

**UPWARD DEPARTURES FROM THE SENTENCING  
GUIDELINES: SHOULD NONSIMILAR, OUTDATED  
CONVICTIONS PROVIDE A BASIS FOR DEPARTURE?**  
*United States v. Diaz-Collado*, 981 F.2d 640 (2d Cir. 1992),  
*cert. denied*, 113 S. Ct. 2934 (1993).

In *United States v. Diaz-Collado*,<sup>1</sup> the Second Circuit held that nonsimilar, outdated convictions may serve as the basis for an upward departure under the United States Sentencing Guidelines (Guidelines).<sup>2</sup> However, the court of appeals did not define a standard for district courts to follow in deciding whether a departure based upon such convictions is warranted.<sup>3</sup>

Diaz-Collado pleaded guilty to attempted cocaine smuggling.<sup>4</sup> The presentencing report<sup>5</sup> indicated that the defendant had a total offense level of fourteen<sup>6</sup> and a criminal history category of IV under the

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1. 981 F.2d 640 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2934 (1993).

2. *Id.* at 644. See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 4A1.3 (Nov. 1993) [hereinafter GUIDELINES].

3. 981 F.2d at 644. This Case Comment addresses upward departures under section 4A1.3 of the Guidelines only. For a further discussion on departures, see generally Judy Clarke, *Departures from the Guidelines Range: Have We Missed the Boat, or Has the Ship Sunk?*, 29 AM. CRIM. L. REV. 919 (1992); Bruce M. Selya and Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991); Michael R. Schechter, Note, *Sentencing Enhancements under the Federal Sentencing Guidelines: Punishment Without Proof*, 19 N.Y.U. REV. L. & SOC. CHANGE 653 (1992). This Case Comment argues that the Court erred in not defining a standard because its decision could lead to increased disparity and judicial discretion, see *infra* notes 86-90 and accompanying text.

4. 981 F.2d at 641. See also 21 U.S.C. § 952(a) (Supp. 1993) (providing that it is illegal to "import into the United States from any place outside thereof, any controlled substance . . . or any narcotic drug . . .").

5. A probation officer must prepare a presentence report to be given to the court for guidance in determining the sentence. GUIDELINES, *supra* note 2, § 6A1.1. This procedure provides a formal structure for the court to determine particular offense and offender characteristics and, consequently, the sentencing range. *Id.* § 6A1.3, cmt.

6. 981 F.2d at 641. The base offense level constitutes the vertical axis of the Sentencing Table. GUIDELINES, *supra* note 2, at ch. 5, pt. A. It focuses on the defendant's conduct during the commission of the offense(s) for which he was tried and convicted. Darren M. Gelber, Note, *The Federal Sentencing Guidelines: Is Discretion Still the Better Part of Valor?*, 9 N.Y.L. SCH. J. HUM. RTS. 355, 357 (1992). The Commission assigned base offense levels to statutory federal crimes and then allowed for upward and downward adjustments according to appropriate specific offense characteristics. *Id.* The base offense level ranges from one to forty-three. See GUIDELINES, *supra* note 2, §§ 2A1.1-2X5.1.

Guidelines.<sup>7</sup> The calculation of his criminal history excluded his past convictions for automobile theft and criminal mischief because they were outdated under the Guidelines' applicable time period.<sup>8</sup> Under the Guidelines, the corresponding sentencing range for the defendant was twenty-seven to thirty-three months.<sup>9</sup>

The district court departed upward from the range and sentenced the defendant to thirty-seven months of imprisonment.<sup>10</sup> On appeal,<sup>11</sup> the

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7. 981 F.2d at 641. The criminal history category (CHC) constitutes the horizontal axis of the Sentencing Table. GUIDELINES, *supra* note 2, at ch. 5, pt. A. The CHC is determined by the total criminal history points calculated in the presentence report based on the defendant's prior sentences of imprisonment, legal status at the time of arrest, and related offenses, among other things. *Id.* § 4A1.1, ch. 5, pt. A. The points start at zero and have no upper limit, although all defendants with thirteen points or more have a CHC of VI, regardless of whether their point total is 14 or 43. *Id.* at ch. 3, pt. A. The presentence report assigned the defendant in Diaz-Collado eight criminal history points; he received six points for his prior convictions between 1977 and 1988 and two points for his probationary status at the time he was arrested for smuggling the cocaine. 981 F.2d at 641. These prior convictions included robbery, possession of stolen property, and assault with a dangerous weapon. *Id.* at 642.

8. *Id.* at 641-42. The defendant had five outdated convictions. *Id.* The defendant committed four automobile thefts in the course of one year, from sometime in 1976 to sometime in 1977. *Id.* The defendant also had one outdated conviction for criminal mischief. *Id.* The defendant was 17 or 18 years old when he committed the offenses for the five outdated convictions. *See id.* The Guidelines' applicable time provision, section 4A1.2(e), provides in part:

*Applicable Time Period*

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within 15 years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen year period.

(2) Any other prior offense that was imposed within 10 years of the defendant's commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

GUIDELINES, *supra* note 2, § 4A1.2(3). The Sentencing Commission spent a great deal of discussion time on the issue of establishing a decay rate for including prior convictions in the criminal history calculation. *See UNITED STATES SENTENCING COMMISSION, PUBLIC HEARING ON THE TREATMENT OF PRIOR CRIMINAL RECORD (1986).*

9. 981 F.2d at 641.

10. *Id.* The court also sentenced Diaz-Collado to five years supervised release and a \$50 special assessment. *Id.* Thirty-seven months imprisonment fell within the applicable sentencing range for a defendant with a base offense level of 14 and a criminal history category of V. *See GUIDELINES, supra* note 2, at ch. 5, pt. A. Diaz-Collado would have needed two additional criminal history points in order to have a CHC of V. *Id.*

11. The Sentencing Reform Act enables both defendants and the government to appeal a sentence if the sentence was imposed in violation of law, was imposed as a result of an incorrect application of the Guidelines, or was imposed outside the applicable guideline range and is unreasonable. 18 U.S.C. § 3742(e) (1988).

Several circuits follow a version of the First Circuit's formulation of the proper standard of appellate review in *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989), *cert. denied*, 493 U.S. 862 (1989). 1 U.S.S.C. ANN. REP. 93 (1990). The appellate court will evaluate the circumstances relied

Second Circuit affirmed the sentence and held that the district court did not err in departing upward based upon the defendant's nonsimilar, outdated convictions.<sup>12</sup> The court reasoned that those past convictions had resulted in lenient sentences for the defendant and reflected a pattern of criminal conduct by the defendant.<sup>13</sup>

The United States Sentencing Commission<sup>14</sup> instituted the Guidelines on November 1, 1987,<sup>15</sup> pursuant to Chapter II of the Comprehensive Crime Control Act of 1984.<sup>16</sup> Through this act, Congress intended to combat disparity,<sup>17</sup> promote honesty,<sup>18</sup> and provide proportionality<sup>19</sup> in

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on by the district court in concluding that the case is sufficiently unusual to warrant departure, determine whether there is a factual basis that supports the existence of the circumstances in the particular case, and examine the reasonableness of the degree and direction of the departure. 874 F.2d at 49.

12. 981 F.2d at 644.

13. *Id.*

14. The Sentencing Commission is an independent agency of the Judicial Branch with nine members, seven voting and two non-voting. GUIDELINES, *supra* note 2, at § ch. 1, pt. A.1. The members are appointed by the President and confirmed by the Senate. 28 U.S.C. § 991(a) (1988). The Commission is a permanent body that can amend the Guidelines each year. GUIDELINES, *supra* note 2, at ch. 1, pt. A.5. *See also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8 (1988) (stating that "Congress intended [the Commission] to be a permanent body that would continuously revise the Guidelines over the years"); W. Travis Parham, Note, *Grist for the Mill of Sentencing Guideline Reform: Williams v. United States*, 28 WAKE FOREST L. REV. 487 (1993) (citing Senator Edward Kennedy, an original sponsor of the Sentencing Reform Act, who stated that "it was always understood that the guidelines system would be evolutionary in nature"). The Commission may submit guideline amendments to Congress each year prior to May 1; an amendment automatically becomes a part of the Guidelines on the date specified by the Commission which can be no earlier than 180 days after submission and no later than November 1 unless a law is enacted to prevent its taking effect. 28 U.S.C. § 994(p) (1988).

15. GUIDELINES, *supra* note 2, at ch. 1, pt. A.1. The Guidelines are applicable to all offenses committed on or after Nov. 1, 1987. 18 U.S.C. § 3551 (1988); GUIDELINES, *supra* note 2, at ch. 1, pt. A.1. A court must apply the Guidelines which were in effect on the date that the defendant is sentenced, unless doing so would violate the Ex Post Facto Clause of the United States Constitution. GUIDELINES, *supra* note 2, at § 1B1.11, cmt. The Commission held thirteen public hearings, published two drafts for public comment, and received more than 1000 letters and position papers from hundreds of individuals and organizations prior to submitting its preliminary guidelines and policy statements to Congress on April 13, 1987. *See* 1990 U.S.S.C. ANN. REP.

16. Comprehensive Crime Control Act of 1984, § 3551, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984). The basic objective of the act is to improve the criminal justice system's ability to combat crime through fair and effective sentencing. GUIDELINES, *supra* note 2, at ch. 1, pt. A3.

17. GUIDELINES, *supra* note 2, at ch. 1, pt. A.3, P.S. Empirical studies became popular in the 1970s. These studies showed that similarly situated offenders were not receiving similar sentences. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990). Much of the disparity seemed attributable to the defendant's race, gender, or social class. *Id.* at 895. Differences could also be attributed to variations among judges in their attitudes toward the purpose of sentencing. *See* S. REP. NO. 225, 98th Cong., 2d Sess. 38

federal sentencing.<sup>20</sup> Congress also described the parameters within which the Commission was to establish guidelines providing fairness and certainty

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(1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224; Nagel, *supra*, at 897.

A study conducted by the Department of Justice gave 16 hypothetical cases to 208 federal judges and asked what sentence should be imposed. S. REP. NO. 225, *supra*, at 44, *reprinted in* 1984 U.S.C.C.A.N. at 3227. The judges recommended a wide variety of sentences even though the hypothetical cases were identical; in one fraud case, the mean prison term was one and half years yet one judge advised that a 15 year jail term be imposed. *Id.* The study revealed that the wide disparity in sentencing did not stem merely from variation in offense and offender characteristics because twenty-one percent of the variance could be attributed to varying judicial tendencies to give generally tough or generally lenient sentences and another twenty-two percent could be attributed to the interaction between judge factors and other factors. *Id.* The Senate Judiciary Committee observed that disparity in sentencing could be "traced directly to the unfettered discretion the law confers" on judges in their sentence determinations. Nagel, *supra*, at 900-901 (quoting S. REP. NO. 225, *supra* at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3224). To correct the disparity Congress mandated that sentencing reform should aspire towards achieving uniformity, meaning that defendants convicted of similar offenses with similar criminal histories would receive substantially similar sentences. See 28 U.S.C. § 991(b)(1)(B) (1988); S. REP. NO. 225, *supra*, at 49-50, *reprinted in* 1984 U.S.C.C.A.N. at 3232-33. For a comprehensive examination of the legislative history of the Sentencing Reform Act, see Kate Stith & Steve Y. Yoh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

18. GUIDELINES, *supra* note 2, at ch. 1, pt. A.3, P.S. The public became disillusioned with the judicial system in the 1970s as it became apparent that convicted offenders were not serving out their sentences because the Parole Commission was determining that many inmates could go free anywhere from one to twenty years early. Nagel, *supra* note 17, at 884. Even after a defendant was sentenced, the judge, the public, and even the defendant could not tell how long he would actually be imprisoned. Breyer, *supra* note 14, at 4; S. REP. NO. 225, *supra* note 17, at 46, *reprinted in* 1984 U.S.C.C.A.N. at 3229. Congress' solution to this problem was to abolish the Parole Commission as part of the sentencing reform. S. REP. NO. 225, *supra* note 17, at 56, *reprinted in* 1984 U.S.C.C.A.N. at 3239.

19. GUIDELINES, *supra* note 2, at ch. 1, at pt. A.3, P.S. Proportionality means imposing appropriately different sentences for criminal conduct of differing severity. *Id.* Public opinion polls revealed that the public believed federal sentencing was too lenient. Nagel, *supra* note 17, at 884. There is potential tension between the goals of uniformity and proportionality because simple uniformity adversely affects proportionality. GUIDELINES, *supra* note 2, at ch. 1, pt. A.3, P.S.

20. 18 U.S.C. § 3553(a)(2) (1988) provides that the goals of sentencing are:

- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- (B) to afford adequate deterrence to criminal conduct;
- (C) to protect the public from further crimes of the defendant; and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

*Id.*

Congress deliberately chose not to express a preference for one sentencing goal over another because individual goals might dictate different sentences depending on the defendant and the offense. S. REP. NO. 225, *supra* note 17, at 75, *reprinted in* 1984 U.S.C.C.A.N. at 3258. Congress also requires that judges consider the "nature and circumstances of the offense and the history and characteristics of the defendant" when making a sentencing decision. 18 U.S.C. § 3553(a)(1).

in sentencing.<sup>21</sup>

Even though it expected courts to follow uniformly the Guidelines,<sup>22</sup> Congress recognized that departures from the Guidelines may be warranted in some cases.<sup>23</sup> Therefore, Congress provided for the possibility of departure if "there exists an aggravating or mitigating circumstance"<sup>24</sup> that the Sentencing Commission did not address or adequately provide for in creating the Guidelines.<sup>25</sup> Congress intended for the Guidelines to structure the unfettered sentencing discretion that judges traditionally exercised.<sup>26</sup> Nevertheless, Congress acknowledged that under certain unusual circumstances some flexibility in individual sentences would be required.<sup>27</sup>

21. Breyer, *supra* note 14, at 4-6. For a discussion on whether the Guidelines are meeting the goals of the Sentencing Reform Act, see Theresa Walke Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (1991).

22. The Guidelines are mandatory for the courts. See 18 U.S.C. § 3553(a) (stating that the "court shall impose a sentence") (emphasis added). See Selya, *supra* note 3, at 6 n.29. The Senate Judiciary Committee determined that the Guidelines would be more effective in achieving their goals if made mandatory rather than voluntary because the most successful individual states had enacted mandatory guidelines. S. REP. NO. 225, *supra* note 17, at 79, reprinted in 1984 U.S.C.C.A.N. at 3262. Many courts resisted following the Guidelines when they were first promulgated on the grounds that they were unconstitutional. Nagel, *supra* note 17, at 906. However, the Supreme Court in *Mistretta v. United States*, 488 U.S. 361 (1989), held that the Guidelines were constitutional and rejected arguments that the Guidelines reflected excessive delegation of legislative power or violated the separation of powers, *id.* at 412.

23. The Senate observed that after a judge has considered the requirements of section 3553(a), a judge must then decide which sentencing guidelines and policy statements apply to the particular defendant. S. REP. NO. 225, *supra* note 17, at 52, reprinted in 1984 U.S.C.C.A.N. at 3235. A judge may conclude that the applicable guideline range is appropriate and impose a sentence within that range, or a judge may decide that the circumstances of the case warrant a departure outside the guidelines. *Id.*

24. 18 U.S.C. § 3553(b) (Supp. 1993).

25. Section 3553(b) provides:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a sentence was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

*Id.*

26. GUIDELINES, *supra* note 2, at ch. 1, pt. A.3, P.S. See 28 U.S.C. § 991(b)(1)(B) (1988).

27. Section 3553 was added by the 95th Congress. S. REP. NO. 225, *supra* note 17, at 78, reprinted in 1984 U.S.C.C.A.N. at 3261. "It requires the sentencing judge to impose a sentence within the guidelines . . . [but] at the same time the provision provides the flexibility necessary to assure adequate consideration of circumstances that might justify a sentence outside the guidelines." *Id.*

The Guidelines specifically allow a court to depart upward from the applicable sentencing range “[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s past criminal conduct or the likelihood that the defendant will commit other crimes.”<sup>28</sup> Recognizing the difficulty of promulgating rules that provide for every possible variance in facts, the Commission considers each guideline merely to carve out a “heartland” of typical cases that meet the definition of conduct regulated by the specific guideline.<sup>29</sup> However, the Commission expects courts to follow the Guidelines in most cases and depart only in those rare instances in which the defendant’s actions differ significantly from the norm.<sup>30</sup> Necessarily, upward departure decisions must be made on a case-by-case basis according to the relevant facts.<sup>31</sup>

The Supreme Court recognized in *Williams v. United States*<sup>32</sup> that the federal circuits are split on the question whether the Guidelines authorize departures based on nonsimilar, outdated convictions but chose not to

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28. GUIDELINES, *supra* note 2, § 4A1.3, P.S. A court can consider an upward departure if it concludes that the defendant’s criminal history was “significantly more serious than that of most defendants in the same criminal history category.” *Id.*

29. *Id.*

30. *Id.*

31. Gelber, *supra* note 6, at 368. A year long study by the Sentencing Commission revealed that judges had departed upward from the Guidelines in 2.3% of the sample cases. 1990 U.S.S.C. ANN. REP. 69. Departures based on inadequacy of the criminal history category, the most frequent reason, accounted for 41% of those departures. *Id.* at 70.

32. 112 S. Ct. 1112 (1992). The defendant appealed his sentence, arguing that it was based on impermissible grounds of prior arrests and outdated, nonsimilar convictions. *Id.* at 1118. The Supreme Court held that a reviewing court cannot affirm a sentence that was based on an improper ground for departure solely because it independently concludes that the departure is reasonable. *Id.* at 1120. A reviewing court must remand unless it concludes the error was harmless. *Id.* The Court vacated the sentence because the district court impermissibly based its departure on the defendant’s past arrests. *Id.* at 1122.

The Court described a two-part inquiry that courts must follow when reviewing departure sentences. *Id.* at 1120. The court must first examine whether the sentence was imposed in violation of law or as a result of an incorrect application of the Guidelines. If the answer is yes, the court must remand. If the answer is no, the court must then determine whether the sentence imposed was an unusually high or low departure from the applicable sentencing range. If yes, the court must remand. *Id.* The Court concluded that a reviewing court may affirm the sentence if it was based upon both proper and improper grounds only if the party defending the sentence proves to the court that the record as a whole indicates that the district court would have chosen to impose the identical sentence absent the invalid grounds. *Id.* at 1121.

address the issue.<sup>33</sup> In *Williams*,<sup>34</sup> the Seventh Circuit had affirmed the upward departure, concluding that remote convictions may, in certain circumstances, serve as “reliable information”<sup>35</sup> which demonstrates a defendant’s more extreme criminal tendency better than that indicated by the criminal history category.<sup>36</sup> The court did not define a standard to be followed; rather, the court held that such departures could be warranted even if the remote convictions were nonviolent and substantially dissimilar to the current offense.<sup>37</sup>

The Fifth,<sup>38</sup> Eighth,<sup>39</sup> and Tenth<sup>40</sup> Circuits have also concluded that nonsimilar, outdated convictions may provide grounds for departure.<sup>41</sup> Each of these courts determined that such convictions may justify an upward departure if the criminal history category underrepresents the

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33. *Id.* at 1122. The Supreme Court did not address the issue because the petition for certiorari, and the parties’ briefs did not clearly present the issue to the Court. *Id.* The Court found that it did not need to decide if remote, nonsimilar convictions are a valid basis for departure because the Court could not ascertain from the record whether the court of appeals had determined that the district court would have imposed the same sentence if it had not improperly considered the defendant’s prior arrests. *Id.* The Supreme Court remanded the case for the appropriate determination to be made by the court of appeals. *Id.*

34. *United States v. Williams*, 910 F.2d 1574, 1578-9 (7th Cir. 1990), *rev’d on other grounds*, 112 S. Ct. 1112 (1992).

35. See GUIDELINES, *supra* note 2, § 4A1.3.

36. 910 F.2d at 1580. The defendant was convicted of being a felon in possession of a firearm and his CHC was calculated at V. *Id.* at 1577. The district court sentenced him as a CHC VI level, however, due to his outdated convictions for automobile stealing and forgery and his prior arrests not resulting in conviction for attempted rape and assault with a dangerous weapon. *Id.*

37. *Id.* at 1579. The court held that the convictions for automobile stealing and forgery could be “reliable information.” *Id.*

38. *United States v. Harvey*, 897 F.2d 1300 (5th Cir.), *cert. denied*, 498 U.S. 1003 (1990), *overruled on other grounds by United States v. Lambert*, 984 F.2d 658 (5th Cir. 1993). The defendant was convicted of possession of a firearm by a convicted felon. *Id.* at 1301-02. The presentence report assigned him a base offense level of nine and a criminal history category of V. *Id.* at 1305. The court held that it was proper to base departure on the defendant’s three prior felony convictions. *Id.* at 1506.

39. *United States v. Andrews*, 948 F.2d 448 (8th Cir. 1991). Convicted of aiding and abetting an armed bank robbery, the defendant received a base offense level of 21 and a criminal history category of I. *Id.* at 448-49. The court held that the district court properly ruled upon outdated convictions for possession of stolen mail and marijuana. *Id.* at 450.

40. *United States v. Jackson*, 903 F.2d 1313 (10th Cir.), *vacated by* 921 F.2d 985 (10th Cir. 1990) (vacating sentence because the trial court failed to articulate adequately the factors relied upon in deciding to depart). Defendant originally pleaded guilty to being a felon in possession of ammunition. 903 F.2d at 1314. He had a criminal history category of III. *Id.* at 1314 n.2. The court found it proper to consider past convictions for forgery, robbery and selling heroin in departing. *Id.* at 1317.

41. *Harvey*, 897 F.2d at 1306; *Jackson*, 903 F.2d at 1318; *Andrews*, 948 F.2d at 449-450. See also *United States v. Russell*, 905 F.2d 1439, 1444 (10th Cir. 1990) (holding that departure based on outdated convictions was warranted because defendant’s incarceration for 11 of the preceding 15 years diluted his criminal history).

defendant's pattern of criminal activity.<sup>42</sup> The courts did not differentiate between similar and nonsimilar convictions when deciding the propriety of departure.<sup>43</sup>

In *United States v. Aymelek*,<sup>44</sup> the First Circuit held that a defendant's nonsimilar, outdated convictions may be used as the basis for an upward sentencing departure.<sup>45</sup> However, the court adopted a compromise test that allows such departures only if the convictions "evinced some significantly unusual penchant for serious criminality" which distinguishes the defendant from other offenders in a particular sentencing range.<sup>46</sup> The First Circuit formulated this standard after rejecting the two extreme positions of never allowing such departures and always allowing such departures.<sup>47</sup> On the one hand, prohibiting judges from ever basing departures on remote convictions, regardless of how extraordinary or numerous, would nullify judicial discretion to consider unusual circum-

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42. In *Harvey*, the Fifth Circuit held that upward departures were permissible if a defendant's criminal history category was not an accurate depiction of past criminal conduct. *Harvey*, 897 F.2d at 1306. The district court had observed that the defendant had been able to "manipulate the criminal justice system basically all of his adult life." *Id.* at 1305. In *Andrews*, the Eighth Circuit concluded that outdated convictions excluded from a defendant's criminal history category may be used as reliable information warranting departure under section 4A1.3 of the Guidelines. *Andrews*, 948 F.2d at 449.

In *Jackson*, the Tenth Circuit found the defendant's criminal history "egregious and serious," justifying a departure from the Guidelines. *Jackson*, 903 F.2d at 1318. The defendant's criminal history category failed to reflect adequately his propensity toward criminal conduct and violence. *Id.* The Tenth Circuit supported its conclusion with the introduction to Chapter Four of the Guidelines, which states that "to protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered." *Id.* (quoting GUIDELINES, *supra* note 2, at ch. 4, pt. A, cmt.).

43. The defendant in *Harvey* had uncounted convictions for assault on a police officer, possession of marijuana, carrying a prohibited weapon, and unlawful possession of a weapon. *Harvey*, 897 F.2d at 1305-06. In *Andrews*, the defendant's criminal history category excluded three prior convictions for armed robbery, possession of stolen mail, and possession of marijuana. *Andrews*, 948 F.2d at 449-50. The defendant in *Jackson* had uncounted, outdated convictions for forgery, robbery by assault, and selling heroin. *Jackson*, 903 F.2d at 1317. None of the courts separated discussion of similar convictions from discussion of dissimilar convictions.

44. 926 F.2d 64 (1st Cir. 1991). Defendant was convicted of being a deported alien illegally present in the United States in violation of 8 U.S.C. § 1326(a) (1988). *Aymelek*, 926 F.2d at 66.

45. The court upheld the departure because the defendant's seven prior, outdated convictions, although dissimilar to the charged offense, were distinguished by their "numerosity" and violent nature. *Id.* at 73.

46. *Id.* Defendant had a CHC of V. *Id.* at 72. His uncounted offenses included assault with intent to rob, unlawful possession by a felon of a firearm, and unlawful sale of a firearm. *Id.* The serious nature of these prior convictions played a big role in both the district court's, and the court of appeal's decision that the CHC did not adequately reflect the defendant's criminal history. *Id.* at 72-73.

47. *Id.* at 73.

stances in sentencing.<sup>48</sup> On the other hand, allowing judges to use outdated convictions at any time to support an upward departure would make a “mockery” of the time restrictions found in the Guidelines.<sup>49</sup>

In *United States v. Rusher*,<sup>50</sup> the Fourth Circuit followed *Aymelek*'s compromise test and held that nonsimilar, outdated convictions may serve as grounds for departure.<sup>51</sup> The court held that remote convictions may be used as grounds for departure even if those convictions are not demonstrative of misconduct similar to the offense of conviction.<sup>52</sup>

As the previous discussion demonstrates, courts have followed different standards in addressing the issue.<sup>53</sup> Nevertheless, the preceding circuits all held that, in some situations, nonsimilar, outdated convictions may serve as grounds for an upward sentencing departure.<sup>54</sup> In *United States v. Leake*,<sup>55</sup> however, the Ninth Circuit held that nonsimilar, outdated convictions may not be considered in a decision to depart upward from the Guidelines.<sup>56</sup> The court based this conclusion primarily on previous

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48. *Id.* The court determined that departure could not be based on the comment to section 4A1.2 (in particular, note 8) because the violent prior convictions were not similar to the nonviolent offense of being an illegal alien. *Id.* at 72. Subsequent to the court's decision, the comment was revised to include “serious dissimilar” conduct. GUIDELINES, *supra* note 2, at app. C, amend. 472.

49. *Id.* at 73. For the applicable time restrictions, see *supra* note 8.

50. *United States v. Rusher*, 966 F.2d 868, 882 (4th Cir.), *cert. denied*, 113 S. Ct. 351 (1992), *appeal after remand*, 1 F.3d 1235 (table) (4th Cir. 1993).

51. *Id.* at 882.

52. *Id.* The defendant was convicted of possession with intent to distribute controlled substances. *Id.* at 871. He had seven prior convictions which were too old to be included in the calculation of his criminal history, including armed robbery, attempted larceny, carrying a concealed weapon, and assault on a federal officer. *Id.* at 881. The Seventh Circuit vacated the sentence and remanded with instructions because the district court had failed to present adequately its reasons for departure and had “bypassed” the Guidelines rather than proceeding sequentially through higher categories in order to determine the appropriate level for the defendant. *Id.* at 882-83.

53. Compare *U.S. v. Jackson*, 903 F.2d 1313 (10th Cir. 1990) (stating that standard is whether the category adequately reflects defendant's violent nature) with *United States v. Aymelek*, 926 F.2d 64 (1st Cir. 1991) (holding that standard is whether the outdated convictions “evince some significantly unusual penchant for serious criminality”).

54. See *supra* notes 38-52 and accompanying text. The Sixth and Eleventh Circuits have not yet addressed this specific issue. *But cf.* *United States v. Samuels*, 938 F.2d 210, 215 (D.C. Cir. 1991) (holding that nonsimilar, outdated juvenile convictions could not serve as reliable information warranting departure under section 4A1.3); *United States v. Thomas*, 961 F.2d 1110, 1117 (3d Cir. 1992) (holding that nonsimilar, outdated, juvenile convictions cannot form the basis of an upward departure and explicitly declining to address whether departures may be based on nonsimilar, outdated adult convictions).

55. 908 F.2d 550 (9th Cir. 1990).

56. *Id.* at 554. Defendant pleaded guilty to passing forged checks at areas within federal jurisdiction. *Id.* at 551. Her criminal history score did not include points for her five outdated convictions of fraudulent activity or for her two outdated convictions of assault and battery. *Id.* at 554.

commentary in the Guidelines Manual that specifically allowed outdated, similar misconduct to be used as a basis for departure but made no mention of outdated, dissimilar misconduct.<sup>57</sup>

The Sentencing Commission specifically addressed the circuit split by amending the language of the commentary to section 4A1.2.<sup>58</sup> The Sentencing Manual now provides that courts can consider outdated convictions for departures under section 4A1.3 if the courts conclude that those convictions manifest similar or "serious dissimilar"<sup>59</sup> conduct.<sup>60</sup> However, the Sentencing Commission did not provide a standard for courts to apply in deciding when the outdated convictions might be sufficiently serious so as to warrant departure consideration.<sup>61</sup> No cases have construed the commentary to section 4A1.2 of the Guidelines Manual since its amendment.

In *Diaz-Collado*,<sup>62</sup> the Second Circuit joined the majority of circuits when it assumed that nonsimilar, outdated convictions could be used as a basis for departure.<sup>63</sup> The court then determined what circumstances would warrant a departure.<sup>64</sup> The court turned to 18 U.S.C. § 3553(b)<sup>65</sup> and to the policy statement of section 4A1.3<sup>66</sup> of the Guidelines as the sources for departure authority.<sup>67</sup> While it recognized that the circuits are split on the issue of availability, the Second Circuit chose not to address the contrary decision in *Leake* because the parties in *Diaz-Collado* conceded that nonsimilar, outdated convictions could be used to determine departures.<sup>68</sup> Instead, the defendant argued that his case did not warrant a

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57. *Id.* The court referred to the comment to section 4A1.2 which stated: "If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct . . . the court may consider this information in determining whether an upward departure is warranted under 4A1.3 (Adequacy of Criminal History Category)." *Id.* This comment was amended, effective November 1, 1992. See *infra* notes 58-60.

58. GUIDELINES, *supra* note 2, app. C, amend. 472 (1992).

59. *Id.* § 4A1.2, cmt., n.8 (effective November 1, 1992).

60. *Id.*

61. See *id.*

62. 981 F.2d 640 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2934 (1993).

63. *Id.* at 644.

64. *Id.* The court limited its holding by stating that departure was not improper based on the facts of the case and did not provide a general rule concerning what circumstances would indicate a proper departure. *Id.*

65. See *supra* note 25.

66. See *supra* note 28.

67. 981 F.2d at 643.

68. *Id.* at 643-44. The opinion also recognized that the Supreme Court had not resolved the split in *Williams*. *Id.* at 643. See *supra* note 33 and accompanying text. The court made no mention of

departure because it was not sufficiently unusual.<sup>69</sup>

Once the court decided that a departure based on the past convictions was permissible, the general departure provision of the Guidelines concerning reliable information governed the decision.<sup>70</sup> Rejecting the defendant's assertion that his was a typical case, the court concluded that the case served as a good example of how a criminal history category can be distorted by disregarding nonsimilar, outdated convictions.<sup>71</sup> The defendant's outdated convictions, in conjunction with his entire criminal record, revealed an unusual tendency to commit crimes shortly after each release from prison.<sup>72</sup> The *Diaz-Collado* court afforded considerable deference to the district court's determination that criminal history category IV "did not adequately reflect the seriousness of his past conduct or the likelihood that he would commit other crimes"<sup>73</sup> because of the frequency of defendant's outdated convictions.<sup>74</sup>

The Second Circuit correctly assumed that nonsimilar, outdated convictions may sustain an upward departure from the Sentencing Guidelines. The Sentencing Commission recognized from the inception of the Guidelines that not all circumstances may be accounted for in the criminal history category calculation and therefore adopted a departure provision.<sup>75</sup> Furthermore, in response to the circuit split, the Commission amended the Guidelines to authorize explicitly the use of dissimilar,

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the amendment to section 4A1.2 which was in effect by the time of the decision. *Id.* at 643-44. This is curious because courts must apply the Guidelines and the policy statement in effect at the time of sentencing. *See supra* note 15.

69. 981 F.2d at 643. The defendant claimed that his record merely contained "run-of-the-mill" old convictions which should not be used in the CHC calculation. *Id.* It is not clear from the opinion why the defendant chose not to argue that nonsimilar, outdated convictions could not serve as a basis for departure.

70. *Id.* at 644. The court quoted section 4A1.3. *See supra* note 28. The court also cited but did not develop the First Circuit's compromise test used in *Aymelek*. 981 F.2d at 644. *See supra* notes 44-49 and accompanying text.

71. 981 F.2d at 644. The court noted that the Guidelines explicitly allow departures if a defendant's sentences for previous offenses were lenient, a determination the district court made here. *Id.*

72. *Id.* The court found that this pattern of crime indicated disrespect for the law. *Id.*

73. *Id.*

74. *Id.*

75. GUIDELINES, *supra* note 2, § 4A1.3, P.S. *See supra* note 28 and accompanying text. Congress recognized the need for flexibility when it adopted 18 U.S.C. § 3553. *See supra* note 23 and accompanying text. However, the Commission also expects that the majority of cases will fall within the applicable sentencing range. *See supra* note 30 and accompanying text.

outdated convictions in certain circumstances.<sup>76</sup>

However, the Second Circuit's decision may lead to increased judicial discretion to the detriment of the Sentencing Guidelines because the court held that the facts of *Diaz-Collado* warranted a departure without outlining a definitive standard to guide district courts.<sup>77</sup> Rather than expounding on what circumstances might warrant using nonsimilar, outdated convictions as grounds for sentencing departures, the *Diaz-Collado* court merely applied the premise to the facts of the case.<sup>78</sup>

The First Circuit in *United States v. Aymelek*<sup>79</sup> took the proper approach to this problem by adopting a compromise test.<sup>80</sup> The language in *Aymelek* was sufficiently stringent to limit the use of nonsimilar, outdated convictions to rare, truly unusual cases, but the language was also sufficiently flexible to allow the courts some discretion.<sup>81</sup> Although the Second Circuit in *Diaz-Collado* cites *Aymelek*, it did not explicitly follow the compromise test.<sup>82</sup>

Even though departure decisions should be made on a case-by-case basis,<sup>83</sup> the Second Circuit overlooked the sentencing reform goal of combating disparity in favor of the goal of sentence proportionality.<sup>84</sup> By focusing on the defendant's pattern of criminal conduct to the exclusion of other factors, the court apparently failed to consider that its conclusion might lead to an increase in the number of future determinations that cases are atypical and therefore warrant departure.<sup>85</sup> The Second Circuit's reasoning might lead district courts to believe that all defendants with

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76. GUIDELINES, *supra* note 2, § 4A1.2, cmt., n.8. *See supra* notes 57-60 and accompanying text. It is unclear how the Third, Ninth, and D.C. Circuits will respond to the change in the Guidelines. *See supra* notes 54-57 and accompanying text. Even though the Commission addressed this aspect of the circuit split, these circuits have not addressed the issue since the amendment.

77. *See supra* note 64 and accompanying text. Even though courts have departed in only 2.3% of all sentencing cases, *see supra* note 31, any increase in the percentage would work against the Congressional goal of combating disparity. *See supra* note 17. The courts should be working to decrease that percentage rather than increase it.

78. *See supra* note 3.

79. 926 F.2d 64 (1st Cir. 1991).

80. *See supra* notes 44-49 and accompanying text.

81. *See supra* note 56 and accompanying text. Congress also recognized the importance of finding a balance between judicial discretion and sentence structuring. *See supra* note 23.

82. 981 F.2d at 644.

83. *See supra* note 27 and accompanying text. *See also* GUIDELINES, *supra* note 2, § 4A1.3, cmt., backg'd. Courts must evaluate each case in order to determine that it is sufficiently unusual to justify a departure. *Id.*

84. *See supra* notes 17-20 and accompanying text.

85. *See supra* notes 72-73 and accompanying text.

remote convictions not calculated into their criminal histories are "atypical." Allowing defendants to be considered atypical based on dissimilar, outdated criminal conduct without identifying some parameters could lead to similar defendants convicted of similar offenses receiving dissimilar sentences.<sup>86</sup>

Failure to define a standard could result in a freer reign of judicial discretion and abrogate Congress' goal of promoting uniformity in sentencing.<sup>87</sup> Past sentences are almost always evidence of criminal conduct of some type, and the Guidelines now authorize departures on any past convictions whether similar or dissimilar.<sup>88</sup> Limiting the use of nonsimilar, outdated convictions will only succeed if the courts follow the First Circuit's decision in *Aymelek* and define a stricter test than that promulgated by the Guidelines.<sup>89</sup>

Nonsimilar, outdated convictions may serve as grounds for an upward departure under the Sentencing Guidelines.<sup>90</sup> However, courts should adhere to the sentencing goals enunciated by Congress and the Sentencing Commission and follow a specific standard in making the determination whether a departure is warranted in each individual case. If courts fail to adopt such a test, the Sentencing Commission must address this issue in the future and resolve it to prevent disparity in sentencing.

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86. Such disparity is exactly the evil Congress sought to combat in enacting the Sentencing Reform Act. See GUIDELINES, *supra* note 2, at ch.1, pt. A.3.

87. *Id.*

88. GUIDELINES, *supra* note 2, § 4A1.2, cmt., n.8. The use of the qualifier "serious" by the Commission is problematic. Judges may hold different philosophies regarding what constitutes a "serious" past offense much like judges harbor different attitudes toward sentencing in general. See *supra* note 17 and accompanying text.

89. "Serious" dissimilarity is too vague to be effective. See GUIDELINES, *supra* note 2, § 4A1.2, cmt., n.8, and *supra* note 88.

90. See *supra* note 14 and accompanying text. This Comment argues that upon such a failure, the Commission should insert language similar to that used in *Aymelek* into the policy statement accompanying section 4A1.3 to comport with Congress' goal of uniformity in sentencing. See Nagel, *supra* note 17, at 899; S. REP. NO. 225, *supra* note 17, at 49, reprinted in 1984 U.S.C.C.A.N. at 3232.

