

and less costly than incarceration.” Section 5H1.1 does not define the term “infirm.” Therefore, the Court utilizes the meaning given the word in common English usage. The dictionary definitions vary somewhat, but the general sense is that to be “infirm” means physically weak or of poor or deteriorated vitality. The independent treating prison doctor, Dr. Gordon Kanan, M.D., testified that Mr. Lipscomb fits this definition.

Dr. Kanan, the prison doctor, has treated Mr. Lipscomb for the last two weeks. He testified that as to Mr. Lipscomb’s overall health “he has some serious medical conditions.” He further stated that he “agreed with the conclusions” of the four private doctors who have treated Mr. Lipscomb and testified. Mr. Lipscomb came to Court carrying an oxygen tank prescribed by the Federal Medical Center personnel. In summary, none of the doctors who testified stated that Mr. Lipscomb was not “elderly and infirm,” the relevant issue under the law, Sentencing Guideline § 5H1.1.

The credible medical evidence does not demonstrate that Mr. Lipscomb has congestive heart failure. The records regarding whether he recently had pneumonia are inconsistent. However, the six doctors who gave sworn testimony do agree that he is blind in one eye and at risk of going blind in the other, suffers from diabetes, hypertension, chronic bronchitis, emphysema and degenerative osteoarthritis. His condition will likely worsen with time.

What makes this case difficult is that while the medical evidence presented in court shows the defendant to be “elderly and infirm” under the Sentencing Guideline in question, the Court is also mindful that because of the defendant’s conduct he does not deserve to be free. The Guidelines provide that where a defendant is “elderly and infirm” an alternative form of punishment is permissible if it is “equally efficient and less costly than incarceration.”

Although the 5th Circuit Court of Appeals has not addressed the issue, other courts have considered the availability of other conditions of confinement and place of service of sentence. *See*

28 U.S.C. 994(d). *United States v. Winters*, 117 F.3d 346, 347 n.1 (7th Cir. 1997), *cert. denied*, 66 USLW 3457 (1998) (citing *United States v. Groene*, 998 F.2d 604, 607-08 (8th Cir. 1993) (discussing, but rejecting a lateral departure)).

Because of the law and the medical evidence presented in court the 41 month sentence assessed as punishment will be served under “house arrest” or home confinement, enforced by an electronic ankle bracelet at defendant’s expense. For the next 40 months and two weeks (the defendant will receive credit for the two weeks spent in prison) the defendant will not leave his home for any reason other than to go to receive necessary medical care under the supervision of a United States Probation Officer. The sentence will not be shortened for “good behavior.” This confinement is as efficient as a federal medical facility, and less costly.

All food, clothing, shelter and medical care will be at the defendant’s expense, rather than the taxpayers’ expense. This place of confinement will thus be “less costly than incarceration,” the last relevant component for an alternative punishment under the Sentencing Guidelines.

You have ten days from the day I sign the judgment and commitment order in this case to appeal. You need to understand the Government has the right to appeal the sentence I am giving you.

I am also advising you of rights you have under Rule 35(b) of the Federal Rules of Criminal Procedure. If the Government asks me to, I have the power for a period of one year, and only one year, to reduce this sentence to reflect any subsequent substantial assistance you may give in investigating or prosecuting another person. In such a situation I have the power, if and only if the Government asks, to even reduce your sentence below the statutory minimum sentence.

A Federal Judge must base all decisions, including sentencing decisions, on the law and evidence presented in court, not on statements made outside the courtroom or on the basis of popular public opinion. And that is a very good thing for you, Mr. Lipscomb.

SO ORDERED.

Dated: April 27, 2000.



JOE KENDALL
UNITED STATES DISTRICT JUDGE