Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines

Kirk D. Houser

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol31/iss2/8

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines

Few of the lads had ever been in combat and they knew little about the critical tolerances of fighter aircraft during violent maneuvers. They knew where the outside of the envelope was, but they didn't know about the part where you reached the outside and then stretched her a little...1

I. INTRODUCTION

This comment explores the established Federal Sentencing Guidelines downward departure2 jurisprudence. While various authors have examined both upward and downward departures to outline "the heartland" of the Sentencing Guidelines (hereinafter "the Guidelines"),3 this comment traces the downward departure sentences that comprise the lower envelope or limits of a district judge's reasonable discretion. To this end, appellate decisions affirming downward departures or providing directions for remand are the principal focus. Major emphasis is given to specific offender characteristics,4 circumstances not considered nor fully developed by the Guidelines,5 as well as enumerated factors that may constitute a basis for departure.6

1. Tom Wolfe, *The Right Stuff* 416 (Farrar Straus Giroux, 1979) (emphasis in original). "The 'envelope' was a flight-test term referring to the limits of a particular aircraft's performance, how tight a turn it could make at such-and-such a speed, and so on. 'Pushing the outside,' probing the outer limits, of the envelope seemed to be the great challenge and satisfaction of flight test." Wolfe, *The Right Stuff* at 12.

2. A downward departure from the Federal Sentencing Guidelines is a criminal sentence imposed by a district judge below the prescribed sentencing range. Downward departures are justified when a case involves either atypical or extraordinary circumstances, or else, mitigating circumstances not adequately considered in the formulation of the Sentencing Guidelines. See Federal Sentencing Guidelines, 18 USC App 4, Ch 1, Part A, 4(b) (1992).


5. USSG § 5K2.0 ps (cited in note 4).

6. USSG §§ 5K2.10-5K2.13, 5K2.16 ps (cited in note 4).
II. STATUTORY OVERVIEW

The Sentencing Reform Act of 1984\(^7\) (hereinafter “the Act”) created and empowered the United States Sentencing Commission (hereinafter “the Commission”) “to promulgate guidelines establishing sentencing ranges for different categories of federal offenses and defendants.”\(^8\) The objective of the Guidelines “is to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct, while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the guidelines.”\(^9\) “The guidelines . . . further an essential need of the Anglo-American criminal justice system—to balance the desirability of a high degree of uniformity against the necessity for the exercise of discretion.”\(^10\)

The initial Guidelines were submitted to Congress on April 13, 1987 and apply to all offenses committed on or after November 1, 1987.\(^{11}\) The Guidelines replace a century-old system of indeterminate-sentencing in federal criminal cases.\(^{12}\) This system had two

---

8. Williams v United States, 112 S Ct 1112, 1117 (1992). The Commission is an independent judicial agency comprised of seven voting members and one non-voting, ex officio member. USSG, Ch 1, Part A, 1 (cited in note 2). The voting members include a minimum of three federal judges and a maximum of four members of the same political party. The United States Attorney General, or his designee, is the non-voting member. Mistretta v United States, 488 US 361, 368 (1989), citing 28 USC § 991(a). Prior to November 1, 1992, the fifth anniversary of the Act, the Chairman of the United States Parole Commission was a second non-voting, ex officio member of the Sentencing Commission. 18 USC § 3551(b)(5).
9. 52 Fed Reg 3920 (1987). “The Act’s basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.” USSG, Ch 1, Part A, 1 (cited in note 2).
11. USSG, Ch 1, Part A, 2 (cited in note 2).
12. Mistretta, 488 US at 363. “Statutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine. This indeterminate-sentencing system was supplemented by the utilization of parole, by
"unjustified" and "shameful" consequences: the great variation among sentences upon similarly situated offenders and the uncertainty as to the time the offender would spend in prison.\textsuperscript{13} Congress concluded that the Guidelines would reduce sentence disparities yet retain the flexibility needed to adjust for unanticipated factors arising in particular cases.\textsuperscript{14}

The Act states that punishment should serve retributive, educational, deterrent, and incapacitative goals,\textsuperscript{15} but rejects imprisonment as an engine of rehabilitation.\textsuperscript{16} Furthermore, the Act consolidates the power of the sentencing judge and the Parole Commission in the Sentencing Commission, directs the Sentencing Commission to devise guidelines (and general policy statements regarding the application of the Guidelines), and prospectively abolishes the Parole Commission.\textsuperscript{17} Finally, the Act makes all sentences generally determinate, subject to reductions for good behavior while in custody.\textsuperscript{18} Generally, the maximum of the sentencing range for each category of offense may not exceed the minimum by more than the greater of 25 percent or six months.\textsuperscript{19}

Federal sentencing, historically, was distributed among the three Branches of Government.\textsuperscript{20} The Commission, however, is established "as an independent commission in the Judicial Branch of the United States."\textsuperscript{21} Its duties include the promulgation, review which an offender was returned to society under the ‘guidance and control’ of a parole officer.” Id, citing Zerbst v Kidwell, 304 US 359, 363 (1938).

14. Id at 367. The tension between uniformity and proportionality in sentencing was minimized by creating a manageable (non-complex) set of guidelines and by limiting the broad discretion of sentencing courts to select the appropriate point in an otherwise broad sentencing range. USSG, Ch 1, Part A, 3 (cited in note 2).
16. \textit{Mistretta}, 488 US at 367 citing 28 USC § 994(k). The Act furthers the basic purposes of criminal punishment: deterrence, incapacitation, just punishment and rehabilitation. USSG, Ch 1, Part A, 2 (cited in note 2). However, it is inappropriate to impose a sentence for the purpose of rehabilitation, educational or vocational training, medical care, or other correctional treatment. \textit{Mistretta}, 488 US at 367, citing 28 USC § 994(k).
19. 28 USC § 994(b)(2). However, if the minimum sentence is 30 years or greater, then the maximum sentence may be life imprisonment. Id.
20. \textit{Mistretta}, 488 US at 364. Under the indeterminate-sentencing system, Congress defined the maximum sentence, the district judge imposed either probation or a sentence within a statutory range, and a parole official of the Executive Branch eventually determined the actual duration of imprisonment. Id at 365.
21. Id at 368, citing 28 USC § 991(a). The hybrid structure and authority of the Commission does not upset the balance of power between the Branches of Government. \textit{Mistretta}, 488 US at 412. In creating the Commission, Congress did not delegate excessive
and revision of the Guidelines. The Commission also must issue "general policy statements" regarding the application of the Guidelines.

The three goals of the Commission are to: (1) "assure the meeting of the purposes of sentencing as set forth" in the Act; (2) "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and (3) "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

Seven factors were considered by the Commission in the formation of the Guidelines' offense categories: (1) the grade of the offense; (2) the aggravating or mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the offense; (4) the community view of the gravity of the crime; (5) the public concern generated by the offense; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense.

Finally, Congress required that the Commission establish defendant categories based upon eleven offender-related factors: (1) age; (2) education; (3) vocational skills; (4) mitigating or plainly relevant mental and emotional conditions; (5) physical condition (including drug or alcohol dependence or abuse); (6) previous employment record; (7) family ties and responsibilities; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for a livelihood. However, the Guidelines must "reflect the general inappropriate-ness" of factors such as education, vocational skills, employment record (including current unemployment), family ties and respon-
sibilities, and community ties of the defendant. Moreover, the Commission is prohibited from considering "race, sex, national origin, creed, [religion,] and socio[-]economic status of offenders."

III. The Guidelines

The Guidelines are defined as "the guidelines promulgated by the Commission pursuant to [28 USC §] 994(a)." Furthermore, the Commission has authority to promulgate both "guidelines," and "general policy statements regarding application of the guidelines." In determining whether a circumstance was adequately considered by the Guidelines, a court must limit its review to the sentencing guidelines, policy statements, and official commentary of the Commission. Whenever "a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline." Nevertheless, policy statements are "interpretive guides to, not substitutes for, the Guidelines themselves."

The Guidelines include a sentencing table with 43 offense levels on a vertical axis and six criminal history categories on a horizontal axis. This table defines 258 discrete sentencing ranges. Each individual range overlaps with ranges in the preceding and succeeding levels.

---

28. 28 USC § 994(e). The Guidelines provide that these factors are "not ordinarily relevant." See note 85 and accompanying text.

29. 28 USC § 994(d). The Commission has determined that the sentencing court cannot consider certain specific factors as grounds for a departure: USSG § 5H1.4 (Policy Statement) (downward departures for drug or alcohol dependence or abuse), USSG § 5H1.10 (Policy Statement) (race, sex, national origin, creed, religion and socio-economic status), USSG § 5H1.12 (Policy Statement) (lack of guidance as a youth and similar circumstances), and USSG § 5K2.12 (Policy Statement) (personal financial difficulties and economic pressures upon a trade or business). USSG, Ch 1, Part A, 4(b) (cited in note 2). However, other factors, whether mentioned or not by the Guidelines, may be considered. Id.

30. 28 USC § 998(c). The Supreme Court has held that the Guidelines are constitutional, and are neither an excessive delegation of legislative power nor a violation of the separation of powers principle. Mistretta, 488 US at 412. See note 21.

31. 28 USC § 994(a)(1).

32. 28 USC § 994(a)(2).

33. 18 USC § 3553(b).

34. Williams, 112 S Ct at 1119.

35. United States v Johnson, 964 F2d 124, 127 (2d Cir 1992). "Even though policy statements are numbered and grouped in the Guidelines Manual by means identical to actual guidelines, their purpose is limited to interpreting and explaining how to apply the guidelines." Williams, 112 S Ct at 1125 (White, joined by Kennedy, dissenting) (citations omitted).

36. USSG, Ch 5, Part A (cited in note 2).

37. USSG, Ch 1, Part A, 4(h) (cited in note 2). In this manner, both the prosecution
A. Departures from the Guidelines

Generally, the sentencing court must select a sentence from within the guideline range.\textsuperscript{38} The Commission describes the Guidelines as "carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes."\textsuperscript{39} A sentencing court may, however, impose a sentence outside the presumptive range established by the applicable guideline if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."\textsuperscript{40} Various enumerated factors may also constitute a basis for departure: the victim's conduct, lesser harms (e.g., mercy killing), coercion and duress, diminished capacity, and voluntary disclosure of the offense.\textsuperscript{41} The application of other non-enumerated factors is left to the discretion of the sentencing judge.\textsuperscript{42}

"A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect."\textsuperscript{43} "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."\textsuperscript{44} However, whenever a court departs from the applicable guideline range, the court must state the specific reasons for and defense recognize that the difference between levels will not necessarily affect the imposed sentence. Thus, litigation is reduced. Id. Nevertheless, the levels allow a sentence to increase proportionally. A change of six levels will generally double the sentence regardless of the starting level. Id.

38. USSG, Ch 1, Part A, 2 (cited in note 2).
39. USSG, Ch 1, Part A, 4(b) (cited in note 2).
40. 18 USC § 3553(b). Pursuant to USSG § 5K2.0 (Policy Statement), two avenues may lead to a valid departure: (1) qualitative ("a district court may depart if it finds an aggravating or mitigating circumstance of a kind not considered by the Sentencing Commission in formulating the guidelines"); and (2) quantitative ("a district court may depart if it finds a material circumstance which, although considered by the Sentencing Commission, is present 'to a degree' neither readily envisioned nor frequently seen in connection with the offender and/or the offense of conviction"). United States v Sklar, 920 F2d 107, 115 (1st Cir 1990). However, regardless whether the departure is qualitative or quantitative, "the circumstance must have weight, that is, it must be sufficiently portentous to move the case out of the heartland for the offense of conviction." Sklar, 920 F2d at 115 n 7.
41. See USSG §§ 5K2.10-5K2.13, 5K2.16 ps (cited in note 4).
43. USSG, Ch 1, Part A, 3 (cited in note 2).
44. USSG, Ch 1, Part A, 4(b) (cited in note 2).
the departure. 46
A rigid, mechanized application which straitjackets a sentencing court should be avoided. 46 Furthermore, a court should not be stripped of its "sensible flexibility" in considering departures. 47 The question of whether judges possess sufficient discretion to address "atypical" cases and the related question of whether Congress and the Commission have permitted virtually no judicial discretion remain unanswered:

Many of those who decry the emphasis on incarceration in the guidelines complain that the system deprives judges of the discretion they need to sentence non-violent offenders to sanctions other than imprisonment. In fact, the Sentencing Reform Act provides significant latitude for departure, but many judges consider themselves bound by the Commission's advice in the Part 5H policy statements that certain offender characteristics are "not ordinarily relevant" to sentencing. 48

This debate could be softened, but not entirely eliminated, by recently proposed amendments to the Guidelines which would broaden judicial discretion in three areas: (1) ordinarily irrelevant offender characteristics which are both present to an unusual degree and important for sentencing purposes; (2) the defendant's age combined with a second, permissible factor (e.g., young and naive or elderly and infirm); and (3) the lack of youthful guidance or a history of family violence. 49

B. Appellate Review

The Act provides for limited appellate review of sentences in order to ensure the proper application of the Guidelines. 50 A defendant may appeal a sentence imposed in violation of law, or as a result of an incorrect application of the Guidelines, or if the district

45. 18 USC § 3553(c).
46. Lara, 905 F2d at 604.
47. United States v Sturgis, 869 F2d 54, 57 (2d Cir 1989). See United States v Lieberman, 971 F2d 989, 999 n 10 (3d Cir 1992) (emphasizing the importance of greater flexibility and visible judicial discretion to advance the purposes of the Act).
49. 57 Fed Reg 90-01 (1992) (USSG, Ch 5, Part H, Departures, Item 33(A-C) (Proposed Amendments) (cited in note 4)). But see 57 Fed Reg 20148-01 (1992) (Amendment, USSG § 5H1.12 ps (cited in note 4)) (providing that: "Lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds for imposing a sentence outside the applicable guideline range."); notes 185-86 and accompanying text.
50. 18 USC § 3742.
court departed upward from the guideline range. Similarly, the Government may appeal a sentence imposed in violation of law, or as a result of an incorrect application of the Guidelines, or if the district court departed downward from the guideline range.

An incorrect application of the sentencing guidelines occurs when a ground for departure, stated by the sentencing judge, is prohibited either by the Guidelines or by the general policy statements regarding the Guidelines' application. The Guidelines are also incorrectly applied where the district court "depart[s] from the applicable sentencing range based on a factor that the Commission has already fully considered in establishing the guideline range or . . . expressly rejected as an appropriate ground for departure." Moreover, an appellate court may not affirm a sentence solely on its independent assessment that the departure was reasonable where the district court relied on an improper ground in departing from the guideline range.

Instead, the appellate court must make two separate inquiries. First, was the sentence imposed "in violation of law or as a result of an incorrect application of the Guidelines?" Second (if the de-

51. *Williams*, 112 S Ct at 1118 citing 18 USC § 3742(a).
52. *Williams*, 112 S Ct at 1118 citing 18 USC § 3742(b). The Supreme Court further stated that Section 3742(f) defines the appellate court's narrow scope of review:
   If the court of appeals determines that the sentence—
   (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
   (2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
   (A) if it determines that the sentence is too high and the appeal has been filed [by the defendant], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
   (B) if it determines that the sentence is too low and the appeal has been filed [by the Government], it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
   (3) is not described in paragraph (1) or (2), it shall affirm the sentence. *Williams*, 112 S Ct at 1118-19, citing 18 USC § 3742(f).
54. Id at 1119.
55. Id at 1120.
56. Id.
57. Id. If true, a remand is required by 18 USC § 3742(f)(1). However, a remand is not required where "the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." *Williams*, 112 S Ct at 1120. In other words, "a remand is appropriate unless the reviewing court concludes, on the record as a whole, that
parture was not a result of error in interpreting the Guidelines), was "the resulting sentence an unreasonably high or low departure from the relevant guideline range?"\(^{58}\)

In reviewing a district court's departure on the basis of mitigating or aggravating circumstances, the appellate court utilizes a three-part test. This three-part standard of review was first provided in *United States v Diaz-Villafane*.\(^{59}\) First, the appellate court exercises plenary review and determines as a matter of law "whether or not circumstances are of a kind or degree that . . . justify departure" through mitigating or aggravating circumstances not adequately considered by the Commission.\(^{60}\) Next, under a clearly erroneous standard, the court reviews the record and determines "whether the circumstances, if conceptually proper, actually exist in the particular case" and have a basis in fact.\(^{61}\) Finally, the actual sentence, in terms of "the direction and degree of departure" and the reasons for its imposition, is reviewed for reasonableness.\(^{62}\)

C. Departure Policy

Although the Commission recognizes that the Guidelines cannot include "the vast range of human conduct potentially relevant to a sentencing decision," it believes that given the legal freedom, sentencing courts will infrequently depart from the Guidelines.\(^{63}\) In this manner, the Guidelines and the assigned sentencing ranges address the "heartland" of typical offenses, while departures are "rare occurrences" and address "unusual cases outside the range of the more typical offenses for which the guidelines were designed."\(^{64}\) Departures may either be guided\(^{65}\) or unguided.\(^{66}\) Re-

---

\(^{58}\) The error was harmless, *i.e.*, that the error did not affect the district court's selection of the sentence imposed." Id at 1120-21, citing FRCrP 52(a).

58. *Williams*, 112 S Ct at 1120. If so, a remand is required under 18 USC § 3742(f)(2). *Williams*, 112 S Ct at 1120.

59. 874 F2d 43, 49-50 (1st Cir 1989).

60. *Diaz-Villafane*, 874 F2d at 49.

61. Id; see 18 USC § 3742(d).

62. *Diaz-Villafane*, 874 F2d at 49; see 18 USC § 3742(e)(2). See also *United States v Kikumura*, 918 F2d 1084, 1110 (3d Cir 1990) (expanding the third part of the standard to determine whether the factors relied upon are appropriate bases for departure and whether the degree of departure is reasonable).

63. USSG, Ch 1, Part A, 4(b) (cited in note 2). For example, physical injury is generally important in crimes of assault or robbery, but is rarely relevant in cases of fraud. However, in such a rare case, a departure would be proper. Id.

64. Id.

65. Guided departures include specific guidance for departure by numerical or non-
Regardless of the type or direction, departure sentences extend beyond the fixed limits of the guideline ranges. To this end, the cumulative downward departure jurisprudence has stretched the lower envelope of the Guidelines.

D. Downward Departures

1. Mitigating Role

When an offense level is extraordinarily magnified by a circumstance that bears little relation to the defendant's actual role in the offense, a downward departure is warranted on the ground that minimal participation exists to a degree not contemplated by the Guidelines. Also, where an adjustment for role in the offense is not available by strict application of the language of the Guidelines, the court has the power to use analogic reasoning to depart from the Guidelines when the basis for departure is similar conduct.

66. Unguided departures are more infrequent and may rest on grounds listed in Chapter Five, Part K or on other grounds not mentioned in the Guidelines. USSG, Ch 1, Part A, 4(b) (cited in note 2). See notes 187-210 and accompanying text.

67. Section 3B1.2 of the USSG provides:

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

USSG § 3B1.2 (cited in note 4).

68. United States v Restrepo, 936 F2d 661, 667 (2d Cir 1991). In this crime of money laundering, the adjustment for the amount of cash associated with the offense resulted in an increase of nine levels. However, the defendants were merely laborers whose sole function was to load boxes of money at a warehouse on the night of the arrest. The defendants' minimal participation existed to a degree not contemplated by the Guidelines and resulted in a four-level downward departure. Restrepo, 936 F2d at 666-67. Compare United States v Joyner, 924 F2d 454, 461 (2d Cir 1991) (rejecting a downward departure because only an extraordinarily minute role deserves a departure beyond the four-level maximum reduction of USSG § 3B1.2).

69. United States v Bierley, 922 F2d 1061, 1069 (3d Cir 1990). In this case, the defendant procured pornographic material from an undercover postal inspector, rather than a nationwide child pornography ring. Bierley, 922 F2d at 1063. However, the undercover agent was not a criminally responsible "participant." Id at 1065. Although USSG § 3B1.2 linguistically did not apply to the defendant, because there was no criminally responsible "participant," the defendant's conduct was not significantly different from another defendant in similar circumstances who might qualify for a role in the offense adjustment. Bierley, 922
For example, in *United States v Valdez-Gonzalez*, the defendants were mere drug "mules" and the sole participants in the offense of possession of marijuana with intent to distribute. An adjustment for marginal culpability was not directly available. Nevertheless, no provision of the Guidelines barred a downward departure for marginal culpability by relatively blameless defendants such as "mules" in drug trafficking. The role in the drug trade played by "mules," therefore, constituted a mitigating circumstance of a kind or to a degree not considered by the Guidelines.

2. Adequacy of Criminal History Score

The USSG § 4A1.3 policy statement contemplates that the six categories associated with the criminal history score may inadequately consider the variability in the severity of various defendants' criminal history. An instance of the exaggeration of the

---

F2d at 1068. Therefore, a downward departure was proper in this rare and unusual case where there was "concerted activity" but only one "participant." Id at 1069. This departure was limited to the extent of the most nearly analogic guideline—two to four levels on the basis of USSG § 3B1.2. *Bierley*, 922 F2d at 1069.

70. 957 F2d 643 (9th Cir 1992).


73. Id at 649.

74. Id.

75. Id at 650. A downward departure, from 41-51 months to eight months plus three years of supervised release, based upon the defendants' role in conduct outside the scope of the offense of conviction, was recognized in order to give effect to the Guidelines' intent, where the offense precluded a downward adjustment under USSG § 3B1.2. *Valdez-Gonzalez*, 957 F2d at 645, 649.

76. Section 4A1.3 (Policy Statement) provides, in pertinent part, that:

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with 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. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category . . . and therefore consider a downward departure from the guidelines.

USSG § 4A1.3 ps (cited in note 4).

77. Id. The Guidelines clearly permit a downward departure where the defendant's conduct is exaggerated by the criminal history score. Id. Moreover, where a district court believes it does not have the discretion to consider mitigating factors relevant to a downward departure, and authority exists, the case may be remanded with instructions that allow, but do not direct, the district judge to consider whether such a departure is warranted. *United States v Brown*, 903 F2d 540, 545 (8th Cir 1990).
criminal history score was *United States v Bowser*, where the conjunction of three factors mitigated the seriousness of the defendant's criminal history: (1) the defendant's two previous criminal acts were committed when he was merely 20 years old; (2) such prior acts were committed within two months of each other; and (3) the defendant was sentenced to concurrent sentences. This unique combination of criminal history factors was insufficiently considered by the Guidelines and their conjunction permitted a downward departure. The over-representation of the seriousness of the criminal history score, was therefore, an appropriate consideration for a downward departure.

3. Specific Offender Characteristics

The specific offender policy statements address the relevance of certain offender characteristics to sentence departures. The Commission has determined that various factors are either relevant, "not ordinarily relevant," or irrelevant in the determination of a departure sentence.

   a. Age

Although age is "not ordinarily relevant," a district court may

---

78. 941 F2d 1019 (10th Cir 1991).
79. 941 F2d 1024. Under the Guidelines, the defendant's sentence could have been nearly tripled by the career offender enhancement. Id at 1023.
80. Id at 1025. Similarly, in *United States v Senior*, 935 F2d 149 (8th Cir 1991), the defendant's criminal history score was overstated because the state courts had treated the defendant's three robberies, committed at age 20, "as more or less one criminal episode." Senior, 935 F2d at 150-51. Moreover, such score was further exaggerated, because at age 24, the defendant committed two drug-related offenses within 14 days. These crimes were consolidated for sentencing, the sentences were imposed concurrently, and parole was granted after about 18 months. Thus, a downward departure from 292 months to the statutory minimum sentence of ten years was reasonable. Id.
81. 941 F2d 1024; *United States v Lawrence*, 916 F2d 553, 554-55 (9th Cir 1990). See *United States v Pinckney*, 938 F2d 519, 521 (4th Cir 1991) (remanding for consideration by district court); *Brown*, 903 F2d at 544-45 (same).
82. USSG, Ch 5, Part H, Intr Commentary (cited in note 2).
83. Id. However, consideration of other specific offender characteristics may be permitted where a departure is firmly grounded in one or more of the penological goals (retribution, general deterrence, incapacitation and rehabilitation) underlying the Guidelines. *United States v Mogel*, 956 F2d 1555, 1558 n 2, 1562 (11th Cir 1992).
84. Section 5H1.1 (Policy Statement) provides, in pertinent part, that:

Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. . . .

USSG § 5H1.1 ps (cited in note 4).
consider age "in an extraordinary case." However, in the arguably atypical case of United States v Carey, the court of appeals noted that a departure based on the combination of the defendant's age, 62, and the fact that he had several serious operations as a result of a brain tumor, without more particularized findings and analysis pursuant to USSG §§ 5H1.1 and 5H1.4 (Policy Statements), was unreasonable. Age is, thus, generally considered in combination with other factors.

b. Education and Vocational Skills

Education and vocational skills are not ordinarily relevant in determining whether a sentence should depart from the Guidelines' range. Thus, in United States v Desormeaux, the defendant's post-arrest conduct in advancing her education and attaining a General Education Development High School Equivalency Certificate (GED) was deemed insufficiently extraordinary to warrant a

85. United States v Lopez, 938 F2d 1293, 1296 (DC Cir 1991). The policy statements of USSG §§ 5H1.1-5H1.6 prohibit sentence range departures "in all but extraordinary cases." Mogel, 956 F2d at 1562.
86. 895 F2d 318 (7th Cir 1990).
87. Carey, 895 F2d at 324.
88. For example, in Bowser, the court considered the defendant's 20-year age at the time of previous criminal acts and permitted a downward departure because these acts overrepresented the severity of the defendant's criminal history. Bowser, 941 F2d at 1025. Age, although not ordinarily relevant, has meaning when reviewing the circumstances of the criminal history. Id at 1024.

Also, in United States v Garcia, No 90-30363, 952 F2d 408 (text in WL) (9th Cir Jan 6, 1992), the court departed downward based on factors in USSG §§ 5H1.1 and 5H1.6 (Policy Statements). The defendant's family ties were unusually supportive and shielded the defendant from gang-related influences. Moreover, the defendant's father, a minister, protected his son by ordering gang members to leave the family home. The defendant's parents arranged for their son to live near relatives, away from gang influence, but in close contact with his parents. In this case, the district court did not commit plain error in departing downward because the defendant's youth, naivete and supportive family ties were exceptional. Garcia, 952 F2d 408 at 5-6.

89. Section 5H1.2 (Policy Statement) provides, in pertinent part, that:

Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor. . . .

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

USSG § 5H1.2 ps (cited in note 4).
90. Id.
91. 952 F2d 182 (8th Cir 1991).
A defendant must either have extraordinary mental and emotional conditions, or else have related factors, not adequately considered or substantially exceeding the ordinary, to justify a USSG § 5H1.3 (Policy Statement) downward departure. A variety of such conditions have been held to be improper for departures: non-spousal physical and emotional abuse, dependent personality disorder, compulsive gambling, the need for psychiatric treatment, and suicidal tendencies.

The requirement for extraordinary mental and emotional circumstances, before a court may properly provide a downward departure, has been identified by the courts. The defendant, in United States v Vela, was sexually abused by her stepfather as a child. She alleged that this ordeal, and the denial of these events by her mother, predisposed her to the distribution of heroin. The court of appeals reversed a downward departure because these factors, though egregious, were insufficiently extraordinary, did not
cause the defendant's criminal conduct, and were often present in the lives of criminals. However, in dictum, the court stated that an extraordinary family history of incest or related treatment, that both caused an offender's mental or emotional conditions and affected the subsequent criminal conduct, could be a proper ground for a downward departure.

A downward departure for mitigating emotional factors was provided in United States v Perez, where the 25-year old defendant had been arrested for dealing in crack, gave birth while in custody, and was forced to give the infant to relatives during her 15-month period of incarceration awaiting trial. Tragically, she experienced the sudden and unexpected death of this child. Moreover, the defendant was subject to deportation as an illegal alien after release, and thus, would continue to be separated from family and friends. A downward departure was authorized because this emotional blow was a mitigating circumstance not adequately considered by the Guidelines.

102. Id at 199. The court stated that the defendant's factual justification was insufficient to support a downward departure. "Childhood abuse and neglect are often present in the lives of criminals" and may cause mental and physical effects. Id. Although the defendant's family life was "shocking and repulsive," her family background was not the cause of her criminal conduct. Id.

103. Id. For example, crimes involving prostitution or child abuse, unlike the distribution of heroin, may have a sufficient nexus with an extraordinary family history of incest. In contrast, United States v Roe, F2d , 1992 WL 252853 (9th Cir), departed downward in a sentence for bank robbery and held that abuse as a child was a proper basis for departure in extraordinary circumstances. Roe, 1992 WL 252853 at 2 (The psychological effects of child abuse manifest themselves in profound mental or emotional conditions of inadequacy, isolation, confusion, low self-esteem and guilt. Such conditions, in this case, affected the defendant's criminal conduct in committing a bank robbery.).

106. Id at 698.
107. Id at 699.
108. Id at 698. "There are occasions where the law's implacability must bend and give homage through compassion to humanity's frailties and nature's cruelties." Id.
d. Physical Condition, Including Drug or Alcohol Dependence or Abuse

A defendant must have an extraordinary, atypical or unusual physical condition, such as the "potential for victimization" and "extreme vulnerability," under a proper USSG § 5H1.4 (Policy Statement) downward departure. Ordinary, typical, or usual physical conditions are inappropriate for such departures. Conditions which the courts have found to be ordinary include: pregnancy, Acquired Immune Deficiency Syndrome (AIDS), "poor health," drug dependence, alcoholism, and participation in a post-arrest drug rehabilitation program.

109. Section 5H1.4 (Policy Statement) provides, in pertinent part, that: Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment. Drug or alcohol dependence or abuse is not a reason for imposing a sentence below the guidelines.

USSG § 5H1.4 ps (cited in note 4).

110. United States v Greenwood, 928 F2d 645, 646 (4th Cir 1991). The defendant was severely handicapped by the loss of both legs below the knee due to action in the Korean War and required specialized treatment at the Veterans Administration Hospital. A downward departure was justified by these extraordinary medical problems where incarceration would have jeopardized the defendant's required treatments. Greenwood, 928 F2d at 646.

111. See United States v Pozzy, 902 F2d 133, 138-39 (1st Cir 1990) (vacating a downward departure because pregnancy was neither atypical nor unusual).

112. Lara, 905 F2d at 601, 605. This case involved an extraordinary situation where the defendant was particularly vulnerable due to his immature appearance, bisexual orientation, diminutive size and fragility. Moreover, the severity of his prison term was exacerbated by his placement in solitary confinement as the sole means of segregating him from other inmates. These factors, ordinarily irrelevant, were properly considered in providing a downward departure because incarceration was neither atypical nor unusual.


115. United States v Guajardo, 950 F2d 203, 208-9 (5th Cir 1991) (the combination of cancer in remission, high blood pressure, a fused right ankle, an amputated left leg and drug dependency was not extraordinary).


118. United States v Martin, 938 F2d 162, 163-64 (9th Cir 1991) (holding that rehabilitation from drug abuse was not a proper ground for departure but could be considered in post-sentence supervised release). Contrast United States v Harrington, 947 F2d 956, 958-62 (DC Cir 1991) (holding that a post-offense, pretrial drug rehabilitation effort may justify a two-level reduction for acceptance of responsibility under USSG § 3E1.1). But see United States v Maier, F2d, 1992 WL 233497 at 5 (2d Cir) (holding that neither USSG §§
Extraordinary physical conditions were found in *United States v Gonzalez*, where the defendant was extremely small and feminine in appearance. Although he was 19, he resembled a 14 or 15-year-old boy. Because his features would “make him prey to the long-term criminals with whom he will be associated in prison,” a downward departure properly ensured the defendant’s safety from homophobic attacks because of his extreme vulnerability.

*United States v Whitehorse* is an unusual case involving the totality of all of the circumstances. The defendant’s previous treatment in prison for alcoholism failed because the prison officials made an ill-advised decision to send the defendant on an unsupervised furlough. The defendant was intoxicated throughout the furlough, failed to return to prison on time, and was charged with an “escape.” Thus, the district court wanted the defendant supervised by a United States probation officer, but not by the Bureau of Prisons, during her subsequent treatment for alcohol addiction. The court of appeals found no abuse of discretion where the district court implemented alcoholism-treatment, by way of sentencing, to provide needed education or vocational training, medical care or other correctional treatment in the most effective manner.

---

5H1.4 nor 3E1.1 discloses the Commission’s adequate consideration of drug rehabilitation, which may warrant departure in an appropriate case).  

119. 945 F2d 525 (2d Cir 1991).  
120. *Gonzalez*, 945 F2d at 526.  
121. Id at 525-26. Unlike *Lara*, which involved a victimized, bisexual defendant, the present defendant, who was neither gay nor bisexual, need not have already been victimized as a prerequisite to a downward departure under the Guidelines. Id at 526-27. Prison violence may be prevented before it occurs based on the recognition that “prison conditions may be particularly oppressive to vulnerable individuals.” Id at 527.

The district court based its decision to depart downward on *Lara* which held that extreme vulnerability was inadequately considered by the Commission. Id at 525-26. Thus, the court of appeals applied a clearly erroneous standard of review to the district court’s findings of fact. Id at 526. In contrast, in *Lara*, the original legal question regarding extreme vulnerability was reviewed de novo. Id at 526 n 1.

The dissent, nevertheless, objected because the findings of fact merely demonstrated a defendant of less than average height and weight. *Gonzalez*, 945 F2d at 528 n 1 (Winter dissenting). “The number of defendants eligible for a downward departure on [the ground of fear of assaults] is thus virtually unlimited, and the Guidelines’ goal of uniformity will be thoroughly subverted.” Id at 529.

122. 909 F2d 316 (8th Cir 1990).  
123. *Whitehorse*, 909 F2d at 319.  
124. Id at 318-19.  
125. Id.  
126. Id at 319-20. A downward departure from 12-18 months to four months, concurrent with a previous assault sentence, was appropriate. Id at 317.
Section 5H1.4 (Policy Statement) of the USSG does not require that a physical condition only be pertinent to the question of imprisonment. Instead, § 5H1.4 permits downward departures whenever there is sufficient evidence of impairment. The district court must make a two-step inquiry: (1) whether the factual findings indicate that the physical and mental disabilities are extraordinary impairments; and (2) whether the condition of disability requires a reduced term of imprisonment or an alternative to confinement.

\[\text{e. Employment Record}\]

In the absence of sufficiently unusual circumstances associated with a defendant's employment record, a downward departure pursuant to USSG § 5H1.5 (Policy Statement) is improper. Employment records involving a steady and successful employment or a commendable military service are usual and ordinary, and therefore, are improper circumstances for such departures. A defendant's employment record supports a downward departure only in exceptional or extraordinary cases.

The defendant, in United States v Big Crow, had an excellent employment record. United States v Ghannam, 899 F2d 327, 329 (4th Cir 1990) (holding that sufficient evidence of impairment may justify various departure sentences: either a greater departure of no imprisonment or a lesser departure of merely shorter imprisonment).

United States v Slater, 971 F2d 626, 634-35 (10th Cir 1992) (remanding to the district court for a two-step determination of whether disabling back pain, inability to work, severe headaches, chronic major depressive disorder and borderline mental retardation were extraordinary impairments that required a reduced term or an alternate form of confinement).

Section 5H1.5 (Policy Statement) provides, in pertinent part, that:

Employment record is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Employment record may be relevant in determining the conditions of probation or supervised release.

USSG § 5H1.5 ps (cited in note 4).

United States v Rushby, 936 F2d 41, 43 (1st Cir 1991).

Rushby, 936 F2d at 41-42 (holding that ownership of a painting and wallpaper-hanging business that earned $30,000 per year over ten years was not unusual).

United States v Neil, 903 F2d 564, 565-66 (8th Cir 1990) (stating that downward departures are "quite rare" and holding that eleven years of commendable military service, as a recruiter in the continental United States, was insufficiently unusual).

United States v Jagmohan, 909 F2d 61, 65 (2d Cir 1990). The defendant was gainfully employed for nine years after he entered the United States. He was convicted of bribery in an unusual offense, where he used a personal check in the illicit transaction. These exceptional and extraordinary circumstances, which reflected a lack of sophistication in committing the offense, justified the downward departure from 15-21 months to three years of probation plus a $4,000 fine. Jagmohan, 909 F2d at 63, 65.

898 F2d 1326 (8th Cir 1990).
employment record, a solid community reputation and made consistent efforts to overcome the adverse environment of an Indian reservation, where the unemployment rate was 72 percent and the per capita income was only $1042.136 The defendant’s employer valued his work and was willing to hold his job until his release from custody.136 These mitigating factors were not adequately considered by the Commission in formulating the Guidelines and justified a downward departure.137

f. Family Ties and Responsibilities, and Community Ties138

In the absence of unique or extraordinary circumstances involving family or community, a downward departure under USSG § 5H1.6 (Policy Statement) is inappropriate.139 Examples of non-extraordinary family circumstances, not warranting departure, include the defendant’s: status as a single parent,140 efforts to keep his family together,141 status as a parent of several children,142 two minor children being separated and placed with “blood strangers,”143 status as parent of a handicapped child,144 spouse was also imprisoned,145 unpleasant childhood and family life,146 and wife’s affair with the victim.147 An example of non-extraordinary commu-

136. Id at 1332.
137. Id at 1331. The 23-year old defendant’s “excellent employment history, solid community ties, and consistent efforts to lead a decent life in a difficult environment” were sufficiently unusual grounds to justify a departure. Id at 1332.
138. Section 5H1.6 (Policy Statement) provides:
Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.
Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine.
USSG § 5H1.6 ps (cited in note 4).
139. Cacho, 951 F2d at 311. Only extraordinary family circumstances, that are outside “‘the heartland’ of cases” the Guidelines were intended to cover, can be the basis for a downward departure. United States v Shortt, 919 F2d 1325, 1328 (8th Cir 1990).
140. United States v Harrison, 970 F2d 444, 447-48 (8th Cir 1992); United States v Chestna, 962 F2d 103, 107 (1st Cir 1992); Mogel, 956 F2d at 1565; United States v Headley, 923 F2d 1079, 1082-83 (3d Cir 1991); United States v Johnson, 908 F2d 396, 399 (8th Cir 1990).
141. United States v Berlier, 948 F2d 1093, 1096 (9th Cir 1991).
142. Cacho, 951 F2d at 310-11 (mother of four small children); Headley, 923 F2d at 1082-83 (parent of five minor children).
145. Pozzy, 902 F2d at 139.
146. Anders, 956 F2d at 913.
147. Shortt, 919 F2d at 1328 (“adultery does not justify blowing up the adulterers, or building a [pipe] bomb capable of doing so”).
nity ties, not warranting a departure, are the defendant’s contributions to his town through his company.\textsuperscript{148}

However, in *United States v Pena*,\textsuperscript{149} the defendant’s criminal behavior, possession with intent to distribute marijuana, was a deviation from her usual conduct.\textsuperscript{150} The defendant was a single parent who provided the sole support for her two-month old child, was steadily employed for a long time, and provided financial support for her 16-year old daughter, who was also a single parent of a two-month old child. Extended incarceration would have placed the two infants at potential risk.\textsuperscript{151} The defendant’s responsibilities combined with the aberrational nature of her conduct created extraordinary circumstances.\textsuperscript{152}

Extraordinary circumstances have also been found where: the stability of a close-knit family depended upon the defendant’s presence,\textsuperscript{153} a child’s exceptionally promising future was threatened,\textsuperscript{154} the family ties were unusually supportive and shielded the young defendant from gang-related influences,\textsuperscript{155} the defendant had extraordinary parental responsibilities,\textsuperscript{156} there was

---

149. 930 F2d 1486 (10th Cir 1991).
150. *Pena*, 930 F2d at 1489, 1495.
151. Id at 1494.
152. Id at 1495. The court departed downward from 27-33 months to a five-year term of probation with six months confinement in a community treatment center. Id at 1489.
153. *United States v Alba*, 933 F2d 1117, 1122 (2d Cir 1991). Incarceration under the Guidelines could destroy an otherwise strong family unit where the defendant was married for twelve years and worked hard at two jobs in a long-standing employment. A downward departure maintained the economic well-being of the defendant’s family, which consisted of his wife, two young children, disabled father, and paternal grandmother. The stability of this close-knit family depended upon the defendant’s presence. These circumstances were sufficiently extraordinary to support such a departure. *Alba*, 933 F2d at 1122.
154. *United States v Handy*, 752 F Supp 561, 564 (ED NY 1990). The defendant was orphaned in her teens, was the mother of three out-of-wedlock children who lived with her, was gainfully employed for the past thirteen years, supported her children without public assistance, cared for the two small children of her boyfriend, and successfully guided her children through a “socio-economic minefield.” *Handy*, 752 F Supp at 561-62. These specific circumstances merited a downward departure and were extraordinary in the area of the defendant’s employment record, family ties and responsibility, and community ties. Moreover, a prolonged incarceration would have threatened the exceptionally promising future of her two older children. Id at 564.
156. *Johnson*, 964 F2d at 129. The defendant’s parental responsibilities were extraordinary where she was solely responsible for the upbringing of her three young children, including an infant, as well as the young child of her institutionalized daughter. Id. However, this downward departure was not provided on behalf of the defendant, but instead, on behalf of her family. Id at 129-30.
a youthful lack of guidance,\textsuperscript{157} and the community would be deprived of the services of "an exemplary citizen."\textsuperscript{158}

g. Role in the Offense\textsuperscript{158}

Downward departures are indirectly granted pursuant to USSG § 5H1.7 (Policy Statement), which provides that the "defendant's role in the offense is relevant in determining the appropriate sentence."\textsuperscript{160} Generally, however, these departures are provided under USSG § 3B1.2 on the basis of the defendant's mitigating role as a minor or minimal participant in concerted activity.\textsuperscript{161}

h. Criminal History\textsuperscript{162}

Although criminal history is relevant, a defendant's first-time offender status cannot justify a downward departure because such status was already accounted for in the Guidelines.\textsuperscript{163}

i. Dependence upon Criminal Activity for a Livelihood\textsuperscript{164}

A downward departure on the basis of business ownership, inso-

\textsuperscript{157} United States v Floyd, 945 F2d 1096, 1102 (9th Cir 1991), amended, 956 F2d 203 (1992). The defendant was abandoned by his parents, imprisoned at age 17, and lacked guidance and education. Floyd, 945 F2d at 1098. The district court did not err in departing downward based upon youthful lack of guidance which clearly constituted "information concerning the background, character, and conduct of the defendant" summarized by USSG § 1B1.4 but not prohibited by any provision of the Guidelines. Floyd, 945 F2d at 1102. In this case, a downward departure from 360 months to life imprisonment down to 194 months was appropriate. Id. But see note 49 and USSG § 5H1.12 ps (cited in note 4) (lack of guidance as a youth is not relevant for departure).

\textsuperscript{158} United States v Turner, No 90-1277, 915 F2d 1574 (text in WL) (6th Cir Oct 5, 1990). The defendant was "an exemplary citizen" whose community and civic activities were "substantially in excess" of most individuals, regardless of their criminal history. Turner, 915 F2d 1574 at 11. Such exceptional community involvement, reflected by participation in various community organizations and service on many community boards over 30 years, was not adequately taken into consideration by the Guidelines. Id at 6. Because other means of punishment were available, a downward departure from 15-21 months to three years probation was appropriate in order not to deprive the community of the defendant's service. Id at 4-5, 11-12.

\textsuperscript{159} Section 5H1.7 (Policy Statement) provides: "A defendant's role in the offense is relevant in determining the appropriate sentence. See Chapter Three, Part B (Role in the Offense)." USSG § 5H1.7 ps (cited in note 4).

\textsuperscript{160} Id.

\textsuperscript{161} See note 67 and sub-section 1 (Mitigating Role) regarding USSG § 3B1.2.

\textsuperscript{162} Section 5H1.8 (Policy Statement) provides: "A defendant's criminal history is relevant in determining the appropriate sentence. See Chapter Four (Criminal History and Criminal Livelihood)." USSG § 5H1.8 ps (cited in note 4).

\textsuperscript{163} Neil, 903 F2d at 566; Big Crow, 898 F2d at 1331. See note 76 and sub-section 2 (Adequacy of Criminal History Score) regarding USSG § 4A1.3 (Policy Statement).

\textsuperscript{164} Section 5H1.9 (Policy Statement) provides: "The degree to which a defendant
far as such ownership indicates a lack of dependence upon criminal activity for a livelihood, is unwarranted.\textsuperscript{165} Unlike upward departures, downward departures are generally not provided under USSG § 5H1.9 (Policy Statement).

\textit{j. Race, Sex, National Origin, Creed, Religion and Socio-Economic Status}\textsuperscript{166}

The factors of USSG § 5H1.10 (Policy Statement) are expressly prohibited for use in the determination of sentences.\textsuperscript{167} The following circumstances are also improper for the justification of a downward departure: defendant unable to speak English,\textsuperscript{168} alien defendant,\textsuperscript{169} consideration of political circumstances,\textsuperscript{170} or defendant’s affluence.\textsuperscript{171} However, mere admonitions or observations by the district judge, unrelated to socio-economic status, regarding the defendant’s background and character,\textsuperscript{172} the particulars of his individual life,\textsuperscript{173} or exposure to domestic violence\textsuperscript{174} are not barred.

In apparent conflict with the USSG § 5H1.10 policy statement, \textit{Big Crow} held that a downward departure was appropriate in light of the defendant’s excellent employment record, solid community reputation and consistent efforts to overcome the adverse environment of an Indian reservation.\textsuperscript{175} These mitigating factors, in light

\begin{itemize}
  \item \textsuperscript{165} \textit{Mogel, 956 F2d at 1564.}
  \item \textsuperscript{166} \textit{Section 5H1.10 (Policy Statement) provides: “These factors are not relevant in the determination of a sentence.” USSG § 5H1.10 ps (cited in note 4).}
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{United States v Rodriguez, 882 F2d 1059, 1066 (6th Cir 1989).}
  \item \textsuperscript{169} \textit{United States v Onwuemene, 933 F2d 650, 651-52 (8th Cir 1991).}
  \item \textsuperscript{170} \textit{See United States v Williams, 937 F2d 979, 981-82 (5th Cir 1991) (vacating an upward departure on other grounds and stating that the sentencing judge’s statements regarding the defendant’s father’s political rhetoric were “mere observations” and not “actual considerations” in sentencing).}
  \item \textsuperscript{171} \textit{See United States v Graham, 946 F2d 19, 20-22 (4th Cir 1991) (vacating an upward departure).}
  \item \textsuperscript{172} \textit{United States v Hatchett, 741 F Supp 622, 623-25 (WD Tex 1990), aff’d, 952 F2d 400 (5th Cir 1992) (a judge’s “lecture” of the defendant during sentencing serves the goals of initiating rehabilitation as well as promoting deterrence “by giving notice that no one is above the law”).}
  \item \textsuperscript{173} \textit{Lopez, 938 F2d at 1297-99 (exposure to domestic violence and its accompanying dislocations is not a component of socio-economic status, which merely encompasses the defendant’s status in society as objectively determined by his education, income and employment).}
  \item \textsuperscript{174} \textit{Id at 1298 (socio-economic status does not encompass domestic violence).}
  \item \textsuperscript{175} \textit{Big Crow, 898 F2d at 1331. See notes 134-37 and accompanying text.}
\end{itemize}
of the adverse environment, were not adequately considered by the Commission in formulating the Guidelines. Thus, excellent employment record and community reputation were the basis of the departure, but not race, national origin or socio-economic status.

k. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works

Absent extraordinary circumstances involving public service, employment-related contributions, or similar prior good works, a downward departure pursuant to USSG § 5H1.11 (Policy Statement) is improper. However, in United States v Takai, the defendants, who engaged in single aberrant acts and were not "professional criminals," were only motivated by misguided benevolent desires to help three members of their community obtain green cards. The defendants had bribed a government official, who was neither an undercover agent nor an informant. The official had not discouraged their actions. Examining the totality of the circumstances, the court of appeals found that downward departures of one point were reasonable where the offenses were not

176. *Big Crow*, 898 F2d at 1331. "Although departure on the basis of socio[-]economic factors is generally impermissible, courts can look to socio[-]economic conditions in determining whether an otherwise permissible factor presents a sufficiently atypical situation to form a basis for departure. . . . The Big Crow court specifically found that the defendant's employment history in such 'a difficult environment' was 'sufficiently unusual to constitute grounds for a departure.' . . . It is the former factor which permits us to view the latter." *Valdez-Gonzalez*, 957 F2d at 649 n 3 (citations omitted).

177. See id. Nevertheless, per the Senate Judiciary Committee's report, "[t]he requirement of neutrality . . . is not a requirement of blindness" toward race, sex, national origin, creed and socio-economic status. United States v Yu, 954 F2d 951, 958 n 3 (3d Cir 1992); Big Crow, 898 F2d at 1332 n 3. However, the Guidelines do not permit reliance upon legislative history. See 18 USC § 3553(b) ("In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.").

178. Section 5H1.11 (Policy Statement) provides:

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

USSG § 5H1.11 ps (cited in note 4).

179. 941 F2d 738 (9th Cir 1991).

180. A single act of truly aberrant behavior is a mitigating circumstance, not considered by the Commission, which warrants a downward departure: United States v Fairless, F2d , 1992 WL 228473 at 6 (9th Cir) (finding aberrant behavior based on the totality of the circumstances); United States v Morales, 961 F2d 1428, 1431 (9th Cir 1992); United States v Dickey, 924 F2d 836, 838 (9th Cir 1991) ("aberrant behavior" is not the same as "first offense"); United States v Russell, 870 F2d 18, 20 (1st Cir 1989).

181. Takai, 941 F2d at 742-44.

182. Id at 744.
for profit and did not involve coercion.\textsuperscript{183} The court further stated, regarding prior good works, that “if Mother Teresa were accused of illegally attempting to buy a green card for one of her sisters, it would be proper for a court to consider her saintly deeds in mitigation of her sentence.”\textsuperscript{184}

\textit{l. Lack of Guidance as a Youth and Similar Circumstances}\textsuperscript{185}

Effective November 1, 1992, the Commission promulgated the new USSG § 5H1.12 policy statement which provides that lack of youthful guidance and the circumstances surrounding a disadvantaged upbringing are irrelevant grounds for any departure.\textsuperscript{186}

\textbf{4. Substantial Assistance to Authorities}\textsuperscript{187}

In general, only the Government may move for a downward departure based upon the defendant's substantial assistance.\textsuperscript{188} The Guidelines provide the Government with the power, but not the duty, to file a substantial assistance motion.\textsuperscript{189} District courts do, however, have the authority to review a prosecutor's refusal to file such motion and grant a remedy if the refusal was based on an unconstitutional motive, such as consideration of the defendant's race or religion.\textsuperscript{190} In addition, the court may inquire whether the Government exercised bad faith in performing its duties under a
plea bargain agreement. Moreover, USSG § 5K1.1 (Policy Statement) merely focuses on the assistance that the defendant provides to the Government, rather than his aid, if any, to the judicial system.

5. Grounds for Departure

Mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Commission may justify a downward departure. Several mitigating factors, considered in United States v Rogers, included the career offender’s: (1) prompt surrender after committing a robbery; (2) full confession and cooperation with authorities; (3) acknowledgment that crack addiction was a contributing factor; and (4) acknowledgment that imprisonment and rehabilitation were appropriate. These factors, in the discretion of the trial court, thus may provide an appropriate basis for a downward departure.

Various courts have held that the following factors were inadequately considered by the Commission: voluntary (albeit late) surrender and acceptance of responsibility, extraordinary accept-

---

192. United States v Garcia, 926 F2d 125, 128 (2d Cir 1991). The defendant not only helped the Government develop the case, but his cooperation after the indictment resulted in the disposition of the charges against his two co-defendants. A downward departure was not precluded when the defendant’s “activities facilitating the proper administration of justice” in the district court were not encompassed by USSG § 5K1.1 (Policy Statement). Garcia, 926 F2d at 128.
193. Section 5K2.0 (Policy Statement) provides, in pertinent part, that:
Under 18 USC § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds “that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”...
Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense.
USSG § 5K2.0 ps (cited in note 4).
194. Id.
196. Rogers, 972 F2d at 492.
197. Id at 493.
198. United States v Crumb, 902 F2d 1337, 1340 (8th Cir 1990). The defendant violated probation, was ordered to surrender for service of sentence, but failed to report to the correctional institution on time. However, he voluntarily presented himself at such institution within nine days after a warrant for his arrest was issued. The district court provided a downward departure beyond a two-point reduction for acceptance of responsibility. Crumb, 902 F2d at 1338-39. This departure was reasonable where the defendant’s prompt surrender
6. Additional Grounds for Departure

Additional grounds for downward departures are also considered by the Guidelines and the courts: conduct of the victim, lesser extraordinary rehabilitation, and money laundering promoting de minimis drug trafficking.

was not adequately accounted for by USSG § 2J1.6. This guideline did not address the widely varying time lapses possible in a voluntary surrender. Crumb, 902 F2d at 1339-40.

199. *United States v Mickens*, 926 F2d 1323, 1332 (2d Cir 1991). A "defendant who realizes his wrongdoing and acts quickly to accept culpability for his crime may deserve more favorable treatment than one who only agrees to plead guilty in the face of a forcible arrest and federal prosecution." Rogers, 972 F2d at 493 citing *Mickens*, 926 F2d at 1332. See Lieberman, 971 F2d at 996.

200. *United States v Smith*, 909 F2d 1164, 1169 (8th Cir 1990). The relatively minor nature of the defendant's two previous crimes within a two-month period (burglary of personal property resulting in a $1000 loss and twice selling LSD to an undercover agent for $40), the briefness of his criminal career, and his age when the crimes were committed, one year above the 18-year threshold, made this an unusual case. The defendant was sentenced to 20 years for possessing and conspiring to sell cocaine, yet the applicable sentencing range was between 24 years, four months and 30 years, five months. A downward departure was justified because the factors that made the defendant a career offender were barely present and "the Government [was] splitting hairs" in seeking resentencing. *Smith*, 909 F2d at 1169-70. See note 76 and sub-section 2 (Adequacy of Criminal History Score) regarding USSG § 4A1.3 (Policy Statement).

201. *Sklar*, 920 F2d at 116. Rehabilitation may, on rare occasion, justify a downward departure, "but only when and if the rehabilitation is 'so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the acceptance of responsibility reduction.'" Id, quoting *Studley*, 907 F2d at 259. In *Sklar*, however, the defendant's rehabilitation after arrest and indictment, including entry in a detoxification program, abstinence from drug use, and acquisition of suitable employment, was solely based on the mandates of his pretrial release program. Because the defendant's rehabilitation was "insufficiently out of the ordinary" the downward departure was improper. *Sklar*, 920 F2d at 117.


203. *United States v Skinner*, 946 F2d 176, 179 (2d Cir 1991). The defendants entered a financial transaction with the intent to promote a narcotics trafficking conspiracy, but not to conceal a serious crime. They were charged with the crime of money laundering. Where such transaction was not intended to conceal a serious crime, but was de minimis and well beyond the "heartland" or the "norm," because it merely represented the completion of a sale between the defendants, the district court was empowered to consider a downward departure for mitigating circumstances of a kind, or to a degree, not adequately considered by the Guidelines. *Skinner*, 946 F2d at 179.

204. USSG § 5K2.10 ps (cited in note 4) ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."). For example, in *United States v Yellow Earrings*, 891 F2d 650 (8th Cir 1989), the defendant was convicted of assault for stabbing the victim in his chest with a nine-inch bread knife and inflicting serious injury. The crime occurred after the defendant refused to have sexual in-
harms, coercion and duress, diminished capacity, voluntary intercourse with the victim, who was six to eight inches taller and probably much stronger than the defendant. The victim's conduct was historically unpredictable when, as in this circumstance, he had been drinking. After being rejected, the victim became verbally abusive, pushed the defendant, went to the doorway of his kitchen, stood nude, and began shouting to the defendant's friends that she should be removed from his bedroom. Yellow Earrings, 891 F2d at 651-54. In this case, the district court's downward departure was reasonable in light of the victim's private abusive words, physical show of force, and public denigration of the defendant. Id at 654.

205. USSG § 5K2.11 ps (cited in note 4) ("Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy killing. . . . In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun . . . as a trophy . . . "). See United States v Saldana, No 88-00196, 1989 WL 61140 at 3 (M D Pa May 19, 1989) (justifying a downward departure where an illiterate foreign defendant reasonably believed he must escape from prison to avoid indefinite incarceration). Compare United States v Napoli, 954 F2d 482, 483 (8th Cir 1992) (The defendant's unreasonable intent to possess a sawed-off shotgun as a collector's item did not justify a downward departure. However, a reduction in sentence was possible under USSG § 2K2.1(b)(1) for possessing a firearm for collection.).

206. USSG § 5K2.12 ps (cited in note 4) ("If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range."). In some cases, coercion may not amount to a complete defense because of the absence of certain elements. Nevertheless, where the defendant is convicted beyond a reasonable doubt because of wilful actions, the district court may depart downward where the mitigating factor of coercion or duress is proved by a preponderance of the evidence. Such proof of coercion under the Guidelines does not require the traditional elements of immediacy or inability to escape, nor does it limit the feared injury to bodily harm. United States v Cheape, 889 F2d 477, 480 (3d Cir 1989).

207. USSG § 5K2.13 ps (cited in note 4) ("If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history [score] does not indicate a need for incarceration to protect the public."). The express language of the policy statement does not require proof amounting to "but for" causation. United States v Ruklick, 919 F2d 95, 96-98 (8th Cir 1990) (A downward departure was proper where the defendant had a diminished mental capacity and functioned as a twelve-year old. This resulted from emotional difficulties that stemmed from a childhood illness and comprised a contributing factor in the commission of a criminal offense.). The reduced capacity must significantly contribute to the defendant's actions. United States v Glick, 946 F2d 335, 336, 339 (4th Cir 1991) (The defendant suffered from a significantly reduced mental capacity, not caused by drugs or intoxicants, and "some possible loss of contact with reality" which "led him to act out in [a] self destructive fashion" at the time he committed the offense of interstate transportation of stolen property.). However, downward departures under USSG § 5K2.13 (Policy Statement) are only available if the defendant committed a non-violent offense while suffering from significantly reduced mental capacity. United States v Rodriguez, 938 F2d 319, 320 n 1 (1st Cir 1991).
disclosure of the offense,\textsuperscript{208} certain limited cases of co-defendant disparity,\textsuperscript{209} and impressive rehabilitation.\textsuperscript{210}

IV. SUMMARY AND CONCLUSION

It has been stated that sentencing is more of an art than an exact science.\textsuperscript{211} After the Commission promulgated the Guidelines, numerous judges, experienced in the art of indeterminate-sentencing, lamented the reduction of judicial discretion and the rigid sentences required by the Guidelines.\textsuperscript{212} Some of these judges may have been somewhat unfamiliar with the limits of the newly established “heartland.” Other judges refused to depart downward, even in unusual cases, because the specific offender characteristics, as defined by the policy statements, were not ordinarily relevant. However, many right-thinking judges knew the outside of the departure envelope and stretched its limits.\textsuperscript{213}

\textsuperscript{208} USSG § 5K2.16 ps (cited in note 4) (“If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted.”).

\textsuperscript{209} See \textit{United States v Ray}, 930 F2d 1368, 1372-73 (9th Cir 1990, amended, 1991) (In the unique situation where one defendant is sentenced under the Guidelines while the other co-defendants are sentenced under a different legal regime, such as when the Court of Appeals for the Ninth Circuit temporarily refused to follow the Guidelines, the district court may find “highly unusual” circumstances that support a downward departure.). Similarly, a departure may be permissible where some conspiracy co-defendants pled guilty to pre-Guidelines offenses and others were sentenced at trial under the Guidelines. \textit{United States v Boshell}, 952 F2d 1101, 1108 (9th Cir 1991).

However, downward departures to equalize sentences are generally unreasonable in the absence of substantial factual differences between the co-defendants and their relative levels of cooperation. \textit{United States v Nelson}, 918 F2d 1268, 1274-75 (6th Cir 1990). In addition, courts may not depart from the Guidelines on the basis of disparities between state and federal sentencing regimes. \textit{United States v Sitton}, 968 F2d 947, 962 (9th Cir 1992).

\textsuperscript{210} \textit{United States v Rodriguez}, 724 F Supp 1118, 1119 (SD NY 1989). The defendant was an addict at the time of the criminal act and lived apart from his wife and children. However, after his arrest, he accomplished an impressive rehabilitation, overcame his addiction, remained drug-free for almost two years, was reunited with his wife and children, obtained employment, and took courses to improve his employment opportunities. The defendant’s personal characteristics permitted a downward departure pursuant to 18 USC § 3553(a)(1) which provides that federal judges may consider “the history and characteristics of the defendant.” \textit{Rodriguez}, 724 F Supp at 1119.

\textsuperscript{211} “The Guidelines were promulgated in part to eliminate disparity in sentencing and should not lightly be laid aside; yet sentencing remains more an art than an exact science.” \textit{Alba}, 933 F2d at 1120.

\textsuperscript{212} See \textit{Harrington}, 947 F2d at 963, 968 n 1 (Edwards concurring) (discussing judicial discretion under the Guidelines and providing a supporting Appendix of Cases and Authorities).

\textsuperscript{213} During sentencing, one United States District Judge stated:

\textit{Let me tell you, and you can take this message back to . . .} [the United States Attor-
Nevertheless, downward departures were severely limited to those rare cases that were truly extraordinary, if not super-ordinary. These cases not only transcended the typical and ordinary "heartland," but also exceeded the merely atypical and unusual conditions, and included sufficiently and substantially atypical and unusual circumstances that justified a departure.

The Guidelines imply that broad judicial discretion destroys "uniformity" for those persons "similarly situated." This logic presumes that fixed sentencing rules, tempered with narrow judicial discretion, accurately positions offenders within the finite sentencing ranges. Such "uniformity," however, substantially depends upon the consistent efforts of the Assistant United States Attorneys. Unfortunately, not all "similarly situated" offenders are truly similarly situated in terms of their diverse offender and complex human circumstances. To this end, fixed rules coupled with narrowly guided policy statements are, on occasion, insufficient and inappropriate.

Broadening the district judge's reasonable discretion to consider merely "atypical and unusual" specific offender characteristics, as opposed to those characteristics that are extraordinary and "not ordinarily relevant," would significantly change the Guidelines.
Alternatively, such broadened discretion could be limited to first-time offenders with two or more “not ordinarily relevant” specific offender characteristics. These changes would further two purposes of criminal punishment — just punishment and rehabilitation — and permit the fair expansion of the envelope in the continuing evolution of the Guidelines.

*Kirk D. Houser*

---

217. For example, such characteristics could include: age, employment record or employment-related contributions, family ties, community ties, public service, or prior good works. Other factors, such as impressive rehabilitation, should also be considered.