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February 26, 2021

US Attorney's Office- SDNY
One St. Andrew's Plaza
New York, New York 10007

Re: *USA v. Tova Noel*
Indictment 19 cr 830 (AT)
Application for Deferred Prosecution

Dear Counsel:

INTRODUCTION

Please accept this submission as Ms. Tova Noel's formal application in support of her request for a deferred prosecution agreement. For the reasons set forth herein, I submit that a deferred prosecution agreement is appropriate and consistent with the principles of federal prosecution as set forth in *Title 9 of the Department of Justice Manual. DOJ Manual, Title 9: Criminal, 9-27.000, et al.* Deferred prosecution is a fair and just resolution of this matter and will satisfy the relevant goals of the criminal justice system. After your review and the review of the U.S. Attorney's committee considering this submission, I am also requesting an opportunity to meet with the decision-making team via videoconference to further discuss why a deferred prosecution agreement is the most appropriate course of action at this time.

The factors that justify a deferred prosecution in this case include, but are not limited to:

- I. The Nature and Circumstances of the Offense
- II. Tova's Background
- III. Adverse Collateral Consequences of a Prosecution and Conviction
- IV. Systemic Issues and Inadequate Training
- V. Existence of Adequate Non-Criminal Alternatives to Prosecution
- VI. Precedent for Prosecution and Deferred Prosecution
- VII. COVID-19
- VIII. Tova's Character

DISCUSSION

I. The Nature and Circumstances of the Offense

Allegations Against Tova Noel

The Government has charged Tova Noel in a six-count indictment alleging that she and her co-defendant conspired to falsely certify that they performed their duties and responsibilities as it relates to conducting the “count” of inmates and make “rounds” to check on inmates. *18 U.S.C. §371* and *18 U.S.C §1001*. In addition to the conspiracy, Tova was charged with substantive counts pursuant to *18 U.S.C. §1001(a)(3) and (2)* that cover conduct from August 9, 2019 through August 10, 2019.

The allegations in this case involve non-violent Class D felonies and carry a maximum sentence of 5 years imprisonment. There is no mandatory imprisonment required. As of December 17, 2019, it has been the Government’s position that the applicable U.S. Sentencing Guidelines would result in a recommended advisory sentencing range of 10-16 months imprisonment.¹ *See December 17, 2019 Pimentel letter, attached hereto as Exhibit A.*

Circumstances of the Offense

Tova did not know who Jeffrey Epstein was prior to his incarceration at the MCC and became aware of his public status after his July 23, 2019 incident in the Special Housing Unit (“SHU”). Her interactions with Epstein were limited because he spent most of his days in the attorney conference room, not in the SHU. Her interactions with Epstein usually took place after 8:00 p.m. Although she was assigned to the SHU, she never received any particular or special instructions on how to monitor Epstein. Tova was not responsible for determining which inmates were housed in the SHU or whether they would have a cellmate. Tova did not receive any specific guidance on how to handle a high-profile inmate like Epstein.

On August 9, 2019, Tova was scheduled to work the 4:00 p.m.-12:00 a.m. shift.² She did not work this shift with co-defendant Thomas. One of the corrections officers that she worked the 4:00 p.m.-12:00 a.m. shift with was working the last of his 3 consecutive shifts.³ During the 4:00 p.m.-12:00 a.m. shift, Tova was advised that she

¹ Note that during the pre-arrest negotiations a formal offer was not provided, however, there were discussions about the possibility of a felony disposition that would include an agreement that called for a suggested sentencing guideline range of 0-6 months.

² Tova usually worked the 4:00 p.m.-12:00 a.m. shift, however, there were days she was also assigned to the 2:00 p.m.-10:00 p.m. shift. Most of the time the 2:00 p.m.-10:00 p.m. shift was not mandated to work overtime. The reasons for that are not essential to this application.

³ Working 3 consecutive shifts (24hrs) is a violation of BOP policy and possibly a violation of Federal and State employment laws. The triple shift is a symptom of the staffing issues at the MCC. The

was selected for mandated overtime and was required to work the 12:00 a.m.-8:00 a.m. shift with her co-defendant. The triple shift worked by Tova's colleague and her mandated overtime were required due to significant long-term understaffing issues at the MCC. The MCC staffing issues existed prior to Tova's employment, which commenced on or about June 24, 2018, and have progressively worsened over time.

Tova was first assigned to work the SHU when she returned to work from an injury on or about June 26, 2019. August 10, 2019 was the first time she worked the 12:00 a.m.-8:00 a.m. shift.⁴ Furthermore, it was also the first time Tova worked the SHU with her co-defendant. Prior to August 9, 2019, Tova was able to avoid working this undesirable shift by signing up for "quasi" voluntary overtime. Tova would regularly sign up for the 8:00 a.m.-4:00 p.m. shift, which was immediately prior to her regular shift, to avoid being mandated for the 12:00 a.m.-8:00 a.m. shift. However, on August 9, 2019, Tova was unable to work the 8:00 a.m.-4:00 p.m. shift because she had a personal appointment earlier that day.

On August 10, 2019, there was no discussion or agreement between Tova and her co-defendant that the paperwork required to certify the counts and rounds would be completed and submitted for the purpose "to conceal their failure to perform their duties."⁵ Tova had every expectation that she would perform all her duties and responsibilities.

Upon information and belief, the co-defendant was working a "quasi" voluntary overtime shift before his normal 8:00 a.m.-4:00 p.m. shift in the warehouse. After Tova prepared the paperwork for the counts and rounds at the beginning of the shift, Tova attempted to perform the 12:00 a.m. shift. However, when she asked the co-defendant to assist her, he denied her request because he deemed it unnecessary since he was made aware that the 10:00 p.m. count was conducted late. Shortly thereafter, co-defendant sat down, pulled his hoodie over his head, and fell asleep. When it was time to perform the rounds and the 3:00 a.m. and 5:00 a.m. counts, Tova attempted to wake him up, but he refused to do so. Knowing that her colleagues were overworked, Tova was not initially alarmed by the situation. Tova's willingness to conduct counts was demonstrated by the fact that she assisted another colleague with a count in a separate area of the SHU, which is corroborated by video surveillance in discovery. Having never received the required SHU training, Tova learned her duties and responsibilities by modelling the conduct of the more senior officers she worked with. In Tova's limited experience as a correctional officer, the rounds were never routinely conducted in the SHU during her time there.

corrections officer who worked the triple had difficulty staying awake during his final 4:00 p.m.-12:00 a.m. shift and he slept for portions of the shift.

⁴ The records provided by the Government in discovery inaccurately reflect that Tova previously worked this shift in the past. The MCC rosters commonly reflected inaccurate assignments and were not appropriately updated.

⁵ Quoted language was from page one of the indictment in this case.

During the 12:00 a.m.-8:00 a.m. shift, there is no movement of inmates, which makes this shift different from the day shift. Tova, having conducted the count in the prior shift⁶, knew exactly how many inmates were on each tier and that they would not be moved until after midnight. Tova exercised poor judgment by concluding that knowing the number of inmates and certifying the number of inmates on each tier was sufficient to clear the count.

Tova was also aware of the regular use of drugs by inmates in the SHU. There has been significant use of synthetic marijuana (K2) by inmates in the SHU and throughout the MCC. Correctional officers at MCC had ongoing concerns about how secondhand smoke from these illicit drugs would affect them while on the job and long term. Tova has witnessed the fog of smoke in the SHU and experienced illness that she believed was associated with breathing in secondhand smoke from the inmates. Prior to August 10, 2019, Tova experienced headaches and nausea, which was an ongoing pre-existing condition that was exacerbated by the conditions at MCC.⁷

As the shift approached the final two hours of the 12:00 a.m. – 8:00 a.m. shift, Tova started to prepare for breakfast. After several hours of sleep, the co-defendant decided to get up and assist Tova with their duties and responsibilities. Before the co-defendant went down the tier where Jeffery Epstein was housed, Tova asked him to cover for the colleague she did the 3:00 a.m. and 5:00 a.m. count with because their colleague wanted to get something to eat. After the co-defendant covered for the colleague, the co-defendant entered the tier where Jeffery Epstein was housed. At approximately 6:33am, Epstein's body was discovered by the co-defendant. When Tova heard the co-defendant's call for help, she sent the alarm and the emergency personnel responded.

Tova did not attempt to deceive or frustrate the emergency response. She did not provide any false information regarding what occurred during her shift after the commencement of the emergency. According to the indictment, Tova and the co-defendant immediately indicated to a superior officer that they "did not complete the 3:00 a.m. or 5:00 a.m. rounds", "we messed up", and "I messed up, she's not to blame, we didn't do any rounds."⁸ There was no attempt to cover up a crime or misconduct. In fact, at no time did Tova suspect that she had committed a crime. Based upon the reaction of her co-defendant and other responding officers, she erroneously concluded that she was merely exposed to the possibility of being written up or may face other employment discipline.

Tova's first consultation with my office was on August 12, 2019. The immediate decision to seek counsel was triggered because, to her surprise, there was

⁶ During the trial, this fact will be disputed.

⁷ Tova's most recent hospital visit due to headaches occurred on February 21, 2021 at New York Presbyterian Hospital. Upon request, the discharge papers can be provided for your review.

⁸ According to the indictment the last two quotes are attributable to the co-defendant.

a criminal investigation being conducted. On August 14, 2019, I accepted service of a grand jury subpoena mandating that Tova testify and give evidence regarding alleged violations of 18 U.S.C. §§371, 1001, 1519. *See August 14, 2019 Grand Jury Subpoena and Rider, attached hereto as Exhibit B.* As per the advice of counsel, Tova exercised her right to remain silent and voluntarily provided her cellphone to law enforcement on August 16, 2019 to assist in the criminal investigation and permit a forensic analysis.

Tova attempted to negotiate an agreement with the Government that would avoid criminal allegations. Efforts to reach an agreement with the Government were made prior the November 19, 2019 arrest and conducted without the benefit of discovery. This submission is Tova's formal attempt to reach an appropriate agreement post indictment. The following information is being provided for the sole purpose of reaching a deferred prosecution agreement with the Government.

II. Background of Tova Noel

Early Personal History

Tova Noel was born on [REDACTED] in Antigua. She was raised by her single mother, Dr. Sylvia Ephraim, her grandparents, and other extended family.⁹ Her mother left Antigua to come to the United States to pursue her education.¹⁰ On July 4, 2002, when Tova was 13 years old, she migrated to the United States to be with her mother. By the time Tova came to the United States, her mother had gotten married and had a child from that union. [REDACTED]

When Tova came to the United States her family was living in the Pocono region of Pennsylvania.¹² At the age of 14, she was required to take a placement test for the Pocono Mountain East school district and based upon her score, she was placed in the 10th grade. Tova excelled in school that year. The next year, her family moved to the Bronx, New York, where Tova continued to excel academically in the 11th grade. The summer before her senior year in high school, her family decided to move back to Pennsylvania. She continued to do well academically, but after her experience in New York City, she knew that she would one day return. Tova graduated from high school at the age of 16 in 2005.

⁹ Her father, Jerry Noel, lives in Antigua. However, Tova's contact with him is very limited. She also has several half siblings on her father's side.

¹⁰ Dr. Sylvia Ephraim is a college professor who obtained her doctorate in Philosophy in Organization and Management.

¹¹ Joseph is a student at the University of Northwestern Ohio.

¹² 200 White Pine Trail, Tannersville, PA

Post High School (2005-2008)

After graduating high school and turning 17 years old, she attempted to enlist in the military. She was unsuccessful because her mother refused to give the military authority to enlist a minor. At the age of 18 years old, Tova left home by herself and returned to New York City. Tova lived with a friend she met when she attended high school in New York City and her friend's older cousin. After struggling to work low level jobs while attending the Borough of Manhattan Community College, Tova decided to temporarily suspend her studies and returned to Antigua to consider what she wanted to do with her life.

In 2007 she returned to the United States and lived in New York City. She met a young man named Kevin Christian. Within a year's time, Tova married Mr. Christian. They ultimately separated some time in 2011 and eventually amicably divorced.

Military Service (2008-2014)

In 2008, Tova no longer needed her mother's permission to enlist in the United States Armed Services. On May 2, 2008, Tova enlisted in the Army National Guard and began to serve our country.



She did her training in Texas and South Carolina. Upon completion of her training, she was assigned to be stationed in Buffalo, NY. Because her husband was in New York City, she was able to be assigned to Buffalo and physically serve in Queens, NY. Tova earned an honorable discharged from the Army on May 1, 2014. *See Department of the Army and the Air Force National Guard Bureau Report of Separation and Record of Service; Certificate of Release or Discharge from Active*

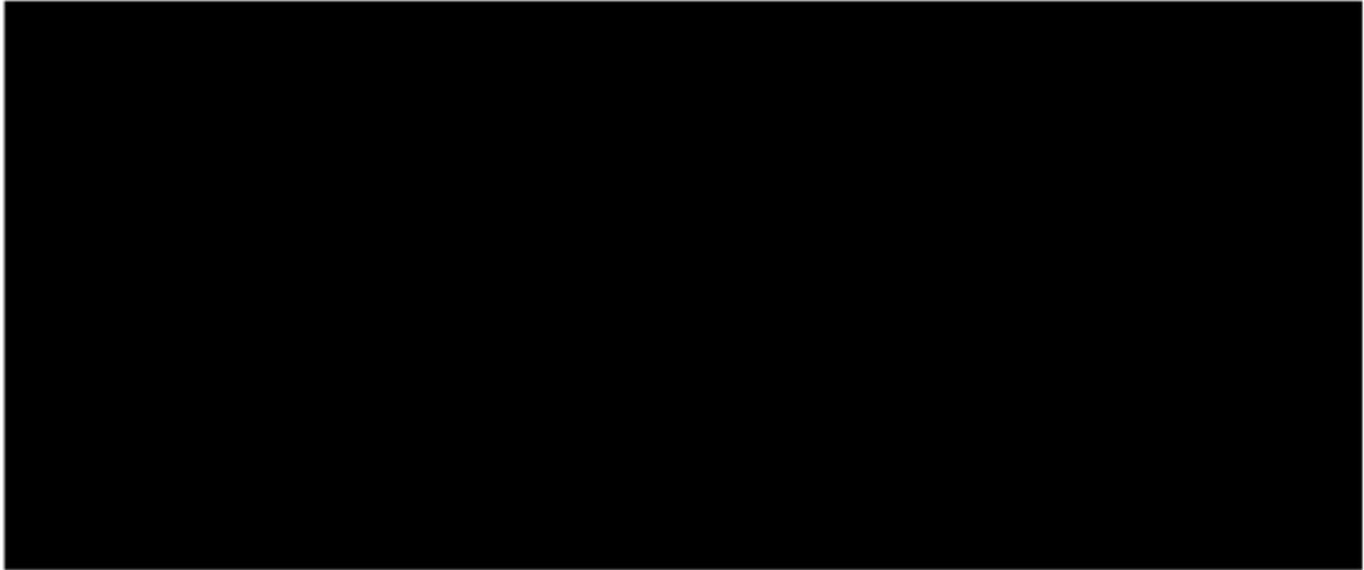
Duty; NY Army National Guard Recognition of Service; Certificate of Honorable Discharge, attached hereto as Exhibit C.

While serving our country, Tova became a Naturalized Citizen on April 10, 2009. *See USA Certificate of Naturalization, attached hereto as Exhibit D.* During her 6 years of service to the United States of America, Tova attained the rank of E4 Specialist. She spent approximately 4 years as a Patient Administrative Specialist. As part of her role as a Patient Administrative Specialist, Tova earned the following certifications:

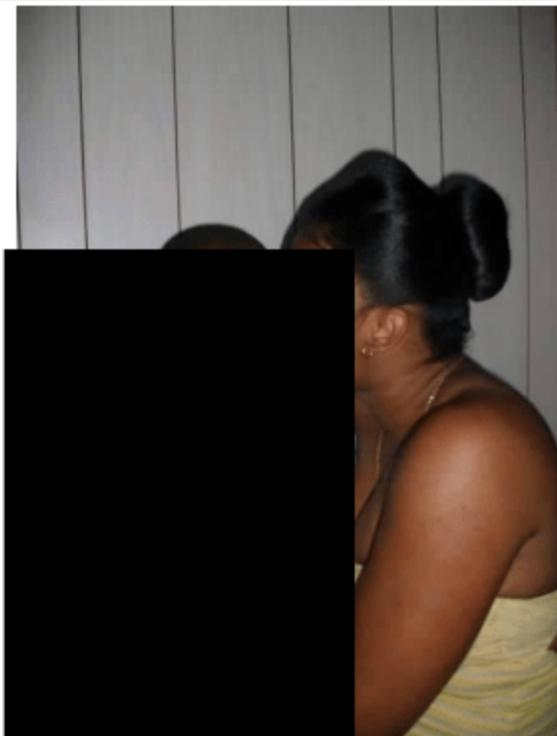
- FEMA certified Command System ICS 100, ICS200b
- Diploma in Patient Administration for the U.S. Army Academy of Health and Science, Houston, TX (2008)
- Certificate in Emergency Medical Technician, New York State EMT, Bronx, NY (2010)

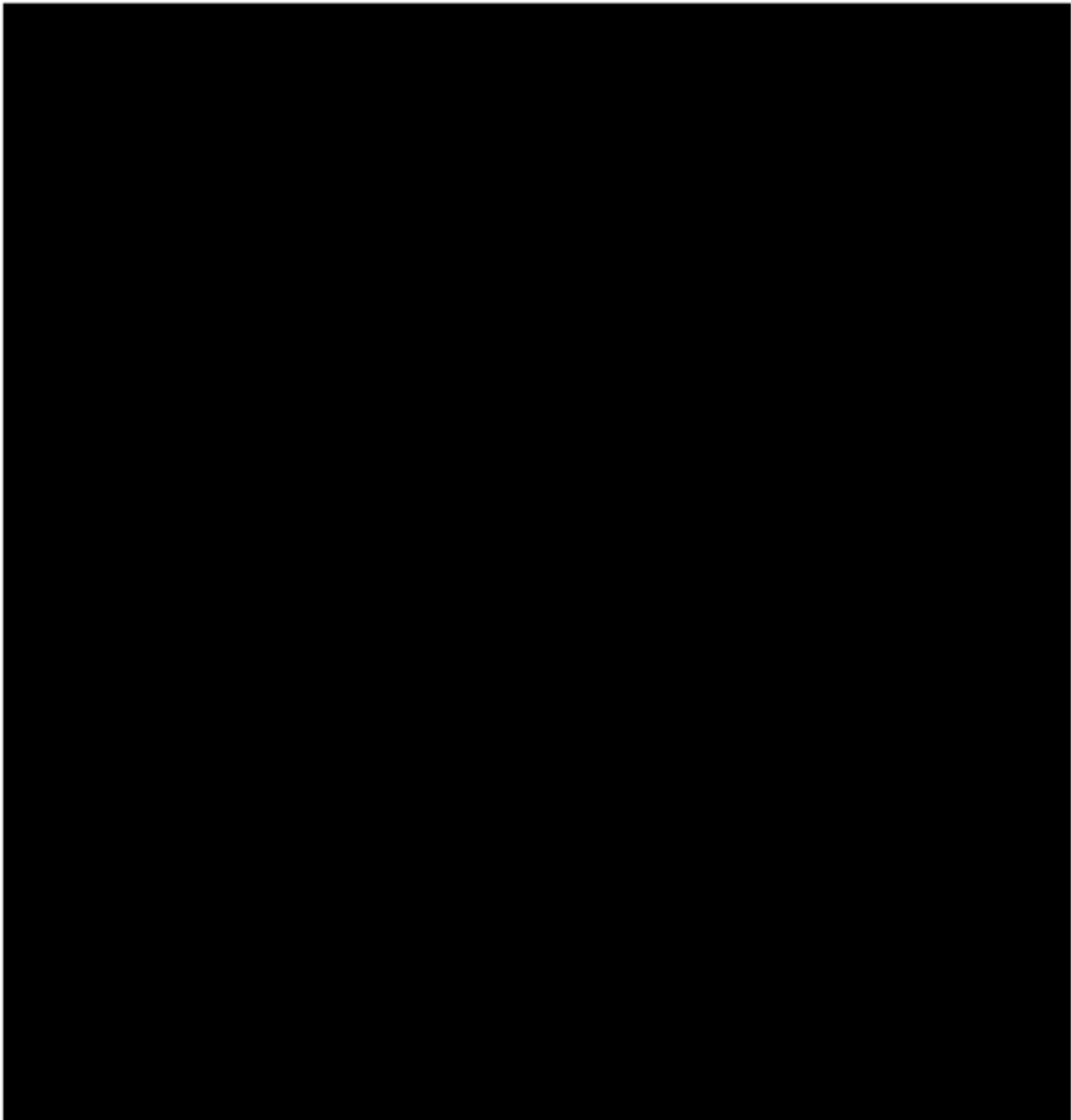
In 2012, Tova was deployed to Kuwait for active duty in support of Operation Enduring Freedom.





Family Tragedy





Continued Education and Employment (2008-2018)

While serving in the National Guard, Tova was able to work and attend school. During her military service she worked security at Macy's (October 2008-January 2009), EMT-B at Transcare Ambulance (January 2009-July 2011), and as a Life Skills Instructor at Ability Beyond Disability (November 2011-January 2013. *See Tova Noel Resume, attached hereto as Exhibit F.* During her final year in the military Tova took courses at ASA College in New York City and earned an Associate of Applied Science Degree in Criminal Justice on November 24, 2014. Tova achieved a

cumulative GPA of 3.90. *See ASA College Degree of Associate in Applied Science in Criminal Justice and ASA Unofficial College Transcript, attached hereto as Exhibit F.*

After being honorably discharged, Tova enrolled in John Jay College of Criminal Justice where she majored in criminal justice and minored in law. While attending John Jay she held the following positions:

- Intern/Case Manager for EAC Bronx TASC (June 2014-September 2014)
- Toll Booth Cashier for the MTA Bridge and Tunnel (June 2014- April 2016)
- Cashier for Home Depot (Bronx) (January 2017- August 2017)

On May 1, 2017, Tova graduated with a Bachelor of Science Degree in Criminal Justice from John Jay College.



She graduated with a 2.97 cumulative GPA. *See John Jay College of Criminal Justice Degree of Bachelor of Science and John Jay Transcript, attached hereto as Exhibit F.* After graduation she secured employment with the federal government as a mail handler assistant with the United State Postal Service in White Plains, NY in August 2017.

Employment with MCC (June 2018-August 2019)

Tova left the USPS to join the Federal Bureau of Prisons at MCC. Tova started at MCC on June 24, 2018. When her employment commenced, she received two weeks of training that was primarily conducted in a classroom setting. After the in-class training, she was assigned to several correctional officers for a short period of time to teach her to do the job. During this initial process, she learned that there is the “BOP way” and there is the “MCC way.” Tova noticed that the “MCC way” was inconsistently applied depending on which correctional officer was instructing her.

In August of 2018 she participated in what was supposed to be a 3-week training in Glynco, GA. The training primarily focused on correctional officer's duties and responsibilities as they related to compounds and camps. There was very little specific training about high rise facilities like MCC. The 3-week training was cut short due to a Hurricane and Tova returned to New York.

When she returned to MCC she was assigned to work units by herself. In the beginning, she had to work through her fear and anxiety. Over time she was able to manage her fears and anxiety, however, the MCC work environment was oppressive. For example, during the probationary period she was required to rotate through the 3 main shifts (i.e., 8:00 a.m.-4:00 p.m., 4:00 p.m.-12:00 a.m., 12:00 a.m.-8:00 a.m.) every 3 weeks. It made it difficult to adjust her sleep patterns during this phase of her employment.

The shortage of staff at MCC was one of the biggest factors that contributed to Tova's oppressive and dysfunctional employment experience. Because of the staff shortage, Tova and her colleagues were forced to work many overtime shifts. These forced overtimes were called "mandations". Tova had multiple experiences where she was required to work 4 back-to-back double shifts. The "mandations" became so frequent, that Tova was forced to call in sick on multiple occasions just so she could get sufficient sleep. Tova has experienced dozing off behind the wheel at traffic lights while driving home from work. Her migraines became more regular and her overall health was compromised by the work schedule and related work stress.

Some of the stress was created by the challenge of obtaining limited parking for work. Tova drove to work because she was not comfortable taking public transportation after midnight to the South Bronx where she lived. To get parking, she would need to arrive to work at 5:00 a.m. and sleep in her car until it was time to report for her "quasi" voluntary overtime at 8:00 a.m. She regularly signed up for the 8:00 a.m. overtime shift to avoid getting mandated for overtime for the 12:00 a.m.-8:00 a.m. shift.¹³

Due to the employees being overworked, the occurrences of absenteeism and tardiness were normalized. When a coworker was late to relieve Tova from a shift, she would be required to stay at her post until the co-worker arrived. Tova experienced this on multiple occasions. When this would occur, she would finish her double shift, leave the facility late due to the tardiness of her relief, and still need to get back to MCC by 5:00 a.m. to secure her parking. Tova was forced to work so many overtime shifts, that from her start date in June 2018 through December 2018, she earned her annual base salary during that period.

¹³ There were occasions she did not have to work voluntary overtime. Those occasions were when she was assigned to work the 2:00 p.m.-10:00 p.m. shift. MCC could not mandate the 2:00 p.m.-10:00 p.m. shift.

The work environment was further complicated by inmates' drug use. Specifically, MCC was overrun with smoke from marijuana and synthetic marijuana (K-2). Employees had legitimate health concerns related to the K-2. Tova reported feeling nausea and light-headed at times due to the fog of smoke in the SHU and other sections of the facility. *See copy of an email to the Regional Director by then Local 3148 Union President, Serene Gregg, dated February 4, 2019 corroborating the subpar work conditions endured by Tova and her colleagues, attached hereto as Exhibit G.*

During her employment at MCC, Tova received multiple threats from inmates. When she reported the threats, she did not always feel supported. For example, while working Unit 11 North Tova overheard an inmate say he wanted to stab her 3 times. When she notified operations, the inmate was taken to the SHU. After completion of his time in the SHU, the same inmate was returned to Unit 11 North where Tova was still assigned. She did not feel safe or supported by her superiors. There was another incident in the same unit where Tova received a note that specific inmates were planning to sexually assault a female officer. Tova reported the incident and sent an email regarding the incident. Nothing was done. In fact, a lieutenant confirmed he saw the email and stated that the inmates referenced in the note "ain't about nothing" and he concluded that "somebody probably wanted them off the unit."

Tova's experience with MCC was further exacerbated by the culture of dissention among the correctional officers and between the frontline correctional officers and management. Because she was new, some colleagues would attempt to take advantage and have her do what were considered the less desirable duties and responsibilities. This was made possible because MCC has a culture of retaliation against employees who speak up. Upon request, we can produce a November 2010 U.S. Equal Employment Opportunity Commission Final Evaluation Report finding that BOP employees have an unusually heightened fear of retaliation for those that challenge or complain about work conditions or otherwise make themselves unpopular.

On or about March 15, 2019, Tova had an accident and fell on the job. She was injured because of her fall. She took leave and did not return to work until June 26, 2019. When she returned to MCC, she was assigned to the 4:00 p.m.-12:00 a.m. shift in the SHU. Prior to being assigned, Tova never worked in the SHU before. Prior to being assigned, Tova never received the specific training required for the SHU. However, when she reported for work, her lieutenant asked her to sign documentation indicating that she received the necessary training to work in the SHU. Tova informed the lieutenant that she had not received the training. The lieutenant indicated that she was aware that Tova had not received the training, but she told Tova that she needed to sign so that the facility could pass program review. Tova relied on her co-workers to lead her through her duties and responsibilities in the SHU.

Working the SHU was an unpleasant assignment and Tova began sending out applications for other job opportunities. She knew she could not continue to work under the conditions at MCC. Unfortunately, Tova was mandated to work the August 10, 2019 shift in the SHU. Her life has never been the same since.

III. The Adverse Collateral Consequences of a Prosecution and Conviction

Pre-Arrest

The adverse collateral consequences of the prosecution were immediately felt by Tova. She was initially suspended with pay. The media attention surrounding the investigation was something she could not escape. She could not watch the news without some reference to the incident at MCC. Her friends and family would contact her and tell her about all the conspiracies and rumors that were bantered about from August until November.

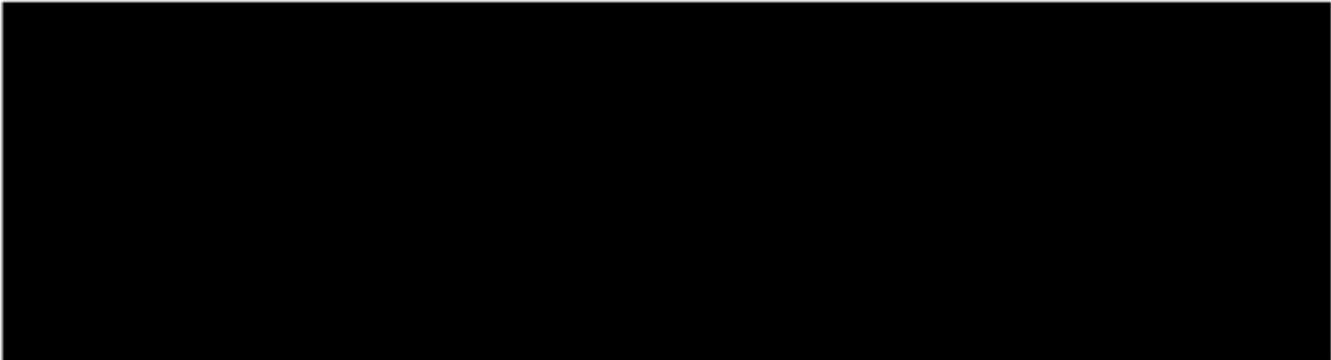
[REDACTED] In September, Tova's grandfather passed away in Antigua. Tova went through the process of executing documents with the Government to avoid any misunderstanding about the reason for her international trip. Although she was not charged with a crime at that time, it was the beginning of her loss of personal autonomy.

Voluntary Surrender

The adverse collateral consequences intensified when Tova voluntarily surrendered to the Government on November 19, 2019. The arraignment was held in a District Court room due to the volume of media and other spectators who were there to support Tova and her co-defendant. When the proceeding concluded and Tova attempted to leave the courthouse, the media reaction was out of control. The scene was outrageous, and it was a miracle that no one was physically hurt. The media hunted Tova down to take her photo and ask questions she was not going to answer. With Tova's permission, I have attached a statement she wrote the week of November 19, 2019. See "*The Journey*" by Tova Noel-November 19-21, 2019, attached hereto as Exhibit H. This contemporaneous statement is being provided to offer a glimpse into Tova's thoughts and feelings. It was drafted without any assistance and neither she nor I knew that we would one day share it with the Government.

On the day of her voluntary surrender, Tova was suspended indefinitely without pay and went from virtual anonymity to her name and face all over the news and social media. The viciousness of some of the media and people on social media was not something Tova was prepared for. The media was camped outside her apartment building for days. She could not leave her apartment. The few times she did, she was harassed. Her neighbors were also harassed with questions about Tova.

Mental Health

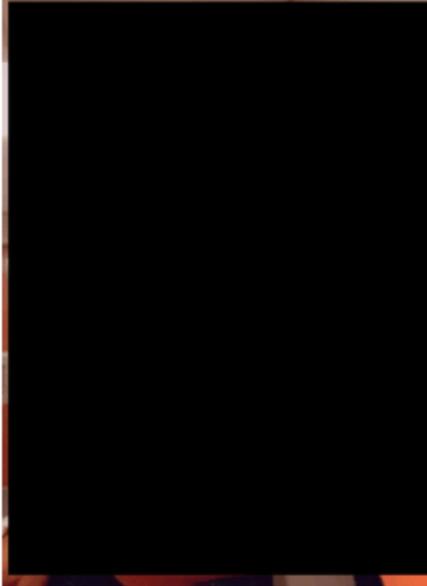


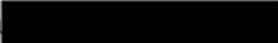
Tova has been overwhelmed by this experience. Prior to the pandemic she would rarely leave her apartment out of fear she will be accosted by the media or random people. Her feeling of security was diminished by the Court order to surrender her firearm, which she had a permit to carry. She has spent a lot of days in the bed feeling stuck in a situation that has occurred due to many circumstances beyond her control.

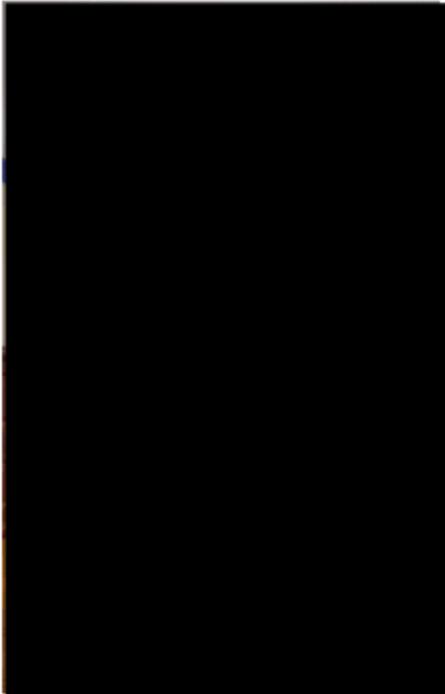
Motherhood

After her arrest, but before the commencement of the pandemic in the United States in March of 2020, Tova rekindled a friendship with Lloyd Gunnings, who she used to date. The relationship with Mr. Gunnings was one of the few bright spots in Tova's life since this case began. Due to certain medical conditions, Tova believed that she could not become pregnant. She was blessedly wrong. 





A conviction that could result in imprisonment would have a devastating impact on Tova  Mr. Gunnings, and the rest of her family. As happy and excited Tova feels about motherhood, she simultaneously experiences anxiety and fear about missing time with her  during a portion of his early months and whether she will be able to find gainful employment as a convicted felon to provide for her new family.



New Employment Opportunities and Other Collateral Consequences

It took some time before Tova could muster the strength to make efforts to seek alternative employment. She has made several attempts to seek employment opportunities without success. In the Fall of 2020, Tova applied for a Claims Specialist position with the Social Security Administration. She had a telephonic interview on November 2, 2020. She has not received an acceptance or rejection yet. Tova also applied for a Contact Tracer position with an organization called Public Consulting Group in January 2021. Other than acknowledging her application, she has not heard back. *See Emails confirming recent efforts to obtain employment, attached hereto as Exhibit K.*

Tova has legitimate concerns regarding her ability to continue building her career in law enforcement, which she studied diligently and worked hard to do. She also has concerns about being able to obtain gainful employment in a career outside of the law enforcement industry. If you conduct an internet search of "Tova Noel", the first things that comes up are references to this case and Jeffrey Epstein. It appears that Tova's name will be forever linked to a pedophile, who was a sexual predator of young girls. It is an unavoidable consequence regardless of the success of this application and regardless of the outcome of the trial.

A conviction in this case will have vast collateral consequences on Tova and her family's future. The collateral consequence included, but are not limited to:

- Felony conviction resulting in more than 60 days in jail will adversely affect her disability compensation.
- Right to vote may be temporarily or permanently revoked depending on the State she will live in.
- Her constitutional right to possess her firearm will be permanently revoked.
- Disqualified for jury service.
- May be disqualified from adopting a child.
- May be disqualified from certain government entitlements and/or benefits.
- May be disqualified for obtaining a bank loan.
- Would be disqualified from certain COVID related government benefits and/or entitlements.
- May be disqualified from many licensing opportunities, such as, nursing, law, liquor license required for a business, etc.
- Removal from federal office and/or employment by the U.S. Government for 5 years.
- May be disqualified with jobs that involve children.
- Many other civil disabilities.

IV. Systemic Issue and Inadequate Training

The defense team engaged the services of a federal bureau of prisons expert, Jack Donson of Prisonology, LLC. Mr. Donson has reviewed the relevant portions of discovery in this case, BOP policy, and Tova's employee file. He also interviewed Tova on multiple occasions. Mr. Donson has decades of experience as a federal corrections officer, who supervised and trained corrections officers. Based on these factors, Mr. Donson has concluded that on August 9, 2019 and August 10, 2019, Tova was inadequately trained to work the SHU. Furthermore, Mr. Donson concludes that the Tova was set up for failure from the beginning of her tenure due to lack of adequate training, support, and supervision in a facility that is one of the most chaotic, understaffed, and poorly managed prisons in the entire BOP system. *See Expert Summary Report, by Jack Donson and Mr. Donson's Curriculum Vitae, attached hereto as Exhibit L.*

V. Existence of Adequate and Non-Criminal Alternatives to Prosecution

Tova is still supported by her Union, Local 3148. They have confirmed that there is an internal administrative disciplinary process that has been used to address the exact type of protocol violations that Tova is alleged to have committed. It has also been confirmed by the Union leadership that prior to this case, a BOP employee in the SDNY has never been prosecuted for the conduct alleged. The Union agrees that the violations of MCC protocol in this case is best addressed through the administrative disciplinary process because the process offers accountability, personal and general deterrence, and rehabilitative educational opportunities to learn and improve as a correctional officer. The Union's submission also provides context to the recent and longstanding problems that enabled an incident like this to occur, despite the significant efforts over multiple years to address the poor and dysfunctional work conditions at the MCC. *See Letter for Union 3148, attached hereto as Exhibit M.*

VI. Prosecution and Deferred Prosecution Legal Precedent

U.S. v. Hernandez, et al (14 cr 18-NDTX)

Prior to filing charges in this case, the Government indicated that there was precedent for a criminal prosecution under the circumstances of this case. Because this case is an anomaly for the SDNY, the Government could not rely on any precedent in the SDNY because it does not exist. Instead, the precedent the Government relied upon was the 5th Circuit case of *U.S. v. Hernandez*. Based upon the defense's review of the case and conversations with the defense attorneys who represented each defendant in that case, we ask that the precedential value of the *Hernandez* case be reevaluated.

The *Hernandez* case involved three defendants. Mr. Hernandez pleaded guilty to violating 18 U.S.C. §1001 and received a 10-month prison sentence. Mr. Moore pleaded guilty to 18 U.S.C. §4 and received probation. Mr. Rosas' case was dismissed. Note that there was an attempt to enter Mr. Rosas into a judicial diversion program, but when it was determined that he did not qualify, the case was dismissed in its entirety. Like Tova's case, the *Hernandez* case involved an inmate suicide in the SHU of an inmate who was known to have a mental health condition. The officers failed to conduct rounds and the count, despite executing documents to the contrary. There are other similarities.

However, despite the similarities, there is a big difference between *Hernandez* and the case against Tova. In *Hernandez*, when the death of the inmate was under investigation the officers made false statements during the investigation. Tova made no false statement to any investigator during the investigation of the death in this case. Based upon the indictment in this case, it is alleged that Tova admitted to failing to conduct the 3:00 a.m. and 5:00 a.m. counts during the acute moments of the emergency. Tova made no effort to cover up, lie, mislead, or otherwise frustrate the emergency response or the investigation.

Mr. Hernandez was an experienced correctional officer who had a supervisory role over the other correctional officers. There was evidence that the correctional officers were watching pornography on the BOP computers. It appears to be the combination of officer Hernandez's experience and supervisory role as the "Senior Shift Officer-in-Charge", that laid the basis for a sentence of imprisonment. Tova was a rookie with less than a year of active time as a correctional officer, who was assigned to the SHU without the required training and lacked supervisory authority.

Mr. Moore was not regularly assigned to the SHU. He signed the round and count slips at the direction of superior officers. He received a term of probation. Mr. Rosas' case was dismissed in its entirety after diversion was not feasible. Based upon my conversation with counsel for Mr. Rosas, the dismissal was because Hernandez was willing to enter a guilty plea and Rosas was willing to go to trial based upon his attorney's prior success in obtaining a not guilty verdict in a similarly charged case in the Northern District of Texas. Upon information and belief, Rosas was more experienced than Moore and had some supervisory role, but to a lesser extent when compared to Hernandez. The precedential value of *Hernandez* is not strong when you consider its factual similarities and differences when compared to this case.

U.S. v. William Marshall (2:17 cr 17- WDVA)

On or about August 30, 2017, four correctional officers at USP-Lee in the Western District of Virginia were indicted in connection with falsely representing that at certain times they had completed required rounds in the SHU on October 27, 2016. The activity came to light during an investigation of an inmate homicide in the SHU. The U.S. Attorney issued a press release regarding the filing of the

indictments. On October 27, 2017, the U.S. Attorney dismissed all the charges against all the defendants and entered into non-prosecution agreements. *See August 30, 2017 USAO for the WDVA Press Release; October 27, 2017 Non-Prosecution Agreement and Government Motion to Dismiss, attached hereto as Exhibit N.*

Based upon my conversation with the attorney for correctional officer William Marshall, the prison had been experiencing issues related to understaffing, which resulted in correctional officers being asked to sign documents by their supervisors. In August of 2019, Tova was working in similar conditions where there was a substantial understaffing issue. She was directed to sign documents that were not true, and she emulated the conduct she observed other senior and superior officers commit as it relates the accuracy of paperwork.

Like the U.S. Attorney for the WDVA, please consider a similar non-prosecution agreement that was offered to correctional officer Marshall and his colleagues. The Western District of Virginia case is more recent than the Northern District of Texas case by approximately 3 years and provides sufficient precedent to change the trajectory of this case.

VII. COVID-19

Given the impact that the pandemic has had on the criminal justice system, this case should be considered for deferred prosecution because it is a relatively low level non-violent criminal case against a defendant with no criminal record. Given the backlog of criminal cases awaiting trial for very serious criminal offenses of incarcerated defendants, there is a substantial likelihood that either our June trial will be delayed or the resources necessary to conduct a trial will result in more serious cases with incarcerated defendants being delayed. When trials resume in the SDNY there will be inherent health risks involved for all participants involved. Given the available alternatives to prosecution and the real possibility that even if convicted after trial Tova may avoid a prison sentence, it would be prudent to forego prosecution at this time. There are many other practical considerations as it relates to conducting a trial during a pandemic, but I will forego the discussion at this time because the Government is intimately aware and involved as a stakeholder in how the Courts plan on conducting the business of jury trials in the SDNY.

VIII. Tova's Character

Tova is a remarkable woman, who despite exercising bad judgment that contributed to her mistakes, is smart, ambitious, self-sufficient, loving, diligent, and worthy of an opportunity to redeem herself without the burden of a criminal conviction and imprisonment. The best people to address the issue of her character are those who have known her personally for years. The following responsible members of the community have submitted letters in support of this application for deferred prosecution (*See Character Letters of Support, attached hereto as Exhibit O*):

1. Dr. Sylvia Ephraim, mother
2. Swanton Julian, cousin
3. Lloyd Gunnings [REDACTED]
4. Kirk Barclay, U.S. Army (retired)
5. Neil K. Jordan, U.S. Army (retired)
6. Dominique Maxwell, U.S Army (honorably discharged)
7. Patsy Bryant, friend
8. Nicole Odom, co-worker from U.S. Post Office
9. Jonathan Vargas, co-worker from U.S. Postal Service
10. Dominique Benjamin, co-worker from Macy's
11. Vernessa George-Robinson, neighbor
12. Johane Michel, U.S. Army (active)
13. Clarissa P. Cordova, friend
14. Lisa Pigott-LaFond, cousin

CONCLUSION

Based on the foregoing, deferred prosecution is in the interest of fairness and justice because the mitigating circumstances substantially outweigh moving forward with a traditional prosecution. The mitigation includes but is not limited to:

- a. Tova's inexperience as a correctional officer with less than a year of active duty.
- b. The co-defendant, who was experienced and apparently exhausted, was not available to assist Tova in her duties and responsibilities because he was asleep.
- c. Tova's conduct was not done with the purpose or intent to violate any criminal laws.
- d. Tova did not attempt to frustrate, lie, or mislead the emergency response or the subsequent investigation.
- e. Tova did not receive sufficient training to work the SHU.
- f. A superior officer instructed her to sign documents falsely confirming she received SHU training that she did not receive.
- g. MCC was severely understaffed which cause a work environment where Tova and her colleagues were overworked.
- h. Tova has no record of employment misconduct.
- i. Tova has no criminal record or prior arrests.

- j. There is more recent precedent involving a deferred prosecution than the precedent relied upon to bring the charges in this case.
- k. The impact that continued prosecution and a possible conviction would have would be unduly burdensome on Tova [REDACTED] and her family.
- l. There is significant support from responsible members of the community for deferred prosecution.
- m. A conviction would be the end of her career in law enforcement.
- n. She would be subject to many civil disabilities.

If the Committee is not convinced that a deferred prosecution agreement is appropriate, I respectfully request the opportunity to appear before the Committee to address all questions and/or concerns. Such an opportunity would allow Tova to supplement this submission by directly addressing any concerns or issues raised by the Committee and provide additional context to the circumstances that have led to Tova becoming a criminal defendant.

Thank you for your thoughtful consideration.

Sincerely,

FOY & SEPLOWITZ LLC

Jason E. Foy

JASON E. FOY
[REDACTED]

cc: Tova Noel