The United States Sentencing Guidelines: Justice for All or Justice for a Few

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Third Circuit Review

THE UNITED STATES SENTENCING GUIDELINES: JUSTICE FOR ALL OR JUSTICE FOR A FEW?

I. INTRODUCTION

The United States Sentencing Guidelines (Guidelines) were enacted in November, 1987.1 The Guidelines were promulgated by the United States Sentencing Commission (Commission) pursuant to The Sentencing Reform Act of 1984.2 The basic purpose of the Guidelines was to implement a fair sentencing system while avoiding wide disparity in sentencing.3 The Guidelines provide a prescribed range and degree of punishment that is calculated by analyzing both the characteristics of the offense and the offender.4 Although a judge must usually stay within the prescribed range, he or she may depart from that range if there exists an aggravating or mitigating circumstance which has not already been adequately considered by the Commission.5 In deciding whether the Co-


The Sentencing Guidelines have survived constitutional attack. The Sentencing Guidelines were challenged as unconstitutional in United States v. Mistretta, 488 U.S. 361 (1989). In Mistretta, the United States Supreme Court held that Congress did not violate the separation of powers doctrine even though the United States Sentencing Commission [hereinafter Sentencing Commission] was placed in the judicial branch, where sentencing had traditionally been decided by judges. Id. at 385-89. The United States Supreme Court also held that Congress, by granting the Sentencing Commission the authority to promulgate the Guidelines, did not violate the non-delegation doctrine, because Congress had provided "significant statutory direction." Id. at 412. The Court noted that this "intricate, labor intensive task" is of the kind for which delegation to the Sentencing Commission is appropriate. Id. at 379.


For a further discussion of how the sentencing range is calculated, see infra notes 28-33 and accompanying text.

5. 18 U.S.C. § 3553(b) (1988). The complete text of § 3553(b) provides:

The court shall impose a sentence of the kind, and within the range,
mission adequately considered a circumstance, the judge must rely entirely on "the sentencing guidelines, policy statements, and official commentary of the Commission." 

Federal courts are divided on the issue of whether an individual's efforts to overcome drug addiction constitutes a mitigating circumstance which would warrant a downward departure from the appropriate sentencing range. To decide this issue, a judge must determine whether the Commission "adequately" considered an individual's efforts to overcome drug addiction when it promulgated the Guidelines. If the Commission has adequately considered drug rehabilitation, then it is not a mitigating circumstance which would warrant a downward departure from the prescribed sentencing range. If the Commission failed to consider or did not adequately consider drug rehabilitation, however, then it would constitute a mitigating circumstance whereby a judge would be

referred to in subsection (a)(4) unless 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 that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

Id. This article does not address aggravating circumstances in which an upward departure from the applicable sentence range might be warranted.

6. Id.


9. Id. For the full text of § 3553(b), see supra, note 5.
justified in issuing a sentence below the prescribed range.\textsuperscript{10}

In \textit{United States v. Pharr},\textsuperscript{11} the Third Circuit held that drug rehabilitation did not constitute a mitigating circumstance because the Commission had adequately considered an individual's efforts at drug rehabilitation when it promulgated the Guidelines. Therefore, according to the court, drug rehabilitation did not warrant a downward departure.\textsuperscript{12} In reaching this conclusion, the \textit{Pharr} court relied on a policy statement set forth in the Guidelines forbidding a downward departure based on drug dependence or alcohol abuse.\textsuperscript{13} The court further relied on a Fifth Circuit case, \textit{United States v. Mejia-Orosco}, for the proposition that Congress intended that the Guidelines represent a shift "away from a system that attempts to rehabilitate the individual."\textsuperscript{14} The Pharr court relied upon this underlying objective in reaching the conclusion that drug rehabilitation is not a circumstance which would allow a district court to depart from the appropriate sentencing range.\textsuperscript{15}

This author submits that, contrary to the holding of the Pharr court, the Commission did not adequately consider drug rehabilitation as a mitigating circumstance. Furthermore, this Brief will explain why the Pharr court's analysis of underlying objectives and policy statements is contrary to the language of both The Sentencing Reform Act and the Guidelines.\textsuperscript{17} In essence, the Pharr court attempted to predict what the Commission would have done had it considered drug rehabilitation rather than properly analyze whether the Commission had actually con-

\begin{itemize}
  \item 10. 18 U.S.C. § 3553(b) (1988).
  \item 11. 916 F.2d 129 (3d Cir. 1990), cert. denied, 111 S. Ct. 2274 (1991).
  \item 12. \textit{Id.} at 130, 133.
  \item 13. \textit{Id.} at 133. The policy statement relied on by the Third Circuit provides in part: "Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." \textit{Sentencing Guidelines}, \textit{ supra} note 1, ch. 5, pt. H, § 5H1.4 (policy statement). The court interpreted this policy statement "to mean that [both] dependence upon drugs, or separation from such a dependency" prohibit a downward departure. \textit{Pharr}, 916 F.2d at 133 (emphasis added).
  \item 15. \textit{Pharr}, 916 F.2d at 132.
  \item 16. Policy statements, while not binding on the courts, are promulgated by the Commission and may be considered in deciding whether a circumstance warrants departure from the Guidelines. 18 U.S.C. § 3553(b) (1988); see \textit{generally Sentencing Guidelines} \textit{supra} note 1. For a discussion of the \textit{Pharr} court's analysis of policy statements, see \textit{infra} notes 50, 58-63, 116-139 and accompanying text.
  \item 17. For a discussion of why underlying objectives are not pertinent to deciding whether a mitigating circumstance exists which would warrant a downward departure, see \textit{infra} notes 85-105 and accompanying text. For a discussion of why the policy statements relied upon by the \textit{Pharr} court are contrary to both Congress's and the Commission's intent, see \textit{infra} notes 116-139 and accompanying text.
\end{itemize}
sidered drug rehabilitation when it promulgated the Guidelines in the first place.

II. BACKGROUND

Before detailing the Phelps court's analysis, it should be noted that the United States Supreme Court has provided only limited review as to how the Guidelines are to be applied.18 The Guidelines, however, are quite detailed and provide a comprehensive system of analysis.19 In enacting the Sentencing Reform Act of 1984,20 Congress's main purpose was to reduce the wide disparity in sentencing that existed in the federal courts.21 The Sentencing Reform Act of 1984 established the United States Sentencing Commission as "an independent Commission in the judicial branch" which consists of seven members, three of whom are active federal judges.22 The Commission was charged with promulgating The Federal Sentencing Guidelines23 according to Congress's instructions.24

18. There have been only three United States Supreme Court cases which have involved the Federal Sentencing Guidelines: Taylor v. United States, 110 S. Ct. 2143 (1990) ("burglary" for sentencing enhancement purposes refers to any crime having basic elements of burglary); Taylor v. United States, 110 S. Ct. 265 (1989) (denying certiorari but Justice Stevens' concurrence criticized Fifth Circuit for allowing efficient management to displace careful administration of justice); United States v. Mistretta, 488 U.S. 361 (1989) (seminal case holding Sentencing Guidelines constitutional, not violative of separation of powers doctrine and not an excessive delegation of legislative power).


22. 28 U.S.C. § 991(a) (1988). The Commissioners are appointed by the President of the United States and confirmed by the Senate. Id. Each Commissioner serves for a term of six years. Id. § 992(a). He or she may be removed by the President for neglect of duty, malfeasance or other good cause. Id. § 991(a). "The Attorney General and the Chairman of the U.S. Parole Commission are ex-officio, non-voting members." Id. Furthermore, no more than four members of the Commission may be members of the same political party. Id.

23. For an account of Congress's instructions, see Ogletree, supra note 3, at 1946-47. Congress, however, provided "only very general direction[s]" to the Commission regarding the "content and structure of the guidelines." Weigel, supra note 3, at 85.

24. 28 U.S.C. § 994 (1988). The task of promulgating such Sentencing Guidelines was monumental. The original Commission considered over 100,000 federal criminal cases. United States Sentencing Com'n, Supplementary Report of the Initial Sentencing Guidelines And Policy State-
The Commission, as a permanent body, is charged with the periodic revision of the Guidelines.25 "Thus, the system is 'evolutionary,'"26—the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."27

The mechanical application of the Guidelines is quite simple. A sentencing judge assigns values to different factors which correspond to the behavior of the defendant exhibited during the criminal activity, as

ments 16-17 (1987). Over 10,000 of the criminal cases were detailed reports. Id. at 11; Breyer, supra note 1, at 7-8. The Commission completed a preliminary draft of the Guidelines in September, 1986 and distributed it to thousands of individuals, organizations and government agencies in order to elicit analysis for comment. U.S. SENTENCING COMM'N GUIDELINES PRELIMINARY DRAFT, 40 Crim. L. Rep. (BNA) 3001 (Oct. 1, 1986). The Commission revised the guidelines to correct the multitude of problems pointed out by commentators. United States Sentencing Comm'n, Supplementary Report of the Initial Sentencing Guidelines and Policy Statements 11 (1987). Judge Edward R. Becker expressed concern that the preliminary federal Sentencing Guidelines would lead to the same disparity in sentencing that the Sentencing Guidelines were trying to correct. Oglitree, supra note 3, at 1949 n.67; see also Sentencing Commission's First Effort Receives Outpouring of Criticism, 40 Crim. L. Rep. (BNA) 2223-28 (Dec. 17, 1986) (many commentators critical of first draft of Sentencing Guidelines partly because of possibility of wide disparity not being corrected). While the Commission met the congressional deadline, it sent the final draft to Congress along with a request to postpone putting the Guidelines into effect pending additional field testing. Sentencing Commission Sends Guidelines to Congress, 41 Crim. L. Rep. (BNA) 1009 (Apr. 15, 1987). Many commentators thought the Sentencing Guidelines required additional revisions. Sentencing Commission's Second Draft Meets with More Approval Than First, 40 Crim. L. Rep. (BNA) 2487-92 (March 25, 1987) (additional "field test[ing]" of Sentencing Guidelines by judges desirable); Oglitree, supra note 3, at 1949 (second draft that "received extensive criticism" rushed through to meet "congressional deadline").


26. Congress as well as the Commission realized that the Guidelines were not perfect and would require constant revision which could only be accomplished effectively by analyzing data and comments from judges, scholars and other commentators. 28 U.S.C. § 994(p) (1988); Sentencing Guidelines, supra note 1, ch. 1 pt. A.

well as to the defendant's criminal history.28 These values are then totaled to generate two numbers:29 the total offense level30 and the criminal history category.31 These two numbers are then applied to a “Sentencing Grid” which produces a minimum and maximum sentencing range.32 The judge may depart from this range if “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission . . . .”33 It was

28. Weigel, supra note 3, at 86. The Guidelines require the sentencing judge to assign numerical weight to numerous aggravating and mitigating factors relating to the conduct attending the offense committed and the defendant's criminal history. Id.
29. Id.
30. Id.
31. SENTENCING GUIDELINES, supra note 1, ch. 1, pt. B, § 1B1.1 (application instructions). The total offense level represents the numerical calculation relating to offense conduct. Id. The criminal history category represents the calculation relating to the defendant's past criminal activities. Id.
32. Id.; Weigel, supra note 3, at 86. These two numerical results, which intersect on a Sentencing Table, “determine a Sentencing Range delineating a minimum and maximum number of months of imprisonment.” Weigel, supra note 3, at 86; see SENTENCING GUIDELINES, supra note 1, ch. 1, pt. B § 1B1.1 (application instructions). Generally, the maximum sentencing range may not exceed the minimum range by twenty-five percent. 28 U.S.C. § 994(b)(2) (1988).
33. 18 U.S.C. § 3553(b) (1988). Chronologically, the Sentencing Guidelines are applied in the following manner. First, the particular crime must be looked up in the applicable section of Chapter Two. SENTENCING GUIDELINES, supra note 1, ch. 1, pt. B, § 1B1.1(a) (application instructions). Second, the base offense level and specific offense characteristics for that particular crime must be found in Chapter Two. Id. ch. 1, pt. B, § 1B1.1(b). Third, levels are added or subtracted from the base offense level for specific offense characteristics. Id. ch. 1, pt. B, § 1B1.1(b). Fourth, adjustments referenced in Chapter Three, relating to the victim, role and obstruction of justice are applied. Id. Parts A, B and C from Chapter Three each refer to different factual circumstances which may have surrounded the criminal activity and each section may apply. Id. For instance, Chapter Three, Part A deals with whether the victim was unusually vulnerable, an officer of the law, or physically restrained in the course of the offense. Id. ch. 3, pt. A, § 3A. Part B deals with the defendant's aggravating, mitigating role in the crime. Id. ch. 3, pt. B, § 3B. Part C deals with the defendant's obstruction of justice and risk of death or harm to others in flight from crime. Id. ch. 3, pt. C, § 3C. Fifth, the computation is adjusted to reflect the defendant's acceptance of responsibility pursuant to Chapter Three, Part E. Id. ch. 1, pt. B, § 1B1.1(e). Sixth, the criminal history category is determined as specified by Chapter Four, Part A and adjustments are made to it by using Chapter Four, Part B. Id. ch. 1, pt. B, § 1B1.1(f). Adjustments are made upwards when the defendant is a career offender or engaged in criminal conduct as a livelihood. Id. ch. 4, pt. B, § 4B1.1-1.4; see id. ch. 1, pt. B, § 1B1.1(f). Seventh, the guideline range is determined by combining the offense level and criminal history category previously calculated pursuant to Chapter Five, Part A. Id. ch. 1, pt. B, § 1B1.1(g). The sentencing requirements and options (for example, probation, imprisonment, supervision conditions, fines and restitution) related to the particular guideline range are set forth in Chapter Five, Parts B-G. Id. ch. 1, pt. B, § 1B1.1(h). Finally, reference to Chapter Five, Parts H and K determines if any departure or additional considerations are warranted. Id. ch. 1, pt. B, § 1B1.1(i). Note that if there are multiple counts of conviction, additional calculations are necessary. Id. ch. 1, pt. B, § 1B1.1(d). Chapter Three, Part D deter-
this issue that ultimately brought Stanley Pharr before the Third Circuit.

III. *United States v. Pharr*

In 1988, Stanley Pharr sold stolen United States Treasury checks to an undercover agent on four different occasions.34 Later that year, Pharr sold a stolen United States money order and attempted to sell a stolen School District of Philadelphia check to the same undercover agent.35 The total face value of the checks involved was $4,565.66.36 According to Pharr, his heroin “addiction motivated him to sell [the] stolen treasury checks.”37 Pursuant to a plea bargain arrangement entered into on October 18, 1989, Pharr agreed to admit his involvement in each of these transactions.38 He pled guilty to one count of selling stolen Treasury checks and one count of possession of stolen mail.39 Stanley Pharr then entered an inpatient drug rehabilitation program, which he successfully completed.40

The appropriate sentencing range for Pharr’s crimes under the Guidelines was fifteen to twenty-one months imprisonment.41 The district court, however, noted that Pharr was making “conscientious efforts” to rehabilitate himself and “overcome a pernicious habit.”42
Moreover, the district court found that the Commission, when promulgating the Guidelines, did not adequately consider a defendant’s drug rehabilitation or the effect that incarceration would have on such rehabilitation.\(^43\) The district court, therefore, believed that it had the authority to depart downward from the fifteen to twenty-one month sentencing range.\(^44\) Accordingly, the district court sentenced Pharr to five years probation.\(^45\)

The government appealed contending that post-conviction rehabilitation had been adequately considered by the Commission and therefore was not a valid basis for a downward departure from the Guidelines.\(^46\) On appeal,\(^47\) the United States Court of Appeals for the Third Circuit agreed with the government’s argument and reversed the district court’s ruling.\(^48\) The Third Circuit based its holding on the “underlying objectives of the sentencing guidelines and the policy statements articulated by the Commission.”\(^49\)

\(^{43}\) *Pharr*, 916 F.2d at 130; Brief for Appellant at 6, United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) (No. 90-1284). The district court believed that the drug treatment in prison was inadequate and would have a detrimental effect on Pharr’s overall drug rehabilitation. *Pharr*, 916 F.2d at 130. The district court explained that while the Guidelines discuss addiction as an unacceptable defense, they do not address whether separation from an addiction may be a mitigating circumstance which would warrant a downward departure. Brief for Appellant at 6-7, United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) (No. 90-1284). The district court held that the community would be ill-served if a downward departure was not permitted. *Id.* at 6-7. The district court also expressed concern over treating “flesh and blood” as calculi. *Id.* Rather, the court favored treating individual defendants separately and believed the Sentencing Guidelines were perhaps inadequate to some degree. *Id.* In this case, therefore, the court believed that in order for justice to be served, a sentence lower than the applicable sentencing range was necessary. *Id.*

\(^{44}\) *Pharr*, 916 F.2d at 130, 133.

\(^{45}\) *Id.* at 130. Stanley Pharr was sentenced to five years probation on each count. *Id.* Both sentences were to be served concurrently. *Id.* Under the district court’s sentence, Pharr was ordered to pay $50 assessment on each count and $1200 restitution payable over the next three years. *Id.*

\(^{46}\) *Id.* at 131. For a discussion of how a mitigating factor may be grounds for a downward departure, see supra notes 5-6 and accompanying text.

\(^{47}\) The Third Circuit’s review of a district court’s determination that the Sentencing Guidelines have or have not adequately considered a particular mitigating circumstance is plenary. *Pharr*, 916 F.2d at 131 (citing United States v. Ryan, 866 F.2d 604, 610 (3d Cir. 1989); United States v. Uca, 867 F.2d 783, 786 (3d Cir. 1989)). Whether a particular mitigating circumstance may warrant a downward departure is therefore a question of law, which is also subject to plenary review. *Id.* (citing United States v. Diaz-Villafane, 874 F.2d 48, 49 (1st Cir. 1989), cert. denied, 110 S. Ct. 177 (1989)).

\(^{48}\) *Pharr*, 916 F.2d at 130, 132-33. The *Pharr* court held that a defendant’s post-conviction drug rehabilitation had been adequately considered by the Sentencing Commission and therefore would not constitute grounds for a downward departure from the appropriate sentencing range. *Id.*

\(^{49}\) *Id.* at 132.
Writing on behalf of a unanimous Third Circuit panel, Judge Cowen began his analysis with the assertion that Congress's authorization of the Guidelines was in fact a shift away from a rehabilitative system and towards a system that attempts to impose a fair punishment for each crime, rather than for each criminal. The court explained that Congress had previously mandated "that personal characteristics should not ordinarily affect sentencing."

The Third Circuit further stated that, because of the shift away from rehabilitation, a district court has limited discretion in sentencing and must adhere to the Guidelines whether or not it agrees with Congress's theory of penology. The court asserted that the Commission "rejected purely personal characteristics" such as drug rehabilitation. Yet, the court recognized that Congress did not absolutely foreclose all consideration of all of a defendant's characteristics. Rather, the personal characteristics that may be considered by a district court are limited to those that the Commission decides are related to the defendant as a criminal.

50. Id. at 130. The panel consisted of Judges Stapleton, Cowen and Weis.

51. Id. at 132. The Third Circuit relied on United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir. 1989), cert. denied, 109 S. Ct. 3257 (1989). Pharr, 916 F.2d at 132. In Mejia-Orosco, the Court of Appeals for the Fifth Circuit held that Congress had decided that the maxim "the punishment should fit the offender and not merely the crime... speaks to the unworkable and unjust." Mejia-Orosco, 867 F.2d at 218 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). Furthermore, the court stated that predictions of "an offender's propensity for, or actual rehabilitation were found to be unsubstantiated." Id. Therefore, a system based upon the parole official's determination of a prisoner's rehabilitation was undesirable. Id. The court concluded that "the main purpose of imprisonment is punishment" and consequently, "the punishment should fit the crime," not the criminal. Id.

52. Pharr, 916 F.2d at 132 (citing 28 U.S.C. § 994(e) (1988)).

53. Id. (citing Mejia-Orosco, 867 F.2d at 218-19; United States v. Lopez, 875 F.2d 1124, 1126 (5th Cir. 1989)).

54. Id. at 133 (citing Sentencing Guidelines, supra note 1, ch. 5, pt. H, § 5H1.3 (policy statement)).

55. Id. at 132.

56. Id. at 132-33. Congress "instructed the Sentencing Commission, not the courts, to determine whether various personal characteristics should be considered in sentencing." Id. (citing 28 U.S.C. § 994(d) (1988)). The text of § 994(d) provides:

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service or other [incidence] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;
The Third Circuit next relied upon a policy statement accompanying the Guidelines which provides that 

"[d]rug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines." 57

It opined that these prohibitions mean that drug dependence, as well as a separation from such a dependence, is not a basis for a downward departure. 58

Although the Third Circuit stated that the Commission could not consider every potential factor that might warrant a departure from the

(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant’s culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.

28 U.S.C. § 994(d) (footnote omitted).

57. Pharr, at 133; Sentencing Guidelines, supra note 1, ch. 5, pt. H, § 5H1.4 (policy statement). The text of the policy statement provides:

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. However, an extraordinary physical impairment may be a reason to impose a sentence other than imprisonment.

Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program. If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body to judge the success of the program.

This provision would also apply in cases where the defendant received a sentence of probation. The substance abuse condition is strongly recommended and the length of probation should be adjusted accordingly. Failure to comply would normally result in revocation of probation.


58. Pharr, 916 F.2d at 133. The policy statement upon which the court relied explicitly addresses only a dependence on drugs. For the text of Sentencing Guidelines, ch. 5, pt. H, § 5H1.4, see supra note 57. However, the Third Circuit read the policy statement as also prohibiting downward departures based on drug rehabilitation (or a separation from drug dependence). Pharr, 916 F.2d at 133. Additionally, the Third Circuit expressed concern that a downward departure under such circumstances would be tantamount to rewarding defendants for being addicted to drugs at the time they commit a crime. Id. ("Along with being rewarded for overcoming their drug dependency, defendants would be rewarded, in a sense, for being addicted.").
Guidelines, the court opined that the Commission had considered and had rejected "factors such as the defendant's efforts to improve himself through drug rehabilitation." Two factors that had been specifically rejected were the defendant's efforts to "improve himself through education or his ability to maintain steady employment." Judge Cowen stated that Pharr's efforts at drug rehabilitation were analogous to the above factors already rejected by the Commission.

Finally, the court concluded that any effect that imprisonment might have on Pharr's efforts to rehabilitate himself would also be inappropriate grounds for a downward departure. This conclusion was also based on the notion that Congress intended to shift away from a rehabilitative system. The court stated that allowing a district court to consider any effect incarceration may have on Pharr's drug rehabilitation efforts would work to undermine Congress's alleged purpose behind the Guidelines.

In reaching the above conclusions, the Third Circuit chose not to rely on the Fourth Circuit opinion in United States v. Van Dyke. The government had relied upon Van Dyke in support of its proposition that the Commission considered a defendant's drug rehabilitation, at least when the defendant was convicted of a "drug-related offense." The

59. Id. at 133 (citing SENTENCING GUIDELINES, supra note 1, ch. 5, pt. K, § 5K2.0 (policy statement)).

60. Id. (citing SENTENCING GUIDELINES, supra note 1, ch. 5, pt. H, §§ 5H1.2, 5H1.5 (policy statements)). For the text of these policy statements, see infra note 133.

61. Pharr, 916 F.2d at 133 (citing SENTENCING GUIDELINES, supra note 1, ch. 5, pt. H, §§ 5H1.2, 5H1.5 (policy statements)).

62. Id.

63. Id.

64. Id.

65. Id. ("Allowing the district court to consider the effect of incarceration on a defendant's drug rehabilitation efforts would undermine the purpose of the guidelines"; the alleged purpose was a shift away from a rehabilitative system).


67. Pharr, 916 F.2d at 131-32; Brief for Appellant at 9-10, United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) (No. 90-1284). The United States Attorney's Office relied on Van Dyke to assert that post-conviction drug rehabilitation is a factor that was considered by the Commission under the acceptance of responsibility adjustment and therefore was an appropriate ground for downward departure. Pharr, 916 F.2d at 131-32. The court in Van Dyke held that any drug rehabilitation efforts were addressed by the Sentencing Commission in providing for a two-level reduction in the offense level (used for calculating sentencing range) if the defendant accepts responsibility for his actions. Van Dyke, 895 F.2d at 986-87. Therefore, the Fourth Circuit held that no departure was warranted as the Commission had adequately considered these circumstances. Id.; Pharr, 916 F.2d at 132. A "drug-related offense" for purposes of this Brief means offenses involving actual illegal drugs and not offenses which were committed due to a dependence on drugs.
court in *Van Dyke* held that, by providing for a two level reduction,\(^6\) if the defendant accepted responsibility for his actions, the Commission had adequately considered any drug rehabilitation efforts by the defendant.\(^7\) This proposition is limited to cases where the defendant is convicted of a drug-related offense, because drug rehabilitation would only qualify for acceptance of responsibility in drug-related offenses.\(^8\) The Third Circuit, therefore, did not consider this proposition applicable to the facts of Pharr’s case, since he did not commit a drug-related offense.\(^9\)

\(^6\) For a discussion of reduction of offense levels for acceptance of responsibility, see *supra* note 33 and accompanying text.

\(^7\) *Van Dyke*, 895 F.2d at 986-87; *Pharr*, 916 F.2d at 131-32; Brief for Appellant at 8-9, United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) (No. 90-1284). The acceptance of responsibility provision allows a reduction of two levels in the defendant’s offense level if he “clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct.” SENTENCING GUIDELINES, *supra* note 1, ch. 3, pt. E, § 3E1.1(a). The commentary to the Guidelines provides a relevant but not exhaustive list of factors to be used in determining whether the defendant is entitled to a reduction:

(a) voluntary termination or withdrawal from criminal conduct or associations;
(b) voluntary payment of restitution prior to adjudication of guilt;
(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;
(d) voluntary surrender to authorities promptly after commission of the offense;
(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
(f) voluntary resignation from the office or position held during the commission of the offense; and
(g) the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.

*Id.* ch. 3, pt. E, § 3E1.1 (commentary: application notes).

\(^8\) *Pharr*, 916 F.2d at 131.

\(^9\) *Id.* at 132. The rationale underlying the *Van Dyke* case is that drug rehabilitation is analogous to acceptance of responsibility for a crime involving drugs. *Van Dyke*, 895 F.2d at 986-87. Therefore, drug rehabilitation has already been taken into consideration by the Commission. *Id.* This proposition is only applicable, however, when the defendant is convicted of a drug-related offense. In *Van Dyke*, the defendant was convicted of “drug-related offenses,” but Stanley Pharr was not convicted of “drug-related offenses.” *Van Dyke*, 895 F.2d at 985 (defendant convicted for possession of heroin); *Pharr*, 916 F.2d at 130. “While Pharr may have been motivated by his drug addiction, the offense for which he was actually sentenced [was] not drug related.” *Pharr*, 916 F.2d at 130. (For a discussion of the crimes committed by Stanley Pharr, see *supra* notes 34-40 and accompanying text.) As a result, the Third Circuit decided that *Van Dyke* was inapplicable to the issues presented in *Pharr*. *Pharr*, 916 F.2d at 132. The *Pharr* court did not decide whether drug rehabilitation is encompassed within the acceptance of responsibility provision under Sentencing Guidelines Section 3E1.1 when sentencing a defendant for a drug-related offense. *Id.*

Note that the *Pharr* court did not state that a defendant who committed a drug-related offense might be entitled to have the district court consider a possible downward departure for any drug rehabilitation. *Id.* It is arguable that *Pharr* may bar any downward departure for drug rehabilitation whether a drug-related
Lastly, it should be noted that the Third Circuit openly acknowledged contrary decisions of other courts. Specifically, the Third Circuit noted that the Sixth Circuit, as well as several district courts, was in disagreement with the conclusions the Third Circuit reached in Pharr. Notwithstanding these contrary holdings, the Pharr court did not allow Stanley Pharr's drug rehabilitation to warrant a downward departure from the Guidelines.

IV. Analysis

This Brief submits that, contrary to the Pharr court's findings, the Commission did not address the issue of whether drug rehabilitation justifies a downward departure from the appropriate sentencing range. Consequently, the district court should have the discretion to decide whether drug rehabilitation is a mitigating circumstance that may warrant a downward departure from the applicable sentencing range. It is alternately submitted that the Guidelines are, at best, ambiguous on the issue of whether a defendant's drug rehabilitation should be considered a mitigating circumstance which would enable a district court to depart from the Guidelines. When a criminal statute is ambiguous, the offense or not. However, in a drug-related offense, any drug rehabilitation may relate to the defendant's characteristics as a criminal and consequently may entitle him to a downward departure. An obstacle to this consideration would be that, according to the Third Circuit, only the Sentencing Commission may delineate characteristics to be considered. Id. at 192-93. In any event, the Third Circuit implied that its ruling might have been different if Stanley Pharr had committed a drug-related offense. Id. at 132. At a minimum, the Pharr court refused to endorse or reject the premise upon which Van Dyke rests. Id.

72. Id.

73. Id. In State v. Maddalena, 893 F.2d 815 (6th Cir. 1989), the court held that a downward departure was warranted for the defendant's drug rehabilitation. Id. at 816-18. In Maddalena, the defendant was convicted of armed robbery. Id. at 816. Therefore, the concerns that the Third Circuit had with Van Dyke and drug-related offenses were not applicable. Although several district courts have held that drug rehabilitation warrants a downward departure, the defendants in those cases were convicted of drug-related offenses. See United States v. Harrington, 741 F. Supp. 698 (D.D.C. 1990) (distribution and possession of cocaine); United States v. Floyd, 738 F. Supp. 1256 (D. Minn. 1990) (distribution of cocaine and drug rehabilitation only one factor in justifying downward departure); United States v. Rodriguez, 724 F. Supp. 1118 (S.D.N.Y. 1989) (distribution of crack cocaine). For a further discussion of these cases allowing a downward departure for drug rehabilitation, see supra note 7 and accompanying text.

74. Pharr, 916 F.2d at 132.

75. Maddalena, 893 F.2d at 818 (district court may consider departure when defendant made effort to stay away from drugs). For a discussion of how mitigating factors may be grounds for departure from the appropriate sentencing range, see supra notes 5-6 and accompanying text.

76. Given the wide disparity of opinion in the federal circuit and district courts, this conclusion seems justified. For a list of differing opinions in the federal courts on the issue of whether drug rehabilitation may warrant a downward departure see supra note 7 and accompanying text.
United States Supreme Court has stated that any ambiguity must "be resolved in favor of lenity." 77 "This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" 78

The Pharr court’s decision is inadequate for three reasons. First, the court’s reliance on underlying objectives 79 is contrary to the clear statutory language of both Congress and the Commission regarding those sources which a court may consider when it decides whether a circumstance warrants a departure from the Guidelines. 80 Second, the court’s assertion that the personal characteristics of a defendant should not be taken into consideration 81 ignores statutory language and case

77. United States v. Bass, 404 U.S. 336, 347 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))). The Supreme Court has noted that this rule of lenity should not "override common sense and evident statutory purpose." United States v. Moore, 425 U.S. 122, 145 (1976) (quoting United States v. Brown, 333 U.S. 18, 25 (1948)). The fact that no consensus has been reached supports the conclusion that the Guidelines must be somewhat ambiguous. For a discussion of differing decisions on whether drug rehabilitation warrants a downward departure, see supra note 7 and accompanying text. The ambiguity would support application of leniency to Pharr without "overriding [any] common sense and evident statutory purpose." Moore, 425 U.S. at 145 (quoting United States v. Brown, 333 U.S. 18, 25 (1948)). For a discussion of the different circuit and district courts’ interpretations of whether drug rehabilitation is grounds for a downward departure, see supra note 7 and accompanying text. To assert that this rule of lenity overrides common sense or evident statutory purpose, the assumption must be made that judges from the United States Courts of Appeals, as well as several district court judges, either have no common sense or are unable to identify evident statutory purpose. (This author is not prepared to make either of these assumptions.) For a discussion of decisions contrary to Pharr in the circuit and district courts, see supra notes 73-75 and accompanying text.

78. United States v. Speight, 726 F. Supp. 861, 867 (D.D.C. 1989) (quoting H. FRIENDLY, BENCHMARKS 209 (1967) (emphasis added)); United States v. Noziger, 878 F.2d 442, 452 (D.C. Cir. 1989). The United States Supreme Court has spoken early and often in cases where criminal statutes are ambiguous. See, e.g., Bass, 404 U.S. at 348 ("[a]mbiguity in a criminal statute . . . [should be] resolved in favor of the defendant"); Rewis v. United States, 401 U.S. 808, 812 (1971) ("[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (citing Bell v. United States, 349 U.S. 81, 83 (1955)); Bell v. United States, 349 U.S. 81, 83 (1955) ("It may be fairly said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."). Admittedly, all of these cases involve defining criminal conduct and not sentencing. However, the "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should" is an underlying concern and should equally apply to sentencing. See Bass, 404 U.S. at 348 (quoting H. FRIENDLY, BENCHMARKS 209 (1967)). For additional history and a discussion of policies underlying this principle of lenity, see id. at 347-48.

79. Pharr, 916 F.2d at 132-33.

80. For a discussion of how the alleged underlying objectives are contrary to statutory language, see infra, notes 97-105 and accompanying text.

81. Pharr, 916 F.2d at 132-33 (Congress "instructed the Sentencing Com-
law to the contrary. Third, the court’s discussion of policy statements goes beyond the clear, unambiguous language of those policy statements. The court attempted to predict what the Commission might have done had it considered drug rehabilitation, rather than determining whether the Commission had in fact considered drug rehabilitation in promulgating the Guidelines.

A. Analyzing the Pharr Court’s Decision

1. Underlying Objectives

There are three reasons why the Third Circuit erred in concluding that Congress intended to shift away from rehabilitation. First, Congress mandated that underlying objectives may not be considered in determining whether a departure from the Guidelines is warranted when it explicitly stated that “only the sentencing guidelines, policy statements, and official commentary of the Commission” are to be considered when making such a determination. The Pharr court’s reliance on alleged underlying objectives of the Guidelines was misplaced, because the court failed to cite the Guidelines, policy statements or official commentary in support of its proposition that the Guidelines represent a shift away from rehabilitation. In other words, the court’s discussion of the alleged Congressional shift away from rehabilitation is not germane to a determination of whether drug rehabilitation is a mitigating circumstance that warrants a downward departure.

Second, the Fifth Circuit case, United States v. Mejia-Orosco, upon which the Third Circuit relied to establish this underlying objective, is not even controlling in the Fifth Circuit as to the issue presented in

mission, not the courts, to determine whether various personal characteristics should be considered in sentencing.” (citing 28 U.S.C. § 994(d)).

82. For a discussion of statutory language and case law that take a defendant’s personal characteristics into consideration, see supra note 7, infra note 108, and accompanying text.

83. Pharr, 916 F.2d at 133.

84. For a discussion of the Pharr court’s use of policy statements as a prediction of what the Commission might have done, see infra note 116-39 and accompanying text.

85. Pharr, 916 F.2d at 132 (“Congress shifted . . . away from a system that attempts to rehabilitate the individual”).

86. For a discussion of the statute which forbids a court from relying on underlying objectives when determining if a departure is warranted, see infra notes 97-102 and accompanying text.

87. 18 U.S.C. § 3553(b) (1988) (emphasis added). For the complete text of § 3553(b), see supra note 5.

88. Pharr, 916 F.2d at 132-33.

89. United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), cert. denied, 109 S. Ct. 3257 (1989); Pharr, 916 F.2d at 132.
According to the Third Circuit, Mejia-Orosco supports the proposition that the underlying objective of the Guidelines was to move toward a system which "imposes fair punishment and away from a system that attempts to rehabilitate the individual." The Fifth Circuit, however, cited no primary authority for this proposition in Mejia-Orosco. Furthermore, in United States v. Lopez, which was decided after Mejia-Orosco, the Fifth Circuit suggested that, while drug dependence is not ordinarily relevant, there may be "extraordinary addictions" where a departure would be justified. Thus, the Lopez decision indicated that Mejia-Orosco was not controlling in the Fifth Circuit itself on the issue presented in Pharr.

In addition, a system which attempts to impose fair punishment would not logically abandon all attempts to encourage and support rehabilitation. The Pharr court cited no authority for its subsilentio as-

90. For a discussion of how Mejia-Orosco may not support the underlying objective that Congress intended a shift away from a rehabilitation system, see supra notes 93-101 and accompanying text.

91. Mejia-Orosco, 867 F.2d at 218.
92. Pharr, 916 F.2d at 132.
93. Mejia-Orosco, 867 F.2d at 218. The Mejia-Orosco court cited various Supreme Court cases to show that before the promulgation of the Sentencing Guidelines, actual rehabilitation was a factor in sentencing. Id. The court also cited the maxim "the punishment should fit the offender and not merely the crime." Id. (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). The Fifth Circuit, however, asserted that this "commendable and ambitious approach ha[s] proven unworkable and unjust." Id. In support of its interpretation of the role of the Sentencing Guidelines, the Mejia-Orosco court quoted Senator Edward M. Kennedy: the Sentencing Guidelines are "a comprehensive and far reaching new approach . . . [designed to] reduce the unacceptable disparity of punishment that plagues the federal system, and . . . to assure sentences that are fair—and are perceived to be fair—to offenders, victims, and society." Id. (quoting Kennedy, The Sentencing Reform Act of 1984, FED. B. NEWS & J. 62, 65 (1985)).
94. United States v. Lopez, 875 F.2d 1124 (5th Cir. 1989).
95. Id. at 1127. The district court judge departed from the applicable sentencing range calculated using the Sentencing Guidelines, a decision based in part on his findings that Lopez was "a multi-convicted defendant . . . and a heroine addict besides." Id. (emphasis omitted). The Fifth Circuit's response was, at least, an implicit approval of allowing departure from the Sentencing Guidelines in cases involving "extraordinary addictions." Id. The Fifth Circuit concluded, however, that the sentencing judge's statement did not "explain why Lopez's addiction [was] so extraordinary that a departure was justified." Id.

Even though Lopez involved an upward departure, the same analysis would apply to a downward departure based on drug rehabilitation. One could argue that a downward departure based on drug rehabilitation may not even require extraordinary circumstances. Such an argument would be based on the fact that while drug dependence was explicitly considered by the Commission, there was no explicit evidence that drug rehabilitation was considered. SENTENCING GUIDELINES, supra note 1, ch. 5, pt. H, § 5H1.4 (policy statement).
96. See Pharr, 916 F.2d at 132 ("Congress shifted toward . . . fair punishment and away from . . . rehabilitation[ion]"); 18 U.S.C. § 3553(a)(2)(D) (1988). Section 3553(a)(2)(D) of the Sentencing Reform Act of 1984 mandates that the sentence imposed "provide the defendant with needed educational or vocational
Third, the Fifth Circuit’s proposition that Congress intended a shift away from rehabilitation is contrary to the language of the Sentencing Reform Act in which Congress specifically mandated that rehabilitation remain a primary purpose in sentencing. As Judge Edward R. Becker of the Third Circuit stated in an opinion decided prior to Pharr, “Section 3553(a) requires—as a matter of law—that district courts impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2)—retribution, deterrence, incapacitation, and rehabilitation.” This explicit Congressional requirement, medical care, or other correctional treatment in the most effective manner.” Id. (emphasis added). The foregoing statute seems to require rehabilitation for the defendant. See S. REP. NO. 225, 98th Cong., 2d Sess. 37, 75 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3258 (requiring sentencing judges to consider four purposes of sentencing: rehabilitation, retribution, incapacitation and restitution, before sentencing a defendant). While there were some compromises made while promulgating the Guidelines, all efforts at rehabilitation have not been extinguished. See generally Breyer, supra note 1, at 8-31 (Guidelines rest on compromises, however, compromises did not foreclose all rehabilitative efforts).

97. For a discussion of the proposition that Congress intended to shift away from rehabilitation is contrary to the Sentencing Reform Act, see infra notes 98-105 and accompanying text.

98. For a discussion of Congress’s mandate that rehabilitation remain a primary purpose in sentencing, see infra notes 99-102 and accompanying text.


(a) Appeal by a Defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentencing if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

Id. 18 U.S.C. § 3742(f) (1988) provides:

If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or
sional recognition regarding the importance of rehabilitation in sentencing goals\textsuperscript{100} emasculates the proposition that Congress intended a shift away from a rehabilitative system of penology.\textsuperscript{101}

Judge Becker further asserted that a sentencing judge has an obligation to depart downward from the applicable Guideline range when he or she believes the minimum sentence would be greater than necessary to meet the four purposes of sentencing.\textsuperscript{102} Admittedly, he noted that "section 3553(a) requires departures only when a refusal to depart would result in a sentence plainly unreasonable in light of the statutory requirement that sentences imposed be sufficient, but not greater than necessary, to meet the four purposes of sentencing."\textsuperscript{103} Nevertheless, it is interesting to recognize that, in addition to bolstering the proposition that Congress intended to maintain rehabilitation as a sentencing goal,\textsuperscript{104} the Sentencing Reform Act of 1984 may actually compel a court

was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and [remand for further sentencing proceedings];

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

\textit{Id.}\textsuperscript{100}. 18 U.S.C. § 3553(a) (1988). The text of the statute provides:

(a) \textbf{FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—}\textit{The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—}\n
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

\textit{Id.} (emphasis added).

\textsuperscript{101} See \textit{Pharr}, 916 F.2d at 132 ("Congress shifted toward . . . fair punishment and away from . . . rehabilitat[ion]").

\textsuperscript{102} \textit{Denardi}, 892 F.2d at 276-77 (Becker, J., concurring in part and dissenting in part).

\textsuperscript{103} \textit{Id.} at 277 (Becker, J., concurring in part and dissenting in part).

to issue a downward departure where the minimum sentence is greater than necessary to further this goal of rehabilitation of the defendant.\footnote{105}

2. \textit{Personal Characteristics of the Defendant}

In support of its contention that the system has moved away from rehabilitation, the Third Circuit relied on the Congressional mandate "that personal characteristics should not ordinarily affect sentencing on an individual basis."\footnote{106} However, the operative words "\textit{not ordinarily},"\footnote{107} indicate that Congress certainly contemplated some extraordinary situations where the personal characteristics of the defendant are to be considered.\footnote{108} Even the Third Circuit conceded that Congress has

\footnote{105} \textit{Denardi}, 892 F.2d at 276 (Becker, J., concurring in part and dissenting in part); T.W. Hutchin\textit{son} & D. Yell\textit{en}, \textit{Federal Sentencing Law And Practice} 384-88 (1989). "The phrase [sufficient, but not greater than necessary], on its face, seems clear and unambiguous—the court must impose a sentence that is not greater than necessary in order to serve the [four] purposes of sentencing." T.W. Hutchin\textit{son} & D. Yell\textit{en}, \textit{supra}, at 385. As previously indicated, rehabilitation is one of these four purposes. 18 U.S.C. § 3553(a)(2)(D) (1988).

There is a lack of any legislative history explaining the phrase in § 3553(a). T.W. Hutchin\textit{son} & D. Yell\textit{en}, \textit{supra}, at 384-85. This may be "because the phrase is quite plain in what it requires." \textit{Id.} at 385.

Since the plain language of section 3553(a) authorizes a court to impose a sentence no greater than necessary to comply with the purposes of sentencing, there would have to be, it would seem, a clear and strong indication in the legislative history that Congress did not mean what the language compels. There does not appear to be any such indication in the legislative history.

\textit{Id.} "Finally, even assuming arguendo that section 3553(a), applied literally, would enable courts to circumvent the guidelines, that result follows from language that Congress drafted and enacted." \textit{Id.} If that language brings about undesirable consequences, then it is up to Congress to amend the provision. \textit{Id.}

For a more detailed discussion of whether § 3553(a) requires a court to depart, see \textit{id.} at 384-90.

\footnote{106} \textit{Pharr}, 916 F.2d at 132. The Third Circuit cited 28 U.S.C. § 994(e) (1988) which provides: "The Commission shall assure that the guidelines and policy statements . . . reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant. \textit{Id.}

\footnote{107} \textit{Pharr}, 916 F.2d at 132.

\footnote{108} United States v. Rodriguez, 724 F. Supp. 1118, 1121 (S.D.N.Y. 1989). "[T]he Commission expressly acknowledged the need in the 'atypical' case for invocation of the departure power to give appropriate effect to personal characteristics." \textit{Id.} The Rodriguez court cited the Second Circuit's approval of departure and stressed that upward as well as downward departures are warranted for personal character. \textit{Id.} The court presented an example of how Al Capone's prosecution would have been an appropriate case for upward departure. \textit{Id.} The Rodriguez court cited numerous cases involving departure from the guidelines based on personal characteristics:

United States v. Barone, 89 Cr. 301 (CLB) (S.D.N.Y. Sept. 29, 1989) (departure upward because guidelines did not consider gravity when perjury is willfully committed by defendant who is high-ranking public official in community); United States v. Stehmah, 1 Fed. Sent. R. 292 (M.D. Pa. 1988) (departure upward because guideline range did not
not completely eliminated consideration of personal characteristics by enacting a uniform sentencing scheme. The Pharr court, however, asserted that the Commission, rather than the courts, should decide which personal characteristics may be considered in sentencing. This statement by the Pharr court would foreclose district courts from considering any personal characteristics not considered by the Commission. Such a result would be at odds with the prevailing case law and statutory authority.

The Sentencing Reform Act explicitly provides that the district court must impose a sentence consistent with the Guidelines “unless the court finds there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission in formulating the guidelines that should result in a sentence different from that described.” The above language, combined with the Commission’s candid statement that it could not consider all potential grounds for departure, contradicts the Pharr court’s assertion that the


Id. at 1121-22.

109. Pharr, 916 F.2d at 132 (“Congress has not completely foreclosed consideration of defendants' individual characteristics”).

110. Id. The Pharr court relied on 28 U.S.C. § 994(d) (1988). For the full text of § 994(d), see supra note 56. The Third Circuit explained that “the Commission included in the guidelines characteristics that relate to the defendant as a criminal, such as criminal history, but rejected purely personal characteristics, such as his mental and emotional conditions.” Pharr, 916 F.2d at 133 (citing Sentencing Guidelines, supra note 1, ch. 5, pt. H, § 5H1.3); Sentencing Guidelines, supra note 1, ch. 5, pt. H, § 5H1.3 (policy statement). For a list of district court holdings of departures unrelated to the defendant as a criminal, see United States v. Harrington, 741 F. Supp. 968, 976 n.8 (D.D.C. 1990).

111. For a discussion of how case law and statutory language allow a district court to consider the defendant’s personal characteristics in determining if departure is warranted, see supra note 104 and accompanying text.


113. Sentencing Guidelines, supra note 1, ch. 5, pt. K, § 5K2.0 (policy statement) provides:

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. Simi-
district court may consider only those personal characteristics which have already been considered by the Commission.\textsuperscript{114} Furthermore, the circuit courts have generally decided that the district courts have wide discretion in determining whether mitigating circumstances exist which have not been adequately considered by the Commission and therefore constitute grounds for a departure.\textsuperscript{115}

3. Policy Statements

a. Policy Statement 5H1.4

The Third Circuit further relied on a policy statement which provides: "Drug dependence . . . is not a reason for imposing a sentence below the guidelines."\textsuperscript{116} The \textit{Pharr} court read this statement to include drug rehabilitation.\textsuperscript{117} Yet, as the court noted, policy statements are simply meant to provide guidance and are not binding.\textsuperscript{118} In addition, the statute addressing departures was modified by the Sentencing Act of 1987.\textsuperscript{119} The original statute provided:

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Commission in formulating the guidelines and that should result in a sentence different from that described.\textsuperscript{120}

The modified statute provides:

\textit{Id.}

\textsuperscript{114} \textit{Pharr}, 916 F.2d at 132.

\textsuperscript{115} United States v. Roberson, 872 F.2d 597, 601 (5th Cir.) ("The court's discretion to depart from the Guidelines is broad."). \textit{cert. denied}, 110 S. Ct. 175 (1989); United States v. Sturgis, 869 F.2d 54, 56 (2d Cir. 1989) ("In Correa-Vargas we emphasized the 'wide discretion' accorded district court [judges] . . . ."); United States v. Correa-Vargas, 860 F.2d 35, 37 (2d Cir. 1988) (section 5K2.0 "gives a district court wide discretion in determining which circumstances to take into account in departing from the Guidelines").

\textsuperscript{116} \textit{Pharr}, 916 F.2d at 133; \textit{SENTENCING GUIDELINES}, \textit{supra} note 1, ch. 5, pt. H, § 5H1.4 (policy statement).

\textsuperscript{117} \textit{Pharr}, 916 F.2d at 133. Specifically, the \textit{Pharr} court stated: "We read policy statement 5H1.4 to mean that dependence upon drugs, or separation from such a dependency, is not a proper basis for a downward departure from the guidelines." \textit{Id.} (footnote omitted).

\textsuperscript{118} \textit{Id.} at 133 n.6. While the policy statements are not binding, 18 U.S.C. 3553(b) (1988) specifically allows the policy statements to be considered in determining whether the Commission adequately considered a circumstance. \textit{Id.}

\textsuperscript{119} 18 U.S.C. § 3553(b) (1988).

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless 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 Commission in formulating the guidelines that should result in a sentence different from that described.\textsuperscript{121}

The modification of this statutory provision to include the words “of a kind, or to a degree” expands the meaning of what constitutes a “mitigating circumstance which may be taken into consideration by a court” and indicates that Congress realized that the district courts need wide discretion to accurately determine whether a departure is warranted.\textsuperscript{122} Hence, even if the Commission considered drug rehabilitation, which the \textit{Pharr} court asserted it did by providing that drug dependence is an improper basis for downward departure, a downward departure might still be warranted if the Commission did not consider the circumstances to the degree present in \textit{Pharr}.\textsuperscript{123}

A possible argument is that drug rehabilitation is in fact a “drug dependence circumstance” of a kind or degree already considered by the Commission.\textsuperscript{124} This rationale was adopted by the \textit{Pharr} court.\textsuperscript{125} Yet, if the Commission had adequately considered this “drug dependence circumstance” to the degree present in \textit{Pharr}, the Commission needed only to mention drug rehabilitation expressly in the same policy statement that addresses drug dependence.\textsuperscript{126} The Commission’s failure to mention drug rehabilitation permits a persuasive argument to be made that the Commission did not adequately consider the circumstance of drug dependence to the necessary degree. If the Commission had considered drug rehabilitation under circumstances similar to those in \textit{Pharr}, it is reasonable to assume it would have stated this explicitly in one of the policy statements.

At best, the \textit{Pharr} court’s conclusion that policy statement 5H1.4 encompasses both drug dependence and drug rehabilitation is an educated opinion of what the Commission might have done had it considered drug rehabilitation. At worst, it is the Third Circuit’s opinion of what the policy statement should have stated. Neither opinion would be in accordance with Congress’s mandate that the proper determination

\textsuperscript{121} 18 U.S.C. § 3553(b) (1988) (emphasis added).

\textsuperscript{122} For a discussion of the statute controlling departures being modified, see \textit{supra} notes 119-23 and accompanying text. For a discussion of how circuit courts believe wide discretion is needed, see \textit{supra} note 115 and accompanying text.

\textsuperscript{123} \textit{Pharr}, 916 F.2d at 133; \textit{Sentencing Guidelines}, \textit{supra} note 1, ch. 5, pt. K, § 5K2.0 (policy statement).

\textsuperscript{124} 18 U.S.C. § 3553(b) (1988).

\textsuperscript{125} \textit{Pharr} 916 F.2d at 132.

of whether a downward departure is warranted rests on whether the Commission, in fact, considered the particular circumstance in question.\textsuperscript{127}

Congress, by modifying the statute, appears to have granted the district courts more discretion to depart from the Guidelines.\textsuperscript{128} The modified statute, as well as the absence of any specific direction from the Commission, appears to be in conflict with the Pharr court’s conclusions.\textsuperscript{129}

b. Policy Statements 5H1.2 and 5H1.5

The Pharr court also relied upon two additional policy statements in asserting that the Commission had considered and rejected a defendant’s efforts at self-improvement as a basis for a downward departure.\textsuperscript{130} First, the court noted that the Commission had, for the most part, rejected a defendant’s efforts to improve himself through education and his efforts to maintain steady employment.\textsuperscript{131} The Third Circuit asserted that drug rehabilitation was self-improvement, analogous to education and maintaining a steady job.\textsuperscript{132} However, the court neglected to mention that both policy statements 5H1.2 and 5H1.5 provide that such factors should “not ordinarily” warrant a downward departure.\textsuperscript{133} By im-

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\item \textsuperscript{127} 28 U.S.C. § 3553(b) (1988). For the complete text of this statute, see supra note 5.
\item \textsuperscript{128} For a discussion of the modified statute, see supra notes 119-123, and accompanying text.
\item \textsuperscript{129} There is validity to the Third Circuit’s concern over rewarding drug addicts for being addicted. Pharr, 916 F.2d at 133. However, the downward departure addresses drug rehabilitation, not drug addiction. Moreover, it is unlikely that there will be an influx of criminals making sure that they have previously been dependent on drugs and are since rehabilitated so that they might receive a downward departure at sentencing.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Sentencing Guidelines, supra note 1, ch. 5, pt. H, §§ 5H1.2, 5H1.5 (policy statements) (emphasis added). Section 5H1.2 provides:

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. See § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). Neither are education and vocational skills relevant in determining the type of sentence to be imposed when the guidelines provide sentencing options. If, independent of consideration of education and vocational skills, a defendant is sentenced to probation or supervised release, these considerations may be relevant in the determination of the length and conditions of supervision for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of certain skill, or in determining the type of length of community service.

\textit{Id.} ch. 5, pt. H, § 5H1.2 (policy statement) (emphasis added). Sentencing Guideline, Section 5H1.5 provides:

Employment record is not ordinarily relevant in determining whether a
\end{enumerate}
\end{footnotesize}
plication, there must be extraordinary circumstances which would warrant a downward departure.\textsuperscript{134} Therefore, relying upon these policy statements to forbid any departure for all instances of self-improvement, including drug rehabilitation, would be erroneous.

Furthermore, the Third Circuit's analogy between a policy statement regarding education and employment and drug rehabilitation\textsuperscript{135} is a prediction of what the Commission may have done, not a determination of whether the Commission adequately considered drug rehabilitation. If the Commission wanted to include drug rehabilitation in a policy statement, it could have easily stated this intention explicitly. The Commission made references to education and employment in two separate policy statements.\textsuperscript{136} Therefore, it is reasonable to assume that it would have made an explicit reference to drug rehabilitation in another policy statement had it considered such a circumstance. It appears unlikely that the Commission, having stated that a defendant's efforts at education and employment should not ordinarily be considered a circumstance that would warrant a downward departure,\textsuperscript{137} also meant that drug rehabilitation should never be considered.\textsuperscript{138}

Determining if departure is proper depends on whether the Commission adequately considered drug rehabilitation, not what the Commission would have done had it considered drug rehabilitation.\textsuperscript{139} The analogy of education and employment to drug rehabilitation is only a prediction of how the Commission would have considered drug rehabilitation. Therefore, it should not be included in the analysis of whether

sentence should be outside the guidelines or where within the guidelines a sentence should fall. Employment record may be relevant in determining the type of sentence to be imposed when the guidelines provide for sentencing options. If, independent of the consideration of employment record, a defendant is sentenced to probation or supervised release, considerations of employment record may be relevant in the determination of the length and conditions of supervision.

\textit{Id.} ch. 5, pt. H, § 5H1.5 (policy statement) (emphasis added).

\textsuperscript{134} T.W. Hutchinson & D. Yellen, \textit{supra}, note 105 at 368-74. "The use of 'ordinarily' implies that if the circumstances are extraordinary, the Commission recommends that the court consider the factor." \textit{Id.} at 369.

\textsuperscript{135} \textit{Pharr}, 916 F.2d at 139.

\textsuperscript{136} \textit{Sentencing Guidelines, supra} note 1, ch. 5, pt. H, §§ 5H1.2, 5H1.5 (policy statements).

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} \textit{Pharr}, 916 F.2d at 133. The Third Circuit stated: "We find that in the circumstances of this case, the defendant's efforts to improve himself through drug rehabilitation are analogous" to "the defendant's efforts to improve himself through education or his ability to maintain steady employment." \textit{Id.} It appears the court may have left an opening for circumstances that are not present in this case. However, the court based its finding on the fact that drug rehabilitation is self-improvement, and it is difficult to imagine a defendant's effort at drug rehabilitation which would not constitute self-improvement. \textit{Id.}

\textsuperscript{139} 18 U.S.C. § 3553(b) (1988).
drug rehabilitation is a mitigating circumstance which would warrant a downward departure.

B. Effects of Incarceration on Drug Rehabilitation

At the end of its opinion, the Third Circuit again relied on the alleged Congressional shift away from rehabilitation to show that the effect of incarceration on Stanley Pharr's drug rehabilitation is an inappropriate ground for a downward departure. However, Congress has stated that "the court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to protect the public from further crimes of the defendant." The interruption of Pharr's drug rehabilitation, therefore, should be a factor in the district court's attempt to prevent any future harm to the public in accordance with the congressional directive. Under the Guidelines, this potential harm would be a legitimate factor to be considered by the court.

Additionally, as addressed above, Congress has explicitly stated that only the Guidelines, policy statements and the official commentary may be considered in determining whether a circumstance was adequately taken into consideration by the Commission and therefore whether a downward departure is warranted. The Third Circuit did not cite, nor did the author find, any of these sources to support the court's conclusion that the effect of imprisonment on a defendant's drug rehabilitation is a circumstance that had been adequately considered by the Commission. It appears, therefore, that the Commission did not consider the effect of imprisonment on a defendant's drug rehabilitation efforts. Consequently, such an effect should allow a downward departure within a district court's discretion.

Furthermore, as discussed above, the underlying objective of a "shift away from a rehabilitative system of penology" is errone-

140. Pharr, 916 F.2d at 133. A technical point could be made, however, that the effect of imprisonment on drug rehabilitation has nothing to do with Stanley Pharr's rehabilitation as a thief. It is arguable, therefore, that a shift away from a rehabilitative system applies to Stanley Pharr's thievery, but not his drug use. This argument exists because Stanley Pharr was convicted of being a thief, but not a drug user. The Third Circuit's reliance on a shift away from rehabilitation, supposedly for the crime committed, may not be applicable to Stanley Pharr's drug rehabilitation.


142. Brief for Appellant at 6-7, United States v. Pharr, 916 F.2d 129 (3d Cir. 1990) (No. 90-1284). Throughout the district court's opinion, the judge expressed concern for the possible ill effects on the community if Stanley Pharr's drug rehabilitation was interrupted. Id.


145. Pharr, 916 F.2d at 133.

146. Id.
ous. Consequently, any findings based on this underlying rationale are also erroneous. Accordingly, a district court may consider the effect of imprisonment on the defendant’s drug rehabilitation efforts in determining whether to depart from the applicable sentencing range.

V. CONCLUSION

The foregoing discussion illustrates that there is no definitive way to determine whether the Commission considered drug rehabilitation when it promulgated the Guidelines. The disagreement between the federal courts in their interpretation of the Guidelines, as well as the Third Circuit’s reliance on underlying objectives and policy statements, underscores the latent ambiguity as to the question of whether drug rehabilitation warrants a downward departure from the Guidelines.

The practical effect of the Pharr decision for defense attorneys is that, at least until this issue is resolved by the United States Supreme Court, the Third Circuit will not allow drug rehabilitation to serve as a mitigating circumstance warranting a downward departure. Furthermore, it appears that if “drug-related offenses” were involved, drug rehabilitation would be even less likely to be grounds for departure in light of Van Dyke. If the Third Circuit adopts Van Dyke, an attorney would not only have to persuade the Third Circuit that the Pharr court’s reasoning was flawed, but also have to persuade the court to reject the Van Dyke reasoning, which the Pharr court declined to consider until the question was “squarely before” it.

147. For a discussion of how the underlying objective that Congress intended a shift away from rehabilitation is erroneous, see supra notes 85-105 and accompanying text.

148. 28 U.S.C. § 3553(b) (1988) provides that “[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statement, and official commentary of the Sentencing Commission.” Id. (emphasis added). This limited authority provides no guidance as to whether the drug rehabilitation was adequately considered.

149. For a discussion of the conflicting views on the issue presented in Pharr, see supra note 7 and accompanying text.

150. Pharr, 916 F.2d at 132 (“We base our holding on the underlying objectives of the sentencing guidelines and the policy statements articulated by the Sentencing Commission.”). For a discussion of the Third Circuit’s reliance on these objectives and statements, see supra notes 63-68 and accompanying text.

151. If the Sentencing Guidelines were not ambiguous then there would be no dispute in the federal courts and consequently, no reason to discuss underlying objectives and policy statements. The above discussion illustrates the conflicts and ambiguities present in the Guidelines with respect to whether a district court has the discretion to depart downward when drug rehabilitation by the defendant is involved. For a discussion of why any ambiguity should be resolved in the defendant’s favor, see supra notes 76-78 and accompanying text.

152. Pharr, 916 F.2d at 132 (court did not address issue of whether drug rehabilitation was already considered under acceptance of responsibility provi-
The Third Circuit's decision in *Pharr* limits the district court's discretion in deciding whether to depart from the applicable sentencing range. The *Pharr* court asserted that it was improper for a district court to substitute its opinion for that of the Commission.\(^{153}\) However, having relied upon material outside of the congressional mandate\(^{154}\) and having used policy statements to predict what the Commission would have done,\(^{155}\) the *Pharr* court substituted its own opinion, not only in place of the Commission's, but also in place of a clear congressional mandate.

Jim McHugh*

\(^{153}\) For a discussion of why the underlying objectives relied upon by the *Pharr* court are contrary to congressional mandate, see supra notes 97-101 and accompanying text.

\(^{154}\) 18 U.S.C. § 3553(b) (1988). For a discussion of why the underlying objectives relied upon by the *Pharr* court are contrary to congressional mandate, see supra notes 97-101 and accompanying text.

\(^{155}\) For a discussion of why the *Pharr* court's analysis of policy statements is only a prediction of what the Commission would have done, see notes 116-39 and accompanying text.

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