Washington and Lee Journal of Civil Rights and Social Justice

Volume 26 | Issue 2 Article 11

5-29-2020

Crime and Punishment: Considering Prison Disciplinary Sanctions as Grounds for Departure Under the U.S. Sentencing Guidelines

Madison Peace
Washington and Lee University School of Law, peace.m@law.wlu.edu

Crime and Punishment: Considering Prison Disciplinary Sanctions as Grounds for Departure Under the U.S. Sentencing Guidelines

Madison Peace*

Abstract

There are currently over 175,000 federal inmates in the United States, 146,000 of whom are held in custody by the Federal Bureau of Prisons. When an inmate in federal prison commits a federal crime, he can be both sanctioned by the Federal Bureau of Prisons and referred to a United States Attorney for prosecution of the crime in federal district court. In the federal district court, a judge will look to the U.S. Sentencing Guidelines as a starting point to determine an appropriate sentence.

One question that the U.S. Sentencing Commission has not addressed, and on which federal appellate courts are divided, is whether prison disciplinary sanctions can be used as bases for downward departure under the U.S. Sentencing Guidelines when inmates are prosecuted in federal courts for crimes they committed while incarcerated. This Note will consider that question and will then recommend that the U.S. Sentencing Guidelines be explicitly amended to include prison disciplinary sanctions as grounds for departure.

* Candidate for J.D., May 2020, Washington and Lee University School of Law. Thank you to Woelke Leithart for suggesting this Note topic, Professor J.D. King for his wonderful guidance through the Note-writing process, and Professor Nora Demleitner for helping me make sense of the U.S. Sentencing Guidelines. Thank you to my parents for their support through law school and to Benjamin Nye for being the best life partner I could have imagined.

Table of Contents

"If he has a conscience, he will suffer for his mistake. That will be punishment—as well as the prison."

Fyodor Dostoevsky,
Crime and Punishment

I. Introduction

A. Consider This: A Federal Sentencing Hypothetical

Consider the following situation. James is serving a three-year sentence in federal prison for selling one hundred pounds of marijuana.[1] He has been the subject of several derogatory remarks from fellow prisoners. One day, a prison guard makes an offhand remark that offends James. He loses his temper and strikes the guard in the face, giving him a black eye. James immediately apologizes to the guard. James's action is considered a "high severity level prohibited act" under federal regulations.[2] After going through a hearing process in his correctional facility, James loses visitation and communication privileges for three months and is thus unable to see or speak with his young daughter.[3] Additionally, he is moved to a different housing unit within the prison. Because the incident also qualifies as a federal offense,[4] the Bureau of Prisons refers it to a U.S. Attorney's Office for potential prosecution.[5] The U.S. Attorney decides to prosecute James, and James pleads guilty to the offense of assault.

Prior to sentencing, a probation officer calculates the appropriate sentencing range for James under the U.S.

1. *See* 21 U.S.C. § 841 (2018) (describing the federal offenses of distributing controlled and counterfeit substances and the penalties associated with such offenses).

2. *See* 28 C.F.R. § 541.3 (2018) (describing acts prohibited within federal prisons and the sanctions associated with committing such acts).

3. *See id.* § 541.5 (setting forth the disciplinary process in federal prisons).

4. *See* 18 U.S.C. § 111 (2018) (setting forth the offense of "[a]ssaulting, resisting, or impeding certain officers or employees").

5. *See* U.S. DEP'T OF JUSTICE, No. 1350.01, PROGRAM STATEMENT: CRIMINAL MATTER REFERRALS (1996) (outlining procedures for "tracking and referring matters for prosecution that occur in Bureau of Prisons facilities or on Bureau of Prisons property, or involve Bureau of Prisons staff").

Sentencing Guidelines.[6] Combining a base offense level of 14 for "aggravated assault,"[7] the specific offense characteristic of causing the guard bodily injury,[8] and adjustments based upon the fact that the guard was a government employee[9] and that James accepted responsibility for his action,[10] the probation officer calculates James's final offense level at 20.[11] Although James's criminal record includes only one other conviction, which is for selling marijuana, because James committed the instant offense while serving a sentence, he earns two criminal history points.[12] This places him in Criminal History Category II.[13] Based upon his offense level (20) and his criminal history category (II), the applicable sentencing range for James's offense is thirty-seven to forty-six months.[14] The probation officer puts this information, along with James's prison disciplinary history, in her report.[15]

In federal district court, the judge considers the report but then decides to give James a sentence of only nine months, to be served consecutively with the sentence he is currently serving. The judge states that he is departing from the guidelines-recommended sentence, because he believes that the

---

6. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41697, HOW THE FEDERAL SENTENCING GUIDELINES WORK: AN ABRIDGED OVERVIEW 1 (2015) (explaining in detail how the guidelines work).

7. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A2.2 (U.S. SENTENCING COMM'N 2018) (describing the base offense level and specific offense characteristics for aggravated assault).

8. *See id.* (listing "bodily injury" as a factor for increasing the offense level).

9. *See id.* § 3A1.2 (setting forth the necessary adjustments when the victim is an "official victim," such as a government employee).

10. *See id.* § 3E1.1 (setting forth the necessary adjustments for when a defendant accepts responsibility for his offense).

11. *See* § 1B1.1 (providing instructions for applying the guidelines).

12. *See* § 4A1.1 (setting forth the criminal history categories and the points associated with them).

13. *See* § 5A (setting forth the sentencing table used to determine the applicable sentencing range based upon a defendant's offense level and criminal history category).

14. *See id.* (providing the sentencing ranges "in months of imprisonment").

15. *See* DOYLE, *supra* note 6, at 1 (explaining in detail how the guidelines work).

disciplinary sanctions James received from the Bureau of Prisons make a guidelines-calculated sentence too harsh.

There are currently over 175,000 federal inmates in the United States, 146,000 of whom are held in Bureau of Prisons custody.[16] As illustrated above in the hypothetical involving the fictional James, when an inmate in federal prison commits a federal crime, he can be both sanctioned by the Federal Bureau of Prisons and referred to a United States Attorney for prosecution of the crime in federal district court.[17] In the federal district court, a judge will look to the U.S. Sentencing Guidelines as a starting point to determine an appropriate sentence.[18]

B. Prison Disciplinary Sanctions as Grounds for Downward Departure: An Unresolved Issue

In October 1984, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984.[19] With the goal of making the federal sentencing system more proportional and consistent, the Sentencing Reform Act abolished federal parole for most cases and established the U.S. Sentencing Commission as an independent agency of the judicial branch.[20] Congress tasked the Commission with promulgating the U.S. Sentencing Guidelines to reduce judicial discretion in federal courts by providing sentencing policies and

16. *See* FED. BUREAU OF PRISONS, STATISTICS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Apr. 30, 2020) (providing updated data on the federal inmate population each Thursday) [https://perma.cc/5QDU-BE6A].

17. *See* PROGRAM STATEMENT: CRIMINAL MATTER REFERRALS, *supra* note 5 (outlining procedures for "tracking and referring matters for prosecution that occur in Bureau of Prisons facilities or on Bureau of Prisons property, or involve Bureau of Prisons staff").

18. *See* DOYLE, *supra* note 6, at 1 (explaining in detail how the guidelines work).

19. *See* 18 U.S.C. § 3551 (2018) (setting forth the provisions of the Sentencing Reform Act).

20. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A.2 (U.S. SENTENCING COMM'N 2018) (setting forth the statutory mission of the U.S. Sentencing Commission).

practices based upon empirical data.[21] In 1987, the Commission published its first guidelines manual.[22] The guidelines were mandatory and binding on sentencing judges until 2005 when the Supreme Court held in *United States v. Booker*[23] that an application of the U.S. Sentencing Guidelines violated a defendant's Sixth Amendment right to trial by jury.[24] In light of the Court's decision in *Booker*, the guidelines are now "effectively advisory."[25] Even though the sections of the Sentencing Reform Act making the guidelines mandatory have been severed, the Act still "requires judges to take account of the Guidelines together with other sentencing goals."[26] District courts must "consult" the guidelines, even though they are "not bound to apply" them.[27] Sentences that fall within the guidelines range, however, may enjoy a presumption of reasonableness upon appellate review.[28]

The U.S. Sentencing Guidelines allow for courts to exercise discretion and depart from the suggested sentencing range based upon a number of factors explicitly addressed within the guidelines in various places—in commentary and policy statements in Chapters Two, Four, and Five.[29] The Commission has also made it clear that it "does not intend to limit the kinds

21. *Id.*

22. *See id.* (noting that the "Commission's initial guidelines were submitted to Congress on April 13, 1987").

23. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Sixth Amendment requires "juries, not judges, to find facts relevant to sentencing" and severing the provision of the federal sentencing statute making the guidelines mandatory).

24. *Id.*

25. *Id.*

26. *Id.* at 259.

27. *Id.* at 264.

28. *See* Rita v. United States, 551 U.S. 338, 347 (2007) (concluding that a "court of appeals *may* apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines") (emphasis added).

29. *See* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 159–60 (Wolters Kluwer 4th ed. 2018) (explaining that commentary in Chapter Two of the guidelines provides "offense-specific bases for departures," Chapter Four provides grounds for criminal history departures, and policy statements in Chapter Five provide "generic bases for departure").

of factors, whether or not mentioned anywhere else in the [G]uidelines, that could constitute grounds for departure . . . ."[30]

One question that the U.S. Sentencing Commission has not addressed, and on which federal appellate courts are divided, is whether prison disciplinary sanctions can be used as bases for downward departure under the U.S. Sentencing Guidelines when inmates are prosecuted in federal courts for crimes they committed while incarcerated.[31] This Note will consider that question and will then recommend that the U.S. Sentencing Guidelines be explicitly amended to include prison disciplinary sanctions as grounds for departure.

II. An Overview of Federal Sentencing

A. The Development of the U.S. Sentencing Guidelines

The Sentencing Reform Act of 1984 created the U.S. Sentencing Commission and tasked it with promulgating and distributing guidelines for federal courts.[32] The guidelines were developed to create a more effective, fair, honest, uniform, and proportional sentencing system that would further the "basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."[33] Under the relevant statutory provision, when imposing a criminal sentence, courts are to consider seven factors:

> 1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> 2) the need for the sentence imposed . . . ;
> 3) the kinds of sentences available;
> 4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the

30. U.S. SENTENCING GUIDELINES MANUAL § 1A.4(b) (U.S. SENTENCING COMM'N 2018).

31. *See id.* § 5K (U.S. SENTENCING COMM'N 2018) (listing the grounds for departure but not including prison disciplinary sanctions).

32. *See* 28 U.S.C. § 994 (2018) (describing the duties of the U.S. Sentencing Commission).

33. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018).

> applicable category of defendant as set forth in the guidelines . . . ;
> 5) any pertinent policy statement—(A) issued by the Sentencing Commission . . . ;
> 6) the need to avoid unwanted 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.[34]

Under what is called the parsimony clause, sentencing courts are to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing,]" which include promoting respect for the law, providing just punishment, deterring criminal conduct, protecting the public, and providing the defendant with "needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . ."[35] In pursuing this end, courts are to look to the U.S. Sentencing Guidelines, which set forth categories of offense behavior and characteristics and corresponding sentencing ranges.[36]

B. How to Calculate a Sentence Under the U.S. Sentencing Guidelines

Federal courts sentence defendants after conviction or pursuant to a plea agreement.[37] The guidelines are the "starting point" for sentencing.[38] Generally, before a sentencing hearing, a probation officer conducts a presentence investigation and prepares a presentence report,[39] which includes factual

---

34. 18 U.S.C. § 3553(a) (2018).

35. *Id.*

36. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018) (setting forth the statutory mission of the U.S. Sentencing Commission); *see also* 28 U.S.C. § 994(a) (2018) (granting authority to the U.S. Sentencing Commission to promulgate and distribute sentencing guidelines for use in federal criminal cases).

37. *See* DOYLE, *supra* note 6, at 1 (explaining in detail how the guidelines work).

38. *Id.*

39. *See* FED. R. CRIM. P. 32(a)(1)(A) (explaining that a presentence investigation and report are required unless a statute requires otherwise or

information and a guidelines calculation for the court to consider.[40] The prosecution and defense are both given the opportunity to respond to the calculation.[41] In determining a sentence, the judge takes into account the guidelines range, the factors set forth in 18 U.S.C. § 3553(a), and "other applicable statutory demands," such as mandatory minimum requirements.[42] The court is to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing.[43]

Section 1B1.1 of the guidelines provides general application instructions for federal courts.[44] The guidelines are to be applied in the following way: First, the probation officer determines what guideline in Chapter Two (Offense Conduct)[45] of the guidelines is "applicable to the offense of conviction."[46] In order to do this, she looks to the Statutory Index,[47] which lists all the federal crime statutes and the corresponding Chapter Two sections.[48] The applicable Chapter Two section guides the officer to determine a Chapter Two offense level by combining the "base offense level" with "specific offense characteristics."[49] The officer

---

the "court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record").

40. *See* DOYLE, *supra* note 6, at 1 (explaining in detail how the guidelines work).

41. *See id.* at 6 (noting that both sides "may object to any of [the report's] provisions or omissions").

42. *Id.* at 1, 6.

43. 18 U.S.C. § 3553(a) (2018).

44. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2018) (describing in detail the order in which the provisions of the guidelines are to be imposed).

45. *See id.* § 2 (categorizing various offenses).

46. *Id.* § 1B1.1(a)(1).

47. *See id.* at app. A (providing the Statutory Index).

48. *See id.* § 1B1.1(a)(2) (describing the second step in applying the guidelines).

49. *Id.* Consider an example relating to the hypothetical at the beginning of this note. Section 2A2.2 of the guidelines covers "aggravated assault," which has a Base Offense Level of 14. *Id.* § 2A2.2. Section 2A2.2 lists several "Specific Offense Characteristics." *Id.* If the "assault involved more than minimal planning," for example, the probation officer increases the offense level by two levels. *Id.* If the assault resulted in "bodily injury," the probation officer

then turns to Chapter Three to consider any adjustments.[50] Adjustments can relate to the victim,[51] the defendant's role in the offense,[52] obstruction of justice,[53] whether the defendant has been convicted of multiple counts,[54] and whether the defendant has accepted responsibility for his actions.[55] By combining the Chapter Two offense level with the adjustments, the officer finds the defendant's final offense level.[56] There are forty-three final offense levels.[57]

Next, the officer calculates a defendant's criminal history points to determine which of six criminal history categories applies to his criminal record.[58] Criminal history points are assigned based upon prior convictions and whether the defendant committed the offense while serving a sentence for another offense.[59] By looking at the final offense level and criminal history category, as well as any applicable departure provisions, the probation officer determines the applicable

---

increases the offense level by three levels, and if it resulted in "serious bodily injury," she increases it by five levels. *Id.*

50. *See id.* § 1B1.1(a)(3) (describing the third step in applying the guidelines).

51. *See id.* § 3A (setting forth "victim-related adjustments," such as "restraint of victim").

52. *See id.* § 3B (setting forth "role in the offense" adjustments, such as "aggravating role" and "mitigating role").

53. *See id.* § 3C (setting forth "obstruction and related adjustments," such as "reckless endangerment during flight").

54. *See id.* § 3D (setting forth instructions on adjusting the sentencing calculation based upon defendant being convicted of more than one count).

55. *See id.* § 3E (setting forth instructions on adjusting the sentencing calculation based upon defendant accepting responsibility for his or her offense).

56. *See id.* § 1B1.1(a)(1)–(7) (setting forth all the steps for determining the final offense level).

57. *See id.* § 5A (setting forth the sentencing table used to determine the applicable sentencing range based upon a defendant's offense level and criminal history category).

58. *See* DOYLE, *supra* note 6, at 1 (explaining in detail how the guidelines work).

59. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (U.S. SENTENCING COMM'N 2018) (setting forth the number of points assigned for criminal history).

sentencing range from the Sentencing Table.[60] The judge is required to consider the range presented in the probation report.[61]

C. Departures and Variances from Guidelines-Recommended Sentencing

When the guidelines were first instituted in 1987, they were mandatory, requiring courts to select sentences from guideline ranges.[62] Now, the guidelines are "effectively advisory,"[63] which means courts are required to consider the guidelines but are allowed to impose a non-guidelines sentence if the judge sees fit.[64] With a few exceptions, courts may consider "without limitation, any information concerning the background, character and conduct of the defendant" in deciding whether or not to impose a sentence outside the guidelines range.[65] Courts may impose non-guidelines sentences through both departures and variances.[66]

A departure is the "imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise

---

60. *See* DOYLE, *supra* note 6, at 4 (discussing how sentences are determined).

61. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part) ("So modified, the federal sentencing statute . . . requires a sentencing court to consider guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.").

62. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018) (explaining how the original guidelines worked).

63. *Booker*, 543 U.S. at 245–46; *see also* Gall v. United States, 552 U.S. 38, 49 (2007) (stating that the "Guidelines should be the starting point and the initial benchmark" but that they are "not the only consideration").

64. *See* Rita v. United States, 551 U.S. 338, 350 (2007) ("The sentencing courts, applying the Guidelines in individual cases may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence).").

65. U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (U.S. SENTENCING COMM'N 2018).

66. *See* U.S. SENTENCING COMM'N, PRIMER: DEPARTURES AND VARIANCES 1 (2018) (describing the general principles by which sentencing courts are to abide when considering imposing a sentence outside the guidelines range).

different from the guideline sentence . . . ."[67] The guidelines have always allowed for departures from the prescribed sentencing range under certain circumstances.[68] A variance, in contrast, is the imposition of a sentence outside the guideline range based upon the statutory sentencing factors and the instruction in 18 U.S.C. § 3553[69] to "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing.[70] These purposes include accounting for the "seriousness of the offense," promoting "respect for the law," providing "just punishment," deterring criminal conduct, protecting the "public from further crimes of the defendant," and providing the "defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[71] In practice, there is a great deal of overlap between the reasons courts give when they grant a departure from the guidelines range and those they give when they grant a variance from the guidelines range.[72] Courts grant departures based upon factors the guidelines themselves anticipate or because a factor takes the case out of the

67. U.S. SENTENCING GUIDELINES MANUAL § 1A, n.1(F) (U.S. SENTENCING COMM'N 2018).

68. *See id.* § 1A1.4(b) (explaining the reasons for the Commission's departure policy and the kinds of departures the guidelines allow).

69. *See* 18 U.S.C. § 3553(a) (2018) (instructing federal courts on how to impose sentences).

70. *Id.; see also* PRIMER: DEPARTURES AND VARIANCES, *supra* note 66 (describing the general principles by which sentencing courts are to abide when considering imposing a sentence outside the guidelines range).

71. § 3553(a).

72. *See* U.S. SENTENCING COMM'N, REASONS GIVEN BY SENTENCING COURTS FOR SENTENCES BELOW THE GUIDELINE RANGE WITH BOOKER/18 U.S.C. § 3553 (2017), https://isb.ussc.gov/api/repos/:USSC:table_xx.xcdf /generatedContent?table_num=Table25B (last visited Apr. 30, 2020) (compiling the reasons for which sentencing courts have stated they are giving a sentence below the guidelines range, citing *Booker* and § 3553 considerations) [https://perma.cc/6QQT-A8XT]; *see also* U.S. SENTENCING COMM'N, REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE (2017), https://isb.ussc.gov/api/repos/:USSC:table _xx.xcdf/generatedContent?table_num=Table25 (last visited Apr. 30, 2020) (compiling the reasons for which sentencing courts have stated they are departing from the guidelines range) [https://perma.cc/H583-6LFE].

"heartland" of cases the guidelines were meant to cover.[73] Variances focus on whether the sentence achieves the goals of sentencing under 18 U.S.C. § 3553.[74]

Sentencing in a federal district court is a three-step process. First, the court considers the guidelines sentencing range.[75] Then the court considers whether any of the departure provisions of the guidelines apply.[76] Finally, the court considers the §3553(a) factors "as a whole" and determines whether it should grant a variance.[77]

1. Types of Departures

There are two types of departure allowed for under the guidelines: departures for which the guidelines "provide specific guidance . . . by analogy or by other numerical or non-numerical suggestions" and "unguided" departures.[78]

---

73. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (U.S. SENTENCING COMM'N 2018); *see also* United States v. Rangel, 697 F.3d 795, 801 (9th Cir. 2012) ("A 'departure' is typically a change from the final sentencing range computed by examining the provisions of the Guidelines themselves.").

74. *See* PRIMER: DEPARTURES AND VARIANCES, *supra* note 66 (describing the general principles by which sentencing courts are to abide when considering imposing a sentence outside the guidelines range); *see also* REASONS GIVEN BY SENTENCING COURTS FOR SENTENCES BELOW THE GUIDELINE RANGE WITH BOOKER/18 U.S.C. § 3553, *supra* note 72 (compiling the reasons for which sentencing courts have stated they are giving a sentence below the guidelines range, citing *Booker* and § 3553 considerations). Top reasons courts have given for sentencing below the guideline range under *Booker* and § 3553 include "[t]he history and characteristics of the defendant pursuant to 18 U.S.C. § 3553(a)(1)," "[r]eflect seriousness of offense/promotes respect for law /just punishment," "[a]fford adequate deterrence to criminal conduct," "[t]he nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)," and "[c]riminal history issues." *Id.*

75. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a) (U.S. SENTENCING COMM'N 2018) (instructing courts to "determine the kinds of sentences and the guideline range as set forth in the guidelines").

76. *See id.* § 1B1.1(b) (instructing courts to consider the departure provisions in Chapter Five and "any other policy statements or commentary in the [G]uidelines that might warrant consideration in imposing a sentence").

77. *Id.* § 1B1.1(c).

78. *Id.* § 1A1.4(b).

The commentary in Chapter Two[79] and the policy statements of Chapter Four[80] of the guidelines cover the first type of departure. The policy statements of Chapter Five cover the second, more generic type of departure.[81] Examples of "unguided" departures include the "victim's conduct," whether "coercion and duress" were involved, a defendant's "aberrant behavior," whether "extreme psychological injury" was caused, whether "property damage or loss" occurred, and "public welfare."[82] The list of departures in Chapter Five's policy statements is not exhaustive.[83]

After considering the two types of departures—those set out in statements in the guidelines themselves and "unguided" departures—judges are to look at the sentencing factors set out in 18 U.S.C. § 3553(a) and consider whether issuing a sentence within the range suggested by the guidelines achieves the purposes of sentencing, keeping in mind the parsimony clause, which instructs courts to "impose a sentence that is sufficient, but not greater than necessary" to comply with the purposes of sentencing as set forth in § 3553(a)(2).[84]

---

79. *See, e.g.*, *id.* § 2A1.1. cmt. n.2(B) (stating that downward departure for felony murder may be warranted when defendant did not cause the death intentionally or knowingly).

80. *See, e.g.*, *id.* § 4A1.3(b)(1) ("If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.").

81. *See id.* § 5K (presenting grounds for departure based upon "substantial assistance to the authorities" as well as numerous other grounds for departure).

82. *Id.*

83. *See id.* §1A1.4(b) ("While Chapter Five, Part K, lists factors the Commission believes may constitute grounds for departure, the list is not exhaustive.").

84. *See* DEMLEITNER, *supra* note 29, at 160 (explaining departures and variances under the guidelines); *see also* 18 U.S.C. § 3553(a)(2) (2018) (explaining the various needs a sentence might address). The statutory provision states that the sentence imposed should "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational and vocational training, medical care, and other correctional treatment in the most effective manner." *Id.*

Departures can be downward or upward.[85] A downward departure is when the court "effects a sentence less than a sentence that could be imposed under the applicable g]uideline range or a sentence that is otherwise less than the guideline sentence."[86] An upward departure is when the court "effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence."[87] Grounds for departure can be raised by the defense, the prosecution, and the court sua sponte.[88] There are two special instances in which the prosecution must ask for downward departure by raising a motion: when a defendant has provided "substantial assistance in the investigation or prosecution of another person"[89] and when the defendant has participated in an "early disposition" program[90] that has been authorized by the Attorney General and U.S. Attorney in the district in which the defendant resides or in which the crime has been committed.[91] These types of prosecutorial departures occur in approximately a quarter of federal cases.[92]

2. The Purpose of Departure Provisions

The U.S. Sentencing Commission adopted a policy allowing departure for two reasons.[93] First, the Commission recognized

85. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A, n.1(F) (U.S. SENTENCING COMM'N 2018) (defining "departure" as used in the guidelines).

86. *Id.*

87. *Id.*

88. *See* DEMLEITNER, *supra* note 29, at 160 (explaining departures and variances under the guidelines).

89. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2018).

90. *Id.* § 5K3.1.

91. *See* DEMLEITNER, *supra* note 29, at 160 (explaining departures and variances under the guidelines); *see also* FED. R. CRIM. P. 18 (requiring, generally, that the government prosecute offenses in the district in which they were committed).

92. *See* DEMLEITNER, *supra* note 29, at 160 (explaining departures and variances under the guidelines).

93. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (U.S. SENTENCING COMM'N 2018) (explaining the reasons for the Commission's departure policy and the kinds of departures the guidelines allow).

that the guidelines could not capture the "vast range of human conduct potentially relevant to a sentencing decision" and that the guidelines could evolve over time to incorporate circumstances not originally set forth in them after the Commission had the opportunity to analyze courts' decisions to depart.[94] Second, the Commission did not believe that courts would depart often and trusted that when they did, they would do so because the case was "atypical," one to which a "guideline linguistically applies but where conduct significantly differs from the norm" and in which a "mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing."[95] While all sentences are considered by appellate courts under a "deferential abuse-of-discretion standard,"[96] appellate courts may give sentences that fall within the calculated guidelines range a presumption of reasonableness under the Supreme Court's decision in *Rita v. United States*.[97] In that case, the Court explained:

> [T]he presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one . . . .[98]

94. *Id.*

95. *See id.* § 5, cmt. 5 (explaining the "integral function" departures play).

96. *See* Gall v. United States, 552 U.S. 38, 41 (2007) ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.").

97. *See* Rita v. United States, 551 U.S. 338, 341 (2007) (holding that the law permits courts of appeals to "presume that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence").

98. *Id.* at 347.

The Fourth,[99] Fifth,[100] Sixth,[101] Seventh,[102] Eighth,[103] Tenth,[104] and District of Columbia[105] Circuits have adopted the presumption of reasonableness allowed by *Rita*. The First,[106]

99. *See* United States v. Green, 436 F.3d 449, 457 (4th Cir. 2005) (explaining that district courts have "some latitude to tailor a particular sentence to the circumstances" but agreeing with the Seventh Circuit that sentences calculated within the guidelines range are "presumptively reasonable").

100. *See* United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) (agreeing with its sister circuits that a "sentence within a properly calculated Guidelines range is presumptively reasonable").

101. *See* United States v. Smith, 881 F.3d 954, 960 (6th Cir. 2018) (stating that in order for a defendant to show that his sentence was "substantively unreasonable," he would need to "overcome a rebuttable presumption that it was reasonable" because it fell within the guidelines range).

102. *See* United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (concluding that post-*Booker*, the "best way to express the new balance . . . is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness").

103. *See* United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005) (holding that a sentence within range for offense and criminal history levels was "presumptively reasonable").

104. *See* United States v. Kristl, 437 F.3d 1050, 1053–54 (10th Cir. 2006) (concluding that a "sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness" in light of the Guidelines purpose to "'promote uniformity'" (quoting United States v. Gonzalez-Huerta, 403 F.3d 727, 738 (10th Cir. 2005)).

105. *See* United States v. Dorcely, 454 F.3d 366, 376 (D.C.C. 2006) ("We agree with our sister circuits that a sentence within a properly calculated Guidelines range is entitled to a presumption of reasonableness.").

106. *See* United States v. Ayala-Vazquez, 751 F.3d 1, 47 (1st Cir. 2014) (declining to adopt a presumption of reasonableness "although the Supreme Court has explicitly given us the authority to apply this presumption of reasonableness").

Second,[107] Third,[108] Ninth,[109] and Eleventh[110] Circuits have declined to adopt the presumption of reasonableness.[111] Although the latter circuits have declined to adopt the presumption of reasonableness, "a Guidelines sentence will normally not be found unreasonable on appeal."[112] In the fourth quarter of 2019, 75.1 percent of sentences fell under the guidelines, with 51.5 percent falling within the guideline range and 23.6 percent departing upward or downward for reasons explicitly set out in the guidelines.[113]

Although the majority of sentences fall under the guidelines range, under the sentencing statute, courts are permitted to depart upward or downward from sentences prescribed by the

107. *See* United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2008) ("Unlike some of our sister circuit courts, we do not presume a Guidelines-range sentence is reasonable.").

108. *See* United States v. Merced, 603 F.3d 203, 213 n.5 (3d Cir. 2010) (stating that the court "declined [the] invitation" from the Supreme Court to "presume that a within Guidelines sentence is reasonable").

109. *See* United States v. Carty, 520 F.3d 984, 988 (9th Cir. 2008) (declining to adopt a presumption of reasonableness while "recogniz[ing] that a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal").

110. *See* United States v. Talley, 431 F.3d 784, 787–88 (11th Cir. 2005) (per curium) (rejecting the argument that a Guidelines sentence is per se reasonable but stating that "ordinarily we would expect a sentence within the Guidelines range to be reasonable"), *abrogated on other grounds* by Rita v. United States, 551 U.S. 338 (2007).

111. *See* PRIMER: DEPARTURES AND VARIANCES, s*upra* note 66, at 4 (compiling all of the previously cited circuit decisions).

112. *Carty*, 520 F.3d at 988.

113. *See* U.S. SENTENCING COMM'N, U.S. SENTENCING COMM'N QUARTERLY DATA REP, FOURTH QUARTER RELEASE: PRELIMINARY FISCAL YEAR 2019 DATA, TABLE 8 (2019).

guidelines when they find "an aggravating[114] or mitigating[115] 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 prescribed."[116] Examples of circumstances courts have found not adequately considered by the guidelines and grounds for downward departure include a defendant's being subjected to severe prison conditions during pre-sentence confinement,[117] a defendant's not knowing how pure the methamphetamine he distributed was,[118] the fact that defendants delivered a large quantity of narcotic drugs in small amounts over a substantial period of time rather than at once,[119] an undocumented

---

114. *See Aggravating Circumstance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an aggravating circumstance). The dictionary provides the following two definitions for "aggravating circumstance":

> 1. A fact or situation that increases the degree of liability or culpability for a criminal act.
> 2. A fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment . . . .

Id.

115. *See Mitigating Circumstance*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a mitigating circumstance). The dictionary provides the following two definitions for "mitigating circumstance":

> 1. A fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce the damages (in a civil case) or the punishment (in a criminal case).
> 2. A fact or situation that does not bear on the question of a defendant's guilt but that may bear on a court's possibly lessening the severity of its judgment.

Id.

116. 18 U.S.C. § 3553(b)(1) (2018).

117. *See* United States v. Carty, 264 F.3d 191, 196 (2d Cir. 2001) (finding that the severe prison conditions defendant experienced in the Dominican Republic while awaiting extradition could serve as a basis for a downward departure).

118. *See* United States v. Mendoza, 121 F.3d 510, 513 (9th Cir. 1997) (remanding defendant's case for sentencing because the district court erred in concluding that it lacked the power to depart from the guidelines on the basis that defendant did not know or have control over how pure the methamphetamine was that he was delivering as a middle man).

119. *See* United States v. Lara, 47 F.3d 60, 67 (2d Cir. 1995) (affirming the district court's decision to grant downward departure for defendant based on "quantity/time factor" not adequately considered by the guidelines).

immigrant serving time in state custody before going into federal custody,[120] and a defendant's post-offense rehabilitation.[121] The Sentencing Commission collects extensive data on courts' departures and variances from guidelines-range sentences, organized by circuit, reason, and degree of departure.[122]

When considering whether a circumstance has been adequately considered by the guidelines, courts are to consider "only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."[123] Again, the Commission has made clear that in "unusual" cases, it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure."[124]

III. An Overview of Prison Disciplinary Sanctions

The Federal Bureau of Prisons is responsible for disciplining inmates who commit prohibited acts.[125] While incarcerated, inmates may commit a number of prohibited acts that violate both prison regulations and federal law. Such acts

120. *See* United States v. Barerra-Saucedo, 385 F.3d 533, 537 (5th Cir. 2004) (holding that it is "permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of the time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody").

121. *See* United States v. Chapman, 356 F.3d 843, 847 (8th Cir. 2004) ("[T]ruly exceptional rehabilitation alone can, in rare cases, support a downward departure even when the defendant does not accept responsibility.").

122. *See* U.S. SENTENCING COMM'N, INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: DEPARTURES AND VARIANCES, https://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest&toc-section=6] (last visited Apr. 30, 2020) (tracking the reasons for which courts issue sentences outside the guidelines range) [https://perma.cc/Z8CU-92H7?type=image].

123. 18 U.S.C. § 3553(b)(1) (2018).

124. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (U.S. SENTENCING COMM'N 2018).

125. *See* 18 U.S.C. § 4042(a)(3) (2018) (setting forth the "protection, instruction, and discipline" of federal inmates as one of the duties of the Bureau of Prisons); *see also* 28 C.F.R. § 541.1 (2018) (setting forth the purpose of the Bureau of Prisons' inmate discipline program).

include possessing drugs, assaulting a prison guard, sexually assaulting a fellow inmate, attempting escape, and committing arson.[126] Bureau staff are to administer sanctions in a way that is neither capricious nor retaliatory.[127] Prohibited acts are divided into four levels of severity: "greatest," "high," "moderate," and "low."[128] The sanctions administered for a prohibited act depend on its level of severity.[129] For example, committing a "greatest severity level prohibited act," such as rioting, an inmate could forfeit one hundred percent of his earned statutory good time and be subject to disciplinary segregation of up to twelve months.[130] In contrast, when an inmate commits a "high severity level prohibited act," such as fighting with another person, the potential penalties are reduced to forfeiting up to fifty percent of earned statutory good time and being subject to disciplinary segregation of up to six months.[131]

When an inmate arrives at a federal prison, he or she is given three documents providing notice of the federal prison's inmate discipline program: a Summary of the Inmate Discipline System, Inmate Rights and Responsibilities, and Prohibited Acts and Available Sanctions.[132]

A. The Disciplinary Process

The disciplinary process begins when a Bureau staff member witnesses or "reasonably believe[s]" that an inmate committed a prohibited act.[133] The staff member issues an

126. *See generally* 18 U.S.C. §§ 1–2725 (2018) (setting forth federal crimes).

127. *See* 28 C.F.R. § 541.1 (2018) (setting forth the purpose for the Bureau of Prison's inmate discipline programs).

128. *Id.* § 541.3.

129. *See id.* (outlining different sanctions for the severity level of a prohibited act).

130. *Id.*

131. *Id.*

132. *See* U.S. DEP'T OF JUSTICE, No. 5270.09, INMATE DISCIPLINE PROGRAM (2011) (describing the notice each inmate must receive and stating that receipt of the documents must be noted on the intake screening form and kept in the inmate's "central file").

133. 28 C.F.R. § 541.5 (2018).

incident report, ordinarily within twenty-four hours.[134] Another Bureau staff member then investigates the incident.[135] Incident reports for moderate and low severity prohibited acts may be resolved informally.[136] If the prohibited act also violates federal law, the incident will be referred for prosecution.[137]

Once a staff investigation is completed, a Unit Discipline Committee (UDC) reviews the incident report, usually within five days, and determines if the inmate committed the act charged and, if so, whether or not the report will be referred to a Discipline Hearing Officer (DHO) for further review, depending upon offense seriousness.[138] Greatest and high severity acts are automatically referred to a DHO.[139] At the Unit Discipline Hearing, the inmate is given the opportunity to appear, make a statement, and present evidence upon his behalf.[140] After the hearing, the UDC will issue any appropriate sanctions, except for "loss of good conduct sentence credit, disciplinary segregation, or monetary fines," which the Committee does not have the authority to issue.[141] An inmate gets a written report of the proceedings and also has the right to appeal.[142]

If the UDC has referred the incident to a DHO or if the incident is of "high" or "greatest" severity, then a DHO conducts the hearing.[143] During a DHO hearing, an inmate is entitled to have a staff representative help him.[144] The DHO has the power to administer any available sanctions, including loss of good

---

134. *Id.*
135. *Id.*
136. *Id.*
137. *See* PROGRAM STATEMENT: CRIMINAL MATTER REFERRALS, *supra* note 5 (outlining procedures for "tracking and referring matters for prosecution that occur in Bureau of Prisons facilities or on Bureau of Prisons property, or involve Bureau of Prisons staff").
138. *See* 28 C.F.R. § 541.7 (2018) (explaining how Unit Discipline Committee reviews of federal inmate incident reports work).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See id.* § 541.8 (explaining how Discipline Hearing Officer hearings work).
144. *Id.*

conduct sentence credit, disciplinary segregation in a special housing unit or control unit, and monetary fines.[145] After a DHO hearing, an inmate receives a written report.[146] The inmate may also appeal the DHO's actions.[147]

B. Deference Given to Prison Disciplinary Sanctions

Prison disciplinary sanctions and regulations are generally granted deference by courts, as long as they pass constitutional muster.[148] When a prison regulation "impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[149] Four factors are used to determine the reasonableness of a regulation.[150] First, there "must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[151] Second, a court should consider whether there are "alternative means of exercising the right that remain open to prison inmates."[152] Third, a court should consider the "impact accommodation of the asserted constitutional right . . . on guards and other inmates, and on the allocation of prison resources generally."[153] Lastly, the court should consider whether or not there are "ready alternatives."[154]

In addition to challenging the prison regulations themselves, inmates may challenge the way the regulations

145. *Id.*
146. *Id.*
147. *Id.*
148. *See Know Your Rights: In Prison-Disciplinary Sanctions and Punishment*, ACLU, https://acluidaho.org/sites/default/files/wpsite/wp-content/uploads/2013/01/kyr_discipline_punishment_rev_jun10.pdf (last visited Apr. 30, 2020) [hereinafter *Know Your Rights*] (providing examples of disciplinary punishment and instructing inmates on how to challenge disciplinary punishment they have received) [https://perma.cc/GPX5-WH9U].
149. Turner v. Safley, 482 U.S. 78, 81, 89 (1987).
150. *Id.* at 89.
151. *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
152. *Id.* at 90.
153. *Id.*
154. *Id.*

were imposed in their specific situations.[155] However, inmates who challenge prison regulations and disciplinary sanctions under the Fourteenth Amendment's Due Process Clause are entitled to hearings only when there is a "state-created liberty interest in freedom from such punishment" and the punishment "imposes an atypical and significant hardship."[156] For example, prisoners can challenge loss of good conduct time, but they cannot challenge being segregated in a Special Housing Unit, being deprived of phone or computer privileges, or being transferred to another prison.[157]

C. Double Jeopardy Concerns

It is well established that disciplinary sanctions generally do not violate the Double Jeopardy Clause of the Fifth Amendment.[158] The Double Jeopardy Clause protects "only against successive criminal trials, and a prison disciplinary proceeding is not a criminal trial."[159] As then-Judge Sotomayor

155. *See Know Your Rights*, *supra* note 148 (providing examples of disciplinary punishment and instructing inmates on how to challenge disciplinary punishment they have received).

156. *Id.; see also* Sandin v. Conner, 515 U.S. 472, 486 (1995) (holding that a defendant's "segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest").

157. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (concluding that procedural due process applies even when "liberty itself is a statutory creation of the State," such as in the case of inmates losing good conduct time).

158. *See* U.S. CONST. amend. V ("No person shall be . . . twice put in jeopardy of life or limb . . . ."); *see also* United States v. Newby, 11 F.3d 1143, 1144 (3d Cir. 1993) ("We do not believe that the Double Jeopardy Clause was ever intended to inhibit prison discipline."); United States v. Rising, 867 F.2d 1255, 1259 (10th Cir. 1989) ("[A]dministrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause."); Kerns v. Parratt, 672 F.2d 690, 691 (8th Cir. 1982) (stating that loss of good time credits based on the violation of prison disciplinary rules "do not place an offender in jeopardy for the purposes of the double jeopardy clause"); United States v. Stuckey, 441 F.2d 1104, 1106 (3d Cir. 1971) (concluding that the fifteen days defendant spent in segregation after being found guilty of possessing a knife-like instrument in prison was "not a bar to subsequent prosecution for the crime in a court of competent jurisdiction").

159. MICHAEL B. MUSHLIN, 2 RIGHTS OF PRISONERS § 10:37 (5th ed. 2018).

wrote in a 2005 opinion from the Second Circuit Court of Appeals:

> The line between civil and criminal sanctions is often hard to draw, and this is nowhere more true than in the context of prisons, where the punitive character of the environment may make even purely regulatory sanctions appear punitive in nature. The need to maintain order, however, is a legitimate nonpunitive interest if it sometimes requires that prison officials take action of a punitive character.[160]

Still, it is conceivable that a prison disciplinary sanction could raise Double Jeopardy concerns, so the court has set forth a test to determine whether Double Jeopardy has been violated.[161] First, the court is to look at "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference" for labeling the mechanism as a civil remedy or a criminal penalty.[162] Second, the court is to look at whether the "statutory scheme is 'so punitive in either purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty.'"[163] The court is to consider seven factors, first set forth in *Kennedy v. Mendoza-Martinez*,[164] to determine whether a sanction is "penal or regulatory in character"[165]:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears

160. Porter v. Coughlin, 421 F.3d 141, 148 (2d Cir. 2005).
161. *Id.* at 145.
162. *Id.* (quotations omitted).
163. *Id.*
164. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–65 (1963) (holding that statutes imposing "forfeiture of citizenship" as a punishment for Americans who leave or remain outside the United States in order to evade military service are unconstitutional).
165. *Id.* at 168.

> excessive in relation to the alternative purpose assigned . . . .[166]

Although inmates view prison disciplinary sanctions as punitive, prison disciplinary sanctions are generally "viewed as civil rather than punitive in nature, having the purpose of ensuring 'the safe, orderly, and effective functioning of prisons.'"[167] One reason for this view is that if prison disciplinary sanctions were considered punitive in nature, prison officials would be forced to choose between "internal discipline and criminal prosecution."[168] As one state court noted:

> Prison officials would be forced to permit conditions inside the walls to deteriorate, forgoing security, order, safety, and rehabilitation in the hope that violent inmates would be brought to trial, convicted, and incarcerated in an institution with greater security. Alternatively, the prison officials could impose internal disciplinary sanctions . . . . Should such action preclude subsequent criminal prosecution, in many instances, the interest of society as a whole in punishing infractions of criminal law will be left unprotected. We refuse to force such a choice on prison officials.[169]

IV. Disciplinary Sanctions as Grounds for Departure in Sentencing: The Circuit Split

The circuit courts are split on whether prison disciplinary sanctions—such as revocation of visitation privileges, segregation from other prisoners, being denied telephone and computer privileges, and loss of good time credits[170]—can be grounds for departure under the sentencing guidelines when an inmate is being sentenced for an offense he committed while

166. *Id.* at 168–69.

167. MUSHLIN, *supra* note 159 (quoting Porter v. Coughlin, 421 F.3d 141, 146 (2d Cir. 2005)).

168. *See* Commonwealth v. Brooks, 479 A.2d 589, 594 (Pa. Super. Ct. 1984) (holding that prison disciplinary sanctions did not violate Double Jeopardy).

169. *Id.*

170. *See Know Your Rights*, *supra* note 148 (providing examples of disciplinary punishment and instructing inmates on how to challenge disciplinary punishment they have received).

incarcerated.[171] The Third Circuit Court of Appeals has stated that prison disciplinary sanctions are *not* grounds for departure under the guidelines.[172] The Fourth Circuit Court of Appeals has said that courts may *decline* to consider disciplinary sanctions as grounds for departure in sentencing.[173] The Eighth and Ninth Circuit Courts of Appeals, in contrast, have stated that courts may *consider* prison disciplinary sanctions—in particular loss of good time credits[174]—as grounds for departure in sentencing.[175]

171. *Compare* United States v. Newby, 11 F.3d 1143, 1148 (3d Cir. 1993) ("Loss of good time credits is not a basis for a downward departure."), *and* United States v. Ortiz-Mercado, 464 F. App'x 160, 161 (4th Cir. 2012) (stating that district court "did not act unreasonably in considering the need to punish [defendant's] federal offense separately from administrative sanctions assessed by prison officials"), *with* United States v. Petersen, 1996 U.S. App. LEXIS 30180, at *1, *3 (9th Cir. Nov. 18, 1996) (stating that district court had the "discretion to consider" whether defendant's losing good time credits took "his case outside the 'heartland' of 'typical cases' contemplated by the Commission" (quoting Koon v. United States, 518 U.S. 81, 104 (1996))), *and* United States v. Whitehorse, 909 F.2d 316, 320 (8th Cir. 1990) (stating that district court "did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case").

172. *See Newby*, 11 F.3d at 1148. ("Loss of good time credits is not a basis for a downward departure.").

173. *See Ortiz-Mercado*, 464 F. App'x at 161 (stating that district court "did not act unreasonably in considering the need to punish [defendant's] federal offense separately from administrative sanctions assessed by prison officials").

174. *See* 18 U.S.C. § 3624(b) (2018) (stating that prisoners serving a term of imprisonment of more than one year may receive up to fifty-four days of credit at the end of each year if the Bureau of Prisons determines that the "prisoner has displayed exemplary compliance with institutional disciplinary regulations").

175. *See Petersen*, 1996 U.S. App. LEXIS 30180, at *3 (stating that the district court had the "discretion to consider" whether defendant's losing good time credits took "his case outside the 'heartland' of 'typical cases' contemplated by the Commission" (quoting Koon v. United States, 518 U.S. 81, 104 (1996))); *see also Whitehorse*, 909 F.2d at 320 (stating that district court "did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case").

A. Third Circuit: United States v. Newby

In *United States v. Newby*,[176] the Third Circuit Court of Appeals considered the appeals of Gene Francis Newby and Raynaldo Barber, both of whom were convicted for knowingly and willfully impeding and interfering with a federal prison guard and one of whom was convicted of assaulting a federal prison guard.[177] Because they used intoxicants and assaulted prison guards in violation of prison regulations, Newby and Barber were disciplinarily transferred and segregated and also deprived of good time credits—1,000 days for Newby and fifty-four for Barber.[178] The Third Circuit Court of Appeals first considered whether defendants' loss of good time credits constituted "punishment" under the Double Jeopardy Clause and concluded that it is well established that prison disciplinary sanctions do not invoke Double Jeopardy.[179]

The court then considered whether defendants' loss of good time credits was a mitigating factor not addressed by the U.S. Sentencing Guidelines and warranting downward departure.[180] The court acknowledged that the loss of good time credits was not explicitly addressed by the U.S. Sentencing Commission,

---

176. *See* United States v. Newby, 11 F.3d 1143, 1144–48 (3d Cir. 1993) (holding that prison disciplinary sanctions do not violate the Double Jeopardy Clause and that they are not basis for a downward departure).

177. *Id.* at 1144.

178. *Id.*

179. *See id.* at 1146 ("We do not believe that the Double Jeopardy Clause was ever intended to inhibit prison discipline."); *see also* United States v. Rising, 867 F.2d 1255, 1259 (10th Cir. 1989) ("[A]dministrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause."); Kerns v. Parratt, 672 F.2d 690, 691 (8th Cir. 1982) (stating that loss of good time credits based on the violation of prison disciplinary rules "do not place an offender in jeopardy for the purposes of the double jeopardy clause"); United States v. Stuckey, 441 F.2d 1104, 1106 (3d Cir. 1971) (concluding that the fifteen days defendant spent in segregation after being found guilty of possessing a knife-like instrument in prison was "not a bar to subsequent prosecution for the crime in a court of competent jurisdiction").

180. *See Newby*, 11 F.3d at 1148 ("A sentencing court has the power to depart downward only when it is faced with a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.").

but it concluded that a prison disciplinary sanction for loss of good time credits was not a mitigating circumstance under 18 U.S.C. § 3553(b).[181] "The gravamen of a mitigating circumstance," said the court, "is that it somehow reduces the defendant's guilt or culpability."[182] The court reasoned that loss of good time credits do not relate to defendants' guilt and that "being sanctioned administratively does not show that [defendants] were morally less culpable of the charged crime."[183] "Loss of good time credits," the court stated, "is not a basis for a downward departure."[184] The court reasoned that granting a downward departure because defendants had received prison disciplinary sanctions "would defeat the very goals of our criminal justice system," giving defendants a "lesser sentence than their respective crimes justly deserve."[185]

A year later, in *United States v. Monaco*,[186] the Third Circuit Court of Appeals clarified its holding in *Newby*, stating that its "pronouncement on moral culpability . . . must be considered dictum"[187] in order to reconcile *Newby* with *United States v. Gaskill*[188] and *United States v. Lieberman*,[189] two earlier decisions in which the court granted downward departures for circumstances that did not lower the defendants'

---

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 1148–49.
186. *See* United States v. Monaco, 23 F.3d 793, 799–801 (3d Cir. 1994) (holding that downward departures were permissible on the bases of overstatement of criminality by loss tables and anguish over involving adult son in fraudulent scheme).
187. *Id.* at 803; *see also* United States v. Evans, 49 F.3d 109, 113 (3d Cir. 1995) (stating that the "government's reliance on Newby is misplaced" and that a mitigating circumstance does not necessarily need to lessen defendant's guilt).
188. *See* United States v. Gaskill, 991 F.2d 82, 86 (3d Cir. 1993) (holding that defendant's responsibility to care for his mentally ill spouse could be grounds for a downward departure).
189. *See* United States v. Lieberman, 971 F.2d 989, 998 (3d Cir. 1992) (holding that downward departure was appropriate because the prosecution had manipulated defendant's indictment to make it possible to charge him for two offenses under the guidelines).

culpability.[190] "[R]educed moral culpability," said the court, "is not the only permissible basis for a downward departure."[191] The court's conclusion in *Monaco*, however, did not overrule *Newby*.[192] Under *Monaco*, *Newby*'s holding—that loss of good time credits is not a mitigating factor warranting downward departure—stands.[193] The court focused on *Newby*'s reasoning that good time credits do not warrant downward departure because of the different purposes prison disciplinary sanctions and criminal sentences serve.[194] "[M]erely because a prisoner faces the prison's administrative penalties for rule infractions," said the court, "he cannot thereby accrue a mitigating benefit in a criminal sentence flowing from the same act or acts."[195]

B. Fourth Circuit: United States v. Ortiz-Mercado

In *United States v. Ortiz-Mercado*,[196] the Fourth Circuit Court of Appeals heard the appeal of Heriberto Ortiz-Mercado, a North Carolina inmate who pled guilty to possession of contraband (a cellular phone, which a guard found in the pocket of a pair of his shorts) and was sentenced by the district court to two months in prison, to run consecutively with the sentence he was serving at the time of the incident.[197] On appeal, Ortiz-Mercado argued that his sentence was "substantively unreasonable," in part because he had received prison disciplinary sanctions from the Bureau of Prisons for possessing

190. *See Monaco*, 23 F.3d at 803 ("Thus, to the extent that *Newby*'s pronouncement on moral culpability can be read to implicitly overrule decisions such as *Gaskill* and *Lieberman*, the *Newby* language must be considered dictum.").

191. *Id.* at 802.

192. *See id.* at 802–03 (distinguishing *Monaco* from *Newby*).

193. *See id.* (explaining that the court's holding in *Newby* must be read in harmony with the courts' decisions in *Gaskill* and *Lieberman*).

194. *See id.* at 802 ("We held [in *Newby*] that because criminal sentences and disciplinary sanctions are designed to serve different purposes, such a departure would defeat the goals of the criminal justice system by giving incarcerated defendants lesser sentences than they deserved.").

195. *Id.*

196. United States v. Ortiz-Mercado, 464 F. App'x 160, 161 (4th Cir. 2012) (holding that defendant's sentence was substantively reasonable).

197. *Id.*

the contraband.[198] As a result of having a prohibited object, Ortiz-Mercado lost good time credits, telephone privileges for eighteen months, and commissary privileges for twelve months.[199] In addition, Ortiz-Mercado was placed in solitary confinement for eight months.[200] The Court concluded that the district court "did not act unreasonably in considering the need to punish Ortiz-Mercado's federal offense separately from administrative sanctions assessed by prison officials" but did not explicitly say that prison disciplinary sanctions could never be considered as grounds for downward departure.[201]

C. Eighth Circuit: United States v. Whitehorse

In *United States v. Whitehorse*,[202] the Eighth Circuit Court of Appeals heard the appeal of Karen Jane Whitehorse, a North Dakota inmate serving a three-year sentence on an assault conviction.[203] While serving her sentence, Whitehorse, an alcoholic, was granted a seven-day furlough to visit relatives.[204] Instead of visiting her relatives, she spent the week's furlough intoxicated and then did not have enough money to return to her correctional center at the appointed time.[205] She did, however, call the correctional center and tell them about the situation.[206] The Bureau of Prisons extended her furlough, and she still failed to appear.[207] She was arrested and charged with escape.[208]

198. Brief for Appellant at 5, United States v. Ortiz-Mercado, 464 F. App'x 160 (4th Cir. 2012) (No. 11-4661).
199. *Id.* at 6–7.
200. *Id.* at 7.
201. *Ortiz-Mercado*, 464 F. App'x at 161.
202. *See* United States v. Whitehorse, 909 F.2d 316, 320 (8th Cir. 1990) (holding that the district court properly considered defendant's loss of good time as a mitigating circumstance and that the "totality of the mitigating factors" the district court considered "warranted downward departure").
203. *Id.* at 317–18.
204. *Id.* at 317.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*

The district court departed from the guidelines-recommended range of twelve to eighteen months, to be served consecutively, and sentenced Whitehorse to a four-month sentence, which she could serve concurrently with the three-year sentence she was already serving.[209] On appeal from the government, the Eighth Circuit Court of Appeals reviewed whether there were mitigating circumstances inadequately considered by the guidelines warranting departure in Whitehorse's case and whether the district court abused its discretion in imposing a four-month sentence.[210] The Court found that there were mitigating factors—one of which was Whitehorse's loss of two months of good conduct time—that warranted downward departure.[211] The court stated: "We hold that the District Court did not err in considering the loss of good time as one of the aggregate of mitigating factors justifying a downward departure in this case."[212]

D. Ninth Circuit: United States v. Petersen

In *United States v. Petersen*,[213] the Ninth Circuit Court of Appeals heard the appeal of Donald W. Petersen, an inmate who sent a "barrage of threatening letters" to two of his former college professors, one of whom was the victim of the assault for which Petersen was serving a seventy-five-month sentence.[214] The state Department of Corrections sanctioned him with the loss of 360 days of good time credits, and Petersen was also charged by the federal government with two counts of mailing threatening letters.[215] The district court that initially heard Petersen's case held that it did not have "discretion to consider [Petersen's] loss of good time credits . . . as bases for departing

209. *Id.*
210. *Id.* at 318.
211. *Id.* at 319–20.
212. *Id.* at 320.
213. *See* United States v. Petersen, 1996 U.S. App. LEXIS 30180, at *1, *4 (9th Cir. Nov. 18, 1996) (holding that the district court had discretion to consider whether defendant's loss of good time credits took his case out of the "heartland" of cases and were therefore grounds for a downward departure).
214. *Id.* at *2.
215. *Id.*

from the Sentencing Guidelines."[216] After the district court's ruling, however, the Supreme Court held in *Koon v. United States*[217] that district courts have the discretion to consider *any* factors not "categorically proscribed by the Sentencing Commission" as bases for departure.[218] Because good time credits had not been addressed by the Sentencing Commission, the Court of Appeals held that the district court that considered Petersen's case had the discretion to consider whether the loss of good time credits took Petersen's case "outside the 'heartland' of 'typical' cases contemplated by the Commission."[219]

V. Why the Third Circuit Court of Appeals Got It Wrong in Newby

As stated above, there are two types of departure allowed for under the guidelines: departures for which the guidelines "provide specific guidance . . . by analogy or by other numerical or non-numerical suggestions" and "unguided" departures.[220] It is clear that prison disciplinary sanctions have not been explicitly covered by the guidelines, nor have related terms such as "administrative sanctions" and "good time credits."[221] The question on which the Third, Fourth, Eighth, and Ninth Circuits disagree is whether prison disciplinary sanctions can be considered as grounds for departure under the second type of

216. *Id.*

217. *See* Koon v. United States, 518 U.S. 81, 109 (1996) (concluding that whether a factor can be an appropriate basis for departure is "limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor" and whether the factor "takes the case outside the heartland of the applicable Guideline"), *superseded by* the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). The PROTECT Act changed the standard of review appellate courts apply to district courts' departure decisions from "abuse of discretion" to de novo for violent crimes involving children.

218. *Petersen*, 1996 U.S. App. LEXIS 30180, at *3.

219. *Id.* at *4 (quoting *Koon*, 518 U.S. at 92–99).

220. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (U.S. SENTENCING COMM'N 2018).

221. *See generally id. (*showing neither "good time credits" nor "administrative sanctions" nor "prison disciplinary sanctions" when the terms were searched in the guidelines).

departures—"unguided" departures.[222] The Third Circuit in *Newby* said that prison disciplinary sanctions, such as the loss of good time credits, could not be considered as an "unguided" departure.[223] Acknowledging that 18 U.S.C. § 3553(b) allows for departure when a 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,"[224] the Third Circuit concluded that prison disciplinary sanctions could not be such a mitigating circumstance because of the "different purposes that the disciplinary sanctions and criminal sentences are designed serve . . . ."[225] "[G]ranting a downward departure to compensate for the defendants' loss of good time credits," said the court, "would defeat the very goals of our criminal justice system."[226]

The Third Circuit Court of Appeals in *Newby* got it wrong. The statutory provision instructing courts on how to apply the guidelines gives courts broad discretion to depart from guideline-specific sentences when they find "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."[227] The guidelines are clear that they are meant to create a "heartland" of cases, a "set of typical cases embodying the conduct that each guideline describes."[228] With a few exceptions, the Commission says that it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."[229] The factors that cannot be considered include "race, sex, national origin, creed, religion,

222. *See* cases cited *supra* note 171.
223. *See* United States v. Newby, 11 F.3d 1143, 1148 (3d Cir. 1993) ("Loss of good time credits is not a basis for a downward departure.").
224. 18 U.S.C. § 3553(b)(1) (2018).
225. *Newby*, 11 F.3d at 1148.
226. *Id.*
227. § 3553(b)(1).
228. U.S. SENTENCING GUIDELINES MANUAL §1A1.4(b) (U.S. SENTENCING COMM'N 2018).
229. *Id.*

and socio-economic status,"[230] "lack of guidance as a youth and similar circumstances,"[231] "drug or alcohol dependence or abuse" (ordinarily),[232] and "personal financial difficulties and economic pressures upon a trade or business."[233]

Even though prison disciplinary sanctions and criminal sentences serve different purposes, it may be appropriate in some cases for judges to consider prison disciplinary sanctions—particularly severe sanctions, such as solitary confinement and loss of a large amount of good conduct time—as grounds for downward departure. Beyond the above-listed exceptions, the Commission has been clear that it "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." [234] The Sentencing Commission tracks the reasons courts list for departing from the guidelines, and the reasons are myriad.[235] In FY2017, for example, courts cited the following reasons for departing from the guidelines: family ties and responsibilities, age, physical condition, time served, cultural assimilation, low likelihood of recidivism, charitable conduct and good works, military record, crack/powder disparity, and sufficient punishment.[236] Although it may be unlikely for judges to depart from the guidelines on the basis of a defendant's receiving prison disciplinary sanctions, given the deference these sanctions are usually afforded[237] and the fact

230. *Id.* § 5H1.10.
231. *Id.* § 5H1.12.
232. *Id.* § 5H1.4.
233. *Id.* § 5K2.12.
234. *Id.* §1A1.4(b).
235. *See* INTERACTIVE SOURCEBOOK OF FEDERAL SENTENCING STATISTICS: DEPARTURES AND VARIANCES, *supra* note 122 (tracking the reasons for which courts issue sentences outside the guidelines range).
236. *See* REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE, *supra* note 72 (compiling the reasons for which sentencing courts have stated they are departing from the guidelines range).
237. *See Know Your Rights*, *supra* note 148 (providing examples of disciplinary punishment and instructing inmates on how to challenge disciplinary punishment they have received).

that they are not mentioned in the guidelines,[238] there is no reason that a court could not consider prison disciplinary sanctions as a possible grounds for departure.

VI. Whether Courts Should Consider Prison Disciplinary Sanctions as Grounds for Downward Departure: A Policy Analysis

Courts *may* consider prison disciplinary sanctions as grounds for downward departure under the guidelines.[239] But *should* they? This Part will consider the reasons for and against judges' departing downward from the guidelines because an inmate has received prison disciplinary sanctions. It will then recommend that the guidelines be explicitly amended to "provide specific guidance" to courts for departing downward on the basis of prison disciplinary sanctions, given the circuit split. Lastly, it will provide an overview of the guidelines' amendment process.

A. Reasons Against Prison Disciplinary Sanctions Being Used as Grounds for Downward Departure

While courts can consider prison disciplinary sanctions as grounds for departure (as well as grounds for variance), there are a number of reasons they may decline to do so. As the court in *Newby* noted, prison disciplinary sanctions serve a different purpose than sentences.[240] Sentences are meant to

238. *See generally,* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2018) (showing neither "good time credits" nor "administrative sanctions" nor "prison disciplinary sanctions" when the terms were searched in the guidelines).

239. *See id.* § 1A1.4(b) (stating "[w]ith those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case" and not listing "disciplinary sanctions" as an exception).

240. *See* United States v. Newby, 11 F.3d 1143, 1148 (1993) ("Because of the different purposes that the disciplinary sanctions and criminal sentences are designed to serve, we think that granting a downward departure to compensate for the defendants' loss of good time credits would defeat the very goals of our criminal justice system.").

> (a) reflect the seriousness of the offense, 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 and vocational training, medical care, and other correctional treatment in the most effective manner . . . .[241]

In contrast, prison disciplinary sanctions are meant to "ensure the safety, security, and orderly operation of correctional facilities, and the protection of the public . . . ."[242] A sentence is punitive in nature, whereas a prison disciplinary sanction is primarily administrative.

When an inmate commits a crime in prison, he has notice that he will be subject to both types of sanctions, and his actions may merit both types of sanctions.[243] The sentencing guidelines state that "a defendant with a prior criminal record is *more culpable* than a first offender and thus deserving of greater punishment."[244] The guidelines instruct that two points should be added to a defendant's criminal history category when the defendant "committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status."[245] The guidelines take it seriously when an inmate has committed an additional offense while serving time for a previously committed offense.[246] If an inmate is indeed "more culpable," it makes sense that he would receive both prison disciplinary sanctions for committing an act prohibited by the prison and also receive a criminal sentence.[247]

---

241. 18 U.S.C. § 3553(a)(2) (2018).

242. 28 C.F.R. § 541.1 (2018).

243. *See* INMATE DISCIPLINE PROGRAM, *supra* note 132 (describing the notice each inmate must receive and stating that receipt of the documents must be noted on the intake screening form and kept in the inmate's "central file"); *see also* 18 U.S.C. §§ 1–2725 (2018) (setting forth federal crimes).

244. U.S. SENTENCING GUIDELINES MANUAL § 4A (U.S. SENTENCING COMM'N 2018) (emphasis added).

245. *Id.* § 4A1.1(d).

246. *See id.* (specifying that two points should be added).

247. *See id.* at pt. A, introductory cmt. ("A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment.").

On a practical level, if judges begin to depart based upon prison disciplinary sanctions, it may lead them to begin departing for other non-criminal sanctions administered by the state or federal government, too, for example, sex offender registration.[248] Lastly, if judges begin to frequently depart because of prison disciplinary sanctions, the Bureau of Prisons could simply decide to discipline inmates *after* the court sentences them in order to avoid the issue, as the timeline for the prison disciplinary process is malleable. While the Bureau of Prisons would likely not do this with sanctions that ensure the "orderly operation of correctional facilities," it is possible that they would do so with sanctions such as loss of good time conduct.[249]

B. Reasons for Prison Disciplinary Sanctions Being Used as Grounds for Downward Departure

The guidelines instruct that the Commission "does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure."[250] Courts are also required under 18 U.S.C. § 3553 to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing]."[251] While the guidelines were instituted in order to make the federal sentencing system more proportional and consistent,[252] they are also meant to provide "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[253]

---

248. *See, e.g.*, 34 U.S.C. § 20912 (2018) (stating that "[e]ach jurisdiction shall maintain a jurisdiction-wide sex offender registry" and "[t]he Attorney General shall issue guidelines and regulations").

249. 28 C.F.R. § 541.1 (2018).

250. *See* U.S. SENTENCING GUIDELINES MANUAL §1A1(b) (U.S. SENTENCING COMM'N 2018) (explaining the reasons for the Commission's departure policy and the kinds of departures to which the guidelines refer).

251. 18 U.S.C. § 3553(a).

252. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A.2 (U.S. SENTENCING COMM'N 2018) (setting forth the statutory mission of the U.S. Sentencing Commission).

253. 28 U.S.C. § 991(b)(1)(B) (2018).

Given the different purposes of prison disciplinary sanctions and criminal sentences, it is unlikely that judges will frequently depart from the guidelines based upon prison disciplinary sanctions.[254] When judges see fit to depart based upon prison disciplinary sanctions, however, they should do so, as they are to do justice on a case-by-case basis, even under the guidelines.[255] Achieving "equal justice across cases" and "individual justice in specific cases" is a difficult task, however.[256] Critics of the guidelines put it this way:

> By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead we cease to judge at all. We *process* individuals according to a variety of purportedly objective criteria. But genuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories . . . . In place of moral judgment, the Guidelines have substituted bureaucratic penalization.[257]

In some cases, such as the hypothetical case of James at the beginning of the Note, a judge may find that justice requires downward departure because the defendant has received prison disciplinary sanctions.[258] Being able to depart on this basis gives the judge the opportunity to do individual justice. Further, granting downward departures on the basis of prison

---

254. *See* REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE, *supra* note 72 (indicating that in FY2017, no sentencing courts cited prison disciplinary sanctions as a reason for downward departure).

255. *See* 28 U.S.C. § 991(b)(1)(B) (stating that the guidelines are to "provide certainty and fairness" while also "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

256. *See* Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1253–54 (1997) (discussing the unintended consequences of the federal sentencing guidelines).

257. *Id.*

258. *See id.* at 1263 (warning that by eliminating the power of judges to consider the circumstances of a crime and the defendant in their entirety "the Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater in which defendants are not persons, but *kinds* of persons").

disciplinary sanctions is consistent with many of the other reasons judges have given for granting downward departure in order to do individual justice, such as "rehabilitation," "convictions on related counts," "totality of circumstances/combination of factors," "sufficient punishment," and the fact that the defendant is "currently receiving punishment under state or federal jurisdiction."[259]

It is well established that prison disciplinary sanctions do not invoke Double Jeopardy concerns.[260] While that is true, a defendant's receiving prison disciplinary sanctions and a criminal sentence may sometimes invoke some of the same philosophical concerns as Double Jeopardy, i.e., that a person should not be punished twice. As then-Judge Sotomayor wrote: "The line between civil and criminal sanctions is often hard to draw, and this is nowhere more true than in the context of prisons, where the punitive character of the environment may make even purely regulatory sanctions appear punitive in nature."[261] While prison disciplinary sanctions do not invoke Double Jeopardy concerns, there are likely situations in which disciplinary sanctions are so punitive (i.e., solitary confinement or loss of an exorbitant amount of good conduct time) that what the defendant actually experiences is double punishment. Further, the guidelines add criminal history points when the defendant "committed the instant offense while under any

259. REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE, *supra* note 72.

260. *See* U.S. CONST. amend. V ("No person shall be . . . twice put in jeopardy of life or limb . . . ."); United States v. Newby, 11 F.3d 1143, 1144 (3d Cir. 1993) ("We do not believe that the Double Jeopardy Clause was ever intended to inhibit prison discipline."); United States v. Rising, 867 F.2d 1255, 1259 (10th Cir. 1989) ("Administrative punishment imposed by prison officials does not render a subsequent judicial proceeding, criminal in nature, violative of the double jeopardy clause."); Kerns v. Parratt, 672 F.2d 690, 691 (8th Cir. 1982) (stating that loss of good time credits based on the violation of prison disciplinary rules "do not place an offender in jeopardy for the purposes of the double jeopardy clause"); United States v. Stuckey, 441 F.2d 1104, 1106 (3d Cir. 1971) (concluding that the fifteen days defendant spent in segregation after being found guilty of possessing a knife-like instrument in prison was "not a bar to subsequent prosecution for the crime in a court of competent jurisdiction").

261. Porter v. Coughlin, 421 F.3d 141, 148 (2d Cir. 2005).

criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status," which is, in a way, an additional punitive measure.[262] Allowing judges to depart from the guidelines on the basis of prison disciplinary sanctions will allow them to soften an unusually harsh prison disciplinary sanction when merited.

Under § 3553, sentencing courts are instructed to consider the "need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," as well as the need "to afford adequate deterrence to criminal conduct."[263] It is possible that the prison disciplinary sanctions imposed by the Bureau of Prisons have satisfied these purposes and that if a departure is not warranted, a variance under § 3553 would be.

C. The Guidelines' Amendment Process

From the very beginning, the guidelines were meant to be "evolutionary."[264] When it first published the guidelines, the Commission stated:

> The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the Guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the [G]uidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.[265]

---

262. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1(d) (U.S. SENTENCING COMM'N 2018).

263. 18 U.S.C. § 3553(a) (2018).

264. 28 U.S.C. § 991(b)(1)(C); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018) (setting forth the statutory mission of the U.S. Sentencing Commission).

265. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018).

The guidelines evolve by way of amendments, based upon "congressional action, decisions from courts of appeals, sentencing-related research, and input from the criminal justice community."[266] The Commission amends the guidelines annually.[267] Each summer, the Commission publishes a notice of proposed priorities in the Federal Register and makes a request for public comment.[268] In the fall, the Commission finalizes its priorities.[269] Generally in December or January, the Commission publishes its proposed amendments in the Federal Register and, again, requests public comment and hosts public hearings.[270] By the first day of May, "at or after the beginning of a regular session of Congress," the Commission submits its proposed amendments to Congress, along with a statement of reasons and proposed dates of effect for the amendments.[271] A date of effect must be at least 180 days after the amendment was submitted—to give Congress time to disapprove or modify the amendment if it chooses to do so—but before November 1.[272] Generally, amendments take effect on November 1.[273] A new

266. *See Amendments to the Guidelines Manual*, U.S. SENT'G COMMISSION, https://www.ussc.gov/guidelines/amendments (last visited Apr. 30, 2020) (archiving the yearly amendments and guidelines manuals dating back to 1987) [https://perma.cc/8KEA-J9B4].

267. *See* 28 U.S.C. § 994(p) (2018) (setting forth amending the guidelines as one of the duties of the Commission and explaining the process).

268. *See Policymaking*, U.S. SENT'G COMMISSION, https://www.ussc.gov/policymaking (last visited Apr. 30, 2020) (providing an overview of the amendment process) [https://perma.cc/62PW-GMVK].

269. *See id.* (providing a general timeline of the commission's policymaking process in which proposals are finalized from September to December).

270. *See Policymaking*, *supra* note 268 ("Typically in January (but sometimes earlier) the Commission publishes proposed amendments responding to its list of priorities."); *see also* 5 U.S.C. § 553 (2018) (setting forth the procedures for agency rulemaking under the Administrative Procedures Act).

271. 28 U.S.C. § 994(p) (2018).

272. *See id.* (detailing the timeline for submitting amendments to the guidelines).

273. *See* U.S. SENTENCING COMM'N, RULES OF PRACTICE AND PROCEDURE, r. 4.1 (2016) (setting forth the process for the promulgation of guidelines amendments).

manual is published each time the guidelines are amended.[274] Since they were first published in 1987, the Sentencing Commission has passed over 800 amendments to the guidelines.[275]

One of the final priorities for the last amendment cycle—which ended on May 1, 2019—was "resolution of circuit conflicts as warranted, pursuant to the Commission's authority under 28 U.S.C. § 991(b)(1)(B)[276] and *Braxton v. United States*,[277] 500 U.S. 334 (1991)."[278] The statutory provision instructs that one of the purposes of the Commission is to

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[279]

In *Braxton*, the Court considered whether it is the duty of the Supreme Court or the Sentencing Commission to resolve conflicts between federal courts regarding the meaning of provisions in the U.S. Sentencing Guidelines.[280] The Court explained that while one of the Court's principal purposes is to

---

274. *See* 28 U.S.C. § 994(p) (2018) (setting forth amending the guidelines as one of the duties of the Commission and explaining the process).

275. *See Policymaking*, *supra* note 268 (providing an overview of the amendment process).

276. *See* 28 U.S.C. § 991(b)(1)(B) (2018) (describing the characteristics of the "sentencing policies and practices" the U.S. Sentencing Commission are to implement).

277. *See* Braxton v. United States, 500 U.S. 334, 348–49 (1991) (declining to resolve question relating to circuit conflict because the "[U.S. Sentencing] Commission has already undertaken a proceeding that will eliminate circuit conflict" and because the controversy could be decided upon other grounds).

278. Final Priorities for Amendment Cycle for United States Sentencing Commission, 83 Fed. Reg. 30,477 (June 28, 2018).

279. 28 U.S.C. § 991(b)(1)(B) (2018).

280. *See Braxton*, 500 U.S. at 348–49 (declining to resolve question relating to circuit conflict because the "[U.S. Sentencing] Commission has already undertaken a proceeding that will eliminate circuit conflict" and because the controversy could be decided upon other grounds).

"resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law," Congress and agencies also share that duty, as they can clarify statutory provisions and regulations.[281] In respect to the guidelines, the Court stated that by charging the Commission to "periodically review and revise" the guidelines, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the guidelines conflicting judicial decisions might suggest."[282]

In the last cycle of proposed amendments, one of the amendments related to a circuit conflict regarding the application of § 1B1.10(b)(2)(B) and whether under that provision courts can "reduce a sentence below the amended guideline range to reflect departures other than substantial assistance that the defendant received at his original sentencing or whether any sentence reduction may reflect only the departure amount attributable to substantial assistance."[283] Reviewing the work of the courts is one of the duties of the Commission.[284] It would be appropriate for the Commission to review the circuit conflict over whether prison disciplinary sanctions can be grounds for downward departure.

VII. Conclusion

Given the conflict between the Third Circuit Court of Appeals and the Fourth, Eighth, and Ninth Circuit Courts of Appeals,[285] the guidelines should be amended to "provide specific guidance"[286] to courts about departing downward on the basis of prison disciplinary sanctions. Amending the guidelines

281. *Id.* at 347.

282. *Id.* at 348 (citing 28 U.S.C. § 994(o)).

283. U.S. SENTENCING COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (2018).

284. *See* Braxton v. United States, 500 U.S. 334, 348–49 (1991) ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the [G]uidelines conflicting judicial decisions might suggest.").

285. *See* cases cited *supra* note 171.

286. U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (U.S. SENTENCING COMM'N 2018).

would provide clear guidance to federal inmates, Bureau of Prisons staff, courts, prosecutors, and defense attorneys. As prosecuting or defending federal inmates for the federal crimes they commit in prison is not a significant part of any attorney's practice, this kind of certainty and consistency would be helpful. It would, for example, make it easier for prosecutors and defense attorneys to negotiate plea agreements, as they would know more fully what factors the federal district judge is considering in sentencing. Take, for example, the case of James, told at the beginning of this Note. If the U.S. Attorney prosecuting that case had known that the judge might depart based upon James's prison disciplinary sanctions, he could have negotiated James's plea agreement accordingly. If James's defense attorney had known that the judge might consider prison disciplinary sanctions, he could have used it to his advantage in the negotiating process, as well. If James had not plead guilty and had gone to trial instead, his defense attorney could have made the case for the prison disciplinary sanctions being grounds for departure. The U.S. Sentencing Commission can provide clear guidance in this area over which the circuits are conflicted—and it should.