INTRODUCTION

Tragically, CLIENT NAME is before this Court for the second time for possessing a firearm after receiving a felony conviction. But Mr. NAME is not the same man who came before this Court in 2013. At the time, he was just 20 years old and he acknowledges he was immersed in a dangerous lifestyle in the Sunnydale neighborhood of San Francisco. Now, Mr. NAME is nearing 30, he is a first-time father to his baby boy, and, before his arrest, he was working for the Department of Public Works and living outside of San Francisco in Bay Point, California, with his new family. But some things will never change. Mr. NAME will never escape the danger he faces in San Francisco because of the neighborhood he grew up in and the way he acted in his youth. Mr. NAME worried about this danger, and his worst nightmare came true when he and his beautiful family were the victims of a vicious shooting in April 2020 while driving home to Bay Point. Instead of leaving the San Francisco Bay Area behind altogether to protect his family, Mr. NAME made the terrible and life-wrecking decision to have a gun for protection. He regrets that decision every day that he sits in a cell instead of being at home with his son. This offense and sentence is different for Mr. NAME. A concurrent sentence of 36 months for the new offense and eight months for the supervised release violation provides the deterrence and punishment to ensure he never makes this mistake again.

BACKGROUND[1]

On April 5, 2020, exactly one year ago, Mr. NAME, his fiancée Ms. Brown, their infant son, her two-year-old daughter, and her three-year-old brother were driving home on the highway when they were hit by a barrage of bullets. *See* Whiting Decl. Ex. A, at 6; PSR ¶ 48. The car filled with screams and blood from the wounds suffered by Mr. NAME, Ms. Brown, and, most tragically, her 2-year-old daughter. Whiting Decl. Ex. A, at 6. They were rushed to the hospital, where the little girl underwent emergency surgery and remained in the ICU for five days. *Id*. They may never fully recover. *See* Whiting Decl. Ex. D.

[1] CLIENT NAME Assessment Report completed by Dr. Amanda Gregory, the Presentence Investigation Report (PSR), and family letters of support. *See* Declaration of Sophia Whiting in Support of Defendant's Sentencing Memorandum (Whiting Decl.); PSR ¶ 41-61.

The violence aimed at Mr. NAME and his family was not mutual. They were a family on their way home from work. Whiting Decl. Ex. A, at 6. Their routine was that Mr. NAME would bring Ms. Brown and their children to her mother's house in the Bayview neighborhood of San Francisco, while he went to work at the Department of Public Works (DPW). *See id*. Her mother would help Ms. Brown care for the young children. Mr. NAME would then pick them up and drive about 45 minutes to their home in Bay Point. *See id*. That is what they were doing on this day when they were the victims of attempted murder. *See id*. Immediately after his family was shot, while still in the hospital, law enforcement questioned them, confiscated their phones, searched the contents of the phones and location data, searched their car,[2] and later searched their home. *See id*; PSR ¶ 48. Probation officers and law enforcement have had been monitoring Mr. NAME ever since he was released from federal custody in 2017 and only once has he even been accused of a new crime (never arrested or charged by the state), which he admitted—and this Court found—to be a misdemeanor vandalism offense. Mr. NAME' last arrest prior to the instant arrest was for the underlying felon in possession of a firearm conviction in 2013. *See* PSR ¶ 29-40. In that case, he was also not suspected of any other criminal conduct. *See* PSR ¶ 30. In April 2020, Mr. NAME was not shot because he was engaged in criminal activity. He had become a hard-working and reliable family man.

Despite removing himself from criminal activity, Mr. NAME had well-founded fears of violence. He has lost **15** close family and friends to gun violence. Whiting Decl. Ex. A, at 15. His father was shot and killed when he was just 11 years old, and he witnessed the aftermath. Whiting Decl. Ex. A, at 3-5, 11; PSR ¶ 44. Mr. NAME has been shot twice. During his last period of supervised release, before the April shooting and his subsequent arrest, Mr. NAME made clear to everyone that his life is in danger in San Francisco because of his past. He called his safety concerns to the attention of his family members, probation officers, and his attorneys. Whiting Decl. ¶ 11-12; *See also* PSR ¶ 48 ("He said while at the RRC, he and his girlfriend were attempting to relocate to

[2] A firearm was found in the engine block of the car. Mr. NAME was never charged with this firearm and there is not persuasive evidence that he had a firearm before the shooting, we therefore object to consideration of any arguments that Mr. NAME was armed before the shooting. If the Court is persuaded that he was armed at any point before the shooting, the same rationale of self- and family-protection applies give the fears he voiced openly, fears that ultimately came true.

Stockton, California. He said he was feeling 'paranoid' about his safety. He informed his lawyer, his probation officer, and family about his safety concerns in San Francisco.").

He does not hide these safety concerns because they are not based in any ongoing crime or gang involvement. Whiting Decl. Ex. A, at 14. Rather, he will always be a target because of where he grew up, who his father was, the friends he made when he was a child, and his own actions in his youth. *See id*. Whiting Decl. Ex. A, at 3. He takes responsibility for his past, but he did not even live in San Francisco anymore and he cannot change his family. In the eyes of others, these are associations he cannot remove. *See id*. His life may always be at risk in San Francisco given his relationship to members of the gang. As is evident from the shooting of his fiancé, her toddler brother, her toddler daughter, and their infant son, the people who shot at Mr. NAME and his family are not very discerning about who their enemies are. Rather, they are sending a broad message about their "territory" and do not care who gets hit in the crossfire.

Mr. NAME was nearly destined for a life plagued by crime and violence, based on circumstances from birth and childhood. However, Mr. NAME has worked hard to remove himself from those circumstances and become a family man. His life changed on December 31, 2019, with the birth of his son. Whiting Decl. Ex. A, at 3. Mr. NAME overhauled his life and goals to meet the new challenge of fatherhood. *See id*; PSR ¶ 48; 57 ("The birth of his child changed his life and priorities," he obtained worked, attending parenting and men's help classes, and stopped using marijuana); Whiting Decl. Ex. A, at 4. ("It was beautiful to sit in our house, watching movies together."). Mr. NAME obtained and maintained steady full-time employment. First, he worked for Home Depot. PSR ¶ 48. Then, he found a better opportunity to work for the Department of Public Works. PSR ¶ 48; 60. He worked at DPW for months until his arrest. He displayed a work ethic unlike ever in the past, and proved that he took his new responsibility seriously. The only downside of his employment is that it was still in San Francisco.

Mr. NAME previously struggled on supervised release, and he was held accountable for those mistakes, but it is important to note how many of those struggles were not being repeated during his most recent period of supervision. He **was not** smoking marijuana. He **was** working full time. He **was** completing counseling programs. He **was** communicating with the probation officer. And, for the

first time ever, he had his **own residence**, which he shared with his fiancé, son, and stepdaughter in Bay Point (far from Sunnydale). But to protect that family, he made the mistake of having a gun.

In the early morning of May 14, 2020, around 6 a.m., at least 25 U.S. Probation, local, and federal law enforcement officers executed a federal probation search at Mr. NAME' family home in Bay Point. *See* PSR ¶ 6. They broke down the front door clear of its hinges. The armed officers methodically swarmed through the entire home, waking and removing the sleeping inhabitants from their beds at gunpoint. *See* Whiting Decl. Ex. D. U.S. Probation had visited the home without incident just two weeks earlier, knew two young children live there, and knew the family had just suffered a violent shooting, so the reason for this dangerous and terrifying early-morning raid remains unclear. Fortunately, Mr. NAME' two-year-old stepdaughter, who was still recovering from her near-fatal gunshot wounds, was not at the home to be re-traumatized by this armed intrusion. Thankfully, and unlike other home raids of this perilous nature (Breonna Taylor comes to mind), no one was physically hurt. The police found one firearm, the firearm charged in this case, on the ground next to the bed where Mr. NAME was sleeping with his partner and infant. Mr. NAME regrets having a firearm out with a baby, but it is important to note that the only child in the home was Mr. NAME' 4-month-old son. The baby could not have accessed the gun. Normally, Mr. NAME secured the firearm on a shelf above his height in a closed closet. The reason Mr. NAME had the gun was to protect his family, not to put them at risk, but he recognizes now that he was not thinking clearly and put them all at greater risk by having a gun. Mr. NAME has been in custody since that day.

The government immediately charged Mr. NAME with violating his supervised release and 18 U.S.C. 922(g), firearm possession by a person previously convicted of a felony, and pursued consecutive sentences against him. He promptly lodged his guilty plea application, before his first appearance in this Court.

DISCUSSION

I. The Sentencing Guidelines (18 U.S.C. § 3553(a)(4))

Mr. NAME' final adjusted offense level is 19 and criminal history category is IV, resulting in a range of 46-57 months imprisonment under the advisory guidelines.

Mr. NAME has two prior adult convictions. One is the prior federal felon in possession of a

firearm conviction from 2013, for which he has also received the supervised release violation. In 2013, he was arrested for mere possession of a firearm after officers seized and searched him in the street. He was not using the firearm or otherwise involved in criminal activity. Mr. NAME received a lengthy sentence of 51 months—agreed to by the parties pursuant to a Rule 11(c)(1)(C) plea agreement—because Mr. NAME' guidelines were enhanced by a prior robbery that no longer qualifies for enhancement[3] and because of his (at the time) recent criminal history. If sentenced in his 2013 case today, his sentencing guidelines would be 37-46 months. The prior robbery is his only other conviction—from 11 years ago, 2010, when Mr. NAME was just 18 years old. The conduct in the robbery is outrageous, and was certainly taken into account when he was last sentenced, but it is now far removed in time, maturity, and circumstances.

Based on these two prior convictions, Mr. NAME' criminal history category would be III, but he lands in criminal history category IV because he receives two points for being on probation or parole at the time of the offense, since he was on federal supervised release. He has also, though, admitted to a supervised release violation as a result of this offense, which carries its own guidelines of 8-14 months. Without this two-point enhancement for being on probation or parole, Mr. NAME' criminal history category would be III and his guidelines would be 37-46 months.

Although the Court must remain mindful of the Sentencing Guidelines recommendation, the advisory Guideline range is not presumptively reasonable and it cannot be given any more or less weight than any other factor listed in section 3553(a). *United States v. Autery*, 555 F.3d 864, 872 (9th Cir. 2009); *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008). The court's paramount concern must be to "'impose a sentence sufficient, but not greater than necessary' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment." *Carty*, 520 F.3d at 991.

A sentence below the guidelines range best aligns with the goals and factors of section 3553(a)

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[3] Mr. NAME received enhanced base offense level 22 because his 2010 second degree robbery conviction was categorized as a crime of violence, which the guidelines and case law no longer recognize as a qualifying offense. *United States v. Bankston*, 901 F.3d 1100, 1104 (9th Cir. 2018).

for the following reasons.

II. A Downward Departure is Appropriate to Reflect Mr. NAME' History of Trauma and the Nature and Circumstances of the Offense (18 U.S.C. § 3553(a)(1))

Mr. NAME' family had been shot in a callous, brutal, and tragic crime just one month before he was arrested for the instant offense. He did not have a gun to engage in a criminal lifestyle, he had a gun for protection of his family. He had a good job, a stable family life, his own residence, and attended counseling and case management on his own. *See* Whiting Decl. Ex. A, at 18. His family and members of the community could see that he was thriving. *See* Whiting Decl. Ex A-H. That does not excuse the crime, but it provides context for the type of danger posed by Mr. NAME' possession, his mindset, the level of punishment necessary, and the outlook for rehabilitation.

Mr. NAME did not use the gun and did not engage in any other criminal activity. While guns certainly can be dangerous, "[b]y regulating the simple possession of potentially 'dangerous products' within only a distinct group of people, i.e., those who have previously been convicted of a felony, the statute proscribes a 'status offense' rather than an 'action crime.'" Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Century-Old Methods to Disarm Black Communities*, CUNY L. Rev. 143, 154 (2018), https://academicworks.cuny.edu/clr/vol21/iss2/3 (A "status offense" is "[a] crime of which a person is guilty by being in a certain condition or of a specific character."). Mr. NAME is not before this Court for violent actions or conduct. He was doing what millions of Americans do every single day as protected by the Second Amendment to the Constitution—he had a firearm in his home to protect his family from crime. The only reason why this act is criminal as opposed to a fundamental right is because Mr. NAME was convicted of a felony when he was 18 years old. This does not excuse his crime, but the sentence should consider his motives and circumstances. Over-penalizing a status offense is especially problematic in light of the racial disparities in enforcement and sentencing of felon firearm possession, as discussed in Part III.

The Courts and the Sentencing Commission have recognized that a below guideline sentence may be warranted in these circumstances where a person commits a crime to "avoid a perceived greater harm. . . [where] circumstances significantly diminish society's interest in punishing the

conduct" or where "conduct may not cause or threaten the harm or evil sought to be prevented by the law." USSG §5K2.11; *United States v. Williams*, 432 F.3d 621 (6 Cir. 2005). In *Williams*, the Sixth Circuit upheld the district court's variance based, in large part, upon the fact that the defendant possessed the firearm after receiving threats to his safety. *Williams*, 432 F.3d at 623. Here, not only was Mr. NAME' life threatened, he and his family were in fact victimized by an attempted murder. In upholding the downward variance from 46 to 24 months custody, the court in *Williams* relied upon USSG §5K2.11, and found that possessing a firearm in self-defense is consistent with the language in USSG §5K2.11, which provides for a below guideline sentence where a defendant commits a crime in order to avoid a perceived greater harm. *Id* ("While this is not a defense or an excuse for the crime, it is a mitigating factor not adequately taken into consideration in formulating the Guidelines."). Application Note 15 reflects a similar sentiment:

> In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a down-ward departure may be warranted if (A) none of the enhancements in subsection (b) apply, *(B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense*.

USSG 2K2.1, comment (n.15). While Mr. NAME does not meet all criteria for the departure, a variance is certainly appropriate for satisfying two of the three.

However wrongly, Mr. NAME believed a firearm was needed to protect his family. Whiting Decl. Ex. A, at 18. ("Mr. NAME reported that he possessed a firearm out of fear for the safety of himself and his family secondary to being shot and exposure to severe community violence that claimed the lives of his friends and father while growing up in the Sunnydale neighborhood of San Francisco."). While no one's background can be used as an excuse for the commission of a crime, Mr. NAME' decision to have a firearm should be considered in light of the substantial trauma he has experienced from the time he was a child to just one month before his arrest. He learned to have a gun to protect his *life*, and his *family's life*. That is why deterrence and rehabilitation in this case will not be accomplished by more time in custody, rather, it will be accomplished by relocating away from the San Francisco Bay Area (including U.S. Probation approving a transfer to Stockton in the Eastern District of California, if appropriate) and continuing counseling to promote better decision-

making, as recommended by Dr. Gregory. Whiting Decl. Ex. A, at 19-20.

III. A Downward Variance is Warranted Because Black Men are Disproportionately Convicted and Incarcerated for Firearm Possession (18 U.S.C. § 3553(a)(6))

Mr. NAME should not have had a firearm and he accepts full responsibility for the illegality of his actions. It is important, though, that the criminal justice system continues to think critically about the ways in which the laws that we have accepted as status quo are perpetuating racism and disproportionately harming Black Americans. Black individuals, *especially in the Northern District of California*, are charged, sentenced, and incarcerated at alarmingly disparate rates when it comes to federal gun offenses.

The United States has the highest prison population rate in the world, incarcerating one in five of the world's prisoners. Wagner and Bertram, *"What percent of the U.S. in incarcerated?" (And other ways to measure mass incarceration*, Prison Policy Initiative (January 16, 2020), https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/; *see also* Roy Walmsley, *World Prison Brief: World Prison Population List*, Institute for Crim. Policy Rsch. (12th ed. 2020), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf. Black individuals are more than five time as likely to be imprisoned as white men. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, The Sentencing Project (June 14, 2016), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/. More than any other sentencing guideline, USSG §2K2.1 is disproportionately used to sentence and incarcerate Black individuals. *See* Declaration of Lisa Tarasyuk in Support of Defendant's Sentencing Memorandum (Tarasyuk Decl.), Table 2. While Black individuals are just 13.4% of the total population in the United States, they are 48.46% of all defendants sentenced under 2K2.1 nationwide. Tarasyuk Decl., Tables 1, 2. The statistics in the Northern District of California (NDCA) are even more staggering: only 5.6% of NDCA population is Black, yet 58.05% of defendants sentenced under 2K2.1 are Black. *Id*. **NDCA is sentencing Black individuals under 2K2.1 at more than ten times their rate in the population.** Black defendants are imprisoned at even higher rates. Nationwide, an estimated 61.05% of individuals sentenced under 2K2.1 who are currently in custody are Black. Tarasyuk Decl., Table 4.

Table 2: Racial Composition of Sentencing Data and Individual Guidelines

Region	Race	Sentencing Data	§2D1.1	§2L1.1	§2K2.2	§2G2.2	Total No. of Cases
National	Black	20.93%	26.97%	2.98%	49.37%	3.33%	177665
	White	24.43%	24.21%	16.36%	28.83%	85.05%	207310
	Hispanic	49.92%	45.58%	77.85%	18.92%	9.19%	423697
Ninth Circuit	Black	6.34%	6.48%	2.36%	23.37%	2.68%	10462
	White	24.91%	24.94%	34.93%	35.23%	79.72%	41074
	Hispanic	60.27%	60.94%	58.09%	31.6%	12.45%	99404
Northern California	Black	24.01%	21.49%	0%	58.05%	4.8%	1637
	White	23.6%	17.76%	14.29%	13.87%	70.31%	1609
	Hispanic	39.07%	49.25%	38.1%	22.82%	14.41%	2664

What explains these alarming disparities? While the disparate rates at which Black men are policed are one part of the puzzle, prosecutorial discretion plays a large role. *See* Colleen Walsh, *Solving racial disparities in policing*, The Harvard Gazette (February 23, 2021), https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/. "[T]he disproportionate rates at which Blacks are convicted of felonies—and thus susceptible to a 'felon in possession' charge—are only a small component of why Blacks are disparately affected by federal 'felon in possession' laws." Shreefter, *supra*, at 160. "Federal programs have existed for twenty-six years to ensure the most aggressive enforcement of gun laws and have been set up to systemically target Black communities." *Id*. U.S. Attorneys' offices collaborate with local police departments to prosecute offenders in federal court, to "face 'the full force of federal sentences with a commitment to no plea bargaining.'" *Id*.

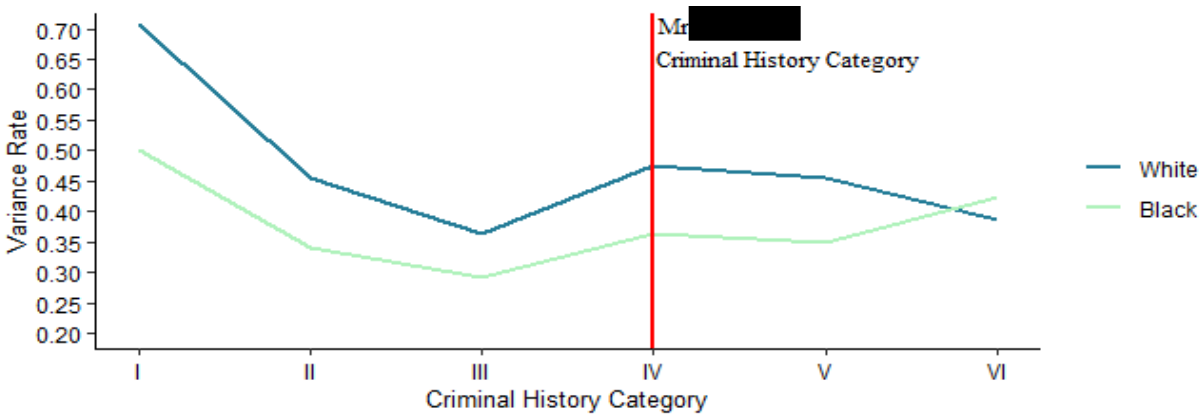
Chad Ramon Jones challenged the racial disparities in federal felon in possession prosecution in *United States v. Jones* after his case was transferred from state to federal court. *United States v. Jones*, 36 F. Supp. 2d 304, 307 (E.D. Va. 1999); *see* Shreefter, at 161. While ultimately ruling against Mr. Jones, and constrained by equal protection and selection prosecution case law, the court stated,

"[t]he inability of the prosecutors to explain the procedure clearly is disquieting and casts some doubt on the assertion that race places no role in deciding whether a particular case is to be federally prosecuted." *Jones*, 36 F. Supp. 2d at n.9. That same disquieting inability to explain the process by which federal prosecutors decide to transfer state cases to federal court—and then proceed to pursue harsh sentences—remains today, in this district.

Today, the Department of Justice operates Project Safe Neighborhoods which, much like Project Exile in *United States v. Jones*, "targets Black communities and disparately impacts Black defendants." Shreefter, at 163. "This disparate impact is evidenced by two practices: the targeted implementation of this project in certain jurisdictional districts, and the federal prosecutors' imbalanced exercise of their discretion to remove cases from state court and to indict under the might of federal law." *Id*. The black box of prosecutorial discretion continues to imprison Black defendants at indefensible rates, without a modicum of transparency or accountability. The U.S. Attorney's Office in NDCA has rejected defense attorneys' requests for basic statistics regarding the race of those prosecuted and convicted, claiming they do not keep such data.

Racial disparities do not end at the charging stage, however. Sentencing data shows Black defendants are less likely to receive a downward variance than white defendants in the same guidelines categories. Black defendants sentenced under 2K2.1 in CHC IV are less likely to receive a variance nationally, in the Ninth Circuit, and in NDCA. **NDCA has the largest disparities**, with 47.62% of white defendants in CHC IV receive a variance while 36.43% of Black defendants receive a variance. Tarasyuk Decl. ¶ 14, Table 5. Table 6 provides a graphic of the disparate variance rates within 2K2.1 in NDCA by race. At minimum, Mr. NAME should receive a downward variance in recognition of his mitigating circumstances and background, in which race certainly also plays a role.

Table 6: Northern California District CHC Variance Rates, by Race



IV. A Sentence of 36 Months is an Average Sentence Among Defendants with Mr. NAME' Exact Guidelines Calculations and Range (18 U.S.C. § 3553(a)(6))

Thirty-six months is not an insignificant sentence, in fact, it is nearly an average sentence for defendants with the same criminal history (CHC IV) and the exact same offense conduct as Mr. NAME. *See* Tarasyuk Decl. ¶ 16, Table 7. The average sentence in NDCA is 38.53 months. *Id*. 41.18% of all defendants received a sentence of 36 months or less. *Id*. 47.06% received a downward variance. *Id*.

The following cases involve defendants sentenced under the identical offense level calculation and criminal history category as Mr. NAME[4]:

- *United States v. Murphy*, 16-cr-00197-RS: Mr. Murphy was convicted of *two* federal offenses—felon in possession of a firearm (Count One), and 21 U.S.C. § 844(a), possession of cocaine base (Count Two). Because of grouping rules, despite two convictions, Mr. Murphy fell into the identical guidelines calculation and range as Mr. NAME. Mr. Murphy ran from police, had a history of domestic violence, probation violations, narcotics sales, and firearms possession. The government requested a sentence of 46 months on Count One to run concurrent to 12 months on Count Two. This Court sentenced Mr. Murphy to 36 months on Count One and 12 months on Count

[4] These are all individuals sentenced under §2K2.1, in Criminal History Category IV, with Base Offense Level 20, no enhancements under §2K2.1(b), save for a 2-level enhancement under §2K2.1(b)(4), who received 3-level decrease under §3E1.1, and a Final Adjusted Offense Level of 19. Tarasyuk Decl. ¶ 9.

Two, to be served concurrently.

- *United States v. Grant*, 17-cr-00020-CRB: In Mr. Grant's case, the government recommended 46 months; probation recommended 51 months; and the defense requested a deferred sentence to prove rehabilitation. After evidence of post-offense rehabilitation, Judge Breyer sentenced Mr. Grant to time served (1 day).
- *United States v. Lee*, 18-cr-00877-WHA: Mr. Lee had a firearm after a conviction for a crime of violence and told police he was on his way to sell the firearm to a friend. He had multiple prior felony convictions and parole revocations. The government recommended 46 months imprisonment. Judge Alsup sentenced Mr. Lee to 34 months in prison.
- *United States v. Knighten*, 16-cr-00421-CRB: The government recommended Mr. Knighten be sentenced to 46 months imprisonment after he was arrested in a stolen vehicle with a loaded stolen firearm, after a previous 70-month federal sentence for firearm possession. Probation recommended 52 months. Mr. Knighten was sentenced to 36 months.
- *United States v. Rios*, 12-cr-00861-CW: The government, U.S. Probation, and the defense all *agreed* in a Rule 11(c)(1)(C) plea to a sentence of 46 months imprisonment after Mr. Rios was seen throwing the firearm out of a truck during a high-risk vehicle stop after reports of shots fired from that truck into another moving vehicle. Mr. Rios has previous convictions for crimes of violence and use of dangerous weapons.

The fact that Mr. NAME was on supervised release at the time of the offense does not change this analysis. As explained above, the reason he is in criminal history category IV is because he was on supervised release, so he is being held accountable for that fact. And he would be treated disparately by sentencing him consecutively—the government frequently resolves new firearm possession on only a supervised release violation (without a new charge) or by recommending the violation be served concurrently with the new conviction.

The following cases involve defendants with underlying 18 U.S.C. 922(g) convictions who possessed firearms in violation of supervised release where the government decided not to file any

federal charges (despite having the firearm in evidence) and resolved the matter by way of the violation alone:

- *United States v. Vearl Jones*, 17-cr-00409-SI: Mr. Jones incurred two new gun arrests while in absconder status from federal supervised release. He attempted to flee both arrests. One arrest involved his hit-and-run on an unmarked police car and a firearm with an extended magazine. Foregoing new charges, the government agreed to resolve the violation with a jointly recommended sentence of 16 months incarceration followed by 20 months of supervised release.
- *United States v. Nathaniel Standifer*, 14-cr-00486-YGR: Mr. Standifer violated supervised release by possessing another firearm while driving under the influence of narcotics after he served a 51-month sentence on a previous federal felon in possession of a firearm conviction. The government agreed to resolve the violation with a jointly recommended sentence of 24 months incarceration followed by one year of supervision.
- *United States v. Antoine Videau*, 17-cr-00033-WHA: Mr. Videau violated supervised release by committing a new crime, with gang members, in a stay-away gang territory. Specifically, Mr. Videau was arrested for auto burglaries, firearm possession, and high capacity magazine possession, among other crimes. The government agreed to jointly recommended sentence of 24 months incarceration with no supervision to follow.
- *United States v. Diante Johnson*, 12-cr-00325-EMC, 13-cr-00799-001-EMC: Mr. Johnson was arrested with a new firearm while on supervised release in two federal cases. The government agreed to jointly recommend 12 months and one day for each violation, served concurrently, and let the state (Solano County) handle the new gun charge. The state court sentenced him concurrently to the violation and he served no additional time.

Defendants will agree to higher sentences when reasonable. For example, in *United States v. Jamar Jones*, 20-cr-00350-VC, the defendant was violated and arrested for his third federal firearms offense, for possessing a ghost gun with a high-capacity magazine, after surveillance video captured him shooting a firearm into another car from his car, then five days later officers responded to

another report of shots fired from his car and pursued Mr. Jones on a high-speed chase (during which he crashed into two parked cars). The government and the defense agreed to a sentence of 46 months on the new firearm possession charge and 14 months on the supervised release violation to run consecutively (the same sentence that U.S. Probation recommends in Mr. NAME' case[5]). Mr. NAME' case is quite the opposite—Mr. NAME was the *victim* of a shooting and was fully compliant in his arrest. Neither Mr. NAME' past struggles on supervision nor his remote criminal history bring him anywhere close to this level of danger or violence, and his sentence should reflect that.

A sentence of 36 months custody followed by 36 months of supervised release is a significant punishment in light of similarly situated defendants.

V. A Sentence of 36 Months Affords Adequate Deterrence, Especially During the COVID-19 Pandemic (18 U.S.C. §§ 3553(a)(2)(B) and (C))

In addition to the added deterrence of imprisonment for a new father, a sentence of 36 months now is also harsher than it would have been before the COVID-19 pandemic. Mr. NAME has been in custody since nearly the beginning of the pandemic, and it has drastically affected his incarceration and the deterrent effect of that incarceration. Mr. NAME is not permitted to receive any visitors, including his fiancée, young son, and stepdaughter. He is also particularly vulnerable to severe COVID-19 infection due to his congenital heart condition and asthma. *See* PSR ¶ 53.

The past year at Santa Rita Jail has been harrowing. Weeks are spent under quarantine, which means no meaningful access to counsel, no recreation, and living in constant fear of catching the virus. Most units have dozens of inmates living together, with two inmates to a cell. Access to personal hygiene items is limited with only those inmates of certain means able to purchase

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[5] In the PSR, U.S. Probation justifies their 60-month request by referring to his criminal history and deterrence. The Court should not rely on "numerous other arrests that did not lead to convictions" relied on by Probation. First, most arrests described would *not* have supported convictions. PSR ¶ 34-40. Second, they were from when Mr. NAME was 18 or younger, over 10 years ago. *Id*. Counsel does not minimize misconduct Mr. NAME was actually engaged in, however, the draft PSR included multiple instances where Mr. NAME' apprehension by police when he was a young boy was incredibly suspect and did not provide proof of any crime. Probation has provided many appreciated corrections and additional information. The following objections remain:

- **Paragraph 36**: Contraband hidden in the kitchen does not support Mr. NAME—a child, in a bedroom, seemingly not even a resident of the house—committing any crime.
- **Paragraph 37**: The report does not provide persuasive and reliable evidence that Mr. NAME committed a crime—it was not his car, drugs were not in his possession, and no evidence of sales.

commissary. The jail would not permit undersigned counsel or Mr. NAME' family to provide him with a KN95 or other protective mask; only the thin disposable masks provided by the jail are permitted. The existing protective measures are not enough to protect the population, as the ongoing outbreaks have demonstrated.

Additionally, the pandemic circumstances drastically reduces the overall standard of living, which is already abysmal at the jail. Personal visits are prohibited, but personal video conferencing is expensive and there are only two monitors available. *See* Alameda County Sheriff, Santa Rita Jail COVID-19 Outbreak Control Plan (October 28, 2020), https://alamedacountysheriff.org/files/COVIDPlan07302020.pdf. A few months ago, GTL—the video and phone provider—implemented a new system that is incompatible with iPhones, so Ms. Brown could not even video visit. For months, Mr. NAME' pod was confined to their cells for 20 hours per day, and in January that was increased to 22 hours per day in response to the worsening pandemic. Programming at the jail has been discontinued or limited. *Id*. Transfers from the jail to BOP facilities are also limited and subject to a case-by-case determination. Even if Mr. NAME is transferred to BOP, current conditions in prison facilities are also grim. Mr. NAME has been anxious and depressed under these condition, which essentially amount to solitary confinement.

In sum, this is an exceptionally difficult and dangerous time to serve a sentence. Time served now is much harder than under normal circumstances. The longer Mr. NAME remains in custody, the greater the risk to his health. Thus, Mr. NAME makes the request for a downward variance in consideration of the fact that it is a much harsher sanction than under normal circumstances.

VI. Mr. NAME Agrees to the Vast Majority of Recommended Conditions, with Limited Objections

Mr. NAME agrees to the majority of the recommended conditions of supervised release. However, the following two conditions are greater deprivations of Mr. NAME' liberty than necessary in this case.

First, the following language should be struck from the special search condition proposed by Probation: "or any property under your control, including any computers, cell phones, and other electronic devices." In *United States v. Bare*, 806 F.3d 1011 (9th Cir. 2015), the Ninth Circuit held

that search conditions that encompass computers should rest on a "properly supported factual finding from the record before [the district court], establishing some nexus between computer use and the need for the sentence imposed to accomplish deterrence, protection of the public, or rehabilitation of the defendant." *Bare*, 806 F.3d at 1013; *see also United States v. Lee*, 687 F. App'x 584, 586 (9th Cir.), cert. denied, 138 S. Ct. 216 (2017) (vacating and remanding same computer-search condition because "there is no evidence on the record establishing a nexus between computer use and the need for the sentence imposed to accomplish deterrence, protection of the public, or rehabilitation of [the appellant]") (citing *Bare,* 806 F.3d at 1013). Additionally, there are particular privacy concerns with data stored on cell phones ("minicomputers") distinct from searches of physical objects or property. *Riley v. California*, 573 U.S. 373, 393 (2014).

Second, the no alcohol condition recommended by Probation is not supported by the record. Mr. NAME has never had any problem with alcohol nor does he have a severe drug abuse problem. Mr. NAME used marijuana regularly in the past, but he was able to stop on his own during his last period of supervision. He will be tested to ensure that marijuana use is not a problem, but he should not be punished if he occasionally has a social drink.

CONCLUSION

For the aforementioned reasons, Mr. NAME respectfully requests the Court sentence him to 36 months custody for the new charge and eight months for the supervised release violation, to run concurrently, followed by three years of supervised released.