

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>UNITED STATES OF AMERICA,</b>	)	<b>CRIMINAL ACTION NO.</b>
	)	
<b>Plaintiff,</b>	)	<b>3:05-CR-240-P</b>
	)	
<b>v.</b>	)	
	)	
<b>XXX YYY,</b>	)	
	)	
<b>Defendant.</b>	)	
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**SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD DEPARTURE OR  
DOWNWARD VARIANCE**

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KATHERINE LIPSKY, LCSW	B
SUSAN C. ZAPPA, RN	C
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## **Friends**

MISTY DAWN DAY (Friend for 5 years)	Q
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ROGER DENGLER (Family friend for 20 years)	S
BRIEL O'SHIELDS (Friend for 5 years)	T
FRED COVEY (Longtime family friend)	U
RUTH CROSBY (Longtime family friend)	V
STEVEN OLIVER (Longtime family friend)	W
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JENNIFER LYNN LITTLE (Friend for 5 years)	Z
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MARK BICKEL (Longtime family friend)	bb
NICK DURHAM (Friend for 4 years)	cc
MICHAEL E. EBERTH (Longtime family friend)	dd
FRANK L. MEANS, D.C. (Friend for 5 years)	ee
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Defendant, XXX YYY, submits this Sentence Memorandum for purposes of assisting the Court in fashioning a sentence under 18 U.S.C. § 3553(a) that is “sufficient but not greater than necessary to comply with the purposes” of § 3553. Mr. YYY’s offense level is currently set at Level 12 and he is in a Criminal History Category of I. **Based upon his health and in order to “avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” undersigned counsel submits that Mr. YYY should be sentenced based upon an Offense Level 10 and sentenced to two years probation with 200 hours of community service as a condition of that probation.**

## **I. BACKGROUND**

### **A. Mr. YYY’s Offense and Relative Culpability Compared to David Muns and Levoie Branam**

During high school Mr. YYY started to work part-time for Office Depot. He was originally paid \$7.00 per hour and received a raise to \$7.20 per hour but he was not eligible for health insurance because of his part-time status. At that point, he still had insurance through Children’s Health Insurance of Texas. In or about August 2001, when he was eighteen years old and still working part-time for Office Depot, Joe Saran and his associates came into the Office Depot to buy office supplies. Saran was so impressed with Mr. YYY’s work ethic and personality that he offered Matt a full-time warehouse job. Most importantly, Mr. YYY was to be provided private health insurance. Mr. YYY accepted the offer of full-time employment.

Mr. YYY worked as a warehouse worker and a “gopher” for Saran. In addition, he reported to David Muns who was a warehouse supervisor. At the direction of Saran and Muns, Mr. YYY, from time to time, was directed to pick up bottles of promethazine cough syrup from

distributors and transport them to the warehouse. At the warehouse, at the direction of Saran and Muns, Mr. YYY assisted other warehouse workers in soaking the bottles of promethazine and peeling the labels off the bottles. Mr. YYY had nothing further to do with the promethazine, although, on two occasions, he assisted in loading the promethazine onto a delivery truck so that another worker, Levoie Branam, could take them to Houston.

Although Mr. YYY knew that what he was doing with the promethazine was illegal, he was, at all times, acting pursuant to the direction of Saran and/or Muns. When Saran offered the warehouse workers under-the-table money for their assistance in soaking the promethazine, Mr. YYY actually requested the money be put in his paycheck so that he could pay taxes on the money.

The government has informed undersigned counsel that it views Mr. YYY as less culpable than Muns or Branam.

### **B. Mr. YYY's Health**

Mr. YYY's medical condition is fully explained in a letter from his hematologist, Dr. Yu-Min Shen.<sup>1</sup> As Dr. Shen explains, Mr. YYY has a congenital bleeding disorder relating to a Factor IX deficiency. "The normal range of factor IX produced by the body ranges from 50% to 150%. Mr. YYY is only able to produce 4% of the Factor IX needed for clotting."

Dr. Shen writes:

Two aspects of hemophilia are important to understand. First, because it is a life long illness, men with this bleeding disorder get to be experts at when they are having a problem and, thus, when they need treatment. It is a critical that factor

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<sup>1</sup>This letter along with numerous other letters in support of Matt YYY are attached hereto as Attachments A-jj.

must be on hand and available for immediate treatment. In spite of Mr. YYY's history of conscientious treatment, he has suffered some permanent damage to several joints. The joint sites that have been involved in repeated bleeds are termed "target joints". In Mr. YYY's case, these include his right ankle, right elbow, and both right and left knees.

The second important aspect is that men with hemophilia need to avoid being placed in situations where they might be exposed to physical trauma. It is especially important in this regard to avoid head trauma, where internal bleeding within the brain can occur. This means avoiding contact sports, such as football or soccer, as well as avoiding group situations where aggression might be taken out in the form of physical altercation or violence.

As to the cost for treatment, Dr. Shen notes that "each treatment episode costs at least \$5,000" and that "Mr. YYY may require more than an infusion of factor per episode." Dr. Shen's statements are reiterated by the Social Worker for the Adult Comprehensive Treatment Program, Katherine Lipsky.

Matt's wife, Kristin YYY, further explains Mr. YYY's medical condition in her letter to the Court:

Matt has hemophilia. As one of Jehovah's Witnesses, Matt feels that it is important to "abstain from blood" as the Bible commands in Acts 15:28, 29 and 21:25. Even as a young child, he made this decision, and that meant that until he was about twelve he would not take the injections used to treat his excessive bleeding because they contained blood fractions. This resulted in several months of painful bleeding and time spent resting in the house. Yet he stood up for what he felt was right, despite the pain. That is the kind of person he is, and although he has made this mistake, I have seen his determination to be honest in even seemingly minor things ever since.

Since the synthetic form of the medicine he needed was made available, he has been able to keep his bleeding at a fairly manageable level, typically taking 2 doses per month which total around \$10,000. However, there are often times when he takes more than 2 injections per month. Occasionally a bleed will not stop, and he may need total rest, ice, and elevation along with an injection every day for a few days. Keeping these serious bleeds to a minimum requires that Matt take

medicine as soon as he can tell a bleed is beginning. This often requires that he come home from work or take medicine immediately after he thinks he might have injured himself.

Matt has a job now that he loves and that provides him with excellent insurance that we can afford. Also, if he knows he is having a bleed, Matt can take a day off with little notice and no problem at all. If Matt is sent to prison, he will lose all of that, and I fear it will be difficult for him to get insurance coverage later on. I am very fearful that Matt will have serious, possibly life threatening bleeds if he goes to prison and of course I am terrified of him not being able to receive the expensive medicine he might need.

### **C. XXX YYY's Character**

#### **1. His Faith**

Several letters explain Matt's abiding conviction to his religion and the steps he has taken within his church to make amends.

- “Matt immediately went to [the overseers in the congregation] and related to them his involvement in this situation. This resulted in a public announcement to our congregation that Matt had been given counsel and discipline but was also very sorry for his actions.” (Kristin YYY, wife)

- “One of the things that I really love about XXX is his deep love for God and fellowman. Many times I've seen his eyes light up with excitement as he relates a conversation he has had with a friend or workmate about the Bible....Immediately after his arrest he went to the Elders in his congregation to tell them what happened and seek help for his disturbed conscience. He has since met many times with these men. We believe XXX has indeed been helped and has shown heartfelt appreciation for forgiveness. This was after many tears, much agonizing remorse and untold prayers” (Lisa Miller, mother-in-law).

- “Matt is deeply contrite over his actions. He fully realizes the harm his actions have caused to others. He often expressed to his family and friends the shame he feels and the sorrow he has for the pain caused to all who know him. But of utmost importance to Matt is the reproach he has brought on the God he worships. He has endeavored to live a life that brings honor to God. He is deeply pained that his actions have detracted from that.” (Scott Miller, father-in-law)

•“XXX was brought up in a very spiritual household where he was raised to follow the Bible’s commands to the best of his ability. He volunteers his time each week to talk to people about the bible and the hope it contains. He has done this since he was a small child and will continue to do this his whole life, his faith is very important to him.” (Magdalena YYY, mother)

•“In fact because of the seriousness of this wrong XXX has been disciplined by the congregation. They felt he was repentant. He has been honest in admitting his wrong.” (Shirley Ann Fewell, grandmother-in-law)

•“It’s commendable on [Matt’s] behalf that he approached me early on in reference to his legal predicament along with other elders who have responsibilities in our congregation. His primary concern was that his situation might shed a bad light on Jehovah’s Witnesses.....” (Steven C. Oliver, long time family friend).

## **2. His Remorse**

Numerous letter writers explain Matt’s sincere remorse for his actions and his naivete.

All of the letters give great insight into Matt’s character:

•“We are both better and changed people because of this terrible situation and now more than ever Matt is the person I admire most....He had been devastated by the thought that his actions hurt anyone. I know this because he has cried and been in anguish so much the past two years.” (Kristin YYY, wife)

•“What makes me especially proud of Matt, however, is his willingness to own up to his culpability in this matter. Matt has lead a somewhat naive life. He has hemophilia and due to this, his parents sheltered him. He had little experience in life until the time he was employed by Mr. Saran. As one gets to know Matt, you quickly see that he looks for the best in everyone. I honestly believe that this positive outlook blinded Matt somewhat as to what was taking place. Having said that, however, Matt takes full responsibility for his role at the company and all of the family, including Matt, realizes that a penalty must be paid. (Scott Miller, father-in-law)

•“XXX has always been such a trusting person and sometimes that has caused him to be a bit naive. He has always been such a loving husband to my friend Kristin and I am so proud of the courage and responsibility that he has shown through this trying time.....He understands the part that he played in all this and he is so sorry for it. I truly believe that this has taught him such a valuable life

lesson that he incorporates into his everyday life. This has made him so much wiser about the world and the fact that there is never a gray area between right and wrong....Your honor, if you need to know anything about the character of XXX YYY just look at the amazing people in his life that love, trust and cherish him.” (Misty Dawn Day, friend for 5 years)

•“Matt seems to have made some bad decisions while employed for Saran. He was asked to do things that were wrong and he did them anyway. We have talked about what he did, and he expressed his sorrow and deep regret that it ever happened. He is ashamed, embarrassed, and ready to put this behind him.” (Jeffrey O-Shields, friend for 5 years).

### **3. His Being**

While undersigned counsel is hopeful that the Court will read the attached letters in full, various comments made in the letters highlight and give keen insight into Matt YYY:

•“Matt and Kristin moved from Arlington to Corsicana when his problems caused loss of employment and he has found a job at a local distribution center. He is at work every day at six o’clock every morning in spite of his serious health problems that have plagued Matt since birth. Matt suffers from hemophilia which causes a lot of pain at times and requires numerous injections which are very expensive. Up till now, Matt has obtained these through various forms of insurance. This has proved to be a real problem for Matt and his family for his entire life and because of this, Matt has been raised in a sheltered position to avoid bleeding injuries that could prove to be life threatening. Because of this condition we feel that Matt was naive as to the ways of the world. And though Matt does not deny wrongdoing we know how he and Kristin have suffered and in coming to know Matt well we are absolutely certain Matt will never be involved in wrongdoing again.” (Darwin Miller, grandfather-in-law)

•“We love Matt deeply. He is such a kind person. He is so good hearted. There have been times I have seen his naivete, but of course he is young. Matt has such endearing qualities, I have personally seen him being so sweet to children and they are crazy about him. Then I have watched him have a conversation with the elderly and see the genuine kindness on his face. His is very sweet and one of the most good-natured persons I have ever met. Matt has been a wonderful addition to our family. We are honestly grateful to him.” (Stacy Rogers, aunt-in-law)

•“At present, he has a job that, while not prestigious or high paying, is honest

hard work which provides adequate health insurance to cover his costly monthly injections. He is a good and dependable worker and as such as [sic.] already been considered for a supervisory position although having been employed at this job for a little over a year. Also the volunteer work that he is involved with serves a great need and benefit to the community. This works helps people make positive changes in line with Bible standards. They thus become better neighbors, family members and citizens.” (Lisa Miller, mother-in-law).

•“His work ethic speaks for it self [sic.], from the age of 14 he started to work first in the school cafeteria during the day and at a grocery store at night and he has worked steadily to this day. He is trust worthy [sic.] and that is what draws people to him. Before XXX was able to walk he would be with his mother and I in volunteer work and he continues this work today. His love for his neighbors moved him to talk to others about Jehovah God and his purpose for the human family.” (Fred YYY, father).

•“Before XXX was hired to work for [Saran’s] company, he always chose to associate with others of good character. He shied away from the usual teenage temptations and I never heard anything discouraging about his activities. Even XXX’s language was exemplary. He spoke of serous matters, his mind was on upbuilding things, and he refrained from using bad language. XXX was an industrious young man who held several jobs during his high school years.” (Roger D. Dengler, family friend for 20 years)

•“My husband liked a CD [Matt] had and wanted to copy it. Matt said ‘No.’ Angered a tad my husband wanted to know why. [Matt] explained basically that he thought of that as stealing, and his conscience would not allow him to agree to it. He got our respect and admiration. It took courage to stand up to a friend about something seemingly small, but he was right and it helped change our views.” (Briel O’Shields, friend for 5 years).

•“[Matt has always been truthful, serious, chase, gentle, and lovable. He has been considerate and kind to those who are elderly and disadvantaged. I have seen him many times approach elderly ones to inquire about their health and talk with them.” (Fred Covey, longtime family friend)

•“XXX, along with his family has been involved in a [sic.] volunteer community service work on a regular basis since I have known him. He graduated from high school to become an independent young man who continues to this day to take responsibility seriously and to volunteer many hours of his time in addition to holding a full time job to support his family.” (Ruth Crosby, longtime family

friend).

•“As a favor to his future father-in-law, I checked into [Matt’s] background with some of my friends of varying age that I had known for decades that also knew Matt and his family. I soon learned that he wasn’t a typical young guy. Each person with whom I spoke was impressed with Matt’s initiative, sense of responsibility and concern for those around him. He didn’t engage in any unlawful or immoral acts so often associated with young men his age. I didn’t get any negative reports. After his marriage we saw each other occasionally at various events. The way he handled himself - without foolishness, disrespect or recklessness - continued to raise my opinion of him.” (David M. Swatek, friend for 3 years)

## **II. DOWNWARD DEPARTURE OR DOWNWARD VARIANCE**

As this Court is aware, its sentencing obligation since the decision in *United States v. Booker*, 125 S.Ct. 738 (2005) is to impose “a sentence sufficient, *but not greater than necessary*” to comply with the factors set forth in 18 U.S.C. § 3553. As one Court has explained:

Sentencing will be harder now than it was [prior to *Booker*]. District courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. *Booker* is not an invitation to do business as usual.

*United States v. Ranum*, 353 F.Supp. 2d 984, 987 (E.D. Mich. 2005).<sup>2</sup>

### **A. Health**

Even prior to *Booker*, U.S.S.G. § 5H1.4 allowed for a downward departure for a defendant with “extraordinary” health problems. Moreover, since *Booker*, courts must consider

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<sup>2</sup>See also *Rita v. United States*, 127 S.Ct. 2456, 2465 (2007) (Presumption that the guidelines are reasonable is an “*appellate* presumption.” “[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” (emphasis in original))

a defendant's need for medical care "*in the most effective manner*" when setting a sentence. 18 U.S.C. § 3553(a)(2)(D) (emphasis added). In determining whether a departure or variance is warranted based upon health, "the ability of the Bureau of Prisons to accommodate a disability is a factor that can be considered." *United States v. Martinez-Guerrero*, 987 F.2d 618, 620 (9th Cir. 1993). Indeed, in determining whether a defendant's physical conditions justifies downward departure from Sentencing Guidelines, a sentencing court should consider whether impairments are serious and imminent medical threats, which could be made worse by incarceration, and/or which Federal Bureau of Prisons could not adequately treat. *United States v. Baron*, 914 F. Supp. 660, 662-64 (D. Mass. 1995).

Simply put, if Mr. YYY bleeds and he does not have immediate access to extremely expensive medicine, he could die or suffer serious and permanent health problems. Moreover, as explained in the letter from his hematologist, he needs to avoid group situations where there is a potential for violence that could produce a bleed. There is at least one case found by counsel where a hemophiliac, who did not even require the expensive version of treatment medicine that is required by Mr. YYY, had problems being cared for while in the custody of the Bureau of Prisons. *Gil v. Reed*, 2002 U.S. Dist. LEXIS 27128, \*19 (D. Wis. 2002) ("Walker, an inmate with hemophilia was occasionally denied a clotting protein when he claimed to be suffering internal bleeding.").

In sum, Mr. YYY's medical condition could be life threatening without the proper care. Moreover, his situation is made much more difficult as a result of his religious convictions. Consequently, he will need almost immediate access to medication costing approximately

\$10,000 per month. There is some indication that the Bureau of Prisons cannot offer consistent care to hemophiliacs that are not Jehovah's Witnesses. There is absolutely no assurance that the Bureau of Prisons could adequately care for Mr. YYY and respect his religious convictions. Moreover, even if the Bureau of Prisons was somehow able to adequately care for Mr. YYY while respecting his religious convictions, the cost to taxpayers would be exorbitant. Finally, being put in a prison will likely increase Mr. YYY's likelihood of suffering bleeds.

Mr. YYY's medical condition is such that it is both out of the ordinary and "extraordinary." Likewise, providing medical care "in the most effective manner" certainly dictates allowing Mr. YYY immediate access to his expensive medicine that is now paid for by private insurance. In other words, a downward departure and/or a downward variance is certainly appropriate in this case based upon Mr. YYY's health problems and need for expensive medication.

### **B. Sentence Disparities**

As noted above, David Muns was Mr. YYY's immediate supervisor. Levoie Branam actually delivered the promethazine cough syrup to Houston for sale. Both accepted under the table payments for their roles in the conspiracy. Indeed, as also noted above, the government has informed undersigned counsel that it views Mr. YYY as *less culpable* than Muns or Branam.

Perversely, because Muns and Branam were higher up in the chain, both had information that resulted in the government filing a downward departure motion in their behalf under U.S.S.G. § 5K1.1. On the other hand, while Mr. YYY met with the government and was completely debriefed, his role in the conspiracy did not allow him sufficient intelligence

information to qualify for a downward departure under U.S.S.G. § 5K1.1.<sup>3</sup>

Branam, who supervised Mr. YYY, was sentenced to four years probation, with 180 days of home confinement and a requirement to perform 100 hours of community service. Muns received an identical sentence. It would be utterly perverse if Mr. YYY received a harsher sentence than his supervisor. Moreover, undersigned counsel submits that, even if Mr. YYY is given an identical sentence as his supervisor, it would be a mockery of the justice system.

### **III. CONCLUSION**

As initially noted, this Court's responsibility is to impose a sentence that is "sufficient but not greater than necessary" to comply with the purposes set forth in 18 U.S.C. § 3553. There should be no question that, in the case of XXX Fred YYY, "sufficient but not greater than necessary" translates into a probationary sentence. The character letters attached hereto speak volumes as to the type of person Mr. YYY is and reflect the fact that his actions in this case are an aberration. Mr. YYY is culpable for his behavior and has accepted responsibility for that behavior both before this Court and his God. Ironically, part of what got him involved in this offense is his goodness and his desire to see the best in everybody. Of course, his desire for health insurance also contributed to his participation.

In the end, "the characteristics of the defendant," the fact that it is completely unnecessary to "protect the public from further crimes by the defendant" and the need to provide the defendant with "needed...medical care...in the most effective manner" cry out for a

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<sup>3</sup>See *United States v. Pressley*, 473 F. Supp. 2d 1303 (N.D. Ga. 2006) (Awarding downward variance to a defendant who did not qualify for a U.S.S.G. § 5K1.1 departure to avoid variance with more culpable defendants who received U.S.S.G. § 5K1.1 departure.)

probationary sentence in this case. Moreover, the need to avoid unwarranted disparities should dictate that Mr. YYY's sentence be less harsh than that of the more culpable Muns and Branam. Consequently, undersigned counsel urges this Court to place Mr. YYY on "straight probation" and for a term of two years rather than four years. Nevertheless, Mr. YYY, because he regularly contributes to his community, welcomes the opportunity to perform community service to repent for his criminal activity and undersigned counsel suggests that 200 hours (double the amount of community service required of Muns and Branam) is appropriate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on November 8, 2007, I caused the foregoing document to be hand delivered, on:

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