

THE HON. RONALD B. LEIGHTON

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIANA WATERS,

Defendant.

) CAUSE NO. CR 05-5828 RBL

) DEFENDANT’S SENTENCING
) MEMORANDUM AND MOTION FOR
) DOWNWARD DEPARTURE

COMES NOW the Defendant, Briana Waters, by and through her attorney, Neil M. Fox, and submits this sentencing memorandum.

I. INTRODUCTION

Eleven years ago, motivated by peer pressure and youthful but misguided idealism, Briana Waters committed a terrible crime that caused enormous economic damage and which destroyed the valuable research of many individuals. Nothing can be done to reverse the events of 2001. There is nothing that Ms. Waters can do now to “un-do” what took place in a different era.

Now, at 36 years of age, an established violin teacher, and the parent of a seven year old daughter, Ms. Waters looks back at her life in 2001 with shame. Ms. Waters’ main interest is to be a loving parent to her daughter, K.L., and to raise her in a way so that K.L. will not repeat her mother’s errors.

1 Ms. Waters was initially tried in this case in 2008 and was found guilty of two
2 counts of arson, for the same fire at the University of Washington Center for Urban
3 Horticulture on May 21, 2001.¹ Judge Burgess sentenced Ms. Waters to serve 72
4 months in prison, but she was released in October 2010, after the Ninth Circuit
5 reversed her convictions.

6 At this point, Ms. Waters made a decision. At a critical time, when Ms.
7 Waters could have gone back to trial, with the Government's case being potentially
8 weakened as a result of certain post-trial developments, Ms. Waters decided to come
9 forward and tell the truth about what took place in 2001. She made this decision,
10 knowing that some in the political movement that had made her a martyr would then
11 revile her. She made this decision knowing that she would return to the Bureau of
12 Prisons for a period of time. She made this decision knowing that her testimony could
13 be used against her college boyfriend, Justin Solondz (and others who are still
14 fugitives).

15 Ms. Waters thus entered guilty pleas to the following charges: Conspiracy,
16 Possession of an Unregistered Firearm, Arson and Using a Destructive Device During
17 a Crime of Violence. The United States has filed a motion pursuant to U.S.S.G. § 5K1.1,
18 asking the Court to sentence Ms. Waters below the applicable sentencing guideline range and
19 below the mandatory minimum sentences based on her timely and substantial assistance.

20 The plea agreement is for a joint recommendation of 48 months imprisonment. Ms.
21 Waters has already served 31 to 32 months in prison, and thus, with good-time, has less than a
22 year (10 to 11 months) to serve under the joint recommendation. This is an appropriate
23 amount of time for this offense that took place over a decade ago.

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¹ The jury could not reach a verdict on the conspiracy count, the unregistered firearm charge and
the destructive device charge.

1 **II. MS. WATERS' BACKGROUND**

2 **A. *Childhood and College***

3 Ms. Waters grew up in Pennsylvania. Her mother and father divorced when she
4 was still a child, and her mother struggled to raise her and her brother pretty much
5 alone. Ms. Waters was not the product of privilege, and her achievements were the
6 result of her own hard work. Ms. Waters did well in school, impressed her teachers
7 and received awards for her achievement. She received a scholarship to the University
8 of Dayton, in Ohio, and then transferred to The Evergreen State College in Olympia.
9 She graduated in December 1999.

10 While at Evergreen, Ms. Waters became active in various student groups
11 addressing animal rights and the environment. She participated in peaceful, and non-
12 violent, protests against logging of old growth forests, and helped to form an alliance
13 between environmental activists and townspeople in the small community of Randle,
14 Washington. Ms. Waters made a film called *Watch*, which documented the success of
15 this non-violent community alliance. The film itself became an issue at Ms. Waters'
16 trial and the exclusion of this evidence was one basis for reversal in the 9th Circuit.
17 *United States v. Waters*, 627 F.3d 345, 357 (9th Cir. 2010) (amended).

18 **B. *Center for Urban Horticulture Arson***

19 Ms. Waters' on-again-off-again boyfriend at Evergreen was Justin Solondz,
20 who was also involved in environmental activism. Through their work, Ms. Waters
21 and Mr. Solondz met William Rodgers, an older man (then in his thirties), who was
22 very active in "Forest Defense." Mr. Rodgers was also involved, for many years, in
23 underground activities, linking up with others in the amorphous "Earth Liberation
24 Front" and "Animal Liberation Front." Rodgers was secretly involved in a series of
25 arsons against perceived enemies of the environment, and published a series of "how
26 to" manuals for sabotage and arson. At that time, many in the environmental and
27 animal rights movement believed that property destruction, that did not involve attacks
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1 on human beings, was a legitimate tool. Ms. Waters, as a young person seeking to fit
2 in, came to the same conclusion as her peers.

3 Rodgers first recruited Ms. Waters to assist him through small tasks, such as
4 obtaining a cell phone for him in her name. Ms. Waters was never part of the broader
5 “ELF/ALF” conspiracy that was alleged in the original indictment. Testimony at the
6 2008 trial revealed that Ms. Waters did not attend the so-called “Book Club”
7 meetings, where various ELF/ALF “members” (such as Ms. Phillabaum and Ms.
8 Kolar) met to train in sabotage and secret communications.

9 In 2001, as Ms. Waters was finishing and showing her film, *Watch*, Mr.
10 Rodgers recruited her and Mr. Solondz to be involved in the action against the Center
11 for Urban Horticulture, which Ms. Waters was led to believe contained research on
12 genetically modified poplar trees. Ms. Waters obtained a rental car to be used in the
13 action; she allowed the house she was renting to be used as a staging ground for the
14 building of the devices; she was a look-out during the actual event.

15 Ms. Waters views her involvement in this tragic event as the result of her own
16 gullibility and peer pressure, by which she sought the approval of other people and
17 convinced herself that her actions were actually good for the world. She was horrified
18 about the scope of the damage that was caused by the fire. She had been assured that
19 the fire would only damage part of the office, not damage the entire building.

20 After the CUH fire, Ms. Waters agreed to be involved in one other ALF/ELF
21 action in October 2001, a horse release in Susanville, California. She initially thought
22 the action would not involve arson and would only involve the release of animals and
23 therefore agreed to participate. However, as the action unfolded, she did learn that it
24 would also involve fire. Yet, based upon what she now sees as peer pressure, she
25 agreed to participate once again.

26 Ms. Waters looks back at these events at this point with a combination of
27 shame and confusion. She is an intelligent person with an understanding that fire is
28 dangerous, both to possible occupants of the buildings and to the fire fighters. It seems

1 obvious from the standpoint of 2012 that her actions were wrong. But, at the time,
2 with the combination of youthful enthusiasm and the desire to gain the approval of
3 others who she respected and who she thought were seeking to improve the world, she
4 concluded that property damage was legitimate (without fully thinking through the
5 personal risks to firefighters or the full effect on those whose incomes and research
6 were devastated).

7 **C. *Move to California***

8 At the end of 2001 and early 2002, Ms. Waters did not like the way her life in
9 Olympia was unfolding and started a new life in the Bay Area. Not being a “member”
10 of the ELF/ALF, Ms. Waters had no difficulties in extracting herself from what the
11 inner part of her saw was a toxic mileau.

12 Once in California, Ms. Waters worked as a nanny, music teacher and
13 musician. Ms. Waters is a talented violinist, trained in the Suzuki method. She
14 teaches both young children and adults, and plays music in different venues, often in
15 community settings. As many of the letters of support show,² Ms. Waters has touched
16 many lives with her music. She also regularly performed at charitable events, and
17 became a fixture in the music community.

18 Ms. Waters met John Landgraf in the Bay Area, and in February 2005, their
19 baby, K.L., was born. They lived a modest life in the East Bay. Mr. Landgraf is a
20 carpenter, while Ms. Waters continued performing music and occasionally teaching
21 violin. Ms. Waters became involved in many community activities, but no longer was
22 tied into the radical environmental movement.

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² A packet of support letters is being filed under separate cover.

1 **D. *First Trial and Incarceration***

2 In February 2006, shortly after K.L.'s first birthday, the FBI knocked on Ms.
3 Waters' door in Oakland, and informed her that she was a target of an investigation
4 into ELF/ALF activities. Ms. Waters declined to cooperate and declined to plead
5 guilty. Instead, she went to trial, risking a 35 year mandatory minimum sentence (30
6 years for the § 924(c) count and 5 years for the arson counts), testifying that she was
7 not guilty. Her motivation was that she would do anything to avoid prison so she could
8 be with her young daughter who was still a baby and completely dependent on her in
9 every way.

10 The jury did not return a guilty verdict on the § 924(c) charge. However, on
11 March 6, 2008, the jury convicted Ms. Waters of the substantive arson charges, which
12 carried a five year mandatory minimum. Ms. Waters, who was out of custody on a
13 recognizance bond until then, was taken into custody the day the jury returned its
14 verdict. Sentencing took place on June 19, 2008.

15 Judge Burgess imposed 72 months, or six years, in prison. Dkt. No. 450.
16 Although Judge Burgess recommended to BOP that Ms. Waters be designated to FCI
17 Dublin, so she could be near her family in California, BOP instead sent Ms. Waters
18 three thousand miles across the country to FCI Danbury in Connecticut. Although that
19 prison was a low security institution, it was very expensive for Mr. Landgraf to take
20 K.L. across the country to visit Ms. Waters. This enforced separation with K.L.
21 traumatized her, and she always had difficulties leaving Ms. Waters, wondering if and
22 when she would see her mother again. K.L. suffered nightmares, digestive issues, bed-
23 wetting, anxiety and tearfulness as a result. *Letter of Daria Wrubel*, Support Letters at
24 56.

25 By coincidence, Ms. Waters' brother lived in New Haven, Connecticut, when
26 Ms. Waters' was incarcerated in Danbury. He describes the visits as follows:

27 During these visits, I had ample opportunity to observe [K.L.] and
28 understand the impact of the situation on her. It was saddening to hear
 [K.L.] ask Briana questions such as "When are you coming home,
 Mommy?" and "Why can't we go outside to play?" At the end of visits,

1 [K.L.] would display a wide range of negative emotions - she would
 2 become upset, cry, sometimes throw small temper tantrums, sometimes
 3 become quiet and withdrawn. The emotional hardship for [K.L.] was
 4 obvious.

5 In addition to the emotional strain, there was physical strain. The
 6 combination of flight schedules, school schedules and flight costs
 7 required [K.L.] and John to take the "red-eye" flight from Sacramento on
 8 their way to New York, followed by a 2-hour drive to New Haven. To
 9 make the most of their visits, [K.L.] and John got up early every morning
 10 and drove 1 hour to make the 8:30-9:00am window for morning visits.
 11 (Arriving at 9:01am meant you had to wait in the waiting room
 12 until 10:30am before they would begin processing you.) Visits ended at
 13 3:00pm, so they would normally have about 6 hours together (9:00am-
 14 3:00pm). While this was great - far better than separation - the prison
 15 visiting room was not the best setting for a child. The rooms were
 16 crowded and very loud, making conversation difficult. There was not
 17 much space to play or interact. There was a children's room, but often it
 18 would be closed because the inmate-attendant would be unavailable. The
 19 only food available was candy and soda from vending machines, which
 20 would give [K.L.] swings of energy and make her behave hyperactively.
 21 There were many rules and regulations strictly enforced by the guards,
 22 which [K.L.] simply did not understand due to her age, but nevertheless
 23 caused her anxiety and angst. The combination of the red-eye flights, jet
 24 lag, early mornings, and long, uncomfortable visits was physically
 25 exhausting for [K.L.], which exacerbated her emotional and
 26 psychological strain.

27 *Letter of Eric Waters, Support Letters at 10-11.*

28 **E. Life After Prison**

In September 2010, the Ninth Circuit reversed Ms. Waters' conviction, based upon a series of errors committed during the trial. Before the mandate issued, the Ninth Circuit ordered Ms. Waters' release, and she left prison on October 14, 2010. Thus, according to the U.S. Probation calculations, Ms. Waters has already spent a total of 953 days (31-32 months) in custody on these charges. Since her release, Ms. Waters (who, as before the trial, was under the supervision of Pretrial Services)³ has resided in California, near where K.L.'s father, Mr. Landgraf resides.⁴

³ Ms. Waters was on pretrial release between March 2006 and March 2008, and again between October 2010 and the present. There have been absolutely no incidents of concern, at all, and her compliance has been perfect.

⁴ While Ms. Waters was incarcerated, Mr. Landgraf entered into a new relationship with another person.

1 Ms. Waters resumed her life of giving violin lessons and playing music,
2 helping those in the community less fortunate than her, and being a mother. As one of
3 the parents of her daughter attests, “Briana is an excellent mother for [K.L.] and a great
4 supporter of our school and class. She routinely volunteers whenever there is a task to
5 be done and she is a great asset to our community.” *Letter of Douglas P. Williams*,
6 Support Letters at 54.

7 K.L. primarily resides with Ms. Waters, and, given the prior separation with her
8 mother, she has exhibited anxiety and trauma when forced to leave her mother, even
9 for short visits with her father. As K.L.’s former⁵ therapist explains:

10 Each time she left her mother she experienced great emotional pain and
11 feared that she would not be returned. This fear, intense separation
12 anxiety, was caused by her previous trauma from the prolonged
13 separation while her mother was incarcerated. She associated being with
14 her father with having to be apart from her mother, so he became an
15 object to be feared rather than loved or trusted. Often, when it was his
16 turn to have time with [K.L.], she would refuse to leave with him or
17 immediately plead to go back to her mother. He often complied with this,
18 so she has gradually come to trust that her father will return her to her
19 mother.

20 The effect of any future prolonged separation from her mother will most
21 certainly result in an inability to form close relationships later in life, due
22 to trust issues. I have witnessed the very strong bond between Briana and
23 [K.L.] and feel that it would be psychologically and emotionally
24 damaging for this young child to experience any further trauma in being
25 separated from her mother.

26 *Letter of Mary Lattimore*, Support Letters at 7.

27 When Ms. Waters was released from prison, she rented a room from Nicole
28 Fox, who writes:

Originally the arrangement between Briana and [K.L.]'s father
was supposed to be a 50/50 time custody share. It was evident
immediately, however, that separating from Briana for even a few hours
was traumatic for [K.L.]. She screamed, begged, and physically fought
against visits with her Dad and Grandparents, the very people who were
charged with caring for her and making her feel as secure as possible
while she was parted from her mother, and forced visits turned into
disaster. School mornings were tearful as she frequently hid or refused
cooperation to avoid being parted from Briana. [K.L.] rejected bedtime
and attached herself to Briana, or to a piece of furniture nearer to where

⁵ For reasons connected to the therapist’s health, K.L. is recently began seeing a new therapist.

1 ever Briana was in the house after the 2-3 hours Briana spent trying to
2 make her feel secure and soothe her to sleep before parting the room.

3 *Letter of Nicole Fox*, Support Letters at 4.

4 Ms. Fox then describes how Ms. Waters was completely selfless in trying to
5 meet K.L.'s needs:

6 Night after night, after [K.L.] had given in to sleep, I witnessed
7 Briana tirelessly searching for solutions. She researched counselors and
8 therapists who could work with [K.L.] on the separation trauma, the
9 subject that was being denied in her absence, and which urgently needed
10 to be addressed. She got insurance for [K.L.] so that the over due dental
11 care and medical exams, which had gone neglected, became possible.
12 She searched for a music teacher and asked other parents for
13 recommendations for physical programs, such as gymnastics, in hope that
14 these activities may provide [K.L.] with an outlet as well as help her to
15 build a healthy sense of self. I also watched Briana work hard to rebuild
16 her business as a music teacher and musician, which she strived for
17 endlessly in order to reach her goal of financial self-sufficiency. Briana
18 did this work night after night, week after week, month after month,
19 while her daughter slept so as not to waste any time together. I saw a
20 mother who was committed to her child, who remained present and
21 strong for her child instead of wallowing in the self-pity or self-centered
22 despair that a bleak future back in prison may invoke in some. In reality
23 she was tired, stressed, and trying hard to "keep a good face" for [K.L.'s]
24 sake all the while confronted by an undetermined fate.

25 I cannot imagine anyone who is more remorseful for bad choices
26 made than Briana Waters. She has suffered, [K.L.] has suffered, and
27 Briana has been paying with every ounce of her being. They are still
28 paying even as I write this, having to live with the daily fear and
debilitating anxiety of yet another painful separation sometime in the
near future.

Is Briana Waters sorry? ABSOLUTELY.

29 *Letter of Nicole Fox*, Support Letters at 5.

30 K.L.'s father, while loving and well-intentioned, in the words of one of his
31 employers, "just doesn't have it together, and hasn't stepped up to the task" of raising
32 his daughter. *Letter of Dan Fries*, Support Letters at 12-13. As Mr. Fries writes, Ms.
33 Waters is the one with a functioning telephone, who returns calls; Ms. Waters is the
34 one who cooks for K.L., takes her to school and drives her to see her friends. *Id.*

35 While one can never predict the future, one could easily conclude that lengthy
36 separation from Ms. Waters as it took place between 2008 and 2010, when Ms.
37 Waters was in Danbury, would cause K.L. to suffer further trauma. It is not that there
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1 are not others who could look after her -- there are such people. But, there is a real
2 concern that K.L.'s trauma would be exacerbated if Ms. Waters is sent across the
3 country again, and not able to see her daughter on a regular basis while she serves out
4 the remaining sentence.

5 **III. THE PECULIARITIES OF SENTENCING MS. WATERS**

6 Normally, people get arrested shortly after committing a crime and often are in
7 custody pending trial. If they are convicted, and then sentenced to prison, they are
8 released from prison, but usually with some combination of less restrictive
9 confinement -- camp, half-way houses and the like. Once out of prison, they are on
10 supervision in the community.

11 Ms. Waters situation is different. After the events of 2001, Ms. Waters lived
12 freely for a number of years (until she was charged in 2006), without any criminal
13 charges and as a productive and valued member of her community. She then spent
14 almost two years on Pretrial Release (without any problems), and was taken into
15 custody upon her conviction in March 2008. Her prison time ended abruptly (without
16 any half-way houses) and she was the placed back on Pre-Trial Release -- for another
17 20-21 months. She has already successfully reintegrated herself into the society, and,
18 as the many support letters illustrate, people in her community value her contributions
19 and see her as a valued part of the community. From the music that brings joy to
20 people's lives to her participation in her daughter's school, one cannot read the many
21 support letters and not be impressed with Ms. Waters' life. Not many people who
22 have left prison have had this degree of success.

23 These letters are significant because they are from "normal" people -- not
24 members of some amorphous support network. In fact, given Ms. Waters' public
25 branding as a "snitch," she has no public support from those interested in her case for
26 political reasons. Rather, the letters reveal how Ms. Waters' has touched the lives of
27 dozens of people, from the music community to those whose children attend K.L.'s
28 school.

1 Under the joint recommendation of 48 months imprisonment, with good time
2 credits, Ms. Waters will have just under a year to serve in custody. Based upon what
3 took place four years ago, the defense has a legitimate fear as to what BOP will do.
4 Will they place Ms. Waters in Danbury, Connecticut, again -- 3000 miles away from
5 K.L.? While, under the Second Chance Act of 2007, Ms. Waters is eligible for
6 placement in a "half-way house" for up to 12 months prior to her release date, 18
7 U.S.C. § 3624(c), BOP has a history of not complying with this statutory mandate and
8 generally has not placed offenders in half-way houses until the final six months of a
9 sentence, if even then. *See Sacora v. Beaman*, 628 F.3d 1059 (9th Cir. 2010)
10 (rejecting lawsuit challenging BOP's compliance with the "Second Chance Act").
11 Apart from the impact on Ms. Waters, the impact on K.L. will be quite harsh.

12 **IV. CALCULATING THE PROPER SENTENCE**

13 In the wake of *United States v. Booker*, 543 U.S. 220 (2005), district courts, as a
14 matter of process, must properly calculate the applicable guidelines range, treat the
15 guidelines as advisory, and then consider the factors set out in 18 U.S.C. § 3553(a). As
16 the Supreme Court summarized:

17 The statute, as modified by *Booker*, contains an overarching provision
18 instructing district courts to "impose a sentence sufficient, but not greater
19 than necessary" to accomplish the goals of sentencing, including "to
20 reflect the seriousness of the offense," "to promote respect for the law,"
21 "to provide just punishment for the offense," "to afford adequate
22 deterrence to criminal conduct," and "to protect the public from further
23 crimes of the defendant." 18 U.S.C. § 3553(a) (2000 ed. and Supp. V).
24 The statute further provides that, in determining the appropriate sentence,
25 the court should consider a number of factors, including "the nature and
26 circumstances of the offense," "the history and characteristics of the
27 defendant," "the sentencing range established" by the Guidelines, "any
28 pertinent policy statement" issued by the Sentencing Commission
pursuant to its statutory authority, and "the need to avoid unwarranted
sentence disparities among defendants with similar records who have
been found guilty of similar conduct." *Ibid.* In sum, while the statute still
requires a court to give respectful consideration to the Guidelines, *see*
Gall v. United States, *ante*, 128 S. Ct. 586, 169 L. Ed. 2d 445, 128 S. Ct.
586, 169 L. Ed. 2d, at 455, 460, *Booker* "permits the court to tailor the
sentence in light of other statutory concerns as well," 543 U.S., at 245-
246, 125 S. Ct. 738, 160 L. Ed. 2d 621.

Kimbrough v. United States, 552 U.S. 85 101 (2007).

1 After consideration of these factors, a district court can impose any sentence
 2 that is “reasonable,” including a sentence that is significantly below the Guidelines
 3 range. *Gall v. United States*, 552 U.S. 38, 50 (2007). “The district court may not
 4 presume that the Guidelines range is reasonable. . . . While the Guidelines are to be
 5 respectfully considered, they are one factor among the § 3553(a) factors that are to be
 6 taken into account in arriving at an appropriate sentence.” *United States v. Carty*, 520
 7 F.3d 984, 992 (9th Cir. 2008) (en banc). Ultimately, the Court’s duty is to impose a
 8 sentence that is “sufficient, but not greater than necessary.” *Id.*

9 In a post-*Booker* environment, the term “downward departure” really is of
 10 limited utility. While the Court first must calculate the Guideline range, the Court
 11 must then set a sentence in accordance with the factors in 18 U.S.C. § 3553(a).
 12 Previous concepts of “heartlands” and “downward departures” have little bearing in
 13 this calculus. Factors that previously could not be considered as a grounds for an
 14 adjustment to the offense level or for a “downward departure,” now can be considered
 15 under 18 U.S.C. § 3553(a). For instance, in *United States v. Menyweather*, 447 F.3d
 16 625 (9th Cir. 2006), the Ninth Circuit approved a non-Guidelines’ sentence based upon
 17 “family circumstances” and diminished capacity, even if those circumstances were not
 18 sufficient to justify a traditional downward departure under the Guidelines.

19 In terms of the Guidelines, the defense agrees with United States Probation (¶
 20 25) that the base offense level is 24 (although reached a different way).⁶ However,
 21 unlike U.S. Probation’s conclusion (¶ 28), there should be an adjustment downward
 22 two points for a minor role in the offense under § 3B1.2(b). In *United States v.*
 23 *Tankersley*, 537 F.3d 1100 (9th Cir. 2008) -- a related ELF case from the District of
 24 Oregon -- the district court adjusted downward two levels for minor role where the
 25 defendant also played a supporting role (i.e. gathering materials for timing devices,
 26 driving to the scene) to the individual who actually set the incendiary devices. While
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⁶ A copy of Ms. Waters’ objections to U.S. Probation’s Presentence Report is attached in Ex. 1.

1 the Circuit addressed Ms. Tankersley's arguments that she should have received a four
 2 point reduction for a minimal role, no one disputed that the two point reduction for a
 3 minor role was appropriate. 537 F.3d at 1104-05, 1110-12. Ms. Waters' involvement
 4 was similar to Ms. Tankersley's and should receive a two-point reduction.⁷

5 The defense disputes the that the underlying offense involved a federal crime of
 6 terrorism (U.S. Probation ¶ 27) and thus objects to the enhancement under § 3A1.4.⁸
 7 Unlike the defendants in the related Oregon cases, who all admitted facts in their plea
 8 statements that qualified them for the terrorism enhancement, *United States v.*
 9 *Tankersley*, 537 F.3d at 1115-16 & n. 13, Ms. Waters' plea agreement was structured
 10 differently, and did not admit that the primary purpose of her actions was "to influence
 11 and affect the conduct of government, commerce, private business and others in the
 12 civilian population by means of force, violence, sabotage, destruction of property,
 13 intimidation and coercion, and by similar means to retaliate against the conduct of
 14 government, commerce and private business." *Id.* Accordingly, the Court should not
 15 impose this enhancement.

16 If the Court does impose the enhancement, the Court can adjust downward
 17 under § 4A1.3(b), where the criminal history category substantially over-represents
 18 someone's criminal history/propensity. *See United States v. Benkahla*, 501 F.
 19 Supp.2d 748, 758-59 (E.D. Va. 2007), *aff'd*, 530 F.3d 300 (4th Cir. 2008); *United*
 20 *States v. Meskini*, 319 F.3d 88, 92 (2nd Cir. 2003). Given the advisory nature of the
 21 Guidelines, and the statutory factors under 18 U.S.C. § 3553(a), the Court should
 22 therefore adjust downward.

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 25 ⁷ As the Government has argued previously, Ms. Waters' participation in the offense was less than
 26 that of Mr. Solondz's. *Government's Sentencing Memo* [Solondz], Dkt. No. 535 at 9. It should be
 27 noted that U.S. Probation's responses to Ms. Waters' objections in the "addendum" do not discuss the
 28 *Tankersley* case.

⁸ Prior to the June 2008 sentencing hearing, Ms. Waters filed a lengthy memo regarding this
 enhancement. Dkt. No. 430. These arguments (to the extent they still apply after the guilty plea in this
 case) are incorporated by reference.

1 Other factors that the Court can consider in adjusting downward include Ms.
2 Waters' family circumstances, where she is the main parent of a child who already has
3 been traumatized by one separation. *See United States v. Menyweather, supra; United*
4 *States v. Husein*, 479 F.3d 318, (6th Cir. 2007). In this regard, it is important to note
5 the documentation, from both professional and lay witnesses, of the trauma Ms.
6 Waters' earlier separation caused to her daughter, and how, since her release from
7 prison, her daughter suffers huge anxiety when she is separated from her mother. Ms.
8 Waters not only is the primary caretaker of K.L. (and one who is the most responsible
9 of the parents), but she is also the caretaker who is essential to K.L.'s mental health. In
10 this regard, Ms. Waters is unique caretaker contemplated by the Ninth Circuit:

11 Here, the district court essentially concluded that the relationship
12 between Defendant and her daughter was so unusual that care by others
was not feasible:

13 This case does not simply involve a single mother and
14 child. The facts and circumstances show unusual traumatic
15 circumstances for this mother and child and an unusual
16 relationship between the two. This mother has been the
17 sole parent caring for the child at home and after school.
18 The mother has been consistently employed since the
19 child's birth and her primary source of financial support.
20 The social security benefits the child receives monthly (less
than \$ 400) are minimal and insufficient to support a child.
[Defendant] has a special relationship with this child who
has already lost one parent and has never been without her
sole surviving parent excluding absences during brief trips.

21 The court also relied on the fact that, although Defendant's grandmother
22 and great-aunt live nearby, their housing situation is unsafe.

23 *Menyweather*, 447 F.3d at 632. Just about every single lay and professional person
24 who has viewed Ms. Waters' relationship with K.L. would concur with this type of
25 assessment, that Ms. Waters has a unique role and that prolonged separation would be
26 unusually traumatic.

27 Other grounds for a "downward departure" include (a) a life-time of good
28 works, *see United States v. Canova*, 412 F.3d 331, 343 (2d Cir. 2005); *United States v.*
Taylor, 499 F.3d 94, 99-100 (1st Cir. 2007); and (b) Ms. Waters' substantial

1 assistance to the Government.⁹ With regard to the decision to cooperate with the
 2 Government, the value that a system based upon the Rule of Law places on
 3 transparency and exposure of the truth sometimes can outweigh the need for excessive
 4 punishment. Ms. Waters' decision to come forward and tell the truth about what took
 5 place in 2001 is certainly a factor that a Court should consider under 18 U.S.C. §
 6 3553(a).¹⁰

7 Most importantly, the Supreme Court has approved of consideration of post-
 8 sentencing rehabilitation as a reason to depart downward. *Pepper v. United States*,
 9 ___ U.S. ___, 131 S. Ct. 1229, 179 L.Ed.2d 196 (2011). The Court held:

10 In light of the federal sentencing framework described above, we
 11 think it clear that when a defendant's sentence has been set aside on
 12 appeal and his case remanded for resentencing, a district court may
 13 consider evidence of a defendant's rehabilitation since his prior
 14 sentencing and that such evidence may, in appropriate cases, support a
 15 downward variance from the advisory Guidelines range. . . .

16 . . .

17 As the original sentencing judge recognized, the extensive
 18 evidence of Pepper's rehabilitation since his initial sentencing is clearly
 19 relevant to the selection of an appropriate sentence in this case. Most
 20 fundamentally, evidence of Pepper's conduct since his release from
 21 custody in June 2005 provides the most up-to-date picture of Pepper's
 22 "history and characteristics." § 3553(a)(1); see *United States v. Bryson*,
 23 229 F.3d 425, 426 (CA2 2000) ("[A] court's duty is always to sentence
 24 the defendant as he stands before the court on the day of sentencing"). At
 25 the time of his initial sentencing in 2004, Pepper was a 25-year-old drug
 26 addict who was unemployed, estranged from his family, and had recently
 27 sold drugs as part of a methamphetamine conspiracy. By the time of his
 28 second resentencing in 2009, Pepper had been drug-free for nearly five
 years, had attended college and achieved high grades, was a top
 employee at his job slated for a promotion, had re-established a

23 ⁹ U.S. Probation concludes that Ms. Waters obstructed justice when she perjured herself at the trial
 24 in 2008 and that her scoring should be adjusted upward. ¶ 27. It is hard to understand how exactly this
 25 fits in to a Guidelines' analysis because of the reversal of the earlier convictions, and then, instead of
 26 going to trial again, Ms. Waters pled guilty and agreed to cooperate with the Government, and she is now
 being sentenced for the new convictions. In any case, when Ms. Waters again had a choice as to how
 to proceed, she made a decision to come forward and tell the truth.

27 ¹⁰ Legal systems based upon the Rule of Law have used differing methods for addressing past
 28 "political" offenses. For one example of how a common-law jurisdiction handled this issue in structured
 legal proceedings that balanced the need for exposure of the truth versus the need for punishment,
 reference can be made to South Africa's Truth and Reconciliation Commission.

1 relationship with his father, and was married and supporting his wife's
2 daughter. There is no question that this evidence of Pepper's conduct
3 since his initial sentencing constitutes a critical part of the "history and
4 characteristics" of a defendant that Congress intended sentencing courts
5 to consider. § 3553(a).

6 131 S. Ct. at 1241-42.

7 A review of the support letters written about Ms. Waters' after she was released
8 from prison demonstrates her essential humanity and positive community involvement.
9 These letters show the most up-to-date picture of Ms. Waters "history and
10 characteristics." Her devotion to her daughter; her involvement in her daughter's
11 school; the musical joy she creates; the deep and lasting impressions she has made to
12 people who did not even know her previously, as well as the fact that many of her
13 friends have stuck by her without regard to whether she pled guilty to arson -- all of
14 this is evidence that Ms. Waters has been rehabilitated.

15 In light of all these factors, the agreed-upon sentencing of 48 months
16 imprisonment is the appropriate one under the Guidelines and § 3553(a).

17 **V. DESIGNATION**

18 Ms. Waters, her friends and family, and those in her community are concerned
19 that BOP will place Ms. Waters in a prison on the other side of the North American
20 Continent, as it did four years ago. It is safe to say that such a placement will not
21 contribute at all to any rehabilitation of Ms. Waters, nor will this placement be
22 necessary to "protect" society. She will not learn any additional vocational skills in a
23 prison on the East Coast nor does she have a substance abuse problem that will (or can)
24 be treated there. Such additional time in Danbury really and truly will be "dead" time.
25 Moreover, such a decision by BOP will once again cause Ms. Waters' daughter to be
26 separated from her mother, with all of the harm that can be caused by such separation.

27 Therefore, while Ms. Waters asks the Court to sentence her to 48 months
28 imprisonment in the Bureau of Prisons, she is asking that the Court make an advisory
recommendation under 18 U.S.C. § 3621(b) as to designation, not to a prison, but
rather that she be imprisoned in a half-way house run under BOP's authority. As

1 noted, under the Second Chance Act, 18 U.S.C. § 3624, because Ms. Waters will have
2 less than 12 months to serve before she is released, Ms. Waters is eligible for
3 immediate placement in a half-way house.

4 Ms. Waters specifically requests placement at the Cornell Corrections-Oakland
5 facility. This facility is the one that is closest to Ms. Waters' daughter. While no one
6 can ever guarantee what BOP will do, a strongly worded recommendation from the
7 Court to BOP, if followed, will allow Ms. Waters to work in a job that will produce
8 significant income to pay back the costs of her incarceration (prisoners pay 25% of
9 their gross income), to support her daughter and to pay restitution. Designation to the
10 Oakland half-way house will minimize any further trauma that K.L. suffers from the
11 separation from her mother.

12 As Ms. Waters writes in her statement to the Court,

13 [I]f there is a way to punish me without punishing my child, I trust that
14 you as a judge will be able to come up with that solution. I deserve to
15 face the consequences for such shameful conduct 11 years ago. I want to
16 make amends however I can to the victims and to society as a whole. Yet
17 I also want my daughter to have the best chance at being a productive,
18 responsible and law abiding citizen that she can. I doubt she will have
19 this chance with continued re-traumatization at such a young age. I know
20 that there must be some way to save her; to punish only me and not her
21 anymore.

22 Alternatively, the Court should recommend FCI Dublin.

23 **VI. SELF-REPORTING**

24 Ms. Waters has been completely responsible on pre-trial release since October
25 2010. To allow her to be designated to the proper facility may require input and
26 coordination. The defense concurs with U.S. Probations' suggestion that she be
27 allowed to self-report.

28 **VII. OTHER ISSUES**

In terms of restitution, Ms. Waters should get credit for the amount of funds
she has already paid toward this obligation after the first sentencing.

As for supervised release, Ms. Waters has been on pre-trial release since her
release from Danbury in October 2010. Imposing a lengthy term of supervised release

1 after her re-release from prison in a year or so from now does not make a whole lot of
2 sense. Accordingly, under 18 U.S.C. § 3583, if the Court imposes supervised release,
3 the length should be one year.

4 The special terms of supervision, proposed by U.S. Probation, include
5 participation in a mental health program. It is not clear where this proposal comes
6 from, and, given the circumstances, the condition is not appropriate.

7 Finally, jurisdiction for supervised release should be transferred under 18
8 U.S.C. § 3605 to the Eastern District of California.

9 **VIII. CONCLUSION**

10 The Court should follow the joint recommendation of the parties. While
11 nothing can ever rebuild the damage caused by Ms. Waters' actions, she hopes that
12 this Court will recognize her life in the intervening years supports the conclusion that
13 48 months imprisonment, with credit for time served and a recommendation for
14 designation in a half-way house, is the appropriate way to put closure on the events of
15 2001.

16 DATED this 18th day of June 2012.

17 Respectfully submitted,

18 /s/ Neil M. Fox
19 NEIL M. FOX
20 WSBA NO. 15277
21 Attorney for Defendant
22 Law Office of Neil Fox, PLLC
23 2003 Western Ave. Suite 330
24 Seattle WA 98121

25 Telephone: 206-728-5440
26 Fax: 206-448-2252
27 e-mail: nf@neilfoxlaw.com
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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to attorney of record for the Plaintiff and all other parties.

/s/ Neil M. Fox
NEIL M. FOX
WSBA NO. 15277
Attorney for Defendant
Law Office of Neil Fox, PLLC
2003 Western Ave. Suite 330
Seattle WA 98121

Telephone: 206-728-5440
Fax: 206-448-2252
e-mail: nf@neilfoxlaw.com

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