DOWNWARD DEPARTURES AFTER KOON -- A FACT-BASED INQUIRY

Carmen D. Hernandez
One Columbus Circle, NE, Suite G-430
Washington, DC 20544
800.788.9908
carmen_hernandez@fd.org
Revised April 2001

TABLE OF CONTENTS

I. DEPARTURES AFTER KOON 621
Identifying Factors That Take the Case Outside the Heartland 621
Defining the Role of District Courts 622
Departure Factors Are Potentially Unlimited 623
Fact-Finding Saves the Day -- Departures Upheld in Koon 624
Victim Provocation - U.S.S.G. § 5K2.10 624
Combination of Factors: Successive Prosecutions 626
Combination of Factors: Susceptibility to Prison Abuse 626
Post-Koon Case Law: Reassessing Departure Grounds 627
Post-Offense Rehabilitation & Remorse 627
Courier's Lack of Control Over Purity Level of Meth 628
Sentence Disparity Among Codefendants 628
Reasonableness of Departure 628

II. AUTHORITY FOR DEPARTURES - US CODE & RULES 628
18 U.S.C. § 3553. Imposition of a sentence 628
(a) Factors to be considered in imposing a sentence. 628
(b) Application of guidelines in imposing a sentence 629
(e) Authority to sentence below a statutory minimum 629
(f) Limitation on applicability of statutory minimums 629
18 U.S.C. § 3661. Use of information for sentencing 630
28 U.S.C. § 991. United States Sentencing Commission 630
28 U.S.C. § 994. Duties of the Commission 630

III. SUBSTANTIAL ASSISTANCE TO AUTHORITIES IN THE INVESTIGATION OR PROSECUTION OF OTHERS 631
18 U.S.C. § 3553(e) 631
28 U.S.C. § 994(n) 631
Rule 35(b), Fed. R. Crim. P. 631
U.S.S.G. § 5K1.1 631

Court May Review Govt Conduct for Unconstitutional Motive 633
Hearing to Determine Bad Faith/Irrational Motive 633
Hearing Where Parties Disagree as to Plea Terms 634
District Court Must Exercise Independent Discretion 634
Authority to Depart Without Government Motion 635
Timing of Rule 35 Motion 636

IV. AUTHORITY FOR OBTAINING DEPARTURES - SENTENCING GUIDELINES 636
Ch. 1, Pt. A, Intro. Comment. 4(b) - "Heartland" 636
U.S.S.G. § 5K2.0 - Grounds For Departures (Policy Statement) 636
Encouraged Departures 636
Discouraged Departures 637
Combination of Factors - 5K2.0, Commentary. 638
U.S.S.G. § 4A1.3 - Adequacy of Criminal History Category 640
Career Offender Departures 640
Not Limited by Departure Requirements of §2L1.2 641
Racial Diparities in State Sentencing Schemes 641

V. OTHER MENTIONED DEPARTURE GROUNDS 641
U.S.S.G. § 2A1.1, comment. (n.1) 641
U.S.S.G. § 2D1.1, comment. (n.14) 642
U.S.S.G. § 2F1.1, comment. (n.11) 642
U.S.S.G. § 2L1.2, comment. (n.5) 643
U.S.S.G. § 2Q1.3(b), comment. (n.4) 644
U.S.S.G. § 5C1.1, Comment. (n.6) - Specific Treatment Purpose 644
U.S.S.G. § 5C1.2 - The "Safety Valve" (18 U.S.C. § 3553(f)) 644

VI. DISCOURAGED DEPARTURES: § 5H Offender Characteristics 645
5H1.1 - Age 646
5H1.2 - Education and Vocational Skills 647
5H1.3 - Mental and Emotional Conditions 647
5H1.4 - Physical Condition 647
5H1.5 - Employment Record 648
5H1.6 - Family Ties and Responsibilities, and Community Ties 649
5H1.11- Military, Civic, Charitable, or Public Service; Employment 651

VII. PROHIBITED DEPARTURES 651
5H1.4 - Drug or Alcohol Dependence or Abuse 651
5H1.10 - Race, Sex, National Origin, Creed, Religion, and Socio- Economic Status 652
5H1.12 - Lack of Guidance as Youth and Similar Circumstances 652
5K2.12 - Economic Hardship 652
5K2.19 - Post-Sentencing Rehabilitation (eff. 11/1/2000) 652

VIII. ENCOURAGED DOWNWARD DEPARTURES 654
5K2.10 - Victim's Conduct 654
5K2.11 - Lesser Harms 655
5K2.12 - Coercion and Duress 656
(Includes battered woman syndrome cases)
5K2.13 - Diminished Capacity 658
(Includes battered woman syndrome cases)
5K2.16 - Voluntary Disclosure of Offense 660
5K2.17 - (Single-shot Firearms) 660
5K2.20 - Aberrant Behavior (eff. 11/1/2000) 661

IX. UNMENTIONED FACTORS 664
Acquitted Conduct or Uncharged Conduct 664
Collateral Consequences (Deportable Alien Cases) 665
Consent to Deportation 665
Cultural Assimilation 665
Effect on Custody in BOP 666
Conditions of Pretrial Confinement 666
Crack Cocaine Disparity 667
Disparity Arising from Charging Or Plea Policies 667
Disparity Among Codefendants' Sentence 668
Due Process 668
Extraordinary Acceptance of Responsibility 669
Fraud, Money Laundering Offenses & Similar Offenses 669
Defendant Did Not Personally Profit from the Scheme 669
Uncertainty of Loss Determination 669
Outside the Heartland -- Money Laundering 669
Money Laundering Tangential to Gambling Offense 670
Bribery Underlying RICO Prosecution 671
Government Conduct 671
Low Purity of Heroin 671
Outside Heartland 671
Remorse & Rehabilitation: Post-Offense 672
Sentencing Postponed to Permit Rehabilitation 672
Tax-Evasion Atypical 673
Sentencing Entrapment/Manipulation 673

DOWNWARD DEPARTURES AFTER KOON -- A FACT-BASED INQUIRY

Carmen D. Hernandez

A district court may depart from the sentence determined under the applicable sentencing guideline 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." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s.

I. DEPARTURES AFTER *KOON*

In ***Koon v. United States***, 518 U.S. 81, 116 S.Ct. 2035 (1996), the Supreme Court held that an appellate court owes substantial deference to a district court's decision to depart from the sentencing guidelines range and may not reverse unless the district court abuses its discretion. "[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." *Koon*, 116 S.Ct. at 2046. In reaffirming the judicial independence to grant departures, the Supreme Court explained that there is room under the guidelines for federal judges to exercise traditional sentencing discretion "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Id.* at 2053.

Koon also explains that a departure potentially may be based on any ground that the Sentencing Commission has not proscribed. Federal courts may not categorically rule out departure factors because that would usurp the Commission's policy-making authority. *Id.* at 2050.

Lastly, *Koon* makes it clear that the departure inquiry is fact-based. "The relevant question, however, is not, as the Government says, "whether a particular factor is within the 'heartland' as a general proposition, but whether the particular factor is within the heartland given all the facts of the case." Id. at 2047 (internal citation omitted).

After *Koon*, it is more important than ever for defense counsel to investigate mitigating facts pertaining to the offense and the defendant. Facts, singly or in combination, must be gathered and presented by counsel in a manner that establishes the unusual nature of each defendant and his crime. Indeed, since *Koon*, a number of courts of appeals have upheld previously rejected departure grounds. Case law changes wrought by *Koon* are discussed below.

A. Identifying Factors That Take the Case Outside the Heartland

After *Koon*, a district court considering a departure must first ask: "What features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?" *Koon*, 116 S.Ct. at 2045, citing, *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993). Upon identifying

distinguishing features, the court must next ask a series of questions to determine whether it should depart:

> **1. Forbidden Factors**
>
> Has the Commission forbidden departures based on those features? . . . If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure.
>
> **2. Encouraged Factors**
>
> If not, has the Commission encouraged departures based on those features? . . . If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account.
>
> **3. Discouraged Factors**
>
> If not, has the Commission discouraged departures based on those features? . . . If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.
>
> **4. Unmentioned Factors**
>
> If a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole' decide whether it is sufficient to take the case out of the Guideline's heartland."

Id.

B. Defining the Role of District Courts

1. Discretion to Impose Individualized Sentences

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and to reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal

judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.

Id. at 2053 (emphasis added).

2. Owed Substantial Deference

A district court's decision to depart from the Guidelines, by contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.

Id. at 2046.

3. Special Competence to Assess Facts

Before 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. . . .To ignore the district court's special competence -- about the 'ordinariness' or 'unusualness' of a particular case -- would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case . . . .

Id. at 2046-47 (citations omitted).

C. Departure Factors Are Potentially Unlimited

The Guidelines, however, "place essentially no limit on the number of

> potential factors that may warrant departure." The Commission set forth factors courts may not consider under any circumstances but made clear that with those exceptions, it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departures in an unusual case." 1995 U.S.S.G. ch. I, pt. A, intro. comment. 4(b). Thus, for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policy-making authority vested in the Commission.

Id. at 2050.

D. Fact-Finding Saves the Day -- Departure Factors Upheld in Koon

1. Victim Provocation - U.S.S.G. § 5K2.10

Koon upheld a five-level downward departure based on an encouraged departure ground: victim provocation. See U.S.S.G. § 5K2.10. The district court in *Koon* found as a mitigating factor warranting departure that the victim's "wrongful conduct contributed significantly to provoking the offense behavior." *Koon*, at 2048.

> Mr. King's provocative behavior eventually subsided. The Court recognizes that by the time the victim's conduct crossed the line to unlawfulness, Mr. King was no longer resisting arrest. He posed no objective threat, and the defendants had no reasonable perception of danger. Nevertheless, the incident would not have escalated to this point, indeed it would not have occurred at all, but for Mr. King's initial misconduct.
>
> Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a manner of seconds, during the course of a dynamic arrest situation. However, the convicted offenses fall under the same Guideline Sections that would apply to a jailor, correctional officer, police officer or other state agent who intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force.
>
> The two situations are clearly different. . . .The Guidelines do not adequately account for the differences between such 'heartland' offenses and the case at hand.
>
> . . .
>
> The punishment prescribed by § 2A2.2 contemplates

> unprovoked assaults, and as a consequence, the District Court did not abuse its discretion in departing downward for King's misconduct in provoking the wrong.

Koon at 2048-2050.

Note that in upholding this departure, the Supreme Court did not restrict its analysis to the encouraged departure identified in § 5K2.10. In part, the Court relied on the fact that Koon did not fall within the "heartland" of civil rights offenses. The Court defined the "heartland" as an unprovoked assault, one where a "jailor, correctional officer, police officer or other state agent ... intentionally used a dangerous weapon to assault an inmate, without legitimate cause to initiate a use of force". Id. Accepting the district court's finding that Koon involved "conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a manner of seconds, during the course of a dynamic arrest situation", the Court reasoned that the conduct in Koon fell outside the "heartland" because the assault was provoked. *Id.*

It is significant, for purposes of advocating departures, that despite the absence of any textual reference to provocation in § 2A2.2, the applicable guideline for assaultive civil rights violations, the Supreme Court defined its "heartland" by reference to provocation. For a number of reasons, this definition of the "heartland" makes sense. First, in a system concerned with just punishment, provoked and unprovoked assaults provide a fact-based distinction that should result in different punishment. Second, § 2A2.2 makes no reference to this distinction -- no specific offense characteristic addresses provocation and nothing in the commentary or background note prohibits consideration of this factor. Lastly, because the § 5K2.10 encouraged departure denotes that the Commission was unable to give adequate consideration to this factor in formulating the guidelines, it is logically consistent with the structure and theory of the guidelines to define the "heartland" of aggravated assaults by reference to victim provocation.

Koon's consideration of this departure provides a valuable framework for obtaining departures. First, identify the factual differences in the case at hand that justify mitigating the punishment. Next, formulate a definition of the "heartland" that incorporates the unique facts of your case. Lastly, if you find no case law support, rely on the court's day-to-day consideration of cases and your own experience to support your contention that the facts are unique and should mitigate the punishment. Indeed, the absence of case law reflects the uniqueness of your circumstances.

Be creative. There is considerable leeway in defining a "heartland" where the applicable chapter two guideline is silent as to the "heartland" that the Commission considered when it formulated the guideline. There is also a growing body of authority which reaffirms the discretionary authority of district courts in sentencing. After *Koon*, once you have convinced the district court that a departure would yield a more just sentence, the only requirements are that the Guidelines do not categorically prohibit a departure on that ground and that you present it in a manner that acknowledges a heartland from which your case may be distinguished.

2. Combination of Factors: Successive Prosecutions

Koon also upheld a departure based on the successive federal prosecution, after the acquittal in the state prosecution. Despite the fact that there is no double jeopardy or other legal bar under federal law to such successive prosecutions, this ground was upheld:

> As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. Nonetheless, the District Court did not abuse its discretion in determining that a "federal conviction following a state acquittal based on the same underlying conduct . . . significantly burden[ed] the defendants." The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court.

Id. at 2053.

The *Koon* defendants may have paid an emotional, physical or financial toll, or perhaps a combination of all three. It is not clear. It was sufficient that the district court was willing to take cognizance of the "significant burden" on the defendants. The Supreme Court upheld this departure in part because it determined that successive prosecutions are rare. Again, this shows the need to structure the departure argument in terms that make the case out-of-the-ordinary. *See e.g., United States v. Lieberman*, 971 F.2d 989, 998 (3d Cir. 1992) (upheld downward departure for a defendant that was charged with both embezzlement and tax evasion for the moneys he embezzled where the district court noted that while there was no prosecutorial misconduct in charging both offenses it had never seen a case charged in this fashion though most fraud-type cases would be subject to such charges).

The successive prosecution departure upheld in *Koon* may also be viewed as upholding departures that amount to imperfect defenses — not enough to be a complete defense but mitigating enough to warrant a reduction in sentence.

3. Combination of Factors: Susceptibility to Prison Abuse

Koon upheld the defendants' susceptibility to abuse in prison as an additional ground, in combination with other factors, to depart downward:

> The extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers, make *Koon* and Powell unusually susceptible to prison abuse. Petitioners' crimes, however brutal, were by definition the same for purposes of sentencing law as those of any other police officers convicted under § 2H1.4, and

> receiving the upward adjustments petitioners received. Had the crimes been still more severe, petitioners would have been assigned a different base offense level or received additional upward adjustments. Yet, due in large part to the existence of the videotape and all the events that ensued, "widespread publicity and emotional outrage . . . have surrounded this case from the outset," which led the District Court to find petitioners "particularly likely to be targets of abuse during their incarceration".
>
> The District court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts.

Id. at 2053.

E. Post-*Koon* Case Law: Reassessing Departure Grounds

Since *Koon*, the courts of appeals have explicitly stated that a different analysis must be applied in determining the availability of grounds for departures. In several instances, these courts have reversed pre-*Koon* precedents in their circuits.

1. Post-Offense Rehabilitation & Remorse

Overruling case law in light of *Koon*, the Fourth Circuit in ***United States v. Brock***, 108 F.3d 31 (4th Cir. 1997), held that post-offense rehabilitation is a proper ground for downward departure. All circuits to have considered the issue since *Koon*, have held this to be a permissible ground:

United States v. Bradstreet, 2000 WL 298570, No. 99-1267 (1st Cir. 2000);
United States v. Core, 125 F.3d 74 (2d Cir. 1997);
United States v. Sally, 116 F.3d 76, 80 (3d Cir.1997);
United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999);
United States v. Jaroszenko, 92 F.3d 486, 491 (7th Cir. 1996) (remorse);
United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997)
United States v. Green, 152 F.3d 1202 (9th Cir. 1998);
United States v. Whitaker, 152 F.3d 1238 (10thCir. 1998) (drug rehabilitation);
United States v. Pickering, 178 F.3d 1168 (11th Cir.) (may reduce criminal history level but not offense level), *cert denied,* 120 S.Ct.433 (1999).
United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998)

Note: An amendment prohibiting departures based on post-sentencing rehabilitation will take effect November 1, 2000. The proposed amendment, U.S.S.G. § 5K2.19 does not prohibit post-*offense* rehabilitation as a departure ground.

2. Courier's Lack of Control Over Purity Level

In ***United States v. Mendoza***, 121 F.3d 510 (9th Cir. 1997), the 9th Circuit reversed where district court concluded that it lacked authority to depart on ground that defendant lacked "control over, or knowledge of, the purity of the methamphetamine because the Guidelines already took purity into account in establishing the offense level....*Koon* makes clear, however, that section 3553(b), in conjunction with the Guidelines, does not restrict the power of the district courts that severely....Applying the *Koon* analysis, we conclude that the district court did have legal authority under the Guidelines to consider a downward departure on the ground that Mendoza had no control over, or knowledge of, the purity of the methamphetamine that he delivered. That ground does not involve one of the few factors categorically proscribed by the Sentencing Commission."

3. Sentence Disparity Among Codefendants

In ***United States v. Meza***, 76 F.3d 117 (7th Cir.), vacated and remanded, 117 S. Ct. 448 (1996) the Supreme Court vacated, for reconsideration in light of *Koon*, the7th Circuit's holding that departure is prohibited because of disparity among codefendants' sentences; *accord* ***United States v. Daas***, 198 F.3d 1167 (9th Cir. 1999) (departs down to equalize sentencing disparity); ***United States v. Martinez-Maldonado***, No. 99-CR-10272, 2000 WL 1801851, (Nov. 8, 2000) (granted departure to defendant based on his 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; defendant had no new evidence to provide to government because his codefendants had already provided information).

4. Reasonableness of Departure

In ***United States v. Sablan***, 114 F.3d 913 (9th Cir. June 5, 1997) (en banc), the Ninth Circuit abandoned its "mechanistic approach to determining whether the extent of a district court's departure was unreasonable;" now if 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.

II AUTHORITY FOR OBTAINING DEPARTURES - U. S. CODE

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.

[The Safety Valve]

(f) **Limitation on applicability of statutory minimums in certain cases**.-- 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.

Consider also:

18 U.S.C. § 3661. Use of Information for Sentencing
No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

28 U.S.C. § 991. United States Sentencing Commission; establishment and purposes

. . .

(b) The purposes of the United States Sentencing Commission are to-

(1) establish sentencing policies and practices for the Federal criminal justice system that–

(A) assure the meeting of the purposes of sentencing as set forth, in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

28 U.S.C. § 994. Duties of the Commission

. . .

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

. . .

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

III. SUBSTANTIAL ASSISTANCE TO AUTHORITIES IN THE INVESTIGATION OR PROSECUTION OF OTHERS

A. **18 U.S.C. § 3553(e).** Permits departures from the statutory mandatory minimum.

B. **28 U.S.C. 994(n).** Directs Commission to ensure reduced sentences for substantial assistance.

C. **Rule 35(b), Fed.R.Crim.P.** Permits departures from the statutory mandatory minimum and from the guidelines sentence based on assistance provided after sentencing.

D. **U.S.S.G. § 5K1.1.** Permits departures from the guidelines range.

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

. . .

(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.

28 U.S.C. § 994. Duties of the Commission

. . .

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Federal Rules of Criminal Procedure
Rule 35. Correction or Reduction of Sentence

. . .

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under §28 U.S.C. 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's

pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence."

U.S.S.G. § 5K1.1 Substantial Assistance to Authorities (Policy Statement)

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, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

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

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

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

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

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

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

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded

the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 290).

< ***Melendez v. United States***, 116 S.Ct. 2057 (1996). 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 U.S.S.G. § 5K1.1, the court is only authorized to depart below the guideline range but not below the statutory minimum.

< Practice Pointer: The plea agreement should include language that binds the government, in the event the defendant provides substantial assistance, to file a motion pursuant to both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.

In General, No Authority to Depart Without Government Motion

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.) (en banc), *cert. denied*., 120 S.Ct. 453 (1999); *United States v. Solis*, 169 F.3d 224 (5th Cir.), *cert. denied*, 120 S.Ct. 112 (1999); *United States v. Abuhouran*, 161 F.3d 206 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 1479 (1999); *United States v. Schaefer*, 120 F.3d 505, 508 (4th Cir.1997).

A. Court May Review Govt Conduct for Unconstitutional Motivation

< ***Wade v. United States***, 112 U.S. 1840 (1992). Where no plea agreement obligates government, district court may grant remedy if government's refusal to file motion is based on unconstitutional motive, such as defendant's race or religion

B. Hearing To Determine Govt's Bad Faith or Irrational Motive

< ***United States v. Isaac***, 141 F.3d 477, 484 (3d Cir. 1998). Government may rebut allegation that it acted in bad faith by explaining its reasons for refusing to file motion; defendant is entitled to hearing if it makes a showing that government acted in bad faith by contradicting government's explanation, supported by some evidence.

< ***United States v. Rounsavall***, 128 F.3d 665 (8th Cir. 1997). Remanded case for evidentiary hearing to determine whether government, though filing § 5K1.1 motion, acted irrationally or in bad faith

in failing to file motion pursuant to § 3553(e) to allow a sentence below the statutory minimum of 20 years. 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 8th 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 § 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 district court had announced it would compel government to file motion, government filed a motion pursuant to 18 U.S.C. § 3553(e).

< ***United States v. Pipes***, 125 F.3d 638 , 641-42 (8th Cir. 1997), *cert. denied sub. nom.*, ***Waldrip v. United States***, 523 U.S. 1012 (1998) Remanded for evidentiary hearing to determine whether prosecutor's failure to file downward departure motion based on defendant's substantial assistance was irrational where defendant had written cooperation agreement, it was undisputed that 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 government had done an "about face" about defendant's cooperation based on a conclusory statement from the prosecutor from the other district.

< ***United States v. Leonard***, 50 F.3d 1152, 1157-1158 (2d Cir. 1995) Remand for hearing to consider "any evidence with a significant degree of probative value" to determine whether government breached its duty of good faith based on 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 change in defendant's story and contact with target were in dispute based on agent's report.

C. Hearing Where Parties Disagree as to the Terms of Plea Agreement

< ***United States v. Barresse***, 115 F.3d 610 (8th Cir. 1997). Remanded for evidentiary hearing to determine what parties meant by term "complete cooperation" in the plea agreement.

D. District Court Must Exercise Independent Discretion

< ***United States v. Campo***, 140 F.3d 415 (2d Cir. 1998). Vacates and remands 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; error for judge to "refuse[s] to exercise the discretion accorded him by law" and that 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; " separation of powers prohibits court from compelling govt to change policy.

Departure Without Government Motion in Limited Circumstances

A. 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). Holds that district court may grant departure, even without govt 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, 913 (9th Cir. 1994) (§5K1.1 controls cooperation to local authorities so that departures available only upon govt motion); *United States v. Love*, 985 F.2d 732 (3d Cir. 1993) (same).

B. 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 exceed the reasonable expectations the sentencing commissioners likely harbored when formulating the guidelines;" here, downward departure reversed and case remanded for resentencing because record did not support departure

< ***United States v. Garcia***, 926 F.2d 125, 128 (2d Cir. 1991). Upheld a downward departure even in absence of govt motion where guilty plea led others to plead guilty which "broke the log jam" in multi-defendant case thus facilitating the administration of justice.

C. 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) Granted five-level downward departure to first-time drug defendant where counsel's conflict of interest (his fees were paid by kingpin against whom defendant/client would have cooperated) obstructed defendant's opportunity to provide substantial assistance to government.

D. Personal & Truthful Efforts Warranted Departure Where No Assistance Because Last to Cooperate & to Avoid Unwarranted Disparity

< ***United States v. Martinez-Maldonado***, No. 99-CR-10272, 2000 WL 1801851, (Nov. 8, 2000). Granted departure from range of 87-108 months to 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 codefendants who had received substantial assistance motions; defendant had no new evidence to provide to government because his codefendants had already provided information.

Timing of Rule 35 Motion

< ***United States v. McDowell***, 117 F.3d 974 (7th Cir. 1997). Court of Appeals sua sponte addressed whether Rule 35 motion was timely in a case where defendant appealed the extent of post-sentencing substantial assistance departure granted by district court then held that one-year limitation, and its express exception, are jurisdictional so that district court lacks power to grant the motion if filed after one year and it does not meet the exception to the one-year rule. Remanded case for evidentiary hearing to determine if the one-year exception applies, i.e., where "the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence." Fed.R.Crim.P. 35(b).

< ***United States v. Morales***, 52 F.3d 7, 8 (1st Cir. 1995). District court may depart under Rule 35(b) pursuant to motion filed more than one year after sentencing if the defendant "was not asked [about the late-disclosed information], or was otherwise unaware of its value."

IV. DEPARTURE AUTHORITY UNDER THE SENTENCING GUIDELINES

CH 1, PT. A, INTRO. COMMENT. 4(b) - "HEARTLAND"

> 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.
>
> [I]t is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. With . . . 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.

U.S.S.G. § 5K2.0 - GROUNDS FOR DEPARTURES (POLICY STATEMENT)

ENCOURAGED DEPARTURES

> 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.

* * *

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 (effective Nov. 1, 1998)

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.

DISCOURAGED DEPARTURES

An offender characteristic or other circumstance that is 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 in a way that is important to the statutory purposes of sentencing.

COMBINATION OF FACTORS - 5K2.0, COMMENT.

> 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. . ..

<***Koon v. United States***, 518 U.S. 81, 116 S.Ct. 2035 (1996).

<***United States v. Decora***, 177 F.3d 676 (8th Cir. 1999). Affirmed downward departure from sentencing range of 37-46 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 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. Rioux***, 97 F.3d 648 (2d Cir. 1996) Affirmed downward departure based on combination of defendant's serious medical condition and charitable and civic good deeds.

< ***United States v. Ribot***, No. 98-10061, 11 Fed. Sent. R. 333, 1999 WL 165919, (D. Mass. Mar 19, 1999) (unpublished) (Gertner, J.). Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly $200,000.

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

<***United States v. Mena***, 968 F. Supp. 115 (E.D. N.Y. 1997) (Weinstein, J.) Downward departure of 15 levels to a safety valve defendant, who was subject to deportation, based on a number of factors, singly and in combination, including:

(a) § 5K2.0, agreement to voluntary deportation;

(b) § 5K2.12, coercion & 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 6th grade at age 14 after; unchallenged psych 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, 602-03 (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, 128-29 (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. Lombard***, 72 F.3d 170, 183-84 (1st Cir. 1995) Remands because district court failed to recognize authority to depart for combination of factors: including defendant's state court acquittal on murder charges; fact that federal sentence for subsequent gun prosecution arising out of conduct underlying state murder acquittal may exceed state sentence that would been available for murder conviction; magnitude of the enhancement; disproportionality between sentence (life) and offense of conviction as well as between enhancement and 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 U.S.S.G. § 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. One Star***, 9 F.3d 60, 61 (8th Cir. 1993) Granted downward departure to Native American who had strong family ties, employment record, and community support.

<***United States v. Bowser***, 941 F.2d 1019 (10th Cir. 1991). Combination of factors, none of which alone warranted departure, justified downward departure from career offender designation.

<defendant was 20 years old when he committed two priors

<the priors were committed within 2 months of each other

<sentences in the 2 priors were imposed to run concurrently

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

<***United States v. Shadduck***, 889 F. Supp. 8, 11-12 (D. Mass. 1995), modified on other grounds, 112 F.3d 523 (1st Cir. 1997). Grants downward departure in a bankruptcy fraud case based on combination of factors including defendant's health problems and teenage children.

<See also Unmentioned Factors, below.

U.S.S.G. § 4A1.3 - ADEQUACY OF CRIMINAL HISTORY CATEGORY

> If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range.
> . . .
> A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes.
> . . .
> However, a prior arrest record itself shall not be considered under § 4A1.3.
> . . .
> There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes.

Facts which have supported a downward departure:
<defendant's youth at time of prior felonies
<proximity in time of prior felonies
<consolidation of prior felonies
<short length of time served
<"relatively minor nature" of prior offenses

A. Courts May Depart Down from Career Offender Designation

<*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, 1131 (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, 556-57 (6th Cir. 1994)
<*United States v. Jones*, 55 F.3d 289, 292 (7th Cir.), *cert. denied*, 116 S.Ct. 161 (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)

<***United States v. Mishoe,*** 241 F.3d 214 (2d Cir. 2001). Although priors involving street-level dealing cannot be the basis for an automatic downward departure, district courts are authorized to depart upon consideration of a several factors, including, the amount of drugs involfed 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). Upholds departure from career offender guideline on basis that 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 over-representation under section 4A1.3."

B. Departure Available Under Immigration Guideline Does Not Limit Departure Authorized under § 4A1.3

<***United States v. Delgado-Reyes***, No. 99-2121, ___ F.3d ___, 2001 WL 292162 (1st Cir. Mar. 29, 2001). Requirements of departure authorized under §2L1.2, comment. (n. 5) do not limit a departure for overrepresentation of criminal history as authorized by §4A1.3.

C. Racial Disparities in State Sentencing Schemes Ground For Downward Departure

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

V. OTHER MENTIONED DEPARTURES GROUNDS: SELECTED CHAPTER 2 COMMENTARY

< **§ 2A1.1, 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. Prevatte***, 16 F.3d 767, 784 (7th Cir. 1994). Reversed imposition of life sentences in a case involving convictions on fourteen 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 reversible 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, 671 (8th Cir. 1993), modified, 41 F.3d 361 (8th Cir. 1994). Upheld 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.

<**§ 2D1.1, comment. (n.14)** (The commentary to the drug trafficking guideline provides for a 2-level downward departure for defendants with offense levels above 36 who qualify for a mitigating role adjustment and who satisfy other criteria).

< ***United States v. Lara***, 47 F.3d 60 (2d Cir. 1995). Upholds departure granted to defendants, whose offense was committed before promulgation of above commentary, on ground that aggregating small quantities distributed over a long period of time overrepresents a defendant's culpability.

< **§ 2F1.1, comment. (n.11).** The commentary to the fraud guideline provides for a departure, up or down, where the "loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct ...[or where it] may overstate the seriousness of the offense."; see also n. 8(b).

< ***United States v. Olgmueller*** , 198 F.3d 669 (8th Cir. 2000) Upheld downward departure where actual loss amount of $829,000, stemming from fraudulent loan application, significantly overstated risk to defrauded bank, thus warranting departure to base offense level corresponding to a loss figure of $58,000, and placing defendant at 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; also departed based on extraordinary restitution undertaken before defendant was indicted.

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

< ***United States v. Broderson***, 67 F.3d 452 (2d Cir. 1995) (Defense counsel: Lawrence Goldman). Downward departure was based on a "confluence of circumstances [that] was not taken into account by the guidelines", including loss overstates seriousness of fraud and that defendant had not

personally gained financially from fraudulent conduct; benefit was to his employer.

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

< ***United States v. Oakford Corp***, 79 F. Supp. 2d 357 (S.D. N.Y. 2000) Downward departure of 13 levels granted where offense level would substantially overstate the seriousness of the offense: 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 court was aware that plea agreement did not prevent it from considering any conduct that might be relevant conduct.

> < **§ 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.")

<***United States v. Delgado-Reyes***, No. 99-2121, __ F.3d __, 2001 WL 292162 (1st Cir. Mar. 29, 2001). Requirements of departure authorized under §2L1.2, comment. (n. 5) do not limit a departure for overrepresentation of criminal history as authorized by §4A1.3.

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

< ***United States v. Sanchez-Rodriguez***, 161 F.3d 556 (9th Cir 1998) (en banc) (FPD Barry J. Portman). Ninth Circuit held that district court did not abuse its discretion in departing down from the reentry-after-deportation guideline where defendant's prior aggravating felony which triggered a 16-level upward adjustment fell outside the heartland of aggravating felonies. See U.S.S.G. § 2L1.2. 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 U.S.S.G. § 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, 118 S.Ct. 730 (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 U.S.S.G. § 2L1.2.

< ***United States v. Diaz-Diaz***, 135 F.3d 572 (8th Cir. 1998). Upholds 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; district court granted departure before this application note went into effect.

< ***United States v. Ortega-Mendoza***, 981 F.Supp. 694 (D.D.C. 1997). Grants downward departure based on U.S.S.G. § 2L1.2, comment. (n.5).

Contra

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

< ***United States v. Hinds***, 803 F. Supp. 675 (W.D. N.Y. 1992), aff'd, 992 F.2d 321 (2d Cir. 1993). 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.

< **2Q1.3(b)(1).** "Depending on 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 wit the violation, a departure of up to two levels in either direction ...may be appropriate."

< ***United States v. Rapanos,*** 235 F.3d 256 (6th Cir. 2000). Affirms 2-level downward departure for defendant convicted of using sand to fill in wetlands on his property but reversed additional one-level departure granted by district court.

U.S.S.G. § 5C1.1, COMMENT. (N.6) - SPECIFIC TREATMENT PURPOSE

> There may be cases in which a departure from the guidelines by substitution of a longer period of community confinement than otherwise authorized for an equivalent number of months of imprisonment is warranted to accomplish a specific treatment purpose (e.g., substitution of twelve months in an approved residential drug treatment program for twelve months of imprisonment). Such a substitution should be considered only in cases where the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate that problem.

U.S.S.G. § 5C1.2 - THE "SAFETY VALVE" (18 U.S.C. § 3553(f))

> "Court shall impose a sentence ... without regard to any statutory minimum sentence" if five criteria are met:

(f)(1) - no more than 1 criminal history point
(f)(2) - defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon
(f)(3) - offense did not result in death or serious bodily injury
(f)(4) - defendant was not an organizer, leader, manager, or supervisor
(f)(5) - not later than time of sentencing, defendant has disclosed information to the government

< Applies only to offenses under 21 U.S.C. §§ 841, 844, 846, 960, 963.

Possession of Firearm by Other Does Not Disqualify Defendant for Safety Valve

< A defendant may be eligible for the safety valve so long as he personally does not possess the firearm, even if codefendants possess firearms and even if the defendant receives gun adjustment under §2D1.1(b)(1). ***United States v. Clavijo***, 165 F.3d 1341 (11th Cir. 1999); ***United States v. Wilson***, 114 F.3d 429 (4th Cir. 1997); *In re Sealed Case*, 105 F.3d 1460 (D.C. Cir. 1997); ***United States v. Wilson***, 105 F.3d 219 (5th Cir. 1997).

Two-Level Downward Adjustment

< U.S.S.G. § 2D1.1(b)(6) provides a two-level downward adjustment if the defendant "meets the criteria set forth in subdivisions (1)-(5) of § 5C1.2 . . . and the offense level . . . is greater than 26.

< ***United States v. Osei**,* 107 F.3d 101 (2d Cir. 1997). The adjustment in the drug guideline applies to defendants who meet the five "safety valve" criteria and whose offense level is 26 or greater even if the defendant is not facing a mandatory minimum penalty. In this case, although defendant had been charged with a mandatory minimum offense he pleaded guilty to an offense that did not carry a mandatory minimum. He otherwise met the five, safety-valve criteria and had an offense level greater than 26; ***United States v. Mertilus,*** 111 F.3d 870 (11th Cir. 1997) (same).

VI. DISCOURAGED DEPARTURES - NOT ORDINARILY RELEVANT

U.S.S.G. § 5H - SPECIFIC OFFENDER CHARACTERISTICS (POLICY STATEMENTS)

> The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. . . . Furthermore, although these factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases.

5H1.1 - Age (Policy Statement) [See also 5H1.4 – Physical Condition]

> Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse).

< ***United States v. Hildebrand*****,** 152 F.3d 756 (8th Cir. 1998) Upheld downward departure from 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 8th 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. Baron***, 914 F. Supp. 660, 662-665 (D. Mass. 1995) (Gertner, J.) - Granted a downward departure from a guideline range of 27 to 33 (level 18) months to a sentence of probation (level 10) to a 76-year old defendant with substantial medical problems convicted of bank fraud.

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

Unreported cases:

< ***United States v. Moy*****,** 1995 WL 311441 (N.D. Ill. 1995) - District court granted a downward departure to a 78-year old defendant who suffered from coronary artery disease, a recent hernia repair, and a history of depression.

< ***United States v. Libutti*****,** 1994 WL 774647 (D. N.J. 1994) - District court granted a downward departure to a 62-year old defendant who was suffering from coronary problems, a personality disorder and several psychiatric conditions and phobias.

< ***United States v. Maltese***, 1993 WL 222350 (N.D. Ill. 1993) - District court granted a downward departure to a 62-year old defendant who had been suffering from liver cancer for a year prior to the sentencing and whose life expectancy had been shortened due to the operation for the cancer and whose chemotherapy treatment would be extremely expensive for the government to provide.

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

> Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).
>
> Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.

< ***United States v. Olbres***, 99 F.3d 28 (1st Cir. 1996) - Loss of jobs to innocent employees occasioned by 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.

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

> Mental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).
>
> Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental healthy program (see §§ 5B1.3(d)(5) and 5D1.3(d)(5)).

< ***United States v. Ostin***, 1998 WL 416079, (9th Cir. June 17, 1998) (unpublished). Mental and emotional conditions warranted departure where at time of offense defendant had suicidal ideation , wanted help, and lacked anti-depressant medication,.

< ***United States v. Shasky***, 939 F. Supp. 695 (D. Neb. 1996). Grants downward departure for combination of reasons to state trooper convicted of receiving pornography involving minors in 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 internet because he was prohibited under the job regulations from engaging in a consensual homosexual relationship, and over 90% of the pornography did not involve minors.

5H1.4 - Physical Condition (Policy Statement)

> Physical condition or appearance, including physique, is not ordinarily

> relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.
>
> Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentence to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see § 5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

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

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

< ***United States v. Gigante***, 989 F. Supp. 436, 441 (E.D. N.Y. 1998) (Weinstein, J.). Grants downward departure from a sentence of 262 - 327 months (level 38) to a sentence of 12 years for defendant of advanced age (69), physical infirmity (aortic operations), and limited life expectancy; court determines that defendant had a "substantial chance of surviving more than ten years in prison" and thus imposing a 12-year sentence, less good time credit, "would probably be short of a life sentence." Defendant, after "decades of vicious criminal tyranny" as gang boss in Genovese Family and in the Mafia generally, but "no longer that maleficent," stood convicted of five counts including RICO and related offenses.

5H1.5 - Employment Record (Policy Statement)

> Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).

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

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

a departure.

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

< ***United States v. Thompson***, 74 F. Supp.2d 69 (D. Mass. 1999) (Gertner, J.) Departs down in crack cocaine case for combination of extraordinary family obligations and work history; in granting departure judge draws on her own experience as a judge, and compared presentence reports for offenders similarly situated to defendant with respect to place (the Bromley Heath projects), time (1998), and offense (sale of crack cocaine), and more generally, reviewed the PSR's of those convicted of crack cocaine sales in the jurisdiction in 1998 and 1999.

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

> Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.
>
> Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.

<***United States v. Aguirre***, 214 F.3d 1122 (9th Cir. 2000). Affirms 4-level downward departure for extraordinary family circumstances where defendant's common-law husband's death during time of defendant's pretrial detention left her child without a caretaker.

<***United States v. Gauvin***, 173 F.3d 798 (10th Cir.), cert. denied, 120 S. Ct. 250 (1999) Affirms district court's exercise of discretion in granting 3-level downward departure based on family circumstances where defendant supported wife and four children and since his incarceration wife has been working 14 hours per day, 55 miles from home leaving children unsupervised by a parent during that period which had caused Navajo Housing Authority to initiate investigation to determine if custody of children should be taken from mother; mother's income is barely able to support family so that she is at risk of losing car; and there is no extended family to take custody of children or assist financially.

<***United States v. Owens***, 145 F.3d 923 (7th Cir. 1998). Upholds departure down to statutory 10-year minimum from range of 168-210 months for defendant convicted of crack cocaine distribution on basis of family circumstances (defendant in 13-year common law relationship; 3 children aged 6, 7, & 11; cares for children after school and helps them with homework, employed in several jobs; without his income family would have to move to public housing; and defendant also spent time every day with a brother who suffered from Downs Syndrome). **See also** ***United States v. Wright***, 218 F.3d 812, 815-16 (7th Cir. 2000) ("Today, we conclude that a downward departure for extraordinary family circumstances cannot be justified when, even after the reduction the sentence is so long that release will come too late to promote the child's welfare;" and distinguishing ***Owens*** on the basis that issue was not raised.)

<***United States v. Galante***, 111 F.3d 1029 (2nd Cir.), reh'g en banc denied, 128 F.3d 788 (2d Cir. 1997) (AFPD Philip L. Weinstein). Affirms departure in deference to 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); departure from OL 23 to OL 10; sentence to time served (8-days prior to release on bail) to prevent disintegration of family and financial hardship to dependents; heroin distribution cases.

< ***United States v. Thompson***, 2000 WL 126772, No. 99-Cr. 153 (N.D. Ill. Feb. 1, 2000) Grants downward departure in bank fraud case to single father who had special relationship with teenage son who would be at risk of severe emotional harm if father sent to jail

< ***United States v. Thompson***, 74 F. Supp.2d 69 (D. Mass. 1999) (Gertner, J.), see above under § 5H1.5.

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

<***United States v. Sclamo***, 997 F.2d 970 (1st Cir. 1993). Downward departure based on defendant's special relationship with 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) (Breyer, C.J.) Remands because district court did not recognize discretion to determine whether family responsibilities were so "extraordinary" as to warrant departure in case where defendant was single-mother with sole responsibility for raising four small children; opinion compiles cases in this area.

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

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

<***United States v. Gaskill***, 991 F.2d 82 (3d Cir. 1993). Downward departure warranted where defendant was sole caretaker of seriously mentally ill wife; there were benefits in non-custodial sentence and lack of any threat to community.

<***United States v. Haversat***, 22 F.3d 790 (8th Cir. 1994). Downward departure granted to defendant whose wife "suffered severe psychiatric problems, which have been potentially life threatening," and his presence was crucial to her treatment.

< ***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 Indian reservation warranted

downward departure.

<**Practice pointer: Departure is less likely to be granted if an alternative caretaker is available. But recent post -K*oon* cases have granted departures where other parent available as caretaker** ***see Gauvin, Owens, & Galante, supra***.

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

> Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

< amendment 386 - effective 11/1/91

<***United States v. Woods***, 159 F.3d 1132 (8th Cir. 1998). Defendant's exceptional charitable efforts (had brought two troubled young women into her home, paid for them to attend private high school and helped them become productive members of society; also assisted elderly friend to move from nursing home to an apartment where she helped care for him so he could live out his remaining years independently) supported one-level downward departure.

< ***United States v. Crouse***, 145 F.3d 786 (6th Cir. 1998). After the Supreme Court remanded for reconsideration in light of *Koon*, the 6th Circuit held that a departure based on 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). Affirmed downward departure based, in addition to medical problems, on defendant's extensive efforts in fund raising for charity.

VII. PROHIBITED DEPARTURES

5H1.4 - Drug or Alcohol Dependence or Abuse

> . . .
> Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines. . . .

< ***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)

> Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant ...

< amendment 466 - effective 11/1/92

< ***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997). "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, U.S.S.G. § 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 (Last sentence of Coercion and Duress departure ground)

> . . . 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 resentenced de novo.

NOTE: This amendment became effective November 1, 2000.

Pre-Amendment Case Law

Post-sentence Rehabilitation Majority of circuits recognize exceptional rehabilitative efforts as basis for downward departure at resentencing on remand after appeal, after successful prosecution of collateral attack on separate grounds, or based on retroactive guideline amendment.

< ***United States v. Bradstreet***, 2000 WL 298570, No. 99-1267 (1st Cir. 2000) Permissible to depart downward based on extraordinary post-offense rehabilitation.

< ***United States v. Hasan***, 205 F.3d 1072 (8th Cir. 2000), affirming, 41 F. Supp. 2d 1004, (D. Neb. 1999) Upholds downward departure for extraordinary post-sentencing rehabilitation at resentencing on a retroactive amendment, 18 U.S.C. § 3582(c)(2); but see **United States v. Sims**, 174 F.3d 911, 912 (8th Cir.1999) (post-sentencing rehabilitation not appropriate basis for a downward departure).

< ***United States v. Rudolph***, 190 F.3d 720 (6th Cir. 1999). Holds that post-sentence rehabilitation may be basis for downward departure.

< ***United States v. Roberts***, No. 98-8037, 1999 WL 13073 (10th Cir. Jan. 14, 1999) (unpublished). Holds that post-sentence rehabilitation may be basis for downward departure.

< ***United States v. Green***, 152 F.3d 1202 (9th Cir. 1998). Holds that post-offense drug rehabilitation may form basis for downward departure on remand after appeal at resentencing two years after original sentence based on defendant's exemplary behavior.

<***United States v. Rhodes***, 145 F.3d 1375 (D.C. Cir. 1998). Holds that sentencing courts may consider post-conviction rehabilitation at resentencing, although sentencing departures based on that

factor will be available only in extraordinary cases.

<***United States v. Core***, 125 F.3d 74 (2d Cir. 1997) (AFPD Henriette Hoffman). Defendant's post-conviction rehabilitation during his incarceration on the original sentence may be a ground for downward departure at resentencing. Remanded for reconsideration of departure because district court believed it had no discretion to depart on this ground. Defendant was appearing to be resentenced after his § 924(c) conviction was reversed on the basis of Bailey v. United States, 116 S. Ct. 501 (1995).

<***United States v. Sally***, 116 F.3d 76, 80 (3d Cir. 1997). "Post-offense rehabilitation efforts, including those which occur post-conviction, may constitute a sufficient factor warranting a downward departure provided that the efforts are so exceptional as to remove the particular case form the heartland in which the acceptance of responsibility guideline was intended to apply." Defendant had earned a GED and nine additional college credits.

Contra

<***United States v. Sims***, 174 F.3d 911, 912 (8th Cir.1999) Holds that post-sentencing rehabilitation is not an appropriate basis for a downward departure.

VIII. ENCOURAGED DOWNWARD DEPARTURES [1]

5K2.10 - Victim's Conduct

> If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. . .

<***Koon v. United States***, 116 S. Ct. 2035 (1996).

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

5K2.11 - Lesser Harms

> Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

< ***United States v. Clark***, 128 F.3d 122 (2d Cir. 1997). Remands case for reconsideration where district court believed it lacked discretion to depart down under the lesser harms (U.S.S.G. § 5K2.11) provision in a felon-in-possession case where defendant had purchased gun as gift for his brother and thus offense could be said to involve lesser harm than what Congress sought to prevent -- keeping guns out of felons' hands because of recidivism potential.

< ***United States v. Barajas-Nunez***, 91 F.3d 826 (6th Cir. 1996). Not plain error to depart under "lesser harms" provision of § 5K2.11 where defendant had illegally reentered 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; remanded for explanation of magnitude of departure; also reverses 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). Upholds departure for defendants convicted of violating Lacey Act and Endangered Species Act for attempted export of endangered primates to Mexico; defendants' conduct did not threaten 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. Carvell***, 74 F.3d 8 (1st Cir. 1996). Downward departure granted under "lesser harm" policy statement because defendant grew marijuana to reduce his well-documented & long-standing suicidal depression.

< ***United States v. White Buffalo***, 10 F.3d 575, 576 (8th Cir. 1993). Affirms departure because defendant possessed unregistered sawed-off shotgun not for 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 conduct did not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue."

5K2.12 - Coercion and Duress

> If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. 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.

< ***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997). Remands because unclear "whether the district court believed that the three grounds for departures (lack of youthful guidance, coercion & 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 departure....[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. Delgado***, 994 F. Supp. 143 (E.D. N.Y. 1998) (Weinstein, J.) Three level downward departure to a first-time offender, drug courier who transported drug based on coercion from a creditor and where other mitigating factors were present.

<***United States v. Mena***, 968 F. Supp. 115 (E.D. N.Y. 1997) (Weinstein, J.) Downward departure of 15 levels to a safety valve defendant, subject to deportation, based on number of factors, singly and in combination, including § 5K2.12, coercion & 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; 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, 73 (6th Cir. 1995). Remanded to 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 heir 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. Amor***, 24 F.3d 432, 437-440 (2d Cir. 1994). Upheld downward departure after jury rejected duress defense; notably duress did not relate to offense that determined the offense level; defense (retaliation against government witness) but related to firearms charge. 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 have 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."

Incomplete defense: A departure on this ground is available even in cases where the jury has rejected duress as a defense to the crime:

< **United States v. Henderson-Durand**, 985 F.2d 970, 976 (8th Cir. 1993). Upheld district court's denial of 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. Amparo**, 961 F.2d 288, 292 (1st Cir. 1992). In dicta, First Circuit stated that "a jury's rejection of a duress defense does not necessarily preclude a ... departure under § 5K2.12."

< **United States v. Cheape**, 889 F.2d 477 (3d Cir. 1989). Third Circuit remands because district court did not understand that it could depart where jury had rejected defense of coercion. Jury instruction for 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." 889 F.2d at 480. 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 robbery took place, she sat in back seat of the car, in 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; robbery had been planned and executed by the two male codefendants; she had no prior convictions.

5K2.13 - Diminished Capacity (effective Nov. 1, 1998)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

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

<***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, vacates en banc opinion and remands to 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 U.S.S.G. § 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. McBroom***, 124 F.3d 533 (3rd Cir. 1997). 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. McBroom*,** 991 F. Supp. 445 (D. N.J. 1998). On remand, district court departed down one level for diminished capacity and two-levels for post-offense rehabilitation.

< ***United States v. Ramos-Oseguera***, 120 F.3d 1028 (9th Cir. 1997). Ninth Circuit remands to permit district court to consider evidence of "battered woman syndrome, a form of post-traumatic stress disorder" resulted in defendant's diminished capacity. The 9th 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, 899 (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 9th 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. Ribot***, F. Supp. 2d ,_No. 98-10061, 1999 WL 165919, (D. Mass. Mar 19, 1999) (Gertner, J.) Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly $200,000.

<***United States v. Mena***, 968 F. Supp. 115 (E.D. N.Y.) (Weinstein, J.) Downward departure of 15 levels to 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 after 6th grade at age 14; unchallenged psych 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". See further discussion of Mena in section on combination of factors, above.

"Non-violent offense" - consider all facts & circumstances

<*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.)

Causation

< ***United States v. Ruklick***, 919 F.2d 95 (8th Cir. 1990) 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.

Low I.Q.

<***United States v. Adonis***, 744 F. Supp.. 336 (D. D.C. 1990). Downward departure granted on basis of defendant's significantly reduced mental capacity--IQ of 64, placed him below the dividing line for mental retardation which is defined as having an IQ below 69. This case reports that the average IQ of the prison population is 93.2, a helpful fact when seeking a downward departure for diminished capacity.

5K2.16 - Voluntary Disclosure of Offense

> If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. . . .

< ***United States v. Jaroszenko***, 92 F.3d 486 (7th Cir. 1996) Reverses district court that believed remorse was not proper basis for departure.

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

5K2.17 - (Firearms That Are Neither Automatic Nor Semiautomatic)

> "According to data reviewed by the Commission, semiautomatic firearms are used in 50-70 percent of offenses involving firearms. Thus, offenses involving a semiautomatic firearm represent the typical or "heartland" case under the guidelines."

U.S.S.G. App. C, Amendment 531.

> Note: This is the explanation given by the Sentencing Commission for promulgating § 5K2.17 encouraging an upward departure for offenses involving "high-capacity, semiautomatic firearms". To the extent that the Commission explains that semiautomatic firearms represent the heartland of offenses involving firearms, a downward departure should be available

in any case that involves an older type of firearm, one that is neither a semiautomatic nor an automatic. As the Commission formulated the gun guidelines for offenses involving more dangerous automatic and semiautomatic firearms, cases involving single-shot firearms are atypical or fall outside the "heartland" and warrant a downward departure.

§§5K2.20. Aberrant Behavior (Policy Statement)[2]

A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, 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.

Commentary

Application Notes:

1. For purposes of this policy statement--

"Aberrant behavior" means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.

"Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to §§1B1.1(Application Instructions).

"Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. §§ 844, that, because the defendant does not meet the criteria under §§5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

2. In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing

the offense; and (E) efforts to mitigate the effects of the offense.

Historical Note: Effective November 1, 2000 (see Appendix C, amendment 603).

NOTE: This new amendment took effect on November 1, 2000. It will enlarge this departure ground in the 3d, 4th, 5th, 6th, 7th, 8th and DC circuits which permitted aberrant behavior departures only where the defendant's conduct amounted to a single "spontaneous or thoughtless" act. On the other hand, it may serve to limit the discretion that courts had enjoyed when applying the "totality of circumstances" test in the 1st, 2nd, 9th and 10th Circuits. As an additional hedge in these types of cases, rely on the "combination of factors" departure authorized in the commentary to § 5K2.0.

Case Law under Old Formulation

1. Totality of Circumstances Standard

Circuit split: The First, Second, Ninth and Tenth Circuits permit 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. *Zecevic v. U.S. Parole Commission*, 163 F.3d 731, 735 (2d Cir. 1998) (internal citations omitted). The D.C., Third, Fourth, Fifth and Seventh Circuits permit a departure only where defendant's conduct amounts to a thoughtless or spontaneous single act and preclude departure where defendant's conduct necessarily involves multiple acts.

< ***United States v. Working***, 224 F.3d 1093 (9th Cir. 2000) (en banc). Holds that district court did not abuse its discretion in granting 21-level downward departure to a defendant who pled guilty to assault with intent to commit murder and using a firearm in a crime of violence on ground that defendant's conduct was in attempting to kill her estranged husband was aberrant but vacates sentence and remands case for an explanation of the degree of departure. The district court based its findings on a psychiatric report that concluded that defendant was suffering from severe depression and was under extreme pressure at time of 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.

< ***Zecevic v. U.S. Parole Commission***, 163 F.3d 731 (2d Cir. 1998). In calculating release date of transfer prisoner -- American citizen convicted of drug offenses in Sweden transferred to US to serve out his sentence -- Parole Commission is required to treat defendant as if sentenced under federal sentencing guidelines and so erred when it did not consider totality of circumstances of defendant's life in assessing downward departure for aberrant behavior.

<***United States v. Grandmaison***, 77 F.3d 555 (1st Cir. 1996) (departure may be granted even

where defendant engaged in multiple acts leading up to the commission of offense (mail fraud by local alderman who deprived citizens of his honest services) if, in light of totality of defendant's life, committing the offense amounts to aberrant behavior; spontaneity or thoughtless act is not a prerequisite).

<***United States v. Kalb***, 105 F.3d 426 (8th Cir. 1997). Holds that "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 downward departure where defendant's conduct over a period of time did not amount to a "single act of aberrant behavior".

< ***United States v. Ribot***, 11 Fed.Sent.R. 333, No. 98-10061, 1999 WL 165919, (D. Mass. Mar 19, 1999) (Gertner, J.). Departs down to probation from range of 24-36 months based on combination of aberrant behavior and mental illness/diminished capacity for defendant convicted of nearly $200,000.

<***United States v. DelValle***, 967 F. Supp. 781 (E.D. N.Y. 1997) (Weinstein, J.). Holds that defendant's involvement in drug conspiracy on two different days, separated by a week, could be understood as unitary instance of behavior; found offense was aberrant in two senses: "First, it was aberrational in comparison to the conduct of other drug conspirators covered by the applicable Guidelines. *See United States v. Kalb*, 105 F.3d 426, 429 (8th Cir. 1997) (particular behavior falling outside of heartland; "aberrational" drug dealer). Second, it was aberrational in the sense that the offense conduct deviated from defendant's own typical behavior. *See, e.g., United States v. Pena*, 930 F.2d 1486, 1495 (10th Cir. 1991) (defendant's conduct an aberration from usual conduct). As to the first point, it is uncontested that defendant was reluctantly doing a favor for a friend, was only a driver, had no interest or involvement in possession or distribution of the contraband, and did not know the specifics of what was being transported — differentiating him from drug conspirators that fall into the "heartland" cases. As to the second point, defendant's brief meander into criminal activity stands in stark contrast to his posture as a responsible, hard working, fully employed member of the community and a loving, involved and reliable husband and family member. *See Pena* (defendant's "behavior here was an aberration from her usual conduct, which reflected long-term employment, economic support for her family, no abuse of controlled substances, and no prior involvement in the distribution of such substances...[This] justified a departure").

<*United States v. Fairless*, 975 F.2d 664 (9th Cir. 1992) (convergence of factors)
<*United States v. Takai*, 941 F.2d 738 (9th Cir. 1991) (multiple incidents over 6-weeks)
<*United States v. Tsosie*, 14 F.3d 1438 (10th Cir. 1994) (aberrational conduct).
<*United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991) (aberration from usual conduct).

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

2. Spontaneous/Single-Act Standard:

<***United States v. Weise***, 128 F.3d 672 (8th Cir. 1997). Reverses aberrant behavior departure where district court, relying on psychologist's report and other evidence that defendant "was not prone to violence," departed down for a defendant convicted of second degree stabbing murder; aberrant behavior "must be more than merely something 'out of character;'"a "single act of aberrant behavior contemplates a 'spontaneous and seemingly thoughtless [act]';" also remands for a "refined assessment" of other departure ground: record of steady employment and maintenance of family ties and responsibilities despite the difficult conditions of life on reservation.

<*United States v. Dyce*, 91 F.3d 1462 (D.C. Cir. 1996).
<*United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994)
<*United States v. Glick*, 946 F.2d 335 (4th Cir. 1991).
<*United States v. Williams*, 974 F.2d 25 (5th Cir. 1992).
<*United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992).
<*United States v. Allery*, 175 F.3d 610, 614 (8th Cir. 1999).

IX. UNMENTIONED FACTORS - Departures Authorized

A. Acquitted Conduct or Uncharged Relevant Conduct

<***United States v. White***, 240 F.3d 127 (2d Cir. 2001). Remands for consideration of departure where district court stated that it had no "leeway" to depart in a drug case where stacking provision of U.S.S.G. §5G1.2 required consecutive sentence based on uncharged relevant conduct.

<***United States v. Cordoba-Murgas.***, 233 F.3d 704 (2d Cir. 2000). Remands to permit district court to apply preponderance standard but also to consider downward departure where district court, applying clear and convincing standard, rejected government's request for life sentences based on uncharged relevant conduct that government claimed proved defendant had committed murder during attempts to collect drug-related debts; government asked court to apply cross reference to 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). Remands for district court to consider whether a departure was warranted in case where guideline sentence resulted in mandatory life as a result of imposition of gun bump in the drug guideline based on possession of firearm by drug coconspirators despite fact that jury had acquitted defendant of gun offense charged under 18 U.S.C. §924(c); had he been convicted of §924(c) count, guideline calculation would have resulted in 360-life range with consecutive 5-year sentence for §924(c) rather than mandatory life.

<***United States v. Lombard*,** 72 F.3d 170 (1st Cir. 1995). Remands for court to consider granting a departure from sentence that was enhanced to life in prison based on acquitted conduct.

B. Collateral Consequences - Immigration

1. Consent to 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. Cruz-Ochoa*, 85 F.3d 325, 325 (8th Cir. 1996).

Available even if government opposes departure

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

Only if non-frivolous defense to deportation

< ***United States v. Marin-Castañeda***, 134 F.3d 551, 555-56 (3d Cir.), cert. denied, 118 S.Ct. 1855 (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. Flores-Uribe***, 106 F.3d 1485, 1486 (9th Cir. 1997). Defendant convicted of unlawful re-entry not eligible for deparutre because stipulation had no practical effect.

2. Cultural Assimilation

< ***United States v. Lipman***, 133 F.3d 726 (9th Cir. 1997). Recognized authority to depart downward based on deportable alien's cultural assimilation into American society in reentry after deportation case. Court explained that factor of "cultural assimilation" "was akin to "family and community ties" under § 5H1.6 and thus may be basis for departure if present to an unusual degree. Until his deportation for conviction of various felonies, defendant had legally resided in the United States for an uninterrupted period of 23 years, having been brought here from Jamaica by his mother when he was 12 years old; he attended NYC public schools; married a US citizen with whom he raised 5 US citizen children; and his entire family including his mother, 3 siblings, wife and children reside in the US as American citizens.

3. Effect of defendant's status as alien on BOP custody

<***United States v. Farouil*****,** 124 F.3d 838 (7th Cir. 1997). Reverses district court for failing to consider that 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 not 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 of one million dollars." Departure on this ground only when offense of conviction involves offense of reentry after deportation.

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

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

< ***United States v. Bakeas***, 987 F. Supp. 44 (D. Mass. 1997) (Gertner, J.). 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.

Contra

<***United States v. Veloza***, 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).

<***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, 644 (2d Cir. 1993) (same).

C. Conditions of Pretrial Confinement

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

< ***United States v. Sutton***, 973 F. Supp. 488 (D. N.J. 1997). Permissible to depart but

rejected departure because facts did not support finding of extraordinary conditions.

D. Crack Cocaine Disparity

< ***United States v. Coleman***, 188 F.3d 354 (6th Cir. 1999) (en banc). Reversed district court that believed it could not consider as ground for downward departure the alleged improper investigative techniques by 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 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.

E. Disparity Arising from Charging Or Plea Policies

< ***United States v. Banuelos-Rodriguez***, 215 F.3d 969 (9th Cir. 2000) (en banc). In a case involving a violation of § 1326 (illegally reentering US after being deported), the 9th Circuit en banc vacates panel opinion and holds 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 seventy months; in the Southern District of California, the Government offers "fast -track" plea agreements that result in reduced sentences of twenty-four months.

< ***United States v. Bonnet-Grullon***, 212 F.3d 692 (2d Cir. 2000) (same).

< ***United States v. Armenta-Castro***, __ F.3d __, No. 99-4155, 2000 WL 1283318 (10th Cir. Sept. 12, 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, 1247-48 (E.D. Wash. 1999). 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, the departing downward on

the ground that the Sentencing Commission had not contemplated unexplainable, arbitrary charging decisions by the government.

F. Disparity Among Defendants' Sentence

<***United States v. Daas***, 198 F.3d 1167 (9th Cir. 1999) Reversed district court which believed it lacked discretion to depart to equalize sentences of codefendants in meth lab case.

< ***Meza v. United States***, 117 S. Ct. 478 (1996). Remanded for reconsideration by the 7th Circuit, in light of *Koon*, of its holding that disparity between co-defendants' sentences could not form basis of downward departure. **On remand**: ***United States v. Meza***, 127 F.3d 545, 549 (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 proper where disparity between coconspirators results from cooperation of some with government and others' refusal to do so; **see also** ***United States v. McMutuary***, 217 F.3d 477 (7th Cir. 2000) (only where unjustified disparity exists between defendant's sentence and "sentences of all other similarly situated defendants nationwide" may downward departure be based on disparity; unjustified disparity relative to a co-defendant may not be 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. Miranda***, No. 94 Cr. 714-2, 1998 WL 173300 (N.D. Ill. Apr. 10, 1998) (unreported). Downward departure for less culpable defendant who stood to receive longest sentence where he was convicted only of PWID but acquitted of conspiracy of which more culpable defendants were convicted, yet stood to be sentenced to the longest sentence partially because he received a 2-level obstruction enhancement for his false testimony at trial.

Contra: ***United States v. McKnight***, 186 F.3d 867 (8th Cir. 1999) (disparity among co-defendants' sentences cannot be basis for downward departure); ***United States v. Contreras***, 180 F.3d 1255, 1271-72 (10th Cir.), cert. denied, 118 S. Ct. 116 (1997) (reversed district court downward departure to a defendant whose disparate sentence was not "unwarranted" because codefendant similarly situated as had pleaded guilty to a lesser charge while defendant had gone to trial and been convicted on four counts); ***United States v. Lawrence,*** 179 F.3d 343 (5th Cir. 1999) (same).

G. Due Process

< ***United States v. Ray***, 950 F. Supp. 363 (D. D.C. 1996) (Oberdorfer, J.). District court granted 1-level downward departure at re-sentencing of defendant who was successful in collateral attack of § 924(c) conviction based on Bailey v. United States, 116 S. Ct. 501 (1995). Defendant who had served significant portion of original term of drug sentence stood to have that term increased because of 2-level gun bump (§ 2D1.1(b)(1)) applicable to drug sentence once § 924(c) conviction vacated. Departure warranted because Sentencing Commission had not adequately considered the due process concerns that would arise if defendants . . . were resentenced with the full two-level "gun bump" – after

having nearly completed their original terms of imprisonment attributable to the narcotics offenses." 950 F. Supp. at 368.

H. Extraordinary Acceptance of Responsibility

< ***United States v. Gee,*** 226 F.3d 885 (7th Cir. 2000). Affirms 2-level downward departure to defendant who was not eligible for 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 verdict against him and froze his inventory, offered negotiations with the government concerning disposal of inventory and offered full assistance to the government with respect to access to inventory; 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.

I. Fraud, Money Laundering & Similar Offenses

1. Defendant Did Not Personally Profit

< ***United States v. Walters***, 87 F.3d 663 (5th Cir. 1996). Departure upheld where defendant did not personally profit from money laundering scheme.

<***United States v. Broderson***, 67 F.3d 452 (2d Cir. 1995) (Defense counsel: Lawrence Goldman). Departure was based on a "confluence of circumstances ... not taken into account by the guidelines," including loss overstated seriousness of fraud and defendant had not personally profited financially from his fraudulent conduct; benefit was derived by corporation which employed him.

2. Uncertainty of Loss Determination

< ***United States v. Henry***, 136 F.3d 12, 20 (1st Cir. 1998). Upheld 1-level downward departure which district court granted because of its uncertainty that 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 facility could lawfully receive the hazardous waste.

3. Outside Heartland

< ***United States v. Smith***, 186 F.3d 290, 300 (3d Cir. 1999) (internal citations omitted). Vacates sentence where district court believed that it lacked discretion to apply fraud guideline rather than money laundering in a case that was atypical for money laundering cases: "Ultimately, we conclude that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 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." Significantly, the 3rd Circuit applied the heartland analysis not as a basis for departure but pursuant to U.S.S.G. § 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. Woods***, 159 F.3d 1132 (8th Cir. 1998) (AFPD Nancy Graven). Affirmed district court which departed downward from money laundering and applied fraud guideline in a bankruptcy fraud case where 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 one-level based on defendant's charitable activities sentenced 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. Hemmingson***, 157 F.3d 347 (5th Cir. 1998) (Defense counsel: Gerry Goldstein & Bob Glass). Fifth Circuit upheld departure granted because defendant's offenses did not fall within the heartland of the money-laundering guideline, and instead applied the fraud guideline in campaign contribution case where 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. 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 political campaign. District court relied in part on DOJ manual in determining heartland .

< ***United States v. Buchanan***, 987 F. Supp. 56 (D. Mass. 1997) (Gertner, J.) Granted a five-level downward departure in a case involving misapplication of bank funds and currency structuring on ground that 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. Gamez***, 1 F. Supp. 176 (E.D. N.Y. 1998) (Weinstein, J.). Proceeds to defendants were limited ($5250 in fees over a number of months) and relatively small scale of the operation was more akin to a structuring offense than to the mainstream money laundering schemes contemplated by Commission.

4. Money Laundering Tangential to Gambling Offense

< ***United States v. Threadgill***, 172 F.3d 357 (5th Cir. 1999). Affirmed downward departure (reducing sentences from between 40% to 75% of presumptive range) based on fact that defendants' money laundering activities "were incidental to the gambling operation" (laundered only $500,000 of $20,000,000 in gross wagers) and that "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities"; in the process 5th Circuit expressly abrogates *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*.

5. Bribery Underlying RICO Prosecution

< ***United States v. Krilich****, 159* F.3d 1020 (7th Cir. 1998). In applying bribery guideline (U.S.S.G. § 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 defendant's offense. However the 7th Circuit remanded for re-sentencing because the district court's reasoning was "inadequate to support a seven-level [downward] departure. 159 F.3d at 1031.

J. Government Conduct

< ***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. 160 F.3d 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 8th 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 that the lesser members" and its less than forthright disclosure of the deals it made with the cooperators. 160 F.3d at 483.

< ***United States v. Parker****, 158* F.3d 1312 (D.C. Cir. 1998). Declined to remand case where it determined that "departing downward on the basis of alleged reckless overdeployment 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;" opinion reports that government acknowledged that district court would err if it determined that it lacked authority to depart "based upon reckless police conduct because there was no 'precedent' for a departure on that ground."

K. Low Purity of Heroin

< ***United States v. Mikaelian***, __ F.3d __ (9th Cir. 1999). Holds that low purity of heroin cannot be categorically excluded as departure ground but affirms district court's denial of departure and denial of funds to hire expert to testify as to purity level because defendant had presented no evidence in support of request.

L. Outside Heartland

< ***United States v. Sicken****,* 223 F.3d 1169 (10th Cir. 2000). In case involving conviction for breaking into and damaging secured intercontinental ballistic missile site by anti-nuclear protesters, the Tenth Circuit affirms a 4-level downward departure where district court based departure on ground that

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.

M. Remorse & Drug Rehabilitation Post-Offense (new amendment promulgated to prohibit post-sentencing rehabilitation departures discussed under prohibited factors above).

< ***United States v. Newlon,*** 212 F.3d 423 (8th Cir. 2000). Post-offense rehabilitation (pre-arrest intensive drug/alcohol treatment) sufficient to warrant departure and district court's reference to defendant's low IQ and home and environmental circumstances were not the basis for the departure but merely extraneous matters noted by the court only to support its conclusion that rehabilitative efforts were extraordinary.

< ***United States v. DeShon***, 183 F.3d 888 (8th Cir. 1999). Post-offense rehabilitation (radical lifestyle change revolving around daily counseling, good acts and attendance at church) appropriate basis for departure despite govt's claim that court had improperly relied on religion as factor.

< ***United States v. Whitaker***, 152 F.3d 1238 (10th Cir. 1998). Holds that extraordinary or exemplary post-offense drug rehabilitation may be a ground for downward departure, reversing *United States v. Ziegler*, 39 F.3d 1058, 1061 (10th Cir. 1994) in light of *Koon*.

<***United States v. Brock***, 108 F.3d 31 (4th Cir. 1997). Reversing pre-*Koon* circuit precedent, the Fourth Circuit holds that post-offense rehabilitation may be a ground for a downward departure.

<***United States v. Jaroszenko***, 92 F.3d 486 (7th Cir. 1996). Remands case because court incorrectly believed that it could not depart on post-offense extraordinary remorse.

< ***United States v. Griffiths***, 954 F. Supp. 738 (D. Vt. 1997). Post-offense rehabilitative efforts – significant work and educational achievements – after arrest for LSD offense warrants downward departure.

<***United States v. Williams***, 65 F.3d 301, 303-309 (2d Cir. 1995). Affirmed a departure to permit defendant to avail himself of an intensive drug rehabilitation program in prison to which he would only be eligible if he received a reduced sentence.

<***United States v. Maier***, 975 F.2d 944, 946-49 (2d Cir. 1992). Affirmed downward departure based on defendant's post-offense drug rehabilitation.

Sentencing Postponed to Permit Rehabilitation

< ***United States v. Flowers***, 983 F. Supp. 159, 172-73 (E.D. N.Y.) (Weinstein, J.) At request of defense, district court deferred sentence for one year to assure itself that defendant has been

rehabilitated, to allow court to have a full and fair sense of the person it is to sentence, and to permit the court to "explore the full range of acceptable sentencing alternatives." Defendant was to remain free under close supervision of pre-trial services. Defendant is a 21-year-old, first-time offender, "Safety-Valve" eligible, single mother convicted of one count of conspiracy to import cocaine for her role in acting as courier in exchange for money.

N. Tax-Evasion Cases

Atypical - Defendant's Intent To Pay

< ***United States v. Brennick***, 134 F.3d 10 (1st Cir. 1998). Tax evasion 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;" remands for further explanation of 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). Remands because 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 attempts at negotiation was not defense to prosecution did not foreclose their consideration as mitigation factor that warranted departure.

O. Sentencing Entrapment/Manipulation

The majority of courts recognize the existence of this beast. But few, except the Ninth Circuit, have actually upheld a departure on this ground. Some courts use the terms sentencing entrapment and manipulation interchangeably. Others draw a clear distinction between the two.

<Sentencing Entrapment

> outrageous official conduct [which] overcomes the will of an individual predisposed only to dealing in small quantities for the purpose of increasing the amount of drugs . . . and the resulting sentence of the entrapped defendant.

United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994), quoting United States v. Rogers, 982 F.2d 1241, 1245 (8th Cir. 1993).

> occurs when 'a defendant, although predisposed to commit a minor or lesser offense, is entrapped in[to] committing a greater offense subject to

greater punishment.'

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995).

<Sentencing Factor Manipulation

> where government agents have improperly enlarged the scope or scale of the crime," the sentencing court has power to exclude "the tainted transaction" from the guideline computations and for purposes of any mandatory minimum statute.

United States v. Egemonyeu, 62 F.3d 425 (1st Cir. 1995).

> when the government engages in improper conduct that has the effect of increasing the defendant's sentence.

United States v. Gomez, 103 F.3d 249 (2d Cir. 1997), *quoting United States v. Okey*, 47 F.3d 238, 240 (7th Cir. 1995).

Downward Departure Granted

<*United States v. McClelland*, 72 F.3d 717 (9th Cir. 1995) 6-level downward departure granted based on imperfect entrapment after jury rejected entrapment defense and found defendant guilty in a murder-for-hire case

<defendant's vulnerable emotional state (recent separation from wife)
<repeated expressions of reluctance
<frequent efforts made by govt cooperator to prod and encourage defendant whenever he expressed hesitation

<***United States v. Naranjo***, 52 F.3d 245 (9th Cir. 1995)
<CI and agent induced defendant to supply 5 kilos of cocaine
<agent offered to "front" four of the five kilos
<CI agreed to buy three or four of the 5 kilos

<***United States v. Staufer***, 38 F.3d 1103 (9th Cir. 1995)
<defendant was target of a sting operation
<induced to buy 10,000 doses of LSD
<departure permissible although jury rejected the entrapment defense

<***United States v. Martinez-Villegas***, 993 F. Supp. 766 (D. CA. 1998) (government's "aggressive encouragement" of wrongdoing by defendants who had no prior convictions, by initially proposing illegal activity, persistently contacting defendants over several weeks, offering considerable sums and concerted enticements and setting all the terms of the deal

including the 92 kilos that undercover agent asked defendants to transport warranted 2-level downward departure)

Authority to Depart Noted

<***United States v. Bala***, 236 F.3d 87, 92 (2d Cir. 2000). A departure based on "aggressive encouragement of wrongdoing by government is not prohibited and §5K2.12 (departure encouraged based on serious coercion, blackmail or duress) may be reasonably be read to authorize such a departure but held that district court's misapprehension that it could depart on this ground was harmless in this case.

ENDNOTES

1. There are also a number of encouraged upward departures:

5K2.1 - Death
5K2.2 - Physical Injury
5K2.3 - Extreme Psychological Injury
5K2.4 - Abduction or Unlawful Restraint
5K2.5 - Property Damage or Loss
5K2.6 - Weapons and Dangerous Instrumentalities
5K2.7 - Disruption of Governmental Function
5K2.8 - Extreme Conduct
5K2.9 - Criminal Purpose
5K2.17 - High-Capacity, Semiautomatic Firearms
5K2.18 - Violent Street Gangs
§5K2.19 - Post-Sentencing Rehabilitative Efforts
§5K2.21 - Dismissed and Uncharged Conduct

2. Until the new policy statement on aberrant behavior becomes effective on November 1, 2000, the Guidelines Manual refers to aberrant behavior in one sentence in Chapter 1, as follows:

> The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

Ch. 1, Pt. A, Intro. Comment. 4(d): Aberrant Behavior.