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DEPARTURES AND VARIANCES<sup>1</sup>

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I. DEPARTURES AND VARIANCES

^01. INTRODUCTION

“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.

*Gall v. United States*, 128 S. Ct. 586, 598 (2007), quoting *Koon v. United States*, 518 U.S. 81, 113 (1996).

From *Booker* through *Gall* and its progeny, the Supreme Court began the process of releasing the shackles of the sentencing guidelines. The formulaic application of the guidelines which existed pre- *Booker* dramatically confined judges’ ability to consider the human being behind the offense. The Supreme Court has made clear that the district court must make an “individualized assessment” based on all the 18 U.S.C. §3553(a) factors. *Gall*, at 597. In order to make such an “individualized assessment”, federal criminal defense attorneys must investigate and advocate the unique complexity of their client’s life and illustrate how that complexity contributed to the offense. They must also investigate and argue all mitigating circumstances, including those related to the offense itself and the client’s role in the offense. With the continued evolution of federal sentencing law, a new world of sentencing advocacy now exists. Counsel must educate the judge that the overarching consideration is a sentence that is “sufficient but not greater than necessary” to meet the goals of sentencing. That means the *least* restrictive sentence.

The purpose of this resource is to provide federal criminal defense attorneys practicing under the Criminal Justice Act a comprehensive collection of cases in which specific mitigating factors, both offense-based and client-based, have resulted in successful departures and variances. Please note, however, that because the guidelines are now merely advisory, the Supreme Court places no area of mitigation off-limits. Successful variances and departures are indexed in the table of contents in this resource by type and circumstances of the offense, client’s role in the offense, and specific circumstances of the client. Federal criminal defense attorneys may click on the relevant mitigating circumstance or departure in the table of contents to find case law supporting their argument.<sup>3</sup>

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<sup>3</sup>For a more comprehensive exposition of arguments supporting a non-guideline sentence, including the district court’s power to reject the guidelines, refer to the Sentencing Resource Page of [www.fd.org](http://www.fd.org). In particular, see Amy Baron-Evans, et al., *Judges Are Free to Disagree With Any Guideline*, available at [http://www.fd.org/pdf\\_lib/Free%20to%20Disagree%20with%20Any%20Guideline.final.pdf](http://www.fd.org/pdf_lib/Free%20to%20Disagree%20with%20Any%20Guideline.final.pdf), *Sentencing by the Statute*, the various *Deconstructing the Guidelines* papers, *Determining Your Client’s Likelihood of Success under Community Supervision and Improving the Odds for a Non-*

## 2. Suggested argument framework

In general, counsel should approach sentencing as follows:

(1) Humanize the client by presenting a rich and compelling story starting with the sympathetic history and characteristics of the defendant, then the unique circumstances of the offense. Tie the facts and circumstances to the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

(2) Make all factual and legal arguments concerning the correct application of the Guidelines and for the lowest advisory guideline range. (Do not neglect this step). Make sure sentencing letters and memos are made a part of the record and incorporated into your objections and sentencing memo.

(3) Include in step (2) traditional departure grounds if available. CAUTION: Be alert to overly restrictive limitations in departure case law that have no application to variances. In a case involving a discouraged or prohibited factor, the judge should state, in the alternative, that s/he would impose the same sentence for a reason or reasons under §3553(a).

(4) Critically examine the history and basis of the applicable Guidelines if warranted. Where, as is often the case, they were not based on empirical data or national experience, argue that the judge should reject the guidelines as unsound. Present a persuasive well-reasoned alternative basis for the sentence based on § 3553(a), arguing for a sentence below the guideline range. Explain why the guideline sentence is greater than necessary to achieve the goals of sentencing in § 3553(a)(2), based on the § 3553(a) factors. Be imaginative in locating and using resources in support of your argument.

(5) Ask the court to state that it is departing downward if there is a basis for doing so, *and* in every case that it is imposing the sentence that is minimally sufficient to achieve the goals of sentencing based on all of the Section 3553(a) factors present in the case.

(6) Defense counsel should further provide detailed findings to assist the court in explaining its factual findings and rationale for departure or a non-Guideline sentence with reference to the § 3553(a) factors. Provide all available authority that exists to grant a given departure or non-Guideline sentence. Counsel should make sure that the written Judgment and Statement of Reasons form are wholly accurate in reflecting the court's reasons and the

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*Prison Sentence, the Defender's Sentencing Resource Manual: Using Statistics and Studies to Redefine the Purposes of Sentencing*, available at [http://www.fd.org/pdf\\_lib/SentencingResourceManualMay2007.pdf](http://www.fd.org/pdf_lib/SentencingResourceManualMay2007.pdf), *The Continuing Struggle for Just, Effective, and Constitutional Sentencing after United States v. Booker* (August 2006), available at [http://www.fd.org/pdf\\_lib/EvansStruggle.pdf](http://www.fd.org/pdf_lib/EvansStruggle.pdf), and *Rita, Gall and Kimbrough: A Chance for Real Sentencing Improvements*, available at [http://www.fd.org/pdf\\_lib/Rita%20Kimbrough%20Sentencing%20Strategies.5.11.08.pdf](http://www.fd.org/pdf_lib/Rita%20Kimbrough%20Sentencing%20Strategies.5.11.08.pdf)

government's position with respect to any below-guideline sentence. If not, counsel should timely seek clerical corrections. See Fed.R.Crim.P. Rules 35(a) and 36.

(7) Preserve objections to the district court's rejection of your arguments for a lesser sentence as required in your jurisdiction to avoid plain error review. Several circuits require objections to defects in the procedure by which a sentence is imposed, such as the district court's failure to adequately explain its sentence, but not to claims of "substantive unreasonableness" based on the length of sentence. This is the rule in the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits. The Eleventh Circuit requires a district court objection to the substantive reasonableness of a sentence to avoid plain error review. The Second Circuit requires parties to object in the district court to preserve claims that the district court failed to consider all the section 3553(a) factors. The issue is unresolved in the Fourth Circuit but at least one panel has applied plain error review to a procedural error. The Seventh Circuit has thus far rejected claims that a party must object after sentence to challenge the court's rejection of the arguments they presented for a different sentence.

## **^02. SELECTED MITIGATING FACTORS AND DOWNWARD DEPARTURES**

### **1. The Guideline sentence conflicts with § 3553(a)'s directive to impose a sentence "sufficient but not greater than necessary."**

*Kimbrough v. U.S.*, 128 S.Ct. 558, 564 (2007)(holding that district court did not abuse its discretion when it imposed lesser sentence based on its disagreement with Sentencing Commission's policy determinations; that district court properly imposed below-guideline sentence to avoid unwarranted disparity caused by Guidelines' treatment of crack and powder cocaine offenses which produced sentence greater than necessary to accomplish goals of sentencing; See discussion of *Kimbrough* in Introduction above); *U.S. v. Irey*, 2009 WL 806860 (11th Cir. March 30, 2009) (affirming 210 month sentence for man convicted of using minors to engage in sexually explicit conduct, despite a guideline range of life and a statutory cap of 360 months, deferring to the district court's reliance on Irey's age, strong family support, service as peer mentor regarding substance abuse, quest for treatment of his pedophilia, and low to medium risk of recidivism); *U.S. v. Robertson*, 2009 WL 260705 (6<sup>th</sup> Cir. 2009)(case remanded for consideration of argument that double-counting a prior drug conviction in calculating both the criminal history category and the offense level, though not procedurally unsound, may have produced a sentence greater than necessary to achieve the §3553(a) sentencing goals); *United States v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008)(upheld sentence of one year and one day as reasonable for defendant convicted of possession with intent to distribute 100 grams of heroin with guideline range of 46-57 months where district court determined guideline range was greater than necessary to meet goals of § 3553(a)(2) and focused on his personal history and characteristics, including long work record, community support, lack of criminal record, and caregiver and sole supporter of his young son and elderly parents, and low recidivism risk); *U.S. v. Mendoza*, 543 F.3d 1186 (10th Cir. 2008) (affirming 240 month sentence the district court deemed parsimonious for defendant's involvement in meth ring, despite guideline range of 324-405 months); *U.S. v. Orsburn*, 525 F.3d 543, 546-547 (7<sup>th</sup> Cir. 2008)(finding that in some cases use of USSG §2C1.1, rather than USSG § 2B1.1 may produce greater punishment that is

warranted.); *U.S. v. Rowan*, 530 F.3d 379 (5<sup>th</sup> Cir. 2008) (affirming district court's determination that the §3553(a) factors as a whole warranted a sentence of 60 months probation for possession of child pornography rather than a guideline term of 46-57 months); *U.S. v Johnson*, 273 Fed. Appx. 95 (2<sup>nd</sup> Cir. 2008) (unpub) (trial judge departed one level to impose 30 years rather than life against 19 year old convicted of Hobbs Act conspiracy that included substantive count of felony murder finding the homicide as reckless rather than intentional and that a life sentence under the circumstances was "too harsh" ).

*U.S. v. Beiermann*, 599 F.Supp.2d 1087 (N.D. Iowa 2009)(imposing 90 months with 10 years supervised release under § 3553(a), rejecting guideline range of 210-262 mos. resulting from § 2G2.2 child porn guideline on categorical, policy grounds because it did not reflect empirical analysis and impermissibly and illogically skewed sentences for even "average" defendants to the upper end of the statutory range, contrary to the goal of producing a sentence no greater than necessary for just punishment, and on basis of an individualized determination); *U.S. v. Jacob*, 2009 WL 1849942, \*16, \*24 (N.D.Iowa June 26, 2009)(rejecting guideline sentence of LIFE and "parties' alternative guideline range" of 292-365 months in enticement of minor and transporting child pornography case as excessive and disproportionately harsh compared to defendant's criminal conduct and history, and imposing 151 months w/10 yrs. supervision because §§ 2G2.1, 2G2.2, and § 4B1.5 enhancement for "pattern of activity involving sexual conduct" improperly skews sentences upward, without regard to defendant's history and characteristics, specific conduct or degree of culpability, blurring distinctions between least and worst offenders and they do not reflect empirical analysis but congressional mandates that undermined work of Sentencing Comm'n. and due to defendant's immaturity, lack of judgment, social isolation, no significant criminal history or history of sex offenses involving children, no serious risk of predatory sexual violence, and his extensive support from friends and family); *U.S. v. Hodges*, 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009) (balancing all factors in light of the parsimony mandate supported a non-guideline sentence for 43-year-old with history of struggling with heroin addiction whose remote priors were non-violent, and who ran his own business successfully for 10 years before a relapse into drugs led to the instant offense); *U.S. v. McElheney*, 2009 WL 1904565 (E.D.Tenn. July 2, 2009)(finding 135 to 168 month guideline range for receipt of child pornography was greater than necessary to achieve statutory sentencing goals, thus imposing 78-months where court found child pornography guidelines lack empirical support, defendant did not produce or distribute child pornography though he continued to download multiple images after he was indicted, the lesser statutory maximum for possessing child pornography than for receipt created sentencing disparity and sentences of other courts demonstrated guideline sentence would create disparity); *U.S. v. Lupton*, 2009 WL 1886007 (E.D.Wis. June 29, 2009)(non-guideline sentence of 24 mos. imposed upon finding 41 to 51 guideline range was greater than necessary, due to Sentencing Commn.'s failure to adequately explain why significantly greater penalties are warranted for honest services fraud under USSG § 2C1.1 versus garden variety money/property fraud under § 2B1.1 for which the range would have been 24-30 months, defendant's lack of prior record, and offense conduct did not reflect the sort of governmental corruption to which the statutes and guidelines are generally targeted); *U.S. v. Cani*, 545 F.Supp. 2d 1235 (M.D.Fla. 2008)(non-guideline sentence of 60 months imposed based on finding that career offender Guideline range of 262-327 months was far greater than necessary to achieve sentencing goals given government's role in drug offense, defendant's

heroin addiction, small drug quantity involved and other factors and personal circumstances); *U.S. v. Taylor*, 2008 WL 2332314 (S.D.N.Y., June 2, 2008) (judge rejects “draconian” guideline range of 151-188 months for first offender convicted of child porn offenses, whom psychiatrists agreed posed no threat to minors at large, and imposes statutory minimum sentence of 60 months though judge also deemed it greater than necessary); *U.S. v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006) (court focused on § 3553(a) factors to impose 42 months, noting that guideline sentence of life would be an absurd result not fitting the circumstances); *U.S. v. Qualls*, 373 F. Supp. 2d 873 (E.D.Wis. 2005) (career offender guideline may create sentences far greater than necessary, such as where qualifying offenses are designated crimes of violence but do not suggest a risk justifying such a sentence, or where the prior sentences were short, causing an increase in the guideline range); *U.S. v. Ranum*, 353 F. Supp. 2d 984, 986 n.1 (E.D.Wis. 2005) (the guidelines clash with § 3553(a)’s primary directive to ‘impose a sentence sufficient, but not greater than necessary to comply with the purposes’ of sentencing, also quoting Justice Kennedy’s 2004 speech to the ABA that “prison sentences are too long...”); *U.S. v. Redemann*, 295 F. Supp. 2d 887 (E.D.Wis. 2003) (court departed downward two levels in bank fraud case, in part because the case fell outside heartland and the guideline range of 18 to 24 months was greater than necessary to satisfy sentencing purposes.); *U.S. v. Gaind*, 829 F. Supp. 669 (S.D.N.Y. 1993) (parsimony provision required departure in part because destruction of defendant’s business already achieved to significant extent some but not all of the § 3553(a) objectives). *See also U.S. v. Vidal-Reyes*, 562 F.3d 43 (1<sup>st</sup> Cir. 2009) (consistent with parsimony mandate, a judge sentencing a defendant on an 18 U.S.C. §1028A aggravated identity theft conviction may take into account that statute’s requirement of a consecutive two year sentence in selecting a sentence for other charges that are not predicate offenses).

## **2. The Guidelines do not fully implement the statutory objectives of sentencing**

*Rita v. U.S.*, 127 S.Ct. 2456, 2473 (2007) (Stevens, J. and Ginsburg, J., concurring. (“The Commission has not developed any standards or recommendations that affect sentencing ranges for many individual characteristics. Matters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civil, charitable, or public service are not ordinarily considered under the Guidelines. See USSG. Manual §§ 5H1.1-6, 11, and 12 (Nov. 2006). These are, however, matters that § 3553(a) authorizes the sentencing judge to consider. *See, e.g.*, 18 U.S.C. § 3553(a)(1)).”

“[I]t is fair to *assume* that the Guidelines, insofar as practicable, reflect a *rough approximation* of sentences that *might* achieve § 3553(a)’s objectives.” *Id.* at 2465 (majority opinion) (emphasis added). The sentencing judge may take into consideration that the Guidelines sentence should not apply “because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations...” *Id.* at 2465.

*U.S. v. Regalado*, 518 F.3d 143 (2<sup>nd</sup> Cir. 2008) (declaring Court will remand cases where the record does not reveal whether the court would have imposed a non-Guidelines sentence had it known it was free to reject the crack-powder ratio to serve the sentencing objectives of §3553(a)); *U.S. v. Seval*, 293 Fed. Appx. 834 (2<sup>nd</sup> Cir. 2008) (unpub) (remanded where record

shows judge did not appreciate his authority to consider that the guidelines reflect unsound judgment); *U.S. v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007) (affirming 70-month sentence imposed for 24-year-old student convicted of possessing child porn, who presented low risk of recidivism in light of treatment and strong family support, where guideline range of 121-150 months was greater than necessary for sentencing purposes); *U.S. v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008) (district court granted 3553(a) variance to safety-valve eligible homeless man caught in sting operation who was at most a delivery man sent at the last minute to pick up drugs from undercover agents; even adjusted for his minimal role, the 37-46 month guideline range was too onerousness for a first offender whose recidivism risk Sentencing Commission studies indicated to be low); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio 2008) (12 months and 1 day imposed rather than a guideline term of 47-56 months for the child porn conviction of a first offender who never molested any minor, the court noting that the child porn guidelines do not reflect the empirical data, national experience, and independent expertise characteristic of the Commission's institutional role and lack coherent sentencing foundation); *U.S. v. Jones*, 352 F. Supp.2d 22 (D. Me. 2005) (where mentally ill defendant convicted of possessing a firearm had a guideline range of 12-to-18 months, and no other downward departure applied, a sentence in Zone C (6 months-to-time served) better insured continuing medical care, or other correctional treatment in the most effective manner and “the marginal protection to the public afforded by a few more months in prison is more than offset by the increased risk upon this defendant's later release after the interruption of his treatment and other regimens.”); *U.S. v. Greer*, 375 F. Supp. 2d 790 (E.D. Wis. 2005) (in drug case guideline range of 46-48 months “was greater than necessary to satisfy the purposes of sentencing [and] no period of imprisonment was appropriate” because if defendant were imprisoned, her young children would suffer, her mother had serious medical problems, children’s father was in prison, and they would likely be put in foster care. Further, requiring her to give birth in prison, then lose custody of her newborn could cause severe damage to both her and the child);

### **3. A non-guideline sentence is authorized after *Booker* based on § 3553(a) factors even for grounds that did not support departure**

*See U.S. v. Chase*, 560 F.3d 828 (8<sup>th</sup> Cir. 2009) (the Supreme Court’s decisions compelled iteration that “the standards governing departures do not bind a district court when employing its discretion with respect to variances,” and the case is remanded because Chase’s advanced age, military service, health issues, and employment history could all warrant a downward variance under §3553(a)); *U.S. v. Howe*, 543 F.3d 128 (3d Cir. 2008) (affirming 2 years of probation with 3 months of home confinement for wire fraud despite a guideline range of 18-24 months, as district court could rely on its finding of Howe’s heartfelt remorse at sentencing despite his denial of fraudulent intent at trial and defense based on blaming another, as well as the defendant’s devotion to family and prior military service); *U.S. v. Jenkins*, 537 F.3d 1 (1<sup>st</sup> Cir 2008) (Although district court denied departure for overstated criminal history, it varied 62 months below the minimum 262 guideline sentence after balancing defendant’s history as a gross recidivist against his history as a low-level, non-violent drug offender); *U.S. v. Zavala*, 300 Fed. Appx. 792 (11th Cir. 2008) (affirming variance sentence of 178 months for a defendant who was not in a position to be able to provide substantial assistance concerning drug conspiracy, in light of codefendant leader who won a substantial assistance departure and a 188-

month sentence; Zala should not be punished for his lesser knowledge); *U.S. v. Spigner*, 416 F.3d 708 (8th Cir. 2005) (post-*Booker* remand granted for defendant convicted of selling more than 50 grams of crack, even though defense agreed not to ask for downward departures based on health, § 5H1.4, because district court can still impose a sentence below the now advisory guidelines, which permit broader considerations of sentencing implications, including the § 3553(a)(d) goal of providing medical care in the most effective manner); *U.S. v. Menyweather*, 431 F.3d 692 (9th Cir. 2005) (eight-level departure upheld in embezzlement of \$500,000 in light of broader, post-*Booker* discretion to weigh multitude of factors previously deemed “not ordinarily relevant”); *U.S. v. Cuevas-Mendoza*, 2008 WL 4120060 (D. Kan. Aug. 26, 2008) (granting motion for variance based on overstated criminal history after denying requests for departure, resulting in an 18 month prison sentence for illegal reentry); *U.S. v. Hodges*, 2009 WL 366231 (E.D. N.Y. Feb. 12, 2009) (court could consider the role drug addiction played in defendant’s prior convictions in assessing his history and characteristics, though they did not justify a departure).

**4. The criminal conduct is atypical or outside the “heartland” of conduct reflected by the guideline.**

§ 5K2.0; *Rita v. U.S.*, 127 S.Ct. 2456( 2007)(majority opinion) (sentencing court may consider disregarding the Guidelines sentence where the case falls outside the “heartland” to which the Commission intends individual Guidelines to apply); *See U.S. v. Garate*, 543 F.3d 1026 (8<sup>th</sup> Cir. 2008) (After *Gall*, the circuit now affirms 30 months for traveling with intent to engage in sexual conduct with minor despite guideline range of 57-71 months, which district court based on defendant’s age, immaturity, lack of a prior record, and the fact Garate “was not a predator and did not fit the profile of many pedophiles convicted of the same crime”); *U.S. v. Lehmann*, 513 F.3d 805 (8th Cir. 2008) (sentence of probation affirmed where justified by the atypical nature and circumstances of the felon in possession of firearm offense and by the defendant’s need to care for her nine-year-old developmentally-disabled son); *U.S. v. Parish*, 308 F.3d 1025 (9th Cir. 2002) (eight-level departure granted in child porn case because defendant’s possession of photographs, which were automatically downloaded when he viewed them, was outside the heartland of much more serious crimes that typical pornographers engage in, according to psychiatrist); *U.S. v. Sicken*, 223 F.3d 1169 (10th Cir. 2000) (four-level departure proper where anti-nuclear protestors, convicted of sabotage, destroyed property at missile site but posed no real danger to national security, and fell outside the heartland); *U.S. v. Lupton*, 2009 WL 1886007 (E.D.Wis. 6/29/2009)(non-guideline sentence of 24 mos. imposed, finding 41 to 51 guideline range greater than necessary, in part because offense conduct did not reflect the sort of governmental corruption to which the statutes and guidelines are generally targeted, USSC’s failure to adequately explain why significantly greater penalties are warranted for honest services fraud under §2C1.1 versus money/property fraud under §2B1.1 and defendant’s lack of prior record); *U.S. v. West*, 552 F. Supp. 2d 74 (D. Mass. 2008) (judge imposed 180 months for possessing cocaine with intent to distribute instead of career offender range of 262-327 months based on priors committed in defendant’s early twenties, reasoning that drug dealing was not West’s main line of business, and that two sales of about \$750.00 worth of cocaine did not merit what could amount to a life sentence for a 38-year-old); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (adolescent age at which child porn defendant began

viewing photos of subjects his own age distinguished him from the typical child porn defendant, and formed part of the basis for a sentence of 12 months and a day rather than one within the 46-57 month guideline); *U.S. v. Grinbergs*, 2008 WL 4191145 (D.Neb. Sept. 8, 2008) (defendant sentenced to a year and a day for possessing child porn rather than a guideline term of 46-57 months, in part because the child porn guidelines were built around distribution or attempted distribution rather than crimes of mere possession); *U.S. v. Crocker*, 2007 WL 2757130 (D. Kan. Sept. 30, 2007) (Downward variance granted based on advisory Guidelines and several factors. Court noted that the defendant was remorseful, bettered herself by getting a college education, intent to repay the money, need for mental health treatment, her responsibilities as a parent, she used the money to pay for medical expenses, and a 2007 amendment to the Guidelines which would lower her range had the new Guidelines been in effect.); *U.S. v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003) (downward departure to one day in jail from 30-month range granted because defendant's reasonable belief that he was authorized to grow marijuana for medicinal purposes took case out of heartland); *U.S. v. Allen*, 250 F. Supp. 2d 317 (S.D.N.Y. 2002) (defendant convicted of drugs and guns entitled to 8-level departure under § 5K2.0 from 80 to 30 months due to his mental immaturity, psychological problems, and mild retardation, which took case out of heartland); *U.S. v. Singh*, 224 F. Supp. 2d 962 (E.D.Pa. 2002) (departure from 37 months to 21 months granted defendant who illegally reentered U.S. to see his dying mother and who intended to stay only a week); *U.S. v. Nachamie*, 121 F. Supp. 2d 285 (S.D.N.Y. 2000) (defendant's initial lack of intent to defraud and diminished intent thereafter made case "atypical" and could be basis for downward departure under § 5K2.0); *U.S. v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998) (downward departure proper for defendant's singular illegal \$20,000 campaign contribution because it was not within the heartland of money laundering cases involving long-running, elaborate schemes).

## **5. Criminal history/career offender guidelines improperly inflate sentence**

**5A. U.S.S.G. § 4A1.3 ("If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.") and U.S.S.G. § 4B1.1.**

*U.S. v. Boardman*, 528 F.3d 86, 87-88 (1<sup>st</sup> Cir. 2008)(holding that *Kimbrough* granted district courts "broader freedom" to determine whether prior convictions qualify as predicate crimes of violence for purposes of the career offender Guideline); *U.S. v. Sanchez*, 517 F.3d 651, 662-67 (2<sup>nd</sup> Cir. 2008)(remanded for clarification as to whether sentence was affected by judge's mistaken view that 28 U.S.C. Sec. 994(h) restricted his authority to impose a non-Guideline sentence or to grant further downward departure; district court granted 2-level downward departure because career offender offense level failed to account for defendant's lesser role in the drug conspiracy, remarked that guideline sentence of 188 months was longer than necessary and defendant could be deterred by even mandatory minimum 120 months, but that it lacked authority to impose lower sentence; holding that 994(h)'s instruction to the Sentencing Commission that it assure sentences for career offenders "at or near" statutory maximum did not deprive district court of authority to impose shorter sentences by way of a non-Guideline sentence or departure; no statutory provision requires career offenders to be

sentenced at or near the statutory maximum and district court must only consider Congress's views in context of § 3553(a) considerations); *U.S. v. Ennis*, 468 F.Supp.2d 228, 234 & n.11 (D.Mass.2006)(observing that career offender predicates include misdemeanor convictions contrary to 28 U.S.C. Sec. 994(h), from states with misdemeanors punishable by more than one year); *U.S. v. Hodges*, 2009 WL 366231 (E.D. N.Y., Feb. 12, 2009) (rejecting career offender range for 43-year-old whose prior convictions were remote, non-violent, and reflected his drug addiction, and the most serious offense occurred in his early twenties, leading to a 10 year sentence that he completed); *U.S. v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender guideline range of 30 years to life rejected in favor of 120 months for a man convicted of sale and possession of small amount of cocaine base, with a non-violent record so meager that the total quantity involved in his entire criminal history "would rattle around in a matchbox", and whose predicate offenses had no temporal proximity to each other or the instant offense); *U.S. v. Patzer*, 548 F.Supp.2d 612 (N.D.Ill.,2008) (13 year prison term imposed for bank robbery and gun offense despite a career offender range of 346-411 months, because Patzer's priors were less serious than most predicate crimes, and in light of his difficult childhood and the improper diagnosis of and treatment for his ADD from which his offense conduct stemmed).

**5B. Criminal history category over-represents the seriousness of past criminal conduct or exaggerates a defendant's propensity to commit crimes<sup>4</sup>**

*U.S. v. Herrick*, 545 F.3d 53 (1<sup>st</sup> Cir.2008) (court granted departure from criminal history category IV to category III, concluding the defendant's CHC overstated the likelihood he would reoffend, particularly where his last conviction was 12 years earlier); *U.S. v. Jenkins*, 537 F.3d 1 (1<sup>st</sup> Cir 2008) (Although district court denied departure for overstated criminal history, it varied 62 months below the minimum 262 guideline sentence after balancing defendant's history as a gross recidivist against his history as a low-level, non-violent drug offender); *U.S. v. Sanchez*, 517 F.3d 651, 655-58 (2<sup>nd</sup> Cir. 2008)(departures granted from career offender category VI to V for overstated criminal history where record as to one defendant consisted of two prior felony drug convictions, committed when defendant was very young and he had never served more than 18 months in jail and guideline range was 262-327 and as to other defendant, offenses were committed when defendant was in his teens and sentences were short; see above discussion of *Sanchez* regarding remand for clarification of whether district court felt constrained by 28 U.S.C. Sec. 994(h) and for determination of whether court would have sentenced defendant to same prison term in absence of perceived limitation); *U.S. v. Mishoe*, 241 F.3d 214 (2d Cir. 2001) (horizontal departure in criminal history category may be warranted where prior sentences were lenient); *U.S. v. Villarini*, 298 Fed. Appx. 79 (2<sup>nd</sup> Cir. 2008) (unpub) (court applied departure to use guideline range of 168-210 months because career offender range of 188-235 months overstated criminal history); *U.S. v. Jones*, 216 F. App'x 189 (3d Cir. 2007)

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<sup>4</sup>For crimes committed on or after October 27, 2003, the Guidelines prohibit a downward departure in criminal history category for armed career criminals and repeat dangerous sex offenders. See USSG § 4A1.3(b) (2) (2004 ed.). In addition, for career offenders, a departure "may not exceed one criminal history category." § 4A1.3(b)(3). In the wake of *Booker* and *Rita*, such restrictions on sentencing discretion are advisory only and do not foreclose the imposition of non-guideline sentences based on consideration of all the § 3553(a) factors in a given case.

(departure granted for overstated criminal history prior to *Booker*); *U.S. v. Yerena-Magana*, 478 F.3d 683 (5th Cir. 2007) (The Fifth Circuit affirmed a downward departure from category II to category I for possession with intent to distribute marijuana. The defendant's prior crimes were illegal reentry and possession with intent to distribute and they occurred at almost the same time. The PSR assessed one point for these priors. The district court disagreed, assessed two points, but then granted downward departure.); *U.S. v. Collington*, 461 F.3d 805 (6th Cir. 2006) (120-month sentence in drugs-and-gun case upheld in the face of 188 -235 months advisory range, in part because the judge found that defendant had never been in custody for a substantial period, despite criminal history category of IV); *U.S. v. Gregor*, 339 F.3d 666 (8th Cir. 2003) (district court may depart downward on the basis that career offender designation overrepresented criminal history where burglary did not involve breaking and entering); *U.S. v. Lamb*, 214 F. App'x 908 (11th Cir. 2007) (affirming 181 months for drug and firearm offenses despite Guideline minimum of 420 months, in light of defendant's youth when he committed the crimes that made him a career offender and his employment at Humane Society); *U.S. v. Thomas*, 361 F.3d 653 (D.C. Cir. 2004) (because arrests prove nothing, court erred in considering long arrest record to justify denial of downward departure for over-represented criminal history), *vacated and remanded in light of Booker*, 543 U.S. 1111 (2005).

*U.S. v. Evans*, 2009 U.S. Dist. LEXIS2700 (D. Conn., Jan. 13, 2009) (defendant convicted of crack crimes sentenced to 120 months rather than career offender range of 168-210 months which increased his criminal history category from category III to category VI, and in light of extraordinary rehabilitation); *U.S. v. Garrison*, 560 F.Supp.2d 83 (D. Mass. 2008) (judge compares sentences and backgrounds of other defendants caught up in same federal-local drug enforcement sweep and imposes non-guideline term, noting that criminal history categories promote false uniformity as they do not distinguish defendants whose convictions are non-violent from those with violent priors); *U.S. v. McCormick*, 2008 WL 268441 (D. Neb. Jan. 28, 2008) (District court granted a departure based on overstated criminal history because the defendant had no crimes of violence as compared to usual category V defendants. The Court also varied because the defendant had already been released and became a productive member of society, he completed drug rehabilitation program, and he was a low risk of recidivism.); *U.S. v. Benkahla*, 501 F.Supp.2d 748 (E.D. Va. 2007) (Court departed downward under 4A1.3 for overstated criminal history. Under the Guidelines, a terrorism enhancement applied which automatically raised the criminal history to category VI regardless of the actual criminal history. The court concluded that it was not prevented from departing especially since Benkahla had no criminal history. The court set the criminal history category at I and sentenced him to the bottom of the Guidelines range.); *Marion v. U.S.*, 2008 WL 4602304 (D. Maine Oct. 15, 2008) (district court departed one criminal history category from the career offender level, noting that one of the predicate crimes was punished by only a fine and the other predicate offense brought the defendant a suspended sentence and then, upon his violation of probation, only 30 days; the district court observed that the sentencing judge's opinion in imposing sentence for the priors was more reliable proof of the nature of the crimes than the untested allegations in the underlying police reports); *U.S. v. Cuevas-Mendoza*, 2008 WL 4120060 (D. Kan. Aug. 26, 2008) (variance granted based on overstated criminal history, producing 18 month prison term for illegal reentry); *U.S. v. Mapp*, 2007 WL 485513 (E.D. Mich. Feb. 9, 2007) (departure granted from advisory range of 84-105 months to 37-46 months where defendant's criminal history was

overstated in that his last conviction occurred in 1994 and all his criminal history points accrued during a two-year period in his late teens for crimes involving small amounts of drugs, court then varied to 30 months based on defendant's oppressed upbringing by abusive parents which led to his grandmother taking him from age five); *U.S. v. Dickmann*, 2007 WL 442397 (E.D. Wis. Feb. 6, 2007) (departure granted from advisory range of 100-125 to advisory range of 87-108 range for conspiracy to distribute cocaine, because defendant's "scored" offenses had been nonviolent petty offenses attempting to get drug money, all occurring during a year in which defendant's life was falling apart; court then varied to 78 months because defendant did not play a major role in the offense, which was not violent, and it appeared he hung around drug dealers to feed his own addiction); *U.S. v. Person*, 377 F. Supp. 2d 308 (D. Mass 2005) (career offender status based on one drug sale "grossly overstated" seriousness of criminal record; departure granted from 262 to 84 months); *U.S. v. Wilkerson*, 183 F. Supp. 2d 373 (D. Mass. 2002) (criminal history category VI over-represented seriousness of defendant's criminal history warranting departure to IV, where he had no convictions for crimes of violence, and had received sentences for prior convictions which just barely triggered scoring under guidelines); *U.S. v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005) (citing *Roper v. Simmons*, district court reduced career offender sentence from 188 to 120 months, discounting prior robbery convictions committed during a six week period as a juvenile, also reasoning that priors barely qualified and finding ten year sentence "a reasonable sentence ... within the sentencing range had he not been determined to be a career offender."); *U.S. v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005) (post-*Booker*, court imposed 36 months rather than 70-87 months, in part because court would have departed for over-stated criminal history in that prior occurred nearly 10 years before); *U.S. v. Hammond*, 240 F. Supp.2d 872 (E.D. Wis. 2003) (in departing from category III to II based on overstated criminal history, court may consider (1) the age of the priors, (2) the defendant's age at time of the priors, (3) whether drug and alcohol use were involved in the priors, (4) the circumstances of the priors ; (5) the length of the prior sentences; (6) the circumstances of the defendant's life at the time of the priors, and (7) the proximity of the priors. Here, the priors were relatively minor and remote in time – occurring 18-to-20 years earlier – and defendant was young and intoxicated when they occurred); *U.S. v. Qualls*, 373 F. Supp.2d 873 (E.D.Wis. 2005); *U.S. v. Moore*, 209 F. Supp. 2d 180 (D.D.C. 2002) (departure from range of 188 to 235 to range of 100-125 where career offender status over- represented defendant's criminal history, priors were attempts and involved small quantity of drugs, four years in between commission of previous offenses and instant offense, and relative length and nature of his previous sentences in comparison with sentence prescribed by the guidelines); *U.S. v. DeJesus*, 75 F. Supp. 2d 141 (S.D.N.Y. 1999) (category V over-represented defendant's criminal history where several priors resulted in probation, only one of three jail sentences exceeded 60 days, two of eight convictions involved loitering and trespass and did not count, remaining six convictions resulted in no more than 2 years jail, and most conduct occurred before age 21, whereas defendant was now married and responsible father and longer sentence under higher criminal history category "will lessen not increase the likelihood of rehabilitation.")

**5C. The Sentencing Commission has recognized that the career offender designation can overstate the risk of recidivism**

*See U.S. Sentencing Commission, Fifteen Years of Guideline Sentencing 133-34 (Nov. 2004)* (“Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.”); *U.S. v. Ortiz*, 502 F.Supp.2d 712 (N.D. Ohio 2007) (District court imposed non-Guideline sentence because of unwarranted disparities with codefendant sentences. The court expressed problems with career offender guideline which fails to distinguish between offenders moving large quantities of drugs and a \$20 sale of heroin like the defendant. The court split the difference between the mandatory minimum and the advisory range.); *U.S. v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (court imposed 126 months because career offender guideline range of 188-235 months was greater than necessary to satisfy sentencing purposes, in part due to Sentencing Commission study on unfairness of career offender designation); *U.S. v. Franklin*, 2005 WL 1330959 (D.Kan. May 25, 2005) (unpub.) (noting the Commission’s finding that career offender provision overstates the likelihood of recidivism for drug trafficking offenders and particularly African-Americans, but rejecting departure here due to defendant’s extensive criminal history).

#### **5D. Career offender designation conflicts with purposes of sentencing**

*U.S. v. Mishoe*, 241 F.3d 214 (2d Cir. 2001) (a large disparity between the length of the prior sentences imposed and the guidelines sentence may indicate that a career offender term provides a deterrent effect in excess of what is required and may “constitute a mitigating circumstance present ‘to a degree’ not adequately considered by the Commission.”); *U.S. v. Colon*, 2007 WL 4246470 (D. Vt. Nov. 29, 2007) (The difference between the prior sentences served justified a Guideline departure from career offender range. The court noted that the sentence would be over a ten-fold increase. In light of the nature of the prior offenses, the sentences served, and the large disparity between prior sentences and the present sentence, the Court found a downward departure was appropriate.); *U.S. v. Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (career offender range of 188-235 months for defendant convicted of two prior sales when he was age 20 was greater than necessary to satisfy sentencing purposes. Absent career offender finding, guidelines called for 87-108 months; court imposed 126 months in part because Commission’s study showed that in cases of low-level street dealers, career offender status often produces sentences far longer than prior sentences and greater than necessary to deter a defendant from re-offending); *U.S. v. Phelps*, 366 F. Supp. 2d 580 (E.D.Tenn. 2005) (it is not unusual for the definitions of “crime of violence” and “controlled substance offense” to operate to subject some defendants to extraordinary increases in the advisory Guideline range, which in some cases will be greater than necessary, especially where a defendant’s prior convictions are old and he has demonstrated some ability to live for substantial periods crime free or in cases where a defendant barely qualifies as a career offender).

#### **5E. Alien who reenters and whose prior conviction is not serious**

*U.S. v. Palos-Luna*, 306 F3d. Appx. (5<sup>th</sup> Cir. 2009) (unpub) (48 months imposed for illegal reentry despite guideline range of 57-71 months, where defendant argued the nonviolent nature of his illegal reentry offense, his apprehension shortly after his reentry, the 24-month sentence on which the §2L1.2 enhancement was based, the age of his priors, his youthfulness when he committed them, and his recent crime-free life); *U.S. v. Tinoco*, 2008 WL 351052, at \*3

(E.D.Wis. Feb. 7, 2008)(24-month sentence warranted where guidelines range was 30-37 months, in order to adjust for 8-level enhancement at 2L1.2(b)(1)(c) which elevated defendant's offense level given that circumstances of his prior escape conviction involved walk away/failure to return to work release center); *U.S. v. Zapata-Trevino*, 378 F. Supp. 2d 1321 (D. N.M. 2005) (court imposed 15 months for illegal reentry despite guideline range of 57 -71 months, because prior conviction was relatively trivial misdemeanor of a consensual kiss for which defendant received probation); *U.S. v. Cuevas-Mendoza*, 2008 WL 4120060 (D. Kan. Aug. 26, 2008) (variance granted based on overstated criminal history, producing 18 month prison term for illegal reentry).

**5F. Sixteen level enhancement for alien is arbitrary, capricious, and unfair because it raises both guideline and criminal history**

*U.S. v. Santos-Nuez*, 2006 WL 1409106 (S.D.N.Y. May 22, 2006) (unpub.) (27 months imposed for illegal reentry, rather than guideline range of 57-71 months, in part because of double counting the crime to raise the offense level and the criminal history score: "Nowhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction....The result of this double-counting produces a Guidelines range that is unreasonable, given the non-violent nature of the instant offense, and the fact that Santos-Nuez has not been charged with any additional crimes since his return to the United States."); *U.S. v. Evangelista*, 2008 U.S. Dist. LEXIS 96410 (S.D. N.Y. 2008) (24 months imposed rather than guideline range of 46-57 months in part because double counting to raise both the offense level and criminal history score was unreasonable to punish non-violent offense); *U.S. v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D.Wis.2005) (below guideline sentence of 24 months imposed in part because of double counting, and because 16 level enhancement seemed far out of proportion "to any reasonable assessment of dangerousness.")

**6. The defendant's cooperation**

**6A. Defendant cooperated with authorities to investigate and prosecute others.**

On the government's motion, the court may depart in light of a defendant's cooperation and substantial assistance in the investigation or prosecution of another person who has committed an offense. See U.S.S.G. § 5K1.1.<sup>5</sup> The extent of a departure is within the

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<sup>5</sup> Section 5K1.1 provides a list of factors relating to the assistance itself that the sentencing court should consider. These include: the usefulness of the assistance, as interpreted by the court and as viewed by the government; the truthfulness of the defendant's information or testimony; the nature and extent of the cooperation; any risk or injury suffered by the defendant or his family; and the timeliness of the assistance. Where a mandatory minimum applies, the government's motion may specify whether the court has the authority to depart from the guidelines, the mandatory minimum, or both. See *Melendez v. U.S.*, 518 U.S. 120 (1996). For a thorough discussion and comprehensive analysis of § 5K1.1, see Thomas W. Hutchison, *et al.*, *Federal Sentencing Law and Practice*, at 1649-1656 (West 2009).

sentencing court's discretion. Once the government so moves, the court can depart to a greater extent than the government recommends. See *U.S. v. Tenzer*, 213 F.3d 34 (2d Cir. 2000) (district court has discretion to depart where defendant tried to negotiate with IRS to make payments through voluntary disclosure program, even though talks broke down and the defendant was convicted); *U.S. v. Castellanos*, 2008 WL 5423858 (D.Neb. Dec. 29, 2008) (defendant's limited mental capacity combined with help she provided law enforcement, plus her relatively brief participation in the drug conspiracy and the lower sentences her co-defendants received merited a sentence of 180 months rather than the guideline range of 360 months to life); *U.S. v. Ledezma*, 2007 4143225 (E.D. Wis. Nov 19, 2007) (After granting 6-level departure based on substantial assistance, Court further varied downward to one day imprisonment with condition of 6 months home confinement based on no criminal history, minimal role in the crime, and just punishment. The Court noted that the defendant was a positive role model in the community by telling young girls her story and how not to fall victim to similar circumstances.); *U.S. v. James*, 2006 WL 3691014 (C.D. Ill. Dec. 12, 2006) (court imposed 210-month sentence where the guidelines and mandatory minimum were life for conspiracy to distribute cocaine and crack after government moved for a substantial assistance downward departure); See also *U.S. v. Udo*, 963 F.2d 1318, 1319 (9th Cir. 1992).

#### **6B. Cooperation not involving prosecution of another**

*U.S. v. Truman*, 304 F.3d 586 (6th Cir. 2002) (district court erred in failing to consider downward departure under § 5K2.0, where defendant arrested for theft of large quantities of controlled substances from a lab subsequently provided information that led to upgrades in the security procedures used by the lab, even in the absence of a government motion for cooperation based on § 5K1.1; *U.S. v. Kaye*, 140 F.3d 86 (2d Cir. 1998) (when a defendant moves for a departure based on cooperation or assistance to government authorities which does not involve the investigation or prosecution of another, Section 5K1.1 does not apply and the court is not precluded from considering the defendant's arguments solely because the government did not request a departure). See also *U.S. v. Dowdell*, 306 Fed. Appx. 16 (4<sup>th</sup> Cir. 2009) (unpub) (Court varied four months below the guideline range for codefendant who pled guilty and persuaded his brother to plead guilty, saving the government and the court the time and effort to prepare for trial); *U.S. v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008) (probation imposed for tax fraud, despite guideline range of 10-16 months, based on defendant's cooperation, acceptance of responsibility, minimal risk of recidivism, and stress suffered prior to sentencing).

#### **6C. Cooperation in the absence of §5K1.1 motion**

After *Booker* and *Rita*, it can be argued that a defendant's cooperation reflects a reduced likelihood of recidivism and is a beneficial part of his or her history and character supporting a

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The Sentencing Commission has found a significant lack of uniformity in the application of § 5K1.1 across the country. See Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, U.S. Sentencing Commission (Jan. 1988).

non-guideline sentence under § 3553(a)(2)(C), even where the government does not file a § 5K motion. *See U.S. v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (a judge must consider "the history and characteristics of the defendant" and should consider that a defendant made efforts to cooperate, even if those efforts did not yield a government motion for a departure); *U.S. v. Lazenby*, 439 F.3d 928, 933-34 (8<sup>th</sup> Cir. 2006)(noting that booker made the prosecution's determination of the cooperation factor less controlling, and holding that district court failed to take Booker's change into account); *U.S. v. Doe*, 213 Fed.Appx. 660, 663 (10<sup>th</sup> Cir. Jan. 12, 2007)(unpub.)(holding that district court should address cooperation as part of its §3553(a) analysis even in absence of a 5K1.1 motion when raised by the defendant); *U.S. v. Ochoa-Ramos*, 2008 WL 2062341, at \*3 (E.D.Wis. 2008)(noting the ability to consider cooperation with the government as evidence of defendant's character under §3553(a) beyond a reduction under §3E1.1, even in the absence of a §5K motion from the prosecution); *U.S. v. Cruz*, 2008 WL 4501951, at \*3 (E.D.Wis. 2008)(same); *U.S. v. Murray*, 2005 WL 1200185 (S.D.N.Y. May 20, 2005) (unpub.) (fact that defendant testified for the government at a time when he had nothing to gain provides support for his genuine contrition); *U.S. v. Hubbard*, 369 F. Supp. 2d 146, 150 (D. Mass. 2005) (suggesting court can correct for government's bad faith in not making §5K1.1 motion under §3553(a)(2)(C)).

#### **6D. Cooperation with state or local authorities**

The Government can move the court for a downward departure pursuant to section 5K1.1 even if the defendant cooperated only with state authorities, *see U.S. v. Emery*, 34 F.3d 911 (9th Cir. 1994), and a §5K1.1 motion is not necessary where the defendant cooperated with local law-enforcement. *See also U.S. v. Kaye*, 140 F.3d 86 (2d Cir. 1998), vacating, 65 F.3d 240 (2d Cir. 1995), although the Ninth Circuit holds otherwise.

#### **6E. Cooperation by a third-party on Defendant's behalf**

Cooperation by a defendant's girlfriend permitted a downward departure under 18 U.S.C. §3553(b) because cooperation is an encouraged basis of departure; and cooperation by third parties on behalf of a defendant is not mentioned by the guidelines. *See U.S. v. Abercrombie*, 59 F. Supp. 2d 585 (S.D. W.Va. 1999) (departure of 3 levels granted defendant who, while incarcerated asked girlfriend to work for police to set up drug buys with no remuneration).

#### **6F. Attempted Cooperation**

*See U.S. v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (in considering a defendant's history and characteristics, the court should consider contention that defendant made efforts to cooperate, even if those efforts did not yield a Government motion for departure); *U.S. v. Tenzer*, 213 F.3d 34 (2d Cir. 2000) (district court has discretion to depart where defendant tried to negotiate with IRS to make payments through voluntary disclosure program, though talks broke down); *U.S. v. Doe*, 213 F. App'x 660 (10th Cir. 1997) (case remanded because sentence would be unreasonable if court had not taken into consideration defendant's efforts to cooperate); *U.S. v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (in meth conspiracy, downward departure granted in part because defendant tried to cooperate repeatedly but had little to offer:

“there is something troubling about the extent to which differences in sentencing were driven not by difference in the crime, but by the happenstance of the way the government indicted, the jurisdictions of indictment, and who ran to cooperate first.”).

## **7. Effect of imprisonment on the defendant**

### **7A. The defendant’s health, need for medical care**

See *U.S. v. Alemenas*, 553 F.3d 27 (1<sup>st</sup> Cir. 2009) (after granting departure from career offender guideline for defendant charged with crack distribution, district court also varied 43 months below the reduced range citing defendant’s chronic neck pain and his mental and emotional condition); *U.S. v. Kempf*, 2009 WL 667413 (4<sup>th</sup> Cir. March 13, 2009) (unpub) (district court granted departure for extraordinary physical impairment based on USSG §5H1.4, in light of defendant’s asbestosis, glaucoma, chronic pulmonary lung disease, hypertension and psychiatric conditions, and further varied 52 months below the guideline range to impose a 240 months for eight charges involving possession, distribution and manufacture of methamphetamine, plus a charge of being a felon-in-possession); *U.S. v. Duhon*, 541 F.3d 391 (5<sup>th</sup> Cir. 2008) (60 months probation upheld for possessing 15 images of child porn, despite guideline range of 27-33 months, in light of this first-time offender’s need to continue medical treatment with his psychologist); *U.S. v. Polito*, 215 F. App’x 354 (5<sup>th</sup> Cir. 2007) (affirming 5-year term of probation granted defendant who possessed child porn six years before date of sentencing during which interim defendant conducted himself in a way atypical for child pornography possessors, where there was no evidence defendant was a sexual predator, and imprisonment would interfere with his mental health treatment for problems that included anxiety disorder, adjustment disorder, depressive personality disorder, and bipolar disorder); *U.S. v. McFarlin*, 535 F.3d 808 (8<sup>th</sup> Cir. 2008) (three years probation imposed for conspiracy to distribute cocaine rather than 60 month guideline term, based on 54-year-old’s serious health problems, including anxiety, depression, nervous disorders and heart disease, significantly reduced life expectancy, as well as his extraordinary post-arrest rehabilitation); *U.S. v. Thompson*, 206 F. App’x 642 (8<sup>th</sup> Cir. 2006) (court varied from 135-168 month advisory range to 110 months apparently due to defendant’s drug addiction and bipolar disorder); *U.S. v. Spigner*, 416 F.3d 708 (8<sup>th</sup> Cir. 2005) (although defendant who sold more than 50 grams of crack had agreed not to ask for downward departures based on health, case was remanded because district court could still impose a sentence lower than the suggested range and § 3553(a)(2)(D) required court to consider the need to provide medical care in the most effective manner. Defendant suffered from high blood pressure so severe it resulted in kidney failure, required regular dialysis treatment and surgery); *U.S. v. Garcia-Salas*, 2007 WL 4553913 (10<sup>th</sup> Cir. Dec. 27, 2007) (unpub.) (sentence at bottom-end of guideline range reversed and remanded for resentencing because it is clear 10<sup>th</sup> Circuit precedent had effectively foreclosed variances and post-*Gall* and *Kimbrough*, district court had greater sentencing discretion than it thought it did; defendant argued for a lower sentence for his extraordinary physical impairment, vulnerability in prison, extraordinary family circumstances, and mental and emotional condition); *U.S. v. Crocker*, 2007 WL 2757130 (D. Kan. Sept. 30, 2007) (Downward variance granted based on advisory Guidelines and several factors. Court noted that the defendant was remorseful, bettered herself by getting a college education, intent to repay the money, need for

mental health treatment, her responsibilities as a parent, she used the money to pay for medical expenses, and a 2007 amendment to the Guidelines which would lower her range had the new Guidelines been in effect.); *U.S. v. Taylor*, 2008 WL 2332314 (S.D.N.Y. June 2, 2008) (judge imposed 60 months for receiving and distributing child porn by first-offender the court knew to be devoted to treatment for depression, whom psychiatrists found to present no threat to minors at large, and as to whom incarceration would be more detrimental than rehabilitative, rejecting “draconian” guideline range of 151-188 months); *Rodriguez-Quezada v. U.S.*, 2008 WL 4302518 (S.D.N.Y. Sept. 15, 2008) (in illegal reentry case, court imposed non-guideline term of 40 months in light of defendant’s health issues, and 14 year lapse since most recent state arrest); *U.S. v. Carmona-Rodriguez*, 2005 WL 840464 (S.D.N.Y. April 11, 2005) (unpub.) (court imposed below guideline sentence on 55 year old with no priors pled guilty to distributing drugs, in part because defendant suffered from high blood pressure and diabetes and had received psychiatric treatment for anxiety and depression since 1994); *U.S. v. Truesdale*, 286 Fed. Appx. 9 (4<sup>th</sup> Cir. 2008) (judge imposed below guidelines sentence of 11 months and 5 days for failure to file an income tax return, rather than guideline sentence of 12 months, based on defendant’s health).

USSG § 5H1.4 provides that “an extraordinary physical impairment may be a reason to impose a sentence below the guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.” See *U.S. v. Martin*, 363 F.3d 25 (1st Cir. 2004) (in tax fraud case, three level downward departure proper (and possibly more on remand) where “several serious medical conditions make Martin’s health exceptionally fragile [and] ...we are not convinced that the BOP can adequately provide for Martin’s medical needs during an extended prison term [and] [t]here is a high probability that lengthy incarceration will shorten Martin’s life span”); *U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000) (downward departure under §5H1.4 based on health upheld where judge found “imprisonment posed a substantial risk to [defendant’s] life,” and that BOP letter stating that it could take care of any medical problem merely trumped BOP capabilities); *U.S. v. Greenwood*, 928 F.2d 645 (4th Cir. 1991) (departure to probation upheld where defendant had severe medical impairment caused by loss of both legs below his knees due to combat in Korean, requiring treatment at VA hospital which would be jeopardized by incarceration).

*U.S. v. Seiber*, 2005 WL 1801614 (E.D. Tenn. July 29, 2005) (unpub.) (although court rejected downward departure for extremely poor health of 69 year old widow convicted of selling Oxycontin, court imposed probation despite guideline range of 97-121 months in light of minor priors); *U.S. v. Pineyro*, 372 F. Supp. 2d 133 (D.Mass. 2005) (court sentenced felon-in-possession to 15 months – time served – despite guideline range of 46-57 months in part because of extraordinary physical condition where BOP failed to show it could provide medical care for heterotopic ossification); *U.S. v. Jiminez*, 212 F. Supp. 2d 214 (S.D.N.Y. 2002) (downward departure from guideline range of 57-71 months where defendant suffered brain aneurism causing severe memory loss and psychotic symptoms after her illegal reentry occurred; court rejected government’s claim that departure is warranted only when BOP cannot adequately treat a physical ailment); *U.S. v. Hammond*, 37 F. Supp. 2d 204 (E.D.N.Y. 1999) (court departed from 48 to 18 months sentence for defendant in drug case suffering from advanced HIV where family would suffer extraordinary financial and emotional harm from his incarceration); *U.S. v.*

*Gigante*, 989 F. Supp. 436 (E.D.N.Y. 1998) (despite criminal past as Mafia associate, downward departure granted from 262 months to 144 months due to advanced age (69) and bad heart).

## **8. Deficiencies of imprisonment**

### **8A. Alien who will be deported**

After *Koon* and *Booker*, the consequence of deportation obviously mitigates the amount of imprisonment necessary to punish. See *Jordan v. De George*, 341 U.S. 223, 232 (1951) (Jackson, J.) (deportation is “a life sentence of banishment in addition to the punishment which a citizen would suffer from the identical acts.”); *U.S. v. Szanto*, 2007 WL 3374399 (N.D. Ill. Nov. 8, 2007) (District court granted a downward variance on several factors. First the defendant was a minimal participant in the crime since he believed he was transporting Viagra not Ecstasy. Second, financial hardships were a motivating factor but during a two year pretrial detention, the defendant had mastered the English language making him more employable. Finally, he was a Canadian citizen and agreed to be deported. Court varied by 12 months and sentenced him to 24 months, time served.).

### **8B. Aliens face more severe restrictions in prison than non-alien**

See *U.S. v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005) (illegal reentry case remanded in light of *Booker* where district court noted defendant would be punished more than a citizen due to ineligibility for six months half way house at end of term); see also *U.S. v. Cardoso-Rodriguez*, 241 F.3d 613 (8th Cir. 2001). After *Booker*, this circumstance can still be a mitigating consideration. *U.S. v. Davoudi*, 172 F.3d 1130 (9th Cir.1999) (ineligibility for minimum security designation of up to six months of home confinement authorized by 18 U.S.C. § 3624(c) can justify departure); see *McClellan v. Crabtree*, 173 F.3d 1176 (9th Cir. 1999), although departure on this ground was not available prior to *Booker* if the defendant pled guilty to illegal entry. See, e.g., *U.S. v. Martinez-Ramos*, 184 F.3d 1055 (9th Cir. 1999); *U.S. v. Pacheco-Soto*, 386 F. Supp. 2d 1198 (D.N.M.2005) (deportable alien convicted of drug crime sentenced to 60 months, rather than minimum guideline term of 74 months, in light of his ineligibility for early release, minimum security prison, or credits for participation in residential drug or alcohol abuse program).

### **8C. A longer sentence would impair defendant’s rehabilitation**

See *Gall v. U.S.*, 128 S. Ct. 586, 593 (2007) (see also “Introduction” above for discussion of defendant’s post-offense contributions to society and the counter-effective result imprisonment would have on defendant’s rehabilitation); *U.S. v. Collington*, 461 F.3d 805 (6th Cir. 2006) (in drug/gun case for which guidelines advised 188-235 months, a 120-month sentence was upheld because it sufficiently reflected the seriousness of the offenses while allowing the possibility for defendant to reform and go on to a productive life upon release in his mid-thirties); *U.S. v. Deveaux*, 198 F. App’x. 480 (6th Cir. 2006) (unpub.) (affirming 180 month sentence for heroin conspiracy tailored to defendant’s need for vocational training and correctional treatment and choice of sentence most likely to end defendant’s heroin dealing);

*U.S. v. Autrey*, 555 F.3d 864 (9th Cir. 2009) (district court's finding that man convicted of one count of child porn possession would not be adequately accommodated in prison and would be better served by outpatient psychiatric treatment supported reasonableness of imposing five years probation rather than a guideline term of 41-51 months); *U.S. v. Halsema*, 180 F. App'x 103 (11th Cir. 2006) (24 month sentence upheld in child porn case having a guideline range of 57-71 months, where court relied on expert testimony that a longer term would impair rehabilitation); *U.S. v. Moreland*, 568 F.Supp.2d 674 (S.D. W.Va. 2008) (after rejecting career offender guideline range of 30 years to life, court imposes statutory mandatory minimum of 120 months for a 34 year old defendant whose educational record reflected a rehabilitative hope the judge decided should not be quashed by a sentence leaving little to hope for beyond imprisonment); *U.S. v. McCormick*, 2008 WL 268441 (D. Neb. Jan. 28, 2008) (District court granted a departure based on overstated criminal history because the defendant had no crimes of violence as compared to usual category V defendants. The Court also varied because the defendant had already been released and became a productive member of society, he completed drug rehabilitation program, and he was a low risk of recidivism.); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (in imposing 12 months and a day on child porn defendant who had never engaged in physical misconduct with an actual child, court observed that lengthier term might negatively impact the rehabilitation Stern commenced prior to his arrest); *U.S. v. Pallowick*, 364 F. Supp. 2d 923 (E.D. Wisc. 2005) (defendant convicted of six armed bank robberies sentenced to 46 months, rather than guideline range of 70-87 months, because no one was hurt, defendant made no direct threats, his only prior was a burglary committed shortly before, his severe mental illness of major depressive disorder and anxiety disorder played a major role in the offenses, after arrest he completed in-patient treatment, enrolled in counseling, and took medication, he was not dangerous and unlikely to re-offend, and judge concluded that a lengthier period would not aid rehabilitation but might hinder his progress in counseling, contrary to § 3553(a)(2)(D)); *United States v. Handy*, 2008 WL 3049899 (E.D.N.Y. Aug. 4, 2008) (court imposes non-guideline sentence of 30 months for twenty-year old felon-in-possession defendant whose life read like "a feeder system into the Cradle to Prison Pipeline," because educational and vocational training would be more effective if provided outside prison and keeping him in prison would result in further hardening of him as a criminal and increase his danger to the community upon release); *U.S. v. Collado*, 2008 WL 2329275 (S.D.N.Y. June 5, 2008) (court imposes time-served for charge of being a felon-in-possession of ammo defendant found inside a used van he bought because incarceration would threaten to undermine sentencing goals by halting or possibly reversing significant progress of defendant in the 15 years since his robbery conviction, during which he became a contributing member of society with a new business).

#### **8D. Departure proper to permit more community service in lieu of prison**

Application Note 6 to USSG §5C1.1 authorizes a departure that permits substitution of more community confinement than otherwise authorized for an equivalent number of months of imprisonment for treatment ("e.g. substitution of twelve months in residential drug treatment for twelve months of imprisonment"). *But see U.S v. Malley*, 307 F.3d 1032 (9th Cir. 2002) (does not authorize reduction in the offense level).

## 9. Post-offense, post-conviction, and post-sentencing rehabilitation

*Gall v. United States*, 128 S.Ct. 586, 593, 599 (2007)(see “Introduction” above for discussion of post-offense self-rehabilitation as supporting probationary sentence); Post-offense rehabilitation should now be recognized as an appropriate mitigating circumstance despite that the Guidelines were amended before *Booker* to prohibit downward departures at re-sentencing for post sentencing rehabilitative efforts for crimes committed on or after November 1, 2000. See USSG. §5K2.19 (2004 ed); *U.S. v. Martin*, 520 F.3d 87 (1<sup>st</sup> Cir. 2008) (judge imposed 144 months for cocaine base distribution conspiracy rather than apply the career offender range, stressing, among other things, defendant’s particularly striking impression as a changed man who renounced his former ways and renewed commitment to religion and family); *U.S. v. Bradstreet*, 207 F.3d 76 (1st Cir. 2000) (departure from 51 to 31 months at re-sentencing in securities fraud case properly based on post-offense rehabilitation wherein defendant tutored inmates in prison, developed, volunteered and succeeded in the prison's Boot Camp Program, began serving as the prison chaplain's assistant, became a program assistant and clerk of the prison parenting program, and lectured at local colleges to business students on ethical perils in business as attested to by letters from prison employees and inmates he had assisted); *U.S. v. Maier*, 975 F.2d 944, 945 (2d Cir.1992) (affirming departure where defendant's "efforts toward rehabilitation followed an uneven course, not a surprising result for someone with a fourteen-year history of addiction"); See *U.S. v. Jones*, 216 F. App’x 189 (3d Cir. 2007) (departure granted for overstated criminal history prior to *Booker* and on remand, court imposed further reduction to 88 months based on post-sentencing rehabilitation); *U.S. v. Beach*, 275 Fed.Appx. 526 (6<sup>th</sup> Cir. 2008)(unpub) (affirming 96 month sentence for knowing transport, shipment, and receipt of child porn, rather than 210-240 months guideline range, based on Beach’s significant progress in and contribution to therapy programs since his offense, his apparently genuine remorse, and his desire to improve himself); *U.S. v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007) (24 year old music student convicted of possessing child porn sentenced to 70 months, rather than advisory range of 121-150 months, where he was in treatment, presented low risk of recidivism, had strong family support, and the guidelines failed to account for his sincere efforts in treatment, which reduced his risk of re-offending and demonstrated strength of character; circuit court affirmed); *U.S. v. Shy*, 538 F.3d 933 (8<sup>th</sup> Cir. 2008) (defendant’s post-offense rehabilitation, including her contributions to society through her “extraordinary work with persons with disabilities” justified three years probation for possessing pseudoephedrine knowing it would be used to make methamphetamine, despite guideline range of 37 - 46 months); *U.S. v. McFarlin*, 535 F.3d 808 (8<sup>th</sup> Cir. 2008) (three years probation imposed for conspiracy to distribute cocaine rather than 60 month guideline term, based on 54 year old defendant’s extraordinary post-arrest rehabilitation, including his installation as a preacher, and serious health problems); *U.S. v. Newlon*, 212 F.3d 423 (8th Cir. 2000) (departure from 110 to 90 months for being felon in possession was not abuse of discretion where prior to arrest defendant had, at his own request, spent 85 hours in drug and alcohol program; his counselor attested to defendant’s sincere desire for treatment, and defendant’s family noted marked improvement in his behavior and attitude); *U.S. v. Green*, 152 F.3d 1202 (9th Cir. 1998) (post-offense and post-sentencing rehabilitative efforts shown by exemplary conduct in prison warranted eleven level downward departure to 30 days); *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998) (upholding downward departure to probation for defendant in weapon possession case

where court considered, among 11 factors, defendant's adherence to conditions of his release and changed both his attitude and conduct during release).

*U.S. v. Evans*, 2009 WL 126882 (D. Conn., Jan. 13, 2009) (court imposed 120 months rather than career offender range of 168-210 months, due to overstatement of criminal history in combination with defendant's post-offense record of staying drug-free over a year while working a steady 40 hour per week job and complying with his conditions of release); *U.S. v. Samuels*, 2009 WL 875320 (S.D. N.Y. April 2, 2009) (time served imposed rather than guideline range of 70-87 for young defendant who stopped selling and using crack on her own initiative two months before her arrest, and who pursued GED, took up typing, had no write ups and led a trusted cleaning crew allowed access to virtually all parts of correctional facility); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (court imposed 12 months and a day for child porn possession based in part on Stern's post-offense rehabilitation by going to college, seeking therapeutic help before he was arrested, maintaining employment and developing healthy relationships); *U.S. v. Blakely*, 2009 WL 174265 (N.D.Tex. Jan. 23, 2009) (defendant's model record in 78 months previously served in prison convinced court that resentencing defendant under §3582 within a range only two levels below the original sentencing range would result in a sentence greater than necessary, so court sentences defendant to "time served"); *U.S. v. Johnson*, 2007 WL 3357564 (E.D. Wis. Nov. 11, 2007) (Court granted a variance based on the post conviction efforts made by the defendant. The defendant acquired a job, quit using drugs, and these changes were reflected by testimony from the defendant's wife.); *U.S. v. Crocker*, 2007 WL 2757130 (D. Kan. Sept. 30, 2007) (Downward variance granted based on advisory Guidelines and several factors. Court noted that the defendant was remorseful, bettered herself by getting a college education, intent to repay the money, need for mental health treatment, her responsibilities as a parent, she used the money to pay for medical expenses, and a 2007 amendment to the Guidelines which would lower her range had the new Guidelines been in effect.); *U.S. v. Hawkins*, 380 F. Supp. 2d 143 (E.D.N.Y. 2005) (probation granted in insurance fraud case, rather than guideline range of 12-18 months, despite the fact defendant engage in further criminal activity in the course of rehabilitation because "the Guidelines are no longer a straightjacket binding courts to artificially created and cruel paradoxes of sentencing, by insisting not only on rehabilitation, but on extraordinary rehabilitation"); *U.S. v. Carvajal*, 2005 WL 476125 (S.D.N.Y. Feb.22, 2005) (career offender range of 262 months too great; client will be 48 when he emerges from prison. The goal of rehabilitation "cannot be served if a defendant can look forward to nothing beyond imprisonment. Hope is the necessary condition of mankind . . . A judge should be hesitant before sentencing so severely that he destroys all hope and takes away all possibility of useful life. . . ."); *U.S. v. Smith*, 311 F. Supp. 2d 801 (E.D. Wis. 2004) (in crack-sale case, two-level departure granted in addition to acceptance of responsibility reduction where defendant demonstrated self- improvement, fundamental change in attitude, and complete withdrawal from criminal drug distribution lifestyle in three years before arrest and before he knew he was under investigation); *U.S. v. Parella*, 273 F. Supp. 2d 161 (D. Mass. 2003) (probation granted, rather than guideline range of 30-37 months, for getaway driver in three bank robberies, because defendant totally changed his life and his behavior and treatment succeeded in producing a rehabilitated person unlikely to recidivate); *U.S. v. Wilkes*, 130 F. Supp. 2d 222 (D.Mass. 2001) (departing for defendant who obtained counseling, remained drug-free and re-established personal and family relationships after a decade of severe alcohol and drug abuse);

*U.S. v. Seethaler*, 2000 WL 1373670 (N.D.N.Y. Sept. 19, 2000) (unpub.) (downward departure for post-offense rehabilitation where defendant completely resolved his sexual fetish and had no continuing urges to search for pornography on the Internet or in other contexts and where he appeared to have re-established himself in his family and in his occupational pursuits); *U.S. v. Bennett*, 9 F. Supp. 2d 513 (E.D.Pa. 1998) (departure granted from 235 months to 144 months where defendant made full restitution early in case and sought to recover funds, even though defendant did not accept responsibility), aff'd. 161 F.3d 171 (3d Cir. 1998).

#### **10. Prison has greater significance for those imprisoned for the first time**

See *U.S. v. Baker*, 445 F.3d 987 (7th Cir. 2006) (affirming non-guideline sentence of 78 months from 108 months for defendant convicted of distributing child porn, justified in part by judge's finding that prison would mean more to this defendant than one who has been imprisoned before, which resonated with goal of "just punishment" in § 3553(a)(2)(A) and "adequate deterrence" in Section 3553(a)(2)(B); see also *U.S. v. Paul*, 239 F.App'x 353 (9th Cir. 2007) (defendant's 16-month sentence, the top end of the guideline range for unlawful receipt of federal funding, was unreasonably high because defendant was a first-time offender, returned the funds, and displayed remorse); *U.S. v. Jewell*, 2009 WL 1010877 (E.D.Ark. April 15, 2009) (defendant sentenced to 30 months in prison for aiding and abetting tax evasion, because guideline range near the statutory maximum of 5 years was inappropriate for first time offender); *U.S. v. Cull*, 446 F. Supp. 2d 961 (E.D. Wis. 2006) (non-guideline sentence of 2 months in jail and 4 months home confinement, where advisory range was 10-14 months for marijuana offense by defendant who had never been confined, was sufficient to impress on him the seriousness of his crime and deter him from re-offending); *U.S. v. Qualls*, 373 F. Supp. 2d 873, 877 (E.D. Wis. 2005) (generally, a lesser prison term is sufficient to deter one who has not been subject to prior lengthy incarceration).

#### **11. Vulnerability to victimization or abuse in prison**

*Koon v. U.S.*, 518 U.S. 81 (1996) (no abuse of discretion to grant downward departure to police officers convicted of civil rights violation due to their vulnerability in prison); *U.S. v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (departure affirmed for defendant who had "feminine cast to his face" and "softness of features" which would make him prey to prisoners)<sup>6</sup>. *U.S. v. Lara*, 905 F.2d 599 (2d Cir. 1990) (departure from 10 to 5 years upheld for defendant whose youthful appearance and bisexuality made him particularly vulnerable to victimization, a factor not adequately considered by the Guidelines); *U.S. v. Long*, 977 F.2d 1264 (8th Cir. 1992) (court departed from 46 months to one year home detention because four doctors wrote defendant would be subject to victimization and potentially fatal injuries in prison); *U.S. v. Parish*, 308 F.3d 1025 (9th Cir. 2002) (eight level departure granted in child porn case in part because defendant had "high susceptibility to abuse in prison" due to his demeanor, his naiveté, and the nature of the offense as psychiatrist opined); *U.S. v. Garcia-Salas*, 2007 WL 4553913 (10th Cir.

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<sup>6</sup>USSG §5H1.4 makes "physical appearance, including physique" a discouraged factor; but *Booker* and its progeny grant district courts greater discretion to consider this part of the defendant's circumstances.

Dec. 27, 2007) (unpub.) (sentence at bottom-end of guideline range reversed and remanded for resentencing because it is clear 10th Circuit precedent had effectively foreclosed variances and post-*Gall* and *Kimbrough*, district court had greater sentencing discretion than it thought it did; defendant argued for a lower sentence for his extraordinary physical impairment, vulnerability in prison, extraordinary family circumstances, and mental and emotional condition); *U.S. v. LaVallee*, 439 F.3d 670 (10th Cir. 2006) (no abuse of discretion granting two-level departure to defendants who were former prison guards based on their susceptibility to abuse in prison after they were convicted of conspiring to deprive inmates of their constitutional rights; case fell outside the heartland in that it resulted from an investigation reported in a publication distributed to federal inmates and defendants were threatened after they were incarcerated).

*U.S. v. Ortiz*, 2007 WL 4208802 (D. N.J. Nov. 27, 2007) (The court varied from the Guidelines based on the horrible prison conditions where the defendant was being held. The court had previously heard testimony regarding the conditions of the prison and granted a variance.); *U.S. v. Volpe*, 78 F. Supp. 2d 76 (E.D.N.Y.1999) (two level departure granted due to extraordinary notoriety of the case and general opprobrium toward defendant combined with his status as a police officer which left him unusually susceptible to abuse and might require a lot of time in segregation); *U.S. v. Ruff*, 998 F. Supp. 1351 (M.D.Ala. 1998) (one level departure granted to impose home detention to a slim, effeminate, and gay defendant who broke into post office who had previously been assaulted in prison), *U.S. v. Wilke*, 995 F. Supp. 828 (N.D. Ill. 1998) (testimony by prisoner-turned-professor persuaded court that defendant's appearance and conviction of sex offense involving juveniles (kiddy porn) subjected him to physical abuse in prison and warranted 4-level departure); *U.S. v. Shasky*, 939 F. Supp. 695 (D.Neb. 1996) (departure granted to homosexual state trooper of diminutive stature and weight upon conviction for receiving material via computer involving pornographic images of minors, as case was outside "heartland" due to defendant's unusual susceptibility to abuse in prison and defendant's extraordinary post-offense efforts at rehabilitation).

## 12. Age

Under the advisory guidelines, age is “ordinarily” not relevant pursuant to USSG §5H1.1, but may be so in unusual cases or in combination with other factors. Yet, the Commission has found “recidivism rates decline relatively consistently as age increases.” See U.S. Sentencing Comm’n, *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, A Component of the Fifteen Year Report on the U.S. Sentencing Commission’s Legislative Mandate (May 2004). Post- *Booker and Rita*, a sentencing court may consider defendants’ age under § 3553(a).

*Gall v. U.S.*, 128 S. Ct. 586, 593, 599 (2007)(affirming sentence of probation, in part, for defendant’s age at the time of the offense conduct); *U.S. v. Dusenberry*, 9 F.3d 110 (6th Cir. 1993) (downward departure granted due to defendant’s age and medical condition – removal of both kidneys requiring dialysis three times a week); *U.S. v. Clark*, 289 Fed. Appx. 44 (5<sup>th</sup> Cir.2008)(court applied a below-guidelines term of 190 months for methamphetamine conspiracy conviction because defendant’s age made him unlikely to commit further crime upon release); *U.S. v. Polito*, 215 Fed.Appx. 354, 357 (5<sup>th</sup> Cir. 2007)(per curiam)(upholding sentence

of probation in child pornography case when use began during adolescence); *U.S. v. Carter*, 538 F.3d 784 (7<sup>th</sup> Cir. 2008)(affirming 24-month sentence for money laundering where GR was 87-108 months based partly on finding that defendant, at age 61, posed a lower recidivism risk); *U.S. v. Chase*, 560 F.3d 828 (8<sup>th</sup> Cir. 2009) (defendant's advanced age, health, and employment history could support downward variance even if it didn't support formal departure); *U.S. v. Gray*, 453 F.3d 1323 (11<sup>th</sup> Cir. 2006) (variance from 151 months to impose 72 months in distribution of porn case was reasonable in light of defendant's history and characteristics, *i.e.*, the defendant was 64, had never molested a child, suffered from depression and had attempted suicide several times).

*U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (court imposed 12 months and a day rather than the 46-57-month guideline range for child porn possession in part because of the adolescent age at which Stern began viewing and became addicted to portrayals of subjects his own age, citing scientific literature supporting different treatment of juveniles, and distinguishing Stern from the typical child porn defendant); *U.S. v. West*, 552 F. Supp. 2d 74 (D. Mass. 2008) (judge imposed 180 months for possessing cocaine with intent to distribute instead of career offender range of 262-327 months, in part because West's sales of about \$750.00 worth of cocaine to an agent who wanted to get him into inform on someone else did not merit what could amount to a life sentence for this 38-year-old); *U.S. v. Villanueva*, 2007 WL 4410378 (E.D. Wis. Dec. 14, 2007) (Courts are able to base variances on factors normally discouraged under the Guidelines including age and physical condition.); *U.S. v. Baron*, 914 F. Supp. 660 (D. Mass. 1995) (downward departure to probation from advisory range of 27-33 months for 76 year old defendant in bankruptcy fraud whose medical problems would worsen in prison); *U.S. v. Roth*, 1995 WL 35676, at \*1 (S.D.N.Y. Jan.30, 1995) (63-year-old with neuromuscular disease had "profound physical impairment" warranting downward departure). This departure is available after the PROTECT ACT in sex with minor cases and child porn cases. USSG § 5K2.22 (effective April 30, 2003).

The Department of Justice has found that "management problems with elderly inmates, ... are intensified in the prison setting and include: vulnerability to abuse and predation, difficulty in establishing social relationships with younger inmates, need for special physical accommodations in a relatively inflexible physical environment." See Correctional Health Care, *Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, U.S. Dept. of Justice National Institute of Corrections, 9, 10 (2004). The report notes that first time offenders are "easy prey for more experienced predatory inmates." *Id.* at 10. The elderly are defined throughout the report as age 50 or older.

### **13. Effect of imprisonment on third parties**

#### **13A. Extraordinary family circumstances or where incarceration would have harsh effect on innocent family members.**

USSG § 5H1.6 generally discourages departures on this basis. The PROTECT Act amendments of April 30, 2003 made family ties and responsibilities "not relevant" in child-

victim, sex abuse and exploitation, obscenity offenses, and related crimes. *Booker* and *Rita* free courts to consider these factors as part of their analysis under § 3553(a).

*U.S. v. Munoz-Nava*, 524 F.3d 1137 (10th Cir. 2008) (sentence of 1 year and 1 day for a man who possessed with intent to distribute 100 grams of heroin, despite a guideline range of 46-57 months, based on his long work career, community support, lack of a criminal record, and responsibilities as sole supporter of 8-year-old son and elderly parents, which reduced the likelihood he would re-offend); *U.S. v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005) (on remand of bank fraud case, district court may consider defendant's role as caretaker for brain-damaged son even though alternative means of care existed); *U.S. v. Taylor*, 280 Fed.Appx. 397 (5<sup>th</sup> Cir. 2008) (unpub) (60 month prison term for trading child porn was not plain error, despite a guideline sentence of 120 months, based on defendant's lack of a prior record, his youth and impressive employment history, supportive testimony of his wife, mother, and step-father, and the needs of his newborn son); *U.S. v. Dominguez*, 296 F.3d 192 (3d Cir.2002) (district court erred in concluding it could not depart four levels in bank fraud case for defendant who resided with elderly parents, who were physically and financially dependant on her); *U.S. v. Prisel*, 2008 WL 4899451 (6<sup>th</sup> Cir. Nov. 13, 2008) (unpub) (sentence of one day in prison plus three years supervised release for possessing child porn upheld despite guideline range of 27-33 months, where defendant worked from home, and had a dependant wife with whom he had a mortgage for which they jointly owed over \$70,000); *U.S. v. Owens*, 145 F.3d 923 (7th Cir. 1998) (departure from 169 to 120 months under § 5H1.6 for defendant who maintained good relationship with his children and court believed his active role raising and supporting his family was atypical for crack dealer and imprisonment may have forced wife on public-assistance and defendant also spent time with brother with Downs Syndrome); *U.S. v. Lehmann*, 513 F.3d 805 (8th Cir. Jan. 17, 2008) (sentence of probation affirmed where justified by the atypical nature and circumstances of the felon in possession case and by the defendant's need to care for her nine-year-old developmentally-disabled son); *U.S. v. Menyweather*, 431 F.3d 692 (9th Cir. 2005) ( in \$500,000 embezzlement case, no abuse of discretion to depart 8 levels to probation in part because of defendant's care for daughter, which was unusual compared to other single parents); *U.S. v. Leon*, 341 F.3d 928 (9th Cir. 2003) (departure granted for defendant who was sole care giver of suicidal wife who also suffered from renal failure); *U.S. v. Aguirre*, 214 F.3d 1122 (9th Cir. 2000) (district court had discretion to depart downward 4 levels for extraordinary family circumstance that defendant's 8-year old son had lost his father and would be losing his mother for substantial amount of time); *U.S. v. Garcia-Salas*, 2007 WL 4553913 (10th Cir. Dec. 27, 2007) (unpub.) (sentence at bottom-end of guideline range reversed and remanded for resentencing because it is clear 10th Circuit precedent had effectively foreclosed variances and post-*Gall* and *Kimbrough*, district court had greater sentencing discretion than it thought it did; defendant argued for a lower sentence for his extraordinary physical impairment, vulnerability in prison, extraordinary family circumstances, and mental and emotional condition); *U.S. v. Gauvin*, 173 F.3d 798 (10th Cir. 1999) (3-level departure to make defendant eligible for shock incarceration was warranted under § 5H1.6 to minimize impact on children where defendant supported 4 young children and his wife worked 14 hour days, miles from home, was barely able to provide for children and risked losing custody of her children and her job, and no extended family could take custody of them).

*U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (court imposed time-served on a first time offender whose devotion to the education of the six children of his 15 year marriage – even while the family lived in a homeless shelter – was attested to by a school teacher and a pediatrician, and by his wife’s views that her children would be traumatized by his separation from them, and the judge believed incarceration would deny the children the “care and guidance clearly needed at this point in their lives”); *U.S. v. Crawford*, 2007 WL 2436746 (E.D. Wis. Aug. 22, 2007) (District court granted a variance from the Guidelines due to the defendant’s family situation with five children and the impact incarceration would have on the children. Furthermore, the defendant was forced to participate in the conspiracy and was severely beaten when she tried to withdraw. Court sentenced her to time served and placed her on four years probation.); *U.S. v. Boeka*, 2006 WL 3780400 (D. Neb. Dec. 20, 2006) (court imposed 12 months and one-day for bank robbery in which Cheez-Its were disguised as a bomb, and government did not oppose departing based on extraordinary family circumstances where defendant gave primary care for disabled 11-year-old who required constant help and defendant suffered from major depression and may have been considering suicide by police); *U.S. v. Bortnick*, 2006 WL 680544 (E.D.Pa. March 15, 2006) (unpub.) (in \$8 million fraud case for which guidelines advised 51-63 months, court imposed \$1 million fine and seven day sentence in part because defendant’s son born with severe handicap needed attention and financial support and taking non-violent defendant with no criminal history out of family environment for protracted time would serve no social or penal purpose); *U.S. v. Bailey*, 369 F. Supp. 2d 1090 (D. Neb. 2005) (post-Booker departure from 24-27 months to probation for defendant convicted of possessing child porn justified by expert testimony showing his presence was critical to his own child’s recovery from molestation by a boyfriend of the child’s mother, and there was reasonable expert assurance that Bailey was not dangerous to the public (including children), and the benefit to the public of incarcerating Bailey was outweighed by the harm it would cause to his daughter); *U.S. v. Manasrah*, 347 F. Supp. 2d 634 (E.D. Wis. 2004) (judge departs two levels to probation with home detention for immigrant from West Bank, convicted of mail fraud where husband threatened take the children back to the West Bank and to not let defendant see them again if wife incarcerated, a harm “far worse than those faced by a defendant-parent and her children in the usual case.”); *U.S. v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004) (downward departure granted in heroin case where defendant’s two young children were thrust into the care of relatives who reported extreme difficulties raising them, both fathers were absent); *U.S. v. Colp*, 249 F. Supp. 2d 740 (E.D. Va. 2003) (departure from 10 months to probation granted in tax evasion case because defendant was sole caretaker for husband disabled by brain injury); *U.S. v. Lopez*, 28 F. Supp. 2d 953 (E.D.Pa.1998) (six-level departure granted defendant who pled guilty to conspiracy to distribute heroin and forfeiture charge where defendant’s mentally ill seven-year-old attempted suicide after defendant’s arrest and defendant’s parental rights would be terminated under full range of incarceration, and defendant was not involved in large-scale drug dealing).

### **13B. Cost to taxpayers of lengthy incarceration**

*U.S. v. Chavez*, 230 F.3d 1089 (8th Cir. 2000) (Bright, J., concurring) (sentence will probably cost taxpayers \$836,000, and the defendant his life; guidelines range for nonviolent offenders drains billions from taxpayers and keeps potentially productive members of society

locked up, causing staggering “opportunity costs”); *U.S. v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (cost of mandatory 61-year-sentence runs to \$1,265,000, money that could otherwise be spent on other law enforcement or social programs to reduce crime) *U.S. v. Hughes*, 825 F. Supp. 866 (D.Minn.1993) (same, the court noting that “the non-rehabilitation purposes of incarceration-retribution, deterrence and incapacitation-would all be more than adequately served by a far shorter sentence. Both society and the defendant will pay a dear cost for this sentence and receive very little in return.”)

#### **14. Limited culpability of defendant**

##### **14A. Downward adjustment for role in the offense is inadequate to show defendant’s peripheral involvement.**

The PROTECT Act prohibited departures based on aggravating or mitigating roles in offenses committed after October 27, 2003, and limited consideration of role to the adjustments at § 3B1.1 and § 3B1.2. *See* USSG § 5K2.0 (d)(3); USSG § 5H1.7. These prohibitions do not prohibit variances from the advisory guidelines post-*Booker*.

*U.S. v. Ruiz*, 2009 WL 636543 (S.D. N.Y. March 10, 2009) (in crack distribution conspiracy, court imposed 96 months rather than the 140-175 guideline range for young defendant with a poor background who was low-level street seller); *U.S. v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (departure from 57 months to probation granted in conspiracy to distribute meth in part because the two-level minor role adjustment did not begin to reflect defendant’s position in the enterprise); *U.S. v. Koczuk*, 166 F. Supp. 2d 757 (E.D.N.Y. 2001) (four level minimal role reduction was inadequate for defendant who was low level employee working as chauffeur and interpreter in enterprise illegally importing caviar, particularly where defendant was acquitted of five counts and convicted of a single count of importing caviar with market value below \$100,000, whereas co-defendant convicted of six counts imported \$11 million worth, magnifying offense level extraordinarily based on a circumstance having little relation to defendant’s role in the offense); *U.S. v. Bruder*, 103 F. Supp. 2d 155 (E.D.N.Y. 2000) (two level departure granted to defendant police officer who assisted another in sexual assault of prisoner because minor role adjustment was inadequate to show peripheral role); *U.S. v. Thomas*, 595 F.Supp.2d 949 (E.D.Wis. 2009) (defendant's minor role in attempted cocaine distribution, combined with problems posed by quantity driven guidelines, and defendant’s other personal qualities and rehabilitative efforts justified 5 months in department of corrections followed by 5 months of home confinement, rather than guideline term of 27-33 months).

##### **14B. Defendant had no knowledge of, or control over, amount or purity of drugs**

*U.S. v. Chalarca*, 95 F.3d 239 (2d Cir.1996) (downward departure upheld based on district court’s finding that defendant had no knowledge of any particular quantity of cocaine and no particular quantity was foreseeable to him in connection with conspiracy); *U.S. v. Mikaelian*, 168 F.3d 380 (9th Cir. 1999), amended, 180 F.3d 1091 (low purity of heroin cannot be categorically excluded as ground for departure); *U.S. v. Mendoza*, 121 F.3d 510 (9th Cir.

1997) (district court may depart where a defendant had no knowledge of or control over the amount or purity of the drugs, if the court determines that the facts are outside the heartland of such cases ); *U.S. v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (departure from 57 months to probation granted in meth conspiracy in part because defendant was a mere functionary who took orders from codefendant, and the amount of pseudo-ephedrine that passed through his hands reflected someone else's decisions).

#### **14C. Defendant was accessory after-the-fact**

See *U.S. v. Adelson*, 441 F. Supp. 2d 506 (SDNY 2006) (defendant in securities fraud case sentenced to 42 months rather than guidelines sentence of life, where defendant joined years after stock had already fallen because of ongoing fraud, and where he concealed the fraud, in part because defendant was closer to an accessory after the fact, a position that has historically been viewed as deserving lesser punishment than that accorded instigators).

#### **14D. Defendant was member of conspiracy for a brief time**

See *U.S. v. Castellanos*, 2008 WL 5423858 (D.Neb. Dec. 29, 2008)(the relatively short time in which defendant participated in the drug conspiracy, combined with her assistance to law enforcement and limited mental capacity supported a sentence of 180 months rather than the 30 years-to life guideline range); *U.S. v. Adelson*, 441 F. Supp. 2d 506 (SDNY 2006) (in securities fraud case, below guideline sentence imposed in part because defendant did not participate in conspiracy until its final months).

#### **14E. Minimal role in the offense**

*U.S. v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008) (district court granted 3553(a) variance of 24 months to safety-valve eligible homeless man caught in sting operation who was at most a delivery man sent at the last minute to pickup drugs from undercover agents, which variance was required even after applying Guidelines minimal role adjustment for a first-time offender who presented a low risk of recidivism); *U.S. v. Ledezma*, 2007 4143225 (E.D. Wis. Nov 19, 2007) (Court granted a departure based on substantial assistance. Court further varied downward to one day imprisonment based on no criminal history, minimal role in the crime, and just punishment. The Court noted that the defendant was a positive role model in the community by telling young girls her story and how not to fall victim to similar circumstances.); *U.S. v. Szanto*, 2007 WL 3374399 (N.D. Ill. Nov. 8, 2007) (District court granted a downward variance on several factors. First the defendant was a minimal participant in the crime since he believed he was transporting Viagra not Ecstasy. Second, financial hardships were a motivating factor but during a two year pretrial detention, the defendant had mastered the English language making him more employable. Finally, he was a Canadian citizen and agreed to be deported. Court varied by 12 months and sentenced him to 24 months, time served.); *U.S. v. Greer*, 375 F. Supp. 2d 790 (E.D. Wis. 2005) (no imprisonment in drug case appropriate partly because defendant was a girlfriend playing peripheral role in drug crime, noting that too often women are punished for remaining with boyfriend or spouse engaged in drug activity, who is typically the father of her children).

#### **14F. Defendant had limited, though not a minor, role in offense**

See *U.S. v. Pauley*, 2007 WL 4555520 (4th Cir. Dec. 20, 2007) (36-month downward variance warranted in child pornography case where defendant was less culpable, deeply remorseful, and affected by collateral consequences); *U.S. v. Gomez*, 215 F. App'x 200 (4th Cir. 2007) (upholding slight reduction of 20 months from 360-month minimum guidelines range for defendant whose role was “a little less pronounced, a little less significant” than heavier players in drug conspiracy); *U.S. v. Garrison*, 560 F.Supp.2d 83 (D. Mass. 2008) (judge compares other defendants caught up in same federal-local drug enforcement sweep that led to individual charges against defendant before imposing 30 month sentence rather than 77-96 month guideline term; court notes that charging Garrison separately obscured his very minor role in any larger distribution ring and made it difficult for the court to take that into account); *U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (time served imposed for first-time offender whose possession of sawed off shotgun apparently prompted by economic pressures, was minor in comparison to co-actor who engaged in a number of firearm sales); *U.S. v. Thomas*, 595 F.Supp.2d 949 (E.D.Wis.,2009) (defendant's minor role in attempted cocaine distribution, combined with problems posed by quantity driven guidelines, and defendant's other personal qualities and rehabilitative efforts justified 5 months in department of corrections followed by 5 months of home confinement, rather than guideline term of 27-33 months); *U.S. v. Crawford*, 2007 WL 2436746 (E.D. Wis. Aug. 22, 2007) (District court granted a variance from the Guidelines due to the defendant's family situation with five children and the impact incarceration would have on the children. Furthermore, the defendant was forced to participate in the conspiracy and was severely beaten when she tried to withdraw. Court sentenced her to time served and placed her on four years probation.); *U.S. v. Venable*, 281 Fed. Appx. 204 (4<sup>th</sup> Cir. 2008) (unpub) (district court granted variance sentence of 120 months for distributing crack in part due to Venable's intermediate role, and the age of his first career offender predicate offense).

#### **15. Defendant's intent or motive**

##### **15A. Lack of knowledge, criminal intent, or mens rea**

See *U.S. v. Bariiek*, 2005 WL 2334682 (E.D.Va. Sept. 23, 2005) (unpub.) (advisory range of 37-46 months was greater than necessary to punish defendant convicted of operating unlicensed money trading business for sending money abroad to Afghanistan and court imposed 18 months in part because defendant lacked knowledge of regulation, an element which Congress expressly omitted from the statute, 18 U.S.C. Section 1960).

##### **15B. Motive not venal**

*U.S. v. Szanto*, 2007 WL 3374399 (N.D. Ill. Nov. 8, 2007) (District court granted a downward variance on several factors. First the defendant was a minimal participant in the crime since he believed he was transporting Viagra not Ecstasy. Second, financial hardships were a motivating factor but during a two year pretrial detention, the defendant had mastered the English language making him more employable. Finally, he was a Canadian citizen and agreed

to be deported. Court varied by 12 months and sentenced him to 24 months, time served.); *U.S. v. Frappier*, 377 F. Supp. 2d 220 (D.Me. 2005) (imposing sentence of 20 months where guidelines recommended 41 to 51 months for being felon in possession of firearms based in part on conclusion that defendant did not possess weapons for any illegal purpose but rather his sole motivation was to teach sons how to use a rifle and he never committed any crime with the weapons); *U.S. v. Ranum*, 353 F. Supp. 2d 984, (E.D.Wis.,2005) (below guideline sentence warranted for bank officer convicted of defrauding bank, in part because defendant did not act for personal gain or for improper personal gain of another and he made attempts to protect the bank. “Under § 3553(a) and the decisions of the Supreme Court, a sentencing court may properly consider a defendant's motive. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (“the defendant's motive for committing the offense is one important factor”); *U.S. v. Rothberg*, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (downward departure proper where defendant, in copyright infringement case, did not act out of a desire to profit or benefit financially thus removing case from heartland of the guideline); *U.S. v. Samuels*, 2009 WL 875320 (S.D. N.Y. April 2, 2009) (time served imposed rather than guideline range of 70-87 months for young defendant from abused background who was embarrassed to sell drugs and did not tell her family about drug sales she performed to support them); *U.S. v. Handy*, 2008 WL 3049899 (E.D.N.Y. Aug. 4, 2008) (court imposes 30 months rather than guideline range of 37-46 months on 20-year-old found in possession of a firearm he did not know was stolen, and which he believed to be inoperable, in an environment where finding a gun on the street was like finding cash); *U.S. v. Collado*, 2008 WL 2329275 (S.D.N.Y. June 5, 2008) (defendant who had done a great deal to turn his life around in 3 years since release from prison receives time-served for being a felon-in-possession of ammo he found in a used van he purchased for his moving business, which he did not turn in to authorities because he feared his possession would be suspect); *U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (time served imposed where possession of a sawed-off shotgun appeared to have an economic motivation due to unemployment by a first-time offender who had throughout his fifteen year marriage worked at all kinds of jobs to get education for his six children, even when they lived in homeless shelters).

**15C. Defendant’s conduct did not threaten the harm sought to be prevented by the law proscribing the offense – perceived lesser harm**

The Guidelines recognize that a departure may be permissible where a defendant commits a crime “to avoid a perceived greater harm . . . [where] circumstances significantly diminish society’s interest in punishing the conduct,” or where “conduct may not cause or threaten the harm or evil sought to be prevented by the law.” USSG § 5K2.11. See *U.S. v. Clark*, 128 F.3d 122 (2d Cir. 1997) (district court may depart in felon-in-possession case of defendant who bought gun as a gift for his brother and did not engage in activity Congress meant to proscribe); *U.S. v. Bayne*, 103 F. App’x 710 (4th Cir. 2004) (four-level departure upheld for defendant’s possession of sawed off shot gun, who had lent it to a friend who returned it sawed and no evidence existed that defendant possessed it for any unlawful purpose.); *U.S. v. White Buffalo*, 10 F.3d 575 (8th Cir. 1993) (downward departure proper for defendant who possessed sawed-off shotgun to shoot animals that killed his chickens); *U.S. v. Bernal*, 90 F.3d 465 (11th Cir.1996) (defendant convicted of exporting primates to Mexico received proper departure from 24 months to 70 days because he did not threaten the animals – the harm Congress sought to

prevent – but rather loved the animals and wanted to propagate them in Mexico); *U.S. v. VanLeer*, 270 F. Supp. 2d 1318 (D. Utah 2003) (felon-in-possession granted departure from 36 months to 18 months because he sold the gun to dispose of it).

#### **15D. Defendant acted with less culpable intent**

*U.S. v. Johnson*, 273 Fed. Appx. 95 (2<sup>nd</sup> Cir. 2008) (unpub) (trial judge departed one level to impose 30 years rather than life against 19 year old convicted of Hobbs Act conspiracy that included substantive count of felony murder finding that the homicide as reckless rather than intentional. After a *Batson* reversal, a different judge imposed life sentence focusing on the victim's death without clearly considering whether defendant's intent mitigated the offense. Case remanded because the scant justification for the higher sentence suggested that the voice of the deceased lurking before the District Judge may have silenced any consideration of the individual characteristics of the appellant and his crime).

#### **16. Victim's conduct substantially provoked the offense behavior**

Victim provocation may be grounds for a departure, although for crimes committed after October 27, 2003, courts are advised to consider the proportionality and reasonableness of the defendant's response to the provocation pursuant to USSG § 5K2.10. See *Koon v. U.S.*, 518 U.S. 81 (1996) (district court acted within its discretion to depart five levels downward based on finding that suspect's wrongful conduct contributed significantly to provoking officers' use of excessive force); *U.S. v. Harris*, 293 F.3d 863 (5th Cir. 2002) (police chief convicted of using excessive force during course of arrest could receive departure based on victim's provocation, but 85% departure too great); *U.S. v. LaVallee*, 439 F.3d 670 (10th Cir. 2006) (prison guard convicted of conspiring to violate inmates rights by assaulting him granted downward departure for victim provocation and aberrant conduct where victim inmate had made sexually explicit remarks to a female officer and threatened defendant ); *U.S. v. DeJesus*, 75 F. Supp. 2d 141 (S.D.N.Y. 1999) (departure from offense level 15 to 11 granted to defendant, a "warlord" of a Bronx gang, whose pregnant sister was punched by victim, where defendant's retaliatory assault was "not incomprehensible" in light of victim's "vile and repugnant" conduct).

#### **17. Government responsibility for criminal behavior**

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

#### **18. Alien who reentered for honorable motive or to prevent perceived greater harm**

*U.S. v. Alba*, 38 F. App'x 707 (3d Cir. 2002) (5 level departure granted where defendant illegally reentered country to visit his 16 year old son); *U.S. v. Bernal-Aveja*, 414 F.3d 625 (6th Cir. 2005) (*Booker* remand granted in illegal reentry case where district court expressed sympathy for defendant who wanted to be near his children in Ohio); *U.S. v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996) (district court did not plainly err by departing under lesser harms

provisions of §5K2.11 where defendant illegally reentered country in the belief his girlfriend was in grave danger of physical harm and wanted to obtain surgery for her, case remanded for explanation of extent of departure); *U.S. v. Galvez-Barrrios*, 355 F. Supp. 2d 958 (E.D.Wis.2005) (three level reduction granted based on defendant's honorable motive for re-entering United States); *U.S. v. Singh*, 224 F. Supp. 2d 962 (E.D.Pa. 2002) (departure granted from 37 months to 21 months where defendant illegally reentered in order to visit his dying mother and only intended to stay in country one week –as evidenced by airline ticket); *U.S. v. Ayala-Garcia*, 2008 WL 2566858 (E.D.Wis. 2008) (the familial and cultural motivations underlying defendant's reentry, combined with positive character developments reflected in his educational and vocational endeavors warranted 42 month sentence, rather than a guideline range of 46-57 months).

## **19. Defendant's Behavior**

### **19A. Defendant's conduct was aberrant**

The Sentencing Reform Act, 28 U.S.C. § 994(j) directed the Sentencing Commission to consider probation for first offenders not convicted of serious offenses. It ordered the Commission to “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 violence or an otherwise serious offense...” *Id.*

In 2000, the Sentencing Commission imposed limitations on what is to be considered aberrant behavior. U.S.S.G. § 5K2.20. Departure for aberrant behavior is authorized for “a single criminal occurrence or single criminal transaction (which is somewhat broader than a single act) and is limited to offenses (A) committed without significant planning; (B) of limited duration; and (C) and that represent a marked deviation by the defendant from an otherwise law-abiding life.” §5K2.20. Departure is precluded if (1) the offense involved serious bodily injury or death, (2) use or discharge of a firearm, (3) a “serious drug trafficking offense” or (4) the defendant has more than one criminal history point. §5K2.20(c). Congress directly amended §5K2.0, effective April 30, 2003, with the Feeney Amendment to the PROTECT Act, eliminating departure in cases involving kidnapping of minors, sex trafficking of children, sexual abuse, and sexual exploitation of children committed on or after that date. Effective October 27, 2003, departure was also disallowed for “serious drug trafficking offenses, including any offense with a statutory mandatory minimum regardless of whether the defendant meets the safety valve at § 5C1.2, 18 U.S.C. § 3553(f). *See* § 5K2.20, comment. (n.1) If the defendant has “any other significant prior criminal behavior” regardless of whether it resulted in conviction. §5K2.20, comment. (n.1). A fraud scheme is generally ineligible for an aberrant behavior departure. § 5K2.20, comment. (n.2). After *Booker* and *Rita*, these restrictions are advisory only. District courts have discretion to consider the individual circumstances of the defendant as part of their analysis under § 3553(a) and under *Kimbrough* and *Spears*, to reject the guidelines on policy grounds.

*U.S. v. Howe*, 543 F.3d 128 (3<sup>rd</sup> Cir. 2008) (affirming probationary sentence and temporary home confinement for wire fraud despite an 18-24 month guideline range, where

appellate court construed district court to have termed the offense an “isolated mistake” in the context of Howe’s otherwise long and upstanding life, despite the government’s assertion Howe waged a two-year campaign to cover up a six-figure fraud on the Air Force); *U.S. v. Castellanos*, 355 F.3d 56, 59 (2d Cir. 2003) (“Under the Guidelines, absence or presence of spontaneity *alone* never determines whether criminal conduct is aberrant behavior.”); *U.S. v. Amor*, 24 F.3d 432, 438-39 (2d Cir. 1994) (downward departure warranted because firearms offense committed one day after defendant’s car shot, defendant threatened, and feared potential violence by union in impending strike); *U.S. v. Carson*, 560 F.3d 566 (6<sup>th</sup> Cir. 2009) (affirming a two-level reduction for aberrant behavior resulting in a 15-21 month guideline range, from which the judge further varied to impose 3 years probation for conspiring to obstruct justice, where the district court stressed that the offense itself happened quickly and spontaneously, that the defendant policeman had no significant record of citizen complaints, and stressed the significant restrictions imposed on his probation); *U.S. v. Paul*, 239 F.App’x 353 (9th Cir. 2007) (defendant’s 16-month sentence, the top end of the guideline range for unlawful receipt of federal funding, was unreasonably high because defendant was a first-time offender, returned the funds, and displayed remorse); *U.S. v. Leyva-Franco*, 162 F. App’x 751 (9th Cir. 2006) (affirming four level departure for aberrant behavior where evidence showed defendant’s drug smuggling was single criminal event, with no significant planning, of limited duration, and representing marked deviation from otherwise law abiding life.); *U.S. v. LaVallee*, 439 F.3d 670 (10th Cir. 2006) (affirming downward departure for defendant, a prison guard, convicted of conspiracy to violate prisoner’s rights by assaulting him, on basis of aberrant behavior and victim provocation where prisoner had made sexually explicit remarks to female officer and threatened defendant immediately before the assault); see also *U.S. v. Garcia*, 182 F.3d 1165, 1176 (10th Cir. 1999).

*U.S. v. Houchin*, 2007 WL 3374595 (E.D. Ark. Nov. 6, 2007) (Court granted a departure or in the alternative a variance based on the officer’s exemplary record, aberrant conduct, and his involvement in the community.); *U.S. v Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005) (granting departure to time served from 20-30 month range due to aberrant conduct involving defendant, age 40 with no prior record, convicted of possession of shortened shotgun who had shortened barrel length for safety reasons to what he considered a legal length and only sold it to cousin out of financial need years later, and other purposes of sentencing satisfied); *U.S. v. Hued*, 338 F. Supp. 2d 453 (S.D.N.Y. 2004) (eleven level aberrant behavior departure granted (from level 22) to defendant convicted of allowing co-defendant boyfriend to use her apartment for drug operation because crime was essentially one of omission in that defendant failed to stop the conduct once she discovered it, conduct was of limited duration, representing marked deviation from law abiding life, defendant had been valuable and trusted employee and a giving member of community who had uniquely harmful relationship with boyfriend); *U.S. v. Booe*, 252 F. Supp. 2d 584 (E.D. Tenn. 2003) (nine level departure for aberrant behavior granted in bank robbery case with no violence and little planning; defendant was a twenty-two year old, black single mother of young son, who had no criminal record, suffered severe depression and was motivated by guilt over child’s well being); *U.S. v. Hancock*, 95 F. Supp. 2d 280 (E.D.Pa. 2000) (downward departure warranted in felon in possession of firearm case on basis of aberrational conduct and totality of circumstances (including employment history and remorse) where defendant only happened upon weapon and briefly possessed it in order to dispose of it); *U.S. v. Iaconetti*, 59 F. Supp. 2d 139 (D. Mass. 1999) (eleven level aberrant behavior departure granted

to defendant convicted of drug conspiracy, who had no prior criminal record or drug involvement, suffered from psychological disorder (gambling compulsion) and had tried unsuccessfully to pay off gambling debts through lawful means before succumbing to loan shark's offer to wipe out debts through drug deal).

### **19B. Aberrant behavior that does not qualify for downward departure**

*U.S. v. Germosen*, 473 F. Supp. 2d 221 (D. Mass. 2007) (sentence of 2 years probation with 6 months home detention justified where guideline range was 37-46 months for conspiracy involving heroin importation; defendant qualified for safety valve and immediately cooperated but, because he was a "mule" could not offer much assistance to government and it declined to move for a downward departure; he did not qualify for aberrant behavior departure under §5K2.20 because the offense was a "serious drug offense"; defendant was hardworking, model citizen, supported his children, participated in youth groups to eradicate racial violence and overcame difficult circumstances of his own youth.)

### **20. Defendant is law abiding citizen who just did a dumb thing**

*U.S. v. Howe*, 543 F.3d 128 (3<sup>rd</sup> Cir. 2008) (affirming probationary sentence and temporary home confinement for wire fraud despite an 18-24 month guideline range, where appellate court construed district court to have termed the offense an "isolated mistake" in the context of Howe's otherwise long and entirely upstanding life); *U.S. v. Hadash*, 408 F.3d 1080, 1084 (8th Cir. 2005) (six level downward departure upheld where district court concluded that defendant was "law abiding citizen, who [did] an incredibly dumb thing" and "was not the type of defendant the guidelines section was designed to punish"); *U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (time served imposed for possessing a sawed-off shotgun, which appeared to have been prompted by economic pressures of unemployment by a first-time offender who had throughout his 15-year marriage worked at lots of jobs to get education for his six children, even when they lived in homeless shelters, and whose personal investment in his children's care was attested to by a school teacher and a pediatrician).

### **21. Duress or Coercion**

U.S.S.G. §5K2.12. *U.S. v. Amor*, 24 F.3d 432, 438-39 (2d Cir. 1994) (downward departure proper because defendant committed firearms offense one day after his car was shot up, he was personally threatened, and he feared potential violence by union in impending strike); *U.S. v. McClelland*, 72 F.3d 717, 725 (9th Cir. 1995) (downward departure warranted based on imperfect entrapment because government engaged in aggressive encouragement, accepted deferred payment, and pushed defendant when he expressed hesitation.); *U.S. v. Nava-Sotelo*, 232 F. Supp. 2d 1269 (D.N.M. 2002) (rev'd on other grounds, 354 F.3d 1202 (10th Cir. 2003) (defendant convicted of kidnaping, assault, and using firearm during crime of violence in attempt to help older brother escape from prison granted six level departure partly due to manipulation of defendant by his brother who threatened suicide if forced to serve full sentence which "amounted to incomplete duress." ).

*U.S. v. Jurado-Lopez*, 338 F. Supp. 2d 246 (D. Mass. 2004) (twelve level downward departure warranted for coercion and duress where defendant, a “mule” in heroin trafficking conspiracy, was locked in a room and forced to insert heroin pellets inside her body by men guarding her, her husband and parents had been shot in Guatemala); *U.S. v. Delgado*, 994 F. Supp. 143 (E.D.N.Y. 1998) (three level downward departure for drug courier who acted under duress to pay off creditor, combined with aberrant behavior, defendant’s fragility, and exceptionally difficult life).

## **22. Attempts by defendant to mitigate the harm**

### **22A. Extraordinary restitution**

*U.S. v. Hairston*, 96 F.3d 102, 108 (4th Cir. 1996) (restitution that cannot be characterized as typical or usual can provide a basis for a departure); *U.S. v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999) (affirming departure on the basis of extraordinary restitution because “[w]e have previously held that cases can fall outside the heartland when there are extraordinary efforts at restitution”); *U.S. v. Kim*, 364 F.3d 1235, 1244-1245 (11th Cir. 2004) (downward departure from 24 months to probation and home detention was justified after guilty plea to conspiracy to defraud the U.S. based on defendants’ (husband and wife) payment of \$280,000 restitution by liquidating 75% of their life savings and voluntarily undertaking enormous debt to pay restitution); *U.S. v. Robson*, 2007 WL4510259 (N.D. Ohio Dec. 18, 2007) (The district court varied because before the defendant was even charged, he had paid back all of the restitution.). *See also U.S. v Curry*, 523 F.3d 436 (4<sup>th</sup> Cir. 2008) (judge varied five months below the guideline range for defendant’s mail fraud and wire fraud convictions to reflect his attempted restitution).

### **22B. Voluntary disclosure of crime**

*U.S. v. DeMonte*, 25 F.3d 343 (6th Cir. 1994) (in computer fraud case, departure proper on ground that defendant admitted to crimes about which government had no knowledge, even though plea bargain required his cooperation); *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possessing firearm by a prohibited person, three level departure affirmed where court considered multiple factors, including that defendant voluntarily disclosed false statements he made to obtain firearm to pretrial services officer despite the inevitable discovery by FBI).

*U.S. v. Rivera*, 262 F. Supp. 2d 313 (S.D.N.Y. 2003) (departure granted in part due to defendant’s voluntary disclosure of participation in 6 additional bank robberies soon after his arrest for 2 robberies and where there was no evidence that government was about to charge him with additional robberies or that defendant believed additional charges were forthcoming);

### **22C. Voluntary cessation of crime before discovery**

See *Gall v. U.S.*, 128 S. Ct. 586, 593, 599, 600 (2007) (see “Introduction” above for discussion of defendant’s voluntary withdrawal from the conspiracy, justifying sentence of probation); *U.S. v. Workman*, 80 F.3d 688, 701 (2d Cir. 1996) (two level departure upheld where defendant cut ties with a narcotics conspiracy and enlisted in the Army before he was indicted); *U.S. v. Numemacher*, 362 F.3d 682 (10th Cir. 2004) (downward departure permissible where defendant possessed and distributed child porn on his website for a brief time but destroyed it before he knew of the investigation and defendant cooperated with FBI).

## **22D. Extraordinary demonstration of acceptance of responsibility**

The advisory guidelines prohibit departures based on acceptance of responsibility for crimes committed on or after October 27, 2003. See § 5K2.0(d)(2). Under the advisory guidelines created by *Booker*, this does not prohibit courts from fashioning sentences relying on §3553(a) to fit the circumstances of the case.

*U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000) (affirming two level downward departure under §5K2.0 for acceptance of responsibility where defendant went to trial and was not eligible for adjustment for acceptance under §3E1.1, based on his demonstrated non-heartland acceptance by early and consistent offers to the government to determine legality of his business); *U.S. v. Kim*, 364 F.3d 1235 (11th Cir. 2004) (defendants’ conduct demonstrated sincere remorse and acceptance of responsibility by liquidating 75% of their life savings and voluntarily undertaking enormous debt in order to pay \$280,000 restitution after pleading guilty to defrauding the U.S., and was extraordinary enough to remove case from heartland and justify downward departure from 24 months to probation and home detention).

*U.S. v. Swift*, 2008 WL 2906884 (N.D.Ind. July 28, 2008) (court departed 10 months from the guideline range to impose the mandatory minimum, citing, among other things, defendants acceptance of responsibility, lack of youthful guidance, and reasoning that the additional 10 months would serve no deterrent or retributive purpose to the defendant, nor make any large difference in terms of deterrence); *U.S. v. Finnigin*, 2007 WL 4201167 (D.Kan. Nov. 27, 2007) (downward variance of 12 months was warranted for “defendant’s voluntary conduct in contacting the police, disclosing that he was wanted for robbery, and turning himself in and accepting responsibility for the robbery”); *U.S. v. Milne*, 384 F. Supp. 2d 1309 (E.D.Wis.2005) (acceptance of responsibility adjustment and 18-24 month range failed to fully account for defendant's voluntarily informing bank of his misconduct and significant early efforts to repay before he was implicated or charged, explaining “courts may grant additional consideration to defendants who demonstrate acceptance beyond that necessary to obtain a two or three level reduction under § 3E1.1. This is so because such conduct bears directly on their character, § 3553(a)(1), and on how severe a sentence is necessary to provide deterrence and punishment, § 3553(a)(2).”); *U.S. v. Smith*, 311 F. Supp. 2d 801 (E.D. Wis. 2004) (two level departure granted, in addition to acceptance of responsibility reduction, where defendant demonstrated self-improvement, fundamental change in attitude, and withdrawal from drug distribution lifestyle in

three years before arrest and before learning of investigation, and such post-offense, pre-arrest rehabilitative efforts had not been taken into account in formulating guideline range); *U.S. v. Rothberg*, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (where defendant pled guilty to copyright infringement without plea bargain and where, despite the government's refusal to file motion for downward departure under §5K1.1, defendant continued to cooperate with the government and put himself at significant risk and without a plea agreement, nothing prevented the government from using the information he provided against him at sentencing; defendant's efforts showed acceptance of responsibility that is outside the heartland of §3E1.1, which along with other factors warranted 2-level departure); *U.S. v. Nguyen*, 212 F. Supp. 2d 1008 (N.D. Iowa 2002) (granting three level departure for extraordinary acceptance of responsibility under § 5K2.0 where defendant entered an Alford plea to possessing 45 grams of crack and then testified in his sister's trial that he put them in her handbag and she was acquitted); *U.S. v. Stewart*, 154 F. Supp. 2d 1336 (E.D. Tenn. 2001) (where defendant pled guilty to possession of several ounces of cocaine, eight-level downward departure granted for extraordinary acceptance of responsibility where defendant continued to plead guilty though co-defendant's suppression motion was sustained which could have resulted in dismissal of defendant's case).

## **22E. Extreme remorse**

*U.S. v. Howe*, 543 F.3d 128 (3d Cir. 2008) (district court judge did not clearly err in partially basing probationary sentence with home confinement for wire fraud on a finding of "heartfelt remorse" in Howe's allocution, even though Howe disputed a fraudulent intent at trial and pursued a defense of blaming a third party; remorse need not be extraordinary to justify consideration as a §3553(a) factor); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (court imposed 12 months and a day rather than the 46-57-month guideline range for child porn possession by a defendant in part based on finding of "credible, if well-coached" remorse by defendant who also manifested self-motivated rehabilitation by seeking therapeutic help before his arrest); *U.S. v. Monaco*, 23 F.3d 793 (3d Cir.1994) (where defendant suffered "a great deal more anguish and remorse than is typical" by involving son in criminal scheme, downward departure was proper); *U.S. v. Pauley*, 2007 WL 4555520 (4th Cir. Dec. 20, 2007) (36-month downward variance warranted in child pornography case where defendant was less culpable, deeply remorseful, and affected by collateral consequences); *U.S. v. Fagan*, 162 F.3d 1280, 1284-85 (10th Cir. 1998) (explaining that despite the fact that defendant's remorse is taken into account under § 3E1.1 acceptance of responsibility guideline, court may depart where defendant showed remorse "to an exceptional degree" because guidelines do not expressly forbid the departure, under rationale of *Koon*); *see also U.S. v. Jaroszenko*, 92 F.3d 486 (7th Cir. 1996).

## **23. Defendant's Personal History**

### **23A. Lengthy period of time since commencement of offense**

*U.S. v. Frappier*, 377 F. Supp. 2d 220, 226 (D.Me. 2005) (defendant convicted of illegally possessing two firearms, court found that eight year period without incident between his purchase of firearm and arrest “...substantiates his contention that his possession of the shotgun was benign and deserving of a less stringent, not more stringent sentence.” Court further concluded that §3553(a)’s directive to tailor the sentence to the individual outweighs guideline’s policies underlying U.S.S.G. §4A1.1’s incorporation of relevant conduct in U.S.S.G. §1B1.3(b)(1) in determining commencement of the offense).

### **23B. Brief period of time previously served in prison**

*U.S. v. Collington*, 461 F.3d 805 (6th Cir. 2006) (upholding sentence of 120 months where guideline range was 188 -235 months in part because guidelines did not reflect defendant’s actual criminal history, that he had only previously served 7 months in prison before the offenses and was an ideal candidate for reform, and that “this incident was the first time that this quantity of drugs and guns had been found in [his] possession.”); *U.S. v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (court rejects career offender guideline range of 30 years to life to impose statutory minimum 120 months for a defendant whose remote and non-violent predicate convictions were cumulatively penalized by much less than a year in prison)..

### **23C. Defendant’s otherwise outstanding character**

*U.S. v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007) (affirming district court’s imposition of 70 month sentence for defendant convicted of receipt of child pornography, where guideline range was 121 to 151 months in part because record demonstrated defendant was a kind, caring individual, who enjoyed broad support of family, friends, colleagues, and teachers. “[T]he guidelines failed to consider defendant’s otherwise outstanding character, as depicted in the many supportive letters, ...while §3553(a)(1) requires the court to consider the character of the defendant, the guidelines account only for criminal history. In cases where the defendant led an otherwise praiseworthy life, the court should consider a sentence below the advisory range,” citing *U.S. v. Page*, 2005 U.S. Dist. LEXIS 19152, at \*12 (E.D. Wis. Aug. 25, 2005) and *U.S. v. Ranum*, 353 F. Supp. 2d 984, 986 (E.D. Wis. 2005); *U.S. v. Shy*, 538 F.3d 933 (8<sup>th</sup> Cir. 2008) (Defendant’s post-offense, pre-indictment rehabilitation, including position as contributing member of society through her “extraordinary work with persons with disabilities” justified probation for possession of pseudoephedrine with knowledge that it would be used to produce methamphetamine where guideline range was 37 - 46 months).

### **23D. Excellent employment history**

*Gall v. U.S.*, 128 S. Ct. 586, 592, 599 (2007) (see discussion in Introduction above concerning defendant’s employment history and the start of his own business); *U.S. v. Baker*, 445 F.3d 987, 992 (7th Cir. 2006) (affirming sentence of 78 months for distributing child pornography, where guidelines called for 108-135 months, based on defendant’s lack of criminal

history, relatively young age, religious background, and history of employment and higher education which coincide with sentencing factors set forth in § 3553(a); *U.S. v. Chase*, 560 F.3d 828 (8<sup>th</sup> Cir. 2009) (defendant's excellent employment record could support downward variance); *U.S. v. Big Crow*, 898 F.2d 1326, 1331-32 (8<sup>th</sup> Cir. 1990) (upholding downward departure for 23 year old defendant convicted of assault resulting in serious bodily injury, based on excellent employment record since age 17 despite an unemployment rate of 72% on Indian reservation and defendant's efforts to lead a decent life on the reservation); *United States v. Whitehead*, 532 F.3d 991 (9<sup>th</sup> Cir. 2008)(upholding probation where guidelines range was 41-51 months for creating counterfeit access device where district court had found that defendant was remorseful, was employed, supported his daughter and no longer posed a threat to community); *United States v. Munoz-Nava*, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008)(upheld sentence of one year and one day as reasonable for defendant convicted of possession with intent to distribute 100 grams of heroin with guideline range of 46-57 months where district court determined guideline range was greater than necessary to meet goals of 3553(a)(2) and focused on his personal history and characteristics, including defendant's long work record, community support, lack of criminal record, and caregiver and sole supporter of his young son and elderly parents, and low recidivism risk); *U.S. v. Jones*, 158 F.3d 492 (10<sup>th</sup> Cir. 1998) (3-level downward departure affirmed for defendant convicted of possessing firearm by prohibited person where court considered defendant's "long impressive work history ...where good jobs are scarce" along with other factors); *U.S. v. Lamb*, 214 F. App'x 908 (11<sup>th</sup> Cir. 2007) (affirming 181 months for drug and firearm offenses despite guidelines minimum of 420 months, in light of defendant's employment at Humane Society and youth when he committed crimes that triggered career offender status); *U.S. v. Hodges*, 2009 WL 366231 (E.D. N.Y., Feb. 12, 2009) (non-guideline sentence proper for 43-year-old defendant who suffered from heroin addiction, yet who established his own company after serving ten year sentence for a non-violent offense and supported his family for another ten years until his relapse into drug abuse led to the collapse of his business); *U.S. v. Collado*, 2008 WL 2329275 (S.D.N.Y. 2008) (court imposed time served on felon-in-possession of ammo defendant had found in a used van he bought for his new moving business, and facts bore out his claim of turning his life around since his release from prison three years earlier, working many jobs and starting his own company with a law-abiding, devoted girlfriend).

**23E. Defendant's good deeds and past integrity; exceptional charitable, community, or military service**

U.S.S.G. §5H1.11 treats "[m]ilitary, civic, charitable, or public service; employment related contributions; and similar prior good works" as discouraged departure grounds. In light of *Booker*, this restriction is advisory only and does not preclude below-guideline sentences that reflect the §3553(a) factors.

*U.S. v. Thurston*, 544 F.3d 22 (1<sup>st</sup> Cir. 2008) (after *Gall*, court affirmed district court's choice of 3 months rather than 60 month guideline term for Medicare fraud conspiracy of more

than \$5 million, citing, among other things, Thurston’s charitable work, community service, generosity with his time, and the spiritual support and assistance he provided others); *U.S. v. D’Amico*, 496 F.3d 95 (1st Cir. 2007) (defendant’s charitable efforts and contributions to the community warranted a downward variance, but sentence was vacated and remanded because the extent of the 88% variance was too substantial) *but see Gall v. U.S.*, 128 S. Ct. 586 (2007) (appellate courts can consider the degree of the variance, but cannot use a “rigid mathematical formula” to determine the strength of the justifications required); *U.S. v. Canova*, 412 F.3d 331, 358-59 (2d Cir. 2005) (affirming 6-level downward departure based on extraordinary public service and good works where defendant, more than twenty years before sentencing, served in Marine Corps’ active reserves and as a volunteer firefighter, and more recently had acted as Good Samaritan demonstrating his commitment to helping persons in distress was an instinctive part of his character.); *U.S. v. Howe*, 543 F.3d 128 (3d Cir. 2008) (affirming sentence of 2 years probation with 3 months home confinement for wire fraud despite a guideline range of 18-24 months. The district court did not clearly error in deeming the offense – characterized by the government as a two-year campaign to cover up a six-figure fraud on the Air Force – an “isolated mistake” in the context of Howe’s entire life, which was otherwise upstanding and included military service, devotion to family, community, and church); *U.S. v. Cooper*, 394 F.3d 172 (3d Cir. 2005) (affirming 4-level departure to probation in securities fraud and tax evasion case based on defendant’s good works where guidelines called for 14-21 months; defendant did not simply donate money to charity but organized and ran youth football team in depressed area and helped members attend better schools and go to college which qualified as exceptional because they entail “hands on personal sacrifices which have a dramatic and positive impact on the lives of others.”); see also *U.S. v. Serafini*, 233 F.3d 758 (3d Cir. 2000); *U.S. v. Woods*, 159 F.3d 1132 (8th Cir. 1998) (defendant’s exceptional charitable efforts in taking in two troubled young women, financing their private education, and assisting an elderly friend’s move from a nursing home justified departure); *U.S. v. Carson*, 560 F.3d 566 (6<sup>th</sup> Cir. 2009) (affirming two-level downward departure based on defendant’s aberrant behavior and sentence below 15-21 month guideline range to sentence of three years’ probation for conspiracy to obstruct justice, where district court’s analysis of §3553(a) factors emphasized offense was quick and spontaneous, defendant was a policeman with no significant history of citizen complaints against him, and probation is a significant sentence when considering the conditions and obligations.); *U.S. v. Chase*, 560 F.3d 828 (8<sup>th</sup> Cir. 2009) (defendant’s prior military service, advanced age, and other issues could support downward variance even if it didn’t support formal departure); *U.S. v. Jones*, 158 F.3d 492 (10th Cir. 1998) (defendant’s community service was properly relied on as one of the factors supporting departure for possessing firearm by prohibited person and providing false information to obtain firearm; court reviewed twelve letters written on defendant’s behalf detailing his good works).

*U.S. v. Thomas*, 595 F.Supp.2d 949 (E.D.Wis. 2009) (considering defendant’s age, limited criminal history, and personal characteristics including military service, and his successful efforts to get his life on track since the offense, combined with his minor role in the attempted distribution of cocaine, and the guidelines’ misguided focus on drug weight, the

district court sentenced the defendant to split sentence of 5 months custody with 5 months home detention and three years supervised release, despite guideline recommendation of 27-33 months imprisonment); *U.S. v. Smith*, 2009 WL 249714 (N.D. Ohio 2009) (“Smith has a background of meaningful contributions to his community and a lack of any previous criminal involvement.”); *U.S. v. Ayala-Garcia*, 2008 WL 2566858 (E.D.Wis.,2008) (In light of defendant’s positive character developments as reflected through his educational and vocational endeavors, combined with a recognition of the cultural and familial motivations behind his family’s crime of re-entry, district court imposed 42-month sentence where the guideline range was 46-57 months); *U.S. v. Davis*, 2008 WL 2329290 (S.D.N.Y. 2008) (time served imposed for possessing a sawed-off shotgun, which appeared to have been obtained prompted by economic pressures of unemployment by a first-time offender who had throughout his 15 year marriage worked at all kinds of jobs to get education for his six children, even when they lived in homeless shelters, and whose personal investment in caring for his children was attested to by a school teacher and a pediatrician); *U.S. v. Baird*, 2008 WL 151258 (D. Neb. Jan. 11, 2008) (The District Court considered the defendant’s 15 year military career, low risk of recidivism, lack of criminal history, and the conduct occurred several years ago as factors for a variance. Court also considered the other punishments that the defendant has received such as discharge from the military, a felony conviction, sex offender registration, and the stigma of being a sex offender. The court also noted that possession of child pornography is the least culpable of the exploitation offenses.); *U.S. v. Ledezma*, 2007 4143225 (E.D. Wis. Nov 19, 2007) (Court granted a departure based on substantial assistance. Court further varied downward to one day imprisonment based on no criminal history, minimal role in the crime, and just punishment. The Court noted that the defendant was a positive role model in the community by telling young girls her story and how not to fall victim to similar circumstances.); *U.S. v. Greene*, 249 F. Supp. 2d 262 (SDNY 2003) (7-level departure granted in tax case based on defendant’s extraordinary charitable good works in devoting his life to orphaned children while a salaried employee, and his extraordinary family circumstances); *U.S. v. Bennett*, 9 F. Supp. 2d 513 (E.D.Pa. 1998) (where defendant’s civic and charitable deeds were extraordinary, together with other grounds, departure from 232 to 92 months was warranted; defendant’s substantial contributions in areas of substance abuse, children and youth, and juvenile justice were well documented and well recognized).

### **23F. Disadvantaged childhood, victimization, lack of guidance as a youth**

USSG. §§ 5H1.12 and 5K2.0 (d)(1) treat lack of guidance as a youth and “circumstances indicating a disadvantaged upbringing” as forbidden departure grounds. *Booker* and its progeny free district courts to consider these factors as part of their analysis under §3553(a).

*U.S. v. McBride*, 2007 WL 4555205 (11th Cir. Dec. 28, 2007) (finding non-guideline sentence of 84 months was sufficient but not greater than necessary district court based on § 3553(a) factors, including the murder of defendant’s father, severe physical abuse defendant suffered at the hands of mother and uncle, sexual abuse he suffered by grandfather, and having been shuffled between foster homes until adulthood); *U.S. v. Lopez*, 938 F.2d 1293, 1297-99

(D.C.Cir. 1991) (remanded for district court to consider a departure from 51 month sentence imposed in drug case because defendant was exposed to domestic violence as a child, his mother's murder by stepfather, his need to leave town due to threats, and having grown up in slums of New York and Puerto Rico ); *U.S. v. Ruiz*, 2009 WL 636543 (S.D. N.Y., March 11, 2009) (judge imposed 96 months rather than guideline range of 140-175 months for crack offenses in part due to defendant's difficult childhood with abusive mother and largely absent father who was incarcerated and a heroin addict, and the absence of any prior substance abuse assistance); *U.S. v. Samuels*, 2009 WL 875320 (S.D. N.Y. April 2, 2009) (time served imposed rather than guideline range of 70-87 months for young woman from abused background who was embarrassed by her drug sales and did not tell her family though she sold them to support them); *U.S. v. Handy*, 2008 WL 3049899 (E.D.N.Y. 2008) (court imposed 30 month sentence rather than guideline range of 37-46 months for 20-year-old whose life story read like it came from "the feeder systems into the Cradle to Prison Pipeline": abandoned as an infant, separated from siblings, raised by aunt in high crime area, shot on the street at age 12, left school and took up crime at age 14, spent the majority of his adolescence in prison, prosecuted for possessing a gun he found and believed to be inoperable in an environment where finding a gun on the street is like finding cash); *US v. Santa*, 2008 WL 2065560 (E.D. N.Y. 2008) (court imposed 120 months as a variance from a guideline term of 262-327 months for a mentally ill defendant's difficult childhood and life: delivered as an infant by his heroin-addicted mother and abandoned by his father at age 4, his difficulties were exacerbated by his resort to drugs to overcome emotional trauma from his separation from his girlfriend and the mother of his children); *U.S. v. Swift*, 2008 WL 2906884 (N.D.Ind.,2008) (court departed 10 months from guideline range and imposed mandatory minimum, finding that defendant's lack of youthful guidance, and acceptance of responsibility indicate that the additional 10 months would serve no deterrent or retributive purpose to defendant or to general public.); *U.S. v. Patzer*, 548 F.Supp.2d 612 (N.D.Ill.,2008)(court imposed sentence of 13 year term, followed by five years of supervised release, despite guidelines range of 346 - 411 months, finding that his prior offenses designating him as a career offender were less serious than most such offenses considered for purposes of that guideline, he had difficult childhood and had not been properly diagnosed and treated for ADD, and his conduct stemmed from mental health and drug problems that were treatable, and that he had potential for rehabilitation with support of friends and foster family.); *U.S. v. Hunt*, 2007 WL 517494 (E.D. Va. Feb. 9, 2007) (imposing 24-month sentence because guideline range of 46-57 months for identity theft was greater than necessary given defendant's history and characteristics and considering other §3553(a) factors. Defendant was thirty years old and was victim of violence as a child and teenager. The court found that the seriousness of the offense paled in comparison to the seriousness of what happened to defendant. "Few persons have had a more difficult childhood than Defendant." She was also imprisoned for a prior crime before she was twenty years old for ten years whereas most youthful offenders receive suspended sentences); *U.S. v. Mapp*, 2007 WL 485513 (E.D. Mich Feb. 9, 2007) (variance granted to 30 months after departing downward from advisory range of 84-105 months to 37-46 months for overstated criminal history based on defendant's upbringing where his parents never married and frequently physically abused each other. He hid in closets or outside for hours and his

grandmother took custody of him at age 5 and raised him.); *U.S. v. Germosen*, 473 F. Supp. 2d 221 (D. Mass 2007) (where guideline range was 37-46 months for conspiracy involving heroin importation, sentence of 2 years probation with 6 months home confinement was warranted partly because defendant had overcome difficult circumstances of his youth); *see also Karis v. Calderon*, 283 F.3d 1117, 1134 (9th Cir. 2002).

### **23G. Early death of parents**

*U.S. v. Collington*, 461 F.3d 805 (6th Cir. 2006) (upholding sentence of 120 months where guidelines called for 188 -235 months in drug and gun case, based in part on fact that defendant's father was murdered when he was nine years old and his mother died soon thereafter). *U.S. v. Castillo*, 2007 WL 582749 (S.D.N.Y. 2007) (finding sentence of 111 months was warranted instead of guideline range of 135-168 months, partly because the depression, anxiety, and pressure defendant experienced at young age due to loss of both parents and the resulting financial and emotional family commitments he faced caused him to have trouble eating, sleeping, and to experience suicidal thoughts which most likely contributed to his involvement in drug conspiracy and distribution of crack).

### **23H. Death of sibling and close friend**

*U.S. v. Wyatt*, 442 F. Supp. 2d 298, 299 (W.D.Va. 2006) (imposing non-guideline sentence of 60 months (121 to 151 month range) in methamphetamine manufacturing case where defendant, age 25, had suffered depression and anxiety since age 14 due to accidental death of her younger brother and two close friends, and defendant's untreated and longstanding drug abuse, relative culpability, youth and family support "make a significant difference in the defendant's case in light of the factors set forth in §3553(a)."); *U.S. v. Hubbard*, 369 F. Supp. 2d 146 (D. Mass 2005) (imposing 108 months instead of 188-235 month career offender sentence based on defendant's diminished capacity from childhood trauma including sexual molestation and death of siblings in fire).

### **23I. Defendant's personal characteristics and the offense were atypical**

*United States v. Autrey*, 555 F.3d 864 (9th Cir. 2009)(upholding sentence of 5 years probation as reasonable for defendant convicted of one count of possessing child pornography with guideline range of 41-51 months where district court found defendant's personal characteristics did not fit typical profile of a pedophile and noted defendant would not be "adequately accommodated" in prison and would be better served in outpatient psychiatric treatment.); *United States v. Huckins*, 529 F.3d 1312 (10th Cir. 2008)( upholding 18 month sentence of defendant who pled guilty to one count of possession of child pornography whose guideline range was 78 to 97 months because the district court, when looking at defendant as a person, determined he had no criminal record, was going through a difficult time in his life when he committed the offense, had no repeat offenses, and had made substantial improvements in his

life while awaiting sentencing and court balanced these mitigating factors against the seriousness of the crime to determine a below guideline sentence was necessary).

### **23J. Holocaust survivor**

*U.S. v. Somerstein*, 20 F. Supp. 2d 454 (E.D.N.Y. 1998) (defendant's history of charitable efforts, exceptional work history, and experiences as child victim of the Holocaust, when considered together, warranted downward departure where defendant was convicted of mail fraud, false statements, and conspiracy, stating that it "simply . . . cannot see incarcerating" defendant for her offenses after what she experienced during the Holocaust in which she lost half her family).

### **24. Cultural heritage and sociological factors**

*U.S. v. Gavilanez*, 238 F.App'x 815 (3d Cir. 2007) (sentencing court properly considered "cultural assimilation" as a § 3553(a) factor, but was counterbalanced by the defendant's extensive criminal record); *U.S. v. Grossman*, 2008 WL 160612 (6th Cir. Jan. 18, 2008) (defendant's education level and appreciation of the magnitude of the crime supported a substantial reduction from 120 months to 66 months); *U.S. v. Ayala-Garcia*, 2008 WL 2566858 (E.D.Wis.,2008) (In light of defendant's positive character developments as reflected through his educational and vocational endeavors combined with a recognition of the cultural and familial motivations behind his family's crime of re-entry, district court imposed a 42 month sentence where the guideline range was 46-57 months); *U.S. v. Decora*, 177 F.3d 676 (8th Cir. 1999) (finding no abuse of discretion by experienced district judge with knowledge of adversities of life on Indian reservation, in departing from 37-46 month range to 3 years probation for assault with dangerous weapon considering the difficulty of life on the reservation and the extraordinary and unusual nature of defendant's educational record and community leadership, and also that on release defendant successfully completed intensive inpatient treatment followed by an alcohol aftercare program and attended Alcoholics Anonymous meetings); *U.S. v. Lipman*, 133 F.3d 726 (9th Cir.1998) (in illegal reentry case, district court has authority to depart downward on the ground that the defendant had "culturally assimilated" into American society – but district court considered and rejected the ground as a matter of discretion though defendant lived in this country for twenty years since age twelve, fathered many citizen children, etc.).

### **25. Mental condition and history**

#### **25A. Extraordinary physical, sexual, or psychological abuse suffered as a child**

*Santosky v. Kramer*, 455 U.S. 745, 789 (1982) (Rehnquist, J., joined by Burger, C.J., White, and O'Connor, J., dissenting) ("It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible,

productive citizens"); *U.S. v. Rivera*, 192 F.3d 81, 84 (2d Cir. 1999) (“It seems beyond question that abuse suffered during childhood – at some level of severity – can impair a person's mental and emotional conditions...in extraordinary circumstances...district courts may properly grant a downward departure on the ground that extreme childhood abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense” but here, defendant “failed to allege and show, as required for a §5H1.3 departure, that any abuse he may have suffered rose to the extraordinary level that can be assumed to cause mental or emotional pathology”); *U.S. v. Ross*, 557 F.3d 237 (5<sup>th</sup> Cir. 2009)(court reversed district court’s *sua sponte* increase of below-guideline sentence it originally imposed, finding that original sentence was reasonable where defendant had cited his lack of criminal history, strong family support, and youth as mitigating factors, and psychiatrist who evaluated defendant had testified he had a low risk of recidivism); *U.S. v. Pullen*, 89 F.3d 368 (7th Cir. 1996) (in light of *Koon v. U.S.*, 518 U.S. 81 (1996), sentence remanded for determination of whether childhood abuse was extraordinary to enable judge to exercise discretion to depart downward); *U.S. v. Garate*, 543 F.3d 1026 (8<sup>th</sup> Cir. 2008) (On remand post-*Gall*, court of appeals found that 30-month sentence for traveling with intent to engage in sexual conduct with minor was not unreasonable where guideline range was 57 - 71 months, and the district court had cited defendant’s age and immaturity, his lack of prior criminal record, the lasting effects on defendant of sex offender registry, and he “was not a predator and did not fit the profile of many pedophiles convicted of the same crime”); *U.S. v. Walter*, 256 F.3d 891 (9th Cir. 2001) (combination of brutal beatings by defendant's father, introduction of drugs and alcohol by his mother\*, and, most seriously, the sexual abuse by his cousin which defendant suffered at young age constituted the type of extraordinary circumstances justifying consideration of the psychological effects of childhood abuse and diminished mental capacity under §5K2.13; remanding for evidentiary hearing so that defendant can substantiate claims of abuse and expert’s conclusions); *U.S. v. Brown*, 985 F.2d 478 (9th Cir. 1993) (where defendant offered letter recounting severe childhood abuse and neglect and psychologist's report concluded that childhood trauma was primary cause of his criminal behavior, court could grant downward departure); *U.S. v. McBride*, \_ F.3d. \_, 2007 WL 4555205 (11th Cir. Dec. 28, 2007) (District court varied from the Guidelines based on § 3553(a) factors. Specifically the court determined the murder of the defendant’s father, severe physical abuse suffered at the hands of his mother and uncle, the sexual abuse he suffered by his grandfather, and his being kick around from foster home to foster home until adulthood. District court felt the sentence of 84 months gave the defendant enough time to complete the treatment program and was sufficient but not greater than necessary.).

*U.S. v. Hubbard*, 369 F. Supp. 2d 146 (D. Mass 2005) (imposing 108 month sentence instead of 188-235 career offender range based on defendant’s diminished capacity from childhood trauma including sexual molestation and death of siblings in fire); *U.S. v. Ayers*, 971 F. Supp. 1197 (N.D. Ill. 1997) (granting departure based upon cruel childhood with relentless physical, sexual and psychological abuse over course of years).

## **25B. Defendant is youthful and immature**

See *Gall v. U.S.*, 128 S. Ct. 586, 593, 601 (2007) (see “Introduction” above for discussion of defendant’s immaturity during the commission of the offense, as evidenced by his post-offense rehabilitation); *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (“today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as categorically less culpable than the average criminal.... [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.... The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.... [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.”); *U.S. v. Jones*, 507 F.3d 657 (8th Cir. 2007) (circuit court found unreasonable the district court’s variance from 262-327 months to 120 months for the defendant’s overstated criminal history, need to avoid unwarranted sentencing disparities, and defendant’s youth at the time of previous convictions) but see *Gall v. U.S.*, 128 S. Ct. 586 (2007) (appellate courts can consider the degree of the variance, but cannot use a “rigid mathematical formula” to determine the strength of the justifications required); *U.S. v. Montanez*, 2007 WL 2318527 (E.D. Wis. Aug. 9, 2007) (Court departed based on overstated criminal history, good prison conduct, and noticeable increase in maturity. The court further agreed that the sentence should vary from the guidelines because the defendant lost the opportunity to serve concurrent time with a state sentence because charges were not brought in federal court for two years.); *U.S. v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va. 2005) (citing *Roper* and imposing non career offender sentence of 120, rather than 188, month sentence because defendant's prior robbery convictions were committed as a juvenile over brief six week period, they barely qualified, and based on his youth at the time of priors).

### **25C. Defendant’s diminished mental capacity**

USSG §5K2.13(p.s.) encourages a downward departure if (1) the defendant committed the offense while suffering from “a significantly reduced mental capacity” and this reduced capacity “contributed substantially to the commission of the crime.” 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.” § 5K2.13, cmt. (n.1)(2006). Section 5K2.13 was directly amended effective April 30, 2003 by Congress. See Feeney Amendment to the PROTECT Act, Pub.L. No. 108-21 §401(a),(b). The amendment provided that a diminished capacity departure is unavailable for defendants convicted of, among others, an offense under chapter 110 of title 18. It also eliminated all non-specified “out of the heartland” downward departures for child-victim, sex abuse, and obscenity offenses. See § 5K2.0(b) (limiting departures to those recognized in chapter 5K). The policy statement provides that a court may not depart if the reduced capacity was “caused by the voluntary use of drugs,” the offense involved “actual violence or a serious threat of violence,” the defendant’s criminal

history indicates a need for incarceration to protect the public, or the offense of conviction is for certain sex and child porn crimes. These limitations are advisory only after *Booker*. Under *Kimbrough* and *Spears*, district courts may reject them based on policy or a categorical disagreement. (See discussion in Introduction above.)

*Gall v. U.S.*, 128 S. Ct. 586, 592, 599 (2007) (see Introduction for discussion concerning defendant's drug addiction as contributing to offense); *U.S. v. Silleg*, 311 F.3d 557 (2d Cir. 2002) (district court has authority to depart downward in child porn case where defendant has diminished capacity and cannot control addiction to porn); *U.S. v. McBroom*, 124 F.3d 533 (3d Cir. 1997) (defendant pled guilty to possession of child porn and moved for reduction under §5K2.13 on grounds he suffered from reduced mental capacity due to sexual abuse as child which drove him to possess child porn. District court denied reduction because defendant was intelligent and could reason. Court of appeals remanded as intelligence is only one aspect and defendant is eligible for departure if he "cannot control his behavior or conform it to the law"; §5K2.13 "applies both to mental defects and emotional disorders . . . the focus is on mental capacity not the cause – organic, behavioral, or both"); *U.S. v. Cockett*, 330 F.3d 706 (6th Cir. 2003) (diminished capacity departure from 21 months to probation affirmed in income tax fraud case because of defendant' depressive disorder though jury necessarily found mental element of intent and no causal link existed between disorder and the crime); *U.S. v. Sadolsky*, 234 F.3d 938 (6th Cir. 2000) (2-level departure under §5K2.13 affirmed in computer fraud case based on defendant's compulsive gambling disorder, where disorder was a likely cause of criminal behavior given that defendant had "maxed out" his own credit line before resorting to fraud to pay his gambling debts; no direct causal link required between the diminished capacity and the crime); *U.S. v. Grinbergs*, 470 F.3d 758, 761 (8th Cir. 2006) (finding district court could still consider defendant's mental capacity insofar as it was relevant to the § 3553(a) factors though diminished capacity departure under § 5K2.13 unavailable to defendant convicted of possession of child pornography); *U.S. v. Lighthall*, 389 F.3d 791 (8th Cir. 2004) (pre-Protect Act, where college student convicted of possessing and distributing child porn, 20 month departure upheld based on "obsessive compulsive disorder" which caused defendant to obsessively collect porn, as attested to by unrebutted opinions of two doctors, noting that "Section 5K2.13 is targeted at offenders who demonstrate "a significantly impaired ability to ... control behavior that the defendant knows is wrongful."); *U.S. v. Ruklick*, 919 F.2d 95, 97, 99 (8th Cir. 1990) (downward departure justified when defendant suffered from schizophrenic affective disorder that predated drug abuse and impaired his judgment); *U.S. v. Garcia*, 497 F.3d 964 (9th Cir. 2007) (district court had discretion to consider defendant's alleged diminished mental capacity due to drug addiction); *U.S. v. Menyweather*, 431 F.3d 692, 698 (9th Cir. 2005) (in embezzlement case, finding no abuse of discretion in district court's downward departure of 8 levels to probation under §5K2.13 in part due to defendant's post traumatic stress disorder (PTSD) where psychologist's testimony was not rebutted);

*U.S. v. Ruiz*, 2009 WL 636543 (S.D.N.Y. March 11, 2009)(judge imposed 96 months rather than guideline range of 140-175 months for crack offenses in part due to defendant's

borderline personality disorder); *U.S. v. Santa*, 2008 WL 2065560 (E.D. N.Y. May 14, 2008) (8-level downward departure granted for significantly reduced mental capacity of 36 year old defendant with IQ of 58, and 120 months imposed for trafficking offenses rather than guideline range of 262 -327 months where the defendant's behavior was causally linked to his mental condition); *U.S. v. Cernik*, 2008 WL 2940854 (E.d.Mich. 2008)(finding "that continued psychological therapy, mandatory counseling with a registered sex offender therapist, and participation in relapse prevention therapy and Sexual Addictions Anonymous will be far more effective in achieving the objectives of §§3553(a)(2)(C) and (D) than would an extended term of imprisonment under the advisory Guidelines range."); *U.S. v. Castellanos*, 2008 WL 5423858 (D.Neb.2008)(finding that defendant's limited mental capacity combined with help she provided to law enforcement officers, and fact that she had participated in the drug conspiracy for a relative short period of time and her co-defendants had received lower sentences, merited sentence of 180 months for participation in drug conspiracy, despite guidelines recommendation of 360 months to life.); *U.S. v. McNeil*, 2007 WL 2318458 (D. Neb. Aug. 9, 2007) (District court departed downward based on diminished capacity because the defendant actions represented that he did not understand why his actions were wrong. Court used testimony regarding the defendant mental diagnoses, his belief that a tax stamp was a "get out of jail free card" and the defendants own statements to the jury that "he was a good drug dealer and one that the jury could trust with their prospective drug purchases."(The defendant represented himself at trial.); *U.S. v. Pallowick*, 364 F. Supp. 2d 923 (E.D. Wis. 2005) (where defendant was convicted of six armed bank robberies and advisory guidelines were 70-87 months, court imposed 46 months because no one was injured, defendant made no direct threats to harm, his only prior conviction was a burglary committed shortly before robberies, his major depressive disorder and anxiety disorder played major role, he completed in-patient treatment after arrest, enrolled in counseling, took medication, he was not dangerous and unlikely to re-offend if he stayed in treatment and on medication, and lengthy incarceration could hinder rehabilitation); *U.S. v. Tanasi*, 2003 WL 328303 (S.D.N.Y. 2003) (unpub.) (defendant convicted of possessing and sending child porn by computer to undercover agent posing as 13 year old entitled to departure from 33-41 month advisory range to 9 month sentence based on diminished capacity given his "obsessive and compulsive behavior," inability to control his conduct, and lack of evidence that he was sexual predator or had sexual contact with child); *U.S. v. Bennett*, 9 F. Supp. 2d 513 (E.D.Pa. 1998) (departure to 141 months from 232 warranted as "...defendant's cognitive faculties or volition, or both, appear to have been subject to some form of extraordinary distortion and, perhaps, significantly reduced capacity"); *U.S. v. Herbert*, 902 F. Supp. 827 (N.D. Ill.1995) (departure under §5K2.13 for defendant convicted of embezzlement who suffered from active depressive illness, mixed personality state, limited coping skills, poor judgment, and psychiatrist opined behavior and thought patterns were influenced by impaired mental condition); *U.S. v. Chambers*, 885 F. Supp. 12 (D.D.C. 1995) (where D convicted of storing drugs in house, departure from 130 months to 20 months granted where client was borderline mental defective with some brain damage, "Justice is not served by placing a 34 year old mother of two children, ages 9 and 12, in jail for over fifteen years for allowing drugs to be stored in her apartment, while the main perpetrator is allowed to go free" "This case represents

another instance where the Sentencing Guidelines bear no relation to the gravity of the crime committed, let alone a relation to the actual individual being sentenced”).

## **25D. Mental Retardation or Impaired Intellectual Functioning**

*Tennard v. Dretke*, 124 S.Ct. 2562, 2571 (2004) (“impaired intellectual functioning is inherently mitigating”); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (“Mentally retarded persons...have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others... often act on impulse rather than pursuant to a premeditated plan, and... are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (O’Connor, J., concurring) (“mental retardation may render a defendant “less morally culpable than defendant who have no such excuse”); *U.S. v. Alemanas*, 553 F.3d 27 (1<sup>st</sup> Cir. 2009) (in prosecution for selling crack, judge granted a downward variance of 43 months from an already reduced Guideline range, citing defendant’s mental and emotional condition plus his chronic neck pain); *U.S. v. Tunnell*, 2009 U.S. Dist. LEXIS 7410 (W.D.Va., Feb. 3, 2009) (court imposed 10 year sentence rather than guideline range of 168-210 months for child porn offenses, based in part on low IQ of defendant whose development was impaired as an infant by spinal meningitis); *U.S. v. Cotto*, 793 F. Supp. 64 (E.D.N.Y. 1992) (defendant's near mental retardation, vulnerability, efforts at rehabilitation and his incompetence warranted four-level downward departure).

## **25E. Compulsive Gambling Disorder**

Effective October 27, 2003, the Guidelines prohibit departure on this ground. USSG §5H1.4. In light of *Booker* and its progeny, this restriction is advisory and other § 3553(a) factors may predominate justifying a non-guideline sentence.

*U.S. v. Sadolsky*, 234 F.3d 938 (6th Cir.2000) (in computer fraud case, 2-level downward departure under §5K2.13 based on defendant's compulsive gambling disorder was not an abuse of discretion, where disorder was a likely cause of criminal behavior, given that defendant had already “maxed out” his own credit line before resorting to fraud to pay his gambling debts – no direct causal link required between the diminished capacity and the crime charged). For crimes committed before that date, see *U.S. v. Vieke*, 348 F.3d 811 (9th Cir. 2003) (because government made only pro forma objection, court of appeals refuses to review district court’s four level downward departure to probation in credit card fraud case where district court said crime committed because of “pathological nature of the [gambling] addiction” and was “totally out of suit with the rest of her life and the behaviors” even though fraud went on for years)

*U.S. v. Liu*, 267 F. Supp. 2d 371 (E.D.N.Y. 2003) (where defendant pled guilty to using unauthorized credit card checks, four level departure granted under 5K2.13 because, according

to psychologist, defendant was pathological gambler who fit DSM IV criteria."... This condition constituted an impulse control disorder [that] led to crime [and] interfered with Liu's ability to control behavior he knew was wrongful"); *U.S. v. Checoura*, 176 F. Supp. 2d 310 (D.N.J. 2001) (where defendant pled guilty to interstate transportation of stolen property, court granted two level departure and held that direct causal link between disorder and crime charged was not required under diminished capacity guideline and expert testimony as to defendant's pathological gambling disorder supported departure); *U.S. v. Iaconetti*, 59 F. Supp. 2d 139 (D. Mass. 1999) (in conspiracy to possess with intent to distribute cocaine case, defendant with no criminal record granted 11-level departure, from level 25 to level 14, based on "single acts of aberrant behavior" involving gambling debts to loan shark caused by defendant's gambling compulsion and resulted in defendant accepting loan shark's solution as to how to extinguish the debts after he had tried to pay them from his personal resources, his business, and his family).

#### **25F. Battered Woman Syndrome**

*U.S. v. Apple*, 915 F.2d 899, 903 n.12 (4th Cir. 1990) (departure warranted where defendant was battered wife who suffered from chronic depression); *U.S. v. Whitetail*, 956 F.2d 857 (8th Cir. 1992) (proper ground for downward departure even if jury rejected as defense); *U.S. v. Gaviria*, 804 F. Supp. 476 (E.D.N.Y. 1992) (downward departure based on defendant being subservient to husband (battered woman)). *See also* Duress or Coercion, *infra*.

#### **25G. Defendant's mental and emotional condition**

*Penry v. Lynaugh*, 492 U.S. 302, 322 (1989) (O'Connor, J., concurring) ("mental retardation may render a defendant less morally culpable than defendant who have no such excuse"); *U.S. v. Walter*, 256 F.3d 891 (9th Cir. 2001) (brutal beatings by defendant's father, introduction to drugs and alcohol by his mother and, most seriously, the sexual abuse defendant faced at the hands of his cousin, justified sentencing court's consideration of the psychological effects of childhood abuse and establish diminished capacity); *U.S. v. Garza-Juarez*, 992 F.2d 896, 913 (9th Cir. 1993) (downward departure in gun case justified under §5H1.3 based on panic disorder and agoraphobia); *U.S. v. Garcia-Salas*, 2007 WL 4553913 (10th Cir. Dec. 27, 2007) (unpub.) (sentence at bottom-end of guideline range reversed and remanded for resentencing because it is clear 10th Circuit precedent had effectively foreclosed variances and post-*Gall* and *Kimbrough*, district court had greater sentencing discretion than it thought it did; defendant argued for a lower sentence for his extraordinary physical impairment, vulnerability in prison, extraordinary family circumstances, and mental and emotional condition); *U.S. v. Crocker*, 2007 WL 2757130 (D. Kan. Sept. 30, 2007) (downward variance granted based on advisory Guidelines and several factors. Court noted that the defendant was remorseful, improved herself by getting a college education, intended to repay the money, need for mental health treatment, her responsibilities as a parent, she used the money to pay for medical expenses, and a 2007 amendment to the Guidelines which would lower her range had it been in effect.).

## 26. Guidelines overstate seriousness of the offense

### 26A. Child pornography guidelines are inflated and lack empirical support

*U.S. v. Vanvliet*, 542 F.3d 259 (1<sup>st</sup> Cir. 2008)(vacating sentence in interstate travel case in light of *Kimbrough* where district court believed it could not impose below guideline sentence based on its policy disagreement with the computer enhancement); *U.S. v. Grossman*, 513 F.3d 592 (6<sup>th</sup> Cir. 2008)(affirming reduction from 120 months to 66 months based on district judge’s assessment that the range was “not reflective of what [Grossman] did”); court noted that as the 135-168 month range was higher than statutory maximum, this evidenced that the guidelines overstated the offense); *U.S. v. Beiermann*, 2009 WL 467628 (N.D. Iowa 2009)(imposing 90 months with 10 years supervised release under § 3553(a), rejecting guideline range of 210-262 mos. resulting from § 2G2.2 child porn guideline on categorical, policy grounds because it did not reflect empirical analysis and impermissibly and illogically skewed sentences for even “average” defendants to the upper end of the statutory range, contrary to the goal of producing a sentence no greater than necessary for just punishment, and on basis of an individualized determination); *U.S. v. Jacob*, 2009 WL 1849942, \*16, \*24 (N.D.Iowa June 26, 2009)(rejecting guideline sentence of LIFE and “parties’ alternative guideline range” of 292-365 months in enticement of minor and transporting child pornography case as excessive and disproportionately harsh compared to defendant’s criminal conduct and history, and imposing 151 months w/10 yrs. supervision because §§ 2G2.1, 2G2.2, and § 4B1.5 enhancement for “pattern of activity involving sexual conduct” improperly skews sentences upward, without regard to defendant’s history and characteristics, specific conduct or degree of culpability, blurring distinctions between least and worst offenders and they do not reflect empirical analysis but congressional mandates that undermined work of Sentencing Comm’n. and due to defendant’s immaturity, lack of judgment, and social isolation, lack of significant criminal history or any history of sex offenses involving children, lack of risk of predatory sexual violence, and his extensive support from friends and family); *U.S. v. Gellatly*, 2009 WL 35166, \*5-\*7 (D.Neb. Jan. 5, 2009); *U.S. v. Phinney*, 599 F.Supp.2d 1037 (E.D.Wis., 2009)(non-guideline sentence appropriate because guidelines for possession of child pornography were overly harsh and did not reflect empirical research as to appropriate sentences for this offense); *U.S. v. Doktor*, 2008 WL 5334121 (M.D.Fla. 2008)(sentencing defendant to 36 months instead of GR of 57-71 because USSG § 2G2.2 was not based on empirical data or the sentencing expertise of the Commission); *U.S. v. Goldberg*, 2008 WL 4542957, \*6 (N.D.Ill. April 30, 2008); *U.S. v. Johnson*, 588 F.Supp.2d 997, 1008-05 (S.D. Iowa 2008)(“Because the guidelines at issue in this case [child pornography] do not reflect the unique institutional strengths of the Sentencing Commission in that they are not based on study, empirical research, and data, this Court, as it did in *United States v. Shipley*, ‘affords them less deference than it would to empirically-grounded guidelines.’”)(quoting 560 F.Supp.2d 739, 745-46 (S.D.Iowa 2008); *U.S. v. Noxon*, 2008 WL 4758583, \*2 (D.Kan. Oct. 28, 2008); *U.S. v. Stults*, 2008 WL 4277676, \*4-\*7 (D.Neb. Sept. 12, 2008); *U.S. v. Grinbergs*, 2008 WL 4191145, \*5-\*8 (D.Neb. Sept. 8, 2008)(sentencing defendant to a year and a day for possession of child pornography rather than 46-57 month GR, finding it too harsh both because

the guidelines for pornography offenses focus on distribution or attempt to distribute, rather than possession offense, and because the enhancements were unreasonable. Court found that based on the defendants immature mental state at time of offense, expert psych testimony that he was not a pedophile or sexual predator and was unlikely to re-offend, and the punishment he would bear based on the social stigma attached to registering as a sex offender, the sentence was sufficient but not greater than necessary to meet the aims of punishment.); *U.S. v. Baird*, 580 F.Supp.2d 889, 892 (D.Neb. 2008); *U.S. v. Stern*, 590 F.Supp. 2d 945, 960-61 (N.D. Ohio 2008); *U.S. v. Hanson*, 561 F.Supp.2d 1004, 1009-1011 (E.D.Wis. 2008)(imposing below guidelines sentence in child pornography case due to guideline not being based on Sentencing Commission's characteristic institutional role and empirical judgment, but was the result of congressional mandates); *U.S. v. Ontiveros*, 2008 WL 2937539, \*8 (E.D.Wis. July 24, 2008)(same).

### **26B. Drugs were of very low purity**

*U.S. v. Berroa-Medrano*, 303 F.3d 277 (3d Cir. 2002) (substantial downward departure granted for "low drug purity" in a sentence reduction of over 5 years); *U.S. v. Mikaelian*, 168 F.3d 380, 390 (9th Cir. 1999) (Low purity of heroin cannot be categorically excluded as a basis for downward departure.; however no evidence presented that heroin of 4% purity is unusually impure.).

### **26C. Disparity caused by crack to powder ratio<sup>7</sup>**

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<sup>7</sup> The Sentencing Commission concluded that the 100-to-1 crack/powder penalty structure is no longer supportable. Its 2007 Report to Congress declared that the quantity-based penalties for crack cocaine offenses overstate the relative harmfulness of crack cocaine compared to powder cocaine, sweep too broadly and apply most often to lower level offenders, overstate the seriousness of most crack offenses, and disproportionately impact minorities. See U.S. Sentencing Comm'n., Report to Congress, *Cocaine and Federal Sentencing Policy*, at 8 (May 2007). Effective November 1, 2007, the Commission reduced the base offense levels in § 2D1.1 by two for most crack offenses, as a modest step toward alleviating the problems associated with the 100 to 1 ratio. See USSG, Supp. to App. C, Amendment 706 (as amended by Amendment.711) (2007). <http://www.ussc.gov>. The Commission made the amendment retroactive effective March 3, 2008. See USSG Sec. 1B1.10. The amendment's new drug quantity table, however, incorporates widely disparate ratios. See *Kimbrough*, at 573 ("as a result of the 2007 amendment, ...the Guidelines now advance a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1"). The new ratios are random, arbitrary, and irrational. Accordingly, they reflect "unsound judgment" and district courts may exercise discretion to reject sentences based on the new drug quantity table. See *Rita*, 127 S.Ct. at 2468.

On April 30, 2009, Asst. United States Attorney General Lanny Breuer testified before the Senate Judiciary Subcommittee on Crime and Drugs declaring that "Congress's goal should

*Kimbrough v. U.S.*, 128 S.Ct. 558, 568-69 (2007) (see “Introduction” for a discussion of the crack disparity and its disproportionate effect); *U.S. v. Regalado*, 518 F.3d 143 (2<sup>nd</sup> 2008) (Second Circuit declares it will remand cases where the record does not reveal whether court would have imposed a non-Guidelines sentence had it known it was free to reject crack-powder ratio to serve the sentencing objectives of §3553(a)); *U.S. v. Jones*, 2008 WL 78716 (3<sup>rd</sup> Cir. Jan. 8, 2008) (Crack/powder disparity may be considered under § 3553(a) as clarified by *Kimbrough*; *U.S. v. Leatch*, 270 Fed.Appx. 274 (5<sup>th</sup> Cir. 2008)(on remand post-*Kimbrough*, court of appeals upheld district court’s imposition of below-guidelines sentence based on its disagreement with the 100:1 ratio and imposing a sentence consistent with a 20:1 ratio); *U.S. v. Gunter* 462 F.3d 237 (3<sup>d</sup> Cir. 2006) (district judge erred in finding that even after *Booker*, he had no discretion to give below guideline sentence because of crack-powder disparity); *U.S. v. Blakely*, 2009 WL 174265 (N.D.Tex.2009)(Court considered that in the 78 months defendant had served in prison, she has been a model prisoner and has gained special privileges and that the two level reduction under the guidelines amendment authorized by § 3582 was not sufficient to prevent the imposition of a sentence that is not “greater than necessary” to meet the aims of sentencing. The court imposed sentence of time served, including 78 months total, and 18 months for the possession with intent to distribute crack-cocaine charge.); *Simon v. U.S.*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) (sentence of 262 months was appropriate for conspiring to distribute more than 50 grams of cocaine base; recommended Guidelines sentencing range of 324 to 405 months substantially overstated the seriousness of the offense when compared to offenses involving comparable quantities of powder cocaine) ; *U.S. v. Smith*, 359 F. Supp. 2d 771, 781 (E.D.Wis. 2005 ) (in distribution of crack case, guidelines range was 121 months, sentence of 18 months imposed based on cooperation and because “adherence to the guidelines would result in a sentence greater than necessary and would also create unwarranted disparity between defendants convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine”).

#### **26D. Loss table overstates amount of loss or seriousness of offense**

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be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.” “[W]e recognize that federal courts have the authority to sentence outside the guidelines in crack cases or even to create their own quantity ratio. Our prosecutors will inform courts that they should act within their discretion to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a) and our prosecutors will bring the relevant case-specific facts to the courts’ attention.” Testimony of Assistant U.S. Attorney General Lanny Breuer, Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity 4/30/2009. On May 21, 2009 Breuer reiterated the Administration’s position before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security’s Hearing on Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?

USSG § 2B1.1, Note 16 (B) provides that where the offense level substantially overstates the seriousness of the offense, a downward departure may be warranted.

*U.S. v. Thurston*, 456 F.3d 211 (1st Cir. 2006) (remand for re-sentencing because district court departed too much, court observed that “a sentencing court plausibly could conclude that a \$5,000,000 intended loss finding, with its resultant 14-level increase in the offense level, leads to a modest overstatement of the seriousness of Thurston's crime.”); *U.S. v. Brennick*, 134 F.3d 10 (1st Cir. 1998) (downward departure in atypical tax evasion case can be proper where defendant fully intended to pay but couldn't, but extent of departure here (30 months) was not justified); *U.S. v. Broderon*, 67 F.3d 452 (2d Cir. 1995) (in white collar contracts fraud, seven level departure affirmed in part because defendant did not profit personally, contracts were favorable to government, and "calculated loss significantly... overstated the seriousness of the defendant's conduct" – see former §2F1.1 comment. (n.7(b)); *U.S. v. Walters*, 87 F.3d 663 (5th Cir. 1996) (in money laundering case, district court reasonably departed downward by six months where D did not personally benefit from the fraud; lack of benefit was not considered by the guidelines; so §5K2.0 authorizes departure); *U.S. v. McBride*, 362 F.3d 360 (6th Cir. 2004) (in bad check and bankruptcy scam, remanded for district court to consider whether to depart downward under 2B1.1 where intended loss of over \$1 million “substantially overstated” actual loss of \$800); *U.S. v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999) (departure upheld where actual loss of \$829,000 from false loan application overstated risk to bank warranting use of loss figure of \$58,000 and lower offense level where defendant had sufficient unpledged assets to support the loan amount and had paid the bank \$836,000 of the amount owed when fraud discovered); *U.S. v. Jewell*, 2009 WL 1010877 (E.D.Ark.,2009) (30 month sentence imposed for aiding and abetting tax evasion where advisory guidelines range was 41 to 51 months, finding that a sentence so close to the statutory maximum of 5 years was not appropriate for a first-time offender such as defendant.); *U.S. v. Milne*, 384 F. Supp. 2d 1309 (E.D.Wis.,2005) (in bank fraud case where guidelines were 18 to 24 months, court imposed 6 months jail and 6 months home confinement for various reasons noting that “[w]ith their almost singular focus on loss amount, the guidelines sometimes are insufficiently sensitive to personal culpability”); *U.S. v. Redemann*, 295 F. Supp. 2d 887 (E.D. Wisc. 2003) (in bank fraud case where guidelines were 18-24 months, for loss of 2.5 million, court departed downward two levels under former § 2F1.1(b)(1) in part because loss significantly overstated seriousness of offense. Defendant submitted false invoices for work supposedly done on the bank, but some valuable work performed for the bank was not adequately recognized by the loss figure); *U.S. v. Maccaul*, 2002 WL 31426006 (S.D.N.Y. Oct. 28, 2002) (unpub.) (in stock manipulation scheme by brokers, defendant granted downward departure, because “it is virtually impossible to justify imprisoning the defendants before this Court for up to five times as long as the [codefendant] who hired, inspired, and gravely misled them” and because “the loss provision...does not make sense when up to 250 people are participating [in the fraudulent scheme], and the loss is difficult if not impossible to apportion fairly.”); *U.S. v. Oakford Corp*, 79 F. Supp. 2d 357 (S.D.N.Y. 2000) (13 level departure granted where offense level overstates gravity of offense; each defendant

personally realized “only small portion of the overall gain” of \$15 million and agency tacitly encouraged floor brokers to “push the envelope”);

#### **26E. Loss amount causes multiple overlapping enhancements at higher offense level**

*U.S. v. Jackson*, 346 F.3d 2 (2d Cir. 2003) (in credit card fraud, multiple overlapping enhancements can justify a downward departure “although the enhancements imposed by the District Court are permissible, they are all little more than different ways of characterizing closely related aspects of Jackson’s fraudulent scheme... Even though these enhancements are sufficiently distinct to escape the vice of double counting, they substantially overlap. Most fraud schemes that obtain more than one half million dollars involve careful planning, some sophisticated techniques, and are extensive.” “ Moreover, a phenomenon of the Guidelines, graphically illustrated by this case, is that any one enhancement increases the sentencing range by a far greater amount when the enhancement is combined with other enhancements than would occur if only one enhancement had been imposed.”); *U.S. v. Gigante*, 94 F.3d 53, 56 (2<sup>nd</sup> Cir. 1996) (downward departure authorized where substantially enhanced sentence range results from series of enhancements proven only by preponderance of the evidence).

*U.S. v. Adelson*, 441 F. Supp. 2d 506 (SDNY 2006 ) (“the [Sentencing] Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic..... Here, their combined effect — an added 20 points under the Government’s approach — ill-fits the situation of someone like Adelson. It represents, instead, the kind of “piling-on” of points for which the guidelines have frequently been criticized. ”) (“Even the Government blinked at this barbarity”) (this case illustrates “the utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense.”)

#### **26F. Money laundering is only incidental to underlying crime or where not drug related**

*U.S. v. Threadgill*, 172 F.3d 357 (5th Cir. 1999) (downward departure proper in money laundering case because crime was only incidental to defendants’ two million dollar illegal gambling operations, and defendants never used laundered money to further other illegal activity. Departure also proper because statutes aimed not at white collar fraud offenders but at the drug trade, racketeering, and more complex offenses); *U.S. v. Woods*, 159 F.3d 1132 (8th Cir. 1998) (where D filed for bankruptcy but concealed ownership of \$20,000 of stock and deposited proceeds of sale into bank account – and where convicted of money laundering, downward departure proper because underlying offense was not drug trafficking or some other

offense typical of organized crime so offense did not fall into “heartland” of money laundering crimes); *U.S. v. Bart*, 973 F. Supp. 691 (W.D.Tex. 1997).

#### **26G. The defendant showed utter lack of sophistication**

*U.S. v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990) (where defendant bribed city official, downward departure from 15 to 21 months to probation and a fine was warranted because defendant's use of personal check in bribery transaction showed “utter lack...of sophistication” usually shown by persons bribing an official).

#### **27. Restitution for life is akin to a life sentence**

*U.S. v. Adelson*, 441 F. Supp. 2d 506 (SDNY 2006) (in securities fraud case where guidelines call for life, court imposed 42 months and 50 million in restitution, which “virtually guarantees that Adelson will be making substantial restitution payments for the rest of his life. So far as monetary sanctions are concerned, therefore, the Court did indeed impose a life sentence.”)

#### **28. Accounting for prejudicial government actions**

##### **28A. Government controls offense level by determining drug type and quantity**

*U.S. v. Cani*, 2008 WL 435159, at \*6 (M.D. Fla. Feb. 14, 2008)(60-month sentence for defendant jailhouse lawyer and heroin addict who had nearly completed his sentence, where guideline range was 262-327, justified in part by government’s construction of drug transaction to include distribution instead of possession offense, Bureau of Prisons’ knowledge of his addiction, government exerting of pressure on defendant to participate in a transaction involving very drug to which he was addicted, and its improper use of informant to entice defendant); *U.S. v. Williams*, 372 F. Supp. 2d 1335 (M.D. Fla. 2005) (where defendant convicted of delivery of crack cocaine and guidelines called for 30 to life (§851 enhancement and career offender), court imposed 204 months partly because “the government essentially controls the offense level, by reason of its undercover purchasing decisions” because could have bought powder, not crack.”); See Sentencing Entrapment, *infra*; Multiple Enhancements overstate offense level.

##### **28B. Prosecutor or defense misconduct prejudices defendant’s plea bargaining**

*U.S. v. Griffin*, 2007 WL 4462735 (2d Cir. Dec 21, 2007) (Gov. breached the plea agreement by suggesting to the court that the acceptance of responsibility reduction should not apply because the defendant objected to certain sentencing enhancements. Reversed with remand to new judge because Gov. actions violated the plea agreement.); *U.S. v. Liriano-*

*Blanco*, 510 F.3d 168 (2d Cir. 2007) (Sentence vacated. Although Defendant waived appeal, district court imposed a sentence with comments that a more lenient sentence may be imposed if it is sent back down after appeal. The US Attorney did not correct the court's misunderstanding regarding appellate waiver. 2nd Circuit concerned that D did not receive full benefit of a hearing because judge made comments suggesting he would go lower if the 2nd circuit allowed him to consider the disparity in fast-track districts. Remanded.) *U.S. v. Lopez*, 106 F.3d 309, 311 (9th Cir. 1997) (where prosecutor's misconduct in dealing with defendant without his counsel prejudiced his opportunity to possibly obtain better plea bargain, three-level downward departure appropriate).

### **28C. Prosecutor's misconduct and improper investigation**

*U.S. v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998) (departures based on investigative misconduct unrelated to defendant's guilt are not expressly precluded and "should not be categorically proscribed"); *U.S. v. Coleman*, 188 F.3d 354 (6th Cir. 1999) (en banc) (under *Koon* improper investigative techniques may justify a departure if outside the heartland.)

### **28D. Government could have brought less serious charge**

*U.S. v. Carey*, 368 F. Supp. 2d 891 (E.D. Wisc. 2005) (where defendant's guideline range was 15-21 months for wire fraud after receiving SSI benefits while running a business, sentence of one year and a day imposed in part to avoid disparity as government typically charged § 641 violation, carrying lower offense level).

### **28E. Dual prosecution by state and federal authorities**

Dual prosecution by both federal and state governments is a circumstance not considered by the guidelines, but case remanded to determine whether departure should be upward or downward. *U.S. v. Haggerty*, 4 F.3d 901 (10th Cir. 1993); *U.S. v. Koon*, 833 F. Supp. 769, 786 (C.D. Cal. 1993) (specter of unfairness raised by successive state and federal prosecutions, inter alia, justifies downward departure), aff'd on this ground, *Koon v. U.S.*, 518 U.S. 81 (1996).

### **28F. Imperfect entrapment – aggressive encouragement by agents**

*U.S. v. Garza-Juarez*, 992 F.2d 896, 910-912 & n. 2 (9th Cir. 1993) (court properly departed downward under §5K2.12 where trial court was troubled by "aggressive encouragement of wrongdoing [by informer], "prosecutorial misconduct and vindictive prosecution." *see also U.S. v. McClelland*, 72 F.3d 717 (9th Cir. 1995) (6-level downward departure proper for imperfect entrapment under §5K2.12 even though defendant initiated plan).

### **28G. Sentencing entrapment or manipulation**

USSG § 2D1.1, comment. (n.12) (“If, however, the defendant establishes that he or she did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing”); and USSG § 2D1.1, comment. (n.14) (“If, in a reverse sting...the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.”); *U.S. v. Montoya*, 62 F.3d 1, 3-4 (1st Cir.1995); *U.S. v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000); *U.S. v. Leong*, 216 F. App’x 671 (9th Cir. 2007) (downward departure affirmed where district court concluded that the government had engaged in sentence manipulation when it orchestrated the sale of substantially more methamphetamine than the defendant was predisposed to be involved with); *U.S. v. Castaneda*, 94 F.3d 592 (9th Cir. 1996) (district court erred in not considering whether to reduce amount of drugs attributed to defendant because he was entrapped); *U.S. v. Naranjo*, 52 F.3d 245, 25-51 (9th Cir. 1995) (evidence indicated defendant agreed to buy cocaine only after months of persistent pressure by snitch and defendant could only afford and preferred to buy 1K but finally agreed to buy 5K only after agent offered to front four of the five and buy back three, case remanded with instructions to provide specific factual findings to support district court's ruling that defendant did not prove sentencing entrapment); *U.S. v. Cani*, 2008 WL 435159, at \*6 (M.D. Fla. Feb. 14, 2008)(see 28A above); *U.S. v. Panduro*, 152 F. Supp. 2d 398 (S.D.N.Y. 2001) (in reverse sting operation, defendant granted three-level downward departure “to adjust for the artificially low price of the [35 kilos] of cocaine resulting from the overly generous credit terms [proposed by the government] – “if [the agent] had not extended credit for half the purchase price...defendants [would have only purchased half the amount]” the extension of credit was “unreasonable and below market”); *U.S. v. Martinez-Villegas*, 993 F. Supp. 766 (C.D.Cal. 1998) (where defendant who normally delivered 5-10 KG was induced to deliver 92 KG, departure warranted.)

## **28H. Delay in arrest or charge or sentencing**

*Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of cert.) (“The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted.”); *U.S. v. Cornielle*, 171 F.3d 748, 754 (2d Cir. 1999) (among other things, four-year pre-indictment delay warranted one-level downward departure); *U.S. v. Barrera-Saucedo*, 385 F.3d 533 (5th Cir. 2004) (in illegal reentry case, district court has discretion to depart downward for all or part of time defendant served in state custody from time federal immigration authorities located him); *U.S. v. Gregory*, 322 F.3d 1157 (9th Cir. 2003) (defendant pled guilty to money laundering and two years later was indicted for drugs crimes related to the money laundering, dismissal of indictment improper, but district court on remand may depart to impose sentence reflecting if both crimes been brought at same time. A departure "may be

appropriate to mitigate the effects of any loss of grouping,"); *U.S. v. Groos*, 2008 WL 5387852 (N.D.Ill.,2008) (district court considered that lengthy incarceration for crimes involving shipping of embargoed goods were ineffective to the aid of deterrence and the period of uncertainty resulting from the four-year delay in prosecuting the case against defendant provided significant punishment which merited a non-guidelines sentence. Court imposed sixty days incarceration and one year supervised release with a fine, despite guidelines recommendation of 24 - 30 months)

### **28I. Delay in sentencing deprives defendant of chance for concurrent sentence**

*U.S. v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (en banc) (downward departure upheld in an illegal reentry case in part because the delay in bringing the federal charge prejudiced the defendant's opportunity to obtain a sentence concurrent to the state sentence he was already serving); *U.S. v. Montanez*, 2007 WL 2318527 (E.D. Wis. Aug. 9, 2007) (Court departed based on overstated criminal history, good prison conduct, and noticeable increase in maturity. The court further agreed that the sentence should vary from the guidelines because the defendant lost the opportunity to serve concurrent time with a state sentence because charges were not brought in federal court for two years.).

### **28J. Pre-indictment delay prejudicing defendant**

*U.S. v. Saldana*, 109 F.3d 100, 104 (1st Cir.1997) (departure appropriate for pre-indictment delay, even if unintentional, if it produces an unfair or unusual sentencing result); *U.S. v. Corneille*, 171 F.3d 748, 754 (2d Cir. 1999) (among other things, four-year pre-indictment delay in perjury prosecution warranted one-level departure); *U.S. v. O'Hagan*, 139 F.3d 641, 656-58 (8th Cir. 1998) (affirming downward departure for delay in prosecution); *U.S. v. Sanchez-Rodriguez*, 161 F.3d 556, 563-64 (9th Cir. 1998) (en banc) (district court acted within its discretion when it departed in illegal reentry case in part because delay in bringing the federal charge prejudiced the defendant's opportunity to obtain a concurrent sentence); *U.S. v. Garcia*, 165 F. Supp. 2d 496 (S.D.N.Y.2001) (departure granted where defendant served 9-months for passport fraud before he was charged with illegal reentry even though he could have been charged immediately); *U.S. v. Medrano*, 89 F. Supp.2d 310\_(E.D.N.Y. 2000) (four-year delay in bringing prosecution for illegal re-entry while defendant was serving state time justifies departure because lost opportunity for concurrent sentence-remanded to determine sentence).

### **29. Pretrial confinement's adverse effect on defense preparation**

*U.S. v. Joyeros*, 204 F. Supp. 2d 412 (EDNY 2002) (two level departure granted where defendant's livelihood was destroyed, preventing her re-entry into criminal activity, she was subjected to lengthy and rigorous pretrial detention, preventing her from effectively preparing her defense or seeing her child)

## **30. Recidivism**

### **30A. Drug rehabilitation reduces recidivism**

*U.S. v. Phinney*, 599 F.Supp.2d 1037 (E.D.Wis.,2009)(based on the defendant's age, lack of prior history, and progress in treatment programs thus far, district court concluded defendant was unlikely to re-offend and further. Court disagreed with the guidelines' approach on possession pornography cases generally, and believed that defendant's treatment would be better achieved in a community-based program, and therefore sentenced the defendant to a period of six months custody followed by ten years of supervised release, despite that guidelines called for a 37-46 month sentence ); *U.S. v. Perella*, 273 F.Supp.2d 162, 164 (D.Mass. 2003)(observing that if drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. Statistics suggest recidivism rate is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of prison setting, citing Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217, 1220 (2002).

### **30B. General deterrence satisfied by short sentences for white collar offenses**

*U.S. v. Groos*, 2008 WL 5387852 (N.D.Ill.,2008) (district court considered that lengthy incarceration for crimes involving shipping of embargoed goods were ineffective to the aid of deterrence and the period of uncertainty resulting from the four-year delay in prosecuting the case against defendant provided significant punishment which merited a non-guidelines sentence. Court imposed sixty days incarceration and one year supervised release with a fine, despite guidelines recommendation of 24 - 30 months); *U.S. v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006) (where guidelines called for life sentence for securities fraud, court imposed forty-two month sentence partly based on "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders" and government failed to present any evidence or empirical studies that sentence of more than 3 ½ years was necessary to achieve the retributive and deterrence objectives of §3553(a)).

### **30C. Older defendants and low risk of recidivism**

Defendants "over the age of forty... exhibit markedly lower rates of recidivism in comparison to younger defendants See *Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines*, at 12, 28 (2004) [www.ussc.gov/publicat/Recidivism\\_General.pdf](http://www.ussc.gov/publicat/Recidivism_General.pdf). ("Recidivism rates decline relatively consistently as age increases"); *U.S. v. Marquez*, 2007 WL 4275499 (10th Cir. Dec. 5, 2007) (defendant argued for a lower sentence because his criminal history was overstated when his only conviction was twenty-years-old, and because the district court tersely rejected the request and imposed a bottom-end guideline sentence, the court of appeals reversed and remanded); *U.S. v. Carter*, 538 F.3d 784 (7<sup>th</sup> Cir. 2008)(affirming 24-month sentence for money laundering where

GR was 87-108 months, based partly on conclusion that at age 61, defendant posed lower risk of recidivism); *U.S. v. Thomas*, 595 F.Supp.2d 949 (E.D.Wis.,2009) (Considering defendant's age, limited prior criminal history, and personal characteristics including time spent in the army, and focused and relatively successful efforts to get his life on track since the offense, along with his minor role in attempted distribution of cocaine and the guidelines' misguided focus on drug weight, district court imposed 5 months in custody and 5 months home detention with three years supervised release, where guidelines recommended 27-33 months imprisonment); *U.S. v. Hodges*, 2009 WL 366231 (E.D. N.Y., Feb. 12, 2009) (court relies in part on lower risk of recidivism for older defendants like this 43-year-old defendant); *U.S. v. Bariiek*, 2005 WL 2334682 (E.D.Va., Sept. 23, 2005) (unpub.) ( Defendant convicted of operating unlicensed money business , guideline range of 37-46 months found greater than necessary and sentence of 18 months imposed in part because it was defendant's first offense, he became a citizen, took care of his family, and maintained employment; recidivism not likely and rehabilitation not served by lengthy sentence); *U.S. v. Lucania*, 379 F. Supp. 2d 288, 297 (E.D.N.Y. 2005) ("Post-Booker courts have noted that recidivism is markedly lower for older defendants."); *U.S. v. Carmona-Rodriguez*, 2005 WL 840464, \*4 (S.D.N.Y. April 11, 2005) (unpub.) ( where 55 year old woman pled guilty to drug distribution, 30-month sentence (below guideline range) was appropriate due to low probability defendant would recidivate); *Simon v. U.S.*, 361 F. Supp. 2d 35 (E.D.N.Y. 2005) ("Under the Guidelines, age was not normally relevant to sentencing. § 5H1.1. Post-Booker, however, at least one Court noted recidivism drops substantially with age); *U.S. v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005) (unpub.) (57-year old defendant convicted of distributing crack with guideline range of 168-210 months, court imposed 108 months based on need to deter under § 3553(a)(2) and low likelihood of recidivism upon release.

### **30D. Young/first time/immature offenders and low risk of recidivism**

*Gall v. U.S.*, 128 S.Ct. 586, 601-602 (2007)("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage (citation omitted)...It was not unreasonable for the district judge to view Gall's immaturity at the time of the offense as a mitigating factor, and his later behavior as a sign that he had matured and would not engage in such impetuous and ill-considered conduct in the future. Indeed, his consideration of that factor finds support in our cases."); *U.S. v. Ross*, 557 F.3d 237 (5<sup>th</sup> Cir. 2009)(Appellate court reversed district court effort to *sua sponte* increase a below-guideline sentence originally imposed, finding that the original sentence was reasonable based on defendant's lack of criminal history, strong family support, and youth as mitigating factors, and a psychiatrist who had evaluated the defendant had testified that he had a low likelihood of recidivism); *U.S. v. Prisel*, 2008 WL 4899451 (6<sup>th</sup> Cir. 2008) (unpub.)(District Court's decision to vary below the recommended guidelines range of 27 - 33 months and sentence the defendant to one day of imprisonment followed by three years of supervised release (including 18 months of electronic home monitoring) on a charge of possession of child pornography was not unreasonable where the district court cited the defendant's age, his mental and emotional condition, and his family ties and responsibilities as reasons for departure and

where the defendant was a one-time offender and psychiatric testimony indicated that his risk of recidivism was low); *U.S. v. Polito*, 215 Fed.Appx. 354, 357 (5<sup>th</sup> Cir. 2007)(per curiam)(upholding sentence of probation in child pornography case when use began during adolescence); *U.S. v. Baker*, 445 F.3d 987, 992 (7<sup>th</sup> Cir. 2006)(upholding reduction based on finding that “a prison term would mean more to Mr. Baker than to a defendant who previously had been imprisoned.”); *U.S. v. Jacob*, 2009 WL 1849942, \*14 (N.D.Iowa June 26, 2009)(rejecting guideline sentence of LIFE and “the parties’ alternative guideline range” of 292-365 months, and imposing 151 months and 10 years supervised release in enticement of a minor and transportation of child porn case for defendant lacking maturity, judgment, and social skills, had no significant criminal history or history of sex offenses involving children, no serious risk of predatory sexual violence, had extensive family and other support suggesting he would have significantly greater support than usual in rehabilitation efforts, and rejecting §§ 2G2.1, 2G2.2, and § 4B1.5 pattern of activity enhancement because they do not reflect empirical analysis); *U.S. v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008) (district court granted 3553(a) variance sentence of 24 months to safety-valve eligible homeless man caught in sting operation who was at most a delivery man who was asked at the last minute to pickup drugs from undercover agents, who played no role in negotiating the deal and who had no means to invest in the deal; court declared the even after reducing the quantity-driven drug guideline range by four levels for minimal role, the resulting 37-46 month range was too onerous as applied to a first time offender whose recidivism risk Sentencing Commission studies indicated to be extremely low); *U.S. v. Germosen*, 473 F.Supp. 2d 221, 227 (D.Mass. 2007)(citing studies that suggest true first time offenders have a very low recidivism rate); *U.S. v. Grinbergs*, 2008 WL 4191145 (D.Neb.2008) (district court sentenced defendant to one year and one day for possession of child pornography where advisory guideline range was 46 - 57 months, finding it to be too harsh both because the guidelines for pornography offenses focus on distribution or where an attempt to distribute was present, rather than possession offense, and because the enhancements were unreasonable. Court found that based on the defendants immature mental state at the time he committed offense, expert psychological testimony that he was not a pedophile or sexual predator and was unlikely to re-offend, and the punishment he would bear based on the social stigma attached to registering as a sexual offender, sentence of 12 months and one day was sufficient but not greater than necessary to meet the aims of punishment.); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, 2008)(sentence of a year and a day imposed, below GR of 46-57 months for possession of child pornography because defendant’s addiction to pornographic images began at age 14 when adolescent brain is underdeveloped (citing review of scientific literature), the guideline provisions were illogical as applied to defendant, a lower sentence was warranted to avoid sentencing disparities and the need for restitution would be satisfied by substantial community service, defendant sought therapy before he was charged, made efforts to turn his life around and lived a well-adjusted life for three years prior to sentencing, and his therapist opined that he recognized wrongfulness of his conduct, had insight and was genuinely remorseful.)

### **31. Ability of defendant to pay restitution**

### **31A. To enable defendant to make restitution**

*U.S. v. Menyweather*, 431 F.3d 692, 702 (9th Cir. 2005) (in case of embezzlement of \$500,000, after *Booker*, no abuse for court to depart downward by 8 levels to probation in part because “ a sentence of probation may have made defendant better able to provide restitution to the victims, *see* 18 U.S.C. § 3553(a)(7)”); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, 2008)(sentence of a year and a day imposed, below GR of 46-57 months for possession of child pornography because defendant’s addiction to pornographic images began in adolescence, the guideline provisions were illogical as applied to defendant, a lower sentence was warranted to avoid sentencing disparities and the need for restitution would be satisfied by substantial community service, defendant sought therapy before he was charged, made efforts to turn his life around and lived a well-adjusted life for three years prior to sentencing, and his therapist opined that he recognized wrongfulness of his conduct, had insight and was genuinely remorseful.); *U.S. v. Coleman*, 370 F. Supp. 2d 661 (S.D. Ohio 2005) (defendant convicted of conspiracy to violate FDA Act involving misbranded drugs, guideline range was 6-12 months; sentenced to probation, community treatment center and house arrest in part because “five years of probation, as opposed to one year of imprisonment or imprisonment with supervised release, will afford Defendants more time to pay restitution. 18 U.S.C. § 3553(a)(7)”); *U.S. v. Peterson*, 363 F. Supp. 2d 1060 (E.D. Wisc. 2005) (defendant, a gambling addict in counseling, pled guilty to defrauding bank of \$80,000; guideline range was 12 to 18 months, court imposed one day in prison and 5 year supervised release term in part so defendant would not lose job and could pay restitution.); *U.S. v. Blackburn*, 105 F. Supp. 2d 1067 (D.S.D. 2000) (defendant pled guilty to failure to pay child support and guideline called for 12-18 months, court departed to probation to ensure defendant would be subject to longer term of supervision, finding imprisonment counter-productive towards payment of child support); For crimes committed after October 27, 2003, the guidelines prohibit departures for restitution if required by law or the guidelines. USSG § 5K.0(d)(5).

### **32. Crediting punishment already received**

#### **32A. Defendant was already punished**

*U.S. v. Carpenter*, 320 F.3d 334, 345 (2d Cir. 2003) (home detention erroneously served can be grounds for departure); *U.S. v. Romualdi*, 101 F.3d 971(3d Cir.1996) (“it may be proper to depart because of the ... home detention [a defendant] had already served.”); *U.S. v. Miller*, 991 F.2d 552, 554 (9th Cir.1993) (that defendant has “already been punished to some extent” by pretrial home detention” is grounds for departure and district court can depart downward to take into account defendant’s home detention erroneously served).

#### **32B. Credit for time served on state case whether related or not**

See U.S.S.G. § 5G1.3, note 3(E) and note 4 departure provisions. *U.S. v. Pray*, 373 F.3d 358 (3d Cir. 2004) (where defendant served 4 months state time for drug offense and later convicted on related federal drug offense, district court cannot “credit” defendant with time served under §5G1.3, but may depart downward on federal sentence to effectively credit defendant with state time--which was completed (and therefore not “undischarged” in accordance with §5G1.3); *Ruggiano v. Reish*, 307 F.3d 121 (3d Cir. 2002) (district court has authority under U.S.S.G. § 5G1.3 to adjust a federal sentence for time served (14 months) on a state sentence (even if preexisting and unrelated), in a way that is binding on the Bureau of Prisons whether called a “departure” a “credit” or an “adjustment.” ); *U.S. v. Figueroa*, 215 F. App’x 343 (5th Cir. 2007) (case remanded because district court failed to consider whether to reduce federal sentence for time served on related state offense under §5G1.3(b)(1)). “*Booker* does not nullify § 5G1.3(b).”); *U.S. v. White*, 354 F.3d 841 (9th Cir. 2004) (where defendant spent 10 months in state custody until his trial for attempted murder and was acquitted, and then was prosecuted in federal court for felon in possession, sentencing was remanded for district court to determine whether to depart under §5G1.3 to give credit for time served where district court erroneously believed only BOP could give defendant credit for the 10 months already served); *U.S. v. Rosado*, 254 F. Supp. 2d 316 (SDNY 2003) (defendant convicted of distributing heroin, and where defendant served 7 months in state custody on conviction that was relevant conduct in the federal sentence, defendant granted 7 month downward departure to account of state time already served).

### **32C. Alien who should receive credit for time served on INS detainer**

*U.S. v. Camejo*, 333 F.3d 669 (6th Cir. 2003) (Where defendant was alien who pled guilty to assault and who remained in INS detention for two years before trial, trial court was empowered to depart to give credit to defendant because guidelines do not forbid this factor--case remanded).

### **32D. Accounting for other punishment required on other counts**

*U.S. v. Vidal-Reyes*, 562 F.3d 43 (1<sup>st</sup> Cir. 2009) (in sentencing a defendant on an 18 U.S.C. §1028A aggravated identity theft conviction, the district court erred in concluding it could not consider the mandatory two-year sentence required by the statute in choosing a sentence for the defendant’s other, non-predicate offenses).

## **33. Defendant already punished by other events**

### **33A. Defendant already punished by collateral consequences**

*United States v. Gardellini*, 545 F.3d 1089 (DC Cir. 2008)(upholding non-guidelines sentence of probation and a fine for defendant convicted of filing false tax returns where guidelines range was 10-16 months because defendant had accepted responsibility, a minimal

risk of recidivism, had already suffered substantially and been treated for stress, and the only real deterrent in these cases are the efforts of prosecutors to enforce the laws, not harsh prison sentences); *U.S. v. Pauley*, 2007 WL 4555520 (4th Cir. Dec. 20, 2007) (36-month downward variance warranted in child pornography case where defendant was less culpable, deeply remorseful, and affected by collateral consequences); *U.S. v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007) (where 24 year old music student convicted of possessing child pornography, and was in treatment and presented low risk of recidivism, had strong support from family and community, district court imposed 70 months and circuit court affirmed where guideline range of 121-150 months in part because “the guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction. His future career as a teacher was ruined, and he was compelled to resign as piano teacher of children and as a church musician. He will also be forced to live with the stigma of being a convicted sex offender”); *U.S. v. Baird*, 2008 WL 151258 (D. Neb. Jan. 11, 2008) (The District Court considered the defendant’s 15 year military career, low risk of recidivism, lack of criminal history, and the conduct occurred several years ago as factors for a variance. Court also considered the other punishments that the defendant has received such as discharge from the military, a felony conviction, sex offender registration, and the stigma of being a sex offender. The court also considered that possession of child pornography is the least culpable of the exploitation offenses.); *U.S. v. Samaras*, 390 F. Supp. 2d 805, 809 (E.D.Wis. 2005) (where defendant convicted of fraud, sentence below guideline warranted in part because “as a consequence of his conviction and sentence, defendant lost a good public sector job, another factor not considered by the guidelines”); *U.S. v. Stone*, 374 F. Supp. 2d 983 (D.N.M. 2005) (where defendant pled guilty to aggravated sex abuse and guideline range was 78-97 months, court accepts Rule 11(c) agreement of 60 months because “since this incident...Boeing has terminated Stone's employment and Stone's wife has divorced him. ... The Court concludes that a sixty month term of incarceration, coupled with Stone's personal losses, reflects the seriousness of his offense, promotes respect for the law, and provides just punishment.”); *U.S. v. Redemann*, 295 F. Supp. 2d 887, 894-97 (E.D.Wis.2003) (departing downward where defendant suffered collateral consequences from conduct including loss of his business);

### **33B. Harshness of pretrial or presentence confinement**

*U.S. v. Carty*, 263 F.3d 191 (2d Cir. 2001) (finding that defendant’s pre-sentence confinement in Dominican Republic where conditions were bad may be a permissible basis for downward departure); *U.S. v. Pressley*, 345 F.3d 1205 (11th Cir. 2003) (where defendant spent six years in presentence confinement, including 5 years in 23-hour a day lockdown and where he had not been outside in 5 years, district court erred in holding that departure not available).

*U.S. v. Ortiz*, 2007 WL4208842 (D. N.J. Nov. 27, 2007) (The court varied from the Guidelines based on the horrible prison conditions where the defendant was being held. The court had previously heard testimony regarding the conditions of the prison and granted a variance.); *U.S. v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004) (presentence sexual abuse by

prison guard and lack of proper medical attention for over 15 hours while defendant was in labor warranted downward departure); *U.S. v. Rodriguez*, 214 F. Supp. 2d 1239 (M.D. Ala. 2002) (downward departure was warranted in drug case under § 5K2.0 because defendant was raped by prison guard pending sentence); *U.S. v. Bakeas*, 987 F. Supp. 44, 50 (D. Mass. 1997) ("[A] downward departure is called for when, as here, an unusual factor makes the conditions of confinement contemplated by the guidelines either impossible to impose or inappropriate.").

### **33C. Defendant had extraordinary punishment not contemplated by guidelines**

*U.S. v. Clough*, 360 F.3d 967 (9th Cir. 2004 ) (district court has discretion to depart downward in firearms case where defendant was shot by police during arrest because his “significant injuries” constitute a continuing form of punishment and factor not considered nor forbidden by the Guidelines)

## **34. Sentencing disparity**

### **34A. Co-Defendant Disparity**

*Gall v. U.S.*, 128 S. Ct. 586, 600 (2007) (appropriate for judges to impose below guideline sentence based on “need to avoid unwarranted similarities among other [defendants] who [are] not similarly situated.”); *Kimbrough v. U.S.* 128 S. Ct. 558 (2007) (same); *Rita v. U.S.*, 127 S. Ct. 2456 (2007) (same); *U.S. v. Vidal-Reyes*, 562 F.3d 43 (1<sup>st</sup> Cir. 2009)(in sentencing a defendant for 18 U.S.C. §1028A aggravated identity theft, district court erred in concluding it could not consider the mandatory two-year sentence required by the statute in choosing a sentence for the defendant’s other, non-predicate offenses); *U.S. v. Martin*, 520 F.3d 87 (1<sup>st</sup> Cir. 2008) (judge imposed 144 instead of applying career offender range of months for cocaine base distribution conspiracy rather than follow career offender guideline range of 262-327 months, citing family support, personal qualities indicating Martin’s potential for rehabilitation, and a perceived need to avoid disparity relative to coconspirator’s sentencing); *U.S. v. Williams*, 524 F.3d 209 (2<sup>nd</sup> 2008) (district courts are neither required to nor prohibited from considering sentence imposed on codefendant to avoid disparity, though case is reversed for reducing sentence based on neighboring jurisdiction’s plea bargain policy); *Cullen v. U.S.*, 194 F.3d 401, 408 (2d Cir. 1999) (sentencing court could plausibly conclude that extremely divergent sentences would undermine the accepted notion that similar conduct should be punished in a somewhat similar manner); *U.S. v. Simpson*, 209 F. App’x 279 (4th Cir. 2006) (unpub.) (affirming 29-month variance for extensive drug conspiracy, kidnaping, and aiding the brandishing of a firearm in light of sentences co-conspirators received. The sentence was reasonable because the district court considered the sentences of co-conspirators who received an average 181 months); *U.S. v. Carter*, 538 F.3d 784 (7<sup>th</sup> Cir. 2008); *U.S. v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006) (recognizing that extreme disparities in the sentences imposed on coconspirators could "fail[] to promote respect for the law"); *U.S. v. Tzoc-Sierra*, 387 F.3d 978

(9th Cir. 2004) (affirming district court's 10-month downward departure from guideline range for drug offense since sentence was equivalent to that of comparable co-defendants, and defendant had no criminal history); *U.S. v. Caperna*, 251 F.3d 827 (9th Cir. 2001) (where defendant was a small cog in large drug conspiracy, district court's downward departure to 36 months because of disparity in sentence of co-defendant was vacated, but on remand district court has discretion to depart downward because of disparity in sentence with other codefendant as long as codefendant was convicted of same crime); *U.S. v. Smart*, 518 F.3d 800 (10<sup>th</sup> Cir. 2008); *U.S. v. Chavez-Diaz*, 444 F.3d 1223 (10th Cir. 2006) (30-month sentence for illegal reentry after deportation was reasonable as sentence was below advisory guidelines range of 41-51 months, district court carefully considered statutory sentencing factors and imposed sentence below guidelines range to make defendant's sentence consistent with that of another defendant sentenced that day); *United States v. Zavala*, 300 Fed. Appx. 792 (11th Cir. 2008)(affirming district court's 3553(a) variance to 178 months based on need to impose sentence sufficient but not greater than necessary and avoid sentencing disparities with other co-defendants where co-defendant leader of conspiracy received departure under 5K1.1 for substantial assistance and a sentence of 188 months and Zavala's lesser role in conspiracy did not enable him to receive such a departure and he should not be punished for that);

*U.S. v. McElheney*, 2009 WL 1904565 (E.D.Tenn. July 2, 2009)(finding 135 to 168 month guideline range for receipt of child pornography was greater than necessary to achieve statutory sentencing goals, thus imposing 78-months where court found child pornography guidelines lack empirical support, defendant did not produce or distribute child pornography though he continued to download multiple images after he was indicted, the lesser statutory maximum for possessing child pornography than for receipt created sentencing disparity and sentences of other courts demonstrated guideline sentence would create disparity); *U.S. v. Tunnell*, 2009 U.S. Dist. LEXIS 7410 (W.D.Va., Feb. 3, 2009) (rejecting guideline range of 168-210 months as almost double the sentence most people receive for similar or worse child pornography crimes as defendants, and a 10 year sentence sufficed to deter and punish first time offender with low IQ reflecting spinal meningitis suffered as an infant, who had a supportive family and church network that, combined with lifetime supervised release, significantly reduce his risk of recidivism); *U.S. v. Faucett*, 543 F. Supp. 2d 549, (S.D. Va. 2008) (court rejects guideline range of 37-46 months citing unwarranted disparity produced by the polysubstance conversion table whereby defendant's possession for distribution of a small amount of marijuana and cocaine base produced a higher offense level than would have applied had Faucett possessed double the amount of cocaine and no other substance. As the anomaly was not an empirically based attempt to punish more severely those who possess multiple kinds of drugs, but an apparent oversight, the court instead imposed 30 months on this low-level dealer who did not make a living by drug sales, who possessed no weapons, and had no serious prior convictions or other record of violence); *U.S. v. Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008) (career offender guideline range violated goal of avoiding disparity, where Moreland's two relatively minor and non-violent prior drug offenses, cumulatively punished by less than a year in prison, vaulted him into the same category as major drug traffickers engaged in gun crimes or acts of

extreme violence); *U.S. v. Garrison*, 560 F.Supp.2d 83 (D. Mass 2008) (district court considers sentences and backgrounds of unrelated defendants arrested in the same federal-local drug enforcement sweep as Garrison and rejected the 77-96 month guideline range in favor of a 30 month term for a defendant with no violent record or prior drug conviction whose offense reflected his own drug and alcohol addictions. The judge notes that quantity driven drug guidelines are a bad proxy for culpability and invite false uniformity, as do criminal history categories insofar as they do not distinguish defendants whose convictions are non-violent from those with violent priors); *U.S. v. Stern*, 590 F.Supp.2d 945 (N.D. Ohio, Dec. 19, 2008) (in imposing 12 months and a day rather than 47-56 month guideline for child porn conviction to, among other things, avoid disparity, court note that the closest analogous case and defendant within the same district received probation); *U.S. v. Colon*, 2007 WL 4246470 (D. Vt. Nov. 29, 2007) (The difference between the prior sentences served justified a Guideline departure from the career offender. The court noted that the sentence would be over a ten-fold increase. In light of the nature of the prior offenses, the sentences served, and the large disparity between prior sentences and the present sentence, the Court finds that a downward departure is appropriate.); *U.S. v. Ortiz*, 502 F.Supp.2d 712 (N.D. Ohio 2007) (District court varied from the Guidelines because of the unwarranted disparities with codefendant sentences. The court expressed problems with career offender section which does not distinguish between offenders moving large quantities of drugs and a \$20 sale of heroin like the defendant. The court split the difference between the mandatory minimum and the advisory range.); *U.S. v. Green*, 2006 WL 3478340 (S.D.N.Y. Dec. 1, 2006) (where guidelines were 188-235 months for conspiracy to distribute and possess with intent to distribute heroin, co-conspirators engaged in the same conduct as the defendant, but were sentenced to 60 months, court imposed sentence of 84 months based on the co-conspirators sentences plus an extra two years for the defendant's additional criminal history); *U.S. v Carey*, 368 F. Supp. 2d 891 (E.D. Wis. 2005) (where defendant charged with wire fraud arising from receipt of SSI benefits while running a business, and where guideline range 15-21 months, sentence of one year and one day imposed in part to avoid disparity because government could have charged defendant under § 641, which is usually did, and which statute provides for lower offense level); *U.S. v. Hensley*, 363 F. Supp. 2d 843 (W.D. Va. 2005) (post *Booker*, where defendant pled guilty to distribution of meth and guidelines were 37-46 months, court imposed 12 months to avoid disparity with co-defendant's 6 month sentence merely because co-defendant went to the government first); *U.S. v. Gray*, 362 F. Supp. 2d 714 (S.D.W.Va. 2005) (in drug case where one defendant's guideline range was 97-121 months, and another's was 135-168 months, court imposes 97 months on both because conduct comparable and similar criminal history even though defendant did not accept responsibility); *U.S. v. Jaber*, 362 F. Supp. 2d 365 (D. Mass. 2005) (departure granted in part because defendant tried to cooperate repeatedly but had little to offer and "there is something troubling about the extent to which differences in sentencing were driven not by difference in the crime, but by the happenstance of the way the government indicted, the jurisdictions of indictment, and who ran to cooperate first...some adjustment is essential to reduce unwarranted disparity in the case at bar"); *U.S. v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005) (Adelman, J.) (post *Booker*, in illegal reentry case where Guideline range was 41-51 months,

court imposes 24 months in part because of unwarranted disparity in sentences among § 1326 defendants in border areas); *U.S. v. Clark*, 79 F. Supp. 2d 1066 (N.D.Iowa 1999) (unlike all districts, U.S. attorney here does not give cooperating witnesses protection for incriminating statement under USSG. §1B1.8, warranting departure from 36 to 28 where eight levels were due to drugs he admitted to in his debriefing).

### **34B. Disparity in plea-bargaining policies between districts**

*U.S. v Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (district courts can consider disparity caused by lack of fast-track program for immigration offenses; like the crack-powder ratio disparity in *Kimbrough*, the “selective institution” of fast-track departure authority does not exemplify the [Sentencing] Commission’s characteristic role, even though it has been blessed by Congress and criticized by the Commission, thus the guidelines and policy statements embodying these judgments deserve less deference; and holding that “...a sentencing court could conclude that, in light of the fast track disparity, a Guideline sentence is not minimally sufficient to achieve the broad goals of sentencing” articulated in § 3553(a)(2) and could thus “ground a variant sentence in [§3553(a)’s] parsimony principle rather than in section 3553(a)(6) alone.”). The Fifth, Ninth, and Eleventh Circuits have held that sentencing courts have no discretion to account for fast-track disparities despite *Kimbrough*. For an excellent discussion of the history of fast-track sentencing, the current circuit split, and for arguments in favor of sentencing court discretion, see Siegler, A., *Disparities and Discretion in Fast-Track Sentencing*, Federal Sentencing Reporter, Vol. 21, No. 5, pp. 299-310.

*U.S. v. Gutierrez-Hernandez*, 2009 U.S. DIST. LEXIS 25178 (S.D. N.Y. 2009) (in illegal reentry case, time served imposed where guideline range was 9-15 months, principally due to lack of “fast track”); *U.S. v. Evangelista*, 2008 U.S. Dist. LEXIS 96410 (S.D. N.Y., Dec. 3, 2008) (illegal reentry defendant sentenced to 24 months rather than guideline range of 46-57 months, it being “difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested for unlawful reentry.” Cites many other opinions); *U.S. v. Paolino-Melende*, 2008 WL 4487652 (S.D. N.Y. Oct. 2, 2008) (accounting for effects of fast-track disparity and double counting defendant’s record to enhance offense level and criminal history score, court reduces offense level and criminal history score to impose 30 year sentence rather than Guideline range of 57-71 months); *U.S. v. Miranda-Garcia*, 2006 WL 1208013 (M.D.Fla., May 4, 2006) (unpub.) (where defendant convicted of illegal reentry and guidelines suggested 41 to 51 months, sentence of 18 months imposed because of disparity between those defendants sentenced in districts with a fast-track program. “18 U.S.C. § 3553(a)(6) specifically instructs the Court to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”); *U.S. v. Santos*, 406 F. Supp. 2d 320 (S.D.N.Y. 2005) (in illegal reentry case where guideline range was 57 to 71 months, sentence of 14 months imposed in part because defendant not offered a “fast track” disposition available in other districts—rejecting government claim that fast-track policy is not ground for variance); *U.S. v. Medrano-Duran*, 386 F. Supp. 2d

943 (N.D.Ill. 2005) (At sentencing for illegal re-entry after deportation due to commission of an aggravated felony, court imposes sentence below the advisory Sentencing Guidelines range, where the unavailability in the district of an early disposition or “fast track” program for persons charged with illegal re-entry created an unwarranted disparity between defendant and illegal re-entry defendants in districts with such programs within the meaning of § 3553(a)(6); *U.S. v. Galvez-Barrios*, 355 F. Supp. 2d 958 (E.D. Wis. 2005) (in illegal reentry case where Guideline range was 41-51 months, court imposes 24 months in part because of unwarranted disparity in sentences among § 1326 defendants in border areas “[i]t is difficult to imagine a disparity less warranted than one that depends on the judicial district where the defendant happens to be found.”); *U.S. v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005) (post *Booker*, in illegal reentry case, where guideline range was 70-87 months (57-70 months after government concession), imposing sentence of 36 months in part because criminal history overrepresented and because “in other districts a similar defendant would not be prosecuted for illegal reentry, but would simply be deported”); *U.S. v. Clark*, 79 F. Supp. 2d 1066 (N.D.Iowa 1999) (unlike all other districts, U.S. attorney here does not give cooperating witnesses protection for incriminating statement under U.S.S.G. §1B1.8, so departure granted from 36 to 28 where extra levels were due to drugs he admitted to in his debriefing); *U.S. v. Bonnet-Grullon*, 53 F. Supp. 2d 430, 435 (S.D.N.Y.1999) (“it is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested.”).

### **34C. Disparity between federal and state sentences**

*U.S. v. Wilkerson*, 411 F.3d 1 (1st Cir. 2005) (where district judge “repeatedly expressed his concern about disparate treatment between federal and state court sentences in similar cases, but stated that the Guidelines did not permit him to take that disparity into account...,” case remanded for resentencing in part because under *Booker*, “the need to avoid unwarranted sentencing disparities” is among the factors to be considered by the now advisory Guidelines); *U.S. v. McDaniel*, 175 F. App’x 456 (2d Cir. 2006) (“Even assuming that McDaniel is correct and the District Court could have considered this type of disparity [between state and federal sentence for felon in possession] in its reasonableness analysis, we conclude that his sentence [of 72 months] is reasonable in light of the other factors listed in 18 U.S.C. § 3553(a).”).

## **35. Considerations of sentencing policy**

### **35A. Uncharged relevant conduct substantially increases the sentence**

*U.S. v. White*, 240 F.3d 127, 136 (2d Cir. 2001) (where defendant convicted of selling large amounts of drugs near school and witnesses testified to numerous uncharged sales over long period, contrary to view of district court, court had authority to depart downward (from 240-year sentence) “where findings as to uncharged relevant conduct made by the sentencing court based on a preponderance of the evidence substantially increase the defendant's sentence

under the Sentencing Guidelines”); *U.S. v. McDonald*, 2008 WL 191819 (3d Cir. Jan. 24, 2008) (Remanded for resentencing on McDonald because the district court failed to conclude if the state sentence was relevant conduct. Other defendant’s sentence affirmed.); *U.S. v. Koczuk*, 166 F. Supp. 2d 757 (EDNY 2001) (where “relevant acquitted conduct produces the same sentencing result as if the defendant had been convicted of that conduct or significantly increases the range, a downward departure is “invariably warranted.”).

### **35B. BOP refuses to honor judicial recommendation of CTC**

*U.S. v. Serpa*, 251 F. Supp. 2d 988 (D.Mass. 2003) (where BOP no longer followed its long-standing policy of honoring judicial recommendations (to place defendants who fell within Zone C of the Sentencing Table in CCCs for the imprisonment portions of their sentences), downward departure granted to defendant who pled guilty to filing false tax returns and whose guideline sentencing range was 10 to 16 months)

### **36. The advisory guideline calculated by a preponderance standard is too high when compared to that calculated by proof beyond a reasonable doubt**

*U.S. v. Gray*, 362 F. Supp. 2d 714 (S.D.W.Va. 2005) (in drug case suggesting that if guideline calculated by preponderance standard was greater than that calculated by beyond a reasonable doubt standard, court’s confidence in correctness advisory guideline was undermined and sentence should be lowered accordingly); *U.S. v. Leroy*, 373 F. Supp. 2d 887 (E.D. Wisc. 2005)( n. 2) (sentence of 70 months, rather than guideline of 100 to 125 months, was sufficient, but not greater than necessary, to serve purposes of sentencing. “Despite the applicability of a preponderance standard to guideline determinations, judges should still require a high degree of confidence in any finding that increases the sentence. As Judge Goodwin noted in *U.S. v. Gray*, 362 F. Supp. 2d 714, 723 (S.D. W. Va. 2005), in determining what weight to give the advisory guidelines, it may be helpful for the court to consider whether any guideline enhancements are supported by evidence beyond a reasonable doubt. This is not a back-door means of adopting the position of the remedial dissenters in Booker. Rather, it allows the court to give effect to both the merits and remedial majority opinions: federal sentencing is still judge-based, but courts should not impose sentences based on the sort of flimsy evidence that often passed under the old regime.”)

### **37. Basic justice and fairness**

#### **37A. The totality of the circumstances**

For crimes committed before October 27, 2003, the district court is authorized to depart downward when the "combination of factors" indicate that a departure is appropriate. *U.S. v. Martin*, 520 F.3d 87 (1<sup>st</sup> Cir. 2008) (judge imposed 144 months for cocaine base distribution conspiracy rather than apply the career offender range, citing the individualized variances for

many coconspirators and the defendants renouncement of his bad ways and religious conversion during two years of post-arrest incarceration plus the defendant's unusually supportive family. The First circuit affirmed, observing that "sentencing decisions represent instances in which the whole sometimes can be greater than the sum of the constituent parts. So here: it is the complex of factors -- their presence in combination -- that verges on the unique. The factors themselves, if viewed in isolation, present a distorted picture."); *U.S. v. Rioux*, 97 F.3d 648 (2d Cir. 1996)(following *Koon*, based on defendant's health problems – severe kidney disease and good acts – charitable fundraising – departure and sentence of probation approved); *U.S. v. Sabino*, 274 F.3d 1053 (6th Cir. 2001) (downward departure not abuse of discretion for combination of factors including death of spouse, age of 72, ailments with eyes and ears, absence of threat, absence of risk of flight, minor role); *U.S. v. Fletcher*, 15 F.3d 553 (6th Cir. 1994) (combination of factors including age of priors justified departure from career offender); *U.S. v. Jones*, 158 F.3d 492 (10th Cir.1998); *United States v. Huckins*, 529 F.3d 1312 (10th Cir. 2008)(appellate court upheld sentence of 18 months for defendant who had pled guilty to one count of possession of child pornography where guideline range was 78 to 97 months because the district court, when looking at the defendant as a person he had no criminal record, was going through a difficult time in his life when he committed offense, had no repeat offenses, and had made substantial improvements in his life awaiting sentencing); *In Re Sealed Case*, 292 F.3d 913 (D.C.Cir. 2002) (defendant with no priors convicted of selling more than 50 grams of crack to agent, facing 87-108 months, though judge's 24-month sentence remanded because some departure grounds invalid (crack-powder disparity), on remand district court may properly consider "defendant's acceptance of responsibility, her desire to seek rehabilitation, and her family and community ties" in a totality of the circumstances analysis even though Commission considered these factors separately).

*U.S. v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004) (9 level departure granted in heroin case for the combination of Mateo's extraordinary family and pre-sentence confinement circumstances even if the Court were to have concluded that the factors did not individually support a departure); *U.S. v. Nava-Sotelo*, 232 F. Supp. 2d 1269 (D. N.M. 2002) (defendant convicted of assault and kidnapping obtains six-level downward departure based on a "combination of exceptional mitigating factors, including family circumstances, incomplete duress, lesser harms, community support, and civic, charitable and public support." ); *U.S. v. Rothberg*, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (where defendant pled to copy right infringement without plea bargain, and where, despite the government's refusal to file motion under § 5K1.1, defendant continued to cooperate with the government, defendant showed extraordinary acceptance of responsibility, and this, together with lack of profit and unusual family situation, warrants additional 2 level departure to 18-24 months); *U.S. v. Ribot*, 97 F. Supp. 2d 74 (D.Mass. 1999) (where defendant embezzled \$200,000, court departs downward to probation from range of 24-36 months based on combination of aberrant behavior and mental illness); *U.S. v. Somerstein*, 20 F. Supp. 2d 454 (E.D.N.Y. 1998) (defendant's history of charitable efforts, exceptional work history, and experiences as a child victim of the Holocaust, when considered together, created a situation which differed significantly from the "heartland"

of cases, and warranted a downward departure after defendant was convicted of mail fraud, making false statements, and conspiracy in connection with actions taken as principal of a catering firm.); *U.S. v. Delgado*, 994 F. Supp. 143 (E.D. N.Y. 1998) (three-level downward departure to first-time offender, a drug courier, based on coercion from a creditor and combination of aberrant behavior, defendant's fragility, and his exceptionally difficult life).

### **37B. Sua sponte departure**

*U.S. v. Williams*, 65 F.3d 301, 309-310 (2d Cir. 1995) ("we wish to emphasize that the Sentencing Guidelines do not displace the traditional role of the district court in bringing compassion and common sense to the sentencing process . . . In areas where the Sentencing Commission has not spoken . . . district courts should not hesitate to use their discretion in devising sentences that provide individualized justice"); *U.S. v. Ekhtor*, 17 F.3d 53 (2d Cir. 1994) (even where defendant agreed not to ask for downward departure, court may do so sua sponte if unusual family circumstances; remanded); *U.S. v. Williams*, 432 F.3d 621 (6th Cir. 2005) (in felon in possession case, where plea agreement forbade defense from arguing downward departure, court apparently sua sponte imposed 24 months instead of Guidelines 40 month sentence because possession was "atypical" and because criminal history was overstated).

*U.S. v. Tanasi*, 2003 WL 328303 (S.D.N.Y. Feb. 6, 2003) (unpub.) (defendant convicted of possessing and sending child porn by computer to undercover agent pretending to be 13 year court sua sponte departs from 33-41 month guideline to 9 months because of diminished capacity given "obsessive and compulsive behavior" and could not control his conduct and where no evidence defendant was a sexual predator or ever was involved sexually with a child); *U.S. v. Marcus*, 238 F. Supp.2d 227 (EDNY 2003) (In receipt of child porn case, even though "the plea agreement precludes defendant from seeking downward departure," court "sua sponte and for its own edification directs defendant to explore whether a basis for such a departure exists...in that regard the defense has already provided the Court with ...the "Able Assessment Test," which purports to show that the defendant does not represent a risk to children. Possibly that information, and or other information may serve as an appropriate predicate for a downward departure); *U.S. v. Blackburn*, 105 F. Supp. 2d 1067 (D.S.D. 2000) (where defendant pled guilty to failure to pay child support and was \$15,000 in arrears, and where guideline called for 12-18 months, court notes imprisonment counter-productive towards payment of child support and grants downward departure on its own motion so court could impose a sentence of probation to make sure that defendant would be subjected to a longer term of supervision than would have been possible if sentence of imprisonment imposed).

### **37C. Judge's own sense of what is fair and just**

*U.S. v. Cruz-Rodriguez*, 541 F.3d 19 (1<sup>st</sup> 2008) (judge varied 60 months below guideline minimum for two counts in drug trafficking conspiracy to avoid penalizing Cruz twice for possessing a firearm - first by enhancing the first two counts for possessing a firearm while part

of the drug conspiracy (USSG §2D1.1(b)(1), and second by imposing a consecutive 60 month sentence for a third count of possessing a firearm in a school zone pursuant to 18 U.S.C. §924(a)(4)); *U.S. v. Jones*, 460 F.3d 191 (2d Cir. 2006) (where defendant convicted of felon in possession and possession of firearm and guidelines were 36 months, district court properly imposed non guideline sentence of 15 months when he considered his own sense of what was fair and just. “Although the sentencing judge is obliged to consider all of the sentencing factors outlined in section 3553(a), the judge is not prohibited from including in that consideration the judge’s own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judges, and it may continue to be exercised, subject to the reviewing court’s ultimate authority to reject any sentence that exceeds the bounds of reasonableness.); *U.S. v. Weisberg*, 297 Fed.Appx. 513 (6<sup>th</sup> Cir. 2008) (Appellate court upheld the district court’s downward variance which would have amounted to a three-level guideline reduction on a tax evasion charge where the record demonstrated that the district court considered at length the 3553(a) factors and the appellate court had a responsibility to grant considerable deference to the district court’s decision).

### **^03 CONCLUSION**

The departure authority within the Guidelines Manual provides a preliminary basis for sentences below the Guidelines, but neither counsel nor the Court fulfill their obligations by considering departures alone. Counsel must show, and the district court must consider, all reasons why a Guideline sentence “fails to properly reflect Section 3553(a) considerations, or perhaps [that] the case warrants a different sentence regardless.” *Rita*, at 2456. The district court cannot presume that the Guidelines range applies to any particular case. *Id.* Counsel’s duty extends to challenging the imposition of a Guidelines range sentence by all arguments available, including Guidelines departures. There is essentially no limit on the potential factors that may warrant a departure or non-Guideline sentence.

### **^04 SUGGESTED READING AND HELPFUL RESOURCES**

Some of the following are available at the Office of Defender Services Training Branch website, <http://www.fd.org>

Sherry Allison (R&WS) and James Langell (AFPD), *Analyzing Presentence Reports and Common Sentencing Issues in Illegal Reentry Cases*, available at [http://www.fd.org/pdf\\_lib/psr%20illegal%20reentry.pdf](http://www.fd.org/pdf_lib/psr%20illegal%20reentry.pdf)

Amy Baron-Evans, Sentencing Resource Counsel, *Enforcing the New Sentencing Law*, March 10, 2006. <http://www.fd.org>

Amy Baron-Evans, Sentencing Resource Counsel, *Sentencing Post-Booker*, April 10, 2006. <http://www.fd.org>

Amy Baron-Evans, Sentencing Resource Counsel, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After United States v. Booker*, August, 2006.

Amy Baron-Evans, Sentencing Resource Counsel, *What is Lovely (and Not So Lovely) About Rita, Implications for Gall, Kimbrough and Future Cases* (Sept. 2007) [http://www.fd.org/pdf\\_lib/Rita\\_Memo\\_9.12.07.pdf](http://www.fd.org/pdf_lib/Rita_Memo_9.12.07.pdf)

Amy Baron-Evans, Sentencing Resource Counsel, *Rita, Gall and Kimbrough: A Chance for Real Sentencing Improvements*, March, 2008.

Anne E. Blanchard, Sentencing Resource Counsel, & Kristen Gartman Rogers, Appellate Attorney, S.D. AL, *Presumptively Unreasonable: Using the Sentencing Commission’s Words to Attack the Advisory Guidelines*, THE CHAMPION, March 29, 2005.

*Deconstructing the Guidelines*, Sentencing Resource Counsel papers  
[http://www.fd.org/odstb\\_SentencingResource3.htm#DECONS](http://www.fd.org/odstb_SentencingResource3.htm#DECONS)

Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 *Stan.L.Rev.* 338 (2005)

Linda Drazga Maxfield & Keri Burchfield, *Immigration Offenses Involving Unlawful Entry: Is Federal Practice Comparable Across Districts?*, 14 *Fed.Sent.Rep.* 260, 2002 WL 31304861 (Mar.Apr. 2002)

Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, *U.S. Sentencing Comm'n* (Jan. 1988).

Alan DuBois, Senior Appellate Attorney, E.D.N.C. & Anne E. Blanchard, National Federal Defender Sentencing Resource Counsel, *The Due Process Approach to Sentencing Justice: How Courts Can Use Their Discretion To Make Sentencing More Accurate and Trustworthy*, 18 *FED. SENT'G REP.* 2, January 2006.

Alan DuBois and Nicole Caplan, *Testimony before the U.S. Sentencing Commission on Problems with the Illegal Reentry Guideline*, at p.28  
[http://www.fd.org/pdf\\_lib/Dubois%20and%20Kaplan%20Testimony%20Final.2.10.09.pdf](http://www.fd.org/pdf_lib/Dubois%20and%20Kaplan%20Testimony%20Final.2.10.09.pdf)

*Federal Public Defender's Office Sentencing Resource Manual: Using Studies & Statistics to Redefine the Purposes of Sentencing* (Jennifer Coffin, Research & Writing Specialist, Federal Public Defender's Office, M.D.TN; Sarah Gannett, Research & Writing Specialist, Federal Public Defender's Office, D.MD; Molly Roth, Asst. Federal Defender, W.D. TX, eds.) (a compilation of useful resources defense attorneys can consult when drafting sentencing memoranda and making oral arguments for below guideline sentences).  
<http://www.fd.org>

Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 *Annals N.Y. Acad. Science* 105-09 (June 2004).

Creasia Finney Hairston, Ph.D. *Prisoners and Families: Parenting Issues During Incarceration*, from U.S. Dept. Of Health & Human Services Conference "From Prison to Home" (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/>

Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules; Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 *AM. CRIM. L. REV.* (2003).

THOMAS W. HUTCHISON ET AL., *FEDERAL SENTENCING LAW AND PRACTICE* (Thompson and West 2009).

Ryan King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After Booker* (January 2006), available at <http://www.sentencingproject.org>

Michael Levine, *138 Mitigating Factors: Cases Granting, Affirming or Suggesting Mitigating Factors*, October 1, 2006 (an updated version of this document is available from the author, Michael R. Levine, Law Offices of Michael R. Levine, Portland, OR, for a fee. Contact Michael Levine for more information at MichaelLevineESQ@aol.com.)

Ross D. Parke and K. Alison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, U.S. Dept. Of Health & Human Services Conference "From Prison to Home" (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/>

Ruben G. Rumbaut, Ph.D. & Walter A. Ewing, Ph.D., Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men* (Spring 2007).

Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 Hastings L.J. 1217 (2002)

Sands & McWhirter, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Reentry Cases*, 8 Fed.Sent.Rep. 275 (1996)

*Sentencing Law and Policy* blog at <http://sentencing.typepad.com>.

The Sentencing Project, *Incarceration and Crime: A Complex Relationship* (2005) <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>.

Sentencing Resource Counsel *Congressional Directive to the Sentencing Commission (1988-2008)*, Table at [http://www.fd.org/pdf\\_lib/SRC\\_Directives\\_Table\\_Nov\\_2008.pdf](http://www.fd.org/pdf_lib/SRC_Directives_Table_Nov_2008.pdf)

Siegler, A., *Disparities and Discretion in Fast-Track Sentencing*, Guest Editor's Observations, Federal Sentencing Reporter, Vol. 21, No. 5 (June 2009).

Troy Stabenow, AFPD, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* (Revised Jan. 2009) available at [http://www.fd.org/pdf\\_lib/child%20porn%20july%20revision.pdf](http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf)

U.S. Dept. of Justice, Office of Justice Programs, *Myths and Facts About Sex Offenders* (Aug. 2000) (Sex offenders are amenable to treatment) available at <http://www.csom.org/pubs/mythsfacts.html>

U.S. Dept. of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released From Prison in 1994*, at 2 available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf> (Sex offenders 25% less likely to re-offend)

U.S. Dept. of Justice, Office of Justice Programs, Center for Sex Offender Management, *Recidivism of Sex Offenders* (May 2001) available at <http://www.csom.org/pubs>

U.S. Dept. of Justice, Office of Juvenile and Delinquency Prevention, Annual Report (2005), available at [www.ncjrs.gov/pdffiles1/ojdp/212757.pdf](http://www.ncjrs.gov/pdffiles1/ojdp/212757.pdf).

U.S. Sentencing Com'n., Proceedings of the National Symposium on Alternatives to Incarceration (2008) [http://www.ussc.gov/SYMPO2008/NSATI\\_0.htm](http://www.ussc.gov/SYMPO2008/NSATI_0.htm)

U.S. Sentencing Com'n., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (2004) [http://www.ussc.gov/15\\_year/15year.htm](http://www.ussc.gov/15_year/15year.htm).

U.S. Sentencing Comm'n., *Measuring Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines*, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004) <http://www.ussc.gov/publicat/Recidivism> General.pdf.

U.S. Sentencing Comm'n., *Recidivism and the "First Offender,"* A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004) [http://www.ussc.gov/publicat/Recidivism\\_FirstOffender.pdf](http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf)

U.S. Sentencing Comm'n., *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004) <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>.

U.S. Sentencing Comm'n., Report to Congress; Downward Departures from the Federal Sentencing Guidelines (Oct. 2003) [www.ussc.gov/depart rpt03/depart rpt03.pdf](http://www.ussc.gov/depart rpt03/depart rpt03.pdf).

U.S. Sentencing Comm'n., Report to Congress; *Cocaine and Federal Sentencing Policy* (May 2007) [www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf)

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(May 2002) [www.ussc.gov/r\\_congress/02crack/2002rpt.pdf](http://www.ussc.gov/r_congress/02crack/2002rpt.pdf)

U.S. Sentencing Comm'n, Federal Register Notices, <http://www.ussc.gov/NOTICE.HTM>