

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	<b>CRIMINAL ACTION NO.</b>
	)	
<b>Plaintiff,</b>	)	<b>3:96-CR-268-P</b>
	)	
<b>v.</b>	)	
	)	
<b>XXXX XXXX XXXX,</b>	)	
	)	
<b>Defendant.</b>	)	
<hr/>	)	

**SENTENCING MEMORANDUM AND  
MOTION FOR DOWNWARD DEPARTURE**

The Presentence Report (the "PSR") prepared in this case by the Probation Department for the Northern District of Texas notes that there are two grounds that may justify a downward departure from Ms. XXXX' sentencing guidelines. First, pursuant to U.S.S.G. § 4A1.3, the Probation Department notes that Ms. XXXX' criminal history category (Category V) may significantly over-represent the seriousness of her criminal history. See PSR at ¶ 78. Second, the Probation Department notes that Ms. XXXX' post traumatic stress disorder may have contributed to her commission of the instant offense thereby making her eligible for a downward departure pursuant to U.S.S.G. § 5K2.13. See PSR at 79.<sup>1</sup>

For the grounds set forth in the PSR and elaborated upon below, defense counsel submits that a downward departure is very appropriate in this case. Defense counsel urges this Court to depart horizontally to Criminal History Category III and depart vertically five levels to Offense Level 8. This results in a guideline imprisonment range of 6-12 months. Nevertheless, because the guideline range after the departure would fall in Zone B of the Sentencing Guidelines, the Court

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<sup>1</sup> The Probation Department notes that its comments regarding grounds for a downward departure do not necessarily constitute a recommendation for such a departure. See PSR at ¶ 77. Nevertheless, this Court is certainly aware that downward departure grounds are rarely identified in presentence reports except for downward departures pursuant to U.S.S.G. § 5K1.1.

could place Ms. XXXX on probation conditioned on home detention or community confinement. See U.S.S.G. § 5C1.1(c).

As will be obvious, Ms. XXXX is in desperate need of psychological counseling and drug counseling. Undersigned counsel submits that such programs are more likely to be successful if conducted in connection with community confinement as opposed to prison. This will allow Ms. XXXX to learn to overcome her post traumatic stress while functioning in society. Therefore, counsel submits that a sentence of five years probation conditioned on twelve months community confinement, extensive psychological counseling and drug counseling is appropriate.

### **I. BACKGROUND**

Prior to July 25, 1990, XXXX XXXX lived, more or less, a typical middle class lifestyle. She married young, at age seventeen, after becoming pregnant with her first child, Michael XXXX, Jr. See PSR at ¶ 49. After five years, that marriage ended in divorce and Ms. XXXX took custody of Michael. Id.

Following her separation from Michael XXXX, Sr., Ms. XXXX became romantically involved with Mark Guzy. Id. at ¶ 50.<sup>2</sup> The couple had two children together: Jessica in 1987 and William in 1989. Id. In 1988, Ms. XXXX purchased a home on her own in Sachse, Texas where she lived with Mr. Guzy and her children. Throughout this time, Ms. XXXX worked and was the primary wage earner. As noted in the PSR, she worked as a salesperson at Access Unlimited from 1986 to 1990. Id. at ¶ 59. During this time, Ms. XXXX also took various courses. In 1988, she trained as a bank teller with Advanced Career Training. Id. at ¶ 56. In 1989, she trained as a medical assistant at the National Education Center. Id. As part of her medical assistant training, Ms. XXXX left her job at Access Unlimited and took a job as a nursing assistant with Hillcrest Manor Nursing Home. Id. at ¶ 58.

Prior to July 25, 1990, Ms. XXXX had only one prior conviction for writing an insufficient fund check. Id. at ¶ 25. Ms. XXXX had been placed on six months probation and successfully

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<sup>2</sup> The two would later marry in February 1994.

completed the probation. Id. While Ms. XXXX admits that she experimented with marijuana and cocaine prior to July 25, 1990, she was definitely not a regular drug user or dependent upon drugs.

On July 25, 1990, at age 26, Ms. XXXX' life, as she previously knew it, ceased to exist. Earlier that week, she and Mr. Guzy had left Dallas to vacation in Puerto Vallarta, Mexico. At dinner, on July 24, 1990, Ms. XXXX had a heated dispute with a hotel waiter over a food order. Then, on the afternoon of July 25, 1990, the hotel employee and another unidentified male came to Ms. XXXX' hotel room and knocked on the door. As Mr. Guzy slept, Ms. XXXX answered the door. The hotel employee proceeded to pull Ms. XXXX from the room, hit her in the face and rip her clothes off. He then attempted to rape her. In her effort to escape the would be rapist and the other male, Ms. XXXX climbed over a small, ivy covered wall thinking that there was a platform to support her on the other side. Unfortunately, the wall was part of the hotel's atrium design and Ms. XXXX, whose clothes had been ripped off, plunged five stories and landed naked in the hotel lobby. See Attachment A (picture showing fall).

Following her fall, Ms. XXXX was rushed to a Mexico hospital. She suffered five compressed vertebrae, one of which punctured her spleen and left kidney resulting in the loss of the kidney. Id. at ¶ 52. She also suffered six broken ribs, a broken left ankle and a broken left wrist. Id. The fact that Ms. XXXX lived at all has been described as "a miracle." Id. at ¶ 11.

After being "held hostage" for a \$7,000 medical bill in Mexico, Ms. XXXX' father, through the intercession of a member of the Texas House of Representatives, arranged for a \$7,500 care flight to take Ms. XXXX from Mexico to Parkland Hospital in Dallas. Id. at ¶ 52. Ms. XXXX had two stays at Parkland Hospital, the first for approximately ten days and the second for approximately four days. Ms. XXXX was also hospitalized at Wylie Community Hospital for injuries that occurred during the attempted rape. In total, Ms. XXXX underwent five surgeries, including three outpatient surgeries at Dallas Family Hospital. In addition, she underwent extensive physical therapy to be able to walk again and to be able to use her left wrist. Ms. XXXX' medical bills, excluding Parkland Hospital where a bulk of the services were performed, totaled \$37,794.

While Ms. XXXX was able to heal physically, she did not heal emotionally. Indeed, Ms. XXXX had totally repressed the assault and had to be hypnotized in order to recall the traumatic events of July 25, 1990. See Attachment B (Report of Harold B. Crasilneck, Ph.D.).<sup>3</sup> Ms. XXXX was ultimately diagnosed with manic depression and post traumatic stress disorder arising out of the brutal attack. See PSR at ¶ 54.

As a result of her physical injuries and emotional problems, Ms. XXXX was unable to return to work following her release from the hospital. In January 1991, the Social Security Administration awarded her benefits of \$367 per month as a result of her depression. Id. Nevertheless, because Ms. XXXX was unable to work, she lost her home to foreclosure in October 1990.

The loss of the family home made a precarious situation even worse. She and her family then moved into her grandparents' home that had been vacant. This was a home in which Ms. XXXX had been molested by her late grandfather until the time she was approximately ten years old. Thus, while having to deal with the emotional problems caused by the brutal attack in Mexico, Ms. XXXX next found herself confronted by horrible memories in every corner of her new home.

Ms. XXXX' mental condition continued to deteriorate, although she did not seek counseling. Instead, she turned to drugs and began to self medicate. This produced a catch-22 situation wherein the drugs caused Ms. XXXX to avoid confronting her emotional problems and avoid counseling. As noted by the Probation Department, "[a] common aspect of the symptomatology of the post traumatic stress disorder is self medication with drugs and/or alcohol." Id. at ¶ 79. It was then that Ms. XXXX' serious criminal problems began. Ms. XXXX had one theft by check conviction in 1991. Id. at ¶ 26. Thereafter, beginning in 1992, Ms. XXXX had multiple arrests and convictions, mostly all involving the use of bad checks and false identifications. Id. at ¶¶ 27-34, 42-46. She also was convicted of prostitution and drug possession, both in 1996. Id. at ¶¶ 35-36.

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<sup>3</sup> Counsel has reviewed the chilling videotape of Ms. Thomas' hypnosis session. This videotape can be provided to the Court or the government if requested.

Of Ms. XXXX' eleven criminal history points, eight are connected with the various bad check convictions, two with her prior drug conviction and one with her prior prostitution conviction. Id. at ¶¶ 26, 28, 30, 32, 34-36. Nevertheless, despite Ms. XXXX' several encounters with the criminal justice system, she has never been given psychological counseling and it has never been a condition of her probation.<sup>4</sup>

It is difficult to appreciate what XXXX XXXX went through on July 25, 1990 and everyday thereafter. However, Ms. XXXX now recognizes that she needs psychological counseling in order to help her cope with the post traumatic stress disorder, including the problem of self medicating with drugs, and live in society.

## **II. DISCUSSION**

In this case, as noted above, the Probation Department has identified two grounds for a downward departure. "It is important...to realize that departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some aspects, the rigidity of the Guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence." United States v. Gaskill, 991 F.2d 82, 86 (3rd Cir. 1993). These observations by the Third Circuit were recently validated by the United States Supreme Court's decision in Koon v. United States, 116 S.Ct. 2035 (1996).

### **A.Ms. XXXX is not typical of a defendant in Criminal History Category V**

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<sup>4</sup> The PSR notes that Ms. Thomas received a psychological evaluation at the Texas Department of Criminal Justice on July 9, 1996 where she was diagnosed with post traumatic stress disorder and where psychiatric services were recommended. See PSR at ¶ 54. Nevertheless, shortly after this evaluation, Ms. Thomas was returned to Dallas County to answer the instant charges. Thus, she never had an opportunity to avail herself of these psychiatric services.

U.S.S.G. § 4A1.3 recognizes that "[t]here may be cases where the Court concludes that a defendant's criminal history category over-represents the seriousness of a defendant's criminal history." In this case, the Probation Department notes that "[a] review of the Defendant's prior record reflects primarily minor theft by check offenses." See PSR at ¶ 78. Indeed, as noted above, Ms. XXXX' eleven criminal history points are comprised of eight points for offenses related to bad checks, two points for a drug possession case, and one point for prostitution.

This Court has obviously encountered numerous defendants falling within each of the six criminal history categories. The question that now confronts the Court is whether, given its experience, Ms. XXXX' criminal history, essentially a series of "minor theft by check offenses," is typical of the type of criminal history that Category V offenders normally possess. Counsel, who has also encountered numerous defendants falling within each of the six criminal history categories, submits that it is not.

A downward departure pursuant to U.S.S.G. § 4A1.3 is not to say, of course, that Ms. XXXX' prior convictions should be ignored. Rather, it implements the Sentencing Commission's recognition that in some case a defendant's criminal history category over-represents the seriousness of his or her criminal history. Counsel submits that experience dictates that Criminal History Category III would more adequately reflect Ms. XXXX' criminal history. This acknowledges that Ms. XXXX does have a criminal history and that it is more serious than the criminal histories of defendants typically falling in Criminal History Category I or II. Nevertheless, it also recognizes that Ms. XXXX is not the type of hardened criminal, having committed at least a couple of serious past offenses (e.g. robbery, drug distribution) and having served significant periods of incarceration, that usually falls within the higher criminal history categories.

**B. U.S.S.G. § 5K2.13**

The Probation Department also notes that a departure may be appropriate in this case pursuant to U.S.S.G. § 5K2.13. See PSR at ¶ 79. Section 5K2.13 allows for a downward departure in non-violent cases in which a defendant's diminished mental capacity contributed to the offense. This section does not require "but-for causation" rather it requires the diminished capacity

to be a contributing factor in the offense. See United States v. Solimon, 954 F.2d 1012, 1014 (5th Cir. 1992).

Section 5K2.13 sets out five requirements for a departure. "The defendant must have 1) committed a non-violent offense 2) while suffering from significantly reduced mental capacity 3) not caused by voluntary use of drugs or other intoxicants. 4) The reduced capacity must contribute to the commission of the offense, and 5) the defendant's criminal history must not indicate a need for incarceration to protect the public. United States v. Cantu, 12 F.3d 1506, 1511 (9th Cir. 1993). Ms. XXXX clearly qualifies.

First, theft of mail is a non-violent offense. Second, it is well documented that the assault in Mexico caused Ms. XXXX to become a manic depressive and caused post traumatic stress disorder. See PSR at ¶ 54. It has also been established that post traumatic stress disorder is an emotional condition that can support a downward departure under U.S.S.G. § 5K2.13. See, e.g., Cantu, 12 F.3d at 1511-13; United States v. Perry, 1995 WL 137294 (D. Neb. 1995). Third, it is readily apparent that Ms. XXXX' emotional conditions contributed to her offense. Prior to July 25, 1990, Ms. XXXX lived a typical middle class lifestyle. She worked, went to school, raised children, and purchased a nice home for her and her family. It was only after July 25, 1990 that Ms. XXXX became a drug addict, who could not work, and who lost her home to foreclosure. Likewise, as previously noted, all but one of Ms. XXXX' convictions occurred subsequent to the attempted rape. The only thing that changed between these two periods (i.e. before and after July 25, 1990) was that Ms. XXXX was affected with post traumatic stress disorder and manic depression, both induced by the brutal attack. Cf. Perry, 1995 WL 137294 at \*11. But for her trip to Mexico, Ms. XXXX would undoubtedly be living in her home in Sachse, working as a nurse and raising a family. Fourth, Ms. XXXX does not pose a danger to the public and with the appropriate counseling can hopefully, once again, become a productive member of our society.

The only question then is whether Ms. XXXX' offense was "caused" by her voluntary drug use.<sup>5</sup> In a very elementary sense it was, yet such a facile conclusion would ignore the "cause and

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<sup>5</sup> It should be noted that "a defendant whose reduced capacity was caused [only] in part by voluntary drug or alcohol use is not disqualified from departure" under Section 5K2.13. Cantu, 12 F.3d at 1514 (emphasis added).

effect" of Ms. XXXX' problems. Indeed, drug addiction did not "cause" Ms. XXXX' problems, but rather, her emotional problems caused the drug addiction that then led to her criminal behavior. See Cantu, 12 F.3d at 1514 ("If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure." (emphasis added)). A similar situation confronted a district court in United States v. McMurray, 833 F. Supp. 1454 (D. Neb. 1993), aff'd, 34 F.3d 1405 (8th Cir. 1994), cert. denied, 115 S.Ct. 1164 (1995). In that case, the Court granted a downward departure under U.S.S.G. § 5K2.13, based upon the defendant's manic depression. Nevertheless, it first considered the question of whether the defendant's behavior was caused by his voluntary drug use thereby precluding a departure.

I do not believe McMurray's voluntary ingestion of drugs disqualifies him from receiving the benefits of a downward departure. While it is true that McMurray was a cocaine addict, and the evidence indicates that he had ingested marijuana at the time of his hospitalization in May, 1991, there is no evidence that McMurray's drug problems were the only cause of his criminal conduct. Both doctors acknowledged the drug problem, but both also diagnosed McMurray as suffering from a discrete mental illness. Drug abuse is often a product of this type of mental illness. (Ex. 7,002: DSM-III-R at 216). Therefore, one cannot honestly deny McMurray a downward departure under U.S.S.G. § 5K2.13, p.s., because of "voluntary use of drugs."

Id. at 1484. As noted in the PSR in this case, Ms. XXXX became addicted to cocaine after the attack. Moreover, the PSR notes that, similar to the situation in McMurray, self medication with drugs is often a product of post traumatic stress disorder. See PSR at ¶ 79.

One can look at XXXX XXXX and say "there but for the grace of God go I." That Ms. XXXX lived and regained her physical health after falling five stories is a miracle. It took five operations and multiple hospital stays to help Ms. XXXX regain her physical health. Nevertheless, it will also take extensive psychological counseling to help Ms. XXXX regain her psychological health and the type of life that was stripped away from her on July 25, 1990. A downward departure pursuant to U.S.S.G. § 5K2.13 is definitely appropriate.

### **III. CONCLUSION**

The goal of society in this case should be to make XXXX XXXX the contributing member that she has shown she can be. Counsel submits that incarceration will not promote this goal but will retard it. Extensive psychological and drug counseling in a community setting is appropriate. Ms. XXXX has healed physically from her assault, but has never had counseling to allow her to heal emotionally. A departure to Offense Level 8/Criminal History Category III can allow Ms. XXXX to get the help she needs while allowing her to apply it in a structured community setting. It is understood that if this attempt fails, Ms. XXXX would face revocation and imprisonment.

Wherefore, counsel submits that a sentence of five years probation conditioned on twelve months community confinement, extensive psychological counseling and drug counseling is the appropriate sentence in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on January \_\_\_\_, 1997, I caused a copy of Defendant's Sentencing Memorandum and Motion for Downward Departure to be hand-delivered to Dianne Jones, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas.

F. Clinton Broden