SupervisedReleaseandProbationMotions[2012]

I. THIS PETITION MUST BE DISMISSED DUE TO AN INVALID WAIVER OF THE RIGHT TO COUNSEL AND THE RIGHT TO A HEARING

II. THESE PROCEEDINGS MUST BE DISMISSED BECAUSE THIS COURT LACKS JURISDICTION UNDER 18 U.S.C. § 3583(I)

III. SUPERVISED RELEASE REVOCATION VIOLATES *APPRENDI* BECAUSE IT PERMITS INCARCERATION THAT IS NOT AUTHORIZED BY THE JURY'S VERDICT OR THE GUILTY PLEA

IV. THE COURT SHOULD SET A DATE FOR OSC AND ISSUE A WRIT OF HABEAS CORPUS AD PROSEQUENDUM

V. THE COURT SHOULD DISMISS THE OSC FOR FAILURE TO COMPLY WITH FEDERAL RULE OF CRIMINAL PROCEDURE 32.1

VI. RULE 32.1(b) REQUIRED THAT THE GOVERNMENT PRESENT NON-HEARSAY EVIDENCE TO SUPPORT THE PROBABLE CAUSE FINDING, AND THE MAGISTRATE JUDGE ERRED BY REFUSING TO REQUIRE AS MUCH

VII. EARLY TERMINATION OF PROBATION SHOULD BE GRANTED

VIII. THIS COURT SHOULD TERMINATE SUPERVISED RELEASE OR MODIFY THE CONDITIONS TO NON-SUPERVISED

SupervisedReleaseandProbationMotions[2012]

**I.**

**MOTION TO DISMISS THE PETITION DUE TO INVALID WAIVER OF THE RIGHT TO COUNSEL AND THE RIGHT TO A HEARING**

The conditions CLIENTNAME allegedly violated stem from modifications of CLIENTNAME's supervised release. *See* Exhibit B & C. The Court imposed these modifications without the benefit of a hearing, nor input from counsel for CLIENTNAME. Without a showing by the government that CLIENTNAME knowingly and voluntarily waived his right to counsel and a hearing regarding the modifications, this Court may not revoke Mr. CLIENTNAME's supervised release.

"Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1 (C)(1). These rights, codified in the federal rules, are constitutionally based. *See United States v. Stocks*, 104 F.3d 308, 310-12 (9th Cir. 1997) (The then-numbered "Rule 32.1(b) is founded on the constitutional principles announced and developed in" a number of Supreme Court cases.). Due process and the Sixth Amendment require that a person be afforded counsel and the right to be heard before any modification of their supervised release. *See id*.

Of course, a person may waive his rights to counsel and a hearing before a modification of supervised release is imposed. Fed. R. Crim. P. 32.1 (C)(2)(A); *Stocks*, 104 F.3d at 310. This waiver, however, must be knowing, intelligent and voluntary. *Stocks*, 104 F.3d at 312 ("Given the importance of these interests and the role [the then-numbered] Rule 32.1(b) plays in securing these interests in the probation modification context, the [then-numbered] Rule 32.1(b) rights at issue require the application to a waiver of the knowing, intelligent, and voluntary standard."). A court must find that any such waiver was knowing, intelligent and voluntary before proceeding on

a revocation premised on a modification that was ex parte or uncounseled. *See id*. at 310-12.

As of this date, the government has provided no evidence that CLIENTNAME knowingly, intelligently and voluntarily waived his rights to counsel and a hearing before his supervised release was modified. Such a waiver does not appear attached to the probation officer's requests to this Court to modify CLIENTNAME's supervised release.

Additionally, in its first request to modify CLIENTNAME's supervised release, the probation office makes no mention of CLIENTNAME's position on the modification. *See* Exhibit B. In contrast, the probation office's second request to modify CLIENTNAME's supervised release references that both the "probation office and CLIENTNAME" are requesting the modification. *See* Exhibit C at X. Although this second request for a modification falls short of demonstrating a knowing and voluntary waiver of CLIENTNAME's rights, it at least indicates that CLIENTNAME was consulted by probation regarding this proposed modification. No such assurance appears on the face of the probation office's first request for modification. *See* Exhibit B.

Unless and until the government demonstrates that CLIENTNAME knowingly, intelligently and voluntarily waived his right to counsel and a hearing before agreeing to any modification of his supervised release, this Court may not revoke CLIENTNAME's supervised release based on alleged violations of those modifications. *See Stocks*, 104 F.3d at 310-12.

**II.**

**THESE PROCEEDINGS MUST BE DISMISSED BECAUSE THIS COURT LACKS JURISDICTION UNDER 18 U.S.C. § 3583(i).**

Title 18 U.S.C. § 3583(i) provides:

> **Delayed revocation.** The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further

> term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

18 U.S.C. § 3583(i). Thus, the statute imposes two requirements for delayed revocation: (1) a "warrant" or "summons" must be issued before the term of supervised release expired; and (2) the delay between the end of the term of supervised release and the district court's revocation order must be reasonably necessary for the adjudication of the revocation issue. United States v. Garrett, 253 F.3d 443, 446 (9th Cir. 2001). Both of these requirements must be met for this Court to have jurisdiction to revoke an individual's supervised release.

**A. A Warrant Within the Meaning of Section 3583(i) Was Not Issued**

The first issue presented here is the meaning of "warrant" as used in section 3583(i). The statutory provision for warrants, 18 U.S.C. § 3046, refers to Rule 4 of the Federal Rules of Criminal Procedure. Rule 4 provides, in pertinent part, that an arrest warrant must be issued "[i]f the *complaint* or one or more *affidavits* filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it." Fed. R. Crim. P. 4(a). A complaint "must be made under oath," Fed. R. Crim. P. 3, as must an "affidavit," see Black's Law Dictionary 58 (6th ed. 1996). Indeed, the Fourth Amendment, which governs the constitutional requirements for the issuance of warrants, expressly states that "no warrant shall issue, but upon probable cause, *supported by Oath or affirmation*." U.S. Const. amend. IV (emphasis added).[1] Thus, a "warrant" under section 3583(i) must mean one issued based upon

[1]The Fourth Amendment plainly prohibits the issuance of warrants based upon unsworn assertions of fact. U.S. Const. Amend. IV. Accordingly, even if this Court has jurisdiction under section 3583(i), the issuance of the arrest warrant violated CLIENTNAME'S rights under the Fourth Amendment, Fifth Amendment right to due process, and the Federal Rules of Criminal Procedure. The failure of the U.S. Probation Office to swear to the veracity of the facts underlying an arrest warrant is a systemic problem in this District, and so, this Court should dismiss the Order

probable cause *and* supported by oath.

The Ninth Circuit affirmed this interpretation in United States v. Vargas-Amaya, 389 F.3d 901, 902 (9th Cir. 2004), that "a district court's jurisdiction to revoke supervised release can be extended beyond the term of supervision under §3583(i), based upon a warrant issued during the term of supervision, *only* if the warrant was issued 'upon probable cause, supported by Oath or Affirmation.'" (emphasis added). The Vargas-Amaya court adopted the plain meaning of "warrant" to mean "a document that is based upon probable cause and supported by sworn facts." Id. at 904.

Here, the facts set forth in the Petition for Warrant or Summons for Offender Under Supervision were not sworn under oath. (See Defense Exh. C.) Thus, the court order for the issuance of an arrest warrant signed by JUDGE on DATE (hereinafter Exhibit X.) did not comply with the requirements of the Fourth Amendment and Fed. R. Crim. P. 4 because it was not based on a statement of probable cause supported by oath or affirmation. As such, the court order is improper and the arrest warrant issued by the DISTRICT does not qualify as a warrant as contemplated by section 3583(I), or the Ninth Circuit in Vargas-Amaya. 389 F.3d at 902. Consequently, because a "warrant" was not issued within the supervision period, section 3583(i) is inapplicable and does not extend jurisdiction, and this Court therefore lacks jurisdiction to revoke supervised release. Id.; United States v. Hazel, 106 F. Supp.2d 14 (D.D.C. 2000) (finding no jurisdiction under section 3583(i) because order requesting defendant's voluntary attendance at revocation hearing was not a "summons").

**B. CLIENTNAME's Supervision Terminated As Scheduled on DATE**

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to Show Cause to force the Probation Office to re-evaluate its practices in revocation matters.

SupervisedReleaseandProbationMotions[2012]

CLIENTNAME's supervision commenced on DATE. (See EX X.) Since the arrest warrant issued by the DISTRICT was invalid under the Fourth Amendment, as well as Ninth Circuit law pursuant to Vargas Amaya, CLIENTNAME's supervision continued without incident and terminated as scheduled on DATE. Although the DISTRICT transferred jurisdiction of the matter over to the Southern District on DATE, no valid arrest warrant ever issued during the term of CLIENTNAME's supervision to give this Court jurisdiction over the matter.

**C. CLIENTNAME's Supervision Was Not Tolled by His Pre-Trial Detention**

While Probation's revocation petition argues that the term of CLIENTNAME's supervision was tolled from his initial arrest in the Southern District of California on DATE to his release date of DATE, the Probation Department misconstrues the meaning of 18 U.S.C. § 3624(e) and inexplicably ignores the established Ninth Circuit case law. The Ninth Circuit has concluded that "pretrial detention does not constitute an 'imprisonment' within the meaning of § 3624(e) and thus does not operate to toll a term of supervised release." United States v. Morales-Alejo, 193 F.3d 1102, 1106 (9th Cir. 1999). The Ninth Circuit reasoned in Morales-Alejo that "[pretrial detention does not fit this definition [of "imprisonment"], because a person in pretrial detention has not yet been convicted and might never be convicted." Id. at 1105. Therefore, CLIENTNAME's supervision was not tolled because his pretrial detention does not constitute "imprisonment" within the meaning of § 3624(e). Id. at 1106.

Moreover, even if this Court were to calculate the tolling of CLIENTNAME's Supervision from the date of his guilty plea on DATE, this does not toll the supervised release term. The Ninth Circuit reasoned in Morales-Alejo that "[t]he entry of a guilty plea does not guarantee an ultimate conviction, because the plea may be withdrawn under a variety of circumstances." Morales-Alejo at 1105. Thus, under Morales-Alejo, the Court should look to the date defendant was received by

the Bureau of Prisons for the purpose of calculating the tolling provisions of § 3624(e). Id. at 1106 n.3 (noting that "[t]he tolling question might remain unresolved even after entry of a judgment of conviction, because computation of credit for pretrial detention is not performed at the sentencing phase but rather after the defendant is received by the Bureau of Prisons.") Therefore, in accordance with the Ninth Circuit's conclusions in Morales-Alejo, CLIENTNAME's supervision was never tolled because he was not received by the Bureau of Prisons until DATE, over three months after the expiration of his Supervision on DATE. (EX X). Hence, CLIENTNAME's Supervision terminated without incident on DATE and this Court does not have jurisdiction to revoke his supervised release.

**D. The Government's Delay in Executing the Warrant Was Not Reasonably Necessary**

Even assuming a valid warrant for CLIENTNAME's arrest was issued prior to the expiration of his term of supervised release, the delay in executing the warrant was not reasonably necessary to the adjudication of his alleged supervised release violations. Therefore, this Court lacks jurisdiction over Mr. CLIENTNAME's petition.

In United States v. Garrett, 253 F.3d 443 (9th Cir. 2001), the court interpreted the meaning of "reasonably necessary" as it appears in 18 U.S.C. § 3583(i). The Ninth Circuit recognized that a "reasonably necessary delay" is not the same as a "reasonable delay," and thus, the government must have some "necessity" before it can extend a defendant's term of supervised release. See id. at 449; see also United States v. Dworkin, 70 F. Supp. 2d 214 (E.D.N.Y. 1999) (holding that the government must articulate some reason why it is necessary to delay revocation proceedings). Nevertheless, the Ninth Circuit in Garrett found that a delay of just over a month-and-a-half between the defendant's release from state custody and his *final* hearing on revocation of his federal term of supervised release was "reasonably necessary" because (1) in order to execute the

warrant any earlier the government would have been required to writ the defendant out of state custody and into federal custody, and (2) the government immediately executed the warrant upon the defendant's release from state custody. 253 F.3d at 450. The court specifically noted that requiring the government to writ the defendant out of state custody and into federal custody to answer a violation warrant would be burdensome in most cases. Id.

The present case is unlike Garrett because CLIENTNAME was already in federal custody, and the DISTRICT had specifically transferred jurisdiction over the matter to the Southern District of California to preserve judicial resources on DATE. (EX X.) Thus, the government was not required to writ CLIENTNAME out of state custody and into federal custody, as in Garrett. Additionally, the Southern District was expressly granted jurisdiction over the matter on DATE in order to deal with the matter expeditiously, which the government failed to do by waiting for CLIENTNAME to finish his term of federal incarceration before petitioning for the issuance of an arrest warrant. Furthermore, in the interim of time between when the Southern District was granted the transfer of jurisdiction and when the government finally petitioned for an arrest warrant, CLIENTNAME's supervision expired.

As was the case in United States v. Dworkin, the government offers no "necessity" for this prejudicial delay. Dworkin, 70 F. Supp. 2d at 216-17. The government's refusal to petition for an arrest warrant for over a year and a half was not reasonably necessary to the adjudication of CLIENTNAME's alleged violations. Therefore, this Court must dismiss the allegations for lack of jurisdiction under 18 U.S.C. § 3583(i).

**E. CLIENTNAME Does Not Have to Show Prejudice, Although He Was Prejudiced by the Delay**

CLIENTNAME does not need to demonstrate prejudice from the government's delay. In Garrett, the Ninth Circuit confirmed that 18 U.S.C. § 3583(i) is jurisdictional. Garrett, 253 F.3d.

at 449. As such, prejudice is not required. See United States v. Tran, 234 F.3d 798, 809 (2d. Cir. 2000) ("Because the defect is jurisdictional, it cannot be cured by the absence of prejudice to the defendant"); United States v. Harris, 149 F.3d 1304, 1308-1309 (11th Cir. 1998) (holding that because jurisdictional defects are nonwaivable, a defendant is not required to show cause and prejudice). In addition, the statute itself explicitly provides the inquiry to be applied, and it nowhere mentions prejudice. See 18 U.S.C. § 3583(I).

Regardless, CLIENTNAME was prejudiced by the government's delay. EXPLAIN PREJUDICE.

**F. The Court Has No Jurisdiction to Revoke CLIENTNAME's Supervised Release, Because The Allegations Are of Newly Discovered Evidence of CLIENTNAME's Previously Revoked Supervised Release.**

This Court may not revoke a future term of supervised release based on newly discovered violations of CLIENTNAME's past term of supervised release. See United States v. Wing, 682 F.3d 861 (9th Cir. 2012). 18 U.S.C. §3583 establishes separate and distinct terms of supervised release that may be imposed–each with its own start and end date. Id. at 864-65. Once a term has been revoked, if it is later discovered that a condition of that term was violated, the violation cannot form the basis for revoking a subsequent term of supervised release. Id. at 865.

Accordingly, because the allegations in the petition constitute violations of CLIENTNAME's previously revoked supervised release, this Court may not revoke CLIENTNAME's current term of supervised release on this basis.

## III.

## SUPERVISED RELEASE REVOCATION VIOLATES *APPRENDI* BECAUSE IT PERMITS INCARCERATION THAT IS NOT AUTHORIZED BY THE JURY'S VERDICT OR THE GUILTY PLEA

SupervisedReleaseandProbationMotions[2012]

## A. Introduction[2]

The supervised release regime is unconstitutional in that the facts necessary to revoke a term of supervised release and impose imprisonment are facts neither alleged in an indictment nor inherent in a jury's verdict or a guilty plea, and they need only be established by a preponderance of evidence, not beyond a reasonable doubt. This judicial fact-finding without these protections is a violation of the Apprendi v. New Jersey, 530 U.S. 466 (2000), line of cases.

Although the Ninth Circuit rejected a similar argument in United States v. Huerta-Pimental, 445 F.3d 1220 (9th Cir. 2006), this Court is not bound by the decision because intervening Supreme Court authority -- Cunningham v. California, 549 U. S. 270, 127 S. Ct. 856 (2007) -- has undercut the theory and reasoning of the decision. See Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc). In short, Cunningham explicitly rejects Huerta-Pimental's theory that the discretion not to imprison a supervised release violator somehow ameliorates Apprendi concerns arising from judicial fact finding of revocation facts. Accordingly, Huerta-Pimental is not binding precedent.

## B. The Supervised Release Revocation Procedures Set Forth in 18 U.S.C. _ 3583(e)(3) Violate Core Apprendi Values Because They Permit the Imposition of Imprisonment Without an Indictment and Without a Jury Finding Beyond a Reasonable Doubt.

In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court reaffirmed its "holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 543 U.S. at

[2] The defense acknowledges that the Ninth Circuit held in United States v. Santana, 526 F.3d 1257, 1262 (9th Cir. 2008), that Huerta-Piminetal was unaffected by Cunningham, but raises the argument here to preserve the issue for further review.

244. At the time of CLIENTNAME's guilty plea, the facts that he admitted established several maxima: time in prison, amount of any fine, time on *non-custodial* supervised release, and amount of the special assessment. But that plea did not authorize the court to require petitioner to serve even one day of supervised release *in prison*; the determination that authorized that punishment necessitated further factual findings, findings made by a judge, without a jury, under a lower standard of proof and without the benefit of an indictment. In other words, the question of whether any portion of the term of supervised release may be served *in prison* was not determined in compliance with Booker and Apprendi.

While supervised release creates a sentencing regime unknown at common law, that is no impediment to applying Apprendi. Cf. Booker, 543 U.S. at 237 (the Apprendi line of cases addresses "the issue of preserving an ancient guarantee under a new set of circumstances").[3] Supervised release is largely discretionary, imposed after consideration of the same factors courts consider in imposing the sentence as a whole. See id. at 259-60 (requiring that courts impose sentence under 18 U.S.C. _ 3553(a)); 18 U.S.C. __ 3583(a), (c) (requiring consideration of almost all the same factors in imposing supervised release). Upon revocation of supervised release, the

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[3] Justice Stevens' majority opinion powerfully discusses the need to apply these "ancient guarantees" to modern innovations.

> The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in Jones v. United States, 526 U.S. 227 (1999) and developed in Apprendi and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

Booker, 543 U.S. at 237.

district court is permitted to "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense," 18 U.S.C. _ 3583(e)(3), subject to certain maxima applicable to the various "classes" of felonies. See, e.g., id. (maximum of 5 years for a class A felony, 3 years for a class B felony, etc.). See also 18 U.S.C. _ 3583(g) (making revocation mandatory in the case of violation of certain conditions of supervised release). Thus, the maximum term of supervised release to be served *in prison* is available only upon a finding of the revocation fact, and *Booker* makes clear that any such fact is subject to the rule in Apprendi. See 543 U.S. at 244.

"[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . ., and the judge exceeds his proper authority." Blakely v. Washington, 542 U.S. 296, 303-04 (2004) (citation omitted) (emphasis in original). Without "finding additional facts," a district court has no authority to require the service of supervised release in prison. Section 3583(e)(3) permits the district court to find the fact of violation, a fact "'which the law makes essential to the punishment'" of requiring the service of supervised release in prison. See id. The revocation procedures thus plainly run afoul of Blakely. Apprendi makes clear that the facts that determine the maximum punishment must be established through constitutionally adequate procedures. In federal court, that means grand jury indictment, see United States v. Cotton, 535 U.S. 625, 627 (2002), proof beyond a reasonable doubt, see Booker, 543 U.S. at 230, and the right to jury trial. See id.

But revocation of supervised release is accompanied by only minimal statutory protections. There is no right to a grand jury indictment. Instead, the defendant in a revocation proceeding is

entitled to only a preliminary hearing before a judge. See 18 U.S.C. _ 3583(e)(3) (incorporating the Federal Rules of Criminal Procedure); Fed. R. Crim. P. 32.1(b)(1) (right to a preliminary hearing, not presentation to a grand jury). Similarly, there is neither a right to a jury determination nor the right to proof beyond a reasonable doubt. See 18 U.S.C. _ 3583(e)(3) ("the court" makes findings "by a preponderance of the evidence"); Fed. R. Crim. P. 32.1(b)(2) (revocation hearing before "the court").

The end result of a revocation is this: after the district court (the wrong decision maker) finds facts by a preponderance of the evidence (the wrong standard) that are charged by the district court through its probation officer (the wrong accuser) in a petition for warrant or summons (the wrong charging instrument), it imposes a sentence that is not authorized by the jury's verdict or the guilty plea: a term of supervised release in prison.

**C. The Court Is Not Bound to Follow Huerta-Pimental Since Its Reasoning Has Been Rejected by the Supreme Court in Cunningham.**

Where the law changes or a new *en banc* Ninth Circuit or Supreme Court decision calls into question the validity of a prior decision, this Court is not bound by the previous panel's determination. Miller, 335 F.3d at 900. In fact, this Court has a duty to follow the intervening authority. Id.; United States v. Orso, 266 F.3d 1030, 1035-40 (9th Cir. 2001) (en banc), overruled on other grounds, Missouri v. Seibert, 542 U.S. 600 (2004).

This Court is not bound by the previous holding in Huerta-Pimental, because intervening Supreme Court authority has overruled it. The Ninth Circuit in Huerta-Pimental held that § 3583 is constitutional under Apprendi, Blakely, and Booker. 445 F.3d at 1221. Essential to the holding in Huerta-Pimental was the premise that revocation of supervised release and subsequent imposition of a term of imprisonment is a discretionary act by the sentencing court. Id. at 1224. The Court concluded that because the sentencing judges may use their discretion to revoke

supervised release or to impose a term of imprisonment, the regime "fails to engage Apprendi." Id. at 1224. This Court further pointed out that because the Supreme Court held that the advisory federal guidelines do not raise constitutional concerns, it follows that the discretionary supervise release regime also avoids these concerns. Id.

The Supreme Court in Cunningham flatly rejected the Huerta-Pimental reasoning and instead emphatically held that "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of [the Supreme Court's] decisions." 127 S. Ct. at 869. In Cunningham, the Supreme Court was asked to determine whether California's determinate sentencing law (DSL) -- which allows trial judges, not the jury, to find facts that expose a defendant to an elevated upper term sentence -- violates a defendant's rights under the Apprendi line of cases. The Cunningham Court answered that it does. Id. at 868. The Court reaffirmed "Apprendi's bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Id. (citing Apprendi, 530 U.S. at 490).

The Court noted that while "that should be the end of the matter" the California Supreme Court decision in People v. Black, 35 Cal. 4th 1238 (2005) held otherwise and found no Apprendi violations to the California sentencing law. Id. Specifically, the Black court erroneously reasoned, like the Huerta-Pimental Court, that there was no constitutional concern because the sentencing scheme "afforded the sentencing judges the *discretion to decide*, with the guidance of the rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence." Id. at 869 (citing Black, 35 Cal. 4th at 1256) (emphasis added). The Black court, like the Huerta-Pimental Court, equated California's DSL system to the post-Booker federal

system noting that the discretion exercised by the California judges appeared to be comparable to the discretion allowed in Booker. Id. at 869-70 (citing Black, 35 Cal. 4th at 1261).

SupervisedReleaseandProbationMotions[2012]

The Supreme Court disagreed. Contrary to Booker, DSL allows judges to increase a sentence above the sentence supported by the jury verdict, based solely on judicial fact-finding under a lower standard of proof. Cunningham, 127 S. Ct. at 870. Even though the decision to enhance is discretionary, a judicial factual finding is a necessary predicate to the invocation of the discretionary authority. The Cunningham Court concluded that because DSL authorizes the judge, not the jury, to find facts permitting an enhanced sentence, the system cannot withstand the Court's precedent regardless of the discretionary nature of the law. Id. 870-71. Like the DSL, the revocation scheme conditions the discretion to revoke and imprison on judicial fact finding.

Similar to the California DSL, the supervised release regime provides discretion to the sentencing judges to increase a term of imprisonment beyond that authorized by an indictment and a defendant's plea or jury verdict supported by proof beyond a reasonable doubt. Similar to the California DSL, the supervised release revocation regime does not survive Cunningham; it suffers from the identical constitutional flaw that afflicts the DSL: the discretion to increase the punishment turns on a fact not found under Apprendi procedures. The Supreme Court makes clear that regardless of whether the sentencing court exercises discretion, a term of imprisonment cannot be enhanced without the Apprendi protections. Id. at 769. Thus, the decision in Huerta-Pimental can no longer be binding precedent. As such, incarceration of CLIENTNAME upon revocation of supervised release is unconstitutional.

## IV.

## THE COURT SHOULD SET A DATE FOR OSC AND ISSUE A WRIT OF HABEAS CORPUS AD PROSEQUENDUM

### A. Revocation or Modification Proceedings Should Occur As Soon As Possible to Preserve Evidence and Witness Availability

Federal Rule of Criminal Procedure 32.1 grants defendants in revocation or modification

cases the right to representation by counsel, to a preliminary examination, to appear at the preliminary examination and hearing, to present evidence on their behalf, and to question adverse witnesses.

Defendant's right to present his case will be prejudiced by waiting months, and in this case as many as 24 months, before his OSC hearing date. Evidence may become stale and witnesses may become unavailable. The government will not be prejudiced if this court exercises its discretion to hold the OSC hearing as soon as possible. This will minimize the possibility of loss of evidence or witnesses.

**B. Revocation or Modification Proceedings Should Occur As Soon As Possible to Assure the Court Maintains Its Discretion to Run a Federal Sentence Concurrently with a State Sentence**

**1. The Court Has Discretion to Run a Federal Sentence for a Supervised Release Violation Concurrently With a State Sentence.**

If this court does determine a sentence is warranted for the alleged violation, Section 3584 of Title 18 allows the court to run the federal sentence concurrently with an undischarged state sentence. That provision states: "If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run consecutively or concurrently, except that the terms may not run consecutively for an attempt or for another offense that was the sole objective of the attempt." 18 U.S.C. § 3584. As CLIENTNAME currently is subject to an undischarged sentence, the statute provides that the court has the discretion to run any federal sentence concurrently with a state sentence.

**C. Mr. CLIENTNAME Will Be Prejudiced If He Can Not Adjudicate His Case Prior to the Completion of His State Sentence.**

If Mr. CLIENTNAME is given no federal sentence at all for his alleged violation of

supervised release, or if the court imposes a sentence concurrent to his state sentence that will be completed prior to the end of his state sentence, he will be free to return home at the end of his state sentence. Otherwise, he will go directly into federal custody at the end of his state sentence and remain in custody at least until the Order to Show Cause is adjudicated. This will involve being arraigned before a magistrate judge in the Southern District of California, and remaining imprisoned at least until the court determines what, if any, sentence he will face for the alleged violation of supervised release.

**D. The Due Process Clause of the United States Constitution and Federal Rule of Criminal Procedure 32.1 Demand That CLIENTNAME Be Writted over into Federal Custody And Allowed to Proceed with the Adjudication of His Case.**

The Due Process Clause applies in revocation and modification hearings. See Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973). It violates CLIENTNAME's due process rights to allow the government to subvert this court's ability to grant him a concurrent sentence just by its failure to bring CLIENTNAME into federal custody. Further, if the court were to writ him over immediately, CLIENTNAME may be able to avoid further custody after his state sentence ends. Denying this opportunity for no reason is arbitrary and denies due process.

Even if the loss of the possibility of a concurrent sentence and the loss of the opportunity to avoid unnecessary incarceration do not each constitute due process violations standing alone, these factors, along with the possibility of lost evidence, lost witnesses, and the loss of speedy adjudication without reason violate the Due Process clause of the Constitution.

Finally, Rule 32.1 of the Federal Rules of Criminal procedure states that Revocation or Modification hearings must be held "within a reasonable time in the district of jurisdiction." For all the reasons stated in this memorandum, waiting for CLIENTNAME's state sentence to conclude before holding the hearing is not reasonable, and is prejudicial.

**E. This Court Should Exercise Its Discretion to Writ CLIENTNAME into Federal Custody And Set an Imminent Court Date for Adjudication of the Order to Show Cause.**

The Supreme Court has often acknowledged that a defendant may move for a writ of habeas corpus ad prosequendum. See Dickey v. Florida, 398 U.S. 30, 32 (1970); Bandy v. United States, 82 S.Ct. 11, 13 (1961). CLIENTNAME respectfully requests that this Court exercise its discretion to grant the writ. In doing so, the Court would insure the case is properly and quickly adjudicated, that evidence is not lost**,** that the Court's jurisdiction is not limited, that CLIENTNAME does not face unnecessary prejudice and burden, that the Congressional intent in Section 3584 is realized, and that CLIENTNAME is not deprived of his rights under Section 3584, the United States Constitution, and Rule 32.1 of the Federal rules of Criminal Procedure.

**V.**

**THE COURT SHOULD DISMISS THE OSC FOR FAILURE TO COMPLY WITH FEDERAL RULE OF CRIMINAL PROCEDURE 32.1**

**A. Two Rule 32.1 Violations Warrant Dismissal**

Federal Rule of Criminal Procedure 32.1 has two provisions that require dismissal of the OSC. First, Rule 32.1(a) states that a "person held in custody for violating probation or supervised release must be taken without unnecessary delay before a magistrate judge." (Emphasis added.) Rule 32.1(a)(1)(B) makes clear that in this case that should have occurred in the district of arrest, the BLANK District of STATE. This requirement of Rule 32.1 was clearly violated, because CLIENTNAME was arrested on DATE, and was held on the outstanding federal warrant, but was not taken before a magistrate judge until DATE -- over a month later.

Second, Rule 32.1(b)(1)(A) requires that if a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. As discussed

below, that hearing has not yet occurred within the requirements of Rule 32.1(b). However, even assuming the DATE hearing before Magistrate Judge NAME did meet the requirements of Rule 32.1(b), and even excusing the delay due to getting CLIENTNAME to San Diego from STATE, there was still a twenty-day delay from his arrival here until the probable cause hearing.

Although Rule 32.1 does not define "prompt," Rule 5.1, which governs preliminary hearings based upon new charges, is instructive. Rule 5.1(c) requires that a preliminary hearing based on new charges be held "within a reasonable time, but not later than 10 days after the initial appearance." (Emphasis added.) Surely the "prompt" requirement off Rule 32.1 is shorter than the "reasonable time" requirement of Rule 5.1, yet the preliminary hearing in this case was delayed for at least twenty days, and arguably has yet to occur as envisioned by Rule 32.1(b) (as addressed below).

The violations addressed above are analogous to violations of Rules 5 and 5.1, and the Speedy Trial Act, all of which compel dismissal in similar circumstances. See 18 U.S.C. §3162(a) (compelling dismissal due to pre-indictment delay); United States v. Osunde, 638 F. Supp. 171, 176-77 (N.D. Cal. 1986) (holding that dismissal appropriate based on government's failure to comply with Rule 5(a)(1)'s requirement that person arrested be brought before magistrate judge "without unnecessary delay"); Rule 5.1(c) and (f) (indicating that preliminary hearing "must" be held within ten days, and that failure to find probable cause within parameters of the Rule compels dismissal). Moreover, Rule 32.1 makes clear that the remedy for failure to meet its requirements is dismissal. See, e.g., Rule 32.1(a)(1) & (5) (magistrate should dismiss if government fails to meet requirements for removal proceedings); Rule 32.1(a)(5)(A)(ii) (magistrate should dismiss if government fails to show probable cause as required by Rule). Finally, barring dismissal, there is no effective remedy. Accordingly, dismissal is the appropriate remedy here.

SupervisedReleaseandProbationMotions[2012]

**B. The Magistrate Judge Could And Should Have Dismissed the Petition And OSC**

Without any discussion or comment, Magistrate Judge NAME took the position that she could not rule on the motion to dismiss based on violations of Rule 32.1. This conclusion is unsupportable in light of the statutory authority granted to magistrate judges, the local criminal rules, and Rule 32.1 itself.

Section 636(a)(1) of Title 28 of the United States Code indicates that a magistrate judge "shall have . . .all powers and duties conferred or imposed . . . by the Rules of Criminal Procedure for the United States District Courts." In addition, Section 636(b)(3) indicates that a "magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." In providing for such other duties, Local Rule 57.4.c.4 indicates that magistrate judges are authorized to "conduct necessary proceedings leading to the potential revocation of probation," and Rule 57.4.c.10 authorizes magistrate judges to "[g]rant motions to dismiss in criminal cases . . . when authorized by statute or rule and when such dismissal is within the jurisdiction of the magistrate judge . . . ."

With the above statutory and local rules as background, it is apparent that Magistrate Judge NAME had the power to entertain the motion to dismiss for violations of Rule 32.1, and the duty to dismiss if she found such a violation. That power and duty is explicit and implicit throughout Rule 32.1 For example, with respect to a person arrested in a district without jurisdiction, an arrested supervisee "must be taken without unnecessary delay before a magistrate judge," and the government must make certain showings. See Fed. R. Crim. P. 32.1(a)(1) & (5). If the government does not do so, the magistrate judge must dismiss the proceedings. See Fed. R. Crim. P. 32.1(a)(5)(A)(ii). Similarly, "if a person is in custody for violating a condition of . . . supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable

cause to believe that a violation occurred." See Fed. R. Crim. P. 32.1(b)(1)(A). "If the judge does not find probable cause, the judge must dismiss the proceedings." Of course, if the magistrate judge has the power to dismiss after holding a hearing to determine if there is probable cause, the magistrate judge must also have the power to dismiss if that hearing is not even held in accordance with the rule: the greater power implies the lesser power. Moreover, the language of the enabling statute and Rule 32.1 indicate that not only did Magistrate Judge NAME have the power the entertain CLIENTNAME's motions to dismiss, she also had the duty to do so, and the obligation to dismiss if she found a violation. This Court should dismiss the petition and OSC. Moreover, there is no doubt that this Court has the authority to dismiss based on the violations of Rule 32.1.

## VI.

## RULE 32.1(b) REQUIRED THAT THE GOVERNMENT PRESENT NON-HEARSAY EVIDENCE TO SUPPORT THE PROBABLE CAUSE FINDING, AND THE MAGISTRATE JUDGE ERRED BY REFUSING TO REQUIRE AS MUCH

### A. The Basic Requirements for a Supervised Release Revocation Proceeding Preliminary Hearing

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court defined certain minimum due process requirements for parole revocation proceedings. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held that those requirements also apply to probation revocations. In 1979, Federal Rule of Criminal Procedure 32.1 was created to codify Morrissey and Gagnon, and the 1989 amendments extended those requirements to supervised release proceedings. See United States v. Comito, 177 F.3d 1166, 1170 (9th Cir. 1999) (discussing the above described genesis of Rule 32.1).

In analyzing what process is due in revocation proceedings, the Supreme Court in

Morrissey noted that there are two distinct phases of such proceedings: (1) the arrest of the parolee and the preliminary hearing; and (2) the revocation hearing. 408 U.S. at 485. As to the former -- at issue here -- the Supreme Court held "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." Id. "Such an inquiry should be in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Id. The Court also noted that the hearing should be held before an independent officer, that officer shall make a record of what occurs, and the officer should state reasons for her ultimate probable cause determination, including the evidence relied upon. Finally, the Court set out basic procedural requirements for the preliminary hearing:

> [T]he parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

408 U.S. at 486-87.

As set out above, and as the 1979 Advisory Committee Notes make clear, Rule 32.1 was written to codify the requirements of Morrissey and Gagnon.[4] The portion of that rule dealing with the preliminary hearing, 32.1(b)(1), states:

> **Preliminary Hearing.**
>
> **(A) In General.** If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing.
>
> **(B) Requirements.** The hearing must be recorded by a court reporter or by a suitable recording device. The judge must give the person:
>
> > **(i)** notice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel;
> >
> > **(ii)** an opportunity to appear at the hearing and present evidence; and
> >
> > **(iii)** upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.
>
> **(C)** If the judge finds probable cause, the judge must conduct a revocation hearing. If the judge does not find probable cause, the judge must dismiss the proceeding.

## B. CLIENTNAME Was Entitled to Confront the Alleged Witnesses Against Him

The right to confront witnesses during a revocation proceeding is mostly based in the due process clause, and was incorporated into Rule 32.1(b)(i)(B)(iii). In Comito, the Ninth Circuit

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[4]The Rule seems to have failed to codify Morrissey in some respects, however. For instance, Morrissey says a releasee's right to confront a witness may be limited if there is a need to protect the identity of an informant, but Rule 32.1(b)(1) broadens the court's power to deny confrontation rights, stating the court may do so in "the interest of justice." In addition, Morrissey makes clear that in determining probable cause, a judge should make clear the reasons for her decision and the evidence relied upon; Rule 32.1(b) does not contain such a requirement. Naturally, the constitution trumps the Rule.

noted that "[u]nder Morrissey, every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses." 177 F.3d at 1170.[5] The Ninth Circuit has held that "in determining whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the government's good cause for denying it." Comito, 177 F.3d at 1170. In assessing the releasee's interest, the Ninth Circuit has looked to non-exclusive factors such as the importance of the hearsay evidence to the court's revocation decision, the nature of the facts to be proven by the hearsay evidence, and the consequences of the court's findings. Id. at 1171; United States v. Martin, 984 F.2d 308, 311-12 (9th Cir. 1993). The Ninth Circuit has also noted that a releasee's interest in confronting an accuser may be strengthened by the nature of the disputed hearsay evidence: "[u]nsworn verbal allegations are, in general, the least reliable type of hearsay, and the particular utterances at issue here bore no particular indicia of reliability." Comito, 177 F.3d at 1171; see also Valdivia v. Schwarzenegger, 548 F. Supp. 2d 852 (N.D. Cal. 2008) (enforcing Comito balancing in parole revocation proceedings).

On the other side of the balance -- the government's claim of good cause -- the Ninth Circuit has looked to factors such as difficulty and expense in procuring witnesses, and the reliability of the proposed testimony. See United States v. Walker, 117 F.3d 417, 420 (9th Cir.

[5]As touched on above, Rule 32.1(b)(1) and Comito misstate Morrissey in this regard. The language in Morrisey makes clear that the government is only excused from presenting an accusing witness during revocation proceedings if the court "determines that an informant would be subjected to risk of harm if his identity were disclosed." Morrissey, 408 U.S. at 487. Given this, the Ninth Circuit balancing test below is arguably wrong, although it leads to the same outcome in this case as would be required by following the language in Morrissey.

1997); Martin, 984 F.2d at 312.[6]

Given the parameters set out above, CLIENTNAME had the right to confront the witnesses that allegedly accuse him in this case. The allegations themselves are hearsay. Moreover, "[t]he reason for requiring a preliminary hearing [is] that the conditional liberty of a probationer or parolee, like the more complete liberty of others, cannot constitutionally be infringed without probable cause." United States v. Sciuto, 531 F.2d 842, 846 (7th Cir. 1976). Thus, all three factors set out in Comito are implicated: (1) the court based its probable cause determination on the hearsay allegations; (2) the facts "proven" by the hearsay allegations were the basis for finding probable cause; and (3) the consequence is the on-going deprivation of liberty.

On the other hand, the government has no legitimate interest in denying CLIENTNAME his confrontation right. Accordingly, the failure to hold a proper preliminary hearing at which that right was respected compels dismissal.

## VII.

## EARLY TERMINATION OF SUPERVISED RELEASE SHOULD BE GRANTED

### A. Early Termination of Probation Is Authorized under the Statute and Federal Rules of Criminal Procedure.

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[6]As indicated, the "indicia of reliability" factor crops up in assessing both the releasee's and the government's interests. See Comito, 177 F.3d at 1171; United States v. Walker, 117 F.3d 417, 420 (9th Cir. 1997); Martin, 984 F.2d at 312. Of course, the Supreme Court recently rejected the Ohio v. Roberts, 448 U.S. 56 (1980), "indicia of reliability" test for permitting introduction of testimonial hearsay statements against a defendant. See Crawford v. Washington, 124 S. Ct. 1354 (2004). The language of the opinion in Crawford is ambiguous as to whether the confrontation right discussed therein applies at all stages of a criminal prosecution, but there is a great deal of language suggesting that the confrontation right does so extend. See, e.g., Crawford, 124 S. Ct. at 1363 (citing to cases rendered shortly after ratification of the constitution that indicate that *ex parte*, testimonial statements are "incompetent," and may not be used to "prejudice" a defendant). The reason for the confrontation clause right supports such a conclusion as well. However, since CLIENTNAME's due process/Rule 32.1(b) confrontation right in this case covers the same practical ground, the court need not reach whether the confrontation clause is also implicated.

SupervisedReleaseandProbationMotions[2012]

Both the statute regarding probation and the Federal Rules of Criminal Procedure contemplate and allow the early termination of probation. Congress allowed early termination of probation at 18 U.S.C. § 3564(c):

> **Early Termination**.--The court may, after considering the factors set forth in § 3553(a) to the extent that they are applicable, may, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, terminate a term of probation previously ordered and discharge the defendant . . . at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

Federal Rule of Criminal Procedure 32.1(c) sets out the procedure to be followed when either party seeks a modification in the probation or supervised release term.

A hearing and assistance of counsel are required before the terms or conditions of probation or supervised release can be modified, unless the relief to be granted to the person on probation or supervised release is favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected.

Therefore, in a case like this, where the defendant is seeking early termination of his probation, the court may grant the request even without a hearing, if the government does not object.

## B. The 18 U.S.C. § 3553 Factors Weigh in Favor of Early Termination of Supervised Release.

The statute directs the court to examine the § 3553 factors in determining whether probation should be terminated. Those factors include the nature and circumstances of the offense; the defendant's history and characteristics; the need for deterrence; the need to protect the public from future crimes; the need to give the defendant training or treatment; the applicable Guidelines; policy statements regarding the Guidelines; and the need to avoid unwarranted sentencing disparities among similarly situated defendants.

SupervisedReleaseandProbationMotions[2012]

In this case, CLIENTNAME specific facts.

**C. Defendant's History.**

CLIENTNAME (case specific facts).

**D. Deterrence.**

CLIENTNAME clearly has been deterred from future criminal conduct since he has committed no other crimes during the term of probation.

**E. Protection.**

Again, the public has been protected from future crimes: CLIENTNAME has not committed any crimes since his arrest in this case, and he shows no signs of sliding back into criminal conduct. CLIENTNAME has always performed perfectly while on probation, and even paid his restitution in full in less than one year.

**F. Rehabilitation.**

As mentioned above, CLIENTNAME has paid back his restitution in full. Due to his stellar compliance with probation, the goal of rehabilitation has been satisfied.

**G. The United States Already Has Achieved the Goals of Probation in CLIENTNAME's Case.**

The goal of probation is to monitor a defendant's behavior to make sure that he does not commit any new crimes. Because CLIENTNAME has been involved in no additional criminal conduct and has complied with all of the conditions of supervised release imposed by the Court, that goal has been achieved.

## VIII.

## THIS COURT SHOULD TERMINATE SUPERVISED RELEASE OR MODIFY THE CONDITIONS TO NON-SUPERVISED

Courts have the authority to modify the conditions of a term supervised release pursuant to

18 U.S.C. § 3583(e). See United States v. Miller, 205 F.3d 1098 (9th Cir. 2000) (holding that district court may modify any portion of fine for which payment is an express condition of supervised release under 18 U.S.C. § 3583(e)(2)). Where a favorable modification is sought, no hearing is necessary as long as the government attorney has been notified and has had a reasonable time to object. Fed. R. Crim. P. 32.1(c)(2)(B) and (C). In the interest of justice and based on the conduct of the defendant, early termination of a term of supervised release may be justified. The defendant may request termination of supervised release any time after serving one year of supervision. 18 U.S.C. § 3583(e)(1). The court should consider the same factors for imposing sentence under 18 U.S.C. § 3553(a) in determining whether to grant an early termination of supervised release. Section 3553(a) provides:

> (a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > (B) to afford adequate deterrence to criminal conduct;
> > (C) to protect the public from further crimes of the defendant; and
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for--
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or
> > B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to

section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. §3553(a). The facts of this case warrant an early termination of supervised release or at least modification to "unsupervised" supervised release.

CLIENTNAME has proven herself since the time of her arrest. For over NUMBER years CLIENTNAME has not engaged in criminal conduct. While CLIENTNAME was not supervised for approximately NUMBER years of this time, records checks reveals that CLIENTNAME has not even been accused of a crime. Thus, CLIENTNAME has already been justly punished, deterred from further criminal conduct, and no longer needs supervision for treatment or training. Both CLIENTNAME and society will be served by terminating supervision.