

TESTIMONY BEFORE THE UNITED STATES SENTENCING COMMISSION

March 17, 2010

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Written Testimony Concerning Specific Offender Characteristics

Good morning, my name is Eric Tirschwell, and on behalf of the Practitioners Advisory Group, thank you for the opportunity to address the Commission with respect to some of the important issues under consideration during this amendment cycle. The PAG strives to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws. We very much appreciate the Commission's willingness to listen to us and consider our thoughts on the issues for comment and the proposals for amendments to the Guidelines.

I am going to limit my comments this morning to Specific Offender Characteristics; our forthcoming comment letter will also address alternatives to incarceration, among many other issues.

Introduction

By way of introduction, we note that Chapter 5, Part H, as currently written, is described in the Introductory Commentary as reflecting the Sentencing Commission's view that "certain circumstances are not ordinarily relevant to the determination of whether a sentence *should be outside the applicable guideline range*." (Emphasis added.) But this same Commentary goes on to make clear that "*this does not mean* that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence." (Emphasis added.)

Accordingly, as currently written, and even before *Booker*, Part H takes no position on whether the identified offender characteristics are relevant to determining the appropriate sentence; the only view expressed is that such characteristics are "ordinarily not relevant" or "not relevant" in "determining whether a *departure*" from the guideline range is warranted. (Emphasis added.)

Analysis

The PAG approaches the issue of specific offender characteristics from a practical perspective, based on our experience with how the Chapter 5, Part H language impacts sentencing – both within and outside the Guidelines framework, and both expressly and in more subtle ways.

We believe that maintaining Part H in its current form, where the specified characteristics are deemed "ordinarily not relevant" or simply "not relevant" to a Guidelines departure analysis, is at a minimum confusing. Take military service as an example. From a practitioner's perspective, an argument for leniency on behalf of a defendant with an exemplary record of military service to this country encounters a number of contradictions along the way. Under Section 3553(a), military service appears to be plainly relevant, because the judge must consider a number of factors including "the

history and characteristics of the defendant.” 18 U.S.C. § 3661 reinforces the overarching mandate that “[n]o 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.” But under Section 5H1.11, we are told that a distinguished record of service is “not ordinarily relevant” to a departure analysis.

So what do we do as defense lawyers? We argue for a variance, under Section 3553(a). But often, notwithstanding that Chapter 5, Part H, is limited to departures, we are met with the argument – whether from the government or the judge or both – that the Sentencing Commission, as a matter of policy, has already determined that such service is “not ordinarily relevant.” The courts are doing an increasingly good job of explaining how, just because certain characteristics may be discouraged or forbidden under the Guidelines, that does not mean they cannot be considered in the context of a variance under Section 3553(a). But in our experience and estimation the Guidelines language has continued and will continue to be used, expressly or *sub silentio*, to unjustifiably discourage individualized sentencing decisions based on many relevant aspects of a defendant’s “history and characteristics.”

Simply put, as to specific offender characteristics such as military service that are discouraged or forbidden under Chapter 5, Part H, the PAG believes that Guidelines as currently written undermine and are inconsistent with the command of Section 3553(a) to consider the defendant’s “history and characteristics.” This inconsistency not only damages the coherence and legitimacy of the current sentencing regime, it also leads to disparity of treatment of defendants depending on whether their particular sentencing judge is more inclined to consider such personal characteristics and history under the discouraging if not forbidding Guidelines rubric or instead under the open-ended umbrella of Section 3553(a).

Another concern we have is that Chapter 5, Part H fails to explain the penological and other bases for the Commission’s determinations that the specified characteristics are “ordinarily not” or never “relevant” to a departure analysis. This lack of explanation weakens the persuasive force of these Guidelines pronouncements and prevents litigants from confronting head on whether in a particular case the Guidelines’ discouragement or prohibition of the consideration of certain characteristics makes sense and should be followed.

Justice Stevens’ concurring opinion in *Rita v. United States*, 551 U.S. 338, 364-65 (2007), which was joined by Justice Ginsburg, identified many of these same tensions. Justice Stevens explained that while “[m]atters such as age, education, mental or emotional condition, medical condition (including drug or alcohol addiction), employment history, lack of guidance as a youth, family ties, or military, civic, charitable, or public service are not ordinarily considered under the Guidelines,” “[t]hese are, however, matters that § 3553(a) authorizes the sentencing judge to consider.” Justice Stevens went on to observe that Rita’s substantial record of military service to his country was neither “taken into consideration in the sentencing guidelines” nor mentioned by the

sentencing judge in explaining his choice of the sentence Rita received, calling this a “serious omission.” The majority opinion too recognized the relevance of Rita’s “lengthy and distinguished military record,” among other personal circumstances, framing the issue on review as whether these circumstances were “special enough” to justify a sentence below the Guidelines pursuant to Section 3553(a).

Part of the problem, which helps point the way to a solution, is the current language’s ambiguity regarding the role of Chapter 5H. In the wake of *Booker* the Commission should clarify that it is addressing offender characteristics within the departure context. After a court considers the possibility of a departure as required by Section 3553(a)(4)-(5), it then will move on to conducting an analysis of the other factors that fall outside of either calculating or departing from a Guidelines range.

Proposed Language

To reconcile the existing tensions and inconsistencies, we respectfully urge the Commission to (a) eliminate that portion of Part H that states (without explaining why) that the specified characteristics are “ordinarily not relevant” or more broadly “not relevant” to departure decisions (and thereby eliminate the suggestion that such characteristics are generally not relevant at all to the sentencing decision) and (b) preserve and expand that portion of Part H that recognizes that, at the same time, and consistent with the mandate of Section 3553(a), these characteristics should be considered and are *not* “necessarily inappropriate to the determination” of both whether a departure is warranted and other critical aspects of the sentence -- including its length and other features and attributes.

Specifically, and with respect to the five specific offender characteristics as to which comment is currently being sought, we recommend that the Commission revise the Part 5, Chapter H language as follows:

In determining whether a departure is warranted, as well as in determining the length and other attributes of a sentence within the applicable guideline range, the court may consider, individually or in combination, the following factors, among other relevant aspects of the defendant’s history and characteristics: (1) age; (2) mental and emotional condition; (3) physical condition, including drug dependence; (4) military, civic, charitable or public service, employment-related contributions, record of prior good works; and (5) lack of guidance as a youth.

For the same reasons mentioned earlier, and especially because of the tension with Section 3553(a), the PAG also urges the Commission to substantially revise Section 5K2.0(a)(4) and Application Note 3(C), and in particular to remove the language reserving for only “exceptional” cases departures that are based on offender characteristics deemed “not ordinarily relevant.”

Although the Commission’s request for comments suggests the possibility that the Guidelines Manual might be amended to provide further specific guidance as to when and how each identified characteristic or set of characteristics ought to impact the sentencing decision in individual cases, the PAG respectfully suggests that such an endeavor is unwise and impractical. Whether it is the circumstances of a defendant’s upbringing, mental, emotional, or physical condition, military service or other good works, or age, the relevance of these characteristics is, in our view, too individualized and too varied from defendant to defendant to translate into describable or quantifiable or one-size-fits-all categories. Providing specific but necessarily limited examples or categories of circumstances where departures may be justified has the undesirable tendency to suggest (or to be misused to argue) that departures in all other contexts are discouraged if not forbidden. In addition, we believe that the “history and characteristics” of a defendant should be viewed – and typically are viewed by sentencing courts – in combination with the other facts and circumstances of the offense and the offender, rather than in isolation. Finally, in our view the overall assessment of each defendant’s “history and characteristics” and the relevance of that assessment, if any, to the purposes and goals of sentencing, are matters that are best left to the sentencing court to consider on an individualized case-by-case basis in the exercise of its sound discretion.

To the extent the Commission is concerned that the PAG’s proposed language, set forth above, might “open the floodgates” to departures from the Guidelines based on specific offender characteristics or the “history and characteristics” of the defendant more generally, and might undermine the SRA’s goal of reducing disparities between similarly situated defendants, the PAG would propose the Commission adding language along the lines of the following:

The sentencing court should consider whether the defendant’s history and characteristics, individually or as a whole, are sufficiently mitigating or aggravating to warrant a departure, taking into account the extent to which such history and characteristics differentiate the defendant from those who do not have the same or similar history and characteristics.

The PAG also would have no concerns about adding language along the following lines with respect to so-called “forbidden” factors:

To the extent the Court considers such history and characteristics, it shall not use them to base a sentence on the improper considerations of a defendant’s race, sex, national origin, creed, or socioeconomic status, all of which are not relevant to determining a sentence.

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Let me end by thanking you again, on behalf of the PAG, for providing us with this opportunity to provide input on the important issue of specific offender characteristics. We look forward to continuing to work with the Commission and the Staff.