

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,)	
)	Docket No. YY-CR-YYY
Plaintiff,)	District Judge ZZZZZZ
)	
v.)	18 U.S.C. § 3661
)	Fed. R. Crim. P. 32(i)
XXX XXXX,)	USSG § 1B1.4
)	
Defendant.)	
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**MEMORANDUM IN AID OF SENTENCING
ON BEHALF OF DEFENDANT XXX XXXX**

I. INTRODUCTION

Counsel for XXX XXXX respectfully submits this memorandum to help this Honorable Court determine an appropriate sentence for his theft of Government money. As set forth in the “Objections and Clarifications to the Draft Presentence Investigation Report,” we submit the correct Sentencing Guidelines offense level is 8; the Criminal History Category is I; and Mr. XXXX’s Sentencing Guidelines range is 0-6 months of imprisonment.

XXXX has lost the reputation he earned over two decades of honorable military service. His felony conviction will ultimately cost him three different jobs, and make it more difficult for him to find new work as he starts over, approaching fifty, in a timid economy still filled with skilled job-seekers. For the brief benefit that his misconduct allowed, XXX XXXX has nullified his life’s work.

We do not excuse XXXX’s serious offense. But, as discussed here, the low-end of the correct Guidelines range – probation and restitution, with any other conditions the Court deems appropriate – is no greater punishment than necessary to serve sentencing’s ends.

II. FACTORS SUPPORTING PROBATIONARY SENTENCE

A. Nature of the Offense

Federal felonies are, by definition, serious offenses. Mr. XXXX's theft of just under \$17,000 is at the low end of the Guidelines loss continuum, however, and no elements of violence were present. Without diminishing what XXXX did, his theft is comparatively less serious than many other crimes this Court must address even this week.

Further, XXXX did not use this money lavishly; he mostly paid bills. He will have nothing to show for his misconduct but a felony conviction and a restitution order. While XXXX's motive *was* personal benefit, it was not to make himself rich. "The defendant's motive for committing the offense is one important factor [in sentencing],"¹ and XXXX's motive included less greed than many other theft defendants.

Neither Congress nor the Sentencing Commission require imprisonment for XXXX's Class C felony (sentencing ranges of 0-10 years and 0-6 months, respectively). Where no minimum prison term is required, "Congress thus not only envisioned, but accepted, the possibility that some defendants found guilty of that [offense] . . . would receive no jail time at all."² For all these reasons, counsel suggests that a probationary sentence is appropriate.

B. Nature of the Offender – Military Service, Family, and Hard Work

The PSR documents the awards and commendations that XXXX received during twenty years of honorable service to the U.S. Army. He served years of overseas duty, including time in a hazardous duty zone. XXXX spent most of the rest of his career in Texas, quietly doing his job while he and wife raised their two sons.

¹ See *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993).

² *United States v. Husein*, 478 F.3d 318, 332 (6th Cir. 2007).

“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 as Porter did.” *Porter v. McCollum*, 558 U.S. ---, 130 S.Ct. 447, 455 (2009). While XXXX was spared the horrors of combat, his twenty years of duty still merit some leniency for his only felony in a lifetime.

C. Collateral Consequences Fulfill Most Purposes of Sentencing

As former President Bush recognized when he commuted Lewis Libby’s perjury and obstruction sentence (from 30 months to probation), “the consequences of his felony conviction . . . will be long-lasting” and “harsh.”³ Likewise, collateral consequences add significantly to XXXX’s punishment, while his unfortunate example deters others from similar misconduct.

Naturally this offense cost XXXX his plum post-retirement job. XXXX eventually replaced most of that income with three part-time jobs: (1) warehouse worker; (2) residential house counselor for Social Services, Inc.; and (3) late-shift parcel handler. For months, XXXX has slept little and worked every hour his bosses can allow – in part, it would seem, to punish himself.

But, company policies require XXXX to tell the warehouse and Social Services of his felony conviction, and we understand that both companies will require his termination. By the end of this prosecution, XXXX’s \$17,000 theft will cost him three jobs, while new jobs will be even more difficult to find amid so many skilled, un-convicted unemployed. XXXX’s earning capacity has been permanently crippled.

³ See White House Office of the Press Secretary, “Statement by the President on Executive Clemency for Lewis Libby,” July 2, 2007 (<http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070702-3.html>) (regarding *United States v. Libby*, Dist. Ct. No. 1:05-CR-00394-RBW-1 (D. D.C. 2007)).

Destruction of “professional capacity” and “ordinary livelihood,” is “a pretty serious punishment already inflicted and carried out . . . and one that’s likely to be permanent.”⁴ Even under mandatory Sentencing Guidelines, in *United States v. Gaind*⁵ for example, a court could depart downward where the Guidelines failed to account for such a heavy consequence as a lost business. Under advisory Guidelines, the Fourth Circuit has expressly approved of mitigated sentences when collateral consequences mean punishment already inflicted.⁶

If “circumstances of the case reveal that the purposes of sentencing have been fully or partially fulfilled . . . a sentence within the range set forth by the guidelines may be ‘greater than necessary’ to satisfy 18 U.S.C. § 3553(a).”⁷ XXXX has lost his livelihood, and the reputation earned from a lifetime of service. He has started over, at the edge of a deep recession, and he will have to start over again if he goes to prison.

The destruction of XXXX’s second career and two other jobs, along with his public esteem and employability, significantly satisfy the need for just punishment and deterrence. In accordance with the Plea Agreement, punishment at the guidelines range’s low-end – probation – is no greater than necessary to finish XXX XXXX’s punishment, while also making a proper example of him.

D. XXXX poses extremely low risks of re-offense

1. Sentencing Commission Research

a. Zero Criminal History points

⁴ *United States v. Whitmore*, 35 Fed.Appx. 307, 322 (9th Cir. 2002) (two-level downward departure for deprivation of livelihood).

⁵ 829 F. Supp. 669, 671 (S.D.N.Y. 1993).

⁶ See *United States v. Pauley*, 511 F.3d 468, 474-75 (4th Cir. 2007) (loss of teaching certificate and State pension).

⁷ *United States v. Redemann*, 295 F.Supp.2d 887, 895-96 (E.D.Wis. 2003).

XXXX has never before been in trouble. The Sentencing Commission notes “that first offenders are less culpable than other offenders.”⁸ It found that “sentencing reductions for ‘first offenders’ are supported by the recidivism data and would recognize their lower re-offending rates.”⁹ Congress has also recognized “the general appropriateness of imposing a sentence other than imprisonment” for first-offenders not convicted of violence or similarly serious offenses.¹⁰

The Sentencing Commission has determined that criminal history *points* better forecast the risks of re-offense than the Criminal History Category.¹¹ Offenders (like XXXX) with zero criminal history points recidivate just 11.7% of the time. Offenders with even one criminal history point re-offend at almost twice that rate, 22.6% of the time.¹²

b. Other Demographic indicators

Recidivism rates are influenced most by a defendant’s personal characteristics, such as: (1) family ties and marital status; (2) level of education; (3) a lack of substance abuse; and (4) a history of stable employment.¹³ XXXX presents long histories of employment and strong family ties, while furthering his education and not abusing drugs. Further,

⁸ U.S.S.C., “Recidivism and the First Offender,” at 9 (Release 2, May 2004)

[\[http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf\]](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_First_Offender.pdf).

⁹ U.S.S.C., “Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines,” at page 15 (hereafter, “Criminal History Computation”) (Release 1, May 2004)

[\[http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf\]](http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf).

¹⁰ 28 U.S.C. § 994(j); *accord*, “Recidivism and the First Offender,” at 3.

¹¹ U.S.S.C., “Criminal History Computation,” at 7.

¹² *See*, “Recidivism and the First Offender,” at 13-14.

¹³ U.S.S.C., “Criminal History Computation,” at 11-14.

“[r]ecidivism rates decline relatively consistently as age increases,” from 35.5% of offenders under age 21, to 12.7% over age 40.¹⁴ XXXX turned 48 last August.

c. Type of Offense (larceny) indicates Low Risk of Re-offense

Larceny offenders studied by the Sentencing Commission recidivated around 19% of the time, less often than most other groups of offenders.¹⁵

III. REQUESTED SENTENCE AND CONCLUSION

We recognize that respect for the law, just punishment, and deterrence demand supervision. But, too harsh a sentence fails to respect the law just as much as too lenient a sentence,¹⁶ and it violates the statute requiring this sentence to be no greater than necessary.

Given this case’s singular circumstances, and in accordance with the Plea Agreement, counsel submits the appropriate sentence is probation, with a restitution schedule and such other conditions as the Court deems appropriate.

Dated: March 21, 2012

Respectfully submitted,

LAW OFFICE OF EJ HURST II

BY: /s/ EJ Hurst II
EJ HURST II (N.C. Bar. No. 39261)
6409 Fayetteville Road
Suite 120, PMB 326
Durham, North Carolina 27713
Tel.: (919) 294-9391
Fax: (866) 876-7269
Email: jayhurst@jayhurst.net
Attorney for Defendant, XXX XXXX (Retained)

¹⁴ U.S.S.C., “Criminal History Computation,” at 12 and 28, Exh. 9 (showing recidivism rates of just 6.9% for offenders, like XXXX, aged between 40 and 50 and in Criminal History Category I).

¹⁵ See U.S.S.C., “Criminal History Computation,” at 13.

¹⁶ See Justice Anthony Kennedy, Testimony before the Senate Judiciary Committee, February 14, 2007 (“Our sentences are too long, our sentences are too severe, our sentences are too harsh. . . there’s no compassion in the system. There’s no mercy in the system.”).

Certificate of Service

I hereby certify that I have this 21st day of March, 2012, served a copy of the foregoing **Memorandum in Aid of Sentencing on Behalf of XXX XXXX** upon U.S. Probation Officer; and Special Assistant U.S. Attorney by electronically filing the foregoing with the Court, using the CM/ECF system.

LAW OFFICE OF EJ HURST II

BY: /s/ EJ Hurst II
EJ HURST II (N.C. Bar. No. 39261)
6409 Fayetteville Road
Suite 120, PMB 326
Durham, North Carolina 27713
Tel.: (919) 294-9391
Fax: (866) 876-7269
Email: *jayhurst@jayhurst.net*

Attorney for Defendant, XXX XXXX (Retained)