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REVIEWING DEPARTURES

REVIEWING DEPARTURES: THE FIRST CIRCUIT'S NEW RIVERA RULE

Aaron J. Rappaport*

Of the roughly 2000 guideline opinions issued each year, only a few deserve to be called "foundational" decisions, those that affect the core structure and operation of the guideline system. The First Circuit's recent opinion in *United States v. Rivera*, 994 F.2d 942 (1st Cir. 1993)—which relaxes the court's standard for reviewing departures—is one such case. By requiring greater deference to the district court in departure decisions, *Rivera* expands the degree of "flex in the joints" of the guideline system. And, it does so with such force that the opinion seems likely to leave a lasting mark on the evolving jurisprudence of departure review.

INCREASED DEFERENCE TO THE DISTRICT COURT

The First Circuit initially set out its standard for reviewing departure decisions in *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir.), cert. denied, 110 S.Ct. 177 (1989). There, the court ruled that a sentencing judge's rationale for departing from the guidelines was a "question of law," and hence subject to "essentially plenary" review. Consequently, a trial court's ruling that a factor was "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission" enjoyed little, if any, deference. Over the following four years, at least twenty-five First Circuit opinions have followed the strict *Diaz-Villafane* test.

With *Rivera*, the First Circuit changed course. Writing for a unanimous panel, Chief Judge Breyer criticized the impression left by *Diaz-Villafane* that its standard "provides no 'leeway' for the district court." The court declared, "[w]e now consider it necessary to elaborate our meaning and to modify, somewhat, our application of *Diaz-Villafane* in later cases."

Departure decisions, the court held, should be reviewed under a standard that takes account of the "comparative institutional competence" of the appellate and district courts. Plenary review, for example, should be applied only where the choice of a departure rationale involves "quintessentially legal" questions, such as where the district court relied on a sentencing factor prohibited by the guidelines, or where the court departed based on a "discouraged" factor without offering an explanation for its decision.

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In contrast, a more deferential standard of review is appropriate for decisions that call for a familiarity with the factual elements of a given case. This category includes some of the most common types of departure rationales, such as those based on a finding that a given case is "unusual" or "out of the ordinary." These departures—which might be called "outside the heartland" departures—require a court to distinguish a given case from the "heartland" of ordinary ones. The *Rivera* court observed that:

A district court may well have a special competence in making this kind of determination, because it may have a better "feel" for the unique circumstances of the particular case before it. A district court is also likely to have seen more ordinary Guideline cases, for appellate courts hear only the relatively few cases that counsel believe present a colorable appeal.

Given these institutional advantages, the court concluded that "outside the heartland" departures generally deserve "respect" from the reviewing court.

A HYBRID CATEGORY

While the distinction between "quintessentially legal" and fact-based rationales is compelling, certain departures do not fit comfortably within either category. In these cases, legal analysis may serve only to narrow the range of permissible departure rationales, without altogether eliminating a district court's discretion to make a departure. The *Rivera* decision, itself, offers an illustration of this kind of hybrid case.

One of the *Rivera* defendants—Robert Adamo—had been convicted of embezzling money from a union fund. At sentencing, the district court departed downward from a minimum guideline sentence of 15 months in prison, imposing a term of probation instead. The court explained that a non-incarcerative sentence would enable the defendant to keep his job and pay restitution to the fund.

The *Rivera* court remanded, observing that a discount for a defendant who can provide restitution would favor white-collar offenders. Such a result, the court said, would violate the Commission's intent to equalize sentences between white- and blue-collar defendants. Consequently, ruling as a matter of law, the court held that restitution was a "discouraged" departure rationale: only extraordinary restitution claims would fall "outside the embezzlement guideline's 'heartland.'" Significantly, the ruling left the district court with a fair degree of discretion to describe what kind of circumstances would represent an "extraordinary" claim. Any such description, the *Rivera* court said, would be treated with "respect."

The First Circuit's holding here is carefully drawn to balance the legal and fact-based elements of the departure decision. While the court's legal analysis

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narrows the range of permissible departure rationales (to extraordinary claims of restitution), it still leaves the trial court with a significant degree of discretion (to identify which claims are extraordinary). This balanced approach highlights the danger of making sharp distinctions between legal and fact-based departure rationales. And it underscores the need for a tailored analysis of a district court's grounds for departure.

One way to insure that the appellate courts apply a suitably flexible standard of review would be to adopt the "reasonableness" standard followed in the Second Circuit. See, e.g., *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992). The Sentencing Reform Act indicates that this standard is an appropriate test for reviewing departure decisions. 18 U.S.C. §3742(e)(3) and (f)(2). And, "reasonableness" is sufficiently malleable to accommodate the range of departure rationales that come before the court.

A reasonableness standard would be fully compatible with the core holding of the *Rivera* decision. For "outside the heartland" departures that rest on a sentencing judge's experience and judgment, reasonableness suggests a significant degree of deference. In contrast, for "quintessentially legal" questions falling within the special province of the appellate courts, reasonableness calls for plenary review (since legal errors are *per se* unreasonable). Finally, for mixed questions involving both textual analysis and judicial experience, a reasonableness standard authorizes a range of departure rationales, limited only by the constraints established by an appellate court's legal rulings.

BROAD SIGNIFICANCE

Although the First Circuit characterized its decision as an "elaboration and modification," *Rivera* represents a major advance over *Diaz-Villafane*. Not

only does the *Rivera* decision show a greater sensitivity to the relative institutional strengths of the trial and appellate courts, but it remains more faithful to the specific statutory directives and general sentencing philosophy underlying the guideline system.¹ Given the significance of the opinion, the *Rivera* court may have avoided the necessity of convening an en banc panel only by employing a practice seldom used in the First Circuit. The court circulated a final draft of the opinion to all active judges on the circuit to obtain their approval prior to its release.

Beyond its effect on the First Circuit, the *Rivera* decision likely will prove influential throughout the federal judiciary. The opinion's author, Chief Judge Stephen Breyer, is one of the architects of the sentencing guidelines; the case marks his first comprehensive analysis of the departure standard. Moreover, the *Diaz-Villafane* test, which *Rivera* significantly modifies, has developed a wide following among the circuits. At least four other circuits have expressly adopted the *Diaz-Villafane* "essentially plenary" standard of review.² One might hope that *Rivera*'s "elaboration and modification" will trigger a similar reevaluation in these other circuits, as well.

FOOTNOTES

¹ See, e.g., Daniel J. Freed and Marc Miller, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 Fed. Sent. R. 235 (1991); Aaron J. Rappaport, *Guideline Developments in the First Circuit: The Two Faces of Appellate Review*, 5 Fed. Sent. R. 267 (1993).

² See, e.g., *United States v. Jones*, 948 F.2d 732, 736 (D.C. Cir. 1991); *United States v. Holmes*, 975 F.2d 275, 283 (6th Cir. 1992), cert. denied, 113 S.Ct. 1322 (1993); *United States v. Lara-Banda*, 972 F.2d 958, 959-60 (8th Cir. 1992); *United States v. Williams*, 922 F.2d 578, 581 (10th Cir. 1990), cert. denied 111 S.Ct. 1637 (1991). See also *United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991) (adopting similar test).