

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

---

DAVID CLAYTON CONERLY—PETITIONER

VS.

UNITED STATES OF AMERICA—RESPONDENT

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI  
TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioner David Clayton Conerly

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JAN 14 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-10454

Plaintiff-Appellee,

D.C. No. 4:17-cr-00578-JSW-1

v.

MEMORANDUM\*

DAVID CONERLY, AKA David Clayton  
Conerly,

Defendant-Appellant.

Appeal from the United States District Court  
for the Northern District of California  
Jeffrey S. White, District Judge, Presiding

Submitted January 8, 2020\*\*

Before: CALLAHAN, NGUYEN, and HURWITZ, Circuit Judges.

David Conerly appeals from the district court's judgment and challenges the 108-month sentence imposed following his guilty-plea conviction for being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Conerly contends that the district court erred by applying a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) for using or possessing a firearm in connection with another felony offense. We review the district court's interpretation of the Guidelines *de novo*, its factual findings for clear error, and the court's application of the Guidelines to the facts for abuse of discretion. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

The district court's finding that Conerly possessed cocaine base with the intent to sell was not "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). The totality of the evidence in the record supports the district court's finding that Conerly's possession of the firearm potentially emboldened his efforts to sell crack cocaine, *see United States v. Polanco*, 93 F.3d 555, 567 (9th Cir. 1996), and the court did not abuse its discretion by applying the section 2K2.1(b)(6)(B) enhancement, *see Gasca-Ruiz*, 852 F.3d at 1170.

**AFFIRMED.**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

APR 16 2020

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-10454

Plaintiff-Appellee,

D.C. No. 4:17-cr-00578-JSW-1  
Northern District of California,  
Oakland

v.

DAVID CONERLY, AKA David Clayton  
Conerly,

ORDER

Defendant-Appellant.

Before: CALLAHAN, NGUYEN, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Conerly's petition for panel rehearing and petition for rehearing en banc (Docket No. 40) are denied.

**UNITED STATES DISTRICT COURT**  
**Northern District of California**

**UNITED STATES OF AMERICA**

v.

David Conerly

) **JUDGMENT IN A CRIMINAL CASE**

)

) USDC Case Number: CR-17-00578-001 JSW

) BOP Case Number: DCAN417CR00578-001

) USM Number: 19176-111

) Defendant's Attorney: Alan Dressler (Appointed)

**THE DEFENDANT:**

pleaded guilty to count(s): One of the Indictment  
 pleaded nolo contendere to count(s): which was accepted by the court.  
 was found guilty on count(s): after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1)	Felon in Possession of a Firearm and Ammunition	November 2, 2017	One

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s).  
 Count(s) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/20/2018

Date of Imposition of Judgment



Signature of Judge

The Honorable Jeffrey S. White

United States District Judge

Name & Title of Judge

November 27, 2018

Date

DEFENDANT: David Conerly

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CASE NUMBER: CR-17-00578-001 JSW

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
108 months

The appearance bond is hereby exonerated, or upon surrender of the defendant as noted below. Any cash bail plus interest shall be returned to the owner(s) listed on the Affidavit of Owner of Cash Security form on file in the Clerk's Office.

The Court makes the following recommendations to the Bureau of Prisons:  
The defendant participates in the Residential Drug Abuse Treatment Program (RDAP) and be housed in a BOP facility as close to the San Francisco Bay Area as Possible. It is further recommended the defendant be housed at FCI Lompoc.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:  
 at on (no later than 2:00 pm).  
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:  
 at on (no later than 2:00 pm).  
 as notified by the United States Marshal.  
 as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

### **SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of: Three (3) years

### **MANDATORY CONDITIONS OF SUPERVISION**

- 1) You must not commit another federal, state or local crime.
- 2) You must not unlawfully possess a controlled substance.
- 3) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
  - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
- 4)  You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
- 5)  You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
- 6)  You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
- 7)  You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: David Conerly

CASE NUMBER: CR-17-00578-001 JSW

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**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court, and bring about improvements in your conduct and condition.

- 1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of RELEASE, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- 2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- 3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- 4) You must follow the instructions of the probation officer related to the conditions of supervision.
- 5) You must answer truthfully the questions asked by your probation officer.
- 6) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with, for example), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 7) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by these and the special conditions of your supervision that he or she observes in plain view.
- 8) You must work at least part-time (defined as 20 hours per week) at a lawful type of employment unless excused from doing so by the probation officer for schooling, training, community service or other acceptable activities. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- 9) You must not communicate or interact with someone you know is engaged in criminal activity. You must not associate, communicate, or interact with any person you know has been convicted of a felony, unless granted permission to do so by the probation officer.
- 10) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- 11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- 12) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

If the probation officer determines that you pose a risk to a third party, the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk. (check if applicable)

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision upon a finding of a violation of probation or supervised release.

(Signed)

---

Defendant

---

Date

U.S. Probation Officer/Designated Witness

---

Date

DEFENDANT: David Conerly

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CASE NUMBER: CR-17-00578-001 JSW

**SPECIAL CONDITIONS OF SUPERVISION**

1. When not employed at least part-time and/or enrolled in an educational or vocational program, you must perform up to 20 hours of community service per week as directed by the probation officer.
2. You must pay any special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release.
3. You must submit your person, residence, office, vehicle, electronic devices and their data (including cell phones, computers, and electronic storage media), or any property under your control to a search. Such a search must be conducted by a United States Probation Officer or any federal, state or local law enforcement officer at any time with or without suspicion. Failure to submit to such a search may be grounds for revocation; you must warn any residents that the premises may be subject to searches.
4. You must participate in a program of drug testing. If you submit a urinalysis specimen which tests positive for illegal substances or you admit to the use of illegal substances, you must participate in a program of testing and treatment for drug and/or alcohol abuse, until such time as you are released from treatment. You are to pay part or all of the cost of this treatment, at an amount not to exceed the cost of treatment. The actual co-payment schedule must be determined by the probation officer.
5. You must cooperate in the collection of DNA as directed by the probation officer.

AO 245B (Rev. AO 11/16-CAN 04/18) Judgment in Criminal Case

**DEFENDANT:** David Conerly

CASE NUMBER: CR-17-00578-001 JSW

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## **CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments.

<b>TOTALS</b>	<b><u>Assessment</u></b> \$ 100.00	<b><u>JVTA Assessment*</u></b> N/A	<b><u>Fine</u></b> Waived	<b><u>Restitution</u></b> None
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- The determination of restitution is deferred until *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the .
  - the interest requirement is waived for the is modified as follows:

<sup>4</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: David Conerly  
CASE NUMBER: CR-17-00578-001 JSW

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**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows\*:

**A**  Lump sum payment of \_\_\_\_\_ due immediately, balance due  
 not later than , or  
 in accordance with  C,  D; or  E, and/or  F below); or

**B**  Payment to begin immediately (may be combined with  C,  D, or  F below); or

**C**  Payment in equal (e.g., weekly, monthly, quarterly) installments of \_\_\_\_\_ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

**D**  Payment in equal (e.g., weekly, monthly, quarterly) installments of \_\_\_\_\_ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

**E**  Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

**F**  Special instructions regarding the payment of criminal monetary penalties:  
**When incarcerated, payment of criminal monetary penalties, \$100 Special Assessment, is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk of U.S. District Court, 450 Golden Gate Ave., Box 36060, San Francisco, CA 94102.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States: a .40 caliber Glock 22 handgun bearing serial number HUL232, and 17 rounds of .40 caliber ammunition, including 11 rounds manufactured by Winchester, one round by Speer, two rounds by PMC, two rounds by Blazer, and one round by PPU.

The Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future, but such future orders do not affect the defendant's responsibility for the full amount of the restitution ordered.

\* Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

AO 245B (Rev. AO 11/16-CAN 04/18) Judgment in Criminal Case

DEFENDANT: David Conerly

CASE NUMBER: CR-17-00578-001 JSW

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PAGES 1 - 26

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**BEFORE THE HONORABLE JEFFREY S. WHITE, JUDGE**

UNITED STATES OF AMERICA,	)	
	)	
PLAINTIFF,	)	NO. CR-17-0578 JSW
	)	
VS.	)	TUESDAY, NOVEMBER 20, 2018
	)	
DAVID CONERLY,	)	OAKLAND, CALIFORNIA
	)	
	)	SENTENCING
	)	
DEFENDANTS.	)	
	)	

**REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

**FOR PLAINTIFF:** ALEX G. TSE, ESQUIRE  
UNITED STATES ATTORNEY  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612  
BY: BRIGID MARTIN,  
ASSISTANT UNITED STATES ATTORNEY

**FOR DEFENDANT:** ALAN DRESSLER, ESQUIRE  
601 MONTGOMERY STREET, SUITE 850  
SAN FRANCISCO, CALIFORNIA 94111

**ALSO PRESENT:** MALIK RICARD, U.S. PROBATION

**REPORTED BY:** DIANE E. SKILLMAN, CSR 4909, RPR, FCRR  
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 CASE.

2 THE REQUEST TO HAVE NEW COUNSEL IS DENIED. WE'LL NOW  
3 PROCEED WITH SENTENCING.

4 NOW, MS. MARTIN, HAVE YOU HAD AN OPPORTUNITY TO REVIEW THE  
5 PRESENTENCE REPORT?

6 **MS. MARTIN:** YES, YOUR HONOR.

7 **THE COURT:** DO YOU HAVE ANY OBJECTIONS?

8 **MS. MARTIN:** NO, YOUR HONOR.

9 **THE COURT:** NOW, MR. CONERLY AND COUNSEL,  
10 MR. DRESSLER, HAS RAISED A COUPLE OF ISSUES WITH RESPECT TO  
11 THE GUIDELINE CALCULATION, THAT IT'S INCUMBENT UPON THE COURT  
12 TO DECIDE. ON ONE OF THEM -- AND THERE IS BASICALLY TWO MAJOR  
13 OBJECTIONS TO THE GUIDELINE CALCULATION THAT HAS AN IMPACT ON  
14 THE CALCULATION.

15 I'LL WAIT FOR MR. DRESSLER TO GET HIS PAPERS.

16 **MR. DRESSLER:** SORRY, YOUR HONOR.

17 **THE COURT:** OKAY. THANK YOU.

18 SO THE FIRST IS THAT MR. CONERLY OBJECTS TO THE FOUR-LEVEL  
19 ENHANCEMENT UNDER GUIDELINE 2. -- 2K2.1(B) (6) REGARDING  
20 POSSESSION OF COCAINE BASE FOR SALE AND WHETHER OR NOT THE  
21 DEFENDANT POSSESSED THE FIREARM WITH WHICH -- AS TO WHICH HE  
22 HAS BEEN -- WHICH IS A SUBJECT MATTER OF HIS CONVICTION, THAT  
23 HE SUPPOSED THAT IN CONNECTION WITH DRUG SALES.

24 THE COURT WILL OVERRULE THAT OBJECTION. I BELIEVE THAT  
25 BASED UPON THE EVIDENCE SUBMITTED BASED UPON THE INFORMATION

1 CONTAINED IN THE PRESENTENCE REPORT, PARTICULARLY AS TO WHAT  
2 WAS ON THE PHONE, FOUND ON THE PHONE, THE INFORMATION FROM THE  
3 CHP OFFICER, ALTHOUGH THE DEFENDANT ATTACKS THE CREDIBILITY  
4 AND RELIABILITY AND COMPETENCE OF THE OFFICER TO OPINE, I  
5 THINK THAT GOES TO THE WEIGHT AND NOT THE ADMISSIBILITY.

6 THIS IS A SENTENCING PROCEEDING, AND I BELIEVE THAT THE  
7 COURT -- THERE IS -- CAN FIND BY A PREPONDERANCE OF THE  
8 EVIDENCE THAT THE BASIS FOR THAT PARTICULAR FOUR-POINT  
9 ENHANCEMENT, FOUR-LEVEL ENHANCEMENT IS JUSTIFIED AND WE'LL  
10 MAINTAIN THAT.

11 THE SECOND ISSUE THAT IS RAISED BY MR. CONERLY IS  
12 ANOTHER -- BOTH OF THEM ARE VALID ARGUMENTS. AND THIS ONE  
13 RELATES TO THE AFTERMATH OF PROPOSITION 64 AND THE FACT THAT  
14 THE DEFENDANT HAD ASKED THE SUPERIOR COURT TO RECALL HIS  
15 CONVICTION IN ACCORDANCE WITH PROP 64, WHICH WAS GRANTED, AND  
16 THE CONVICTION WAS DECLARED LEGALLY INVALID UNDER THAT  
17 PROPOSITION.

18 NOW, WHAT I THOUGHT WOULD BE HELPFUL TO THE PARTIES  
19 BECAUSE I THINK THIS IS A CASE OF FIRST IMPRESSION GIVEN THE  
20 RECENCY OF THIS PROPOSITION 64, TO AVAIL THE PARTIES OF THE  
21 COURT'S RESEARCH AND THEN GET THE PARTIES TO GIVE ME THEIR  
22 INPUT. I DON'T THINK THAT THE CASE THAT THE GOVERNMENT CITED  
23 IS APROPOS, APPLIES HERE BECAUSE IT PREDATES PROP 64 AND I  
24 DON'T THINK THE DIAZ CASE IS ALSO -- THERE IS SOME DICTA IN  
25 THAT CASE DEFENDANT RELIES ON, BUT I DON'T THINK IT IS BINDING

1 ON THE COURT. THOSE CASES ARE NOT HELPFUL.

2 JUST TO SUMMARIZE THE COURT'S RESEARCH TO DATE AND JUST TO  
3 KIND OF GIVE EVERYBODY KIND OF A TEASER FOR NEWS AT A 11 HERE,  
4 I HAVE NO CONCLUSION BECAUSE I THINK IT'S A NOVEL POINT AND  
5 HAS TO BE FLESHED OUT IN LITIGATION.

6 SO I DIDN'T FIND ANY CASE DIRECTLY ON POINT, AND MANY OF  
7 THE CASES WHERE PROPOSITION 64 IS INVOLVED INVOLVE CONVERTING  
8 A FELONY CONVICTION INTO A MISDEMEANOR OR CONCERN SENTENCING  
9 ENHANCEMENT, THAT IS TO SAY, A CRIME ELEMENT RATHER THAN A  
10 CRIMINAL HISTORY CATEGORY AS WE HAVE HERE.

11 NOW, WE KNOW THAT THE GUIDELINE, THE SENTENCING  
12 GUIDELINES, PARTICULARLY THE GUIDELINES MANUAL SAYS QUOTE:

13 "A NUMBER OF JURISDICTIONS HAVE VARIOUS PROCEDURES  
14 PURSUANT TO WHICH PREVIOUS CONVICTIONS MAY BE SET ASIDE OR THE  
15 DEFENDANT'S MAY BE PARDONED FOR REASONS UNRELATED TO INNOCENCE  
16 OR ERRORS OF LAW, FOR EXAMPLE, E.G., IN ORDER TO RESTORE CIVIL  
17 RIGHTS OR TO REMOVE THE STIGMA ASSOCIATED WITH CRIMINAL  
18 CONVICTION. SENTENCES RESULTING FROM SUCH CONVICTIONS ARE TO  
19 BE COUNTED, HOWEVER, EXPUNGED CONVICTIONS ARE NOT COUNTED,"  
20 UNQUOTE.

21 THAT IS THE GUIDELINES MANUAL SECTION 4A1.2J, COMMENT AT  
22 NOTE 10.

23 NOW, THE NINTH CIRCUIT HAS NOT GIVEN US ANY GUIDANCE YET  
24 EITHER. THERE IS A CASE CALLED UNITED STATES VERSUS NORBURY,  
25 N-O-R-B-U-R-Y, 492 F.3D 1012 AT 1015 WHERE THE COURT STATED AS

1       FOLLOWS AT PAGE 1015 QUOTE:

2           "EXPUNGED OR DISMISSED STATE CONVICTIONS NONETHELESS  
3       QUALIFIES AS A PRIOR CONVICTION UNDER THE SENTENCING  
4       GUIDELINES."

5           AND THEN THE FOLLOWING LANGUAGE I'M EMPHASIZING FOR YOU:

6           "IF THE EXPUNGEMENT OR DISMISSAL QUOTE, WITHIN THE QUOTE  
7       DOES NOT ALTER THE LEGALITY OF THE CONVICTION OR DOES NOT  
8       REPRESENT THAT THE DEFENDANT WAS ACTUALLY INNOCENT OF THE  
9       CRIME,"" UNQUOTE.

10          AND THEN IT GOES ON TO SAY THAT QUOTE:

11           "THE LEGALITY OF A CONVICTION DOES NOT DEPEND UPON THE  
12       MECHANICS OF STATE POST-CONVICTIONS PROCEDURES, BUT RATHER  
13       INVOLVES THE CONVICTIONS UNDERLYING LAWFULNESS," UNQUOTE.

14          HERE, THE PRIOR MARIJUANA CONVICTION WAS DEEMED TO BE  
15       QUOTE "LEGALLY INVALID". THIS SUGGESTS TO THE COURT THAT THE  
16       CHANGE DOES ALTER THE LEGALITY OF THE UNDERLYING STATE  
17       CONVICTION.

18          I'VE NOT FOUND A CASE IN THE NINTH CIRCUIT OR ANY FEDERAL  
19       COURT, FOR THAT MATTER, THAT ADDRESSES THIS ISSUE HEAD ON, BUT  
20       IT SEEMS TO ME THAT THIS DESIGNATION IS MATERIALLY DIFFERENT  
21       FROM CLASSIFYING A FELONY AS A MISDEMEANOR AS DO OTHER CASES.

22          GIVEN THE LANGUAGE OF NORBURY, THE DEFINITION OF LEGALLY  
23       INVALID SEEMS THE SAME AS QUOTE "ALTERING THE LEGALITY OF THE  
24       CONVICTION" UNQUOTE, AND, THEREFORE, UNDER THAT ANALYSIS  
25       SHOULD NOT BE USED TO CALCULATE CRIMINAL HISTORY CATEGORIES

1 UNDER THE GUIDELINES.

2 IT IS WORTH POINTING OUT THAT THE CALIFORNIA STATUTE  
3 DISTINGUISHES BETWEEN HAVING A PRIOR CONVICTION DESIGNATED AS  
4 A MISDEMEANOR INFRACTION OR LEGALLY INVALID. THE TERMS DO NOT  
5 APPEAR TO BE INTERCHANGEABLE.

6 NOW, HEALTH AND SAFETY CODE SECTION 1136.1 SUBDIVISION E  
7 STATES THAT QUOTE, "A PERSON WHO HAS COMPLETED HIS OR HER  
8 SENTENCE FOR A CONVICTION MAY FILE AN APPLICATION BEFORE THE  
9 TRIAL COURT AND ENTERED -- THAT ENTERED THE JUDGMENT OF  
10 CONVICTION IN HIS OR HER CASE TO HAVE THE CONVICTION DISMISSED  
11 AND SEALED BECAUSE THE PRIOR CONVICTION IS NOW LEGALLY INVALID  
12 OR REDESIGNATED AS A MISDEMEANOR.

13 SO THIS, GOING BACK TO WHERE I STARTED, THIS PARTICULAR  
14 QUESTION DOES APPEAR TO BE AN ISSUE OF FIRST IMPRESSION. SO  
15 OF COURSE ULTIMATELY IT IS UP TO THE COURT IN THE FINAL  
16 ANALYSIS, AT LEAST AT THIS LEVEL OF THE TRIAL COURT.

17 IF THE POINT OF PROPOSITION 64 WAS TO DECRIMINALIZE  
18 CERTAIN ACTIVITY, THAT IS TO SAY HAVING TO DO WITH MARIJUANA,  
19 AND IT WAS, IT SEEMS INEQUITABLE TO CONTINUE TO USE THAT  
20 ACTIVITY AS A FACTOR THAT INCREASES THE TIME A PERSON WILL  
21 SERVE IN FEDERAL PERSON.

22 ON THE OTHER HAND, WITH RESPECT TO THE CASES CONTENDING  
23 WITH RETROACTIVE CONVERSIONS OF FELONY CONVICTIONS INTO  
24 MISDEMEANORS, THE COURTS CONSISTENTLY STATE THAT THE  
25 CONVERSION OR RECLASSIFICATION DOES NOT MAKE A DEFENDANT

1 INNOCENT OF THE CRIME. THE CONVERSION MERELY DOWNGRADES THE  
2 OFFENSE.

3 WHAT MATTERS FOR THE PURPOSE OF SENTENCING IS WHETHER THE  
4 FELONY CONVICTION OCCURRED; A LATER DOWNGRADE DOESN'T SEEM  
5 TO -- DOESN'T CHANGE THE FACT THAT THE FELONY CONVICTION  
6 OCCURRED, BUT I BELIEVE THAT MR. CONERLY'S SITUATION IS  
7 DISTINGUISHABLE BECAUSE THE MARIJUANA CONVICTION IS NOW  
8 LEGALLY INVALID, NOT JUST A MISDEMEANOR.

9 SO I THINK ALL IN, PERHAPS THE WISER COURSE OF ACTION AT  
10 THIS POINT, THERE BEING NO CASES AND THE TERMS BEING LEGALLY  
11 INVALID SEEM TO FIT MORE INTO THE CASES WHERE COURTS HAVE HELD  
12 THAT THE CONVICTIONS -- THE CONVICTION SHOULD BE TREATED AS IF  
13 IT NEVER OCCURRED AND NOT COUNTED, BUT I WOULD BE INTERESTED  
14 IN HEARING WHETHER THE GOVERNMENT HAS ANYTHING TO SAY ABOUT  
15 ANYTHING FURTHER.

16 **MS. MARTIN:** THE CLOSEST I HAD COME WAS TO THE CASE  
17 THAT I HAD CITED AND I DO RECOGNIZE IT IS DIFFERENTLY,  
18 PARTICULARLY NOW THAT I'VE HAD MORE TIME TO LOOK AT THE  
19 DOCUMENT THE DEFENSE HAS PROVIDED.

20 AND YOU'RE RIGHT, I MEAN I HAVEN'T SEEN ANYTHING THAT MADE  
21 A CASE -- A PRIOR CRIME INVALID. SO I DO THINK IT MIGHT BE  
22 DIFFERENT. I DON'T NECESSARILY DISAGREE THAT THE WAY TO MOVE  
23 FORWARD HERE IS TO NOT COUNT IT.

24 **THE COURT:** IS THERE ANYTHING FURTHER YOU WANT TO  
25 SAY, MR. DRESSLER?

1                   **MR. DRESSLER:** SINCE THE U.S. ATTORNEY HAS INDICATED  
2 THAT -- WHAT SHE INDICATED, I WOULD HEARTILY JOIN IN HER  
3 STATEMENT.

4                   **THE COURT:** I THINK THAT I'M GOING TO -- I THINK THE  
5 BETTER COURSE HERE UNTIL I GET FURTHER GUIDANCE, EITHER FROM  
6 THE NINTH CIRCUIT OR ANOTHER -- IT WOULDN'T BE ANY OTHER  
7 CIRCUIT, MAYBE EVEN THE CALIFORNIA SUPREME COURT, IT  
8 DOESN'T -- GIVEN THAT I THINK ANY CRIMINAL SENTENCE -- OR ANY  
9 CRIMINAL MATTER, ANY CRIMINAL STATUTE SHOULD, IF THERE IS A  
10 DOUBT, IT SHOULD BE RESOLVED IN FAVOR OF LENITY OR LENIENCY  
11 AND, THEREFORE, I'M NOT GOING TO COUNT THAT PRIOR CONVICTION.

12                  AND THE RESULT OF THAT FROM THE COURT'S CALCULATION IS  
13 THAT MR. CONERLY IS A CRIMINAL HISTORY CATEGORY III, NOT A  
14 CRIMINAL HISTORY CATEGORY IV AND, THEREFORE, UNDER THE  
15 APPROPRIATE GUIDELINE CALCULATION HIS EXPOSURE UNDER THE  
16 NONBINDING GUIDELINES WOULD BE 87 TO 108 MONTHS AS OPPOSED TO  
17 100 TO 125 MONTHS.

18                  SO THAT'S WHAT THE COURT HOLDS IN THIS CASE. AND IF THE  
19 GOVERNMENT WANTS TO TAKE ME UP AND MAKE SOME NEW LAW, THEY  
20 HAVE EVERY RIGHT TO DO SO.

21                  BUT, AGAIN, I THINK THAT'S THE RIGHT WAY TO GO ESPECIALLY  
22 IN LIGHT OF THE CANDID STATEMENT, WHICH I APPRECIATE FROM  
23 GOVERNMENT COUNSEL.

24                  ALL RIGHT. SO THAT SAID, WE ARE NOW DEALING WITH A  
25 DIFFERENT STARTING POINT IN TERMS OF THE GUIDELINES UNDER

1 CARTER -- CARTY, U.S. VERSUS CARTY IN THE NINTH CIRCUIT. AND  
2 I'VE READ -- MS. MARTIN, I'VE READ YOUR MEMORANDUM. IS THERE  
3 ANYTHING YOU WANT TO SAY AT ALL, AND IN PARTICULAR, NOW THAT  
4 THE GUIDELINE CALCULATION IS DIFFERENT?

5 **MS. MARTIN:** THE GOVERNMENT STILL ASKS FOR A HIGH END  
6 GUIDELINE. SO 108 MONTHS WOULD BE OUR RECOMMENDATION AT THIS  
7 POINT FOR THE REASONS STATED THEREIN.

8 HIS BACKGROUND IS PRETTY HEINOUS. HE HAS MULTIPLE DRUG  
9 SALES CONVICTIONS, THE CIRCUMSTANCES SURROUNDING THIS  
10 PARTICULAR ARREST WITH THE FIREARM INVOLVED ACTUAL THREATS OF  
11 VIOLENCE TO ANOTHER PERSON. AND HE WAS ONLY RECENTLY BEFORE  
12 THIS ARRESTED AND WAS FACING FEDERAL CHARGES BEFORE.

13 SO IT DOESN'T SEEM THAT A WAKE-UP CALL IS GOING TO AT THIS  
14 POINT REHABILITATE THE DEFENDANT. CERTAINLY THE GOVERNMENT  
15 HOPES THAT IN HIS FUTURE HE IS REHABILITATED, AND WE WOULD  
16 LOVE FOR HIM TO CHOOSE A DIFFERENT PATH, BUT I THINK WE CAN'T  
17 TAKE THAT RISK AND WE CAN'T BELIEVE THAT HE WILL AFTER THIS  
18 PATTERN OF CRIMINAL ACTIVITY.

19 SO I THINK TO BE -- TO KEEP THE PUBLIC SAFE, A PRISON  
20 SENTENCE OF AS LONG AS POSSIBLE IS REQUIRED HERE. AND SO WE  
21 ARE SEEKING A HIGH-END SENTENCE.

22 **THE COURT:** EXPLICIT IN WHAT YOU ARE SAYING OR  
23 IMPLICIT, IS THAT YOU ARE NOT ASKING FOR AN UPWARD VARIANCE.

24 **MS. MARTIN:** THE GOVERNMENT WOULD NEED SPECIAL  
25 PERMISSION FROM SUPERVISORS TO SEEK AN UPWARD VARIANCE. SO WE

1 ARE SIMPLY ASKING FOR A HIGH-END SENTENCE.

2                   **THE COURT:** THANK YOU VERY MUCH.

3                   MR. DRESSLER, YOU DID AN EXCELLENT JOB AND THE COURT  
4 APPRECIATES BRINGING THAT ISSUE TO THE COURT'S ATTENTION  
5 BECAUSE EVEN THE PROBATION OFFICER IS EXCELLENT AT KEEPING UP  
6 ON THE LAW DID NOT PUT THAT IN THERE.

7                   I WAS NOT -- I WAS GENERALLY AWARE OF PROPOSITION 64, BUT  
8 NOT IN THE CONTEXT OF HOW IT IMPACTS THE GUIDELINES. SO THE  
9 COURT APPRECIATES YOU BRINGING THAT UP. IT CERTAINLY MAKES --  
10 PUTS A DIFFERENT LIGHT ON THE CASE IN TERMS OF THE DEFENDANT'S  
11 EXPOSURE AND ALSO AVOIDED AN ISSUE ON APPEAL THAT COULD HAVE  
12 COME UP FOR THE FIRST TIME WITHOUT THE DISTRICT COURT HAVING  
13 HAD AN OPPORTUNITY TO RESEARCH THE MATTER. SO THE COURT  
14 APPRECIATES YOU BRINGING IT TO THE COURT'S ATTENTION.

15                   IS THERE ANYTHING FURTHER YOU WISH TO SAY AT THIS POINT?

16                   **MR. DRESSLER:** YES, YOUR HONOR. THANK YOU FOR THAT.

17                   I WOULD SAY THAT -- AND I WILL CHARACTERIZE IT BRIEFLY IN  
18 TERMS OF WHAT I'VE ARGUED, AND THAT IS REALLY FOR THE FIRST  
19 TIME IN HIS LIFE, FOR THE TWO YEARS OR A LITTLE LONGER PRIOR  
20 TO THIS OFFENSE BEFORE HE... BEFORE HE GOT OFF THE TRACK  
21 AGAIN, HE HAD DONE SOMETHING WHICH HE HAD NEVER DONE BEFORE IN  
22 HIS WHOLE LIFE WHICH IS TO HAVE A JOB, WORK AT IT. HE  
23 REALLY -- THE -- ONE OF THE EXHIBITS I SUBMITTED SHOW THAT HE  
24 HAD STARTED IN APRIL OF 2017, STARTED APPLYING FOR THE TRUCK  
25 DRIVING SCHOOL, AND HE SAW THAT AS A REAL OPPORTUNITY FOR HIM

1 TO MAKE SOME REAL MONEY FOR THE FIRST TIME IN HIS LIFE. AND  
2 AS WITH ALL PEOPLE THAT HAVE DRUG PROBLEMS, IT'S NOT A STEADY  
3 CURE THAT JUST RISES FROM THE BOTTOM ALL THE WAY UP TO TOTAL  
4 REHABILITATION.

5 SO, HE DID, WITH THE HELP, AND I -- AS I SUGGESTED WITH  
6 THE HELP OF SERVICES THAT ARE AVAILABLE IN A FEDERAL COURT AS  
7 OPPOSED TO A STATE COURT THAT HAVE MORE PEOPLE AND LESS  
8 RESOURCES THAT -- AND WITH THE HELP OF PRETRIAL SERVICES  
9 BEFORE HIS PREVIOUS CASE WAS DISMISSED, HE GOT SOME REAL HELP.  
10 AND HE TOOK IT TO HEART AND HE GOT A JOB, AND HE DID THE BEST  
11 HE COULD. AND THEN IT HAPPENED THAT HE FELL BACK INTO HIS OLD  
12 WAYS.

13 I DON'T KNOW WHETHER IT WAS BECAUSE HE HAD A DIFFICULT  
14 TIME AND IT REQUIRED A LOT OF EFFORT AND MULTIPLE APPLICATIONS  
15 FOR DIFFERENT REASONS TO GET INTO THAT TRUCK DRIVING SCHOOL,  
16 HE FELL OFF THE WAGON, SO TO SPEAK.

17 **THE COURT:** DON'T THE FACTS CLEARLY SHOW THAT EVEN  
18 WHILE HE WAS WORKING, DURING THE PERIOD THAT HE WAS WORKING HE  
19 POSSESSED A FIREARM?

20 **MR. DRESSLER:** YES, BUT I THINK THAT WAS RELATIVELY  
21 RECENT, FRANKLY, RELATIVE TO THE INCIDENT IN THIS CASE.

22 AND EVEN DESPITE THE FACT THAT HE WAS ARRESTED, DESPITE  
23 THE FACT THAT HE WAS CHARGE WITH FELONIES, HE DIDN'T JUST SIT  
24 AROUND AND FEEL SORRY FOR HIMSELF. HE WENT DOWN TO FONTANA,  
25 CALIFORNIA, SPENT A COUPLE OF DAYS THERE, SIGNED A LOAN

1 AGREEMENT AND WAS ON HIS WAY, ALBEIT AFTER THE FACT -- IT'S  
2 NOT LIKE HE THOUGHT OF THAT RIGHT AFTER HIS ARREST, MAYBE I'LL  
3 DO THIS, HE HAD BEEN TRYING TO DO THAT FOR A NUMBER OF MONTHS.

4 AND I DIDN'T SUBMIT -- I HAD ABOUT 200 PAGES OF PAPERWORK  
5 IN TERMS OF THOSE APPLICATIONS, I SUBMITTED ENOUGH TO GIVE THE  
6 COURT AN IDEA OF WHAT ALL THAT WHAT WAS ABOUT.

7 SO ULTIMATELY THE QUESTION FOR THE COURT IS WHAT IS A  
8 SUFFICIENT SENTENCE TO DETER HIM AND TO HELP HIM CONTINUE  
9 ALONG THE RIGHT PATH.

10 AS I SAID IN MY MOVING PAPERS, I KNOW THIS COURT AND I  
11 KNOW THE COURT TAKES THESE KINDS OF CASES VERY SERIOUSLY, AND  
12 A SUBSTANTIAL SENTENCE IS IN ORDER, BUT I WOULD SUGGEST THAT  
13 BASED ON THE 3553(A) FACTORS THAT I TALKED ABOUT, THAT  
14 SOMETHING LESS THAN -- SOMETHING LOWER THAN THE ADVISORY  
15 GUIDELINE RANGE IS APPROPRIATE.

16 AND HE'S GETTING OLDER. AS THE COURT KNOWS, THE OLDER  
17 PEOPLE GET, FRANKLY, THE LESS LIKELY THEY ARE TO RECIDIVATE.  
18 I THINK THAT HE'S GETTING -- EVEN IF YOU GIVE HIM A FIVE- OR  
19 SIX-YEAR SENTENCE, WHICH I CONSIDER TO BE SUBSTANTIAL, THAT'S  
20 A LONG SENTENCE FOR SOMEONE HIS AGE. AND I THINK IT WOULD BE  
21 IMPORTANT FOR HIM TO BE RELEASED FROM A PRISON SENTENCE WHILE  
22 HE'S STILL YOUNG ENOUGH TO NOT ONLY TAKE ADVANTAGE OF  
23 SUPERVISED RELEASE AND REHABILITATION THAT COMES ALONG WITH  
24 THAT, BUT ALSO NOT SO OLD NO ONE WILL WANT TO HIRE HIM.

25 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH,

1 MR. DRESSLER.

2 MR. CONERLY, THIS IS YOUR OPPORTUNITY TO ADDRESS THE COURT  
3 ON SENTENCING AND ANY MATTER THAT YOU THINK THE COURT SHOULD  
4 TAKE INTO ACCOUNT IN CONNECTION WITH SENTENCING YOU.

5 WHAT WOULD YOU LIKE TO SAY TO THE COURT?

6 **THE DEFENDANT:** FIRST I WOULD LIKE TO START OFF WITH  
7 AN APOLOGY. I AM SORRY THAT I AM CONSTANTLY BEING A PROBLEM  
8 TO THE COMMUNITY.

9 YOU KNOW, MY INTENTIONS WERE NOT TO HURT ANYONE. I NEVER  
10 HURT ANYONE. NEVER SENT NOBODY TO THE HOSPITAL, JUST NEVER  
11 DOCUMENTED NO NOTHING. NO MATTER HOW BAD THE PROSECUTION  
12 MAKES ME SEEM, I NEVER HURT ANYONE.

13 I DON'T GO OUT THERE INTENTIONALLY VICTIMIZE ANYONE. I'M  
14 NOT TRYING TO MINIMIZE WHAT I DID OR POTENTIAL RISK THAT COULD  
15 HAVE HAPPENED, I'M NOT TRYING TO MINIMIZE IT, BUT I HAVEN'T.  
16 LAST TIME I DID GET A BREAK THEY FOUND EVIDENCE THAT THE  
17 BERKELEY POLICE HAD VIOLATED MY CONSTITUTIONAL RIGHTS, AND I  
18 WAS RELEASED FROM CUSTODY.

19 LIKE MY ATTORNEY SAID, I NEVER HAD A JOB BEFORE. I TOOK  
20 IT INTO CONSIDERATION BECAUSE, YOU KNOW, MY LIFE WASN'T GOING  
21 NOWHERE. I AM GETTING OLDER. I'VE DONE SOME TIME BEFORE, AND  
22 IT WASN'T HELPING ME, SO I TOOK THE INITIATIVE MYSELF FROM  
23 DEEP DOWN INSIDE AND GAVE AN EFFORT FOR IT, AND I KEPT  
24 FIGHTING AND FIGHTING.

25 AND THEN AS TIME WAS GOING ON AND COMMUNICATING WITH

1 DIFFERENT POSITIVE PEOPLE IN SOCIETY THAT WAS GIVING ME THE  
2 PROPER GUIDANCE, THEY WAS TURNING ME ON TO LIKE NEW VENUES IN  
3 MY LIFE. FIRST I WAS DOING WAREHOUSING. THEN THEY TURNED ME  
4 ON TO A COLLEGE PROGRAM. THEN THEY TURNED ME ON TO A DONATION  
5 AMBASSADOR WHERE I'M DOING DRIVES, HELPING PEOPLE, FIRE  
6 VICTIMS IN SANTA ROSA, ALL THAT TYPE OF STUFF.

7 AND THEN SOMEBODY JUST GAVE ME A HIT ON A CAREER THAT I  
8 KNEW I COULD SURVIVE OFF OF. HE SHOWED ME A MEMO FROM C.R.  
9 ENGLAND AND IT SHOWED I COULD MAKE A SUBSTANTIAL AMOUNT OF  
10 MONEY WHERE I COULD PAY RENT AND LIVE CLEAN AND FREE AND HAVE  
11 A LITTLE BIT LOWER THAN MIDDLE CLASS LIFESTYLE WHERE I CAN  
12 AFFORD TO STAY SOMEWHERE. SO I TOOK THAT INTO CONSIDERATION.

13 IT WAS HARD. IT TOOK ME LIKE SIX MONTHS TO FIND FUNDING,  
14 AND THEN I HADN'T HAD NO CONVICTIONS IN OVER SEVEN YEARS, SO  
15 THE COMPANY DOWN THERE IN SOUTHERN CALIFORNIA HAD ACCEPTED ME.

16 SO BY THE TIME -- I WENT TWICE. THE FIRST TIME I WENT I  
17 HAD MY SOCIAL SECURITY CARD MYSTERIOUSLY CAME UP MISSING SO  
18 THEY SENT ME BACK UP HERE BECAUSE THEY COULDN'T HIRE ME  
19 WITHOUT MY SOCIAL SECURITY CARD.

20 SO I WAS SENT BACK DOWN THERE LIKE A COUPLE OF MONTHS. I  
21 KIND OF LOST FOCUS. I WAS HAVING PROBLEMS WITH MY FEMALE --  
22 YOU KNOW, I STARTED DRINKING. AND IT JUST BUST ON ME. THEN,  
23 YOU KNOW, IT WAS A LOT OF VIOLENCE GOING ON IN MY  
24 NEIGHBORHOOD, BUT THE GUN HAD NO BULLETS OR ANYTHING.

25 I'M NOT TRYING TO MINIMIZE IT. MY INTENTION WASN'T TO

1 HURT ANYONE. AND THEN I JUST FELL. I FELL ON HARD TIMES.  
2 YOU KNOW, I APOLOGIZE.

3 BUT THE TIMES I HAVE BEEN ARRESTED, I HAVE THE STUFF TO  
4 REHABILITATE MYSELF TOWARDS THE COMMUNITY. LIKE I WENT TO  
5 FIRE CAMP ON ONE OF THEM CONVICTIONS. WE DEAL WITH SUICIDES,  
6 STRIKE TEAMS. I MEAN STUFF LIKE FLOODS, STUFF THAT A LOT OF  
7 PEOPLE WOULDN'T PUT THEMSELVES OUT ON THE LINE TO TRY TO HELP  
8 SAVE THE COMMUNITY.

9 WHAT ELSE? I WROTE YOU A LETTER. DID YOU HAPPEN TO READ  
10 MY LETTER?

11 **THE COURT:** YES, I DID.

12 **THE DEFENDANT:** AND I REALLY NEVER BEEN OUT OF JAIL  
13 THAT LONG. I NEVER HAD AN OPPORTUNITY TO BE OUT OVER A COUPLE  
14 OF YEARS AND, YOU KNOW, I JUST CAME AT A LOW POINT IN MY LIFE  
15 AND MY ADDICTION JUST TOOK OVER. I'M JUST -- I APOLOGIZE. I  
16 AM SORRY.

17 **THE COURT:** ALL RIGHT. THANK YOU VERY MUCH.

18 SO THE COURT HAS THIS MATTER FOR SENTENCING. IT'S ONE OF  
19 THE THINGS -- ONE OF THE THINGS THAT STRUCK ME ABOUT THIS CASE  
20 WAS THAT YOU WERE IN A SITUATION WHERE YOU'RE NOT ALL THAT  
21 LONG AGO YOU HAD BEEN CHARGED WITH A SIMILAR VIOLATION AND THE  
22 CASE -- YOUR COUNSEL SUCCESSFULLY ARGUED THAT THE SEARCH --  
23 THAT GAVE RISE TO THE EVIDENCE AGAINST YOU WAS ILLEGALLY  
24 OBTAINED, THEREFORE, IT WAS EXCLUDED, AND THERE BEING NO  
25 FURTHER EVIDENCE BEYOND THAT, THE CHARGES WERE DISMISSED, I

1 WOULD HAVE THOUGHT THAT MOST PEOPLE WOULD SAY, YOU KNOW WHAT?  
2 THAT'S MAYBE A GIFT FROM WHEREVER, WHATEVER I BELIEVE IN, AND  
3 MAYBE I GOT AWAY WITH ONE BECAUSE WE ALL BOTH KNOW THAT  
4 MATTERS -- CASES THAT ARE DISMISSED BECAUSE OF SUPPRESSION OF  
5 EVIDENCE DOESN'T -- BECAUSE THERE IS A SUPPRESSION DOESN'T  
6 FIND THAT YOU WERE INNOCENT OR NOT GUILTY, IT SIMPLY FINDS  
7 THAT THE EVIDENCE WAS IMPROPERLY OBTAINED.

8 AND IN ORDER TO DETER THE POLICE FROM CONDUCTING THAT  
9 UNCONSTITUTIONAL ACTIVITY, YOU KNOW, THE CONSTITUTION EXCLUDES  
10 THAT EVIDENCE, BUT IT HAS NOTHING TO DO WITH GUILT OR  
11 INNOCENCE.

12 BUT IF, IN FACT, YOU DID HAVE -- THE COURT WILL NOT TAKE  
13 THAT INTO ACCOUNT BECAUSE THE EVIDENCE UPON WHICH IT RELIED  
14 WAS ILLEGALLY OBTAINED ACCORDING TO A DISTRICT COURT JUDGE,  
15 BUT I WOULD HAVE THOUGHT THAT THAT WHOLE SERIES OF EVENTS  
16 WOULD HAVE SAID, HEY, I HAD MY CHANCE. I GOT OFF WITH THIS,  
17 YOU KNOW, BECAUSE THE POLICE ACTED INAPPROPRIATELY, AND WOULD  
18 HAVE JUST MOVED ON WITH YOUR LIFE, BUT YOU DIDN'T DO THAT.

19 AND THIS IS NOT -- THIS IS NOT YOUR GARDEN VARIETY CASE  
20 THAT WE SEE WHEREBY THE GOVERNMENT CHARGES SOMEBODY WITH A  
21 FIREARMS VIOLATION WHERE THEY SIMPLY HAD THE FIREARM, USUALLY  
22 THERE'S NOTHING ELSE GOING ON EXCEPT THEY WERE TRYING TO  
23 PROTECT THEMSELVES. OFTEN THEY WERE SHOT AND THEY THINK THEY  
24 NEED TO PROTECT THEMSELVES.

25 NONE OF THAT IS JUSTIFIED, BUT AT LEAST IT'S A DIFFERENT

1 KIND OF SITUATION AND IT'S NOT AS AGGRAVATING. BUT HERE, IT'S  
2 UNDISPUTED THAT, YOU KNOW, YOU FLED FROM THE POLICE, WHICH  
3 YOU'VE DONE BEFORE, YOU ASSAULTED A YOUNG LADY WITH A BASEBALL  
4 BAT BY THROWING IT AT HER, YOU HAD A FIREARM WITH AN EXTENDED  
5 MAGAZINE, WHICH IS EXTREMELY DANGEROUS, YOU ATTEMPTED TO  
6 ASSAULT THE ARRESTING OFFICERS, AND YOU KICKED ONE OFFICER AND  
7 SPAT ON THE OFFICER, ACCORDING TO THE EVIDENCE CONTAINED IN  
8 THE PRESENTENCE REPORT, WHICH IS UNDISPUTED, YOU THREATENED TO  
9 KILL THE ARRESTING OFFICER.

10 NO, YOU HAD THE OPPORTUNITY. DON'T RAISE YOUR HAND. YOU  
11 HAD YOUR OPPORTUNITY.

12 AND ALSO IT'S PRETTY CLEAR TO THE COURT THAT YOU WERE  
13 DEALING DRUGS, ALTHOUGH AT A STREET LEVEL, AND THIS FIREARM  
14 WAS TO PROTECT YOUR BUSINESS. SO THE ELEMENTS -- THE FACTS  
15 RELATING TO THIS CONVICTION ARE MUCH MORE SERIOUS THAN THE  
16 USUAL ONE, AND IN SOME WAYS, YOU KNOW, YOU ARE FORTUNATE  
17 BECAUSE YOU WERE ABLE TO AVOID THIS PREVIOUS CHARGE IN FRONT  
18 OF ONE OF MY COLLEAGUES, JUDGE TIGAR, YOU -- THE GOVERNMENT  
19 DID NOT CHARGE YOU WITH A SEPARATE SUBSTANTIVE OFFENSE FOR  
20 USING A GUN IN THE COURSE OF A DRUG SALE, WHICH WOULD HAVE --  
21 COULD HAVE RESULTED IN A MANDATORY MINIMUM CONSECUTIVE  
22 SENTENCE OF AT LEAST FIVE YEARS.

23 YOUR LAWYER SUCCESSFULLY ARGUED ABOUT THE IMPACT OF THE  
24 PETITION TO REDUCE -- TO FIND YOUR PREVIOUS MARIJUANA  
25 CONVICTION TO BE LEGALLY INVALID, SO YOU ARE STANDING HERE IN

1 THE FACE OF SOME REALLY SERIOUS CHARGES AND REALLY SERIOUS  
2 FACTS IN A -- FOR SOMEBODY IN THAT POSITION, PRETTY FAVORABLY.

3 I LOOK AT THE FACT THAT BASED UPON PREVIOUS SENTENCES IN  
4 VIOLATIONS OF PAROLE AND OTHER SENTENCES YOU'VE HAD, YOU WERE  
5 LOOKING AT TEN-YEAR SENTENCES, TWO-YEAR SENTENCE IN STATE  
6 COURT, AND EVEN THE LOOMING POTENTIAL TEN-YEAR SENTENCE IN  
7 STATE PRISON DID NOT DETER YOU FROM GOING BACK TO YOUR  
8 CRIMINAL WAYS AND POSSESSING THIS FIREARM.

9 YOU HAVE FOUR PRIOR ADULT FELONY CONVICTIONS, ONE OF THEM,  
10 THE DRUG CHARGE IS NOT VALID, BUT YOU STILL HAVE THE OTHER  
11 ONES, AND YOU HAVE THIS HABIT OF FLEEING FROM POLICE AND GOING  
12 BACK REGRESSING TO POSSESSING FIREARMS.

13 SO THIS IS A PRETTY SERIOUS CASE, AND WHAT YOU PRESENT TO  
14 ME, MR. CONERLY, IS A PERSON WHO, BECAUSE OF ALL OF THE  
15 VIOLATIONS OF PROBATION AND PAROLE YOUR BEHAVIOR IN THE  
16 CONTEXT OF THESE CONVICTIONS AND THE ARREST IN THIS CASE, AS A  
17 PERSON WHO REALLY DOESN'T RESPECT THE LAW.

18 AND CONTRARY TO THE CALM DEMEANOR THAT YOU PRESENT HERE IS  
19 AS DEMONSTRATED HIMSELF TO BE VIOLENT AND NOT RESPECTING  
20 AUTHORITY IN THE FORM OF THE POLICE OR EVEN THE COURT, AND THE  
21 SENTENCE, AS THE GOVERNMENT I THINK PROPERLY ARGUES AND IS  
22 RECOMMENDED BY THE PROBATION OFFICER IS NECESSARY TO INSTILL  
23 RESPECT FOR THE LAW AND ALSO TO PROTECT THE PUBLIC FROM YOU.

24 BECAUSE IT STRIKES ME, GIVEN YOUR REACTION, YOU KNOW, IN  
25 THE POLICE CAR AND YOU'RE ASSAULTING THIS YOUNG WOMAN BY

1           THROWING A BASEBALL BAT AT HER, THAT YOU ARE A VIOLENT  
2           INDIVIDUAL AND SOCIETY NEEDS TO PROTECT -- BE PROTECTED FROM  
3           YOU, AND YOU NEED TO BE DETERRED FROM COMMITTING THIS KIND  
4           OF -- THIS VIOLENCE AND REGRESSING TO FIREARMS IN THE FUTURE.

5           NOW, AGAIN, THE GOVERNMENT HAS NOT REQUESTED AN UPWARD  
6           VARIANCE. AND I THINK THIS IS A CLOSE CASE WHERE A VARIANCE  
7           UP TO THE STATUTORY MAXIMUM OF TEN YEARS WOULD BE APPROPRIATE,  
8           BUT I THINK IT WOULD BE INTELLECTUALLY DISHONEST FOR THE COURT  
9           OR NOT COMPLETELY HONEST FOR THE COURT HAVING SUSTAINED YOUR  
10           OBJECTION TO THE GUIDELINE CALCULATION TO SAY, WELL, IN ANY  
11           EVENT I'M GOING TO GIVE THE SAME SENTENCE THAT I MAY HAVE  
12           GIVEN HAD THAT PRIOR CONVICTION BEEN COUNTED AGAINST YOU. I  
13           DON'T THINK THAT IS APPROPRIATE. SO THERE IS ANOTHER BREAK  
14           THAT YOU'RE GETTING.

15           SO AS YOU LEAVE THE COURTROOM THINKING, YOU KNOW, YOU  
16           REALLY GOT A TOUGH BREAK HERE, KEEP IN MIND THAT THESE THINGS  
17           THAT I TALKED ABOUT, IT COULD HAVE BEEN MUCH, MUCH WORST FOR  
18           YOU. I JUST HOPE, BECAUSE YOU SEEM LIKE, YOU KNOW, GIVEN THE  
19           WAY YOU WRITE AND THE WAY YOU SPEAK, TO BE A VERY ARTICULATE  
20           YOUNG MAN, AN INTELLIGENT YOUNG MAN, BUT IT'S THE IMPULSE  
21           CONTROL THAT CONCERNS THE COURT.

22           AND I'M HOPING THAT YOUR TIME -- DURING YOUR TIME IN  
23           PRISON YOU WILL CONTINUE TO LEARN A TRADE, THAT YOU WILL LEARN  
24           TO -- YOU WILL TAKE ANGER MANAGEMENT TRAINING, AND THAT YOU  
25           WILL COME OUT AS A LAW ABIDING CITIZEN AND NOT A THREAT TO

1 SOCIETY. SOMEBODY IS GOING TO GET HURT AND IT MAY BE YOU.

2 THE SENTENCE OF THE COURT IS AS FOLLOWS:

3 PURSUANT TO THE SENTENCING REFORM ACT OF 1984, IT IS THE  
4 JUDGMENT OF THE COURT THAT CAN DAVID CONERLY IS HEREBY  
5 COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS TO BE IN  
6 PRISON FOR A TERM OF 108 MONTHS.

7 THE COURT RECOMMENDS THAT THE DEFENDANT PARTICIPATE IN THE  
8 BUREAU OF PRISON'S RESIDENTIAL DRUG ABUSE TREATMENT PROGRAM OR  
9 RDAP.

10 UPON RELEASE FROM IMPRISONMENT, THE DEFENDANT SHALL BE  
11 PLACED ON SUPERVISED RELEASE FOR A TERM OF THREE YEARS.

12 WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU  
13 OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE  
14 PROBATION OFFICE IN THE DISTRICT TO WHICH HE IS RELEASED.

15 WHILE ON SUPERVISED RELEASE, THE DEFENDANT SHALL NOT  
16 COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME, SHALL COMPLY  
17 WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS  
18 COURT, SHALL REFRAIN FROM ANY UNLAWFUL USE OF A CONTROLLED  
19 SUBSTANCE, AND SUBMIT TO A DRUG TEST WITHIN 15 DAYS OF RELEASE  
20 ON SUPERVISED RELEASE AND TWO PERIODIC DRUG TESTS THEREAFTER,  
21 AND SHALL COMPLY WITH THE FOLLOWING CONDITIONS.

22 1. WHEN NOT EMPLOYED AT LEAST PART TIME AND/OR ENROLLED  
23 IN AN EDUCATIONAL OR VOCATIONAL PROGRAM, YOU MUST PERFORM UP  
24 TO 20 HOURS OF COMMUNITY SERVICE PER WEEK AS DIRECTED BY THE  
25 PROBATION OFFICER.

1           2. YOU MUST PAY ANY SPECIAL ASSESSMENT THAT IS IMPOSED BY  
2 THIS JUDGMENT AND THAT REMAINS UNPAID AT THE COMMENCEMENT OF  
3 THE TERM OF SUPERVISED RELEASE.

4           3. YOU MUST SUBMIT YOUR PERSON, RESIDENCE, OFFICE,  
5 VEHICLE, ELECTRONIC DEVICES AND THEIR DATA, INCLUDING CELL  
6 PHONES, COMPUTERS AND ELECTRONIC STORAGE MEDIA OR ANY PROPERTY  
7 UNDER YOUR CONTROL TO A SEARCH. SUCH A SEARCH MUST BE  
8 CONDUCTED BY A UNITED STATES PROBATION OFFICER OR ANY FEDERAL,  
9 STATE, OR LOCAL LAW ENFORCEMENT OFFICER AT ANY TIME WITH OR  
10 WITHOUT SUSPICION. FAILURE TO SUBMIT TO SUCH A SEARCH MAY BE  
11 GROUNDS FOR REVOCATION. YOU MUST WARN ANY RESIDENTS THAT THE  
12 PREMISES MAY BE SUBJECT TO SEARCHES.

13          4. YOU MUST PARTICIPATE IN A PROGRAM OF DRUG TESTING. IF  
14 YOU SUBMIT A URINALYSIS SPECIMEN WHICH TESTS POSITIVE FOR  
15 ILLEGAL SUBSTANCES OR YOU ADMIT TO THE USE OF ILLEGAL  
16 SUBSTANCES, YOU MUST PARTICIPANT IN A PROGRAM OF TESTING AND  
17 TREATMENT FOR DRUG AND/OR ALCOHOL ABUSE UNTIL SUCH TIME AS YOU  
18 ARE RELEASED FROM SUCH TREATMENT. YOU ARE TO PAY PART OR ALL  
19 OF THE COST OF THIS TREATMENT IN AN AMOUNT NOT TO EXCEED THE  
20 COST OF TREATMENT. THE ACTUAL CO-PAYMENT SCHEDULE MUST BE  
21 DETERMINED BY THE PROBATION OFFICER.

22          5. YOU MUST COOPERATE IN THE COLLECTION OF DNA AS  
23 DIRECTED BY THE PROBATION OFFICER.

24          IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL PAY TO THE  
25 UNITED STATES A SPECIAL ASSESSMENT OF \$100. PAYMENT SHALL BE

1 MADE TO THE CLERK, U.S. DISTRICT COURT, 450 GOLDEN GATE  
2 AVENUE, P.O. BOX 36060 SAN FRANCISCO, CALIFORNIA, 94102.

3 DURING IMPRISONMENT, PAYMENT OF CRIMINAL MONITARY  
4 PENALTIES ARE DUE AT THE RATE OF NOT LESS THAN \$25 PER  
5 QUARTER, AND PAYMENTS SHALL BE THROUGH THE BUREAU OF PRISONS  
6 INMATE FINANCIAL RESPONSIBILITY PROGRAM.

7 THE COURT FINDS THE DEFENDANT DOES NOT HAVE THE ABILITY TO  
8 PAY A FINE AND, THEREFORE, ORDERS THE IMPOSITION OF ANY FINE  
9 TO BE WAIVED.

10 FORFEITURE. THE DEFENDANT'S INTEREST IN THE FOLLOW  
11 PROPERTY SHALL BE FORFEITED TO THE UNITED STATES. A .40  
12 CALIBER GLOCK 22 HANDGUN BEARING SERIAL NUMBER HUL232, AND 17  
13 ROUNDS OF .40 CALIBER AMMUNITION, INCLUDING 11 ROUNDS  
14 MANUFACTURED BY WINCHESTER AND ONE ROUND BY SPEER, S-P-E-E-R,  
15 TWO ROUNDS BY F PMC, TWO ROUNDS OF BLAZER, B-L-A-Z-E-R, AND  
16 ONE ROUND BY PPU.

17 I WANT TO ADVISE YOU, MR. CONERLY, BECAUSE YOU PLED OPEN,  
18 THAT YOU HAVE A RIGHT TO APPEAL THE JUDGMENT OF THIS COURT TO  
19 THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. YOU  
20 HAVE TWO WEEKS, 14 DAYS, THAT IS, TO FILE SUCH AN APPEAL  
21 PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE.

22 IF YOU CANNOT AFFORD COUNSEL ON APPEAL, YOU CAN PETITION  
23 FOR THE COURT TO PROCEED IN FORMA PAUPERIS AND ANY FEES WILL  
24 BE WAIVED FOR SUCH FILING OF NOTICE OF APPEAL.

25 MR. CONERLY, DO YOU UNDERSTAND YOUR RIGHT TO APPEAL?

1                   **THE DEFENDANT:** YES.

2                   **THE COURT:** ANYTHING FURTHER?

3                   **MS. MARTIN:** NO. THANK YOU, YOUR HONOR.

4                   **MR. DRESSLER:** COULD THE COURT RECOMMEND THAT

5                   MR. CONERLY BE HOUSED IN THE BAY AREA, HOPEFULLY AT LOMPOC?

6                   **THE COURT:** I RECOMMEND THAT TO THE BUREAU OF  
7 PRISONS.

8                   **MR. DRESSLER:** AND ALSO THERE WAS SOME MONIES THAT  
9 WERE SEIZED BY THE BERKELEY POLICE DEPARTMENT AT THE TIME HE  
10 WAS ARRESTED. THERE HAS BEEN NO FORFEITURE MOTION AND I'M NOT  
11 SURE WHO HAS THAT MONEY. BUT IF IT IS IN FEDERAL CUSTODY, I  
12 WOULD ASK THE COURT TO ORDER THAT TO BE RETURNED TO  
13 MR. CONERLY.

14                   **THE COURT:** DO YOU KNOW ANYTHING ABOUT THAT?

15                   **MS. MARTIN:** I AM PRETTY SURE IT IS NOT IN FEDERAL  
16 CUSTODY.

17                   WE WILL CHECK.

18                   **THE COURT:** WHY DON'T YOU CHECK. IF IT'S IN STATE  
19 CUSTODY, YOU NEED TO PETITION THEM. IF IT'S IN FEDERAL COURT,  
20 YOU JUST NEED TO FILE A PETITION BECAUSE THERE HAS BEEN NO  
21 REQUEST TO FORFEIT THAT IN THIS COURT.

22                   SO I AM NOT MAKING A RULING ON THAT, BUT IF IT'S -- IF  
23 IT'S BEFORE -- IF BERKELEY HAS IT OR ANOTHER JURISDICTION,  
24 STATE JURISDICTION, THEN I HAVE NO JURISDICTION. IF I DO,  
25 THEN YOU CAN FILE A MOTION AND I WILL CONSIDER THAT ON THE

1 MERITS.

2 THANK YOU VERY MUCH.

3 **MR. DRESSLER:** THANK YOU.

4

5 (PROCEEDINGS ADJOURNED AT 1:48 P.M.)

6

7

8 **CERTIFICATE OF REPORTER**

9 I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE  
10 UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY  
11 CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE  
12 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

13

  
Diane E. Skillman

14  
15 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

16

THURSDAY, JANUARY 3, 2018

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7 Attorney for Defendant David Conerly

8  
9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 OAKLAND DIVISION

12 UNITED STATES OF AMERICA,

13 CR 17-00578-1 JSW

14 Plaintiff,

15 DEFENDANT CONERLY'S  
16 SENTENCING MEMORANDUM

17 v.

18 Date:

19 DAVID CONERLY,

20 Time: 1:00 p.m.

21 Defendant.

22 Court: Hon Jeffrey S. White

23  
24 INTRODUCTION

25 For most Mr. Conerly's adult life has been unemployed and addicted to drugs. He has also  
26 been arrested or convicted for street level drug crimes and possession of firearms on a number of  
27 occasions. However, starting approximately two and one-half years before he was arrested in this  
28 case he began, for the first time in his life, to try and break free from his cycle of arrest and  
incarceration followed by another arrest and incarceration, by obtaining full-time and steady  
employment for over two years at Goodwill Incorporated. He also applied to was admitted to a  
commercial truck driving school. During that same time period he also tried to extract himself  
from a lengthy and destructive personal relationship.

Mr Conerly understands that he now appears before the Court for sentencing because despite  
his best intentions, he was not able to complete his rehabilitation on his own. He is aware that the  
Court will impose punishment for his conviction and he will be sentenced to federal custody for  
the first time. However, he is hopeful that the Court will impose a sentence that takes into

1 consideration his efforts over the last two years and his efforts to get back on track after his arrest  
2 by enrolling in and completing a numerous programs offered at the Glen Dyer facility. He looks  
3 forward to taking part in drug treatment and any other available programs which will be offered  
4 while he is in BOP custody and while he is on supervised release.

5 The Presentence Investigation Report (PSR) has determined that his advisory guideline range  
6 is 100 to 125 months and recommends a sentence of 120 months, which is the maximum  
7 sentence that can be imposed in this case. It is anticipated the government will make the same  
8 recommendation. We argue below that the Mr. Conerly's advisory guideline range should be 57  
9 to 71 months and that a sentence of slightly less than 57 months is warranted pursuant to a  
10 number of 18 U.S.C. § 3553(a) factors.

## 11 ARGUMENT

### 12 I. DEFENDANT CONERLY'S OBJECTIONS TO THE OFFENSE LEVEL AND 13 CRIMINAL HISTORY CALCULATION SET FORTH IN THE PSR

#### 14 A. Mr. Conerly Should Not Receive An Enhancement Under U.S.S.G § 2K2.1(b)(6)(B)

15 Mr. Conerly objects to the four level enhancement under U.S.S.G § 2K2.1(b)(6)(B) set forth  
16 in PSR ¶ 2. This objection is based on the fact that the evidence in this case does not support the  
17 conclusion that he possessed cocaine base and powder for sale on November 2, 2017.

18 At the time Mr. Conerly was arrested he possessed two plastic baggies, one of which  
19 contained three rocks of cocaine base and the other a small quantity of powder cocaine. During  
20 that arrest the Berkeley Police Department (BPD) officers did not find any unused empty baggies  
21 or any cutting implement that could be used to cut the cocaine base rocks into smaller pieces that  
22 could be sold on the street. Nor did they find a scale which could be used to weigh either  
23 type of cocaine.

24 A review of the BPD reports in this case reveal that when Mr. Conerly was arrested he  
25 possessed: (1) one loose "small white rock like substance" which was located in his lower left  
26 jacket pocket (Exhibit A-1); (2) a "clear sandwich baggie" containing "a white rocky, substance"  
27 suspected of being cocaine base with an aggregate weight of 20.9 grams, which was found in his  
28 "right jacket pocket". (Exhibit A-2); and (3) a plastic baggie containing approximately 3.5 grams

1 of powder cocaine found in his "right front pants pocket". (Exhibit A-3) None of the BPD  
2 reports indicate how many "rocks" were found in the "sandwich baggie". The DEA Chemical  
3 Analysis Report indicates that they received a plastic bag containing three "rock like" units  
4 which had a net weight of 18.4 grams and tested positive for cocaine base and one plastic bag  
5 containing 3.5 grams of "powder" cocaine, that tested positive for cocaine hydrochloride.

6 (Exhibit B)

7 Based on the foregoing it is not clear whether the "three rock like substances" referred to in  
8 the DEA report included the loose rock found in Mr. Conerly's right jacket pocket. If that is the  
9 case it is likely that the plastic baggie seized from Mr. Conerly contained two large rocks of  
10 cocaine base which in total weighed approximately 18 grams. It does not make sense that if Mr.  
11 Conerly was intending to sell rock cocaine on the street at the time he was arrested he would not  
12 likely be intending to sell two large rocks on the street, he would be selling smaller rocks, and  
13 thus would have had to have something in his possession to cut them into smaller quantities and  
14 empty baggies in which to package them. The same analysis applies to the powder cocaine  
15 contained in the other plastic baggie seized when he was arrested. It is more likely that Mr.  
16 Conerly was intending to go home and use one or both types of cocaine for recreational purposes.

17 Moreover, the government has not established by a preponderance of the evidence that the  
18 amount of cocaine possessed by Mr. Conerly could only have been possessed for sale as opposed  
19 to possession for personal use. The only evidence relied on by the government to establish that  
20 the aforementioned drugs were possessed for sale is the unsigned "affidavit" of a California  
21 Highway Patrol Officer, who is completely unqualified to render an opinion that Mr. Conerly  
22 possessed the cocaine for sale. (Exhibit B)

23 That "affidavit" reveals that the CHP officer has no personal or other experience with street  
24 level drug dealing. The "Curriculum Vitae" submitted with the "affidavit" is completely devoid  
25 of any relevant experience dealing with street level drug dealing of any kind or the amount of or  
26 doses of drugs used by people who are abusing drugs as opposed to selling drugs. The only drug  
27 related law enforcement experience remotely possessed by the affiant appears to be (a)

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DEFENDANT CONERLY'S SENTENCING MEMO  
IN CR 17-00578-1 JSW

1 performing "DRE's", which are drug recognition examinations conducted at the roadside when  
2 the a vehicle is pulled over for erratic driving and the driver is suspected of either drug or alcohol  
3 use and (b) testifying in court during a trial of a persons arrested for driving under the influence  
4 of drugs. Also, the CHP officer's review of "Conerly's criminal history" as a component of his  
5 opinion sheds little light on the issue herein, which is whether or not the drugs found on Mr.  
6 Conerly on November 2, 2017 were possessed for sale, not whether Mr. Conerly has a propensity  
7 for possessing drug's for sale in his past.

8 Finally, the search of Mr. Conerly's phone reveals a number of conversations which are  
9 consistent with a person who was selling street level quantities of marijuana as opposed to  
10 cocaine. This also would explain why, at the end of the night, Mr. Conerly possessed \$737 in  
11 currency.

12 Based on the foregoing, we request that the Court reduce Mr. Conerly's offense level by four  
13 points.

14 **B. Mr. Conerly Should Not Be Assessed Criminal History Points For His 2003  
15 Conviction For Violating California Health and Safety Code Section 11357**

16 The PSR imposes three criminal history points based Mr. Conerly's 2003 conviction for  
17 possession of concentrated cannabis in violation of California Health and Safety Code § 11357.  
18 PSR, ¶ 33. We submit that those points should not have been assessed because that conviction  
19 was declared "legally invalid" by the State of California and therefore, cannot be used to increase  
20 his Criminal History Category. We request that the Court deduct three points from Mr.  
21 Conerly's criminal history score, which would result in his Criminal History Category being  
22 reduced from a Category IV to a Category III.

23 On April 10, 2017, Mr. Conerly petitioned the Superior Court of Alameda County for a  
24 "Redesignation or Dismissal/ Sealing" of his 2003 concentrated cannabis conviction pursuant to  
25 California Health and Safety Code § 11361.8. (Proposition 64) (Exhibit D) On April 14, that  
26 petition was granted and the conviction was recalled, redesignated as a infraction, dismissed, and  
27 declared "legally invalid". (Exhibit E)

28 Subdivisions (e) and (f) of § 11361.8 state as follows:

DEFENDANT CONERLY'S SENTENCING MEMO  
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1 (e) A person who has completed his or her sentence for a conviction under Sections 11357,  
2 11358, 11359, and 11360, whether by trial or open or negotiated plea, *who would not have*  
3 *been guilty of an offense or who would have been guilty of a lesser offense under the Control,*  
4 *Regulate and Tax Adult Use of Marijuana Act had that Act been in effect at the time of the*  
5 *offense*, may file an application before the trial court that entered the judgment of conviction  
6 in his or her case to have the conviction *dismissed and sealed* because the prior conviction is  
7 *now legally invalid or redesignated as a misdemeanor or infraction in accordance with*  
8 *Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4 as those*  
9 *sections have been amended or added by this Act.* (emphasis added)

10 (f) *The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the*  
11 *party opposing the application proves by clear and convincing evidence that the petitioner*  
12 *does not satisfy the criteria in subdivision (e).* Once the applicant satisfies the criteria in  
13 subdivision (e), the court *shall redesignate* the conviction as a *misdemeanor or infraction or*  
14 *dismiss and seal the conviction as legally invalid* as now established under the Control,  
15 *Regulate and Tax Adult Use of Marijuana Act.* (emphasis added)

16 California Health and Safety Code §11357, as amended by the “Control, Regulate and Tax  
17 Adult Use of Marijuana Act”, referred to above, legalized the possession of less than 8 grams of  
18 concentrated cannabis by any person over 18 years of age<sup>1</sup>, thus rendering possession of less than  
19 8 grams of that substance legally invalid under subdivision (e) of §11361.8.

20 The District Attorney’s Office of Alameda County did not object to Conerly’s petition under  
21 § 11361.8. (Exhibit D, at Page 2 of 3), which is an admission that they could not prove by clear  
22 and convincing evidence that Mr. Conerly would have been convicted of possessing more than 8  
23 grams of concentrated cannabis if he had gone to trial, thus the Superior Court was authorized  
24 under subdivision (f) to dismiss and seal the conviction as legally invalid.

25 The effect of the recall, redesignation as a infraction, dismissal, and declaration that Mr.  
26

27  
28 <sup>1</sup> Exhibit F

1 Conerly's 2003 conviction is "legally invalid" on a federal court's ability to use that conviction  
2 to enhance a federal sentence appears to be a matter of first impression in this district and the  
3 Ninth Circuit. As discussed below, there is one Ninth Circuit case which has discussed the effect  
4 of a state expungement or dismissal on a prior state conviction under California Proposition 47,  
5 which among other things, reduced future convictions under California Health and Safety Code §  
6 11350(a) from a felony to a misdemeanor and permitted previously-convicted defendants to  
7 petition the court for a "recall of sentence", which, if granted, effectively reclassified those  
8 felonies as misdemeanors. See Cal. Penal Code § 1170.18(a). However, Proposition 47, unlike  
9 Proposition 64, did not authorize California Courts to declare a conviction "legally invalid".

10 In, *United States v. Diaz*, 838 F.3d 968 (9<sup>th</sup> Cir. 2016), the Ninth Circuit held that a reduction  
11 of an §11350(a) conviction from a felony to a misdemeanor under Cal. Penal Code § 1170.18(a)  
12 did not have any effect on an earlier federal sentencing which used that conviction to impose a  
13 life sentence under 21 U.S.C. § 841(b)(1)(A):

14 " . . . we have addressed whether dismissing or expunging a predicate state conviction  
15 invalidates a federal enhancement under this section [21 U.S.C. § 841(b)(1)(A)]. See  
16 *Norbury*, 492 F.3d 1012. In *Norbury*, we held that a state's later dismissal or expungement of  
17 a predicate state conviction had no bearing on whether § 841's requirements were met. *Id.* at  
18 1015. In other words, despite the fact that the state felony conviction was now expunged, this  
19 did not change the historical fact that, for purposes of § 841, the defendant had been  
20 convicted of the felony in the past. *Id.* We noted one exception: where the dismissal or  
21 expungement alters the legality of the original state conviction—such as where there was a  
22 trial error or it appears the defendant was actually innocent of the underlying crime. *Id.*  
23 (citing *Dickerson*, 460 U.S. at 115). Other than this circumstance, we explained that a federal  
24 enhancement "does not depend upon the mechanics of state post-conviction procedures, but  
25 rather involves the [state] conviction's underlying lawfulness. *Id.*" *Diaz*, 838 F.3d at 973.  
26 (emphasis added)

27 *Diaz* is clearly distinguishable from the instant case because California Penal Code §  
28

1 1170.18(a) did not authorize the state courts to declare a conviction to be "legally invalid"  
2 whereas §11361.8, subdivisions(e) and (f), do authorize such a declaration. Based upon the  
3 foregoing we request that this court subtract three points from Mr. Conerly's criminal history  
4 score.

5 **C. Conclusion**

6 If the court accepts the arguments set forth in A. and B., *supra*, Mr. Conerly will have a total  
7 offense level of 23 and a criminal history Category of III, which results in an advisory Guideline  
8 range of 57 to 71 months.

9 **II. MITIGATING FACTORS UNDER 18 U.S.C. 3553(a)**

10 The Court is familiar with the directives of *United States v. Booker*, 543 U.S. 220 (2005) and  
11 18 U.S.C. § 3553(a). The Sentencing Guidelines range is not mandatory and the Court has a duty  
12 to exercise judgment and discretion in arriving at an appropriate sentence. Importantly, the  
13 district court may not presume the Guidelines range is reasonable. *Nelson v. United States*, 555  
14 U.S. 350, 352 (2009) (per curiam). Instead, the Court must consider the Guidelines range, the  
15 nature and circumstances of the offense, the history and characteristics of the defendant, and the  
16 need to avoid unwarranted sentence disparities among similarly situated defendants. 18 U.S.C. §  
17 3553(a)(1), (a)(4) and (a)(6). In crafting a sentence that is sufficient, but not greater than  
18 necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a), the Court must also  
19 consider the need for the sentence imposed: (A) to reflect the seriousness of the offense, to  
20 promote respect for the law, and to provide just punishment for the offense; (B) to afford  
21 adequate deterrence to criminal conduct; and (C) to protect the public from further crimes of the  
22 defendant. 18 U.S.C. 3553(a)(2).

23 In determining what a reasonable sentence would be we ask the Court to consider Mr.  
24 Conerly's upbringing, including childhood and adult traumas, and early addiction to drugs.  
25 Although his extensive criminal record is not justified by his upbringing, his recent but  
26 unsuccessful efforts to break free from an adulthood crippled by a repeating cycle of criminal  
27 activity followed shortly thereafter by incarceration provides insight into who he has been and  
28

1 who he can become. Mr. Conerly's letter to the Court indicates that the age 40 he is ready to have  
2 a normal life and that he accepts full responsibility for his conduct. He understands that the Court  
3 will certainly impose a significant term of imprisonment, and yet, he is hopeful that the sentence  
4 imposed will provide him a chance to lead that normal life before he is too old to enjoy it.

5 Mr. Conerly's describes his home life while was growing up as a "harsh reality" that was  
6 punctuated by his father's drug addiction, periodic extreme poverty, witnessing verbal domestic  
7 violence by his father directed towards his mother, and the passing of his grandmother, who was  
8 the person he felt closest to. See PSR at ¶¶ 56 - 59. His letter to the Court sets forth in his own  
9 words, the harsh and difficult upbringing he received at home, other traumatic events that  
10 affected his behavior as an adult, and the poor decisions he made in his choice of friends and the  
11 adoption those friends' lifestyle. (Exhibit G)

12 On February 22, 2013, Mr Conerly was arrested by the Berkeley Police Department for  
13 possession of a controlled substance and possession of a gun. PSR § 47. As a result of this arrest  
14 he was indicted for a violation of 18 U.S.C. 922(g) in this court on October 31, 2013. (CR No.  
15 13-717 JST) On December 8, 2014 Judge Tigar granted a motion to suppress all of the  
16 incriminating evidence in that case. (Dkt. 97) The government appealed and Mr. Conerly was  
17 released from custody in late 2014 or early 2015 and was placed on the equivalent of pretrial  
18 release to a half-way house where he resided for a number of months. On March 9, 2014 with the  
19 blessing of Mag. Ryu, he obtained a job at Goodwill. The indictment was dismissed by the  
20 government on April 13, 2015 (Dkt. 129) As a result of the guidance and help of federal pretrial  
21 services, and the half-way house, Mr. Conerly did something he had never done before in his  
22 entire adult life — he worked full-time for two years straight and developed a plan to enroll in a  
23 truck driving school that could provide him with a high paying full-time job. Although he was  
24 arrested, but not charged on two occasions during the week of August 3, 2015 (PSR ¶¶ 50- 51) he  
25 had no law enforcement contacts for over two years — until he was arrested by Berkeley police  
26 officers on November 2, 2017 for offense in this case. After that arrest, he was released on bail  
27 and traveled to Fontana, California to attend the CR England Truck Driving School, which he

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DEFENDANT CONERLY'S SENTENCING MEMO  
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1 had been trying to enroll in since April of 2017. (Exhibit I) On his second day at the school he  
2 was arrested by FBI agents pursuant to the instant indictment. He certainly regrets and takes  
3 responsibility for his relapse. However, despite that relapse, his two years of full-time  
4 employment nevertheless establish, that with the proper supervision and guidance he is capable  
5 of becoming a productive citizen.

6 With the foregoing in mind, we respectfully suggest that the Probation Officer's  
7 recommendation that Mr. Conerly be sentenced to the maximum sentence of ten years is not  
8 warranted. It appears that a significant basis for that recommendation is the fact that "While on  
9 community supervision . . . [Mr. Conerly] has struggled to refrain from base cocaine and powder  
10 cocaine usage" and has "failed "to modify his conduct while on community supervision."  
11 Sentencing Recommendation at p. 1-2). While those statements are certainly true, for essentially  
12 all of that supervision he was on state probation or parole, neither of which provide the programs,  
13 guidance and supervision provided by the BOP and supervised release monitored by U.S.  
14 Probation. Additionally, those statements give no weight to Mr. Conerly's more recent self-  
15 directed attempts to modify his conduct after the case before J. Tigard was dismissed, and his  
16 participation in numerous rehabilitative programs since he has been detained the Glen Dyer  
17 Facility. (Exhibit J) Mr. Conerly's two and one-half years of self-directed rehabilitation establish  
18 that he is capable of being rehabilitated. This is especially true in light of the fact that after he is  
19 released from BOP custody he will have the support of his fiancee, his child and former wife, and  
20 his family and friends, all of whom have submitted letters of support to the Court. (Exhibit K)

21 We suggest that Mr. Conerly's successes resulting from his federal pretrial supervision  
22 described above and the programs he has participated in at Glen Dyer while in custody in this  
23 case will only increase once Mr. Conerly takes part in drug and other counseling while in the  
24 custody of the BOP. And the same is true when he is on supervised release after he completes his  
25 custodial sentence. We respectfully submit that the foregoing is a reason to decrease, rather than  
26 increase, the length of Mr. Conerly's BOP sentence and request that the Court imposed a  
27 custodial sentence of slightly less than 57 months.

28

DEFENDANT CONERLY'S SENTENCING MEMO  
IN CR 17-00578-1 JSW

1  
2  
3 Respectfully submitted,  
4  
5

/s/  
6 Alan A. Dressler  
7 Attorney for Defendant  
8 David Conerly  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID CLAYTON CONERLY,

Defendant.

} CASE NO. CR 17-00578 JSW  
} UNITED STATES' SENTENCING  
} MEMORANDUM  
} HEARING: NOVEMBER 20, 2018 AT 1:00 p.m.  
} THE HONORABLE JEFFREY S. WHITE

I. INTRODUCTION

The defendant, David Conerly, has been a danger and a menace to his community in Berkeley for most of his adult life. He has consistently sold drugs, carried loaded firearms, and disobeyed the police in Berkeley. His illegal possession of firearms and drugs contributes to a significant drug and gun problem in the Bay Area. This conduct can often lead to violence, and the defendant has in fact engaged in violence during the course of an adult life filled with arrests and incarceration. The defendant's conduct in this case is alarming. He not only possessed a firearm illegally, but he did so while threatening a woman, whom Conerly physically struck with a bat before she called 911 to report him. The defendant was drunk during this intense argument, and although the victim apparently did not know it, Conerly was carrying a loaded gun. This is an example of a circumstance in which the crime of

illegal gun possession can escalate into even more serious and dangerous conduct. Thankfully, no one was hurt with Conerly's gun in this case.

One of the most disappointing features of this case is that prior to the instant offense, the defendant was prosecuted by this U.S. Attorney's Office in 2013-2015 for being a felon in possession of a firearm. *See United States v. David Conerly*, CR 13-0717 JST. After years of arrests and convictions in state court that did not deter the defendant, he finally faced a serious federal prosecution with the possibility of a ten-year prison sentence. That case ended without a conviction, however, after Judge Jon S. Tigar suppressed the evidence of the defendant's illegal drug and gun possession. *Id.*, Dkt. # 97 (Order suppressing evidence). Indeed, on April 10, 2015, the United States dismissed the case because of the suppression of the evidence. *Id.*, Dkt. # 129 (Order of Dismissal). As such, Conerly narrowly escaped a federal prosecution after a long string of state arrests and convictions. Disappointingly, instead of counting his lucky stars and finally deciding to stay out of trouble, Conerly went right back to it. Within approximately four months of the dismissal of that federal case, Conerly was arrested for obstructing a police officer and being a felon in possession of a firearm following a domestic dispute. PSR, ¶ 48. Twelve days later, he was arrested for possessing fraudulent credit cards. PSR, ¶ 49. Then, following his arrest in this case in late 2017, he found himself back in federal court once again facing a ten-year federal prison sentence for the illegal possession of a loaded gun and drugs he intended to sell.

After all of the prior convictions, arrests, fights with the police, and repeated attempts to flee the police, the defendant has shown this Court that he lacks either the ability or the intention to become a law-abiding citizen. The defendant even had a job and was about to begin to train for a new job as a truck driver when he committed the instant offense. This was not some sort of crime of necessity; Conerly has always made the choice to continue his criminal lifestyle, and the Court now knows that he will always return to gun and drug crimes. He will always resort to violence and hurting people. Accordingly, to account for the defendant's criminal history and the offense conduct in this case, the government joins the U.S. Probation Office and respectfully asks this Court to sentence the defendant to ten years in prison, which is within the applicable guidelines range and represents the maximum sentence available under the 18 U.S.C. § 922(g)(1). The government also recommends a 3-year term of supervised release with the special conditions described herein, no fine, forfeiture of the gun and

ammunition listed in the Indictment, and a \$100 special assessment.

## II. FACTUAL BACKGROUND

### A. **The Instant Offense.<sup>1</sup>**

#### 1. Domestic Violence and a 911 Call Lead to the Defendant's Arrest.

On November 2, 2017, the defendant, David Conerly, was arrested by the Berkeley Police Department and charged with a number of crimes. See Dkt. # 30, Declaration of FBI Special Agent Beth Alvarez (“Alvarez Decl.”), ¶ 3, Ex. 1 (Berkeley Police Report). The police responded to a 911 call reporting a domestic violence incident involving the defendant. The victim (the defendant’s ex-girlfriend) told the police that Conerly came to her house drunk, they got into an argument, and she was scared so she picked up a bat to defend herself. PSR, ¶ 5. Conerly grabbed the bat and threw it at her, hitting her in the leg with the bat. *Id.* She told Conerly she was going to call the police, and he left the house. *Id.* The victim called the police and described the defendant. The police arrived quickly and saw the defendant nearby. *Id.* The police called out to the defendant, but he ignored their commands and ran away from them. They chased after him through the residential area. PSR, ¶ 6. When the police caught up to Conerly and detained him, he fought with them violently. PSR, ¶ 7. When he tried to empty his pockets, an officer ordered him to stop. *Id.* Conerly responded, “Fuck you bitch. I’ll fuck you up.” *Id.* He fought with the police so much that they were forced to try to restrain him in a WRAP restraint. *Id.* While officers tried to get control of Conerly and place him in the WRAP restraint, Conerly kicked a female officer in the middle of her chest. PSR, ¶ 8. He yelled and threatened them, saying, “Get off me mother fucker before I kill your ass,” and “Fuck you, bitch, I’m going to kill you.” *Id.* Conerly also spat on officers, even spitting in one officer’s face and neck. *Id.* As such, the officers placed a “spit hood” on Conerly to prevent him from further spitting on them. After the officers finally got Conerly into a police car to transport him to the Berkeley jail, Conerly began hitting his head on the Plexiglas that divides the front and rear of the police car. PSR, ¶ 9. He attempted to kick out the rear

<sup>1</sup> The facts of the instant offense are described in the government’s memorandum in opposition (Dkt. # 29) to the defendant’s motion to suppress. The facts listed in the government’s opposition are supported by declarations and other evidence. For any citations not contained herein, the government respectfully refers the Court to Dkt. # 29 for the full testimonial and other evidentiary support for the facts recited in this Sentencing Memorandum.

driver's side window. *Id.* When an officer instructed Conerly to stop, Conerly said, "Fuck you, you bitch ass nigga! I'm going to kill you, bitch." *Id.* Eventually, medical and/or fire personnel gave Conerly a sedative, which finally calmed him down. *Id.* He was later booked into jail, where officers found cash, additional drugs, and ammunition on areas of Conerly's body that the police were unable to search previously because of the need to place him in a WRAP restraint. PSR, ¶ 10.

During and after the struggle, the police searched the defendant and the area around him and found his .40 caliber Glock pistol, multiple rounds of ammunition, cocaine base in quantities typically possessed for sale, and his cell phone, among other things. PSR, ¶¶ 6-8. The police lawfully seized the defendant's cell phone incident to his arrest. Conerly was in possession of approximately 17.52 grams of cocaine base ("crack cocaine"). See DEA Report (CONERLY-000255), attached hereto as Ex. 1. Crack cocaine can be ingested by users in amounts as little as .10 grams. See Affidavit of CHP Officer Sean Deise, attached hereto as Ex. 2. Officer Deise reviewed evidence from this case relating to the arrest and the drugs seized from Conerly and rendered his opinion that "17.52g of cocaine base ... would far exceed the amount considered for personal use [because with that amount] Conerly could possibly ingest cocaine base 175 times." *Id.* The police also seized \$737.00 from Conerly. This cash was in small denominations, and Officer Deise found this to be further evidence that Conerly possessed the crack cocaine in this case for sale, not for personal use. *Id.*

According to the police report, Conerly was charged with multiple offenses, including possession of cocaine base for sale, assault with a deadly weapon other than a firearm, battery,<sup>2</sup> felon in possession of a firearm, and possession of a controlled substance while armed with a loaded firearm. *Id.* Shortly thereafter, on November 16, 2017, a federal grand jury returned the Indictment in this case, charging the defendant with a single count of being a felon in possession of a firearm and ammunition. *United States v. David Clayton Conerly*, CR 17-0578 JSW, Dkt. # 1. After filing a motion to suppress (Dkt. # 28), which was denied (Dkt. ## 43, 52), the defendant pleaded guilty to the charged offense (Dkt. ## 58, 59).

On March 8, 2018, the FBI searched the defendant's cell phone and found multiple text messages reflecting drug trafficking activity, including requests for price quotes and certain strains of

<sup>2</sup> The victim obtained an emergency protective order against Conerly the day after the domestic violence incident that led to his arrest. PSR, ¶ 11.

marijuana. PSR, ¶ 13. There was also a message in which the defendant spoke about have a certain quantity of something that was “spoon-ready.” Conerly’s cell phone also contained a clear image of the pistol that he possessed in this case, including the large-capacity magazine. *See Alvarez Decl.*, Ex. 2 (Dkt. # 30).

**B. The Defendant’s Criminal History.**

The defendant has four prior adult convictions, all of which are felonies. He has two prior convictions for controlled substance offenses, each of which involved cocaine base for sale, including quantities similar to the quantity of cocaine base involved in this case. PSR ¶¶ 30 (approx. 15.5 grams) and 32. He also has a prior conviction for possession for sale of a controlled substance (PSR, ¶ 33) (this involved cocaine and crack cocaine), and another for drug possession (PSR ¶ 31) (marijuana). In addition to his convictions, Conerly has been arrested many times in cases that either led to a revocation of parole or probation instead of a new criminal case, or were dismissed for other reasons. *See* PSR, ¶ 38 (probation revocation in lieu of new charges); PSR, ¶ 39 (probation revocation in lieu of new filing); PSR, ¶ 40 (violation of parole); PSR, ¶ 41 (defendant returned to prison for 10 years following burglary arrest for violating terms of probation issued following conviction listed in PSR, ¶ 32); PSR, ¶ 42 (returned to CDCR custody following arrest for carrying concealed weapon and felon in possession of firearm); PSR, ¶ 43 (returned to CDCR custody on parole violation after arrest for obstructing police and possession of cocaine); PSR, ¶ 44 (returned to CDCR on parole violation); PSR, ¶ 45 (prosecution deferred for revocation of parole, and returned to CDCR custody on parole violation in case involving crack cocaine and a loaded handgun); PSR, ¶ 46 (returned to CDCR custody on parole violation in case involving drugs and a loaded gun); PSR, ¶ 47 (returned to CDCR custody for parole violation in case involving arrest for felon in possession of firearm, possession of cocaine base for sale, and obstructing the police); PSR, ¶ 48 (charges not filed due to lack of evidence in domestic violence case in which Conerly brandished a handgun on the same victim who called the police in the instant case following a domestic violence incident); and PSR, ¶ 49 (no charges filed in case involving marijuana and fraudulent credit cards in Conerly’s pockets).

Many of Conerly’s arrests also included Conerly’s possession of crack cocaine, often in quantities similar to the quantity in this case. *See* PSR, ¶ 30 (15.5 grams of crack cocaine); PSR, ¶ 32

(seven pieces of cocaine base); PSR, ¶ 33 (15 rocks of cocaine base, along with 23 packages of cocaine); PSR, ¶ 37 (involving 11 rocks of crack cocaine weighing 3.376 grams); PSR, ¶ 38 (involving “two rocks of base cocaine,” although there was another passenger with Conerly in the car); and PSR, ¶ 45 (six rocks of cocaine base packaged for sale); PSR, ¶ 47 (arrest for possession of cocaine base for sale).

Notably, during every single arrest that led to a conviction (including this case), Conerly fled from the police, often putting those officers and/or nearby citizens in danger. See PSR, ¶ 6 (during the instant offense, “Mr. Conerly fled from the officers and failed to comply with verbal commands.”); PSR, ¶ 30 (“Officers attempted to contact Mr. Conerly but he started to run away and into oncoming traffic.”); PSR, ¶ 31 (Conerly “fled through a residential area [and] … attempted to evade officers by jumping fences and running through yards.”); PSR, ¶ 32 (Conerly “fled on foot and [was] observed discarding a .357 revolver in a driveway [and] … climbing on a rooftop and jumping fences in an attempt to avoid arrest.”); and PSR, ¶ 33 (Conerly “exited his home and fled the area.”). Conerly also fled from the police during arrests that either led to revocations of parole or probation or were dismissed without further action. See PSR, ¶ 36 (Conerly “fled out of the bank and collided into a responding officer on a bike. Mr. Conerly continued to run from the officers but was apprehended a short time later.”); PSR, ¶ 37 (“Conerly robbed a cashier at Walgreens at gunpoint, and fled with cash,” and then “fled on foot” from the officers.); PSR, ¶ 41 (after committing a burglary, Conerly fled but was later found by officers); and PSR, ¶ 43 (Conerly “stepped out of the vehicle and immediately ran to the rear of the vehicle, attempting to flee the scene on foot,” and when an officer caught up to him, “Conerly threw his elbows back and violently thrashed his upper body attempting to free himself from the deputy’s grip.”).

The defendant has been sentenced to prison multiple times, and he has violated the terms of his parole and probation repeatedly. The defendant has accumulated nine criminal history points, which places him at the uppermost part of criminal history category IV in the Sentencing Guidelines. The instant offense will add three points to that total in the future.

### III. SENTENCING GUIDELINES

The government agrees with Guidelines calculations in the PSR. Conerly’s criminal lifestyle has resulted in a Guidelines range of 100-120 months. PSR, ¶ 79. The government agrees with the U.S. Probation Office that there are no bases for either a downward departure or variance from that

Guidelines range. PSR, ¶¶ 94-95. The defendant's criminal history points place him at the top of criminal history category IV, and the government respectfully recommends a sentence of 120 months.

**IV. ARGUMENT**

**A. The Nature and Circumstances of the Offense Warrant a Sentence of 120 Months.**

This was a serious offense for multiple reasons. First, the defendant was in possession of a loaded gun while also in possession of crack cocaine, which he intended to sell. The combination of gun possession and drugs is very dangerous. Moreover, he had just assaulted a woman whom he has assaulted previously. The defendant was drunk, violent, and in possession of a loaded firearm. When the police attempted to speak to him, he fled, as he always does. He led the police on a brief foot chase between houses in a residential area. He was armed, and the police were armed. This put innocent people in danger.

The 4-level increase under 2K2.2(b)(6)(B) for possession of the firearm in connection with another felony is warranted because the defendant was in possession of crack cocaine for sale at the time he possessed the gun. The defendant has a long history of selling crack cocaine, including in quantities similar to the amount he possessed in this case, and he routinely carries a loaded gun while dealing drugs. The evidence in support of his enhancement includes the quantity of drugs he possessed in this case, the currency he had in small denominations, the opinion of CHP Officer Deise that the defendant was in possession of crack cocaine for sale, and the defendant's history of selling crack while armed, which is documented in the PSR. The 4-level increase should be applied to the base offense level of 26.

The defendant's conduct in this case was very serious, and this factor weighs in favor of a 120-month sentence.

**B. History and Characteristics of the Defendant.**

David Conerly sells crack, carries a loaded gun, and runs from the police when he gets caught. He has done this for years, and the conduct in this case is consistent with the lifestyle Conerly has chosen to lead for decades. Conerly has been incarcerated many times, following either a revocation of parole or probation or a new conviction, yet the prison terms he has received thus far have simply not deterred him from committing future crimes. Conerly speaks fondly about his relationship with his great grandmother, but the fact that he was incarcerated during her funeral was not significant enough to deter

him from missing future life events while in prison. PSR, ¶ 57. No matter the punishment Conerly has received, he has always returned to drug and gun crimes. He reports having lost a cousin who was murdered, apparently a result of gun violence. *Id.* This did not deter the defendant from strapping on a loaded gun and heading out to deal drugs. The defendant's criminal history is lengthy and deplorable. His treatment of the police in this case and repeatedly throughout his adult life is shameful. This factor weighs in favor of a 120-month sentence.

**C. The Need to Punish the Defendant, Deter Others, and Protect the Community.**

Similarly, a 120-month sentence is warranted to punish the defendant and deter him from committing another crime in the future. The sentences he has received thus far have been inadequate. It is also necessary to deter others from committing this crime in a city that has been plagued by gun violence and drugs for many years. This Court's judgment will hopefully show other habitual recidivists that lenient sentences repeated in the state court system are not an indication of how the federal courts treat this conduct. Other repeat criminals must know that despite the state court's inability to deal with criminals like this defendant, the federal courts take this type of dangerous conduct very seriously. A 120-month sentence will also protect the community from the defendant for the better part of the next ten years.

**D. A Suspicionless Search Clause Is Warranted.**

The government respectfully recommends an "expanded search condition," to include the suspicionless search of the defendant and his property, including cell phones and other electronic devices. This is the kind of case that cries out for a suspicionless search clause. The nature of the offense and the defendant's criminal history make it clear that a suspicionless search clause is warranted. This condition is appropriate because his past conduct and the offense conduct suggest that he is at a particularly high risk of reoffending. *See United States v. Cervantes*, 859 F.3d 1175, 1184 (9th Cir. 2017) (determining suspicionless search clause was justified to mitigate risk of reoffense). Indeed, the defendant used his phone in connection with the instant offense (he was trying to sell the gun by sending pictures and messages), and he used the phone to facilitate the drug trafficking offenses that are the basis for the 4-level increase of the base offense level in the Guidelines.

**E. A Community Service Condition Is Warranted.**

Likewise, the government recommends a community service condition in the terms of Supervised Release (or probation). Idle time is not a good idea for this defendant. A community service condition will keep the defendant busy upon his reentry into society, and hopefully give him a sense of contribution to his community that will deter him from committing future crimes.

**V. CONCLUSION**

For the reasons stated herein, the United States respectfully recommends a sentence of 120 months in prison, three years on Supervised Release with special conditions described above (expanded search and community service conditions), no fine, forfeiture of the firearm and ammunition listed in the Indictment, and a \$100 special assessment.

DATED: November 13, 2018

Respectfully submitted,

ALEX G. TSE  
United States Attorney

/s/  
BRIGID MARTIN  
WILLIAM J. GULLOTTA  
Assistant United States Attorneys

# EXHIBIT 1



**U.S. Department of Justice  
Drug Enforcement Administration**

**Western Laboratory  
Pleasanton, CA**

**Chemical Analysis Report**

**FBI - San Francisco Office  
450 Golden Gate Ave., 13th Floor  
San Francisco, CA 94102-9523**

**Case Number: 2017-SFL7-05156  
LIMS Number: 2017-SFL7-05156**

**Observations, Results and Conclusions:**

<b>Exhibit</b>	<b>Substance(s) Identified</b>	<b>Net Weight</b>	<b>Substance Purity</b>	<b>Amount Pure Substance</b>
1B20.01	Cocaine Base	18.416 g ± 0.004 g	----	----
1B20.02	Cocaine Hydrochloride	3.506 g ± 0.001 g	----	----

**Remarks:**

Exhibit 1B20.01: The net weight was determined by direct weighing of all unit(s). The net weight uncertainty value represents an expanded uncertainty estimate at the 95% level of confidence.

Exhibit 1B20.02: The net weight was determined by direct weighing of all unit(s). The net weight uncertainty value represents an expanded uncertainty estimate at the 95% level of confidence.

**Exhibit Details:**

**Date Accepted by Laboratory:** 11/21/2017

**Gross Weight:** 110.0 g

<b>Exhibit</b>	<b>No. Units</b>	<b>Pkg. (Inner)</b>	<b>Form</b>	<b>Reserve Wt.</b>
1B20.01	3	Plastic Bag	Rock Like	17.52 g
1B20.02	1	Plastic Bag	Powder	3.432 g

**Remarks:**

**Sampling:**

Exhibit 1B20.01: Cocaine confirmed in 3 units tested of 3 units received. Salt form determined from testing 3 units. A composite was formed from 3 units for further testing.

Exhibit 1B20.02: A composite was formed from 1 unit for testing. Cocaine confirmed in the composite. Salt form determined from testing the composite.

**Exhibit      Summary of Test(s)**

1B20.01	Gas Chromatography/Mass Spectrometry, Infrared Spectroscopy
1B20.02	Gas Chromatography/Mass Spectrometry, Infrared Spectroscopy

**Analyzed By:** /S/ Shana M. Irby, Senior Forensic Chemist

**Date:** 01/05/2018

**Approved By:** /S/ Roger A. Ely, Supervisory Chemist

**Date:** 01/08/2018

# EXHIBIT 2



**DEISE, SEAN P@CHP**

California Highway Patrol – Oakland, 3601 Telegraph Ave., Oakland, CA 94609 | (510)450-3821 | sdeise@chp.ca.gov

This affidavit is for the purpose of giving my opinion in the matter of David Conerly (CA/DL# B4581069). I have read and reviewed Berkeley Police Report # 2017-00066824, Conerly's criminal history, and the facts and evidence presented in the police report. After reviewing the facts outlined in Berkeley Police Report # 2017-00066824, I believe Conerly was in possession of cocaine base for sale and transportation of cocaine base for sale. I believe this to be true due to the following factors:

Conerly was found to have a large amount of cocaine base on his person (NIK tested positive). Cocaine base is a technical term for the street drug "Crack". Cocaine base is a CNS Stimulant with a usable amount weighing as little as .10g. Due to Conerly having a total of 17.52g of cocaine base, this would far exceed the amount considered for personal use. With Conerly being in possession of 17.52g of cocaine base and a usable amount of cocaine base being as little as .10g, Conerly could possibly ingest cocaine base 175 times.

Conerly was found to have \$737.00 of United States currency, in small denominations on his person at the time of his arrest. Due cocaine base being sold on the streets for as little as \$5.00-\$10.00, it would be reasonable for Conerly to have currency with various denominations. Due to my training and experience, I know street level dealers carry a large sum of currency consisting of \$20.00 bills, \$10.00 bills, \$5.00 bills, and \$1.00 bills. Carrying currency in this fashion is consistent with an individual who may be selling street level drugs.

Conerly's criminal history indicates he has had shown a propensity of selling narcotics, specifically cocaine, cocaine base, and marijuana. Per CRIMS, Conerly has prior convictions for 11351 H&S (possession with intent to sell) in 1999 and 2010. Conerly also has felony convictions for 11351.5(a)H&S (possession of cocaine base for sale) and 11357(a)H&S (possession of 28.5g or more of marijuana) in 2003.

# CIRRICULUM VITAE

## CURRENT ASSIGNMENT

Officer July 2008-Present  
ID Number: 19059  
DRE ID Number: 18552  
Academy Graduation Date: July 11, 2008  
DRE Certification Date: April 01, 2011  
DRE/Instructor Expiration Date: April 01, 2020

## EDUCATION

California State University Stanislaus, Turlock, CA  
**Bachelors of Science (Sociology)** 2004-2006  
I was the 2006 C. Wright Mills Sociology Student of the Year recipient. I had a 3.8 overall GPA

Mesa Community College, Mesa, AZ  
**General Studies** 1998-2003  
Chandler/Gilbert Community College, Gilbert, AZ  
**General Studies** 1998-2003

Dobson High School, Mesa, AZ  
**High School Diploma** 1996-1998  
I was a member of the varsity baseball team three years in a row. I was president of the Latin Club my senior year.  
I was involved in the student athletic trainer program three years in a row.

## LAW ENFORCEMENT ASSIGNMENTS

California Highway Patrol – Oakland, Oakland, CA  
**Officer** July 2008 – Present

I interpreted and applied the provisions of the Vehicle Code, Penal Code, and other complex laws in the course of my enforcement actions. I stopped motorists for unsafe or illegal traffic actions, as well as for vehicle equipment violations. I issued all types of enforcement documents and conducted lengthy investigations with thorough reports. I conducted in-view patrol and maintained responsibility for my assigned beat. I responded to, and investigated, various types of traffic collisions. I rendered daily assistance to members of the motoring public. I assumed incident command at complex scenes and delegated responsibilities to fellow officers in order to expedite the investigation, as well as minimize traffic congestion. In addition to my road patrol duties, I also serve as a Field Training Officer (FTO), Drug Recognition Expert (DRE), and assisted the Oakland CHP Area office with the DRE certification site. I serve as a DRE instructor, SFST instructor, ARIDE instructor, as well as a PAS coordinator/instructor. As a DRE instructor, I have given the opportunity to oversee and instruct students at the CHP Oakland certification site. I have taught DUI/DRE classes to various law enforcement agencies and professional sports teams (Oakland Raiders). Such classes include ARIDE as well as DRE Re-Certification classes. I have also assisted the DUI/DRE unit with cadet wet labs. Due to the level of trust placed upon me, in the absence of the unit supervisor, I have been entrusted as the Officer-in-Charge (OIC) of the unit on several occasions.

Cadet

January 11, 2008 – July 7, 2008

I received instruction in the interpretation and application of the Penal Code, Vehicle Code, and laws of arrest. I successfully participated in, and completed, firearms training, accident investigation, Community Oriented Policing Services (COPS), Incident Command System (ICS), Hazardous Materials (HAZMAT) training, detection and apprehension of persons driving under the influence, controlled substances identification, controlled substance law, problem solving, conflict resolution, and the Emergency Vehicle Operations Course (EVOC). I demonstrated proficiency in enforcement tactics, physical methods of arrest, thorough report writing, and effective speaking. I received order and direction from the instructional staff of various ranks.

### LAW ENFORCEMENT TRAINING AND COURSES

Intermediate Accident Investigation	05/2018
Officer In Charge (OIC) Training	07/2016
C.N.O.A. Conference- San Francisco -Prescription Medications/Poly Drug Use -Synthetic/Designer Drugs -Medical Marijuana	12/2015
Area Representative for the CHP Oakland Area Office	Current
Individual Crisis Intervention and Peer Support- CHP Headquarters (13 Hours)	09/2015
Group Crisis Intervention- CHP Headquarters (14 Hours)	09/2015
Associate Instructor for FTEP Program- Academy, West Sacramento (40 Hours)	05/2015
Field Training Officer – Academy, West Sacramento (40 Hours)	02/2015
PAS Coordinator Class – CHP Oakland, Oakland, CA (8 Hours)	11/2014
Law Enforcement Active Shooter Emergency Response – Hayward, CA (8 Hours)	02/2013
Taser Training – Oakland CHP, Oakland, CA (8 Hours)	12/2012
Drug Recognition Evaluator Instructor Course – Academy, West Sacramento, CA (40 Hours)	06/2012
Standardized Field Sobriety Testing Instructor – Academy, West Sacramento, CA (40 Hours)	04/2012
Drug Recognition Expert School – Redding, CA (40 Hours)	11/2011
Drug Recognition Expert Field Certification – CHP Oakland, Oakland, CA (40 Hours)	04/2011
Field Training Officer – Academy, West Sacramento (40 Hours)	10/2010

**DRUG ENFORCEMENT / EVALUATION EXPERIENCE TO DATE**

Estimated Enforcement Contacts	16,000
Estimated Evaluations/Investigations	2,950
Estimated DUI Arrests	620
Estimated DRE Arrests	195
Estimated DRE Evaluations	134

**EXPERIENCE IN TESTIFYING FOR DRUG RELATED CASES**

Estimated Number of Court Appearances	250
Estimated Number of Alcohol Cases	181
Estimated Number of Drug Influence Cases	20
Estimated Number of Drug Possession, Or Drug Sales Cases	20

**COURTROOM EXPERT QUALIFICATIONS**

Number of Times Qualified as an Expert	10
Subject Matter for Expert Qualification	PAS Expert/DRE

**Courses Taught**

DRE Cert site located at the CHP Oakland Area Office  
A.R.I.D.E. (CHP, Out of State, Multiple Countries, Local Allied Agencies)  
DRE Recertification Course  
FTO School located at the CHP Academy in West Sacramento  
FTO Module updates at the CHP Oakland Area Office  
CHP Cadet DUI wet labs at the CHP Academy in West Sacramento

**Awards and Recognition**

Captain's Commendation	2018
MAAD State Hero Award	2014
Oakland Area DUI Warrior Award	2014
Golden Gate Division Oakland Officer of the Year	2014
MAAD Century Award	2013
Oakland Area Office, Officer of the year	2013
MAAD Award	2009-2016

**Outside reading, study, and websites**

Physicians' Desk Reference

High Times

Alameda County Point of View

Lawyers Weekly

Peace Officer Legal Source Book

Drug ID Bible

[www.erowid.org](http://www.erowid.org)

[www.dancesafe.org](http://www.dancesafe.org)

[www.norml.org](http://www.norml.org)

[www.leafly.com](http://www.leafly.com)

[www.leginfo.legislature.ca.gov](http://www.leginfo.legislature.ca.gov)

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**CRIMINAL MINUTE ORDER**

**Date: June 19, 2018**

**Time in Court: 54 minutes**

**Judge: Jeffrey S. White**

**Case No.: CR-17-00578 JSW**

**United States of America v. David Conerly**  
Defendant  
Present ( X ) Not Present ( ) In-Custody ( X )

**William Gullotta**  
U.S. Attorney

**Alan Dressler**  
Defense Counsel

**Deputy Clerk: Jennifer Ottolini**

**Court Reporter: Diane Skillman**

**PROCEEDINGS**

**REASON FOR HEARING: Change of Plea**

**RESULT OF HEARING:**

**Defendant indicated he has questions to ask the Court.**

1:14 pm: Under Seal Hearing held with defendant and his counsel.  
The US Attorney and spectators are excused from the courtroom.  
1:23 pm: The courtroom is unsealed. The US Attorney is now present.  
1:25 pm: The matter is passed to the end of the calendar.  
2:13 pm: Court reconvened.

**The Defendant is sworn.**

**The Court voir dired the Defendant re: Change of Plea**  
The Defendant pled guilty to Count 1 of the Indictment in violation of  
18 USC § 922(g)(1) – felon in possession of firearm and ammunition.

**The Court accepted the plea of guilty. The *Application for Entry of Guilty Plea and Order Thereon* is signed by the Court and ordered filed.**

**The Defendant is referred to the US Probation Office for the preparation of a pre-sentence report.**

**The Defendant remains in U. S. Marshal custody.**

**Case Continued to 10-2-18 at 1:00 p.m. for Judgment and Sentencing**

## United States District Court

## For the Northeth District of California.

CERT. APP. 64

United States District Court

For the Northern District of California

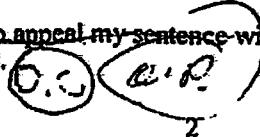
1 28 U.S.C. SECTION 2461 (c) 4. I have told my  
2 lawyer all the facts and circumstances known to me about the charges made against me in the  
3 indictment. I believe that my lawyer is fully informed on all such matters.

4  
5  
6 5. I know that the Court must be satisfied that there is a factual basis for a plea of  
7 "GUILTY" before my plea can be accepted. I represent to the Court that I did the following acts in  
8 connection with the charges made against me in Counts

9 ONE - SEE ATTACHMENT "A"

10  
11  
12 (In the above space defendant must set out in detail in his/her own handwriting what he/she  
13 did. If more space is needed, add a separate page.)

14 6. My lawyer has counseled and advised me on the nature of each charge, all lesser  
15 included charges, all penalties and consequences of each charge, all possible defenses that I may  
16 have in this case and the constitutional rights I am waiving.

17 7. I understand that my constitutional rights are as follows:  
18 (a) the right to a speedy and public trial by jury;  
19 (b) the right to see all of the evidence against me and to hear all witnesses called  
20 to testify against me and to have my attorney cross-examine them;  
21 (c) the right to use the power and process of the court to compel the production of  
22 any evidence, including the attendance of any witnesses in my favor;  
23 (d) the right to the assistance of a lawyer at all stages of the proceedings including  
24 trial and appeal and if I cannot afford one, to have the court appoint one to  
25 represent me without cost to me or based upon my ability to pay;  
26 (e) the right to remain silent or to take the witness stand at my sole option and if I  
27 do not take the witness stand, no inference of guilt may be drawn from such  
28 failure and the jury must be so advised;  
(f) the right against self-incrimination;  
(g) the right to appeal from an adverse judgment;  
(h) the right to appeal my sentence without any limitation contained in my plea  
agreement.   
2

1       8. I know that I may plead "NOT GUILTY" to any offense charged against me and  
2 exercise all of my rights as listed above.

3       9. I know that if I plead "GUILTY" I am giving up all of the rights enumerated in  
4 paragraph 7 and that there will be no trial either before a court or jury.

5  
6       10. I know that if I plead "GUILTY" the result of my plea is more than just an admission  
7 or confession of guilt and that it will result in my conviction, and that further, the court may impose  
8 the same punishment as if I had pleaded "NOT GUILTY," stood trial and been convicted by a jury.

9       11. My lawyer has discussed with me the maximum and minimum, if any, punishments  
10 which the law provides and the various provisions of the Sentencing Guidelines that may apply to  
11 me. I understand that the maximum punishment for the offense(s) charged in Count(s)

12 ONE of the indictment is 10 years of imprisonment, a fine of  
13 \$ 250,000, and a period of 3 years supervised release. I understand that  
14 there is a mandatory minimum punishment of N/A years imprisonment for the offense(s)  
15 charged in Count(s)                   . I also understand that the minimum period of supervised  
16 release which the court may impose is                    (if applicable) and that if I violate any  
17 condition of supervised release the release may be revoked and I may be sentenced to all or a part of  
18 the term of supervised release imposed in addition to any other term of imprisonment which I have  
19 received.

20       I understand that I may be assessed the costs of confinement and/or supervision. I understand  
21 that I must pay a penalty assessment of \$100.00 per count to which I plead (or \$25.00 in the case of  
22 misdemeanor counts). I understand that I may be ordered to pay restitution in an amount determined  
23 by the court.

24       I know that the sentence I will receive is solely a matter within the control of the Judge. I  
25 understand that the Judge will make no decision regarding my sentence until the Judge has read and  
26 considered the pre-sentence investigation report prepared and submitted to the court by the Probation  
27 Department.

28

1 I also understand that the court and counsel cannot promise what sentence or sentencing  
2 range will be set and that these calculations will depend upon the Sentencing Guidelines as they  
3 apply to me. I have been advised that the court may sentence within the guideline range determined  
4 by the Probation Department or may depart upward or downward from the range. However, no  
5 promises have been made to me as to the range or departure.

6 12. If I am on probation, supervised release or parole in this or any other court, I know  
7 that by pleading guilty here my probation, release or parole may be revoked and I may be required to  
8 serve time in that case, which may be consecutive, that is, in addition to any sentence imposed upon  
9 me in this case.

10 13. I declare that no officer or agent of any branch of government (federal, state or local)  
11 has promised or suggested that I will receive a lighter sentence, or probation, or any other form of  
12 leniency, nor have any other promises been made if I plead "GUILTY," in the Plea  
13 Agreement I have signed, stated on the record in my entry of plea or as follows: \_\_\_\_\_

14 THIS IS AN OPEN PLEA; THE GOVERNMENT HAS MADE NO PROMISES TO ME OR  
15 MY ATTORNEY AND THERE IS NO PLEA AGREEMENT

16 (In the space above insert any promises or concessions made to the  
17 defendant or to his/her attorney.)

18 If anyone else made such a promise or suggestion, except as noted in the previous sentence, I know  
19 that person had no authority to do it. No one has forced or coerced me into entering this plea. My  
20 willingness to plead guilty (does) (does not) result from prior discussions between my attorney and  
21 the government's attorney. (If it does, state any factors that influenced you that are not reflected in  
22 the plea agreement.)

23 *I didn't want to get a Super Sealed indictment  
24 and possibly more severe penalty* D.C.

25 14. I believe that my lawyer has done all that a lawyer could do to counsel and assist me,  
26 and I am satisfied with the advice and help he/she has given me.

27 15. I know that the court will not permit anyone to plead "GUILTY" who maintains  
28 he/she is innocent and, with that in mind and because I am "GUILTY," I respectfully request the

1 court to accept my plea of "GUILTY" and to have the clerk enter my plea of "GUILTY" as follows:

2 GUILTY TO COUNT 1; I ALSO AGREE TO FORFEIT THE .40 GLOCK HANDGUN

3 AND 17 ROUNDS OF AMMUNITION REFERRED TO IN THE INDICTMENT

4 \_\_\_\_\_ 16. My mind

5 is clear. I am not under the influence of alcohol or drugs and I am not under a doctor's care. The  
6 only drugs, medicines or pills that I took within the past seven days are:

7 \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_

10 (If none, so state.)

11

12 17. I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF  
13 MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET  
14 FORTH IN THE INDICTMENT AND IN THIS APPLICATION AND IN THE  
15 CERTIFICATE OF MY LAWYER WHICH IS ATTACHED TO THIS APPLICATION. IN  
16 OFFERING MY PLEA OF "GUILTY" I FREELY AND VOLUNTARILY WAIVE (give up)  
17 THE CONSTITUTIONAL RIGHTS GUARANTEED TO ME AS STATED IN PARAGRAPH  
18 7 ABOVE.

19 18. I waive the reading of the indictment in open court, and I request the court to enter my  
20 plea of "GUILTY" as set forth in Paragraph 15 of this application.

21 19. I understand that all of the above statements will be made in open court under oath  
22 and that any false statements may be used against me in a prosecution for perjury or false statement  
23 which is a felony.

24 20.  I am proficient enough in English to read the above and have read and fully  
25 understand it.

26 \_\_\_\_\_ I am not proficient enough in English. I speak and understand  
27 \_\_\_\_\_ which is my native language. The above was read to me in  
28 \_\_\_\_\_ and I fully understand it.

United States District Court

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Signed by me in open court in the presence of my attorney this date: 6/14/18

Defendant's Signature

1 **INTERPRETER CERTIFICATION**  
2

3 I, \_\_\_\_\_, hereby certify that I am a duly \_\_\_\_\_  
4 interpreter in the English and \_\_\_\_\_ languages and that  
5 I read all of the above to the defendant, that he/she stated he/she fully understood it, and I am  
6 satisfied that his/her answer is true and correct.

7 \_\_\_\_\_  
8 Date

9 \_\_\_\_\_  
10 Interpreter's Signature  
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1 **CERTIFICATE OF COUNSEL**

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The undersigned, as lawyer and counselor for the defendant David Clayton

Connelly, hereby certifies:

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1. I have read and fully explained to the defendant and believe he/she fully understands the allegations contained in the indictment of this case, the defenses he/she may have to each and every one of the allegations and the consequences of a plea of "GUILTY," including the pertinent Sentencing Guidelines provisions and maximum and minimum penalties.

2. I believe the defendant fully understands the constitutional rights he/she is waiving and that by entering a plea of "GUILTY" he/she is waiving each and every one of those rights.

3. Nothing has come to my attention which causes me to believe that the defendant lacks the ability to understand anything contained in the attached application or that at the time of entering his/her plea he/she is under the influence of any drug or alcohol.

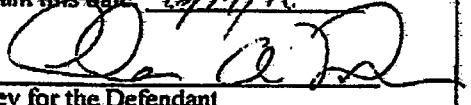
4. The plea of "GUILTY" offered by the defendant in Paragraph 15 accords with my understanding of the facts he/she related to me and is consistent with my advice to the defendant.

5. In my opinion the defendant's waiver of reading of the indictment in open court as provided by Rule 10 is voluntarily and understandingly made, and I recommend to the court that the waiver be accepted by the court.

6. ~~Defendant has read the Plea Agreement she/he signed in the matter and I believe she/he fully understands it.~~ I certify that no promises have been made to the defendant by the government or myself other than those contained in the Plea Agreement and if there are such other promises I must state them on the record before my client and the court.

7. In my opinion the plea of "GUILTY" offered by the defendant in Paragraph 15 of the application is voluntarily and understandingly made. I recommend that the court accept the plea of "GUILTY."

Signed by me in open court in the presence of the defendant above-named and after full discussion of the contents of this certificate with the defendant this date: 6/14/15

  
Attorney for the Defendant

ATTACHMENT A TO APPLICATION FOR PERMISSION TO ENTER PLEA OF GUILTY  
AND ORDER ACCEPTING PLEA

On the night of November 2, 2017 I was arrested by the Berkeley Police Department in Berkeley, CALIFORNIA while I was knowingly in possession of a .40 caliber Glock 22 handgun bearing Serial Number HUL 232 and seventeen rounds of .40 caliber ammunition, including eleven rounds manufactured by Winchester and, one round by Speer, two rounds PMC, two rounds of Blazer, and one round by PPV. At the time I possessed the gun and bullets I knew I had been previously convicted of a felony punishable by a term of imprisonment exceeding one year. Through Discovery received from the government I am aware that the gun and bullets involved in this case were not manufactured in California therefore traveled interstate commerce.

David Conely 6-14-18

**ORDER**

I find that:

1. The defendant enters this plea of guilty freely and voluntarily and not out of  
2 ignorance, inadvertence, fear or coercion.
3. The defendant understands and knowingly, freely and voluntarily waives his  
4 constitutional rights.
5. The defendant freely and voluntarily executed the within Application and understands  
6 its contents.
7. The defendant has admitted the essential elements of the crime charged.

8 **IT IS THEREFORE ORDERED** that the defendant's plea of "GUILTY" be accepted and  
9 entered as prayed for in the Application and as recommended in the certificate of his lawyer.

10 Done in open court this date: 6/19/18

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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE