

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

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|----------------------------------|---|----------------------------|
| UNITED STATES OF AMERICA, |) | CRIMINAL ACTION NO. |
| |) | |
| Plaintiff, |) | 3:95-CR-346-G |
| |) | |
| v. |) | |
| |) | |
| XXXX XXXX XXXX, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

**SENTENCING MEMORANDUM AND
MOTION FOR DOWNWARD DEPARTURE**

The following Sentencing Memorandum is submitted to the Court in order to assist the Court in imposing a just sentence in this case.

I. INTRODUCTION

"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).

II. MEDICAL CONDITION OF MR. XXXX AND HIS FAMILY

Mr. XXXX is seventy-four years old. See Presentence Report (the "PSR") at ¶ 62. Mr. XXXX is currently under the care of several physicians. Foremost, Mr. XXXX suffers from renal failure. His renal failure was first diagnosed by Dr. Thomas Eller and Dr. Eller referred Mr. XXXX to Dr. Thomas Gonwa. A lengthy medical evaluation by Dr. Eller setting forth Mr. XXXX's complete medical condition is attached hereto as Exhibit A.

As a result of his renal failure, Mr. XXXX was required to begin dialysis on April 25, 1995. A report by Dr. J. David Cargill, the doctor monitoring Mr. XXXX's dialysis, is attached hereto as

Exhibit B. Dr. Cargill's report notes that Mr. XXXX is a chronic dialysis patient who "will require chronic dialysis treatments the rest of his life." Mr. XXXX "currently undergoes hemodialysis treatments three times per week for four hours each session." Id.

Mr. XXXX also suffers from diabetes and is on medication for his diabetes. This condition is referenced in Dr. Eller's medical evaluation. See Exhibit A.

Furthermore, Mr. XXXX recently underwent surgery as a result of circulatory problems. A report from Surgical Associates of Dallas detailing the surgery is attached hereto as Exhibit C. It is currently believed that Mr. XXXX may require additional surgery to relieve further circulatory problems. Nevertheless, such surgery is considered to be risky and Mr. XXXX's circulatory condition is currently being monitored.

In addition, Mr. XXXX has suffered from "chronic right-sided abdominal pain for approximately two years" and continues to suffer from sharp abdominal pains. Dr. Watson P. Roye recently conducted exploratory surgery but was unable to discover the cause of the abdominal pain. Dr. Roye's report is attached hereto as Exhibit D. This condition remains chronic, but unexplained.

Finally, Mr. XXXX underwent cataract surgery in both eyes in May of 1995. A report by Dr. David W. Reagan is attached hereto as Exhibit E. Mr. XXXX currently sees Dr. Reagan for aftercare and monitoring.

As noted in the Presentence Report, Mr. XXXX currently takes numerous medications, including Glipizide, Nephrocaps, Phos-Lo Quinine Sulphate, Trazadone and Darvoset. Id. at ¶ 69.

Mr. XXXX is considered permanently disabled and also has a compensable disability related to his service in the United States Army of twenty percent. See Exhibits F and G. During his four years of service, Mr. XXXX received a Purple Heart, Asiatic-Pacific medal, Combat Infantryman Badge, Good Conduct Metal, four overseas service bars, and the American Defense Service Ribbon. See PSR at ¶ 71.

In addition to caring for himself, Mr. XXXX is also forced to care for his wife and disabled son. Mr. XXXX's wife suffers from morbid obesity (she is 5'2" tall and weighs approximately 260

lbs.), coronary disease, and severe depression. See PSR at ¶ 64. She is considered 100 percent disabled by the Social Security Administration. Moreover, Mr. XXXX's son, Tony, recently underwent surgery for injury to his spinal cord as a result of cervical myelopathy and is recovering from neck surgery. A report from Tony's doctor, Dr. Craig C. Callewart, is attached hereto as Exhibit H. Tony is currently required to wear a neck brace and is expected to be recuperating until December 1996.

As a result of Mrs. XXXX's and Tony XXXX's medical conditions, Mr. XXXX provides almost the entire household support. He cooks, does laundry, drives his family to appointments and to church, etc....

III. MOTION FOR DOWNWARD DEPARTURE

In its Presentence Report, the Probation Department has specifically recognized that two grounds exist that would support a downward departure in this case. The first ground recognized by the Probation Department as supporting a downward departure is Mr. XXXX's medical condition combined with his advanced age. See PSR at ¶ 91. The second ground recognized by the Probation Department as supporting a downward departure is the fact that Mr. XXXX is the sole support for his wife and his adult son, both of whom suffer from serious health problems. Id. at ¶ 92. Indeed, both of these grounds, whether considered separately or in conjunction with one another, would, in fact, support a downward departure in this case.

A. Mr. XXXX's Medical Condition and Advanced Age

U.S.S.G. § 5H1.4 provides that an extraordinary physical impairment may be a reason for downward departure.¹ 5H1.4 allows a downward departure any time a sentencing court is presented with sufficient evidence of a serious physical impairment. See United States v. Slater, 971 F.2d 626, 634-35 (10th Cir. 1992); United States v. Hilton, 946 F.2d 955, 958 (1st Cir. 1991).

¹ "[A]n extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." U.S.S.G. § 5H1.4.

Similarly, U.S.S.G. § 5H1.1 recognizes that "[a]ge may be a reason to impose a sentence below the applicable guideline range when 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." Indeed, the United States Court of Appeals for the Fifth Circuit recognizes that the Sentencing Guidelines do, in fact, allow for departures where it is found that a defendant is "elderly and infirm" at the time of sentencing. United States v. Fierro, 38 F.3d 761, 775 (5th Cir. 1995).

Several courts of appeals have granted downward departures based upon physical infirmities. For example, in United States v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991), the defendant was convicted of being a felon in possession of a firearm. The District Court granted the defendant's motion for a downward departure based upon his severe medical impairment that was caused by the loss of both of his legs below the knee and sentenced the defendant to four years of probation without incarceration. Id. The District Court noted that a sentence of incarceration would jeopardize the defendant's medical treatment that he had been receiving through the Veterans Administration. Id.

Similarly, in United States v. Long, 977 F.2d 1264, 1277-78 (8th Cir. 1992), the defendant was convicted for laundering money obtained from drug sales after a jury trial. The District Court granted the defendant's motion for a downward departure based upon extraordinary physical circumstances and departed from the applicable guideline of 46 to 57 months to five years probation without incarceration. On appeal, the downward departure was upheld.

Also, in United States v. Carey, 895 F.2d 318, 324 (7th Cir. 1990), the United States Court of Appeals for the Seventh Circuit held that the District Court could depart downward based upon a defendant's age (the defendant in Carey was sixty-two years old) and poor physical condition where the defendant had several serious operations as a result of a brain tumor. The Court of Appeals remanded the case with instructions for the District Court to make particularized findings in support of the downward departure.

Moreover, recent cases from several district courts are particularly instructive given their similarity to the instant case. In United States v. Baron, 1995 WL 784844 (D. Mass. Oct. 2. 1995)

(attached hereto as Exhibit I), the District Court for the District of Massachusetts downward departed from a sentence of 27-33 months to one year probation conditioned upon six months home confinement in the case of a seventy-six year old defendant with substantial medical problems. Similar to Mr. XXXX's condition, Mr. Baron's medical condition involved several conditions interrelating and potentially exacerbating each other. Id. at *2.

In United States v. Moy, 1995 WL 311441 (N.D. Ill. May 18, 1995) (attached hereto as Exhibit J), the District Court for the Northern District of Illinois downward departed in the case of a seventy-eight year old defendant who suffered from coronary artery disease, a recent hernia repair, and a history of depression. In making its departure, the Moy Court noted that a healthy seventy-eight year old defendant has a life expectancy of only seven to eight years. Id. at *26. In addition to Moy's physical condition, the Court also based its downward departure upon the defendant's care of his wife who had serious health problems. Id. at *30-33.

In another similar case, a District Court departed downward where a defendant was required to undergo dialysis three times a week as a result of a kidney disease. United States v. Dusenbery, 1993 WL 393323, *1 (6th Cir. October 5, 1993) (attached hereto as Exhibit K), cert. denied, 115 S.Ct. 256 (1994).

In the instant case, Mr. XXXX is without question, "elderly and infirm." Mr. XXXX is currently seen by a myriad of doctors, all of whom are intimately familiar with his conditions. Likewise, Mr. XXXX is required to take numerous medications on a daily basis. Moreover, he is required to undergo his chronic dialysis treatment three days a week for four hours at a time. As it is, Mr. XXXX's life expectancy is short. Many courts have recognized that it would be inappropriate to incarcerate an individual with Mr. XXXX's precarious physical condition thereby jeopardizing the treatment he is receiving from doctors familiar with his interrelated medical conditions.

B. Defendant's Care for Sick Wife and Injured Son

U.S.S.G. § 5H1.6 recognizes that in some cases, albeit not in "ordinary" cases, a court may downward depart as a result of a defendant's family responsibilities as well. See, e.g., United States v. Canoy, 38 F.3d 893, 903-08 (7th Cir. 1994); United States v. Haversat, 22 F.3d 790, 797 (8th Cir. 1994), cert. denied, 116 S.Ct. 671 (1995); United States v. Parham, 16 F.3d 844 (8th Cir. 1994); United States v. Sclamo, 997 F.2d 970, 973-74 (1st Cir. 1993); United States v. Rivera, 994 F.2d 942 (1st Cir. 1993); United States v. Gaskill, 991 F.2d at 83-86; United States v. Johnson, 964 F.2d 124, 128-30 (2d Cir. 1992); United States v. Alba, 933 F.2d 1117, 1122 (2d Cir. 1991); United States v. Pena, 930 F.2d 1486, 1494-95 (10th Cir. 1991). As outlined above, this case is not the "ordinary" case in which a sentence of imprisonment will simply cause basic heartache and hardship as usually occurs when one spouse is away from another or where a parent is separated from the child. Indeed, as noted in the PSR, "the defendant is the sole provider for his wife who has both emotional and health problems." See PSR at ¶ 12. As also noted, the defendant is the sole provider for "an adult son who had neck surgery and is without income for possibly one year is currently residing with and dependent upon the defendant." Id.

In United States v. Rivera, Steven Breyer, then Chief Judge of the First Circuit Court of Appeals, former U.S. Sentencing Commissioner, and now United States Supreme Court Justice, attempted to clarify a sentencing court's responsibility when considering whether certain factors warrant a departure. Justice Breyer recognized that trial courts are likely to have a more difficult time recognizing their responsibility in determining whether to grant a departure when it comes to those departures that are "ordinarily not relevant" or "discouraged" as opposed to the other types of departures specifically enumerated in the guidelines. Rivera, 994 F.2d at 947-49.

Justice Breyer noted that the Sentencing Commission, in considering departures under Part 5H of the Sentencing Guidelines, "recogniz[ed] that...circumstances could remove a case from the heartland...if they are present in a manner that is unusual or special...." Id. at 948. For example, he posited that "a single mother with family responsibilities...at some point...may transform the 'ordinary' case of such circumstances into a case that is not all ordinary." Id. Justice Breyer noted that some of the circumstances which may be "extraordinary" thereby warranting a departure from

the sentencing guidelines for extraordinary family circumstances in the case of a single mother are whether the offender has a child with handicaps, or no place for children to go, or no money. Id. at 948. The Court in Rivera then reversed and remanded for resentencing because the district court judge did not believe he had the power to downward depart in the face of extraordinary family circumstances. Id. at 952-54.

The United States Court of Appeals for the Third Circuit faced a situation similar to the instant case in United States v. Gaskill. In that case, a sixty-three year old defendant, who had been convicted of fraudulent use of social security numbers, cared for his mentally ill spouse. Gaskill, 991 F.2d at 83-84. The Court found it very significant that Mr. Gaskill was convicted of a non-violent offense and that he was subject to a relatively short period of imprisonment. Id. at 85. The Gaskill Court reversed the District Court's determination that it did not have legal grounds to downward depart based on Mr. Gaskill's responsibility in caring for his wife and remanded the case for resentencing. Id. at 86. See also Haversat, 22 F.3d at 796-97 (Downward departure appropriate based upon severe psychiatric problems of defendant's wife); Moy, supra. (Downward departure appropriate based upon defendant's care of his wife who suffered from serious health problems).

Mr. XXXX, like Mr. Gaskill, is also charged with a non-violent offense. In addition, like the defendant in Gaskill, Mr. XXXX's guideline imprisonment range is relatively short compared to many offenders. Compare United States v. Headley, 923 F.2d 1079 (3rd Cir. 1991) (Downward departure for family responsibilities would have little effect where the defendant's guideline imprisonment range was over seventeen years and, therefore, even a downward departure would result in a prolonged custodial sentence).

As noted in the letter Mr. XXXX's wife has written to the Court, Mrs. XXXX is almost totally dependent on Mr. XXXX to help her function in everyday life. Her severe depression, when combined with her morbid obesity and angina, make it almost impossible for her to engage in basic life functions. Indeed, Mr. XXXX is required to care for the household, take her to appointments and to generally ensure safety and well being.

Likewise, Mr. XXXX is required to care for his disabled son, Tony, during Tony's rehabilitation period from neck surgery. Tony is required to wear a neck brace and any shifting of his neck could reinjure his neck and force additional surgery. As a result, Tony finds it impossible to stand for long periods and usually requires Mr. XXXX to drive him to medical appointments, to church and alike. Because Tony is unable to return to work until December 1996, he is also financially dependent upon the XXXXs for a place to live.

IV. CONCLUSION

Mr. XXXX is currently at offense level 11/Criminal History Category I of the Sentencing Guidelines. See PSR at ¶ 78. This places him in Zone C of the Sentencing Guidelines and requires this Court to impose at least a "split" imprisonment sentence absent a downward departure.

As noted in the PSR and as discussed above, there are two grounds which alone, or in combination, support a downward departure.² Such a departure will allow Mr. XXXX to obtain the

² The Presentence Report also notes one possible ground for an upward departure based upon the similarity of the current offense to Mr. XXXX's prior offenses. See PSR at ¶ 94. Where prior sentences are not counted in a defendant's criminal history score because of their staleness, the Sentencing Guidelines allow for an upward departure provided such sentences are evidence of "similar or serious dissimilar, criminal conduct." U.S.S.G. § 4A1.2 (Application Note 8). Nevertheless, all of Mr. XXXX's prior offenses occurred many years ago. Indeed, Mr. XXXX's last conviction occurred in 1975 - twenty years ago. Id. at ¶ 39. Moreover, all of the prior convictions involve the passing of bad checks, an offense that is not serious in nature and that is dissimilar to the instant offense. Therefore, it is submitted that legal grounds do not exist for an upward departure in this

extensive medical attention he requires and it will allow Mr. XXXX to continue caring for his wife and disabled son. Additionally, it will conserve the resources of the Bureau of Prisons in that the Bureau of Prisons will not have to undertake to provide Mr. XXXX the extensive medical attention he unquestionably needs.

For the foregoing reasons, defense counsel submits that the Court should depart down three levels and place Mr. XXXX on probation for a period of five years. Mr. XXXX will, of course, understand that the five year term of probation may very well place him on probation for the rest of his life and that if he violates the probation he will likely face incarceration.

Respectfully submitted,

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XXXX XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on April ____, 1996, I caused a copy of Defendant's Sentencing Memorandum and Motion for Downward Departure to be hand-delivered to Madeleine Johnson, Assistant United States Attorney, at 1100 Commerce Street, Third Floor, Dallas, Texas and to Jerry Ritchie, United States Probation Officer, at 1100 Commerce Street, Room 13B3, Dallas, Texas.

F. Clinton Broden