

DEPARTURES



**Prepared by the
Office of General Counsel
U.S. Sentencing Commission**

April 2003

DISCLAIMER: Information provided by the Commission's Legal Staff is offered to assist in understanding and applying the sentencing guidelines. The information does not necessarily represent the official position of the Commission, should not be considered definitive, and is not binding upon the Commission, the court, or the parties in any case. **ACKNOWLEDGEMENT:** The Commission credits Carmen D. Hernandez for use of her *Downward Departures After Koon – A Fact-Based Inquiry* and Michael R. Levine for use of his *Eight Easy Departures* in preparing this outline.

Table of Contents

	<u>Page</u>
Introduction	1
I. <i>Koon v. United States</i>	1
II. Departure Analysis Roadmap	2
III. Statutory Authority for Departures	4
A. 18 U.S.C. § 3553	4
B. 18 U.S.C. § 3742	5
IV. Overview of Guideline Provisions	6
A. Ch. 1, Pt A. Intro. Comment. 4(b) – “Departures”	6
B. USSG §5K2.0 – Other Grounds for Departures	8
V. Post- <i>Koon</i> Appellate Court (and Some District Court) Departure Decisions	10
A. Forbidden Factors	10
§5H1.4 (Drug or Alcohol Dependence or Abuse) (Policy Statement)	10
§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status) (Policy Statement)	10
§5H1.12 (Lack of Guidance as Youth and Similar Circumstances) (Policy Statement)	10
§5K2.12 (Economic Hardship) (Policy Statement)	11
§5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement)	11
B. Encouraged Factors Identified in Chapter Five	11
§5K2.1 (Death) (Policy Statement)	11
§5K2.2 (Physical Injury) (Policy Statement)	12
§5K2.3 (Extreme Psychological Injury) (Policy Statement)	13
§5K2.4 (Abduction or Unlawful Restraint) (Policy Statement)	14
§5K2.7 (Disruption of a Government Function) (Policy Statement)	14
§5K2.8 (Extreme Conduct) (Policy Statement)	14
§5K2.9 (Criminal Purpose) (Policy Statement)	15
§5K2.10 (Victim Misconduct) (Policy Statement)	16
§5K2.11 (Lesser Harms) (Policy Statement)	16
§5K2.12 (Coercion and Duress) (Policy Statement)	17
§5K2.13 (Diminished Capacity) (Policy Statement)	20
§5K2.14 (Public Welfare) (Policy Statement)	24
§5K2.16 (Voluntary Disclosure of Offense) (Policy Statement)	24
§5K2.20 (Aberrant Behavior) (Policy Statement)	25

	<u>Page</u>
Pre-§5K2.20 Case Law	25
Totality of Circumstances Standard	25
§5K2.21 (Dismissed and Uncharged Conduct) (Policy Statement)	28
C. Encouraged Factors Identified in Chapters Two and Three	28
§2A1.1 (First Degree Murder), comment. (n.1)	28
§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), comment. (n.3)	29
§2A2.4 (Obstructing or Impeding Officers), comment. (n.3)	29
§2A3.2 (Criminal Sexual Abuse of a Minor; Attempt to Commit Such Acts), comment. (n.7)	29
§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), comment. (backg'd)	29
§2A5.3 (Crimes Aboard Aircraft), comment. (n.2)	29
§2A6.1 (Threatening or Harassing Communications), comment. (n.3(A))	29
§2A6.2 (Stalking or Domestic Violence), comment. (n.5)	30
§2B1.1, App. Note 15 (B) (eff. Nov. 1, 2001)	30
§2B1.5 (Cultural Heritage), comment. (n.9)	31
§2B2.1 (Burglary), comment. (backg'd)	31
§2B3.1 (Robbery), comment. (n.5)	31
§2B3.2 (Extortion), comment. (nn.7-8)	31
§2B5.3 (Criminal Infringement of Copyright or Trademark), comment. (n.5)	31
§2C1.1 (Bribery; Extortion under Color of Official Right), comment. (n.5)	31
§2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), comment. (n.5)	32
§2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking in Controlled Substances), comment.	32
§2D1.2 (Simple Possession), comment. (n.1)	33
§2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), comment. (n.2)	33
§2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy), comment. (n.1)	33
§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), comment. (n.4(C))	33
§2D1.12 (Unlawful Possession, Manufacturing, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy), comment. (n.1)	34
§2D2.3 (Operating Common Carrier Under the Influence), comment. (backg'd)	34

§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), comment. (n.4)	34
§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), comment. (n.2)	34
§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), comment. (n.6)	34
§2G2.2 (Trafficking in, Receiving, Possessing Material Involving the Sexual Exploitation of a Minor), comment. (n.2)	34
§2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), comment. (n.2)	34
§2H2.1 (Obstructing an Election or Registration), comment. (n.1)	35
§2H4.1 (Peonage, Involuntary Servitude, and Slave Trade), comment. (n.3)	35
§2J1.2 (Obstruction of Justice), comment. (n.4)	35
§2J1.3 (Perjury or Subordination of Perjury; Bribery of Witness), comment. (n.4)	35
§2J1.6 (Failure to Appear), comment. (n.4)	35
§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment (n.10)	35
§2K1.4 (Arson; Property Damage by Use of Explosives), comment. (n.3)	35
§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.18)	35
§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), comment. (n.2(B))	36
§2K2.5 (Possession of a Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), comment. (n.4)	36
§2L1.1 (Alien Smuggling), comment. (n.3)	36
§2L1.2, comment. (n.5)	36
Pre-Amendment Case Law	36
§2L2.1 (Trafficking in Immigration Documents; False Statements; Fraudulent Marriage), comment. (n.5)	37
§2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), comment. (n.2)	38
§2M4.1 (Failure to Register/Evasion of Military Service), comment. (n.1)	38
§2M5.1 (Evasion of Export Controls), comment. (n.1)	38
§2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), comment. (n.1)	38

§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations) comment. (n.2)	38
§2N1.1 (Tampering with Consumer Products), comment. (n.1)	38
§2N1.2 (Threatening to Tamper with Consumer Products), comment. (n.1)	39
§2N1.3 (Tampering with Intent to Injure Business), comment. (n.1)	39
§2N2.1 (Statutory and Regulatory Violations Relating to Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), comment. (n.1)	39
§2P1.1 (Escape), comment. (n.4)	39
§2P1.3 (Engaging in, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention), comment. (n.1)	39
§2Q1.1 (Knowing Endangerment From Mishandling Hazardous or Toxic Substances), comment. (n.1)	39
§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), comment. (n.4)	39
§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), comment. (n.3)	39
§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), comment. (n.5)	40
§2T1.8 (Offenses Relating to Withholding Statements), comment. (n.1)	40
§2T2.1 (Non-Payment of Taxes), comment. (n.2)	40
§2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property), comment. (n.2)	40
§3A1.1 (Hate Crime Motivation or Vulnerable Victim), comment. (n.4)	40
§3A1.2 (Official Victim), comment. (n.2)	40
§3A1.3 (Restraint of Victim), comment. (n.3)	41
§3A1.4 (Terrorism), comment. (n.4)	41
§3B1.1 (Aggravating Role), comment. (n.2)	41
§3B1.2 (Mitigating Role)	41
§3B1.4 (Using a Minor to Commit a Crime), comment. (n.3)	42
§3C1.2 (Reckless Endangerment During Flight), comment. (n.2)	42
§3D1.4 (Determining Combined Offense Level), comment. (backg'd)	42
D. Discouraged Factors	42
§5H1.1 (Age) (Policy Statement)	43
§5H1.2 (Education and Vocational Skills) (Policy Statement)	44
§5H1.3 (Mental and Emotional Conditions) (Policy Statement)	44
§5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse) (Policy Statement)	45
§5H1.5 (Employment Record) (Policy Statement)	48
§5H1.6 (Family Ties and Responsibilities and Community Ties)	

	(Policy Statement)	48
	§5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) (Policy Statement)	52
	Exceptional Civic or Charitable Involvement	52
	Extraordinary Academic Success	53
	Exceptional Military Service	54
E.	Unmentioned and Unaccounted Factors	54
	Vulnerability to Victimization in Prison	55
	Successive Prosecutions	56
	Disparate Practices of Prosecutors	56
	Time Served on Preexisting Sentence	57
	Class of Offenses Falls Outside the Heartland	57
	Alienage (and Consenting to Deportation)	58
	Status of the Sentencing Commission	60
	Offenses Charged in Indictment Without Jury Verdict Being Reached	61
	Substantial, Voluntary Restitution	61
	Rehabilitation	62
	Multiple Victims of Threatening Communications	65
	Cultural Assimilation	65
	Two Murder-for-Hire Conspiracies Against One Victim	65
	Possession of Child Pornography without Additional Wrongful Conduct	65
	Cultural Differences	66
	Victim Participation in Prosecution	67
	Application of Cross-Reference Provision	67
	Acquitted Conduct or Uncharged Relevant Conduct	67
	Conditions of Pretrial Confinement	68
	Crack Cocaine Disparity	69
	Disparity Among Defendants' Sentences	69
	Federal/State Sentencing Disparity	70
	Due Process	71
	Extraordinary Acceptance of Responsibility	71
	Fraud, Money Laundering, and Similar Offenses	72
	Defendant Did Not Personally Profit	72
	Uncertainty of Loss Determination	72
	Outside The Heartland	73
	Money Laundering Tangential to Gambling Offense	74
	Bribery Underlying RICO Prosecution	74
	Government Conduct	75
	Outside National Security Heartland	76

	<u>Page</u>
Tax-Evasion Cases	76
Atypical – Defendant’s Intent To Pay	76
Atypical – IRS Voluntary Disclosure Negotiations Broke Down	77
Entrapment	77
Adverse Civil Judgment Based on Same Conduct	78
Defendant’s Mistake of Fact Regarding Type of Drugs	79
Exemplary Behavior Pending Appeals	79
Inadequate Additional Punishment	79
Brandishing	79
Combination of Factors	79
 VI. Criminal History Departures (Chapter Four)	 84
Methodology for Departing	85
Criminal History Category Did Not Adequately Reflect Seriousness of Offense	 86
Armed Career Criminal Status Over-represents Seriousness of Criminal History	 86
No Downward Departure from Criminal History I	87
Uncounted Foreign Convictions	87
Commission of Additional Offenses While Previously on Supervised Release	 87
Excessive Number of Criminal History Points	87
Relation to Safety Valve	87
Consolidation of Related Prior Sentences	88
Remote Convictions	88
Juvenile Convictions	88
Civil Misconduct	88
Relevant Conduct	88
Courts May Depart Down from Career Offender Designation	89
Defendant’s Criminal History Overstates His Propensity To Commit Crimes	89
 VII. Substantial Assistance Departures (§5K1.1) (Policy Statement)	 92
Substantial Assistance in the Absence of Government Motion	92
Court May Review Government Conduct for Unconstitutional Motivation	93
Hearing To Determine Government’s Bad Faith or Irrational Motive	94
Hearing Where Parties Disagree As to the Terms of Plea Agreement	95
District Court Must Exercise Independent Discretion	95
Cooperation with State or Local Authorities	95
Cooperation that Facilitates the Administration of Justice	95
Counsel’s Conflict of Interest Obstructed Opportunity to Provide Assistance	96

	<u>Page</u>
Personal and Truthful Efforts Warranted Departure Where No Assistance Because Last to Cooperate and to Avoid Unwarranted Disparity	96
No Requirement that Government Recommend Specific Sentence	96
No Functional Equivalent of Motion	96
VIII. The Extent of Departures	97
IX. Notice Requirements	99
A. The Sentencing Reform Act’s Procedural Amendments	99
B. <i>Burns v. United States</i>	99
Timing of Rule 35 Motion	101

Departures Overview and Case Law Summary

Introduction

Since the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), district courts have had greater flexibility in determining the appropriate sentencing in cases that differ from the “heartland” of cases involving federal crimes.

Statutory provisions grant courts the authority to depart in cases involving aggravating or mitigating factors not adequately considered by the Sentencing Commission. The Sentencing Commission, in turn, has forbidden, encouraged, or discouraged departures based on certain factors. Other factors are unmentioned in the guidelines. Most departure decisions have addressed factors unmentioned by the Commission.

I. *Koon v. United States*

In *Koon v. United States*, the Supreme Court examined the issue of the standard of review to be applied by appellate courts in assessing district court departure decisions. The Court unanimously joined in Justice Kennedy’s opinion that an appellate court should not review a district court’s departure decision *de novo*, but instead should ask whether the sentencing court had abused its discretion in granting the departure.

In reaching its decision, the Court emphasized the role the Sentencing Commission has in monitoring district court decisions and refining the guidelines to specify precisely when departures are permitted. The Court noted that before a departure is authorized, certain aspects of the case must be found unusual enough for it to fall outside the heartland of typical cases. The Court observed that sentencing courts are provided “considerable guidance” as to which factors are likely or not likely to make a case atypical because the Commission has identified certain factors as encouraged or discouraged grounds for departure. *Id.* at 94. The Court explained that “encouraged factors” are those that “the Commission has not been able to take into account fully in formulating the guidelines.” *Id.* (quoting §5K2.0). Discouraged factors are those “not ordinarily relevant” to a departure decision, and should only be relied upon as grounds for departure “in exceptional cases.” *Id.* at 95 (quoting USSG intro. comment.). Certain factors, including race, sex, national origin, and religion, have been identified by the Commission as ones that courts may not use as grounds for departure. *See, e.g.*, §5H1.10. These are commonly referred to as forbidden factors.

Koon explains that if the identified factor is a forbidden basis of departure, the court may not depart. If it is an encouraged factor, the court may depart if the applicable guideline has not taken it into account. If the factor is a discouraged factor, or an encouraged factor already addressed by the applicable guideline, the court may only depart if the factor is present “to an exceptional degree or in some way makes the case different from the ordinary case where the factor is present.” *Id.* at 95-96.

If the identified factor is not mentioned, the sentencing court must “consider[] the ‘structure and theory of both relevant individual guidelines and the guidelines taken as a whole’” and “decide whether it is sufficient to take the case out of the guideline’s heartland.” *Id.* at 96 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). “The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the guidelines will be “highly infrequent.” 518 U.S. at 96 (quoting USSG, intro. comment.) The *Koon* Court clarified that in determining whether a case falls outside the heartland, a sentencing court “must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.” *Id.* at 98. The determinations made by the court are “matters determined in large part by comparison with the facts of other guidelines cases.” *Id.*

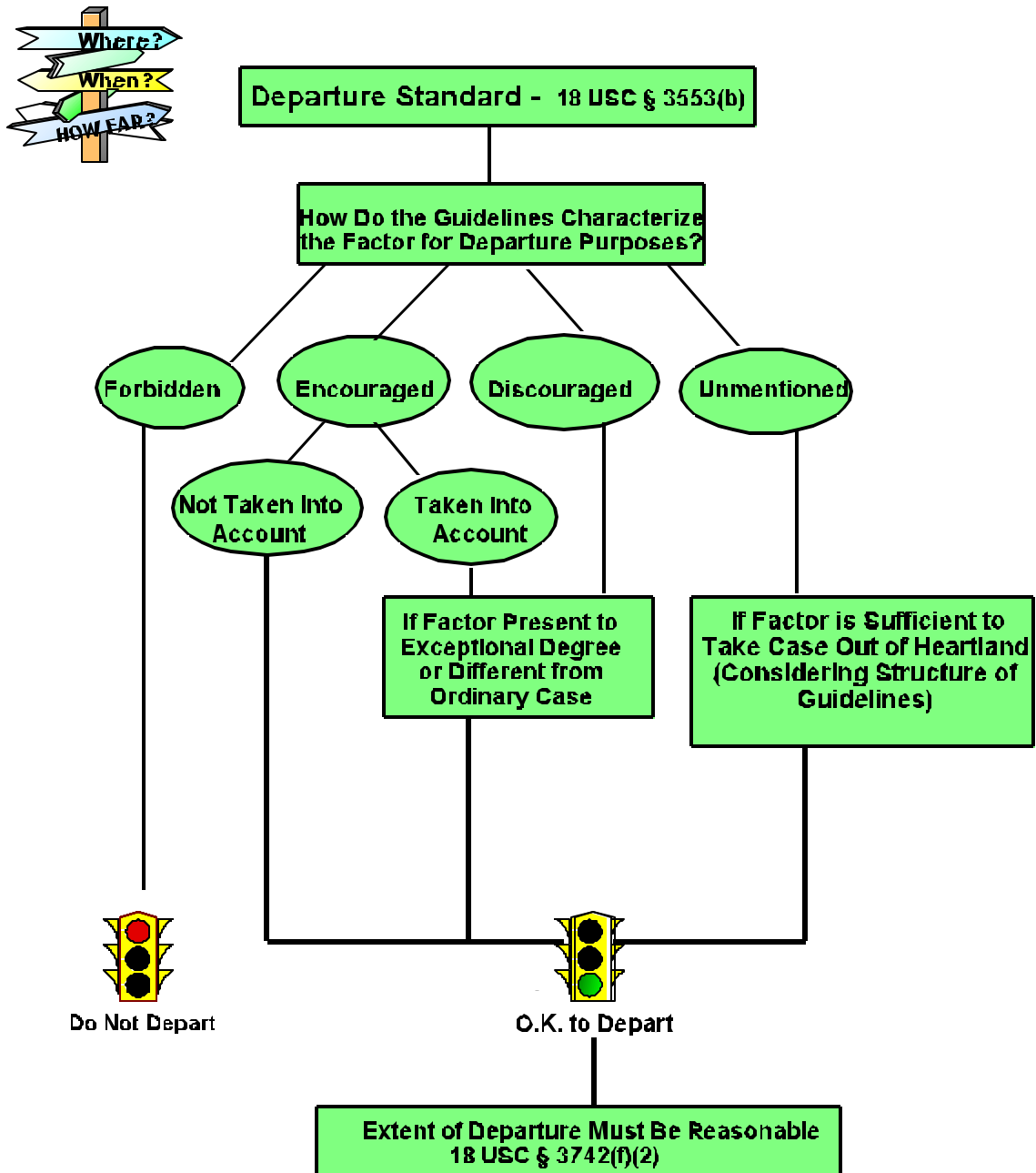
As noted above, departure determinations are reviewed using the abuse of discretion standard. In adopting this standard, the *Koon* Court emphasized that district courts have an “institutional advantage” over appellate courts in making the factual determinations necessary to finding whether a particular case is deserving of departure. *Id.* The Court recognized that certain questions, such as “whether a factor is a permissible basis for departure under any circumstances,” are questions of law, but noted that an error of law is, by definition, an abuse of discretion. *Id.* at 100.

Ultimately, a divided Court held that the district court in *Koon* had not abused its discretion in downwardly departing based on: (1) the victim’s misconduct in provoking the defendants’ offenses; (2) the defendants’ susceptibility to abuse in prison; and (3) the successive prosecutions. The Court found that the district court had abused its discretion, however, in granting downward departures based on (1) the defendants’ low likelihood of recidivism and (2) the defendants’ collateral employment consequences because those factors had been adequately considered by the Commission.

II. Departure Analysis Roadmap

The following flow chart was designed as a user friendly roadmap that outlines, step-by-step, the departure analysis set forth in the *Koon* case: 1) identify the departure factor; 2) determine how the factor is characterized under the guidelines—bidden, encouraged, discouraged, or unmentioned, and 3) determine whether departure is permissible and, if so, the extent of the departure.

DEPARTURE ANALYSIS ROADMAP



ADDITIONAL KEY POINTS

- Court must specify reasons for departure and extent of departure
- If choosing not to depart, court should make clear its decision is an informed, discretionary one

III. Statutory Authority for Departures

A. 18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case, it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds "there exists 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 should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0.

18 U.S.C. § 3553. Imposition of a sentence

(a) **Factors to be considered in imposing a sentence.**—The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]. . .

- (2) (A) . . . just punishment for the offense;
- (B) . . . adequate deterrence . . . ;
- (C) . . . protect the public . . . ; and
- (D) . . . provide the defendant with needed educational or vocational training, medical care, or other correctional treatment . . .

(b) **Application of guidelines in imposing a sentence.**—The Court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists 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 should result in a sentence different from that described. . . .

. . .

(e) **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) **Limitation on applicability of statutory minimums in certain cases.**—[The Safety Valve] Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841,

844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

B. 18 U.S.C. § 3742

Before the guidelines system was instituted, a federal criminal sentence within the statutory limits generally was not reviewable on appeal.¹ The Sentencing Reform Act of 1984 altered this scheme to allow limited appellate jurisdiction to review federal sentences. Thus, either party can appeal an incorrect application of the sentencing guidelines, 18 U.S.C. § 3742(a)(2) and (b)(2); the defendant may appeal an upward departure, 18 U.S.C. § 3742(a)(3); and the government may appeal a downward departure, 18 U.S.C. § 3742(b)(3). All circuits have repeatedly held that there is no appellate jurisdiction to review a district court's discretionary refusal to depart downward. However,

¹*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

there is appellate jurisdiction if a district court erroneously believed that it did not have the authority to depart downward. *See* 18 U.S.C. § 3742(a)(2) (defendant may appeal incorrect application of the guidelines). The Court of Appeals will review a sentencing court's departure decision for abuse of discretion. *Koon v. United States*, 518 U.S. at 91.

IV. Overview of Guideline Provisions

Section 5K2.0 of the sentencing guidelines tracks the departure authority given to district courts in 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline-specified sentence only when 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 should result in a sentence different from that described." Once this standard is met, the district courts have discretionary power to determine whether, and to what extent, departures are warranted.

The Sentencing Commission has specified certain factors, including race, sex, national origin, and religion, as ones that courts may not use as grounds for departure. *See, e.g.*, §5H1.10. These are commonly referred to as forbidden factors. Certain other factors, while not forbidden, are discouraged bases for departure. Discouraged factors are those "not ordinarily relevant" to a departure decision, *see* USSG intro. comment., and should only be relied upon as grounds for departure "in exceptional cases." *Id.* Certain discouraged factors are detailed in Chapter Five, Part H. The Commission has also identified "encouraged factors" for departure. These are those that "the Commission has not been able to take into account fully in formulating the guidelines." §5K2.0. A court may depart on the basis of an encouraged factor if the applicable guideline has not taken it into account. If the applicable guideline has taken the encouraged factor into account, a departure may still be warranted if the factor is present "to an exceptional degree or in some way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96. A non-exhaustive list of encouraged factors may be found in Chapter Five, Part K. In addition, the commentary to specific guidelines indicates certain factors that are encouraged bases of departure. Finally if a potential ground for departure is not mentioned in the guidelines, the sentencing court must "consider[] the 'structure and theory of both relevant individual guidelines and the guidelines taken as a whole'" and "decide whether it is sufficient to take the case out of the guideline's heartland." *Id.* (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

A. Ch. 1, Pt A. Intro. Comment. 4(b) – "Departures" provides:

The sentencing statute permits a court to depart from a guideline-specified sentence only when 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 should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider

whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in preguidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in preguidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five,

Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

B. USSG §5K2.0 – Other Grounds for Departures provides:

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists 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 should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines.

Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines.

Commentary

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United States, 518 U.S. 81 (1996). Furthermore, "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a

preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.

V. **Post-Koon Appellate Court (and Some District Court) Departure Decisions**

Although *Koon* established that the “abuse of discretion” standard was to be used in reviewing district court departure decisions, certain assessments remain matters of law that may essentially be reviewed *de novo*. See *Koon*, 518 U.S. at 100 (recognizing that certain questions, such as “whether a factor is a permissible basis for departure under any circumstances,” are questions of law, but noting that an error of law is, by definition, an abuse of discretion). Set forth below are summaries of selected post-*Koon* cases from the federal appellate courts, organized according to the nature of the factor upon which departure was based or sought to be based.

A. **Forbidden Factors**

The Commission has identified a number of departure factors that courts cannot take into account as grounds for departure: race, sex, national origin, creed, religion, and socio-economic status, see §5H1.10; lack of guidance as a youth and similar circumstances indicative of disadvantaged upbringing, see §5H1.12; drug or alcohol dependence or abuse, see §5H1.4 (third sentence); certain forms of coercion and duress, see §5K2.12 (last sentence); and post-sentencing rehabilitative efforts, see §5K2.19.

- **§5H1.4 (Drug or Alcohol Dependence or Abuse) (Policy Statement).** Compare *United States v. Carvell*, 74 F.3d 8 (1st Cir. 1996). Grants departure under “lesser harm” policy statement because defendant grew marijuana to reduce his suicidal depression; court explained that the suicidal ideations were not the byproduct of drug dependence but vice versa.
- **§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status) (Policy Statement).** These factors are not relevant in the determination of a sentence.
- **§5H1.12 (Lack of Guidance as Youth and Similar Circumstances) (Policy Statement).**

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997), *cert. denied*, 522 U.S. 1135 (1998). “At the time of [defendant’s] offense, youthful lack of guidance was a valid basis for a downward departure. Such a departure recognizes that lack of adult guidance “may have led a convicted defendant to criminality.” While the Sentencing Commission later decided that youthful lack of guidance was not relevant to sentencing decisions, USSG §5H1.2 (1992), this departure was available to [the defendant] and continues to do so.” (Internal citations omitted).

Compare *United States v. Ayers*, 971 F. Supp. 1197 (N.D. Ill. 1997). Departure granted based on exceptionally cruel childhood abuse; relentless physical, sexual and psychological abuse inflicted over extended period of years was sadistic torture of an extraordinary nature; rejected government’s argument that the departure was precluded by §5H1.12.

- **§5K2.12 (Economic Hardship) (Policy Statement).** The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in sentence.
- **§5K2.19 (Post-Sentencing Rehabilitative Efforts) (Policy Statement).** Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

Commentary

Background: The Commission has determined that post-sentencing rehabilitative measures should not provide a basis for downward departure when resentencing a defendant initially sentenced to a term of imprisonment because such a departure would (1) be inconsistent with the policies established by Congress under 18 U.S.C. §§ 3624(b) and other statutory provisions for reducing the time to be served by an imprisoned person; and (2) inequitably benefit only those who gain the opportunity to be resented de novo.

B. Encouraged Factors Identified in Chapter Five

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds “that there exists 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 should result in a sentence different from that described.” Chapter Five, Part K, lists factors that the Commission has identified as encouraged factors that may constitute grounds for departure. This list is non-exhaustive.

- **§5K2.1 (Death) (Policy Statement)**

Death of Partially Responsible Participant. *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998). The Fourth Circuit vacated and remanded for further findings where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant’s conviction for the involuntary manslaughter. Because reckless driving was taken into account by the guideline under which the defendant was sentenced, a departure for endangering public safety and welfare would only be appropriate in exceptional cases. The court determined that

although an upward departure is permitted under §5K2.1 even when the decedent was a participant in the activity that led to his death (where the additional death was not accounted for in the applicable guideline), the district court should have made findings to support the level of departure, including findings on whether the defendant's recklessness was adequate to establish malice.

Death Resulting from Relevant Conduct. *United States v. Purchess*, 107 F.3d 1261 (7th Cir. 1997). The court affirmed an upward departure based on the death of a drug courier making a trip that was related to, but not part of, the conspiracy offense of conviction. Under §5K2.1, an upward departure may be based on a death resulting from relevant conduct as opposed to conduct comprising the offense of conviction.

Death of Kidnapping Victim. *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998). The Fourth Circuit upheld an upward departure to life imprisonment based on the kidnapping victim's death. In this case, the victim was kidnapped for the purpose of sexual assault and only later did the defendant form the intent to murder her. Because the kidnapping guideline did

not take into account these facts, an upward departure to life imprisonment based on the kidnapping victim's death was not an abuse of discretion.

- **§5K2.2 (Physical Injury) (Policy Statement)**

United States v. Evans, 285 F.3d 664 (8th Cir.), cert. denied, 123 S. Ct. 221 (2002). The Eighth Circuit affirmed a 135-month upward departure pursuant to §5K2.2 based in part on the significant physical injuries suffered by prostitute victims of the defendant's violent acts. Although the defendant argued on appeal that the use of force against his victims was taken into account by the criminal sexual abuse guideline, §2A1.3, under which he was sentenced, the court noted that the issue was whether or not the injuries were present to an exceptional degree. Among the significant physical injuries suffered by the victims were a broken wrist, dislocated shoulder, head trauma, temporary hearing loss, a broken rib and black eyes. The district court did not abuse its discretion in upwardly departing based in part on these injuries.

United States v. Philiposian, 267 F.3d 214 (3d Cir. 2001). The Third Circuit affirmed a 2-level upward departure granted by the district court under §5K2.2 to account for the extreme physical pain suffered by the victim who was shot by the defendant using a high-powered assault rifle. Although the victim's injuries were somewhat accounted for by the 6-level enhancement in §2A2.2(b)(3)(C), the district court had not abused its discretion in finding that the permanent injuries suffered by the victim, which were accompanied by serious and unrelenting pain, were above and beyond the typical case for which the standard 6-level increase would apply.

United States v. Levy, 250 F.3d 1015 (6th Cir.), cert. denied, 534 U.S. 941 (2001). The appellate court affirmed the district court's finding that no double counting existed in departing upward based on the defendant's extreme conduct and the extent of the victim's injury. The defendant pled guilty to solicitation to commit a crime of violence in violation of 18 U.S.C. § 373, retaliating against a witness in violation of 18 U.S.C. § 1513, and being an accessory after the fact in violation of 18 U.S.C. § 3. On appeal, the defendant argued that upward departures pursuant to §§5K2.2 (Physical Injury) and 5K2.8 (Extreme Conduct) amounted to double counting because those provisions punished conduct taken into account in §2J1.2(b)(1), and because §§5K2.2 and 5K2.8 overlap each other in the same manner. The Sixth Circuit disagreed on both accounts. Section 2J1.2(b)(1) was applied because the offense caused bodily injury. However, the guideline does not require "serious" injury. Section 5K2.2 requires consideration of the extent of injury. In addition, the court held that no double counting existed between §2J1.2(b)(1) and §§5K2.2 and 5K2.8 because §5K2.2 focused solely on the extent of the physical injury, and §5K2.8 focused on the depravity of the defendant's conduct and the effects on the victim.

- **§5K2.3 (Extreme Psychological Injury) (Policy Statement)**

United States v. Helbling, 209 F.3d 226 (**3d Cir.** 2000), *cert. denied*, 531 U.S. 1100 (2001). The Third Circuit held that the district court did not abuse its discretion in departing upward 2 levels for emotional and psychological injuries caused to victims in a fraud case involving embezzlement from a pension fund. The victims incurred the humiliation of being forced to seek work at an advanced age and to rely on help from family members, the trauma of losing one's savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from tax authorities.

United States v. Sawyer, 180 F.3d 1319 (**11th Cir.** 1999), *cert. denied*, 528 U.S. 1126 (2000). The Eleventh Circuit upheld a 2-level upward departure for extreme psychological injury to a bank teller who was employed at the bank the defendant robbed. The court noted that a departure for extreme psychological injury is warranted if it is "much more serious than that normally resulting from commission of the offense." More than two and one-half years after the robbery, the victim still did not feel safe at work, was especially cautious entering and leaving the bank, and had restricted her daily activities. Upon extensive review of the record, the court found that the district court had not abused its discretion in departing 2 levels upward for extreme psychological injury.

United States v. Jacobs, 167 F.3d 792 (**3d Cir.** 1999). The appellate court vacated and remanded a 5-level upward departure under §5K2.3 for "extreme psychological injury" because the district court had not found that the victim's psychological injury was "much more serious than that normally resulting from the commission" of the crime of aggravated assault. The district court focused on a portion of the guideline that explains the types of situations that may give rise to the level of psychological injury without making the preliminary finding that the injury was beyond the heartland of injuries from the same offense.

- **§5K2.4 (Abduction or Unlawful Restraint) (Policy Statement)**

United States v. Footman, 215 F.3d 145 (1st Cir. 2000). The First Circuit upheld an upward departure based on the abduction of two minors in front of fellow prostitutes on two separate occasions during a conspiracy to transport women across state lines for the purpose of prostitution. The record supported the conclusion that defendant carried out these attacks in front of other prostitutes in order to send a message. Since the abductions occurred during the time period of the conspiracy and clearly “facilitated” the commission of the conspiracy, an upward departure under §5K2.4 was warranted.

- **§5K2.7 (Disruption of a Government Function) (Policy Statement)**

United States v. Regueiro, 240 F.3d 1321 (11th Cir. 2001). The court affirmed an upward departure based on a disruption of governmental function due to the defendant’s fraudulent Medicare scheme. The defendant was sentenced under the money laundering guideline, which did not take into account disruption of a governmental program, and the district court found that this aspect removed the case from the “heartland.” The court noted that each time one of the more than 100 nursing groups that the defendant helped organize and establish fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide medical care to eligible Medicare patients. Through the fraudulent billing and the loss of over \$15 million, those monies were no longer available for the medical care of the persons in this program.

United States v. Baird, 109 F.3d 856 (3d Cir.), cert. denied, 522 U.S. 898 (1997), rev’d on other grounds, 218 F.3d 221 (2000). The Third Circuit affirmed an upward departure based on consideration of additional counts dismissed pursuant to a plea agreement. The district court found that the defendant’s involvement in a large police corruption scandal in Philadelphia caused a significant disruption of governmental functions pursuant to §5K2.7 and warranted an upward departure.

- **§5K2.8 (Extreme Conduct) (Policy Statement)**

United States v. Bonetti, 277 F.3d 441 (4th Cir. 2002). The Fourth Circuit affirmed a 1-level upward departure under §5K2.8 on the grounds that the 15-year-long duration of the defendant’s alien harboring offense took the offense outside of the heartland and constituted “extreme conduct.” The court concluded that the applicable guideline, §2L1.1, does not take duration of the offense into account. Moreover, even though no evidence had been presented that 15 years of alien harboring was of “atypical” duration for such an offense, the district court’s departure was appropriate because the departure had been granted under §5K2.8 based on a finding that the duration of the offense prolonged the victim’s pain and humiliation and constituted “extreme conduct.”

United States v. Loud Hawk, 245 F.3d 667 (8th Cir. 2001). The appellate court affirmed the district court's decision to depart upward for extreme conduct where the defendant brutally killed his parents in the presence of his 6-year-old nephew and later burned his parents' bodies. The defendant pled guilty to two counts of second degree murder and one count of violating 18 U.S.C. § 924(c). At sentencing, the district court departed upward 10 levels under §5K2.8 due to the heinous nature of the crime. On appeal, the defendant argued that the district court abused its discretion by failing to consider his recent diagnosis of paranoid schizophrenia and his history of drug abuse. The court held that §5K2.8 measures only the extreme character of a defendant's criminal conduct and omits any mention of mental illness, substance abuse, or other ameliorative circumstances. The court affirmed defendant's sentence.

United States v. Davis, 170 F.3d 617 (6th Cir.), cert. denied, 528 U.S. 861 (1999). The court affirmed an 8-level upward departure for extreme conduct based on a telemarketer's extremely demeaning conduct toward his victims, noting that although there was no serious physical injury, there was an intentional infliction of psychic injury. The Court of Appeals reversed the upward departure on the same basis for a codefendant who the district court had described as using a "friendly demeanor that resulted in psychological harm to his victims." *Id.* at 629.

United States v. Roston, 168 F.3d 377 (9th Cir.), cert. denied, 528 U.S. 843 (1999). The Ninth Circuit affirmed a 7-level upward departure under the "extreme conduct" provision of the sentencing guidelines. The court noted that evidence presented at the sentencing hearing showed that the defendant had severely beat and strangled his wife before throwing her body overboard on the final night of their honeymoon cruise. As compared to other second degree murder cases, the severity of the crime and the unusually cruel circumstances of the death of the defendant's wife warranted an upward departure of 7 levels.

- **§5K2.9 (Criminal Purpose) (Policy Statement)**

United States v. Hanson, 264 F.3d 988 (10th Cir. 2001). The Tenth Circuit upheld the district court's finding that it did not have the legal authority to consider an upward departure pursuant to §5K2.9. The defendant had been convicted of the second degree murder of his father, and the government argued that because the murder had been committed for the purpose of committing a robbery, an upward departure was appropriate. The court agreed with the district court that the Sentencing Commission had implicitly considered the distinctions between first and second degree murders in setting offense levels, and these distinctions included whether the murder was committed in connection with another felony. Accordingly, an upward departure from the second degree murder guidelines would be inappropriate.

United States v. Evans, 148 F.3d 477 (5th Cir. 1998), cert. denied, 525 U.S. 1112 (1999). The Fifth Circuit upheld an upward departure for a parole officer convicted of taking bribes.

The case was extraordinary because had the defendant developed a romantic relationship with the parolee and facilitated the parolee's cocaine and crack distribution.

- **§5K2.10 (Victim Misconduct) (Policy Statement)**

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). The Fourth Circuit reversed the district court's downward departure for victim misconduct where the bank's delay in confronting the defendants about the handling of their accounts in no way goaded the defendants into launching a check-kiting scheme. The court noted that §5K2.10 provides that in cases of non-violent offenses, "provocation and harassment" of the defendant by the victim may warrant a departure for victim misconduct. The victim's lack of action neither provoked nor led to the fraud and was not conduct that was contemplated by §5K2.10.

United States v. Paster, 173 F.3d 206 (3d Cir. 1999). The Third Circuit upheld the district court's denial of a §5K2.10 departure. Without deciding whether the defendant's wife's past infidelities constituted "wrongful conduct" under §5K2.10, the court found there was ample evidence to support the denial of a departure because the victim's conduct did not pose actual or threatened danger to the defendant, as apparently contemplated by §5K2.10, and even if the wife's conduct was "wrongful," the defendant's response in killing her was grossly disproportionate.

United States v. DeJesus, 75 F. Supp. 2d 141 (S.D.N.Y. 1999), *cert. denied*, 532 U.S. 976 (2001). Where the defendant was a "warlord" for a Bronx gang whose pregnant sister was punched by victim, and where defendant and his gang planned a retaliatory assault against the victim, and where the defendant pled guilty, a downward departure from offense level 15 to 11 was warranted because the victim's conduct was "vile and repugnant" and defendant's conduct in response was "not incomprehensible."

United States v. Whitetail, 956 F.2d 857 (8th Cir. 1992). The Eighth Circuit remanded the case because the district court erred when it believed it lacked discretion to depart based on battered-woman syndrome. The district court believed it lacked the ability to depart because the jury had rejected defense and found defendant guilty; however, a departure is available even where facts do not amount to complete defense.

United States v. Yellow Earrings, 891 F.2d 650 (8th Cir. 1989). The victim's conduct of pushing defendant, verbally abusing her, and attempting to publicly humiliate her when she refused his request for sexual intercourse, warranted departure from 41 to 15 months.

- **§5K2.11 (Lesser Harms) (Policy Statement)**

United States v. Clark, 128 F.3d 122 (2d Cir. 1997). The court remanded for reconsideration of the district court's denial of a downward departure based on the lesser

harms paragraph of §5K2.11 for a felon who had illegally purchased a firearm for his brother. The court noted that the second paragraph of §5K2.11, which permits a departure where a defendant's conduct might not have caused or threatened the harm sought to be prevented by the law proscribing the offense, might have applied, and the district court may have misunderstood its authority to depart.

United States v. Carvell, 74 F.3d 8 (**1st Cir.** 1996). The court upheld a downward departure granted under the "lesser harm" policy statement because defendant grew marijuana to reduce his well-documented and long-standing suicidal depression.

United States v. Barajas-Nunez, 91 F.3d 826 (**6th Cir.** 1996). It was not plain error the district court to depart under the "lesser harms" provision of §5K2.11 where the defendant had illegally reentered the country after having been deported because he believed that his girlfriend was "in grave danger of physical harm" and wanted to secure needed surgery for her. The case was remanded for explanation of the magnitude of departure; the court also reversed as "plain error," the diminished capacity departure based on defendant's lack of education and inability to speak English.

United States v. Bernal, 90 F.3d 465 (**11th Cir.** 1996). The court upheld a departure for defendants convicted of violating the Lacey Act and Endangered Species Act for attempted export of endangered primates to Mexico; defendants' conduct did not threaten the harm sought to be prevented by statutes as defendants did not intend to harm the primates but intended to use the gorilla for breeding purposes to help perpetuate the species; one defendant was a conservationist and held a position with a Mexican state Commission of Parks and Resources and of Foreign Fauna.

United States v. White Buffalo, 10 F.3d 575 (**8th Cir.** 1993). The court affirmed a departure because the defendant possessed an unregistered sawed-off shotgun not for the purpose of committing other crimes but to shoot animals that preyed on his chickens and often hid in crawl spaces underneath the shacks next to his house; thus, the conduct did not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue."

United States v. Hadaway, 998 F.2d 917 (**11th Cir.** 1993). The court remanded where the defendant possessed a sawed-off shotgun because the court has the power to depart downward if possession threatened lesser harm than statute intended to prevent. The defendant claimed that, on a whim, he exchanged a bucket of sheetrock for the shotgun, intending to keep it as a curiosity or to use it for parts; the defendant also said he did not keep the sawed-off shotgun among his admittedly large collection of firearms because he was not sure it worked.

- **§5K2.12 (Coercion and Duress) (Policy Statement)**

United States v. Sachdev, 279 F.3d 25 (**1st Cir.** 2002). The First Circuit upheld the district court's refusal to downwardly depart on the basis of the defendant's claimed duress. The defendant had claimed that he had committed the offense (cashing bad checks) because he had felt threatened to repay money invested by a former friend in his business. The First Circuit held that the guidelines ordinarily require a threat of physical harm when coercion is proffered as a basis for departure. Here, the district court had found that no such explicit threats had been made. To assess whether implicit threats had been made, a court should consider: (1) the actual intent of the threat-maker; (2) the subjective understanding of the defendant; and (3) whether as an objective matter a person in defendant's position would reasonably consider the act/statement to be a serious threat of physical injury (or other type of threat recognized by §5K2.12). In addition, the defendant must have committed the offense "because of" the coercion, blackmail or duress. The circuit court upheld the district court's finding that the defendant's belief that he was in physical danger was not reasonable.

United States v. King, 280 F.3d 886 (**8th Cir.**), *cert. denied*, 123 S. Ct. 402 (2002). The Eighth Circuit reversed a departure granted in part on the purported influence of the defendant's father, a codefendant, on the defendant's behavior. The court analyzed this basis for departure under §5K2.12 and found that the district court had not specified any facts to suggest that the defendant had been subject to an exceptional degree of coercion.

United States v. Delgado, 994 F. Supp. 143 (**E.D. N.Y.** 1998). The court granted the 3-level downward departure for a first-time offender drug courier who transported drugs based on coercion from a creditor and where other mitigating factors were present.

United States v. Ramos-Oseguera, 120 F.3d 1028 (**9th Cir.** 1997), *cert. denied*, 522 U.S. 1135 (1998). The court remanded because it was unclear "whether the district court believed that the three grounds for departures (lack of youthful guidance, coercion and duress, diminished capacity) were duplicative and therefore could not be considered separately. Because the court clearly took the history of abuse into consideration, we remand for the district court to make findings on imperfect duress and diminished capacity as it relates to battered woman syndrome, and to exercise its discretion to depart under these two additional departures [C]oercion or duress was and is a separate ground for downward departure. The duress policy statement allows that [i]f the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence [I]t has been held that the injury threatened need not be imminent in order to apply this departure. The guideline's statement directs the sentencing court to the defendant's subjective evaluation of the circumstances in which the defendant was placed." (internal citations omitted).

United States v. Gallegos, 129 F.3d 1140 (**10th Cir.** 1997). The court vacated and remanded a downward departure based in part on coercion, where the only evidence of coercion was the defendant's comment that she would not testify against a codefendant

because she was scared. Ordinarily, coercion must involve a threat of physical injury, substantial damage to property or similar injury, and it must also have caused the defendant to commit the offense.

United States v. Mena, 968 F. Supp. 115 (**E.D. N.Y.** 1997). The court granted a downward departure of 15 levels for a safety valve defendant, subject to deportation, based on number of factors, singly and in combination, including §5K2.12, coercion and duress because defendant was dominated, manipulated and pressured by his older brother, who remained a fugitive at the time of defendant's sentencing; brother and another hatched a plan to purchase 100 kgs of cocaine; while defendant attended one meeting, brother engaged in over 20 conversations with informant; also granted 4-level downward adjustment for minimal role, §3B1.2(a).

United States v. Hall, 71 F.3d 569 (**6th Cir.** 1995). The court remanded to the district court based on "overwhelming evidence that the defendant's criminal actions resulted, at least in part, from the coercion and control exercised by her husband . . . [S]he had not been involved in any bank fraud schemes before she met [her husband], and . . . she continued her criminal activity only after he threatened to kill himself, to kill her, to hurt their friends and pets, and to commit bank robbery using violent means." In remanding, the Sixth Circuit noted that "failure of the probation report and the district court to take note of these circumstances or to discuss this issue indicates that it was not aware of the applicability of §5K2.12 and of its discretion to depart downward. It must consider coercion as a basis for departure."

United States v. Herbert, 902 F. Supp. 827 (**N.D. Ill.** 1995). The court granted a departure under §5K2.13 to a defendant convicted of embezzlement where the defendant suffered from an active depressible illness, mixed personality state and had limited coping capacity and poor judgment and a doctor said her behaviors and thought patterns were influenced by her impaired mental condition.

United States v. Amor, 24 F.3d 432 (**2d Cir.** 1994). The court upheld a downward departure after the jury rejected a duress defense; notably duress did not relate to the offense that determined the offense level (retaliation against government witness) but related to a firearms charge. The defendant purchased and possessed firearms because he "was fearful of potential violence on the part of the union in an impending strike, . . . his car was shot up," he received a note threatening him with violence to his person which contributed to his state of mind at the time the weapon offense was committed." The Second Circuit agreed that although the defendant's conduct was "not wholly caused by duress, if [the defendant] had not been under duress at the outset, none of the events in the chain, including the retaliation, would have occurred."

United States v. Isom, 992 F.2d 91 (**6th Cir.** 1993). The district court can depart downward for coercion.

United States v. Henderson-Durand, 985 F.2d 970 (8th Cir. 1993). The court upheld the district court's denial of a departure but noted that a §5K2.12 "ground for departure is broader than the defense of duress, as it does not require immediacy of harm or inability to escape, and allows the district court to consider the subjective mental state and personal characteristics of defendant in its determination."

United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993). "[A]ggressive encouragement of wrongdoing [by informer]" warranted departure.

United States v. Amparo, 961 F.2d 288 (1st Cir. 1992). In dicta, the First Circuit stated that "a jury's rejection of a duress defense does not necessarily preclude a . . . departure under §5K2.12."

United States v. Meyers, 952 F.2d 914 (6th Cir. 1992). A downward departure was warranted if the sentencing court found the defendant committed the offense under serious coercion, although it did not constitute a full defense.

United States v. Johnson, 956 F.2d 894 (9th Cir. 1992). A downward departure was warranted when the defendant was battered, although duress did not constitute full defense.

United States v. Gaviria, 804 F. Supp. 476 (E.D.N.Y. 1992). A downward departure was justified based on the defendant being subservient to her husband (battered woman).

United States v. Apple, 915 F.2d 899 (4th Cir. 1990). A downward departure was warranted when the court found that the defendant was a battered wife who suffered from chronic depression.

United States v. Cheape, 889 F.2d 477 (3d Cir. 1989). The Third Circuit remanded because the district court did not understand that it could depart where the jury had rejected a defense of coercion. A jury instruction for the defense of coercion differs from the standard for granting departure, as §5K2.12 does not "require proof of immediacy or inability to escape; nor d[oes] it limit the feared injury to bodily injury." Here, defendant had been involved in a 3-year relationship with one of the two codefendants, her car was used in the robbery, and while the robbery took place, she sat in the back seat of the car, in a parking lot out of sight of the bank; there was evidence that the other codefendant had put a gun to her head prior to the robbery; the robbery had been planned and executed by the two male codefendants; and she had no prior convictions.

- **§5K2.13 (Diminished Capacity) (Policy Statement)**

United States v. Petersen, 276 F.3d 432 (8th Cir. 2002). The Eighth Circuit reversed the district court's downward departure based on the "temporary insanity" of the defendant when

he raped and assaulted his estranged wife. The court found that the Sentencing Commission had adequately considered mental capacity as a basis for departure and that §5K2.13 provides the only avenue for such a departure. Since the defendant could not qualify for a §5K2.13 departure because his conduct encompassed multiple violent offenses, a departure based on “temporary insanity” was not authorized by the guidelines and was thus contrary to law. Moreover, the district court’s factual findings were inadequate in any event.

United States v. Greenfield, 244 F.3d 158 (**D.C. Cir.** 2001). The appellate court affirmed the district court’s decision to deny the defendant’s request for a departure under §5K2.13. The defendant pled guilty to possession with intent to distribute crack cocaine. The defendant requested a downward departure based on §5K2.13 because he had committed the offense while suffering from depression. On appeal, the court found that the evidence failed to demonstrate that the defendant’s mental capacity was either significantly reduced by his moderate depression, or that was it significantly reduced at the relevant time of the offense.

United States v. Cravens, 275 F.3d 637 (**7th Cir.** 2001). The Seventh Circuit affirmed the district court’s refusal to appoint an expert to assist the defendant in preparing a motion for a downward departure based on §5K2.13. The court found that because the defendant would not be entitled to a departure in any event because his offense involved actual or threatened violence, and because his criminal history indicated a need to protect the public, expert testimony to establish proof of a mental defect would be unnecessary.

United States v. Davis, 264 F.3d 813 (**9th Cir.** 2001). The Ninth Circuit affirmed the district court’s refusal to depart downward based on §5K2.13 notwithstanding the defendant’s long history of mental illness. Because the defendant’s criminal history (as a chronic bank robber with a propensity for violence) demonstrated a need to protect the public, *see* §5K2.13, the court lacked the authority to depart.

United States v. Sadolsky, 234 F.3d 938 (**6th Cir.** 2000). The district court’s 2-level downward departure under §5K2.13 in a computer fraud case, based on the defendant’s compulsive gambling disorder, was not an abuse of discretion, where the defendant’s disorder was a likely cause of his criminal behavior, given that he had already “maxed out” his own credit line before resorting to fraud to pay his gambling debts—no direct causal link was required between the diminished capacity and the crime charged.

United States v. Ribot, 97 F. Supp. 2d 74 (**D. Mass.** 1999). The court departed down to probation from the guideline range of 24-36 months based on a combination of aberrant behavior and mental illness/diminished capacity.

United States v. Askari, 159 F.3d 774 (**3d Cir.** 1998) (*en banc*), *vacating and superseding on reconsideration*, 140 F.3d 536 (**3d Cir.** 1998) (*en banc*). In bank robbery cases, the Third Circuit vacated an *en banc* opinion and remanded to the district court in light of the

amendment to §5K2.13 that went into effect on November 1, 1998, “so that it may reconsider the sentence in light of the guidelines amendment, and, in particular, make findings or draw legal conclusions in the first instance about the two facts that will likely determine whether [defendant’s] sentence will be reduced: (1) whether [defendant’s] offense involved ‘actual violence or a serious threat of violence’; and (2) whether [defendant’s] criminal history indicates ‘a need to incarcerate the defendant or protect the public.’ See USSG §5K2.13.” (reversed *United States v. Rosen*, 896 F.2d 789 (**3d Cir.** 1991) (that held that “non-violent offense” in §5K2.13 is governed by definitions in the career offender guideline).

United States v. Miller, 146 F.3d 1281 (**11th Cir.** 1998). The court held that the defendant’s impulse control disorder did not take his case outside the heartland of cases involving sexual exploitation of minors. The defendant’s impulse control disorder was related to viewing adult pornography and acting out sexually with adults. The impulse was related to viewing pornography but had not been shown to have a causal link to the offense conduct as required by §5K2.13. Because there was nothing unusual about the defendant or the facts of this case, the court affirmed that the case fell within the heartland of cases regulated by the sentencing guideline.

United States v. McBroom, 991 F. Supp. 445 (**D. N.J.** 1998). On remand, the district court departed down 1 level for diminished capacity and 2 levels for post-offense rehabilitation.

United States v. Bennett, 9 F. Supp. 2d 513 (**E.D. Pa.** 1998). In the largest charitable fraud case in history, the court departed to 141 months from 232 months. The court based its departure on a combination of three factors: the defendant’s extraordinary restitution, and a ‘hybrid’ of an extraordinary mental and emotional condition, per §5H1.3, a discouraged factor, and diminished capacity, per §5K2.13, an encouraged factor. “Regardless of one’s point of view, defendant’s cognitive faculties or volition, or both, appear to have been subject to some form of extraordinary distortion and, perhaps, significantly reduced capacity.”

United States v. McBroom, 124 F.3d 533 (**3d Cir.** 1997). *But see United States v. Nordby*, 225 F.3d 1053 (**9th Cir.** 2000). The court reversed the district court’s denial of a downward departure under §5K2.13 where district court had determined that a departure was not appropriate because the defendant “was able, at the time of the offense, to absorb information in the usual way and to exercise the power of reason.” The Third Circuit held that in considering a departure, the district court “could have considered the possibility that [the defendant] suffered from a volitional impairment which prevented him from controlling his behavior or conforming it to the law.”

United States v. Ramos-Oseguera, 120 F.3d 1028 (**9th Cir.** 1997), *cert. denied*, 522 U.S. 1135 (1998). The Ninth Circuit remanded to permit the district court to consider whether “battered woman syndrome, a form of post-traumatic stress disorder” resulted in the defendant’s diminished capacity. The Ninth Circuit explained that one symptom of battered

woman syndrome “is learned helplessness, which may prevent an abused woman from leaving her batterer. *United States v. Johnson*, 956 F.2d 894 (**9th Cir.** 1992) (citing Leonore Walker, *The Battered Woman Syndrome* 33, 94 (1984)). This perceived inability to leave may have contributed to [defendant’s] commission of the offense.” The Ninth Circuit held that the same evidence of abuse could form the basis for three “separate and distinct” departures—youthful lack of guidance, coercion and duress, and diminished capacity. “The three potentially applicable departures are founded in distinct policy rationales and recognize separate reasons for reduced culpability.”

United States v. Mena, 968 F. Supp. 115 (**E.D. N.Y.** 1997). The court made a downward departure of 15 levels for a safety valve defendant, who was subject to deportation, based on a number of factors, singly and in combination, including §5K2.13, diminished capacity: defendant had an IQ of 67; dropped out of school after sixth grade at age 14; unchallenged psychological evaluation characterized defendant’s “thinking as naive, child-like, concrete and simplistic,” a “person who is easily overwhelmed, is highly dependent on others, and tends to excessively look to others for approval, reassurance and direction because he has few inner resources to draw upon when confronted with new or challenging situations,” and because the defendant was “prone to suggestibility and gullibility.”

United States v. Risse, 83 F.3d 212 (**8th Cir.** 1996). Where the defendant pled guilty to use of a firearm in relation to drug trafficking crime and felon in possession, the court properly departed downward under §5K2.13 for diminished capacity based on defendant’s post-traumatic stress disorder resulting from service in the Vietnam War.

United States v. Weddle, 30 F.3d 532 (**4th Cir.** 1994). Diminished capacity departure may be considered in a case involving threatening communication.

United States v. Chatman, 986 F.2d 1446 (**D.C. Cir.** 1993). Diminished capacity departure not precluded in a case where bank robber presented a note and no gun was involved.

United States v. Cantu, 12 F.3d 1506 (**9th Cir.** 1993). Where felon possessed firearm, the district court has discretion to downward depart in case of post-traumatic stress disorder and should resentence in the awareness that “the criminal justice system long has meted out lower sentences to persons who although not technically insane are not in full command of their actions.” Reduced mental capacity need only be contributing cause of the crime not sole cause.

United States v. Lewinson, 988 F.2d 1005 (**9th Cir.** 1993). The court affirmed the 4-level downward departure under §5K2.13 in a fraud case even though there was evidence of some drug use because about half the time no drugs were involved in the offense conduct; and even though the mental disease was not severe and did not affect defendant’s ability to perceive reality, drug use was both “a product and factor of his impaired mental condition.”

United States v. Glick, 946 F.2d 335 (4th Cir. 1991). In a case of transportation of stolen property, departure from 30 months to probation was proper where the defendant's diminished capacity was a contributing factor in the offense, even if not the sole cause of the conduct.

United States v. Philibert, 947 F.2d 1467 (11th Cir. 1991). A downward departure was warranted when the defendant manifested symptoms of severe mental illness and placed severed head of recently deceased horse on stairs of the federal courthouse.

United States v. Adonis, 744 F. Supp. 336 (D. D.C. 1990). The court granted a downward departure where the defendant's IQ of 64 showed he was retarded where the average IQ of the prison population is 93.

United States v. Davis, 919 F.2d 1181 (6th Cir. 1990). A downward departure was justifiable when the defendant commits nonviolent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of intoxicants.

United States v. Ruklick, 919 F.2d 95 (8th Cir. 1990). A downward departure was justifiable when the defendant suffered from a longstanding schizophrenic affective disorder that predated his drug abuse and impaired his judgment. Diminished capacity does not need to be the sole cause of the offense as long as it was a contributing factor to commission of the offense.

- **§5K2.14 (Public Welfare) (Policy Statement).** *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998). The case was vacated and remanded for further findings where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant's conviction for involuntary manslaughter. Because reckless driving was taken into account by the guideline under which the defendant was sentenced, a departure for endangering public safety and welfare would only be appropriate in exceptional cases.
- **§5K2.16 (Voluntary Disclosure of Offense) (Policy Statement)**

United States v. Ekeland, 174 F.3d 902 (7th Cir. 1999). The court upheld the district court's refusal to grant a §5K2.16 departure, finding that the language in §5K2.16 "discloses to authorities" means legal authorities, and defendant who disclosed his crime to his company's officials rather than police or some other governmental agency did not qualify for departure.

United States v. Jones, 158 F.3d 492 (10th Cir. 1998). The court upheld a downward departure based in part on the defendant's voluntary disclosure of facts underlying his false statements offense. While the defendant was not motivated by the knowledge that discovery of his offense was imminent, the offense was likely to be discovered. The departure pursuant to §5K2.16 was nonetheless permissible. The fact that the defendant received a 3-level downward adjustment for acceptance of responsibility does not preclude departure on this basis.

United States v. Aerts, 121 F.3d 277 (7th Cir. 1997). The Seventh Circuit upheld a refusal to grant a §5K2.16 downward departure, noting that “section 5K2.16, by its plain terms, authorizes a departure for the voluntary disclosure of undiscovered ‘offenses,’ not offenders.” See also *United States v. Brownstein*, 79 F.3d 121 (9th Cir. 1996) (affirming refusal to depart where the offense was known to authorities even though they did not know that defendant committed it until he turned himself in).

United States v. Bestler, 86 F.3d 745 (7th Cir. 1996). The court clarified that district courts should apply objective test in determining whether offense was unlikely to be discovered—not whether defendant believed discovery was unlikely.

United States v. DeMonte, 25 F.3d 343 (6th Cir. 1994). In a computer fraud case, departure available on the ground that the defendant admitted to crimes about which the government had no knowledge, even though plea bargain required cooperation.

- **§5K2.20 (Aberrant Behavior) (Policy Statement).** The departure for aberrant behavior was moved from Chapter One to §5K2.20 effective November 1, 2000. It provides an encouraged basis for a downward departure in an extraordinary case if the defendant’s conduct constituted aberrant behavior. The Commission attempted to slightly relax the “single act” rule and provide guidance and limitations regarding what can be considered aberrant behavior. This policy statement provides that the court may not depart below the guideline range on this basis if: (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter Four.

Pre-§5K2.20 Case Law

These cases are provided to assist in the determination of whether the amendment was clarifying or substantive for purposes of an *ex post facto* analysis.

Totality of Circumstances Standard

Circuit split: The First, Second, Ninth and Tenth Circuits permitted a district court to consider the totality of a defendant’s conduct during his lifetime, including: (1) the singular nature of the criminal act; (2) the defendant’s criminal record; (3) psychological disorders from which the defendant was suffering at the time of the offense; (4) extreme pressures under which the defendant was operating, including the pressure of losing his job; (5) letters from friends and family expressing shock at the defendant’s behavior; and (6) the defendant’s motivations for committing the crime. See *Zecevic v. U.S. Parole Commission*, 163 F.3d 731 (2d Cir.

1998) (internal citations omitted). The District of Columbia, Third, Fourth, Fifth, and Seventh Circuits permitted a departure only where the defendant's conduct amounted to a thoughtless or spontaneous single act and precluded a departure where the defendant's conduct necessarily involved multiple acts.

United States v. Working, 224 F.3d 1093 (**9th Cir.** 2000) (*en banc*). The court held that the district court did not abuse its discretion in granting a 21-level downward departure to a defendant who pled guilty to assault with intent to commit murder and use of a firearm in a crime of violence on the ground that the defendant's conduct was in attempting to kill her estranged husband was aberrant but vacated the sentence and remanded the case for an explanation of the degree of departure. The district court based its findings on a psychiatric report that concluded that the defendant was suffering from severe depression and was under extreme pressure at the time of the shooting because her husband had filed for custody of their children on the basis of false charges that she had engaged in sexual misconduct with his son; had no criminal record; and based on several letters in her behalf among them letters from the two sons of the estranged husband who wrote about their father's abusive personality.

United States v. Hancock, 95 F. Supp. 2d 280 (**E.D. Pa.** 2000). A downward departure was warranted in a felon-in-possession case where the defendant happened upon a weapon and possessed it for very short time to dispose of it, because the conduct was aberrant.

United States v. Garcia, 182 F.3d 1165 (**10th Cir.** 1999). That defendant's crime was "carefully planned" did not preclude a finding of aberrant behavior because the correct focus is not on the number of discrete acts undertaken by the defendant but rather on the aberrational character of the conduct.

United States v. Iaconetti, 59 F. Supp. 2d 139 (**D. Mass.** 1999). The defendant, who had no prior criminal record and who pled guilty to the charge of conspiracy to possess with intent to distribute cocaine, was entitled to an 11-level departure from level 25 to level 14 based on "single acts of aberrant behavior"—gambling debts to a loan shark caused by the defendant's gambling compulsion resulted in the defendant agreeing with a loan shark's idea as to how to extinguish the debts after the defendant had tried to pay the debts from his personal resources, his business, and his family.

United States v. Ribot, 97 F. Supp. 2d 74 (**D. Mass.** 1999). The court departed down to probation from range of 24-36 months based on a combination of aberrant behavior and mental illness/diminished capacity.

Zecevic v. U.S. Parole Commission, 163 F.3d 731 (**2d Cir.** 1998). In calculating release date of transfer prisoner—an American citizen convicted of drug offenses in Sweden transferred to the United States to serve out his sentence—the Parole Commission is required to treat the defendant as if sentenced under federal sentencing guidelines and so it erred when it

did not consider the totality of the circumstances of the defendant's life in assessing downward departure for aberrant behavior.

United States v. Jones, 158 F.3d 492 (**10th Cir.** 1998). Where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by 3 levels to probation when, as one of 11 factors, it considered that the crime was aberrant conduct where the defendant had been law abiding until age 35 when his marriage disintegrated.

United States v. Martinez-Villegas, 993 F. Supp. 766 (**C.D. Cal.** 1998). In a drug case, a downward departure of 1 level was granted because of aberrant conduct where the government offered money to a defendant with no criminal record to perform a single act of transporting drugs.

United States v. Kalb, 105 F.3d 426 (**8th Cir.** 1997). The court held that the "single act of aberrant behavior" analysis must be reconsidered in light of *Koon*; *but see United States v. Weise*, 128 F.3d 672 (**8th Cir.** 1997), reversing the downward departure where the defendant's conduct over a period of time did not amount to a "single act of aberrant behavior."

United States v. Delvalle, 967 F. Supp. 781 (**E.D. N.Y.** 1997). The defendant's involvement in a drug conspiracy on two different days, separated by a week, were so loosely related they could be seen as a single act of aberrant conduct warranting a 12-level departure.

United States v. Grandmaison, 77 F.3d 555 (**1st Cir.** 1996). Departure may be granted even where the defendant engaged in multiple acts leading up to the commission of the offense (mail fraud by local alderman who deprived citizens of his honest services) if, in light of totality of the defendant's life, committing the offense amounted to aberrant behavior; spontaneity or thoughtless act is not a prerequisite).

United States v. Lam, 20 F.3d 999 (**9th Cir.** 1994). The court held that where a law-abiding immigrant obtained a sawed-off shotgun to protect his family against predators after he and pregnant sister were robbed by three gunman, and where the defendant not aware that he possessed illegal weapon, and where the defendant's only prior offense was driving without a license, the court had discretion to depart downward from the 18-month sentence because of aberrant conduct; court rejects view that aberrant conduct must be single incident; and rejects view that offense must be first offense.

United States v. Patillo, 817 F. Supp. 839 (**C.D. Cal.** 1993). A first-time offense, possession of 586 grams of crack, was "out of character" for the defendant who had a stable employment history and who acted in a moment of "financial weakness" and "unusual temptation" and demonstration of "tremendous remorse."

United States v. McCarthy, 840 F. Supp. 1404 (**D. Colo.** 1993). An aberrant behavior departure to probation was proper for armed bank robber who was disorganized and unsophisticated where he was also facing a five-year mandatory minimum for possession of a gun.

United States v. Baker, 804 F. Supp. 19 (**N.D. Cal.** 1992). Where the defendant pled guilty to possession of one kilogram of crack, a downward departure to a minimum mandatory sentence was proper where the act was a "single act of aberrant behavior."

Aberrant Behavior facts which have supported a downward departure: long-term, full-time employment; charitable activities; impulsive or unpremeditated conduct; no prior criminal record; return of stolen property almost immediately after crime; cooperation in subsequent police investigation; extent of pecuniary gain to defendant; prior good deeds; efforts to mitigate the effects of the crime; convergence of factors; manic depression; suicidal tendencies; recent unemployment; employment; no prior abuse or distribution of drugs; economic support of family.

- **§5K2.21 (Dismissed and Uncharged Conduct) (Policy Statement).** Effective November 1, 2000, §5K2.21 (Dismissed and Uncharged Conduct) was added as an encouraged basis for an upward departure 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.

C. Encouraged Factors Identified in Chapters Two and Three

Commentary to specific guidelines in Chapters Two and Three provides encouraged grounds for upward or downward departures.

- **§2A1.1 (First Degree Murder), comment. (n.1)**

The commentary to the first degree murder guideline provides that a downward departure may be warranted "[i]f the defendant did not cause the death intentionally or knowingly."

United States v. Nichols, 169 F.3d 1255 (**10th Cir.**), *cert. denied*, 526 U.S. 1007 (1999). The court upheld the district court's refusal to depart downward based on the defendant's contention that he did not cause death intentionally or knowingly, pursuant to §2A1.1, comment. (n.1). The defendant had argued that the district court was required to make findings regarding the defendant's mental state in determining whether a downward departure was appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart, disagreeing with *United States v. Prevatte*, 16 F.3d 767 (**7th Cir.** 1994).

United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994). The court reversed imposition of life sentences in a case involving convictions on 14 counts of explosives and firearms violations arising from a bombing-burglary scheme that resulted in the unintended death of an elderly woman who died when she was hit by shrapnel from a pipe bomb that the defendants had detonated in an alley to gauge the response time of emergency services so they could later plan their burglaries. It was a reversible error for the district court to fail to “undertake further analysis of the mental state of each defendant in imposing sentence.”

United States v. Ryan, 9 F.3d 660 (8th Cir. 1993), *modified*, 41 F.3d 361 (8th Cir. 1994), *cert. denied*, 534 U.S. 1082 (1995). The court upheld the 5-level downward departure which had been granted to an arson defendant whom the court found had acted recklessly and wantonly but had not intentionally caused the death of two firemen who died while attempting to extinguish the fire.

- **§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), comment. (n.3).** An upward departure may be warranted if offense created a substantial risk of death or serious bodily injury to more than one person.
- **§2A2.4 (Obstructing or Impeding Officers), comment. (n.3).** An upward departure may be warranted if offense involves significant disruption of governmental functions.
- **§2A3.2 (Criminal Sexual Abuse of a Minor; Attempt to Commit Such Acts), comment. (n.7).** An upward departure may be warranted where the offense level under this guideline substantially understates the seriousness of the offense.
- **§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), comment. (backg'd).** A downward departure may be warranted in cases where the defendant and the victim are similar in sexual experience; the Commission recommends a downward departure to the equivalent of an offense level of 6.
- **§2A5.3 (Crimes Aboard Aircraft), comment. (n.2).** An upward departure may be warranted if the conduct intentionally or recklessly endangered the safety of the aircraft or passengers.
- **§2A6.1 (Threatening or Harassing Communications), comment. (n.3(A)).** A departure may be warranted to account for factors not incorporated in the guideline; the Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level); **comment. (n.3(B))** (an upward departure may be warranted if the conduct involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim.

- **§2A6.2 (Stalking or Domestic Violence), comment. (n.5).** An upward departure may be warranted if the defendant received an enhancement under subsection (b)(1) (for violating court order of protection; bodily injury; possession or threatened use of dangerous weapon; or pattern of stalking, threatening, harassing or assaultive activity), but the enhancement does not adequately reflect the extent or seriousness of the conduct involved.
- **§2B1.1, App. Note 15 (B) (eff. Nov. 1, 2001).** An upward departure may be warranted where the offense level substantially understates the seriousness of the offense (listing factors to consider); a downward departure may be warranted where the offense level substantially overstates the seriousness of the offense.

United States v. Olgmueeller, 198 F.3d 669 (**8th Cir.** 2000). The court affirmed a downward departure where the actual loss amount of \$829,000, stemming from a fraudulent loan application, significantly overstated the risk to the defrauded bank, thus warranting a departure to the base offense level corresponding to a loss figure of \$58,000, and placing the defendant at a sentencing level of 11, where defendant had sufficient unpledged assets to support the loan amount and to pay the bank most of the amount it was owed, as shown by the fact he had paid the bank \$836,000 of the \$894,000 owed when the fraud was discovered; the court also departed based on the extraordinary restitution undertaken before defendant was indicted.

United States v. Oakford Corp., 79 F. Supp. 2d 357 (**S.D. N.Y.** 2000). A downward departure of 13 levels was granted where the offense level would substantially overstate the seriousness of the offense: the district court considered that “each defendant personally realized only a small portion of the overall gain or profits of \$15 million; the Exchange “tacitly encouraged floor brokers” to “push the envelope” in this area; and that “the parties’ negotiated plea bargains did not seek to hold the defendants responsible for this object of the conspiracy,” although the court was aware that the plea agreement did not prevent it from considering any conduct that might be relevant conduct.

United States v. Walters, 87 F.3d 663 (**5th Cir.** 1996). The court affirmed a downward departure based on the fact that the defendant did not personally profit from the money laundering scheme.

United States v. Rostoff, 53 F.3d 398 (**1st Cir.** 1995). Multiple causes of the losses including the permissive attitude of the bank's senior management, buyer's greed, and unexpected nosedive of the condominium market warranted downward departure.

United States v. Broderson, 67 F.3d 452 (**2d Cir.** 1995). The court affirmed a downward departure based on a “confluence of circumstances [that] was not taken into account by the guidelines,” including the fact that the amount of loss overstates the seriousness of the fraud and that defendant had not personally gained financially from the fraudulent conduct; rather, the benefit was to his employer.

United States v. Monaco, 23 F.3d 793, 799 (3d Cir. 1994). The departure was affirmed where the defendant's intent was not to steal money from the United States but to expedite payment that would have been due at some future time.

United States v. Gregorio, 956 F.2d 341 (1st Cir. 1992). A downward departure was affirmed because losses were not caused solely by the defendant's misrepresentation in obtaining the loan.

- **§2B1.5 (Cultural Heritage), comment. (n.9).** There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (*e.g.*, the Statue of Liberty or the Liberty Bell).
- **§2B2.1 (Burglary), comment. (backg'd).** An upward departure may be warranted for weapon use during burglary; usually such use would make the offense a robbery.
- **§2B3.1 (Robbery), comment. (n.5).** An upward departure may be warranted if the defendant intended to murder the victim.
- **§2B3.2 (Extortion), comment. (nn.7-8).** *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998). The Ninth Circuit upheld a 2-level departure based on Application Note 8 to the extortion guideline, which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.
- **§2B5.3 (Criminal Infringement of Copyright or Trademark), comment. (n.5).** An upward departure may be warranted if the offense level substantially understates the seriousness of the offense; listing factors to consider.
- **§2C1.1 (Bribery; Extortion under Color of Official Right), comment. (n.5).** An upward departure may be warranted in cases in which the seriousness of the offense is not adequately reflected. *See United States v. Reyes*, 239 F.3d 722 (5th Cir.), *cert. denied*, 534 U.S. 868 (2001). The Fifth Circuit upheld an upward departure pursuant to Application Note 5 of §2C1.1, finding that the actions of the defendant, a Houston city council member, were "part of a systematic or pervasive corruption of a governmental function, process, or office that may

cause loss of public confidence in government.” The court agreed with the district court that the defendant’s organizer role in the offense was relevant in finding the corruption systematic and pervasive. In addition, there were many indications that the corruption might result in a loss of public confidence.

- **§2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), comment. (n.5).** An upward departure may be warranted where the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government.
- **§2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking in Controlled Substances), comment.** An upward departure may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection; **comment. (n.14)** (a downward departure may be warranted when the price set by the government in a reverse sting was substantially below market value, thus resulting in a purchase by the defendant of a significantly greater quantity than his available resources otherwise would have allowed him to purchase); **comment. (n.15)** (an upward departure may be warranted where, in the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense); **comment. (n.16)** (in an extraordinary case, an upward departure may be warranted above offense level 38 on the basis of drug quantity).

United States v. Cones, 195 F.3d 941 (7th Cir. 1999). The Seventh Circuit reversed an upward departure based on the district court’s belief that drug quantity should be converted to street-level purity. Even though the court reversed the upward departure, it found that the only function of Application Note 9 to §2D1.1 is to determine whether a higher purity is probative of the defendant’s role or position in the chain of distribution. When higher purity implies a higher role in a criminal organization, departure should be limited to the number of levels that could be awarded under §3B1.1. The court noted that statutes and guidelines allow conversion to a uniform purity for PCP and methamphetamine, and the guidelines now allow a conversion for LSD. For drugs other than LSD, PCP, and methamphetamine, the sentence must be calculated without an adjustment to a uniform purity level.

United States v. Mikaelian, 168 F.3d 380 (9th Cir. 1999). The court held that an extremely low purity of drug might be a basis for a downward departure.

United States v. Doe, 149 F.3d 634 (7th Cir. 1998) , *cert. denied*, 525 U.S. 914 (1998). The court affirmed a 6-level upward departure to account for the concentrated form of heroin involved.

United States v. Mendoza, 121 F.3d 510 (9th Cir. 1997). The district court has discretion to depart on the ground that the defendant had no knowledge of or control over the amount or purity of the drugs, if the court determines that the facts are outside the heartland of such cases, because that ground is not one categorically proscribed by Sentencing Commission.

United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996). The court upheld a downward departure when the district court found the defendant had no knowledge of any particular quantity of cocaine and no particular quantity was foreseeable to him in connection with the conspiracy of which he was a member.

- **§2D1.2 (Simple Possession), comment. (n.1).** *United States v. Warren*, 186 F.3d 358 (3d Cir. 1999). The Third Circuit reversed an upward departure based on large quantities of drugs involved in a simple possession case, although such a factor was encouraged as a grounds for upward departure in Application Note 1 to §2D2.1, which states “. . . Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.” The court found, based on the record, that the defendant *did not* intend for anyone to consume the large quantities of drugs but only intended to turn those drugs over to government agents and did so. In such a situation the court concluded that the district court abused its discretion in utilizing Application Note 1 of §2D2.1 or §5K2.0 as a basis for an upward departure based on quantity of drugs. The court again reversed the lower court's upward departure. See *United States v. Warren*, 229 F.3d 1140 (3d 2002).
- **§2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), comment. (n.2).** An upward departure may be warranted if as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large.
- **§2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy), comment. (n.1).** An upward departure may be warranted for a large-scale dealer of drug paraphernalia; a downward departure may be warranted if the paraphernalia offense was not committed for pecuniary gain.
- **§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), comment. (n.4(C)).** An upward departure may be warranted in a case involving two or more chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, if the offense level does not adequately address the seriousness of the offense; **comment. (n. 6)** (an upward departure may be warranted if the enhancement under subsection (b)(3) does not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel)).
- **§2D1.12 (Unlawful Possession, Manufacturing, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or**

Material; Attempt or Conspiracy), comment. (n.1). An upward departure may be warranted if the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material; **comment. (n.3)** (an upward departure may be warranted in cases in which the enhancement under subsection (b)(2) does not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel)).

- **§2D2.3 (Operating Common Carrier Under the Influence), comment. (backg'd).** A downward departure may be warranted if no or only a few passengers were placed at risk; an upward departure may be warranted if death or serious bodily injury of a large number of persons occurred and offense level does not reflect seriousness of offense.
- **§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), comment. (n.4).** A departure may be warranted if the rule in Application Note 4 pertaining to a previously imposed sentence that is also part of the pattern of racketeering activity produces an anomalous result.
- **§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), comment. (n.2).** An upward departure may be warranted if bodily injury results; **comment. (n.12)** (an upward departure may be warranted if the offense involved more than 10 victims).
- **§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), comment. (n.6).** An upward departure may be warranted if (A) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (B) the offense involved more than 10 victims.
- **§2G2.2 (Trafficking in, Receiving, Possessing Material Involving the Sexual Exploitation of a Minor), comment. (n.2).** An upward departure may be warranted if the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) (for engaging in pattern of activity) does not apply; an upward departure may also be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.
- **§2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), comment. (n.2).** An upward departure may be warranted if the offense involved a large number of visual depictions, regardless of whether subsection (b)(2) (for more than ten items containing visual depictions) applies.

- **§2H2.1 (Obstructing an Election or Registration), comment. (n.1).** An upward departure may be warranted if the offense resulted in bodily injury or significant property damage, or involved corrupting a public official.
- **§2H4.1 (Peonage, Involuntary Servitude, and Slave Trade), comment. (n.3).** An upward departure may be warranted if the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude.
- **§2J1.2 (Obstruction of Justice), comment. (n.4).** A departure may be warranted if a weapon was used, or bodily injury or significant property damage resulted.
- **§2J1.3 (Perjury or Subordination of Perjury; Bribery of Witness), comment. (n.4).** An upward departure may be warranted if a weapon was used, or bodily injury or significant property damage resulted.
- **§2J1.6 (Failure to Appear), comment. (n.4).** An upward departure may be warranted if a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense.
- **§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.10).** An upward departure may be warranted if the quantity of explosive materials significantly exceeded 1,000 pounds; the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives; the defendant knowingly distributed explosive materials to a person under 21 years of age; or the offense posed a substantial risk of death or bodily injury to multiple individuals); **comment. (n.11)** (an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives)).
- **§2K1.4 (Arson; Property Damage by Use of Explosives), comment. (n.3).** An upward departure may be warranted if bodily injury resulted.
- **§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.18).** An upward departure may be warranted under §5K2.6 (Weapons and Dangerous Instrumentalities) where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives).
- **§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), comment. (n.2(B)).** In a case in which the guideline sentence

is determined under subsection (b), a sentence above the minimum term required by 18 U.S.C. § 924(c) or § 929(a) is an upward departure from the guideline sentence. A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense but is not determined to be a career offender under §4B1.1.

- **§2K2.5 (Possession of a Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), comment. (n.4).** An upward departure may be warranted where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply.
- **§2L1.1 (Alien Smuggling), comment. (n.3).** An upward departure may be warranted where defendant knew the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior); **comment. (n.4)** (an upward departure may be warranted if offense involved substantially more than 100 aliens).
- **§2L1.2, comment. (n.5)** (effective Nov. 1, 1997). The commentary to the reentry after deportation guideline provides for a downward departure in cases where the prior aggravated felony overstates the severity of the prior: “Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.”

For crimes committed after November 1, 2001, *see* amended USSG §2L1.2.

Pre-Amendment Case Law

- These cases are provided to assist in the determination of whether the amendment was clarifying or substantive for purposes of an ex post facto analysis.

United States v. Delgado-Reyes, 245 F.3d 20 (**1st Cir.** 2001). Requirements of departure authorized under §2L1.2, comment. (n.5) do not limit a departure for over-representation of criminal history as authorized by §4A1.3.

United States v. Alfaro-Zayas, 196 F.3d 1338 (**11th Cir.** 1999). The court remanded the case to the district court to consider the nature of the prior aggravated felony as a ground for departure even where the defendant did not meet the prerequisites for departure under §2L1.2, comment. (n.5).

United States v. Diaz-Diaz, 135 F.3d 572 (**8th Cir.** 1998). The court upheld a downward departure based on fact that 16-level upward adjustment that applied because defendant had a prior aggravated felony overstates the seriousness of prior (sale by defendant of 8.3 grams of marijuana) for which he received a sentence of 22 days' confinement; the district court granted the departure before this application note went into effect.

United States v. Sanchez-Rodriguez, 161 F.3d 556 (**9th Cir.** 1998) (*en banc*). The Ninth Circuit held that the district court did not abuse its discretion in departing down from the reentry-after-deportation guideline where the defendant's prior aggravating felony which triggered a 16-level upward adjustment fell outside the heartland of aggravating felonies. The prior offense consisted of the sale of \$20 worth of heroin. The Court expressly reached its conclusion "without reference to the new amendment [in USSG §2L1.2, comment. (n.5)], and without deciding whether the amendment is clarifying or substantive." This *en banc* opinion reverses *United States v. Rios-Favela*, 118 F.3d 653 (**9th Cir.** 1997), *cert. denied*, 522 U.S. 1065 (1998), which had held that no such departures were permissible because the Sentencing Commission adequately considered the nature of the aggravated priors before establishing the 16-level bump under USSG §2L1.2.

United States v. Ortega-Mendoza, 981 F. Supp. 694 (**D. D.C.** 1997). The court granted a downward departure based on USSG §2L1.2, comment. (n.5).

United States v. Hinds, 803 F. Supp. 675 (**W.D. N.Y.** 1992), *aff'd*, 992 F.2d 321 (**2d Cir.** 1993). The court granted a downward departure in a reentry after deportation case to a defendant with a criminal history IV and three prior convictions—a manslaughter offense and two sales of small quantities of marijuana—based on the fact that the criminal history overstated the seriousness of the priors.

Contra

United States v. Marquez-Gallegos, 217 F.3d 1267 (**10th Cir.**), *cert. denied*, 531 U.S. 905 (2000). Downward departure based on nature of aggravated prior may only be granted where the defendant meets the requirements of §2L1.2, comment. (n.5). *United States v. Tappin*, 205 F.3d 536 (**2d Cir.**), *cert. denied*, 531 U.S. 910 (2000) (same).

- **§2L2.1 (Trafficking in Immigration Documents; False Statements; Fraudulent Marriage), comment. (n.5).** An upward departure may be warranted if the defendant knew or had reason to believe that the felony offense in subsection (b)(3) was especially serious. *See United States v. Velez*, 185 F.3d 1048 (**9th Cir.** 1999). The Ninth Circuit affirmed a 2-level departure based on the district court's finding that the 2,700 documents falsified by the defendant substantially exceeded the number normally involved in such an offense, making it a factor outside the heartland of §2L2.1 cases. This case was decided under 1994 version of the *Guidelines Manual*, which did not include Application Note 5.

- **§2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), comment. (n.2).** A downward departure may be warranted where the revelation of the information at issue is likely to cause little or no harm.
- **§2M4.1 (Failure to Register/Evasion of Military Service), comment. (n.1).** An upward departure may be warranted if the offense was committed when persons were being inducted for compulsory military service during the time of war or armed conflict.
- **§2M5.1 (Evasion of Export Controls), comment. (n.1).** An upward departure may be warranted for violation during the time of war or armed conflict; **comment. (n.2)** (a departure may be warranted where the court considers the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences, and determines that such factors are present in an extreme form).
- **§2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), comment. (n.1).** A downward departure may be warranted in the unusual case where the offense conduct was not harmful or potentially harmful to a security or foreign policy interest of the United States; an upward departure may be warranted in the case of a violation during time of war or armed conflict); **comment. (n.2)** (an upward departure may be warranted where the court considers the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences and determines that such factors are present in an extreme form).
- **§2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations) comment. (n.2).** (A) In General.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. *See* Chapter Five, Part K (Departures). (B) War or Armed Conflict.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.
- **§2N1.1 (Tampering with Consumer Products), comment. (n.1).** An upward departure may be warranted where the offense posed a substantial risk of death or serious bodily injury to numerous victims or caused extreme psychological injury or substantial property damage or monetary loss; a downward departure may be warranted in the unusual case where the offense did not cause a risk of death or serious bodily injury and did not cause, nor was intended to cause bodily injury.

- **§2N1.2 (Threatening to Tamper with Consumer Products), comment. (n.1).** An upward departure may be warranted where death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted.
- **§2N1.3 (Tampering with Intent to Injure Business), comment. (n.1).** An upward departure may be warranted where death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted.
- **§2N2.1 (Statutory and Regulatory Violations Relating to Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), comment. (n.1).** A downward departure may be warranted where conduct was only negligent; **comment. (n.3)** (an upward departure may be warranted if death or bodily injury, extreme psychological injury, substantial property damage or monetary loss resulted).
- **§2P1.1 (Escape), comment. (n.4).** An upward departure may be warranted if death or bodily injury resulted.
- **§2P1.3 (Engaging in, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention), comment. (n.1).** An upward departure may be warranted if death or bodily injury resulted.
- **§2Q1.1 (Knowing Endangerment From Mishandling Hazardous or Toxic Substances), comment. (n.1).** An upward departure may be warranted if death or bodily injury resulted.
- **§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), comment. (n.4).** A downward departure may be warranted where the case involves negligent, as opposed to knowing conduct; **comment. (n.6)** (a departure of up to 3 levels upward or downward may be warranted where the public health is seriously endangered, depending upon the nature of the risk created and the number of people placed at risk; a departure would be warranted if death or serious bodily injury results); **comment. (n.7)** (a 2-level upward or downward departure may be warranted where a public disruption, evacuation or cleanup at substantial expense has been required); **comment. (n.8)** (a 2-level upward or downward departure may be warranted where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required, depending upon the nature and quantity of the substance involved and the risk associated with the offense).
- **§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), comment. (n.3).** A downward departure may be warranted in cases involving negligent conduct; **comment. (n.4)** (a 2-level departure may be appropriate, depending upon the harm resulting from the emission, release or discharge, the quantity and

nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, due to the wide range of conduct potentially covered by the guideline); **comment. (n.5)** (a 3-level departure upward or downward may be warranted depending upon the nature of the risk created and the number of people placed at risk; a departure would be warranted if death or serious bodily injury results); **comment. (n.6)** (a 2-level departure upward or downward may be warranted depending upon the nature of the contamination involved); **comment. (n.7)** (a 2-level departure upward or downward may be warranted depending upon the nature and quantity of the substance involved and the risk associated with the offense); **comment. (n.8)** (an upward departure may be warranted where the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order).

- **§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), comment. (n.5).** An upward departure may be warranted if the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value.
- **§2T1.8 (Offenses Relating to Withholding Statements), comment. (n.1).** An upward departure may be warranted where the defendant is attempting to evade, rather than merely delay, payment of taxes.
- **§2T2.1 (Non-Payment of Taxes), comment. (n.2).** An upward departure may be warranted for offense conduct directed at more than tax evasion (*e.g.*, theft or fraud).
- **§2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property), comment. (n.2).** An upward departure may be warranted where duties are evaded on items for which entry is prohibited, limited, or restricted, especially when such items are harmful or protective quotas are in effect, as the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation.
- **§3A1.1 (Hate Crime Motivation or Vulnerable Victim), comment. (n.4).** *United States v. Brown*, 147 F.3d 477 (6th Cir. 1998). The Sixth Circuit upheld an upward departure based on the age of telemarketing victims. Congress expressed the view, manifested in the Senior Citizens Against Marketing Scams Act, that the guidelines do not sufficiently punish the defendants who target the elderly. The court noted that such offense behavior is not adequately accounted for by relevant conduct, role in the offense, or vulnerable victim adjustments.
- **§3A1.2 (Official Victim), comment. (n.2).** An upward departure may be warranted in cases involving certain high-level officials, such as the President and Vice-President, to reflect potential disruption of governmental function.

- **§3A1.3 (Restraint of Victim), comment. (n.3).** An upward departure may be warranted if the restraint was sufficiently egregious.
- **§3A1.4 (Terrorism), comment. (n.4).** By the terms of the directive to the Commission in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.
- **§3B1.1 (Aggravating Role), comment. (n.2).** *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996). The First Circuit affirmed an upward departure pursuant to Application Note 2 based on a finding that the defendant's management of the assets of a large-scale criminal enterprise was outside the heartland of the aggravated role adjustment.
- **§3B1.2 (Mitigating Role)**

United States v. Sewell, 159 F.3d 275 (7th Cir.), *cert. denied*, 525 U.S. 1168 (1998). The Seventh Circuit held that where the district court has granted a reduction for minor role or determined it not to be appropriate, it is inappropriate to depart under §5H1.7 based on role in the offense.

United States v. Romualdi, 101 F.3d 971 (3d Cir. 1996). The court reversed a downward departure based on a finding that the defendant's conduct, possession of child pornography, was analogous to a situation where a recipient of child pornography might qualify for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.

United States v. Speenburgh, 990 F.2d 72 (2d Cir. 1993). Where the defendant was ineligible for a minor role reduction because the other participant was a government agent, a downward departure was proper.

United States v. Patillo, 817 F. Supp. 839 (**C.D. Cal.** 1993). The defendant was granted a downward departure because he was a minor player when he delivered 500 grams of crack to the post office, because he lived in a community where opportunities to become involved in drug trafficking "are rampant" and was subject to "tremendous financial responsibilities," and where the Commission ignored the need for "greater variations in sentencing to account for the vastly different culpabilities of the various players in the drug trade."

United States v. Valdez-Gonzalez, 957 F.2d 643 (**9th Cir.** 1992). Role in the drug trade played by mules may constitute a mitigating circumstance of a kind or degree not considered by guidelines warranting downward departure; *but see United States v. Webster*, 996 F.2d 209 (**9th Cir.** 1993) (effective Nov. 1, 1992, the role in the offense guideline makes couriers eligible for mitigating role adjustments, so downward departures on this ground alone would not be appropriate).

United States v. Restrepo, 936 F.2d 661 (**2d Cir.** 1991). Based on his minimal role in a money laundering offense—merely unloading boxes of money in a warehouse on one date—the defendant received both a 4-level offense level reduction and a 4-level downward departure.

United States v. Bierley, 922 F.2d 1061 (**3d Cir.** 1990). A minimum role departure was available even where the defendant was a sole actor in buying pornography from agent.

- **§3B1.4 (Using a Minor to Commit a Crime), comment. (n.3).** An upward departure may be warranted where the defendant used or attempted to use more than one person less than 18 years of age.
- **§3C1.2 (Reckless Endangerment During Flight), comment. (n.2).** An upward departure may be warranted where there is a higher degree of culpability than is reflected by the 2-level increase permitted under the guideline for reckless endangerment during flight; **comment. (n.6)** (an upward departure may be warranted where death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person).
- **§3D1.4 (Determining Combined Offense Level), comment. (backg'd).** *United States v. Brown*, 287 F.3d 684 (**8th Cir.** 2002). The Eighth Circuit affirmed a 6-month upward departure where, although the defendant had been convicted of four separate incidences of assault of a toddler, the grouping rules operated so that three of the assaults did not result in any additional incremental punishment. The court pointed to the background commentary to §3D1.4, noting that the Sentencing Commission had recognized that departures in unusual cases would be appropriate.

D. Discouraged Factors

The Commission has determined that the following specific offender characteristics are not ordinarily relevant to the determination of whether a departure should be granted, but may be relevant in “extraordinary” or “exceptional” cases: age (§5H1.1), education and vocational skills (§5H1.2), mental and emotional conditions (§5H1.3), physical condition, including drug and alcohol dependence or abuse (§5H1.4), employment record (§5H1.5), family ties and responsibilities, and community ties (§5H1.6), military, civic, charitable, or public service; employee-related contributions; and record of prior good works (§5H1.11). Title 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant’s education, vocational skills, employment record, family ties and responsibilities and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.

- **§5H1.1 (Age) (Policy Statement)**

United States v. Hildebrand, 152 F.3d 756 (**8th Cir.** 1998). The court upheld downward departure from a sentencing range of 51-63 months to a sentence of 5 years probation with 6 months in home confinement to be followed by 18 months of home confinement. Defendant, the bookkeeper for a group that were convicted of mail fraud, conspiracy to commit mail fraud, and conspiracy to launder money for their part in a fraudulent scheme that offered to file claims in a purported federal class action lawsuit, was a 70-year-old with life-threatening health conditions. The Eighth Circuit deferred to the district court’s judgment finding no abuse of discretion though it noted that the issue was close because it “doubtless would have granted no downward departure or a far less generous departure.”

United States v. Marin-Castaneda, 134 F.3d 551 (**3d Cir.** 1998). The Third Circuit upheld a district court’s refusal to depart based in part on the defendant’s age, 67, absent some extraordinary infirmity.

United States v. Moy, No. 90-CR-760, 1995 WL 311441 (**N.D.Ill.** May 18, 1995). A downward departure was based upon defendant's advanced age, aggravated health condition, and emotionally depressed state.

United States v. Baron, 914 F. Supp. 660 (**D. Mass.** 1995). The court granted a downward departure from a guideline range of 27-33 months (level 18) to a sentence of probation (level 10) to a 76-year-old defendant with substantial medical problems convicted of bank fraud.

United States v. Roth, 1995 WL 35676 (**S.D.N.Y.** Jan.30, 1995). A 63-year-old defendant with neuromuscular disease had "profound physical impairment" warranting a downward departure.

United States v. Dusenberry, 9 F.3d 110 (**6th Cir.** 1993). A downward departure was granted due to the defendant's age and medical condition—he had had both kidneys removed and was required to undergo dialysis three times a week.

United States v. Higgins, 967 F.2d 841 (**3d Cir.** 1992). Young age and stable employment will justify a downward departure if "extraordinary"; remanded to see if the judge realized he had power to depart.

- **§5H1.2 (Education and Vocational Skills) (Policy Statement)**

United States v. Kloda, 133 F. Supp. 2d 345 (**S.D.N.Y.** 2001). In a business tax fraud case, a 1-level departure was granted in part because of "the needs of [defendant's] business and employees."

United States v. Olbres, 99 F.3d 28 (**1st Cir.** 1996). Loss of jobs to innocent employees occasioned by the defendant's imprisonment was not categorically excluded as basis for departure nor was it encompassed as a discouraged departure within the meaning of §5H1.2; though mere fact of job loss to others is not alone enough to take case out of heartland, the issue is one of degrees, involving quantitative and qualitative judgments, which at some point may rise to the level of an appropriate basis for downward departure.

United States v. Milikowsky, 65 F.3d 4 (**2d Cir.** 1995). The high probability that a business run by an antitrust offender would go under if the defendant was incarcerated and the resulting hardship on 100 employees of the business justified a downward departure of 1 level from 11 to 10, authorizing probation.

- **§5H1.3 (Mental and Emotional Conditions) (Policy Statement)**

United States v. Walter, 256 F.3d 891 (**9th Cir.** 2001). The Ninth Circuit reversed the district court's decision to deny a departure based on the defendant's childhood abuse. The court found that brutal beatings by the defendant's father, the introduction to drugs and alcohol by his mother, and sexual abuse by a cousin could constitute extraordinary circumstances justifying a departure under §5H1.3.

United States v. Shasky, 939 F. Supp. 695 (**D. Neb.** 1996). The court granted a downward departure for a combination of reasons to a state trooper convicted of receiving pornography involving minors in a well-publicized case: trooper was homosexual, was of diminutive stature (5'7" & 135 lbs.), was susceptible to abuse in prison, had engaged in extraordinary rehabilitative efforts, was drawn to pornography on the Internet because he was prohibited under the job regulations from engaging in a consensual homosexual relationship, and over 90 percent of the pornography did not involve minors.

United States v. Garza-Juarez, 992 F.2d 896 (**9th Cir.** 1993). Where defendants were convicted of sale of guns and possession of silencers, the court departed downward under §5H1.3 because the defendants suffered from panic disorder and agoraphobia.

- **§5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse) (Policy Statement)**

United States v. Jiminez, 212 F. Supp. 2d 214 (S.D.N.Y. 2002). Where the defendant was convicted of illegal reentry, a downward departure from a range of 57-71 months was required because after the crime was committed, she suffered a brain aneurism that left her “literally a different person than the one who committed those past offenses.” She was mentally and physically weaker and constituted significantly less of a threat of a law violation than was the case previously. As a result of a bleeding artery in her brain, which required emergency neurosurgery to correct, the defendant suffered from severe memory loss, loss of strength in her right arm, headaches and blurred vision, psychotic disorders including hallucinations Treatment of these psychotic symptoms required the defendant to consume psychotropic drugs, which themselves have debilitating side effects. The court rejected the position of the government that departure was warranted only if the physical ailment could not be adequately treated by BOP.

United States v. Krilich, 257 F.3d 689 (7th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002). The Seventh Circuit reversed a downward departure granted to a 69-year-old defendant with age-related medical problems. The district court had found that four separate problems combined to present an “unusual medical profile” but had also noted that there was no structural reason why the defendant could not receive adequate medical care from the Bureau of Prisons. In reversing, the court found that the defendant’s problems were not “extraordinary,” noting that the defendant was not bedridden, could receive adequate care in jail and would not likely have a shortened life span as a result of incarceration.

United States v. Gee, 226 F.3d 885 (7th Cir. 2000). A downward departure under §5H1.4 based on health was not abuse of discretion where the judge reviewed 500 pages of medical records and where the judge concluded that “imprisonment posed a substantial risk to [defendant’s] life.” BOP letter stating that it could take care of any medical problem “was merely a form letter trumpeting [BOP] capability.”

United States v. Lacy, 99 F. Supp. 2d 108 (D. Mass. 2000). A 3-level downward departure was warranted in a drug case where the defendant had a bullet in his brain causing a partial loss of hearing in his left ear, had blood clots in his arteries, and experienced seizures.

United States v. Rivera-Maldonado, 194 F.3d 224 (1st Cir. 1999). The First Circuit upheld the district court's decision not to depart based on the defendant's HIV-positive status. The defendant did not have advanced AIDS, remained in relatively good physical condition, and did not have an "extraordinary physical impairment." *Id.* (citing *United States v. Thomas*, 49 F.3d 253, 260-61 (6th Cir. 1995)). The Sixth Circuit upheld a district court's decision not to depart where the defendant was HIV-positive but had not yet progressed into advanced AIDS. *See*

also *United States v. Woody*, 55 F.3d 1257 (**7th Cir.** 1995) (same); *United States v. Rabins*, 63 F.3d 721 (**8th Cir.** 1995).

United States v. Hammond, 37 F. Supp. 2d 204 (**E.D.N.Y.** 1999). The defendant in a drug case suffering from advanced HIV was entitled to a downward departure from 48 to 18 months where the family will suffer extraordinary financial and emotional hardship from his incarceration.

United States v. Russell, 156 F.3d 687 (**6th Cir.** 1998). The court held that deafness, without more, could not qualify the defendant for a downward departure under the guidelines for extraordinary physical impairment. The defendant did not allege that prison services were inadequate to accommodate his disability or that he was not protected against attackers.

United States v. Gigante, 989 F. Supp. 436 (**E.D. N.Y.** 1998). The court granted a downward departure from a sentence of 262 to 327 months (level 38) to a sentence of 12 years for a defendant of advanced age (69), with a physical infirmity (aortic operations), and a limited life expectancy. The court determined that the defendant had a “substantial chance of surviving more than ten years in prison” and thus imposed a 12-year sentence, less good time credit, which “would probably be short of a life sentence.”

United States v. Webb, 134 F.3d 403 (**D.C. Cir.** 1997). The District of Columbia Circuit held that the defendant’s drug addiction could not form a basis for a downward departure. The district court identified the defendant’s drug addiction as the “principal mitigating circumstance” that took the case outside the heartland of the guideline for drug distribution. The court, applying the *Koon* analysis, stated that drug dependency or abuse was essentially a forbidden departure under the guidelines and should not have been granted. The defendant pled guilty to distribution of more than 50 grams of crack cocaine in a single transaction, not to a small-time purchase or possession. That single transaction placed the defendant within the “heartland” of distribution cases for 50 grams of more of crack cocaine.

United States v. Rioux, 97 F.3d 648 (**2d Cir.** 1996). The court affirmed a downward departure for a defendant who had a serious kidney ailment and other medical problems and had previously had kidney transplant.

United States v. Johnson, 71 F.3d 539 (**6th Cir.** 1995). Under USSG §5H1.4, although “rare,” a downward departure was possible for a physician convicted of distribution of drugs and mail fraud based on his medical condition where the defendant was a 65-year-old man who suffered from diabetes, hypertension, hypothyroidism, ulcers, potassium loss, and reactive depression.

United States v. Moy, 1995 WL 311441 (**N.D.Ill.** May 18, 1995). A downward departure was based upon the defendant's advanced age, aggravated health condition, and emotionally depressed state.

United States v. Baron, 914 F. Supp. 660 (**D. Mass.** 1995). In a bankruptcy fraud case, a downward departure from a range of 27 to 33 months to probation and home detention to a 76-year-old defendant with medical problems which could be made worse by incarceration was warranted.

United States v. Patriarca, 912 F. Supp. 596 (**D. Mass.** 1995). Life-threatening cancer warranted a downward departure.

United States v. Roth, 1995 WL 35676 (**S.D.N.Y.** Jan. 30, 1995). A 63-year-old defendant with neuromuscular disease had a "profound physical impairment" warranting a downward departure..

United States v. Streat, 22 F.3d 109 (**6th Cir.** 1994). The court remanded the case to the district court, observing that the court has discretion to depart because of defendant's "extraordinary physical impairment."

United States v. Martinez-Guerrero, 987 F.2d 618 (**9th Cir.** 1993). A departure was properly denied for a legally blind defendant because prison could accommodate him.

United States v. Long, 977 F.2d 1264 (**8th Cir.** 1992). A defendant's extreme vulnerability to victimization in prison justified a downward departure where four doctors said so.

United States v. Slater, 971 F.2d 626 (**10th Cir.** 1992). Mental retardation, scoliosis of the spine, and chronic pain may warrant departure under §5H1.4.

United States v. Gonzalez, 945 F.2d 525 (**2d Cir.** 1991). A defendant's feminine cast and softness of features justified downward departure because he would be victimized in prison.

United States v. Greenwood, 928 F.2d 645 (**4th Cir.** 1991). A departure was granted to a double amputee whose required treatment at a VA Hospital would be jeopardized by incarceration.

United States v. Velasquez, 762 F. Supp 39 (**E.D.N.Y.** 1991). Life-threatening cancer warranted a downward departure.

- **§5H1.5 (Employment Record) (Policy Statement)**

United States v. Jones, 158 F.3d 492 (10th Cir. 1998). The court upheld a downward departure based in part on the defendant's long-term work history in an economically depressed area with few employment opportunities as well as on the adverse impact incarceration would have on his future employment prospects, in light of the community in which he lives. The court noted that the Supreme Court in *Koon* approved consideration of collateral employment consequences.

United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995). Adverse effect on 150 to 200 employees of companies in which the defendant was a principal if the defendant was imprisoned was an extraordinary circumstance justifying a downward departure.

United States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994). A departure was warranted where a defendant who had been steadily employed, supported his family through his employment, and whose conduct was aberrational.

United States v. Higgins, 967 F.2d 841 (3d Cir. 1992). Young age and stable employment will justify a downward departure if "extraordinary"; remanded to see if judge realized this discretion to depart.

United States v. Jagmohan, 909 F.2d 61 (2d Cir. 1990). The district court granted a downward departure based on the defendant's solid employment record and naivete displayed in offense.

United States v. Ragan, 952 F.2d 1049 (8th Cir. 1992). A downward departure was granted because the defendant stopped using drugs a year before his indictment, maintained steady employment, and offered to cooperate; departure was affirmed where the government did not object at sentencing.

United States v. Alba, 933 F.2d 1117 (2d Cir. 1991). A downward departure was based upon long-standing employment at two jobs.

United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). A downward departure was based upon an excellent employment record.

- **§5H1.6 (Family Ties and Responsibilities and Community Ties) (Policy Statement)**

United States v. Sweeting, 213 F.3d 95 (3d Cir.), *cert. denied*, 531 U.S. 906 (2000). The court reversed a 12-level downward departure based on the defendant's single-parent status and the adverse effect the defendant's incarceration would have on her five children, including on the oldest child who was afflicted with a neurological disorder. Disruptions of the

defendant's life and concomitant difficulties for those who depended on the defendant were inherent in the punishment of the incarceration. The court further noted that defendant's status as a single parent did not meet the threshold of "extraordinary" when compared to innumerable cases in which single parents commit crimes.

United States v. Wright, 218 F.3d 812 (7th Cir. 2000). The Seventh Circuit vacated a downward departure based on the adverse effect the loss of a remaining parent to imprisonment would have on defendant's children. The court noted that reducing a sentence to assist a child's development makes most sense when the range is low to begin with and a small departure allows the parent to provide continuing care. The court concluded that a downward departure for extraordinary family circumstances cannot be justified when, even after reduction, the sentence is so long that release will come too late to promote the child's welfare.

United States v. Aguirre, 214 F.3d 1122 (9th Cir.), *cert. denied*, 531 U.S. 970 (2000). The court affirmed a 4-level downward departure for extraordinary family circumstances where the defendant's common-law husband's death during the time of the defendant's pretrial detention left her child without a caretaker.

United States v. Gauvin, 173 F.3d 798 (10th Cir.), *cert. denied*, 528 U.S. 798 (1999). The court affirmed the district court's exercise of discretion in granting a 3-level downward departure based on family circumstances where the defendant supported his wife and four children, and since his incarceration wife had been working 14 hours per day, 55 miles from home, leaving the children unsupervised by a parent during that period which had caused Navajo Housing Authority to initiate an investigation to determine if custody of children should be taken from the mother. The mother's income was barely able to support the family, and there is no extended family to take custody of children or assist financially.

United States v. Faria, 161 F.3d 761 (2d Cir. 1998). The court vacated a downward departure based on the hardship the defendant's incarceration would have on the children and his ex-wife, finding that the defendant's family was not uniquely dependant on his support.

United States v. Sprei, 145 F.3d 528 (2d Cir. 1998). The Second Circuit reversed a downward departure based on the responsibility the defendant, as a Hasidic Jew, bore for his children's desirability as marriage partners because of his incarceration.

United States v. Owens, 145 F.3d 923 (7th Cir. 1998). The Seventh Circuit held that it was not error to depart downward for extraordinary family circumstances where the defendant's common-law wife and children might have to go on public assistance and where the defendant maintained a good relationship with his children and a brother with Down's Syndrome. While the case was not the most compelling for departure, the appellate court refused to second-guess the district court's decision.

United States v. Galante, 111 F.3d 1029 (**2d Cir.**), *reh'g en banc denied*, 128 F.3d 788 (**2d Cir.** 1997). The court affirmed a departure in deference to the district court's finding of exceptional family circumstances (41-year-old, married, first-time offender; primary source of financial support; two children, ages 8 and 9; wife had limited earning capacity as she spoke little English).

United States v. Archuleta, 128 F.3d 1446 (**10th Cir.** 1997). The court reversed a downward departure for family circumstances where there was no one but the defendant, a single parent, to care for his two children and his diabetic mother.

United States v. Wilson, 114 F.3d 429 (**4th Cir.** 1997). The court reversed a downward departure based on the defendant's responsibility to his out-of-wedlock children.

United States v. Dyce, 91 F.3d 1462 (**D.C. Cir.** 1996). The court vacated a departure for a single mother of three children, one of whom she was breastfeeding, because the only fact arguably unusual was the breastfeeding and there was no evidence that child could not have been fed from a bottle. The court noted that the district court could have delayed commencement of the sentence until after the baby was weaned.

United States v. Allen, 87 F.3d 1224 (**11th Cir.** 1996). The Eleventh Circuit reversed a departure for a defendant who was the primary caretaker of a 70-year-old father with Alzheimer's and Parkinson's diseases, finding that the defendant's responsibilities, although difficult, were not extraordinary.

United States v. Haversat, 22 F.3d 790, 797 (**8th Cir.** 1994), *cert. denied*, 516 U.S. 1027 (1995). The court affirmed a downward departure granted to a defendant whose wife "suffered severe psychiatric problems, which have been potentially life threatening," and his presence was crucial to her treatment.

United States v. Ekhtor, 17 F.3d 53 (**2d Cir.** 1994). Even where the defendant agreed not to ask for a downward departure, the court may do so *sua sponte* if unusual family circumstances; here, a Nigerian widow with five children, three of whom were very ill.

United States v. One Star, 9 F.3d 60 (**8th Cir.** 1993). A departure downward from 33 months to probation was proper where the defendant was not dangerous, possessed a revolver in self-defense, had strong family ties, and lived on an Indian reservation.

United States v. Sclamo, 997 F.2d 970 (**1st Cir.** 1993). The First Circuit upheld a downward departure based on the defendant's special relationship with a young boy who had psychological and behavioral problems and "would risk regression and harm if defendant were incarcerated."

United States v. Rivera, 994 F.2d 942 (**1st Cir.** 1993). The court remanded because the district court did not recognize its discretion to determine whether family responsibilities were so “extraordinary” as to warrant departure in a case where the defendant was a single-mother with sole responsibility for raising four small children; opinion compiles cases in this area.

United States v. Gaskill, 991 F.2d 82 (**3d Cir.** 1993). A downward departure was warranted where the defendant was sole caretaker of his seriously mentally ill wife.

United States v. Johnson, 964 F.2d 124 (**2d Cir.** 1992). A departure was granted to a defendant with sole responsibility for raising four young children.

United States v. Alba, 933 F.2d 1117 (**2d Cir.** 1991). A downward departure was granted to a defendant who had been married for 12 years and lived with a disabled, dependent father and grandmother.

United States v. Pena, 930 F.2d 1486 (**10th Cir.** 1991). A departure was warranted based upon the defendant being a single parent of infant and sole supporter of a 16-year-old daughter and the daughter's infant.

United States v. Kloda, 133 F. Supp. 2d 345 (**S.D.N.Y.** 2001). A husband and wife who filed false tax returns for their business were entitled to downward departure in part because of needs of their small children. A judge must sentence “without ever being indifferent to a defendant's plea for compassion, for compassion also is a component of justice.”

United States v. Blake, 89 F. Supp. 2d 328 (**E.D.N.Y.** 2000). A departure from level 29 to level 8 and probation was proper in part because of emotional trauma the defendant's 3-year-old daughter would suffer.

United States v. Wehrbein, 61 F. Supp. 2d 958 (**D. Neb.** 1999). A downward departure to probation in a case involving low-level trafficking in methamphetamine and possession of weapons, where the defendant's 11-year-old son, whose emotional and mental disorders improved markedly when the defendant returned from serving state sentence on similar charges, would be harmed if defendant was not present to provide continued structured discipline. There were no other care givers available to substitute for defendant, and the federal government could have avoided or lessened impact on child if federal prosecutor had not delayed prosecution for 14 months after the matter was referred.

United States v. Hammond, 37 F. Supp. 2d 204 (**E.D.N.Y.** 1999). The defendant in a drug case suffering from advanced HIV was entitled to a downward departure from 48 to 18 months where family would suffer an extraordinary financial and emotional hardship from his incarceration. “A sentence without a downward departure would contribute to the needless suffering of young, innocent children.”

United States v. Lopez, 28 F. Supp. 2d 953 (**E.D. Pa.** 1998). Extraordinary family circumstances warranted a downward departure of 6 levels for a defendant who pleaded guilty to conspiracy to distribute heroin and to a forfeiture charge where defendant's 7-year-old daughter suffered mental illness and attempted suicide since the defendant's arrest. A risk existed that the defendant's parental rights would be terminated if she was sentenced to her full range of incarceration. In addition, the defendant was not involved in large-scale drug dealing.

United States v. Bissell, 954 F. Supp. 841 (**D. N.J.** 1996). Although financial hardship is generally present where a single parent is sentenced, the highly publicized suicide of the children's father constituted a unique circumstance warranting departure.

United States v. Big Crow, 898 F.2d 1326 (**8th Cir.** 1990). Solid family and community ties, and "consistent efforts to lead a decent life in difficult environment" of an Indian reservation warranted downward departure.

United States v. Blackwell, 897 F. Supp. 586 (**D. D.C.** 1995). Causing needless suffering of innocent children was not in the interests of justice.

United States v. Chambers, 885 F. Supp. 12, 15 (**D. D.C.** 1995). The defendant is single mother with two children ages 12 and 15. Incarcerating the defendant for 15 years would deprive her children of their sole parent: "that children need supportive and loving parents to avoid the perils of life is without question . . . causing needless suffering of young, innocent children does not promote the ends of justice."

United States v. Rose, 885 F. Supp. 62 (**E.D.N.Y.** 1995). The defendant, charged with interstate receipt of a firearm, who had no prior record, who assumed role of non-custodial surrogate father to four children, and aided their struggling grandmother in raising them merited downward departure to probation because the departure "is on behalf of the family."

United States v. Newell, 790 F. Supp. 1063 (**E.D.Wash.** 1992). A downward departure was warranted where the defendant was the caretaker of six young children.

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

Exceptional Civic or Charitable Involvement

United States v. Serafini, 233 F.3d 758 (**3d Cir.** 2000). Community service and charitable works performed by the defendant, a state legislator convicted of perjury in a federal grand jury investigation, were sufficiently "extraordinary and exceptional" to justify a 3-level downward departure for community and charitable activities; examples

included providing a \$300,000 guarantee for medical treatment of a terminally ill patient and mentoring a seriously injured college student, showing generosity of time as well as money.

United States v. Crouse, 145 F.3d 786 (**6th Cir.** 1998). The court upheld the district court's finding that the defendant's exceptional civic involvement was sufficient to take the case out of the heartland of white collar offenders.

United States v. Woods, 159 F.3d 1132 (**8th Cir.** 1998). The court upheld a 1-level downward departure for the defendant's extensive charitable activities: the defendant brought two troubled young women into her home, including a former employee who had stolen from her, and paid for them to attend private high school. Both women became productive members of society. The defendant also assisted an elderly friend to move from a nursing home to an apartment and helped care for him so that he could live out his remaining years with greater independence.

United States v. Jones, 158 F.3d 492 (**10th Cir.** 1998). Where the defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by 3 levels when, as one of 11 factors, it considered defendants's long history of community service even though under §§5H1.5 and 5H1.11 good works are not ordinarily relevant, because here they were "very unusual."

United States v. Bennett, 9 F. Supp.2d 513 (**E.D.Pa.** 1998). In the largest charitable fraud in history, where under §5H1.11 the defendant's civic and charitable good deeds were extraordinary, together with other grounds, departure from 232 to 92 months was warranted—the defendant's substantial contributions in the areas of substance abuse, children and youth, and juvenile justice were well documented and well recognized.

United States v. Canoy, 38 F.3d 893 (**7th Cir.** 1994). Charitable and civic activities may, if exceptional, provide a basis for departure.

Extraordinary Academic Success

United States v. Decora, 177 F.3d 676 (**8th Cir.** 1999). The court affirmed a downward departure based upon the defendant's extraordinary academic success (he was one semester away from a college degree) and his great promise as a community leader and role model, notwithstanding the adversity of life on a Indian reservation. In addition, while released on bond, the

defendant had
successfully
completed an
intensive
in-patient
treatment
program,
participated in
an alcohol
after-care
program
following his
treatment, and
attended
Alcoholics
Anonymous
meetings.

United States v. Crouse, 145 F.3d 786 (**6th Cir.** 1998). After the Supreme Court remanded for reconsideration in light of *Koon*, the Sixth Circuit held that a departure based on a defendant's good works and community activities was not precluded but again reversed the district court's departure on the grounds that the extent of the departure (9 levels) was unreasonable as defendant's civic contributions did not support such a drastic departure; the other grounds upon which the district court departed—exemplary behavior during pendency of appeals, for one—were not valid.

United States v. Rioux, 97 F.3d 648 (**2d Cir.** 1996). The court affirmed a downward departure based, in addition to medical problems, on the defendant's extensive efforts in fund raising for charity.

Exceptional Military Service

United States v. McCaleb, 908 F.2d 176 (**7th Cir.** 1990). Departure for military service might be warranted under some circumstances, but not here.

United States v. Neil, 903 F.2d 564 (**8th Cir.** 1990). Military service might warrant a departure in some cases, but not here.

United States v. Pipich, 688 F. Supp. 191 (**Md.** 1988). Where the defendant was convicted of mail theft, his extraordinary military record warranted a departure to probation. The defendant was in the Marines and served in combat in Vietnam for one year. He received over 45 awards of the Air Medal, including one special award for heroism in connection with the

extraction of a reconnaissance team that was surrounded by North Vietnamese forces. The defendant was awarded the Purple Heart twice. He was also the recipient of several Vietnamese awards.

E. Unmentioned and Unaccounted Factors

A case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. The presence of such a factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Such “unmentioned factors” are factors which have no controlling semantic or practical equivalent or substitute in the guidelines. The courts have reversed or affirmed departures based on a number of unmentioned factors.

Moreover, pursuant to §5K2.0, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range, if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guideline is inadequate or excessive. Such factors have been taken into consideration within the structure of the sentencing guidelines but not *always* specifically addressed in a given guideline. Of course, factors that have been adequately considered by the Commission are not proper grounds for departure.

- **Vulnerability to Victimization in Prison**

United States v. Winters, 174 F.3d 478 (**5th Cir.**), *cert. denied*, 528 U.S. 969 (1999). The court reversed a downward departure based on susceptibility to abuse in prison for a state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner. The officer faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the Fifth Circuit. The district court then departed downward on the grounds that his status as an officer made him especially susceptible to abuse in prison and that the guidelines sentence, which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the Fifth Circuit reversed the downward departures. No other factors existed that made the defendant more susceptible to abuse in prison than any other convicted corrections officer. Because the district court articulated no adequate departure factors and based the departure only on its preference for what the sentence should be, the case was remanded for resentencing without the benefit of the departures.

United States v. Hammond, 37 F. Supp. 2d 204 (**E.D.N.Y.** 1999). The defendant in a drug case suffering from advanced HIV was entitled to a downward departure from 48 to 18 months where family would suffer extraordinary financial and emotional hardship from his incarceration.

United States v. Wilke, 156 F.3d 749 (**7th Cir.** 1998). The court reversed a downward departure for a defendant convicted of child pornography offense based on susceptibility to abuse in prison. A court may not rely on the nature of defendant's offense as a factor justifying such a departure because doing so would establish an automatic departure for an entire class of offenders. The court could consider the defendant's sexual orientation and demeanor.

United States v. Ruff, 998 F. Supp. 1351 (**M.D. Ala.** 1998). The court granted a 1-level downward departure and sentenced the defendant to home detention because he was slim, effeminate, and gay and was assaulted previously in prison.

Koon v. United States, 518 U.S. 81 (1996). No abuse of discretion to grant downward departure to police officers convicted of civil rights violation because of vulnerability in prison.

United States v. Graham, 83 F.3d 1466 (**D.C. Cir.** 1996). Extreme vulnerability to abuse in prison could constitute grounds for departure; case remanded to consider such departure.

United States v. Long, 977 F.2d 1264 (**8th Cir.** 1992). The court affirmed a downward departure from 46 months to 1-year's home detention because four doctors wrote that the defendant was subject to victimization and potentially fatal injuries in prison.

United States v. Gonzalez, 945 F.2d 525 (2d Cir. 1991). Downward departure was affirmed where the defendant had "feminine cast to his face" and "softness of features" which would make him prey to long-term prisoners.

United States v. Lara, 905 F.2d 599, 605 (2d Cir. 1990). A downward departure from 10 to 5 years was upheld. Here, the defendant's youthful appearance and bisexuality made him "particularly vulnerable to prison victimization," a factor "not adequately considered by the guidelines."

- **Successive Prosecutions.** *United States v. Sewell*, 252 F.3d 647 (2d Cir.), cert. denied, 534 U.S. 968 (2001). The Second Circuit affirmed the district court's decision to deny the defendant's request for a downward departure based on successive prosecutions because the defendant's factual arguments regarding hardships that the federal prosecutors imposed on him were unavailing. According to the sentencing transcript, the district judge made no error in interpreting the applicable guidelines and understood his authority to depart. The court determined that the district court merely found that the facts of this case did not support the departure under *Koon*.

- **Disparate Practices of Prosecutors**

United States v. Buckendahl, 251 F.3d 753, 757 (8th Cir.), cert. denied, 534 U.S. 1049 (2001). The appellate court reversed and remanded a departure based on "a significant disparity between the Northern and Southern Districts of Iowa in the availability of section 1B1.8 use immunity." On appeal, the court held that the district court did not have the authority to depart based on inter-district disparity in prosecutorial practices where the practice at issue was within the proper exercise of prosecutorial discretion.

United States v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000) (*en banc*). In a case involving a violation of section 1326 (illegally reentering US after being deported), the Ninth Circuit en banc vacated the panel opinion and held that sentencing disparity that arises from different plea-bargaining policies of United States Attorneys in California's Central and Southern Districts is categorically prohibited as a basis for downward departure. The defendant, prosecuted in the Central District of California, was sentenced to a prison term of 70 months. In the Southern District of California, the Government offers "fast-track" plea agreements that result in

reduced
sentences of
24 months.
United States
v. Bonnet-
Grullon, 212
F.3d 692 (**2d**
Cir.), *cert.*
denied, 531
U.S. 911
(2000) (same).

United States v. Armenta-Castro, 227 F.3d 1255 (**10th Cir.** 2000). Inter-district plea policies cannot form basis of downward departure because such practices are not “mitigating circumstances” as to a defendant’s crime; involve an approach at odds with the fact-bound heartland analysis required for departures; and the impact of plea bargaining and charging practices have been adequately taken into account by the Sentencing Commission.

United States v. Contreras-Gomez, 991 F. Supp. 1242 (**E.D. Wash.** 1999). The district court departed downward on the basis that the government had arbitrarily decided to charge this defendant under 8 U.S.C. § 1362(b) which carried a maximum penalty of 20 years and a guideline enhancement of 16 levels while it had charged every other similarly situated defendant to appear before the court with a § 1362(b)(1) offense which caps the sentence at 2 years. When the government failed to explain its charging decision beyond stating that it had charging discretion, it justified the downward departure on the ground that the Sentencing Commission had not contemplated unexplainable, arbitrary charging decisions by the government.

- **Time Served on Preexisting Sentence.** *United States v. Fermin*, 252 F.3d 102 (**2d Cir.** 2001). The court affirmed the district court’s decision not to depart downward based on defendant’s time served on a preexisting sentence and held that such decision was not subject to review. The defendant pled guilty to reentering the United States illegally after deportation and at sentencing requested a downward departure for time served on a preexisting sentence for a state parole violation. The district court decided not to depart downward to reduce the defendant’s sentence for the time the defendant already served on the state sentence because of the lack of aggravating and mitigating circumstances of a kind or to a degree not already taken into account by the sentencing guidelines. On appeal, the defendant argued that the district court erred in not departing downward because such departures were permitted by §5G1.3(c). The Second Circuit disagreed and found that §5G1.3 and its accompanying application notes did not contain any language authorizing the district court to grant a downward departure in order to achieve a reasonable incremental punishment.

- **Class of Offenses Falls Outside the Heartland.** *United States v. Koczuk*, 252 F.3d 91 (2d Cir. 2001). The appellate court vacated a downward departure based on a class of offenses, defined by regulation and treaty, falling outside the “heartland.” The defendants were convicted of illegally smuggling sturgeon roe into the United States and at sentencing were granted a downward departure because the district court determined that this case fell outside the “heartland” of cases concerning offenses involving fish and wildlife because the importation of sturgeon roe was merely “regulated” rather than “prohibited,” and because part of the reason why sturgeon was placed under the protection of CITES² was to assist Russia’s economy. On appeal, the Second Circuit determined that the district court could not depart downward on the grounds that an entire class of offenses, defined by regulation and treaty, fell outside the “heartland” of a guideline. Rather, a court must analyze the particular facts of a case and compare them with others that typically fall within the applicable guideline.

²CITES is an acronym for the Convention on International Trade in Endangered Species of Wild Fauna and Flora).

- **Alienage (and Consenting to Deportation)**

United States v. Martinez-Carillo, 250 F.3d 1101 (**7th Cir.**), *cert. denied*, 534 U.S. 927 (2001). The appellate court affirmed the district court's finding that deportable alien status was not a proper basis for departure in cases involving convictions for illegal reentry after deportation. The defendant pled guilty to unlawfully reentering the United States in violation of 8 U.S.C. § 1326, and at sentencing was denied his request for a downward departure based on his status as a deportable alien. On appeal, he argued that when the offense of conviction is a section 1326 violation, a defendant should not be precluded from a departure based on deportable alien status. The Seventh Circuit disagreed. Citing *United States v. Gonzales-Portillo*, 121 F.3d 1122 (**7th Cir.** 1997), and *United States v. Farouil*, 124 F.3d 838 (**7th Cir.** 1997), the court affirmed the district court's decision and held that deportable alien status was not a proper basis for departure when the offense of conviction is one listed under 8 U.S.C. § 1326 because "'all crimes covered by §2L1.2 involve illegal presence in the United States by aliens, [and] deportability was certainly accounted for in the guideline.'" *Martinez-Carillo*, at 1106 (quoting *Gonzales-Portillo*, 121 F.3d at 1125); *see also Farouil*, 124 F.3d at 847.

United States v. Lopez-Salas, 266 F.3d 842 (**8th Cir.** 2001). The Eighth Circuit reversed a downward departure that had been granted based on certain collateral consequences of alienage. The district court had found that the defendant would be ineligible for early release after completing a BOP drug treatment program and had also mentioned that deportable aliens were not eligible for minimum security facilities and cannot serve the final ten percent of their sentence in a halfway house. The Eighth Circuit found that under BOP regulations, certain categories of offenders, including aliens, are ineligible for early release after drug treatment and so being categorically excluded from early release is not an atypical factor by itself that would justify departure. In addition, a departure based on conditions of confinement could only be justified in exceptional circumstances, such as where there is a substantial, undeserved increase in the severity of confinement that would affect a substantial portion of the defendant's term.

United States v. Garay, 235 F.3d 230 (**5th Cir.** 2000), *cert. denied*, 532 U.S. 986 (2001). The Fifth Circuit upheld the district court's refusal to depart downward on the basis of defendant's alienage. The court determined that the defendant's status as a deportable alien, an inherent element of his immigration crime, had already been considered by the Commission in formulating the applicable guideline.

United States v. Galvez-Falconi, 174 F.3d 255 (**2d Cir.** 1999). A defendant seeking a downward departure from sentencing guidelines for consenting to deportation must present colorable, nonfrivolous defense to deportation, such that act of consenting to deportation carries with it unusual assistance to administration of justice; in the absence of such a showing, the act of consenting to deportation, alone, would not be circumstance that distinguishes a case as sufficiently atypical to warrant downward departure.

United States v. Davoudi, 172 F.3d 1130 (**9th Cir.**1999). Where the defendant was convicted of making false statements to a bank, the district court had discretion to depart downward because a deportable alien may be unable to take advantage of minimum security designation of the up to six months' of home confinement authorized by 18 U.S.C. § 3624(c), but the court's discretionary failure to do so was not reviewable. Departure on this ground not available if defendant pled guilty to illegal entry. *See, e.g., United States v. Martinez- Ramos*, 184 F.3d 1055 (**9th Cir.** 1999); *United States v. Cardosa-Rodriguez*, 241 F.3d 613 (**8th Cir.** 2001).

United States v. Rodriguez-Lopez, 198 F.3d 773 (**9th Cir.** 1999). The court reversed the district court there it believed it lacked discretion to depart based on the defendant's offer to stipulate to deportation and where the government opposed the departure as the defendant had not pled early enough for the "fast-track" plea agreement.

United States v. Marin-Castañeda, 134 F.3d 551 (**3d Cir.**), *cert. denied*, 523 U.S. 1144 (1998). "A defendant [convicted of heroin trafficking] without a nonfrivolous defense to deportation presents no basis for downward departure by simply consenting to deportation."

United States v. Clase-Espinal, 115 F.3d 1054 (**1st Cir.**), *cert. denied*, 522 U.S. 957 (1997). A defendant seeking a downward departure from the sentencing guidelines for consenting to a deportation must present colorable, nonfrivolous defense to deportation, such that act of consenting to deportation carries with it unusual assistance to administration of justice; in the absence of such a showing, act of consenting to deportation, alone, would not be a circumstance that distinguishes a case as sufficiently atypical to warrant downward departure.

United States v. Farouil, 124 F.3d 838 (**7th Cir.** 1997). The court reversed the district court for failing to consider that the defendant "would be ineligible to serve any part of his sentence in a minimum security facility, that his entire family resides in France, that he has no friends in the United States, that he will be unable to have any regular contact with his family or friends, and the cost to the United States of his incarceration will approach one-half million dollars." Departure on this ground may be considered when the offense of conviction involves offense of reentry after deportation.

United States v. Hernandez-Reyes, 114 F.3d 800, 802 (**8th Cir.** 1997). "The district court here had the authority to depart downward on the basis that [the defendant] consented to an administrative deportation."

United States v. Flores-Uribe, 106 F.3d 1485 (**9th Cir.** 1997). The defendant convicted of unlawful re-entry was not eligible for a departure because stipulation had no practical effect.

United States v. Bakeas, 987 F. Supp. 44 (**D. Mass.** 1997). The court departed down from a 12-month sentence in an embezzlement case to a sentence of probation with a number of restrictions that would approximate imprisonment in a prison camp for a lawful permanent resident alien, who nevertheless would have been denied minimum security classification.

United States v. Barajas-Nunez, 91 F.3d 826 (**6th Cir.** 1996). It was not plain error to depart under lesser harms provisions of §5K2.11 where the defendant had illegally reentered the country after having been deported when he believed his girlfriend was in grave danger of physical harm and wanted to obtain surgery for her, but the case was remanded to explain the extent of departure.

United States v. Cruz-Ochoa, 85 F.3d 325 (**8th Cir.** 1996). The district court can depart downward on basis of the defendant's waiver and consent to administrative deportation upon filing of joint motion by the parties for a 2-level downward departure at sentencing on plea of guilty to illegal reentry.

United States v. Cubillos, 91 F.3d 1342 (**9th Cir.** 1996). The court remanded for further findings to determine whether the departure was warranted on the basis of the effect that the defendant's status as a deportable alien would have on his BOP custody.

United States v. Veloz, 83 F.3d 380, 382 (**11th Cir.** 1996). Only extraordinary consequences of defendant's alienage may serve as basis for downward departure. The ordinary consequences, such as, "(1) the unavailability of preferred conditions of confinement, (2) the possibility of an additional period of detention pending deportation following the completion of the sentence, and (3) the effect of deportation as banishment from the United States and separation from family" did not warrant departure. Citing *United States v. Restrepo*, 999 F.2d 640, 644 (**2d Cir.** 1993). See also *United States v. Mendoza-Lopez*, 7 F.3d 1483 (**10th Cir.** 1993), *cert. denied*, 511 U.S. 1036 (1994) (same); *United States v. Nnanna*, 7 F.3d 420 (**5th Cir.** 1993) (same); *United States v. Restrepo*, 999 F.2d 640 (**2d Cir.** 1993) (same).

United States v. Smith, 27 F.3d 649 (**D.C. Cir.** 1994). The court remanded to permit the district court to grant a downward departure to the extent that a deportable alien would face more serious prison conditions, *i.e.*, denial of halfway house placement.

- **Status of the Sentencing Commission.** *United States v. Martin*, 221 F.3d 52 (**1st Cir.** 2000). The court vacated a sentence imposed by the district court in which it erroneously granted a downward departure based on the then moribund status of the Sentencing Commission and on the perceived disparity between the defendant's sentencing range and the national median sentence for persons convicted of federal drug trafficking. The

appellate courts noted that neither factor, singularly or in combination, could carry the weight of a downward departure. It further stated that sentencing guidelines, once promulgated, have the force of law, even when the Commission lacks a quorum.

- **Offenses Charged in Indictment Without Jury Verdict Being Reached** *United States v. Mapp*, 170 F.3d 328 (2d Cir.), cert. denied, 528 U.S. 901 (1999). The Second Circuit upheld an upward departure based on the district court's finding, by clear and convincing evidence, that the defendant had participated in three robberies that had been charged in the indictment but as to which the jury was unable to reach a verdict.

- **Substantial, Voluntary Restitution**

United States v. Blackburn, 105 F. Supp. 2d 1067 (D. S.D. 2000). Where the defendant pled guilty to failure to pay child support and was \$15,000 in arrears, and where the guideline called for 12 to 18 months of imprisonment with one year of supervised release, imprisonment was counter-productive towards payment of child support. The court granted a downward departure on its own motion to probation to make sure that the defendant would be subjected to a longer term of supervision, which would not have been possible if greater imprisonment was imposed.

United States v. Oligmueller, 198 F.3d 669 (8th Cir. 1999). The Eighth Circuit held that departing downward on the basis of the defendant's extraordinary efforts at restitution was not an abuse of discretion. Upon the bank's discovery of the defendant's misrepresentation of assets claimed in order to secure a bank loan, the defendant began liquidating assets owned, pledged or unpledged, in order to repay the bank. Over a one-year period, the defendant repaid the bank most of the money owed while simultaneously and substantially reducing the bank's loss amount from over \$800,000 to less than \$60,000. The court noted that the defendant voluntarily began making restitution almost a year before he was indicted and the restitution paid nearly 94 percent of that owed to the bank. The court held the defendant's substantial voluntary restitution was "extraordinary" and appropriate as a basis for a downward departure.

United States v. Bennett, 161 F.3d 171 (3d Cir. 1998), cert. denied, 528 U.S. 819 (1999). Even where the defendant did not accept responsibility, his full restitution early in case and efforts to recover funds warranted a downward departure to 91 months (from 235 to 144) in part under §5K2.0.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), cert. denied, 519 U.S. 1114 (1997). Payment of restitution can, in exceptional circumstances, be basis for departure from sentencing guidelines; here, however, restitution of less than half of the money embezzled and only after indictment to avoid civil liability was not extraordinary.

United States v. Miller, 991 F.2d 552 (9th Cir. 1993). The court remanded for the district court to determine whether \$58,000 repaid for \$45,000 embezzled constituted atypical restitution.

United States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992). The court affirmed the departure where the defendant agreed to pay "\$34,000 more than he thought was owed and to which he pled guilty."

United States v. Garlich, 951 F.2d 161 (8th Cir. 1991). The district court erred in failing to exercise its discretion to determine if the defendant who turned over assets of \$1.4 million to cover loss of \$253,000 merited a departure for extraordinary restitution.

- **Rehabilitation³**

United States v. Craven, 239 F.3d 91 (1st Cir. 2001). The court vacated a downward departure for extraordinary presentence rehabilitation and remanded the case for resentencing. The defendant disavowed drug and alcohol abuse approximately one year before his arrest but during his pretrial detention incurred numerous disciplinary infractions. The district court granted a downward departure by relying on an expert opinion the court solicited *ex parte*. Based on that opinion, the district court found that the proliferation of disciplinary violations did not undercut the defendant's eligibility for a downward departure based on his supposed extraordinary rehabilitation. The Sixth Circuit determined that a sentencing court may not use an *ex parte* conversation with a court-appointed expert as a means to acquire information critical to a sentencing determination. The court concluded that the district court's violation of this principle tainted the factual basis for the departure decision and annulled the defendant's downward departure for extraordinary presentence rehabilitation.

United States v. K., 160 F. Supp. 2d 421 (E.D.N.Y. 2001). Where the defendant convicted of trying to sell ecstasy and where the government agreed that the defendant should be sentenced on the basis of the 1,000 pills actually sold instead of 15,000, and where the defendant was mentally retarded, the court continued sentencing one year in part to enable the defendant to attend a rehabilitation program and demonstrate post-offense rehabilitation for a downward departure—strong statements in favor of continuing sentences to enable the defendant to show rehabilitation.

United States v. Hernandez, 2001 WL 96369 (S.D.N.Y. Feb. 2, 2001). The defendant's "significant and successful efforts at rehabilitation from her addiction to heroin since her arrest

³The new policy statement, §5K2.19, does not apply to post-offense rehabilitation efforts that occur before the original sentencing.

are extraordinary factors warranting a downward departure” from 12 to 18 months range to probation.

United States v. Newlon, 212 F.3d 423 (**8th Cir.** 2000). A departure from 110 to 90 months was not an abuse of discretion where prior to his arrest on the charge of felon in possession, the defendant had, at his own request, spent 85 hours in drug and alcohol program; his counselor reported that he had a sincere desire for treatment; and his family noted a marked improvement in his behavior and attitude.

United States v. Blake, 89 F. Supp. 2d 328 (**E.D.N.Y.** 2000). In bank robbery, departure from level 29 to level 8 and probation was proper in part because incarcerating the defendant would “reverse the progress she has made” and considering the decreasing opportunities for rehabilitation in federal prisons resulting from ever-increasing prison populations.

United States v. Seethaler, 2000 WL 1373670 (**N.D.N.Y.** Sept. 19, 2000). A downward departure was granted from 46 to 30 months for post-offense rehabilitation where the defendant had completely resolved his sexual fetish and had no continuing urges to search for pornography on the Internet or in any other situation, and where the defendant appeared to have re-established himself in his family and in his occupational pursuits.

United States v. Kane, 88 F. Supp. 2d 408 (**E.D. Pa.** 2000). Where the defendant was convicted of selling methamphetamine and where he had abused drugs and alcohol for 25 years, but where urine tests since his release from a drug program in May 1999 showed he had stopped use of drugs and limited alcohol consumption, a downward departure from 188 to 120 months was warranted “in recognition of sincere effort to repair his life” even though a few lapses caused him to miss a number of meetings with pretrial services and therapists because lapses have to be viewed in context of his former behavior.

United States v. DeShon, 183 F.3d 888 (**8th Cir.** 1999). The district court did not abuse its discretion in departing downward from 30 to 37 months to 5 months' community confinement without work release based on defendant's post-offense rehabilitation, after witnesses testified that he had "renewed his life in the church" and was making extraordinary efforts to turn his life around.

United States v. Bryson, 163 F.3d 742 (**2d Cir.** 1998). The Second Circuit vacated a downward departure based on post-offense rehabilitation where the evidence was insufficient to support a conclusion that rehabilitation had taken place and the district court had only vaguely stated its findings on rehabilitation while expressing dissatisfaction with the guideline range.

United States v. Jones, 158 F.3d 492 (**10th Cir.** 1998). Where the defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by 3 levels to probation when, as one of 11 factors, it considered that the

defendant had adhered to the conditions of his release and changed both his attitude and conduct during his release constituting exceptional post-offense rehabilitation.

United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998). The Tenth Circuit held that post-offense drug rehabilitation can form the basis for departure, effectively overruling prior pre-*Koon* circuit precedent to the contrary. The court found that although addiction and abuse are typically forbidden as a basis for departure, this does not preclude consideration of post-offense drug rehabilitation efforts. These efforts are to be evaluated by the same standards as a defendant's efforts at any

United States v. Brock, 108 F.3d 31 (**4th Cir.** 1997). The defendant was convicted of credit card fraud with 12-to-18 months range sought downward departure because of post-arrest rehabilitation; district ruled that it lacked authority to do so. The circuit remanded because previous decision ruling out such departures no longer good law in light of *Koon*.

United States v. Kapitzke, 130 F.3d 820 (**8th Cir.** 1997). Post-offense rehabilitation effort in a child pornography case may justify a downward departure where the defendant has undergone eight months of sex offender and chemical dependency treatment with a high probability of success.

United States v. Flowers, 983 F. Supp. 159 (**E.D.N.Y.** 1997). Sentencing continued for one year to allow time to determine if the defendant was truly rehabilitated.

United States v. Griffiths, 954 F. Supp. 738 (**D. Vt.** 1997). A 13-level downward departure was granted on the basis of the defendant's extraordinary rehabilitative efforts after the defendant overcame drug use, left his former lifestyle entirely behind him, and became involved in a program for children; the defendant's progress would be utterly frustrated if the defendant were incarcerated.

United States v. Workman, 80 F.3d 688 (**2d Cir.** 1996). Between the defendant's criminal conduct and arrest, he left a gang, joined the Army, and was honorably discharged, earning a modest downward departure proper because the defendant abandoned his criminal lifestyle.

United States v. Shasky, 939 F. Supp. 695 (**D. Neb.** 1996). A downward departure was granted in a child pornography case where the defendant entered a nationally recognized sex offender program and had an excellent long-term prognosis with minimum risk of re-offending.

United States v. Williams, 65 F.3d 301 (**2d Cir.** 1995). When a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he had been admitted to a selective and intensive inmate drug treatment program and a guideline sentence would deprive him of his only opportunity rehabilitate himself, a departure was within the discretion of the court and a departure from 130 months to 60 months was reasonable if additional conditions were attached to the supervised release term.

United States v. Neiman, 828 F. Supp. 254 (**S.D.N.Y.** 1993). A downward departure was granted based upon the likelihood of rehabilitation in non-narcotics context where religious

leaders and family members agreed to supervise home confinement, and medical treatment was to be provided.

- **Multiple Victims of Threatening Communications.** *United States v. Adelman*, 168 F.3d 84 (2d Cir. 1999). The court upheld an upward departure based on the fact that the defendant's threatening communications affected people other than the direct victim, a situation not provided for in the offense guideline, §2A6.1. The defendant not only made threats to a judge but also indicated in one of the threatening phone messages that the judge's "kid" was held captive. Since the judge had three children, the court agreed that it was properly found that all three children were victims of the threatening behavior. The court determined that because the sentencing guidelines did not account for multiple victims under §2A6.1, an upward departure was warranted.
- **Cultural Assimilation.** *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998). The Ninth Circuit upheld as a potential ground for downward departure for an illegal reentry defendant the defendant's "cultural assimilation." The defendant's 23 years of legal residence in the United States, his marriage to a United States citizen, and his five children who were United States citizens provided significant cultural ties to the United States that made his motivation for illegal reentry or continued presence different from the typical economic motivation. The court noted that it may lessen a defendant's culpability that his motivation is familial or cultural rather than economic. The court upheld the district court's discretionary decision not to depart in this case.
- **Two Murder-for-Hire Conspiracies Against One Victim.** *United States v. Scott*, 145 F.3d 878 (7th Cir. 1998). The Tenth Circuit upheld a 2-level upward departure based on the fact that the defendant commenced two separate murder-for-hire conspiracies against a single victim.
- **Possession of Child Pornography without Additional Wrongful Conduct**

United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000). The court reversed a downward departure based on the defendant's history of not abusing any child, of not having an inclination, predisposition, or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, and had no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant's case out of the "heartland" of §2G2.4. Consistent with the Second, Eighth, and Ninth Circuits, the court stated that the guidelines had taken into account the varying degrees of severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court held that §§2G2.1-2G2.4 clearly reflect consideration of whether, and the degree to which, harm to minors is or has been involved. *See also United States v. Barton*, 76 F.3d 499 (2d Cir. 1996); *United States v. Wind*, 128 F.3d 1276 (8th Cir. 1997). *But see United States v. Silleg*, 311 F.3d 557 (2d Cir. 2002).

United States v. Stevens, 197 F.3d 1263 (9th Cir. 1999). The Ninth Circuit held that the determination of whether the defendant's conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant's conduct with that of other offenders. The court reasoned that the defendant's substantial number of "old" images of child pornography was typical of heartland cases under §2G2.4. Consistent with the Second and Eighth Circuits, *see United States v. Barton, supra*, and *United States v. Wind, supra*, the court held that the defendant's failure to engage in additional wrongful conduct is impermissible as a grounds for departure when sentencing for crime of possession of child pornography. The court further held that the fact that the defendant downloaded the images from the Internet was not a ground for departure when use of a computer is provided as a sentencing enhancement under §2G2.4.

- **Cultural Differences**

United States v. Guzman, 236 F.3d 830 (7th Cir. 2001). The court reversed the district court's decision to downward depart because the defendant was more likely to participate in her boyfriend's criminal activities because, as Mexican woman, she was expected to submit to her boyfriend's will. The majority said this reasoning impermissibly joined factors of gender and national origin, which were expressly forbidden sentencing considerations; the concurring judge noted: "Because an individual's cultural heritage encompasses a set of beliefs and a manner of

behavior that exist conceptually and practically quite apart from that individual's immutable sex, race or national origin, I believe that cultural heritage should not be considered a prohibited basis for departure under the wording of the current guideline. Indeed, nowhere in the guidelines does the term cultural heritage appear; it is thus best categorized as what the Supreme Court has described as an unmentioned factor.” *Id.* at 838. *See Koon v. United States*, 518 U.S. 81, 96 (1996).

United States v. Tomono, 143 F.3d 1401 (11th Cir. 1998). The Eleventh Circuit held that the district court erred in departing downward based on “cultural differences” in connection with the defendant’s illegal importation of turtles and snakes from Japan. The court noted that the defendant was aware of the United States regulations forbidding the importation of reptiles, and yet with this understanding falsely completed Customs forms to indicate that the defendant was not bringing into the United States live animals. The court found insufficient evidence that reptiles hold a “unique” place in Japanese culture, and found that the circumstances surrounding the defendant’s crime were not very different from the “heartland” of cases considered by the Sentencing Commission in drafting §2Q2.1. The court did not decide whether “cultural differences” could ever be the proper basis for departure.

United States v. Carbonell, 737 F. Supp. 186 (E.D.N.Y. 1990). In a cocaine case, where a Hispanic defendant sought to help out a new immigrant, a departure downward from 41 to 12 months is warranted because of the defendant's "personal characteristics as explained by a sociological phenomenon" that in "the cohesiveness of first generation immigrant communities in the United States engenders loyalty, responsibility and obligation to others in the community even if they are strangers." *Id.* at 187.

- **Victim Participation in Prosecution.** *United States v. Yang*, 281 F.3d 534 (6th Cir. 2002). The Sixth Circuit vacated and remanded for resentencing where the district court had granted a 14-level downward departure to defendants primarily on the ground that the victim in the trade secrets case had, in its view, played an overly active role in the prosecution. The appellate court reversed, finding that the role of the victim was an unmentioned factor in the guidelines but that the district court had provided no basis from which to conclude that the involvement of the victim in the prosecution removed the case from the heartland. The district court had not explained how the victim’s participation was at all relevant to the offense or the offenders.
- **Application of Cross-Reference Provision.** *United States v. Fenner*, 147 F.3d 360 (4th Cir. 1998). The Fourth Circuit reversed a downward departure based on a significant increase in sentencing guideline ranges due to the application of a cross-reference provision that applies to firearms offenses resulting in death. Such a factor did not take the case outside the “heartland” of cases under §2K2.1. The guidelines clearly take into account that application of the cross-reference will result in an enhanced guideline range and consequently this increase does not take the case outside of the “heartland.”

- **Acquitted Conduct or Uncharged Relevant Conduct**

United States v. White, 240 F.3d 127 (2d Cir. 2001). The court remanded for consideration of a departure where the district court stated that it had no “leeway” to depart in a drug case where the stacking provision of USSG §5G1.2 required a consecutive sentence based on uncharged relevant conduct.

United States v. Koczuk, 166 F. Supp. 2d 757 (E.D.N.Y. 2001). Where the defendant was acquitted of five counts but convicted of a single count of importing caviar with a market value of less than \$100,000, but where the codefendant was convicted of six counts of importing \$11 million worth, the offense level “has been extraordinarily magnified by a circumstance that bears little relation to defendants’ role in the offense.” *Id.* at 763. Here, the defendant’s role in the conspiracy bore little correlation to \$11 million because the defendant was not actively involved in the codefendant’s business but was merely a low-level employee–chauffeur and interpreter—who “took orders from the codefendant”; thus a 4-level minimal role reduction simply was not adequate.

United States v. Cordoba-Murgas. 233 F.3d 704 (2d Cir. 2000). The court remanded to permit the district court to apply the preponderance standard but also to consider a downward departure where the district court, applying a clear and convincing standard, rejected government’s request for life sentences based on uncharged relevant conduct that the government claimed proved the defendant had committed murder during attempts to collect drug-related debts; the government asked the court to apply the cross-reference to the murder guideline or alternatively to depart upwardly pursuant to §5K2.1 (where death results).

United States v. Patterson, 215 F.3d 776 (7th Cir. 2000), *cert. denied*, 534 U.S. 853 (2001). The court remanded for the district court to consider whether a departure was warranted in a case where the guideline sentence resulted in mandatory life imprisonment as a result of the imposition of a gun enhancement in the drug guideline based on possession of a firearm by drug co-conspirators despite the fact that the jury had acquitted the defendant of the gun offense charged under 18 U.S.C. § 924(c); had he been convicted of the § 924(c) count, the guideline calculation would have resulted in a 360-life range with a consecutive 5-year sentence for § 924(c) rather than mandatory life.

United States v. Monk, 15 F.3d 25 (2d Cir. 1994). Where a defendant is acquitted by a jury of drug distribution and convicted of the lesser included offense of possession, the court has the power to depart because relevant conduct requires an extraordinary increase in sentence by reason of conduct for which defendant was acquitted.

- **Conditions of Pretrial Confinement**

United States v. Carty, 264 F.3d 191 (2d Cir. 2001). The defendant's pre-sentence confinement in the Dominican Republic where conditions were bad may be a permissible basis for a downward departure from sentencing guidelines.

United States v. Francis, 129 F. Supp. 2d 612 (S.D.N.Y. 2001). In an illegal reentry case, the court departed downward 1 level because the defendant's 13-month pretrial confinement in a county facility where the defendant was subjected to extraordinary stress and fear: certain aspects of the facility were virtually controlled by gangs and inmates; the defendant was the victim of an attempted attack and threats; he suffered significant weight loss, stress, insomnia, depression, and fear as a result; and the facility was operating at 150 percent capacity. These facts establish qualitatively different conditions than those of pre-sentence detainees in federal facilities operated by the Bureau of Prisons.

United States v. Brinton, 139 F.3d 718 (9th Cir. 1998). The district court did not have to determine whether the district court abused its discretion when it granted a 30-month departure based on 2 and 1/2-months' incarceration in a harsher non-federal institution because the government waived its challenge by failing to object below; on remand, the district court ought to consider whether departure appropriate.

- **Crack Cocaine Disparity.** *United States v. Coleman*, 188 F.3d 354 (6th Cir. 1999) (en banc). The Sixth Circuit reversed the district court where that court believed it could not consider as a ground for downward departure the alleged improper investigative techniques by the government which targeted African-American parolees and those on supervised release with offers to engage in drug and other offenses. The panel opinion at 138 F.3d 616 (6th Cir. 1998), which was vacated when *reh'g en banc* was granted, 146 F.3d 1051 (6th Cir. 1998), had also determined that the district court erred when it categorically rejected crack cocaine disparity, in combination with other grounds, as a departure ground: "Thus, while the disparity alone may not indicate that a crack cocaine case is outside of the 'heartland,' the disparity coupled with the improper targeting and inducement of individuals to commit those crimes may well do so. Accordingly, we hold that the district court erred by failing to consider the cocaine disparity coupled with the particular circumstances of this case to determine whether the case was removed from the 'heartland' of crack cocaine cases." 138 F.3d at 622. The en banc opinion makes only passing reference to crack cocaine holding only that the district court on remand must consider all the particular circumstances of the case to determine whether the case is outside the "heartland of crack cocaine cases;" the en banc court does not explicitly address the disparity in sentencing between crack and powder cocaine as a departure ground. 188 F.3d at 360-362.
- **Disparity Among Defendants' Sentences**

United States v. Caperna, 251 F.3d 827 (**9th Cir.** 2001). The appellate court vacated and remanded a downward departure based on sentence disparity among cooperating and non-cooperating defendants. The district court had granted a downward departure based on sentence disparity among the codefendants but, on appeal, the government argued that it was not appropriate for a sentencing court to depart on the basis of codefendant sentence disparity unless the codefendant was convicted of the same offense as the defendant. Citing *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (**9th Cir.** 2000), the Ninth Circuit stated that a district court may not depart based on codefendant sentence disparity if the codefendant was convicted of a different offense than the defendant. The court held that the district court erred by departing downward in the defendant's case because it considered two codefendants' sentences, one of which was convicted of an offense different from the defendant's.

United States v. McMutuary, 217 F.3d 477 (**7th Cir.**), *cert. denied*, 531 U.S. 1001 (2000). Only where unjustified disparity exists between defendant's sentence and "sentences of all other similarly situated defendants nationwide" may a downward departure be based on disparity; unjustified disparity relative to a codefendant may not be a basis for departure as that would create the type of unjustified disparity between their sentences and those of all similarly situated defendants that the guidelines seek to avoid.

United States v. McKnight, 186 F.3d 867 (**8th Cir.** 1999), *cert. denied*, 531 U.S. 999 (2000). Disparity among codefendants' sentences cannot be basis for downward departure.

United States v. Daas, 198 F.3d 1167 (**9th Cir.** 1999). The court reversed the district court which believed it lacked discretion to depart to equalize sentences of codefendants in methamphetamine laboratory case.

United States v. Noriega, 40 F. Supp. 2d 1378 (**S.D. Fla.** 1999). The court reduced an old-law sentence from 40 to 30 years because of the disparity in time served by the codefendant and informants, but primarily because of the nature of the incarceration.

United States v. Clark, 79 F. Supp. 2d 1066 (**N.D. Iowa** 1999). The court permitted as a grounds for departure the disparity between the availability of §1B1.8 use immunity between the United States Attorney's offices in two different districts

. In the
defend
ant's
case,
the
United
States
Attorne
y did
not give
him, a
cooper
ating
witness
,
protecti
on for
incrimin
ating
stateme
nts
under
USSG
§1B1.8
. A
departu
re was
granted
from
36 to
28
months,
where
8 levels
were
due to
drugs
the
defend
ant
admitte
d to in

United States v. Contreras, 108 F.3d 1255 (**10th Cir.**), *cert. denied*, 522 U.S. 839 (1997). The court reversed the district court's downward departure for a defendant whose disparate sentence was not "unwarranted" because a codefendant similarly situated had pled guilty to a lesser charge while the defendant had gone to trial and had been convicted on four counts. *United States v. Lawrence*, 179 F.3d 343 (**5th Cir.** 1999) (same).

Meza v. United States, 519 U.S. 990 (1996). Remanded for reconsideration by the Seventh Circuit, in light of *Koon*, of its holding that disparity between codefendants' sentences could not form basis of downward departure. On remand, *United States v. Meza*, 127 F.3d 545 (**7th Cir.** 1997). After *Koon*, district courts may no longer categorically decline to consider a departure based on a disparity in sentences between co-conspirators. If the disparity between sentences is justified result of a proper application of the guidelines to the particular circumstances of that case, then it is not a valid basis for departure. No departure was proper where the disparity between co-conspirators resulted from cooperation of some with the government and others' refusal to do.

United States v. Boshell, 952 F.2d 1101 (**9th Cir.** 1991). A downward departure from 27 to 12 years was upheld on the ground that the guideline sentence was disproportionately long compared to the 5- to 6-year sentences imposed on a codefendant who had been sentenced after the Ninth Circuit held the guidelines unconstitutional, but before they were upheld by the Supreme Court.

- **Federal/State Sentencing Disparity.** *United States v. Snyder*, 136 F.3d 65 (**1st Cir.** 1998), *cert. denied*, 532 U.S. 1057 (2001). The First Circuit held that the punishment the ACCA defendant faced in federal court as compared with the more lenient sentence he would have faced in a state prosecution was not a valid basis for departure. Allowing a departure on this basis would undermine the guidelines' goal of promoting uniformity in federal sentencing. *See also United States v. Searcy*, 132 F.3d 1421 (**11th Cir.** 1998) (same).
- **Due Process.** *United States v. Ray*, 950 F. Supp. 363 (**D. D.C.** 1996). The district court granted a 1-level downward departure at the re-sentencing of a defendant who was successful in the collateral attack of section 924(c) conviction based on *Bailey v. United States*, 516 U.S. 137 (1995). The defendant, who had served a significant portion of the original term of a drug sentence stood to have that term increased because of the 2-level gun enhancement (§2D1.1(b)(1)) applicable to a drug sentence once section 924(c) conviction was vacated. A departure was warranted because the Sentencing Commission had not adequately considered the due process concerns that would arise if the defendants were resentenced with the full 2-

level “gun bump”—after having nearly completed their original terms of imprisonment attributable to the narcotics offenses.

- **Extraordinary Acceptance of Responsibility**

United States v. Stewart, 154 F. Supp. 2d 1336 (**E.D. Tenn.** 2001). Where the defendant pled guilty to possession of 8 ounces of cocaine, an 8-level downward departure, in addition to 3 normal levels, was granted for “extraordinary acceptance” where the defendant continued to plead guilty even though the judge had granted the codefendant’s suppression motion which could have resulted in dismissal of the defendant’s case.

United States v. Gee, 226 F.3d 885 (**7th Cir.** 2000). The court affirmed a 2-level downward departure for a defendant who was not eligible for an acceptance of responsibility adjustment because he had gone to trial but whose conduct demonstrated a “non-heartland acceptance of responsibility” in that he had made early and consistent offers to the government to determine the legality of his business and immediately discontinued business following the verdict against him and froze his inventory, offered negotiations with the government concerning disposal of the inventory, and offered full assistance to the government with respect to access to the inventory; the defendants were engaged in the business of selling electronic chips and modules for use in cable television scrambler boxes and were convicted of multiple counts of wire fraud.

United States v. Whitaker, 152 F.3d 1238 (**10th Cir.** 1998). Post-offense drug rehabilitation efforts may be considered as a basis for departure.

United States v. Evans, 49 F.3d 109 (**3d Cir.** 1995). Voluntary disclosure of true identity resulting in increased criminal history score may warrant a downward departure.

United States v. DeMonte, 25 F.3d 343 (**6th Cir.** 1994). In computer fraud case, a departure was proper on the ground that the defendant admitted to crimes about which the government had no knowledge, even though cooperation was part of the plea bargain.

United States v. Brown, 985 F.2d 478 (**9th Cir.** 1993). Under §5K2.0, in light of defendant's confession, the court can depart downward from the range if it determines that the 2-point reduction did not adequately reflect the defendant's acceptance.

United States v. Miller, 991 F.2d 552 (**9th Cir.** 1993). Voluntary restitution exhibiting extraordinary acceptance of responsibility can justify downward departure.

United States v. Rogers, 972 F.2d 489 (**2d Cir.** 1992). The district court was empowered to depart downward where the defendant emerged from a drug-induced state, realized his wrongdoing, and turned himself in and confessed.

United States v. Lieberman, 971 F.2d 989 (**3d Cir.** 1992). A 1-level downward departure was affirmed where the defendant offered to make restitution greater than the amount taken, met with bankers and offered to explain how he avoided detection, resigned his position and went to the FBI to admit his embezzlement and pled guilty.

United States v. Davis, 797 F. Supp. 672 (**N.D. Ind.** 1992). An 8-level downward departure was proper where the defendant made \$750,000 restitution voluntarily.

United States v. Farrier, 948 F.2d 1125 (**9th Cir.** 1991). Admission of guilt to other crimes can justify departure under §5K2.0, but not further adjustment for acceptance.

United States v. Crumb, 902 F.2d 1337 (**8th Cir.** 1990). Voluntary surrender 9 days after the issuance of a warrant resulted in a 9-month downward departure.

- **Fraud, Money Laundering, and Similar Offenses**

Defendant Did Not Personally Profit

United States v. Walters, 87 F.3d 663 (**5th Cir.** 1996). A downward departure was upheld where the defendant did not personally profit from a money laundering scheme.

United States v. Broderson, 67 F.3d 452 (**2d Cir.** 1995). A downward departure was based on a “confluence of circumstances . . . not taken into account by the guidelines,” including that loss overstated the seriousness of fraud, the defendant had not personally profited financially from his fraudulent conduct, and the benefit was derived by the corporation which employed him.

Uncertainty of Loss Determination. *United States v. Henry*, 136 F.3d 12 (**1st Cir.** 1998). The court upheld a 1-level downward departure which the district court granted because of its uncertainty that the loss had been properly calculated in a case involving conspiracy to transport hazardous waste to a facility that does not have a permit to receive such waste and related wire and mail fraud offenses resulting from a scheme that falsely represented to the customers that the facility could lawfully receive the hazardous waste.

Outside The Heartland

United States v. Smith, 186 F.3d 290 (**3d Cir.** 1999) (internal citations omitted). The court vacated the sentence where the district court believed that it lacked the discretion to apply the fraud guideline rather than the money laundering guideline in a case that was atypical for money laundering cases: “Ultimately, we conclude that the Sentencing Commission itself has indicated that the heartland of USSG §2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime. That is not the type of conduct implicated here. In this case,

the money laundering convictions were based on 15 checks sent by Benchmark to Smith's creditors. This left a paper trail, conduct inconsistent with planned concealment. The money laundering activity, when evaluated against the entire course of conduct, was an "incidental by-product" of the kickback scheme." *Id.* at 300. Significantly, the Third Circuit applied the heartland analysis not as a basis for departure but pursuant to USSG §1B1.2(a), (comment. n.1) to select the guideline "most applicable to the nature of the offense conduct charged" which in this case should have been the fraud guideline.

United States v. Threadgill, 172 F.3d 357 (5th Cir. 1999). The court affirmed a downward departure based on the fact that the defendants' money laundering activities "were incidental to the gambling operation" and that the "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities." *Id.* at 376. The court noted that post-*Koon*, it would not declare categorically that the incidental nature of the money laundering is an impermissible basis for departure.

United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998). The Fifth Circuit upheld the departure granted because the defendant's offenses did not fall within the heartland of the money laundering guideline, and instead applied the fraud guideline in a campaign contribution case where the defendants were convicted of interstate transportation of stolen property, money laundering, and engaging in a monetary transaction with criminally derived property, and one of them was also convicted of making false statements to a federal agent. The money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime, while present case involved use of conduit to conceal the infusion of corporate funds into a political campaign. The district court relied in part on the DOJ manual in determining heartland.

United States v. Woods, 159 F.3d 1132 (8th Cir. 1998). The court affirmed the district court which departed downward from money laundering and applied the fraud guideline in a bankruptcy fraud case where the defendant had failed to disclose to the bankruptcy court her ownership of some stock which she sold and used the proceeds to pay personal expenses and repay a personal loan to a relative. The government charged her with money laundering for depositing into her husband's bank account the check representing the proceeds of the stock. The district court, which also departed downward 1 level based on the defendant's charitable activities, sentenced the defendant to probation when it determined that the case fell outside the heartland of the money laundering statute which was primarily concerned with combating drug trafficking and organized crime offenses.

United States v. Gamez, 1 F. Supp. 2d 176 (E.D. N.Y. 1998). A departure downward was appropriate where the proceeds to defendants were limited (\$5,250 in fees over a number of months) and relatively the small scale of the operation was more akin to a structuring offense than to the mainstream money laundering schemes contemplated by the Commission.

United States v. Buchanan, 987 F. Supp. 56 (**D. Mass.** 1997). The court granted a 5-level downward departure in a case involving misapplication of bank funds and currency structuring on the ground that the offense fell outside the heartland of money laundering—no other independent, serious criminal activity, no drugs, no allegations of “mob influence” and the amount involved less than \$100,000, the minimum necessary to trigger an offense level increase in the money laundering guideline.

United States v. Stuart, 22 F.3d 76 (**3d Cir.** 1994). Although the face value of the bonds was \$129,000, which determined the offense level, the small profit actually made might warrant a downward departure by analogy to §2F1.1, which states that strict application of the loss table can overstate the seriousness of the offense.

United States v. Arutunoff, 1 F.3d 1112 (**10th Cir.** 1993). The district court may depart downward if a defendant was not involved in all of his co-conspirator's efforts to defraud an investor, causing the loss figure to overstate the defendant's culpability. The case was remanded to determine whether a 10-level departure was appropriate.

United States v. Gregorio, 956 F.2d 341(**1st Cir.** 1992). Multiple causation of victim loss justifies downward departure.

Money Laundering Tangential to Gambling Offense. *United States v. Threadgill*, 172 F.3d 357 (**5th Cir.** 1999). The court affirmed a downward departure (reducing sentences from between 40 to 75 percent of presumptive range) based on fact that the defendants’ money laundering activities “were incidental to the gambling operation” (laundered only \$500,000 of \$20,000,000 in gross wagers) and that the “defendants’ conduct was atypical because the defendants never used the laundered money to further other criminal activities”; in the process, the Fifth Circuit expressly abrogated *United States v. Willey*, 57 F.3d 1374 (**5th Cir.**), *cert. denied*, 516 U.S. 1029 (1995) (departure cannot be justified on finding that the subject crime was “disproportionately small part of the overall criminal conduct”) in light of *Koon*.

Bribery Underlying RICO Prosecution. *United States v. Krilich*, 159 F.3d 1020 (**7th Cir.** 1998). In applying the bribery guideline (USSG §2C1.1) which incorporates the loss table in the fraud guideline, a district court may refer to the application notes to §2F1.1 which explain or limit the loss table. Thus the district court had discretion based on the application notes to §2F1.1 to depart from the bribery guideline if it overstated the severity of the defendant’s offense. However the Seventh Circuit remanded for re-sentencing because the district court’s reasoning was inadequate to support a 7-level [downward] departure. 159 F.3d at 1031.

- **Government Conduct**

United States v. Sanderson, 110 F. Supp. 2d 1221 (**N.D. Cal.** 2000). Where the defendant’s plea bargaining position was subverted by the government's failure to disclose

information regarding the participation of government witnesses in an incentive program at the United States Customs Service, a 4-level departure was warranted, even though no new trial was warranted.

United States v. Coleman, 188 F.3d 354 (**6th Cir.** 1999) (*en banc*). The Sixth Circuit reversed and remanded on the grounds that the district court should have considered whether a downward departure was warranted based on the government's alleged improper targeting and inducement of African American parolees to commit crack cocaine offenses.

United States v. Parker, 158 F.3d 1312 (**D.C. Cir.** 1998). The court declined to remand a case where it determined that "departing downward on the basis of alleged reckless over-deployment of SWAT teams would be an abuse of discretion given that there is no evidence showing that SWAT personnel in any way caused appellant's injuries"; *id.* opinion reports that the government acknowledged that the district court would err if it determined that it lacked the authority to depart "based upon reckless police conduct because there was no 'precedent' for a departure on that ground." *Id.*

United States v. Nolan-Cooper, 155 F.3d 221 (**3d Cir.** 1998). The Third Circuit found that the district court would need to consider on remand whether an undercover agent's sexual misconduct with the defendant committed during the investigation would take the case outside of the heartland.

United States v. Santoyo, 146 F.3d 519 (**7th Cir.** 1998). The court affirmed a district court's refusal to depart based on the alleged "cajoling" of government agents for the defendant to introduce them to a cocaine supplier. Behavior was not so unique as to remove this case from the heartland of drug offenses.

United States v. Jones, 160 F.3d 473 (**8th Cir.** 1998). In a case that was remanded for re-sentencing on other grounds, the Eighth Circuit also held that "if the district court on remand determines that any of the appellants were directly prejudiced by the government's conduct significantly enough to take the case out of the heartland. . . it may exercise its discretion" to depart downward. *Id.* at 484. Though it did not find that the government's conduct required reversal of the conviction and it did not clearly specify what conduct was potentially prejudicial, the Eighth Circuit did comment on two troubling aspects of the government's conduct—its decision to grant substantial assistance motions to more culpable defendants in exchange for their testimony against lesser members of the conspiracy which results "in the principals receiving substantially lower sentences than the lesser members" and its less than forthright disclosure of the deals it made with the cooperators. *Id.* at 483.

United States v. Lopez, 106 F.3d 309 (**9th Cir.** 1997). Where the prosecutor's misconduct in dealing with defendant without his counsel prejudiced the defendant's opportunity to possibly obtain better a plea bargain, a 3-level downward departure was appropriate.

United States v. Treleven, 35 F.3d 458 (9th Cir. 1994). The district court was authorized to grant downward departure for substantial assistance even though no government motion was filed where the government committed misconduct in bringing the defendant before the grand jury without notifying counsel and where the defendant testified truthfully, even though the government did not need the testimony.

United States v. De la Fuente, 8 F.3d 1333 (9th Cir. 1993). Where the government breached ambiguous plea agreement to recommend minimum sentence based on the defendant's substantial assistance, the court can construe a 5K motion and depart below statutory minimum.

United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992). Where the prosecution charged the defendant with tax evasion and embezzlement, knowing not groupable, and other defendants were not charged, the court can depart downward to ensure equality in sentencing so that the U.S. Attorney cannot manipulate sentencing even absent bad faith.

United States v. Whitehorse, 909 F.2d 316 (8th Cir. 1990). A downward departure was warranted in an escape case where the government was irresponsible in releasing a known alcoholic on furlough without making some effort to assist her.

- **Outside National Security Heartland.** *United States v. Sicken*, 223 F.3d 1169 (10th Cir. 2000). In a case involving a conviction for breaking into and damaging a secured intercontinental ballistic missile site by anti-nuclear protesters, the Tenth Circuit affirmed a 4-level downward departure where the district court based the departure on the ground that the case was outside the heartland of such prosecutions because the offense did not involve a significant threat to the national security, did not create a substantial risk of death or serious

injury, occurred during peacetime, did not involve a foreign power, and the guideline lacked offense severity gradations to take such factors into consideration.

- **Tax-Evasion Cases**

Atypical – Defendant’s Intent To Pay. *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998). Tax evasion was outside the “heartland” as defendant’s intent was “not as wicked as that of the typical tax evader because, despite some conscious wrongdoing, he did not intend permanently to deprive the government of the funds he failed to pay”; before financial difficulties engulfed him, the defendant had exhibited a pattern “to retain the use of the funds in question for periods of four to six months and then to pay over the funds, adding penalties and interests”; remanded for further explanation of the district court’s reliance on another departure ground and extent of departure.

Atypical – IRS Voluntary Disclosure Negotiations Broke Down. *United States v. Tenzer*, 213 F.3d 34 (2d Cir. 2000). The court remanded because the district court erroneously believed that it lacked discretion to depart based on defendant’s attempted negotiations with IRS to make payments through the IRS voluntary disclosure program which resulted in criminal prosecution when negotiations broke down; fact that attempting negotiation was not a defense to prosecution did not foreclose its consideration as a mitigating factor that warranted departure.

- **Entrapment**

United States v. Bala, 236 F.3d 87 (2d Cir. 2000). A departure based on “aggressive encouragement of wrongdoing” by the government is not prohibited and §5K2.12 (departure encouraged based on serious coercion, blackmail or duress) may be reasonably be read to authorize

e such
a
departu
re.

United States v. Searcy, 233 F.3d 1096 (8th Cir. 2000). The court remanded to determine if the defendant was entrapped for sentencing purposes.

United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997). If the defendant proves he was entrapped into carrying a gun, the downward departure was warranted.

United States v. Ramirez-Rangel, 103 F.3d 1501 (9th Cir. 1997). The defendant was entrapped into receiving machine guns carrying a 30-year sentence when the guns were delivered to him in a bag and where he spoke no English.

United States v. Castaneda, 94 F.3d 592 (9th Cir. 1996). The district court erred in not considering whether to reduce the amount of drugs attributed to the defendant because he was entrapped.

United States v. McClelland, 72 F.3d 717 (9th Cir. 1995), *cert. denied*, 517 U.S. 1148 (1996). A 6-level downward departure was granted based on imperfect entrapment after the jury rejected an entrapment defense and found the defendant guilty in a murder-for-hire case. The departure finding of imperfect entrapment was supported by the defendant's vulnerable emotional state (recent separation from wife), repeated expressions of reluctance, and frequent efforts made by the government cooperator to prod and encourage the defendant whenever he expressed hesitation.

United States v. Naranjo, 52 F.3d 245 (9th Cir. 1995). Where evidence indicated the defendant agreed to buy cocaine only after months of persistent pressure, and where the defendant could afford to buy and preferred to buy only one kilogram but finally agreed to buy the five kilograms only after the agent offered to front the four of the five and said he would buy back three, the case was remanded with instructions to provide specific factual findings to support the district court's ruling that the defendant did not prove sentencing entrapment.

United States v. Stauffer, 38 F.3d 1103 (9th Cir. 1994). In a case of imperfect entrapment where the defendant was the target of a sting operation and was induced to buy 10,000 doses of LSD, a downward departure was permissible although the jury rejected the entrapment defense.

United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993). Even though the defendant was not entrapped in a legal sense, the court appropriately departed downward under

§5K2.12 where the trial court was troubled by "aggressive encouragement of wrongdoing [by informer]," "prosecutorial misconduct and vindictive prosecution."

United States v. Panduro, 152 F. Supp. 2d 398 (S.D.N.Y. 2001), *aff'd*, 2002 WL 432679 (2d Cir. Mar. 19, 2002). In a reverse sting operation, the defendant was granted a 3-level downward departure under Application Note 15 "to adjust for the artificially low price of the [35 kilos] of cocaine resulting from the overly generous credit terms [proposed by the government]—"if [the agent] had not extended credit for half of the purchase price . . . defendants [would have only purchased half the amount]" thus the extension of credit was "unreasonable and below market."

United States v. Martinez-Villegas, 993 F. Supp. 766 (C.D. Cal. 1998). The government's "aggressive encouragement" of wrongdoing by the defendants who had no prior convictions, by initially proposing illegal activity, persistently contacting the defendants over several weeks, offering considerable sums and concerted enticements and setting all the terms of the deal including the 92 kilos that the undercover agent asked the defendants to transport warranted a 2-level downward departure.

- **Adverse Civil Judgment Based on Same Conduct.** *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999). The Eighth Circuit upheld the district court's refusal to depart downward based on the fraud victim's receipt of a \$6,000,000 judgment in its civil fraud action against the defendant for the conduct at issue in the criminal case. The court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud. It is entirely foreseeable that fraud victims will seek to recover their damages in civil actions against fraud perpetrators; thus, an adverse civil judgment does not warrant a downward departure because it does not take a fraud case out of the heartland.
- **Defendant's Mistake of Fact Regarding Type of Drugs.** *United States v. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999). The Eighth Circuit upheld the district court's refusal to depart downward based on the defendants' mistake of fact where they contended they believed they were transporting marijuana instead of methamphetamine. The Court of Appeals held that the guidelines explicitly consider the effect of a drug defendant's mistake of fact on his or her sentencing accountability in §1B1.3, comment. (n.2)(a)(1) (1998)), and the district court could not depart on that basis.
- **Exemplary Behavior Pending Appeals.** *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998). The Sixth Circuit reversed the district court's finding that the defendant's exemplary behavior during the pendency of appeals warranted a downward departure. The court noted that the defendant, convicted of an interstate shipment of adulterated orange juice, was granted a downward departure because the defendant had "satisfactorily complied" with all the terms of home confinement and was a "model probationer." *Id.* at 790. The court found that it is

expected that a person sentenced to home confinement, or any other punishment, will “satisfactorily comply” with the terms of the sentence, or otherwise suffer the consequences of non-compliance. To reward the defendant for following the law is not a permissible grounds for departure.

- **Inadequate Additional Punishment.** *United States v. G.L.*, 143 F.3d 1249 (9th Cir. 1998). The court reversed an upward departure based on inadequate punishment which resulted from the grouping of three auto theft convictions. The court found that this case did not present an exceptional degree of sentencing inadequacy and recommended that the correct course of action is “a sentence in the upper regions of the guideline range rather than a departure.”
- **Brandishing.** *United States v. Bellamy*, 264 F.3d 448 (4th Cir. 2001), *cert. denied*, 534 U.S. 1143 (2002). The Fourth Circuit upheld an upward departure where the defendant, sentenced under the felon-in-possession guideline, §2K2.1, had brandished the firearm in a middle school classroom and pointed the firearm at a teacher. Because “brandishing” is a specific offense characteristic in other guidelines, the court found it likely that it would be an encouraged basis for an upward departure in appropriate cases involving other offenses.
- **Combination of Factors**

United States v. Johnstone, 251 F.3d 281 (1st Cir. 2001). The appellate court affirmed the district court’s decision to decline awarding the defendant a downward departure on the grounds of the defendant’s medical condition, the purported overstatement of the seriousness of his criminal history, and/or his motive in returning to the United States. On appeal, the defendant argued that the court had erred in not granting the downward departure, but the First Circuit disagreed. The court found that it had no jurisdiction to review a district court’s decision not to depart downward unless the district court misunderstood its authority to do so. The record indicated no such misunderstanding on the part of the district court.

United States v. Yeaman, 248 F.3d 223 (3d Cir. 2001), *cert. denied*, 534 U.S. 1082 (2002). The appellate court reversed and remanded the case for resentencing. The defendants were convicted on several counts of mail and wire fraud and at resentencing requested a downward departure based on extraordinary rehabilitation, disparity in sentencing among similarly situated codefendants, extraordinary family circumstances, and reincarceration after completion of a sentence. At resentencing, the district court departed downward 17 levels for one defendant and 16 levels for the other defendant in order to reimpose their original sentences without stating with specificity which factor was the basis for its substantial departure. On appeal, the court found that although the district court found “the record of both individuals while in custody was exemplary and reflected a concentrated attitude of rehabilitation and cooperation,” nothing pointed to anything “remarkable” or “exceptional” in the defendants’ “rehabilitation” enough to warrant a downward departure. *Id.* at 228. The court also found

that the record lacked factual findings regarding whether a departure was granted based on disparities in sentencing and noted such disparities are generally not a valid basis for departure absent prosecutorial misconduct. The court further determined that a discussion of extraordinary family circumstances as a basis for departure was not warranted since neither defendant urged this as the basis for his departure. Finally, the court found that reincarceration as the result of a successful government appeal of an earlier too-lenient sentence cannot move the case beyond the “heartland” unless there were extraordinary circumstances surrounding the reincarceration or there were extraordinary effects from the reincarceration. No such extraordinary circumstances or effects were presented by the defendants in this case. *Id.* at 233.

United States v. Fortier, 242 F.3d 1224 (10th Cir. 2001), *cert. denied*, 534 U.S. 979 (2001). The district court did not err in imposing a 13-level upward departure⁴ under various provisions of the guidelines for the harm resulting from the bombing of a federal building based on the defendant’s knowledge of the possible consequences of his actions, even though the defendant was not a bombing co-conspirator. The defendant pled guilty to several offenses resulting from his involvement with codefendants prior to the Oklahoma City bombing of 1995. The defendant appealed his original sentence and the court vacated and remanded for resentencing. On remand, the defendant was sentenced to an identical prison term and a reduced fine. On appeal, the defendant argued that the district court judge’s imposition of the second sentence was vindictive and that the district court erred in applying an upward departure. On appeal, the Tenth Circuit made no finding of vindictiveness and found that there was a sufficient nexus between the defendant’s admitted wrongdoing and the Oklahoma City bombing to permit an upward departure even though the defendant was not charged as a co-conspirator. The court held that the defendant bore sufficient legal responsibility for the bombing to support an upward departure.

United States v. Lewis, 235 F.3d 394 (8th Cir. 2000). The court affirmed an upward departure on account of pervasive obstructive conduct, extreme psychological injury (§5K2.3), unlawful restraint (§5K2.4), and the extreme conduct (§5K2.8) involved in the defendant’s case, in which he was convicted of conspiring to harbor an illegal alien and harboring an illegal alien. The defendant held captive an illegal alien, forcing him to work as a servant in defendant’s household. The illegal alien was repeatedly physically beaten, tormented, sexually

⁴*Id.* at 1227. The defendant’s upward departures were based on several Sentencing Guidelines sections: §5K2.1 (multiple deaths); §5K2.2 (significant physical injury); §5K2.3 (extreme psychological injury); §5K2.5 (property damage); §5K2.7 (disruption of governmental functions); and §5K2.14 (endangerment of public health and safety). Another factor taking the case out of the 1994 Guidelines heartland was the absence of the current terrorism guideline §3A1.4 from the 1994 version of the *Guidelines Manual* applicable to the defendant’s case.

abused, and deprived of nourishment and medical care until his death, when he was buried in the backyard of defendant's home.

United States v. De Beir, 186 F.3d 561 (**4th Cir.** 1999). The court reversed a downward departure that was based on a combination of factors including the defendant's unique psychological condition and unusual susceptibility to abuse in prison; the defendant's alien status and employment consequences; the defendant's exposure to negative publicity; the victimless nature of the defendant's offense (defendant was convicted of interstate travel with intent to engage in sexual act with minor; "minor" actually was undercover agent); the fact that the defendant was not a pedophile; the defendant's asserted post-offense rehabilitation and extreme remorse. The court found that neither individually, nor in combination, were the circumstances, characteristics or consequences of this case so unique or extraordinary to bring it outside the heartland.

United States v. Iannone, 184 F.3d 214 (**3d Cir.** 1999). The court affirmed a 2-level upward departure based on a combination of factors that the district court determined removed the case from the heartland of the fraud guideline: (1) the defendant's masquerade as a decorated Vietnam combat veteran, a person in a witness protection program, and a government agent on a secret mission; (2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) the defendant's attempt to conceal his fraud by faking his own death; (4) his fabricated story about his family being killed by a drunk driver; and (5) the severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case unusual and justified a 2-level departure. The Third Circuit held that this was not an abuse of discretion.

United States v. Reed, 167 F.3d 984 (**6th Cir.**), *cert. denied*, 528 U.S. 897 (1999). The Sixth Circuit reversed a downward departure based in part on the district court's assessment that the defendant's conduct was on the outer edges of that contemplated by the money laundering statutes and, in part, on the time and cost involved in her interlocutory appeal. Although finding the defendant less culpable than the typical money launderer, the district court provided no specifics and offered no factors not contemplated by the guidelines. Further, although delay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure, the appellate court stated that neither the district judge nor the defendant provided any evidence that the length of the delay or the costs involved in the appeal were unusual; in fact, the defendant remained free on bond during the entire process.

United States v. Decora, 177 F.3d 676 (**8th Cir.** 1999). The court affirmed a downward departure from the sentencing range of 37 to 46 months to 3 years' probation in a case involving assault with a dangerous weapon by a young man living on the Rosebud Sioux Tribal Reservation, who kicked an officer with shod feet, on the basis of a combination of the difficulty of life on the reservation and the extraordinary and unusual nature of defendant's educational

record (one semester shy of bachelor's degree) and post-offense rehabilitation (successfully completed intensive in-patient treatment program, after-care program and attended AA meetings).

United States v. Payton, 159 F.3d 49 (**2d Cir.** 1998). The Second Circuit reversed a downward departure based on a combination of factors: the defendant's lack of a positive male role model, his history of drug abuse and failed treatment, the defendant's ineligibility for credit for his pretrial detention, and his learning disability and loss of educational opportunities. The first two bases were invalid, the third was not factually supported, and the last was inadequate to alone support a departure.

United States v. Delgado, 994 F. Supp. 143 (**E.D. N.Y.** 1998). A 3-level downward departure for a first-time offender, a drug courier who transported drug was based on coercion from a creditor and a combination of aberrant behavior, the defendant's fragility, and the defendant's exceptionally difficult life.

United States v. Drew, 131 F.3d 1269 (**8th Cir.** 1997). The court reversed a downward departure for a defendant convicted of receiving child pornography based on the defendant's high intelligence, disruption of education, employment consequences, and susceptibility of abuse in prison.

United States v. Sablan, 114 F.3d 913 (**9th Cir.** 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998) (*en banc*). The court affirmed an upward departure for a defendant convicted of maliciously damaging a post office with an explosive based on significant personal injury and property damage.

United States v. Gallegos, 129 F.3d 1140 (**10th Cir.** 1997). The court reversed a departure based on a combination of factors, finding that a departure based on disparity in sentences between non-similarly situated defendants was inappropriate; the defendant's minor role was accounted for in §3B1.2; the purported coercion was not extraordinary; the defendant's lack of criminal history was already taken into account; and the defendant's family circumstances did not remove her case from the heartland.

United States v. Mena, 968 F. Supp. 115 (**E.D. N.Y.** 1997). The court granted a downward departure of 15 levels to a safety valve defendant, who was subject to deportation, was based on a number of factors, singly and in combination, including: (a) §5K2.0, agreement to voluntary deportation; (b) §5K2.12, coercion and duress (defendant was dominated, manipulated and pressured by his older brother, who remained a fugitive by the time of sentencing; brother and another hatched a plan to purchase 100 kgs of cocaine; defendant attended a single meeting while brother engaged in over 20 conversations with informant); also received a 4-level downward adjustment for minimal role, §3B1.2(a); (c) §5K2.13, diminished capacity (IQ of 67; dropped out after sixth grade at age 14; unchallenged psychological

evaluation characterized defendant's "thinking as naive, child-like, concrete and simplistic"; a "person who is easily overwhelmed, is highly dependent on others, and tends to excessively look to others for approval, reassurance and direction because he has few inner resources to draw upon when confronted with new or challenging situations"; and "prone to suggestibility and gullibility"; (d) "potential for victimization" while incarcerated due to his mental retardation, citing *Lara*, 905 F.2d 599 (**2d Cir.** 1990); and (e) the "need for defendant to provide for and support his family both financially and emotionally," citing *cf. United States v. Johnson*, 964 F.2d 124 (**2d Cir.** 1992) (defendant had two children by his common law wife of ten years and prior to his arrest, was employed as an Amway salesperson earning \$400 per month) but not expressly mentioning §5H1.6.

United States v. Rioux, 97 F.3d 648 (**2d Cir.** 1996). The court affirmed a downward departure based on a combination of the defendant's serious medical condition and charitable and civic good deeds.

United States v. Blackwell, 897 F. Supp. 586 (**D. D.C.** 1995). The court granted a departure based on a combination of diminished capacity, significant family circumstances, and aberrant behavior.

United States v. Lombard, 72 F.3d 170 (**1st Cir.** 1995). The court remanded because the district court failed to recognize its authority to depart for a combination of factors: including the defendant's state court acquittal on murder charges; the fact that federal sentence for a subsequent gun prosecution arising out of conduct underlying the state murder acquittal may exceed the state sentence that would been available for the murder conviction; the magnitude of the enhancement; disproportionality between the sentence (life) and the offense of conviction as well as between the enhancement and the base sentence; and absence of statutory maximum for offense of conviction, which makes case "unusual" and removes it from "heartland" of §2K2.1 that yielded the mandatory life sentence. "It seems . . . unlikely that the Commission could have envisioned the particular combination of circumstances that in this case culminated in the mandatory life sentence and the corresponding institutional concerns. Whether or not constitutional concerns were raised by these circumstances, as we think they are, we conclude that their combination here gave the court power to depart under USSG §5K2.0. That the application of the guidelines that produced the mandatory life sentence does raise constitutional concerns only reinforces our conclusion. This case may be viewed—virtually by definition—as an "unusual" one falling outside the heartland of section 2K2.1(c). To decide otherwise would be to assume that the Commission intended that the application of section 2K2.1(c)'s cross-reference provisions could, even in a heartland case, produce sentences raising serious constitutional issues."

United States v. Shadduck, 889 F. Supp. 8 (**D. Mass.** 1995), *modified on other grounds*, 112 F.3d 523 (1st Cir. 1997). The court granted a downward departure in a bankruptcy fraud

case based on a combination of factors including the defendant's health problems and teenage children.

United States v. One Star, 9 F.3d 60 (8th Cir. 1993). The court granted a downward departure to a Native American who had strong family ties, employment record, and community support.

United States v. Bowser, 941 F.2d 1019 (10th Cir. 1991). A combination of factors, none of which alone warranted departure, justified a downward departure from the career offender designation: the defendant was 20 years old when he committed 2 prior offenses; the prior offenses were committed within 2 months of each other; and sentences for the 2 prior offenses were imposed to run concurrently.

VI. Criminal History Departures (Chapter Four)

The guidelines suggest that in considering a departure for adequacy of criminal history category, the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category. If, for example, the court concludes that Criminal History Category III under-represents the seriousness of the defendant's criminal history, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. §4A1.3, p.s. These departures are referred to as horizontal, because they move along the horizontal axis of the Sentencing Table.

Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case. §4A1.3, p.s. Some examples of appellate court analyses of criminal history departures follow:

- **Methodology for Departing**

United States v. Cross, 289 F.3d 476 (**7th Cir.** 2002). The Seventh Circuit reversed and remanded an upward departure because the district court had not used the appropriate methodology in determining the extent of the departure. The defendant had 20 criminal history points and a sentencing range of 77 to 96 months. Although the district court had adequately stated grounds for an upward departure based on §4A1.3, and a departure was justified by the facts, the court abused its discretion in not linking the extent of the departure to the structure of the guidelines. Instead, the court had determined that the defendant needed to be incarcerated and incapacitated for as long as possible given the statutory maximums and had sentenced the defendant accordingly.

United States v. Walker, 284 F.3d 1169 (**10th Cir.** 2002). The Tenth Circuit reversed and remanded a sentence with directions to the district court that further reasoning and analysis was required to explain the extent of an upward departure. Although the district court had been justified in finding that the defendant's extensive criminal history (resulting in 34 criminal history points) removed him from the heartland of defendants in Criminal History Category VI, the district court's explanation for the extent of the departure had been insufficient. The district court upwardly departed one offense level for each of the defendant's seven prior convictions that were in excess of those necessary to accumulate the points required for Category VI, but did not explain why this degree of departure was appropriate.

United States v. Smith, 289 F.3d 696 (**11th Cir.** 2002). The Eleventh Circuit reversed a 6-level vertical downward departure that the district court had based on the non-violent nature of the defendant's criminal history, the defendant's diminished capacity, and the disparity in the sentences between the defendant and others involved in the crime. With respect to the findings about criminal history, the appellate court found that the district court had erred in three ways. First, the district court had granted a criminal history departure under §5K2.0, instead of §4A1.3. Because §4A1.3 explicitly addresses departures based on likelihood of recidivism, any departures granted on this ground must be guided by the direction in §4A1.3. Second, in granting a departure

pursuant to §4A.13, a court should proceed along the horizontal axis, considering whether each criminal history category is adequate. Finally, the district court had abused its discretion in determining that the seriousness of the defendant's criminal history was overstated. The circuit court pointed out that the defendant had six prior

felonies
,
includin
g a
drug
convicti
on and
a
robber
y
convicti
on, and
two
prior
misdem
eanors.
These
crimes
resulted
in his
charact
erizatio
n as a
career
offende
r and
resulted
in 19
criminal
history
points.
In
additio
n, the
district
court
had
focused
on the
underlyi
ng facts
of the

defendant's crimes whereas the policy statement governing §4A1.3 departures is concerned with the pattern and timing of prior convictions.

United States v. Lawrence, 161 F.3d 250 (**4th Cir.** 1998), *cert. denied*, 526 U.S. 1032 (1999). The court vacated and remanded an upward departure because the trial court had not explained which criminal conduct was not adequately accounted for or how it reached the guideline range it did. In doing so, the Fourth Circuit reiterated its methodology for criminal history departures. A sentencing court can depart to the next higher category and move on to a still higher category only upon a finding that the previous category failed adequately to reflect the seriousness of the defendant's record. If the court gets to level VI and still finds the sentencing options insufficient, the district court may depart to the guideline range applicable to career offenders similar to the defendant if defendant's prior criminal record is sufficiently serious to conclude that he should be treated as a career offender. The appellate court found that the district court had erred in not considering intermediate criminal history categories, particularly where the unaccounted for criminal conduct would only have resulted in Criminal History Category II, with a corresponding guideline range below the applicable mandatory minimum. *See also United States v. Boe*, 117 F.3d 830 (**5th Cir.** 1997) (reversing and remanding an upward departure from Category I to Category VI that had been granted to reflect the seriousness of the defendant's past conduct).

- **Criminal History Category Did Not Adequately Reflect Seriousness of Offense**

United States v. Gallagher, 223 F.3d 511 (**7th Cir.**), *cert. denied*, 531 U.S. 951 (2000). The court affirmed an upward departure from Criminal History Category V to VI based on findings that an arson defendant's criminal history category did not adequately reflect the defendant's commission of an uncharged murder and other past uncharged crimes. The court agreed with the district court's findings that, based on a preponderance of the evidence, the defendant had multiple motives for committing the murder and was the only suspect with the opportunity to commit the crime. The evidence further supported the upward departure as more accurately reflecting the defendant's true criminal history.

United States v. Herr, 202 F.3d 1014 (**8th Cir.** 2000). The Eighth Circuit held that the district court did not abuse its discretion by departing upward for purposes of deterrence based on the defendant's prior dissimilar convictions, even though the prior convictions were not as serious as the instant offense. The defendant's repeated violations, including convictions for failure to appear and resisting arrest, showed the defendant's disrespect for the law and provided support that leniency towards the defendant had not been effective.

- **Armed Career Criminal Status Over-represents Seriousness of Criminal History.** *United States v. Rucker*, 171 F.3d 1359 (**11th Cir.**), *cert. denied*, 528 U.S. 976 (1999). The court reversed a downward departure granted on the basis that although the defendant's prior convictions fell within the statutory definition of serious drug offenses, they only involved small amounts of drugs and therefore were "very minor." The court noted that the defendant's prior state convictions for possession with intent to distribute cocaine constituted serious drug offenses within the meaning of 18 U.S.C. § 924(e)(2)(A)(ii) and, therefore, the defendant fell within §4B1.4, the Armed Career Criminal Guideline. The appellate court rejected the departure, reasoning that a sentencing court may not look behind the facts of a prior conviction to conclude whether a downward departure is warranted on the grounds that the predicate offense involved only a small amount of drugs and therefore was not serious.
- **No Downward Departure from Criminal History I.** *United States v. Sherpa*, 265 F.3d 144 (**2d Cir.** 2001). The Second Circuit affirmed a district court's refusal to depart downward from the guideline range on the grounds that Criminal History Category I overstated his insignificant criminal history. The court agreed that the district court did not have authority to grant such a departure given the plain language of §4A1.3 to the contrary.
- **Uncounted Foreign Convictions.** *United States v. Fordham*, 187 F.3d 344 (**3d Cir.** 1999), *cert. denied*, 528 U.S. 1175 (2002). The court affirmed an upward departure based in part on a foreign conviction that had not been counted. The district court found that Criminal History Category I significantly under-represented the seriousness of the defendant's criminal history and departed to Category II based on the uncounted foreign conviction. The appellate court concluded that the district court was within its discretion to hold that the foreign conviction was fair and upheld the departure.

- **Commission of Additional Offenses While Previously on Supervised Release.** *United States v. King*, 150 F.3d 644 (7th Cir. 1998). The court approved an upward departure under §4A1.3 on the grounds that the defendant had committed five bank robberies while on supervised release for an earlier conviction for bank robbery. The defendant's criminal history category did not adequately reflect the seriousness of his conduct which was outside the heartland of §4A1.1(d).

- **Excessive Number of Criminal History Points**

United States v. Melgar-Galvez, 161 F.3d 1122 (7th Cir. 1998). The court upheld a 1-level upward departure based on the district court's belief that the defendant's excess number of criminal history points (18) was not adequately reflected in his assigned criminal history category (VI) and on the likelihood of the defendant's recidivism.

United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998). The court held that Criminal History Category V, based on 7 criminal history points for traffic violations, over-represented the relatively minor and non-violent nature of the defendant's record and replicated disparities in the state sentencing scheme particularly racial disparities; the court relied on studies that reflect the incidence of pretextual traffic stops (the offense of "driving while black") and the fact that the defendant's offenses received points based on jail sentences for more than 30 days for offenses not involving erratic driving.

- **Relation to Safety Valve.** *United States v. Resto*, 74 F.3d 22 (2d Cir. 1996). The Second Circuit agreed with the district court that even though defendant was granted a downward departure to Criminal History Category I, he was ineligible for the safety valve because he had more than one criminal history point as determined under the guidelines.

- **Consolidation of Related Prior Sentences.** *United States v. Rivas*, 922 F.2d 1501 (10th Cir. 1991). The Tenth Circuit upheld an upward departure where the district court's treatment as a single sentence of defendant's factually related three felony convictions for first-degree murder, solicitation, and kidnaping did not adequately reflect defendant's criminal history.

- **Remote Convictions**

United States v. Brown, 51 F.3d 233 (11th Cir. 1995). The court affirmed an upward departure even though remote fraud offenses were not similar to the instant escape offense because the district court had found them to be serious.

United States v. Wyne, 41 F.3d 1405 (10th Cir. 1994). The court remanded an upward departure because the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest were not serious and should have been given little, if any, weight.

- **Juvenile Convictions**

United States v. Barber, 200 F.3d 908 (**6th Cir.** 2000). The court upheld an upward departure on the basis that the defendant's criminal history category did not reflect his past criminal conduct, which included nine uncounted juvenile convictions, or the likelihood of his recidivism.

United States v. Franklyn, 157 F.3d 90 (**2d Cir.** 1998), *cert. denied*, 525 U.S. 1112 (1999). The Second Circuit affirmed an upward departure based on three uncounted remote juvenile convictions and the likelihood of the defendant's recidivism.

- **Civil Misconduct.** *United States v. Hernandez*, 160 F.3d 661 (**11th Cir.** 1998). The court upheld an upward departure based on similar, albeit civil, misconduct. Thus, the defendant's failure to pay his employees in accordance with minimum wage and overtime guidelines and to comply with a settlement agreement with the government regarding that violation was a proper basis for departure under §4A1.3.
- **Relevant Conduct.** *United States v. Hunerlach*, 258 F.3d 1282 (**11th Cir.** 2001). The Eleventh Circuit vacated an upward departure that had been based on relevant conduct that could not be counted as a prior conviction under §4A1.2. The court found that when conduct underlying a conviction is relevant conduct and is considered in calculating the applicable base offense level, that conduct cannot be considered a "prior sentence" under §4A1.3 and used to justify a departure. *See also United States v. Cade*, 279 F.3d 265 (5th Cir. 2001) (reaching same conclusion).
- **Courts May Depart Down from Career Offender Designation**

United States v. Mishoe, 241 F.3d 214 (**2d Cir.** 2001). Although the fact that the defendant's prior record involved only street-level dealing cannot be the basis for an automatic downward departure, district courts are authorized to depart upon consideration of several factors, including the amount of drugs involved in the prior offense, the amount of time previously served, the sentence previously imposed and the defendant's role in the prior offense.

United States v. Collins, 122 F.3d 1297 (**10th Cir.** 1997). The court upheld a departure from the career offender guideline on the basis that the defendant's career offender status "overstates his criminal past and likely criminal future," thus removing him from the heartland of the career offender guideline; defendant's age, infirmity, and the circumstances surrounding his 1986 predicate conviction [involving conduct committed beyond the 10-year time limit which resulted in a relatively lenient sentence], taken together, justified the court's finding of overrepresentation under section 4A1.3. *See United States v. Bechkam*, 968 F.2d 47 (**D.C. Cir.** 1992); *United States v. Lindia*, 82 F.3d 1154 (**1st Cir.** 1996); *United States v. Rivers*, 50 F.3d 1126 (**2d Cir.** 1995); *United States v. Shoupe*, 35 F.3d 835 (**3d Cir.** 1994); *United*

States v. Adkins, 937 F.2d 947 (**4th Cir.** 1991); *United States v. Fletcher*, 15 F.3d 553 (**6th Cir.** 1994); *United States v. Jones*, 55 F.3d 289 (**7th Cir.** 1995); *United States v. Brown*, 903 F.2d 540 (**8th Cir.** 1990); *United States v. Lawrence*, 916 F.2d 553 (**9th Cir.** 1990); *United States v. Bowser*, 941 F.2d 1019 (**10th Cir.** 1991); *United States v. Webb*, 139 F.3d 1390 (**11th Cir.** 1998).

- **Defendant's Criminal History Overstates His Propensity To Commit Crimes**

United States v. Mishoe, 241 F.3d 214 (**2d Cir.** 2001). Although reversing the district court's grant of a downward departure because a departure should not automatically be given to street-level dealers, a horizontal departure in criminal category may be warranted on the ground that prior sentences were lenient.

United States v. Collins, 122 F.3d 1297 (**10th Cir.** 1997). Departure from a career offender range of 151-188 to 42 months was permitted where the defendant was 65 and ill (high blood pressure, heart disease, ulcers, etc.) and his 10-year-old conviction overstated the criminal history because the conduct was committed beyond the 10-year limit; and the defendant was not sentenced in that case until 15 months after the crime was committed. The district court correctly reasoned that quick prosecution would have precluded the career offender enhancement altogether. The other conviction was a minor drug charge for which the defendant received a lenient sentence. The defendant was "not as likely to recidivate as other career offenders." Furthermore, *Koon* makes it clear that Congress did not intend "to vest in appellate courts wide-ranging authority over district court sentencing decisions."

United States v. Fletcher, 15 F.3d 553 (**6th Cir.** 1994). The court upheld a departure downward from the career offender guideline to level 29 and category V based on the age of the prior convictions, the time intervening between the priors and the current crime, and the defendant's responsibilities; the court of appeals affirmed, noting that the district court can consider the age of priors in determining recidivism.

United States v. Reyes, 8 F.3d 1379 (**9th Cir.** 1993). The court upheld a downward departure from 210 months to 33 months—from the career offender guidelines—in both offense level and criminal category—on the grounds that the defendant a comparatively minor offender—6 minor drug and theft priors—but remanded for the court to state the reason for the extent of departure.

United States v. Gayles, 1 F.3d 735 (**8th Cir.** 1993). The case was remanded to permit the judge to consider a downward departure, noting that in making a determination, the judge must "consider the historical facts of the defendant's criminal career."

United States v. Shoupe, 988 F.2d 440 (**3d Cir.** 1993). The court may consider the defendant's age and immaturity when the priors committed in determining that criminal history (career offender) over-represents his history.

United States v. Brown, 985 F.2d 478 (**9th Cir.** 1993). The defendant's age at the time of the prior convictions and the nature of those convictions—DUI's—are proper factors to consider in determining whether the career offender status significantly over-represents the seriousness of the defendant's criminal history.

United States v. Bowser, 941 F.2d 1019 (**10th Cir.** 1991). The defendant's age and the close proximity in time between prior criminal acts provided the proper bases to depart downward from the career offender category.

United States v. Senior, 935 F.2d 149 (**8th Cir.** 1991). The defendant was only 20 years old when he committed his first predicate offense, a series of robberies, and the defendant received a short sentence for second predicate offense drug charges; it was obvious that the state did not consider the defendant's crimes serious, so a downward departure was proper.

United States v. Lawrence, 916 F.2d 553 (**9th Cir.** 1990). Even though the defendant was a career offender because of two drug convictions, the low risk of recidivism justified a downward departure.

United States v. Summers, 893 F.2d 63 (**4th Cir.** 1990). The court affirmed a downward departure because the drunk driving crimes exaggerated the defendant's criminal history but vacated the sentence because of the extent of the departure.

United States v. Moore, 209 F. Supp. 2d 180 (**D. D.C.** 2002). The court departed from a range of 188 to 235 months to a range of 100 to 125 months where the career offender status over-represented the defendant's criminal history because the prior convictions were for attempts, and involved a small quantity of drugs, and there were four years in between the commission of the previous offenses and the instant offense, considering the relative length and the nature of his previous sentences in comparison with the sentence prescribed by the sentencing guidelines.

United States v. Wilkerson, 183 F. Supp. 2d 373 (**D. Mass.** 2002), *aff'd* by 2002 U.S. App. LEXIS 27227 (**1st Cir.** 2002). Where the defendant convicted of distribution of crack and his criminal history score of VI over-represented his criminal culpability for purposes of sentencing, he was entitled to a downward departure to Criminal History Category IV. The court considered that he had no convictions for crimes of violence, and he had received sentences for prior convictions that just barely triggered scoring under the guidelines.

United States v. Chambers, 2001 WL 96365 (S.D.N.Y. Feb. 2, 2001). Where the defendant pled guilty to conspiring to deliver heroin, the four criminal history points calculated in the presentence report overstated the seriousness of the defendant's criminal record. The attempted criminal sale of a controlled substance in the third degree was his first offense and took place when defendant was only 17 years old, and thus the court departed from category III to II.

United States v. DeJesus, 75 F. Supp. 2d 141 (S.D.N.Y. 1999). Criminal History Category V over-represented the defendant's criminal history where several priors were probation terms and, of 3 jail sentences, only one was longer than 60 days, and 2 of 8 convictions were for loitering and trespassing and did not count for guideline purposes, and remaining 6 convictions resulted in no more than 2 years in jail, and most conduct was committed before the defendant was 21—and now that the defendant is married and a father, he is more responsible—"a lengthy sentence required by higher criminal history category will lessen not increase the likelihood of rehabilitation."

United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998). Criminal History Category V, based on traffic violations that accounted for 7 criminal history points, over-represented relatively minor and non-violent nature of defendant's record and replicated disparities in state sentencing scheme, particularly racial disparities.

United States v. Taylor, 843 F. Supp. 38 (W.D. Pa. 1993). A downward departure from career offender level 34 to level 20 was justified where the prior state burglary convictions were more than ten years old and occurred when the defendant a teenager, the crimes did not involve any physical violence or use of a weapon, and the burglary spree occurred over a relatively short period.

United States v. Hinds, 803 F. Supp. 675 (W.D. N.Y. 1992). In an illegal reentry case, a departure from 51 months to 33 months was proper where prior marijuana convictions over-represented criminal history and where the Commission increased the guideline for reentry with aggravated felony. *Aff'd*, 992 F.2d 321 (2d Cir. 1993).

VII. Substantial Assistance Departures (§5K1.1) (Policy Statement)⁵

Substantial assistance is a recognized ground for departure under §5K1.1 upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.

⁵A more extensive analysis of departures under §5K1.1 is provided in USSC's publication "Substantial Assistance Departures" Case Law.

- The general rule is that a district court may not grant a downward departure for substantial assistance absent a motion by the government. *E.g.*, *United States v. Cruz-Guerrero*, 194 F.3d 1029 (**9th Cir.** 1999); *In re Sealed Case*, 181 F.3d 128 (**D.C. Cir.**), *cert. denied*, 528 U.S. 989 (1999); *United States v. Solis*, 169 F.3d 224 (**5th Cir.**), 528 U.S. 843 (1999); *United States v. Abuhouran*, 161 F.3d 206 (**3d Cir.** 1998), *cert. denied*, 526 U.S. 1077 (1999); *United States v. Schaefer*, 120 F.3d 505 (**4th Cir.** 1997).
- *Melendez v. United States*, 518 U.S. 120 (1996). The district court is not authorized to sentence below a statutory mandatory minimum unless the government motion certifies a defendant's substantial assistance and requests a departure, pursuant to 18 U.S.C. § 3553(e), below the statutory minimum. If the government motion is only pursuant to USSG §5K1.1, the court is only authorized to depart below the guideline range but not below the statutory minimum.

- **Substantial Assistance in the Absence of Government Motion**

United States v. Doe, 233 F.3d 642 (**1st Cir.** 2000). The First Circuit has held that to successfully challenge the government's discretionary decision to not file a §5K1.1 motion, a defendant must show bad faith, requiring proof of either an unconstitutional motive or arbitrariness in a breach of contract.

United States v. Moore, 225 F.3d 637 (**6th Cir.** 2000). The Sixth Circuit has held that where a plea agreement retains "complete discretion" to file §5K1.1 motion with the government, a review of a failure to file such a motion is limited to unconstitutional motive; bad faith may not be considered.

United States v. Cruz-Guerrero, 194 F.3d 1029 (**9th Cir.** 1999). The court upheld a district court's refusal to grant a downward departure based on substantial assistance to the government where the government had not moved for such departure. Section 5K1.1 requires a motion to be filed by the government for consideration of the defendant's substantial assistance. The court reinforced its interpretation of §5K1.1 to mean that, in the absence of arbitrariness or unconstitutional motivation on the part of the government, a district court may not depart downward from the guidelines for substantial assistance unless the government moves for such a departure.

In re Sealed Case No. 97-3112, 181 F.3d 128, (**D.C. Cir.**), *cert. denied*, 528 U.S. 989 (1999). The District of Columbia Circuit held that the district court cannot depart downward for substantial assistance absent a motion from the government, unless the government's refusal to file such motion was done as a bad faith breach of a plea agreement or with an unconstitutional motive.

United States v. Solis, 169 F.3d 224 (**5th Cir.**), *cert. denied*, 528 U.S. 843 (1999). The court reversed a downward departure that was based on the defendant's substantial assistance where the government filed no motion. The court held that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a government motion.

United States v. Abuhouran, 161 F.3d 206 (**3d Cir.** 1998), *cert. denied*, 526 U.S. 1077 (1999). The Third Circuit has held that a downward departure absent a motion from the government may be permissible under §5K1.1 or §5K2.0 only when the refusal of the government to make a §5K1.1 motion is based on an unconstitutional motive or is in bad faith contravention of a plea agreement.

United States v. Isaac, 141 F.3d 477 (**3d Cir.** 1998). The Third Circuit held that the district court can review a prosecutor's decision not to file a §5K1.1 for "good faith," where the plea agreement gave the prosecutor "sole discretion" to make a determination as to substantial assistance.

United States v. Aderholt, 87 F.3d 740 (**5th Cir.** 1996). The Fifth Circuit has held that where the prosecutor retains "sole discretion in plea agreement" to make a §5K1.1 motion, a decision not to make such a motion is reviewable only for an unconstitutional motivation.

United States v. Sanchez, 927 F.2d 1092 (**9th Cir.** 1991). The court upheld finding of the district court that the defendant's surrendering of property pursuant to a civil forfeiture agreement did not constitute substantial assistance.

- **Court May Review Government Conduct for Unconstitutional Motivation.** *Wade v. United States*, 504 U.S. 181 (1992). Where no plea agreement obligates government, the district court may grant a remedy if the government's refusal to file the motion is based on unconstitutional motive, such as the defendant's race or religion.

- **Hearing To Determine Government's Bad Faith or Irrational Motive**

United States v. Isaac, 141 F.3d 477 (**3d Cir.** 1998). The government may rebut an allegation that it acted in bad faith by explaining its reasons for refusing to file the motion; the defendant is entitled to a hearing if it makes a showing that the government acted in bad faith by contradicting the government's explanation, supported by some evidence.

United States v. Rounsavall, 128 F.3d 665 (**8th Cir.** 1997). The court remanded the case for an evidentiary hearing to determine whether the government, though filing a §5K1.1 motion, acted irrationally or in bad faith in failing to file a motion pursuant to section 3553(e) to allow a sentence below the statutory minimum of 20 years. The defendant, who pled guilty to money laundering and drug charges, testified for a total of 5 days against her brother, who received a life sentence after his conviction. The Eighth Circuit found that defendant had made a threshold showing requiring a hearing on two separate grounds—(1) that representations made to the defendant by the prosecuting attorney that if she fully cooperated she should receive a sentence of from 7 to 10 years were part of the plea agreement which the government breached by not filing the section 3553(e) motion to allow imposition of a sentence below the 20-year mandatory; and (2) that the government may have impermissibly based its decision on factors other than the defendant's cooperation, in this instance, its expectation that if the defendant cooperated, her brother also would cooperate; before resentencing after the district court had announced it would compel the government to file the motion, the government filed a motion pursuant to 18 U.S.C. § 3553(e).

United States v. Pipes, 125 F.3d 638 (**8th Cir.** 1997), *cert. denied sub. nom.*, *Waldrup v. United States*, 523 U.S. 1012 (1998). The case was remanded for an evidentiary hearing to determine whether the prosecutor's failure to file a downward departure motion based on the defendant's substantial assistance was irrational where the defendant had a written cooperation agreement, it was undisputed that the defendant cooperated with the government and that this cooperation, at least in part, contributed to the government's case against a defendant prosecuted in another district and the government had done an “about face” about the defendant's cooperation based on a conclusory statement from the prosecutor from the other district.

United States v. Leonard, 50 F.3d 1152 (**2d Cir.** 1995). The case was remanded for a hearing to consider “any evidence with a significant degree of probative value” to determine whether government breached its duty of good faith based on the cooperation agreement on the theory that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled” citing, *Santobello v. New York*, 404 U.S. 257, 262 (1971); government reliance on a change in the defendant's story and contact with the target were in dispute based on the agent's report.

- **Hearing Where Parties Disagree As to the Terms of Plea Agreement.** *United States v. Barresse*, 115 F.3d 610 (8th Cir. 1997). The case was remanded for an evidentiary hearing to determine what the parties meant by term “complete cooperation” in the plea agreement.
- **District Court Must Exercise Independent Discretion.** *United States v. Campo*, 140 F.3d 415 (2d Cir. 1998). The court vacated and remanded for re-sentencing where the district court “made it ‘abundantly clear’ that it would not consider the §5K1.1 government motion filed by the government in the absence of a specific sentencing recommendation” by the government. It was error for the judge to “refuse[s] to exercise the discretion accorded him by law.” The government’s failure “to recommend a specific below-guideline sentence may not prevent the court from exercising its own informed discretion in considering §5K1.1 motions.”
- **Cooperation with State or Local Authorities.** *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), *vacating*, 65 F.3d 240 (2d Cir. 1995). The court held that the district court may grant a departure, even without a government motion, pursuant to §5K2.0, for a defendant who cooperated with local law enforcement authorities because “offense” as used in §5K1.1 applies to federal offenses only and does not address assistance relating to state offenses.

Contra United States v. Emery, 34 F.3d 911 (9th Cir. 1994). Section 5K1.1 controls cooperation provided to local authorities so that departures are available only upon government motion.

United States v. Love, 985 F.2d 732 (3d Cir. 1993). The Third Circuit held that substantial assistance to state authorities can be basis of §5K1.1 motion made by the government. Assistance to state authorities is not an appropriate ground for departure under §5K2.0.

- **Cooperation that Facilitates the Administration of Justice**

United States v. Dethlefs, 123 F.3d 39 (1st Cir. 1997). “In an appropriate case a defendant’s timely entry of a guilty plea might facilitate the administration of justice in such an unusual way, or to so inordinate a degree, that it substantially exceeds the reasonable expectations the sentencing commissioners likely harbored when formulating the guidelines”; here, the downward departure was reversed and the case was remanded for resentencing because the record did not support the departure.

United States v. Dorsey, 61 F.3d 260 (4th Cir. 1995). The Fourth Circuit, pre-*Koon*, upheld a refusal to depart, concluding that “substantial assistance to the judicial system”

is not a proper basis for departure. *See also United States v. Shrewsberry*, 980 F.2d 1296, 1298 (**9th Cir.** 1992) (same); *United States v. Lockyer*, 966 F.2d 1390 (**11th Cir.** 1992) (same).

United States v. Garcia, 926 F.2d 125 (**2d Cir.** 1991). The court upheld a downward departure even in the absence of a government motion where the guilty plea led others to plead guilty, which “broke the log jam” in a multi-defendant case, thus facilitating the administration of justice.

United States v. Patillo, 817 F. Supp. 839 (**C.D.Cal.** 1993). The court departed based upon a complex of mitigating factors including aberrant conduct, minimal role, and assistance to a probation officer during Los Angeles riots.

- **Counsel’s Conflict of Interest Obstructed Opportunity to Provide Assistance.** *United States v. Gonzalez-Bello*, 10 F. Supp. 2d 232 (**E.D. N.Y.** 1998). The court granted a 5-level downward departure to a first-time drug defendant where counsel’s conflict of interest (his fees were paid by a kingpin against whom the defendant/client would have cooperated) obstructed the defendant’s opportunity to provide substantial assistance to the government.
- **Personal and Truthful Efforts Warranted Departure Where No Assistance Because Last to Cooperate and to Avoid Unwarranted Disparity.** *United States v. Martinez-Maldonado*, 2000 WL 1801851 (**D. Mass.** 2000). The court granted a departure from a range of 87 to 108 months to a sentence of 42 months (the same as imposed on codefendants) based on defendant’s personal efforts to cooperate and his truthful testimony during a 4-hour polygraph examination administered by the government so as to equalize his sentence with that of his codefendants who had received substantial assistance motions; the defendant had no new evidence to provide to the government because his codefendants had already provided information.
- **No Requirement that Government Recommend Specific Sentence.** *United States v. Campo*, 140 F.3d 415 (**2d Cir.** 1998). The Second Circuit reversed where the district court had declined to depart downward in response to the government §5K1.1 motion because the government did not recommend a specific sentence.
- **No Functional Equivalent of Motion**

United States v. Difeaux, 163 F.3d 725 (**2d Cir.** 1998). The court upheld a decision by the district court not to grant a downward departure based on a letter from a Deputy U.S. Marshal detailing the defendant’s assistance in capturing fugitives. The letter did not request a downward departure, the Deputy Marshal was not “the government” for purposes of §5K1.1, and it is the prosecutor who must make the motion.

United States v. Brick, 905 F.2d 1092 (7th Cir. 1990). The Seventh Circuit held that the government's statements at sentencing that the defendant had assisted in the prosecution and conviction of another cocaine dealer, and that his cooperation "should be considered" did not satisfy motion requirement of §5K1.1. The guidelines unambiguously require the filing of a motion.

VIII. The Extent of Departures

The guidelines contemplate two kinds of departures, guided and unguided. With respect to the first, the guidelines provide policy guidance for departure by analogy or by numerical or non-numerical suggestions. See USSG Ch. 1, Pt. A(4), intro. comment. These suggestions are intended as policy guidance, and the Commission has stated its view that most departures will reflect the suggestions and that the courts of appeal will be more likely to find departures unreasonable where they fall outside suggested levels. *Id.* Unguided departures may be for grounds mentioned in Chapter Five, Part K, or on grounds not mentioned in the guidelines.

As illustrated below, the touchstone for the analysis of the extent of a departure is reasonableness.

In *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998), the Ninth Circuit held that the unitary abuse of discretion standard announced for analyzing the propriety of departures in *Koon* applies equally to an analysis of the extent of departures. The court held that where "a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed." *Id.* at 919. For example, in *United States v. Mathews*, 120 F.3d 185 (9th Cir. 1997), the district court upwardly departed in sentencing a defendant who placed a bomb that injured a third party, based on the substantial risk of death or serious injury to more than one person. The Ninth Circuit found the extent of the departure unreasonable, in that it exceeded the sentence the defendant could have received had he been convicted of the offenses the district court analogized to in departing. Where a guideline is used by analogy as approximating the defendant's conduct, the reasonableness of the departure is evaluated by treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it.

In *United States v. Roston*, 168 F.3d 377 (9th Cir.), *cert. denied*, 528 U.S. 843 (1999), the Ninth Circuit approved a 7-level upward departure for extreme conduct where the defendant was convicted of second-degree murder for killing his wife on their honeymoon. The court noted that, although such a departure was substantial, the district court was well-positioned to determine if the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. Following *Sablan*, the court emphasized that "where a district court sets out findings justifying the magnitude . . . and extent of its departure from the guidelines, and that explanation cannot be said to be

unreasonable, the sentence imposed must be affirmed'." *Id.* at 378 (quoting *Sablan*, 114 F.3d 913 (9th Cir. 1997) (*en banc*)).

In *United States v. Jacobs*, 167 F.3d 792 (3d Cir. 1999), the Third Circuit remanded a 5-level upward departure under §5K2.3 for “extreme psychological injury” because the district court had not specifically articulated the reasons for the degree of the departure. The court suggested that reasoning by analogy to other guidelines might be appropriate. The Third Circuit in *United States v. Queensborough*, 227 F.3d 149 (3d Cir. 2000), *cert. denied*, 531 U.S. 1131 (2001), affirmed an upward departure for extreme conduct that did not use the analogy approach. Also post-*Koon*, the Second Circuit has signaled its continuing approval of the analogical method. In *United States v. Adelman*, 168 F.3d 84 (2d Cir. 1999), the court approved the use of an analogy to the grouping principles as an appropriate basis for determining the extent of its upward departure for threats to people other than the direct victim. The district court created hypothetical counts for each of the multiple victims of the defendant’s threats, then, because counts involving different victims are not grouped under §3D1.1, the court calculated a 4-level increase in the defendant’s offense level. The court of appeals held that the grouping methodology was not an abuse of discretion.

The Seventh Circuit does not read *Koon* as altering its reviewing authority over the magnitude of a departure chosen by the district court. According to that appellate court, although *Koon* changed the standard of review with respect to whether to depart at all, it did not change the circuit’s rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. See *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996).

In *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999), the Seventh Circuit rejected a 10-level upward departure, stating, “[w]hile this Court has approved of looking to an analogous sentencing guideline in measuring the extent of a departure, we must be mindful that the analogy selected is an appropriate one.” The court of appeals held that the facts of the case did not warrant the district court’s analogy to the terrorism guideline, since the defendant did not attempt to influence or affect the conduct of the government and had at most threatened to use the toxins he had developed against various family members and friends. The court found it significant, in looking at other guidelines, that the defendant could have attempted to use the toxin, even causing significant injury to a victim, and potentially have received a less severe sentence than that which the district court imposed for his conduct of merely possessing a toxin. The court of appeals held that a departure logically should not exceed the level the defendant could have received had he actually committed a more serious offense.

The Tenth Circuit has held that, in departing from the applicable guideline range, a district court “must specifically articulate reasons for the degree of departure.” *United States v. Yates*, 22 F.3d 981 (10th Cir. 1994) (quoting *United States v. Flinn*, 987 F.2d 1497 (10th Cir. 1993)). The district court “may use any ‘reasonable methodology hitched to the sentencing guidelines to justify the reasonableness of the departure,’” including using extrapolation from, or analogy to, the guidelines. *United States v. Jackson*, 921 F.2d 985, 991 (10th Cir. 1990) (*en banc*) (quoting *United States v.*

Harris, 907 F.2d 121, 124 (**10th Cir.** 1990)). The Tenth Circuit has indicated a view that the *Koon* decision does not affect the analysis of the degree of departure. See *United States v. Collins*, 122 F.3d 1297 (**10th Cir.** 1997). Post-*Koon*, the court has reaffirmed that, while the district court is not required to justify its degree of departure from the guidelines with mathematical exactitude, its justification must include "some method of analogy, extrapolation, or reference to the guidelines'." *United States v. Whiteskunk*, 162 F.3d 1244 (**10th Cir.** 1998) (quoting *United States v. O'Dell*, 965 F.2d 937 (**10th Cir.** 1992)).

The First Circuit only requires that the court provide a "reasoned justification for its decision to depart" so long as that statement "constitutes an adequate summary from which an appellate tribunal can gauge the reasonableness of the departure's extent." The court is under "no obligation to go further and attempt to quantify the impact of each incremental factor on the departure sentence." *United States v. Emery*, 991 F.2d 907, 913 (**1st Cir.** 1993). See *United States v. Chapman*, 241 F.3d 57 (**1st Cir.** 2001) (reiterating standard, post-*Koon*).

IX. Notice Requirements

A. The Sentencing Reform Act's Procedural Amendments

The Sentencing Reform Act of 1984, which initiated the guidelines system, also made procedural reforms to achieve the congressional goals of "certainty and fairness" in sentencing. Because a court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment, more formality was thought to be necessary in determining such issues. Federal Rule of Criminal Procedure 32 was amended to provide for adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence. The amended rule directs the probation officer to prepare a presentence report addressing all matters germane to the sentence and requires that the report be disclosed to the parties so that they may file responses or objections with the court. The report must identify any basis for a departure. Furthermore, if the court determines to depart *sua sponte*, Rule 32(h) (effective December 1, 2002) requires that "before the court may depart from the applicable sentencing 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. The notice must specify any ground on which the court is contemplating a departure."

B. *Burns v. United States*

In *Burns v. United States*, 501 U.S. 129 (1991), the Supreme Court reasoned that the right to be heard on an issue is rendered meaningless unless one is informed that a decision on the issue is contemplated. The Court held that before a district court can depart upward from the applicable guideline range on a ground not identified as a ground for such a departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties

reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure.

The *Burns* requirement has been incorporated into the guidelines as a policy statement: “When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor.” USSG §6A1.3(a).

The circuit courts have further refined the concept of what notice is required by Rule 32: *United States v. Canada*, 960 F.2d 263 (**1st Cir.** 1992). The First Circuit found that the *Burns* notice requirements would not apply to an upward adjustment to the offense level pursuant to Chapter Three, at least where the facts relevant to the adjustment are known to the defendant.

- Several courts have held that the *Burns* notice requirements do not apply to deviations from the nonbinding policy statements found in Chapter Seven of the *Guidelines Manual*.

United States v. Burdex, 100 F.3d 882 (**10th Cir.** 1996), *cert. denied*, 520 U.S. 1133 (1997); *United States v. Hofierka*, 83 F.3d 357 (**11th Cir.** 1996), as modified by, 92 F.3d 1108 (**11th Cir.** 1996), *cert. denied*, 519 U.S. 1071 (1997); *United States v. Mathena*, 23 F.3d 87 (**5th Cir.** 1994); *United States v. Pelensky*, 129 F.3d 63 (**2d Cir.** 1997).

United States v. Morris, 204 F.3d 776 (**7th Cir.** 2000). The Seventh Circuit reversed an upward departure, finding that boilerplate language in the presentence report that referred only to the possibility that §4A1.3(e) could be a basis for departure was insufficient notice to the defendant. The court held that the notice must refer not only to the guideline but also to the rationale for the departure and the facts that support the theory of departure.

United States v. Gabriel, 125 F.3d 89 (**2d Cir.** 1997). The Second Circuit, citing *Burns*, remanded a *sua sponte* upward departure in the fine.

United States v. Johnson, 121 F.3d 1141 (**8th Cir.** 1997). The Eighth Circuit vacated and remanded an upward departure under §5K2.8 based on the cruel and brutal nature of the offense when the presentence report stated explicitly that there were no factors warranting departure and the possibility of departure was not brought up until just before the court pronounced the sentence.

United States v. Pankhurst, 118 F.3d 345 (**5th Cir.**), *cert. denied*, 522 U.S. 1030 (1997). The Fifth Circuit reversed a downward departure where the government had not received proper notice. The court held that Fed. R. Crim. P. 32 provides that the government is also entitled to notice of the court’s intent to depart. *See also United States v. Andruska*, 964 F.2d 640, 644 (**7th Cir.** 1992).

United States v. Lopreato, 83 F.3d 571 (**2d Cir.**), *cert. denied*, 519 U.S. 871 (1996). The court upheld an upward departure, stating that, even if notice of the court's intent to depart was not sufficient under *Burns*, the error was harmless beyond a reasonable doubt because the argument the defendant would have made against the departure was explicitly taken into account by the sentencing court.

United States v. Dolloph, 75 F.3d 35 (**1st Cir.**), *cert. denied*, 517 U.S. 1228 (1996). The court upheld an upward departure where the court did not give notice of two of the grounds for departure, but the extent of the departure was fully justified by the ground of which the defendant had notice and there was "no realistic possibility" of a different result on remand.

- **Timing of Rule 35 Motion**

Effective December 1, 2002, a substantive change has been made in Rule 35(b). Although the general rule remains that the government must make its motion within one year of sentencing, a later motion may be made under the provisions of Rule 35(b)(2) if the defendant's substantial assistance involved: "(A) information not known to the defendant until one year or more after sentencing; (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant." This amendment resolves a split in the circuits. Compare *United States v. Morales*, 52 F.3d 7 (1st Cir. 1995), with *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998).