

1999

The Imagination Is a Fertile Stomping Ground: Non-Enumerated Grounds for Departure from the United States Sentencing Guidelines under 5K2.0

Jennifer L. Cordle

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Criminal Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Jennifer L. Cordle, *The Imagination Is a Fertile Stomping Ground: Non-Enumerated Grounds for Departure from the United States Sentencing Guidelines under 5K2.0*, 47 Clev. St. L. Rev. 193 (1999) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol47/iss2/5>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

THE IMAGINATION IS A FERTILE STOMPING GROUND:
NON-ENUMERATED GROUNDS FOR DEPARTURE FROM THE
UNITED STATES SENTENCING GUIDELINES UNDER § 5K2.0

JENNIFER L. CORDLE¹

INTRODUCTION	194
I. BACKGROUND.....	196
A. <i>Pre-Guidelines Sentencing System</i>	196
B. <i>United States Sentencing Guidelines</i>	198
II. DEPARTURES.....	200
A. <i>Types of Departure Grounds</i>	201
1. Forbidden.....	201
2. Encouraged	201
3. Discouraged	202
4. Unmentioned (non-enumerated).....	203
B. <i>Non-enumerated Departures under § 5K2.0</i>	203
1. § 5K2.0	203
a. <i>Unlimited Possibilities</i>	203
b. <i>Extraordinary factors</i>	204
c. <i>Combinations</i>	205
2. <i>Koon v. United States</i>	205
3. Analysis	209
C. <i>Successful Considerations when Choosing Grounds for Departure</i>	213
1. Rehabilitation	213
2. Third Party Harm.....	214
3. Voluntary Conduct	216
4. Unfairness Resulting from Government Conduct.....	217
5. “Just Deserts”	218
6. Judges	219
III. CONCLUSION.....	220

¹Ms. Cordle received a B.A. from Ohio University and a J.D. from Capital University Law School. She is a law clerk for Federal Magistrate Judge Norah McCann King. This article was written and accepted for publication prior to her employment with Judge King; accordingly, the views and opinions expressed herein are solely those of the author and do not reflect the views or opinions of Judge King or the other judges for the United States District Court for the Southern District of Ohio. Special thanks to Max Kravitz, Professor of Law, Capital University Law School, for his assistance and review of the drafts of this article.

INTRODUCTION

Justice has sometimes been represented by the blindfolded icon, Justitia. This ancient metaphor is appropriate for adjudication. In deciding guilt or innocence, it ought not to matter whether the defendant is rich or poor, nor whether the defendant has erred in the past, or suffered unusual disadvantages, nor even whether the defendant is likely to break the law again. The decision on guilt or innocence is properly blind to these circumstances, blind to everything but the question of whether the defendant's actions and accompanying mental state instantiate the abstract features specified in a criminal statute. The character of this determination is represented by the icon's scales. Essentially a matter of weighing evidence and determining facts, the process of adjudication has more in common with scientific than with moral reasoning.

But Justitia usually is depicted also holding a sword, representing not the power to determine guilt or innocence, but the power to punish. Before that power is exercised, before the sword is raised, Justitia must raise the blindfold. When it comes to the imposition of punishment, the question is always one of degree. The need is not for blindness, but for insight, for equity, for what Aristotle called "the correction of the law where it is defective owing to its universality," and this can only occur in a judgment that takes account of the complexities of the individual case.²

Individuality in sentencing is a hallmark of true justice. The universality of law results in a "canned justice," which provides for similar sentences for similar crimes, but does not account for the bundle of characteristics in the offender which contributed to that offender's particular form of criminality.³ This is not necessarily justice at all,⁴ but administrative convenience. The United States Sentencing Commission, which provides for uniformity through a series of detailed guidelines, recognized the need for individuality in sentencing by allowing for discretionary departures.

Though the Sentencing Guidelines provide some direction regarding departures, the Commission did not take all factors that may be relevant into account when developing the guidelines. The majority of departures are unguided and fall under

²Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1283 (1997).

³"There are occasions where the law's implacability must bend and give homage through compassion to humanity's frailties and nature's cruelties." *United States v. Perez*, 756 F. Supp. 698, 699 (E.D.N.Y. 1991). "[N]ot all seemingly similar offenders are in fact similar, and there are atypical situations when justice is best served by different sentences for different people." Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1029 (1997).

⁴"Unfortunately, not all 'similarly situated' offenders are truly similarly situated in terms of their diverse offender and complex human circumstances. To this end, fixed rules coupled with narrowly guided policy statements are, on occasion, insufficient and inappropriate." Kirk D. Houser, *Downward Departures: The Lower Envelope of the Federal Sentencing Guidelines*, 31 DUQ. L. REV. 361, 389 (1993).

the catch-all provision, United States Sentencing Guidelines (hereinafter USSG) § 5K2.0. This provision is a safety valve that exists in order to permit judges to do justice in extraordinary cases.⁵ Though judges possessed this discretion, they believed departures were disfavored under the Sentencing Guidelines.⁶ However, *Koon v. United States*⁷ “reemphasized and clarified that district courts do have broad departure discretion.”⁸

⁵See Gregory N. Racz, *Exploring Collateral Consequences: Koon v. United States, Third Harm, and Departures From Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1463 (1997); Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1701 (1998).

[S]ection 5K2.0 is meant to operate as a safety valve in those less frequent occasions where an important or extraordinary circumstance not duly considered by the Sentencing Commission is present 5K2.0 is not to be applied as a matter of course by district judges. Rather it enables judges bound by the guidelines to impose fair and particularized sentences . . . in unique or unanticipated circumstances.

Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 808 (1994). For a war story in which a district judge acted as an antidote to the poisonous disparity resulting from prosecutorial discretion under the Guidelines, see Houser, *supra* note 4, at 389 n. 213. The judge stated:

Let me tell you, and you can take this message back to the United States Attorney’s office: I think it is my job to see that justice is meted out fairly, and that’s what the guidelines are trying to do—supposedly trying to do. And there seems to be a lack of coordination in your office on how these cases are handled.

I sentenced five men the other day in a gigantic conspiracy. I mean these guys were out there unloading marijuana from planes. And two of the plea agreements provided for probation. And you want these 18, 21-year old guys to get 27 months when your office comes in here and makes deals suggesting probation or three years for guys who are involved in giant conspiracies involving millions of dollars.

Maybe your office doesn’t see it, because you each handle different cases, and have different philosophies, but I see it every day. And as long as I have anything to say about it, justice is going to be [handed] out on an even basis. I don’t care if they are from Mexico, Canada or the United States. We are going to handle it the way I see [it], and the way I think is right and fair.

United States v. Valdez-Gonzalez, 957 F.2d 643, 646 (9th Cir. 1992) (quoting District Judge Alfredo C. Marquez and affirming a downward departure for the marginal culpability of drug “mules”).

⁶See Saris, *supra* note 3, at 1040.

⁷518 U.S. 81 (1996).

⁸Stephanie M. Wright, *How Koon v. U.S. Clarifies Courts’ Discretion to Depart from Sentencing Guidelines*, 11 No. 4 WHITE-COLLAR CRIME REP. 1, 1 (1997); see also Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 569 (1998) (*Koon* “endorsed district court discretion and individual consideration of defendants.”); Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT. REP. 19, 19 (1996) (the Supreme Court argued “in favor of [a] shift toward increased district court departure authority . . .”).

Due to the Court's seeming encouragement of judicial discretion in relation to departures, the courts' ability to depart has been expanded from that previously in force. "Post-*Koon*, with the exception of the forbidden factors, there appears to be no limit to the kinds of factors which may constitute grounds for departure in an unusual case."⁹ When considering possible factors for departure from the Sentencing Guidelines, one is only bound by the limits of one's imagination. One should be "imaginative and proactive in finding grounds to depart downward."¹⁰ Any factor, either alone or in combination with other factors, may be sufficiently atypical to warrant departure.

Section I of this article describes the sentencing systems in effect in the United States both before and after the adoption of the Sentencing Guidelines. Section II discusses the types of departure grounds, explains when a non-enumerated ground for departure may be appropriate in light of *Koon*, and suggests general characteristics that appear to underlie successful non-enumerated departures. Section III concludes that departures will be more common-place after *Koon* and encourages attorneys to be imaginative when exploring potential grounds for departure.

I. BACKGROUND

A. Pre-Guidelines Sentencing System

The sentencing scheme in place within the United States prior to the Sentencing Reform Act of 1984 was one of indeterminate sentencing. This system involved a "three-way sharing of sentencing responsibility,"¹¹ with responsibility delegated between Congress, the sentencing judge, and the Parole Commission. The reasoning behind this delegation was that "if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."¹²

Congress defined the maximum sentence that could be imposed by developing a "system of ranges within which the sentencer could choose the precise punishment" for each defendant.¹³ These "[s]tatutes specified the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide" the offender's punishment.¹⁴ The judge's discretion was enhanced by the fact that the judge could later suspend the sentence that was imposed upon the defendant or replace that sentence with probation.¹⁵

⁹Wright, *supra* note 8, at 1.

¹⁰Farabee, *supra* note 8, at 569.

¹¹*Mistretta v. United States*, 488 U.S. 361, 364 (1989).

¹²*United States v. Brown*, 381 U.S. 437, 443 (1965).

¹³*Mistretta*, 488 U.S. at 364.

¹⁴*Id.* at 363. The sentencing judge possessed the "discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation should be imposed instead of imprisonment or fine." *Id.*

¹⁵*See id.* at 364.

The Parole Commission was the third organization to exercise authority over the defendant's sentence. Congress granted "corrections personnel within the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge."¹⁶ It was the parole official who ultimately determined the actual duration of the defendant's incarceration.¹⁷ When paroled, the offender "was returned to society under the 'guidance and control' of a parole officer."¹⁸

The sentencing judge and the Parole Commission were given such broad discretion because the indeterminate sentencing scheme was based upon the goal of rehabilitation.¹⁹ This model held that "it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."²⁰ The reform of the inmate resulted from "a rigid system of discipline, labor, and religion."²¹ This underlying theory "required the judge and the parole officer to make their respective sentencing and release decisions upon their own assessments of the offender's amenability to rehabilitation."²² Because these decisions were based upon individualized observations, the judge's sentencing determination "met with virtually unconditional deference upon appeal,"²³ and the Parole Commission "possessed almost absolute discretion over the parole decision."²⁴

The indeterminate sentencing scheme, due to the high level of discretion delegated to judges and parole officials, developed serious problems. Sentencing disparities occurred as a result of the judges' broad discretion.²⁵ This discretion led

¹⁶*Id.*

¹⁷*See id.* at 365.

¹⁸*Mistretta*, 488 U.S. at 363.

¹⁹*See* Lisa M. Rebello, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion,"* 26 SUFFOLK U. L. REV. 1031, 1033 (1992); *see also* Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: A Backdoor Out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 137 (1992). "It is generally accepted that there are four theories of criminal punishment: retribution, incapacitation, rehabilitation, and deterrence." *Id.*

²⁰*Mistretta*, 488 U.S. at 363. This belief stemmed from the concept of crime as "a moral disease, and punishment, a 'social therapeutic' designed to reform the criminal rather than to inflict suffering." Bornstein, *supra* note 19, at 137.

²¹Rebello, *supra* note 19, at 1033.

²²*Mistretta*, 488 U.S. at 363.

²³*Id.* at 364. The sentencing judge "enjoyed the 'superiority of his nether position'" because he could "'see[] more and sense[] more' than the appellate court." *Id.*

²⁴*Id.*

²⁵*See* Bruce M. Selya & Matthew Kipp, *An Examination of Emerging Departure Jurisprudence under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 4 (1991) ("Troubling assumptions concerning race, ethnicity, economic status, and gender were often at the heart of these disparities."); *see also* Panel Discussion, *Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813 (1989) for the criticism that

unfettered judicial discretion provided a shield for discrimination: some district court judges systematically treated blacks and hispanics more harshly, while others used the

to the belief that “federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”²⁶ Uncertainty regarding the length of a defendant’s actual imprisonment resulted from the Parole Commission’s discretion regarding whether a defendant should be paroled. Uncertainty also surrounded the effectiveness of rehabilitation as a penological theory.²⁷ In the face of “[f]undamental and widespread dissatisfaction with the uncertainties and the disparities [that] continued to be expressed,”²⁸ Congress took action in an attempt to improve the criminal sentencing system.

B. *United States Sentencing Guidelines*

“Because the existing indeterminate sentencing system resulted in serious disparities among the sentences imposed by federal judges upon similarly situated offenders and in uncertainty as to an offender’s actual date of release by Executive Branch parole officials, Congress passed the Sentencing Reform Act of 1984.”²⁹ With this Act, Congress created the United States Sentencing Commission and charged it with developing a comprehensive set of sentencing guidelines.³⁰ The Commission was to establish sentencing policies and practices for the Federal criminal justice system³¹ by promulgating binding sentencing guidelines that establish a range of determinate sentences for all categories of federal offenses and defendants.³² Congress consolidated the power that had been exercised by the judge and the Parole Commission³³ in the outmoded rehabilitation model.³⁴

The goal of the resulting United States Sentencing Guidelines is “to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.”³⁵ This goal is

court to promote a system of alleged justice, where minorities were given light sentences as an accommodation to past societal wrongs, the latter pattern without regard for the dire consequences this practice holds for minority and other victims.

Id. at 1815 (statement by Commissioner Iliene H. Nagel).

²⁶S.Rep. No. 98-225, p. 38 (1983).

²⁷*See Mistretta*, 488 U.S. at 365. Rehabilitation came to be viewed as an unattainable goal for the majority of cases. *Id.* Empirical research indicated that rehabilitation was not working and concluded that the “rehabilitative disposition is plainly untenable.” Bornstein, *supra* note 19, at 139 n.18.

²⁸*Mistretta*, 488 U.S. at 366.

²⁹*Id.* at 361.

³⁰*Koon v. United States*, 518 U.S. 81, 92 (1996).

³¹28 U.S.C. § 991(b)(1) (1988).

³²*See Mistretta*, 488 U.S. at 361.

³³*See id.* at 367.

³⁴S.Rep. No. 98-225 (1983).

³⁵*Koon*, 518 U.S. at 113.

accomplished by focusing on the congressional objectives of honesty,³⁶ uniformity,³⁷ and proportionality.³⁸ The Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system.³⁹ The Guidelines also provide discretion to sentencing judges to consider each defendant as an individual with a unique case.⁴⁰ The main purpose of the Sentencing Commission was:

to establish sentencing policies and practices for the federal criminal justice system that provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.⁴¹

In addition to creating the Sentencing Commission, the Act did other things. First, it rejected rehabilitation as a goal of incarceration.⁴² Second, the Act generally made all sentences determinate⁴³ and binding on judges, with one exception.⁴⁴ Third, it prospectively abolished the Parole Commission.⁴⁵ Finally, the Act authorized limited appellate review of the district judge's sentencing determination.⁴⁶ A defendant is permitted to appeal if the sentence is above the defined range; the

³⁶“‘Honesty’ in sentencing refers to the length of imprisonment that an offender actually serves versus that imposed by the sentencing judge.” Rebelló, *supra* note 19, at 1040 n.6. The Commission hoped to achieve honesty in sentencing by abolishing parole. *See id.* at 1040.

³⁷Uniformity in sentencing is meting out “similar sentences for similar conduct by similar offenders, or treating similar cases alike.” *Id.*

³⁸“‘[P]roportionality’ refers to sentences of different severity for unlike offenses, or treating different cases differently.” *Id.* at 1040 n.6.

³⁹*Koon*, 518 U.S. at 113.

⁴⁰*See id.* The *Koon* Court stated:

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. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines. . . .

Id.

⁴¹28 U.S.C. § 991(b)(1)(B).

⁴²*See* 28 U.S.C. § 994(k) (1998).

⁴³*See* 18 U.S.C. § 3624(a) (1994).

⁴⁴*See* 18 U.S.C. §§ 3553(a)-(b) (1994). The courts are authorized to depart from the applicable guideline if the judge finds “an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines.” § 3553(b).

⁴⁵*See* 28 U.S.C. § 995(a)(1) (1994).

⁴⁶*See* 18 U.S.C. §§ 3742(a)-(b) (1994).

government may appeal if it is below the range; and either side can appeal an improper application of a guideline.⁴⁷

When determining a sentence under the Sentencing Guidelines the judge begins by identifying the base offense level assigned to the crime in question.⁴⁸ If the judge finds the case to be a typical one, he must impose a sentence within the applicable guideline range.⁴⁹ If the case is not a typical one, the judge “adjusts the base level as the Guidelines instruct.”⁵⁰ There are four basic steps that a judge should follow when determining whether a departure is in order. The judge should ask:

- 1) What features of this case, potentially, take it outside the Guidelines’ “heartland” and make of it a special, or unusual case?
- 2) Has the Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?⁵¹

Finally, the judge determines the defendant’s criminal history category. Coordinating the adjusted offense level and criminal history category yields the appropriate sentencing range.⁵²

II. DEPARTURES

The Introduction to the Guidelines [Manual] . . . makes an important distinction between a “heartland case” and an “unusual case.”⁵³ The Manual explains:

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct

⁴⁷*See id.*

⁴⁸*Koon v. United States*, 518 U.S. 81, 88 (1996).

⁴⁹*See id.* at 85.

⁵⁰*See id.* at 88.

⁵¹*Id.* at 95 (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). In *Rivera*, the court explained:

If no special features are present, or if special features are also “forbidden” features, then the sentencing court, in all likelihood, simply would apply the relevant guidelines. If the special features are “encouraged” features, the court would likely depart, sentencing in accordance with the Guidelines’ suggestions. If the special features are “discouraged” features, the court would go on to decide whether the case is nonetheless not “ordinary,” i.e., whether the case differs from the ordinary case in which those features are present. If the case is not ordinary, the court would go on to consider departure.

Rivera, 994 F.2d at 949.

⁵²*Koon*, 518 U.S. at 88.

⁵³*Rivera*, 994 F.2d at 947.

significantly differs from the norm, the court may consider whether a departure is warranted.⁵⁴

A factor is not part of the heartland 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.”⁵⁵ Atypical cases were not adequately considered by the Commission, and factors that make a case atypical provide potential bases for departure.⁵⁶

A. Types of Departure Grounds

1. Forbidden

After determining that a factor does not fit within the heartland of the applicable statute, one must look to see whether the Commission has forbidden consideration of the factor. The Commission forbade consideration of several factors, including: 1) race, sex, national origin, creed, religion, and socio-economic status;⁵⁷ 2) lack of guidance as a youth;⁵⁸ 3) drug or alcohol dependence;⁵⁹ and 4) economic hardship.⁶⁰ These factors may never be part of the determination regarding whether a departure from the sentencing range is appropriate. Thus, even if these factors make a case ‘unusual,’ taking it outside an individual guideline’s heartland, the sentencing court is not free to consider departing.⁶¹

2. Encouraged

After determining that a potential departure factor is not a forbidden factor, it must be determined whether departure is encouraged in light of this factor. The Commission offers judges assistance by providing a “host of considerations that may take a particular case outside the ‘heartland’ of any individual guideline and, in doing so, may warrant a departure.”⁶² “Encouraged factors are those ‘the Commission has not been able to take into account fully in formulating the

⁵⁴UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, USSG Ch. 1, Pt. A, intro. comment 4(b) (1995).

⁵⁵18 U.S.C. § 3553(b); U.S. Sentencing Guidelines and Policy Statements § 5K Policy Statement (1987).

⁵⁶See *Koon*, 518 U.S. at 94.

⁵⁷See USSG § 5H1.10.

⁵⁸See USSG § 5H1.12.

⁵⁹See USSG § 5H1.4.

⁶⁰See USSG § 5H2.12.

⁶¹*United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993); But see *United States v. Yu*, 954 F.2d 951, 958 n.3 (3d Cir. 1992) (explaining that, per the Senate Judiciary Committee’s report, “‘the requirement of neutrality is not a requirement of blindness’ toward race, sex, national origin, creed and socio-economic status.”).

⁶²*Rivera*, 994 F.2d. at 948.

guidelines.”⁶³ Factors that warrant a downward departure from any given sentence include conduct of the victim that provoked the offense behavior,⁶⁴ when a defendant commits a crime in order to avoid a greater harm,⁶⁵ if a defendant commits a crime due to coercion or duress,⁶⁶ and if a defendant committed an offense while suffering from a significantly reduced mental capacity.⁶⁷ “A sentencing court facing such non-heartland circumstances can feel confident, because of this encouragement, that a departure would not be ‘unreasonable.’”⁶⁸ However, encouraged factors are not always an appropriate basis for departure—sometimes the applicable guideline has contemplated the factor.⁶⁹ In such a circumstance, a court may depart based upon the factor, but only if the factor is “present to a degree substantially in excess of that which ordinarily is involved in the offense.”⁷⁰

3. Discouraged

Those factors that are “not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range” are discouraged factors.⁷¹ Examples of discouraged factors include age;⁷² education and vocational skills;⁷³ mental and emotional conditions;⁷⁴ physical condition;⁷⁵ employment record;⁷⁶ community and family ties and responsibilities;⁷⁷ and military, civic, charitable or public service record.⁷⁸ The Commission discourages, but does not absolutely forbid, the use of these factors when considering a departure.⁷⁹ Though the Guidelines do not provide for adjustments based upon these factors, the factors do not automatically take a case outside of the heartland.⁸⁰ Such factors could remove a

⁶³Koon v. United States, 518 U.S. 81, 94 (1996) (quoting USSG § 5K2.0).

⁶⁴See USSG § 5K2.10.

⁶⁵See USSG § 5K2.11.

⁶⁶See USSG § 5K2.12.

⁶⁷See USSG § 5K2.13.

⁶⁸Rivera, 994 F.2d at 948.

⁶⁹See Koon, 518 U.S. at 95.

⁷⁰USSG § 5K2.0 (Policy Statement).

⁷¹USSG Ch. 5, Pt. H, Introductory Commentary.

⁷²See USSG § 5H1.1.

⁷³See USSG § 5H1.2.

⁷⁴See USSG § 5H1.3.

⁷⁵See USSG § 5H1.4.

⁷⁶See USSG § 5H1.5.

⁷⁷See USSG § 5H1.6.

⁷⁸See USSG § 5H1.11.

⁷⁹See United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993).

⁸⁰See *id.*

case from the heartland only if they are “present in a manner that is unusual or special, rather than ordinary.”⁸¹ In order for a discouraged factor to result in a departure, the sentencing judge must determine that it is present in unusual kind or degree.⁸²

4. Unmentioned (non-enumerated)

If the Guidelines are silent regarding a factor, i.e. the factor is not a forbidden, encouraged or discouraged factor, the courts may analyze the factor when considering a departure. “If a factor is unmentioned in the Guidelines, the court must, after considering the ‘structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,’ decide whether it is sufficient to take the case out of the Guidelines heartland.”⁸³ If it is decided that a departure is appropriate, the authority for the departure is USSG § 5K2.0, the catch-all provision.

B. Non-enumerated Departures under § 5K2.0

1. § 5K2.0

a. Unlimited Possibilities

The Sentencing Reform Act did not eliminate all of the district court’s traditional sentencing discretion because the Commission formulated each guideline to apply to a “heartland of typical cases.”⁸⁴ USSG § 5K2.0 is a catch-all provision that allows for the independent exercise of judicial discretion by means of departures due to grounds that are not discussed within the Guidelines.⁸⁵ In fact, this section provides sentencing judges with “significant opportunity . . . to depart from the Guidelines in a number of different scenarios.”⁸⁶

The Guidelines “do not purport to—nor can they—take into account all factors that do and should affect sentencing.”⁸⁷ The Sentencing Guidelines include a catch-all departure provision because Congress and the Sentencing Commission realized that the Guidelines could not address every possible scenario. The guideline reads, “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.”⁸⁸ This lack of consideration is positive because “[a] sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent

⁸¹*Id.*

⁸²*See id.* Discouraged factors should only be relied upon for departure “in exceptional cases.” USSG ch. 5, pt. H, Introductory Commentary.

⁸³*Koon v. United States*, 518 U.S. 81, 96 (1996).

⁸⁴*Wright*, *supra* note 8, at 1; *see also Koon*, 518 U.S. at 92.

⁸⁵*See Farabee*, *supra* note 8, at 569.

⁸⁶*Id.*

⁸⁷*Saris*, *supra* note 3, at 1030-31.

⁸⁸USSG § 5K2.0.

effect.”⁸⁹ “A rigid, mechanized application which straightjackets a sentencing court should be avoided.”⁹⁰

The Guidelines not only instruct that it cannot completely list all grounds that may be relevant to a particular offense and its offender, but it also provides that the Commission did not intend to limit the factors that may constitute grounds for departure.⁹¹ Other than the grounds that are forbidden, the Guidelines “place essentially no limit on the number or potential factors that may warrant departure.”⁹² In fact, Congress stated explicitly in 18 U.S.C. § 3661 that “the court cannot be limited in the information that it may review and consider concerning the background, character, and conduct of a defendant awaiting sentencing.”⁹³

b. Extraordinary factors

The Commission amended § 5K2.0 two different times in order to provide enough flexibility in the Guidelines to allow justice to be done in individual circumstances. One amendment added a paragraph explaining that discouraged factors, though not ordinarily relevant to a departure consideration, were not categorically prohibited from consideration.⁹⁴ These factors may warrant departure when they are present to an extraordinary degree.

The Sentencing Reform Act and 18 U.S.C. § 3553(b) were amended by the Sentencing Act of 1987, which added the words “of a kind or to a degree” after its general description of when a departure is in order.⁹⁵ The Commission soon added the phrase to § 5K2.0 as well. This phrase was inserted so that practitioners would understand that factors that have been considered by the Commission may constitute adequate grounds for departure under the proper circumstance. The ‘degree’ factor is essentially triggered in situations where it is apparent that the Commission did adequately consider a given factor as a type or kind, but that factor is present in a

⁸⁹Houser, *supra* note 4, at 366.

⁹⁰*Id.* at 367.

⁹¹*See* 1998 USSG Ch. 1, Pt. A., intro. comment 4(b).

⁹²*Id.*; *see also* Racz, *supra* note 5, at 1464 (stating that “the range of grounds for departure is nearly limitless”).

⁹³Tony Garoppolo, *Downward Departures Under the Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 291, 291 (1990). The Commission similarly stated, “In determining the sentence to impose within the guideline range, or whether a departure from the Guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” USSG § 1B1.4.

⁹⁴*See* USSG § 5K2.0.

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.

Id.

⁹⁵*See* Garoppolo, *supra* note 93, at 295.

particular case to an extreme degree that could not have been adequately contemplated by the Commission.⁹⁶ The amendment was designed to “make clear what [was] already implicit in current law.”⁹⁷

c. Combinations

Although a “single mitigating factor may not warrant a downward departure,”⁹⁸ the Guidelines allow for departure when a combination of factors that may not be sufficient in isolation exist in such a way that a case is atypical, thus falling outside of the Guideline’s heartland.⁹⁹ “The factors in any particular case do not exist in isolation. The totality of the individual circumstances may well converge to create the unusual circumstances not contemplated by the Commission.”¹⁰⁰

This allowance was not always included in § 5K2.0. Congress amended the section in order to broaden its scope and to increase the number of departures in the future. The pre-amendment Guidelines were not allowing judge’s sufficient discretion to do justice.

2. Koon v. United States

After the creation of the Sentencing Guidelines, judges thought that departures were unfavored due to the Guidelines’ purpose of eliminating disparity that resulted from overabundant judicial discretion.¹⁰¹ However, the Supreme Court decision in *Koon v. United States* changed the way judicial discretion in relation to sentencing is viewed.¹⁰² *Koon* not only affirmed the role of departures,¹⁰³ but it broadened judicial discretion to individualize punishment under the Guidelines.

⁹⁶*Id.*

⁹⁷Michael S. Gelacak, et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 328 (1996).

⁹⁸Alan Ellis, *Baker’s Dozen: Tips for the Experienced Advocate*, 11 CRIM. JUST. 34, 35 (1997).

⁹⁹See USSG § 5K2.0, comment (“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 circumstances will be extremely rare.”).

¹⁰⁰See, e.g., *United States v. Simpson*, 7 F.3d 813, 820 (8th Cir. 1993).

¹⁰¹See Saris, *supra* note 3, at 1040. Also, despite the broad latitude provided for departure under the Sentencing Reform Act, “many judges consider themselves bound by the Commission’s advice in the Part 5H policy statement that certain offender characteristics are ‘not ordinarily relevant’ to sentencing.” Houser, *supra* note 4, at 367.

¹⁰²But see Johnson, *supra* note 5, at 1746 for the proposition that “because one could interpret *Koon*’s abuse of discretion standard to encompass much of the pre-*Koon* appellate review, it may effect little change (and therefore impose little damage).” Johnson also maintains that “the vast majority of guidelines are unlikely to be affected by *Koon*.” *Id*; see also Stith & Cabranes, *supra* note 2, at 14, for the argument that “a thorough and candid assessment of *Koon* requires the conclusion that it has not changed matters significantly, and perhaps not at all.” Stith and Cabranes also comment that “despite *Koon*’s expansive dicta regarding the scope of sentencing court discretion, federal appellate courts have not generally

In *Koon*, the Court basically did four things. First, the Court determined that the appropriate standard of review for departure appeals was abuse of discretion.¹⁰⁴ Second, the Court explained that the Guidelines preserved the traditional discretion of sentencing judges to reach a just sentence in each case.¹⁰⁵ Third, it maintained that authority should primarily rest with district court judges regarding departures because, as a group, they have more experience with Guidelines cases than appellate court judges.¹⁰⁶ Finally, the Court adopted the “heartland” concept.¹⁰⁷

When the Supreme Court adopted the abuse of discretion standard of review for sentencing determinations under the Sentencing Guidelines it “changed materially the level of deference owed to such decisions.”¹⁰⁸ The Court reasoned that under the old law, sentencing decisions were not reviewable on appeal.¹⁰⁹ Though it recognized that Congress altered this scheme when it adopted the Sentencing Reform Act, the Court reiterated that this appellate review was a limited review.¹¹⁰ Congress’ intention not to give appellate courts “wide-ranging authority over district court sentencing decisions”¹¹¹ is demonstrated by its admonition to “give due deference to the district court’s application of the guidelines to the facts.”¹¹² The Court argued, “The development of the guidelines sentencing regime has not changed our view that, except to the extent specifically directed by statute, ‘it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.’”¹¹³

The Court also explained that an abuse of discretion standard is in order because the Guidelines did not intend to strip sentencing judges of their traditional

recognized the decision as granting sentencing judges greater departure authority than had existed.” *Id.*; see also Paul J. Hofer, et al., *Departure Rates and Reasons After Koon v. U.S.*, 9 FED. SENT. REP. 284 (1997). Hofer explains that the “data from the first nine months of *Koon* has not reflected significant changes in the rates of departure and the reasons for departure. See Francesca D. Bowman, *Has Koon Undermined the Guidelines*, 9 FED. SENT. 32 (1996) (for the proposition that “[a]lthough it is too soon to discern a long-term effect, it does not appear that the *Koon* decision is undermining the guidelines at this point”).

¹⁰³ See Racz, *supra* note 5, at 1464.

¹⁰⁴ See *Koon v. United States*, 518 U.S. 81, 91 (1996).

¹⁰⁵ See *id.* at 97.

¹⁰⁶ See *id.* at 99.

¹⁰⁷ See *id.* at 93-94.

¹⁰⁸ Johnson, *supra* note 5, at 1724. Abuse of discretion is a dramatically more deferential review than the previous approach in which departure decisions were strictly reviewed; see also Francesca Bowman, *supra* note 102, at 32 (discussing the fear that an abuse of discretion standard would cause a return to a highly discretionary, largely unreviewed sentencing practice).

¹⁰⁹ See *Koon*, 518 U.S. at 96.

¹¹⁰ See *id.*

¹¹¹ *Id.* at 82.

¹¹² *Id.* (quoting 18 U.S.C. § 3742(e)(4)).

¹¹³ *Id.* at 97 (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)).

discretion,¹¹⁴ but rather, Congress manifested an “intent that district courts retain much of their traditional sentencing discretion.”¹¹⁵ It viewed the Guidelines system as “minimally disruptive of the individual sentencing judge’s traditional prerogatives” and that judges retain “substantial latitude to depart.”¹¹⁶ Today, a district judge’s departure decision “embodies the traditional exercise of discretion by a sentencing court.”¹¹⁷ This traditional exercise of discretion historically has been very broad.¹¹⁸

The district courts’ place in the scheme of things also supports an abuse of discretion standard of review according to the Supreme Court. District courts are “better suited than appellate courts” to decide whether a departure is warranted in a particular situation.¹¹⁹ This “institutional advantage over appellate courts” results from the fact that district courts “see so many more Guidelines cases than appellate courts do.”¹²⁰ Also, district courts have an advantage over appellate courts in that they may decide whether a departure should be granted by comparing a particular case with the facts of other Guidelines cases that they have seen.¹²¹ In this sense, district court judges utilize their “day-to-day experience in criminal sentencing”

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶Johnson, *supra* note 5, at 1724.

¹¹⁷*Koon*, 518 U.S. at 98; *see also* Frank Bowman, *supra* note 8, at 19. Bowman refers to this conclusion as “pure banana oil” because the traditional sentencing discretion of district courts was virtually unlimited prior to the Guidelines. *Id.* He argued, “The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by courts of appeal.” *Id.* He points out:

[T]o suggest, as the Court plainly does in *Koon*, that a decision to depart from the sentencing range prescribed by the guidelines is discretionary in the same way that all sentencing before the guidelines was discretionary, or in the same way that imposition of a sentence within the guideline range is now discretionary, is to disembowel the guidelines at a stroke. If discretion to depart were in truth a remnant of “traditional sentencing discretion” preserved to sentencing judges by the SRA, then the guidelines would be advisory rather than mandatory.

Id.

¹¹⁸*See supra* note 14 and accompanying text.

¹¹⁹Frank Bowman, *supra* note 8, at 19; *see also Koon*, 518 U.S. at 99 (maintaining that district courts have a “special competence—about the ‘ordinariness’ or ‘unusualness’ of a particular case . . .”).

¹²⁰*Koon*, 518 U.S. at 98.

¹²¹*See id.*

when deciding whether to grant a departure,¹²² and this factor should not be overridden by a less experienced appellate court.¹²³

The Court also explicitly recognized the importance of the “heartland” concept to sentencing under the Guidelines. It explained that the Commission “formulated each guideline to apply to a heartland of typical cases.”¹²⁴ The heartland embodies conduct that each guideline describes,¹²⁵ and if the conduct in a particular case falls outside this set of average conduct, then a departure may be warranted because the case is atypical.¹²⁶ In relation to this concept, the Court adopted the paradigm in which departures should be reviewed to determine whether the potential departure factor is forbidden, encouraged, discouraged, or unmentioned by the Guidelines.¹²⁷

¹²²*Id.* But see Johnson, *supra* note 5, at 1731 (for the argument that “it is precisely the perspective provided by the appellate courts’ distance from individual cases that enables them to provide principled guidance and promote greater consistency among individual sentencing judges”).

¹²³But see Frank Bowman, *supra* note 8, at 19. Bowman claims that district court judges are not more experienced than appellate court judges regarding Guidelines cases. He argues:

First, there are roughly five district court judges for every judge on a court of appeals. Assume for the sake of illustration that in 1994 each district court judge handled twenty guidelines cases. If so, there would be 100 guidelines cases sentenced at the district court level for every appellate judge. If the figure cited by the Supreme Court for percentage of guidelines cases appealed in 1994 (6.1%) were correct, there would be roughly six guidelines appeals per sitting appellate judge. But because three judges sit on each appellate panel, each appellate judge would hear eighteen guidelines appeals per year. In short, even if the appellate statistics used by the Court were accurate, they would prove that district and appellate court judges see roughly the same number of guidelines cases

[However,] [t]here are strong indications that the Commission is dramatically underreporting the number of criminal appeals involving sentencing issues [I]f we apply what appears to be more accurate appellate data to our illustrative case, we see that if there are 100 guidelines cases sentenced at the district court level for every appellate judge, somewhere between 10 % and 20% of that number, or 10 to 20 actual cases, will reach the court of appeals. Because each appellate case requires three judges, every appellate judge will hear thirty to sixty guidelines cases, as compared to the twenty heard by each district court judge. In short, it appears that each appellate court judge hears not fewer, but between 50% and 200% more guidelines cases than does each district court judge. Consequently, the empirical premise on which the Supreme Court bases its argument for the superior competence of district court judges to determine the “usualness” of a guidelines case collapses.

Id.

¹²⁴*Koon*, 518 U.S. at 95.

¹²⁵*See id.* at 93.

¹²⁶*See id.* at 94.

¹²⁷*See id.* at 93-96.

3. Analysis

“The most widely recognized avenue of flexibility under the guidelines is the sentencing judge’s ability to depart from the prescribed sentencing range.”¹²⁸ Due to the unlimited grounds that could possibly warrant departure, a world of possibilities are open to defendants and their attorneys when arguing in favor of departures from the Guidelines’ mandated sentence. Departures under § 5K2.0 provide the “‘fine-tuning’ for the Guidelines so that different defendants are treated differently based on offender characteristics.”¹²⁹

Though some judges’ reluctance to depart is understandable, it is misplaced. *Koon v. United States* appears to be the “most important development in the area of departures since the implementation of the sentencing guidelines.”¹³⁰ The case “altered the ground rules for downward departure giving defense lawyers and judges more latitude.”¹³¹ The Supreme Court made it clear that it wanted “district courts to have more discretion to depart from the otherwise applicable guideline.”¹³² *Koon* appears to issue a “license to depart” to sentencing judges,¹³³ and “[w]ith this green light . . . district courts [may] depart[] more often from the stated guidelines range where a judge believes that permissible considerations are present.”¹³⁴ In fact, judges should utilize *Koon* as a basis for becoming “departure-happy”¹³⁵ compared to their prior restraint under the Guidelines. For those courts that “have taken to heart the language emphasizing sentencing judge discretion,”¹³⁶ *Koon* can be interpreted to “permit both sentencing judges and appellate courts to consider fundamental issues of culpability and just punishment in deciding whether there should be a departure from the Guidelines.”¹³⁷ *Koon* signifies a return to individualization in sentencing and the rise of true justice under the Guidelines.¹³⁸

¹²⁸Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, FED. PROBATION, Dec. 1991, at 10.

¹²⁹Saris, *supra* note 3, at 1043.

¹³⁰Hofer, *supra* note 102, at 284.

¹³¹Ellis, *supra* note 98, at 35.

¹³²Frank Bowman, *supra* note 8, at 19.

¹³³Francesca Bowman, *supra* note 102, at 32.

¹³⁴Saris, *supra* note 3, at 1041.

¹³⁵Francesca Bowman, *supra* note 102, at 32.

¹³⁶Johnson, *supra* note 5, at 1747.

¹³⁷Stith & Cabranes, *supra* note 2, at 1277.

¹³⁸See Frank Bowman, *supra* note 8, at 19.

“The hopeful view of *Koon* is that sentencing judges will expand their use of the departure power enough to ameliorate some of the harsher guidelines outcomes, but will move with sufficient restraint that they will neither imperil the guidelines structure in fact, nor be perceived as doing so by Congress, the bar, or the public.”

Id. But *c.f.*, Francesca Bowman, *supra* note 102, at 32 for the proposition that the courts resolved the problems regarding the Guidelines lack of individualization prior to *Koon*, thus making the decision superfluous to sentencing law.

The Supreme Court's approval of departures is demonstrated by its adoption of the abuse of discretion standard of appellate review. Despite the claims of naysayers who say that *Koon* did not change the standard,¹³⁹ abuse of discretion is a lesser standard than the close scrutiny that appellate courts used prior to *Koon*. Indeed, abuse of discretion is "the most deferential standard of review available with the exception of no review at all."¹⁴⁰

Furthermore, abuse of discretion is the standard of review that most fulfills the purposes of the Guidelines. In the Sentencing Reform Act, Congress stated that appellate courts "shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts."¹⁴¹ This demonstrates that the legislature knew how to designate a specific standard of review when they intended it to be utilized.

It is this "due deference" wording that caused the conflict regarding the proper standard of review intended by Congress. However, the "legislative history of the original version of § 3742 leaves the unmistakable impression that Congress did not want the appellate courts to use de novo review."¹⁴² Congress stated:

Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed The sentencing provisions of [the Act] are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court. At the same time, they are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing.¹⁴³

Based upon this discussion, "due deference" cannot be viewed as authorizing de novo review.¹⁴⁴

Koon may come too late in the evolution of sentencing guidelines. During the nine years that the system has been straining to find ways to compensate for the unfairness in mandatory minimum penalties and some of the harsh outcomes of relevant conduct, the system seems more or less to have found its own answers through the mitigating aspects of plea agreements and substantial assistance motions.

Id.

¹³⁹See *supra* note 102 and accompanying discussion.

¹⁴⁰Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 SAN DIEGO L. REV. 469, 480 (1988). "These [appellate review] standards occupy a continuum of degrees of deference, ranging from no review at all, through such deferential standards as review for abuse of discretion and review for clear error, to plenary, or de novo review." Johnson, *supra* note 5, at 1706.

¹⁴¹18 U.S.C. § 3742(e) (1999).

¹⁴²Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 636 (1992).

¹⁴³*Id.*

¹⁴⁴*Id.*

Abuse of discretion is the standard of review that best fulfills the intent of Congress. The “due deference” language discloses that “the guidelines do not divest the district courts of all sentencing discretion; they merely guide and control the exercise of that discretion within a framework designed to eliminate unwarranted sentencing disparity.”¹⁴⁵ Appellate courts would possess sufficient control over district court decisions to ensure compliance with the guidelines.

Implicit in the concept of abuse of discretion is that the appellate court defers to the district court’s judgment but does not hesitate to step in if that judgment was exercised wrongly. The key to abuse-of-discretion review is that it does not permit the appellate court simply to substitute its judgment for that of the district court.¹⁴⁶

Limited review is all that is necessary to avoid the problems that were experienced prior to the guidelines, when no review for sentencing decisions existed.

Consequently, if the Commission was distressed by the Supreme Court’s adoption of the abuse of discretion standard, it could have addressed the issue.

Congress created the Sentencing Commission as a permanent body, charged not merely with developing an initial set of sentencing guidelines, but also with monitoring and evaluating those guidelines on an ongoing basis. Thus the Commission is required to review the guidelines periodically and empowered to submit proposed amendments to the guidelines to Congress.¹⁴⁷

“The Guidelines’ sentencing ranges are a compendium of actual practice and are subject to periodic revision” based upon the Commission’s monitoring of courts and their departures.¹⁴⁸ “The idea behind fine-tuning [of the Guidelines], of course, is that the twelve federal appellate courts can do an excellent job of discovering technical problems, minor inconsistencies, and other glitches in the drafting and structure of the guidelines that the Commission may have overlooked.”¹⁴⁹ The Commission hopes to “learn from the courts’ reaction to its rules in order to improve sentencing procedures” and to “specify more precisely when departures should and should not be permitted.”¹⁵⁰

“The congressional statement accompanying the 1988 amendment noted that it would be “inappropriate” for an appellate court to apply de novo review even to subjective determinations of the district court, such as whether a particular victim was “unusually vulnerable” within the meaning of U.S.S.G. § 3A1.1. The statement also indicated that “purely legal” determinations should be reviewed “more closely” under the deference standard, but it did not expressly approve of de novo review.”

Id. at 637 n.58.

¹⁴⁵*Id.* at 636.

¹⁴⁶*Id.* at 637.

¹⁴⁷Becker, *supra* note 128, at 10.

¹⁴⁸Bornstein, *supra* note 19, at 146.

¹⁴⁹Zipperstein, *supra* note 142, at 628.

¹⁵⁰Bornstein, *supra* note 19, at 146.

A few examples exist which reveal that the Commission is in fact watching the courts' sentencing decisions and responding when it feels that a response is necessary. For example, when the Second Circuit reversed downward departures in two cases involving the receipt of child pornography,¹⁵¹ it did so and reluctantly noted that the defendants "were not a risk to the community, were only 'passive' participants in the offense who desired rehabilitation, and that the Bureau of Prisons lacked treatment programs."¹⁵² The Commission considered and responded to these comments by transmitting a recommended amendment to Congress which "reduced the sentence recommended under the guidelines for mere receipt or possession of child pornography."¹⁵³ In this way, the Commission informed the legal world not only that it was doing its job, but that it considers suggestions from the courts.

When the Second Circuit departed downward based upon a defendant's youthful appearance and admitted bisexuality, which made him particularly vulnerable to victimization in prison,¹⁵⁴ the Commission again responded. The Commission gave voice to its disagreement over this matter by modifying § 5H1.4. It provided that "appearance, including physique, is not ordinarily relevant in determining whether a sentence outside the guidelines is justified."¹⁵⁵ Again, the Commission displayed its conviction to fulfill its statutory duty by addressing troublesome issues and by clarifying guidelines when necessary.

If the Commission did not agree with the *Koon* Court's declaration that the standard of review for departure decisions is abuse of discretion, it could have amended the Sentencing Guidelines to make this clear. This is particularly important in light of the fact that "[t]he standard for departure is vital to the proper functioning of the guidelines system."¹⁵⁶ The Commission has not so altered the Guidelines; in fact, it seems to have done just the opposite. The Commentary of § 5K2.0 was extended to include a discussion of *Koon*, which recognizes that the Court decided the case on an abuse of discretion standard. The Commission does not present a new or unusual definition for this standard during this discussion; thus, the term must be given its traditional meaning.

More evidence exists which demonstrates that *Koon* has altered the way the courts do business regarding departures. For example, the decision "may have changed the rule that disparity among co-defendants is not a basis for departure."¹⁵⁷ Traditionally, the circuits ruled that disparity was not a basis for departure.¹⁵⁸

¹⁵¹See *United States v. Studley*, 907 F.2d 254 (2d Cir. 1990) and *United States v. Deane*, 914 F.2d 11 (2d Cir. 1990).

¹⁵²Becker, *supra* note 128, at 12.

¹⁵³*Id.*

¹⁵⁴See *United States v. Lara*, 905 F.2d 599, 603-04 (2d Cir. 1990).

¹⁵⁵Becker, *supra* note 128, at 12.

¹⁵⁶Gelacak, *supra* note 97, at 330.

¹⁵⁷ROGER W. HAINES, JR., ET AL., *FEDERAL SENTENCING GUIDELINES HANDBOOK* 789 (1998).

¹⁵⁸See *United States v. Torres*, 960 F.2d 226 (1st Cir. 1992); *United States v. Butt*, 955 F.2d 77 (1st Cir. 1992); *United States v. Wogan*, 938 F.2d 1446 (1st Cir. 1991); *United States v. Arjoon*, 964 F.2d 167 (2d Cir. 1992); *United States v. Minicone*, 960 F.2d 1099 (2d Cir.

However, the Court indicated that the traditional view may no longer be the law when it summarily vacated and remanded a Seventh Circuit case, *Meza v. United States*,¹⁵⁹ that applied the traditional view.

Another example of the manner in which *Koon* changed the departure landscape is displayed in *United States v. Jones*.¹⁶⁰ Because “the fact-based assessment of whether [a defendant’s] post-offense rehabilitation efforts are exceptional falls within the realm of the district court’s ‘special competence,’”¹⁶¹ “cases barring departures for post-offense rehabilitation have been effectively overruled by *Koon*.”¹⁶² The *Jones* court also concluded, in regard to aberrant behavior departures, that “[t]he district court is in the best position to determine whether the crime is out of character for that individual.”¹⁶³

C. Successful Considerations when Choosing Grounds for Departure

1. Rehabilitation

After *Koon*, it appears that the Supreme Court encourages an approach to sentencing that “assumes a willingness to allow socially determined circumstances to mitigate culpability.”¹⁶⁴ “Courts that take into account the background and the likelihood of the defendant to rehabilitate support their sentencing departures by invoking Congressional intent as derived from the Comprehensive Crime Control

1992); *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991); *United States v. Schular*, 907 F.2d 294 (2d Cir. 1990); *United States v. Higgins*, 967 F.2d 841 (3d Cir. 1992); *United States v. Ellis*, 975 F.2d 1061 (4th Cir. 1992); *United States v. McKenley*, 895 F.2d 184 (4th Cir. 1990); *United States v. Ives*, 984 F.2d 649 (5th Cir. 1993); *United States v. Goldfaden*, 959 F.2d 1324 (5th Cir. 1992); *United States v. Boyd*, 885 F.2d 246 (5th Cir. 1989); *United States v. Rutana*, 932 F.2d 1155 (6th Cir. 1991); *United States v. Parker*, 912 F.2d 156 (6th Cir. 1990); *United States v. Edwards*, 945 F.2d 1387 (7th Cir. 1991); *United States v. Evans*, 924 F.2d 714 (7th Cir. 1991); *United States v. Cea*, 963 F.2d 1027 (7th Cir. 1992); *United States v. Davila*, 964 F.2d 778 (8th Cir. 1992); *United States v. Albers*, 961 F.2d 710 (8th Cir. 1992); *United States v. Torres*, 921 F.2d 196 (8th Cir. 1990); *United States v. Keene*, 915 F.2d 1164 (8th Cir. 1990); *United States v. Nejia*, 953 F.2d 461 (9th Cir. 1991); *United States v. Hoy*, 932 F.2d 1343 (9th Cir. 1991); *United States v. Carpenter*, 914 F.2d 1131 (9th Cir. 1990); *United States v. Youngpeter*, 986 F.2d 349 (10th Cir. 1993); *United States v. Jackson*, 950 F.2d 633 (10th Cir. 1991); *United States v. Cox*, 934 F.2d 1114 (10th Cir. 1991); *United States v. Trujillo*, 906 F.2d 1456 (10th Cir. 1990); *United States v. Hendrieth*, 922 F.2d 748 (11th Cir. 1991); *United States v. Williams*, 980 F.2d 1463 (D.C. Cir. 1992); *United States v. Broxton*, 926 F.2d 1180 (D.C. Cir. 1991)).

¹⁵⁹519 U.S. 990 (1996), *vacating* *United States v. Meza*, 76 F.3d 117 (7th Cir. 1996) (remanded for reconsideration in light of *Koon v. United States*, 518 U.S. 81 (1996)).

¹⁶⁰158 F.3d 492 (10th Cir. 1998).

¹⁶¹*Id.*

¹⁶²HAINES, JR., *supra* note 157, at Supplement vol. 9, No. 12, at 11.

¹⁶³*Jones*, 158 F.3d at 500.

¹⁶⁴Bornstein, *supra* note 19, at 157. Despite the broad discretion encouraged in *Koon*, one district court judge maintains that “appellate and district judges applying the Guidelines may have failed to recognize warranted disparity.” Saris, *supra* note 3, at 1029.

Act and its legislative history.”¹⁶⁵ The consideration of rehabilitation does not violate congressional policy in regards to sentencing “because Congress [itself] directed courts to consider all four goals of punishment in order to provide individualized sentences.”¹⁶⁶ Congress also instructed that no one goal was superior to the others,¹⁶⁷ and this should be reflected in sentencing policy. However, due to their nature, the Guidelines fail “to achieve a proper balance of the four theories of punishment, favoring retribution and general deterrence, and relegating rehabilitative efforts to those convicted of only the least severe crimes.”¹⁶⁸ Departures are a means of evening the balance between uniformity and individuality.¹⁶⁹

2. Third Party Harm

The first question to ask when considering a possible departure factor is “who benefits.”¹⁷⁰ Whether third parties would benefit from a defendant’s conduct¹⁷¹ or from a departure seems to affect judges significantly when deciding whether or not a factor is worthy of departure.¹⁷² “[C]ollateral or related circumstances may properly give substance to the ultimate basis for departure.”¹⁷³ “[P]reventing harm to third

¹⁶⁵Bornstein, *supra* note 19, at 158.

The purpose of the legislation was not to eliminate the thoughtful imposition of individual sentences or for the guidelines to be imposed in a mechanistic fashion. The Committee believes that the sentencing judge has an obligation to consider all relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the Guidelines is to provide a structure for evaluating the fairness of a sentence for an individual offender.

Id. at 158 n.128; *see also* 28 U.S.C. § 991(b)(1)(A) (1988).

¹⁶⁶Bornstein, *supra* note 19, at 158. *See also* 28 U.S.C. § 3553(a)(2) (directing the courts to consider all four purposes of punishment in reaching a sentence).

¹⁶⁷S. Rep. No. 225, 98th Cong., 1st Sess. 40 (1983). Congress directed, “In setting out the four purposes of sentencing the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants.” *Id.* at 77.

¹⁶⁸Bornstein, *supra* note 19, at 160; *see also* Rebello, *supra* note 19, at 1059 (“The Commission appears to have focused on the goal of uniformity.”).

¹⁶⁹*See* Houser, *supra* note 4, at 362. “The guidelines further an essential need of the Anglo-American criminal justice system—to balance the desirability of a high degree of uniformity against the necessity for the exercise of discretion. *Id.* “Congress concluded that the Guidelines would reduce sentence disparities yet retain the flexibility needed to adjust for unanticipated factors arising in particular cases.” *Id.* at 363.

¹⁷⁰Racz, *supra* note 5, at 1479.

¹⁷¹*See* United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992) (defendant not only paid extraordinary restitution to the bank from which he embezzled, but he explained to bank officials how they could detect improper transactions in the future).

¹⁷²There is a “trend of looking to collateral circumstances to gauge a factor’s quantitative weight.” Selya & Kipp, *supra* note 25, at 34.

parties and reducing costs to society already seem to be the driving forces behind departures in actual . . . cases.”¹⁷⁴

In fact, many departures have been granted because someone other than the defendant would be negatively impacted by the defendant’s imprisonment.¹⁷⁵ For example, departures were granted due to family circumstances,¹⁷⁶ collateral business effects where employees would become unemployed due to the defendant’s possible incarceration,¹⁷⁷ facilitation of the administration of justice,¹⁷⁸ community service,¹⁷⁹ and post-offense or sentence rehabilitation.¹⁸⁰ In regard to the family circumstances

¹⁷³*Id.* at 36. See also *Racz, supra* note 5, at 1486 n.146 (“[T]hird parties effects [are] effects that the Guidelines explicitly use to ground departures. For example, the Guidelines permit departures when the defendant’s actions lead to certain third party effects such as death, extraordinary property damage or extreme physical or psychological injury.”) *Id.*

¹⁷⁴*Racz, supra* note 5, at 1488.

¹⁷⁵See *Johnson v. United States*, 964 F.2d 124, 129-30 (2d Cir. 1992) (the departure was not granted on behalf of the defendant, but on behalf of her family who depended on her).

¹⁷⁶See *United States v. Gaskill*, 991 F.2d 82 (3d Cir. 1993) (defendant was solely responsible for the care of his mentally ill wife); *United States v. Haversat*, 22 F.3d 790 (8th Cir. 1994) (the wife’s psychiatric problems were potentially life threatening and defendant was an “irreplaceable” part of her treatment); *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (defendant was a single mother who served as the sole support for her three small children under the age of six, her institutionalized daughter’s 6 year-old child, and her 17 year old son); *United States v. Sclamo*, 997 F.2d 970 (1st Cir. 1993) (the 12 year old son of the woman defendant had been living with suffered various psychological problems as a result of his abusive father; the boy’s psychologists believed that defendant’s relationship with the boy was important to his progress and removing defendant could trigger a major regression); *United States v. Handy*, 752 F. Supp. 561 (E.D.N.Y. 1990) (single mother of three teenage children supported them without public assistance, and an exceptionally promising future of the older two children would be threatened by the prolonged incarceration of their mother); *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991) (single mother of an infant also supported her older daughter who is also a single mother of an infant); *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991) (defendant’s imprisonment would destroy a strong family unit that consisted of the defendant, his wife, his two daughters, father and paternal grandmother; defendant maintained two jobs to take care of his family, and his father relied on the defendant for assistance in getting in and out of his wheelchair).

¹⁷⁷See *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996) (judge found that 12 full-time employees would lose their jobs if the defendant was sentenced to prison); *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995) (judge held that up to 200 employees would lose their jobs if the defendant was sentenced to prison).

¹⁷⁸See *United States v. Garcia*, 926 F.2d 125 (2d Cir. 1991) (defendant broke a “log jam” in the courts by pleading guilty); *United States v. Stoffberg*, 782 F. Supp. 17 (E.D.N.Y. 1992) (defendant provided substantial assistance in a congressional investigation).

¹⁷⁹See *United States v. Turner*, 915 F.2d 1574 (6th Cir. 1990) (due to defendant’s exemplary community service a departure was granted in order to not deprive the community of the defendant’s service).

¹⁸⁰At the resentencing hearing for Bernard Bradstreet, Judge Stearns stated, “I also think it significant that unlike the inmates in the cases I have cited, whose rehabilitative efforts were focused on their own self-improvement, Mr. Bradstreet’s efforts have been directed, in large, to others as well.” 13 *Crim. Prac. Rep.* (BNA) 30, 36 (Jan. 27, 1999) (quoting *Tr. of Bradstreet Resent. Hr’g* on 12/9/98).

departure, the unique circumstance must concern more than a single parent household.¹⁸¹

When deciding whether to depart due to collateral consequences, the court should be encouraged to weigh the effects of the defendant's actions and those of the prescribed sentence.¹⁸² Departure may be in order "when the effects of the defendant's actions are ordinary and the effects of the defendant's sentence are extraordinary."¹⁸³ Under these circumstances, the judge could argue that the defendant's incarceration is not more important than "preventing the extreme harm that will come to [the third party] from the loss of the defendant's emotional, physical, and economic support."¹⁸⁴

3. Voluntary Conduct

Another factor which courts seem to take into consideration when determining whether a departure is in order is the voluntary conduct of a defendant. This conduct spans a broad range of behavior, including a defendant's voluntary return after escaping from prison,¹⁸⁵ disclosure of identity,¹⁸⁶ surrender to officials after failing to report for service of sentence,¹⁸⁷ extraordinary cooperation by revealing to the police other undiscovered crimes,¹⁸⁸ substantial assistance to the authorities despite the absence of a State motion requesting a departure,¹⁸⁹ and voluntary restitution.¹⁹⁰

All of these conducts significantly ease the burden on governmental organizations by reducing their work load. Courts seem to be of the opinion that such conduct should be "rewarded" with a downward departure because "28 U.S.C. § 994(n) explicitly directed the Commission to assure that the guidelines reflect the general appropriateness of lesser sentences for defendants who substantially assist the prosecution."¹⁹¹

¹⁸¹See Selya & Kipp, *supra* note 25, at 34.

¹⁸²See Racz, *supra* note 5, at 1486 indicating that there are three questions that the courts should ask in these circumstances: "(1) What are the effects of the defendant's actions? (2) What are the effects of the prescribed sentence? (3) How do these effects compare?" *Id.*

¹⁸³*Id.*

¹⁸⁴*Id.* at 1488.

¹⁸⁵See *United States v. Weaver*, 920 F.3d 1570 (11th Cir. 1991).

¹⁸⁶See *United States v. Evans*, 49 F.3d 109 (3d Cir. 1995).

¹⁸⁷See *United States v. Crumb*, 902 F.2d 1337 (8th Cir. 1990).

¹⁸⁸See *United States v. DeMonte*, 25 F.3d 343 (6th Cir. 1994).

¹⁸⁹See *United States v. Kay*, 140 F.3d 86 (2d Cir. 1998); *United States v. LaGuardia*, 902 F.2d 1010 (1st Cir. 1990); *United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993); *United States v. Paden*, 908 F.2d 1229 (5th Cir. 1990); *In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")*, 149 F.3d 1198 (D.C. Cir. 1998).

¹⁹⁰See *United States v. Broderson*, 67 F.3d 452 (2d Cir. 1995); *United States v. Lieberman*, 971 F.2d 989 (3d Cir. 1992); *United States v. Garlich*, 951 F.2d 161 (8th Cir. 1991).

¹⁹¹*In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")*, 149 F.3d 1198 (D.C. Cir. 1998).

However, this reduced burden is not the only reason that courts have granted departures based upon voluntary conduct. Such voluntariness represents an acceptance of responsibility by the defendant that is not adequately considered by the Sentencing Guidelines.¹⁹² Just because the conduct may not fall within the heartland of the guideline does not necessarily mean that the defendant's conduct does not warrant departure. Section 994 does not require a motion by the government requesting a departure in order for the court to consider a defendant's acceptance of responsibility, the Commission added that requirement in the Substantial Assistance Guideline.

4. Unfairness Resulting from Government Conduct

Courts also seem to grant departures in order to alleviate any unfairness that may result from the conduct of government actors such as prosecutors or officers. These departures mostly are not applied in order to punish the government for its questionable conduct, but rather to prevent that conduct from prejudicing the defendant.

Several types of government misconduct resulted in departures for defendants. Departures have been granted when a defendant's entrapment argument was not a perfect defense;¹⁹³ investigating officers partook in sentencing entrapment;¹⁹⁴ the government delayed in indicting the defendant;¹⁹⁵ the prosecution improperly manipulated the defendant's indictment;¹⁹⁶ the prosecutor prejudiced the defendant by communicating directly with a represented defendant regarding plea negotiations;¹⁹⁷ the prosecutor held an improper ex parte communication with the defendant and failed to notify defendant's counsel when soliciting the defendant's grand jury testimony;¹⁹⁸ and there was a delay in transferring an alien defendant to federal custody.¹⁹⁹

¹⁹²Conduct may not fall within § 3E1.1, the guideline allowing for a reduction for a defendant's acceptance of responsibility, for various reasons such as if the defendant puts the government to its burden of proof or if the defendant receives an enhancement under § 3C1.1, which results from obstructing or impeding the administration of justice.

¹⁹³*See* United States v. McClelland, 72 F.3d 717 (9th Cir. 1995); United States v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1991).

¹⁹⁴*See* United States v. Connell, 960 F.2d 191, 196 (1st Cir. 1992); United States v. Montoya, 62 F.3d 1 (1st Cir. 1995); United States v. Graham, 146 F.3d 6 (1st Cir. 1998); United States v. Barth, 990 F.2d 422, 424 (8th Cir. 1993); United States v. Stavig, 80 F.3d 1241 (8th Cir. 1996); United States v. Stauffer, 38 F.3d 1103 (9th Cir. 1994); United States v. Robinson, 94 F.3d 1325 (9th Cir. 1996); United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997); United States v. Lacey, 86 F.3d 956 (10th Cir. 1996); United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998).

¹⁹⁵*See* United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998); United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998).

¹⁹⁶*See* United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992).

¹⁹⁷*See* United States v. Lopez, 106 F.3d 309 (9th Cir. 1997).

¹⁹⁸*See* United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994).

¹⁹⁹*See* United States v. Montez-Gaviria, 163 F.3d 697 (2d Cir. 1998).

Also, an alcoholic defendant that binged during an unsupervised furlough and was unable to return to the prison on time because of a lack of funds was given a departure because the conduct was due to the “ill-advised decision” of the releasing prison official.²⁰⁰ Another defendant was granted a departure when the statutory maximum nullified the defendant’s acceptance of responsibility reduction.²⁰¹ When an investigating officer not only engaged in a reverse sting operation, but engaged in a sexual relation with the target, the court determined that a departure was in order despite the fact that such conduct on the government’s behalf did not equate to a complete defense of entrapment.²⁰² The Sixth Circuit also held that a court may consider a departure based upon the government’s improper investigative techniques which targeted and induced African-American parolees to commit crimes.²⁰³

Thus, if the government’s behavior has been questionable, prejudicial or harmful to the defendant’s case or person an argument can be made for a downward departure that should pass the “straight face test.” However, the harm to the defendant must be shown to be a function of the improper government conduct. If the circumstances do not pass the “but-for test” then a departure will not be granted.²⁰⁴

5. “Just Desserts”

The courts appear to be tailoring sentences according to the culpability of the defendants in order to give them their “just desserts,” but not more punishment than they have really earned. This culpability is examined regarding not only the conduct of the individual defendant, but in some cases the conduct of others individuals involved in the specific crimes is explored.

Several examples demonstrate that courts are using a “just desserts” philosophy when sentencing. Downward departures have been granted when the guidelines or the loss (harm) overstated the seriousness of the crime and the defendant’s criminality.²⁰⁵ When a victim suffered loss due to the defendant’s crime but other causes contributed to the loss, courts have seen fit to depart downward.²⁰⁶ A court has also granted a departure when a defendant’s criminal history category overstated the defendant’s criminality due to state sentencing disparity. The defendant had a

²⁰⁰See *United States v. Whitehorse*, 909 F.2d 316 (8th Cir. 1990).

²⁰¹See *United States v. Rodriguez*, 64 F.3d 638 (11th Cir. 1995).

²⁰²See *United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998). For more examples in which government conduct resulted in a downward departure, see Table One.

²⁰³See *United States v. Coleman*, 138 F.3d 616 (6th Cir. 1998).

²⁰⁴See *United States v. Parker*, 158 F.3d 1312 (1998) (departure was not granted on the basis of the overemployment of SWAT, despite the defendant’s significant injuries, because the defendant could not show that this factor was directly responsible for his injuries).

²⁰⁵See *United States v. Shattuck*, 961 F.2d 1012 (1st Cir. 1992); *United States v. Stuart*, 22 F.3d 76 (3d Cir. 1994); *United States v. Monaco*, 23 F.3d 793 (3d Cir. 1994); *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991); *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991); *United States v. Lara*, 47 F.3d 60 (2d Cir. 1994); *United States v. Bierley*, 922 F.2d 1061 (3d Cir. 1990).

²⁰⁶See *United States v. Gregorio*, 956 F.2d 341 (1st Cir. 1992); *United States v. Arutunoff*, 1 F.3d 1112 (10th Cir. 1993).

number of traffic offenses which the judge concluded resulted from the phenomenon of “driving while black.”²⁰⁷ Departures were authorized when a defendant’s conduct demonstrated that he intended to pay his taxes²⁰⁸ or displayed a lack of sophistication.²⁰⁹

Consideration of the individual defendant’s culpability is being examined more and more in relation to the conduct of other people involved in the crime. For example, a “mule,” or drug courier, was granted a departure because a person in his position is not as culpable as the other participants in a drug crime.²¹⁰ A departure was given to a defendant when the principle offender in the drug conspiracy was given a deal in exchange for his testimony against lesser members of the conspiracy because the court determined that the deal directly resulted in unacceptable prejudice to the defendant.²¹¹ Such sentencing disparity should be considered to be against the policy of the Sentencing Guidelines. When the “big fish” hangs the “little fish” out to dry, justice is not served for the person of greater culpability is receiving a lesser sentence than the person who is not as bad an actor. Consequently, disparity between co-defendants may be a valid basis for departure after *Koon*.²¹² Courts considered extraordinary disparity even prior to the *Koon* decision;²¹³ however, by remanding a co-defendant disparity departure that was rejected, the Supreme Court recognized that *Koon* encouraged departures, and this encouragement may extend to circumstances in which co-defendants receive grossly disproportionate sentences.²¹⁴

6. Judges

Another factor to consider when arguing for departure is the individual judge and his or her theories of justice and penology.²¹⁵ This factor should be examined

²⁰⁷See *United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998).

²⁰⁸See *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998).

²⁰⁹See *United States v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990).

²¹⁰See *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992).

²¹¹See *United States v. Jones*, 160 F.3d 473 (8th Cir. 1998).

²¹²See *United States v. Meza*, 519 U.S. 990 (1996).

²¹³See *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991); *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992); *United States v. Melton*, 930 F.2d 1096 (5th Cir. 1991); *United States v. Williams*, 894 F.2d 208 (6th Cir. 1990); *United States v. Nelson*, 918 F.2d 1268 (6th Cir. 1990); *United States v. Torres*, 81 F.3d 900 (9th Cir. 1996); *United States v. Sardin*, 921 F.2d 1064 (10th Cir. 1990); *United States v. Alpert*, 989 F.2d 454 (11th Cir. 1993).

²¹⁴See *Meza v. United States*, 519 U.S. 990 (1996).

²¹⁵See Bornstein, *supra* note 19, at 146. “The variance [in relation to departures] reflects different judges own preferences for different theories of punishment . . .” *Id.* For an example of the reasoning underlying such a departure, see *United States v. Rivera*, 994 F.2d 942, 954-55 (1st Cir. 1993). The court explained:

When I look at these cases of sentencing, the first thing I ask myself is, “What sentence would I impose if there were no guidelines?” That’s what I did for more than 20 years. And then I ask myself, “What’s a just sentence in these circumstances? Am I going to be limited by these artificial guidelines made by people who have no idea of what kind of a case I’m going to have to decide?” No two cases are the same . . .

because “in a significant minority of cases, departure is driven by the sentencing judge’s desire to reach a result different from that specified in the Guidelines, rather than by the presence of meaningfully atypical facts.”²¹⁶ In fact, many judges depart in order to further the goal of rehabilitation.²¹⁷ Thus, a judge may depart based upon a factor that is not actually valid because he or she feels that justice would not be done under the guidelines. In light of the *Koon* decision, it appears that “only the most plainly illegal departures should fail under the deferential standard adopted.”²¹⁸

III. CONCLUSION

In light of *Koon*, “departures are a flourishing practice.”²¹⁹ Section 5K2.0 can humanize America’s criminal justice system through its provision for departures based upon any ground that is meaningfully relevant to any particular case. The individualization of the guidelines sentencing system will remove the blindfold from the eyes of Justitia, and result in true justice, not the “canned” version to which we are accustomed. “Depart! Depart! Depart! Departures are the lifeblood of the Guidelines process!”²²⁰ should be the rallying cry of Justitia and her followers.

The imagination is a fertile stomping ground—explore it when considering factors for departure.²²¹ As Alan Ellis, a nationally recognized expert on sentencing, advocated:

Be creative. Don’t pigeonhole yourself to downward departures identified in the guidelines themselves. Think of things that make your case unusual. Remember that not only must your offender have been an unusual offender, but if the offense behavior is unusual in and of itself—specifically, less serious than envisioned by the guidelines—this is a good ground for an “unusual” case as defined by *Koon*: one that is outside the heartland of the guidelines justifying a downward departure.²²²

Remember that “sentencing is more of an art than an exact science.”²²³ Try to make your departure argument appealing to the eye by painting it in shades of

Id.

²¹⁶See Gelacak, *supra* note 97, at 364.

²¹⁷See Bornstein, *supra* note 19, at 146.

²¹⁸Abraham L. Clott, *An Assistant Public Defender Responds to Koon*, 9 FED. SENT. REP. 25, 25 (1996).

²¹⁹Wright, *supra* note 8, at 569.

²²⁰*Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2070 (1992) (remarks of Judge Vincent L. Broderick, United States District Court for the Southern District of New York).

²²¹See *United States v. Walker*, 27 F.3d 417 (9th Cir. 1994) (arguing that post-arrest “self-inflicted punishment” should warrant a departure) and *United States v. Parker*, 158 F.3d 1312 (D.C. Cir. 1998) (arguing that the overemployment of SWAT should warrant departure) for examples where defense attorneys utilized their imagination and earned an A+ for effort despite the fact that their grounds were rejected.

²²²Ellis, *supra* note 98, at 35.

²²³Houser, *supra* note 4, at 388.

“acceptance of responsibility via voluntary conduct,” “rehabilitation,” “collateral third-party consequences,” and “just desserts.” However, each case is its own canvas and its circumstances may produce other less common hues. Utilize every factor possible in your departure argument and you may produce a masterpiece.

TABLE 1²²⁴
Downward Departure Grounds Approved by Appellate Courts

Aberrant behavior	<i>United States v. Grandmaison</i> , 77 F.3d 555 (1st Cir. 1996) <i>United States v. Russell</i> , 870 F.2d 18 (1st Cir. 1989) <i>United States v. Ritchey</i> , 949 F.2d 61 (2d Cir. 1991) <i>United States v. Marcello</i> , 13 F.3d 752, 761 (3d Cir. 1994) <i>United States v. Darby</i> , 37 F.3d 1059 (4th Cir. 1994) <i>United States v. Williams</i> , 974 F.2d 25, 26 (5th Cir. 1992) <i>United States v. Burlison</i> , 22 F.3d 93 (5th Cir. 1994) <i>United States v. Duerson</i> , 25 F.3d 376 (6th Cir. 1994) <i>United States v. Andruska</i> , 964 F.2d 640 (7th Cir. 1992) <i>United States v. Carey</i> 895 F.2d 318 (7th Cir. 1990) <i>United States v. Jenkins</i> , 78 F.3d 1283 (8th Cir. 1996) <i>United States v. Simpson</i> , 7 F.3d 813 (8th Cir. 1993) <i>United States v. Garlich</i> , 951 F.2d 161, 164 (8th Cir. 1991) <i>United States v. Dickey</i> , 924 F.2d 836 (9th Cir.), <i>cert. denied</i> , 112 S. Ct. 282 (1991) <i>United States v. Takai</i> , 941 F.2d 738 (9th Cir. 1991) <i>United States v. Fairless</i> , 975 F.2d 664 (9th Cir. 1992) <i>United States v. Morales</i> , 972 F.2d 1007 (9th Cir. 1992) <i>United States v. Pena</i> , 930 F.2d 1486 (10th Cir. 1991)
-------------------	--

²²⁴Several resources were relied upon when compiling the information for Table 1. See ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK § 5K2.0 (Nov. 1998 ed.); ROGER W. HAINES, JR., ET AL., FEDERAL SENTENCING & FORFEITURE GUIDE § 5K2.0 (3d ed. 1999); ROGER W. HAINES JR., ET AL., FEDERAL SENTENCING GUIDELINES NEWSLETTERS (Jan. 4, 1999 – Mar. 29, 1999); Jeane G. Chutuape, et al., Departures (U.S. Sentencing Commission Feb. 20, 1998). Table 1 rearranges and expands upon a table of departures found in another source. See HAINES, FEDERAL SENTENCING GUIDELINES NEWSLETTER, Table 1.

	<i>United States v. Tsosie</i> , 14 F.3d 1438, 1431-42 (10th Cir. 1994) <i>United States v. Withrow</i> 85 F.3d 527 (11th Cir. 1996) <i>United States v. Dyce</i> , 78 F.3d 610 (D.C. Cir. 1996)
Alien's cultural assimilation	<i>United States v. Lipman</i> , 133 F.3d 726 (9th Cir. 1998)
Atypicality of money laundering scheme	<i>United States v. Skinner</i> , 946 F.2d 176 (2d Cir. 1991)
Burden of successive prosecutions	<i>Koon v. United States</i> , 518 U.S. 81 (1996)
Charitable services	<i>United States v. Rioux</i> , 97 F.3d 648 (2d Cir. 1996) <i>United States v. Crouse</i> , 145 F.3d 786 (6th Cir. 1998) <i>United States v. Woods</i> , 159 F.3d 1132 (8th Cir. 1998)
Childhood abuse	<i>United States v. Brown</i> , 985 F.2d 478 (9th Cir. 1993) <i>United States v. Roe</i> , 976 F.2d 1216 (9th Cir. 1992)
Credit for time served on expired sentence	<i>United States v. O'Hagan</i> , 139 F.3d 641 (8th Cir. 1998)
Criminal history score mirrors racial disparities in state sentencing ("Driving while Black")	<i>United States v. Leviner</i> , No. 97-10260-NG, Second Amended Order Re: Sentencing 12/22/98
Defendant's conduct did not threaten the harm sought to be prevented by the statutes	<i>United States v. Bernal</i> , 90 F.3d 465 (11th Cir. 1996)
Defendant fails to comprehend the socially unacceptable nature of child pornography, thus, he/she lacks mens rea	<i>United States v. Gifford</i> , 17 F.3d 462 (1st Cir. 1994)
Defendant received no personal benefit from money laundering	<i>United States v. Broderson</i> , 67 F.3d 452 (2d Cir. 1995) <i>United States v. Walters</i> , 87 F.3d 663 (5th Cir.), cert. denied, 117 S. Ct. 498 (1996)
Defendant's tragic personal history	<i>United States v. Lopez</i> , 938 F.2d 1293 (D.C. Cir. 1991) <i>United States v. Deigert</i> , 916 F.2d 916 (4th Cir. 1990)
Defendant's "youthful lack of guidance" ²²⁵	<i>United States v. Floyd</i> , 945 F.2d 1096 (9th Cir. 1991)

²²⁵The Commission specifically excluded a defendant's lack of guidance as a youth or disadvantaged upbringing as a reason for departure when it added § 5H1.12. See UNITED

Delay in indictment and sentencing prevented concurrent sentences	<i>United States v. O'Hagan</i> , 139 F.3d 641 (8th Cir. 1998) <i>United States v. Sanchez-Rodriguez</i> , 161 F.3d 556 (9th Cir. 1998)
Delay in transferring alien to federal custody	<i>United States v. Montez-Gaviria</i> , 163 F.3d 697 (2d Cir. 1998)
Deportable alien status may result in exceptional hardship	<i>United States v. Farovil</i> , 124 F.3d 838 (7th Cir. 1997) <i>United States v. Smith</i> , 27 F.3d 649 (D.C. Cir. 1994) <i>United States v. Charry Cubillos</i> , 91 F.3d 1342 (9th Cir. 1996)
Deportation	<i>United States v. Agu</i> , 763 F. Supp. 703 (E.D.N.Y.1991)
Diminished capacity	<i>United States v. McBroom</i> , 124 F.3d 533 (3d Cir. 1996) <i>United States v. Glick</i> , 946 F.2d 335 (4th Cir. 1991) <i>United States v. Pullen</i> , 88 F.3d 368, 370-71 (7th Cir. 1996) <i>United States v. Christensen</i> , 18 F.3d 822 (9th Cir. 1994) <i>United States v. Garza-Juarez</i> , 992 F.2d 896 (9th Cir. 1993) <i>United States v. Cantu</i> , 12 F.3d 1506 (9th Cir. 1993)
Disparity between co-defendants	<i>United States v. Joyner</i> , 924 F.2d 454 (2d Cir. 1991) <i>United States v. Seligsohn</i> , 981 F.2d 1418 (3d Cir. 1992) <i>United States v. Melton</i> , 930 F.2d 1096 (5th Cir. 1991) <i>United States v. Williams</i> , 894 F.2d 208 (6th Cir. 1990) <i>United States v. Nelson</i> , 918 F.2d 1268 (6th Cir. 1990) <i>United States v. Torres</i> , 81 F.3d 900 (9th Cir. 1996) <i>United States v. Sardin</i> , 921 F.2d 1064 (10th Cir. 1990) <i>United States v. Alpert</i> , 989 F.2d 454 (11th Cir. 1993)
Extraordinary level of cooperation by revealing other undiscovered crimes	<i>United States v. DeMonte</i> , 25 F.3d 343 (6th Cir. 1994)

STATES SENTENCING COMMISSION, GUIDELINES MANUAL, Appendix C, amendment 386, effective November 1, 1991.

Family Circumstances	<i>United States v. Sclamo</i> , 997 F.2d 970 (1st Cir. 1993) <i>United States v. Alba</i> , 933 F.2d 1117 (2d Cir. 1991) <i>United States v. Johnson</i> , 964 F.2d 124 (2d Cir. 1992) <i>United States v. Galante</i> , 128 F.3d 788 (2d Cir. 1997) <i>United States v. Gaskill</i> , 991 F.2d 82 (3d Cir. 1993) <i>United States v. Monaco</i> , 23 F.3d 793 (3d Cir. 1994) <i>United States v. Owens</i> , 145 F.3d 923 (7th Cir. 1998) <i>United States v. Haversat</i> , 22 F.3d 790 (8th Cir. 1994) <i>United States v. Pena</i> , 930 F.2d 1486 (10th Cir. 1991) <i>United States v. Handy</i> , 752 F. Supp. 561 (E.D.N.Y. 1990) <i>United States v. Pokuaa</i> , 782 F. Supp. 747 (E.D.N.Y. 1992)
Government misconduct	<i>United States v. Nolan-Cooper</i> , 155 F.3d 221 (3d Cir. 1998) <i>United States v. Coleman</i> , 138 F.3d 616 (6th Cir. 1998) <i>United States v. Lopez</i> , 106 F.3d 309 (9th Cir. 1997) ²²⁶ <i>United States v. Treleaven</i> , 35 F.3d 458 (9th Cir. 1994)
Guidelines overstate the seriousness of the offense	<i>United States v. Restrepo</i> , 936 F.2d 661 (2d Cir. 1991) <i>United States v. Alba</i> , 933 F.3d 1117 (2d Cir. 1991) <i>United States v. Lara</i> , 905 F.2d 599 (2d Cir. 1990) <i>United States v. Bierley</i> , 922 F.2d 1061 (3d Cir. 1990)
Improper manipulation of indictment	<i>United States v. Liberman</i> , 971 F.2d 989 (3d Cir. 1992)
Incomplete defense of entrapment	<i>United States v. McClelland</i> , 72 F.3d 717 (9th Cir. 1995) <i>United States v. Garza-Juarez</i> , 992 F.2d 896 (9th Cir. 1991)

²²⁶The defendant suffered prejudice because plea negotiations were held without defendant's counsel present.

Increase for aliens convicted of aggravated felonies	<i>United States v. Hines</i> , 803 F. Supp. 675, 676-79 (W.D.N.Y. 1992), <i>aff'd</i> 992 F.2d 321 (2d Cir. 1993) <i>United States v. Cuevas-Gomez</i> , 61 F.3d 749 (9th Cir. 1995) <i>United States v. Estrada-Plata</i> , 57 F.3d 757 (9th Cir. 1995) <i>United States v. Rios-Favela</i> , 118 F.3d 653 (9th Cir. 1997)
Intent to pay taxes	<i>United States v. Brennick</i> , 134 F.3d 10 (1st Cir. 1998)
Job loss to innocent third parties	<i>United States v. Olbres</i> , 99 F.3d 28 (1st Cir. 1996)
Lack of knowledge of purity of drugs	<i>United States v. Mendoza</i> , 121 F.3d 510 (9th Cir. 1997)
Lack of sophistication	<i>United States v. Jagmohan</i> , 909 F.2d 61 (2d Cir. 1990)
Lesser harm	<i>United States v. Carvell</i> , 74 F.3d 8 (1st Cir. 1996)
Loss of credit while defendant was in INS custody	<i>United States v. Ogbondah</i> , 16 F.3d 498 (2d Cir. 1994)
Loss overstated criminality of defendant	<i>United States v. Shattuck</i> , 961 F.2d 1012 (1st Cir. 1992) <i>United States v. Sturart</i> , 22 F.3d 76 (3d Cir. 1994) <i>United States v. Monoco</i> , 23 F.3d 793 (3d Cir. 1994)
Loss resulting from fraudulently obtained loan not caused solely by the defendant's misrepresentation ("multiple causation of loss")	<i>United States v. Gregorio</i> , 956 F.2d 341 (1st Cir. 1992) <i>United States v. Arutunoff</i> , 1 F.3d 1112 (10th Cir. 1993)
Military record	<i>United States v. Pipich</i> , 902 F. Supp. 1991 (D. Md. 1988)
"Mules" ineligible for § 3B1.2 mitigating role adjustment	<i>United States v. Valdez-Gonzalez</i> , 957 F.2d 643 (9th Cir. 1992)
Physical impairment	<i>United States v. Little</i> , 736 F. Supp. 71 (D. NJ), <i>aff'd</i> , 919 F.2d 137 (3d Cir. 1990) <i>United States v. Ghannam</i> , 899 F.2d 327 (4th Cir. 1990) <i>United States v. Greenwood</i> , 928 F.2d 61 (4th Cir. 1991) <i>United States v. Rioux</i> , 97 F.3d 648 (2d Cir. 1996)
Plea bargain in full satisfaction of all federal charges which may be brought	<i>United States v. Paton</i> , 110 F.3d 562 (8th Cir. 1997)

Principal's reduced sentence in exchange for testimony against lesser members of conspiracy directly results in prejudice to a defendant ("Big Fish" hangs the "little fish" out to dry)	<i>United States v. Jones</i> , 160 F.3d 473 (8th Cir. 1998)
Prison official's "ill-advised decision" to send an alcoholic on an unsupervised furlough	<i>United States v. Whitehorse</i> , 909 F.2d 316 (8th Cir. 1990)
Rehabilitation	<i>United States v. Sklar</i> , 920 F.2d 107 (1st Cir. 1990) <i>United States v. Maier</i> , 975 F.2d 944 (2d Cir. 1992) <i>United States v. Workman</i> , 80 F.3d 688 (2d Cir. 1996) <i>United States v. Core</i> , 125 F.3d 74 (2d Cir. 1997) <i>United States v. Bryson</i> , 163 F.3d 742 (2d Cir. 1998) <i>United States v. Sally</i> , 116 F.3d 76 (3d Cir. 1997) <i>United States v. Brock</i> , 108 F.3d 31, 35 (4th Cir. 1997) <i>United States v. Lara-Velasquez</i> , 919 F.2d 946 (5th Cir. 1990) <i>United States v. Maddalena</i> , 893 F.2d 815 (6th Cir. 1989), <i>cert. denied</i> 112 S. Ct. 233 (1991) <i>United States v. Kapitzke</i> , 13 F.3d 820 (8th Cir. 1997) <i>United States v. Green</i> , 152 F.3d 1202 (9th Cir. 1998) <i>United States v. Jones</i> , 158 F.3d 492 (10th Cir. 1998) <i>United States v. Whitaker</i> , 152 F.3d 1238 (10th Cir. 1998) <i>United States v. Williams</i> , 948 F.2d 706 (11th Cir. 1991) <i>United States v. Rhodes</i> , 145 F.3d 1375 (D.C. Cir. 1998) <i>United States v. Harrington</i> , 741 F. Supp. 1327 (N.D. Ill. 1989)
Remorse	<i>United States v. Jaroszenko</i> , 92 F.3d 486 (7th Cir. 1996) <i>United States v. Fagan</i> , 162 F.3d 1280 (10th Cir. 1998)

Restitution	<i>United States v. Broderson</i> , 67 F.3d 452 (2d Cir. 1995) <i>United States v. Lieberman</i> , 971 F.2d 989 (3d Cir. 1992) <i>United States v. Garlich</i> , 951 F.2d 161 (8th Cir. 1991)
Sentencing entrapment	<i>United States v. Connell</i> , 960 F.2d 1991, 196 (1st Cir. 1992) <i>United States v. Montoya</i> , 62 F.3d 1 (1st Cir. 1995) <i>United States v. Graham</i> , 146 F.3d 6 (1st Cir. 1998) <i>United States v. Barth</i> , 990 F.2d 422, 424 (8th Cir. 1993) <i>United States v. Stavig</i> , 80 F.3d 1241 (8th Cir. 1996) <i>United States v. Stauffer</i> , 38 F.3d 1103 (9th Cir. 1994) <i>United States v. Robinson</i> , 94 F.3d 1325 (9th Cir. 1996) <i>United States v. Parrilla</i> , 114 F.3d 124 (9th Cir. 1997) <i>United States v. Lacey</i> , 86 F.3d 956 (10th Cir. 1996) <i>United States v. Sanchez</i> , 138 F.3d 1410 (11th Cir. 1998)
Statutory maximum nullified acceptance of responsibility reduction	<i>United States v. Rodriguez</i> , 64 F.3d 638 (11th Cir. 1995)
Substantial assistance when motion not made by the government	<i>United States v. Kay</i> , 140 F.3d 86 (2d Cir. 1998) <i>United States v. LaGuardia</i> , 902 F.2d 1010 (1st Cir. 1990) <i>United States v. Paramo</i> , 998 F.2d 1212 (3d Cir. 1993) <i>United States v. Paden</i> , 908 F.2d 1229 (5th Cir. 1990) <i>In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")</i> , 149 F.3d 1198 (D.C. Cir. 1998)
Susceptibility to abuse in prison due to status as police officers and due to unusual degree of national press coverage	<i>Koon v. United States</i> , 518 U.S. 81 (1996)
Voluntary disclosure of identity	<i>United States v. Evans</i> , 49 F.3d 109 (3d Cir. 1995)
Voluntary return after escape from prison	<i>United States v. Weaver</i> , 920 F.2d 1570 (11th Cir. 1991)

Voluntary surrender to officials after failing to report for service of sentence	<i>United States v. Crumb</i> , 902 F.2d 1337 (8th Cir. 1990)
Vulnerability to victimization in prison. ²²⁷	<i>United States v. Lara</i> , 905 F.2d 599 (2d Cir. 1990) <i>United States v. Gonzalez</i> , 945 F.2d 525 (2d Cir. 1991) <i>United States v. Maddox</i> , 48 F.3d 791 (4th Cir. 1995) <i>United States v. Adonis</i> , 744 F. Supp. 336 (D.C. 1990) <i>United States v. Graham</i> , 83 F.3d 1466 (D.C. Cir. 1996)

²²⁷The Commission amended § 5H1.4 to state that physical appearance, including physique, is not ordinarily relevant when determining whether a departure is appropriate. See Appendix C, amendment 466, effective November 1, 1992.