11. Under that heading, describe *Orrega*, preferably in one paragraph, but no more than two paragraphs. Make sure you explain what the court did in *Orrega* and why. Note the difference between the outcome before the District Court and the Eleventh Circuit. Use selected quotes to focus attention on the most important aspects of the case. For extra credit, instead of starting the paragraph with a boring sentence (such as "In the case of *United States v. Orrega*. . . ."), consider using a topic sentence that provides a general sense of the importance of the case.
12. Next, you need a paragraph that *applies* the "lesson" of *Orrega* to Sutton's case. Preferably, start the paragraph with something to let the reader know, unequivocally, that you are about to apply *Orrega* to the facts of this case. The most common approach is to begin the paragraph with the phrase "In this case. . . ." Then you should explain why Sutton's case is similar to *Orrega*, so a downward departure should be denied here, as it was in *Orrega*.
13. Now you need a pithy heading for your second argument (Roman Numeral II) about how Sutton's conduct was not "without significant planning."
14. Under that heading, you need to describe *Bailey* in one, or no more than two, paragraphs.
15. Next, you need one paragraph that *applies Bailey* to Sutton's case.
16. Center the final heading: **CONCLUSION**.
17. Under that heading, say something like this: **WHEREFORE**, for the foregoing reasons, the Court should deny the Defendant's Motion for Downward Departure.
18. Finally, include the date and a signature block. Use a format similar to the one used in our Prosecution Version, but include your name as the Assistant U.S. Attorney.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Crim. No. 06–99**
	)	
NICK SUTTON	)	
Defendant	)	

PROSECUTION VERSION

Now Comes the United States of America, by undersigned counsel, and hereby offers the following as its "prosecution version" of the facts the United States would prove if this case were to proceed to trial.

Count One: False Declarations Before the Court

Since January 2000, Nick Sutton has been the Chief Executive Officer of the Casco Chair Company ("Casco"). Sutton was also the principal witness for Casco in a contract dispute with Acme Chair Suppliers. The dispute formed the basis of the civil case of *Casco Chair Company v. Acme Chair Suppliers*, Civil No. 05–11 [hereinafter *Casco v. Acme*].

In the course of that civil litigation, Casco requested a Temporary Restraining Order against Acme. In support of that request, Casco filed with the Court an affidavit signed by Nick Sutton on Tuesday, July 18, 2006, which stated in pertinent part as follows:

> ¶ 42. On February 15, 2006, I sent Carol Miller, an Acme employee, an e-mail asking about the delay in finalizing the new contract. The same day, Miller sent me a response confirming that "everything was agreed to" and that Jeff Harold, Acme's Vice President, would work with us to finalize a written contract. Exhibit 17 is a copy of the e-mail exchange.

(Sutton July 18, 2006, Affidavit ¶ 42).

Exhibit 17 to Sutton's July 18th Affidavit appears to be a February 15th e-mail exchange in which Nick Sutton asked a series of questions about the

Casco-Acme contract negotiations, together with what appears to be a series of responses from Carol Miller to each of those questions. In pertinent part, Exhibit 17 to Sutton's July 18th Affidavit stated as follows:

> Sutton: In terms of the amended contract, what is holding this up? After our meetings with Jeff, I thought that everything was agreed to.
>
> Miller: It was. Jeff will work with you to finalize.

(Exhibit 17 to the July 18th Sutton Affidavit).

On Thursday, July 20, 2006, Acme responded by filing an affidavit from Carol Miller in which she "questioned the genuineness" of Exhibit 17. In response, on Friday, July 21, 2006, Sutton filed another affidavit which, among other things, stated as follows:

> 13. Miller questions the "genuineness" of the February 15th e-mail exchange between us, as represented in Exhibit 17. However, Exhibit 17 is a true and accurate copy of an e-mail that I received from Carol Miller.

(July 21st Sutton Affidavit ¶ 9).

The next day, Saturday, July 22nd, Sutton met with his attorneys and confessed that he had fabricated Exhibit 17 and that his affidavits were false. On Monday, July 24th, Casco's attorneys notified the Court of the perjury and, at the same time, moved to voluntarily dismiss (with prejudice) Casco's civil case against Acme. On Friday, July 24, 2006, Acme responded with a motion for sanctions against Casco. On August 10, 2006, the presiding judge in *Casco v. Acme*, Judge Hoffmann, decided to hold the civil case in abeyance pending the outcome of his referral of Sutton's perjury to the U.S. Attorney's Office for potential criminal prosecution.

On September 6, 2006, the U.S. Attorney's Office filed a one-count information charging Sutton with perjury. Sutton pled guilty the next day.

If this case had gone to trial, in addition to the facts above, the government expected Carol Miller to testify (a) that she never wrote the e-mail responses attributed to her in Exhibit 17; (b) that in fact she never responded to Sutton's e-mail inquiry of February 15, 2006; and (c) that the false e-mail messages attributed to her involved issues that were material to the outcome of the *Casco v. Acme* civil litigation.

Respectfully submitted,

Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	**Criminal Action No. 06–99**
	)	
	)	
NICK SUTTON	)	
Defendant.	)	

DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE AND INCORPORATED SENTENCING MEMORANDUM

NOW COMES Defendant Nick Sutton, by undersigned counsel, and hereby moves for a downward departure based on "aberrant behavior" pursuant to 18 U.S.C. §3553 and the United States Sentencing Guidelines, Sections 5Hl.6, 5K2.20, and 5K2.0.

BACKGROUND FACTS REGARDING THE OFFENSE

Upon the Court's referral, the U.S. Attorney's Office charged Mr. Sutton, by criminal information, with one count of making a False Declaration Before a Court pursuant to 18 U.S.C. §1623. Mr. Sutton promptly pled guilty. Sentencing is scheduled for December 1, 2006. The offense arose in the context of a civil action, also before this Court, *Casco Chair Company v. Acme Chair Suppliers*, Civil No. 05-11 [hereinafter *Casco v. Acme*]. Currently, the Court is holding that civil case in abeyance pending the outcome of this criminal matter.

In 2000, Mr. Sutton became CEO of Casco, which had two large Maine manufacturing facilities that produced specialty chairs for a number of

national retailers. In 2002, Casco entered into a contract with Acme Chair Suppliers ("Acme"), one of the largest American chair retailers. In 2004, the domestic furniture market collapsed, which left Casco with only one customer: Acme.

In January of 2006, Casco and Acme began to discuss a new contract. During the course of those discussions, Acme demanded that Casco close its Maine facilities and manufacture all of its products in factories that Acme controlled in China. Mr. Sutton strongly resisted because of the consequences it would have on the manufacturing operations in Maine, which employed hundreds of people. Ultimately, however, Mr. Sutton was forced to close one of the two Maine facilities, since Casco's existence was completely dependent on a continued relationship with Acme.

At the same time, negotiations intensified for a new contract. Under the proposed new contract, termination of the business relationship required 360 days' notice. Despite Acme's repeated assurances that it would enter into the new contract, Acme abruptly notified Casco on Friday, July 14, 2006, that it would terminate its business relationship with Casco in 60 days, in accordance with the terms of the 2002 Casco–Acme contract. On Monday, July 17, 2006, Mr. Sutton met all day with Casco's attorneys to discuss the company's legal options, including the need to file a Temporary Restraining Order ("TRO") to prevent the impending termination of the Acme–Casco contract. Many issues were discussed, but one particularly sore subject was how Acme's representatives had repeatedly promised to abide by the terms of the new contract, which included the longer termination provision. The more the issue was discussed, the more agitated Mr. Sutton became. In the course of the discussion, the attorneys mentioned that, pursuant to the statute of frauds, the new contract terms would not be enforceable unless there was something in writing to confirm the agreement.

That night, Mr. Sutton became so distraught at the prospect of losing his company, and so infuriated at Acme's refusal to abide by the terms of its oral agreement, that he sat down at his home computer and fabricated the e-mail message dated February 15, 2006. The fabricated e-mail was based on an actual February 15th e-mail message that included various questions posed to Acme employee Carol Miller. Although in truth Carol Miller had simply ignored Mr. Sutton's February 15th e-mail questions Mr. Sutton altered the text to make it look like Miller responded to Mr. Sutton's question about whether "everything was agreed to" by writing the following: "It was. Jeff will work with you to finalize."

The next day, July 18, 2006, Mr. Sutton showed the fabricated e-mail to Casco's attorneys, together with a variety of other documents that would be used in support of a TRO. The attorneys worked all day on an affidavit for Sutton's signature that would authenticate the documents and provide other supporting factual information. In the rush to complete the TRO filing, which involved a myriad of issues, Casco's attorneys did not question Mr. Sutton about the inclusion of Exhibit 17 or its authenticity. Late that evening, Casco's attorneys filed the TRO request, which was supported by, among other things, Sutton's affidavit and the fabricated e-mail.

On Thursday, July 20, 2006, Acme filed a Response in opposition to Casco's TRO that asserted a variety of arguments. Included among the facts in support of Acme's Response was a July 20th affidavit from Carol Miller, who was somewhat coy in her comments about the February 15th e-mail. Miller did not call the February 15th e-mail an outright fabrication; instead, she "questioned the genuineness" of the e-mail, but otherwise ignored it. Likewise, Acme's legal brief focused on other issues, as if the February 15th e-mail, even if true, made no difference to the pending TRO request.

However, when Casco's attorneys read Acme's Response, including Miller's affidavit, they immediately confronted Mr. Sutton, who was adamant about the authenticity of the February 15th e-mail. To prove his point, Mr. Sutton signed a second affidavit that, among other things, reaffirmed the authenticity of the February 15th e-mail. On Friday, July 21, 2006, Casco's lawyers filed a Reply brief in support of the TRO request, which included, among other things, the second Sutton affidavit.

On Saturday morning, July 22, 2006, Casco's lead attorney received a phone call from Mr. Sutton, who was so distraught that he could hardly speak. Fighting back the tears, Mr. Sutton confessed that he had been so worried about losing the company that he had fabricated the February 15th e-mail. On Monday, July 24, 2006, Casco's lawyers notified the Court and Acme's lawyers of the perjury. Casco's lawyers also filed a motion to dismiss the *Casco v. Acme* lawsuit with prejudice. Acme responded with a motion for the Court to impose sanctions on Casco.

On August 10, 2006, the Court decided that it would hold the *Casco v. Acme* case in abeyance pending the results of a referral to the U.S. Attorney's Office for Mr. Sutton's perjury. On September 6, 2006, the U.S. Attorney's Office charged Mr. Sutton in a criminal information with one count of perjury. The next day, Mr. Sutton pleaded guilty unconditionally. Mr. Sutton now

requests a downward departure in his sentence due to "aberrant behavior" under the Guidelines.

NICK SUTTON'S PERSONAL BACKGROUND

Nick Sutton has a Bachelor of Arts degree and a Master's in Business Administration. He is Casco's Chief Executive Officer, which provides good-paying jobs with full benefits to approximately sixty Maine families. He is also a substantial citizen in his community, where he dedicates his personal time to community affairs, including youth sports and town and school activities. Those who know him best describe him in the many letters submitted to the court as a valued friend, colleague, and neighbor. The letters confirm that Mr. Sutton's isolated behavior that brings him before the court is contrary to the manner in which he has lived his entire life. For those who live and work alongside Mr. Sutton, his conduct was aberrant and explicable only by his intense commitment to his family and employees.

In the aftermath of the termination of the Acme relationship, Casco was placed in an untenable financial position. Even now, the company is struggling to survive in the absence of its business relationship with Acme. Mr. Sutton is the lifeblood of the company, and he is intimately involved in all aspects of its daily operations. His presence is essential to the company's efforts to survive the loss of Acme's business. Any significant absence from the company would make Casco's survival unlikely, with obvious consequences to its employees and their families.

ARGUMENT

Congress has expressly acknowledged "the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances" by allowing sentencing courts to depart from a particular guideline range 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. *Koon v. U.S.*, 518 U.S. 81, 92 (1996). In *Koon*, the Court observed that while the goal of the sentencing guidelines is to "provide a measure of uniformity and predictability," it also preserves the federal judicial tradition for the sentencing judge to "consider every convicted person as an individual and every case as a unique study in the human failings

that sometimes mitigate . . . the crime and punishment to ensue." *Id.* at 113. With this in mind, and for the reasons more fully explained below, the Court should impose a sentence below the applicable Guidelines sentencing range.

I. Sutton Qualifies for a Downward Departure Based on "Aberrant Behavior"

Federal Sentencing Guidelines 5K2.20 provides that a sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. The commentary to Section 5K2.20 provides that aberrant behavior "means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." As more fully discussed below, Mr. Sutton's case qualifies as aberrant behavior.

A. Sutton's Conduct Was a Single Criminal Occurrence or Transaction

The most recent amendment substituting a "single criminal occurrence or transaction" for the former "single act" standard was in response to a circuit conflict regarding whether, for purposes of a downward departure, a "single act of aberrant behavior" includes multiple acts occurring over a period of time." *Federal Sentencing Guidelines Manual*, Appendix C, Amendment 603. The First Circuit fell into the minority of circuits, which adopted the more flexible "totality of the circumstances" approach. *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996) (Sentencing Commission intended the word "single" to refer to the crime committed; therefore, "single acts of aberrant behavior" include multiple acts leading up to the commission of the crime); See also *Zecevic v. United States Parole Commission*, 163 F.3d 731 (2d Cir. 1998) (aberrant behavior is conduct which constitutes a short-lived departure from an otherwise law-abiding life, and the best test is the totality of the circumstances). Conversely, the majority of circuits held that a "single act" could not include multiple acts occurring over a period of time. See *United States v. Marcello*, 13 F.3d 752 (3d Cir. 1994) (single act of aberrant behavior requires a spontaneous, thoughtless, single act involving lack of planning); *United States v. Glick*, 946 F.2d 335 (4th Cir. 1991) (conduct over a ten-week period involving a number of actions and extensive planning was not "single act of aberrant behavior").

The amendment, while adopting neither the majority nor the minority standard in full, "defines and describes 'aberrant behavior' more flexibly than the interpretation of existing guideline language followed by the majority of circuits that have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless." *Federal Sentencing Guidelines Manual*, Appendix C, Amendment 603. The Commission intended that the phrase "single criminal occurrence" and "single criminal transaction" to be broader than "single act," but it was limited to offenses committed without significant planning, of limited duration, and that represented a deviation by the defendant from an otherwise law-abiding life. *Id*.

Consistent with the Commission's new standard, Nick Sutton's criminal behavior constitutes a single criminal occurrence or criminal transaction. Mr. Sutton's affidavit stated, in pertinent part, that Acme employee Carol Miller had informed him that "everything was agreed to" with respect to the new contract. Attached to his affidavit, Mr. Sutton included Exhibit 17, which is the e-mail he falsified. Acme then questioned the authenticity of the e-mail, which led to Mr. Sutton's second affidavit reaffirming the accuracy of Exhibit 17. Both affidavits were submitted in the same civil action, and the content of the affidavits did not involve or implicate more than the single act of inserting the false phrase that "everything was agreed to." Accordingly, Mr. Sutton's criminal conduct was functionally a solitary instance of criminal behavior.

B. Sutton's Conduct Was "Without Significant Planning"

Mr. Sutton felt a deep responsibility for his company and its employees particularly in the aftermath of the Acme disaster. He was concerned that the lives of dozens of families, including his own, would be severely impacted if the suit against Acme did not give the company additional time to salvage its operations. His response, while inexcusable, was committed in desperation and without significant thought or planning. It was transparently the act of desperation, impulse, distress, and fear, rather than a measured thoughtful and carefully conceived effort to perpetrate a fraud.

C. Sutton Has Otherwise Led an Exemplary, Law-abiding Life

The manner in which Nick Sutton has lived his life stands in marked contrast to the behavior that has brought him before this Court. The letters that have

been submitted to the Court testify to an extraordinarily hard-working and committed father, employee, and citizen. He contributes what little time he has left at the end of the day, and precious financial resources, to community groups and events. His commitment to his family, employees, and neighbors is noteworthy.

In determining whether to grant a downward departure based on "aberrant behavior," the Court may consider the defendant's mental and emotional condition, employment record, record of prior good works, motivation for committing the offense, and effort to mitigate the effects of the offense. In this case, the mental and emotional state in which Mr. Sutton found himself was overwhelming. Mr. Sutton had already been compelled by Acme to close down half of Casco's manufacturing facilities in Maine, and he was faced with the distinct possibility of losing the remainder. He was understandably distraught.

When his criminal behavior is viewed in the context of the circumstances swirling around Mr. Sutton at the time Acme terminated the Casco contract, including his deep emotional commitment to those who stood to lose their livelihoods as a result of Acme's action, it is clear Mr. Sutton's acts fall within the Guidelines' description of "aberrant behavior."

II. Sutton Was Motivated by Extraordinary Business Circumstances

This Circuit and others have held that it is appropriate to consider the impact that incarceration would have on a defendant's business and its employees in determining whether to depart downward at sentencing. *U.S. v. Olbres*, 99 F.3d 28 (1st Cir. 1996). In *Olbres*, the District Court convicted the appellants of tax evasion and sentenced them to 18 months' imprisonment. At the sentencing hearing, the District Court declined to grant a downward departure, believing that, as a matter of law, business failure and third-party job loss, regardless of the magnitude or the severity of the consequences, could not serve as the basis for a downward departure. The District Court reached this conclusion even though it found that if Mr. Olbres were jailed, his business certainly would fail and its employees would lose their jobs. *Id.* at 33. The District Court explained that if the fact of a business failure could serve as a legal basis for departure under the sentencing guidelines, departure would be warranted "in a manner sufficient to keep the business from fading and putting those people out of work." *Id.* at 33. Appellants appealed on the grounds that business consequences are a legitimate consideration for

a motion for downward departure. *Id.* The First Circuit agreed, holding that there was no categorical imperative that prohibited the District Court from considering that the defendant's imprisonment would likely cause innocent employees to lose their jobs. *Id.*

In *United States v. Milkowsky*, 65 Fed. 3d 4 (2nd Cir. 1995), the Second Circuit affirmed a downward departure because of the negative impact that Milkowsky's imprisonment would have on his employees. *Id.* at 6. Milkowsky was convicted of price fixing in violation of the Sherman Act and was sentenced to two years' probation. The District Court granted his motion for downward departure based on the fact that his imprisonment likely would lead to the failure of his steel businesses, and inflict severe financial hardship on his employees and their families. *Id.* The court was persuaded by unrebutted letters and testimony from family members and business associates attesting to Milkowsky's indispensability to the company. *Id.* at 8. Milkowsky was the only person with the knowledge, skill, experience, and relationships to run the business on a daily basis. *Id.* As such, his daily involvement with the company was necessary to ensure its continuing viability. The Court also reasoned that the company's dependence on *Milkowsky* was "greatly increased by the company's extremely precarious financial condition." *Id.* at 8.

The *Milkowsky* Court rejected the government's argument that there was nothing extraordinary about the prospect of imprisoning, and potentially putting out of business, a small business owner such as would warrant consideration of Mr. Milkowsky's circumstances as outside the heartland of Sentencing Guideline cases. *Id.* The Court explained that among the permissible justifications for downward departure is the need "to reduce the destructive effects that incarceration of a defendant may have on innocent third parties." *Id.* at *7*. Milkowsky's situation was distinguishable from other "high-level business people" the Court has sentenced because of the extraordinary impact the loss of his daily involvement would have on his business and its employees.

Relying on *Milkowsky*, the sentencing court in the *United States v. Somerstein*, 25 F.Supp. 2d 454 (E.D.N.Y. 1998) granted a downward departure to the business-owner defendants. Evidence presented at the sentencing proceeding revealed that the Defendant was indispensable to the business. *Id.* at 461. The *Somerstein* court also observed that the business's dependence on her was greatly increased by its extremely precarious financial condition. *Id.* at 462. As the Supreme Court explained in *Koon*, the "relevant question,

however, is not, as the government says, whether a particular factor is within the heartland as a general proposition, but whether the particular factor is within the heartland given all the facts of the case. . . . These considerations are factual matters." *Koon*, 116 Sup. Ct. at 2047 (citations omitted). Because the business was uniquely dependent on Somerstein's expertise, the court concluded that a downward departure was warranted.

Similarly, Mr. Sutton's importance to the continued viability of the company cannot be overstated. Simply, Mr. Sutton is the indispensable and driving force behind almost every important company function. His knowledge of the industry, and of the company's operations in particular, is irreplaceable and critical to whether it will survive the aftermath of the Acme debacle. *Id*. at 19. The company's dependence on Mr. Sutton is further heightened, as in *Milkowsky*, because of its difficult financial position. *Id.* at 19. The company employs dozens of families in an area of Maine that has suffered the debilitating effects of high unemployment and empty industrial plants. *Id*. at 14. The distress, both socially and financially, on the employees and their families will be acute. Downward departure, in light of these circumstances, is warranted under the Guidelines and prevailing case law.

CONCLUSION

WHEREFORE, for the foregoing reasons, Nick Sutton respectfully requests that the Court grant this request for a downward departure from the Sentencing Guidelines.

Respectfully submitted,

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DeRose & DeRose
500 Commercial Street
Portland, Maine 04101
Counsel for Defendant
Nick Sutton

UNITED STATES v. BAILEY, 377 F.Supp.2d 268 (D. Me. 2005)

WOODCOCK, District Judge.

This Court denies a U.S.S.G. § 5K2.20 Motion for Downward Departure for Aberrant Behavior, because it concludes the Defendant, a school teacher, failed to demonstrate he did not engage in significant planning when he repeatedly used a school computer on school property to gain access to child pornography over a four-month period. . . .

I. Statement of Facts

On November 22, 2004, Gerald Bailey, the Defendant, pleaded guilty to an Information charging him with possession of child pornography, a violation of 18 U.S.C. § 2252A(a)(5)(B). . . . Mr. Bailey was a teacher at the Holbrook Elementary School in Holden, Maine, and on January 11, 2002, two students at the school reported to the school principal they had seen Mr. Bailey looking at pornographic images on a school computer in his classroom. A forensic examination of the computer revealed that between October 10, 2001, and February 12, 2002, a person using the screen name, tsetseforever, had performed Internet searches on Yahoo! using terms associated with child pornography and this person had joined dozens of sexually oriented Yahoo! clubs with names associated with child pornography. Approximately ninety images of child erotica and child pornography were found in the computer's unallocated space. Mr. Bailey admitted he had used that screen name on the school computer and was responsible for the pornographic images.

II. Downward Departure for Aberrant Conduct: U.S.S.G. § 5K2.20 (2002)

A. The Guidelines

[The applicable version of the U.S.S.G. provides:]

> A sentence below the applicable guideline range may be warranted in an extraordinary case if the defendant's criminal conduct constituted aberrant behavior. However, the court may not depart below the guideline range on this basis if (1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous

> weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point . . . , or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter 4.

Mr. Bailey is not excluded under (1)-(5) from application of § 5K2.20; the question is whether he merits its application.

B. Guideline Commentary

The Commentary to § 5K2.20 is illuminating. Application Note 1 states:

> "Aberrant behavior" means a single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life.

U.S.S.G. § 5K2.20, Application Note 1 (2002). The Commentary goes on to say: In determining whether the court should depart on the basis of aberrant behavior, the court may consider the defendant's (A) mental and emotional condition; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense. U.S.S.G. § 5K2.20, Application Note 2 (2002).

C. Without Significant Planning

[T]his Court focuses on whether the Defendant committed this crime without significant planning. . . . In *United States v. Bayles*, 310 F.3d 1302, 1314–15 (10th Cir.2002), the Tenth Circuit concluded that an individual had engaged in significant planning when he admitted moving most of his one hundred rifles and seventy-five to eighty-five handguns because of a court order prohibiting his possession of firearms. In *United States v. Castellanos*, 355 F.3d 56 (2d Cir.2003), the Second Circuit upheld the sentencing court's refusal to depart downward under § 5K2.20, where the defendant made plans to buy heroin one week in advance and arrived at the transaction with thousands of dollars to buy the drugs. In *United States v. Dickerson*, 381 F.3d 251 (3d Cir.2004), the Third Circuit rejected the district court's granting of a downward departure based on aberrational conduct, where the defendant traveled to the Dominican Republic to pick up a suitcase full of heroin and transport it back to the United States.

This Court concludes that Mr. Bailey has failed to demonstrate his actions were without significant planning. Mr. Bailey began using the school computer to access sexually oriented material on October 10, 2001, and continued to do so until February 12, 2002, when he was discovered by students. He not only accessed child pornography web sites; he actually joined child pornography Internet clubs. He did so using a screen name. Mr. Bailey's use of the school computer was "extensive"; he joined "dozens" of child pornography clubs; he received e-mails from Yahoo! confirming his membership in these clubs; approximately ninety images of child erotica and child pornography were located in the computer's unallocated space; and, he had deleted, but not yet written over, these images. In these circumstances, this Court cannot conclude Mr. Bailey acted without significant planning under U.S.S.G. § 5K2.20.

SO ORDERED.

UNITED STATES v. ORREGA, 363 F.3d 1093 (11th Cir. 2004)

KRAVITCH, Circuit Judge.

The issue in this appeal is whether the district court erred by granting a downward departure to defendant John Orrega, who pleaded guilty to using a means of interstate commerce to entice a minor to engage in sexual acts, in violation of 18 U.S.C. § 2422(b).

I. Background

On March 28, 2002, a special agent with the United States Secret Service ("agent") signed onto a Yahoo! Internet chat room using the undercover name of Hialeahnina13. Orrega contacted the agent and identified himself as a twenty-four-year-old male. The agent told Orrega that she was a thirteen-year-old female. Orrega initiated a sexually explicit conversation and asked Hialeahnina13 to meet so that they could have sex. The meeting did not take place due to logistical reasons.

Several weeks later, on April 23, 2002, the agent was signed into the Yahoo! chat room under the name Hialeahnina13 when Orrega initiated another sexually explicit conversation. In addition, Orrega sent a real-time video feed via his web camera to Hialeahnina13. He also sent her a nude picture of himself. Orrega asked Hialeahnina13 if they could meet so that Hialeahnina13 could perform oral sex on him. The two agreed to meet behind a local supermarket that night at 8:00 p.m. Orrega stated that he would be driving a blue Volkswagen Jetta. Hialeahnina13 advised Orrega that her name was Jessica and that she would be wearing jeans, a white t-shirt, and a baseball hat.

That evening, Orrega entered the supermarket parking lot, driving a blue Volkswagen Jetta. Orrega called out "Jessica" to an undercover agent, who had positioned herself in the parking lot. The agent indicated that she was Jessica. Orrega then drove toward the agent. When he stopped, agents arrested Orrega. Orrega subsequently pleaded guilty to enticing a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). . . .

The district court. . . .granted Orrega a downward departure on the grounds that his conduct constituted aberrant behavior. The district court reasoned that Orrega had no previous criminal record, worked, and attended

school to better himself. On the basis of these facts, the district court concluded that this is a "textbook example of aberrant behavior," and sentenced Orrega to five years' probation. The United States appeals the grant of the downward departure.

II. Discussion

[A.] Downward Departure

A district court may only depart from the Sentencing Guidelines when there is 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." 18 U.S.C. § 3553(b). When making this determination, the court may "consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* Our review of a district court's grant of a departure from the Sentencing Guidelines is de novo, even if, as here, the appeal was pending at the time the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act took effect. *United States v. Saucedo-Patino*, 358 F.3d 790, 792–93 (11th Cir.2004); *see* 18 U.S.C. § 3742(e)(4).

In this case, the district court granted a downward departure on the basis that Orrega's actions constituted aberrant behavior. Such a departure is permissible "in an *extraordinary case* if the defendant's criminal conduct constituted aberrant behavior." U.S.S.G. § 5K2.20 (2002) (emphasis added). But, such a departure is not permissible if "(1) the offense involved serious bodily injury or death; (2) the defendant discharged a firearm or otherwise used a firearm or a dangerous weapon; (3) the instant offense of conviction is a serious drug trafficking offense; (4) the defendant has more than one criminal history point . . . ; or (5) the defendant has a prior . . . conviction." *Id.* Thus, in order to qualify for an "aberrant behavior" departure, (1) the case must be "extraordinary," (2) the defendant's conduct must constitute "aberrant behavior," *and* (3) the defendant cannot be disqualified by any of the five listed factors.

A defendant's conduct is aberrant behavior if that conduct constitutes a "single criminal occurrence or single criminal transaction that (A) was committed without significant planning; (B) was of limited duration; and (C) represents a marked deviation by the defendant from an otherwise law-abiding life." U.S.S.G. § 5K2.20, cmt. n. 1 (2002). In addition, when determining whether it should depart on the basis of aberrant behavior, the district

court "may consider the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." U.S.S.G. § 5K2.20, cmt. n. 2 (2002).

On appeal, we must decide whether this is an "extraordinary case" and, if so, whether Orrega's conduct constitutes aberrant behavior under the guideline. . . . This case does not appear to be extraordinary. Rather, when compared to other § 2422(b) cases, this case is ordinary and is within the "heartland," *see Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996) (noting that a departure from the Sentencing Guidelines is only appropriate if the case is outside the "heartland" of typical cases embodied by the guideline), of typical cases covered by the applicable guideline. *See, e.g., United States v. Panfil*, 338 F.3d 1299 (11th Cir.2003); United States v. Miranda, 348 F.3d 1322 (11th Cir.2003). . . . In each of these cases, the defendant contacted, via the Internet, an undercover agent who was portraying a minor. Thus, the fact that Orrega contacted an agent and not a minor does not make this case extraordinary. Moreover, the facts in this case are more egregious than those in Panfil because, here, Orrega not only contacted the undercover agent, but also sent a video feed and a naked picture of himself to the agent.

In addition, none of the factors considered by the district court are extraordinary. The defendant produced no evidence of mental or emotional problems or of his prior good works, and he made no effort to mitigate the effects of the offense. His motivation for committing the offense was to satisfy his sexual desires at the expense of a thirteen-year-old girl. Although Orrega went to school and was gainfully employed as a waiter in a family-owned restaurant, these factors are not extraordinary. . . .

Even assuming that this case is "extraordinary," we would reverse the district court's grant of a downward departure because Orrega's conduct does not constitute aberrant behavior. This case involves more than a "single criminal occurrence or single criminal transaction." Orrega had two ninety-minute conversations with the undercover agent almost a month apart and, in each, he requested that they engage in sexual acts. 18 U.S.C. § 2422(b) criminalizes any attempt to entice a minor to engage in a sexual act. By attempting to entice a person he believed to be a minor to commit sexual acts during each conversation, Orrega committed two criminal acts. The commission of two criminal acts by Orrega bars him from receiving an aberrant behavior departure.

Moreover, this crime was not "committed without significant planning," nor was it "of limited duration."[2] *See* U.S.S.G. Supp. to App. C., cmt. to amend. 603 at 76–77 (2002) (stating that the phrases "'single criminal occurrence' and 'single criminal transaction' . . . will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life"). "Significant planning" is not defined, but we need not decide the specific parameters of a crime that was "committed without significant planning" because Orrega's conduct goes beyond the maximum amount of planning that would allow an aberrant behavior departure. Orrega (1) initiated two conversations with a person he believed to be a minor; (2) requested that the person perform sexual acts on him; (3) sent a naked picture of himself to the person; (4) set up a meeting place; (5) discussed how he would recognize the "minor" and how the "minor" would recognize him; and (6) drove to the meeting place. Such facts certainly do not indicate that the crime was "committed without significant planning". . . .

VACATED and REMANDED.

[2] Orrega engaged in two conversations of ninety minutes each. In the circumstances of § 2422(b), such extended conversations cannot be considered "of limited duration."

Strategic Considerations under the Sentencing Guidelines

In criminal cases, the nature of the Sentencing Guidelines fosters a wide variety of "strategic" behavior by prosecutors and defense attorneys alike. To give you a "feel" for how that works, here are Nick Sutton's applicable Guideline provisions:

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

(a) Base Offense Level: 12
(b) Specific Offense Characteristics
  (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.
  (2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by 3 levels. . . .

Commentary

Statutory Provisions: 18U.S.C.§§201(b)(3),(4), 1621–1623. For additional statutory provisions), see Appendix A (Statutory Index).

Application Notes:

1. *"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination, based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.*

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
    (1) timely providing complete information to the government concerning his own involvement in the offense; or
    (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

§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