UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 13-287 (MJD)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	GOVERNMENT'S POSITION
v.	)	WITH RESPECT TO SENTENCING
	)	
PAUL KALASH,	)	
	)	
Defendant.	)	

The United States of America, by and through its attorneys John R. Marti, Acting United States Attorney for the District of Minnesota, and Assistant United States Attorney Charles J. Kovats, Jr., hereby submits its position with respect to the sentencing of defendant Paul Kalash ("the defendant").

I. THE CASE AGAINST THE DEFENDANT

A. The Charge of Conviction

On March 19, 2013, defendant Paul Kalash pleaded guilty to Smuggling Goods from the United States, in violation of Title 18 U.S.C. § 554. This offense carries a statutory maximum sentence of 10 years' imprisonment, a three-year term of supervised release, a $250,000 fine, and a $100 special assessment.

B. The Defendant's Relevant Conduct

1. The Factual Basis in the Plea Agreement

As agreed to by the parties in the plea agreement:

> On February 22, 2011, U.S. Customs and Border Protection ("CBP") Officers in Chicago seized two packages that the defendant shipped to O.T. an address in Kharkov, Ukraine. The first shipment contained one firearm

stock and seven boxes containing 600 rounds of ammunition. The parcel's label described the contents as "plastic stock and hunting metal tools." The second parcel contained eight boxes of approximately 2000 rounds of ammunition. The parcel was labeled as "hunting metal tools."

On March 6, 2011, a third package sent by the defendant to "O.T." at the same Kharkov, Ukraine, address was seized by CBP. The box was labeled "hunting metal tools" and contained 1700 rounds of ammunition.

On March 10, 2011, a fourth package sent by the defendant to "I.T." at the same Kharkov, Ukraine, address was seized by CBP. The box was labeled "metal hunting tools" and contained 1700 rounds of ammunition.[1]

On March 7, 2011, CBP sent the defendant a Notice of Seizure to his Plymouth, Minnesota residence explaining that his February 22, 2011, shipment was seized under Title 22, United States Code, because the ammunition he sought to export was considered a defense article identified on the United States Munitions list. The Notice also informed the defendant that a license was required to export such controlled defense articles.

On April 1, 2011, CBP officers seized another shipment from the defendant to "K.O.T." at the same Kharkov, Ukraine, address which contained 950 rounds ammunition and five boxes that contained 100 9mm shell cases. The package was labeled as "metal hunting tool (sic)." On the same day, two more packages sent by the defendant were seized. Both were addressed to "Y.S." at a different address in Kharkov, Ukraine. Contained in the first parcel were two boxes of rifle shell cases, 700 rounds of assorted ammunition, and one box containing 100 9mm Luger shell cases; in the second parcel, 1200 rounds and 100 9mm Luger shell cases.

On April 3, 2011, the defendant responded to the Notice of Seizure and requested that the items seized be returned. Included in this response was a notarized letter signed by the defendant in which he stated that he sent the firearm stock and 600 jacketed bullet tips to Ukraine for the purpose of providing his friend with better marksmanship competition-grade ballistics. In the same letter, the defendant asked that his items be returned and stated, "In the future I will not send these items."

On May 6, 2011, CBP Officers seized another parcel shipped by the defendant. This shipping label falsely listed the sender as "Ralph Carlson"

[1] In re-reviewing the case materials, the government believes the actual number of rounds contained in this parcel is 900.

> with a fictitious address in Brooklyn Center, MN. This parcel was addressed to "V.K.'" of Kharkov, Ukraine. The shipping label described the contents as "Tools." Inside the parcel were 950 rounds of assorted ammunition.
>
> When federal agents interviewed the defendant at his residence on October 13, 2011, the defendant admitted that he had shipped ammunition and other items to his friend in the Ukraine. He explained the ammunition was used for competition shooting by his friend. The defendant stated that all the parcels - regardless of the name used on the label - were shipped to his friend who had asked him to ship the ammunition to Ukraine because he was unable to purchase the items himself. The defendant cooperated with the agents when he voluntarily provided agents with copies of shipping receipts he retained which documented other shipments to Ukraine about which the government was not yet fully aware.

2. Additional Facts Described in the PSR

The PSR also notes that the defendant informed the probation officer that he sent the ammunition to an associate named "Igor" who runs a sporting goods store in Ukraine. (PSR ¶ 18). The defendant also asserted that "Igor" intended to use the ammunition for "hunting" or "sport-related" purposes. (Id.). In addition to ammunition, the defendant stated that he sent hunting bows and clothing to "Igor" as well. (Id.).

According to the defendant, he purchased ammunition through online retailers using money wired by "Igor" to his Wells Fargo Bank account. (PSR ¶ 19). The defendant claims he received only nominal payments from "Igor" in exchange for smuggling the ammunition out of the United States. (PSR ¶ 21).

3. The Pertinent Guideline Calculations Agreed to By the Parties

In the plea agreement, the parties agreed to the following Guideline calculations:

Base Offense Level, § 2M5.2(a)(1):	27	(Plea Agreement, para. 6(a))
Acceptance of responsibility, §§ 3E1.1(a), (b):	-3	(Id. para. 6(b))

The defendant reserved the right to argue that a departure under Application note 1 to § 2M5.2, is appropriate because his conduct did not have the "potential to be harmful to a security or foreign policy interest of the United States." (Id. para. 6).[2]

The parties agreed that no other Chapter 3 adjustments applied. (Id. para. 6(b)).

The parties also agreed that the defendant's Criminal History Category would likely be I. (Id. para. 6(c)).

II. THE PSR's CALCULATIONS AND RECOMMENDATIONS.

On or about June 27, 2013, the United States Probation Office disclosed the PSR in this case. The PSR calculates defendant's applicable guideline range at 46-57 months' imprisonment, based on a total offense level of 23, criminal history category I, and a statutory maximum sentence of 10 years' imprisonment. (PSR ¶ 67). The PSR guideline calculations are summarized as follows:

Base Offense Level, § 2M5.2):	26	(PSR ¶ 23)
Victim Related Adjustments:		
Acceptance of responsibility, §§ 3E1.1(a), (b):	-3	(PSR ¶¶ 30-31)
Total Offense Level:	23	(PSR ¶ 32)
Criminal History Category:	I	(PSR ¶ 38)
Guideline Range:	46-57 months	(PSR ¶ 67)
Supervised Release:	Up to 3 years	(PSR ¶ 71)
Fine:	$10,000-$100,000	(PSR ¶ 76)

[2] A defendant seeking a downward departure from an otherwise applicable sentence bears the burden of proving he is entitled to the reduction by a preponderance of the evidence.

The PSR also indicates that the information provided does not constitute a recommendation by the USPO for a departure or a variance. (PSR ¶ 82).

IV. GOVERNMENT'S RESPONSE TO THE PSR.

A. Objections to the PSR

The government has no objections to the PSR.

B. The Government's Guideline Calculations

The government agrees with the both the factual summary and the guideline calculations in the PSR. The government does not believe any other Specific Offense Characteristics or Victim-Related Adjustments are appropriate. The government also concurs that the appropriate guideline range is 46-57 months' imprisonment based on Total Offense Level of 23 and a Criminal History Category of I.

III. THE GOVERNMENT'S ANALYSIS UNDER 18 U.S.C. § 3553(A).

In *Gall v. United States*, 552 U.S. 38 (2007), the Supreme Court set forth the appropriate sentencing methodology: the district court calculates the advisory Guidelines range and, after hearing from the parties, considers the 18 U.S.C. § 3553(a) factors to determine an appropriate sentence. 552 U.S. at 49-50; *United States v. Ruvalcava-Perez*, 561 F.3d 883, 886 (8th Cir. 2009) ("In sentencing a defendant, the district court should first determine the appropriate Guidelines range, then evaluate whether a traditional departure is warranted, and finally decide whether or not to impose a guideline sentence after considering all the § 3553(a) sentencing factors").

The district court may not assume that the Guidelines range is reasonable, but instead "must make an individualized assessment based on the facts presented." *Id.* at 50.

If the court determines that a sentence outside of the Guidelines is called for, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.* Section 3553(a) requires the Court to analyze a number of factors, including, "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the need for the sentence to reflect the seriousness of the offense," "the need for deterrence," "the need to protect the public from further crimes of the defendant," and "the need to avoid unwarranted disparities." 18 U.S.C. § 3553(a).

A. Nature and Circumstances of the Offense.

As described in the plea agreement and PSR, the defendant repeatedly and illegally shipped ammunition from the United States to Ukraine. The defendant did so knowing it was wrong. Worse yet, he continued to do so even after having been caught.

Specifically, the defendant initially misrepresented the nature of what he unlawfully smuggled ("hunting tools") to a fictitious user ("O.T") in Ukraine on each parcel's customs declaration to avoid detection. Later, after several shipments were seized by the United States government, he was advised explicitly that he could not ship ammunition because ammunition was a "defense article" identified on the United States Munitions list. The notice also informed the defendant that a license was required to export ammunition.

Notwithstanding this unambiguous – but not yet punitive – message delivered to him by the United States government: "You can't keep doing what you're doing," the defendant pressed on. Indeed, the defendant redoubled his efforts to conceal his illegal smuggling operation. No longer did the defendant merely misrepresent what he was

sending and to whom he was sending it, the defendant then elected to ship his parcels using an alias and fake address.

In total, the defendant smuggled between 10,000 and 25,000 rounds of ammunition to Ukraine.[3] The government has obtained no direct evidence or information to refute or to corroborate the defendant's claim that the ammunition he smuggled to Ukraine was for his friend "Igor" to consume for "hunting" or "sport-related" purposes. However, the sheer quantity of ammunition (even if considering only the 10,000 rounds *actually seized*) and the numerous types of ammunition (supporting at least nine different firearms) smuggled over a relatively short period of time (about 6 weeks) strongly suggests that "Igor" might not be the only consumer of this ammunition.

Whether or not the ammunition was used by "Igor" alone (or, if not, whether or not the defendant knew what "Igor" was doing with this ammunition) may never been known. However, it is precisely because of this ambiguity that the United States saw fit to control the delivery of ammunition from the United States. Additionally, the fact that the defendant sent the ammunition to "Igor" because "he was unable to purchase the items himself" suggests that Ukraine also recognizes the need to control access to ammunition.

[3] More than 10,000 rounds were actually seized by CBP. Based on shipping records obtained by the case agent (some from the defendant himself) and invoices obtained from vendors who sold ammunition to the defendant, the government believes that more than 20,000 rounds of ammunition were sent by the defendant to Ukraine. Further, it should be made clear that vast majority of the ammunition shipped by the defendant was not in final form, rather, was only the projectile itself. Therefore, before becoming a functional bullet, each projectile must undergo a simple machining process in which the projectile is inserted into a metal casing containing powder and a primer.

As described above, the Base Offense Level is 26 pursuant to § 2M5.2 of the Guidelines because the defendant smuggled "more than 500 rounds of ammunition" from the United States. The 12-level increase from a Base Offense Level 14 is not merely a mathematical exercise, but is based on the Sentencing Commission's recent judgment that offenses involving the smuggling of large quantities of ammunition are particularly serious, "[small arms] ammunition typically is sold in quantities of not more than 500 rounds, depending on the manufacturer and the type of ammunition. The Commission determined that, as with export offenses involving more than two firearms, export offenses involving more than 500 rounds of ammunition are more serious and more likely to involve trafficking." *See* U.S.S.G. App. C, Amendment 753, at 404 (2011) (Commentary to § 2M5.2).[4]

B. History and Characteristics of Defendant.

The defendant was born in Kharkov, Ukraine, in 1972. (PSR ¶ 42). In 1997, he and his family left Ukraine because the authorities restricted their freedom to practice their religion; he and his family arrived in the United States as religious refugees. (PSR ¶¶ 45, 46). He became a naturalized U.S. citizen in 2007. (PSR ¶ 42). The defendant is married and, together with his wife, has three young children. (PSR ¶ 48). To his credit, the defendant has lived as an adult in the United States for more than 16 years and has

[4] The government notes the absence of two aggravating factors often present in other smuggling cases: (1) there is no evidence the defendant smuggled weapons from the United States, and (2) there is no evidence the defendant profited in any meaningful way from his ammunition smuggling.

accrued no criminal history (PSR ¶¶ 36-41). Moreover, he has generally been reliably employed. (PSR ¶¶ 58-61).

In mitigation, when approached by law enforcement agents the defendant accepted responsibility for his actions, admitted to his role in the offense, and provided additional incriminating evidence of his own misconduct (in the form of shipping records) to investigating agents.[5] Further, the defendant continued to accept responsibility for his crimes throughout the judicial process. He waived his right to proceed by way of indictment and his right to file pre-trial motions.

C. The Need for the Sentence Imposed to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment for the Offense.

The defendant committed a serious crime when he knowingly smuggled ammunition to Ukraine. Considering the seriousness of this crime, promoting respect for the law and providing just punishment are important factors in this case. Further, the defendant's participation in this offense cannot be viewed as a discrete event occurring at a singular place and time. Indeed, the defendant can fairly be called a "trafficker" of ammunition. Last, the defendant demonstrated his lack of respect for the law when he (1) knowingly smuggled ammunition to Ukraine in violation of U.S. law and (2) when he chose to doing so even after having been caught by CBP. It is important that the Court's sentence generates in the defendant a healthy respect for the law.

[5] At the very outset of the interview, the defendant falsely claimed that (1) he did not send any more packages to Ukraine once he received the notice from CBP, and (2) denied recognized the shipping labels on the parcels he sent after he received the notice from CBP. The defendant did not attempt to maintain these false statements during the course of his interview.

D. The Need for the Sentence to Afford Adequate Deterrence to Criminal Conduct, and the Need for the Sentence Imposed to Protect the Public.

In this case, there is a need for both individualized and general deterrence. Individualized deterrence is that which discourages a defendant from ever committing such a crime again. General deterrence is the public response necessary to deter other people from committing similar crimes. "Congress specifically made general deterrence an appropriate consideration . . ., and we have described it as 'one of the key purposes of sentencing.'" *Ferguson v. United States*, 623 F.3d 627, 632 (8th Cir. 2010) (quoting *United States v. Medearis*, 451 F.3d 918, 920 (8th Cir. 2006)). When sentencing this defendant, the Court should remain mindful that the previous "non-punitive" contact by CBP failed to arrest the defendant's criminal behavior.

E. The Kinds of Sentences Available, the Need to Avoid Disparities and the Sentencing Guidelines and Related Policy Statements.

The Guideline sentencing range for the offense to which the defendant pleaded guilty would be 46-57 months' imprisonment. The government believes that a sentence at or near the Guideline range is appropriate and necessary to satisfy the factors described in 18 U.S.C. § 3553(a).

Dated: October ___, 2013

Respectfully Submitted,

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