

CASE COMMENTS

CHAOTIC SENTENCING: DOWNWARD DEPARTURES BASED ON EXTRAORDINARY FAMILY CIRCUMSTANCES

United States v. Johnson, 964 F.2d 124 (2d Cir. 1992)

In *United States v. Johnson*,¹ the Second Circuit held that a sentencing court may depart from the United States Sentencing Guidelines (the "Guidelines")² on the basis of a defendant's extraordinary family circumstances.³

A jury convicted the defendant, Cynthia Johnson, of theft, conspiracy, and bribery.⁴ Although the nature of Johnson's crimes generated an offense level under the Guidelines of twenty-three,⁵ the district court judge for the Southern District of New York subtracted ten offense levels due to the defendant's burdensome family responsibilities.⁶

1. 964 F.2d 124 (2d Cir. 1992).

2. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (1992) [hereinafter U.S.S.G.]. The United States Sentencing Guidelines were set forth by the United States Sentencing Commission, which Congress created in accordance with the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1987, 2040 (1984) (codified as amended at 18 U.S.C. §§ 3551-3566, 3571-3586 (1988), 28 U.S.C. §§ 991-998 (1988)). For an overview of the Guidelines, see generally Thomas W. Hutchison & David Yellen, FEDERAL SENTENCING LAW AND PRACTICE (1989); Andrew von Hirsch et al., THE SENTENCING COMMISSION AND ITS GUIDELINES (1987).

3. The scope of this Comment is limited to the issue of whether a court's downward departure from the United States Sentencing Guidelines on the basis of extraordinary family circumstances is consistent with congressional intent, the Sentencing Reform Act of 1984, and the Sentencing Guidelines.

4. 964 F.2d at 126. In the spring of 1989, one of Johnson's coworkers at the Bronx Veterans Administration Hospital devised a scheme to steal money by inflating paychecks. *Id.* Johnson knowingly accepted inflated paychecks from this coworker, who was a payroll clerk at the hospital. *Id.* Johnson then sought out other hospital employees and offered to inflate their paychecks. *Id.* For each employee who accepted the offer, Johnson and the payroll clerk received one-half of the overpayment on each check issued. *Id.*

5. Under the Guidelines, a judge must first determine the base offense level and then make various additions and subtractions consistent with the Guidelines. In *Johnson*, the court derived the offense level of 23 from various additions to the base offense level required under the Guidelines. Based on § 2C1.1(a) the sentencing judge first calculated a base offense level of 10 for the bribery counts. *Id.* The judge then added two levels because Johnson made multiple bribes, § 221.1(b)(1); and five levels because the amount of Johnson's bribes exceeded \$40,000. Finally, the judge added four levels for Johnson's participation in the organization of the criminal activities, § 3B1.1(a); and two levels for obstructing justice, § 3C1.1. *Id.*

6. *Id.* The judge also deducted two levels because, in his opinion, Johnson's crime resembled theft more than bribery, and deducted one additional level because the defendant shared the proceeds with her coworker. *Id.*

The judge found that Johnson was a single mother, and that she had the sole responsibility for raising her own three children and her institutionalized daughter's six-year-old child.⁷ The court then imposed a sentence of six months of home detention followed by three years of supervised release.⁸ The government appealed the offense level reduction to the United States Court of Appeals for the Second Circuit, which ruled that extraordinary family circumstances may warrant a downward departure from the offense levels specified in the Guidelines.⁹

Congress enacted the Sentencing Reform Act of 1984 (the "Sentencing Reform Act")¹⁰ to ensure that defendants found guilty of similar crimes, who possess similar criminal records, will receive consistent sentences.¹¹ Through the Sentencing Reform Act, Congress established the United States Sentencing Commission (the "Commission")¹² to draft a set of guidelines that provide for consistent sentencing and allow for flexibility if mitigating or aggravating circumstances exist.¹³

In 1987, Congress approved the Commission's initial sentencing guidelines for individual defendants.¹⁴ The Guidelines direct a sentencing court to calculate an appropriate sentence by first determining the base offense level that corresponds to the crime which the defendant commit-

7. *Id.* at 126, 130. The judge also noted that in addition to raising her three young children and her daughter's child, Johnson also raised a 17-year-old son. Neither the father of the 17-year-old nor the father of the five and six-year-old children contributed to their respective support. *Id.* at 130. Moreover, the father of the five-month-old infant was unemployed, and the defendant's institutionalized daughter was also incapable of providing financial support. *Id.*

8. *Id.* at 126. The court also required Johnson to provide restitution in the amount of \$27,973. *Id.*

9. *Id.* at 128-29.

10. *See supra* note 2.

11. 18 U.S.C. § 3553(a)(6) (1988). In imposing sentences, courts "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* *See also* S. REP. NO. 225, 98th Cong., 1st Sess. 38-59 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3220-43.

12. 28 U.S.C. § 991(a) (1988).

13. One purpose of the Sentencing Commission is to:

[P]rovide 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.

28 U.S.C. § 991(b)(1)(B) (1988).

14. The Commission retained the power to amend the Guidelines under the authority of 28 U.S.C. § 994(a). Periodically, the Commission prepares amendments which are published in the Federal Register with a stated effective date. If Congress does not take action prior to the specified effective date, the amendments become law. 28 U.S.C. § 994(p).

ted.¹⁵ Then the court should add or subtract offense levels based on the specific characteristics of the defendant's crime.¹⁶ Once the court adjusts the offense level, it evaluates the defendant's criminal history and ascertains the appropriate sentencing range.¹⁷ However, a court may depart from the Guidelines when the case presents circumstances which the Commission did not consider when promulgating the Guidelines.¹⁸

Yet, in the Sentencing Reform Act, Congress did not clearly address the significance of family ties and responsibilities to sentencing determinations.¹⁹ Consequently, the Commission failed to formulate a conclusive rule regarding sentencing departures based on family circumstances.²⁰ The only pertinent language in the Guidelines is not contained within a specific provision, but rather is found in one of the policy statements the Commission drafted to accompany the Guidelines.²¹ Policy Statement section 5H1.6 provides that "family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."²² Differing in-

15. Matthew Kipp & Bruce M. Selya, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 6-8 (1991).

16. *Id.*

17. *Id.*

18. 18 U.S.C. § 3553(b) (1988).

19. For example, § 3661 provides that "[n]o limitation shall be placed on the information concerning the background . . . of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Another provision, however, states that the Commission should only consider family ties and responsibilities "to the extent that they do have relevance" to the sentencing decision. 28 U.S.C. § 994(d)(7) (1988). The very next provision of § 994 narrows the applicability of family circumstances even further. Section 994(e) of the Act instructs the Commission to "assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the . . . family ties and responsibilities . . . of the defendant." 28 U.S.C. § 994(e) (1988).

20. Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 970 (1992).

21. Congress distinguished policy statements from sentencing guidelines in the Sentencing Act. *Johnson*, 964 F.2d at 127. Compare 28 U.S.C. § 994(a)(1) (guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case") with 28 U.S.C. § 994(a)(2) (policy statements are instructions in regarding application of the guidelines or any other aspect of sentencing or sentence implementation).

Policy statements differ from guidelines, which impose sentences, because policy statements address whether certain characteristics have any relevance to sentencing. Although not bound by policy statements, judges must consider them when determining an appropriate sentence. PRACTICE UNDER THE NEW FEDERAL SENTENCING GUIDELINES 81, 86 (Phyllis S. Bamberger ed. 1988).

22. U.S.S.G., *supra* note 2, § 5H1.6 (Policy Statement). Policy Statement § 5H1.6 provides: "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are

terpretations of the language "not ordinarily relevant" by the federal appellate courts have led to a split among the circuits on the sentencing departure issue.²³

In *United States v. Thomas*,²⁴ the Seventh Circuit held that a sentencing judge may never depart downward from the Guidelines on the basis of a defendant's extraordinary family circumstances.²⁵ The defendant in *Thomas* was the sole provider for two of her three mentally disabled adult children and the legal guardian of her four-year-old grandchild.²⁶ The court based its decision to reverse the district court's downward departure on a literal reading of Policy Statement section 5H1.6.²⁷ This policy provision provides that courts can consider family circumstances when deciding whether to impose probation or when determining the

complied with may be relevant to the determination of the amount of restitution or fines." U.S.S.G., *supra* note 2, § 5H1.6 (Policy Statement) (as amended Nov. 1, 1991).

The Sentencing Commission's directives regarding departures from the Guidelines appear in the policy statements concerning specific offender characteristics. U.S.S.G., *supra* note 2, §§ 5H1.1-5H1.3, 5H1.5, 5H1.6 (Policy Statements).

23. Most of the policy statements concerning specific offender characteristics invoke the language "not ordinarily relevant." See, e.g., U.S.S.G., *supra* note 2, §§ 5H1.1-5H1.3, 5H1.5, 5H1.6 (Policy Statements). As a result of the vague language used by the Commission in these policy statements, courts addressing issues involving offender characteristics generally hold that extraordinary circumstances warrant a sentencing departure.

For example, § 5H1.1 states that a defendant's age "is not ordinarily relevant" for purposes of sentencing departures. U.S.S.G., *supra* note 2, § 5H1.1 (Policy Statement). Courts, however, interpret this language as permitting departures based upon extraordinary age factors. See, e.g., *United States v. Summers*, 893 F.2d 63, 69 (4th Cir. 1990). In addition, § 5H1.2 declares educational and vocational skills not ordinarily relevant, yet courts find that such characteristics, if extraordinary, justify departures. U.S.S.G., *supra* note 2, § 5H1.2 (Policy Statement); see, e.g., *United States v. Burch*, 873 F.2d 765, 768 (5th Cir. 1989) ("Other factors are generally irrelevant except in extraordinary cases—e.g., age, education and family and community ties.") (citing U.S.S.G., *supra* note 2, §§ 5H1.1, 5H1.2, 5H1.6 (Policy Statements)). Likewise, mental and emotional conditions are not ordinarily relevant to sentencing deviations. U.S.S.G., *supra* note 2, § 5H1.3 (Policy Statement). Again, however, courts conclude that extraordinary mental or emotional conditions warrant downward departures. See, e.g., *United States v. Russell*, 917 F.2d 512, 516-17 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1427 (1991). In § 5H1.5, the Commission stated that a defendant's previous employment record is not ordinarily relevant to departure determinations. U.S.S.G., *supra* note 2, § 5H1.5 (Policy Statement). Courts interpret this language as allowing departures in extraordinary prior employment situations. *United States v. Jagmohan*, 909 F.2d 61, 65 (2d Cir. 1990).

For a comprehensive examination of those courts interpreting the language of § 5H1.6 as permitting downward sentencing departures in the face of extraordinary family circumstances, see *infra* notes 34-56 and accompanying text.

24. 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

25. *Id.* at 530.

26. *Id.* at 529.

27. *Id.* at 530.

length and conditions of supervised release.²⁸ The court concluded that section 5H1.6 evidenced the Commission's intention to allow a sentencing court to consider family circumstances only in these limited circumstances.²⁹ Because the defendant's offense required that she serve a prison sentence,³⁰ the court held that any downward departure based on family circumstances was improper.³¹ Moreover, the court noted that the Commission failed to authorize expressly downward departures based upon extraordinary family circumstances in section 5H1.6, whereas it expressly provided for departures based on extraordinary circumstances in another policy statement.³² The court reasoned that its holding reflected the Guidelines' underlying rationale of basing a defendant's sentence on the nature of the crime rather than on the defendant's personal characteristics.³³

The Eighth Circuit generally adopted this restrictive approach in *United States v. Sutherland*,³⁴ but has held that unusual family circumstances may justify a downward departure in certain cases.³⁵ In *Suther-*

28. *Id.* The Sentencing Commission later amended the policy statement contained in § 5H1.6 in 1991, and thereby eliminated the statement denoting the relevance of family responsibilities with respect to probation and supervised release but retained the statement regarding fines and restitution. U.S.S.G., *supra* note 2, § 5H1.6 (Policy Statement). See *supra* note 22 for the relevant text of § 5H1.6.

29. 930 F.2d at 530. The court stated that § 5H6.1 contains no language indicating that these enunciations are examples, rather than an exhaustive list. *Id.* Furthermore, the court found no language in § 5H6.1 to suggest that a sentencing judge possesses the power to depart from the Guidelines on a discretionary determination that family circumstances are compelling. *Id.*

30. *Id.* at 528. The court convicted the defendant of possessing almost four kilograms of heroin. 21 U.S.C. § 841(b)(1)(A) mandates a 10-year prison sentence for violations involving more than one kilogram of heroin. A court cannot impose probation or a suspended sentence. 21 U.S.C. § 841(b)(1)(A) (1988).

31. 930 F.2d at 530.

32. *Id.* As an example, the court cites the policy statement § 5H1.4, which provides in pertinent part: "Physical condition . . . is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range. . . ." U.S.S.G., *supra* note 2, § 5H1.4 (Policy Statement).

33. 930 F.2d at 530 (explaining that "of the fifteen grounds for departure listed in [Chapter 5, Part K of the Guidelines] not a single one looks to characteristics of the defendant: ten factors examine the specific criminal conduct and the resulting harm, and five relate to the defendant's mental capacity or motive at the time of the conduct") (citing *United States v. McHan*, 920 F.2d 244, 247 (4th Cir. 1990)).

34. 890 F.2d 1042 (8th Cir. 1989).

35. See, e.g., *United States v. Shortt*, 919 F.2d 1325, 1328 (8th Cir. 1990) (holding that it is legally possible for family circumstances to justify a departure); *United States v. Neil*, 903 F.2d 564, 565 (8th Cir. 1990) (finding that departure is justified for family circumstances in a typical case). In addition to the division within the Eighth Circuit, a split of authority exists in the Fourth Circuit. In

land, the Eighth Circuit rejected the defendant's argument that his unusual family circumstances warranted a downward departure.³⁶ The court reasoned that the defendant's argument lacked merit in light of the Commission's statement that family ties are not ordinarily relevant.³⁷ In *United States v. Shortt*,³⁸ however, the Eighth Circuit took the opposite view and held that under section 5H1.6 extraordinary family circumstances may warrant a departure.³⁹ The defendant in *Shortt* urged the judge to depart downward, arguing that a prison sentence would detrimentally affect his family because he was the family's sole source of income, his wife had a history of substance abuse, and he helped his disabled father operate the family farm.⁴⁰ In declining to depart, the court noted that the defendant's brothers could help their father farm and that the defendant's wife had recovered from her substance abuse problems.⁴¹ The court held that the defendant's case did not present extraordinary circumstances because all families suffer when one member is incarcerated, thus explaining why family circumstances are not ordinarily relevant in sentencing determinations.⁴²

The majority of courts that have addressed this issue have held that the Guidelines permit sentencing judges to base a downward departure on extraordinary family circumstances, but these courts have yet to deem any set of circumstances extraordinary.⁴³ For example, in *United States*

United States v. McHan, 920 F.2d 244 (4th Cir. 1990), the court held that family circumstances and community ties cannot serve as bases for downward sentencing departures unless probation is a sentencing option. *Id.* at 248. This probation provision was later omitted in an amendment of the Guidelines. *See supra* note 28. However, in *United States v. Deigert*, 916 F.2d 916 (4th Cir. 1990), the Fourth Circuit held that § 5H1.6 of the Guidelines permits departures in the face of extraordinary family circumstances. *Id.* at 919. *See United States v. Brand*, 907 F.2d 31, 33 (4th Cir.), *cert. denied*, 111 S. Ct. 585 (1990).

36. 890 F.2d at 1043.

37. *Id.*

38. 919 F.2d 1325 (8th Cir. 1990).

39. *Id.* at 1328.

40. *Id.* at 1326.

41. *Id.* at 1328.

42. *Id.* Although the court held that a defendant's family circumstances may legally justify a downward departure, this defendant's situation was not outside the "heartland" of cases which the Guidelines cover (relying on U.S.S.G., *supra* note 2, ch.1, pt.A, Introduction 4(b) (Departures)).

43. *See, e.g., United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir. 1992) (holding that defendant's support of two minor children and a mother was not an extraordinary circumstance warranting a downward departure); *United States v. Cacho*, 951 F.2d 308, 310-311 (11th Cir. 1992) (holding that defendant's care of four small children was not an extraordinary circumstance because the defendant "has shown nothing more than that which innumerable defendants could no doubt establish: namely that the imposition of prison sentences normally disrupts . . . parental relation-

v. Headley,⁴⁴ the Third Circuit held that the defendant did not have an extraordinary family circumstance even though she was a single mother of five young children.⁴⁵ In *Headley*, the defendant was convicted of conspiring to manufacture and distribute illegal drugs.⁴⁶ On appeal, the defendant argued that the district court's refusal to depart downward stemmed from its erroneous belief that it lacked the authority to base the departure only on family circumstances.⁴⁷ The defendant urged that her tremendous parental responsibility constituted an extraordinary family circumstance which warranted a downward departure from her sentence.⁴⁸ The Third Circuit held that although section 5H1.6 authorizes courts to deviate from the Guidelines in cases of extraordinary family circumstances, confinement of a single parent to prison is not extraordinary because numerous defendants could establish that prison sentences disrupt parental relationships.⁴⁹

In contrast, in *United States v. Peña*,⁵⁰ the Tenth Circuit allowed a downward departure partially based on the defendant's status as a single parent.⁵¹ In *Peña*, the district court found that the defendant supported her two-month-old child, her sixteen-year-old daughter, and her daugh-

ships"); *United States v. Carr*, 932 F.2d 67, 72 (1st Cir.), *cert. denied*, 112 S. Ct. 112 (1991) (holding that because defendant's responsibility to his young son is not a situation outside of the "heartland" of typical cases, it is not extraordinary); *United States v. Shoupe*, 929 F.2d 116, 121 (3d Cir.), *cert. denied*, 112 S. Ct. 382 (1991) (holding that even though defendant's young son resided with his former wife, that he paid child support regularly and that he frequently spoke with his child the court could not justify departure on the basis of extraordinary family circumstances); *United States v. Headley*, 923 F.2d 1079, 1082-83 (3d Cir. 1991) (ruling that the defendant failed to establish that her situation, as a single mother of five minor children, was extraordinary); *United States v. Pozzy*, 902 F.2d 133, 139 (1st Cir.), *cert. denied*, 111 S. Ct. 353 (1990) (holding that a wife's sentence should not be reduced on the basis that the penal sentence received by her husband for the same crime is an extraordinary circumstance and finding that pregnancy is not an extraordinary circumstance); *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir.), *cert. denied*, 111 S. Ct. 127 (1990) (refusing to justify a departure in case where the defendant was a mother of young children because her situation was not "sufficiently unusual").

44. 923 F.2d 1079 (3d Cir. 1991).

45. *Id.* at 1082.

46. *Id.* at 1081-82. The court convicted the defendant of conspiring to manufacture and distribute both marijuana and cocaine.

47. *Id.* at 1082.

48. *Id.* The defendant insisted that a long prison sentence would cause her children to suffer psychologically.

49. *Id.* at 1083. The court held, therefore, that the district court did not err in refusing to depart downward.

50. 930 F.2d 1486 (10th Cir. 1991). The defendant was convicted of possession of marijuana with intent to distribute. *Id.*

51. *Id.* at 1494.

ter's two-month-old child.⁵² The district court also found that incarcerating the defendant for a significant period of time would place the infants at risk.⁵³ The *Peña* court held that the language of section 5H1.6 implies that extraordinary family circumstances may justify a sentencing departure.⁵⁴ The court then reasoned that the defendant's responsibilities to the two infants, combined with other factors,⁵⁵ warranted a downward departure from the normal scheme promulgated in the Sentencing Guidelines.⁵⁶

In *United States v. Johnson*,⁵⁷ the Second Circuit reaffirmed its position as the only circuit to premise a downward departure solely upon extraordinary family circumstances.⁵⁸ In reaching this decision, the court first determined the authoritative value of the Guidelines' policy statements.⁵⁹ The court found that the policy statements serve to assist courts in interpreting the Guidelines but do not convey the same authority as the Guidelines' provisions themselves.⁶⁰ Nevertheless, the court concluded that policy statements can aid courts in deciding whether to depart from the Guidelines' sentencing ranges.⁶¹

Next, the Second Circuit analyzed Policy Statement section 5H1.6 and determined whether the Commission adequately considered extraordinary family circumstances when formulating the Guidelines.⁶² The court

52. *Id.* The defendant's 16-year-old daughter was the mother of the defendant's two-month-old grandchild.

53. *Id.*

54. *Id.* at 1495.

55. *Id.* at 1495. In addition to the defendant's "unique" family responsibilities, the court considered that her conduct was a deviation from her usual behavior, which did not reflect substance abuse or prior involvement in the distribution of controlled substances. *Id.* Prior to her conviction, the defendant was steadily employed and provided financial support for her family. *Id.*

56. *Id.*

57. 964 F.2d 124 (2d Cir. 1992).

58. The Second Circuit in *United States v. Alba*, 933 F.2d 1117 (2d Cir. 1991), downwardly departed on the basis of extraordinary family responsibilities when the defendant lived with his wife of 12 years, his children, his disabled father (who relied on defendant to use his wheelchair) and the defendant's grandmother. *Id.* at 1122. At the time of the events giving rise to the conviction, the defendant provided for his entire family. *Id.*

59. 964 F.2d at 127. The court first reviewed the relative weight courts should grant to policy statements because the government's case largely relied on a narrow reading of § 5H1.6. *Id.* at 126.

60. *Id.* at 127. The court noted that Congress distinguished policy statements from the Guidelines in 28 U.S.C. § 994(a)(2), which provides that policy statements are directives "regarding application of the guidelines or any other aspect of sentencing." 28 U.S.C. § 994(a)(2) (1988). *See supra* note 21.

61. 964 F.2d at 128.

62. *Id.* The court considered this question the most important to any departure decision. *Id.* This inquiry is critical because under § 3553(b) of the Sentencing Act, a district court could only

concluded that the language of section 5H1.6 indicated that the Commission only considered ordinary family circumstances.⁶³ Because section 5H1.6 contains no express language absolutely prohibiting courts from considering family circumstances when imposing a sentence, the *Johnson* court held that sentencing courts can depart downward after finding the existence of extraordinary family circumstances.⁶⁴

Finally, the court evaluated the government's contention that extraordinary family circumstances alone cannot justify a downward departure.⁶⁵ The court noted that both the Guidelines and case law support deviating from the Guidelines in extraordinary circumstances.⁶⁶ Moreover, the court found no reason to hold that certain family circumstances by themselves do not constitute extraordinary circumstances.⁶⁷ Examining the defendant's family situation, the court determined that the defendant's responsibility for providing care to four young children constituted an extraordinary family circumstance that warranted a downward departure.⁶⁸

The Second Circuit persuasively resolved the sentencing departure issue. First, the court correctly interpreted the relevant policy statement in the Guidelines.⁶⁹ The language of section 5H1.6 indicates that the Commission considered only ordinary family responsibilities when it formulated the Guidelines.⁷⁰ The *Thomas* court erred in relying on the situations designated by section 5H1.6 as the only instances in which a court can consider family circumstances when imposing a sentence.⁷¹ This position ignores Congress' desire, manifest in the Sentencing Reform Act, to have the Commission formulate guidelines which allow

depart if a circumstance was "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." *Id.* (quoting 18 U.S.C. § 3553(b) (1988)).

63. *Id.*

64. *Id.* at 129. The court stated that the Commission would have used unequivocal language barring family circumstances from departure consideration if it had so intended. *Id.*

65. *Id.* In support of this argument, the government showed that all of the cases cited by the defendant involved other departure bases in addition to that of the extraordinary family circumstances. *Id.*

66. *Id.* See *supra* notes 22-23 and accompanying text.

67. 964 F.2d at 129.

68. *Id.* The court stated that the downward departure was not a signal that the defendant's family circumstances diminished her level of culpability. Rather, the court rationalized the departure on grounds that a prison sentence would "wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Id.*

69. See *supra* note 22.

70. 964 F.2d at 128-29. See *supra* notes 22, 63, 64 and accompanying text.

71. See *supra* note 29 and accompanying text.

courts to exercise sentencing flexibility when confronted with an unforeseen mitigating circumstance.⁷²

Second, the court correctly determined that the Commission intended for extraordinary family circumstances to justify a downward departure from applicable sentencing ranges.⁷³ Policy Statement section 5H1.6 does not impose a total prohibition on the consideration of family circumstances in the sentencing decision.⁷⁴ Thus, section 5H1.6 stands in stark contrast to section 5H1.10, which completely bars any consideration of racial status.⁷⁵ This comparison suggests that the Commission did not intend to absolutely prohibit consideration of family circumstances.⁷⁶

Third, the Second Circuit properly held that extraordinary family circumstances by themselves may warrant a sentencing departure.⁷⁷ Neither the Guidelines nor the policy statements contain any language to the contrary.⁷⁸ Moreover, because courts have held in other contexts that extraordinary circumstances may justify a departure, the argument that a specific family circumstance standing alone can never justify a departure lacks credibility.⁷⁹

Finally, the *Johnson* court failed to consider the problematic message it sent to other federal appellate courts when it classified the defendant's family circumstance as extraordinary. Although *Johnson's* responsibility for providing for several young children evokes sympathy, the Second Circuit dangerously construed this circumstance as extraordinary.⁸⁰ Most courts confronted with analogous circumstances decline to label them as extraordinary.⁸¹ Congress intended that the Guidelines provide

72. See *supra* note 13 and accompanying text.

73. See *supra* notes 63, 64 and accompanying text.

74. See *supra* note 66 and accompanying text.

75. U.S.S.G., *supra* note 2, § 5H1.10 (Policy Statement) (providing that race, sex, national origin, creed, religion and socio-economic status are not relevant in the determination of a sentence).

76. For a comparison of the language of § 5H1.6 with the stringent language in § 5H1.10, see *supra* notes 22, 75 and accompanying text.

77. See *supra* notes 66-67 and accompanying text.

78. Section 5H1.6 contains the Commission's only pertinent statement about this issue. Policy Statement 5H1.6 provides: "Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fines." U.S.S.G., *supra* note 2, § 5H1.6 (Policy Statement).

79. See *supra* notes 35, 39, 43, 51, 58 (providing examples of other contexts in which courts have held that extraordinary circumstances warrant a sentencing departure).

80. See *infra* notes 82-83 and accompanying text.

81. See *supra* notes 42-43, 49.

uniformity and fairness in sentencing.⁸² In deciding that Johnson's family circumstances warranted a departure, the Second Circuit created a situation totally inconsistent with the Guidelines' underlying purposes of uniformity and fairness.⁸³

Yet, the *Johnson* decision did not result from flawed reasoning. Rather, the Guidelines simply failed to provide adequate instructions to sentencing courts.⁸⁴ Congress should direct the Sentencing Commission to amend section 5H1.6 to provide the courts adequate guidance in determining what types of family circumstances constitute extraordinary circumstances.⁸⁵ Until Congress takes such action, courts faced with analogous family circumstances will continue to make disparate departure determinations.

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82. See *supra* notes 11, 13. The Sentencing Reform Act directed the Sentencing Commission to establish guidelines which effectuate certainty in sentencing. 28 U.S.C. § 991(b)(1)(B) (1988).

83. *Id.*

84. See *supra* notes 19-21 and accompanying text.

85. In amending § 5H1.6 to provide for uniformity in the determination of extraordinary family circumstances, Congress should primarily consider typical family contingencies. For example, the following factors might be deemed to determine whether a circumstance is extraordinary: the number of the defendant's children; whether any of the children has a physical or mental disability and the degree of such disability; whether the defendant cares and/or provides for the children and the level of support provided; whether the defendant cares and/or provides for parents or any other immediate family member; the amount of money available to those dependent upon the defendant in his or her absence and the availability of friends or relatives to assume the defendant's responsibilities.

Congress, based on the Commission's suggestions, could, for example, create a mini-sentencing grid as a possible solution to this dilemma. The vertical axis might contain various imprisonment ranges (in months), which roughly approximate those in the Guidelines' sentencing grid, while various mitigating family contingencies, from least to most significant, could shape the horizontal axis. The grid's boxes could either allow or deny a departure, or leave the decision to the judge's discretion. Those boxes in the upper-left portion of the grid could allow departures, those in the lower-right portion could deny them and those in between could permit a sentencing judge to use discretion when determining the sentence. Ascertaining a defendant's imprisonment range from the Guidelines' grid, the judge could simply match the appropriate grid box with the applicable imprisonment range and the pertinent mitigating family circumstance to determine if such a factor warranted a departure. This system better achieves the aim of the Guidelines to provide sentencing uniformity with a degree of flexibility. Moreover, Congress could create alternative concepts to improve sentencing disparities arising from other policy statements.

Because the Commission is not likely to amend § 5H1.6 in the foreseeable future, courts currently confronting this sentencing departure issue should strive to follow the decisions of other courts facing the same issue under analogous circumstances. Such a procedure fosters consistency in sentencing and thus advances the Guidelines' objectives.

