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Childhood Abuse as a Mitigating Factor in Federal sentencing: The Ninth Circuit Versus the United States Sentencing Commission

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RECENT DEVELOPMENT

Childhood Abuse as a Mitigating Factor in Federal Sentencing: The Ninth Circuit Versus the United States Sentencing Commission

I. INTRODUCTION

Prior to the enactment of the Federal Sentencing Guidelines in 1987, sentencing courts routinely considered an offender's background

and personal characteristics when imposing a sentence.[1] Today, however, judges strain to exercise their discretion in a sentencing structure that focuses primarily on the offense committed and discourages consideration of a defendant's personal history.[2] Although judicial departures from the formal sentencing structure are permissible in certain circumstances,[3] discretionary departures based on a defendant's background and personal characteristics consistently have met opposition by the United States Sentencing Commission. This opposition has led to the Commission's adoption of more restrictive policies governing the relevance of offender characteristics in federal sentencing.[4] Despite these policies, however, district and circuit judges continue to find ways to circumvent the guidelines in cases warranting special consideration.[5]

On October 6, 1992, the Ninth Circuit in *United States v. Roe*[6] vacated and remanded a district court ruling that refused to grant a downward departure[7] from the sentencing guidelines to a defendant with a shocking history of family violence—an offender characteristic that the Commission has not addressed specifically.[8] Although other circuits have held that childhood abuse of the defendant may be relevant in certain circumstances,[9] the Ninth Circuit in *Roe* was the first to recommend a departure based solely on a finding of extraordinary abuse.

Fourteen months prior to *Roe*, the Ninth Circuit in *United States v. Floyd*[10] affirmed a downward departure on related grounds: the defendant's "youthful lack of guidance."[11] In response to *Floyd*, the Commission amended the sentencing guidelines in 1992 to reflect its policy that "lack of guidance as a youth" and other circumstances related to a

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1. See Bruce M. Selya and Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 Notre Dame L. Rev. 1, 1 (1991) (noting that "[f]or most of this century, . . . federal district judges enjoyed nearly unfettered discretion").

2. See id. at 10 (stating that the main focus of sentencing under the guidelines is on the charged offense and the criminal history category of the defendant).

3. See 18 U.S.C. § 3553(b) (1988 & Supp. 1991) and text accompanying notes 48-54.

4. See Daniel J. Freed and Marc Miller, *Departures Visible and Invisible: Perpetuating Variation in Federal Sentences*, 5 Fed. Sent. Rptr. 3, 9 (1992).

5. See notes 62, 167-69, and accompanying text.

6. 976 F.2d 1216 (9th Cir. 1992).

7. This Note uses the term "downward departure" to refer to a decrease in sentence length.

8. *Roe*, 976 F.2d at 1217, 1219.

9. See *United States v. Vela*, 927 F.2d 197, 199 (5th Cir. 1991) (acknowledging that childhood abuse may serve as possible grounds for departure in extraordinary circumstances); *United States v. Desormeaux*, 952 F.2d 182, 185 (8th Cir. 1991) (conceding that spousal abuse may be a potential ground for departure in extreme cases). See also notes 137-51 and accompanying text for a discussion of these cases.

10. 945 F.2d 1096 (9th Cir. 1991), overruled on different grounds by *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993).

11. Id. at 1102-03. See also notes 94, 95, 161, and accompanying text.

"disadvantaged upbringing" are not relevant considerations for departure from the guidelines.[12] Although the Commission's action is consistent with its tradition of squelching judicial discretionary departures based on offender characteristics, the potential scope of this amendment is troublesome. Did the Commission intend to encompass childhood abuse within the vague contours of a "disadvantaged upbringing," thus making it an inappropriate ground for departure? Or does the absence of more specific language show a reluctance on the part of the Commission to bar such considerations?

Part II of this Recent Development examines the history of the Federal Sentencing Guidelines and sets out the statutory provisions of the Sentencing Reform Act and the guidelines that deal with offender characteristics. Part III focuses on the different types of departures from the sentencing guidelines, appellate review of departures, and judicial restraints on sentencing courts. Part IV addresses the significance of policy statements and the Commission's use of them as tools for narrowing judicial discretion. Part V analyzes *Roe* and other abuse cases in light of the 1992 amendment, examines the history and construction of the amendment, and addresses the implications of the amendment's classification as a policy statement. Part VI explores the issue of whether a defendant's history of abuse should be precluded from consideration in federal sentencing and concludes that the judicial discretion to weigh the mental and emotional effects of abuse must be preserved. Finally, this Recent Development recommends adoption of the approach taken by the Ninth Circuit in *Roe*, which preserves a court's ability to depart from the sentencing guidelines in extreme cases of abuse if that court finds the abuse caused a reduction of mental or emotional capacity.

II. BACKGROUND

A. Reforming the Federal System

In 1984, Congress responded to the criminal justice system's dissatisfaction with indeterminate sentencing by passing the Sentencing Reform Act[13] (the "Act"). Indeterminate sentencing, which prevailed in the federal courts for most of the last century,[14] allowed judges to sen-

12. See United States Sentencing Commission, *Federal Sentencing Guidelines Manual* § 5H1.12, p.s. (West, 1992) ("U.S.S.G.").

13. The Sentencing Reform Act of 1984 was enacted as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984), codified at 18 U.S.C §§ 3551-3586, 3621-3625, 3742 and 28 U.S.C. §§ 991-998 (1988).

14. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. J. 1681, 1685 (1992).

tence within wide ranges using individualized approaches for adjusting sentences upward or downward.[15] This practice created uncertainty and unwarranted disparity in criminal sentencing.[16] Reports show, for example, that under the pre-guidelines system, an African American defendant convicted of robbery in the southern United States was likely to receive a substantially longer sentence than an African American defendant who committed the same crime in another region.[17] Apart from race, inequalities in sentencing also appeared to stem from judges' unjustified considerations of the offender's sex and socioeconomic class.[18] To tackle these problems, the Act created the United States Sentencing Commission, a self-governing administrative agency in the judicial branch composed of seven voting members, three of whom are federal judges.[19] The Commission's main task was to construct a framework of sentencing guidelines, based on categories of criminal behavior and offender characteristics, that would provide courts with appropriate sentencing ranges for all crimes.[20]

The original guidelines became effective on November 1, 1987 amid hopes that a new, structured system would siguificantly reduce the problems prevalent in the former system.[21] In recent years, however, this hope has given way to frustration for federal district court judges who complain that the new system overly restricts their discretion in sentencing. Lower court judges further complain that the courts of appeals increase their burden with overly strict guideline interpretations.[22]

A source of frustration for district and circuit court judges has been the Commission's failure to resolve questions surrounding the relevance of a defendant's history and background characteristics to sentencing decisions.[23] The root of the confusion is Congress's inconsistent treatment of offender characteristics within the statutory provisions of the Sentencing Reform Act.[24]

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15. See id. at 1687-88.

16. See id. at 1687-89.

17. Selya and Kipp, 67 Notre Dame L. Rev. at 4 (cited in note 1) (quoting Hearings on Sentencing Guidelines before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 554, 676-77 (1987) (testimony of Commissioner Ilene H. Nagel)).

18. Selya and Kipp, 67 Notre Dame L. Rev. at 4 (cited in note 1).

19. See Comprehensive Crime Control Act § 217, 98 Stat. at 2017-34.

20. See 28 U.S.C. § 994(c)-(n) (Supp. 1992) (setting forth the Commission's statutory instructions for developing the guidelines).

21. See generally Theresa Walker Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 Emory L. J. 393, 394 (1991).

22. See Freed, 101 Yale L. J. at 1686 (cited in note 14).

23. Id. at 1715-18.

24. See text accompanying notes 25-33 for a discussion of these provisions.

B. *The Congressional Approach to Offender Characteristics Under the Sentencing Reform Act*

In Title 18 Section 3553(a) of the Sentencing Reform Act, Congress instructs the sentencing court to consider the following factors in determining an appropriate sentence: (1) the circumstances and nature of the crime, and the *defendant's history and characteristics*; (2) the need for sentencing in general; (3) the types of available sentences; (4) the guideline sentencing range for the particular offense category; (5) applicable policy statements; (6) the overall need to eliminate disparity in sentencing; and (7) the victim's need for restitution.[25] Additionally, Section 3553(b) authorizes courts to depart from the sentencing range imposed by the guidelines if an "aggravating or mitigating circumstance" is present that, because of its nature or degree of severity, was not adequately considered by the Commission in formulating the guidelines.[26] Section 3661 of the same title reinforces Section 3553(a) by declaring that Congress shall impose no limits on the receipt and consideration of information about a defendant's character or background for purposes of sentencing.[27]

In contrast to the nonrestrictive provisions of Title 18, Congress's directives to the Commission in Title 28 indicate that the Commission, not the sentencing court, is to determine the relevance of offender characteristics. Section 994(d) asks the Commission to consider eleven offense characteristics and ultimately to determine their relevance to a sentencing determination.[28] These characteristics include eight background factors: education, age, vocational skills, physical condition, mental and emotional condition, previous employment record, community ties, and family ties and responsibilities.[29] Also, Section 994(d) lists three factors that pertain to the defendant's criminality: role in the offense, extent of reliance upon crime for a livelihood, and criminal record.[30] Section 994(e), however, admonishes the Commission to ensure that its policy statements and guidelines reflect the "general inappropriateness" of considering some of the above personal characteristics of the defendant in prison sentencing, including the defendant's community ties, family ties and responsibilities, employment history, vocational skills, and educational history.[31]

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25. 18 U.S.C. § 3553(a) (cited in note 13).
26. Id. § 3553(b).
27. Id. § 3661.
28. See 28 U.S.C. § 994(d) (cited in note 20).
29. Id.
30. Id.
31. Id. § 994(e).

The restrictive language in Title 28 largely nullifies the Title 18 provisions that advocate virtually unrestricted consideration of offender characteristics in sentencing.[32] These conflicting provisions have created confusion in the federal court system over the proper treatment of offender characteristics in sentencing, confusion that later was compounded by the Sentencing Commission's incorporation of similar inconsistencies into the Guidelines Manual.[33]

C. *The Guidelines' Approach to Offender Characteristics*

Guideline 1B1.4 currently reflects the mandate of Title 18 Sections 3553(a) and 3661: in determining sentences, the sentencing court is free to consider "without limitation" all of a defendant's background characteristics, conduct, and character, subject to other prohibitions by law.[34] This guideline applies essentially the same freedoms of consideration to departure decisions.[35] The commentary to Guideline 1B1.4, however, calls the courts' attention to policy statements that reflect the Commission's view that some factors are inappropriate considerations for departures, sentencing, or both.[36]

In other sections, the guidelines set forth the Commission's ultimate determination, made pursuant to Congress's instructions in Section 994, that only the three criminal characteristics of the defendant (role in the offense, extent of reliance upon crime for a livelihood, and criminal record) are relevant in determining an appropriate sentence.[37] By contrast, policy statements in Section 5H classify the eight personal characteristics of the defendant as either "not relevant" or "not ordinarily relevant" to a decision to depart from the appropriate guideline range.[38] The introductory commentary to Part H of Chapter 5, however, notes that, unless stated otherwise, factors not relevant to a departure decision may be appropriate considerations for determining sentences

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32. See notes 25-27 and accompanying text.

33. See Freed, 101 Yale L. J. at 1716-18 (cited in note 14). See also notes 34-42 and accompanying text.

34. U.S.S.G. § 1B1.4 at 24 (cited in note 12). Professor Freed suggests that the words "unless otherwise prohibited by law" refer to the final sentence in 28 U.S.C. § 994(d): "The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of the offenders." Freed, 101 Yale L. J. at 1717 n.181 (cited in note 14). The guidelines, however, do not provide authority for this statement.

35. See U.S.S.G. § 1B1.4 at 24-25.

36. Id., comment. at 25.

37. Id. §§ 3B1.1-.2 at 243-45 (addressing role in the offense), §§ 4B1.1-.4 at 281-85 (addressing criminal livelihood), and §§ 4A1.1-.3 at 269-79 (addressing criminal history). See also Freed, 101 Yale L. J. at 1717 n.183 (cited in note 14).

38. U.S.S.G. §§ 5H1.1-.6 at 323-35. Section 5H1.10 reiterates that race, sex, national origin, creed, religion, and socioeconomic status are "not relevant in determination of a sentence." Id. at 326. Amendments added as §§ 5H1.11 and 5H1.12 are discussed in text accompanying notes 88-95.

within a guideline range or for conditions of supervised release or probation.[39]

Policy statement 5K2.0, although not binding as a guideline,[40] preserves a court's ability to depart by incorporating the "aggravating or mitigating circumstance" provision of Section 3553(b).[41] How narrowly courts interpret this provision and other guideline commentary pertaining to departures bears directly on a judge's willingness to impose a sentence outside a designated sentencing range.[42] The introduction to the first chapter of the Guidelines Manual sheds some light on what role the Commission intended departures to play in the sentencing scheme.[43]

III. Departures Under the Federal Sentencing Guidelines

A. Types of Departures

The introduction to Chapter One of the Guidelines Manual identifies two types of departures from the sentencing structure: guided and unguided.[44] Guided departures are predetermined increases or decreases in a defendant's sentencing level that are suggested by the Commission in the absence or presence of certain factors.[45] Therefore, district court judges have true discretion in unguided departures only because the Commission makes no formal recommendation as to adjustments in sentencing levels.[46] However, the Commission has designated certain factors as appropriate or inappropriate grounds for unguided departures.[47]

The first type of unguided departure, governed by Section 5K1.1, is a downward departure based on the defendant's cooperation with authorities.[48] The 5K1.1 departure requires a government motion, al-

39. Id. at ch. 5, Pt. H, intro. comment. at 323.

40. See notes 69-75 and accompanying text for a discussion of the distinction between guidelines and policy statements.

41. U.S.S.G. § 5K2.0, p.s. at 330 (cited in note 12).

42. See note 103 and accompanying text.

43. See U.S.S.G. ch. 1., Pt. A, intro. comment. at 1-10 (cited in note 12).

44. Id. at 5-6.

45. Id. An example of a guided departure is found in the commentary accompanying U.S.S.G. § 2G1.1 at 133 ("Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct"). An eight-level downward departure is recommended if no commercial purpose was involved. Id.

46. Id.

47. See generally U.S.S.G. cb. 5, Pts. H & K at 323-36. For a discussion of these factors, see text accompanying notes 37-41.

48. See id. § 5K1.1 at 329 (providing that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who bas committed an offense, the court may depart from the guidelines").

though an amendment has been proposed to allow sentencing courts to initiate the departure in special situations.[49]

The second type of unguided departure is the judicial discretionary departure, which occurs when a sentencing court finds an "aggravating or mitigating circumstance" that calls for a sentence either above (upward departure) or below (downward departure) the applicable guideline range.[50] In order to justify a departure, the circumstance must be one that the Commission did not adequately consider in promulgating the guidelines.[51] Several circuits, including the Ninth, articulate the rule as follows: if the Commission considered a factor in formulating the guidelines, a sentencing court can depart only in "extraordinary circumstances."[52] In determining whether a particular factor was adequately considered, the Commission instructs the circuit courts to consider only the guidelines, policy statements, and official commentary.[53] For purposes of appellate review, judges must explicitly state their reasons for imposing a sentence outside a specified range.[54]

B. *Appellate Review of Departures*

Judicial discretionary departures are subject to appellate review for reasonableness.[55] The Ninth Circuit applies a three-part test similar to that used in other circuits.[56] First, the court reviews de novo whether the district judge identified an aggravating or mitigating circumstance of a kind or to a degree that the Commission did not adequately con-

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49. See 57 Fed. Reg. 62848 (1992) (proposed Dec. 31, 1992) (inviting comment on a proposed amendment that would authorize courts, in cases in which mandatory minimum sentencing statutes are not applicable, to depart if they find that the defendant substantially assisted authorities, regardless of whether the government makes such a motion).

50. See U.S.S.G. § 5K2.0 at 330 (cited in note 12). Also significant is the statement in § 5K2.0 that "[t]he controlling decision as to whether and to what extent departure is warranted can only be made by the courts." Id.

51. Id.

52. See *United States v. Roe*, 976 F.2d 1216, 1218 (9th Cir. 1992) (citing *United States v. Boshell*, 952 F.2d 1101, 1107 (9th Cir. 1991) (holding that if a factor was taken into consideration in structuring the guidelines, it will not support a departure unless extraordinary circumstances exist)).

53. 18 U.S.C. § 3553(b) (cited in note 13). Professor Freed notes the significance of the word "adequately" in § 3553(b). He states that "the statute did not make mere Commission 'consideration' the test of guideline legitimacy and enforceability. . . . [T]he Commission's mention of a factor in a sentencing guideline, policy statement, or official commentary would [not] be sufficient to bind a district court." Freed, 101 Yale L. J. at 1733-34 (cited in note 14).

54. 18 U.S.C. § 3553(c).

55. Id. § 3742(e)(3).

56. See *United States v. Lira-Barraza*, 941 F.2d 745, 746 (9th Cir. 1991). For a detailed analysis of the review processes in the various circuits, see Thomas W. Hutchinson and David Yellen, *Federal Sentencing Law and Practice* § 9.4 (West, 1989 & Supp. 1991) (noting that tbe approaches used by the Seventh and Second Circuits are more deferential to the guidelines).

sider when drafting the guidelines.[57] Second, the court reviews, for clear error, findings of fact supporting the presence of the aggravating or mitigating circumstance.[58] Last, the court determines whether the degree of departure was reasonable or an abuse of discretion.[59]

Some circuits routinely remand or reverse departures in which district courts have relied on the defendant's background characteristics.[60] Perhaps this occurs because appellate judges do not face the offender when reviewing a case and therefore find it easier to detach themselves from humanistic considerations; as a result, appellate judges are more willing to enforce the Commission's restrictive policy statements.[61] In contrast, the Ninth Circuit is moving toward a policy of greater deference to the trial court and less deference to the Commission's policy statements in departure cases that are based on offender characteristics.[62] Many circuits, however, still construe policy statements strictly.[63]

C. *Judicial Restraints on Discretionary Departures*

The primary restraints on discretionary departures are the policy statements in Section 5H, which label offender characteristics either "not ordinarily relevant" to departure decisions or "not relevant" at

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57. *Lira-Barazza*, 941 F.2d at 746.

58. Id.

59. Id. at 747.

60. See Karle and Sager, 40 Emory L. J. at 431 (cited in note 21) (noting that "[t]he First, Third, Sixth, and Seventh Circuits have rejected downward departures based upon offender characteristics"). More specifically, see *United States v. Pozzy*, 902 F.2d 133 (1st Cir. 1990) (overturning departure based on pregnancy of the defendant and other factors); *United States v. Harpst*, 949 F.2d 860 (6th Cir. 1991) (overturning departure based on the defendant's suicidal tendency); *United States v. Frazier*, 979 F.2d 1227 (7th Cir. 1992) (overturning departure based on failure to establish a connection between diminished mental capacity and the commission of the offense). See also note 132 and accompanying text for a discussion of *United States v. Daly*, 883 F.2d 313 (4th Cir. 1989).

61. See generally Freed, 101 Yale L. J. at 1698-1700 (cited in note 14) (discussing the tendency of appellate courts to narrow the discretion of district courts through restrictive review standards).

62. Consider *United States v. Cook*, 938 F.2d 149 (9th Cir. 1991), appeal after remand, 988 F.2d 123 (9th Cir. 1993) (endorsing the complex of factors approach discussed in text accompanying notes 168-70); *United States v. Floyd*, 945 F.2d 1096 (9th Cir. 1991), overruled on different grounds by *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (departing based on lack of guidance as a youth); *Roe*, 976 F.2d at 1216 (recommending departure based on childhood abuse). More recently, see *United States v. Valdez-Gonzalez*, 957 F.2d 643 (9th Cir. 1992) (affirming downward departure based on the defendant's relative lack of culpability and socioeconomic status); *United States v. Crippen*, 961 F.2d 882 (9th Cir. 1992) (affirming that a finding of reduced culpability based on a defendant's history and characteristics may constitute grounds for a downward departure).

63. See note 60.

all.[64] The Commission's recent amendment to Section 5H, effective November 1, 1992, is a policy statement declaring that youthful lack of guidance and other similar circumstances evidencing a disadvantaged upbringing belong in that category of factors deemed "not relevant" grounds for departure from the guidelines.[65] The other factors previously labeled "not relevant" include race, creed, sex, socioeconomic status, national origin, religion, alcohol or other drug dependence, and financial difficulties.[66] Those circumstances warranting the more lenient classification of "not ordinarily relevant" include the following: education and vocational skills; age and physical condition; mental and emotional conditions; employment history; family and community ties and responsibilities; civic, military, public, or charitable service; and contributions related to employment or prior similar good works.[67]

In determining the possible impact of Amendment 5H1.12 on abuse cases, several questions are crucial. First, how does a policy statement differ from a guideline, and what degree of deference should be accorded to each? Second, did the Commission intend similar circumstances evidencing a disadvantaged upbringing[68] to encompass childhood abuse, or was the Commission primarily concerned with eliminating *Floyd*-type departures based on youthful lack of guidance? Third, what are the grounds for the distinction between those factors that are not ordinarily relevant and those that are never relevant? Last, assuming that the Commission did intend to exclude abuse along with youthful lack of guidance as possible grounds for departure, was the Commission justified in its decision?

IV. THE POLICY STATEMENT

A. *Policy Statements as Nonbinding Authority*

Many courts regard the guidelines and policy statements as equally binding; however, commentators Daniel Freed and Marc Miller suggest that Congress intended policy statements to be purely advisory and not binding on sentencing courts.[69] In support of their arguments, the authors note that Congress did not afford policy statements the same pre-

64. U.S.S.G. §§ 5H1.1-.12, p.s. at 323-26 (cited in note 12). For the Commission's policy statements as to valid grounds for upward and downward departures, see id. §§ 5K1.1-2.16 at 329-35.

65. Id. § 5H1.12 at 326.

66. Id. §§ 5H1.4 at 324, 5H1.1 at 326, 5K2.12 at 326.

67. Id. §§ 5H1.1-.6 at 325, 5H1.11 at 326.

68. Id. § 5H1.12 at 326.

69. See Marc Miller and Daniel J. Freed, *Offender Characteristics and Vulnerable Victims: The Difference Between Policy Statements and Guidelines*, 3 Fed. Sent. Rptr. 3, 3 (1990).

sumption of validity as the guidelines. For example, no statutory provision requires review of a proposed policy statement before it becomes effective, nor is an appellate review required when a policy statement is violated.[70] Additionally, the absence of explanations or studies in support of most policy statements is more reason to question their authority.[71]

Despite this evidence that Congress did not intend for policy statements to bind sentencing courts, many judges continue to treat them as guidelines.[72] Moreover, in the recent decision *Williams v. United States*,[73] a majority of the Supreme Court afforded considerable weight to a policy statement and ignored the dissenters' argument that Congress intended to differentiate between policy statements and guidelines.[74] Because policy statements do command deference, warranted or not, the promulgation of new policy statements has been the Commission's most effective weapon against judicial discretionary departures.[75]

B. The Amendment: The Commission's Best Weapon

The Sentencing Commission is authorized to submit guideline amendments and modifications to Congress for annual approval.[76] After a period of review, these changes become effective unless Congress modifies or disapproves of them.[77] Prior to submitting these changes, however, the Commission is required to consult with authorities such as the Judicial Conference of the United States, the Bureau of Prisons, and the Criminal Division of the Justice Department.[78] Section 994(o) requires these and other authorities to submit annual reports to the Commission, suggesting warranted guideline changes and generally assessing the guidelines' effectiveness and the Commission's work.[79] However, the Commission is not required to include these suggested changes in its proposal to Congress.[80]

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70. Id. at 4.

71. See id. See also Marc Miller and Daniel J. Freed, *Editor's Observations: Amending the Guidelines*, 4 Fed. Sent. Rptr. 307 (1992).

72. See Miller and Freed, 3 Fed. Sent. Rptr. at 4 (cited in note 69).

73. 112 S. Ct. 1112 (1992).

74. Id. at 1125. Justice White noted that "Congress has clearly distinguished hetween guidelines and policy statements." Id. (White, J., dissenting).

75. See notes 85-95 and accompanying text.

76. 28 U.S.C. § 994 (p) (cited in note 20).

77. See id.

78. Id. § 994(o).

79. Id.

80. See id. The statute requires only that "[t]he Commission periodically . . . review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to this section." Id.

Freed and Miller suggest that the Commission drafted restrictive policy statements with the intent of soliciting feedback from judges because it did not have time, when originally promulgating the guidelines, to consider adequately all potentially relevant offender characteristics in sentencing.[81] Through the reports of authorities such as the Judicial Conference, the Commission could consider this feedback when promulgating future amendments to the guidelines.[82]

Although judges throughout the federal system have provided valuable feedback, the Commission has largely ignored it, particularly suggestions that the Commission take a more flexible approach in considering offender characteristics during sentencing.[83] The Commission has not only ignored this request, but it has further restricted the scope of discretionary departures by attacking those offender characteristics that judges have relied on in specific cases.[84]

For example, in the 1990 decision *United States v. Lara*,[85] the Second Circuit affirmed a downward departure based on the defendant's delicate physique and his potential vulnerability in prison.[86] The Commission responded with the November 1991 amendment to Section 5H1.4, declaring that physical appearance, including physique, is not ordinarily relevant as a consideration for departure.[87] That same year, the Commission added Section 5H1.11 in response to two cases: *United States v. Big Crow*,[88] in which the Eighth Circuit affirmed a downward departure based on the defendant's impeccable employment history and his continuous efforts to overcome the adverse conditions of an American Indian reservation,[89] and *United States v. Pipich*,[90] a District of Maryland case in which the court based a downward departure on the defendant's military service.[91] The 5H1.11 amendment announced that military, charitable, civic, or public service; work-related contribu-

81. Miller and Freed, 3 Fed. Sent. Rptr. at 4-5 (cited in note 69).

82. Id.

83. See Paul J. Hofer, *Commission Sends 31 Amendments to Congress*, 4 Fed. Sent. Rptr. 310 (1992) (noting the Judicial Conference's "special concern [with] the lack of flexibility on the part of judges to individualize sentences under the guidelines").

84. See Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 Fed. Sent. Rptr. 6, 8-9 (1992) (noting that "[t]he Sentencing Commission seems determined to root out any deviation from harsh punishment").

85. 905 F.2d 599 (2d Cir. 1990).

86. Id. at 605.

87. See U.S.S.G. § 5H1.4, p.s. at 324 (cited in note 12). See also Weinstein, 5 Fed. Sent. Rptr. at 9 (cited in note 84).

88. 898 F.2d 1326 (8th Cir. 1990).

89. Id. at 1332.

90. 688 F. Supp. 191 (D. Md. 1988).

91. Id. at 192.

tions; and other prior good deeds are not ordinarily relevant in considering whether a departure from the guidelines is warranted.[92]

The most recent links in the amendments to departures chain are the Ninth Circuit's decision in *Floyd*[93] and the November 1992 amendment prohibiting consideration of lack of guidance and similar factors.[94] The 5H1.12 amendment, however, differs from other amendments in one important aspect: it identifies lack of guidance and other considerations stemming from a disadvantaged youth as belonging to that class of factors that can *never* be relevant to a departure decision.[95]

C. "Not Relevant" Versus "Not Ordinarily Relevant"

Congress's main goal in creating the Sentencing Commission was to achieve equality in sentencing by preventing courts from considering irrelevant factors such as race, sex, and economic class.[96] In promulgating the guidelines and amendments, however, the Commission has used language that often discourages consideration of factors that are relevant to the sentencing decision, such as the defendant's personal history.[97]

In the introductory chapter to the guidelines, the Commission expressed its intent that the courts treat a guideline as having carved out a heartland, a group of typical cases dealing with the particular type of conduct described in the guideline.[98] A departure may be warranted, however, in an atypical case, in which a guideline applies but the defendant's conduct is significantly different from the norm.[99] The Commission then excepts those factors labeled in Section 5H and 5K as "not relevant" and declares that such considerations *cannot* be grounds for departure.[100] Apart from these exceptions, the Commission concedes that any other factor, whether addressed in the guidelines or not, may serve as a basis for departure in unusual cases.[101] Therefore, unlike the "not relevant" factors, those considerations listed as "not ordinarily rel-

92. U.S.S.G. § 5H1.11, p.s. at 326. See also Weinstein, 5 Fed. Sent. Rptr. at 9 (cited in note 84).

93. *Floyd*, 945 F.2d 1096.

94. U.S.S.G. § 5H1.12, p.s. at 326 (cited in note 12).

95. Id.

96. See notes 17-20 and accompanying text.

97. See notes 102, 103, and accompanying text.

98. U.S.S.G. Ch. 1, Pt. A 4(b), intro. comment. at 5-6 (cited in note 12).

99. Id.

100. Id.

101. Id. This commentary specifically states that except for the few factors declared not relevant, "the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case." Id. at 6. "Lack of [g]uidance as a [y]outh and [s]imilar [c]ircumstances" is specifically enumerated here as not relevant, a result of the 1992 amendment. Id.

evant" in Section 5H may be valid grounds for departure in unusual situations.[102] Many judges, however, hesitate to depart, even in unusual cases, if a factor has been labeled "not ordinarily relevant," either for fear of reversal on appeal or because the Commission adequately considered the factor in formulating the guidlelines.[103] The end result is that the Sentencing Commission has thwarted judicial discretion beyond the level intended by Congress.

The latest addition to the Commission's blacklist of irrelevant factors is especially disturbing: an outright attempt to ban the consideration of a defendant's family background.[104] The Commission offers no explanation or commentary in support of its conclusion that lack of guidance as a youth or a disadvantaged upbringing is completely irrelevant for sentencing purposes, and it fails to delineate the scope of the amendment.[105] Because of this ambiguity, sentencing courts are likely to regard a defendant's history of childhood abuse as a similar circumstance indicating a disadvantaged upbringing,[106] and refuse to consider it as possible grounds for departure even in extreme cases. However, an alternative, more flexible approach for determining the relevance of childhood abuse in criminal sentencing has emerged: the Ninth Circuit method in *Roe*.[107] Hopefully this approach will prevail.

V. *UNITED STATES V. ROE*

B. Roe[108] pled guilty to bank robbery in the United States District Court for the District of Oregon and received a sentence of 145 months in prison.[109] Roe appealed to the Ninth Circuit Court of Appeals claiming that the lower court erred when it declined to grant a downward departure based on her childhood history of abuse.[110] The record shows that until the age of twelve, Roe lived with her mother, a drug addict, and her mother's boyfriend, a drug dealer.[111] For several years, often daily, the mother's boyfriend brutally beat Roe with coat hangers, ex-

102. See id.

103. See *United States v. Roe*, 976 F.2d 1216, 1217 (9th Cir. 1992) (noting the district court's reluctance to classify Roe's exceptional history of abuse as extraordinary). See also *United States v. Dillard*. 975 F.2d 1554, 1555 (8th Cir. 1992) (concluding that because the Commission "adequately considered" diminished mental capacity in formulating Section 5K2.13, a court is foreclosed from considering that factor under 5K2.0).

104. U.S.S.G. § 5H1.12, p.s. at 326 (cited in note 12).

105. Id.

106. Id.

107. See notes 119-22 and accompanying text.

108. This case was initially filed under the plaintiff's full name; however, the court decided to change that name to "B. Roe" for purposes of publication. *Roe*, 976 F.2d at 1216.

109. Id. at 1217.

110. Id.

111. Id. at 1218.

tension cords, and belts; Roe also was raped and sodomized repeatedly.[112] At least once, the boyfriend urinated in Roe's mouth while forcing her to lie naked.[113] After Roe ran away from home at age twelve, an acquaintance took her to Las Vegas and forced her to become a prostitute, during which period Roe was repeatedly abused by pimps and customers.[114] Roe suffered similar patterns of abuse until the time she committed the robbery over fifteen years later.[115]

The district court held that the effects of childhood abuse are covered under Section 5H1.3, the Commission's policy statement pertaining to mental and emotional conditions.[116] Because the Commission concluded that such conditions are "not ordinarily relevant" grounds for departure, the district court stated that it could grant a departure based on a defendant's abusive history in "extraordinary circumstances" only;[117] the court held that such circumstances did not exist in Roe's case.[118]

The Ninth Circuit agreed with the district court's ruling that Section 5H1.3 encompasses the effects of abuse,[119] and therefore such a finding may constitute grounds for departure in extraordinary circumstances only.[120] The Ninth Circuit, however, held that the lower court clearly erred in concluding that Roe's circumstances were not extraordinary; the court pointed to expert medical testimony showing that Roe's abusive history greatly exceeded that of typical abuse cases, and that, as a result, she had become "virtually a mindless puppet."[121] The Ninth Circuit remanded the case to the district court for reconsideration of Roe's exceptional circumstances.[122]

The Ninth Circuit opinion implied that the savage abuse Roe suffered affected her state of mind, thus reducing her culpability.[123] The blameworthiness of a defendant traditionally has been important in

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112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 1217-18.
117. Id. at 1217 (citing *United States v. Boshell*, 952 F.2d 1107, 1107 (9th Cir. 1991)).
118. Id.
119. The court noted that the Fifth and Eighth Circuits also support the proposition that the effects of abuse are encompassed under Section 5H1.3. Id.
120. Id. at 1218.
121. Id.
122. Id. The Ninth Circuit also suggested that on remand the district court should consider "whether Roe's history of abuse and neglect warrants a departure under . . . *Floyd*." Id. Note that *Roe* was decided approximately one month prior to the effective date of Amendment 5H1.12. See note 158 and accompanying text.
123. *Roe*, 976 F.2d at 1217-18.

sentencing.[124] In the pre-guideline era, sentencing judges routinely considered mental competency, education, age, criminal record, and other factors in calculating the degree of a defendant's blameworthiness.[125] Despite policy statements discouraging consideration of many of these factors, *Roe* represents the proposition that culpability should remain a central principle in federal sentencing. The Ninth Circuit justified its focus on culpability in *United States v. Crippen*[126] by asserting that although Congress did not define "aggravating or mitigating circumstance" for purposes of Section 3553(b), those words suggest that such a circumstance is a proper basis for departure only if it relates to the defendant's culpability, the seriousness of the crime, or other sentencing concerns authorized by Congress.[127] Moreover, the Ninth Circuit has continued to adhere to its pre-guidelines principle that a sentencing judge must personally assess the culpability of individual defendants rather than mechanically apply a prescribed sentence to a given category of crime.[128]

In the wake of Amendment 5H1.12, the questions arise of whether courts should treat childhood abuse as manifesting a mental or emotional condition under 5H1.3, preserving a court's right to depart in extreme cases, or as a circumstance indicating a disadvantaged upbringing under 5H1.12, thus refusing to consider it as grounds for departure, even in extreme cases such as *Roe*. Freed and Miller's argument that no policy statement is binding on the courts would solve this problem;[129] however, most courts, including the Supreme Court,[130] have not embraced this idea and continue to afford considerable deference to the policy statements.[131] Therefore, the question remains: Is a defendant's

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124. See Miller and Freed, 3 Fed. Sent. Rptr. at 5-6 (cited in note 69) (noting that the blameworthiness of the defendant historically has been an "integral component[] of just sentencing").

125. Id.

126. 961 F.2d 882 (9th Cir. 1992).

127. Id. at 884.

128. See *United States v. Floyd*, 945 F.2d 1096, 1102 (9th Cir. 1991), overruled on different grounds by *United States v. Atkinson*, 990 F.2d 501 (9th Cir. 1993) (discussing the *Barker/Brady* principle as first enunciated in *United States v. Barker*, 771 F.2d 1362 (9th Cir. 1985), a pre-guidelines case, later held as valid in the post-guidelines case *United States v. Brady*, 895 F.2d 538 (9th Cir. 1990)).

129. See note 69 and accompanying text.

130. See note 73 and accompanying text for a discussion of *Williams*, 112 S. Ct. at 1112. See also *Dillard*, 975 F.2d at 1555 (holding that because "the Sentencing Commission adequately considered the circumstances for downward departure based on diminished mental capacity when it formulated section 5K2.13, [the court was] foreclos[ed from] consideration of diminished mental capacity under section 5K2.0").

131. Policy statements such as § 5H1.12 that declare certain factors "not relevant" are even less likely to be challenged in court than those labeled "not ordinarily relevant." See generally U.S.S.G. § 5H1.1-.12 at 326 (cited in note 12).

history of abuse per se an improper consideration? Or should the abuse be considered grounds for departure in extraordinary or atypical cases?

A. Treatment of Childhood Abuse in Other Circuits

The Fourth Circuit in *United States v. Daly*[132] refused to depart downward based on the defendant's history of childhood abuse, stating that criminal conduct too often can be traced to such factors.[133] Such courts believe that if these kinds of departures are allowed, the criminal justice system will be flooded with defendants fighting to establish the connection between childhood abuse and criminal conduct.[134] The *Daly* floodgates argument[135] fails to recognize that weeding out meritless claims and defenses is an essential function of the judicial system. The relevance of a defendant's history of abuse should depend on the quantity and severity of the abuse endured and whether the effects of the abuse bear on the defendant's culpability. Certainly, if a defendant's history is indistinguishable from that of innumerable other defendants, no departure is warranted. In cases such as *Roe*, however, in which a defendant's mental and emotional state has deteriorated as a result of over fifteen years of continuous physical and sexual abuse,[136] a sentencing court should be free to depart based on a finding of reduced culpability.

The Fifth Circuit, like the Ninth, analyzes the effects of childhood abuse as a mental and emotional condition covered under policy statement 5H1.3.[137] In addition to the "extraordinary circumstances" requirement, however, the Fifth Circuit requires a direct causal connection between the abuse and the present offense.[138] For example, in *United States v. Vela*,[139] the Fifth Circuit acknowledged that a history of incest could be grounds for departure in an extraordinary case but affirmed the district court's refusal to depart downward even though the defendant suffered childhood sexual abuse that admittedly was "shocking and repulsive."[140] The court held that this downward de-

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132. 883 F.2d 313 (4th Cir. 1989).

133. Id. at 319. The court noted that "current criminal behavior can often be partially explained by childhood abuse and neglect" and that "these are [not] the kinds of considerations which warrant substantial reductions in guidelines sentences." Id.

134. See id.

135. See id. The court refers to the "innumerable defendants" that could plead "unstable upbringing" as a ground for departure.

136. See notes 112-15 and accompanying text.

137. See *United States v. Vela*, 927 F.2d 197, 199 (5th Cir. 1991).

138. See id. at 199-200.

139. *Vela*, 927 F.2d 197.

140. Id. at 199.

parture was unjustified because the evidence failed to show that the defendant's unfortunate history caused her to commit the offense.[141]

A noticeable distinction arises between *Roe* and *Vela*. In *Roe*, the defendant claimed that a male companion coerced her into committing the robbery by threatening and striking her prior to the incident.[142] Additionally, medical experts testified that the defendant's exceptional history of abuse rendered her nothing more than a mindless instrument in the perpetration of the crime.[143] The defendant in *Vela* offered no similar testimony; rather, the court found that the defendant freely chose to participate in a heroin conspiracy.[144] Although reaching different results, both of these cases appear to rest on the same principle: to warrant a downward departure, the effects of abuse must manifest themselves in such a way as to impair the volition of the defendant.

Just as the Ninth and Fifth Circuits treat the effects of childhood abuse as a potential mental or emotional condition under 5H1.3, the Eighth Circuit treats the effects of spousal abuse similarly. In *United States v. Desormeaux*,[145] the Eighth Circuit stated that although spousal abuse is "not ordinarily relevant" in departure decisions, it nevertheless may warrant a departure in unusual circumstances.[146] The court, however, held that the circumstances in *Desormeaux* did not meet that test, reversing the lower court's decision to depart from the guidelines.[147] In support of this holding, the court maintained that the abuse was too attenuated to support a departure.[148] For example, the defendant had never married but claimed to have been involved with a man who emotionally and physically abused her.[149] Further, the abuse had occurred three years prior to the assault for which the defendant was charged, and the victim had no relation to the prior abuse.[150] Finally, the court held that the defendant's diminished self-esteem and self-worth were not significant enough to justify departure.[151]

Desormeaux presents yet another issue: what weight should sentencing courts give to the amount of time that passes between the abuse and the commission of the crime? Although the *Roe* and *Vela* courts did not address the significance of a lapse of time between the abuse

141. Id. at 200.
142. *Roe*, 976 F.2d at 1219.
143. Id. at 1218.
144. See *Vela*, 927 F.2d at 199.
145. 952 F.2d 182 (8th Cir. 1991).
146. Id. at 185.
147. Id. at 185, 187.
148. Id. at 185.
149. Id.
150. Id.
151. Id.

and the crime, this temporal factor could bear on culpability and causation. In *Roe* the record showed that the defendant had been abused for the past fifteen years, apparently until the time of the trial.[152] In *Vela*, however, the abuse apparently was confined to the defendant's childhood, several years prior to the conviction.[153]

Although the *Roe* court focused on the defendant's state of mind and her reduced culpability, the continual abuse Roe suffered until the time of the offense likely influenced the outcome of the case. Under the *Roe* approach, however, a temporal lapse would not necessarily defeat a departure. By contrast, such a lapse likely would prevent a departure under the *Vela* analysis because temporal proximity bears directly on causation; the more time that passes between the abuse and the crime, the less likely it becomes that the former trauma caused the latter behavior.

One final factor appears in *Desormeaux* that is not present in *Roe* or *Vela*: the victim of the crime was not involved in prior abusive incidents.[154] Although the identity of the defendant's abuser is not relevant to a departure based on a mental or emotional condition under 5H1.3, it is relevant to policy statement 5K2.10, which allows departures from a guideline range if the victim's misconduct provoked the defendant into acting violently.[155] This policy statement, however, does not apply to a defendant who is charged with criminal sexual abuse or a nonviolent crime.[156]

In summary, defendants may receive some protection from the inflexible guideline system under 5K2.10 when their crimes are directed at their abusers. Victims of abuse whose crimes are not related to their abusers may seek a departure in those circuits relying on 5H1.3, provided extraordinary circumstances exist. Depending upon the judicial reception of policy statement 5H1.12, however, departures may become unavailable even in these circuits.

B. The 1992 Amendments

Policy statement 5H1.12, effective November 1, 1992, states that youthful lack of guidance and similar circumstances evidencing a disadvantaged upbringing are not relevant grounds for a downward depar-

152. See *United States v. Roe*, 976 F.2d 1216, 1218 (9th Cir. 1992).

153. See text accompanying notes 137-41.

154. See *Desormeaux*, 952 F.2d at 185.

155. See U.S.S.G. § 5K2.10, p.s. at 333 (cited in note 12) (stating that "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstance of the offense").

156. See id.

ture from the applicable guideline range.[157] The history of the amendment indicates that 5H1.12 was not proposed in its current form; rather, the Commission initially requested comment on whether the policy statements should be amended to provide expressly whether a court may consider a defendant's lack of guidance as a youth, a history of family violence, or similar factors as grounds for departure.[158] Significantly, the policy statement in its final form does not mention "history of family violence;" instead, it substitutes the vagne notion of "similar circumstances indicating a disadvantaged upbringing."[159] Although the Commission may have intended the latter clause to be all-encompassing, a more rational explanation is that after evaluating the issue of family violence, the Commission was not comfortable expressly precluding consideration of a defendant's abusive history.

Further support for the proposition that 5H1.12 does not cover family violence is the Commission's prompt proposal of the amendment in response to *Floyd*,[160] because of the case's "lack of youthful guidance" standard, which was regarded as dangerously vague.[161] By contrast, a defendant's abusive upbringing is a palpable reality; the effects of such abuse are more easily gauged and are usually much more severe. Therefore, a defendant's documented history of childhood abuse does not deserve the same treatment as the nebulous lack of youthful guidance standard.

Declaring that a defendant's past suffering can never be relevant to a sentencing decision ignores the reality that judges sentence individuals, not fact patterns, and that they consider many factors when evaluating a defendant's culpability.[162] Alternatively, some circuits now skirt restrictive policy statements by recognizing that sentencing necessarily involves evaluation of a multitude of offender characteristics and their interactions with each other.[163] In 1992, the Commission, on behalf of

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157. Id. at § 5H1.12, p.s. at 326.

158. 57 Fed. Reg. 112 (1992) (proposed Jan. 2, 1992).

159. U.S.S.G. § 5H1.12, p.s. at 326 (cited in note 12).

160. See Miller and Freed, 4 Fed. Sent. Rptr. at 307 (cited in note 71) (noting that although the Commission directly attacked the "lack of youthful guidance standard," it did so without specifically mentioning *Floyd* or otherwise explaining its conclusion).

161. See *Judicial Conference Testimony*, 4 Fed. Sent. Rptr. 319, 324 (1992) (quoting Statement of Vincent L. Broderick, Chair, Comm. on Criminal Law of the Judicial Conference of the United States, and Mark L. Wolf, Chair, Subcomm. on Sentencing Guidelines and Procedures before the United States Sentencing Commission, as remarking that "[a]mbiguous standards such as 'lack of youthful guidance' . . . are likely to make the sentencing hearing a battleground over discrete factors that are poorly defined").

162. See id. at 320 (stating that "[t]he Commission provides Guidelines for a statistical universe: each time a judge sentences there is not only a factual pattern before him but there is an individual, different from every other individual in the world").

163. See note 167 and accompanying text.

the Judicial Conference, considered a second amendment reflecting this alternative view, but the amendment failed in Congress.[164] This amendment proposed adding the following paragraph to the Introductory Commentary of Chapter 5, Part H:

> Offender characteristics that are not ordinarily relevant to determining whether a sentence should be outside the guidelines, or where within the guidelines a sentence should fall, may be relevant to a departure from the guidelines if such factors, *alone or in combination*, are present to an unusual degree and are important to the sentencing purposes in the particular case.[165]

The amendment was part of an overall plea with the Commission to eliminate guideline language discouraging departures, because judges perceive the discretion to depart from the guidelines to be an integral part of an effective guidelines system.[166] The Commission designed this particular addition to encourage judges to consider offender characteristics that are present in abnormal degrees or unique combinations, and to depart if necessary to further the sentencing purpose.[167]

The Commission is considering a revised but essentially identical amendment in 1993,[168] attempting again to resolve the question of whether a court may treat a conglomeration of factors as a mitigating circumstance warranting departure or whether individual circumstances must be weighed separately. Meanwhile, the Ninth Circuit continues to use the "combination of factors" approach it enunciated in *United States v. Cook*.[169] In *Cook*, the court stated that the reference in Title 18 U.S.C. Section 3553(b) to a "mitigating circumstance" in the singular is not a rational reason for holding that this circumstance cannot be comprised of a "combination of factors."[170] Moreover, the court stressed that to reach a wise decision, the court must consider total behaviorial patterns and how particular factors interact.[171]

The "complex of factors" approach to sentencing departures ensures that certain circumstances, such as a defendant's violent family

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164. See 57 Fed. Reg. 112 (1992) (proposed Jan. 2, 1992).

165. Id. (emphasis added).

166. See generally *Judicial Conference Testimony*, 4 Fed. Sent. Rptr. at 320-29 (cited in note 161).

167. See id. at 324.

168. See 57 Fed. Reg. 62848 (1992) (proposed Dec. 31, 1992) (inserting the following additional paragraph in the Introductory Commentary to § 5H1.1: "Offender characteristics that are not ordinarily relevant to determining whether a sentence should be outside the guidelines may be considered if such factors, alone or in combination, are present to an unusual degree and are important to the sentencing purpose in the particular case"). The Commission also invited comment on "whether the language in Chapter One, Part A 4(b) (departures) can be read as overly restrictive of a court's ability to depart and, if so, how this language might be amended." Id.

169. 938 F.2d 149 (9th Cir. 1991).

170. Id. at 153.

171. Id.

history, receive consideration when warranted. As a result of policy statement 5H1.12, however, courts now may refuse to consider this factor even in combination with others.

VI. Conclusion

Until the Commission chooses to address directly the relevance of a defendant's history of family violence in federal sentencing, courts must decide for themselves whether to apply the extraordinary circumstances test under 5H1.3 or to refuse consideration of the abuse under 5H1.12. The proposed 1993 amendments contain no reference to either policy statement or to departures based on a history of family violence; however, a complete examination of departure jurisprudence is scheduled for the 1994 amendment cycle.

Apart from deciding the scope of new and existing policy statements, courts retain the power to challenge all policy statements as nonbinding authority. However, in light of the significant weight the Supreme Court recently afforded a policy statement in *Williams*, these challenges are less likely now, particularly challenges to policy statements declaring a factor "not relevant." Therefore, to preserve the discretion to depart based on a defendant's history of abuse, judges should follow *Roe* and weigh the effects of abuse on a defendant's mental or emotional condition under 5H1.3.

Retaining judicial discretion to depart from the sentencing structure in severe cases of abuse furthers the congressional purpose behind the Sentencing Reform Act: to provide *guidelines* that promote uniformity in sentencing but remain sufficiently flexible to account for aggravating or mitigating circumstances. Through their voice in the Judicial Conference, sentencing judges should urge the Commission to endorse the *Roe* approach in future amendments to the guidelines. The alternative—for judges to interpret 5H1.12 as prohibiting consideration of the effects of abuse—would further narrow the scope of judicial discretion and prevent accurate assessments of criminal culpability, an essential function of an equitable system of justice.

Jean H. Shuttleworth