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Departures from the Federal Sentencing Guidelines After *Koon v. United States*: More Discretion, Less Direction

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CASE COMMENT

DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES AFTER *KOON v. UNITED STATES*: MORE DISCRETION, LESS DIRECTION

I. INTRODUCTION

Many commentators and district court judges complain that under the Federal Sentencing Guidelines (Guidelines), sentencing judges must follow overly rigid sentencing instructions, are held to narrow sentencing ranges, and possess little discretion to depart from the Guidelines.¹ They argue that judges need more flexibility in sentencing than is allowed under the present structure of the Guidelines, as the Guidelines do not allow them to consider the context of the specific case or the individual characteristics of the specific offender.² Judges are able to deviate from the sentencing ranges only when a case is "atypical," or different from the "heartland" of cases encountered with a given federal crime. However, this discretion is limited: the factors that the judge relies upon for departures must be specifically enumerated and justified on the record, the factor cannot be expressly forbidden by the Guidelines, and the factor must, usually, exist at an extraordinary level. Furthermore, prior to *Koon v. United*

1 See, e.g., W. Travis Parham, Note, *Grist for the Mill of Sentencing Guideline Reform: Williams v. United States*, 28 WAKE FOREST L. REV. 487, 498 (1993) ("Judicial animosity toward the Sentencing Commission and the guidelines themselves is one of the major problems facing the sentencing guidelines."). The author presents several examples where judges have shown their dissatisfaction with being unable to depart from the Guidelines more freely. See also Lisa M. Rebello, Note, *Sentencing Under the Federal Sentencing Guidelines: Five Years of "Guided Discretion"*, 26 SUFFOLK U. L. REV. 1031, 1054 (1992) ("[C]ourts and commentators have strongly criticized the Guidelines for restricting traditional judicial discretion in the sentencing process . . .").

2 See, e.g., Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1956-58 (1988) ("To rectify the guidelines' principal shortcomings, the Commission should propose to Congress specific amendments designed to increase judges' discretion to consider a broad range of individual offender characteristics.") *Id.* at 1056.

States,³ the sentencing judge's decision to depart had been subject to plenary review by appellate courts, which allowed the circuit courts to substitute their own opinions for those of the district courts. Finally, to frustrate further the ability to depart from the Guidelines, Congress has given limited guidance to the courts on how to make a departure decision.

The United States Supreme Court, through its decision in *Koon*, has modified and simplified the appellate review process and has given more discretion to the district courts by changing the proper standard of review from de novo to abuse of discretion. However, the mechanics of the departure process itself remain unclear.

This Comment first reviews, in Part II, the unique background of the *Koon* case and the context in which the Supreme Court granted certiorari. Part III summarizes Congress's intent in enacting the Sentencing Reform Act of 1984, which created the basis for the Guidelines. Additionally, this part outlines the mechanics of using the Guidelines and describes the appellate review process before the Supreme Court's *Koon* decision. Part IV sets forth the Guideline application and appellate review in the lower courts' *Koon* cases, and more fully explains the Supreme Court's decision in *Koon v. United States*. Part V surveys federal appellate court cases attempting to apply the Supreme Court's decision. Although many circuit courts have correctly applied the standard of review mandated by *Koon*, some circuits have attempted to maintain their power of departure reversals by misapplying the opinion. In addition, *Koon* leaves open many other aspects of the departure process and ability to review departure decisions. Finally, Part VI concludes that the Supreme Court's decision appropriately modifies the standard of review for departures from the Guidelines, but leaves open for clarification the mechanics of the departure process. This Comment proposes a potential solution to the difficulties of sentencing departures which may help provide a proper balance between the district court's departure discretion and the circuit court's ability to check that discretion.

II. THE BACKGROUND OF THE INFAMOUS *KOON* CASE

On the evening of March 2, 1991, Rodney King and his friends took a drive on a Los Angeles freeway after a night of drinking malt liquor in King's car. Police officers spotted King driving in excess of 100 m.p.h. and attempted to pull him over. After an extended chase, he finally pulled off the freeway and drove eight more miles to the

3 116 S. Ct. 2035 (1996).

entrance of a recreation area. Once stopped, the police officers approached the car and immediately ordered King and his friends to exit the car and assume the felony prone position—that is, to lie flat on the ground with their hands behind their heads. Although his friends complied, King did not. He did get down on his hands and knees, but when the police officers tried to force him down he resisted and became combative. The officers retreated to a more safe position and shot King with taser darts in an attempt to subdue him. King then became more combative and charged after one of the police officers. The officer struck King on the side of the head with his baton, and King fell to the ground. He attempted to rise but the officers struck him repeatedly to keep him down. Finally, King's resistance subsided and he lay prone. Nevertheless, the officers did not end their behavior; they continued to strike King on his legs and on his chest, and they "stomped" on him and kicked him for almost half a minute more before handcuffing King and placing him in the police car. The officers then took King to the hospital, where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions.⁴

Few in America have not seen the bystander's famous video taken that night at the recreation area capturing this beating on tape. And after a California jury acquitted the Los Angeles police officers of state charges of assaulting King, the response of violent rioting that took place for three days in Los Angeles brought further controversy and notoriety to the case. Because the state criminal system appeared to have failed, two of the officers, Sergeant Stacey Koon and Officer Lawrence Powell, were eventually tried in federal court and convicted of violating King's constitutional rights under color of law, pursuant to 18 U.S.C. § 242.⁵ Although a straightforward application of the Sentencing Guidelines prescribed a sentence of 70-to-87 months imprisonment for Koon and Powell, the trial court judge, because of unusual case circumstances, greatly departed from that range; the judge sentenced the defendants to only 30 months in prison, less than

4 See *id.* at 2041.

5 18 U.S.C. § 242 (1994), which states in part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title; . . . and if bodily injury results from the acts committed in violation of this section or if such acts include the use . . . of a dangerous weapon, . . . [the defendant] shall be fined under this title or imprisoned not more than ten years

half the original minimum sentence length. In response, the government appealed the sentence arguing that the judge considered invalid case circumstances, or factors, in justifying the sentence outside the Guideline range. The Ninth Circuit, using a *de novo* standard of review, agreed with the government and reversed the departures. The defendants appealed that ruling.⁶

As a result of these appeals, the notoriety of this case did not end with the state trial, violent riots, and ultimate federal convictions of Koon and Powell. The United States Supreme Court granted certiorari on the sentencing issue. On June 13, 1996, the Court issued its opinion, unanimously changing the standard of review for sentencing departures to a more lenient abuse of discretion standard.⁷ Using this standard of review, a majority of the Court upheld most of the factors the District Court used to justify the downward departures.⁸

The *Koon* decision seeks to resolve an important issue which has been at the heart of debates over the effectiveness of the Federal Sentencing Guidelines since their enactment in 1987: the amount of discretion which should be left to sentencing judges.⁹ Under previous sentencing practice, federal judges enjoyed wide discretion in making sentencing decisions and appellate review of those decisions was very limited. Congress, through the Guidelines, sought to replace such an unstructured sentencing practice because it resulted in wide disparity in sentence lengths for similarly situated defendants who committed similar crimes.¹⁰ The Guidelines' goal is to reduce such disparity by requiring sentencing judges to impose, in the typical case, a sentence within a given narrow range.¹¹ This requirement should lead to greater consistency in sentencing. However, Congress did not intend to remove all of the sentencing judges' discretion, recognizing that a fair system would allow for the flexibility of modified sentences when unusual, or unforeseen circumstances exist in a case. The Guidelines therefore give the sentencing judge the ability to depart upwards or downwards from a prescribed range in those cases which present

6 See *Koon*, 116 S. Ct. at 2041-43.

7 See *id.* at 2043.

8 See *id.* at 2053.

9 See Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 318 & n.82 (1996). "[T]he scope of the departure provision serves as the key battleground between those urging greater uniformity and those urging greater flexibility." *Id.* at 318.

10 See Ogletree, *supra* note 2, at 1944; Honorable Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, (1991).

11 See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(g) (1995); 18 U.S.C. § 3553(b) (1994); 28 U.S.C. § 994(b)(2) (1995).

unique factors, unlike the typical case.¹² But the Guidelines must not allow sentencing judges to use their freedom to depart too frequently, or the goal of reduced sentencing disparity would be lost. Congress therefore allowed for appellate review of departures, initiated by either the government or the defendant, as a way to check these discretionary decisions. Thus, although necessary, an inherent conflict exists between the sentencing judge's need for freedom to depart from the Guidelines to treat each defendant fairly and the appellate role of limiting, or controlling, such discretion to reduce disparity.

The Supreme Court decided to limit the appellate role in departure decisions. The *Koon* decision reduces the chance that an appellate court will replace its viewpoint for that of the trial court's. Under an abuse of discretion standard, a district court's decision to depart will be given greater weight.

Although the Justices of the Supreme Court were unanimous in their decision about the abuse of discretion standard of review, the Justices disagreed about whether the factors the District Court relied upon actually made the case atypical, warranting the sentence reduction. This alone suggests that both the district and circuit courts need more explicit guidance regarding when departure decisions are allowed than what Congress or the Sentencing Commission has supplied. Without such guidance, neither goal of uniformity or fairness can be fully achieved, regardless of the appellate courts' standard of review.

III. HISTORY AND APPLICATION OF THE FEDERAL SENTENCING GUIDELINES

A. *Purposes of the Guidelines*

Prior to the enactment of the Federal Sentencing Guidelines, district court judges enjoyed wide discretion in sentence determinations. Statutes specified the penalties for each crime, and the judge was given wide latitude in determining which factors to take into account in the sentencing phase and how long the offender should be incarcerated, given parole, or both.¹³ This broad discretion was further enhanced by the limited role of appellate courts. Before the Guidelines, a criminal defendant could appeal the sentence imposed only if it exceeded the statutory maximum, and the government could never appeal a criminal sentence. In addition, the review process was limited: "[O]nce it is determined that a sentence is within the limitations

12 See U.S. SENTENCING GUIDELINES Manual ch. 1, pt. A, cmt. 4(b) (1995).

13 See *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

set forth in the statute under which it is imposed, appellate review is at an end."¹⁴ Inevitably, such a system resulted in unpredictable and widely disparate sentence lengths for identical crimes.¹⁵

The Sentencing Reform Act of 1984 (SRA)¹⁶ was enacted to replace such sentencing practices with a more effective, fair sentencing system.¹⁷ Specifically, Congress sought to achieve three objectives through the use of a structured set of sentencing rules: (1) *honesty* in sentencing by avoiding confusion and implicit deception in the fact that sentences were indeterminate; (2) *uniformity* in sentencing by narrowing the wide disparity that historically existed; and (3) *proportionality* in sentencing by imposing appropriately different sentences for criminal conduct of varying severity.¹⁸ Inherent in these objectives exists a tension between the two competing goals of uniformity and proportionality. Complete uniformity, in its most simple terms, would lump all violators of a given crime into one category corresponding to a given sentence length. This would not allow for the flexibility, however, to vary sentences in cases which warrant different treatment, destroying proportionality. However, the more a sentencing system attempts to be flexible in treating cases differently, the less manageable, or uniform, the system becomes.¹⁹ As a result, Congress envisioned the Guidelines "to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, [but] not to eliminate the thoughtful imposition of individualized sentences."²⁰ Attempting to achieve this balance between uniformity and proportionality, Congress enacted 18 U.S.C. § 3553, which states, in part:

14 *Dorszynski v. United States*, 418 U.S. 424, 431 (1974).

15 See, e.g., S. REP. NO. 98-225, at 44-45 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3227-28. The Senate Report provides several studies confirming the great disparity in sentencing. For example, one study surveyed 208 active federal judges and found that the mean prison term the judges would impose in one hypothetical bank robbery case was 7.3 years, with a maximum sentence length of 25 years and a standard deviation of 6.1 years. See also Rebello, *supra* note 1, at 1033-34 (noting that prior to the Sentencing Reform Act, sentences for similar crimes varied greatly and the sentence often depended upon the geographical region and the sentencing judge).

16 Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. §§ 991-998 (1994)).

17 See S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

18 See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A., cmt. 3 (1995).

19 See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 13 (1988).

20 S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

The court shall impose a sentence of the kind, and within the range [given in the Guidelines], unless 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.²¹

This is the statute which grants sentencing judges the authority to depart from the Guideline ranges in appropriate circumstances, and is the only guidance Congress has given to the courts.

Congress also allowed for the review of sentencing departures "to assure that the guidelines are applied properly."²² In contrast with past practice, these appeals may be made by either the defendant or the government because,

[i]t is clearly desirable, in the interest of unwarranted sentence disparity, to permit the government . . . to appeal and have increased a sentence that is below the applicable guideline and that is found to be unreasonable. If only the defendant could appeal his sentence there would be no effective opportunity for the reviewing courts to correct the injustice arising from a sentence that was patently too lenient.²³

The SRA also created a permanent administrative agency, the United States Sentencing Commission (Commission),²⁴ to set out the specifics of the envisioned Guidelines in accordance with Congress's instructions.²⁵ The Commission continually monitors and reviews the application of the Guidelines at both the trial and appellate court levels,²⁶ and recommends, with the knowledge gained from experience, modifications and amendments to the Guidelines to Congress each year.²⁷

Following Congress's specific mandates, the Commission created a Federal Sentencing Guidelines Manual, commonly referred to as the "Guidelines." The violation of almost every federal criminal law corre-

21 18 U.S.C. § 3553(b) (1994).

22 S. REP. NO. 98-225, at 151(1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334.

23 *Id.*

24 *See* 28 U.S.C. § 991 (1994).

25 *See generally id.*

26 *See* 28 U.S.C. § 994(o) (1994).

27 *See* 28 U.S.C. § 994(p)-(r). To date, 540 such recommendations have been approved by Congress and amended to the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL app. C (Supp. 1996).

sponds to a Guideline section in Chapter Two of the manual.²⁸ As a starting point for the sentencing ranges, the Commission attempted, if possible and appropriate, to account for any characteristics of a crime or criminal defendant which appeared to affect pre-Guideline sentencing, with the ranges representing an "average" of the those pre-Guideline sentences.²⁹ And in conformity with congressional mandate, the Commission kept these sentencing ranges narrow; the maximum of the range does not exceed the minimum by more than the greater of either six months or twenty-five percent.³⁰ Such a limitation on the range of sentencing improves the uniformity of sentences imposed upon offenders who fall within the same categories of offense behavior and offender characteristics. A sentencing judge is free to choose a sentence within the Guideline range, and may consider, among other factors, the background, character, and conduct of the defendant.³¹

B. Operation of the Guidelines

The Guidelines employ a matrix, or table, of applicable sentencing ranges. The total "Offense Level" (between one and forty-three) forms the vertical axis, and the defendant's "Criminal History Category" (between I and VI) forms the horizontal axis. The intersection of these two variables provides a Guideline range, given in months of imprisonment.³²

To begin determining the total offense level, each Guideline section, in Chapter Two of the Guidelines Manual, provides a base offense level and specific offense characteristic adjustments a judge can rely upon to modify the offense level, if appropriate. Next, adjustments from Parts A, B, and C of Chapter Three, pertaining to the victim, the role of the defendant in the offense, and any obstruction of justice, are also applied to the offense level, if appropriate.³³ These

28 See 28 U.S.C. § 994(a); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 5 (1995) ("[T]he guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines.").

29 See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 3 (1995).

30 See 28 U.S.C. § 994(b)(2). These ranges do overlap to some degree, to discourage unnecessary litigation. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(h) (1995).

31 See U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (1995). A sentence within this range is not appealable. See 18 U.S.C. § 3742 (1994).

32 See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (1995).

33 See *id.* ch. 3.

adjustments are considered “guided” because they provide specific guidance in both the numerical level of adjustment and offense or offender characteristics.³⁴ Finally, an adjustment for acceptance of responsibility, if appropriate, is applied to obtain the total offense level.³⁵ Chapter Four is used to determine the defendant’s criminal history category, which depends upon the number of previous convictions and the circumstances surrounding those convictions. Using the intersection of the total offense level and the offender’s criminal history category, a sentencing “range” is provided by the matrix.³⁶

Although most cases should result in sentences within the Guideline range, the sentencing judge has the ability to depart from the given range if the judge feels that the Guideline section fails to reflect adequately a pertinent “aggravating or mitigating circumstance.”³⁷ In formulating the Guidelines, the Commission

[i]ntends 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 significantly differs from the norm, the court may consider whether a departure is warranted.³⁸

Such departures are termed “unguided.” The Commission provides some examples, in Chapter Five of the Guidelines Manual, of factors which a sentencing judge could use to depart; however, the number of potential factors which might warrant departure in a given case cannot be comprehensively listed in advance. The sentencing judge may therefore justify this type of a departure based on mentioned or unmentioned factors. In addition, the extent of an “unguided” departure is left to the discretion of the trial court, although the extent is subject to review for “reasonableness.”³⁹ Congress be-

34 See *id.* ch. 1, pt. A, cmt. 4(b).

35 See *id.* ch. 3, pt. E.

36 See Breyer, *supra* note 19, at 34.

37 18 U.S.C. § 3553(b) (1994); see also S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

38 U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995).

39 See 18 U.S.C. § 3742 (1994). A good example of the use of the Guidelines is described in JIMMY GURULÉ, *COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME* 606-07 (1996), which follows a basic seven step process:

- (1) Look up the robbery statute in the statutory index. The index will lead the judge to Guideline § 2B3.1 (“Robbery”).
- (2) Find the “base offense level” for “Robbery” (Level “18”).
- (3) Add “specific offense characteristics.” In this case, add two levels for the money taken and three more levels for the gun.

lieved that, based upon previous experience, these departures might be appropriate in up to twenty percent of the cases.⁴⁰

In Chapter Five, the Guidelines Manual first gives specific examples of factors which a judge is forbidden to consider, regardless of whether or not they take the case outside of the heartland of cases in the court's opinion. These "forbidden" factors include the defendant's race, sex, national origin, creed, religion, socio-economic status, and lack of guidance as a youth.⁴¹ Second, the Guidelines list several factors that the Commission recognized it was not able to fully take into account in formulating the Guidelines. These are "encouraged" departure factors, which "may warrant departure from the guide-

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- (4) Determine if any "adjustments" from chapter 3 of the Guidelines apply. They include adjustments for a vulnerable victim or an official victim, abduction of the victim, role in the offense, efforts to obstruct justice, acceptance of responsibility, and rule for multiple counts.
 - (5) Calculate a criminal history score on the basis of the offender's past conviction record. Here, § 4A1.1 assigns three points for one prior serious conviction.
 - (6) Look at the table on page 5.2 of the Guidelines to determine the sentence. Here, an offense level of "23," with three points for the prior conviction, yields a range of fifty-one to sixty-three months in prison for this armed robbery by a previously convicted felon.
 - (7) Impose the Guideline sentence, or, if the court finds unusual factors, depart and impose a non-Guideline sentence. The judge must then give reasons for departure, and the appellate courts may then review the "reasonableness" of the resulting sentence.

(citing Breyer, *supra* note 19, at 6; various U.S. SENTENCING GUIDELINES MANUAL sections; and 18 U.S.C. § 3553 (1994)).

40 See S. REP. NO. 98-225, at 52 n.71 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases in its jurisdiction. It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines.

The most frequently used "departure" is substantial assistance to the government, which is usually used as part of a plea bargain. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1995). In 1995, the Sentencing Commission's Annual Report showed that such "Substantial Assistance Departures" occurred in 19.7% of Guideline cases, and "Other Downward Departures" occurred in 8.4% of all cases. See Francesca D. Bowman, *Has Koon Undermined the Guidelines?*, 9 FED. SENTENCING REP. 32, 33 n.2 (1996).

41 For a complete list, see U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.4, p.s., 5H1.10, p.s., 5K2.12, p.s. (1995).

lines . . . in the discretion of the sentencing court”⁴² if the Guideline section does not already take that factor into account. If the encouraged factor is already taken into account by the Guideline section, “departure from the applicable guideline range is warranted *only* if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense.”⁴³ Examples include such aggravating factors as death, physical or extreme psychological injury, property damage, and extreme conduct, which would warrant upward departures. Mitigating factors are also provided, such as victim misconduct, coercion and duress, and diminished capacity, which would warrant downward departures. Third, the Commission lists several “discouraged” factors, commonly involving certain offender characteristics, which are not *ordinarily* relevant in departure decisions, but may become relevant when present to an unusual degree. Examples of these discouraged factors include age, mental and emotional condition, physical condition or drug dependence, and employment record.⁴⁴ Beyond the enumerated potential departure factors, the Commission recognizes that “the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.”⁴⁵

When faced with a situation where the potentially unusual factor is not mentioned in the Guidelines, a court must decide whether the factor makes the case atypical enough to take it outside of the heartland by considering the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.”⁴⁶ However, the Commission believed that departures based upon unmentioned factors would be “highly infrequent.”⁴⁷

Finally, if the sentencing judge decides to depart, “[t]he court . . . shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence . . . is outside the [Guideline] range,

42 *Id.* § 5K2.0, p.s.

43 *Id.* (emphasis added).

44 For an interesting analysis of the Commission’s departure guidance, see Gelacak et al., *supra* note 9, at 316–17. The authors parallel the language in 18 U.S.C. § 3553(b) “of a kind” as a “qualitative” type of departure, representing factors which are of a kind the Commission encourages judges to use as departure bases if not already taken into consideration by the Guideline section, and “to a degree” as “quantitative” departures, representing discouraged factors which a judge cannot use unless the circumstance is present to an extraordinary degree. See also Selya & Kipp, *supra* note 10, at 22.

45 U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, p.s. (1995).

46 *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996) (quoting *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)).

47 U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995).

... [state] the specific reason for the imposition of a sentence different from [the applicable range]."⁴⁸

C. Appellate Review of a Departure Decision Prior to Koon v. United States

To ensure consistent application of the Guidelines by district courts, Congress provided for a limited amount of appellate review under 18 U.S.C. § 3742. This statute provides an opportunity for the defendant *or* the government to appeal a sentence which was: (1) imposed in violation of the law; (2) imposed as a result of an incorrect application of the Sentencing Guidelines; or (3) imposed for an offense for which there is no Sentencing Guideline and is plainly unreasonable. In addition, the criminal defendant may appeal an imposed sentence which is greater than the sentence specified in the applicable Guideline range (an upward departure), and the government may appeal a sentence which is less than the Guideline range (a downward departure).⁴⁹ The statute also addresses the appropriate standard of review for such appeals:

The court of appeals 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.⁵⁰

Further, the appellate court shall consider whether the sentence "is outside of the applicable guideline range, and is unreasonable."⁵¹ If so, the appellate court must set aside the sentence and remand the case.⁵²

Despite the language in the statute that appellate courts should give "due deference" to the trial court's application of the Guidelines, the circuit courts commonly decided that decisions to depart from the Guidelines, in part, involve interpretations of the Guidelines. Statutory interpretations are questions of law; therefore, the appellate courts could review *de novo* that portion of the departure decision.

48 18 U.S.C. § 3553(c)(2) (1994).

49 See 18 U.S.C. § 3742(a), (b).

50 18 U.S.C. § 3742(e).

51 18 U.S.C. § 3742(f).

52 See *id.*

The most widely followed departure review analysis⁵³ was first enumerated by the First Circuit in *United States v. Diaz-Villafane*.⁵⁴ The court divided the task of reviewing whether the trial court properly departed from the Guidelines into three determinations:⁵⁵

(1) Whether the circumstances relied on by the district court "are of a kind or degree that they may appropriately be relied upon to justify departure" ⁵⁶ This, the court decided, is a question of law which the appellate court could ascertain as easily as the trial court, and was therefore subject to *de novo* review.

(2) Whether "the circumstances . . . actually exist in the particular case." ⁵⁷ This is a factual determination which should be set aside only upon a finding of *clear error*.

(3) Whether the record supports "the direction and degree of departure." ⁵⁸ This question should be measured by a standard of *reasonableness* due to the trial courts' superior "feel" for the case and better ability to judge the relative unusualness of the case. This portion of the review process also takes into account the "unreasonable" language of the statute.

The circuit courts of appeals began to rely upon this tripartite test rather than the statute itself, leading them astray from Congress's original instructions. Consider, for example, the Second Circuit Court of Appeals' difficulty in consistently and properly applying the test. In the Second Circuit case *United States v. Lara*,⁵⁹ the district court had decided to depart downward from a range of 121-to-151 months to 60 months, the mandatory minimum, because of the unusual circumstances of the case. The defendant was a "delicate looking man" who was chronologically twenty-two years old, but looked sixteen. He was admittedly bisexual and, during pre-sentence incarceration, he had been threatened with being forced to become a male prostitute. The prison officials decided that the only way to protect

53 This test was followed by a majority of the circuits in some similar form. See, e.g., *United States v. Lira-Barraza*, 941 F.2d 745, 746-47 (9th Cir. 1991); *United States v. Feeke*, 929 F.2d 334, 336 (7th Cir. 1991); *United States v. Weaver*, 920 F.2d 1570, 1573 (11th Cir. 1991); *United States v. Lara*, 905 F.2d 599, 602-03 (2d Cir. 1990); *United States v. Shuman*, 902 F.2d 873, 875-76 (11th Cir. 1990); *United States v. Lang*, 898 F.2d 1378, 1379-80 (8th Cir. 1990); *United States v. White*, 893 F.2d 276, 277-78 (10th Cir. 1990); *United States v. Rodriguez*, 882 F.2d 1059, 1067 (6th Cir. 1989).

54 874 F.2d 43 (1st Cir. 1989).

55 See *id.* at 49-50.

56 *Id.* at 49.

57 *Id.*

58 *Id.*

59 905 F.2d 599 (2d Cir. 1990).

the defendant was to place him in solitary confinement. Because of the extent of the defendant's vulnerability to prison abuse and the more harsh punishment the defendant would receive if left in solitary confinement, the sentencing judge decided the factor was a mitigating circumstance not adequately taken into consideration by the Sentencing Commission, thereby warranting the downward departure.

The Second Circuit Court of Appeals, using a test similar to the tripartite test used in *Diaz-Villafane*, upheld the sentence. Under a de novo standard of review, the court agreed that the factor of extreme vulnerability to prison abuse found in the present case was not considered by the Commission in formulating the Guidelines, and therefore was appropriately relied upon by the district court.

The problem with using the tripartite test for reviewing departures becomes evident when future cases attempt to follow precedent. About a year after the *Lara* decision, the Second Circuit reviewed another, very similar case of downward departure due to potential abuse in prison in *United States v. Gonzalez*.⁶⁰ Again, the facts showed that the defendant was small and feminine looking, and, although he was nineteen, he resembled a fourteen- or fifteen-year old boy. Unlike *Lara*, however, the defendant in this case was neither gay nor bisexual, and had not already been victimized in prison. Also in contrast to *Lara*, the Second Circuit only reviewed the district court's departure decision for findings of fact using a clearly erroneous standard—only following the second part of the tripartite analysis. The Circuit Court decided that *Lara* had already determined that "potential for victimization in prison" was a valid departure factor. Therefore, the court easily affirmed the sentence departure, without ever reviewing the initial question of whether this case presented mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."⁶¹ The short-cut provided by the tripar-

60 945 F.2d 525 (2d Cir. 1991).

61 18 U.S.C. § 3553(b) (1994). The dissent did reach the question, however, and recognized that the *Lara* decision did not stand for the proposition that a downward departure may be based upon a prisoner's potential vulnerability to physical assault, but only that "such an extraordinary situation [exists in the *Lara* case] because of the defendant's particular vulnerability due to his immature appearance, sexual orientation and fragility. The severity of [that defendant's] prison term is exacerbated by his placement in solitary confinement as the only means of segregating him from other inmates." *Gonzalez*, 945 F.2d at 527-28 (Winter, J., dissenting) (citing *Lara*, 905 F.2d at 603).

Judge Winter would not have extended the *Lara* holding to the present case, however, concluding that "I cannot say that the Commission did not take this factor [as it exists in the present case] into account." Further, he warned that anticipating that a given defendant may be subject to physical assault in prison is entirely subjec-

tite test suggested that a circuit court could declare a general "circumstance," or factor, as always justifying or forbidding departure. The Supreme Court's *Koon* decision, as will be explained in Part IV, addresses this presumed authority and concludes that it would "transgress the policymaking authority vested in the Commission."⁶²

A step towards the Supreme Court's *Koon* decision took place in 1993 when the First Circuit reconsidered its tripartite test of appellate review, and modified it somewhat, in *United States v. Rivera*.⁶³ The court continued to use the three-part test, but the de novo review of question one, whether the circumstances relied upon by the district court "are of a kind or degree that they may appropriately be relied upon to justify departure,"⁶⁴ was further explained. Then-Chief Circuit Judge Breyer,⁶⁵ writing for the court, recognized that the first inquiry involves both questions of law, requiring de novo review, and questions of fact, requiring a deferential standard. De novo review would be appropriate where the question on review is quintessentially legal,⁶⁶ including whether or not the allegedly special circumstances are of the kind that the Guidelines, in principle, permit the sentencing court to consider at all. For example, de novo review, and departure reversal, would be appropriate when the factor relied upon by the district court was "forbidden" by the Guidelines, or "discouraged," but relied upon without explaining how the case was special. Simi-

tive, and "[t]he number of defendants eligible for a downward departure on that ground [would be] virtually unlimited, and the Guidelines' goal of uniformity [would] be thoroughly subverted." *Gonzalez*, 945 F.2d at 529 (Winter, J., dissenting).

In an apparent response to these cases (see *Koon v. United States*, 116 S. Ct. 2035, 2050–51 (1996)), the United States Sentencing Commission, with Congress's approval, amended the discouraged factors enumerated in U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 on November 1, 1991, replacing the words "Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines" with the words "Physical condition or appearance, including physique, is not ordinarily relevant" See U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 386 (1995) (emphasis added). Of course, this does not leave out the possibility of extraordinary circumstances which *would* make physical appearance relevant, such as the conditions present in *Lara*.

62 *Koon*, 116 S. Ct. at 2055.

63 994 F.2d 942 (1993).

64 See *supra* text accompanying notes 55–58.

65 In addition to the significance of his role in *Rivera*, "[i]t is logical to assume that [*Koon v. United States*] is of particular interest to Justice Breyer [because] [a]s a former member of the United States Sentencing Commission, Justice Breyer is viewed as a principal architect of the Sentencing Guidelines." Douglas W. Kmiec, "*Beating Sense*" into *Federal Sentencing*—*The Aftermath of the Rodney King Case*, 1996 PREVIEW U.S. SUP. CT. CAS. 196, 197.

66 See *Rivera*, 994 F.2d at 951.

larly, plenary review would be appropriate when the task is purely one of statutory interpretation; that is, the interpretation of the drafter's intent in using a set of words. However, a deferential standard would be required when an appellate court is reviewing "whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent."⁶⁷ Such a deferential standard is justified because the district court has a better "feel" for the unique circumstances of a particular case, and has observed many more ordinary Guideline cases for comparison purposes.⁶⁸

Judge Breyer also set forth a useful analysis for guiding district courts in departure decisions. The Supreme Court, in the *Koon* decision, agreed with this analysis:⁶⁹

[W]e suggest . . . that, as an initial matter, a sentencing court considering departure analyze the case along the following lines:

- 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?

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 [G]uidelines. If the special features are "encouraged" features, the court would likely depart, [if the applicable Guideline section does not already take that feature into account]. If the special features are "discouraged" features, [or an encouraged factor already taken into account by the applicable Guideline section], the court would go on to decide whether the case is nonetheless not "ordinary," i.e., whether the case differs [to an exceptional degree or in some other way makes the case different] from the ordinary case in which those features are present. If the case is ordinary, the court would not depart. If it is not ordinary, the court would go on to consider departure.⁷⁰

67 *Id.*

68 For example, in 1994, 93.9% of Guideline cases were not appealed and therefore were not observed by the circuit courts. See *Koon v. United States*, 116 S. Ct. 2035, 2047 (1996).

69 See *id.* at 2045.

70 *Rivera*, 994 F.2d at 949. Additional words reconcile Judge Breyer's analysis with the *Koon* decision.

Judge Breyer went on to explain that this analysis does not help in the case of unusual features not mentioned in the Guidelines. In such a case, the district judge must make a judgment about whether a departure is appropriate, given the structure and theory of the individual guidelines and the Guidelines taken as a whole.⁷¹ The court must also "bear[] in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'"⁷²

Although *Rivera's* modified approach seems more consistent with the intent of 18 U.S.C. § 3742, the circuit courts which originally adopted the *Diaz-Villafane* tripartite test did not embrace this more deferential standard of review.⁷³ By granting certiorari in the *Koon v. United States* case, the Supreme Court would resolve this split between the circuits, and decide whether decisions to depart from the Guidelines should be reviewed under the de novo standard most circuits used or the deferential standard of *Rivera*.

IV. APPLICATION OF THE FEDERAL SENTENCING GUIDELINES IN *KOON V. UNITED STATES*

A. *The United States District Court Decision*

After *Koon* and *Powell* were convicted of violating King's constitutional rights under color of law, the United States District Court for the Central District of California applied the Sentencing Guidelines. Guideline section 2H1.4 applies to violations of 18 U.S.C. § 242, depriving civil rights under color of law, and prescribes a base offense level which is the greater of: 10, or 6 plus the offense level applicable to any underlying offense.⁷⁴ In this case, the underlying offense was aggravated assault, corresponding to section 2A2.2, which carries a base offense level of 15,⁷⁵ to which 6 was added for a total of 21. The district court then applied two guided upward adjustments as specifically enumerated in section 2A2.2: four levels for the use of dangerous weapons, and two levels because King sustained bodily injury during

⁷¹ See *id.*

⁷² *Koon*, 116 S. Ct. at 2045 (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (1995)).

⁷³ See GURULÉ, *supra* note 39, at 683 ("A substantial majority of circuits have adopted the three-part analysis for appellate review enunciated by the First Circuit in *Diaz-Villafane*. These circuits, however, do not embrace the deferential standard articulated in *Rivera*.").

⁷⁴ See U.S. SENTENCING GUIDELINES MANUAL § 2H1.4 (1992).

⁷⁵ See *id.* § 2A2.2(a).

the crime.⁷⁶ With a total offense level of 27, and with a criminal history category of I (Koon and Powell had no previous convictions), the corresponding sentencing range was 70-to-87 months. However, using unguided departure criteria, the court decided to depart downward from this range a total of eight levels because of the extraordinary circumstances present in the case. Specifically, the court justified five levels of the departure because "the victim's wrongful conduct contributed significantly to provoking the offense behavior."⁷⁷ This departure factor is encouraged by the Sentencing Commission, although the extent of departure remains unguided.⁷⁸ The Court justified an additional three levels of downward departure based upon the existence and combination of four factors,⁷⁹ or mitigating circumstances, which standing alone do not justify departure, but when "taken together, justify a reduced sentence."⁸⁰ None of these four factors are specifically mentioned in the Guidelines. The mitigating factors include the following circumstances: (1) the defendants were likely to be targets of abuse in prison because of the widespread publicity of the case; (2) Koon and Powell would be disqualified from future employment in law enforcement, and suffer the "anguish and disgrace these deprivations entail, [which] will constitute substantial punishment in addition to any court imposed sen-

76 See *id.* § 2A2.2(b)(2)(B), (b)(3)(A) (1992); *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

77 *Koon*, 833 F. Supp. at 786.

78 See U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (1995).

79 See *Koon*, 833 F. Supp. at 785-86. Although the District Court described only three combination factors (punishment in addition to the sentence imposed by the court, absence of likelihood to commit future crimes, and successive state and federal prosecutions), the Ninth Circuit and U.S. Supreme Court divided the first factor into two: susceptibility to abuse in prison, and loss of employment.

80 *Id.* at 786. The approach of using a combination of factors to justify a departure was approved by the Ninth Circuit. See *Koon*, 34 F.3d at 1452. Although in 1994 the First, Third, and Fourth Circuits did not agree with such an approach, (see UNITED STATES SENTENCING COMMISSION, 1994 ANNUAL REPORT 16), the Commission has since amended the Guidelines to allow for such departures, although "the Commission believes that such cases will be extremely rare." U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 508 (1995).

For the proper appellate review of this approach, see *Leading Cases*, 110 HARV. L. REV. 135, 314-17 (1996) (arguing that to review a combination departure meaningfully, the appellate court must break down the combination and analyze each component separately, but must also take into account the "synergy created by the interplay of supporting factors") *Id.* at 316; see also *Koon*, 116 S. Ct. at 2054 (Stevens, J., concurring in part and dissenting in part) ("I also note that I do not understand the opinion to foreclose the District Court from basing a downward departure on an aggregation of factors each of which might in itself be insufficient to justify a departure.").

tence";⁸¹ (3) the successive state and federal prosecutions "raise a specter of unfairness";⁸² and (4) Koon and Powell posed low likelihoods of recidivism.⁸³

With a new offense level of 19, the corresponding sentencing range was 30-to-37 months, and Koon and Powell were ultimately sentenced at the low end of 30 months; less than half of what the sentences would have been before the downward departures. The government appealed the departure decision and resulting lenient sentence.

B. *The Ninth Circuit Court of Appeals Decision*

On appeal, the Ninth Circuit briefly described its reviewing role of the District Court's decision to depart from the Guideline range. In a single sentence, the court stated that "[w]e review de novo whether the district court had authority to depart,"⁸⁴ citing Ninth Circuit precedent.⁸⁵ That precedent outlined three steps of the review process identical to those enumerated in *United States v. Diaz-Villafane*.⁸⁶ Although reviewing whether the district court had the "authority to depart" could involve questions of the existence of circumstances and the reasonableness of the direction and degree of departure, the court chose a single de novo review standard. Presumably, the circuit court viewed its role only as reviewing whether the circumstances present in this case were of a kind or degree that appropriately justified the departures.

Using this de novo standard of review, the Ninth Circuit reversed all of the District Court's departure decisions. The court held that the five-level departure based upon provocation by the victim was in error because the victim's misconduct, although an encouraged departure factor under the Guidelines,⁸⁷ did not justify departure in this case for two reasons. First, the court did not agree with the sentencing judge that the victim's wrongful conduct contributed to provoking the criminal behavior. In the Ninth Circuit's view, the criminal conduct began

81 *Koon*, 833 F. Supp. at 789.

82 *Id.* at 790.

83 *See id.* at 789-90.

84 *Koon*, 34 F.3d at 1451.

85 *See United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991).

86 874 F.2d 43 (1st Cir. 1989); *see supra* text accompanying notes 55-58.

87 *See U.S. SENTENCING GUIDELINES MANUAL* § 5K2.10, p.s. (1995). In relevant part, this section provides: "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range"

when King was no longer persisting in his misconduct. Therefore, he was not "provoking the offense behavior" any longer.⁸⁸

Second, even if the victim's behavior *did* provoke the assault, the Circuit Court believed the relevant Guideline section already took that factor into account. The District Court and Ninth Circuit disagreed about which Guideline section to use for determining the heartland: that covering 18 U.S.C. § 242, violations of civil rights under color of law, section 2H1.4; or the section covering the underlying behavior used to calculate the total offense level—aggravated assault, found in section 2A2.2. In the District Court's view, the proper measuring standard was whether "Mr. King's wrongdoing and the substantial role it played in bringing about the defendants' unlawful conduct remove this case from the heartland of offenses contemplated by the aggravated assault Guideline."⁸⁹ In the Ninth Circuit's view, however, the case did not fall outside the heartland of cases of excessive force by police officers, with the standard being Guideline section 2H1.4. The Ninth Circuit concluded that the case was not taken out of the heartland because "provocation by the victim in a situation where an officer must act instantly is typical—not unusual."⁹⁰

The Ninth Circuit also rejected each of the four factors used for the three-level downward departure. To justify the first factor, possibility of abuse in prison, the district court relied upon the two Second Circuit cases, *United States v. Lara* and *United States v. Gonzales*,⁹¹ as evidence that extreme vulnerability to prison abuse is a valid factor for downward departure. The Ninth Circuit refused to extend those cases to the present situation, however, because in contrast to departures based upon an "extraordinary physical impairment," Koon's and Powell's vulnerability "rests solely on their status as police officers and on the public outrage that their crime engendered."⁹² Departures based on an individual's occupation or his notoriety are "open-ended" and "[n]othing would prevent this rationale from being applied to numerous groups."⁹³ Additionally, the court noted that it would be incongruous to allow a downward departure for potential abuse in prison

88 See *Koon*, 34 F.3d at 1458–59.

89 *Koon v. United States*, 833 F. Supp. 769, 787 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

90 *Koon*, 34 F.3d at 1459.

91 905 F.2d 599 (2d Cir. 1990); 945 F.2d 525 (2d Cir. 1991); see *supra* text accompanying notes 59–61.

92 *Koon*, 34 F.3d at 1455.

93 *Id.*

due to the high profile of the case when “[a]ny public outrage was the direct result of appellants’ criminal acts.”⁹⁴

The second factor relied upon by the district court, disqualification from future employment, also was not an appropriate ground for departing because that factor is “not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes.”⁹⁵ The possibility of disqualification from future employment, or other adverse consequences of criminal convictions, are also too common to take the case outside the heartland.⁹⁶ Therefore, the Sentencing Commission must have taken that factor into consideration.

The unusual circumstance of successive state and federal prosecutions also did not justify departure because, again, it speaks nothing of “the culpability of the defendant, the severity of the offense, or to some other legitimate sentencing concern.”⁹⁷ To the contrary, the Ninth Circuit opined, the fact that the Attorney General has authority to “undertake a successive prosecution only when [it is determined that] the earlier state prosecution did not vindicate ‘compelling [f]ederal interests,’ ”⁹⁸ indicates that vindication of distinct federal interests was mandated in this case.⁹⁹ A downward departure here would again be incongruous with the court’s requirement to impose a sentence that reflects the seriousness of the offense.¹⁰⁰

Finally, the low likelihood of recidivism was rejected as an appropriate departure factor because the Sentencing Guidelines clearly state that

[t]he lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.¹⁰¹

94 *Id.* at 1456.

95 *Id.* at 1454.

96 *See id.* (“[T]he societal consequences that flow from a criminal conviction are virtually unlimited.”).

97 *Id.*

98 *Id.* at 1457 (quoting *United States v. Snell*, 592 F.2d 1083, 1087–88 (9th Cir. 1979)).

99 *See id.*

100 *See id.*

101 U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1995).

The Ninth Circuit concluded, "[t]hus, the Commission has expressly disapproved of sentencing courts' departing below the range for the category that already reflects the lowest risk."¹⁰²

Against this backdrop, the Supreme Court set out to advance the analysis of departures from the Federal Sentencing Guidelines. The Court would decide the amount of deference due to sentencing courts in their decisions to treat some criminals different from the majority. And in the end, the Court would decide if the extraordinary circumstances surrounding this case justified more lenient punishments.

C. *The United States Supreme Court's Decision in Koon v. United States*

1. The Appellate Court's Standard of Review

The Supreme Court unanimously concluded that appellate courts should review Sentencing Guideline departures under an abuse of discretion standard rather than *de novo*. The government, which was able to appeal the downward departure under the Guidelines, advocated the *de novo* review undertaken by the Ninth Circuit, arguing that such a review was necessary to protect against unwarranted sentencing disparities. Justice Kennedy, writing for the Court, agreed that Congress, in allowing for greater appellate review of sentencing determinations, "was concerned about sentencing disparities, but we are just as convinced that Congress did not intend . . . to vest in appellate courts wide-ranging authority over district court sentencing decisions."¹⁰³ The Court also pointed out that Congress, in enacting 18 U.S.C. § 3742, required that courts of appeals "give due deference to the district court's application of the guidelines to the facts."¹⁰⁴ In conclusion, "[a] district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court."¹⁰⁵ The district courts "have an institutional advantage" over appellate courts in making departure determinations.¹⁰⁶

102 *Koon*, 34 F.3d at 1457.

103 *Koon v. United States*, 116 S. Ct. 2035, 2046 (1996).

104 18 U.S.C. § 3742(e)(4) (1994).

105 *Koon*, 116 S. Ct. at 2046.

106 *See id.* at 2047. Interestingly, the Court noted that determining whether a given case is unusual enough for it to fall outside the heartland of cases are "matters determined in large part by comparison with the facts of other Guideline cases." *Id.* But neither the district court, the Ninth Circuit, or the Supreme Court performed such a task. This omission is criticized in Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 765 (1996).

By setting forth an abuse of discretion standard, the Court collapsed all three parts of the tripartite test previously used by the courts of appeals into one single review standard.¹⁰⁷ This simplifies matters and focuses the appellate court on its appropriate task. The relevant question on review is not "whether a particular factor is within the 'heartland' as a general proposition, . . . but whether the particular factor is within the heartland given all the facts of the case."¹⁰⁸ This, of course, does not mean that an appellate court will not encounter questions of law when reviewing departures. In the words of the Court:

[The abuse of discretion standard] does not mean that district courts do not confront questions of law in deciding whether to depart. In the present case, for example, the Government argues that the District Court relied on factors that may not be considered in any case. The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law. That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled de novo while other parts are labeled an abuse of discretion. The abuse of discretion standard includes review to determine

(arguing that since the Sentencing Commission's intentions are unclear concerning most factors, the Supreme Court should have remanded the case to the trial court to make explicit findings as to whether the factors were in fact inside or outside the heartland by comparing the present case with other police brutality cases).

107 The Supreme Court similarly collapsed multipart tests, involving questions of law and fact, into single abuse of discretion standards in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (review of Rule 11 sanctions) and *Pierce v. Underwood*, 487 U.S. 552 (1988) (district court's determinations under Equal Access to Justice Act, 28 U.S.C. § 2412(d)). In those cases, as here, the district court is owed deference because it is "better positioned than another to decide the issue in question." *Koon*, 116 S. Ct. at 2047 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). However, the Supreme Court, when faced with mixed questions of law and fact, has not always used a single abuse of discretion standard. See *Leading Cases*, *supra* note 80, at 317–27.

108 *Koon*, 116 S. Ct. at 2047 ("For example, it does not advance the analysis much to determine that a victim's misconduct might justify a departure in some aggravated assault cases. What the district court must determine is whether the misconduct which occurred in the particular instance suffices to make the case atypical."); see also *id.* at 2050–51 ("Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance."); *supra* text accompanying note 62.

that the discretion was not guided by erroneous legal conclusions.¹⁰⁹

This Supreme Court explanation of the new standard leaves room for different interpretations, and Part V of this Comment will show that some circuit courts have taken advantage of this. But most circuit courts have held closely to the reasoning of this passage. The "occasional" legal determinations that an appellate court must make include determinations of whether the district court used factors which are expressly forbidden by the Guidelines, or whether the district court has misinterpreted a set of words given in the Guidelines or the statutes relevant to the Guidelines. Such an interpretation of this passage has support from the *Rivera* decision, described previously in this Comment, that the Supreme Court, for the most part, agreed with.¹¹⁰

2. Downward Departure Factors

The Court next reviewed the District Court's downward departure decisions using the abuse of discretion standard. Although four Justices dissented to different parts of the majority's conclusions in this area, these dissents probably did not arise out of a failure to use the new standard of review but rather out of a lack of guidance by Congress or the Sentencing Commission concerning when departures are appropriate.

a. Five-level Departure Due to Victim Misconduct

The Court unanimously reversed the Ninth Circuit, upholding the District Court's decision to depart downward because King's "wrongful conduct contributed significantly to provoking the offense behavior."¹¹¹ Victim misconduct is an encouraged departure factor, and therefore the district court is authorized to depart if the applicable Guideline does not already take that factor into account. Because the applicable Guideline for violating 18 U.S.C. § 242 is unusual in that it applies to multiple types of behavior, the relevant heartland is difficult to pinpoint.¹¹² The underlying offense in this case was aggravated assault, and the Court agreed with the District Court that the

109 *Koon*, 116 S. Ct. at 2047-48 (citations omitted).

110 *See* *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993).

111 *Koon v. United States*, 833 F. Supp. 769, 786 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

112 This difficulty is evidenced by the District and Circuit Court's struggle with finding the relevant heartland. *See supra* text accompanying notes 89-90.

applicable heartland is not police officer excessive force cases, but aggravated assault committed under color of law cases. The Guideline range therefore “applies both to a Government official who assaults a citizen without provocation as well as instances like this where what begins as legitimate force becomes excessive.”¹¹³ The Court concluded that the District Court “did not abuse its discretion in differentiating between the classes of cases, nor did it do so in concluding that *unprovoked* assaults constitute the relevant heartland.”¹¹⁴

The Court also agreed with the District Court that, in this case, the victim provoked the criminal conduct of Koon and Powell. “A finding that King’s misconduct provoked lawful force but not the unlawful force that followed without interruption would be a startling interpretation and contrary to ordinary understandings of provocation.”¹¹⁵ Therefore, the District Court was justified in finding the circumstances of this provoked assault atypical, warranting a downward departure.¹¹⁶

b. Three-level Departure Based on a Combination of Factors

Addressing the first of the combination factors, eight of the nine Justices agreed that the District Court abused its discretion in relying on the defendant’s disqualification from future employment as a departure factor. “[I]t is not unusual for a public official who is convicted of using his governmental authority to violate a person’s rights to lose his or her job and to be barred from future work in that field.”¹¹⁷ Therefore, basing a departure upon job loss in this case is inappropriate because the factor does not take the case outside of the heartland. Justice Stevens dissented from this conclusion, simply stating that “the District Court did not abuse its discretion when it relied

113 *Koon*, 116 S. Ct. at 2050.

114 *Id.* (emphasis added).

115 *Id.* at 2049.

116 For a broader view of this holding and its implications, see Freeman, *supra* note 105, at 680–83, 751–65:

The Supreme Court’s reversal of the Ninth Circuit is troubling not only because of the symbolic weight that the ‘Rodney King case’ carries, but also because the decision paves the way for downward departures from the sentencing guidelines in future police brutality cases. . . . Now the Sentencing Commission must act again, this time to ensure that just sentencing for police brutality is not circumvented by the Supreme Court’s ruling. It must promptly amend the guidelines to make clear that the departure grounds approved in *Koon* are not normally applicable in police brutality cases.

Id. at 683.

117 *Koon*, 116 S. Ct. at 2052.

on the unusual collateral employment consequences faced by these petitioners as a result of their convictions."¹¹⁸

Second, the Court unanimously agreed with the Ninth Circuit that the defendants' low likelihood of recidivism was not an appropriate basis for departure because there is evidence that the Commission took that factor into account when formulating the criminal history categories. Specifically, the Commission expressly stated that "[t]he lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I . . . cannot be appropriate."¹¹⁹

Only six of the nine Justices agreed with the District Court on the use of the remaining two factors. The circumstance of potential for abuse in prison is not mentioned in the Guidelines; therefore, the sentencing judge must determine whether the circumstances of the case take it outside of the heartland of violations of 18 U.S.C. § 242, keeping in mind the structure and theory of both the particular Guideline section corresponding to this statute as well as the Guidelines as a whole. The majority held that because of the widespread publicity and emotional outrage surrounding this case, the District Court's finding that Koon and Powell were particularly likely to be targets of abuse in prison, making this case unusual or outside of the heartland of cases "is just the sort of determination that must be accorded deference by the appellate courts."¹²⁰

The last of the four factors, successive state and federal prosecutions, was properly considered by the District Court for departure purposes. The Court stated that "[t]he state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court."¹²¹ The Court justified the departure because it significantly burdened the defendants, presumably beyond the burden to defendants in the heartland of cases.¹²²

118 *Id.* at 2054 (Stevens, J., concurring in part and dissenting in part).

119 *Id.* at 2052-53 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1992)).

120 *Id.* at 2053.

121 *Id.*

122 The Court did not mention any type of heartland analysis, including whether the factor made the case unusual or whether the Commission already took the factor into consideration. Therefore, it is presumed that the Court found that the District Court did not abuse its discretion in finding the extent of burden upon the defendants in this case "atypical."

In conclusion, because the District Court based its departure on both permissible and impermissible factors, the Court remanded the case to the District Court for resentencing.¹²³

c. Dissenting Opinions

Justice Souter, joined by Justice Ginsburg, dissented in part, finding that the Court's acceptance of the last two factors, susceptibility to abuse in prison and successive state and federal prosecutions, "attribute[s] an element of irrationality to the Commission and to its 'heartland' concept."¹²⁴ In Justice Souter's opinion, departures may only be based upon the existence of unusual factual circumstances which *should* result in a different sentence. "Departures . . . must be consistent with rational normative order."¹²⁵ These sentiments resemble the Ninth Circuit's conclusion that the District Court's results were "incongruous" with sentencing goals.¹²⁶

The District Court's reliance upon the defendant's susceptibility to abuse in prison was in error because the publicity "stemmed from the remarkable brutality of petitioners' proven behavior."¹²⁷ Allowing a downward departure on this basis would result in reverse logic; in this situation, the more *serious* the crime and widespread the publicity because of the seriousness of the crime, the *less* one would be punished. Justice Souter also pointed out that the Commission discouraged downward departures for susceptibility to prison abuse even when due to unusual physical appearance.¹²⁸ Therefore, rewarding the offender based upon his own acts "could hardly have been in the contemplation of [the] Commission."¹²⁹

Justice Souter also disagreed with the majority that the successive prosecutions warranted a downward departure. Because the federal court used the same evidence as the state court to prove their case, he concluded that the state court system clearly malfunctioned since the state trial did not result in a conviction although the federal trial did. For the defendants to obtain a lighter sentence because of this occur-

123 On remand, U.S. District Judge John Davies declined to impose additional imprisonment on Koon and Powell because, in his opinion, the factors upheld by the Supreme Court warranted the same sentence. See *No More Prison in King Beating*, WASH. POST, Sept. 27, 1996, at A2.

124 *Koon*, 116 S. Ct. at 2054 (Souter, J., concurring in part and dissenting in part).

125 *Id.*

126 See *United States v. Koon*, 34 F.3d 1416, 1456 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

127 *Koon*, 116 S. Ct. at 2054 (Souter, J., concurring in part and dissenting in part).

128 See U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (1995).

129 *Koon*, 116 S. Ct. at 2055 (Souter, J., concurring in part and dissenting in part).

rence "would again attribute a normative irrationality to the heartland concept."¹³⁰ This would reward the defendants for a malfunction in the state system, which has nothing to do with penological purposes or sentencing goals. Justice Souter acknowledged that successive federal prosecutions after state proceedings occur very rarely, but the factor should not always be subject to discretion to depart downward given the "normative ordering" of whether a court *should* take it into account.¹³¹

Justice Breyer, also joined by Justice Ginsburg, dissented in part as well, arguing that Congress intended, when enacting 18 U.S.C. § 242, to provide a federal forum for cases when state prosecutions have failed. And because the Commission "'examined the many hundreds of criminal statutes in the United States Code,' . . . it would likely have been aware of this well-known legislative purpose."¹³² Therefore, the Commission must have taken the factor of potential double prosecution, although rare, into account when formulating the corresponding Guideline section.

Justice Breyer also concluded that the District Court abused its discretion in using the defendants' potential for prison abuse as a departure factor.

I believe that the Guidelines themselves embody an awareness of potentially harsh (or lenient) treatment in prison, thereby permitting departure on that basis only in a truly unusual case. Even affording the District Court "due deference," I cannot find in this record anything sufficiently unusual, compared, say, with other policemen imprisoned for civil rights violations, as to justify departure.¹³³

130 *Id.* at 2056.

131 *See id.* at 2055-56.

132 *Id.* at 2056 (Breyer, J., concurring in part and dissenting in part) (quoting U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 5 (1995)). This reasoning is criticized in Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENTENCING REP. 14, 16 (1996). Her argument is that Justice Breyer did not use the stated language of 18 U.S.C. § 3553 in his analysis. That statute provides that, when deciding whether the Commission adequately considered a given circumstance, the court shall consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b) (1994). She argued that Justice Breyer did not base his conclusions on this information, but knew about the Commission's thinking only because he was a member of the Sentencing Commission when it promulgated the civil rights guidelines. In addition, "[t]he real question is not whether the Commission actually took some factor into account, but rather, whether the factor is rare enough to overcome the presumption that the Commission took it into account." Stith, *supra* at 16.

133 *Koon*, 116 S. Ct. at 2056 (Breyer, J., concurring in part and dissenting in part) (citation omitted). This analysis seems to ignore the fact that the *Koon* case is ex-

V. CASES FOLLOWING THE SUPREME COURT'S *KOON* DECISIONA. *Applications of the Standard of Review*

Many Federal Circuits appear to be accurately applying the abuse of discretion standard for Sentencing Guideline departures set forth in *Koon v. United States*.¹³⁴ Because the First Circuit's *Rivera* case was, for the most part, accepted by the Supreme Court, it is not surprising to find that another First Circuit case, *United States v. Olbres*,¹³⁵ explains the *Koon* decision well. In that case, the defendants, convicted of tax evasion, appealed a denial of a downward departure. The court followed the structure of analysis set forth in *Koon* and initially rejected the trial court's categorical approach of proclaiming job loss due to business failure inappropriate for departure in all cases. Then the court went on to explain *Koon's* standard of review:

Koon, we believe, reinforces this Circuit's view that "[p]lenary review is appropriate where the question in review is simply whether the allegedly special circumstances . . . are of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." This is so because the court, "in deciding whether the allegedly special circumstances are of a 'kind' that permits departure, will have to perform the 'quintessentially legal' function of interpreting a set of words . . . in light of their intention or purpose."¹³⁶

Beyond that legal question, the *Olbres* case implies that any additional review of a departure decision should give the sentencing judge substantial deference, including the determination of whether the cir-

trremely unusual, given the notoriety of the Rodney King beating caught on videotape and the Los Angeles riots that followed the state court acquittal. Justice Souter's argument on "normative ordering" is more persuasive on this point.

134 See, e.g., *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996); *United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996); *United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996), cert. denied, 117 S. Ct. 1097 (1997); *United States v. Withers*, 100 F.3d 1142 (4th Cir. 1996), cert. denied, 117 S. Ct. 1282 (1997); *United States v. Hairston*, 96 F.3d 102 (4th Cir. 1996), cert. denied, 117 S. Ct. 956 (1997); *United States v. Wells*, 101 F.3d 370 (5th Cir. 1996); *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996); *United States v. Pullen*, 89 F.3d 368 (7th Cir. 1996), cert. denied, 117 S. Ct. 706 (1997); *United States v. Charry Cubillos*, 91 F.3d 1342 (9th Cir. 1996); *United States v. Beasley*, 90 F.3d 400 (9th Cir. 1996), cert. denied, 117 S. Ct. 533 (1996); *United States v. Sablan*, 90 F.3d 362 (9th Cir. 1996), reh'g en banc granted, 101 F.3d 618 (9th Cir. 1996); *United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996).

135 99 F.3d 28 (1st Cir. 1996).

136 *Id.* at 35 (quoting *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993)) (emphasis added).

cumstances, as they exist in the case, are unusual enough to cause the case to fall outside of the heartland.¹³⁷

Other circuit courts have attempted to apply the *Koon* decision with some difficulty, however. For example, in *United States v. Weinberger*,¹³⁸ the Fourth Circuit reversed a downward departure based upon extraordinary forfeiture, an unmentioned departure factor.¹³⁹ Although the court's conclusion was probably correct, most of its analysis conflicts with *Koon*. First, the court concluded that extraordinary forfeiture could never be used as a departure factor because the Commission considered forfeiture as a part of the heartland of cases as evidenced by section 5E1.4 of the Guidelines, which provides: "Forfeiture is to be imposed upon a convicted defendant as provided by statute."¹⁴⁰ The court did not address the perceived extraordinary forfeiture in the case however. As *Koon* stated, "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance."¹⁴¹ Evidence existed that the Commission had considered forfeiture in formulating the Guidelines, but that does not mean that extraordinary forfeiture, in a given case, might not warrant a downward departure.¹⁴²

Second, the court reviewed the downward departure using a *de novo* standard, framing the review of the departure as a legal question: "The court's action was an error of law and 'by definition' was an abuse of discretion."¹⁴³ This conclusion misinterprets the Supreme Court's *Koon* decision. *Koon* stated that there may be questions of law upon appellate review of a departure decision, but as an example the Court stated that "whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point."¹⁴⁴ That

137 See *id.* at 37. The court ultimately remanded the case for further findings of fact. See *id.* at 38.

138 91 F.3d 642 (4th Cir. 1996).

139 The Government received \$600,000 in a forfeiture action where the plea agreement set the restitution amount at \$545,000. The trial court characterized this as an "extraordinary forfeiture." See *id.* at 643.

140 *Id.* at 644 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5E1.4 (1995)).

141 *Koon v. United States*, 116 S. Ct. 2035, 2050 (1996).

142 For a different interpretation of whether *Koon* requires a discretionary standard in deciding whether the Sentencing Commission has taken a factor into account, see Stith, *supra* note 132, at 14 ("*Koon* gave deference to the sentencing court only on the question of which factors are present in the case at hand, not on the question whether the Commission had already taken that factor adequately into account . . .").

143 *Weinberger*, 91 F.3d at 645 (citing *Koon*, 116 S. Ct. at 2046-48).

144 *Koon*, 116 S. Ct. at 2047 (emphasis added).

question, referring to forbidden factors, is quite different from the question of whether a given circumstance, as it exists in the case at hand, warrants departure—a question which demands deference under *Koon*.

The same circuit, in deciding a case which had been before the Supreme Court at the same time as *Koon v. United States*, but had been remanded for further consideration in light of the *Koon* decision, very clearly misapplied the Supreme Court's instructions. In *United States v. Rybicki*,¹⁴⁵ the Fourth Circuit reversed a district court's decision to depart downwards five levels based upon a combination of factors. In reviewing the departure decision, the court reverted back to a multi-part test—a difficult analysis to consistently apply which *Koon* clearly attempted to rectify by setting forth a *single* abuse of discretion standard. The court in *Rybicki* explained their five-part analysis:¹⁴⁶

First, the factual determinations of the circumstances and consequences of the offense are reviewed for clear error.

Second, the determination that the circumstances are "atypical" and therefore potentially take the case outside of the applicable heartland is never subject to appellate review because of the district court's "experience in criminal sentencing."¹⁴⁷

Third, whether the factor is "forbidden," "encouraged," "discouraged," or "unmentioned" is a question of law reviewed de novo.

Fourth, the determination that an "encouraged" factor has already been adequately taken into account by the Guidelines, or whether a "discouraged" factor is present to an exceptional degree, or whether an unmentioned factor justifies departure based on the structure and theory of the Guidelines, are all legal questions subject to de novo review.¹⁴⁸

Fifth, "whether circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure from the guideline's specified sentencing range is therefore warranted" is subject to an abuse of discretion review.¹⁴⁹

Using this multi-part analysis, the court easily reversed the five-level departure. Little difference can be found between the analysis of steps four and five. Perhaps the court was only distinguishing step five on the basis of *whether* the departure was warranted, leaving only *that*

145 96 F.3d 754 (4th Cir. 1996).

146 See *id.* at 757–58.

147 *Id.* at 757.

148 See *id.* at 758.

149 *Id.*

determination to the discretion of the sentencing court. The court also seemed to be separating two questions which *Koon* expressly stated should be analyzed as one: "The relevant question [on appeal] is not . . . whether a particular factor is within the 'heartland' as a general proposition, but whether the particular factor is within the heartland given all the facts of the case. . . . [And] [t]hese considerations are factual matters."¹⁵⁰

B. Other Departure Issues Which *Koon* Does Not Resolve

One main area of Sentencing Guideline departure jurisprudence left open by *Koon* is the appropriate review of the *extent* of departure. According to 18 U.S.C. § 3742(f) (2), if the appellate court determines the sentence "is outside the applicable guideline range and is unreasonable," the court shall set aside the sentence and remand the case.

Both district and appellate courts commonly determine and review the extent of departure by analogizing the unusual circumstances to other parts of the Guidelines.¹⁵¹ For example, the Seventh Circuit in *United States v. Horton*¹⁵² described the review of extent of departure as follows: "Although we have recognized the impossibility of formulating precise rules for determining whether the extent of an upward departure is reasonable . . . this court and others have approved of a method that involves calculating the defendant's sentence by analogy to existing guideline provisions."¹⁵³ Further,

[w]e do not read *Koon* to require that we abdicate our reviewing authority over the magnitude of a departure chosen by the district court. . . . Although *Koon* changed the standard of review with respect to [whether to depart], . . . we do not believe that it subverted our rationale for requiring a district court to explain its reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review.¹⁵⁴

150 *Koon*, 116 S. Ct. at 2047. Interestingly, another Fourth Circuit case, *United States v. Hairston*, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997), which was decided 10 days before *Rybicki*, 96 F.3d 754, accurately followed *Koon's* single abuse of discretion standard of review.

151 See, e.g., *United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996); *United States v. Horton*, 98 F.3d 313 (7th Cir. 1996).

152 98 F.3d 313 (7th Cir. 1996).

153 *Id.* at 317; see also *Hardy*, 99 F.3d at 1253; *United States v. Sablan*, 90 F.3d 362, 364-65 (9th Cir. 1996), *reh'g en banc granted*, 101 F.3d 618 (9th Cir. 1996).

154 *Horton*, 98 F.3d at 319.

Ultimately, the court remanded the case because the district court did not choose an appropriate analogy for determining the extent of an upward departure.¹⁵⁵

In contrast to most circuits, the Eighth Circuit, in *United States v. McCarthy*,¹⁵⁶ refuses to review the extent of departure, “‘regardless of the district court’s reasons for refraining from departing further.’”¹⁵⁷ In that case, the defendant, convicted of money laundering and conspiracy to distribute marijuana, appealed the extent of departure the district court made in favor of the defendant as not being great enough.¹⁵⁸ The district court departed downward from a sentencing range of 210–to–262 months imprisonment to a final sentence of 156 months, based upon substantial assistance to the government and a request to depart below the statutory mandatory minimum.¹⁵⁹ The defendant asserted that the district court relied on improper factors in determining the extent of departure. The appellate court refused to review the district court’s reasons for departure: “In this circuit, the *extent* of a district court’s downward departure is not reviewable.”¹⁶⁰ The court would not examine the factors listed by the district court justifying departure and the weight it gave to each factor. In conclusion, “[a]ll the statute and the Guidelines require is that the reasons for the departure be stated.”¹⁶¹ This statement ignores the fact that an appellate court must use the reasoning of the sentencing court in order to determine whether the extent of departure is “unreasonable.”¹⁶²

155 The district court departed upward eight levels in the case of a bomb threat pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K2.7 (1995), because the “defendant’s conduct significantly disrupted a governmental function . . .” *Horton*, 98 F.3d at 318. The sentencing judge erroneously justified the extent of departure by analogizing to U.S. SENTENCING GUIDELINES MANUAL § 2A6.1(b)(1) (1995), which is reserved for defendants whose conduct evidences an intent to carry out the threat. *Horton*’s conduct did not. See *Horton*, 98 F.3d at 318.

156 97 F.3d 1562 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1011 (1997), 117 S. Ct. 1284 (1997).

157 *Id.* at 1577 (quoting *United States v. Dutcher*, 8 F.3d 11, 12 (8th Cir. 1993)).

158 Note that this appeal is not allowed by 18 U.S.C. § 3742 (1994), because a defendant can only appeal a sentence which “is *greater* than the sentence specified in the applicable guideline range . . .” 18 U.S.C. § 3742(a) (emphasis added).

159 See *McCarthy*, 97 F.3d at 1577.

160 *Id.* (emphasis added).

161 *Id.* (referring to 18 U.S.C. § 3553(c)); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a) (1995).

162 See S. REP. NO. 98-225, at 80 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3263 (“The statement of reasons for a sentence outside the guidelines is especially important. . . . The statement of reasons will play an important role in the evaluation of the reasonableness of the sentence.”).

Another split between the circuit courts lies in the question of whether a decision *not* to depart from the Guidelines should be reviewed by an appellate court.¹⁶³ This question was not before the Court in *Koon*, but criminal defendants have attempted to use the decision to require appellate courts to review such a sentence determination.

It appears that Congress, in enacting the SRA, did not intend for appellate courts to review decisions not to depart from the Guidelines:

Appellate courts have long followed the principle that sentences imposed by district courts within legal limits should not be disturbed Section 3742 accommodates [departure] considerations by . . . confining [appellate review of sentences] to cases in which the sentences are illegal, are imposed as the result of an incorrect application of the sentencing guidelines, or are outside the range specified in the guidelines and unreasonable [These] limitations imposed . . . are further restrictions on the use of appellate review of sentences in order to avoid unnecessary appeals.¹⁶⁴

In accordance with this congressional intent, the Second Circuit, in *United States v. Brown*,¹⁶⁵ declined to extend *Koon* to decisions not to depart from the Guidelines. The Second Circuit had observed in the infancy of the Guidelines that:

Congress's failure to provide appellate review of sentences within the Guidelines correctly calculated [sentencing range] was . . . a conscious decision consistent with its overall purpose. The very nature of the sentencing reform enterprise was to establish national standards narrowing the discretion of sentencing judges as to attain a degree of uniformity¹⁶⁶

The court held that "[t]hese principles were in no way affected by the Court's decision in *Koon*."¹⁶⁷

163 Compare *United States v. Brown*, 98 F.3d 690 (2d Cir. 1996), and *McCarthy*, 97 F.3d 1562 (declining to review decisions not to depart), with *United States v. Hardy*, 99 F.3d 1242 (1st Cir. 1996), *United States v. Lewis*, 90 F.3d 302 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 713 (1997), *United States v. Edwards*, 98 F.3d 1364 (D.C. Cir. 1996), *cert. denied*, No. 96-1492, 1997 WL 134423 (U.S., Apr. 14, 1997), and *United States v. Olbres*, 99 F.3d 28 (1st Cir. 1996) (reviewing decisions not to depart).

164 S. REP. NO. 98-225, at 150, 154 (1993), reprinted in 1984 U.S.C.A.N. 3182, 3333, 3337; see also Selya & Kipp, *supra* note 10, at 13-15, 14 n.62. "Congress did not intend to impinge on what remains of the district court's discretion by providing for review of sentences imposed within the proper guideline range." *Id.* at 14.

165 98 F.3d 690 (2d Cir. 1996).

166 *Id.* at 692 (quoting *United States v. Colon*, 884 F.2d 1550, 1555 (2d Cir. 1989)).

167 *Id.*

A compelling argument exists, however, for the review of decisions not to depart from the Guidelines in *United States v. Olbres*.¹⁶⁸ The First Circuit, in that case, reviewed a district court's refusal to depart from the Guidelines based upon termination of an ongoing business enterprise and innocent persons' loss of employment as a result of the defendants' convictions. The district court decided that case precedent mandated that "as a matter of law, business failure and third party job loss, regardless of the magnitude or severity of the consequences, could not serve as the basis for a downward departure motion."¹⁶⁹ The First Circuit cited *Koon* many times in the opinion, and concluded that categorical refusal to use the factors of job loss from business failures "would run afoul of one of the important concerns articulated in *Koon*. The Supreme Court has held that generally courts should not categorically reject a factor as a basis for departure from [the] Guidelines"¹⁷⁰ The First Circuit correctly interprets *Koon*, although *Koon* did not address the issue of a district court's categorical approach to departure factors. In *Koon*, the *circuit* court had incorrectly used that approach. Perhaps if such a review were not characterized as a review of a sentence outside the Guideline range, but rather as an "incorrect application of the sentencing guidelines,"¹⁷¹ this would be allowed under 18 U.S.C. § 3742.

Finally, does *Koon* apply to adjustment decisions (guided departures) as well as unguided departures? Some circuits continue to review such adjustments using the *de novo* standard they used before the *Koon* decision, reasoning that appellate review of guided departures involves interpreting a statute.¹⁷² The Eighth Circuit, however, in *United States v. McCarthy*,¹⁷³ used *Koon*'s abuse of discretion standard to review whether a two- or four-level adjustment was warranted in

168 99 F.3d 28 (1st Cir. 1996).

169 *Id.* at 33.

170 *Id.* at 34.

171 18 U.S.C. § 3742(a)(2) (1994).

172 *See, e.g., United States v. Taylor*, 88 F.3d 938, 942 (11th Cir. 1996) ("In the context of applying enhancements pursuant to specific offense characteristics and for obstruction of justice, this Court has held that our scope of review is *de novo*. . . . We review a district court's *departure* from the applicable sentencing guideline range for abuse of discretion." (emphasis added)).

173 97 F.3d 1562 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1011 (1997), 117 S. Ct. 1284 (1997); *see also United States v. Edwards*, 98 F.3d 1364, 1371 (D.C. Cir. 1996) (using a due deference standard, and citing *Koon* as authority, for the review of a district court's failure to apply a two-level adjustment), *cert. denied*, No. 96-1492, 1997 WL 134423 (U.S., Apr. 14, 1997).

that case, citing *Koon* as authority.¹⁷⁴ Although not addressed by *Koon*, the reasoning behind an abuse of discretion standard—that sentencing judges have a better “feel” for the case and ability to apply the facts of the case to the Guidelines’ instructions—would perhaps justify a similar standard of review for adjustment decisions.¹⁷⁵ In addition, guided departures are similar to unguided departures in that the process involves both questions of law and questions of fact. That is, the process involves interpreting the Guidelines as well as deciding whether the particular circumstances of the case cause it to fall within the guided departure criteria.

VI. CONCLUSIONS AND A PROPOSED SOLUTION

A. Appellate Review of Departure Decisions

The *Koon* decision, by adopting an abuse of discretion standard, addresses and properly modifies the appropriate roles which the district and circuit courts should play in departures from the Federal Sentencing Guidelines.¹⁷⁶ Under the previous de novo review, the appellate courts were permitted to decide not only the scope of cases which constitute the heartland of a particular Guideline section, but also whether the facts of a case cause it to fall within or outside of that heartland. Neither determination is appropriate for the circuit courts.

First, as the Supreme Court noted, the district court, because of its unique vantage point and day-to-day experience in criminal sentencing, has an institutional advantage over circuit courts in making both of these determinations.¹⁷⁷ The district courts view many more Guideline cases than circuit courts, and the district courts also see first-hand the circumstances of the specific case and specific offender characteristics. Their ability to compare the two cannot be replaced or matched by a higher court. Deference to their discretionary decisions is therefore logical and appropriate.

174 *Id.* at 1579 (citing *Koon*, 116 S. Ct. at 2046–48). None of these pages mention sentencing adjustments; they only mention the unguided departures which were before the Court.

175 An argument could be made that adjustment decisions should not be reviewable at all because they fall within the legal limits of the guideline range. However, some limited appellate review would probably be helpful to maintain the goals of reduced disparity and uniformity.

176 This conclusion has support in Abraham L. Clott, *An Assistant Federal Defender Responds to Koon*, 9 FED. SENTENCING REP. 25, 27 (1996) (“If *Koon* is taken seriously, sentencing responsibility is shifted even further from the courts of appeals to both the district courts and the Commission.”).

177 See *Koon*, 116 S. Ct. at 2047.

Second, Congress, in contrast with prior sentencing practice, provided for limited appellate review under the Sentencing Guidelines, only to “assure that the guidelines are applied properly.”¹⁷⁸ This review does not contemplate the replacement of the district court judge’s “thoughtful imposition of individualized sentences,”¹⁷⁹ but is required only to “provid[e] adequate means for correction of erroneous and clearly unreasonable sentences.”¹⁸⁰

Without greater scrutiny of departure decisions, many commentators believe that the discretionary review adopted in *Koon* will result in more departures from the Guidelines, undermining the goal of reduced disparity in criminal sentences.¹⁸¹ However, Congress’s goal of reduced disparity can be fully achieved through the inherent restrictions in the Guidelines themselves. Under the Guidelines, district court judges are held to narrow sentencing ranges in the typical case, can only depart when “there exists an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines,” and must specifically enumerate and justify the reasons for departures. Further, their departure decisions are subject to limited appellate review, initiated by the defendant or the government. These are radical changes from the previous sentencing practices which resulted in great disparity in sentences for similarly situated defendants. The constraints imposed upon sentencing judges by such a structured sentencing scheme should in and of themselves improve uniformity in sentencing. Further, keeping in mind the additional goal of proportionality and fair-

178 S. REP. NO. 98-225, at 151 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3334.

179 *Id.* at 52, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235.

180 *Id.* at 155, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3338; *see also id.* at 150, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333 (“The sentencing provisions of the reported bill 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.”).

181 *See, e.g.,* Clott, *supra* note 176:

Defense lawyers seeking to persuade sentencing judges that they have broad discretion to depart below guideline sentencing ranges that appear correctly calculated but too high will find some immediate gratification in the Supreme Court’s *Koon* decision Only the most plainly illegal departures should fail, at least under the present guidelines

Id. at 25; Bowman, *supra* note 40, at 32 (“Since *Koon* seems to provide courts with a license to depart, it would not be too far fetched to believe that a departure-happy district might seize the moment and begin an onslaught of court-initiated downward departures.”). *But see* Stith, *supra* note 132, at 15 (claiming that the significance of the abuse of discretion standard is diminished within the *Koon* decision by the extent of review the Justices undertook).

ness, discretion should properly be given to the district courts to depart when the individual circumstances justify a different sentence. As long as this ability to depart conforms with the instructions for departure provided in the Guidelines, *unwarranted* disparity should not occur. And this is the only disparity which should be of concern.¹⁸²

Finally, the discretionary standard properly reflects Congress's original intent in formulating the Federal Sentencing Guidelines: "The sentencing guidelines system will not remove all of the judge's sentencing discretion. Instead, it will guide the judge in making his decision on the appropriate sentence."¹⁸³ The Supreme Court echoed this intent, by stating in *Koon*: "Discretion is reserved within the Sentencing Guidelines, and reflected by the standard of appellate review we adopt."¹⁸⁴

B. *The Mechanics of Departure Decisions*

Although the Supreme Court unanimously agreed on the appropriate appellate standard of review, the Court's disagreement over the validity of the District Court's departure factors evidences the ambiguity surrounding the proper procedures to follow for departure decisions. This ambiguity leads not only to a district court's uncertainty about when it can legally depart, but also to inconsistent appellate review of departure decisions. Thus, the fear of potentially increased sentence disparity caused by the more deferential review standard is only enhanced by this ambiguity. Therefore, Congress and the Sentencing Commission should amend the Guidelines to provide further guidance on departure decisions.

The foundation for such an amendment can be found in the Supreme Court's *Koon v. United States* decision itself, and the bases for

182 For a position advocating increased, but constrained, discretion to depart, see Karen Lutjen, Article, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389, 464 (1996):

Perhaps the most important and necessary method of improving the guidelines is also the most obvious—return enough discretion to judges so they may consider all relevant offender and offense characteristics. This does not mean a return to unconstrained discretionary sentencing, where every factor that the defendant wishes to assert in his favor must be considered. Rather, it contemplates the consideration of factors 'not ordinarily relevant,' such as age, family responsibilities, work experience or drug and alcohol abuse.

Id.; see also Kmiec, *supra* note 65, at 201 ("None of the Guidelines' critics doubt the necessity for appropriate appellate review, but all stress the need that such review ought not displace the need for individualized punishment.").

183 S. REP. NO. 98-225, at 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234.

184 *Koon v. United States*, 116 S. Ct. 2035, 2053 (1996).

the dissenting opinions. The *Koon* decision, as do the Guidelines, emphasizes the “heartland” concept: “The Commission . . . says it has formulated each Guideline to apply to a heartland of typical cases. Atypical cases were not ‘adequately taken into consideration’”¹⁸⁵ This explanation seemingly leads to a simple typical/atypical case analysis. However, the heartland concept is not so simple, and even the majority did not always follow the typical/atypical analysis in its conclusions. In fact, the atypical, or unusual, test is only one of three used throughout the opinion.

The majority used a second test when it concluded that the petitioner’s low likelihood for recidivism was an invalid departure factor. The Court based this conclusion not upon the fact that the case was typical, but because the Court found evidence in the Guidelines that the Commission took the factor into account in formulating Criminal History Category I.¹⁸⁶ As a third test, Justice Souter’s dissent emphasized the “rational normative order” requirement that departures are warranted only if the unusual circumstances *should* result in a different sentence.¹⁸⁷

Support for all three of these viewpoints, or tests, can be found in the Guidelines and applicable statutes.¹⁸⁸ Therefore, an appropriate set of departure instructions should take all three tests into account.¹⁸⁹

185 *Id.* at 2044 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1995)); see also Stith, *supra* note 132, at 14 (“[T]he court unanimously embraced the notion that the sentencing guidelines deal with ‘heartland’ cases, and that judges may depart in cases outside the ‘heartland.’”).

186 See *Koon*, 116 S. Ct. at 2052–53.

187 See *id.* at 2054 (Souter, J., concurring in part and dissenting in part).

188 First, “[t]he 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.” U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(b) (1995); Second, “[t]he court shall impose a sentence . . . within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines” 18 U.S.C. § 3553(b) (1994); Third, “[t]he court shall impose a sentence . . . within the range . . . unless the court finds [a factor] not adequately taken into consideration [and the factor] *should* result in a sentence different from that described.” 18 U.S.C. § 3553(b) (1994) (emphasis added). See also Paul J. Hofer, *Discretion to Depart After Koon v. United States*, 9 FED. SENTENCING REP. 8 (1996) (describing the three potentially different heartland concepts as “statistical, intentional, and normative”).

189 In contrast, the First Circuit, in *United States v. Rivera*, chose to interpret the apparent conflict between the different departure instruction languages by stating:

[W]e believe the statutory language “adequately taken into consideration” sometimes has little practical importance. . . . The Commission itself has

C. *Proposed Departure Test*

This Comment recommends continued adherence to then-Chief Judge Breyer's analysis set forth in *Rivera*, as the Court in *Koon* supported,¹⁹⁰ but with some modifications. The test proposes that, for a district court to justify a departure from the applicable Guideline range, the judge must satisfy all three parts of the following test:

(1) The circumstances, or factors, of the case make the case special, or unusual, compared with other cases falling under the same Guidelines section.

(2) If the factor is encouraged, the court may depart if the applicable Guideline section does not already take the factor into account.

If the factor is discouraged, or encouraged but already taken into account by the applicable Guideline section, the court may depart if the unusual factor is present "to a degree substantially in excess of that which ordinarily is involved in the offense."¹⁹¹

If the factor is not mentioned in the Guidelines, the court may depart if it finds that the factor was not adequately taken into consideration by the Commission in formulating the applicable Guideline section, considering "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."¹⁹² The court should decide whether the departure is appropriate "after considering the 'structure and theory of both relevant individual

explicitly said that . . . it did not "adequately" take *unusual* cases "into consideration." . . . [O]nce the court . . . has properly determined that a case is, indeed, "unusual," the case becomes a candidate for departure, for the Commission itself has answered the statutory "adequate consideration" question.

United States v. Rivera, 994 F.2d 942, 947 (1st Cir. 1993). However, an interpretation which satisfies *all* the language variations throughout the Guidelines seems more appropriate. See *Williams v. United States*, 503 U.S. 193, 200 (1992):

The Guidelines echo the [Sentencing Reform] Act's instruction that a district court may depart from the applicable guideline range only when it finds an aggravating or mitigating circumstance not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. Construing the plain language of the Guidelines Manual *and* the governing statute, we conclude that it is an incorrect application of the Guidelines for a district court to depart from the applicable sentencing range based on a factor that the Commission has already fully considered . . .

Id. (emphasis added) (citations and internal quotation marks omitted).

190 See *supra* notes 69-72 and accompanying text.

191 U.S. SENTENCING GUIDELINES MANUAL § 5K2.0, p.s. (1995).

192 18 U.S.C. § 3553(b) (1994).

guidelines and the Guidelines taken as a whole,”¹⁹³ and keeping in mind that “such cases will be highly infrequent.”¹⁹⁴

(3) The unusual circumstances *should* result in a departure.

The first and third parts of this test are clearly discretionary decisions best made by the district courts. The second part of this test could potentially involve questions of law, or an interpretation of a set of words in the Guidelines, and it is this part which provides the appellate courts with the most power to scrutinize a district court’s decision. But as the Supreme Court stated, “[l]ittle turns . . . on whether we label review of [a legal] question abuse of discretion or de novo, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction.”¹⁹⁵ In conformance with the *Koon* decision, the de novo portion of this review should not extend to the discretionary decision of whether the Commission took a particular factor, as it exists in the case at hand, into account when formulating the Guidelines.

An example of the use of this test, as it would have applied in the *Koon* case, is helpful. In the case of susceptibility to abuse in prison, the District Court found that the extent of this potential abuse was great enough to make the case unusual. This decision is discretionary, and as the majority stated, “[t]he . . . conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts.”¹⁹⁶ Therefore, use of the factor complies with the first part of the proposed test. Second, since the factor is not mentioned in the Guidelines, the appellate court must review whether the Commission took the factor into account in formulating the applicable Guideline section for violations of civil rights under color of law. The Commission most likely contemplated that police officers would be prosecuted under this statute, and their

193 *Koon v. United States*, 116 S. Ct. 2035, 2045 (1996) (quoting *Rivera*, 994 F.2d at 949).

194 U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, cmt. 4(d) (1995). Both parts one and two of this analysis are required because, although what the Commission has taken into account includes typical circumstances, the reverse is not always true. An atypical factor may also have been taken into account by the Commission in formulating the Guidelines, even though the circumstance occurs only rarely. See, for example, Justice Breyer’s argument that the factor of double prosecution may be rare, but was taken into consideration by the Sentencing Commission when formulating the Guideline section corresponding to 18 U.S.C. § 242 (1994) (violating constitutional rights under color of law). It must have been contemplated that this statute would potentially involve federal proceedings after state prosecution has failed. See *Koon*, 116 S. Ct. at 2056 (Breyer, J., concurring in part and dissenting in part).

195 *Koon*, 116 S. Ct. at 2047.

196 *Koon*, 116 S. Ct. at 2053.

increased potential for abuse in prison would most likely have been considered. However, the District Court based its decision to depart upon "[t]he extraordinary notoriety and national media coverage of this case, *coupled with* the defendants' status as police officers."¹⁹⁷ Therefore, giving deference to the District Court's determination that the Commission did not take the circumstances as they exist in the case into account, the second part is also satisfied.¹⁹⁸

The final part of this test is the most difficult for the District Court to overcome: should these unusual circumstances result in a downward departure? As Justice Souter pointed out, part of the reason for the great publicity of this case, upon which the District Court justified the downward departure, "stemmed from the remarkable brutality of petitioners' proven behavior, which it was their misfortune to have precisely documented on film."¹⁹⁹ In that case, departure would seem to reward the defendants for the criminal acts they were convicted of. However, an additional part of the "widespread publicity and emotional outrage"²⁰⁰ of this case did not stem from Koon and Powell's proven behavior, but from the state court acquittal and the violent riots which followed. The defendants were not responsible for these circumstances surrounding the case, but since the circumstances contributed to the greater likelihood for prison abuse, perhaps the factor justified a downward departure. Giving the District Court substantial deference, the third part of the proposed test would most likely be considered satisfied. Therefore, the susceptibility to abuse in prison factor would have been upheld using this test, as it was by the majority of the Supreme Court.

The test proposed in this Comment more clearly outlines the analysis a district court must undertake in departure decisions. At the same time, it places further inherent limitations on the district court's

197 *United States v. Koon*, 833 F. Supp. 769, 785-86 (C.D. Cal. 1993) (emphasis added), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, *Koon v. United States*, 116 S. Ct. 2035 (1996).

198 Further support for the District Court's determination that it could rely upon susceptibility to abuse in prison as a valid departure factor, given the structure and theory of the Guidelines, can be found in the Commission's response to *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990). The Circuit Court upheld the sentencing judge's decision to depart downward due to the defendant's susceptibility to abuse in prison due to his physical appearance. In response, the Commission did not declare potential for prison abuse an invalid, or forbidden departure factor, but rather the Commission amended the Guidelines by adding physical appearance as a discouraged departure factor. See *supra* note 61.

199 *Koon*, 116 S. Ct. at 2054-55 (Souter, J., concurring in part and dissenting in part).

200 *Id.* at 2054.

ability to depart from the Guidelines, which should limit departures to only those cases which truly warrant different sentences from the majority. This test also gives circuit courts more guidance for their review process and focuses their constraining ability upon the correct criteria.

In conclusion, departures from the Federal Sentencing Guidelines, and review of those departures, capture the essence of the balance between the goals of proportionality and uniformity that Congress originally intended to achieve through the Sentencing Reform Act and the Guidelines. This is a delicate balance which requires deference to the trial court's discretionary decisions and an appropriate check on this discretion by the appellate court. Equilibrium between the two can only be achieved through explicit instructions for the departure process as well as the standard of review. The Supreme Court, in *Koon v. United States*, addresses and appropriately modifies the second requirement. The first remains to be resolved.

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