

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION

UNITED STATES OF AMERICA	)
	)
Plaintiff,	)
	)
vs.	) No.
	)
JOHN DOE	)
	)
	) FILED UNDER SEAL
Defendant.	)

DEFENDANT John Doe’S SENTENCING MEMORANDUM

COMES NOW Defendant, John Doe, by and through his counsel, _____, and states the following to aid the Court in sentencing.

I. Introduction

Defendant John R. Doe is a 64-year old diabetic who is in fragile health due to war injuries stemming from his honorable service in Vietnam. He plead guilty to stealing Veterans Administration benefits, an offense he committed by continuing to collect veterans’ widows pension payments in his mother’s name after she passed away. Doe’s guidelines range of 18-24 months is greater than necessary to achieve the purposes of sentencing, and imprisonment would jeopardize his health and safety. For reasons explained in this memorandum, Doe asks the Court to impose a sentence of home confinement and probation.

III. History and Characteristics of the Defendant

John Doe grew up in the small rural community of _____, in the 1950s, the youngest of eight children. Doe’s father, _____, had served in the Army during World War I

and suffered from shell shock for the remainder of his life. After an industrial accident killed one of Doe's brothers and crippled his father, the Does separated, and the family fell on hard economic times. Doe began working on a farm at the age of ten to assist with expenses. Doe graduated from high school in May 1964. The following year, he married _____.

In December 1965, Doe was drafted into the Army. After completing basic training, Doe shipped out to Vietnam on September 22, 1966. As a member of Company ____, _____ Battalion, _____ Infantry, ____ Infantry Division, Doe participated in the Counter Offensive _____. His unit took part in several major engagements and operations, beginning with Operation _____, a search and destroy mission that uncovered large stores of Viet Cong supplies and ammunition.¹

In the fall of 1966, the _____ division's _____ brigade participated in Operation _____ along the Cambodian border, meeting North Vietnamese Regular Army (NVRA) units in a series of battles.² The _____ operation waned into Operation _____, another series of battles against NVRA troops that lasted until April 1967. *Id.* The _____ brigade also participated in what the Army termed "pacification programs," in which U.S. soldiers relocated more than 5,000 people from 35 villages in the Iron Triangle region, a heavily jungled area north of Saigon that contained enemy bases and logistical centers. *Id.*

¹ Lt. Gen. Bernard William Rogers, Introduction, "Vietnam Studies, Cedar Falls-Junction City: A Turning Point" (Washington, D.C. 1989), <http://www.history.army.mil/books/Vietnam/90-7/cont.htm>. *See also* 2d Battalion, 22d Infantry Regiment History, <http://www.drum.army.mil/sites/tenants/division/1BCT/2-22INF/2-22%20History.htm>. *And see* "South Viet Nam: The Giant Spoiler," Time Magazine, Nov. 18, 1966; *and* "South Viet Nam: Disappearing Act," Time Magazine, Nov. 25, 1966.

² Maj. Gen. Charles P. Stone, "The Fighting Fourth in Vietnam: The Third Call to Arms," <http://www.cacti35th.org/regimenthistory/other/f4thp5.htm>.

In early 1967, the _____ battalion, _____ infantry and other units of the _____ division participated in Operation _____, intended to disrupt the extensive enemy activities in the Iron Triangle.³ The _____ battalion, _____ infantry established blocking positions west of the Saigon River.⁴ Units involved in Operation _____ sealed and combed the Iron Triangle area, “uncovering base camps, food, equipment. . . ammunition,” and intelligence documents, encountering “light” and sporadic enemy resistance. Starry at 91. The operation ended on Jan. 25, 1967. *Id.* at 95. Doe’s unit spent nearly three weeks in an area rife with tunnels and bunkers and detained and questioned an entire village.⁵ Most of the American casualties and deaths at _____ resulted from snipers who emerged from concealed tunnels, mines, and booby traps.⁶

The last campaign in which Doe participated during his service in Vietnam was Operation _____, between February and May 1967.⁷ Doe was wounded on his thigh

³ Gen. Donn A. Starry, “Mounted Combat in Vietnam,” (Washington, D.C. 1989), at 91, <http://www.history.army.mil/books/Vietnam/mounted/chapter4.htm>. *And see* David A. Prawdizk, “After Action Report: Cedar Falls,” Headquarters, 196th Light Infantry Brigade, March 9, 1967, <http://25thaviation.org/history.id735.htm>.

⁴Prawdizk at 10(c), 11(a) - (e).

⁵ Prawdizk at 11(d)(14)(d).

⁶ Public Broadcast System, Battlefield Vietnam, Timeline, <http://www.pbs.org/battlefieldvietnam/timeline/index1.htm>; *and see* Starry at 96.

⁷ Starry at 95-102; Jasper J. Wilson, “Operational Report for Quarterly Period Ending 30 April 1967,” (Headquarters 25th Infantry Div., May 19, 1967), at 1(a)(9), 1(e)(1)(b)-(c), <http://25thaviation.org/history.id763.htm>.

by shrapnel on February 6, 1967.⁸ Although the wound was relatively serious, Doe did not want to leave his unit, as he had lost several close friends already and felt a responsibility to his fellow soldiers. Even if Doe had wanted to leave, medical transport was not always available and was reserved for the most seriously wounded. Doe received treatment from the medics accompanying his unit and walked with a limp until the wound healed. On March 21, 1967, Doe's unit participated in the Battle of _____ after Viet Cong soldiers attacked a U.S. fire support base.⁹ The brigade received a Presidential Unit Citation for their actions in one of the largest single-day battles of the war.¹⁰ The Presidential Unit Citation is awarded to a unit for "extraordinary heroism in action against an armed enemy. . . . The unit must display such gallantry, determination, and esprit de corps in accomplishing its mission under extremely difficult and hazardous conditions as to set it apart from and above other units participating in the same campaign."¹¹ In addition to that citation, Doe's unit also received the Republic of Vietnam Gallantry Cross with Palm Unit Citation Badge (awarded by the Government of the Republic of Vietnam for valorous combat achievement), and the Vietnam Campaign Medal (awarded by the Vietnamese government to soldiers who served in Vietnam for 6 months or more). *Id.* at 126, 128.

⁸ See DD Form 214, Exhibit A.

⁹ Starry at 100-102.

¹⁰ David M. Norris, Major, AGC, Adjutant General, "Recommendation of a Presidential Unit Citation, Suoi Tre, March 21, 1967," available at <http://www.vietnamtripledeuce.org/battles.htm>.

¹¹ Army Regulation 600-8-22, *Personnel-General Military Awards* (Dept. of the Army, Dec. 2006), at 81, http://www.army.mil/usapa/epubs/pdf/r600_8_22.pdf.

Doe earned several individual medals during his service in Vietnam: a Purple Heart (awarded for being wounded in action), a Good Conduct Medal (awarded for “exemplary behavior, efficiency and fidelity in active Federal military service”), a National Defense Service Medal (awarded for honorable active service during specified times, including Vietnam time period), a Combat Infantryman Badge (awarded for satisfactory performance of infantryman duties while assigned to a unit during such time as the unit is engaged in active ground combat, and for being personally present and under hostile fire . . . in a unit actively engaged in ground combat with the enemy), and a Vietnam Service Medal with 2 Bronze Service Stars (Service Medal awarded to all members of armed forces who served in Vietnam. Bronze service stars are awarded for service with a unit during a period when it participated in combat and to soldiers who were awarded a combat decoration). *Id.* at 20, 24, 27-28, 56, 98.

Doe left Vietnam on August 14, 1967. Upon his arrival in the States, he was stationed at _____. For several months, the Army assigned Doe to pursue soldiers who were absent without leave or had been charged with or convicted of crimes. Doe received an Honorable Discharge on December 12, 1967. He then moved to _____, where he worked with his brother as a welder at the _____ Company for two years.

Immediately upon his departure from Vietnam, Doe began to experience episodes of Post-Traumatic Stress Disorder (PTSD) and seriously considered suicide. At that early date of 1967, no treatment was available for Vietnam veterans experiencing PTSD.¹² Even after the American Psychiatric Association and the Veterans Administration formally recognized combat-

¹² Hans Pols et al., “War & Military Mental Health: The US Psychiatric Response in the 20th Century,” *Am. J. Public Health* 97 (2007): 2132-2142.

related PTSD as an illness in 1980 and began to provide counseling for the disorder, Doe was determined to do without them and instead decided to “tough it out.”¹³ The symptoms of the disorder — edginess, fearfulness, emotional numbing, irritability, hypervigilance, flashbacks, exaggerated startle responses, and nightmares — took a toll on Doe’s daily life.¹⁴ Nonetheless, unlike many Vietnam veterans, he did not abuse drugs or alcohol, and he had no legal problems until the instant offense.

Despite his medical problems, Doe was a dedicated husband and a good father who is close to his family. Doe has four children who are employed as prison guards, an executive for LensCrafters, and an accountant. PSR at ¶¶47, 48. He maintains a close relationship with his adult children, as well as with his six surviving siblings. PSR at ¶46. Doe’s wife states that “Doe is a good man, and he takes care of her and their children.” PSR at ¶48. Despite his serious medical problems, which went untreated for decades, it is noteworthy that Doe successfully dedicated himself to raising a family.

Doe first applied for service-connected disability benefits in 1988. The application was denied, as was Doe’s appeal, but he continued to try to establish his eligibility for the benefits. In 2003, the Veterans Administration found that Doe’s PTSD and other war injuries rendered him 100 percent disabled. Doe still struggles with PTSD and regularly visits the PTSD clinic in nearby _____. Although he no longer has hallucinations or nightmares, Doe has

¹³ *Id.*, and see Ben Franklin, “V.A. Is Ordered to Drop Plans to Close 9 Counseling Centers,” *New York Times* (June 30, 1987). The Veterans Administration is now known as the Department of Veterans Affairs. The term “VA” in this memorandum refers to both agencies.

¹⁴ Shannon Hanson, “Stress Takes its Toll on Combat Veterans,” *VFW: Veterans of Foreign Wars Magazine* 92 (March 1, 2005), at 14; Carla K. Johnson, “Combat Stress Tied to Higher Heart Ills,” *Ft. Wayne J. Gazette* (Jan. 2, 2007).

ongoing memory problems and trouble sleeping. Doctors have also provisionally diagnosed Doe with cognitive disorder, which causes problems with memory, perception, and problem solving.¹⁵

Doe's war service resulted in other ongoing health conditions. He suffers from a skin condition caused by exposure to the defoliant Agent Orange. When Doe had his first heart attack at the age of 40 in 1986, doctors told him that exposure to Agent Orange likely had caused his coronary artery disease. The herbicide caused Doe to develop diabetes mellitus, with which he was diagnosed in 2002. Doe is an insulin-dependent diabetic who frequently experiences numbness in his feet and legs. The diabetes medications he takes are slowly causing his kidneys to fail. Doe also suffers from problems with his hips, knees, and feet as a result of wartime injuries sustained when he was blown out of the gunner turret of an armored patrol vehicle when it drove over a land mine. This incident also caused degenerative disk disease, which provokes constant, and at times excruciating, back pain. Finally, Doe has a shrapnel wound on his thigh, sustained in combat.

The lingering health problems from Doe's war injuries are not his only serious medical conditions. Doe has had hypertension since 1997. In 2002, he was diagnosed with vascular dementia (blocked blood vessels in the brain) that was caused by a stroke.¹⁶ Doe also suffers from high cholesterol, sleep apnea, vision problems, aldosteronism (an adrenal gland disorder

¹⁵ American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. Text Revision, at §294.9.

¹⁶ Mayo Clinic, "Vascular Dementia," <http://www.mayoclinic.com/health/vascular-dementia/DS00934>

that causes high blood pressure),¹⁷ and atrial fibrillation (irregular heartbeat).¹⁸ He takes 20 daily medications, some of which are not on the Bureau of Prisons' formulary.¹⁹

IV. Nature of the Offense

Doe was suffering from severe, untreated post-traumatic stress disorder, heart disease and the effects of exposure to Agent Orange when his mother died in 1987. She had been receiving a veterans' pension after the death of Doe's father, who served in World War I. Doe submitted a false form authorizing the deposit of federal recurring benefits in 1989 and a false financial status report and supporting documentation in 1994. He then continued to cash his mother's benefit checks until the VA terminated the benefits payments in 2004 after it did not receive a required form. The total loss to the VA was \$204,032, or \$12,002 for each year of the offense. According to discovery provided by the government, although the VA ceased making payments in 2004, its investigative unit first learned of the potential fraud in 2006, but VA investigators did not

¹⁷ Mayo Clinic, "Primary Aldosteronism," <http://www.mayoclinic.com/health/primary-aldosteronism/DS00563>

¹⁸ Mayo Clinic, "Atrial Fibrillation," <http://www.mayoclinic.com/health/atrial-fibrillation/DS00291>

¹⁹ Doe's daily medicines are: Spironolactone (used to treat hyperaldosteronism), Omeprazole (used to treat ulcers), Lisinopril (high blood pressure), Metformin (diabetes), Furosemide (reduces swelling and fluid retention), Simvastatin (reduces cholesterol), Oxycodone (pain relief), Tramadol HCL (pain relief; not on BOP formulary), Metoprolol Tartrate (high blood pressure), Glipizide (diabetes), Docusate (stool softeners), Diltiazem (high blood pressure, angina), Terazosin (enlarged prostate, high blood pressure), Warfarin (Coumadin) (prevents blood clots), Fluoxetine (treats depression and other psychiatric disorders), Gabapentin (relieves pain due to skin disorders), Ziprasidone (used to treat schizophrenia, bipolar disorder, and other mood disorders), Naproxen (arthritis pain), Methadone (pain relief), and Nitroglycerine (angina; not on BOP Formulary). See National Institutes of Health, Medline Plus, <http://medlineplus.gov> (follow link to Drugs and Supplements); Bureau of Prisons National Formulary (2009), http://www.bop.gov/news/PDFs/formulary_part2.pdf.

interview Doe about the benefits until 2008. When asked, Doe readily admitted that he had submitted false documents to continue receiving benefits for his own use after his mother's death. The government indicted Doe on April 23, 2009, just months before the five-year statute of limitations expired on the last of the benefits checks, which was dated December 1, 2004. *See Indictment* at 2; PSR at ¶8.

Doe timely entered his guilty plea on December 3, 2009.

V. Just Punishment

Section 3553(a) instructs the Court to impose a sentence that is sufficient, but not greater than necessary, to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence to criminal conduct, protect the public, and provide the defendant with needed correctional treatment. 18 U.S.C. §3553(a). In the facts and circumstances of this case, a sentence of home confinement and probation is sufficient, but not greater than necessary, to accomplish the goals of sentencing. Doe suffers from several serious medical conditions that constitute an extraordinary physical impairment, and home confinement and probation would be the most efficient, least costly, and most effective manner of providing his necessary medical treatment. Additionally, Doe is a decorated war veteran of the Vietnam conflict, and many of his medical problems stem from his meritorious service in the Army. The Supreme Court recently emphasized that former military service is a proper consideration in sentencing. *See Porter v. McCollum*, 130 S.Ct. 447, 455 (2009) (“Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines.”).

Under Sentencing Guidelines §5H1.4, the Court may impose a non-prison sentence if the

defendant is “seriously infirm” and it would be “as efficient as, and less costly than, imprisonment.” The Court may also consider alternative forms of incarceration for a defendant who is “elderly and infirm” and “where a form of punishment such as home confinement might be equally as efficient as and less costly than incarceration.” Sentencing Guidelines §5H1.1. *And see United States v. McFarlin*, 535 F.3d 808 (8th Cir. 2008) (affirming a sentence of probation for 56-year-old defendant with multiple past heart surgeries, coronary artery disease, peripheral vascular disease, post-traumatic stress disorder, depression, anxiety, sleep apnea, hypertension, gout, diabetes, and other serious conditions). Poor health and the provision of necessary medical care is also an appropriate consideration under 18 U.S.C. §3553(a)(2)(D). *See United States v. Wadena*, 470 F.3d 735, 740 (8th Cir. 2006) (affirming a sentence of probation when 67-year-old defendant had several chronic health conditions, including hypertension, hearing loss, cataracts, diabetes, and kidney disease requiring dialysis, and was the sole caretaker for a severely disabled son, and noting that the terms of defendant’s probation, as well as his “age and recent deterioration in his health reduce the risk of re-offending”).

Doe’s multiple illnesses and chronic medical conditions constitute an extraordinary physical impairment, a recognized basis for a downward departure or variance from the advisory Guidelines range. An extraordinary physical impairment is a physical condition such that imprisonment would impose more than the normal hardship on the defendant, would subject the defendant to more than the normal inconvenience or danger, and that has a substantial present effect on the defendant’s ability to function. *See United States v. Rabins*, 63 F.3d 721, 729 (8th Cir. 1995). An extraordinary physical impairment that results in extreme vulnerability in prison is also a legitimate basis for departure. *See United States v. Long*, 977 F.2d 1264, 1277 (8th Cir.

1992).

As stated above, Doe is 64 years old, has had three open-heart surgeries, suffers from Type II diabetes, and has failing kidneys. He has been diagnosed with vascular dementia (blocked blood vessels in the brain), high cholesterol, sleep apnea, vision problems, aldosteronism (an adrenal gland disorder that causes high blood pressure), an irregular heartbeat, degenerative disk disease, a skin condition caused by Agent Orange exposure, and post-traumatic stress syndrome. He takes 20 daily medications. Doe's war wounds cause him daily pain in his back, legs, knees, and feet. These conditions constitute an extraordinary physical impairment.

The Veterans' Administration found Doe to be 100 percent disabled due to his combination of war injuries. Under VA regulations, this "total disability" designation required a finding that Doe suffered from "any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation [and] is reasonably certain to continue throughout the life of the disabled person." 38 C.F.R. §4.15. The VA's assessment further demonstrates that Doe's combination of health problems are an extraordinary physical impairment.

Doe's fragile health greatly reduces his ability to function in day-to-day life. While he is not bedridden, he spends hours a day coping with his medical conditions— directly, as for medical appointments and insulin shots, and indirectly, because simple tasks like bathing, grooming, using the bathroom, and preparing meals are a struggle. Imprisonment would subject him to more than normal hardship and inconvenience and would be less efficient, and more costly, than allowing Doe to care for himself. At present, Doe can administer his own pain medicines and insulin shots as needed; in prison, he would require the services of nursing staff several times a

day. Staff would also have to assist Doe in daily activities such as bathing, dressing, and grooming. Significant staff time would be invested in transporting him to medical appointments. If Doe's kidneys fail completely while he is imprisoned, the BOP would have to arrange for dialysis on a weekly basis. Finally, Doe's combination of infirmities and his age render him uniquely vulnerable to harassment by younger, stronger, healthier inmates. Protecting a vulnerable inmate like Doe would further burden BOP staff. The Veterans' Administration doctors who treat Doe's PTSD are more experienced with that illness than BOP staff, and continued treatment by the VA would be the most effective treatment for Doe's PTSD. *See United States v. Brownfield* (D. Colo. 2009) (Cause No. 08-cr-00452 JLK) (slip op.) (imposing a sentence of probation for a veteran with war-related PTSD who smuggled contraband to inmates while employed by the BOP). A sentence of home detention and probation would avoid these problems and would provide the most effective correctional treatment for Doe.

A non-prison sentence would accomplish the other goals of sentencing. In particular, probation would be sufficient, but not greater than necessary, to reflect the seriousness of this offense and to promote respect for the law. Probationers are subject to conditions that "substantially restrict their liberty." *Gall v. United States*, 128 S.Ct. 586, 595 (2007). Standard conditions prohibit probationers from leaving the judicial district, moving, or changing jobs without notifying or receiving permission from their probation officers or the court. *Id.* They must "report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking." *Id.* Probationers may also be subject to special conditions of probation such as drug treatment, random drug testing, and community service. *See United States v. Colla*, 2008 WL

5000220 at *6 (E.D. Wisc. Nov. 20, 2008). And, because the Court can revoke a term of probation and impose a term of imprisonment for violation of any of these conditions, a probationer has a strong incentive to comply with the terms of release. *See* 18 U.S.C. §3565.

Doe's monetary offense was not insubstantial, but it was also a crime of opportunity that he will have no chance to repeat. Other than this offense, Doe has never been in trouble with the law. He poses no danger to the public, and the lack of future opportunities to commit like offenses, coupled with his age and infirmity, greatly reduce the likelihood that he will recidivate. While not justifying his offense, when one considers why an otherwise law-abiding and deeply patriotic man who gave much to his country and family did wrong, it is understandable that he felt he was substituting the benefits not paid to him (but ultimately determined to be owed) with his father's benefits.

A variance from the Guidelines range of 18-24 months' imprisonment is warranted because the range is based on Guidelines that are not the product of careful study and review by the Sentencing Commission. The advisory guidelines sentencing range of 18-24 months is based entirely on the total loss amount of \$204,032. *See* PSR at ¶¶11, 31-39, 66. Under Sentencing Guidelines §2B1.1(a)(2) and §2B1.1(b)(1)(G), the offense level is based on the loss amount. As many courts have found, the recommended offense levels are not the result of careful study by the Sentencing Commission.

Under the original 1987 guidelines, Doe's loss amount would have resulted in a base offense level of 4, plus 9 levels for loss amount over \$200,001, for a total offense level of 13. *See* Sentencing Guidelines §2B1.1 (1987). In 1989, the Commission revised §2B1.1 to increase the enhancements for graduated loss amounts, raising the offense level for a loss above \$200,001

from 9 to 10, for a total offense level of 14. *See* Federal Sentencing Guidelines Manual, App. C, Amdt. 99. The Commission explained that the amendment’s purpose was “to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table.” *Id.*

In 2001, the Commission substantially amended §2B1.1 and provided the offense levels currently in effect. *See* Federal Sentencing Guidelines Manual, App. C, Amdt. 617. The amendment increased the base offense level from 4 to 6 and increased the loss-amount enhancement from 10 to 12, for a total offense level of 18. Sentencing Guidelines §2B1.1 (2002). The amendment combined the guidelines for fraud (§2F1.1), theft (§2B1.1), and property destruction (§2B1.3). *See* Amdt. 617. The Commission explained, “Consolidation will provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines.” *Id.* The amendment purportedly responded to complaints by probation officers, judges, and practitioners about whether to apply the fraud or theft guidelines in given cases, a decision that could result in “disparate sentencing outcomes.” *Id.* To avoid such confusion and to make the guideline easier to use, the Commission combined all three guidelines. In doing so, it increased the base offense levels for theft and property destruction from 4 to 6, to match the base offense level for fraud. *Id.* The Commission did not explain why it was necessary to increase the theft guideline to match the fraud guideline.

The Commission also stated that it increased the loss-based enhancements in response to

comments from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others that the current guidelines “underpunish” individuals who have “moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines.” *Id.* At least two commentators whose views the Commission sought disagreed with this approach, but the Commission did not address their concerns in the final explanation of reasons for the amendment. Commentator David F. Axelrod observed that the increases in the loss tables were meant to achieve “better proportionality with the penalties for comparable offenses,” but the “Proposed Amendments neither identify such comparable offenses, nor offer empirical data to support the proposed changes.”²⁰ The Proposed Amendments, moreover, increased the loss tables, and in particular the middle portions of the loss tables, “substantially more than necessary” to incorporate the proposed enhancement for more than minimal planning. *Id.* Similarly, commentator Charles M. Meadows, Jr., criticized the Commission for raising penalties for mid-level fraud and theft offenses without offering empirical data in support.²¹ In particular, Meadows questioned whether longer sentences for mid-level frauds would deter more individuals from committing those crimes or make restitution easier. *Id.* Because empirical data suggests that the recidivism rate for economic crimes is extremely low, “incarceration plays no role in deterrence and actually inhibits restitution for economic crimes.” *Id.*

²⁰ Statement of David F. Axelrod to the United States Sentencing Commission (March 5, 1998), <http://www.ussc.gov/hearings.htm> (follow link to “Written Statements of Witnesses from March 5, 1998, Public Hearing Regarding Federal Theft, Fraud, and Tax Crimes”).

²¹ Prepared Remarks from Charles M. Meadows, Jr., Sentencing Commission (March 5, 1998), <http://www.ussc.gov/hearings.htm> (follow link to “Written Statements of Witnesses from March 5, 1998, Public Hearing Regarding Federal Theft, Fraud, and Tax Crimes”).

The combined effect of Amendments 99 and 617 to Sentencing Guideline §2B1.1 raised the offense level provided by the original 1987 Guidelines from 13 to 18. For Doe, those Guidelines revisions mean the difference between a range of 6-12 months (total offense level of 13, reduced by 3 under §3E1.1, Criminal History Category I, 1987 Guidelines) and the present advisory guidelines range of 18-24 months.

When the Sentencing Commission revised the fraud guidelines to increase offense levels based on amount of loss with Amendments 99 and 617, it failed to provide empirical data in support of the resulting higher sentences. Under *United States v. Kimbrough*, 128 S.Ct. 558, 575 (2007), when the Sentencing Commission fails to fulfill its institutional role of developing a guideline based on empirical data, national experience, or some rational policy basis, the District Court has discretion to determine, even in a mine-run case, that the advisory guidelines range yields a sentence greater than necessary to achieve the purposes of sentencing.

VI. Conclusion

The advisory guidelines range, which is based entirely on the loss amount, overstates the seriousness of this offense and fails to take into account Doe's meritorious military service and his medical and mental health conditions. The fact that the government waited more than four years to indict Doe indicates that it did not consider the offense serious enough to prioritize this prosecution. Doe readily admitted his actions when asked by investigators, and he is sincerely remorseful. He deeply regrets that this offense has marred an otherwise law-abiding and upstanding life, and he has taken full responsibility for his actions. The combination and severity of his medical problems and his age of 64 indicate that a sentence of home confinement and probation would be the most efficient, cost-effective, and medically effective manner of

punishment.

Respectfully submitted,