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Sentencing Reform and Appellate Review

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THE FOURTH CIRCUIT REVIEW

SENTENCING REFORM AND APPELLATE REVIEW

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I. INTRODUCTION

The court year 1987-88 was once again a busy one for the judges of the Fourth Circuit.[1] The eleven active circuit judges were assisted in handling the heavy caseload by two senior circuit judges and many district court judges who graciously sat with the court by designation. Also, the court was honored with the presence of Associate Justice Lewis F. Powell, Jr. (retired) who sat with the court during the October and June terms.

A large portion of the caseload involved criminal appeals that presented the court with a variety of issues.[2] Although some of the issues involving challenges to convictions were complex, challenges to the sentences imposed rarely required extended consideration because of the limited review allowed of criminal sentences. However, with the recent United States Supreme Court decision in *Mistretta v. United States*,[3] all levels of the federal court system face a new dimension in criminal sentencing.

In *Mistretta* the Court upheld the constitutionality of the Sentencing Reform Act of 1984[4] (Reform Act) and the United States Sentencing Commission (Commission) against several challenges.[5] The eight to one majority decision[6] clears the way for further implementation of the Reform Act and the sentencing guidelines promulgated by the Commission for use

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This Article should not be interpreted as a statement by the United States Sentencing Commission.

1. The court disposed of an average of 146 cases per active judge from July 1, 1987 through June 30, 1988.

2. Criminal appeals constituted 13% of the total regular appeals.

3. 109 S. Ct. 647 (1989).

4. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (1985)).

5. Defendant Mistretta alleged that the Reform Act violated separation of powers principles by placing the Commission in the Judicial Branch, requiring that Article III judges serve on the Commission, and empowering the President to remove Commissioners "for cause." Mistretta v. United States, 109 S. Ct. 647, 660, 673 (1989). Mistretta also alleged that the Reform Act was an excessive delegation of lawmaking authority. *Id.* at 658, 661, 675. The Court rejected all these challenges.

6. Justice Blackmun authored the opinion of the Court. *Id.* at 649. Justice Scalia dissented in a written opinion. *Id.* at 675.

by federal sentencing courts.[7] Full, nationwide implementation of the Reform Act and the sentencing guidelines following an initial period of constitutional uncertainty[8] has a number of significant implications for the federal criminal justice system, not the least of which is a substantial increase in the criminal case workload for United States magistrates, United States District Courts, the twelve United States Courts of Appeals that handle criminal appeals, and the United States Supreme Court.

The increased volume of criminal appeals arises most directly from the Reform Act's authorization of appellate review of sentences,[9] which represents a dramatic change in criminal jurisprudence from the practice that has prevailed for most of our nation's history. Prior to the advent of the Reform Act, appeal of sentences in the federal courts was a relatively rare occurrence, limited to a few special situations and, more generally, to those instances in which there was an alleged violation of statutory or constitutional law. The Reform Act preserves these general opportunities for appellate review of sentences and authorizes review of several additional categories of cases related to application of the sentencing guidelines. The combined effect is to provide avenues for thousands of additional criminal defendants each year to bring their cases before the federal appellate courts.

Before examining the new appellate review status in greater detail, it is useful to consider the past status of appellate review of sentences and some of the legislative and policy background underlying this dramatic change in appellate sentencing review.

II. Previous Appellate Review of Sentences: General Nonreviewability

Historically, appellate courts have spent little time addressing challenges to individual criminal sentences. It was well-settled that a federal trial judge was vested with broad discretion in the sentencing phase of criminal prosecutions, and that sentences imposed within the statutory limits generally were not reviewable on appeal.[10] The Court of Appeals for the Fourth Circuit consistently adhered to the doctrine that a sentence within the

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7. The initial guidelines were submitted by the Commission to Congress on April 13, 1987, in accordance with section 235(a)(1)(B)(i) of the Reform Act. The guidelines took effect on November 1, 1987, following the prescribed period of congressional review. They are applicable to crimes committed after the guidelines became effective. *See* Pub. L. No. 100-182, § 2, 101 Stat. 1266 (1987).

8. Prior to the Court's decision in *Mistretta,* some 160 district courts and the Court of Appeals for the Ninth Circuit had invalidated some or all of the Reform Act and the guidelines, while some 120 district courts and the Court of Appeals for the Third Circuit had upheld the statute and the guidelines.

9. *See* 18 U.S.C. § 3742.

10. United States v. Tucker, 404 U.S. 443, 446-47 (1972); United States v. Schocket, 753 F.2d 336, 341-42 (4th Cir. 1985) (citing United States v. Pruitt, 341 F.2d 700 (4th Cir. 1965)) (no abuse of discretion in sentence of 15 years imprisonment for conspiracy to possess with intent to distribute 4,600 tons of marijuana).

statutory limits would not be reviewed on appeal in the absence of extraordinary circumstances[11] and would not be disturbed except for gross abuse of discretion.[12]

A. Review Under the Eighth Amendment

Even in the face of this general policy of deference, individual sentences were, and remain, subject to review under the eighth amendment prohibition of cruel and unusual punishment.[13] In *Solem v. Helm* the United States Supreme Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[14] The Court established three criteria to guide a reviewing court in a proportionality analysis: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[15]

Although the Court recognized that successful challenges to proportionality of particular sentences would be exceedingly rare outside the context of capital punishment, it held that proportionality analysis is applicable in noncapital cases.[16] In so holding, the Court did not abandon the longstanding deferential standard of review for sentences:

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.[17]

After the decision in *Solem,* the Fourth Circuit continued to accord great deference to sentences within statutory limits, holding that an extensive proportionality analysis is required only in those cases involving life sentences without parole.[18] Even where the court has been concerned about the

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11. *Schocket,* 753 F.2d at 341 (citing United States v. Wilson, 450 F.2d 495 (4th Cir. 1971)).

12. *Id.* (quoting United States v. Hodge, 394 F.2d 122 (4th Cir. 1968)).

13. U.S. CONST. amend. VIII.

14. 463 U.S. 277, 290 (1983).

15. *Id.* at 292.

16. *Id.* at 289-90.

17. *Id.* at 290 n.16.

18. United States v. Rhodes, 779 F.2d 1019, 1028 (4th Cir. 1985), *cert. denied,* 476 U.S. 1182 (1986).

severity of a sentence for less than life, it has refused to conduct a proportionality review.[19]

B. Review Under the Dangerous Special Offender Statute

Another exception to the general policy of deference was found under the dangerous special offender statute,[20] which provided for enhancement of felony sentences of defendants adjudged dangerous special offenders.[21] The standard for appellate review of such enhanced sentences was far greater than the standard of review generally allowed for sentences.[22] This statute allowed either the defendant or the United States to seek review of a sentence in a court of appeals,[23] which included consideration of "whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."[24]

The Fourth Circuit recognized that "[o]ne of the motivating factors underlying Congress' enactment of this [appellate review] section of the statute was the desire to limit the discretion of sentencing judges."[25] The Senate Report accompanying the enactment legislation expressed concern that "haphazard development of excessive, inadequate, and wholly discretionary sentencing has been dismal. Individual defendants have had imposed upon them palpably excessive or insufficient or inconsistent sentences, doing injustice sometimes to defendants and sometimes to society."[26] In response to this problem, appellate courts were empowered to modify or vacate sentences based on erroneous findings or when found to be unnecessary and unfair.[27]

Some of the concerns which prompted the strictures on sentencing in the dangerous offender statute also provided impetus for the Reform Act and promulgation of the sentencing guidelines. With these revolutionary changes, the discretion of sentencing courts has been reduced and the sentences imposed subjected to greater scrutiny on appellate review.

III. THE REFORM ACT: BACKGROUND

The legislative history of section 3742 reflects a careful, deliberative decision by Congress after lengthy debate and study. Proposals to authorize

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19. United States v. Guglielmi, 819 F.2d 451, 456-57 (4th Cir. 1987), *cert. denied,* 108 S. Ct. 731 (1988). The defendant received consecutive maximum five-year sentences on five related counts of interstate transportation of obscene films. *Id.* at 453. The court expressed concern regarding the imposition of a 25-year sentence for five mailings which were instigated by the FBI, but deferred to the precedent established in *Rhodes* which precluded a proportionality review. *Id.* at 456-57.

20. 18 U.S.C. §§ 3575, 3576 (1970) (repealed by the Reform Act, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (1984), effective November 1, 1986).

21. 18 U.S.C. § 3575.

22. United States v. Scarborough, 777 F.2d 175, 179 (4th Cir. 1985).

23. 18 U.S.C. § 3576.

24. *Id.*

25. *Scarborough,* 777 F.2d at 180.

26. S. REP. No. 617, 91st Cong., 1st Sess. 85 (1969).

27. *Scarborough,* 777 F.2d at 180.

appellate review of sentences preceded legislative consideration of a comprehensive sentencing reform package and the concept of sentencing guidelines,[28] but were later melded into the structure of sentencing reform as a principal component. The general concept of appellate review of sentences enjoyed wide bipartisan support in Congress.

The overall purpose of this key provision of the Reform Act was to establish "a limited practice of appellate review of sentences in the Federal criminal justice system."[29] Although Congress did not desire simply to allow the substitution of a decision of the appellate court for that of the sentencing judge, it did want to "control the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing."[30] Congress anticipated that appellate review in conjunction with the sentencing guidelines would accomplish these goals and, furthermore, that review of guideline application decisions by the appellate courts would assure correct application and "case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Commission in refining the guidelines as the need arises . . . [to perhaps build into the guidelines factors frequently cited as a basis for departure]."[31]

Since enactment as part of the Reform Act, the appellate review section has been the subject of several amendments. The Criminal Law and Procedure Technical Amendments Act of 1986[32] deleted certain ill-conceived provisions that would have authorized an appellate court to change a sentence determined to have been imposed in violation of law or as a result of an incorrect application of the sentencing guidelines. After consideration, Congress determined that it was more appropriate for an appellate court to remand a case for further sentencing proceedings in all instances in which the district court decision was reversed, thereby leaving imposition of the final sentence to the district court.[33]

The Sentencing Act of 1987[34] made three additional changes to section 3742. Section 4 of that Act added a new procedure for appellate review of United States magistrates' sentences by district courts in a manner comparable to circuit court review of district court decisions. Section 5 of the Act provided a "plainly unreasonable" standard for appellate review of sentences imposed for offenses for which there is no applicable sentencing guideline. Finally, section 6 of the 1987 Sentencing Act clarified that an appellate court should affirm a sentence imposed unless a statutory ground for reversal and remand was present.[35]

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28. Senator Roman Hruska (R. Neb.) was an early and diligent champion of appellate review of sentences. In 1970, the U.S. Senate unanimously passed S. 1540 (90th Cong.), a Hruska bill to authorize appellate review, but the bill died in the House.

29. S. REP. No. 225, 98th Cong., 1st Sess. 149 (1983).

30. *Id.* at 150.

31. *Id.* at 151.

32. Pub. L. No. 99-646, § 73, 100 Stat. 3592 (1986).

33. *See* 132 CONG. REC. H11294 (daily ed. Oct. 17, 1986).

34. Pub. L. No. 100-182, §§ 4-6, 101 Stat. 1266 (1987).

35. *See* 133 CONG. REC. H10018 (daily ed. Nov. 16, 1987).

More recently, section 7103 of the Omnibus Anti-Drug Abuse Act of 1988[36] made further technical and clarifying changes to section 3742 to more closely conform the statutory language to the structure of the guidelines and the intent of the appellate review section. This legislation also modestly reorganized parts of section 3742 to collect in one subsection the provisions pertaining to appeals of sentences imposed in connection with Federal Rules of Criminal Procedure 11(e)(1)(C) plea agreements.[37] Finally, the 1988 Act accomplished a significant clarification of the standard by which appellate courts are to consider questions involving application of the guidelines to the facts of a particular case.

The statute previously required that appellate courts "give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact . . . unless they are clearly erroneous."[38] The amendment added a significant requirement that appellate courts also "give due deference to the district court's application of the guidelines to the facts."[39] The legislative history of the adoption of the "due deference" standard of review is very instructive:

> This standard is intended to give the court of appeals flexibility in reviewing an application of a guideline standard that involves some subjectivity. The deference due a district court's determination will depend upon the relationship of the facts found to the guidelines standard being applied. If the particular determination involved closely resembles a finding of fact, the court of appeals would apply a clearly erroneous test. As the determination approaches a purely legal determination, however, the court of appeals would review the determination more closely.[40]

The level of deference due a sentencing judge's application of the guidelines to the facts thus depends on the circumstances of the case. If the issue turns primarily on a factual determination, an appellate court

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36. Pub. L. No. 100-690, § 7103, 102 Stat. 4181 (1988).

37. Rule 11 provides, in pertinent part:

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussion with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particulate sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

FED. R. CRIM. P. 11(e)(1).

38. 18 U.S.C. § 3742(d) (1982 & Supp. IV 1986), as it existed prior to these amendments (concluding sentence).

39. Pub. L. No. 100-690, § 7103(a)(7), 102 Stat. 4181 (1988).

40. 134 CONG. REC. H11257 (daily ed. Oct. 21, 1988).

should apply the "clearly erroneous" standard.[41] If a case turns primarily on the legal interpretation of a guidelines term or on which of several offense conduct guidelines most appropriately applies to facts as found, the standard moves to one akin to *de novo* review. This "due deference" standard is, then, the standard courts long have employed when reviewing mixed questions of fact and law. On mixed questions, courts have not defined any bright-line standard of review. Rather, the standard of review applied varies with the "mix" of the mixed question.

IV. APPELLATE REVIEW IN GENERAL

Section 3742,[42] as amended, authorizes appeal of sentences, by either the defendant or the government, if the sentence was imposed in any of

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41. *See* United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989); United States v. White, 875 F.2d 427 (4th Cir. 1989).

42. As amended, section 3742 currently reads as follows:

§ 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
  (1) was imposed in violation of law;
  (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
  (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
  (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government, with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
  (1) was imposed in violation of law;
  (2) was imposed as a result of an incorrect application of the sentencing guidelines;
  (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or
  (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—
  (1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and
  (2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set

four situations: (1) in violation of law; (2) as a result of incorrect application of the sentencing guidelines; (3) as a departure from the applicable guideline range or from a Rule 11(e)(1)(C) plea agreement; or (4) for an offense not

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forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—
  (1) that portion of the record in the case that is designated as pertinent by either of the parties;
  (2) the presentence report; and
  (3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—
  (1) was imposed in violation of law;
  (2) was imposed as a result of an incorrect application of the sentencing guidelines;
  (3) is outside the applicable guideline range, and is unreasonable, having regard for—
    (A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
    (B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
  (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

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.

(f) Decision and disposition.—If the court of appeals determines that the sentence—
  (1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
  (2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—
    (A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
    (B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;
  (3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a sentence by a magistrate.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

18 U.S.C. § 3742 (Supp. 1989).

covered by the sentencing guidelines (if plainly unreasonable or if a departure from a Rule 11(e)(1)(C) plea agreement).

Significantly, the statute does not authorize appeal of a sentence imposed within the guidelines as a result of a correct application of the guidelines.[43] If the sentencing court correctly applies the guidelines and sentences within the applicable guideline range, neither the government nor the defendant has a right to appeal based on an assertion that the court should have departed from the guideline range. The absence of statutory appeal authorization in this instance appears to have been a conscious decision by Congress,[44] and although there have been recommendations to create such a right,[45] no legislation to accomplish that objective has been seriously considered. The effect of insulating a correctly applied, "within-guideline" sentence from appellate review is to leave a defendant or the government in no worse position than before enactment of the Reform Act.[46] Additionally, shielding within-guideline decisions from appellate review provides an additional measure of respect for the guidelines scheme of determining an appropriate range of sentence for defendants with similar offense conduct and prior criminal history.[47]

V. Appellate Review of Guideline Departures

Foregoing a discussion of appellate review of sentences in the other situations authorized by section 3742,[48] this article will examine appellate review of guideline departures. The statutory scheme for review of sentences that depart from the otherwise applicable guideline range involves the

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43. Nor does the statute permit an appeal of a sentence that is consistent with a Rule 11(e)(1)(C) plea agreement.

44. The Senate Report explains that the guidelines "provide a practical basis for distinguishing the cases where review is most needed from where appeal would most likely be frivolous." S. Rep. No. 225, 98th Cong., 1st Sess. 154 (1983).

45. *See, e.g., Sentencing Guidelines: Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary,* 100th Cong., 1st Sess. 485 (1987) (testimony of Judge Jon O. Newman, U.S. Court of Appeals, 2d Cir.); *Sentencing Commission Guidelines: Hearing Before the Senate Committee on the Judiciary,* 100th Cong., 1st Sess. 197-199 (1987) (discussion among Senator Specter and Judges Becker, Mazzone, and Tjoflat).

46. As indicated, *supra* notes 10-12 and accompanying text, in general there was no preexisting right to appellate review of a sentence imposed within the statutory maximum and minimum for the offense.

47. The Reform Act provides a six-month period of congressional review of guidelines and amendments to guidelines issued by the Commission. This substantial period of congressional review and opportunity to legislatively modify Commission decisions, as well as the ability of Congress, at any time, to directly amend the guidelines or direct the Commission to amend them, serves as a check upon arbitrary or unreasonable Commission action. Because of legislative monitoring, as well as requirements that the Commission follow certain Administrative Procedure Act ("APA") processes to assure public input into the Commission's guideline promulgation decisions, Congress did not find it necessary that the guidelines be subject to general appellate review under the APA in the manner which applies to most other agency rules. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 181 (1983).

48. *See supra* note 42 and accompanying text.

interplay of section 3742 and 18 U.S.C. § 3553(b), the provision of the Reform Act that sets out the bases for departure decisions.[49] In turn, the statutory scheme meshes with the sentencing guidelines jointly to determine when a departure is appropriate, as well as how much of a departure is reasonable.

A. Statutory Bases for Departures

A close reading of the language demonstrates that the departure standard set forth in section 3553(b) envisions a two-prong test. First, the court must identify one or more aggravating or mitigating circumstances (or factors) of a kind or degree[50] "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Second, having identified one or more factors not adequately accounted for in the guidelines, the court may depart from the guideline range only if it further determines that the factor(s) "should result in a sentence different from that described" by the applicable guidelines.

The first part of the test entails an examination of the circumstances of each individual case in relation to the factors that the Commission appears to have considered in formulating the guidelines and to have incorporated into the structure of the guidelines, either as part of the base offense level, as a specific offense characteristic, or as some other adjustment to the offense level. In determining whether a factor was adequately taken into consideration by the Commission, section 3553(b) states that the court shall confine its examination to the guidelines, and the policy statements and official commentary of the Commission.[51] Thus, the sentencing court may not concern itself with background documents considered by the Commission, the extent or adequacy of Commission debate about a partic-

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49. The relevant portion of 18 U.S.C. § 3553(b) provides as follows:

> Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) 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. . . .

50. The "kind or degree" language was added by section 3 of the Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266. The legislative history of that amendment, read in conjunction with that of the Reform Act, makes clear that Congress intended the inserted language to clarify or make explicit that which was originally intended in the Reform Act. *Compare* 133 CONG. REC. H10016-21 (daily ed. Nov. 16, 1987) (statements of Rep. Conyers and Rep. Fish) *and* 133 CONG. REC. S16647 (daily ed. Nov. 20, 1987) (statement of Senator Hatch) *with* S. REP. No. 225, 98th Cong., 1st Sess. 78-79 (1983).

51. This provision also was added to the Reform Act by section 3 of the Sentencing Act of 1987, Pub. L. No. 100-182, § 3, 101 Stat. 1266. The legislative intent is succinctly expressed at 133 CONG. REC. S16647-48 (daily ed. Nov. 20, 1987) (statements of Senators Thurmond and Kennedy).

ular factor, or subjective Commissioner intent regarding a factor. Rather, the court must make its determination solely by looking to the language of the *Guidelines Manual* and drawing reasonable inferences therefrom. As will be explained in greater detail below, the Commission has provided guidance to the courts in determining what the Commission believes it has adequately considered in formulating the guidelines. This guidance consists of the language of particular guidelines, as well as accompanying commentary and a general description of the Commission's approach to the scope of guidelines and departures.

Although sometimes overlooked, there is a distinct second prong to the departure standard in section 3553(b). A departure must be based not only upon a factor not taken into account in the guidelines, but also upon a determination that the factor is of sufficient importance in the case that it "should result" in a sentence outside the applicable guideline range. The existence of a guideline range, which under the current guidelines generally varies by the greater of six months or 25% between the low and high points, provides flexibility that may be adequate for the court to give appropriate weight to a factor not accounted for in the guideline. For example, in a typical case in which the court might otherwise appropriately sentence near the middle of the range, the presence of an unaccounted-for, mitigating, or aggravating circumstance may be a basis for sentencing at another point in the range. The court may determine that such a decision gives adequate weight to the factor in the case and that a guideline departure should not result.[52]

The "should result" aspect of the departure test basically calls for weighing a possible departure factor's importance or substantiality on a case-specific basis, in conjunction with other factors in the case. It also involves an evaluation of the *reasonableness* of using that factor as a basis for departure, in terms of appellate courts' evaluation of departure decisions.

B. Commission Approach to Departures

Having described the statutory bases for a departure from the applicable guideline range, consideration also must be given to the manner in which the Commission approached its guideline promulgation task in relation to the statutory departure standard. Commission pronouncements on departures are interspersed throughout the *Guidelines Manual*. The general Com-

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52. The Senate Report confirms the importance of this second part of the departure test and further illustrates the congressional view of its practical effect:

> The provision recognizes, however, that even though the judge finds an aggravating or mitigating circumstance in the case that was not adequately considered in the formulation of guidelines, the judge might conclude that the circumstance does not justify a sentence outside the guidelines. Instead, he might conclude that a sentence at the upper end of the range in the guidelines for an aggravating circumstance, or at the lower end of the range for a mitigating circumstance, was more appropriate or that the circumstance should not affect the sentence at all.

S. REP. No. 225, *supra* note 50, at 79.

mission approach, often referred to as the "heartland" approach, is described in Chapter One.[53] As this introductory comment indicates, the Commission intends that each guideline and each specific offense characteristic apply to a certain range of similar conduct called the "heartland" of the guideline. The parameters of this range of typical conduct are to be determined by the sentencing court, again based on the written Commission pronouncements within the "four corners" of the *Guidelines Manual* and reasonable inference drawn therefrom. In policy statement section 5K2.0, the Commission further expands upon its view of departures and the circumstances under which they may or may not be appropriate.

In addition to a detailed description of this general approach to building specific factors into the guidelines, the Commission also has described several different kinds of departure circumstances.[54] One important kind of departure circumstance is what has come to be known as "Commission-identified" or "invited departures." These refer to language in the commentary accompanying specific guidelines in which the Commission expressly has identified circumstances that it did not "adequately consider" in constructing a guideline and that may warrant a departure if they occur. For example, in Guideline section 2D1.1, the offense guideline applicable to drug trafficking, the Commission has scaled the guideline offense level according to the quantity of drugs involved in the "revelant conduct"[55] of the offense. However, in Application Note 9 of the accompanying commentary, the Commission notes that scaling offense levels according to drug quantity sometimes may not adequately account for unusually high drug purity (a factor that often indicates a prominent role in the criminal enterprise). Thus, the presence of unusually pure narcotics "may warrant" an upward departure, particularly when this factor is associated with smaller drug quantities.

Occasionally, the commentary accompanying a particular guideline not only describes an "invited departure" but also suggests how the court should structure or limit its departure decision. For example, the Application Note in the commentary to section 2G1.1 which pertains to interstate transportation for the purposes of prostitution, describes circumstances not adequately considered in that guideline and specifically suggest limits on the amount of departure.

Another kind of departure the Commission discusses in the *Guidelines Manual* Introduction involves aggravating or mitigating circumstances not

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53. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL, 1-6 (rev. ed. 1988) [hereinafter GUIDELINES MANUAL].

54. The first kind of departure discussed in the Introduction, interpolation, will not be mentioned here, inasmuch as the Commission has determined interpolation is unnecessary and proposed an amendment to delete the discussion pertaining to it. *See* 54 Fed. Reg. 9122, 9123, 9126 (1989) (Proposed Amendments 3 and 19).

55. *See* GUIDELINES MANUAL, *supra* note 53, at 17 (defining "relevant conduct"); *see also id.* at 70 (discussing amount and type of drugs involved in offense as factors in determining offense level).

adequately considered in the guidelines and also not specifically identified by the Commission as a departure opportunity in the commentary accompanying particular guidelines. These factors may be of the general variety listed in Chapter Five, Part K of the Guidelines, or they may be some other factor presented in the case which the court identifies and which may properly be labeled judicially-created departures. Although theoretically there is no limit to the number of factors that potentially could form the basis for a departure from the applicable guideline range, in reality, as section 3553(b) envisions, many factors are not of sufficient importance to warrant a sentence outside the guideline range. Thus, the Commission expects that departures based upon factors that it has not identified will be associated with highly unusual cases.[56] In fact, the latest statistics from the Monitoring and Evaluation Division of the Commission show that 82.3% of sentences imposed under the guidelines since November 1, 1987 were within the appropriate guideline ranges, 5.7% were outside the appropriate ranges because of substantial assistance (a statutorily recognized basis for departure), 2.9% were upward departures, and only 9.1%, including negotiated pleas, commission-invited departures, and judicially-created departures, resulted in downward departures.

C. Interface of Appellate Review with Departure Standard and Commission Standard

The language and purposes of the portion of the Reform Act authorizing appellate review of sentences have been considered briefly. In addition, the two-prong test embodied in the Reform Act authorizing a sentencing court to depart from the otherwise applicable sentencing guideline range has been examined. Finally, the general approach to guideline drafting and departures described by the Commission, as well as different kinds of departures that the Commission envisioned, have been reviewed. The question remains: how does all of this fit together into a framework for appellate court consideration of departure decisions?

First, the language of subsections 3742(e)(3) and (f)(2), which pertain to consideration and disposition of a departure sentence appeal, requires an appellate court determination of whether the departure is "unreasonable," taking into account all of the factors in 18 U.S.C. § 3553(a) to be considered in imposing a sentence,[57] and the sentencing court's reasons supporting the

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56. *See id.* at 8 (discussing Commission's views on departures from sentencing guidelines).

57. 18 U.S.C. § 3553(a) (1985 & Supp. 1989) provides as follows:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics

departure decision. From the appellate court's view of a departure, the "reasonableness" of that departure decision ordinarily must encompass both the reasonableness of the determination of whether departure is warranted in the first place, as well as the reasonableness of the amount or extent of departure.[58]

As an abstract proposition, the scope of appellate review of departures under a "reasonableness" standard, which some commentators have associated with the substantial evidence test, might be said to be more deferential to the sentencing court than the clearly erroneous standard.[59] However, where the issue on appeal concerns the correctness of the factual findings underlying the decision to depart, surely the appropriate standard will be a review for clear error. Regarding other departure issues, the deference to be extended the sentencing court will vary according to whether the issue presented concerns the reasonableness of the departure or the reasonableness of the extent of the departure.[60]

Congress has supplied a specific statutory test for sentencing court departure decisions in 18 U.S.C. § 3553(b),[61] and appellate courts should

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of the defendant;

(2) the need for the sentence imposed—
  (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  (B) to afford adequate deterrence to criminal conduct;
  (C) to protect the public from further crimes of the defendant; and
  (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
(3) the kinds of sentences available;
(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;
(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

58. Alternatively, it is possible to interpret the phrase "is outside the applicable guideline range, and is unreasonable" in section 3742(e) and (f) in such a way that the "unreasonable" standard applies only to the extent of the departure above or below the guideline range and not to the decision to depart in the first place. Under that interpretation, an appellate court would have to read into section 3742 the two-part departure standard of section 3553(b) in order to have means for the consideration and disposition of the initial sentencing court determination to impose a sentence outside the guideline range. The more straightforward view seems to be that expressed in this article, *i.e.*, reading the "unreasonable" standard as covering all parts of the departure decision, but using the language of section 3553(b) to more fully define what is reasonable.

59. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS 75-78 (1977).

60. Note that section 3742(f)(2) requires that an appellate court "shall state specific reasons for its conclusions" as to why a district court departure decision is unreasonable. 18 U.S.C. § 3742(f)(2) (Supp. 1989).

61. *See supra* note 49.

use the same statutory test as a means of assessing whether a decision to sentence outside the applicable guideline range is unreasonable. Applying the departure standard in section 3553(b) and the Commission's approach to departures, it is apparent that the appellate evaluation of reasonableness in relation to an "invited departure" decision is simplified. If the Commission expressly has identified an aggravating or mitigating circumstance that it has not adequately taken into account in the guidelines and, consequently, has stated that a departure "may be warranted," then obviously the appellate court need not be as concerned with the reasonableness of the departure decision itself.

However, even in the case of the typical Commission-invited departure, only the first half of the section 3553(b) departure test is *per se* established.[62] The sentencing court ordinarily still must weigh the importance of the factor in the given case to determine if the factor "should result" in a sentence outside the guideline range, and the appellate court in turn must assess the reasonableness of that decision, paying particular attention to the sentencing court's statement of reasons as to why a sentence outside the guideline range was justified. Finally, if the appellate court finds that some departure was reasonable, it also must consider the reasonableness of the extent of departure above or below the otherwise applicable guideline range. Here again, the sentencing court's statement of reasons, as well as the section 3553(a) factors, must be considered carefully.

On the other hand, when the departure decision is founded upon a circumstance that the sentencing court, without the aid of a specifically-invited departure, determines was not adequately considered in the guidelines, it may not be appropriate for the appellate court to simply substitute its judgment *de novo* for that of the sentencing court, but a more thorough review generally will be required. In such a situation, the evaluation of the reasonableness of the departure necessarily must focus on both prongs of the section 3553(b) departure standard to determine if each was satisfied, as well as on the extent of departure. The appellate court must independently evaluate the pertinent language in the *Guidelines Manual,* including the introductory commentary describing the Commission's approach, to determine if the sentencing court reasonably concluded that the circumstance cited as a basis for departure was not adequately taken into consideration by the Commission in formulating the guidelines.

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62. Some Commission-identified departures are expressed more strongly than the typical "may be warranted" language of an invited departure. For example, Application Note 1 of the commentary under Prostitution Guideline § 2G1.1 states that if "the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission *recommends* a downward departure of 8 levels." GUIDELINES MANUAL, *supra* note 53, at 97 (emphasis added). Similarly, commentary under the Official Victim adjustment in § 3A1.2 states that if the victim was one of several officials not expressly covered in 18 U.S.C. § 1114, the court *shall* depart upward by at least three levels. *Id.* at 179 (emphasis added). The stronger the language of invitation, of course, the more likely it is that a decision to depart from the guideline range is *per se* reasonable.

The fact that the district court relied upon a factor in the case that is among those listed in Chapter Five, Part K of the *Guidelines Manual,* may or may not be a sufficient indicator of whether the particular factor adequately was taken into account by the offense conduct guidelines applicable to the particular case. This is because some of the departure factors listed in section 5K2 obviously have been incorporated, at least to some degree, into particular offense guidelines in Chapter Two.[63]

The appellate court's scrutiny of a departure not specifically invited by the Commission also must extend to the second prong of the section 3553(b) departure standard. Finally, just as with invited departures, the appellate court must also apply the reasonableness standard to the extent of departure above or below the guideline range, again taking into consideration the purposes of sentencing, other factors in section 3553(a), and the justification in the district court's statement of reasons.

When the issue is the reasonableness of the extent of departure, the appellate courts should give greater deference to the district court's decision. However, the deference is not unfettered. Congress again has incorporated by reference statutory criteria to assist in determining the reasonableness of the sentence. Specifically, 18 U.S.C. § 3742(e)(3) references the factors to be considered in imposing sentences (set forth in 18 U.S.C. § 3553(a)) and the district court's specific departure reasons. Among the sentencing factors listed in section 3553(a)(1) that the appellate court should reference to assess whether the extent of departure in a particular case was reasonable are the sentencing guidelines themselves. In a case in which the applicable guideline range may not account for one or more factors in a specific case (therefore making some amount of departure reasonable), analogy to other guideline provisions may provide a basis for assessing whether the extent of departure also was reasonable.[64]

In summary, while the reasonableness standard will be interpreted and defined by subsequent case law, the incorporation into this standard of the section 3553(b) departure test and the section 3553(a) sentencing factors provides specific content that will permit a broader judicial inquiry than otherwise would be warranted by a bare reasonableness standard alone.[65]

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63. *See, e.g.,* United States v. Uca, 867 F.2d 783 (3d Cir. 1989) (fact that firearms offense may have significantly endangered national security, public health, or safety, although potential departure factor listed in § 5K2.14, does not justify departure in case because offense conduct guideline adequately considers that factor).

64. For example, it might be appropriate and reasonable for a sentencing court to depart upward because a pending state felony offense for which the defendant had been convicted but not yet sentenced is not counted in the defendant's criminal history score for the instant offense. However, absent other aggravating circumstances, it probably would be unreasonable to depart upward to a greater sentence than would have been justified had the criminal history score included that prior state felony offense.

65. Like the due deference standard for reviewing guideline application issues, the reasonableness standard for reviewing departures should not be viewed as a fixed point within the scope of review spectrum, but rather as something of a sliding scale, depending on the particular aspect of a departure decision being reviewed. For example, if the question is

V. CONCLUSION

The Reform Act and guideline sentencing represent a dramatic change in our criminal justice system, and federal courts at all levels are working hard to adjust. The final result will be achievement of the goals of the Reform Act and a resulting system of justice which is fairer, more honest, and more effective than the system of the past.

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whether the evidence establishes the existence of a mitigating circumstance that could conceivably be a basis for departure, the standard might equate with clearly erroneous. On the other hand, the standard for reviewing the question of whether a mitigating factor, once found, has been adequately considered in formulating the guidelines ordinarily would be broader and less deferential to the district court.