

The Court Should Depart Downward Pursuant to U.S.S.G. §5H1.4 by Reason of Mr. N's Extraordinary Physical Impairment.

U.S.S.G. §5H1.4 p.s. makes clear that "an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range." The prerogative of a federal court to reduce a sentence on account of a defendant's extraordinary medical problems is well established. *United States v. Jones*, 18 F.3d 1145, 1147-50 (4th Cir. 1994); *United States v. Greenwood*, 928 F.2d 645 (4th Cir. 1991); *United States v. Ghannam*, 899 F.2d 327 (4th Cir. 1990). An impairment may be "extraordinary" for purposes of the §5H1.4 p.s. departure yet warrant only a reduction in, not elimination of, the term of imprisonment. *United States v. Slater*, 971 F.2d 626, 634-35 (10th Cir. 1992); accord *Ghannan*, 899 F.2d at 329. Nor does the ability of the Bureau of Prisons to accommodate or deal with the physical impairment necessarily affect the availability of the departure. *Slater*, 971 F.2d at 634. "Where a defendant is unable, due to age and physical condition, to endure a sentence, the Guidelines do permit a downward departure." *Jones*, 18 F.3d at 1149.

The ailments from which Mr. N suffers could scarcely be characterized as other than profound and extraordinary. They are by nature incurable and will profoundly compromise the quality of

the life which will be available to him in prison. In the words of the presentence report:

"[H]e has been diagnosed with recurrent peritonitis; end stage renal disease; hypertension and duodenal diverticulum. He requires hemodialysis to sustain life. He also suffers from pancreatitis.... Additionally, he is legally blind and requires glasses in order to see and has had a history of bone infections, back problems, malnutrition and other complications."

Mr. N clearly meets the criteria for application of the §5H1.4 p.s. downward departure. In similar situations, sentencing courts have departed substantially below the adjusted guideline range. See, e.g. *United States v. Velasquez*, 762 F.Supp. 39 (E.D.N.Y. 1991) (in drug distribution case, defendant's metastasized cancer justified departure from range of 151 to 188 month range to mandatory minimum 60 months); *United States v. McClean*, 822 F.Supp 961 (E.D.N.Y. 1993) (defendant's polio justified departure from range of 46 to 57 months to 33 months); *United States v. Silber*, No. S-90-0421 (D. Md. 3/6/91) (27-month guideline sentence reduced to 12 months community confinement as a result of poor health and military record); *United States v. Gore*, No. MJG-91-0282 (D. Md. 12/17/92) (departure in counterfeiting case from 18-24 months to 12 months in part because of defendant's coronary artery disease, hypertension, seizure disorder, Parkinson's disease, emphysema, and two

myocardial infarctions). The quality of life which Mr. N will have while imprisoned will be substantially impaired because of his medical condition, and the burden of imprisonment will correspondingly be more onerous upon him than it would be upon a healthy inmate. Indeed that he will survive for the recommended term of 108 months may be doubted. Mr. N submits that a departure of six levels to the mandatory minimum sentence of 60 months would be appropriate and would satisfy the interests of justice.