04-3643-cr

To be Argued By:
JOHN A. DANAHER III

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-3643-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

SUSAN GODDING,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

JOHN A. DANAHER III
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

GUIDELINES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The government filed a timely notice of appeal, and this Court has appellate jurisdiction pursuant to 18 U.S.C. §§ 3742(b)(1) and (2) over the government's challenge to the defendant's sentence. The Solicitor General has authorized this government appeal.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred in departing downward seven levels from a Sentencing Guideline range of 24 to 30 months to one day's imprisonment and five years of supervised release on the grounds of mental and emotional condition, extraordinary family circumstances, extraordinary acceptance of responsibility, lesser harms, and a combination of all of the foregoing factors.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3643-cr

UNITED STATES OF AMERICA,

Appellant,

-vs-

SUSAN GODDING,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal presents the question of whether multiple Sentencing Guideline factors that are individually without merit can be combined to support a seven-level downward departure. The defendant bank employee pleaded guilty to embezzling nearly $366,000 over a five-year period from her employer, the National Iron Bank ("NIB"), a small

bank in Norfolk, Connecticut. The district court departed seven offense levels - from a level 17 to a level 10 in zone B - to impose a sentence of one day imprisonment, followed by five years' supervised release, instead of a sentence within the Guideline range of 24 to 30 months' imprisonment.[1] Each of the grounds for departure identified by the district court was unsupported by the facts in the record. Grounds for departure which are so lacking in merit cannot be combined to justify a departure.

Statement of the Case

On September 29, 2003, the defendant-appellee Susan Godding pleaded guilty to a one-count Information that charged her with embezzling nearly $366,000 in violation of 18 U.S.C. § 656. See Joint Appendix ("JA") at 6-16.[2] On May 24, 2004, the district court (Peter C. Dorsey, J.), sentenced the defendant to five years of probation with six months of home confinement. The court further ordered the defendant to pay full restitution and imposed a $100 special assessment. JA 330.

The district court entered judgment on May 27, 2004, but on June 2, 2004, entered an amended judgment imposing one day of incarceration to be followed by five

---

[1] The court applied the U.S. Sentencing Commission Guidelines Manual in effect on November 1, 2002. All Guideline provisions cited herein are from the 2002 manual.

[2] The presentence investigation report, the addenda to that report, and a letter pertaining to the defendant's husband, have all been filed in a Sealed Joint Appendix and will be cited as "SJA."

years of supervised release. JA 332. The government filed a timely notice of appeal on June 15, 2004. JA 333.

Statement of Facts

A. The Offense Conduct

The defendant is a 39-year-old woman who worked at the NIB in Norfolk, Connecticut, from 1988 until she resigned on April 21, 2003. She began embezzling funds from the bank in 1998 by identifying elderly, wealthy bank customers and making small withdrawals from their accounts. When the withdrawals were not detected, she made larger and larger withdrawals until one of the customers discovered her conduct. Subsequent investigation revealed that the defendant embezzled a total of $365,733.24 between 1998 and 2003. SJA 4 (Presentence Investigation Report ("PSR") ¶¶ 7-10); JA 49-50.

As a result of the defendant's conduct, this small bank suffered a direct loss of $63,000, a deductible expense for its insurance coverage, and an increase in its insurance premiums. NIB's insurance company, Traveler's Insurance Company, suffered a loss of nearly $360,000. In addition to these immediate losses, the bank suffered a loss of reputation which caused customers to withdrawal deposits, currently totaling $2 million, due to concerns about the safety of funds in the institution. SJA 5 (PSR ¶¶ 12-16).

When the course of embezzlement was discovered, the FBI carried out a court-ordered search of the defendant's

property, a search that yielded significant evidence of the defendant's conduct. Following the search, the defendant acknowledged her responsibility and, on September 29, 2003, agreed to plead guilty to a charge of embezzlement in violation of 18 U.S.C. § 656. In the plea agreement, the defendant stipulated that between 1998 and 2003, she embezzled $365,733.24 from the bank.

The defendant eventually submitted a written statement regarding the disposition of the embezzled funds. SJA 45-46; JA 299-301. That statement reflects that she spent the stolen money on a variety of luxuries and gifts, including $75,000 for a car, clothes, electronics and jewelry for her older daughter; dinner at the Ritz in Paris for a niece; a trip to Jamaica for a sister-in-law on a honeymoon; and a helicopter trip in Hawaii for a nephew. *Id.* at 300-01.

B. The Presentence Report

The Presentence Report properly calculated the defendant's Guidelines as follows:

Base offense level - § 2B1.1(a)	6
Loss enhancement for $365,733.24 - § 2B1.1(b)(1)(G)	+12
Abuse of position of trust[3] - § 3B1.3	+ 2
Acceptance of responsibility - § 3E1.1	- 3
Total offense level	**17**

[3] The parties litigated the two-level enhancement for abuse of position of trust, and the district court resolved this dispute in favor of the government. JA 53.

An offense level of 17 and a criminal history category of I[4] calls for an imprisonment range of 24 to 30 months.

As relevant to potential sentencing departures, the PSR revealed that at the time of the report, the defendant's mother lived independently, and still worked, but had been diagnosed with heart disease and diabetes. SJA 8; (PSR ¶ 36); JA 81. The defendant's mother reported that the defendant helped her with house cleaning, general care, and transportation to medical appointments. SJA 9 (PSR ¶ 39); JA 81. The defendant has three brothers who live in close proximity to her and her mother. SJA 8-9 (PSR ¶ 37). The probation officer interviewed the defendant's mother and one of the defendant's brothers for the report. SJA 9 (PSR ¶ 38).

The defendant has a 19-year old daughter, who, at the time of the PSR, was not living with her mother, but was instead attending college and living with a boyfriend in Winsted, Connecticut. SJA 10 (PSR ¶ 43). The defendant has a 6-year old daughter with her husband, David Godding. SJA 10 (PSR ¶ 44). Mr. Godding sought a divorce due to the defendant's conduct. SJA 10 (PSR ¶ 45).

The defendant contended that she used much of the embezzled money for mental health and medical treatment for her 19-year old daughter. In her sentencing memorandum, she estimated that she expended the

---

[4] The defendant had two prior larceny convictions which did not result in an enhancement of the defendant's criminal history. PSR ¶¶ 30-32.

majority of the funds "to provide gifts to make her daughter feel better and for family members and for members of the community." JA 55.

The PSR further noted that the defendant's therapist found the defendant to have suffered from a depressive disorder (single episode), post-traumatic stress disorder due to an earlier, physically abusive relationship, and avoidant personality disorder. SJA 14-15 (PSR ¶ 64).

C. The First Sentencing Hearing (December 18, 2003) and the Motion for Departure

The defendant did not move for a downward departure on any basis until the initial sentencing hearing, when, in a memorandum filed moments before the hearing began, JA 54, 64, she sought a downward departure on five grounds: (1) significantly reduced mental capacity, based on a diagnosis that she was suffering from "avoidant personality disorder"; (2) family responsibilities, based on the assertion that the defendant (who was married at the time of sentencing) was the "responsible caretaker" for her 6-year old daughter, her 19-year old daughter, and her mother; (3) extraordinary acceptance of responsibility, based upon the fact that the defendant confessed to the crime when confronted and had made restitution of approximately $27,400; (4) the concept of "lesser harms," based upon the assertion that the defendant used "the majority" of the embezzled funds to provide mental health care and medical treatment for her daughter; and (5) a combination of the foregoing claims.

Having just received the defendant's departure motion, the district court made clear that it intended to rule favorably on the motion. Before hearing any evidence in support of the departure motion, or hearing any response from the government, the court stated that although it was inclined to rule against the defendant on a specific offense characteristic, "[i]t's not going to make any difference as a practical matter, because I intend to consider the departure grounds that you've raised . . . and as a matter of fact, I think there's one or two that in addition to the ones that you've raised that I think are pertinent and should be considered." JA 21-22.

The government objected, argued against any departure, and requested additional time to respond to the arguments raised by the defendant. JA 54.

The government objected to the downward departure motion on the basis of the defendant's mental condition, questioning whether a family therapist is qualified to diagnose a person as having "avoidant personality disorder" and arguing that such a disorder is insufficient to justify a downward departure. JA 63-64. On the "family ties" departure, the government argued that the defendant's husband was available to care for the 6-year old daughter, the defendant's older daughter had reached the age of majority and was enrolled in college, and the defendant's mother lived independently, and in any event, had three other children living nearby who could provide any assistance she needed. JA 57-63. The government objected to the "extraordinary acceptance of responsibility" argument because the defendant had done little more than acknowledge her guilt when she was

confronted by agents searching her home. JA 56. Finally, the government objected to the "lesser harms" argument, noting that this rarely used departure should only apply in extraordinary circumstances. In this case, the majority of the embezzled funds were not used to provide medical care, but rather were used to purchase objects and gifts. JA 55-56.

After hearing argument, the court indicated its intention to depart, noting that neither federal authorities nor state banking authorities had discovered the embezzlement, and asserting that the community needed protection from the bank's failure to take appropriate steps to protect itself from this type of embezzlement. JA 88. The court also referred to the defendant's caretaking responsibilities for her children, her mother, and her mother-in-law.[5] JA 89-90. The court found the defendant's mental health problem to be "very substantial" in leading to her conduct and referred, also, to the defendant's physical health.[6] JA 90. The court credited the fact that some of the funds were used for the defendant's "daughter and her daughter's

---

[5] The latter statement by the court is inexplicable, since the defendant's mother-in-law did not indicate that she was personally dependent upon the defendant in any way. JA 84-86.

[6] As before, this comment is inexplicable. There is no evidence that the government can locate regarding any physical issue on the part of the defendant, other than high blood pressure that is addressed with medication. SJA 13 (PSR ¶ 60). The defendant did acknowledge using cocaine on a regular basis for some 16 years, but claims to have abandoned drug use in 1996. SJA 13 (PSR ¶ 61).

many problems . . . ." The court noted that the defendant paid for expenses for some of her relatives, as well. JA 91. The court also noted the defendant's civic activities, and her rehabilitation, in that she was seeking mental health treatment and was making voluntary restitution payments. JA 91-92. The court stated that incarceration would interrupt the defendant's mental health treatment. JA 93. The court concluded "these factors . . . independently warrant a departure and in combination, I think warrant a departure." JA 94.

The government sought additional time to respond to the departure issues, confirming that the government had not waived any objections or abandoned any arguments. JA 98-99. Despite the government's objections, the court determined to impose a sentence of one day of imprisonment, followed by five years of supervised release, JA 94-95, but withheld the judgment and commitment order pending the submission of the government's written position. The court stated that after reviewing briefs by all parties, to be filed no later than January 31, 2004, the court would issue the judgment and commitment order or, if the court were inclined to alter the proposed sentence, would reschedule the matter for sentencing. JA 106. The court then advised the defendant that her morning in court would constitute the one day of incarceration that had been ordered. JA 107.

Thereafter, all relevant memoranda were filed by February 2, 2004 and no further action was taken until the court issued a calendar on May 17, 2004, indicating that sentencing would go forward on May 24, 2004. The court did not otherwise indicate the subject matter that would be

explored at the hearing, and after the May 17, 2004 calendar was issued, both parties moved for a continuance, which was denied on May 21, 2004.

D. The Second Sentencing Hearing (May 24, 2004)

At the May 24, 2004 sentencing, the court heard argument on the parties' submissions and considered additional evidence that had been developed on an ex parte basis between the defendant and the court, specifically, a psychological evaluation that had been conducted on February 16, 2004, and which was made available to the government, for the first time, on May 21, 2004. JA 267-68. After argument, the court sentenced the defendant to five years' probation, citing the defendant's mental and emotional condition, her family ties and responsibilities, her extraordinary acceptance of responsibility, and her "lesser harms" argument. JA 309-21. The court also stated that even if no one of the foregoing circumstances constituted a sufficient grounds for downward departure, those factors, considered in combination, did warrant downward departure.[7] *Id.*

---

[7] The court also mentioned the defendant's efforts at rehabilitation, making reference to Sentencing Guidelines § 5K2.19. JA 319. The defendant did not seek downward departure on the basis of extraordinary efforts at rehabilitation, and there are no facts in the record that would support such a departure. Further, § 5K2.19 refers to post-sentencing rehabilitation. To the extent the court departed on the basis of extraordinary rehabilitation, it was an error to do so. *See* (continued...)

Following argument, the court found that the bases for departure were "on balance" favorable to the question of departure, "but each one of them, in and of itself, is not an absolutely clear qualification under any articulation of grounds for departure." JA 309-10. The court then stated that the latter fact demonstrates why it was "simply not possible" to place the defendant "to a particular point on the guideline grid." JA 310. The court then concluded that "the claims submitted for a departure have merit individually, and more importantly, taken on balance in conjunction with each other." *Id*.

At the conclusion of the hearing, the district court imposed a sentence of five years' probation, with six months home confinement, and entered judgment on May 27, 2004. On June 2, 2004, the court signed an amended judgment that imposed one day of incarceration and five

---

[7] (...continued)
United States v. Carpenter, 320 F.3d 334, 342 (2d Cir. 2003).

years of supervised release.[8] JA 332. The

[8] The court's May 24, 2004, sentence was unlawful in that the court had failed to impose a sentence requiring even a single day of incarceration. Because the defendant pled guilty to a Class B felony -- embezzlement in violation of 18 U.S.C. § 656, with a statutory maximum penalty of 30 years of imprisonment -- U.S.S.G. § 5B1.1(b)(1) precludes imposition of a term of probation. The June 2, 2004, judgment corrected this deficiency.

The amended judgment was still unlawful, however. The district court orally departed downward to offense level 10, yielding a Guideline range of 4-10 months. U.S.S.G. § 5C1.1(c) permits the court to impose either (1) "a sentence of imprisonment" (i.e., of 4-10 months), or (2) "a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement[] or home detention according to the schedule in subsection (e), *provided that at least one month is satisfied by imprisonment.*" *Id.* (emphasis added). As noted, the district court imposed only *one day* of imprisonment, not *one month.* The amended judgment does not make clear whether the originally imposed term of 6 months' home confinement remained in place with respect to the term of supervised release, and the Probation Office has not taken a position on that matter.

The government did not object in the district court based on this violation of U.S.S.G. § 5C1.1(c). Nevertheless, the government's repeated objections, both oral and written, to any downward departure, adequately preserved its claim that the defendant should have been sentenced at offense level 17, with a Guideline range of 24 to 30 months of imprisonment.

The amended judgment was unlawful additionally because the district court failed to include the reasons for the downward

(continued...)

government filed a notice of appeal on June 15, 2004. JA 333.

SUMMARY OF ARGUMENT

The district court granted the defendant a downward departure of seven levels based on the defendant's claims of mental and emotional conditions, extraordinary family circumstances, extraordinary acceptance of responsibility, lesser harms, and a combination of the foregoing circumstances. None of the bases for departure was supported by the record or by applicable law. The district court did not find that the defendant suffered a significant reduction in mental capacity, and so her mental and emotional condition did not warrant a downward departure. The defendant's family circumstances are in no way extraordinary, and in any event, other people were available to serve as caregivers for the defendant's mother and daughter. The defendant's acceptance of responsibility is in no way extraordinary, in view of the fact that the defendant, while under pressure from civil

---

[8] (...continued)
departure in the written order of judgment. *See* 18 U.S.C. § 3553(c)(2). The district court fully explained its reasons for departure in open court and thus this error does not prevent this Court from reviewing the judgment. As explained in the text, the government contends that this case must be remanded for resentencing within the appropriate Guideline range, but if this Court disagrees with the government on the merits, this case must be remanded in any event to allow the district court to enter the reasons for its departure in the written judgment. 18 U.S.C. § 3742(f).

litigation, repaid no more than 25 percent of the amount embezzled. The "lesser harm" departure of § 5K2.11 did not apply in this embezzlement case because most of money that the defendant embezzled was spent on luxury and consumer items, not on expenditures to avoid "greater harms." The foregoing individual bases for departure being wholly without merit, those bases cannot be combined to support a "combination of factors" downward departure.

This case falls far outside the limited range of circumstances that this Court has ruled may justify a downward departure. The government asks this Court to vacate the district court's sentence and remand for imposition of a sentence within the Guideline range.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DEPARTING DOWNWARD ON MULTIPLE GROUNDS

A. Relevant Facts

An overview of the relevant facts is provided, *supra*, in the Statement of Facts discussion. The facts that are relevant to each of the five bases for departure are set forth, *infra*, in the course of discussing each of the five departure theories adopted by the district court.

B. Governing Law and Standard of Review

The governing law relevant to each ground for departure is set forth in the applicable discussion below.

Under the recently enacted "Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003" ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003), this Court reviews de novo the district court's "application of the guidelines to the facts" in connection with downward departures, while continuing to review underlying factual findings for "clear error." *United States v. Kostakis*, 364 F.3d 45, 51 (2d Cir. 2004) (brackets and quotation marks omitted) (holding that new standard-of-review provisions of 18 U.S.C. § 3742(e) apply to all cases pending on appeal); *United States v. Huerta*, 371 F.3d 88, 94 (2d Cir. 2004) (applying *de novo* review under PROTECT Act to family-circumstances departure).

C. Discussion

1. Mental and Emotional Condition

The district court plainly erred in granting a departure on the basis of the defendant's mental and emotional condition. U.S.S.G. §§ 5H1.3 and 5K2.13 do not permit a departure in the absence of some evidence that the defendant suffered from a significant mental condition at the time of the offense and that her condition substantially contributed to the offense. These factors are not present here.

a. Facts

Three individuals provided evidence on the defendant's mental condition. The defendant relied on the opinion of her marriage and family therapist, with whom she began treatment after her criminal conduct came to light. This therapist opined that the defendant suffers from a depressive disorder which is the result (not the cause) of her crime. SJA 14-15 (PSR ¶¶ 63-64). As a secondary diagnosis, the therapist concluded that the defendant has avoidant personality disorder, a disorder which causes the defendant to seek the appreciation of others. *Id.*

A psychiatrist retained by the government sought an opportunity to meet with the defendant, but the defendant declined such a meeting. JA 118. However, based upon available records, that psychiatrist, Dr. Donald R. Grayson, believes that the defendant is more likely to suffer from an anti-social personality disorder rather than an avoidant personality disorder. JA 118-19, 145-48. In any case, he asserted that an avoidant personality disorder does not cause a significantly reduced mental capacity and would not be a major significant contributing factor in diminishing the defendant's ability to appreciate the wrongfulness of her behavior or in diminishing her ability to conform her behavior to the expectations of the law. *Id.*

Finally, the court and the defendant, on an ex parte basis, arranged for a psychologist to evaluate the defendant in a single session. The psychologist's report revealed that the defendant is within the average range of intellectual ability, that she is showing significant depression and anxiety which "are understandable given her legal

situation," and that her personality functioning shows "some histrionic, narcissistic and anti-social traits, which suggest a borderline personality organization." SJA 56.

b. Law and Discussion

The defendant sought a departure for a mental and emotional condition pursuant to § 5K2.13 which provides a general exception to the rule of § 5H1.3, which provides in pertinent part that "[m]ental and emotional conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Part K, Subpart 2." Section 5K2.13 provides that a departure may be warranted if "the defendant committed the offense while suffering from a *significantly* reduced mental capacity." *Id.* (emphasis added). "If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense." *Id.*

This Court has interpreted Section 5K2.13 as requiring a showing of a causal link between the diminished capacity and the offense conduct. *See United States v. Silleg*, 311 F.3d 557, 564 (2d Cir. 2002) (remanding for factual findings on diminished-capacity departure grounds, but noting that "denial of a diminished capacity departure based on the absence of a causal link is . . . proper"); *United States v. Ventrilla*, 233 F.3d 166, 169 (2d Cir. 2000) (holding that defendant must show that he "suffers from 'reduced mental capacity' and that a 'causal link [exists] between that reduced capacity and the commission of the charged offense'") (alteration in original) (citations

omitted); *United States v. Piervinanzi*, 23 F.3d 670, 684 (2d Cir. 1994) (affirming district court's refusal to depart downward under § 5K2.13, based on factual conclusion that there was "no connection between the diminished capacity and the criminal activity itself").[9]

This is illustrated by *United States v. Janusz*, 986 F. Supp. 328 (D. Md. 1997) (departure based on § 5K2.13). In *Janusz*, the defendant embezzled less than $70,000 from her employer and was diagnosed as suffering "from major depression, anxiety reaction and impulse control disorder." *Id.* at 330. A psychiatrist stated that her depression "was severe enough to have caused a change in her normal impulse control and judgment." *Id.* (quotation marks omitted). He concluded that her mental state "was a causative factor in her actions" and "contributed to a change of her normal behavior." *Id.*. Nonetheless, the Motion for Downward Departure was rejected, the district court concluding that emotional problems were insufficient to support a downward departure. *Id. See also United States v. Frazier*, 979 F.2d 1227, 1228-29, 1230 (7th Cir. 1992) (defendant embezzled $41,582.60; court held that there can be no departure under § 5K2.13 unless there is a conclusion that the mental and emotional condition amounts to "'*significantly* reduced mental capacity'" or "'this reduction contributed to the commission of the

---

[9] Section 5K2.13 has since been amended to require a showing that the diminished capacity "contributed substantially to the commission of the offense." *See* U.S.S.G. Guidelines Manual § 5K2.13 (2003). As noted above, this Court has always required proof of a causal link, though not necessarily a "substantial" one.

offense.'") (quoting *United States v. Gentry*, 925 F.2d 186, 189 (7th Cir. 1991)).

In the present case, the district court, sua sponte, considered whether a mental or emotional condition could otherwise justify relief under § 5H1.3. This Court has rejected a general departure under § 5H1.3 (and a "combination of factors" departure premised in part on this section) where a defendant did not demonstrate evidence of psychosis, his sense of morality was significantly intact and, further, he appreciated "both the societal and moral constraints of his behavior." *United States v. Barton*, 76 F.3d 499, 502 (2d Cir. 1996). In *Barton*, this Court found insufficient evidence to support such a departure where (as in the present case) the district court had "surmise[d]" that the defendant's mental and emotional condition must have contributed to his commission of the offense. *Id.* at 502.

In this case, the district court did not expressly find that the defendant suffered a significant reduction in mental capacity, as required by § 5K2.13, nor that such a condition caused her offense conduct. Accordingly, any departure under that section or under § 5H1.3 was improper.

The common thread that can be discerned among the three diagnoses of the individuals who have examined the defendant is that she has, at most, a minimal mental and emotional disorder. Although the defendant's therapist opined that she suffered from "avoidant personality disorder," this diagnosis was not supported by the two other mental health professionals in this case, and in any event, there was no evidence that this disorder -- assuming

that she had it -- would result in a *significant* reduction in mental capacity.

Moreover, there was no evidence of any causal connection between the defendant's mental condition and her crime. Again, even if the defendant suffers from "avoidant personality disorder," there was no evidence that this disorder *caused* her offense conduct. Indeed, the government's witness, a psychiatrist, asserted that this disorder would not diminish the defendant's ability to appreciate the wrongfulness of her behavior or her ability to conform her behavior to the expectations of the law. And while both of the defendant's mental health experts stated that the defendant suffered from depression, they both also concluded that this resulted from -- and was not caused by -- her crime.

In short, none of the expert evaluations support a departure under the specific provisions of § 5K2.13, nor otherwise under § 5H1.3.

2. Extraordinary Family Circumstances

The district court erred in granting a departure based on the defendant's family ties and circumstances. U.S.S.G. § 5H1.6 discourages departures based on family circumstances, and the facts of this case this case do not present any reason to deviate from this policy.

a. Facts

The district court cited the defendant's responsibility for four people to support a departure for family circumstances: the defendant's mother, the defendant's two daughters, and the defendant's mother-in-law.

There was no evidence that the defendant had any responsibility for her mother-in-law. Indeed, the defendant's mother-in-law spoke at the first sentencing hearing, and she did not indicate that she was personally dependent on the defendant in any way. JA 84-86.

Similarly, although the defendant cited her responsibility for her older daughter to support her claim for a family ties departure, and although there was evidence that the defendant had assisted her daughter through years of mental health and substance abuse treatments, the evidence also revealed that this daughter was 18 years old at the time of the initial sentencing hearing. SJA 10 (PSR ¶ 43). Moreover, at the time of sentencing, this 18-year old woman was attending college and had been living with her boyfriend in Winsted, Connecticut. *Id.*

Finally, although the defendant certainly had responsibility for her 6-year old daughter and provided various services to her 74-year old mother, the government identified evidence that there were alternative caregivers for both of these individuals. Specifically, the defendant's husband confirmed that he was willing and able to care for his 6-year old daughter, SJA 66; JA 294-96, 307-08, and that the defendant's three brothers were in a position to

provide assistance to their mother, JA 307. The government argued that, due to their proximity to the defendant's mother, the three adult brothers were capable of providing any necessary additional assistance. *Id.*

After the defendant and her husband sold their house in order to assist in making restitution payments, the defendant moved in with her mother. The defendant's mother reported to the probation officer that this living situation was a "god send." SJA 40. This relationship was not necessary for the care of the defendant's mother, however, because the defendant's own mental health expert noted that the defendant was aggressively seeking additional employment so that she could move out of her mother's home and move into her own home with her daughter "as soon as possible." SJA 56.

The court contended that if the defendant's husband were capable of caring for the daughter, that the husband should have been present to assert that he would do so. The court also asserted that the defendant's siblings should be present if they were willing to provide any necessary care for their mother. The government noted that the probation officer had never inquired of all of the defendant siblings if they would be willing to care for their mother. The court countered that if such a question were put to the defendant's siblings, their answer would undoubtedly be in the affirmative, but the court would not credit such an answer. JA 62. Absent the siblings coming forward on their own and asserting that they would provide alternative care, the court indicated that it would not conclude that such alternative care was available. JA 63.

The government pointed out that such a standard is unworkable, since siblings, knowing that they were increasing the likelihood that their sister would be incarcerated, and the likelihood that they would be accepting additional care-giving responsibilities, would hardly be likely to step forward and offer the court such an alternative, absent any solicitation either by the probation officer or the court. Any individual would be motivated, on the contrary, to take the position that the defendant, alone, was the only available care-giver. JA 306-08. Indeed, the court credited the government's representation that the defendant's husband was not present because his lawyer had advised him that if he did appear, and represented that he could care for his own child, it might increase the likelihood that the child's mother would be incarcerated, thus damaging the father's relationship with his daughter. The court credited the facts as stated as being true, but rejected the logic of the argument. JA 314-16.

The court did state, at JA 316, that there is a "signed statement from Robert Kelly . . . defendant's brother, that he is just unable to provide fully for the mother and that there is no one else in the family in a position to provide the kind of care that the mother obviously needs." The statement to which the court referred, however, acknowledged that Robert Kelly passes by the mother's house almost daily, and that he performed minor chores for his mother. He stated that he "is not in a position to take my sister Susan's place in caring for my mother." JA 229. He also said that he does not believe that there is anyone in his family who would be able to take his sister's place in this regard. *Id.* The Third Addendum to the

Presentence Report, however, indicates that other family members stated that, "if asked" at least one brother would have done more to care for his mother. SJA 40. In addition, the Addendum indicates that the defendant's brothers did take care of yard work and repairs for their mother. *Id.*

b. Law and Discussion

Section 5H1.6 provides that "[f]amily ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."[10]

The facts concerning a defendant's family circumstances, to justify a departure, must be "truly extraordinary." *United States v. Walker*, 191 F.3d 326, 338 (2d Cir. 1999). In *United States v. Smith*, 331 F.3d

---

[10] In the 2003 Manual, newly added application notes set forth a non-exhaustive list of circumstances to be considered by the court under § 5H1.6, including whether "the defendant's caretaking or financial support [is] irreplaceable to the defendant's family." § 5H1.6, app. note 1(B)(iii). Likewise, the court should consider whether "the loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant." § 5H1.6, app. note 1(B)(ii). The existence of "some degree of financial hardship or suffer[ing] to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure." *Id.* Although this commentary is not contained in the 2002 Manual applicable to this defendant, it is nevertheless consistent with this Court's case law described in the text.

292, 294 (2d Cir. 2003), this Court reversed a family-circumstances departure when the defendant was neither the sole care giver nor financial supporter of his two-year old son, even though his incarceration would force his wife to postpone college studies and seek to supplement her income. This Court emphasized that departure on this basis is disfavored and should not be permitted except in extraordinary family circumstances. *Id.* Similarly, in *United States v. Maurer*, 76 F. Supp.2d 353, 355 (S.D.N.Y. 1999), the defendant was convicted of wire fraud, forgery, and bank fraud. He cited to his mother's mental and physical conditions, his wife's mental condition, and his concerns for his two young children. *Id.* at 362. The court concluded that it was not clearly established that the defendant was "a unique source of financial and/or emotional support for a significant number of dependents." *Id.* at 362 (citing *United States v. Faria*, 161 F.3d 761, 762 (2d Cir. 1998)). The court noted that, instead, the defendant's ties with his mother, wife and children should be factors in considering where to sentence the defendant within the Guideline range. *Id.*

In *United States v. Madrigal*, 331 F.3d 258, 260 (2d Cir. 2003), a family circumstances departure was reversed when it was based upon a female defendant's relationship with her six children. This Court noted an absence of evidence that the defendant was the only person capable of providing adequate care for the youngest children, that the defendant's three older children were doing well and were available to care for their younger siblings, and that the defendant's extended family was also available for care giving. *Id. See also United States v. Carrasco*, 313 F.3d 750, 756-57 (2d Cir. 2002) ("being the father of three

children is in no sense an exceptional circumstance," even if the children receive some financial support from the father).

By contrast, this Court has found "truly extraordinary" circumstances in cases more compelling than the present case. *See United States v. Galante*, 111 F.3d 1029, 1035 (2d Cir. 1997) (upholding departure where defendant provided substantial support for two children and defendant's wife spoke limited English); *United States v. Johnson*, 964 F.2d 124, 129-30 (2d Cir. 1992) (upholding departure where defendant had sole responsibility for four young children); *United States v. Alba*, 933 F.2d 1117, 1122 (2d Cir. 1991) (upholding departure where defendant supported "close-knit family whose stability depends on Gonzalez' continued presence," including disabled father who lived with defendant and relied on him to get out of his wheelchair).

This Court recently remanded for further fact-finding in *Huerta*, 371 F.3d at 95, where the district court granted a family-circumstances departure to a defendant whose wife was unemployed, who supported two daughters (ages 8 and 11), and who assisted in financially supporting and caring for his paralyzed elderly father (whose wife was at work for much of the day). The court remanded for a number of findings, but emphasized the "central" importance of a finding regarding "the absence or presence of adults who can step in during the defendant's incarceration to assist with caring and providing for the defendant's dependents." *Id.*

The facts of this case are less compelling than *Smith* and *Madrigal*, where this Court reversed family-circumstances departures under the more lenient abuse-of-discretion standard of review. In this case, the nature of the defendant's familial responsibilities were not more than ordinary. She provided care for her daughters, but her older daughter is now 19 years old and attending college, and there is no indication that her 6-year old daughter requires specialized care that only the defendant could provide. The defendant's mother lived independently and continued to work at a job. Although the defendant lived with her mother at the time of sentencing, she represented to her psychologist that she was seeking to move out of her mother's house as soon as possible, thereby undermining any claim that such joint living arrangements were necessary.

Moreover, even apart from the entirely ordinary nature of the defendant's obligations, a departure was not justified given the overwhelming evidence of the availability of other family members to assist those who relied on the defendant. In other words, the facts do not support a finding, deemed "central" by *Huerta*, that the defendant was the sole, irreplaceable caregiver to her mother or 6-year old daughter. The defendant's mother can be cared for by any one of three other siblings who live in the area. Similarly, the defendant's 6-year old daughter can be cared for by the girl's father. The court accepted the representation that the father did not step forward to assert his willingness to care for his daughter because the father's lawyer had advised him that to do so would enhance the likelihood that the child's mother would be incarcerated, causing a rift between the father

and the child. An opinion by the father's therapist was filed, with the court's permission, following the hearing and supports the foregoing contention.

In sum, the facts of this case do not support a downward departure for family circumstances.

3. Extraordinary Acceptance of Responsibility

The district court erred to depart downward under Section 5K2.0 for extraordinary acceptance of responsibility based on the defendant's acknowledgment of guilt and her efforts to make restitution. This Court has already held that these arguments cannot support a downward departure for extraordinary acceptance of responsibility.

a. Facts

After the defendant was confronted with evidence of her crime, she confessed to the crime. JA 126. She subsequently wrote letters to the individual victims of her crime that acknowledged her guilt. SJA 6 (PSR ¶ 17). Although the defendant also identified her frequent meetings with investigating agents as evidence of her acceptance of responsibility, the government noted that those meetings were necessary to convince the defendant of the magnitude of the loss for which she was responsible.

The defendant also began to pay restitution before sentencing, and liquidated most of her assets (including her house) to accomplish this goal. However, she did so in the face of civil litigation pressure, initiated prior to

sentencing, in which the NIB's insurer, noting the defendant's guilty plea, attached her interest in her real property interests. SJA 67-76. Nevertheless, by the time of the second sentencing hearing, she still had made restitution only in the amount of approximately $81,000, or 25 percent of the total amount of restitution owed. This payment included the proceeds of the sale of her home, approximately $50,000, a home which the NIB's insurer had attached. SJA 36, 67-76.

On the basis of this evidence, the district court granted a departure for extraordinary acceptance of responsibility. The court noted that the defendant had substantially liquidated her assets and that she was aggressively seeking employment. In addition, the court faulted the NIB, claiming that the embezzlement had gone on for some six or seven years without having been detected. JA 313-14. The court then indicated that it did find extraordinary acceptance of responsibility, and that its sentence was not based upon any shortcomings on the part of the bank, but it merely wished to note its criticism of the bank for the record. JA 314.

b. Law and Discussion

Although this Court has acknowledged the possibility of a downward departure for a defendant's "extraordinary acceptance of responsibility," a defendant must demonstrate truly extraordinary circumstances. *See United States v. Rogers*, 972 F.2d 489, 493, 495 (2d Cir. 1992) (holding that defendant who, "emerging from a drug-induced state and realizing his wrongdoing, turns himself over to the police and confesses" might be entitled

to departure; vacating and remanding for consideration of departure on these grounds); *United States v. Mickens*, 926 F.2d 1323, 1333 (2d Cir. 1991) (acknowledging theoretical availability of downward departure based on "degree of contrition"; vacating and remanding for further findings, because district court made no findings that would justify such a departure beyond the two-point reduction that the defendant had already received).

This Court has held that a downward departure is unwarranted for extraordinary acceptance of responsibility where a defendant cooperated only after his crime was discovered. *See United States v. Carpenter*, 320 F.3d 334, 343 (2d Cir. 2003) (noting that § 5K2.16 permits departure only "for defendants who voluntarily disclose their offenses to the authorities," and thereby limits departures for extraordinary acceptance under § 5K2.0). The present case is similar to *Carpenter*, because here the defendant did not acknowledge her guilt until after her home was searched pursuant to a court order, and after she met with counsel. Further, although she met with agents on numerous occasions prior to entering the guilty plea, the record establishes that those meetings were for the purpose of convincing the defendant that the level of embezzlement was as high as the government had claimed it was.

Nor was a departure warranted for the defendant's payment of restitution amounting to approximately 25 percent of the amount embezzled. This Court has squarely held that "pre-conviction restitution is also a form of acceptance of responsibility 'adequately taken into consideration' by the Sentencing Commission in formulating section 3E1.1," and therefore is an

impermissible basis for downward departure. *See Carpenter*, 320 F.3d at 343 (quoting *United States v. Arjoon*, 964 F.2d 167, 171 (2d Cir. 1992)). Likewise, this Court has held that "'compliance with court-ordered restitution' cannot justify a downward departure for extraordinary rehabilitation." *United States v. Middleton*, 325 F.3d 386, 389 (2d Cir. 2003) (quoting *Carpenter*, 320 F.3d at 343); *see also United States v. Broderson*, 67 F.3d 452, 459 (2d Cir. 1995) (acknowledging that restitution is discouraged basis for departure; affirming downward departure where defendant's criminal intent "was significantly different from that of the typical fraud defendant," in that there was no ultimate fraud loss).

Even if this Court had not held that early restitution is categorically impermissible as a basis for downward departure, the facts of this case are not extraordinary. First, the defendant has not paid all of the restitution, and did not make any restitution until her crime was discovered. Furthermore, the Traveler's Insurance Company, which is bearing the bulk of the responsibility for recovering the losses caused by the defendant, had actively pursued the defendant through civil process. The active civil efforts to recover the stolen funds reveals that the defendant's liquidation of her assets were required by ongoing legal proceedings, not provoked by spontaneous feelings of contrition.

In short, the defendant's acceptance of responsibility was far from extraordinary.

4. Lesser Harms

The district court erred in departing downward on the basis of § 5K2.11, the so-called "lesser harms" departure. On the facts of this case, there is no basis for concluding that the defendant embezzled nearly $366,000 to help others.

a. Facts

The defendant argued that she was entitled to a "lesser harms" departure because she had spent some of the money -- at one point she claimed the "majority" of the embezzled funds -- to help others and thereby avoid greater harms. The defendant's primary support for this departure was her claim that she spent embezzled funds for medical care for her older daughter.

The evidence showed, however, that the defendant expended the vast majority of the money that she had embezzled on items unrelated to her older daughter's medical care. She had estimated a $100,000 expense for medical care, but the only available evidence, generated by the government, showed a significant payment, in at least one instance, of medical bills having been paid by the defendant's insurer. JA 195-205. On the other hand, the defendant acknowledged having spent the vast majority of the embezzled money for an automobile for her daughter, electronics, jewelry, clothing, presents to relatives, housing bills, an investment fund for her daughters, gifts for her husband, dinner at the Ritz in Paris for a niece, a trip to Jamaica for a sister-in-law, a helicopter trip in Hawaii for a nephew, concert tickets, and other items, all of which she

claimed to have given to other individuals. SJA 45-46. She did not acknowledge having expended any of the funds on herself, *id.*, even though the third addendum to the PSR provides evidence that the defendant expended significant funds on clothing for herself and entertainment for herself. SJA 37-42.

The court, in response, noted that much of the defendant's expenditure of funds was for altruistic uses, JA 318-19, even though the defendant, herself, estimated that the total amount that she had donated to charity was approximately $10,000 out of the $366,000 she had embezzled,[11] SJA 45-46.

b. Law and Discussion

Section 5K2.11 provides that a departure may be warranted either (1) if a defendant commits a crime in order to avoid "a perceived greater harm," but only if those circumstances "significantly diminish society's interest in punishing the conduct, for example, in the case of a mercy

---

[11] "While there is some suggestion . . . that the defendant herself realized a substantial benefit from [the money], that I've taken into consideration, but on the other hand, I have also taken into consideration the utilization of funds for others, particularly others that were in need, including siblings' families, and while it is not to be suggested that substantially all of the funds taken were used in the fashion that would constitute an altruism in some absolute sense, the fact is that it is again a significant factor by which the defendant did attempt to meet the needs of others, that while it is not within the lesser harm category of 5K2.11, it nonetheless is reflective of a personality that diminishes the moral turpitude." JA 318-19.

killing," or (2) if a defendant's conduct does "not cause or threaten the harm or evil sought to be prevented" by the criminal statute at issue. The defendant and the district court relied only upon the first prong of § 5K2.11, involving avoidance of a perceived greater harm.

This Court has not had occasion to address the first prong of § 5K2.11, involving "perceived greater harm[s]." Like most other appellate courts, this Court has only addressed the second prong, involving claims that a defendant's actions did not implicate the harm sought to be prevented by the statute of conviction. *See, e.g.*, *United States v. Carrasco*, 313 F.3d 750, 755 (2d Cir. 2002). The government has found only two published appellate cases that uphold departures under the first prong of § 5K2.11, and both involve defendants who were seeking to avoid far more serious "greater harms" than the one at issue in the present case. In *United States v. Barajas-Nunez*, 91 F.3d 826, 832 (6th Cir. 1996), the defendant, who was convicted of illegal reentry to the United States, "perceived that his girlfriend was in grave danger of physical harm [because she was pregnant and required surgery] and that he was responsible for making sure she received medical care." Although the Sixth Circuit held that the "district court's findings in this case do not support a lesser harms departure," it also held that the district court did not "plainly err" in departing under the first prong of § 5K2.11. *Barajas-Nunez*, 91 F.3d at 832 (remanding for re-sentencing in case where district court departed on multiple grounds including § 5K2.11 "lesser harm").

And in *United States v. Carvell*, 74 F.3d 8, 12 (1st Cir. 1996), the First Circuit held that a district court could

properly depart downward under § 5K2.11, based on the court's factual finding that the defendant used marijuana in order to avoid committing suicide.[12]

In the present case, the district court conceded that this case "is not within the lesser harm category of 5K2.11," but believed nevertheless that the above factors, in combination, warranted a downward departure. Yet the defendant presented an insufficient factual predicate for her assertion, at least initially, that she used "the majority" of the embezzled funds to alleviate situations that she perceived to be a greater harm. Nor was there a sufficient factual predicate for the district court's assertion that the defendant used any substantial amount of funds to "meet the needs of others." JA 318.

Specifically, at the sentencing hearing in December 2003, the defendant estimated that $50,000 to $100,000 was used to pay medical bills relating to her daughter. She offered no documentation of any kind to support the estimate. In a document generated at the second sentencing hearing, and offered into evidence as Government's Exhibit 1, the defendant stated, in a letter,

---

[12] *Cf. United States v. Salemi*, 26 F.3d 1084, 1087 (11th Cir. 1994) (reversing § 5K2.11 departure for defendant convicted of kidnaping, where no evidence supported finding that kidnaped baby might have been taken from abusive environment); *United States v. Lam*, 20 F.3d 999, 1004 (9th Cir. 1994) (affirming aberrant-behavior departure, but expressing "reluctan[ce] to agree with the suggestion that [defendant's] possession of the weapon for the purpose of protecting himself and his family is a 'lesser harm' pursuant to Guideline Policy Statement § 5K2.11").

that she estimated having spent "at least a hundred thousand dollars over the five years" for her older daughter's medical expenses. Again, however, she offered no documentation of any kind to support this estimate which appears to have ballooned from her initial $50,000 to $100,000 estimate. On the other hand, that same Government Exhibit 1 includes the defendant's conclusions that she expended $75,000 for material items for her older daughter, $15,000 for investments for her children, $10,000 to $15,000 for her older daughter's legal fees, $25,000 for gifts for her husband and $40,000 for gifts for other family members and friends. SJA 45-46. Furthermore, the government introduced evidence that significant payments for the older daughter's medical expenses were made by an insurance carrier. JA 195-205. Under any assessment, then, the vast majority of the embezzled funds did not go to the daughter's medical expenses.

5. Combination of Factors

Section 5K2.0 permits a downward departure when a number of factors, considered individually, do not permit a downward departure, but when combined create a situation that "differs significantly from the 'heartland' cases covered by the Guidelines." *United States v. Rioux*, 97 F.3d 648, 663 (2d Cir. 1996) (quoting U.S.S.G. § 5K2.0 cmt). As this Court made clear in *Rioux*, however, this type of departure is reserved for "extraordinary cases." *Id.* Given the plain inadequacy of the individual grounds for downward departure, there is no basis for concluding that the combination of factors sufficed to warrant the downward departure. At its core, the defendant committed

a significant, though not atypical, embezzlement: she stole hundreds of thousands of dollars from her employer; spent most of it on luxuries for herself and her family; suffers some vague personality disorders which do not affect her ability to function in society or to comprehend or control her actions; and provides some -- but not all -- support for two members of her family (a 6-year old daughter and an elderly, employed mother) who had alternative sources of support. Taken together, these facts do not support a seven-level departure.

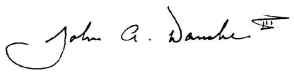
CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and sentence, and remand the case for resentencing within the applicable Sentencing Guideline range of 24 to 30 months, without a downward departure for any of the bases discussed in this brief.

Dated: October 13, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

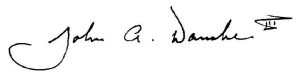


JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY (OF COUNSEL)

CERTIFICATION PER FED. R. APP. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,943 words exclusive of the Table of Contents, Table of Authorities this Certification, and the Addendum of Statutes and Rules.



JOHN A. DANAHER III
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES

18 U.S.C. § 3742(e) (as amended April 30, 2003). Review of a sentence.

(e) Consideration.–Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that–

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the

imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

United States Sentencing Guideline Section 5H1.3 (Mental and Emotional Conditions) (Policy Statement)

Mental and emotion conditions are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range, except as provided in Chapter Five, Park K, Subpart 2 (Other Grounds for Departure).

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

United States Sentencing Guideline Section 5K2.13 (Diminished Capacity) (Policy Statement)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

United States Sentencing Guideline Section 5H1.6 (Family Ties and Responsibilities, and Community Ties) (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

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

United States Sentencing Guideline Section 5K2.0 (Grounds for Departure) (Policy Statement)

Under 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guideline range pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The decision as to whether and to what extent departure is warranted rests with the sentencing court on a case-specific basis. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline

range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

Finally, an offender characteristic or other circumstance that is, in the Commission's view, "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and

distinguishes the case from the “heartland” cases covered by the guidelines.

United States Sentencing Guideline Section 5K2.11 Lesser Harms (Policy Statement)

Sometimes, a defendant may commit a crime in order to avoid a perceived greater harm. In such instances, a reduced sentence may be appropriate, provided that the circumstances significantly diminish society’s interest in punishing the conduct, for example, in the case of a mercy killing. Where the interest in punishment or deterrence is not reduced, a reduction in sentence is not warranted. For example, providing defense secrets to a hostile power should receive no lesser punishment simply because the defendant believed that the government's policies were misdirected.

In other instances, conduct may not cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue. For example, where a war veteran possessed a machine gun or grenade as a trophy, or a school teacher possessed controlled substances for display in a drug education program, a reduced sentence might be warranted.