108 EASY MITIGATING FACTORS

(Formerly "88 Easy Departures")

Cases Granting, Affirming, Or Suggesting Mitigating Factors

by

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TABLE OF CONTENTS

Paragraph No. Page

Introduction: Some Useful Observations On mitigating factors 9

1 The advisory guideline "greater than necessary" or too draconian, and the purpose of sentencing is satisfied by a sentence below the guidelines.....11

2. Criminal Conduct Atypical And Outside Heartland Of The Guideline.....12

3. Amount Of Drugs Distributed Overstated The Defendant's Culpability Because The Drugs Were Distributed Over A Lengthy Period Of Time.....13

4. Downward Adjustment For Role In The Offense Is Inadequate To Show Defendant's Peripheral Involvement. 13

5. Defendant Had No Knowledge Of Or Control Over Amount Or Purity of Drugs He Delivered. 14

5A. Defendant Is Just An Addict Who Delivered Small Quantities.....14

6. The Drugs Were Of Very Low Purity.....15

7. Uncharged Relevant Conduct Substantially Increases The Sentence.....15

8. The Defendant's Criminal History Overstates His Propensity To Commit Crimes. 15

9. Length Of Time Until First Crime. 18

10. Loss Table Overstates Amount Of Loss Or Seriousness Of Offense. 18

11. Amount of Loss Triggers Multiple Enhancements At High Offense Level.....19

12 Money Laundering Only Incidental To Underlying Crime Or Where Not Drug Related.20

*13. The Defendant's Crime Constituted Aberrant Behavior. 20

14. Rendering Aid To Victim. 22

*15. Defendant's Conduct Did Not Threaten The Harm Sought To Be Prevented By The Law Proscribing The Offense – Perceived Lesser Harm. 23

*16. To Enable Defendant To Be Eligible For Boot Camp, Counseling, Or Other Rehabilitative Program. 24

17. Departure To Substitute Community Confinement For Prison……....24

18. To Enable Defendant To Make Restitution. 25

*19. The Defendant Suffered Extraordinary Physical Or Sexual Abuse As Child. 25

20. The Defendant Was Exposed To Domestic Violence....26

21. Holocaust Survivor. 26

22. The Defendant Is Elderly 13

22A. Unlikely to be A Recidivist....27

23 The Defendant is Youthful and of Immature Mental Age....27

24. Excellent Employment History. 27

*25. The Defendant Manifested "Super" Acceptance Of Responsibility. 28

26. Defendant Showed Extreme Remorse. 29

*27 Post-Offense, Post-Conviction, And Post-Sentencing Rehabilitation. 29

28. Post-Offense Restitution. 33

29. Voluntary Disclosure Of A Crime. 33

30. Voluntary Cessation of Criminal Activity before discovery....34

31. The Defendant Showed Utter Lack Of Sophistication. 34

32. Cooperation With Authorities To Prosecute Others. 34

33. Cooperation But Not To Prosecute Others…… 34

34. Cooperation With The Judiciary And Administration Of Justice....35

35. Departure For Cooperation When Government Refuses To Make 5K1.1 Motion.....35

36. Cooperation that saved life of government informant 35

37. Cooperation With Congressional Committee. 36

38. Cooperation With State Or Local Authorities. 36

39. Cooperation By Third Party On Behalf Of Defendant. 36

40. Attempted Cooperation With IRS.....36

*41. Extraordinary Family Situations Or Responsibilities Or Where Incarceration Would Have Extraordinary Effect On Innocent Family Members. 36

42. Incarceration Would Have Extraordinary Effect On Business Causing Loss Of Jobs. 39

43. Exceptional Good Works, Charitable And Community Activities.....41

44 Good Deeds (e.g., saving a life)……41

45. Defendant's Status As War Refugee And His Lack Of Education.....41

46. Defendant's Extreme Anguish From Involving Son In Scheme. 41

*47. Defendant's Diminished Mental Capacity. 45

48. Mental Retardation. 45

49. Compulsive Gambling Disorder 46

50 Battered Woman Syndrome..... 46

51. Defendant's Extraordinary Mental And Emotional Condition.....47

52. Defendant Was Merely An Aider And Abettor. 47

53. Defendant Responsible For Only Part Of Loss. 47

54. Defendant Was Already Punished By Parole Commission On Earlier Pre-Guideline Offense (By Loss Of Parole). 47

55. Defendant Already Punished By Having Earlier Sentence Increased Because Of Instant Crime.....47

56. Defendant already punished by home detention before appeal.....
48.

57. Prosecutor's Manipulation Of The Charges, Even If No Bad Faith.....48

58. Prosecution Or Defense Misconduct Prejudices Defendant's Plea Bargaining. 48

59. Prosecutor's Misconduct In Failing To Disclose Brady Material. 48

60. Ineffective Assistance Of Counsel.....49

61. Delay In Arrest Or Charge.....49

62. Gender Discrimination In Plea Bargaining.....49

63. Prosecutor's Misconduct – Selective Prosecution – Improper Investigative Techniques. 49

64. Minimal Role In The Offense.....50

65. Small Profit In Stolen Bond Scheme. 50

66 No Profit Or Motive or Financial Gain.....50

67. Vulnerability To Abuse or Victimization In Prison.....50

68. Defendant Raped By Guard Pending Sentencing.....52

69. Defendant Shot by police during arrest.....52

70. Defendant's Subjected To Extraordinary Punishment Not Contemplated by Guidelines. 52

*71. Bureau of Prisons refuses to follow policy of honoring judicial recommendation to place defendants in community treatment center.....52

72. Solitary Confinement Or Harsh Nature Of Defendant's Incarceration 52

73. Defendant Subject To Abuse In Prison.....53

74. Cultural Heritage And Sociological Factors.....54

75. Loss Of Business, Assets, And Source Of Income. 54

76. The Defendant's Tragic Personal History. 55

77. Victim's Conduct Substantially Provoked The Offense Behavior. 55

78. Defendant Has Extraordinary Physical Impairment Or Bad Health and BOP unable to provide adequate care.. 55

79. Military Service-Extraordinary. 57

80. Delay In Sentencing Which Deprives Defendant Of Chance For Concurrent Sentence...57

81. Pre-Indictment Delay That Prejudices Defendant. 58

82. Imperfect Entrapment – Aggressive Encouragement By Agents. 58

*83 Sentencing Entrapment. 58

*84. Duress Or Coercion. 59

85. Sentence Erroneously Served. 61

86. Disparity In Sentencing. 61

87 Disparity In Plea-Bargaining Policies Between Districts. 62

88. Government Responsible For Criminal Behavior. 62

89. Dual Prosecution By State And Federal Governments. 62

90. Breach Of Plea Bargain Re: Substantial Assistance. 63

91. Government Misconduct In Contacting D Without Notice To Counsel And D's Cooperation. 63

92. Civil Forfeiture. 63

93. Punishment For Acquitted Conduct. 63

94. Credit For Time Served On INS Detainer. 64

*95. Credit For State Time Whether Related Or Not. 65

96. Harshness of Pretrial or Presentence Confinement.....65

97. Lengthy Pretrial Confinement's Adverse Effect On Defense Preparation.....66

*98. Defendant Is Deportable Alien Who Faces More Sever Prison Conditions Than Non-Alien. 67

99. Alien Who Will Be Deported Because Of Guilty Plea Punished Too Severely.....67

100. Alien Who Reentered For Good Motive Or To Prevent Perceived Greater Harm 68

101. Alien Who Consents To Deportation.....68

102. Alien Who Illegally Reenters And Whose Prior Aggravated Felony Is Not Serious.....68

103. Alien Who Has Assimilated Into American Culture. 69

104 Alien who receives no credit on INS detainer.....70

105. Defendant Does Not Understand Socially Unacceptable Nature Of Child Porn.....70

*106 The Totality Of The Circumstances.....71

107. Sua Sponte Departure By Court.....72

108. To Be Announced!

108 EASY MITIGATING FACTORS

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Caveat: CHECK ALL CITES!! Mitigating Factors marked with an "*" should be considered in every case. Note that many categories overlap.

Introduction: Some Useful Observations On Mitigating Factors

In **United States v. Booker**, 125 S.Ct. 738, 2005 WL 50108 (Jan. 12, 2005), the Supreme Court held that the sentencing guidelines are advisory only, not mandatory. The other factors set forth in 18 U.S.C. § 3555 (a) must also be considered in fashioning the appropriate sentence. See **United States v. Ameline**, ___ F.3d ____, 2005 WL _____, U.S. App. LEXIS 2032 (9th Cir. Feb. 9, 2005) (advisory guideline range is "only *one* of many factors that a sentencing judge must consider in determining an appropriate individualized sentence"). These factors include the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for law and to provide *just* punishment for the offense, to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant; to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, the need to avoid unwarranted sentencing disparities, and to provide restitution to the victims. *Booker* at 19; Hence, this paper now uses the term **"mitigating factors"** instead of "downward departures." *See* Dissent of Justice Stevens in Booker at 35 ("there can be no departure from a mere suggestion.").

The district court may now consider even those mitigating factors that the advisory guidelines prohibit: e.g., poverty, racial discrimination and humiliation, drug abuse and addiction, dysfunctional family background, lack of guidance as a youth, etc. **Ameline**; ***United States v. Ranum***, 2005 WL 161223 (E.D. Wisc. Jan. 19, 2005) ("The guidelines' prohibition of considering these factors cannot be squared with the Section 3553(a)(1) requirement that the

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court evaluate the "history and characteristics" of the defendant'); U.S. v. Myers 2005 WL 165314, *2 (S.D.Iowa,2005) ("The guidelines prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant....Thus, in cases in which a defendant's history and character are positive, consideration of all of the § 3553(a) factors might call for a sentence outside the guideline range")
see also 18 U.S.C. § 3661("no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (cited in Booker at 15). Consider also that Congress had directed that the district court "shall impose a sentence sufficient, *but not greater than necessary*, to comply with [the purposes of sentencing]" (emphasis added). 18 U.S.C. § 3553(a). This is the "primary directive" of the sentencing statute. Ranum, at ____

Remember also that The Supreme Court said in Koon v. U.S. , 518 U.S. 81, 113 (1996), that "[i]t 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."

Caveat: Recall that effective April 30, 2003, **the Feeney Amendment** sharply cut back the grounds for departures in certain sex and child porn cases. *Booker's* remedial opinion did not expressly mention these cutbacks, and Booker's effect on the Amendment is not clear. **But see U.S. v. Detwiler 338 F.Supp. 2d 1166 (D.Or. 2004) (holding the Feeney Amendment renders mandatory sentencing guidelines an unconstitutional violation of the separation of powers).**

Even before *Booker*, the Sentencing Guidelines "place[d] essentially no limit on the number of potential factors that may warrant a departure." Koon 518 U.S. at 106; U.S. v. Coleman, 188 F.3d 354, 358 (6th Cir.1999) (en banc) (there are a "potentially infinite number of factors which may warrant a departure"); 18 U.S.C. §3661 ("no limitation shall be placed on the information" a court can receive and consider for purposes of imposing an appropriate sentence). A departure is warranted if the case is "unusual enough for it to fall outside the heartland of cases in the guidelines." Even when the guidelines were mandatory, they did 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. Williams, 65 F.3d 301, 309-310 (2d Cir. 1995); "It is important, too, to realize that departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some aspects, the rigidity of the Guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence." U.S. v. Gaskill, 991 F.2d 82, 86 (3rd Cir. 1993). "The Guidelines are not a straightjacket for district judges." U.S. v. Cook, 938 F.2d 149, 152 (9th Cir. 1991); The Guidelines "do not require a judge to leave compassion and common sense at the door to the courtroom." U.S. v. Dominguez,

296 F.3d 192, 196 n. 7 (3rd Cir. 2002) (quoting U.S. v. Johnson, 964 F.2d 124, 125 (2d Cir.1992)); ." U.S. v. Blarek II, 7 F.Supp. 2d 192, 211 (EDNY 1998) ("To impose the harsh sentence suggested by Probation and the government under the Guidelines without appropriate downward departures would amount to an act of needless cruelty given the nature of the crimes committed and the personal circumstances of these defendants"). Finally, remember that "[i]f the 600-plus pages of the most recent set of sentencing guidelines have taught us anything, it is that punishment cannot be reduced to an algorithm." U.S. v. Myers , 2005 WL 165314, *1 (S.D.Iowa Jan. 26, 2005)

Practice tip: In arguing for the existence of mitigating factors, defense attorneys "will be most effective when they are creative, industrious, spirited, and well-financed in developing and presenting [mitigating factor] arguments—e.g., when counsel formulates novel legal bases for departures and marshals compelling facts through the use of hired experts and other witnesses." Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring The Risk of Disparity From Differences in Defense Counsel Under Guidelines Sentencing*, Iowa Law Review (January 2002) at 456.

108 Easy Mitigating Factors

***1. The advisory guideline "greater than necessary" or too draconian, and the purpose of sentencing is satisfied by a sentence below the guidelines.**

U.S. v. Jones, 2005 WL 121730 (D.Me.,2005)(post Booker, where mentally ill defendant convicted of possessing firearm and guidelines are 12 to 18 months, and where he doesn't qualify for other downward departures, and because guidelines only advisory, a sentence below the guidelines to Zone C (6 months—time served) will better insure 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" So the sentence imposed "will in all likelihood better protect the public over thelongterm.");

United States v. Redemann, 295 F. Supp. 2d 887 (E.D. Wisc. 2003) (in bank fraud case where guidelines were 18-24 months, court departed downward two levels in part because case outside the heartland and the guideline sentence was "greater than necessary" to satisfy the "purposes" of sentencing 5K2.20. "Courts have long recognized that where the sentence called for by the guidelines would result in punishment greater than necessary the court can depart downward." Here D had been civilly prosecuted by the office of the comptroller of the currency and had to pay $75,000, suffered adverse publicity in small town, ruined his business, and caused ill health and ultimate death of his wife—so "the primary purposes of sentencing were partially achieved before the case was filed....and [the collateral punishment] partially satisfied the need for just punishment—district judges may consider such successive punishments ...in deciding whether to depart...."; also general deterrence

achieved given what happened to the defendant); *United States v. Gaind*, 829 F.Supp. 669 (S.D.N. Y. 1993) (departure granted in part because the destruction of the defendant's business already achieved to a significant extent some although not all of the objectives otherwise required to be sought through the sentencing process so 18 U.S.C. section 3553(a) , which states that "court shall impose a sentence sufficient, but not greater than necessary" to achieve the purposes of sentencing "requires me to depart downward from the Guidelines"), *aff'd*, 31 F.3d 73 (2nd Cir. 1994).

Tip: Argue the advisory guidelines are overly harsh or draconian. See United States v. Stockton 968 F.2d 715, 721 (8th Cir 1992) (Bright, Senior Judge, Concurring) (guideline sentence "have gone awry" with sentence of 20 years for first time meth offender and is "excessively long" and "greater than necessary" and "cannot be justified in a civilized society"); United States v. Andruska, 964 F.2d 640, 646-47 (7th Cir. 1992)(Will, Senior Judge, concurring) ("the irrationality and draconian nature of the Guidelines sentencing process is again unhappily reflected in this case"); United States v. England, 966 F.2d 403, 410 (8th Cir. 1992) (Bright, J., concurring)(Although not illegal, the "draconian" sentences in this methamphetamine case "emanate from a scheme gone awry."). United States v. Harrington, 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring) (the guidelines "often produce harsh results that are patently unfair because they fail to take account of individual circumstances...."); U.S. v. Molina, 963 F.Supp. 213, *215 (E.D.N.Y.,1997)(commenting on "[t]he all-too-familiar harshness required by rigid federal Guidelines...and the depredations they wreak upon individual defendants and their families.")

***2. Criminal Conduct Atypical And Outside The Heartland Of The Guideline.**

USSG ch. 1. Pt A comment 4(b)(departure proper where conduct "atypical" and "significantly differs from the norm" of conduct covered by the guideline); Koon, 518 U.S. at 100 ("the severity of the misconduct, its timing, and the disruption it causes" are factors which influence a district court's determination of whether the misconduct in a particular instance makes the case atypical); 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 the documents, was outside the heartland of much more serious crimes that typical pornographers engage in, according to psychiatrist) [*distinguish* U.S. v. Thompson, 315 F.3d 1071 (9th Cir. 2002) (no departure because not outside heartland where D not only deliberately possessed but also distributed porn)]; U.S. v. Sicken, 223 F.3d 1169 (10th Cir. 2000) (where anti-nuclear protestors, convicted of sabotage, destroyed property at missile sight but posed no real danger to national security, four level departure proper because district court could consider that guideline failed to adequately consider range of seriousness of sabotage offenses and this case outside the heartland); U.S. v. Sanchez-Rodriguez, 161 F.3d 556, 561 (9th Cir. 1998) (en banc) (affirming downward departure in sentencing for illegal reentry following aggravated felony based on minimal amount of drugs involved in underlying felony); U.S. v. Stockheimer, 157 F.3d 1082, 1091 (7th

Cir.1998) (noting permissibility of downward departure where intended loss related to fraud conviction overstated seriousness of offense in comparison to realistic possibility of actual loss);

District Court

U.S. v. Rosenthal, 266 F.Supp.2d 1068 (N.D. Cal. 2003) (Breyer, J.) (in marijuana case, downward departure to one day in jail from 30-month range granted because defendant reasonably believed he was authorized by city of Oakland to grow marijuana for medicinal purposes taking this outside the heartland of drug cases); U.S. v. Allen, 250 F.Supp.2d 317 (SDNY 2002)(Where D convicted of drugs and guns, D entitled to 8 level departure under USSG 5K2.0 from 80 months to 30 months because his mental immaturity-even though 21 behaves like 14 year old and psychological problems and mild retardation take case out of heartland of drug and gun cases); U.S. v. Singh, 224 F.Supp.2d 962 (E.D.Pa. 2002) (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— departure from 37 months to 21 months proper); U.S. v. Koczuk, 166 F.Supp. 2d 757 (ED.N.Y. 2001) (where D acquitted of five counts of illegally importing caviar but convicted of single count with market value less than $100,000, but where co-D convicted of six counts of importing $11million dollars worth, offense level "has been extraordinarily magnified by a circumstance that bears little relation to defendant's role in the offense" – here D's role in conspiracy "bore little correlation to 11 million dollars because D "was not actively involved in co-D business was "merely a low level employee – chauffeur and interpreter – who "took orders from co-D"4-level minimal role reduction simply not adequate); U.S. v. Nachamie, 121 F.Supp.2d 285 , 297(S.D.N.Y. 2000) (the circuit has recognized that a district court can consider a defendant's initial lack of intent in granting a downward departure under §5K2.0. That defendants did not join Nachamie's scheme with criminal intent – and then operated for an additional period of time with "diminished" intent – makes this an "atypical" case that "significantly differs from the norm" and therefore falls outside the "heartland" of the fraud Guidelines.); see Lesser Harms below, ¶12.

3. The Amount Of Drugs Distributed Overstated The Defendant's Culpability Because The Drugs Were Distributed Over A Lengthy Period Of Time.

U.S. v. Genao, 831 F.Supp. 246 (S.D.N.Y. 1993) (because the guidelines do not consider the relationship between the length of the distribution period and the quantity distributed, court may depart downward where total quantity was distributed over substantial period of time), aff'd in part, U.S. v. Lara, 47 F.3d 60, 66 (2d Cir. 1995) (same at least for offense levels over 36). [Tip: renewed vitality in light of Booker]

4 Downward Adjustment For Role In The Offense Is Inadequate To Show Defendant's Peripheral Involvement.

Caveat: *For crimes committed after October 27, 2003, the Guidelines prohibit departures based on aggravating or mitigating roles, which "may be taken into account only under" USSG*

3B1.1 and 3B1.2. See new USSG 5K2 (d) (3); 5H1.7. [**Tip**: **but highly questionable caveat now in light of Booker]** For crimes committed before October 27, 2003, *see* U.S. v. Restrepo, 936 F.2d 661, 667 (2d Cir. 1991) (a departure may be justified where "an offense level has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense"); U.S. v. Stuart, 22 F.3d 76, 83-84 (3d Cir. 1994) (court may depart where offense level overstates culpability due to external circumstances, even where defendant's conduct renders him ineligible for §3B1.2 adjustment); U.S. v. Alba, 933 F.2d 1117, 1121 (2d Cir. 1991) ("though limited participation in the offense is a factor taken into consideration by the Sentencing Commission, a departure is justified here because the defendant played only a small role in the sale, and indeed was unaware he was involved in a drug transaction until "shortly before the incident.").

U.S. v. Koczuk, 166 F.Supp. 2d 757 (ED.N.Y. 2001) (where D acquitted of five counts but convicted of single count of importing caviar with market value less than $100,000, but where co-D convicted of six counts of importing $11million dollars worth, offense level "*has been extraordinarily magnified by a circumstance that bears little relation to defendants' role in the offense*" – here D's role in conspiracy "bore little correlation to 11 million dollars because D "was not actively involved in co-D business was "merely a low level employee – chauffeur and interpreter – who "took orders from co-D"4-level minimal role reduction simply not adequate); U.S. v. Bruder, 103 F.Supp.2d 155, 181 (E.D.N.Y. 2000) (where police officer assisted another in sexual assault of prisoner (Louima), two level departure granted in addition to two level adjustment for minor role because adjustment inadequate to show peripheral role).

5. Defendant Had No Knowledge Of, Or Control Over, Amount Or Purity of Drugs He Delivered.

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) (the district court has discretion to depart where the defendant had no knowledge of or control over the amount or purity of the drugs, if the court determines that the facts are outside the heartland of such cases – because that ground is not one categorically proscribed); U.S. v. Chalarca, 95 F.3d 239, 245 (2d Cir.1996) (upholding a downward departure when the district court found the defendant had no knowledge of any particular quantity of cocaine and no particular quantity was foreseeable to him in connection with the conspiracy of which he was a member).

5A. Defendant Is Just An Addict Who Delivered Small Quantities.

U.S. v. Williams, 78 F.Supp.2d 189 (S.D.N.Y. 1999) (relatively minor nature of defendant's prior and current drug convictions warranted departure from the career offender guidelines; in each prior defendant was a street seller, the lowest level on the distribution chain and the most easily replaced by those who operate the distribution network), **disapproved** U.S. v. Mishoe, 241 F.3d 214 (2d Cir. 2001) (reversing district court's grant of departure, which should not automatically be given to street level dealers; however, that prior sentences were lenient may provide basis for downward departure from criminal history category in particular case); U.S. v. Webb, 966 F.Supp. 16 (D.D.C.

1997) (departure from 70 to 40 months granted where D only an addict who could have been arrested after he sold agent small quantities on two earlier occasions, but who instead was arrested after third delivery of over 50 grams. Courts need to distinguish major dealers from addicts), **reversed**, 134 F.3d 403 (D.C. Cir. 1998). (**Rationale and results of the reversals must be reconsidered in light of Booker)**

6. The Drugs Were Of Very Low Purity.

U.S. v. Mikaelian, 168 F.3d 380, 390 (9th Cir. 1999) ("We agree that the low purity of heroin involved in a crime cannot be categorically excluded as a basis for a downward departure"; however D presented no evidence that heroin of four percent purity is unusually impure; nor did he even indicate that the expert witness he requested would so testify); U.S. v. Berroa-Medrano, 303 F.3d 277 (3rd Cir. 2002) (circuit court observes that district judge mitigated harsh sentence by granting substantial downward departure for "low drug purity" in a sentence reduction of over 5 years).

7. Uncharged Relevant Conduct Substantially Increases The Sentence.

U.S. v. White, 240 F.3d 127, 136 (2d Cir. 2001) (where D 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. Cordoba-Murgas, 233 F.3d 704, 709 (2d Cir.2000); U.S. v. Gigante, 94 F.3d 53, 56 (2d Cir.1996); U.S. v. Koczuk, 166 F. Supp. 2d 757 (ED.N.Y. 2001) (where D acquitted of five counts but convicted of single count of importing caviar with market value less than $100,000, but where co-D convicted of six counts of importing $11million dollars worth, offense level "has been extraordinarily magnified by a circumstance that bears little relation to defendant's role in the offense"– here D's role in conspiracy "bore little correlation to 11 million dollars because D "was not actively involved in co-D's business, was "merely a low level employee – chauffeur and interpreter – who "took orders from co-D," 4-level minimal role reduction simply not adequate; furthermore, 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.").

***8. The Defendant's Criminal History Overrepresents seriousness of past criminal conduct or overstates his Propensity To Commit Crimes.**

Caveat 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 new USSG 4A1.3(b) (2). **But caveat highly questionable now in light of Booker**. In addition, for career offender the departure "may not exceed one criminal history category." 4A1.3(b)(3). [note: no limitation is placed on the number of offense levels a district court may depart].

U.S. v. Thomas, 361 F.3d 653 (D.C. Cir. 2004) (district court erred in considering the defendant's lengthy arrest record in justifying court's failure to depart downward because of overrepresentation of criminal history; arrests prove nothing); U.S. v. Cuevas-Gomez, 61 F.3d 749 (9th Cir. 1995) (district court may depart downward in illegal reentry case where D received 16-level upward adjustment in offense level – if court believes criminal history overstated); U.S. v. Reyes, 8 F.3d 1379 (9th Cir. 1993) (court upholds downward departure – 210 months to 33 months – from career offender guidelines – in both offense level and criminal category – where defendant a comparatively minor offender – 6 minor drug and theft priors – but remands for court to state reason for extent of departure); U.S. v. Brown, 985 F.2d 478, 482 (9th Cir. 1993) (age at time of prior convictions and nature of those convictions – DUIs – are proper factors to consider in determining whether career offender status significantly over-represents seriousness of defendant's criminal history); U.S. v. Lawrence, 916 F.2d 553, 554 (9th Cir. 1990) (even though defendant is career offender because of two drug convictions, low risk of recidivism justifies downward departure); U.S. v. Mishoe, 241 F.3d 214 (2d Cir. 2001) (although reversing district court's grant of downward departure because they should not automatically be given to street level dealers; horizontal departure in criminal category may be warranted where prior sentences were lenient); U.S. v. Gregor, 339 F.3d 666 (8th Cir. 2003)(in departing downward because career offender designation overrepresents criminal history because burglary did not involve breaking and entering, district court may shift left on the criminal history category **and** move downward on the offense level); U.S. v. Collins, 122 F.3d 1297 (10th Cir. 1997) (departure from career offender 151-188 to 42 months o.k. where D was 65 and ill (high blood pressure, heart disease, ulcers, etc) and 10 year old conviction overstated criminal history because conduct committed beyond ten-year limit; and D not sentenced in that case until 15 months after crime committed – **so district court correctly reasoned that quick prosecution would have precluded the career offender enhancement altogether** – other conviction was minor drug charge for which D received lenient sentence – so D "not as likely to recidivate as other career offenders" – and because Koon makes clear that Congress did not intend "to vest in appellate courts wide-ranging authority over district court sentencing decisions"); U.S. v. Fletcher, 15 F.3d 553, 557 (6th Cir. 1994) (affirming departure downward from career offender to level 29 and category V based on age of prior convictions, time intervening between priors and current crime, and defendant's responsibilities; court of appeals affirmed noting district court can consider age of priors in determining recidivism); U.S. v. Gayles, 1 F.3d 735, 739 (8th Cir. 1993) (case remanded to permit judge to consider downward departure, noting that in making determination, judge must "consider the historical facts of the defendant's criminal career"); U.S. v. Shoupe, 988 F.2d 440, 447 (3d Cir. 1993) (court may consider defendant's age and immaturity when priors committed in determining that criminal history (career offender) over represents history); U.S. v. Bowser, 941 F.2d 1019, 1024 (10th Cir. 1991) (age and close proximity in time between prior criminal acts provided proper bases to depart downward from career offender category); U.S. v. Senior, 935 F.2d 149, 151 (8th Cir. 1991) (defendant only 20 years old when he committed his first predicate offense, a series of robberies, and D received short sentence for second predicate offense drug charges, obvious state did not consider D's crimes serious; so downward departure proper); U.S. v. Summers, 893 F.2d 63, 67 (4th Cir. 1990) (affirms downward departure because drunk driving crimes exaggerated criminal history but remands because of the extent of the departure).

District Court

United States v. Huerta-Rodriguez, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (post Booker, where guideline range was 70-87 months court imposed 36 months in part because court would have granted downward departure for over-representation of criminal history in that prior occurred nearly ten years ago);

U.S. v. Hammond, 240 F. Supp.2d 872 (E.D. Wisc. 2003) (in granting departure from category III to II, because criminal history is overstated, 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 prior offenses ; (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 from the instant offense (eighteen and twenty years old) and unrelated to it, and D was young at the time of the priors and was intoxicated at the time.); 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. Wilkerson, 183 F.Supp.2d 373 (D. Mass. 2002) (where D convicted of distribution of crack, his criminal history score of VI over-represented his criminal culpability for purposes of sentencing, and thus defendant was entitled to a downward departure to IV and (170 to 120 months) where he had no convictions for crimes of violence, and he had received sentences for prior convictions that just barely triggered scoring under the guidelines); U.S. v. Chambers, 2001 WL 96365, *3 (S.D.N.Y. Feb. 2, 2001) (unpublished) (where defendant pled to conspiring to deliver heroin, the four criminal history points calculated in the presentence report overstated the seriousness of D's criminal record. The attempted criminal sale of a controlled substance in the third degree was his first offense, and took place when D was only seventeen years old – so court departs from category III to II); U.S. v. Lacy, 99 F.Supp.2d 108, 119 (D.Mass. 2000) (departing where D's record "largely non-violent, and relatively minor, the kind that characterizes and out-of-control addict); U.S. v. DeJesus, 75 F.Supp. 2d 141, 144 (S.D.N.Y. 1999) (criminal category V over represented D's criminal history where several priors were probation terms and, of three jail sentences, only one longer that 60 days, and two of eight convictions were for loitering and trespassing and did not count for guideline purposes, and remaining six convictions resulted in no more than 2 years jail, and most conduct committed before D was 21 – and now that D married and father more responsible – **"**a lengthy sentence required by higher criminal history category will lessen not increase the likelihood of rehabilitation."); U.S v. Hammond, 37 F.Supp.2d 204 (EDNY 1999) (departing from category VI to III where D "had no history violent behavior and his prior arrests resulted from minor drug crimes …and the kind of petty criminality associated with a poor addict's attempt to acquire money for the purchase of drugs."); U.S. v. Leviner, 31 F.Supp.2d 23 (D. Mass. 1998) (category V, based on traffic violations that accounted for 7 criminal history points, over-represented relatively minor and non-violent nature of defendants record and replicated disparities in state sentencing scheme, particularly racial disparities); U.S. v. Miranda, 979

F.Supp. 1040, 1044 (D.N.J. 1997) (discounting traffic convictions "distinct in seriousness and kind from the instant offense"); U.S. v. Taylor, 843 F. Supp. 38 (W.D.Pa. 1993) (downward departure from career offender level 34 to level 20 justified where prior state burglary convictions were more than ten years old and occurred when D a teenager, the crimes did not involve any physical violence or use of a weapon, and burglary spree occurred over a relatively short period); U.S. v. Hinds, 803 F. Supp. 675 (W.D. N.Y. 1992) (in illegal reentry case departure from 51 months to 33 months proper where prior marijuana convictions over represented criminal history and where Commission increased guideline for reentry with aggravated felony), aff'd, 992 F.2d 321 (2d Cir. 1993).

9. Length Of Time Until First Crime.

Departure warranted because guidelines fail to consider length of time defendant refrains from commission of first crime, here until age 49. U.S. v. Ward, 814 F.Supp. 23 (E.D.Va. 1993). [**Renewed force in light of Booker**]

***10. Loss Table Overstates Amount Of Loss Or Seriousness Of Offense.**

See U.S.S.G. § 2B1.1, App. Note 16 (B) (eff. Jan. 25, 2003 and former App. Note 15(B), eff. Nov. 1, 2001) (where "the offense level determined under [2B1.1] substantially overstates the seriousness of the offense**...**a downward departure may be warranted"); **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) (upheld downward departure where actual loss amount of $829,000 stemming from false loan application overstated risk to defrauded bank warranting use of loss figure of $58,000 and offense level 11 where D 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. Brennick, 134 F.3d 10 (1st Cir. 1998) (downward departure in atypical tax evasion case can be appropriate where D fully intended to pay but could not, but extent of departure (30 months) was not justified); 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. Broderson, 67 F.3d 452 (2d Cir. 1995) (in white collar contracts fraud by president of Gruman Data, seven level departure o.k. in part because D did not profit personally, contracts were favorable to the government, and "calculated loss significantly . . . overstated the seriousness of the defendant's conduct" – see §2F1.1 comment. (n.7(b)); U.S. v. Monaco, 23 F.3d 793, 799 (3d Cir. 1994) (D's intent not to steal money from U.S. but to expedite payment that would have been due at some future time); U.S. v. Rostoff, 53 F.3d 398 (1st Cir. 1995) (multiple causes of the losses including permissive attitude of bank's senior management, buyer's greed, and unexpected nosedive of condo market warranted downward departure); U.S. v. Gregorio, 956 F.2d 341 (1st Cir. 1992) (departure granted because losses resulting from fraudulently obtained loan were not caused solely by the defendant's misrepresentation).

District Court

United States 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 in part because loss significantly overstated seriousness of offense. "Under application notes 8(b) and 11, the court may depart when the amount of loss determined under § 2F1.1(b)(1) significantly overstates the seriousness of the defendant's offense. U.S.S.G. § 2F1.1 cmt. n. 8(b) & 11 (1998)." Here defendant submitted false invoices for work supposedly done on the bank, but he did in fact do some valuable work for the bank which was not adequately recognized by the loss figure); U.S. v. Roen, 279 F.Supp. 2d 986 (E.D. Wisc. 2003) (in mail fraud scheme where D wrote checks on closed bank accounts in the amount of $1.2 million as payment for various items he attempted to buy and where None of the checks were honored, and defendant did not obtain any goods, departure of nine levels granted on the grounds that "the amount of loss bore little or no relation to economic reality." "the discrepancy between the actual loss - $19,000 - and the intended loss - over $1.2 million - was extreme."); U.S. v. Maccaul, 2002 WL 31426006 (S.D.N.Y. Oct. 28, 2002)(unpublished) (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. Corcoran, 2002 WL 31426019 (SDNY Oct. 28, 2002) (unpublished) (four level departure for same reasons in Maccaul, supra); U.S. v. Distefano, 2002 WL 31426023 (SDNY Oct. 28, 2002) (unpub.) (three level departure for reasons set forth in Corcoran and Maccaul, supra); U.S. v. Oakford Corp, 79 F.Supp. 2d 357 (S.D.N.Y. 2000) (13 level departure granted where offense level overstates gravity offense–here each defendant personally realized "only small portion of the overall gain" of $15 million–and where agency tacitly encouraged floor brokers to "push the envelope").

***11. Amount of Loss Causes Multiple Overlapping Enhancements At High Offense Level**.

United States v. Lauersen, 348 F.3d 329 (2nd Cir. 2003) (where doctor convicted of defrauding insurance companies and government of more than one million dollars for unauthorized medical procedures, and where multiple enhancements for loss affecting financial institution and abuse of trust were overlapping and caused offense level to go to 33, "the cumulation of such substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present "to a degree" not adequately considered by the Commission...[and] permits a sentencing judge to make a downward departure"-remanded); **U.S. v. Jackson,** 346 F.3d 2 (2nd 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. Thus, his base level of 6 was increased 10 levels because his offense involved a large sum of money, another 2 levels because he carefully planned the activity, another 2 levels because he used sophisticated means, and another 4 levels because the scheme was extensive. 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 [*12] one enhancement had been imposed."); U.S. v. Gigante, 94 F.3d 53, 56 (2d Cir.1996) (downward departure authorized where substantially enhanced sentence range results from series of enhancements proven only by preponderance of the evidence).

12. 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. Buchanan, 987 F.Supp. 56 (D.Mass. 1997); U.S. v. Bart, 973 F. Supp. 691 (W.D.Tex. 1997).

***13. The Defendant's Crime Constituted Aberrant Behavior.**

USSG § 5K2.20 (Caveat I: effective April 30, 2003 for sex and child porn crimes committed on or after that date, this departure has been eliminated by the Feeney Amendment); but see U.S. v. Detwiler, supra at introduction (holding Feeney amendment rendered mandatory guidelines unconstitutional); Also highly questionable in light of Booker

Caveat II For crimes committed after October 27, 2003 departure prohibited by USSG 5K2.20(c)(4) if defendant subject to a mandatory minimum term of 5 years or more for drug offense, regardless of whether the defendant meets the safety valve criteria under USSG 5C1.2. Departure also prohibited, under USSG 5K2.20 (c)(4)(B) if defendant has "any other significant prior criminal behavior," even if not otherwise counted under Chapter 4. Finally, fraud schemes generally will not qualify for the departure. USSG 5K2.20, Application Note 2. **All Caveats highly questionable in light of Booker**.

Otherwise, effective Nov. 1, 2000, a departure for aberrant conduct is authorized but only for "a single criminal occurrence or single criminal transaction that was committed without significant planning, was of limited duration, and represented a marked deviation from an otherwise law abiding life." 5K2.20 App. Note 1. Further, this departure is unavailable if (1) offense involved serious bodily injury or death, (2) *use* or discharge of a firearm, (3) a serious drug trafficking crime, or (4) the defendant has more than one criminal history point. Under this standard, "The Sentencing

Commission specifically rejected a rule that would have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless...The Commission saw the need to define aberrant behavior more flexibly and to slightly relax the single act" rule." U.S. v. Gonzalez, 281 F.3d 38 (2nd Cir. 2002).

That said, **see United States v. Smith**, 387 F.3d 826 (9th Cir. 2004) (where D convicted of retaliating against a witness (18 U.S.C. 1513(b)(2)), case remanded to district court to reconsider its refusal to grant aberrant behavior departure, nothing that fact that defendant may have had time to plan the offense does not mean it was the result of "significant planning," and that crime lasted for ten minutes does not mean it lasted a long time; and that the conduct was indeed extraordinary); 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).

For any crime that occurred before Nov. 1, 2000, law is much more favorable (at least in the Ninth Circuit). See U.S. v. Working, 224 F.3d 1093 (9th Cir. 2000) (en banc) (where woman convicted of attempted murder of husband and use of firearm, when he threatened divorce and taking children, district court may properly depart 21 levels (on att. murder guideline) for aberrant conduct even though crime well-planned and relentlessly executed, but remanded for court to give reasons for extent (from range of 87 to 108 months to one day), *but on appeal after remand, departure vacated because unreasonably great and based on impermissible factors.* 287 F.3d 801 (2002); U.S. v. Lam, 20 F.3d 999, 1003-05 (9th Cir. 1994)(where law-abiding immigrant obtained sawed-of shotgun to protect his family against predators after he and pregnant sister were robbed by three gunman, and where D not aware that he possessed illegal weapon, and where only prior driving without a license, court had discretion to downward depart from 18 month sentence because of aberrant conduct-note court rejects view that aberrant conduct must be single incident; and rejects view that must be first offense); U.S. v. Fairless, 975 F.2d 664 (9th Cir. 1992) (bank robbery, down on the floor, with unloaded gun, in light of depression, loss of job, first offense, "shocked" response of family, constitutes aberrant behavior justify downward departure from 60 to 30 months); U.S. v. Morales, 972 F.2d 1007, 1011 (9th Cir. 1993) (court may downward depart for "aberrant conduct" where no criminal history); U.S. v. Takai, 941 F.2d 738, 744 (9th Cir. 1991)(multiple incidents over six-week period in effort to obtain green cards by bribing INS official still constituted a single act of aberrant behavior where D's crime did not lead to pecuniary gain, government agent influenced D to commit crime, and one D committed charitable acts-outstanding good deeds); U.S. v. Dickey, 924 F.2d 836 (9th Cir. 1991) (crime may be aberrant where D stole $80,000 which he received by bank error); U.S. v. Garcia, 182 F.3d 1165, 1176 (10th Cir. 1999) (that defendant's crime was "carefully planned" did not preclude finding of aberrant behavior because the correct focus is not on the number of discrete acts undertaken by the defendant but rather on the aberrational character of the conduct); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels to probation when, as one of eleven factors, it considered that crime was aberrant conduct where the defendant had been law abiding until age 35 when his marriage disintegrated).

District Court

U.S. v Myers, 2004 WL 165314 (S.D. Iowa Jan. 26, 2005) (where D 40 years of age with no record and lead blameless life convicted of unlawful possession of short-barrelled shotgun he sold to his cousin four years earlier, and where advisory guideline 20-30 months, departure to time served and three month term of supervised release because of aberrant conduct and because other purposes of sentencing satisfied); **U.S. v. Hued**, 338 F.Supp.2d 453 (S.D.N.Y. 2004) (where defendant pled guilty to making maintaining a place to store heroin with range of 41 to 51 months, downward departure of 11 levels granted under 5K2.20(c) for aberrant conduct because she "was never actively involved in the planning of the criminal conduct" and her conduct was of "limited duration" and "a marked deviation from an otherwise law-abiding life."); U.S. v. Booe, 252 F.Supp. 2d 584 (E.D. Tenn. 2003) (defendant who robbed bank with note granted 9 level downward departure for aberrant conduct because she was a 22 year old black single mother of a one year old son, had severe depression, no criminal record and felt guilt over child's well being--little planning and no violence); U.S. v. Hancock, 95 F.Supp.2d 280 (E.D.Pa. 2000)(downward departure warranted in felon in possession case where D happened upon weapon and possessed it for very short time to dispose of it, because conduct was aberrant); U.S. v. Iaconetti, 59 F.Supp.2d 139 (D. Mass. 1999) (Defendant, who had no prior criminal record and who pled guilty to the charge of conspiracy to possess with intent to distribute cocaine, was entitled to eleven-level departure from Sentencing Guidelines (from level 25 to level 14) based on "single acts of aberrant behavior"--gambling debts to a loan shark caused by defendant's gambling compulsion resulted in defendant agreeing with loan shark's idea as to how to extinguish the debts after defendant had tried to pay the debts from his personal resources, his business, and his family); U.S. v. Martinez-Villegas, 993 F.Supp. 766 (C.D. Cal. 1998)(in drug case downward departure of one level granted because of aberrant conduct where government offered much money to defendant with no criminal record to perform single act of transporting drugs); U.S. v. Delvalle, 967 F.Supp. 781 (E.D. N.Y. 1997) (defendant's involvement in drug conspiracy on two different days, separated by a week, were so loosely related they could be seen as single act of aberrant conduct warranting twelve-level departure); U.S. v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993) (first time offense, possession of 681 grams of crack, "out of character" for defendant who had stable employment history and in a moment of "financial weakness" and "unusual temptation" and demonstration of "tremendous remorse"); U.S. v. Baker, 804 F. Supp. 19, 21 (N.D.Cal. 1992) (where D pled guilty to possession of one kilogram of crack downward departure to minimum mandatory sentence proper where act was "single act of aberrant behavior"); U.S. v. McCarthy, 840 F. Supp. 1404 (D. Colo. 1993) (aberrant behavior departure to probation proper for armed bank robber who was disorganized and unsophisticated where he was also facing 5 year mandatory minimum for possession of gun).

14. Rendering Aid To Victim.

"Rendering aid to a victim is a factor that is not considered by the guidelines." U.S. v. Tsosie, 14 F.3d 1438, 1443 (10th Cir. 1994).

***15. Defendant's Conduct Did Not Threaten The Harm Sought To Be Prevented By The Law Proscribing The Offense – Perceived Lesser Harm.**

See U.S.S.G. § 5K2.11 (departure permissible where d 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"); **U.S. v. Bayne** 2004 WL 1488548, 103 Fed. Appx. 710 (4th Cir. 2004) (unpublished) (where D charged with possession of sawed off shotgun, four level departure by district court not improper where D lent gun to a friend who returned it sawed off and where no evidence D possessed shotgun for any unlawful purpose and where possession would not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense"); U.S. v. Hemmingson, 157 F.3d 347 (5th Cir. 1998) (one illegal $20,000 campaign contribution was not within the heartland of money laundering cases involving long-running, elaborate schemes, so downward departure proper); U.S. v. Clark, 128 F.3d 122 (2d Cir. 1997) (remanding-district court has discretion to depart downward on lesser harms theory in felon in possession case where defendant had purchased gun as a gift for his brother and thus not engaged in activity Congress meant to proscribe); U.S. v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996) (not plain error to depart under lesser harms provisions of §5K2.11 where defendant had illegally reentered country after having been deported when he believed his girlfriend was in grave danger of physical harm and wanted to obtain surgery for her, but remanded to explain extent of departure); U.S. v. Bernal, 90 F.3d 465 (11th Cir.1996)(D convicted of violation of Lacey Act by exporting primates to Mexico properly given downward departure from 24 months to 70 days because D did not threaten animals-the harm sought to be prevented by the statute-but rather loved animals and wanted them to propagate in Mexico); U.S. v. Carvell, 74 F.3d 8 (1st Cir. 1996)(where D claims he grew marijuana to combat depression and suicidal tendencies, district court may consider downward departure from 70-month sentence under § 5K2.11, the "lesser harms" provision, because sole question is whether the D committed the offense in order to avoid a perceived greater offense); 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. Hadaway, 998 F.2d 917, 919-20 (11th Cir. 1993) (remanded--where D possessed sawed-off shotgun, court has power to depart downward if possession threatened lesser harm than statute intended to prevent–defendant claimed that, on a whim, he exchanged a bucket of sheetrock for the shotgun, intending to keep it as a curiosity or to use it for parts-defendant also said he did not keep the sawed-off shotgun among his admittedly large collection of firearms because he wasn't sure it worked).

District Court

U.S. v. VanLeer, 270 F.Supp.2d 1318 (D. Utah 2003) (Judge Cassell) (in felon in possession case four level departure (from 36 to 18 months) granted because defendant brought shotgun to pawnshop and sold it; so by disposing of gun outside the heartland of cases--also asserts Feeney amendment changes little); U.S. v. Nava-Sotelo, 232 F.Supp. 2d 1269, 1283 (D.N.M. 2000) (D convicted of kidnapping and assault in attempt to help brother escape from lengthy sentence granted downward departure under 5K2.11 in part because D "believed that his choice to assist

his brother in the escape attempt was a lesser harm than the devastating consequences to his parents' mental and physical well-being should they have discovered his brother's true sentence."); U.S. v. Hancock, 95 F.Supp.2d 280 (E.D.Pa. 2000) (downward departure warranted in atypical felon in possession case where D happened upon weapon and possessed it for very short time to dispose of it).

***16. To Enable Defendant To Be Eligible For Boot Camp, Counseling, Or Other Rehabilitative Program.**

[Argument much strengthened in light of Booker] U.S. v. Thompson, 315 F.3d 1071 (9th Cir. 2002) (Berzon, J. concurring) (although district court erred in departing downward on ground that D's conduct outside heartland of possession of child porn guideline, district court should consider departure to allow D to enter sex treatment in prison immediately, instead of waiting years in prison); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered that imprisonment would sever the defendant's access to rehabilitative counseling – one of the purposes of sentencing is "to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. §3553(a)(2)(D)); U.S. v. Martin, 827 F.Supp. 232 (S.D.N.Y. 1993) (district court departed downward from 48 to 30 months to enable D to be eligible for boot camp. Court found that boot camp might help the defendant make a clean break with former lifestyle and departure proper if boot camp provided the best hope of protecting the public, deterring misconduct and providing rehabilitation); cf. U.S. v. Duran, 37 F.3d 557, 560-61 & n. 3 (9th Cir. 1994) ("once imprisonment is selected as the means of punishment," the court may consider "correctional treatment" and "rehabilitation" to determine the length of sentence. In this case, these considerations justified a longer sentence. Court notes that "a sentence of not less than 12 nor more than 30 months permits the court to commit a defendant to an Intensive Confinement Center." In addition, a sentence of 18 to 24 months allowed inmate to enter, complete, and receive "fullest possible benefit under prison drug abuse program.").

17 Departure To Substitute Community Confinement For Prison

Note that 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) (this provision does not authorize reduction in the offense level).

18. To Enable Defendant To Make Restitution.

U.S. v. Blackburn, 105 F.Supp.2d 1067 (D.S.D. 2000) (where D pled guilty to failure to pay child support and was $15,000 in arrears, and where guideline called for 12-18 months of imprisonment with one year of supervised release, imprisonment counter-productive towards payment of child support, and court grants downward departure on its own motion to probation to make sure that defendant would be subjected to a longer term of supervision, which would have been possible if imprisonment imposed); *caveat For crimes committed after October 27, 2003, the guidelines prohibit departures for restitution if required by law or the guidelines. USSG 5K.0(d)(4).* ***[argument that restitution is mitigating factor much strengthened after Booker]***

***19. The Defendant Suffered Extraordinary Physical Or Sexual Abuse As Child.**

U.S. v. Walter, 256 F.3d 891 (9th Cir. 2001)(where D sent threat to the president, district court could downward depart from 41 months sentence because combination of brutal beatings by defendant's father, the introduction to drugs and alcohol by his mother, and, most seriously, the sexual abuse defendant faced at the hands of his cousin, constituted the type of extraordinary circumstances justifying consideration of the psychological effects of childhood abuse and establish diminished capacity); U.S. v. Brown, 985 F.2d 478 (9th Cir. 1993) (where D offered a letter recounting his childhood of severe abuse and neglect and produced psychologist's report concluding that childhood trauma was the primary cause of D's criminal behavior, court could grant downward departure); U.S. v. Roe, 976 F.2d 1216 (9th Cir. 1992) (court clearly erred in holding it did not have discretion to depart downward where defendant's suffered extraordinary sexual abuse as a child); 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 D not entitled to one here because he "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. Pullen, 89 F.3d 368 (7th Cir. 1996) (in light of Koon v. U.S., 518 U.S. 81 (1996), sentence remanded to see if D can establish that childhood abuse was extraordinary to enable judge to exercise discretion to depart downward); see 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"); Motley v. Collins, 3 F.3d 781, 792 (5th Cir. 1993) (death penalty) (fact that a doctor did not opine that he murder was likely the result of child abuse did not preclude jurors from making the required inference "after all, the effects of child abuse are not peculiarly within the province of an expert . . . 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").

District Court

U.S. v. Ayers, 971 F.Supp. 1197 (N.D. Ill. 1997) (departure granted based upon cruel childhood with relentless physical, sexual and psychological abuse over course of years).

20. The Defendant Was Exposed To Domestic Violence.

The court can consider the defendant's troubled upbringing and his exposure to domestic violence as a child. U.S. v. Lopez, 938 F.2d 1293, 1298 (D.C.Cir. 1991); see U.S. v. Deigert, 916 F.2d 916, 918-19 (4th Cir. 1990); see Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (evidence about the defendant's background is relevant because of the belief "long held by this society, that the defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems may be less culpable than defendants who have no such excuse.")

21. 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 a child victim of the Holocaust, when considered together, took case out of "heartland" of cases, and warranted a downward departure where defendant was convicted of mail fraud, making false statements, and conspiracy in connection with actions taken as principal of a catering firm. The court stated that it "[S]imply . . . cannot see incarcerating" defendant for her offenses after what she had experienced during the Holocaust, in which she lost half of her family).

22. The Defendant Is Elderly

U.S. v. Nellum , 2005 WL 300073 (N.D. Ind. Feb. 3, 20005) (where 57-year old defendant convicted of distributing crack-cocaine; and his guideline sentencing range was 168-210 months, sentence of 108 months because court had also to consider the need to deter Nellum and others from committing further crime under § 3553(a)(2). A guideline sentence would mean the defendant would be over the age of seventy at his release. The court's sentence will cause his release at 65 and "The likelihood of recidivism by a 65 year old is very low." *See* United States Sentencing Commission Report released in May, 2004) (located at http://www.ussc.gov/publicat/Recidivism-General.pdf.); Under the advisory guidelines, age is not "ordinarily" not relevant pursuant to U.S.S.G. §5H1.1, maybe so in unusual cases or in combination with other factors. However, that "age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration); U.S. v. Hildebrand, 152 F.3d 756 (8th Cir. 1998) (affirmed downward departure for 70-year old from range of 51-63 months to probation with 6 months in home confinement where D bookkeeper for a group convicted of mail fraud and had life-threatening health conditions – even though court of appeals said it would not have granted a departure); U.S. v. Higgins, 967 F.2d 841 (3d Cir. 1992) (young age and stable employment will justify a downward departure if "extraordinary"; remanded to see if judge realized he had power); 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.

Baron, 914 F. Supp. 660, 662-665 (D. Mass. 1995) (in bankruptcy fraud, downward departure from range of 27-33 months to probation and home detention to a 76-year old defendant with medical problems which could be made worse by incarceration); see U.S. v. Moy, 1995 WL 311441, at *25-29, *34 (N.D.Ill. May 18, 1995) (downward departure based upon defendant's advanced age, aggravated health condition, and emotionally depressed state); U.S. v. Roth, 1995 WL 35676, at *1 (S.D.N.Y. Jan.30, 1995)(sixty-three year old defendant with neuromuscular disease had "profound physical impairment" warranting downward departure). **This departure is available even in sex with minor cases and child porn cases. USSG 5K2.22 (effective April 30, 2003).**

Practice tip: Argue as mitigating factor: "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. *Correctional Health Care, Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, U.S. Department of Justice, National Institute of Corrections, 2004 edition, pp 9 and 10. The report notes on page 10 that first time offenders are "easy prey for more experienced predatory inmates." It should be noted that throughout the report, the elderly are defined by the various institutions as 50 or older.

22A. Unlikely to Be A Recidivist

United States v. Nellum, 2005 WL 300073, 2005 U.S. Dist. LEXIS 1568 (N.D. Ind. Feb. 3, 2005) (Simon, J.) (post Booker, in crack case where Guideline range was 168-210 months, imposing sentence of 108 months where, among other things unlikely to recidivate because of his age of 57, relying on government statistics)

23. The defendant is youthful and immature mental age

U.S. v. Allen, 250 F.Supp.2d 317 (SDNY 2003)(Where D convicted of drugs and guns, D entitled to 8 level departure from 80 months to 30 months because his mental immaturity-even though 21 behaves like 14 year old and psychological problems and mild retardation take case out of heartland of drug and gun cases)

24. Excellent Employment History.

U.S. v. Thompson, 74 F.Supp.2d 69 (D.Mass. 1999) (departure from 87 to 60 months in drug case-setting out framework for determining when employment history and family ties warrant downward departure as extraordinary – here "not only did defendant exhibit a sustained commitment to his family dating back to the instant he became a father, he consistently worked to provide for them"), **reversed** 234 F.3d 74 (1st Cir. 2000) (district court erred in limiting its inquiry to cases involving crack cocaine dealers and then asking whether defendant's record stood apart from the rest); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a

firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered the defendant's "long impressive work history ...where good jobs are scarce." Even though under §5H1.5 ordinarily a discouraged basis, here unusual); U.S. v. Higgins, 967 F.2d 841 (3d Cir. 1992) (young age and stable employment will justify a downward departure if "extraordinary"; remanded to see if judge realized he had power); U.S. v. Alba, 933 F.2d 1117 (2d Cir. 1991) (long-standing employment at two jobs); U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990) (exceptional employment history and nature of the crime); U.S. v. Big Crow, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (excellent employment record); U.S. v. Shoupe, 988 F.2d 440 (3d Cir. 1993) (age and immaturity considered in whether criminal history overstates propensity); U.S. v. Ragan, 952 F.2d 1049 (8th Cir. 1992) (defendant stopped using drugs a year before his indictment, maintained steady employment, and offered to cooperate-departure affirmed where government did not object at sentencing).

***25. The Defendant Manifested "Super" Acceptance Of Responsibility.**

Caveat: For crimes committed on or after October 27, 2003, the guidelines eliminate this ground for departure. See New USSG 5K2.0(d)(2). **Booker reverses the caveat**. Moreover, frame issue in terms of post offense rehabilitation. See **U.S. v. Smith**, 311 F.Supp.2d 801 (E.D. Wis. 2004) (in sale of crack case, two level downward departure from heartland of sentencing guidelines granted, even though defendant also received offense level reduction for acceptance of responsibility, where defendant demonstrated self- improvement, fundamental change in attitude, and complete withdrawal from criminal drug distribution lifestyle in three years before he was arrested and before he knew he was under investigation, and those post-offense, pre-arrest rehabilitative efforts had not been taken into account in formulating guideline range.

For crimes committed before October 27, 2003, see **U.S. v. Kim**, 364 F.3d 1235 (11th Cir. 2004) ($280,000 restitution by defendants, a husband and wife, after they pled guilty to conspiracy to defraud the United States and fraudulently obtaining government assistance, respectively, was extraordinary enough to remove case from heartland and justify downward departure from 24 months to probation and home detention where defendants dipped significantly into their life savings and voluntarily undertook enormous amount of debt to pay restitution; defendants' conduct demonstrated their sincere remorse and acceptance of responsibility); U.S. v. Brown, 985 F.2d 478, 482-83 (9th Cir. 1993) (under § 5K2.0, in light of defendant's confession, court can depart downward from the range if it determines that the two point reduction did not adequately reflect acceptance); U.S. v. Miller, 991 F.2d 552 (9th Cir. 1993) (voluntary restitution exhibiting extraordinary acceptance of responsibility can justify downward departure); U.S. v. Farrier, 948 F.2d 1125, 1127 (9th Cir. 1991) (admission of guilt to other crimes can justify departure under §5K2.0, but not further adjustment for acceptance); U.S. v. Gee, 226 F.3d 885 (7th Cir. 2000)(affirms 2-level downward departure for acceptance of responsibility under §5K2.0, where D was not eligible for adjustment for acceptance under §3E1.1 because went to trial. Defendant demonstrated a non-heartland acceptance in that he made early and consistent offers to government to determine legality of his business); U.S. v. Faulks, 143 F.3d 133 (3d Cir. 1998); U.S. v. DeMonte, 25 F.3d 343, 349 (6th Cir. 1994) (in computer fraud case, departure proper on ground that defendant admitted to crimes about which government had no knowledge, even though part of plea

bargain to cooperate-remanded); U.S. v. Evans, 49 F.3d 109 (3d Cir. 1995) (voluntary disclosure of true identity resulting in increased criminal history score may warrant downward departure); U.S. v. Rogers, 972 F.2d 489, 494 (2d Cir. 1992) (district court empowered to depart downward where defendant emerged from a drug-induced state, realized his wrongdoing and turned himself in and confessed); U.S. v. Lieberman, 971 F.2d 989, 995-96 (3d Cir. 1992) (one level downward departure o.k. where D offered to make restitution greater that amount taken, met with bankers and offered to explain how avoided detection, resigned his position and went to FBI to admit his embezzlement, pled guilty); U.S. v Crumb, 902 F.2d 1337, 1339-40 (8th Cir. 1990) (voluntary surrender nine days after issuance of warrant 9 month downward departure).

District Court

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 for downward departure under U.S.S.G. § 5K1.1, defendant continued to cooperate with the government, and where, in doing so, he put himself at risk of a significant detriment: without a plea agreement, there was nothing to prevent the government from using the information he provided against him at sentencing, defendant's efforts show acceptance of responsibility that is outside the heartland of § 3E1.1, with other factors, warranted two level additional departure); U.S. v. Nguyen, 212 F.Supp.2d 1008 (N.D. Iowa 2002) (where D entered 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, district court grant an extra three level departure to defendant for "extraordinary acceptance of responsibility,"under U.S.S.G. § 5K2.0*);* U.S. v. Stewart, 154 F.Supp.2d 1336 (E.D. Tenn. 2001) (where defendant pled guilty to possession of 8 ounces of cocaine, eight-level downward departure, in addition to 3 normal levels, granted for "extraordinary acceptance" where defendant continued to plead guilty even though judge had granted codefendant's suppression motion which could have resulted in dismissal of defendant's case); U.S. v. Davis 797 F. Supp. 672 (D.C.N.Ind. 1992) (8-level downward departure proper where defendant make $775,000 restitution voluntarily); U.S. v. Ziegler, 835 F. Supp. 1335 (D. Kan. 1993) (downward departure justified for complete acceptance of responsibility exhibited by extraordinary drug rehabilitation in that defendant had smoked 20 marijuana cigarettes a day for 20 years and stopped).

26. Defendant Showed Extreme Remorse.

U.S. v. Fagan, 162 F.3d 1280, 1284-85 (10th Cir. 1998)(because guidelines do not expressly forbid the departure, under rationale of Koon, court may downward depart where defendant showed great remorse "to an exceptional degree" even though D already received adjustment for acceptance of responsibility); U.S. v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996).

***27. Post-Offense, Post-Conviction, And Post-Sentencing Rehabilitation.**

Caveat: Effective Nov. 1, 2000 (i.e. for crimes committed on or after that date) §5K2.19 prohibits downward departure for "post *sentencing* rehabilitative efforts, even if exceptional**.**"

(The amendment "does not restrict departures based on extraordinary rehabilitative efforts prior to sentencing." U.S.S.G., Appendix C, No. 602); **Caveat questionable now in light of Booker**.

U.S. v. Green, 152 F.3d 1202 (9th Cir. 1998) (post-sentencing rehabilitative efforts – here, exemplary conduct in prison – may be basis for downward departure in manufacturing 4,000 marijuana plant case, and no abuse to depart downward 11 levels and re-sentence defendant to 30 days – no difference between post-offense and post-sentencing rehabilitation – court need not analogize to comparable guideline provisions to explain extent of departure so long as reasonable); U.S. v. Newlon, 212 F.3d 423 (8th Cir. 2000) (departure from 110 to 90 months not abuse of discretion where prior to his arrest on charge of felon in possession D had, at his own request, spent 85 hours in drug and alcohol program; his counselor reported that he had a sincere desire for treatment, and his family noted a marked improvement in his behavior and attitude); U.S. v. Bradstreet, 207 F.3d 76 (1st Cr. 2000) (departure from 51 to 31 months at re-sentencing in securities fraud case not abuse of discretion for post-offense rehabilitation while in prison D tutored inmates, taught adult that he 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 the business world and where appended to the motion were letters of commendation from people with whom he had worked in prison as well as from several of the inmates whom he had assisted.); U.S. v. Rudolph, 190 F.3d 720 (6th Cir. 1999) (at re-sentencing court may depart down for extraordinary rehabilitation occurring after original sentencing); U.S. v. DeShon, 183 F.3d 888 (8th Cir. 1999) (where D pled to tax evasion etc., district court did not abuse its discretion in departing downward from 30-37 months to 5 months community confinement without work release based on defendant's post-offense rehabilitation, after witnesses testified that he had "renewed his life in the church" and was making extraordinary efforts to turn his life around); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels to probation when, as one of eleven factors, it considered that the defendant had adhered to the conditions of his release and changed both his attitude and conduct during his release constituting exceptional post-offense rehabilitation. Cases forbidding a departure on this ground have been overruled by Koon); U.S. v. Rhodes, 145 F.3d 1375 (D.C.Cir. 1998) (post-conviction rehabilitation grounds for departure if "exceptional degree" of rehabilitation shown – in light of Koon); U.S. v. Whitaker, 152 F.3d 1238, 1241 (10th Cir. 1998) (defendant's "drug rehabilitation efforts" could possibly provide a basis for departure and case remanded for the district court to decide); U.S. v. Kapitzke, 130 F.3d 820 (8th Cir. 1997) (post-offense rehabilitation effort in child porn case may justify downward departure where defendant has undergone eight months of sex offender and chemical dependency treatment with a high probability of success); U.S. v. Core, 125 F.3d 74 (2d Cir. 1997) (good conduct in prison after initial sentencing may justify downward departure on re-sentencing. On remand, court should determine if D's rehabilitative efforts justify departure); U.S. v. Sally, 116 F.3d 76 (3d Cir. 1977) (In light of Koon, a defendant's post-conviction rehabilitation efforts may be sufficient to warrant a downward departure where D is resentenced several years later if there is at least "concrete gains toward turning ones' life around." Here, D was 17 when convicted of crack and gun charges and has since earned his GED and nine college

credits); U.S. v. Brock, 108 F.3d 31 (4th Cir. 1997) (D convicted of credit card fraud with 12-18 months guidelines sought downward departure because of post-arrest rehabilitation; district denied saying no authority. Remanded because previous decision ruling out such departures no longer good law in light of Koon); U.S. v. Workman, 80 F.3d 688 (2d Cir. 1996) (between defendant' criminal conduct and arrest he left a gang joined the army and was honorably discharged – a modest downward departure proper because defendant abandoned his criminal lifestyle-"[R]ehabilitation efforts by drug-addicted defendants may justify downward departures under appropriate circumstances."); U.S. v. Williams, 65 F.3d 301, 306 (2d Cir. 1995) (when a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he had been admitted to a selective and intensive inmate drug treatment program and a guideline sentence would deprive him of his only opportunity rehabilitate himself, departure from 130 months to 60 months is reasonable if additional conditions attached to supervised release term); *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");.

District Court

U.S. v. Smith, 311 F.Supp.2d 801 (E.D. Wis. 2004) (in sale of crack case, two level downward departure from heartland of sentencing guidelines granted , even though defendant also received offense level reduction for acceptance of responsibility, where defendant demonstrated self- improvement, fundamental change in attitude, and complete withdrawal from criminal drug distribution lifestyle in three years before he was arrested and before he knew he was under investigation, and those post-offense, pre-arrest rehabilitative efforts had not been taken into account in formulating guideline range); U.S. v. Parella, 273 F.Supp. 2d 161 (D. Mass. 2003) (where D convicted of being getaway driver in three bank robberies, court departs from 30-37 months to probation because defendant "totally changed his life and his behavior" and treatment was successful "a rehabilitated defendant is not likely to be a recidivist"); U.S. v. Lange, 241 F. Supp. 2d 907 (E.D. Wis. 2003) (where D convicted of distributing crack, 2 level departure granted for post offense rehabilitation where he became leader of treatment group, gave up drugs, reconnected with his family, and showed great insight into his problems); U.S. v. Rosado, 254 F.Supp.2d 316 (SDNY 2003) (D convicted of distribution of heroin given 2 level departure for post offense rehabilitation where he successfully complete shock incarceration while in jail, obtained GED, gave up drugs, found employment, and severed ties with his drug-dealing friends); U.S. v. Bodden, 2002 WL 1364035 (SDNY June 24, 2002) (unpublished) (defendant convicted of bank fraud with range of 18-24 months court grants departure to 6 months halfway house because of efforts at drug rehabilitation even where relapses "The standards for departure, particularly in the context of long-term drug addiction, do not require unblemished success in a defendant's path to recovery, but rather extraordinary progress as measured by all relevant factors.) ; **U.S. v. K.**, 160 F.Supp.2d 421 (E.D.N.Y. 2001) (where D convicted of trying to sell ecstasy and where government agreed that D should be sentenced on basis of 1000 pills actually sold instead of 15,000 said he could get so guideline 12-18 months, and where D mentally retarded, **Judge Weinstein continues sentencing one year** in part to enable D to attend rehabilitation program and demonstrate post offense rehabilitation for

downward departure–strong statements in favor of continuing sentences to enable defendant to show rehabilitation) (See Flowers below); U.S. v. Hernandez, 2001 WL 96369, *3 (S.D.N.Y. Feb. 2, 2001)(unpublished) (D's "significant and successful efforts at rehabilitation from her addiction to heroin since her arrest are extraordinary factors warranting a downward departure" from 12-18 months to probation); *U.S. v. Wilkes*, 130 F.Supp.2d 222, 240-41 (D.Mass. 2001) (departing where, after a decade of severe alcohol and drug abuse, defendant obtained counseling, remained drug-free, and re-established meaningful personal and family relationships); U.S. v. Seethaler, 2000 WL 1373670, *2 (N.D.N.Y. Sept. 19, 2000)(unpub.) (downward departure from 46 to 30 months for post-offense rehabilitation where D had completely resolved the sexual fetish and had no continuing urges to search for pornography on the Internet or in any other situation and where D appears to have re-established himself in his family and in his occupational pursuits); U.S. v. Kane, 88 F.Supp.2d 408 (E.D. Pa. 2000) (where D convicted of selling meth and where he had abused drugs and alcohol for 25 years, but where urine tests since his release from drug program showed he had stopped use of drugs and limited alcohol consumption, downward departure from 188 to 120 months warranted "in recognition of since effort to repair his life" even though a few lapses because lapses have to be viewed in context of his former behavior); U.S. v. Blake, 89 F.Supp.2d 328 (E.D.N.Y. 2000) (in bank robbery, departure from level 29 to level 8 and probation proper in part because incarcerating defendant would "reverse the progress she has made" and considering the decreasing opportunities for rehabilitation in federal prisons resulting from ever-increasing prison populations); U.S. v. Bennett, 9 F. Supp. 2d 513 (E.D.Pa. 1998) (even where defendant does not accept responsibility, his full restitution early in case and efforts to recover funds warranted downward departure 91 months (from 235 to 144) in part under §5K2.0), aff'd 161 F.3d 171 (3d Cir. 1998); U.S. v. Flowers, 983 F.Supp. 159 (E.D.N.Y. 1997) (Weinstein, J.) (**sentencing continued for one year to allow time to determine if D truly rehabilitated**); U.S. v. Shasky, 939 F. Supp. 695 (D.Neb. 1996) (departing downward in child porn case where defendant entered a nationally recognized sex offender program and had an excellent long-term prognosis with minimum risk of re-offending); U.S. v. Griffiths, 954 F.Supp. 738 (D.Vt. 1997) (13-level downward departure granted on basis of D's extraordinary rehabilitative efforts after D overcame drug use, left his former lifestyle entirely behind him, and became involved in program for children; D's progress would be utterly frustrated if D were incarcerated); U.S. v. Neiman, 828 F.Supp. 254 (S.D.N.Y.1993) (downward departure granted based upon likelihood of rehabilitation in non-narcotics context where religious leaders and family members agreed to supervise home confinement and medical treatment was to be provided.)

Note: In Ninth Circuit, do not frame issue in terms of rehabilitation from drug addiction, because departure on this ground alone is forbidden. U.S. v. Martin, 938 F.2d 162 (9th Cir. 1991) (no departure possible for drug rehabilitation because guidelines already took into drug addiction into account and departure would give break to an addict that non-addict doesn't get) [**Practice note: The result, if not the holding, highly questionable now in light of Koon and Booker**]; see U.S. v. Akin, 62 F.3d 700 (5th Cir. 1995) (five circuits allow departure for extraordinary presentence efforts in alcohol or drug rehabilitation); see U.S. v. Ragan, 952 F.2d 1049, 1050 (8th Cir. 1992) (not plain error to grant downward departure to D who had stopped using drugs for a year before his indictment and who maintained steady employment); U.S. v.

Maddalena, 893 F.2d 815, 818 (6th Cir. 1989) (district court may consider D's pre-arrest efforts to avoid drugs in extraordinary circumstances); U.S. v. Maier, 975 F.2d 944, 946-49 (2d Cir. 1992) (affirming downward departure and noting distinction between drug dependence and effort to conquer drug dependence so 5H1.4 not relevant; contrary to 9th Circuit, rehabilitation is worthy goal of sentencing, even if not of incarceration); U.S. v. Sklar, 920 F.2d 107 (1st Cir. 1990); U.S. v. Williams; 948 F.2d 706 (11th Cir. 1991) (truly extraordinary post-arrest pre-sentence recovery may justify downward departure); U.S. v. Harrington, 947 F.2d 956 (D.C. Cir. 1991).

28. Post-Offense Restitution.

U.S. v. Kim, 364 F.3d 1235 (11th Cir. 2004) (Payment of $280,000 restitution by defendants, a husband and wife, after they pled guilty to conspiracy to defraud the United States and fraudulently obtaining government assistance, respectively, was extraordinary enough to remove case from heartland and justify downward departure from 24 months to probation and home detention where defendants dipped significantly into their life savings and voluntarily undertook enormous amount of debt to pay restitution; defendants' conduct demonstrated their sincere remorse and acceptance of responsibility); U.S. v. Garlich, 951 F.2d 161, 163 (8th Cir. 1991) (district court erred in failing to exercise its discretion to determine if defendant who turned over assets of $1.4 million to cover loss of $253,000 merited departure for extraordinary restitution); U.S. v. Miller, 991 F.2d 552, 553-54 (9th Cir. 1993) (remanding for district court to determine whether $58,000 repaid for $45,000 embezzled constituted atypical restitution); U.S. v. Hairston, 96 F.3d 102, 107-08 (4th Cir.1996) (1997) (payment of restitution can, in exceptional circumstances, be basis for departure from sentencing guidelines-here, however, restitution of less than half of money embezzled and only after indictment to avoid civil liability not extraordinary); U.S. v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992) (affirming departure where defendant agreed to pay "$34,000 more than he thought he owed and to which he pled guilty"); U.S. v. Bennett, 9 F.Supp.2d 513 (E.D.Pa. 1998) (even where defendant does not accept responsibility, his full restitution early in case and efforts to recover funds warranted downward departure 91 months (from 235 to 144) in part under §5K2.0): *United States v. DeMonte*, 25 F.3d 343, 346 (6th Cir.1994) (stating that "we have acknowledged that restitutionary payments may constitute 'exceptional circumstances' that justify a downward departure" (citing *United States v. Brewer*, 899 F.2d 503, 509 (6th Cir.1990))); *United States v. Bean*, 18 F.3d 1367, 1369 (7th Cir.1994) ("Undoubtedly there are circumstances that would justify using § 5K2.0 to [depart downward on the basis of restitution] beyond [the] two levels [of reduction provided by § 3E1.1]."); *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir.1999) (affirming a district court's downward 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" (citing *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir.1991)).

29. Voluntary Disclosure Of A Crime.

U.S.S.G. §5K2.16; U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered that the defendant voluntarily disclosed to pretrial services officer false statements he made to obtain firearm even though would have been inevitably discovered by FBI); U.S. v. Plunkett, (Cr. 93-60, Sept. 7, 1993)(in unarmed bank robbery case, under U.S.S.G. 5K2.16, Helen Frye in departed downward 18 levels, from 21 to 3 because the defendant, while serving time on an unrelated sentence, called up the FBI and confessed to a robbery he had committed two years earlier); 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 cooperation-remanded); but see U.S. v. Brownstein, 79 F.3d 121 (9th Cir.1996)(no departure permissible under §5K2.16 where D voluntarily came to police about bank robberies because police already knew about crimes even if they didn't know who did them).

30 A. Voluntary Cessation of Criminal Conduct Before Discovery

U.S. v. Numemacher, 362 F.3d 682 (10th Cir. 2004) (where D possessed and distributed child porn on his website for a short time but destroyed all porn before learning of the investigation and where he cooperated with the FBI, conduct "atypical" and justified a downward departure)

31. The Defendant Showed Utter Lack Of Sophistication.

U.S. v. Jagmohan, 909 F.2d 61 (2d Cir. 1990)(where D bribed city official, downward departure from 15 to 21 months to probation and fine warranted because defendant's use of personal check in bribery transaction showed "utter lack...of sophistication" usually shown by persons bribing an official); cf. U.S. v. Castro-Cervantes, 927 F.2d 1079, 1081 (9th Cir. 1990) (upward departure upheld because guidelines "do not take into account the sophistication of the robber").

***32. Cooperation With Authorities To Prosecute Others.**

U.S.S.G. §5K1.1 (Upon motion of the government); U.S. v. Udo, 963 F.2d 1318, 1319 (9th Cir. 1992) (once government makes motion, court can depart more than government recommends); U.S. v. Tenzer, 213 F.3d 34 (2d Cir. 2000) (remanded –district court does have discretion to depart where D tried to negotiate with IRS to make payments through voluntary disclosure program, even though talks broke down and D convicted).

33**. Cooperation With Third Party Business, Not For Prosecution of Others.**

U.S. v. Truman, 304 F.3d 586 (6th Cir. 2002) **(w**here defendant stole large quantities of controlled substances from lab, and after his arrest, provided information that led to upgrades in the security procedures used by the lab, district court erred in not considering whether it could court departed downward from sentencing range of 121 to 151 months under 5K2.0 , which

authorizes departure for circumstances not mentioned by the Sentencing Commission, *even though gov. did not file 5K1.1 cooperation motion*, citing U.S. v. Kaye, 140 F.3d 86 (2nd Cir. 1998) ("when a defendant moves for a downward departure on the basis of cooperation or assistance to government authorities which does not involve the investigation or prosecution of another person, U.S.S.G. § 5K1.1 does not apply and the sentencing court is not precluded from considering the defendant's arguments solely because the government has not made a motion to depart." Case remanded).

34. Cooperation With The Judiciary And Facilitation of The Administration Of Justice.

U.S. v. Garcia, 926 F.2d 125 (2d Cir. 1991) (even in absence of government §5K1.1 motion, court can depart downward where defendant's plea induced others to plead thereby clearing busy trial court's calendar); U.S. v. Carrozza, 807 F. Supp. 156 (D.Mass. 1992) (same) aff'd, 4 F.3d 70 (1st Cir. 1993); U.S. v. Patillo, 817 F. Supp. 839 (C.D.Cal. 1993) (a complex of mitigating factors including aberrant conduct, minimal role, and assistance to probation officer during L.A. riots); **contra**, U.S. v. Shrewsberry, 980 F.2d 1296 (9th Cir. 1992) (Practice idea: **Reconsider in light of Koon and especially Booker**); see U.S. v. Dethlefs, 123 F.3d 39 (1st Cir. 1997) (criticizing Shrewsberry and noting that since Koon, "in theory, the court had authority to depart for conduct (i.e., the timely guilty pleas) which conserved judicial resources and thereby facilitated the administration of justice" Court said, however, "the case for departure, overall, falls so far short of Garcia that the court's global departures cannot survive"); **U.S v. Shah**, 263 F.Supp.2d 10 (D.D.C. 2003) (d's plea which encourages others to plead could serve as ground for departure but not here).

35. Cooperation Of The Defendant On Court's Own Motion Where Government Refuses To Make §5K1.1 Motion.

U.S. v. Khoury, 62 F.3d 1138 (9th Cir. 1995) (court may depart downward where government refuses to make §5K1.1 motion because D went to trial although gov. initially offered to do so and where D's cooperation led to arrest of co-D); U.S. v. Treleaven, 35 F.3d 458 (9th Cir. 1994); U.S. v. Paramo, 998 F.2d 1212 (3d Cir. 1993) (remanded to show whether government's refusal to make §5K1.1 motion for only coconspirator who went to trial was pretextual). When departing downward, court must evaluate D's cooperation on an individualized basis and cannot engage in mechanical reduction of only 3-levels. U.S. v. King, 53 F.3d 589, 590-92 (3d Cir. 1995).

36. Cooperation that saved life of government informant

United States v. Khan, 920 F.2d 1100 (2d Cir.1990) (the defendant's activity in protecting the safety of a confidential informant is the sort of substantial assistance that the sentencing court could consider absent a government motion, since an exception to § 5K1.1's motion requirement exists "where the defendant offers information regarding actions he took,

which could not be used by the government to prosecute other individuals.").

37. Cooperation With Congressional Committee.

U.S. v. Stoffberg, 782 F. Supp. 17 (E.D.N.Y. 1992) (where defendant convicted of violating munitions export laws and sentencing range 8-14 months, three level downward departure proper where House Committee wrote letter to sentencing judge asking for consideration in light o defendant's testimony and cooperation with Committee).

***38. Cooperation With State Or Local Authorities.**

Government has authority to move under §5K1.1 for downward departure even if D cooperated only with state authorities. U.S. v. Emery, 34 F.3d 911 (9th Cir. 1994), and §5K1.1 motion **not necessary** where defendant cooperated with local law-enforcement. U.S. v. Kaye, 140 F.3d 86 (2d Cir. 1998), vacating, 65 F.3d 240 (2d Cir. 1995); contra, U.S. v Emery, 34 F.3d 911, 913 (9th Cir. 1994) (§5K1.1 controls cooperation to local authorities so that departures available only on government motion).

39. Cooperation By Third Party On Behalf Of Defendant.

Cooperation by defendant's girlfriend permits 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 the defendant is not mentioned by the guidelines. Here, while D incarcerated, D asked girlfriend to work for police, and she set up drug buys with no remuneration. So departure of 3 levels granted. U.S. v. Abercrombie, 59 F.Supp. 2d 585 (S.D. W.Va. 1999)

40. Attempted Cooperation With IRS.

U.S. v. Tenzer, 213 F.3d 34 (2d Cir. 2000) (remanded –district court has discretion to depart where D tried to negotiate with IRS to make payments through voluntary disclosure program, even though talks broke down and D convicted).

***41. Extraordinary Family Situations Or Responsibilities Or Where Incarceration Would Have Extraordinary Effect On Innocent Family Members.**

Caveat one: For crimes committed on or after October 27, 2003, USSG 5H1.6 adds commentary giving list of factors court should consider in determining whether to depart on this ground including seriousness of the offense, involvement in the offense, danger to family members, whether service of sentence with range will cause substantial and special loss of essential care taking, etc.; [**But question relevance now in light of Booker]**

Caveat two: For sex and child porn crimes committed on or after April 30, 2003, this departure arguably no longer available, but question this caveat in light of Booker..

Otherwise, *see* U.S. v. Leon, 341 F.3d 928 (9th Cir. 2003) (in false income tax return case court affirms district court's downward departure of six levels from 30 months to 10-16 months granted because defendant sole caregiver of his wife who suffered from renal failure and is suicidal-court reaches same result whether standard is abuse of discretion or de novo as required by Feeney amendment); U.S. v. Aguirre, 214 F.3d 1122 (9th Cir. 2000) (within district court's discretion to depart downward 4 levels for extraordinary family circumstances "based on the fact that there is an 8 year-old son who's lost a father and would be losing a mother for a substantial period of time"); U.S. v. Dominguez, 296 F.3d 192 (3rd Cir.2002) (in bank fraud case, district court erred in holding it could not depart four levels downward for defendant who resided with her elderly parents, who were physically and financially dependant upon her where father had undergone brain surgery and had suffered a heart attack, was non-ambulatory, obese, incontinent, has significantly impaired mental ability, and experiences difficulty speaking, and where mother has severe arthritis and heart problems which prevented her from physically caring for her husband and, although she is seventy-five years old, is now forced to work to support him... circumstances were "truly tragic"); U.S. v. Gauvin, 173 F.3d 798 (10th Cir. 1999) (where defendant supported 4 young children and wife worked 14 hours a day 44 miles from home and barely able to provide for children, and at risk of losing custody of children and job, and no extended family to take custody of children, departure of three levels to 37 months, making D eligible for shock incarceration, warranted under §5H1.6 "to minimize the impact of defendant's children"); U.S. v. Owens, 145 F.3d 923 (7th Cir. 1998) (affirmed downward departure from level 32 (169 to 210 months) to 120 months under 5H1.6 for defendant convicted of possession of crack cocaine with intent to distribute where "he maintained a good relationship with his [three] children"; he also spent time every day with a brother who suffered from Downs Syndrome and where common law wife testified that if the defendant went to prison "she might have to move to public-assisted housing and receive welfare benefits." *So* district court said defendant's situation "differs from that of a typical crack dealer in that [the defendant] takes an active role in raising his children and supporting his family."); U.S. v. Galante, 111 F.3d 1029 (2d Cir.1997) (affirms district court's downward departure in drug case from 46-57 months to 8 days – where D showed he was a conscientious and caring father of two sons who would have faced severe financial hardships); United States v. Milikowsky, 65 F.3d 4, 8 (2d Cir. 1995) ("Among the permissible justifications for downward departure ... is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties."); U.S. v. Rivera, 994 F.2d 942, 952-54 (1st Cir. 1993) (Note: reasoning of this case largely adopted in Koon) (Breyer, J.); U.S. v. Haversat, 22 F.3d 790 (8th Cir. 1994) (in antitrust case where husband's care is critical to well-being of mentally ill wife, downward departure ok, but not to probation); U.S. v. Ekhator, 17 F.3d 53 (2d 1994) (even where d agreed not to ask for downward departure court may do so sua sponte if unusual family circumstances; here Nigerian widow with five children 3 of whom were very ill; remanded); U.S. v. One Star, 9 F.3d 60 (8th Cir. 1993) (ex-felon in possession – departure downward from 33 months to probation proper where defendant not dangerous, possessed revolver in self-defense, had strong family ties, and lived on Indian reservation); U.S. v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (affirmed downward departure from 24-30 month range to six months home detention for defendant who had been living with a divorced woman and her two children since and had developed special relationship with woman's son that helped ameliorate son's serious

psychological and behavioral problem, and son would regress if D incarcerated); U.S. v. Gaskill, 991 F.2d 82, 85-86 (3d Cir. 1993) (remanded for court to consider downward whether departure to house confinement or probation warranted under §5H1.6 where defendant only care-provider to mentally ill wife, no danger to community – indeed benefit to it by allowing D to care for wife – and only short period of incarceration called for); U.S. v. Johnson, 964 F.2d 124, 128-130 (2d Cir. 1992) (where D was a single mother responsible for three young children and young child of her institutionalized daughter, depart not because D has lesser culpability but because "**we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing**"); U.S. v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991) (D and wife cared for four and eleven year old and disabled father and paternal grandmother, incarceration could well result in destruction of an otherwise strong family unit); U.S. v. Pena, 930 F.2d 1486, 1495 (10th Cir. 1991) (single parent of infant and sole support of sixteen-year-old daughter and daughter's infant); U.S. v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990) (solid family and community ties and "consistent efforts to lead a decent life in the difficult environment" of an Indian reservation).

District Court

U.S. .v. Mateo, 299 F.Supp.2d 201 (S.D.N.Y. 2004) (in heroin case where defendant's two young children were "thrust into the care" of defendant's relatives, "who report extreme difficulties in raising them" and where both fathers are absent, and the children, now ages six and one, will be raised apart from both biological parents for as long as the defendant is in custody, a downward departure is appropriate); U.S. v. Colp, 249 F.Supp. 2d 740 (E.D. Va. 2003) **(**where defendant pled guilty to one count of income tax evasion departure from guideline range of 10 to 16 months to probation warranted because of extraordinary family circumstances in that she was the sole caretaker for her disabled husband who suffers from a brain injury resulting from auto accident. "Any period of incarceration" here would "serve as an undue hardship on Mr. Colp"); U.S. v. Greene, 249 F.Supp.2d 262 (SDNY 2003) (in tax case D granted seven-level departure because of extraordinary charitable good works as well as extraordinary family circumstances including being single parent of three adopted children with numerous psychological problems and highly dependent on D and in desperate need of stability); U.S. v. Norton, 218 F.Supp.2d 1014 (E.D.Wisc. 2002); (departure from 15-21 months to probation and home confinement granted to D convicted of credit card fraud observing that the Guidelines "do not require a judge to leave compassion and common sense at the door to the courtroom." *(U.S. v. Johnson, 964 F.2d 124, 125 (2nd Cir. 1992).* The defendant was a 38-year old single mother of three children who cares for aging mother. If she were incarcerated, the children would "almost certainly" be placed in foster care. It is proper to consider harm to children because a court must consider the public interest which requires that a defendant be held accountable for her conduct. However, "the public also has an interest in not having children unnecessarily placed in foster care. Such placements increase costs to taxpayers and may be more likely to cause children to become law breakers. See generally, John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 Crime & Justice 121 (1999). " A departure is most appropriate when the defendant 'could be given probation (or home confinement) rather than incarceration with only a small downward

departure'." Court was reluctant "to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."); U.S. v. Kloda, 133 F.Supp.2d 345 (S.D.N.Y. 2001) (father and daughter who filed false tax returns for their business entitled to downward departure in part because of needs of daughter's small children. A judge must sentence "without ever being indifferent to a defendant's plea *for compassion, for compassion also is a component of justice*."); U.S. v. Tineo, 2000 WL 759837 (S.D.N.Y. June 8, 2000) (downward departure is warranted if "incarceration in accordance with the Guidelines might well result in the destruction of an otherwise strong family unit" in credit card fraud departure from 10 to 16 months to probation is warranted where mother sole financial support of three young children); U.S. v. Blake, 89 F.Supp.2d 328 (E.D.N.Y. 2000) (in bank robbery, departure from level 29 to level 8 and probation proper in part because of emotional trauma 3-year-old daughter would suffer); U.S. v. Wehrbein, 61 F.Supp.2d 958 (D. Neb. 1999) (downward departure to probation in case involving low-level trafficking in methamphetamine and possession of weapons; where D's 11-year-old son, whose emotional and mental disorders improved markedly when defendant returned from serving state sentence on similar charges, would be harmed if D not present to provide continued structured discipline, there were no other care givers available to substitute for defendant and federal government could have avoided or lessened impact on child if federal prosecutor had not delayed 14 months after matter was referred before commencing federal case); U.S. v. Hammond, 37 F.Supp.2d 204 (E.D.N.Y. 1999) (defendant in drug case suffering from advanced HIV entitled to a downward departure from 48 to 18 months where family will suffer extraordinary financial and emotional harsh from his incarceration. "A sentence without a downward departure would contribute to the **needless suffering of young, innocent children**."); U.S. v. Lopez, 28 F.Supp.2d 953 (E.D.Pa. 1998) (extraordinary family circumstances warranted a downward departure of six levels for a defendant who pleaded guilty to conspiracy to distribute heroin and to forfeiture charge where D's seven-year-old daughter suffered mental illness and attempted suicide since the defendant's arrest. A risk existed that the defendant's parental rights would be terminated if she was sentenced to her full range of incarceration. In addition, the defendant was not involved in large-scale drug dealing); U.S. v. Chambers, 885 F.Supp. 12, 14 (D.D.C. 1995) (defendant is single mother with two children ages 12 and 15, incarcerating defendant for 15 years would deprived children of sole parent "that children need supportive and loving parents to avoid the perils of life is without question . . . causing needless suffering of young, innocent children does not promote the ends of justice"); U.S. v. Blackwell, 897 F.Supp. 586, 588 (D.D.C. 1995) (causing needless suffering of innocent children not in the interests of justice); U.S. v. Rose, 885 F.Supp. 62 (E.D.N.Y. 1995) (D, charged with interstate receipt of firearm, who had no prior record and who assumed role of non-custodial surrogate father to four children and aided struggling grandmother in raising them merited downward departure to probation because the departure "is on behalf of the family"); U.S. v. Newell, 790 F.Supp. 1063, 1064 (E.D.Wash. 1992) (granting downward departure to defendant who was caretaker of six young children).

42. Incarceration Would Have Extraordinary Effect On Business Causing Loss Of Jobs.

The high probability that business run by an antitrust offender would go under if her were incarcerated and the resulting hardship on 100 employees of those business justified downward departure of one level from 11 to 10 authorizing probation. U.S. v. Milikowsky, 65 F.3d 4 (2d

Cir. 1995); U.S. v. Olbres, 99 F.3d 28 (1st Cir. 1996) (guidelines do not prohibit departure on grounds that incarceration of defendant will cause job losses to his employees; case remanded to determine if extent of loss outside the heartland of such cases); U.S. v. Kloda, 133 F.Supp.2d 345 (S.D.N.Y. 2001) (in business tax fraud case, one-level departure granted in part because of "the needs of [defendant's] business and employees").

43. Defendant Engaged In Exceptional Charitable And Community Activities and Good Works.

U.S. v. Cooper, 394 F.3d 172 (3rd Cir. 2005) (in securities fraud and tax evasion case, with sentence range of 14-21 months, four-level downward sentencing **departure** for "**good works**" and sentence of probation was warranted for defendant's "exceptional" good works who did not simply donate money to charity but also organized and ran youth football team in depressed area, mentored its members, and helped several members attend better high schools or 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").

U.S. v. Serafini, 233 F.3d 758 (3d Cir. 2000)(community service and charitable works performed by defendant, a state legislator convicted of perjury in a federal grand jury investigation, were sufficiently "extraordinary and exceptional" to justify three-level downward departure for community and charitable activities; e.g., providing a $300,000 guarantee for medical treatment of a terminally ill patient and mentoring a seriously injured college student, and showed generosity of time as well as money); U.S. v. Woods, 159 F.3d 1132 (8th Cir. 1998) (defendant's exceptional charitable efforts – bringing two troubled young women in her home, paying for them to attend private high school – and also assisting elderly friend to move from nursing home to apartment – justified one level departure); U.S. v. Jones, 158 F.3d 492 (10th Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered defendant's long history of community service even though under §§5H1.5 and 1.11 good works are not ordinarily relevant because here "very unusual"); U.S. v. Crouse, 145 F.3d 786 (6th Cir. 1998) (where D was chief executive officer of company found to have fraudulent distributed orange juice adulterated with sugar, and where judge departed downward 13 levels to impose home confinement where guidelines were 30-37 months, court of appeals will defer to district court's decision that D's charitable contribution were outstanding and, together with other factors, justify departure, but extent was an abuse of discretion); U.S. v. Rioux, 97 F.3d 648 , 663 (2d Cir. 1996) (affirming downward departure based on charitable fund-raising conduct as well as poor medical condition); U.S. v. Canoy, 38 F.3d 893 (7th Cir. 1994) (charitable and civic activities may, if exceptional, provide a basis for departure).

District Court

U.S. v. Greene, 249 F.Supp.2d 262 (SDNY 2003) (in tax case D granted seven-level departure because of extraordinary charitable good works--devoting his life to orphaned children, while just a salaried employee, and extraordinary family circumstances); U.S. v. Bennett, 9 F.Supp.2d 513 (E.D.Pa. 1998) (in largest charitable fraud in history, where under §5H1.11 defendant's civic and charitable good deeds were extraordinary, together with other grounds, departure from 232 to 92 months warranted – D had substantial contributions in the areas of substance abuse, children and youth, and juvenile justice were well documented and well recognized.); U.S. v. Wilke, 995 F.Supp. 828 (N. D. Ill. 1998) (defendant's contribution to an art and music festival, to theater work, and to his interfaith food pantry warrant departure), vacated and remanded, 156 F.3d 749 (7th Cir. 1998).

44 Good Deeds (e.g., saving a life)

U.S. v. Acosta, 846 F.Supp. 278 (SDNY 1994) (where D convicted of attempted robbery, D's have rescued baby from burning building together with D's mild retardation justifies departure "Acosta's life saving, heroic act in itself justifies such a departure but certainly does so when considered in combination with his retarded mental condition") [quote the Talmudic saying that "he who saves one life is as one who has saved the whole world."]

45. Defendant's Status As War Refugee And His Lack Of Education.

Defendant convicted of drug offenses involving opium. Defendant's status as refugee and profound lack of education warranted a departure where defendant from Laos and fled country because of service to U.S. with CIA. Lack of education coupled with refugee status made virtually impossible to earn a lawful living. Departure justified. U.S. v. Vue, 865 F.Supp. 1353 (D.Neb. 1994).

46. Defendant's Extreme Anguish From Involving Son In Scheme.

Where defendant suffered extremely "a great deal more anguish and remorse than is typical" in involving son in scheme to obtain accelerated payments from government to save business, downward departure proper. U.S. v. Monaco, 23 F.3d 793 (3d Cir.1994).

***47. Defendant's Diminished Mental Capacity.**

*Caveat I: Effective April 30, 2003, this departure has been eliminated for convictions for certain sex and child porn crimes. USSG 5K2.13.Caveat II: For Crimes committed after October 27, 2003, USSG 5K2.13 amended to add requirement that diminished capacity must have "contributed substantially" to the commission of the offense. [**But caveats of questionable force now in light of** **Booker**]* **Otherwise, Note**, *effective November 1, 1998*: U.S.S.G. §5K2.13 (diminished capacity), which used to limit departures to "non-violent" cases, liberalized to authorize a downward departure if the defendant committed the offense "while suffering from a significantly reduced mental capacity." This applies if D has a significantly impaired ability to understand the wrongfulness of his behavior or to "control behavior" that he knows is wrongful. No departure is authorized if (1) the reduced mental capacity was caused by the voluntary use of drugs; (2) there is a need to protect the public because the offense involved "actual violence or a serious threat of violence"; or (3) defendant's criminal history indicates need to incarcerate to protect the public. **Note:** Guideline should apply in typical, unarmed bank robbery cases (if no threat of death) because no "actual violence" and no "serious" threat of violence. See U.S. v. Bradshaw, 1999 WL 1129601 (N.D. Ill. Dec. 3, 1999) (unpublished) (recognizing that unarmed bank robbery with no serious threat of violence would now qualify for departure but rejects departure here because defendant's lengthy criminal history of armed robberies and batteries shows incarceration necessary to protect the public); Thus, new guideline implicitly overrules U.S. v. Cook, 53 F.3d 1029 (9th Cir. 1995) (unarmed bank robbery is crime of violence so no departure either under §5K2.12 or §5H2.2-6) and U.S. v. Borrayo, 898 F.2d 91, 94 (9th Cir. 1990); see U.S. v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) (diminished capacity departure not precluded in case where bank robber presented a note and note gun involved-remanded). **Note Further** that in **U.S. v. Checoura**, 176 F.Supp.2d 310 (D.N.J. 2001), the court said that "departures for diminished mental capacity are encouraged by the Sentencing Guidelines"under §5K2.13 – also note direct causal link between illness and crime not required).

The "goal of the guideline [§ 5K2.13] is lenity toward defendants whose ability to make reasoned decisions is impaired." U.S. v. Cantu, 12 F.3d 1506, 1512, 1516 (9th Cir. 1993) (where felon possessed firearm, the district court has discretion to downward depart in case of post-traumatic stress disorder and should resentence in the awareness that "the criminal justice system long has meted out lower sentences to persons who although not technically insane are not in full command of their actions."); U.S. v. Thompson, 315 F.3d 1071 (9th Cir.2002) (Berzon, J. concurring) (although district court erred in departing downward on ground that D's conduct outside heartland of possession of child porn guideline, district court should consider departure for diminished capacity because D could not control his addiction to porn); **U.S. v. Lighthall**, 389 F.3d 791 (8th Cir. 2004) (where 21 year old college student convicted of possessing and distributing porn, 20 month downward departure (from 80 month sentence) proper because of "obsessive compulsive disorder" leading defend to gather pornography obsessively—as attested two by the 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." Application Note 1(B)—also noting that [before the Protect Act passed on April 30, 2003] **the guideline applicable to Lighthall's case, does**

not "contain[ ] any language suggesting that diminished capacity is not a permissible basis for departure in child pornography cases."); U.S. v. Lewinson, 988 F.2d 1005 (9th Cir. 1993) (affirmed 4-level downward departure under §5K2.13 in fraud case even though some drug use because about half the time no drugs; and even though mental disease not severe and did not affect D's ability to perceive reality; drug use was both "a product and factor of his impaired mental condition"); Caro v. Woodford, 280 F.3d 1247, 1258 (9th Cir. 2002) (death penalty-vacated "more than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system"); Karis v. Calderon, 283 F.3d 1117, 1134 (9th Cir. 2002)("There is a belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); U.S. v. Silleg, 311 F.3d 557 (2d Cir. 2002) (district court has authority to downward depart in porn case where defendant has diminished capacity and cannot control addiction to porn); United States v. Cockett, 330 F.3d 706 (6th Cir. 2003) (in income tax fraud case diminished capacity downward departure from 21 months to probation affirmed because of defendant' depressive disorder even though jury necessarily found mental element of intent and even though no causal link between disorder and the crime); U.S. v. Sadolsky, 234 F.3d 938 (6th Cir. 2000) (district court's two-level downward departure under §5K2.13 in computer fraud, based on defendant's compulsive gambling disorder, was not an abuse of discretion, where defendant's disorder was a likely cause of his criminal behavior, given that he had already "maxed out" his own credit line before resorting to fraud to pay his gambling debts – *no direct causal link required between the diminished capacity and the crime charged*); U.S. v. McBroom, 124 F.3d 533 (3d Cir. 1997) (D 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 compelled him to possess child porn. District court ruled crime nonviolent but denied reduction because D was very smart and could reason. Court of appeals remanded and said intelligence only one aspect and D eligible for departure if "cannot control his behavior or conform it to the law" – also agreed with Cantu that §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. Chatman, 986 F.2d 1446, 1454 (D.C.Cir.1993) (court undertakes its inquiry into defendant's mental condition and the circumstances of the offense "with a view to lenity, as § 5K2.13 implicitly recommends."); see 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").

District Court

U.S. v. Tanasi, 2003 WL 328303 (S.D.N.Y. Feb. 6, 2003) (unpub.) (D convicted of possessing and sending child porn by computer to undercover agent pretending to be 13 year old entitled to departure 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 D was a sexual predator or ever was involved sexually with a child); U.S. v. Bennett, 9 F.Supp.2d 513 (E.D.Pa. 1998) (in largest charitable fraud case in history, departure to 141 months from 232 o.k. – questionable whether a departure should be attributed to an extraordinary mental and emotional condition §5H1.3, a discouraged factor, or to diminished capacity,

§5K2.13 *an encouraged factor*. "Regardless of one's point of view, defendant's cognitive faculties or volition, or both, appear to have been subject to some form of extraordinary distortion and, perhaps, significantly reduced capacity"); U.S. v. Herbert, 902 F.Supp. 827(N.D. Ill.1995) (following Lewinsohn, granting departure under §5K2.13 to defendant convicted of embezzlement where D suffered from an active depressible illness, mixed personality state and had limited coping capacity and poor judgment and shrink said her behaviors and though patterns were influenced by her impaired mental condition); U.S. v. Risse, 83 F.3d 212 (8th Cir. 1996) (where defendant pled guilty to use of a firearm in relation to drug trafficking crime and felon in possession, court properly departed downward under §5K2.13 for diminished capacity based on defendant's post-traumatic stress disorder resulting from service in Vietnam War); U.S. v. Glick, 946 F.2d 335, 338 (4th Cir. 1991) (in case of transportation of stolen property, departure from 30 months to probation proper where defendant's diminished capacity was contributing factor the offense, even if not sole cause of conduct); U.S. v. Chambers, 885 F.Supp. 12 (D. DC 1995) (where D convicted of storing drugs in house, departure from 130 months to 20 months granted where client was borderline mental defective and 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"); U.S. v. Adonis, 744 F.Supp. 336 (D.D.C. 1990) (downward departure where D's IQ of 64 showed he was retarded where average IQ of prison population is 93). .

U.S. v. Davis, 919 F.2d 1181, 1187 (6th Cir. 1990) (downward departure justifiable when defendant commits nonviolent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of intoxicants); U.S. v. Ruklick, 919 F.2d 95, 97, 99 (8th Cir. 1990) (downward departure justifiable when defendant suffered from longstanding schizophrenic affective disorder that predated drug abuse and impaired judgment); U.S. v. Philibert, 947 F.2d 1467, 1471 (11th Cir. 1991) (downward departure warranted when defendant manifested symptoms of severe mental illness and placed severed head of recently deceased horse on stairs of federal courthouse); U.S. v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994) (downward departure for defendant suffering from Hodgkin's disease upheld where d convicted of mailing threatening letters in violation of 18 U.S.C. §876);

NOTE: IF FACTS DO NOT MEET CRITERIA FOR 5K2.13. RAISE ALTERNATIVE ARGUMENT UNDER 5K2.0. See United States v. Allen, 205 F.Supp.2d 317 (SDNY 2003) (where D convicted of guns and drugs, even though not suffering from diminished capacity as defined by 5K2.13, departure from 70 to 30 months granted under 5K2.0 because of "the combination of defendant's immaturity, his personal defects, and his subnormal intellectual functioning at the time of the offense.") **; but see** U.S. v. Smith 330 F.3d 1209 (9th Cir. 2003) (rejecting theory that an improper diminished capacity departure under 5K2.13 may still be proper under 5K2.0)

48. Mental Retardation

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. K., 160 F.Supp.2d 421 (E.D.N.Y. 2001) (where D convicted of trying to sell ecstasy and where government agreed that D should be sentenced on basis of 1000 pills actually sold instead of 15,000 said he could get so guideline 12-18 months, and where D mentally retarded, **Judge Weinstein continues sentencing one year** in part to enable D to attend rehabilitation program and demonstrate post offense rehabilitation for downward departure–strong statements in favor of continuing sentences to enable defendant to show rehabilitation).

District Court

U.S. v. Allen, 250 F.Supp.2d 317 (SDNY 2003)(Where D convicted of drugs and guns, D entitled to 8 level departure from 80 months to 30 months because his mental immaturity-even though 21 behaves like 14 year old and psychological problems and mild retardation take case out of heartland of drug and gun cases); U.S. v. Cotto, 793 F. Supp. 64 (E.D.N.Y. 1992) (defendant's near mental retardation, his vulnerability, his efforts at rehabilitation and his incompetence warranted four-level downward departure); U.S. v. Adonis, 744 F.Supp. 336 (D.D.C. 1990(downward departure where D's IQ of 64 showed he was retarded where average IQ of prison population is 93). .

49. Compulsive Gambling Disorder.

Caveat: Effective October 27, 2003 (crimes committed on or after that date), the guidelines arguably prohibit a departure on this ground. See New USSG 5H1.4. **But Booker changes this result**. 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. Sadolsky, 234 F.3d 938 (6th Cir.2000) (district court's two-level downward departure under §5K2.13 in sentencing for computer fraud, based on defendant's compulsive gambling disorder, was not an abuse of discretion, where defendant's gambling disorder was a likely cause of his criminal behavior, given that he had already "maxed out" his own credit line before resorting to fraud to pay his gambling debts – no direct causal link required between the diminished capacity and the crime charged)

District Court

U.S. v. Liu, 267 F.Supp.2d 371 (EDNY 2003) (where defendant pled guilty to using unauthorized credit card convenience checks issued to others, four level departure granted under 5K2.13 and sentence of 24 months imposed because, according to psychologist, defendant was pathological gambler who fit all the DSM IV criteria. His condition was "evidenced by participation in state-operated numbers games [and] 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) (Defendant pled guilty to interstate transportation of stolen property and sought diminished mental capacity downward departure based on her compulsive gambling. The district court observed that "departures for diminished mental capacity are encouraged by the Sentencing Guidelines" under 5K2.13 . The court granted two level departure and held that: (1) *direct causal link was not required* between disorder and crime charged in order to invoke diminished-capacity Guideline; (2) expert testimony as to defendant's pathological gambling disorder supported Court's authority to depart downward) U.S. v. Iaconetti, 59 F.Supp.2d 139 (D. Mass. 1999) (Defendant, who had no prior criminal record and who pled guilty to the charge of conspiracy to possess with intent to distribute cocaine, was entitled to eleven-level departure from Sentencing Guidelines (from level 25 to level 14) based on "single acts of aberrant behavior"--gambling debts to a loan shark caused by defendant's gambling compulsion resulted in defendant agreeing with loan shark's idea as to how to extinguish the debts after defendant had tried to pay the debts from his personal resources, his business, and his family).

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50. Battered Woman Syndrome.

Proper ground for downward departure even if jury rejected defense. U.S. v. Whitetail, 956 F.2d 857 (8th Cir. 1992); 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. Gaviria, 804 F.Supp. 476 (E.D.N.Y. 1992) (downward departure justified based on defendant being subservient to husband (battered woman)). See cases at paragraph 69 (Duress or Coercion).

***51. Defendant's Extraordinary Mental And Emotional Condition.**

See USSG § 5H1.3 (mental and emotional conditions do not "ordinarily" justify departure); U.S. v. Walter, 256 F.3d 891 (9th Cir. 2001)(combination of brutal beatings by defendant's father, the introduction to drugs and alcohol by his mother, and, most seriously, the sexual abuse defendant faced at the hands of his cousin, constituted the type of extraordinary circumstances justifying 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)(where d convicted of sale of guns and possession of silencers, court departed downward under §5H1.3 where D suffered from panic disorder and agoraphobia. (Note: court did not base its departure on "diminished capacity" §5K2.13); 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").

52. Defendant Was Merely An Aider And Abettor.

Downward departure proper for aider and abettor who merely supplied dilutent, because guidelines did not contemplate such a circumstance. U.S. v. Posters 'N' Things, 969 F.2d 652 (8th Cir. 1992)

53. Defendant Responsible For Only Part Of Loss.

The district may depart downward if a defendant was not involved in all of his co-conspirators efforts to defraud investor, causing the loss figure to overstate the defendant's culpability. Case remanded to see whether 10 level departure appropriate. U.S. v. Arutunoff, 1 F.3d 1112 (10th Cir. 1993); U.S. v. Gregorio, 956 F.2d 341, 344-348 (1st Cir. 1992) (multiple causation of victim loss justifies downward departure).

54. Defendant Was Already Punished By Parole Commission On Earlier Pre-Guideline Offense (By Loss Of Parole).

Where D is sentenced while already serving a pre-guideline sentence, court may consider a defendant's loss of parole eligibility on earlier sentence as a factor in decision whether to depart downward on later sentence. U.S. v. Moss, 972 F.2d 273 (9th Cir. 1992); U.S. v. Whitehorse, 909 F.2d 316, 320 (8th Cir. 1990); U.S. v Stewart, 917 F.2d 970, 974 (9th Cir. 1990); Caldwell v U.S. , 842 F.Supp. 945 (E.D. Mich. 1994) (departure warranted for D convicted while on parole for a prior offense and also sentenced as a parole violator to insure total sentence did not exceed maximum allowable under guidelines).

***55. Defendant Already Punished By Having Earlier Sentence Increased Because Of Instant Crime.**

Even if Sentencing Commission has not formalized sentencing rules for multiple conviction [see U.S.S.G. §5G1.3], district courts retain flexibility to downward depart to protect D against double punishment. Witte v. U.S. , 515 U.S. 389 (1995).

56. Defendant already punished by home detention served before appeal

United States 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); U.S. v. Carpenter, 320 F.3d 334, 345 (2nd Cir. 2003) (home detention erroneously served can be grounds for departure); *United States 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.").

57. Prosecutor's Manipulation Of The Charges, Even If No Bad Faith.

See U.S.S.G. Pt. A.4 ("a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power"); U.S. v. Gamez, 1 F.Supp. 2d 176 (E.D.N.Y. 1998) (Weinstein, J.) (departure from level 20 to 15 warranted in money laundering case because nature of crime more closely resembled structuring crime which had lower guidelines); U.S. v. Lieberman, 971 F.2d 989, 995 (3d Cir. 1992) (where prosecution charged D with tax evasion and embezzlement, knowing not groupable, and other defendants not charged, court can depart downward to ensure equality in sentencing and that U.S. Attorney not manipulate sentencing even absent bad faith); see U.S. v. Deitz, 991 F.2d 443 (8th Cir. 1993) (Bright, J., dissenting) (time to check enormous abuse and allow departure where feds agree to take over state pros after state judges dismisses state charges for violation of state speedy trial act).

58. Prosecutor Or Defense Misconduct Prejudices Defendant's Plea Bargaining.

U.S. v. Lopez, 106 F.3d 309, 311 (9th Cir. 1997)(here the prosecutor's misconduct in dealing with defendant without his counsel, Barry Tarlow, prejudiced D's opportunity to possibly obtain better plea bargain, three-level downward departure appropriate. (Note: This departure has nothing to do with defendant's background or severity of the offense.); U.S. v. Basalo**,** 109 F.Supp.2d 1219 (N.D. Cal. 2000) (in drug case, unethical conduct of defense attorney inducing client not to cooperate with government, and telling lies in his affidavit, and perjure himself justifies eight-level downward departure from 292 months to 63 months), **reversed,** 258 F.3d 945 (9th Cir. 2001) (government's decision to withhold information that customs agents had received cash awards for such things as preparing trial testimony could not be basis for downward departure).

59. Prosecutor's Misconduct In Failing To Disclose Brady Material.

U.S. v. Sanderson, 110 F.Supp.2d 1221 (N.D.Cal. 2000) (where defendant's plea bargaining position was subverted by the government's failure to disclose information regarding the participation of government witnesses in an incentive program at the U.S. Customs Service, four-level departure warranted, even though no new trial warranted); U.S. v. Basalo, 109 F.Supp.2d 1219 (N.D. Cal. 2000) (same), **reversed** 258 F.3d 945 (9th Cir. 2001) (rejecting claim that Brady violation or ineffective assistance can constitute grounds for downward departure) [***Booker* changes this result**].

60. Ineffective Assistance Of Counsel.

Not valid ground for departure say U.S. v. Crippen, 961 F.2d 882 (9th Cir. 1992) (alleged ineffective assistance of counsel in advising defendant to refuse plea agreement in earlier state proceeding was not proper basis for downward departure from more serious guidelines sentence in federal prosecution on identical charges; ineffective assistance of counsel is not "mitigating or aggravating" circumstances did not make federal crime any less serious, or affect defendant's culpability) and U.S. v. Basalo, 258 F.3d 945 (9th Cir.2001)); [**but Booker**

changes these results] but see U.S. v. Duran-Benitez, 110 F. Supp. 2d 133 (E.D.N.Y. 2000) (where defense lawyer had conflict of interest because he was paid by third party to encourage defendant not to rat out third party, so defendant did not cooperate, 2255 analysis applied at sentencing and D granted 6-level downward departure which is what he would have received had he cooperated and secured a §5K1.1 letter from the government).

***61. Delay in Arrest or Charge.**

U.S. v. Gregory, 322 F.3d 1157 (9th Cir. 2003) **(**where D 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 that would have been imposed had both crimes been brought at same time. A departure "may be appropriate to mitigate the effects of any loss of grouping,"); U.S. v. Cornielle, 171 F.3d 748, 754 (2d Cir. 1999) (among other things, four-year preindictment delay in perjury prosecution warranted one-level downward departure). In U.S. v. Sanchez-Rodriguez, 161 F.3d 556 , 563-64 (9th Cir. 1998) (en banc) (the district court acted within its discretion when it departed downward in an illegal reentry case (8 U.S.C. §1325) by 3 levels from 77 to 30 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. 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. Barth, 788 F. Supp. 1055 (D.Minn. 1992).(Deliberate delay of D's arrest to keep piling up drug amounts to trigger mandatory minimum.) **See Pre-Indictment Delay Cases at ¶ 65.**

62. Gender Discrimination In Plea Bargaining.

Intentional discrimination by prosecutor on the basis of gender in plea bargaining "mule" cases justifies downward departure. U.S. v. Redondo-Lemos, 817 F. Supp 812 (D.Ariz. 1993); rev'd, U.S. v. Alcaraz-Peralta, 27 F.3d 439 (9th Cir. 1994) (on remand male defendant unable to overcome presumption of constitutionality of prosecutorial decision in face of prosecutor's explanation for disparate treatment).

63. Prosecutor's Misconduct – Selective Prosecution – Improper Investigative Techniques.

U.S. v. Nolan-Cooper, 155 F.3d 221 (3d Cir. 1998) (departures based on investigative misconduct unrelated to the guilt of the defendant are not expressly precluded and "should not be categorically proscribed"); U.S. v. Coleman, 188 F.3d 354 (6th Cir. 1999) (en banc) (Defendant's claim – that in executing a strategy of approaching felons as they were reporting to their parole office, and offering to deal in drugs or firearms with targeted individuals, agent targeted only African-American parolees – could justify a downward departure. Improper investigative techniques are not factors considered by the guidelines, so under Koon, such techniques may justify a departure if outside the heartland.)

64. Minimal Role In The Offense.

Minimal role as "mule" in drug conspiracy warrants downward departure but not below statutory minimum. U.S. v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992) (role in the drug trade play by mules may constitute a mitigating circumstance of a kind or degree not considered by guidelines warranting downward departure); but see U.S. v. Webster, 996 F.2d 209 (9th Cir. 1993) (effective Nov. 1, 1992, defendant's role in the offense makes couriers eligible for mitigating role adjustments so downward departures on this ground alone not appropriate); U.S. v. Patillo, 817 F. Supp. 839 (C.D.Cal. 1993) (D was a minor player when he delivered 500 grams of crack to post office, because lived in a community where opportunities to become involved in drug trafficking "are rampant" and D subject to "tremendous financial responsibilities," and where Commission ignored the need for "greater variations in sentencing to account for the vastly different culpabilities of the various players in the drug trade"); U.S. v. Restrepo, 936 F.2d 661 (2d Cir. 1991) (based on minimal role in a money laundering offense – merely unloading boxes of money in a warehouse on one date – defendant received both a four-level offense level reduction and a four-level downward departure); Alba, 933 F.2d 1117 (2d Cir. 1991); U.S. v. Bierley, 922 F.2d 1061 (3d Cir. 1990) (minimum role departure available even where defendant sole actor in buying pornography from agent); U.S. v. Speenburgh, 990 F.2d 72, 75-76 (2d Cir. 1993) (where D ineligible for minor role reduction because other participant is government agent, downward departure proper).

65. Small Profit In Stolen Bond Scheme.

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

66. No Profit or Motive or Financial Gain

U.S. v. Rothberg, 222 F.Supp. 2d 1009 (N.D. Ill. 2002) (where there was no serious claim that defendant committed the offense of copyright infringement “out of a desire to profit, or that he benefited financially from his participation in the conspiracy” and where the heartland of cases contemplated offenses "motivated by a desire for financial gain--either personally or commercially." case is an atypical one that falls outside the heartland of the Guideline to which he is subject thus permitting a departure).

***67. 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 because of vulnerability in prison); *U.S. v. Parish, 308 F.3d 1025 (9th Cir. 2002) (eight level departure in child porn case in part because defendant would have "high susceptibility to abuse in prison" because of "his demeanor, his naiveté, and the nature of the offense" where psychiatrist testified defendant was in "for a hard time" in prison); U.S. v. Graham, 83 F.3d 1466, 1481 (D.C.Cir. 1996) (extreme vulnerability to abuse in prison grounds for departure; case remanded to consider such); U.S. v. Long, 977 F.2d 1264, 1277-78 (8th Cir. 1992) (affirms downward departure from 46 months to one-year home detention because four doctors wrote they D subject to victimization and potentially fatal injuries in prison); U.S. v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (downward departure from 10 to 5 years upheld – "*Congress did not limit sentencing courts to characteristic directly related to the crime in determining which factors warrant a departure*"--here defendant's youthful appearance and bisexuality make him "particularly vulnerable to prison victimization" a factor "not adequately considered by guidelines"); U.S. v. Gonzalez, 945 F.2d 525 (2d Cir. 1991) (downward departure affirmed where D had "feminine cast to his face" and "softness of features" which would make him prey to long-term prisoners); **Note:** U.S.S.G. §5H1.4 makes "physical appearance, including physique" a discouraged factor; **but Booker undercuts this**.

District Court

U.S. v. Ruff, 998 F.Supp. 1351 (M.D.Ala. 1998) (granting one level downward departure and sentencing defendant to home detention where he broke into post office because slim, effeminate, and gay – was assaulted previously in prison – cites law review articles); see Marjorie Rifkin, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Colum.Hum.Rts.L.Rev. 273, 276, 278, and n. 24 (1995) ("[B]rutal assault and homosexual rape are facts of daily life in men's prisons . . . Correctional administrators have long recognized that prisoners likely to be victimized are overwhelmingly young first offenders of slight build with passive, soft-spoken personalities."); Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S.Tex.L.Rev. 443, 470-72 (1993) (citing statistics concerning inmate-on-inmate sexual assault, noting effects of rape and the groups of inmates who are more at risk for rape); U.S. v. Wilke, 995 F. Supp. 828 (N.D. Ill. 1998) (testimony by prisoner-turned-professor persuades court that defendant's appearance and conviction of sex offense involving juveniles (kiddy porn) subjects him to physical abuse in prison and warrants 4-level departure); U.S. v. Blarek, 7 F.Supp.2d 192 (E.D.N.Y. 1998) (defendant's homosexuality and need to be removed from general prison population for his safety – which amounts to sentence of solitary confinement warrants departure – as well as his HIV status even if not yet AIDS); U.S. v. Hammond, 37 F.Supp.2d 204 (E.D.N.Y. 1999) (defendant in drug case suffering from advanced HIV entitled to a downward departure from 48 to 18 months where family will suffer extraordinary financial and emotional hardship from his incarceration); U.S. v. Shasky, 939 F.Supp. 695 (D.Neb. 1996) (downward departure 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; defendant was homosexual state trooper of diminutive stature and weight, and

director of internationally – renowned sex offender treatment program which defendant had entered testified that his progress had been extraordinary).

68. Defendant Raped By Guard Pending Sentencing

U.S. v. Rodriguez, 214 F.Supp.2d 1239 (M.D. Ala. 2002) **(**three level departure granted to defendant under 5K2.0 who was raped by prison guard pending sentencing (in addition to five levels for cooperation). Court noted that the rape was "an extremely traumatic event" and that "The court believes that the physical and mental trauma Rodriguez suffered was so 'extraordinary' that it lifted her case out of the guideline heartland." *id., at 1241. A* prison rape was a type of mitigating circumstance that had not adequately been taken into consideration by the Sentencing Commission when it formulated the Guidelines).

69. Defendant Shot by police during arrest

U.S. v. Clough, 360 F.3d 967 (9th Cir. 2004) (district court has discretion to downward depart in firearms case where he was shot by police during arrest because his "significant injuries" constitute a continuing form of punishment and factor not considered and not forbidden by the guidelines)

70. Defendant's Subjected To Extraordinary Punishment Not Contemplated by Guidelines.

U.S. v. Clough, 360 F.3d 967 (9th Cir. 2004) (district court has discretion to downward depart in firearms case where he was shot by police during arrest because his "significant injuries" constitute a continuing form of punishment and factor not considered and not forbidden by the guidelines)

***71. Bureau of Prisons refuses to follow policy of honoring judicial recommendation to place defendants in community treatment center.**

U.S. v. Serpa, 251 F.Supp.2d 988 (D.Mass. 2003) (where BOP no longer follow 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, district court grants downward departure to defendant who pled guilty to three counts of filing false income tax returns and whose guideline sentencing range was 10 to 16 months before BOP announced its policy to avoid any hint of an ex post facto violation in his sentence and because not change not foreseeable)

72. Solitary Confinement Or Harsh Nature Of Defendant's Incarceration.

U.S. v. Noriega, 40 F.Supp.2d 1378 (S.D.Fla. 1999) (judge reduces old-law sentence from 40 to 30 years because of disparity of time served by codefendant and rats but primarily because of nature of incarceration – "There is little question that [segregated confinement] is a more difficult type of confinement than in general population. For some, the consequences of such deprivation can be serious."); see McClary v. Kelly, 4 F.Supp.2d. 195, 207 (W.D.N.Y.

1998) (“a conclusion however, that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this court as rocket science. Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances (citing cases).” See also, "*The Eighth Amendment and Psychological Implications of Solitary Confinement*,” 21 Law and Psychology Review, Spring 1997, p. 271; "*Solitary Confinement, Legal and Psychological Considerations*," 15 New England Journal on Criminal and Civil Confinement, 301, Summer 1989). See Pretrial Confinement Conditions at Paragraph 81 below.

73. Defendant Subject To Abuse In Prison.

U.S. v. Volpe, 78 F.Supp.2d 76, 89 (E.D.N.Y.1999) ("Volpe II") (Defendant entitled to two-level departure because "[t]he extraordinary notoriety of this case and the degree of general opprobrium toward Volpe . . . , coupled with [his] status as a police officer," left him "unusually susceptible to abuse in prison" and D may have to spend most his time in segregation); U.S. v. Bruder, 103 F.Supp.2d 155, 182 (E.D.N.Y. 2000) (same).

74. Cultural Heritage and Sociological Factors.

U.S. v. Guzman 236 F.3d 830 (7th Cir. 2001) (concurring and dissenting) (majority mistakenly reversed downward departure where defendant was more likely to participate in her boyfriend's criminal activities because, as a Mexican woman, she was expected to submit to boyfriend's will –: "Because an individual's cultural heritage encompasses a set of beliefs and a manner of behavior that exist conceptually and practically quite apart from that individual's immutable sex, race or national origin…cultural heritage should not be considered a prohibited basis for departure…nowhere in the guidelines does the term cultural heritage appear; it is thus best categorized as what the Supreme Court has described as an unmentioned factor"); U.S. v. Decora, 177 F.3d 676 (8th Cir. 1999) (district judge, with almost 30 years on the bench and knowledge of the adversities of life on Indian reservation, did not abuse discretion in departing downward from 37-46 month sentencing range to probation for assault with a dangerous weapon, by imposing probation for three years considering the difficulty of life on the reservation and the extraordinary and unusual nature of defendant's educational record and community leadership, and also the fact that while released defendant successfully completed an intensive inpatient treatment program, participated in an alcohol after-care program following his treatment, 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 downward depart 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 – even through D lived in U.S. for twenty years since he was twelve, fathered many citizen children, etc.); U.S. v. Star, 9 F.3d 60 (8th Cir. 1993) (ex-felon in possession – departure downward from 33 months to probation proper where defendant no dangerous, possessed revolver in self-defense, had strong family ties, lived on Indian reservation); U.S. v. Big Crow, 898 F.2d 1326, 1332 (8th Cir. 1990) (downward departure warranted because of defendant's "consistent efforts to lead a decent life in a difficult environment [Indian Reservation]"); U.S. v. Carbonell, 737 F. Supp. 186 (E.D.N.Y. 1990) (in cocaine case where Hispanic defendant sought to help out a new immigrant, departure downward from 41 to 12 months is warranted because of the defendant's "personal characteristics as explained by a sociological phenomenon" that in "the cohesiveness of first generation immigrant communities in the U.S. engenders loyalty, responsibility and obligation to others in the community even if they are strangers"); see Olabisi, "Cultural Differences and Sentencing Departures," 5 Fed. Sent. Reptr. 348-352 (1993) (arguing that departures are appropriate when a defendant's culture would justify behavior contrary to U.S. law).

75. Loss Of Business, Assets, And Source Of Income.

U.S. v. Gaind, 829 F. Supp. 669 (S.D.N.Y. 1993) (the destruction of a defendant's only business, involving testing material for the EPA, warranted a downward departure in false statement case because elimination of the defendant's inability to engage in similar or related activities and the substantial loss of assets and income were a source of individual and general deterrence).

76. The Defendant's Tragic Personal History.

U.S. v. Lopez, 938 F.2d 1293, 1297-99 (D.C.Cir. 1991) (where D received 51 months in cocaine case, case remanded for district court to consider departure because D exposed to domestic violence , the death of his mother by his stepfather murdering her, his need to leave town because of threats, and his growing up in the slum areas of New York and of Puerto Rico).

77. Victim's Conduct Substantially Provoked The Offense Behavior.

Caveat, for crimes committed after October 27, 2003, U.S.S.G. § 5K2.10 adds factor that court must consider: the proportionality and reasonableness of the defendant's response to the victim's provocation. Otherwise, *see* Koon v. U.S. , 518 U.S. 81, 100 (1996) (district court acted within its discretion in departing downward five levels 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) (where police chief convicted of using excessive force during course of arrest, district court did not abuse its discretion in depart downward based on victim provoking offense behavior, but did abuse its discretion with respect to amount of departure when it departed 85% percent from minimum sentence); U.S. v. Yellow Earrings, 891 F.2d 650, 918-919 (8th Cir. 1989) (victim's conduct of pushing defendant, verbally abusing her, and attempting to publicly humiliate her when she refused his request for sexual intercourse, warranted departure from 41 to 15 months); U.S. v. DeJesus, 75 F.Supp. 2d 141 (S.D.N.Y. 1999) (where D was "warlord" for Bronx gang whose pregnant sister was punched by victim, and where D and his gang planned assault retaliatory assault against victim, and where D pled guilty, downward departure from offense level 15 to 11 warranted because victim's conduct was "vile and repugnant" and defendant's conduct in response was "not incomprehensible.").

78. Defendant Has Extraordinary Physical Impairment Or Bad Health and BOP may not be able to provide adequate care.

U.S.S.G. §5H1.4 makes "physical appearance including physique" not "ordinarily" relevant, but may be so in unusual cases. **Booker strengthens arguments for this mitigating factor and undermines restrictions of the guidelines. This departure is available even in sex with minor cases and child porn cases. USSG § 5K2.22 (effective April 30, 2003).** 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, 50 (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] There is a high probability that lengthy incarceration will shorten Martin's life span); See U.S. v. Gee, 226 F.3d 885 (7th Cir. 2000) (downward departure under §5H1.4 based on health not abuse of discretion where judge reviewed 500 pages of medical records and where judge concluded that "imprisonment posed a substantial risk to [defendant's] life," BOP letter stating that it could take care of any medical problem "was merely a form letter trumpeting [BOP] capability"); U.S. v. Johnson, 71 F.3d 539, 545 (6th Cir. 1995) (under U.S.S.G. §5H1.4, although "rare," downward departure possible for physician convicted of

distribution of drugs and mail fraud based on his medical condition where defendant was a 65-year-old man who suffered from diabetes, hypertension, hypothyroidism, ulcers, potassium loss, and reactive depression, but specific findings required); U.S. v. Streat, 22 F.3d 109, 112-13 (6th Cir. 1994) (remanded to district court observing that court has discretion to depart because of defendant's "extraordinary physical impairment"); U.S. v. Long, 977 F.2d 1264, 1277-78 (8th Cir. 1992) (D's extreme vulnerability to victimization in prison justifies downward departure where four doctors said so); U.S. v. Greenwood, 928 F.2d 645 (4th Cir. 1991) (where D was felon who possessed firearm, departure to probation proper where D's had severe medical impairment caused by loss of both his legs below his knee due to action in the Korean where D required treatment at Veterans Administration hospital and that incarceration would jeopardize such treatment); U.S. v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (same); U.S. v. Gonzalez, 945 F.2d 525 (2d Cir. 1991) (D's feminine cast and softness of features justifies downward departure because he will be victimized in prison); U.S. v. Slater, 971 F.2d 626, 635 (10th Cir. 1992) (mental retardation, scoliosis of spine and chronic pain may warrant departure under §5H1.4); U.S. v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991) (loss of both legs in war, which required ongoing treatment that would be jeopardized by incarceration, justified downward departure to probation); but see U.S. v. Martinez-Guerrero, 987 F.2d 618, 620-21 (9th Cir. 1993) (departure properly denied for legally blind defendant because prison could accommodate him).

District Court

U.S. v. Willis, 322 F. Supp. 2d 76, (D. Mass. 2004) (in tax evasion case downward departure granted to 69 year old from 27 months to probation with six months home confinement based upon inordinate number of potentially serious medical conditions, and was at age where such conditions would have invariably gotten worse in prison—in response to gov. argument that BOP could care for defendant, court said "I have never had a case before me in which the Bureau of Prisons suggested that it did not have the capacity to care for a defendant"); U.S. v. Jiminez, 212 F.Supp.2d 214 (S.D.N.Y. 2002) (where D convicted of illegal reentry, downward departure from range of 57-71 required because after crime was committed she has suffered brain aneurism severe memory loss, and psychotic symptoms. *court rejects position of gov. that departure warranted only if physical ailment cannot be adequately treated by BOP*.); U.S. v. Lacy, 99 F.Supp.2d 108 (D.Mass. 2000) (three-level downward departure warranted in drug case where D has bullet in his brain causing lost partial hearing in his left ear, has blood clots in his arteries, and experiences seizures); U.S. v. Hammond, 37 F.Supp.2d 204 (E.D.N.Y. 1999) (defendant in drug case suffering from advanced HIV entitled to a downward departure from 48 to 18 months where family will suffer extraordinary financial and emotional harsh from his incarceration); U.S. v. Gigante, 989 F.Supp. 436 (E.D.N.Y. 1998) (despite vicious criminal past as Mafioso, downward departure granted from 262 months to 144 months because of advanced age (69) and bad heart); U.S. v. Blarek, 7 F.Supp.2d 192, 212-13 (E.D.N.Y.), aff'd, 166 F.3d 1202 (2d Cir.1998); U.S. v. Baron, 914 F.Supp. 660, 662-665 (D.Mass. 1995) (in bankruptcy fraud, downward departure from range of 27-33 months to probation and home detention to a 76-year old defendant with medical problems which could be made worse by incarceration); see U.S. v. Moy, 1995 WL 311441, at *25-29, *34 (N.D.Ill. May 18, 1995) (downward departure based upon defendant's advanced age, aggravated health condition, and emotionally depressed state);

U.S. v. Roth, 1995 WL 35676, at *1 (S.D.N.Y. Jan. 30, 1995) (63-year-old defendant with neuromuscular disease had "profound physical impairment" warranting downward departure under the Guidelines); U.S. v. Velasquez, 762 F.Supp 39, 40 (E.D.N.Y. 1991) (life-threatening cancer warranted downward departure); U.S. v. Patriarca, 912 F.Supp. 596, 629 (D.Mass. 1995) (same).

Tip: Infirmity or disability should be combined with defendant's advanced age, if possible. See Para 18, *supra*.

79. Military Service-Extraordinary.

Note U.S.S.G. §5H1.1 ("military, civic, charitable . . . and similar prior good works [not] ordinarily" relevant to departures). **This restriction questionable in light of *Booker***. Even pre-Booker, courts could downward depart for extraordinary military service. U.S. v. Pipich, 688 F. Supp. 191 (D.Md. 1988) (where D convicted of mail theft extraordinary military record warrants departure to probation. Defendant was in Marines from 1968 to and served in combat in Vietnam for one year He received over 45 awards of the Air Medal, including one special award for heroism in connection with the extraction of a reconnaissance team that was surrounded by North Vietnamese forces. The defendant was awarded the Purple Heart twice. He was also the recipient of several Vietnamese awards); U.S. v. McCaleb, 908 F.2d 176 (7th Cir. 1990) (departure for military service might be warranted under some circumstances, but not here); U.S. v. Neil, 903 F.2d 564, 566 (8th Cir. 1990) (military service might warrant departure in some cases, but not here). In U.S. v. Claudio, CR. No. 9244 (D.Ore. October 4, 1993), Judge Owen Panner departed downward from because of the defendant's "extraordinary" military service. Similarly, in U.S. v. Leigh, Cr 91-96-FR (D.Ore.), Judge Helen Frye granted a substantial downward departure in a bank robbery case based in part on prior military service.

80. Delay In Sentencing Which Deprives Defendant Of Chance For Concurrent Sentence Justifies Downward Departure.

U.S. v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (en banc) (district court acted within its discretion when it departed downward in an illegal reentry case by nine levels and imposed 30-month term 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 and in part because D stipulated to deportation).

81. Pre-Indictment Delay Prejudicing Defendant.

U.S. v. Corneille, 171 F.3d 748, 754 (2d Cir. 1999) (among other things, four-year preindictment delay in perjury prosecution warranted one-level departure); 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 by 3 levels from 77 to 30 in part because the delay in bringing the federal charge prejudiced the defendant's opportunity to obtain a concurrent sentence); U.S. v. O'Hagan, 139 F.3d 641, 656-58 (8th Cir. 1998) (affirming downward departure for delay in prosecution); U.S. v. Saldana, 109 F.3d 100, 104 (1st Cir.1997) (departure appropriate for preindictment delay, even if unintentional, if it produces an unfair or unusual sentencing result); U.S. v. Martinez, 77 F.3d 332, 336-37 (9th Cir.1996) (where D pleads guilty to trafficking in stolen goods and gets 8 months, and later gov. re-indicts D for stealing the goods, D lost benefit of "multiple count" rule, did not get good time credits for the 8-month sentence, would have two separate convictions which might cause harsher sentence in future, and where D could be impeached with original conviction, court can grant downward departure); U.S. v. Blackwell, 49 F.3d 1232, 1241-42 (7th Cir.1995) (authorizing downward departure to achieve the effect of concurrency with a fully discharged sentence); U.S. v. Medrano, 89 F. Supp.2d 310 (E.D.N.Y. 2000) (four-year delay in brining prosecution for illegal re-entry while D serving state time justifies departure because lost opportunity for concurrent sentence-remanded to determine sentence); U.S. v. Garcia, 165 F.Supp.2d 496 (S.D.N.Y.2001) (where D served 9-month sentence for passport fraud before charged with illegal reentry even though could have been charged immediately, D should be sentenced as though he were being sentenced at the same time as he was sentenced on the passport fraud so court departs from 57-71 month guideline to 35 months. Reduction reflects correction for additional criminal history points incurred because of passport fraud and 9 months client already served).

82. Imperfect Entrapment – Aggressive Encouragement By Agents.

Even though the defendant was not entrapped in a legal sense, court appropriately departed downward under §5K2.12 where trial court was troubled by "aggressive encouragement of wrongdoing [by informer], "prosecutorial misconduct and vindictive prosecution." U.S. v. Garza-Juarez, 992 F.2d 896, 910-912 & n. 2 (9th Cir. 1993); see U.S. v. McClelland, 72 F.3d 717 (9th Cir. 1995) (district court properly departs downward 6 levels for imperfect entrapment under §5K2.12 even though D initiated plan).

***83. Sentencing Entrapment.**

See U.S.S.G. § 2D1.1, comment. (nn.12, 15); U.S. v. Searcy, 233 F.3d 1096, 1099 (8th Cir. 2000) (remands to see if D was entrapped for sentencing purposes–"Application Note 12 states, in relevant part: 'If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, 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 he or she did not intend to provide or was not

reasonably capable of providing.'"–"the Sentencing Guidelines focus the sentencing entrapment analysis on the defendant's predisposition"); 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 D because he was entrapped); U.S. v. Staufer, 38 F.3d 1103 (9th Cir. 1994) (district court has authority to depart downward where defendant was encouraged by agents to furnish 10,000 doses of LSD, more drugs than defendant was predisposed to deliver (5,000 doses)); U.S. v. Naranjo, 52 F.3d 245, 25-51 (9th Cir. 1995) (where evidence indicated D agreed to buy cocaine only after months of persistent pressure by rat and where D could afford to buy and preferred to buy only one kilogram but finally agreed to by the five only after agent offered to front the four of the five and said he would buy back three, case remanded with instructions to provide specific factual findings to support district court's ruling that D did not prove sentencing entrapment); see U.S. v. Parrilla, 114 F.3d 124, 127-128 (9th Cir. 1997) (if D proves he was entrapped into carrying gun, downward departure warranted); U.S. v. Ramirez-Rangel, 103 F.3d 1501 (9th Cir. 1997) (D entrapped into receiving machine guns carrying 30-year sentence when guns delivered to him in bag and where he spoke no English); U.S. v. Searcy, 233 F.3d 1096, 1099 (8th Cir.2000) (sentencing entrapment viable ground for downward departure–"This case demonstrates that the Sentencing Guidelines have a "terrifying capacity for escalation of a defendant's sentence" as a result of government misconduct"); U.S. v. Montoya, 62 F.3d 1, 3-4 (1st Cir.1995) (same).

District Court

U.S. v. Panduro, 152 F.Supp.2d 398 (S.D.N.Y. 2001) (in reverse sting operation, defendant granted three-level downward departure under App. Note 15 "to adjust for the artificially low price of the [35 kilos] of cocaine resulting from the overly generous credit terms [proposed by the government] – "if [the agent] had not extended credit for half 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 D who normally delivered 5-10 kilogram quantities was induced to deliver 92 kilogram quantities, departure warranted.)

Note: U.S.S.G. §2D1.1, Appl. n. 15**(** "in a reverse sting operation" if the court finds that the government agents "set a price for he controlled substance that was substantially below the market value there by leading to the defendant purchase of a significantly greater quantity [than otherwise] a downward departure may be warranted"). See also App. Note 12.

***84. Duress Or Coercion.**

See U.S.S.G. §5K2.12; U.S. v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) (remanded because not clear that trial judge understood that coercion or duress is a separate ground for downward departure under §5K2.12. The duress policy statement allows that "[i]f the defendant committed the offense because of serious coercion . . . or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence." "[I]t has been held that the injury threatened need not be imminent" in order to apply this departure); overruled on other grounds, U.S. v. Nordby, 225 F.3d 1053 (9th Cir. 2000) (en banc); U.S. v. Johnson, 956 F.2d

894, 901 (9th Cir. 1992) (downward departure warranted when defendant battered although duress did not constitute full defense); U.S. v. Apple, 915 F.2d 899, 903 n.12 (4th Cir. 1990) (downward departure warranted when court found that defendant was battered wife who suffered from chronic depression); U.S. v. Cheape, 889 F.2d 477 (3d Cir. 1989) (court had authority to impose sentence below guideline range on defendant convicted of bank robbery and bank robbery by use of dangerous weapon, on grounds that she had been coerced to participate, even though jury had rejected coercion defense in finding her guilty; and the guidelines do not require proof of immediacy inability to escape, or limit the feared injury to bodily injury); U.S. v. Hall, 71 F.3d 569 (6th Cir. 1995) (remanded to consider coercion by husband based on "overwhelming evidence that criminal actions resulted least in part from the coercion and control exercised by her husband"); U.S. v. Amor, 24 F.3d 432, 438-39 (2d Cir. 1994) (downward departure warranted when defendant committed firearms offense one day after his car shot up, he was personally threatened, and feared potential violence by union in impending shrike); U.S. v. Amparo, 961 F.2d 288, 292 (1st Cir. 1992) (downward departure warranted when defendant, in response to threats by smuggler, agreed to traffic cocaine strapped to her corset, even if jury rejected duress defense); U.S. v. Meyers, 952 F.2d 914, 920 (6th Cir. 1992) (downward departure warranted if sentencing court found defendant committed offense under serious coercion although not full defense); U.S. v. Garza-Juarez, 992 F.2d 896, 910-912 (9th Cir. 1993) ("aggressive encouragement of wrongdoing [by informer]" warrants departure);

District Court

U.S. v. Jurado-Lopez, 338 F.Supp.2d 246 (D. Mass. 2004) (where Guatemalan woman, whose husband and parents had been shot, was locked in room by drug lords and forced to swallow 23 pellets containing 250 grams of heroin, departure from level 25 to level 13 granted) [seems like plotline of the movie, "Maria, Full of Grace"]; U.S. v. Isom, 992 F.2d 91 (6th Cir. 1993) (district court can depart downward for coercion); U.S. v. Delgado, 994 F.Supp. 143 (E.D.N.Y. 1998) (three-level downward departure to first-time offender, drug courier based on coercion from a creditor and combination of aberrant behavior, defendant's fragility, and his exceptionally difficult life); U.S. v. Gaviria, 804 F.Supp. 476 (E.D.N.Y. 1992) (downward departure justified based on defendant being subservient to husband (battered woman); U.S. v. Nava-Sotelo, 232 F.Supp. 2d 1269 (D.N.M. 1269) (D convicted of kidnapping and assault in attempt to help brother escape from lengthy sentence granted downward departure in part because he had been manipulated by his older brother into participating in the escape attempt when he had threatened to commit suicide if he had to stay in prison for his full 22-year prison sentence "amounted to incomplete duress" within the meaning of U.S.S.G. § 5K2.12).

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85. Sentence Erroneously Served.

District court can depart downward by up to six months to take into account defendant's home detention erroneously served. U.S. v. Miller, 991 F.2d 552, 554 (9th Cir. 1993).

86. Disparity In Sentencing.

Argument strengthened by *Booker*. **U.S. v. Tzoc-Sierra**, 387 F.3d 978 (9th Cir. 2004) (in drug case affirmed district court's downward departure from range of 46-47 months to 36 months on basis of disparity of sentence received by codefendants); U.S. v. Caperna, 251 F.3d 827 (9th Cir. 2001) (where D a small cog in large drug conspiracy, district court's downward departure to 36 months because of disparity in sentence of co-D vacated, but on remand district court has discretion to depart downward because of disparity in sentence with other codefendant as long as codefendant convicted of same crime); U.S. v. Daas, 198 F.3d 1167 (9th Cir. 1999) (defendant argued for departure based on disparity between his sentence and that of co-defendants turned rats, but judge said not legal ground. Reversed. "Downward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances . . . Indeed, a central goal of the Sentencing Guidelines is to eliminate sentencing disparity . . . Here, the record indicates that the district court believed incorrectly that it lacked the authority to depart downward based on sentencing disparity. Because the district court actually had this authority but mistakenly failed to exercise it to determine whether the facts here warranted departure, this court remands for findings as to whether a downward departure is appropriate."); U.S. v. Meza, 127 F.3d 545 (7th Cir. 1997) (an unjustified disparity, one that does not result from the proper application of he guidelines, "is potentially a sentencing factor to consider" because the goal of the guidelines is of course "to reduce unjustified departures."); U.S. v. Boshell, 952 F.2d 1101, 1106-09 (9th Cir. 1991) (downward departure from 27 to 12 years upheld on ground that guideline sentence was disproportionately long compared to the 5 to 6-year sentences impose on codefendant who had been sentenced after the Ninth Circuit held the guidelines unconstitutional but before they were upheld by the Supreme Court); U.S. v. Ray, 920 F.2d 562 (9th cir. 1990), amended, 930 F.2d 1368, 1372-73 (9th Cir. 1991) ("disparity was said to be one of the most important evils the guidelines were intended to cure"); but see U.S. v. Kohl, 972 F.2d 294 (9th Cir. 1992).

District Court

United States v. Galvez-Barrios, ___ F. Supp. 2d ___, 2005 WL 323703 (E.D. Wis. Feb. 2,2005) (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); **United States v. Huerta-Rodriguez**, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (post Booker, in illegal reentry case, where guideline range was 70-87 months (57-70months 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. Maccaul, 2002 WL 31426006 (S.D.N.Y. Oct. 28, 2002) (unpublished) (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. 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 U.S.S.G. §1B1.8, so departure granted from 36 to 28 where eight levels were due to drugs he admitted to in his debriefing); U.S. v. Noriega, 40 F.Supp.2d 1378 (S.D.Fla. 1999) (judge reduces old-law sentence from 40 to 30 years because of disparity of time served by codefendant and rats but primarily because of nature of incarceration);

87. Disparity In Plea-Bargaining Policies Between Districts.

United States v. Galvez-Barrios, ___ F. Supp. 2d ___, 2005 WL 323703 (E.D. Wis. Feb. 2,2005) (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); **United States v. Huerta-Rodriguez**, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (post Booker, in illegal reentry case, where guideline range was 70-87 months (57-70months 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). A sentencing disparity for a Section 1326 violation that arises from different plea-bargaining policies of U.S. Attorneys in California's Central and Southern Districts (where latter has 24-month fast track policy) **cannot** be a valid basis for departure, so defendant's 70-month sentence is vacated and remanded. U.S. v. Banuelos-Rodriguez, 215 F.3d 969 (9th Cir. 2000) (en banc). [**Can still be mitigating factor under Booker**]

88. Government Responsible For Criminal Behavior.

Downward departure warranted in escape case where government was irresponsible in releasing known alcoholic on furlough without making some effort to assist her. U.S. v. Whitehorse, 909 F.2d 316 (8th Cir. 1990).

89. Dual Prosecution By State And Federal Governments.

Dual prosecution by both federal and state governments is a circumstance of a kind 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).

90. Breach Of Plea Bargain On Substantial Assistance.

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

91. Government Misconduct In Contacting D Without Notice To Counsel And D's Cooperation.

District court authorized to grant downward departure for substantial assistance even though no government motion where government committed misconduct in bringing D before grand jury without notifying counsel and where D testified truthfully, even though government did not need testimony. U.S. v. Treleaven, 35 F.3d 458 (9th Cir. 1994).

92. Civil Forfeiture.

Civil forfeiture of property alone does not constitute grounds for a downward departure; but taken in combination with other specific offender characteristics such as an extraordinary imposition on family ties and responsibilities, and community ties under §5H1.6 might. See U.S. v. Crook, 9 F.3d 1422, n. 7. (9th Cir. 1993) [Note: This holding is subject to attack in light of Koon. Note further that voluntary forfeiture of property where defendant foregoes meritorious defenses may show extraordinary acceptance of responsibly which could warrant a departure. U.S. v. Faulks, 143 F.3d 133, 138 (3d Cir. 1998). **Finally, forfeiture is a mitigating factor under Booker.**

93. Punishment For Acquitted Conduct.

U.S. v. Monk, 15 F.3d 25, 28-29 (2d Cir. 1994) (where D is acquitted by jury of distribution and convicted of lesser included of possession, court has power to depart because relevant conduct requires an extraordinary increase in sentence by reason of conduct for which D acquitted); U.S. v. Concepcion, 983 F.2d 369, 385-89 (2d Cir. 1992). U.S. v. Koczuk, 166 F.Supp. 2d 757 (ED.N.Y. 2001) (Where D acquitted of five counts but convicted of single count of importing caviar with market value less than $100,000, but where co-D convicted of six counts of importing $11million dollars worth, offense level "has been extraordinarily magnified by a circumstance that bears little relation to defendant's role in the offense" – here D's role in conspiracy "bore little correlation to 11 million dollars because D "was not actively involved in co-D business was "merely a low level employee – chauffeur and interpreter – who "took orders from cod"4 level minimal role reduction simply not adequate);

***94. Credit For Time Served On State Case Whether Related Or Not**

U..S. v. Pray, 373 F.3d 358 (3rd Cir. 2004) (where D served 4 months state time for drug offense and later convicted on related federal drug offense district court may depart downward on federal sentence to credit defendant with state time--which was completed (and therefore not
"undischarged" in accordance with §5G1.3) and where defendant was on state parole at the time federal authorities brought charges which charges were considered relevant conduct to his state charges. District Court could not "credit" defendant in his federal case with the time he served in his state case, in accordance with §5G1.3, but could accomplish the same result through a departure.); **U.S. v. White**, 354 F.3d 841 (9th Cir. 2004) (where D spent 10 months in state custody until his trial for attempted murder and was acquitted, and then prosecuted in federal court for felon in possession, sentencing remanded for district court to determine whether to depart where district court erroneously believed only BOP could give defendant credit for the 10 months already served because departure authorized under 5G1.3 App. note 7); Ruggiano v. Reish, 307 F.3d 121 (3rd 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, in a way that is binding on the Bureau of Prisons--whether called a "departure" a "credit" or an "adjustment." While the BOP has the sole authority to grant sentencing credits for time served in detention for the offense for which the defendant is ultimately sentenced, under 5G1.3(c), an adjustment or departure for time served on a preexisting, unrelated state sentence is within the exclusive power of the sentencing court –so BOP ordered to credit defendant with 14 months he served on state sentence—as district court had ordered); U.S. v. Sanchez-Rodriguez, 161 F.3d 556 , 563-64 (9th Cir. 1998) (en banc) (the district court acted within its discretion when it departed downward in an illegal reentry case by 3 levels from 77 to 30 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. Gonzalez, 192 F.3d 350 (2d Cir. 1999) (although federal court may not order that federal sentence begin when D was arrested by state for same conduct underlying federal offense, because BOP determines credit, federal judge may accomplish same end by departing downward in federal sentence. "The proper way to ensure that Gonzalez served a total of 156 months would have been for the court to increase the downward departure it granted him and sentence him to 129 months."); U.S. v. Otto 176 F.3d 416, 418 (8th Cir. 1999); U.S. v. O'Hagan, 139 F.3d 641 (8th Cir. 1998) (district judge has authority, under §5K2.0, to make a downward departure from guidelines to take into account an expired state term of imprisonment that was based on conduct "inextricably intertwined" with the federal offense because Commission did not adequately consider the issue. Section 5G1.3 addresses only credit only for "undischarged" terms of imprisonment); U.S. v. Blackwell, 49 F.3d 1232, 1241-42 (7th Cir.1995) (authorizing downward departure to achieve the effect of concurrency with a fully discharged sentence); U.S. v. Kiefer, 20 F.3d 874 (8th Cir. 1994) (in ACC case, court can grant downward departure below the 15-year minimum to ensure that D gets credit for time served in state where the gun in the ACC case was used in an underlying state crime. Time runs concurrent from date of the arrest on the state charge); U.S. v. Drake, 49 F.3d 1438 (9th Cir. 1995) (where state robbery had been fully taken into account in determining the offense level for the federal firearms offense (felon in possession), the district court is required to reduce defendant's mandatory minimum sentence for time served in state prison. Notwithstanding Wilson, court can impose guideline provision §5G1.3(b) to reduce sentence in order not to

frustrate the concurrent sentencing principles mandated by other statute); U.S. v. Rosado, 254 F.Supp. 2d 316 (SDNY 2003) (where D convicted of distributing heroin, and where D served 7 months in state custody on conviction that was relevant conduct in the federal sentence, D granted 7 month downward departure to account of state time already served).

[**Practice Tip**: BOP problems (and habeas litigation) can be avoided if you convince the district court, at the time of sentencing, to reduce the federal sentence to account for the state time at issue].

95. Credit For Time Defendant In Federal Custody After Grant Of State Parole That Would Be Dead Time And Count Only Against State Sentence.

U.S. v. Anderson, 98 F.Supp.2d 643 (E.D.Pa. 2000) (defendant entitled to a downward departure reflecting the time he spent in federal custody following the grant of parole in state case since, in the absence of a departure, defendant would be subjected to an additional seven months on a state sentence that was, in all but the most technical sense, complete, without receiving any credit towards his federal sentence).

96. Harshness of Pretrial or Presentence Confinement

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

District Court

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 in sentence for conspiring to distribute heroin); *U.S. v. Rodriguez*, 214 F.Supp. 2d 1239 (M.D. Ala. 2002) (two level downward departure (in addition to other departures) in drug case under 5K2.0 because defendant raped by prison guard pending sentence-- "A rape in prison, by a prison guard, while awaiting sentencing on this case, is obviously a highly unusual situation....to fail to take this rape into account in Rodriguez's sentence would mete out a disproportionate punishment to her, thus thwarting the Sentencing Guidelines' express goal of equalizing sentences."); U.S. v. Francis, 129 F.Supp.2d 612, 616 (S.D.N.Y. 2001) (in illegal reentry case, court departs downward one level because d's 13 month pretrial confinement in county facility (HCCC) where D was subjected to extraordinary stress and fear, parts of the facility were virtually controlled by gangs and inmates, D was the victim of an attempted attack and threats, suffered significant weight loss, stress, insomnia, depression, and fear as a result, and HCCC was operating at 150% capacity . . . --qualitatively different conditions than those of pre-sentence detainees in federal facilities operated by the Bureau of Prisons.); 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.").

97. Lengthy Pretrial Confinement Adverse Effect On Defense Preparation

U.S. v. Joyeros, 204 F.Supp.2d 412 (EDNY 2002) (where defendant pled to money laundering, court departed downward two levels where defendant's livelihood was destroyed, preventing her re-entry into criminal activity, she was subjected to lengthy and rigorous pretrial detention, and defendant was repeatedly denied bail, preventing defendant from effectively preparing her defense or seeing her child)

***98. Alien Who Faces More Severe Restrictions In Prison Than Non-Alien.**

Argue that the defendants' status as deportable aliens unnecessarily places them in a more restrictive status of confinement, and denies them access to BOP's drug treatment, early release, and community confinement programs that are otherwise available to the general prison population. See U.S. v. Davoudi, 172 F.3d 1130 (9th Cir.1999) (where D convicted of making false statements to bank, district court had discretion to depart downward because deportable alien may be unable to take advantage of minimum security designation of the up to six months of home confinement authorized by 18 U.S.C. §3624(c), but court's discretionary failure to do so not review able); U.S. v. Charry Cubillos, 91 F.3d 1342, 1344 (9th Cir.1996)(same); U.S. v. Farouil, 124 F.3d 838 (7th Cir. 1997) (where D charged with importing heroin, district court may consider whether defendant status as a deportable alien would result in unusual or exceptional hardship in conditions of confinement that might warrant a departure (ineligible for home detention, community confinement, work release, intermittent incarceration, or minimum security designation.); U.S. v. Bakeas, 987 F.Supp. 44 (D. Mass. 1997) (departure from 12 months to probationary sentence and home confinement for legal resident alien convicted of embezzlement because he was ineligible for minimum security confinement); U.S. v. Smith, 27 F.3d 649 (D.C.Cir.1994) (D's status as a deportable alien subjects him to harsher confinement because ineligible for benefits of early release (to CTC) and not eligible for minimum security prison; so court has authority to consider downward departure); **contra**, U.S. v. Alvarez-Cardenas, 902 F.2d 734 (9th Cir. 1990); U.S. v. Restrepo, 999 F.2d 640 (2d Cir. 1993), reversing, 802 F.Supp. 781 (E.D.N.Y. 1992). **Under Booker an arguable mitigating factor.**

Note: Also argue that a deportable alien is not eligible for one-year reduction of sentence awarded those who complete the BOP's 500-hour drug program. McClean v. Crabtree, 173 F.3d 1176 (9th Cir. 1999).

Note: Departure on this ground **not** available if D pled guilty to illegal entry. See, e.g., U.S. v. Martinez- Ramos, 184 F.3d 1055 (9th Cir. 1999); U.S. v. Cardosa-Rodriguez, 241 F.3d 613 (8th Cir. 2001). **[Now still mitigating factor under Booker]**

99. Alien Who Will Be Deported Because Of Guilty Plea Punished Too Severely.

Deportation is not grounds for departure. U.S. v. Alvarez-Cardenas, 902 F.2d 734 (9th Cir. 1990). Questionable now in light of *Koon*. Argue that factor was not considered by guidelines (in non-immigration case); therefore departure justified where defendant's guilty plea results in deportation. *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.").

100. Alien Who Reentered Illegally For Good Motive Or To Prevent Perceived Greater Harm .

U.S. v. Alba, (unpublished), No. 01-2510, 2002 WL 522819 (3d Cir. April 8, 2002) (where defendant illegally reentered country to visit his 16 year old son, five level downward departure proper); U.S. v. Barajas-Nunez, 91 F.3d 826 (6th Cir. 1996) (not plain error to depart under lesser harms provisions of §5K2.11 where defendant had illegally reentered country after having been deported when he believed his girlfriend was in grave danger of physical harm and wanted to obtain surgery for her, but remanded to explain extent of departure); U.S. v. Singh, 224 F.Supp.2d 962 (E.D.Pa. 2002) (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—departure from 37 months to 21 months proper).

101. Alien Who Consents To Deportation.

District Court may grant downward departure where D consents to deportation even if government objects. U.S. v. Rodriguez-Lopez, 198 F.3d 773, 776 n 1 (9th Cir. 1999). Arguably, however, departure is available only he if he has colorable, non-frivolous defense to deportation, an issue not reached in Rodriguez because the government did not raise the issue below. Cf., U.S. v. Galvez-Falconi, 174 F.3d 255 (2d Cir. 1999) (Defendant seeking a downward departure from Sentencing Guidelines for consenting to deportation must present colorable, nonfrivolous defense to deportation, such that act of consenting to deportation carries with it unusual assistance to administration of justice; in the absence of such a showing, act of consenting to deportation, alone, would not be circumstance that distinguishes case as sufficiently atypical to warrant downward departure); U.S. v. Clase-Espinal, 115 F.3d 1054, 61 (1st Cir. 1997) (same); see U.S. v. Cruz-Ochoa, 85 F.3d 325 (8th Cir.1996) (District court can depart downward on basis of defendant's waiver and consent to administrative deportation upon filing of joint motion by the parties for a two-level downward departure at sentencing on plea of guilty to illegal reentry).

102. Alien Who Illegally Reenters And Whose Only Prior Aggravated Felony Is Not Serious.

United States v. Lopez-Zamora , 392 F.3d 1087 (9th Cir. 2004) (even for illegal reentry after November 1, 2001 (when USSG 2L1.2 was amended) district court may grant downward departure where underlying felony conviction was minor—but no abuse of discretion here); U.S. v. Sanchez-Rodriguez, 161 F.3d 556) (9th Cir. 1998) (en banc) (district court acted within its discretion when it departed downward in an illegal re-entry case by 3 levels from 77 to 30 months on the grounds (1) that the prior aggravated conviction was only a $20 heroin sale; and (2) that 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. Castillo-Casiano, 198 F.3d 787 (9th Cir. 1999) (district court's failure to consider nature of prior felony plain error); amended, 204 F.3d 1257 (9th Cir. 2000); U.S. v. Cruz-Guevara, 209 F.3d 644 (7th Cir. 2000) (D's only prior felony conviction was for "aggravated criminal sexual abuse of a minor," a consensual sex act between D (age 18) and his girlfriend (age 16). He was sentenced to 116 days. The district court granted a 10-level downward departure under Note 5 and the

government appealed. The Seventh Circuit disagreed with the government's argument that the extent of the departure was patently unreasonable. The court made a strong argument for the departure under Note 5, but remanded for the district court to link the degree of the departure to the structure of the guidelines); U.S. v. Diaz-Diaz, 135 F.3d 572 (8th Cir. 1998) (court upheld downward departure from 63 to 10 months because 16-level adjustment overstated the seriousness of prior which involved sale of 8.3 grams of marijuana for which D received 22 days jail).

District Court

United States v. Huerta-Rodriguez, ___ F. Supp. 2d ____, 2005 WL 318640, 2005 U.S. Dist. LEXIS 1398 (D. Neb. Feb. 1, 2005) (Bataillon, J.) (post Booker, where guideline range was 70-87 months court imposed 36 months in part because court would have granted downward departure for over-representation of criminal history in that prior occurred nearly ten years ago);

U.S. v. Marcos-Lopez, 2000 WL 744131 (S.D.N.Y. June 9, 2000) (unpublished) (where only prior was sale of $20, Application Note 5 encourages departure, so proper to depart 8 levels from 16 increase and sentence to 18 months in illegal reentry case. Court noted that the offense "did not rise beyond the level of an attempt and did not involve a large quantity of drugs." D had only one other prior conviction: for "farebeating," apparently a misdemeanor); U.S. v. Ortega-Mendoza, 981 F.Supp. 694 (D.D.C. 1997) (departure downward to 30 months granted where prior aggravated felony involved sale of only .2 grams of cocaine); U.S. v. Hinds, 803 F.Supp. 675 (W.D.N.Y. 1992), aff'd, 992 F.2d 321 (2d Cir. 1993) (departure from 51 to 30 months granted because criminal history overstated seriousness of priors).

103. Alien Who Has Assimilated Into American Culture.

U.S. v. Lipman, 133 F.3d 726 (9th Cir. 1998) (in illegal reentry case, the court held the district court has authority to downward depart 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 – even through D lived in U.S. for twenty years since he was twelve, fathered many citizen children, etc.); **U.S. v. Castillo**, 386 F.3d 632 (5th Cir. Sept. 22, 2004) (district court's downward departure in illegal reentry case for cultural assimilation from 77 to 56 months not plain error where government did not state grounds of objection and where defendant was brought to the United States at age three by his parents and continuously lived in the United States, where he was educated and worked, becoming fluent in English, and defendant had virtually no ties to Mexico, and he had spent virtually no time there) ; U.S. v. Rodriguez-Montelongo 263 F.3d 429 (5th Cir. 2001) (where defendant came to U.S. when he was three, became legal resident, received education, settled in Colorado with wife and children, and 22 years later convicted of felony and deported, but reentered illegally, reversible error not to consider downward departure on basis of cultural assimilation); U.S. v. Sanchez-Valencia, 148 F.3d 1273, 1274 (11th Cir.1998) (per curiam) (stating that the sentencing court was aware of its authority to depart on this ground);

District Court

U.S. v. Reyes-Campos, 293 F.Supp. 2d 1252 (M.D. Ala. 2003) (in illegal reentry case, two level downward departure granted to 25 year old Mexican who came to country with family when he was nine –because he was culturally assimilated); U.S. v. Martinez-Alvarez, 256 F.Supp.2d 917 (E.D. Wisc. 2003) (in illegal reentry case, defendant granted one level downward departure and sentenced to only (!) 51 months because of assimilation to U.S; he had spent entire life (except for first 6 months) in U.S., had not family or ties in Mexico).

104 Alien May Receive Credit For Time Served On INS Detainer.

U.S. v. Camejo 333 F.3d 669 (6th Cir. 2003) (Where D was alien who pled guilty to assault and who remained in INS detention for two years before trial, trial court was empowered to downward depart to give credit to defendant because guidelines do not forbid this factor--case remanded); U.S. v. Montez-Gaviria, 163 F.3d 697 (2d Cir. 1998) (district court can depart downward for time D in custody on INS detainer not credited elsewhere, "nothing in the Sentencing Guidelines precludes the district court from departing downward under §5K2.0 on the basis of [the defendant's] uncredited time served in state custody"); U.S. v. Ogbondah, 16 F.3d 498 (2d Cir. 1994) (trial court has authority to depart downward to give D credit for time technically spent on bail but actually spent incarcerated by the INS who took D into custody after she posted bail. Neither D nor prosecutor aware of INS detainer. If D had known he would not have requested bail. These circumstances not contemplated by guidelines);

105. Defendant Does Not Understand Socially Unacceptable Nature Of Child Pornography.

U.S. v. Gifford, 17 F.3d 462, 475 (1st Cir. 1994) (downward departure justified when D does not comprehend socially unacceptable nature of child pornography).

***106. The Totality Of The Circumstances.**

Caveat: *For crimes committed after October 27, 2003 departure on this ground, under new USSG 5K2.0 (c), permitted "only if" the combined circumstances make the case "an exceptional one"[as opposed to "unusual" one] and each circumstance is present "to a substantial degree" and each circumstance is "identified in the guidelines as a permissible ground for departure," even if not ordinarily relevant.* ***Question the force of this caveat in light of Booker.***

For crimes committed before October 27, 2003, the he district court is authorized to depart downward when the "combination of factors" indicate that a departure is appropriate. U.S. v. Cook, 938 F.2d 149, 153 (9th Cir. 1991); U.S. v. Lam, 20 F.3d 999, 1003-005 (9th Cir. 1994) ("a number of convergent factors" supported conclusion that D's conduct aberrant); 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, although 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. Sabino, 274 F.3d 1053 (6th Cir. 2001) (in scam to avoid paying taxes, a three level downward departure not abuse of discretion for combination of factors including death of spouse, age of 72, ailments with eyes and airs, absence of threat, absence of risk of flight, minor role); U.S. v. Coleman, 188 F.3d 354, 360 (6th Cir.1999) (en banc) (downward departure may be based on an aggregation of factors each of which might in itself be insufficient to justify a departure); U.S. v. Jones, 158 F.3d 492 (10th Cir.1998); U.S. v. Rioux, 97 F.3d 648 (2d Cir. 1996) (following Koon, based on D's health problems – severe kidney disease and good acts – charitable fund-raising – departure from level 20 to level 10 and sentence of probation approved); 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. Parham, 16 F.3d 844 (8th Cir. 1994); U.S. v. Broderson, 67 F.3d 452, 458-59 (2d Cir. 1995) (relying on U.S. v. Rivera, 994 F.2d 942 (1st Cir. 1993) (Breyer, J.)) (in fraud case, district court has "better feel" for unique circumstances of the case; here combination of factors – that loss overstated; seriousness of D's conduct; the restitution paid; that no personal benefit; that contract favorable to government justify 7-level departure); U.S. v. Cuevas-Gomez, 61 F.3d 749 (9th Cir. 1995) (court may depart in aggravated reentry (immigration) case even though directed to increase offense level by 16 levels).

District Court

U.S. v. Mateo , 299 F.Supp.2d 201 (S.D.N.Y. 2004) (heroin case 9 level departure granted where 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. Allen, 250 F.Supp.2d 317 ((SDNY 2003)(Where D convicted of drugs and guns, D entitled to 8 level departure under USSG 5K2.0 from 80 months to 30 months because of combination of his mental immaturity-even though 21 behaves like 14 year old and psychological problems and mild retardation); U.S. v. Nava-Sotelo, 232 F.Supp.2d 1269 (D. N.M. 2002) (D convicted of assault and kidnapping, etc., arising from his aiding brother's escape resulting in brother's death given 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. Bruder, 103 F.Supp.2d 155, 190 (E.D.N.Y. 2000) (in assault case defendant's role in caring for his brother, who is a quadriplegic, four year service in Marine Corps, notable record as a police officer, and receipt of numerous medals and letters of recognition warrant a four-level reduction in Schwarz's offense level); U.S. v. Ribot, 97 F.Supp.2d 74 (D.Mass. 1999) (where D embezzled $200,000, court downward departs 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. The defendant had performed numerous charitable works and was an exceptionally hardworking person devoted to her profession, and the court stated that it "[S]imply . . . cannot see incarcerating" defendant for her offenses after what she had experienced during the Holocaust, in which she lost half of her family); U.S. v. Delgado, 994 F.Supp. 143 (E.D. N.Y. 1998) (three-level downward departure to first-time offender, drug courier based on coercion from a creditor and combination of aberrant behavior, defendant's fragility, and his exceptionally difficult life); U.S. v. Patillo, 817 F. Supp. 839 (C.D.Cal. 1993) (complex of mitigating factors including aberrant conduct, minimal role, and assistance to probation officer during L.A. riots).

107. Sua Sponte Departure By Court.

U.S. v. Vizcaino, 202 F.2d 345, 348 (D.C. Cir. Cir. 2000) (implicitly recognizing authority of district court to depart *sua sponte* but finding no plain error not to do so); U.S. v. Ekhator, 17 F.3d 53 (2d Cir. 1994) (even where D agreed not to ask for downward departure, court may do so *sua sponte* if unusual family circumstances; remanded); 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")

District Court

U.S. v. Tanasi, 2003 WL 328303 (S.D.N.Y. Feb. 6, 2003)(unpublished) (D 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 D was a sexual predator or ever was involved sexually with a child); United States v. Kim, 2003 WL 22391190 (SDNY Oct. 20, 2003) (Patterson, J.) (unpublished) (where 57-year old naturalized citizen from Korea went to the United Nations and fired several shots at an 85 degree angle to call attention to plight of North Koreans and tossed pamphlets in the air describing his native country as "a nation groaning under the weight of starvation and dictatorial suppression, " and waited to be arrested, and where he pled guilty to using a handgun to assault

foreign officials, in violation of 18 U.S.C. § 112, and where guideline range of 30 tom 37months in prison and bargain prohibited either side from seeking departure, trial judge sua sponte departed downward by one level and imposed a sentence of 27 months. Judge attacks Feeney amendment stating it was the "latest attack on the third branch of the government" and overlooks that "obvious fact that trial judges are more qualified to determine a proper sentence than the assistant U.S. attorneys making the reports." Notes that "U.S. attorneys already have immense power in the criminal justice process under the Sentencing Guidelines" Courts said that "If, as a result of Congress' increasing pressure to eliminate any departures from the Guidelines, trial judges' sentencing decisions do not comply with the basic tenets of fairness and justice, the confidence of our citizens that the courts play an independent and fair role in the dispensation of justice will be diminished or lost. Then our system of justice will be regarded as subservient to the other branches of government - the system that prevailed for so many years behind the Iron Curtain."); 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; *see generally*, U.S. v. Silleg, 311 F.3d 557 (2d Cir. 2002)" [*Silleg* discussed at Par. 37 above]); U.S. v. Henderson, CR -01-378 (D. Or. May 10, 2002 (unpublished) (in armed bank robbery case where plea bargain prohibited defense from seeking departure, and over vigorous prosecution objection, Judge King departed 3 levels *sua sponte*, from 57 to 41 months, based on aberrant conduct and super acceptance); U.S. v. Blackburn, 105 F.Supp.2d 1067 (D.S.D. 2000) (where D pled guilty to failure to pay child support and was $15,000 in arrears, and where guideline called for 12-18 months of imprisonment with one year of supervised release, 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 rather than imprisonment to make sure that defendant would be subjected to a longer term of supervision than would have been possible if sentence of imprisonment imposed); U.S. v. Gonzalez-Bello, 10 F.Supp.2d 232 (E.D.N.Y. 1998) (substantial downward departure for emotionally disturbed Venezuelan woman who carried drugs and who was prevented by her attorney from cooperating with the government because he was hired by her handlers); U.S. v. Arize, 792 F.Supp. 920 (E.D.N.Y.1992); U.S. v. Ramirez, 792 F.Supp. 922 (E.D.N.Y.1992). U.S. v. Spiegelman, 4 F.Supp.2d 275, 285 (S.D.N.Y. 1985) ("it is well settled that district courts may depart from the Sentencing Guidelines *sua sponte"*). **But Note** U.S. v. Burns, 501 U.S. 129 (1991) (before district court may depart court must give parties reasonable notice);

108. To Be Announced

!!!!!!! G O O D L U C K !!!!!!!