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13 Attorneys for Defendant Jason Fong

14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA

17 UNITED STATES OF AMERICA,	)	CASE NO. SACR 20-00146-DOC
	)	
18	)	
19 Plaintiff,	)	
20 v.	)	
	)	DEFENDANT’S SENTENCING
21 JASON FONG	)	POSITION
	)	
22 Defendant.	)	
23 _____)	)	

24  
25 Defendant JASON FONG, by and through his counsel of record, Karren  
26 Kenney and Charles Swift hereby submit Defendant’s Sentencing Position in the  
27 above-entitled matter. Mr. Fong’s position is based upon the attached  
28 memorandum of points and authorities, the files and records in this case, the

1 United States Probation Office’s Presentence Report, and any other evidence or  
2 argument presented at sentencing. Mr. Fong respectfully reserves the right to  
3 supplement this memorandum if additional information becomes known.

4 DATE: November 20, 2023

Respectfully submitted,

5  
6 s/ Karren Kenney  
7 **KARREN KENNEY**  
8 Attorney for Defendant Fong

9 s/ Charles Swift  
10 **CHARLES SWIFT**  
11 Attorney for Defendant Fong

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1 2 level adjustment under § 4C1.1. Second, the PSR fails to give any consideration  
2 to whether and to what extent a downward departure under 5K2.0 is warranted.

3 **1. Adjustment For Certain Zero-Point Offenders**

4 Section 4C1.1 provides for an adjustment decreasing the offense level if the  
5 defendant meets all the following criteria:

- 6
- 7 (1) the defendant did not receive any criminal history points from  
8 Chapter Four, Part A;
- 9 (2) the defendant did not receive an adjustment under §3A1.4  
10 (Terrorism);
- 11 (3) the defendant did not use violence or credible threats of violence  
12 in connection with the offense;
- 13 (4) the offense did not result in death or serious bodily injury; (5) the  
14 instant offense of conviction is not a sex offense;
- 15 (6) the defendant did not personally cause substantial financial  
16 hardship;
- 17 (7) the defendant did not possess, receive, purchase, transport,  
18 transfer, sell, or otherwise dispose of a firearm or other dangerous  
19 weapon (or induce another participant to do so) in connection with the  
20 offense;
- 21 (8) the instant offense of conviction is not covered by §2H1.1  
22 (Offenses Involving Individual Rights);(9) the defendant did not  
23 receive an adjustment under §3A1.1 (Hate Crime Motivation or  
24 Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense);  
25 and(10) the defendant did not receive an adjustment under §3B1.1  
26 (Aggravating Role) and was not engaged in a continuing criminal  
27 enterprise, as defined in 21 U.S.C. § 848. §4C1.1 U.S.S.G
- 28

1 Mr. Fong meets each of these requirements. Nine of the ten requirements  
2 are met on their face, as it is undisputed that (1) Mr. Fong is a first-time offender;  
3 (2) false official statements do not fall within any of the disqualifying offenses; and  
4 (3) none of the disqualifying enhancements are applicable. The only disqualifying  
5 requirement requiring some analysis then is the weapons disqualification (7). An  
6 analysis of the weapons disqualification shows that it is likewise not disqualifying.

7  
8 Disqualification (7) requires that the defendant “not possess, receive,  
9 purchase, transport, transfer, sell, or otherwise dispose of a firearm or other  
10 dangerous weapon (or induce another participant to do so) *in connection with the*  
11 *offense; emphasis added.* Fong is not disqualified by (7) because while he lawfully  
12 possessed weapons, the possession was not in connection with the offense of  
13 conviction.

14 Mr. Fong’s possession of each weapon predated the investigation and was  
15 continuous. Nor was the possession of firearms the subject of the false statements  
16 for which he stands convicted. To disqualify Mr. Fong based simply on the fact  
17 that he possessed firearms, would amount to a blanket prohibition against awarding  
18 the adjust to first time offender who also were gun owners. An interpretation that  
19 would both have serious Second Amendment problems and would render the  
20 phrase “*in connection with the offense,*” meaningless. The appropriate plain  
21 language reading of the phrase instead is that disqualification seven disqualifies a  
22 broad set of individuals for firearms related crimes of conviction but does not  
23 disqualify some like Mr. Fong who made false statements for which he was  
24 convicted and possessed firearms for which he was not convicted.

25 (a) *Mr. Fong’s Possession of Firearms is Not Disqualifying Relevant*  
26 *Conduct.*

27 Instead, Mr. Fong’s possession of firearms only disqualifies him if the  
28 possession of firearms is relevant conduct with respect to the offense of

1 conviction—his false statement. While the PSR includes Mr. Fong’s possession as  
2 relevant conduct, an analysis of the guidelines reveals that Probation’s analysis  
3 conflates related conduct with relevant conduct, and Mr. Fong’s possession of  
4 firearms is not relevant conduct for the purposes of §4C1.1(7).

5 Section 4C1.1 only recently came into effect, and therefore has yet to be  
6 interpreted within the relevant conduct principles set down in the guidelines.  
7 Applying the existing principles concerning relevant conduct, however, shows that  
8 Mr. Fong’s possession of firearms in alleged violation of state law, even if the  
9 possession was unlawful under state law, it is not relevant conduct with respect to  
10 an offense of conviction for false statements.

11 A definition of ‘offense of conviction’ that includes only the substantive  
12 crime charged ensures that defendants have notice of the precise nature of the  
13 charges provided in the indictment or information. *See, e.g., United States v. Smith*,  
14 44 F.3d 1259, 1263-64 (4th Cir. 1995) (stating the "basic principle[]" that an  
15 indictment "must contain allegations of each element of the offense charged, so  
16 that the defendant is given fair notice of the charge that he must defend" (citations  
17 omitted)); Fed. R. Crim. P. 7(c)(1) ("The indictment or information must be a  
18 plain, concise, and definite written statement of the essential facts constituting the  
19 offense charged . . .").

20 The above definition preserves "the compromise" made by the Sentencing  
21 Commission "between real offense sentencing and charged offense sentencing"  
22 that forms the foundation of the entirety of the Guidelines, *United States v. Fine*,  
23 975 F.2d 596, 604 (9th Cir. 1992); *see* Stephen Breyer, *The Federal Sentencing*  
24 *Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1,  
25 11-12 (1988) (discussing the compromise reached by the Sentencing Commission  
26 in balancing elements of charged-offense and real-offense systems), by ensuring  
27 that courts select the appropriate Chapter Two section based on the offense of  
28 conviction, then apply relevant conduct principles to reach a sentence based on a

1 defendant's actual conduct, *see, e.g.*, U.S.S.G. § 1B1.1 (providing the application  
2 instructions for the Guidelines);

3 The phrase 'offense of conviction' is not defined under the definitions  
4 section of the Guidelines." *United States v. Rebmann*, 321 F.3d 540, 543 (6th Cir.  
5 2003); *see also* U.S.S.G. § 1B1.1 cmt. n.1. Numerous courts, however, analyzing  
6 the Guidelines, as a whole—including the definition of "offense of conviction"  
7 provided in Section 1B1.2(a)3, in conjunction with the history of the Guidelines  
8 have found the phrase "'offense of conviction' describes only the precise conduct  
9 constituting the crime for which the defendant was convicted, and does not include  
10 non-offense relevant conduct." *Rebmann*, 321 F.3d at 543-44; *see, e.g., United*  
11 *States v. Holbert*, 285 F.3d 1257, 1261 n.3 (10th Cir. 2002) ("The Sentencing  
12 Guidelines do not specifically define 'offense of conviction,' but indicate that the  
13 phrase encompasses only facts immediately related to the specific offense for  
14 which the defendant was convicted."); *United States v. Pressler*, 256 F.3d 144, 157  
15 n.7 (3d Cir. 2001) (finding that the phrase "'offense of conviction' includes only the  
16 substantive crime for which a particular defendant was convicted"). Most  
17 importantly, this definition preserves "the compromise" made by the Sentencing  
18 Commission "between real offense sentencing and charged offense sentencing"  
19 that forms the foundation of the entirety of the Guidelines, *United States v. Fine*,  
20 975 F.2d 596, 604 (9th Cir. 1992).

21 Abiding by this compromise a sentencing judge can only consider acts for  
22 which defendant has not been convicted as relevant conduct if "all such acts and  
23 omissions were part of the same course of conduct or common scheme or plan as  
24 the offense of conviction' for crimes which qualify under section 3D1.2 (d).  
25 U.S.S.G. § 1B1.3(a)(2)." *United States v. Wong*, 2 F.3d 927, 928 (9<sup>th</sup> Cir. 1993).

26 Mr. Fong's alleged unlawful possession does not qualify as relevant conduct  
27 under § 3D1.2 (d). Section 3D1.2 (d) provides that:  
28

1 All counts involving substantially the same harm shall be grouped together into a  
2 single Group. Counts involve substantially the same harm within the meaning of  
3 this rule:

4 (a) When counts involve the same victim and the same act or transaction.

5 (b) When counts involve the same victim and two or more acts or  
6 transactions connected by a common criminal objective or constituting part  
7 of a common scheme or plan.

8 (c) When one of the counts embodies conduct that is treated as a specific  
9 offense characteristic in, or other adjustment to, the guideline applicable to  
10 another of the counts.

11 (d) When the offense level is determined largely on the basis of the total  
12 amount of harm or loss, the quantity of a substance involved, or some other  
13 measure of aggregate harm, or if the offense behavior is ongoing or  
14 continuous in nature and the offense guideline is written to cover such  
15 behavior.<sup>1</sup>

16 There is of course not only the factual question of whether Mr. Fong’s  
17 possession of an alleged unregistered firearm (“ghost gun”)<sup>2</sup>, but also whether  
18 conduct that does not constitute a federal crime could be grouped under 3D1.2(d).  
19 This Court, however, does not have to grapple with those questions, because  
20 application Note 1’s definition of a victim excludes the group of any misconduct  
21 related to firearms from grouping with the false statements offense of conviction.

22 <sup>1</sup> Offenses covered by the following guidelines are to be grouped under this subsection: §2A3.5;  
23 §§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1; §§2C1.1, 2C1.2, 2C1.8; §§2D1.1, 2D1.2,  
24 2D1.5, 2D1.11, 2D1.13; §§2E4.1, 2E5.1; §§2G2.2, 2G3.1; §2K2.1; §§2L1.1, 2L2.1; §2N3.1;  
§2Q2.1; §2R1.1; §§2S1.1, 2S1.3; §§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

25 Specifically excluded from the operation of this subsection are: all offenses in Chapter Two, Part  
26 A (except §2A3.5); §§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3; §2C1.5; §§2D2.1, 2D2.2, 2D2.3;  
§§2E1.3, 2E1.4, 2E2.1; §§2G1.1, 2G1.3, 2G2.1; §§2H1.1, 2H2.1, 2H4.1; §§2L2.2, 2L2.5;  
27 §§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9; §§2P1.1, 2P1.2, 2P1.3; §2X6.1.

28 <sup>2</sup> Mr. Fong contested the counts in California and aside from his references to the weapon as  
something he built there is scant evidence before this Court, as the state dropped these charges,  
rather than proceeding to trial.

1  
2 To wit the Application Notes instruct as follows:

3 For offenses in which there are no identifiable victims (e.g., drug or  
4 immigration offenses, where society at large is the victim), the “victim” for  
5 purposes of subsections (a) and (b) is the societal interest that is harmed. In  
6 such cases, the counts are grouped together when the societal interests that  
7 are harmed are closely related. Admin note 1 to U.S.S.G. § 3D1.1(d).

8  
9 The PSR correctly identifies the victim as a societal interest. The same is  
10 true for any unlawful possession of firearms, but the interests are not closely  
11 related as they protect against distinct and different harms – the need for truthful  
12 statements to federal officials as opposed to the requirement to register firearms to  
13 prevent the presence of unknown weapons in the public. As such they should not  
14 be grouped under the guidelines and Mr. Fong is entitled to a 2-point adjustment  
15 under § 4C1.1 bringing his offense level down from 23 to 21 with a suggested  
16 sentencing range of 37-46 months of confinement. A departure from the suggested  
17 sentence is warranted to credit the confinement Mr. Fong served prior to  
18 sentencing that will not be credited by the Bureau of Prisons. Dealing with the  
19 issues presented by Mr. Fong’s uncredited pre-trial confinement is best addressed  
20 as part of the guidelines, as it is not encompassed by the remaining § 3553 (a)  
21 factors.

22  
23 **2. Mr. Fong’s Uncredited Pre-trial Confinement Warrants a 12-**  
24 **level Departure Under § 5K2.0**

25 After a five-month undercover sting operation overseen by the FBI, the Orange  
26 County Sherriff’s Department, in coordination with the FBI’s Joint Terrorism  
27 Taskforce (JTTF), executed a search warrant on Mr. Fong’s residence on May 20,  
28 2020. In conjunction with the search, federal agents from the JTTF interviewed

1 Mr. Fong. During the interview, Mr. Fong made the false statements that are the  
2 basis for the offense conduct. At the conclusion of the interview, Mr. Fong was  
3 arrested and taken into custody.

4 Mr. Fong, however, was not initially charged with either conduct related to the  
5 undercover investigation nor the making of false official statements. Instead, he  
6 was arrested on State weapons charges. Even though the state charges were lower-  
7 level felonies that ordinarily would have warranted a release on bond, Mr. Fong  
8 was denied bond and spent the next five months, from May 20, 2020, to October  
9 19, 2020, in state custody. When Mr. Fong successfully moved to reduce his State  
10 bond, he was immediately indicted on October 19, 2020, in this Court for material  
11 support of terrorism and transferred to federal custody. The state charges were  
12 subsequently dismissed.

13 After transfer to this Court, Mr. Fong again sought release but was detained by  
14 this Court based on the presumption of threat to the community created by the  
15 indicted charges and the government representations regarding the threat posed by  
16 Mr. Fong. Mr. Fong appealed his detention to the Ninth Circuit. During the  
17 pendency of the appeal, Mr. Fong spent 10 ½ months (October 19, 2020, until  
18 August 4, 2021), in pre-trial custody. Following the Ninth Circuit's decision in his  
19 favor, Mr. Fong was transferred from in-custody detention to in-home custody on  
20 August 4, 2021, where he has remained, without incident, for just under 27 months  
21 at the time of sentencing.

22 Although Mr. Fong will have spent more than 40 months in a combination of  
23 in-custody detention and home confinement at the time of his sentencing, Mr. Fong  
24 will receive only 10 ½ months sentence credit from Bureau of Prisons. *See* 18  
25 U.S.C. § 3585 (delineating when a defendant should receive sentence credit). A  
26 court cannot remedy inequities created by the failure to receive credit for state and  
27 home confinement by directing that a defendant receive additional credit as BOP  
28 exclusively determines whether the defendant should receive credit for any prior

1 time spent in custody. Instead, this Court's ability to remedy uncredited State and  
2 home confinement lies in § 5K2.0<sup>3</sup> of the sentencing guidelines. *See Werber v.*  
3 *United States*, 149 F.3d 172, 179 (2d Cir. 1998). (Concluding that court's power to  
4 remedy inequities created by uncredited confinement lies instead in § 5K2.0.)  
5 *See also United States v. Montez-Gaviria*, 163 F.3d 697, 701 (2d Cir. 1998)  
6 (Concluding that nothing in the Sentencing Guidelines precludes the district court  
7 from departing downward under § 5K2.0 on the basis of uncredited time served in  
8 state custody.)

9 **(a) State Pretrial Confinement**

10 Courts have repeatedly recognized that a downward departure, pursuant to §  
11 5K2.0 to account for related uncredited state confinement, is within the Court's  
12 discretion and appropriate. *See . Montez-Gaviria*, 163 F.3d 697 (holding that it is  
13 within the district court's authority to grant a downward departure based on a  
14 period of completed, uncredited incarceration *Id.* at 701.); *see also United States v.*  
15 *Estrada-Mederos*, 784 F.3d 1086, 1092 (7<sup>th</sup> Cir. 2015) , (holding that the district  
16 court erred by failing to address defendant's argument that his sentence for illegal  
17 reentry should have been reduced because the government's delay in charging him  
18 deprived him of the opportunity to serve a partially concurrent sentence with a  
19 state sentence and resulted in immigration confinement that could not be credited  
20 toward his federal sentence.)

21 Crediting Mr. Fong's five months in State custody through a downward  
22 departure under § 5K2.0 is consistent with the above cited cases. Mr. Fong's  
23 initial state arrest was part of a coordinated state and federal law enforcement

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24 <sup>3</sup> Section 5K2.0 permits a court to "impose a sentence outside the range established by the  
25 applicable guideline, if the court finds 'that there exists an aggravating or mitigating  
26 circumstance of a kind, or to a degree, not adequately taken into consideration by  
27 the Sentencing Commission in formulating the guidelines that should result in  
28 a sentence different from that described.'" United States Sentencing Commission, *Guidelines*  
*Manual*, § 5K2 (quoting 18 U.S.C. § 3553 (b)) ("§ 5K2.0").

1 effort. On information and belief, the federal investigation expanded to include the  
2 state when the federal officers learned of potential violations of State law, rather  
3 than the reverse. Thus, like *Montez-Gaviria*, the State charges were closely  
4 coordinated with the federal investigation.

5 Federal officers were present during the State search for these weapons and  
6 took a lead role in questioning Mr. Fong during the state search. Following Mr.  
7 Fong's arrest, while he was in state custody, the government attempted to negotiate  
8 a pre-trial agreement with him to resolve the state and federal charges. When that  
9 effort failed, and Mr. Fong was indicted on Federal charges, the State subsequently  
10 dropped the charges against Mr. Fong. Thus, his State time is uncredited. In  
11 summary, the federal investigation and prosecution was the driving force behind  
12 Mr. Fong's five months in state pre-trial custody, the state custody is complete and  
13 uncredited and therefore warrants a departure to credit it.

14 Crediting Mr. Fong's state pretrial custody under § 5K2.0 is accomplished with  
15 a downward departure of 2 levels. Mr. Fong's offense level when the recent first-  
16 time offender adjustment is incorporated without a departure, is 21, resulting a  
17 sentencing range of 37 to 46 for Mr. Fong. Reducing Mr. Fong's guidelines score  
18 by two levels to 19, results in a guidelines range of 30-37. While this is seven-  
19 month difference in both the high and low end of the range, the additional two  
20 months are accounted for by the fact that Mr. Fong does not receive the good time  
21 credits he earns as both a first-time offender and for his behavior while in custody.

22 **(b) Home Confinement**

23 The defense respectfully submits that downward departure under § 5K2.0,  
24 however, should not be limited to just Mr. Fong's uncredited State confinement,  
25 but should also include credit for Mr. Fong's time in pre-trial home confinement.  
26 At least one court has recognized that there are circumstances where the interest of  
27 justice warrants downward departure to give day for day credit for home  
28 confinement. See *United States v. Givens*, 2006 U.S. Dist. LEXIS 86094, (Finding

1 that the defendant was entitled to a downward departure under U.S.S.G. § 5K2.0 of  
2 one year to account for the time he served on home confinement. *Id.* at 17). In  
3 making this finding, Chief Judge Bataillon recognized that home confinement is  
4 substantially different and more onerous than release on probation, warranting a  
5 downward departure equivalent to the amount of time the defendant would have  
6 spent in confinement. *Id.* at 17-18.

7 The defendant in *Givens* differs from Mr. Fong in that he had served the home  
8 confinement as part of a post-trial sentence that was later overturned, rather than as  
9 pre-trial restraint. But that difference does not mandate a different result as Mr.  
10 Fong's home confinement is likewise extraordinary. Mr. Fong's home  
11 confinement arose out of the original charges of material support of terrorism  
12 which carried a presumption of detention and the government's proffers of his  
13 dangerousness. The charge to which Mr. Fong ultimately plead guilty, 18 USC  
14 1001A, carries no similar presumption, and at the time of his plea to this charge,  
15 the government admitted that they no longer believed Mr. Fong posed a threat.

16 At the time of his plea, there had not been a substantial change in Mr. Fong, nor  
17 had there been a substantial change in his pre-arrest conduct. Instead, what  
18 changed was the understanding of the seriousness of his conduct. Had that  
19 understanding been present from the onset, the defense respectfully submits that  
20 this Court would have imposed far less restrictive conditions.

21 Further, had Mr. Fong been charged exclusively with a § 1001 violation, he  
22 would have plead guilty early in the process and not spent two plus years in home  
23 confinement. This assertion is not speculation, but a reasonable conclusion  
24 supported by the facts. As this Court is aware from reviewing the transcript of Mr.  
25 Fong's questioning, Mr. Fong, rather than continuing to assert the truth of the  
26 charged statements, he subsequently admitted the charged statements were false  
27 during the same interview. When given the opportunity to plead to making a false  
28 statement, he did so promptly. Accordingly, there is no reason to believe that he

1 would not have done so if he had been charged exclusively with the present  
2 offense at the onset.

3 Nor should it matter that Mr. Fong sought home confinement as an  
4 alternative to pre-trial custody. The same was true in *Givens*, where the defendant  
5 had also sought a sentence of home confinement as opposed to in custody  
6 confinement, which the court erroneously believes it could award. In this case, the  
7 legal presumption underlying the home confinement and proffer were ultimately  
8 erroneous, but that is truly a distinction without a difference, as failing to credit the  
9 time is not in the interests of justice in either case.

10 In Mr. Fong's case, giving day for day credit for 27 months of home  
11 confinement from a level 19 sentencing range of 30 to 37 months requires an  
12 additional 10 level departure to level 9 with a sentencing range of 4 to 10 months.  
13 The high end here is still slightly below the amount of time the defendant spent in  
14 creditable custody and justifies a sentence of time served.

15  
16 **B. Sentencing Mr. Fong To The Time Severed In Federal Pre-Trial**  
17 **Detention Is Likewise Supported The Remaining Section 3553(A)**  
18 **Factors.**

19  
20 Section 3553(a) requires a sentencing court to impose a sentence that is  
21 "sufficient, but not greater than necessary" to achieve the following: (A) to reflect  
22 the seriousness of the offense, to promote respect for the law, and provide just  
23 punishment for the offense; (B) to afford adequate deterrence to criminal conduct;  
24 (C) to protect the public from further crimes of the defendant; and (D) to provide  
25 the defendant with needed educational or vocational training, medical care, or  
26 other correctional treatment in the most effective manner . . . In fashioning its  
27 sentence, the Court is also to consider the nature and circumstances of the offense  
28 and the history and characteristics of the defendant. 18 U.S.C. § 3553(a)(1). "No

1 limitation shall be placed on the information concerning the background, character,  
2 and conduct of a person convicted of an offense which a court of the United States  
3 may receive and consider for the purpose of imposing an appropriate sentence.” Id.  
4 § 3661. In determining a defendant’s need for “correctional treatment in the most  
5 effective manner,” id. § 3553(a)(2)(D), the Court must bear in mind that  
6 “imprisonment is not an appropriate means of promoting correction and  
7 rehabilitation,” id. § 3582(a)

8  
9 **1. Nature and Circumstances of the Offense**

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11 Mr. Fong’s offense of conviction is 18 U.S.C. 1001a, making a false official  
12 statement to a federal officer relating to a terrorism investigation. As set out in the  
13 stipulated conduct, Mr. Fong made false representations to investigating FBI  
14 officers concerning his knowledge of and contact with individuals of interest to the  
15 officers. When confronted with these falsities, Mr. Fong admitted that he had not  
16 told the truth and apologized.

17 Mr. Fong’s questioning arose from an approximately five month long  
18 undercover counterterrorism investigation into Mr. Fong after he was identified by  
19 FBI online undercover operatives. Much of the PSR’s so-called relevant conduct  
20 applies to this investigation. As explained above, the conduct is not relevant  
21 conduct in the guideline circumstances, but the court can certainly consider it in  
22 the context of the remaining 3553(a) factors.

23 For the reporting probation officer, the significance of the related conduct is  
24 that the conduct indicates that Mr. Fong, prior to making the false statements, was  
25 predisposed to commit a violent act. Specifically, the probation officer notes in her  
26 recommendation letter that: “While Fong told law enforcement that he had no  
27 intention of hurting people, it is difficult to take this statement at face value given  
28 the proactive steps taken by Fong.”

1 The conclusions of the probation officer are similar to what was presented to  
2 this Court at the onset of the charges. But the probation officer was not in court for  
3 Mr. Fong's first trial. What the PSR omits and what this Court observed prior to  
4 the mistrial in Mr. Fong's first trial, is that Mr. Fong's conduct occurred during the  
5 early days of the pandemic and the associated lockdowns. Mr. Fong's references to  
6 arming oneself and to violence in the United States did not refer to any offensive  
7 attack; rather, they stemmed from his mistaken beliefs that the pandemic  
8 lockdowns were the beginning of the imposition of an authoritarian state in the  
9 U.S. and an ensuing civil war. In short, Mr. Fong believed that the authorities were  
10 preparing to seize all the citizenry's weapons as a precursor to the civil war. Had  
11 the trial progressed further, the defense would have provided evidence, through an  
12 expert witness, that this was a common belief at that time, widely held online.  
13 What is most important is that when authorities did not mobilize to seize weapons  
14 and a civil war did not break out, Mr. Fong took no actions to precipitate such  
15 violence in the United States.

16 Instead, Mr. Fong, with some prompting from the undercovers, began to  
17 consider going overseas. While Mr. Fong did talk about it on several occasions, he  
18 never made any concrete plans. He did not buy a ticket, did not try to secure a visa,  
19 and did not secure funds for travel.

20 In the absence of plans to travel, the government inserted a fictitious  
21 commander of HTS, a designated foreign terrorist organization. This undercover  
22 sought to persuade Mr. Fong to assist HTS in making bombs for use in their  
23 ongoing conflict in Syria. Rather than take HTS up on their offer, Mr. Fong  
24 denounced the fictional HTS commander as a terrorist and cut off contact with him  
25 and the undercover who arranged the meeting. Finally, Mr. Fong briefly suggested  
26 that the group should contribute financially to support Hamas. But again, this was  
27 not a suggestion Mr. Fong entertained for more than a couple of days. At no time  
28

1 did he make any effort to collect money from his group nor did he attempt  
2 personally to send money to Hamas.

3 Ultimately, the search of Mr. Fong's home and his questioning was not  
4 because he was about to commit a violent criminal act, but because it became clear  
5 to the government at this point that he was not going to commit such activity and  
6 was unlikely to agree to such activity in the future. This of course does not excuse  
7 that Mr. Fong lied about his activities during the pandemic to the undercover,  
8 investigating officers—that is a crime. And it is more serious because it was  
9 committed in the context of a terrorism investigation. But the circumstances do not  
10 warrant significant confinement to protect the public or to specifically deter Mr.  
11 Fong and others from lying under these circumstances. Indeed, as the government  
12 admitted to this Court after Mr. Fong's plea, after being presented with the facts,  
13 they no longer consider Mr. Fong a danger.

## 14 15 **2. Mr. Fong's History and Characteristics**

16  
17 Mr. Fong is a 27-year-old Chinese-American who throughout his life, with  
18 the exception of boot camp and active duty with the Marine Corps, resided with his  
19 parents. As Mr. Fong's father Charlie Fong explains in his letter, despite being  
20 extraordinarily bright with an excellent aptitude for languages, Mr. Fong struggled  
21 in school. Instead of going to college, Mr. Fong joined the U.S. Marine Corps as a  
22 reservist where he was selected as a drone and aviation specialist working on  
23 reconnaissance drones. The regimented requirements of the Marine Corps suited  
24 Mr. Fong. Apart from the investigation and charges before this Court, Mr. Fong  
25 served in the Marine Corps without incident and was set to leave the Marine Corps  
26 with an honorable discharge and the rank of Corporal E-4.<sup>4</sup>

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28 <sup>4</sup> Mr. Fong was arrested prior to his scheduled separation date. After his arrest, instead of  
separating as scheduled, he was administratively separated with an other-than-honorable

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*(a) Adult Diagnosed Autism*

During the time this case was being prepared for trial, it became apparent when analyzing the behavior involved that Mr. Fong exhibited symptoms of ASD (Autism Spectrum Disorder). As a result, he underwent significant testing by Dr. Cronin, a specialist in autism, and a detailed 18-page report was generated, previously provided to the court during the jury trial process as a sealed filing. Doc. 181.1, Exhibit A (filed under seal).

Autism explains much of Mr. Fong’s seemingly contradictory behavior. Some of the defining characteristics are the failure to recognize social cues, impulsive verbal behavior, obsession with interests, and grandiosity in verbal representations. One need not look much further than X, formerly Twitter, to see these characteristics on display on a daily basis. Autism explains Mr. Fong’s initial attraction to the structure of the Marine Corps and his difficulty with advancing into leadership positions among his fellow Marines, the lack of meaningful romantic relationships and the struggles in school.

It also explains Mr. Fong’s intense interest in Islam which at least in part a driving factor in why the FBI focused on Mr. Fong as opposed to others and his subsequent abandonment in favor of Catholicism and currently Lutheranism.<sup>5</sup>

The most important thing about autism, in this case, is that Mr. Fong and his parents are aware that his thinking and actions are affected by the disorder. As Charlie Fong (father) tells this Court in his letter, as a young man, Charlie was neurologically affected by being struck in the head by a baseball and physically affected by losing a leg in a motorcycle accident. Charlie nevertheless persevered

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administrative discharge. Mr. Fong waived his administrative board, believing he was unable to adequately defend himself while in pre-trial custody.

<sup>5</sup> See Exhibit A, Charlie Fong’s letter. See also Exhibit C, detailing Mr. Fong’s enrollment at Catholic Distance University.

1 and supported his family the best he could by seeking blue collar jobs he could  
2 excel at.

3 Now aware of their son’s limitations, Charlie Fong and his wife are equally  
4 committed to making sure Mr. Fong has the support necessary to persevere despite  
5 the effects he has had neurologically and physically and finds a meaningful way to  
6 contribute to his family and society at large.

7 To that end, Mr. Fong applied and was accepted to Geneva College and is  
8 scheduled to begin in-person classes in January 2025 (Exhibits B). The focus of  
9 Mr. Fong’s will not be esoteric subjects like religion but practical courses that can  
10 help him find a lucrative job.

11 Awarding a sentence of time served meets the needs of this defendant.  
12 Further incarceration is not going to get him closer to a productive life nor is it  
13 going to provide therapy for his autism. Quite the opposite—incarceration  
14 threatens the progress Mr. Fong has made. If incarcerated, he will not be able to  
15 attend college or start therapy. Instead, he will remain in limbo pending the  
16 completion of his sentence, thereby threatening the opportunity for real and lasting  
17 change in Jason’s life.

18  
19 **CONCLUSION**

20 For the reasons set forth above, the defense respectfully submits that the  
21 sentence of time served best fits the facts of this case because 1) it gives credit for  
22 the time Mr. Fong has already spent pre-trial incarceration; 2) does not endanger  
23 the public; 3) when coupled with his pre-trial confinement and administrative  
24 consequences Mr. Fong suffered in the Marine Corps provides sufficient  
25 deterrence; 4) and meets the needs of Mr. Fong.

26 DATED: November 20, 2023                      Respectfully submitted,  
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s/Karren Kenney\_\_\_\_\_

Karren Kenney

s/Charlie Swift\_\_\_\_\_

Charlie Swift

*Attorneys for Jason Fong*