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Hon. XXXX
United States District Court Judge
U.S. District Court
211 E. 7th Ave.
Eugene, OR 97401

HAND DELIVERED

XXXXXX, 200X

re: UNITED STATES V. DEFENDANT
Case No. CR XXXXXXXXX

Dear Judge XXX:

Mr. Defendant is scheduled to be sentenced by the Court on Wednesday, XXX. He has pled guilty to conspiracy to distribute 5 grams or more of actual methamphetamine, which carries an minimum mandatory prison term of 5 years, and a minimum 4-year term of supervised release. However, the parties and U.S. Probation agree that Mr. Defendant meets the criteria for the "safety valve,"[1] and should the Court concur, the minimum mandatory terms of imprisonment and of supervised release do not apply to Mr. Defendant's case.[2] There are no objections to the guidelines calculations as set forth in the presentence report (hereinafter, "PSR"). If the Court follows the parties' recommendation on that issue, Mr. Defendant's resulting guideline range will be an offense level XX, criminal history category X, with a low-end sentence of XX months imprisonment.

The defense has objected to the conclusion in ¶66 of the PSR, that there are no sentencing considerations under 18 USC §3553(a) that may warrant a lesser sentence than the advisory guideline range. The defense stands by its agreement with the

[1] U.S.S.G. §5C1.2 & 18 U.S.C. §3553(f).
[2] See U.S.S.G. §5C1.2, Application Note 9.

Government to not seek a downward departure under the guidelines; however, the plea agreement is silent regarding the defense urging other statutory factors to support a lower sentence. It is my understanding, based on consultation with the prosecutor, that the Government agrees that the Court may consider other statutory factors in arriving at a sentence, in light of *United States v. Booker*, 125 S.Ct. 738 (2005), and that Mr. Defendant may seek a lesser sentence than the advisory guideline sentence based upon those factors, without being in breach of his plea agreement.

The remedial holding of *Booker*, that rendered the guidelines advisory, and one of many factors the Court must now consider in arriving at a just sentence, is not an illusory right of defendants who entered pleas before *Booker* changed the law of sentencing. The Ninth Circuit, in *United States v. Ameline,* 2005 WL 350811 (9th Cir. CA#02-30326, 2/9/05; slip opinion on rehearing, pp. 16-17), *reh'g en banc granted,* 2005 WL 61270 (9th Cir. Mar. 11, 2005), observed:

> As the Fourth Circuit recently held, "to leave standing this sentence imposed under the mandatory guideline regime, we have no doubt, is to place in jeopardy the fairness, integrity or public reputation of judicial proceedings." *United States v. Hughes*, —F.3d—, 2005 WL 147059, at *5 (4th Cir. Jan. 24, 2005) (quotation marks omitted). . . . Accordingly, it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime.

Furthermore, it is clear that the remedial holding of *Booker* applies to cases such as Mr. Defendant's, where there is arguably no Sixth Amendment violation in arriving at the guideline range. The *Booker* Court concluded that its remedial scheme should apply not only to those defendants, like Booker, whose sentences had been imposed in violation of the Sixth Amendment, but also to those defendants, like Fanfan, who had been sentenced under the mandatory regime without suffering a constitutional violation. *See id.* at 765 (stating that Fanfan's sentence did not violate the Sixth Amendment but noting that "the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions"); *id.* ("[W]e must apply today's holdings—both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act—to all cases on direct review.").

It is the duty of this Court to consider and weigh far more factors than Mr. Defendant's guideline range in arriving at an individualized sentence that is "sufficient, but not greater than necessary," to comply with the purposes of sentencing set forth in 18 U.S.C. §3553(a)(2). This letter will proceed by setting forth the legal framework for

determining the sentence; presenting the relevant facts (including many which are specifically excluded from consideration by the guidelines, see generally Chapter 5H, U.S.S.G.); and demonstrating that a sentence substituting community confinement and/or house arrest, rather than an extended term of imprisonment at a BOP facility, is a reasonable, sufficient, and just sentence for Mr. Defendant.

I. The Legal Framework For Post-*Booker* Sentencing.

In an opinion authored by Justice Breyer, the Court ruled 5-4 that the mandatory nature of the federal sentencing guidelines is "incompatible" with the *Booker* Court's Sixth Amendment holding, and that 18 U.S.C. § 3553(b)(1) (providing that district courts "shall" impose a guidelines sentence) and §3742(e) (setting forth standards of appellate review) can and must be severed from the remainder of the SRA and excised. *Booker*, 125 S. Ct. at 756-57. This, in the remedy majority's words, makes the sentencing guidelines "effectively advisory" in all cases. *Id.* at 757.

The result is that district courts must now impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), after considering the following factors:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant [§3553(a)(1)];

(2) the kinds of sentences available [§3553(a)(3)];

(3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range [§3553(a)(4) & (a)(5)];

(4) the need to avoid unwarranted sentencing disparity among defendants with similar records that have been found guilty of similar conduct [§ 3553(a)(6)]; and

(5) the need to provide restitution to any victim of the offense [§3553(a)(7)].

Thus the guidelines are only one factor, and need not be accorded greater weight in determining the sentence than the other statutory factors. *See, Ameline, supra,* slip opinion at pp. 18-19 ("the advisory guideline range is only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence"). Furthermore, "the Sentencing Guidelines' limitations on the factors a court may consider in sentencing—*e.g.*, the impermissible grounds for departure set forth in §5K2.0(d)—no longer constrain the court's discretion in fashioning a sentence within the statutory range." *Id.*

The overriding principle and basic mandate of Section 3553(a) requires district courts to impose a sentence "*sufficient, but not greater than necessary*," to comply with

the four purposes of sentencing set forth in Section 3553(a)(2):

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

(b) deterrence;

(c) incapacitation ("to protect the public from further crimes"); and

(d) rehabilitation ("to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

The sufficient-but-not-greater-than-necessary requirement is often referred to as the "parsimony provision." The parsimony provision is not just another "factor" to be considered along with the others set forth in Section 3553(a); it sets an independent limit on the sentence a court may impose. *See, Ameline, supra,* slip opinion at 18-19 ("Sentencing discretion is not boundless, however; it must be tethered to the congressional goals of sentencing as reflected in the Sentencing Reform Act. *See* 18 U.S.C. §3553(a). To this end, "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of the Act] set forth in [18 U.S.C. §3553(a)(2)]."

Booker did not affect statutory minimum mandatory penalties, such as those prescribed by Congress for drug trafficking crimes. Congress, however, has provided a "safety valve" for certain low-level offenders with minimal prior criminal histories to escape these penalties. 18 U.S.C. §3553(f). That statute provides that the Court "shall impose a sentence pursuant to [the] guidelines . . . without regard to any statutory minimum mandatory sentence" if the Court finds the defendant meets the "safety valve" criteria. Significantly, the statute does not limit the Court's authority to sentence below the minimum mandatory to a 2-level reduction of the offense level; that limitation appears only in the guidelines. See U.S.S.G. §5C1.2 & §2D1.1(b)(6).

In the only reported decision found by the defense that addresses this issue post-*Booker*, the district court concluded that the "safety valve's" 2-level reduction is advisory only, and the Government ultimately concurred in that position after consultation with the Department of Justice in Washington, D.C. *United States v. Duran*, 2005 WL 395439 (D. Utah).[3] In addition, pre-*Booker* case law held that once a defendant was exempt from the minimum mandatory sentence pursuant to the "safety valve," the district court could

[3] It is worth noting that *Duran* was authored by Judge Cassell, who also authored *United States v. Wilson*, 2005 WL 78552, in which he concluded the guidelines should be afforded "great weight" in determining the sentence. That approach is not the law in the Ninth Circuit. See, *Ameline, supra*.

impose a sentence less than the 2-level reduction if there were any other grounds for departure. *United States v. Lopez*, 264 F3d 527, 531-32 (5th Cir. 2001).

Mr. Defendant has agreed to not seek any downward departures or downward adjustments under the guidelines, other than as set forth in his plea agreement. That agreement, however, cannot prevent this Court from considering information concerning Mr. Defendant's personal history and characteristics, 18 U.S.C. §3553(a)(1), in mitigation of sentence, for the same reasons historically recognized by the courts to warrant downward departures; e.g., pre-sentence rehabilitative efforts, "aberrant conduct," vulnerability to abuse in prison, etc. Moreover, the weight to be given such mitigating evidence "should not follow the old 'departure' methodology." *United States v. Ranum*, 2005 WL 161223 (E.D. Wis. Jan. 19, 2005); see also, 18 U.S.C. §3661 ("*no limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.") (emphasis added). This statutory language certainly overrides the (now-advisory) policy statements in Part H of the sentencing guidelines, which list as "not ordinarily relevant" to sentencing a variety of factors such as the defendant's age, educational and vocational skills, mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S.G. §5H1.

Finally, under 18 U.S.C. §3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation" (emphasis added). Thus, to the extent that a defendant is in need of rehabilitation, whether educational, vocational or medical, this separate statutory provision provides a strong argument for a lower or non-custodial sentence.

Mr. Defendant is being sentenced for a Class B felony and, therefore, is not eligible for probation. 18 U.S.C. §3561. There is, however, no minimum term of imprisonment required. See 18 U.S.C. §3553(f). He has served approximately XX days in custody in connection with this case. The Court has the authority to sentence Mr. Defendant to serve a period of supervise release not exceeding five years. 18 U.S.C. §3583(b). The Court may impose as a special condition of supervised release a period of community confinement and/or house arrest. See 18 U.S.C. §3583(d) and U.S.S.G. §5C1.1 & Commentary.

II. The Facts And Circumstances Relevant To A Lesser Sentence

DELETED TO PROTECT CLIENT CONFIDENTIALITY.

III. The 33-Month Advisory Guidelines Sentence Is Not Presumptively Reasonable.

Ameline makes clear that the sentence arrived at through application of the guidelines is no longer a presumptively reasonable sentence. A recent report issued by the Sentencing Guidelines Commission raises even graver concerns about the weight to be given the factor of the now-advisory guideline sentence in drug cases. United States Sentencing Commission, Fifteen Years of Guidelines Sentencing at 11-12 (Nov. 2004) (hereinafter, "Fifteen-Year Assessment").[4] That report, at p. 49, notes that the drug trafficking guideline, in combination with the relevant conduct rule, "had the effect of increasing prison terms far above what had been typical in past practice," before the guidelines became effective. The Fifteen Year Assessment goes on to question the soundness of determining the seriousness of drug offenses based primarily on drug quantity:

> Given the problems with relying on drug type and quantity to measure the seriousness of drug trafficking offenses, some observers have called for a fundamental re-examination of the role of quantity under the guidelines (Bowman, 1996; RAND, 1997; ABA, 2002). Thirty-one percent of district court judges responding to the Commission's 2002 survey listed drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing (USSC, 2003d), with 73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses (USSC, 2003d). *Id.* at p. 52.

The lack of correlation between the guidelines, and offense seriousness and offender culpability, is apparent in Mr. Defendant's case, where the guideline range for the drug offense is based solely on drug type and quantity. Unfortunately for Mr. Defendant, the purity of methamphetamine that he purchased for resale—a factor he had no knowledge of or control over—resulted in a 2-level increase in the base offense level over what the total weight of the drugs called for, with a corresponding increase in his advisory-guideline sentence.

The 2-level safety valve reduction takes into account only one aspect of Mr. Defendant's criminal history—i.e., the number of "points"—and a limited set of circumstances related to the offense, e.g., use of weapon, and role of defendant in the offense. Thus, Mr. Defendant's anticipated guideline range fails to take into account

[4] This report is available on-line at the Commission's website.

virtually all of the “history and characteristics of the defendant,” as well as some of the mitigating circumstances of the offense: The guidelines do not take into account that Mr. Defendant’s aberrant conduct in selling methamphetamine arose from the desperate act of a good family man, unable to find work due to XX, whose judgment was impaired by depression stemming from the loss of his job, his home, his children, his dignity, and his deteriorating health. Addiction to methamphetamine, often a form of “self-medication,” then propelled Mr. Defendant along this criminal course. His post-arrest rehabilitation, and strong family support, evidence a very low risk of recidivism, and likewise are not taken into account by the guideline calculations in this case.

In an opinion that preceded but which employs the same analytical approach as *Ameline* to post-*Booker* sentencing, the district court in *United States v. Meyers*, 2005 WL 165314 (S.D.Iowa Jan 26, 2005), explained:

> [U]nder §3353(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, U.S.S.G. §5H1.1, his education and vocational skills, §5H1.2, his mental and emotional condition, §5H1.3, his physical condition including drug or alcohol dependence, §5H1.4, his employment record, §5H1.5, his family ties and responsibilities, §5H1.6, his socio-economic status, §5H1.10, his civic and military contributions, §5H1.11, and his lack of guidance as a youth, §5H1.12. 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. The only aspect of a defendant's history that the guidelines permit courts to consider is criminal history. Thus, in cases in which a defendant's history and character are positive, consideration of all of the §3553(a) factors might call for a sentence outside the guideline range.

Courts outside this district with published opinions have imposed sentences less than the advisory guideline sentence upon consideration of the defendant’s character and background. See, e.g., *Meyers, supra,* (sentence of three months' probation, rather than federal Sentencing Guidelines' range of 20 to 30 months' imprisonment, was appropriate for defendant convicted of possession of illegal firearm); *Ranum*, *supra,* (sentencing defendant convicted of misapplying bank funds to one year and one day prison sentence in case where guideline range was 37-36 months); see also unpublished *United States v. Nellum* (N.D. Indiana, 2/3/05)(Imposing 108 month prison sentence in crack cocaine case involving distribution of over 200 grams, and 168-210 guideline range, based on consideration of offender history and characteristics showing low risk of recidivism, family support, and no trouble with the law prior to addiction to

crack); *United States v. Harris*, 2005 U.S. Dist. LEXIS 3958 (D.D.C. Mar. 7, 2005) (Robertson, J.) (where guideline ranges for two defendants were, respectively, 120-150 months and 70-87 months, sentencing them to 96 and 60 months, in part on basis that Sentencing Commission's findings "are sound authority for the proposition that the sentencing ranges for [the defendants'] crime by the Guidelines are greater than necessary").

"The Commission evaded the problem of reconciling the purposes of punishment by presenting empirically-based guidelines as a 'consensus' view, drawn from the accumulated experience of the sentencing system." Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy: or Confessions of Two Reformed Reformers*, 9 George Mason L. Rev. 1014 (2001). In our post-*Booker* world, this is the very problem this Court must confront in considering the weight to give the advisory guideline sentence in Mr. Defendant's case.

IV. Mr. Defendant's History, Characteristics, And Rehabilitative Efforts Establish A Very Low Risk Of Recidivism.

Two of the four purposes of sentencing, deterrence and incapacitation to protect the public, that would otherwise justify a lengthy sentence, are counterbalanced by evidence of low risk of recidivism. A defendant who has been successfully rehabilitated does not need imprisonment to be deterred from re-offending, nor locked up to protect the public. If there were truly any value in imprisoning drug offenders to deter others from committing drug crimes, we would not be perpetually losing the war against drugs.

Mr. Defendant lived in society for about XXX years, with only one minor transgression, prior to his involvement in selling methamphetamine. He was gainfully employed at age XX, and worked most of his life, overcoming his disabilities until they became too great. His progress in treatment has been "remarkable," according to his aftercare counselor. His family members love and support him. Defendant is living clean and sober, and haz demonstrated his commitment to remain so over the past XX months. All of these facts point to a very low risk of recidivism, and a corresponding very low need for incarceration to satisfy two of the four purposes of sentencing. *See generally U.S. v. Hock*, 172 F3d 676, 681 (9th Cir. 1999)(Post-offense rehabilitative efforts may be basis for downward departure if "extraordinary.").

V. Mr. Defendant's Physical Disabilities Will Be Aggravated By A Sentence Of Imprisonment And He Will Be Vulnerable To Abuse.

Defense counsel has searched the BOP website and reviewed every policy that appeared to possibly relate to programs or services for disabled inmates, and found nothing that provides for any special accommodations for living assistance or extra time to accomplish tasks for disabled inmates. The only reference found regarding services for disabled inmates appears in successive BOP annual reports as “Objective 5.09,” stating the objective as one to “develop and implement plans to address the special needs of physically disabled inmates.” Given the lack of any written policies addressing those special needs, one must conclude that objective has yet to be met.

Defense counsel then contacted the Federal Defender’s Office, and spoke with an investigator there who regularly works on BOP issues involving inmates. The investigator advised there were no accommodations for disabled inmates beyond handicapped-accessible cells and lavatories for inmates in wheelchairs at FIC Sheridan, to her knowledge, and that for living assistance, disabled inmates were dependent on the mercies of their cellmates. When asked who defense counsel could contact at the BOP regarding services and accommodations for disabled inmates, the investigator advised the only response from any official would be that the BOP is equipped to care for such inmates. See also, *U.S. v. Willis*, 322 F.Supp.2d 76, (D. Mass. 2004) (in response to government argument that BOP could care for defendant, court said “I have never had a case before me in which the Bureau of Prisons suggested that it did not have the capacity to care for a defendant”); *U.S. v. Gee*, 226 F.3d 885 (7th Cir. 2000) (court finding BOP letter stating that it could take care of any medical problem “was merely a form letter trumpeting [BOP] capability”).

This Court is required to consider the guideline’s policy statements in arriving at the sentence. 18 U.S.C. §3553(a)(4)&(5). U.S.S.G. §5H1.4 provides that “an extraordinary physical impairment may be a reason to impose a sentence below the guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.” In *United States v. Martinez Guerrero*, 987 F2d 618, 620-21 (9th Cir. 1993), the court noted that the district judge may consider the BOP’s ability to care for a disabled defendant in deciding whether to depart for extraordinary impairment, “[b]ut it is not the only factor.” The Ninth Circuit explained:

> A district court may consider any number of circumstances in making its finding on the question of extraordinary physical impairment under section 5H1.4. *See United States v. Long,* 977 F.2d 1264 (8th Cir.1992) (district court's downward departure under section 5H1.4 affirmed on grounds that "an extraordinary physical impairment that results in extreme vulnerability is a legitimate basis for departure"); *United*

> *States v. Lara,* 905 F.2d 599, 603-05 (2d Cir.1990) (district court's downward departure affirmed based on the defendant's "potential for victimization" due to a combination of U.S.S.G. §5H1.1 (age), 5H1.3 (mental condition) & 5H1.4). *Id.*

Judge Ferguson, concurring, 987 F.2d at 621, observed that “conditions that might be entirely ordinary or widespread in the world outside of prison may still constitute extraordinary physical impairments under section 5H1.4.” He went on to conclude that: “Thus, the proper inquiry under section 5H1.4 calls for a comparison between the efficiency and cost of a full term of incarceration, as opposed to a lesser or alternative sentence, in achieving deterrence, incapacitation, just punishment, and rehabilitation.”

In Mr. Defendant’s case, the Court should consider not only the difficulties he is likely to encounter in daily living inside a prison environment, but also his vulnerability: To think there is no risk that the weak will be preyed upon by the strong is to ignore the realities of prison life.

Imprisonment carries a greater punishment for Mr. Defendant than the non-disabled defendant. In short, putting Mr. Defendant in prison will be hazardous to his health. *See generally,* United States v. Roth, 1995 WL 35676 (S.D.N.Y. Jan. 30, 1995)(finding departure warranted in case of defendant with progressive, incurable, debilitating neuromuscular disease resulting in substantially limited mobility with further physical decline expected).

VI. Mr. Defendant Is In Need Of Educational, Vocational, Medical, and other Correctional Services That Will Not Be Provided In Prison Or Can Be Provided Outside Of Prison More Effectively.

One of the four purposes of sentencing that the Court must fashion its sentence to effectuate is rehabilitation, and whether Mr. Defendant is in need of rehabilitative services that will not be provided in prison or can be provided outside of prison more effectively.

Upon information and belief, Mr. Defendant will not receive services to “improve his quality of life” while in BOP custody. Those services are available in the community once Mr. Defendant can qualify for medical care through XX.

If Mr. Defendant is ever to work again, he is in need of vocational services for disabled individuals, and there are no BOP vocational programs for disabled inmates.

Mr. Defendant's ability to find work would likely increase if he pursued higher education to expand job opportunities to those not involving physical labor. His access to higher education is readily available in the community.

Mr. Defendant's success in drug treatment strongly suggests that follow-up services in the community would be of assistance, whereas participation in the BOP intensive drug treatment program would probably be an unnecessary use of limited resources. Additionally, Mr. Defendant would need a prison sentence of at least 30 months in order to be eligible for participation in the program, contrary to the strong arguments against imposition of such a lengthy sentence. BOP policies also require that an inmate be able to work and pay their own way, in order to be eligible for halfway house placement, which is part of the early-release requirements for the drug treatment program. See BOP Policy Statements 7430.02 & 7310.04.[5] Mr. Defendant's physical disabilities are likely to render him unable to work and therefore unable to qualify for early release should he participate in the drug treatment program, as well as unable to serve the last six months or less of his sentence in a BOP halfway house. In sum, the Court should not sentence Mr. Defendant to prison with the expectation that his sentence would be substantially reduced upon completion of the drug treatment program.

VII. Consideration Of The 18 U.S.C. §3553(a) Factors.

(1) The nature and circumstances of the offense and the history and characteristics of the defendant [§3553(a)(1)];

Commission of the offense is aberrant conduct for Mr. Defendant, and the product of impaired judgment resulting from depression, a mental illness. He was motivated by a terribly misguided but desperate attempt to preserve his family through the only money-making activity immediately available to him. He readily acknowledges his errors in judgment and expresses sincere remorse for his conduct. He has made "remarkable" progress in his post-arrest rehabilitation, and appears unlikely to re-offend if continued on community supervision. He has strong family support. Apart from this criminal episode and period of drug addiction, Mr. Defendant has been by all reports a good

[5] Policy 7310.04, concerning community correctional transfer procedures, states: "(4) Inmates with minor medical conditions or disabilities may also be considered for community placement. Inmates are required to assume financial responsibility for their health care while assigned to community programs. Such inmates must provide sufficient evidence to institution staff of their ability to pay for health care while at a CCC

father. Mr. Defendant suffers from progressive, incurable, debilitating XXX and other medical conditions with further physical decline expected and likely to accelerate in a prison setting. Mr. Defendant thus has significant physical disabilities which the Court must consider as his medical condition relates to both the nature of the punishment that should be imposed, as well as the need for rehabilitation, two of the four purposes of sentencing under ¶3553(a)(2).

(2) the kinds of sentences available [§3553(a)(3)];

The Court has the authority to sentence Mr. Defendant to a period of imprisonment below the five-year statutory minimum mandatory and, in fact, with no minimum term. See 18 U.S.C. §3553(f) & *United States v. Duran, supra*. The Court has authority to sentence Mr. Defendant to a period of imprisonment equivalent to the time he has already served, followed by a term of supervised release that could be up to five years, and impose as special conditions community confinement and/or house arrest, in lieu of imprisonment in a federal correctional facility.[6] See 18 U.S.C. §3583(d) & U.S.S.G. §5C1.1 & Commentary. Due to Mr. Defendant's disabilities, and the likely aggravation of those disabilities in a prison environment, Mr. Defendant probably would not qualify for any early release program, or placement in a BOP halfway house that would otherwise shorten the amount of his sentence that would be served in prison.

(3) the guidelines and policy statements issued by the Sentencing Commission, including the (now non-mandatory) guideline range [§3553(a)(4) & (a)(5)];

The Sentencing Commission itself has noted long-standing and widespread concerns that the drug trafficking guideline in many cases calls for higher sentences than necessary to satisfy the purposes of sentencing. See Fifteen-Year Assessment, *supra*. Furthermore, the advisory guideline sentence in Mr. Defendant's case fails to take into account most of the mitigating facts in this case related to his character and background as set forth above. The policy statement in U.S.S.G. §5H1.4 provides that "an extraordinary physical impairment may be a reason to impose a sentence below the guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." Mr. Defendant suffers from physical disabilities which, at least in a prison environment, would constitute "an extraordinary

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prior to the referral being made. When an inmate is unable or unwilling to bear the necessary health care, the inmate shall be denied placement."

[6] According to the PSR writer, if the Court ordered community confinement as a condition of supervised release, US Probation would do the placement and the BOP policies would therefore not apply.

physical impairment" due to his inability to function independently and unassisted in prison, his increased vulnerability to the risks of violence in prison, and the medical likelihood that life in prison would accelerate the loss of XXX. The Government agrees that the Court must follow the *Booker* decision; thus the Court must take this policy statement into account in arriving at the appropriate sentence, notwithstanding Mr. Defendant's agreement to not seek a "downward departure" under the guidelines.

(4) the need to avoid unwarranted sentencing disparity among defendants with similar records that have been found guilty of similar conduct [§ 3553(a)(6)];

Whatever disparity that may result from a sentence for Mr. Defendant that takes into account all of the other factors set forth above, including his disabilities, will not be "unwarranted," but rather, warranted by the overriding purposes of sentencing.

(5) the need to provide restitution to any victim of the offense [§3553(a)(7)].

This factor does not apply in Mr. Defendant's case.

<u>VIII. A Sentence Of Community Confinement And/Or House Arrest Is Sufficient In Mr. Defendant's Case To Achieve The Purposes Of Sentencing.</u>

The overriding principle and basic mandate of Section 3553(a) requires district courts to impose a sentence "*sufficient, but not greater than necessary*," to comply with the four purposes of sentencing set forth in Section 3553(a)(2):

(a) retribution (to reflect seriousness of the offense, to promote respect for the law, and to provide "just punishment")

Mr. Defendant has committed a serious offense. He acknowledges the Court must impose punishment for his crime, while asking for a punishment short of imprisonment in a federal penitentiary. Punishment can be served by restrictions on liberty short of a penitentiary sentence, such as community confinement or house arrest. Community confinement in a half-way house would afford Mr. Defendant the flexibility of additional time to rest, XXX, and preserve basic human dignity. House arrest would allow Mr. Defendant to be assisted as needed by family members, and avoid aggravating the progressive nature of his disabilities. Because of Mr. Defendant's medical conditions, a prison sentence would be substantially more punitive in nature than for a non-disabled defendant. Prison would expose Mr. Defendant to risks of violence against which he is defenseless, and would aggravate the progressive deterioration of his health "[T]he proper inquiry under section 5H1.4 calls for a comparison between the efficiency and cost of a full term of incarceration, as opposed to a lesser or alternative sentence, in

achieving deterrence, incapacitation, just punishment, and rehabilitation." *United States v. Martinez Guerrero, supra* (Ferguson, J., concurring).

(b) deterrence;

Mr. Defendant presents a low risk of recidivism, and that risk would further decrease with continued supervision and the provision of rehabilitative services available in the community, including treatment for depression. Further incarceration in a prison setting, at least for any substantial period of time, is unnecessary to promote deterrence.

(c) incapacitation ("to protect the public from further crimes");

For the same reasons, incarcerating Mr. Defendant in prison is unnecessary to protect the public.

(d) rehabilitation ("to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner").

Mr. Defendant is in great need of rehabilitative services that can be provided most effectively outside of a prison setting, and most probably will not be available in to him in prison. Pursuant to 18 U.S.C. §3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553(a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation" (emphasis added). Thus, Mr. Defendant's need for rehabilitative services counsels against the imposition of a substantial prison sentence.

IX Conclusion.

Upon consideration of the statutory factors and the purposes of sentencing, the Court should find that a sentence of imprisonment to time served, followed by a term of supervised release than includes community confinement and/or house arrest is sufficient but not greater than necessary in Mr. Defendant's case. As a less-favored and less-reasonable alternative, the defense urges the Court to impose no more than six months in prison, followed by a term of supervised release, because a longer term of imprisonment, given Mr. Defendant's disabilities, would be greater than necessary "punishment," which is only one of the four purposes of sentencing. The other three purposes of sentencing are adequately served by a sentence with imposes no further imprisonment in a penitentiary.

Yours truly,

Terri Wood