

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK ODOM, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit*

(CA4 No. 18-4089)

Petition for *Writ of Certiorari*

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QUESTION PRESENTED

Petitioner Frank Odom, Jr., entered into a plea agreement that contained a waiver of his right “to contest either the conviction or the sentence in any direct appeal....” [App. 5]. In connection with his sentencing, Mr. Odom made a motion that the district court consider a reduced sentence, either via U.S.S.G. § 5H1.6 or under 18 U.S.C. § 3553(a), given his caretaking responsibilities for one of his children who is developmentally delayed and has both cerebral palsy and epilepsy. *See, e.g.*, [App. 36-37]. The district court never ruled on the motion nor explicitly acknowledged that it had actually considered the request before imposing a 72-month sentence. *See* [App. 32-34].

Mr. Odom appealed to the Fourth Circuit. He asked the Fourth Circuit to grant him specific performance of the implied promise contained in the appeal waiver of his plea agreement: that while he would abide by the district court’s ultimate disposition of his arguments at sentencing, the district court would in fact consider his arguments. The Fourth Circuit dismissed the appeal in a brief opinion that assumed without deciding that the district court had not actually considered Mr. Odom’s mitigation arguments. *See* [App. 2-3]. It held that that issue fell within the scope of the appeal waiver and was, therefore, not appealable.

The question presented in this petition is the following: Does a plea agreement with an appeal waiver waive the right to obtain a remand requiring the district court to actually consider the defendant’s mitigation arguments?

LIST OF PARTIES

All parties appear in the caption of this Petition's cover page.

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Frank Odom, Jr., respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND ORDERS BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication. It is reprinted in the Appendix.

The U.S. District Court for the District of South Carolina did not prepare a reported opinion. Its pertinent rulings are reprinted in the Appendix.

JURISDICTION

The district court had jurisdiction over the federal criminal charge. 18 U.S.C. § 3231.

This Court has jurisdiction to review the judgment of the Fourth Circuit, which was entered on October 24, 2018, [App. at 1]. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

STATEMENT OF THE CASE

A. The Guilty Plea

Mr. Odom pleaded guilty to one count of possessing cocaine with the intent to distribute and another count of being a felon in possession of a firearm, *see* 18 U.S.C. § 922; 21 U.S.C. § 841. [App. 40-41]. As part of the plea agreement he reached with the Government, he agreed to “waive[] the right to contest the conviction or the sentence, and that applies to the appeal or to any post-conviction actions under 2255,” a provision that does not apply to ineffective assistance of counsel or to future changes in the law. [App. 5].

B. The Sentencing Memorandum

In a pre-hearing memorandum, Mr. Odom’s counsel asked the district court to consider a below-Guidelines sentence. [App. 37]. He specifically asked the district court to consider a variance under U.S.S.G. § 5H1.6 to “address the loss of caretaking or financial support” for Mr. Odom’s son, who has epilepsy and

cerebral palsy and is intellectually disabled. [App. 37]. Counsel noted that, prior to his arrest, Mr. Odom was seeing his children every other day, had shared custody every other weekend, had financially supported his children, and was “extremely involved” in his son’s medical treatments. [*Id.*]. To the extent that a departure under the Guidelines were not appropriate, the Court should consider a variance under 18 U.S.C. § 3553(a) instead. *See [id.]*.

C. The Sentencing Hearing

The district court adopted the findings and conclusions in the PSR, which provided a Guideline range of 70-87 months. [App. 13].

The district court then asked the Government if it wished to be heard at sentencing. [App. 13]. The Government responded that it did, but “after the motion for variance is made and presentation by the defense.” [App. 13].

The district court then turned to the defense, which, among other things, again asked the district court to consider the effect that a lengthy term of incarceration would have on Mr. Odom’s disabled child:

The little boy, Judge, I think it’s important to note he is 12 years old, he has cerebral palsy, he is confined to a wheelchair. And Mr. Odom, Judge, I think this speaks to his character, he has a tremendous heart, Judge, and he has taken a lot of time, energy, responsibility, shared custody, even when he has split from the mother of this little boy and taking care of him.

And, Judge, what I think is even more important to note, too, is that he has been issued no court ordered responsibility in taking care of his children, and he has taken his job as a father seriously, he’s taken his job as a father as one of the most important things he can do in life. And he

not only gives with his heart and his time, but he gives with his finances as well when it comes to taking care of his children.

[App. 18-19].

Defense counsel also noted Mr. Odom's largely consistent work history since 2004. [App. 22].

Mr. Odom also spoke directly to the district court, asking for leniency because "I feel like I should be home with my kids, you know, I don't want to have to take care of them from behind prison walls, I would like to be with them inside their lives every day." [App. 27].

When the district court pronounced sentence, it did not formally rule on the motion for a variance. *See* [App. 32-34]. Nor did it explicitly address Mr. Odom's children and his relationship with them. *See [id.]*. Ultimately, it decided to impose a sentence of 72 months' imprisonment, three years of supervised release, and a \$200 special assessment. [App. 33].

D. The Fourth Circuit's Decision

Although Mr. Odom appealed only the district court's failure to have actually considered his mitigation arguments and requested a remand for the district court to do so, the Fourth Circuit dismissed the appeal pursuant to the appeal-waiver provision in the plea agreement. [App. 1-3].

REASONS FOR GRANTING THE PETITION

"Although the analogy may not hold in all respects, plea bargains are essentially contracts." *Puckett v. United States*, 556 U.S. 129, 137 (2009) (citation

omitted)). Parties to the contract are the defendant on the one hand and the entire government on the other. *See, e.g., United States v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) (“[T]hough the Government negotiates its plea agreements through the agency of specific United States Attorneys—as necessarily it must—the agreements reached are those of the Government. It is the Government at large...that is bound by plea agreements negotiated by agents of Government.”). Because plea agreements arise in the context of waivers of the right to a jury trial, “[i]f the government breaches express or implied terms of a plea agreement, a violation of due process occurs.” *United States v. Martin*, 25 F.3d 211, 216-17 (4th Cir. 1994). An appropriate remedy for the breach of a plea agreement is specific performance. *Santobello v. New York*, 404 U.S. 257, 263 (1971) (explaining that a remedy for a breach of a plea agreement is “specific performance of the agreement on the plea....”).

“[B]oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements. This is particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement – for the same reasons that dictate that approach in interpreting private contracts.” *Harvey*, 791 F.2d at 300-01 (citations omitted).

“[A]s in all contracts, plea agreements are accompanied by an implied obligation of good faith and fair dealing.” *United States v. Ahn*, 231 F.3d 26, 35-36 (D.C. Cir. 2000).

Below, Mr. Odom sought specific performance of his plea agreement—he was not trying to run away from it. Implied in the promise that Mr. Odom would not appeal the district court’s disposition of his sentencing arguments is a reciprocal promise that the district court would in fact consider his arguments in mitigation. *Cf. generally United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (“[A] defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court.”). But the Fourth Circuit below dismissed Mr. Odom’s appeal without ever reaching the issue of whether the district court had in fact ever considered Mr. Odom’s arguments in mitigation.

Mr. Odom concedes that this Petition does not implicate any split among the Circuits. Nonetheless, he respectfully submits that this Court should exercise its unquestioned supervisory authority, *see* U.S. Sup. Ct. R. 10(a), to vacate the judgment below and remand with instructions for the Fourth Circuit to consider whether the district court actually considered Mr. Odom’s arguments in mitigation and, if not, to consider what relief should issue. *Cf. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that a grant-vacate-and-remand order is an important tool that this Court has because it “assists the court be-

low by flagging a particular issue that it does not appear to have fully considered, [and] assists this Court by procuring the benefit of the lower court's insight before we rule on the merits...." (citation omitted)). *See also Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999) ("[A] summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law.").

CONCLUSION

For the forgoing reasons, this Court should grant the petition and vacate the Fourth Circuit's judgment below.

Dated: January 22, 2019

Respectfully submitted,

FRANK ODOM, JR.

Howard W. Anderson III
CJA Counsel for Petitioner

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Appendix to
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UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 18-4089

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANK ODOM, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at
Charleston. David C. Norton, District Judge. (2:16-cr-00784-DCN-1)

Submitted: October 10, 2018

Decided: October 24, 2018

Before WILKINSON and FLOYD, Circuit Judges, and SHEDD, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Howard W. Anderson III, LAW OFFICE OF HOWARD W. ANDERSON III, LLC,
Pendleton, South Carolina, for Appellant. Sherri A. Lydon, United States Attorney, Sean
Kittrell, Assistant United States Attorney, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Frank Odom, Jr., seeks to appeal his sentence after pleading guilty. On appeal, he contends that the district court erred in failing to address his sentencing mitigation argument. The Government contends that we should dismiss the appeal, because Odom knowingly and voluntarily waived the right to appeal his sentence, and his sentencing claim falls within the scope of the waiver. Odom does not dispute that his appeal waiver was knowing and voluntary, but he argues that the waiver does not apply, because the district court did not consider his mitigation argument. We dismiss the appeal.

“[A] plea agreement allocates risk between the two parties as they see fit,” and we will “enforce a plea agreement’s plain language” to “ensure that each party receives the benefit of the bargain.” *United States v. Under Seal*, 902 F.3d 412, 417, 420 (4th Cir. 2018) (internal quotation marks and citations omitted). “A defendant may waive the right to appeal his conviction and sentence so long as the waiver is knowing and voluntary.” *United States v. Copeland*, 707 F.3d 522, 528 (4th Cir. 2013) (internal quotation marks and citation omitted). We review the validity of an appeal waiver *de novo*, and we will enforce the waiver if it is valid and the issue appealed is within the scope of the waiver. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016) (citation omitted). “Generally . . . if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.” *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir. 2018) (internal quotation marks and citation omitted).

Upon review of the plea agreement and transcript of the Fed. R. Crim. P. 11 hearing, we conclude that Odom knowingly and voluntarily waived his right to appeal his sentence, and the issue he seeks to appeal falls within the scope of the waiver. Although “[a] defendant who waives his right to appeal a plea ‘retains the right to obtain appellate review of his sentence on certain limited grounds,’” *McCoy*, 895 F.3d at 363 (citation omitted), Odom’s appeal issue is not one of these limited grounds. We therefore dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE DISTRICT COURT OF THE UNITED STATES.
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,) 2:16-CR-784
vs.)
Plaintiff) Charleston,
) South Carolina
FRANK ODOM,) March 10, 2017
DEFENDANT)

TRANSCRIPT OF GUILTY PLEA HEARING
BEFORE THE HONORABLE DAVID C. NORTON,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MR. SEAN KITTRELL
Assistant United States Attorney
151 Meeting Street
Charleston, SC 29401

For the Defendant: MS. SARA TURNER
McCoy and Stokes
145 King Street
Suite 407
Charleston, SC 29401

Court Reporter: Amy C. Diaz, RPR, CRR
P.O. Box 835
Charleston, SC 29402

Proceedings recorded by mechanical shorthand,
Transcript produced by computer-aided transcription.

[PRECEDING TRANSCRIPT PAGES OMITTED FROM APPENDIX]

1 defendant's representation and discusses his relationship
2 with his attorney and says that they have met on numerous
3 times, for a sufficient period of time to discuss his case,
4 discuss the offenses, and he understands the rights he's
5 waiving by pleading guilty. And essentially, it says that he
6 is entering this plea freely and voluntarily.

7 Next paragraph outlines the fact that he has certain
8 rights under various code provisions to contest either the
9 conviction or sentence. He acknowledges those rights, but in
10 exchange for the concessions made by the Government, he has
11 waived the right to contest the conviction or the sentence,
12 and that applies to the appeal or to any post-conviction
13 actions under 2255. It doesn't apply to claims of
14 ineffective assistance of counsel or future changes in the
15 law.

16 The next paragraph is important because it is a
17 waiver of his right to appeal in certain circumstances.

18 The next paragraph outlines his waiver of Freedom of
19 Information, Privacy Act stuff

20 And the last paragraph is the typical merger clause.

21 BY THE COURT:

22 Q. Mr. Odom, are those the terms of your plea agreement as
23 you understand them?

24 A. Yes, I do.

25 Q. This is your signature on the last page of your plea

1 agreement?

2 A. Yes.

3 Q. Before you signed it did you have plenty of time to go
4 over it with your lawyers?

5 A. Yes.

6 Q. And before you signed it, did you understand what you've
7 agreed to do and what the Government's agreed to do in
8 return?

9 A. Yes.

10 Q. And you signed it back on the 7th, it's now the 10th.
11 It's been three days. You thought over it, you still want to
12 go forward with it?

13 A. Yes, I do.

14 Q. And going back to paragraph 12, I told you earlier, you
15 remember I said under some circumstances you or the
16 Government could appeal any sentence I might give you? You
17 remember me telling you that?

18 A. Correct.

19 Q. Now, by signing this, you understand you have given up
20 part of that right?

21 A. Correct.

22 Q. You can only appeal from the sentence I give you from
23 prosecutorial misconduct or ineffective assistance by your
24 lawyer?

25 A. Correct.

1 Q. You can only attack your sentence under habeas corpus for
2 prosecutorial misconduct, ineffective assistance by your
3 lawyer, or changes in the law that affect your sentence. You
4 understand that?

5 A. Correct.

6 Q. Okay. Has anyone made you any promise, other than your
7 plea agreement, to induce you to plead guilty?

8 A. Say that again.

9 Q. Has anyone made you any promise, other than your plea
10 agreement, to induce you to plead guilty?

11 A. No.

12 Q. If you have a question for your lawyer, go ahead and ask
13 her.

14 A. No.

15 Q. Okay. Has anyone made any predictions, prophecies or
16 promises as to what your sentence is going to be?

17 A. No, sir.

18 Q. Okay. I've also received, as part of the Government's
19 change of plea hearing memorandum, the factual basis for the
20 plea. You've gone over that with your lawyer?

21 A. Yes, sir, I have.

22 Q. Okay. And you agree that that is what you want the Court
23 to adopt for the factual basis for this plea; is that
24 correct?

25 A. Yes, sir.

1 Q. Because it's true, right?

2 A. Yes.

3 Q. Okay.

4 THE COURT: It's the finding of the Court in the case
5 of *United States of America vs. Frank Odom, Jr.*, that Mr.
6 Odom is fully competent and capable of entering an informed
7 plea. His plea of guilty is a knowing and voluntary plea
8 supported by an independent basis in fact, containing each of
9 the essential elements of the offense. His plea therefore is
10 accepted and you are now adjudged guilty of the offense.

11 Please sign this for me.

12 (Thereupon, the document was signed.)

13 THE CLERK: May it please the Court?

14 THE COURT: Sure.

15 THE CLERK: The defendant, Frank Odom, Jr., having
16 withdrawn his plea of not guilty entered October 25th, 2016,
17 pleads guilty to Counts 9 and 10 of the Indictment after
18 arraignment in open court.

19 Signed defendant, Frank Odom, on March 10th, 2017.

20 THE COURT: Okay. All right. Mr. Odom, like I
21 said, I've got your bond paper set at \$150,000 PR bond, some
22 restrictions. The probation office will explain what your
23 restrictions are. And as long as you comply with your bond,
24 you will be fine, all right? If you don't comply with your
25 bond, they are going to come find you and you will be back in

1 jail, and that's not going to be good for you, okay?

2 What else is going to happen is the Presentence
3 Report is going to be completed. It's going to be sent to
4 your lawyer. Your lawyer will call you in and go over it
5 with you. If you make any objections or corrections, then
6 you can do that. And once it's finalized, we'll be back
7 together for sentencing, okay? And the other thing is that
8 you are not going to be released from here. They are going
9 to have to take you back to the jail and process you out of
10 the jail. So if you have somebody going to pick you up, they
11 have to pick you up there and not down here.

12 THE DEFENDANT: Am I going to be released today?

13 THE COURT: As far as I know as soon as the
14 paperwork is done, you go back -- yeah?

15 MR. KITTRELL: Yeah. As long as sufficient
16 information is given.

17 THE COURT: As long as we've got enough information
18 and the paperwork goes through. I can't control the jail,
19 but more likely than not you are going to spend the weekend
20 at home, okay? All right. Thanks.

21 ***** ***** *****

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2 I certify that the foregoing is a correct transcript from the
3 record of proceedings in the above-titled matter.

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9 Amy C. Diaz, RPR, CRR

April 20, 2018

10 S/ Amy Diaz

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA :
vs. :
FRANK ODOM, JR. : 2:16 CR 784

Sentencing in the above-captioned matter held Monday, January 29th, 2018, commencing at 9:40 a.m., before the Honorable David C. Norton, in Courtroom I, United States Courthouse, 83 Meeting Street, Charleston, South Carolina, 29401.

APPEARANCES:

SEAN KITRELL, ESQ., Office of the U.S. Attorney, P.O. Box 978, Charleston, SC, appeared for the Government.

PETER M. MCCOY, JR., ESQ., 145 King Street,
Charleston, SC, appeared for the defense.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
P.O. Box 835
Charleston, SC 29402
843-579-2600

1 MR. KITTRELL: Your Honor, this is United States of
2 America versus Frank Odom, also known as Kilo. The defendant
3 is present, represented by Mr. Peter McCoy, who is also
4 present. We're here for purposes of sentencing. There are no
5 objections to the presentence report. The defense has filed a
6 sentencing memorandum, and in there is essentially a motion
7 for variance.

8 THE COURT: Y'all ready to go?

9 MR. McCOY: We are, Your Honor.

10 THE COURT: Mr. Odom pleaded guilty back on
11 March 7th of last year, and I accepted his plea at that time.
12 I then asked the probation office to prepare a presentence
13 report, which has been prepared and submitted to both counsel
14 for the Government and defendant. It's my understanding
15 everybody has had plenty of time to go over the presentence
16 report and there are no objections to it. Is that correct?

17 MR. KITTRELL: Yes, sir, that's correct.

18 MR. McCOY: Correct, Your Honor.

19 THE COURT: Mr. Odom, did you have plenty of time to
20 go over your presentence report with your lawyer?

21 THE DEFENDANT: Yes, I did.

22 THE COURT: Inasmuch as all parties have had access
23 to the report and there are no objections to it, I'll ask the
24 clerk to file the report under seal. In the event of an
25 appeal, the clerk will make the report available to counsel

1 for appellate purposes. Additionally, the probation officer
2 made a recommendation which will remain under seal until
3 further order of the Court.

4 In view of the fact there are no objections to the factual
5 statements contained in the presentence report, I'll adopt
6 those statements as the findings of fact for the purposes of
7 sentencing.

8 Having done so, it looks like it's offense level 25,
9 criminal history category three, which is 70 to 87 months
10 imprisonment, three years supervised release on count nine,
11 one to three years supervised release on count ten, \$100
12 special -- \$200 special assessment.

13 Does anyone have any objection to the facts which have
14 been adopted for the purposes of sentencing or the guideline
15 ranges?

16 MR. KITTRELL: The Government does not.

17 MR. McCOY: No objection here, Judge.

18 THE COURT: Does the Government have any position
19 with regard to the sentence?

20 MR. KITTRELL: Yes, sir, but I think I should respond
21 after the motion for variance is made and presentation by the
22 defense.

23 THE COURT: Okay. Yes, sir, Mr. McCoy.

24 MR. McCOY: Thank you for the opportunity to be here
25 to represent Mr. Odom. It's a privilege to have represented

1 him. Judge, I've known Mr. Odom for quite some time. I want
2 to let the Court know that he is also joined in the courtroom
3 today by several family members and friends who are seated
4 behind me, and off to the left as well.

5 Judge, Mr. Odom is 31 years old. He has grown up in the
6 Charleston area his entire life. And, Judge, I have to say
7 I've had the experience of knowing Mr. Odom and knowing his
8 family for outside of courtroom experiences as well, Judge.
9 I've had the privilege to know him and his family for quite
10 some time, upwards of seven or eight years, Judge.

11 And what I can tell you about Mr. Odom before I get into
12 the details of my mitigation, Judge, is that he is a smart
13 young man, Judge, his mind is constantly moving, constantly
14 working. He has been very involved, Judge, in his case. And
15 not only in the research and the background and understanding
16 the guidelines, understanding the charges, Judge, his family
17 has purchased books for him that he's read while he's been
18 incarcerated. And during that time he's read the books, he's
19 been able to assist me in his defense. Judge, I have to say
20 he was very involved not only in his discovery, but also
21 involved in the writing of his sentencing memorandum, and also
22 the examination of the PSR report that was issued by
23 probation.

24 So, Judge, I want to let the Court know that this is not
25 something that Mr. Odom is taking lightly, this is not

1 something that Mr. Odom brushes off, and he knows how serious
2 it is. His family knows how serious it is. He knows this is
3 his day in court for sentencing, Judge. So I ask you to keep
4 in mind that he is a bright young man, and he's taken a big
5 interest in his case and the outcome of his case.

6 Judge, if I could, I would like to start with a couple
7 things that when I was looking, and obviously, Judge, again,
8 I've already said for the record and I stand by this, we don't
9 have objections to the sentencing memorandum or the level of
10 computation that were done. And I've noted that, Judge, on
11 the record, and I've noted that with Mr. Kittrell as well.
12 And I know that the enhancements that were given are
13 statutorily allowed to be given by law, but I would point out
14 that a couple of issues in the computation that came up for
15 his offense level and guideline range.

16 Specifically, when I look at No. 69 on the PSR, it lists
17 specific offense characteristics, a dangerous weapon was
18 possessed, thus an offense level is increased by two levels,
19 Judge. And I also take a look, and I note when you look at
20 number 76, it also says the same thing, specific offense
21 characteristic, the defendant possessed the firearm and
22 ammunition in connection with another felony offense, to wit,
23 possession with intent to distribute cocaine.

24 Judge, we're not here to negate what happened, we're not
25 here to say that he's not accepting responsibility, because

1 obviously, Judge, we came in and entered a timely guilty plea.
2 He wanted to accept responsibility for this, he did accept
3 responsibility for this. So he's come before you, Judge, and
4 already pled guilty.

5 But when it comes to the enhancement levels that are on
6 here, Judge, just for my purposes, when I look at, there are
7 multiple points that are given and multiple circumstances
8 where a gun is used with alongside a felony, Judge, I -- you
9 know, I'm not arguing again with the PSR, but when it comes to
10 computing the level here, I take a little bit of an issue with
11 that, because it seems like it's done more than once.

12 And, Judge, when I look at number 75, too, this says the
13 defendant was engaged in trafficking firearms, thus, the
14 offense level is increased by four levels. Again, Judge,
15 Mr. Odom pled guilty, he accepts full responsibility for what
16 happened between the months of July and August of 2015.

17 But I would note for the record, Judge, and I'd like for
18 you to know this, too, he has no history whatsoever of being
19 involved in selling guns at all. This is not a scenario,
20 Judge, where he works with others and boxes up crates of
21 firearms and travels up and down Highway 95 to make sales to
22 different folks, Judge. This is an event that happened, these
23 guns, and I would argue that one of them is not even operable.
24 But, Judge, I just want the Court to know that that's not in
25 his nature, it's not in his characteristic, and I wanted to

1 note that for the record, Judge.

2 MR. KITTRELL: Your Honor, if that's an objection,
3 then I think it needs to be responded to. Or we need time to
4 be able to respond to it. He couches it as not really being
5 an objection, but he may be claiming that there's double
6 counting or the like. And if there's an objection to the PSR,
7 I would like to have time to adequately respond to it.

8 THE COURT: Thank you.

9 MR. McCOY: Judge, I would again say that I'm not
10 objecting to the PSR.

11 THE COURT: Okay. Go ahead.

12 MR. McCOY: Thank you, Judge. May it please the
13 Court. Judge, I say those things again, as not an objection,
14 but I just wanted to make the Court aware of the fact because
15 I think it's important for you to know at sentencing time the
16 nature of him and his background and the type of person that
17 he is.

18 And, Judge, when I take a look at some of the other
19 instances that we have, and I'll go along with the PSR as
20 well, I think it's important for you to know about his family.
21 I know you have the PSR in front of you, Judge, but his mother
22 is a clerk at the VA Hospital, his father a current
23 electrician. Again, they're life-long Charlestonians. Judge,
24 they've taken a very active role in Mr. Odom's life. As
25 you've read in the PSR, his parents were together, and he

1 lived with them until they were divorced when he was nine
2 years old. Judge, he lived with his mother after that, and
3 then went on to live with his grandmother in Mt. Pleasant.
4 And at the age of 17 he went on to live by himself, which he
5 has done so, and now he's 31 years old. So he's lived on his
6 own his entire life, Judge, he's taken care of himself for his
7 entire life.

8 What I think is very important about Mr. Odom and where it
9 hits home with me, Judge, is that he has been very hands on
10 and very responsible when it comes to taking care of his
11 children. Judge, he was in a life-long relationship that
12 produced two children, one is a little boy and one is a little
13 girl. The little boy, Judge, I think it's important to note
14 he is 12 years old, he has cerebral palsy, he is confined to a
15 wheelchair. And Mr. Odom, Judge, I think this speaks to his
16 character, he has a tremendous heart, Judge, and he has taken
17 a lot of time, energy, responsibility, shared custody, even
18 when he has split from the mother of this little boy and
19 taking care of him.

20 And, Judge, what I think is even more important to note,
21 too, is that he has been issued no court ordered
22 responsibility in taking care of his children, and he has
23 taken his job as a father seriously, he's taken his job as a
24 father as one of the most important things he can do in life.
25 And he not only gives with his heart and his time, but he

1 gives with his finances as well when it comes to taking care
2 of his children.

3 Judge, I'll tell you why this is important to me, too, is
4 I have -- my oldest daughter is six years old. And at the age
5 of five months, she suffered seizures, and she is unable to
6 walk, unable to talk. And, Judge, this is my oldest child.
7 And she goes to a summer camp that's called Pattison's
8 Academy. That's in North Charleston, it's an academy for
9 children with special needs in the Low Country area.
10 Mr. Odom's oldest son, Ja'Von, goes to this school, and he's
11 there in the summer, he's at the same camp with my daughter.
12 The entire staff, Judge, I've spent time with the folks that
13 run that camp, they know Mr. Odom, he's there, he's present,
14 he takes a role not only in the summertime camp with his son,
15 but also in the school time year with his son.

16 So, Judge, we share a special bond, Mr. Odom and I do,
17 when it comes the taking care of a child that has special
18 needs. And I commend Mr. Odom, because I know it's not easy,
19 at times it is difficult, but this is the path that God has
20 chosen for both of us. And Mr. Odom realizes that as well,
21 Judge. And I know I speak for myself and Mr. Odom the same
22 way, I wouldn't have it any other way in terms of my child,
23 and I know Mr. Odom wouldn't have it any other way with his
24 child either, he loves the child very much.

25 I'd note for the record too, Judge, that his oldest, the

1 child that I've been speaking of, Ja'Von, is set to have some
2 surgery on his spine here in the next six months. And that
3 surgery that is hopefully going to make some corrections in
4 straightening him out in terms of his posture, Judge. So I
5 think it's important to know that, Judge, it's a very
6 important aspect of Mr. Odom's life.

7 Judge, on the PSR, I would note for the record, too, I see
8 that, you know, he spent some time, he got evaluated, Judge,
9 and he also noted that he has diabetes type II, I want the
10 Court to know that, he experiences from time to time some
11 numbness in his feet. I think that's the only real effect
12 that he feels from his diabetes. He takes medication, Judge.
13 And if I could, I'd like to put that on the record. We've got
14 Gabapentin, Glipizide, Celexa, Prazosin, Humulin, Metformin,
15 Septra and Motrin.

16 And, Judge, I would also note, too, this is not in the
17 PSR, but Mr. Odom experienced a gang assault on him while he
18 was at the jail. There was a knob off of a door that was used
19 as a weapon and put into a pillowcase or some kind of device
20 that was used to swing at Mr. Odom's head. He was attacked by
21 a group of men and he received 14 staples to his head that he
22 was treated at MUSC for, Judge. So I want to make sure that
23 that's also noted for the record.

24 Judge, again, when I look at his mental and emotional
25 state, Mr. Odom is very engaging young man, he's very easy to

1 talk to, he's very respectful to me, he's been respectful to
2 my office. We have spent an immense amount of time not only
3 going through his discovery and going through his PSR, but
4 also different ideas of how to couch arguments at a
5 sentencing, like we're doing here today, Judge. So he's very
6 much with it mentally. I think that he is -- it touches on
7 this in the PSR -- he experiences a little bit of restlessness
8 and a little bit of worry when it comes to what's going to
9 happen at sentencing here today, but, Judge, I think that's
10 normal and I think that's appropriate, given what he's facing
11 here today.

12 In addressing his substance abuse, Judge, he states in the
13 PSR that he tried alcohol for the first time at the age of 21.
14 He states that he tried marijuana for the first time at the
15 age of 16. He's also noted to probation that he has used
16 marijuana extremely heavily at times, often much relied on it.
17 He has denied in his PSR that he needs substance abuse
18 treatment. Judge, I would disagree with him on that. I think
19 that he would not be in this scenario that he is in today, if
20 he had treatment for some substance abuse issues, especially
21 when it comes to marijuana.

22 Judge, he has never been to prison before and never
23 received any substance abuse treatment whatsoever. So I think
24 that any sort of sentence that's couched here today, Judge, I
25 think it would do a great benefit to the Court and a great

1 benefit to Mr. Odom if he were to have and receive some
2 counseling and treatment of sorts.

3 Judge, the PSR also notes that he did not graduate high
4 school, but he did attain his GED, and that was in December of
5 2009. He has spent some time at Trident Tech, Judge, in
6 learning some different trades, such as welding, but where his
7 real love and where his real, I would say touch comes when
8 it -- when he comes to employment, comes in the culinary
9 arena, Judge. He is very much involved and wants to stay
10 involved in, even after this happens, pursuing a career in
11 working in restaurants, Judge. He wants to further himself
12 there, and I think he would be fantastic in doing so.

13 And what I think is of importance, Judge, and I don't know
14 if you see this often, I sure don't see it as often on the
15 defense side, but it's very important to note for the Court,
16 Mr. Odom's work history. I would say he's been employed
17 steadily at a good job since 2004, Judge.

18 And I think it's important to note, too, that all of his
19 jobs, Judge, have been lengthy, they've been ones that he's
20 been engaged with management, ones that he's worked with
21 management, and they've all sung his praises, Judge, when it
22 comes to his work ethic, his timelessness and his ability to
23 do a good job at the particular restaurants. And I would note
24 particularly, Judge, in 2004 to '07, he worked at California
25 Dreaming; '07 to 2010 he worked at various restaurants as a

1 cook, but he also worked at Coastal Glass Company, where he
2 cut glass.

3 In 2010 to 2015, he worked at Wet Willies, Judge. And
4 that restaurant, it's also noted in the PSR, shut down in May
5 of 2015, where he ceased to work there.

6 Judge, from 2016, in March, to August 2016, he worked at
7 FIG in North -- sorry -- in Charleston. And, Judge, even when
8 he was released from his incarceration for these particular
9 charges and let out on bond, the short amount of time that he
10 was let out, he did have a job at Outback Steakhouse where he
11 went to work immediately.

12 I would also note, Judge, and I think this is important,
13 just showing the Court and showing the prosecution the work
14 history that Mr. Odom has had, again, putting emphasis on the
15 2010 to 2015 where he was at Wet Willies, when that restaurant
16 shut down in May of 2015, you'll note, Judge, that these
17 indictments, they start in the offense time of between July of
18 2015 and August, mid August of 2015. And, Judge, again, I'm
19 not here to make excuses for what happened, because Mr. Odom
20 already pled guilty, he accepts responsibility, and I'm
21 certainly here not to negate that responsibility. But, Judge,
22 he has always taken an active and leading role financially for
23 his family and extended family. And, Judge, he fell on hard
24 times, and I'm not making excuses, Judge, but it was in
25 between the time that he was let go from work at Wet Willie's

1 because the business shut down, that these offenses occurred
2 and he didn't have money to take care of his children, didn't
3 have money to take care of his family, which I know he takes a
4 very active role in doing. So I would just note that for the
5 record, Judge, again, not as an excuse, because we're here to
6 accept responsibility. But I think it's important, Judge, for
7 you to know that, that this was a lapse of time that he had in
8 employment that resulted in him making very poor decisions,
9 Judge.

10 And if I could have one moment, Judge. And, Judge,
11 finally, I'd like to add, too, that I think it's important
12 that we address this. There was a time during these charges
13 where Mr. Odom was released from custody and let out onto the
14 streets. Judge, we sat down and we did two proffers with the
15 U.S. Attorney and the Government, the agents that were
16 involved in the case. And, Judge, I have to say that I'm very
17 grateful for both the prosecutor and the agents for giving us
18 the opportunity to sit and talk. They did so twice. They
19 took a chance on us. Mr. Odom did give information to them,
20 he did give names to them. But the crux of where the rubber
21 really hit the road is when he was released, he did agree to
22 do work. And, Judge, he did not do that. And I've sat down
23 and I've talked to him and I've asked him, I've said,
24 Mr. Odom, you know, this was part of what we decided to do,
25 this is part of the route that we took. Not only did the

1 Government take the opportunity and the chance on you, but the
2 agents took the opportunity and the chance on you as well.
3 And, Judge, all I can tell you is that he was scared to move
4 forward, Judge, he was scared to act on the information he was
5 given, and so he wound up right back in jail.

6 Judge, I would note, too, I think this is very important
7 because I think it speaks to the character of Mr. Odom, but
8 while he's been incarcerated, Judge, and I have the
9 certificate here, he was baptized on December 21st of 2017 in
10 the jail, and I think that's important, Judge, in moving
11 forward in life in any aspect, to have Christ and have God in
12 your life moving forward.

13 I would note, Judge, in my presentencing memo that -- or
14 sentencing memorandum that I filed, I have 439 days as time
15 served, but that's based on our January 26th initial hearing.
16 So adjusting that, Judge, to January 29th, I've got 442 days,
17 and that's what he's served total here today.

18 Judge, I would ask, when you do impose sentence, I've
19 spoken to his family and I've spoken to Mr. Odom at length
20 about this, if we could note or if you could note,
21 respectfully, to have him incarcerated in a prison that's
22 local or one that's here in South Carolina. He's done
23 research on it, he's read that, he wants to be close to his
24 family, he wants to be close to his son and in particular and
25 stay involved in his life.

1 Judge, again, I appreciate the opportunity to be here
2 today. I have tell you again that Mr. Odom's been a very
3 respectful client to me, he's been very respectful to my
4 office, it's been a privilege to represent him, Judge. And
5 again, I thank you for the time that you've given us here
6 today. And Mr. Odom does want to address you, Judge, and I
7 just told him he could do so whenever you saw fit.

8 THE COURT: Sure. Glad to hear from you, Mr. Odom.

9 THE DEFENDANT: How are you doing, sir.

10 I would just like to tell you that this whole incident,
11 I'm regretful that it happened. But I would just like to get
12 forward with my life. I have many aspirations in life. I
13 want to continue my schooling, get my culinary arts degree, I
14 want to open up a business, I want to open up a restaurant. I
15 would like to go into real estate. I also want to open up a
16 special needs day care center for my kid, Ja'Von, and kids
17 like him so they can come and have some place to come and feel
18 at home and, you know, just fit in. It's going to be a place
19 that's going to be set up for, you know, disabled kids with
20 disabilities, it's going to have a physical therapist,
21 occupational/speech therapist, just different types of therapy
22 to help out the kids. This is one thing I want to do.

23 I come from a good family. I was born and raised in
24 Charleston. My parents did all they could do to help me out,
25 you know, throughout my life coming up. I feel that they did

1 a very good job, and I made some mistakes on my own. But I
2 know, you know, I ask God every night to help me out and help
3 me straighten my life out, and so I can get back on the right
4 track. I feel like I should be home with my kids, you know, I
5 don't want to have to take care of them from behind prison
6 walls, I would like to be with them inside their lives every
7 day. Because I don't want anyone else raising my kids, I'd
8 like to take responsibility for my own kids, you know what I'm
9 saying? I just feel like I just -- I know I made some wrong
10 decisions in life, but I would just ask for the mercy of the
11 Court and leniency in my sentencing. And I'm just pray to God
12 that you can find it in your heart to show me some mercy.

13 THE COURT: Thank you, Mr. Odom.

14 MR. MCCOY: Judge, thank you.

15 THE COURT: Mr. Kittrell?

16 MR. KITTRELL: Your Honor, every case has, at its
17 core, a tragedy that the family's involved, and I think that
18 is true also with Mr. Odom because of his children. But we're
19 here because of what he did. And I think it's important to
20 note that his behavior isn't caused by unemployment, it's
21 caused because of criminality. The defendant is named Kilo,
22 which is an odd nickname, and matches, of course kilo for
23 drugs. And paragraph 88 it shows that he has a moneybag
24 tattoo on him, which shows also what he likes to do.

25 And Mr. Odom has that criminality without a doubt, and

1 that's shown by the presentence report. Going through the
2 presentence report shows a deep sense of inability to obey the
3 law. His record starts out at a phenomenally young age. He
4 is at 11 years of age when he's carrying a concealed weapon.
5 It wasn't a pistol, but it was a weapon. And he continues
6 with violent crimes to others and property crimes. He has
7 drug crimes, resisting arrest, possession of stolen pistol,
8 possession of cocaine and possession of cocaine first offense,
9 possession marijuana as an adult. And again, it's almost an
10 unbroken series of offenses. Assault and battery first
11 degree, criminal domestic violence, assault and battery third
12 degree, trespassing which actually involved an a domestic
13 incident as illustrated in paragraph 39. Then there's a
14 series of arrests for which there were no convictions, but
15 these include weapons offenses and assaults. All of these
16 show to me a propensity for crime. And I think that that's
17 important, because it kind of goes to the 3553 factors. The
18 offenses that he engaged in were serious. And the first buy
19 wasn't just for a little bit of cocaine in order for him to
20 feed his habit or his family, he was, if I recall, for \$1400,
21 and all of the buys were significant. He was also trafficking
22 in firearms, because he said he could get guns, and showed
23 that by the sale of guns through the undercover agent. And we
24 know that the undercover was acting in a capacity that he's
25 buying drugs, he's going to sell them. So Mr. Odom is

1 essentially selling guns to a drug dealer. And we know what
2 happens in the community with guns and drugs, it creates
3 violence, creates havoc and it destroys neighborhoods. That's
4 what Mr. Odom was doing when trafficking.

5 I want to address whether or not there's double counting,
6 because I don't think it's necessary, the case law shows that
7 these enhancements were appropriate. I would say that in some
8 districts some courts have held it's permissible to do a
9 924(c) charge for a defendant who is engaged in a drug trade
10 and there's a gun involved.

11 So there are other offenses, and he received a benefit
12 throughout the course of this investigation.

13 The pretrial -- the sentencing memorandum speaks also of
14 acceptance of responsibility. And here, that's hard to talk
15 about in a sense, because all of us tend to be lenient towards
16 defendants when they accept responsibility and don't demand
17 that the Government go to trial.

18 But in this case, acceptance is problematic at best. He's
19 fortunate to receive it. The probation office, in a case like
20 this, would normally give it. But I think this is on the
21 edge. The defendant violated his bond. As Mr. McCoy stated,
22 he was allowed out. That was a dangerous thing to do, we
23 thought he could help himself, it was a risk that was taken,
24 nothing happened fortunately, but he did violate bond when he
25 was out, because he didn't do what he was supposed to. He

1 didn't keep his word, he didn't keep his promises. He also
2 tested positive for drugs in the middle of all of that, I
3 think the first day he was out, he's smoking marijuana, then
4 he tests positive for cocaine, then he says -- basically says
5 he didn't do anything. He's finally placed into custody.

6 So I think it's problematic that he is out on bond and
7 violates bond and then receives, as I said, those adjustments
8 for the acceptance of responsibility.

9 I would say that the fact that he uses marijuana
10 constantly is a problem for him and for his future, but it's
11 not the cause of his crime. He's not selling drugs in order
12 to support a marijuana habit, as shown by his criminal record
13 and by the activities he engaged in during the course of this
14 investigation.

15 He was always available, always was able to sell large
16 quantities of drugs and was always able to get firearms.

17 We think the appropriate sentence, Your Honor, would not
18 be a variance, would not be below the guidelines certainly,
19 and shouldn't be at the bottom. We'd recommend that it be at
20 the top of the guidelines.

21 THE COURT: Thank you. Mr. McCoy, anything else?

22 MR. MCCOY: Judge, I would just add, I think Mr.
23 Kittrell misspoke in saying that there was a possession of a
24 stolen pistol conviction. I see possession of stolen vehicle,
25 so maybe that's what was meant to be said.

1 MR. KITTRELL: There was an arrest for felon in
2 possession.

3 MR. McCOY: There was an arrest for it? Okay.

4 Thank you, Judge.

5 THE COURT: Thank you. All right. You talked about
6 the -- you talked about his diabetes and his health problems.
7 You're confident that his health problems are sufficiently
8 under control that I should not recommend Butner, which is the
9 closest medical facility?

10 MR. McCOY: Judge, I am. I think his medical issues
11 are under control. And as noted, I think that -- I mean,
12 Judge, if the Court sees fit, he is telling me that based on
13 his hit that he had while he -- when he received the staples
14 in his head, that he had memory loss issues from time to time.
15 And I know he is treated, again, for diabetes. I think the
16 treatment is working, but he does have some effects that do
17 happen, such as the numbness that he experiences.

18 THE COURT: There are medical facilities at every one
19 of them, but there's really the closest, quote unquote,
20 "hospital," is in Butner. So maybe I'll recommend the closest
21 institution to Charleston, maybe that's probably Kingstree?

22 MR. McCOY: Yes, Your Honor.

23 THE COURT: And if his health problems can't be
24 handled there, they would send him off to Butner anyway. So
25 take one step at a time.

1 MR. MCCOY: Thank.

2 THE COURT: Anything else?

3 MR. MCCOY: No, sir.

4 THE COURT: All right. In determining the sentence
5 I've looked at the factors of 18 United States Code 3553(a).
6 First one is the nature and circumstances of the offense. As
7 the prosecutor said, it's a serious offense because guns and
8 drugs go together, and guns and drugs are the root of a lot of
9 violence and murders, and especially in North Charleston
10 recently.

11 History and characteristics of Mr. Odom. Mr. Odom has 19
12 convictions and 18 other arrests. Now, some of those
13 convictions are for speeding and traffic offenses and all that
14 kind of stuff, but there's some serious convictions, including
15 assault -- first degree assault where he shot somebody three
16 times.

17 Sentencing factors. Again, to reflect the seriousness of
18 the offense, I've already gone over that. Promote respect for
19 law, again, somebody that has 37 arrests has really had no
20 respect for the law, and he's only 31 years old.

21 To provide just punishment for the offense, that's in the
22 eye of the beholder.

23 Afford adequate deterrence to criminal conduct, certainly
24 incarceration will do that.

25 Protect the public from further crimes, certainly

1 incarceration will do that too.

2 And to provide him with needed educational, vocational
3 training, medical care, other correctional treatment. As
4 noted, he needs some medical care, depends how serious it is,
5 they can determine that. He doesn't need educational training
6 because he has a GED. He does need vocational training, and I
7 think they probably do have food services classes in certain
8 federal institutions, so maybe he can fulfill his dream in
9 getting his degree in culinary arts while he's incarcerated.
10 So maybe he can kill two birds with one stone in that time.

11 So having calculated and considered the advisory
12 Sentencing Guidelines and the relevant statutory factors --
13 and he gets credit for 442 days -- relevant statutory factors
14 contained in 18 United States Code 3553, it's the judgment of
15 the Court the defendant, Frank Odom, Junior, is hereby
16 committed to the custody of Bureau of Prisons for a period of
17 72 months, which is as to count nine, and 72 months as to
18 count ten concurrent. No fine, \$200 special assessment, three
19 years supervised release, which is count nine and ten
20 concurrent. While on supervised release, the mandatory
21 standard conditions of supervision, following special
22 conditions. Shall participate in a program for domestic abuse
23 under the guidance and supervision of the probation office.
24 Shall participate in a program of testing and treatment for
25 substance abuse as approved by probation office. Defendant

1 shall contribute to the cost of the treatment, drug testing or
2 location monitoring not to exceed the amount determined
3 reasonable by the Court approved U.S. probation officer
4 sliding scale for services, and cooperate in securing any
5 applicable third-party payment.

6 I also recommend that he participate in and successfully
7 complete the 500-hour drug treatment program. Mr. McCoy, you
8 can tell him by participating in and successfully completing
9 that program, that will certainly benefit to the length of his
10 sentence. So you can explain that to him, he may not know
11 that.

12 Does anyone have any objection to the form of that
13 sentence?

14 MR. KITTRELL: No, Your Honor, thank you.

15 MR. MCCOY: I don't, Your Honor.

16 THE COURT: Okay. Are we dismissing some other
17 charges?

18 MR. KITTRELL: Move to dismiss the remaining counts.

19 THE COURT: All right, Mr. Odom, you have 14 days
20 from today to appeal from this sentence. If you can't afford
21 a lawyer, I'll appoint Mr. McCoy to represent you. Good luck.

23 (Court adjourned at 10:15 a.m.)

24

25

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,)
)
)
 VS.)
)
)
FRANK ODOM, JR.)
)
)
 Defendant.)
)
)

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SENTENCING MEMORANDUM

Mr. Frank Odom, Jr. by and through his attorney, pursuant to 18 U.S.C. §3553 (a) and §3661, presents the following arguments and relevant information for this Court to consider in determining the appropriate punishment to impose at sentencing. The overriding principle and basic mandate of Section 3553 (a) requires District Courts to impose a sentence “sufficient, but not greater than necessary,” and to comply with the four purposes of sentencing set forth in Section 3553 (a) (2): retribution, deterrence, incapacitation, and rehabilitation. The Defendant asks this Court to sentence him on the basis of all relevant and accurate information to a reasonable sentence, as defined under Section 3553 (a).

I. LIFE AND BACKGROUND OF FRANK ODOM, JR.

Frank Odom, Jr., hereinafter “Mr. Odom” or “Defendant”, was born in Charleston, South Carolina on August 14, 1986. His father, Frank Odom (age 59) currently resides in Summerville, South Carolina, and is employed as an electrician. His mother, Terry Murphy (age 59), resides in Goose Creek, South Carolina, and is employed as a clerk at the Veterans Administration Medical Center. Mr. Odom has two children; a son, who is twelve (12) years old, and daughter, who is nine (9) years old. Mr. Odom has supported the children even though he is not court ordered to

support either child. Mr. Odom is not married, but his children were the product of a long term relationship with Sharita Campbell. Mr. Odom and Ms. Campbell were in a relationship for fourteen years.

Mr. Odom grew up with both parents in the home until his parents divorced when he was nine (9) years old. Mr. Odom initially lived with his mother after the divorce, but then moved in with his maternal grandmother when he was fourteen (14) years old. He then moved into his own apartment when he was seventeen (17) years old. He has five siblings, ages forty-one (41), forty (40), thirty-eight (38), thirty-five (35), and sixteen (16).

Mr. Odom attended high school at North Charleston High School until the tenth grade. Mr. Odom obtained his GED on December 12, 2009. In addition, Mr. Odom attended a welding program at Trident Technical College subsequent to obtaining his GED. He worked most recently at Outback Steak House in North Charleston as a cook. He worked there from March 2017 to May 2017. He previously worked as a cook at DIG in the Park from March 2016 to August 2016. He worked at Wet Willie's as a cook from 2010 to 2015. Prior to that time he worked as a cook at California Dreaming beginning in 2004 until 2007 and then various restaurants after that from 2007 until 2010 until he started working at Wet Willie's. He has always had a passion for being a cook and had an interest in furthering his career by attending a culinary arts school. He has always had the drive to work and provide for his family.

II. GUIDELINE ISSUES

(A) Family Ties & Responsibilities

Pursuant to U.S.S.G §5H1.6, family ties and responsibilities are an appropriate ground for a downward departure where "the defendant's service of a sentence within the applicable guideline range will cause a direct loss of essential caretaking, or essential financial support, to

the defendant's family." In looking closely at Defendant and the impact that he has on his family and with his immediate family, it is easy to see that not only is he a provider of financial means for his family, but he is also there for caretaking needs of his son, who has cerebral palsy, is epileptic, and is intellectually delayed. Mr. Odom saw his children every other day and shared custody of them every other weekend. He financially supported his children and was extremely involved in his son's medical requirement. He could have an immediate impact on his family's financial situation as soon as he was able to come home and work. A departure is appropriate to address the loss of caretaking or financial support in the case for Mr. Odom. U.S.S.G. §5H1.6 (n.1 (B) (iv). This issue could also be addressed by Mr. Odom as a ground for a variance.

(B) Acceptance of Responsibility:

Pursuant to U.S.S.G. §3E1.1, defendant qualifies for a decrease of three offense levels if the offense level is sixteen or greater, and "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty..." The Court can look at appropriate considerations, including, Defendant "truthfully admitting the conduct comprising the offense of conviction." U.S.S.G. §3E1.1 (n.1(A)). Here, Defendant entered a plea of guilty and accepted responsibility on March 7, 2017, pursuant to a written plea agreement. Defendant was arrested on September 1, 2016, and entered his plea within six (6) months from his date of arrest. Defendant did not delay in entering his plea and did not require the government to exert expense and time in preparation for trial. Defendant's offense level is twenty-eight (28), therefore above the requisite sixteen (16) that is required for a three (3) point reduction. Therefore, a three (3) point reduction is appropriate in Defendant's case.

(C) Substance Abuse:

Pursuant to §5H1.4, “while ordinarily drug dependence is not a reason for a downward departure . . . in certain cases a downward departure may be appropriate to accomplish a specific treatment purpose.” Mr. Odom has several drug related charges. When Mr. Odom was interviewed after he was arrested he tested positive for marijuana. He began using marijuana at the age of sixteen (16) and continued to use it until the day he was arrested. He smoked marijuana and when he was evaluated was given a diagnostic impression of an adjustment disorder and possible cannabis use disorder. It would be in Mr. Odom’s best interests for a downward departure in order to get him in to a drug treatment program outside of prison and address and treat his drug dependence issue.

III. SENTENCING ISSUES

Pursuant to the PSI and pursuant to 21 U.S.C. § 841(a) (1) and (b)(1)(C), the statutory provisions state that for Count 9, the minimum sentence of zero (0) years and a maximum sentence of twenty (20) years. Pursuant to 18 U.S.C. § 922 (g)(1) and 924 (a)(2) the minimum sentence is zero (0) years and a maximum sentence of ten (10) years. Pursuant to the guideline provisions, Mr. Odom’s case carries a total offense level of twenty-eight (28), and twenty-five (25) with an acceptance of responsibility reduction, and a criminal history category of III. Following these figures, the guidelines range of punishment for Mr. Odom lands him in the range of seventy (70) to eighty-seven (87) months. In following U.S.S.G. § 5C1.1(f), Zone D requires a sentence of imprisonment in which probation cannot be awarded either through the Statutory provisions or through the Guideline provisions. However, in following 18 U.S.C. §3583 (b) if a particular term of imprisonment were to be imposed for Mr. Odom, the Court may impose a term of supervised release. Section 18 U.S.C. §3583(d) lists the mandatory conditions

for supervised release as follows: 1) Mr. Odom shall not commit another federal, state, or local crime, 2) Mr. Odom shall not unlawfully possess a controlled substance, and 3) Mr. Odom shall refrain from any unlawful use of a controlled substance and submit to a drug test as required by the Court. In looking at Mr. Odom and his prior record, this is the most serious offense that he has faced. His previous record has several charges that pale in comparison to the above listed Federal Indictment to which he has pled guilty. There has never been a time in his past that he has spent significant time awaiting sentencing like he has for this charge. On January 26, 2018, the date that Mr. Odom will be sentenced, he will have been incarcerated for four hundred forty-two (442) days.

The real issue of sentencing now comes down to evaluating the Guideline provisions and if there is a need to go below the guidelines to achieve an appropriate punishment for Mr. Odom and his involvement in the above listed case. The PSI and probation have correctly calculated the initial base offense level for Mr. Odom, now other factors must be examined to receive a variance from these figures. This examination must begin with a closer look at the decision from *Blakely v. Washington*, 542 U.S. 296 (2004) in which the Supreme Court ruled that its Sixth Amendment holding applied to the Federal Sentencing Guidelines. The Court also examined this issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Booker* 543 U.S. at 235 and ruled that the provisions of the Federal Sentencing Reform Act of 1984 that make the Guideline provisions mandatory are incompatible with the Sixth Amendment ruling in the above listed cases. Therefore, in following the *Booker* case, the Guideline provisions were to be looked upon as advisory and not mandatory. *United States v. Booker*, 543 U.S. at 245. This ruling in *Booker* allowed Courts to not only look to the Sentencing Reform Act of 1984 and the Guideline

provisions surrounding a punishment for a particular crime, but to also look to other statutory provisions that may allow the Court to look outside of the Guideline provisions.

The other statutory provisions that must be examined to go below the allotted Guideline provisions come to us from 18 U.S.C §3553(a) (2) which state that a punishment for a particular crime should 1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment, 2) provide adequate deterrence of criminal conduct, 3) protect the public from further crimes of Mr. Odom, and 4) provide Mr. Odom with treatment/punishment in the most effective manner. Section 18 U.S.C. §3553(a) also states the following criteria must also be examined in determining a proper punishment for a defendant: 1) the nature and circumstances of the event and the history of Mr. Odom, 2) the sentences that are available for Mr. Odom, 3) need to avoid unwarranted sentence disparities between defendants with similar charges, and 4) the need to provide restitution for the particular crime. The Court should also take into consideration the fact that imprisonment may not be the most appropriate way to rehabilitate and punish Mr. Odom for this offense. 18 U.S.C. §3582(a); 18 U.S.C. §3661; and U.S.S.G. §5H1.6.

Since the ruling in *Booker* allows the Court to look at the Guideline provisions with the same weight as the 18 U.S.C. §3553(a) criteria, it is not necessary to strictly follow the sentencing format of the Guideline provisions. The Guideline provisions appear to be advisory when tailoring an appropriate sentence for Mr. Odom. It has also been stated in *United States v. Denardi*, 892 F.2d 269 (3rd Circuit 1989), that if the provisions of §3553(a) directly conflict with the Guideline provisions, that the sentencing factors of §3553(a) should trump the Guideline provisions when determining an appropriate sentence. Mr. Odom's involvement in this case involved two (2) counts for which he pled guilty on March 7, 2017. The two (2) counts that Mr. Odom pled guilty to involved felon in possession of a firearm and possession with intent to

distribute cocaine. Between July 7, 2015, and August 19, 2015, Mr. Odom sold approximately 188.775 grams of cocaine to an undercover ATF agent or a confidential informant. On August 19, 2015, Odom texted the undercover agent inquiring if he was ready to purchase the .40 caliber firearm and they agreed the UC would buy the gun and an ounce of cocaine. The undercover agent purchased the .40 caliber Taurus pistol, 12 rounds of .40 caliber ammunition, and a magazine. The undercover agent paid Mr. Odom \$1,950.00 for the transaction.

In looking at the sentencing range provided by the Sentencing Commission and as mentioned before, the PSI indicates the guidelines provide for a sentencing range for Mr. Odom of seventy (70) to eighty-seven (87) months. Mr. Odom does not take issue with the PSI report. In addition to the calculations completed by probation, he does wish for the Court to consider the calculations listed above for a possible downward departure. He also respectfully requests for the Court to look at the guideline provisions as advisory and use the sentencing characteristics from §3553(a) to apply a variance to the guidelines. Mr. Odom is ready to get back home to his family and friends in Charleston where he can put this event behind him, move forward, and be a contributing member to society.

IV. CONCLUSION

As discussed herein, regardless of the advisory guideline calculations, several mitigating factors exist that this Court should consider in determining sentence for Mr. Odom that is sufficient but not greater than necessary to achieve the goals of sentencing under 18 U.S.C. §3553(a). According to the PSI, there is also an additional factor of saving a significant amount of money for the Federal Government with the imprisonment of Mr. Odom versus the supervised release of Mr. Odom. The PSI indicates that it would cost the Government approximately eighty-eight dollars (\$88.00) a day to imprison Mr. Odom as opposed to eleven dollars (\$11.00)

per day for supervised release. In looking further at U.S.S.G. §5b1.1 supervised release can be fashioned as a sentence for Mr. Odom through a downward departure and the sentencing factors of §3553(a). In closing, Mr. Odom respectfully requests the Court to consider a downward variance from the guideline provisions by closely examining the mitigating factors listed above from §3553(a) and fashion a sentence for Mr. Odom to serve a sentence that would outside of his allotted guideline range followed by a period of supervised released based on his guideline range. This is a fair and just sentence that would allow Mr. Odom to return to being a contributing member of society while still upholding respect, with the proper deterrence factor, for the laws in this State. Mr. Odom believes this sentence to be a fair and equitable result for his case under applicable law.

Respectfully Submitted,

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