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Places in the Heartland: Departure Jurisprudence After Koon

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There are two things upon which I suspect most observers will agree following the decision in *Koon v. United States*.[1] First, the United States Supreme Court wants district courts to have more discretion to depart from the otherwise applicable guideline range, and wants appellate courts to have less authority to overturn those discretionary judgments. Second, in light of the conflicting signals the Court gave by, on the one hand, declaring that the standard of appellate review for departure decisions is to be "abuse of discretion," and on the other hand, finding that two of the five factors relied upon by the district court in its departure decision were improper, it is virtually impossible to predict the practical effect of *Koon* on the daily work of the lower federal courts.

I am not going to attempt any sort of augury here. Rather, I will note what seem to me to be some defects in the approach taken by the Court, defects which both render the opinion unconvincing and make the lower courts' task of reading *Koon*'s entrails extraordinarily difficult.

Koon is a case about institutional roles. The project of the majority opinion is to justify a reallocation of authority over departure decisions away from both the Sentencing Commission and the courts of appeals. But the Court's argument in favor of the shift toward increased district court departure authority rests on a series of claims that are either legally or factually unsupportable.

The Argument from Statutory Construction and Congressional Intent

The Court argues that the Sentencing Reform Act (SRA) preserves a broad grant of sentencing discretion to district court judges. The majority writes:

> We agree that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of [18 U.S.C.] § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion.[2]

With the utmost respect to the Justices, this is pure banana oil. Pre-guidelines, the "traditional sentencing discretion" of district courts was virtually limitless, and the power of appellate courts to review the exercise of that discretion was virtually nil. As the *Koon* court itself noted, "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."[3] The whole point of the guidelines was to hem in district courts with a set of rules created by the Commission and enforced by courts of appeals.

This is not to say that district courts operating under the guidelines have no sentencing discretion. They do. However, one must distinguish between types of discretion exercised under the guidelines. District court judges do exercise something very much akin to their "traditional sentencing discretion" when selecting a sentence *within the applicable guideline range.* That is, just as before the guidelines, a judge may impose a sentence anywhere within the range without offering any explanation whatever.[4] However, to suggest, as the Court plainly does in *Koon,* that a decision to *depart from the sentencing range prescribed by the guidelines* is discretionary in the same way that all sentencing before the guidelines was discretionary, or in the same way that imposition of a sentence within the guideline range is now discretionary, is to disembowel the guidelines at a stroke. If discretion to depart were in truth a remnant of "traditional sentencing discretion" preserved to sentencing judges by the SRA, then the guidelines would be advisory rather than mandatory.

Similarly, the Court's suggestion that 18 U.S.C. § 3742 "manifests an intent" by Congress to make departure decisions discretionary with the district court is unsupportable. Section 3742 says, first, that the standard of review for findings of fact by district courts in sentencing proceedings is the same as it is for findings of fact in all other proceedings, that is, whether the finding is "clearly erroneous." But a "clearly erroneous" standard of review for factual determinations, while certainly deferential, represents an *increase* in control by appellate courts over pre-guidelines practice because, before the guidelines, there were no findings of fact at sentencing and no appellate reviews of the non-findings.

The segment of § 3742 on which the Court principally relies is from the 1988 amendment which added the mandate that courts of appeals "give due deference to the district court's application of the guidelines to the facts."[5] At first glance, this passage has superficial appeal as a statutory basis for the Court's result in *Koon.* The determination of whether a departure under § 5K2.0 is available on the facts of a particular case looks like an "application of the guidelines to the facts." The obvious difficulty is that every other "application of the guidelines to the facts" performed by a district judge—*e.g.*, every decision to add two levels because of Fact A or subtract two

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levels because of Fact B—has hitherto been held to be reviewable de novo (where questions of guideline interpretation predominate)[6] or, at the least, for clear error (where the factual inquiry predominates).[7] There is no indication in *Koon* that the Court intends to sweep aside all this previous caselaw regarding the standard of review to be applied to determinations of which guideline range is applicable, yet the Court holds out § 3742(e) as authority for the view that the decision of whether to depart from the guidelines for a particular defendant is discretionary with the district judge. "Abuse of discretion," at least as the term is generally understood, is a more deferential standard than either "clearly erroneous" or de novo review. It is an untenable proposition that the SRA says, or Congress intended it to mean, that a district judge should be subject to less central supervisory control when determining that the sentence mandated by the guidelines simply should not apply to Defendant Smith than when the same judge is deciding whether Smith merits an enhancement for possessing a firearm in the course of a bank robbery.

In short, the Court's effort to find support in the Sentencing Reform Act for its conclusion in *Koon* must be deemed unsuccessful.

The Argument from Institutional Competence

The second arrow in the Court's quiver is the claim that district courts are better suited than appellate courts to make the determination of whether a departure is appropriate in a particular case. Under the SRA and the guidelines, no departure is permitted "unless the court finds that there exists a circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. . . ."[8] The Commission described its task as "carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes," and the task of district courts in making a departure decision as identifying the "atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm. . . ."[9]

The majority opinion in *Koon* asserts that, "District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. In 1994, for example, 93.9% of Guidelines cases were not appealed."[10] This passage seems straightforward. In fact, on close examination, it is not at all clear what the Court means. If, on the one hand, the Court is saying nothing more than that district court judges *as a group* see more cases than appellate court judges *as a group*, the statement is true, but irrelevant. District court judges are not a collective intelligence; they are a collection of individuals who make all their sentencing decisions, particularly their decisions as to whether a particular case is outside of the "heartland," alone.

Thus, a district judge making a departure decision can only be said to have greater competence in assessing what is or is not "typical" if he or she "sees" more guidelines cases than does an appellate judge.

But if the *Koon* majority means to imply that each district court judge "sees" more guidelines cases than each appellate court judge, the Court is objectively wrong—on not one, but two, grounds.

First, there are roughly five district court judges for every judge on a court of appeals.[11] Assume for the sake of illustration that in 1994 each district court judge handled twenty guidelines cases. If so, there would be 100 guidelines cases sentenced at the district court level for every appellate judge. If the figure cited by the Supreme Court for percentage of guidelines cases appealed in 1994 (6.1%) were correct, there would be roughly six guidelines appeals per sitting appellate judge. But because three judges sit on each appellate panel, each appellate judge would hear *eighteen* guidelines appeals per year. In short, even if the appellate statistics used by the Court were accurate, they would prove that district and appellate court judges see roughly the same number of guidelines cases.

Second, the figure for rate of appeals in guidelines cases upon which the Court bases its argument is wrong, for at least three reasons:

(1) The majority opinion cites a letter from a member of the Sentencing Commission staff as authority for its claim that in 1994, "93.9% of Guidelines cases were not appealed." However, the Court mischaracterizes the data in the letter. The letter provides figures from Fiscal Years 1993 and 1994 for the "% of Guidelines Sentences 'Not Appealed' by End of FY 1995" (92.7% for FY 1993, and 93.9% for FY 1994).[12] The letter states that, "The Commission's databases do not include the number of filings in the appellate courts, only the number of published or unpublished orders and opinions issued. Thus, the term 'not appealed' refers to those cases for which the appellate courts have not issued an order or opinion on a sentencing-related issue."[13] In short, the number quoted by the Court reflects, not the percentage of guidelines cases that were not appealed, but only those guidelines cases sentenced during FY 1994 that, by the end of FY 1995, had gone completely through the appellate process to the issuance of a written opinion.

(2) The number selected from the Commission's letter obviously underreports the percentage of guidelines cases in which appeals are filed and a sentencing issue is raised. This can be demonstrated conclusively from the Commission's own published data. In 1994, there were 39,971 cases sentenced under the guidelines.[14] In the same year, according to the Commission, 3,942 appeals involving a guidelines issue were decided.[15] Consequently, the ratio of

guidelines appeals concluded to guidelines cases sentenced in 1994 was not 6.1%, but 9.86%. In 1995, the rate of guidelines appeals was 11.24%.[16]

Calculating an appeals rate for guidelines cases by comparing the number of cases sentenced in a particular year to the number of appeals involving sentencing issues reported by the Commission in the same year is concededly imprecise. Indeed, if there had been dramatic fluctuations in either the number of cases sentenced or the number of appeals over the last few years, it could be misleading, because: (a) the Commission does not report appeals until they are decided; (b) sentencing appeals often take more than one year; and (c) therefore, sentencing appeals are often not reported in the same year as the original sentencing. Nonetheless, between 1992 and 1995, the total number of guidelines sentencings each year averaged about 40,000.[17] In 1994 and 1995, the number of sentencing appeals reported in each year by the Commission was roughly 4,000.[18] In short, according to the Sentencing Commission's figures, and even allowing for lag time, at any given moment about 10% of the cases sentenced under the guidelines are being appealed.

(3) There are strong indications that the Commission is dramatically underreporting the number of criminal appeals involving sentencing issues. According to figures collected by the Administrative Office of the Courts, there were 8,057 appeals raising sentencing issues in FY 1994 and 7,481 such appeals in 1995.[19] If true, this would mean that roughly 20% of all cases sentenced under the guidelines result in appeals raising guidelines issues.

In sum, if we apply what appears to be more accurate appellate data to our illustrative case, we see that if there are 100 guidelines cases sentenced at the district court level for every appellate judge, somewhere between 10% and 20% of that number, or 10 to 20 actual cases, will reach the court of appeals. Because each appellate case requires three judges, every appellate judge will hear *thirty to sixty* guidelines cases, as compared to the twenty heard by each district court judge. In short, it appears that each appellate court judge hears not fewer, but between *50% and 200% more* guidelines cases than does each district court judge. Consequently, the empirical premise on which the Supreme Court bases its argument for the superior competence of district court judges to determine the "usualness" of a guidelines case collapses.

Beyond the Numbers

Even if the Supreme Court were right in asserting that district court judges "see" more guidelines cases than appellate judges, the institutional competence argument in favor of granting broad discretionary departure authority to district judges would still stand on shaky ground. The question at issue when considering the possibility of a departure is whether there exists a "circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," and it is very difficult to contend that district court judges are better suited for deciding what the Commission considered than are appellate judges.

Furthermore, even if one shifts the ground of inquiry, as the *Koon* court tries to do, from what the Commission intended to a determination of whether a particular case is unusual, or atypical, or outside the norm, one is left with the questions: Unusual where? Atypical as compared to what group of other cases? The norm where? And as defined by whom?

District Judge Jones in Miami is better suited than an appellate judge to determine that defendant Smith is "unusual" or "atypical" as compared to other defendants who have appeared in her courtroom. Judge Jones may even be better than the court of appeals in determining the "norm" in her courthouse or in all the courthouses in the Southern District of Florida. The problem, of course, is that the guidelines are not a local, or even regional, enterprise. They exist not merely, or even primarily, because pre-guidelines sentences were disparate between judges in the same courthouse, but because local norms were perceived to vary widely and unjustly. The "norm" of which we must speak if the guidelines are not to be deprived of their fundamental justification is a *national* norm.

Which brings us back to the central question of *who* is empowered by the Sentencing Reform Act to define the norm. Before *Koon*, I think it fair to say that appellate courts reviewing departures under § 3553(b) understood their task as one of ascertaining the boundaries the *Commission* meant to set on the national "heartland" of cases for which no departure is appropriate. The question of whether a particular set of aggravating or mitigating circumstances was "adequately taken into consideration by the Commission" was construed as a way of asking whether the circumstances at issue fell inside or outside of that boundary. Viewed this way, the question was, at the very least, a "mixed question of fact and law" and not a discretionary choice for the trial judge.

Koon, by contrast, can be read to imply that sentencing judges may depart based on a disagreement with the "adequacy" of the Commission's *judgment in setting the boundaries of the heartland*, and that appellate courts should generally defer to such conclusions. The language of the *Koon* opinion can be squared with the language of 18 U.S.C. § 3553(b) only if the Court is suggesting a radical revision of the relationship of judges generally, and district judges in particular, to the guidelines. However, the Sentencing Reform Act, no matter how ingeniously it is tortured, will not admit of the interpretation that district court judges have a roving warrant to depart from the guidelines whenever they disagree with the judgments of the Commission. It is difficult to conceive of

the Supreme Court itself traveling too much farther down the path hinted at in *Koon*, if for no other reason than the Justices' undoubted awareness that any sustained effort to regain by judicial fiat the courts' former untrammeled sentencing discretion would certainly meet with a furious congressional backlash. The outlook in the lower federal courts, however, seems a good deal less certain.

The hopeful view of *Koon* is that sentencing judges will expand their use of the departure power enough to ameliorate some of the harsher guidelines outcomes, but will move with sufficient restraint that they will neither imperil the guidelines structure in fact, nor be perceived as doing so by Congress, the bar, or the public. The less optimistic, and I fear more likely, prognosis is that the combination of incidents of intemperance among the district courts and general confusion among the courts of appeals[20] will lead to amendments by the Commission to the guidelines, and by Congress to the SRA, which will narrow the range of district court departure authority even more than was the case before *Koon*.

NOTES

[1] 116 S. Ct. 2035 (1996).

[2] *Id.* at 2046.

[3] *Id.* at 2045.

[4] In cases where the guidelines range exceeds 24 months, the district court is obliged to explain his choice of sentence within that range. 18 U.S.C. § 3553(c)(1).

[5] 18 U.S.C. § 3742(e). *Quoted in Koon*, 116 S. Ct. at 2046.

[6] *See, e.g., United States v. Patterson*, 962 F.2d 409 (5th Cir. 1992) (reviewing de novo the questions of whether and how to group defendant's offenses).

[7] *See, e.g., United States v. Connell*, 960 F.2d 191 (1st Cir. 1992) (reviewing determination for clear error that defendant knew laundered money was criminally derived). *See generally United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (excellent general analysis of standards of appellate review for mixed questions of law and fact).

[8] 18 U.S.C. § 3553(b); § 5K2.0.

[9] Ch.1, pt. A, intro. comment 4(b).

[10] *Koon*, 116 S. Ct. at 2047.

[11] The ratio varies slightly from circuit to circuit, and depending on whether one counts senior judges. *Compare* the roster of appellate court judges listed at 85 F.3d VII (1996) *with* the roster of district court judges listed at 927 F. Supp. VII (1996).

[12] Memorandum from Pamela G. Montgomery, Deputy General Counsel, U.S. Sentencing Commission, to Doris Jensen, Librarian, U.S. Supreme Court, July 2, 1996.

[13] *Id.*

[14] *See* United States Sentencing Commission, *Annual Report 1994*, at 31.

[15] *See id.* at 139, Table M. I say that "at least" 3,942 cases involved sentencing issues, because the Commission's system for capturing appellate data (which relies on a combination of material the Commission "requested" from courts of appeals and material gleaned from searches of Westlaw, *id.* at 133) plainly does not capture all guidelines appeals. Moreover, it is somewhat unclear from the Commission's remarks in its 1994 Annual Report whether the 3,942 appeals in the Commission's appellate database is a count of *cases* or *defendants*. If Table M reflects cases rather than defendants, it underreports guidelines appeals by counting multi-defendant appeals as a single case.

[16] In 1995, there were 38,500 guidelines defendants. *See* United States Sentencing Commission, *Annual Report 1995*, at 41. There were 4,314 cases involving guidelines appeals. *See id.* at 133, Table 52.

[17] *See id.* at 41.

[18] The Commission reported 3,942 appeals involving sentencing issues in 1994. *See Annual Report 1994*, at 139, Table M. In 1995, the Commission reported 4,314 such appeals. *See Annual Report 1995*, at 153, Table 52.

[19] *Judicial Business of the United States Courts, Report of the Director*, 1995.

[20] *See, e.g., United States v. Sherpa*, 97 F.3d 1239, 1244-45, 1996 WL 571175 (9th Cir. 1996) (citing *Koon* for the proposition that a sentencing court may ignore a jury's findings of facts necessary to the verdict in making factual rulings at sentencing).