06-2662-cr

To Be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2662-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DARIUS DURAND MCGEE,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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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

RULES

GUIDELINES

STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. The district court originally entered a final judgment on May 2, 2002. Approximately one year later, the defendant filed a motion under 28 U.S.C. § 2255 alleging that he received ineffective assistance of counsel because his lawyer failed to file a notice of appeal. On May 16, 2006, the district court granted the defendant's motion, and as a remedy, ordered that the sentence be vacated and judgment re-entered to allow the filing of a notice of appeal. The defendant filed a timely notice of appeal on May 26, 2006. *See* Fed. R. App. P. 4(b). This Court has appellate jurisdiction under 18 U.S.C. § 3742(a) to consider the defendant's challenge to his sentence.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court commit plain error when it granted a downward departure under U.S.S.G. § 4A1.3 without precise information about the exact length of time served by the defendant for his prior convictions?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2662-cr

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DARIUS DURAND MCGEE,
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Preliminary Statement

At the defendant's sentencing hearing for his guilty plea to one count of violating 21 U.S.C. § 841(a)(1), he argued that his designation as a career offender under Sentencing Guideline § 4B1.1(C) overstated the seriousness of his criminal history and urged the district court to depart downward. The district court did just that, departing downward from the defendant's calculated range of 151-188 months to the range that would have applied without the career offender designation, 92-115 months.

Thereafter, the court imposed a sentence of 115 months of imprisonment and five years of supervised release. Appendix ("App.") 42; *see also* App. 8 (docket entry).

The defendant now appeals, claiming that the district court could not calculate the appropriate level of departure without an accurate record about the length of time he served in prison for his prior convictions. This argument, raised for the first time on appeal, is without foundation. The district court had adequate information about the defendant's prior terms of incarceration in the Pre-Sentence Report, and the defendant offers no reason to believe that more precise or different information would have had any impact on his sentence.

Statement of the Case

On September 19, 2001, a federal grand jury in Bridgeport, Connecticut returned an indictment against the defendant, Darius McGee, charging him with three counts of possession with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). App. 3. The defendant pleaded guilty to Count One of the indictment on January 18, 2002. App. 5.

On April 25, 2002, the district court (Janet C. Hall, J.) sentenced the defendant to 115 months of imprisonment and five years of supervised release. App. 5. The defendant did not appeal this judgment, but on April 17, 2003, he filed a motion to vacate his sentence under 28 U.S.C. § 2255 claiming, *inter alia*, that he received ineffective assistance of counsel because his lawyer failed to file an appeal. On May 16, 2006, the district court

granted his motion to vacate, ordering that his sentence be vacated and judgment re-entered. App. 43. The defendant filed a timely notice of appeal on May 26, 2006. App. 47.

The defendant is in custody serving the sentence imposed.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Defendant's Plea and Sentencing

On January 19, 2001, a federal grand jury returned a three-count indictment against the defendant charging him with violating 21 U.S.C. § 841(a)(1) (possession with intent to distribute and distribution of cocaine base) on three separate occasions. App. 3 (docket entry). The defendant pleaded guilty to Count One of the indictment on January 18, 2002. App. 5.

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report ("PSR"). The PSR detailed the defendant's lengthy criminal history and concluded, as relevant here, that because of the defendant's prior convictions, he qualified as a career offender under Sentencing Guideline § 4B1.1. PSR ¶¶ 21, 24-33. This conclusion raised his offense level from 26 to 32 under § 4B1.1(C), and thus resulted in a total offense level of 29 after a three-level reduction for acceptance of responsibility. PSR ¶¶ 21-23. The defendant's criminal history placed him in criminal history category VI (a conclusion also required by his career offender

designation), resulting in a sentencing guidelines range of 151-188 months. PSR ¶ 33; Sentencing Table.

At sentencing, the defendant raised no objections to the facts and findings as presented in the PSR, and the district court thus adopted those findings. App. 11-12. Based on those findings, the district court calculated the defendant's guidelines range, and again, the defendant offered no objection to the calculation. App. 12-13.

The only contested issue at sentencing was the defendant's request for a downward departure. The defendant argued that his guidelines calculation, based on his designation as a career offender, overstated the seriousness of his criminal history and accordingly asked for a downward departure under Sentencing Guideline § 4A1.3 and *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). App. 12, 16-25. During defense counsel's argument in support of the departure, he related the defendant's assertion that the longest period of time he had ever served was 4-5 months' imprisonment. When the district court questioned this assertion with reference to information in the PSR that he had served 12 ½ months for one conviction, the defendant (through counsel) allowed that it was "nine months." App. 18-19. The district court inquired about another conviction detailed in the PSR, noting that it showed the defendant served 17 or 18 months. In response, the defendant stated that he did not serve that sentence. App. 19-20. Defense counsel elaborated saying, "[h]e indicates [that he did not serve that sentence], your Honor. I have no way of verifying that." App. 20. Even though this colloquy revealed a

potential dispute about the actual length of time served by the defendant for his prior offenses, defense counsel did not ask the court to resolve the dispute before ruling on the departure request, or even ask for more time to clarify the record.

The district court recognized that it had authority to grant a downward departure when a criminal history calculation overstated the seriousness of the defendant's criminal history, and identified the factors it could consider in making a decision on the departure, including the amount of drugs involved in prior offenses, the defendant's role in prior offenses, the sentences for prior offenses, and the amount of time the defendant served for prior offenses as compared to the sentencing range calculated for the instant offense. App. 28-30. With respect to this last factor, the court emphasized the need to achieve an "'appropriate relationship between the sentence for the current offense and the sentences, particularly the time served, for prior offenses.'" App. 30 (quoting *Mishoe*). As applied in this case, the district court concluded that these factors warranted a downward departure:

> The Court notes the following facts that are present before me on the record with respect to this particular defendant and his prior criminal history: He has a total criminal history of 22 points, which would suggest that category VI doesn't begin to overstate his criminal history.

However, because of the operation of the career offender status guideline, he jumps in effect from what would be level 26 up to level – I'm sorry, 23, he jumps to level 29, changing a guideline range from 92 to 115 into 151 to 188 months.

He earned the criminal history status under the guidelines for a number of prior criminal offenses. The first one he was sentenced at age 18, he received a two-year sentence but at least according to what's in front of me, he only served approximately one year of that sentence before community release.

Quantity of drugs was small. Defense counsel says it was .2 grams, I'm not certain that I have that in front of me but I will take that it is .2 according to the probation officer's second addendum.

The next convictions, two possession convictions, resulted in a prison term sentence of 18 months and approximately ten months served. That quantity was – I'm sorry, I need to correct myself. The arrest and conviction reflected in paragraph 26 was for .2 grams. The conviction on the same date for a different offense reflected in 27 was for three grams. The two possession charges, I don't believe that I have quantity.

On the conviction in paragraph 30, that was for possession and he received a probationary sentence,

no jail time and that involved quantity of approximately one gram.

Paragraph 32 involved, I believe as defense counsel indicates and the probation officer reports, approximately two grams of marijuana for which he received a 22-month sentence but at least according to the presentence report, served 18 months.

So we have quantities which certainly when measured by someone who has a career offender status, would be considered I believe small. I don't know if the government would take exception to that finding but that's my observation based on my knowledge of cases in federal court and quantities often involved.

The second thing to be noted about what I've just recited is that although this defendant is unlike some defendants who appear in front of me with experience in the state system, who have no jail time at all despite four or five convictions or if it's any jail time, it's 60 days, something like that, this defendant did get sentences and served time, as I say, my calculation is in the range of ten to twelve to 18 months on three occasions, which are not small sentences, the Court would have hoped they would have deterred this defendant on return to his drug dealings, one clearly didn't, but they clearly are short in comparison to the time that he faces in a career offender category in federal court.

> The last thing that the court suggests in *Mishoe* is to look at the role of the defendant in the offenses. To the extent they mean his role relative to everybody else, I believe the record would show that this defendant is basically a street dealer and basically is working on his own. I have no facts to form any other conclusion.
>
> So I think that if they mean by role the fact that he's a street dealer, which of course were the facts in the *Mishoe* case, the Court makes that finding and observation as well.

App. 30-33.

Based on these facts, the court exercised its discretion to depart downward to the offense level that the defendant's offense conduct would have warranted without consideration of the career offender designation. This resulted in a guidelines range of 92-115 months' imprisonment. App. 33-35. The district court sentenced the defendant to the top of that range (115 months) and to five years of supervised release. App. 37.

B. The Subsequent Proceedings

The defendant did not file a notice of appeal after sentencing, but nearly one year later, he filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 claiming, *inter alia*, that he had received ineffective assistance of counsel because his lawyer had failed to file an appeal on his behalf.

On May 16, 2006, the district court granted the defendant's motion under 28 U.S.C. § 2255. The court found that because the defendant had told his attorney he wanted to appeal, but no appeal was filed, he was entitled to relief under § 2255. App. 45-46 (citing *Garcia v. United States*, 278 F.3d 134, 137 (2d Cir. 2002)). As a remedy, the court ordered that the original judgment be vacated and judgment re-entered imposing the same sentence. App. 46. The defendant filed a timely notice of appeal on May 26, 2006. App. 47.

SUMMARY OF ARGUMENT

Under Sentencing Guideline § 4A1.3, a district court may grant a downward departure when "reliable information" indicates that a defendant's criminal history category "significantly over-represents" the seriousness of the defendant's criminal history. In this case, the district court did not commit plain error when it granted the defendant a departure under this provision in reliance on the information about the defendant's prior terms of incarcerations in the PSR. The information in the PSR, gleaned from official sources, was reliable and sufficient to guide the district court's analysis. Furthermore, even if the district court erred in failing to go *beyond* the information found in the PSR, the defendant points to no authority for this proposition and thus the error was not plain. In any event, the defendant cannot show that any error caused him prejudice. He does not dispute the accuracy of the information found in the PSR, much less explain how more or different information would have had an impact on the district court's sentencing decision.

Finally, because the district court sentenced the defendant in reliance on official information found in the PSR, and because the defendant does not even allege that this procedure caused him any prejudice, the defendant has not shown that the purported error warrants correction as an exercise of this Court's discretion.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR WHEN IT GRANTED A DOWNWARD DEPARTURE WITHOUT PRECISE INFORMATION ABOUT THE LENGTH OF TIME THE DEFENDANT SERVED FOR PRIOR CONVICTIONS

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

1. Sentencing Guideline § 4A1.3

Sentencing Guideline § 4A1.3 provides that a district court *may* depart downward if it determines, based on "reliable information," that the defendant's "criminal history category *significantly* over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3 (emphasis added). A decision to depart

under this section must be based on an "individualized consideration of the circumstances of a defendant's case, rather than a general 'rule.'" *United States v. Mishoe*, 241 F.3d 214, 218 (2d Cir. 2001).

In *Mishoe*, this Court identified the circumstances that a district court could consider in deciding whether a departure under U.S.S.G. § 4A1.3 is appropriate. As explained in *Mishoe*, a district court "might" consider "the amount of drugs involved in [the defendant's] prior offenses, [the defendant's] role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in [criminal history category] VI." *Id.* at 219.

2. Standard of Review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." Those purposes include the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to serve various purposes of punishment, the kinds of sentences available, the sentencing guidelines and sentencing commission

policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims of the offense. *See* 18 U.S.C. § 3553(a).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-Booker sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness

review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness, that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

With respect to procedural reasonableness, this Court has held that "a sentence could be unreasonable because of a procedural error committed in the process of selecting the sentence." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005). Thus, "[a]n error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *Id.*; *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

Just as before *Booker*, however, an error in sentencing must be raised before the district court to preserve the issue for appellate review. *See Crosby*, 397 F.3d at 114, 116 (procedural errors in sentencing subject to plain error review). Where, as here, the defendant fails to object to the alleged error, plain error is the appropriate standard of review. *See* Fed R. Crim. P. 52(b); *Johnson v. United*

States, 520 U.S. 461, 468 (1997); *United States v. Olano*, 507 U.S. 725, 734 (1993). Under plain error review, before an appellate court may correct an error which was not raised before the district court, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." *Olano*, 507 U.S. at 732. Only if all three conditions are met is an appellate court authorized to correct plain error, but even then it is not required to do so. *See id.* at 735. The court should exercise its discretion to correct the error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 732.

C. Discussion

The defendant cannot satisfy any of the plain error standards.[1] First, the district court did not err when it ruled on the defendant's downward departure request in reliance on the information in the PSR about the defendant's prior terms of incarceration. Sentencing Guideline § 4A1.3

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[1] To the extent the defendant is challenging the extent of the downward departure granted by the district court, this question is not reviewable. *See United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) ("[A] refusal to downwardly depart is generally not appealable, and . . . review of such a denial will be available only when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.") (quotations omitted); *United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (court lacks jurisdiction "to review a district court's refusal to grant a downward departure or the extent of any downward departure that is granted").

authorizes a district court to grant a departure when "reliable information" indicates that a defendant's criminal history category "significantly over-represents the seriousness of a defendant's criminal history." U.S.S.G. § 4A1.3. The PSR here provided information – obtained from official court documents and criminal history records – about the defendant's prior terms of incarceration. Specifically, it listed the date of arrest, the date of sentencing, and the date the defendant was released from prison for each of his prior convictions. *See* PSR ¶¶ 25-32. The defendant raised no objections to this part (or any other part) of the PSR, and thus this information was sufficiently reliable to allow the district court to calculate the length of time the defendant served in prison for his prior convictions.

Although the defendant argued at sentencing that he had not served sentences as long as those set forth in the PSR, the defendant's contradictory and uncorroborated statements did not undermine the reliability of the information in the PSR. The defendant, through counsel, initially told the court that he had not served any sentence longer than four or five months. App. 18-19. When the district court noted that this statement contradicted information in the PSR, the defendant conferred with counsel and changed his story, asserting that his longest sentence was nine months. App. 19. The district court addressed the defendant again, noting that with respect to one conviction, the PSR indicated that he had served 17 or 18 months, and asking defense counsel, "He didn't do that time?" The defendant answered "No," and defense counsel elaborated, "He indicates no, your Honor. I have

no way of verifying that." App. 20. These contradictory and uncorroborated statements provided no reason for the district court to discount or reject the information in the PSR – information taken from official sources – on the defendant's prior sentences.

To the extent the defendant's argument is not that there was a dispute about the length of his sentence, but rather that the district court lacked *precise* information about the length of his prior sentences, this argument, too, is misplaced. Although the PSR does not identify the date that the defendant began serving his sentences, it does list, for each prior conviction, the date that sentence was imposed and the date he was released from prison. The district court apparently used these dates to calculate the approximate length of the defendant's prior terms of incarceration, App. 31-32, and the defendant does not challenge these estimates as erroneous. In sum, the PSR provided reliable information that allowed the court to estimate the length of the defendant's prior sentences. There was no error.

Nor has the defendant satisfied the second prong of plain error analysis, that any error was plain, in the sense of "clear and obvious." Section 4A1.3 requires the judge to make a decision about departures on the basis of "reliable information," and the defendant cites no authority for the proposition that the information contained in a PSR – gleaned from official sources – is insufficiently reliable to meet this standard. Although the defendant cites cases emphasizing that the court should make decisions about departures in part based on comparisons between the

defendant's prior terms of incarceration and the proposed range of incarceration, those cases do not require that this comparison be based on information beyond that typically contained in a PSR. Because the defendant has cited no authority, much less binding precedent, to show that the district court could not properly rely on the PSR alone, the defendant has not shown that any purported error was "plain." *Cf. United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (noting that "[w]ithout a prior decision from this court or the Supreme Court mandating the jury instruction that [defendant], for the first time on appeal, says should have been given, we could not find any such error to be plain, if error it was") (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)).

The defendant has likewise failed to satisfy the third prong of plain error analysis by proving that he suffered prejudice from the alleged error, in that "it affected the outcome of the district court proceedings." *United States v. McLean*, 287 F.3d 127, 135 (2d Cir. 2002) (internal citations and quotation marks omitted); *see also Olano*, 507 U.S. at 734-35; *United States v. Gore*, 154 F.3d 34, 47 (2d Cir. 1998). Significantly, the defendant does not identify any errors in the information relied upon by the district court in its sentencing decision. Using information in the PSR, the district court calculated that the defendant had previously served one term of approximately 12 months, one term of approximately 10 months, and one term of 18 months. App. 31-32. Although the defendant disputed these calculations – without any support in the record – at sentencing, he does not renew those disputes now or suggest any error in the district court's

calculations. In other words, although he argues that the district court must use accurate information about his prior terms of incarceration, he does not show that the information the district court used in this case was anything other than accurate.

Furthermore, in the absence of any challenge to the accuracy of the information used by the district court, the defendant fails to even *allege* that any more accurate or precise information would have changed the district court's decision on his departure or resulted in a larger downward departure. This is especially telling here, where the length of the defendant's prior terms of incarceration was only one factor among several that the district court properly considered in making a decision on his request for a downward departure. *Mishoe*, 241 F.3d at 219. Absent even an allegation that the district court's purported error had an impact on his sentencing, the defendant has failed to satisfy his burden of establishing prejudice.

Finally, even if there had been plain error affecting the defendant's substantial rights, the defendant has not shown that this Court should exercise its discretion to correct the error. In particular, the defendant has not shown that "the forfeited error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-70. As set forth above, the district court granted the defendant a substantial downward departure on the basis of official information available to it in the PSR. The defendant has not alleged, much less shown, that that information was in any way inaccurate or unreliable, or

that different information would have changed the result in his case. Thus, the district court's decision here cannot be said to have undermined the integrity or reputation of the judicial proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 29, 2006

Respectfully submitted,

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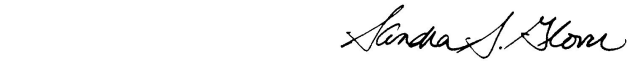

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ADDENDUM

Sentencing Guideline § 4A1.3. Adequacy of Criminal History Category (Policy Statement)

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

(a) prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses);

(b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;

(c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;

(d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;

(e) prior similar adult criminal conduct not resulting in a criminal conviction.

. . .

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History

Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.