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James C. MacGillis

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Note

The Dilemma of Disparity: Applying the Federal Sentencing Guidelines to Downward Departures Based on HIV Infection

James C. MacGillis*

Thomas Daniel DePew, a criminal defendant infected with the human immunodeficiency virus (HIV),¹ had the accompanying signs of a more advanced stage of the disease.² After his

* J.D., M.A. Candidate 1998, University of Minnesota; B.A. 1992, John Carroll University.

1. Doctors identify the HIV infection by isolating the virus or by isolating the presence of antibody to the virus. Dennis H. Osmond, *Classification and Staging of HIV Disease*, in AIDS KNOWLEDGE BASE 1.1, 1.1-9 (P.T. Cohen et al. eds., 1994).

2. *United States v. DePew*, 751 F. Supp. 1195, 1200 (E.D. Va. 1990), *aff'd on other grounds*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). The court noted that DePew had "tested positive for the AIDS HIV virus and [was] already in need of treatment and medication for this condition." *Id.*

The progressed state of HIV infection leads to a designation of Acquired Immune Deficiency Syndrome, commonly referred to as "AIDS." According to the Center for Disease Control's 1993 revision, a person has AIDS if: (1) the CD4 lymphocyte count is less than 200 cells per cubic millimeter; or (2) one of a variety of clinical conditions is diagnosed. Osmond, *supra* note 1, at 1.1-4. The CD4 lymphocyte cells "perform the extremely important function of initiating or stimulating immune system activities." Helena Brett-Smith & Gerald H. Friedland, *Transmission and Treatment*, in AIDS LAW TODAY 18, 23 (Harlon L. Dalton et al. eds., 1993). The HIV virus reproduces inside the CD4 cell, eventually destroying it. *Id.* at 22. Destruction of the CD4 cell weakens the human body's ability to repel infection. *Id.* at 23. Consequently, infection with viruses, fungi, bacteria, or parasites are often the "immediate cause of death in the patient who has AIDS, even though the underlying cause of the disease is the immune deficiency." AIDS AND THE LAW 467 (David W. Webber et al. eds., 2d ed. 1992).

"AIDS" refers to a "specific group of diseases or conditions that indicate severe immunosuppression related to infection with the human immunodeficiency virus (HIV)." Abe M. Macher, *HIV Disease/AIDS: Medical Background*, in AIDS AND THE LAW, *supra*, at 1. Individuals infected with HIV develop a spectrum of disease-states, ranging from the asymptomatic carrier stage to full-blown AIDS. *Id.* at 4. The Center for Disease Control has established four categories of HIV-infected patients:

conviction in federal court, he moved for a downward sentence departure on the grounds that his HIV status constituted an "extraordinary physical impairment."³ The district court rejected his motion.⁴ The court concluded that neither HIV infection nor other life threatening conditions were a basis for departure, and therefore ruled that it did not have the discretion to give DePew a lesser sentence.⁵

The district court in *United States v. DePew* looked to the United States Sentencing Guidelines (Guidelines) for direction in evaluating DePew's motion for departure.⁶ The Guidelines mandate a sentence range within which courts must sentence an offender, but allow courts to depart from the range in certain circumstances. The Guidelines do not explicitly permit district courts to consider HIV status in determining the length

Group I: Patients with transient signs and symptoms that appear at the time of, or shortly after, initial infection with HIV as identified by laboratory studies. These patients have a mononucleosis-like syndrome, with or without aseptic meningitis, associated with seroconversion for HIV antibody. All patients in Group I should be reclassified in another group after resolution of this acute syndrome.

Group II: Patients who have no signs or symptoms of HIV infection: [referred to as] asymptomatic HIV disease.

Group III: Patients with persistent generalized lymphadenopathy, defined as palpable lymphadenopathy (lymph node enlargement of one centimeter or greater) at two or more extrainguinal sites (outside the groin or lower abdomen) persisting for more than three months in the absence of a concurrent illness or condition other than HIV infection to explain the findings.

Group IV: Patients with clinical symptoms and signs of HIV infection other than or in addition to lymphadenopathy. Patients in this group are assigned to one or more subgroups based on clinical findings.

Id. at 6-7.

3. *DePew*, 751 F. Supp. at 1199.

4. *Id.*

5. *Id.* The court noted, "Except in extraordinary circumstances not present here, terminally ill persons who commit serious crimes may not use their affliction to escape prison. Were this rule otherwise, the law's deterrent effect would be unreasonably and unnecessarily diminished in the case of terminally ill persons." *Id.* The *DePew* court's language would eventually be used in other cases restricting the applicability of downward departures. See *United States v. Thomas*, 49 F.3d 253, 260-61 (6th Cir. 1995) (rejecting downward departure where at the time of sentencing, the defendant had not developed AIDS and was still in relatively good health); *United States v. Woody*, 55 F.3d 1257, 1275-76 (7th Cir.) (rejecting downward departure based on AIDS where defendant failed to request a departure according to the provisions of the sentencing guidelines), *cert. denied*, 116 S. Ct. 234 (1995); *United States v. Rabins*, 63 F.3d 721, 727-29 (8th Cir. 1995) (rejecting downward departure where defendant's AIDS condition did not present an extraordinary physical impairment at the time of sentencing).

6. *DePew*, 751 F. Supp. at 1199.

of an offender's sentence. The Guidelines do, however, permit a court to consider an offender's physical condition if the condition constitutes an "extraordinary physical impairment."⁷ While the Guidelines leave "extraordinary physical impairment" undefined, they do provide that the condition of a "seriously infirm defendant" could warrant departure.⁸

The expansive scope and continued spread of HIV infection, combined with its progressed form, Acquired Immune Deficiency Syndrome (AIDS),⁹ have affected most facets of the criminal justice system, including sentencing under the Guidelines.¹⁰ Federal district courts, however, are not uniformly prepared to deal with the issue. Some courts considering downward departures based on HIV status are well informed about the disease,¹¹ while other courts' ignorance has surfaced in misuse of HIV terminology.¹² Some district courts have

7. U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] § 5H1.4, p.s. (Nov. 1994).

8. *Id.*

9. The Center for Disease Control recorded the 500,000 mark for AIDS cases in October of 1995. *First 500,000 Cases*, 44 MORBIDITY & MORTALITY WKLY. REP. 849, 849 (1995). The period from 1981 through 1987 claimed 10% of all known cases; the period from 1988 through 1992 claimed 41%; and the period from 1993 through October 1995 claimed 49%. *Id.* The rate of AIDS cases continues to increase at a slightly faster rate in United States prisons and jails than in the population at large. *Study Finds AIDS Growing but Not Rampant Among U.S. Prisons*, AIDS ALERT, Apr. 1994, at 57, available in WESTLAW, Health Law Library, HWD File.

10. The presence of HIV infection and AIDS in correctional facilities has produced significant litigation on issues ranging from confidentiality for inmates to segregation and adequacy of medical care. See THEODORE M. HAMMETT ET AL., 1992 UPDATE: HIV/AIDS IN CORRECTIONAL FACILITIES 79-83 (1994). At the state level, a court extended the sentence of a prisoner for attempting to transmit HIV to a guard. See *New Jersey v. Smith*, 621 A.2d 493, 496-98 (N.J. Super. Ct. App. Div. 1993) (upholding the 25-year sentence for an HIV-infected inmate who bit guard's hand and allegedly said, "Now die, you pig! Die from what I have!"). See generally AIDS AND THE LAW, *supra* note 2, at §§ 9.1-9.6 (discussing the housing of AIDS prisoners, testing for the HIV virus in prisons, and the liability of prison officials).

11. See *United States v. Rabins*, 63 F.3d 721, 738-44 (8th Cir. 1995) (Wilson, J., dissenting) (discussing the medical condition of the offender, the current HIV classification system, the life expectancy of persons with AIDS, and the differences between AIDS and other serious illnesses), *cert. denied*, *Johnson v. United States*, 116 S. Ct. 1031 (1996).

12. See *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995) (stating that a downward departure would only be possible where an offender's condition was "advanced AIDS"). The court inappropriately used the term "advanced AIDS," because AIDS itself is a clinical designation for an advanced progression of the HIV infection. The court probably meant "advanced HIV" or "advanced HIV disease," terms that would properly describe persons late in

dealt with their lack of knowledge about HIV by pleading for guidance from higher courts as to how to evaluate HIV in sentencing.¹³ The varied approaches courts have taken when addressing HIV and the continued increase in the number of HIV-positive offenders¹⁴ suggest that all courts require better information regarding the nature of HIV infection and its relevance to downward departures.

This Note addresses the application of Guideline sections 5H1.4 and 5K2.0—respectively governing “extraordinary physical impairments” and “mitigating circumstances”—to downward sentence departures based on HIV infection. Part I considers the formation and structure of the Guidelines and reviews the general and HIV-specific application of downward departures under 5H1.4 and 5K2.0. Part II critiques the approaches courts have taken with regard to HIV infection as a basis for downward sentencing departures. Part II concludes that the Sentencing Reform Act and the Guidelines’ language support judicial consideration of downward departures based on a medical diagnosis of AIDS or advanced HIV. Part III urges the courts to give particularly acute examination to departure requests based on either AIDS accompanied by physical deterioration or advanced HIV. This Note proposes that the Sentencing Commission amend the Guidelines to clarify that AIDS accompanied by physical deterioration and advanced HIV is an “extraordinary physical impairment” warranting consideration for downward sentencing departure.

I. THE FEDERAL SENTENCING GUIDELINES AND THEIR APPLICATION

A. FORMATION AND STRUCTURE OF THE GUIDELINES

The Sentencing Reform Act of 1984 established a Federal

the AIDS disease process. Letter from Lee Hardy, AIDS Research Information Center, to author (Dec. 18, 1995) (on file with *Minnesota Law Review*).

13. See *Rabins*, 63 F.3d at 735 (noting the request for guidance on the downward departure issue by a district court judge who stated, “I wouldn’t be upset if you get me reversed.”).

14. See PETER M. BRIEN & CAROLINE W. HARLOW, U.S. DEP’T OF JUSTICE, *HIV IN PRISONS AND JAILS*, 1993, at 1 (1995). The number of state and federal inmates reported to be HIV-infected increased by 23% from 1991 to 1993. *Id.* at 2. Confirmed AIDS cases in U.S. prisons increased 124% from 1991 to the end of 1993, from 1,682 to 3,765. *Id.* Most HIV and AIDS cases occur in state prisons, though the number of reported HIV-infected inmates in the Federal Bureau of Prisons increased 52%, to 959, from 1991 to 1993. *Id.*

Sentencing Commission (Commission) to develop a mandatory sentencing system.¹⁵ Congress gave the Commission the power, subject to congressional review and other federal statutes,¹⁶ to evaluate past sentencing practices and create definitive and narrower sentence ranges for federal offenses.¹⁷ Prior

15. The original legislation calling for guidelines was the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994) and 28 U.S.C. §§ 991-998 (1994)). Congress passed the Sentencing Reform Act in part due to public concern over increased violent crime, recidivism, and drug use. Charles J. Ogletree, Jr., *The Death of Discretion? Reflection on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1945 (1988). See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (discussing background and principles behind the Guidelines).

The United States Sentencing Commission took three years to develop the Guidelines, with the participation of judges, attorneys, and academics seeking to standardize the sentencing process in the federal court system. *Id.* at 5-6. The Commission's establishment by Congress responded to judicial and legislative concern about the variety of sentences received by offenders who had committed the same or similar crimes. S. REP. NO. 98-225, at 52 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3235; see also *United States v. Draper*, 888 F.2d 1100, 1104 (6th Cir. 1989) ("The primary goal of the Act was to eradicate what Congress felt to be gross and unjustified disparity in sentencing across the nation, and to foster uniformity."); Judge Edward Becker, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2053 (1992) ("The impetus behind the creation of the federal sentencing guidelines arose from widespread concern about increased crime, the perception that tougher sentences would decrease crime, and the recognition of widespread disparity in sentencing."). According to the introduction of the 1994 Annual Report, the Guidelines intend:

[T]o provide certainty and fairness in meeting these purposes by avoiding unwarranted sentencing disparity among offenders with similar characteristics convicted of similar criminal conduct while permitting sufficient judicial flexibility to account for relevant aggravating and mitigating factors

U.S. SENTENCING COMM'N, ANN. REP. xv (1994) [hereinafter COMM'N REP.].

16. The Commission has always created the Guidelines and then submitted them to Congress for review. If Congress fails to act on the Guidelines within 180 days, then the Guidelines are automatically accepted and become binding on federal courts. U.S.S.G., *supra* note 7, Ch.1, Pt.A, intro. cmt. 2. In 1994, six new amendments were submitted to Congress and became effective after Congress failed to act on them. COMM'N REP., *supra* note 15, at 5.

17. The decision to enact a sentencing procedure whereby courts sentence based on the key offense while also considering some actions taken by the offender during the crime resulted in a modified "charge offense" system. U.S.S.G., *supra* note 7, Ch.1., Pt.A, intro. cmt. 4(a). A pure "real offense" system would "base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted." *Id.* The Commission's decision was generally well received. See, e.g., Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 10

to the Guidelines, a judge could sentence anywhere within a broad statutory range.¹⁸ When Congress approved the Guidelines,¹⁹ it replaced the wide latitude federal judges previously enjoyed²⁰ with a purposefully limited opportunity to depart from the Guidelines' sentence range.²¹

Under the Guidelines, courts now have a more adminis-

(1991) ("This hybrid approach is both workable and equitable. Because our system of justice must combat the vicissitudes and innovations of criminal enterprise, courts must be able to depart from the Guidelines in the face of aggravating or mitigating circumstances."). *But see* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 227-30 (1991) (critiquing the modified model adopted by the Commission and proposing, by contrast, an "offense-of-conviction" model, which would consider only conduct formally proven at trial or admitted to by the defendant as a basis for sentencing).

18. See Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687-88 (1992).

19. The Guidelines became law on November 1, 1987, after congressional review and adoption. U.S.S.G., *supra* note 7, Ch.1, Pt.A, intro. cmt. 2.

20. The discretion given judges led to disparities in sentences for similar crimes committed by different offenders and for offenders committing similar crimes in different regions. See S. REP. NO. 98-225, at 41-45, reprinted in 1984 U.S.C.C.A.N. 3182, 3224-29 (describing the results of two sentencing studies that found judges specifying wide ranges of sentences for the same crime). The sentences detailed by twenty judges for a hypothetical bank robbery ranged from eighteen years in prison and a \$5,000 fine to five years in prison and no fine. *Id.* at 42-43; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 17-23, 118-24 (1972) (providing examples of sentence disparities and making an early call for sentence reform); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 4-5 (1976) (discussing studies from the early 1970s that illustrate sentence disparity in California, Ohio, and South Carolina); Kevin Clancy et al., *Sentencing Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentencing Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 553 (1981) (concluding that sentence disparity "is a widespread phenomenon").

21. Congress and the Commission meant to limit judicial discretion of courts for downward and upward departures from the guideline sentences. See 18 U.S.C. § 3553(b) (1994) (directing the court to follow the sentence 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"); S. REP. NO. 98-225, at 79, reprinted in 1984 U.S.C.C.A.N. 3182, 3262 (noting the rejection of an amendment that would have expanded the opportunities for judges to depart from the sentencing guidelines); see also Harvey Berkman, *Court To Take On Sentencing Rules*, NAT'L L.J., Jan. 15, 1996, at A1 ("Since they were drafted 10 years ago, the federal sentencing guidelines and mandatory minimums have accomplished at least one thing they were supposed to do: reduce judicial discretion.").

trative than judicial role.²² When sentencing, a court first determines an offense point total based on the convicted crime and characteristics involved in the crime's commission.²³ The point total of the crime then intersects with one of six criminal history levels, providing the court with a range within which to sentence the offender.²⁴ The district court may depart upward or downward from this range only in particular circumstances.²⁵ An appellate court can review the sentence only for clear errors of law, and not for the district court's discretionary decision of whether or not to depart from the Guideline range.²⁶

The Guidelines include three types of directives: guide-

22. See Berkman, *supra* note 21, at A1 (detailing the relative inability of judges to depart from the sentencing guideline ranges).

23. U.S.S.G., *supra* note 7, Ch.1, § B1.1. An offender convicted of aggravated assault, for example, would have a base offense level of 15. U.S.S.G., *supra* note 7, § 2A2.2. Discharge of a firearm during the crime would increase the total offense mark by five levels. *Id.* If the victim sustained bodily injury, two to six levels could be added for a total offense level ranging from 22 to 28. *Id.*

24. The above example of an aggravated assault with discharge of firearm, minimal bodily injury, and no previous criminal history for the offender would result in a sentence ranging from 41 to 51 months. U.S.S.G., *supra* note 7, Ch.5, Pt.A. The court must sentence the offender in the designated sentence range, subject to the exceptions for which the Guidelines provide. *Id.*

Within the sentencing range, a court is guided by the need for the sentence imposed:

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

18 U.S.C. § 3553(a)(2)(A-D) (1994).

25. The most common basis for downward departure is for the "substantial assistance" of the defendant. See COMM'N REP., *supra* note 15, at 80. In 1994, courts effected a downward departure in 19.5% of all sentencing cases based on the "substantial assistance" of the defendant. *Id.* For an overview of the debate about prosecutorial discretion in dictating who receives substantial assistance departures, see Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1862-72 (1995).

26. See *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993) ("We review a district court's factual findings for clear error and will not reverse unless we are left with the 'definite and firm conviction that a mistake has been committed.'" (quoting *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991))).

lines, policy statements, and commentary.²⁷ Together, they create and support "heartland"²⁸ sentence ranges that identify the typical circumstances for many crimes.²⁹ The Commission considered the major factors affecting district courts' previous sentencing decisions when it created the sentence range for each crime.³⁰ Accordingly, the Commission expected that only a limited number of atypical cases would require judicial departures from the designated sentence ranges.³¹

27. Guidelines and policy statements provide two different levels of Commission directive, a distinction that has been lost on some courts. Freed, *supra* note 18, at 1732. "Guidelines" set by the Sentencing Reform Act control sentencing courts when the courts determine the penalty to be imposed in a criminal case. 28 U.S.C. § 994(a)(1) (1994). Congress has a six-month review period during which it may reject or modify the Guidelines, or amendments to the Guidelines, before they take effect. 28 U.S.C. § 994(p) (1994). The Supreme Court has equated guidelines with legislative rules adopted by federal agencies. See *Stinson v. United States*, 113 S. Ct. 1913, 1919 (1993).

"Policy statements" are general directives "regarding application of the guidelines or any other aspect of sentencing or sentence implementation . . ." 28 U.S.C. § 994(a)(2) (1994). According to the 1987 Prosecutors Handbook on Sentencing Guidelines: "policy statements . . . only provide general advisory statements which are not binding," and "[a] court is not required to abide by a policy statement suggesting a departure from the guidelines even though a factor is present in the case which is addressed by such a policy statement and insufficiently addressed by the guidelines themselves." Freed, *supra* note 18, at 1732 (citing U.S. DEP'T OF JUSTICE, PROSECUTORS HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984, at 7 (1987)) (emphasis omitted).

The Commission issues "commentary" to aid in the explanation of guidelines and policy statements. It is "authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson*, 113 S. Ct. at 1915.

28. The "heartland" range is the set of typical cases embodying the conduct that each guideline describes. U.S.S.G., *supra* note 7, Ch.1, Pt.A, intro. cmt. 4(b). The Commission intended the "heartland" range to cover the vast majority of situations that formerly would have provided courts with reason to exercise their departure discretion. *Id.* Using past sentencing practice data and anticipating future modifications based on newer data, the Commission hoped to refine the Guidelines to preserve the general inclusiveness of the "heartland" range. *Id.*

29. *Id.* The Commission expressed its belief that, "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." *Id.*

30. *Id.*; see also 28 U.S.C. § 994(d) (1994) (legislating that the Commission should consider the relevance of age, education, vocational skill, mental and emotional condition, physical condition, previous employment record, community ties, role in the offense, criminal history, and degree of dependence upon criminal activity for a livelihood when establishing categories of defendants for use in the Guidelines).

31. U.S.S.G., *supra* note 7, Ch.1, Pt.A, intro. cmt. 4(b) ("Such rare occurrences are precisely the type of events that the courts' departure powers were

To prevent courts from reconsidering those variables the Commission took into account when it formulated a sentencing range, the Guidelines restrict courts from using certain offender characteristics to justify a departure.³² The Guidelines state, for example, that characteristics such as age, community involvement, and physical condition are "not ordinarily relevant"³³ to the court's sentence determination. These limits, however, are subject to other sections of the Guidelines and conflicting federal statutes, all of which allow the court to consider any relevant characteristic of the offender for sentencing purposes.³⁴ Taken together, the guidelines, commentary, and policy statements of the Guidelines, as well as relevant statutes, provide inconsistent directions for the district court seeking to depart downward.³⁵

B. DOWNWARD DEPARTURES UNDER SECTIONS 5H1.4 AND 5K2.0 OF THE GUIDELINES

Although Congress established the Guidelines to eliminate

designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.”)

32. *Id.*, §§ 5H1.1-5H1.12, p.s.; see also *id.*, Ch.5, Pt.H, intro. cmt. (“The Commission has determined that certain factors are *not ordinarily relevant* to the determination of whether a sentence should be outside the applicable guideline range.”) (emphasis added). Included is the policy statement that, “Physical condition . . . is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” *Id.*, § 5H1.4, p.s.

33. *Id.*, §§ 5H1.1, 5H1.4, 5H1.6, p.s.

34. Guideline 1B1.4, for instance, directs that:

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.

Id., § 1B1.4.

Similarly, 18 U.S.C. § 3577 (1994) mandates:

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

35. Confusion also extends to judges seeking to sentence offenders to a longer term than the sentencing table directs. See, e.g., *United States v. Harris*, 70 F.3d 1001, 1003 (8th Cir. 1995) (reversing upward departure based on conduct from dismissed counts); *United States v. Big Medicine*, 73 F.3d 994, 997 (10th Cir. 1995) (vacating upward departure based on age of victim in sexual abuse); *United States v. George*, 56 F.3d 1078, 1085-87 (9th Cir.) (reversing upward departure based on offender's criminal history points), *cert. denied*, 116 S. Ct. 351 (1995).

the disparity in sentences among similarly situated offenders,³⁶ neither Congress nor the Commission foreclosed all judicial options for distinguishing among unusual circumstances. Sections 5H1.4 and 5K2.0 of the Guidelines provide a specific instance, and a more general directive, respectively, that allow a district court to consider certain exceptional, relevant circumstances.³⁷

1. Downward Departures Under Section 5H1.4 for
"Extraordinary Physical Impairment"

Section 5H1.4 (physical condition statement) of the Guidelines states that courts should not consider an offender's physical condition during sentencing.³⁸ This restriction is subject to the exception, however, that an "extraordinary physical impairment" may provide justification for a sentence below the delineated "heartland range."³⁹ The Commission provides as an example a seriously infirm defendant for whom home detention might be more economical and efficient than prison.⁴⁰

The district court is responsible for determining whether an offender has an "extraordinary physical impairment." Once

36. See S. REP. NO. 98-225, at 52-53 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3235-36 (noting Senate Report language expressing concern over disparity in federal sentences).

37. The effort to contain the courts' discretion extends to a limitation on the use of offender characteristics for upward departure without legitimate findings. See, e.g., *United States v. Smallwood*, 3 F.3d 1217, 1220 (9th Cir. 1993) (remanding case for resentencing where district court improperly considered offender's prior convictions for unrelated offenses); *United States v. Gerra*, 900 F.2d 1057, 1061-64 (7th Cir. 1990) (rejecting district court's sentence of 120 months imprisonment without adequate explanation, where guideline range was 41-51 months); cf. *United States v. Merritt*, 988 F.2d 1298, 1312 (2d Cir. 1993) (finding upward departure from 37 to 60 months reasonable where offender's conduct of concealing criminal proceeds went far beyond the "heartland" stage).

38. U.S.S.G., *supra* note 7, § 5H7.4, p.s. ("Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines . . .").

39. The pertinent part of the policy statement reads as follows:

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Id., § 5H1.4, p.s.

40. *Id.*

a district court finds that an impairment is "extraordinary," it has broad discretion whether to depart from the sentence range in that particular case.⁴¹ A higher court may only reverse the district court's factual finding of an extraordinary physical impairment if the lower court has committed a "clear error of law."⁴² Generally, appellate courts have scrutinized district courts' downward departures from the Guidelines by requiring them to explain clearly any extraordinary physical impairments⁴³ and by limiting their attempts to extend the definition of impairment.⁴⁴

Courts have found a variety of maladies to constitute an extraordinary physical impairment. One appellate court af-

41. *United States v. Morales*, 898 F.2d 99, 102 (9th Cir. 1990); *see also United States v. Pickett*, 941 F.2d 411, 417 (6th Cir. 1991) (noting "a court is never required to depart downward"); *United States v. Gregory*, 932 F.2d 1167, 1169 (6th Cir. 1991) (holding that district court's refusal to depart downward was not appealable); *United States v. Gant*, 902 F.2d 570, 573 (7th Cir. 1990) ("It would be anomalous to find that we have jurisdiction over the appeal of a defendant who actually benefited from a downward departure that he regards as being niggardly.").

42. *United States v. Martinez-Guerrero*, 987 F.2d 618, 621 (9th Cir. 1993). Judge Ferguson's concurring opinion in *Martinez-Guerrero* details a two-step analysis for granting downward departures under § 5H1.4. Under this analysis, the district court initially makes a factual finding about whether the offender's disabilities constitute an extraordinary physical impairment under § 5H1.4. If the court concludes the impairment is "extraordinary," it then determines whether the impairment warrants a departure. The court can sentence below the Guideline sentence range or even provide an alternative to imprisonment. *Id.* (Ferguson, J., concurring); *United States v. Saunders*, 743 F. Supp. 444, 446-48 (E.D. Va. 1990) (denying downward departure request on two separate grounds), *aff'd*, 943 F.2d 388 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1199 (1992); *see, e.g., United States v. Roe*, 976 F.2d 1216, 1218 (9th Cir. 1992) (overturning a factual finding that childhood abuse of the defendant was not "extraordinary" under § 5H1.3 of the Guidelines).

43. *See Martinez-Guerrero*, 987 F.2d at 620 (describing the two-step process for departure as follows: the district court should first make a factual finding whether the offender has an "extraordinary physical impairment" and then consider whether the impairment warrants a modified sentence) (citing *United States v. Carey*, 895 F.2d 318, 324 (7th Cir. 1990)).

44. *See, e.g., United States v. Goff*, 6 F.3d 363, 366 (6th Cir. 1993) (rejecting district court's sentence of a wheelchair-bound quadriplegic to less than the mandatory minimum sentence of ten years imprisonment); *United States v. Pozzy*, 902 F.2d 133, 139 (1st Cir.), *cert. denied*, 498 U.S. 943 (1990) (rejecting sentencing court's use of female offender's pregnancy status to justify downward sentence departure); *United States v. Carey*, 895 F.2d 318, 324 (7th Cir. 1990) (rejecting departure based on numerous operations for brain tumor without specific findings that offender "was elderly and infirm and that an alternative form of confinement would be equally efficient and less costly than incarceration").

firmed a departure where several minor physical ills combined to equal an extraordinary impairment.⁴⁵ Another appellate court affirmed a downward departure where impairments were likely to worsen over the course of a sentence.⁴⁶ In one unappealed departure case, a district court found that metastasized cancer was an extraordinary physical impairment warranting a departure from the Guideline range.⁴⁷ The offender in this case had moved for a departure on the ground that his cancer was "a serious, life-threatening illness."⁴⁸

Courts have also departed from the Guidelines based on "extraordinary physical impairment" where the convicted individual's physical condition might lead to an extraordinarily harmful experience.⁴⁹ In *United States v. McClean*,⁵⁰ for ex-

45. *United States v. Boy*, Nos. 93-30100 & 93-30133, 1994 WL 59781, at *2-3 (9th Cir. Feb. 25, 1994). The offender had a degenerative hip and knee condition, nonactive tuberculosis, and Hyperactive Adjustment Disorder. *Id.* at *2. The court upheld the departure despite the Presentence Report that "specifically indicated that [the offender's] medical problems could be addressed in prison." *Id.* at *3.

46. *United States v. Long*, 977 F.2d 1264, 1277-78 (8th Cir. 1992) (upholding downward departure where district court concluded that "the imposition of a term of imprisonment could be the equivalent of a death sentence for Mr. Long."); see also Susan Chandler, *Ailing Cosentino Gets Five Years' Probation*, CHI. SUN-TIMES, Sept. 23, 1993, at 3 (reporting that a federal district court accepted as an "extraordinary physical impairment" an offender's congestive heart failure and diabetes despite testimony by a prison official that the system had adequate resources to care for the offender).

47. *United States v. Velasquez*, 762 F. Supp. 39, 40 (E.D.N.Y. 1991).

48. *Id.*

49. *United States v. McClean*, 822 F. Supp. 961, 962 (E.D.N.Y. 1993). Courts have applied this consideration also where the physical appearance of a particular offender could lead to out-of-the-ordinary and unusually vicious treatment by other prisoners. For a frequently cited and critiqued example, see *United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990). In *Lara*, the court of appeals upheld a departure granted on the basis that the offender was bisexual, looked 16, and as such was "peculiarly vulnerable" to attack. *Id.* at 601. The sentencing court judge noted that adhering to the guideline range would be "nothing less than draconian," resulting in "a sentence which is unduly severe relative to most other defendants in this Court who do not have the vulnerability, the appearance, [and] the sexual orientation that this defendant presents." *Id.*; see also *United States v. Gonzalez*, 945 F.2d 525, 526-27 (2d Cir. 1991) (affirming departure based on extreme vulnerability to physical abuse arising from "a feminine cast of face").

The Commission challenged the *Lara* court decision, based on what is often referred to as the "physical vulnerability" departure, the following year. Specifically, the Commission substantially limited any future use of the departure by amending its guidelines to state explicitly that "physique" was among the physical characteristics "not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."

ample, the court found that the offender's crippled leg and poor health would leave him more vulnerable than the average prisoner to abuse from other inmates.⁵¹ The court thus reduced his sentence to account for this potentially harsh treatment.⁵² While the Bureau of Prisons has specialty medical centers for inmates, a court may still consider the Bureau's ability to accommodate an offender in determining whether an offender has an extraordinary impairment.⁵³

2. Downward Departure Under Section 5K2.0

Section 5K2.0 is the general departure provision permitting sentence departures in cases where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission."⁵⁴ This provision holds the court responsible for evaluating the unusualness of a circumstance and the degree of consideration

U.S.S.G., *supra* note 7, App. C, amend. 386. Before amendment, the guideline stated: "Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall." *U.S. Sentencing Guidelines Manual* § 5H1.4, policy statement (Nov. 1989). Both versions of the guidelines, however, allow that "an extraordinary physical impairment may be a reason" to impose a sentence outside the usual range. *Id.*; U.S.S.G., *supra* note 7, § 5H1.4, p.s.

50. 822 F. Supp. 961 (E.D.N.Y. 1993).

51. *Id.* at 962.

52. *Id.*

53. See *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993) ("The ability of the Bureau of Prisons to accommodate a disability is [one] factor which the district court may consider" in making a finding regarding an extraordinary physical impairment.) (citations omitted); see also *United States v. Long*, 977 F.2d 1264, 1278 (8th Cir. 1992) (suggesting that availability of appropriate facilities is a permissible factor in determining downward departures).

54. U.S.S.G., *supra* note 7, § 5K2.0, p.s. The policy statement takes its language from 18 U.S.C. § 3553(b):

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

18 U.S.C. § 3553(b) (1994). For a thorough judicial discussion of the § 5K2.0 departure, see *United States v. Merritt*, 988 F.2d 1298, 1305-09 (2d Cir.), *cert. denied*, 508 U.S. 961 (1993).

the Sentencing Commission gave it.⁵⁵ In reviewing mitigating circumstance departures, appellate courts should examine why a district court departed and then "consider how such aggravating circumstances are treated in the Manual in order to determine whether they were 'of a kind, or to a degree' adequately considered by the Commission."⁵⁶ A mitigating circumstance departure can complement a physical condition departure, under section 5H1.4, or be used alone as a court's justification for evaluating a particular characteristic of an offender.⁵⁷

Courts have found mitigating circumstances to support both upward and downward sentencing departures.⁵⁸ In *United States v. Velasquez*,⁵⁹ the district court ruled that the defendant's cancer was a mitigating circumstance not adequately considered by the Commission, and thus, that it could be a basis for a downward departure.⁶⁰ In a case with similar mitigating circumstances, an offender's life-threatening metastatic kidney cancer warranted a downward departure.⁶¹ The use of the mitigating circumstance departure suggests that courts are recognizing some offender circumstances that the Commission did not anticipate, or, alternately, did not consider "adequately" when it developed the Guidelines.⁶²

55. Unless the Commission explicitly commented on a characteristic or circumstance, there is no way for a court to be certain of the extent to which the Commission considered a given factor. See Freed, *supra* note 18, at 1733-37 (criticizing the Commission for its failure to define "adequate consideration").

56. *Merritt*, 988 F.2d at 1306 (quoting 18 U.S.C. § 3553(b) (1994)).

57. The departures were used together in *United States v. Velasquez*, 762 F. Supp. 39, 40 (E.D.N.Y. 1991), but are often used separately. See, e.g., *United States v. Martinez-Guerrero*, 987 F.2d 618, 619 (9th Cir. 1993) (moving for departure on grounds of "extraordinary physical impairment"); *United States v. Lara*, 905 F.2d 599, 602 (2d Cir. 1990) (moving for departure on grounds of mitigating circumstance).

58. See *supra* note 37 (discussing constraints on upward departures) and notes 45-49 and accompanying text (noting downward departure examples).

59. 762 F. Supp. 39 (E.D.N.Y. 1991).

60. *Id.* at 40.

61. *United States v. Basey*, No. 95-1348, 1995 WL 567356, at *1 (8th Cir. Sept. 12, 1995). The sentencing court reduced the defendant's Guidelines range penalty of 77 to 96 months imprisonment to 40 months imprisonment and three years probation. *Id.* The defendant unsuccessfully appealed this departure, arguing the district court should have departed to a sentence of probation. *Id.*

62. See *infra* notes 141-144 and accompanying text (identifying a failure to consider "adequately" the circumstance of HIV-positive offenders).

C. HIV INFECTION AND SENTENCING: THE JUDICIAL RESPONSE

1. The Scope of the HIV Crisis

The HIV and AIDS⁶³ crisis continues unabated in the United States; late in 1995, reported AIDS cases reached the 500,000 mark.⁶⁴ Issues associated with HIV infection and the development of AIDS have permeated the criminal justice system.⁶⁵ The prison system, in particular, has borne the burden of balancing additional health,⁶⁶ safety, and budgetary⁶⁷ con-

63. See *supra* note 2 (defining stages of HIV infection and AIDS, and outlining the Center for Disease Control classification system).

64. MORBIDITY & MORTALITY WKLY. REP., *supra* note 9, at 849.

65. A 1994 study combining statistics for local, state, and federal prisons found that full-blown AIDS among prisoners increased over 66% from October 1990 to March 1993. Randy Martin et al., *A Content Assessment and Comparative Analysis of Prison-Based AIDS Education Programs for Inmates*, 75 PRISON J. 5, 6 (1995). For another indication of HIV infection rates escalating at crisis levels among the prison population, compare *id.* at 5, citing a 1990 study setting the ratio of HIV infection among the general and prison populations at six to one, with Elizabeth Kantor, *AIDS and HIV Infection in Prisoners*, in AIDS KNOWLEDGE BASE, *supra* note 1, at 1.8-1, reporting that AIDS is 14 times more prevalent among state and federal prisoners than it is among the general population.

Thus far, the number of HIV-related appeals of sentences to the federal appeals courts does not reflect this disproportionate representation. Two explanations for the limited number of HIV-related appeals appear plausible. The first and most likely is that the federal courts come into contact with fewer HIV-infected offenders than do the state courts. Interview with Michael Tonry, Professor of Law, University of Minnesota, in Minneapolis, Minn. (Oct. 25, 1995). The types of crimes that are more likely to be committed by intravenous drug users, a high-risk factor for HIV transmission, are violations of state criminal law. *Id.* The high number of HIV-infected prisoners in New York, which has a significant population of intravenous drug users, supports this proposition. Kantor, *supra*, at 1.8-1.

The second possible explanation is that HIV-infected offenders are likely to be receiving downward departures in other ways, such as by substantial assistance departures or selective application of criminal counts by Assistant United States Attorneys. Tonry, *supra*; see also *supra* note 24 (discussing "substantial assistance" departures). The high number of departures in some circuits corroborate the supposition that the Guidelines are being evaded in some cases. In the Ninth Circuit's Arizona District, for instance, 36.0% of all sentences were issued with downward departures for a reason *other* than substantial assistance. COMM'N REP., *supra* note 15, at 85. When the substantial assistance departures are included, an additional 14.8% of sentences were downward departed. *Id.* At the other extreme, the Eastern District of Virginia (4th Cir.) granted downward departures in only 6.7% of sentences, with 2.8% of these being for reasons other than substantial assistance. *Id.* at 83.

66. In New York, New Jersey, Connecticut, Georgia, Massachusetts, and Florida, for example, AIDS-related deaths comprised about half or more of all deaths in 1993. See BRIEN & HARLOW, *supra* note 14, at 6.

cerns, while also trying to fulfill its mission of confining offenders in facilities that are "safe, humane, and appropriately secure."⁶⁸ The sixty-six percent increase in federal, state, and local inmates diagnosed with AIDS between 1990 and 1993⁶⁹ strongly suggests that the prison system will continue to struggle to accommodate HIV-infected prisoners and prisoners with AIDS.⁷⁰

The nature of the HIV virus complicates its use as a basis for downward sentencing departures. Because a person can remain in relatively good health for up to ten years after HIV infection,⁷¹ a downward departure based on the virus would

The interaction between persons infected with tuberculosis and persons infected with HIV, two groups overrepresented in prisons, may prove disastrous. See Faith Colangelo & Mariana Hogan, *Jails and Prisons—Reservoirs of TB Disease: Should Defendants with HIV Infection (Who Cannot Swim) Be Thrown into the Reservoir?*, 20 FORDHAM URB. L.J. 467, 467 (1993). The compromised immune systems of HIV-infected inmates leave them particularly vulnerable to tuberculosis outbreaks. *Id.* at 468 (citing Charles L. Daley, M.D. et al., *An Outbreak of Tuberculosis with Accelerated Progression Among Persons Infected with the Human Immunodeficiency Virus*, 326 NEW ENG. J. MED. 231, 231 (1992)); see also Jonathan M. Smith, *Spread of TB Poses Danger to Prisoners and Staff*, NAT'L PRISON PROJECT J., Spring 1995, at 2 (noting the difficulty of testing for tuberculosis where rates of HIV infection are high). See generally Lawrence O. Gostin, *The Resurgent Tuberculosis Epidemic in the Era of AIDS: Reflections on Public Health, Law, and Society*, 54 MD. L. REV. 1, 67-70 (1995) (discussing public health ramifications of interaction between tuberculosis and the HIV virus).

67. The District of Columbia Correction System estimates that it costs \$60,000 per year to care for an inmate with advanced HIV, about 2.5 times the cost of a healthy inmate. Sara Polonsky et al., *HIV Prevention in Prisons and Jails: Obstacles and Opportunities*, 109 PUB. HEALTH REP. 615, 621 (1994); see also Colangelo & Hogan, *supra* note 66, at 468 nn.9-13 and accompanying text (recognizing the staggering public health and economic consequences of treating an increasing number of prisoners for tuberculosis); Susan Lundstrom, Note, *Dying to Get Out: A Study on the Necessity, Importance, and Effectiveness of Prison Early Release Programs for Elderly Inmates Suffering from HIV Disease and Other Terminal-Centered Illnesses*, 9 BYU J. PUB. L. 155, 165 ("The American prison hospital system is collapsing under the pressure of both expanding prison population and rising health care costs." (quoting Jonathon Turley, *Why Prison Health Care Is a Crime*, CHI. TRIB., Mar. 19, 1991, at C19)).

68. Kathleen M. Hawk, *Federal Bureau of Prisons* (visited Aug. 30, 1996) <<http://gopher.usdoj.gov/bureaus/bop.html>>.

69. Martin, *supra* note 65, at 6; HAMMETT, *supra* note 10, at 15 (noting a 64% same-period increase for the general population).

70. See Kantor, *AIDS and HIV Infection in Prisoners*, in AIDS KNOWLEDGE BASE, *supra* note 1, at 1.8, 1.8-1 (noting higher rate of HIV infection in state and federal prisons).

71. See David Baltimore, *Lessons from People with Nonprogressive HIV Infection*, 332 NEW ENG. J. MED. 259, 259-60 (1995) (noting that "the absence

only be warranted if the person is in one of the two final stages of the disease, late symptomatic or advanced HIV. The late symptomatic stage of HIV infection, more commonly referred to as AIDS, is generally recognized when the CD4 lymphocyte cell count drops below 200 and other symptoms are present.⁷² "Advanced HIV" is the final stage of AIDS, when CD4 cell counts have dropped below fifty with accompanying opportunistic infections or cancers.⁷³ During the advanced stage of the virus, a person is likely to have neurological complications, often leading to loss of bowel and bladder control, confusion, and loss of ability to speak.⁷⁴

2. HIV Infection and AIDS in Sentencing

A number of recent cases have examined the relevance of HIV infection to sentencing. In *United States v. Thomas*,⁷⁵ the Sixth Circuit concluded that the Commission had considered HIV infection and determined it was not an ordinarily relevant characteristic for a downward departure.⁷⁶ That the Commission had already considered the physical condition of offenders, as evidenced by the "extraordinary physical impairment" distinction in § 5H1.4, served as the primary basis for the court's conclusion.⁷⁷

of any apparent progression of disease over a decade or more" following HIV infection is a "particularly intriguing" characteristic of AIDS).

72. See Paul A. Volberding, *Clinical Spectrum of HIV Disease*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 123, 126 (Vincent T. DeVita, Jr. et al. eds., 3d ed. 1992) (explaining that while HIV can infect and replicate in a wide variety of human cells, researchers have studied and have best understood HIV infection of lymphocytes expressing the cell surface antigen CD4).

73. *Id.*

74. See Hardy, *supra* note 12 (discussing AIDS and advanced HIV).

75. 49 F.3d 253, 260-61 (6th Cir. 1995).

76. *Id.* at 260. The Guideline language of "not ordinarily relevant" is different from the policy statements in the same chapter that specify certain offender characteristics are "not relevant." See U.S.S.G., *supra* note 7, §§ 5H1.10-5H1.12, p.s. (directing that race, sex, national origin, creed, religion, socio-economic status, and "lack of guidance as a youth," or similar circumstances indicating a disadvantaged upbringing, are all "not relevant" factors in sentencing). The distinction between "not relevant" and "not ordinarily relevant" has not been lost on courts seeking to depart from the Guidelines' ranges. See *United States v. Deigert*, 916 F.2d 916, 918-19 (4th Cir. 1990) (observing, in a case predating § 5H1.12, that although the Guidelines completely enjoin consideration of certain enumerated factors, a tragic and abusive upbringing may, if extraordinary, permit departure).

77. *Thomas*, 49 F.3d at 260-61; see *supra* text accompanying notes 39-40 for description of policy statement.

In support of this decision, the *Thomas* court cited *United States v. DePew*,⁷⁸ a 1990 district court decision holding that a diagnosis of AIDS does not by itself qualify a defendant for an extraordinary physical impairment departure.⁷⁹ In *DePew*, the district court stated unequivocally that AIDS was not an extraordinary physical impairment, analogizing AIDS to cancer and other terminal or life-threatening maladies.⁸⁰ "Except in extraordinary circumstances not present here," the *DePew* court declared, "terminally ill persons who commit serious crimes may not use their affliction to escape prison."⁸¹

Even in rulings more favorable to HIV-related downward departures, the level of discourse concerning HIV infection has been limited and inconclusive.⁸² In *United States v. Streat*,⁸³

78. 751 F. Supp. 1195, 1199-1200 (E.D. Va. 1990), *aff'd on other grounds*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991).

79. *Id.*; *United States v. Thomas*, 49 F.3d 253, 260-61 (6th Cir. 1995) ("Thomas would only be entitled to a departure if his HIV had progressed into advanced AIDS . . .").

80. *DePew*, 751 F. Supp. at 1190. The court based its decision, in part, on the availability of medical facilities in the Federal Bureau of Prisons. *Id.* *DePew*, at the time of sentencing, had tested positive for the HIV virus and was in need of treatment and medication for his condition. *Id.* at 1200. The court also relied on caselaw which, as the court found, supported the proposition that AIDS, without more, like cancer or other life-threatening illnesses, without more, is not a basis for departure, absent some showing of "extraordinary physical impairment." *Id.*

81. *Id.* at 1199. The court sentenced DePew to 400 months in prison. *Id.* at 1200.

82. The desirability of clarity on this issue stems from the Commission's congressional mandate to review appellate decisions and other apposite materials in order to ensure that a given topic receives adequate consideration. See 28 U.S.C. § 991 (1994) (establishing the purpose of the Commission). Congress directed that:

The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant [to its duties] The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful

28 U.S.C. § 994 (1994).

Defense attorneys are entitled to understand the potential for success in pursuing motions to depart downward based on HIV condition. District judges are entitled to act with confidence within the limits of their discretion. Avoiding adequate discussion on the appellate level may lead to postponed clarification by the Commission. To leave judges unsure of what they can do may result in alternate means of departing from the Guideline sentence

the appellate court directed the district court to evaluate the offender's physical condition for a possible departure.⁸⁴ The appellate court extricated itself from the debate, commenting that whether AIDS "warrants a downward departure need not be decided today."⁸⁵

In a similar response, the Eighth Circuit noted recently in *United States v. Rabins*⁸⁶ that "AIDS is a basis for a departure under [§] 5H1.4" when it has progressed to the stage of "extraordinary physical impairment."⁸⁷ The court did not define when AIDS is at the "extraordinary physical impairment" stage or provide guidance on how to make this determination.⁸⁸

II. A CRITIQUE OF CURRENT HIV JURISPRUDENCE AND THE GUIDELINE, STATUTORY, AND MEDICAL SUPPORT FOR CONSIDERING AIDS AND ADVANCED HIV DISEASE FOR DOWNWARD DEPARTURE

The Guidelines, along with medical projections about the life spans of persons with AIDS, support downward sentencing departures for an offender with AIDS or advanced HIV. The physical condition statement of the Guidelines permits departures for extraordinary physical impairments;⁸⁹ AIDS and advanced HIV fit within this language. The mitigating circumstance section of the Guidelines permits the court to consider

ranges. See *supra* note 65 (suggesting that the high number of substantial assistance departures indicates covert disagreement with the Guidelines).

83. 22 F.3d 109 (6th Cir. 1994) (per curiam).

84. *Id.* at 112 ("There is little authority specifically addressing the circumstances under which AIDS is a proper ground for a downward departure. Still, sections of the guidelines could justify a downward departure under certain circumstances.")

85. *Id.* at 113. While the court of appeals failed to provide any guidance on the question of AIDS-based departures, the district court found on remand that the offender's condition met the undefined "extraordinary physical impairment" standard. *United States v. Streat*, 893 F. Supp. 754, 756-57 (N.D. Ohio 1995).

86. *United States v. Rabins*, 63 F.3d 721 (8th Cir. 1995), *cert. denied*, *Johnson v. United States*, 116 S. Ct. 1031 (1996).

87. *Id.* at 728 (citing *United States v. Woody*, 55 F.3d 1257, 1275 (7th Cir.), *cert. denied*, 116 S. Ct. 234 (1995)). The court, responding to a district court clearly equivocating on the issue of HIV departure, merely reiterated the district court's suggestion that AIDS, depending on its severity, may warrant departure.

88. For a detailed dissenting appellate court examination of HIV infection, terminology, patient classification system, and suggestions for court policy, see *Rabins*, 63 F.3d at 732-743 (Wilson, J., dissenting).

89. U.S.S.G., *supra* note 7, § 5H1.4, p.s.

all relevant factors in sentencing; AIDS and advanced HIV are relevant to determining the length of an offender's sentence.⁹⁰ Moreover, related issues such as the cost of treating HIV-infected inmates,⁹¹ prison population health concerns,⁹² and the courts' roles in reviewing the Guidelines support increased district court discretion to consider departures based on AIDS and advanced HIV.

A. DEPARTURES BASED ON HIV INFECTION: INTER-CIRCUIT DISPARITIES

1. Rejecting HIV Infection and AIDS as Departure Bases

Two related cases present the primary arguments for rejecting HIV infection as a basis for downward departures. *United States v. DePew*⁹³ concludes that AIDS is not an extraordinary impairment for departure purposes.⁹⁴ While the *DePew* court's rejection of the departure motion in this case is appropriate,⁹⁵ the court's dicta goes too far by grouping AIDS and other terminal illnesses together and labeling them all as ineligible factors for downward departures in future cases.⁹⁶ This blanket conclusion not only disregards prior departure decisions,⁹⁷ but also gives short shrift to the Guidelines and statutory directives allowing courts to consider all relevant of-

90. See 18 U.S.C. § 3553(b) (1994) (directing the courts to follow the Guidelines unless they find an aggravating or mitigating circumstance not adequately considered in the Guidelines); U.S.S.G., *supra* note 7, § 5K2.0, p.s. (noting that unusual or unique circumstances will give rise to additional grounds for departure).

91. See Stephanie Mencimer, *D.C.'s New Death Row; AIDS is Devastating the District's Prisons and Busting its Budget*, WASH. POST, Jan. 31, 1993, at C1 (reporting a cost of \$60,000 per year in the Washington D.C. correctional system to care for each inmate with advanced HIV).

92. See *supra* note 66 (discussing interaction between HIV infection and tuberculosis).

93. 751 F. Supp. 1195, 1199 (E.D. Va. 1990), *aff'd on other grounds*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991).

94. *Id.* at 1199; see *supra* text accompanying note 81 (quoting the *DePew* court).

95. See *DePew*, 751 F. Supp. at 1196-97 (noting details of the defendant's plan to kidnap, murder, and sexually mutilate a young boy).

96. *Id.* at 1199.

97. See, e.g., *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991) (affirming departure where defendant lost lower part of both legs); *United States v. Little*, 736 F. Supp. 71, 71 (D.N.J.), *aff'd*, 919 F.2d 137 (3d Cir. 1990) (unpublished table opinion) (affirming departure based on chronic pulmonary disease).

fender characteristics in sentencing.⁹⁸

Additionally, the court's combining of AIDS and the various HIV stages with all other life-threatening diseases demonstrates the court's failure to examine and explore relevant distinctions for this relatively new disease.⁹⁹ Unlike cancer and most other terminal illnesses, HIV infection can spread to other prison inmates.¹⁰⁰ Unlike other illnesses in which the infected person is sick with only that illness, having AIDS or advanced HIV renders a person susceptible to a wide range of life-threatening diseases.¹⁰¹ The *DePew* court's failure to consider these distinctions constitutes an abdication from the important judicial function of providing direction and shape to the Guidelines, a function the Commission specifically requested.¹⁰²

In the second related case, the court in *United States v. Thomas*¹⁰³ supported the conclusions of the *DePew* court while engaging in its own analysis of the issue. In refusing to depart downward, the *Thomas* court held that the HIV-infected offender "would only be entitled to a departure if his HIV had progressed into advanced AIDS, and then only if his health was . . . an 'extraordinary physical impairment.'"¹⁰⁴ The court

98. The tension between more narrow sentencing ranges and the importance to the offender of contextualized sentences has led to conflict between the statutory language, the Guidelines, and their application to departures. Compare 18 U.S.C. § 3661 (1994) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence.") and *United States v. Milikowsky*, 65 F.3d 4, 6-8 (2d Cir. 1995) (affirming departure where imprisonment would impose an extraordinary hardship on offender's employees) with U.S.S.G., *supra* note 7, § 5H1.6, p.s. (stating that family responsibilities and community ties are not ordinarily relevant in departure consideration). Resolving this tension completely is difficult; Congress clearly intended the Commission to reduce the number of sentencing disparities, but Congress also wanted to preserve the court's discretion to consider all factors.

99. See *supra* notes 1-2 and accompanying text (discussing the unique characteristics of the AIDS virus).

100. HIV is currently spread in three principle ways: unprotected sex, sharing of needles from intravenous drug use, and by birth from mother to child. Brett-Smith & Friedland, *supra* note 2, at 24-28.

101. See, e.g., *id.*, at 35 (discussing extreme vulnerability of HIV-positive people to tuberculosis).

102. U.S.S.G., *supra* note 7, Ch.1, Pt.A, § 4(b), p.s. (discussing the hope for an evolving sentencing guideline system based on continuing study of court sentencing practices).

103. 49 F.3d 253 (6th Cir. 1995).

104. *Id.* at 261.

questionably asserted that the offender would be "entitled" to a downward departure if his condition were an extraordinary physical impairment.¹⁰⁵ The *Thomas* court failed to recognize, however, that a district court's departure decision is a discretionary one that is also based on the seriousness of the crime and the need to punish the offender.¹⁰⁶ In addition, the *Thomas* court made an unsupported assumption that because the Commission considered whether an offender's physical condition should be a factor in sentencing, it had considered possible HIV infection.¹⁰⁷

DePew and *Thomas* reflect the hurried analyses in which courts have engaged for HIV infection in sentencing. Because of the limited number of cases reaching the appellate level, subsequent courts have incorporated the holdings and dicta of *DePew* or *Thomas* in every recent case dealing with HIV and downward departures.¹⁰⁸ The use of these two cases as authority has led to a multiplier effect of decisions based on awkward holdings, further complicating future decisions of district courts considering HIV-related departures.

2. Qualified Consideration of HIV and AIDS as a Basis for Downward Departures

Even when appellate courts remand to the district courts to determine the propriety of downward departures for HIV-

105. *Id.*

106. *See supra* note 43 (discussing two-step process for departure consideration).

107. *Thomas*, 49 F.3d at 260.

108. A "multiplier effect" is evident in a string of cases emanating from the *DePew* holding in that every subsequent case relies on the *DePew* court as its basis. The Seventh Circuit, however, recently used the *Thomas* decision, and its reliance on *DePew*, to reach a slightly different result. *United States v. Woody*, 55 F.3d 1257, 1275 (7th Cir. 1995). The *Woody* court held: "An AIDS-afflicted individual is entitled to a downward departure under § 5H1.4 only when the disease has progressed to such an advanced state that it could be characterized as an "extraordinary physical impairment." *Id.* The courts have thus made explicit the position implicit in the original case. The *DePew* court ruled that AIDS is not per se an extraordinary physical impairment. 751 F. Supp. at 1199. *Thomas* agreed with *DePew* but acknowledged "advanced AIDS" and poor health that was an "extraordinary physical impairment" would qualify for departure. *Thomas*, 49 F.3d at 261. *Woody* borrowed from both *DePew* and *Thomas* and reached the least qualified conclusion: an HIV positive condition properly documented is grounds for downward departure. *Woody*, 55 F.3d at 1275.

infected offenders, the appellate courts often fail to provide direction. One appellate court chose to provide evidence for both sides of the departure debate, citing to *DePew* as a restriction against departure, while noting numerous examples of less serious illnesses that warranted departure.¹⁰⁹ It remanded the departure decision to the district court, refusing to comment on the proper use of AIDS or advanced HIV as a reason for downward departures.¹¹⁰

While such a directive may appear open-ended and flexible, it actually limits the consideration and application of HIV departures. By failing to define if and when HIV infection and AIDS become "extraordinary physical impairments," an appellate court leaves a district court to examine HIV infection and interpret the nature of the resulting impairment.¹¹¹ Some district courts have been reluctant to perform this task.¹¹² Moreover, by refusing to discuss HIV infection and AIDS, appellate courts fail to acknowledge that the Commission may not have adequately considered HIV infection and AIDS during the development of the Guidelines.¹¹³ Because failure to consider a factor adequately is a basis for a possible mitigating circumstance departure, this omission by appellate courts is problematic.¹¹⁴

The result in *United States v. Rabins*¹¹⁵ produced a different uncertainty for the sentencing court. After an Iowa district court explicitly requested clarification about whether the Guidelines allow departure for HIV infection, the Eighth Cir-

109. *United States v. Streat*, 22 F.3d 109, 112 (6th Cir. 1994) (per curiam).

110. *Id.* at 113.

111. See *supra* notes 83-85 and accompanying text (discussing the *Streat* court's relinquishment of the issue of AIDS and downward departure to the lower court's discretion).

112. See *United States v. Rabins*, 63 F.3d 721, 733 (8th Cir. 1995) (Wilson, J., dissenting) ("Judge Longstaff stated that he would 'be delighted to have some more specific guidance from the Eighth Circuit' on this issue . . ."), *cert. denied*, *Johnson v. United States*, 116 S. Ct. 1031 (1996).

113. The total number of AIDS cases reported during the formation of the Guidelines, while significant, pales in comparison to current cumulative totals. Of the 501,310 cases of AIDS reported in the United States and its territories by October 31, 1995, 62% had died. MORBIDITY & MORTALITY WKLY. REP., *supra* note 9, at 849.

114. See U.S.S.G., *supra* note 7, § 5K2.0, p.s. (discussing the power of courts to impose sentences outside the range established by the Commission); *supra* note 109 (noting the request for guidance on the issue of HIV and downward departures).

115. 63 F.3d 721 (8th Cir. 1995).

cuit Court of Appeals responded by reiterating that AIDS is a basis for downward departure when it reaches the extraordinary physical impairment stage.¹¹⁶ The appellate court affirmed the lower court's rejection of the departure request without further examination, however, despite the lower court's uncertainty over whether it had the authority to depart.¹¹⁷ The district court's confusion and the failure of the appellate court to confront the confusion directly reflect the lack of consensus surrounding HIV-related departures, as well as the inconclusive interpretation of "extraordinary impairment."¹¹⁸

116. *Id.* at 728.

117. *Id.* ("We will not disturb the Court's conclusion unless it is clearly erroneous.") (citation omitted).

118. Traditional canons of interpretation direct a court to interpret a legislative directive by its ordinary meaning where the text of a statute is clear and there are not conflicting or outrageous results. *See United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1603 (1994) ("When interpreting a statute, we look first and foremost to its text.") (citing *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992)); *FDIC v. Meyer*, 114 S. Ct. 996, 1001 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.") (citing *Smith v. United States*, 113 S. Ct. 2050, 2054 (1993)).

When the text leads to conflicts, courts can turn to the lesser canons, including legislative history, legislative intent, and reasonableness. *See Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 508-09 (1989) ("Concluding that the text is ambiguous . . . we then seek guidance from legislative history and from the Rules' overall structure."); *see also Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the legislature") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). The former method encourages "bright lines" such as the *DePew* court made. *United States v. DePew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990), *aff'd on other grounds*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). The latter method permits a broader application of discretion and is better suited to the still evolving case law surrounding HIV infection in sentencing. *See United States v. Schein*, 31 F.3d 135, 138 (3d Cir. 1994) (noting downward departure may be appropriate for an HIV-infected offender, but remanding for further findings on the physical condition of the particular offender); *United States v. Streat*, 22 F.3d 109, 112 (6th Cir. 1994) (*per curiam*) (authorizing the district court to use discretion in determining whether HIV or AIDS warrants a downward departure).

B. SECTION 5H1.4 AND "EXTRAORDINARY PHYSICAL IMPAIRMENT": THE RELEVANCE OF AIDS AND ADVANCED HIV CONDITION TO DOWNWARD DEPARTURES

Courts should consider departing below the Guidelines range for an offender with AIDS or an advanced HIV designation because the advanced stages of HIV will produce an "extraordinary physical impairment." Both the late symptomatic stage and the advanced stage of HIV involve physical debilitation sufficient to qualify as "extraordinary physical impairment."¹¹⁹ Both of these HIV stages significantly impair an affected person's health, are precursors to certain death, and are recognized by a widely accepted classification system—the CD4 count in combination with particular symptoms.¹²⁰ Thus, defining what constitutes extraordinary physical impairment at the latter two stages of HIV is a workable standard for lower courts to follow.

1. Extraordinary Impairment of AIDS and Advanced HIV Offenders

The characteristics of an offender with AIDS or advanced HIV are as serious or more serious than other impairments which courts have recognized as warranting downward departures. The late symptomatic stage is consistent with progressive HIV infection, a worsening condition, and an approximate survival time of ten years.¹²¹ The final stage of AIDS, advanced HIV,¹²² leaves an offender exceptionally susceptible to oppor-

119. See *supra* note 2 (discussing HIV classification system and the current debate over terminology and disease stages).

120. See *supra* note 2 (describing the Center for Disease Control's HIV classification system).

121. A recent supplement of AIDS AND THE LAW cautions on this point, reporting:

Currently, the average time period from infection with HIV to death is estimated to be 10 years. Most persons with HIV show at least some clinical or laboratory evidence of immunodeficiency within that time period. Generalizations on this point can be meaningless when applied to individual cases, however, given that many persons are long-term survivors who have lived with HIV infection for well over a decade without any evidence of immunodeficiency.

DAVID W. WEBBER, AIDS AND THE LAW 4 (2d ed. Supp. 2 1995).

122. See Volberding, *supra* note 72, at 133 (describing the advanced HIV designation as "used for those patients with an increasingly significant risk of mortality, which separate studies have seen when CD4+ cell counts drop below 50 cells per millimeter cubed."); see also Hardy, *supra* note 12 (noting that

tunistic infections such as Kaposi's sarcoma, HIV-related dementia, and tuberculosis.¹²³ This progressive physical debilitation¹²⁴ is more likely to occur in a prison system increasingly challenged to provide adequate health care to its inmates.¹²⁵

AIDS and advanced HIV most closely resemble a progressing cancer that may subside at times, yet remains terminal and unstoppable. Like the metastasized cancer some courts have regarded as an extraordinary physical impairment,¹²⁶ advanced HIV is debilitating, requires significant medical attention, and inevitably leads to death. Without the option to downward depart in appropriate cases, the Guidelines' sentence range can mandate terms of imprisonment equivalent to "death sentences" and treat offenders with AIDS and advanced HIV differently than offenders with other maladies.¹²⁷

2. Guideline Support for AIDS and Advanced HIV Offenders as Seriously Infirm

The physical condition statement of the Guidelines provides that an extraordinary impairment departure may be considered for a "seriously infirm defendant" for whom home detention is more appropriate because of cost and efficiency concerns.¹²⁸ AIDS and advanced HIV can reduce an offender to such a seriously infirm state that imprisonment becomes too

when the cell count falls below 50, "the trouble really starts. This is the major alarm point, by which time an HIV-positive person must begin taking prophylactic treatments with a number of antiviral and antibiotic drugs to prevent the almost certain development of a host of opportunistic diseases.")

123. Brett-Smith & Friedland, *supra* note 2, at 36-38. Kaposi's sarcoma is a blood vessel tumor, while HIV-related dementia resembles Alzheimer's disease in its ruthlessness.

124. See *supra* text accompanying notes 121-123 (explaining the characteristics of persons with deteriorating AIDS and advanced HIV).

125. See generally Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars*, 47 U. MIAMI L. REV. 291, 299-301 (discussing increasing pressures on prison medical systems because of the confluence of HIV infection and newer strains of tuberculosis).

126. See *United States v. Velasquez*, 762 F. Supp. 39, 40 (E.D.N.Y. 1991).

127. Of course, an ill offender can be sentenced to such a "death sentence" even with the use of a downward departure. The opportunity to depart, however, is the option this Note suggests is best left to the sentencing court.

128. See *supra* notes 39-40 and accompanying text (providing description of policy statement). A potential implication of a court basing its sentencing on cost and efficiency concerns is to limit departure power to medical cases in which treatment is extremely costly. Drawing this line is dangerous, as it neglects the other purposes of sentencing Congress directed the courts to consider. See *supra* note 24 (listing the four purposes of sentencing found in 18 U.S.C. § 3553(a)(2)).

costly and inefficient to be a viable option.¹²⁹ While the Bureau of Prisons has a federal medical center for inmates, the high cost of caring for a prisoner in the advanced stages of HIV infection¹³⁰ and the questionable efficiency of caring for dying inmates warrant the courts' attention to alternatives to full-term sentencing.

The Federal Bureau of Prison's ability to accommodate a prospective inmate has been used as one factor in determining whether an offender has an extraordinary physical impairment warranting downward departure.¹³¹ In *United States v. Fisher*,¹³² for example, the appellate court remanded a case to the district court for proper consideration of the costs of imprisoning a paralyzed offender when determining whether the defendant's disabilities constituted an extraordinary physical impairment.¹³³ The cost of imprisoning offenders with AIDS and advanced HIV is significantly higher than imprisoning a paralyzed offender, by even conservative estimates, because of the expensive drug therapy many of these inmates require.¹³⁴ Consistency in sentencing practice dictates that courts be afforded the opportunity to consider sentence departures or modified sentencing for AIDS and advanced HIV offenders.¹³⁵

129. See *supra* note 15 (discussing the congressional motivation for sentence reform).

130. See Polonsky, *supra* note 67, at 621 (noting cost to care for advanced HIV-infected prisoner in D.C. corrections system).

131. *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993). The court noted, "the proper inquiry under section 5H1.4 calls for a comparison between the efficiency and cost of a full term of incarceration, as opposed to a lesser or alternative sentence, in achieving deterrence, incapacitation, just punishment, and rehabilitation." *Id.* at 621-22 (Ferguson, J., concurring). The Fourth Circuit has upheld a departure from incarceration so that the offender could continue to receive specialized medical treatment. *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991). The extraordinary impairment in this case was the offender's loss of both legs below the knee in the Korean War. *Id.* The appellate court emphasized that, "[c]onsideration of such an extraordinary medical problem in deciding to impose a sentence other than imprisonment is specifically authorized by the Guidelines." *Id.*

132. 55 F.3d 481 (10th Cir. 1995).

133. *Id.* at 485; see also Polonsky, *supra* note 67, at 621 (discussing cost of caring for HIV-infected inmates in the District of Columbia).

134. See Lundstrom, *supra* note 67, at 178 (noting estimates of the cost of caring for prison inmates with AIDS and advanced HIV).

135. Certainly cases exist in which downward departures would be completely inappropriate no matter how extensive an offender's HIV impairment was. While the court in *DePew* can be criticized for its blanket assertion that AIDS is not ever an extraordinary physical impairment, the decision to not

3. Drawing an Appropriate Line for HIV-Related Departures

Because the time between initial HIV infection, deterioration, AIDS designation, and advanced HIV can vary significantly, mere HIV infection without physical deterioration should not be a basis for downward departure. HIV infection alone, or even low cell counts alone, do not mean debilitation is imminent.¹³⁶ To the contrary, about five percent of HIV infected persons have a nonprogressive strain of HIV that allows them to remain healthy for significant periods of time.¹³⁷ People with these nonprogressive infections have been infected for up to fifteen years, yet have retained healthy immune responses to their infections.¹³⁸

Regarding infection alone as an extraordinary physical impairment means an HIV-infected offender could receive an abbreviated sentence, serve the sentence, and exit the correctional facility still in relatively good health. This would defeat the purpose of the departure: to alleviate extraordinary hardship on the offender as well as on the Bureau of Prisons. The widespread use of departures for HIV-infected offenders without manifestations of a more advanced phase of the disease could conceivably create a separate sentencing standard for infected offenders, leading to a subversion of Congress's goal of uniformity in sentencing.¹³⁹

depart would have been appropriate even if the court believed it had the discretion to depart. The court convicted the offender in *DePew* of conspiring to kidnap and sexually torture a young boy with the hope of video recording and marketing the acts. *United States v. DePew*, 751 F. Supp. 1195, 1196 (E.D. Va. 1990), *aff'd on other grounds*, 932 F.2d 324 (4th Cir.), *cert. denied*, 502 U.S. 873 (1991). Providing clear directives to a court that confirms its discretion to examine HIV infection is distinct from any suggestion that a court must depart for a particular circumstance. The district court remains firmly in control of applying its discretion to the physical impairment, the crime committed, and the danger of the offender.

136. Interview with James Rothenberger, M.P.H., University of Minnesota School of Public Health, in Minneapolis, Minn. (Dec. 20, 1995).

137. See Baltimore, *supra* note 71, at 259-60 (discussing ability of a subset of the population to resist development of AIDS after infection with HIV).

138. *Id.*; see also Susan P. Buchbinder et al., *Long-term HIV-1 Infection Without Immunologic Progression*, 8 AIDS 1123, 1123-28 (1994) (reporting results of a study examining a subgroup of men infected with HIV for 10-15 years without progression of the disease).

139. See *supra* note 15 (discussing original purposes behind Guidelines).

C. THE MITIGATING CIRCUMSTANCE DEPARTURE: SUPPORT FOR COURTS' DISCRETION TO DEPART IN CASES OF AIDS AND ADVANCED HIV

Courts have discretion under policy statement 5K2.0 to depart from the sentence range if they find that the nature of the crime or offender constitutes a mitigating circumstance that the Commission did not adequately consider in formulating the Guidelines.¹⁴⁰ While the Guidelines do account for physical condition generally, the recent time period in which HIV infection developed, the nature of the disease, and its differences from other illnesses the Commission probably examined, suggest it is unlikely the Commission "adequately considered" HIV infection. Accordingly, a district court that addresses the Commission's silence on HIV infection and considers the purposes of sentencing may choose to downward depart based on AIDS or advanced HIV.

1. The Inadequacy of the Commission's Consideration of HIV Infection

While courts have reached different conclusions as to whether the Commission considered HIV infection when it deliberated offender characteristics in setting the Guidelines' ranges,¹⁴¹ no evidence exists suggesting that the Commission did; certainly no evidence exists as to whether the Commission considered HIV status "adequately."¹⁴²

To consider adequately HIV infection, the Commission would have needed to consider thoroughly HIV during the de-

140. U.S.S.G., *supra* note 7, § 5K2.0, p.s. For a recent overview of the debate regarding "adequate consideration" and what is an atypical case, see *United States v. Anderson*, 82 F.3d 436, 438-42 (D.C. Cir. 1996).

141. See *United States v. Thomas*, 49 F.3d 253, 260 (6th Cir. 1995) ("The key issue is whether the Sentencing Commission adequately considered the impact, proportionately speaking, of the sentencing guidelines on persons who are HIV positive [T]he guidelines did consider whether the physical condition of a defendant should be a factor in sentencing"); *United States v. Rabins*, 63 F.3d 721, 735 (8th Cir. 1995) (Wilson, J., dissenting) ("It is beyond dispute that the Commission has not taken into consideration the issue of HIV"), *cert. denied*, *Johnson v. United States*, 116 S. Ct. 1031 (1996).

142. The federal statute provides, "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b) (1994). The Second Circuit has fittingly noted, "Extraordinary circumstances . . . are by their nature not capable of adequate consideration. They therefore may constitute proper grounds for departure." *United States v. Johnson*, 964 F.2d 124, 128 (2d Cir. 1992).

velopment of the Guidelines. With the crisis period of HIV just having emerged in the mid-1980s, it is unlikely that HIV-related cases would have worked their way through the appellate system in a manner that would have produced significant statistics for the Commission to consider.¹⁴³

Even if the Commission had been aware of this disease making its way through certain populations, the Commission probably did not foresee the widespread emergence of the disease among convicted offenders.¹⁴⁴ Further, the wildly varied stages of this disease do not support interpreting the Commission's silence as a recommendation that HIV infection is always ordinary and of no particular relevance. A court's conclusion that the Commission "adequately considered" HIV infection is therefore unsupported by the available evidence.

2. Appellate Findings of Mitigating Circumstances

The same rationale that appellate courts have used to justify mitigating circumstances for other diseases can potentially apply to AIDS and advanced HIV infection. Like a cancer in its advanced stages,¹⁴⁵ a medical diagnosis of AIDS with a deteriorating physical condition is life threatening. Both conditions can be such a guarantee of physical and mental debilitation as to warrant the consideration of downward departure. Admitting such conditions as atypical cases need not destroy the "heartland" of cases that the relevant guideline range represents. To the contrary, it is in keeping with the statutory directive to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing.¹⁴⁶

143. Some of the earliest federal cases mentioning HIV infection or AIDS are from 1985. *See, e.g.*, *Georgia v. Fleck & Assocs.*, 622 F. Supp. 256, 257 (N.D. Ga. 1985) (dealing with State's attempt to close gay club); *Baker v. Wade*, 106 F.R.D. 526, 528 (N.D. Tex. 1985) (discussing AIDS in reference to suit challenging state ban on consensual sodomy between homosexuals).

144. *See First 500,00 Cases, supra* note 9, at 851 (noting that 50,000 AIDS cases in the United States were reported from 1981 to 1987, while more than 245,000 were reported from 1993 to October 1995).

145. *See supra* text accompanying notes 59-61 (discussing *United States v. Velasquez*, 762 F. Supp. 39 (E.D.N.Y. 1991) and *United States v. Basey*, No. 95-1348, 1995 WL 567356 (8th Cir. Sept. 12, 1995)).

146. 18 U.S.C. § 3553(a) (1994); *see also supra* note 24 (noting the four purposes of sentencing, found in 18 U.S.C. § 3553(a)(2)(A-D), that courts should consider in determining the sufficiency of a sentence); *United States v. Martinez-Guerrero*, 987 F.2d 618, 621 (9th Cir. 1993) (arguing relevant goal in sentencing offender is not to sentence to a full guideline range sentence, but to follow the statute, which sets forth "deterrence, incapacitation, just pun-

III. THE COURTS AND THE COMMISSION: A PROPOSAL FOR PARTNERSHIP IN GUIDELINE ADMINISTRATION

A. RESPONDING FULLY TO DEPARTURE MOTIONS BASED ON HIV INFECTION: THE ROLE OF THE DISTRICT AND APPELLATE COURTS

The courts' assessments of the extent to which the Commission considered unlisted offender characteristics are an integral part of the continued development of the Guidelines.¹⁴⁷ The complexity of a new sentencing system and the importance of understanding the practical effects of the Commission's effort require active feedback not only from academics, but also from courts influenced by the Guidelines. To resolve whether the acceptance of AIDS or advanced HIV is an extraordinary physical impairment or a mitigating circumstance that creates an open-ended rationale for departures, the district and appellate courts must increase discussion about the disease. District courts that apply Guideline sections 5H1.4 and 5K2.0 and discuss HIV infection as a basis for downward departures provide the foundation for a more definite confirmation or rejection of the practice by appellate courts.

Appellate courts, although limited in their scope of review, should emphasize that HIV infection at the stage of AIDS and advanced HIV can qualify as an extraordinary physical impairment and that district courts can consider them as bases for downward departures. This reserves, though does not mandate, the power of district courts to depart from the Guideline range if appropriate. Presently, the reluctance to speak clearly on the HIV departure issue¹⁴⁸ raised in the lower courts preserves the discretion of the district courts to make inquiries as thorough or as limited as they believe warranted. This complete deference to the district courts' discretion leads to potential differences in sentences for similarly situated offenders. By recognizing that HIV infection in its advanced stages is an extraordinary physical impairment, or that the Commission did not consider it in developing the Guidelines,

ishment, and rehabilitation" as goals) (citation omitted).

147. See U.S.S.G., *supra* note 7, Ch.1, Pt.A, § 4(b), p.s. (discussing the Commission's intention that courts consider unlisted factors where relevant in unusual cases and noting the sentencing guideline refinement that will occur with monitoring of the uses of such factors).

148. See text accompanying notes 111-118 (discussing courts' commentary on the HIV departure issue).

the appellate courts will produce a clearer rule for the lower courts and a clearer issue for the Commission to consider.¹⁴⁹

B. PROVIDING RESPONSIVE DIRECTION: THE ROLE OF THE COMMISSION

The Commission is ultimately responsible for the successful application of the Guidelines.¹⁵⁰ The Commission recognizes that the regular review mandated by Congress¹⁵¹ is integral to the evolutionary process of the Guidelines.¹⁵² While courts originally had hoped that the Commission's revisions would reflect the nuances of their sentencing practices,¹⁵³ the Commission's response has been limited at best and hostile in some cases.¹⁵⁴ The future of the Guidelines in those circuits

149. See *United States v. Rivera*, 994 F.2d 942, 946-49 (1st Cir. 1993) (summarizing the statutory and guideline support for a sentencing court's departure decision). The *Rivera* court's excellent review notes:

[T]he very theory of the Guidelines system is that when courts, drawing upon experience and informed judgment in such cases, decide to depart, they will explain their departures. The courts of appeals, and the Sentencing Commission, will examine, and learn from, those reasons. And, the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves. That is the theory of partnership that the Guidelines embody.

Id. at 949-50.

150. See *supra* note 16 (noting the prominent role of the Commission in the creation of the Guidelines).

151. See *supra* note 82 (providing statutory language that requires updates in the Guidelines).

152. The Commission explained the limited number of offender characteristics it commented on, writing:

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

U.S.S.G., *supra* note 7, Ch.1, Pt.A, § 4(b), p.s.; see also U.S.S.G., *supra* note 7, App. C. (listing 1988-1993 amendments).

153. See, e.g., *United States v. Rodriguez*, 724 F. Supp. 1118, 1122-23 (S.D.N.Y. 1989) ("The Commission has announced that it will revise the Guidelines in the future based upon its study of departures To guide future revision of the Guidelines, sentencing judges have an obligation to create a record for the Commission showing where departure has been found appropriate.").

154. See *supra* note 49 (discussing the departure in *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990), that the Commission responded to by barring the future consideration of "physique" as ordinarily relevant).

where sentence range evasion is widespread¹⁵⁵ is dependent upon the Commission regaining the authority to establish binding sentence ranges. Clarifying the status of HIV infection in the consideration of sentence departure is one way to reinforce the uniformity the Guidelines claim to represent.¹⁵⁶

The Commission should therefore amend the physical conditions statement to present AIDS and advanced HIV infection as additional examples of an extraordinary physical impairment that could be grounds for downward sentencing departures. The current disagreement among circuits,¹⁵⁷ as well as the reluctance of some appellate courts to provide clear guidance on the issue of HIV infection,¹⁵⁸ is a clarion call for the Commission to continue the evolution of the Guidelines that began a decade ago. Only by the Commission's issuance of evidence of review can a lower court confidently conclude the Commission "adequately considered" HIV infection. Anything short of clarification will not curtail disparate sentences for similarly situated offenders. Such inter-circuit disparity is what the Sentencing Reform Act sought to minimize.¹⁵⁹

CONCLUSION

The Sentencing Guidelines, while addressing many of the issues surrounding disparities in sentencing, have not resulted in the uniform application of downward departures for

155. Approximately 30% of sentenced cases in each of the First, Third, Eighth, and Ninth Circuits result in a downward departure. COMM'N REP., *supra* note 15, at 83-85.

156. One commentator provided an answer to the argument that the Commission cannot micro-manage administration of the Guidelines:

If the Senate Judiciary Committee, with a host of legislative topics on its agenda, could provide a volume of well-considered reasons to explain its guidance to the Commission, surely the Commission, charged with the duty to "establish sentencing policies and practices for the federal justice system that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," could do at least as well in its guidance.

Freed, *supra* note 18, at 1736.

157. See *supra* notes 5, 11, 12 (describing various conclusions of circuit courts on the issue of HIV and departures). See generally Stacey M. Studnicki, *Individualized Sentencing: Federal Sentencing Departures Based Upon Physical Condition*, 1994 DET. C.L. REV. 1215, 1224 ("[T]he Second and Eighth Circuits have issued a majority of the decisions granting or upholding departures based upon physical condition.") (footnote omitted).

158. See *supra* text accompanying notes 109-118 (discussing limited review by some appellate courts).

159. See *supra* note 15 (noting the goals of the Sentencing Reform Act).

offenders with AIDS or advanced HIV. Significantly, federal appellate courts have interpreted the Commission's downward departure policy differently, or avoided conclusive rulings altogether. The result is a patchwork of interpretations subverting the goal of consistency in sentencing policy and barely examining HIV infection and AIDS. To resolve this ambiguity and lack of direction, the Sentencing Commission should amend the Guidelines to clarify that AIDS accompanied by physical deterioration and advanced HIV is an "extraordinary physical impairment" warranting consideration for downward sentencing departure.