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A Retreat from Uniformity: Does Compliance with a Plea Agreement Justify Downward Departure

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Notes

A RETREAT FROM UNIFORMITY:
DOES COMPLIANCE WITH A PLEA AGREEMENT
JUSTIFY DOWNWARD DEPARTURE?

United States v. DeMonte

I. Introduction

When the United States Sentencing Commission promulgated the Federal Sentencing Guidelines Manual (Guidelines) in 1987, it significantly changed criminal sentencing practices by demanding greater uniformity.1 This quest for uniformity in sentencing, however, all but

1. Uniformity was one of the primary objectives of the Guidelines "by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, cmt. 3 (Nov. 1993) [hereinafter U.S.S.G.]. Attorney General William French Smith, in his 1984 statement before the Senate Judiciary Committee, stated:

Of the improvements [under consideration by the Committee] . . . perhaps the most important are those related to sentencing criminal offenders. These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for sentencing similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing.


destroyed the plenary discretion that the district court judges once enjoyed.\textsuperscript{2} In response, a trend in federal sentencing jurisprudence emerged: courts began using "departures" as a means for regaining the discretion that they had enjoyed prior to the Guidelines' introduction.\textsuperscript{3}

\begin{itemize}


\begin{quote}
Sentencing is a scandal that permits the courts to play judicial roulette in determining whether defendants convicted of violent crimes go free or go to jail. Almost every day, the press reports the abuses caused by the unfettered discretion of judges in criminal sentencing. Excessively harsh sentences and incredible examples of leniency proliferate side by side, and undermine public confidence in our system of justice.
\end{quote}


\item \textsuperscript{3} "Departures" are instances in which courts impose sentences outside the range specified by the Sentencing Guidelines. See Selya & Massaro, supra note 2, at 802 (noting that Guidelines contain policy statements dictating conditions under which sentencing courts might depart); Bruce M. Selya & Matthew R. Kipp, \textit{An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines}, 67 Notre Dame L. Rev. 1, 2-3 (1991) (noting that since 1987, appellate courts' attempts to establish unified system for reviewing departure decisions led to emerging body of departure jurisprudence). Statistics indicate that the use of departures in federal sentencing increased between 1989 and 1993. See Marc Miller, \textit{Rehabilitating the Federal Sentencing Guidelines}, 78 Judicature 180, 185 (1995) (noting rise in departures from 18% in 1989 to nearly 25% in 1993). While the rate of judicial departures actually decreased in this five-year period, the use of downward departures markedly increased. See \textit{id.} (finding that downward departures were as low as 1.7% and as high as 6.6% in the same five-year period). For a discussion of departures based on a judge's reasonable exercise of discretion, see \textit{infra} notes 29-65 and accompanying text.
\end{itemize}
The Guidelines also impacted the role of plea agreements in determining a defendant's sentence. Plea agreements, which are an essential component to the vitality of the criminal justice system, account for nearly ninety percent of the cases in which federal criminal defendants plead guilty. Therefore, when sentencing courts depart from the Guidelines based on the defendant's compliance with a plea agreement, issues arise concerning the propriety of such a departure. In United States v. DeMonte, the United States Court of Appeals for the Sixth Circuit specifically addressed the issue of whether compliance with the terms of a plea agreement warrants a departure from the Guidelines.

This Note explores the issues that arise when a sentencing court departs from the Guidelines based on a plea agreement's provisions. As background, section II of this Note discusses the promulgation of the Guidelines, acceptance of responsibility, the role of departures, plea agreements and white-collar crime under the Guidelines. After presenting the relevant background in section II, section III of this Note


5. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(c); see also Santobello v. New York, 404 U.S. 257, 260 (1971) (noting that plea bargaining "is an essential component of the administration of justice"). The Supreme Court legitimized plea bargains in 1970 in Brady v. United States, 397 U.S. 742, 752-53 (1970). See Reddy, supra note 4, at 1117 (stating that since Supreme Court legitimized plea bargaining in Brady, "[p]lea bargaining has become essential to the smooth functioning of the criminal justice system"); see also Meredith Kolsky, Project, Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1992-1993, 82 GEO. L.J. 771, 926 (1994) (noting importance of plea bargaining to criminal justice system). Moreover, because of the great number of defendants who plead bargain, plea bargaining was a controversial issue for the Commission when it formulated the Guidelines. See Breyer, supra note 1, at 29.

6. For a discussion of departures, see infra notes 29-65 and accompanying text. For a discussion of the Guidelines treatment of plea agreements, see infra notes 66-75 and accompanying text. For a discussion of the issues concerning downward departures based on plea agreements, see infra notes 191-219 and accompanying text.

7. 25 F.3d 343 (6th Cir. 1994) [hereinafter DeMonte II].
8. Id.
9. For a discussion of the promulgation and goals of the Guidelines, see infra notes 19-23 and accompanying text.
10. For a discussion of the acceptance of responsibility adjustment, see infra notes 24-28 and accompanying text.
11. For a discussion of departures under the Guidelines, see infra notes 29-65 and accompanying text.
12. For a discussion of plea agreements under the Guidelines, see infra notes 66-75 and accompanying text.
13. For a discussion of white-collar crime under the Guidelines, see infra notes 76-82 and accompanying text.
sets forth the facts and procedural history of DeMonte,\textsuperscript{14} then analyzes the rationale of the DeMonte II majority\textsuperscript{15} and the two dissenting opinions.\textsuperscript{16} Next, section IV of this Note asserts that the DeMonte II majority, in its attempt to follow the Guidelines, rendered an illogical opinion that is not only inconsistent with the Guidelines' requirements, but also minimizes the effectiveness of plea agreements.\textsuperscript{17} Finally, sections V and VI of this Note conclude by examining the impact of the DeMonte II holding on the goal of uniformity in sentencing and the role of plea agreements within the Guidelines scheme, and advocates that fundamental problems exist when a sentencing court departs from the Guidelines merely because a defendant complies with his or her plea agreement.\textsuperscript{18}

II. BACKGROUND

A. The United States Sentencing Guidelines

In 1984, Congress enacted the Sentencing Reform Act (Sentencing Act), which in turn created the United States Sentencing Commission (Commission).\textsuperscript{19} The Sentencing Act charged the Commission with draft-

\textsuperscript{14} For a discussion of the facts and procedural history of DeMonte II decision, see infra notes 83-107 and accompanying text.

\textsuperscript{15} For a discussion of the reasoning governing the majority opinion in DeMonte II, see infra notes 108-53 and accompanying text.

\textsuperscript{16} For a discussion of Judge Batchelder's dissenting opinion, see infra notes 154-79 and accompanying text. For a discussion of Judge Celebrezze's dissenting opinion, see infra notes 180-90 and accompanying text.

\textsuperscript{17} For a critical analysis of the DeMonte II decision, see infra notes 191-211 and accompanying text.

\textsuperscript{18} For a discussion of the impact of the DeMonte II decision, see infra notes 212-19 and accompanying text.


The birth of the Sentencing Reform Act is traceable to a proposal by Judge Frankel to Congress in the 1970s concerning the improvement of the federal sentencing system. Judge Frankel noted that "those of us whose profession is the law must not choose any longer to tolerate a regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society, the power to take liberty and . . . life by process of what purports to be law." Marvin E. Frankel, LAWLESSNESS in Sentencing, 41 U. Cin. L. Rev. 1, 2 (1972). Judge Frankel decried the lack of meaningful sentencing standards for federal judges. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972). Judge Frankel noted that "bad governments . . . wrote no general rules of conduct at all, leaving that highly important task to the unbridled discretion of government agents" to define and punish criminal conduct. Id. at 4 (citing Ginzburg v. United States, 383 U.S. 463, 477 (1966) (Black, J., dissenting)). Consequently, Judge Frankel's proposal for a "sentencing commission," coupled with public concern for the serious increase in crime, led Congress to enact the Comprehensive Crime Control Act, a massive
ing and establishing a Guidelines Manual for federal courts to use in sentencing criminals.\textsuperscript{20} One of the Commission’s primary goals was to achieve greater uniformity in sentencing by assuring that similarly situated individuals convicted of the same crime receive approximately the same sentence.\textsuperscript{21} At the same time, however, the Sentencing Act also required the Commission to maintain a flexible system that would permit federal courts to individualize sentences when mitigating factors exist.\textsuperscript{22} When the Guidelines became law on November 1, 1987, federal courts departed from the

federal criminal law reform project that includes the Sentencing Reform Act of 1984. Ogletree, supra note 2, at 1945. For an excellent discussion of the development of the Commission and the proposals of the 1970s and 1980s, see id. at 1942-47 and Wilkins, Plea Negotiations, supra note 1, at 183-84.

The Commission, which the Sentencing Reform Act subsequently created, is a permanent and independent agency of the United States judiciary that has the power to revise and amend the Guidelines periodically. 28 U.S.C. § 994(o) (1994). The Commission is bi-partisan, consisting of seven voting and two non-voting ex officio members who are appointed by the President of the United States with the advice and consent of the Senate. Id. § 991(a). At least three members of the Commission must be federal judges and may serve as Commissioners without re-signing as judges. Id. §§ 991(a), 992(c). The Commission has the power to periodically review and revise the Guidelines, considering comments and data from various branches of the federal criminal justice system. Id. § 994(o).

20. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 1 (stating that Commission’s “principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes”). The Sentencing Act states that “[t]he purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system.” 28 U.S.C. § 991(b)(1) (1994).

21. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 3. The Sentencing Reform Act of 1984 reaffirms this principle by stating that “[t]he [sentencing] court . . . shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6) (1994).

The overriding purpose of the Guidelines “was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.” U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 3. Moreover, the Guidelines embrace the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. Id. The first objective was to achieve uniformity in sentencing. Id. For a discussion of achieving uniformity in sentencing, see supra note 1 and accompanying text.


The third purpose of the Guidelines was to promote proportionality. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 3. By proportionality, the Commission intended to introduce “a system that imposes appropriately different sentences for criminal conduct of differing severity.” Id.

22. 28 U.S.C. § 991(b)(1)(B). The Sentencing Act states that the Commission shall establish Guidelines that:
Villanova Law Review, Vol. 40, Iss. 2 [1995], Art. 5

434

VILLANOVA LAW REVIEW

[Vol. 40: p. 429

from previously unguided and unreviewable sentencing practices “to a process of accountability, greater uniformity, and articulated reasons for punishment.”

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

Id.

In order to achieve uniformity and maintain a flexible system of sentencing, the Commission analyzed 10,500 cases in detail and an additional 100,000 cases to a lesser degree. Wilkins, Plea Negotiations, supra note 1, at 184 (citing Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 16 (June 18, 1987)). The Commission solicited anyone with an interest in reforming the sentencing process, including comments from probation and prison officials, Department of Justice and American Bar Association representatives, defense lawyers, criminologists, victims, federal judges and other with an interest in sentencing reform. Ogletree, supra note 2, at 1948-49. The Commission also studied preguidelines sentencing practice by analyzing summaries of “some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.” U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 5. Judge Wilkins, Chairman of the Commission and Circuit Judge for the United States Court of Appeals for the Fourth Circuit, found that examining such a volume of cases provided a practical guide for making sentencing policy decisions. Id. Judge Breyer (currently Associate Justice of the U.S. Supreme Court), also a Commissioner, noted the particular reliance the Commission placed on past sentencing practices “in creating categories and determining sentence lengths.” Breyer, supra note 1, at 7; see also Ogletree, supra note 2, at 1948 (describing Commission’s research project as “awesome” because Commission also conducted public hearings and tested Guidelines against offenders who were convicted against the actual sentences imposed).


One year after its introduction, the Guidelines survived constitutional attack in Mistretta, 488 U.S. at 412. The Supreme Court granted certiorari, in Mistretta, in recognition of the importance of settling the constitutionality of the Commission
B. Acceptance of Responsibility

Although the Guidelines require courts to impose mandatory minimum sentences, one method that courts use to maintain flexibility in sentencing is through “acceptance of responsibility” adjustments.24 Under

and its Guidelines amidst the “disarray among the Federal District Courts.” Id. at 371. The Court found that Congress did not violate the separation of powers principle when it placed the Commission in the judicial branch, because substantive sentencing decisions and judicial rulemaking have traditionally been carried out by judges. Id. at 380-84. The Court also found that Congress did not violate the non-delegation doctrine in authorizing the Commission to draft the Guidelines because Congress provided it with significant statutory direction. Id. at 371-79. Further, the Court noted that “[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.” Id. at 379.

24. U.S.S.G., supra note 1, § 3E1.1. The Guidelines prescribe that adjustments be combined with the base offense level to create a total offense level. Id. § 1B1.1(a)-(i). The Guidelines also delineate rules to determine the defendant’s criminal history category. Id. § 4A1.1-4B1.4. The Sentencing Table reveals the mandatory sentencing range by finding the intersection between the total offense level on the vertical axis and the criminal history category on the horizontal axis. Id., at Ch. 5, Pt. A, cmt. 1; see also Marc Miller, True Grid: Revealing Sentencing Policy, 25 U.C. DAVIS L. REV. 587, 587 (1992) (proposing that 258-box sentencing grid is unnecessarily complex); Selya & Massaro, supra note 2, at 801-02 (describing sentencing grid as “neither the be-all nor the end-all” in federal sentencing).

Adjustments “for such factors as acceptance of responsibility are judgments made altogether separately from the decision regarding an upward or downward departure.” United States v. Carey, 895 F.2d 318, 328 (7th Cir. 1990). Adjustments may include victim-related adjustments that increase offense levels (Part A), adjustments based on the role that the defendant played in the crime (Part B), adjustments based on abuse of obstruction of the administration of justice (Part C), adjustments gauged by closely-related offenses (Part D), and downward adjustments based on the acceptance of responsibility (Part E). See U.S.S.G., supra note 1, §§ 3A1.1 - 3E1.1; Feinstein et al., supra note 2, at 1085-86 (outlining adjustments Chapter of Guidelines and noting “[t]he Commission has assigned each of the adjustments a positive or negative numerical value”). The “acceptance of responsibility” adjustment is another example of how the Commission balanced the interests of uniformity and flexibility. Wilkins, Plea Negotiations, supra note 1, at 190; see also Breyer, supra note 1, at 28-29 (noting that “acceptance of responsibility” was one key compromise in Guidelines).

One critic maintains that the “acceptance of responsibility” adjustment, however, may not promote “uniformity in sentencing” because disparities between defendants convicted at jury trials and defendants who plead guilty may result. Alschuler, supra note 2, at 471-72. Professor Alschuler derides the acceptance of responsibility adjustment by stating that:

The two-level reduction for an “acceptance of responsibility” could become simply an “add-on” — an extra benefit that a defendant receives after striking a bargain with an Assistant United States Attorney: “Come to our showroom; make your best deal with one of our friendly sales personnel; and then use the enclosed certificate — Guidelines section 3E1.1 — to receive an additional 20 percent discount from the price of your new car.

Id. at 472.
this adjustment, a sentencing court may reduce a defendant's offense level if a defendant clearly accepts responsibility for his or her offense.25

The comments to the Guidelines suggest eight factors that a court may use to determine whether a defendant accepted responsibility.26 For example, if a defendant makes voluntary restitution before adjudication of guilt, he or she may also qualify for an acceptance of responsibility adjustment.27 Likewise, a defendant may qualify for an acceptance of responsibility:

25. U.S.S.G., supra note 1, § 3E1.1(a). The Guidelines state that a guilty plea does not automatically entitle the defendant to this adjustment "as a matter of right." Id. § 3E1.1, cmt. 3. Instead, the sentencing judge is in a unique position to determine whether the defendant accepted responsibility." Id. § 3E1.1, cmt. 5. Appellate courts, therefore, should grant sentencing judges great deference when reviewing acceptance of responsibility adjustments. Id.

The adjustment of offense level provided by acceptance of responsibility adjustment also "recognizes legitimate societal interests." Id. § 3E1.1 (background). For example, "a defendant who clearly demonstrates acceptance of responsibility . . . is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility." Id.

26. Id. § 3E1.1, cmt. 1. The suggested factors are:
[a] truthfully admitting the conduct comprising the offense . . . ;
[b] voluntary termination or withdrawal from criminal conduct or associations;
[c] voluntary payment of restitution prior to adjudication of guilt;
[d] voluntary surrender to authorities promptly after commission of the offense;
[e] voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
[f] voluntary resignation from the office or position held during the commission of the offense;
[g] post-offense rehabilitative efforts . . . ; and
[h] the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Id.

The Guidelines also provide that if the "[e]ntry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct . . . will constitute significant evidence of acceptance of responsibility." Id. § 3E1.1, cmt. 3. However, even if the defendant accepts responsibility, the court does not have to make an adjustment if the defendant acts in a manner inconsistent with his or her acceptance of responsibility. Id.

27. Id. § 3E1.1, cmt. (1)(c); see also United States v. Carey, 895 F.2d 318, 322-24 (7th Cir. 1990) (analyzing defendant's payment of restitution as basis for determining acceptance of responsibility). In Carey, the sentencing court granted an acceptance of responsibility adjustment based on the defendant's restitution payments. Id. at 323. The court further departed from the Guidelines, however, maintaining that the defendant's restitution warranted an additional departure. Id. The United States Court of Appeals for the Seventh Circuit held that because the Commission considered restitution as a factor in determining a departure based on acceptance of responsibility, the sentencing court may not take an additional departure unless it found that the defendant's conduct was so unusual as to warrant the existing deduction inadequate. Id. at 323-24. But see United States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992) (affirming district court's finding that defendant's conduct was extraordinary, thus warranting additional departure). If a defendant does not make restitution, a court may force restitution under the Guidelines. See U.S.S.G., supra note 1, § 5E1.1(a)(1) (stating that "[t]he court
bility adjustment if a defendant truthfully admits to the offense and any additional relevant conduct.\(^{28}\)

C. Departures Under the Guidelines

Federal courts also retain flexibility in sentencing by using Guideline departures.\(^{29}\) The Commission adopted departures for two reasons. First, the Commission recognized that it could not foresee every possible circumstance that may warrant an increase or decrease in a defendant's sentencing.

... enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664\(^{\text{c}}\)). A court may also order restitution if a defendant violates any provision of Title 18 of the United States Code. 18 U.S.C. §§ 3556, 3663-3664 (1994). Notably, the sentencing court may consider the defendant's financial resources when ordering the defendant to pay restitution. See 18 U.S.C. § 3664(a) (stating that "the court shall consider financial resources of defendant when determining whether to order restitution"); U.S.S.G., supra note 1, § 5E1.1 (background) (same).

28. U.S.S.G., supra note 1, § 3E1.1, cmt. 1(a). The Guidelines provide that the "defendant is not required to... admit relevant conduct beyond the offense of conviction in order to obtain a reduction." Id. The Guidelines specifically define relevant conduct as "all acts and omissions committed... or willfully caused by the defendant... that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." Id. § 1B1.3(a)(1).

29. Id. §§ 5K1.1-5K2.16. The greatest discretion a judge may exercise lies in the Guidelines' range itself. See 28 U.S.C. § 994(b)(2) (stating that "the maximum of [an imprisonment term]... shall not exceed the minimum of that range by more than... 25 percent"); Selya & Massaro, supra note 2, at 832 ("The bedrock principle of departure jurisprudence... is that the district court possesses the option not to depart").

The Guidelines developed two different types of departures: guided and unguided departures. U.S.S.G., supra note 1, at Ch.1, Pt. A, cmt. 4(b); see also Selya & Massaro, supra note 2, at 826 (identifying differences between guided and unguided departures). A guided departure, through numerical suggestion, provides a sentencing judge with specific guidance in implementing a departure. Id. The Guidelines also may provide guidance by analogy or other non-numerical suggestion. Id. The Commission intended "that most departures will reflect the [Guidelines'] suggestions and that the courts of appeals may... find departures 'unreasonable' where they fall outside suggested levels." Id. For a discussion of the "reasonableness" standard, see infra note 60 and accompanying text.

An unguided departure "may be based either on grounds specifically identified in the Guidelines, or on circumstances unforeseen by the Commission." Selya & Kipp, supra note 3, at 11-12 (footnote omitted); see U.S.S.G., supra note 1, at Ch. 1, Pt. A, 4(b) (stating that unguided departure may be based on grounds already contemplated by Commission, or on grounds not mentioned by Guidelines); see also United States v. Garlich, 951 F.2d 161, 163 (8th Cir. 1991) (stating that sentencing court has discretion to determine if defendant's restitution was so unusual as to warrant further departure); United States v. Johnson, 931 F.2d 238, 241 (3d Cir.) (affirming upward departure when gun "otherwise used"), cert. denied, 502 U.S. 886 (1991); United States v. Bogas, 920 F.2d 363, 368 (6th Cir. 1990) (suggesting that district court may consider applying "unguided" departure); United States v. Diaz-Villafane, 874 F.2d 43, 52 (1st Cir.) (affirming sentence of 10 years when Guidelines called for 27-33 month sentence), cert. denied, 493 U.S. 862 (1989).

30. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(b).
sentence. Second, while the Commission considered many factors, it acknowledged that rare and atypical behavior may create the unusual case that would warrant a departure.

Although departures allow some flexibility in sentencing, the primary purpose underlying the Guidelines and the Sentencing Act was to eliminate discretionary and indeterminate sentencing on the part of the court by confining sentencing courts to the Guidelines’ mandate. In fact, the

31. Id. The Guidelines state that “it is difficult to prescribe a single set of guidelines that encompass the vast range of human conduct” that may be relevant to sentencing. Id. Furthermore, the Guidelines state that “[c]ircumstances that may warrant departure from the guidelines . . . cannot . . . be comprehensively listed . . . in advance.” Id. § 5K2.0. However, because the Commission will continue to analyze court-imposed sentences, it may use its status as a permanent body to “refine the Guidelines to specify . . . when departures should and should not be permitted.” Id. at Ch. 1, Pt. A, cmt. 4(b).

32. Id. In formulating the Guidelines, the Commission considered the major factors influencing pre-guidelines sentencing practice. Id. For example, physical injury made an important difference in pre-guideline sentencing in crimes such as robbery or assault; therefore, the guidelines specifically included this factor to enhance the sentence. Id. However, “an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud).” Id. The courts’ departure powers were thus orchestrated to cover such rare occurrences — “unusual cases outside the range of the more typical offenses for which the guidelines were designed.” Id. But see Feinstein et al., supra note 2, at 1088 (noting that departure power is limited); U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(b) (“[T]he Commission believe[d] that despite the courts’ legal freedom to depart . . . they [would] not do so very often.”).

33. 18 U.S.C. § 3553(c) (1994). The Sentencing Act requires that the court shall state the reasons for imposing a different sentence than that mandated by the Guidelines. Id. The Sentencing Act also states that “[t]he court shall impose a sentence . . . within the range, referred to [by the Sentencing Guidelines] 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.” Id. § 3553(b). This language is consistent with the legislative history of the Sentencing Act. See S. REP. NO. 225, 98th Cong., 2d Sess. 1, 52 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3235 (envisioning that most sentences will be imposed through use of Guidelines); see also United States v. Todd, 920 F.2d 399, 408-09 (6th Cir. 1990) (stating that sentencing court should provide “a short clear written statement or a reasoned statement from the bench’’) (quoting United States v. Perez, 871 F.2d 45, 47 (6th Cir.)), cert. denied, 492 U.S. 910 (1989); Bogas, 920 F.2d at 369 (stating that burden of proof for downward departure rests with defendant).

In Burns v. United States, 501 U.S. 129 (1991), the Supreme Court noted the mandatory nature of the guidelines:

The only circumstance in which the district court can disregard the mechanical dictates of the Guidelines is when it 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 . . . .”

Id. at 133 (quoting 18 U.S.C. § 3553(b) (1988)); see also United States v. Davern, 970 F.2d 1490, 1492 (6th Cir. 1992) (finding that “the Guidelines are a sentencing imperative”); cert. denied, 113 S. Ct. 1289 (1993); United States v. Allen, 873 F.2d 965, 966 (6th Cir. 1989) (noting that curtailing of discretion formerly exercised by sentencing courts does not violate due process).

Because of the decrease of judicial discretion, most federal judges and lawyers who practice in federal courts deeply dislike the Guidelines. U.S. SENTENCING
Commission intended that sentencing courts “treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes.”\textsuperscript{34} Thus, a federal court must impose a sentence within the Guideline range unless “an aggravating or mitigating circumstance” exists that the Commission, when formulating the Guidelines, did not adequately consider.\textsuperscript{35} To determine whether the Commission considered a particular mitigating circumstance, sentencing courts may ex-

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Despite staunch criticism regarding the Guidelines’ mechanical application, sentencing courts, however, do retain some discretion to depart from the Guidelines. See United States v. Jagmohan, 909 F.2d 61, 65 (2d Cir. 1990) (noting that Congress did not intend to “straightjacket” the sentencing courts, “compelling them to impose sentences like a robot inside a Guidelines’ glass bubble, and prevent[ ] [them] from exercising discretion”) (quoting United States v. Lara, 905 F.2d 599, 604 (2d Cir. 1990)); \textit{holding limited by United States v. Contractor}, 926 F.2d 128 (2d Cir. 1991); United States v. Roberson, 872 F.2d 597, 601 (5th Cir.) (“The court’s discretion to depart from the Guidelines is broad”), \textit{cert. denied}, 493 U.S. 861 (1989); United States v. Mejia-Orosco, 867 F.2d 216, 219 (5th Cir.) (calling Guidelines analytical framework for sentencing because “[j]ustice cannot be meted out according to mathematical formulas”), \textit{cert. denied}, 492 U.S. 924 (1989).

\textsuperscript{34} U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(b).
\textsuperscript{35} 18 U.S.C. § 3553(b) (1994). Section 3553 states, in pertinent part:
\textbf{APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE. — The court shall impose a sentence of the kind, and within the [Guidelines] range . . . 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.}

\textit{Id.}

The Commission considered specific features, allowing some mitigating circumstances, excluding others and not fully developing others. Selya & Kipp, supra note 3, at 11. Throughout the text of the Guidelines, commentators and select policy statements identified factors that they did not consider when formulating the Guidelines. \textit{Id.}

The Commission specifically stated, however, that a court may not consider any of the following factors as grounds for departure: (1) § 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), (2) § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), (3) the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse) and (4) the last sentence of § 5K2.12 (Coercion and Duress). U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. The Commission, however, did not limit the kinds of factors that could constitute grounds for departure in an unusual case, regardless of whether it was mentioned anywhere else in the Guidelines. \textit{Id.}
amine only the text of the Guidelines, the policy statements and the commentary. 36 Only when a case falls outside this "heartland" of typical cases should the sentencing court consider a departure. 37

An example of conduct that warrants a departure in that the Commission did not already consider when formulating the Guidelines can be found in United States v. Diaz-Villafane. 38 In Diaz-Villafane, the sentencing court departed from the twenty-seven to thirty-three month range by imposing a 120 month sentence. 39 In stating the reasons for its departure, the sentencing court found that the defendant was an "important supplier," had eight pending drug-trafficking charges, used children to deliver narcotics and profited between $10,000 and $15,000 daily from narcotics sales. 40 On appeal, the United States Court of Appeals for the First Circuit affirmed the departure and the resulting ten-year sentence,

Moreover, a court must presumptively impose a sentence within the range specified by the Guidelines before considering aggravating or mitigating circumstances. 18 U.S.C. § 3553(b) (1994); see also United States v. Nelson, 918 F.2d 1268, 1279 (6th Cir. 1990) ("[T]here is a virtual rebuttable presumption of... 'reasoned' uniformity in the guidelines.").

36. 18 U.S.C. § 3553(b) (1994); see also United States v. Ferra, 900 F.2d 1057, 1061-62 (7th Cir. 1990) ("A judge may not simply say: 'I have decided to depart, so I now throw away the Guidelines.'"); United States v. Carey, 895 F.2d 318, 322 (7th Cir. 1990) (holding that sentencing court did not properly consider Guidelines in sentencing defendant); United States v. Joan, 885 F.2d 491, 492 (6th Cir. 1989) (affirming upward departure when Guidelines "absorbed" different aspect of defendant's offense level), aff'd, 27 F.3d 566 (6th Cir. 1994); Roberson, 872 F.2d at 602 (affirming district court's upward departure, noting that it adequately considered Guidelines).

37. United States v. Aguilar-Pena, 887 F.2d 347, 349 (1st Cir. 1989). The Aguilar-Pena court stated:

Departure is permitted ... where idiosyncratic circumstances warrant individualization of sentence beyond that which is possible within the comparatively close-hewn parameters constructed by the guidelines. Such circumstances are those which "cannot, by their very nature, be comprehensively listed and analyzed in advance." And because departures are meant to be the exception, not the rule, there must be something "special" about a given offender, or the accoutrements of the crime committed, which distinguishes the case from the mine-run for that offense.

Id. at 349-50 (citations omitted). In United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992), the United States Court of Appeals for the Third Circuit noted that departures are the exceptions, not the rule. Lieberman, 971 F.2d at 996. The court specifically noted that "departure[s] ... must necessarily be limited, lest the unusual case become the ordinary one." Id.

38. 874 F.2d 43 (1st Cir.), cert. denied, 493 U.S. 862 (1989). Diaz-Villafane was the first time the United States Court of Appeals for the First Circuit reviewed a sentence to determine whether a sentencing court correctly applied the Guidelines. Id. at 44-45. For a discussion of the appellate standard of review, as formulated by Diaz-Villafane, see infra notes 57-65 and accompanying text.

39. Id. at 45. The judge ordered a presentence investigation report (PSI). Id. The PSI found that under the Guidelines, the defendant's total offense level and criminal history category placed him in the sentencing range of 27-33 months. Id.

40. Id. at 50. The sentencing court also cited the purity of the heroin as another basis for its departure. Id. at 51.
finding that the Commission did not adequately consider circumstances such as these in drafting the Guidelines.\textsuperscript{41}

Conversely, in United States v. Carey,\textsuperscript{42} the United States Court of Appeals for the Seventh Circuit found that a departure based on the defendant’s restitution was inappropriate because the Commission already incorporated restitution into the Guidelines when it formulated the acceptance of responsibility adjustment.\textsuperscript{43} In Carey, the sentencing court lowered the defendant’s sentence because of the defendant’s age, illness and “single act of aberrant behavior.”\textsuperscript{44} The sentencing court, however, also departed downward partly because the defendant made restitution.\textsuperscript{45} The Seventh Circuit reversed, finding that the Commission incorporated restitution in the acceptance of responsibility adjustment.\textsuperscript{46}

\textsuperscript{41} Id. at 52. The First Circuit concluded that the “retreat from the Guidelines” was reasonable. Id. Further, the First Circuit stated that the circumstances “swept the case well out of the mainstream,” thus constituting permissible grounds for a departure. Id.

The First Circuit noted that the degree of departure was admittedly substantial, more than tripling the Guideline range. Id. at 51. The court noted, however, that the district court had firsthand knowledge of the case. Id. at 52. The district court also carefully cited reasons that these circumstances were “markedly atypical.” Id. Therefore, the First Circuit found that the sentence imposed was not outside the “universe of acceptable punishments.” Id.

\textsuperscript{42} 895 F.2d 318 (7th Cir. 1990).

\textsuperscript{43} Id. at 322-23. For a discussion of the Commission’s consideration of the acceptance of responsibility adjustment, see supra notes 24-28 and accompanying text.

\textsuperscript{44} Id. at 321-22. In Carey, the defendant, as president of North Side Trucking Company, maintained checking accounts in two banks. Id. at 320. For at least 15 months, the defendant participated in a check-kiting scheme where he constantly overdrew from the checking accounts. Id. Once discovered, the scheme revealed an insufficiency of $219,000. Id. The defendant pled guilty to executing a scheme to defraud a bank in violation of 18 U.S.C. § 1944 (1988). Id. at 320.

\textsuperscript{45} Id. at 321. In Carey, the defendant made voluntary restitution prior to indictment. Id. at 322. The cumulative effect of these four factors (age, physical infirmity, restitution and lack of criminal history) led the sentencing court to depart from the applicable guideline range. Id. The sentencing court ultimately reduced a 12-18 month sentence and imposed one month of actual imprisonment. Id. The sentencing court stated that “none of these factors . . . alone persuaded it to depart downward but that the aggregate effect . . . warranted the departure.” Id. at 322.

Despite reversing the lower court’s sentence, the Seventh Circuit shared the district court’s concern over the harshness of the Guidelines. Id. at 326. In Carey, “the defendant had lived a meritorious life and had been a model citizen.” Id. The defendant committed his crime to help his company through hard times and the lower court believed that the defendant “had suffered enough” for his crime. Id. Despite these factors, the Seventh Circuit stated that “the Guidelines seek to end the disparity in sentencing.” Id. Therefore, because the defendant’s behavior was not exceptional, the aggregate behavior did not warrant departure. Id.

\textsuperscript{46} Id. at 323-24. The Seventh Circuit found that the Commission adequately considered restitution in formulating the Guidelines. Id. at 323 (citing U.S.S.G., supra note 1, § 3E1.1, cmt. 1(c)). The Seventh Circuit acknowledged that “if [a] factor is present to a degree substantially in excess of that . . . ordinarily involved in the offense,” then the Guidelines may warrant an additional departure. Id. (quot-
Moreover, if the Commission considered a factor, then “departure . . . is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense.” Thus, the Guidelines permit departures when a court encounters an atypical case, where a guideline provision “linguistically applies but where conduct significantly differs from the norm.”

Departures, however, are not as rare as the Sentencing Act and the Guidelines suggest. Not only do the Guidelines delineate numerous bases for departure, but the Guidelines also state that “[a]ny case may involve factors . . . that have not been given adequate consideration by the Commission.” Presence of any such factor may warrant departure from the Guidelines under some circumstances, in the discretion of the sentencing judge.

In United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989), the defendant was an elderly man who was in poor health and required routine daily assistance. Several days after the defendant moved in with Doherty, Doherty fell and struck his head on a table. After rushing to Doherty’s side, the defendant could not detect breathing or a pulse. The defendant filed with Doherty’s dead body. After driving around in a state of panic, the defendant burned the body beyond recognition. The defendant used Doherty’s credit card to purchase gas, food, clothing and an airline ticket. After several unsuccessful state prosecutions on murder charges, the federal government charged the defendant with credit card fraud. At 600. Following the defendant’s conviction, the district court sentenced the defendant to 120 months in prison, even though the Guidelines recommended 30 to 37 months incarceration. In affirming the lower court’s sentence, the Fifth Circuit found that sentencing courts must impose a sentence within the Guidelines range unless specific grounds exists for departure. At 605-06. Once grounds for departure are found, the Fifth Circuit stated that a court then may choose an appropriate sentence. At 606.

See Feinstein et al., supra note 2, 1088 (noting that Guidelines are not as restrictive as they might appear). For a discussion of the standard under which a court might depart under the Sentencing Act, see supra note 35 and accompanying text. For a discussion of the standard under which a court might depart under the Guidelines, see supra notes 47-48 and accompanying text.

The Third Circuit recognized that “there appears to be some inherent tension in the guidelines themselves as to the extent to which departure is permissible.” United States v. Ryan, 866 F.2d 604, 609 (3d Cir. 1989). The First Circuit in Diaz-Villafane, however, “read the Guidelines as envisioning considerable discretion in departure decisions, at least at this early stage of their existence.” United States v. Diaz-Villafane, 874 F.2d 43, 52 (1st Cir.), cert. denied, 493 U.S. 862 (1989), modified by United States v. Rivera, 994 F.2d 942 (1st Cir. 1993); see also S. Rep. No. 225, 98th
ses for departure,\(^{50}\) but sentencing courts also may depart for reasons not specifically mentioned in the Guidelines.\(^{51}\) For instance, *United States v. Lieberman*\(^ {52}\) illustrates the type of facts which warrant an additional departure. In *Lieberman*, the defendant pled guilty to embezzling $94,000 from his employer, a local bank.\(^ {53}\) Before criminal investigation began, how-

Cong., 2d Sess. 1, 52, reprinted in 1984 U.S.C.A.N. 3182, 3235 (noting that purpose of Guidelines "is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences").

In *United States v. Uca*, 867 F.2d 783 (3d Cir. 1989), however, the Third Circuit warned that "attempts to impose uniformity will be destroyed if courts depart often from the Guidelines," *Uca*, 867 F.2d at 787. *But see* *United States v. Mejia-Orosco*, 867 F.2d 216, 219 (5th Cir.) (noting that departures are important because fairness in sentencing cannot eliminate individualized sentences), *cert. denied*, 492 U.S. 924 (1989).

50. U.S.S.G., *supra* note 1, §§ 5K1.1-5K2.16. Some bases for departure include death, physical injury, extreme psychological injury, use of weapons or dangerous instrumentalities, extreme conduct, coercion or duress and voluntary disclosure of offense. *Id.* Also, a departure for substantial assistance to authorities may be granted upon the prosecution’s motion. *Id.* § 5K1.1. A departure may be warranted if a defendant voluntarily discloses and accepts responsibility before authorities discover it. The Voluntary Disclosure of Offense Policy Statement states, in pertinent part:

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure . . . might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant’s knowledge that discovery of the offense is likely or imminent, or where the defendant’s disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

*Id.*

51. *See* U.S.S.G., *supra* note 1, at Ch. 1, Pt. A, cmt. 2 (stating that sentencing court is allowed “to depart from the guidelines and sentence outside the prescribed range”); *see e.g.*, *United States v. Roe*, 976 F.2d 1216, 1217-18 (9th Cir. 1992) (stating that abusive childhood may constitute grounds for departure). Nevertheless, the sentencing judge may face remand by an appellate court when the Guidelines, commentary or policy statement have specifically prohibited the grounds for departure. *See Williams v. United States*, 503 U.S. 193, 200-02 (1992) (noting that “incorrect application” of Guidelines requires remand where different sentence would have been imposed absent district court’s error). Thus, a sentencing court may not depart downward because of the defendant’s ability to make restitution because the commentary states that a judge may not consider socio-economic factors. *See* U.S.S.G., *supra* note 1, § 5H1.10 (stating that defendant’s socio-economic status may not be considered in determining sentence). For a discussion of the Commission’s prohibition of departures based on socio-economic status, *see infra* note 82 and accompanying text.

52. 971 F.2d 989 (3d Cir. 1992).

53. *Id.* at 990-91. In addition to pleading guilty to one count of bank embezzlement, the defendant also pled guilty to one count of attempted income tax evasion. *Id.* at 990. The sentencing court “imposed five years of probation on each count to be served concurrently, eight months of home detention, restitution of
ever, the defendant confessed to embezzling money, went to the FBI, resigned from his position, met with managers to explain how they might detect improper transactions and began making restitution of over $128,000.\textsuperscript{54} The district court sentenced the defendant within the Guidelines, but granted an additional one-point reduction for accepting responsibility.\textsuperscript{55} In affirming the lower court’s sentence, the United States Court of Appeals for the Third Circuit found that meeting with bank officials prior to an arrest and making restitution beyond the amount charged constituted unusual conduct, justifying an additional downward departure.\textsuperscript{56}

To determine the propriety of departures, most circuits have adopted the three part standard of review that the First Circuit formulated in United States v. Diaz-Villafane.\textsuperscript{57} Under this standard of review, a court must first

\begin{itemize}
  \item $128,442.37, plus interest, and a special assessment of $100." \textit{Id}. In addition, the court ordered the defendant to "pay 10\% of his gross weekly salary towards restitution to the bank and to file an amended tax return for the years affected by his embezzlement." \textit{Id}. at 990-91. The government appealed. \textit{Id}. at 991.

  \item Over approximately four years, the defendant engaged in approximately 36 separate transactions, transferring money from the bank’s suspense account, which he controlled, into his own account. \textit{Id}. The amounts transferred ranged from $1,000 to $7,500. \textit{Id}

  \item When bank officials confronted the defendant concerning the improper transactions, the defendant immediately admitted his wrongdoing. \textit{Id}. The defendant signed a plea agreement, pleading guilty to bank embezzlement and tax evasion. \textit{Id}. Although the plea agreement stipulated that the bank’s loss was between $50,001 and $100,000, the defendant entered into a separate consent judgement, agreeing to pay $128,442.37 to the bank. \textit{Id}

  \item The district court stated that the defendant came forward, as soon as he was confronted and began restitution. \textit{Id}. at 994. The district court further noted that the defendant not only admitted to owing the full amount that he thought was owed, but even agreed to a larger amount than the bank asserted, including interest. \textit{Id}. Moreover, the district court concluded that the defendant “has done everything conceivable. Voluntary and truthful admission to the authorities. I don’t know anything more that he could do.” \textit{Id}

  \item The Third Circuit concluded that “a sentencing court may depart downward when the circumstances of a case demonstrate a degree of acceptance of responsibility that is substantially in excess of that ordinarily present.” \textit{Id}. The court noted that the defendant’s admission of wrongdoing, resignation of his position and voluntary and truthful admissions to the authorities were all “acts which would not take him out of the unusual case.” \textit{Id}. However, the court found that by meeting the bank officials to explain how they might detect future impropriety, coupled with making restitution in excess of the accused amount, warranted a finding that the defendant’s conduct constituted unusual behavior. \textit{Id}

  \item The court noted that while another judge might not have done the same, the district court’s finding was not an abuse of discretion. \textit{Id}

  \item The Sixth, Eighth, Tenth and Eleventh Circuits also have expressly adopted this test. \textit{See, e.g.}, United States v. Weaver, 920 F.2d 1570, 1573 (11th Cir. 1991) (adopting tripartite standard of review); United States v. Lang, 898 F.2d 1378, 1379-80 (8th Cir. 1990) (same); United States v. White, 893 F.2d 276, 277 (10th Cir. 1990) (same); United States v. Rodriguez, 882 F.2d 1059, 1067 (6th Cir. 1989) (same), \textit{cert. denied}, 110 S. Ct. 144 (1990).

Other circuits, including the District of Columbia, Second, Third, Seventh and Ninth have similar tests. \textit{See, e.g.}, United States v. Lira-Barraza, 941 F.2d 745
determine whether the circumstances relied upon by the lower court were "sufficiently unusual" to warrant departure. Second, the court must determine "whether the circumstances, if conceptually proper, actually exist[ed]." Third, if the appellate court is confident that the sentencing

(9th Cir. 1991) (en banc) (employing standard which "give[s] weight to district court's choice within a permissible range"); United States v. Schmude, 901 F.2d 555, 558-59 (7th Cir. 1990) (using broader deferential standard); United States v. Lara, 905 F.2d 599, 602-03 (2d Cir. 1990) (using clearly erroneous standard after court determined that factor warranting departure is reasonable); United States v. Kikumura, 918 F.2d 1084, 1098 (3d Cir. 1990) (same); United States v. Burke, 888 F.2d 862, 865 (D.C. Cir. 1989) (giving broad deference to lower courts once appellate court determined that factor warranting departure is reasonable).

Other circuits that do not employ this exact methodology, nevertheless, apply a similar analysis. See, e.g., United States v. Chester, 919 F.2d 896, 900 (4th Cir. 1990) (using clearly erroneous and abuse of discretion standards); United States v. Velasquez-Mercado, 872 F.2d 632, 634-35 (5th Cir.) (using clearly erroneous standard), cert. denied, 493 U.S. 866 (1989).

The standard of review governing sentences is specifically set forth in 18 U.S.C. § 3742(e):

CONSIDERATION—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines;
(3) is outside the applicable guideline range, having due regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and
(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of § 3553(c); or
(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable. The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.


58. *Diaz-Villafane*, 874 F.2d at 49. Review of the circumstances warranting departures is plenary and a question of law. *Id.* at 49. But see United States v. Rivera, 994 F.2d 942 (1st Cir. 1993) (holding that appellate courts should be cautious in interfering with district court's determination of whether departure is appropriate).

59. *Id.* The second part of the test "involves factfinding and the trier's determinations can be set aside only for clear error." *Id.* If a district court's finding is not supported by the record, it does not pass the "clear error" test and the sentencing court's determination may be set aside. *Id.*

The appeals court may review pertinent portions of the record, the presentence report and information submitted during sentencing. 18 U.S.C. § 3742(d). Section 3742(d) provides, in pertinent part:

RECORD ON REVIEW—If a notice of appeal is filed . . . the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;
(2) the presentence report; and
(3) the information submitted during the sentencing proceeding.
court considered appropriate circumstances for departure and those circumstances did in fact exist, then the direction and degree of departure must be reasonable.60

The United States Court of Appeals for the Sixth Circuit specifically adopted the Diaz-Villafane test in United States v. Brewer.61 In Brewer, the co-defendants plead guilty to embezzlement.62 To justify its downward departure, the sentencing court relied on such factors as community ties, restitution, lack of purposefulness for incarceration and lack of a prior criminal record.63 Applying part one of the Diaz-Villafane test, the Sixth Circuit found that the Commission contemplated these factors.64 Consequently, the Sixth Circuit concluded that these factors were not sufficiently unusual to warrant departure.65

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Id.

60. Diaz-Villafane, 874 F.2d at 49. With regard to the third part of the test, "reasonableness is [to be] determined with due regard for 'the factors to be considered in imposing a sentence,' generally, and 'the reasons given by the district court in imposing the sentence as stated by the district court,'' Id. (quoting 18 U.S.C. § 3742(d)(3)). Some of the factors to be considered in imposing a sentence include the seriousness of the offense, the interests of deterrence and public protection, the sentencing range mandated by the Guidelines and the policy statements of the Guidelines. 18 U.S.C. § 3553(a)(1)-(7).

The Diaz-Villafane court called this step "essentially a judgment call," respecting the "trier's superior 'feel' for the case." Diaz-Villafane, 874 F.2d at 49-50. The Diaz-Villafane court also stated that "[d]istrict courts are in the front lines, sentencing flesh-and-blood defendants. The dynamics of the situation may be difficult to gauge from the antiseptic nature of a sterile paper record . . . . We will not lightly disturb decisions to depart, or not, or related decisions implicating degrees of departure." Id.

61. 899 F.2d 503, 506 (6th Cir. 1990). The first case in which the Sixth Circuit adopted the Diaz-Villafane standard of review was United States v. Joan, 883 F.2d 491, 494 (6th Cir. 1989). For purposes of this casenote, all references to the Brewer test refer to Parts I-III of the appellate standard of review as set forth in Diaz-Villafane.

62. Brewer, 899 F.2d at 504-05. Co-defendants Brewer and Evans were tellers at a local bank. Id. at 505. Over the course of a 10-month period, Brewer and Evans embezzled approximately $9,000 and $19,000, respectively. Id. After an unannounced audit, the bank found that $28,000 was missing. Id. The defendants voluntarily repaid the missing funds prior to an indictment but after having been discovered. Id.

63. Id. at 505-06. The district court justified its departure with the following factors: (1) the degree to which the community supported both of these defendants, (2) the degree of remorse that the defendants demonstrated since discovery of the offense, (3) the degree of promptness of restitution, (4) the previous history and continued community involvement, (5) the fact that their conduct was completely inconsistent with their life history, (6) the fact that both women were mothers to young children, (7) the fact that the president of the victimized bank recommends clemency, (8) the fact that imprisoning the defendants would serve no useful purpose. Id.

64. Id. at 509-10. The Sixth Circuit identified each of the bases that the sentencing court relied upon in deciding to depart and found that the Commission already took these factors into consideration when it promulgated the Guidelines. Id. at 508-10.

65. Id.
D. Plea Agreements Under the Guidelines

Along with departures, the Commission carefully considered how the Guidelines would treat plea agreements due to the fact that plea agreements comprised eighty-five percent of the sentences that the Commission reviewed. Although the Commission examined major reform proposals in plea agreement practices, it made only slight modifications.

66. See Breyer, supra note 1, at 30 (citing the United States Sentencing Commission, Supplementary Report on Initial Sentencing Guidelines & Policy Statements, 48 n.80 (1987)).

The Supreme Court addressed the practical significance of plea agreements in the effective administration of justice in Blackledge v. Allison, 431 U.S. 63 (1977). The Blackledge Court stated that "[w]hatever might be the situation in the ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." Id. at 71.


67. See U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(c); Stephen J. Schulhofer and Irene H. Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 AM. CRIM. L. REV. 291, 242 (1989) (noting importance of Commission's decision not to "make significant changes in current agreement practices"). Some commentators urged the Commission not to attempt any major reforms arguing that such changes would threaten to make the federal system unmanageable. Id.; Wilkins, Plea Negotiations, supra note 1, at 188 (same); see also Breyer, supra note 1, at 29 n.137 (citing testimony of both Hon. Bobby R. Baldock of the United States Court of Appeals for the Tenth Circuit and Bobby Lee Cook, Esq. as examples of proponents of plea bargaining). Others argued that guidelines which failed to control and limit plea agreements would leave an untouched "loophole" large enough to undo the good that the Guidelines might otherwise bring. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(c); see also Wilkins, Plea Negotiations, supra note 1, at 188 (noting concern that plea bargaining might bring to Guidelines' success). Still others argued for complete abolition of the practice of plea agreements. See Breyer, supra note 1, at 29 n.136 (citing Public Hearing Before the U.S. Sentencing Commission, 182-97 (Chicago, Ill., Oct. 17, 1986) (testimony of Professors Alschuler and Schulhofer) (hearings on file at Hofstra Law Review)); see also Albert A. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. REV. 550, 565 (1978) (noting that poorer countries with less judicial resources than United States resolve criminal cases without plea agreements). Other than the requirements imposed on plea agreements, the Commission basically left the problems surrounding plea agreements where it found them. Breyer, supra note 1, at 30.

The Commission decided against radical changes in existing plea agreement practices because the potential for unanticipated problems that could undermine the effective administration of justice weighed heavily against a sudden revamping of the plea agreement process. Wilkins, Plea Negotiations, supra note 1, at 188. The slight changes that the Commission did decide to make, however, were in the form of general policy statements. U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(c). The Commission, therefore, adopted a prudent course with respect to plea agreements by issuing policy statements that set broad limits for the conduct required to offer a negotiated plea to a court. Wilkins, Plea Negotiations, supra note 1, at 188. It is important to note that policy statements differ from the Guidelines. Id. at 187. While Guidelines are specific in nature and mandatory in application, Congress intended policy statements to provide general guidance on a variety of concerns involved in the sentencing process. Id. (citing S. REP. No. 225, 98th Cong., 1st
First, the Commission adopted a policy that plea agreements must adequately reflect the seriousness of the crime.\textsuperscript{68} Second, the Commission determined that a timely guilty plea would increase the likelihood of a court granting an acceptance of responsibility adjustment.\textsuperscript{69} The Guidelines, however, cautioned that any further reduction

\textsuperscript{68} U.S.S.G., \textit{supra} note 1, § 6B1.2(a). The Guidelines state that the district court may accept a plea agreement if the "remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of . . . the sentencing guidelines." \textit{Id.} According to the Guidelines, plea agreement practices cannot perpetuate unwarranted sentencing disparity. \textit{Id.} Congress expects judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." \textit{Id.} (citing S. Rep. No. 98-225, 98th Cong., 1st Sess. 63, 167 (1983)). For example, the sentencing court in United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1990), should have rejected the plea agreement that did not adequately reflect the seriousness of the defendant's behavior. \textit{Castro-Cervantes}, 927 F.2d at 1079. Instead, the court counted the dismissed charges in calculating the defendant's sentence. \textit{Id.} Thus, the sentencing court erred when it departed upward in sentencing the defendant on two other robbery counts. \textit{Id.}

\textsuperscript{69} U.S.S.G., \textit{supra} note 1, § 6B1.2. While a guilty plea may warrant an acceptance of responsibility reduction, the Guidelines do not allow for a reduction based on the plea alone. \textit{Id.} § 3E1.1. The Commission considered and rejected an automatic reduction for guilty pleas. Wilkins, \textit{Plea Negotiations}, \textit{supra} note 1, at 191 (citing \textit{Public Hearing Before U.S. Sentencing Commission on Plea Agreements}, 8, 16 (Washington, D.C., Sept. 23, 1986) (testimony of Professor Stephen J. Schulhofer, University of Chicago Law School)). Even though the Commission rejected an automatic discount for guilty pleas, the Commission found that accepting responsibility should continue to be encouraged. Wilkins, \textit{Plea Negotiations}, \textit{supra} note 1, at 191.

Consequently, the comments to the Guidelines provide that "[e]ntry of a plea of guilty . . . combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct . . . will constitute significant evidence of acceptance of responsibility." U.S.S.G., \textit{supra} note 1, § 3E1.1. The comments further state, however, that this evidence may be outweighed by defendant's conduct which is inconsistent with accepting of responsibility. \textit{Id.} A defendant who enters a guilty plea is not entitled to an adjustment as a matter of right. \textit{Id.} Therefore, if the court does not believe that the defendant has, in fact, accepted responsibility, the guilty plea may not be used to reduce the sentence. \textit{See}, \textit{e.g.}, United States v. Smith, 905 F.2d 1296, 1301-02 (9th Cir. 1990) (affirming denial of reduction because statements to FBI and probation officer differed); United States v. Rios, 893 F.2d 479, 481 (2d Cir. 1990) (finding although defendant pled guilty, defendant was not entitled to sentence reduction for accepting responsibility because he delayed taking guilty plea until just before jury selection and denied guilt to probation officials). For a discussion of the acceptance of responsibility adjustment, see \textit{supra} notes 24-28 and accompanying text.
based on a plea agreement would undermine the efficacy of the guidelines.\textsuperscript{70}

Once these criteria are satisfied, a judge's role in the practice and procedure of plea agreements is fairly limited.\textsuperscript{71} District courts only can approve or disapprove of plea agreements; they cannot modify or enforce selective provisions.\textsuperscript{72} Moreover, plea agreements are contractual in nature.\textsuperscript{73} Parties to plea agreements are bound by the mutual obligations to


\textsuperscript{71} Fed. R. Crim. P. 11(e)(1). Rule 11(e) defines the conduct of the government and the defendant during plea negotiations. Kolsky, supra note 5, at 926; see Wilkins, Plea Negotiations, supra note 1, at 186 (noting that under Rule 11, the procedures governing plea agreements have led to increased uniformity in sentencing). For a discussion of the requirements of a guilty plea under Rule 11, see Reddy, supra note 4, at 1118-24.

\textsuperscript{72} Fed. R. Crim. P. 11(e). Rule 11(e)(1) specifies that judges should not participate in plea "discussions." Id. Rule 11(e)(2) further provides that "the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." Id. In United States v. Werker, 535 F.2d 198 (2d Cir.), cert. denied, 429 U.S. 926 (1976), the Second Circuit found that "the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him (or her) of a plea agreement." Werker, 535 F.2d at 201; see also United States v. Olesen, 920 F.2d 538, 540 (8th Cir. 1990) ("Appeallate courts have consistently prohibited district courts from interfering with the plea bargaining process."); United States v. Partida-Parra, 859 F.2d 629, 692 (9th Cir. 1988) (stating that district court may not revisit accepted plea to determine if contract was formed); United States v. Cruz, 709 F.2d 111, 114-15 (1st Cir. 1983) (finding that district court may not "simply change its mind" and reject plea agreements once accepted). Compare James F. Bond, Plea Bargaining and Guilty Pleas § 6.15 (2d ed. 1983) (identifying arguments against judicial participation as coercive or too commanding) with id. § 6.16 (identifying arguments for judicial participation as enhancing intelligence of defendant's plea and more effective sentencing). For a thorough discussion of the largely procedural role of the judge in plea agreements, see Kolsky, supra note 5, at 935-48.

\textsuperscript{73} United States v. Santobello, 404 U.S. 257, 262 (1971) (noting that government must fulfill its agreement because prosecutor's promise was part of "consideration" for guilty plea); United States v. Ingram, 979 F.2d 1179 (9th Cir. 1992) (same), cert. denied, 113 S. Ct. 1616 (1993); United States v. Robison, 924 F.2d 612, 613-14 (6th Cir. 1991) (holding that plea agreements are interpreted and enforced pursuant to traditional contract law principles because they are contractual in nature); United States v. Fentress, 792 F.2d 461, 464 (4th Cir. 1986) (finding that no breach occurred when prosecutor recommended restitution and consecutive sentences because written plea agreement serves as "complete and exclusive" statement of terms of agreement, when agreement did not establish limits on prosecutor's sanction recommendation); United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980) (noting that plea agreements' content and meaning are determined according to standard contract principles). But see United States v. Johnson, 979 F.2d 396, 399 (6th Cir. 1992) (holding that despite contractual nature of plea agreements, defendant's underlying right to contract is constitutional and thereby implicates additional concerns to those raised in contracts between private parties (citing United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986))); United States v. Olesen, 920 F.2d 538, 542 (8th Cir. 1990) (finding that despite fact that
which they promise.\(^{74}\) Therefore, if a defendant breaches, the prosecution has no duty to comply with the agreement.\(^{75}\)

E. The Guidelines and White-Collar Crime

In formulating the Guidelines, white-collar crime was also an issue because the Commission recognized two significant discrepancies in the

plea agreements are like contracts, court is not permitted to "revisit" original plea agreement because of mutual mistake); United States v. Partida-Parra, 859 F.2d 629, 634 (9th Cir. 1988) (holding that contract analogy is not extended so far as to allow district court to consider whether "contract has been formed, even though it treats plea agreements like contracts"); United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985) (acknowledging that plea bargains are still matters of criminal jurisprudence), cert. denied, 479 U.S. 855 (1986).

This principle stems from the dual sovereignty doctrine whereby plea agreements entered into by one governmental body are generally not binding on other jurisdictions. Kolsky, supra note 5, at 928; see Heath v. Alabama, 474 U.S. 82, 88 (1985) (holding that defendant committed two distinct "offenses" when defendant violated peace and dignity of two sovereigns by breaking laws of each in single act); see also Meagher v. Clark, 943 F.2d 1277, 1281 (11th Cir. 1981) (holding that plea agreement with state prosecutor for concurrent sentences not binding on federal prosecutors because dual sovereignty doctrine prevents courts from providing defendant with relief).

A common feature in plea agreements is federal immunity. See Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 2 (1992) (calling immunity agreements "an ancient practice now wearing sophisticated modern dress" because of its considerable importance). Immunity agreements have become more important because they enable the prosecution to make a case against additional defendants in exchange for the original defendant's testimony. Id.; see also United States v. Palumbo, 897 F.2d 245, 246 (7th Cir. 1990) (describing immunity as "important weapon").

74. Santobello, 404 U.S. at 262. The Supreme Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Id.

To determine each party's duties, the courts interpret the terms in the agreement using an objective standard. See United States v. Arnett, 628 F.2d 1162 (9th Cir. 1979) (finding that when parties use imprecise language, courts look to facts of each case to decide what was "reasonably understood" by defendant); United States v. Crusco, 536 F.2d 21, 23, 27 (3d Cir. 1976) (same).

75. Reddy, supra note 4, at 1125; see, e.g., United States v. Britt, 917 F.2d 353, 356 (8th Cir. 1990) (finding government's filing of more serious drug charge against defendant proper when defendant breached plea agreement), cert. denied, 498 U.S. 1090 (1991); United States v. Giltner, 889 F.2d 1004, 1009 (11th Cir. 1989) (finding that introducing knowledge of cocaine involvement at sentencing was proper when defendant breached plea agreement).

After the defendant breaches the agreement, the government can prosecute the defendant again and bring more serious charges against him or her. See United States v. Reardon, 787 F.2d 512, 516 (10th Cir. 1986) (holding that defendant's failure to fulfill plea agreement terms relieves government of its reciprocal obligations under agreement); United States v. Calabrese, 645 F.2d 1379, 1390 (10th Cir.) (same), cert. denied, 454 U.S. 831 (1981); United States v. Simmons, 537 F.2d 1260, 1261 (4th Cir. 1976) (same); United States v. Resnick, 483 F.2d 354, 358 (5th Cir.) (same), cert. denied, 414 U.S. 1008 (1973); United States v. Nathan, 476 F.2d 456, 459 (2d Cir.) (same), cert. denied, 414 U.S. 823 (1973).
sentencing practices of white-collar criminals. First, courts more frequently awarded probation to white-collar criminals than their non-white-collar counterparts. Second, those white-collar criminals who were incarcerated received comparatively less severe sentences than non-white-collar criminals.

Consequently, the Commission made a "serious" policy decision, targeting white-collar criminals for stiffer sentences. The Commission decided to require short but minimum terms of confinement. The Commission determined that a short yet definite confinement period would deter future criminal conduct more effectively than sentences with-

76. Breyer, supra note 1, at 19. In revealing sentencing discrepancies under the pre-Guideline practices, the Commission compared certain white-collar crimes, such as fraud, with other common-law crimes, such as theft. Id.

77. Id. at 20 (citing United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 18 (1987)).

78. Id. at 20 (citing Hearings Before Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 8 (Oct. 22, 1987) (testimony of Commissioner Stephen Breyer)). Courts in the mid-to-late 1980s, however, began imposing harsher sentences on white-collar offenders than in previous years. See United States v. Marquardt, 786 F.2d 771, 773 (7th Cir. 1986) (sentencing white-collar criminal to seven concurrent three-year sentences for savings and loan fraud conviction); United States v. Morse, 785 F.2d 771, 774 (9th Cir.) (imposing on two defendants charged four year prison term and five years of probation, and seven years imprisonment respectively), cert. denied, 479 U.S. 861 (1986); United States v. Lamp, 779 F.2d 1088, 1098 (5th Cir.) (sentencing white-collar criminal to 12 years imprisonment for conspiracy and aiding and abetting perjury), cert. denied, 476 U.S. 1144 (1986). See generally Elkan Abramowitz, From Wrist Slaps to Hard Time, N.Y.L.J., Jan. 8, 1991, at 3 (discussing Michael Milken's sentence to 10 years incarceration and $600 million in fines and restitution for fraud violations prior to Guidelines as evidence of stiffening sentences for white-collar criminals).


80. See U.S.S.G., supra note 1, at Ch. 1, Pt. A, cmt. 4(d):
Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud and embezzlement, that in the Commission's view are "serious." The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment . . . .

Id.; see Breyer, supra note 1, at 20-21 (citing how perpetrators of white-collar crimes such as embezzlement, tax evasion, insider trading and antitrust violation would have received only probation prior to Guidelines). Only the least serious white-collar crimes will not warrant some sort of incarceration. Id. at 22. However, for all other white-collar crimes (offense levels of "6" or less), some sort of minimum confinement of one to six months would result. Id. Such confinement could include either intermittent confinement, community confinement or imprisonment. Id.
out confinement.\textsuperscript{81} Furthermore, in its effort to stiffen sentences for white-collar criminals, the Commission also prohibited courts from considering a defendant's socio-economic status as a factor in sentencing.\textsuperscript{82}

### III. \textit{United States v. DeMonte}

#### A. Facts and Procedural History

In \textit{United States v. DeMonte},\textsuperscript{83} Thomas A. DeMonte served as the supervisory accountant at the Fiscal Services Center (FSC) of the Veterans' Affairs Outpatient Clinic (VA) in Columbus, Ohio.\textsuperscript{84} As supervisory

\textsuperscript{81} U.S.S.G., \textit{supra} note 1, at Ch. 1, Pt. A, cmt. 4(b). "The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm." \textit{Id.; see also Breyer, supra} note 1, at 22 (noting that under Guidelines, confinement is all but certain in white-collar criminal cases); Feinstein et al., \textit{supra} note 2, at 1095 (noting that retribution and deterrence are main purposes in sentencing white-collar criminals because of low degree of recidivism); Project, \textit{Sentencing}, \textit{22 Am. Crim. L. Rev.} 279, 669 (1985) (stating that general deterrence is main purpose for sentencing white-collar criminals).

\textsuperscript{82} U.S.S.G., \textit{supra} note 1, § 5H1.10. The Sixth Circuit stated in United States v. Harpst, 949 F.2d 860 (6th Cir. 1991), that "a rule permitting greater leniency in sentencing in those cases in which restitution is at issue and is a meaningful possibility (i.e. generally white-collar crimes) would . . . nurture the unfortunate practice of disparate sentencing based on socio-economic status, which the guidelines were intended to supplant." \textit{Harpst}, 949 F.2d at 863. The Guidelines also state that national origin, creed and religion are not relevant in determining a sentence. U.S.S.G., \textit{supra} note 1, § 5H1.10.

In United States v. Rutana, 932 F.2d 1155 (6th Cir.), \textit{cert. denied}, 112 S. Ct. 300 (1991), the district court lowered the defendant's sentence level from 18 to 6 because he was the owner and chief operating officer of a company which employed 26 people. \textit{Rutana}, 932 F.2d at 1158-59. Upon de novo review, the Sixth Circuit reversed because the district judge relied on the defendant's business, which might fail if the defendant was incarcerated. \textit{Id.} at 1158. The court stated that "[t]he guidelines specifically state that a defendant's socio-economic status is not relevant in the determination of a sentence." \textit{Id.} Therefore, even assuming that the defendant's imprisonment would lead to failure of his business and loss of employee's jobs, this fact does not distinguish this case from other similar offenders. \textit{Id.; see also United States v. Bolden, 889 F.2d 1336, 1340 (4th Cir. 1989)} (stating that economic desirability of preserving defendant's job so as to enable him to make restitution does not warrant downward adjustment under the Guidelines). \textit{But see Alschuler, supra} note 2, at 464-65 (stating that sentencing court may consider socio-economic status and depart from Guidelines if court determines that Commission's unexplained policy statement (§ 5H1.10 does not reflect "adequate" consideration of economic hardship).

\textsuperscript{83} DeMonte II, 25 F.3d 343 (6th Cir. 1994). This was DeMonte's second appearance before the Sixth Circuit. His initial sentencing was reversed by the Sixth Circuit in United States v. DeMonte, 961 F.2d 1579, No. 91-3775, 1992 WL 99454 at *1, 1992 U.S. App. LEXIS 11392, (6th Cir. May 12, 1992) (unpublished) (per curiam) [hereinafter \textit{DeMonte I}].

\textsuperscript{84} DeMonte II, 25 F.3d at 343.
accountant, he ensured that bills submitted to the FSC were processed correctly through the VA Finance Center.85

In October of 1989, the defendant rented a post office box in Powell, Ohio using the false name of Professional Services.86 Between October 1989 and November 1990, the defendant generated over fifty fictitious payments exceeding $46,000 to Professional Services from the VA.87 When a FSC employee reported suspicious activity, the VA began an investigation.88 Having learned of the investigation, the defendant retained counsel; defendant and counsel immediately contacted the United States Attorney's Office to admit the defendant's wrongdoing.89

On March 7, 1991, the government charged the defendant with one count of computer fraud.90 At DeMonte's arraignment, the court accepted a plea agreement that required him to plead guilty to one count of computer fraud, make restitution to the United States Government and confess to any prior fraudulent acts.91 In return, the government agreed

85. Id. The VA Outpatient Center in Columbus, Ohio, and the VA Finance Center was located in Austin, Texas. Id. DeMonte's responsibilities also included supervision of account clerks, accounting technicians, a payroll clerk and an agent cashier at the FSC. Brief for Appellant at 6, United States v. DeMonte, 961 F.2d 1579 (6th Cir. 1992) (No. 92-3964) [hereinafter Government Brief]. Approvals for payment were sent to the Finance Center by computer. Id. Employees at the FSC in Columbus would transmit requests to the VA Finance Center for issuance of Government Treasury checks. Id. These checks would pay physicians and other medical supply companies for services or supplies provided. Id.

86. DeMonte I, supra note 83, at *1; Government Brief, supra note 85, at 6.

87. DeMonte I, supra note 83, at *1. The defendant made these 50 fictitious entries through fraudulent computer entries at the FSC to approve payments to Professional Services at the VA Finance Center computer. Government Brief, supra note 85, at 6.


89. DeMonte I, supra note 83, at *1.

90. DeMonte II, 25 F.3d at 344. The government filed a one-count information in the United States District Court for the Southern District of Ohio, charging the defendant with a form of computer fraud in violation of 18 U.S.C. § 1030(a)(4) and (c)(3)(A).

91. DeMonte II, 25 F.3d at 344-45. The Plea Agreement provided, in pertinent part:

4. Defendant THOMAS A. DEMONTE agrees to testify truthfully and completely concerning all matters pertaining to the Information filed herein and to any and all other computer fraud in which he may have been involved or as to which he may have knowledge . . . . Pursuant to § 1B1.8 of the Federal Sentencing Guidelines, the government agrees that any self-incriminating information so provided will not be used against the defendant in determining the applicable guidelines range for sentencing, or as a basis for upward departure from the guideline range.

5. Defendant THOMAS A. DEMONTE agrees to make restitution in the amount of $46,514.75 to the United States.

6. If such a guilty plea is entered, and not withdrawn, and defendant THOMAS A. DEMONTE acts in accordance with all other terms of this agreement, the United States Attorney for the Southern District of Ohio agrees not to file additional charges against Defendant THOMAS A.
not to file additional charges or use any self-incriminating information against the defendant. 92

When the defendant did not make restitution as the plea agreement required, the district court ordered the defendant to make restitution to the government. 93 After the defendant returned for sentencing, his counsel informed the court that the defendant made significant restitution, liquidating nearly all of his assets. 94 The government also notified the court that the defendant willingly admitted to a separate embezzlement scheme. 95

DEMONTÉE based on his activities charged in the Information or based on other computer fraud in the Southern District of Ohio occurring prior to the date of the Information and as to which Defendant gives testimony or makes statements pursuant to this agreement.

*Id.* at 345 n.2.

92. DeMonte I, supra note 83, at *1. For a description of the applicable portions of the plea agreement, see supra note 91.

When debriefed by the government, the defendant informed the government of another fraudulent scheme that lasted from 1986 to 1988. DeMonte I, supra note 83, at *1. In a scheme of which the investigators and the United States Attorney’s Office had no independent knowledge, the defendant embezzled $30,000. *Id.; see also* Government Brief, supra note 85, at 8 (noting that government complied with terms of agreement by not using confessed information against defendant at sentencing and by securing relief from prosecution in Southern District of Ohio for this scheme).

93. DeMonte II, 25 F.3d at 345. The sentencing court ordered restitution on May 24, 1991:

[T]he court notes that from the presentence report that this defendant has unencumbered total assets of approximately $31,769. Before imposing sentence on this defendant, the court directs this defendant to liquidate these assets and pay them over totally to the United States government before the court, and the court will give you two weeks to do that.

*Id.*

This May 24, 1991 hearing was to DeMonte’s sentencing hearing; however, the court ordered a continuance of the sentencing proceedings because the defendant did not make restitution pursuant to his plea agreement. *Id.* For a discussion of court-ordered restitutions under the Guidelines, see supra note 27.

94. DeMonte II, 25 F.3d at 345. The defendant’s counsel informed the court that the defendant liquidated all his assets except for the clothes he was wearing and $20 he had in his pocket. *Id.*

95. DeMonte I, supra note 83, at *2. The government was unaware of the separate embezzlement scheme. DeMonte II, 25 F.3d at 345. The government, however, informed the court that it did not intend to make a downward departure motion under § 5K1.1 of the Guidelines. DeMonte I, supra note 83, at *2. The court, on the other hand, expressed its displeasure at the government’s failure to file a substantial assistance to authorities motion under § 5K1.1. Government Petition for Rehearing at 2, United States v. DeMonte, 25 F.3d 343 (6th Cir. 1994) (No. 92-3964), *reh’g* denied, [hereinafter Petition for Rehearing]. However, had the government applied for the motion, this departure would have been inapplicable because § 5K1.1 addresses substantial assistance in the context of an investigation. DeMonte I, supra note 83, at *2. For an example of departures based on substantial assistance to authorities, see supra notes 51-56 and accompanying text.
Due to the defendant’s “extraordinary level of cooperation and restitution,” the district court, in sentencing the defendant, reduced the defendant’s offense level from thirteen to six. The departure dropped the guideline sentencing range from twelve to eighteen months to zero to six months. The sentencing court chose not to incarcerate the defendant and instead imposed probation for three years.

The government appealed the sentence and the Sixth Circuit reversed. The Sixth Circuit found that the sentencing court “failed to indicate whether it considered the plea agreement or the two-point reduction for accepting responsibility.” Also, the Sixth Circuit noted that the sentencing court failed to indicate whether the defendant’s conduct “exceeded the conduct contemplated in the plea agreement.”

On remand, the district court cited two reasons for departing from the Guidelines. First, the court explained that the manner in which the

96. DeMonte II, 25 F.3d at 354. The sentencing court reduced the base offense level because the defendant made restitution to the government to the fullest extent possible. Id. The sentencing court then calculated the defendant's total offense level at 13, subjecting the defendant to 12-18 months incarceration. Id. Departing from the Guidelines, the court imposed a possible sentence of zero to six months by decreasing the guideline imprisonment range seven levels. Id. For a discussion of downward departures of sentences, see supra notes 29-65 and accompanying text.

97. DeMonte II, 25 F.3d at 345.

98. Id.

99. Id. The Sixth Circuit reversed the district court's sentence in an unpublished opinion. DeMonte I, supra note 83, at *1. The Sixth Circuit noted that because the government did not make a motion to depart based on § 5K1.1 (Substantial Assistance to Authorities), the district court should not have departed on those grounds. Id. at *2. The Sixth Circuit concluded by stating that the district court should either resentenc e the defendant within the applicable guidelines range or clearly articulate the basis for any departure and explain why the departure was reasonable. Id.

100. DeMonte I, supra note 83, at *2. For a discussion of plea agreements under the Guidelines, see supra notes 66-75 and accompanying text. For a discussion of the two-point adjustment for accepting responsibility, see supra notes 24-28 and accompanying text.

101. DeMonte I, supra note 83, at *2. The Sixth Circuit remanded the case, asking the sentencing court to “clearly articulate the basis for any departure and for the reasonableness of the degree of departure.” Id. at *3. The Sixth Circuit found that “[a] defendant who has cooperated with the government but does not meet the [§ ] 5K1.1 departure criteria may qualify, under [§ ] 5K2.0, for departure based on mitigating circumstances of a kind or to a degree not adequately considered by the Sentencing Commission.” Id. at *2. For a discussion of downward departures under the Guidelines, see supra notes 29-65 and accompanying text.

102. Id. at *2. In the opinion and order dated August 18, 1992, the district court remained firm in imposing three years probation without any term of imprisonment. Id. The district court stated:

This Court has no greater obligation than to see that justice is accomplished in every case. . . . [I]t is this Court's firm belief that the instant case falls beyond the "heartland" of cases provided for in the Sentencing Guidelines. Accordingly, a significant downward departure from the guidelines’ proposed sentence was, and is, warranted. Because this court
defendant made restitution was so unusual that a downward departure was appropriate.\textsuperscript{108} Second, the court pointed to the defendant's "extraordinary level of cooperation," as evidenced by the defendant's admission to a separate embezzlement scheme.\textsuperscript{104}

On the subsequent government appeal, the Sixth Circuit addressed the issue of restitution and cooperation separately.\textsuperscript{105} With regard to the restitution issue, the majority found that the defendant was not entitled to a downward departure.\textsuperscript{106} Concerning the cooperation issue, however, the Sixth Circuit found that the defendant demonstrated an "extraordinary level of cooperation," justifying departure from the base offense level.\textsuperscript{107}

\section*{B. The Majority Opinion}

The Sixth Circuit, in evaluating whether the district court properly sentenced the defendant, began its analysis by framing the legal prerequisites for departures.\textsuperscript{108} Initially, the court noted that sentencing courts should impose a range within the guidelines unless "an aggravating or mitigating circumstance . . . not adequately taken into consideration by the . . . Commission" existed.\textsuperscript{109} The court also stated that when the Commis-

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cannot do that which is unjust and frivolous, the Court departs downward in the sentence suggested by the guidelines and imposes probation for . . . three years.
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\textit{Id.}

103. \textit{Id.} The district court found that "the degree of restitution in the instant case, and the manner in which it was made . . . [were] sufficiently unusual to warrant a downward departure." Government Brief, \textit{supra} note 85, at 5.

104. \textit{DeMonte II}, 25 F.3d at 345-46. The district court stated: Defendant's "extraordinary level of cooperation" [was] demonstrated by providing the government with extensive information regarding crimes with which he was not even charged. Such crimes were unknown to both investigators and the United States Attorney's Office until disclosed by the Defendant. Further, by voluntarily disclosing this information, the Defendant willingly subjected himself to the possibility of more serious punishment. Thus, the Defendant's level of cooperation is also sufficiently unusual to warrant a downward departure.

\textit{Id.}

105. \textit{Id.} at 346-51.

106. \textit{Id.} at 346-48. With regard to the restitution issue, Judges Jones and Batchelder composed the majority and Judge Celebrezze represented the dissent. \textit{Id.} at 351, 355-54.

107. \textit{Id.} at 348-51. The Sixth Circuit agreed with the sentencing court's finding. \textit{Id.} at 349. With regard to the cooperation issue, the majority consisted of Judges Jones and Celebrezze. \textit{Id.} at 351. Judge Batchelder dissented. \textit{Id.} at 351-53.

108. \textit{Id.} at 346. For a discussion of the standard upon which judges determine departures under the Guidelines, see \textit{supra} notes 29-65 and accompanying text.

mission considered a factor, the sentencing court should depart "only if the factor is present to a degree substantially in excess of that which ordinarily is involved."\textsuperscript{110} The court then applied the standard of review mandated under the \textit{Brewer} test and reversed the district court's departure based on restitution, but affirmed the district court's departure based on the defendant's cooperation.\textsuperscript{111}

1. \textit{Restitution}

The Sixth Circuit offered three reasons for reversing the lower court's departure based on restitution.\textsuperscript{112} First, the court reasoned that the defendant's restitution did not pass muster under Part I of the \textit{Brewer} test.\textsuperscript{113} The court recognized that voluntary restitution may constitute an "exceptional circumstance" under the acceptance of responsibility adjustment.\textsuperscript{114} It pointed out, however, that the defendant's restitution was "not made voluntarily before adjudication of guilt, but \textit{pursuant to a court order and after adjudication of guilt}."\textsuperscript{115} The majority found that the court order expressly required the defendant to liquidate his assets.\textsuperscript{116} Consequently, the ma-

\textsuperscript{110} \textit{Id.} The court also cited the Guidelines policy statement on departures. \textit{Id.} For a discussion of the Guidelines' policy statement on departures, see \textit{supra} note 48 and accompanying text.

\textsuperscript{111} \textit{Id.} For a discussion of the appellate standard of review as defined by the \textit{Diaz-Villafane} court and the \textit{Brewer} test, see notes 57-61 and accompanying text.

\textsuperscript{112} \textit{Id.} at 345. Judge Batchelder concurred on this issue, simply stating that she agreed that the defendant's "restitution in this case cannot support the downward departure taken by the district court." \textit{Id.} at 351.

\textsuperscript{113} \textit{Id.} at 346. Because the majority determined that Part I of the \textit{Brewer} test was not met, it did not address or consider Parts II or III of the test. The defendant argued that he met Part I of the \textit{Brewer} test because he liquidated virtually all of his assets thus constituting "conduct significantly different from the norm." \textit{Id.} (citing U.S.S.G., \textit{supra} note 1, at Ch. 1, Pt. A, cmt. 4(b)).

\textsuperscript{114} \textit{Id.} The majority based its decision on previous cases, notably, United States \textit{v. Brewer}, 899 F.2d 503 (6th Cir.), \textit{cert. denied}, 498 U.S. 844 (1990); United States \textit{v. Garlich}, 951 F.2d 161 (8th Cir. 1991) and United States \textit{v. Carey}, 895 F.2d 318 (7th Cir. 1990). \textit{Id.} at 346-47. The majority noted that the \textit{Brewer} court stated that "[u]nless the defendants have proved that their voluntary repayment of the embezzled funds constitutes an 'exceptional circumstance,' a downward departure based on [restitution is] not warranted." \textit{Id.} (citing \textit{Brewer}, 899 F.2d at 509). The court also relied on the Eighth Circuit's approach, as articulated in \textit{Garlich}: "[T]he extent and timing of [the defendant's] restitution are sufficiently unusual to warrant departure." \textit{Id.} (citing \textit{Garlich}, 951 F.2d at 163); \textit{see also} \textit{Carey}, 895 F.2d at 323 (finding that using restitution to justify downward departure was warranted if total dollar loss overstates seriousness of the offense but noting that such departure would be rare).

\textsuperscript{115} \textit{DeMonte II}, 25 F.3d at 347. The majority noted that the Guidelines take into consideration court-ordered restitution. \textit{Id.} For a discussion of court-ordered restitutions, see note 27.

\textsuperscript{116} \textit{Id.} The majority did acknowledge the positive impression that the defendant's restitution made upon the sentencing court. \textit{Id.} For a discussion of the court-ordered restitution in \textit{DeMonte II}, see \textit{supra} note 93 and accompanying text.
majority concluded that the sentencing court impermissibly created a special circumstance to justify departure.\footnote{117} Second, the court held that it was improper for the lower court to consider a defendant's socio-economic status as a basis for departure.\footnote{118} The court noted that the Commission considered, but ultimately rejected, one's ability to make restitution as a basis for departure.\footnote{119} Emphasizing the uniformity mandate of the Guidelines, the Sixth Circuit found that a downward departure based on ability to make restitution was a form of socio-economic discrimination and thus improper.\footnote{120}

\footnote{117} Id. Judge Jones stated that if the defendant had “liquidated his assets so promptly simply in order to fulfill his obligation pursuant to the plea agreement,” then he would agree with Judge Celebrezze that a departure was warranted. Id. at 347 n.5. Judge Jones noted, however, that the defendant did not volunteer to completely liquidate all his assets within a matter of weeks as the plea agreement required. Id. Judge Jones stated that if the defendant had done so, “this would be unusual enough to merit a downward departure under the first prong of the Brewer test.” Id. For the text of the plea agreement, see supra note 91 and accompanying text.

\footnote{118} Id. For additional support for this proposition, see U.S.S.G., supra note 1, § 5H1.10. For a discussion of the prohibition against departures based on socio-economic status, see supra note 82 and accompanying text.

\footnote{119} DeMonte II, 25 F.3d at 347 (quoting United States v. Harpst, 949 F.2d 860, 863 (6th Cir. 1991)). The DeMonte II court stated that the following example represented precisely what the Guidelines sought to eradicate:

[I]f the defendant in this case were so poor that he had no assets to liquidate, the district court might not have departed downward based on the defendant’s extraordinary restitution measures, and so the defendant would in effect have been denied an equal opportunity to receive a sentence of probation rather than imprisonment. It is precisely this kind of discrimination on the basis of economic status with which [the Guidelines] is concerned.

\footnote{119} Id. The court stated:

In accordance with [Guidelines] § 5H1.10, we may not sentence a poor convict more harshly than a rich convict simply because the rich convict is better able to make restitution. Conversely, however, we should not sentence a poor convict less harshly than a rich convict simply because the poor convict is forced to liquidate assets to make restitution.

\footnote{119} Id. The court noted three Sixth Circuit cases that support its holding. Id. at 347 (citing United States v. Harpst, 949 F.2d 860, 863 (6th Cir. 1991); United States v. Rutana, 932 F.2d 1155, 1159 (6th Cir.), cert. denied, 112 S. Ct. 300 (1991); United States v. Brewer, 899 F.2d 503, 507 (6th Cir.), cert. denied, 498 U.S. 844 (1990)). The court agreed with Brewer, stating that the Commission intended to impose sentences “based upon the crime committed, not the offender.” Id. (quoting Brewer, 899 F.2d at 507). Additionally, the court cited United States v. Harpst, which determined that sentencing guidelines were, at least in part, “intended to supplant the ‘unfortunate practice of disparate sentencing based on socio-economic status.’ ” Id. (quoting Harpst, 949 F.2d at 863). In light of this support, the court stated that “‘economic considerations . . . do not provide a basis for downward departure.’” Id. (citing Rutana, 932 F.2d at 1159 (stating that “[t]he imposition of a ‘harsh’ fine is not a proper basis for departure from the Guidelines” because Guidelines have already taken fines, even large ones, into consideration)).
Third, the court explained that allowing probation was inconsistent with the Commission’s decision to incarcerate white-collar criminals. The court restated the Commission’s intent to put white-collar crimes on par with “street crimes,” and thereby reduce disparity in sentencing. The court, therefore, found that restitution-based probation manifests the same unequal treatment between white-collar and “street” criminals that the Guidelines originally sought to minimize.

2. Cooperation

The Sixth Circuit affirmed the district court’s downward adjustment based on the defendant’s cooperation, relying heavily on the court’s reasoning in United States v. Lieberman. The majority highlighted the fact that the defendant in Lieberman met with bank officials concerning how to prevent embezzlement in the future and repaid more than he was charged with embezzling. The majority then noted that the Third Circuit found that these were “sufficient grounds for the one-level departure.”

The court then applied the Brewer test, and under Part I, found that the defendant’s conduct was “sufficiently unusual” to warrant a departure. In making this finding, the majority rejected the government’s assertion that the plea agreement and the Guidelines required the defendant to cooperate and admit to other crimes. Rather, the court found that the defendant demonstrated “an unusual willingness to cooperate.”

121. DeMonte II, 25 F.3d at 347. For a discussion of the Commission’s intent to incarcerate white-collar criminals, see supra notes 76-82 and accompanying text.
122. Id. at 948.
123. Id. The court stated that using the defendant’s restitution to drop the total offense level to probation without confinement results in the very same unequal treatment that the Guidelines intended to eradicate. Id.
124. Id. at 948-50. For a discussion of Lieberman, see supra notes 52-56 and accompanying text.
125. Id. The DeMonte II court noted that the Third Circuit found that the defendant’s “admission of the full extent of his wrongdoing when confronted by bank officials, resignation of his position at the bank shortly after being confronted with the improper transactions, and voluntary and truthful admissions to the authorities” fell within the range of conduct contemplated by the Commission. Id. (quoting United States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992)).
126. Id. (quoting Lieberman, 971 F.2d at 996). The court also outlined the government’s three part argument. Id. at 349. First, the government asserted that even though the defendant cooperated fully, his conduct was not unusual because it constituted nothing more than his duty under the law. Id. Second, the government challenged the district court’s finding that the defendant subjected himself to increased criminal liability. Id. Thus, it was the government’s contention that the case did not pass muster under Part II of the Brewer test. Id. Finally, the government argued that the departure failed Part III of the Brewer test because the degree of departure was unreasonable. Id.
127. Id. The court noted that “[u]nder these circumstances, it was unusual indeed for DeMonte to have made the disclosures that he did.” Id.
128. Id.
The court initially noted that the defendant could have bargained for an agreement that did not require disclosure of prior thefts. Moreover, the majority determined that if the defendant chose to conceal the prior thefts, the police would likely not have discovered them. Thus, the majority concluded that the defendant was neither "forced nor compelled" to disclose his prior offense, and consequently, held that the defendant displayed unusual conduct.

In so holding, the court did note that mere compliance with one's plea agreement does not constitute grounds for departure. Absent government suspicion, however, the court found that the defendant's disclosure was "not the sort of damning admissions that judges expect to hear everyday." In light of these facts, the court concluded that the defendant's conduct passed Part I of the Brewer test because the admission was sufficiently unusual to warrant departure.

Next, the court applied Part II of the Brewer test to determine whether sufficient circumstances existed to warrant departure. The court found such circumstances to exist because the "defendant subjected himself to increased liability." The government, on the other hand, asserted that due to the plea agreement, the defendant was not subject to increased liability because the confession could not be used to enhance his sentence.

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129. Id. at 349. Although the court agreed with the government's contention that the defendant's admission was a formally required term of the Plea Agreement, it nonetheless found the admission to be "an unusual willingness to cooperate." Id.

130. Id. The court found that "[f]rom this it follows that DeMonte voluntarily undertook his obligation to disclose the prior theft." Id.

131. Id. The court found this to be the more important matter. Id. Because the authorities would not have discovered the prior offense, the defendant was in no sense "forced or compelled either by the government or the plea agreement, to risk disclosing the prior theft." Id.

132. Id. The court also stated that the defendant's conduct did not constitute "relevant conduct" under § 3E1.1, comment n.1(a) of the Guidelines. Id. The government asserted that the defendant had an obligation under this section — acceptance of responsibility — to disclose "relevant conduct." Id. The court further determined that the prior fraud was a separate and distinct operation in that it occurred approximately one-and-a-half years before fraudulent activity for which the defendant was sentenced in DeMonte II. Id. For a discussion of the acceptance of responsibility adjustment, see supra notes 24-28 and accompanying text.

133. Id. at 349. For a discussion of plea agreements under the Guidelines, see supra notes 66-75 and accompanying text.

134. Id. The court further stated that admissions like the defendant's are unusual regardless of whether the admissions are made pursuant to a plea agreement. Id.

135. Id.

136. Id. For a discussion of Part II of the Brewer test, see supra note 59 and accompanying text.

137. Id. The government asserted that it could not use any information the defendant submitted concerning other acts of fraud. Id. In addition, the government held that it could not use this information to further prosecute the defendant or enhance his sentence. Id.
tence.\textsuperscript{138} While the Sixth Circuit agreed, noting that the plea agreement prohibited further prosecution and sentence enhancement, it determined that the defendant could still be subjected to increased state liability.\textsuperscript{139} The court noted that other circuits have held that state immunity has no bearing on whether federal authorities could prosecute a defendant.\textsuperscript{140} Likewise, a defendant may still be subject to state liability for his or her previous crimes even though he or she is immune from federal prosecution.\textsuperscript{141} The court, therefore, concluded that these circumstances actually warranted a departure, thus satisfying Part II of the \textit{Brewer} test.\textsuperscript{142} 

3. \textit{Comparing Restitution and Cooperation as Bases for Downward Departures}

In support of its conclusion that cooperation warranted a departure while restitution did not, the majority in \textit{DeMonte II} identified three differences between cooperation and restitution.\textsuperscript{143} First, the court found that the defendant's "cooperation was voluntary in a way that his attempt to make restitution was not."\textsuperscript{144} The court recognized that the district court

\textsuperscript{138} \textit{Id.} at 349-50. The court found that the government's suggestion that the defendant "subjected himself to increased punishment by 'coming clean' is not supported by the record." \textit{Id.; see Government Brief, supra note 85, at 14 (calling sentencing court's factual findings unquestionably erroneous).}

\textsuperscript{139} \textit{DeMonte II}, 25 F.3d at 350. The court stated that "even though the federal authorities agreed not to use the information which [the defendant] provided against him, [his] revelations exposed him to potentially increased state criminal liability." \textit{Id.}

\textsuperscript{140} \textit{Id.}; see United States v. Roberson, 872 F.2d 597, 610-12 (5th Cir.) (holding that state's agreement with defendant not to prosecute in return for defendant's cooperation did not preclude federal authorities from prosecuting because agreement did not mention federal authorities), \textit{cert. denied}, 493 U.S. 861 (1989); United States v. Jordan, 870 F.2d 1310, 1316 (7th Cir.) (same), \textit{cert. denied}, 493 U.S. 861 (1989).

\textsuperscript{141} \textit{DeMonte II}, 25 F.3d at 350. For a discussion of the dual sovereignty doctrine, see \textit{supra} note 78.

\textsuperscript{142} \textit{Id.} at 350. The court could not hold that the district court's finding was clearly erroneous. \textit{Id.} Further, the Sixth Circuit refused to address Part III of the \textit{Brewer} test, reasonableness of the departure, because it remanded the case for sentencing on the restitution issue. \textit{Id.} The government argued, unsuccessfully, that even if the district court's departure were warranted, the "downward departure of seven levels was patently unreasonable." \textit{Id.} For a discussion of Parts II and III of the \textit{Brewer} test, see \textit{supra} notes 59-60 and accompanying text.

\textsuperscript{143} \textit{Id.} at 350. Judge Jones acknowledged that both Judges Batchelder and Celebrezze believed that, as grounds for downward departure, both restitution and cooperation are "on an equal footing." \textit{Id.} He noted that Judge Batchelder (concurring in part and dissenting in part) suggested that cooperation and restitution are both invalid as bases for departure in this case. \textit{Id.} He also noted that Judge Celebrezze (concurring in part and dissenting in part) suggested that cooperation and restitution are equally valid bases for departure. \textit{Id.} He disagreed with each of these views and used this section to clarify the differences between the two standards for downward departure. \textit{Id.}

\textsuperscript{144} \textit{Id.}
ordered restitution, "whereas [the defendant] voluntarily entered into a plea agreement" requiring disclosure.145

Second, the majority found that restitution and cooperation are different because the defendant could fail to disclose his prior theft, but could not fail to make restitution.146 The court explained that the sentencing court had "no means to determine whether [the defendant] complied with his obligation to disclose prior thefts."147 The sentencing court did, however, exercise full control over the defendant's restitution.148 Thus, the majority found that DeMonte's cooperation was notable because he could have concealed his prior theft but chose not to do so.149

Finally, the court noted that unlike rewarding restitution, rewarding cooperation does not involve socio-economic considerations.150 The court pointed out that white-collar and street criminals are equally capable of admitting prior crimes.151 Further, the majority found that unlike rewarding restitution, rewarding cooperation does not have a discriminatory effect.152 Thus, the court concluded that rewarding cooperation does not lead to any of the inequities that the Guidelines sought to eradicate.153

C. Judge Batchelder's Dissenting Opinion

Judge Batchelder concurred with Judge Jones' majority opinion, finding that the defendant's restitution did not support the lower court's

145. Id. at 349-50. The court noted that the lower court ordered the defendant to make restitution within two weeks. Id. For a discussion of the lower court order, see supra note 93 and accompanying text. For a discussion of the defendant's plea agreement, see supra note 91 and accompanying text.

146. Id. For a discussion of the facts surrounding the defendant's failure to make restitution and the subsequent court order, see supra note 93 and accompanying text.

147. Id. at 350.

148. See id. (noting that sentencing court could determine whether defendant complied with order to make restitution). Judge Jones stated that the defendant "could not have reasonably believed that he could keep a failure [to make restitution] a secret." Id.

149. Id. at 349-50. The court noted that "DeMonte had reason to believe that he could keep his prior theft a secret." Id. at 350.

150. Id. The court stated that "[r]ewarding such behavior with a downward departure does not present the danger of unfairly discriminating on the basis of economic status." Id. For a discussion of departures based on socio-economic factors, see supra note 82 and accompanying text.

151. Id.

152. Id. The court noted that rewarding restitution can result in unequal treatment that favors white-collar criminals. See id. (stating that "to the extent that white collar criminals tend to have more assets to liquidate than street criminals, rewarding the liquidation of assets may result in the sort of unequal treatment favoring white collar criminals that the sentencing guidelines sought to eradicate"); see also id. at 347 (discussing possible discriminatory effects of rewarding restitution).

153. Id. at 350. The court stated that "because a white collar criminal is no more able to make unanticipated disclosures of prior crimes than a street criminal, rewarding such disclosures is unlikely to result in any corresponding inequity." Id.
downward departure.\textsuperscript{154} On the issue of the defendant’s cooperation, however, Judge Batchelder found the majority’s holding to be “wholly unsupportable.”\textsuperscript{155} In particular, she argued that the majority’s holding would allow subsequent defendants to claim that compliance with the terms of their plea agreements justifies a downward departure.\textsuperscript{156} Judge Batchelder argued that the majority even recognized the folly of granting downward departures when a defendant simply complies with a plea agreement.\textsuperscript{157}

Judge Batchelder also contended that the majority’s holding blatantly disregarded the “unquestionable enforceability” of plea agreements.\textsuperscript{158} Recognizing that plea agreements are a type of contract, she disagreed with the majority’s finding that the defendant’s confession was not “forced or compelled.”\textsuperscript{159} In addition, she stated that once a district court accepts a plea agreement, it is not subject to \textit{sua sponte} modification or “selective enforcement.”\textsuperscript{160} Thus, Judge Batchelder explained that “[t]he govern-

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  \item \textsuperscript{154} Id. at 351 (Batchelder, J., concurring in part and dissenting in part).
  \item \textsuperscript{155} Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder stated that she did “not agree that DeMonte’s cooperation with the government was sufficiently unusual to support the downward departure.” Id. (Batchelder, J., concurring in part and dissenting in part).
  \item \textsuperscript{156} Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder noted that “[t]he majority is holding, of course,” that mere compliance with a plea agreement is basis for downward departure. Id. (Batchelder, J., concurring in part and dissenting in part) (emphasis added).
  \item \textsuperscript{157} Id. (Batchelder, J., concurring in part and dissenting in part). More succinctly, Judge Batchelder stated that the majority’s “protest to the contrary [of such an interpretation of its holding], indicates that it does recognize, in theory, the folly in permitting simple compliance with one’s plea agreement to support a downward departure.” Id. (Batchelder, J., concurring in part and dissenting in part).
  \item \textsuperscript{158} Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder questioned the consistency of the majority’s holding, asking whether “the government, adopting the majority’s view, [could] maintain that [the confession] was not provided pursuant to the plea agreement and thus [was] not subject to the government’s commitment not to use it in the calculation of DeMonte’s sentence and not to file additional charges against him.” Id. (Batchelder, J., concurring in part and dissenting in part).
  \item \textsuperscript{159} Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder questioned the soundness of the court’s opinion:

  Have plea agreements come to mean nothing more than unilateral commitments on the government’s part? Does not the government have the right to take each case to trial, without so much as a thought to entering into a mutually beneficial bargain with the defendant? Does a man’s word mean so little that when, in exchange for a benefit, he promises to disclose other fraudulent activities, it can be said that unless he can effectively be “forced or compelled” to keep his word, his adherence to the contract is “unusual indeed”?

  Id. (Batchelder, J., concurring in part and dissenting in part).
  \item \textsuperscript{160} Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder cited three recent courts of appeal cases holding that plea agreements are analogous to contracts. Id. (Batchelder, J., concurring in part and dissenting
ment performed its end of the deal; DeMonte’s written consent to the plea agreement obligated him to do no less than [comply].”\(^\text{161}\)

Besides finding the majority’s holding theoretically weak, Judge Batchelder applied Part I of the \textit{Brewer} test and argued that the defendant’s conduct was not “sufficiently unusual to warrant departure” as a matter of law.\(^\text{162}\) She noted that entering into a contract requiring disclosure of prior fraudulent acts was “commendable.”\(^\text{163}\) She also noted, however, that compliance with one’s plea agreement rarely justifies departure, “unless the performance under the plea agreement [was] above and beyond the call of duty.”\(^\text{164}\) Therefore, Judge Batchelder concluded that the defendant’s conduct did not pass Part I of the \textit{Brewer} test because the defendant’s conduct was not “sufficiently unusual.”\(^\text{165}\)

Judge Batchelder continued by explaining that the Commission, in formulating the Guidelines, already considered disclosure of prior offenses as a mitigating circumstance.\(^\text{166}\) She noted that the Guidelines sup

\(^{161}\) Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder further criticized the majority’s holding:

Does the majority really believe that DeMonte’s conduct was not required by the plea agreement? What would have happened if the government had done a brief investigation of DeMonte’s work and found another pattern of fraud, which DeMonte had not disclosed? Certainly, under the plea agreement, the government would have been entitled to withdraw from the agreement and take DeMonte to trial not only on the charge in the one-count [indictment], but also on every other known fraudulent act. This condition substantially upped the ante, providing DeMonte strong incentive to abide by his promise. Why does this not qualify as an enforceable provision of the plea agreement? Quite revealing is the majority’s complete failure to provide any supporting law for this novel proposition.

\(^{162}\) Id. at 352 (Batchelder, J., concurring in part and dissenting in part) (citing United States v. Brewer, 899 F.2d 503, 506 (6th Cir.), cert. denied, 498 U.S. 844 (1990)). For a discussion of Part I of the \textit{Brewer} test, see supra notes 57-58, 61-65 and accompanying text.

\(^{163}\) DeMonte II, 25 F.3d at 352 (Batchelder, J., concurring in part and dissenting in part).

\(^{164}\) Id. (Batchelder, J., concurring in part and dissenting in part).

\(^{165}\) Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder did acknowledge that downward departures for conduct performed under plea agreements are theoretically possible. Id. (Batchelder, J., concurring in part and dissenting in part). For the majority of plea agreements, however, she concluded that because the government presumably considers the conduct required of the defendant by the plea agreement, the defendant should not receive a downward departure just because the defendant complies with the agreement. Id. (Batchelder, J., concurring in part and dissenting in part).

\(^{166}\) Id. (Batchelder, J., concurring in part and dissenting in part). In support of the contention that the Guidelines already contemplated guilty pleas, Judge Batchelder found that the commentary to § 6B1.2 of the Guidelines (Standards for Acceptance of Plea Agreements) provides that a timely guilty plea “will
port downward departures for voluntary disclosures that are "motivated by exemplary character."\(^{167}\) She contended, however, that the Guidelines prohibit departure when the defendant discloses related crimes in connection with an investigation.\(^{168}\) She suggested that the proposed plea agreement may have alerted the defendant to government suspicion of other fraudulent acts thus prompting him to confess.\(^ {169}\)

Therefore, Judge Batchelder ultimately concluded that the departure was unjustified because the Commission not only rejected disclosures as a

\(^{167}\) DeMonte II, 25 F.3d at 352 (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder relied upon § 5K2.16 of the Guidelines, a policy statement entitled "Voluntary Disclosure of Offense", which provides:

If the defendant voluntarily discloses to authorities the existence of, and accepts responsibility for, the offense prior to the discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply where the motivating factor is the defendant's knowledge that discovery of the offense is likely or imminent, or where the defendant's disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

U.S.S.G., supra note 1, § 5K2.16.

\(^{168}\) DeMonte II, 25 F.3d at 352 (Batchelder, J., concurring in part and dissenting in part) (citing U.S.S.G., supra note 1, § 5K2.16). Judge Batchelder noted, however, that the Commission found disclosures made "in connection with the investigation or prosecution of the defendant for related conduct" to be unworthy of a departure. Id. (Batchelder, J., concurring in part and dissenting in part) (quoting U.S.S.G., supra note 1, § 5K2.16). Having noted the Commission's use of "related conduct" instead of "relevant conduct," she suggested that the Guidelines already took the defendant's prior fraud into consideration. Id. (Batchelder, J., concurring in part and dissenting in part) (quoting U.S.S.G., supra note 1, § 5K2.16 ("related conduct") and U.S.S.G., supra note 1, § 3E1.1 cmt., n.1(a) ("relevant conduct"). Judge Batchelder concluded that, because the Guidelines considered such conduct, the prior fraudulent acts should not be afforded any further consideration in determining whether a departure is warranted. Id. (Batchelder, J., concurring in part and dissenting in part).

\(^{169}\) Id. at 352 (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder stated that "[i]t is therefore reasonable to suppose that DeMonte felt that investigation and discovery of his other scheme were 'likely or imminent,' a motivating factor on which a downward departure may not be based under § 5K2.16." Id. (Batchelder, J., concurring in part and dissenting in part) (quoting U.S.S.G., supra note 1, § 5K2.16).
mitigating factor but the plea agreement required the defendant’s disclosure.\footnote{170} Judge Batchelder also found that the sentencing court’s departure was unreasonable under Part III of the \textit{Brewer} test, which the majority declined to apply.\footnote{171} She first compared the two-level adjustment for accepting responsibility with the additional seven-level departure granted by the sentencing court.\footnote{172} She found that the departure of seven levels “can hardly be justified” in light of the Guidelines’ two-level acceptance-of-responsibility adjustment.\footnote{173} Second, Judge Batchelder noted that the sentence was even more unreasonable because the defendant was given the lowest possible sentence.\footnote{174} Thus, Judge Batchelder concluded that the downward departure was “clearly unreasonable,” failing Part III of the \textit{Brewer} test.\footnote{175}

\footnote{170} \textit{Id.} at 352-53 (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder also suggested that the defendant’s acceptance of the plea arrangement demonstrated that his prior conduct was “related” for purposes of § 5K2.16 of the Guidelines. \textit{Id.} (Batchelder, J., concurring in part and dissenting in part) (quoting U.S.S.G., \textit{supra} note 1, § 5K2.16).

\footnote{171} \textit{Id.} (Batchelder, J., concurring in part and dissenting in part) (citing United States v. Brewer, 899 F.2d 503, 506 (6th Cir.), \textit{cert. denied}, 498 U.S. 844 (1990)). For a discussion of Part III of the \textit{Brewer} test, see \textit{supra} note 60 and accompanying text.

\footnote{172} \textit{DeMonte II}, 25 F.3d at 353 (Batchelder, J., concurring in part and dissenting in part); see also U.S.S.G., \textit{supra} note 1, § 3E1.1(a) (Acceptance of Responsibility) (allowing two-level decrease in offense level when defendant accepts responsibility for offense). Judge Batchelder noted that the guideline range 12-18 months dropped to 0-6 months after the sentencing court made its seven-level departure, and that the defendant was ultimately sentenced to probation. \textit{DeMonte II}, 25 F.3d at 353 (Batchelder, J., concurring in part and dissenting in part). For a discussion of the offense level and the downward departure, see \textit{supra} note 96 and accompanying text.

\footnote{173} \textit{Id.} (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder posed the following question: “If, in the Commission’s view, owning up is good for two points, how can owning up big be worth two plus seven points?” \textit{Id.} (Batchelder, J., concurring in part and dissenting in part).

\footnote{174} \textit{Id.} (Batchelder, J., concurring in part and dissenting in part).

\footnote{175} \textit{Id.} (Batchelder, J., concurring in part and dissenting in part). Despite her ardent critique of the majority, Judge Batchelder did agree with the majority’s reliance on the Commission’s policy decision to eliminate sentencing disparities between white-collar criminals and street criminals who commit similar crimes. \textit{Id.} at 353 n.1 (Batchelder, J., concurring in part and dissenting in part). She further determined, however, that the Commission’s goal was as equally applicable to the cooperation issue as it was to the restitution issue. \textit{Id.} (Batchelder, J., concurring in part and dissenting in part). She stated that “[t]o the extent that the district court used DeMonte’s cooperation to drop the total offense level to a point where probation could be imposed without any confinement, the court violated both the letter and the spirit of the [G]uidelines.” \textit{Id.} (Batchelder, J., concurring in part and dissenting in part). Consequently, Judge Batchelder concluded that “the defendant’s sentence should be vacated in its entirety and his case remanded to the district court for resentencing within the applicable guidelines range.” \textit{Id.} (Batchelder, J., concurring in part, dissenting in part).
In addition to her disagreement with the majority’s application of the Brewer test, Judge Batchelder also did not agree with the majority’s affirmation that Lieberman supported the downward departure.176 She found Lieberman factually distinguishable from DeMonte II.177 Judge Batchelder noted that DeMonte’s confession occurred under the terms of his plea agreement, whereas Lieberman confessed before any criminal investigation began and “before any anticipated quid pro quo.”178 Therefore, Judge Batchelder concluded that “Lieberman is materially different” from DeMonte II.179

D. Judge Celebrezze’s Dissenting Opinion

In contrast to Judge Batchelder, Judge Celebrezze, in his dissenting opinion, disagreed with the majority on the restitution issue and concurred with the majority on the cooperation issue.180 Regarding the restitution issue, Judge Celebrezze noted the statutory standard for departures181 and explained that the defendant’s restitution did not represent the typical conduct exhibited in Sixth Circuit criminal cases.182

176. Id. (Batchelder, J., concurring in part and dissenting in part) (citing United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992)). For a further discussion of Lieberman, see supra notes 52-56, 124-25 and accompanying text.

177. DeMonte II, 25 F.3d at 358. (Batchelder, J., concurring in part and dissenting in part) (citing United States v. Lieberman, 971 F.2d 989 (3d Cir. 1992)). Judge Batchelder addressed Lieberman because “[t]he majority notes with apparent approval the district court's use of [Lieberman], in support of the downward departure.” Id. (Batchelder, J., concurring in part and dissenting in part) (citation omitted).

178. Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder stated that “DeMonte’s confession was bargained for; Lieberman’s was given without any expectation of reward or benefit.” Id. (Batchelder, J., concurring in part and dissenting in part).

179. Id. (Batchelder, J., concurring in part and dissenting in part). Judge Batchelder used this opportunity to reiterate her discomfort with the majority’s holding by stating that the majority “essentially holds that it is 'sufficiently unusual' for a defendant to abide by his plea agreement. This is a view that I believe this Court cannot and should not take.” Id. (Batchelder, J., concurring in part and dissenting in part).

180. Id. at 353-54 (Celebrezze, J., concurring in part and dissenting in part).

181. Judge Celebrezze stated that “[a] court is required to impose a sentence within a range defined by the Guidelines '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.'” Id. at 354 (Celebrezze, J., concurring in part and dissenting in part) (quoting 18 U.S.C. § 3553(b)). He also noted that departures are warranted only for “atypical cases 'to which a particular guideline linguistically applies, but where conduct significantly differs from the norm.'” Id. (Celebrezze, J., concurring in part and dissenting in part) (quoting U.S.S.G., supra note 1, at Ch. 1, Pt. A(4)(b)).

182. Id. (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze emphasized the fact that, as the lower court recognized, “the defendant liquidated all of his assets, [leaving himself] with only the clothes on his back.” Id. (Celebrezze, J., concurring in part and dissenting in part). The defendant also
Conceding that the defendant entered into a plea agreement requiring restitution and received a court order to liquidate his assets, Judge Celebrezze still found the defendant's conduct to be "sufficiently different from the norm." Therefore, in Judge Celebrezze's view, the defendant's conduct justified a downward departure because the defendant made rapid and nearly complete restitution.

Judge Celebrezze explained that it was the defendant's method of making restitution, not his ability to do so, that made his conduct "exceptional.

Although the defendant was unable to make total restitution, Judge Celebrezze found that the method in which the defendant attempted to make restitution was extraordinary. Consequently, Judge Celebrezze concluded that "the methods by which a defendant makes restitution may qualify as an exceptional circumstance."

immediately retained counsel and turned himself in to the authorities as soon as he gained knowledge of the Veterans Affairs Finance Center's investigation. Id. (Celebrezze, J., concurring in part and dissenting in part). For a discussion of the facts concerning DeMonte's conduct, see supra notes 83-89 and accompanying text.

183. Id. at 355 (Celebrezze, J., concurring in part and dissenting in part). Restating the reasoning of the district court in his own words, Judge Celebrezze stated that "despite the fact that defendant agreed to make restitution and despite the fact that he did so at the district court's discretion, there was still something extraordinary about [the] defendant's behavior." Id. (Celebrezze, J., concurring in part and dissenting in part).

184. Id. (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze further stated that "[t]his type of behavior should not simply be dismissed under the guise that he was obligated to so perform. Such a view ignores the realities of life." Id. (Celebrezze, J., concurring in part and dissenting in part).

185. Id. (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze made the distinction between the method of making or attempting to make restitution and the ability to make restitution, and concluded that the method made the defendant's conduct extraordinary:

The fact that [DeMonte] may have some economic means should neither be held for him [nor] against him. To suggest that when a defendant is affluent, his attempts at restitution can never qualify as an exceptional circumstances [sic] is as repugnant to equal protection ideology as to hold the lack of ability to make restitution against an indigent defendant. It is clear that in some cases, the methods by which a defendant makes restitution may qualify as an exceptional circumstance, above and beyond what is considered in the Guidelines.

Id. (Celebrezze, J., concurring in part and dissenting in part).

186. Id. (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze added that regardless of the defendant's ability or inability to make restitution, the court should judge the defendant on the basis of his action. Id. (Celebrezze, J., concurring in part and dissenting in part).

187. Id. (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze found that, in contrast to the defendants in Harpst and Brewer, DeMonte's behavior was "clearly 'sufficiently unusual' " to justify a departure. Id. at 356 (Celebrezze, J., concurring in part and dissenting in part) (citing United States v. Harpst, 949 F.2d 860 (6th Cir. 1991), and United States v. Brewer, 899 F.2d 503 (6th Cir.), cert. denied, 498 U.S. 844 (1990)). He noted that in Harpst the defendant made no attempt to make restitution. 25 F.3d at 356 (Celebrezze, J., concurring in part and dissenting in part). In Brewer, the defendants voluntarily repaid
Alternatively, considering cooperation and restitution together, Judge Celebrezze found that DeMonte II could be distinguished from the “heartland” type of cases that the Commission contemplated. Judge Celebrezze argued that even if neither argument would suffice on its own, the combination of defendant’s extraordinary cooperation and restitution made his conduct unusual. Therefore, Judge Celebrezze concluded that the cumulative nature of the defendant’s conduct justified a downward departure.

IV. CRITICAL ANALYSIS

The majority in United States v. DeMonte correctly applied the Guidelines when it denied a downward departure based on the court ordered restitution. In this regard, the court properly denied a downward departure for restitution based on economic considerations.

the funds they had embezzled. Brewer, 899 F.2d at 505. Judge Celebrezze concluded, therefore, that the defendant’s actions were exceptional because he voluntarily repaid the embezzled money. Id. For a discussion of the facts of Brewer, see supra note 62 and accompanying text.

188. DeMonte II, 25 F.3d at 356 (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze found that the district court, in its decision to make the downward departure, considered restitution and cooperation together. Id. at 354, 356 (Celebrezze, J., concurring in part and dissenting in part). He believed:

We risk a great injustice when concentrating our efforts into breaking down each stated reason for departure into separate and distinct elements without also viewing these reasons in the context of the whole proceedings. It seems to me that we must judge each event in its totality if we are to reach a fair and just decision.

Id. at 354 (Celebrezze, J., concurring in part and dissenting in part).

189. Id. at 356 (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze found that the combination of restitution and cooperation "could indeed distinguish this case from the heartland type of cases contemplated by the Guidelines." Id. (Celebrezze, J., concurring in part and dissenting in part).

190. Id. at 356 n.1 (Celebrezze, J., concurring in part and dissenting in part). Judge Celebrezze, in referring to the combination of restitution and cooperation, stated that he “does not mean to imply [that] there is a synergistic effect, although such a result could be real. Rather, it is merely cumulative in nature.” Id. (Celebrezze, J., concurring in part and dissenting in part).

191. See U.S.S.G., supra note 1, at Ch. 1, Pt. A(4) (b) (requiring conduct to be "significantly different from the norm"); United States v. Hendrickson, 22 F.3d 170, 176 (7th Cir.) (finding that downward departure not justified when defendant voluntarily paid entire mandatory forfeiture prior to adjudication of guilt because payment only affects degree to which defendant accepted responsibility), cert. denied, 115 S.Ct. 209 (1994); see also DeMonte II, 25 F.3d at 346 (rejecting defendant’s contention that his conduct was significantly different from the norm). For a discussion of the majority’s reversal of the district court’s grant of a downward departure based on restitution, see supra notes 112-23 and accompanying text.

192. See DeMonte II, 25 F.3d at 347 (arguing that downward departures based on economic consideration violates policy of Guidelines). The DeMonte II court also noted that the Commission rejected as a basis for departure a defendant’s ability to make restitution as a basis for departure. Id. (citing United States v. Harpst, 949 F.2d 860, 863 (6th Cir. 1991)). For a discussion of the interplay be-
On the other hand, with regard to the cooperation issue, the majority added both confusion to the Guidelines and minimized the effectiveness of plea agreements in sentencing. In applying the Guidelines, the majority tenuously concluded that the defendant’s cooperation was “sufficiently unusual” and “not the sort of admission [ ] that judges expect to hear every day.” In doing so, the Sixth Circuit discredited the value of its judicially approved plea agreement. The terms of the plea agreement demanded that the defendant confess to previous crimes; thus, if the court hoped to maintain any semblance of authority, it must have expected the defendant’s confession. As Judge Batchelder so correctly stated in her dissent, the defendant’s obligation to cooperate represents the very nature of the mutualty of obligation that underpins plea agreements. Thus, the Sixth Circuit’s explanation of how the defendant’s confession was unusual was unconvincing at best.

In addition to the improper conclusion drawn from the Guidelines, the majority rendered an internally inconsistent opinion. First, the majority held that complying with a court-ordered restitution did not constitute agreements, see supra notes 118-20 and accompanying text.

193. See U.S.S.G., supra note 1, § 6B1.2 (requiring plea agreement to “adequately reflect the seriousness of the actual offense and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines”). Judge Batchelder suggested that the majority’s holding gave more discretion to sentencing courts. DeMonte II, 25 F.3d at 353 (Batchelder, J., concurring in part and dissenting in part). She noted that “[i]t is generally known that many district courts would like more discretion in sentencing.” Id. (Batchelder, J., concurring in part and dissenting in part). She added, however, that the solution did not rest with the court, but rather with Congress: “[U]ntil Congress changes the Guidelines, the courts must follow the law.” Id. (Batchelder, J., concurring in part and dissenting in part).

194. DeMonte II, 25 F.3d at 349 (emphasis added). The majority found that “in the absence of any hint by the government that it suspected anything, DeMonte’s potentially damning admissions” constituted “sufficiently unusual” conduct. Id. For a discussion of the majority’s analysis of DeMonte’s cooperation with authorities, see supra notes 124-42 and accompanying text.

195. See Fed. R. Crim. P. 11(e)(3) (granting court power to reject or accept plea agreement); Kolsky, supra note 5, at 939-40 (noting that judge’s approval of plea agreements is discretionary power). For a discussion of the relevant text of the plea agreement, see supra note 91 and accompanying text.

196. See DeMonte II, 25 F.3d at 351 (Batchelder, J., concurring in part and dissenting in part) (noting that plea agreements are enforceable). For a discussion of the role of the courts in plea agreements, see supra note 72 and accompanying text.

197. See id. (Batchelder, J., concurring in part and dissenting in part) (noting contractual nature of plea agreements). For a discussion of the contractual nature of plea agreements, see supra notes 73-75 and accompanying text.

198. See id. (Batchelder, J., concurring in part and dissenting in part) (noting that majority’s explanation of downward departure for abiding by terms of plea agreement was “foolish”). For a discussion of Judge Batchelder’s analysis, see supra notes 154-79 and accompanying text.
extraordinary conduct. Then, almost within the same breath, the majority held that compliance with a judicially approved plea agreement was extraordinary conduct. Logically, there is no difference between the two situations; both court-ordered restitutions and plea agreements are legally compelling acts. Yet, the DeMonte II court treats these legally compelling acts differently, creating an illogical inconsistency.

Perhaps the most curious aspect of the majority’s opinion was the blatant misapplication of the “common law” of plea agreements and the mutuality of obligation that is so vital to plea agreements. A correct application of plea agreement jurisprudence would find that the plea agreement required the defendant’s cooperation. Yet, the DeMonte II court found that the defendant was not “forced or compelled” to cooperate with the government and admit his prior theft. After concluding that the defendant was not forced to cooperate with the government, the court determined that his confession to his other crimes was “unusual.” Yet, the plea agreement itself compelled the defendant to cooperate with the government. The government could have vacated the plea agreement and stripped the defendant of federal immunity when the defendant breached the terms of the plea agreement. Accordingly, the Sixth Circuit flatly contradicted the “common law” of plea agreements.

199. Id. at 346-47. For a discussion of the court’s reasoning on the restitution issue, see supra notes 112-23 and accompanying text. For a discussion of court-ordered restitutions under the Guidelines, see supra note 27.

200. Id. at 348-50. For a discussion of the majority’s holding on the cooperation issue, see supra notes 124-42 and accompanying text.

201. See 18 U.S.C. § 3556 (authorizing court to impose restitution for violations of Title 18 of the United States Code); United States v. Robison, 924 F.2d 612, 613-14 (6th Cir. 1991) (reiterating that plea agreements are enforced by court pursuant to contract principles). For a discussion of the compelling nature of plea agreements, see supra notes 73-75 and accompanying text.

202. For a discussion of the common law of plea agreements and the mutuality of obligation in plea agreements, see supra notes 71-75 and accompanying text.

203. Fed. R. Crim. P. 11(e)(1); see, e.g., Robison, 924 F.2d at 613-14 (finding that plea agreements are binding to both prosecutor and defendant because plea agreements are contractual in nature).

204. See DeMonte II, 25 F.3d at 349 (stating that “there is no sense in which DeMonte was forced or compelled, ... by the plea agreement, to risk disclosing the prior theft”). For a discussion of Judge Batchelder’s dissent on the majority’s view of the compelling nature of plea agreements, see supra notes 154-79 and accompanying text.

205. Id.

206. Id. at 352 (Batchelder, J., concurring in part and dissenting in part); see, e.g., United States v. Ataya, 864 F.2d 1324, 1338 (7th Cir. 1988) (finding agreement void and government free to reindict on same charge when defendant refused to testify at trial of codefendant). For a discussion of the binding nature of plea agreements, see supra notes 72-75 and accompanying text. For a discussion of federal immunity, see supra note 78.
Finally, as Judge Batchelder’s dissent suggested, the majority failed to interpret United States v. Lieberman correctly. Although the DeMonte II court correctly recited the Lieberman holding, it failed to identify how Lieberman was factually similar to DeMonte II, thereby warranting a similar holding. The Lieberman court found instances of unusual conduct in that the defendant met with bank officials to explain how the bank might better detect future improprieties, and agreed to pay an amount greater than that which was formally charged. Even this unusual conduct demonstrated in Lieberman warranted only a one-level downward departure. There was, however, no finding of similar conduct on the part of the defendant in DeMonte II. Therefore, because the DeMonte II court failed to identify factual similarities to Lieberman, the majority did not shed any light on why Lieberman holds any precedential value.

V. A Retreat from Uniformity

Although the court remanded the case for resentencing due to its reversal on the restitution issue, the implications of the Sixth Circuit’s holding are troubling for two reasons. First, sentencing courts may now depart from the Guidelines when defendants abide by the terms of plea agreements that require confessions to unrelated crimes. Yet, when de-
fendants have no criminal acts to confess, they are not entitled to a departure. The application of DeMonte II to this situation ironically awards departures on the basis of more extensive criminal pasts, and therefore, is antithetical to the Commission's goal of uniformity.

Second, when courts depart from the Guidelines based on defendants' compliance with plea agreements, the courts effectively rewrite plea agreements by granting defendants greater benefits than the original agreements provided. The Guidelines suggest that mere compliance with the terms of a plea agreement cannot support a downward departure. Sentencing courts, however, cannot modify plea agreements at

in part and dissenting in part) (citing U.S.S.G., supra note 1, § 5K2.16, policy statement entitled "Voluntary Disclosure of Offense").

To the extent that the Guidelines were in fact effective, the Sixth Circuit's remand will certainly fulfill the "double-edged" aspect of the Guidelines. See Selya & Massaro, supra note 2, at 849 (arguing that Guidelines can act as "double-edged sword"). Judge Selya argues that one side of the sword harms defendants because the Guidelines punish relatively minor offenses "with undue severity." Id. The other side of the sword benefits defendants by allowing for departures when a defendant cooperates with law enforcement authorities. See id. at 833-34 (noting that various provisions in Guidelines look past defendant's crimes and furnishes incentives for productive cooperation with law enforcement initiatives). In DeMonte II, the defendant was rewarded for cooperating with authorities once they discovered his embezzlement scheme. DeMonte II, 25 F.3d at 348-51. However, the Sixth Circuit reversed and remanded for resentencing on the restitution issue. Id. at 350-51. Therefore, to the extent that the Guidelines are a "double-edged" sword, the Guidelines served its purpose.

214. See 18 U.S.C. 3553(b) (requiring "that there be an aggravating or mitigating circumstance . . . that should result in a sentence different from that described" before sentencing court departs from the Guidelines); U.S.S.G., supra note 1, § 5K2.0 (same). Defendants cannot demonstrate extraordinary behavior that would warrant a departure if they have no crimes to confess to.

Consider the following scenario. A and B commit the same crimes. They also agree to the same plea agreements, which guarantee immunity from enhancing the sentence if they confess to previous crimes. The government does not know of any crimes A or B might have committed. A has committed a previous crime and confesses pursuant to the plea agreement. B has not committed any previous crimes and therefore confesses nothing. Under DeMonte II, A may receive a downward adjustment because his conduct was "aggravating or mitigating." 18 U.S.C. § 3553(b) (1994); see also U.S.S.G., supra note 1, at Ch. 1, Pt. A, § 4 (setting "aggravating or mitigating circumstances . . . not taken into consideration by the Commission" as standard) (quoting 18 U.S.C. § 3553(b)). B, however, will not receive a downward adjustment.

215. See United States v. Joan, 883 F.2d 491, 493 (6th Cir. 1989) (noting that principal purpose of Sentencing Reform Act of 1984 was to eliminate unwarranted disparities in sentencing by assuring that similarly situated individuals convicted of same crime receive approximately same sentence), aff'd, 27 F.3d 566 (6th Cir. 1994). For a discussion of the Commission's and Guidelines' uniformity goal, see supra note 1 and accompanying text.

216. See DeMonte II, 25 F.3d at 351 (Batchelder, J. concurring and dissenting in part) (noting that plea agreements are "immune to a sua sponte modification or selective enforcement by the court[s]").

217. See U.S.S.G., supra note 1, at Ch. 1, Pt. A(4) (b) (requiring conduct that significantly differs from norm to justify downward departure); see also id., § 6B1.2(a) (requiring that plea agreements do not undermine statutory purposes
will.\textsuperscript{218} Therefore, \textit{DeMonte II} not only clouds the importance of plea agreements, it also creates an inherent inconsistency between plea agreements and the Guidelines, an issue that the Commission ought to address.\textsuperscript{219}

VI. Conclusion

In \textit{DeMonte II}, the Sixth Circuit upheld a defendant’s compliance with a plea agreement as a possible basis for downward departures.\textsuperscript{220} The \textit{DeMonte II} holding, therefore, permits a defendant to receive additional benefits when a defendant merely complies with his or her plea agreement.\textsuperscript{221} The unfortunate effect of \textit{DeMonte II} will be greater disparities in sentencing, thus contradicting the uniformity mandate of the Sentencing Act.\textsuperscript{222}

The inconsistencies that permeate this decision, coupled with the great number of criminal cases that involve plea agreements, necessitate review.\textsuperscript{223} The Commission, the permanent body that can recommend change, should address this issue.\textsuperscript{224} A determination that a defendant’s mere compliance with plea agreements does not warrant a departure would yield clarity and result in greater uniformity in sentencing.

\textit{Bryant D. Lim}

\textsuperscript{218} See \textit{Fed. R. Crim. P.} 11(e)(2) (defining limited role of court in plea agreements); see also United States v. Anderson, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (noting that Rule 11 of Federal Rules of Criminal Procedure proscribes court participation in plea bargaining process, regardless of whether prejudice was shown); United States v. Adams, 634 F.2d 850, 855-42 (5th Cir. 1981) (holding that judge’s impermissible intervention entitled defendant to resentencing because judicial participation in negotiations are inherently dangerous).

\textsuperscript{219} See U.S.S.G., \textit{supra note} 1, § 6B1.2 (mandating that plea agreements cannot undermine the statutory purposes of sentencing or sentencing guidelines).

\textsuperscript{220} \textit{DeMonte II}, 25 F.3d at 348-51. For a discussion of the majority reasoning, see \textit{supra notes} 124-42 and accompanying text.

\textsuperscript{221} \textit{Id.} at 348-51 (discussing court’s reasoning for downward departure based on cooperation issue).

\textsuperscript{222} See \textit{18 U.S.C. § 3553(a)(6)} (1988) (identifying need “to avoid unwarranted sentence disparities among defendants with similar records who have been found of guilty conduct”). \textit{But cf.} Robinson, \textit{supra note} 2, at 9 (cautioning that other goals of deterrence and just punishment should not be sacrificed at expense of achieving uniformity). For a discussion of the uniformity mandate under the Sentencing Act, see \textit{supra note} 1 and accompanying text. For a discussion of the disparities and inconsistencies created by the \textit{DeMonte II} opinion, see \textit{supra notes} 191-211 and accompanying text.

\textsuperscript{223} See Petition for Rehearing, \textit{supra note} 95, at 11 (“Given the numerous cases disposed of in this Circuit by Plea Agreement, the consequences of the majority opinion could be wide-ranging.”).

\textsuperscript{224} See Selya & Massaro, \textit{supra note} 2, at 840 (“[B]oth the Congress and Commission conceived of the amendment process as a crucial vehicle allowing the Guidelines to evolve in response to feedback from district judges and others.”) For a discussion of the Commission and a discussion of the Guidelines, see \textit{supra notes} 19-23 and accompanying text.