

DEPARTURES



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Departures Overview and Case Law Summary

Introduction

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

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

I. *Koon v. United States*

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

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

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

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

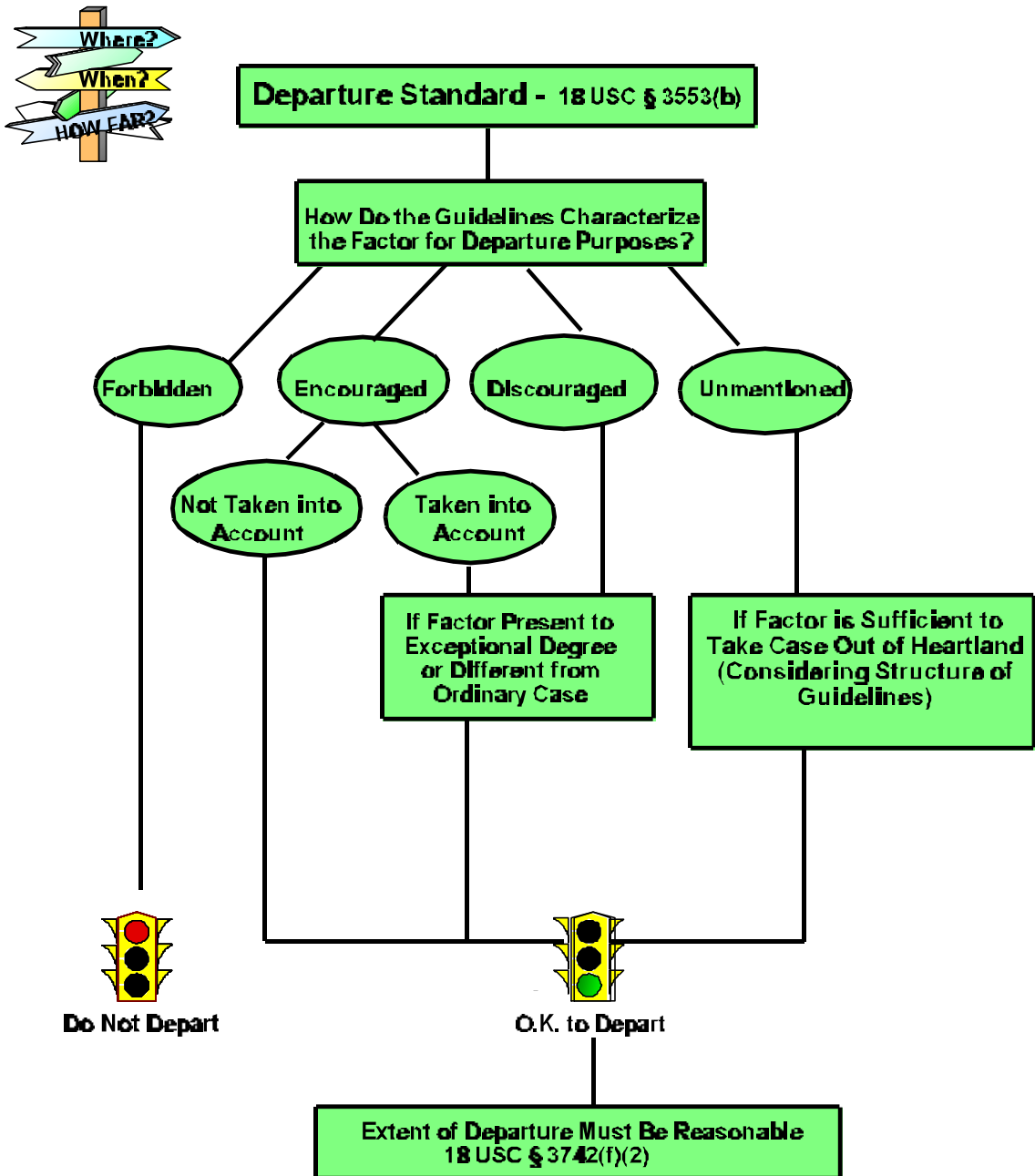
As noted above, departure determinations are reviewed using the abuse of discretion standard. In adopting this standard, the *Koon* Court emphasized that district courts have an “institutional advantage” over appellate courts in making the factual determinations necessary to finding whether a particular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

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

II. Departure Analysis Roadmap

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

DEPARTURE ANALYSIS ROADMAP



ADDITIONAL KEY POINTS

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

III. Statutory Authority for Departures

A. 18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case, it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); *see also* §5K2.0.¹

B. 18 U.S.C. § 3742

Before the guidelines system was instituted, a federal criminal sentence within the statutory limits generally was not reviewable on appeal.² The Sentencing Reform Act of 1984 altered this scheme to allow limited appellate jurisdiction to review federal sentences. Thus, either party can appeal an incorrect application of the sentencing guidelines, 18 U.S.C. §§ 3742(a)(2) and (b)(2); the defendant may appeal an upward departure, 18 U.S.C. § 3742(a)(3); and the government may appeal a downward departure, 18 U.S.C. § 3742(b)(3). All circuits have repeatedly held that there is no appellate jurisdiction to review a district court's discretionary refusal to depart downward. However, there is appellate jurisdiction if a district court erroneously believed that it did not have the authority to depart downward. *See* 18 U.S.C. § 3742(a)(2) (defendant may appeal incorrect application of the guidelines). The Court of Appeals will review a sentencing court's departure decision for abuse of discretion. *Koon v. United States*, 518 U.S. at 91.

IV. Guideline Provisions

Section 5K2.0 of the Sentencing Guidelines tracks the departure authority given to district courts in 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Once this standard is met, the district courts have discretionary power to determine whether, and to what extent, departures are warranted.

The Sentencing Commission has specified certain factors, including race, sex, national origin, and religion, as ones that courts may not use as grounds for departure. *See, e.g.*, §5H1.10. These are commonly referred to as forbidden factors. Certain other factors, while not forbidden, are discouraged bases for departure. Discouraged factors are those "not ordinarily relevant" to a

¹This document does not discuss sentencing below the mandatory minimum under 18 U.S.C. § 3553(e) for substantial assistance upon motion from the government.

²*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

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

V. Post-*Koon* Appellate Court Departure Decisions

The power of district courts to depart was arguably broadened somewhat by the 1996 *Koon* decision. Although *Koon* established that the “abuse of discretion” standard was to be used in reviewing district court departure decisions, certain assessments remain matters of law that may essentially be reviewed *de novo*. *See Koon*, 518 U.S. at 100 (recognizing that certain questions, such as “whether a factor is a permissible basis for departure under any circumstances,” are questions of law, but noting that an error of law is, by definition, an abuse of discretion). Set forth below are summaries of selected post-*Koon* cases from the federal appellate courts, organized according to the nature of the factor upon which departure was based or sought to be based.

A. Forbidden Factors

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

- **§5K2.19 (Post-Sentencing Rehabilitation).** *United States v. Buckley*, 251 F.3d 668 (7th Cir. 2001). The appellate court affirmed the district court’s decision not to depart downward based on post-sentencing rehabilitation. The defendant pled guilty to robbery and at resentencing requested a downward departure based on his extraordinary efforts at post-sentencing rehabilitation. The district judge refused to depart downward because she thought she was precluded from considering such a downward departure. On appeal, the Seventh Circuit agreed with the district court and found that although §5K2.19 was not applicable to the defendant because it took effect on November 1, 2000, six weeks after the defendant was resentenced, the rehabilitation was based on modest religious activities that did not begin to justify the extraordinary relief requested.

B. Encouraged Factors Identified in Chapter Five

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Chapter Five, Part K, lists factors that the Commission has identified as encouraged factors that may constitute grounds for departure. This list is non-exhaustive.

- **§5K2.1 (Death)**

Death of Partially Responsible Participant. *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), *cert. denied*, 528 U.S. 853 (1999). The Fourth Circuit vacated and remanded for further findings where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant’s conviction for the involuntary manslaughter. Because reckless driving was taken into account by the guideline under which the defendant was sentenced, a departure for endangering public safety and welfare would only be appropriate in exceptional cases. The court determined that although an upward departure is permitted under §5K2.1 even when the decedent was a participant in the activity that led to his death (where the additional death was not accounted for in the applicable guideline), the district court should have made findings to support the level of departure, including findings on whether the defendant’s recklessness was adequate to establish malice.

Death Resulting from Relevant Conduct. *United States v. Purchess*, 107 F.3d 1261, 1271 (7th Cir. 1997). The court affirmed an upward departure based on the death of a drug courier making a trip that was related to, but not part of, the conspiracy offense of conviction. Under §5K2.1, an upward departure may be based on a death resulting from relevant conduct as opposed to conduct comprising the offense of conviction.

Death of Kidnapping Victim. *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998). The Fourth Circuit upheld an upward departure to life imprisonment based on the kidnapping victim’s death. In this case, the victim was kidnapped for the purpose of sexual assault and only later did the defendant form the intent to murder her. Because the kidnapping guideline did not take into account these facts, an upward departure to life imprisonment based on the kidnapping victim’s death was not an abuse of discretion.

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

United States v. Levy, 250 F.3d 1015 (**6th Cir.**), *cert. denied*, 122 S. Ct. 316 (2001). The appellate court affirmed the district court's finding that no double counting existed in departing upward based on the defendant's extreme conduct and the extent of the victim's injury. The defendant pled guilty to solicitation to commit a crime of violence in violation of 18 U.S.C. § 373, retaliating against a witness in violation of 18 U.S.C. § 1513, and being an accessory after the fact in violation of 18 U.S.C. § 3. On appeal, the defendant argued that upward departures pursuant to §§5K2.2 (Physical Injury) and 5K2.8 (Extreme Conduct) amounted to double counting because those provisions punished conduct taken into account in §2J1.2(b)(1), and because §§5K2.2 and 5K2.8 overlap each other in the same manner. The Sixth Circuit disagreed on both accounts. Section 2J1.2(b)(1) was applied because the offense caused bodily injury. However, the guideline does not require "serious" injury. Section 5K2.2 requires consideration of the extent of injury. In addition, the court held that no double counting existed between §2J1.2(b)(1) and §§5K2.2 and 5K2.8 because §5K2.2 focused solely on the extent of the physical injury, and §5K2.8 focused on the depravity of the defendant's conduct and the effects on the victim.

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

- **§5K2.3 (Extreme Psychological Injury).** *United States v. Helbling*, 209 F.3d 226 (**3d Cir.** 2000), *cert. denied*, 531 U.S. 1100 (2001). The Third Circuit held that the district court did not abuse its discretion in departing upward two levels for emotional and psychological injuries caused to victims in a fraud case involving embezzlement from a pension fund. The victims incurred the humiliation of being forced to seek work at an advanced age and to rely on help from family members, the trauma of losing one's savings, and the psychological damage resulting from resisting slurs, threats, frivolous lawsuits, and pressure from tax authorities.

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

United States v. Sawyer, 180 F.3d 1319 (**11th Cir.** 1999), *cert. denied*, 528 U.S. 832 (2000). The Eleventh Circuit upheld a 2-level upward departure for extreme psychological injury to a bank teller who was employed at the bank the defendant robbed. The court noted that a departure for extreme psychological injury is warranted if it is "much more serious

than that normally resulting from commission of the offense.” More than two and one-half years after the robbery, the victim still did not feel safe at work, was especially cautious entering and leaving the bank, and had restricted her daily activities. Upon extensive review of the record, the court found that the district court had not abused its discretion in departing two levels upward for extreme psychological injury.

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

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

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

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

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

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

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

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

- **§5K2.9 (Criminal Purpose).** *United States v. Evans*, 148 F.3d 477 (**5th Cir.** 1998), *cert. denied*, 525 U.S. 1112 (1999). The Fifth Circuit upheld an upward departure for a parole officer convicted of taking bribes. The case was extraordinary because had the defendant developed a romantic relationship with the parolee and facilitated the parolee's cocaine and crack distribution.

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

- **§5K2.10 (Victim Misconduct).** *United States v. LeRose*, 219 F.3d 335 (**4th Cir.** 2000). The Fourth Circuit reversed the district court's downward departure for victim misconduct where the bank's delay in confronting the defendants about the handling of their accounts in

no way goaded the defendants into launching a check-kiting scheme. The court noted that §5K2.10 provides that in cases of non-violent offenses, “provocation and harassment” of the defendant by the victim may warrant a departure for victim misconduct. The victim’s lack of action neither provoked nor led to the fraud and was not conduct that was contemplated by §5K2.10.

United States v. Paster, 173 F.3d 206, 211 (**3d Cir.** 1999). The Third Circuit upheld the district court's denial of a §5K2.10 departure. Without deciding whether the defendant’s wife’s past infidelities constituted “wrongful conduct” under §5K2.10, the court found there was ample evidence to support the denial of a departure because the victim's conduct did not pose actual or threatened danger to the defendant, as apparently contemplated by §5K2.10, and even if the wife's conduct was “wrongful,” the defendant's response in killing her was grossly disproportionate.

- **§5K2.11 (Lesser Harms).** *United States v. Clark*, 128 F.3d 122 (**2d Cir.** 1997). The court remanded for reconsideration the district court’s denial of downward departure based on the lesser harms paragraph of §5K2.11 for a felon who had illegally purchased a firearm for his brother. The court noted that the second paragraph of §5K2.11, which permits a departure where a defendant’s conduct might not have caused or threatened the harm sought to be prevented by the law proscribing the offense, might have applied, and the district court may have misunderstood its authority to depart. *See also United States v. Bernal*, 90 F.3d 465 (**11th Cir.** 1996) (affirming a downward departure based on a finding that defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction).
- **§5K2.12 (Coercion and Duress).** *United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997). The court vacated and remanded a downward departure based in part on coercion, where the only evidence of coercion was the defendant’s comment that she would not testify against a codefendant because she was scared. Ordinarily, coercion must involve a threat of physical injury, substantial damage to property or similar injury, and it must also have caused the defendant to commit the offense.

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

United States v. Sachdev, 279 F.3d 25 (**1st Cir.** 2002). The First Circuit upheld the district court’s refusal to downwardly depart on the basis of the defendant’s claimed duress. The defendant had claimed that he had committed the offense (cashing bad checks) because he had felt threatened to repay money invested by a former friend in his business. The First Circuit held that the Guidelines ordinarily require a threat of physical harm when coercion is proffered as a basis for departure. Here, the district court had found that no such explicit threats had been made. To assess whether implicit threats had been made, a court should consider: (1) the actual intent of the threat-maker; (2) the subjective understanding of the defendant; and (3) whether as an objective matter a person in defendant’s position would reasonably consider the act/statement to be a serious threat of physical injury (or other type

of threat recognized by §5K2.12). In addition, the defendant must have committed the offense “because of” the coercion, blackmail or duress. The circuit court upheld the district court’s finding that the defendant’s belief that he was in physical danger was not reasonable.

- **§5K2.13 (Diminished Capacity)**

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

Long History of Mental Illness. *United States v. Davis*, 264 F.3d 913 (9th Cir. 2001). The Ninth Circuit affirmed the district court’s refusal to depart downward based on §5K2.13 notwithstanding the defendant’s long history of mental illness. Because the defendant’s criminal history (as a chronic bank robber with a propensity for violence) demonstrated a need to protect the public, *see* §5K2.13, the court lacked the authority to depart).

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

Temporary Insanity. *United States v. Petersen*, 276 F.3d 432 (8th Cir. 2002). The Eighth Circuit reversed the district court’s downward departure based on the “temporary insanity” of the defendant when he raped and assaulted his estranged wife. The court found that the Sentencing Commission had adequately considered mental capacity as a basis for departure and that §5K2.13 provides the only avenue for such a departure. Since the defendant could not qualify for a §5K2.13 departure because his conduct encompassed multiple violent offenses, a departure based on “temporary insanity” was not authorized by the guidelines and contrary to law. Moreover, the district court’s factual findings were inadequate in any event.

Impulse Control Disorder. *United States v. Miller*, 146 F.3d 1281 (11th Cir. 1998), *cert. denied*, 525 U.S. 1127 (1999). The court held that the defendant’s impulse control disorder did not take his case outside the heartland of cases involving sexual exploitation of minors. The defendant’s impulse control disorder was related to viewing adult pornography and acting out sexually with adults. The impulse was related to viewing pornography but had not been shown to have a causal link to the offense conduct as required by §5K2.13. Because there was nothing unusual about the defendant or the facts of this

case, the court affirmed that the case fell within the heartland of cases regulated by the sentencing guideline.

- **§5K2.14 (Public Welfare).** *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), *cert. denied*, 528 U.S. 853 (1999). The case was vacated and remanded for further findings where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant's conviction for involuntary manslaughter. Because reckless driving was taken into account by the guideline under which the defendant was sentenced, a departure for endangering public safety and welfare would only be appropriate in exceptional cases.
- **§5K2.16 (Voluntary Disclosure of Offense).** *United States v. Aerts*, 121 F.3d 277, 280 (7th Cir. 1997). The Seventh Circuit upheld a refusal to grant a §5K2.16 downward departure, noting that "section 5K2.16, by its plain terms, authorizes a departure for the voluntary disclosure of undiscovered 'offenses,' not offenders." *See also United States v. Brownstein*, 79 F.3d 121, 122-23 (9th Cir. 1996) (affirming refusal to depart where the offense was known to authorities even though they did not know that defendant committed it until he turned himself in).

United States v. Ekeland, 174 F.3d 902, 905 (7th Cir. 1999). The court upheld the district court's refusal to grant a §5K2.16 departure, finding that the language in §5K2.16 "discloses to authorities" means legal authorities, and defendant who disclosed his crime to his company's officials rather than police or some other governmental agency did not qualify for departure.

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

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

- **§5K2.21 (Dismissed and Uncharged Conduct).** Effective November 1, 2000, §5K2.21 (Dismissed and Uncharged Conduct) was added as an encouraged basis for an upward departure to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

C. Encouraged Factors Identified in Chapters Two and Three

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

- **§2A1.1 (First Degree Murder), comment. (n.1).** *United States v. Nichols*, 169 F.3d 1255 (10th Cir.), *cert. denied*, 528 U.S. 934 (1999). The court upheld the district court's refusal to depart downward based on the defendant's contention that he did not cause death intentionally or knowingly, pursuant to §2A1.1, comment. (n.1). The defendant had argued that the district court was required to make findings regarding the defendant's mental state in determining whether a downward departure was appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart, disagreeing with *United States v. Prevatte*, 16 F.3d 767, 784 (7th Cir. 1994).
- **§2B3.2 (Extortion), comment. (nn.7-8).** *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998). The Ninth Circuit upheld a 2-level departure based on Application Note 8 to the extortion guideline, which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.
- **§2C1.1 (Bribery; Extortion under Color of Official Right), comment. (n.5).** *United States v. Reyes*, 239 F.3d 722 (5th Cir.), *cert. denied*, 122 S. Ct. 156 (2001). The Fifth Circuit upheld an upward departure pursuant to Application Note 5 of §2C1.1, finding that the actions of the defendant, a Houston city council member, were "part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government." The court agreed with the district court that the defendant's organizer role in the offense was relevant in finding the corruption systematic and pervasive. In addition, there were many indications that the corruption might result in a loss of public confidence.
- **§2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking in Controlled Substances), comment. (n.9).** *United States v. Cones*, 195 F.3d 941 (7th Cir. 1999). The Seventh Circuit reversed an upward departure based on the district court's belief that drug quantity should be converted to street-level purity. Even though the court reversed the upward departure, it found that the only function of Application Note 9 to §2D1.1 is to determine whether a higher purity is probative of the defendant's role or position in the chain of distribution. When higher purity implies a higher role in a criminal organization,

departure should be limited to the number of levels that could be awarded under §3B1.1. The court noted that statutes and guidelines allow conversion to a uniform purity for PCP and methamphetamine, and the guidelines now allow a conversion for LSD. For drugs other than LSD, PCP, and methamphetamine, the sentence must be calculated without an adjustment to a uniform purity level. *See also United States v. Doe*, 149 F.3d 634 (7th Cir.) (affirming 6-level upward departure to account for the concentrated form of heroin involved), *cert. denied*, 525 U.S. 914 (1998). *United States v. Mikaelian*, 168 F.3d 380, 390 (9th Cir. 1999) (holding that an extremely low purity of drug might be a basis for a downward departure).

- **§2D1.2 (Simple Possession), comment. (n.1).** *United States v. Warren*, 186 F.3d 358 (3d Cir. 1999). The Third Circuit reversed an upward departure based on large quantities of drugs involved in a simple possession case, although such factor was encouraged as a grounds for upward departure in Application Note 1 to §2D2.1, which states “. . . Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.” The court found, based on the record, that the defendant *did not* intend for anyone to consume the large quantities of drugs but only intended to turn those drugs over to government agents and did so. In such a situation the court concluded that the district court abused its discretion in utilizing Application Note 1 of §2D2.1 or §5K2.0 as a basis for an upward departure based on quantity of drugs.
- **§2K1.2 (Unlawful Receipt, Possession or Transportation of Explosives), comment. (n.16).** *United States v. Diaz*, 285 F.3d 92 (1st Cir. 2002). The First Circuit reversed an upward departure based on Application Note 16 to §2K1.2, finding that the district court had erred in departing upwardly based on the fourth prong of that note. That application note specifies four circumstances when an upward departure may be warranted, including when “the offense posed a substantial risk of death or bodily injury to multiple injuries.” The appellate court concluded that the defendant’s actions in “brandishing a single small weapon in a single episode, with no evidence of an intent to fire, is insufficient to support a departure aimed at punishing conduct that puts multiple individuals at substantial risk of injury or death.” *Id.* at 100. The court noted that the defendant’s conduct had been accounted for by virtue of the 4-level enhancement in §2K1.2(b)(5), for possession of the firearm in connection with another felony offense.
- **§2L2.1 (Trafficking in Immigration Documents; False Statements; Fraudulent Marriage), comment. (n.5).** *United States v. Velez*, 185 F.3d 1048 (9th Cir.), *cert. denied*, 528 U.S. 1030 (1999). The Ninth Circuit affirmed a 2-level departure based on the district court’s finding that the 2,700 documents falsified by the defendant substantially exceeded the number normally involved in such an offense, making it a factor outside the heartland of §2L2.1 cases. This case was decided under 1994 version of the *Guidelines Manual*, which did not include Application Note 5.
- **§3A1.1 (Hate Crime Motivation or Vulnerable Victim), comment. (n.4).** *United States v. Brown*, 147 F.3d 477 (6th Cir.), *cert. denied*, 525 U.S. 918 (1998). The Sixth Circuit upheld an upward departure based on the age of telemarketing victims. Congress expressed the view, manifested in the Senior Citizens Against Marketing Scams Act, that the guidelines do not sufficiently punish the defendants who target the elderly. The court noted

that such offense behavior is not adequately accounted for by relevant conduct, role in the offense, or vulnerable victim adjustments.

- **§3B1.1 (Aggravating Role), comment. (n.2).** *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996). The First Circuit affirmed an upward departure pursuant to Application Note 2 based on a finding that the defendant's management of the assets of a large-scale criminal enterprise was outside the heartland of the aggravated role adjustment.
- **§3B1.2 (Mitigating Role).** *United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996). The court reversed a downward departure based on a finding that the defendant's conduct, possession of child pornography, was analogous to a situation where a recipient of child pornography might qualify for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.

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

- **§3D1.4 (Determining Combined Offense Level), comment. (backg'd.).** *United States v. Brown*, 287 F.3d 684 (8th Cir. 2002). The Eighth Circuit affirmed a 6-month upward departure where, although the defendant had been convicted of four separate incidences of assault of a toddler, the grouping rules operated so that three of the assaults did not result in any additional incremental punishment. The court pointed to the background commentary to §3D1.4, noting that the Sentencing Commission had recognized that departures in unusual cases would be appropriate.

D. Encouraged Factors Based on Commentary Not Mentioned Above

- **§2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), comment. (n.3)** (an upward departure may be warranted if offense created a substantial risk of death or serious bodily injury to more than one person)
- **§2A2.4 (Obstructing or Impeding Officers), comment. (n.3)** (an upward departure may be warranted if offense involves significant disruption of governmental functions)
- **§2A3.2 (Criminal Sexual Abuse of a Minor; Attempt to Commit Such Acts), comment. (n.7)** (an upward departure may be warranted where the offense level under this guideline substantially understates the seriousness of the offense)
- **§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), comment. (backg'd.)** (a downward departure may be warranted in cases where the defendant and the victim are similar in sexual experience; the Commission recommends a downward departure to the equivalent of an offense level of 6)

- **§2A5.3 (Crimes Aboard Aircraft), comment. (n.2)** (an upward departure may be warranted if the conduct intentionally or recklessly endangered the safety of the aircraft or passengers)
- **§2A6.1 (Threatening or Harassing Communications), comment. (n.1)** (a departure may be warranted to account for factors not incorporated in the guideline; the Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level); **comment. (n.2)** (an upward departure may be warranted if the conduct involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim)
- **§2A6.2 (Stalking or Domestic Violence), comment. (n.5)** (an upward departure may be warranted if the defendant received an enhancement under subsection (b)(1) (for violating court order of protection; bodily injury; possession or threatened use of dangerous weapon; or pattern of stalking, threatening, harassing or assaultive activity), but the enhancement does not adequately reflect the extent or seriousness of the conduct involved)
- **§2B1.1 (Fraud, Theft), comment. (n.15)** (an upward departure may be warranted where the offense level substantially understates the seriousness of the offense (listing factors to consider); a downward departure may be warranted where the offense level substantially overstates seriousness of the offense)
- **§2B2.1 (Burglary), comment. (backg'd.)** (an upward departure may be warranted for weapon use during burglary; usually such use would make the offense a robbery)
- **§2B3.1 (Robbery), comment. (n.5)** (an upward departure may be warranted if the defendant intended to murder the victim)
- **§2B5.3 (Criminal Infringement of Copyright or Trademark), comment. (n.5)** (an upward departure may be warranted if the offense level substantially understates the seriousness of the offense; listing factors to consider)
- **§2C1.1 (Bribery; Extortion Under Color of Official Right), comment. (n.4)** (an upward departure may be warranted in cases in which the seriousness of the offense is not adequately reflected)
- **§2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions), comment. (n.5)** (an upward departure may be warranted where the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government)
- **§2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking in Controlled Substances), comment. (n.1)** (an upward departure may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable

material in an unusually sophisticated manner in order to avoid detection); **comment. (n.14)** (a downward departure may be warranted when the price set by government in reverse sting was substantially below market value, thus resulting in a purchase by the defendant of a significantly greater quantity than his available resources otherwise would have allowed him to purchase); **comment. (n.15)** (an upward departure may be warranted where, in the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense); **comment. (n.16)** (in an extraordinary case, an upward departure may be warranted above offense level 38 on the basis of drug quantity)

- **§2D1.5 (Continuing Criminal Enterprise; Attempt or Conspiracy), comment. (n.2)** (an upward departure may be warranted if as part of the enterprise the defendant sanctioned the use of violence, or if the number of persons managed by the defendant was extremely large)
- **§2D1.7 (Unlawful Sale or Transportation of Drug Paraphernalia; Attempt or Conspiracy), comment. (n.1)** (an upward departure may be warranted for large-scale dealer of drug paraphernalia; a downward departure may be warranted if paraphernalia offense was not committed for pecuniary gain)
- **§2D1.11 (Unlawfully Distributing, Importing, Exporting, or Possessing a Listed Chemical; Attempt or Conspiracy), comment. (n. 4(C))** (an upward departure may be warranted in a case involving two or more chemicals used to manufacture different controlled substances or to manufacture one controlled substance by different manufacturing processes, if the offense level does not adequately address the seriousness of the offense); **comment. (n. 6)** (an upward departure may be warranted if the enhancement under subsection (b)(3) does not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel)).
- **§2D1.12 (Unlawful Possession, Manufacturing, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material; Attempt or Conspiracy), comment. (n.1)** (an upward departure may be warranted if the offense involved the large-scale manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material); **comment. (n.3)** (an upward departure may be warranted in cases in which the enhancement under subsection (b)(2) does not adequately account for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel))
- **§2D2.3 (Operating Common Carrier Under the Influence), comment. (backg'd.)** (a downward departure may be warranted if no or only a few passengers were placed at risk; an upward departure may be warranted if death or serious bodily injury of a large number of persons occurred and offense level does not reflect seriousness of offense)
- **§2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), comment. (n.4)** (a departure may be warranted if rule in Application Note

4 pertaining to a previously imposed sentence that is also part of the pattern of racketeering activity produces an anomalous result)

- **§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct), comment. (n.2)** (an upward departure may be warranted if bodily injury results); **comment. (n.12)** (an upward departure may be warranted if (A) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (B) the offense involved more than 10 victims)
- **§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material), comment. (n.6)** (an upward departure may be warranted if (A) the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years; or (B) the offense involved more than 10 victims)
- **§2G2.2 (Trafficking in, Receiving, Possessing Material Involving the Sexual Exploitation of a Minor), comment. (n.2)** (an upward departure may be warranted if the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) (for engaging in pattern of activity) does not apply; an upward departure may also be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved)
- **§2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), comment. (n.2)** (an upward departure may be warranted if the offense involved a large number of visual depictions, regardless of whether subsection (b)(2) (for more than ten items containing visual depictions) applies)
- **§2H2.1 (Obstructing an Election or Registration), comment. (n.1)** (an upward departure may be warranted if the offense resulted in bodily injury or significant property damage, or involved corrupting a public official)
- **§2H4.1 (Peonage, Involuntary Servitude, and Slave Trade), comment. (n.3)** (an upward departure may be warranted if the offense involved the holding of more than ten victims in a condition of peonage or involuntary servitude)
- **§2J1.2 (Obstruction of Justice), comment. (n.4)** (a departure may be warranted if a weapon was used, or bodily injury or significant property damage resulted)
- **§2J1.3 (Perjury or Subordination of Perjury; Bribery of Witness), comment. (n.4)** (an upward departure may be warranted if a weapon was used, or bodily injury or significant property damage resulted)
- **§2J1.6 (Failure to Appear), comment. (n.4)** (an upward departure may be warranted if a defendant is convicted of both the underlying offense and the failure to appear count, and the

defendant committed additional acts of obstructive behavior (*e.g.*, perjury) during the investigation, prosecution, or sentencing of the instant offense)

- **§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), comment. (n.10)** (an upward departure may be warranted if the quantity of explosive materials significantly exceeded 1,000 pounds; the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives; the defendant knowingly distributed explosive materials to a person under 21 years of age; or the offense posed a substantial risk of death or bodily injury to multiple individuals); **comment. (n.11)** (an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives))
- **§2K1.4 (Arson; Property Damage by Use of Explosives), comment. (n.1)** (an upward departure may be warranted if bodily injury resulted)
- **§2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), comment. (n.18)** (an upward departure may be warranted under §5K2.6 (Weapons and Dangerous Instrumentalities) where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (*e.g.*, the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives))
- **§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), comment. (n.1)** (an upward departure may be warranted to reflect the seriousness of the defendant's criminal history); **comment. (n.2)** (an upward departure may be warranted where a conviction under 18 U.S.C. §§ 844(h), 924(c), or 929(a) would result in a decrease in total punishment)
- **§2K2.5 (Possession of a Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), comment. (n.4)** (an upward departure may be warranted where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply)
- **§2L1.1 (Alien Smuggling), comment. (n.3)** (an upward departure may be warranted where defendant knew alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior); **comment. (n.4)** (an upward departure may be warranted if offense involved substantially more than 100 aliens)
- **§2L2.1 (Trafficking in Immigration Documents; False Statements; Fraudulent Marriage), comment. (n.3)** (an upward departure may be warranted if the defendant knew or had reason to believe that felony offense in subsection (b)(3) was especially serious)

- **§2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), comment. (n.2)** (a downward departure may be warranted where the revelation of the information at issue is likely to cause little or no harm)
- **§2M4.1 (Failure to Register/Evasion of Military Service), comment. (n.1)** (an upward departure may be warranted if offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict)
- **§2M5.1 (Evasion of Export Controls), comment. (n.1)** (an upward departure may be warranted for violation during time of war or armed conflict); **comment. (n.2)** (a departure may be warranted where the court considers the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences, and determines that such factors are present in an extreme form)
- **§2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License), comment. (n.1)** (a downward departure may be warranted in the unusual case where the offense conduct was not harmful or potentially harmful to a security or foreign policy interest of the United States; an upward departure may be warranted in the case of a violation during time of war or armed conflict); **comment. (n.2)** (an upward departure may be warranted where the court considers the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences and determines that such factors are present in an extreme form)
- **§2N1.1 (Tampering with Consumer Products), comment. (n.1)** (an upward departure may be warranted where the offense posed a substantial risk of death or serious bodily injury to numerous victims or caused extreme psychological injury or substantial property damage or monetary loss; a downward departure may be warranted in the unusual case where the offense did not cause a risk of death or serious bodily injury and did not cause, nor was intended to cause bodily injury)
- **§2N1.2 (Threatening to Tamper with Consumer Products), comment. (n.1)** (an upward departure may be warranted where death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted)
- **§2N1.3 (Tampering with Intent to Injure Business), comment. (n.1)** (an upward departure may be warranted where death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted)
- **§2N2.1 (Statutory and Regulatory Violations Relating to Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product), comment. (n.1)** (a downward departure may be warranted where conduct was only negligent); **comment. (n.3)** (an upward departure may be warranted if death or bodily injury, extreme psychological injury, substantial property damage or monetary loss resulted)

- **§2P1.1 (Escape), comment. (n.4)** (an upward departure may be warranted if death or bodily injury resulted)
- **§2P1.3 (Engaging in, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention), comment. (n.1)** (an upward departure may be warranted if death or bodily injury resulted)
- **§2Q1.1 (Knowing Endangerment From Mishandling Hazardous or Toxic Substances), comment. (n.1)** (an upward departure may be warranted if death or bodily injury resulted)
- **§2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), comment. (n.4)** (a downward departure may be warranted where the case involves negligent, as opposed to knowing conduct); **comment. (n.6)** (a departure of up to three levels upward or downward may be warranted where the public health is seriously endangered, depending upon the nature of the risk created and the number of people placed at risk; a departure would be warranted if death or serious bodily injury results); **comment. (n.7)** (a 2-level upward or downward departure may be warranted where a public disruption, evacuation or cleanup at substantial expense has been required); **comment. (n.8)** (a 2-level upward or downward departure may be warranted where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required, depending upon the nature and quantity of the substance involved and the risk associated with the offense)
- **§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), comment. (n.3)** (a downward departure may be warranted in cases involving negligent conduct); **comment. (n.4)** (a 2-level departure may be appropriate, depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, due to the wide range of conduct potentially covered by the guideline); **comment. (n.5)** (a 3-level departure upward or downward may be warranted depending upon the nature of the risk created and the number of people placed at risk; a departure would be warranted if death or serious bodily injury results); **comment. (n.6)** (a 2-level departure upward or downward may be warranted depending upon the nature of the contamination involved); **comment. (n.7)** (a 2-level departure upward or downward may be warranted depending upon the nature and quantity of the substance involved and the risk associated with the offense); **comment. (n.8)** (an upward departure may be warranted where the defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order)
- **§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), comment. (n.5)** (an upward departure may be warranted if the offense involved the destruction of a substantial quantity of fish, wildlife, or plants, and the seriousness of the offense is not adequately measured by the market value)

- **§2T1.8 (Offenses Relating to Withholding Statements), comment. (n.1)** (an upward departure may be warranted where the defendant is attempting to evade, rather than merely delay, payment of taxes)
- **§2T2.1 (Non-Payment of Taxes), comment. (n.2)** (an upward departure may be warranted for offense conduct directed at more than tax evasion (*e.g.*, theft or fraud))
- **§2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property), comment. (n.2)** (an upward departure may be warranted where duties are evaded on items for which entry is prohibited, limited, or restricted, especially when such items are harmful or protective quotas are in effect, as the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation)
- **§3A1.2 (Official Victim), comment. (n.2)** (an upward departure may be warranted in cases involving certain high-level officials, such as the President and Vice-President, to reflect potential disruption of governmental function)
- **§3A1.3 (Restraint of Victim), comment. (n.3)** (an upward departure may be warranted if restraint was sufficiently egregious)
- **§3B1.4 (Using a Minor to Commit a Crime), comment. (n.3)** (an upward departure may be warranted where defendant used or attempted to use more than one person less than 18 years of age)
- **§3C1.2 (Reckless Endangerment During Flight), comment. (n.2)** (an upward departure may be warranted where there is a higher degree of culpability than is reflected by the 2-level increase permitted under the guideline for reckless endangerment during flight); **comment. (n.6)** (an upward departure may be warranted where death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person)

E. Discouraged Factors

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

- **§5H1.1 (Age).** *United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), *cert. denied*, 523 U.S. 1144 (1998). The Third Circuit upheld a district court's refusal to depart based in part on the defendant's age, 67, absent some extraordinary infirmity.
- **§5H1.3 (Mental and Emotional Conditions).** *United States v. Walter*, 256 F.3d 891 (9th Cir. 2001). The Ninth Circuit reversed the district court's decision to deny a departure based on the defendant's childhood abuse. The court found that brutal beatings by the defendant's father, the introduction to drugs and alcohol by his mother, and sexual abuse by a cousin could constitute extraordinary circumstances justifying a departure under §5H1.3.
- **§5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse)**

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

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

HIV-Positive Status. *United States v. Rivera-Maldonado*, 194 F.3d 224, 235-36 (1st Cir. 1999). The First Circuit upheld the district court's decision not to depart based on the defendant's HIV-positive status. The defendant did not have advanced AIDS, remained in relatively good physical condition, and did not have an "extraordinary physical impairment." *Id.* (citing *United States v. Thomas*, 49 F.3d 253, 260-61 (6th Cir. 1995)). The Sixth Circuit upheld a district court's decision not to depart where the defendant was HIV-positive but had not yet progressed into advanced AIDS. *See also United States v. Woody*, 55 F.3d 1257, 1275 (7th Cir. 1995) (same); *United States v. Rabins*, 63 F.3d 721, 727-28 (8th Cir. 1995), *cert. denied*, 516 U.S. 1153 (1996).

Age-Related Medical Problems. *United States v. Krilich*, 257 F.3d 689 (7th Cir. 2001), *cert. denied*, 122 S. Ct. 1175 (2002). The Seventh Circuit reversed a downward departure granted to a 69-year-old defendant with age-related medical problems. The district court had found that four separate problems combined to present an "unusual medical profile" but had also noted that there was no structural reason why the defendant could not receive adequate medical care from the Bureau of Prisons. In reversing, the court found that the defendant's problems were not "extraordinary," noting that the defendant was not

bedridden, could receive adequate care in jail and would not likely have a shortened life span as a result of incarceration.

- **§5H1.5 (Employment Record).** *United States v. Jones*, 158 F.3d 492 (**10th Cir.** 1998). The court upheld a downward departure based in part on the defendant's long-term work history in an economically depressed area with few employment opportunities as well as on the adverse impact incarceration would have on his future employment prospects, in light of the community in which he lives. The court noted that the Supreme Court in *Koon* approved consideration of collateral employment consequences.
- **§5H1.6 (Family Ties and Responsibilities and Community Ties).** *United States v. Allen*, 87 F.3d 1224, 1225-26 (**11th Cir.** 1996). The Eleventh Circuit reversed a departure for a defendant who was the primary caretaker of 70-year-old father with Alzheimer's and Parkinson's diseases, finding that the defendant's responsibilities, although difficult, were not extraordinary.

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

United States v. Dyce, 91 F.3d 1462, 1467 (**D.C. Cir.**), *cert. denied*, 519 U.S. 1018 (1996). The court vacated a departure for a single mother of three children, one of whom she was breastfeeding, because the only fact arguably unusual was the breastfeeding and there was no evidence that child could not have been fed from a bottle. The court noted that the district court could have delayed commencement of the sentence until after the baby was weaned.

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

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

United States v. Sclamo, 997 F.2d 970, 973-74 (**1st Cir.** 1993). The First Circuit upheld a downward departure based on the defendant's special relationship with a young boy who had psychological and behavioral problems and "would risk regression and harm if defendant were incarcerated."

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

United States v. Sweeting, 213 F.3d 95 (3d Cir.), cert. denied, 531 U.S. 906 (2000). The court reversed a 12-level downward departure based on the defendant's single-parent status and the adverse effect the defendant's incarceration would have on her five children, including on the oldest child who was afflicted with a neurological disorder. Disruptions of the defendant's life and concomitant difficulties for those who depend on the defendant are inherent in the punishment of the incarceration. The court further noted that defendant's status as a single parent did not meet the threshold of "extraordinary" when compared to innumerable cases in which single parents commit crimes.

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

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

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

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

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

Extraordinary Academic Success. *United States v. Decora*, 177 F.3d 676, 677-78 (8th Cir. 1999). The court affirmed a downward departure based upon the defendant's extraordinary academic success (he was one semester away from a college degree) and his great promise as a community leader and role model, notwithstanding the adversity of life on a Indian reservation. In addition, while released on bond, the defendant had successfully completed an intensive in-patient treatment program, participated in an alcohol after-care program following his treatment, and attended Alcoholics Anonymous meetings.

F. Unmentioned Factors

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

- **Successive Prosecutions.** *United States v. Sewell*, 252 F.3d 647 (2d Cir.), cert. denied, 122 S. Ct. 382 (2001). The Second Circuit affirmed the district court’s decision to deny the defendant’s request for a downward departure based on successive prosecutions because the defendant’s factual arguments regarding hardships that the federal prosecutors imposed on him were unavailing. According to the sentencing transcript, the district judge made no error in interpreting the applicable guidelines and understood his authority to depart. The court determined that the district court merely found that the facts of this case did not support the departure under *Koon*.
- **Disparate Practices of Prosecutors.** *United States v. Buckendahl*, 251 F.3d 753 (8th Cir. 122 S. Ct. 633 (2001)). The appellate court reversed and remanded a departure based on “a significant disparity between the Northern and Southern Districts of Iowa in the availability of section 1B1.18 use immunity.” On appeal, the court held that the district court did not have the authority to depart based on interdistrict disparity in prosecutorial practices where the practice at issue was within the proper exercise of prosecutorial discretion.
- **Time Served on Preexisting Sentence.** *United States v. Fermin*, 252 F.3d 102 (2d Cir. 2001). The court affirmed the district court’s decision not to depart downward based on defendant’s time served on a preexisting sentence and held that such decision was not subject to review. The defendant pled guilty to reentering the United States illegally after deportation and at sentencing requested a downward departure for time served on a preexisting sentence for a state parole violation. The district court decided not to depart downward to reduce the defendant’s sentence for the time the defendant already served on the state sentence because of the lack of aggravating and mitigating circumstances of a kind or to a degree not already taken into account by the Sentencing Guidelines. On appeal, the defendant argued that the district court erred in not departing downward because such departures were permitted by §5G1.3(c). The Second Circuit disagreed and found that §5G1.3 and its accompanying application notes did not contain any language authorizing the district court to grant a downward departure in order to achieve a reasonable incremental punishment.
- **Class of Offenses Falls Outside the Heartland.** *United States v. Koczuk*, 252 F.3d 91 (2d Cir. 2001). The appellate court vacated a downward departure based on a class of offenses, defined by regulation and treaty, falling outside the “heartland.” The defendants were convicted of illegally smuggling sturgeon roe into the United States and at sentencing were granted a downward departure because the district court determined that this case fell outside the “heartland” of cases concerning offenses involving fish and wildlife because the importation of sturgeon roe was merely “regulated” rather than “prohibited,” and because

part of the reason why sturgeon was placed under the protection of CITES³ was to assist Russia's economy. On appeal, the Second Circuit determined that the district court could not depart downward on the grounds that an entire class of offenses, defined by regulation and treaty, fell outside the "heartland" of a guideline. Rather, a court must analyze the particular facts of a case and compare them with others that typically fall within the applicable guideline.

- **Alienage.** *United States v. Martinez-Carillo*, 250 F.3d 1101 (7th Cir.), cert. denied, 122 S. Ct. 285 (2001). The appellate court affirmed the district court's finding that deportable alien status was not a proper basis for departure in cases involving convictions for illegal reentry after deportation. The defendant pled guilty to unlawfully reentering the United States in violation of 8 U.S.C. § 1326, and at sentencing was denied his request for a downward departure based on his status as a deportable alien. On appeal, he argued that when the offense of conviction is a section 1326 violation, a defendant should not be precluded from a departure based on deportable alien status. The Seventh Circuit disagreed. Citing *United States v. Gonzales-Portillo*, 121 F.3d 1122, 1125 (7th Cir. 1997), and *United States v. Farouil*, 124 F.3d 838, 846 (7th Cir. 1997), the court affirmed the district court's decision and held that deportable alien status was not a proper basis for departure when the offense of conviction is one listed under 8 U.S.C. § 1326 because "all crimes covered by § 1326 involve illegal presence in the United States by aliens, [and] deportability was certainly accounted for in the guideline." *Martinez-Carillo*, at 1106 (quoting *Gonzales-Portillo*, 121 F.3d at 1125); see also *Farouil*, 124 F.3d at 847.

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

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

- **Status of the Sentencing Commission.** *United States v. Martin*, 221 F.3d 52 (1st Cir. 2000). The court vacated a sentence imposed by the district court in which it erroneously

³CITES is an acronym for the Convention on International Trade in Endangered Species of Wild Fauna and Flora).

granted a downward departure based on the then moribund status of the Sentencing Commission and on the perceived disparity between the defendant's sentencing range and the national median sentence for persons convicted of federal drug trafficking. The appellate courts noted that neither factor, singularly or in combination, could carry the weight of a downward departure. It further stated that sentencing guidelines, once promulgated, have the force of law, even when the Commission is empty.

- **Offenses Charged in Indictment Without Jury Verdict Being Reached.** *United States v. Mapp*, 170 F.3d 328 (2d Cir.), cert. denied, 528 U.S. 901 (1999). The Second Circuit upheld an upward departure based on the district court's finding, by clear and convincing evidence, that the defendant had participated in three robberies that had been charged in the indictment but as to which the jury was unable to reach a verdict.
- **Substantial, Voluntary Restitution.** *United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999). The Eighth Circuit held that departing downward on the basis of the defendant's extraordinary efforts at restitution was not an abuse of discretion. Upon the bank's discovery of the defendant's misrepresentation of assets claimed in order to secure a bank loan, the defendant began liquidating assets owned, pledged or unpledged, in order to repay the bank. Over a one-year period, the defendant repaid the bank most of the money owed while simultaneously and substantially reducing the bank's loss amount from over \$800,000 to less than \$60,000. The court noted that the defendant voluntarily began making restitution almost a year before he was indicted and the restitution paid nearly 94 percent of that owed to the bank. The court held the defendant's substantial voluntary restitution was "extraordinary" and appropriate as a basis for a downward departure.
- **Presentence Rehabilitation.** *United States v. Craven*, 239 F.3d 91 (1st Cir. 2001). The court vacated a downward departure for extraordinary presentence rehabilitation and remanded the case for resentencing. The defendant disavowed drug and alcohol abuse approximately one year before his arrest but during his pretrial detention incurred numerous disciplinary infractions. The district court granted a downward departure by relying on an expert opinion the court solicited *ex parte*. Based on that opinion, the district court found that the proliferation of disciplinary violations did not undercut the defendant's eligibility for a downward departure based on his supposed extraordinary rehabilitation. The Sixth Circuit determined that a sentencing court may not use an *ex parte* conversation with a court-appointed expert as a means to acquire information critical to a sentencing determination. The court concluded that the district court's violation of this principle tainted the factual basis for the departure decision and annulled the defendant's downward departure for extraordinary presentence rehabilitation.
- **Post-Offense Rehabilitation.**⁴ *United States v. Bryson*, 163 F.3d 742 (2d Cir. 1998). The Second Circuit vacated a downward departure based on post-offense rehabilitation where the evidence was insufficient to support a conclusion that rehabilitation had taken

⁴The new policy statement, §5K2.19, does not apply to post-offense rehabilitation efforts that occur before the original sentencing.

place and the district court had only vaguely stated its findings on rehabilitation while expressing dissatisfaction with the guideline range.

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

- **Multiple Victims of Threatening Communications.** *United States v. Adelman*, 168 F.3d 84 (2d Cir. 1999). The court upheld an upward departure based on the fact that the defendant's threatening communications affected people other than the direct victim, a situation not provided for in the offense guideline, §2A6.1. The defendant not only made threats to a judge but also indicated in one of the threatening phone messages that the judge's "kid" was held captive. Since the judge had three children, the court agreed that it was properly found that all three children were victims of the threatening behavior. The court determined that since the sentencing guidelines did not account for multiple victims under §2A6.1, an upward departure was warranted.
- **Improper Investigative Techniques.** *United States v. Coleman*, 188 F.3d 354 (6th Cir. 1999) (*en banc*). The Sixth Circuit reversed and remanded on the grounds that the district court should have considered whether a downward departure was warranted based on the government's alleged improper targeting and inducement of African American parolees to commit crack cocaine offenses.

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

United States v. Santoyo, 146 F.3d 519 (7th Cir. 1998), *cert. denied*, 525 U.S. 1167 (1999). The court affirmed a district court's refusal to depart based on the alleged "cajoling" of government agents for the defendant to introduce them to a cocaine supplier. Behavior was not so unique as to remove this case from the heartland of drug offenses.

- **Cultural Assimilation.** *United States v. Lipman*, 133 F.3d 726 (9th Cir. 1998). The Ninth Circuit upheld as a potential ground for downward departure for an illegal reentry defendant the defendant's "cultural assimilation." The defendant's 23 years of legal residence in the United States, his marriage to a United States citizen, and his five children who were United States citizens provided significant cultural ties to the United States that made his motivation for illegal reentry or continued presence different from the typical economic motivation. The court noted that it may lessen a defendant's culpability that his motivation is familial or cultural rather than economic. The court upheld the district court's discretionary decision not to depart in this case.

- **Two Murder-for-Hire Conspiracies Against One Victim.** *United States v. Scott*, 145 F.3d 878 (10th Cir. 1998). The Tenth Circuit upheld a 2-level departure based on the fact that the defendant commenced two separate murder-for-hire conspiracies against a single victim.
- **Possession of Child Pornography without Additional Wrongful Conduct.** *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000). The court reversed a downward departure based on the defendant's history of not abusing any child, of not having an inclination, predisposition, or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, and had no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant's case out of the "heartland" of §2G2.4. Consistent with the Second, Eighth, and Ninth Circuits, the court stated that the guidelines had taken into account the varying degrees of severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court held that §§2G.2.1-2G2.4 clearly reflect consideration of whether, and the degree to which, harm to minors is or has been involved. *See also United States v. Barton*, 76 F.3d 499 (2d Cir. 1996); *United States v. Wind*, 128 F.3d 1276 (8th Cir. 1997).

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

- **Cultural Differences.** *United States v. Tomono*, 143 F.3d 1401 (11th Cir. 1998). The Eleventh Circuit held that the district court erred in departing downward based on "cultural differences" in connection with the defendant's illegal importation of turtles and snakes from Japan. The court noted that the defendant was aware of the United States regulations forbidding the importation of reptiles, and yet with this understanding falsely completed Customs forms to indicate that the defendant was not bringing into the United States live animals. The court found insufficient evidence that reptiles hold a "unique" place in Japanese culture, and found that the circumstances surrounding the defendant's crime were not very different from the "heartland" of cases considered by the Sentencing Commission in drafting §2Q2.1. The court did not decide whether "cultural differences" could ever be the proper basis for departure.
- **Victim Participation in Prosecution.** *United States v. Yang*, 281 F.3d 534 (6th Cir. 2002). The Sixth Circuit vacated and remanded for resentencing where the district court had granted a 14-level downward departure to defendants primarily on the ground that the victim in the trade secrets case had, in his view, played an overly active role in the prosecution. The appellate court reversed, finding that the role of the victim was an

unmentioned factor in the guidelines but that the district court had provided no basis from which to conclude that the involvement of the victim in the prosecution removed the case from the heartland. The district court had not explained how the victim's participation was at all relevant to the offense or the offenders.

- **Application of Cross-Reference Provision.** *United States v. Fenner*, 147 F.3d 360 (4th Cir.), cert. denied, 525 U.S. 1030 (1998). The Fourth Circuit reversed a downward departure based on a significant increase in sentencing guideline ranges due to the application of a cross-reference provision that applies to firearms offenses resulting in death. Such factor did not take the case outside the "heartland" of cases under §2K2.1. The guidelines clearly take into account that application of the cross-reference will result in an enhanced guideline range and consequently this increase does not take the case outside of the "heartland."

G. Factors Taken Into Account

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

- **Adverse Civil Judgment Based on Same Conduct.** *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999). The Eighth Circuit upheld the district court's refusal to depart downward based on the fraud victim's receipt of a \$6,000,000 judgment in its civil fraud action against the defendant for the conduct at issue in the criminal case. The court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud. It is entirely foreseeable that fraud victims will seek to recover their damages in civil actions against fraud perpetrators; thus, an adverse civil judgment does not warrant a downward departure because it does not take a fraud case out of the heartland.
- **Defendant's Mistake of Fact Regarding Type of Drugs.** *United States v. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999). The Eighth Circuit upheld the district court's refusal to depart downward based on the defendants' mistake of fact where they contended they believed they were transporting marijuana instead of methamphetamine. The Court of Appeals held that the guidelines explicitly consider the effect of a drug defendant's mistake of fact on his or her sentencing accountability in §1B1.3, comment. (n.2(a)(1)(1998)), and the district court could not depart on that basis.
- **Sentencing Disparity.** *United States v. Caperna*, 251 F.3d 827 (9th Cir. 2001). The appellate court vacated and remanded a downward departure based on sentence disparity among cooperating and non-cooperating defendants. The district court had granted a downward departure based on sentence disparity among the codefendants but, on appeal, the government argued that it was not appropriate for a sentencing court to depart on the basis of codefendant sentence disparity unless the codefendant was convicted of the same

offense as the defendant. Citing *United States v. Banuelos-Rodriguez*, 215 F.3d 969 (9th Cir. 2000), the Ninth Circuit stated that a district court may not depart based on codefendant sentence disparity if the codefendant was convicted of a different offense than the defendant. The court held that the district court erred by departing downward in the defendant's case because it considered two codefendants' sentences, one of which was convicted of an offense different from the defendant's. *United States v. Contreras*, 180 F.3d 1204 (**10th Cir.**), *cert. denied*, 528 U.S. 904 (1999) (reversing a downward departure based on sentencing disparity between codefendants who were not similarly situated).

- **Federal/State Sentencing Disparity.** *United States v. Snyder*, 136 F.3d 65 (**1st Cir.** 1998). The First Circuit held that the punishment the ACCA defendant faced in federal court as compared with the more lenient sentence he would have faced in a state prosecution was not a valid basis for departure. Allowing a departure on this basis would undermine the guidelines' goal of promoting uniformity in federal sentencing. *See also United States v. Searcy*, 132 F.3d 1421 (**11th Cir.** 1998) (same).
- **Defendant's Susceptibility to Abuse in Prison Based on the Nature of Offense.** *United States v. Wilke*, 156 F.3d 749 (**7th Cir.** 1998). The court reversed a downward departure for a defendant convicted of child pornography offense based on susceptibility to abuse in prison. A court may not rely on the nature of defendant's offense as a factor justifying such a departure because doing so would establish an automatic departure for an entire class of offenders. The court could consider the defendant's sexual orientation and demeanor.
- **Voluntary Deportation.** *United States v. Galvez-Falconi*, 174 F.3d 255 (**2d Cir.** 1999). The Second Circuit reversed and remanded for the district court to consider whether the defendant had a "colorable, non-frivolous consent to deportation" that could serve as a basis for a downward departure. The court held that in exceptional circumstances, a defendant's consent to deportation, in the absence of government's consent could substantially assist in the administration of justice enough to warrant a downward departure.
- **Money Laundering Minimal Part of Overall Offense Conduct.** *United States v. Threadgill*, 172 F.3d 357 (**5th Cir.**), *cert denied*, 528 U.S. 871 (1999). The court affirmed a downward departure based on the fact that the defendants' money laundering activities "were incidental to the gambling operation" and that the "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities." *Id.* at 376. The court noted that post-*Koon*, it would not declare categorically that the incidental nature of the money laundering is an impermissible basis for departure.
- **Conduct Not Typical Money Laundering Conduct.** *United States v. Hemmingson*, 157 F.3d 347 (**5th Cir.** 1998). The Fifth Circuit held that the district court did not abuse its discretion when it determined that the defendant's offenses did not fall within the heartland of the money laundering guideline and instead departed downward by applying the fraud guideline, which resulted in lower sentencing range. The district court determined that money laundering guideline primarily targets large-scale money laundering, while the present case involved use of a conduit to conceal the fact that corporate funds were infused into a political campaign.

- **Exemplary Behavior Pending Appeals.** *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998). The Sixth Circuit reversed the district court's finding that the defendant's exemplary behavior during the pendency of appeals warranted a downward departure. The court noted that the defendant, convicted of an interstate shipment of adulterated orange juice, was granted a downward departure because the defendant had "satisfactorily complied" with all the terms of home confinement and was a "model probationer." *Id.* at 790. The court found that it is expected that a person sentenced to home confinement, or any other punishment, will "satisfactorily comply" with the terms of the sentence, or otherwise suffer the consequences of non-compliance. To reward the defendant for following the law is not a permissible grounds for departure.
- **Inadequate Additional Punishment.** *United States v. G.L.*, 143 F.3d 1249 (9th Cir. 1998). The court reversed an upward departure based on inadequate punishment which resulted from the grouping of three auto theft convictions. The court found that this case did not present an exceptional degree of sentencing inadequacy and recommended that the correct course of action is "a sentence in the upper regions of the guideline range rather than a departure."
- **Brandishing.** *United States v. Bellamy*, 264 F.3d 448 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 1097 (2002). The Fourth Circuit upheld an upward departure where the defendant, sentenced under the felon-in-possession guideline, §2K2.1, had brandished the firearm in a middle school classroom and pointed the firearm at a teacher. Because "brandishing" is a specific offense characteristic in other guidelines, the court found it likely that it would be an encouraged basis for an upward departure in appropriate cases involving other offenses.

H. Combination of Factors

- *United States v. Debeir*, 186 F.3d 561 (4th Cir. 1999). The court reversed a downward departure that was based on a combination of factors including the defendant's unique psychological condition and unusual susceptibility to abuse in prison; the defendant's alien status and employment consequences; the defendant's exposure to negative publicity; the victimless nature of the defendant's offense (defendant was convicted of interstate travel with intent to engage in sexual act with minor; "minor" actually was undercover agent); the fact that the defendant was not a pedophile; the defendant's asserted post-offense rehabilitation and extreme remorse. The court found that neither individually, nor in combination, were the circumstances, characteristics or consequences of this case so unique or extraordinary to bring it outside the heartland.
- *United States v. Drew*, 131 F.3d 1269 (8th Cir. 1997). The court reversed a downward departure for a defendant convicted of receiving child pornography based on the defendant's high intelligence, disruption of education, employment consequences, and susceptibility of abuse in prison.

- *United States v. Fortier*, 242 F.3d 1224 (**10th Cir.** 2001), *cert. denied*, 122 S. Ct. 409 (2001). The district court did not err in imposing a 13-level upward departure⁵ under various provisions of the Guidelines for the harm resulting from the bombing of a federal building based on the defendant's knowledge of the possible consequences of his actions, even though the defendant was not a bombing co-conspirator. The defendant pled guilty to several offenses resulting from his involvement with codefendants prior to the Oklahoma City bombing of 1995. The defendant appealed his original sentence and the court vacated and remanded for resentencing. On remand, the defendant was sentenced to an identical prison term and a reduced fine. On appeal, the defendant argued that the district court judge's imposition of the second sentence was vindictive and that the district court erred in applying an upward departure. On appeal, the Tenth Circuit made no finding of vindictiveness and found that there was a sufficient nexus between the defendant's admitted wrongdoing and the Oklahoma City bombing to permit an upward departure even though the defendant was not charged as a co-conspirator. The court held that the defendant bore sufficient legal responsibility for the bombing to support an upward departure.
- *United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997). The court reversed a departure based on a combination of factors, finding that a departure based on disparity in sentences between non-similarly situated defendants was inappropriate; the defendant's minor role was accounted for in §3B1.2; the purported coercion was not extraordinary; the defendant's lack of criminal history was already taken into account; and the defendant's family circumstances did not remove her case from the heartland.
- *United States v. Iannone*, 184 F.3d 214 (**3d Cir.** 1999). The court affirmed a 2-level upward departure based on a combination of factors that the district court determined removed the case from the heartland of the fraud guideline: (1) the defendant's masquerade as a decorated Vietnam combat veteran, a person in a witness protection program, and a government agent on a secret mission; (2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) the defendant's attempt to conceal his fraud by faking his own death; (4) his fabricated story about his family being killed by a drunk driver; and (5) the severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case unusual and justified a 2-level departure. The Third Circuit held that this was not an abuse of discretion.
- *United States v. Johnstone*, 251 F.3d 281 (**1st Cir.** 2001). The appellate court affirmed the district court's decision to decline awarding the defendant a downward departure on the grounds of the defendant's medical condition, the purported overstatement of the seriousness of his criminal history, and/or his motive in returning to the United States. On

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

appeal, the defendant argued that the court had erred in not granting the downward departure, but the First Circuit disagreed. The court found that it had no jurisdiction to review a district court's decision not to depart downward unless the district court misunderstood its authority to do so. The record indicated no such misunderstanding on the part of the district court.

- *United States v. Lewis*, 235 F.3d 394 (8th Cir. 2000). The court affirmed an upward departure on account of pervasive obstructive conduct, extreme psychological injury (§5K2.3), unlawful restraint (§5K2.4), and the extreme conduct (§5K2.8) involved in the defendant's case, in which he was convicted of conspiring to harbor an illegal alien and harboring an illegal alien. The defendant held captive an illegal alien, forcing him to work as a servant in defendant's household. The illegal alien was repeatedly physically beaten, tormented, sexually abused, and deprived of nourishment and medical care until his death, when he was buried in the backyard of defendant's home.
- *United States v. Payton*, 159 F.3d 49 (2d Cir. 1998). The Second Circuit reversed a downward departure based on a combination of factors: the defendant's lack of a positive male role model, his history of drug abuse and failed treatment, the defendant's ineligibility for credit for his pretrial detention, and his learning disability and loss of educational opportunities. The first two bases were invalid, the third was not factually supported, and the last was inadequate to alone support a departure.
- *United States v. Reed*, 167 F.3d 984 (6th Cir.), cert. denied, 528 U.S. 897 (1999). The Sixth Circuit reversed a downward departure based in part on the district court's assessment that the defendant's conduct was on the outer edges of that contemplated by the money laundering statutes and, in part, on the time and cost involved in her interlocutory appeal. Although finding the defendant less culpable than the typical money launderer, the district court provided no specifics and offered no factors not contemplated by the guidelines. Further, although delay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure, the appellate court stated that neither the district judge nor the defendant provided any evidence that the length of the delay or the costs involved in the appeal were unusual; in fact, the defendant remained free on bond during the entire process.
- *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997) (en banc), cert. denied, 522 U.S. 1075 (1998). (en banc). The court affirmed an upward departure for a defendant convicted of maliciously damaging a post office with an explosive based on significant personal injury and property damage.
- *United States v. Winters*, 174 F.3d 478 (5th Cir.), cert. denied, 528 U.S. 969 (1999). The court reversed a downward departure based on susceptibility to abuse in prison for a state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner. The officer faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the Fifth Circuit. The district court then departed downward on the grounds that his status as an officer made him especially susceptible to abuse in prison and that the guidelines sentence,

which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the Fifth Circuit reversed the downward departures. No other factors existed that made the defendant more susceptible to abuse in prison than any other convicted corrections officer. Because the district court articulated no adequate departure factors and based the departure only on its preference for what the sentence should be, the case was remanded for resentencing without the benefit of the departures.

- *United States v. Yeaman*, 248 F.3d 223 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 816 (2002). The appellate court reversed and remanded the case for resentencing. The defendants were convicted on several counts of mail and wire fraud and at resentencing requested a downward departure based on extraordinary rehabilitation, disparity in sentencing among similarly situated codefendants, extraordinary family circumstances, and reincarceration after completion of a sentence. At resentencing, the district court departed downward 17 levels for one defendant and 16 levels for the other defendant in order to reimpose their original sentences without stating with specificity which factor was the basis for its substantial departure. On appeal, the court found that although the district court found “the record of both individuals while in custody was exemplary and reflected a concentrated attitude of rehabilitation and cooperation,” nothing pointed to anything “remarkable” or “exceptional” in the defendants’ “rehabilitation” enough to warrant a downward departure. 245 F.3d at 228. The court also found that the record lacked factual findings regarding whether a departure was granted based on disparities in sentencing and noted such disparities are generally not a valid basis for departure absent prosecutorial misconduct. The court further determined that a discussion of extraordinary family circumstances as a basis for departure was not warranted since neither defendant urged this as the basis for his departure. Finally, the court found that reincarceration as the result of a successful government appeal of an earlier too-lenient sentence cannot move the case beyond the “heartland” unless there were extraordinary circumstances surrounding the reincarceration or there were extraordinary effects from the reincarceration. No such extraordinary circumstances or effects were presented by the defendants in this case. *Id.* at 233.

VI. Criminal History Departures (Chapter Four)

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

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

- **Methodology for Departing.** *United States v. Lawrence*, 161 F.3d 250 (4th Cir. 1998), cert. denied, 526 U.S. 1031 (1999). The court vacated and remanded an upward departure because the trial court had not explained which criminal conduct was not adequately accounted for or how it reached the guideline range it did. In doing so, the Fourth Circuit reiterated its methodology for criminal history departures. A sentencing court can depart to the next higher category and move on to a still higher category only upon a finding that the previous category failed adequately to reflect the seriousness of the defendant's record. If the court gets to level VI and still finds the sentencing options insufficient, the district court may depart to the guideline range applicable to career offenders similar to the defendant if defendant's prior criminal record is sufficiently serious to conclude that he should be treated as a career offender. The appellate court found that the district court had erred in not considering intermediate criminal history categories, particularly where the unaccounted for criminal conduct would only have resulted in Criminal History Category II, with a corresponding guideline range below the applicable mandatory minimum. See also *United States v. Boe*, 117 F.3d 830 (5th Cir. 1997) (reversing and remanding an upward departure from Category I to Category VI that had been granted to reflect the seriousness of the defendant's past conduct).

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

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

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

Second, in granting a departure pursuant to §4A.13, a court should proceed along the horizontal axis, considering whether each criminal history category is adequate. Finally, the district court had abused its discretion in determining that the seriousness of the defendant's criminal history was overstated. The circuit court pointed out that the defendant had six prior felonies, including a drug conviction and a robbery conviction, and two prior misdemeanors. These crimes resulted in his characterization as a career offender and resulted in 19 criminal history points. In addition, the district court had focused on the underlying facts of the defendant's crimes whereas the policy statement governing §4A1.3 departures is concerned with the pattern and timing of prior convictions.

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

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

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

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

- **Uncounted Foreign Convictions.** *United States v. Fordham*, 187 F.3d 344 (3d Cir. 1999), *cert. denied*, 528 U.S. 1175 (2000). The court affirmed an upward departure based in part on a foreign conviction that had not been counted. The district court found that Criminal History Category I significantly underrepresented the seriousness of the defendant's criminal history and departed to Category II based on the uncounted foreign conviction. The appellate court concluded that the district court was within its discretion to hold that the foreign conviction was fair and upheld the departure.
- **Commission of Additional Offenses While Previously on Supervised Release.** *United States v. King*, 150 F.3d 644 (7th Cir. 1998). The court approved an upward departure under §4A1.3 on the grounds that the defendant had committed five bank robberies while on supervised release for an earlier conviction for bank robbery. The defendant's criminal history category did not adequately reflect the seriousness of his conduct which was outside the heartland of §4A1.1(d).
- **Excessive Number of Criminal History Points.** *United States v. Melgar-Galvez*, 161 F.3d 1122 (7th Cir. 1998). The court upheld a 1-level upward departure based on the district court's belief that the defendant's excess number of criminal history points (18) was not adequately reflected in his assigned criminal history category (VI) and on the likelihood of the defendant's recidivism.
- **Relation to Safety Valve.** *United States v. Resto*, 74 F.3d 22, 28 (2d Cir. 1996). The Second Circuit agreed with the district court that even though defendant was granted a downward departure to Criminal History Category I, he was ineligible for the safety valve because he had more than one criminal history point as determined under the guidelines.
- **Consolidation of Related Prior Sentences.** *United States v. Rivas*, 922 F.2d 1501, 1504 (10th Cir. 1991). The Tenth Circuit upheld an upward departure where the district court's treatment as a single sentence of defendant's factually related three felony convictions for first-degree murder, solicitation, and kidnaping did not adequately reflect defendant's criminal history.
- **Remote Convictions.** *United States v. Wyne*, 41 F.3d 1405, 1408-09 (10th Cir. 1994). The court remanded an upward departure because the eight misdemeanor convictions which occurred more than 30 years prior to defendant's arrest were not serious and should have been given little, if any, weight.

United States v. Brown, 51 F.3d 233, 234 (11th Cir. 1995). The court affirmed an upward departure even though remote fraud offenses were not similar to the instant escape offense because the district court had found them to be serious.

- **Juvenile Convictions.** *United States v. Franklyn*, 157 F.3d 90, 99 (2d Cir. 1998). The Second Circuit affirmed an upward departure based on three uncounted remote juvenile convictions and the likelihood of the defendant's recidivism.

United States v. Barber, 200 F.3d 908, 912-13 (**6th Cir.** 2000). The court upheld an upward departure on the basis that the defendant's criminal history category did not reflect his past criminal conduct, which included nine uncounted juvenile convictions, or the likelihood of his recidivism.

- **Civil Misconduct.** *United States v. Hernandez*, 160 F.3d 661, 670 (**11th Cir.** 1998). The court upheld an upward departure based on similar, albeit civil, misconduct. Thus, the defendant's failure to pay his employees in accordance with minimum wage and overtime guidelines and to comply with a settlement agreement with the government regarding that violation was a proper basis for departure under §4A1.3.
- **Relevant Conduct.** *United States v. Hunerlach*, 258 F.3d 1282 (**11th Cir.** 2001). The Eleventh Circuit vacated an upward departure that had been based on relevant conduct that could not be counted as a prior conviction under §4A1.2. The court found that when conduct underlying a conviction is relevant conduct and is considered in calculating the applicable base offense level, that conduct cannot be considered a "prior sentence" under §4A1.3 and used to justify a departure. *See also United States v. Cade*, 279 F.3d 265 (5th Cir. 2001) (reaching same conclusion).

VII. Substantial Assistance Departures (§5K1.1)⁶

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

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

United States v. Aderholt, 87 F.3d 740, 742-43 (**5th Cir.** 1996). The Fifth Circuit has held that where the prosecutor retains "sole discretion in plea agreement" to make a §5K1.1 motion, a decision not to make such a motion is reviewable only for an unconstitutional motivation.

United States v. Cruz-Guerrero, 194 F.3d 1029, 1031 (**9th Cir.** 1999). The court upheld a district court's refusal to grant a downward departure based on substantial assistance to the government where the government had not moved for such departure. Section 5K1.1 requires a motion to be filed by the government for consideration of the defendant's substantial assistance. The court reinforced its interpretation of §5K1.1 to mean that, in the absence of arbitrariness or unconstitutional motivation on the part of the government, a district court may

⁶A more extensive analysis of departures under §5K1.1 is provided in USSC's publication "Substantial Assistance Departures" Case Law.

not depart downward from the guidelines for substantial assistance unless the government moves for such a departure.

United States v. Doe, 233 F.3d 642, 643 (1st Cir. 2000). The First Circuit has held that to successfully challenge the government's discretionary decision to not file a §5K1.1 motion, a defendant must show bad faith, requiring proof of either an unconstitutional motive or arbitrariness in a breach of contract.

United States v. Isaac, 141 F.3d 477, 482 (3d Cir. 1998). The Third Circuit held that the district court can review a prosecutor's decision not to file a §5K1.1 for "good faith," where the plea agreement gave the prosecutor "sole discretion" to make a determination as to substantial assistance.

In re Sealed Case No. 97-3112, 181 F.3d 128, 142 (D.C. Cir.), *cert. denied*, 528 U.S. 989 (1999). The District of Columbia Circuit held that the district court cannot depart downward for substantial assistance absent a motion from the government, unless the government's refusal to file such motion was done as a bad faith breach of a plea agreement or with an unconstitutional motive.

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

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

- **No Requirement that Government Recommend Specific Sentence.** *United States v. Campo*, 140 F.3d 415, 419-20 (2d Cir. 1998). The Second Circuit reversed where the district court had declined to depart downward in response to the government §5K1.1 motion because the government did not recommend a specific sentence.
- **No Functional Equivalent of Motion.** *United States v. Brick*, 905 F.2d 1092, 1098-99 (7th Cir. 1990). The Seventh Circuit held that the government's statements at sentencing that the defendant had assisted in the prosecution and conviction of another cocaine dealer, and that his cooperation "should be considered" did not satisfy motion requirement of §5K1.1. The guidelines unambiguously require the filing of a motion.

United States v. Difeaux, 163 F.3d 725, 728 (2d Cir. 1998). The court upheld a decision by the district court not to grant a downward departure based on a letter from a Deputy U.S. Marshal detailing the defendant's assistance in capturing fugitives. The letter did not request a downward departure the Deputy Marshal was not "the government" for purposes of §5K1.1, and it is the prosecutor who must make the motion.

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

United States v. Kaye, 140 F.3d 86 (**2d Cir.** 1998). The court remanded for resentencing, holding that §5K1.1 governs assistance provided to federal authorities. As a result, substantial assistance to local law enforcement can be considered under §5K2.0.

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

United States v. Garcia, 926 F.2d 125, 128 (**2d Cir.** 1991). The court upheld a downward departure where the defendant's cooperation broke the "log jam in a multi-defendant case" in an over-clogged judicial system, and "facilitated the proper administration of justice."

United States v. Dorsey, 61 F.3d 260 (**4th Cir.** 1995). The Fourth Circuit, pre-*Koon*, upheld a refusal to depart, concluding that "substantial assistance to the judicial system" is not a proper basis for departure. *See also United States v. Shrewsberry*, 980 F.2d 1296, 1298 (**9th Cir.** 1992) (same); *United States v. Lockyer*, 966 F.2d 1390, 1392 (**11th Cir.** 1992) (same).

United States v. Dethlefs, 123 F.3d 39 (**1st Cir.** 1997). The First Circuit vacated and remanded departures based on conduct that conserved judicial resources and facilitated the administration of justice. Although a departure on such grounds could theoretically be proper, the facts did not support it in this case.

VIII. The Extent of Departures

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

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

In *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (1998), the Ninth Circuit held that the unitary abuse of discretion standard announced for analyzing the propriety of departures in *Koon* applies equally to an analysis of the extent of departures. The court held that where "a district court sets out findings justifying the magnitude of its decision to depart and extent of departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed." *Id.* at 919. For example, in *United States v. Mathews*, 120 F.3d 185 (**9th Cir.** 1997), the district court upwardly departed in sentencing a

defendant who placed a bomb that injured a third party, based on the substantial risk of death or serious injury to more than one person. The Ninth Circuit found the extent of the departure unreasonable, in that it exceeded the sentence the defendant could have received had he been convicted of the offenses the district court analogized to in departing. Where a guideline is used by analogy as approximating the defendant's conduct, the reasonableness of the departure is evaluated by treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it.

In *United States v. Roston*, 168 F.3d 377 (**9th Cir.**), *cert. denied*, 528 U.S. 843 (1999), the Ninth Circuit approved a 7-level upward departure for extreme conduct where the defendant was convicted of second-degree murder for killing his wife on their honeymoon. The court noted that, although such a departure was substantial, the district court was well-positioned to determine if the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. Following *Sablan*, the court emphasized that "'where a district court sets out findings justifying the magnitude . . . and extent of its departure from the Guidelines, and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed.'" *Id.* at 378 (quoting *Sablan*, 114 F.3d 913, 919 (**9th Cir.** 1997) (*en banc*)).

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

The Seventh Circuit does not read *Koon* as altering its reviewing authority over the magnitude of a departure chosen by the district court. According to that appellate court, although *Koon* changed the standard of review with respect to whether to depart at all, it did not change the circuit's rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. *See United States v. Horton*, 98 F.3d 313, 319 (**7th Cir.** 1996).

In *United States v. Leahy*, 169 F.3d 433, 445 (**7th Cir.** 1999), the Seventh Circuit rejected a 10-level upward departure, stating, "[w]hile this Court has approved of looking to an analogous sentencing guideline in measuring the extent of a departure, we must be mindful that the analogy selected is an appropriate one." The court of appeals held that the facts of the case did not warrant the district court's analogy to the terrorism guideline, since the defendant did not attempt to influence or affect the conduct of the government and had at most threatened to use the toxins he had developed against various family members and friends. The court found it significant, in looking at other guidelines, that the defendant could have attempted to use the toxin, even causing significant injury to

a victim, and potentially have received a less severe sentence than that which the district court imposed for his conduct of merely possessing a toxin. The court of appeals held that a departure logically should not exceed the level the defendant could have received had he actually committed a more serious offense.

The Tenth Circuit has held that, in departing from the applicable guideline range, a district court "must specifically articulate reasons for the degree of departure." *United States v. Yates*, 22 F.3d 981, 990 (10th Cir. 1994) (quoting *United States v. Flinn*, 987 F.2d 1497, 1502 (10th Cir. 1993)). The district court "may use any 'reasonable methodology hitched to the Sentencing Guidelines to justify the reasonableness of the departure,'" including using extrapolation from, or analogy to, the guidelines. *United States v. Jackson*, 921 F.2d 985, 991 (10th Cir. 1990) (*en banc*) (quoting *United States v. Harris*, 907 F.2d 121, 124 (10th Cir. 1990)). The Tenth Circuit has indicated a view that the *Koon* decision does not affect the analysis of the degree of departure. See *United States v. Collins*, 122 F.3d 1297, 1303 (10th Cir. 1997). Post-*Koon*, the court has reaffirmed that, while the district court is not required to justify its degree of departure from the guidelines with mathematical exactitude, its justification must include "some method of analogy, extrapolation, or reference to the guidelines'." *United States v. Whiteskunk*, 162 F.3d 1244, 1254 (10th Cir. 1998) (quoting *United States v. O'Dell*, 965 F.2d 937, 939 (10th Cir. 1992).

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

IX. Notice Requirements

A. The Sentencing Reform Act's Procedural Amendments

The Sentencing Reform Act of 1984, which initiated the guidelines system, also made procedural reforms to achieve the congressional goals of "certainty and fairness" in sentencing. Because a court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment, more formality was thought to be necessary in determining such issues. Federal Rule of Criminal Procedure 32 was amended to provide for adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence. The amended rule directs the probation officer to prepare a presentence report addressing all matters germane to the sentence and requires that the report be disclosed to the parties so that they may file responses or objections with the court. Rule 32 mandates that the parties be afforded "an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." Fed. R. Crim. P. 32(a)(1).

B. *Burns v. United States*

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

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

The circuit courts have further refined the concept of what notice is required by Rule 32:

United States v. Canada, 960 F.2d 263 (1st Cir. 1992). The First Circuit found that the *Burns* notice requirements would not apply to an upward adjustment to the offense level pursuant to Chapter Three, at least where the facts relevant to the adjustment are known to the defendant.

Several courts have held that the *Burns* notice requirements do not apply to deviations from the nonbinding policy statements found in Chapter Seven of the *Guidelines Manual*. *United States v. Burdick*, 100 F.3d 882, 885 (10th Cir. 1996), *cert. denied*, 520 U.S. 1133 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (11th Cir. 1996), *as modified by*, 92 F.3d 1108 (11th Cir. 1996), *cert. denied*, 519 U.S. 1071 (1997); *United States v. Mathena*, 23 F.3d 87, 93 n.13 (5th Cir. 1994); *United States v. Pelensky*, 129 F.3d 63, 70 (2d Cir. 1997).

United States v. Morris, 204 F.3d 776, 778 (7th Cir. 2000). The Seventh Circuit reversed an upward departure, finding that boilerplate language in the presentence report that referred only to the possibility that §4A1.3(e) could be a basis for departure was insufficient notice to the defendant. The court held that the notice must refer not only to the guideline but also to the rationale for the departure and the facts that support the theory of departure.

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

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

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997). The Eighth Circuit vacated and remanded an upward departure under §5K2.8 based on the cruel and brutal nature of the offense

when the presentence report stated explicitly that there were no factors warranting departure and the possibility of departure was not brought up until just before the court pronounced the sentence.

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

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