

Examples of Non-Substantial Assistance Downward Departures in Economic Crimes

District	Case Summary
Alabama, Northern	<p>In <i>United States v. Sanders</i>, a bank vice president defrauded her employer and two other victims out of monies in excess of \$200,000. Although only losses related to the bank's loss were set forth in the indictment, the other thefts were covered in the plea agreement relating to restitution. The defendant sought a departure based upon charitable works, family ties and responsibilities, aberrant behavior, diminished capacity, and extraordinary efforts at rehabilitation. The Court departed seven levels from an offense level of 15 to 8 on the basis of defendant's alleged diminished capacity and aberrant behavior. This established a guideline range of 0-6 months. He sentenced the defendant to eight hours in custody. The government appealed the sentence. The Eleventh Circuit reversed and remanded requiring the district court to explain why her mental condition took the case outside the heartland of similar cases. The Court imposed the same sentence on remand. Although she had a high paying job and spent much of the money on herself, the Court found that the defendant embezzled money to "buy love in her close relationships" which permitted her to function in a "carefully built facade of success and normality." The government has taken another appeal.</p> <p>In <i>United States v. Weaver</i>, the defendant admitted to the theft/embezzlement of \$162,000 from SouthTrust Bank. At the time of the original sentencing, she presented testimony of a psychiatrist who stated that Ms. Weaver had been sexually abused in the past which caused her to steal. The amount embezzled was over an 18-month period and entailed approximately 75 separate transactions. The sexual abuse as a minor was a family secret because the defendant's brother in law committed the acts. The defendant allegedly was later raped and conceived a child out of wedlock when she was 21. These incidents were not reported to police. The government expert testified that the defendant was malingering and discounted the effect of any sexual abuse on the defendant's mental capacity at the time of the offense. The Court agreed with the defendant's expert and sentenced the defendant to one-year probation. The probation office informed the Court that this was a Class B felony and probation was not a permissible sentence. The Court then sentenced the defendant to one hour in custody and suspended the remaining five years of probation he had ordered. The government has requested authorization to appeal.</p>

Alaska

In *United States v. Whitmore*, the former chairman of the board of Alaska Statebank was convicted of 24 counts of bank fraud, false entries and misapplication of bank funds related to five separate schemes in connection with the failure of Alaska Statebank in 1989. The complex financial schemes involved: (1) an attempt to take over another Alaskan bank through a series of loans to directors, that were funded solely with Alaska Statebank monies and then rolled over and over with no payments when the scheme failed and (2) a scheme to falsify the bank's financial statements by understating the loan loss reserves. The purpose of understating the financials was to permit the bank to pay extraordinary dividends at a time when the bank was failing. The dividends were used to keep Whitmore in control of the bank and put money in his pocket. The jury convicted the defendant of falsifying his financials and the dividend scheme despite the defense that Price Waterhouse, the bank's accountants, had signed off on the year-end financials. Whitmore was also convicted of paying substantial personal expenses out of the bank's monies and misapplying bank funds by setting up a branch office in Beverly Hills, CA, his home town, to benefit himself and his children at the expense of the bank. This case represented the most egregious bank fraud in Alaskan history.

Whitmore was facing a sentencing range of 46-57 months for losses exceeding \$5.1 million, the district court downward departed seven levels for four reasons and sentenced Whitmore to 24 months. The Court departed downward two levels because it found that, due to the length of the investigation, defendant, who was 67 years old at conviction, lost 6-11 of his most productive years because he was unlikely to be employable as a banker. The Court also downward departed two levels on the ground that the case was "atypical" because Whitmore was not trying to destroy the bank and two levels because the sentence was more punitive on Whitmore due to his age than it would be on a person of middle age. Finally, the Court departed one level because it found, without any support in the record, that Whitmore might be incarcerated in a federal institution of a higher degree of security than which he should be subjected. The Government cross-appealed and the Ninth Circuit affirmed in an unpublished decision at 35 Fed. Appx. 307.

California, Central

In *United States v. Menyweather*, the defendant, an administrative employee in the U.S. Attorney's Office, pleaded guilty to embezzling between \$350,000 and \$500,000 from the government over the course of ten years by abusing government-issued credit cards. Her guidelines' range for one count of mail fraud was 21-27 months. The Court departed eight levels and sentenced the defendant to a five-year suspended sentence, with the requirement that she serve 40 days' imprisonment on consecutive weekends. Although no grounds for the departure were given, the defendant sought a departure for mental impairment, her status as a single mother, no societal interest in her incarceration, the fact that she ostensibly posed no further threat to society, and the totality of the circumstances. The government appealed.

The Ninth Circuit reversed and remanded in an unpublished decision at 36 Fed.Appx. 262. On remand, the Court imposed the same sentence based upon the grounds propounded by the defendant at her first sentencing and post-conviction rehabilitation. The government has taken another appeal.

In *United States v. Defterios*, a loan fraud case, the Court effectively departed downward ten levels from an offense level of 16 and criminal history category II (range 24-30) to a one-month sentence on the basis of "crediting" defendant with the time he would have served had a prior case and the instant case been charged and sentenced together.

In *United States v. Newman*, based on a finding of aberrant behavior, the Court departed five levels from an 18-24 month range to six- months' community confinement/three-years' probation in the case of a CEO "cooking the books." The departure was unjustified given the length and extent of the criminal activity, which involved falsifying the corporation's quarterly numbers to meet "street" estimates. The CFO, who was sentenced a few months later, received a similar departure.

In *United States v. Paine*, a telemarketing fraud defendant personally solicited more than \$800,000 from victims in cold calls. The loss attributable to his acts was in excess of \$250,000. The guidelines called for a level 13 (Zone D, 12-18 months' imprisonment). Over the government's objection, the Court departed downward three levels based on defendant's poor health. Among other conditions, he suffered from liver problems and high blood pressure. The Court sentenced defendant to 12-months' home detention.

California, Eastern

In *United States v. Mugrdechian*, the defendant was charged with three counts of embezzlement from an employee welfare benefit plan. The PSR recommended a guideline range of 27-33 months, based on an offense level of 18.

The sentencing hearings went on for over two years. Prior to the last hearing, the defendant filed a motion for downward departure based on a variety of factors (aberrant behavior, post-offense rehabilitation, post-offense restitution, voluntary disclosure of the crime, lack of sophistication, extraordinary family situation, charitable and community service, government misconduct, loss of business income, loss overstates the offense, and totality of circumstances). At sentencing, the Court examined each factor and specifically found the defendant had not satisfied the factors for a downward departure. Nonetheless, the Court reduced the amount of loss, then departed downward an additional two levels to a level 14 under the "totality of the circumstances," and gave the defendant the low end of the sentencing range. His final sentence was 15 months.

California, Northern

In *United States v. Desaigouard*, defendants Desaigouard, Gupta and Henke were charged with conspiracy, false statements, securities fraud, wire fraud, and insider trading. Two days into trial, Gupta pled guilty to conspiracy and insider trading. Henke and Desaigouard moved for a mistrial, which the Court granted. At the conclusion of the second trial, both defendants were convicted of conspiracy, false statements, insider trading and securities fraud. The PSR calculated Henke’s offense level to be 33 with a sentencing range of 135-156 months and Desaigouard’s offense level to 34 with a sentencing range of 151-188 months. Both guideline calculations were reduced by 4 levels because the Court declined to apply an obstruction of justice enhancement for untruthful trial testimony and applied a lower loss amount. The Court departed downward ten levels for both defendants based on a combination of factors. For Henke, the departure was based on aberrant behavior, effects on his family, and severe collateral consequences for his career. With Henke’s offense level of 19, the guideline range was 30-37 months. Henke was sentenced to 32 months’ incarceration. From a range of 33-41 months, Desaigouard was sentenced to 36 months’ incarceration. His departure was based upon the same factors as Henke’s in addition to his unusual charitable contributions and poor health. Gupta was sentenced to four-years’ probation. While the Court granted the government’s motion for a downward departure based on Gupta having provided “substantial assistance,” the Court sentenced Gupta far below the sentence recommended by the government.

At sentencing, the Court explained that “we have in Mr. Desaigouard an individual of extraordinary talents, abilities and accomplishments, who built a business, built a life, provided economic opportunities for many other people and also engaged in a number of good works for the community and for matters of interest to him and members of his family...[but that he and Henke] put into the market information that was false and misleading and obviously, misled the market...”

California, Northern (contd.)	<p>The Ninth Circuit ultimately reversed defendants' convictions and, therefore, it did not reach the government's cross-appeal of the sentencing issues.</p> <p>In <i>United States v. Sarmiento</i>, the defendant pled guilty to fraud in connection with access devices. Defendant stole credit card applications belonging to 50-100 of his employer's customers and used the information to purchase roughly \$250,000 of merchandise and credit over the internet. Defendant moved for a downward departure based on extraordinary acceptance of responsibility, family ties and a combination of factors. The defendant's offense level was 13 (Zone D, 12-18 months imprisonment). Over the government's objection, the Court departed to a level 10 (6-12 months) and sentenced the defendant to five-years' probation and 12-months' community confinement.</p>
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California, Southern

In *United States v. Rasmussen*, the Court departed downward four levels based upon certain unspecified reasons bringing the defendant into Zone C, where it split the 10 months (the low end of the range) and gave him only five months in custody. The government had recommended 97 months. The case involved a defendant who illegally transported and abandoned a container full of hazardous waste (over 3000 containers), which included both acids and cyanides. If the acids and cyanides had mixed, it would have created a deadly gas cloud, possibly killing nearby residents. During various periods of his life, he held controlling positions in many different companies. He has experience in financing and structuring business enterprises, raising capital, and developing financial strategies. In this case, Rasmussen was one of the founders of, and raised capital for, "La Paz Farmaceuticos," a pharmaceutical company in Mexico. He was also personally involved in the storage and transportation of certain chemicals which were originally intended to be shipped to La Paz to make health supplements. The chemicals sat in storage in the United States for many years, and constituted hazardous waste. The government unsuccessfully cross-appealed the Court's downward departure. See 43 Fed. Appx. 48 (9th Cir. 2002).

In *United States v. Adams*, the Court departed downward four levels for a combination of factors in a case involving the sale of unapproved medical devices, charged as mail fraud. The Court stated the defendant's role was overrepresented and found the defendant did not control the loss amount because he did not set the price, even though he continued to operate the business for over a year after his co-conspirator was jailed. Though the government recommended 18-months' imprisonment, the Court sentenced him to a split sentence with only four months in custody.

California, Southern (contd.)

In *United States v. Heffner*, a bank senior vice-president who was also president of the bank's subsidiary real estate development company, was convicted of accepting bribes from a residential developer (and then bank-borrower). The developer paid the defendant \$175,000 in cash over an 18-month period in return for the bank releasing as collateral a championship golf course valued at \$6.3 million. The golf course secured, in part, loans in excess of \$17 million, which were eventually defaulted on. The PSR incorrectly calculated the offense level using the amount of the bribes paid, which resulted in a sentencing range of 12-18 months. The PSR also recommended a downward departure suggesting a sentence of one-day imprisonment and one-year home detention. The government argued the total offense level should have been based on the loss of the value of the collateral, or \$6.3 million, resulting in a guideline range of 51 to 63 months.

At sentencing, the Court agreed with the government's total offense calculations but departed downward 14 levels based on the defendant's heart condition and other physical ailments to arrive at a Zone B sentencing range of 6-12 months. It then imposed a sentence of six-months' home detention.

Connecticut

In *United States v. Lewis*, a physician evaded at least \$400,000 in taxes. As a result, he came out at a level 16 with a sentencing range of 21-27 months' imprisonment. During preparation of the PSR, the doctor told the probation officer that he had been diagnosed with post-traumatic stress disorder from his bad experiences in Vietnam, that he had been injured there when a helicopter that he was a passenger in had been shot down, and that he had a Silver Star medal. The government obtained his military records and learned that he had never been to Vietnam and that he had no medals. These deliberate lies were pointed out to the court. At sentencing, the government requested a two-level obstruction enhancement. The defendant produced evidence about his community service, primarily as a volunteer team physician for high school sports. Despite having been directly lied to (which increased his sentencing range to 27-33 months), the Court departed downward and sentenced him to six-months' community confinement with a condition that he donate 40 hours of medical services per week to a clinic. The defendant dutifully left the halfway house each day, but neglected to show up for his community service. As a result, he is now in prison.

Connecticut (contd.)

In *United States v. Schwartz and Ginsberg*, two large real estate developers used their insider status at a number of banks to direct loans to themselves and each other, and submitted to the bank vastly inflated financial statements to justify the loans. The losses were in excess of \$30 million. The banks failed, in large part due to the crush and failure of insider loans. From an offense level of 23 and sentencing range of 46-57 months, the Court departed downward and sentenced Ginsberg to a probationary sentence and Schwartz to six-months' imprisonment. The primary reason was that the "loss overstated the seriousness of the conduct," although the judge did not explain how he arrived at the extent of the departure.

<p>Florida, Middle</p>	<p>In <i>United States v. Hauck</i>, the defendant pled guilty to bank fraud. The PSR calculated defendant’s offense level to be 18 even though the government recommended an offense level of 13 (based on its belief that the loss overstated defendant’s culpability). The Court, however, departed downward below even the government’s recommendation to a level 10 (range of 6-12 months) based on aberrant behavior. It sentenced defendant to three- years’ probation with a special condition of six-months’ home detention.</p>
<p>Hawaii</p>	<p>In <i>United States v. Boulware</i>, a multi-millionaire Hawaii-based businessman was convicted of tax evasion, tax perjury and conspiracy to commit bank fraud. The offense level included a tax loss to the United States and State of Hawaii of in excess of \$29 million. The PSR recommended additional levels for obstruction, abuse of trust and sophisticated means. The defendant did not accept responsibility for his actions. The total recommended offense level was a 32 resulting in a guideline range of 121-151 months.</p> <p>The Court ignored precedent by eliminating corresponding state tax losses as relevant conduct. Despite the jury's rejection of defendant's self-exculpating testimony at trial and the government's evidence of obstructive actions after becoming aware of the criminal investigation, the Court also eliminated the recommended increases for abuse of trust and obstruction of justice. The Court then found, based on letters and monies spent in the community during the same period of income tax evasion and at least partially after he learned of the criminal investigation, that the defendant was entitled to an additional two-level downward departure for civic and charitable works. The Court ultimately sentenced defendant to 51-months’ imprisonment, based on a total tax loss of \$8,105,714 and a guideline level of 22. The Solicitor General has authorized a cross-appeal.</p>

Idaho	<p>In <i>United States v. Britt</i>, 27 Fed. Appx. 862 (9th Cir. 2001), the government unsuccessfully appealed the district court's four-level downward departure in a bankruptcy fraud case. The defendant concealed property from the bankruptcy trustee. The specified guideline range called for a sentence between 21-27 months (offense level 16, criminal history category I). The departure appears to have been based on the fact that defendant's "plans to start a new career as a lawyer have been dashed, and the record reflects that she was under considerable mental stress as a result of her divorce and custody battle." Instead of mandatory incarceration, the defendant was eligible for a split sentence under Zone C and received 6 months incarceration.</p>
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Illinois, Central

In *United States v. Hamilton*, a jury convicted a farmer and owner of a trucking business of filing false income tax returns, tax evasion, making false statements to a federal land bank and defrauding a financial institution. The defendant's offense level before departure was 16, which subjected him to a sentencing range of 21-27 months. The Court departed downward seven levels to an offense level of 9, which carried a sentencing range of 4-10 months. As his basis for the departure, the Court cited "extraordinary family circumstances." The Court noted that Hamilton operated a family farm, which was owned by his elderly parents. Hamilton argued that the farm would likely lose a significant amount of money if Hamilton were incarcerated during planting or harvesting season. The Court also cited Hamilton's parenting of two step-children (one of whom has Downs syndrome) and his obligation to his wife, who had various medical problems. The Court sentenced Hamilton to four-months' incarceration.

Illinois, Northern

In *United States v. Roach*, an Andersen Consulting manager and associate partner was convicted of defrauding her employer of \$240,000 by falsifying expense vouchers. The PSR calculated the defendant's sentencing range to be 12-18 months based upon an offense level of 13. That defendant moved for a downward departure under Section 5K2.13 on the basis of diminished capacity, arguing (and presenting psychiatric testimony) that she was a "shopaholic" who stole because she was unable to control her urge to shop at Neiman Marcus and Barneys New York. The Court agreed and sentenced her to five-years' probation, with six-weeks' work release, followed by six-weeks' home confinement and weekend electronic monitoring. The government appealed, and the Seventh Circuit reversed and remanded in a published decision at 296 F.3d 565 (7th Cir. 2002).

In *United States v. Krilich, Sr.*, defendant Krilich schemed to bribe public officials to obtain assistance in the approval and financing of construction projects. The gain reaped by the defendant by offering tax-free bonds was \$14 million. The benefit to the defendant was calculated by the Court at between \$5 million and \$10 million. The Court made a seven level downward departure because it found that the guideline range of 135-168 months overstated the seriousness of his conduct and disparity existed between his sentence and the mayor's sentence or other public corruption cases. The Court imposed a sentence of 64 months. The Seventh Circuit reversed and remanded the case for resentencing in an opinion published at 159 F.3d 1020 (7th Cir. 1998). On remand, the Court imposed a sentence of 87 months by departing five levels for health reasons (cardiovascular disease, chronic peripheral vascular disease, and lower back pain). The sentencing range was 78-97 months. The Seventh Circuit reversed and remanded the case with instructions to sentence the defendant within the 135-168 month range. *United States v. Krilich*, 257 F.3d 689, 694 (7th Cir. 2001). The Seventh Circuit found the defendant's condition to be neither debilitating nor extraordinary.

**Illinois, Northern
(contd.)**

In *United States v. Grasser*, the defendant, an assistant manager at a bank, was convicted of bank theft and fraud for stealing jewelry from a safety deposit box and money (\$87,991) from a customer whom she believed had Alzheimer's disease. The Court departed 6 levels from an offense level of 15 (sentencing range of 18-24 months), and imposed a sentence of four months, with a recommendation that the sentence be served in community confinement. The Court based the departure on extraordinary acceptance of responsibility as evidenced by the sale and payment of equity in the defendant's home and the fact that she was working 70 hours a week in two jobs to pay restitution of \$1,000 a month. The equity in the house equaled \$33,000, and she had paid another \$4,000 at the time of the sentencing. The Court also based the departure on family circumstances (twin daughters, age 13, who prefer to live with her instead of her ex-husband and his wife, although the latter testified that they were willing and able to care for the children) and the psychological condition of the defendant given sexual abuse as a child. The government has taken an appeal in this case.

Indiana, Northern

In *United States v. Treesh*, the defendant owned an insurance agency. He and a local prosecutor engaged in a scheme to fix the bad driving records of the defendant's customers. The customers usually had convictions for driving while intoxicated, sometimes accompanied by accidents or bodily injury, and had their drivers' licenses suspended. The government introduced evidence regarding some fourteen drivers and the payment of bribes totaling roughly \$5,000. The government also introduced evidence that there were close to eighty driving records altered in this fashion as part of the scheme. A witness in the government's case against the prosecutor indicated that he earned more working with Treesh than he did as a deputy prosecutor. The jury in the case against the prosecutor heard evidence that Treesh provided gifts, merchandise, and loans to the prosecutor. The PSR calculated defendant's offense level to be 22 with a criminal history category I, resulting in a sentencing range of 41-51 months. At sentencing, the defendant introduced evidence of his advanced age and medical problems, and claimed the Bureau of Prisons could not adequately treat his medical problems. Medical professionals testified for both the government and the defense. The Court agreed with the defense, departed downward 12 levels and sentenced the defendant to home detention and a \$75,000 fine. See *United States v. Fernandes*, 272 F.3d 938 (7th Cir. 2001) for background on the cases.

**Indiana, Northern
(contd.)**

In *United States v. Norris*, Norris and his co-defendant, Gee, were charged in connection with a scheme to assist in the unauthorized reception of cable television signals. He was convicted for assisting unauthorized reception of cable service. The loss attributed to Norris by the Court was \$1.24 million, although the government had argued that his loss calculation should have been \$15.1 million. Over the government's objection, the district court, having heard from Defendant's cardiologist and mental health therapist, concluded that imprisonment posed a substantial risk to defendants' life because of an extraordinary medical condition. As a result, it departed downward under Section 5H1.4 and sentenced defendant to probation and 37 months of home confinement. The government cross-appealed the sentences imposed by the Court. Though the Seventh Circuit upheld the ability of the lower court to downward depart, it vacated the lower court's decision to sentence defendant to a non-prison term because defendant's offense level of 21 (sentencing range of 37-46 months) clearly fell within Zone D of the sentencing table. The Seventh Circuit held that although 5H1.4 allows for home detention, the defendant must be within Zone A or B of the sentencing table to qualify for such a non-prison term. See *United States v. Gee*, 226 F.3d 885 (7th Cir. 2000).

Iowa, Northern

In *United States v. Zurcher*, the defendant was part of a nationwide fraud involving a group called "We the People" where he served as the bookkeeper and managed the "claims administration activity". Victims were told that a class action had been won and anyone who filed a claim through defendants and paid a \$300 fee would receive millions of dollars in damages for things such as paying taxes, using currency, not graduating from college and other things. Victims were defrauded out of over \$1 million. Zurcher was facing a guideline range of 51-63 months imprisonment. Because he was 70 years old, the Court departed downward under Section 5H1.1, finding the defendant was elderly and infirm. The Court placed defendant on five-years' probation with special conditions that he serve six-months' community confinement and 18-months' home detention. The Eight Circuit affirmed the departure stating: "Although this issue is close because we doubtless would have granted no downward departure or a far less generous departure, we conclude the district court did not abuse its departure discretion under *Koon*." *United States v. Hildebrand*, 152 F.3d 756, 767 (8th Cir. 1998). The appellate court stated that "the government introduced no evidence that home confinement would not cost less than incarceration". The government's expert testified that BOP could manage the defendant's health condition.

In *United States v. Sinnott*, a pharmacist pled guilty to mail fraud and misdemeanor misbranding of drugs. Notwithstanding government evidence establishing BOP's ability to manage defendant's medical condition, the Court departed downward from a level 12 to a level 8 based on Section 5H1.4 and the defendant's physical condition. As a result, the Court sentenced defendant to three-years' probation and six-months' home detention.

<p>Iowa, Northern (contd.)</p>	<p>In <i>United States v. O’Kane</i>, 155 F.3d 969, 971-75 (8th Cir. 1998), the government appealed the sentence imposed for the defendant’s conviction for mail fraud and money laundering. In the course of his scheme, the defendant defrauded his employer of over \$304,000 worth of baseball cards. At the time of sentencing, he had made full restitution. After receiving a reduction for acceptance of responsibility, the defendant had an offense level of 16 and a sentencing range of 21-27 months. The district court departed downward four levels for extraordinary acceptance of responsibility because of the restitution payments and sentenced defendant to five-months’ community confinement and five-months’ home detention. The Eighth Circuit reversed and found that his conduct did not constitute extraordinary acceptance of responsibility.</p>
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Kansas

In *United States v. McClatchey*, a jury convicted the defendant, chief operating officer at Baptist Medical Center in Kansas City, Missouri, of conspiring to pay kickbacks in exchange for Medicare and Medicaid referrals and of offering or paying kickbacks to induce such referrals in violation of the Medicaid Antikickback Act. Although the PSR calculated his offense level at 13 (based upon a \$50,000 bribe) and his sentencing range at 12-18 months without the possibility of probation (a Zone D classification), the Court sentenced defendant to three-years' probation, including six-months' home detention. The government argued that the offense conduct required at least an offense level of 28 (based upon bribes of \$6.9 million involved in the conspiracy) and a sentencing range of 78-97 months. The Court made a downward departure for aberrant behavior and extraordinary family circumstances, which allowed the imposition of probation and home detention with electronic monitoring. The Court also commented on the defendant's community service. The government has appealed the sentence. This is the second appeal in the case. The Court granted a post-verdict motion for a judgment of acquittal, which was reversed by the Tenth Circuit in a published opinion at 217 F.3d 823 (10th Cir. 2000).

<p>Kentucky, Western</p>	<p>In <i>United States v. Sadolsky</i>, a regional carpet manager with Sears fraudulently credited his personal credit card account with \$39,477 in returned merchandise. He was convicted of computer fraud because he accessed the corporation's computers thirteen times and fraudulently credited his personal credit card for returned merchandise. Although the statute required a minimum term of imprisonment of six months, the Court departed downward two levels under Section 5K2.13, based on defendant's gambling disorder. The defendant received a term of six months' home confinement (not imprisonment) in violation of the statutory requirement. The government appealed. The judgment was affirmed in an opinion published at 234 F.3d 938 (6th Cir. 2000).</p>
<p>Louisiana, Western</p>	<p>In <i>United States v. Cary</i>, a city councilman used his position to coerce city employees into buying insurance from him. In one case, he used his position to rehire a fired city auditor in exchange for the auditor buying his insurance. A jury convicted him of violating the Hobbs Act and mail fraud statute. The PSR calculated his offense level to be 20 (sentencing range of 33-41 months). The Court departed downward and sentenced defendant to 12-months' incarceration followed by six-months' community confinement. The Court justified the departure on the ground that defendant's conduct did not typify the conduct anticipated by the guidelines in addressing political extortion cases. The Court stated there was a difference between an official exerting power versus influence, and defendant had only exerted influence.</p>

Maryland	<p>In <i>United States v. Yates</i>, a General Services Administration (GSA) employee and his accountant (Yates) were convicted after trial of submitting bogus/inflated invoices to GSA for building repairs. The overall loss attributable to the scheme was \$500,000, although the Court found that only \$20,000 to \$40,000 was reasonably foreseeable as to Yates. Yates took the stand and lied at trial resulting in a PSR recommendation that he receive a two level enhancement for obstruction of justice. He also received an aggravating role enhancement for serving as an organizer/leader of an activity with five or more participants. This resulted in an offense level 17 and a sentencing range of 24-30 months. Over the government's objection, the Court departed downward nine levels because the defendant had an autistic son who he supported financially. He is serving 30 weekends in a local facility. The Solicitor General authorized a cross-appeal.</p>
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Massachusetts

In *United States v. Bogdan*, the defendant, while working as Chief Financial Officer, embezzled over \$250,000 which resulted in his conviction for mail fraud. The parties stipulated to an offense level of 15 which resulted in a sentencing range of 18-24 months, a Zone D sentence requiring incarceration. The Court imposed a sentence of one year and one day. Although the plea agreement allowed the defendant to argue for a departure on the grounds of aberrant behavior, the parties agreed that no other bases for departure were appropriate. The Court departed downward because the defendant was funding an extramarital affair, had "made amends" with his wife (from whom he was divorced by the time of sentencing) and had been a good father. The defendant served four months in prison, five months in community confinement, and three months in home confinement.

Though the First Circuit reversed the departure, the district court departed again on remand because, at the time of resentencing, the defendant had almost completed community confinement and, in the Court's view, it would have been unfair to return him to a more severe confinement. That departure was also reversed. See *United States v. Bogdan*, 284 F.3d 324 (1st Cir. 2002)(reversing family circumstance departure); and *United States v. Bogdan*, 302 F.3d 12 (1st Cir. 2002)(reversing departure based on defendant's imminent completion of erroneously short sentence). On the second remand, the First Circuit remanded the case "for imposition of a sentence within the guideline range of 18 to 24 months' imprisonment." *Bogdan*, 302 F.3d at 17.

Massachusetts (contd.)	<p>In <i>United States v. Thurston</i>, the Court departed downward 16 levels, from roughly 60-months' imprisonment to only three-months' imprisonment (with a recommendation that it be served in community confinement) and three-months' home detention as a condition of supervised release, based on the defendant's so-called extraordinary "charitable works and community service" and his perceived need to equalize the defendant's sentence with that of the co-defendant (who pled guilty). The defendant had been convicted after trial of conspiring to defraud Medicare. He served as Vice-President of Damon Clinical Laboratories, Inc., which was in the business of doing laboratory work on blood tests. He arranged to add a test to standard lab work ordered by doctors and then charged Medicare for the extra cost even though the doctors had not ordered the test and had no use for it. The result of the scheme was that labs under the defendant's control overcharged Medicare about \$5 million. Defendant's indicated sentencing range was 63-78 months, although the statutory maximum was 60 months. The government has appealed the sentence.</p>
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Michigan, Eastern	<p>In <i>United States v. Jarvis</i>, the guideline range resulting from the defendant's bankruptcy fraud conviction was 12-18 months. The Court departed downward and sentenced defendant to three-months' community confinement and nine-months' home detention as a condition of supervised release. Though the government established that the defendant had an extensive criminal history and, subsequent to the bankruptcy fraud, wagered \$340,000 at a nearby casino, the Court departed on the basis of family circumstances. The defendant cared for two teenage girls who were not her children. One of the defendant's convictions was obtained while she cared for the girls.</p>
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Michigan, Western

In *United States v. Crouse*, the defendant was convicted of interstate shipment and sale of adulterated orange juice. Crouse was the owner, CEO, and Chairman of the Board of Peninsular Products Company, which produced and distributed orange juice made from concentrate. The loss attributable to the fraud was \$10.3 million. The Court departed from a 30-37 month sentencing range (offense level of 19 with a criminal history category of I) down to 12 months' house arrest based on the defendant's community service, the Court's attempt to achieve proportionality in sentencing among co-defendants, the extensive adverse publicity from the case, defendant's business losses, and the defendant's exemplary behavior during appeals. The Court referred to the defendant's community ties, civic and charitable deeds, prior good works, and lost equity in the multi-million dollar business that he had built. The Court added that the defendant had been compelled to give up other prominent positions of communal leadership, suffered embarrassment, was deprived of director's fees, and had his good name tarnished.

The Sixth Circuit reversed in a published opinion at 38 F.3d 832 (6th Cir. 1994). The Sixth Circuit found "it is usual and ordinary, in the prosecution of similar white-collar crimes involving high ranking corporate executives such as Crouse, to find that a defendant was involved as a leader in community charities, civic organizations, and church efforts."

On remand, the district court departed by four levels for time served credit and sentenced the Defendant to 18 months' imprisonment. The Sixth Circuit reversed and remanded the case once again. "Although we noted the unfairness of a white collar defendant's getting 'checkbook justice,' by spending money or otherwise making token efforts at community service, the heart of our reasoning was that (a) departures such as this require very unusual circumstances, and (b) it is not unusual for white collar executives to have a record of substantial community contributions because such activities are part-and-parcel of their positions, and the qualities that lead to an executive position are often those that also lead to useful community activity." *United States v. Crouse*, 78 F.3d 1097, 1101 (6th Cir. 1996).

Michigan, Western (contd.)	<i>On remand from the Supreme Court after Koon, the Court sentenced the Defendant to the same terms as he had imposed in the initial sentencing. The Court relied on the Defendant's exemplary behavior during the pendency of his appeals, collateral consequences of his conviction, and desire to reach proportionality in sentences among co-defendants. The Sixth Circuit vacated the sentence and remanded for resentencing in a published decision at 145 F.3d 786 (6th Cir. 1998).</i>
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Minnesota

In *United States v. Stevenson*, the defendant pled guilty to wire fraud resulting from false corporate financial statements being filed with the SEC immediately prior to an initial public offering that raised roughly \$16 million. The defendant was the president, chief executive officer and chairman of the board of the company. He owned significant shares of stock and stood to profit by millions of dollars from the scheme to "cook the books." The scheme was discovered before defendant could sell his stock and profit from the scheme. The parties stipulated to a \$1 million loss in the plea agreement. The guideline range was 21-27 months based on the agreed \$1 million loss. The Court, however, granted the defense's motion for a downward departure and sentenced defendant to 12 months and a day based on its belief that the loss was overstated.

In *United States v. King*, a father and son defrauded investors out of millions in a Ponzi scheme. Based on the son's family circumstances (his wife had rheumatoid arthritis and he had a significant relationship with his preschool children) and the son's blind faith in his father, the Court departed from a 108-135 month sentencing range to a 48-month sentence. The government appealed. In a published decision at 280 F.3d 886 (8th Cir. 2002), the Eight Circuit reversed because the facts did not support this outside-the-heartland departure and instructed the district court to sentence the son within the 108-135 range. At the time of the offense, the son was in his early thirties and possessed a college degree in business administration and finance.

Montana

In *United States v. Allen*, a jury convicted a dentist of conspiracy, bank fraud and making false statements to financial institutions relating to his involvement in a scheme to defraud a Montana bank. Total losses exceeded \$10 million. Participants included Allen, his co-defendant, John Lence (a lawyer), former bank president Werner Schreiber, former bank cashier Marlene Havens and a Spokane businessman, John Petersen. Petersen and Schreiber received the bulk of the proceeds from the scheme. Petersen, Schreiber and Havens all pled guilty, cooperated with the government and received Section 5K1.1 and Rule 35(b) departures. The Court calculated Allen's offense level to be 21, before departure. This calculation included an increase of 11 levels for a loss of \$1,321,158 and four levels because Allen derived more than \$1 million in gross receipts and the offenses affected financial institutions. At an offense level of 21, Allen's sentencing range was 37-46 months. The Court departed downward by nine levels to a level 12 (Zone C) and sentenced Allen to six months in a halfway house and six-months' home detention. The Court found that a departure was authorized under *U.S. v. Koon* and Section 5K2.0 in that the case was outside-the-heartland of bank fraud offenses.

The Court then cited the following factors in favor of departure: Allen's heart condition, his good works in the community, including pro bono dentistry, Section 5K1.1 departures given to cooperating co-conspirators, including Petersen, advise of counsel from co-defendant Lence (first asserted in Allen's written allocution at sentencing), repayments to the bank after discovery of the offense and the low risk of recidivism. The Court also found that the offenses were not typical of Allen's life, but it did not make the specific finding that the offenses constituted aberrant behavior. While acknowledging that many of the departure factors cited are discouraged factors under the guidelines, the Court found that the totality of the circumstances warranted departure.

**Montana
(contd.)**

In *United States v. Lence*, a jury convicted an attorney/CPA of the aforementioned conspiracy and bank fraud. The Court calculated Lence's offense level to be 20, before departure. This calculation included an increase of ten levels for a loss of \$784,000 and two levels for abuse of a position of trust and use of a special skill in connection with his preparation of a fictitious subpoena and other documents to help conceal the scheme. At a level 20, Lence's sentencing range was 33-41 months. The Court departed downward three levels and sentenced Lence to 24-months' imprisonment. As with Allen, the Court found that a departure was authorized under *U.S. v. Koon* and Section 5K2.0, in that the case was outside-the-heartland of bank fraud offenses. The Court found that the departure factors were that Lence was a single parent raising two teenage children (ages 16 and 18), that he lost his licenses to practice law and public accounting as a result of the convictions, and that substantial assistance departures had been previously given to Petersen and the other cooperating co-conspirators. The government intends to seek authorization to appeal the *Lence* and *Allen* sentences.

In *United States v. Vieke*, an identity theft prosecution, the defendant defrauded credit card companies out of over \$50,000 by assuming her parents' identities. Though the defendant had an offense level of 12 (sentencing range of 10-16 months), the Court made a four-level downward departure based on aberrant behavior resulting in a probationary sentence. Aberrant behavior did not characterize the defendant's actions given the three year duration of the scheme and the fact she had done the same thing without detection in the past. The government has appealed the sentence.

<p>Montana (contd).</p>	<p>In <i>United States v. Williams</i>, the defendant was convicted of Social Security fraud. Although he received in excess of \$50,000 of Title II disability payments in the 90's, he worked for nineteen different employers. His offense level was 12 with a criminal history category of I. The applicable guideline range was 10-16 months. Over the government's objection, the Court departed downward four levels and sentenced defendant to five-years' probation. The Court based its departure on the fact that defendant's Social Security retirement benefits (to which he is now eligible as a result of age) would cease during a period of incarceration and that he could not work if incarcerated. Although the government was the only victim in the case and sought incarceration, the Court believed that these circumstances took the case outside-the-heartland of disability benefits fraud cases given that few defendants in such cases had the wherewithal to make restitution. The Ninth Circuit reversed in an unpublished decision at 36 Fed. Appx. 256.</p>
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New Jersey

In *United States v. Walsh*, the defendant committed bank fraud in 1990. He later fled from New Jersey to Florida, initially could not be located, and then was found in prison in Florida on subsequent, unrelated drug charges. Charges were brought in January 1996, and the defendant simultaneously pled guilty in an effort to cooperate with the government. After two years of unproductive cooperation, the defendant was sentenced in September 1998. The Court departed downward four levels from 15-21 months' imprisonment to six-months' home confinement and three- years' probation. The Court gave as its reasons: (1) the length of time it had taken to indict the case (which was due to defendant's flight, and was half of the statute of limitations); (2) the length of time before the defendant was sentenced (which was due to his failed cooperation); (3) his failed cooperation (which is not a basis for departure, except under the drug safety valve), and (4) the Court's view that prison does no good and does not deter, and that the defendant was rehabilitated.

In *United States v. Vitale*, 159 F.3d 810 (3rd Cir. 1998), the defendant was convicted of wire and tax fraud involving more than \$12 million in wire fraud and \$1.2 million in tax fraud. The defendant had been employed for more than thirteen years by a specialty chemical and metal products manufacturer. He had served as the vice-president of strategic development and corporate affairs and controlled a multi-million dollar budget for domestic and international marketing and communications. His psychiatrist testified that the defendant was not motivated by greed or accumulation of wealth, but his "obsession with antique clocks overpowered his sense of right and wrong." *Vitale* at 812. The district court departed downward for extraordinary acceptance of responsibility, restitution efforts, community service and post-offense rehabilitation, and sentenced the defendant to 30-months' incarceration, a 21-month departure from the bottom of the applicable sentencing range (Level 24, 51-63 months).

In *United States v. Checoura*, the defendant, a bookkeeper for S&S X-Ray Products, was convicted of interstate transportation of stolen property. Pursuant to Section 5K2.13 (diminished capacity), the defendant received a two-level downward departure from an offense level of 20 because the defendant's compulsive gambling disorder significantly impaired her ability to control her embezzlement of over \$4 million from her employer over a five-year period. This reduced the guideline range from 33-41 to 27-33.

New York, Eastern

In *United States v. Bloom*, a CPA was convicted for failing to report as personal income approximately \$5 million embezzled from the estate of an heiress, resulting in an approximate \$1 million tax loss. The defendant testified falsely at trial. The defendant sought a downward departure on the ground of extraordinary family circumstances, relating to the harm his imprisonment would cause his elderly mother. The government opposed the departure, arguing there were others who could care for his mother (the defendant's sister, wife and adult son) and that the proof that the mother needed extensive care was insufficient. The government also sought an upward adjustment for obstruction of justice based on the defendant's perjury at trial. The district court granted a downward departure from a range of 27-33 months to six months on the basis of the claimed extraordinary family circumstances. The Court also denied the government's requested obstruction enhancement, notwithstanding its conclusion that the defendant's testimony was utter nonsense.

In *United States v. Koczuk*, the defendant illegally smuggled \$11 million of sturgeon roe (caviar). The adjusted offense level was 29 with a sentencing range of 87-108 months. In the Court's view, the range overstated the seriousness of offense, the offense was outside the heartland involving endangered species, and the defendant's wife suffered uncontrolled diabetes/post-traumatic stress incurred by his legal troubles. The Court departed downward to a sentence of 20 months' imprisonment. The Second Circuit reversed the downward departure. *United States v. Koczuk*, 252 F.2nd 91 (2nd Cir. 2001).

New York, Northern	<p>In <i>United States v. Lawrence</i>, after a five week trial, the jury convicted the defendant of embezzling more than \$37 million from insurance companies he controlled, failing to pay over 401(k) funds, and failing to pay over social security taxes and other taxes which had been withheld from employee paychecks. Although the undisputed sentencing range for these offenses was 97-121 months, the Court departed downward by 60 months (nine levels), and sentenced Lawrence to 37-months' imprisonment. The Court granted this departure under Section 5K2.0, based on the totality of the defendant's "extraordinary" community support, his "extensive" charitable work, his lack of criminal history and his current family status. The government argued there was nothing extraordinary about Lawrence's age, health, family responsibilities, or community ties. The government also argued that while his civic and charitable activities were laudable, his financial contributions were a prohibited factor under the guidelines, and his contributions of time were not unusual for a prominent businessmen of his station. The government dismissed its appeal after Lawrence was diagnosed with terminal cancer – a condition that did not surface until after the sentencing.</p>
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New York, Southern

In *United States v. Rabinowitz*, a middleman in a prime bank fraud was convicted after trial. The loss amount attributable to the defendant was over \$21.5 million, with in excess of \$50 million involved in the total scheme to defraud. The Court downward departed by nine levels from a level 24 to a level 15, relying on two sentences from a letter written by the defendant suggesting he was having a tough time in prison and defense counsel's story about the defendant's non-physical abuse in prison causing the defendant to relieve himself in his bed, coupled with the Court's observation that the defendant looked worse after being imprisoned for six months. The defendant's guidelines moved from a minimum guideline range of 51-months' imprisonment to the 18 months the Court ultimately imposed.

In *United States v. Goldberger*, 4 Fed. Appx. 66 (2nd Cir. 2001), defendant Goldberger pled guilty to charges of credit card fraud and conspiracy to commit credit card fraud. The loss attributable to the crime was approximately \$220,000. He requested a downward departure arguing that he was the father of preschool triplets and his wife would bear an enormous burden if left to care for the children alone. Defendant also submitted a letter from his rabbi stating that during counseling sessions, defendant was "extremely sorry" and "very remorseful." Relying on these facts, the Court departed downward three levels on the grounds of extraordinary family circumstances and extraordinary acceptance of responsibility. The defendant's pre-departure offense level was 13. He was sentenced to 5 months community confinement and 7 months home confinement.

The government appealed and the Second Circuit reversed and remanded, holding that neither defendant's acceptance of responsibility nor his family circumstances were extraordinary. The Court noted that Goldberger was convicted in State Court for check kiting while on bail in this case. Also there was evidence that he had stolen at least \$1,000 in merchandise from his employer while on bail. On remand, the defendant was sentenced to six months incarceration.

New York, Western

In *United States v. Jacobson*, a psychiatrist charged in a health care fraud matter, received a probationary sentence after a seven-level downward departure (from a Zone D sentencing range of 24-30 months) principally on the grounds of diminished capacity. The Court concluded that a prison sentence would be inappropriate and departed to an offense level of 10 (which provided for a range within Zone B of 6-12 months). The five-year probationary sentence, \$50,000 fine and restitution order (\$786,585), included special conditions of probation that the defendant serve his first six months in home detention, perform 250 hours of volunteer community service per year for five years, and submit to psychiatric care. An appeal is pending. A sentence of incarceration would have removed the doctor from practice. Now the doctor is fighting to retain his medical license with the state medical board and using the fact that the district court ordered him to perform community service as a reason to maintain his license.

The Court relied primarily on the defendant's diminished capacity motion, finding that the hypomanic condition diagnosed by defendant's expert "caused him to be unable to control this drive to act as he did" in overbilling. The Court, however, also cited "other factors" coupled with the illness resulting in his diminished capacity to justify the departure. While the Court stated that the restitution agreed to by Jacobson "does not warrant any special consideration for his sentence" and concluded "that fact alone" does not entitle defendant to a downward departure, the court found the acceptance of responsibility reflected by that restitution "noteworthy" and apparently included it as one of the factors leading to the sentence imposed. More clearly cited were the Court's conclusions that "[t]he defendant is a valuable asset to this community in that he takes care of a large number of mental patients" and that removing him from the community "would cause a deep hardship to his patients who rely upon continuity of care in rendering psychotherapy and would put a tremendous burden on other psychiatrists to absorb the patient load."

North Carolina, Eastern

In *United States v. Crumbliss*, a jury convicted the defendant of theft of federal funds and conspiracy to steal federal funds. The defendant embezzled hundreds of thousands of dollars in federal funds that his business partnership was responsible for administering in connection with a mental health program. At sentencing, the Court expressed sympathy for the defendant, as well as dismay over having his discretion limited by the guidelines. The Court stated, “Oh, how I yearn for the old days when I could really take into consideration everything that I thought, as a judge, I should take into consideration when fashioning a sentence for a person who is brought before me.” The Court also listed factors it felt would warrant a lenient sentence. It found that the defendant was no threat to society; that he had already been punished by the loss of his career and his reputation; that his conviction was a tragic conclusion to an otherwise good career; that he was broken financially and physically; and that the prognosis for his health was poor. The first four of these five factors all relate to the defendant’s status as a white collar defendant. Only the fifth factor presented a potentially legitimate basis for a sentencing departure, and, pursuant to Section 5H1.4, a departure would be warranted only if Crumbliss suffered an “extraordinary physical impairment.”

The defense filed three motions urging the judge to grant a downward departure for various reasons. The Court recognized that, of the grounds asserted, only the defendant’s physical condition was a recognized departure ground. The defense presented evidence showing that the defendant had physical impairments. The government provided evidence showing that the Bureau of Prisons was capable of providing appropriate medical care. The Court credited that evidence, finding as follows: “Thankfully, we’ve got a prison system ... that has the ability to meet his needs.” The Court nevertheless granted a substantial downward departure, which he attributed to defendant’s physical condition. The defendant’s guideline range of 37-46 months (based on an offense level 22 and a criminal history category I) fell within Zone D. The judge imposed a five-year term of probation with up to 364 days of home detention.

<p>North Carolina, Eastern (contd.)</p>	<p>A probationary sentence including a term of home detention cannot be imposed as part of a Zone or D sentence. Thus, the sentence imposed was, at most, a Zone B sentence, which applies to offense levels of nine or ten. This represents a downward departure of at least 11 levels. An appeal is currently pending before the Fourth Circuit.</p>
<p>North Carolina, Middle</p>	<p>In <i>United States v. Coble</i>, 11 Fed. Appx. 193 (4th Cir. 2001), the defendant obstructed and impeded the due administration of the tax laws. The defendant mailed an invalid “comptroller warrant” to discharge his tax liability and receive substantial refund. The presentence report assigned defendant an offense level of 14 (sentencing range of 15-21 months) based in part on a two-level upward adjustment for obstruction of justice (false testimony). At sentencing, the district court not only declined to apply the obstruction adjustment, reasoning that the false testimony was immaterial, it downward departed by two levels and sentenced defendant to three-years’ probation and six-months home detention. The Court based its downward departure on aberrant behavior and a combination of discouraged factors, namely, physical condition/age, employment record, community ties, mental capacity, lack of criminal record, emotional toll from dispute within the IRS, and military service. It reasoned that such factors were present “to such an extraordinary degree that is an atypical case to place the defendant in a position that he would be subject to an active sentence under the circumstances here.”</p> <p>The government appealed the downward departure. On appeal, the Fourth Circuit reversed the downward departure.</p>

North Carolina, Western

In *United States v. Goodman*, 6 Fed. Appx. 129 (4th Cir. 2001), a bank employee pled guilty to engaging in a monetary transactions in criminally derived property. At sentencing, the district court calculated her offense level to be 15 and her sentencing range to be 18-24 months' imprisonment. The district court departed downward five levels on the basis of aberrant behavior, extraordinary restitution and the district court's finding that the defendant had herself been preyed upon by a co-conspirator. Ultimately, the district court sentenced the defendant to five-years' probation, twelve months of which were to be served in home detention with electronic monitoring. The government appealed. On appeal, the Fourth Circuit concluded that the district court abused its discretion in departing downward on the basis of extraordinary restitution and aberrant behavior. It affirmed the district court's downward departure, however, on the basis of "extreme predatory conduct" in what it called a "very close case."

In *United States v. Perry*, 173 F.3d 427 (4th Cir.1999)(unpublished), a bank employee pled guilty to embezzling more than \$550,000 from her employer. At sentencing, the defense requested a downward departure under Section 5K2.13 on that ground that defendant was clinically depressed; that her actions evidenced a need for acceptance, an addictive quality, and a capacity for denial; and that the denial and addictive aspects of her problem diminished her capacity. The district court agreed and departed from an offense level of 15 (18-24 months) to an offense level of 13. It sentenced defendant to 12 months and one day of imprisonment. On appeal, the Fourth Circuit affirmed over a strongly worded dissent.

Ohio, Northern

In *United States v. Phillips*, the defendant defrauded Medicare by billing for unnecessary services to patients who did not qualify for home health care. Under the guidelines, the defendant should have been sentenced at a level 13 and received a minimum prison term of 12 months. The Court downward departed one level and sentenced her to a split sentence recommending the term of imprisonment be served in a halfway house so she could assist in the care of her mentally handicapped adult son. Such a sentence would violate U.S.S.G. §5C1.1(d). The government opposed the departure, producing evidence that the son was in a group home, and that he became agitated and distressed when his mother visited or took him on outings. The defendant's ex-husband was also available and active in visiting the son.

In *United States v. Yang*, a case involving a conspiracy to steal trade secrets in violation of the Economic Espionage Act, the district court departed downward 14 levels based on the victim company's participation in the prosecution of the case. Defendant, his corporation, and his daughter were charged with mail and wire fraud, money laundering, conspiracy to commit theft of a trade secret and attempted theft of a trade secret in violation of the Economic Espionage Act. Yang owned a Taiwanese company involved in the manufacture of adhesives. An employee of one of Yang's chief competitors provided confidential trade secrets to Yang. The jury convicted the defendants of attempt and conspiracy to commit theft of a trade secret. The government appealed the downward departure. The Sixth Circuit remanded the case for resentencing after reversing the 14 level downward departure in a published opinion at 281 F.3d 534 (6th Cir. 2002).

Oklahoma, Western	<p>In <i>United States v. Ronne</i>, the defendant, a bank branch manager, was convicted of bank embezzlement. A bank audit disclosed discrepancies in the foreign currency account. It was determined that defendant had taken for her own use approximately \$ 40,000 from the account. At the same time, defendant applied for a loan at another bank, lying about her salary and forging a signature on the verification sent to her employer.</p> <p>The PSR established an offense level of 12 and a criminal history of 1 resulting in a sentencing range 10-16 months. Defendant moved for a departure based on aberrant behavior and family ties/responsibilities. Over the government's objection, the Court departed downward two levels stating that it was doing so to allow probation. Defendant was sentenced to two-years' probation under standard conditions with home detention for 180 days.</p>
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Pennsylvania, Eastern

In *United States v. Yeaman and Mendenhall*, the co-defendants participated in a scheme to supply worthless reinsurance coverage to a health insurance company in return for millions of dollars in premium payments. Yeaman was convicted of conspiracy, wire fraud, and securities fraud. A former stockbroker, he was President of Capital General Corporation, which assisted other companies in going public through mergers with existing shell corporations. The insurance company ultimately collapsed, compelling a state fund to pay policyholders' claims totaling \$6 million. Yeaman manipulated the market quotes and inflated the financial statements of three corporations of minimal value. He purported to lease \$12 million of stock of these companies. Although the PSR recommended a loss calculation of \$6.4 million and an addition of 14 levels under 2F1.1(b)(1), the court "did not explicitly make any findings with respect to intended loss" or "the gain acquired by Yeaman...." The government's appeal contested the finding of no monetary loss, the failure to impose a four-level enhancement under 2F1.1(b)(6) for a scheme with a substantial effect on a financial institution, and failure to impose a special skills enhancement. The Third Circuit remanded the case on all three issues. *United States v. Yeaman*, 194 F.3d 442 (3rd Cir. 1999). The judge initially ruled the offense caused no loss, and granted sentences which were a fraction of those recommended by the government. For example, Yeaman, who should have received a minimum sentence of 97 months imprisonment, was sentenced to 14 months (which he then served). The government successfully appealed the loss determination.

<p>Pennsylvania, Eastern (contd.)</p>	<p>On remand, the district court granted downward departures in order to reimpose the same sentences which were vacated. The parties had stipulated to an offense level of 30 based on a loss incurred figure of \$4.5 million and other factors. The sentencing range was 97-121 months. Mendenhall's new range was 63-78 months. The Court relied on a variety of grounds, including the situation of returning to prison after serving a short term, post-offense rehabilitation, and family circumstances. The departures amounted to 17 levels for Yeaman and 16 levels for Mendenhall, a co-defendant (who had been sentenced to 10 months in community confinement initially). Because of the downward departure, the district court imposed no additional incarceration. The government again appealed and the Third Circuit again reversed in a decision published at 248 F.3d 223 (3rd Cir. 2001). The Third Circuit rejected post-sentencing rehabilitation, disparity in sentences among co-defendants, disruption of relationships with family members, substantial economic hardship of family, and requirement of reincarceration as basis for downward departure. The second resentencing is pending.</p>
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**Pennsylvania, Eastern
(contd.)**

In *United States v. Wayne and Michael Inglisa*, the Court sentenced both defendants to three-years' probation and eight-months' home detention following their guilty pleas for conspiracy to defraud the IRS and filing false federal tax returns. The sentence represented an unwarranted departure from the 8-14 month guideline range and a Zone C classification for which straight probation is not possible.

Defendants pleaded guilty to tax offenses involving unreported income skimmed from their printing business, resulting in a tax loss of approximately \$70,000. As part of their plea agreements, defendants agreed that no departures applied and that their agreement to repay the tax, interest, and penalty did not constitute any basis for a sentence below the guideline range. The government also agreed to recommend that defendants serve staggered prison terms, thereby allowing at least one defendant to remain free to operate the business and to care for their elderly parents.

At sentencing, defendants nevertheless requested the Court to depart to a non-imprisonment sentence under Sections 5K2.0 and 5H1.6 based on defendants' need to care for their parents and for their repayment of the delinquent tax. Over the government's objection, the Court imposed a probationary sentence, with a condition of home confinement that allowed defendants freedom to care for their parents, to attend religious services, and to maintain their business. In effect, defendants received straight probation despite a plea agreement in which they had agreed to serve 8-12 months in prison.

In *United States v. Thayer*, the defendant was convicted of tax and bankruptcy fraud. The charge pertained to willful failure to pay federal employment taxes, willful filing of false claims against the government, and concealment of bankruptcy estate assets. Thayer, who owned 4 companies, was sentenced to 18 months. Thayer's offense level was 19 with a criminal history category of III (37 - 46 months). The Court departed downward six-levels because of defendant's community and business affairs.

**Pennsylvania, Eastern
(contd.)**

In *United States v. Bennett*, the defendant operated a charitable foundation that fraudulently promised to match funds donated by individuals. Bennett was President of New Era Philanthropy. The Third Circuit described the case as the “largest charity fraud in history, a six-year scheme in which he solicited over \$350 million in a bogus ‘matching’ program.” The defendant was charged with bank fraud, mail fraud, wire fraud, false statements, false tax returns, and impeding the administration of revenue laws. The loss at the time the offense was discovered was \$135 million although the total taken from victims was \$354 million. The court calculated the loss to be in excess of \$100 million and departed downward from a sentencing range of 235-293 months to a 144-month sentence because of defendant’s extraordinary civic, charitable, and public service, post-offense restitution, and diminished capacity.

Pennsylvania, Western	<p>In <i>United States v. O’Toole</i>, a jury convicted the defendant of committing a \$4 million commercial fraud and unrelated personal tax fraud. The Court departed downward based on defendant’s heart condition. The departure resulted in community confinement instead of incarceration for what should have been at least 50 months. The Court granted the departure despite (1) the fact this ground for departure was raised only as an afterthought, triggered by a comment from the defendant's sister seated in the gallery after all other disputed sentencing issues had been resolved; (2) assurances by BOP that appropriate medical care could be provided during incarceration; (3) the lack of any evidence that the defendant's level of activity was then impaired in any meaningful way; and (4) the defendant's history of disregard of basic health precautions (i.e., diet, smoking) that was well documented in his medical records. In fact, the defendant was regularly seen during court proceedings smoking in the vestibule.</p>
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Puerto Rico

In *United States v. Maldonado-Montalvo*, a farmer pled guilty to adulterating milk and delivering it to the processing plant for entry into interstate commerce. At sentencing, the Court rejected the government’s loss calculations and refused to calculate the loss by including three additional instances of adulteration. The Court sentenced defendant to five months’ home detention, followed by supervised release. The government appealed and the case was remanded for re-sentencing. Pursuant to the remand order, the Court recalculated the loss and included additional relevant conduct in accordance with the appellate court’s mandate, yielding a guideline level of 17. The Court then granted a downward departure over the government’s objection resulting in the imposition of a guideline level of 12 – the same level it had previously imposed. The Court determined that the loss calculation overstated the seriousness of the offense, reasoning that the loss was caused by “multiple interdependent factors,” including: (1) the financial conditions of the milk industry, which made adulterating the milk supply “the best of the bad options available” to defendant; (2) the involvement of delivery truck drivers who were paid by defendant in the scheme; (3) the conduct of the managers of the milk processing plant who failed to detect the adulteration; (4) the role of the government’s undercover agent in allowing the milk to go through; and (5) the conclusion that the adulteration “did not result in any actual financial loss or health problems.” The Court sentenced defendant to five-months’ imprisonment and five-months’ home detention, with a recommendation of confinement in a halfway house. The government has appealed this sentence.

South Carolina

In *United States v. Hensel*, a 22-year real estate lawyer misapplied monies from his escrow account to pay personal expenses and misapplied funds received from one client to pay off obligations related to other client closings. His misapplication of client monies also resulted in a number of NSF checks being drawn on his escrow account for mortgage payoffs. While none of his clients suffered losses because their mortgages were ultimately paid off by title insurance claims, the amount defendant failed to pay on behalf of his clients was nearly \$200,000. Defendant's guideline level was 15 with a corresponding range of 15-21 months. The Court granted a defense motion for downward departure based on extraordinary efforts of rehabilitation and departed downward five levels. It sentenced the defendant to three-years' probation with a special condition that he serve six-months' home confinement.

South Dakota

In *United States v. Oligmueller*, the defendant lied about the number of cattle he owned to collateralize bank loans exceeding \$800,000. He admitted to the fraud only after a cattle inspection uncovered his lies. Prior to indictment, he made substantial payments to the bank by liquidating secured and unsecured assets. At the time of sentencing, the loss to the bank was \$58,000. At sentencing, the Court erroneously calculated defendant's intended loss at \$0 and his actual loss at \$58,000. This left the defendant at an offense level of 11 and a sentencing range of 8-14 months. The Court then departed downward one level finding that the defendant had made extraordinary efforts to rehabilitate himself. It imposed a sentence of one-month imprisonment and five-months' home detention. The government appealed. In a published decision at 198 F.3d 669 (8th Cir. 1999), the Eighth Circuit found that the district court erred in calculating the loss. It stated that the actual loss was \$829,000 resulting in an offense level of 17 and a sentencing range of 24-30 months. The appellate court, despite this finding of error, found the sentence to be appropriate because the departure was based on the lower court's determination that the loss significantly overstated the risk to the lending institution and because of the defendant's extraordinary efforts to rehabilitate himself.

Tennessee, Eastern

In *United States v. Wright and Rutherford*, a jury convicted a hospital administrator, comptroller and physical therapist for extortion under color of official right in a case in which the hospital administrator of a city-owned hospital took bribes for the awarding of physical therapy contracts. The Court granted, over the government's objection, the hospital administrator's motion for downward departure, under Section 5K2.0, based on community service and physical impairment (high blood pressure, prostate problems, vision problems and skin problems) sentencing him to 48 months in prison on a sentencing range of 57-71 months. It also granted, over the government's objection, a downward departure to the hospital controller based on community service (he coached little league baseball), sentencing him to a prison term of 52 months on a guideline range of 57-71 months.

Tennessee, Middle

In *United States v. Balsley*, an insurance agent pled guilty to a mail fraud scheme in which he submitted 285 fictitious life insurance policy applications to the American General Life Insurance Company. He received approximately \$200,000 in commissions and other compensation based upon these fictitious life insurance applications. His offense level was 15 with a sentencing range of 18-24 months. Over the government's objection, the Court departed downward five levels and sentenced defendant to six-months' home detention and three-years' probation based on defendant's extraordinary family circumstances and the totality of the circumstances. Specifically, the Court based the downward departure on his motive for the crime, and the related medical needs of his son and wife, and the limited availability of other family members to provide necessary care for the child.

Tennessee, Western	<p>In <i>United States v. Coleman</i>, the defendant pled guilty to wire fraud. The PSR calculated defendant's offense level to be 18 and his criminal history category to be II, resulting in a sentencing range of 30-37 months. The defendant was not eligible to receive a downward departure under Section 5K1.1 because he could not provide substantial assistance in the investigation or prosecution of others. He acted alone and his only cooperation was as to his own criminal conduct. The defense filed a motion for downward departure citing <i>United States v. Truman</i>, 304 F.3d 586 (6th Cir. 2002). The government opposed the motion by arguing that all of the factors upon which the defense relied had already been taken into account by the guidelines under Section 3E1.1 and by distinguishing <i>Truman</i> on the facts. The Court granted the defendant's motion and sentenced the defendant to 24 months which was, in effect, a two-level departure.</p>
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Texas, Eastern

In *United States v. Thetford*, the Court downward departed based on family circumstances and the tender of legitimate accounts receivables to the government as partial restitution. In this case, the defendant's 3 ½ year old son had heart and lung problems, psychological problems, medication needs, and no competent family member to care for him, except for the defendant. The other family circumstance mentioned in the motion for downward departure was that the defendant was the sole provider for her 16 year old daughter who was facing "peer pressure to abuse alcohol and drugs." The defendant admitted that she stole over \$1.1 million acting in concert with her partner. The defendant and co-defendant operated a medical billing company. For over two years, both defendants submitted billing charges to Medicare and Medicaid for procedures that were not performed. In addition, both defendants embezzled money belonging to two of the doctors for whom they performed billing. The defendant's total offense level was 16 and her criminal history category was I, making her guideline range 21 to 27 months. Over the government's objection, the sentencing judge granted the defendant's motion for a downward departure due to extraordinary circumstances, pursuant to §5H1.6. The judge departed a minimum of 6 levels and sentenced her to 5 years probation, 6 months home confinement, and ordered her to perform 300 hours of community service and to pay restitution totaling over \$1.1 million.

While the defendant was serving her term of probation, she embezzled \$78,650 by writing checks on her employer's account and depositing them into her personal bank account. She pleaded guilty to bank fraud arising from this conduct. After pleading guilty to bank fraud and while awaiting sentencing, Thetford issued checks totaling over \$464,700 on her new employer's bank account payable to herself, forged the owner's name, and deposited the checks into her personal account. Thetford pleaded guilty to new bank fraud charges and is scheduled to be sentenced for this most recent offense on February 21, 2003.

Texas, Western

In *United States v. Navarro*, the defendant pled guilty to mail fraud and aiding and abetting. The victim was the Hartford Insurance Company, for whom defendant formerly served as a regional vice-president. The government agreed to not oppose a three-level downward adjustment for acceptance of responsibility and further agreed it would not oppose a sentence at the low end of the applicable guideline range. Defendant's properly calculated range stood at 18-24 months with restitution in the amount of \$239,760.

Defendant sought a downward departure based on his civil settlement with the insurance company whereby he assigned his vested benefits to pay them back in full. He claimed his early and full payment of substantial restitution by the sentencing date constituted "exceptional acceptance of responsibility sufficiently unusual to warrant a downward departure." Over the government's objection, defendant sought a five-level downward departure to an offense level of 10 so the Court could impose probation with a period of home detention. The Court sentenced defendant to three years supervised probation, 300 hours of community service and no fine. It reasoned that those who pay full restitution should be dealt with leniently.

**Texas, Western
(contd.)**

In *United States v. Wright*, a jury convicted a husband (a lawyer) and wife of tax evasion. Their scheme involved transferring \$100,000 in cash to a third-party for the purchase of a house by a nominee even though they had made representations to the IRS about their financial circumstances as part of an offer-in-compromise of past due tax liabilities. The husband's sentence of 12 months and one day of imprisonment with the recommendation that it be served in a halfway house was a one level downward departure in that he had an offense level of 13 with a sentencing range of 12-18 months. His wife, however, was similarly situated and the Court departed downward to sentence her to five years' probation. The Court based the departure on a finding that she was the mother of two young children who would suffer from being removed from their parents. A doctor called by the defense also testified that the children may not have the same financial benefits being raised by someone other than their parents that they might have if their parents did not have to go to prison. On cross-examination, the doctor acknowledged that they would not suffer any more than any other children who are removed from loving parents. Further, the loss would be less if only one parent were removed at a time. The Court rejected the government's arguments that family situation and socio-economic status did not warrant a downward departure.

Utah	<p>In <i>United States v. Stratford</i>, a jury convicted the defendant of bank and wire fraud based on the deposit of 25 fraudulent and counterfeit checks from Nigeria, totaling over \$1.1 million (five were actually honored totaling \$244,316). At sentencing, the Court erred in three significant respects: First, the Court credited defendant with a two-level reduction under Section 4E1.1 for acceptance of responsibility despite the fact that the defendant went to trial and testified falsely in his defense. Second, the Court limited its loss calculation to the amount of restitution, which resulted in an additional three-level reduction. Third, the Court granted Stratford's motion for downward departure under Sections 5H1.1 and 5H1.4, despite the absence of any compelling evidence establishing that Stratford suffered from an extraordinary mental or physical impairment. In granting Stratford's departure motion, the Court departed downward 12 levels from a level 20. Whereas defendant should have been sentenced to 33-41 months imprisonment, he instead received straight probation.</p>
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Virginia, Eastern

In *United States v. Elliott*, the defendant, a 68-year-old woman, was convicted of bank fraud. The charges arose from a scheme whereby she and her brother jointly opened an investment account, in which they deposited the assets of her father, a very elderly individual in a nursing home. Although withdrawals from the account required the signatures of defendant, her brother, and their father, she withdrew about \$226,000 in a series of transactions in which she forged her brother's signature. She used the proceeds for her own purposes.

Defendant's offense level of 16 established a guideline range of 21-27 months. The Court departed downward four levels on the basis of extraordinary family circumstances because of the needs of her husband, who has had a heart attack and suffers from cancer and diabetes. They have a daughter, a registered nurse, who lives in the same community as her parents. The court sentenced the defendant to five months' imprisonment. The government has taken an appeal in this case.

Washington, Eastern

In *United States v. Frazier*, a doctor pled guilty to causing false applications for payments to be made under a federal health care program. The plea agreement established an offense level of 17 with a sentencing range of 24-30 months. At sentencing, two doctors, one an orthopedic surgeon, testified to the defendant's good character and good works and opined that he suffered from a bipolar disorder causing diminished capacity, also known as clinical depression. Ten other doctors sent letters to the Court praising defendant's good character and medical accomplishments. The government argued the defendant's "clinical depression" was not sufficiently severe to constitute a valid diminished capacity defense, and his behavior was self-induced through the excessive use of alcohol. The government argued that the failure to incarcerate defendant for at least 12 months would send a message to the public that there are different standards for doctors than for citizens without money or community stature.

The Court, after calculating defendant's adjusted offense level to be 20, (a sentencing range of 33-41 months), departed downward 12 levels under Section 5K2.13, leaving defendant with a sentencing range of 0-6 months. The Court found that "the defendant was suffering from a significantly reduced mental capacity at the time he committed the instant offenses ... the defendant's mental impairment was not caused by the voluntary use of drugs or other intoxicants; that the defendant does not present a threat of violence to the public; and that the defendant's criminal history does not reflect a need for incarceration to protect the public."

West Virginia, Northern	<p>In <i>United States v. Ware</i>, a minority businesswoman and president of a disadvantaged business enterprise agreed to front her company for a general contractor in order to obtain a subcontract and meet a federal highway's project's disadvantaged enterprise goal. In exchange, she illegally received a \$10,000 kickback. At sentencing, the Court calculated the loss to be roughly \$150,000. Because the defendant testified falsely at trial, the Court calculated her offense level to be 17, resulting in a sentencing range of 24-30 months. The Court departed downward and sentenced defendant to only 10 months. The Court stated that the loss computation overstated the actual amount of the loss, which the Court determined to be the amount of the \$10,000 kickback.</p> <p>Additional details are documented in the opinion in <i>United States v. Brothers Construction</i>, 219 F.3d 300 (4th Cir. 2000). One of the defendants in that case was fined \$500,000 for its role in the fraud based upon the same \$150,000 loss computation which the <i>Ware</i> court earlier deemed to be overstated.</p>
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West Virginia, Southern

In *United States v. Coleman*, the defendant pled guilty to tax evasion. The Court departed downward five levels on the basis of the defendant's charitable work. The defendant's offense level should have been 15 (a sentencing range of 18-24 months). Instead, the Court sentenced defendant to six months' imprisonment, with a recommendation that the defendant serve his sentence in a halfway house.

In *United States v. LeRose*, the defendant engaged in a check kiting scheme to keep his business afloat, resulting in a bank loss of over \$3.3 million. He was convicted of a scheme to defraud a financial institution and filing a false tax return. LeRose, the mayor of Summersville, West Virginia, with family interests in several automobile dealerships and other business interests, used corporate funds to pay for personal expenses. Having calculated the defendant's offense level at 18 with a criminal history category of I, the Court departed downward from a 27-33 month range to a twelve-month sentence because the loss overstated the seriousness of the offense, victim misconduct, extraordinary restitution and the defendant's substantial assistance (even though the government declined to make a substantial assistance motion). The government appealed. In a published opinion at 219 F.3d 335 (4th Cir. 2000), the Fourth Circuit reversed because the facts cited by the district court did not constitute grounds for departure and because the government was not required to move for a substantial assistance departure. The defendant was sentenced to 27 months on remand, which was affirmed in an unpublished opinion at 9 Fed. Appx. 98 (4th Cir. 2001).

Wisconsin, Eastern	<p>In <i>United States v. John Forchette</i>, a jury convicted the defendant of bank fraud and interstate transportation of stolen property based on roughly \$450,000 of fraudulent checks the defendant either personally negotiated or recruited someone to negotiate. The Court, <i>sua sponte</i>, departed downward two levels finding the loss overstated the harm. As a result, defendant's sentencing range dropped from 24-30 months to 18-24 months. This was particularly troubling because defendant was personally involved with each check attributed to him. He was aware of the amount of each check and was the ring-leader of the scheme. The Court made this finding based upon the defendant's claim that he only received a percentage of the proceeds. This downward departure was done after the Court decided not to adjust defendant's offense level upwards for his role in recruiting over ten individuals to negotiate the fraudulent checks, thereby negating what should have been an additional four-level increase in defendant's offense level. The overall effect was to cut defendant's sentence in half.</p>
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