

February 2021

## United States v. Jackson: The United Standards for Departure from the Federal Sentencing Guidelines

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### Recommended Citation

J. Kevin Ray, *United States v. Jackson: The United Standards for Departure from the Federal Sentencing Guidelines*, 69 *Denv. U. L. Rev.* 779 (1992).

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*UNITED STATES V. JACKSON: UNIFORM STANDARDS FOR  
DEPARTURE FROM THE FEDERAL SENTENCING  
GUIDELINES*

I. INTRODUCTION

When the United States Sentencing Guidelines (Guidelines)<sup>1</sup> went into effect on November 1, 1987,<sup>2</sup> they produced sweeping changes in the federal sentencing system. These changes created a need for standards to govern departure from the Guidelines and a need for sentencing decisions to be explained. The Tenth Circuit Court of Appeals addressed both issues in *United States v. Jackson*.<sup>3</sup> In *Jackson*, the court applied a limited reasonableness standard that required the trial court judge to adhere to the structure of the Guidelines when sentencing outside the preset ranges of the Guidelines.<sup>4</sup> Then, to aid the appellate courts in applying this standard, the Tenth Circuit required the trial court to supply a detailed description of its reasons for departure and degree of departure.<sup>5</sup> Other circuit courts have applied different standards governing degree of departure from the Guidelines. These varied standards threaten the goal of uniformity announced by Congress<sup>6</sup> when it established the Guidelines.

Implementation of the Guidelines also affected the role of plea agreements in sentencing decisions. In *Jackson*, a plea agreement was arranged and the court set the initial sentence prior to accepting the Guidelines.<sup>7</sup> One year later, the United States Supreme Court forced adherence to the Guidelines by rendering them constitutional in *Mistretta v. United States*.<sup>8</sup> On appeal, in light of *Mistretta*, the case was remanded for resentencing pursuant to the Guidelines.<sup>9</sup> On remand, the trial court chose to depart from the Guidelines and the defendant again appealed, resulting in the case that is the subject of this Comment.<sup>10</sup> The confusion in this case stems from the trial court's desire to give weight to the circumstances surrounding the crime in making its sentencing decision. Throughout this process, however, the court appears

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1. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1990) [hereinafter U.S.S.G.].

2. U.S.S.G., *supra* note 1, at 1.1.

3. 921 F.2d 985 (10th Cir. 1990).

4. *Id.* at 993.

5. *Id.*

6. U.S.S.G., *supra* note 1, at 1.2.

7. *Jackson*, 921 F.2d at 987. After the Guidelines were implemented, many courts refused to adopt them on constitutional grounds. See *infra* notes 65-68 and accompanying text.

8. 488 U.S. 361 (1989). This Supreme Court case held that the Guidelines were constitutional, which bound all federal courts to use the Guidelines in sentencing. See *infra* notes 67-70 and accompanying text.

9. *Jackson*, 921 F.2d at 987.

10. *Id.* at 987-88.

to have ignored the changed role of plea bargaining under the new system.

Part I of this Comment briefly recounts the history of federal sentencing practices. Part II describes the facts, procedural history, and rationale of the *Jackson* case. Part III discusses the implications of *Jackson* for the Tenth Circuit and the federal systems. Part IV provides concluding remarks.

## II. A HISTORY OF FEDERAL SENTENCING

### A. *The Pre-Guideline Era*

For the greater part of the twentieth century, federal sentencing practice was unguided,<sup>11</sup> and sentencing judges generally enjoyed broad discretion.<sup>12</sup> With a few exceptions,<sup>13</sup> the judge's discretion was only limited by statutory maximum terms.<sup>14</sup> These maximums were not very restrictive. For example, the federal bank robbery statute authorized imprisonment for anywhere from zero to twenty-five years.<sup>15</sup> The judge could also grant probation for any offense not punishable by life imprisonment or death.<sup>16</sup>

In determining the sentence that a criminal actually would serve, the court also considered the effect of parole and "good time" statutes.<sup>17</sup> Under the parole system, a criminal could be released after serving one-third of the actual sentence.<sup>18</sup> In addition, "good time" statutes allowed a further reduction in the sentence, for good time served.<sup>19</sup> Parole, like unguided sentencing, was based on a theory of rehabilitation.<sup>20</sup> Under this theory, both the judge and the parole officer were required to assess the offender's amenability to rehabilitation.<sup>21</sup> Since evaluation of the criminal's character was necessary and the trial court "sees more and senses more than the appellate court,"<sup>22</sup> the sentencing decision was seldom disturbed on review if it was within the statutory

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11. *Mistretta*, 488 U.S. at 363.

12. *United States v. Tucker*, 404 U.S. 443, 446-47 (1972) (a federal trial judge generally has wide discretion in determining sentence); *United States v. Wylie*, 625 F.2d 1371, 1379 (9th Cir. 1980) (sentencing disparity is not improper if sentences are within statutory limits); *United States v. Cardi*, 519 F.2d 309, 311-12 (7th Cir. 1975) (district court's sentence will not be disturbed on appeal except on a plain showing of abuse).

13. "Some crimes, however, carry with them statutorily mandated minimum terms, and some crimes even require the imposition of a fixed term." Stanley J. Roszkowski, *Sentencing Provisions and Considerations in the Federal System*, 13 *LOY. U. CHI. L.J.* 621, 622 (1982).

14. *Id.*

15. 18 U.S.C. § 2113(a) (1988) (sentencing provisions not amended after the original 1948 enactment).

16. Roszkowski, *supra* note 13, at 625.

17. *Id.* at 622.

18. 18 U.S.C. § 4205(a) (repealed 1984).

19. 18 U.S.C. § 4161 (repealed 1984).

20. *Mistretta*, 488 U.S. at 363. Justice Blackmun's opinion began by summarizing the history of federal sentencing.

21. *Id.*

22. *Id.* at 364.

limits.<sup>23</sup> Thus, a three-tiered sentencing structure was created. Congress defined the maximums; the judge fixed the sentences according to statutory ranges; and the parole board determined the actual duration of incarceration.<sup>24</sup> This structure created a system of checks on federal judicial sentencing power.<sup>25</sup>

Prosecutors eventually became part of this system by virtue of their plea bargaining power.<sup>26</sup> Plea bargaining allowed a prosecutor to negotiate a guilty plea with the defendant.<sup>27</sup> This was and continues to be a common practice. Approximately eighty-five percent of all federal criminal convictions result from guilty pleas.<sup>28</sup> As part of his or her plea bargaining power, a prosecutor could dismiss or reduce charges against the defendant in exchange for a guilty plea.<sup>29</sup> As a check on this prosecutorial sentencing power, the judge could impose any sentence within statutory limits, regardless of the prosecutor's recommendation.<sup>30</sup>

Even though numerous checks were in place, serious disparities existed in sentencing practices.<sup>31</sup> To resolve this problem Congress attempted several reforms,<sup>32</sup> which culminated in the Sentencing Reform

23. *United States v. Main*, 598 F.2d 1086, 1094 (7th Cir.) (sentence within statutory limits not subject to appellate review unless sentencing judge relied on inaccurate information), *cert. denied*, *Main v. United States*, 444 U.S. 943 (1979); *United States v. Cardi*, 519 F.2d 309, 311-12 (7th Cir. 1975) (sentence will not be disturbed on appeal except on a plain showing of abuse); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (sentence unreviewable if within statutory limits and no showing of discretion abuse or inaccurate information); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (a sentence within statutory limits is generally not subject to review).

24. *Mistretta*, 488 U.S. at 364-65. See *United States v. Addonizio*, 442 U.S. 178, 190 (1979) (Congress entrusted release determinations to the Parole Commission and not to the courts); *Williams v. New York*, 337 U.S. 241, 248 (1949) (the ultimate termination of an indeterminate sentence may be decided by a non-judicial agency).

25. *Mistretta*, 488 U.S. at 365.

26. Albert W. Alschuler, *The Prosecutors' Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

27. See FED. R. CRIM. P. 11(e)(1):

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

(A) move for dismissal of other charges; or

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

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

The court shall not participate in any such discussions.

28. UNITED STATES SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (June 18, 1987).

29. *Id.*

30. STEPHEN J. SCHULHOFER, PROSECUTORIAL DISCRETION AND FEDERAL SENTENCING REFORM, 10-11 (Report for the Federal Judicial Center, 1979).

31. See, e.g., *United States v. Wylie*, 625 F.2d 1371, 1379 (9th Cir. 1980) (two co-conspirators with identical criminal histories received different sentences after being convicted of the same conspiracy).

32. In 1958 Congress attempted to establish sentencing standards by creating judicial sentencing institutes and joint councils. 28 U.S.C. § 334 (1988). In 1976 Congress adopted the United States Parole Board guidelines, which established sentencing ranges. 18 U.S.C. §§ 4201-4218 (repealed 1984).

Act of 1984 (Act).<sup>33</sup> The Act recited the Congressional goals of promoting fairness and reducing sentencing disparities while maintaining flexibility for individualized sentencing.<sup>34</sup> To achieve these ambitious goals, Congress established the United States Sentencing Commission (Commission)<sup>35</sup> and instructed it to promulgate guidelines for federal courts to use in determining criminal sentences.<sup>36</sup> The Guidelines were inaugurated on November 1, 1987.<sup>37</sup>

## B. *The Guidelines*

### 1. Physical Structure

The Guidelines articulate the goals of "proportionality" and "uniformity" in sentencing.<sup>38</sup> To achieve these goals, the Commission created a grid system based on the offender's criminal history characteristics and the offense characteristics.<sup>39</sup> The criminal history categories form the horizontal axis and the offense levels form the vertical axis. This grid system creates "boxes," each of which is assigned a narrow range of sentences. Where the Guidelines call for imprisonment, the maximum term of sentence does not exceed the minimum term of sentence by more than twenty-five percent.<sup>40</sup> Thus, criminals with similar criminal histories, who are charged with the same offense, will be given sentences that differ by no more than twenty-five percent.

The Guidelines provide instructions for selecting the proper offense and criminal history categories. The Commission created a point system to apply to offense and criminal history characteristics.<sup>41</sup> For the criminal history portion, point values are assigned to previous convictions based on criteria such as length of sentence, age at sentencing, type of crime and the similarity of the past crime to the current crime. The points are then totaled to determine the proper criminal history category.

For the offense levels, the Commission wrestled with the question of whether to use the real offense or the charged offense and finally adopted a combination of the two choices.<sup>42</sup> The Commission supplied a list of general base offenses, which are determined by the charged offense. Within each base offense it listed specific offense characteristics,

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33. Pub. L. No. 98-473 tit. II §§ 211-238, 98 Stat. 1987-2034 (codified as amended at 28 U.S.C. §§ 991-998 (1988) and 18 U.S.C. §§ 3551-3586, 3601-3625, 3661-3673, 3742 (1988)).

34. 28 U.S.C. § 991(b)(1)(B) (1988). These policy ideas were reworded to "uniformity" and "proportionality" by the United States Sentencing Commission. U.S.S.G., *supra* note 1, at 1.2.

35. 28 U.S.C. § 991 (1988).

36. *Id.* § 994.

37. U.S.S.G., *supra* note 1, at 2.1.

38. *Id.* at 1.2.

39. *Id.* at 1.1.

40. *Id.*

41. *Id.* §§ 4A1.1 - 4A1.3.

42. *Id.* at 1.5. The real offense is defined as the defendant's actual conduct, regardless of the charges for which he or she was indicted or convicted.

which are determined by the real offense. The specific offense characteristics are used to adjust the base offense.<sup>43</sup> Yet, the use of real offense characteristics is limited. Under the Guidelines, a court is not permitted to consider real conduct that is not articulated in the specific offense characteristics.<sup>44</sup> It may, however, consider the real offense characteristics, or "what really happened," when it is considering a departure from the Guidelines.<sup>45</sup>

The Commission created forty-three offense levels, which include all crimes from petty offenses to first degree murder.<sup>46</sup> Only six criminal history categories were created.<sup>47</sup> Criminal history category VI is open-ended, including all criminal histories with a total of thirteen or more points.<sup>48</sup> Under a strict reading of the Guidelines, a criminal with fifty criminal history points would be classified in the sixth category.

## 2. Provisions for Departure

The sentencing statute allows a court to depart from the guidelines only upon a showing of "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."<sup>49</sup> The Commission expected departures to be rare, since it had taken into account the factors that made a significant difference in pre-Guidelines sentencing practices.<sup>50</sup> In practice, a judge may consider departure from the Guidelines above the sixth category.

## 3. Provisions for Plea Agreements

A proper sentence is determined by a combination of the prosecutor's plea bargaining power and the judge's power to order the actual duration of incarceration. Both are important and inseparable functions in the overall sentencing process.<sup>51</sup> Congress recognized this when it instructed the Commission to include plea bargaining in the Guidelines.<sup>52</sup> The Commission honored this instruction by devoting a section

43. *Id.*

44. Stephen G. Breyer & Kenneth R. Feinberg, *The Federal Sentencing Guidelines: A Dialogue*, 26 CRIM L. BULL. 5, 23 (1990).

45. *Id.*

46. U.S.S.G., *supra* note 1, at § 5A.

47. *Id.* §§ 4A1.1 - 4A1.3.

48. *Id.*

49. 18 U.S.C. § 3553(b) (1990).

50. U.S.S.G., *supra* note 1, at 1.6.

51. See FED. R. CRIM. P. 11(e)(1), *supra* note 27; Schulhofer, *supra* note 30; Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459 (1988); Alschuler, *supra* note 26; Breyer & Feinberg, *supra* note 44; Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 237-38 (1989).

52. 28 U.S.C. § 994(a)(2)(E) (1988) (Commission shall promulgate general policy statements regarding the appropriate use of plea agreements under FED. R. CRIM. P. 11(e)(2)).

of the Guidelines specifically to plea agreements.<sup>53</sup> It opted not to make major changes in the pre-Guidelines plea agreement practices, but instead issued general policy statements concerning the acceptance of plea agreements.<sup>54</sup> These statements provide two significant directives to district courts. First, they allow a court to accept the dismissal of a charge only when the remaining charges reflect the seriousness of the real offense.<sup>55</sup> Second, they require the court to determine whether dismissal of charges will undermine the statutory purposes of the Guidelines.<sup>56</sup> Two other rules mandated by Congress went into effect when the Guidelines were implemented: the Act provided for limited appellate review of sentencing decisions<sup>57</sup> and abolished early release on parole.<sup>58</sup>

### C. *The Post-Guideline Era*

The implementation of the Guidelines has had a significant effect on sentencing practice. First, the use of narrow sentence ranges has limited judges' sentencing discretion.<sup>59</sup> Second, the acceptance of charge offense sentencing has reduced judges' ability to adapt an individualized sentence to fit the actual crime. Third, the Guidelines only allow judges to consider certain past criminal convictions when determining the proper criminal history category. Fourth, for the purposes of judicial review, a trial court must now provide reasons for imposing a particular sentence when it chooses to depart from the Guidelines or when the sentence range exceeds two years.<sup>60</sup> Finally, a real-time sentencing system has been created. Since Congress abolished parole, with the exception of minimal time off for good behavior,<sup>61</sup> the sentence imposed will be the sentence served.<sup>62</sup>

The role of plea bargaining also has changed in the post-Guidelines era. Before the Guidelines were accepted, a judge could accept a plea agreement, then disregard the prosecutor's recommendation and impose any sentence within the statutory limits.<sup>63</sup> In practice, many judges accepted plea agreements in order to shorten the court's docket.<sup>64</sup>

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53. U.S.S.G., *supra* note 1, § 6B.

54. *Id.* § 6B1.2.

55. *Id.* § 6B1.2(a). *See also* United States v. Bos, 917 F.2d 1178 (9th Cir. 1990) (Guidelines send contradictory messages by requiring courts to accept only plea agreements that reflect the seriousness of the conduct, while providing for departure when the crime of conviction does not reflect the seriousness of the conduct); United States v. Henry, 893 F.2d 46 (3d Cir. 1990) (defendants need not be informed of applicable sentencing guideline range before plea is taken).

56. U.S.S.G., *supra* note 1, § 6B1.2.

57. 18 U.S.C. § 3742 (1988).

58. The Act repealed 18 U.S.C. § 4205, which provided for release on parole after one-third of the sentence had been served. Pub. L. 98-473, § 281(a)(5), 98 Stat. 2027 (1984).

59. *See Mistretta*, 488 U.S. at 367.

60. 18 U.S.C. § 3553(c) (1988).

61. 18 U.S.C. § 3624(b) (1988).

62. Schulhofer & Nagel, *supra* note 51, at 237.

63. Schulhofer, *supra* note 30, at 10-11.

64. *Id.* at 11 n.10.

Under the old system, the judge's discretion to tailor a sentence to the actual offense, as opposed to the charged offense, was a useful check on prosecutorial plea bargaining power. The implementation of the Guidelines and the *Mistretta* decision created a different sentencing system with new methods of administering sentences and accepting plea agreements. Judges no longer have the discretion to select a sentence based on circumstances that have been plea bargained away,<sup>65</sup> and Congress has eliminated early release on parole. Prosecutorial discretion now remains virtually unfettered.<sup>66</sup> As a result, the prosecutor's plea bargaining role has become more powerful.

These changes made judges reluctant to accept the Guidelines. Many had doubts about the constitutionality of the Guidelines and refused to apply them.<sup>67</sup> In all, over two hundred district court judges held the Guidelines unconstitutional,<sup>68</sup> while approximately 120 judges adhered to them.<sup>69</sup> This conflict continued until January 18, 1989 when the United States Supreme Court, in an eight-to-one decision, declared the Sentencing Guidelines constitutional.<sup>70</sup> After that date, all federal courts were bound to follow the new sentencing rules.

### III. UNITED STATES v. JACKSON

#### A. Facts and Procedural History

On July 5, 1988, the defendant, Leonard Brady Jackson, was arrested in Oklahoma for possession of firearms by a felon, possession of ammunition by a felon, and possession with intent to distribute approximately one gram of cocaine.<sup>71</sup> He was later indicted on the same charges. Pursuant to a plea agreement, Jackson pled guilty to possession of ammunition by a felon.<sup>72</sup> The government dismissed the other two charges and agreed not to seek the enhanced fifteen-year mandatory

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65. See U.S.S.G., *supra* note 1 at 1.5 (declaring policy of using charge offense sentencing instead of real offense sentencing).

66. Schulhofer & Nagel, *supra* note 51, at 238.

67. See, e.g., *United States v. Bolding*, 683 F. Supp. 1003, 1005 (D. Md. 1988) (the Act violates the separation of powers doctrine by transferring judicial power from the federal courts to the Sentencing Commission), *rev'd*, 876 F.2d 21 (4th Cir. 1989); *United States v. Allen*, 685 F. Supp. 827, 828 (N.D. Ala. 1988) (the Act is unconstitutional because it violates the separation of powers principle); *United States v. Arnold*, 678 F. Supp. 1463, 1469 (S.D. Cal. 1988) (the Act is unconstitutional because it designates the Commission, which possesses executive powers and duties, as a part of the judicial branch). *But see* *United States v. Chambless*, 680 F. Supp. 793, 795 (E.D. La. 1988) (the Act does not give the Sentencing Commission "free rein to do as it pleases" and therefore does not unconstitutionally delegate legislative authority); *United States v. Ruiz-Villanueva*, 680 F. Supp. 1411, 1417 (S.D. Cal. 1988) (because the Act contains "intelligible standards and statements of purpose," it does not embody an unconstitutional delegation of legislative power).

68. Schulhofer & Nagel, *supra* note 51, at 257 n.116.

69. *Id.*

70. *Mistretta*, 488 U.S. 361.

71. Appellee's Supplemental Brief at 5, *United States v. Jackson*, 921 F.2d 985 (10th Cir. 1990) (No. 89-6118).

72. *Jackson*, 921 F.2d at 987.

sentence under the Armed Career Criminal Act.<sup>73</sup>

Prior to this arrest, Jackson had been arrested six times.<sup>74</sup> These arrests were for robbery and forgery in the 1960's; two counts for sale of heroin in 1975; felon in possession of a firearm in 1978; reckless conduct with a firearm and carrying a loaded firearm in a motor vehicle in 1982; and three counts of shooting with intent to kill in 1983. He was convicted of all charges except the 1978 firearm possession and two counts of shooting with intent to kill in 1983.<sup>75</sup>

The district court, believing that the Sentencing Guidelines were unconstitutional, sentenced Jackson to the statutory maximum of five years and applied a special assessment of fifty dollars.<sup>76</sup> At sentencing, the court noted the defendant's extensive criminal history, which involved both guns and drugs,<sup>77</sup> and expressed concern about the cocaine and firearms found in the defendant's apartment.<sup>78</sup>

The defendant appealed the sentence<sup>79</sup> and the circuit court remanded the case for resentencing pursuant to the *Mistretta* decision.<sup>80</sup> At resentencing, the judge chose to depart from the applicable Guideline range of four to ten months and sentenced Jackson to sixty months confinement, two years supervised release, and a special assessment of fifty dollars.<sup>81</sup> The court explained the departure by noting Jackson's extensive criminal history and the fact that his prior convictions, some of which were excluded by the Guidelines, demonstrated a continuing course of criminal conduct.<sup>82</sup>

Jackson again appealed, stating that neither the departure nor the degree of departure was justified.<sup>83</sup> On appeal, a panel of three judges upheld the trial court's sentencing decision.<sup>84</sup> The defendant petitioned for a rehearing en banc, which was granted.<sup>85</sup>

### B. *Holding and Rationale*

The Tenth Circuit remanded the case to the sentencing court for a more specific explanation of the departure from the Guidelines.<sup>86</sup> The court stated that although the trial court had sufficiently described its reasons for departure, it had not adequately explained the degree of departure,<sup>87</sup> and that the reviewing court needed "a base line from

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73. 18 U.S.C. § 924(e)(1) (1988).

74. Appellee's Supplemental Brief, *supra* note 71, at 6.

75. *Id.*

76. *Jackson*, 921 F.2d at 987.

77. Appellee's Supplemental Brief, *supra* note 71, at 10.

78. *Jackson*, 921 F.2d at 992.

79. *Id.* at 987.

80. *Id.*

81. *Id.* at 988.

82. *Id.* at 992.

83. *Id.* at 988.

84. *United States v. Jackson*, 903 F.2d 1313 (10th Cir. 1990).

85. *Jackson*, 921 F.2d 985.

86. *Id.* at 993.

87. *Id.* at 992.

which we can gauge the reasonableness of the degree of departure."<sup>88</sup> In other words, the trial court had explained why it moved from criminal history level III to criminal history level VI, but it had not provided a reasonable justification for a sentence above level VI.<sup>89</sup> The court reasoned that since category VI fits any offender with thirteen points or more, the Commission intended cases reaching this category generally to stay within its sentencing confines.<sup>90</sup> Additionally, to uphold the principles of proportionality and uniformity, the court held that the trial court must rely on the Guidelines to find analogous levels and principles to guide its degree of departure.<sup>91</sup>

#### IV. IMPLICATIONS OF THE JACKSON CASE

##### A. *Necessity of Standards*

The ability to depart is a key feature of the Guidelines because it allows a court to uphold Congress's goal of proportionality.<sup>92</sup> At the same time, however, uniformity must be maintained. Therefore, the circuit courts must adopt standards governing departure. The appeals courts have been generally consistent when determining what standard should control departure,<sup>93</sup> but they have diverged in their treatment of departure above the highest criminal history category, category VI.<sup>94</sup> The most restrictive standard, which was used by the Seventh and Ninth Circuits, requires the court to use the basic structure of the Guidelines as a guide when determining the appropriate sentence range above criminal history category VI.<sup>95</sup> The First, Fifth, Sixth, and Eleventh Circuits have adopted a less restrictive standard based on reasonableness.<sup>96</sup> Under this standard, the appeals court will determine if the sentence

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88. *Id.* at 993.

89. *Id.*

90. *Id.* at 992.

91. *Id.* at 993.

92. 28 U.S.C. § 991(b)(1)(B) (1988).

93. Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals? An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 422 (1991).

94. *Id.* at 423.

95. *United States v. Schumde*, 901 F.2d 555, 560 (7th Cir. 1990) (courts should use the 10-15% increases authorized by the Guidelines to derive the proper sentence when criminal history category VI underrepresents the defendant's criminal background); *United States v. Pearson*, 900 F.2d 1357, 1362 (9th Cir. 1990) (departure should be measured by analogy to the Guidelines).

96. *United States v. Brown*, 899 F.2d 94, 98 (1st Cir. 1990) (trial court decision to depart above criminal history category VI from the 3-9 month range to 21 months was reasonable because the defendant had a "demonstrated penchant for criminality" not fairly accounted for by the Guidelines); *United States v. Harvey*, 897 F.2d 1300, 1306 (5th Cir.) (affirming trial court decision to depart upward from the 18-24 month range to 60 months despite failure to explain the degree of departure and indicating that explanation is necessary only for low criminal history categories), *cert. denied*, 111 S. Ct. 568 (1990); *United States v. Christoph*, 904 F.2d 1036 (6th Cir. 1990) (trial court decision to depart upward from the 33-41 month range to 60 months was reasonable since criminal history category VI did not adequately represent defendant's criminal history), *cert. denied*, 111 S. Ct. 713 (1991); *United States v. Simmons*, 924 F.2d 187, 192 (11th Cir. 1991) (departure above criminal history category VI was reasonable based on the defendant's prior adult criminal conduct).

imposed is reasonable without requiring the trial judge to resort to analogy based on the structure of the Guidelines.<sup>97</sup> The Eighth Circuit has implemented an even more lenient reasonableness standard, allowing the trial court to use a great deal of discretion in determining the proper sentence above criminal history category VI.<sup>98</sup>

In *Jackson*, the court significantly changed the Tenth Circuit view. The Tenth Circuit originally adopted a reasonableness standard to control departures in *United States v. White*.<sup>99</sup> The *White* opinion, however, did not consider the issue of how a court should determine the proper sentence range when criminal history category VI is inadequate. This issue was deliberated in *United States v. Bernhardt*.<sup>100</sup> In *Bernhardt*, the Tenth Circuit adopted the reasonableness standard of the First, Fifth, Sixth and Eleventh Circuits. Finding no guidance from the Sentencing Commission, the *Bernhardt* court applied its "own judgment" to determine the reasonableness of a sentence imposed above criminal history category VI.<sup>101</sup> In *Jackson*, the court abandoned this position and opted for the more restrictive view expressed by the Seventh and Ninth Circuits. Citing the Seventh Circuit case of *United States v. Schmude*,<sup>102</sup> the court stated that "the increments between the Guidelines ranges could assist both the sentencing court and the reviewing court in gauging the reasonableness of the degree of departure."<sup>103</sup>

The Tenth Circuit should be applauded for adopting a standard that requires close adherence to the Guidelines for departures above criminal history category VI. Uniformity is more likely to be achieved when the standard for departure requires judges to remain true to the structure of the Guidelines. As demonstrated before the Guidelines were implemented, judicial discretion leads to non-uniform sentencing.<sup>104</sup> Additionally, it has been argued that the sentencing Guidelines will add to the already severe prison overcrowding problem.<sup>105</sup> The reasonableness standard established in *Bernhardt* would have exacerbated this problem because it would have resulted in proportionately longer sentences. By adopting the more restrictive standard of *Jackson*, the Tenth Circuit has held these problems to a minimum.

Nevertheless, the problem of non-uniformity among the circuits still exists. Sentencing has only become uniform among the circuits that

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97. *Simmons*, 924 F.2d at 191.

98. *United States v. Hill*, 911 F.2d 129, 130 (8th Cir. 1990) (trial court did not abuse its discretion in departing above criminal history category VI based on the defendant's extensive criminal history); *United States v. Carey*, 898 F.2d 642, 646 (8th Cir. 1990) (trial court decision to depart upward from the 15-year range to 19 years was permissible because the seriousness of the defendant's criminal history and his incorrigibility were not adequately reflected in his criminal history category).

99. 893 F.2d 276 (10th Cir. 1990).

100. 905 F.2d 343 (10th Cir. 1990).

101. *Id.* at 346.

102. 901 F.2d 555 (7th Cir. 1990).

103. *Jackson*, 921 F.2d at 993.

104. *Supra* notes 12-30 and accompanying text.

105. See generally Michael K. Block & William M. Rhodes, *Forecasting the Impact of the Federal Sentencing Guidelines*, 7 BEHAV. SCI. & LAW 51 (1989).

have chosen similar standards. Either the other circuits should follow the Tenth Circuit's lead and adopt the most sensible standard, or the Supreme Court should grant *certiorari*. Otherwise, the Federal Sentencing Guidelines perhaps should be renamed the Circuit Sentencing Guidelines.

B. *Necessity of Detailed Explanations When Sentencing*

The increased specificity required by the court in *Jackson* will achieve three desirable results: first, it will provide reviewable material on appeal; second, it will establish precedent; and third, it will allow the Commission to adjust and maintain the Guidelines.

Detailed explanations of departures by trial courts are necessary for adequate review on appeal. Congress has empowered appeals courts to review departure sentences for reasonableness,<sup>106</sup> but the determination of reasonableness must be based on the rationale advanced by the trial court and not the appeals court's own post hoc reasoning.<sup>107</sup> Unless the trial court articulates its rationale, the appeals court cannot effectively review the sentencing process.<sup>108</sup> If courts of appeal were unable to review the basis of a departure decision, trial courts would be able to depart from them indiscriminately. This would render the Guidelines useless, and sentencing would revert back to the pre-Guidelines system.<sup>109</sup> Such a reversion would be directly opposed to Congressional intent.<sup>110</sup>

A detailed description of departures will also provide the basis for common law precedent.<sup>111</sup> Each time a trial court departs from the Guidelines, it is setting common law precedent. Having a detailed record to follow will aid future judges in determining when departure is acceptable. Finally, a particular reason for departure that becomes pervasive may be included in the Guidelines. Congress empowered the Commission to monitor the sentencing process and adjust the Guidelines where necessary.<sup>112</sup> Records of trial court reasoning allow the Commission to identify common departures and consider whether that reasoning should be incorporated in the Guidelines. By ensuring that the sentencing process is open to study, evaluation, and review, written opinions will help preserve good faith and rational support for a guideline system.<sup>113</sup>

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106. 18 U.S.C. § 3742(a)(4) (1988).

107. *United States v. Dean*, 908 F.2d 1491, 1497 (10th Cir. 1990) (case remanded for failure to explain departure sentence adequately).

108. *United States v. Gardner*, 905 F.2d 1432, 1436 (10th Cir.), *cert. denied*, 111 S. Ct. 202 (1990).

109. *See United States v. Ferra*, 900 F.2d 1057, 1062 (7th Cir. 1990) ("Unless there is discipline in determining the amount of departure, . . . sentencing disparity will reappear.").

110. 28 U.S.C. § 991(b)(1)(B) (1988).

111. *See* Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & LAW 3, 20-21 (1989).

112. 28 U.S.C. § 995 (1988).

113. Miller, *supra* note 111, at 21.

### C. *The Role of Plea Bargaining*

Although the *Jackson* court should be applauded for adjusting the standard governing degree of departure and for requiring more detailed explanations for departures, it seems to have ignored the role of plea bargaining. Because of the timing of this case, the court effectively intermingled the new and the old sentencing systems. A plea agreement was reached under the pre-Guidelines system,<sup>114</sup> yet the trial court was required to support the sentence under the standard of the post-Guidelines system.<sup>115</sup> Under the old system, the trial court could consider facts included in the charges dismissed by the plea agreement.<sup>116</sup> Under the new system, it could only consider aggravating circumstances that were related to the charged offense.<sup>117</sup>

By failing to recognize the effect of the Guidelines on plea agreements,<sup>118</sup> the *Jackson* court has set a precedent for the intermingling of law in similar cases. Any subsequent cases that were plea bargained before *Mistretta*, but sentenced after, will put the sentencing power in the hands of the prosecutors. This outcome could have been avoided, had the court allowed for reconsideration of the plea agreement on remand. The trial court then could have exercised its power to accept or reject the plea bargain and impose an appropriate sentence.

### V. CONCLUSION

The goals of the United States Sentencing Guidelines were to increase uniformity and maintain proportionality in the sentencing process. To maintain proportionality, the Guidelines allow for departure from the prescribed sentencing ranges. To achieve uniformity, it is essential that judges write detailed sentencing opinions and that appeals courts validate or invalidate those opinions based on strict standards. Those standards should be uniform among the circuits. The *Jackson* court acknowledged this need by applying a strict standard to sentences that depart above criminal history category VI. It would be in the best interest of society if the circuits not already applying this standard would follow suit.

*J. Kevin Ray*

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114. *Jackson*, 921 F.2d at 987; see *supra* note 7 and accompanying text.

115. See *supra* notes 86-91 and accompanying text.

116. At sentencing, the court noted the defendant's extensive criminal history involving guns and drugs and expressed concern about the cocaine and firearms involved in the current charges. Appellee's Supplemental Brief, *supra* note 71, at 10. At resentencing, the court noted that the defendant's prior convictions were not adequately taken into consideration under the Guidelines. *Jackson*, 921 F.2d at 992.

117. U.S.S.G., *supra* note 1, § 5K2.0 (1989). The Guidelines no longer require that the aggravating circumstances be related to the charged offense. U.S.S.G., *supra* note 1, § 5K2.0 (1990).

118. See *supra* note 51 and accompanying text.