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FRANK DARRYL HOLDER
8

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11 EASTERN DIVISION

12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 FRANK DARRYL HOLDER,
16 Defendant.
17

NO. ED CR 08-244-VAP

DEFENDANT'S SENTENCING
MEMORANDUM; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT

Date: 11/30/2009
Time: 9:00 a.m.

18 Defendant Frank Darryl Holder, through his attorney of record, Deputy
19 Federal Public Defender Kay Otani, hereby presents his sentencing memorandum.
20

21 Respectfully submitted,

22 SEAN K. KENNEDY
Federal Public Defender
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24 DATED: November 9, 2009

By 
KAY OTANI
Deputy Federal Public Defender
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1 Memorandum of Points and Authorities

2 **I. Introduction**

3 Frank Darryl Holder grew up in a loveless household where children were not
4 spoken to, and where his mother constantly told him he was worthless. He joined the
5 United States Army right out of high school and served our country by secretly
6 disrupting Viet Cong supply lines. During those missions he saw terrible things that
7 most of us cannot imagine. Mr. Holder learned to suppress his emotions and adopted
8 the phrase "It ain't nothin'," to deal with the violence that was done to him and that
9 he was forced to do to others. He developed post-traumatic stress disorder ("PTSD"),
10 but never dealt with any of those issues until after the incidents that occurred herein.

11 Afterward his service in the Vietnam conflict, Mr. Holder served as a police
12 officer for 30 years. He raised a family, giving them the love he was denied. He has
13 been married for 44 years, and raised two sons, both of whom are also police officers.
14 He committed the instant offense because he accrued debt trying to show his love for
15 his family through material possessions. He became despondent, believing his family
16 would abandon him, and because he was not thinking clearly due to his untreated
17 PTSD, he robbed banks to stave off the inevitable.

18 After his arrest, Mr. Holder voluntarily sought, and continues to receive,
19 therapy to help him recognize and control his behavior. It is a testament to the kind
20 of man he is that not only his family, but his friends and former colleagues continue
21 to support him. A former police officer who served with Mr. Holder is a surety for
22 his bail. His friends and family view Mr. Holder as someone with an illness, who
23 acted out of character, and hope for his recovery.

24 Mr. Holder should be sentenced to a year and a day in custody because (1) his
25 life was otherwise filled with good works and heroic acts, (2) his actions were caused
26 by his PTSD arising from his experiences in childhood and in Vietnam, (3) he
27 showed extraordinary acceptance of responsibility by confessing to carrying a firearm
28 that the government would not have otherwise known about, and (4) he is 62 years

1 old, is a first time offender, has begun treatment for his PTSD, and is very unlikely to
2 recidivate.

3 Because Mr. Holder did not intend to take a firearm with him into the bank,
4 and because he did not knowingly possess the firearm in the bank, the parties'
5 recommended guidelines calculation is correct and should be respected.

6 In light of Mr. Holder's financial situation and lack of any history of drug use,
7 the defense requests waiver of interest on restitution and waiver of drug testing.

8 **II. Brief Statement of Supplemental Facts**

9 In light of the details of Mr. Holder's life contained in the report of Dr. Carole
10 Morgan, the support letter from Dr. Chuck Leeb, the Presentence Investigation
11 Report ("PSR"), and numerous other letters from friends and family in support of Mr.
12 Holder, this statement of facts will be limited to addressing some minor errors and
13 misunderstandings in the PSR.

14 The PSR states that Mr. Holder's sister has one adult daughter. (PSR ¶ 62, at
15 11.) That is not correct. She does not have a daughter.

16 The PSR states that Mr. Holder's mother and sister blamed him for not coming
17 back to for his father's funeral. (PSR ¶ 68, at 11.) Actually, there was no funeral
18 because his father's body was donated to science. The only memorial service was a
19 mass service given by the donee institution about a year later. The service was for all
20 the people who had donated their bodies to science that year. It was held about 200
21 miles from the family home in Georgia. Mr. Holder did not attend because it was a
22 year late, it was 200 miles from his father's friends and family, there was nothing of
23 his father at the service, and the service was not even personal to his father.

24 There is a typographical error in paragraph 70 of the PSR. It states Mr.
25 Holder's son, William Scott Holder, is "29." (PSR ¶ 70, at 12.) His son's age is
26 actually 39.

27 There seems to have been some confusion during the presentence interview
28 regarding Mr. Holder's scars. Mr. Holder and Mr. Otani remember discussing

1 tattoos, but do not recall discussing scars. Any miscommunication that Mr. Holder
2 does not have any scars was unintentional. (PSR ¶ 73, at 12.) Mr. Holder has small
3 scars from a mortar wound on his left forearm and upper arm. He did not receive a
4 Purple Heart for the wounds because his unit did not request a Purple Heart unless
5 the soldier was “Med Evac’d.” It was a matter of honor in the unit.¹

6 While on pretrial release, Mr. Holder was on home detention for eight months,
7 and is currently on curfew. He has complied with all terms of his release and has
8 assisted his father-in-law post surgery as well.

9 Mr. Holder’s wife loves Mr. Holder and depends on him being there for her.
10 She is very frightened of his incarceration as they have never been apart since he
11 returned from Viet Nam.

12 **III. Discussion**

13 **A. Because Mr. Holder’s Actions Herein Were Aberrant in a Life** 14 **Otherwise Filled with Good Works and Heroic Acts, He Should Be** 15 **Given a Nonguideline Sentence of a Year and a Day**

16 “[S]urely, if ever a man is to receive credit for the good he has done, and his
17 immediate misconduct assessed in the context of his overall life hitherto, it should be
18 at the moment of his sentencing, when his very future hangs in the balance. This
19 elementary principle of weighing the good with the bad, which is basic to all the
20 great religions, moral philosophies, and systems of justice, was plainly part of what
21 Congress had in mind when it directed courts to consider, as a necessary sentencing
22 factor, ‘the history and characteristics of the defendant.’” United States v. Adelson,
23 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. July 20, 2006) (relying in part on defendant’s
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25 ¹ The defense would also like to clarify that the civilian casualties discussed in PSR ¶
26 88, at 14, and elsewhere in the reports of Dr. Morgan and Dr. Leeb, did not occur in
27 villages like the Mai Lai massacre. The Viet Cong used “convoys” of civilian
28 porters, including men, women and children, to transport munitions and war materiel.
Mr. Holder’s unit was ordered to disrupt those supply lines while maintaining the
secrecy of their missions. The civilian casualties were the porters carrying Viet Cong
supplies under Viet Cong protection.

1 | good works to reduce sentence from 85 years (per USSG) to three and one-half
2 | years); United States v. Acosta, 846 F. Supp. 278, 280 (S.D.N.Y. 1994) (reducing
3 | sentence in part because of mentally challenged defendant’s past heroic act of saving
4 | baby from burning apartment building at risk of his own life). Furthermore, an
5 | otherwise lawful life marred by an aberrant criminal act can merit a reduction in
6 | sentence. United States v. Lam, 20 F.3d 999, 1005 (9th Cir. 1994) (district court had
7 | discretion to reduce sentence where law abiding immigrant, ignorant of law against
8 | sawed-off shotguns, possessed sawed-off shotgun to protect family after recently
9 | being robbed).

10 | Mr. Holder did things in the service of our country that thankfully very few are
11 | called upon to do. His Combat Infantry Badge and Air Medal testify to his “everyday
12 | heroism” in combat deep within enemy territory. His thirty years of service as a
13 | police officer also speaks to his good works. But perhaps his greatest testimony to
14 | his goodness is the way he raised a family with the love that he was denied. So often
15 | familial cruelties are transmitted across the generations, it is exceptional when
16 | someone can not only break the cycle, but raise two fine children who are themselves
17 | police officers, and be so well loved by not just his family, but the community at
18 | large.

19 | Against a lifetime of good works stands the aberrant behavior of the acts Mr.
20 | Holder committed herein. While the defense acknowledges the seriousness of the
21 | offenses, the balancing of the aberrant behavior with the goodness of Mr. Holder’s
22 | life militates for a below guidelines sentence.

23 | Because Mr. Holder’s actions herein were aberrant in a life otherwise filled
24 | with good works and heroic acts, he should be given a nonguideline sentence of a
25 | year and a day.

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1 **B. Because Mr. Holder's Actions Were Caused by His PTSD Arising**
2 **from His Experiences in Childhood and in Vietnam, He Should Be**
3 **Given a Nonguideline Sentence of a Year and a Day**

4 Where Mr. Holder acted under the influence of PTSD, a mental disorder, he is
5 less culpable and the Court should reduce his sentence accordingly. U.S. v.
6 Menyweather, 447 F.3d 625, 631-32 (9th Cir. 2006) (in \$500,000 embezzlement
7 case, district court to departed downward by 8 levels to probation in part because of
8 post-traumatic stress syndrome).

9 Mr. Holder experienced emotional deprivation during childhood that stunted
10 his emotional growth. This was exacerbated when he served in Viet Nam because of
11 the terrible things he witnessed there. He internalized and cut-off all his emotions.
12 When he came back from Viet Nam he was "very quiet." His watch words became
13 "It ain't nothin'." His treating psychologist believes that Mr. Holder would never
14 have committed the offenses herein had he not fought in Viet Nam.

15 Mr. Holder kept all of this to himself for 30 years. He used his job in order to
16 cope with his PTSD. When he retired he lost his only compensating mechanism. He
17 got into debt because of compulsive buying to "prove" his love for his family. He
18 was afraid that he would be abandoned if he was discovered. Because of his PTSD,
19 he was unable to reason clearly and unable to figure a rational way out. Under the
20 influence of his disease the only thing he could think of was robbing banks to stave
21 off the inevitable. On some level he must have wanted to be caught because he knew
22 as a former police officer that bank robbers get caught, and he did not even bother to
23 use any disguises. All of his behaviors are consistent with PTSD. Mr. Holder's
24 disease makes him less culpable and should be taken into account by the Court at
25 sentencing.

26 Because Mr. Holder's actions were caused by his PTSD arising from his
27 experiences in childhood and in Vietnam, he should be given a nonguideline sentence
28 of a year and a day.

1 **C. Because Mr. Holder Showed Extraordinary Acceptance of**
2 **Responsibility by Immediately Confessing, Confessing to Carrying a**
3 **Firearm that the Government Would Not Have Otherwise Known**
4 **About, and Proffering to the Government, He Should Be Given a**
5 **Nonguideline Sentence of a Year and a Day**

6 Where a district court determines that the defendant's acceptance of
7 responsibility is not adequately reflected by the guidelines, it can give a reduced
8 nonguideline sentence. United States v. Brown, 985 F.2d 478, 482-83 (9th Cir.
9 1993) (reduction for extraordinary acceptance even where confession after high
10 speed chase lacked important details about the offenses committed). Disclosure of an
11 otherwise undiscoverable crime can merit a reduction for extraordinary acceptance of
12 responsibility. United States v. De Monte, 25 F.3d 343, 349 (6th Cir. 1994)
13 (reduction for extraordinary acceptance where defendant disclosed prior that was
14 highly unlikely to be otherwise discovered, even though defendant was obligated to
15 such disclosure under cooperation agreement).

16 Here Mr. Holder immediately confessed upon his arrest. Furthermore, he
17 confessed to carrying a firearm during the last bank robbery when he never referred
18 to it, displayed it, or, as discussed below, thought about it. No one in the bank saw
19 the firearm or knew he had a firearm. Had Mr. Holder not confessed to carrying it,
20 no one could have ever known about it. Mr. Holder further accepted responsibility
21 by proffering to the government regarding the firearm and his involvement, or lack of
22 involvement, in several other bank robberies. Mr. Holder proffered without the
23 benefit of a cooperation agreement.

24 These are all extraordinary in the sense that the Court does not usually see this
25 level of confession and cooperation in the absence of a cooperation agreement. As
26 noted in De Monte, it is very unusual to have a defendant admit to something serious
27 that would otherwise be undiscoverable—a crime in De Monte and a firearm in this
28 case. This extraordinary acceptance should be taken into account by the Court at

1 sentencing.

2 Because Mr. Holder showed extraordinary acceptance of responsibility by
3 immediately confessing, confessing to carrying a firearm that the government would
4 not have otherwise known about, and proffering to the government, he should be
5 given a nonguideline sentence of a year and a day.

6 **D. Because Mr. Holder Is 62 Years Old, Is a First Time Offender, Has**
7 **the Support of His Family and Friends, and Has Begun Treatment**
8 **for His PTSD, He Is Very Unlikely to Recidivate and Should Be**
9 **Given a Nonguideline Sentence of a Year and a Day**

10 The risk of recidivism declines with age and is an appropriate characteristic for
11 the Court to consider in granting a nonguideline sentence. United States v. Wadena,
12 470 F.3d 735, 740 (8th Cir. 2006); United States Sentencing Commission, Measuring
13 Recidivism: the Criminal History Computation of the Federal Sentencing Guidelines,
14 Research Series on the Recidivism of Federal Guideline Offenders, Release 1, May
15 2004, at 12 (“Recidivism rates decline relatively consistently as age increases. . . .
16 Among all offenders under age 21, the recidivism rate is 35.5 percent, while
17 offenders over age 50 have a recidivism rate of 9.5 percent.”).² A defendant’s ill
18 health is also appropriately considered at sentencing. Wadena, 470 F.3d at 739.
19 Strong familial and community support also warrant a below guideline sentence
20 because the guidelines do not account for the role such support plays in rehabilitating
21 and reintegrating the defendant into the community. United States v. Wchowiak, 412
22 F. Supp. 2d 958, 964 (E.D. Wis. 2006) (“Because defendant’s family and friends
23 have not shunned him despite learning of his crime, he will likely not feel compelled
24 to remain secretive if tempted to re-offend. Rther, he will seek help and support.”).
25 Furthermore, the impact of imprisonment is greater upon a first offender making a
26 lower sentence appropriate. United States v. Qualls, 373 F. Supp. 2d 873, 877 (E.D.

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² Available at www.ussc.gov/publicat/Recidivism_General.pdf.

1 Wis. 2005) (“Generally, a lesser period of imprisonment is required to deter a
2 defendant not previously subject to lengthy incarceration than is necessary to deter a
3 defendant who has already served serious time yet continues to re-offend.”).

4 Mr. Holder is 62 years old. He is very unlikely to re-offend just on his age
5 alone. As an older first time offender, incarceration is likely to be very hard on Mr.
6 Holder and will make a great impact on him indeed. As noted in Wachowiak, the
7 support of Mr. Holder’s family and friends will help him to keep from re-offending.
8 Lastly, his service in Viet Nam has left Mr. Holder with partial disability from
9 malaria, hearing loss, and PTSD.

10 Given these factors, a reduced sentence will be sufficient to keep Mr. Holder
11 from re-offending and be sufficient but not greater than necessary to serve the
12 purposes of sentencing.

13 Because Mr. Holder is 62 years old, is a first time offender, has the support of
14 his family and friends, and has begun treatment for his PTSD, he is very unlikely to
15 recidivate and should be given a nonguideline sentence of a year and a day.

16 **E. Because Mr. Holder Did Not Intend to Take a Firearm with Him**
17 **into the Bank, and Because He Did Not Knowingly Possess the**
18 **Firearm in the Bank, the Parties’ Recommended Guidelines**
19 **Calculation Is Correct and Should Be Respected**

20 Unconsciously carrying of a firearm is not sufficient to trigger the
21 enhancement of USSG § 2B3.1(b)(2)(C) (brandishing or possession). See United
22 States v. Miller 105 F.3d 552, 555 (9th Cir. 1997) (overruled on other grounds)
23 (holding that 18 U.S.C. § 922(g) requires knowing possession of a firearm).

24 As Mr. Holder proffered to the government, he carried a firearm almost daily
25 for over 30 years, first in Viet Nam, then as a police officer. It became a part of him,
26 like putting on shoes or socks. At the time of the offenses, Mr. Holder was still doing
27 background checks on a contract basis. He had a license to carry a firearm and when
28 he went into rough neighborhoods he took a firearm with him. Mr. Holder only took

1 the firearm into the bank on the last occasion because he was already wearing it and
2 forgot to take it off. On the prior robberies he specifically left it in the car or at
3 home.

4 Just as forgetting to take one's shoes off when entering a friend's home can be
5 an unconscious act that runs contrary to one's intentions, so Mr. Holder's taking the
6 gun in on the last robbery was an unconscious act and contrary to his intentions. This
7 is bourn out by the statements of witnesses. No one saw a gun, remembered a gun, or
8 mentioned a gun. The only evidence that Mr. Holder had a gun is his own statement.

9 The language of the guideline and case law also militates towards this
10 interpretation. The guideline refers to *brandishing* and possession, and the cases
11 discuss the effects of showing a gun through a shirt, remarking on a gun, or otherwise
12 making the presence of the gun known without brandishing. There is a dearth of
13 cases regarding a possession where no one even knew the gun was present.

14 Given that Mr. Holder's carrying the firearm was not knowing and conscious,
15 the Court should respect the parties' agreement as to the guideline calculation in this
16 case. That calculation has two units of level 22. See PSR ¶¶ 32-36, at 8. Pursuant to
17 USSG § 3D1.4 there are two additional levels for two units giving a total level of 24.
18 After adjustment for acceptance (minus three), the correct guideline calculation is 21.
19 At criminal history category one (zero points), this results in a guidelines range of 37
20 to 46 months.

21 Because Mr. Holder did not intend to take a firearm with him into the bank,
22 and because he did not knowingly possess the firearm in the bank, the parties'
23 recommended guidelines calculation is correct and should be respected.

24 **F. In Light of Mr. Holder's Financial Situation and Lack of Any**
25 **History of Drug Use, the Defense Requests Waiver of Interest on**
26 **Restitution and Waiver of Drug Testing**

27 Because Mr. Holder does not have the ability to pay a fine, and because he has
28 no history of drug use, the defense requests that interest and drug testing be waived

1 pursuant to 18 U.S.C. §§ 3563(a)(5) and 3612(f)(3)(A).

2 In light of Mr. Holder’s financial situation and lack of any history of drug use,
3 the defense requests waiver of interest on restitution and waiver of drug testing.

4 **III. Conclusion**

5 Because Mr. Holder’s actions herein were aberrant in a life otherwise filled
6 with good works and heroic acts, he should be given a nonguideline sentence.

7 Because Mr. Holder’s actions were caused by his PTSD he should be given a
8 nonguideline sentence.

9 Because Mr. Holder showed extraordinary acceptance of responsibility he
10 should be given a nonguideline sentence.

11 Because Mr. Holder is 62 years old, is a first time offender, has the support of
12 his family and friends, and has begun treatment for his PTSD, he is very unlikely to
13 recidivate and should be given a nonguideline sentence.

14 Because Mr. Holder did not knowingly possess the firearm in the bank, the
15 parties’ recommended guidelines calculation is correct and should be respected.

16 In light of Mr. Holder’s financial situation and lack of any history of drug use,
17 the defense requests waiver of interest on restitution and waiver of drug testing.


18 For the foregoing reasons, Mr. Holder respectfully requests imposition of a
19 term of imprisonment of a year and a day, for placement in an FCI in Southern
20 California, and for any other and further relief the Court may deem proper.

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Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: November 9, 2009

By 
KAY OTANI
Deputy Federal Public Defender

1 PROOF OF SERVICE

2 I, the undersigned, declare that I am a resident or employed in Riverside
3 County, California; that my business address is the Federal Public Defender's Office,
4 3801 University Avenue, Suite 150; Riverside, California 92501; that I am over the
5 age of eighteen years; that I am not a party to the above-entitled action; that I am
6 employed by the Federal Public Defender for the Central District of California, and
7 am a member of the Bar of the United States District Court for the Central District of
8 California. I served the DEFENDANT'S SENTENCING MEMORANDUM;
9 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT.

10 On November 9, 2009, following ordinary business practice, service was:

11 Placed in a closed
12 envelope, for collection and
13 hand-delivery by our internal
14 staff, addressed as follows:

11 By hand-
12 delivery addressed
13 as follows:

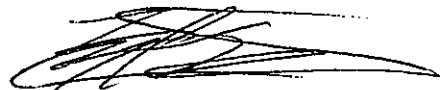
11 Placed in a sealed
12 envelope for collection and
13 mailing via United States
14 Mail, addressed as follows:

14 Sheri Pym & Priya Sopori—VIA ECF
15 Assistant United States Attorneys
16 United States Attorney's Office
3880 Lemon Street, Suite 210
Riverside, California 92501

14 Melinda Nusbaum
15 United States Probation Officer
16 600 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

17
18 This proof of service is executed at Riverside, California, on November 9,
19 2009.

20 I declare under penalty of perjury that the foregoing is true and correct to the
21 best of my knowledge.

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24 Kay Otani
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