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SHOULD POST-ARREST DRUG REHABILITATION BE A CONSIDERATION IN GRANTING A DOWNWARD DEPARTURE UNDER THE UNITED STATES SENTENCING GUIDELINES?

I. INTRODUCTION

Many have proclaimed that America's addiction to drugs has led to a decline in moral values, educational attainment, and national productivity. Drug addiction has also been held responsible for an increase in violent crime, infant mortality, and broken families.¹ The war on drugs is a battle that is not only fought on America's streets and in America's homes, but also in America's courtrooms. The United States Sentencing Guidelines² and their application to defendants who have undergone post-arrest drug rehabilitation has been the subject of great disagreement among the Federal Court of Appeals.³

The split is centered upon whether post-arrest drug rehabilitative efforts may warrant a downward departure from the United States Sentencing Guidelines.⁴ The United States Sentencing Guidelines were promulgated by the United States Sentencing Commission in 1984 for the basic purpose of lessening disparity in sentencing and providing a fair means of sentencing.⁵ The defendant's sentence is calculated by a two-dimensional matrix established by the Guidelines.⁶ The Vertical Axis, which is more commonly referred to as the "offense level," represents the severity of the defendant's offense.⁷ The Horizontal Axis, referred to as the "criminal history category," plots the criminal history of the defendant.⁸ The correlation of the defendant's position on each axis results in a guideline sentencing range or GSR.⁹ The judge is allowed to make certain reductions in the defendant's sentencing level. These reductions are explicitly set-out. For example, if the defendant accepts responsibility for the crime the judge under § 3E1.1 may grant a reduction of two offense levels. Thus, the defendant's sentencing range would be less. The judge is then expected to select a

1. According to the Uniform Crime Reports For the United States, the 1992 drug abuse violation arrest total was up 7 percent from the 1991 level, less than 1 percent lower than in 1988 and 57 percent higher than in 1983. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 216 (1992).

2. 18 U.S.C. §§ 3551-3586 (1988).

3. *United States v. Williams*, 948 F.2d 706 (11th Cir. 1991); *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991); *United States v. Sklar*, 920 F.2d 107 (1st Cir. 1990); *United States v. Martin* 938 F.2d 162 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992); *United States v. Pharr*, 916 F.2d 129 (3d Cir. 1990), cert. denied, 111 S.Ct. 2274 (1991); *United States v. Van Dyke*, 895 F.2d 984 (4th Cir.), cert. denied, 111 S. Ct. 112 (1990).

4. 18 U.S.C. §§ 3551-3586 (1988) [hereinafter U.S.S.G.].

5. U.S.S.G. *supra* note 4, ch. 1 pt. A. 3, The Basic Approach (Policy Statement).

6. U.S.S.G. *supra* note 4, ch. 5 pt. A, Determining the Sentence.

7. *Id.*

8. *Id.*

9. *Id.*

sentence within the determined guideline sentencing range.¹⁰ The judge also has the discretion to depart entirely from the range in certain circumstances under § 5K2.0 of the Guidelines.¹¹ For example, the judge may grant a downward departure on grounds referred to in Chapter 5, Part K of the Guidelines, or on grounds not mentioned in the Guidelines at all.¹²

The First Circuit Court in *United States v. Sklar*, opined that a defendant's pre-sentence rehabilitative efforts, if unusual, may serve as a basis for granting a downward departure from the Sentencing Guidelines.¹³ Although this holding has been followed by the Eleventh,¹⁴ Second,¹⁵ and the District of Columbia Circuits,¹⁶ it has been expressly rejected by the Third,¹⁷ Fourth,¹⁸ Tenth,¹⁹ and Ninth Circuits.²⁰

The effects of this particular split are far-reaching from a legal and sociological standpoint.²¹ Depending upon which jurisdiction the defendant finds himself, post-arrest drug rehabilitation can be viewed as a personal triumph not worthy of judicial consideration in sentencing, or an accomplishment that merits a possible downward departure. The perniciousness of this split is obvious because the defendant's liberty is at stake.

II. THE CONFLICT: CONSIDERING POST-ARREST DRUG REHABILITATION AT SENTENCING

A. Drug Rehabilitation Can Be Considered in Granting a Downward Departure

The First Circuit Court of Appeals, in *United States v. Sklar*,²² determined that a defendant's post-arrest drug rehabilitative efforts, if unusual, may warrant a downward departure in the Sentencing Guidelines. On January 24, 1989, David Sklar was arrested in the vicinity of a post office near Stockbridge, Massachusetts in possession of an Express Mail package.²³ This package contained approximately 75 grams of cocaine. David Sklar was indicted and charged with conspiracy to traffic drugs and possession

10. *Id.*

11. U.S.S.G. *supra* note 4, ch. 5 pt. A, Determining the Sentence.

12. *Id.* Although Chapter Five, Part K lists factors that may constitute grounds for departure, the commission conceded that the list is not exhaustive. The commission further believes that there may be cases in which a departure outside suggested levels is warranted. The commission however contends that such cases will be highly infrequent.

13. 920 F.2d 107 (1st Cir. 1990).

14. *United States v. Williams*, 948 F.2d 706 (11th Cir. 1991).

15. *United States v. Maier*, 975 F.2d 944 (2nd Cir. 1992).

16. *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991).

17. *United States v. Pharr*, 916 F.2d 129 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991).

18. *United States v. Van Dyke*, 895 F.2d 984 (4th Cir.), cert. denied, 111 S. Ct. 112 (1990).

19. *United States v. Gaither*, 1 F.3d 1040 (10th Cir. 1993).

20. *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992).

21. From an ideological and pragmatic standpoint the split forces us to resolve the age old question of whether or not sentencing should serve primarily to punish or to rehabilitate — or a combination of the two. Perhaps the split on post-arrest drug rehabilitation can be viewed as harmful because of the many societal implications that it raises. For instance, given the overcrowded nature of today's jails, a downward departure which rewards drug rehabilitative efforts may perhaps remove from an overcrowded jail an individual who is no longer a threat to himself or society. A prudent system of downward departure which would remove such an individual from a jail could possibly facilitate the retention of an individual in a jail who is a threat to himself and more importantly a threat to today's society.

22. 920 F.2d 107 (1st Cir. 1990).

23. *Id.* at 108.

of cocaine with intent to distribute.²⁴ On March 9, 1990, the district court calculated David Sklar's guideline sentencing range.²⁵ The court determined the guideline sentencing range to be 37-46 months.²⁶ The district court then departed downward based upon David Sklar's "posture of rehabilitation during the interval between indictment and sentencing, as well as defendant's cooperation with the government."²⁷ David Sklar was sentenced to serve 30 months in prison, in addition to a term of supervised release.²⁸ On appeal, the prosecution challenged the district court's downward departure.²⁹

The First Circuit Court of Appeals held that "a defendant's rehabilitation might, on rare occasion, serve as a basis for a downward departure, but only when and if the rehabilitation is 'so extraordinary as to suggest its presence to a degree not adequately taken into consideration by the acceptance of responsibility reduction.'"³⁰ The court based its conclusion on several contentions.³¹ The court stated that a three-part methodology³² must be used in order to assess whether the district court properly granted Sklar a downward departure.³³ The first prong in the analysis considers whether the case is sufficiently "unusual" to warrant departure.³⁴ If the first prong is met, the second prong determines whether the circumstances in the first prong were accurately documented.³⁵ The last prong measures the departure by a standard of reasonableness.³⁶

Within the first prong, the court established that U.S.S.G. § 5K2.0 must be considered.³⁷ The court stated that § 5K2.0 can be interpreted as presenting two avenues that can lead to a valid departure, qualitative and quantitative.³⁸ The qualitative avenue states that a district court may depart "if it finds an aggravating or mitigating circumstance 'of a kind' not considered by the Sentencing Commission in formulating the guidelines."³⁹ The quantitative avenue states that a district court may depart "if it finds a material circumstance which, although considered by the Sentencing Commission, is present 'to a degree' neither readily envisioned nor frequently seen in connection with offender and/or the offense of conviction."⁴⁰

The First Circuit stated that it was clear that Congress largely rejected rehabilitation as a direct goal of criminal sentencing under the guidelines.⁴¹ In support of its contention, the court cited *Mistretta v. United States*⁴² which determined that "the

24. *Id.*

25. *Id.*

26. *Id.* at 109.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 116.

31. *Id.* at 114.

32. The court utilized three three-part methodology established in *United States v. Diaz-Villafane*, 874 F.2d 43 (1st Cir. 1989).

33. 920 F.2d 107, 114 (1st Cir. 1990).

34. *Id.*

35. *Id.*

36. *Id.*

37. U.S.S.G. § 5K2.0.

38. 920 F.2d 107, 115 (1st Cir. 1990).

39. *Id.*

40. *Id.*

41. *Id.*

42. 488 U.S. 361 (1989).

enabling legislation 'rejected imprisonment as a means of promoting rehabilitation.'"⁴³

The court continued by narrowing its discussion from Congress' treatment of rehabilitation generally to treatment of post-arrest/pre-imprisonment rehabilitation.⁴⁴ The court concluded that a defendant's rehabilitative efforts were only given "small weight" by the Commission.⁴⁵ In addition, the court stated that the Commission seemed to factor presentence rehabilitation into the two-level reduction in the offense level for acceptance of responsibility under U.S.S.G. § 3E1.1.⁴⁶ The court found somewhat incredulous the assumption that the Commission's failure to figure the rehabilitative efforts of the defendant more prominently into the Guidelines was a mere oversight.⁴⁷ The court concluded that "the mere fact of demonstrated rehabilitation between date of arrest and date of sentencing cannot form the basis for a downward departure from the GSR [guideline sentencing range]."⁴⁸

The First Circuit's view was later confirmed by an amendment to the commentary of § 3E1.1. The commentary was amended to include "post-offense rehabilitative efforts (e.g., counseling or drug treatment)," as a factor which might indicate an acceptance of responsibility.⁴⁹ This acceptance would warrant the two-level reduction in the offense level. This amendment does not resolve the split between the circuits as the courts still disagree as to whether drug rehabilitation may be considered in granting a downward departure.

Although the First Circuit determined that a defendant's presentence rehabilitation is already factored into the guidelines, the court conceded that a defendant's presentence rehabilitation will support the quantitative departure if the rehabilitation is "significantly unusual."⁵⁰ The court went on to summarize its conclusions in the following statements: "We continue to believe that, in an appropriate case, a defendant's presentence rehabilitative efforts and progress can be so significant, and can so far exceed ordinary expectations, that they dwarf the scope of presentence rehabilitation contemplated by the sentencing Commissioners when formulating § 3E1.1."⁵¹ Thus, the First Circuit Court in *United States v. Sklar* concluded that a defendant's rehabilitation may serve as a basis for a downward departure when the rehabilitation is extraordinary.⁵²

The District of Columbia Circuit⁵³ and the Eleventh Circuit⁵⁴ both support the conclusion reached by the First Circuit in *United States v. Sklar*.⁵⁵

43. 920 F.2d 107, 115 (1st Cir. 1990).

44. *Id.*

45. *Id.*

46. U.S.S.G. § 3E1.1. Section 3E1.1 provides: (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels. (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial. (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

47. 920 F.2d 107, 116 (1st Cir. 1990).

48. *Id.*

49. U.S.S.G. §3E1.1 commentary (1)(g).

50. *Id.*

51. *Id.*

52. *Id.*

53. *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991).

54. *United States v. Williams*, 948 F.2d 706 (11th Cir. 1991).

55. 920 F.2d 107 (1st Cir. 1990).

B. Presentencing Rehabilitation Efforts — Inappropriate Basis for Granting a Downward Departure

The Third Circuit Court of Appeals in *United States v. Pharr*⁵⁶ differed from the interpretation of the Sentencing Guidelines provided by the First Circuit Court in *United States v. Sklar*.⁵⁷ In *United States v. Pharr*, the defendant, Pharr, plead guilty to the sale of stolen United States Treasury checks— hence violating 18 U.S.C. § 510 (b).⁵⁸ Pharr admitted that he was a heroin addict and that his addiction motivated him to commit the offense to which he pled guilty.⁵⁹ After he entered his guilty plea, Pharr entered and successfully completed an in-patient drug rehabilitation program.⁶⁰ The district court granted Pharr a downward departure in his sentence based upon the assertion that the Guidelines did not consider a defendant's efforts to overcome drug addiction or the effects that incarceration would have on these efforts.⁶¹ The government appealed the downward departure afforded Pharr.⁶²

The Third Circuit began its analysis of whether drug rehabilitative efforts warrant a downward departure by analyzing U.S.S.G. § 3E1.1.⁶³

The court held that post-arrest drug rehabilitative efforts and the potential effect of incarceration on those efforts are not appropriate grounds for discretionary departure from the Sentencing Guidelines under § 5K2.0.⁶⁴ The Third Circuit based its conclusion on the underlying Sentencing Guidelines and policy statements which were articulated by the Sentencing Commission.⁶⁵

In support of its conclusion, the court asserted that Congress elected to shift toward a system of penology and away from rehabilitation when it authorized the Sentencing Guidelines.⁶⁶ Therefore, the court concluded that this shift is an inherent limitation on the discretion that individual district courts may exercise in the sentencing process.⁶⁷

In addition, the court stated that in mandating a more uniform sentencing procedure, Congress has not completely curtailed consideration of a defendant's individual

56. 916 F.2d 129 (3d Cir. 1990).

57. 920 F.2d 107 (1st Cir. 1990).

58. 916 F.2d 129, 130 (3d Cir. 1990).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 131. The court determined that § 3E1.1 allowed a reduction in a defendant's offense level by two levels if the defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." *Id.* In addition, the commentary to § 3E1.1 (a) listed various factors which could have been considered in deciding whether the defendant qualifies for a downward departure. *Id.* The court conceded that although the list of factors was not exclusive, all of the listed factors related to actions by the defendant either accepting responsibility for the offense for which he was being sentenced or mitigating the effects of his criminal activity. *Id.* The court determined that drug rehabilitation efforts in the case at bar did not constitute accepting responsibility or mitigating the harm caused, but rather self improvement. *Id.* The court stated that self improvement is not the type of conduct which was contemplated by the acceptance of responsibility provisions of the guidelines. *Id.*

Of course, the debate as to whether § 3E1.1 allows a reduction for rehabilitative efforts has been answered by the amendment to the commentary discussed above.

64. *Id.* at 132.

65. *Id.*

66. *Id.*

67. *Id.*

characteristics.⁶⁸ However the court carefully pointed out that Congress restricted the role of the district court in determining which personal characteristics are to be considered in sentencing.⁶⁹ The court asserted that in U.S.S.G. Ch. 4 the Commission chose to consider personal characteristics regarding a defendant's criminal history, but chose to reject any purely personal characteristics.⁷⁰

The court continued by stating that the Commission's policy statements rejected factors such as the defendant's efforts to improve himself through education or his ability to maintain steady employment.⁷¹ The court opined that a defendant's drug rehabilitative efforts were so analogous to the factors discussed in the policy statements that a downward departure should likewise not be granted for these efforts.⁷²

Finally, the Third Circuit Court concluded that consideration of a defendant's drug rehabilitative efforts and the consideration of incarceration in relation to those efforts is never an appropriate basis to grant a downward departure as it undermines the shift towards penology espoused and desired by Congress.⁷³

The Fourth⁷⁴ and Ninth⁷⁵ Circuits have also held that drug rehabilitative efforts do not and cannot warrant a downward departure from the Sentencing Guidelines.⁷⁶

III. SENTENCING GUIDELINE REVISIONS

The increase in drug related crime and drug use is an unfortunate and destructive tear in our country's moral fabric. This trend has forced us to determine what role the judiciary should play in mitigating the harmful effects of this trend.

The Federal Sentencing Guidelines⁷⁷ and their seemingly contradictory policy statements invite disagreement and misinterpretation among the circuits.⁷⁸ The disagreement concerning whether a defendant's drug rehabilitative efforts may warrant a downward departure appears to hinge upon the interpretation of U.S.S.G. § 3E1.1 of the guideline and policy statements § 5H1.2, § 5H1.4, § 5H1.5, and § 5K2.0.

The court in *United States v. Pharr*⁷⁹ relied upon a number of policy statements in support of its holding. One such policy statement is § 5H1.4 which provides: "Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." The Third Circuit interpreted this statement to include drug rehabilitation.⁸⁰ Although the argument proposed by the Third Circuit has merit, the court appears to read language into the policy statement which is absent. The Third Circuit Court con-

68. *Id.*

69. *Id.* at 132-133.

70. *Id.* at 133.

71. *Id.*

72. *Id.*

73. *Id.*

74. *United States v. Van Dyke*, 895 F.2d 984 (4th Cir.), cert. denied, 111 S. Ct. 112 (1990).

75. *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992).

76. 18 U.S.C. §§ 3551-3586 (1988).

77. 18 U.S.C. §§ 3551-3586 (1988).

78. *United States v. Williams*, 948 F.2d 706 (11th Cir. 1991); *United States v. Harrington*, 947 F.2d 956 (D.C. Cir. 1991); *United States v. Sklar*, 920 F.2d 107 (1st Cir. 1990); *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991), cert. denied, 112 S. Ct. 1679 (1992); *United States v. Pharr*, 916 F.2d 129 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991); *United States v. Van Dyke*, 895 F.2d 984 (4th Cir.), cert. denied, 111 S. Ct. 112 (1990).

79. 916 F.2d 129 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991).

80. *United States v. Pharr*, 916 F.2d 129, 133 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991).

cedes that policy statements are for guidance; however, the thrust of its analysis centers upon the interpretation of these various statements.⁸¹

In addition, the Third Circuit cited § 5H1.2 and § 5H1.5 as a basis for concluding that the Commission had considered and rejected a defendant's drug rehabilitative efforts as meriting a downward departure. Policy statement § 5H1.5 states in part: "Employment record is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall." Similarly, § 5H1.2 partially states: "Education and vocational skills are not ordinarily relevant in determining whether a sentence should be outside the guidelines, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor." The Third Circuit opined that employment and educational improvements are analogous to drug rehabilitation.⁸² Once again, the court appears to read language into the policy statements which is not readily apparent from the face of the provisions.⁸³

Perhaps one of the policy statements which appears to attack the rationale provided by the Third Circuit Court is U.S.S.G. § 5K2.0. The relevant part of § 5K2.0 states:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if 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." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. Nonetheless, the present section seeks to aid the court by identifying some of the factors that the Commission has not been able to fully take into account in formulating precise guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing judge.⁸⁴

It appears as though the Commission has failed to adequately address the issue of drug rehabilitation. Therefore, just as it is possible to conclude that the Commission wished to preclude a downward departure based upon drug rehabilitative efforts; it is just as plausible to conclude from the language of the policy statements that drug rehabilitation can warrant a downward departure.

The Sentencing Guidelines do not bar consideration of a defendant's drug rehabilitation efforts. However, the Third Circuit and its followers have read language into the policy statements and guidelines which does not exist.⁸⁵ In the context of facilitat-

81. *Id.*

82. *United States v. Pharr*, 916 F.2d 129, 132 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991).

83. The words "drug rehabilitation" do not exist in either U.S.S.G. § 5H1.2 or U.S.S.G. § 5H1.5 of the Guidelines. The court's improper imposition of the words "drug rehabilitation" into these policy statements abets the improper interpretation and application of the Guidelines.

84. *Id.*

85. *See, United States v. Maier*, 975 F.2d 944, 945 (2nd Cir. 1992) (arguing that the Third Circuit's views are mistaken and allowing a downward departure based on drug rehabilitation.).

ing the interpretation and application of the Sentencing Guidelines in the area of drug rehabilitative efforts, a simple revision can be made in the commentary of U.S.S.G. § 5K2.03.⁸⁶ The following addition can be made to § 5K2.0: *Voluntary post-arrest drug rehabilitative efforts may be grounds for such a downward departure in unusual cases.*

The primary goal in suggesting this slight redraft is not to mandate that the court grant a downward departure for drug rehabilitative efforts in every case, but rather, it is to overturn the Third Circuit's view. Thus, the goal is to establish Guidelines that do not preclude the court from granting a downward departure when it deems appropriate.

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86. U.S.S.G. § 3E1.1.

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