

III. Because of the Effects Which Mr. Ks' Incarceration Will Have Upon His Young Son, A Departure Minimizing the Period of Separation of Mr. Keys and His Son Should Be Awarded.

Mr. Ks' twelve-year-old son, D Jr., suffers from attention deficit disorder and hyperactivity disorders. He is being treated at Kennedy-Krieger Institute in Baltimore. His guardian is Mr. K's elderly mother, who is poorly equipped to deal with the problems of a troubled child. Among the reasons cited by Magistrate Judge Grimm in releasing Mr. K was that the release would afford Mr. K the opportunity to see his son, to renew their relationship, and perhaps to resolve some of the son's problems. Since being placed at Volunteers of America, Mr. K has taken advantage of weekly "family visits" to deal with his son's problems, After his release, Mr. K succeeded in securing counseling sessions for himself and his son at Kennedy Mr. K will testify at sentencing that renewing his relationship with his son has been very successful and that D Jr., is now doing well in an excellent school. He will also state his view, however, that his impending incarceration threatens to destroy what has been gained and that his son stands to suffer from the separation which lengthy incarceration will impose.

Though "family ties and responsibilities" is discouraged as a basis for downward departure, USSG sec. 5H1.6 p.s., it plainly is not forbidden, and Courts have frequently granted departures where the collateral impact of a defendant's incarceration will impose exceptional hardships upon his children or other family members. *See, e.g. United States v. Canoy*, 38 F.3d 893 (7th Cir. 1994)(departure permitted where family ties are so unusual that they may be characterized as exceptional); *United States v. Haverstat*, 22 F.3d 790 (8th Cir. 1994); *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993)(court authorized to consider family circumstances in case of destitute mother of three); *see also United States v. Maddox*, 48 F.3d 791, 799 (4th Cir. 19) and authorities cited (power to depart acknowledged, but departure not supported on the facts of the cases).

A particularly strong basis for departure is present where the stability of a child may be affected or compromised by his parent's extended incarceration. *United States v. Sclamo*, 997 F.2d 970 (1st Cir. 1993) (where defendant was stabilizing influence for partner's twelve-year-old son who suffered from psychological disorders, significant departure deemed appropriate). It follows that a modest one-level departure in this case which will minimize the separation between Mr. K and his son would serve the interests of justice.

III. The Pretrial Custody Served by Mr. K at the Baltimore City Detention Center, Which Entailed an Effective Denial of Necessary Medical Services, Was So Unusually Severe and Harsh as to Be Outside the Heartland Contemplated by the U.S. Sentencing Commission, and Therefore Justifies a Downward Departure.

In at least two cases, this Court has granted downward departures in order to reflect the harsh conditions of confinement which pretrial detainees may face at the Baltimore City Detention Center. The reasoning which supported the sentencing decisions in *United States v. Vincent Stinchecum*, No. JFM-96-0158 (D. Md. 9/4/96) and *United States v. Ruel Law*, No. JFM-95-0445 (D. Md. 8/16/96) applies with equal force force in this case and compels the conclusion that this Court should grant a downward departure here.

At the time of his initial appearance and detention hearing in December, 1997, Mr. K. complained of pain and bleeding from the mouth and the effects of the beating inflicted at the time of his arrest. Moreover, while incarcerated at the Baltimore City Detention Center, Mr. K. was tied up, gagged, and assaulted by other inmates. He applied on a daily basis for sick call, but throughout his incarceration, he never saw a physician, and the paramedical staff which deigned to see him on a few occasions dispensed ibuprofen, but did nothing else. Medical attention secured by Mr. K. since his release have confirmed that throughout his incarceration he has suffered from severe periodontal infections that required treatment on an emergency basis.

The starting point of the court's analyses in the *Stinchecum* and *Law* cases, *supra*, was that in establishing sentencing ranges, the United States Sentencing Commission assumed the reasonableness of the pretrial confinement to which the defendants were subjected. The courts' analyses proceeded to the conclusion that there is nothing reasonable about conditions of confinement which lend themselves to and culminate in physical injury to the persons detained. In that respect, the analysis is little different from that of the Supreme Court in *United States v. Koon*, 116 S.Ct. 2035 (1996), which sanctioned a sentencing court's reliance to the defendant's particular susceptibility to abuse in prison as proper basis for departure. According to the judgment and commitment in *Stinchecum*, the court "granted a two-level downward departure because defendant "was beaten by a correctional officer and denied medical treatment for a hernia for a long period of time while in pretrial detention." In *Law*, a beating inflicted by an inmate moved the court to grant a two-level departure. In both cases, the court regarded the unusual and "uncivilized" conditions at Baltimore City Detention Center as exposing the defendants in those cases to the injuries they suffered.

Clearly, pretrial confinement under intolerable conditions which entail a defendant's being denied basic necessary medical services is not a circumstance "adequately taken into consideration" by the Sentencing Commission in formulating its Guidelines. 18 U.S.C. § 3553(a). The *Koon* decision makes clear that this is precisely the sort of unusual circumstance which the sentencing court may consider in fashioning an appropriate sentence.

Mr. K.'s experience in pretrial custody at the BCDC is remarkably similar to that experienced by the defendant in *Stinchecum*. Counsel respectfully suggests that Mr. K. receive the same two-level downward departure awarded in that case.

.. from counseling because of allegations by a receptionist at Kennedy-Krieger that he had made inappropriate comments to her.