UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	:	Case no.: 1:12-CR-119
Plaintiff,	:	JUDGE MICHAEL R. BARRETT
vs.	:	
ROBERT FRANK POANDL,	:	
Defendant.	:	

DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE AND SENTENCING MEMORANDUM

Defendant Robert Frank Poandl, through counsel, hereby moves the Court for a downward departure and/or a variance from the United States Sentencing Guidelines ("Guidelines" or "USSG"). A review of the sentencing factors which the court must consider pursuant to 18 U.S.C. § 3553(a) strongly suggests that the defendant should not be sentenced to incarceration in federal prison for 41 to 51 months as recommended by the Guidelines. Rather, the defendant should receive a substantially lesser sentence. Defendant respectfully requests that this honorable Court impose a sentence that takes into account the defendant's individual characteristics, particularly his advanced age and the grave condition of his health.

Defendant Robert Poandl turns seventy-three in May of 2014. He has served as a Catholic priest virtually his entire adult life. He has given counsel, guidance, and support to countless families in the community. He suffers from significant health problems, notably stage IV urothelial cancer. According to scientific data, there is a high likelihood that Fr. Poandl will die from cancer before the end of 2014. He has no prior criminal history and has worked steadily his entire adult life. He presents little risk to anyone. Given these circumstances, a

sentence below the guideline range 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).

I. Father Poandl is of advanced age, with severe health problems, and presents a low risk of harm to the public.

Today, at seventy-two years of age, Fr. Poandl suffers from significant health problems. He was diagnosed with Stage IV urothelial cancer of the right kidney by Dr. Thomas Blom, an oncologist practicing in New Jersey in October of 2012. The highly aggressive form of cancer had spread to his lymph nodes. Fr. Poandl underwent surgery at Memorial Sloan Kettering Cancer Center in New York City on January 13, 2013. His right kidney and ureter were removed due to metastasis of the cancer. Dr. Paul Russo, the surgeon who performed the surgery, also removed lymph nodes in Fr. Poandl's abdomen because of the metastasis, but was unable to remove lymph nodes in the chest, because doing so would have been fatal.

Dr. Russo noted that the five-year survival rate for Stave IV cancer is less than 20%, but other sources suggest that the survival rate is much lower when the cancer has metastasized to the lymph nodes. An article by the National Institute of Health, submitted as an attachment to the pre-sentence report, states that there is only a 10-15% likelihood that the cancer can be cured if it is discovered while it is still confined to the renal pelvis or ureter. However, the National Institute of Health article gives a much more negative prognosis when the cancer has spread. "[P]atients with tumors with penetration through the urothelial wall or with distant mestases usually cannot be cured with currently available forms of treatment." Fr. Poandl's cancer had spread through the ureter, kidney, abdomen, and chest by the time it was discovered. The "[p]rognosis for patients with metastatic urothelial cancer is poor, with only 5-10% of patients living 2 years after diagnosis." The median survival time is only 1.7 years from diagnosis. *See*

Bladder Cancer article, page 7, attached to pre-sentence report. The available scientific data show that Fr. Poandl has a high likelihood of dying within the next year.

In addition to the grave danger from his advanced and aggressive cancer, Fr. Poandl suffers from other serious health problems: high blood pressure, prostatitis, psoriasis, and pre-diabetes. These disorders, combined with the fact that one of his kidneys has been removed, show that he has extremely poor overall health.

Fr. Poandl is not a danger to the public in light of his advanced age and poor health. He has been compliant with all conditions of bond. The offense at issue in this case occurred in 1991 – twenty-three years ago. There have been no allegations that Fr. Poandl has harmed anyone in any way since then.

II. Downward Departure is Warranted Pursuant to the Guidelines

It is this combination of circumstances, Fr. Poandl's community service, a productive and law abiding life, his age, significant health problems, and the fact that he presents little risk to anyone that justify a sentence significantly below the forty-one month to fifty-one month range that is called for by the Sentencing Guidelines. The circumstance of Fr. Poandl'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," Fr. Poandl 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 numerous examples where courts have concluded that a departure under either §5H1.1 or §5H1.4 is justified in circumstances such as those found in Fr. Poandl's case.

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 twelve-and-a-half to fifteen-and-a-half years 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 downward 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." The costs of treating Fr. Poandl's cancer could easily exceed $1,000,000, as further testing, chemotherapy, and surgery may be necessary. Just as was true with the defendant in Willis, Fr. Poandl is at an age where his health will "invariable get worse." As was true in Willis, too, it seems likely that Fr. Poandl would "emerge in substantially worse shape than he is now if he does not die before completing his sentence." Given all that, it seems reasonable to impose a lesser sentence that will reduce the financial and logistical burdens upon the prison system.

III. 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 that is less than the guideline range. In sum, these 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.

In United States v. Glover, 431 F.3d 744, 752-753 (11th Cir. 2005), the 11th Circuit Court of Appeals pointed out that 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 Fr. Poandl's service to the community, his long and productive life, his

age, his health difficulties, and the good works he has performed for others 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. Fr. Poandl recognizes that the circumstances of this case work against him. He recognizes the jury verdict and the mandate that follows from it. Nevertheless, the circumstances of his health and age call for a careful measure of both the practical considerations of the sentence and the goals of the guidelines.

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. Poandl 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.").

Some of the statutory factors set forth in §3553 play a greater role in Fr. Poandl's case than others. Given his advanced age and infirm health, there would not seem to be any real need to impose a period of incarceration "to protect the public from further crimes of [Fr. Poandl]." 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, treatment would be costly and logistically difficult. There are surely few defendants that have committed Fr. Poandl's offense that have the sort of history and characteristics that are present here. Accordingly, whatever disparity might be created by giving him a lesser sentence than the guideline is one that is warranted.

A sentence less than the guideline adequately 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 long-standing service to the community 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 Fr.

Poandl's age and his poor health neither undermines the need for deterrence nor fails to reflect the seriousness of the offense.

Thus, the circumstances presented in Fr. Poandl'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 Fr. Poandl show that a sentence below the guideline range is "sufficient but not greater than necessary to comply with" the goals of sentencing. Fr. Poandl, therefore, requests this Court to impose just such a sentence.

Dated: February 4, 2014

Respectfully submitted,

s/Stephen J. Wenke
Stephen J. Wenke (0040520)
36 East Seventh Street
Suite 2020
Cincinnati, OH 45202
(513) 651-2126 phone
(513) 345-3900 fax
swenke7403@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been filed electronically with the U.S. District Court this 4th day of February, 2014. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. If a party is not given notice electronically through the Court's system, a copy will be served by ordinary United States mail, first class postage prepaid, this 4th day of February, 2014.

s/Stephen J. Wenke
Stephen J. Wenke (0040520)