

recidivism, nature of the offense, and available safeguards for protecting the community, collectively justify departures and variances under United States Sentencing Guidelines (hereinafter U.S.S.G. or Guidelines) §5H1.1, §5H1.4, §5K2.0, and 18 U.S.C. § 3553(a).

PROCEDURAL BACKGROUND

Mrs. Rostie was arraigned on the Indictment in this matter on February 14, 2008 and after full cooperation with the Government, she pled guilty on September 4, 2008 to Counts 1 and 2 of the Indictment. The pleas of guilty pertained to Count 1 Conspiracy to Possess and Distribute Controlled Substances in violation of 21 U.S.C. 841(a)(1),(b)(1)(D),(b)(2),(b)(3) and 846. Count 2 entailed a plea of guilty to Conspiracy to Commit Money Laundering in violation of 18 U.S.C. 1956(h). Mrs. Rostie was the first defendant to enter a plea of guilty and accept full responsibility. She also participated in several interviews with the USA as well as testified at the trial of 3 of the co-defendants.

ANALYSIS AND ARGUMENT

In accordance with the three-step sentencing procedure of *United States v. Robertson*, 568 F.3d 1203, 1210 (10th Cir. 2009), *United States v. HawkWing*, 433 F.3d 622, 631 , (8th Cir. 2006), and *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006) Mrs. Rostie offers the following:

I. Step 1: Determine the Guidelines Sentencing Range

Mrs. Rostie objects, on Fifth and Sixth Amendment grounds, and in accordance with *United States v. Booker*, 125 S.Ct. 738 (2005), to judicial fact finding in general, to

fact finding by a preponderance, and to the presumption that a sentence within the range established by the Guidelines is presumptively reasonable. She also objects to the holding that an extraordinary variance must be supported by extraordinary circumstances. Mrs. Rostie acknowledges the current state of law in the Eighth Circuit as articulated in *United States v. Stewart*, 462 F.3d 960 (8th Cir. 2006) (holding judicial fact-finding is permissible under both *Booker* and the Sixth Amendment), *United States v. Johnson*, 450 F.3d 831 (8th Cir. 2006) (holding Due Process is not violated when significant enhancements are found by a preponderance of the evidence), and *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) (holding the Guideline range is presumptively reasonable and extreme variances require extraordinary circumstances).

If the Sixth Amendment requires that all sentence increasing enhancements must be charged and either proven to a jury, or admitted by the defendant, then none of the enhancements would apply in Mrs. Rostie's case because they have not been pled to, nor proven to a jury beyond a reasonable doubt. Mrs. Rostie's Total Offense Level after Acceptance of Responsibility would be 17, her Criminal History Category would be I, and the resulting Guideline range would be 24 to 30 months confinement. The presumptive sentence would mandate a 24 month sentence.

II. Step 2: Determine Whether Traditional Departures Apply

Mrs. Rostie believes that departures are appropriate in her case based on the unique interaction of age, her deteriorating physical condition, susceptibility to abuse, and length of recommended sentence. In assessing whether departures are appropriate

under U.S.S.G. §5K2.0(a)(4) and (c), the Court is asked to bear in mind that whenever Mrs. Rostie is released she will be subject to at least two years of supervised release.

A. Age: U.S.S.G. §5H1.1

The Guidelines explicitly state that age and physical condition are not “ordinarily relevant” as a basis for departure. *See U.S.S.G. §5H1.1, §5H1.4.* They are therefore “discouraged” factors under *United States v. Koon*, 116 S.Ct. 2035 (1996) (holding susceptibility to abuse is a valid grounds for downward departure) which may only be considered if “present to an exceptional degree or in some other way [makes] the case different from the ordinary case.” *Id.* at 2045. The factors of age and deteriorating physical condition are present in this case to an extraordinary degree.

The 24 to 30 month sentence advocated by the PSIR is a de-facto life sentence. The Centers for Disease Control and Prevention (CDC) estimate life expectancy for white females who turned 56 in 2007 as 80.8 years. *See National Vital Statistics Report 2003*, (Exhibit A) at 3. Mrs. Rostie turns 60 in August, 2011. Given this data a normal white female in Mrs. Rostie’s situation would be expected to live 249.6 more months or 20.8 years, *without Mrs. Rostie’s poor health taken into consideration.*

Prison conditions shorten life expectancy. A 2004 Department of Justice (DOJ) study found that prison is so stressful the Bureau of Prisons considers all inmates over 50 as elderly. *See Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*, (Feb. 2004) (Exhibit B), at 29. The DOJ attributes accelerated aging to “stress experienced by new inmates trying to survive the prison

experience unharmed; efforts to avoid confrontations with correctional staff and fellow inmates; financial stress related to inmates' legal, family, and personal circumstances; withdrawal from chronic substance abuse; and lack of access to adequate medical care.” *Id.* at 8, 9.

Offenders sent to prison later in life experience special difficulties including: “1) Vulnerability to abuse and predation, 2) Difficulty in establishing social relationships with younger inmates, 3) Need for special physical accommodations in a relatively inflexible physical environment, and 4) Need for special programs in a setting where special privileges are disdained as counterproductive to discipline and orderliness.” *Id.* at 9. These needs will put Mrs. Rostie at conflict with both the general population, and the prison facility, resulting in further accelerated aging and deterioration. *Id.* at 10. The Bureau of Prisons does not separate the elderly from general population. *Id.* at 65,66, 68. As a result, “the lack of personal protection for elderly inmates, who may be frail and therefore vulnerable to the threats of assault by younger predatory inmates,” further “contribute[s] to the emotional stress and physical deterioration,” that hastens aging. *Id.* at 9. Mrs. Rostie requires daily blood sampling as well as daily hydrocodone tablets and a narcotic pain patch for severe pain. These narcotics make Mrs. Rostie particularly vulnerable to predation by other inmates, many of whom have substance abuse issues.

The prison medical system exacerbates the problem. The DOJ noted with great concern the persistent “belief that those convicted of serious crimes have somehow earned their suffering, as if the pain of illness and old age in prison were a part of the

inmate's just desserts. These beliefs are widespread and intense among some custody personnel and are prevalent also among health care providers.” *Id.* at 48. The DOJ also observed that elderly inmates are mixed with the general population and therefore struggle for attention and consistent care in a system that takes a skeptical view towards any medical complaints, switches care providers frequently, and contemplates any illness or infirmity as a temporary condition to be handled on an ad hoc basis. *Id.* at 49-50, 68. Even if the staff is conscientious, the Bureau of Prisons does not train staff on working with elderly populations. *Id.* at 99. Bureau of Prisons treatment is “episodic, discontinuous, and not under the advice and control of treatment providers,” thereby prolonging the time it may take staff to identify an important health trend. *Id.* at 50. Perhaps as a result of these care flaws, “prison inmates experience disproportionately high levels of chronic and acute physical health problems.” *Id.* at 9.

Mrs. Rostie presents two other significant variables that will tend to cause accelerated aging. First, Mrs. Rostie has Stage 3 kidney disease and will likely need dialysis in the not-to-distant future. Her clotting disorder requires daily medical supervision so as to detect and prevent any clots from entering the heart or lungs. Second, Mrs. Rostie knows if she somehow survives this sentence, she is likely to have no family to assist her or care for her upon release. If science and common sense are the standards, it is extremely unlikely that Mrs. Rostie will survive a PSIR sentence.

Because a PSIR sentence is a virtual death sentence, Mrs. Rostie would experience a qualitatively harsher sentence than is either appropriate or normal for this offense. As

the DOJ observed, “the usual circumstances of dying in prison are very different from those in the free world,” and “a ‘good death’—one that involves reconciliation with the inevitable outcome and time with family and friends, supported by professionals in an appropriate setting—is rarely available to inmates.” *Id.* at 50. A departure based on age is therefore appropriate.

B. Physical Condition: §5H1.4 or §5K2.0

Long before her death, Mrs. Rostie will undoubtedly reach the state where illness and infirmity incapacitate her as effectively as incarceration. In point of fact, she is presently at this state. It is therefore appropriate for the Court to consider a departure for physical impairment. *See Dr. Moore’s letter* (Exhibit C) Mrs. Rostie believes she is *presently* suffering from a condition that prevents normal function in the civilian world, something the Eighth Circuit considered important in *United States v. Rabin*, 63 F.3d. 721, 734 (8th Cir. 1995). The Rabin Court cited *United States v. Long*, 977 F.2d 1264 (8th Cir.1992) (an extraordinary physical impairment which results in extreme vulnerability is a legitimate basis for departure). Mrs. Rostie requires a cane to even walk and requires narcotics for pain management of which a side effect is disorientation. Moreover, her doctor has required her to not seek employment due to infirmity in the civilian world; it is extremely unlikely she could manage a required employment in a prison setting. Nevertheless, as part of its holding in *United States v. Johnson*, 318 F.3d 821 (2003), the Eighth Circuit recently held that factors must be assessed in light of what Mrs. Rostie will endure in prison. *Id.* at 826. Within the context of prison, Mrs. Rostie will immediately suffer enhanced, life-

shortening stress as a result of her physical condition. Prison is intolerant to the concerns of the elderly, and her inability to conform her activities to the young women around her will result in unusual hardships and inconveniences. *See* Exhibit B. at 30. Mrs. Rostie's physical condition will also invite abuse and exploitation.

That sexual abuse in prison occurs is not debatable. In passing the Prison Rape Elimination Act of 2003, Congress observed experts "conservatively estimate" at least 13% of inmates in the United States have been sexually assaulted, 200,000 currently imprisoned inmates have been or would be sexually abused, and approximately 1,000,000 inmates have been sexually assaulted in the past 20 years. 42 U.S.C. § 15601. A follow-up study of prisoners, including federal prisoners, demonstrated that up to 20% of prisoners reported sexual abuse while in prison. *See* Bureau of Justice Statistics (BJS), *Data Collections for the Prison Rape Elimination Act of 2003*, (2004) (Exhibit D), at 2.

Certain physical and emotional conditions serve as predictors of sexual victimization. However, as noted by the DOJ study, Mrs. Rostie will be more vulnerable and susceptible to abuse based on age and diminishing physical vigor. *Exhibit B.* at 9. Furthermore, Mrs. Rostie is timid, speaks hesitantly, is physically weak and unable to protect herself, and is inexperienced with the prison system, characteristics common to the most commonly targeted victims. *See No Escape: Male Rape in U.S. Prisons* (Human Rights Watch), April 2001, at 63. *See also United States v. Lara*, 905 F.2d 599 (2nd Cir. 1990) (approving departure based on diminutive size, immature appearance, and sexual

orientation) and *United States v. Parish*, 308 F.3d 1025 (9th Cir. 2002) (approving departure based on stature, demeanor, naivety, and class of conviction). The likelihood of abuse increases if overlapping factors exist. *No Escape*. at 63. Mrs. Rostie has no gang affiliations to protect her. Her education, upbringing and perceived social status and age will likely inhibit her ability to develop a safety network for her. Moreover, her narcotic medication and likely inability to be expected to work will surely put her at odds with the majority of inmates even in a minimum security setting. Her constant medical monitoring of her condition will also be envied by the majority of prisoners as she will not be expected to participate in anything that hinders her daily medical monitoring. The combination of all these factors creates a unique situation in which a departure is necessary and humane.

III. Step 3: Apply the factors under § 3553(a)

If this Court adopts the Guideline Range proposed in the PSIR, Mrs. Rostie will request a significant variance. Likewise, if this Court opts not to grant downward departures based on age, infirmity, or susceptibility to abuse, Mrs. Rostie will request that the Court consider each as a basis for a variance. As this Court is aware, the Guidelines are but one advisory factor to consider in fashioning a sentence that is “sufficient, but not greater than necessary” to comply with the purposes of sentencing” as set forth in 18 U.S.C. §3553(a). *See United States v. Booker*, 125 S. Ct. 738 (2005). 18 U.S.C. § 3553(a) reads as follows:

- (a) Factors to be considered in imposing a sentence.

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (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 for the applicable category of offense committed by the
 - (A) applicable category of defendant as set forth in the guidelines...
- (5) any pertinent 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.

In Mrs. Rostie's case, a sentence imposed as per the Guidelines in the PSIR would

violate the policies and provisions of 18 U.S.C. §3553(a), in that it would impose a sentence greater than necessary to comply with the purposes of sentencing for the additional following additional reasons:

A. Risk of Recidivism: 18 U.S.C. §3553(a)(1) and (a)(2)

Mrs. Rostie is statistically anomalous to other Category I offenders and is not likely to recidivate. *See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004) (Exhibit E), at 28. Within the group of Category I offenders, it is known that youthful offenders recidivate at a 29.5% rate, whereas offenders in Mrs. Rostie's age category recidivate at only 6.2%. *Id.* Furthermore, Mrs. Rostie presents many favorable variables that correlate to lower recidivism within this group. She is highly educated, does not use drugs recreationally, is married and consistently maintained employment prior to this offense. *Id.* at 11-13. Mrs. Rostie's case is therefore distinguishable from *United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006) (holding it was not appropriate to grant a 50% variance from a Career Offender Guideline range). Mrs. Rostie has an exemplary and lengthy work history, is well educated, has never been incarcerated and is not addicted to drugs for recreational purposes.

For all of these reasons, Mrs. Rostie's case represents a unique set of variables which justify substantial departures and variances from the Guideline range suggested in the PSIR.

IV. CONCLUSION

WHEREFORE, based on the foregoing, Mrs. Rostie respectfully requests that this Honorable Court impose a sentence consistent with the suggestions contained in this Memorandum, and for further relief deemed proper by the Court.

In the alternative, she respectfully asks that if a custody sentence is imposed that the Court allow for self-surrender to the BOP-designated facility.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of April, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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Attorney for Defendant Rostie