

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>VS.</b>	)	<b>Docket No. 2:21-CR-00164</b>
	)	
<b>K'SHAWN BROOKS,</b>	)	
<b>DEFENDANT</b>	)	

**K'SHAWN BROOKS' SENTENCING MEMORANDUM**

<b>TABLE OF CONTENTS</b>	<b>Page</b>
BACKGROUND.....	2
1. Agreement for Purposes of Sentencing .....	2
2. Pre-Sentence Report and Advisory Guidelines .....	3
3. Summary of Position .....	3
4. Introduction to K'Shawn Brooks .....	4
5. Non-Guideline or Variant Sentence .....	6

**ARGUMENT**

A sentence of no incarceration with three years of supervised release is appropriate based on the history and characteristics of K'Shawn Brooks.....

**A. VARIANT FACTORS**

1. Variant Factor-The Collateral Consequences of the Federal Conviction.....8

2. Variant Factor-Cost of Incarceration Instead of Supervision.....	12
3. Variant Factor-Post-Arrest Conduct.....	17
4. Variant Factor-Impact on Innocent Dependents .....	20
5. Variant Factor-Youth.....	22
6. Variant Factor-Employment History.....	23
7. Variant Factor-K'Shawn's Childhood.....	24
8. Variant Factor-Law Abiding.....	26
9. Variant Factor-Similarly Situated Co-Defendants.....	27
SUMMARY.....	29
REQUESTED SENTENCING RECOMMENDATIONS.....	30

## **BACKGROUND**

### **1. Agreement for Purposes of Sentencing**

There is no specific plea agreement for the purposes of sentencing except Mr. Brooks may appeal a sentence of greater than six months incarceration. *ECF* #113.

## **2. Pre-Sentence Report and Advisory Guidelines**

The Presentence Investigation Report (hereinafter ‘PSR’) establishes an offense level of nine and a criminal history category of I, with an advisory Guideline sentencing range of four to ten months. *PSR* ¶50.

## **3. Summary of Position**

The Guideline range for Mr. Brooks is four to ten months of incarceration for Conspiracy to Utter/Pass Counterfeit Currency in violation of 18 U.S.C. § 371, 472 and 2 with one to five years of probation. *Id.* We ask the Court to sentence Mr. Brooks to a sentence of zero months incarceration, with one year probation. This sentence is “sufficient but not greater than necessary” based on application of the sentencing factors set out in 18 U.S.C. §3553(a) and in particular, the nature and circumstances of the offense and the characteristics of the offender. We further ask that the Court to find extraordinary circumstances exist and waive any fine, restitution<sup>1</sup>, or community service requirement.

---

<sup>1</sup> Mr. Brooks is not opposing restitution, but instead relies on probation’s determination related to restitution. See *PSR* ¶11A.

#### **4. Introduction to K'Shawn Brooks**

K'Shawn Brooks was born to the union of Robert Brooks and Shawn (ne'e) Brooks-Goodman on August 25, 1997. He spent his childhood in the projects in the Bronx borough of New York City. K'Shawn remains in his childhood home where he grew up, although his parents moved to New Jersey several years ago. In his early years, K'Shawn's maternal grandmother helped raise him due to his parent's work ethic, which kept them employed in various jobs for long hours.

Unlike many of his peers, K'Shawn had the continued benefit of love and involvement of both of his parents. But his parents and grandmother could not shelter him from the reality that K'Shawn grew up in one of the worst possible environments for a child, a housing project replete with drugs, violence, and gangs and poverty. Although his parents provided for him as much as they could, it was with the reality that they were supporting two children and two-half siblings with minimal income. He recalls when he was young police and cameras were everywhere all of the time. There was a certain security in that. But by the time he was heading to his teens, the area had returned to a violent crime rate that continues to nearly be double in comparison to the rest of New York City. <https://furmancenter.org/neighborhoods/view/the-bronx;>  
[https://www.nydailynews.com/new-york/bronx/bronx-river-houses-residents-neighborhood-gangs-threatening-family-day-tradition-article-1.157303.](https://www.nydailynews.com/new-york/bronx/bronx-river-houses-residents-neighborhood-gangs-threatening-family-day-tradition-article-1.157303)

Growing up, K'Shawn was a great athlete and his mother encouraged him to spend his time reading and playing basketball. The basketball court became a sanctuary of sorts; a place he could socialize and achieve. He spent hours upon hours playing there, by himself, with friends, and with his father, a memory he cherishes. But at the age of 12, he witnessed someone shot and killed at his home away from home, directly in front of him. While many would be fearful of returning to such a location, K'Shawn turned fear inward and promised himself he would never let his own fears change him. But some of the biggest enduring bandages are unseen. See Lewis, Miles Marshall, *Scars of the Soul are Why Kids Wear Bandages When they Don't Have Bruises*, Columbia University Libraries (2004).<sup>2</sup> While K'Shawn displayed bravado, he was hurting inside. It would be understandable for the fragilities of life to be so pronounced and impactful to a 12-year-old who really wouldn't understand nor seek trauma therapy, or understand concepts such as post-traumatic stress disorder and the like. His grandmother, however, was the person he felt he could be vulnerable by discussing his inner feelings, and his understandable fear. He didn't need to be strong for her like he did for his parents. She died, however, as K'Shawn entered high school. For him, this meant he really had to bury away his feelings. He turned to books as his source for security, albeit their one-dimensional conversation. To no one's surprise, he became an excellent student, obtaining his

---

<sup>2</sup> Is a notable literary piece about the coming of age of the 'hip-hop' culture in the Bronx within the surroundings of violence.

advanced diploma at Metropolitan Soundview High School, a designation reserved for those with a 90 average or better. Perhaps this is why K'Shawn loves the movie 'Finding Forrester'<sup>3</sup>, because for him, the story is relatable.

After graduating from high school, he stayed local attending SUNY where he worked and played basketball. Unfortunately, he ended up in a terrible situation which impacted his schooling and financial aid. Sadly, he left and then attended Hudson Valley Community College. He worked and played basketball there but absent financial support, was unable to continue. He tried one semester at Bronx Community College while living at home but felt that the timing wasn't right to put in the dedication to school.

Today, K'Shawn is an incredible role model for his son, his family, and the community. He has no substance abuse issues, he has been and continues to be meaningfully employed, and outside of one student loan, he has not requested public assistance. He is employed at Sunrun Solar with a bright future. His son means everything to him and provides the constant drive today. K'Shawn has one goal in mind now and that is to ensure that his son does not grow up in the housing projects in the Bronx. <https://nypost.com/2022/10/26/bronx-shootout-captured-in-newly-released-footage/>; <https://www.amny.com/new-york/brooklyn/nyc-shootings-january-5/>.

---

<sup>3</sup> Staring Sean Connery, Finding Forrester is about an African-American Bronx youth who excels at both basketball and writing. <https://www.imdb.com/title/tt0181536/>

## 5. Non-Guideline or Variant Sentence

The United States Supreme Court held that it is impermissible to presume that the Sentencing Guidelines are reasonable. *Nelson v. United States*, 555 U.S. 350, 129 S.Ct. 890 (2009). The Supreme Court stated in *Pepper v. United States* that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” 562 U.S. 476 (2011) quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996)). Courts need not adhere to the rigidity of the Sentencing Guidelines. *United States v. Booker*, 543 U.S. 220 (2005). In fact, the district judge may not simply rely upon the Sentencing Guidelines. *Gall v. United States*, 552 U.S. 38, 39 (2007); *Peugh v. United States*, 133 S.Ct. 2072, 2080 (2013).

A departure and/or variant sentence is appropriate in this matter based on the application of the sentencing factors in 18 U.S.C. §3553(a) which provides in pertinent part:

*“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed shall consider-*  
*(1) the nature and circumstances of the offense and the history and characteristics of the defendant;*

*(2) the need for the sentence imposed—*

*(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;*

*(B) to afford adequate deterrence to criminal conduct;*

*(C) to protect the public from further crimes of the defendant; and*

*(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.*

## **ARGUMENT**

### **A. A Sentence of Zero Months Incarceration is Appropriate Based on the History and Characteristics of K'Shawn Brooks**

#### **1. Variant Factor- Collateral Consequences of a Conviction**

K'Shawn is aware that he engaged in unlawful activities and that leads to serious and deserved consequences. He was aware of this from the time that he relinquished his Constitutional right to a trial and agreed to accept responsibility for his actions by pleading guilty, saving the government the time and expense of a trial. He is also aware that his actions will have consequences that will remain with him for the rest of his life.

There are nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons. See generally

American Bar Association, Nat'l Inventory of the Collateral Consequences of Conviction, [abacollateralconsequences.org](http://abacollateralconsequences.org); see also How to Get Around A Criminal Conviction, N.Y. TIMES, at A22 (Oct. 19, 2015) ("some 70 million to 100 million people in the United States-more than a quarter of all adults-have a criminal record, and as a result they are subject to tens of thousands of federal and state laws and rules that restrict or prohibit their access to the most basic rights and privileges-from voting, employment and housing to business licensing and parental rights.").

Many Courts have considered the collateral impact when determining sentences. See *United States v. Stewart*, 590 F.3d 93, 141-2 (2<sup>nd</sup> Cir. 2009) ("it is difficult to see how a court can properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence."). Some holdings in the various circuits have been as follows:

- Second Circuit: Approved as reasonable a variance from guidelines of 78-97 months to 20 months, because the defendant's conviction for violating rules against communicating with a prisoner "made it 'doubtful that [he] could pursue' his career as an academic or translator." *Id.* The court commented that "[i]t is difficult to see how a court can properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence." *Id.*
- Fourth Circuit: Affirmed a 36-month variance for a child pornography defendant, based in part on the fact that he lost his teaching certificate and state pension as a result of his conduct: "Consideration of these facts is consistent with § 3553(a)'s directive that the sentence reflect the need for 'just punishment' and 'adequate deterrence.'" *United States Pauley*, 511 F.3d 468, 474 (4<sup>th</sup> Cir. 2007).
- Seventh Circuit: Affirmed 50-month variance from guidelines of 121-151 in child pornography case, in part because conviction ruined a 24-year-old music student's future career as a teacher and church musician, and imposed lifelong stigma. *United States v. Wachowiak*, 496 F.3d 744 (7<sup>th</sup> Cir. 2007); see also *United States v. Owens*, 145 F.3d 923 (7<sup>th</sup> Cir. 1998) (affirming downward departure based on extraordinary

family circumstances, including that defendant's wife and three young children might have to move to public housing and receive welfare benefits if defendant received a prison sentence).

- Eighth Circuit: Affirmed a 7-month variance for a defendant convicted of insider trading and money laundering, based in part on how the defendant "suffered atypical punishment such as the loss of his reputation and his company." *United States v. Anderson*, 533 F.3d 623, 633 (8<sup>th</sup> Cir. 2008); see also *United States v. Garate*, 543 F.3d 1026 (8<sup>th</sup> Cir. 2008) (court properly considered lasting effects of registering as a sex offender in deciding to impose below-guideline sentence).

The First Circuit indirectly addressed this issue in *United States v. Prosperi*, where it upheld sentences of six months home monitoring, 1,000 hours of community service, and three years of probation in a matter with a guideline range of 87 to 108 months incarceration. 686 F.3d 32 (1<sup>st</sup> Cir. 2012). In that case, the Court emphasized that the defendants did not profit from their misconduct nor create a significant safety hazard and the Court discussed the impact of the criminal charges stating "I think it is very difficult at times, for those of us who are judges or prosecutors or lawyers, to put ourselves in the shoes of a person with no prior experience with the criminal justice system who finds himself or herself accused of a crime. I do not think, sometimes, we fully recognize the anguish and the penalty and the burden that persons face when called to account, as these men are, for the wrong that they committed..." *Id.* These "critical findings" were supplemented with considerations of individual circumstances supporting probationary sentences. *Id.*

As eloquently referenced in *Prosperi*, it is difficult to stand in K'Shawn's shoes who now faces significant consequences that are warranted and immeasurable. Convicted

felons are less likely to be hired for general employment. See *Ex-Offenders and the Labor Market*, U.S. Center on Economic and Policy Research, (2010)(finding that a felony conviction significantly reduces the ability of ex-offenders to find jobs, costing the U.S. economy an estimated \$57 to \$65 billion annually in lost economic output). <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>; see Devah Pager, *Marked: Race, Crime, and Finding Work In An Era of Mass Incarceration* vii (2007)(“the results of the study provide clear evidence for the significant effect of a criminal record, with employers using the information as a screening mechanism, weeding out ex-offenders at the very start of the hiring process. As a result, ex-offenders are one-half to one-third as likely to receive initial consideration from employers as equivalent applicants without criminal records. Mere contact with the criminal justice system—in the absence of any transformative or selective effects—severely limits subsequent job prospects. The mark of a criminal record indeed represents a powerful barrier to employment.”) This is of particular concern in this matter because of the necessity for K’Shawn to continue in meaningful employment to provide the financial assistance for his family. See *United States v. Gardellini*, 545 F.3d 1089 (DC Cir. 2008)(upholding non-guidelines sentence of probation and a fine for defendant convicted of filing false tax returns where guidelines range was 10-16 months because defendant had accepted responsibility, a minimal -65- risk of recidivism, had already suffered substantially and

been treated for stress, and the only real deterrent in these cases are the efforts of prosecutors to enforce the laws, not harsh prison sentences).

Other specific consequences to K'Shawn are also apparent. Under 42 U.S.C. § 13661 and 24 C.F.R. §5.855, he may be denied admission to federally assisted housing for a "reasonable time." 18 U.S.C. §922 provides that "{a}ny felony convictions bars an individual from possession, sale, shipment, transportation, or receipt of a firearm in interstate and foreign commerce, and is permanent." Finally, given K'Shawn's intellect, it is also of concern if K'Shawn chooses to return to school and further his education, and likely cannot receive any grants or assistance for a significant, if not indefinite period of time.

## 2. Variant Factor- Cost of Incarceration Instead of Supervision

The annual cost of detaining federal prisoners before trial and after sentencing is significantly higher than the cost of supervision in the community, according to figures compiled by the Administrative Office of the U.S. Courts. This was the subject of an extensive study just seven years ago. In fiscal year 2016, detaining an offender before trial and then incarcerating him post-conviction was roughly eight times more costly than supervising an offender in the community. Placing an offender in a residential reentry center was about seven times more costly than supervision. United States Courts, published on August 17, 2017, found at

<http://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision>.

This is also summarized (and updated) in the PSR. *PSR ¶60* As the graph shows, it costs over \$3300 more per month to incarcerate K'Shawn as opposed to supervising him. *Id.* See also Speech of Former Attorney General Eric Holder delivered on August 12, 2013 before the ABA convention in San Francisco: “Our current incarceration polity “imposes a significant economic burden — totaling \$80 billion in 2010 alone — and it comes with human and moral costs that are impossible to calculate.” found at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

To calculate specifically, a 10-month sentence in this matter would cost \$36,880 while a one year period of probation would cost \$4,454.00 *PSR ¶60*.

Courts that have addressed this issue have cited these findings when imposing sentences. See *United States v. Moreland*, 366 F.Supp.2d 416, 422 (S.D.W.Va.,2005)(imposition of guideline sentence would cost the taxpayers an enormous amount of money) *remanded on other issue*; *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004) (“Given that holding a person in federal prison costs about \$23,000 per year... . [M]oney could also be spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization”); *United States v. Chavez*, 230 F.3d 1089, 1092 (8<sup>th</sup> Cir. 2000) (Bright, J., concurring) (“It costs the United States government and its taxpayers approximately

\$22,000 per year to keep a federal offender in prison. Therefore, it will cost the taxpayers \$836,000 for his incarceration. This sentence is a waste of time, money, and more importantly, a man's life. These unwise Sentencing Guidelines put nonviolent offenders in prison for years, they ruin the lives of the prisoners, their families, and they also hurt our economy and our communities by draining billions of dollars from the taxpayers and keeping potentially productive members of society locked up. The opportunity costs imposed by the Sentencing Guidelines are staggering”<sup>4</sup>; *United States v. Bernier*, 758 F.Supp. 195 (S.D.N.Y. 1991)(sentencing distortion “produces an economic as well as personal consequence”); *United States v. Hughes*, 825 F.Supp. 866, 868 (D.Minn.,1993) (“[L]engthy incarceration substantially diminishes the likelihood that the defendant will be able to become a productive member of society upon his release. Second, the monetary cost to the American taxpayer of this incarceration will exceed \$270,000. Further, the non-rehabilitation purposes of incarceration-retribution, deterrence and incapacitation-would all be more than adequately served by a far shorter sentence. Both society and the defendant will pay a dear cost for this sentence and receive very little in return”); *United States v. Dossie*, 851 F.Supp.2d 478, 483 (E.D.N.Y. 2012) (“the drug-offense Guidelines ranges are excessively severe. In formulating those ranges, the Commission decided to jettison its pre-Guidelines data and instead chose to make the

---

<sup>4</sup> It is noteworthy that K'Shawn, like Mr. Chavez, was convicted of as non-violent offense.

sentencing range in every single drug case proportional to the onerous mandatory sentences meant only for leaders and managers.”)

a. Incarceration in this matter will not serve as a deterrence

Empirical studies show there is no relationship between sentence length and general or specific deterrence. See Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A review of Research* 28–29 (2006); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 *Criminology* 587 (1995); Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 *Criminology* 357 (2010) (all concluding there is no correlation between sentence length and crime rates).

Incarceration can be deleterious to public safety for individuals like Josh whose convictions are predominately non-violent. *See, e.g., United States Sentencing Commission, Sentencing Options Under the Guidelines* (1996) (recognizing the “criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties”); Justin Murray, *Reimagining Criminal Prosecution*, 49 *American Criminal Law Review* (2012)

at 1565 (“Rather than rehabilitating prisoners, modern incarceration tends to make prisoners more violent, antisocial, and prone to criminality”). “Most who study prison life believe there are significant brutalizing effects to imprisonment that impair prisoners’ inclination to conform to the law.” *Id.* quoting Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital and Crime: Implications for Social Disorganization Theory*, 36 *Criminology* 442, 465 (1998). See also *United States v. Bannister*, 786 F.Supp.2d 617 (E.D.N.Y., 2011) (“Recidivism may be promoted by the behavior traits prisoners develop while incarcerated.” To survive, they “tend to develop characteristics institutionally selected for survival: circumspection, canniness, coldness, and cruelty.”) Furthermore, according to “the best available evidence, . . . prisons do not reduce recidivism more than noncustodial sanctions.” Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Prison J.* 48S, 50S–51S (2011).

Courts across the country are recognizing the value to the defendant and the public of treatment instead of incarceration. They are acknowledging that for certain offenders, probation or home detention with cognitive treatment is the appropriate sentence. *United States v. Duhon*, 541 F.3d 391 (5<sup>th</sup> Cir. 2008) (where defendant convicted of possession of child pornography and guidelines called for 33–40 months prison, district court’s sentence to probation reasonable in part because of district court’s “strong emphasis on [defendant’s] general need for treatment”); *United States v. Whitehead*, 532 F.3d 991 (9<sup>th</sup>

Cir. 2008)(in matter where guidelines of 41-51 months, court's sentence of probation with community service not an abuse of discretion); *United States v. Vega*, 545 F.3d 743 (9<sup>th</sup> Cir. 2008) ("We agree with the Seventh Circuit that the imposition of... community service conditions will further the statutory goal of providing 'the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner'" quoting 18 U.S.C. § 3553(a)(2)(D) ("...community service is another opportunity for a defendant to obtain education and vocational training"); *United States v. Autery*, 555 F.3d 864 (9<sup>th</sup> Cir. 2009) (where defendant convicted of poss. of porn. and where guidelines 41-51 months, court's sua sponte variance to probation not unreasonable in part because in light of district court's 'stern warning' of maximum sentence to follow any violation "improbable that the district court's stern warning will be an ineffective deterrent in this case." )

Finally, in this matter, K'Shawn will be sentenced nearly two years from the date of the criminal activities. "The deterrent value of any punishment is, of course, related to the promptness with which it is inflicted." *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981)(*Stevens, J.*, concurring in denial of cert.)

### 3. Variant Factor- Post-Arrest Conduct

"In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*,

any information concerning the background, character and *conduct of the defendant*, unless otherwise prohibited by law. See 18 U.S.C. §3661.” *USSG §1B1.4* (2010)(emphasis added). In *Pepper v. United States*, the Supreme Court stated that “fundamentally, evidence of Pepper’s conduct since his release from custody in June 2005 provides the most up-to-date picture of Pepper’s history and characteristics.” 562 U.S. 476 (2011).

K’Shawn’s criminal conduct was nearly two years ago. He was released from custody on November 17, 2021. *PSR pg. 1*. Since that time, he has avoided any legal issues, release violations, positive drug or alcohol tests, and has continued to provide for his family. He has been actively employed. He has made positive contributions as a basketball coach for inner city youth. His conduct while on pretrial release clearly shows that there is minimal chance of recidivism.<sup>5</sup> See *United States v. Munoz-Nava*, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008)(defendant’s “behavior while on a year-and-a-half pretrial release, which the district court found to be exemplary” shows defendant unlikely to reoffend); *United States v. Baker*, 502 F.3d 465 (6<sup>th</sup> Cir. 2007)(where defendant pled guilty to possession of unregistered firearm arising from altercation with wife during which gun accidentally discharged and guideline range was 27-33 months, below-guideline sentence of probation with one year house arrest proper in part because he behaved “exceedingly well” while under supervision of pretrial services).

---

<sup>5</sup> See *Section I(A)(2)(a)*, *infra*.

In *United States v. Clay*, the Court sentenced the Defendant to 1/3 of the low end of the guidelines. 483 F.3d 739 (11<sup>th</sup> Cir. 2007). The Court held that considerations of post offense rehabilitation are appropriate when a district court evaluates the history and characteristics of the defendant and the need to protect the public from further crimes specifically stating that “a departure for post offense rehabilitation reflects that, unlike some other defendants, Clay had fundamentally changed since his offense, poses a lesser risk to the community, and does not require incarceration for too long.” *Id.* at 743. These factors all exist in this matter. See *U.S. v. Johnson* 588 F.Supp.2d 997 (S.D. Iowa 2008)(“The Court views Defendant’s behavior during the three-year period between the seizure of his computer and his indictment as a good indication of what society can expect from him after he completes his sentence [and is a factor court considers in imposing sentence]”); *United States v. D.M.* , 942 F.Supp.2d 327 (E.D.N.Y. 2013) (Weinstein, J.)(guidelines 78-90 months, sentence of probation warranted in part because “[e]vidence of a defendant’s efforts at rehabilitation is persuasive. It is indicative of the likelihood that a defendant will not reoffend and will not cause harm to the public”); Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 Ark. L. Rev. 529, 572-73 (2012) (“[W]hen it comes to sentencing, judges look at what offenders have done to rehabilitate themselves when deciding what kinds of sentences to assign. Accordingly, in the data set . . . sentencing judges were swayed by offenders’ rehabilitation efforts almost as much as they were swayed by offenders’ family obligations and family support.”)

Finally, the proposed period of probation and pretrial supervision would be just three years. In *United States v Polito*, the district court's sentence of probation with one year house arrest was reasonable in part because the years of probation would give the community a record of Polito's conduct to measure post offense rehabilitation. (5<sup>th</sup> Cir. Jan. 31, 2007) 2007 WL 313463 (unpub.)

#### 4. Variant Factor- Impact on Innocent Dependents

K'Shawn has a young child, K'Shawn Vincent Brooks, Jr., just over one year old, one resides with K'Shawn and his girlfriend, Shaniya Simmons. She does not work. Any jail sentence would have a significantly detrimental impact on them. Courts have addressed the issue of sentences based on family circumstances. A departure can be warranted based on children of the offender, an issue examined in *United States v. Pereira*, 272 F.3d 76 (1<sup>st</sup> Cir. 2001). The Court found that the relevant question is the impact of incarceration on innocent dependents. *Id.* The *Pereira* Court held that a defendant must be found to be "irreplaceable" to his or her family before the Court can depart downward under this section. *Id.* There is no doubt that K'Shawn is irreplaceable.

In *United States v. Schroeder*, 536 F.3d 746 (7<sup>th</sup> Cir. 2008), the Court remanded for resentencing when the sentencing court did not address defendant's claim of extraordinary family circumstances holding "[w]hen a defendant presents an argument for a lower

sentence based on extraordinary family circumstances, the relevant inquiry is the effect of the defendant's absence on his family members". *Id.* It is clear that his absence on his family would be financially devastating and thus, an "extraordinary circumstance." See also *United States v. Lehmann*, 513 F.3d 805 (8<sup>th</sup> Cir. 2008) (affirming a downward variance to probation where the district court found that a prison sentence would negatively affect the defendant's disabled young son); *United States v. Mateo*, 299 F. Supp. 2d 201 (S.D.N.Y. 2004) (downward departure granted in heroin case where defendant's two young children were thrust into the care of relatives who reported extreme difficulties raising them); *United States v. Antonakopoulos*, 399 F.3d 68 (1<sup>st</sup> Cir. 2005) (on remand of bank fraud case, district court may consider defendant's role as caretaker for brain-damaged son even though alternative means of care existed); *United States v. Dominguez*, 296 F.3d 192 (3<sup>rd</sup> Cir.2002) (district court erred in concluding it could not depart four levels in bank fraud case for defendant who resided with elderly parents, who were physically and financially dependent on her); *United States v. Owens*, 145 F.3d 923 (7<sup>th</sup> Cir. 1998) (departure from 169 to 120 months under § 5H1.6 for defendant who maintained good relationship with his children and court believed his active role raising and supporting his family was atypical for crack dealer and imprisonment may have forced wife on public-assistance and defendant also spent time with brother with Downs Syndrome); *United States v. Lehmann*, 513 F.3d 805 (8<sup>th</sup> Cir. Jan. 17, 2008) (sentence of probation affirmed where justified by the atypical nature and circumstances of the felon in possession case and

by the defendant's need to care for her nine year-old developmentally-disabled son); *United States v. Bailey*, 369 F. Supp. 2d 1090 (D. Neb. 2005) (post-Booker departure from 24-27 months to probation for defendant convicted of possessing child porn justified by expert testimony showing his presence was critical to his own child's recovery from molestation by a boyfriend of the child's mother, and there was reasonable expert assurance that Bailey was not dangerous to the public (including children), and the benefit to the public of incarcerating Bailey was outweighed by the harm it would cause to his daughter); *United States v. Pauley*, 511 F.3d 468 (4<sup>th</sup> Cir. 2007) (where client pled to possession of child porn. and guidelines 78-97 months, court's downward variance to 42 months affirmed in part because defendant "is a good parent" which is a "valid consideration under § 3553(a).")

##### 5. Variant Factor- Youth

At the time of the offense, K'Shawn was 23 years-old. The young are less culpable than the average offender and have a high likelihood of reforming in a short period of time. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464-66 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2026-27 (2010); *Roper v. Simmons*, 543 U.S. 551, 567, 569-70 (2005). Current scientific research on brain development demonstrates that the region of the brain governing judgment, reasoning, impulse control, and the ability to accurately assess risks and foresee consequences is not fully formed until the early to mid-twenties. Research

shows that adolescents and youths are more susceptible to peer pressure to engage in risky behavior than adults age 24 and older. See Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preferences and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 *Developmental Psych.* 625, 632 (2005).

#### 6. Variant Factor- Employment History

K'Shawn is currently employed by Sunrun Solar. He has been employed there for nearly one year. He works 60 hours per week and also works part time for his Father. Previous to this position, he was always actively employed, most recently as a security officer. Numerous courts have considered current and past employment as a factor for consideration in sentencing. In *United States v. Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008), the circuit court affirmed the district court's consideration of the defendant's "history of strong employment" in granting a variance from 30-37 months' imprisonment to one day of imprisonment followed by three years' supervised release (to be partially served in a community confinement facility), in part so that the defendant could continue to work. *Id.* In a case involving heroin trafficking, the Tenth Circuit affirmed a below guideline sentence under 18 U.S.C. § 3553(a) of one year and a day in prison, plus a year of home confinement and five years of supervised release, where the guidelines called for a sentence of 63-78 months. See *United States v. Munoz-Nava*, 524 F.3d 1137 (10<sup>th</sup> Cir.

2008). Among other things, the district court considered the defendant's stable employment history as evidence that he was unlikely to reoffend. *Id.* at 1148-49. The Third Circuit affirmed a below-guideline sentence of probation, community service, restitution, and fine on a conviction for tax evasion, which was based in part on the defendant's employment record. *United States v. Tomko*, 562 F.3d 558, 571 (3<sup>rd</sup> Cir. 2009) (*en banc*) (“{t}his variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating the defendant.”)

#### 7. Variant Factor- K'Shawn's Childhood

There is little doubt K'Shawn experienced a traumatic and disadvantaged childhood, which helped to put him on the path to the matter before this Court. As outlined in the PSR, K'Shawn was exposed to violence, gangs, drugs, and death as a youth. At a young age when people are enjoying their childhood, K'Shawn was looking for ways to simply survive.

Courts have consistently considered childhood factors as a basis for a lower sentence. *United States v. McBride*, 2007 WL 4555205 (11<sup>th</sup> Cir. Dec. 28, 2007) (finding non-guideline sentence of 84 months, a departure from a term of 151-188 was sufficient but not greater than necessary. Among the factors considered where the severe physical

abuse defendant suffered and having been shuffled between foster homes until adulthood); *United States v. Lopez*, 938 F.2d 1293, 1297-99 (D.C.Cir. 1991) (remanded for district court to consider a departure from 51 month sentence imposed in drug case because defendant was exposed to domestic violence as a child, his mother's murder by stepfather, his need to leave town due to threats, and having grown up in slums of New York and Puerto Rico ); *United States v. Ruiz*, 2009 WL 636543 (S.D. N.Y., March 11, 2009) (judge imposed 96 months rather than guideline range of 140-175 months for crack offenses in part due to defendant's difficult childhood with abusive mother and largely absent father who was incarcerated and a heroin addict, and the absence of any prior substance abuse assistance); *United States v. Samuels*, 2009 WL 875320 (S.D. N.Y. April 2, 2009) (time served imposed rather than guideline range of 70-87months for young woman from abused background who was embarrassed by her drug sales and did not tell her family though she sold them to support them); *United States v. Handy*, 2008 WL 3049899 (E.D.N.Y. 2008) (court imposed 30 month sentence rather than guideline range of 37-46 months for 20-year-old who was effectively abandoned as an infant and separated from siblings,); *United States v. Santa*, 2008 WL 2065560 (E.D. N.Y. 2008) (court imposed 120 months as a variance from a guideline term of 262-327 months for a mentally ill defendant based on difficult childhood and life); *United States v. Germosen*, 473 F. Supp. 2d 221 (D. Mass 2007) (where guideline range was 37-46 months for conspiracy involving heroin importation, a sentence of 2 years of probation with six

months home confinement was warranted partly because defendant had dealt with and was prepared to overcome difficult circumstances of his youth).

In *United States v. Shift*, the district court departed ten months from the guideline range and imposed the mandatory minimum sentence, finding that defendant's lack of youthful guidance, and acceptance of responsibility indicated that ten additional months of incarceration would serve no deterrent or retributive purpose to defendant or to general public. 2008 WL 2906884 (N.D.Ind. 2008). Perhaps no argument better summarizes the situation as it relates to K'Shawn. What would be gained by a prison sentence?

8. Variant Factor –K'Shawn is an Otherwise Law-Abiding Citizen Who Made a Terrible Mistake

K'Shawn could be entitled to a departure or variance based on the actions considered aberrant because in 2000, the Sentencing Commission explained what is considered aberrant behavior. U.S.S.G. §5K2.20. A departure for aberrant behavior is authorized for "a single criminal occurrence or single criminal transaction (which is somewhat broader than a single act) and is limited to offenses (A) committed without significant planning; (B) of limited duration; and (C) and that represent a marked deviation by the defendant from an otherwise law-abiding life." It is arguable that this is a single criminal occurrence. §5K2.20.

Even if the Court does not consider a departure, the basic application of factors under §5K2.20 does not preclude the Court from a variance. See *United States v. Howe*,

543 F.3d 128 (3<sup>rd</sup> Cir. 2008) (affirming probationary sentence and temporary home confinement for wire fraud despite an 18-24 month guideline range, where appellate court construed district court to have termed the offense an “isolated mistake” in the context of Howe’s otherwise long and entirely upstanding life). Similar to that matter, K’Shawn has largely lived an otherwise entirely upstanding life; he has avoided involvement in the criminal justice system for his limited adult life, this matter the only exception. He is a law-abiding citizen who did an incredibly dumb thing. *See United States v. Hadash*, 408 F.3d 1080, 1084 (8<sup>th</sup> Cir. 2005) (six level downward departure upheld where district court concluded that defendant was “law abiding citizen, who [did] an incredibly dumb thing” and “was not the type of defendant the guidelines section was designed to punish”); *United States v. Davis*, 2008 WL 2329290 (S.D.N.Y. June 5, 2008) (time served imposed for possessing a sawed-off shotgun, which appeared to have been prompted by economic pressures of unemployment by a first-time offender who had throughout his 15-year marriage worked at lots of jobs to get education for his six children, even when they lived in homeless shelters, and whose personal investment in his children’s care was attested to by a school teacher and a pediatrician).

#### 9. Variant Factor- Avoiding Sentencing Disparities with Co-Defendants

Section 3553(a) states that Courts shall consider a variety of factors when imposing a sentence, including: “(1) [Defendant's] personal history and characteristics; (2) his

sentence relative to the nature and seriousness of his offense; (3) the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public; (4) the need for rehabilitative services; (5) the applicable guideline sentence; and (6) *the need to avoid unwarranted sentencing disparities among similarly-situated defendants.*” *United States v. Bryant*, Crim. No. CCB-95-202-3, 2020 WL 2085471, at \*4 (D. Md. Apr. 30, 2020)(emphasis added).

In this matter, both of K’Shawn’s co-defendants had their matters dismissed, despite probation concluding that “each conspirator held average roles ... [n]one were substantially less culpable than the others.” *PSR* ¶10A. See *United States v. Payton*, 2021 WL 927631 (D. Md. 2021)(Judge Messitte, finds “extraordinary and compelling reasons” based on the unwarranted sentencing disparity between two co-defendants to reduce sentence from 25 months to time served); *United States v. Lazenby*, 439 F.3d 928, 934 (8<sup>th</sup> Cir. 2006) (recognizing that extreme disparities in the sentences imposed on coconspirators could “fail to promote respect for the law;”); *Cullen v. United States*, 194 F.3d 401, 408 (2<sup>nd</sup> Cir. 1999) (sentencing court could plausibly conclude that extremely divergent sentences would undermine the accepted notion that similar conduct should be punished in a somewhat similar manner); *United States v. Krutsinger*, 449 F.3d 827 (8<sup>th</sup> Cir. 2006) (where defendant convicted of obstruction of justice regarding drug conspiracy and where government sought 60 months based on cooperation, judge properly imposed below guideline sentence of 20 months because of disparity with other defendants. “We cannot

say the district court abused its discretion in fashioning a sentence that attempted to address the disparity in sentences between two nearly identically situated individuals who committed the same crime in the same conspiracy;”); *United States v. Ray*, 920 F.2d 562 (9<sup>th</sup> Cir. 1990), amended, 930 F.2d 1368, 1372-73 (9<sup>th</sup> Cir. 1991) (“disparity was said to be one of the most important evils the guidelines were intended to cure”); *United States v. Hensley*, 363 F.Supp.2d 843 (W.D. Va. 2005)(post *Booker*, where D pled guilty to distribution of meth. and guidelines were 37-46 months, court imposes 12 months to avoid disparity with codefendant’s six months sentence merely because codefendant went to the government first).

### **SUMMARY**

“If ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, “the history and characteristics of the defendant.” *United States v. Adelson*, 441 F.Supp.2d 506 (S.D.NY 2006). In this moment, with both K’Shawn and his family’s future in the balance, we ask that this Court sentence him to no incarceration and one year of probation.

### **REQUESTED SENTENCING RECOMMENDATIONS**

Based on the foregoing, K'Shawn makes the following requests for Judicial recommendations at sentencing:

- 1) K'Shawn be sentenced to zero months incarceration;
- 2) K'Shawn be placed on probation for a period of one year with the conditions proposed in PSR ¶67.
- 3) The Court find extraordinary circumstances exists and order no fine, restitution, or community service. In the alternative, order a \$100.00 fine as opposed to any community service.

Dated in Portland, Maine this 6<sup>th</sup> day of July 2023.

Respectfully submitted,

s/David J. Bobrow, Esq.

Attorney for K'Shawn Brooks  
BEDARD AND BOBROW, PC  
9 Bradstreet Lane  
P.O. Box 366  
Eliot, ME 03903  
207.439.4502  
djblaw@bedardbobrow.com

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>VS.</b>	)	<b>Docket No. 2:21-CR-00164</b>
	)	
<b>K'SHAWN BROOKS,</b>	)	
<b>DEFENDANT</b>	)	

**CERTIFICATE OF SERVICE**

I, David J. Bobrow, Esq., hereby certify that I have caused to be served via ECF K'Shawn Brooks' Sentencing Memorandum on the following individuals:

1. Green, Sean (USAME) [Sean.Green2@usdoj.gov](mailto:Sean.Green2@usdoj.gov);
2. All other attorneys of record in this matter.

Dated in Portland, Maine this 6<sup>th</sup> day of July 2023.

Respectfully submitted,

*s/David J. Bobrow, Esq.*  
Attorney for K'Shawn Brooks  
BEDARD AND BOBROW, PC  
9 Bradstreet Lane  
P.O. Box 366  
Eliot, ME 03903  
207.439.4502  
[djblaw@bedardbobrow.com](mailto:djblaw@bedardbobrow.com)

