UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERIC SCOTT RUSKA,

Defendant.
_______________________________________/

Case No. 2:17-cr-25

Hon. Robert J. Jonker
Chief U.S. District Judge

GOVERNMENT'S SENTENCING MEMORANDUM AND MOTION FOR UPWARD DEPARTURE AND VARIANCE

The United States of America hereby respectfully files its sentencing memorandum, moves the Court for an upward departure and upward variance, and asks the Court to impose a sentence of imprisonment for life. It is difficult to overstate the heinous nature of Defendant Eric Scott Ruska's conduct in this case and the cases before. The facts set forth in the presentence investigation report (PSR) depict a clear pattern of violent and depraved conduct: three times, Ruska has lured an unsuspecting woman to isolated location, and then violently raped her. Ruska has not been deterred by a long prison sentence he received for his second set of offenses. To the contrary, his conduct appears to be getting more violent. The totality of Ruska's offense conduct and his history warrant the extraordinary sentence of life imprisonment.

A. Facts.

1. 2002 Sexual Assault.

In 2002, Ruska convinced the victim, a friend, to meet with him. (PageID.185.)[1] He then drove the victim down a two-track road in a rural location in the Upper Peninsula of Michigan. Once isolated, he produced a handgun and then anally and vaginally raped the victim three times. Ruska was charged with three counts of first-degree criminal sexual conduct ("CSC-1"). (PageID.126.) He pled to a reduced charge of assault with intent to do great bodily harm less than murder, and was sentenced to 24 months of probation and 12 months in jail. (PageID.185-86.)

2. 2003 Kidnapping and Sexual Assault.

In 2003, Ruska attended a party with his next victim, an acquaintance from work. After they left the party, Ruska drove this woman to a cabin in a rural location, using the ruse that she could use the telephone at the cabin. Once in the cabin, Ruska overpowered the victim and forcibly raped her in the anus. After, he forced her to remain partially undressed and held her in the cabin for another three or four hours. Ruska told the victim that he had planned to do these things. At approximately 4:30A.M., Ruska agreed to take her home. But, instead, he drove around some backroads for a couple of hours and commented that no one would ever find her. The victim believed she was going to be killed. Ruska eventually released the victim at her home. (PageID.186-88.) Ruska was charged with two counts of

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[1] At the time this Sentencing Memorandum was prepared, the Final Presentence Report had not been disclosed.

third-degree criminal sexual conduct ("CSC-3"), kidnapping and a habitual offender enhancement. (PageID.129.) He pled guilty to one count of CSC-3 and kidnapping, while the other charges were dismissed. He was sentenced to 10-15 years in prison. (PageID.186-88.)

3. 2017 Kidnapping and Sexual Assault.

In early July 2017, Ruska invited L.M.W., his co-worker, out for a summer's evening fishing trip on Chicago Lake. After several hours on the lake, Ruska "kind of snapped" and said "I'm not out here for the enjoyment of fishing, but this is what I'm about to do and either you go along with it or I have a gun and I'll shoot you with it." A nightmare scenario then began for L.M.W. as Ruska raped her multiple times while on the boat. Over the next six days, Ruska held L.M.W. captive in his truck, ratchet-strapped to the seat, and drove her to various remote places in Delta, Marquette and Alger Counties, where he repeatedly raped her vaginally, anally and orally. Ruska slapped and beat L.M.W. causing significant bruising and abrasions. He threatened to kill her and kill her family. Ruska hid placed in telephone, boat and trailer in different locations in order to buy time. Ruska repeatedly drove deep into a remote part of the Hiawatha National Forest in order to hide from police and commit more rapes. (PageID.176-79.) The undersigned Attorney for the government went to that location and it can be fairly described as a place where a buried body would never be found.

Ruska never released L.M.W. Instead, L.M.W.'s six-day nightmare came to end when Ruska drove to a gas station during the early morning hours of July 14,

and was spotted by police. L.M.W. was found, ratchet-strapped to the front seat, bruised, tired, dirty, her clothes torn and destroyed. (PageID.175.)

B. Argument.

A friend of Ruska described him as follows: "Some people have a switch switched that cannot be switched back. When incidents like this happen, and each time gets a bit worse, there's no real logic to it, maybe they're just not wired correctly." (PageID.191.) The government agrees.

The government is seeking a life sentence under the federal three strikes law, 18 U.S.C. § 3559(c), and, in the alternative, a life sentence pursuant to the provisions of the United States Sentencing Commission, *Guidelines Manual* (Nov. 2016), and 18 U.S.C. § 3553(a). In the government's view, a life sentence is called for due to Ruska's history and characteristics, the nature and circumstances of the offense, and the need to protect the public from future crimes by Ruska.

Turning to the details of the sentencing process, it is the government's view that none of the counts of convictions should be grouped. In the initial PSR, U.S. Probation grouped Count 1 (the kidnapping conviction) and Count 2 (the first aggravated sexual abuse conviction), but allowed Counts 3 and 4 (the remaining aggravated sexual abuse charges) to remain ungrouped. It is the government's understanding that U.S. Probation now intends to recommend (i) that Ruska receive the 6-level enhancement under U.S.S.G. § 2A4.1(b)(5) (enhancement for sexual exploitation during kidnapping) based on the sexual assaults that took place on Chicago Lake during the first day that Ruska kidnapped L.M.W., and (ii) that

each aggravated sexual abuse conviction be counted as a separate group because each constitutes a separate harm occurring on different days. This scoring is reasonable under the grouping rules in U.S.S.G. § 3D1.2 because the acts underlying Ruska's convictions occurred on different days and do not constitute one composite harm. Instead, the conduct underlying each offense constitutes a separate instance of fear, risk of harm, degradation and pain inflicted on the victim on different days.

Based on this revised scoring, Ruska's Guidelines, before any upward departures or variances, would be: Total Offense Level (TOL) 39 and Criminal History Category (CHC) II with a resulting Guidelines range of 292-365 months.

1. Response to Ruska's Objection to Guidelines Scoring.

During the PSR objection meeting, Counsel for Ruska objected to U.S. Probation's grouping recommendations, which are contained in PSR ¶¶ 82-101. (PageID.182-83.) It is the government's understanding that Ruska believes that all of the sexual assault convictions should be grouped with the kidnapping conviction, which would result in a TOL of 35. It is the government's understanding that Ruska relies on U.S.S.G. § 3D1.2(b) to reach this conclusion. Ruska's argument, if accepted, would reduce Ruska's Guidelines to TOL 35, which, when combined with Criminal History Category II, results in a range of 188-235 months.

In the government's view, U.S. Probation's expected revised scoring is correct. The kidnapping Guideline includes as a specific offense characteristic a 6-level increase if the victim was sexually exploited. U.S.S.G. § 2A4.1(b)(5). The sexual

assaults against L.M.W. on Chicago Lake during the first night of the kidnapping constitute relevant conduct as defined in Section 1B1.3(a)(1) and should trigger this enhancement.

The key issue here is whether the three aggravated sexual abuse convictions should be grouped with the kidnapping conviction. This question requires interpretation of U.S.S.G. 3D1.2(b), which calls for grouping of counts:

> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.[2]

The starting point for answering this question is found in the Introductory Commentary for U.S.S.G. Ch. 3, Pt. D, which explains the overarching purpose of the grouping rules.[3] The grouping rules are intended to allow the Court to determine "a single offense level that encompasses all the counts of which the defendant is convicted." U.S.S.G. Ch. 3, Pt. D., intro. comment. In addition, the grouping rules "seek to provide incremental punishment for significant additional

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[2] It is possible that Defendant will assert that Counts 1-4 should be grouped under the rule set forth in U.S.S.G. § 3D1.2(a), which calls for grouping "[w]hen counts involve the same victim and the same act or transaction." The government's response would be the same: that the conduct underlying the four counts of conviction constitutes separate harms occurring on separate days that should not be grouped.

[3] "[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993).

criminal conduct." *Id.* The rules also "limit the significance of the formal charging decision" by preventing "multiple punishment for substantially identical offense conduct." (*Id.*) "Convictions on multiple counts do not result in a sentence enhancement *unless they represent additional conduct that is not otherwise accounted for by the guidelines*." *Id.* (italics added). In other words, the intent of the grouping rules is to provide a sentence enhancement if an additional conviction is the result of a harm that is not already accounted for in the Guidelines.

Ruska is likely to assert that all of the counts of conviction are connected by a common scheme or plan, and, accordingly, should be grouped. This argument is wrong for several reasons.

First, it assumes that the rapes occurring after the initial rapes on Chicago Lake did no additional harm to the victim and that all counts involve "substantially the same harm."[4] This assumption is not correct. A common sense reading of the facts set forth in the PSR leads to the conclusion that each sexual assault constituted a separate instance of fear, risk of harm, degradation and pain inflicted on L.M.W. She will speak on this point when she gives her victim impact statement during sentencing. Ruska must ask the Court to believe that one rape occurring during a 1-day kidnapping does the same amount of harm, entails the same amount of pain, and causes the same amount of fear as 20 rapes occurring over a 6-day kidnapping. In other words, Ruska appears to claim that all of the rapes after the

[4] As noted in U.S.S.G. § 3D1.2, counts involving "substantially the same harm" should be grouped.

first one are consequence free. This simply does not make sense practically or legally.[5] Application note 4, which discusses Section 3D1.2(b), states (with italics added):

> This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one *composite harm* (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

This application note comports with the overarching purpose of the grouping rules, which is to provide a sentence enhancement if an additional conviction resulted in harm that is not accounted for in the Guidelines.

Nevertheless, as the Guidelines recognize, grouping decisions are not always "clear cut." U.S.S.G. § 3D1.2, comment. (backg'd.) "[H]ow contemporaneous must two assaults on the same victim be in order to warrant grouping together as a single transaction or occurrence?" (*Id.*) The application notes and case law indicate that rapes and similar offenses occurring on different days are not grouped. Application note 3, which interprets U.S.S.G. § 3D1.2(a), lists examples of convictions that are grouped based on timing. This note distinguishes between conduct occurring on the same day, which is grouped, and conduct occurring on different days, which is not grouped. *See also* U.S.S.G. § 3D1.2, comment. (backg'd.) (directing sentencing courts to look to the underlying policy stated in the Introductory Commentary); *United States v. Sneezer*, 983 F.2d 920, 925 (9th Cir. 1992) ("[t]he decision of whether to group independent offenses under the Guidelines turns on timing").

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[5] These same arguments would apply if Ruska relied on U.S.S.G. § 3D1.2(a) to argue that all counts should be grouped.

Application note 4, which interprets U.S.S.G. § 3D1.2(b), also supports the conclusion that rapes and similar offenses occurring on different days are not grouped. This application note provides a telling example of a situation in which offenses are not grouped: "the defendant is convicted of two counts of rape for raping the same person on different days. The counts are not grouped together."

Defendant's likely assertion that multiple rapes occurring over multiple days are grouped conflicts with the examples in the application notes as well as case law. *See Sneezer,* 983 F.2d at 925 (in a kidnapping and rape case, holding that sexual assaults of the same victim "separated by only a few minutes" must be grouped, but suggesting that the same offenses committed against a single victim held in captivity over a period of days would not be grouped, and noting that the Guidelines' emphasis on timing dictated this result); *United States v. Von Loh*, 417 F.3d 710, 714 (7th Cir. 2005) (affirming district court's decision to treat multiple sexual offenses occurring on separate days as separate harms under § 3D1.2(b)); *United States v. Vasquez*, 389 F.3d 65, 77 (2d Cir. 2004) (affirming district court's decision to not group sexual assaults by a prison guard occurring on separate days and stating that "two episodes of sexual misconduct that society has legitimately criminalized occurring with the same person on different days are not 'substantially the same harm' for purposes of section 3D1.2").

In its objection to the initial PSR (PageId.202), the government asked U.S. Probation to provide a break-out of the dates and locations of the different sexual assaults. At a minimum, this break-out should show:

- Multiple sexual assaults occurring on Chicago Lake on the night of July 8-9, 2017, which resulted in no federal charges due to lack of jurisdiction;
- Multiple sexual assaults occurring at the sites off the Rapid River Truck Trail (*see infra*, discussing location of these sexual assaults) over the course of two days and nights, July 9-11, which resulted in two federal charges;
- Multiple sexual assaults occurring at different locations in Marquette County, occurring from July 11-13, which did not result in federal charges due to lack of jurisdiction; and
- At least one sexual assault occurring at one of the sites off the Rapid River Truck Trail on the night of July 13-14, which resulted in one federal charge.

The federal charges are based on multiple sexual assaults occurring on different days after the initial kidnapping and sexual assaults on Chicago Lake. The 6-level enhancement under U.S.S.G. § 2A4.1(b)(5) is triggered by the sexual assaults occurring on Chicago Lake, during the first night of the kidnapping. But the conduct underlying the three convictions for aggravated sexual abuse occurred on different days. This conduct constitutes separate harms that should not be grouped.

2. Motion For An Upward Departure.

The facts and circumstances of this case provide multiple grounds for upward departures and upward variances. The government respectfully moves for an

upward departure under U.S.S.G. § 4A1.3 (under-represented criminal history and high risk of recidivism), U.S.S.G. § 5K2.8 (extreme conduct), and U.S.S.G. § 5K2.21 (uncharged conduct not included in Guidelines calculation).[6]

a. Under-Represented Criminal History, Pursuant to U.S.S.G. § 4A1.3.

The government respectfully moves this Court to depart upward to reflect Ruska's under-represented criminal history and risk of recidivism. United States Sentencing Commission, *Guidelines Manual*, § 4A1.3 (Nov. 2016) provides: "If reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted." *Id*. at § 4A1.3(a)(1). Both of these considerations apply in this case.

First, CHC II (PageID.188) does not adequately reflect Ruska's criminal history. The initial PSR describes sexual assaults committed by Ruska in 2002 and 2003. (PageID.185-88.) The first of these sexual assaults was pled down to assault with intent to cause great bodily harm less than murder, in violation of Mich. Comp. Laws § 750.84, and resulted in a twelve-month sentence followed by 2 years of probation. (PageID.185-86.) Ruska was still on probation at the time he kidnapped and raped K.S. in 2003. (PageID.186.) But, the probation violation was dismissed in plea negotiations and, as a result, Ruska's 2002 conviction does not result in the

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[6] The facts and circumstances that justify upward departures under these provisions also justify an upward departure under U.S.S.G. § 5K 2.0 (circumstances not adequately taken into consideration by the Guidelines).

addition of any criminal history points. As a result of the plea negotiations in these two cases, Ruska has only 3 criminal history points rather than the 6 that he would have had if his probation violation had not been negotiated away.[7] This calculation alone would put Defendant in CHC III.

But, more importantly, neither CHC II nor CHC III adequately reflects Defendant's high risk of recidivism. An unusually high likelihood of recidivism is an appropriate basis for an upward departure. *United States v. Herrera-Zuniga*, 571 F. 3d 568, 590 (6th Cir. 2009).[8] One fact in this case is starkly obvious: Ruska

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[7] If the probation violation had added one month and one day to Defendant's 2002 sentence, then Defendant's sentence would have fallen into the 15-year applicable time period for sentences exceeding one year and one month, which would have added 3 criminal history points. U.S.S.G. § 4A1.1(a), 4A1.2(e)(1) and (k)(1).

[8] An upward departure under U.S.S.G. § 4A1.3 does not need to be justified by an exact accounting of additional criminal history points for convictions not previously scored. *See United States v. Tate*, 516 F.3d 459, 468 (6th Cir. 2008) (affirming an upward departure under § 4A1.3 where the sentencing judge based its departure on a "wide range of considerations," some of which were not directly related to the defendant's criminal history). The Sixth Circuit has rejected any requirement that district courts follow a "rigid . . . methodology" or "a mechanical application of § 4A1.3" that requires sentencing judges "'to explain formalistically, gridblock by gridblock,'" the basis for departing to a particular level. *Herrera-Zuniga*, 571 F.3d at 588 (*quoting United States v. Thomas*, 24 F.3d 829, 833 (6th Cir. 1994)).

Section 4A1.3 "explicitly contemplates and encourages a district court to consider a defendant's likelihood of recidivism together with a more particularized consideration of the defendant's past." *United States v. Barber*, 200 F. 3d 908, 912 (6th Cir. 2000) (affirming the defendant's above-Guidelines sentence).

If this Court departs upwardly under Section 4A1.3, the Court must state in writing "the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3(c)(1).

has demonstrated an unusually high likelihood of recidivism. The violent sexual assaults Ruska committed against L.M.W. are the third in a series of this type crime. Ruska cannot be deterred by the threat of a long prison term: he kidnapped and repeatedly raped L.M.W. *after* having served a 10 to 15 year prison sentence for a previous kidnapping and rape. (PageID.186.)

Furthermore, Ruska's rapes appear to be pre-meditated. In 2003, he told K.S. that he planned to do the things he had done. (PageID.187.) His kidnapping and rape of L.M.W. also appear premeditated. Ruska is a person who orchestrates opportunities to be alone with unsuspecting women so he can rape them.

Moreover, Ruska's offenses are getting more serious and more violent in nature.

To make matters worse, Defendant does not appear to accept fully that he has committed these crimes. He claimed that the weapon he used during the 2002 rape was a pellet gun while the victim recalls a revolver. (PageID.185.) He also initially claimed that this rape was, in fact, consensual sex. (*Id.*) Defendant also told the U.S. Probation Officer who wrote the PSR that he and the victim of the 2003 kidnapping-rape were drunk and that he could not recall what happened. Yet Defendant was able to state a factual basis of guilt when questioned by the Honorable Circuit Judge Charles H. Stark on May 17, 2004. (PageID.215, 221-24.) Thus, Defendant appears to be telling himself and others stories in an effort to minimize the severity of his prior offenses.

Twice before, Defendant was given a break and an opportunity to set himself right. He did not take advantage of those opportunities. His history reflects that, if released, Defendant will lay in wait for a chance to rape an unsuspecting victim or will orchestrate an opportunity. And this next rape is likely to be more violent and more depraved than his past rapes. In 2003, after having raped K.S. multiple times, he informed her that he could find a place where no one would ever find her. K.S. feared that Defendant would kill her. (PageID.187.) It is not unreasonable to think that this is what Defendant will do if he ever gets another chance.

b. Motion for Upward Departure for Extreme Conduct, Pursuant to U.S.S.G. § 5K2.8.

Defendant engaged in repeated (and uncounted) acts of forcible vaginal, anal and oral rape of L.M.W. over a six-day period. But stating this fact is not enough to give context to what he did. When one contemplates the actual details of what Defendant did, a clear picture of extreme degradation and depravity emerges. Defendant and L.M.W. spent almost a week living out of his truck. L.M.W. did not pack clothes for a week or toiletries because she only expected to be out fishing for an evening. By the end of the six days, her clothes were torn or destroyed. She wasn't allowed to clean herself. And she was forced to survive in the woods, eating and drinking only what Defendant gave her, sleeping in the truck, using the woods to take care of bodily functions, and waiting for the next time that Defendant would want to rape her vaginally, anally and/or orally. Defendant simply hauled L.M.W. around from place to place like a piece of property, using a ratchet strap to secure

her in his truck when he thought she might have an opportunity to escape. Those are the facts of how L.M.W. was forced to exist.

There is no doubt that Defendant used his knowledge of the remote places in the Hiawatha National Forest to heighten L.M.W.'s fear, isolation and hopelessness. Defendant took L.M.W. to places in the forest away from other people, buildings and any form of ambient light, and then repeatedly raped her.

The photo below shows the logging trail, located off the Rapid River Truck Trail, that Ruska drove down in order to hide from police and to commit additional rapes against L.M.W.

The photo below shows the site of some of the rapes in Alger County.

During the ordeal, Defendant told L.M.W. that she was going to go home. (PageID.176.) But then he did not take her home. Instead, he hid out in remote parts of the forest and continued to rape L.M.W.

Defendant discussed different scenarios for ending the ordeal: turning himself in, committing suicide, dropping her off. (PageID.176-77.) And while talking about how to end the ordeal, Defendant continued to threaten L.M.W. and her family. Given Defendant's continuing sexual assaults, threats of violence, talk of suicide, and intimate knowledge of the backroads of the National Forest, L.M.W. had to be conscious of the possibility that she would not survive the ordeal. There is no doubt that L.M.W. was aware that she was under Defendant's absolute control and that he could simply kill her and bury her body in some remote place in the woods. And she had to be contemplating that prospect each time Defendant took her down one of these remote trails in the middle of the night.

The combination of degrading conditions, repeated vaginal, anal and oral rapes, and fear-inducing circumstances created by Defendant amount to extreme conduct and warrant an upward departure from the Guidelines range.

Section 5K2.8 provides as follows:

> If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

This section applies for several reasons. First, Defendant's repeated acts of anal and oral rape constitute extreme conduct. "[F]orced oral and anal sex may be especially degrading under § 5K2.8." *United States v. Pujayasa*, 703 F. App'x 817, 820 (11th Cir. 2017) (quoting *United States v. Lewis*, 115 F.3d 1531, 1539 (11th Cir. 1997)); *see also United States v. Johnson,* 56 F.3d 947, 958 (8th Cir.1995) (holding that defendant's extreme conduct, including forcing victim to perform oral sex, fell within parameters of § 5K2.8); *United States v. Anderson,* 5 F.3d 795, 804 (5th Cir.1993) (affirming upward departure under § 5K2.8 based on multiples acts of forced oral and anal sex); *United States v. Chatlin,* 51 F.3d 869, 873 (9th Cir.1995) (stating that "extreme conduct may be established by a showing of anal intercourse, which is a degrading form of sexual abuse"); *United States v. Ellis,* 935 F.2d 385, 386 (1st Cir. 1991) (holding that particularly degrading forms of sexual abuse warranted upward departure).

In addition, the prolonged, degrading and fear-inducing circumstances combined with ongoing threats of violence and use of restraints warrant an upward

departure under Section 5K2.8. *See United States v. Cole*, 359 F.3d 420, 430 (6th Cir. 2004) (affirming upward departure under § 5K2.8 in case involving "repeated sexual assaults by multiple participants over a four-hour period at gun point" thus "prolonging of pain or humiliation").

c. Motion for Upward Departure for Uncharged Conduct, Pursuant to U.S.S.G. § 5K2.21.

The government respectfully asks this Court to depart upward to reflect the fact that some of sexual assaults by Defendant against L.M.W. did not enter into the determination of the Guidelines range. Section 5K2.21 provides:

> The court may depart upward to reflect the actual seriousness of the offense based on conduct (1) underlying a charge dismissed as part of a plea agreement in the case, or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason; and (2) that did not enter into the determination of the applicable guideline range.

In this case, only three of the sexual assaults resulted in federal criminal charges. These three assaults have one thing in common: they were committed in a remote part of the Hiawatha National Forest just east of the Rapid River Truck Trail, just north of the Alger-Delta County line, and, most importantly, within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7(3).

Defendant accessed this area by turning east off the Rapid River Truck Trail onto a rough, over-grown logging trail. He drove east on this logging trail less than half a mile and then came to a barely discernible fork in the trail. On different occasions, he went a short distance up the right-hand fork, and on others, he took

the left fork. He committed the sexual assaults charged in Counts 2, 3 and 4 at these two locations. These locations are shown below.

Hiawatha National Forest

Site 2

Site 1

Legend - 8/13/2017 - Hiawatha GIS Team

Sites

USFS Lands Acquired before February 1, 1940

The government was able to identify these locations by two means. First, after completing his 3-1/2 hour interview on the morning of July 14, 2017, Ruska traveled with police to the various locations of the sexual assaults. (PageID.179.)

He identified the intersection of the Rapid River Truck Trail and a logging trail, and informed investigators that a number of sexual assaults had occurred at a location down the logging trail. Second, investigators went to this location with L.M.W. and actually went down the logging trail and down each fork. Investigators found food wrappers, empty water bottles, cigarette butts and tree limbs that Ruska had used to hide his vehicle in these locations. L.M.W. was able to identify these locations as the locations of several sexual assaults committed against her.

After these two physical locations were determined, a surveyor from the U.S. Forest Service surveyed these locations, obtained the deeds showing when the United States had purchased these lands (all were purchased in the 1930s), and confirmed these locations were within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. § 7(3).

The sexual assault charges in the superseding indictment are based on acts taking place at these two locations; the other sexual assaults were not be charged by the federal government due to lack of jurisdiction. Of particular note, the initial sexual assaults (vaginal, anal and oral) occurring on Chicago Lake on the night of July 8-9 took place outside the special maritime and territorial jurisdiction of the United States and, as a result, could not be the basis for federal charges.[9]

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[9] Although Chicago Lake and the surrounding lands are part of the Hiawatha National Forest, these areas were acquired after February 1, 1940, and the federal government has not affirmatively accepted jurisdiction. Thus, these areas are not within the special maritime and territorial jurisdiction of the United States. As noted in *United States v. Gabrion*, "[t]here are two provisions in the United States Constitution under which Congress may create jurisdiction for the federal

Similarly, the sexual assaults committed by Ruska in Marquette County during the course of the 6-day kidnapping occurred outside the special maritime and territorial jurisdiction of the United States and could not be the basis for federal charges. If these other sexual assaults had taken place within the special maritime and territorial jurisdiction of the United States, the government could have brought at least three additional charges under 18 U.S.C. § 2241(a)(1).

U.S. Probation's revised Guidelines calculation will include the Chicago Lake assaults because Probation relies on these assaults to trigger the 6-level enhancement in Section 2A4.1(b)(5). Nevertheless, the sexual assaults occurring in Marquette County on July 11-13 are still excluded from the Guidelines calculation.

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government to prosecute federal crimes on federal property: the Property Clause, Art. IV, § 3, cl. 2, and the Federal Enclave Clause." 517 F.3d 839, 846 (6th Cir. 2008). In 1923, the State of Michigan formally consented to the cession of forest lands to the federal government, provided that the State would retain concurrent criminal jurisdiction over those lands. *See* M.C.L.S. §§ 3.401 & 3.402 (Aug. 30, 1923). And, "[p]rior to the enactment of 40 U.S.C. § 255 on February 1, 1940, the federal government's acceptance of jurisdiction over acquired land was 'presumed in the absence of any dissent on [the federal government's] part.'" *Gabrion*, 517 F.3d at 848 (quoting *Ft. Leavenworth R.R. v. Lowe*, 114 U.S. 525, 528 (1885)). Thus, as noted in *Gabrion*, for lands acquired by the federal government prior to February 1, 1940, federal jurisdiction is presumed absent an express declination by the federal government. *See also United States v. Fields*, 516 F.3d 923, 935–36 (10th Cir. 2008) (holding that the United States had jurisdiction to prosecute a murder occurring on land in a national forest acquired before 1940 and responding to defendant's challenge to the presumption of jurisdiction by noting that "a pre–1940 acquisition of national forest land provided an *essential* occasion on which to articulate the mode of jurisdiction involved, i.e., to explicitly refuse the jurisdiction ceded by the state or accept it through silence").

The additional conduct occurring in Marquette County, if charged, would have added two additional units under U.S.S.G. § 3D1.2. In total, the four counts of conviction and the two additional units linked to the Marquette County rapes would have totaled 6 units. This would have added a total of 5 levels to the total offense level. U.S.S.G. § 3D1.4. The Guidelines recommended by U.S. Probation, based on the non-grouping of the four offenses of conviction, trigger an increase of 4 levels under Section 3D1.4. The Marquette County assaults should trigger one additional level, for a total increase of 5 levels. The government respectfully asks the Court to depart upward to reflect uncharged conduct that was not included in the Guidelines calculation.

3. Motion For Upward Variance.

In addition to or as an alternative to an upward departure, the government seeks an upward variance under 18 U.S.C. § 3553(a)(1) (nature and circumstances of the offense, defendant's history and characteristics) and 18 U.S.C. § 3553(a)(2)(C) (need to protect the public from further crimes of the defendant).

a. To Reflect the Nature and Circumstances of the Instant Offense, and History and Characteristics of Defendant, Pursuant to 18 U.S.C. § 3553(a)(1).

The government expects U.S. Probation's revised advisory guideline range, prior to departures or variances, to be 292-365 months, based on TOL 39 and CHC II. As high as that range is, it still does not adequately reflect the nature and circumstances of this case and the history and characteristics of this defendant. As noted above, the totality of the facts of the instant offenses – six days of rape,

beatings, degradation, threats, physical and psychological torture – combined with Ruska's terrible criminal history demand a sentence of more than 365 months.

b. To Reflect the Need to Protect the Public from Further Crimes of Defendant, Pursuant to 18 U.S.C. § 3553(a)(2)(C).

Ruska is 37 years old. A sentence within the guidelines will permit Ruska the opportunity to be released to the public again. Ruska has shown that he is unable to stop raping and beating women. If released, Ruska will rape again and the next time he will likely kill his victim.

Title 18 U.S.C. § 3553(a)(2)(C) provides, "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to protect the public from further crimes of the defendant." Concerns regarding a defendant's high risk of recidivism have been found to be a sufficient basis to warrant a sentence above the Guidelines range. *See United States v. Melchor*, 515 F. App'x 444, 447 (6th Cir. 2013) (stating that "this Court has not hesitated to affirm reasonable upward variances based on potential for recidivism" and collecting cases). If released, Ruska will kidnap and rape another unsuspecting victim. This Court must protect the community. Ruska must spend the rest of his life in prison.

C. Conclusion.

Defendant Ruska has engaged in a pattern of pre-meditated, violent and depraved sexual assaults against a series of unsuspecting women. He has shown that he is undeterred by a lengthy prison sentence. His crimes against L.M.W. appear to be the worst yet. The totality of the circumstances in this case call for an

extreme and unusual sentence: Defendant should spend the rest of his life in prison.

Respectfully submitted,

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