IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

vs. CASE NO. xxxxxx

JOHN DOE,

Defendant.
_____/

DEFENDANT'S SENTENCING MEMORANDUM

Defendant, John Doe, is seventy-nine years of age. He served in the United States Army during the Korean War and was a member of the Merchant Marines at the close of World War II. He suffers from significant health problems, notably congestive heart failure, and is at considerable risk for a heart attack and sudden death. He has no prior criminal history and, prior to his retirement, worked steadily. He appears to present little risk to anyone. Given these circumstances, a sentence of probation with a period of home detention would be "sufficient, but not greater than necessary," to comply with the goals of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Like many men of his generation, Mr. Doe served in the Korean War, spending about a year in Korea. (Filed separately as Exhibit 1, is a July 17, 2002, article from the weekly Taylor County newspaper, the *Taco Times*, in which Mr. Doe discussed his service during the war.[1]) As recognized

[1]While Mr. Doe served several miles back from the front line, the conditions were harsh: sub-zero temperatures, "plague-infested rats," and "three changes of clothes and three baths the whole year." (Ex. 1, p. 3). The shooting wasn't far away. In a letter Mr. Doe wrote his parents in July of 1952 he discussed it: "They also killed a lot of enemy but our casualties were awful heavy. Two of my best friends were killed instantly in the third platoon. There were fourteen men left out of the platoon John and I were in. Not a very good chance out of [roughly] forty-eight." (That particular page of Mr. Doe's letter is Exhibit 2.)

All of the references to Exhibits will be by the abbreviation "Ex.", followed by the particular

in the PSR (¶ 46), Mr. Doe received the Bronze Service Star in recognition of his service in Korea.

Prior to Mr. Doe's service in the Army, he was in the Merchant Marines from 1945 through 1950. While World War II had ended by the time Mr. Doe joined the Merchant Marines on September 18, 1945, those who served in the Merchant Marines after the end of the war were faced with mines that had been strewn throughout the oceans of the world.[2] In recognition of those such as Mr. Doe who served between December 7, 1941 and December 31, 1946, the United States Government has awarded certain benefits and an honorable discharge from the Coast Guard.[3]

After leaving the Army in 1952, Mr. Doe worked for a variety of companies including DuPont, the research and development lab of Pratt & Whitney Aircraft, the Florida Sugar Company, and a host of others maintaining a variety of machinery.[4] Mr. Doe also worked in the field of photography and television.[5] At one point he held a pilot's license and was a certified marine captain. (Ex. 4).

Today, at seventy-nine years of age, Mr. Doe suffers from significant health problems. Most

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exhibit number and, in some instances, the page number. Mr. Doe will file the collection of Exhibits at his sentencing hearing. Copies of the Exhibits are being mailed this date to the Court and the Government so that they can be reviewed prior to the hearing.

[2]Some thirty-four ships were sunk or damaged by mines between May of 1945 and March of 1947. See www.usmm.org/shipssunkveandvj.html. According to the Coast Guard, over five thousand Merchant Marines were killed during World War II. *See* www.usmm.org/faq.html#faq5. Mr. Doe, in fact, reports that during his service he, on one occasion, steered his ship from collision with a mine.

[3]See P.L. 95-202 the "GI Bill Improvement Act of 1977," P.L. 105-368 the "Merchant Mariners Fairness Act of 1997," and Exhibit 3.

[4]Ex. 4, which is a copy of a resume prepared many years ago by Mr. Doe.

[5]See Ex. 1, which includes a photograph of Mr. Doe with the famous movie actress, Dorothy Lamour.

notably, he is suffering from congestive heart failure. Lori Grubbs, a professor of nursing at Florida State University, has reviewed Mr. Doe's most recent medical records from the Veterans Administration. According to Ms. Grubbs, those records show that, as a result of his congestive heart failure, Mr. Doe's heart is pumping blood at a rate of only sixty percent of what would be considered normal. (Ex. 5). In addition to congestive heart failure, Mr. Doe suffers from hypertension, atherosclerotic heart disease (coronary artery disease), elevated triglycerides, morbid obesity, severe degenerative joint disease of the left ankle, right foot drop as a result of lumbar disc problems, prostate problems, and what has been diagnosed as an anxiety disorder. *Id.* Nancy Wonder, a Tallahassee psychologist who conducted a psychosexual risk assessment of Mr. Doe, has also concluded that, because of problems with short term memory loss, "Mr. Doe has evidence of what appears to be early signs of dementia."[6] The most threatening aspect of Mr. Doe's health, though, may be the risk posed by the combination of his hypertension, coronary artery disease, elevated triglycerides, and congestive heart failure. As Ms. Grubbs has explained, those factors put Mr. Doe "at great risk for a second heart attack and sudden death."[7] (Ex. 5, p. 2).

Mr. Doe's health problems have limited his mobility and his ability to accomplish things on his own. His son has plans to move Mr. Doe next door to him, but for some time Mr. Doe has lived on his own. Both the interior and exterior of his mobile home, though, are poorly maintained. When Mr. Doe was first arrested he was able to drive his van. Since then, though, he has had cataract surgery and currently cannot see well enough to drive. He is awaiting glasses and is unsure as to

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[6]Ex. 6, p. 13, which is the June 30, 2006, report of Dr. Wonder. She has recommended a neurological examination of Mr. Doe. *Id.* at 14.

[7]Mr. Doe suffered a heart attack in the mid-1990s.

whether his vision will be adequate for driving. As it stands he is dependant upon friends to drive him where ever he goes. For the most part he eats ready made food. As Mr. Doe describes it, he cannot walk a hundred feet because of his ankle. Mr. Doe has little energy and often suffers chest pain, taking a nitroglycerin pill ever two or three days.

Nancy Wonder maintains her psychology practice in Tallahassee. She is the current vendor for the United States Probation Office, providing mental health and sex offender counseling to those defendants under supervision. Between August of 2000 and July of 2005 she worked for the sexually violent predator program of the Department of Children and Families conducting psychosexual risk assessments of sexual defendants being considered for civil commitment.[8] She spent roughly five hours with Mr. Doe back in June conducting her assessment. (Ex. 6, p. 1). She concluded that Mr. Doe suffers from "no significant psychopathology or mental illness at this time." *Id.* at 12. She concluded as well:

> "At this time this examiner does not find enough evidence to justify a diagnosis of Pedophilia for Mr. Doe, as he has no hands on offenses towards children. Mr. Doe also displays a great deal of remorse for his actions and realizes what he did was wrong. Mr. Doe needs outpatient counseling and this could be best served in the community. It is the opinion of this examiner that Mr. Doe is at low risk to commit a sexual offense."

Id. at 13.[9]

Downward Departure Pursuant to Guidelines

It is this combination of circumstances, Mr. Doe's military service, a productive and law

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[8]Ex. 7, p. 2, the Curriculum Vitae for Dr. Wonder.

[9]*See also* Exhibit 8, a collection of letters from individuals who know Mr. Doe and can vouch that he has always treated children respectfully and appropriately. The letters are from: . . . . . .

abiding life, his age, significant health problems, and Dr. Wonder's conclusion that he presents little risk to anyone that justify a sentence significantly below the six-and-a-half to almost eight years called for by the Sentencing Guidelines. The circumstance of Mr. Doe's age and poor health would, by itself, justify a downward departure from the Guidelines on the basis of USSG § 5H1.1(a).

Section 5H1.1 of the Sentencing Guidelines Manual reads:

> Age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

The pertinent portion of §5H1.4 reads:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinarily physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

To the extent that §5H1.4 requires that the individual be "seriously infirm," which is presumably a higher standard than is found in §5H1.1, which requires only that the defendant be "infirm," Mr. Doe relies on §5H1.1.

As stated in §5H1.1, age "is not ordinarily relevant in determining whether departure is warranted." Nonetheless, circumstances such as age may be relevant "to the determination of whether a sentence should be outside the applicable guideline range" "in exceptional cases." USSG Ch. 5, Pt. H, Intro. Comment. *See also* United States v. Collins, 122 F.3d 1297, 1307 (10th Cir. 1997). There are any number of examples where courts have concluded that circumstances such as those found in Mr. Doe's case have justified a departure under either §5H1.1 or §5H1.4.

In United States v. Collins, 122 F.3d at 1307, the defendant was sixty-four years old, and suffered from "heart disease, high blood pressure, ulcers, arthritis and prostatitis." In light of Collins's "old age and ill health," the court sentenced him to forty months of incarceration for distribution of cocaine rather than the one hundred and fifty-one to one hundred and eighty-eight months recommended by the Sentencing Guidelines. In United States v. Hildebrand, 152 F.3d 756 (8th Cir. 1998) *overruled in part by* Whitfield v. United States, 543 U.S. 209 (2005), the court sentenced the seventy year old defendant to five years of probation with six months in a community correctional facility for mail fraud and money laundering in lieu of the fifty-one to sixty-three months recommended by the Sentencing Guidelines. The court did so even though "the Bureau of Prisons could manage Zucker's [the defendant's] conditions." *Id.* In United States v. Jackson, 14 F. Supp. 2d 1315, 1316 (N.D. Ga. 1998), the court sentenced the seventy-six year old defendant to eighteen months of imprisonment for eighty-three counts of mail fraud rather than the thirty-three to forty-one months recommended by the Sentencing Guidelines. The defendant suffered from severe osteoarthritis, a torn rotator cup, and chest pains. 14 F. Supp. 2d at 1318-1319. Even though the court recognized the Bureau of Prisons would be able to accommodate the defendant's needs, 14 F. Supp. 2d 1315 at 1321, it concluded that the "combination of ailments" justified the departure. 14 F. Supp. 2d 1315 at 1322. In United States v. Barbato, No. 00 CR 1028, 2002, WL 31556376 (SDNY Nov. 15, 2002)(unpublished), the eighty-one year old defendant suffered "from a variety of serious medical ailments, including hypertension, carotid artery disease and coronary artery disease." *1. Instead of sentencing the defendant to the twenty-four to thirty months the Guidelines had recommended for his loan sharking conviction, the court sentenced the defendant to twelve months of home confinement and two years of supervised release. *5 The court justified the departure

because of the defendant's "medical condition and his advanced age." *Id.* In United States v. Willis, 322 F. Supp. 2d 76, 78 (D. Mass. June 23, 2004), the court sentenced the sixty-nine year old defendant to probation with six months of home detention for income tax offenses. The court imposed that sentence rather than the twenty-one to twenty-seven months recommended by the Sentencing Guidelines, 322 F. Supp. 2d at 78, after, in part, considering the cost of home detention verses jail:

> The issue is one of degree. Willis has an inordinate number of potentially serious medical conditions. It seems imminently logical the Willis is at an age where these medical conditions will invariably get worse. It seems logical that being away from his support structure, both family and doctors, will invariably exacerbate his conditions. It seems logical that were he to go to jail for three years between the ages of 69 and 71 that he will emerge in substantially worse shape than he is now, if he does not die before completing his sentence. It seems logical that while the BOP can care for him, the costs of that care are bound to escalate. Finally, it seems logical that his conditions at least put him in the zone that enables me to balance the cost of home detention vs. jail, whether home confinement will be "equally efficient as and less costly than incarceration," U.S.S.G. § 5H1.1, or whether "home detention may be as efficient as, and less costly than, prison" as it is described in U.S.S.G. § 5H1.4.

322 F. Supp. 2d at 84-85.

That consideration of costs is, of course, one of the commands of §5H1.1: "age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." According to the Presentence Report in Mr. Doe's case, imprisonment in the Bureau of Prisons costs $1,952.66 a month. Supervision costs only $287.50 a month. Just as was true with the defendant in Willis, Mr. Doe is at an age where his health will "invariable get worse." As was true in Willis, too, it seems likely that Mr. Doe would "emerge in substantially worse shape than he is now if he does not die before completing his sentence." Given all that, as in Willis, it seems reasonable

to "balance the costs of home detention verses jail."

18 U.S.C. § 3553(a)

Beyond what may be permissible under the Guidelines, "the history and characteristics of the defendant," 18 U.S.C. § 3553(a), and the other factors set forth in 18 U.S.C. § 3553(a)(2) support a sentence of probation with a period of home detention. In United States v. Hunt, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the factors that must be considered:

> (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 . . .;
> (5) any pertinent [Sentencing Commission] policy statement . . .;
> (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.

As recognized in Hunt, there has been a continuing debate among the courts as to how much weight should be given to one of the listed factors, the Sentencing Guidelines. 459 F.3d at 1183-1184. The decision in Hunt, however, has resolved the debate for the Eleventh Circuit. In the decision, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Rather, a "district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant's sentence." 459 F.3d at 1185. Thus, as recognized by Judge Tjoflat in United States v. Glover, 431

F.3d 744, 752-753 (11th Cir. 2005), in some cases the Guidelines may have little persuasive force in light of some of the other § 3553(a) factors:

> Although "judges must still consider the sentencing range contained in the Guidelines, . . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)]." *Id*. at 787 (Stevens, J., dissenting). Indeed, as one district judge has already observed,
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> > the remedial majority in Booker [] direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore. For example, under § 3553(a)(1) a sentencing court must consider the "history and characteristics of the defendant." But under the guidelines, courts are generally forbidden to consider the defendant's age, his education and vocational skills, his mental and emotional condition, his physical condition including drug or alcohol dependence, his employment record, his family ties and responsibilities, his socio-economic status, his civic and military contributions, and his lack of guidance as a youth. The guidelines' prohibition of considering these factors cannot be squared with the § 3553(a)(1) requirement that the court evaluate the "history and characteristics" of the defendant.
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> United States v. Ranum, 353 F. Supp. 2d 984, 986 (E.D.Wis.2005) (citations omitted). Thus, mitigating circumstances and substantive policy arguments that were formerly irrelevant in all but the most unusual cases are now potentially relevant in every case.

The factors of Mr. Doe's military service, his long and productive life, his age, his health difficulties, and the favorable opinion returned by Dr. Wonder are all part of the history and characteristics of the defendant that must be considered. These are, of course, to be balanced against the circumstances of the offense. Mr. Doe, needless to say, recognizes that the circumstances of his case work against him. There are literally thousands of images of child pornography, some that are especially offensive. He recognizes, as well, "the intrinsic harm done to children" in the production of child pornography and that the "subsequent circulation of the images perpetrates the injury to the depicted child." United States v. Williams, 444 F.3d 1286, 1291 (11th Cir. 2006). Nonetheless, the

circumstances of especially Mr. Doe's health and age call for careful practical consideration and should carry great weight.

There are a number of decisions where courts have given notably less weight to the Sentencing Guidelines in recognition of the fact that older individuals, some as young as 40, are less likely to commit additional crimes. *See* United States v. Carmona-Rodriguez, No. 04CR667RWS, 2005 WL 840464 (S.D.N.Y. April 11, 2005); United States v. Hernandez, No. 03 CR 1257(RWS), 2005 WL 1242344 (S.D.N.Y. May 24, 2005); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073 (N.D. Ind. February 3, 2005); and United States v. Phillips, 368 F. Supp. 2d 1259 (Dist. N.M. March 21, 2005). In United State v. Testerman, No. 1:06CR00004, 2006 WL 2513018 (W.D.Va. Aug. 31, 2006), the 79 year old defendant received three years of probation with four months of home detention rather than the twenty-seven to thirty-three months the Guidelines recommended for his charge of dealing in firearms. *1. The court found that the sentence would "adequately deter" the defendant and others, in part, because of the defendant's "advanced age [and] his previous law-abiding life." *3.

In considering the age of the defendant, several courts have gone beyond simply the issue of recidivism. Those courts recognize that elderly individuals such as Mr. Doe are reaching the end of their lives and that a prison sentence of significant length has a much greater impact than it would on a younger individual. *See* United States v. Willis, 322 F. Supp. 2d at 83 ("a given sentence may be uniquely disproportionate to the elderly offender; elder criminals will lose a greater percentage of their lives than younger criminals and may suffer more from the same sentence"); and United States v. Jackson, 14 F. Supp. 2d at 1322 ("While the court is unable to predict defendant's life expectancy, based on his age and various infirmities it is clear that a thirty-three months sentence is more onerous

for Paradies than for most defendants. In reality, the defendant's thirty-three months sentence may turn out to a life sentence.").[10]

Courts have not excluded child pornography cases from the command of §3553 that sentences should not be longer than necessary to achieve the goals of sentencing.[11] In United States v. Gray, 453 F.3d 1323 (11th Cir. 2006) the defendant had been convicted of downloading child pornography, something he had done for five years. The defendant was sixty-four years old, "had a history of health problems," and "had never molested a child." 453 F.3d at 1324. The court approved a sentence of seventy-two months, "less than half the one hundred fifty-one months that [d]efined the bottom of the guidelines range." 453 F.3d at 1325. In United States v. Halsema, 180 Fed.Appx, 103, 104-105 (11th Cir. May 9, 2006), the mitigating circumstances were seemingly far less compelling than those in Mr. Doe's case, but were sufficient to justify a sentence of twenty-four months rather than the fifty-seven to seventy-one months recommended by the Guidelines. In United States v. Wachowiak, 412 F. Supp. 2d 958 (E.D. Wisc. February 3, 2006), a twenty-four year old music student convicted of child pornography charges received a seventy month sentence rather than the one hundred and twenty-one to one hundred and fifty-one months recommended by the Sentencing Guidelines based largely on his expression of remorse, an otherwise praiseworthy life, strength of character, and the broad support of family and friends.

Some of the statutory factors set for in §3553 play a greater role in Mr. Doe's case than

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[10]Mr. Doe is of the view that he will not survive a prison sentence and that such a sentence would be a "death sentence" for him. When he was initially arrested, his blood pressure increased so dramatically that he required medical attention. He believes he suffered a minor stroke, as well.

[11]In United States v. Grigg, 442 F.3d 560, 564 (7th Cir. 2006), the court recognized that the PROTECT Act could not be read to exclude the holding in United States v. Booker, 543 U.S. 220 (2005).

others. Given the findings of Dr. Wonder, there would not seem to be any real need to impose a period of incarceration "to protect the public from further crimes of [Mr. Doe]." He has led a law abiding life for many years, he does not appear to present a threat to anyone, his age argues against recidivism, and his poor health surely comes close to eliminating it as a possibility. While there may be medical care available in the Bureau of Prisons, it would be delivered most effectively, as would the counseling suggested by Dr. Wonder, outside the prison system. While a sentence that foregoes incarceration may on the surface create some disparity, the concern is for "unwarranted" disparities. There are surely few defendants that have committed Mr. Doe's offense that have the sort of history and characteristics that are present here. Accordingly, whatever disparity might be created is one that is warranted.

The harder issues may be whether a sentence without incarceration serves the more general concern of deterrence and fulfills the "need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." To consider an individual's service during times of war and his long productive, law-abiding life cannot be said to undermine the need for deterrence, nor does it fail to reflect the seriousness of the offense. Similarly, to base a sentence on the practical considerations of Mr. Doe's age and his poor health neither undermines the need for deterrence nor fails to reflect the seriousness of the offense. Indeed, sentencing someone such as Mr. Doe to a long prison sentence may even undermine respect for the law.

Thus, the circumstances presented in Mr. Doe's case justify a departure from the Sentencing Guidelines. More importantly, now that the decision in United States v. Booker, 543 U.S. 220 (2005) has made the Guidelines advisory and the parsimony clause of 18 U.S.C. § 3553(a) the

paramount consideration, the history and characteristics of Mr. Doe show that a period of supervision that includes home detention is "sufficient but not greater necessary to comply with" the goals of sentencing. Mr. Doe, therefore, requests this Court to impose just such a sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by electronic transmission to the office of Assistant U. S. Attorney, Thomas Kirwin, 111 N. Adams Street, Fourth Floor, Tallahassee, FL 32301, this October 6, 2006.

Respectfully Submitted,

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