

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

99-CR-131-A

AREF AHMED,

Defendant.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ERIE) SS:
CITY OF BUFFALO)

ANTHONY M. BRUCE, being duly sworn, deposes and states:

1. I am an Assistant United States Attorney in the Western District of New York and in such capacity I was responsible for representing the government at the trial and sentencing of the defendant, Aref Ahmed, in this matter.

2. I make this affidavit as a result of the status conference held on February 13, 2008, wherein this Court directed the Government to set forth its position as to the amount of restitution Ahmed should be ordered to pay when he is re-sentenced pursuant to the decision and mandate of the Second Circuit issued in this matter.

3. On March 3, 2004, a petit jury returned guilty verdicts against Ahmed and four other individuals who were charged with violating 18 U.S.C. § 1956(h) (conspiring to commit money laundering with the proceeds of an unlawful activity) and 18 U.S.C. § 2342 (trafficking in contraband cigarettes). The scheme underlying the offenses of conviction enabled the defendants to avoid paying excise taxes on cigarettes which the defendants, including Ahmed, were securing for purposes of resale.

4. For all times relevant to these proceedings, it is uncontroverted that the New York State excise tax due and owing on a carton of cigarettes was \$5.60.

5. As a predicate to setting a base offense level from which appropriate sentencing guideline ranges for the defendants could be calculated, this Court needed to establish tax loss figures that could be reasonably attributed to each defendant.

6. To ascertain the appropriate tax loss calculation for each of the five defendants, this Court held a hearing on February 9, 2005, at which Bureau of Alcohol, Firearms, Tobacco and Explosives Forensic Auditor, Jeff Cosgrove, testified.

7. Through Mr. Cosgrove's testimony, the government introduced schedules prepared under Mr. Cosgrove's direction which were derived from an inspection of over 6,800 invoices that detailed transfers of cigarettes from a cigarette wholesaler, A.D. Bedell, to the Roseine Smoke Shop where Ahmed and the others obtained their cigarettes. The schedules covered the period January 1994 to May 1997.

8. Mr. Cosgrove testified that the invoices bore codes in the form of names, letters and/or numbers which reflected the ultimate intended recipient of the untaxed cigarettes shipped by the wholesaler to Roseine's.

9. Mr. Cosgrove did not personally know which, if any, of the codes related to which, if any, of the defendants when reviewing the invoices. As a result, for the purpose of computing Ahmed's tax loss figure, Mr. Cosgrove was directed by me to attribute to Ahmed every invoice that had a code that bore in whole or in part the designations "A.T.", "Aref", "Arif" and/or "Tom".

10. On June 24, 2005, this Court issued an Order and Decision in which it adopted the forensic auditor's calculations of tax losses attributable to each defendant stating:

... the Court finds Linda Mohawk to be a credible witness. Specifically, the Court finds her testimony

regarding the code names used on the A. D. Bedell invoices to be credible. Accordingly, in determining the amount of tax loss for which each defendant should be held accountable, the Court shall rely on the coded invoices.

A copy of the Court's Order and Decision is attached for the Court's convenience as Exhibit A.

12. With respect to Ahmed this court found that Ahmed was responsible for causing a tax loss to the State of New York in the amount of \$273,890.

13. After sentence was imposed, Ahmed filed an appeal, contending, inter alia, that this Court erred in adopting a tax loss figure of \$273,890 because the testimony of Linda Mohawk was inherently incredible.

14. On September 12, 2007, the Second Circuit, issued its decision in the appeals of this matter, holding that it was not clearly erroneous for this Court to find that Linda Mohawk's testimony relative to the invoices was credible. However, based on a concession made by the Government, the Court of Appeals found that in some circumstances the forensic auditor was told to link certain invoice codes with certain defendants where such links were not supported by the testimony of Linda Mohawk or any other record evidence. A copy of that decision is attached as Exhibit B.

15. As a result of the foregoing finding, the Second Circuit with respect to Ahmed, ordered that his sentence be vacated because, insofar as his tax loss calculation was mistaken, Ahmed may owe less restitution.

16. Upon reviewing the relevant testimony of Linda Mohawk, a copy of which is attached as Exhibit C, the Government acknowledges that although her testimony expressly links the designations "A.T." (in various forms) and "Arif" to Ahmed, Mohawk's testimony fails to provide any link between Ahmed and invoices coded with the designations "Aref" and/or "Tom".

17. Given that at this juncture there is no record evidence to link Ahmed to the codes "Tom" and/or "Aref", I caused a review to be conducted of one of Mr. Cosgrove's worksheets prepared in connection with this matter and further caused a calculation of Ahmed's tax loss to be made only on the basis of invoices bearing assignments with the designations "A.T." and/or "Arif". A copy of the pertinent portion of the worksheet is attached as "Exhibit D".

18. Based on the foregoing, the invoices linked to Ahmed by the testimony of Linda Mohawk reflects that Ahmed received 46,044 cartons of cigarettes for which excise taxes due but not paid would

have amounted to \$257,846.20 (46,044 cartons X \$5.60 = \$257,846.40).

19. It is respectfully requested that in re-sentencing Ahmed, this Court order restitution in the amount of \$257,846.40.

s/Anthony M. Bruce
ANTHONY M. BRUCE
Assistant U.S. Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202
716/843-5700, ext. 886
Anthony.M.Bruce@usdoj.gov

Sworn to before me this
13th day of March, 2008.

s/Karen A. Brown
Karen A. Brown
Notary Public, State of New York
Qualified in Erie County
My Commission Expires June 30, 2011

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

99-CR-131-A

AREF AHMED,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I electronically filed a **AFFIDAVIT** with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

Herbert I. Greenman, Esq.

s/Karen A. Brown
KAREN A. BROWN

Exhibit A

JA-478

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DECISION AND ORDER
99-CR-131A

MOHAMED ABUHAMRA,
AREF AHMED,
RMZY ABDULLAH,
NAGIB AZIZ, and
AZZEAZ SALEH,

Defendants.

INTRODUCTION

On March 3, 2004, defendants Mohamed Abuhamra, Aref Ahmed, Rmzy Abdullah, Nagib Aziz and Azzeaz Saleh were found guilty following a jury trial of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and substantive violations of the Contraband Cigarette Trafficking Act, 18 U.S.C. § 2342(a). Currently before the Court are: (1) defendants' objections to the amount of loss determinations in their respective Presentence Investigation Reports ("PSR"); (2) the government's request for a two-level upward adjustment for use of a minor by defendant Mohamed Abuhamra; and (3) the government's motions for upward departures regarding defendants Nagib Aziz and Azzeaz Saleh, based on their alleged participation in a robbery of another cigarette smuggler. A sentencing hearing was held on February 9 and May 4, 2005.

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BACKGROUND

From February 1995 to January 1997, defendants, along with 27 other co-defendants, participated in a scheme whereby they bought large quantities of untaxed cigarettes from a smokeshop located on the reservation of the Seneca Nation of Indians, and then transported and sold such cigarettes in New York and/or Michigan, without collecting or paying any state excise taxes. At least some of the proceeds from the sale of the cigarettes were used to buy additional cigarettes to perpetuate the scheme.

The defendants would usually order the cigarettes in advance from the smokeshop, which was owned and operated by witness Linda Mohawk ("Mohawk"). Once Mohawk received an order from a defendant, she would, in turn, relay the order to her cigarette wholesaler, defendant A.D. Bedell Company ("A.D. Bedell"). On each such order to A.D. Bedell, Mohawk would indicate a "code name" for the particular defendant making the order. For example, Mohawk testified that the code name for defendant Aref Ahmed was "AT." Once A.D. Bedell received an order from Mohawk, it would prepare an invoice for that order, charging a special account set up by Mohawk for this smuggling activity and indicating the code name of the particular defendant making the order. Thus, an A.D. Bedell invoice for an order by Aref Ahmed would have indicated that the order was for "AT."

According to the PSR, if all the cigarettes for which there are invoices would have been sold in New York, the total amount of tax loss to New York would have been \$12,750,645. Likewise, if all the cigarettes had been sold in Michigan, the total tax

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loss to Michigan would have been \$17,760,758. There is no evidence of exactly how many cigarettes were sold in New York as opposed to Michigan.

DISCUSSION

A. Amount of Loss

Section 1B1.3 of the United States Sentencing Guidelines ("U.S.S.G.") provides that when determining the amount of relevant conduct for which a defendant is to be held accountable, the sentencing court should include:

in the case of jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense[.]

See U.S.S.G. § 1B1.3(a)(1)(B). Application Note 2(c) of § 1B1.3 provides several examples to assist courts in determining whether a defendant should be held accountable for jointly undertaken criminal activity. Both the government and the defendants agree that the most relevant example with regard to this case is Application Note 2(c)(6), which provides as follows:

Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities

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of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.

The government contends that the defendants in this case are "Q's" rather than "P's," and therefore each of them should be held accountable for the entire amount of tax loss resulting from the conspiracy because all such losses were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. The government argues that the defendants should be considered "Q's" because they employed common drivers to transport the cigarettes (in some instances, they even used each other as drivers). According to the government, such pooling of resources makes defendants "Q's" rather than "P's." The government's theory results in a New York tax loss of \$12,740,645 and a Michigan tax loss of \$17,760,758, with a corresponding base offense level of 26 for each defendant. See U.S.S.G. §§ 2S1.1(a)(1), 2E4.1(a)(2), 2T4.1(K). As stated above, these tax loss amounts were derived from totaling all the A.D. Bedell invoices for the cigarette orders that were part of the scheme and calculating the tax owing thereon.

In the alternative, the government argues that even if the defendants were considered to be "P's" rather than "Q's," the base offense level for each defendant would still be 26. The government arrives at this conclusion based on evidence regarding how frequently each defendant picked up cigarettes at the smoke shop and how large their loads usually were, along with evidence regarding the invoices from A.D. Bedell. See Item No. 1101. According to the government, when the amount of trips each defendant made to the smokeshop is multiplied by the average load, the total

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tax loss caused by each defendant is in excess of \$2.5 million, which under U.S.S.G. §§ 2S1.1(a)(2) and 2B1.1(b)(1)(J), the government argues, results in a base offense level of 26.¹

Contrary to the government, the defendants contend that they should be considered "P's" rather than "Q's." Defendants argue that although they may have had a common source of supply, *i.e.*, A.D. Bedell and the smokeshop, there is no evidence that they participated in jointly undertaken criminal activity. They each operated their own businesses independently of their codefendants. There is no evidence that they received any type of benefit from or had any responsibility for any of the businesses or activities of their codefendants. Perhaps most importantly, there is no evidence that they pooled their profits or had any financial interest in each other's businesses. Thus, defendants argue, they should each be held accountable only for the amount of tax loss for which the government can prove they were each personally responsible.

Defendants further argue that the government has failed to prove any specific tax loss amounts by a preponderance of the evidence. They argue that the government relies almost exclusively on the testimony of Linda Mohawk, who is not a credible witness. For example, defendants argue, Mohawk testified at trial that the code name "AT" belonged to defendant Aref Ahmed, yet before the grand jury, she testified that the code name "AT" belonged to someone else. Defendants also point out that while Mohawk testified at trial that the defendants came to the smoke shop hundreds of times over the period of the conspiracy, they appear on relatively few of the

¹ It is not clear to the Court why the government is applying U.S.S.G. §§ 2S1.1(a)(2) and 2B1.1(a)(1) rather than U.S.S.G. §§ 2S1.1(a)(1), 2E4.1(a)(2) and 2T4.1.

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approximately 400 in-store video surveillance tapes she provided to the government. Thus, defendants argue, because the government has failed to prove by a preponderance of the evidence any specific tax loss amounts attributable directly to each defendant, the Court must apply the minimum base offense level of 9 for each of them. See U.S.S.G. §§ 2S1.1(a)(1) and 2E4.1(a)(1).

In the alternative, at least some of the defendants argue that the most tax loss they should each be held accountable for is the amount traceable directly to each of them through the code names used on the A.D. Bedell invoices. This would result in a different base offense level for each defendant, each of which would be substantially lower than the base offense level of 26 proposed by the government.

The Court finds that the defendants should be considered "P's" rather than "Q's." In United States v. Studley, 47 F.3d 569, 575 (2d Cir. 1995), the Second Circuit, in discussing the example in Application Note 2(c)(6) to § 1B1.3, stated as follows:

This illustration demonstrates, first, that a defendant's knowledge of another participant's criminal acts is not enough to hold the defendant responsible for those acts. It also demonstrates that a relevant factor in determining whether activity is jointly undertaken is whether the participants pool their profits and resources, or whether they work independently. P's success was not dependant upon the other dealers in the area, whereas Q's success was directly tied to the activities of the other dealers.

Here, the evidence adduced at trial and at the hearing supports the conclusion that each defendant's agreement to participate in the cigarette smuggling scheme was limited to his own smuggling activity and did not encompass the smuggling activity of the other smugglers. Each defendant operated independently, with the objective of making as much money as possible for himself. There was no pooling or

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sharing of profits. The success of a particular defendant was not dependent on the other smugglers. The defendants had no interest in the success of the operation as a whole, and took no steps to further the operation beyond smuggling their own loads of cigarettes.

The defendants certainly knew of the criminal acts of the other smugglers, but that by itself is not sufficient to hold them accountable for those acts. Although there was some evidence that they sometimes employed common drivers to haul their loads, there is no evidence that they shared the profits with those drivers or with anyone else, or that they shared the costs with each other.²

Because the defendants are "P's" rather than "Q's," they are only accountable for the tax loss amounts that they personally participated in or caused.

The Court rejects the tax loss calculations for individual defendants proffered by the government that are based on the number of trips to the smokeshop by each defendant multiplied by the average load. Linda Mohawk was, for the most part, a credible witness. However, her testimony regarding the number of smuggling trips made by the defendants appears to have been somewhat exaggerated. While she testified that the defendants made hundreds of trips to the smokeshop, they appeared on relatively few of the surveillance tapes. In addition, the Court finds these calculations questionable because they result in a tax loss significantly greater than the amount of tax loss calculated using the A.D. Bedell invoices (and that amount was attributable to all 32 defendants in this case, not just the five who went to trial).

² It appeared for the most part that the defendants drove their own loads.

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The Court also rejects defendants position that the government has failed to prove any specific tax loss amounts by a preponderance of the evidence. As stated, the Court finds Linda Mohawk to be a credible witness. Specifically, the Court finds her testimony regarding the code names used on the A.D. Bedell invoices to be credible. Accordingly, in determining the amount of tax loss for which each defendant should be held accountable, the Court shall rely on the coded invoices. Forensic Auditor Jeffrey Cosgrove of the Bureau of Alcohol, Tobacco, Firearms and Explosives testified at the hearing that the excise tax losses attributable to coded invoices linked to the individual defendants were as follows:

<u>Defendant</u>	<u>N.Y. Loss</u>	<u>Mich. Loss</u>
Mohamed Abuhamra	\$288,597	\$386,512
Aref Ahmed	\$273,890	\$366,817
Rmzy Abdullah	\$ 33,359	\$ 44,677
Nagib Aziz	\$ 10,780	\$ 14,437
Azzeaz Saleh	\$ 6,815	\$ 9,127

The Court will use the New York tax loss amounts because they are smaller and therefore provide a more conservative estimate of the loss amounts. Pursuant to U.S.S.G. §§ 2S1.1(a)(1), 2E4.1(a)(2) and 2T4.1, the resulting base offense level for each of the defendants is as follows:

<u>Defendant</u>	<u>Base Offense Level</u>
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Mohamed Abuhamra	18
Aref Ahmed	18
Rmzy Abdullah	14
Nagib Aziz	10
Azzeaz Saleh	10

The Court shall apply these base offense levels, along with the specific offense characteristics detailed in each defendant's PSR, at the time of sentencing.³

B. Use of a Minor by Defendant Mohamed Abuhamra

With regard to defendant Mohamed Abuhamra, the government requests that the Court apply a two-level upward adjustment pursuant to U.S.S.G. § 3B1.4, because he used a person less than eighteen years of age to commit the offense. The Court shall apply such an adjustment. A videotape admitted into evidence at trial showed a young boy accompanying defendant Abuhamra, taking direction from him and assisting him in gathering and loading cigarettes.

³ Defendants argue that the Sixth Amendment of the United States Constitution precludes the Court from increasing their sentences above the minimum base offense level based on any fact not found by the jury as part of its verdict. Here, the jury did not determine the amount of loss. Thus, defendants argue, the Court is precluded from determining the amount of loss and must apply the minimum base offense level under the U.S.S.G. Defendants further argue that even though the United States Supreme Court recently held in United States v. Booker, 125 S. Ct. 738 (2005), that the U.S.S.G. are only advisory and therefore do not violate the Sixth Amendment, application of the Booker decision here would violate the *ex post facto* clause of the Constitution. This same argument was raised and rejected by the Eleventh Circuit in United States v. Duncan, 400 F.3d 1297, 1306-07 (11th Cir. 2005). This Court adopts the reasoning and result in Duncan, and finds defendant's *ex post facto* argument without merit.

C. Government's Motions for Upward Departure

The government has moved for upward departures, pursuant to U.S.S.G. § 5K2.21, against defendants Nagib Aziz and Azzeaz Saleh based on their alleged participation in a robbery of another cigarette smuggler.⁴ After considering the evidence adduced at the sentencing hearing, the Court grants the government's motion for upward departure with regard to defendant Nagib Aziz, but denies it as to Azzeaz Saleh.

The evidence adduced at the hearing showed by a preponderance of the evidence that defendant Nagib Aziz, along with others, participated in the carjacking, robbery and beating of another smuggler, Menal Mikha, on or about March 31, 1997. Defendant Aziz and the other robbery participants took from Mikha over \$10,000 in cash and \$28,000 in contraband cigarettes. They also took Mikha's van, physically restrained him and caused him bodily injury.

Drawing an analogy to Hobbs Act robbery, 18 U.S.C. § 1951, the Court shall depart upward seven levels: two levels for causing Mikha bodily injury, see U.S.S.G. § 2B3.1((b)(3)(A); two levels for physically restraining Mikha to facilitate commission of the offense, see 2B3.1((b)(4)(B); two levels because the offense involved carjacking, see U.S.S.G. § 2B3.1(b)(5); and one level because the amount of loss exceeded \$10,000, see U.S.S.G. § 2B3.1(b)(7)(B).

Although a close question, the Court finds that the government failed to

⁴ U.S.S.G. § 5K2.21 provides that "[t]he court may increase the sentence above the guideline range to reflect the actual seriousness of the offense based on conduct . . . that did not enter into the determination of the applicable guideline range."

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prove by a preponderance of the evidence defendant Azzeaz Saleh's involvement in the robbery. While there is circumstantial evidence linking defendant Saleh to the robbery, there is a serious question regarding identification. Robert Williams, the former Town of Hamburg police detective who investigated the robbery, misidentified Saleh in court. When asked to identify the man in court that Mikha had previously identified as being one of the robbers, Detective Williams incorrectly pointed out another defendant as being the person identified by Mikha.⁵ Detective Williams' misidentification throws into question Mikha's out-of-court identification, which was already suspect because he (Mikha) failed to pick out defendant Saleh from a photo array (he later identified Saleh from an individual photo of Saleh).

CONCLUSION

For the reasons stated, the Court shall apply the following base offense levels at the time of sentencing: (1) Mohamed Abuhamra, level 18; (2) Aref Ahmed, level 18; (3) Rmzy Abdullah, level 14; (4) Nagib Aziz, level 10; and (5) Azzeaz Saleh, level 10. The Court also grants the government's request that a two-level upward adjustment be applied to defendant Mohamed Abuhamra for use of a minor to commit the offense. In addition, the Court grants the government's motion for upward departure with regard to defendant Nagib Aziz and shall depart upward seven levels. Finally, the Court denies the government's motion for an upward departure with regard to defendant Azzeaz Saleh.

⁵ Mikha is now deceased.

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Defendant Aref Ahmed shall be sentenced on July 26, 2005 at 12:30 p.m.

Defendant Mohamed Abuhamra shall be sentenced on July 27, 2005 at 12:30 p.m.

Defendant Rmzy Abdullah shall be sentenced on July 28, 2005 at 12:30 p.m.

Defendant Nagib Aziz shall be sentenced on August 3, 2005 at 12:30 p.m. Defendant

Azzeaz Saleh shall be sentenced on August 4, 2005 at 12:30 p.m.

The "Statements of Parties with respect to Sentencing Factors," including any objections or motions, shall be filed by July 8, 2005. Responses to any objections or motions shall be filed by July 15, 2005. The Final PSR's shall be disseminated by July 19, 2005. Any sentencing memoranda or letters in support of the defendants shall be filed by July 20, 2005.

IT IS SO ORDERED.

/s/ Richard J. Arcara

**HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT**

Dated: June 24 , 2005

Exhibit B

241 Fed.Appx. 747
241 Fed.Appx. 747, 2007 WL 2705574 (C.A.2 (N.Y.))
(Cite as: 241 Fed.Appx. 747)

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk974 Sufficiency
350Hk975 k. In General. Most

Cited Cases
Video showing defendant's six- or seven-year-old son carrying boxes of contraband cigarettes and loading them into a truck with his father was sufficient to support sentencing enhancement for the use of a minor in the commission of a crime, when sentencing defendant for conspiracy to commit money laundering and trafficking in contraband cigarettes. U.S.S.G. § 3B1.4, 18 U.S.C.A.

[10] Sentencing and Punishment 350H 761

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk761 k. Obstruction of Justice.

Most Cited Cases
Sentencing enhancement for obstruction of justice was warranted when sentencing defendant for conspiracy to commit money laundering and trafficking in contraband cigarettes, even if defendant's actions did not in fact interfere with the government's prosecution, since his actions had the potential to impede the imposition of an appropriate sentence. U.S.S.G. § 3C1.1, 18 U.S.C.A.

[11] Sentencing and Punishment 350H 834

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk831 Other Offenses, Misconduct or Charges

350Hk834 k. Arrests or Charges; Necessity of Conviction. Most Cited Cases
Seven-level sentencing enhancement for defendant's aggravated beating and robbery of a fellow ci-

garette smuggler was reasonable, when sentencing defendant for conspiracy to commit money laundering and trafficking in contraband cigarettes. U.S.S.G. § 5K2.21, p.s., 18 U.S.C.A.

[12] Criminal Law 110 1134(3)

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) k. Questions Considered in General. Most Cited Cases
Challenge to defendant's pre-sentence report was rendered moot once defendant was no longer in custody of the Bureau of Prisons.

*749 Appeal from the United States District Court for the Western District of New York (Arcara, J.). **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Stephan J. Baczynski, James P. Kennedy, Jr., Assistant United States Attorneys, for Appellee Terrence P. Flynn, United States Attorney for the Western District of New York, Buffalo, N.Y.; Herbert L. Greenman, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP, Buffalo, N.Y., for Defendant-Appellant Aref Ahmed; Thomas Theophilos, Law Offices of John Pieri, Buffalo, N.Y., for Defendant-Appellant Rmzy Abdullah; Jeremy D. Schwartz, Eoannou, Lana & D'Amico, Buffalo, N.Y., for Defendant-Appellant Azzeaz Saleh; Jeremy Gutman (Maria G. Giordano, on the brief), New York, N.Y., for Defendant-Appellant Mohamed Abuhamra; Michael G. O'Rourke, Buffalo, N.Y., for Defendant-Appellant Nagib Aziz.

PRESENT: Hon. GUIDO CALABRESI, Hon. REENA RAGGI, and Hon. PETER W. HALL, Circuit Judges.

SUMMARY ORDER

241 Fed.Appx. 747

241 Fed.Appx. 747, 2007 WL 2705574 (C.A.2 (N.Y.))
(Cite as: 241 Fed.Appx. 747)

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**1 Defendants-Appellants Aref Ahmed, Rmzy Abdullah, Azzeaz Saleh, Mohamed *750 Abuhamra, and Nagib Aziz appeal from their convictions and sentences for conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and trafficking in contraband cigarettes, in violation of 18 U.S.C. § 2342. We assume the parties' familiarity with the facts, procedural history, and issues on appeal.

Between them, Appellants raise nine distinct issues: (1) whether the federal prosecutions were effectively foreclosed by New York's policy of not enforcing its cigarette tax on non-Native Americans purchasing cigarettes on Indian reservations; (2) whether there was legally sufficient evidence to convict Abuhamra of conspiracy to commit money laundering; (3) whether the government's failure to inform Ahmed of its intent to secure in-court identification by two witnesses necessitated a mistrial; (4) whether the court below erred in instructing the jury on variance dates; (5) whether the absence of Saleh's attorney during a twenty-minute portion of the trial deprived Saleh of the effective assistance of counsel; (6) whether the fact that the court below, in determining the tax loss calculations in order to set the base offense levels, used data that was in part flawed warrants resentencing; (7) whether the court below abused its discretion in applying Sentencing Guidelines enhancement provisions to Aziz and Abuhamra; (8) whether Abdullah's sentence was substantively reasonable; and (9) whether portions of Ahmed's Pre-Sentence Report should have been redacted. In this order, we address all of the claims except Saleh's ineffective assistance of counsel claim, which we address in a separate opinion, and Abdullah's challenge to the reasonableness of his sentence, which we need not reach in light of our decision to remand for resentencing on other grounds.

[1] (1) Federal law prohibits the states from taxing cigarettes sold on Native American reservations to Native Americans, but allows state taxes to be imposed on non-Native American consumers on reser-

vations. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 475-83, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). New York law provides for taxes on non-Native Americans purchasing cigarettes in stores on reservations, but New York has a policy of non-enforcement of this tax. *N.Y. Ass'n of Convenience Stores v. Urbach*, 92 N.Y.2d 204, 213-14, 677 N.Y.S.2d 280, 699 N.E.2d 904 (N.Y.1998). Ahmed and Abuhamra assert that this non-enforcement policy "effectively 'de-taxed' sales of cigarettes to non-Native Americans on reservation land," thereby negating the element of "contraband" necessary to a conviction for trafficking in contraband cigarettes under 18 U.S.C. §§ 2341-42. This argument is meritless. While it appears that New York does not enforce its taxes on small quantities of cigarettes purchased on reservations for personal use by non-Native Americans, nothing in the record supports the conclusion that the state does not demand that taxes be paid when, as in this case, massive quantities of cigarettes were purchased on reservations by non-Native Americans for resale. Appellants' claim that they believed these cigarettes to have been "effectively 'de-taxed'" is further belied by their active efforts, including the use of police scanners, to evade official detection.

**2 [2] Appellants' claims that taxing cigarette sales made on reservations to non-Native Americans violates the Treaty with the Seneca, May 20, 1842, 7 Stat. 586, 590 (1842), or New York Indian Law § 6 (McKinney 2000), are equally unavailing. Both the treaty and the New York statute clearly prohibit only the taxation of real property, not chattels like cigarettes. See *Snyder v. Wetzler*, 193 A.D.2d 329, 603 N.Y.S.2d 910, 912-13 (N.Y.App.Div.1993), *751 *aff'd*, 84 N.Y.2d 941, 620 N.Y.S.2d 813, 644 N.E.2d 1369 (N.Y.1994).

[3] (2) Abuhamra asserts that there was insufficient evidence to convict him of conspiracy to commit money laundering. "[A] defendant raising an appellate challenge to the sufficiency of the evidence supporting a conviction faces a 'heavy burden,' be-

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cause we must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor.' " *United States v. Lombardo*, 491 F.3d 61, 67 (2d Cir.2007) (quoting *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir.2004)). We reverse only if no reasonable factfinder could have found Appellant guilty beyond a reasonable doubt. *Id.* Given the sheer quantity of cigarettes purchased by Appellant and the number of such purchases, a reasonable jury could easily have concluded that he was selling them for a profit and putting at least some of the proceeds back into the smuggling operation. In other words, a jury could reasonably have found that he knowingly undertook financial transactions involving the proceeds of an unlawful activity with the intent to promote the carrying on of the unlawful activity-i.e., money laundering. 18 U.S.C. § 1956(a)(1). Moreover, the evidence of repeated interactions between Abuharra and several of his co-defendants sufficed to permit a reasonable jury to conclude that he had joined with them in a common money laundering scheme-i.e., that he was part of a conspiracy. See *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

[4] (3) At trial, the Government attempted to introduce into evidence two in-court identifications of Ahmed, which had not been disclosed to him in response to his discovery motion. In both instances, the court below denied defense counsel's motion for a mistrial, but struck the evidence from the record and instructed the jury to disregard it. We review a trial court's denial of a motion to declare a mistrial for abuse of discretion. *United States v. Carson*, 52 F.3d 1173, 1188 (2d Cir.1995). In conducting this review, we assume "that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be "devastating" to the defendant." *United States v. Mussaleen*, 35 F.3d 692, 695 (2d Cir.1994) (quoting *Greer v. Miller*, 483 U.S. 756, 766 n. 8,

107 S.Ct. 3102, 97 L.Ed.2d 618 (1987)) (internal citations omitted). Here, there is no indication that the jury was unable to follow the court's instructions to disregard the evidence or that the evidence was particularly devastating. The record strongly suggests that the jurors never saw one piece of stricken evidence (a poster-board with Appellant's picture on it); other witnesses had already identified Appellant before the jury, and the fact that Appellant was acquitted on some charges indicates that the jury was not unfairly prejudiced. See *United States v. Miller*, 116 F.3d 641, 683 (2d Cir.1997); *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir.1994).

**3 (4) In response to a jury question, the district court instructed that the law "only requires a substantial similarity between the dates alleged in the indictment and the dates established by testimony or exhibits." Ahmed challenges this charge. Our cases are clear that the court below was correct in so charging the jury. *752 *United States v. Patino*, 962 F.2d 263, 266 (2d Cir.1992); *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.1987).

[5] (5) As noted above, we address Saleh's ineffective assistance of counsel claim in a separate opinion.

[6] (6) The Sentencing Guidelines provide for different base offense levels depending on the amount of tax evaded. U.S.S.G. §§ 2E4.1, 2T4.1. Ahmed, Abdullah, and Abuharra challenge the district court's calculation of the amount of tax evaded by each. The forensic auditor who determined how much tax loss to attribute to each defendant relied on a list provided by prosecutors and government investigators to link coded invoices with particular defendants. In accepting the forensic auditor's calculations, the district court found credible testimony intended to link certain invoices with certain defendants. That finding was not clearly erroneous. It is undisputed, however, that the government told the forensic auditor to link certain invoice codes with certain defendants in some circumstances where such links were not supported by the afore-

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mentioned testimony or any other record evidence.

[7] Despite these conceded errors, the Government asserts that only Abuhamra's sentence should be vacated. It submits that Ahmed's challenge to his sentence is moot because he has finished serving his prison sentence. We note, however, that he was ordered to pay restitution in the amount of tax loss attributed to him. Insofar as that calculation was mistaken, he may owe less restitution. The issue is therefore not moot, and his sentence must be vacated.

[8] The Government also concedes that Abdullah's base offense level was improperly calculated, but points to the court below's statement that, "if it is later determined that the Court incorrectly determined the offense level, it would under 18 U.S.C. 3553(a) impose the same sentence in this case, because of the seriousness of the offense, and the need for adequate punishment and deterrence." The Government contends that this is sufficient reason not to vacate Abdullah's sentence. Our decision in *United States v. Rattoballi*, 452 F.3d 127 (2d Cir.2006), however, indicates that an assertion that the sentence would have been the same absent error must be supported by reasons specific to the defendant before the court. *Id.* at 134-35. Relying on that authority, which we recognize post-dates Abdullah's judgments of conviction, we therefore vacate his sentence to afford the district court an opportunity to satisfy *Rattoballi's* dictates.

[9] (7) Abuhamra and Aziz challenge the district court's application of the Sentencing Guidelines enhancement provisions. Abuhamra received a two-level enhancement, pursuant to U.S.S.G. § 2S1.1(b)(2)(B), for his conviction for conspiracy to launder money, and a two-level enhancement, pursuant to U.S.S.G. § 3B1.4, for the use of a minor in the commission of the crime. Appellant objects to the former on the grounds that there was insufficient evidence to convict him of conspiracy to launder money, but this contention has already been rejected above. At trial, a video was shown of Abuhamra's son, then age six or seven, carrying

boxes of contraband cigarettes and loading them into a truck with his father. Appellant argues that his son was too young to know what he was doing and therefore could not have had the requisite *mens rea* to commit a crime. This argument is beside the point: the enhancement is to Appellant's sentence, not his son's, *753 and the fact that his son was too young to know what he was doing all the more strongly supports such an enhancement for Abuhamra. See *United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir.2004).

**4 [10] Aziz received a two-level enhancement pursuant to U.S.S.G. § 3C1.1, for obstruction of justice, and a seven-level enhancement, pursuant to U.S.S.G. § 5K2.21, for complicity in the aggravated beating and robbery of a fellow cigarette smuggler. Aziz asserts that the government did not meet its burden of proof on the obstruction enhancement. We review this sufficiency challenge for clear error, *United States v. Canova*, 412 F.3d 331, 356 (2d Cir.2005), and find none. Appellant also contends that, even if the testimony introduced in support of this enhancement is true, it does not show obstruction because his actions did not interfere with the Government's prosecution. This argument misunderstands obstruction in the context of sentence enhancement under U.S.S.G. § 3C1.1, which exists even where the accused's conduct "ha[s] the potential to impede ... the imposition of an appropriate sentence." *United States v. McKay*, 183 F.3d 89, 95 (2d Cir.1999) (emphasis added). The evidence introduced was more than sufficient to show such potential.

[11] Aziz challenges the sufficiency of the evidence supporting the enhancement of his sentence due to his aggravated beating and robbery of a fellow cigarette smuggler. This contention is frivolous. He also challenges the magnitude of the enhancement. The court below arrived at a seven-level enhancement by analogizing the beating and robbery here to a Hobbs Act violation, 18 U.S.C. § 1951. For a conviction under the Hobbs Act involving bodily injury, physical restraint, carjacking, and a loss ex-

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ceeding \$10,000, the Guidelines prescribe a seven-level enhancement. See U.S.S.G. § 2B3.1(b)(3)-(7). We find the analogy to the Hobbs Act reasonable and the calculations correct.

(8) Abdullah challenges the substantive reasonableness of his sentence. Because we have vacated his sentence and remanded for resentencing on other grounds, we do not reach this issue.

[12] (9) Ahmed asserts that portions of his Pre-Sentence Report ("PSR") should have been redacted. The court below asserted that the portion that Ahmed wants redacted did not affect its sentence, and Appellant does not challenge this assertion. Appellant makes a vague claim that the fact that the PSR was provided to the Bureau of Prisons "acted to Appellant's detriment." Appellant, however, is no longer in the custody of the Bureau of Prisons, and this contention is therefore moot.

Accordingly, the judgment of the district court is VACATED and the cases are REMANDED for the resentencing of Ahmed, Abdullah, and Abuhamra. Saleh's ineffective assistance of counsel claim will be dealt with by separate opinion. In all other respects, the judgment of the district court is AFFIRMED.

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END OF DOCUMENT

Exhibit C

LINDA MOHAWK

1 that he was supposed to charge for them and everything. An
2 when he got done with it, he thought Aref had stole money
3 him.

4 Q. Now, you say he came to the store. Did they ask for
5 certain invoices?

6 A. Yes, he asked for his.

7 Q. And how did you know what invoices were his?

8 A. Because they had his initials or Aref's initials on it
9 Aref and Tony.

10 Q. And did you provide him with each and every one of the
11 invoices, insofar as you could find them?

12 A. I kept his all together for him.

13 Q. And did he proceed to go through them?

14 A. Yes, he went through them. Every one of them.

15 Q. With an adding machine or calculator?

16 A. Yes, he sat there for hours with the calculator figuring
17 them out.

18 Q. Was Mr. Ahmed there?

19 A. No.

20 Q. What was the accusation you recall him making?

21 A. He said that Aref had cheated him.

22 Q. Do you recall Mr. Ahmed doing any driving or running
23 also?

24 A. Yes, he did.

25 Q. Can you tell the jury the people for whom he drove?

A-001171

731

LINDA MOHAWK

- 1 A. He drove for Ali.
- 2 Q. Ali Kaid?
- 3 A. Ali Kaid, I think he drove for Mohamed Kaid a couple
4 times, too.
- 5 Q. Mohamed Kaid?
- 6 A. Um-hum.
- 7 Q. Um-hum means yes?
- 8 A. Yes.
- 9 Q. And Mohamed Kaid is this fellow we know as Jimmy?
- 10 A. Is Jimmy.
- 11 Q. And do you recall, I think you said twice is, that abo
12 it?
- 13 A. Yeah, I think it was only like two times.
- 14 Q. I'd like to show you Government Exhibit 60-B, and I'd
15 like to you look first of all --
- 16 MR. BRUCE: And, Ms. Prawel, you don't need to put that
17 up.
- 18 Q. The first several pages, one, two, four, six, seven,
19 nine, those pages, would it be fair to say, all refer to an
20 individual named A-H-M-E-D?
- 21 A. Yes.
- 22 Q. Did you know that to be someone other than Mr. Aref
23 Ahmed?
- 24 A. That wasn't Aref.
- 25 Q. So it was somebody else?

A-001112

732

LINDA MOHAWK

1 A. Yes.

2 Q. Now I'd like you to look at page ten.

3 MR. BRUCE: And over in the lower left-hand corner, Ms.
4 Prawl, if you'd help us along here. About midway down the
5 page.

6 Q. Do you see about?

7 THE COURT: What page are you on?

8 MR. BRUCE: Midway what?

9 THE COURT: What page are you on?

10 MR. BRUCE: Ten. Try your monitor, Judge.

11 THE COURT: I've got a hole right through where the page
12 number is. That's exactly where the page number is. I guess
13 I better use the monitor.

14 BY MR. BRUCE:

15 Q. Do you see A-R-I-F on here?

16 A. Yes.

17 Q. And to whom does that refer?

18 A. Aref.

19 Q. The gentleman in the courtroom?

20 A. Yes.

21 Q. Page 11, do you see about two-thirds of the way down it
22 says A.T.?

23 A. Yes.

24 Q. To whom does that refer?

25 A. That would be Aref and Tony.

A-001173

733

LINDA MOHAWK

1 Q. The Tony you spoke about before?

2 A. Yes.

3 Q. Page 13 it says A dash T.

4 A. That's the same one.

5 Q. Aref and Tony?

6 A. Aref and Tony.

7 Q. Page 14, same A dash T.

8 A. Yes.

9 Q. Same two people?

10 A. Yes.

11 Q. Page 15 it says A.T.

12 THE COURT: It says on the screen -- oh, it's the left
13 hand?

14 MR. BRUCE: I'll go back.

15 THE COURT: What exhibit are you on now, 16?

16 MR. BRUCE: 60-B. And I just left page 14, we just had
17 that up.

18 THE COURT: Has on the top part of the monitor has
19 60-B-16.

20 MR. BRUCE: 14.

21 THE COURT: Pardon me?

22 MR. BRUCE: Page 14.

23 THE COURT: So that number coincides with the page
24 number.

25 MR. BRUCE: Yes, it does, Judge.

A-001174

734

LINDA MOHAWK

1 THE COURT: Okay.

2 MR. BRUCE: Can I go ahead?

3 THE COURT: Now it says 15 on the left-hand corner.

4 MS. PRAWEL: Because I'm entering that, Your Honor, to
5 move to the next page.

6 THE COURT: So we rely on the number on the right-hand
7 side?

8 MS. PRAWEL: Yes.

9 BY MR. BRUCE:

10 Q. Now we're on page 15. Do you see order A.T.?

11 A. Yes.

12 Q. Does that refer to Mr. Ahmed?

13 A. Yes, it would.

14 Q. Page 16, do you see a similar entry order, just A.T.?

15 A. Yes.

16 Q. Again, Mr. Ahmed?

17 A. Yes.

18 THE COURT: What does the T stand for?

19 A. Tony.

20 THE COURT: Tony. So it's A.T., Aref and Tony.

21 A. Aref and Tony.

22 THE COURT: Okay.

23 BY MR. BRUCE:

24 Q. Page 18, over in the left-hand side here, do you see

25 A.T.?

A-001115

735

LINDA MOHAWK

1 A. Yes.

2 THE COURT: Page 17 or 18.

3 MR. BRUCE: On 18.

4 THE COURT: That's the left-hand. All right.

5 BY MR. BRUCE:

6 Q. Again, Aref and Tony?

7 A. Yes.

8 Q. Page 19, do you see an entry here, A.T. number two?

9 A. Yes.

10 Q. Aref and Tony?

11 A. Yes.

12 Q. Page 21, do you see an entry here, A.T. number one?

13 A. Yes.

14 Q. Aref and Tony?

15 A. Yes.

16 Q. Page 22, do you see an entry here, A.T., Jammy?

17 A. (Witness nodded affirmatively.)

18 Q. Can you tell us what that's all about?

19 A. Yeah, that's Aref and Tony, and the driver's name is
20 Jammy.

21 Q. Jammy was a driver for those two individuals?

22 A. Yeah, Jammy was picking it up.

23 Q. 23, do you see A.T., and in this case J-A-M, do you see
24 that?

25 A. Yes.

A-001-76

736

LINDA MOHAWK

- 1 Q. Same thing except we've shortened Jammy?
- 2 A. Right.
- 3 Q. 24, did you see it says A.T. and Jimmy. Do you see it?
- 4 A. Yes.
- 5 Q. What is that all about?
- 6 A. That would be when Aref was driving for Jimmy.
- 7 Q. Jimmy being Mohamed Kaid?
- 8 A. Mohamed Kaid.
- 9 Q. 25, A.T. number one?
- 10 A. Aref and Tony.
- 11 Q. 26, A.T. number two?
- 12 A. Aref and Tony.
- 13 Q. 27, order A.T.?
- 14 A. Aref. Aref and Tony.
- 15 Q. 28, A.T.?
- 16 A. Aref and Tony.
- 17 Q. 29, A.T.?
- 18 A. Aref and Tony.
- 19 Q. 30, A.T.?
- 20 A. Aref and Tony.
- 21 Q. 31, A.T. one?
- 22 A. Aref and Tony.
- 23 Q. 32, A.T. three.?
- 24 A. Aref and Tony.
- 25 Q. 33, A.T. two?

A-001111

737

LINDA MOHAWK

- 1 A. Aref and Tony.
- 2 Q. 34, A.T. one?
- 3 A. Aref and Tony.
- 4 Q. 35, A.T. two?
- 5 A. Aref and Tony.
- 6 Q. By the way, we've been through some A.T. ones, A.T. twos
7 and so forth. What's the significance of the ones and the
8 twos and the threes?
- 9 A. How many -- that's how many orders there are in one day.
- 10 Q. For them?
- 11 A. Yes.
- 12 Q. 36, A.T. three?
- 13 A. Aref and Tony.
- 14 Q. 37, A.T.?
- 15 A. Aref and Tony.
- 16 Q. 38, A.T. one?
- 17 A. Aref and Tony.
- 18 Q. 39, A.T. two?
- 19 A. Aref and Tony.
- 20 Q. 40, A.T. three?
- 21 A. Aref and Tony.
- 22 Q. 41, A.T. two?
- 23 A. Aref and Tony.
- 24 Q. 42, A.T. one?
- 25 A. Aref and Tony.

A-001178

738

LINDA MOHAWK

- 1 Q. 43, A.T. six?
- 2 A. Aref and Tony.
- 3 Q. 44, A.T. one?
- 4 A. Aref and Tony.
- 5 Q. 45, A.T. two?
- 6 A. Aref and Tony.
- 7 Q. 46, A.T. four?
- 8 A. Aref and Tony.
- 9 Q. 47, A.T. three?
- 10 A. Aref and Tony.
- 11 Q. 48, A.T. five?
- 12 A. Aref and Tony.
- 13 Q. 49, A.T. one?
- 14 A. Aref and Tony.
- 15 Q. 50, A.T. two?
- 16 A. Aref and Tony.
- 17 Q. 51, A.T. two?
- 18 A. Aref and Tony.
- 19 Q. 53, A.T. one?
- 20 A. Aref and Tony.
- 21 Q. 55 appears to be the last page of a four-page order,
- 22 A.T.?
- 23 A. Yes.
- 24 Q. And how much is this particular order?
- 25 A. Seventeen thousand nine hundred ninety dollars

A-001119

739

LINDA MOHAWK

- 1 twenty-five cents.
- 2 Q. All paid in cash?
- 3 A. I paid it.
- 4 Q. In cash?
- 5 A. Yes.
- 6 Q. And they paid you?
- 7 A. I don't know, I'd have to see the --
- 8 Q. Okay. 56, A.T. two?
- 9 A. Aref and Tony.
- 10 Q. 57, A.T. one?
- 11 A. Aref and Tony.
- 12 Q. 58, A.T. three?
- 13 A. Aref and Tony.
- 14 Q. 61 appears to be the third page of a three-page order?
- 15 A. Yes.
- 16 Q. And it's A.T. one?
- 17 A. Yes, it is.
- 18 Q. Aref and Tony?
- 19 A. Aref and Tony.
- 20 Q. 62, A.T. two?
- 21 A. Yes.
- 22 Q. Same thing?
- 23 A. Yes.
- 24 Q. 63, A.T. four?
- 25 A. Yes.

A-001130

740

LINDA MOHAWK

- 1 Q. Same thing?
- 2 A. Yes.
- 3 Q. 64, A.T. three, same thing?
- 4 A. Yes.
- 5 Q. 66 appears to be the second page of a two-page order,
- 6 A.T. five?
- 7 A. Yes.
- 8 Q. 67, A.T. three?
- 9 A. Yes.
- 10 Q. Also Aref and Tony?
- 11 A. Yes.
- 12 Q. 68, A.T. two, Aref and Tony?
- 13 A. Yes.
- 14 Q. Page 70 appears to be the second page of a two- page
- 15 order, A.T. one? Aref and Tony?
- 16 A. Yes, it is.
- 17 Q. 71, A.T. number two, Aref and Tony?
- 18 A. Yes.
- 19 Q. 72, A.T. number one?
- 20 A. Yes.
- 21 Q. Same?
- 22 A. Same.
- 23 Q. 73 and 74 appear to be a two-page order, A.T. one, sar
- 24 thing?
- 25 A. Yes.

A- 001-101

741

LINDA MOHAWK

1 Q. 75, A.T. four?

2 A. Yes.

3 Q. 76 and 77 appear to be a two-page order A.T.?

4 A. Yes, it is.

5 Q. 78, A.T. three?

6 A. Yes.

7 Q. 79, A.T. seven?

8 A. Yes.

9 Q. 80?

10 THE COURT: That means seven orders, ma'am?

11 A. Excuse me?

12 THE COURT: Is that what seven means, seven orders?

13 A. Yes. It could either mean seven orders or seven bundi

14 to the thing. Yeah, that would be -- no, this would be

15 seven -- this would mean there was seven orders to this ord

16 THE COURT: What's an order consist of again?

17 A. An order is just a list of the cigarettes that they o

18 for one.

19 THE COURT: It's one order, isn't it?

20 A. Well, if they had different orders for different

21 customers they had, they would send them -- they would bre

22 it all up, so it was broke up when it came in.

23 THE COURT: I see, so the order is one order, but coul

24 be seven different --

25 A. Yes.

A-001132

742

LINDA MOHAWK

1 THE COURT: And you broke it up.

2 A. No, Bedell's would break it up for us.

3 THE COURT: Okay.

4 BY MR. BRUCE:

5 Q. I want to try and get through some of these and I'm go
6 to bunch them together, 80, 81, 82, 83, 84, 85 and 86, 87,

7 A.T. orders?

8 A. Yes, they are.

9 Q. All Aref and Tony. 88?

10 A. Yes.

11 Q. 89, 92, 94, 96, 97, 98, 99, 100, 101, 102, 103, 105, 1

12 all A.T. orders?

13 A. Yes, they are.

14 Q. All Aref and Tony?

15 A. Yes.

16 Q. 110?

17 A. Yes.

18 Q. 111?

19 A. Yes.

20 Q. 112?

21 A. Yes.

22 Q. 113, 114, 115, 116, 117, 119, 120 and 121, all Aref

23 orders?

24 A. Yes, they would be.

25 Q. All for A.T.?

Exhibit D

A	B	C	D	E	F	G	H	I	J
1	A.D Bedell Co Inc								
2	P.O. Box 349 Salamanca NY 14779								
3									
4	ATF Audit Case Number: 98-6032 H1C (TY)								
5	Workpaper Prepared By: J. G. COSGROVE								
6	Date of Preparation: April 1, 2005								
7	Lead Auditor: James J. VAUGHN, CPA								
8	Forensic Audit Manager: North Atlantic Region								
9	Auditor: J. G. COSGROVE, CFS								
10	Forensic Auditor, North Atlantic Region								
11									
12	1994-1997 Coded Cigarette Sales to Roseine's/Mohawk								
13	(Sorted in Code Sequence)								
Inv #	Date	Sold To	Order #	\$ Amt	Ctns	Acct #	Code	Abbreviated	
14	10/31/94	Roseine's	22421	\$6,155.73	567	913012	ORDERA	A	
15	11/28/94	Roseine's	13057	\$494.97	73	913012	ORDERA	A	
16	12/23/94	Roseine's	24837	\$12,420.90	1,110	913012	ORDERA	A	
17	12/28/94	Roseine's	24974	\$0.00	0	913012	ORDERAA	A	
18	10/14/95	Mohawk, L	34524	\$3,180.45	360	945923	A #1	A	
19	10/14/95	Mohawk, L	34525	\$13,383.00	1,200	945923	A #2	A	
20	10/17/95	Mohawk, L	34706	\$16,545.60	1,440	945923	order A1	A	
21	12/21/95	Mohawk, L	24714	\$3,791.70	330	945923	A 3	A	
22	12/21/95	Mohawk, L	38166	\$3,548.70	330	945923	order A1	A	
23	12/21/95	Mohawk, L	24717	\$4,807.34	466	945923	A 2	A	
24	05/24/96	Linda Moha	59839	\$2,581.89	231	945923	A	A	
25	07/05/96	Linda Moha	19897	\$1,129.55	95	945923	A3	A	
26	08/14/96	Linda Moha	74930	\$9,423.78	852	945923	A	A	
27	08/15/96	Linda Moha	47324	\$6,373.72	568	945923	A	A	
28	08/17/96	Linda Moha	21600	\$9,837.00	450	945923	A	A	
29	08/21/96	Linda Moha	21694	\$6,137.10	540	945923	A	A	
30	08/21/96	Linda Moha	47513	\$11,119.80	1,020	945923	A	A	
31	08/22/96	Linda Moha	47513	\$11,298.15	1,035	945923	A	A	
32	08/22/96	Linda Moha	47513	\$1,119.80	1,020	945923	A	A	
33	08/22/96	Linda Moha	47513	\$1,119.80	1,020	945923	A	A	
34	08/23/96	Linda Moha	53103	\$1,573.58	1,007	945923	A	A	

A	B	C	D	E	F	G	H	I
Inv #	Date	Sold To	Order #	\$ Amt	Ctns	Actt #	Code	Abbreviated
14								
730	300800	Linda Mohr	31731	\$4,045.97	353	945923	AT	AT
731	302256	Linda Mohr	22633	\$7,612.45	655	945923	AT	AT
732	305787	Linda Mohr	23012	\$3,904.55	365	945923	AT	AT
733	307002	Linda Mohr	11979	\$7,959.45	700	945923	AT	AT
734	307312	Linda Mohr	49594	\$4,005.00	350	945923	AT	AT
735	307972	Linda Mohr	23241	\$4,357.33	399	945923	AT	AT
736	308363	Linda Mohr	49705	\$962.90	95	945923	AT 2	AT
737	308373	Linda Mohr	49709	\$6,127.05	560	945923	AT 1	AT
738	308439	Linda Mohr	12103	\$8,020.95	735	945923	AT	AT
739	308441	Linda Mohr	12104	\$3,464.05	315	945923	AT	AT
740	308446	Linda Mohr	23297	\$4,393.98	394	945923	AT JAMMY	AT
741	309739	Linda Mohr	23411	\$4,901.40	420	945923	A.T AND JIM	AT
742	309751	Linda Mohr	49863	\$1,488.05	140	945923	AT 1	AT
743	309757	Linda Mohr	33667	\$4,180.05	365	945923	AT2	AT
744	309929	Linda Mohr	12246	\$2,800.80	240	945923	AT 5	AT
745	309931	Linda Mohr	12244	\$2,170.91	188	945923	AT 2	AT
746	309932	Linda Mohr	12252	\$4,302.50	375	945923	AT	AT
747	309940	Linda Mohr	12245	\$2,660.33	245	945923	AT3	AT
748	309941	Linda Mohr	49879	\$1,767.79	162	945923	AT4	AT
749	309942	Linda Mohr	49876	\$2,337.50	218	945923	AT	AT
750	313933	Linda Mohr	23989	\$4,360.45	385	945923	A-T #1	AT
751	313936	Linda Mohr	40000	\$7,534.15	710	945923	A-T #2	AT
752	315746	Linda Mohr	12805	\$7,182.65	660	945923	AT	AT
753	316693	Linda Mohr	24433	\$4,201.20	360	945923	AT	AT
754	317463	Linda Mohr	40183	\$11,928.15	1,100	945923	A-T	AT
755	322593	Mohawk, L	13503	\$6,922.50	600	945923	AT	AT
756	323324	Mohawk, L	25630	\$1,527.80	140	945923	AT #2	AT
757	323737	Mohawk, L	25704	\$6,120.70	535	945923	#AT	AT
758	323360	Mohawk, L	25629	\$9,055.20	810	945923	AT #1	AT
759	323404	Mohawk, L	40415	\$700.20	60	945923	AT #3	AT
760	324275	Mohawk, L	25801	\$1,050.30	90	945923	#AT2	AT
761	325105	Mohawk, L	25950	\$12,358.65	1,095	945923	AT1	AT
762	325106	Mohawk, L	25951	\$1,400.40	120	945923	AT2	AT
763	325319	Mohawk, L	36927	\$7,654.80	690	945923	AT #3	AT
764	325352	Mohawk, L	36943	\$18,205.20	1,560	945923	AT	AT

A	B	C	D	E	F	G	H	I	
Inv #	Date	Sold To	Order #	\$ Amt	Ctns	Acft #	Code	Abbreviated	
765	325590	02/06/97	Mohawk, L	40586	\$24,154.02	2,206	945923	AT 1	AT
766	325593	02/06/97	Mohawk, L	40587	\$2,562.30	240	945923	AT 2	AT
767	326059	02/08/97	Mohawk, L	37110	\$3,501.00	300	945923	AT 3	AT
768	326063	02/08/97	Mohawk, L	37109	\$2,669.88	239	945923	AT 2	AT
769	326068	02/08/97	Mohawk, L	37108	\$7,596.45	685	945923	AT 1	AT
770	326547	02/11/97	Mohawk, L	26229	\$350.10	30	945923	AT 6	AT
771	326548	02/11/97	Mohawk, L	26224	\$1,671.00	150	945923	AT 1	AT
772	326551	02/11/97	Mohawk, L	26225	\$875.25	75	945923	AT 2	AT
773	326554	02/11/97	Mohawk, L	26227	\$2,881.60	280	945923	AT 4	AT
774	326552	02/11/97	Mohawk, L	26226	\$1,514.95	135	945923	AT 3	AT
775	326563	02/11/97	Mohawk, L	26228	\$6,755.60	605	945923	AT 5	AT
776	328821	02/12/97	Mohawk, L	37303	\$8,711.85	780	945923	AT #1	AT
777	328822	02/12/97	Mohawk, L	37304	\$4,301.70	405	945923	AT #2	AT
778	327552	02/15/97	Mohawk, L	76681	\$6,047.25	525	945923	AT #1	AT
779	327660	02/17/97	Mohawk, L	26441	\$17,990.25	1,650	945923	AT	AT
780	327932	02/18/97	Mohawk, L	26508	\$3,966.25	350	945923	AT 2	AT
781	327942	02/18/97	Mohawk, L	26507	\$6,097.00	550	945923	AT 1	AT
782	327986	02/18/97	Mohawk, L	26509	\$5,188.05	465	945923	AT 3	AT
783	328515	02/20/97	Mohawk, L	26618	\$18,374.10	1,740	945923	AT 1	AT
784	328553	02/20/97	Mohawk, L	26619	\$1,037.05	90	945923	AT 2	AT
785	328554	02/20/97	Mohawk, L	26621	\$1,750.50	150	945923	AT 4	AT
786	328576	02/20/97	Mohawk, L	26620	\$1,983.90	170	945923	AT 3	AT
787	328578	02/20/97	Mohawk, L	13851	\$6,417.00	575	945923	AT 5	AT
788	329413	02/25/97	Mohawk, L	37857	\$1,225.35	105	945923	AT #3	AT
789	329417	02/25/97	Mohawk, L	37856	\$3,488.10	330	945923	AT #2	AT
790	329421	02/25/97	Mohawk, L	37854	\$10,168.30	940	945923	AT #1	AT
791	329690	02/26/97	Mohawk, L	14087	\$2,472.10	255	945923	AT #2	AT
792	330000	02/27/97	Mohawk, L	37976	\$2,541.65	245	945923	AT 1	AT
793	330010	02/27/97	Mohawk, L	37977	\$3,790.95	360	945923	AT 2	AT
794	330011	02/27/97	Mohawk, L	37978	\$2,721.30	240	945923	AT 3	AT
795	330012	02/27/97	Mohawk, L	37982	\$2,975.85	255	945923	AT 7	AT
796	330014	02/27/97	Mohawk, L	37980	\$700.20	60	945923	AT 5	AT
797	330022	02/27/97	Mohawk, L	37981	\$2,567.40	220	945923	AT 6	AT
798	330055	02/27/97	Mohawk, L	27024	\$1,983.90	170	945923	AT 8	AT
799	330057	02/27/97	Mohawk, L	27025	\$1,575.45	135	945923	AT 9	AT

A	B	C	D	E	F	G	H	I
Inv #	Date	Sold To	Order #	\$ Amt	Cins	Acft #	Code	Abbreviated
800	03/01/97	Mohawk, L	27107	\$2,560.53	229	945923	AT	AT
801	03/01/97	Mohawk, L	27110	\$9,411.57	901	945923	AT #1	AT
802	03/03/97	Mohawk, L	40700	\$5,337.30	480	945923	AT #1	AT
803	03/03/97	Mohawk, L	38102	\$4,777.85	430	945923	AT #1	AT
804	03/04/97	Mohawk, L	40701	\$3,019.01	278	945923	AT #2	AT
805	03/04/97	Mohawk, L	27217	\$7,346.00	1,500	945923	AT	AT
806	03/05/97	Mohawk, L	38212	\$6,351.76	548	945923	AT #2	AT
807	03/05/97	Mohawk, L	38213	\$3,851.10	330	945923	AT #3	AT
808	03/05/97	Mohawk, L	38211	\$2,805.59	242	945923	AT #1	AT
809	03/06/97	Mohawk, L	27328	\$8,864.10	780	945923	AT 2	AT
810	03/06/97	Mohawk, L	27327	\$9,334.50	900	945923	AT 1	AT
811	03/07/97	Mohawk, L	14309	\$2,948.15	285	945923	AT #3	AT
812	03/07/97	Mohawk, L	58182	\$6,030.62	552	945923	AT #1	AT
813	03/07/97	Mohawk, L	27386	\$4,875.35	460	945923	AT 2	AT
814	03/08/97	Mohawk, L	38352	\$1,548.95	135	945923	AT #6	AT
815	03/08/97	Mohawk, L	38348	\$4,161.45	360	945923	AT #2	AT
816	03/08/97	Mohawk, L	38349	\$1,050.30	90	945923	AT #3	AT
817	03/08/97	Mohawk, L	38347	\$4,408.10	380	945923	AT #1	AT
818	03/08/97	Mohawk, L	38351	\$816.90	70	945923	AT #5	AT
819	03/08/97	Mohawk, L	38353	\$970.80	90	945923	AT #7	AT
820	03/08/97	Mohawk, L	38350	\$1,580.80	140	945923	AT #4	AT
821	03/10/97	Mohawk, L	27446	\$1,000.05	90	945923	ET3	AT
822	03/18/97	Mohawk, L	14585	\$1,211.15	105	945923	AT #3	AT
823	03/18/97	Mohawk, L	14584	\$6,974.05	595	945923	AT #2	AT
824	03/18/97	Mohawk, L	58506	\$7,010.10	608	945923	AT #1	AT
825	03/22/97	Mohawk, L	28108	\$1,843.50	150	945923	AT1	AT
826	03/22/97	Mohawk, L	28111	\$2,348.40	210	945923	AT4	AT
827	03/22/97	Mohawk, L	28109	\$2,812.60	240	945923	AT2	AT
828	03/22/97	Mohawk, L	38942	\$737.40	60	945923	AT 13	AT
829	03/22/97	Mohawk, L	38941	\$2,005.20	180	945923	AT 12	AT
830	03/22/97	Mohawk, L	38940	\$5,673.00	500	945923	AT 11	AT
831	03/22/97	Mohawk, L	28110	\$6,923.10	590	945923	AT3	AT
832	03/25/97	Mohawk, L	39014	\$4,212.60	340	945923	AT #3	AT
833	03/25/97	Mohawk, L	39013	\$841.68	72	945923	AT #2	AT
834	03/25/97	Mohawk, L	28278	\$11,645.85	965	945923	AT 1	AT

A	B	C	D	E	F	G	H	I	J	K
Inv #	Date	Sold To	Order #	\$ Amt	Ctns	Acct #	Code	Abbreviated		
4812	278951	Linda Moh	37211	\$3,544.20	365	945923	Z1A	Z		
4813	280315	Linda Moh	20604	\$6,855.90	615	945923	Z5	Z		
4814	280359	Linda Moh	19895	\$791.80	70	945923	Z2	Z		
4815	280363	Linda Moh	19892	\$5,365.90	460	945923	Z1	Z		
4816	280370	Linda Moh	20611	\$1,702.50	150	945923	Z7	Z		
4817	280375	Linda Moh	20610	\$1,886.30	170	945923	Z6	Z		
4818	280382	Linda Moh	19895	\$929.65	85	945923	Z2	Z		
4819	280384	Linda Moh	74672	\$653.95	55	945923	Z8	Z		
4820	281942	Linda Moh	10028	\$1,070.10	90	945923	Z3	Z		
4821	281946	Linda Moh	20796	\$4,394.10	390	945923	Z5	Z		
4822	281947	Linda Moh	10027	\$1,345.80	120	945923	Z2	Z		
4823	281948	Linda Moh	20797	\$2,437.45	205	945923	Z4	Z		
4824	281952	Linda Moh	10029	\$6,063.90	510	945923	Z1	Z		
4825	283815	Linda Moh	20976	\$1,071.94	106	945923	Z	Z		
4826				\$24,847,623.75	2,276,901					
4827										
4828	REFERENCE: All invoices referenced were traced to the invoice in the government's possession having the same exhibit number									
4829	as the invoice.									
4830	Purpose: To document coded sales made by A.D. Bedell to Roseine's Smoke Shop (Linda &/or Joseph Mohawk).									
4831	Source: Sales Invoices obtained from A.D. Bedell									
4832	Scope: January 1, 1994-May 16, 1997									
4833	Conclusion: During the period under review:									
4834	(1) A.D. Bedell sold \$24,847,623.75 of cigarettes to Roseine's Smoke Shop (Linda &/or Joseph Mohawk) utilizing coded invoices.									
4835	(2) A.D. Bedell sold 2,276,901 cartons of cigarettes to Roseine's Smoke Shop (Linda &/or Joseph Mohawk) utilizing coded invoices.									