

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA**

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v.

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**Criminal No.** \_\_\_\_\_

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**DEFENDANT’S MEMORANDUM IN AID OF SENTENCING**

\_\_\_\_\_ The Government contends that \_\_\_\_\_ offense is an offense level 18 under the Sentencing Guidelines. At the Court’s direction, for purposes of the sentencing proceeding to be held on April 23, 1999, the parties will assume, arguendo, that level 18 is the appropriate offense level and address whether a downward departure from that level would be warranted and, if so, the extent of the appropriate departure.<sup>1</sup> Based on each of the grounds set forth below, individually and in aggregate, a downward departure to a sentence of probation is warranted in this case.

**I. Diminished Capacity**

Pursuant to U.S.S.G. § 5K2.13, a downward departure may be warranted “if the defendant committed the offense while suffering from a significantly reduced mental capacity.” A downward departure for diminished capacity is only precluded where one of the following is true: 1) the defendant’s reduced mental capacity was caused by the voluntary use of drugs or \_\_\_\_\_

<sup>1</sup> Mr. \_\_\_\_\_ disputes the government’s contention. The Court has previously indicated, and the government agrees, that Mr. \_\_\_\_\_ does not waive the right to argue that level 18 is not, in fact, the correct offense level.

alcohol; 2) the facts or circumstances of the offense indicate a downward departure would interfere with the need to protect the public; or 3) the defendant's criminal history indicates a downward departure would interfere with the need to protect the public. Section 5K2.13. Based on the testimony adduced at trial, the government does not contest that Mr. \_\_\_\_\_ committed the instant offense while suffering from a reduced mental capacity, nor does it contend that any of these three bars to a diminished capacity downward departure are present in this case.<sup>2</sup> Attached hereto as Exhibit A is a letter dated April 12, 1999 written by Dr. Carol Kleinman, M.D., J.D., FAPA, setting forth her expert conclusion that Mr. \_\_\_\_\_ meets each of the prerequisites to qualify for a downward departure based on diminished capacity.<sup>3</sup>

It is therefore undisputed that the Court has the authority to depart downwards based on Mr. \_\_\_\_\_'s diminished capacity at the time of the offense. Based on the extent

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<sup>2</sup> The Guidelines define the term "significantly reduced mental capacity" as follows: "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful. Application Note 1 to § 5K2.13 (emphasis added). At trial, both expert psychiatrists agreed that Mr. \_\_\_\_\_ was suffering a psychotic episode at the time of the offense. As a result, he sincerely believed that he was in direct communication with God and that he could not return to his seat. Accordingly, he could not control his behavior and was, therefore, suffering from a significantly reduced mental capacity.

Further, none of the three bars to application of the diminished capacity departure are present. First, neither psychiatrist concluded that Mr. \_\_\_\_\_'s conduct was the result of drugs or alcohol. Second, following Mr. \_\_\_\_\_'s conviction, the government did not seek, and the Court did not impose, any modifications of Mr. \_\_\_\_\_'s conditions of release. Accordingly, the government implicitly conceded, and the Court concurred, that Mr. \_\_\_\_\_ did not represent a danger to the public.

<sup>3</sup> Mr. \_\_\_\_\_ also intends to present to the Court at the sentencing proceeding on April 23, 1999 the opinion of a second expert psychiatrist, concurring with Dr. Kleinman's conclusions.

of Mr. \_\_\_\_\_'s diminished capacity at the time of the offense, the contribution of that diminished capacity to the commission of the offense, and the Court's ability to continue to monitor the steps being taken by Mr. \_\_\_\_\_ to address his mental illness by sentencing him to a period of probation, a downward departure to a sentence of probation is appropriate. See United States v. Glick, 946 F.2d 335, 339 (4th Cir. 1991)(affirming departure from offense level 18, for interstate transportation of stolen property, to sentence of probation based solely on defendant's diminished capacity).<sup>4</sup>

## **II. Aberrant Behavior**

Mr. \_\_\_\_\_'s behavior on the airplane was a single, thoughtless act, of exceptional quality, completely out of character for Mr. \_\_\_\_\_. The Sentencing Commission has explicitly stated that a downward departure from an offense level that would require a term of incarceration to an offense level that would permit a sentence of probation may be warranted where the offense conduct consisted of a single act of aberrant behavior. See U.S.S.G., ch. 1, part A, intro. 4(d) (Commission "has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures"). As set forth below, a downward departure to a sentence of probation is warranted in this case, based on the mitigating circumstance that the conduct at issue constituted aberrant behavior.

The term "aberrant behavior" is not defined in the Guidelines. The Fourth Circuit has stated that "aberrant behavior" consists of "a spontaneous and seemingly thoughtless act

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<sup>4</sup> At the sentencing proceeding on April 23rd, Mr. \_\_\_\_\_ will present additional evidence and/or argument to the Court as to the propriety of a downward departure to a sentence of probation based on Mr. \_\_\_\_\_'s diminished capacity at the time of the offense.

rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable.” Glick, 946 F.2d at 338 (holding that offense conduct involving sending five different letters containing misappropriated information over a ten-week period did not constitute a single act of aberrant behavior).<sup>5</sup>

\_\_\_\_\_ Mr. \_\_\_\_\_’s offense conduct is precisely the type of conduct that the Glick Court envisioned in defining “aberrant behavior.” The testimony at trial demonstrated that Mr. \_\_\_\_\_ did not set out to engage in criminal behavior on the airplane. There was absolutely no premeditation or other advance planning. Indeed, the testimony demonstrated that Mr. \_\_\_\_\_ was perfectly well behaved for the first several hours of the flight.

Both psychiatrists testified at trial that Mr. \_\_\_\_\_’s conduct resulted not from premeditation, but rather from the fact that he suffered a psychotic episode during the flight. Both psychiatrists agreed that Mr. \_\_\_\_\_, due to a previously undiagnosed mental illness, sincerely believed himself to be Jesus Christ and to be in direct communication with God. As a result of this delusion, Mr. \_\_\_\_\_ believed that he could not return to his seat and that, if he did, catastrophic consequences would result.

When his failure to return to his seat became a situation that the flight attendants could not ignore, the flight attendants approached him and sternly ordered him to return to his seat. In reaction to this circumstance, as he perceived the situation while suffering from the

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<sup>5</sup> The Fourth Circuit’s definition of aberrant behavior is borrowed from the Seventh Circuit’s articulation of aberrant behavior in United States v. Carey, 895 F.2d 318, 325 (7th Cir. 1990)(holding that criminal conduct occurring over a fifteen-month period could not be deemed to be single act of aberrant behavior).

psychotic delusion, he apparently pushed a flight attendant and then struggled with several people who tried to subdue him. Mr. \_\_\_\_\_ was plainly spontaneously reacting to events, as opposed to controlling them through advanced planning or continued reflection.

Mr. \_\_\_\_\_ acted in a spontaneous and thoughtless manner -- the entire episode was over within a matter of minutes, if not seconds. Once the fracas was over and he was physically restrained, he stayed passive for the duration of the flight and remained so following his removal from the airplane.

Mr. \_\_\_\_\_ had absolutely no criminal history at the time of the instant offense. Further, since the time of this offense in December 1997, Mr. \_\_\_\_\_ has fully complied with the supervision of Pretrial Services and the Probation Office and has incurred no additional offenses. Mr. \_\_\_\_\_'s offense conduct was plainly out of character.<sup>6</sup> His brief, unplanned spontaneous conduct on the airplane presents a classic case of aberrant behavior warranting a downward departure under the standard articulated by the Fourth Circuit in Glick.

Indeed, the only way to conclude that Mr. \_\_\_\_\_'s conduct falls outside the Fourth Circuit's concept of a single act of aberrant behavior would be to read the Fourth Circuit's definition so narrowly as to render the aberrant behavior departure unavailable to nearly every defendant. Such an approach has been squarely rejected. "Every offense, no matter how basic or simple, is composed of a series of acts. Moreover, very few (if any) acts which are

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<sup>6</sup> Not only has Mr. \_\_\_\_\_ had no other interaction with the criminal justice system, but the people who have known him the longest and know him best attest to the fact that he is a gentle, thoughtful person who has worked hard to pursue positive goals and has been a role model for others. See Exhibit B (letters to the Court from numerous family members attesting to Mr. \_\_\_\_\_'s character). Mr. \_\_\_\_\_ may present the Court additional character letters at the sentencing proceeding on April 23rd.

considered criminal are truly 'spontaneous' or 'thoughtless.'" United States v. McCarthy, 840 F. Supp. 1404, 1410 (D.Colo. 1993). Thus, the Fourth Circuit standard properly understood focuses "not upon how many separate acts imaginative minds can discern in a course of conduct, but upon whether that course of conduct reveals substantial advance planning or continued thought or reflection as events unfold." Id.

In order to determine whether the criminal conduct at issue constitutes a single aberrant act, the following factors should be considered:

the period of time covered by the conduct in question, the number of separate criminal acts deliberately committed during this period, the extent to which the facts demonstrate the execution of an overall plan, and the extent to which defendant was merely reacting to events (as opposed to controlling, or attempting to control, them).

Id.<sup>7</sup> Consideration of these factors demonstrates that Mr. \_\_\_\_\_'s offense conduct falls squarely within the contours of the aberrant behavior departure.

In short, Mr. \_\_\_\_\_'s offense conduct constituted a quintessential single act of aberrant behavior. Mr. \_\_\_\_\_ has no other criminal history. His criminal conduct was wholly out of character. He engaged in no advance planning and the conduct was not premeditated. Mr. \_\_\_\_\_ was not executing any overall plan of criminal activity. Rather, Mr. \_\_\_\_\_ simply spontaneously reacted to events that had, given his mental illness, escalated beyond his power to control them in a rational manner. He acted not out of malice, but as a result of a previously undiagnosed mental illness. Since the offense, he has been receiving

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<sup>7</sup> In McCarthy, based on the factors set forth above, the court concluded that a bank robbery, in which a firearm was brandished, constituted a single act of aberrant behavior. As set forth herein, Mr. \_\_\_\_\_'s conduct was significantly more spontaneous and thoughtless than the bank robbery at issue in McCarthy.

treatment for the mental illness and has not been involved in any other inappropriate conduct.

The Sentencing Commission has explicitly recognized that when it formulated Guidelines for offense conduct that results in incarceration rather than probation, it was not considering the type of aberrant conduct engaged in by Mr. \_\_\_\_\_. Accordingly, a downward departure to a sentence of probation is warranted.

### **III. Post-Offense Rehabilitation**

The Fourth Circuit has explicitly recognized that post-offense rehabilitation, to the extent that it is exceptional and distinguishes the defendant from the typical defendant, is a proper basis for a downward departure. United States v. Brock, 108 F.3d 31, 35 (4th Cir. 1997). Such a departure may be warranted where the defendant has “scrupulously followed” the conditions of his release, including “regular consultations with a psychologist.” See United States v. Jones, 158 F.3d 492, 503 (10th Cir. 1998)(affirming downward departure based on atypical post-offense rehabilitative efforts).<sup>8</sup>

The opportunity for supervision of a defendant’s continuing rehabilitation efforts

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<sup>8</sup> The Jones Court also noted that the defendant, since the offense, had been working regularly and had improved his attitude and understanding. Id. at 503. Similarly, Mr. \_\_\_\_\_, in addition to meeting regularly with a psychologist and receiving treatment from a psychiatrist, has been taking other positive steps since his offense. From January 1998, shortly after the offense, to June 1998, Mr. \_\_\_\_\_ earned nine credit hours toward an associate degree in general education at Montgomery College. See Revised PSR dated March 31, 1999 at ¶ 56. From June 1998 through December 1998, Mr. \_\_\_\_\_ was employed, first as a grounds keeper and then as seasonal help at a department store. Id. at ¶¶ 58, 60. Since February 1999, Mr. \_\_\_\_\_ has been enrolled as a full-time student at Bowie State University, pursuing a four-year college degree. Id. at ¶ 57.

through a period of probation militates in favor of a downward departure to a sentence of probation in a case where a defendant's treatment is on-going. For example, in United States v. Kapitzke, 130 F.3d 820 (8th Cir. 1997), the Eighth Circuit affirmed a downward departure for post-offense rehabilitation, even though the District Court had expressed significant reservations as to the sincerity of the defendant's efforts. The District Court noted that, on the advice of counsel, the defendant, who had unsuccessfully attempted treatment previously, was currently being treated for a sexual disorder. At the time of sentencing, the defendant had received eight months of treatment and appeared to be making progress. Despite concerns about the defendant's sincerity, the District Court agreed to a substantial downward departure, noting that the defendant's probationary period would allow for continued supervision of the defendant's treatment. Id. at 823 ("To address its concerns about the sincerity of Kapitzke's remorse and the future correction of his behavior, the district court sentenced Kapitzke to the maximum term of probation, leaving the district court with the option to impose incarceration if Kapitzke's probationary accomplishments are illusory and merely staged to gain a favorable sentence.") The Eighth Circuit affirmed, concluding that "Kapitzke's rehabilitation efforts are a permissible basis for a departure from the Guidelines." Id. at 824.

In this case, there are no concerns about Mr. \_\_\_\_\_'s sincerity. Prior to this offense, Mr. \_\_\_\_\_ had never previously been diagnosed as having a mental illness. Both psychiatrists that testified at trial agreed that Mr. \_\_\_\_\_ was not malingering and did, in fact, suffer from a previously undiagnosed mental illness.

Since December 1997, Mr. \_\_\_\_\_ has been under court supervision as a result of the instant offense. During the almost year-and-one-half period he has been under

supervision, he has fully complied with his supervision requirements, including attending regularly sessions with a psychologist. In addition, he has been seen by a psychiatrist and has been taking medications prescribed for him to stabilize his moods. There is never been any suggestion that Mr. \_\_\_\_\_ is less than 100% sincere in his efforts to combat his mental illness.

Mr. \_\_\_\_\_ has demonstrated that he is eminently subject to court-ordered supervision. Under the supervision of Pretrial Services and the Probation Office, he has complied with all conditions, including the implementation of the mental health treatment plan deemed appropriate by Pretrial Services and the Probation Office. Mr. \_\_\_\_\_ has made every effort to address the mental illness that was the cause of the offense conduct. A period of probation would allow the Court to supervise his continuing efforts to address his mental illness. Based on Mr. \_\_\_\_\_'s significant post-offense rehabilitation efforts, a downward departure is warranted to a sentence of probation, with continuing mental health treatment as a condition of the probation.

#### **IV. Outside the Heartland**

Section 5K2.0 expressly permits a downward departure where mitigating circumstances exist of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. In order for a departure to be warranted, certain aspects of the case must be "unusual enough for it to fall outside the heartland of cases." Commentary to § 5K2.0 (quoting Koon v. United States, 518 U.S. 81, 98 (1996)). Any single factor may take a case out of the heartland. Moreover, a combination of factors that individually

would not take a case out of the heartland may, in aggregate, do so. Id. (“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.”); see also United States v. Rioux, 97 F.3d 648, 663 (2d Cir. 1996)(affirming departure based on combination of medical condition and charitable good works, neither of which individually would warrant departure).

To the extent that the Court finds that none of the bases discussed above, standing alone, would warrant a downward departure to probation, Mr. \_\_\_\_\_ respectfully submits that all of these factors, when considered together, take this case outside of the heartland of cases and support the requested departure. Finally, as set forth below, the facts of this offense (even without the considerations discussed above) demonstrate that this case is not typical of prosecutions for interference with a flight crew pursuant to 49 U.S.C. § 46504, and therefore, this case falls outside the heartland of cases.

The typical prosecution of interference with a flight crew results from belligerent, vulgar and abusive conduct motivated by mean-spiritedness and, often, voluntary intoxication. See United States v. Grossman, 131 F.3d 1449 (11th Cir. 1997) (defendant convicted under 49 U.S.C. § 46504 after becoming belligerent on plane because he was not served breakfast, threatened to sue, yelled obscenities, pushed flight attendant twice, and became violent with deputy sheriff after flight landed); United States v. Compton, 5 F.3d 358 (9th Cir. 1993) (defendant passed threatening note to flight attendant); United States v. Hicks, 980 F.2d 963 (5th Cir. 1992) (incredibly abusive, vulgar, and offensive behavior involving defendant’s defiant

refusal to turn off radio); United States v. Tabacca, 924 F.2d 906 (9th Cir. 1991) (after flight attendant had asked defendant to put out his cigarette because he was in a non-smoking section, defendant used abusive language and grabbed flight attendant); United States v. Hall, 691 F.2d 48 (1st Cir. 1982) (defendant struck flight attendants and passengers with hand and book, used abusive language, attempted to set papers afire with cigarette lighter, and threatened several times to blow up plane); United States v. Figueroa, 666 F.2d 1375 (11th Cir. 1982) (defendant gave flight attendant note threatening to explode bomb in public place if he was not flown to Cuba); United States v. Meeker, 527 F.2d 12 (9th Cir. 1975) (after consuming several alcoholic drinks prior to flight, defendant began striking and arguing with passengers, and also struck co-pilot and off-duty flight engineer when they instructed him to behave). Prosecutions in the Fourth Circuit have included United States v. Pelfrey, 1998 WL 811781 (4th Cir. 1998) (unpublished) (defendant became drunk, smoked in bathroom, struggled with attendant over bottle of duty-free liquor he was improperly consuming on plane, then grabbed flight attendant and shook her violently, causing her to suffer black and blue marks); and United States v. Butt, 1994 WL 4671 (4th Cir. 1994) (unpublished) (defendant was drunk, belligerent, and loud, kicked seat in front of him, threatened passengers, told flight attendant he would tear plane apart if he did not get a beer, and told flight attendant he was a dead man).

Plainly, the conduct in these cases is of a different degree or kind than Mr.

\_\_\_\_\_’s conduct.<sup>9</sup> Mr. \_\_\_\_\_ indicated that it was not his intent to hurt anyone.

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<sup>9</sup> Likewise, Mr. \_\_\_\_\_’s conduct is different in kind from the type of conduct Congress had in mind in enacting the portion of 49 U.S.C. § 46504 at issue in this case. The Administrator of the FAA requested the statutory provision making it a federal crime to assault, threaten, intimidate or interfere with a flight crew member in response to the hijacking of a commercial airliner. See H.R. Rep. 87-958 (Aug. 16, 1961)(History of Legislation). Obviously,

He simply could not comply with requests that he return to his seat. Only after he was sternly told he must do something that he believed God had directed him not to do, did he touch anyone. Even then, it was solely for the purpose of getting away from the flight attendants that were so instructing him. Finally, when he was grabbed by at least four men, in his agitated state he struggled back, trying to get free. Mr. \_\_\_\_\_ was not acting out of mean-spiritedness, did not intend to hurt anyone and was not abusive or belligerent. Rather, he was in the midst of a psychotic episode and was reacting accordingly. These facts fall far outside the heartland of interference with a flight crew cases. For this reason alone, a downward departure is warranted.

### CONCLUSION

Mr. \_\_\_\_\_ is a young man whose very bright future is already stained by a felony conviction as a result of this incident. A sentence of probation will ensure that he continues to receive the medical treatment he needs and that any concerns about safety to the community are addressed. Any additional restrictions on Mr. \_\_\_\_\_'s liberty would only serve to impede the very positive steps undertaken by Mr. \_\_\_\_\_ since this incident occurred.

For all of the reasons set forth above, Mr. \_\_\_\_\_ respectfully submits that, assuming arguendo, he committed a level 18 offense, a downward departure is warranted and he should receive a sentence of probation, with a condition of his probation that he continue to comply with the Probation Office's treatment plan for his mental illness.

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Mr. \_\_\_\_\_'s conduct does not come close to rising to the level of a hijacking.

Respectfully submitted,

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