s a logical matter, . . . rejection of the 100:1 ratio [] necessarily implies adoption of [a replacement] ratio." *Id*. at 265.

[256] *Spears*, 555 U.S. at 264–66; *Kimbrough*, 552 U.S. at 111. After *Kimbrough* and *Spears*, Congress enacted the Fair Sentencing Act of 2010, which reduced the disparity between the threshold quantities triggering mandatory minimum sentences for crack and powder cocaine offenses from 100-to-1 to 18-to-1. Fair Sentencing Act of 2010, Pub. L. No. 111–220, § 2, 124 Stat. 2372. Subsequently, Congress enacted the First Step Act of 2018, which provided for the retroactive application of the Fair Sentencing Act of 2010. First Step Act of 2018, Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222. The First Step Act now provides that offenders sentenced before enactment of the Fair Sentencing Act may be sentenced as if the provisions of the Fair Sentencing Act were in effect at the time the offender was sentenced.

In 2007, the Commission addressed the 100-to-1 cocaine penalty ratio by amending the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to reduce by two levels the base offense levels assigned for each quantity of crack cocaine. USSG App. C, amend. 706 (effective Nov. 1, 2007); *see also* USSG App. C, amend. 713 (effective Mar. 3, 2008) (giving retroactive effect to Amendment 706). In 2010, the Commission further amended the Drug Quantity Table to account for the changes that the Fair Sentencing Act of 2010 made to the quantity thresholds required to trigger a mandatory minimum penalty. USSG App. C, amend. 748 (effective Nov. 1, 2010). *See also* USSG App. C, amend. 782 (effective Nov. 1, 2014) (reducing by two levels the base offense levels in the Drug Quantity Table for each drug quantity, across all drug types).

[257] *See, e.g.*, United States v. Collins, 828 F.3d 386 (6th Cir. 2016) (affirming downward variance where court polled jury as to what it believed to be an appropriate sentence; poll was but one factor in granting variance); United States v. Brown, 808 F.3d 865, 874–75 (D.C. Cir. 2015) (court committed plain error in varying upward without explaining why guideline sentence did not fully account for the conduct); United States v. Grober, 624 F.3d 592, 601 (3d Cir. 2010) (court may vary on the basis of disagreement with the child pornography guidelines because "the Commission did not do what 'an exercise of its characteristic institutional role' required—develop §2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress."); United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (same). *But see* United States v. Bistline, 665 F.3d 758, 762 (6th Cir. 2012) (although courts may disagree with §2G2.2 on policy grounds, "the fact of Congress' role in amending a guideline is not itself a valid reason to disagree with the guideline."); United States v. Vanvliet, 542 F.3d 259, 271 (1st Cir. 2008) (remanding for resentencing because the court erroneously believed it could not vary based on policy disagreements with the child pornography guideline).

[258] *See, e.g.*, United States v. Clay, 787 F.3d 328, 331 (5th Cir. 2015) (court's "sentencing discretion [to grant a variance] is no more burdened when a defendant is characterized as a career offender under § 4B1.1 than it would be in other sentencing decisions."); United States v. Corner, 598 F.3d 411, 416 (7th Cir. 2010) (en banc) ("Because § 4B1.1 [the career offender guideline] is just a Guideline, judges are as free to disagree with it as they are with § 2D1.1(c) (which sets the crack/powder ratio). No judge is required to sentence at

firearms,[259] and offender characteristics.[260] The circuits are divided on the issue of whether a district court may vary based on fast-track sentencing disparities.[261]

Even where variances on the basis of policy disagreements are authorized, such a variance "is permissible only if a District Court provides 'sufficiently compelling' reasons to

variance with a Guideline, but every judge is at liberty to do so."); United States v. Sanchez, 517 F.3d 651, 666 (2d Cir. 2008) (court may vary on the basis of the career offender guideline because the statute creating the career offender designation is a directive to the Commission, not the courts); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008) (remanding for reconsideration because the court mistakenly believed it did not have discretion to vary downward based on policy disagreements concerning what constitutes a "crime of violence" under the career offender guideline). *But see* United States v. Henshaw, 880 F.3d 392, 396, 398 (7th Cir. 2018) (vacating and remanding probationary sentence imposed on a defendant who qualified for the career offender enhancement, reasoning that the court failed to adequately account for and consider all of the § 3553(a) factors in varying to such a great degree); United States v. Jimenez, 512 F.3d 1, 8–9 (1st Cir. 2007) ("As we have explained, the crack/powder dichotomy is irrelevant to the career offender sentence actually imposed in this case. Consequently, the decision in *Kimbrough*—though doubtless important for some cases—is of only academic interest here.").

[259] *See* United States v. Cavera, 550 F.3d 180, 184 (2d Cir. 2008) (en banc) (affirming upward variance in a firearms trafficking case based on the court's view that the "Guidelines failed to take into account the need to punish more severely those who illegally transport guns into areas like New York City."); *see also* United States v. Pedroza-Orengo, 817 F.3d 829, 834 (1st Cir. 2016) (affirming upward variance where the court "linked Puerto Rico's problem with gun violence to 'individuals like [Pedroza] with guns of this nature.' "). *But see* United States v. Ortiz-Rodriguez, 789 F.3d 15, 20 (1st Cir. 2015) (remanding case where court varied upward because "[g]iven the nature of this drug offense, and the fact that the District Court did not explain how the enhancing conduct involving firearms falls outside the heartland of the guideline enhancement that had already been imposed, the District Court's explanation of the defendant's conduct was not sufficiently compelling to explain this upward variance.").

[260] Pepper v. United States, 562 U.S. 476, 504 (2011) (remanding for resentencing because the court of appeals erred in "categorically precluding" the district court from exercising its discretion based upon policy disagreements, thus not granting a downward variance based on extensive post-sentencing rehabilitation); United States v. Simmons, 568 F.3d 564, 569 (5th Cir. 2009) (remanding for reconsideration where court erroneously believed that it could not disagree with policy statement regarding age).

[261] *See supra* discussion of §5K3.1 at Section III.D.6.w. The majority of circuits have held that district courts may vary on the basis of fast-track disparity. *See, e.g.*, United States v. Lopez-Macias, 661 F.3d 485, 491 (10th Cir. 2011) (*Kimbrough*'s holding extends to a policy disagreement with the fast-track guideline; courts can consider fast-track disparity "as a sentence-evaluating datum within the overall ambit of § 3553(a)"); United States v. Jimenez-Perez, 659 F.3d 704, 711 (8th Cir. 2011) (disparity resulting from absence of fast-track program not excluded as sentencing factor); United States v. Camacho-Arellano, 614 F.3d 244, 245 (6th Cir. 2010) (same); United States v. Reyes-Hernandez, 624 F.3d 405, 422 (7th Cir. 2010) (same); United States v. Arrelucea-Zamudio, 581 F.3d 142, 149 (3d Cir. 2009) ("[A] sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and . . . such a variance would be reasonable in an appropriate case."); United States v. Rodriguez, 527 F.3d 221, 227 (1st Cir. 2008) (same)). A minority of circuits have held that fast-track disparities cannot be considered under section 3553(a). *See* United States v. Gonzalez-Zotelo, 556 F.3d 736, 740 (9th Cir. 2009) ("We now join the Fifth and Eleventh Circuits in holding that *Kimbrough* did not undercut our precedent holding that fast-track disparities are not 'unwarranted' so as to permit their consideration under § 3553(a)(6)."); United States v. Vega-Castillo, 540 F.3d 1235, 1238–39 (11th Cir. 2008) (per curiam) (same); United States v. Gomez-Herrera, 523 F.3d 554, 562–63 (5th Cir. 2008) (same); United States v. Perez-Pena, 453 F.3d 236, 244 (4th Cir. 2006) (district court erred in departing downward to account for lower sentences received by defendants who qualified for fast-track program in other districts).

justify it."[262] Although district courts have the authority to vary based on policy disagreements, they are not required to do so.[263] Finally, "*Kimbrough* does not force district or appellate courts into a piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines."[264]

---

[262] United States v. Lychock, 578 F.3d 214, 219 n.2 (3d Cir. 2009) (reversing downward variance because the court "failed to consider all of the relevant factors and appears to have made a determination based solely on a policy disagreement with the Guidelines . . . making the sentence procedurally unreasonable" given its failure to provide sufficient reasons for its disagreement) (internal quotation omitted); *see also* United States v. Engle, 592 F.3d 495, 502–03 (4th Cir. 2010) (reversing downward variance in a "mine-run" tax evasion case because the record was insufficient to review the reasonableness of the sentence which was based, in large part, on court's disagreement with the policy statements regarding the seriousness of tax evasion offenses).

[263] *See* United States v. Fry, 851 F.3d 1329, 1333 (D.C. Cir. 2017) (collecting cases for same); United States v. Huffstatler, 571 F.3d 620, 624 (7th Cir. 2009) (per curiam) ("[W]hile district courts perhaps have the freedom to sentence below the child-pornography guidelines based on [a] disagreement with the guidelines, as with the crack guidelines, they are certainly not required to do so."); United States v. Lopez-Reyes, 589 F.3d 667, 671 (3d Cir. 2009) ("As this Court has made clear, however, *Kimbrough* does not require a district court to reject a particular Guidelines range where that court does not, in fact, have disagreement with the Guideline at issue.").

[264] United States v. Duarte*,* 569 F.3d 528, 530 (5th Cir. 2009); *see also* United States v. Aguilar-Huerta, 576 F.3d 365, 367–68 (7th Cir. 2009) (while a court is required to consider a non-frivolous argument that a guideline produces an unsound sentence in a particular case, it is not required to consider "an argument that a guideline is unworthy of application in any case because it was promulgated without adequate deliberation . . . [and] should not have to delve into the history of a guideline so that [it] can satisfy [itself] that the process that produced it was adequate to produce a good guideline.").