§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

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.

Commentary

The United States Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard, because the decision to depart embodies the traditional exercise of discretion by the sentencing court. Koon v. United

States, 518 U.S. 81 (1996). Furthermore, "before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District Courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." Id. at 98.

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 75 *U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.*

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

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, as determined under Chapter 4 (Criminal History and Criminal Livelihood); or (5) the defendant has a prior federal, or state, felony conviction, regardless of whether the conviction is countable under Chapter 4.

Commentary

Application Notes:

1. *For purposes of this policy statement –*

   "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.

   "Dangerous weapon," "firearm," "otherwise used," and "serious bodily injury" have the meaning given those terms in the Commentary to § IBl.l (Application Instructions).

   "Serious drug trafficking offense" means any controlled substance offense under title 21, United States Code, other than simple possession under 21 U.S.C. § 844, that, because the defendant does not meet the criteria under §5C1.2 (Limitation on Applicability of Statutory Mandatory Minimum Sentences in Certain Cases), results in the imposition of a mandatory minimum term of imprisonment upon the defendant.

2. *In determining whether the court should depart on the basis of aberrant behavior, the 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.*

Calculating Sutton's Guideline Range

In order to determine the sentencing range for Sutton under the applicable federal Sentencing Guidelines, you begin with the offense charged – perjury – which carries a so-called "Offense Level" of 12 (Guideline Section 2J1.3(a)). Sutton, however, promptly pleaded guilty, which entitles him to a 2-level reduction for "acceptance of responsibility" (Guideline Section 3E1.1). The result is an "Offense Level" of 10.

With that "Offense Level," you can calculate Sutton's recommended sentencing range by reference to the following "Sentencing Table" in the Guidelines. The first column is for "Offense Level," which in Sutton's case is 10. The second column is for "Criminal History Category," which in Sutton's case is "I" because he has no criminal history (this is his first offense). If you match up "Offense Level 10" with "Criminal History Category I," you can see that Sutton's guideline range (which is at the bottom end of the so-called "Zone B") is 6–12 months in prison.

SENTENCING TABLE (in months of imprisonment)

		Criminal History Category (Criminal History Points)					
	Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
Zone C	12	10–16	12–18	15–21	21–27	27–33	30–37
	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51

Using the same applicable Guideline provisions, and the "Sentencing Table," you can also see how a small change in the facts can make a big difference in the outcome. The most common example involves the defendant's decision to plead guilty and "accept responsibility." In Sutton's case, that decision reduced the range of his likely sentence by 25–40 percent. Specifically, by pleading guilty, Sutton's "Offense Level" was 10 (not 12), and his Guideline Sentencing Range was 6–12 (not 10–16) months in prison.[3]

Drafting Considerations

Now that you have reviewed the materials, and considered the Sentencing Guidelines, it is time to focus on strategy. More specifically, as the prosecutor, you need to ask yourself from the outset: Should I consent to this motion for downward departure, oppose it, or take no position?

When answering those questions, keep in mind the larger context of the Sentencing Guidelines. In various forms, the Sentencing Guidelines have been in effect since 1987 for the purpose of achieving more uniformity in criminal sentences. It is a double-edged sword, however. On the one hand, any effort toward uniformity necessarily reduces the court's discretion based on the unique circumstances of any particular case. On the other hand, the Guidelines created an objective sentencing range that provides the court with somewhat of a "safe harbor," such that the imposition of a sentence within the recommended range is less likely to be overturned on appeal.

That "safe harbor" concept also applies to the prosecutor. In some cases, a prosecutor may oppose a downward departure in order to avoid the appearance of leniency. For example, in Sutton's case, the prosecutor may not want to appear lenient toward white-collar defendants or, more specifically, those who

[3] When advising a client, you also need to consider all of the subtle enhancements found throughout the Guidelines. For example, when charged with perjury, as quoted earlier, there is a 3-point enhancement for "substantial interference with the administration of justice" (Guideline Section 2J1.3(b)(2)), which is defined to include "any judicial determination based upon perjury, false testimony, or other false evidence," or "the unnecessary expenditure of substantial government or court resources" (*Id.* Application Note 1). Thus, if Sutton had *not* confessed his perjury to Casco's lawyers, and if Casco's lawyers had *not* promptly informed the court, Judge Hoffmann might have ruled on Casco's TRO request and based his decision in part on the fabricated e-mail. If that had happened, Sutton's "Offense Level" would have been 13 (12 points for perjury plus a 3-point enhancement for "substantial interference with the administration of justice" minus 2 points for "acceptance of responsibility"), which calls for a sentence of 12–18 months in prison.

commit perjury and undermine the integrity of the judicial system. At the same time, however, the prosecutor may feel that a downward departure is warranted, particularly if the rigid application of the sentencing guidelines would lead to a sentence that is too harsh for the circumstances.

Given all this potential give-and-take, the best position is the one stated in the Criminal Chief's memo: simply oppose the downward departure because, as a matter of principle, it does not meet the required elements. With the benefit of that decision, you can then move on to the next considerations: what to say and, more importantly, what not to say.

What Not to Say

Sometimes the most important aspect of legal writing is what is *not* said. On one level, that means following the physician's rule of thumb – "First do no harm" – to avoid saying anything that is contrary to your strategic objectives. On a deeper level, however, what you choose not to say can have a persuasive effect.[4] For example, by avoiding debates about losing issues, you can significantly increase your credibility. Moreover, by conceding certain issues, you can help narrow the overall dispute to those matters on which you have the strongest chance of success.[5]

[4] The concept is similar to "the dog that did not bark," from the Sherlock Holmes classic, *Silver Blaze*, by Arthur Conan Doyle. "In that tale, Sherlock Holmes solved a murder and the disappearance of a famous race horse, Silver Blaze. . . . [T]he failure of the dog to bark – its silence when it would ordinarily be heard – was a clue the legendary detective considered in solving the crime. In other words, while the dog's failure to bark would ordinarily and independently hold little significance, in this context, Holmes found it relevant." *In re Chateaugay Corp.*, 89 F.3d 942, 954 n. 1 (2nd Cir. 1996).

[5] Consider how Abraham Lincoln used that strategy when he was an Illinois trial lawyer during the years leading up to his election in 1860 as the sixteenth American president. As described by one of his contemporaries, Lincoln was masterful at conceding points that made no difference to the outcome, while narrowing the dispute to the most favorable terrain:

> When the whole thing was unraveled, the adversary would begin to see that what he [Lincoln] was so blandly giving away was simply what he couldn't get and keep. By giving away six points and arguing the seventh, he traded away everything which would give him the least aid in [proving his point]. Any man who took Lincoln for simple-minded would very soon wake up with his back in a ditch.

Gary Wills, *Lincoln at Gettysburg: The Words That Remade America* at page 96. (Simon and Schuster 1992) (quoting *Herndon's Lincoln: The True Story of a Great Life*, pages 269–70, by William H. Herndon and Jesse W. Weik (1889), in the Paul M. Angle edition for Da Capo (1942)).

When considering what *not* to say, try to look at the case from the judge's perspective. As explained in Chapter 4, the judge will expect the litigants to provide a chronology of the facts, a statement of the legal standards, and a description of any analogous cases. Accordingly, you should avoid arguments that fall outside those parameters. For example, you should avoid arguments that suggest you are vouching for a witness or for your client, or otherwise offering your personal beliefs. Similarly, you should avoid appealing to emotions or sympathy. You should likewise avoid arguments that rely on pejorative language or hyperbole or otherwise misstate the facts. Indeed, when trying to determine what arguments you should *not* make, one helpful reference is to the case law regarding those matters the court would prohibit counsel from arguing during an opening statement or closing argument. In Maine, for example, the federal district court has collected many of the applicable First Circuit standards on the following Web site: http://www.med.uscourts.gov/practices/OpeningAndClosing.pdf.

In the Sutton case, the strongest argument against a downward departure is the fact that Sutton lied twice. It goes to the heart of the definition of "aberrant behavior" as a "single criminal occurrence or single criminal transaction." Accordingly, that argument deserves the most emphasis and should be presented first. Indeed, depending on the circumstances, one could reasonably decide to limit the Response to that one issue.

For this assignment, however, you should also include your second strongest argument, which is that Sutton engaged in some amount of planning before he perjured himself. Although that argument is not as compelling – especially since Sutton decided to lie the same day he spoke with his attorneys – it allows you to illustrate other important aspects of the case that suggest the need to deny the motion for downward departure. For example, it allows you to emphasize how Sutton used his computer to fabricate evidence, which indicates the kind of deliberate behavior that disqualifies him from an "aberrant behavior" downward departure. That fact alone indicates there was at least some planning to Sutton's fabrication of the e-mail and his perjury the next day. Moreover, taken together with your first argument, you can paint a compelling portrait of Sutton as a person who thought carefully about how to lie, and then proceeded to lie more than once.

Get to the Point

Finally, editing is an important part of the process of deciding what arguments *not* to assert. Often, the first draft of a brief includes a variety of arguments that, upon further reflection, are not worth making. Don't be afraid to delete those arguments. Although a long and complicated brief, with several alternative and overlapping arguments, may impress your friends (and even some unsuspecting clients), it will not impress the judge. The judge will be more impressed with the strength of your best arguments and your ability to "get to the point."

After having devoted a substantial amount of time to researching and writing a particular argument, it is often difficult to make the decision to leave those points on the cutting-room floor. That is understandable. It is also understandable to bristle somewhat when a more senior attorney (or an experienced secretary, for that matter) offers substantial edits to your work. Try to put your ego aside and learn something from the suggestions, especially if they reflect the perspective of someone who is reading the brief for the first time, since the judge (and the judge's clerk) will be in the same position.[6]

[6] In that respect, you can take some solace from the historical example of Thomas Jefferson, one of our nation's greatest writers, when the delegates to the Continental Congress substantially edited his first draft of the Declaration of Independence. Jefferson learned, the hard way, that his writing was meant to serve a purpose larger than his own ego:

> This was no hack editing job: the delegates who labored over the draft Declaration had a splendid ear for language. Jefferson, however, did not see it that way. . . . The more alterations Congress made on his draft, the more miserable Jefferson became. He had forgotten, as has posterity, that a draftsman is not an author, and that the [Declaration] was not a novel, or a poem, or even a political essay presented to the world as the work of a particular writer, but a public document, an authenticated expression of the American mind.
>
> Pauline Maier, *American Scripture: Making the Declaration of Independence* (Alfred A. Knopf, 1998) (pages 148–149).

CHAPTER SEVEN

Counseling Dean Covelli

You receive the following letter and documentation from the Vice President for Student Affairs. The Vice President for Student Affairs has broad jurisdiction over all matters involving student life and activities on the University of Katahdin campus.

THE UNIVERSITY OF KATAHDIN

Dear Counselor:

I need your help in preparing a direct, but polite, letter of reprimand to one of my new staff members. She is Sharon Covelli, Assistant Dean for Student Governance. The duties of her job primarily involve providing guidance and serving as the official university point of contact for the variety of student organizations, including the Student Senate.

During my eight years as Vice President, I have had six Assistant Deans for Student Governance. None has been better than mediocre. Students either have tended to ignore them, leaving important university issues unaddressed, or have treated them as part of the "evil administration." Prior to the start of this year, I would have viewed student governance as one of the most disappointing aspects of the co-curricular learning experience at UK.

Six months ago, I hired Sharon Covelli for this position. Sharon's background for the position was unusual. She had no background in university or student affairs work. I hired her as she was retiring from a twenty-year career in the United States Marine Corps. In the interview process, I was bowled over by her maturity, vitality, and organizational skills. I have not been disappointed with that judgment. Sharon quickly formed strong relationships with many student leaders. She has guided an improvement of student governing bodies and student organizations that has delighted the entire campus. Sharon has also been a superb mentor for other, and younger, professional staff members in the Student Affairs Office.

So what is my problem? One issue clouds this sunny picture. Sharon has become the promoter of a weekly poker game at her apartment. Admission is by invitation only and is limited to student leaders with whom Sharon regularly works. The monetary stakes are small. I gather that rarely does anyone win or lose over $50 per night. The one constant that I hear from student comment is that Sharon is regularly one of the winners. I first learned of the poker games from a student leader who has not received an invitation to the games. The student suggested that it was widely perceived that Sharon "played favorites" in who was invited and that "expert players weren't welcome." Discussions with other students cause me to think the student may have exaggerated somewhat, but not entirely.

I don't find anything in our UK Regulations to address the issue. My understanding is that small stakes games are not covered by the criminal laws of Katahdin on gambling. However, I am just uneasy with this.

I approached Sharon two weeks ago and casually raised the matter. Sharon confirmed the games took place. She denies that she is a regular winner or that she plays favorites in the selection of players. She regards the games as a very effective way of maintaining relations with student leaders in an informal atmosphere and of keeping current on student issues. She seemed politely dismissive of my concerns about the games that I may not have articulated very well. Two days ago I learned that the games were still going on.

I was almost ready to let this go, until I reviewed our University of Katahdin Staff Handbook. I enclose the provision that captures many of my concerns. I'm now feeling that I need to put something in writing. However, I certainly hope this can be done in a way that doesn't forfeit all the strengths that Sharon brings to her job. Based on past experience, I couldn't come close to replacing her. I'd also likely have a student revolt on my hands.

I know you will come up with just the right letter for my signature.

Thanks so much. I'll owe you big time.

Carlene Gordon

Vice President for Student Affairs

UNIVERSITY OF KATAHDIN PROFESSIONAL STAFF HANDBOOK EXTRACTS

Introduction – "This Handbook is designed to provide guidance to both new and experienced University of Katahdin professional staff members. Its suggestions are not legally binding. Rather they are suggestive of good practices for professional staff members."

Page 9 – "Relations with Students. A collegial and interactive relationship between students and staff advances the educational goals of UK. However, professional staff should always understand that they are in a position of superior power in their dealings with students. They should also appreciate that students are quick to perceive discrimination when they are denied privileges that are accorded to other students. In such matters, the good judgment of the professional staff member is often the best guide."

STATE OF KATAHDIN CRIMINAL CODE

Section 29.101

Gambling and Gaming. It shall be a felony offense to operate or promote a game of chance for money without a license from the Katahdin Gaming Commission.

Section 29.105

Exception for Small Stakes and Social Games. The provisions of this chapter do not apply to games in which less than $250 changes hands at any one session. The provisions of this chapter also do not apply to games which are not regularly organized by one player or organizations or games in which the players have an established social relationship outside of the gambling activity.

By now you should be comfortable working your way down the Guidelines in Chapter One. You are asked to prepare a letter to Assistant Dean Covelli for the Vice President's signature. However, you are entitled to make the argument (in a note attached to the letter) to the Dean of Students that this isn't yet the time for sending the letter.

Once again, do your strategic thinking. What are the objectives of the letter? What would be the ideal resolution of this situation? What would be less satisfactory results? Are there any unacceptable consequences? How does your letter help accomplish or avoid those consequences?

CHAPTER EIGHT

How to Draft a Judicial Opinion

For your fourth litigation assignment, you are a law clerk for the federal court judge who will rule on Nick Sutton's motion for a downward departure. Your assignment arrives in the form of the following memo:

MEMORANDUM

To: My New Judicial Clerk
From: Judge Anders Jackson
Re: *US v. Sutton: Downward Departure Motion*

Welcome aboard as my new judicial clerk! Here's your first assignment. I have decided to grant Nick Sutton's motion for a downward departure. Simply put, I find the motion far more persuasive than the opposition. Here's why.

As I see it, there was a single criminal transaction. Although I realize Sutton lied twice, the conduct after the first lie does not strike me as a second criminal occurrence. Instead, it seems that Sutton was, for a short time, unwilling to confess his crime and therefore reaffirmed the first lie. In this case, the government can hardly disagree because it only charged one count of perjury.

The facts also reflect very little planning for the perjury. There is no dispute that Sutton fabricated the e-mail the same day he learned from his lawyers about the need for written confirmation of the contractual agreement.

From my perspective, Sutton's behavior also appears aberrant. There's no dispute that he's never done anything like this before. I also have no doubt that he will never do it again.

Please prepare a draft decision, for my signature, in which I grant the motion for downward departure. You can use any of the facts from the Motion, Opposition, or Prosecution Version, which should be cited like this: (Motion at page 6) or (Opposition at page 7) or (Prosecution Version at 2).

In terms of organization, I suggest the following:

1. Use the same caption as the Motion, the Opposition, and the Prosecution Version.
2. Center the following heading: "**INTRODUCTION**."
3. Under that heading, include a short summary of the decision (three or four sentences) that includes a statement of the result in the final sentence. Avoid any kind of "theme" or "creative" writing. I am looking for a straightforward summary of the decision that would provide a reader, who knows nothing about the case, with a pretty good idea of what it is

about. I strongly suggest that you do not write the summary until *after* you have completed the rest of the assignment.

4. Center the next heading: "**BACKGROUND**."
5. Under that heading, include all the facts necessary to explain the underlying events and the outcome of the motion. I suggest you present the facts in chronological order. If you think the government's Opposition brief did a good job of explaining the facts, feel free to repeat that section with some minor modifications and editing, as appropriate for a judicial opinion.
6. Center the next heading: "**STANDARDS FOR DOWNWARD DEPARTURE**."
7. Under that heading, explain the applicable standards. Again, if you feel the government's Opposition brief did a good job, feel free to repeat it with some minor modifications and editing.
8. Center the next heading: "**DISCUSSION**."
9. Under that heading, you might want to start by pointing out the various elements that argue in favor of a downward departure, which were *not* in dispute. Specifically, point out how it is undisputed that Sutton had an excellent "employment record," that the crime was of "limited duration," and that it represented a "marked deviation" from Sutton's otherwise "law-abiding life." Perhaps more importantly, point out that the criminal conduct was a result of the defendant's "mental and emotional condition," and that the defendant's confession was an effort "to mitigate the effects of the offense." In one or two paragraphs, try to weave together the facts from the record that support each of those elements. As you do, I expect it will illustrate why the case is "extraordinary" and deserves a downward departure.
10. The next paragraph or two should address the primary contested issue: that the crime was a "single criminal occurrence or single criminal transaction." That requires you to distinguish *Orrega*. Perhaps in one paragraph you could work through the several significant ways in which this case is different from *Orrega* such that Sutton deserves leniency even though the defendant in *Orrega* did not. Then, in a second paragraph, you could explain how Sutton's second affidavit was really just part of the same "criminal transaction" because it merely reaffirmed the first lie. Try to work in the fact that the government's indictment only charged one count of perjury.

11. Next you should address the final contested issue: that the crime was committed "without significant planning." In that regard, I would like you to rely on the case of *United States v. Langille*, 324 F.Supp.2d 38 (D. Me. 2004). In one paragraph, explain what happened in *Langille* and why the court ruled as it did. You might want to begin that paragraph with a topic sentence to indicate that, based on *Langille*, the court finds that Sutton committed the crime "without significant planning." In a second paragraph, you should *apply* the teachings of *Langille* to show how Sutton's case is similarly deserving of leniency.
12. Next, center the following heading: "**CONCLUSION**."
13. Under that heading, summarize the outcome in one sentence.
14. Finally, include a place for me to sign and date the opinion.
15. The draft opinion should be approximately five to six pages long.

UNITED STATES v. LANGILLE, 324 F.Supp.2d 38 (D. Me. 2004)

WOODCOCK, District Judge

On October 22, 2003, Roger Langille, a seventy-year-old man living in his car, having just been denied a bank loan, marched undisguised back into the same bank, handed the teller a note threatening to shoot her, and left with just over $3,000. Within moments, he was apprehended, cash still in hand, at an auto mechanic's shop while he waited for a new car battery to be installed in his get-away vehicle. Before the turn of the year, Mr. Langille had pleaded guilty to bank robbery. This case comes for sentencing before this Court. Over the objection of the Government, this Court grants the Defendant a downward departure for aberrant behavior under U.S.S.G. § 5K2.20. The Defendant is in a Criminal History Category I with no prior criminal record. His total offense level is 21; the guideline range is thirty-seven to forty-six months imprisonment. This Court sentences the Defendant to twenty months' imprisonment and three years of supervised release with standard and specific conditions.

I. Statement of Facts

Roger Langille, now a seventy-one-year-old man, is unmarried and has no children. He is a veteran, having served in the United States Army in 1950–51. While in the Army, he sustained leg and internal injuries. Mr. Langille last worked in 2001 as a part-time security guard. Approximately four years ago, the Veterans Administration determined it had overpaid Mr. Langille approximately $20,000 in veteran's benefits. To recoup its overpayment, the VA stopped payment of his $200 monthly veteran's benefit. Despite repeated efforts to obtain employment since 2001, Mr. Langille had been unsuccessful and he found himself unable to make ends meet on his net monthly social security benefit. By October 23, 2003, his situation had become desperate and he was living in his car. On that day, he entered the Machias Savings Bank in Calais, Maine, to obtain a loan. The bank officers noted the outstanding debt to the Veterans Administration and denied his loan request. Mr. Langille left the bank.

Shortly thereafter, Mr. Langille returned to the same bank, proceeded to the teller's window, and passed a note to the teller, which stated the following: "This is a bank robbery – have gun in my jacket. Put money in bag or I'll shoot you." The teller immediately handed Mr. Langille $3,574 in cash, and he left

the bank. Mr. Langille did not, in fact, have a gun. He drove away and went directly to an auto repair shop, where he was in the process of having a new car battery installed in his automobile when he was apprehended by the Calais police. Mr. Langille had not spent any of the stolen money; the Machias Police Department has returned the full $3,574 to Machias Savings Bank.

II. Discussion

. . . .

B. Did the Defendant Meet the Remaining Requirements of Section 5K2.20 for Downward Departure for Aberrant Behavior?

Under U.S.S.G. § 5K2.20, a downward departure may be warranted for aberrant behavior only "in an exceptional case." The Guideline sets forth the specific requirements:

(1) The Defendant may have committed only a "single criminal occurrence or single criminal transaction";
(2) The crime must have been of "limited duration";
(3) The crime must represent a "marked deviation by the defendant from an otherwise law-abiding life."

U.S.S.G. § 5K2.20(b). In addition, the Application Notes provide further factors for analysis: "In determining whether the court should depart under this policy statement, the 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(b), app. n. 3. Moreover, the crime must have been committed without significant planning."

Finally, this Court has reviewed case law for guidance on the proper application of § 5K2.20. The seminal First Circuit case on aberrant behavior was decided before § 5K2.20 went into effect. *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996); *see also United States v. Dewire*, 271 F.3d 333, 335 n. 2 (1st Cir. 2001) (noting § 5K2.20 became effective November 1, 2000). In *Grandmaison*, the First Circuit ruled that in determining whether to depart downward for aberrant behavior, the courts should look at the "totality of the circumstances." *Id*. at 563. The *Grandmaison* Court directed the sentencing courts to consider such mitigating factors as pecuniary gain to the