

1 CUAUHTEMOC ORTEGA (Bar No. 257443)
 Federal Public Defender
 2 GEORGINA WAKEFIELD (Bar No. 282094)
 (E-Mail: Georgina Wakefield@fd.org)
 3 GABRIELA RIVERA (Bar No. 283633)
 (E-Mail: Gabriela Rivera@fd.org)
 4 JULIA DEIXLER (Bar No. 301954)
 (E-Mail: Julia Deixler@fd.org)
 5 JOSHUA D. WEISS (Bar No. 338918)
 (E-Mail: Joshua Weiss@fd.org)
 6 Deputy Federal Public Defenders
 321 East 2nd Street
 7 Los Angeles, California 90012-4202
 Telephone: (213) 894-2854
 8 Facsimile: (213) 894-0081

9 Attorneys for Defendant
 JERRY NEHL BOYLAN

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 11
 12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA**
 14 **WESTERN DIVISION**

15
 16 UNITED STATES OF AMERICA,
 17 Plaintiff,
 18 v.
 19 JERRY NEHL BOYLAN,
 20 Defendant.

Case No. 2:22-cr-00482-GW

**JERRY NEHL BOYLAN'S
 SENTENCING POSITION;
 EXHIBITS**

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1
2 Jerry Nehl Boylan, by and through the undersigned, hereby submits his
3 sentencing memorandum. This submission is based on the attached memorandum of
4 points and authorities, all pleadings and records in this case, and any further argument
5 this Honorable Court might require.

6
7 Respectfully submitted,
8 CUAUHTEMOC ORTEGA
9 Federal Public Defender

10 DATED: April 25, 2024

By /s/ Georgina Wakefield

11 GEORGINA WAKEFIELD
12 GABRIELA RIVERA
13 JULIA DEIXLER
14 JOSHUA D. WEISS
15 Deputy Federal Public Defenders
16 Attorneys for JERRY NEHL BOYLAN
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Jerry Boylan is an indigent, 70-year-old man in poor health who devoted over
4 three decades of his life to working on Truth Aquatics boats. Since the terrible tragedy
5 on the *Conception*, it has become widely known that regulations require a roving patrol
6 while a boat is anchored at night, and there is no dispute that there should have been a
7 roving patrol posted on the *Conception* and every other Truth Aquatics boat. But the
8 undisputed evidence is that Truth Aquatics did not instruct its employees to implement
9 a roving patrol or provide any training about it. The undisputed evidence shows that no
10 captain on any Truth Aquatics boat, or any other local boat for that matter, posted a
11 roving patrol at night. The terrible reality is that the devastating loss of life that
12 occurred on the *Conception* on September 2, 2019, could have occurred on any other
13 Santa Barbara dive boat, regardless of who the captain was.

14 This is a tragic case when viewed from any perspective. Thirty-four people lost
15 their lives when the *Conception* caught fire, and many more lives have been profoundly
16 and permanently changed as a result of the accident. Because of the number of victims,
17 the government seeks a ten-year term of imprisonment, which is the statutory
18 maximum sentence for Mr. Boylan's offense. But the parsimony principle is not
19 abandoned even when there is such a significant loss of life, and the Court must still
20 craft a sentence that is sufficient but not greater than necessary to achieve the purposes
21 of sentencing. While the loss of life here is staggering, there can be no dispute that Mr.
22 Boylan did not intend for anyone to die. Indeed, Mr. Boylan lives with significant
23 grief, remorse, and trauma as a result of the deaths of his passengers and crew.

24 Because this was an unintentional crime committed by a dedicated employee
25 following company-wide procedures [REDACTED]
26 [REDACTED], the defense requests that the Court
27 substitute home incarceration for imprisonment given the unique circumstances of the
28 case.

1 Thus, for the reasons explained below, the defense requests that the Court
2 impose a five-year probationary sentence, with three years to be served under home
3 incarceration. Additionally, the defense requests that the Court impose location
4 monitoring, mental health treatment, and 500 hours of community service.

5 **II. THE SENTENCING GUIDELINES**

6 As discussed in the previously filed objections to the Presentence Report, Mr.
7 Boylan submits that the correct guideline calculation is as follows:

8	Base offense level:	18	(§2A1.4(a)(2)(A))
9	Multiple count adjustment:	+5	(§3D1.4)
10	Zero-point offender reduction:	-2	(§4C1.1)
11	Total offense level:	21	
12	Guideline range:	37-46 months	

13 Mr. Boylan’s previous filing addresses this Guideline calculation at length, and
14 so the defense will only clarify three main points here. First, as to the enhanced base
15 offense level for an offense that “involved the reckless operation of a means of
16 transportation,” U.S.S.G. § 2A1.4(a)(2)(B), Mr. Boylan submits that it should not apply
17 here. In responding to Mr. Boylan’s motion for a new trial regarding the lesser-
18 included offense instruction, the government argued that a captain on a voyage can be
19 guilty of seaman’s manslaughter without “operating” the vessel by, “for example,
20 starting a fire with a cigarette.” *See* Dkt. No. 413 at 4. In denying Mr. Boylan’s
21 motion for a new trial, the Court cited to this argument of the government’s. *See* Dkt.
22 No. 421 at 5. This ruling should apply equally in the sentencing context. Under the
23 government’s narrow definition of “operating,” Mr. Boylan’s offense did not involve
24 the operation of a vessel; the vessel was anchored and he was not driving or otherwise
25 operating the vessel at the time of the fire. That is, the term “operation” implies active
26 conduct. For that reason, the enhanced base offense level typically applies to those
27 who drive while drunk or under the influence of drugs. *See United States v. Kilty*, C.D.
28 Cal. No. 5:16-cr-24-JGB, Dkt. No. 132 at 3 (Probation Office letter recommending a

1 downward variance in part because “in mitigation, Kilty’s conduct did not include
2 severe intoxication as is often the case for defendants subject to the base offense level
3 under USSG §2A1.4(2)(B)”); *see also id.* Dkt. No. 136 at 8 (government sentencing
4 position paper quoting the Probation recommendation letter.) Mr. Boylan was not
5 driving the boat or engaged in recklessly driving or maneuvering the boat while, for
6 example, under the influence. His crime is that of failing to do something, not actively
7 doing it.

8 Even if the Court concludes that Mr. Boylan was operating the boat at the time of
9 the fire, as discussed in *infra* Section III.D.2, Mr. Boylan’s mental state was not as
10 culpable or reckless as individuals convicted of manslaughter who operate cars while
11 under the influence of drugs or alcohol.

12 Second, the PSR’s Guidelines calculation also includes the abuse of trust
13 enhancement, U.S.S.G. § 3B1.3, but, as Mr. Boylan previously submitted to the Court,
14 the enhancement cannot apply here. *See* Dkt. No. 415 at 6-10. The government
15 attempts to defend the PSR’s application of the enhancement, but its arguments lack
16 merit. In short, the Ninth Circuit has stated that the enhancement applies only where
17 “in addition to the elements of the crime, the defendant *exploited* the trust relationship
18 to facilitate the offense.” *United States v. Christiansen*, 958 F.2d 285, 287–88 (9th Cir.
19 1992) (emphasis added); *see also United States v. Armstrong*, 165 F.3d 918 (9th Cir.
20 1998) (unpublished) (quoting same). As explained in detail in Mr. Boylan’s previously
21 filed objections to the PSR, to “exploit” a trust relationship, one must necessarily do so
22 intentionally. *See* Dkt. No. 415 at 6. The government does not dispute that
23 *Christiansen* stands for this proposition, nor does it claim that *Christiansen* has been
24 overruled. *See* Dkt. No. 426 at 7-8. It argues, though, that the Court should disregard
25 *Christiansen* because it was decided in 1992. *See id.* But, as the government has
26 previously pointed out, “Ninth Circuit precedent binds this Court unless ‘the reasoning
27 or theory of [the] prior circuit authority is clearly irreconcilable with the reasoning or
28 theory of intervening higher authority.’” Dkt. No. 246 at 26 (quoting *Miller v.*

1 *Gammie*, 335 F.3d 889, 893 (9th Cir. 2003)). The government points to no authority—
2 higher or otherwise—indicating that *Christiansen* has been overruled. *Christiansen*
3 thus remains binding and, as the government fails to rebut, stands for the proposition
4 that the abuse of trust enhancement can apply only to intentional crimes.

5 The Court should also disregard the government’s perplexing claim that Mr.
6 Boylan’s crime was intentional. *Contra* Dkt. No. 426 at 9. Indeed, prior to trial, the
7 government argued that the but-for cause requirement articulated by the Supreme Court
8 in *Burrage* should not apply here since “*Burrage* involved a different statute (drug
9 distribution) and also intentional conduct. Here, defendant did not intend to kill his
10 victims[.]” Dkt. No. 246 at 26. The government cannot now reverse its position,
11 having earlier asked the Court to make a critical ruling regarding jury instructions on
12 the basis of the fact that Mr. Boylan’s was an unintentional crime. *Cf. United States v.*
13 *Mirabal*, ---F.4th---, No. 22-50217, 2024 WL 1628673, at *4 (9th Cir. Apr. 16, 2024)
14 (holding that “formal, signed statements made by a government attorney in filings
15 before a court” are admissions of a party-opponent, admissible by a defendant at trial).
16 As the government previously agreed, Mr. Boylan’s was not an intentional crime, and
17 so, under *Christiansen*, the abuse of trust enhancement does not apply.

18 Finally, both the government and the Probation Office recommend that the Court
19 vary upward and sentence Mr. Boylan to 10 years’ imprisonment, the statutory
20 maximum sentence. Varying upward to reach this sentence is unreasonable for the
21 reasons discussed below. Moreover, a sentence of 120 months would approach a total
22 offense level of 32 at criminal history category one. That would be the same or a
23 similar offense level to vastly more serious crimes requiring a heightened mental state,
24 including second degree murder (offense level 33).

1 **III. BECAUSE THE COURT’S MANDATE IS TO CRAFT A SENTENCE**
2 **THAT IS SUFFICIENT BUT NO GREATER THAN NECESSARY TO**
3 **ACHIEVE THE PURPOSES OF SENTENCING, A THREE-YEAR**
4 **PERIOD OF HOME INCARCERATION TO SUBSTITUTE FOR A**
5 **THREE-YEAR PRISON SENTENCE UNDER THE CORRECT**
6 **GUIDELINE CALCULATION IS WARRANTED.**

7 **A. Mr. Boylan’s History and Characteristics Support a Sentence of Home**
8 **Incarceration Instead of Prison.**

9 **1. Mr. Boylan served a decades-long career as a safe and well-**
10 **respected captain for Truth Aquatics.**

11 Mr. Boylan began working for Truth Aquatics as a deckhand in 1983 and
12 eventually worked his way up to earning his captain’s license. In his decades of
13 experience prior to the *Conception* fire, Mr. Boylan had a reputation among the
14 company’s crew and passengers of being a safety-conscious captain. Chris Spiros, a
15 former Truth Aquatics captain who has worked as a licensed captain for forty years,
16 notes in his letter to the Court that he was “always impressed with Jerry’s paramount
17 concern for the safety of the passengers, crew and the vessel. He showed this concern
18 with his attention to the minutest detail.” Ex. 2 (Spiros Letter). Another former
19 crewmember, Julie Frans, writes that Mr. Boylan’s “dedication to ensuring the safety
20 and well-being of both crew and passengers was unparalleled, and his meticulous
21 approach left an indelible mark on my work ethic. His attention to detail was legendary,
22 and he expected nothing less from his crew.” Ex. 3 (Frans Letter). “He was always
23 alert to the smallest noise or anything that was ‘off.’ He was knowledgeable and
24 attuned to the conditions of the sea, what was happening on the boat with the crew and
25 passengers.” Ex. 4 (Buchanan Hallenberger Letter).

26 Several former Truth Aquatics crewmembers note in particular the attention that
27 Mr. Boylan gave throughout his career to crew training. He maintained high standards
28

1 and rigorously trained crewmembers on all aspects of the boat operations. As one
2 former crewmember, Chris Wilcox explains:

3 “The first thing that I noticed in working with Jerry during this time, was
4 that he ran, as the saying goes, a VERY tight ship. The crew worked with
5 absolute diligence under his command, in every aspect of the operation.
6 From cleaning the heads to safely managing the days long dive trips, and
7 ensuring the vessel was always in top operating condition, Jerry kept a
8 watchful eye over all aspects of the operation. He was quick to correct any
9 transgression from regular, safe operating procedures and always aspired
10 to make the systems we used better, safer and more efficient.”

11 Ex. 5 (Wilcox Letter). Mr. Boylan’s training also included fire safety. He “would run
12 safety drills as often as we could with our demanding schedule, testing the fire hoses
13 and underwater recall, and practicing man-overboard drills.” Ex. 6 (Friedland Letter).
14 Former crewmember Jessica Friedlander recounts, “Jerry personally trained me many
15 times on how to operate our fire hoses and emergency shut-off valves, where they were
16 located, and when to use them, and I would train crew with him.” *Id.*

17 Many other crewmembers recall how Mr. Boylan went out of his way to teach
18 them necessary skills for operating the boat safely. *See, e.g.*, Ex. 5. At trial, former
19 crewmember Baron Kelly testified that he shadowed Mr. Boylan so often on the boat
20 that another captain joked to Mr. Boylan, “you’ve got a fly on your back.” Dkt. 374 at
21 50:18-25. Mr. Kelly also testified about how Mr. Boylan took the time on off days to
22 train him without pay so that Mr. Kelly could practice driving the boat in and out of the
23 harbor. *Id.* at 48:21-49:05. Mr. Spiros states that Mr. Boylan “was so good at training
24 his crew, I could tell who had been trained by Jerry when I worked with them on other
25 boats.” Ex. 2.

26 Because scuba-diving trips made up the majority of Truth Aquatics’ business,
27 and because of the myriad risks inherent with the sport, Mr. Boylan’s “utmost concern
28 was for scuba diver safety.” Ex. 7 (Shemet Letter). Several former crewmembers

1 attest that Mr. Boylan was one of the most conservative captains when it came to diving
2 safety, sometimes even disappointing passengers for refusing to visit certain dive sites
3 when conditions were not up to his safety standards. *See, e.g.*, Ex. 8 (Debbie Buchanan
4 Letter) (“I remember many trips, but, one in particular, where the spearfishermen were
5 adamant about wanting to dive at a certain spot. Jerry said no. The conditions were not
6 good and it would not be safe.”). Mr. Boylan would always “pick the dive sites based
7 on weather, water conditions and the physical ability of the passengers on board.” Ex.
8 2. He “did not like taking risks and was very conservative about choosing dive sites
9 and anchorages compared to other captains.” Ex. 6. “Diving and boating come with
10 inherent risks. Jerry was attuned to those risks at all times and did everything within
11 his power to keep his people safe.” Ex. 4.

12 Even when taking all precautions with respect to diver safety, accidents are a
13 regular occurrence on scuba-diving boats, for myriad reasons. Several crewmembers
14 and passengers recount how Mr. Boylan and his trained crew “sprang into action” in
15 such scenarios to administer often life-saving care. Chris Wilcox, for example, recalls
16 an incident in which a passenger came to the ocean’s surface bleeding and foaming at
17 the mouth, “a worst nightmare for crew of a dive vessel.” Ex. 5. “Jerry coordinated
18 efforts seamlessly, and we had the passenger in stable condition with a USCG
19 helicopter en-route within minutes.” *Id.* Ms. Friedland recounts that as a
20 crewmember,

21 “We faced many life-and-death emergencies and I would always fall back
22 on my training, reporting to [Jerry] while carrying out his orders,
23 managing how the crew responded, administering CPR or medical aid,
24 deploying a rescue swimmer or responding in our inflatable skiff while he
25 operated the vessel, communicated with the Coast Guard and gave us
26 precise instructions. He always kept a cool head under pressure,
27 responding methodically and swiftly to whatever circumstances we faced,
28 which ranged from injuries to illness to drownings.”

1 Ex. 6. Ed Stetson, a long-time customer of Truth Aquatics who has been organizing
2 dive charters for 45 years, writes that “Jerry and his crew were directly responsible for
3 saving the lives of several people who either got into trouble or had medical
4 emergencies while diving. He took his job as a captain very seriously. He’s one of the
5 best captains I’ve ever worked with.” Ex. 9 (Stetson Letter).

6 In general, Truth Aquatics passengers loved being on trips with Mr. Boylan, and
7 felt safe with him. “Jerry stood out as that captain who put safety first.” Ex. 8. Indeed,
8 the only passengers who the government called as witnesses at trial testified to their
9 positive experiences with Mr. Boylan. Jacque Palmer, who travelled on the *Conception*
10 shortly before the accident, testified that the crew was “totally awesome,” and that she
11 not only wanted to go on another trip on the *Conception* but wanted to create a
12 PowerPoint presentation “to get more people to come on a trip with me.” Dkt. 361 at
13 107:02-13. Similarly, government witness Mark Copple testified that he had been on
14 several trips with Truth Aquatics over the years and that both he and the Finstad family
15 (who owned Worldwide Diving Adventures, the charterer for the accident trip)
16 “preferred to book trips with Jerry.” Dkt. 365 at 29:17-21. Mr. Copple further testified
17 that the conditions on Truth Aquatics boats were “very good” and the diving operations
18 were “extremely safe.” *Id.* at 29:24-30:04.

19 These positive passenger experiences are not limited to those who chose to
20 testify at trial or submit letters to the Court. All passengers were provided with written
21 surveys at the end of each Truth Aquatics trip in which they were asked to provide
22 ratings on a 1-5 scale regarding several aspects of the trip. The ratings across all trips
23 captained by Mr. Boylan were very high; his trips averaged a rating of 4.73 for “Staff
24 Knowledge and Professionalism,” 4.88 for “Captain Manner,” and 4.82 for “Overall
25 Trip Experience.” *See* Ex. 23 (Customer Surveys Chart).¹

26
27
28 ¹ This exhibit is a demonstrative that was created by the defense team through a
review of all customer surveys produced by the government in discovery. The raw data
used to compile the demonstrative is available for the Court’s review if requested.

1 These letters demonstrate that Mr. Boylan devoted his working years to Truth
2 Aquatics because he wanted to share his love for the ocean with others. He did not do
3 it because it was particularly lucrative. He made a modest daily wage, had no
4 retirement plan, and now survives entirely on social security payments. Though he was
5 the most experienced captain employed by Truth, his annual income in 2019 was
6 \$38,000; in 2018 it was \$44,000. Ex. 24 (Boylan Tax Return Summary). Since the
7 accident, his social security payments are unable to cover his monthly expenses and he
8 has not made any payments on the trailer where he resides in over 4 years. PSR ¶¶ 107,
9 111.

10 Despite his career-long record of safety, Mr. Boylan now faces sentencing for a
11 horrible accident that occurred on his watch. But the accident did not occur because
12 Mr. Boylan was less safe or more reckless than his other Truth Aquatics colleagues. To
13 the contrary, the uncontroverted opinion of former crewmembers is that Mr. Boylan
14 was more conscientious about safety than most other captains. As former Truth
15 Aquatics captain Chris Wilcox writes:

16 “It is painfully ironic to me that Jerry was the captain aboard the
17 Conception during the fire that took so many lives. I have worked in the
18 maritime industry as crew, captain and business owner ever since Jerry
19 took me under his wing 25 years ago, and I have known many captains
20 during this time. None of them compare to Jerry in the depth of
21 knowledge, diligence and care for the safety of his crew, passengers, and
22 vessel. He did everything in his power to do his job as master of the vessel
23 to the absolute best of his abilities, which were nothing short of
24 exceptional.”

25 Ex. 5. Chris Spiros similarly shares that, in the span of a 40-year career as a licensed
26 captain on several different types of vessels, “I can say, without reservation, Jerry is the
27 most conscientious captain I have ever met. This fact makes the terrible tragedy aboard
28

1 the *Conception* all the more horrifying. I still shu[dd]er to think about the fact that if
2 this could happen with Jerry Boylan as captain, it could happen to any of us.” Ex. 2.

3 **2. Mr. Boylan** [REDACTED]
4 [REDACTED].

5 The *Conception* accident was a terrible tragedy, and the sudden loss of 34 people
6 has caused unspeakable pain and heartbreak to their loved ones. Although he did not
7 lose a relative, Mr. Boylan too has experienced profound grief, remorse, and emotional
8 despair since the accident. He had deep personal relationships with some of the
9 decedents. Alexandra Kurtz, the first deckhand who slept in the bunkroom with the
10 passengers on the Labor Day weekend trip, was the youngest crewmember on the
11 *Conception* and had worked with Mr. Boylan before. Kristina Finstad, the charter
12 master for the trip, co-owned Worldwide Diving Adventures (“WDA”), a scuba-diving
13 company that had worked with Mr. Boylan and Truth Aquatics for over four decades.
14 Mr. Boylan was close personal friends with Ms. Finstad and her family, particularly her
15 father, who founded WDA. Mr. Boylan watched Ms. Finstad grow up since she was a
16 young girl. As one former crewmember notes, she and Mr. Boylan both “had known
17 many of the passengers who passed away for many years and considered them to be our
18 friends.” Ex. 6. Another former crewmember has observed Mr. Boylan’s grief and
19 sorrow since the accident, noting that “[t]he crew and passengers were not just crew
20 and passengers, they were a community. They were Jerry’s people, some of whom he
21 had known since childhood, like me.” Ex. 4. The lives lost in the accident were deeply
22 personal to Mr. Boylan, and that loss will pain him for the rest of his life.

23 The enduring grief and remorse that Mr. Boylan experiences [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 Those close to Mr. Boylan have also seen that he has been crippled with pain and
6 guilt in the years since the accident. Some observe that he is a “shell of the man he
7 once was,” Ex. 12 at 2, and a “shadow of a man since the accident,” Ex. 6 at 2. Mr.
8 Boylan shared with Chris Spiros, another Truth Aquatics captain, that he was glad it
9 wasn’t Mr. Spiros operating the boat the day of the accident, because Mr. Spiros has a
10 family that would have been devastated. Ex. 2. Mr. Boylan, conversely, has almost no
11 family after the recent death of his sister in 2022. But “[h]e has always and will always
12 care for others over himself.” *Id.* Mr. Spiros writes to the Court, “I know he has been
13 dealing with an incredible amount of guilt even though, in my opinion, he did all that
14 he could given the circumstances.” *Id.* To those that have been in contact with him
15 since the accident, “it’s clear that he lives in mourning for the losses endured in the
16 horrible accident that was beyond his control.” Ex. 3. As one former crewmember
17 writes, “Knowing Jerry the way I do, I can imagine the weight of this tragedy on his
18 heart and mind every second of every day. It absolutely breaks my heart to know what
19 he has gone through these past years.” *Id.* Another former colleague of Mr. Boylan’s
20 writes, “It is so very hard to convey to anyone not knowing Jerry how this tragedy
21 weighs on his heart and in his mind as well as ours. It is immeasurable. Saddened and
22 at a loss, words cannot convey the ache. Forever changed.” Ex. 11.

23 In addition to the grief and remorse that Mr. Boylan feels for the loss of the 34
24 decedents, [REDACTED]
25 [REDACTED] Mr. Boylan himself nearly died in the *Conception* fire. Even
26 while making the mayday call to the Coast Guard, he could be heard struggling to
27 breath due to the thick black smoke that was filling the wheelhouse as he attempted to
28 seek help during the fire. Two of the surviving crewmembers testified that they

1 believed Mr. Boylan was actually *on fire* because of the amount of smoke that trailed
2 him when he narrowly escaped the fire surrounding the wheelhouse. *See* Dkt No. 336
3 at 63:16-19; Dkt. No. 341 at 92:16-24. And once he was rescued by first responders,
4 Mr. Boylan was seen sobbing, vomiting, dry-heaving, laying in the fetal position, and
5 muttering to himself incoherently. *See* Ex. 25 (Belitski Tr. Excerpt) at 7-8. He
6 “collapsed with emotion to the deck several times.” Ex. 26 (Hayward ROI). He was
7 covered in soot with no shoes and partially clothed. *Id.* Mr. Boylan appeared so
8 emotionally distraught that first responders on the scene determined that he needed to
9 be observed for his own safety. Ex. 27 (Barrera ROI).

10 Mr. Boylan’s own near-death experience, as well as coping with the grief of 34
11 deaths, [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26
27
28

1 The government attempts to portray Mr. Boylan as callous and uncaring, as a
2 person who has “never apologized”² and who only sought to “save himself” during the
3 fatal fire. That insensitive portrayal is based on nothing but a cruel caricature. It in no
4 way reflects the real person who continues to suffer on a daily basis since the day of the
5 horrible *Conception* accident in which he nearly lost his own life.

6 **3. Mr. Boylan participated in the rescue efforts and immediate**
7 **investigation into the accident.**

8 While the government tries to paint Mr. Boylan as someone who callously
9 abandoned the boat and “never apologized,” the truth is that he stayed on scene to assist
10 with rescue efforts and cooperated with the immediate investigation into the accident.
11 While he went to trial and is not therefore entitled to the three-level reduction for
12 acceptance of responsibility under the guidelines, the Court can and should consider
13 Mr. Boylan’s efforts under the statutory sentencing factors and impose a sentence of
14 home incarceration as a substitute for prison.

15 Mr. Boylan did not abandon the vessel. He stayed in the wheelhouse as it filled
16 with smoke to alert the Coast Guard and get immediate assistance. He jumped out of
17 the burning wheelhouse only at the last possible second, with the surviving crew
18 believing he was on fire as he jumped into the ocean. He then reboarded the vessel at
19 the back, helped free the skiff, and rescue the surviving crew who were in the ocean.
20 He then got on the radio from the *Grape Escape*, staying on the boat to answer all the
21 questions posed to him by the Coast Guard over the radio so that help could arrive as
22 soon as possible.

23 Once the Coast Guard and fire boats arrived, Mr. Boylan insisted on staying on
24 scene to assist their efforts while the rest of the crew went back to shore. Rescue
25 personnel described Mr. Boylan’s distraught demeanor.

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² In making this argument, the government implicitly and improperly asks the
Court to punish Mr. Boylan for exercising his Fifth Amendment constitutional right.

1 Mr. Boylan eventually returned to shore with the Coast Guard. At the base, he
2 made out a written statement, admitting that he was asleep at the time the fire was
3 discovered. He also submitted to a breathalyzer at the station, which was negative for
4 alcohol. Mr. Boylan was then driven to a drug testing facility, which was closed due to
5 the Labor Day holiday. He returned to the drug testing facility the next day and
6 submitted a urine sample, which was negative for drugs.

7 In the immediate aftermath of the accident, the NTSB, in coordination with the
8 Coast Guard, began an investigation. They asked to interview Mr. Boylan and he
9 agreed. He appeared for a voluntary interview, but the NTSB told him to return the
10 following day. Mr. Boylan returned the following day and waited several hours to be
11 interviewed. The USAO asked the NTSB not to interview Mr. Boylan because it would
12 be pursuing criminal charges against him. But Mr. Boylan was willing and made
13 himself available for an interview with investigators.

14 In conclusion: Mr. Boylan made an emergency call to the Coast Guard, helped
15 the crew get to safety, stayed on the radio with the Coast Guard from a nearby boat,
16 boarded a Coast Guard boat and stayed on scene to assist rescue efforts, returned to the
17 base where he submitted a written statement admitting he was asleep that night and
18 gave a breathalyzer, submitted to drug testing, and appeared for a voluntary interview
19 with investigators. Because of the USAO, the interview did not proceed. Mr. Boylan
20 wanted to and did assist investigators. The Court should consider this and impose
21 home incarceration as a substitute for prison.

22 **4. Mr. Boylan is 70 years old with several significant health issues.**

23 A non-custodial sentence is also appropriate given Mr. Boylan's age and
24 numerous health issues. Mr. Boylan's age alone would make incarceration far harsher
25 than it would be for a younger person. The DOJ considers those who are 50 and older
26 to be "aging inmates" – a population that DOJ has determined to be more costly to
27 incarcerate, far less likely to recidivate, and lacking in programming and adequate
28

1 staffing to meet their needs in BOP facilities.³ According to a study by the Department
2 of Justice’s National Institute of Corrections, this is because incarceration accelerates
3 the aging process, due to factors such as “the amount of stress experienced by new
4 inmates trying to survive the prison experience unharmed; efforts to avoid
5 confrontations with correctional staff and fellow inmates; financial stress related to
6 inmates’ legal, family, and personal circumstances....”.⁴ The OIG agrees, citing
7 studies that show that “an inmate’s physiological age averages 10-15 years older than
8 his chronological age due to the combination of stresses associated with incarceration
9 and the conditions that he or she may have been exposed to prior to incarceration.”
10 OIG Report at 1-2. Aging inmates are also particularly vulnerable to the threat of
11 assault by younger predatory inmates, and the lack of protection from this threat
12 “contributes to the emotional stress and physical deterioration [elderly inmates]
13 routinely experience.” NIC Report at 9. Inmates over the age of 50, let alone aged 70
14 like Mr. Boylan, are “‘easy prey’ for more experienced predatory inmates.” *Id.* at 11.

15 In addition to his age, Mr. Boylan suffers from multiple health issues that would
16 make incarceration more punitive and could risk his ability to access necessary medical
17 care. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____
25 ³ See generally OIG, U.S. Dept. of Justice, *The Impact of an Aging Inmate*
26 *Population on the Federal Bureau of Prisons*, rev’d Feb. 2016 (“OIG Report”),
available at <https://oig.justice.gov/reports/2015/e1505.pdf>

27 ⁴ U.S. Dept. of Justice, National Institute of Corrections, *Correctional Health*
28 *Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates*
(2004) (“NIC report”) at 8, available at
<https://info.nicic.gov/nicrp/system/files/018735.pdf>

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 The average life expectancy of a male in the United States is 73.5 years.⁶ Mr.
8 Boylan turns 71 in October. He does not deserve to die in prison. But given his age
9 and health condition, the excessively punitive sentence recommended by the
10 government and Probation could very well result in that fate. Such punishment is far
11 greater than necessary to meet the goals of sentencing in this case.

12 **5. Prison rather than home incarceration would not serve the**
13 **sentencing goals of rehabilitation or specific deterrence in this**
14 **case.**

15 A sentence of home incarceration as a substitute for prison is also sufficient to
16 serve the sentencing goals of rehabilitation, specific deterrence, and protection of the
17 public. *See* 18 U.S.C. § 3553(a)(2). There is no need here to incarcerate Mr. Boylan in
18 prison rather than in his trailer so that he learns from his mistakes or receives
19 “correctional treatment.” Nor is prison needed to deter Mr. Boylan from similar
20 conduct in the future. His captain’s license has expired and he will never captain a boat
21 again.⁷ That in itself is no small loss for Mr. Boylan, who has worked as a boat captain
22

23 ⁵ The defense is still in the process of obtaining further records and information
24 regarding the follow-up treatment that Mr. Boylan will need for each of these
25 conditions.

26 ⁶ Centers for Disease Control and Prevention, Life Expectancy for the United
27 States, *available at* <https://www.cdc.gov/nchs/fastats/life-expectancy.htm> (last visited
28 April 25, 2024).

⁷ Probation recommends that the Court impose a condition of supervision that
Mr. Boylan “not seek, apply for, or obtain employment in any position on a boating
vessel.” Dkt. 403 at 3 (Proposed Condition No. 9). Mr. Boylan has no objection to this
condition and he has not sought, applied for, or obtained employment on a boat since
the accident.

1 for nearly his entire adult life. Indeed, several of those who know Mr. Boylan well
2 attest to the fact that “his job was his life.” Ex. 8; *see also* Ex. 6 (“He was a boat
3 captain in every sense of the title, and his entire life was on that boat. It was our whole
4 world.”). Even Mr. Boylan’s trailer is “filled with pictures of the boat” that he will
5 never again set foot on. *Id.* Instead, Mr. Boylan will likely live out the rest of his life
6 unable to sleep or function in the world, barely surviving on Social Security benefits,
7 and under self-imposed isolation [REDACTED] overwhelming grief.
8 Because of these consequences, there is a near zero risk that Mr. Boylan would commit
9 any similar offense or endanger another person for any reason. A term of
10 imprisonment rather than home incarceration is not necessary.

11 **B. Systemic Failures Outside of Mr. Boylan’s Control Contributed to the**
12 **Tragedy on the *Conception*.**

13 **1. The NTSB concluded that the Coast Guard’s oversight failures**
14 **and Truth Aquatics’ company-wide policies and practices**
15 **significantly contributed to the accident and the loss of life on the**
16 ***Conception*.**

17 The National Transportation Safety Board (“NTSB”) immediately began an
18 investigation into the sinking of the *Conception*, with the objective of determining the
19 contributory causes of the fire.⁸ In the course of its investigation, the NTSB
20 interviewed dozens of witnesses, collected and analyzed numerous documents and
21 regulations, and conducted site visits. A little over a year after the fire, the NTSB
22 released a full report documenting its investigation.⁹ While the NTSB was not able to
23

24 ⁸ The NTSB is an independent federal agency tasked with investigating
25 transportation accident and making recommendations for improving transportation
26 safety. The NTSB has primary jurisdiction over civil transportation investigations, but
27 not criminal investigations.

28 ⁹ The report is maintained on the NTSB’s publicly available docket along with
factual reports and transcripts of some interviews. The report is available at
[https://data.nts.gov/Docket/Document/docBLOB?ID=11566688&FileExtension=pdf&
FileName=MAR2003-Rel.pdf](https://data.nts.gov/Docket/Document/docBLOB?ID=11566688&FileExtension=pdf&FileName=MAR2003-Rel.pdf)

1 determine the definitive cause of the fire, it found that the likely origin point was in the
2 aft part of the salon on the main deck, and the most likely sources included the
3 electrical distribution system, unattended battery charging, or improperly discarded
4 smoking materials. *Id.* at viii. The NTSB concluded that the probable cause of the
5 accident was the failure of Truth Aquatics to provide effective oversight of its vessels
6 and crewmember operations, including requirements to ensure that a roving patrol was
7 maintained. *Id.* at 75. Additionally, the NTSB found that the U.S. Coast Guard was
8 responsible for contributing causes such as the inadequate regulation of smoke
9 detection aboard passenger vessels and inadequate emergency escape arrangements.
10 *Id.*

11 In determining that Truth Aquatics' lack of oversight of its vessels and
12 crewmember operations was the probable cause of the fire, the NTSB noted that Truth
13 Aquatics was a well-respected operator among regulators, current and former
14 crewmembers, competitors, and passengers. *Id.* at 69. Indeed, a Coast Guard
15 representative stated to the NTSB that the company "had a good reputation for being
16 good operators." *Id.* at 70. And a former Truth Aquatics captain with decades of
17 experience described the company's vessels as "the safest boats on the coast." *Id.*
18 Despite its reputation, however, the post-accident investigation by the NTSB revealed
19 several unsafe practices on Truth Aquatics vessels, including a lack of crew training,
20 emergency drills, and the roving patrol. In reviewing the company's policies and
21 procedures, the NTSB found that Truth Aquatics had been deviating from required safe
22 practices for some time. *Id.* The owner of Truth Aquatics stated to the NTSB that
23 there were no company-wide operating procedures; instead, he said, watch standing,
24 crew training, and operating procedures, including hiring, training, and dismissal of
25 crewmembers, were the responsibility of the captains of the company's vessels. The
26 NTSB noted, however, that the lax practices it discovered—lack of roving patrol,
27 failure to provide a passenger safety orientation before getting underway, failure to
28 require all crewmembers conduct fire drills or training on emergency scenarios—were

1 not single incidents or isolated to the *Conception*. Indeed, as was revealed at trial, these
2 practices were common across the Truth Aquatics fleet of vessels. The NTSB found
3 that, had Truth Aquatics been “actively involved in ensuring the safe practices required
4 by regulations were enforced, most notably the requirement for a roving patrol, they
5 could have identified unsafe practices and fire risks on the *Conception* and taken
6 corrective action before the accident occurred.” *Id.* at viii. Accordingly, the NTSB
7 concluded that “Truth Aquatics provided ineffective oversight of its vessels’
8 operations, which jeopardized the safety of crewmembers and passengers.” *Id.* at ix.

9 In assessing that the Coast Guard also bore responsibility for fire due to its
10 failure to implement and enforce safety regulations, the NTSB examined the Coast
11 Guards regulations regarding smoke detection and emergency egress. As an initial
12 matter, the NTSB noted that the *Conception* was in compliance with Subchapter T
13 regulations regarding smoke detection and emergency escape arrangements. *Id.* at vii.
14 Regarding smoke detection, the only compartment that was required to be fitted with
15 smoke detectors was the passenger bunkroom, since it was the vessel’s only overnight
16 accommodation space. *Id.* In addition to those smoke detectors the *Conception* was
17 also heat detectors in the galley and engine room. *Id.* The smoke and heat detectors
18 were not interconnected to other alarms or a central operating station in the
19 wheelhouse. *Id.* at 42. The NTSB found that, “The circumstances of this accident
20 make clear that interconnected smoke detectors in all accommodation spaces would
21 have given early warning of the fire to the passengers and crew and likely would have
22 allowed time for the crew to fight the fire and assist passengers in evacuating the
23 bunkroom.” *Id.* at 64. Accordingly, the NTSB recommended that the Coast Guard
24 revise Subchapter T “to require all vessels with overnight accommodations, including
25 vessels constructed prior to 1996, have interconnected smoke and fire detectors such
26 that when one detector alarms, the remaining detectors also alarm.” *Id.*

27 Similarly, the NTSB concluded that the means of escape from the *Conception*
28 bunkroom, while in compliance with Coast Guard regulations, were inadequate in

1 circumstances such as the fire that claimed the *Conception*. The *Conception* had two
2 means of escape from the bunkroom, both of which led to the salon. *Id.* at 67. The
3 primary access was a spiral staircase from the starboard forward part of the main deck
4 salon to the starboard forward corner of the bunkroom. *Id.* The secondary emergency
5 exit for the bunkroom occupants was the square escape hatch on the centerline in the
6 overhead. *Id.* The *Conception*'s escape hatch was accessible from either port or
7 starboard aisles by climbing into one of the top aftermost inboard bunks. This
8 emergency exit opened into the aft part of the salon, where the fire was most intense.
9 Because the *Conception* was designed in accordance with the Old T regulations, it was
10 required only to have "not less than two avenues of escape from all general areas
11 accessible to the passengers or where the crew may be quartered or normally employed,
12 so located that if one is not available the other may be," and there were no additional
13 requirements regarding size, egress times, vertical access, or obstructions. *Id.*
14 Analyzing the design of the escape hatch, the NTSB opined that even if "the bunkroom
15 escape hatch not been blocked by fire, there still may have been difficulties evacuating
16 a large number of people through the hatch in a timely manner. The escape path
17 through the hatch was impeded by the bunks below it." *Id.* at 68. The NTSB
18 concluded that "[i]f regulations had required the escape hatch to exit to a space other
19 than the salon, optimally directly to the weather deck, the passengers and crewmember
20 in the bunkroom would have likely been able to escape." *Id.* at viii. Thus, the NTSB
21 recommended that the Coast Guard review the Subchapter T regulations regarding
22 means of escape for all vessels constructed prior to 1996 and modify regulations to
23 ensure that there are no obstructions to egress. *Id.* at 69.

24 Additionally, the NTSB noted that it was imperative that the Coast Guard
25 develop means to verify compliance with roving patrol requirements. When questioned
26 by investigators, Coast Guard inspectors stated that they could not verify compliance
27 with the roving patrol requirement, since inspections were not conducted during
28 overnight voyages and because there was no requirement for a log for the roving patrol.

1 *Id.* at 66. Indeed, the NTSB noted that Coast Guard inspection aids and checklists did
2 not include line items to verify or even discuss regulatory watch standing requirements
3 or the terms of the COIs. *Id.* The NTSB also found that Coast Guard records show
4 that, since 1991, no owner, operator, or charterer has been issued a citation or been
5 fined for failure to post a roving patrol. *Id.* Accordingly, the NTSB concluded that the
6 Coast Guard did not have an effective means of verifying compliance with and actually
7 enforcing roving patrol requirements. *Id.* Accordingly, the NTSB recommended that
8 the Coast Guard develop and implement a means to verify that small passenger vessel
9 owners, operators, and charterers are conducting roving patrols. *Id.* at 67.

10 Ultimately, as a result of its investigation into the accident, the NTSB issued
11 seven new safety recommendations to the Coast Guard that focused on improving
12 regulations regarding smoke detection, verification of roving patrols, and means of
13 escape aboard all small passenger vessels, including existing vessels. *Id.* at ix-x.

14 **2. The Coast Guard determined after the accident that its manning**
15 **requirements on the *Conception* were insufficient.**

16 After the *Conception* accident, the Coast Guard’s Marine Board of Investigation
17 (MBI) conducted an inquiry into the accident. Among other things, the MBI found a
18 “safety concern” regarding the manning of the *Conception* prior to the tragedy—that is,
19 the MBI found that the *Conception* did not have sufficient crew to safely conduct multi-
20 day trips. Captain Jason D. Neubauer—chief of the Office of Investigations &
21 Analysis at Coast Guard Headquarters¹⁰—documented the issue in an email. Ex. 29.
22 Captain Neubauer wrote: “When considering CONCEPTION’s operations, which
23 included both day and night dives where the deckhands were serving in numerous dive
24 related duties (filling dive tanks, outfitting divers, prepping the small boat, watching
25 diver bubble trails) in addition to their shipboard engineering, hotel services (sewage
26 pumping, cleaning), and navigation duties (lookout, anchoring ops), it seems that the

27 _____
28 ¹⁰ See <https://media.defense.gov/2017/Feb/02/2001693825/-1/-1/0/CAPT%20NEUBAUER%20BIO-02FEB17-MEDIA%20KIT.PDF>.

1 crew was stretched very thin.” *Id.* He further noted that leading up to the accident
2 voyage, the *Conception* deckhands “were working more than 18-hours each day with
3 very little sleep.” (*Id.*)

4 The captain also wrote that the two galleyhands on the *Conception*, or “food
5 handlers,” could *not* have made up for the deficient staffing: “many outside observers
6 to this casualty believe that one of the food handlers should have been standing the
7 roving watch, when in fact they were prohibited from conducting safety sensitive
8 positions because they weren’t officially listed as deckhands and subject to drug
9 testing.” *Id.* The captain noted that he looked at the Certificates of Inspection (COI)
10 for other similarly sized vessels and concluded that a more “appropriate” manning
11 requirement would have required a captain, a mate, and *four* deckhands for overnight
12 trips on a vessel the size of the *Conception*—that is, twice the number of deckhands as
13 were required on the *Conception* before the accident. *Id.*

14 Captain Neubauer wrote that he conducted a survey of the manning requirements
15 in COIs for small passenger vessels around the country, and he found that the Los
16 Angeles / Long Beach Coast Guard sector (which cover Santa Barabra) “manning
17 requirements are generally less than other CG units nationwide and Sector LA/LB often
18 only requires 2 deckhands for the largest overnight T-boats.” *Id.* The email concluded
19 that this manning issue was a safety issue that needed to be addressed in the whole
20 sector. *See id.*

21 As was addressed at length in the trial, the *Conception* COI required only 4 crew
22 members—the captain, mate, and two deckhands—and Truth Aquatics would provide
23 only those minimum required crewmembers for overnight trips (not counting the
24 kitchen staff, who were not permitted to conduct safety sensitive duties, as Captain
25 Neubauer wrote). The *Conception*’s sister vessel, the *Vision*, had the same manning
26 requirements before the *Conception* accident. *See Ex. 30* (2018 *Vision* COI). But after
27 the accident, the Coast Guard revised the *Vision*’s COI to require an additional
28 deckhand on any overnight trips. *See Ex. 31* (2021 *Vision* COI).

1 The MBI revealed that the *Conception*, like many other vessels overseen by the
2 Los Angeles / Long Beach Sector of the Coast Guard, was critically undermanned prior
3 to the accident. The crew was working very long hours, and, with that level of
4 manning, likely could not realistically comply with all Coast Guard safety requirements
5 (including rest required for safety sensitive crew). The government has previously
6 argued that if the vessel did not have sufficient manning, then a safe captain should not
7 have left the dock. Maybe so. But the question for sentencing purposes is whether the
8 blame for these safety failures—including persistent and dangerous undermining of
9 Truth Aquatics vessels and other vessels in Southern California—should fall entirely on
10 Mr. Boylan, or whether his culpability is lessened in light of the fact that these were
11 systemic problems with the safety of small passenger vessels in Southern California,
12 and, more specifically, with all Truth Aquatics vessels. Indeed, today the *Vision* (the
13 *Conception*'s sister vessel) has a Certificate of Inspection requiring an extra deckhand
14 so that there are enough rested crew to be able to have a roving patrol at night.

15 **3. The Coast Guard's post-accident inspection of the *Conception*'s**
16 **sister ship revealed structural deficiencies that were not in Mr.**
17 **Boylan's control.**

18 The Coast Guard carried out annual inspections of the *Conception* and its sister
19 vessels, the *Truth* and the *Vision*, in April of 2019. During the April 2019 inspection of
20 the *Vision*, the Coast Guard marine inspector noted no deficiencies. However, in the
21 immediate aftermath of the fire aboard the *Conception*, the Coast Guard returned to
22 Truth Aquatics and conducted an inspection of the *Vision*—this time reaching different
23 conclusions. *See* NTSB Marine Accident Report at 52. Despite having noted not a
24 single deficiency six months before, during the October and November 2019
25 inspections of the *Vision*, the Coast Guard noted a total of 40 deficiencies. Ex. 32
26 (Coast Guard summary of inspection). Among the deficiencies noted by the Coast
27 Guard was the *Vision*'s failure to comply with a requirement to provide a means of
28 escape from a below-deck passenger accommodation area (the shower room) that leads

1 to an area that does not contain any source of fire (such as a galley stove). In the
2 bunkroom, a deficiency was issued for an inoperable public address system speaker.
3 Furthermore, the Coast Guard noted that the double bunks did not allow for free and
4 unobstructed escape for the inside occupant as required by the regulations.
5 Significantly, this bunk arrangement deficiency had never been cited during the
6 previous 40-year history of the vessel. Additionally, the Coast Guard inspection found
7 19 electrical system deficiencies throughout the *Vision*, with deficiencies in the salon
8 and galley area for corrosion, improper connectors, and signs of overload on a power
9 strip.

10 After the fire on the *Conception* and the post-accident inspections by the Coast
11 Guard, Truth Aquatics began modifications to the *Vision* and the *Truth*. See NTSB
12 Marine Accident Report at 52. Truth Aquatics installed an integrated fire-detection
13 system and an electronics-charging cabinet on each vessel. The cabinet was equipped
14 with self-closing doors and a fire-suppression system that vented to the exterior and
15 was integrated with the fire-detection system. *Id.* Additionally, an improvement to the
16 fire detection system was designed to shut down all ventilation if smoke is sensed in
17 any compartment on board the *Truth* or *Vision*. Truth Aquatics also dramatically
18 improved bunkroom emergency egress on the *Vision* by installing hatches from the
19 bunkroom to the exterior main deck walkways on both the port and starboard side of
20 the vessel. *Id.* These changes could only be made by Truth Aquatics, not by Mr.
21 Boylan. And while the Court ultimately excluded a defense-noticed financial expert
22 under relevance grounds, it is clear that Truth Aquatics had the financial ability to make
23 these safety changes and the ability to hire an extra crewmember to serve as a roving
24 patrol. Indeed, today the *Vision* is operated by a different company, but it employs an
25 extra crew member who sleeps during the day and serves as a roving patrol at night.

26 **4. A post-accident inspection campaign by the Coast Guard resulted**
27 **in a two-hour roving patrol recommendation, which would not**
28 **have altered the outcome here.**

1 Following the fire aboard the *Conception* and the public scrutiny of the Coast
2 Guard, the Coast Guard initiated a “concentrated inspection campaign” of all
3 Subchapter T-inspected vessels with overnight accommodation for passengers, paying
4 special attention to compliance with roving patrol and fire training requirements. *See*
5 NTSB Marine Accident Report at 52. The concentrated inspection campaign was
6 conducted independent of the required regulatory inspections for certification and
7 focused on firefighting, fire protection, means of escape systems, and crew proficiency
8 regarding the elements of firefighting, fire protection, and means of escape. In the
9 course of this inspection campaign, the Coast Guard inspected 383 vessels across the
10 United States and various Coast Guard Marine Safety Detachments (“MSD”). *Id.*
11 Significantly, in educating vessel operators about the roving patrol requirement,
12 different Coast Guard Marine Safety Detachments suggested different means of
13 implementing the roving patrol requirement. For example, the Panama City MSD
14 issued detailed reports memorializing that vessel operators in that sector were educated
15 that they must post a roving watch who will conduct rounds of the vessel with “no more
16 than 2 hours between each round,” and the MSD further recommended that the vessel
17 operators keep a written record demonstrating their compliance with the roving watch
18 regulation. Ex. 33 at 14 (Activity Summary Report, Vessel Inspection of *Tradewinds*
19 (“It was highly recommended that the operator designate the individual(s) in writing
20 along with their duties and log their patrols. We recommended no more than 2 hours
21 between each round to be conducted and discussed items that should be checked as part
22 of the round.”).) Another MSD inspecting a vessel that “[did] not have a . . . night
23 watch program in place,” noted that the vessel owner would be required to “create a
24 written program to include 24hr watch logs and crew responsibilities during night
25 watches.” *Id.* at 19 (Activity Summary Report, Vessel Inspection of *Kate*.)

26 The inspection campaign revealed not only that different Coast Guard MSDs had
27 different ideas about how to implement a roving patrol and ensure compliance, but also
28 that owners and operators were not always aware of the roving patrol requirement.

1 Accordingly, during the inspection campaign, the Coast Guard took the opportunity to
2 educate the operators about the regulations and clarify any confusion the operators
3 might have about when a roving patrol is required. Ex. 32 at 2 (Activity Summary
4 Report, Vessel Inspection of *Brilliant*) (“The captain thought that while the vessel was
5 anchored it did not count as underway therefore he was not meeting the 24 hour watch
6 requirements assigned on his COI. The master was informed of the regulations as well
7 as the vessel management.”); Ex. 32 at 7 (Activity Summary Report, Vessel Inspection
8 of *Mercantile*) (“Discussed the Night watchman requirements with the O/O, past
9 practice was intermittent based on weather conditions, expected weather/sea conditions,
10 number of pax onboard, etc. Notified O/O that a night watchman shall remain up at all
11 times when passengers are onboard regardless of weather conditions or operational
12 status, at anchor or underway.”).

13 **C. The Sentencing Goal of General Deterrence has Already Been Met**
14 **Through New Regulatory Requirements and Changes in Industry-Wide**
15 **Practices**

16 The *Conception* tragedy spurred enormous changes among regulators and
17 industry professionals to attempt to avoid any similar tragedy in the future. That is, the
18 horrific nature of the accident created general deterrence and spurred a sea change in
19 the industry and among regulators. A term of imprisonment rather than home
20 incarceration is not needed to further the sentencing goal of general deterrence.

21 **1. Regulatory changes**

22 After the *Conception* tragedy, the Coast Guard conducted an extensive revision
23 of the Subchapter T regulations that apply to small passenger vessels. See 86 Federal
24 Register No. 245 at Table 1 (Dec. 27, 2021), available at
25 <https://www.govinfo.gov/content/pkg/FR-2021-12-27/pdf/2021-27549.pdf> (table
26 summarizing all regulatory changes and listing specific regulations that were amended
27 in lieu of the *Conception* accident). After the accident, the Coast Guard: required small
28 passenger vessels to install an alarm system to ensure compliance with night watch

1 requirements; required vessels to install interconnected fire alarm systems, so that a fire
2 in one location on a vessel will trigger alarms throughout; required older vessels,
3 constructed before 1996 and subject to “Old-T regulations,” to conform to structural
4 regulations imposed on newer vessels, including requirements regarding emergency
5 exits from passenger berths; updated the regulations addressing how crews must be
6 trained in firefighting and other emergency procedures to include far more details on
7 the substance and frequency of trainings; added a requirement for a master to conduct
8 emergency egress drills with passengers; and added requirements for the storage and
9 handling of potentially hazardous items, including certain batteries and electric devices.

10 (*Id.*)

11 In short, after the *Conception* tragedy the Coast Guard saw that many of its
12 regulations permitted potentially unsafe conditions to exist on a vessel. For example,
13 while the *Conception* was permitted to have two emergency exits in the passenger
14 bunkroom that both led to the inside of the salon, which was engulfed in flames and
15 prevented any access to or escape from the passenger bunkroom, today, a small
16 passenger vessel must have “two independent means of escape that prevent one
17 incident blocking both means of escape.” (*Id.* at 73167.)

18 That is, the accident itself motivated the Coast Guard to attempt to prevent
19 similar tragedies in the future. No further motivation, or general deterrence, is needed
20 to motivate the agency to prevent future tragedies.

21 **2. Industry changes**

22 The government argues in its sentencing position that Mr. Boylan should receive
23 a 10-year prison sentence in part because *other* captains admitted to not using a roving
24 patrol at night, making general deterrence “a key objective in this case.” Dkt. No. 420
25 at 25. This argument disregards Mr. Boylan’s personal culpability and instead seeks to
26 punish him for the failings of an entire industry. It further ignores the fact that the
27 industry has *already* changed its practices with respect to a roving patrol—not because
28 this Court’s sentencing decision, but because of the accident itself. At trial, one Santa

1 Barbara captain who operated a competitor business to Truth Aquatics testified that,
2 before the *Conception* fire, his practice was to not have a roving patrol at night if the
3 boat was anchored in a safe location, despite the fact that the boat’s COI required a
4 “designated patrolman” at all times. Dkt. No. 374 at 82:14-83:17. The day that the
5 *Conception* fire happened, that policy changed. *Id.* at 84:14-16. The boat
6 “immediately . . . hired someone to be a full-time night watch roving patrol person. So
7 we added a crew member.” *Id.* at 84:17-85:05. The company that now operates the
8 *Vision* after Truth Aquatics implemented the very same change. And, as discussed
9 further above, the Coast Guard implemented several changes that the industry is now
10 required to follow. Subjecting Mr. Boylan to a lengthy prison sentence is not necessary
11 promote general deterrence in an industry that has already implemented extensive
12 reforms in response to this tragedy.

13 **D. The government and Probation Office’s sentencing recommendations**
14 **would create severe and unwarranted sentencing disparities**

15 **1. Disparities with other defendants convicted of seaman’s**
16 **manslaughter, Section 1115**

17 An examination of seaman’s manslaughter cases involving conduct that was
18 more obviously reckless than Mr. Boylan’s reveals that the sentence requested by the
19 defense is not out of step and in fact serves to avoid unwarranted sentencing disparities.

20 In *United States v. Richard Smith*, 04-cr-00700-ERK (E.D.N.Y.), Smith, the
21 captain of a 6,000-passenger Staten Island ferry, “dozed off” under the influence of
22 synthetic opioids and painkillers and caused the ferry to collide at full speed with a
23 concrete pier, tearing open the side of the vessel where passengers had crowded to
24 disembark. As a result, 11 people were killed and 70 people were injured, some
25 severely and permanently. Smith fled the scene and was later found at his home.
26 Smith was also convicted of making false statements in his application to renew his
27 Coast Guard license, falsely representing that he did not suffer and had never suffered
28 from any illness and was not taking any medications despite the fact that he had filled a

1 total of 75 prescriptions for six different medications in the years leading up to the
2 accident and had filled prescriptions for a variety of medications in the weeks and
3 months before submitting his medical form to the Coast Guard. (Dkt. 11.) Ultimately,
4 Smith was sentenced to 18 months' imprisonment.

5 In *United States v. Patrick Ryan*, 1:04-cr-673-ERK (E.D.N.Y.), stemming from
6 the same deadly Staten Island ferry accident as *Smith*, the New York City Ferry
7 Director was convicted of seaman's manslaughter and making repeated false statements
8 to the NTSB, the Coast Guard, NYPD, and the United States Attorney's Office for the
9 Eastern District of New York in an apparent effort to obscure his failure to enforce a
10 century-old rule requiring two pilots remain in the wheelhouse during docking to guard
11 against the hazard of a pilot's sudden disability. He was sentenced to a year and a day
12 in prison.

13 In *United States v. Christopher Hutchinson*, 2:16-cr-00168-NT (D. Me.),
14 Hutchinson, the captain, owner, and operator of a 45-foot lobster boat called *No Limits*,
15 took his boat and two crewmen into a forecasted storm, for which the National Weather
16 Service had issued a Gale Watch. Hutchison did so after drinking alcohol, smoking
17 marijuana, and abusing illegally-obtained prescription opioid oxycodone. The boat
18 capsized, and the bodies of the crewmen, one of whom was a minor, were never
19 recovered. (Dtk. 1 at 1-2.) Defendant Hutchison continued to abuse opiates while on
20 pretrial release and continued to operate a lobster boat while on pretrial release (Dkt.
21 41.) Hutchison had a criminal history that included speeding, losing control of his
22 vehicle on two separate occasions, and two convictions for operating a motor vehicle
23 under the influence. (Dkt. 119 at 4.) Hutchison was sentenced to 48 months'
24 imprisonment.

25 In *United States v. Richard J. Oba*, 3:05-cr-00502-HA (D. Or.), Oba, the captain
26 and operator of a chartered fishing vessel, steered his boat into restricted, treacherous
27 waters near the entrance to a port after nightfall despite having received multiple oral
28 communications and admonishments directly from the Coast Guard in the hours and

1 minutes leading up to the accident specifically advising him to avoid the area which
2 was experiencing unusually large waves; Oba repeatedly falsely represented to the
3 Coast Guard that he did not intend to enter the restricted area. Friends of Oba along
4 with other charter operators reached out to him to describe the dangerous conditions
5 and to urge him to avoid the area. Oba disregarded the orders he received from the
6 Coast Guard and the warnings he received from friends and other operators, and he
7 entered the restricted and dangerous waters of the port as night fell. The boat was
8 struck by a large wave and sunk, resulting in the death of three of the passengers; the
9 body of one of the passengers was never recovered. Oba was the only person on the
10 boat wearing a life jacket during the difficult and ultimately deadly port crossing. The
11 accident came only two years after another charter fishing vessel, the *Taki-Too*, sailed
12 into dangerous waters from a nearby bay under similar conditions (attempting the
13 crossing of a “bar” separating a bay from the ocean) and capsized, resulting in 11
14 deaths. Ultimately, Oba was sentenced to 51 months’ imprisonment.

15 *United States v. Joseph Shore*, 02-cr-10413-RWZ (D. Mass.), arose out of an
16 incident in which a 20-year-old passenger on a “booze cruise” fell overboard through a
17 railing that the captain and owner of the vessel, Joseph Shore, was aware was broken
18 following a collision with another boat. Before the trip, Shore loaded the vessel with
19 large quantities of alcohol that were placed in various locations to make it freely
20 available to all passengers. The voyage was advertised as providing unlimited alcohol,
21 and Shore did not check any passengers for identification to determine whether they
22 were of legal drinking age. At one point during the trip, the vessel was anchored and
23 drifted into another boat, causing a section of the railing to break off the side of the
24 boat. The captain continued the cruise and was seen dancing with passengers away
25 from the boat’s control area. The passengers were not warned of the broken railing or
26 instructed to avoid it, despite heavy consumption of alcohol on the vessel. Shore
27 continued the cruise, during which an underage passenger fell overboard. When Shore
28 learned of the passenger falling overboard, he failed to call the Coast Guard for 50

1 minutes, delaying efforts to rescue the passenger, who was later found to have
2 drowned. Shore was sentenced to three years' probation with six months of home
3 confinement.

4 **2. Disparities with other defendants convicted of involuntary**
5 **manslaughter, Section 1112**

6 In addition to creating significant sentencing disparities with other defendants
7 convicted of seaman's manslaughter, under Section 1115, the government and
8 Probation's sentencing recommendation would also create significant disparities
9 between Mr. Boylan and other defendants sentenced under the involuntary
10 manslaughter guideline, U.S.S.G. § 2A1.4, or convicted of involuntary manslaughter
11 under 18 U.S.C. § 1112.

12 The Sentencing Commission analyzed every case from 2015 to 2023 in which
13 someone was sentenced using as the "primary guideline" the involuntary manslaughter
14 guideline, U.S.S.G. § 2A1.4."¹¹ In total, the commission analyzed 335 such cases, and
15 found that the average sentence imposed was 42 months' imprisonment, and the
16 median sentence was 36 months:

17 //

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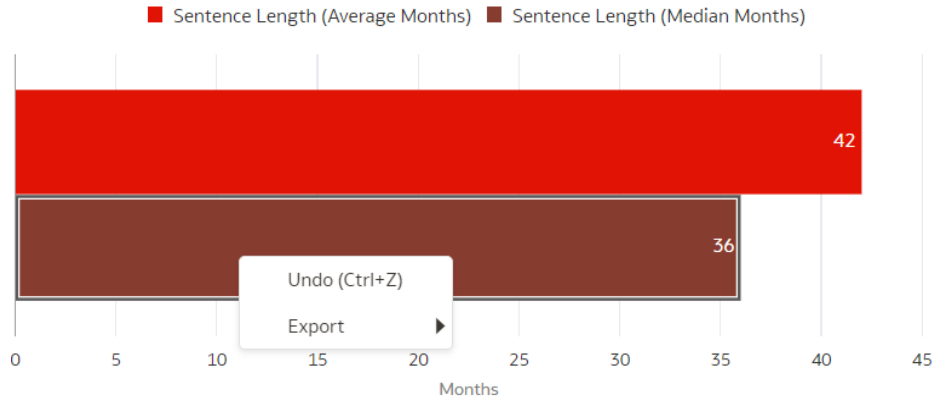
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27 ¹¹ This data can be accessed at the United States Sentencing Commission's
28 Interactive Data Analyzer, under the "Sentencing Outcomes" tab, by filtering by year
and primary guideline. See <https://ida.ussc.gov/analytics/saw.dll?Dashboard>
(hereinafter "Sentencing Commission Data Analyzer").

Average and Median Sentence Length

Fiscal Year 2015,2016,2017,2018,2019,2020,2021,2022,2023



The figure includes the 335 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure. Sentences of 470 months or greater (including life) and probation were included in the sentence average computations as 470 months and zero months, respectively. Sentences of probation only are included here as zero months. The information in this figure includes conditions of confinement as described in USSG §5C1.1.

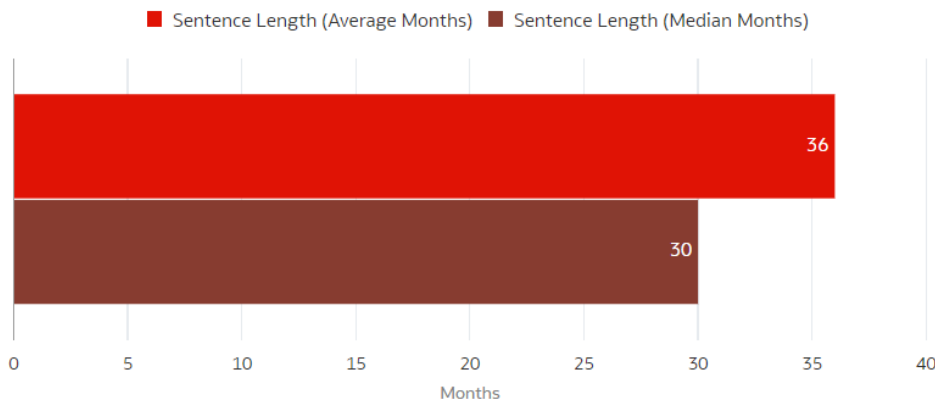
FILTER:

Fiscal Year: 2015,2016,2017,2018,2019,2020,2021,2022,2023; Circuit: All; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: All; Guideline: §2A1.4; Drug Type: All; Sentencing Zone: All; Criminal History: All; Career Offender Status: All

Narrowing this data to cases in which the defendant was, like Mr. Boylan, in Criminal History Category I, yielded a set of 214 cases in which the average sentence was 36 months, and the median sentence was 30 months:

Average and Median Sentence Length

Fiscal Year 2015,2016,2017,2018,2019,2020,2021,2022,2023



The figure includes the 214 cases reported to the Commission. Cases missing information necessary to complete the analysis were excluded from this figure. Sentences of 470 months or greater (including life) and probation were included in the sentence average computations as 470 months and zero months, respectively. Sentences of probation only are included here as zero months. The information in this figure includes conditions of confinement as described in USSG §5C1.1.

FILTER:

Fiscal Year: 2015,2016,2017,2018,2019,2020,2021,2022,2023; Circuit: All; State: All; District: All; Race: All; Gender: All; Age: All; Citizenship: All; Education: All; Crime Type: All; Guideline: §2A1.4; Drug Type: All; Sentencing Zone: All; Criminal History: I; Career Offender Status: All

1 While useful for providing averages, the Sentencing Commission’s data does not
2 offer more details about these 214 involuntary manslaughter cases where the
3 defendants were in criminal history category I. To offer more details and produce a
4 clearer picture of more “typical” involuntary manslaughter cases, the defense used
5 PACER to pull the details of every involuntary manslaughter prosecution, under
6 Section 1112, in California federal courts since 2005 (when the Supreme Court decided
7 in *Booker* that the Guidelines are discretionary). While this search revealed that federal
8 involuntary manslaughter prosecutions are rare in California, the results also show that
9 Mr. Boylan’s mental state was far *less* culpable than the average involuntary
10 manslaughter defendant’s.

11 First, in *United States v. Culligan*, C.D. Cal. No. 2:20-cr-263-AB, pled guilty to
12 involuntary manslaughter after he drove a stolen car, while under the influence of
13 “illegal narcotics,” into the oncoming traffic lane of a road on a military base. (*Id.* Dkt.
14 No. 30 at 5-6 (plea agreement).) He then collided head-on with an oncoming car,
15 causing the death of one person and serious injuries to another. (*Id.*) Culligan was also
16 charged with fleeing the scene after the accident, but that charge was dropped as part of
17 the plea agreement. Because the offense involved the reckless operation of a vehicle,
18 his base offense level was 22—the same base offense the Probation Office suggests
19 applying to Mr. Boylan. (*Id.* at 7.) The defendant was in criminal history category IV,
20 and the Honorable Andre Birotte, Jr., sentenced him to 46 months’ imprisonment. (*Id.*
21 Dkt. Nos. 43 & 37 at 2.)

22 The only other involuntary manslaughter prosecution the defense has found in
23 this district is *United States v. Kilty*, C.D. Cal. No. 5:16-24-JGB. In that case,
24 defendant-Kilty was convicted at trial of involuntary manslaughter, under Section 1112.
25 The trial evidence showed that he parked his tractor-trailer truck, which was hauling a
26 heavy military tactical vehicle, “in the middle of the right lane of traffic” on a military
27 road. (*Id.* Dkt. No. 136 at 3-4 (government sentencing position describing facts); *see*
28 *also* Dkt. No. 133 (PSR).) After parking in the middle of the dark road, Kilty turned

1 off the lights on his truck, and “did not place any warning cones or triangles, or activate
2 any warning lights, to alert other drivers he was parked in a moving lane. Instead, he
3 went to sleep in the sleeper berth of his semi-truck..” (*Id.*) While he was sleeping, “a
4 commuter bus carrying a load of passengers, crashed into the military tactical vehicle.”
5 (*Id.*) One bus passenger died from the accident, and many others were injured,
6 including one who had his arm amputated as a result of the accident. (*Id.*) At
7 sentencing, Kilty’s base offense level was also 22—the same base offense the
8 Probation Office suggests applying to Mr. Boylan. (*Id.* Dkt. No. 133 at 6 (Kilty PSR);
9 *see also id.* Dkt. No. 174 (sentencing transcript, where the court adopted the PSR
10 calculation).) The Honorable Jesus G. Bernal varied downward from the applicable
11 guidelines range and sentenced Kilty to 22 months’ imprisonment. (Dkt. No. 174 at
12 25-26.)

13 Moving to other districts in California, in *United States v. Moser*, E.D. Cal. No.
14 1:14-cr-115-LJO-SKO, the defendant pleaded guilty to involuntary manslaughter,
15 under Section 1112, and to operating a vehicle under the influence of alcohol or drugs,
16 under 36 U.S.C. § 4.23(a)(1). In the plea agreement, the defendant admitted that he
17 was driving a pickup truck while under the influence of marijuana and alcohol, with a
18 blood alcohol level above the legal limit. (*Id.*, Dkt. No. 3 at 2-3.) He was driving with
19 four passengers, three of whom were sitting unsecured in bed of the pickup truck. (*Id.*)
20 He drove recklessly, crashed, and caused the death of one passenger and the
21 hospitalization of the other three. (*Id.*) The district court sentenced Moser to 46
22 months on the involuntary manslaughter count and 6 months on the drunk driving
23 count, for a total sentence of 52 months. (*Id.* Dkt. No. 14.)

24 Finally, in *United States v. Low*, N.D. Cal. No. 3:23-cr-439, the defendant was
25 charged with drunk driving and involuntary manslaughter, under Section 1112, for
26 driving “while under the influence of alcohol to a degree that rendered the defendant
27 incapable of safe operation” and thereby caused the death of one person. (*Id.* Dkt. No.
28

1 1.) The defendant pled guilty to both counts, and is scheduled for sentencing in July
2 2024. (*Id.*, Dkt. No. 27.)

3 These cases—the total set of federal involuntary manslaughter charges
4 prosecuted in California since 2005—demonstrate that the heartland of involuntary
5 manslaughter involves reckless driving while under the influence of drugs and/or
6 alcohol. The Probation Office has elsewhere agreed with this conclusion: in *Kilty*, the
7 Central District’s Probation Office recommended a downward variance in part because
8 “in mitigation, Kilty’s conduct did not include severe intoxication as is often the case
9 for defendants subject to the base offense level under USSG §2A1.4(2)(B).” (C.D. Cal.
10 No. 5:16-cr-24-JGB, Dkt. No. 132 at 3 (Probation recommendation letter); *see also id.*
11 Dkt. No. 136 at 8 (government sentencing position paper quoting the Probation
12 recommendation letter).) Compared to the typical case subject to the involuntary
13 manslaughter guideline, Mr. Boylan’s conduct is far less culpable; far from operating a
14 vehicle while under the influence of drugs or alcohol, he operated a boat in the same
15 manner as everyone else who worked at his company, as he had been trained to do by
16 his employer, and as many others in his industry. His conduct should thus be viewed
17 on the less culpable end of defendants in criminal history Category I sentenced under
18 the involuntary manslaughter guideline, § 2A1.4—that is less culpable than the
19 defendants who received an average sentence of 36 months and a median sentence of
20 30, according to the Sentencing Commission.

21 **E. The Court should reject the Probation Office’s flawed recommendation**
22 **for an upward departure or variance**

23 The Probation Office has recommended an upward departure or variance, but its
24 recommendation is premised on legal and factual error.

25 In discussing a departure, the Probation Office notes that “USSG §5K2.1
26 provides that a sentence increase above the authorized guideline range may be
27 warranted if death resulted[.]” (Probation Recommendation Letter, Dkt. No. 403, at 6.)
28 Section 5K2.1 is not applicable here. The Guideline notes that in assessing whether to

1 apply the upward departure, the Court should consider “the extent to which the offense
2 level for the offense of conviction . . . already reflects the risk of personal injury. For
3 example, a substantial increase may be appropriate if the death was intended or
4 knowingly risked or if the underlying offense was one for which base offense levels do
5 not reflect an allowance for the risk of personal injury, such as fraud.” U.S.S.G. §
6 5K2.1. Mr. Boylan is being sentenced based on the involuntary manslaughter
7 Guideline, which, by definition, already takes into account the risk of death or bodily
8 injury. And he already faces a substantial increase to his offense level based on the
9 number of decedents. Per the Guideline’s plain text, no further upward departure is
10 warranted based on this same fact—that the offense involved the loss of life.

11 The other factors mentioned by the Guideline—other factors “that would
12 normally distinguish among levels of homicide, such as the defendant’s state of mind
13 and the degree of planning or preparation,” *id.*—also counsel against an upward
14 departure. The deaths in this case were an accident and there was no “planning or
15 preparation.” Additionally, as addressed above, a departure would be especially
16 inappropriate since Mr. Boylan’s Guidelines range is already significantly higher than
17 the average federal sentence for involuntary manslaughter, even though his conduct—
18 his state of mind and degree of recklessness—was far less culpable than most
19 involuntary manslaughter cases that involve driving under states of “severe
20 intoxication.” *See Kilty*, C.D. Cal. No. 5:16-cr-24-JGB, Dkt. No. 132 at 3 (Probation
21 recommending a downward variance in part because “in mitigation, Kilty’s conduct did
22 not include severe intoxication as is often the case for defendants subject to the base
23 offense level under USSG §2A1.4(2)(B)”); *see also id.* Dkt. No. 136 at 8 (government
24 sentencing position paper quoting the Probation recommendation letter).

25 As to a variance, the Probation Office’s recommendation for an upward variance
26 is premised on factual claims that contradict the trial evidence, as was addressed at
27 length in Mr. Boylan’s Objections to the PSR. (*See* Dkt. No. 415.) For example, the
28 Probation Office’s letter states that an upward variance is warranted because, the

1 Probation Office claims, Mr. Boylan did not inform his passengers where the escape
2 hatch was located in the bunkroom; allowed passengers to cover the escape hatch with
3 an ice chest; did not train his crew; and “did not attempt to fight the fire and was the
4 first to abandon ship.” (Dkt. No. 403 at 4.) As addressed in detail in Mr. Boylan’s
5 filing addressing the PSR, all of these allegations were disproven at trial and they are
6 thus an inappropriate basis for an upward variance. (See Dkt. No. 415.)

7 At bottom, the Probation Office’s recommendation letter parrots discredited
8 factual claims made by the government throughout this litigation, despite the fact that
9 the trial evidence discredited these prejudicial allegations. Its recommendation also
10 fails to account for any of the mitigating circumstances described in this position paper.
11 For these reasons, the Court should reject the Probation Office’s (and the
12 government’s) argument for an upward departure or variance.

13 IV. CONCLUSION

14 For these reasons, the undersigned respectfully requests that the Court impose a
15 sentence of five years of probation to include three years of home incarceration with
16 location monitoring and 500 hours of community service. Such a sentence is a
17 significant punishment for Mr. Boylan that also accounts for the extensive mitigating
18 factors addressed above.

19
20 Respectfully submitted,

21 CUAUHTEMOC ORTEGA
22 Federal Public Defender

23 DATED: April 25, 2024

By /s/ Georgina Wakefield

24 GEORGINA WAKEFIELD
25 GABRIELA RIVERA
26 JULIA DEIXLER
27 JOSHUA D. WEISS
28 Deputy Federal Public Defenders
Attorneys for JERRY NEHL BOYLAN