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United States Court of Appeals
for the Third Circuit

CAROL LOS MANSMANN
CIRCUIT JUDGE

U.S. COURTHOUSE
PITTSBURGH, PA 15219
412-644-3574

November 8, 1990

Mr. Paul Martin
Communications Director
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Mr. Martin:

In response to the Commission Chairman's request for comments on current problems concerning Sentencing Guideline sections or policy statements, I address three problems that may require review or clarification. I suggest that the Commission reexamine these issues.

Drug Rehabilitation

18 U.S.C. § 3553(b) allows a judge to take into account any aggravating or mitigating circumstances of a kind or to a degree not considered by the Commission in formulating the Guidelines. This section has required judges to determine whether the Commission considered drug rehabilitation in its formulations. See United States v. Pharr, No. 90-1284 (3d Cir. filed Oct. 19, 1990).

The Guidelines do not provide a clear answer to this question. Section 5H1.4 (policy statement) states that drug dependence and alcohol abuse are not reasons to depart from the

Guidelines. Section 5K2.13 (policy statement) provides that a lower sentence may be warranted if a defendant commits a non-violent crime while suffering from a reduced mental capacity except in cases in which the reduced capacity was caused by drugs or other intoxicants. Do these policy statements prevent a judge from taking drug rehabilitation into account under section 3553(b)?

Courts disagree on whether the Commission previously considered drug rehabilitation in formulating the Guidelines and on whether it is proper to consider drug rehabilitation in sentencing. Some courts do not allow consideration of rehabilitation, U.S.A. v. Pharr, No. 90-1284 (drug rehabilitation is not a proper consideration); U.S. v. Van Dyke, 895 F.2d 984 (4th Cir. 1990) (rehabilitative efforts previously considered by the Commission under section 3E1.1, Acceptance of Responsibility), cert. denied, ____ U.S. ____ (Oct. 1, 1990), while others do allow it to be considered. United States v. Maddalena, 893 F.2d 815 (6th Cir. 1989) (judge may consider drug rehabilitation); United States v. Harrington, 741 F. Supp. 968 (D.D.C. 1990) (same); United States v. Floyd, 738 F. Supp. 1256 (D. Minn. 1990) (same); United States v. Rodriguez, 724 F. Supp. 1118 (S.D.N.Y. 1990) (same).

The Commission needs to clarify its position on whether drug rehabilitation should be considered in sentencing. This requires an evaluation of the problems rehabilitation presents a judge in sentencing. Departing from the Guidelines for

rehabilitation in one sense rewards the defendant with a drug problem at the time he or she commits crime because the defendant without a drug problem is unable to receive a similar downward departure. See United States v. Pharr, No. 90-1284, slip op. at 9. On the other hand, rehabilitative efforts are an indication that the defendant recognizes the impropriety of his or her conduct. Defendants who exhibit similar recognition, by affirmatively accepting responsibility for their criminal conduct, receive a downward reduction under section 3E1.1. The same societal interests served by a reduction under section 3E1.1 may be served by a downward departure for rehabilitation.

The facts surrounding the defendant's rehabilitative efforts may also call attention to different underlying policy concerns. For example, if the defendant has made a sincere effort to rehabilitate prior to the commission of the crime, such efforts may alter the judge's view of the punishment the defendant deserves. Taking rehabilitative efforts into account, therefore, may further the purpose of fair punishment. For an example of a similar factual setting, see United States v. Maddalena, 893 F.2d 815, 816 (the Cir. 1989).

Section 4A1.3 Upward departure when criminal history category does not adequately represent the seriousness of defendant's prior crimes.

Section 4A1.3 allows the judge to depart from the guidelines if the criminal history category, determined under

section 4A1.2, does not represent the true seriousness of the defendant's prior criminal record. In determining the extent of the departure, the section explains that the judge should "use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable." Problems arise, however, when a defendant has a criminal history category of VI (the highest category), and the judge determines that the category underrepresents the seriousness of the defendant's prior crimes. What does the judge use as a reference in departing above the guideline range for the highest criminal history category? Also, what limit is there on the judge's departure?

This section should be reexamined to provide more guidance to judges who determine that a departure above the highest criminal history category is required. Perhaps there is need for more categories, and broader ranges within those categories, to give judges the ability to significantly depart where needed.

5K1.1 Departure for cooperation

Section 5K1.1 allows the judge to depart downward from the guidelines upon a motion by the government that the defendant has provided "substantial assistance." This section raises several issues which require clarification. Some judges have reported situations where they believe the defendant that he has done everything possible to co-operate but the government, perhaps vindictively, is refusing to make a 5K1.1 motion. Does

the judge lack the power to depart absent a government motion? The language of section 5K1.1 seems to answer this question in the affirmative. Still, section 5K1.1 does not completely resolve the question of whether a judge can consider cooperation at all, in the absence of a government motion. 18 U.S.C. § 3661 states that there is no limit on the conduct a judge can consider in sentencing. Can a judge consider cooperation under § 3661 without a government motion?

One possible answer to this question is to read section 5K1.1 as prohibiting a judge from departing from the Guidelines absent a government motion. While this seems a bit inconsistent with section 3661, 18 U.S.C. § 3553(b) and the plain language of section 5K1.1 limit a judge's discretion in taking into account conduct or circumstances previously considered by the Commission. This does not mean that judge could never consider cooperation absent a government motion, only that a judge may not depart absent a motion. A judge still could consider a defendant's cooperation under section 3661 in sentencing within the appropriate range provided by the Guidelines. See U.S. v. Bruno, 897 F.2d 691 (3d Cir. 1990).

The proper use of cooperation in sentencing needs to be clarified for judges. The Commission should consider providing in addition to section 5K1.1 some guidance on the use of cooperation absent a government motion.

Thank you for this opportunity to express current concerns about the Guidelines. I hope these remarks will be of help to the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Carol Los Mansmann".

Carol Los Mansmann
United States Circuit Judge

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