

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA )  
 ) No. 16 CR 590  
 v. )  
 ) Judge Gary Feinerman  
 MARCO PROANO )

**REPLY TO THE GOVERNMENT'S  
SENTENCING MEMORANDUM**

Now comes the Defendant, Marco Proano, by and through his attorney, Daniel Q. Herbert, from the Law Offices of Daniel Q. Herbert & Associates and in response to the government's sentencing papers, states as follows:

**I. Introduction**

The government is asking for an unduly harsh sentence in this case to punish Proano far beyond the offense of conviction. Rallying under the guise of general deterrence, the government asks this Court to send a message by sentencing Proano to eight years in prison. The requested sentence is not in line with the offense conduct and far greater than necessary to meet the ends of justice.

**II. Nature and Circumstances of Offense Conduct**

In its sentencing memorandum the government detailed a very biased recitation of the events that it asserts comprise the offense conduct in this matter. In an attempt to cast Proano in the worst possible light, the government cherry picked portions of the record that support its position and ignored the parts that do not. Nothing in this response is meant to denigrate the seriousness of the offenses for which Proano was convicted; however, the government is not entitled to unbridled latitude in its fashioning of the facts.

Under the government's sentencing theory, Marco Proano discharged his firearm without cause or justification because the teenagers in the Toyota did not listen to the officers on scene. Doc. 154 at 11. The government would have this Court believe that this was only one explanation for Proano's decision to discharge his firearm. However, that is entirely not correct. This Court had the opportunity to observe all of the witnesses whom testified at trial and judge their credibility; and while Proano was convicted, it does not necessarily follow that the government's version of the events is true or even that said version was believed in total by the jury. To the contrary, the government's sensationalized offering does not wholly conform with the evidence at trial or common sense. While there is no need to retry this case in position papers, the government's claim that Proano's reasoning for discharging his firearm at the driver of the Toyota was fabricated in an attempt to justify his actions after the fact, and that their witnesses are the paradigm of virtue, cannot stand unrebutted. Here, Proano intended to stop Mr. Bates from recklessly driving the Toyota who placed Mr. Brown in imminent danger of great bodily harm or death.

### **III. Proano's History and Personal Characteristics**

Proano briefly responds to some of the arguments made by the government regarding his history and personal characteristics.

The government argues that Proano's "lack of remorse" is "another reason this Court should sentence him to a substantial term of imprisonment." Doc. 154 at 12-13. It is difficult to understand how the government can assert that Proano lacks remorse other than by taking his statements out of context and embellishing them to make such an appearance. In doing so, the government wholly ignores the fact that Proano "continues to be reflective about the situation." PSR ¶ 80.

Additionally, the government argues that Proano's family circumstances should play a limited role in this Court's analysis. Proano is the patriarch of his family. It is abundantly clear that his family is, has, and always will be paramount in his life. A sentence of incarceration would have an ineffable negative impact on his family members' lives and Marco Proano is immensely concerned about the toll incarceration would have on his family. *See U.S. v. Galante*, 111 F.3d 1029 (2d Cir.1997) (the court affirmed the district court's 13-level downward departure in drug case from 46-57 months to 8 days where the defendant showed he was a conscientious and caring father of two young sons who would have faced severe financial hardships); *U.S. v. Owens*, 145 F.3d 923 (7th Cir. 1998) (the court affirmed a downward departure from level 32 (169 to 210 months) to 120 months under 5H1.6 for a defendant convicted of possession of crack cocaine with intent to distribute where "he maintained a good relationship with his [three] children"; the district court said the defendant's situation "differs from that of a typical crack dealer in that [the defendant] takes an active role in raising his children and supporting his family"); *U.S. v. Milikowsky*, 65 F.3d 4, 8 (2d Cir. 1995) ("Among the permissible justifications for downward departure ... is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties."); *U.S. v. Johnson*, 964 F.2d 124, 125 (2nd Cir. 1992) (departure from 15-21 months to probation on home confinement granted to the defendant convicted of credit fraud observing that the Guidelines "do not require a judge to leave compassion and common sense at the door of the courtroom.")

#### **IV. The Need to Afford Adequate Deterrence**

In recommending a term of eight years imprisonment, the government capitalizes on antipolice sentiment and the deeply rooted police-community distrust. Although the government acknowledges that the "long-ingrained distrust of the police did not start" with Proano's actions,

it asserts that Proano “gave the community reason to doubt law enforcement’s intentions and reason to believe that it cannot have faith that law enforcement will serve all citizens equally.” Doc. 154 at 11, 12. In doing so, the government seeks to make Proano a puppet stating that Proano’s convictions provide a “significant opportunity for the judicial system to send a message to law enforcement that violating the constitutional and civil rights of the very same individuals they have sworn to serve and protect is a very serious offense that will be punished to the fullest extent of the law.” Doc. 154 at 14. If, as the government contends, it wants to send a message, it can consider the message received.

The government’s argument that a significant prison term is warranted to deter other law enforcement officers from violating the constitutional and civil rights of citizens, is curious as every law enforcement officer on the streets would not dare step into the shoes of Marco Proano. Marco Proano was a decorated police officer who now is branded as a criminal. A search of his name does not reveal heroic arrests or public service awards, rather it is story after story about his indictment, trial, and conviction. The unqualified anguish that Proano and his family have endured throughout this ordeal cannot be naysaid. His reputation is gone. His finances are ruined. His job is gone. There will not be one police officer, who, having heard about all that Proano lost, would not be deterred from breaking the law. The stigma of a felony conviction is permanent. It is pervasive. It serves as an eternal badge of infamy, even serving to impugn reputation beyond the grave. This alone constitutes powerful deterrence.

Moreover, given Proano’s age and background, he clearly lacks a propensity to commit crimes; he is not beyond rehabilitation, and the risk for recidivism is nil. The fact that Proano can no longer work in law enforcement and will forever be branded a federal felon is sufficient punishment in and of itself. *See U.S. v. Samaras*, 390 F.Supp.2d 805, 809 (E.D.Wis., 2005) (a

sentence below the guideline range in a fraud case was warranted in part because “as a consequence of his conviction and sentence, defendant lost a good public-sector job, another factor not considered by the guidelines.”)

#### **V. The Need to Avoid Unwarranted Sentencing Disparities**

As the government notes, under § 3553(a)(6), a district court, in sentencing a defendant, must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” Doc. 154 at 15. The government then describes a number of other § 242 cases along with the ultimate sentences of those matters. As an initial matter, all we know from the cases that the government discusses is the ultimate sentence. We do not know the individuals who were sentenced or their backgrounds. Nor do we know the particular facts and circumstances giving rise to those sentences. This Court cannot adequately consider the issue of sentencing disparities without knowing the facts of those cases that may have led to the sentences that were given.

The government wants this Court to interpret § 3553(a)(6) as leaving the district court with little discretion in determining a proper sentence. However, it is important to note that § 3553(a)(6) does not mandate uniformity in sentencing. Rather, it counsels against *unwarranted* disparity, i.e. those disparities lacking justification under the factors set forth in § 3553(a). *See United States v. McGee*, No. 06-CR-140, 479 F. Supp. 2d 910, 2007 U.S. Dist. LEXIS 19410, at \*9-10 (E.D. Wis. Mar. 19, 2007 (stating that disparity between sentences is “unwarranted only if the judge fails to provide sufficient reasons for the difference, grounded in the § 3553(a) factors”); *United States v. Boumenot*, No. 09-CR-194, 2010 U.S. Dist. LEXIS 1610, at \*8-9 (E.D. Wis. Jan. 8, 2010) (defendant’s sentence varied from the guidelines, but because it was supported by the particular and unusual facts of the case, it created no

unwarranted disparity); *United States v. Brasfield*, No. 11-CR-96, 2011 U.S. Dist. LEXIS 96890, at \*12 n.5 (E.D. Wis. Aug. 27, 2011) (sentence varied from the guidelines, but it created no unwarranted disparity because the variance was supported by the facts of the case); *United States v. Craig*, No. 11-CR-62, 2011 U.S. Dist. LEXIS 139255, at \*13 (E.D. Wis. Dec. 3, 2011) (defendant's sentence varied substantially from the guideline range but did not create an unwarranted disparity due to the unusual features of the case).

#### **VI. Supervised Release Conditions Outlined in the PSR**

Defendant does not object to the supervised release conditions proposed by the Probation Office.

The Probation Office recommends that Proano be required to comply with the following conditions set forth in 18 U.S.C. § 3583(d) to which Proano has no objection.

- Not commit another federal, state or local offense.
- Not unlawfully possess a controlled substance.
- Cooperate with the collection of a DNA sample if the collection is authorized by law.

The Probation Office recommends that Proano be required to comply with the following discretionary conditions set forth in 18 U.S.C. 3563(b) and 3583(d) to which Proano has no objection:

- Provide financial support to any dependents if financially able.
- Seek and work conscientiously at lawful employment or pursue conscientiously a course of study or vocational training that will equip the defendant for employment.
- Refrain from knowingly meeting or communicating with any person whom defendant knows to be engaged, or planning to be engaged, in criminal activity.
- Refrain from excessive use of alcohol or any use of a narcotic drug or other controlled substance, without a prescription from a licensed medical practitioner.
- Refrain from possessing a firearm, destructive device, or dangerous weapon.

- Remain within the jurisdiction where defendant is being supervised, unless granted permission to leave by the court or a probation officer.
- Report to a probation officer as directed by the Court or a probation officer.
- Permit a probation officer to visit defendant at any reasonable time at home, work, or other reasonable location specified by a probation officer, and permit confiscation of any contraband observed in plain view of the probation officer.
- Notify a probation officer promptly, within 72 hours, of any change in residence, employer, or workplace and, absent conditional or other legal privilege, answer inquiries by probation officer.
- Notify a probation officer promptly, within 72 hours, if arrested or questioned by a law enforcement officer.

Lastly, the Probation Officer recommends the following special conditions of supervised release pursuant to 18 U.S.C. 3563(b)(22) and 3583(d) to which Proano does not object:

- If unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, perform at least 20 hours of community service per week at the direction of the U.S. Probation Office until gainfully employed, with the amount of community service not exceeding 400 hours.
- Not incur new credit card charges or open additional lines of credit without the approval of a probation officer unless you are in compliance with the financial obligations imposed by this judgment.
- Provide a probation officer with access to any requested financial information necessary to monitor compliance with conditions of supervised release.
- Notify the Court of any material change in defendant's economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- Pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release. Defendant's monthly payment schedule shall be an amount that is at least 10% of his net monthly income, defined as income net of reasonable expenses for basic necessities such as food, shelter, utilities, insurance, and employment-related expenses.
- Not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

## **VII. Supervised Release Conditions Outlined by the Government**

The government requests that defendant be required to comply with the following mandatory conditions set forth in 18 U.S.C. § 3583(d) to which Proano has no objection.

- Not commit another federal, state or local offense.
- Not unlawfully possess a controlled substance.
- Cooperate with the collection of a DNA sample if the collection is authorized by law.

Additionally, the government recommended the following conditions to which Proano does not object to:

- Provide financial support to any dependents if financially able.
- Seek and work conscientiously at lawful employment or pursue conscientiously a course of study or vocational training that will equip the defendant for employment.
- Refrain from knowingly meeting or communicating with any person whom defendant knows to be engaged, or planning to be engaged, in criminal activity.
- Refrain from excessive use of alcohol or any use of a narcotic drug or other controlled substance, without a prescription from a licensed medical practitioner.
- Refrain from possessing a firearm, destructive device, or dangerous weapon.
- Remain within the jurisdiction where defendant is being supervised, unless granted permission to leave by the court or a probation officer.
- Report to a probation officer as directed by the Court or a probation officer.
- Permit a probation officer to visit defendant at any reasonable time at home, work, or other reasonable location specified by a probation officer, and permit confiscation of any contraband observed in plain view of the probation officer.
- Notify a probation officer promptly, within 72 hours, of any change in residence, employer, or workplace and, absent conditional or other legal privilege, answer inquiries by probation officer.
- Notify a probation officer promptly, within 72 hours, if arrested or questioned by a law enforcement officer.

- If unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, perform at least 20 hours of community service per week at the direction of the U.S. Probation Office until gainfully employed, with the amount of community service not exceeding 400 hours.
- Not incur new credit card charges or open additional lines of credit without the approval of a probation officer unless you are in compliance with the financial obligations imposed by this judgment.
- Provide a probation officer with access to any requested financial information necessary to monitor compliance with conditions of supervised release.
- Notify the Court of any material change in defendant's economic circumstances that might affect your ability to pay restitution, fines, or special assessments.
- Pay any financial penalty that is imposed by this judgment that remains unpaid at the commencement of the term of supervised release. Defendant's monthly payment schedule shall be an amount that is at least 10% of his net monthly income, defined as income net of reasonable expenses for basic necessities such as food, shelter, utilities, insurance, and employment-related expenses.
- Not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

### **CONCLUSION**

For all the reasons set forth above, Defendant, Marco Proano, respectfully requests that this Court sentence Mr. Proano to a term of supervised release, coupled with some form of community service. Such sentence would be consistent with the goals of sentencing, and it is "sufficient, but not greater than necessary" to accomplish the purpose of sentencing.

DATED: November 6, 2017

By: /s/ Daniel Q. Herbert  
Daniel Q. Herbert

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**CERTIFICATE OF SERVICE**

I, Daniel Q. Herbert, an attorney, certify that on November 6, 2017, I caused to be served Defendant's Reply to Government's Sentencing Memorandum to all counsels of record via Electronic Case Filing (ECF).

/s/ Daniel Q. Herbert  
Daniel Q. Herbert