Selected Departure and Variance Decisions

Prepared by
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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS

This document contains annotations to judicial opinions addressing some of the most commonly applied departure provisions. It also addresses issues relating to variances outside the guideline range. The document was developed to help judges, lawyers and probation officers locate relevant authorities when applying the federal sentencing guidelines. It does not include all authorities needed to correctly apply the guidelines. Instead, it presents authorities that represent jurisprudence on selected departure provisions. The document is not a substitute for reading and interpreting the actual guidelines manual; rather, the document serves as a supplement to reading and interpreting the guidelines manual.

I. GENERAL PRINCIPLES

A. PROCEDURE OF THE SENTENCING COURT

Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), sentencing courts should engage in a three-step approach to federal sentencing.

First, the court should apply the sentencing guidelines to establish the sentencing guideline range. *Gall v. United States*, 552 U.S. 38 (2007) (stating that the district court should begin all sentencing proceedings by correctly calculating the applicable guideline range, and that "to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark").

Second, the court should determine whether a departure is consistent with the guidelines. *See, e.g.*, *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006) (holding that guideline departures are still a relevant consideration for determining the appropriate guideline sentence); *United States v. Jordi*, 418 F.3d 1212 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"); *see also United States v. Lofink*, 564 F.3d 232 (3d Cir. 2009) (holding that a district court's failure to rule on the defendant's departure arguments constitutes procedural error). *But see United States v. Johnson*, 427 F.3d 423 (7th Cir. 2005) (stating that the defendant's "framing of the issue as one about 'departures' has been rendered obsolete by our recent decisions applying *Booker*," and holding that "[i]t is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory"); *United States v. Mohammed*, 459 F.3d 979 (9th Cir. 2006) (holding that, in light of *Booker*, it would "treat such so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range" and subject it to a "unitary review for reasonableness, no matter how the district court styles its sentencing decision"); *see also United States v. Brown*, 578 F.3d 221 (3d Cir. 2006) (vacating and remanding where district court failed to distinguish whether above guideline sentence was

product of a departure or a variance); *United States v. Miller*, 479 F.3d 984 (8th Cir. 2007) (holding that conflating departure considerations and the variance analysis can be harmless error where the ultimate sentence is not unreasonable).

Third, the court should determine whether a variance (a sentence outside the advisory guideline system) is warranted under the authority of 18 U.S.C. § 3553(a).

B. NOTICE REQUIREMENTS

If the district court is considering granting a departure pursuant to Federal Rule of Criminal Procedure 32(h), reasonable notice must be given to the parties unless the grounds for the departure are identified in the presentence report or in a prehearing submission. *Burns v. United States*, 501 U.S. 129 (1991); *United States v. Dozier*, 444 F.3d 1215 (10th Cir. 2006). If, however, the district court is considering granting a variance, Rule 32(h) does not require the district court to provide advance notice to the parties. *Irizarry v. United States*, 553 U.S. 708 (2008). *But see United States v. Walker*, 447 F.3d 999 (7th Cir. 2006) (stating that because Seventh Circuit precedent has "declared the concept of departures 'obsolete' and 'beside the point,'" Rule 32(h) no longer has "continuing application").

C. REVIEW OF SENTENCES ON APPEAL

The appellate court engages in a two-step process on review. The appellate court "first ensure[s] that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . [and] then consider[s] the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard[,] . . . tak[ing] into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall v. United States*, 552 U.S. 38 (2007).

As before *Booker*, the "district court's decision to deny a Guideline-based departure . . . is not reviewable by [the reviewing court] so long as the district court was aware of and understood its discretion to make such a Guideline-based departure." *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006); *United States v. Kornegay*, 410 F.3d 89 (1st Cir. 2005); *United States v. Frokjer*, 415 F.3d 865 (8th Cir. 2005). Unlike before, however, calculation of the guideline sentence, including any decisions regarding guideline-based departures, "is only the first step in sentencing decisions under *Booker*, for the court must also consider the § 3553(a) factors before making its ultimate decision" that the defendant's sentence is reasonable. *United States v. Mickelson*, 433 F.3d 1050 (8th Cir. 2006). Thus, while the majority of circuits have held that the district court must continue to base guideline departures on proper guideline factors before considering whether the case warrants a variance based on § 3553(a) factors, "many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court—with greater latitude—under section 3553(a)." *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006); *United States v. Andrews*, 447 F.3d 806 (10th Cir. 2006) (holding that "while the guidelines discourage consideration of certain factors for downward departures, *Booker* frees courts to consider those factors as part of their analysis under § 3553(a)"); *United*

States v. Martin, 520 F.3d 87 (1st Cir. 2008) (collecting cases, and holding that while "[p]olicy statements issued by the Sentencing Commission are, of course, pertinent to sentencing determinations even under the now-advisory guidelines, . . . such policy statements normally are not decisive as to what may constitute a permissible ground for a variant sentence in a given case").

Pursuant to the Supreme Court's decision in *Rita v. United States*, 551 U.S. 338 (2007), the courts of appeals may apply a presumption of reasonableness to a within-guideline sentence that reflects a proper application of the sentencing guidelines. *See Nelson v. United States*, 555 U.S. 350 (2009); *Spears v. United States*, 555 U.S. 261 (2009). *But see United States v. Carty*, 520 F.3d 984 (9th Cir. 2008) (en banc) (declining to adopt an appellate presumption of reasonableness for sentences imposed within the guideline range, but recognizing, however, that "a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal"); *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006) (en banc) (same); *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (same); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006) (same); *United States v. Talley*, 431 F.3d 784 (11th Cir. 2005) (per curiam) (same).

II. DEPARTURES

A. CHAPTER FOUR, PART A – CRIMINAL HISTORY

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

Section 4A1.3 provides for both upward and downward departures based on the inadequacy of the otherwise applicable criminal history category. *See also* §5H1.8. (Criminal History (Policy Statement)).

i. Upward Departures:

The policy statement provides that an upward departure may be warranted "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." *See also United States v. Brewster*, 127 F.3d 22 (1st Cir. 1997) (holding that a departure based on the inadequacy of a defendant's criminal history score can be based on prior dissimilar conduct that the defendant was not charged with or convicted of, if the conduct is so serious that, unless it is considered, the criminal history category will be manifestly deficient as a measure of the defendant's past criminal behavior or likely recidivism). The court may use the following information as the basis for an upward departure:

(A) Prior sentence(s) not used in computing the criminal history category (for example, sentences for foreign and tribal offenses). *See, e.g.*, *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003) (affirming the district court's decision to depart based on the fact

that the defendant had numerous Canadian convictions); *United States v. Chesborough*, 333 F.3d 872 (8th Cir. 2003) (affirming the district court's decision to upwardly depart based in part on the large number of criminal convictions too old to be counted as part of the defendant's criminal history).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions. *See* §4A1.3, comment. (n.2(A)(ii)) (listing as an example a case in which the defendant received "a prior consolidated sentence of ten years for a series of serious assaults.").

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order. *See* §4A1.3, comment. (n.2(A)(iii)) (listing as an example a case in which the defendant committed a "similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding"); *see also United States v. Hernandez*, 160 F.3d 661 (11th Cir. 1998) (affirming the district court's decision to depart based in part on the defendant's failure to abide by an administrative settlement agreement arising out of claims that he failed to pay his employees minimum wage and overtime in violation of the Fair Labor Standards Act).

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense. *See* §4A1.3, comment. (n.2(A)(iv)) (listing as an example a case in which the defendant committed the instant offense "while on bail or pretrial release for another serious offense").

(E) Prior **similar** adult criminal conduct not resulting in a criminal conviction. *See, e.g., United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007) (holding that the court cannot depart upward based on uncharged, *unrelated* misconduct); *United States v. Rice*, 358 F.3d 1268 (10th Cir. 2004) (holding that the district court cannot use similar uncharged conduct to increase both the defendant's offense level and as a basis for a departure under §4A1.3), *cert. granted, judgment vacated on other grounds by Rice v. United*

States, 543 U.S. 1103 (2005); *United States v. Hunerlach*, 258 F.3d 1282 (11th Cir. 2001) (same).

According to the guideline, however, "[a] prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement."

Section 4A1.3 also provides guidance for the determination of the extent of an upward departure. In general, the court is to "determine the extent of a departure . . . by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant's." *See United States v. Azure*, 536 F.3d 922 (8th Cir. 2008) (finding that the district court abused its discretion when it upwardly departed from Criminal History Category I to Category VI without attempting "to assign hypothetical criminal history points to the conduct that did not result in convictions," and not discussing "intermediary categories II, III, IV, or V before deciding on category VI"); *United States v. Valdes*, 500 F.3d 1291 (11th Cir. 2007) (stating that, under §4A1.3, if a sentencing judge wishes to depart upwards due to a defendant's criminal history the court must "explicitly consider" the next criminal history category up and make a determination as to whether that range is appropriate).

If the court wants to upwardly depart from 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." In such a case, when determining "whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record." *See* §4A1.3, comment. (n.2(B)); *see also United States v. Walker*, 284 F.3d 1169 (10th Cir. 2002) (holding that the district court erred by relying solely on the number of criminal history points exceeding the requirement of Criminal History Category VI for the degree of upward departure).

ii. Downward Departures:

The policy statement provides that a downward departure may be warranted "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." Such a departure may be warranted "if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period." *See* §4A1.3, comment. (n.3).

Section 4A1.3 prohibits "[a] departure below the lower limit of the applicable guideline range for Criminal History Category I." *See, e.g.*, *United States v. Atondo-Santos*, 385 F.3d 1199 (9th Cir. 2004) (holding that a downward departure under the sentencing guidelines based on first-time offender status is not warranted, because the guidelines already take that factor into account). The guideline also prohibits a downward departure of any amount for "(i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and

dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors)."

For career offenders within the meaning of §4B1.1 (Career Offender), the guideline limits the extent of a downward departure to one criminal history category.

Section 4A1.3 also makes clear that a "defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category)."

iii. Written Requirements:

If the court decides to depart from the otherwise applicable criminal history category, the court is required to specify in writing the following:

(1) For an upward departure:

> the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

(2) For a downward departure:

> the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

Remand is appropriate when the district court fails to adequately explain the basis for its departure. *United States v. Wallace*, 461 F.3d 15 (1st Cir. 2006). Different circuits require a different level of specificity in their findings. For example, the Second Circuit holds that as long as the reasons for departure are fully explained, "a mechanistic, step-by-step procedure is not required." *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003). The Eighth Circuit allows the court to choose any method as long as it is not inconsistent with the guidelines, *United States v. Gonzales-Ortega*, 346 F.3d 800 (8th Cir. 2003), and the Tenth Circuit requires a reasoned method of analogy for extrapolation in departing upward. *United States v. Hurlich*, 348 F.3d 1219 (10th Cir. 2003).

iv. Criminal History Departures Post-*Booker*

As discussed in the "variance" section below, to avoid the strict requirements of §4A1.3, many courts now use variances to impose an outside-the-guidelines sentence based on the inadequacy of the defendant's criminal history category. *See, e.g.*, *United States v. Mejia-*

Huerta, 480 F.3d 713 (5th Cir. 2007) ("We reiterate for emphasis that §4A1.3 applies only to departures—based on unrepresentative criminal history—not to variances.").

B. CHAPTER FIVE, PART K – DEPARTURES: SUBSTANTIAL ASSISTANCE TO AUTHORITIES

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

Section 5K1.1 provides for a downward departure from the guidelines if the government files a motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." The amount of the reduction "shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following":

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered; *See* §5K1.1, comment. (n.3) (stating that the court should give "substantial weight . . . to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain"). *But see United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005) (stating that the court is not bound by the government's recommendation as to how far to depart); *United States v. Milo*, 506 F.3d 71 (1st Cir. 2007) (same); *United States v. Grant*, 493 F.3d 464 (5th Cir. 2007) (same).

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

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

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

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

The Commentary to §5K1.1 states that "[u]nder circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence."

A reduction under this policy statement must "be considered independently of any reduction for acceptance of responsibility." *See* §5K1.1, comment. (n.2).

i. Statement of Reasons

While the court is afforded "[l]atitude" in reducing a defendant's sentence based upon variable relevant factors, the court must, pursuant to 18 U.S.C. § 3553(c), state the reasons for reducing a sentence under this policy statement. This can be done *in camera* or under seal to protect the safety of the defendant or to avoid disclosure of information. *See* §5K1.1, comment. (backg'd).

ii. Motion Requirement

If the government seeks departure from the guideline range based on the defendant's cooperation, it must make a motion under §5K1.1. A departure for cooperation from a statutory mandatory minimum penalty requires a separate motion under 18 U.S.C. § 3553(e). *Melendez v. United States*, 518 U.S. 120 (1996). When departing below a mandatory minimum sentence, the appropriate point of departure pursuant to §5K1.1 is the statutorily required mandatory minimum sentence, rather than the lower otherwise applicable guideline range. *See, e.g.*, *United States v. Auld*, 321 F.3d 861 (9th Cir. 2003).

The government can file a motion pursuant to 18 U.S.C. § 3553(e) after a case has been remanded for resentencing. *United States v. Mills*, 491 F.3d 738 (8th Cir. 2007).

iii. District Court Review

The government has the power, not the duty, to file a motion when the defendant has provided substantial assistance. *See Wade v. United States*, 504 U.S. 181 (1992). In other words, the district court's power is conditioned on the government's motion. Nevertheless, "a district court may review the government's refusal to make a substantial assistance motion under section 3553(e) or §5K1.1, if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest." *United States v. Perez*, 526 F.3d 1135 (8th Cir. 2008). To obtain an evidentiary hearing, the defendant "'must make a substantial threshold showing that the government's refusal to make a substantial assistance motion was premised on an improper motive.'" *Id*. at 1138 (quoting *United States v. Mullins*, 399 F.3d 888 (8th Cir. 2005)).

Some courts have held that one constitutionally impermissible motive for a government refusal to file is a desire to penalize the cooperating defendant for choosing to exercise his right to trial in his own case. *See United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993); *United States v. Khoury*, 62 F.3d 1138 (9th Cir. 1995).

Some circuits have also held that substantial assistance plea agreements create a quasi-contractual obligation of government good faith even in circumstances that would not meet the *Wade* requirements. *See, e.g.*, *United States v. Doe*, 233 F.3d 642 (1st Cir. 2000); *United States v. Roe*, 445 F.3d 202 (2d Cir. 2006). *But see, e.g.*, *United States v. Aderholt*, 87 F.3d 740 (5th Cir. 1996); *United States v. Gates*, 461 F.3d 703 (6th Cir. 2006).

iv. Post-*Booker* Issues

Since *Booker*, the procedure for granting a substantial assistance motion has remained largely unchanged. The Sentencing Reform Act and the guidelines still explicitly require a government motion as a precondition for a departure based on substantial assistance.

A departure under §5K1.1 and 18 U.S.C. § 3553(e) can only be based on substantial assistance, not on other §3553(a) factors. *See, e.g.*, *United States v. Desselle*, 450 F.3d 179 (5th Cir. 2006) (joining the majority of circuits in holding that the extent of a §5K1.1 or §3553(e) departure must be based solely on assistance-related concerns); *United States v. Anzalone*, 148 F.3d 940 (8th Cir. 1998) (stating that the government cannot base its §5K1.1 decision on factors other than the substantial assistance provided by the defendant), *reh'g en banc granted, opinion vacated by* 1998 U.S. App. LEXIS 23921, *and reinstated by* 161 F.3d 1125 (1998); *United States v. A.B.*, 529 F.3d 1275 (10th Cir.) (holding that the district court had authority under § 3553(e) to depart below the mandatory minimum but "was without authority to go further below the statutory minimum based upon § 3553(a) factors" after granting the substantial assistance departure); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008) (holding that the sentencing court committed "procedural *Gall* error" when it based the extent of a §5K1.1 departure on an impermissible consideration—namely, one that did not pertain to cooperation).

On review, as discussed above, courts have still held that the district court's decision not to depart is not reviewable on appeal unless the court was unaware of its power to do so. Nevertheless, courts do now review the final sentence for reasonableness. *See, e.g.*, *United States v. Berni*, 439 F.3d 990 (8th Cir. 2006) ("The fact that an advisory Guidelines determination involves a section 5K1.1 departure does not shield the overall sentence from our review for reasonableness").

§5K1.2. Refusal to Assist (Policy Statement)

The policy statement provides that a "defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor."

The defendant's refusal to assist authorities may be considered in sentencing within the guideline range. *United States v. Klotz*, 943 F.2d 707 (7th Cir. 1991).

C. CHAPTER FIVE, PART K – DEPARTURES: OTHER GROUNDS FOR DEPARTURE

§5K2.0. Grounds for Departure (Policy Statement)

i. Introduction

In certain cases, the guidelines permit a court to depart from the applicable guideline range if 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." As discussed in Chapter 1, Part A of the *Guidelines Manual*:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

In cases other than child crimes and sex offenses (discussed below), the court may depart (either up or down) from the guideline range in the following situations:

(1) If there exists in a case circumstances of a kind not adequately taken into consideration in determining the applicable guideline range.

This includes the **encouraged departures** (discussed below)—some of which are found in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure), and some of which are found in specific guideline provisions.

This also includes the **exceptional case** in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence. Such circumstances are intended to be rare. The Commission determined that all potential departure factors "cannot, by their very nature, be comprehensively listed and analyzed in advance." USSG §5K2.0, p.s. (1995).

(2) If there exists in a case circumstances present to a degree not adequately taken into consideration in determining the applicable guideline range.

This includes the **exceptional case** in which the court determines that a circumstance already taken into account in the guideline is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(3) If there exists in a case offender characteristics or other circumstances that are not ordinarily relevant, but are present in an exceptional degree.

This includes the **discouraged departures** (discussed below), which are found in Chapter Five, Part H (Specific Offender Characteristics).

ii. Prohibited Grounds for Departure

The guidelines also include several factors (discussed below) that the court cannot take into account as grounds for departure.

(1) Any circumstance specifically prohibited as a ground for departure in **§§5H1.10** (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), **5H1.12** (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of **5H1.4** (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of **5K2.12** (Coercion and Duress), and **5K2.19** (Post-Sentencing Rehabilitative Efforts).

§5H1.10. Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)

The policy statement provides that the factors listed in the title are not relevant in the determination of a sentence. *See, e.g.*, *United States v. Guzman*, 236 F.3d 830 (7th Cir. 2001) (holding that the court erred by departing downward based on the defendant's cultural heritage—the district court had found that the defendant was more likely to participate in her boyfriend's criminal activities because as a Mexican woman, she was expected to submit to her boyfriend's will—and finding that "cultural heritage" was really the joinder of gender and national origin, both prohibited grounds for consideration in sentencing); *United States v. Floyd*, 458 F.3d 844 (8th Cir. 2006) (rejecting the defendant's argument that she was entitled to a downward departure because she was a law-abiding and God-fearing citizen); *United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997) (reversing a downward departure based in part on the fact that most of the codefendants—who received lower sentences—were white, while the defendant was black).

§5H1.12. Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

Section 5H1.12 states that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted." *See United Stated v. Godinez*, 474 F.3d 1039 (8th Cir. 2007) (upholding the denial of a downward departure sought because the defendant "lost his father at the age of twelve, was unable to attend school, and remained illiterate until late adolescence"); *United States v. Dyck* 334 F.3d 736 (8th Cir. 2003) (reversing a downward departure given because the defendant's "Mennonite upbringing left him ignorant and uneducated to the 'ways of the world'" as inconsistent with §§5H1.10 and 5H1.12). *But see United States v. Rivera,* 192 F.3d 81, 84 -85 (2d Cir. 1999) (while "the Guidelines foreclose any downward departure for lack of youthful guidance. . . . a downward departure may be appropriate in cases of extreme childhood abuse").

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

Section 5H1.4 states that drug or alcohol dependence "*ordinarily* is not a reason for a downward departure." *See, e.g., United States v. Williams*, 891 F.2d 962 (1st Cir. 1989) (reversing a downward departure based in part of the defendant's addiction to drugs). Similarly, the court may not impose a longer sentence solely to make the defendant eligible for drug treatment programs in prison. *See Tapia v. United States*, 131 S. Ct. 2382 (2011).

The policy statement recommends, however, "that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (*see* §5D1.3(d)(4))." Further, "where a defendant who is a substance abuser is sentenced to probation," the policy statement "strongly recommend[s] that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (*see* §5B1.3(d)(4))."

Additionally, section 5H1.4 states that in certain cases in which §5C1.1, Application Note 6 is applicable, "a downward departure may be appropriate to accomplish a specific treatment purpose."

§5K2.12. Coercion and Duress (Policy Statement)

Section 5K2.12 provides that "personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure."

§5K2.19. Post-Sentencing Rehabilitative Efforts (Policy Statement)

Section 5K2.19 states that "[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense." Such rehabilitation efforts may, however, "provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1)."

Post-*Booker*, post-sentence rehabilitation remained an impermissible basis for a downward departure or variance. However, in 2011 the Supreme Court held that "at resentencing [a district court] may consider evidence...of postsentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory Guideline range." *Pepper v. United States*, 131 S. Ct. 1229 (2011) (stating post-sentencing rehabilitation evidence may be highly relevant to several §3553(a) factors, such as the most up-to-date picture of "history and characteristics" and the likelihood of engaging in future criminal conduct).

Post-offense rehabilitation can also provide the basis for a downward variance. *Gall v. United States*, 552 U.S. 38 (2007).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility) cannot support a departure.

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively. *See also* §5H1.7. (Role in the Offense (Policy Statement)) (stating that a defendant's role in the offense is relevant in determining the applicable guideline range but is not a basis for departing from that range).

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense). *Compare United States v. O'Malley*, 364 F.3d 974 (8th Cir. 2004) (reversing the district court's departure because the defendant's efforts did not constitute "extraordinary restitution" even though he "must have gone to great lengths to have a cashier's check for $459,047.02 readily available for tender at the sentencing hearing") *with United States v. Oligmueller*, 198 F.3d 669 (8th Cir. 1999) (upholding a departure based in part on extraordinary restitution where defendant made voluntary payments a year prior to indictment, often worked sixteen-hour days on his farm to raise the money, took on a second job, turned over his life insurance policy and his wife's certificate of deposit, and gave up his home).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

§5K2.22. Specific Offender Characteristics as Grounds for Downward Departure in Child Crimes and Sexual Offenses (Policy Statement)

Section 5K2.22 provides special rules for offenses involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code. When sentencing a defendant convicted of such an offense:

(1) Age may be a reason to depart downward only if and to the extent permitted by §5H1.1.

(2) An extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by §5H1.4.

(3) Drug, alcohol, or gambling dependence or abuse is not a reason to depart downward.

iii. Encouraged Grounds for Departure

If the special factor is encouraged, the court may use it as a basis for a departure, but only if the applicable guideline does not already take the factor into account, or if the factor is present to an exceptional degree.

§5H1.9. Dependence upon Criminal Activity for a Livelihood (Policy Statement)

Section 5H1.9 states that "the degree to which a defendant depends upon criminal activity for a livelihood is relevant in determining the appropriate sentence."

§5K2.1. Death (Policy Statement)

Pursuant to §5K2.1, "[i]f death resulted, the court may increase the sentence above the authorized guideline range." *See, e.g.*, *United States v. Mousseau*, 517 F.3d 1044 (8th Cir. 2008) (affirming an upward departure under §5K2.1 where the victim died one day after the defendant provided the victim with methamphetamine, and finding that even though the defendant did not intend to harm the victim, it was "clear that her actions were very dangerous and that she disregarded a known risk by giving an unknown substance, suspected to be a narcotic, to a minor to ingest"); *United States v. Montgomery*, 550 F.3d 1229 (10th Cir. 2008) (finding that the defendant's emotional and physical abuse of his wife, his knowledge that she had previously attempted suicide, his attempt to keep her from taking antidepressants, and his threat to take their son from her, "all indicate that her suicide by his [illegally possessed] weapon was reasonably foreseeable" to him).

The policy statement provides a number of factors the court should take into consideration when determining the extent of such a departure. The court, for example, "must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation." *See United States v. Davis*, 30 F.3d 613 (5th Cir. 1994) (stating that the "only 'mandatory' language in the section is that the judge 'must' consider matters that 'normally distinguish among levels of homicide,' such as state of mind"); *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998) (holding that the district court erred by failing to consider the factors listed in §5K2.1, and not making any finding as to the defendant's state of mind).

The policy statement also lists as appropriate factors whether multiple deaths resulted, and the means by which life was taken. The policy statement also provides that "[t]he extent of the increase should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." *See United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998) (finding that the kidnapping guideline does not take into account the scenario where the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her); *United States v. Rodriguez*, 553 F.3d 380 (5th Cir. 2008) (affirming an upward departure based on numerous resulting deaths that were in addition to the deaths accounted for under §2L1.1).

§5K2.2. Physical Injury (Policy Statement)

Section 5K2.2 provides for an increase above the authorized guideline range if **significant** physical injury resulted. *See United States v. Singleton*, 917 F.2d 411 (9th Cir. 1990) (holding that the district court must make specific findings that the injury is "something more than the ordinary scratches, scrapes, and bruises that a person would suffer in almost any minor scuffle"). *But see United States v. Baker*, 339 F.3d 400 (6th Cir. 2003) (holding that the facts did not support an upward departure for physical injury because "[a]ppalling as the defendants' conduct and its consequences were by the standards of any civilized person, it is no extreme outlier within the universe of robberies resulting in permanent or life-threatening injuries, for surely every such robbery is appalling").

The policy statement provides that "[t]he extent of the increase ordinarily should depend on the extent of the injury, the degree to which it may prove permanent, and the extent to which the injury was intended or knowingly risked."

In general, the same considerations apply to this policy statement as in §5K2.1. *See United States v. Jones*, 30 F.3d 276 (2d Cir. 1994) (affirming the district court's decision to depart upward in a drug trafficking conspiracy case in which the defendant planned for days the shooting of an undercover police officer which resulted in massive internal injuries, and stating that the sentencing guidelines did not adequately take into consideration the intentional and indifferent nature of the defendant's acts).

Section 5K2.2 does not preclude an enhancement under §2A2.2(b)(3)(C) based upon the victim's injury. *See United States v. Reyes*, 557 F.3d 84 (2d Cir. 2009) (holding an enhancement under §2A2.2(b)(3)(C) and an upward departure under §5K2.2 were warranted and nothing in the guidelines or in statutory law preclude the application of both a §2A2.2(b)(3)(C) enhancement and a §5K2.2 departure).

§5K2.3. Extreme Psychological Injury (Policy Statement)

The policy statement provides that if a victim or victims "suffered psychological injury much more serious than that normally resulting from commission of the offense, the court may increase the sentence above the authorized guideline range." *See, e.g., United States v. Bond*, 22 F.3d 662 (6th Cir. 1994) (reversing the district court's decision to depart because, as a result of the bank robbery, "the tellers suffered anxiety for several weeks after the robbery; but this would not be unusual for any victim of an armed bank robbery"); *United States v. Lasaga*, 328 F.3d 61 (2d Cir. 2003) (reversing a departure under this policy statement where the district court did not make the additional finding that the victim suffered much more serious harm than would normally be the case); *United States v. Yellow*, 18 F.3d 1438 (8th Cir. 1994) (affirming a departure where the defendant was convicted of raping his younger brother, who suffers from cerebral palsy, and younger sister, and the record included expert testimony regarding the severity and likely duration of psychological harm suffered by the victims); *United States v. Hefferon*, 314 F.3d 211 (5th Cir. 2002) (affirming a departure in a child sex offense where the victim's doctor testified that the victim will suffer long-term psychological effects, such as lack of trust (especially of adults) that are excessively severe, and where the doctor indicated that the victim's trauma was the most severe of anybody she had ever worked with).

According to the policy statement, "[t]he extent of the increase ordinarily should depend on the severity of the psychological injury and the extent to which the injury was intended or knowingly risked."

Section 5K2.3 states that under normal circumstances, "psychological injury would be sufficiently severe to warrant application of this adjustment only when there is a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim, when the impairment is likely to be of an extended or continuous duration, and when the impairment manifests itself by physical or psychological symptoms or by changes in behavior patterns."

§5K2.4. Abduction or Unlawful Restraint (Policy Statement)

The policy statement states that the court may upwardly depart "[i]f a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime."

§5K2.5. Property Damage or Loss (Policy Statement)

Section 5K2.5 provides for an upward departure if the "offense caused property damage or loss not taken into account within the guidelines." *See United States v. Dayea*, 32 F.3d 1377 (9th Cir. 1994) (holding that §5K2.5 provides for departures based on property damage or loss, not other harms, such as (in this case) consequential financial damages to a victim's widow); *United States v. Thomas*, 62 F.3d 1332 (11th Cir. 1995) (same).

The policy statement also provides guidance regarding the extent of the increase: "[T]he increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by the conduct relevant to the offense of conviction."

§5K2.6. Weapons and Dangerous Instrumentalities (Policy Statement)

Section 5K2.6 provides for an upward departure if "a weapon or dangerous instrumentality was used or possessed in the commission of the offense." *See, e.g.,United States v. Bond*, 22 F.3d 662 (6th Cir. 1994) (holding that "robbers discharge firearms during robberies specifically to frighten the victims, to ensure cooperation with their demands, and to facilitate escape; the factors articulated by the district court [did] not deviate substantially from the norm").

The policy statement also provides guidance regarding the extent of the increase: "[T]he increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others."

§5K2.7. Disruption of Governmental Function (Policy Statement)

The policy statement provides that "[i]f the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected." *See, e.g.*, *United States v. Cole*, 357 F.3d 780 (8th Cir. 2004) (reversing the district court's decision to depart in a case in which the defendant transmitted a threat in interstate commerce by making a bogus threat of an Anthrax attack on a school because the specific offense characteristics of §2A6.1 already provided for an increase in the base offense level if governmental functions are substantially disrupted); *United States v. Archambault*, 344 F.3d 732 (8th Cir. 2003) (holding that a Native American Tribal District was a recognized governing authority of the Standing Rock Sioux Tribe–a sovereign entity under federal law–and, because the defendant's arson caused many of the members of the community to lose their source of transportation for three months, affirmed the district court's decision to depart).

Departure from the guidelines, however, "ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference." *But see United States v. Regueiro*, 240 F.3d 1321 (11th Cir. 2001) (affirming the district court's decision to depart in a case involving conspiracy to defraud the United States, conspiracy to commit money laundering, and money laundering because every time one of the nurses from the 100 groups the defendant organized fraudulently billed Medicare, the government lost funds that it otherwise could have used to provide care to eligible patients).

§5K2.8. Extreme Conduct (Policy Statement)

Section 5K2.8 states that if the "defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct." Examples of such conduct "include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation." *See, e.g.*, *United States v. Wallace*, 605 F.3d 477 (8th Cir.) (affirming an upward departure where the defendant imprisoned and prostituted a mentally disabled young woman and committed such acts as inflicting injuries upon the victim with knives and cigarettes, forcing the victim to drink urine, and forcing the victim to perform acts of bestiality), *cert. denied*, 131 S. Ct. 840 (2010); United *States v. Bonetti*, 277 F.3d 441 (4th Cir. 2002) (affirming an upward departure where the defendant, convicted of harboring an illegal alien, brought the victim to the United States, and for 15 years kept control of her visa and passport, kept her in virtually slave-like conditions, did not pay her, forced her to work as many as 15 or more hours a day, and the defendant's wife regularly abused her); *United States v. Baker*, 339 F.3d 400 (6th Cir. 2003) (affirming an upward departure in a bank robbery case where the defendant shot a bank security guard after he had raised his arms to surrender, kicked his wounded body until he passed out, and shot him again when he came to); *United States v. Clark*, 45 F.3d 1247 (8th Cir. 1995) (affirming an upward departure in a carjacking case in which the defendant held a gun to the victim's head, traveled around with the victim still in the car, robbed him, and repeatedly told him that he was going to die); *United States v. Johnson*, 144 F.3d 1149 (8th Cir. 1998) (affirming an upward departure based on extreme conduct where the defendant threatened the victim and a male co-worker with a sawed off shotgun and forced them to disrobe, unsuccessfully attempted to penetrate the female victim, repeatedly forced her to perform oral sex, penetrated her digitally and with his penis, left her lying naked on the floor, and threatened to return and kill her if she called the police); *United States v. Haggard*, 41 F.3d 1320 (9th Cir. 1994) (affirming an upward departure where the defendant deliberately provided false statements that he knew the whereabouts of the body of a missing eight-year-old girl and the identity of her assailant); *United States v. Hanson*, 264 F.3d 988 (10th Cir. 2001) (holding that an upward departure for extreme conduct may be imposed even when the victim is dead or unconscious when the conduct occurs).

Section 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) encourages an upward departure pursuant to §5K2.8 "[i]f a victim was sexually abused by more than one participant." *See, e.g., United States v. Queensborough*, 227 F.3d 149 (3d Cir. 2000) (affirming an upward departure where the defendant and a codefendant accosted a man and a woman, raped and assaulted the woman, assaulted the man, and forced the two victims to have sex as they watched).

§5K2.9. Criminal Purpose (Policy Statement)

The policy statement provides that "[i]f the defendant committed the offense in order to facilitate or conceal the commission of another offense, the court may increase the sentence above the guideline range to reflect the actual seriousness of the defendant's conduct." *See, e.g.*, *United States v. Hanson*, 264 F.3d 988 (10th Cir. 2001) (affirming the district court's refusal to

depart based on the defendant's commission of a robbery in the course of a murder (for which he was convicted) because robbery is one of the issues that distinguishes first and second degree murder under the guidelines, and an upward departure based on a factor that distinguishes the crime in such a fashion is inappropriate).

§5K2.10. Victim's Conduct (Policy Statement)

Section 5K2.10 allows the court to reduce the sentence below the guideline range "to reflect the nature and circumstances of the offense" if the victim's wrongful conduct **contributed significantly** to provoking the offense behavior. *See, e.g.*, *United States v. Mussayek*, 338 F.3d 245 (3d Cir. 2003) (holding that, for a downward departure under this policy statement, the victim's misconduct must have significantly contributed to provoking the defendant's offense behavior, and the provoked offense must be proportional to the provoking conduct). To determine whether to depart and by how much, the court should consider the following:

(1) The size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant.

(2) The persistence of the victim's conduct and any efforts by the defendant to prevent confrontation.

(3) The danger reasonably perceived by the defendant, including the victim's reputation for violence. *See United States v. Paster*, 173 F.3d 206 (3d Cir. 1999) (holding that the conduct of the victim—admitting to the defendant that she had between 40 and 50 affairs—is not the type of violent, wrongful conduct that warrants a departure).

(4) The danger actually presented to the defendant by the victim.

(5) Any other relevant conduct by the victim that substantially contributed to the danger presented.

(6) The proportionality and reasonableness of the defendant's response to the victim's provocation. *See United States v. Paster*, 173 F.3d 206 (3d Cir. 1999) (finding that the conduct of the victim—admitting to the defendant that she had between 40 and 50 affairs—did not warrant the response by the defendant—stabbing her 16 times).

The policy statement provides that victim misconduct is generally not sufficient to depart under this provision in the context of criminal sexual abuse cases (found in Chapter Two, Part A, Subpart 3). Further, the provision does not generally permit a departure in the context of non-violent offenses. One example of an exception, however, is if the victim engaged in "an extended course of provocation and harassment" that led the defendant to steal or destroy property in retaliation.

§5K2.11. Lesser Harms (Policy Statement)

The policy statement provides for a reduced sentence if the defendant committed a crime in order to avoid a perceived greater harm, "provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing."

Similarly, if the defendant's conduct does "not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue," a departure may be warranted. The policy statement lists as examples the following behavior: "a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program." *See, e.g.*, *United States v. Carvell*, 74 F.3d 8 (1st Cir. 1996) (holding that a reduced sentence under §5K2.11 was warranted because the defendant was using marijuana to avoid the greater possible harm of suicide); *United States v. Lewis*, 249 F.3d 793 (8th Cir. 2001) (holding that the lesser harms rationale of §5K2.11 permits a sentencing court to depart for violations of the statute barring the making of a false statement in connection with the acquisition of a firearm where the firearm at issue was an heirloom that the defendant inherited from his father). *But see United States v. Carrasco*, 313 F.3d 750 (2d Cir. 2002) (holding that the defendant was not entitled to a lesser harm departure because a deported alien reentering the country illegally, even without intent to commit a crime, has committed the act the statute prohibits); *United States v. Rojas*, 47 F.3d 1078 (11th Cir. 1995) (finding that the district court erred by granting a downward departure under §5K2.11 to a defendant convicted of knowing possession of unregistered firearms, based upon his claims that he was transporting the weapons to Cuba in order to avoid the greater harm of the total destruction of a country and the annihilation of its citizens, and stating that the "traditional" departure categories for §5K2.11 include hunting, sport shooting and protecting the home); *United States v. Riley*, 376 F.3d 1160 (D.C. Cir. 2004) (stating that the mere absence of an unlawful purpose does not warrant a departure under §5K2.11).

§5K2.12. Coercion and Duress (Policy Statement)

Section 5K2.12 allows the court to depart downward if the "defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." *See, e.g.*, *United States v. Amor*, 24 F.3d 432 (2d Cir. 1994) (affirming a departure where the district court found that the defendant would not have purchased and altered the firearm but for the threats he received and the shots fired at his vehicle); *United States v. Bala*, 236 F.3d 87 (2d Cir. 2000) (agreeing with the Ninth, Fourth, and Eighth Circuits that "'imperfect entrapment,' described as 'aggressive encouragement of wrongdoing, although not amounting to a complete defense,' is a proper ground for downward departure at sentencing pursuant to U.S.S.G. § 5K2.12").

The policy statement provides the following direction regarding the extent of the decrease: The extent "should depend on the reasonableness of the defendant's actions, on the proportionality of the defendant's actions to the seriousness of coercion, blackmail, or duress involved, and on the extent to which the conduct would have been less harmful under the

circumstances as the defendant believed them to be." This generally means that the offense involved a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. *See, e.g.*, *United States v. Sachdev*, 279 F.3d 25 (1st Cir. 2002) (affirming the district court's decision not to depart in a case in which 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, and finding that the departure ordinarily requires a threat of physical harm, either explicit or implicit). *But see United States v. Cotto*, 347 F.3d 441 (2d Cir. 2003) (holding that the coercion occasioned by a defendant's generalized fear of a third party, based solely on knowledge of that third party's violent conduct toward others rather than on any explicit or implicit threat, was insufficient to constitute the unusual or exceptional circumstances warranting a departure under §5K2.12).

§5K2.13. Diminished Capacity (Policy Statement)

Section 5K2.13 provides for a downward departure if: "(1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity **contributed substantially** to the commission of the offense." *See, e.g.*, *United States v. Smith*, 289 F.3d 696 (11th Cir. 2002) (finding insufficient evidence showing that the defendant suffered from "significantly reduced mental capacity" where the district court had found that the defendant's judgment was impaired by a number of factors, including drug abuse, a low aptitude or learning disability leading to classification as a special education student, and early treatment for an emotional or mental disorder).

The extent of the departure "should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." Application Note 1 states that "significantly reduced mental capacity" means "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."

The policy statement states that a departure on the basis of diminished capacity is prohibited if:

(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants;

(2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence. *See, e.g.*, *United States v. Bowe*, 257 F.3d 336 (4th Cir. 2001) (concluding that the defendant did not satisfy the criteria set forth in §5K2.13, which states that if the offense involved actual violence or a serious threat of violence, then the court may not depart below the applicable guideline range); *United States v. Riggs*, 370 F.3d 382 (4th Cir. 2004) (same), *cert. granted and judgment vacated on other grounds by*

543 U.S. 1110 (2005); *United States v. Woods*, 364 F.3d 1000 (8th Cir. 2004) (holding that bank robbery committed by intimidation (no weapon involved) is a "serious threat of violence"); *United States v. Dela Cruz*, 358 F.3d 623 (9th Cir. 2004) (stating that a defendant convicted of making telephonic bomb threats was ineligible for a departure under §5K2.13 because the crime involved a serious threat of violence).

(3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. *See United States v. Davis*, 264 F.3d 813 (9th Cir. 2001) (holding that although the defendant suffered from an extraordinary mental disease, his substantial criminal history demonstrated a need for incarceration to protect the public, and, thus, precluded a departure under §5K2.13); or

(4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

§5K2.14. Public Welfare (Policy Statement)

The policy statement provides for an upward departure if "national security, public health, or safety was significantly endangered." The extent of the departure should "reflect the nature and circumstances of the offense."

§5K2.16. Voluntary Disclosure of Offense (Policy Statement)

Section 5K2.16 allows for a downward departure if "the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise." *See United States v. Besler*, 86 F.3d 745 (7th Cir. 1996) (holding that the district court erred by granting the departure without making findings as to the likelihood that the offense of conviction would have been discovered absent defendant's disclosure). The policy statement lists as an example of such conduct an offense where a "defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered." *See United States v. Lovaas*, 241 F.3d 900 (7th Cir. 2001) (stating that a departure under §5K2.16 only applies when a defendant is motivated by guilt and discovery is unlikely).

A departure under this policy statement is not warranted, however, "where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct."

§5K2.17. Semiautomatic Firearms Capable of Accepting Large Capacity Magazine (Policy Statement)

The policy statement provides that an upward departure may be warranted if "the defendant possessed a semiautomatic firearm capable of accepting a large capacity magazine in connection with a crime of violence or controlled substance offense." The extent of the departure "should depend upon the degree to which the nature of the weapon increased the likelihood of death or injury in the circumstances of the particular case."

Section 5K2.17 defines "semiautomatic firearm capable of accepting a large capacity magazine" as "a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm."

§5K2.18. Violent Street Gangs (Policy Statement)

The policy statement provides that if the "defendant is subject to an enhanced sentence under 18 U.S.C. § 521 (pertaining to criminal street gangs), an upward departure may be warranted."

This departure provision is intended "to enhance the sentences of defendants who participate in groups, clubs, organizations, or associations that use violence to further their ends." The provision does not apply, however, in a case "in which 18 U.S.C. § 521 applies, but no violence is established."

§5K2.20. Aberrant Behavior (Policy Statement)

The policy statement generally allows for a downward departure "in an exceptional case if (1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c)." *See, e.g.*, *United States v. Smith*, 387 F.3d 826 (9th Cir. 2004) (holding that the district court's finding that it could not depart on the basis of aberrant behavior was clearly erroneous where the crime only lasted for five or ten minutes and many letters of support were submitted on behalf of defendant indicating that the defendant had lived an exemplary life prior to the crime, and that the crime represented a departure from her normal way of life).

Subsection (b) states that a court may depart downward pursuant to this policy statement "only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life." This does not include an offense that involved "[r]epetitious or significant, planned behavior." *See* §5K2.20, comment. (n.2); *see also United States v. Castellanos*, 355 F.3d 56 (2d Cir. 2003) (stating that spontaneity was not determinative, but it was a relevant and permissible consideration when treated as one

factor in evaluating whether the three-pronged test of §5K2.20 has been met). *But see United States v. Gonzalez*, 281 F.3d 38 (2d Cir. 2002) (holding that the sentencing court should not consider spontaneity in connection with the decision whether to depart based on aberrant behavior, and stating that the Sentencing Commission expressly intended to relax the requirements for aberrant behavior).

The court can also consider the following factors when determining whether to depart under this provision: "the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." *See* §5K2.20, comment. (n.3).

Pursuant to subsection (c), the court may not depart if any of the following circumstances are present:

(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 either of the following: (A) more than one criminal history point, as determined under Chapter Four (Criminal History and Criminal Livelihood) before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History Category); or (B) a prior federal or state felony conviction, or any other significant prior criminal behavior, regardless of whether the conviction or significant prior criminal behavior is countable under Chapter Four.

Further, a defendant convicted "of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code" is prohibited from receiving a departure under this policy statement.

§5K2.21. Dismissed and Uncharged Conduct (Policy Statement)

The policy statement provides that a court may "depart upward 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." *But see United States v. Stephens*, 373 F. App'x 457 (5th Cir. 2010) (holding that the district court did not properly compute the departure when it upwardly departed under §5K2.21 to account for uncharged 924(c) conduct), *cert. denied* 132 S. Ct. 1040 (2012).

The government must prove the charge by a preponderance of the evidence. *See United States v. Azure*, 536 F.3d 922 (8th Cir. 2008) (stating that "although the quantum of proof is less than the beyond-a-reasonable-doubt formulation used at trial, the burden of proof remains unchanged at sentencing: the government bears the burden").

§5K2.23. Discharged Terms of Imprisonment (Policy Statement)

This policy statement provides that a "downward departure may be appropriate if the defendant (1) has completed serving a term of imprisonment; and (2) subsection (b) of §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged Term of Imprisonment) would have provided an adjustment had that completed term of imprisonment been undischarged at the time of sentencing for the instant offense." The "departure should be fashioned to achieve a reasonable punishment for the instant offense."

§5K2.24. Commission of Offense While Wearing or Displaying Unauthorized or Counterfeit Insignia or Uniform (Policy Statement)

Section 5K2.24 allows for an upward departure "[i]f, during the commission of the offense, the defendant wore or displayed an official, or counterfeit official, insignia or uniform received in violation of 18 U.S.C. § 716."

§5K3.1. Early Disposition Programs (Policy Statement)

The policy statement states that, "[u]pon motion of the Government, the court may depart downward not more than 4 levels pursuant to an early disposition program authorized by the Attorney General of the United States and the United States Attorney for the district in which the court resides."

Early disposition, or fast track, programs, were previously available in only certain districts. On September 22, 2003, the Attorney General issued a memorandum outlining the criteria for authorization of early disposition, or fast-track, programs, stating that fast-track programs were "properly reserved for exceptional circumstances, such as where the resources of a district would otherwise be significantly strained by the large volume of a particular category of cases."

The existence of fast track programs in some, but not all, districts, generated significant circuit conflict about whether a district court may vary on the basis of this disparity. *Compare United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009) ("a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and that such a variance would be reasonable in an appropriate case") *with United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008) (holding that "because any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)"). *See also* Section III(C) "Variances Based on Policy Disagreements with the Guidelines" below for further discussion of

this issue.

On January 31, 2012, the Deputy Attorney General issued a memorandum in which all districts were authorized to create fast-track programs for illegal reentry. The creation of fast track programs for illegal reentry in all districts appears to preclude a district court's grant of a variance on the basis of disparity between districts with fast track programs for illegal reentry and those without. However, fast track programs have been authorized in certain districts for felonies other than illegal reentry and those programs were not within the ambit of the Deputy Attorney General's January 31, 2012, memorandum. The memorandum made note of the existence of fast track programs for offenses other than illegal reentry in certain districts and indicated that these programs will continue through March 1, 2012, allowing for "a substantive review of these programs in due course."

Encouraged Departures Within Individual Guidelines

The following is a non-exhaustive list of places within individual guidelines where departures are encouraged:

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States, App. Note 19

Application Note 19 to §2B1.1 states that in cases "in which the offense level determined under this guideline substantially understates the seriousness of the offense," an upward departure may be warranted. The Note lists a non-exhaustive list of factors the court may consider in determining whether a departure is warranted.

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy, App. Note 14

Application Note 14 to §2D1.1 states that a downward departure may be warranted "[i]f, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent."

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition, App. Note 11

Application Note 11 to §2K2.1 states that an "upward departure may be warranted in any of the following circumstances: (1) the number of firearms substantially exceeded 200; (2) the offense involved multiple National Firearms Act weapons (*e.g.*, machine guns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals."

§2L1.2. Unlawfully Entering or Remaining in the United States, App. Notes 7 and 8

Application Note 7 to §2L1.2 provides for upward or downward departure in cases "in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction." Application Note 7 provides the following examples: "(A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted." (B) "In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted."

Application Note 8 indicates that a downward departure based on cultural assimilation in an illegal reentry case may be appropriate in cases where (A) the defendant formed cultural tires to the United States from having continuously resided in the United States from childhood, (B) the reentry was motivated by cultural ties, and (C) a departure is unlikely to increase the risk of further crimes of the defendant. The application note provides a nonexclusive list of seven factors that the court is to consider in determining whether a departure is warranted.

§3B1.1. Aggravating Role, App. Note 2

Application Note 2 to §3B1.1 states that an upward departure may be warranted "in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization."

§5C1.1 Imposition of a Term of Imprisonment, App. Note 6

Application Note 1 to §5C1.1 states that a departure from the sentencing options authorized by the guidelines for Zone C may be appropriate to accomplish a specific treatment purpose in cases where the court finds (A) the defendant is an abuser of controlled substances or alcohol, or suffers from a significant mental illness, and (B) the defendant's criminality is related to the treatment problem to be addressed.

§5D1.1. Imposition of a Term of Supervised Release, App. Note 1

Application Note 1 to §5D1.1 allows the court to depart from this guideline and not impose a term of supervised release if it determines that supervised release is neither required by statute nor required for any of the following reasons: (1) to protect the public welfare; (2) to enforce a financial condition; (3) to provide drug or alcohol treatment or testing; (4) to assist the reintegration of the defendant into the community; or (5) to accomplish any other sentencing purpose authorized by statute.

iv. Discouraged Grounds for Departures

The Commission has determined that certain circumstances are either potentially relevant or not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. A defendant's guideline sentence is to be based on the offense the defendant committed, not the character of the defendant.

Chapter Five, Part H lists those factors that the Commission has deemed either potentially relevant or not ordinarily relevant to the determination of whether to depart from the guideline range. Unless stated, however, this does not mean that these factors are necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of appropriate conditions of probation or supervised release. If the special factor is discouraged under the guidelines, it can only be a basis for departure if the factor is present in the case to an **exceptional degree**.

§5H1.1. Age (Policy Statement)

Section 5H1.1 states that age (including youth) "may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical case covered by the guidelines."

If the defendant is elderly and infirm, however, and "where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration," age may be a reason to depart downward. *See, e.g.*, *United States v. Crickon*, 240 F.3d 652 (7th Cir. 2001) (affirming the district court's decision not to depart based on age in a case involving a 60-year-old man, and stating that, because there was no medical evidence supporting it, the defendant's statement that he would die in prison was not persuasive); *United States v. Tocco*, 200 F.3d 401 (6th Cir. 2000) (stating that "it is possible 'that an aged defendant with a multitude of health problems may qualify for a downward departure . . . [but] such downward departures are rare," but requiring, on resentencing, the district court to "obtain independent and competent medical evidence to determine the extent of [the defendant's] infirmities and the prison system's ability or inability to accommodate them"); *United States v. Brooke*, 308 F.3d 17 (D.C. Cir. 2002) (affirming the court's denial of a departure based on the defendant's age (82) and physical condition, and concluding that home confinement would not be effective punishment because the defendant had a history of drug dealing in his home, and that his impairment was not extraordinary).

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

According to the policy statement, "[e]ducation and vocational skills are not ordinarily relevant in determining whether a departure is warranted."

Courts have rejected arguments for an upward departure based on the fact that the defendant held public office or was a "gifted, talented, individual." *United States v. Burch*, 873 F.2d 765 (5th Cir. 1989); *see also United States v. Barone*, 913 F.2d 46 (2d Cir. 1990) (holding that the defendant did not use his public office or profession as a lawyer to facilitate his crimes). Courts have also rejected downward departures based on the defendant's high intelligence or hardship caused to the defendant's community or employees. *See e.g.*, *United States v. Groene*, 998 F.2d 604 (8th Cir. 1993) (rejecting a downward departure based on hardship caused by a chiropractor's absence from a rural community); *United States v. Sharapan*, 13 F.3d 781 (3d Cir. 1994) (reversing a downward departure that was based on the fact that incarceration would cause the defendant's business to fail and result in the loss of 30 jobs in the community); *United States v. Drew*, 131 F.3d 1269 (8th Cir. 1997) (reversing a downward departure in a child pornography case based on the defendant's high intelligence and candidacy for a PhD in chemistry).

Education and vocational skills may, however, "be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service."

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

Section 5H1.3 states that mental and emotional conditions "may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical case covered by the guidelines." Some courts have stated that in extreme circumstances, a court may depart downward where extreme childhood abuse caused mental and emotional conditions that contributed to the commission of the offense. *See, e.g.*, *United States v. Walter*, 256 F.3d 891 (9th Cir. 2001). There must, however, be a causal connection between the defendant's impaired emotional or mental condition and the criminal conduct. *See United States v. Brady*, 417 F.3d 326 (2d Cir. 2005). While mental and emotional conditions may be relevant in extraordinary instances, however, they are still only relevant if the defendant committed a nonviolent offense. *See* §5K2.13 (Diminished Capacity (Policy Statement)).

Section 5H1.3 further provides that in certain cases in which §5C1.1, Application Note 6 is applicable "a downward departure may be appropriate to accomplish a specific treatment purpose."

Mental and emotional considerations "may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (*see* §§5B1.3(d)(5) and 5D1.3(d)(5))."

§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)

The policy statement provides that physical condition or appearance, including physique, "may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical case covered by the guidelines." *See United States v. Carr*, 271 F.3d 172 (4th Cir. 2001) (declining to review the district court's refusal to depart based on the defendant's physical impairment, AIDS); *United States v. Castillo*, 430 F.3d 230 (5th Cir. 2005) ("[A] defendant's HIV-positive status alone does not constitute an extraordinary medical condition warranting a downward departure under §5H1.4."). *But see United States v. Graham*, 83 F.3d 1466 (D.C. Cir. 1996) (holding that extreme vulnerability to abuse in prison may justify a downward departure); *United States v. Parish*, 308 F.3d 1025 (9th Cir. 2002) (affirming, in a child pornography case, a departure based on the fact that the defendant was susceptible to abuse in prison based on his stature, naivete, and the nature of the offense).

If the defendant can be cared-for properly by the prison system, the district court should not depart. *See United States v. Coughlin*, 500 F.3d 813 (8th Cir. 2007) (reversing a downward departure despite the defendant's poor health where the record did not show that "imprisonment would subject [the defendant] to more than the normal inconvenience or danger"); *United States v. Albarran*, 233 F.3d 972 (7th Cir. 2000) (reversing the district court's decision to grant a downward departure because the defendant did not present any evidence regarding why his physical condition would preclude him from being incarcerated and cared for properly by the prison); *United States v. Krilich*, 257 F.3d 689 (7th Cir. 2001) (holding that "older criminals do not receive sentencing discounts" unless the medical problem is extraordinary in the sense that prison medical facilities cannot cope with it). The court must make specific findings if it wants to depart based on extraordinary physical impairment. *See, e.g.*, *United States v. Persico*, 164 F.3d 796 (2d Cir. 1999).

The policy statement further provides that drug or alcohol dependence "*ordinarily* is not a reason for a downward departure." Additionally, in certain cases in which §5C1.1, Application Note 6 is applicable, "a downward departure may be appropriate to accomplish a specific treatment purpose."

§5H1.5. Employment Record (Policy Statement)

Section 5H1.5 states that the defendant's "[e]mployment record is not ordinarily relevant in determining whether a departure is warranted," but that the record "may be relevant in determining the conditions of probation or supervised release (*e.g.*, the appropriate hours of home detention)."

Courts have affirmed downward departures based on the defendant's employment record in extraordinary cases. *See, e.g.*, *United States v. Jones*, 158 F.3d 492 (10th Cir. 1998) (taking into account the affect the defendant's incarceration would have on his prospects for future employment in a very economically depressed community).

§5H1.6. Family Ties and Responsibilities (Policy Statement)

Family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. Such factors are only a basis for departure in extraordinary cases. *See, e.g.*, *United States v. Spero*, 382 F.3d 803 (8th Cir. 2004) (holding that a situation in which one parent is critical to a child's well-being qualifies as an exceptional circumstance justifying a downward departure); *United States v. Leon*, 341 F.3d 928 (9th Cir. 2003) (affirming the district court's departure based on defendant's indispensable role in caring for his wife, who recently had her kidney removed due to renal cancer and who had been diagnosed as being at risk of committing suicide if she were to lose her husband to death or incarceration); *United States v. Reyes-Rodriquez*, 344 F.3d 1071 (10th Cir. 2003) (stating that, to qualify for a departure based on family ties and responsibilities, the defendant must be the only individual able to provide the assistance the family member needs); *United States v. Louis*, 300 F.3d 78 (1st Cir. 2002) (holding that the district court did not err in refusing to grant a departure based on the defendant's family ties and responsibilities in a case in which the defendant argued that because his son was biracial, it was important for the parent of color to be present and involved in the son's life); *United States v. Pereira*, 272 F.3d 76 (1st Cir. 2001) ("As long as there are feasible alternatives of care that are relatively comparable to what the defendant provides, the defendant cannot be irreplaceable."); *United States v. Londono*, 76 F.3d 33 (2d Cir. 1996) (holding that the district court erred when it granted a downward departure to a defendant to allow the defendant and his wife to have a child during the wife's remaining childbearing years); *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998) (reversing the district court's grant of a downward departure based on the devastating impact a long period of incarceration would have on the defendant's children, for whom the defendant (a Hasidic Jew) would not be available to find marriage partners); *United States v. Bueno*, 549 F.3d 1176 (8th Cir. 2008) (affirming a departure down to a term of probation based on the fact that the defendant's wife's lupus and rheumatoid arthritis constituted extraordinary family circumstances, but stating that the extent of the departure "stretches the allowable downward departure under §5H1.6 to its very limits").

Family responsibilities that are complied with, however, "may be relevant to the determination of the amount of restitution or fine."

Application Note 1 states that, in "determining whether a departure is warranted under this policy statement, the court shall consider the following non-exhaustive list of circumstances":

(i) The seriousness of the offense.

(ii) The involvement in the offense, if any, of members of the defendant's family.

(iii) The danger, if any, to members of the defendant's family as a result of the offense.

Further, the commentary limits the court's ability to depart based on the loss of caretaking or financial support of the defendant's family. In addition to the factors listed above, the

departure requires the presence of the following circumstances: :

(i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.

(ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.

(iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.

(iv) The departure effectively will address the loss of caretaking or financial support.

Family ties and responsibilities and community ties are not relevant, however, in determining whether a sentence should be below the applicable guideline range if the defendant was convicted of an offense involving a minor victim under section 1201, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

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

The policy statement provides that "military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical case covered by the guidelines."

Section 5H1.11 further states that "civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."

Courts have allowed such departures when the defendant's community service was unusual. *See, e.g.*, *United States v. Canova*, 412 F.3d 331 (2d Cir. 2005) (affirming a downward departure for an ex-Marine who, as a volunteer firefighter, had rescued a three-year-old from a burning building, delivered three babies, and administered CPR to persons in distress); *United States v. Huber*, 462 F.3d 945 (8th Cir. 2006) (affirming a downward departure for a defendant who had loaned money to neighbors and fellow farmers in need, saving farms from foreclosure); *United States v. Cooper*, 394 F.3d 172 (3d Cir. 2005) (allowing a downward departure for community service that was "hands-on" and likely had a dramatic and positive impact on the lives of others).

v. Illustrative Examples of Departure Decisions

The following are examples of departures in cases involving either a factor not mentioned by the guidelines or "present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon v. United States*, 518 U.S. 81 (1996).

Upward Departures

United States v. Holmes, 193 F.3d 200 (3d Cir. 1999) (affirming an upward departure based on extraordinary abuse of position of trust and rejecting the defendant's argument that §3B1.3 adequately covers abuse of position of trust because nothing in the guidelines suggests that the Sentencing Commission "envisioned multiple acts of abuse of trust to the degree that was present in this case").

United States v. Pitts, 176 F.3d 239 (4th Cir. 1999) (holding that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement).

United States v. Twitty, 104 F.3d 1 (1st Cir. 1997) (upholding an upward departure based on the large number of guns involved in the case, and the endangerment to public safety, and rejecting a double-counting argument).

United States v. Fan, 36 F.3d 240 (2d Cir. 1994) (affirming an upward departure in a case in which an alien smuggler kept the aliens—who were indebted to the smuggler in amounts ranging from $10,000 to $30,000—in "inhumane" conditions).

United States v. Kaye, 23 F.3d 50 (2d Cir. 1994) (affirming an upward departure based on the extent of the victim's loss, and concluding that the extent of the consequences of the defendant's conduct on his victim was not captured by the applicable Chapter Three adjustments).

Downward Departures

United States v. Barrera-Saucedo, 385 F.3d 533 (5th Cir. 2004) ("[I]t is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody").

United States v. Aguilar-Portillo, 334 F.3d 744 (8th Cir. 2003) (holding that a downward departure for "cultural assimilation" has no role in sentences for drug crimes); *United States v. Chapman*, 356 F.3d 843 (8th Cir. 2004) (holding that "truly exceptional rehabilitation alone can, in rare cases, support a downward departure even when the defendant does not accept responsibility"); *United States v. DeShon*, 183 F.3d 888 (8th Cir. 1999) (same).

United States v. Los Santos, 283 F.3d 422 (2d Cir. 2002) (holding that a sentencing court may

not depart under §5K2.0 based on prosecutorial delay that resulted in a missed opportunity for concurrent sentencing unless the delay was "in bad faith or . . . longer than a reasonable amount of time for the government to have diligently investigated the crime").

United States v. Sheridan, 270 F.3d 669 (8th Cir. 2001) (reversing a downward departure based on the fact that the victim was promiscuous, and stating that this was an impermissible ground because §2A3.2 already adequately takes into account a victim's willingness to engage in the act).

United States v. Basalo, 258 F.3d 945 (9th Cir. 2001) (stating that prosecutorial policy choices are not mitigating circumstances).

United States v. Armenta-Castro, 227 F.3d 1255 (10th Cir. 2000) (stating that a district court may not grant a downward departure from an otherwise applicable guideline sentencing range on the ground that, had the defendant been prosecuted in another federal district, the defendant may have benefitted from the charging or plea-bargaining policies of the United States Attorney in that district).

United States v. Searcy, 132 F.3d 1421 (11th Cir. 1998) (affirming the district court's conclusion that it could not depart to reflect the theoretical sentence the defendant might have received had prosecution occurred in state court).

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996) (stating that exposure to civil forfeiture is not a basis for a downward departure, and that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment).

Courts have generally held that when a government refuses to file a substantial assistance motion under §5K1.1, the defendant cannot recast his claim as a request for a departure under §5K2.0 because the Commission has already taken a defendant's substantial assistance into consideration. *See, e.g., United States v. Alegria*, 192 F.3d 179 (1st Cir. 1999). In certain circuits, however, assistance to local or state law enforcement agencies—if not taken into account under §5K1.1—may provide a basis for a downward departure pursuant to §5K2.0. *See, e.g., United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998).

Courts have also held that the Commission took into account not "only the immigration status of prospective offenders, but also the collateral consequences that would flow from that status within the federal prison system" when it promulgated §2L1.2. Thus, those consequences—such as ineligibility for prison boot camp and certain rehabilitation programs—do not remove convicted alien cases from the heartland of cases. *United States v. Vasquez*, 279 F.3d 77 (1st Cir. 2002). *But see United States v. Lopez-Salas*, 266 F.3d 842 (8th Cir. 2001) (holding that deportable-alien status and the collateral consequences flowing from that status may serve as a basis for departure in an exceptional case).

vi. Child Crimes and Sex Offenses

Downward departures are only allowed in cases of child crimes and sex offenses if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that:

(1) is listed in Part K of Chapter Five as a permissible ground of downward departure in these sentencing guidelines and policy statements;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

Thus, downward departures based on grounds not listed in Part K of Chapter Five are prohibited in child crimes and sex offenses. Upward departures, however, in child crimes and sex offenses are allowed even if the departure basis is not mentioned in the guidelines or is found somewhere other than Chapter Five, Part K.

vii. Limitations and Prohibitions Applicable to all Cases

a. Multiple grounds for departure

The policy statement provides that the court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

(1) such offender characteristics or other circumstances, **taken together, make the case an exceptional one**; and

(2) each such offender characteristic or other circumstance is—

(A) present to a **substantial degree**; and

(B) **identified in the guidelines** as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

See, e.g., *United States v. Bogdan*, 284 F.3d 324 (1st Cir. 2002) (reversing a downward departure where all the factors the district court relied on were either discouraged or already taken into account by the guidelines and where none of the factors were present, either individually or in combination, in some exceptional degree); *United States v. Iannone*, 184 F.3d 214 (3d Cir. 1999) (affirming an upward departure based on five factors that, alone, would not justify a departure, but in combination, the factors made the case very unusual and justified a two-level departure); *United States v. Decora*, 177 F.3d 676 (8th Cir. 1999) (affirming a downward departure based on a number of factors, and stating that although the court relied on

some factors the guidelines list as not ordinarily relevant in determining whether a departure is warranted (education, employment record, family and community responsibility), these factors were present in an unusual degree not adequately taken into consideration by the Sentencing Commission); *United States v. Moskal*, 211 F.3d 1070 (8th Cir. 2000) (affirming an upward departure based on the following factors: 1) the embezzlement involved a large number of vulnerable victims; 2) the defendant manipulated these victims to gain their trust; and 3) the defendant employed a number of methods to defraud his victims; 4) the defendant's conduct damaged the law firm's goodwill and standing in the legal community; and 5) the defendant's conduct adversely impacted the legal profession and justice system).

viii. Requirement of Specific Reasons for Departure

Section 5K2.0 requires a sentencing court that departs from the applicable guideline range to state, pursuant to pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received *in camera*, state those reasons with specificity in the written judgment and commitment order. *See United States v. Nuzzo*, 385 F.3d 109 (2d Cir. 2004) (instructing that on remand, the district court must adhere to the requirements of the PROTECT Act to state in open court, "with specificity in the written order and judgment," reasons for imposing a sentence outside the guidelines).

III. VARIANCES

A. GENERAL PRINCIPLES

As explained more fully above, the three-step post-*Booker* sentencing process first requires a district court to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. § 3553(a)(4); *Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing."); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). At the second step, after determining the guideline range, the district court should refer to the Guidelines Manual and consider whether the case warrants a departure. "'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *See Irizarry v. United States*, 553 U.S. 708, 714 (2008). The third and final step requires the court to consider the factors contained in 18 U.S.C. § 3553(a). A "variance" – i.e., a sentence outside the guideline range other than as provided for in the Guidelines Manual – is considered only after departures have been considered. Courts have held that variances are not subject to the guideline analysis for departures—in some cases, a circumstance prohibited for departure may be considered as a basis for a variance. *See, e.g.*, *United States v. Chase*, 560 F.3d 828 (8th Cir. 2009) (holding that "departure precedent does not bind district courts with respect to variance decisions, it is merely persuasive authority"). Variances are also not subject to the notice requirements applicable to departures (see discussion above). A court may grant a departure and a variance in the same sentence (*e.g.*, a departure for substantial assistance and a variance for the defendant's history and characteristics).

This Primer discusses a selection of cases in which the sentencing court varied from the applicable guideline range based on § 3553(a) factors.

B. SECTION 3553(A) FACTORS

i. Section 3553(a)(1): The nature and circumstances of the offense and the history and characteristics of the defendant

a. Defendant's Criminal History

United States v. Ruvalcava-Perez, 561 F.3d 883 (8th Cir. 2009) (affirming an upward variance of 48 months in a drug and illegal reentry case in which the district court found that the defendant had a history of violence against women, had a long and extensive violent history, and exhibited a "total disregard for the law").

United States v. Hilgers, 560 F.3d 944 (9th Cir. 2009) (affirming an upward variance from a guideline range of 12 to 18 months in prison to 60 months in prison based on the defendant's extensive criminal history, the fact that he had engaged in similar conduct in the past, and that he was essentially a "con man" who had cheated his own mother).

United States v. Colon, 474 F.3d 95 (3d Cir. 2007) (stating that the court need not follow the circuit's "ratcheting procedure" when granting a variance based on the defendant's criminal history); *United States v. McIntyre*, 531 F.3d 481 (7th Cir. 2008) ("Since the Supreme Court decided *United States v. Booker*, . . . we do not require a district court to follow §4A1.3 when imposing an above-guidelines sentence.").

United States v. Collington, 461 F.3d 805 (6th Cir. 2006) (stating that post-*Booker* a sentencing court has "greater latitude" to sentence outside the guideline range, and that "[i]n appropriate cases . . . a district court may conclude that the criminal history category overstates the severity of the defendant's criminal history or that a lower sentence would still comply with and serve the mandates of section 3553(a)") (quotation omitted); *United States v. McGhee*, 512 F.3d 1050 (8th Cir. 2008) (per curiam).

b. Characteristics of the Defendant

United States v. Sprague, 370 F. App'x 638 (6th Cir.), *cert. denied*, 131 S. Ct. 223 (2010) (affirming a sentence twice as long as the advisory guideline sentence, based in part on the defendant's likelihood of re-offending. The court noted that the defendant was a child sexual predator "who has been actively seeking additional victims" and who had a high risk of recidivism).

United States v. Autery, 555 F.3d 864 (9th Cir. 2009) (affirming a downward variance from a guideline range of 41-51 months in prison to five years of probation in a possession of child pornography case based in part on the fact that the defendant did not fit the profile of a pedophile, had no history of substance abuse, no interpersonal instability, was motivated and intelligent, and had the continuing support of his family).

United States v. Robinson, 516 F.3d 716 (8th Cir. 2008) (stating that the district court knew about the defendant's public and military service, and took these factors into account).

United States v. Howe, 543 F.3d 128 (3d Cir. 2008) (affirming a downward variance based on the defendant's twenty years of military service followed by honorable discharge, and on his remorse).

United States v. Huckins, 529 F.3d 1312 (10th Cir. 2008) (affirming a downward variance in a possession of child pornography and criminal forfeiture case based on the defendant's lack of significant criminal history, depression at the time of the offense, short time period in which the offense took place, lack of repeat offending by the defendant after his arrest, significant self-improvement efforts made by the defendant during the year and a half in which he waited to be prosecuted, and the fact that the defendant was 20 years old when he committed the crime).

United States v. McBride, 511 F.3d 1293 (11th Cir. 2007) (affirming a downward variance from 151 to 188 months in prison to 84 months in prison in a child pornography case in which the district court found the defendant's history of abuse and abandonment to be one of the worst ever seen by the court).

United States v. White, 506 F.3d 635 (8th Cir. 2007) (affirming a downward variance in a distribution of child pornography case in which: there was only one instance of distribution; the defendant was an older man with a deteriorating medical condition; he had no criminal history; and a medical expert testified that the defendant posed a low risk of recidivism).

United States v. Davis, 537 F.3d 611 (6th Cir. 2008) (acknowledging that the sentencing court "may account for a defendant's age at sentencing," but remanding for resentencing in this case because the defendant's age (70) compared to the age at which he committed the crime (56) did not warrant downward variance to a sentence of one day of imprisonment).

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008) (remanding—in a child pornography case— for resentencing a downward variance to probation based on the district court's findings that the defendant (1) was a first-time offender without a history suggesting that he had or would abuse children; (2) was addicted to adult pornography and had sought treatment for that addiction; (3) was not a pedophile and presented a low risk for recidivism, according to a psychologist who evaluated him; and (4) complied with the terms and conditions of his pretrial supervision, and holding that the nature and circumstances of the offense took the district court's sentence out of the realm of reasonableness).

United States v. Garcia, 497 F.3d 964 (9th Cir. 2007) (holding "that district courts are not prohibited in all circumstances from considering a defendant's drug addiction in choosing a reasonable sentence").

c. Defendant's Health Problems

United States v. Almenas, 553 F.3d 27 (1st Cir. 2009) (affirming a downward variance of 43

months below the bottom of the guideline range based on the defendant's combination of physical and mental disabilities).

United States v. Meyers, 503 F.3d 676 (8th Cir. 2007) (holding that the "district court did not abuse its discretion in finding that a shorter period of incarceration, with mental health treatment and supervised release, is the most effective sentence").

d. Family Circumstances

United States v. Schroeder, 536 F.3d 746 (7th Cir. 2008) (remanding a case for resentencing where the sentencing court did not address the defendant's argument regarding his extraordinary family circumstances, and stating that "[w]hen a defendant presents an argument for a lower sentence based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant's absence on his family members").

United States v. Menyweather, 447 F.3d 625 (9th Cir. 2006) (holding that, even if the court accepted the government's argument that the sentencing court erred by granting a departure based on family circumstances, any error would be harmless because the sentencing court could and would impose the same sentence using a downward variance based in part "on difficulty of providing appropriate care for a child of a single parent").

United States v. Martin, 520 F.3d 87 (1st Cir. 2008) (stating that, post-*Booker*, "policy statements normally are not decisive as to what may constitute a permissible ground for a variant sentence in a given case," and affirming a 91-month variance down from the guideline range based in part on "the support that the defendant stood to receive from his family [and] personal qualities indicating his potential for rehabilitation").

United States v. Carter, 510 F.3d 593 (6th Cir. 2007) (holding that the district court did not abuse its discretion by deciding not to vary from the guideline range based on exceptional family circumstances, and stating that the district "court reasonably concluded that [the defendant's] absence from his family would be mitigated by [his wife's] continued presence at home and the family's continued receipt of substantial healthcare, housing, and sustenance benefits").

United States v. Muñoz-Nava, 524 F.3d 1137 (10th Cir. 2008) (stating that *Gall* "indicates that factors disfavored by the Sentencing Commission may be relied on by the district court in fashioning an appropriate sentence," and holding that the sentencing court's conclusion that the defendant's family circumstances were extraordinary—the defendant cared for his eight-year-old son as a single parent and had elderly parents with serious medical problems—was supported by the record).

United States v. Lehmann, 513 F.3d 805 (8th Cir. 2008) (affirming a downward variance to probation in a case in which the district court found that a prison sentence would have negatively affected the defendant's disabled young son).

e. The Nature of the Offense

United States v. Whitehead, 532 F.3d 991 (9th Cir. 2008) (affirming a downward variance to probation in a case involving the sale of counterfeit access cards in violation of the Digital Millennium Copyright Act based in part on the district court's finding that the defendant's crime "[di]d not pose the same danger to the community as many other crimes").

United States v. Pauley, 511 F.3d 468 (4th Cir. 2007) (affirming a downward variance that was 36 months lower than the low-end of the guideline range based in part on the following facts relating to the nature and circumstances of the offense found by the district court: the defendant was less culpable than an individual who approaches a minor victim and asks her to take nude photographs of herself; the defendant was less culpable because the victim's face did not appear in any of the photographs; there were few pornographic photographs taken and the Polaroid photos were not readily transmittable over the Internet; and no other child pornography was found in the defendant's house).

United States v. Dehghani, 550 F.3d 716 (8th Cir. 2008) (affirming an upward variance to 432 months in prison—substantially higher than the guideline range—because the seriousness of the defendant's conduct (child pornography and threatening the judge) outweighed any mitigating factors present in the case).

ii. Section 3553(a)(2): The need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

a. Need to Protect the Public from Further Crimes

United States v. Tristan-Madrigal, 601 F.3d 629 (6th Cir. 2010) (affirming an upward variance based upon previous convictions of drunk driving. The Sixth Circuit noted that the district court's consideration of the defendant's repeat and identical drunk-driving convictions reflected in part its belief that a lengthy sentence was needed to protect the public).

United States v. Gilmore, 497 F.3d 853 (8th Cir. 2007) (affirming an upward variance from 151 to 188 months in prison to 396 months in prison based on the threat the defendant presents to herself and to the public as a result of her personal characteristics and the brutal nature of her crime), *abrogated as recognized by United States v. Clay*, 579 F.3d 919 (8th Cir. 2009).

United States v. Seay, 553 F.3d 732 (4th Cir. 2009) (affirming an upward variance from 46 to 57 months in prison to 96 months in prison based in part on the need for the sentence imposed to protect the public from further crimes of the defendant, referencing the district court's finding that the defendant "had become increasingly dangerous over the years, progressing from possessing a knife to possessing a gun in connection with his stalking practices").

United States v. Grossman, 513 F.3d 592 (6th Cir. 2008) (affirming a downward variance from 120 months in prison to 66 months with 10 years supervised release, and stating that the sentencing court "accounted for § 3553(a)'s concerns that the sentence protect society and deter future criminal conduct," but that "it opted to pursue those goals, not through a longer term of imprisonment, but through extensive counseling and treatment and an extensive period of supervised release").

b. Need to Provide Just Punishment for the Offense

United States v. Anderson, 533 F.3d 623 (8th Cir. 2008) (affirming a downward variance based in part on "other ways in which the defendant had suffered atypical punishment such as the loss of his reputation and his company, the ongoing case against him from the Securities and Exchange Commission and the harm visited upon him as a result of the fact that his actions brought his wife and friend into the criminal justice system").

c. Need to Reflect the Seriousness of the Offense

United States v. Kane, 552 F.3d 748 (8th Cir. 2009) (reversing a downward variance to 120 months in prison based in part on the seriousness of the defendant's offense in a case in which the defendant repeatedly restrained and compelled her nine-year-old daughter to submit to the sexual gratification of a pedophile in exchange for the defendant's receipt of $20), *cert. granted, judgment vacated by* 131 S. Ct. 1597 (2011), *adhered to in part on reconsideration by* 639 F.3d 1121 (2011).

United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc)(affirming an upward variance six months above the high-end of the guideline range based on the fact that firearm smuggling is more serious and more harmful when done in New York City than in rural or suburban areas, and on the greater-than-average need in this case to achieve strong deterrence).

United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008) (remanding an upward variance much higher than the guideline range and at the statutory maximum level of punishment because the defendant's "use of powerful weapons and his engagement in violence were not so unusually egregious as to justify the imposition of the most severe possible sentence").

iii. Section 3553(a)(3): The kinds of sentences available

United States v. Jimenez, 605 F.3d 415 (6th Cir. 2010) (ruling that although section 3582(a) bars consideration of rehabilitation concerns in the decision whether and how long to imprison a defendant, where permissible factors justify the imprisonment and the length of imprisonment, the sentencing court is free to recommend rehabilitation services), *abrogated by Tapia v. United States*, 131 S. Ct. 2382 (2011).

United States v. Tapia-Romero, 523 F.3d 1125 (9th Cir. 2008) (rejecting the defendant's argument that § 3553(a)(3) requires or allows sentencing courts to consider the cost to society of imprisoning a defendant).

United States v. Phillips, 516 F.3d 479 (6th Cir. 2008) (stating that recommending that the defendant serve his sentence in his hometown, near his sick mother, indicates that the sentencing court took into account the kinds of sentences available).

United States v. Ruff, 535 F.3d 999 (9th Cir. 2008) (the court affirmed a variance sentence of one day of imprisonment plus three years' supervised release with a condition of twelve months and one day served at a corrections center that would permit the defendant to participate in work release, receive counseling, and make visits to his young son).

iv. Section 3553(a)(4), (5): The guideline sentence and any pertinent policy statement issued by the Sentencing Commission

United States v. Hammons, 558 F.3d 1100 (9th Cir. 2009) (stating that the "court must also consider, but is not bound by, the applicable sentencing range as set forth in the guidelines").

United States v. Ruelas-Mendez, 556 F.3d 655 (8th Cir. 2009) (holding that the "district court was not forbidden to consider the guidelines," among other things, and pointing out that "the governing statute directs the sentencing court to consider" this matter as a "factor[] among several in the sentencing process").

United States v. Almenas, 553 F.3d 27 (1st Cir. 2009) (approving of the district court's consideration of "the guidelines' severe penalties for crack cocaine offenses" when deciding whether to vary further from the applicable guideline range).

United States v. Williams, 524 F.3d 209 (2d Cir. 2008) ("The displacement of the Sentencing Guidelines at the threshold, because of a 'personal policy' to conform the sentence to one that would have been imposed in a proceeding in the City of Yonkers, cannot be reconciled with 18 U.S.C. § 3553(a), which provides that '[t]he court, in determining the particular sentence to be imposed, shall consider' the Sentencing Guidelines.").

United States v. Scott, 529 F.3d 1290 (10th Cir. 2008) (affirming an upward variance from a guideline range of 70 to 87 months in prison to 120 months in prison where the district court stated that "it would have imposed an even higher sentence absent the benchmark provided by the Guidelines, thereby satisfying its obligation to give weight to the Guidelines").

v. Section 3553(a)(6): The need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct

Following the Supreme Court's decision in *Booker*, most courts have stated that this factor generally concerns "national disparities between defendants with similar records who have been found guilty of similar conduct—not disparities between codefendants," *see, e.g.*, *United States v. Conatser*, 514 F.3d 508, 521 (6th Cir. 2008) (holding that the district court could, but was not required to, consider disparity between codefendants), but have held that, in the proper case, the sentencing court may look to codefendant disparity when fashioning a reasonable sentence.

United States v. Frias, 521 F.3d 229 (2d Cir. 2008) (stating that the Second Circuit does not, "as a general matter, object to district courts' consideration of similarities and differences among co-defendants when imposing a sentence" (quotation omitted)).

United States v. Martin, 520 F.3d 87 (1st Cir. 2008) (recognizing that "district courts have discretion, in appropriate cases, to align codefendants' sentences somewhat in order to reflect comparable degrees of culpability—at least in those cases where disparities are conspicuous and threaten to undermine confidence in the criminal justice system").

United States v. Smart, 518 F.3d 800 (10th Cir. 2008) ("After *Gall*, it is clear that codefendant disparity is not a per se 'improper' factor . . . .").

United States v. Parker, 462 F.3d 273 (3d Cir. 2006) ("Although § 3553(a)(6) does not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so").

United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006) (concluding that the district court should have given more weight to extreme disparity between codefendants' sentences because such disparity fails to serve the legislative intent of § 3553(a)(6)).

United States v. Candia, 454 F.3d 468 (5th Cir. 2006) (affirming as reasonable the defendant's sentence, which the district court thought "adequately fit into the range of the co-defendants' sentences").

The Seventh Circuit alone "refuses to view the discrepancy between sentences of codefendants as a basis for challenging a sentence," even if the codefendant's sentence is lenient. *United States v. Omole*, 523 F.3d 691, 700 (7th Cir. 2008). In the Seventh Circuit's view, disparity is only relevant "if it is between the defendant's sentence and all other similar sentences imposed nationwide." *United States v. Woods*, 556 F.3d 616, 623 (7th Cir. 2009).

Disparity among codefendants, according to courts, can be reasonable for a number of reasons, such as "differences in criminal histories, the offenses of conviction, or one codefendant's decision to plea guilty and cooperate with the government." *Conatser*, 514 F.3d at 522.

United States v. Cisneros-Gutierrez, 517 F.3d 751 (5th Cir. 2008) (holding that the defendant and his brother were not similarly situated because his brother "pled guilty, provided information to law enforcement authorities, and did not flee before trial").

United States v. Phinazee, 515 F.3d 511 (6th Cir. 2008) (stating that sentencing disparities are justified by differences in criminal histories and departures for substantial assistance).

United States v. Zapata, 546 F.3d 1179 (10th Cir. 2008) (stating that "a disparity among co-defendants is justified 'when sentences are dissimilar because of a plea bargain'").

United States v. Bras, 483 F.3d 103 (D.C. Cir. 2007) (finding that disparity between the defendant's sentence and that of his codefendant were warranted because the defendant and his codefendants "did not hold comparable positions" in the conspiracy, and the defendant did not provide substantial assistance in the investigation).

United States v. Parker, 462 F.3d 273, 278 (stating that "§ 3553(a)(6) by its terms plainly applies only where co-defendants are similarly situated").

Gall v. United States, 552 U.S. 38 (2007) ("[I]t is perfectly clear that the District Judge considered the need to avoid unwarranted disparities, but also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.").

The Fifth Circuit has provided even more limits on the district court's consideration of codefendant disparity, holding that the district court erred when it considered the "*warranted* sentencing disparity" between the defendant and his codefendant. *United States v. Duhon*, 541 F.3d 391, 397 (5th Cir. 2008). The sentencing disparity between the defendant and his codefendant existed, according to the court, because the codefendant had received a downward departure for providing substantial assistance and the defendant had not assisted the government. *Id*. The court held that disparity in sentences between a defendant who provides substantial assistance and one who does not is not unwarranted, and any consideration of such disparity is improper. *Id*; *see also United States v. Gallegos*, 480 F.3d 856 (8th Cir. 2007) ("Disparity in sentences between a defendant who provided substantial assistance and one who provided no assistance . . . is not 'unwarranted'"); *United States v. Spotted Elk*, 548 F.3d 641 (8th Cir. 2008) ("When one defendant cooperates and another does not, their situations, and hence their sentences, can properly be held to differ."). In both Eighth Circuit cases, however, the court's holding was also based on other factors that distinguished the codefendants—such as drug quantity and criminal history.

vi. Section 3553(a)(7): The need to provide restitution to any victims of the offense

United States v. Orlando, 553 F.3d 1235 (9th Cir. 2009) (approving the district court's statement that "a fine was particularly appropriate for a tax evasion crime where restitution is not ordered").

vii. Totality of the § 3553(a) Factors

United States v. Massey, 663 F.3d 852 (6th Cir. 2011) (clarifying that "although departures under §5K1.1 require a motion from the government, variances do not," and a district court retains discretion to take the defendant's cooperation into account as a section 3553(a) mitigating factor).

United States v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. 2009) ("a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and [] such a variance would be reasonable in an appropriate case").

C. VARIANCES BASED ON POLICY DISAGREEMENT WITH THE GUIDELINES

In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Supreme Court held that it is not "an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." The Court observed that, in creating the drug guidelines, the Commission varied from its usual practice of employing an "empirical approach based on data about past sentencing practices," instead adopting the "weight-driven scheme" used in the 1986 Anti-Drug Abuse Act, and maintaining the 100-to-1 quantity ratio throughout the drug table. The Court also pointed out that the Commission had subsequently criticized the ratio, quoting from the various Commission reports to Congress on the issue, and discussed Congress's previous responses to Commission actions and recommendations.

The Court then discussed the Commission's ongoing role in determining sentencing ranges, noting that "while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." The Court held that the crack cocaine guidelines, however, "do not exemplify the Commission's exercise of its characteristic institutional role" and noted the Commission's opinion that the crack cocaine guidelines produce "disproportionately harsh sanctions." In light of this, "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."

The Court discussed this issue again in *Spears v. United States*, 555 U.S. 261 (2009) (per curiam), reaffirming its holding in *Kimbrough*, and stating that "with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect." According to the Court, the point of *Kimbrough* was "a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case."

The Court recognized that the Eighth Circuit's holding in *Spears II* was based, in part, on language from *Kimbrough*, that stated:

> The [district] court did not purport to establish a ratio of its own. Rather, it appropriately framed its final determination in line with § 3553(a)'s overarching instruction to "impose a sentence sufficient, but not greater than necessary" to accomplish the sentencing goals advanced in § 3553(a)(2).

The Court held that "[t]o the extent the above quoted language has obscured *Kimbrough*'s holding, we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on policy disagreements with those Guidelines." According to the Court, "[a]s a logical matter, . . . rejection of the 100:1 ratio . . . necessarily implies adoption of [a replacement] ratio."

Courts of appeals have expanded the rationale of *Kimbrough* to include variances on the basis of policy disagreements with the child pornography, career offender, firearms, offender characteristics and immigration guidelines. The following cases involve variances from the child pornography guidelines: *United States v. Vanvliet*, 542 F.3d 259 (1st Cir. 2008) (remanding for resentencing because the district court erroneously believed that it could not vary based on its policy disagreements with the child pornography guideline); *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (a district court may vary on the basis of disagreement with the child pornography guideline because the Commission did not use an empirical approach based on past sentencing practices to develop the guideline); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (a district court may vary on the basis of disagreement with the child pornography guidelines because "the Commission did not do what 'an exercise of its characteristic institutional role' required — develop §2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress"); *but see United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012) (although district courts may disagree with §2G2.2 on policy grounds, "the fact of Congress' role in amending a guideline is not itself a valid reason to disagree with the guideline"); *United States v. Huffstatler*, 571 F.3d 620 (7th Cir. 2009) (a district court "perhaps" has the freedom to sentence below the child pornography guidelines, but it is "certainly not required to do so").

The following cases involve variances from the career offender guideline: *United States v. Boardman,* 528 F.3d 86 (1st Cir. 2008) (remanding for reconsideration post-*Kimbrough* because the district court mistakenly believed it did not have discretion to vary downward based on policy disagreements with what constitutes a crime of violence under the career offender guideline); *United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008) (a district court may vary on the basis of the career offender guideline because the statute creating the career offender designation is a direction to the Sentencing Commission, not the courts); *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010) ("Because § 4B1.1 [the career offender guideline] is just a Guideline, judges are as free to disagree with it as they are with § 2D1.1(c) (which sets the crack/powder ratio). No judge is *required* to sentence at variance with a Guideline, but every judge is at liberty to do so."); *but see United States v. Jimenez*, 512 F.3d 1 (1st Cir. 2007) ("As we have explained, the crack/powder dichotomy is irrelevant to the career offender sentence actually imposed in this case. Consequently, the decision in *Kimbrough* -- though doubtless important for some cases -- is of only academic interest here."); *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009), *cert. granted, judgment vacated*, 130 S. Ct. 1135 (2010) (a district court may not vary on the basis of a disagreement with the career offender guideline because "the Supreme Court [in *Kimbrough*] expressly made a distinction between the Guidelines' disparate treatment of crack and powder cocaine offenses -- where Congress did not direct the Sentencing Commission to create this disparity -- and the Guideline's punishment of career offenders -- which was explicitly directed by Congress").[1]

[1] The Supreme Court vacated the judgment and remanded for rehearing on the basis of the Solicitor General's position that "*Kimbrough*'s reference to Section 994(h) as an example of Congress directing 'the Sentencing Commission' to adopt a Guideline reflecting a particular policy, 552 U.S. at 103, did not suggest that Congress had bound sentencing courts through Section 994. The court of appeals' reliance on Kimbrough's reference to Section 994(h) therefore depends on the additional, unstated, premise that congressional directives to the Sentencing Commission are equally binding on

The following cases involve the guidelines' policy statements about offender characteristics: *Pepper v. United States*, 131 S. Ct. 1229 (2011) (remanding for resentencing because the court of appeals erred in "categorically precluding" the district court from exercising its discretion based upon policy disagreements, thereby failing to grant a downward variance based upon extensive evidence of the defendant's postsentencing rehabilitation); *United States v. Simmons*, 568 F.3d 564 (5th Cir. 2009) (remanding for reconsideration because the district court erroneously believed that it could not disagree with the guideline policy statement regarding age because "*Kimbrough* does not limit the relevance of a district court's policy disagreement with the Guidelines to the situations such as the cocaine disparity and whatever might be considered similar"). Only one circuit court has addressed variances from the firearms guidelines. *See United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008), cert. denied, 129 S. Ct. 2735 (2009) (affirming an upward variance in a firearms trafficking case based on the district court's view that the "Guidelines failed to take into account the need to punish more severely those who illegally transport guns into areas like New York City").

As previously discussed, the circuits are divided on the issue of whether a district court may vary on the basis of fast track sentencing disparities. *See* Section II.C.ii, above. *Compare United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011) (concluding that *Kimbrough*'s holding extends to a policy disagreement with the fast track guideline and that district courts can consider fast-track disparity "as a sentence-evaluating datum within the overall ambit of § 3553(a)"); *United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010) (district courts may vary on the basis of fast track disparity because *Kimbrough* "permits district court judges to impose a variance based on disagreement with the policy underlying a guideline"); *United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009) ("a sentencing judge has the discretion to consider a variance under the totality of the § 3553(a) factors (rather than one factor in isolation) on the basis of a defendant's fast-track argument, and [] such a variance would be reasonable in an appropriate case"); *United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008) (district courts may vary based on fast track disparity because "[l]ike the crack/powder ratio, the fast-track departure scheme does not exemplify the [Sentencing] Commission's exercise of its characteristic institutional role"), *with United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008) ("because any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)"); *United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008) ("any disparity created by section 5K3.1, the fast-track guideline, does not fall within the scope of section 3553(a)(6)"); *United States v. Gonzalez-Zotelo*, 556 F.3d 736 (9th Cir. 2009) ("We now join the Fifth and Eleventh Circuits in holding that *Kimbrough* did not undercut our precedent holding that fast-track disparities are not 'unwarranted' so as to permit their consideration under § 3553(a)(6)"); *see also United States v. Mejia*, 461 F.3d 158 (2d Cir. 2006) (holding that the district court's refusal to vary based on fast track disparity is not necessarily unreasonable, without deciding whether district court has the authority to so vary if it deems such a reduced sentence warranted). Notably, while district courts in the Seventh Circuit may vary on this basis, "a district court need not address a fast-track argument unless the defendant has shown that he is similarly situated to persons who actually would receive a benefit

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sentencing courts. That premise is incorrect."

in a fast-track district." *United States v. Ramirez*, 652 F.3d 751 (7th Cir. 2011), *opinion amended and superseded on denial of reh'g by*, 2011 WL 6450620 (7th Cir. Dec. 23, 2011).

Even where variances on the basis of policy disagreements are authorized, a sentence based on a policy disagreement "is permissible only if a District Court provides sufficiently compelling reasons to justify it." *United States v. Lychock*, 578 F.3d 214, 219 (3d Cir. 2009) (internal quotation omitted) (reversing a downward variance to probation in a child pornography case because "the District Court failed to consider all of the relevant factors and appears to have made a determination based solely on a policy disagreement with the Guidelines . . . making the sentence procedurally unreasonable"). *See also United States v. Engle*, 592 F.3d 495 (4th Cir. 2010) (reversing a downward variance to probation in a "mine run" tax evasion case because the record was insufficient to review the reasonableness of the sentence which was based, in large part, on district court's disagreement with the Commission's policy statements regarding the seriousness of tax evasion offenses).

In addition, although district courts have the authority to vary based on policy disagreements, they are not required to do so. *See United States v. Hendry*, 522 F.3d 239 (2d Cir. 2008) (within district court's discretion to refuse to vary based on § 3553(a)'s parsimony clause if district court finds that defendants in fast track districts are not similarly situated to those in non-fast track districts); *United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010) (district courts may vary based on fast track disparity but a variance based solely on fast track disparity may still be unreasonable because it must result from a holistic and meaningful review of all relevant § 3553(a) factors); *United States v. Lopez-Reyes*, 589 F.3d 667 (3d Cir. 2009) ("As this Court has made clear, however, *Kimbrough* does not require a district court to reject a particular Guidelines range where that court does not, in fact, have disagreement with the Guideline at issue."); *United States v. Huffstatler*, 571 F.3d 620 (7th Cir. 2009) ("while district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines, as with the crack guidelines, they are certainly not required to do so").

Finally, "*Kimbrough* does not force district or appellate courts into a piece-by-piece analysis of the empirical grounding behind each part of the sentencing guidelines." *United States v. Duarte,* 569 F.3d 528, 530 (5th Cir. 2009); *see also United States v. Aguilar-Huerta*, 576 F.3d 365 (7th Cir. 2009) (while a judge is required to consider a nonfrivolous argument that guideline produces an unsound sentence in a particular case, the judge is not required to consider "an argument that a guideline is unworthy of application in any case because it was promulgated without adequate deliberation. . . . [and] should not have to delve into the history of a guideline so that he can satisfy himself that the process that produced it was adequate to produce a good guideline").