UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	**CASE NO. 1:11cr00008-CBA**
	§	
ANNA FERMANOVA	§	

ANNA FERMANOVA'S MOTION FOR NON-GUIDELINE SENTENCE AND MEMORANDUM IN SUPPORT

NOW COMES Anna Fermanova ("Fermanova"), by and through her attorney of record Scott H. Palmer, and files this Motion for a Non-Guideline Sentence and Memorandum in Support, and respectfully shows the Court the following:

I. Overview

Fermanova asks this Court for a sentence below the recommended guideline range of 46-57 months for her conduct in violating the Arms Export Control Act, 22 U.S.C. §2778(b)(2). Fermanova accepts responsibility for her conduct of exporting one and attempting to export three night vision rifle sights to Russia.

However, a review of cases involving convictions under the Arms Export Control Act and/or sentenced under U.S.S.G. §2M5.2, shows that the recommended guideline range overstates Fermanova's offense conduct because her conduct did not threaten or harm a security or foreign policy interest of the United States. Instead, Fermanova was taking the rifle scopes to her husband and father-in-law for resale to the hunting club members in Moscow.

Additionally, an analysis of the sentencing factors set forth in 18 U.S.C. §3553 shows that there are mitigating factors that warrant a below-guideline sentence, and that a sentence of probation would be sufficient, but not greater than necessary, to punish Fermanova for this

offense.

II. Sentencing After *United States v. Booker* and *Rita v. United States*

Title 18, section 3553(a) requires courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2," which states that such purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. §3553(a)(2).

Section 3553(a) further directs sentencing courts to consider, among other things, (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the kinds of sentences available; (3) the need to avoid unwanted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and (4) the need to provide restitution to any victims of the offense.

District courts must in all cases "consider" the guideline range, but the guidelines do not subordinate the other factors in § 3553(a). The Supreme Court has held that while a guideline sentence may, on appeal, be presumed reasonable, that presumption "applies only on appellate review." *Rita v. United States*, 551 U.S. 338 (2007). The sentencing court "does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Id.* Instead, the sentencing court, after determining the guideline range, may decide that the guideline sentence:

> should not apply, perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, U.S.S.G. § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless. *See* Rule 32(f). Thus, the sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure.

Id. at 339. The *Rita* Court was also careful to note that, although the courts of appeal may presume that a within-guideline sentence to be reasonable, they may not presume a non-guideline sentence to be *unreasonable*. *Id.* at 355.

Thus, while *Rita* spoke primarily to those courts of appeal who presumed a guideline sentence to be reasonable, it also assured district courts that the guidelines are *truly* advisory. The Court affirmed the broad sentencing discretion district courts possess under *Booker* and stated that district courts may impose non-guideline sentences by departing or applying § 3553(a).

A. Sentence Procedure

"[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 48 (2007). While "the Guidelines should be the starting point and the initial benchmark," they "are not the only consideration." *Id*. The district court must "consider all of the [18 U.S.C.] § 3553(a) factors" and "must make an individualized assessment based on the facts presented." *Id*. at 48-49. As stated by the Ninth Circuit in *United States v. Autery*, 555 F.3d 864, 872 (9th Cir. 2009), the court is to "give serious consideration to the extent of any departure from the Guidelines," then "explain the conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."

III. Mitigating Factors Warranting Non-Guideline Sentence

The advisory Guidelines provide numerous grounds for a non-guideline sentence and Fermanova moves the Court to grant a sentence below the recommended Guideline range based on the following: (1) the offense conduct posed no risk to a security or foreign policy interest of the United States; and (2) the guideline range greatly overstates Fermanova's offense conduct.

A. Downward Departure Potential Is Recognized in the Guideline

The commentary to the applicable guideline provision, U.S.S.G. § 2M5.2, provides in relevant part:

> The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted.
>
> * * *
>
> In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security or foreign policy interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences.

U.S.S.G. §2M5.2, comment. (n. 1 and 2)

B. Fermanova's Offense Posed No Threat to Security or Foreign Policy Interest of the United States

Fermanova's conduct consisted of attempting to export to Russia night-vision equipment that was designed, modified, or configured for military use, and listed on the United States Munitions List. Fermanova did not first obtain a required license or written approval from the State Department prior to this attempted export. The equipment consisted of one Raptor Night-Vision Weapon Sight and two Advanced Rifle Sights. (PSR, ¶ 1).

When stopped at JFK airport after ICE agents discovered the three rifle sights in her luggage, Fermanova immediately cooperated with the agents, explained where she purchased the

sights, and that they belonged to her.[1] (PSR, ¶¶ 7-8). She likewise admitted that she had removed identification markings on the sights so that "they would be less noticeable." (PSR, ¶ 9).

As explained by Fermanova in the PSR, her father-in-law is the Target Master at The Moscow Club, where he has worked for 20 years. She explained that The Moscow Club is a "country club for the wealthy" and that members hunted bears, wild boar, and other large animals, and that she was taking the night-vision scopes to her husband and father-in-law, so that they could sell the scopes to hunters and members of The Moscow Club. (PSR, ¶ 15).[2]

Under the present facts, this case presents the exact scenario that qualifies for a downward departure under the applicable guideline. The rifle sights purchased by Fermanova are available for purchase by any American citizen, via the internet or a retail store. Fermanova's purpose in purchasing the sights was to take them to Russia for her father-in-law and husband to sell to known customers who engage in the sport of hunting animals. Her conduct did not involve any threat to a national security interest or a foreign policy interest. Instead, Fermanova knew who she was taking the sights to and that those individuals intended to sell them to animal hunters. These facts, along with the fact that the offense involved a very small number of prohibited items, clearly show that a downward departure is warranted under the guideline commentary.

C. U.S.S.G. §2M5.2 Greatly Overstates Fermanova's Offense Conduct

A downward departure is warranted as the recommended guideline range of 46-57 months greatly overstates Fermanova's offense conduct. This is due in large part to the over-inclusive

[1] Attached to this Motion as Exhibit "2" is a true and correct copy of the invoice for the three rifle sights Fermanova attempted to export.

[2] Attached to this Motion as Exhibit "3" is the business card of Fermanova's father-in-law, reflecting his employment at The Moscow Club, as well as an English translation of that card.

nature of the guideline section itself in that a base offense level of 26 reflects no distinction between exporting four rifle sights, as in the present case, and exporting large numbers of firearms or ammunition, helicopters, or nuclear, chemical, and/or biological weapons.

1. Guideline Not Based on Empirical Data or Research By Sentencing Commission

The current guideline used to calculate Fermanova's sentencing range is not based on empirical data or research conducted by the Sentencing Commission, but instead is based strictly on Congressional policy and mandates. Consequently, the Sentencing Commission has acted outside its role in setting the base offense levels in U.S.S.G. §2M5.2.

As explained in *Rita v. United States*, 551 U.S. 338 (2007), in carrying out its mission to provide guidelines that meet the objectives stated in 18 U.S.S.G. § 3553(a), "the Commission took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions," etc. *Id.*

As it did when it fashioned the guidelines for crack cocaine offenses, the Sentencing Commission acted outside its characteristic role in establishing the base offense levels under U.S.S.G. § 2M5.2. The guideline provides two base offense levels: (1) an offense level 26 for all offenses not described in subsection 2; and, (2) a base offense level 14, "if the offense involved only non-fully automatic small arms, and the number of weapons did not exceed ten." U.S.S.G. § 2M5.2(a).

The rifle sights in this case do not fall within the category of "non-fully automatic small arms" and are therefore not eligible for a base offense level of 14. On the other hand, common

sense would dictate that they also do not fall under the category of "military aircraft, helicopters, artillery, shells, missiles, rockets, bombs, vessels of war, explosives, military and space electronics, and certain firearms," U.S.S.G. § 2M5.2 cmt. n. 1, all of which would receive the same base offense level of 26 as recommended for Fermanova. The base offense level of 26 applies to all items other than non-fully automatic small arms, whether the items are night-vision sights, such as those at issue here, or nuclear weapons. As explained by the court in *United States v. Oldani*, 2009 WL 1770116 (S.D. W.Va. 2009):

> The base offense level of 26 was established during the 2001 amendments to the guidelines. As it was originally written, § 2M5.2(a) provided for "(1) 22 if sophisticated weaponry was involved; or (2) 14." U.S.S.G. § 2M5.2(a) (1987). It was amended in 1990 to read: "(1) 22, except as provided in (2) below; (2) 14, if the offense involved [less than ten] only non-fully automatic small arms . . ." This amendment was made to "better distinguish between the more and less serious forms of offense conduct covered." U.S.S.G. App. C. amend. 337 Amendment. A 2001 Amendment raised the default offense level from 22 to 26 to respond to a "a statutory provision expressing a sense of Congress . . . that guideline penalties [were] inadequate for certain offenses involving the importation and exportation of nuclear, chemical, and biological weapons. . ." U.S.S.G. App. C amend. 633. The Congressional statement provided little guidance but plenty of discretion to the sentencing commission to fashion the increased penalties. Rather than adopting some specific offense characteristics (such as, the number of articles exported, their technical sophistication, the capability to cause harm, etc.), the commission simply raised the base offense four levels.
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> * * *
>
> It would be logical for there to be a sliding scale (such as exists for different drug types and weights) based on the lethal nature or technical sophistication of different munitions: no such scale exists, however. Further, it is clear that the increase in offense level from 22 to 26 was a result, not of empirical study, but a policy directive from Congress.

Id.

Illustrative of the breadth of the type of conduct that can be at issue in cases under the Arms Export Control Act and sentenced under U.S.S.G. § 2M5.2 is *United States v. Smith*, 918 F.2d

1032 (2d Cir. 1990). The defendants were convicted of one count of conspiracy to violate the Arms Export Control Act 22 U.S.C. § 2751 et seq. and to commit wire fraud, and thirteen counts of wire fraud after they attempted to sell seven Agusta Bell AB 204 B helicopters without the proper export license. The defendants created a ruse to allow the helicopters to reach the Middle East, and then planned that the helicopters would be diverted to another country for military use. In attempting to sell the helicopters, the defendants asserted that they could be armed and shipped anywhere in the world.

By comparison, Fermanova's offense conduct involved four rifle sights that were going to be used by wealthy Russians to hunt animals. As noted by the court in *Oldani*, the 2001 amendment to § 2M5.2 raised the base offense level from 22 to 26 to reflect Congress's sense that the punishment was inadequate for offenses involving nuclear, chemical, and biological weapons. At a minimum, a downward departure to the pre-2001 base offense level of 22 would be reasonable under the circumstances of this case.

2. Review of Several Cases Sentenced Under U.S.S.G. §2M5.2

A review of the underlying conduct and of the sentences actually received under U.S.S.G. § 2M5.2 further illustrates that a downward departure is warranted based on the guideline commentary, as the conduct underlying the sentences under this guideline is far more egregious than Fermanova's offense conduct.[3]

For example, *United States v. Golitschek*, 808 F.2d 195 (2d Cir. 1986)[4] involved an

[3] In addition to the cases discussed herein, please see the table of cases reviewing the sentences received for violations of 22 U.S.C. §2778 and/or sentenced under U.S.S.G. §2M5.2, which can be found in Exhibit 1 to this Motion.

[4] This opinion reversed the order of the trial court; however the case is helpful to consider what the district court felt was an appropriate sentence for this conduct.

Austrian citizen who never entered the United States during the course of the offense. The defendant, along with agents of the United States, attempted to complete a fictitious sale of helicopters in the United States to Iran. The defendant was convicted of conspiracy to violate 22 U.S.C. § 2778(b)(2) and 18 U.S.C. § 1001; conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; and wire communications fraud, in violation of 18 U.S.C. § 1343. He received concurrent prison terms of *three and one-half years*.

Further, the case of *United States v. Hendron*, 43 F.3d 24 (2d Cir. 1994) illustrates the extreme nature of a sentence falling within the recommended guideline range of 46 to 57 months in Fermanova's case. In *Hendron* the defendant received two concurrent *sixty month* sentences of imprisonment followed by three years supervised release, where his conduct consisted of attempting to sell *100 AK-47s* to United States Customs agents purporting to be representatives of the Republic of Iraq. The defendant had the weapons shipped to New York, and created false documents for the Polish government reflecting that the weapons were being sent to the Philippines. He also arranged meetings for the agents in Frankfurt, Germany with suppliers of other military items. He was sentenced to 60 months after pleading guilty to: (1) conspiring to illegally import into and export out of the United States items on the United States Munitions List in violation of 18 U.S.C. § 371; (2) unlawfully importing into the United States defense articles contained on the United States Munitions List in violation of 22 U.S.C. § 2778(b)(2); and (3) transporting monetary instruments of more than $10,000.00 to a place outside of the United States without filing the report mandated by 31 U.S.C. § 5316(a)(1)(A) while violating another law of the United States, all as prohibited by 31 U.S.C. § 5322(b). The defendant in *Hendron* engaged in conduct that was clearly a threat to the United States, yet his sentence was *only three months*

greater than the high end of Fermanova's recommended guideline range.

The case of *United States v. Gregg*, 829 F.2d 1430 (8th Cir. 1987) also shows that the recommended guideline range greatly overstates Fermanova's actual offense conduct. In *Gregg*, a husband and wife were prosecuted. The wife pled guilty to tax violations charged in the indictment and received a sentence of three years confinement, with all but six months suspended. Werner Gregg received a sentence of *three years* custody with five years of probation after he was convicted of: (1) unlawful export of night vision goggles usable for military purposes, without a required license from the State Department; (2) unlawful export of sixteen military aircraft communication radios without State Department license; (3) unlawful export of component parts of a Tube Launched, Optically Tracked, Wire Command Missile System missile system without State Department license; (4) unlawful export of a tactical air navigational radio system without State Department license; (5) attempt to export a Laser Inertial Navigation System for aircraft without a validated Commerce Department license; (6) false statement (gross undervaluation) of 25 transceivers; and (7) undervaluation of 43 transceivers.

Perhaps the most telling case is *United States v. Naugle*, 1995 WL 322277 (E.D. N.Y. 1995), in which the defendant was convicted of conspiracy to import AK-47 rifles without State Department permission -- a violation of the Arms Export Control Act, 22 U.S.C. §§ 2778(b) and (c). In that case, the Court stated that the defendant's activities were "dangerous," and imposed a sentence of *18 months*. Fermanova's conduct in attempting to export three night-vision rifle sights, and previously exporting one night-vision rifle sight, pales in comparison.

In the pre-guideline case of *United States v. Keuylian,* 602 F.2d 1033 (2nd Cir. 1979), the defendant was convicted of violating 18 U.S.C. § 922(e) by attempting to export firearms and

ammunition from Los Angeles to Jordan. His luggage contained 12 hand handguns, 2 rifles, and over 1,400 rounds of ammunition, including metal-piercing ammunition. He was convicted of knowingly delivering to a common carrier for transportation in foreign commerce firearms and ammunition contained in his luggage without written notice to the carrier. The court sentenced Keuylian to *three years' imprisonment* with *all but four months suspended*, and he was placed on probation for five years.

Finally, in *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991), the defendants were involved in multiple export violations and/or attempted violations involving: (1) the sale and shipment of more than *1300* night vision goggles, worth $7 million, to Argentina during the Falkland Islands War with Great Britain; (2) an attempt to export *110* boxes of firearms and ammunition to *Iraq*, via the Netherlands and Belgium; (3) an agreement to ship *400* night vision goggles to the Soviet Union; and (4) an attempt to ship *500* automatic rifles and *100,000* rounds of ammunition to Poland. The maximum sentence for any of the defendants resulting from these offenses was *15 years imprisonment*.[5]

As can be seen, the conduct reflected in these cases falls at the opposite end of the culpability spectrum from Fermanova's conduct. Defendants in these cases were involved in much more extreme, threatening conduct, yet the most egregious conduct was subject to a sentence of 15 years. Fermanova's conduct, while admittedly illegal, warrants a downward departure because the base offense level under § 2M5.2 overstates Fermanova's criminal culpability.

[5] The Second Circuit reversed the RICO convictions and two of the wire fraud convictions, resulting in remand to the district court for a determination of whether it would have imposed the same or somewhat lesser sentences for the remaining convictions as the sentence imposed.

IV. Analysis of 18 U.S.C. § 3553(a) Factors

The Court must also consider the factors set out in § 3553(a) in determining a sentence that is sufficient, but not greater than necessary, to achieve the sentencing goals outlined in that statute. Certain applicable factors are discussed below and analyzed in light of the particular facts of this case.

A. The Nature and Circumstances of the Offense - 3553(a)(1)

As set forth above, Fermanova's conduct, while violative of the statute of conviction, was neither harmful nor did it have the potential to be harmful to a security or foreign policy interest of the United States. In comparison to other cases sentenced for this type of conduct, Fermanova's offense was minor. Her conduct involved a total of four night-vision sights taken to her husband and father-in-law in Russia, where the technology exists and is available, to be used by members of The Moscow Club to hunt animals.

B. Fermanova's History and Characteristics - 3553(a)(1)

Section § 3553(a)(1) also requires the sentencing court to consider the history and characteristics of Fermanova. There are numerous factors in connection with Fermanova's history and personal characteristics that support a below-guideline sentence.

1. Fermanova's History and Community Ties

Fermanova is a United States citizen who immigrated from Latvia with her parents after suffering religious persecution after the fall of the Soviet Union in 1991. (PSR, ¶¶ 35, 37). She is described by her mother as an active leader, who is "sweet, friendly, intelligent," (PSR, ¶ 36). Her mother describes the religious persecution as "rampant," and explains that there were "Nazi's walking the streets like Hitler was there." (PSR, ¶ 37).

Fermanova married and moved to Russia when her husband was deported from the United States in 2006. (PSR, ¶ 37). She was "heartsick" to leave her family and traveled to Texas often. (PSR, ¶ 38). She and her husband had been growing apart prior to the offense and she does not want to return to Moscow, but instead wants to remain in the United States. (PSR, ¶ 38). Fermanova's mother states that "it would have been better if she had never met that guy. He has brought such a problem on our family." (PSR, ¶36).

Filed with this Motion, for the Court's consideration, are several letters submitted by Fermanova's friends. The letters are attached as Exhibit "4." Nela Golubovic, who has known Fermanova since she was 12 years old, describes her as a "very amiable and honest young lady" and a "loyal friend" with a "great heart." She explains that Fermanova has impacted people's lives "in a very positive way." She states that people like Fermanova are "hard to find in today's society," and that "we need more people like her, to make the world a better and more positive place." (Ex. 4).

Anatoli Shevtsov writes that Fermanova treats people equally, without depending on their "background, nationality or ethnicity. . . . She knows how to share with them her life experience and spiritual attitude." Shevtsov explains that they have attended synagogue and Shabath dinners together, as well as spirituality lectures and Torah lessons.

Further, Chinar Hassan, who has known Fermanova for thirteen years, writes that Fermanova was "the happiest person around school. She had many friends from all different social groups in junior high school." She relates that Fermanova is "the energy and light in my life. She has always been the most reliable and trustworthy person and she has a heart of gold. She has always put everyone before herself." She continues:

> Last year when the unfortunate events that occurred with Anna and her mistake of taking the scopes with her on her travels and the aftermath of media, court, and all the slander caused by the media had put a big hole into all our hearts. Her family, friends, neighbors, even the grocery cashier supports her in all of this and we have stayed positive for Anna, because we the people who live in Dallas, the people who raised her, the people who went to junior high school to college with her, all know who Anna is.

Ex. 4.

A reading of these letters and comments in the PSR depicting Fermanova's character shows that this offense was not indicative of her normal conduct.

2. Fermanova's Medical Condition

A downward departure under U.S.S.G. § 5H1.4, or a downward variance under the § 3553(a) factors is available due to a defendant's medical condition. Fermanova suffers ulcerative colitis (currently in remission) and this factor may be considered by the Court in sentencing her below the recommended guideline range. (PSR ¶ 43; Exhibit 5). As detailed in the PSR, the condition can be debilitating and lead to life-threatening complications. *Id.* Section 5H1.4 deals with a defendant's physical condition, without regard to age, and provides in pertinent part:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

U.S.S.G. § 5H1.4.[6]

In *United States v. Edwards*, 595 F. 3d 1004 (9th Cir. 2010), the appeals court affirmed the district court's downward variance based in part on Edwards' medical condition of diabetes

[6] As explained below, the Court is no longer limited to finding a circumstance "extraordinary" before granted a non-guideline sentence in the post-*Booker* regime.

and related medical complications, finding that "imprisoning Edwards would simply pass the cost of medical care on to taxpayers." *Id.* at 1011. *See also United States v. McClean*, 822 F. Supp. 961 (E.D.N.Y. 1993) (departure granted where defendant's left leg had been crippled by polio as a child); *United States v. Little*, 736 F. Supp. 71 (D. N.J.), *aff'd,* 919 F.2d 137 (3d Cir. 1990) (departure granted on the basis of the defendant's chronic pulmonary disease); *United States v. Tillem*, 906 F. 2d 814 (2nd Cir. 1990) (departure based on the defendant's "failing physical condition" was upheld). In fashioning her sentence, the Court should consider that imprisoning Fermanova could unnecessarily burden taxpayers with the cost of any needed medical care..

3. Fermanova's Family Circumstances

In addition to her own medical condition, both of Fermanova's parents are ill and need her care and financial support. Attached to this Motion as Exhibit "6" is a statement from Dr. Naira Babaian in which it is stated that Fermanova's father, Michael, is under Dr. Babaian's treatment for hypertension, diabetes mellitus and hyperlipidemia. Dr. Babaian also states that Fermanova's mother, Bella, is under treatment for bronchial asthma, allergic rhinitis and osteoporosis. *See also* PSR ¶ 35.

Under the now advisory Guidelines, a sentence reduction based on family circumstances is proper if the resulting sentence is reasonable. *See Booker*, 543 U.S. at 260. *See also United States v. Gainer*, 2006 WL 535739 (5th Cir. 2006) (vacating and remanding post-*Booker* case based on district court's belief that it was precluded from granting departure by Guideline requirement that family circumstances be "exceptional.").

A review of applicable case law shows that courts have reduced sentences in circumstances where the defendant's incarceration would cause family hardship. *See United States v. Galante*,

111 F.3d 1029 (2d Cir. 1997) (affirmed district court's downward departure in a drug case from 46-57 months to 8 days, in part because defendant was a conscientious and caring father of two sons who would face sever financial hardships); *United States 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.").

Also the commentary to the guidelines provides in relevant part:

> (B) Departures Based on Loss of Caretaking or Financial Support.—A departure under this policy statement based on the loss of caretaking or financial support of the defendant's family requires, in addition to the court's consideration of the non-exhaustive list of circumstances in subdivision (A), the presence of the following circumstances:
> (i) The defendant's service of a sentence within the applicable guideline range will cause a substantial, direct, and specific loss of essential caretaking, or essential financial support, to the defendant's family.
>
> (ii) The loss of caretaking or financial support substantially exceeds the harm ordinarily incident to incarceration for a similarly situated defendant. For example, the fact that the defendant's family might incur some degree of financial hardship or suffer to some extent from the absence of a parent through incarceration is not in itself sufficient as a basis for departure because such hardship or suffering is of a sort ordinarily incident to incarceration.
>
> (iii) The loss of caretaking or financial support is one for which no effective remedial or ameliorative programs reasonably are available, making the defendant's caretaking or financial support irreplaceable to the defendant's family.
>
> (iv) The departure effectively will address the loss of caretaking or financial support.

U.S.S.G. §5H1.6, comment. (n. 1).

The impact of incarcerating Fermanova and the resulting hardship imposed on her parents is another factor that should be considered by the Court when fashioning a sentence that is

sufficient, but not greater than necessary.

4. Fermanova's Involvement in this Offense Can Be Considered Aberrant Behavior

Under the mandatory Guidelines, Fermanova could not support an argument for a downward departure based on aberrant behavior; however, the Court *can* consider the aberrant nature of Fermanova's conduct in evaluating the 18 U.S.C. § 3553(a) factors. Considering the information provided to the Court regarding Fermanova's immediate cooperation, her characteristics, and the nature of the charged offense, Fermanova's behavior in this offense can be considered aberrant behavior. Fermanova requests that the Court consider this in determining whether to grant a below-Guideline sentence.

C. Need For the Sentence Imposed To Reflect § 3553(a)(2) Factors

1. Reflect the Seriousness of the Offense; Promote Respect for the Law; Provide Just Punishment for the Offense.

"Respect for the law is promoted by punishments that are fair, however, not those that simply punish for punishment's sake." *United States v. Stern*, 590 F. Supp.2d 945, 956-57 (N.D. Ohio 2008). "[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Id*. (quoting *Gall*, 552 U.S. at 54).

A defendant who deserves leniency but is sentenced harshly does nothing to promote respect for the law. The same is true for a defendant who deserves a harsh punishment but receives a simple slap on the wrist. The sentence must be balanced, taking into consideration all of the sentencing factors. Consequently, a just punishment for Fermanova is one that balances the

severity of her offense with individual characteristics that indicate leniency. A sentence below the recommended guideline range will accomplish this sentencing goal.

2. Afford Adequate Deterrence to Criminal Conduct

Deterrence and prohibition are essential objectives for society. However, in keeping with the directives set out in § 3553(a), the sentence imposed upon Fermanova must be sufficient, but not greater than necessary, to meet the overall purposes of sentencing. The mere fact of Fermanova's prosecution and conviction will deter others from engaging in this type of conduct. Further, a non-custodial sentence, one involving probation with certain restrictions such as home confinement, is considered punishment and will act as a deterrence. As explained by the Supreme Court in *Gall*:

> We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual "special conditions" imposed by the court. Gall, for instance, may not patronize any establishment that derives more than 50% of its revenue from the sale of alcohol, and must submit to random drug tests as directed by his probation officer.

Id. at 49-50 (internal citations omitted).

The *Gall* Court also cited to several publications regarding the restrictive and confining nature of a sentence under probation and/or parole:

> Advisory Council of Judges of National Council on Crime and Delinquency, Guides for Sentencing 13-14 (1957),("Probation is not granted out of a spirit of leniency .... As the Wickersham Commission said, probation is not merely 'letting an offender off easily'"); 1 N. Cohen, The Law of Probation and Parole § 7:9 (2d ed. 1999) ("[T]he probation or parole conditions imposed on an individual can have a significant impact on both that person and society . . . . Often these conditions

> comprehensively regulate significant facets of their day-to-day lives . . . . They may become subject to frequent searches by government officials, as well as to mandatory counseling sessions with a caseworker or psychotherapist").

Id. at 50 n.4.

A non-guideline sentence in the present case will adequately deter Fermanova from future criminal activity.

3. Protect the Public from Further Crimes by Fermanova

A Guideline sentence of 46-57 months is wholly unnecessary to protect the public from future crimes by Fermanova.

Fermanova's offense did not involve violence, nor a threat to national security or foreign policy. Further, as reflected in the PSR, ¶ 29, she has zero criminal history points. As a result, she poses the lowest possible risk of recidivism, and creates the lowest possible need to protect the citizenry under 18 U.S.C. §3553(a)(2)(B) and § 3553(a)(2)(C). [7] *See* U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 7 (2004). It thus cannot be said that a Guideline sentence, which assumes a rough equivalence between her risk of recidivism and that of offenders with one criminal history point, adequately accounts for her extremely low risk of recidivism. Other factors to consider regarding recidivism include:

1. Stable employment in the year prior to arrest is associated with a lower rate of recidivism. *Id.* at 12. Fermanova has had stable employment, essentially since 2000 when she was a high school student. (PSR, ¶¶ 52-56).

2. Offenders with a high school education and some college are less likely to recidivate.

[7] See U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score*, at 5 (2005) ("scoring at the minimum value of zero on the CHC indicates a very low recidivism risk.")

Id. at 12. Fermanova has a high school diploma and is currently studying to obtain a university degree in mass communications/public relations. (PSR, ¶47).

3. Offenders sentenced under fraud, larceny, and drug guidelines are the least likely to recidivate. *Id.* at 13.

According to the Sentencing Commission's own data, Fermanova presents an extremely low risk of recidivism.

4. Provide Needed Educational/Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

A below-guideline sentence would allow Fermanova to remain in, or return to, society and more quickly allow her to continue her pursuit of a college degree, as well as to effectively receive the medical care she needs. This option would place a far less burden on the taxpayers of the United States than incarcerating her and providing her medical care through the BOP. Additionally, Fermanova is willing to pursue her education and has no need for educational or vocational training or other correctional treatment at tax payer expense. (See PSR, ¶¶ 47, 52-56).

5. The Need to Avoid Unwarranted Sentence Disparities Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct

One of the more difficult and relevant factors that this Court has to consider is the need to avoid unwarranted sentencing disparities. Before the Court is a woman with no criminal history points who, according to the PSR, is facing a sentencing range of 46-57, for an export licensing violation consisting of attempting to export three night-vision rifle sights to Russia, and exporting one such sight.

Attached as Exhibit "1" is a chart of case summaries that illustrates that a sentence in the range of 46-57 months will cause a great sentence disparity. The majority of cases listed therein involve conduct that was threatening or potentially threatening to the United States and its foreign

policy interests. Many of the cases involve exporting items to enemy countries of the United States, and almost all involve exporting many more items and/or more sophisticated items, and involve a much more detailed plan than Fermanova's case. In contrast, Fermanova's conduct involved technology that was already available in Russia, and were items that were readily available for purchase in the United States by anyone with a computer and credit card. The night vision sights themselves pose no threat to the security or policies of the United States.

Additionally, and in contrast to every case cited herein and included in Exhibit "1", Fermanova was not an insider or in the "trade" of arms dealing or smuggling. The events that form the basis of this indictment were isolated in nature and her involvement in this matter was a result of her doing a favor for her husband and father-in-law who was involved in a shooting club in Moscow.

Consequently, a non-guideline sentence for Fermanova would not cause disparate sentencing, but would in fact rectify the disparity that will occur if Fermanova is sentenced in the recommended guideline range.

D. Conclusion – §3553 Factors

Fermanova asks the Court to take into consideration all of the factors set forth in this motion in evaluating the §3553 factors. Under the mandatory guidelines, a sentencing court was ordinarily required to find the existence of "extraordinary circumstances" that would take the case outside of the "heartland" of criminal cases before imposing a sentence outside of the then-mandatory Guidelines range. Such a finding is no longer required. In reviewing the "substantive reasonableness" of a sentence, the United States Supreme Court held that a district court does not need to find "extraordinary" or "exceptional" circumstances to justify a

non-Guidelines sentence. *See Gall v. United States*, 552 U.S. 38, 47 (2007). *See also United States v. Rivera*, 448 F.3d 82, 85 (1st Cir. 2006) ("[A] party need not make an 'extraordinary' showing in order to persuade the district court that a sentence below the [advisory guidelines range] is warranted.").

As set out above, the mitigating factors present in Fermanova's case support a below-guideline sentence. When these mitigating qualities are evaluated under the requirements of § 3553(a), a non-guideline sentence of probation would be reasonable as sufficient, but not greater than necessary to achieve the goals of sentencing.

V. A Below-Guideline Sentence Based on the Totality of the Circumstances is Appropriate

A sentence reduction under U.S.S.G. § 5K2.0 based on the combination of factors presented herein is also warranted. In *United States v. Jones*, 158 F.3d 492, 499 (10th Cir. 1998), the district court departed from a sentencing range of 12 to 18 months, to a sentence of six months confinement and three years probation. The departure was based on the totality of circumstances, including "collateral employment consequences, aberrant nature of the offense conduct, community service, support in the community, voluntary disclosure of offense conduct, post-offense rehabilitation, and access to rehabilitative counseling." *Id*. at 504. *See also United States v. Broderson*, 67 F.3d 452, 458 (2nd Cir. 1995) (downward departure allowed where factors which individually would not warrant a downward departure were combined, and the court concluded that this "confluence of circumstances" had not been taken into account by the Guidelines). The combination of factors present in this Motion make a departure or variance

appropriate based on the totality of the circumstances presented herein.[8]

Fermanova asks this Court to utilize its discretion and sentence her to a range of imprisonment below the recommended guideline range based on the factors provided herein, and the totality of the circumstances presented by the "confluence of circumstances" present in this one particular case.

VI. A Sentence of Probation Is Warranted

This Court has authority to grant a more reasonable sentence than the advisory guideline range. As stated by the Supreme Court of the United States in *Koon v. United States*, 518 U.S. 81 (1996):

> It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnifying, the crime and punishment to ensue.

Id. at 113. Fermanova submits that considering the above factors and applying the requirements of 18 U.S.C. § 3553(a), a sentence of probation is warranted in this matter.

[8] *See also* U.S.S.G. § 5K2.0.

WHEREFORE, PREMISES CONSIDERED, Fermanova prays that this Court will grant this Motion for Non-Guideline Sentence and sentence her to a term of probation, probation and home confinement, or a term of incarceration less than the guideline range that the Court deems necessary under 18 U.S.C. § 3553(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 24th day of August 2011, the undersigned electronically transmitted the attached document to the Clerk of the Court using the ECF for filing and transmittal of electronic filing to the following ECF registrant:

Assistant U.S. Attorney
Seth D. DuCharme
Brooklyn, NY

/s/ Scott H. Palmer
SCOTT H. PALMER