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I. INTRODUCTION

This primer discusses some of the more commonly applied grounds for departure from a defendant's sentencing guideline range under the *Guidelines Manual*. It also addresses issues relating to variances, which are sentences imposed outside of the framework of the *Guideline Manual.* 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. DEPARTURES VERSUS VARIANCES

After applying the guidelines in Chapters Two, Three, and Four of the *Guidelines Manual*, sentencing courts calculate a guideline range pursuant to Part A of Chapter Five.[1] Sentencing courts then may consider any information concerning the background, character, and conduct of a defendant when deciding what sentence to impose,[2] whether that sentence be within or outside of the guideline range. Sentences imposed outside of the guideline range rely on departures or variances, which differ both substantively and procedurally.[3]

A. SUBSTANTIVE DIFFERENCE

Departures are sentences outside of the guideline range authorized by specific policy statements in the *Guidelines Manual*.[4] As Congress acknowledged in the Sentencing Reform Act, and as the *Guidelines Manual* 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."[5] Departures therefore were incorporated the guidelines framework to allow for "flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[6]

Variances are sentences outside of the guideline range that are not imposed within the guidelines framework.[7] Courts are able to impose sentences that vary from the

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1 U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.1(a)(1)–(7) (Nov. 2021) [hereinafter USSG].

2 *See* 18 U.S.C. § 3661.

3 *See, e.g.*, United States v. Hall, 965 F.3d 1281, 1295 (11th Cir. 2020) ("Although they may lead to the same result (a sentence outside the advisory guidelines range) a variance and a departure reach that result in different ways.").

4 USSG Ch.1, Pt.A(1)(4)(b). The *Guidelines Manual* includes a List of Departure Provisions located after the Index.

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

6 USSG §5K2.0, comment. (backg'd.); 28 U.S.C. § 991(b)(1)(B).

7 USSG §1B1.1, comment. (backg'd.) ("If . . . the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a 'variance'."); *see also* United States v. Crosby, 397 F.3d 103,

guidelines because of the guidelines' advisory nature following *United States v. Booker*.[8] While the guidelines remain "the starting point and initial benchmark" in sentencing,[9] a court may determine that a sentence outside of the guidelines framework is warranted based upon the statutory sentencing factors found at 18 U.S.C. § 3553(a).[10]

Because departures are part of the guidelines framework, while variances are not, sentencing courts typically calculate any departures prior to considering whether to vary.[11]

111 n.9 (2d Cir. 2005) (variances are sentences outside of the guideline range that are not "imposed pursuant to the departure authority in the Commission's policy statements"), *abrogated on other grounds by* United States v. Fagans, 406 F.3d 138 (2d Cir. 2005); United States v. Jacobs, 635 F.3d 778, 782 (5th Cir. 2011) ("The [g]uidelines 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 [g]uidelines . . . . By contrast, if after completing the [g]uidelines' 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).").

[8] 543 U.S. 220, 259 (2005) ("[W]e must sever and excise . . . the provision that requires sentencing courts to impose a sentence within the applicable [g]uidelines range (in the absence of circumstances that justify a departure) . . . ."). The Court noted that the existence of departures did not impact the need to make the guidelines advisory because "departures are not available in every case. *Id.* at 234.

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

[10] Rita v. United States, 551 U.S. 338, 344 (2007) (sentence below the guideline range could take two forms: a departure within the guidelines' framework, or a sentence independent of the guidelines by application of 18 U.S.C. § 3553(a)).

[11] USSG §1B1.1(a)–(c) (courts shall first determine the guideline range, then consider the departure policy statements, then consider the 18 U.S.C. § 3553(a) factors as a whole); *see also* United States v. Lozoya, 623 F.3d 624, 625 (8th Cir. 2010) (district courts "should decide if any applicable [g]uidelines provisions permits a traditional 'departure' from the recommended sentencing range"); 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 constituted procedural error); United States v. Martinez-Barragan, 545 F.3d 894, 900 (10th Cir. 2008) ("One step in applying the [g]uidelines is to determine whether or not to depart from the range specified in the Sentencing Table."); 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 [g]uidelines sentence or a non-[g]uidelines sentence." (internal citations omitted)). *But see* United States v. Peterson, 977 F.3d 381, 394–95 (5th Cir. 2020) (district court did not err in imposing an upward variance based on the defendant's criminal history without first considering whether an upward departure on that basis was appropriate); 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 considering departure provisions). With respect to sentencing methodology, the Seventh Circuit has held that "[d]iscretion has replaced formal departure analysis in post-*Booker* sentencing," *United States v. Gardner*, 939 F.3d 887, 892 (7th Cir. 2019), but that courts still may take guidance from departure policy statements, *United States v. Loving*, 22 F.4th 630, 635–36 (7th Cir. 2022) ("sentencing courts are no longer required to engage in traditional departure analysis" but courts can take guidance from the departure provisions).

B. Procedural Differences

Although departures and variances have the same ultimate result (a sentence above or below the applicable guideline range), they are treated differently procedurally, including with respect to notice and appellate review.[12]

1. Notice

Courts must provide notice before imposing a departure outside of the guideline range but generally do not have to provide notice before imposing a variance. Rule 32(h) of the Federal Rules of Criminal Procedure provides that before departing from the guideline range "on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure."[13] This rule was added in 2002, when the guidelines were still mandatory, to allow parties a meaningful opportunity to comment on the issues that might result in a departure from the calculated range.[14] In contrast, since the guidelines became advisory, the Supreme Court has held that no advance notice of a variance is required.[15] Thus, "while a district court must give notice before it can impose a *departure*, the same is not true for a *variance*."[16]

However, the Supreme Court suggested that where "the factual basis for a particular sentence . . . come[s] as a surprise," district courts should "consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial."[17] At least one circuit has vacated the imposition of a variance where "the facts or issues on which the district court relied to impose a variance came as a surprise and [the

[12] Although this section is limited to these two common procedural differences, the distinction between departures and variances may be crucial throughout the course of a prosecution. For example, a plea agreement may specify that neither party shall seek a departure while leaving the parties free to argue for a variance. *See* United States v. Murray, 897 F.3d 298, 308 n.8 (D.C. Cir. 2018); *see also* United States v. Jacobs, 635 F.3d 778, 781–83 (5th Cir. 2011) (plea waiver that allowed a defendant to appeal only in the case of an upward departure not requested by the government barred an appeal based upon an upward variance).

[13] Fed. R. Crim. P. 32(h); *see also* USSG §6A1.4; Burns v. United States, 501 U.S. 129, 131 (1991) (district courts may not depart upward without first notifying the parties); 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)).

[14] Fed. R. Crim. P. 32(h) advisory committee's note to 2002 amendment; *see also Burns*, 501 U.S. 129; Irizarry v. United States, 553 U.S. 708, 713–16 (2008) (explaining that the notice requirement for departures in Rule 32(h) came about when the guidelines were still mandatory).

[15] *Irizarry*, 553 U.S. at 712–13.

[16] United States v. Fleming, 894 F.3d 764, 770 (6th Cir. 2018) (citations omitted); *see also* United States v. Kuljko, 1 F.4th 87, 97 (1st Cir. 2021) ("It is clear beyond hope of contradiction that Rule 32(h) requires advance notice of departures, not variances.").

[17] *Irizarry*, 553 U.S. at 715–16.

defendant's] presentation to the court was prejudiced by the surprise."[18] Other circuits have suggested agreement with this general principle in dicta.[19] While notice may therefore be required in some instances of variance, this case-by-case analysis differs from Rule 32(h)'s categorical application in the context of departures.

2. Appellate Review

A district court's decision to deny a departure is not reviewable "unless the trial court incorrectly believed that it lacked the authority to . . . depart" or the district court had an unconstitutional motive.[20] By contrast, variances are always reviewable. Courts of appeal must review sentences under an abuse-of-discretion standard, and they may not presume that a sentence outside the guideline range is unreasonable.[21] Therefore although the standard is "narrow and deferential," a court of appeals may review the denial of a downward variance.[22]

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[18] United States v. Hatcher, 947 F.3d 383, 392 (6th Cir. 2020) (alteration in original) (quoting United States v. Coppenger, 775 F.3d 799, 804 (6th Cir. 2015)). In *Hatcher*, the district court relied on the defendant's alleged involvement in a shooting incident to vary upwards, but the government had not alleged the defendant was connected to the shooting and "the suddenness of this information's relevance" deprived the defendant of the opportunity to present evidence suggesting he did not commit the shooting. *Id.* at 389–94.

[19] *See* United States v. Daoust, 888 F.3d 571, 576 (1st Cir. 2018) ("[W]e have indicated, albeit in dictum, that in a rare case advance notice may be required when a sentencing court proposes 'to adopt a variant sentence relying on some ground or factor that would *unfairly surprise* competent and reasonably prepared counsel.'" (quoting United States v. Vega-Santiago, 519 F.3d 1, 5 (1st Cir. 2008) (en banc))); United States v. Brown, 879 F.3d 1231, 1241 (11th Cir. 2018) (relying on *Irizarry* to conclude that a defendant was required to be in attendance at his resentencing and have "an opportunity at a hearing to guide the District Court's discretion before it imposed an upward variance"); United States v. Foy, 617 F.3d 1029, 1035–36 (8th Cir. 2010) (upholding a variance and concluding that "[o]n these facts"—counsel indicating a lack of surprise in response to the possibility of a variance, not requesting a continuance to respond, and not identifying any prejudice from lack of notice—"resentencing is not required based on a lack of notice"); United States v. Orlando, 553 F.3d 1235, 1238 (9th Cir. 2009) ("*Irizarry* established that a sentencing court abuses its discretion when it imposes an upward variance 1) based on facts that amount to a prejudicial surprise; 2) without considering a continuance; 3) where advance notice might have affected the parties' presentations of evidence."); United States v. Cavera, 550 F.3d 180, 194 (2d Cir. 2008) (en banc) (upholding a sentence and noting the district court "followed th[e] sound practice" described in *Irizarry* by informing the parties it was considering a variance and then adjourning to allow further submissions on the issue). *But see* United States v. Thompson, 777 F.3d 368, 377–78 (7th Cir. 2015) (suggesting in dicta that *Irizarry* set forth a "best practice" regarding notice, "which is different from a required practice").

[20] United States v. Brinley, 684 F.3d 629, 634 (6th Cir. 2012); *see also* United States v. Angeles-Moctezuma, 927 F.3d 1033, 1037 (8th Cir. 2019) ("[A] district court's decision to deny [a] downward departure[ ] is unreviewable 'unless the district court had an unconstitutional motive or erroneously thought that it was without authority to grant the departure.'" (citation omitted) (alterations in original)); United States v. Robinson, 799 F.3d 196, 201 (2d Cir. 2015) ("[A] district court's decision not to depart . . . is generally unreviewable, unless it misunderstood its authority to do so.").

[21] Gall v. United States, 552 U.S. 38, 51 (2007).

[22] *See* United States v. Lewis, 593 F.3d 765, 773 (8th Cir. 2010) (reviewing the denial of a request for a downward variance but concluding it was substantively reasonable).

Additionally, sentences that were improperly imposed as departures may be affirmed as variances. While district courts must base departures on guideline factors, many of those factors also can support a variance as part of the court's consideration of section 3553(a) factors.[23] Courts of appeal have held that when a district court errs in departing, the error is harmless if the district court would have imposed the same sentence as variance.[24]

III. DEPARTURES

Authorized and prohibited grounds for departures are described throughout the *Guidelines Manual*; a comprehensive list of departure provisions can be found following the index. This Section of the primer discusses the grounds for departure set forth in: the Specific Offender Characteristics policy statements in Chapter Five, Part H; the Departures policy statements in Chapter Five, Part K; the criminal history departure authorized in Chapter Four; and the departure provisions applicable to the most commonly applied Chapter Two offense guidelines. The authorized and prohibited grounds for departures are based on various circumstances of the offense, specific personal characteristics of the offender, and certain procedural history of the case.

A. DEPARTURES BASED ON INADEQUACY OF CRIMINAL HISTORY CATEGORY, SUBSTANTIAL ASSISTANCE TO AUTHORITIES, AND EARLY DISPOSITION PROGRAMS

Three grounds for departure are distinct from the others in that they have specific procedural requirements: inadequacy of criminal history category (§4A1.3); substantial assistance to authorities (§5K1.1); and early disposition programs (§5K3.1). Departures under §4A1.3 require courts to move incrementally down the guidelines sentencing table to find the appropriate guideline range. Departures under §5K1.1 and §5K3.1 require a

[23] *See, e.g.*, United States v. Santini-Santiago, 846 F.3d 487, 490 (1st Cir. 2017) ("[W]e are at a loss to identify any movement away from the applicable guidelines sentencing range that can be justified as a departure, but not as a variance."); 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).").

[24] United States v. Brevard, 18 F.4th 722, 728–29 (D.C. Cir. 2021) (upholding a sentence where, although a departure was erroneously applied, the district court's alternative imposition of the sentence as a variance was not an abuse of discretion); United States v. Laboy-Nadal, 992 F.3d 41, 43–44 (1st Cir. 2021) (upholding a sentence where, even if the district court's reasoning was impermissible as a departure, "its analysis tracked the § 3553(a) factors" so the sentence was reasonable as a variance); United States v. Lavalais, 960 F.3d 180, 189 (5th Cir. 2020) ("Even if the upward departure was improper, the error is harmless because the heightened sentence was imposed as a variance as well."); United States v. Timberlake, 679 F.3d 1008, 1011 (8th Cir. 2012) ("[A]ny procedural error in granting an upward departure is harmless when the district court makes it clear that the sentence is also based on an upward variance under the section 3553(a) factors.").

government motion. Notably, the majority of all sentencing departures are attributed to §5K1.1 and §5K3.1.[25]

1. Section 4A1.3: Inadequacy of Criminal History

Recognizing that "the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur," §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.[26]

a. 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."[27]

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 (*e.g.*, sentences for foreign and tribal offenses).[28]

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.[29]

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[25] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2021), at Table 29 – Sentence Imposed Relative to the Guideline Range., https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/Table29.pdf .

[26] USSG §4A1.3, comment. (backg'd.); *see also* USSG §5H1.8.

[27] 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).

[28] 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. Brown, 992 F.3d 665, 672 (8th Cir. 2021) (district court properly departed upwards based on the defendant's "underrepresented criminal history of multiple tribal convictions"); 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. Simmons, 343 F.3d 72, 78–79 (2d Cir. 2003) (affirming the district court's decision to depart where defendant had numerous Canadian convictions); United States v. Chesborough, 333 F.3d 872, 874 (8th Cir. 2003) (affirming district court's decision to depart upward based in part on the large number of criminal convictions too old to be counted as part of the defendant's criminal history).

[29] USSG §4A1.3(a)(2)(B); s*ee 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").

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.[30]

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.[31]

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.[32]

However, "[a] prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement."[33]

Section 4A1.3 also provides guidance on 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."[34] 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."[35] If the court decides to depart upward from Category VI, "the

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[30] 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.' " (third alteration in original)); 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' . . . ." (alteration in original)).

[31] 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").

[32] USSG §4A1.3(a)(2)(E); *see also* United States v. Allen, 488 F.3d 1244, 1257–58 (10th Cir. 2007) (sentencing court cannot depart upward based on uncharged "distinctly dissimilar" misconduct); United States v. Hunerlach, 258 F.3d 1282, 1286–87 (11th Cir. 2001) (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).

[33] USSG §4A1.3(a)(3).

[34] 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 upon 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 upward 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).

[35] 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 . . . ." (citation omitted)); United States v. Walker, 284 F.3d 1169, 1173 (10th Cir. 2002) ("[N]othing in the [g]uidelines supports a degree of upward departure based solely on 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."[36]

b. Downward departures

Section 4A1.3 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."[37] Such a departure may be warranted "if, for example,
the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period."[38]

Section 4A1.3 prohibits "[a] departure below the lower limit of the applicable guideline range for Criminal History Category I."[39] For career offenders within the meaning of §4B1.1 (Career Offender), courts may depart downward under §4A1.3 by one criminal history category at most.[40] 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)."[41]

Even if a defendant has a Criminal History Category I after a §4A1.3 departure, the defendant is not eligible for relief under §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)."[42]

c. Procedural requirements

The court is required to specify in writing the reasons for departure under §4A1.3. For an upward departure, the court must specify the reasons why the applicable criminal

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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.' ").

36 USSG §4A1.3(a)(4)(B).

37 USSG §4A1.3(b)(1).

38 USSG §4A1.3, comment. (n.3).

39 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).

40 USSG §4A1.3(b)(3)(A).

41 USSG §4A1.3(b)(2)(B).

42 USSG §4A1.3(b)(3)(B).

history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.[43] Similarly, 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.[44] Circuit courts have remanded cases when the district court fails to adequately explain the basis for its departure.[45]

Circuit courts have explained the degree and level of explanation a sentencing court must provide when departing from the otherwise applicable guideline range in different ways. 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."[46] The Eighth Circuit allows the sentencing court to choose any method so long as it is not inconsistent with the guidelines,[47] while the Tenth Circuit requires a "reasonable methodology hitched to" the guidelines.[48]

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

a. Substantive requirements

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."[49] 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."[50] 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":[51]

43 USSG §4A1.3(c)(1).

44 USSG §4A1.3(c)(2).

45 *See, e.g.*, 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, 454 (1st Cir. 1996))).

46 United States v. Simmons, 343 F.3d 72, 78 (2d Cir. 2003) (citation omitted).

47 United States v. Gonzales-Ortega, 346 F.3d 800, 803–04 (8th Cir. 2003).

48 United States v. Hurlich, 348 F.3d 1219, 1222 (10th Cir. 2003) (citation omitted).

49 USSG §5K1.1, comment. (backg'd.).

50 USSG §5K1.1.

51 USSG §5K1.1(a).

(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;[52]

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;[53]

(3) the nature and extent of the defendant's assistance;[54]

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;[55]

(5) the timeliness of the defendant's assistance.[56]

A reduction under §5K1.1 must "be considered independently of any reduction for acceptance of responsibility."[57]

Notably, a motion for a departure under §5K1.1 does not authorize a court to impose a sentence below a statutory mandatory minimum penalty. Rather, a court is authorized to sentence a defendant below a statutory mandatory minimum based on a defendant's substantial assistance only under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended.[58]

b. Procedural requirements

In *Wade v. United States*, the Supreme Court explained that the government has the power, but not the duty, to file a motion under 18 U.S.C. § 3553(e) or §5K1.1 when the defendant has provided substantial assistance.[59] A departure under §5K1.1 and 18 U.S.C.

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[52] USSG §5K1.1(a)(1); USSG §5K1.1, comment. (n.3) (district court should give "[s]ubstantial 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. Milo, 506 F.3d 71, 77 (1st Cir. 2007) (court not bound by the government's recommendation as to how far to depart); United States v. Grant, 493 F.3d 464, 467 (5th Cir. 2007) (same); United States v. Pizano, 403 F.3d 991, 996 (8th Cir. 2005) (same).

[53] USSG §5K1.1(a)(2).

[54] USSG §5K1.1(a)(3).

[55] USSG §5K1.1(a)(4).

[56] USSG §5K1.1(a)(5).

[57] USSG §5K1.1, comment. (n.2).

[58] USSG §5K1.1, comment. (n.1). A departure from a statutory mandatory minimum penalty for cooperation requires a motion under section 3553(e). Melendez v. United States, 518 U.S. 120, 125–26 (1996). Section 3553(e) motions may be made after remand for resentencing. 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).

[59] 504 U.S. 181, 185 (1992); *see also* United States v. Davis, 583 F.3d 1081, 1097 (8th Cir. 2009) ("The 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. Mullins, 399 F.3d 888, 889–90 (8th Cir. 2005))). 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). *See* United

§ 3553(e) can be based only on substantial assistance, not on other section 3553(a) factors.[60] 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.[61] To obtain an evidentiary hearing, the Eighth Circuit has held that a defendant must make a " 'substantial threshold showing' that the government's refusal to make a substantial assistance motion was premised on an improper motive."[62]

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.[63] 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; but circuits are split on this issue.[64]

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

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States v. Díaz-Lugo, 963 F.3d 145, 151 (1st Cir. 2020) ("The fact that the government abstains from moving for a section 5K1.1 departure . . . does not divest the sentencing court of its statutory discretion to consider a defendant's cooperation and impose a downwardly variant sentence predicated on such cooperation.").

60 *See, e.g.*, United States v. M.M., 23 F.4th 216, 222 (11th Cir. 2021) ("When departing below a mandatory minimum for substantial assistance, § 3553(a) factors cannot be used to further reduce a sentence."); 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]").

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

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

63 *See* United States v. Khoury, 62 F.3d 1138, 1141–43 (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. Gomez, 705 F.3d 68, 79 (2d Cir. 2013) (citing *Khoury* and *Paramo* as examples of a constitutional limit enforceable by a court); United States v. Easter, 981 F.2d 1549, 1555 (10th Cir. 1992) (endorsing this principle in dicta).

64 *See, e.g.*, United States v. Doe, 865 F.3d 1295, 1298, 1301 (10th Cir. 2017) (recognizing a circuit split but holding that courts may review whether the government acted in good faith); 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 standard . . . articulated in *United States v. Garcia*, 698 F.2d 31, 35 (1st Cir. 1983), remain[s] good law after *Wade*"). *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 absent a claim of unconstitutional motivation); United States v. Aderholt, 87 F.3d 740, 742 (5th Cir. 1996) ("If the [g]overnment 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 of the accused.").

departure under §5K2.0 because the Commission already has taken a defendant's substantial assistance into consideration in formulating the guidelines.[65] 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.[66]

The court is afforded "latitude" in reducing a defendant's sentence based upon "variable relevant factors," but the court must "state the reasons for reducing a sentence" for substantial assistance under §5K1.1.[67] 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.[68] Although a district court's decision not to depart under §5K1.1 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.[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]

c. 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.[71] However, in some circuits a defendant's refusal to assist authorities may be considered in sentencing *within* the guideline range.[72]

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[65] *See, e.g.*, United States v. Fountain, 223 F.3d 927, 928 (8th Cir. 2000) (holding that "[a] defendant cannot avoid the §5K1.1 government-motion requirement by moving for a departure based on substantial assistance pursuant to . . . §5K2.0" and collecting cases from the First, Third, Fifth, Ninth, and D.C. Circuits in accord); United States v. Maldonado-Acosta, 210 F.3d 1182, 1184 (10th Cir. 2000) (same); *see also* United States v. Rashid, 274 F.3d 407, 418–19 (6th Cir. 2001) (adopting this position).

[66] *See, e.g.*, United States v. Truman, 304 F.3d 586, 591 (6th Cir. 2002) (collecting cases and holding that "when 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, . . . §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.").

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

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

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

[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] 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.").

[72] *See* United States v. Strong, 729 F. App'x 243, 245–46 (4th Cir. 2006) (per curiam) (discussing circuit disagreement on this issue and citing United States v. Price, 988 F.2d 712, 722 (7th Cir. 1993) and United States v. Safirstein, 827 F.3d 1380, 1388 (9th Cir. 1987)).

3. Section 5K3.1: Early Disposition Programs (Policy Statement)

a. Substantive requirements

In the PROTECT Act, Congress required the Commission to promulgate a policy statement authorizing downward sentence departures of up to four levels upon a government-filed motion "pursuant to an early disposition program" authorized by the Department of Justice for certain immigration offenses.[73] In line with this directive, the Commission promulgated §5K3.1 (Early Disposition Programs (Policy Statement)), commonly referred to as a "fast-track departure."[74]

As of 2012, the Department of Justice utilizes "uniform, baseline eligibility requirements for any defendant who qualifies for fast-track treatment, regardless of where that defendant is prosecuted."[75] Those criteria are that the defendant: (1) is prosecuted for illegal reentry in violation of 8 U.S.C. § 1326; (2) enters into a written plea agreement; (3) agrees to a factual basis; (4) agrees not to file pretrial motions under Federal Rule of Criminal Procedure 12(b)(3); (5) waives the rights to request a variance and appeal; and (6) waives the right to file a post-conviction petition under 28 U.S.C. § 2255 (except based on ineffective assistance of counsel).[76] Prosecutors have discretion to impose additional requirements, including requiring that the defendant enter into a sentencing agreement or waive a full presentence investigation.[77]

b. Procedural requirements

Section 5K3.1 and the PROTECT Act allow for a departure only upon the government's motion.[78] However, district courts are not required to grant §5K3.1 motions and may deny a defendant some or all of the requested departure.[79]

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[73] Pub. L. No. 108–21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

[74] USSG App. C, amend. 651 (effective Oct. 27, 2003).

[75] Memorandum from Deputy Attorney General James Cole to United States Attorneys (Jan. 31, 2012), https://www.justice.gov/dag/legacy/2012/01/31/fast-track-program.pdf [hereinafter "Cole Memorandum"].

[76] Cole Memorandum.

[77] *Id*.

[78] USSG §5K3.1; Pub. L. No. 108–21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003).

[79] *See, e.g.*, United States v. Cueto-Núñez, 869 F.3d 31, 36 (1st Cir. 2017) (plea agreement required the government to recommend a "fast-track adjustment" but did not require the district court to accept that recommendation); United States v. Rosales-Gonzalez, 801 F.3d 1177, 1183 (9th Cir. 2015) (district courts may reject jointly requested fast-track departures); United States v. Shand, 739 F.3d 714, 715–16 (2d Cir. 2014) (per curiam) (same). The Ninth Circuit has stated, however, that "it [would] be an abuse of discretion for a district court judge to implement a blanket policy against granting recommended fast-track departures in plea agreements with non-binding sentences." *Rosales-Gonzales*, 801 F.3d at 1184.

B. Other Grounds for Departure

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 Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described."[80] This departure provision reflects the fact that the guidelines are designed to account for offenses that fall in the "heartland" of the offense type, but that conduct or circumstances may make an individual offense fall outside of that "heartland."[81] 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.[82]

In *Koon v. United States*,[83] the Supreme Court explained that factors that could take a case out of the "heartland" of the guidelines fall into four categories: "prohibited, discouraged, unmentioned, and encouraged."[84] If a factor is prohibited by the guidelines, it may not be the basis for a departure.[85] A discouraged factor may be the basis for a departure "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present"; the same is true of an encouraged factor that is "already taken into account by the applicable [g]uideline."[86] An encouraged factor not taken into account by the applicable guideline authorizes the sentencing court to depart.[87] Finally, an unmentioned factor may serve as the basis for a departure if the court determines that the unmentioned factor takes the case

[80] USSG §5K2.0(a)(1); *see, e.g.*, United States v. Vasquez, 279 F.3d 77, 80–83 (1st Cir. 2002) (possible adverse consequences faced by defendant—a deportable alien—during incarceration or assignment to certain rehabilitative programs, did not constitute grounds for downward departure under §5K2.0; consequences were adequately taken into consideration by §2L1.2 because the only persons who would have been sentenced under guideline were deportable aliens).

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

[82] 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, as well as 'with specificity in the written order and judgment,' reasons for imposing a sentence" outside the guidelines (citation omitted)).

[83] 518 U.S. 81, 95–96 (1996) (citing United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)), *superseded on other grounds by* the PROTECT Act.

[84] United States v. D'Amario, 350 F.3d 348, 355 (3d Cir. 2003) (summarizing *Koon*).

[85] *Koon*, 518 U.S. at 95–96 (discussing what it calls "forbidden" factors).

[86] *Id.* at 96.

[87] *Id.*

out of the "heartland," "considering the 'structure and theory of both relevant individual guidelines and the [g]uidelines taken as a whole.' "[88]

This section discusses the grounds prohibited, discouraged, or encouraged by the guidelines, and the procedure necessary for courts to determine if unmentioned grounds may support a departure. This section also discusses the use of multiple grounds to justify departures and the limitations on departures in cases involving children or sexual offenses.

1. Prohibited Grounds for Departure

Section 5K2.0(d) prohibits using certain "specific offender characteristics," offense conduct, and procedural history as grounds for departure. Section 5K2.0(d)(1) forbids relying on certain offender characteristics outlined in Chapter Five, Part H as the basis for a departure: race, sex, national origin, creed, religion, and socio-economic status;[89] "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing";[90] addiction to gambling;[91] and personal financial difficulties and economic pressures upon a trade or business.[92] Section 5K2.0(d)(2)–(3) provides that acceptance of responsibility or aggravating or mitigating roles in the offense are accounted for in Chapter Three and cannot form the basis of a departure.[93]

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88 *Id.* (quoting *Rivera*, 994 F.2d at 949).

89 USSG §5K2.0(d)(1) (citing USSG §5H1.10); *see, e.g.*, United States v. Guzman, 236 F.3d 830, 833 (7th Cir. 2001) (holding that the district court erred by departing downward based on the defendant's cultural heritage, which was based on its conclusion that "[b]ecause the defendant [wa]s a Mexican woman, she may have been more likely to participate in her boyfriend's criminal activity than if she had been an Anglo male" and explaining that "[w]hat the district judge regarded as a matter of cultural heritage is just the joinder of gender and national origin, two expressly forbidden considerations in sentencing").

90 USSG §5H1.12; USSG §5K2.0(d)(1) (prohibiting reliance on circumstances discussed in 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 relying on the fact the defendant's "Mennonite upbringing left him ignorant and uneducated to the 'ways of the world' " was inconsistent with §§5H1.10 and 5H1.12). *But see* United States v. Rivera, 192 F.3d 81, 84–85 (2d Cir. 1999) (while "the [g]uidelines foreclose any downward departure for lack of youthful guidance . . . a downward departure may be appropriate in cases of extreme childhood abuse" under §5H1.3 as a discouraged factor if the extreme childhood abuse caused mental or emotional conditions).

91 USSG §5K2.0(d)(1) (citing the last sentence of USSG §5H1.4).

92 USSG §5K2.0(d)(1) (citing the last sentence of USSG §5K2.12).

93 USSG §5K2.0(d)(2)–(3). The listed factors are accounted for at USSG §§3E1.1 (Acceptance of Responsibility), 3B1.1 (Aggravating Role), and 3B1.2 (Mitigating Role), respectively. However, Application Note 2 to §3B1.1 provides for a potential upward departure where a defendant "did not organize, lead, manage, or supervise another participant," and thus does not receive an adjustment under that section, but the defendant "nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." USSG §3B1.1, comment. (n.2). *But see* United States v. Ochoa-Gomez, 777 F.3d 278, 282–83 (5th Cir. 2015) (explaining that Fifth Circuit precedent "has construed [Application] Note 2 to allow application of an *adjustment*" not just a departure).

Section 5K2.0 also provides that "a departure may not be based merely on the fact that the defendant decided to plead guilty or enter into a plea agreement."[94] However, "a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in a plea agreement and accepted by the court."[95] This provision prohibits the mere fact of a plea agreement or guilty plea from warranting departure, but allows for plea agreements to take into account, and recommend, permissible departures.

Nor may a departure be based upon "[t]he defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines."[96] This means a departure cannot be based upon "unexceptional efforts to remedy the harm caused by the offense."[97]

2. Discouraged Grounds for Departures

Chapter Five, Part H includes policy statements discussing specific offender characteristics that the Commission has deemed either "may be relevant" or are "not ordinarily relevant" to the determination of whether to depart from the guideline range. If a factor is discouraged under the guidelines, it only can be a basis for departure if present in the case to an "exceptional degree."[98]

The factors that "may be relevant" in determining whether a departure is warranted if "present to an unusual degree" and that "distinguish the case from the typical case" include age (including youth),[99] mental and emotional conditions,[100] physical condition or appearance,[101] and military service.[102] For example, age "may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration."[103]

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94 USSG §5K2.0(d)(4); USSG §6B1.2 (Standards for Acceptance of Plea Agreements (Policy Statement)).

95 *Id.*; *see also* USSG §5K2.0, comment. (n.5) (Departures Based on Plea Agreements).

96 USSG §5K2.0(d)(5).

97 *Id.*

98 USSG §5K2.0(a)(4).

99 USSG §5H1.1.

100 USSG §5H1.3; *see, e.g.*, United States v. Brady, 417 F.3d 326, 333–35 (2d Cir. 2005) (extreme childhood abuse contributed to the commission of the offense).

101 USSG §5H1.4.

102 USSG §5H1.11.; *see also* United States v. Jackson, 862 F.3d 365, 402 (7th Cir. 2017) (noting, in the context of a variance, that §5H1.11 is limited to cases "where military service is present to an 'unusual degree' and distinguishes the case from the typical cases"); *cf.* 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).

103 USSG §5H1.1.

Mental and emotional conditions may form the basis of a downward departure where a downward departure accomplishes a specific treatment purpose.[104] Courts have held that physical condition or appearance can warrant downward departure where the defendant might be susceptible to abuse in prison,[105] but if the defendant has a physical condition which the prison system can appropriately care for, departure is not warranted.[106] As with a mental or emotional condition, downward departure may be warranted to accomplish a specific treatment purpose for a physical condition.[107]

The factors that are "not ordinarily relevant" to determining if a departure is warranted include educational and vocational skills,[108] drug or alcohol dependence or abuse,[109] employment record,[110] and "[c]ivic, charitable, or public service; employment-related contributions; and similar prior good works."[111] Additionally, family ties and responsibilities are "not ordinarily relevant" to the decision of whether to depart.[112]

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[104] USSG §5H1.3 (citing USSG §5C1.1, comment. (n.7) (departure to allow for community treatment options)).

[105] *See* 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, demeanor, naiveté, and the nature of the offense).

[106] *See* United States v. Dailey, 958 F.3d 742, 746–47 (8th Cir. 2020) (district court properly denied a departure where it found the prison could "accommodate [the defendant's] condition and provide appropriate medical care"); United States v. Díaz-Rodríguez, 853 F.3d 540, 547 (1st Cir. 2017) (same).

[107] USSG §5H1.4 (citing USSG §5C1.1, comment. (n.7) (departure to allow for community treatment options)).

[108] USSG §5H1.2; *see, e.g.*, United States v. McClatchey, 316 F.3d 1122, 1134 (10th Cir. 2003) ("Unless we are simply to impose lesser penalties on the educated and business elite, there is nothing exceptional about [the defendant's] education and enviable career to warrant consideration for downward departure.").

[109] USSG §5H1.4 (such dependence is "ordinarily not a reason for downward departure").

[110] USSG §5H1.5; *see, e.g.*, United States v. Jones, 158 F.3d 492, 498–99 (10th Cir. 1998) (affirming a downward departure based in part on the effect the defendant's incarceration would have on his prospects for future employment in a very economically depressed community).

[111] USSG §5H1.11; *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. 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); 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). *But see* 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).

[112] USSG §5H1.6; *see also, e.g.*, United States v. Herman, 848 F.3d 55, 59 (1st Cir. 2017) (departure is not warranted under §5H1.6 unless the defendant's caretaking is irreplaceable, such that there are no feasible alternatives of care); 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); United States v. Leon, 341 F.3d 928, 930, 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, 82–84 (1st Cir.

Unlike the other "not ordinarily relevant" factors, the Commentary to §5H1.6 sets forth a non-exhaustive list of circumstances for the court to consider in determining whether a departure for family ties and responsibilities is warranted: "(i) The seriousness of the offense[;] (ii) The involvement in the offense, if any, of members of the defendant's family[; and] (iii) The danger, if any, to members of the defendant's family as a result of the offense."[113] In addition, if the potential departure is based on loss of caretaking or financial support, the following circumstances also must be present: (i) a within-range sentence would "cause a substantial, direct, and specific loss" of either essential caretaking or financial support to the defendant's family; (ii) such a loss "exceeds the harm ordinarily incident to incarceration for a similarly situated defendant"; (iii) "no effective remedial or ameliorative programs are reasonably available," so the defendant's support is "irreplaceable"; and (iv) a departure "effectively will address the loss of caretaking or financial support."[114]

Certain factors that are discouraged grounds for departure may be relevant considerations in other parts of sentencing. A defendant's education and vocational skills, mental and emotional conditions, and employment record, are relevant in determining the conditions of probation or supervised release.[115] Additionally, the policy statement regarding drug or alcohol abuse "strongly recommend[s] that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program."[116] And the policy statement on family ties and responsibilities provides that family responsibilities "may be relevant to the determination of the amount of restitution or fine."[117]

3. Identified Grounds for Departure

The *Guidelines Manual* permits courts to sentence outside of the guideline range based on certain identified grounds—what the Supreme Court referred to in *Koon v. United States* as "[e]ncouraged factors."[118] The court may use these grounds to depart upward or downward if the applicable offense guideline does not already take the ground into account, or if the ground is present to an exceptional degree.[119]

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).

113 USSG §5H1.6, comment. (n.1(A)).

114 USSG §5H1.6, comment. (n.1(B)). 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. USSG §5H1.6.

115 USSG §§5H1.2, 5H1.3, 5H1.5.

116 USSG §5H1.4.

117 USSG §5H1.6.

118 518 U.S. 81, 94 (1996); *see* USSG §5K2.0(a)(1).

119 USSG §5K2.0(a)(1), (a)(3).

a. Upward departures in Chapter Five, Part K

i. Death (§5K2.1), Extreme Physical Injury (§5K2.2), and Extreme Psychological Injury (§5K2.3)

Under §5K2.1, "[i]f death resulted, the court may increase the sentence above the authorized guideline range."[120] This policy statement provides a number of factors for courts to consider when determining the extent of such a departure. For example, the court "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."[121] Section 5K2.1 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."[122]

Section 5K2.2 provides for an increase above the authorized guideline range if significant physical injury resulted.[123] 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

[120] USSG §5K2.1; *see also, e.g.*, United States v. McCray, 7 F.4th 40, 47–49 (2d Cir. 2021) (district court properly departed under §5K2.1 based on relevant conduct of fentanyl trafficking resulting in death), *cert. denied*, 142 S. Ct. 1373 (2022); 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).

[121] 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. 1992))).

[122] 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).

[123] 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"). Courts have held that 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). *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 precludes the application of both provisions in the same case).

knowingly intended or risked.[124] Additionally, the extent of the increase should depend on "the degree to which [the injury] may prove permanent."[125]

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.[126] 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."[127] 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."[128]

ii. Abduction or Unlawful Restraint (§5K2.4)

Section 5K2.4 provides that a court may depart upward 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."[129]

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[124] USSG §5K2.2; *see also* United States v. Gillispie, 929 F.3d 788, 789–90 (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).

[125] USSG §5K2.2.

[126] 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, 1439, 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. 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); *and* 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").

[127] USSG §5K2.3.

[128] *Id.*

[129] USSG §5K2.4; *see also* United States v. Barragan-Espinoza, 350 F.3d 978, 982 (9th Cir. 2003) (in drug distribution conspiracy, 3-level upward adjustment under §5K2.4 was not erroneous where district court

iii. Extreme Conduct (§5K2.8)

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."[130] Examples of such conduct include "torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation."[131] Section 2A3.1 (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.[132]

iv. Weapons and Dangerous Instrumentalities (§5K2.6) and Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (§5K2.17)

Section 5K2.6 provides for an upward departure if "a weapon or dangerous instrumentality was used or possessed in the commission of the offense."[133] The increase

found defendant held victim against her will and forced her to carry drugs in her bra, conduct that was not alleged in or directly related to, charges in the indictment).

[130] USSG §5K2.8.

[131] *Id.*; *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 an act 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, 449–51 (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, 1150–51 (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 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 Begaye*, 635 F.3d at 469 (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).

[132] 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 recognized by* United States v. Dahmen, 675 F.3d 244, 247–48 (3d Cir. 2012).

[133] 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 shot into floor of home and into apartment below "[b]ecause the enhancements account for two distinct harms"); *cf.* 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.").

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."[134]

Section 5K2.17 provides 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.[135] 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.[136]

v. Violent Street Gangs (§5K2.18)

Section 5K2.18 provides for an upward departure for a defendant who participates in groups, clubs, organizations, or associations that use violence to further their ends. "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."[137] This departure 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 in such a case the guidelines "will account adequately for the conduct."[138]

vi. Property Damage or Loss (§5K2.5)

Section 5K2.5 provides for an upward departure if the "offense caused property damage or loss not taken into account within the guidelines."[139] The extent of increase ordinarily should depend on "the extent to which the harm was intended or knowingly

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134 USSG §5K2.6.

135 USSG §5K2.17. "[S]emiautomatic firearm capable of accepting a large capacity magazine" means "a semiautomatic firearm that has the ability to fire many rounds without 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." *Id.* In cases involving an offense of conviction referenced to §2K2.1 (covering certain firearm offenses), 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").

136 USSG §5K2.17; *see also* United States v. Philiposian, 267 F.3d 214, 218 (3d Cir. 2001) (§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).

137 USSG §5K2.18.

138 *Id.*

139 USSG §5K2.5; *see also* United States v. Thomas, 62 F.3d 1332, 1347 (11th Cir. 1995) (vacating 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," and the circumstances "were not so extraordinary as to render the [g]uidelines' considerations of circumstantial damages inadequate"); United States v. Dayea, 32 F.3d 1377, 1382 (9th Cir. 1994) (§5K2.5 provides for departures based on property damage or loss, not other harms, such as consequential financial damages to a victim's widow).

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."[140]

vii. Disruption of Governmental Function (§5K2.7), Public Welfare (§5K2.14), and Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (§5K2.24)

Under §5K2.7, 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."[141] 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."[142]

Section 5K2.14 provides for an upward departure if "national security, public health, or safety was significantly endangered."[143] The extent of the departure should "reflect the nature and circumstances of the offense."[144]

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[140] USSG §5K2.5.

[141] USSG §5K2.7; *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); United States v. Archambault, 344 F.3d 732, 736–37 (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).

[142] 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, 1324–25 (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).

[143] USSG §5K2.14.

[144] *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. Cole, 357 F.3d 780, 784 (8th Cir. 2004) (a real, as opposed to empty, threat must be present); United States v. Bell, 303 F.3d 1187, 1193 (9th Cir. 2002) (possession of deadly chemicals and nerve agents); 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).

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."[145]

viii. Dependence upon Criminal Activity for a Livelihood (§5H1.9) and Criminal Purpose (§5K2.9)

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."[146] Under §5H1.9, "the degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence."[147]

ix. Dismissed and Uncharged Conduct (§5K2.21)

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 other reason; and (2) that did not enter into the determination of the applicable guideline range."[148] Courts have held that the government must prove the dismissed or potential charge by a preponderance of the evidence.[149]

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[145] 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).

[146] 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); United States v. Hanson, 264 F.3d 988, 996–97 (10th Cir. 2001) (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).

[147] USSG §5H1.9; *see also* United States v. Schulte, 144 F.3d 1107, 1109 (7th Cir. 1998) ("Examples of encouraged factors include . . . dependance on criminal activity for a livelihood.").

[148] 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). The D.C. Circuit has held that where "uncharged D.C. Code offenses would not have been properly joined with [the defendant's] federal" charge in a federal district court due to law on bringing D.C. offenses in federal court, the uncharged D.C. Code offenses could not support a departure under §5K2.21. United States v. Brevard, 18 F.4th 722, 727–28 (D.C. Cir. 2021).

[149] *See* United States v. Smith, 681 F.3d 932, 935–36 (8th Cir. 2012) ("*Booker* only prevents a judge from using judicially found facts to sentence a defendant outside of the statutory maximums," so an upward departure for uncharged conduct under §5K2.21 found by preponderance of the evidence was 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.").

b. Downward departures in Chapter Five

i. Victim's Conduct (§5K2.10)

Section 5K2.10 allows the court to depart downwards "to reflect the nature and circumstances of the offense" if the "victim's wrongful conduct contributed significantly to provoking the offense behavior."[150] To determine whether to depart and to what extent, the court should consider (1) the victim's relevant physical characteristics, in comparison with the defendant's; (2) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation; (3) the defendant's reasonable perception of danger, including the victim's reputation for violence;[151] (4) the actual danger the victim presented to the defendant; (5) other relevant conduct by the victim that substantially contributed to the danger presented; and (6) the proportionality and reasonableness of the defendant's response.[152]

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.[153]

ii. Lesser Harms (§5K2.11)

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."[154]

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.[155] The policy statement lists as examples the following behavior: "a war

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[150] 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).

[151] *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 a departure).

[152] USSG §5K2.10; *see also Paster*, 173 F.3d at 211–12 (conduct of the victim did not warrant the response by the defendant—stabbing her 16 times).

[153] USSG §5K2.10.

[154] USSG §5K2.11.

[155] *Id.*

veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program."[156]

iii. Coercion and Duress (§5K2.12)

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."[157] 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."[158] 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.[159]

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[156] *Id.*; *see also, e.g.*, United States v. Lewis, 249 F.3d 793, 795–97 (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); 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). *But see* 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); United States v. Carrasco, 313 F.3d 750, 756 (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).

[157] USSG §5K2.12; *see also, e.g.*, United States v. Bala, 236 F.3d 87, 91–92 (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" (citations omitted)); 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).

[158] USSG §5K2.12.

[159] *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, either explicit or implicit, "of physical injury, substantial damage to property, or similar injury resulting from the unlawful action of a third party (or from a natural emergency)").

iv. Diminished Capacity (§5K2.13) and Application Note 7 to §5C1.1 (Imposition of a Term of Imprisonment)

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."[160] The extent of the departure "should reflect the extent to which the reduced mental capacity contributed to the commission of the offense."[161] Significantly reduced mental 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."[162]

A departure for diminished capacity is prohibited where (1) the defendant's significantly reduced capacity was caused by voluntary use of intoxicants; (2) the offense involved actual violence or a serious threat of violence indicating a need to protect the public;[163] (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public;[164] or (4) the defendant has been convicted of an offense under chapter 71 (obscenity), 109A (sexual abuse), 110 (sexual exploitation or other abuse of children), or 117 (transportation for illegal sexual activity and related crimes), of title 18 of the United States Code.[165]

Similarly, Application Note 7 to §5C1.1 provides for downward departures in limited cases where departure would serve a treatment purpose. The application note states that a downward departure from the sentencing options authorized by the

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[160] 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").

[161] USSG §5K2.13.

[162] USSG §5K2.13, comment. (n.1).

[163] *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).

[164] *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).

[165] USSG §5K2.13.

guidelines for Zone C to the sentencing options for Zone B[166] 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."[167] The note also provides that courts should consider if the treatment program and the departure would reduce the risk to the public from further crimes of the defendant.[168]

v. Voluntary Disclosure of Offense (§5K2.16)

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."[169] 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."[170]

vi. Aberrant Behavior (§5K2.20)

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.[171] The departure is only available if the defendant "committed a single criminal occurrence or

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166 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).

167 *Id.*

168 *Id.*

169 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. 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); 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).

170 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).

171 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, 834–35 (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).

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."[172] The departure is not available if the offense involved "[r]epetitious or significant, planned behavior."[173]

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.[174] 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; or (4) the defendant has more than one criminal history point, as determined under Chapter Four, a prior federal or state felony conviction, or any other significant prior criminal behavior.[175]

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, United States Code" is prohibited from receiving a departure under this policy statement.[176]

vii. Discharged Terms of Imprisonment (§5K2.23)

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 or Anticipated 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."[177] The departure "should be fashioned to achieve a reasonable punishment for the instant offense."[178]

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[172] USSG §5K2.20(b).

[173] USSG §5K2.20, comment. (n.2); *see also* United States v. Castellanos, 355 F.3d 56, 59–60 (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. 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.").

[174] USSG §5K2.20, comment. (n.3).

[175] USSG §5K2.20(c).

[176] USSG §5K2.20(a).

[177] 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").

[178] 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

viii. 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 §5D1.1 and not impose a term of supervised release if it determines that supervised release is neither required by statute nor necessary in light of the section 3553(a) factors applicable to supervised release under 18 U.S.C. § 3583(c).[179]

c. Selected grounds for departures for certain offense types

i. Application Note 21 to §2B1.1 (covering fraud, theft, and embezzlement offenses)

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.[180] Similarly, a downward departure may be warranted where the offense level "substantially overstates the seriousness of the offense."[181] Upward and downward departures may be appropriate in specific situations as well, including where an offense results in a substantial disruption to critical infrastructure[182] or when the offense involves an extension or overpayment of disaster relief benefits that were legitimately received in the first place.[183]

ii. Application Note 27 to §2D1.1 (covering certain drug trafficking offenses)

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 defendant's purchase of a significantly greater quantity of the

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").

179 USSG §5D1.1, comment. (n.1); USSG §5D1.1, comment. (n.3); 18 U.S.C. § 3583(c).

180 USSG §2B1.1, comment. (n.21(A)).

181 USSG §2B1.1, comment. (n.21(C)).

182 USSG §2B1.1, comment. (n.21(B)) (upward departure).

183 USSG §2B1.1, comment. (n.21(D)) (downward departure).

controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent.[184]

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 base offense level based on drug quantity.[185] 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.[186]

Third, an upward departure may be appropriate if a trafficked controlled substance had an "unusually high purity."[187] 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."[188] The departure is not available for PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone because the guideline itself already addresses those substances' purities.[189]

Fourth, in cases involving synthetic cathinones, either an upward or downward departure may be warranted 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.[190]

And lastly, upward and downward departures may be warranted in unusual circumstances in cases involving synthetic cannabinoids.[191] 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.[192]

iii. Application Note 11 to §2K2.1 (covering certain firearms offenses)

Application Note 11 to §2K2.1 states that an upward departure may be warranted in any of the following circumstances:

184 USSG §2D1.1, comment. (n.27(A)).

185 USSG §2D1.1, comment. (n.27(B)).

186 *Id.*

187 USSG §2D1.1, comment. (n.27(C)).

188 *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).

189 USSG §2D1.1, comment. (n.27(C)).

190 USSG §2D1.1, comment. (n.27(D)).

191 USSG §2D1.1, comment. (n.27(E)).

192 USSG §2D1.1, comment. (n.27(E)(i)).

> (A) the number of firearms substantially exceeded 200; (B) the offense involved multiple National Firearms Act weapons (*e.g.*, machineguns, 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.[193]

The Commentary to §2K2.1 also provides for an upward departure "[i]f the defendant trafficked substantially more than 25 firearms"[194] and a downward departure where the defendant is convicted under certain statutes relating to the straw purchase of firearms, no specific offense characteristics applied, "the defendant was motivated by an intimate or familial relationship or by threats or fear" and "was otherwise unlikely" to commit the offense, and the defendant "received no monetary compensation." [195]

iv. 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."[196] 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.[197]

Application Note 7 provides for a downward departure to reflect all or part of the time the defendant served while in state custody.[198] 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.[199] 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

193 USSG §2K2.1, comment. (n.11).

194 USSG §2K2.1, comment. (n.13(C)).

195 USSG §2K2.1, comment. (n.15).

196 USSG §2L1.2, comment. (n.6).

197 *Id.*

198 USSG §2L1.2, comment. (n.7).

199 *Id.*

> 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.[200]

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 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.[201] The application note provides a nonexclusive list of seven factors that the court should consider in determining whether a departure is warranted.[202]

4. Unmentioned Grounds

As the Supreme Court has noted "departures based on grounds not mentioned in the [g]uidelines will be 'highly infrequent.' "[203] The Commission has in the past amended the guidelines to account for previously unmentioned grounds for departure when they arose in caselaw.[204] Unmentioned factors must be analyzed in view of the "structure and theory of both relevant individual guidelines and the [g]uidelines taken as a whole."[205]

5. 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 an exceptional one; and
>
> (2) each such offender characteristic or other circumstance is—
>
> (A) present to a substantial degree; and

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200 *Id.*

201 USSG §2L1.2, comment. (n.8).

202 *Id.*

203 Koon v. United States, 518 U.S. 81, 96 (1996) (quoting USSG Ch.1, Pt.A).

204 *See, e.g.*, *id.* at 107 (discussing the Commission's amendment of USSG §5H1.4 to add physical appearance and physique as discouraged grounds for departure following a Second Circuit case, United States v. Lara, 905 F.2d 599 (2d Cir. 1990), which upheld a downward departure on similar grounds); USSG App. C, amends. 603 (effective Nov. 1, 2000), 604 (effective Nov. 1, 2000) (adding policy statements to account for previously unmentioned factors).

205 *Koon*, 518 U.S. at 96 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

(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.[206]

6. Child Crimes and Sex Offenses

Downward departures under §5K2.0 are limited in cases of child crimes and sex offenses.[207] 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 as a permissible ground of downward departure in these sentencing guidelines and policy statements; (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and (3) should result in a sentence different from that described.[208]

In addition, §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), 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:

(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.[209]

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[206] 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, 1074–75 (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 to a degree "not adequately taken into consideration by the Sentencing Commission").

[207] USSG §5K2.0(b).

[208] USSG §5K2.0(b)(1)–(3).

[209] USSG §5K2.22.

IV. VARIANCES

A. GENERAL PRINCIPLES

Courts may impose a variance outside of the guideline range after consideration of all relevant departure provisions.[210] Courts have held that variances are not subject to the guideline analysis for departures.[211] Although courts are not bound by the guidelines' designation of a factor as prohibited, discouraged or encouraged, nor by precedent on departures, such considerations may be persuasive.[212] A court may grant a departure and a variance in the imposition of a sentence (*e.g.*, a departure for substantial assistance and a variance for the defendant's history and characteristics).[213] In sum, the ability to vary preserves a district court's ultimate ability to impose a sentence that it views is "sufficient, but not greater than necessary"[214] to serve the goals of sentencing in 18 U.S.C. § 3553(a), regardless of the guideline range.[215] However, courts may not vary below the statutory minimum sentence.[216]

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[210] Gall v. United States, 552 U.S. 38, 49 (2007); *see also supra* note 11.

[211] *See, e.g.*, United States v. Williams, 5 F.4th 500, 506–07 (4th Cir.) (rejecting a defendant's procedural reasonableness argument because the district court varied rather than departed), *cert. denied*, 142 S. Ct. 625 (2021); United States v. Rodríguez-Reyes, 925 F.3d 558, 566–68 (1st Cir. 2019) (a variance based on underrepresentation of the defendant's criminal history was not subject to the restrictions on use of arrest records that a departure under §4A1.3 would be); United States v. Rodriguez, 855 F.3d 526, 532 (3d Cir. 2017) (distinguishing departure cases from variance cases in the context of reviewability); 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." (quoting United States v. Floyd, 499 F.3d 308, 311 (3d Cir. 2007)). *But see* United States v. Gardner, 939 F.3d 887, 891–92 (7th Cir. 2019) (explaining that in the Seventh Circuit, departures and variances are not considered distinct because departures are obsolete).

[212] *See, e.g.*, United Stats v. Howard, 28 F.4th 180, 212 (11th Cir. 2022) ("While [a prior case] dealt with a downward departure and this case involves a downward variance, similar principles come into play."), *petition for cert. filed sub nom*. United States v. Bramwell, No. 21-8092 (U.S. June 6, 2022); United States v. Pankow, 884 F.3d 785, 794 (7th Cir. 2018) ("We never have said, however, that the considerations formerly denominated 'departures' or 'offense characteristics' are irrelevant to the sentencing process. Indeed, 18 U.S.C. § 3553(a) contemplates that the district court will give them conscientious consideration."); United States v. Johnson, 619 F.3d 910, 921 (8th Cir. 2010) ("While a district court is not bound by departure precedents when making variance decisions, it may still consider the departure precedents as persuasive authority.").

[213] *See, e.g.*, United States v. Dalton, 477 F.3d 195, 197 (4th Cir. 2007) ("When 'an appropriate basis for departure exists, the district court may depart.' 'If the resulting departure range still does not serve the factors set forth in § 3553(a),' the court may impose a variance sentence." (citation omitted)).

[214] 18 U.S.C. § 3553(a).

[215] *See, e.g.*, United States v. Ortiz-Pérez, 30 F.4th 107, 112 (1st Cir. 2022) ("It is the sentencing court's prerogative—indeed, its duty—to 'draw upon [its] familiarity with a case, weigh the factors enumerated in [section] 3553(a), and custom-tailor an appropriate sentence.'" (alterations in original) (quoting United States v. Flores-Machciote, 706 F.3d 16, 20 (1st Cir. 2013))).

[216] United States v. Williams, 474 F.3d 1130, 1132 (8th Cir. 2007) ("Nothing in the reasoning of *Booker* expands the authority of a district court to sentence below a statutory minimum.").

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 a defendant's history and characteristics, including the defendant's criminal history[217] and various personal characteristics.[218] Some circuits have stated that a defendant's deportability may be considered as a variance factor.[219]

[217] *See, e.g.*, United States v. Donahue, 959 F.3d 864, 867 (8th Cir. 2020) (affirming upward variance where the defendant's criminal history "showed a persistent disrespect for the law" including occasions where he "lied to police, fled from police, assaulted a police officer while resisting arrest, and committed other crimes while on probation"); United States v. Santiago-González, 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).

[218] *See, e.g.*, United States v. Red Cloud, 966 F.3d 886, 888–89 (8th Cir. 2020) (affirming downward variance where the defendant had "significant cognitive impairments that affected his ability to properly care for a newborn child" resulting in the child's death); United States v. Autery, 555 F.3d 864, 874–75 (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. Howe, 543 F.3d 128, 138–40 (3d Cir. 2008) (affirming downward variance based on defendant's 20 years of military service, honorable discharge, and remorse); United States v. Davis, 537 F.3d 611, 616–18 (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 in light of the other considerations under the § 3553(a) factors); 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. McBride, 511 F.3d 1293, 1298 (11th Cir. 2007) (per curiam) (affirming downward variance where the district court found the defendant's history of abuse and abandonment by his parents to be one of the worst it had ever seen).

[219] *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) ("A sentencing court 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) ("[T]he need 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.").

In addition, a defendant's health problems[220] and family circumstances[221] have been grounds for a variance.

Courts also have varied upward or downward from the guideline range to reflect the nature of the offense.[222] Moreover, in cases where a defendant has provided 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.[223] However,

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[220] *See, e.g.*, United States v. McFarlin, 535 F.3d 808, 810–12 (8th Cir. 2008) (variance to a sentence of probation was warranted in part based on the defendant's "poor health" and "need for medical care"); 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.").

[221] *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, 1143, 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, 806, 809 (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). *But see* 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).

[222] *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, 1164–66 (10th Cir. 2014) (affirming upward variance to: account for the multiple deaths caused by the defendant's conduct; reflect the defendant's extreme recklessness by driving with a blood alcohol level almost three times the legal limit; properly represent the defendant's criminal history; and address the defendant's continued post-conviction substance abuse and criminal conduct); 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. Whitehead, 532 F.3d 991, 993 (9th Cir. 2008) (per curiam) (affirming downward variance because the defendant's crime "[di]d not pose the same danger to the community as many other crimes"); 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).

[223] *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) ("Accordingly 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. 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. 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. 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

such variance may not go below the mandatory minimum in the absence of a government motion.[224] Even where a court is authorized to impose a sentence below the statutory minimum based on a defendant's substantial assistance pursuant to 18 U.S.C. § 3553(e), the court may not base the amount below the statutory minimum on any factor other than the defendant's substantial assistance.[225]

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 by, for example, varying upward due to the defendant's criminal history indicating a likelihood of recidivism or varying downward where the defendant could be deterred from future crimes through means other than imprisonment.[226] In addition, courts have varied both upward and downward in order to provide just punishment for the offense or reflect its seriousness, for example, varying upward where the defendant committed a crime in an especially heinous manner or created a greater danger of harm than is typically associated with the offense.[227]

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calculating the appropriate degree of departure . . . . A §5K1.1 motion represents the government's endorsement of a *downward* departure from the applicable [g]uideline 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))).

[224] *See* 18 U.S.C. § 3553(e).

[225] *See* United States v. Williams, 687 F.3d 283, 286 (7th Cir. 2012) (collecting cases in support of this proposition).

[226] *See, e.g.*, United States v. Hall, 965 F.3d 1281, 1296 (11th Cir. 2020) (upward variance due to the defendant's "lengthy and ongoing history of abusing young girls, even while being a registered sex offender"); United States v. Garcia, 946 F.3d 1191, 1212–14 (10th Cir. 2020) (criminal history, including recidivism, warranted upward variance); United States v. Allgire, 946 F.3d 365, 367–68 (7th Cir. 2019) (the defendant's "likelihood of recidivism given his criminal history and previous disregard for supervised release terms" justified upward variance); United States v. Grossman, 513 F.3d 592, 597 (6th Cir. 2008) (downward variance was proper where counseling, treatment, and supervised release reduced the likelihood of recidivism).

[227] *See, e.g.*, United States v. Ross, 29 F.4th 1003, 1009–10 (8th Cir. 2022) (upward variance because the defendant "recklessly fired a gun fourteen times in a residential street, killing a seven-year-old boy, and attempted to evade responsibility by stealing money to abscond"); United States v. Rivera-Morales, 961 F.3d 1, 18–19 (1st Cir. 2020) (upward variance based upon "multiple aspects of the defendant's" sexual abuse of his daughter "that rendered [his crime] especially heinous"); United States v. Cavera, 550 F.3d 180, 185–86 (2d Cir. 2008) (en banc) (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). *But see* United States v. Ortiz-Rodriguez, 789 F.3d 15, 19–20 (1st Cir. 2015) (remanding case where court varied upward because the district court's "contextualizing comments about gun crime in Puerto Rico" did not sufficiently "explain how the enhancing conduct involving firearms falls outside

Additionally, the Supreme Court held in *Dean v. United States* that sentencing courts also may account for the mandatory consecutive term of imprisonment imposed under 18 U.S.C. § 924(c) (possession, brandishing, or discharge of a firearm in relation to a crime of violence or drug trafficking crime) in determining the appropriate sentence on a predicate count.[228] The Court explained that the length of the mandatory consecutive term bore on both the need to protect the public from further crimes of the defendant and the need to afford adequate deterrence.[229]

3. Section 3553(a)(3)

The kinds of sentences available

This factor requires courts "to consider sentences other than imprisonment."[230] For example, the Eighth Circuit has upheld a district court's downward variance to a sentence of ten years' supervised release, one year of home confinement, and other restrictions, based in part upon this factor.[231] 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."[232] Sentencing courts may, however, discuss "opportunities for rehabilitation within prison or the benefits of specific treatment or training programs."[233] Some courts have varied downward to permit access to counseling or treatment programs.[234]

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the heartland of the guideline enhancement that had already been imposed"). The Fifth Circuit has noted that "[t]his sentencing factor overlaps substantially with § 3553(a)(1)'s requirement for judges to consider the 'nature and circumstances of the offense,' so any discussion of § 3553(a)(2)(A) applies equally to § 3553(a)(1) as well." United States v. Khan, 997 F.3d 242, 247 n.3 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1153 (2022).

228 137 S. Ct. 1170, 1176 (2017).

229 *Id.*

230 Gall v. United States, 552 U.S. 38, 59 (2007).

231 United States v. Davis, 20 F.4th 1217, 1221–22 (8th Cir. 2021) (sentence constituted "a substantial punishment" and the Supreme Court has noted § 3553(a)(3) requires sentencing courts to consider non-custodial sentences).

232 564 U.S. 319, 332 (2011). Courts of appeal have held that *Tapia* prohibits district courts from denying motions for a downward variance because of in-prison treatment options. United States v. Thornton, 846 F.3d 1110, 1115 (10th Cir. 2017) (stating that a contrary holding would "belie[] precedent, the relevant federal statute, and common sense"); United States v. Escalante-Reyes, 689 F.3d 415, 424–25 (5th Cir. 2012) (en banc) (although district court varied downwards, it plainly erred where "the circumstances show a probability that the court's mercy was . . . 'tempered' by the desire to have [the defendant] receive anger management training").

233 *Tapia*, 564 U.S. at 334.

234 *See, e.g.*, United States v. Ruff, 535 F.3d 999, 1001, 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.");

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 and any pertinent policy statements issued by the Commission.[235] Courts refer to the guidelines as a benchmark when varying either upward or downward.[236]

5. Section 3553(a)(6)

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

Many courts hold that section 3553(a)(6) looks to "*national* disparities, not differences among co-conspirators."[237] However, in certain cases, the sentencing court may look to codefendant disparity when fashioning a reasonable sentence.[238] 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

cf. United States v. Garza, 706 F.3d 655, 662–63 (5th Cir. 2013) (vacating substantially above-guideline revocation sentence where "rehabilitative needs were the dominant factor in the court's mind").

[235] *See, e.g.*, United States v. Burris, 29 F.4th 1232, 1237 (10th Cir. 2022) ("Although the [g]uidelines range is one of seven factors listed in § 3553(a), it is far more than that. A defendant's [g]uidelines range is 'the starting point and initial benchmark' of sentencing, and 'a district court should begin all sentencing proceedings by correctly calculating the applicable [g]uidelines range.' " (quoting *Gall*, 552 U.S. at 49)).

[236] *See, e.g.*, *Gall*, 552 U.S. at 49–50 ("As a matter of administration and to secure nationwide consistency, the [g]uidelines should be the starting point and the initial benchmark" but courts must "consider all of the § 3553(a) factors" and "make an individualized assessment based on the facts presented"); United States v. Asbury, 27 F.4th 576, 580 (7th Cir. 2022) ("A district court is entitled to disagree with the sentencing philosophy of the guidelines, and so it may reject the advisory range . . . [but] it must explain the final sentence and indicate which of the permissible sentencing considerations persuaded it to do so." (citation omitted)).

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

[238] *See* United States v. Brown, 26 F.4th 48, 69 (1st Cir. 2022) ("Though [§ 3553(a)(6)] is typically concerned with national disparities, we have also considered claims that a sentence is substantively unreasonable because of a disparity relative to a co-defendant's sentence."), *petition for cert. filed*, No. 22-5127 (U.S. July 15, 2022); *see also* United States v. Merrett, 8 F.4th 743, 753 (8th Cir. 2021) (stating that in the Eighth Circuit, relief in comparison to co-conspirators is unusual and requires an extreme disparity between similarly situated coconspirators and a consolidated appeal allowing remand of both parties' sentences).

similarities among other co-conspirators who were not similarly situated."[239] Courts have determined that within-guidelines sentences tend to be reasonable under this metric.[240]

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. For example, the Sixth Circuit has affirmed a downward variance based in part on the district court's determination that full restitution was possible if sentencing was structured to allow for it.[241] However, the Tenth Circuit has held that a district court abused its discretion where it relied on the defendant's salary, and thus ability to pay restitution, "as overriding all other sentencing considerations," and varied downwards to a sentence of probation.[242]

7. Multiple Section 3553(a) Factors

While courts have varied from the guidelines based a single section 3553(a) factor warranting a sentence above or below the guideline range, courts also may vary where a combination of section 3553(a) factors makes the case unusual and so warrants a non-guidelines sentence.[243] For example, the Eighth Circuit has affirmed a downward variance based upon a combination of the defendant's "meritorious military career" and positive pretrial release conduct (under section 3553(a)(1)) in combination with the "substantial

[239] 552 U.S. at 55; *see also* United States v. Reyes-Santiago, 804 F.3d 453, 457, 468–74 (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. Smart, 518 F.3d 800, 804 (10th Cir. 2008) ("[I]t is clear that codefendant disparity is not a per se 'improper' factor, such that its consideration would constitute procedural error.").

[240] *E.g.*, United States v. Jarigese, 999 F.3d 464, 474 (7th Cir. 2021) ("Sentencing disparities are at their ebb when the [g]uidelines are followed, for the ranges are themselves designed to treat similar offenders similarly . . . . A sentence within a properly ascertained range therefore cannot be treated as unreasonable by reference to § 3553(a)(6)." (quoting United States v. Boscarino, 437 F.3d 634, 638 (7th Cir. 2006))); United States v. Naidoo, 995 F.3d 367, 383 (5th Cir. 2021) ("[A]voiding unwarranted general sentencing disparities is not a factor that we grant significant weight where the sentence is within the [g]uidelines range." (quoting United States v. Diaz, 637 F.3d 592, 604 (5th Cir. 2011))).

[241] United States v. Musgrave, 647 F. App'x 529, 536, 539 (6th Cir. 2016); *see also* United States v. Cole, 765 F.3d 884, 886–87 (8th Cir. 2014) (district court did not procedurally err in mentioning that a probationary sentence would allow the defendant to make restitution; the district court also did not abuse its discretion in the overall weighing of the § 3553(a) factors).

[242] United States v. Sample, 901 F.3d 1196, 1199–1200 (10th Cir. 2018).

[243] *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").

punishment" the district court imposed through "ten years of supervised release, one year of home confinement, and other restrictions" (under section 3553(a)(3)).[244]

C. VARIANCES BASED ON POLICY DISAGREEMENT WITH THE GUIDELINES

Courts also have discretion to vary based on policy disagreements with the guidelines. The Supreme Court first recognized district court's ability to vary due to a disagreement with the guidelines in *Kimbrough v. United States*.[245] The Court explained that its prior decisions rendered the guidelines advisory but "preserved a key role for the Sentencing Commission": to provide a "recommendation of a sentencing range [which] will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives'" based on empirical data and national experience.[246] Nonetheless, a court may vary "based solely on the judge's view that the [g]uidelines range 'fails to properly reflect § 3553(a) considerations' even in a mine-run case," although "closer review may be in order."[247]

Kimbrough concerned the vast difference between the quantities of crack cocaine and powder cocaine that triggered the same sentencing result.[248] The Court explained that this disparity in the guidelines did "not exemplify the Commission's exercise of its characteristic institutional role" and indeed ran against the Commission's "report[ing] that the crack/powder disparity produces disproportionately harsh sanctions" so it was not an abuse of discretion for the district court to determine that even in a mine-run case, the guideline range was greater than necessary to achieve the purposes of sentencing.[249]

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244 United States v. Davis, 20 F.4th 1217, 1221 (8th Cir. 2022).

245 552 U.S. 85, 110 (2007).

246 *Id.* at 108–09 (quoting Rita v. United States, 551 U.S. 338, 350 (2007)).

247 *Id.* at 109 (quoting *Rita*, 551 U.S. at 351).

248 *Id.* at 91. Congress subsequently 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. Congress then 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. *Id.*

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).

249 *Kimbrough*, 552 U.S. at 109–10. The Court reaffirmed its holding in *Spears v. United States*, stating that "with respect to the crack cocaine [g]uidelines, a categorical disagreement with and variance from the [g]uidelines is not suspect." 555 U.S. 261, 264 (2009) (per curiam). The Court explained that *Kimbrough* was "a recognition of district courts' authority to vary from the crack cocaine guidelines based on *policy*

Courts of appeal have expanded the rationale of *Kimbrough* to include variances based on policy disagreements with the guidelines applicable to child pornography,[250] career offender[251] and offender characteristics.[252] Circuits have in some cases affirmed variances from the guideline applicable to firearms based on a policy view that the guideline fails to take into account greater harms to certain localities, but there are also cases holding that such variances are improper.[253]

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disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." *Id.* And the Court clarified "that district courts are entitled to reject and vary categorically from the crack cocaine [g]uidelines based on a policy disagreement with those [g]uidelines." *Id.* at 265–66. The Court also stated that, "[a]s a logical matter, . . . rejection of the 100:1 ratio . . . necessarily implies adoption of [a replacement] ratio to govern the mine-run case." *Id*. at 265.

[250] *See, e.g.*, United States v. Henderson, 649 F.3d 955, 963 (9th Cir. 2011) (holding "that, similar to the crack cocaine [g]uidelines, district courts may vary from the child pornography [g]uidelines, §2G2.2, based on policy disagreement with them"); 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. Smith, 959 F.3d 701, 703 (6th Cir. 2020) (although courts may disagree with §2G2.2 on policy grounds, "the fact of Congress's role in amending a guideline is not itself a valid reason to disagree with the guideline" (citation omitted)); United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) ("The [child pornography g]uidelines involved in [this] case, however, do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.").

[251] *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 [g]uideline, 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 variance with a [g]uideline, but every judge is at liberty to do so."); United States v. Boardman, 528 F.3d 86, 87–88 (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); 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). *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.").

[252] Pepper v. United States, 562 U.S. 476, 504 (2011) (remanding for resentencing because the court of appeals erred in reversing a downward variance predicated on the defendant's extensive post-sentencing rehabilitation and, thus, "categorically precluding" the district court from exercising its discretion based upon policy disagreements); United States v. Simmons, 568 F.3d 564, 569–70 (5th Cir. 2009) (remanding for reconsideration where court erroneously believed that it could not disagree with policy statement regarding age).

[253] *Compare* 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*'" (alteration in original)) *and* 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 "[g]uidelines failed to take into account the need to punish more severely those who illegally transport guns

Even where variances on the basis of policy disagreements are authorized, courts have held that such a variance "is permissible only if a District Court provides 'sufficiently compelling' reasons to justify it."[254] Although district courts have the authority to vary based on policy disagreements, they are not required to do so.[255] 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."[256]

into areas like New York City"), *with* United States v. Ortiz-Rodriguez, 789 F.3d 15, 19–20 (1st Cir. 2015) (remanding case where court varied upward because the district court's "contextualizing comments about gun crime in Puerto Rico" did not sufficiently "explain how the enhancing conduct involving firearms falls outside the heartland of the guideline enhancement that had already been imposed"). The First Circuit has granted a petition to hear the issue en banc. United States v. Flores-González, No. 19-2204, 2022 WL 3583654 (1st Cir. Aug. 22, 2022).

[254] 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 [g]uidelines, . . . making the sentence procedurally unreasonable" given its failure to provide sufficient reasons for its disagreement (citation omitted)); *see also* United States v. Engle, 592 F.3d 495, 501–04 (4th Cir. 2010) (vacating sentence that included 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).

[255] *See* United States v. Fry, 851 F.3d 1329, 1333–34 (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 [g]uidelines range where that court does not, in fact, have disagreement with the [g]uideline at issue.").

[256] 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").