A. THERE IS NO LIMIT ON THE BACKGROUND AND CHARACTER INFORMATION THAT THE DISTRICT COURT CAN CONSIDER INIMPOSING AN APPROPRIATE SENTENCE

There is no limit on the background and character information that this Court can consider in imposing an appropriate sentence for (Fill in the Blank). 18 U.S.C. s. 3661; *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005); also see 18 U.S.C. s. 3553(a)(1). When determining a sentence, no unusual circumstances need exist. *United States v. Castro-Jones*, 425 F.3d 430, 436 (7th Cir. 2005). In this post-*Booker* realm, all that is necessary to sustain a sentence outside the guideline range is “an adequate statement of the judge’s reasons, consistent with section 3553(a), for thinking that the sentence (s)he has selected is indeed appropriate for the particular defendant.” *Id*. Furthermore, consideration of “unwarranted disparities” among defendants properly includes “the need to avoid unwarranted *similarities* among others who were not similarly situated.” *United States v. Lehmann*, 513 F.3d 805 (2008).

B. VARIANCES ARE NOT SUBJECT TO THE GUIDELINE ANALYSIS FOR DEPARTURES

Courts have held that variances are not subject to the guideline analysis for departures. *United States v. Fumo*, 655 F.3d 288, 317 (3d Cir. 2011). In some situations, a prohibited ground for departure may be a valid basis for a variance. *United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009). In sum, the ability to vary preserves district courts’ ultimate ability to impose, regardless of what the guideline range is found to be, a sentence that it views is “sufficient, but not greater than necessary” 18 U.S.C. § 3553 to serve the goals of sentencing. *United States v. Ausburn*, 502 F.3d 313, 327 (3d Cir. 2007) (noting that the sentencing court, in the

post-Booker era, has the "discretion to craft an appropriate sentence falling anywhere within the range of punishments authorized by Congress").

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 552 U.S. at 52. In sentencing a defendant, a District Judge should consider all of the section 3553(a) factors to determine whether they support the sentence requested by a party. In doing so, the judge may not presume the Guidelines range is reasonable; instead, the judge must make an individualized assessment based on the facts presented. *Id*.

C. VARIANCES DO NOT REQUIRE A SHOWING OF EXTRAORDINARY CIRCUMSTANCES

The *Gall* Court rejected both a rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range, and the use of a rigid mathematical formula, noting that a mathematical approach suffers from infirmities of application – deviations from the Guidelines range will always appear more extreme in percentage terms when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Furthermore, quantifying the variance as a certain percentage of the maximum, minimum or median prison sentence recommended by the Guidelines gives no weight to the "substantial restriction of freedom" involved in a term of supervised release or probation. Most important, both the exceptional circumstances requirement and the rigid mathematical formulation reflect an impermissible practice of applying a heightened standard of review to sentences outside the Guidelines range. *Gall*, 552 U.S. at 47-48.

D. FACTORS JUSTIFYING DOWNWARD VARIANCE Lack of Criminal History Combined with Other Factors

Though a defendant's criminal history is part of the calculation of the guideline range, prior criminal history (or lack thereof) "fits squarely into one of the § 3553(a) factors, the history and characteristics of the offender, 18 U.S.C. § 3553(a)(1), and (is) therefore a proper basis for the court's consideration." *U.S. v. Williams*, 526 F.3d 1312, 1324 (11th Cir. 2008); 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence."). Also see *United States v. Huckins*, 529 F.3d 1312 (10th Cir. 2008) (affirming downward variance in possession of child pornography and criminal forfeiture case based on defendant's lack of significant criminal history combined with depression at the time of the offense, short time period in which the offense took place, lack of repeat offending by the defendant after his arrest.

A court may vary downward where the defendant does not fit the profile of the person who typically commits the type of crime the defendant is being sentenced for has no interpersonal instability, is motivated and intelligent, and has the continuing support of his family. See *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009) (affirming downward variance from a guideline range of 41–51 months to 5 years' probation in possession of child pornography case based in part on finding that the defendant did not fit the profile of a pedophile, had no history of substance abuse, no interpersonal instability, was motivated and intelligent, and had the continuing support of his family).

Health Problems of Family Members Constitutes a Legitimate Basis for a Downward Departure or Variance

It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall*, 552 U.S. at 52. In sentencing a defendant, a District Judge should consider all of the section 3553(a) factors to determine whether they support the sentence requested by a party. In doing so, the judge may not presume the Guidelines range is reasonable; instead, the judge must make an individualized assessment based on the facts presented. *Id*.

The Supreme Court has recognized that there are compelling family circumstances where an individual in the defendant's family will be very badly hurt if the defendant is not available to take care of that person. *Id*.

A family member's health problems and a defendant's involvement in addressing those problems and meeting the family member's needs associated with the health problems is a legitimate basis for a downward departure or downward variance from the Guidelines. In *United States v. Schroeder*, 536 F.3d 746 (7th Cir. 2008) the circuit Court concluded that the defendant was entitled to a downward departure based on the fact that the defendant and his wife had an adopted daughter who had a compromised immune system that made her vulnerable to illness, making daycare an implausible childcare option (the defendant worked from home, caring for the couple's daughter). *Id*. at 756.

In *Munoz-Nava*, the District Court imposed a non-custodial sentence, varying downward from the Guidelines on the basis that the defendant was the

primary caretaker and sole supporter of his son and ailing elderly parents. *Munoz-Nava*, 524 F.3d at 1143.

In *United States v. Lehmann*, supra, the District Court departed downward from a Guidelines range of 37 to 46 months imprisonment, and sentenced the defendant to 5 years probation with 6 months community confinement as a condition of probation. *Lehmann*, 513 F.3d 805, 807. The defendant had asked the District Court to downward depart under section 5H1.6 of the advisory sentencing Guidelines, or to vary from the Guidelines under 18U.S.C. 3553(a), based on her family ties and responsibilities. *Id*. at 806. She argued that her son suffered from disabilities (including Asperger's Syndrome) that required her day-to-day involvement in his care and development. *Id*. She argued that her son's father wasn't in a position to provide the necessary care and emotional support, despite his long-time role as either the primary or joint custodial parent for the child. *Id*.

The Court found that departure was in order under section 5H1.6, and that a variance was justified based on 18 U.S.C. section 3553(a) because the Guideline sentence of 37 to 46 months was unreasonable given the defendant's unique set of acts. *Id*. at 807. The court emphasized that the evidence concerning the defendant's son "clearly" took the case "outside the heartland of cases." *Id*.

The District Judge stated that "the one thing that guides me more than ever is I do not want this young boy to suffer any more." *Id*. The court believed this was "an extraordinary, exceptional situation ..." *Id*. The Court concluded that standard conditions of probation, coupled with the special condition that the Defendant serve six months in community confinement constituted a substantial restriction on the defendant's liberty, and that sending the defendant to prison would have a very negative effect on the emotional development of the defendant's son, which is not

materially different from the sort of "compelling family circumstances" that the Supreme Court indicated would justify probation for a drug trafficker in *Gall*. *Id*.

While the Court in *Lehmann* framed the defendant's circumstances as "extraordinary", the *Gall* Court rejected both a rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range, and the use of a rigid mathematical formula, noting that a mathematical approach suffers from infirmities of application – deviations from the Guidelines range will always appear more extreme in percentage terms when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. *Gall*, 552 U.S. at 47-48. Furthermore, quantifying the variance as a certain percentage of the maximum, minimum or median prison sentence recommended by the Guidelines gives no weight to the "substantial restriction of freedom" involved in a term of supervised release or probation. *Id*. at 48. Most important, both the exceptional circumstances requirement and the rigid mathematical formulation reflect an impermissible practice of applying a heightened standard of review to sentences outside the Guidelines range. *Id*. at 49.