SENTENCING IN FEDERAL COURT: A PRIMER

The introduction of the United States Sentencing Guidelines in 1987 radically changed federal sentencing. The Guidelines have dramatically changed the role of the lawyers and the probation officer and stripped the District Court of much of its sentencing discretion. Although the recent Supreme Court decision in United States v. Booker, ____U.S. ____, 125 S.Ct. 738, 160 L.Ed2d 621 (2005) restored some of that discretion, many federal judges still place heavy reliance on the Guidelines in reaching sentencing decisions. This is not surprising as for many federal judges, Guidelines sentencing is all they know. Moreover, many judges are wary of unwanted (and unwarranted) Congressional intervention and believe that adhering to the Guidelines will help keep Congress in check.

Political niceties to the side, it is important to remember that in all likelihood sentencing will happen in your case and you better be ready for it. Because of the government's tremendous power that manifests itself most often in a motion for downward departure for substantial assistance pursuant to U.S.S.G. § 5K1.1, for many lawyers, aggressive representation at sentencing consists of pushing their way past the co-defendant's lawyer to be the first horse to drink from the trough.

While cooperation with the government could certainly be in the best interests of a defendant, this paper is authored with the goal of providing some guidance to the lawyer who, after full consultation with a defendant, is not looking to move into the government camp as a cooperating defendant. If you approach the case with sentencing in mind, you might lay the factual basis to reduce your client's guideline sentence and/or convince the court to sentence relying more on the factors set out in 18 U.S.C. 3553(a) than the Guidelines. DO NOT BELIEVE THAT THE ONLY WAY YOU CAN GET A DOWNWARD DEPARTURE IS BY COOPERATION. There are some real prospects for downward departures besides §5K1.1 if you are willing to develop and present them in a coherent fashion with supporting facts and case law. UNDERSTAND WHAT §3553(a) PROVIDES SO THAT YOU CAN ARGUE WHY ITS CONTENTS ALSO SUPPORT A LOWER SENTENCE THAT IS "SUFFICIENT, BUT NOT GREATER THAN NECESSARY."

What follows are some ideas that you might want to incorporate the next time you are retained on a case in United States District Court or receive a phone call notifying you of your appointment as a Criminal Justice Act Panel Attorney.

GETTING STARTED

If you are going to appear in United States District Court, you need to have an idea of the Sentencing Guidelines. Unfortunately, it is not unusual to see an inexperienced federal practitioner take a case without any idea of the particular guidelines. As basic as this might sound, buy the Sentencing Guidelines. Pull the particular guideline that applies to your case and read it. Then read it again.

You need to know what are the specific offense characteristics of the charged offense. These are contained in Chapter 2 of the Guidelines. Then get the complaint or indictment and start preparing for the detention hearing with a number of goals in mind. One of the goals should be setting the stage for sentencing.

While reading the complaint/indictment, you want to determine which of those specific offense characteristics might apply to your case. In a drug or fraud case, you want to see if there is a way that you can somehow start to limit your client's relevant conduct. You need to look and see if there any victim related or obstruction in Chapter 3 that might be applicable. You want to start trying to develop the record that your client is worthy if not of a mitigating role adjustment, of at least a finding of being an average participant under U.S.S.G. § 3B1.1.

In addition to reading the Guidelines, don't be afraid to do some research. You might have come across Margie Meyers' papers on the Guidelines. They are incredibly helpful. Some other sources you might want to consider to familiarize yourself with the Guidelines include Federal Sentencing Law and Practice, a West Publication that is reasonably priced, Michael R. Levine, "108 Mitigating Factors," (May 1, 2005 ed.), and access to various Federal Defender websites. For an understanding of the differing interpretations of Booker and its application you might want to read the decisions in United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005) and United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005).

These two cases aptly demonstrate the competing views on the Guidelines in the post-Booker world. In Wilson, Judge Cassell determined that the Guidelines are still presumptive and should only be departed from "in unusual cases for clearly identified and persuasive reasoning." Wilson, 350 F.Supp.2d at 911. On the other hand, in Ranum, Judge Adelman concluded that the Guidelines are not presumptive, but advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in §3553(a).

THE DETENTION HEARING

Using your new-found knowledge of the applicable Guideline, press on during the detention hearing to show that certain upward adjustments do not apply. For example, in drug cases, U.S.S.G. § 2D1.1 provides for a two level upward adjustment if a dangerous weapon, including a firearm is possessed. The Application Note to that section provides that "the adjustment should be applied if the weapon was present, unless it was clearly improbable that the weapon was connected to the offense." United States v. Mueller, 902 F.2d 335, 345 (5th Cir. 1990). The enhancement is appropriate unless the defendant proves the exception – that it is clearly improbable that the weapon was connected with the offense. Try to show through the testifying agent that it was improbable it was connected to the offense, or, merely try to distance your client as far away from the firearm as possible. Think about getting the agent to admit that there is no evidence that your client was involved with the firearm or had any knowledge of the presence of the firearm. In a fraud case, try to have the agents admit what the intended loss is. That might provide an argument down the road that could reduce your client's exposure.

An aggravating role adjustment can add up to four points to your client's guidelines score. Try to get the agent to limit the number of participants and/or your client's role. Look at Application Note to U.S.S.G. § 3B1.1 which lists the factors a court should consider under this section: exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of

the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree and control and authority exercised over the control of others.

And, finally, if your client confessed, make sure to show that when he spoke with the agent, the client accepted responsibility for his/her actions.

Even if your client is detained (surprise), you have started building a record that might be to his advantage when sentencing comes around.

INFORMING THE CLIENT

Increasingly, defendants in the Southern District of Texas are veterans of state court prosecutions. Their knowledge and experience of sentencing comes from their practice with the standard state court plea bargain for an agreed upon period of supervision or incarceration that is accepted and approved by the state district judge. You need to let them know that life is different in federal court. Because the FDC is crowded with the self appointed experts on federal sentencing, speak with your clients about the possible application of the guidelines as soon as possible.

Be sure to get the client to understand that you are only providing him a prediction, not a guarantee, of what his sentence will be in the wake of Booker and the interplay with § 3553(a)

PLEA BARGAINING AND THE GUILTY PLEA

Plea bargaining under the Guidelines can be a seminar topic onto itself and is beyond the scope of this paper. Let me be bold enough to point out two of the biggest mistakes made in federal sentencing during the plea bargaining process. First, relevant conduct can include uncharged, dismissed and acquitted conduct. Many of us have seen the inexperienced practitioner cut a deal a la state court and think that he or she has limited a client's exposure by pleading to certain substantive counts. Don't think that if you have cut a deal to plead to that substantive count involving the one kilogram delivery that the plea will somehow limit your relevant conduct. Second, review the proposed factual basis of the plea very carefully. While, generally speaking, you cannot hide the ball or limit your relevant conduct, you certainly do not want to expand the relevant conduct attributable to your client. Unfortunately, many an unsuspecting defendant has had his relevant conduct unduly increased by counsel's failure to adequately review the factual basis.

THE RED FOLDER

Your client has just entered his guilty plea. In the Southern District of Texas, the courtroom deputy hands you the always popular red pocket folder with the order for the PSR and disclosure and sentencing dates. Inside the red folder are the biographical worksheets, the financial information forms, and other directions. Do not leave it to the client to fill out these forms alone. You should go over all of them with the client well in advance of the PSI interview and have them filled out well before your client meets with the USPO. Get the requested documents -- marriage certificates, discharge papers, income tax returns, etc -- together before the PSI interview.

After you and your client complete forms as best as you can, send a copy to the USPO. You can save them a great deal of time and

gain credibility if you are prepared and provide them the information and forms in advance of the PSI interview.

THE PROBATION OFFICER

To a large extent, the USPO controls your client's future. It is important that you have credibility with the USPO. I believe that the role of the USPO has changed since pre-Guidelines law. What was primarily a social science function has now become one of number crunching and, for many, practicing law without a license when they respond to your legal objections to the guidelines application. Having said that, what can you do before to further your position with the USPO before the probation interview? The offense conduct portion of the PSI and the relevant conduct determinations are drawn largely from the offense reports and interviews with the agents. If there is an issue about relevant conduct, for example, get your position to the USPO early. Provide the documentation or other evidence that supports your claim. Get to them before they take the agent's position lock, stock and barrel. Try to keep the offense conduct section of your client's PSR being a cut and paste version of a DEA 6 or FBI 302.

Similarly, if you have a factual and legal basis for a downward departure, you may want to consider providing the USPO the information to support your arguments at this stage. I use the word "may" because, depending on the USPO, it may well be better off and present it directly to the district court shortly before sentencing to prevent the USPO from undermining the argument.

I have attached a letter provided to a USPO in a recent case that was successful in ensuring that the defendant would not be hit for a firearm adjustment under U.S.S.G. §2D1.1(b)(1). This had a tremendous impact because the decision in turn insured that the defendant would be safety valve eligible.

THE PSI INTERVIEW

As part of the PSI, your client will be interviewed by the USPO. If you don't bother to show up, you should not be practicing law. It's that simple. This is such a critical stage of the proceeding that to not appear is ineffective assistance of counsel. A great deal of the interview is mundane – going over the biographical information, filling out forms and signing releases. Then why should you be there? First, pursuant to U.S.S.G. §3C1.1, Application Note, 5, a two level obstruction of justice enhancement can result from "providing false or misleading information, not amounting to a material falsehood, in respect to a presentence investigation. " Second, that obstruction enhancement can in turn lead to a denial of a downward adjustment for acceptance of responsibility. Your failure to be at the PSI interview just cost your client five levels.

One of the common areas where this five point turnaround can occur is when it comes to criminal history. Do not, I repeat, do not allow your client to discuss his criminal history. The USPO will have his NCIC print out and most of the offense reports before him. They know what the criminal history is; don't run the risk of a client forgetting that 199 state jail crack case where he was sentenced under 12.44(a) to county time.

Another major reason to appear is to insure that the acceptance of responsibility discussion goes well. I typically have my client's prepare a written statement about acceptance well in advance of the PSI interview to ensure that it satisfies §3E.1.1.

Many times, the USPO will be satisfied with the written statement. However, if they have questions for your client during the interview, your presence surely will help it go smoother.

REVIEWING AND RESPONDING TO THE PSR

After trying your best to positively influence both the PSI writer and the product, you get the PSI. What do you do? Go over it immediately with the defendant and start preparing your objections. The local rules of the Southern District of Texas require that the objections be in writing and timely filed. Although I have seen many Judges take up oral objections at the time of sentencing, do you really think that you have much of a chance of winning when you raise it at the last minute? Nope. Get them timely filed. What form should your objections take? There is no real magic to it. Some file their objections directly with the USPO; others file them with the Court. Sample objections are attached.

THE DEFENDANT'S SENTENCING MEMORANDUM

An often overlooked defense tool is the Defendant's Sentencing Memorandum. This allows a lawyer to present the legal and equitable arguments supporting a downward departure, or at the very least, a sentence at the low end of the applicable guideline. You cannot expect to give a Judge a handful of letters written by the defendant's supporters right before sentencing and expect them to have any meaningful impact.

If you have a basis for a downward departure, your chances of success increase if you present your arguments in a coherent and timely fashion.

How do you do it? At the time of rearraingnment, you should have a list of addresses for character witnesses. Do not rely on the defendant to get these letters. You provide these witnesses with a letter requesting their assistance and have them address certain areas. The sort of areas that they can address include the possible grounds for downward departure. As will be discussed *infra*, the Sentencing Guidelines, "place essentially no limit on the potential factors that may warrant departure." Koon v. United States, 518 U.S. 81 (1996); 18 U.S.C. § 3661 ("no limitation shall be placed on the information" a court can receive and consider for purposes of imposing an appropriate sentence). Following this portion of the article is a sampling of some potential ideas for downward departures.

Remember now that the Guidelines are only advisory and are only one factor to be considered along with the seven factors in 18 U.S.C. 3553(a). Make arguments under § 3553(a) that support a lower sentence. I try to make arguments to the Court to show whether he or she uses the pre-Booker traditional departure methodology or a post-Booker approach using 3553(a), a lower sentence is warranted.

After you get the letters and other documentary evidence that support your motion for a downward departure, put together a memorandum that weaves the equities with the law to support your motion. Provide your arguments supporting the objections that you made earlier. And get them to Chambers in a timely fashion. Again, give the Court sufficient time to read and digest your arguments. Don't expect to get your materials to the Court a day before sentencing. It's not fair to the Court or to the client.

Remember, we live in a visual society. In all but one area of advocacy, criminal defense lawyers are head and shoulders the best lawyers around. That one area where we are lacking is the effective use of visual aids and demonstrative evidence. Do not be afraid to steal from the civil lawyers by presenting a judge with a "Day in the Life" videotape. This was done recently in Judge Hittner's court by a lawyer who videotaped testimonials from the beneficiaries of a defendant's volunteer efforts and gave the judge a videotaped walk through of a client's daily existence at the work and at charities. The result? A downward departure and sentencing.

THE SENTENCING HEARING

Most sentencing hearings in the Houston Division of the Southern District of Texas are relatively short proceedings where the court rules on the objections, allows the defendant to allocute, and then allows counsel to allocute on the defendant's behalf. Some assorted tips to follow: know your judge's sentencing practices. While it is relatively uncommon in Houston to present live testimony, a number of districts allow the presentation of testimonial evidence in support of objections. Know the sentencing judge's practices. If you have an objection, make sure it is ruled upon. Finally, if your client is going to allocute, give him some guidance in what may or may not be effective with the Court.

If your representation ends at the district court level, make sure that you request leave to draw to avoid any pitfalls with the Fifth Circuit.

DOWNWARD DEPARTURES

In Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035 (1996), the Supreme Court established the framework for determining when a downward departure may be appropriate. District Courts may depart based on circumstances of the offense or the offender that are not adequately taken into account by the Commission pursuant to 18 U.S.C. 3553(b). The appropriateness of a departure is largely determined by whether a certain factor is encouraged, discouraged, or forbidden by the Sentencing Commission. As Koon noted, the Guidelines list very few factors that courts absolutely cannot use to depart. 518 U.S. at 93 (listing forbidden factors as "race, sex, national origin, creed, religion, socio-economic status, lack of guidance as youth, drug or alcohol dependence, and economic hardship). If the factor is encouraged, the court can depart only "if the applicable guideline does not already take it into account." Koon, 518 U.S. at 96. If the factor is discouraged, or encouraged but has already been taken into account in the guideline, courts can depart "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." Id. If the factor is unmentioned, courts must, "after considering the 'structure and theory of the guidelines and the Guidelines taken as a whole,' decide whether the [factor] is sufficient to take case out of the Guideline's heartland." Id.

The Koon Court also confirmed that a district court's departure decision is due considerable deference. Although governed by these core restraints of the sentencing guidelines, a decision to depart falls within a district court's traditional exercise of its discretion. As the Court noted in Koon, "This, too, must be remembered, however. ***It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider ever convicted person as an individual and every case as a study in***

the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge."

Koon, 518 U.S. at 112 (emphasis supplied).

Recognizing the untapped potential for downward departures, what follows is some food for thought in moving for downward departures.

Criminal history overstates propensity to commit crimes

If minor offenses "exaggerate" a defendant's criminal history, a downward departure may be appropriate. United States v. Summers, 893 F.2d 63, 67 (4th Cir. 1990). Most circuits have held that a downward departure under §4A1.3 may be considered if that category overrepresents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit future crimes. United States v. Webb, 139 F.3d. 1390, 1395 (11th Cir. 1998); United States v. Cuevas-Gomez, 61 F.3d 749 (9th Cir. 1995).

Loss table overstates the amount of loss or seriousness of offense

United States v. Walters, 87 F.3d 663 (5th Cir. 1996) (in money laundering case, district court reasonably departed downward by six months where defendant did not personally benefit from fraud; lack of benefit was not considered by the Guidelines so §5K2.0 justifies departure.

Money laundering is only incident to underlying conduct

United States v. Threadgill, 172 F.3d 357 (5th Cir. 1999) (downward departure proper in money laundering case because money laundering was only incidental to defendants' two million dollar illegal gambling operations, and they never used laundered money to further criminal activity; departure also proper because statutes aimed not at white collar offenders but at drug trade, racketeering and more complex offenses)

Aberrant Behavior

Recently amended U.S.S.G. § 5K2.20 allows a departure for aberrant conduct only for "a single criminal occurrence or single criminal transaction that was committed without significant planning, was of limited duration, and represented a marked deviation from an otherwise law-abiding life. This departure is unavailable if (1) offense involved serious bodily injury or death; (2) use or discharge of a firearm; (3) a serious drug trafficking crime; or (4) the defendant has more than one criminal history point.

For offense occurring prior to November 1, 2000, the date of the offense, law is more defendant friendly. United States v. Workling, 224 F.3d 1093 (9th Cir. 2000 (woman convicted of attempted murder of husband and use of firearm when he threatened to take children could receive an aberrant behavior departure); United States v. Tsoie, 14 F.3d 1438 (10th Cir. 1994); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (extraordinary family circumstances and aberrational nature of conduct).

Lesser harms

U.S.S.G. § 5K2.11 permits a departure where a defendant commits a crime to avoid

a greater harm … [where] circumstances significantly diminish society's interest in punishing the conduct" or where "conduct may not cause or threaten the harm or evil sought to be prevented by the law." United States v. Hemingson, 157 F.3d 347 (5th Cir. 1998) (one illegal $20,000 contribution was not within the heartland of money laundering cases involving long-running elaborate schemes and downward departure appropriate); United States v. Clark, 128 F.3d 122 (2nd Cir. 1997) (district court has authority to depart downward on lesser harms theory in felon in possession case where defendant had purchased the gun as gift for his brother and thus not engaged in activity Congress sought to proscribe; United States v. White Buffalo, 10 F.3d 575 (8th Cir. 1993) (downward departure proper for defendant who possessed sawed off shotgun to shoot animals who killed his chickens).

Post offense, post-conviction and post-sentencing rehabilitation

Although the November 2000 amendments added U.S.S.G. § 5K2.19 which prohibits downward departures for "post-sentencing rehabilitative efforts, even if exceptional," for offenses committed prior to that date, the defendant can receive such a departure. A number of circuits have recognized that a sentencing court may depart downward based on a defendant's post-offense rehabilitation. United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Koon allows exceptional efforts at drug rehabilitation to be considered as basis for downward departure because these efforts were not expressly forbidden as a basis for departure by the Commission); United States v. Green, 152 F.3d 1202 (9th Cir. 1998) (post conduct actions, particularly rehabilitation, may be considered as basis for departure; eleven level downward departure affirmed); United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998); United States v. Core, 125 F.3d 74 (2nd Cir. 1997); United States v. Sally, 116 F.3d 76 (3rd Cir. 1997); United States v. Holloway, 990 F.2d 1377 (D.C. Cir. 1993) (per curiam); United States v. Maier, 975 F.2d 944 (2nd Cir. 1992); United States v. Williams, 948 F.2d 706 (11th Cir. 1991); United States v. Sklar, 920 F.2d 107 (1st Cir. 1990); United States v. Griffith, 954 F.Supp. 738 (D.Vt. 1997).

Super acceptance of responsibility

A number of courts have departed downward for what is at times called "super-acceptance" of responsibility particularly when it is combined with exceptional efforts at drug rehabilitation. United States v. Fagan, ____F.3d ____, (Appeal No. 97-3306, 10th Cir., opinion delivered December 29, 1998); United States v. Jaroszenko, 92 F.3d 486, 490-91 (7th Cir. 1996); United States v. Cotto, 979 F.2d 921 (2nd Cir. 1991) (departure based on drug rehabilitation efforts subsequent to arrest is permissible); United States v. Maddalena, 893 F.2d 615 (6th Cir. 1989), cert. denied, 112 S.Ct. 233 (1991) (district court had discretion to consider defendant's efforts to stay away from drugs as mitigating circumstance justifying departure); United States v. Harrington, 808 F.Supp. 883 (D.D.C. 1992) (defendant's efforts to free himself from drug addiction and assume leadership role in drug treatment both before and after his conviction were atypical and extraordinary to a degree not contemplated by the Commission in establishing the acceptance of responsibility provision); United States v. Floyd, 738 F.Supp. 1256 (D. Minn. 1990) (substantial rehabilitation showing material change in life justified departure); United States v. Rodriguez, 724 F.Supp. 1118 (S.D.N.Y. 1989) (probation granted in light of defendant's "impressive rehabilitation");

United States v. Concepcion, 721 F.Supp. 186 (E.D.N.Y. 1990) (successful efforts to rehabilitate himself and reintegrate himself to family and community support departure).

Extraordinary family circumstance where incarceration would have extraordinary effect on innocent family members

United State v. Aguirre, 214 F.3d 1122 (9th Cir. 2000) (within district court's discretion to depart downward for extraordinary family circumstances "based on the fact that there is an 8 year old son who's lost a father and would be losing another for a substantial period of time'); United States v. Galante, 111 F.3d 1029 (2nd Cir. 1997 (affirming district court's downward departure in drug case where defendant showed he was a conscientious and caring father of two sons who would have faced severe financial hardships); United States v. Sclamo, 997 F.2d 970 (1st Cir. 1993) (downward departure based on family circumstances supported by fact that drug defendant had become model for son of woman he was living with and had provided strong guidance to child and psychologist's testimony that defendant had played positive role in child's psychotherapy and continued presence was essential for child's continued progress); United States v. Johnson, 964 F.2d 124 (2nd Cir. 1992); United States v. Pena, 930 F.2d 1486 (10th Cir. 19910; United States v. Ingram, 816 F.Supp. 26 (D.D.C. 1993); United States v. Concepcion, 795 F.Supp. 1262 (E.D.N.Y. 1992) United States v. Newell, 790 F.Supp. 1063 (E.D. Wash. 1992); United States v. Gerard, 782 F.Supp. 913 (S.D.N.Y 1992).

Adverse impact on business causing loss of job to innocent people

United States v. Milkowsky, 65 F.3d 4 (2nd Cir. 1995) (high probability that business run by antitrust offender would go under if she were incarcerated justified one level downward departure)

Exceptional charitable and community activities

United States v. Serafini, 233 F.3d 758 (3rd Cir. 2000) (community service and charitable works performed by defendant were sufficiently extraordinary and exceptional); United States v. Canoy, 38 F.3d 893 (7th Cir. 1994) (charitable and civic activities, may, if exceptional, provide a basis for departure).

Diminished mental capacity

U.S.S.G. § 5K2.13 allows a departure for diminished capacity if the defendant committed the offense while suffering from a significantly reduced mental capacity.

The disorder need only be a contributing cause, not a but-for or sole cause of the offense. United States v. Soliman, 954 F.2d 1012, 1014 (5th Cir. 1992). The section requires only that the district court find *some* degree, not a *particular* degree of causation. United States v. Cantu, 12 F.3d 1506, 1515 (9th Cir. 1993). The guideline provision requires *only* that the defendant suffer from a significantly reduced mental *capacity.* It concerns the *effect* of the impairment on the defendant, not the characteristics or the seriousness of the impairment itself. Id., at 1513.

Section 5K2.13 does not require a showing of insanity. United States v. Leandre, supra.

> Nor does it require a defendant's diminished capacity to have prevented formation of the legally

> defined mental state associated with the offense. Nor must a defendant demonstrate that he or she is mentally retarded. The departure under section 5K2.13 applies to all crimes equally and may be considered by the fact-finder has rejected a defense of insanity or diminished capacity. United States v. Spedalieri, 910 F.2d 707, 711 (10th Cir. 1991); United States v. Cheape, 889 F.2d 477, 480-81 (3rd Cir. 1989). As this Court noted in vacating and remanding for resentencing in United States v. Chatman, 986 F.2d 1146, 1452 (D.C. Cir. 1993), the ultimate goal of section 5K2.13 "is to treat with lenity those individuals whose reduced mental capacity contributed to the offense."

United States v. Leandre, 132 F.2d 796, 803 (D.C. Cir. 1998).

Cases have found "significantly reduced mental capacity" to include bipolar disorder (or manic-depressive disorder) (United States v. McMurray, 833 F.Supp. 1454 (D. Neb. 1993)), schizophrenic disorder (United States v. Ruklick, 919 F.2d 95, 97 (8th Cir. 1990)), major depressive disorder, obsessive compulsive disorder (United States v. McBroom, 991 F.Supp. 445, 449 (D.N.J. 1998)), post traumatic stress disorder (United States v. Cantu, 12 F.3d 1506, 1513 (9th Cir. 1993)), schizophreniform disorder (United States v. Speight, 726 F.Supp. 861, 867 (D.D.C. 1989)) and even just "psychological problems" (United States v. Lewinson, 988 F.2d 1005, 1006-07 (9th Cir. 1993)).

Emotional disorders are not excluded from the application of Section 5K2.13. As noted in United States v. Cantu, supra:

> To artificially distinguish organic syndromes (mental defects) from emotional disorders is to ignore the increasingly blurry line between them. Robert Michels, M.D., Peter M. Marzuk, M.D. *Progress in Psychiatry, New. Eng. J.Med.* 552, 628 (1993) (surveying more than 300 scientific papers, including those pertaining to post-traumatic stress disorders and concluding that "[t]he biologic basis of psychiatry is more firmly established than ever before"). Treating emotional disorders in the same way as we do mental abnormalities furthers the purposes of 5K2.13. The goal of the guideline is lenity towards defendants whose ability to make reasoned mental decisions is impaired. Emotional conditions, like mental conditions, may distort or suppress the formation of reasoned decisions. The focus of the guideline provision is reduced mental *capacity*, not the cause – organic, behavioral, or both – of the reduction.

12 F.3d at 1512.

The basis for the role that one's mental condition should play in determining an appropriate sentence is well stated by Judge Frank Easterbrook of the Seventh Circuit:

> The criminal justice system long has meted out lower sentences to persons who, although not technically insane, are not in full command of their actions. The Sentencing Commission based its guidelines on the common practices of judges, which it attempted to make more uniform without fundamentally altering the criteria influencing sentences. Under both the desert approach to sentencing and the deterrence approach, mental states short of insanity are important. Persons who find it difficult to control their conduct do not – considerations of dangerousness to one side – deserve as much punishment as those who act maliciously or for gain.

United States v. Poff, 926 F.2d 588, 595 (7th Cir. 1991) (Easterbrook, J., dissenting).

Extraordinary physical impairment or bad health

U.S.S.G. § 5H1.4 makes physical impairment not ordinarily relevant except in unusual cases. United States v. Gee, 226 F.3d 8854 (7th Cir. 2000) (downward departure under section based on health not abuse of discretion where after review of extensive medical records, judge concluded that "imprisonment posed a substantial threat to defendant's life"); United States v. Streat, 22 F.3d 109 (6th Cir. 1994).

Duress or coercion

"If a defendant committed an offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may depart downward under U.S.S.G. 5K2.12." United States v. Gaviria , 804 F.Supp. 476 (E.D.N.Y 1992 (downward departure appropriate for battered spouse who was subservient to her husband); United States v. Hall, 71 F.3d 569 (6th Cir. 1995) (remanded to consider coercion by husband based on "overwhelming evidence that her criminal actions resulted at least in part from the coercion and control exercised by her husband")

Cultural assimilation

United States v. Rodriguez-Montelongo, 263 F.3d 429 (5th Cir. 2001); United States v. Lipman, 133 F.3d 726 (9th Cir. 1998) (in illegal reentry case, district court had authority to depart downward on ground that defendant had "culturally assimilated" into American society.

Totality of the circumstances

The district court is authorized to depart downward when the combination of factors indicate a departure is appropriate. The Guidelines themselves recognize this "totality of the circumstances" approach as a valid basis for a departure. As noted in the Commentary to U.S.S.G. 5K2.0:

> The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstances that is not ordinarily relevant to a departure from the applicable guideline maybe relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the heartland cases covered by the guidelines.

Again, a number of courts have agreed with this concept and departed downward. United States v. Parham, 16 F.3d 844 (8th Cir. 1994) (totality of circumstances may well converge to create the unusual situation not contemplated by the Commission); United States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994) (totality of circumstances departure based on defendant's steady employment, economic support of family, combined with aberrational conduct in that he had no prior criminal history); United States v. One Star, 9 F.3d 60 (Court affirmed departure based on a combination of factors and the "unusual mitigating circumstances of life on an Indian reservation"); United States v. Bowser, 941 F.2d 10198, 1024-1025 (10th Cir. 1991) ("a unique combination of factors," none of which "standing alone may have warranted a departure" provided a basis for a departure for a career offender); United States v. Cook, 938 F.2d 149, 153 (9th Cir. 1991) (a combination of factors together may together constitute a mitigating circumstance"); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (long employment history, lack of criminal record, absence of abuse of prior distribution, and responsibility for two infants justified departure); United States v. Griffith, 954 F.Supp. 738 (D.Vt. 1997); United States v. Artim, 944 F.Supp. 363 (D.N.J. 1996); United States v. Blackwell, 897 F.Supp. 586 (D.D.C. 1995) (even if defendant's palpably diminished capacity, extraordinary circumstances, and fact that her offense was a single aberrant behavior in otherwise stable history did not individually justify a departure, departure was appropriate when considerations were taken in the aggregate); United States v. DiRiggi, 893 F.Supp. 171 (E.D.N.Y. 1995), aff'd, 72 F.3d 7 (2nd Cir. 1995); United States v. Hollins, 863 F.Supp. 563 (N.D. Ohio 1994); United States v. Acosta, 846 F.Supp. 278 (S.D.N.Y 1994).

Family and community ties

Permitted only in "extraordinary circumstances" United States v. Woods, 159 F.3d 1132 (8th Cir. 1998) (affirming departure to defendant who brought two troubled individuals into her home, paid for their high school, and turned them into two productive members of society); United States v. Alba, 933 F.2d 117 (2nd Cir. 1991).

§ 5K2.0 Departure for Extraordinary Acceptance of Responsibility

An extraordinary acceptance of responsibility may be the basis for a departure where the defendant's assistance in the investigation and prosecution rises to a level beyond what ordinarily sees in a standard case. United States v. Lieberman, 971 F.2d 989, 996 (3rd Cir. 1992) (departure upheld where following embezzlement of $34,000 from employer, defendant resigned, paid back restitution and explained to

employer how to detect similar schemes in future); United States v. Faulks, 143 F.3d 133 (3rd Cir. 1998)(agreement not to contest administrative forfeiture could be basis for downward departure where meritorious defenses were abandoned); States v. Stewart, 2001 WL 844882 (E.D. Tenn. 2001) (unpublished opinion) (§ 5K2.0 departure appropriate where defendant did not contest relevant conduct that was discovered only on the basis of an unlawful search).

Voluntary disclosure of offense

United States v. Besler, 86 F.3d 745 (7th Cir. 1996) (a departure under § 5K2.16 is warranted only when (1) the defendant voluntarily disclosed the existence of, and accepted responsibility for, the offense prior to its discovery; and (2) the offense was unlikely to have been discovered otherwise. Id., at 747. This second prong applies when a "defendant is motivated by guilt and discovery is unlikely." Id).

Attachment A: Letter to United States Probation Officer outlining potential issues

Attachment A

June 3, 2005

Mr. __________
United States Probation Officer
515 Rusk, Second Floor
Houston, Texas 77002

Re: USA v. ____________.

Dear Mr. __________:

I am representing Mr. _______________. before Judge Atlas and it is my understanding that you have been assigned to write his Presentence Investigation Report. I wanted to send you this letter to alert you to some possible issues with respect to sentencing.

Factual background

Mr. _______ and his father, ________________., were arrested by the DEA in November and charged with narcotics offenses. Both ________ entered pleas of guilty to conspiring to possess with intent to distribute in excess of 10 grams of liquid LSD. The facts are fairly straightforward. I have enclosed a copy of the factual basis of the plea but recognize that this factual basis is not the "be all and end all" of the Court's factual determination as you will review the DEA investigative files and speak with the case agent, Mr._________.

You will note that the factual basis reveals that, __________was taken into custody, a handgun was located in a zippered briefcase in the hatchback portion of the car, far out of the reach of Mr. ____________. You will also note that he possessed a permit to carry the weapon.

I do, however, want to point two distinct areas related to the facts because they could have a profound impact on the application of the guidelines herein. One has to do with the timing of the defendant's involvement; that is, that he was not involved in this transaction until the very end of the negotiations. The second has to do with the discovery of a firearm in a zippered briefcase in the hatchback area of VW Jetta. The zippered briefcase was far beyond the defendant's reach.

Potential Issues in the PSR

1. Safety valve eligibility and the application of §2D1.1, Commentary Note 3

As noted above, a firearm was discovered during the search of _____________ car. It is our position that, pursuant to §2D1.1, Commentary Note 3 that _______________., should **not** receive a two level increase under §2D1.1(b)(1). Commentary Note 3 states, "The adjustment should not be applied if the weapon was present, unless it is clearly improbable that the weapon was connected to the offense." We believe that it is clearly improbable that the weapon was connected with the offense for the following reasons:

- As the evidence revealed, ______________., was not involved in the offense until the very end. The investigative reports reveal contact between ______________. and a confidential source for several days. During these several days, there were negotiations for the delivery of 26 grams of liquid LSD for $360,000. During these negotiations, there was no reference or allusion to the defendant or to any firearm. On the date of the delivery, ______________. found out about his father's negotiations when his father asked him to drive him to the Galleria area to meet the confidential source. The defendant did so and then went to the Galleria. The defendant retained the drugs (a liquid suspended in a sealed opaque liquor bottle) while his father negotiated further with the confidential source. When the confidential source refused to change the location where the drugs would be transferred, _______________. called the defendant and directed him to bring the contraband from the Galleria to the nearby meeting place. There both father and son were arrested. Before this time, there was no indication that the defendant was involved in the transaction. Furthermore, before the search of the car, there was no discussion of a weapon nor was it ever brandished or displayed
- _______________. had a carry permit for the weapon. I have witnesses who would testify that he got the permit well before the offense and the weapon was for self-defense purposes and was typically kept in the car.
- The weapon was not found at the ready, that is, at the defendant's side ready to be used. Rather, it was located in a zippered brief case, in the hatchback portion of a VW Jetta and far beyond the defendant's reach.
- When the defendant was arrested, he was asked if he had any weapons. He immediately told them that there was a weapon in a brief case in the hatchback area. The agents located the brief case, but even then had difficulty locating the gun in the bag. The defendant had to explain to them twice where the gun was.

Interestingly, during the guilty plea, after hearing the factual basis, Judge Atlas asked AUSA __________ if the weapon was connected to the offense and it is my recollection that Mr. _____ said that he did not think so. I am going to get a copy of the guilty plea proceeding as I think it might assist you on this point.

The decision regarding the gun is an important issue because it not only impacts the offense level, but the defendant's eligibility for safety valve consideration. Under the facts of this case, we do believe that it is clearly improbable that the weapon was connected with the offense. As

such, there should be no two level upward adjustment under §2D1.1(b)(1) and that the defendant should be considered for the safety valve, provided he meets the other criteria.

2. Mitigating role adjustment

We believe that the defendant should receive at the very least a three level reduction pursuant to §3B1.2(b). He is clearly less culpable than the average participant. He was a late-comer to the transaction, only discovering his father's involvement at a very late stage. His only function was to take his father along with the contraband to the Galleria, and then, at his father's behest, drive it a short distance where his father was to deliver it to the confidential source.

The PSR interview and statement regarding acceptance

I have met with ______________. and completed a large part of the biographical form and the financial information. I will pick them up very early next week and provide them to you in advance of any PSR interview. I will also have a statement regarding acceptance of responsibility ready at or before the time of the interview.

___________ is a United States citizen and speaks English fluently. He will not need a translator.

I look forward to working with you on this matter.

Respectfully,

David Cunningham
DC/ms

Attachment B: Sample Objections to PSR

ATTACHMENT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CR. NO. H-00-256
JOSE MEDINA	*	

DEFENDANT'S OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT

JOSE MEDINA, files these his objections to the Presentence Investigation Report in this matter. In support, defendant would show the following:

OBJECTIONS WHICH AFFECT GUIDELINE COMPUTATIONS

OBJECTIONS TO ROLE IN THE OFFENSE DETERMINATION

(Paragraphs 3, 25-30, and 43)

There are several paragraphs in the PSR which are used as a basis for an aggravating role adjustment for the defendant. In paragraph 3, the PSR claims that Cantu and Torres were distributors who worked for the defendant. Paragraphs 25-30 discuss in detail the purported basis for the finding of four level increase pursuant to U.S.S.G. § 3B1.1(a). Defendant objects to these statements and findings.

As a basis for his objection, defendant would show that while the defendant occasionally financed the purchase of drugs by Torres and Cantu, set the prices on drugs, and determined where he would meet the two for the transfer of contraband he did direct or control their activities in the distribution of the drugs that they bought from him. Accordingly, the defendant's relationship with the two is best characterized as buyer-seller.

As a result, the defendant's role adjustment should be pursuant to U.S.S.G. §3B1.1(b) or (c).

OBJECTION TO ADJUSTMENT FOR FIREARM
(Paragraphs 24, 30, and 41)

Paragraph 30 recounts the basis for the conclusion that a two level increase pursuant to U.S.S.G. §2D1.1(b)(1) is warranted. Defendant objects to the conclusion and the two level increase. In the body of the PSR, there is no indication that the defendant used or carried the firearm in connection with his drug related activities. None of the individuals who cooperated or debriefed with the government averred that the defendant carried a firearm when cocaine was delivered to them either in the downstairs area of his residence or another location. There is a good reason for that: the defendant kept the firearm in his upstairs bedroom. There must be a spatial relationship between the firearm and the drug related activity. In this case, the defendant's drug related activity at his residence occurred downstairs or in the detached shed where he at times stored contraband. Moreover, there is no showing that the gun was present at any earlier transaction. As noted in the PSR, the defendant was arrested many months after the last recorded drug transaction. Absent any connection between the gun upstairs and the activity downstairs, it is clearly improbable that the gun was used in drug trafficking. Supporting the defendant's position is United States v. Guess, 203 F.3d 1143 (9th Cir. 2000). In Guess, police arrived to execute search warrants on the defendant's drug laboratory. The defendant heard noises outside, drew his gun, clicked the safety off and went patrolling on his apartment balcony. After the officers identified themselves, he dropped the gun. It was found with a chambered round and was ready to fire. A divided Ninth Circuit found because the officers were unaware of the pistol until after the defendant was arrested, he did not actually use the firearm. In this case, the officers did not discover the firearm until the officers made an early morning hours forced entry. The defendant's actions with respect to the firearm were to protect himself and his family,

not any contraband or proceeds there from. See also, United States v. Hernandez, 187 F.3d 806 (8th Cir. 1999) (Denial of enhancement pursuant to §2D1.1(b)(1) affirmed despite fact that shotgun was found in cab of tractor-trailer hauling marijuana where evidence showed that gun was purchased for protection after attempted break-in of sleeping compartment and was never intended to protect cargo).

OBJECTIONS TO RELEVANT CONDUCT DETERMINATIONS
(Paragraphs 3, 4, 25-29)

Seventy-five kilograms of cocaine are attributed to the defendant resulting in a base offense level of 36. Much of the information leading to the attribution of additional amounts of cocaine came from the defendant during a debriefing session wherein the defendant believed that U.S.S.G. § 1B1.8 applied. Defendant objects to this conclusion and the foregoing paragraphs which are used as support for this amount. Specific objections follow.

Objections for attribution of amounts of cocaine in contravention of § 1B1.8(a)

Section 1B1.8(a) provides that if the government agrees that self-incriminating information provided pursuant to an agreement to debrief, "then such information should not be used in determining the applicable guideline range, except as provided in the agreement." In debriefing with government in the hopes of securing a downward departure pursuant to § 5K1.1, the defendant provided self-incriminating information that was use increase his guideline range. Specifically, the defendant provided information in paragraph 25-29. Defendant objects to such information gleaned solely from his debriefing and requests that such amounts be deleted from the guidelines computations.

Specific objections

In paragraph 4, the PSR recites that there were three (3) six kilogram transactions for a total of 18 kilograms. Defendant asserts that there were only two (2) six kilogram transactions.

In paragraph 25, the PSR discusses the defendant's debriefing session. The PSR recites, "the first source who supplied Medina cocaine provided him cocaine in 5-7 kilogram increments." Defendant admits that he received contraband from this source (Felix Martinez) but that he told the officers that the most he ever saw this first source with was 5-7 kilograms. The defendant never received 5-7 kilogram increments from this first source and objects to the conclusion.

In paragraph 26, a second source purportedly supplied the defendant cocaine in 5-7 kilogram increments and also provided the defendant with 12 kilograms on one occasion. The PSR attributes 32 kilograms from this second source. However, this second source is the source of the 18 kilograms of cocaine that defendant provided Guy Williams in paragraph 29. Defendant objects to the double counting of the same cocaine and requests that the amount attributed to the defendant be reduced accordingly.

Paragraph 27 reflects that a third source provided the defendant with 5 kilograms on one occasion. The PSR is mistaken. The third source did not provide the defendant with cocaine. Rather, the defendant provided him with 5 kilograms that came from the 32 kilograms purchased from source two.

The defendant does not deny his involvement in drug trafficking. He denies the amount of cocaine attributed to him. Defendant asserts that, at most, he should be held accountable for 49 kilograms. The net result of the defendant's objections to the amount attributed to him is to lower his guideline range from a level 36 to a level 34.

OBJECTIONS PURSUANT TO APPRENDI V. NEW JERSEY

(Paragraphs 61 and 62)

Count One of the indictment in this matter does not properly allege or plead a drug quantity as an element of the offense. Pursuant to Apprendi v. New Jersey, 120 S.C. 2348

(2000), “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Count One does not meet the requirement of Apprendi and as such, the statutory maximum in the absence of such a pleading should be 240 months.

Defendant asserts that this objection is mooted if the Court agrees with the defendant’s objections. The granting of the objections with respect to defendant’s relevant conduct (i.e., 49 kilograms versus 75 kilograms), aggravating role adjustment and firearm would have the net effect of reducing the defendant’s final offense level to a 33. Based on a level 33, CHC I, the defendant’s final guideline range would be 135-168 months rather than the 262-327 months.

OBJECTION TO FINE GUIDELINES
(Paragraph 71)

The PSR provides for a fine guideline range of $25,000 to $9,000,000. The fine guideline range should be reduced based on the defendant’s objections to his role in the offense and the firearm question. Irrespective of any reduction based on the defendant’s objections, defendant submits that he lacks the means or resources to pay any fine.

OBJECTIONS WHICH DO NOT AFFECT GUIDELINE COMPUTATIONS

There are several factual inaccuracies in the PSR. None of the following objections affect the guideline computations. Paragraph 52 asserts that the defendant’s father was sentenced to twenty years in prison for a drug offense. In actuality, the father received a ten-year sentence. The same paragraph also reflects that the defendant’s mother has prior drug conviction. In fact, she was convicted of assault.

Therefore, defendant requests that this Court

(1) Grant his objections;

(2) Consider the appropriate requests for downward departure to be filed with the Court;

(3) Sentence him at the low end of the applicable guideline.

Respectfully submitted,

____

David Cunningham
Niels Esperson Building
808 Travis St., 24th Floor
Houston, Texas 77002
713/225-0325
713/650-1602 (fax)
Texas Bar No. 05234400
S.D. Tex. Admissions No. 1352

CERTIFICATE OF SERVICE

A true and correct copy of the Defendant's Objections to Presentence Investigation Report has been delivered to the following entity:

Mr. Bertram Isaacs
USAO
P.O. Box 61129
Houston, Texas 77208-1129

Mr. Javier Vela
USPO
515 Rusk, Second Floor
Houston, Texas 77002

Dated: __________

____

David Cunningham

Attachment C: Memoranda in Aid of Sentencing

ATTACHMENT C-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA *

VS. * CR. NO. H-

______________________ *

DEFENDANT'S MEMORANDUM IN AID OF SENTENCING AND REQUEST FOR DOWNWARD DEPARTURE

____________, defendant, provides this Court with this Memorandum in Aid of Sentencing setting forth the legal and factual reasons why the Court should grant the defendant's objections and sentence the defendant to a period of probation.

PRIOR PROCEEDINGS

The defendant was originally named in a one-count indictment charging tax evasion and alleging a tax loss of some $178,000. After the defendant declined to enter into a guilty plea to the one count, the government secured a superseding indictment alleging additional counts but failing to allege a particular amount of loss, only that "a substantial additional tax was due and owing to the United States."[1] Specifically, the superseding indictment alleged four counts of income tax evasion pursuant to 26 U.S.C. § 7201 (counts 1-4) and three counts of filing a false corporate return pursuant to 26 U.S.C. § 7206(1) (counts 5-7). The defendant went to trial although he was willing to enter a plea of guilty to two misdemeanor counts of failure to file a tax return in a plea bargain offered by the United States Attorney's Office in Houston. However, because the Tax Division at Department of Justice did not agree to the proposed plea agreement,

[1] The defendant objected to this point prior to trial, but the Court ruled that the government was not required to amend the indictment to allege a specific tax loss amount.

the defendant proceeded to trial. He was found guilty on all charges in the indictment. Sentencing is currently set for December 17, 2001.

GUIDELINE COMPUTATIONS AND THE DEFENDANT'S OBJECTIONS

The PSR in this matter recommended that the defendant be held accountable for some $247,000 in losses and be accorded a two level adjustment for using a sophisticated means of concealment pursuant to U.S.S.G. §2T1.1(b)(2). The defendant timely objected to the adjustments. The PSR also failed to accord the defendant a two level reduction for acceptance of responsibility. The defendant objected to this as well. The PSR recommends a guideline range of 27-33 months. In support of his objections, defendant would show the following:

a. The tax loss was incorrectly calculated

As noted above, the PSR found that the tax loss to be some $247,000. This is wrong. While it is true that under § 2T1.1(c), the tax loss should be treated as equal to 28% of the unreported income gross income plus 100% of any false tax credits claimed against a tax, *unless* a more accurate determination can be made, the PSR and its addenda and the government fail to adequately respond to this argument. First, for reasons stated in the defendant's objections, the tax loss should be less than $2,000 because the government was not required to allege and prove a specific amount. Secondly and alternatively, a more accurate determination has been made and that accurate determination is reflected in the appendices affixed to the Defendant's Objections. These appendices would show, at best, a tax loss of only $59,000. This would have the effect of reducing the defendant's base offense level from a l6[2] to a level 11.

[2] Although not raised in his initial objections, the PSR uses the amended tax loss table following the 1993 guideline amendments. This is done in spite of the fact that the first count alleged in the indictment involves the 1992 tax year and the vast amount of the purported tax loss under the PSR and government scenario. Defendant submits that he should be sentenced on the tax loss table from 1992, a copy of which is attached as Exhibit A. According to this tax loss table, a loss of $59,000 that will be shown *inter alia* to be, at most, the tax loss attributed to the defendant, results in a base offense level of 11 pursuant to § 2T4.1(F). A loss of $247,000, as claimed by the

In it's Response to the Defendant's Objection to Presentence Report filed on or about November 8, 2001, the government takes two positions that are wholly untenable. The first position the government takes is that because the defendant's evidence concerning the loss was not offered at trial on the merits, it should not be considered by the Court at sentencing. The question at trial – guilt or innocence – is totally different from that raised here as to the amount of the loss. On a daily basis, this Court considers sentencing challenges that would not normally be relevant in a trial on the merits. The challenge to the loss – like the challenge to the amount of drugs attributed to a drug defendant or the number of aliens attributed to an alien smuggler – is not precluded by the government's fallacious reliance on the claim that the defendant chose not to produce it at trial. Government's Response to Defendant's Objection to Presentence Report, paragraph 15(b).

The second untenable position taken by the government is, implicit in the jury's verdict, the jury's totally accepted the $247,429.38 figure used by the government. Government's Response to Defendant's Objection, paragraph 23. As noted above, there was a substantial difference between the original and superceding indictments in the amount of loss alleged. By refusing to name a specific amount in the superceding indictment, the government was not required to prove the specific amount; they were only required to prove that there was a loss. The amount at issue was not submitted to the jury for determination. For example, assume that the jury in fact determined that 10% of the money paid to Paradigm was the result of the defendant's legal services and the remainder was legitimate consulting fees under the contract with Scott. In that case, the jury still would have been obligated to return a verdict of guilty but the tax loss – and the defendant's attendant sentence – would be substantially different. Put

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government, would result in a base offense level of 14 pursuant to §2T4.1(I). Use of any other table other than the 1992 table would be a violation of the Ex Post Facto clause of the United States Constitution.

another way, absent a jury determination of the amount of the loss (which the defendant requested in pretrial motions), it is improper to sentence the defendant based on the $247,429.38 figure used by the government.[3]

b. The offense did not use a sophisticated means of concealment

The PSR contends that because the defendant formed Cumber Holdings to conceal his personal earnings, a two level increase is warranted because this was "a deliberate step . . . taken to make the offense or its extent more difficult to detect." Throughout this whole process, the government repeatedly fails to take into account (a) that the creation of both the family trust and the foreign corporation were undertaken by the defendant's father following the receipt of competent advise from a tax attorney; and (b) that the defendant cooperated fully with the IRS once the matter was referred for a criminal investigation.

The sophisticated mean/sophisticated concealment[4] adjustment was added for deterrence purposes;[5] that is, to deter the use of sophisticated means to impede the discovery of the nature or extent of the offense. However, the returns themselves as well as the defendant's actions in dealing with the IRS show no attempt to impede the IRS. Indeed, if all of the relevant information was set out in the defendant's tax returns and were explained to the IRS before any referral, how can it be said that the defendant impeded any investigation? This case involved a disagreement over the characterization over certain money – the IRS claimed it should have been claimed as legal fees; the defendant claimed it was rightfully claimed as consulting fees under a

[3] This, of course, brings the Court to the defendant's argument that, based on the unique facts of this case, the elevation of the defendant's base offense level from 6 to 16 constitutes a violation of the letter and the spirit of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.435 (2001), an argument set out in detail in the Defendant's Objections and incorporated by reference herein.

[4] The adjustment was originally termed a "sophisticated means" enhancement in the original Guidelines. It was amended in 1998 to apply "if the offense involved sophisticated concealment." Again, this amendment did not apply at the time of the offense and to use the 1998 amendment and find a sophisticated concealment would constitute another violation of the Ex Post Facto Clause of the United States Constitution.

[5] Amendment 491 to the Guidelines included background commentary noting that "an additional sanction [was needed] for deterrence purposes.

valid agreement. All of the money at issued was reported on the defendant's returns. There was no sophisticated means or concealment because *all of the money at issue is reflected on the returns.*

The defendant's actions since his first contact with the IRS over this matter do not evidence any effort on his part to impede the IRS discovery of the offense. When the defendant was contacted by the IRS, he immediately cooperated with them in their investigation and provided them with several hours of interviews, reams of documents and complete access to other voluminous material. In interviews with the IRS, the defendant traced the creation of the both the family trust and the foreign corporation, and his legal justification for doing so. The defendant claimed then, as he does now, that the actions were taken based on the advise of competent tax counsel. Any argument concerning concealment evaporates in light of the presence of the contested money on the defendant's return and his extensive cooperation with the IRS. Ironically, shortly after that tax lawyer, _________, corroborated the defendant's statement about the nature of the tax advise, the IRS made a criminal referral on Mr. _______.

The defendant's actions in this matter in no way compare with case law upholding a sophisticated means/sophisticated concealment adjustment. The defendant's actions did not involve the use of a "daisy chain" involving a series of paper transactions through many companies some of which were fictitious,[6] he did not use several mailing addresses from different IRS regional centers or direct his spouse to file misleading returns,[7] he did not use an alias, move his address repeatedly, destroy records, or fail to report interest on accounts,[8] or bribe an IRS employee[9] -- all instances where courts have imposed the adjustment.

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[6] United States v. Veksler, 62 F.3d 544 (3rd Cir. 1995).
[7] United States v. Pierce, 17 F.3d 146 (6th Cir. 1994).
[8] United States v. Hammes, 3 F.3d 1081 (7th Cir. 1993).
[9] United States v. Friend, 104 F.3d 127 (7th Cir. 1997).

Moreover, if the defendant's actions in this matter – full cooperation with the government in explaining his rationale for the use of the family trust and the foreign corporation created upon the advise of a competent tax counsel– then every tax evasion case will involve sophisticated means. If that were the case, then the sentencing tail will indeed wag the dog and the exception will subsume the rule: now, every tax evasion case will be one involving sophisticated means/sophisticated concealment. This was pointed out by the Tenth Circuit in United States v. Rice, 52 F.3d 843, 849 (10th Cir. 1995), *appeal after remand*, 76 F.3d 394 (10th Cir. 1996). There, the Tenth Circuit found clearly erroneous a district court's finding that the defendant had used sophisticated means. The Rice court eliminated the two level enhancement and remanded for resentencing, noting:

> [Defendant's] tax evasion scheme was not sophisticated. He merely claimed to have paid withholding taxes he did not pay. . . In substance, [defendant's] fraud is the functional equivalent of claiming more in itemized deductions than actually paid. If that scheme is sophisticated within the meaning of the guidelines, then every fraudulent tax return will fall within that enhancement's rubric.

The defendant did not impede the discovery of the alleged evasion. The money at issue is reflected on the return, a fact that would differentiate him from a lawyer who collected a $247,000 fee and never reported it. He made a full transactional disclosure well before any criminal referral and again afterward. The transaction and the income *consistent with that advise* were fully reported to the IRS. The IRS merely disagreed with the characterization of the income – the defendant claimed and reported the income as consulting fees; the government alleged it was income from his law practice.

A two level sophisticated means or sophisticated concealment should be rejected.

c. The defendant accepted responsibility for his actions

The defendant readily acknowledges that it is only in rare situation where a defendant can proceed to trial, be found guilty and then receive an adjustment for acceptance.[10] In this case, the defendant fully cooperated with the IRS and did not impede their investigation in any way, shape or form. When appearing before the IRS, he was never offered the option of civil redress nor was he given the opportunity to negotiate civil restitution. He stood ready to accept the plea agreement approved by the local United States Attorneys' office calling for an entry of a guilty plea to the charges of failure to file tax returns but Washington nixed such an agreement. His post-verdict statements clearly evidence his acceptance of the verdict and responsibility for his actions.

In light of all of the evidence, this Court should accord the defendant a two level reduction.

A DOWNWARD DEPARTURE IS SUPPORTED BY SEVERAL DISTINCT CHARACTERISTICS AND CIRCUMSTANCES THAT REMOVE THIS CASE FROM THE "HEARTLAND" OF CASES

In Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035 (1996), the Supreme Court created the framework for determining when a departure may be appropriate. District Courts may depart based on circumstances of the offense or the offender that are not adequately taken into account by the Commission pursuant to 18 U.S.C. 3553(b). The appropriateness of a departure is largely determined by whether a certain factor is encouraged, discouraged, or forbidden by the Sentencing Commission. As Koon noted, the Guidelines list very few factors that courts absolutely cannot use to depart. 518 U.S. at 93 (listing forbidden factors as "race, sex, national origin, creed, religion, socio-economic status, lack of guidance as youth, drug or alcohol dependence, and economic hardship)." If the factor is encouraged, the court can depart only "if

[10] Application note 2 to § 3E1.1 provides that the "rare situation" may be "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt . . . In each such instance, however, a determination of whether a defendant has accepted responsibility will be based primarily upon pretrial statements and conduct."

the applicable guideline does not already take it into account." Koon, 518 U.S. at 96. If the factor is discouraged, or encouraged but has already been taken into account in the guideline, courts can depart "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." Id. If the factor is unmentioned, courts must, "after considering the 'structure and theory of the guidelines and the Guidelines taken as a whole,' decide whether the [factor] is sufficient to take case out of the Guideline's heartland." Id.

The Koon Court also confirmed that a district court's departure decision is due considerable deference. Although governed by these core restraints of the sentencing guidelines, a decision to depart falls within a district court's traditional exercise of its discretion. All of the circumstances listed below are grounds recognized by both Courts and the Commission as accepted grounds for departure.

In the instant case, there are a number of factors that warrant a substantial downward departure. Each of the grounds, singularly and in conjunction with each other, takes this case and this defendant out of the heartland of drug cases.

a. Aberrant behavior

A review of the PSR shows that the defendant, a practicing lawyer and businessman, has no prior criminal history. His involvement in the matter before the Court is the only criminal activity in his heretofore law abiding life. The defendant was an honor student in high school and turned down a West Point appointment to remain near his career military family in __________. Although the defendant turned down an academy appointment, he was actively involved in ROTC at __________ University and graduated with honors. He served his nation

with distinction with the United States Army in West Germany earning several commendations before honorably leaving the service to continue his education.

While the Fifth Circuit had not defined aberrant behavior prior to the addition of U.S.S.G. 5K2.20, the Court has stated that "we are most certain that it requires more than an act which is merely a first offense or 'out of character' for the defendant." United States v. Williams, 974 F.2d 25, 26 (5th Cir. 1992), cert. denied, 507 U.S. 934, 113 S.Ct. 1320, 122 L.Ed.2d 706 (1993) (affirming a refusal to depart downward because the robbery involved planning). In United States v. Winters, 105 F.3d 200, 207 (5th Cir. 1997), the Circuit noted that there must be "some element of abnormal or exceptional behavior" such as a "spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning."

Section 5K2.20, which became effective November 1, 2000, defines aberrant behavior and sets out five factors that will preclude a downward departure on this ground. The defendant does not fit within any of the five prohibited factors. The defendant's actions were the result of tax advise rendered by a competent tax attorney. Furthermore, as required by the commentary, the defendant's activity represented a "marked deviation from an otherwise law-abiding life."

Based on the foregoing, this Court should consider a departure under U.S.S.G. § 5K2.20 for aberrant behavior.

b. The defendant's family and community support

Attached hereto as Exhibits are a number of character letters from friends, family and business associates, all of who describe the defendant's positive character traits. His mother and wife have provided letters outlining his exemplary life and describing his special traits as a son, husband and father. (Letters of ______________________, attached hereto as Exhibits B-1 and B-2). Several letters from business associates deserve mention within the body of this document.

One letter is provided by Colonel ___________ (USA, ret.), one of Mr. _______clients and business associates. In his letter, Col. _______discusses a number of business endeavors that he has shared with Mr. ______ including business dealings with Military Sealift Command and the Department of Defense, including being involved in setting up and providing "Phone Home" centers in remote parts of Saudi Arabia that allowed U.S. military personnel to call home during Operation Desert Storm. (Letter of ___________, attached hereto as Exhibit C). Another letter is provided by__________. Mr. __________, an officer and majority shareholder for _________ Technologies, favorably discusses his professional and personal dealings with the defendant. (Letter of ________________, attached hereto as Exhibit D). Other associates describe "his business and personal conduct [as being] beyond reproach,[11]" his "knowledge . . ., professional[ism] and . . . thorough[ness],[12]" his "display of a high level of honour and integrity,[13]" and his being "trustworthy, honorable, and to all that know him most likeable.[14]"

Extraordinary family and community support can justify a downward departure. United States v. Canoy, 38 F.3d 893 (7th Cir. 1994); United States v. Johnson, 964 F.2d 124, 129 (2nd Cir. 1992); United States v. Diegert, 916 F.2d 916 (4th Cir. 1990); United States v. Sharpsteen, 913 F.2d 59 (2nd Cir. 1990); United States v. Big Crow, 898 F.21d 1326 (8th Cir. 1990); United States v. Handy, 752 F.Supp. 561 (E.D.N.Y. 1990).

The defendant requests that this Court do likewise.

c. The adverse State Bar consequences of a conviction

If, as and when the defendant's conviction becomes final, he will lose his law license. He may petition the State Bar for readmission. However, the defendant cannot apply until five years

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[11] Letter of ____________, President and CEO of _______, attached as Exhibit E.
[12] Letter of ______________, attached as Exhibit F.
[13] Letter of _____________l, attached as Exhibit G.
[14] Letter of ____________, attached as Exhibit H.

have passed since he has been released from any form supervision. In other words, he will be denied his law practice and livelihood for an additional five-year prior beyond any period of incarceration and supervised release. This additional punishment is not a factor that was considered by the guidelines and should be considered as a ground for departure.

d. The combination of these factors support a departure

The defendant has set out a number of factors that standing alone will support a downward departure. The defendant further asserts that the cumulative effect of these factors supports a departure. The Guidelines themselves recognize this "totality of the circumstances" approach as a valid basis for a departure. As noted in the Commentary to U.S.S.G. 5K2.0:

> The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstances that is not ordinarily relevant to a departure from the applicable guideline maybe relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the heartland cases covered by the guidelines.

Again, a number of courts have agreed with this concept and departed downward. United States v. Parham, 16 F.3d 844 (8th Cir. 1994) (totality of circumstances may well converge to create the unusual situation not contemplated by the Commission); United States v. Tsosie, 14 F.3d 1438 (10th Cir. 1994) (totality of circumstances departure based on defendant's steady employment, economic support of family, combined with aberrational conduct in that he had no prior criminal history); United States v. One Star, 9 F.3d 60 (Court affirmed departure based on a combination of factors and the "unusual mitigating circumstances of life on an Indian reservation"); United States v. Bowser, 941 F.2d 10198, 1024-1025 (10th Cir. 1991) ("a unique combination of factors," none of which "standing alone may have warranted a departure" provided a basis for a departure for a career offender); United States v. Cook, 938 F.2d 149, 153 (9th Cir. 1991) (a combination of factors together may together constitute a mitigating

circumstance"); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (long employment history, lack of criminal record, absence of abuse of prior distribution, and responsibility for two infants justified departure); United States v. Griffith, 954 F.Supp. 738 (D.Vt. 1997); United States v. Artim, 944 F.Supp. 363 (D.N.J. 1996); United States v. Blackwell, 897 F.Supp. 586 (D.D.C. 1995) (even if defendant's palpably diminished capacity, extraordinary circumstances, and fact that her offense was a single aberrant behavior in otherwise stable history did not individually justify a departure, departure was appropriate when considerations were taken in the aggregate); United States v. DiRiggi, 893 F.Supp. 171 (E.D.N.Y. 1995), aff'd, 72 F.3d 7 (2nd Cir. 1995); United States v. Hollins, 863 F.Supp. 563 (N.D. Ohio 1994); United States v. Acosta, 846 F.Supp. 278 (S.D.N.Y 1994).

THE PROSPECT OF INCARCERATION

Defendant recognizes that the Court can sentence him to a period of incarceration. In this regard, defendant requests the following:

(a) That if a period of incarceration is ordered, the Court allow him to surrender to the unit designated for incarceration; and (b) that the Court recommend to the Bureau of Prisons that the defendant serve his sentence in a federal prison camp close to Houston so that he may be near his wife and family.

CONCLUSION

The defendant has presented substantial arguments concerning the amount of loss and other adjustments in the PSR. Based on his objections and the law supporting same, the defendant requests that he be sentenced:

- Pursuant to a base offense level of 6 under the 1992 tax loss table because of the government's failure to allege and prove, by a jury special issue, a specific amount of tax loss[15];
- with a finding that a sophisticated means/sophisticated concealment is not warranted;
- and that he be accorded a two level acceptance of responsibility adjustment.

Respectfully submitted,

____
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S.D. Tex. Admissions No. 1352

Attorneys for Defendant

[15] A final offense level of 6 would place the defendant clearly within Zone A of the Sentencing Guidelines and would allow this Court to impose a sentence of probation without having to resort to departures. Should the Court find that the tax loss amount is $59,000 (and accept the defendant's other objections) the defendant would be still be eligible for a probated sentence within Zone B of the sentencing guidelines.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Memorandum in Aid of Sentencing and Motion for Downward Departure was forwarded to

Mr. Joseph M. Giannullo
Department of Justice, Tax Division
600 E. Street, NW
Washington, DC 20004

Gail Winkler
United States Probation Department
515 Rusk, Second Floor
Houston, Texas 77002

Dated: ______________

____
Robert A. Morrow

ATTACHMENT C-2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CR. NO. V-94-001-01
KERRY LARRON BASS	*	

DEFENDANT'S MEMORANDUM IN AID OF SENTENCING AND MOTION FOR DOWNWARD DEPARTURE

KERRY LARRON BASS, defendant, files this Memorandum in Aid of Sentencing and Motion for Downward Departure. In support, he would show the following:

PRIOR PROCEEDINGS

The Fifth Circuit succinctly summarized this case's procedural history in ***Bass II***[1]:

> In 1994, Bass was charged with 15 federal narcotics and tax violations, including one count of participation in a continuing criminal enterprise ("CCE"). After he was convicted on all counts, the district court sentenced Bass to ten 360-month terms of imprisonment, followed by five years of supervised release; one 120-month term of imprisonment, followed by three years of supervised release; four 12-month terms of imprisonment followed, followed by one year of supervised release; and a $650 mandatory assessment. All prison terms were to be served concurrently. For the CCE charge, Bass' punishment included one 360-month term of imprisonment followed by five years of supervised release and a $50 special assessment.
>
> After we affirmed Bass' conviction and sentence on direct appeal [in United States v. Alix, 86 F.3d 429 (5th Cir. 1996), Bass filed a *pro se* 28 U.S.C. § 2255 petition that became the subject of ***Bass I*** [310 F.3d 321 (5th Cir. 2002)]. There, we concluded that the evidence was insufficient to support Bass' CCE conviction, and because his counsel's failure to raise the issue on direct appeal was prejudicial, we vacated his CCE conviction.

In ***Bass II***, the Fifth Circuit ruled that ***Bass I*** "unbundled" the defendant's "integrated sentencing package," allowing for the vacating of his sentences and a new sentencing hearing. 104 Fed.Appx. at 999.

[1] United States v. Bass, 104 Fed.Appx. 997, 998 2004 WL 1719484 (5th Cir. 2004)

MR. BASS' CURRENT STATUS

Information about Mr. Bass' sentence

According to BOP records[2], Mr. Bass sentence begin date is February 6, 1995 and he has been in BOP custody for over 124 months. He has an additional 122 days of jail credit. His projected release date under the current sentence is November 25, 2025.

Mr. Bass was initially designated for USP Leavenworth, but his "favorable institutional adjustment[3]," lead to him being transferred to the medium facility at the Beaumont Federal Correctional Complex. In early January 2001, he was transferred to the low facility at the Beaumont complex.

He is currently housed at Karnes County Correctional Center awaiting his sentencing.

Information about Mr. Bass' activities since his last appearance in Court in 1995

As noted above, Mr. Bass has been housed in a variety of BOP facilities. During his time in custody, Mr. Bass has tried to make the best of the situation. In a letter provided to the Court, he provides the motivation for doing so:

> Many say that incarceration is terrible. But when one comes to the understanding that one has messed up and its time to straighten up, you look at incarceration in another lite. . . . The main impact of incarceration to me is simple, come in this environment and throw the negative attitude out the door and look at the positive opportunity that is there for you to grow and learn from. This incarceration has meant much to me, it may sound strange to stay this, but I can say this time may have spared my life and my family life (sic) from the road that I was traveling a decade ago. Have everyday been easy doing this time of incarceration, No! But as I stated earlier, God knows best.

Letter of Kerry Bass, Exhibit A.

Since being jailed over a decade ago, Mr. Bass has been a model inmate. Documents collected from the BOP and supervisors in UNICOR support this statement. A 2003 BOP

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[2] This information is drawn from a BOP Progress Report issued to Mr. Bass in November, 2003. It is attached hereto as Exhibit B.

[3] Id.

Progress Report notes that Mr. Bass "has maintained a favorable institutional adjustment during his incarceration" with a "record of clear conduct.[4]" He has availed himself of every program that the BOP offered and worked steadily within UNICOR. His 2003 Progress Report notes that his file record "indicates that he received good to outstanding performance evaluations from his previous work detail supervisors." Mr. Kelly S. Kelly, the Assistant Business Manager at the UNICOR Business Office notes:

> Please be advised that inmate Kerry Bass, #66118-079 is a devoted worker in the UNICOR Business Office. He requires little or no supervision, and had demonstrated a positive attitude towards staff and his fellow inmate workers. Inmate Bass has excellent organizational skills and work ethic. He goes above and beyond his assigned duties to ensure that they are completed timely and accurately. Inmate Bass has provided training to the new clerical inmates that are hired in the Business Office, and is a role model to other inmates on how to conduct himself.

BOP Memorandum from Kelly S. Kelly, Exhibit C.

Another one of his UNICOR Supervisors has provided the Court with a letter extolling Mr. Bass' virtues. P.E. Howell writes:

> Mr. Bass is extremely reliable, his analyzation (sic), insistence on accuracy and communication skills has earned him respect and an admirable reputation. He is a dependable, ethical, efficient worker who is a self-starter, with the ability to excel without supervision. Should a problem or issue arise, he will persevere to solve the difficulty, no matter how complicated or burdensome, he will facilitate a correct action and resolution.
>
> During Mr. Bass' employment he has excelled in crating a training environment for new employees as well as always taking that extra step in monitoring of fellow employees. His hard work and initiative is very much appreciated by management and fellow employees. He has the ability to promote harmony and efficiency while producing quality work products.
>
> The impact that Mr. Bass' professionalism has had to this organization goes without saying. As an Assistant Factory Manager and Quality Manager in a correctional facility I am limited from making recommendations, but would be unresponsive should I fail not to acknowledge Mr. Bass' achievements.

[4] BOP Progress Report, Exhibit B.

Letter of P.E. Howell, Exhibit D.

In addition to his work at UNICOR, he has volunteered for a number of programs including the ACE Business Class. As part of ACE program, Mr. Bass has spoken to local students about the need to make the right choices in life. He has also spoken to teens and young adults as part of the Victim Impact Group within the Federal Correctional Complex. He is also a member of the Suicide Watch Group at the FCC, a position that is a result of his good behavior and positive approach to incarceration.

Since his incarceration in 1995, Mr. Bass' marriage failed. However, despite being jailed, Mr. Bass strove to maintain a relationship with his son, now 17. His ex-wife, Geneva Simpson, has provided the Court with a letter describing how Mr. Bass has tried to serve as positive role model for his son.[5]

Other friends and family members have written the Court describing his remorse for his actions and their support for him. Those letters are attached as Exhibits F through L.

A NUMBER OF FACTORS SUPPORT A SUBSTANTIAL REDUCTION OF MR. BASS' ORIGINAL 360 MONTH SENTENCE

Since Mr. Bass' original sentencing in February, 1995, a number of legal developments have changed the face of federal sentencing and impact Mr. Bass' resentencing. In addition to the ruling in ***Bass I*,** the Supreme Court's ruling in United States v. Booker, ___U.S.___, 125 U.S. 738, 160 L.Ed.2d 621 (2005), restores some of the District Court's traditional discretion in sentencing decisions. The defendant submits that this Court has greater leeway in imposing sentences in 2005, and is subject only to the "reasonableness" standards mandated in Booker.[6]

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[5] Exhibit E.

[6] The remedial portion of Booker mandates that reviewing courts should review sentences for reasonableness in light of the sentencing identified in 18 U.S.C. § 3553(a).

This memorandum will outline the legal and equitable reasons why a sentence substantially lower than that originally imposed is appropriate.

LEGAL DEVELOPMENTS SINCE 1995

Bass I and it's impact on the application of the guidelines herein

In ***Bass I,*** the Fifth Circuit undertook a sufficiency review of the defendant's CCE conviction when it considered the defendant's claim of ineffective assistance of counsel on appeal. The Circuit noted that this Court had found that the defendant had controlled six individuals: Bounds, Fisher, Kyles, Wade, Paul Alix, and Steven Alix.[7] The Fifth Circuit disagreed with this Court's findings and held that " a buyer-seller relationship *by itself*, *i.e.,* in the absence of some indicia of management, supervision or organization, is insufficient to establish liability under the CCE statute.[8]" The Court continued:

> . . . [C]onstruing the evidence in the light most favorable to the government, we find that Bass managed, supervised, or organized only three individuals – Bounds, Fisher and Kyles. Bounds was actually employed by Bass's legitimate business and delivered cocaine at Bass's direction. Fisher used vehicles rented by Bass in furtherance of the activities of the drug enterprise, was directed by Bass not to drive flashy automobiles, and listed KLB as him employer in rental applications. Kyles spoke with Bass about the activities of the drug ring, was permitted to use Bass as an employment reference, falsely told police that he was employed at KLB, and was directed by Bass to locate and drive him to retrieve the rental car seized from Fisher by the police. All of these activities are the same or similar to those evidenced managerial control in the cases in other courts that have applied the rule that more than a buyer-seller relationship is required to maintain CCE liability.
>
> Even when we draw all reasonable inferences in favor of the jury's verdict, we are convinced that a rational trier of fact could not have concluded that Bass's involvement with the other three drug dealers – Wade, Paul Alix, and Steven Alix -- consisted of anything more than a buyer-seller relationship. The evidence shows that these three men simply purchased cocaine from Bass **and resold it as cocaine base in Victoria. Bass did not receive any additional monies or benefits from these resales as cocaine base. There is no evidence that Bass controlled the resale activities of these three individuals, such as by dictating**

[7] 310 F.3d at 326
[8] Id. at 327

> **the quantity, the asking price, or to whom the cocaine base would be sold. Beyond evidence of ordinary purchases and sales, the record is devoid of evidence of control by Bass whatsoever over these three individual's drug activities.**[9]

By vacating the CCE conviction and making these findings regarding the buyer-seller relationship between the remaining drug-dealers, ***Bass I*** implicated the application of the Sentencing Guidelines in at least two ways: the defendant's role in the offense under U.S.S.G. §3B1.1 and the application of the relevant conduct rules under U.S.S.G. §1B1.3.

A. Role in the offense

The original PSR herein noted at paragraph 47 that, in light of the defendant's CCE conviction, that "no adjustment is applicable for defendant's aggravating role; since his role has already been sanctioned pursuant to the four level increase in U.S.S.G. §2D1.5." Defendant would object to any increase for an aggravating role adjustment because of the fact that he had only a buyer-seller relationship with all of the individuals but Troy Bounds.

In the alternative, should this Court find an aggravating role adjustment to be appropriate, Mr. Bass would submit that such an adjustment should be only a two level increase pursuant to §3B1.1(c).

B. Relevant conduct

At his original sentencing, Mr. Bass was held accountable for 4.68 kilograms of crack cocaine. Mr. Bass' very capable trial counsel challenged the constitutionality of the 100-1 conversion tables which made crack sentences much more draconian than powder cocaine sentences.[10] Trial counsel did not challenge the 4.68 kilograms of crack attributable to him on

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[9] Id. at 328-329 (footnotes omitted)(emphasis supplied)

[10] See, Sentencing Transcript at page 4 where this Court noted Mr. Bass' challenge and pages 18-29 where the Court heard the parties' arguments and declared, " . . . I am not in a position to declare the penalty statutes

the grounds that it was not relevant conduct under §1B1.3. Mr. Bass wishes to raise that argument at this new sentencing proceeding. Two arguments related to relevant conduct warrant sentencing Mr. Bass on the basis of the powder cocaine that he sold, not on the basis of the crack cocaine it was converted into. First, mere knowledge that powder cocaine is being converted into crack cocaine is not enough to attribute the 4.68 kilograms of crack to Mr. Bass. Secondly, the holding in ***Bass I*** clearly removes the converted crack from the relevant conduct equation because such conversion for resale was not within the scope of the agreed upon jointly undertaken criminal activity.

In the original sentencing herein, this Court did not have the opportunity to consider this argument because, obviously, it did not have the benefit of ***Bass I*** when it attributed the 4.68 kilograms of crack to the defendant. Specifically, in reaching this decision regarding the 4.68 kilograms, this Court noted at the original sentencing:

> I think that under the existing law the fact that there's ample testimony presented that even though some of the transactions involved powder, **it was known that it was being converted into crack** and I think under the laws as it exists that that is the proper finding.[11]

A reading of §1B1.3 and case law interpreting it supports the defendant's position that he should be sentenced on the basis of 4.68 kilograms of powder, not crack, cocaine. Under §1B1.3(a)(1)(B), relevant conduct is, "in the case of jointly undertaken activity (a criminal plan, scheme, endeavor, enterprise undertaken by a defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Stated another way, "to hold the defendant

---

concerning crack to be unconstitutional." The Court did note, in imposing the 360 month sentence which was at the low end of the then applicable guideline range the following: "The reason for the low end, as compared to a life sentence, there are many reasons, but simply that this case does not merit a life sentence, I do not believe, and **I think that the low end is appropriate, if you take into consideration the great discrepancy or difference between the punishment for powder and crack cocaine.**" Sentencing Transcript at page 46 (emphasis supplied).

[11] Sentencing Transcript at page 18 (emphasis supplied).

accountable for the crime of third person, the government must establish that the defendant agreed to jointly undertake the activity with the third person, and that the particular crime was within the scope of the agreement." United States v. Evboumvan, 992 F.2d 70, 74 (5th Cir. 1992).

Here, the defendant sold powder cocaine, but the scope of the agreement did not extend to the conversion into crack cocaine. It is not enough to find, as this Court did here that "it was known that it was being converted into crack[12]"; to hold Mr. Bass accountable for drugs belonging to someone else – especially after those people were responsible for converting it into crack. The government must prove something more than mere knowledge that it was being converted into crack. The following passage from the Fifth Circuit supports Mr. Bass' claim that the conversion was not part of the jointly undertaken criminal activity.

> The evidence shows that these three men simply purchased cocaine from Bass **and resold it as cocaine base in Victoria. Bass did not receive any additional monies or benefits from these resales as cocaine base. There is no evidence that Bass controlled the resale activities of these three individuals, such as by dictating the quantity, the asking price, or to whom the cocaine base would be sold. Beyond evidence of ordinary purchases and sales, the record is devoid of evidence of control by Bass whatsoever over these three individual's drug activities.**[13]

The government had to prove that the defendant agreed to undertake criminal activity jointly with others and that the conversion into crack was within the scope of that agreement. It failed.

Support for the defendant's position can be found in United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996). There, Chisholm was convicted of various drug charges. At trial, the

[12] See, United States v. Smith, 13 F.3d 860, 865 (5th Cir. 1994),("It is not enough to find only that Smith knew or could have foreseen that others were selling drugs in the house. To hold her accountable for drugs belonging to someone else, it is necessary to find that she agreed to undertake criminal activity jointly with others")

[13] Id. at 328-329 (footnotes omitted)(emphasis supplied)

evidence showed that Chisholm served as an intermediary to connect a known crack dealer with a source for powder cocaine on two different occasions. At sentencing, the district court sentenced him on the basis of the crack that the powder had been converted into. The Eleventh Circuit reversed, finding that the conversion into crack cocaine was not within the scope of Chisholm's agreement.

> In the present case, there is no evidence that the conversion to or use of crack cocaine was reasonably foreseeable by Chisholm, or that it was part of the scope of the criminal activity that he agreed to undertake. In both drug transactions for which Chisholm is charged, the evidence shows that Chisholm merely assisted with the procurement of the powder cocaine.

73 F.3d at 308.

This Court should do likewise and find that the conversion was not relevant conduct. Accordingly, the defendant should be sentenced on the basis of 4.68 kilograms of powder cocaine with no aggravating role adjustment.

If the Court were to find that the defendant was accountable for the 4.68 kilograms of powder cocaine, his base offense level would be a level 30. Even with a two level aggravating role adjustment, the final offense level would be 121-151 months. The defendant has effectively completed this sentence in light of his time served and good time credit.

However, the defendant recognizes that there could well be a difference of opinion as to these two positions regarding role in the offense and relevant conduct. Should the Court disagree with his analysis, there is still a well-founded basis for lesser sentence.

Booker and the role of the Sentencing Guidelines in formulating sentences

In Booker v. United States, ___U.S.___, 125 U.S. 738, 160 L.Ed.2d 621 (2005), the United States Supreme Court found that a mandatory sentencing scheme was unconstitutional and remedied the situation by making the Guidelines advisory, and in the context of appellate

review of sentences, change the standard of review from de novo to that of reasonableness. "Without the mandatory provision, the [Sentencing Reform] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals." *Id.,* at 764.

In the wake of Booker, there is disagreement about its interpretation and application. In effect, two schools of thought have emerged exemplified by United States v. Wilson, 350 F.Supp.2d 910 (D. Utah 2005) and United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005). In Wilson, Judge Cassell determined that the Guidelines are still presumptive and should only be departed from "in unusual cases for clearly identified and persuasive reasoning." Wilson, 350 F.Supp.2d at 911. On the other hand, in Ranum, Judge Adelman concluded that the Guidelines are not presumptive, but advisory, and should be treated as one factor to be considered in conjunction with other factors that Congress enumerated in §3553(a). The defendant believes that the proper approach is that articulated by Judge Adelman in Ranum.[14] However, irrespective of which approach this Court adopts, a sentence far less than the 360 months previously imposed is supported by the law and facts.

*Wilson* and presumptive approach

Under the approach taken by the Court in Wilson, the Guidelines are still presumptive and that there should be departures only in unusual cases. Should the Court adopt this model for sentencing, Mr. Bass would point out at least two different grounds for a downward departure.

A. Post-Sentencing Rehabilitative Efforts pursuant to U.S.S.G. §5K2.19

Although §5K2.19 now prohibits downward departures for "post-sentencing rehabilitative efforts, even if exceptional," that section does not preclude a downward departure for Mr. Bass

[14] A copy of the Ranum decision as well as the opinion in United States v. Myers, 353 F.Supp.2d 1026 (S.D. Iowa 2005) are attached as exhibits. Both of these opinions articulate the basis for the advisory model much better than counsel could ever imagine doing.

for two reasons. First, his offense occurred before the amendment in 2000, and, secondly, Mr. Bass' rehabilitative efforts have come prior to his sentencing on July 5.

The BOP materials that the defendant has submitted show that this defendant has made the most out of a bad situation. He has become a valued employee at UNICOR as shown by the letters submitted by his supervisors. He has become a volunteer within the BOP and tried to carry the message about his mistakes to younger people to hopefully prevent them from making the mistakes that he did. The numerous letters show that the defendant is remorseful for his action. These exhibits document the defendant's rehabilitative efforts.

The defendant's rehabilitative potential is a mitigating factor that the Court may also consider. United States v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990). A number of circuits have recognized that a sentencing court may depart downward based on a defendant's post-offense rehabilitation. *See,* United States v. Newlon, 212 F.3d 423 (8th Cir. 2000)(departure from 110 to 90 months not abuse of discretion where prior to his arrest on felon in possession, defendant had, at his own request, spent eighty five hours in drug and alcohol program; his counselor noted that he had a sincere desire for treatment and his family noted a marked improvement in his behavior and attitude); United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000) (departure from 51 to 31 months at resentencing in securities fraud case not an abuse of discretion for post-offense rehabilitation where while in prison, defendant had tutored inmates, began serving as the prison chaplain's assistant, became a program assistant and clerk of the prison parenting program, and lectured at local colleges to business students on the ethical perils in the business world); United States v. Rudolph, 190 F.3d 720 (6th Cir. 1999) (at re-sentencing, court may depart downward for extraordinary rehabilitation occurring after original sentencing); United States v. DeShon, 183 F.3d 888 (8th Cir. 1999) (where defendant plead to tax evasion,

district court did not abuse discretion in departing downward from 30-37 months to five months community confinement without work release based on defendant's post-offense rehabilitation, after witnesses testified that he had "renewed his life in the church" and was making extraordinary efforts to turn his life around); United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Koon allows exceptional efforts at drug rehabilitation to be considered as basis for downward departure because these efforts were not expressly forbidden as a basis for departure by the Commission); United States v. Green, 152 F.3d 1202 (9th Cir. 1998) (post conduct actions, particularly rehabilitation, may be considered as basis for departure; eleven level downward departure affirmed); United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998); United States v. Core, 125 F.3d 74 (2nd Cir. 1997); United States v. Sally, 116 F.3d 76 (3rd Cir. 1997); United States v. Holloway, 990 F.2d 1377 (D.C. Cir. 1993) (per curiam); United States v. Maier, 975 F.2d 944 (2nd Cir. 1992); United States v. Williams, 948 F.2d 706 (11th Cir. 1991); United States v. Sklar, 920 F.2d 107 (1st Cir. 1990); United States v. Griffith, 954 F.Supp. 738 (D.Vt. 1997).

Defendant submits that he has provided ample basis for a downward departure on this ground.

B. The gross disparity between the powder and crack cocaine sentencing table

Even should this Court reject the defendant's argument that he should be sentenced on the basis of 4.68 kilograms of powder cocaine, the gross disparity between powder and crack cocaine should be a basis for a downward departure.

Courts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact in federal sentencing. *See*, *e.g.,* United States v. Dumas, 64 F.3d 1427, 1432 (9th Cir.

1995)(Boocheever, J., concurring); United States v. Willis, 967 F.2d 1220, 1226 (8th Cir. 1992)(Heaney, J., concurring); United States v. Clary, 846 F.Supp. 768 (E.D.Mo.), *rev'd* 34 F.3d 709 (8th Cir. 1994); United States v. Patillo, 817 F.Supp. 839 (C.D.Cal. 1993); David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1995); Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System that Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines Classification Between Crack and Powder Cocaine,* 25 U. TOL. L. REV. 215 (1994); *The Debate on the 2002 Federal Drug Guideline Amendments,*14 FED. SENT. REPTR. 123, 188-242 (Nov./Dec. 2001-Jan./Feb. 2002).

Both the Sentencing Commission and the United States Judicial Conference have sought to reduce the disparity. *See,* UNITED STATES SENTENCING COMMISSION, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Criminal Justice System is Achieving the Goals of Sentencing Reform,* at 132 (2004); *Cocaine Sentencing, reprinted in* 14 FED. SENT. REPTR. 217, 224 (Nov./Dec. 2001-Jan./Feb. 2002) (testimony of Judge Sim Lake on behalf of the U.S. Judicial Conference, in favor of "dramatically lowering the current 100 to 1 crack to powder cocaine ratio").

This Court was obviously troubled by this ratio at the initial sentencing in this matter. The defendant submits that a departure can now lie for this disparity.

Ranum and the advisory approach where the Guidelines are but one factor among many factors to be considered

In Ranum, Judge Adelman set out his position about the role of the Guidelines in the post-Booker world.

> . . . [C]ourts must in all cases seriously consider the Guidelines. The Commission has collected a great deal of data over the years and studied sentencing practices. Thus, courts not imposing guidelines within the advisory guideline range should

> provide an explanation for their decision. But in so doing, courts should not follow the old "departure" methodology. The guidelines are not binding, and courts need not justify a sentence outside of them by citing factors that take the case outside of the "heartland." Rather, courts are free to disagree, in individual cases and in the exercise of discretion, with the actual range proposed by the guidelines so long as the ultimate sentence is reasonable and carefully supported by reasons tied to the §3553(a) factors.

Ranum, 353 F.2d at 986-987.

Section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph 2." Section 3553(a)(2) states that such purposes are: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Section 3553(a) further directs sentencing courts to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (3) the kinds of sentences available; (6) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any the victims of the offense

Applying this factors to the instant case (and borrowing from Judge Adelman's opinion in United States v. Smith, 359 F.Supp.2d 771 (E.D. Wis. 2005), would result in a substantially lower sentence. Based on the materials secured from the BOP, the defendant is not a threat to commit future crimes; if anything, his prison deportment shows that he is more than ready to re-enter society with vocational skills learned in custody. The defendant has been a model inmate in the decade he has been incarcerated. Further prison time will not make the punishment any more

"just." A sentence based on the strict adherence to the advisory guidelines would warehouse this defendant longer when, as the record shows, he has a great deal to offer to the free world.

Adhering to the crack cocaine guidelines would result in a sentence greater than necessary and would also create unwarranted disparity between defendant's convicted of possessing powder cocaine and defendants convicted of possessing crack cocaine. Accordingly, it would be appropriate under this model to reduce the 100 to 1 ratio to a 10 to 1 ratio.[15] In addition, the defendant would be entitled to a departure for his post-offense rehabilitation.

If this Court were to adopt this model, the defendant would be sentenced on the basis of a level 34 before any adjustments for (a) role in the offense, and/or (b) departure due to his extraordinary post-offense rehabilitation.

REQUESTED SENTENCE

In the event that the Court finds that the relevant conduct in this matter involved 4.68 kilograms of powder cocaine, the defendant requests that he be sentenced to a sentence of 135 months.

In the event that the Court finds that the relevant conduct in this matter involved 4.68 kilograms of crack cocaine, the defendant requests that he be sentenced pursuant to a level 34.

Therefore, defendant requests that this Court grant him such relief in law and in equity as he may be entitled.

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[15] Judge Adelman used a 20 to 1 ratio in formulating the sentence in United States v. Smith, 359 F.Supp.2d 771 (E.D. Wis. 2005). In light of the massive sentencing disparity between one sentenced on the basis of 4.68 kilograms of powder (guideline range of 97-120 months) and one sentenced on the basis of 4.68 kilograms of crack (235-293), a more appropriate ratio would 10-1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the Defendant's Memorandum in Aid of Sentencing has delivered to the following entity:

Mr. Tim Hammer
USAO
Victoria, Texas

Mr. Ruben Mesa
USPO
Victoria, Texas

Both via hand delivery

Dated: __________

David Cunningham

SUPPORTING DOCUMENTATION

RELEVANT CASE LAW