

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA :
:
- v. - :
:
ABDUWALI ABDUKHADIR MUSE, :
:
Defendant. :
:
-----X

S1 09 Cr. 512 (LAP)

**GOVERNMENT'S MEMORANDUM IN CONNECTION
WITH THE SENTENCING OF ABDUWALI ABDUKHADIR MUSE**

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The Government respectfully submits this memorandum in connection with the sentencing of Abduwali Abdukhadir Muse (“Muse”) scheduled for February 16, 2011. Because of the extraordinarily depraved and violent nature of Muse’s crimes, the Government requests that the Court impose a sentence at the top of the stipulated sentencing range – 405 months’ imprisonment.

During a five-week period in the spring of 2009, Muse, a Somali citizen, led a gang of pirates on a series of violent attacks against three different ships that were navigating in the Indian Ocean off the coast of Somalia. During each of these attacks, Muse and his fellow pirates hijacked the targeted ship by pulling alongside it in a smaller motor boat; firing machine guns at the ship and its defenseless crewmembers; and then demanding, at gunpoint, that the crew stop the ship. Once onboard, Muse, as the acknowledged leader of the gang, assumed command of the ship and directed his men to corral the ship’s crewmembers together at gunpoint.

Muse, an experienced seaman who bragged to multiple hostages that he had collected millions of dollars in ransoms from numerous hijackings in the past, proceeded to use each ship

as a base from which to launch the next hijacking. Muse ordered the first captain to tie his ship to the back of the second hijacked ship as Muse and his gang trolled the ocean for weeks for their next target. And all the while, he held the ships' captains and crewmembers hostage – more than thirty men - and threatened to kill them if they did not obey his orders. According to one hostage, Muse assembled an improvised explosive device using a coffee jar, screws and pointed pieces from broken forks in front of him, placed it near the hostage, and told the hostage that he intended to detonate it if the authorities located them.

On April 8, 2009, approximately one month after hijacking the first two ships, Muse and his gang set their sights on the Maersk Alabama, a five-hundred-foot long U.S.-flagged container ship operated by a crew of twenty American sailors. Using a portable ladder and machineguns, Muse and three other pirates boarded the Maersk Alabama and took command of the ship, as they had during the two prior hijackings. However, the resistance mounted by the Maersk Alabama crewmembers ultimately led Muse and his men to kidnap Richard Phillips, the captain of the Maersk Alabama, and hold him hostage in an enclosed motorized life boat that was launched from the ship.

For nearly four full days in the middle of the Indian Ocean, Muse and the three other pirates kept a gun trained on Captain Phillips and repeatedly threatened to kill him. Muse himself held his gun to Captain Phillips' head, pulled the trigger, and then laughed when the gun clicked but did not fire. During this period, Muse directed his crew to bind Captain Phillips' wrists and ankles with rope, and he told Captain Phillips that he planned to bury him in a shallow area of the ocean. At one point, Captain Phillips attempted to escape by jumping into the water whereupon one of Muse's men fired his machinegun into the water until Captain Phillips

surrendered. And thereafter one of the pirates hit Captain Phillips so hard in the head that he lost consciousness, causing him to believe that he had been shot in the head.

After four days, Muse asked to leave the life boat and boarded one of the U.S. Navy vessels that was on the scene. Once on board, Muse received medical treatment from U.S. Navy doctors and insisted that he and his men be granted safe passage to Somalia before they released Captain Phillips. After several more hours of negotiations during which Muse and his three men refused to release Captain Phillips, members of the U.S. Navy shot the three pirates on the life boat and rescued Captain Phillips. Muse was taken into custody immediately thereafter. After his arrest and after waiving his Miranda rights, Muse stated, among other things, that he was forced to participate in the hijacking of the Maersk Alabama by the three other pirates who were with him. Muse also told investigators that he was 15 years old but then began laughing and stated he was between 18 and 19 years old.

As a result of the foregoing conduct, Muse was charged in a ten-count indictment with the following crimes: (1) piracy on the high seas, in violation of Title 18, United States Code, Section 1651; (2) hijacking a ship, in violation of Title 18, United States Code, Section 2280; (3) conspiracy to hijack three ships, in violation of Title 18, United States Code, Section 2280; (4) possession of machine guns during and in relation to the crime of violence charged in Count Two, in violation of Title 18, United States Code, Section 924(c); (5) hostage taking, in violation of Title 18, United States Code, Section 1203; (6) conspiracy to engage in hostage taking, in violation of Title 18, United States Code, Section 1203; (7) possession of machine guns during and in relation to the crime of violence charged in Count Five, in violation of Title 18, United States Code, Section 924(c); (8) kidnaping, in violation of Title 18, United States Code, Section

1201; (9) conspiracy to engage in kidnaping, in violation of Title 18, United States Code, Section 1201; and (10) possession of machine guns during and in relation to the crime of violence charged in Count Eight, in violation of Title 18, United States Code, Section 924(c).

On May 18, 2010, Muse pled guilty to Counts Two, Three, Five, Six, Eight and Nine pursuant to a plea agreement under which the Government elected not to proceed on Count One, which carries a mandatory life sentence for piracy. Based on that agreement, Muse faces a stipulated sentencing range of 324 to 405 months' imprisonment. For the reasons set forth below, the Government respectfully submits that a sentence of no less than 405 months' imprisonment is appropriate.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Muse's Hijacking of the Serenity

The SY Serenity (the "Serenity") is a privately-owned thirty-eight foot yacht that was docked in the Seychelles in 2009.¹ On March 4, 2009, an independent captain, who had been hired by the owner of the Serenity to sail the Serenity to Madagascar, and his crewmember were sailing the Serenity in the waters near the Seychelles. At approximately 2:00 p.m., the Serenity captain and his crewmember were attacked by a gang of nine pirates in a small boat. During an interview with an agent of the U.S. Naval Criminal Investigative Service, the Serenity captain was shown a photo array of six photographs and asked if he recognized the leader of the pirate gang. The Serenity captain identified Muse as the leader and the first one to board the Serenity.

¹ The Republic of Seychelles is comprised of an archipelago of 115 islands in the Indian Ocean approximately 1,000 miles east of mainland Africa.

According to the Serenity captain, Muse said the pirates were members of the “Indian Ocean Coast Guard,” and fired his gun in the air as he boarded the ship. Muse then asked the Serenity captain for his satellite phone. Muse and his gang then robbed the captain and his crewmember of their possessions, including their watches, rings and clothing.

Muse told the Serenity captain that he was looking for a French ship and directed the Serenity captain to sail toward a nearby island where Muse believed the French ship was anchored. The pirates tied their small boat to the Serenity and the Serenity captain began to sail toward the island. On the way, Muse saw a light in the distance and told the Serenity captain to stop. Muse and some of the pirates got into their small boat and drove toward the light. They returned later with another man who they had apparently taken from another ship. Muse then told the Serenity captain to take this man on board the Serenity. When the Serenity captain refused, Muse threatened to kill him and ordered him to sail for Somalia.

On the way to Somalia, Muse saw another ship and again ordered the Serenity captain to stop the Serenity. Muse and some other pirates then took their small boat and attempted to hijack the ship but they were repelled, the Serenity captain was told by one of Muse’s men, because the crew of the ship had guns. After several days, the Serenity reached the coast of Somalia, first near Mogadishu and then near Garacad. At this point, Muse told the Serenity captain that he wanted \$3 million for his release. In response, the Serenity captain told Muse that neither he nor the Seychelles government had any money for a ransom payment.

Several days later, Muse approached the Serenity captain while laughing and pointing a gun at his head. Muse said, “I make you spare part.” When the Serenity captain asked one of Muse’s men what Muse was saying, he advised that Muse meant that he would cut up the

Serenity captain in spare parts and sell his organs. Upon hearing this, the Serenity captain began to cry and asked Muse why he kidnaped people. In response, Muse laughed at him and said “Seychelles no money, you take us to high seas.” The Serenity captain became upset at the idea of taking the Serenity back out into the open water because, at this point, only one of its engines was functioning. Muse then told the Serenity captain that he would kill him if he did not follow Muse’s orders. Later that day, the Serenity departed from the Somali coast, towing the pirates’ smaller boat and searching for the next ship to attack.

During this trip out toward the middle of the Indian Ocean, Muse told the Serenity captain that he would release him if he helped Muse hijack a big ship. But if they did not hijack a big ship, according to Muse, he would kill the Serenity captain. At one point during this trip, which lasted several days, Muse, in front of the Serenity captain, built an improvised explosive device using a glass coffee jar, screws and pointed pieces from broken forks. Muse placed the device near where the Serenity captain was sitting, and told him that he intended to detonate it and kill the Serenity captain if the Serenity was located by the authorities.

B. Muse’s Hijacking of the Win Far 161

The Win Far 161 (the “Win Far”) is a 180-foot fishing vessel owned by a Taiwanese company that was operating in the Indian Ocean in 2009. On April 6, 2009, approximately one week after the Serenity had left the coast of Somalia, Muse spotted the Win Far from the deck of the Serenity. Muse and three other pirates got into their smaller motor boat and headed toward the Win Far. At this time, the Win Far was being operated by a crew of thirty men – seventeen of the crew members were from the Philippines, six were from Indonesia, five were from China, and two were from Taiwan.

According to three of those crew members who were interviewed by members of the New York Joint Terrorism Task Force (“JTTF”), on the morning of April 6, 2009, a speed boat full of pirates began firing at the Win Far. Shortly thereafter, the pirates boarded the Win Far, some armed with AK-47 machineguns, and, according to one crew member, one pirate was equipped with a rocket-propelled grenade launcher on his back. During their respective interviews with members of the JTTF, each of the three crew members from the Win Far was shown the same photo array that was shown to the Serenity captain. All three crew members identified Muse as the English-speaking leader of the pirates.² According to two of the crew members, Muse was carrying a gun when he boarded the Win Far (the third crewmember did not remember Muse carrying a gun), and the pirates robbed the crew members at gun point after boarding.³

Later that day, according to the three Win Far crew members, a second group of pirates boarded the Win Far along with three hostages from the Seychelles that they brought with them. At this point, according to the Serenity captain, the Serenity and the pirates’ motor boat were tied to the rear of the Win Far and the Win Far captain was directed to sail to Somalia.

All three crew members from the Win Far and the Serenity captain recounted that within days of the hijacking of the Win Far on April 6, 2009, they saw Muse and three other pirates leave the Win Far in the pirates’ motor boat and never saw them return.⁴

² One of the crew members said he was not 100 percent certain of his identification.

³ A wallet containing identification documents and family photos belonging to one of the Win Far crew members was recovered from the life boat of the Maersk Alabama after the rescue of Captain Phillips on April 12, 2009. During his interview, the Win Far crewmember identified the wallet and its contents as his own.

⁴ The Serenity captain identified two of the pirates who left with Muse as “Ali” and
(continued...)

C. Muse's Hijacking of the Maersk Alabama

On April 8, 2009, the Maersk Alabama, a five-hundred-foot long container ship owned by Maersk Lines Limited of Norfolk, Virginia, was en route from the Republic of Djibouti for Mombasa, Kenya. The ship, which was several hundred miles off the coast of Somalia in the Indian Ocean, was being operated by a crew of twenty sailors, all of whom were United States citizens. The following account of the events of that day are based upon law enforcement interviews of the captain and the crew of the Maersk Alabama.

At approximately 7:30 a.m. on April 8, 2009, Muse and his three men approached the Maersk Alabama in their motor boat. The pirates fired guns at the ship as they neared. Muse used a portable ladder to board the Maersk Alabama and was the first pirate to get onto the deck of the ship. Muse, who was armed, quickly entered the bridge of the ship and told the captain, Richard Phillips, to stop the ship.⁴ Before Muse had boarded the Maersk Alabama, most of the crew had retreated to a designated safe room within the interior of the ship.

The three other pirates ultimately boarded the Maersk Alabama, and all of them were armed as well. The motor boat used by the pirates to reach the Maersk Alabama was damaged and sunk after all of the pirates boarded the Maersk Alabama. All four pirates generally stayed in or near the bridge during their nearly twelve-hour stay on the ship. Muse demanded that Captain Phillips order the crew to come to the bridge. The captain complied but the majority of the crew

⁴(...continued)

“Noor.” This is consistent with the true names of two of the deceased pirates found on the life boat after Captain Phillips was rescued.

⁴ Larger container ships are typically operated and controlled from the bridge, which is an enclosed room in the rear, raised part of the ship that provides a view of the deck of the ship and the waters around the ship.

remained in the safe room. Based on their training, the crew understood that they should stay in the safe room. Muse also demanded money from Captain Phillips who provided the pirates with approximately \$30,000 in cash from the ship's safe.

Certain members of the crew, including the chief engineer, shut down all power on the ship shortly after Muse and the three other pirates boarded. As a result, the ship stopped moving, there were no lights or air conditioning within the interior of the ship and various alarms were triggered. Muse later began to canvass the ship with one of the crew members searching for the majority of the crew who were hiding in the safe room. The crew member convinced Muse that he should leave his gun on the bridge with the other pirates because the crew members in hiding would be too afraid to surrender if Muse was armed. During one of these walks to the darkened interior of the ship, another crew member tackled Muse and was able to subdue him and tie his hands with wire. He then took Muse to the safe room where he was guarded by the rest of the crew.

When the other three pirates realized that Muse had been captured, they demanded his return. They ultimately agreed to leave the Maersk Alabama, in an enclosed motorized life boat that was on board the Maersk Alabama, if Muse was returned to them. The crew launched the life boat for the pirates and provided them with food and additional fuel, among other things. Captain Phillips boarded the life boat with the three other pirates, and the crew members allowed Muse to board the life boat. Captain Phillips then showed Muse how to operate the life boat and then attempted to leave the life boat. At that time, Muse reneged on his agreement with the crew, and refused to allow Captain Phillips to get out of the life boat and return to the Maersk Alabama. The life boat then navigated a short distance away from the Maersk Alabama with all

four pirates and Captain Phillips on board.

D. Muse's Kidnaping of Captain Phillips

Several hours later, on April 9, 2009, the USS Bainbridge, a U.S. Navy destroyer, arrived at the scene to coordinate the safe passage of the Maersk Alabama and its nineteen crew members to Kenya as well as the rescue of Captain Phillips from the life boat. Two other United States Navy vessels – the USS Boxer and the USS Halyburton – ultimately reached the scene as well. Over the course of the following three days, there were hours of radio communications between Muse from the life boat and hostage negotiators on the USS Bainbridge. During these recorded communications, Muse repeatedly threatened to kill Captain Phillips and refused to release him unless and until he and his group were given safe passage to Somalia.

One night, Captain Phillips attempted to escape from the life boat by jumping into the water and swimming toward one of the U.S. Navy vessels. In response, the pirates shot an AK-47 into the water at him until he surrendered. The next day, Muse told the negotiators on the USS Bainbridge, "We are going to punish him now. We are going to tie him." Thereafter, Muse and his men beat Captain Phillips and yelled at him. They also bound his hands and feet with rope and tied his hands to the interior of the life boat.

Muse also accused Captain Phillips of being dirty and performed a religious ritual involving ropes, which the captain believed was going to end in his death. Muse told Captain Phillips that he was going to bury him in a shallow area of the ocean because he was dirty. At this time, Muse also said, "Not tonight. Tomorrow night." The captain understood Muse to mean that Muse intended to kill him the following night.

Muse also explained to the captain that he liked having hijacked an American ship and

wanted to kill Americans. Muse also told Captain Phillips about previous hijackings that he had committed, which had yielded him millions of dollars in ransom payments. Muse said that a ransom payment of only a few million dollars for the captain was not worth it and that he would rather kill the captain than accept that amount. After Captain Phillips' escape attempt, Muse and his men also deprived him of food and water. In addition, at a certain point, one of the pirates hit the captain so hard in the head that he thought he had been shot as he lost consciousness and began to bleed.

After Muse and his men tied him up, Captain Phillips told them that other pirates would be upset with them for what they were doing. In response, Muse pointed his pistol at Captain Phillips' head and pulled the trigger. After it clicked and did not fire, Muse laughed. Thereafter, Captain Phillips began to chew on the ropes tied around his wrists and legs. This upset the pirates to the point that they stuck a stick inside Captain Phillips' mouth. After doing that, Muse called the captain "stick mouth" and shined a flashlight into his mouth to make sure the stick stayed in position.

On the morning of April 12, 2009, Muse asked to leave the life boat and board the USS Bainbridge. The three other pirates remained in the life boat with Captain Phillips. Once on board the USS Bainbridge, Muse received medical treatment for a cut on his hand and continued to negotiate for the safe passage of his crew to Somalia. The pirates on the life boat ultimately agreed to allow the USS Bainbridge to tow them because the life boat had run out of fuel. After several more hours of negotiations involving the three pirates on the life boat, Muse on the deck of the USS Bainbridge, and Government personnel on the USS Bainbridge, the situation became increasingly tense as the three pirates continued to refuse to release Captain Phillips. In these

circumstances, the U.S. Navy shot the three pirates on the life boat and rescued Captain Phillips. Muse was taken into custody immediately thereafter.

During a search of the life boat, 2 loaded AK-47 assault rifles, 6 AK-47 magazines, and a pistol were recovered, among other things. In addition, a wallet that had been stolen from one of the Win Far crewmembers was also recovered. See footnote 3 supra.

E. Muse's Post-Arrest Statement

After his arrest and transfer to the custody of the JTTF, Muse provided oral and written waivers of his Miranda rights. When asked his age at the beginning of the interview, Muse said that he was fifteen years old and then began to laugh. The interviewing detective then asked Muse for his religion and Muse advised that he was a "true Muslim." When the detective asked Muse if a true Muslim lies, Muse retracted his statement that he was fifteen years old and said that he was between eighteen and nineteen years old. Muse then apologized to the detective for lying to him about his age and said that he would ask Allah for forgiveness.

When asked about his role in the hijacking of the Maersk Alabama, Muse stated that, one week before the hijacking, he was preparing for a fishing trip with two friends. While the three of them were in their motor boat near the shore, they were approached by a group of men in a second motor boat who fired guns into the air, causing Muse's two friends to flee to shore. Some of the men with the guns then boarded the motor boat Muse was in and forced him to join them while they roamed the Indian Ocean looking for foreign cargo ships to hijack. Muse then claimed that he was given a gun by one of the men but did not use it to escape because he was too intimidated by them. Muse then stated that he boarded the Maersk Alabama and held a gun

to Captain Phillips' head on the life boat because he feared the U.S. Navy ship nearby would kill him.

F. Muse's Presentment and Age Hearing

On April 21, 2009, Muse was charged in a five-count complaint with piracy, seizing a ship by force, hostage taking, and two firearm possession counts. On the same date, Muse was presented before Magistrate Judge Andrew J. Peck in the Southern District of New York. Prior to Muse's presentment, defense counsel requested a sealed hearing pursuant to 18 U.S.C. § 5031 et seq. to establish that Muse was under 18 years old at the time of the charged conduct and therefore should be prosecuted as a juvenile. Over the objections of the Government and members of the media who were present in court, Magistrate Judge Peck agreed to conduct the requested hearing. A transcript of the hearing is attached as Exhibit A.

During the hearing, the Government presented evidence regarding Muse's age both by attorney proffer and witness testimony. First, the Government proffered that Muse stated that he was over 18 years old on four different occasions after he was taken into custody. See Exhibit A at 27. On April 12, 2009, after being taken into custody and initially stating that he was 16, Muse stated through a Somali interpreter that he was 19. Id. Hours after that, Muse stated that he was 26. Id. And the following day, during a pedigree interview with the assistance of a Somali interpreter, Muse again said that he was 19. Id. at 28. To address the fourth occasion during which Muse said he was over 18, the Government called Detective Frederick Galloway of the JTTF.

During his sworn testimony, Detective Galloway described his conversation with Muse from the day before during Muse's transport to the United States. According to Detective

Galloway, when he asked Muse his age, Muse laughed. Id. at 30. Detective Galloway then asked Muse if he was 15 years old and Muse laughed again. Id. Detective Galloway then asked Muse if he was a true Muslim, and Muse responded affirmatively. Id. In response, Detective Galloway asked Muse if “true Muslims” lie. Id. According to Detective Galloway, Muse then apologized to Detective Galloway and said he was between 18 and 19 years old. Id. Muse also informed Detective Galloway that he planned to ask Allah to forgive him for lying and that he would not lie to Detective Galloway again. Id.

Before concluding Detective Galloway’s direct examination, the Government further proffered to the Court that, when asked for the ages of the three deceased pirates, Muse provided approximate ages of 28, 31 and 35 years old. Id. In addition, the Government proffered that multiple witnesses on the Maersk Alabama estimated Muse’s age to be approximately 25 based their perceptions of his physical appearance and the manner in which he conducted himself. Id.

Between direct and cross-examinations of Detective Galloway, Magistrate Judge Peck asked the detective whether Muse provided him with a date of birth. Id. at 33. In response, Detective Galloway testified that Muse only said that he was “between 18 and 19,” and that Muse had advised him that he did not know his birth date because there were no government records in Somalia. Id. The Government then confirmed that Muse did not provide a birth date during any of his prior interviews. Id.

During cross-examination, defense counsel asked Detective Galloway about the conditions of the interview, the availability of a doctor and a second Somali interpreter, and whether Muse spoke to his parents at any point during his transport to the United States. Id. at

34-36. On redirect examination, Detective Galloway testified that he and Muse had the conversation about his age after Muse had waived his Miranda rights. Id. at 36-37.

After the Government rested, the defense introduced the testimony of a man who identified himself as Muse's father via telephone from Somalia. During his direct testimony, which was conducted via speaker phone in the courtroom, the witness stated that Muse was his oldest son among twelve children. Id. at 39. The witness then stated that Muse was born on November 20, 1993. Id. at 39. According to the witness, his next oldest child was born in July or August of 1997. Id. at 40. The witness further testified that he saw Muse a lot while he was growing up and that he was present when Muse was born on November 20, 1993. Id. at 40-41.

After brief cross-examination by the Government, Magistrate Judge asked the witness for the birth date of his fourth oldest child. Id. at 42. In response, the witness stated that his fourth oldest child was born in 1990. Id. Magistrate Judge Peck concluded his questioning after that response. Id.

At the conclusion of this testimony, Magistrate Judge Peck asked the defense if Muse intended to testify. Id. at 43. Magistrate Judge Peck made clear that he "would be prepared to limit questions to [Muse] only about his age." Id. After conferring with Muse, defense counsel advised the Court that Muse did not wish to testify. Id.

Magistrate Judge Peck then heard brief oral argument from the parties and ruled from the bench. Magistrate Judge Peck found that Muse was over 18 years old and would not be treated as a juvenile based on the "credible" testimony of Detective Galloway about his post-arrest interview of Muse. Id. at 46. With respect to the testimony of the man identified as Muse's father, Magistrate Judge Peck explained that it was "incredible" that he knew Muse's exact birth

date but was vague as to his second oldest child's birth date and picked a birth year that would make the fourth oldest child his oldest child. Id. at 47. Magistrate Judge Peck further reasoned that "it is conceivable that . . . [the witness] knew he needed to pick an age under 18 in order for his son to be treated as a juvenile." Id. at 47. Magistrate Judge Peck concluded: "I just did not find the father's testimony to be credible at all." Id. at 48. After noting that another "small factor" in his decision was the fact that the need for juvenile secrecy had been obviated by the prior press coverage of the case, Magistrate Judge Peck ordered the unsealing of the courtroom and the transcript. Id. at 48. The Government then publicly filed the complaint against Muse.

G. The Hostages on the Serenity and the Win Far

After the rescue of Captain Phillips and the arrest of Muse on April 12, 2009, Muse's men returned to Garad, Somalia on the Win Far, continuing to hold hostage the thirty crew members of the Win Far and the three men from the Seychelles. One of the hostages recounted that, during the five day trip to Somalia, the hostages were not allowed to stand or to urinate without permission. The three Seychelles hostages were held captive on board the Win Far by Muse's men for more than six months – from March 4, 2009 to September 19, 2009. The thirty crew members of the Win Far were held captive on board the same ship by Muse's men for more than ten months – from April 6, 2009 to February 11, 2010. One of the hostages recalled that, during this time, the hostages were kept in the dark, and forced to eat rice with sand in it and to drink water mixed with diesel fuel and salt water. During the ten-month period of captivity, two crew members of the Win Far died of illness and Muse's men disposed of their bodies.

H. Muse's Plea

On May 18, 2010, Muse pled guilty to Counts Two (hijacking a ship), Three (conspiracy to hijack to three ships), Five (hostage taking), Six (conspiracy to engage in hostage taking), Eight (kidnaping) and Nine (conspiracy to engage in kidnaping) pursuant to a plea agreement between the parties. In the plea agreement, the parties agreed that Muse's total offense level is 41, which includes a four-level leadership enhancement, and his Criminal History Category is I. In addition, based on his plea, Muse faces a stipulated sentencing range of 324 to 405 months' imprisonment.

After the Court advised Muse of the terms of the plea agreement, including his waiver of any challenge to his conviction based on his age, the rights he was giving up by pleading guilty, and the maximum penalties he faced, Muse admitted the following: (i) in 2009, he agreed with others to capture any ship they found in the Indian Ocean; (ii) in April 2009, he and three other men used firearms to capture the Maersk Alabama, its captain and its crew; (iii) he and the three men then took the captain of the Maersk Alabama as their "captive" onto an emergency boat; (iv) when the U.S. Navy arrived at their location in the Indian Ocean, using the radio on the emergency boat, he and the three men demanded that they be permitted to return to land safely in exchange for the release of the captain; and (v) if their demands were not met, they threatened to harm the captain. See May 18, 2010 Plea Transcript at 22-25.

II. APPLICABLE LEGAL PRINCIPLES

Under current law, sentencing courts must engage in a three-step sentencing procedure. See United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). First, the district court must determine the applicable sentencing range, and, in so doing, "the sentencing judge will be entitled to find all

of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.” Id. at 112. Second, the district court must consider whether a departure from that Guidelines range is appropriate. Id. Third, the court must consider the Guidelines range, “along with all of the factors listed in section 3553(a),” and determine the sentence to impose. Id. at 113.

Although the Guidelines are no longer mandatory, district courts must continue to “consult” the Guidelines and “take them into account” when sentencing. United States v. Booker, 543 U.S. 220, 264 (2005); accord United States v. Cavera, 550 F.3d 180, 187 (2d Cir. 2008) (en banc) (“In [Booker], the Court retained an important role for the Sentencing Commission, leaving untouched the statutory direction to district courts that they should consult the Guidelines range when imposing sentence.”) (citing Booker, 543 U.S. at 245-46). Because the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” Gall v. United States, 552 U.S. 46 (2007), district courts must treat the Guidelines as the “starting point and the initial benchmark” in sentencing proceedings, id. at 49, and must “remain cognizant of them throughout the sentencing process,” id. at 50 n.6. It also is the Court’s duty to form its own view of the “nature and circumstances of the offense and the history and characteristics of the defendant,” and to then impose a sentence “sufficient, but not greater than necessary,” to accomplish the objectives of criminal sentencing. 18 U.S.C. § 3553(a); see Cavera, 500 F.3d at 188 (“In addition to taking into account the Guidelines range, the district court must form its own view of ‘the nature and circumstances of the offense and the history and characteristics of the defendant.’”).

III. DISCUSSION

A. The Applicable Guidelines Range

The Government agrees with the Probation Office's analysis with respect to the applicable sentencing range for Muse. Specifically, the Government agrees that, pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") §§ 3D1.2(a) and 3D1.2(b), all six counts are grouped together into a single group. See Presentence Report ("PSR") ¶ 59. The Government also agrees that the base level for the group is 32 pursuant to U.S.S.G. §§ 3D1.3(a) and 2A4.1. Id. ¶¶ 59-60. Because a ransom demand or a demand upon a government was made, the offense level is increased by six levels pursuant to U.S.S.G. § 2A4.1(b)(1). Id. ¶ 61. Pursuant to U.S.S.G. § 2A4.1(b)(3), an additional two-level enhancement is warranted because a dangerous weapon was used. Id. ¶ 63. In addition, because Muse was an organizer or leader of the criminal activity, which involved five or more participants or was otherwise extensive, the offense level is increased four levels pursuant to U.S.S.G. § 3B1.1(b). Id. ¶ 65. Finally, because Muse accepted responsibility by pleading guilty prior to trial and provided timely notification of his intention to plead guilty, the offense level is decreased by 3 levels pursuant to U.S.S.G. §§ 3E1.1(a) and 3E1.1(b). Id. ¶ 68.

Based on the foregoing, the Government agrees that Muse's applicable Guidelines offense level is 41. Id. ¶ 69. The Government also agrees that Muse's Criminal History Category is Category I. Id. ¶ 88. Accordingly, based on a Guidelines' offense level of 41, and a Criminal History Category of I, the resulting Guidelines range is 324 to 405 months' imprisonment. Id. ¶ 119.

B. The Statutory Sentencing Factors Call For A Sentence Of 405 Months' Imprisonment

In United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), the Court of Appeals held that, after calculating the appropriate Sentencing Guidelines range, see supra, the sentencing court should determine the appropriate sentence based on the Section 3553(a) factors. These factors are:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant;
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];
- (5) any pertinent policy statement [issued by the Sentencing Commission];
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

Because of the extraordinary nature of the offenses, the need for the sentence imposed to protect the public from further crimes of the defendant, and the need for the sentence imposed to afford adequate deterrence to this type of conduct, a sentence at the top end of the applicable Guidelines range – 405 months' imprisonment – is the only appropriate sentence here. This is

the sentence that the Probation Office recommends, see PSR at 34-36, and it is the sentence Muse deserves.

Over the span of five weeks, Muse led a gang of armed men on a brazen and terrorizing wave of attacks at sea during which they commandeered three ships and kidnaped fifty-three defenseless sailors. For Muse, however, this was not enough.

He was not willing to take the Maersk Alabama life boat and return to Somalia with his men. Instead, he chose to turn that life boat into a floating prison for Captain Phillips for three excruciating days within which Muse and his men subjected the captain to various forms of physical and psychological trauma. It is because of his choices and his actions that Muse is before the Court for sentencing. And his choices and his actions warrant the maximum term of imprisonment under the applicable Sentencing Guidelines range. The defendant's arguments to the contrary are meritless.

1. Muse's Offenses Are Extraordinary

The gang of men who violently and methodically seized control of the Serenity, the Win Far and the Maersk Alabama were experienced, coordinated and ruthless in the practice of hijacking, robbery and hostage-taking. They were skilled seamen who understood how to track and approach larger vessels from their speed boats. They were comfortable handling and firing AK-47 machineguns while on the water. They understood how to board and then commandeer various types of target vessels quickly and efficiently. They did not hesitate to beat, injure and shoot at their hostages. They were willing to hold their captives for months and they refused to surrender. Their approach was premeditated, organized and relentless. And it was executed under the direction of one man.

Muse was the undisputed leader of the gang of approximately ten pirates who participated in the hijackings of the *Serenity*, the *Win Far* and the *Maersk Alabama*. The pirates' conduct makes clear that they were not merely robbing crew members to support themselves. Theirs was a far more ambitious and lucrative objective: multi-million dollar ransom payments in exchange for the lives of the crew members. And they were committed to holding on to their dozens of hostages for as long as was necessary to get paid, even if hostages died as a result. The extreme level of violence and sadism that Muse employed – almost all of which was entirely unnecessary to his demands for ransom – emphatically demonstrates that Muse and his men were not, as Muse suggests, half-hearted participants conscripted into service by hunger or any other duress: they appeared to relish even their most depraved acts of physical and psychological violence and abandoned all pretense of humane treatment of their captives. In this regard especially, Muse was the undisputed leader, threatening to kill one of his captives with an improvised explosive device, playing Russian roulette with Captain Phillips, and continually threatening to kill his captives.

At the outset of each attack, Muse and his men fired their guns at or in the vicinity of the target ships – immediately instilling a sense of fear in their unarmed crew members. Once on board, Muse directed the ship's captain to cut the engine and instructed his men to corral all of the crew members together. On the *Serenity* and the *Win Far*, Muse and his men then robbed the crew members of their belongings at gun point. They were not just interested in cash; they took cellphones, jewelry and, in the case of at least one *Win Far* crew member, his wallet with his

identification and photos of his family.⁵ That was the first part of the plan.

Under threat of death, Muse then ordered the ship's captain to follow his commands. With the hijacked ships tied to one another, Muse used the floating caravan as a base of operations on which to detain his hostages and from which to launch subsequent attacks. When a new target ship was identified, Muse loaded up the pirates' speed boat with a few of his men and some of their guns, and led them to their next attack. The other pirates stayed behind with the hostages, awaiting an update from Muse.

After a successful hijacking, Muse and his men returned to the coast of Somalia with their hostages. It was there that they held the three Seychelles hostages for five months and the thirty Win Far hostages for ten months. And it was from there where they demanded multi-million dollar ransom payments for the release of the hostages. That was the second part of the plan.

When the crew of the Maersk Alabama bravely refused to submit to them on the morning of April 8, 2009, Muse and his men could have abandoned the job. That morning, Muse could have decided to take the Maersk Alabama life boat back to the Win Far. He already had thirty-three hostages and two ships under his control, which could have yielded substantial ransom payments for him and his men. But Muse made a different choice. He chose to search for the Maersk Alabama crewmembers. Confronted with resistance, he remained committed to gaining control of the ship and the men on it. As a result, Muse and his men stayed on the Maersk Alabama for nearly twelve hours, hunting for its crew.

During this period, the majority of the crew was huddled in the ship's safe room, which

⁵ This is the wallet that was recovered from the life boat after Muse's arrest. See footnote 3 supra.

was located within the interior area of the ship. The ship's power had been cut so there was no air conditioning. Temperatures reached well over 100 degrees inside the safe room. The crewmembers had limited access to food and water, and virtually no ability to learn what was transpiring on the rest of the ship. After several hours, there was a knock on the door of the safe room and when they opened the door, the crewmembers saw two of their own with Muse whose hands were tied with wire. The crewmembers in the safe room then took custody of Muse. Rather than retaliate against him for what he was forcing them to endure, the crewmembers helped him. They provided him with a bandage for a deep cut on his hand.

Later in the day, the crewmembers agreed to release Muse to his three men in exchange for Captain Phillips and the life boat on board the Maersk Alabama. After the three pirates boarded the enclosed life boat with supplies provided by the crew and Captain Phillips, Muse was permitted to descend a ladder down onto the life boat. The crewmembers then expected the pirates to release Captain Phillips and depart. Once on board the life boat, however, Muse again made a different choice.

After having been given a bandage and released by the crewmembers, Muse again decided not to abandon the ship and return to the Win Far. Instead, he forced Captain Phillips to stay on the life boat with him and his men, and he ordered Captain Phillips to set a course for Somalia. That evening – the evening of April 8, 2009 – the crew of the Maersk Alabama used their ship to prevent the life boat from navigating toward Somalia until the U.S. Navy arrived on the scene.

On the morning of April 9, 2009, Muse was presented with another choice. He, his three men and Captain Phillips were now floating in the life boat in the shadow of the USS Bainbridge,

a U.S. Navy destroyer. A Somali interpreter speaking on behalf of Government negotiators on board the USS Bainbridge made radio contact with the life boat and asked Muse to surrender so that neither he, his men nor Captain Phillips would be harmed. Muse refused and threatened to kill Captain Phillips unless Muse and his men were provided safe passage to Somalia with Captain Phillips. Muse maintained the same position throughout hours of negotiations throughout the day and night on April 9, 2009. He maintained the same position throughout hours of negotiations throughout the day and night on April 10, 2009. And he maintained the same position throughout hours of negotiations throughout the day and night on April 11, 2009. All the while, he was subjecting Captain Phillips to vicious physical attacks and horrifying psychological abuse. See Part B.2 infra.

On April 12, 2009, Muse asked to board the USS Bainbridge to receive treatment for the cut on his hand. While Muse was on the deck of the USS Bainbridge, Government personnel continued to attempt to negotiate a peaceful resolution with him and his men. Despite three days' within which to surrender, Muse and his men would not relent and chose not to release Captain Phillips. As a result, the U.S. Navy was forced to shoot Muse's men and rescue Captain Phillips.⁶

It is not possible to quantify the lasting trauma that Muse and his men have caused. On the day that Muse entered their lives, each of the fifty-three sailors were working on the sea,

⁶ The defendant's suggestion that, after more than three full days of negotiations the U.S. Navy shot the other three pirates while they were in the process of surrendering, is patently false and conflicts with the statements of multiple witnesses interviewed by the Government. See Sentencing Submission of Abduwali Abdukhadir Muse ("Defense Submission") at 11-12. The Government submits, however, that the Court need not resolve this dispute because it is not material to sentencing.

doing their jobs and looking forward to returning home to their families and friends. As John Cronan, the Third Assistant Engineer on the Maersk Alabama, explained in his letter to the Court: "I am not a soldier. I never desired to be a soldier. I just wanted to go to work and provide for my family." Letter of John Cronan, at 1. Little did these men know, however, that they were being targeted from afar by machinegun-toting outlaws who viewed them as nothing more than a form of currency. But as soon as each sailor heard the first rounds of machinegun fire and saw Muse and his men bearing down on them, their lives would never again be the same. Their inner sense of security and their way of life on the water were altered forever.

While Muse was arrested months before their deaths, two of the fifty-three sailors kidnaped by Muse and his men did not survive the harsh conditions of their captivity. After ten months of living on a ship anchored off the coast of Somalia during which time they were forced to eat rice with sand in it and drink water mixed with diesel fuel and salt water, two of the sailors succumbed to illness. Their fellow crewmembers were forced to watch their gradual deaths, powerless to help them and left to wonder day after day whether they would soon be next. Their loved ones will never see them again, as Muse's men disposed of their bodies at sea.

For the fifty-one hostages who did survive, the trauma they experienced at the hands of Muse and his men will likely endure with them for the rest of their lives. Captain Phillips has physical scars on his wrists from the ropes used to bind him and on his head from the beating that knocked him unconscious. For the captain of the Serenity, the memory of Muse building an improvised explosive device full of screws and broken forks and then placing it near him will no doubt haunt him forever. Each of the other forty-nine survivors will have to confront and attempt to overcome their own psychological and emotional wounds.

As Heather Cronan, the wife of John Cronan, explained in her letter to the Court: “For my family there will always [be] two very distinct parts of our lives. Before the attack, and after.” Letter of Heather Cronan, at 1. Because he suffers from Post-Traumatic Stress Disorder, Mr. Cronan has been unable to return to work over the last nearly two years. Letter of John Cronan, at 1. He also has extreme difficult sleeping, and when he does sleep, he has nightmares during which he lashes out at pirates in his sleep. Letter of Heather Cronan, at 1. According to Kelly Baughman Fisher, her former husband Matthew Fisher, the First Assistant Engineer on the Maersk Alabama, came home after the hijacking “a changed man.” Letter of Kelly Baughman Fisher, at 1. She noticed that his personality and his behavior were different. Id. As a result, their marriage deteriorated into divorce. Id. These are but two examples of the ways in which the fifty-one men whom Muse victimized have suffered and continue to suffer today.

Of course, the human consequences of Muse’s hijackings and kidnappings have been felt by far more than those who crossed Muse’s path in the Indian Ocean in the spring of 2009. The families of the crewmembers have also suffered in a variety of ways as they struggle to help their loved ones recover. Ms. Fisher writes how she has seen the crewmembers of the Maersk Alabama and their families endure “incredible hardships since the attack – mental, physical, emotional, and financial.” Letter of Kelly Baughman Fisher, at 1. According to Mrs. Cronan, she still struggles with panic attacks when she is unable to reach her husband, fearing that he may have been harmed again. Letter of Heather Cronan, at 1. The Cronans’ youngest daughter continues to have nightmares and told her parents that she is afraid Muse will escape from prison and come searching for her. Id. In addition, their family has been “financially devastated” because her husband’s income constituted more than half of their household earnings. Id.

Because of Mr. Cronan's inability to work and thousands of dollars in additional expenses for multiple therapists for the family, the Cronan's home was lost to foreclosure. Id.

Fifty-three sailors spread across six countries, along with their families, have been profoundly affected by Muse's choices and actions. Certainly most, if not all, of them will suffer in some manner for the rest of their lives from the trauma Muse has visited upon them. The number of victims and the breadth and the depth of their suffering make plain the extraordinary nature of Muse's offenses – offenses for which a sentence of not less than 405 months' imprisonment is warranted.

2. The Public Must Be Protected From Muse

Section 3553(a)(2) directs the Court to consider, among other things, the need for the sentence imposed to protect the public from further crimes of the defendant. By his choices and his actions, Muse has demonstrated himself to be a ruthless predator who targets defenseless victims. It cannot fairly be disputed that he was the leader of an armed gang of pirates who consistently exhibited no regard for the sanctity of human life.

- Under Muse's command, his men sprayed the decks of the Maersk Alabama and the Win Far with machinegun fire as they made their initial approach.
- Under Muse's command, his men deprived their hostages, including Captain Phillips, of food and water. After Muse's arrest, his men deprived their hostages of food and water and two hostages died of illness.
- Under Muse's command, one of his men indiscriminately fired an AK-47 at night into the water at Captain Phillips when he tried to escape from the life boat.
- Under Muse's command, his men hit Captain Phillips so hard in the back of the

head that he was rendered unconscious and thought he had been shot.

- On multiple occasions, Muse aimed his gun at the head of a hostage and pulled the trigger, laughing when the gun did not fire.

In the face of this horrifying conduct, the defendant asserts: “Noone was meant to get hurt.” Defense Submission at 26. This a claim that becomes even more astounding when one considers the manner in which Muse conducted himself throughout the offenses.

By all accounts, Muse did not just commit the acts to which he pled guilty; he reveled in them. From boasting about the millions he had made from prior hijackings to laughing after pulling the trigger of his pistol next to a hostage’s head to suggesting that he would cut up a hostage and sell his organs, Muse derived joy from the suffering of his victims. He abused them physically and psychologically in an effort to subdue and control them. He also directed his men to do the same. As noted above, he viewed the lives of his hostages as a form of currency to be traded for his own enrichment. Beyond that, he evinced absolutely no concern for their condition or their well-being.

Moreover, his ruthless and calculating approach was not tempered by the kind acts of his hostages. For example, after he was captured by the crew on the Maersk Alabama and placed in the safe room, crewmembers treated the gash on his hand and provided him with a bandage. Hours later, after he had deceived Captain Phillips and the crew and prevented Captain Phillips from getting off the life boat, Captain Phillips treated the same wound using the first aid kit on the life boat. Neither of these generous gestures from his victims had any effect on Muse or his view of his hostages.

After his arrest, Muse was unrepentant. He provided three different ages – 16, 19, and 26

– to the U.S. Navy after he was taken into custody. He lied to the JTTF during his post-arrest interview, claiming that he had been forced at gunpoint to hijack the Maersk Alabama by the three deceased pirates. He also continued to lie about his age, claiming he was fifteen years old. And in his sentencing submission, he now claims that his three men had agreed to surrender on the life boat but the U.S. Navy betrayed him and the shot the men. See Defense Submission at 11.

Finally, Muse is not an older man and he could conceivably return to some type of piracy activity after his release from prison. As evidenced by his telephone calls from the Metropolitan Correctional Center (the “MCC”) described in paragraph 16 of the Presentence Report, several months after his arrest, Muse continued to engage in coded piracy-related activity from prison. While the parties differ on the meaning of these coded calls – the defense contends that Muse was discussing the payment of a piracy-related debt while the Government asserts that Muse relayed an order to kill the Win Far captain who was being held hostage by his men at the time – the calls are very troubling, even assuming the defense’s interpretation is the correct one. Significantly, the defense does not dispute that the calls related to piracy matters. See Defense Submission at 15. More alarming, however, is that, according to the defense’s interpretation of the calls, Muse was asking his mother and his brother to inform the “leader of a piracy network” (Ilko Asse) that he could use some of Muse’s personal piracy funds that were being held by other pirates to satisfy a piracy-related debt. See Defense Submission at 17-19. And Muse’s mother and brother agreed to do this. See Defense Submission at 17-19. Even assuming *arguendo* that the defense’s interpretation is true, the calls weigh heavily against a sentence at the bottom of the applicable sentencing range.

For all of these reasons, a sentence of 405 months' imprisonment is appropriate to ensure that Muse is not a serious threat to the public again.

3. The Need For Specific And General Deterrence Is Clear

Section 3553(a)(2) directs the Court to consider, among other things, the need for the sentence imposed to afford adequate deterrence to criminal conduct. For the reasons discussed above, the need for specific deterrence in this case is self-evident. The need for general deterrence is just as essential.

According to the International Chamber of Commerce's International Maritime Bureau ("IMB"), a non-profit organization that comprehensively tracks piracy and piracy-related activity, 2010 was the worst year on record for piracy. According to the IMB's Annual Piracy Report for 2010, there were 445 reported pirate attacks in 2010, a increase from 2009. In 2010 alone, Somali pirates took 1,016 sailors hostage, hijacked 49 ships, and collected tens of millions of dollars in ransom payments. Eight hostages were killed in 2010. As far as this year, in January 2011 alone, there were seven hijackings off the coast of Somalia and 148 people have been taken hostage. By the IMB's estimate, as January 29, 2011, Somali pirates were holding 33 hijacked vessels and 758 hostages for ransom.⁷

Clearly, the arrest of Muse in April 2009 has not deterred subsequent piracy attacks and hostage-takings off the coast of Somali. More importantly for the security of the United States and the safety of its citizens, the well-publicized hijacking of the Maersk Alabama did not deter subsequent attacks on U.S.-flagged ships. In fact, on April 14, 2009, just two days after the U.S.

⁷ See www.icc-ccs.org/home/piracy-reporting-centre/piracynewsfigures.

Navy rescued Captain Phillips, another U.S.-flagged container ship, the Liberty Sun, with a crew of twenty sailors was attacked off the coast of Somalia. The Liberty Sun was en route to Kenya from Texas when a gang of pirates attempted to commandeer it using machineguns and grenades. Fortunately, the crew was able to thwart the attack and the Liberty Sun was escorted to its destination by one of the U.S. Navy vessels that had participated in the rescue of Captain Phillips.

More recently, in November 2010, five Somali men were found guilty by a jury in the Eastern District of Virginia of piracy and piracy-related charges based on their participation in an April 2010 attack on a U.S. Navy vessel, which the men believed was a commercial container ship. See United States v. Mohammed Modin Hassen, et al., Criminal No. 2:10 Cr. 56 (E.D. Va.). As the above makes clear, U.S.-flagged ships in the Indian Ocean and the defenseless American sailors who operate them remain extremely vulnerable to violence at the hands of Somali pirates. The sentence in this case should send an unmistakable message to would-be pirates that the punishment will be severe for those who would consider harming Americans for their own financial gain.

4. Muse's Arguments Are Meritless

Against this backdrop, Muse contends that he should be sentenced at the bottom of the applicable sentencing range. Muse offers three principal justifications for such a sentence: (1) his age; (2) the conditions he faced growing up in Somalia; and (3) his conditions of confinement in the MCC.

With respect to the issue of Muse's age, Muse has attempted to use his youthful appearance as a tool for leniency on multiple occasions since the moment he was arrested. This

Court should not permit him to do so at sentencing and should reject any mitigation argument based on his age.

More than twenty-one months have elapsed since Magistrate Judge Peck conducted an age hearing at Muse's request and found that Muse is over 18 years old and should be prosecuted as an adult. Muse never once asked this Court to reconsider Magistrate Judge Peck's finding during that period. Moreover, at that hearing, Magistrate Judge Peck heard the live testimony of Detective Galloway who recounted how Muse told him that he was 15 years old, then laughed, then admitted to lying to him, and then said that he was between 18 and 19 years old. Muse's lie of 15 years old, of course, followed the three other ages – 16, 19 and 26 – that he had previously provided to the U.S. Navy.

In the face of this evidence, the defense presented the testimony of Muse's father who claimed that he was present for Muse's birth and that Muse was born on November 20, 1993. Magistrate Judge Peck found this testimony to be "incredible" and suggested that Muse's father may have concocted his testimony so that his son would be treated as juvenile. See Exhibit A at 47. Tellingly, Muse himself chose not to testify at the hearing, even though Magistrate Judge Peck made clear that he would be prepared to limit questioning of him to his age only. Id. at 43. The defense did not call any other witnesses. Cf. United States v. Alvarez-Porras, 643 F.2d 54 (2d Cir. 1981) (holding that the Government can satisfy its burden at an age hearing by impugning the defendant's credibility as "the Constitution is not offended by requiring the defendant to come forward with credible evidence of his minority").

Now, the defense claims that he was "about 16" at the time he and his men hijacked the Maersk Alabama. See Defense Submission at 2. In support of this contention, they submit

multiple affirmations, including an affirmation from Muse's mother in which she states that Muse was born in 1993. See Defense Submission, Exhibit F. This is the same birth year for Muse that his father provided to Magistrate Judge Peck during the age hearing – testimony that was adjudged to be incredible. In addition, the defense relies on an affirmation of a self-described “media consultant” from Somalia, which states that in January 2011, Muse's younger brother “seemed to be 16 or 17 years old” based on his appearance. See Defense Submission, Exhibits J and K. Muse has never attempted to be truthful about his age, and he now hopes it will afford him a lower sentence. As Magistrate Judge Peck found, Muse is over 18 years old. His conduct makes clear that he is an adult. And he should be held to account as an adult.

Second, Muse contends that he was driven to commit these crimes because of the extremely difficult conditions he faced growing up in Somalia. See Defense Submission at 27, 36 (“Abduwali would not be before the Court for sentencing if not for the chaotic conditions prevalent in Somalia . . .”). Somalia has been a failed state for nearly 20 years and its citizens have suffered enormously during that time. The Government has no reason to question that Muse endured an extremely difficult upbringing. Unfortunately, so have millions of other citizens of Somalia. Unlike Muse, however, they have not resorted to preying on the defenseless and terrorizing the innocent – time after time. It is an insult to all of those who are persevering through the conditions in Somalia in a law-abiding manner to suggest that those conditions, rather than his own choices, led Muse to where he is today.

Finally, Muse contends that his sentence should be reduced in light of his conditions of confinement and the mental health problems he has experienced in prison. See Defense Submission at 32-36. In United States v. Carty, 264 F.3d 191 (2d Cir. 2001), the Court of

Appeals held that “pre-sentence confinement conditions may in appropriate cases be a permissible basis for downward departures” under the Sentencing Guidelines.⁸ 264 F.3d at 208; see also, e.g., United States v. Naranjo-Ramirez, No. 09-4343-cr, 2010 WL 4723301, at *2, *4 (2d Cir. Nov. 23, 2010) (noting that sentencing Judges are “under no obligation to depart from the Guidelines on the basis of [a defendant’s] allegedly harsh pre-sentence confinement conditions,” so long as they are “consider[ed]”) (emphasis in original). Following Carty, “the courts have granted relief generally where the conditions in question are extreme to an exceptional degree and their severity falls upon the defendant in some highly unique or disproportionate manner.” United States v. Mateo, 299 F. Supp. 2d 201, 211 (S.D.N.Y. 2004) (Marrero, J.); accord, e.g., United States v. Torres-Teyer, 322 F. Supp. 2d 359, 377-78 (S.D.N.Y. 2004) (Lynch, J.); United States v. Green, 04 Cr. 424-14, 2006 WL 3478340, at *4 (S.D.N.Y. Dec. 1, 2006) (Sweet, J.).

Seeking to meet this standard, Muse contends that he is entitled to a reduction in sentence because of his conditions of confinement at the MCC, and more specifically, the mental health problems he has experienced as a result of his confinement. See Defense Submission at 32-36. As an initial matter, the Government appreciates the impact that Special Administrative Measures (“SAMs”) can have on particular defendants. However, Muse brought those measures upon himself. Muse is no longer subject to SAMs, and had Muse not used the MCC’s telephones to relay coded messages to his fellow pirates, it would not have been necessary to have him held in isolation. Accordingly, he should not now receive the benefit of a lesser sentence as a result.

⁸ Consistent with the parties’ plea agreement, the defense is relying on Carty in support of a reduced sentence under Section 3553(a), not for a downward departure under the Sentencing Guidelines.

With respect to Muse's mental health problems detailed in the defense submission, Muse has clearly experienced some difficult episodes. Without minimizing the extent of Muse's suffering, however, the Government submits that the gravity of the defendant's crimes and the extent of his victims' suffering dwarfs any sentencing consideration that the defendant should receive based on his mental health problems.

This reasoning finds support in the case law. Courts have found that an argument for a reduction in sentence based on conditions of confinement is less compelling when the nature of the offense is more serious. In United States v. Torres-Teyer, 322 F. Supp. 2d 359 (S.D.N.Y. 2004), for example, Judge Lynch considered a defendant's application for a downward departure where the defendant had spent ten months in a foreign prison, which the defendant characterized as "an extraordinarily harsh environment filled with fear, danger, violence, rape and corruption." 322 F. Supp. 2d at 377. Given that the defendant's Guidelines sentencing range was "about twenty years," id., Judge Lynch concluded that, "[a]bsent evidence of truly horrific conditions, subjection to substandard detention conditions for ten months does not warrant a meaningful departure from a twenty-year sentence." Id. Similarly, on remand from the Court of Appeals in Carty, Judge Schwartz declined to depart downward — citing, among other things, "the severity of [the defendant's] crimes." See Exhibit B (United States v. Carty, 95 Cr. 973 (S.D.N.Y. Nov. 9, 2001)) at 23-24. Accordingly, Muse should not receive a more lenient sentence based on his conditions of confinement.

IV. CONCLUSION

The fifty-one surviving crewmembers from the Maersk Alabama, the Win Far and the Serenity were forced to experience a level of terror that will affect them for the rest of their lives

– a level of terror inflicted seemingly, at times, for its own sake. For some of the survivors, the effects have already proven to be unbearable, and for others they will be both profound and lasting. The suffering has been, and will be, multiplied among their loved ones, as letters from the victims’s families starkly demonstrate. For those who can, they must return to their jobs on the water and do their best to overcome the memories of Muse and his men. And their families must help them recover and overcome their own fears of future attacks. Muse inflicted all of this suffering – through his choices and his actions – and he cannot escape responsibility for any of it. A sentence of 405 months’ imprisonment is warranted in this case, and the Government respectfully requests that that be the sentence the Court imposes.

Dated: February 9, 2011

Respectfully submitted,

PREET BHARARA
United States Attorney

By:

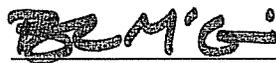


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following by ECF and electronic mail on February 9, 2011:

Philip L. Weinstein, Esq.
philip_weinstein@fd.org

A handwritten signature in black ink, appearing to read "B.R. McGuire", written in a cursive style.

Brendan R. McGuire

EXHIBIT A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----x

UNITED STATES OF AMERICA,

v.

ABDUWALI ABDUCHADIR MUSE,

Defendant.

Hearing

-----x

New York, N.Y.
April 21, 2009
2:47 p.m.

Before:

HON. ANDREW J. PECK,

Magistrate Judge

APPEARANCES

LEV L. DASSIN
Acting United States Attorney for the
Southern District of New York

BRENDAN R. McGUIRE

DAVID RASKIN

Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK, INC.

Attorneys for Defendant

BY: PHILIP L. WEINSTEIN, ESQ.

DEIRDRE D. VON DORNUM, ESQ.

ALSO PRESENT: SHUKRI SHARIFF, Somali Language Interpreter

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1 (In open court)

2 (Case called)

3 (Appearances noted)

4 THE COURT: Let's swear in the interpreter.

5 THE CLERK: Please state your name for the record.

6 THE INTERPRETER: Shukri Shariff.

7 (Interpreter sworn)

8 THE COURT: All right. You are a Somali interpreter?

9 THE INTERPRETER: Yes. I'm Somali interpreter.

10 THE COURT: All right. All right. Applications,
11 before we begin anything else?

12 MR. WEINSTEIN: Yes, your Honor. Let me make an
13 application and first start off by saying, the obvious point is
14 that our client has been brought into the courtroom, and we
15 are --

16 THE COURT: Let me just note that that was at your
17 request.

18 MR. WEINSTEIN: It was, and I just wanted to put on
19 the record our reason for that request is that there have been
20 secret proceedings written about in the papers and all the
21 rest. We are at the stage of establishing a relationship with
22 the client, and we want him to understand that we are his
23 attorneys and we're not doing something in secret.

24 That said, we have evidence that he is under 18. I
25 think I have mentioned to the Court that we have been in

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1 contact with his family in Somalia, and we think that he
2 qualifies, until removed, under the juvenile delinquency law of
3 federal court. And in order to reach the point of establishing
4 that age, because the government is of the view that he is
5 older than 18, we will have his father in a hookup, as well as
6 other statements. And we would like, if he is a juvenile,
7 which we believe he is, then the proceedings should be closed
8 until the Court determines otherwise. So our request is that,
9 for purposes of the hearing and fact finding by the Court, that
10 the courtroom be closed.

11 THE COURT: Mr. McGuire?

12 MS. VON DORNUM: Your Honor, may I have just one
13 moment with Mr. Muse and the interpreter. I apologize.

14 THE COURT: Yes.

15 (Defendant and counsel conferring)

16 MS. VON DORNUM: Thank you, your Honor. I apologize.

17 THE COURT: That's quite all right.

18 Let me just note for the rather large audience that we
19 have made arrangements through our, quote-unquote, press office
20 for an overflow room in Room 850. However, because I knew
21 there was going to be this application, we have not set that
22 room up so we don't have to shut it off if we go into a closed
23 courtroom proceeding. If we wind up not going to a closed
24 proceeding, then we will turn the camera on in here, and those
25 of you who don't fit comfortably here and want to go to

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1 Room 850, can go to Room 850.

2 All right. Mr. McGuire?

3 Let's just make sure, Marshals, CSOs, anyone who wants
4 to come in at this point, make room, and anyone who's sitting
5 on coats or, you know, let's make as much room as possible in
6 the courtroom for everybody. Let's just wait a second.

7 If you're coming in, gentlemen in the back, come in;
8 if you're not, don't. But don't hold up the people behind you.

9 All right. Is everyone in who wants to be? I'll
10 assume that's a yes.

11 No? Judge Berman?

12 (Pause)

13 THE COURT: We are going to give it just another
14 minute or two to fit everybody into the room.

15 All right. Marshals, CSOs, even though it's an
16 overflow, unless you tell me otherwise, judicial decision is to
17 let everyone in for now because we may then go into a closed
18 proceeding, so we're not going to set up the auxiliary viewing
19 room yet. So if there are people still out there, let's get
20 them in.

21 (Pause)

22 THE COURT: Okay. Thank you.

23 Just to summarize briefly for latecomers, even though
24 we have Mr. Muse in open court at the moment, his counsel has
25 moved to have a sealed proceeding as to whether Mr. Muse is a

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1 juvenile in terms of the statute 18 US Code Section 5031, et
2 al., and we were just about to hear and are now going to hear
3 from the government as to their position on this. If we do not
4 go to a sealed proceeding, then we will open up courtroom 850
5 for overflow to be more comfortable there.

6 Mr. McGuire?

7 MR. MCGUIRE: Your Honor, first, with respect to the
8 sealing request by the defense, the government objects to that.
9 The government has requested from the defense, but has not been
10 furnished with, any authority for the proposition that this
11 type of proceeding should be sealed. As your Honor's deputy
12 just read out the name of the defendant, and the purpose for
13 sealing in this context would be to protect the name and
14 identity of the defendant, it appears that that bell has been
15 rung at this point and that any proceedings that the defense
16 would like to have with respect to age can now be done in full
17 view of the public.

18 THE COURT: This whole thing strikes me as somewhat
19 the tail chasing the dog or something else, because it was
20 announced on the radio yesterday, possibly even before that,
21 that Mr. Muse would be presented in this court yesterday or
22 today. When I showed up this morning at 8:30, the satellite
23 trucks were already blocking all of Worth Street. And I gave
24 the defense the option, as we started calling this proceeding,
25 of doing it as US against John Doe and not having the defendant

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1 appear while the arguments were being made as to sealing or
2 not. Having gotten this pregnant, so to speak, I'm not sure
3 that it pays, just on the age proceeding, to seal the
4 courtroom.

5 So, Mr. Weinstein, if you'd like to address that
6 further.

7 The other thing I should, before you do that, note for
8 the record is a fax that was received in my chambers that says:

9 "Dear Judge Peck:

10 "Members of the press are intending to cover the
11 presentment of the accused Somali pirate, which we believe is a
12 case of global public interest.

13 "We have noted today in press reports that the man's
14 family claims he is 16 years old, which is younger than the
15 government has been quoted as saying. In an abundance of
16 caution, we ask that if any attempt is made by any party to
17 close the hearing (for example, on grounds he is a juvenile),
18 the press be first given an opportunity to be heard and to
19 object. We believe that, absent concrete proof that he is a
20 juvenile, it would be wrong to seal the hearing, and we would
21 want to be present at any hearing where the question of his age
22 is debated in advance of a sealing.

23 "We also ask that if any closed meeting has already
24 been held on this issue that the Court summarize what occurred
25 and also release a transcript. We also ask not to be kept out

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1 of the courtroom until this issue is resolved and then only be
2 told afterwards that a sealed proceeding occurred.

3 "We are happy to discuss this further and again want
4 to make clear that we object to any closure of the hearing."

5 And it's signed Ben Weiser, New York Times; Larry
6 Neumeister, Associated Press; Chad Bray, Dow Jones; Bruce
7 Golding, New York Post; Mark Hamblett, New York Law Journal;
8 Christine Kearney, Reuters; and John Riley, Newsday.

9 MR. WEINSTEIN: We're going to just divide this into
10 two. So first let me respond to the Court's comment, the bell
11 had already been rung. Certainly it cannot be the law that the
12 government can defeat juvenile privacy by making public
13 announcements. So I think the fact that that's been done is
14 neither a waiver nor anything else. Otherwise, the government
15 would always be encouraged to do that.

16 THE COURT: I understand that. I'm just saying, as a
17 practical matter, you have your arguments preserved for when
18 this case is indicted, if it is indicted, to take before the
19 district judge or, even before that, to move to dismiss on the
20 ground of prosecutorial misconduct --

21 MR. WEINSTEIN: Well, there's more than that.

22 THE COURT: -- or whatever it may be, but it hardly
23 seems that the purpose of the statute, which is to protect the
24 identity of the juvenile, is serving any purpose anymore.

25 MR. WEINSTEIN: Ms. Von Dornum is going to respond to

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1 that.

2 THE COURT: All right. Ms. Von Dornum?

3 MS. VON DORNUM: Your Honor, I know you've recently
4 reviewed the statute, as have I, as has Mr. Weinstein. I think
5 in fact it goes far beyond protecting the identity. That's
6 clearly what 5038(e) refers to, but as the Court is aware, what
7 5038(a), (b) and (c) refer to is a far broader protection. And
8 as you previously noted, we did consent to Mr. Muse's
9 appearance here, in large part, as Mr. Weinstein noted, so that
10 he would understand what was happening and be able to have some
11 trust in us, which, everyone can understand, he might not at
12 this stage in his proceedings. But what the statute says is
13 that the record shall be safeguarded from disclosure to
14 unauthorized persons.

15 THE COURT: Once he is a juvenile, which we don't know
16 yet.

17 MS. VON DORNUM: Right. But I think that the juvenile
18 question is of course inherent in all of this, and to say we
19 can first discuss whether or not he's a juvenile and then, if
20 so, we'll seal everything, would defeat the purpose of that,
21 particularly because I understand the government will rely in
22 this proceeding on investigatory statements that would not be
23 made public were you to decide that he was a juvenile. And so
24 by disclosing those to the press and everyone else in the
25 course of this proceeding, we could not then undo that. And it

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1 goes far beyond his name and identity; it goes to the nature of
2 the investigation and the charges against him. And as you
3 know, this is not -- my concern today is not the First
4 Amendment, it's the due process clause and his Fifth Amendment
5 rights. And so for the government to put on the record, as it
6 has a right to in order to try to prove that he is of age of
7 majority, investigatory statements would damage it to the
8 extent that he could not be protected. I don't think his name
9 and identity are clearly the primary concern. It's the
10 investigation. It is going to be a highly contested case, and
11 we believe there's a lot more to it, but we do not want that to
12 come out before you've had a chance to hear the evidence on
13 whether or not he is a juvenile.

14 THE COURT: All right. Let me hear any of the members
15 of the press. I know you're not -- maybe you are here with
16 your lawyers by now. But if anyone from the press has anything
17 further to add to the April 21st Weiser, et al. letter, let
18 me hear from you.

19 MR. WEISER: I'm Ben Weiser from the Times. I just
20 would like to add that even if it is found he is a juvenile, we
21 believe the proceedings should be public because of the
22 seriousness of the crime and the high public interest in the
23 case.

24 THE COURT: That's an argument that you have to make
25 to Congress because if he is a juvenile, Congress has decreed,

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1 in passing 18 US Code 5031 through 5038, and possibly even a
2 few sections more, that juvenile proceedings are sealed
3 regardless of how serious the juvenile delinquency is, which,
4 if it were a crime, would be a crime of much information,
5 notice, etc.

6 Can you give me a proffer, Mr. Weinstein, of what your
7 evidence will show. Since I think it sounds like you're
8 concerned about the government's statements, before I decide
9 whether to seal or not, I'd like to know if there is going to
10 be any bona fide argument that he is a juvenile.

11 MR. WEINSTEIN: Yes. We have spoken to his father in
12 Somalia. We've alerted him --

13 THE COURT: I'm sorry. I'm told that there may have
14 been some other member of the press who, lawyer or otherwise,
15 who wanted to speak. Yes.

16 MR. GOLDING: Yes, your Honor. I'd like to address
17 the Court on the motion to close this courtroom.

18 THE COURT: Who are you?

19 MR. GOLDING: My name is Bruce Golding. I'm a
20 reporter for the New York Post.

21 It's my understanding that a hearing must precede your
22 decision to close these proceedings and that I and the
23 newspaper have the right to present argument at that hearing.
24 Through a grant of reasonable time, I'd like to contact my
25 editor and the newspaper's lawyer so that it may present

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1 arguments properly. May I have that time, please, your Honor?

2 Thank you very much.

3 THE COURT: Your First Amendment time, unfortunately,
4 runs up against the defendant's time to get speedily presented,
5 whether as a juvenile or as an adult, as the case may be. As
6 you may have noticed, while these proceedings normally would be
7 digitally tape recorded, on the assumption that if I do close
8 the courtroom, I'm going to get myriad applications from you
9 and your colleagues and that they will probably then be
10 reviewed by possibly a higher court. To make your life easier
11 or somebody's life easier, we're doing this with a court
12 reporter so a transcript, once it is unsealed, can be very
13 quickly made publicly available.

14 Unless the defense wishes to have things put off for a
15 day or more to gather more evidence and also allow you to argue
16 against them -- and I'm already seeing esteemed defense counsel
17 shaking their head no -- you can make whatever arguments you've
18 been supplied with by your lawyers or editors at the moment,
19 but because this is statutory and not just a matter of judicial
20 discretion, my hands are tied by the statute.

21 MR. GOLDING: If the Court will not take a brief
22 recess then, your Honor, on behalf of the New York Post, I
23 request that my objection and brief statement of the legal
24 issues be made part of the record in this case.

25 THE COURT: All right.

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1 MR. GOLDING: Thank you.

2 THE COURT: I guess that was the brief statement you
3 wanted to be made part of the record, and it is. And I won't
4 even charge you for the transcript, yet.

5 All right. Mr. Weinstein?

6 MR. WEINSTEIN: The proffer is, your Honor, we've
7 spoken to the defendant's father in Somalia, with the
8 assistance of an interpreter. We've arranged for him to be
9 available for a phone conference with the Court, subject to
10 cross-examination by the government, and the proffer is that he
11 is -- his date of birth is 11/20/93. And his father can
12 testify to how he knows that.

13 THE COURT: And is your client going to be testifying?

14 MR. WEINSTEIN: No.

15 THE COURT: Well, I guess the interesting question
16 will be how you would expect me to weigh the credibility of
17 statements allegedly made by the defendant -- and I won't say
18 anything more since we're in open court -- with, you know, a
19 disembodied voice being translated for me over a telephone and
20 come up with a decision without your client testifying. I've
21 got to tell you, Mr. Weinstein, it's going to be a very tough
22 row you have to hoe, but if that's what you want to do, we will
23 seal the courtroom for that purpose.

24 MR. WEINSTEIN: I think you will use the same method
25 they will, since I assume the people to whom the statements

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1 were supposedly made, for the most part -- maybe one is here --
2 are not here. They're people on the boats. So it's an
3 equipoise for the Court to determine. You'll have the same
4 hearsay from both sides.

5 THE COURT: All right. Mr. McGuire, anything further?

6 MR. MCGUIRE: Just, your Honor, if I could state the
7 government's position with respect to the hearing.

8 THE COURT: State it without going into any of the
9 things that you've already revealed to Mr. Weinstein and the
10 Court that they don't want revealed publicly at this point.

11 MR. MCGUIRE: Absolutely. It's our view, given the
12 state of play right now, that there is no hearing necessary,
13 that the purpose of such a hearing has been obviated and that,
14 given current conditions, the defendant should be tried as an
15 adult.

16 THE COURT: I don't know about tried as an adult, but
17 presented as an adult.

18 Let me ask this, and I think it's clear, but why not
19 put you on the spot. If I hold that he is -- that whoever has
20 the burden of proof, that we go forward and treat Mr. Muse as
21 an adult and if that proves to be erroneous because the
22 information that you have may be correct, it may not be
23 correct -- Let me be less oblique on that, that you're relying
24 on certain statements by the defendant. If that proves wrong
25 and the Court, therefore, has been led into error, shall we

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1 say, what are the ramifications for the government; and are you
2 prepared, on behalf of your office, to live with those
3 ramifications if we go into an open proceeding?

4 MR. MCGUIRE: Your Honor, I think the sole issue for
5 today is with respect to the complaint and the -- obviously
6 initially here, it is the sealing of this hearing.

7 THE COURT: Well, let me be more clear. While I
8 certainly feel that this is much ado about nothing since we've
9 got probably 200 people sitting and standing in the back of the
10 courtroom, and while a few of them are courthouse employees who
11 don't have anything better to do -- Hopefully that won't get
12 printed. That's a joke, folks. You know, in all seriousness,
13 the publicity aspect or the public knowledge aspect of it, this
14 all seems to me we're dancing on the head of a pin.

15 On the other hand, 18 US Code 5031, etc., is crystal
16 clear, and in the time that this issue has been on my desk
17 since 9:00 this morning or whatever, I have not had enough time
18 to research whether, if I make the decision that the
19 proceedings are open and that is incorrect, what are the
20 ramifications of that for the government?

21 MR. MCGUIRE: Your Honor, there are -- this is
22 obviously not -- juvenile cases proceeding in federal court,
23 this is not the first one. And it can be the case --

24 THE COURT: The first one where I've had an issue as
25 to, is the person a juvenile or not; that's for sure.

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1 MR. McGUIRE: Well, I think that there are cases,
2 obviously, where the issue of the defendant's juvenile status
3 can come up, further along in the case. And in that case there
4 are cases where the treatment afforded, it is then -- the court
5 will then, as it were, treat the defendant, as of that time, as
6 a juvenile going forward. And that is -- that is a common
7 situation within this context.

8 THE COURT: But that's different than the juvenile
9 through counsel saying: I'm a juvenile, there should not be
10 public proceedings. There are then, if we go that route,
11 public proceedings, at which point, you know, to use the old
12 cliché, that bell can't be unrung. If there is any punishment,
13 any -- whatever the right word is -- sanction against the
14 government in that situation, I don't know what it might be,
15 but it might be dismissal of the case or something else, and I
16 want to make sure, in a case of this seriousness, that we are
17 all treading carefully.

18 MR. McGUIRE: We feel the same way, your Honor, and
19 we -- we are comfortable with the evidence that we have that
20 demonstrates the defendant's majority status.

21 THE COURT: Is it anything other than his statements?

22 MR. McGUIRE: There is -- there is evidence beyond the
23 statements.

24 THE COURT: All right. Then I guess we'll get to
25 that.

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1 All right. I know this is not going to make me
2 popular with the press, but that's why we get paid the big
3 bucks. Another joke. That you can print. I am going to close
4 the courtroom briefly.

5 Mr. Weiser, you're raising your hand.

6 MR. WEISER: Judge, I would just ask that if you find
7 that he is a juvenile and that the proceedings will remain
8 closed, I think we'd like to ask that at least we be given some
9 notice that a finding has been made. And if you find the
10 opposite, I think we'd like to ask that a transcript be
11 produced today and released today of the entire sealed hearing
12 and that, again, we'd be given quick notice when the hearing is
13 done so that we can find out --

14 THE COURT: Well, you can all hang around in the
15 hallway outside or you can all assemble in Room 850, and if we
16 open up the courtroom, we'll either turn the camera on and beam
17 into there or send a marshal down to tell you to come on back.

18 Gentlemen in the back with the blue shirt.

19 MR. RILEY: Your Honor, John Riley from Newsday. I
20 also signed the letter.

21 There have been various references over the last 15
22 minutes to discussions and perhaps papers having been reviewed
23 prior to us coming into this courtroom.

24 THE COURT: All right. Let me put whatever I can on
25 that on the record so you know what happened.

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1 First, the government gave me the complaint to review
2 to see if probable cause was established, and I have signed the
3 complaint. It is under a quasiséal or seal, which is why you
4 have not gotten it, so that this juvenile issue could be
5 resolved.

6 In addition, we had a very brief conversation this
7 morning on the record in the courtroom, tape recorded, and that
8 tape recording can be made available, depending on the outcome
9 of this proceeding, in which Mr. McGuire presented himself, his
10 statements as to what the government's evidence would be as to
11 whether Mr. Muse is a juvenile or not. That's some of the
12 information that will be repeated, I'm sure, at the hearing
13 we're about to hold. And at that point Mr. Weinstein and
14 Ms. Von Dornum were relying -- which now I won't be funny
15 anymore -- they were relying on a press story that said that
16 Mr. Muse was a juvenile. They had not yet interviewed him or
17 seen him or anything else. There was no Somali interpreter
18 here at that time. This was around 11:00 this morning. And so
19 they briefly asked for time to interview him and decide what
20 they wanted to do. That is the gist of that hearing.

21 If either Mr. Weinstein or Mr. McGuire want to add
22 anything to that other than the sealed information, they can
23 put that on the record now.

24 MR. WEINSTEIN: Your Honor, I'm approaching with the
25 permission of the government just to ask you one question.

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1 THE COURT: Yes.

2 (Mr. Weinstein conferring with the Court)

3 THE COURT: Okay. Mr. Riley?

4 MR. RILEY: If I could just close the loop on that
5 then, I would -- all the objections made in our letter I would
6 extend to objecting to the lack of access to the complaint, to
7 the proceedings this morning, to the failure of the Court to
8 hold a hearing prior to closing the hearing this morning, and I
9 would -- My question is: Is it your intention that the release
10 or nonrelease of all those materials you just mentioned will
11 depend on the outcome of the hearing you're about to hold?

12 THE COURT: Let me be very clear. If Mr. Muse is a
13 juvenile, as the statute uses it, the proceedings must be
14 sealed as a matter of law. There's no balancing test. There's
15 nothing else. You know, go talk to our friends in Congress.
16 The statute says, if it's a juvenile proceeding, it must be
17 sealed. So if, at this hearing we are about to go into, it is
18 established that he is a juvenile, then you're not going to see
19 the complaint, at least subject to motions by your lawyers,
20 etc., or a sufficient passage of time that something happened
21 to otherwise change the situation.

22 If at this hearing the defense does not convince me or
23 the government doesn't convince me, whichever way you want to
24 look at that, if it is determined that he is not a juvenile at
25 this point, then you get everything, the complaint, the

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1 proceedings that we're about to go into to establish whether he
2 is a juvenile, and the very short counsel conference that we
3 had this morning.

4 MR. RILEY: And the question of whether you did or did
5 not find probable cause will also remain sealed?

6 THE COURT: Well, the probable cause is just the
7 complaint. If you know the procedures, all one does is review
8 the complaint, the agent swears to it, and if, in reading the
9 complaint and the agent swearing to it, that establishes
10 probable cause, then the Court signs it. There are no other
11 papers, no other decisions. The signature or nonsignature is
12 the finding of probable cause.

13 All right. Mr. Weinstein.

14 MR. WEINSTEIN: Your Honor, I'm about to present you
15 with a financial affidavit. Again, should the Court find that
16 this is sealed, it should be made public, but obviously
17 that's...

18 THE COURT: All right. Hand it up, please.

19 (Pause)

20 THE COURT: All right. Mr. Muse, if you would please
21 stand.

22 Did you complete this financial affidavit with the
23 help of Mr. Weinstein and Ms. Von Dornum, and the interpreter?

24 THE DEFENDANT: Yes.

25 THE COURT: Is this your signature on the bottom?

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1 THE DEFENDANT: Yes.

2 THE COURT: Please raise your right hand.

3 Do you solemnly swear that the information in your
4 financial affidavit is true, complete and correct, so help you
5 god?

6 THE DEFENDANT: It is very true what I wrote in there.

7 THE COURT: All right. I approve your application and
8 appoint Mr. Weinstein and Ms. Von Dornum and the Federal
9 Defenders to represent you. You may be seated.

10 Mr. Weinstein, does it make sense -- and I'm sorry
11 we're making people stand this long. Maybe we should have gone
12 into the overflow room. But does it make sense to give
13 Mr. Muse the other warnings that he would be given at an
14 initial presentment?

15 MR. WEINSTEIN: In open court, that's fine.

16 THE COURT: All right. So that we're doing as much as
17 possible in front of the watchful, helpful eyes of the press.
18 Mr. Muse -- Why did you laugh at that? I was not being
19 facetious on that one.

20 Mr. Muse, let me advise you of certain rights that you
21 have. This is not a trial, and you're not called upon to
22 answer the charges against you at this time. You have the
23 right to remain silent. You're not required to make any
24 statements. Even if you've already made any statements to the
25 authorities, you need not make any further statements.

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1 Anything you do say can be used against you. You have the
2 right to be released, either conditionally or without
3 conditions, pending trial, unless I find that there are no
4 conditions that would reasonably assure your continued presence
5 in court and the safety of the community. If the government
6 asks me to detain you pending trial, you're entitled to a
7 prompt hearing on whether those conditions exist.

8 Do you understand all of these rights, Mr. Muse?

9 THE DEFENDANT: Yes.

10 THE COURT: You have the right to be represented by
11 counsel during all court proceedings, including this one, and
12 during all questioning by the authorities. If you cannot
13 afford an attorney, I will appoint one today, as I have just
14 done, to represent you throughout this case at no charge to
15 you.

16 Do you understand your rights to counsel, Mr. Muse?

17 THE DEFENDANT: I understand. I don't have any money.

18 THE COURT: All right. And that's why I've appointed
19 Ms. Von Dornum and Mr. Weinstein to represent you. You don't
20 have to pay them anything. The Court takes care of that.
21 Understood?

22 THE DEFENDANT: I understand.

23 THE COURT: Good. We could, if you wish, go through
24 the rights to the preliminary hearing and --

25 MR. WEINSTEIN: We can. We have a medical application

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1 and a bunch of other stuff, which we could do publicly.

2 THE COURT: We could also, without revealing the
3 contents of the complaint, if both sides consent, you know,
4 have the colloquy about your having received the complaint,
5 etc. We seem to have an objection from the government.

6 MR. RASKIN: Your Honor, we're just not comfortable
7 going forward with anything that resembles a presentment until
8 the defendant has at least had a copy of the complaint in front
9 of him, reviewed the charges with his --

10 THE COURT: I think he already has.

11 MR. WEINSTEIN: He has. We have.

12 MR. RASKIN: We haven't seen him review the complaint.

13 MR. WEINSTEIN: Well, you never do.

14 MR. RASKIN: The complaint is not here and --

15 MR. WEINSTEIN: Yes, it is. We have a copy.

16 MR. RASKIN: Excuse me.

17 MR. WEINSTEIN: Okay.

18 MR. RASKIN: We would prefer to do the presentment as
19 a presentment is normally done, with the public reading of the
20 charges, if necessary, as opposed to doing it in a bifurcated
21 fashion like that.

22 THE COURT: The public reading can be your press
23 conference later on, because in the 14 years I've been doing
24 this, I don't think defense counsel, and certainly not the
25 Federal Defenders, have ever asked that the complaint be read

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1 in open court as opposed to recognizing that it's been verified
2 and sworn to and that they have received it and reviewed it
3 with their client. Nevertheless, since we are, you know,
4 trying to accommodate First Amendment interests versus Fifth
5 Amendment interests but since there's an objection to doing
6 that, we'll hold off on that, and at this point we will go into
7 sealed proceedings.

8 So all those who are not involved as counsel in this
9 case or law enforcement need to leave the courtroom. That will
10 include all court staff except for my staff. So other law
11 clerks, sorry about that.

12 MR. WEINSTEIN: Your Honor, Ms. Doherty is part of our
13 team, right here.

14 THE COURT: Okay.

15 (All unauthorized persons excused and the courtroom
16 sealed)

17 (Recess)

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1 (In open court)

2 MR. RASKIN: Your Honor, if we're beginning, I just
3 have --

4 THE COURT: Well, first I want to make sure that the
5 people left in the courtroom are supposed to be here and that
6 it's not somebody who, like a wedding, each side thinks they're
7 with the other side and we have wedding crashers. So let me
8 ask just, out of an excess of caution, could you please
9 identify on the prosecution side those who are with you. Is
10 that everybody on my right side of the courtroom?

11 MR. McGUIRE: That's correct, Judge.

12 THE COURT: All right.

13 MR. WEINSTEIN: The groom side is on the left, so we
14 have Ms. Doherty, Mr. Byrnes --

15 THE COURT: I recognize some of them, and they're all
16 with you?

17 MR. WEINSTEIN: The three over here.

18 MS. VON DORNUM: And we also have a representative
19 from the MCC here, your Honor, whom we did not ask to be here.
20 We don't have an objection, but he's not with us, technically,
21 of course.

22 THE COURT: What does the government want?

23 MR. McGUIRE: We have no objection.

24 THE COURT: All right. Then the CSOs would please
25 lock the courtroom door. We are now in sealed session.

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1 MR. WEINSTEIN: Your Honor, just, again, in excess of
2 caution, assuming the Court does not find this a juvenile, that
3 the representative of the MCC -- we have no objection to him
4 being here -- be under a gag order for the time being?

5 THE COURT: Understood?

6 MCC REPRESENTATIVE: I assume, your Honor, I can
7 notify my warden of the proceedings, because we are housing him
8 currently.

9 THE COURT: Yes, I understand that. No talking to the
10 press or anyone outside the law enforcement community.

11 MCC REPRESENTATIVE: That will not happen, your Honor.

12 THE COURT: All right. We are now in a sealed
13 proceeding. And let us begin.

14 MR. RASKIN: Your Honor, just a word on what the
15 government's position will be down the line.

16 THE COURT: Time out. I am told that for recording
17 purposes, we just need to announce the case and get counsel to
18 note their appearances again, so the clerk will do that.

19 (Case called)

20 (Appearances noted)

21 THE COURT: All right. Proceed.

22 MR. RASKIN: Just very briefly, your Honor, if the
23 Court finds that Mr. Muse is a juvenile, here is what the
24 government's position is on what would happen next. A
25 complaint would be filed, publicly, though that complaint would

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1 only bear the defendant's initials. The complaint would not be
2 sealed. The proceedings would not be sealed. The case would
3 not be sealed. His name would be kept out of the public view.
4 Okay?

5 The defense has made a decision to bring their client
6 into the courtroom and have his name announced to the public,
7 right? If you rule that he is a juvenile, we will then go back
8 and we will file -- You have the complaint. We will take the
9 name off the complaint and we will replace that name with
10 initials. So from the government's perspective, we really
11 don't see what we're doing here.

12 THE COURT: Ms. Von Dornum?

13 MS. VON DORNUM: Your Honor, I know you know better
14 than I do. We did not have the defendant's name announced to
15 the press ahead of time. And 18 United States Code 5038(c)
16 states that, "During the course of any juvenile delinquency
17 proceeding, all information, records relating to the proceeding
18 which are obtained or prepared in the discharge of an official
19 duty by an employee of the court or an employee of any other
20 governmental agency," which one must assume includes the United
21 States government and the Executive Branch, "shall not be
22 disclosed, directly or indirectly, to anyone other than the
23 judge, counsel for the juvenile and the government, or others
24 entitled under this section to receive juvenile records." The
25 others entitled, as you know, are specifically listed under

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1 subsection A. That does not involve a public filing, so I
2 think if the government were to treat -- were to file a new
3 complaint publicly, that would violate this statute.

4 MR. RASKIN: That is why -- that is why the
5 defendant's name isn't on the complaint and only the initials,
6 because it is not identified as a juvenile proceeding if his
7 name isn't on it.

8 THE COURT: Because we have lots of Somali pirates
9 being presented in this district.

10 I understand you're both dancing on the head of a pin,
11 and I'm not sure any of this makes sense, but let's proceed and
12 we'll see where it leads us.

13 So Mr. Raskin or Mr. McGuire, I guess you get to go
14 first on this. Why don't you present your evidence either
15 through agents, if the agents who heard these statements are
16 here, or otherwise, and then we'll hear from the defense and
17 we'll go from there.

18 MR. MCGUIRE: Your Honor, I'll proceed by both, if I
19 may. I'll begin, and then I'll ask one of the agents to stand
20 and address the Court.

21 The government's evidence is as follows: On four
22 different occasions the defendant stated that he was over 18.
23 On April 12th, 2009, initially stating that he's 16; hours
24 later, he stated through a Somali interpreter that he was 19;
25 and hours after that, he stated that he was 26. The following

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1 day, during a pedigree interview, again, with the assistance of
2 a Somali interpreter, he stated that he was 19. Those are the
3 instances that I will address.

4 I would also -- the Court asked earlier about other
5 sources other than the defendant's statements. The government
6 is aware of comments from -- the reporting from the defendant's
7 brother, who stated that the defendant is 18.

8 In addition to that, and I think --

9 THE COURT: I'm sorry. Is that reported via the press
10 or...

11 MR. McGUIRE: No.

12 THE COURT: Okay.

13 MR. McGUIRE: And I think in addition to that, what I
14 think is most compelling is the defendant's statements
15 yesterday to one of the interviewing FBI agents on the plane as
16 he was being flown here to Southern District of New York, and I
17 will ask Detective Fred Galloway, who was that interviewing
18 agent, to stand up briefly to address the Court and explain, or
19 describe his conversation with the defendant when he was asked
20 his age.

21 MR. WEINSTEIN: I'd just ask that it be under oath,
22 your Honor.

23 THE COURT: All right. We don't have a witness box
24 here, do we? So you can stand.

25 THE CLERK: Right there.

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1 THE COURT: Oh. Unless anyone cares, we'll let him
2 stand at the table. But we will swear you in.

3 THE CLERK: Can you please state your name for the
4 record.

5 THE WITNESS: Frederick Galloway.

6 THE CLERK: And your title?

7 THE WITNESS: Detective Frederick Galloway.

8 (Witness sworn)

9 THE COURT: All right. Proceed. Mr. McGuire, do you
10 want to do a narrative, do you want to do it as questions?
11 Whatever you'd prefer.

12 FREDERICK GALLOWAY,

13 called as a witness by the Government,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. MCGUIRE:

17 Q. I will just ask Detective Galloway to just describe what
18 his conversation with the defendant was yesterday when he asked
19 the defendant for his age.

20 A. While flying back from Djibouti, Africa, I did interview
21 Mr. Abdu -- Abduwali.

22 THE COURT: The defendant here?

23 THE WITNESS: Yes.

24 THE COURT: Okay. Proceed.

25 A. I did ask him his name and asked him how old he was, and

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Galloway - direct

1 when it got to his age, he laughed. And I asked him, Why are
2 you laughing? And he looked at me again. He smiled again. I
3 said, What's the matter? And he goes -- I said, Are you 15?
4 He laughed again. Then I asked him, Are you a true Muslim?
5 And he says yes. And I said, Do Muslims lie? And then he
6 said -- through his interpreter, he said. No. I'm sorry. I'm
7 between 18 and 19.

8 THE COURT: All right. Anything else?

9 A. Yeah. He also said, I'm sorry for lying to you. He said,
10 When I pray again, I'll ask Allah to forgive me for lying to
11 you, and I won't lie to you again.

12 MR. MCGUIRE: Your Honor, I'd also add, at the
13 pedigree interview the defendant had on April 13th, he was
14 asked about obviously a host of pedigree information. He was
15 also asked about the ages of the three deceased pirates with
16 whom he is alleged to have committed the crimes charged, and he
17 provided their ages. For one of the deceased pirates, he
18 provided an age of approximately 31; for the second pirate, he
19 provided an age of approximately 28; and for the third pirate,
20 he provided the age of approximately 35.

21 And in addition, your Honor, based on the perception
22 of the witnesses on the hijacked ship, in terms of their
23 perceptions of the defendant, both in terms of his conduct and
24 in his physical appearance, multiple witnesses from that ship
25 estimated his age to be approximately 25.

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1 THE COURT: All right. And with respect to the three
2 now deceased pirates, does the government have any information
3 as to how old they actually are?

4 MR. McGUIRE: The government does not have that
5 information as of now, your Honor.

6 THE COURT: Even approximately?

7 MR. McGUIRE: It has not been determined yet, Judge.

8 THE COURT: All right. Mr. Weinstein?

9 MR. WEINSTEIN: I just want to ask our client two
10 questions, your Honor, with the interpreter.

11 THE COURT: Okay. Go ahead.

12 (Defendant and counsel conferring)

13 THE COURT: All right. Mr. Weinstein, before you
14 proceed, let us just borrow the interpreter to tell the father
15 on the phone that he has to keep holding on. He's been on
16 silent hold.

17 MR. McGUIRE: Your Honor, I just want to make one more
18 point, if I might.

19 THE COURT: Well, let's just...

20 MR. McGUIRE: I'm sorry. Okay.

21 (Pause)

22 THE COURT: All right. Proceed, Mr. McGuire.

23 MR. McGUIRE: As your Honor is aware, while this issue
24 has not come up in quite a bit in the past, there are cases
25 that do address it. One that the government would direct the

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1 Court to is *US v. Alvarez-Porras* --

2 THE COURT: Any chance you brought copies?

3 MR. McGUIRE: I don't have copies, but I can certainly
4 get copies.

5 THE COURT: What's the citation?

6 MR. McGUIRE: 643 F.2d 54 (2d Cir. 1980).

7 THE COURT: Which says what?

8 MR. McGUIRE: Which says -- which says, among other
9 things, that in this context, impugning a defendant's
10 credibility with respect to his own statements about his age
11 may, on its own, satisfy the government's burden in
12 establishing majority status. To that point --

13 THE COURT: Well, but was there contrary evidence
14 there?

15 MR. McGUIRE: Was there contrary evidence there? Yes,
16 that went to an age hearing, where there was a dispute as to
17 the defendant's status. And among other things, the government
18 was able to demonstrate that the answers, among them pedigree
19 answers that the defendant gave, in addition to his age, were
20 so incredible that he could not be believed as to his age that
21 he gave that was below 18.

22 To that point, at the time that the defendant provided
23 pedigree information on April 13th on one of the Navy vessels
24 in which he said he was 19, he also provided the names of his
25 relatives as well as, as I mentioned before, the ages of the

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1 deceased pirates and their names. The names of the relatives
2 that he provided, including the names of his parents, brothers
3 and sisters, were also provided by him yesterday to Detective
4 Galloway when the defendant again said that he was of majority
5 status. Those names in both instances check out. And so in
6 that, the government would submit that in both instances the
7 defendant was being credible about his family, was being
8 credible about his age, which is that of a majority.

9 THE COURT: One more question for you and -- well, let
10 me start with Detective Galloway.

11 Did Mr. Muse give a date of birth, including month,
12 date, year or any subparts of that, or just that he was between
13 18 and 19?

14 THE WITNESS: Just between 18 and 19. He said because
15 they had no -- they had no government when he was born and so
16 there was no record, so he didn't know.

17 THE COURT: All right. Mr. McGuire, during the
18 pedigree interview on the 13th or the statement on the
19 12th, was any specific date given?

20 MR. MCGUIRE: It was not, Judge.

21 THE COURT: Okay. Mr. Weinstein, any questions for
22 the detective?

23 MR. WEINSTEIN: I do, and just one comment on the
24 appellate case cited by Mr. McGuire. I think as the Court
25 knows, there is an abuse of discretion review by the Court of

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1 Appeals. Usually it is not a fact finding, so the issue is not
2 that. So -- and I haven't read the case. But putting that
3 aside for a moment, I mean, maybe it says that.

4 But yes, I do have some questions for the detective.

5 THE COURT: All right. Go ahead.

6 CROSS-EXAMINATION

7 BY MR. WEINSTEIN:

8 Q. Detective, was Mr. Muse in handcuffs?

9 A. Yes, he was.

10 Q. Was he in leg shackles?

11 A. Yes, he was.

12 Q. Did he have tape or some substance over his eyes?

13 A. During our interview, no, but at some point upon entering
14 the plane, he did.

15 Q. And it was removed when you entered -- interviewed him,
16 correct?

17 A. Yes.

18 Q. And he also had a wound on his hand?

19 A. Yes, sir.

20 Q. And he told you he was in pain.

21 A. He told me he was -- he told me he was in pain for
22 something else, not the hand. The wound on his hand.

23 Q. Okay. Did he ask for medication?

24 A. No. We had a doctor aboard. We had a doctor on board.

25 Q. Was he crying?

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Galloway - cross

1 A. No.

2 Q. Never cried.

3 A. I never saw him cry.

4 Q. Do you know where, what region of Somalia the interpreter
5 was from?

6 A. I'm not sure.

7 Q. Do you know what dialect the interpreter spoke?

8 A. No.

9 Q. You don't speak Somali, do you?

10 A. No, sir.

11 Q. Was there anyone else on the plane who spoke Somali?

12 A. No.

13 Q. When you questioned him, did you tell him that you -- that
14 he had to answer your questions?

15 A. No, sir.

16 Q. And he just voluntarily did it?

17 A. Yes, sir.

18 Q. Were you with him before he got on the plane?

19 A. Yes, sir.

20 Q. And how long were you with him prior to boarding the plane?

21 A. About 45 minutes.

22 Q. And do you know where he was before that?

23 A. Yes.

24 Q. Where was he?

25 A. He was -- he was at -- on the Boxer, USS Boxer.

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Galloway - cross

1 Q. And do you know how long he had been aboard that ship?

2 A. Not offhand, but I have notes that tell me.

3 Q. A week; is that a fair guess?

4 A. A couple days.

5 Q. Couple days?

6 A. Yeah.

7 Q. And as far as you know, he'd been in custody since
8 April 12th?

9 A. Yes.

10 Q. And during that time he didn't call his parents?

11 A. I don't think he had a phone call.

12 Q. He had no phone calls. So did he have any contact with the
13 outside world?

14 A. No, not that I know of.

15 Q. Not that you know of?

16 A. Right.

17 Q. I can only ask you what you know.

18 MR. WEINSTEIN: Okay. Nothing further, your Honor.

19 THE COURT: Anything further?

20 REDIRECT EXAMINATION

21 BY MR. MCGUIRE:

22 Q. Detective Galloway, before you received this information
23 from the defendant, did you advise him of his *Miranda* rights?

24 A. Yes.

25 Q. Did he waive those rights?

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Galloway - redirect

1 A. Yes.

2 Q. Did the defendant understand any English?

3 A. No.

4 THE COURT: Okay.

5 RE CROSS EXAMINATION

6 BY MR. WEINSTEIN:

7 Q. Was there a signed waiver?

8 A. Yes, sir.

9 Q. Do you have a copy of it?

10 A. Yes, I do.

11 MR. WEINSTEIN: May I see it.

12 THE COURT: Do you want to mark it as an exhibit to
13 the hearing? Which --

14 MR. RASKIN: Early discovery, your Honor.

15 This may be our only copy we have, because we weren't
16 prepared to produce discovery today.

17 MR. WEINSTEIN: I'll give it back.

18 (Pause)

19 THE COURT: All right. Any other questions while the
20 detective is looking for that?

21 MR. WEINSTEIN: No.

22 THE COURT: All right. Anything else from the
23 government?

24 MR. McGUIRE: No, your Honor.

25 THE COURT: All right. Mr. Weinstein?

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1 Ms. Von Dornum? We've lost the person on the phone, so if
2 that's who you're going to call, we need to call them again.

3 All right. Madam reporter, would you help out on
4 that? I mean, Madam interpreter, would you help out on that.

5 (Pause)

6 THE COURT: All right. Madam interpreter, you'll need
7 to stand here so you're near the phone but also use the
8 headphone for the benefit of Mr. Muse, the microphone. This is
9 going to be an interesting challenge.

10 All right. Ms. Von Dornum, do you wish to ask the
11 father some questions?

12 MS. VON DORNUM: Yes, your Honor. Thank you.

13 THE CLERK: Do I swear him in?

14 THE COURT: Yes.

15 THE CLERK: Can you please state your name for the
16 record.

17 THE WITNESS: I'm the father. Abdukadir Muse is my
18 name.

19 THE CLERK: Do you affirm and declare that the
20 testimony that you shall give this Court in this issue shall be
21 the truth, the whole truth, and nothing but the truth?

22 THE WITNESS: Me? What did you say?

23 THE COURT: Do it again.

24 THE CLERK: You do affirm and declare that the
25 testimony that you give this Court in this issue shall be the

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1 truth, the whole truth, and nothing but the truth?

2 THE WITNESS: I put on God that I will tell the truth.
3 I'll answer any questions that you guys have that I know.

4 THE COURT: Go ahead.

5 ABDUKADIR MUSE GHEDI,

6 called as a witness by the Defendant,

7 having been duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MS. VON DORNUM:

10 Q. What is the name of your oldest son?

11 A. Abdu.

12 Q. What's his full name?

13 A. Abduwali Abduchadir Muse.

14 Q. And how many children do you have?

15 A. 12.

16 Q. And do you know when Abduwali was born?

17 A. 1993, November.

18 Q. Do you know what day in November?

19 A. The 20th.

20 Q. The 20th of November 1993 is when Abduwali was born?

21 A. Yes, Abdu was born on that day.

22 Q. And where was he born?

23 THE INTERPRETER: I can't hear.

24 MR. WEINSTEIN: Maybe you can just pick up the phone
25 rather than...

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Muse Ghedi - direct

1 A. Afigooye (ph).

2 Q. Was he born at home or in a hospital; what location?

3 A. House. House.

4 Q. And do you know the birthdate of your next oldest child?

5 A. He was born -- I don't remember if it was July or -- July
6 or August, but he was born in '97.

7 Q. The next oldest.

8 A. Yes.

9 Q. Okay. And how can you be so certain about the date of
10 birth of Abduwali?

11 A. I'm grown and I'm older, so I know when I had my first --
12 my child.

13 Q. And do you celebrate the birthdays of your children at your
14 home in Somalia?

15 A. We slaughter an animal and we celebrate.

16 Q. And are you close? Did you see Abduwali regularly growing
17 up?

18 A. Yes, I see him a lot. He was with his mom the whole time.
19 But when me and his mom got separated, when me and the mother
20 got separated, he used to come around.

21 Q. Do you know how many years of school, if any, he had?

22 A. He only went to like a mosque to study, but he never had
23 that much schooling.

24 Q. Did he have any --

25 THE INTERPRETER: I can't hear him. I have to ask him

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Muse Ghedi - direct

1 to repeat.

2 A. I live in the village. I stayed in the village.

3 Q. Did he have any --

4 A. Okay. I have another wife, so during that time I was in
5 the village, but I know that -- I don't know if she took him to
6 school or not, but I don't think he had a lot of schooling.

7 Q. Okay. And even when you had your other wife, did you still
8 see Abduwali regularly?

9 A. Okay. When I used to go around and visit and stuff, I
10 would see him or -- I'm his father, so he came and saw me all
11 the time.

12 Q. Did you see Abduwali on the first day that he was born?

13 A. Mm-hmm. I was there when he was born.

14 Q. And do you have any doubt that that day was
15 November 20th, 1993?

16 A. I was there. I was there the whole time. I was there.

17 MS. VON DORNUM: Thank you.

18 MR. McGUIRE: Let me begin by asking the interpreter
19 to repeat the gentleman's name. I didn't catch that at the
20 beginning. And spell it.

21 THE INTERPRETER: For me? Abdukadir, A-B-D-A-D-A --
22 I'm trying to remember. I'm sorry. A-B-D-U-A-D-I-R. Muse,
23 M-U-S-E.

24 MR. McGUIRE: Could we just confirm that that's his
25 full name.

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Muse Ghedi

1 THE WITNESS: My real name is Abdukadir Muse Ghedi.

2 MR. MCGUIRE: If I could ask the defense, what is the
3 phone number that was called?

4 (Ms. Von Dornum provided the phone number, which has
5 been redacted from this record.)

6 MR. MCGUIRE: We have no questions, your Honor.

7 THE COURT: Ask him what the birthdate of his fourth
8 oldest child is, please.

9 THE WITNESS: I was not with my wife at the time when
10 the child was born.

11 THE COURT: But does he know the birth, date of birth
12 anyway, even if he wasn't there?

13 THE WITNESS: I went to the village somewhere out in
14 the woods where -- for about a month and a half. When I got
15 back, he was there.

16 THE COURT: What year?

17 THE WITNESS: 1990.

18 THE COURT: Okay. That's all I have. Anything
19 further from either side?

20 MR. WEINSTEIN: No questions, your Honor.

21 MR. MCGUIRE: No, your Honor.

22 THE COURT: All right. Then tell him thank you and we
23 can hang up.

24 MR. WEINSTEIN: I just want to ask the interpreter
25 something about this.

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1 (Pause)

2 THE COURT: Okay. Anything further from the defense
3 in terms of evidence?

4 MS. VON DORNUM: No, your Honor.

5 MR. WEINSTEIN: No, your Honor.

6 THE COURT: All right. And I know there are Fifth
7 Amendment issues and all of that, but I take it you are not
8 calling Mr. Muse, and I would be prepared to limit questions to
9 him only about his age.

10 MR. WEINSTEIN: Can we have two minutes to talk with
11 him with the interpreter, your Honor?

12 THE COURT: Yes.

13 MR. WEINSTEIN: We'll just stand back here for...

14 THE COURT: That's fine.

15 (Defendant and counsel conferring)

16 THE COURT: All right. Mr. Weinstein, are you ready?

17 MR. WEINSTEIN: We're just finishing. Yes, we are.
18 We're not putting him on.

19 THE COURT: All right. If you feel you must make
20 argument, do so. Otherwise, I'm prepared to rule.

21 MR. McGUIRE: Briefly, your Honor, I think what we
22 have here that's most compelling is the defendant's own words.
23 Either A, they are true and on four different occasions he
24 stated that he was of majority status; or, B, he's playing
25 around with his age and his credibility with respect to his age

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1 has been sufficiently impugned that it's clear that he is
2 deliberately claiming that he's minority status and that on
3 that basis alone, as I stated earlier, under Second Circuit
4 caselaw, that alone permits the Court to make a finding that
5 the defendant's of majority status.

6 I think secondly, because of the nature of these
7 proceedings -- and it is an unusual argument, but in this
8 context we can make it -- the Constitution is not offended if
9 the Court seeks affirmative evidence from the defendant, and as
10 we just saw, the defendant chose not to testify. The person in
11 the unique -- with the unique position of knowing the most
12 about his age has chosen not to tell the Court about his age.

13 Finally, with respect to the defense's sole witness
14 and the telephone call that we just heard, it's clear that that
15 witness had selective memory about certain dates. The only
16 birthdate the witness was able to remember was that of the
17 defendant. Otherwise, there were --

18 THE COURT: I get the point. Anything else?

19 MR. McGUIRE: And finally, I believe at the end of
20 that, the defendant -- the witness said that his fourth oldest
21 child was born in 1990, which would make that child 19, and he
22 said the defendant was his oldest child.

23 And finally, the phone number that was used to call
24 this individual differed than the phone number that was
25 provided as a contact by the defendant at the time of his

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1 pedigree.

2 THE COURT: Mr. Weinstein?

3 MR. WEINSTEIN: Number one, there is an underlying
4 assumption by the government that Mr. Muse understood the
5 significance of age. My guess is that he didn't.

6 Second, he made various inconsistent statements to the
7 government. He was shackled, he was in pain, he was under
8 medication, he was denied any communication with anyone for
9 over a week. And even then he said 16, 18, 26. He gave a
10 bunch of different ages.

11 As to knowing his age, it is not uncommon, I am told,
12 in Somalia, for people not to be certain of when they're born.
13 They may have -- What they know is what their parents tell
14 them. And the person in the best -- The only reason I know
15 when I'm born is because I have a birth certificate, but that
16 doesn't exist, but otherwise it's because of what my parents
17 would have told me. I suspect that in a place like Somalia,
18 where there are no birth certificates -- he was born in a
19 village, I'm guessing a midwife -- that there are no records
20 and he knows what his parents have told him.

21 And also, by the way, the final part is, when -- the
22 first age he said was, he was 16, which, without having
23 heard -- presumably they weren't giving him the New York Times
24 or the Associated Press, and so when he said that, that's
25 consistent with what has been said in the press.

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1 THE COURT: All right. The Court finds that he will
2 not be treated as a juvenile. The Court is persuaded by the
3 evidence from Detective Galloway. Whatever the issues were in
4 not understanding or anything like that are issues that could
5 have been addressed by the defendant, Mr. Muse.

6 The Second Circuit case that Mr. McGuire cited to
7 previously, which my clerk printed out and I've read while all
8 this was going on, *United States v. Alvarez-Porras*, 643 F.2d 54
9 (2d Cir. 1981), the only case cited to the Court by either
10 side, in fact had a situation where the defendant testified at
11 the age hearing. So that is something that the defendant here
12 could have done, and the Court, as I noted, was prepared to
13 limit questioning so that it did not open the door and waive
14 any other, or any Fifth Amendment rights at all. You know, it
15 would be impermissible for a defendant to say, I'm not
16 testifying ever, I'm going to let the government prove my age,
17 particularly if I've come from a country where birth
18 certificates don't exist, and then say the government hasn't
19 met its burden.

20 Even to the extent that the burden is the government's
21 here -- and I believe that is ultimately correct and it is
22 their burden -- Detective Galloway's testimony about asking
23 whether he was a true Muslim of the defendant and then getting
24 the answer that he was between 18 and 19 is credible to the
25 Court.

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1 And whether it was language problems or what it was --
2 and obviously all I was able to understand was the interpreter
3 and not Mr. Muse's father, but it does strike the Court as
4 incredible that he knew the defendant Muse's birth down to the,
5 you know, month, day and year, but that as to the second oldest
6 child he was rather vague, it was somewhere in a two-month
7 period, and as to the fourth child, he picked a date that would
8 make the fourth child the oldest child. So again, either he
9 didn't understand or, quite frankly, having been educated by
10 the press, it is conceivable that, you know, he knew he needed
11 to pick an age under 18 in order for his son to be treated as a
12 juvenile.

13 Finally, and a small factor in this case but
14 nevertheless another factor is, there is no secret as to who
15 this defendant is and what he's being charged with, and the
16 need for juvenile secrecy, albeit that's what the statute
17 provides, is clearly obviated by the situation we found
18 ourselves in today. If that's the government's fault, you can
19 deal with that at some other point. But quite frankly, what we
20 did in open court, even though it would have been a charade if
21 we just said, you know, in re possible juvenile pirate or any
22 other way that the case would have been called anonymously,
23 which the Court was prepared to do, in order to have Mr. Muse
24 see what's going on and know that you really are his attorneys
25 and are fighting for him and good reason to bring him out, but

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1 you know, no pun intended, the ship certainly sailed from the
2 defense point of view at that point. But as I say, that's sort
3 of the footnote to the opinion, my main opinion, and obviously
4 at the appropriate time you can take it to whatever appropriate
5 reviewing court. Obviously it went up to the Second Circuit in
6 the *Alvarez-Porras* case eventually. But in this case, I just
7 did not find the father's testimony to be credible at all.

8 No testimony directly in front of the Court from the
9 defendant, Mr. Muse, and credible testimony from Detective
10 Galloway, even if the Court ignores the other proffer from
11 Mr. McGuire as to the other statements where the defendant, in
12 giving pedigree and other information, said he was not a minor.

13 So at this point I am going to unseal the courtroom,
14 unseal this transcript so that the press can have access to it,
15 briefly summarize it, and so we will take a short recess just
16 long enough to bring the press in.

17 MR. WEINSTEIN: Your Honor, I guess the only thing we
18 would ask is the father's number be redacted. I gave it to the
19 government.

20 MR. MCGUIRE: No objection, your Honor.

21 THE COURT: All right. The reporter will make sure to
22 redact that out of the transcript.

23 MR. MCGUIRE: And just to close the loop, your Honor,
24 the government will now go and file the complaint.

25 THE COURT: All right. And you can file it. Bring me

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1 my copy. We'll go through the rest of the proceedings.

2 I'll ask the marshals to bring in as many people as
3 will fit and then we'll open up Room 850 for the overflow.

4 Let's give priority to the sketch artists.

5 We'll take a five-minute recess for all that shuffling
6 to occur.

7 (Recess)

8 (End of stenographic record)

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EXHIBIT B

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

95 Cr. 973 AGS

5 ENRIQUE CARTY,

95 Cr. 980 AGS

6 Defendant.

7 -----x

8 November 9, 2001

9 11:00 a.m.

10 Before: New York, N.Y.

11 HON. ALLEN G. SCHWARTZ,

12 District Judge

13 APPEARANCES

14 MARY JO WHITE
15 United States Attorney for the
16 Southern District of New York
17 DAVID C. ESSEKS
18 Assistant United States Attorney

19 GEOFFREY STEWART
20 Attorney for Defendant

21 YOLANDA SAMAYOA Spanish Interpreter

22 SENTENCE

23
24
25

1 THE COURTROOM DEPUTY: For sentencing, United States
2 v. Enrique Carty, 95 Cr. 973 and 95 Cr. the 80.

3 MR. ESSEKS: David Esseks for the government.

4 MR. STEWART: Geoffrey Stewart for Enrique Carty.

5 THE COURT: We are here this morning as a result of
6 the fact that the Second Circuit in this case has vacated the
7 sentence and remanded this matter to the district court so that
8 this Court "can reconsider the defendant's request for a
9 downward departure and do so in light of this holding."

10 I have now received from Mr. Stewart additional
11 materials in support of his motion for downward departure and I
12 have read all of those materials and I am now prepared to
13 proceed. Are you prepared to proceed, Mr. Stewart?

14 MR. STEWART: Yes, I am, Judge.

15 THE COURT: I won't repeat what was said in the
16 earlier proceeding; that is, I know that you and your client
17 have read the presentence report and you either noted or had
18 the opportunity to note any objections or comments you have.
19 And I will not repeat all that I have said there because this
20 resentencing is isolated to the issue that the Second Circuit
21 has referred to. So I'm prepared to hear you if you wish to
22 address the Court, Mr. Stewart, as to the submission that
23 you've made and any other matter that you may wish to bring to
24 the Court's attention.

25 MR. STEWART: Thank you, Judge. I appreciate that

1 opportunity. I don't want to belabor and repeat any of the
2 issues that are raised in what I submitted to the Court. I
3 would just ask that that, as well as all the previously
4 submitted materials, the request for downward departure at the
5 initial sentencing, be made part of the record here as well. I
6 think it is part of the record.

7 THE COURT: It is my understanding that that is
8 appropriate and all of those materials submitted in connection
9 with the prior proceeding are deemed part of this record as
10 well as the transcript of the earlier sentence except obviously
11 in regard to the portion that has to do with the denial of the
12 motion for downward departure on the basis of his having been
13 incarcerated in the Dominican Republic under those adverse
14 conditions. So all that I've said previously and all that was
15 submitted previously are all part of this record.

16 MR. STEWART: Thank you, Judge. Just very briefly and
17 then I'll ask the Court to allow Mr. Carty to speak as well.
18 There was a time before 1987 when sentencing of a defendant in
19 a criminal matter had much to do with the individuality and the
20 person, of the individual before the Court. The court then
21 considered rehabilitation, the court would consider deterrence
22 as well as ideas of incapacitating the defendant before the
23 court.

24 Rereading what occurred at the original sentencing and
25 then having participated in the appeal process, at best I think

1 the Court of Appeals thought that there may have been an issue
2 about whether the Court understood its authority to depart. I
3 have a great deal of respect for the Court. I know the Court
4 gave a great deal of consideration to those issues when they
5 were originally raised. But rereading the sentencing, I
6 believe the Court had almost a visceral reaction to the concept
7 that somehow Mr. Carty could parlay his extreme error in
8 judgment of leaving the country, of fleeing to the Dominican
9 Republic, having the extra misfortune of getting caught,
10 detained pending some removal, I don't want to call it
11 extradition because I don't think that's what it was, and then
12 now he's before the Court saying you should lower my sentence
13 because this bad thing happened to me, with the idea that it
14 happened to him because of his own errors in judgment, his own
15 bad choices.

16 But what I want to say to the Court is that I think
17 the focus should really not be, when you're exercising your
18 discretion, not merely on what country this happened in, that
19 this happened to him in his own country and it happened to him
20 in the country that he fled to, but I think the Court should
21 really focus on what in fact this individual went through at
22 that time, because if Mr. Carty, while he was a fugitive, had
23 provided some tremendous information to either his own
24 government or to the United States Government, had participated
25 in a rescue, had done something extraordinary, I would be

1 bringing that to the Court's attention as well because I think
2 it's relevant and I think at this stage in the affairs of a
3 federal court that individuals -- that the Court may consider
4 sentencing beyond factors that occur within our own geographic
5 boundaries.

6 Having said that, I don't think it's particularly
7 relevant what country he was in when this happened. The type
8 of logic that says it happened to him in his own country and he
9 went there and maybe those are the standard conditions in his
10 country, that type of logic, if applied in the Navarro case
11 which is the only case that we were aware of where there was an
12 actual downward departure for inhumane prison conditions or
13 deplorable prison conditions, the judge there could have said,
14 you know what, defendant, you had the bad choice of committing
15 your crime in New Jersey and unfortunately for you you got
16 locked up in a Union County jail. And really that's your
17 problem.

18 But while it was his bad choice to go back to his
19 country, he certainly had no control and did not bring upon
20 himself the prison conditions as they were. It wasn't as if he
21 was in a particular prison setting and then set a fire in the
22 jail and then was put into some worse condition. He was forced
23 to suffer in a way that I think if the Court were to put itself
24 in his shoes, might see a little bit more about what actual
25 psychological and physical suffering that is. That is being

1 locked up in a small, overcrowded cell with other individuals
2 in a like situation who don't know what's happening one day to
3 the next, no access to legal assistance, no formal legal
4 proceedings commenced against him and Judge, the impact of that
5 is that if you're in jail, yes, he knows he's a fugitive but
6 does he know he's being held for an extradition or does he
7 think he's just being held like thousands of other people in
8 the Dominican Republic, that are in the report, with no access
9 to the legal system, without any real information about why
10 they're being held, what they're being held for, how long
11 they're going to be held, when they're going to see a judge.
12 That is a type of psychological torture. He's held in a
13 detention center which the information, although it's hearsay I
14 included it in the letter, was a prison that was built as a
15 short-term detention center, almost like a local precinct if
16 you will. The only unfortunate thing is it doesn't have any
17 windows. And he's there for approximately nine months. And
18 this is not to get to the most serious part of that and that is
19 food being provided at the whim and certainly unscheduled hours
20 of the prison staff, medical attention nonexistent, recreation
21 nonexistent.

22 And we're not talking about a week or two weeks or a
23 couple of days. We're not talking about somebody who is taken
24 out to court every now and then to see how his case is going,
25 we're talking about just being locked down for nine months.

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1 Mr. Carty stated in the presentence report way back before the
2 original sentence that as a result of that he lost 40 pounds
3 while he was in jail.

4 If the Court could attempt to do that and I know it's
5 a very difficult step, to put itself in Mr. Carty's shoes as he
6 sits in that cell, albeit in his own country, I think the Court
7 might be more inclined to exercise its discretion.

8 We provided the reports to the Court that in 1999 to
9 2000, at least three major organizations, Amnesty
10 International, the Human Rights Watch and the Organization of
11 American States were extremely critical if not outright
12 condemning of the prison system in the Dominican Republic.

13 I ask the Court to consider this information as to the
14 request for a downward departure and I also ask the Court,
15 because I believe we are here for resentencing, the sentence
16 was vacated, that if not that, that the Court consider
17 sentencing Mr. Carty to the lower end of the guideline range
18 which the Court already had sentenced him to. And I appreciate
19 the opportunity to appear before your Honor. Thank you.

20 THE COURT: Mr. Carty, anything you wish to say?

21 THE DEFENDANT: The way I was in jail in my country
22 was inhuman. I was in a cell that was three by three at most
23 and I shared that with up to four people. There was no light,
24 I couldn't even read a newspaper. The food was horrendous.
25 The police treated us like animals. I had no right to see my

1 family. I never saw a lawyer who could defend my case. I know
2 that I made a mistake in the past, your Honor, and it was even
3 worse because I ran away. But I have been trying to improve in
4 the time that I have been spending in jail now. And I am
5 studying for the GED and I'm working.

6 When I was in Santo Domingo, in that time I lost 40
7 pounds. I had high blood pressure and I had medication but
8 they were not giving me those medications for me to take. I'm
9 a human being who has made a mistake and I would hope for a
10 little bit of consideration.

11 This is all I have to say.

12 THE COURT: Thank you. Mr. Esseks, anything you wish
13 to say?

14 MR. ESSEKS: Yes, your Honor. When we were here last
15 for the original sentencing, I did not argue that the Court had
16 no discretion to grant a departure on these grounds; I argued
17 that the Court should not, and the principal bases for that
18 argument are the same now as they were then which are quite
19 simply, the defendant ran away to a place that he chose, that
20 is in fact his own country. What happened to him is very
21 unfortunate, and we're not quarreling about the facts, I don't
22 necessarily adopt all the facts, I do not adopt all the factors
23 cited by the defendant, although I do not present the Court
24 with contrary facts, but my point is that despite the
25 conditions that the defendant suffered under, those are not

1 conditions that the Court ought to rely in adjusting the
2 sentence here, for the reason that they are consequences
3 foreseeable and directly attributable to the defendant's own
4 conduct in seeking refuge in the Dominican Republic. And one
5 of the consequences is, if you get caught, you get treated as
6 the Dominican police and government treat everybody else.

7 Defense counsel has, Mr. Stewart has contended that
8 this wasn't an extradition. Well, certainly it wasn't an
9 extradition in the same sense that this country deals with
10 incoming extradition requests from foreign countries. But
11 extradition is a matter of the executive department in the
12 Dominican Republic and this is apparently the way they handle
13 extraditions. So there's nothing irregular about this
14 extradition as opposed to any other that I've been involved
15 with in bringing people back from the Dominican Republic.

16 Your Honor stated at the original sentence that
17 Mr. Carty was imprisoned in his own country under what the
18 Court had to assume, and I joined in that assumption, were the
19 standard conditions of confinement in that country. And your
20 Honor concluded by stating that you did not believe that the
21 law was that such conditions warranted a departure and stated
22 nor should it be the law.

23 Your Honor obviously can speak and will speak for
24 yourself. It is our position that on these facts, it should
25 not be the case that the defendant gets an adjustment to a

1 sentence because of the admittedly unpleasant, inhumane
2 conditions under which he was imprisoned in his chosen refuge.
3 To the extent that the Court is interested or inclined to grant
4 a departure, I submit that the extent of it would logically be
5 some percentage at the most of the approximately nine months
6 that he was under those conditions. Thank you.

7 THE COURT: Thank you. Mr. Stewart, any legal reason
8 why sentence should not now be imposed?

9 MR. STEWART: Not that I know of, your Honor.

10 THE COURT: Ask the defendant to rise, please. Before
11 we begin with the sentence, let me note that the case as I
12 indicated is here on remand from the Second Circuit and I want
13 to, in order to focus this sentence, recite from the Second
14 Circuit decision. The Second Circuit said "We agree with the
15 defendant that the Court may have misapprehended its authority
16 in this case." And the Second Circuit went on to say that "the
17 Court's use of the phrase 'under no circumstances' suggests
18 that the Court may have believed that presentence conditions of
19 confinement at least when such confinement occurs in the
20 defendant's own country can never serve as the basis for a
21 downward departure. This is not correct."

22 Therefore I want to make clear that my decision today
23 recognizes the law as established by the Second Circuit in this
24 case and will not be based upon any such consideration, that
25 is, a consideration that would include under no circumstance

1 may a defendant's conditions of confinement in his own country
2 serve as a basis for a downward departure. Put that out of
3 your mind. I eliminate that.

4 And I've also read carefully the submission made by
5 Mr. Stewart on November 6, 2001 which includes the materials
6 that Mr. Stewart has referred to, including the report of the
7 Organization of American States, InterAmerican Commission on
8 Human Rights, the segment of the annual report of Amnesty
9 International in 1999 and the segment from the annual report of
10 Amnesty International for 2000 and the pages from the Human
11 Rights Watch World Report regarding the Dominican Republic for
12 1998. I've read all of those materials.

13 Having read all of those materials and having given
14 consideration to the factors that have been raised here and to
15 what was stated by the Second Circuit to this Court, I now
16 state the following.

17 The defendant, Enrique Carty, has pled guilty without
18 benefit of a plea agreement to Count 1 only of 95 Cr. 973 to
19 the crime of conspiracy to violate the federal narcotics laws
20 in violation of Title 21, United States Code, Section 846,
21 which is a Class A felony. He has also pled guilty as charged
22 under 95 Cr. 980 to Count 1, to the crime of conspiracy to
23 violate the federal narcotics laws in violation of Title 21,
24 United States Code, Section 846, a Class A felony, and to Count
25 2 of that indictment, to the crime of conspiracy to violate the

1 federal narcotics laws in violation of Title 21, United States
2 Code, Section 846 which is a Class B felony.

3 The base offense level for these crimes as set forth
4 in paragraphs 30-31 of the presentence report is as follows.
5 Count 1 of the indictment, 95 Cr. 973, which charges the
6 violation of 21 United States Code Section 846, which I just
7 referred to, and Counts 1 and 2 of information 95 Cr. 980,
8 which also charge violation of Title 21 United States Code
9 Section 846, are grouped; that is, Count 1 and Count 2 of
10 95 Cr. 980 are grouped with Count 1 of 95 Cr. 973, all pursuant
11 to guideline section 2D1.2(d). And the result of that is that
12 the sentence is predicated on the basis, or largely on the
13 basis, of the quantity of substance involved, or some other
14 measure of aggregate harm, and the offense behavior is ongoing
15 or continuous. The result of all of that is that the two
16 indictments, the counts in the two indictments, are now
17 grouped.

18 In that connection, with that grouping, the guidelines
19 for violation of 21 U.S.C. 846 are found in Section 2D1.1. The
20 defendant's criminal activity as he conceded involved the
21 receipt and the distribution of in excess of 1.5 kilograms of
22 crack cocaine in North Carolina and at least five kilograms and
23 approximately 116 grams of heroin in New York. When these
24 amounts of narcotics are converted into marijuana, their
25 aggregate weights is approximately 30,300 kilograms of

1 marijuana, and under the drug quantity table, 2D1.1(c)(1) the
2 base offense level is 38.

3 The presentence report, as I indicated earlier in the
4 prior sentence, recommended a four-level increase for the
5 defendant's role in the offense and described him as a
6 leader/organizer.

7 The government agreed that the defendant should not
8 receive a four-level organizer/leader adjustment but contended
9 that that adjustment should be reduced to a two-level
10 adjustment and the government contended that the defendant,
11 although not the level of leader or organizer that is described
12 in the presentence report, nonetheless had a leadership or
13 supervisory role that would support a two-level rather than
14 four-level enhancement and the government conceded the
15 defendant did not supervise an organization that had five or
16 more participants or was otherwise extensive.

17 As I read the presentence report, as I stated in the
18 earlier sentence, I did not find that there was a basis for any
19 role adjustment here. It is difficult to find any supervisory
20 or leadership role or other role that will support an upward
21 increase in the offense level, therefore I declined and I do
22 now decline to impose an increase on that basis. So the base
23 offense level of 38 remains the base offense level.

24 Parenthetically, it should be noted that the
25 presentence report, having made various calculations, concluded

1 that the defendant was at a total offense level of 39, Criminal
2 History Category III, and that would account for guideline
3 provisions of 324 months to 405 months, and the recommended
4 sentence was 324 months with consideration for time served.
5 I'm pointing that out because I want you to know that I've
6 given serious consideration to the arguments made by the
7 defendant, the arguments that were made earlier and the
8 arguments that were made on the present motion for a downward
9 departure. And I've considered all of those.

10 As I stated earlier and I state again, there are
11 however certain other issues that have to be addressed. First
12 is the question of whether the defendant who failed to appear
13 has engaged in conduct which eliminated his entitlement to a
14 three-level reduction for acceptance of responsibility and
15 whether the defendant is now to be subjected to a two-level
16 increase for having obstructed justice. And the facts with
17 regard to this matter, as I stated earlier and I'm repeating
18 today, are as follows.

19 Mr. Carty pleaded guilty before this Court on November
20 28, 1995 to the two-count information 95 Cr. 980 which I just
21 referred to. And he also pleaded guilty to an indictment in
22 the Western District of North Carolina which was transferred
23 here pursuant to the Federal Rules of Criminal Procedure and
24 was renumbered 95 Cr. 973. These pleas were entered into
25 pursuant to a cooperation agreement with the government and on

1 the government's consent, Mr. Carty was released on bail
2 conditions.

3 The bail conditions also included certain travel
4 conditions. It permitted Mr. Carty to travel to the Southern
5 and Eastern Districts of New York, except for agent-supervised
6 trips to the Western District of North Carolina. Following his
7 release on bail, the government concedes that Mr. Carty
8 Assisted the DEA in a variety of cases. However, there did
9 come a time when the government learned that Mr. Carty was no
10 longer in the United States and the government, in fact,
11 learned that Mr. Carty was in the Dominican Republic.

12 The DEA agent called Mr. Carty who according to the
13 DEA agent stated that Mr. Carty said that he had traveled to
14 the Dominican Republic because his mother passed away and he
15 would be returning to New York shortly. Later it was contended
16 that it was his father who passed away and that that was a
17 triggering event for Mr. Carty leaving the United States. I
18 don't think it's material whether it was his mother or father,
19 although that point was argued by the government in its
20 submission.

21 At the end of April 1998, the DEA agent again called
22 Mr. Carty, Mr. Carty having earlier said that he would be
23 returning to New York shortly, and Mr. Carty stated that he was
24 waiting for friends to get him money so he could fly back to
25 New York. Subsequently, both the cellular telephone number for

1 Mr. Carty in the Dominican Republic and the telephone number,
2 Mr. Carty's number in New York, were disconnected. Mr. Carty
3 did not return to New York.

4 In May of 1999, Mr. Carty was leaving or attempting to
5 leaving the Dominican Republic to fly to a neighboring island
6 but was arrested at the Santo Domingo airport based on a United
7 States arrest warrant and thereafter Mr. Carty was returned to
8 this country by the Dominican Republic in February of 2000 and
9 arrived in the Southern District of New York in March of 2000.

10 The net of that is that Mr. Carty, notwithstanding his
11 cooperation agreement and his having pled guilty and having
12 accepted responsibility, had now not only breached the terms of
13 his cooperation agreement, but he also fled. It is difficult,
14 as I stated earlier, to conclude otherwise than that Mr. Carty,
15 whatever reason he now gives or then gave, fled this country
16 and returned to his native country of the Dominican Republic.
17 It was there that he was apprehended and held and then
18 imprisoned for these nine months that we've referred to and
19 thereafter was returned to the United States.

20 Let me also say that I do accept that conditions in
21 the prison in Santo Domingo were as set forth in the various
22 reports that were submitted by the defendant under cover of the
23 letter of Mr. Stewart November 6, 2001, I accept that they were
24 severe and substantially substandard conditions and that
25 Mr. Carty was required to endure something that was, in my

1 judgment, not humane.

2 However, to return to the issues at hand, before
3 getting to that issue, the result of all of the foregoing is
4 that Mr. Carty was then confronted with the loss or the
5 potential loss of the three-level reduction that he would
6 easily have had for his acceptance of responsibility. And the
7 government, in fact, contended that not only should Mr. Carty
8 lose that three-level reduction for acceptance of
9 responsibility but the government moved this Court for a
10 two-level increase in the defendant's offense level for
11 obstruction of justice pursuant to Guideline Section 3C1.1.
12 The Court noted at the time of the earlier sentence, and I do
13 today repeat, the application notes to guideline section 3E1.1
14 state that "while entry of a guilty plea and admission of
15 additional relevant criminal conduct will constitute
16 significant evidence of acceptance of responsibility, this
17 evidence may be outweighed by conduct of the defendant that is
18 inconsistent with such acceptance of responsibility." A
19 defendant who enters a guilty plea is not entitled to an
20 adjustment under this section as a matter of right, which is
21 set forth in the application note 3 of guideline 3D1.1.

22 As I stated at the initial sentencing and I repeat
23 today, the Court has given long consideration to the question
24 of whether the defendant has accepted responsibility for his
25 crimes. I could then have found, at the earlier sentence, that

1 the defendant by virtue of his obstruction of justice, was not
2 entitled, in my discretion, to this three-level reduction. But
3 I stated at the earlier sentence and I'm repeating today that
4 having heard the defendant and his having accepted
5 responsibility for the more than one and a half kilograms of
6 crack cocaine and having responsibility for the remainder of
7 his crime, the crimes to which he has pled guilty, and
8 notwithstanding his flight for which he presents still another
9 question, I stated then and I am today still of the view that
10 the defendant is entitled to the reduction for acceptance of
11 responsibility and I then earlier and I do today give him that
12 three-level reduction for acceptance of responsibility. So I
13 want you to understand that I've exercised my discretion now in
14 two different areas favorable to the defendant and understand
15 the totality of his circumstances.

16 The Court earlier stated and I repeat today, however,
17 the defendant also is subject to Guideline Section 3C1.1 and to
18 the application note which sets forth that an example of
19 conduct to which the obstruction of justice enhancement
20 enhancement is applies is escaping or attempting to escape from
21 custody before trial or sentencing, or willfully failing to
22 appear as ordered for a judicial proceeding. And this is set
23 forth in application note 4(e) to Guideline Section 3C1.1.

24 I stated earlier and I state again today, the
25 conclusion is inevitable, and I so find, that the defendant

1 fled, that is, the escape or attempt to escape from custody
2 before trial or sentencing, he willfully failed to appear. He
3 did so in the face of what is now a clear and overwhelming
4 record that he had no justification for doing so because the
5 DEA agent who spoke to him by telephone in effect said that
6 they were looking for him and that he was to return and
7 Mr. Carty said that he would return but he didn't. He didn't
8 return until he was apprehended, until he was incarcerated,
9 then ordered or directed to be, and in fact returned by the
10 government of the Dominican Republic. Under those
11 circumstances I found and I do find that he has obstructed
12 justice and he is therefore subject to the two-level
13 obstruction of justice enhancement.

14 The reduction of the three levels from the base
15 offense level of 38 for acceptance of responsibility brings him
16 to 35 offense level plus two levels for his obstruction of
17 justice, places him at the offense level of 37 and I then found
18 and I do now find that he is at total offense level 37. As I
19 pointed out earlier, the presentence report recommended that he
20 be placed at offense level 39.

21 His Criminal History Category as we have agreed is
22 III. That criminal history category is spelled out in the
23 presentence report and I adopt that finding and rely on the
24 presentence report in that regard.

25 But he's also subject to two criminal history points

1 which put him in Criminal History Category III based on the
2 fact that he committed these crimes while he was under
3 supervision. He was under supervision in 1992 and on his
4 allocution conceded that he was involved in the North Carolina
5 conspiracy from 1994 and the New York conspiracy from 1992.

6 In any event, the record is clear that he is correctly
7 in Criminal History Category III, Guideline level 37, Criminal
8 History Category III, he is in a guideline imprisonment range
9 of 262 to 327 months. His guideline supervised release range
10 is three to five years. His guideline fine range is 25,000 to
11 ten million dollars. There's a mandatory special assessment of
12 50 dollars per count, and he has pleaded to three counts for a
13 total of 150 dollars. The defendant's objections were duly
14 noted and I do note them even today. And now he seeks the
15 downward departure.

16 The record, in order to be clear, reflects that he was
17 involved in the cocaine amounts that he's pleaded to and in
18 fact, even during these proceedings, he argued that he
19 transported eight or nine kilograms of powdered cocaine to
20 North Carolina. In accordance with what the Court found
21 previously, I do continue to find he's also subject to and
22 responsible for distributing 116.86 grams of heroin as set
23 forth in the presentence report paragraphs 18-25.

24 Mr. Carty argued in the earlier proceeding and
25 Mr. Stewart has referred to including all of this in the record

1 so I'm referring to it here, he argued that his co-conspirator,
2 who is sometimes referred to as his brother, Leoncio Wade,
3 conducted most of the narcotics transactions. This is
4 Mr. Stewart's contention. But as I said earlier and do
5 reiterate, the law is also clear that Mr. Carty, a
6 co-conspirator, is also liable for Mr. Leoncio Wade's narcotics
7 transactions through the conspiracy in which they were both
8 involved, and a conspirator is responsible for the foreseeable
9 acts of his co-conspirators in furtherance of the conspiracy.
10 And Mr. Carty, of course, is therefore held responsible for all
11 of the activity jointly undertaken in that criminal conspiracy.

12 In light of that concession, the concession which he
13 made in his allocution and repeated, that the heroin conspiracy
14 accomplished distribution of a hundred grams, he is properly
15 chargeable with that amount and that is all included in the
16 computation which led to the initial base offense level of 38.

17 The defendant also sought a downward departure for
18 substantial assistance to the government and as I stated
19 earlier and reiterate, that downward departure was denied for
20 the simple reason first that it is the law of the Second
21 Circuit that in order for a defendant to be entitled to such
22 departure under Guideline Section 5K1.1, a government motion is
23 required, and that no departure is in order based solely on the
24 defendant's argument that he assisted the government not
25 withstanding the fact that he breached the cooperation

1 agreement by fleeing as he did. In this case, the government
2 has made no motion and there is therefore no basis for the
3 Court to find that the defendant is entitled to the downward
4 departure under Section 5K11. and I denied it earlier and do
5 deny it today.

6 The defendant also sought a downward departure on the
7 grounds that his cooperation or assistance to the government
8 broke the log jam and resulted in the prosecution of other
9 defendants. As I stated earlier and I repeat today, I'm not
10 going to repeat all that I said on that subject earlier, the
11 record was abundantly clear that Mr. Carty's contentions were
12 without foundation and I found, after setting forth all the
13 circumstances in North Carolina and here of the various
14 defendants who pleaded and cooperated etc., that even if the
15 defendant established that his plea and assistance did not
16 break any log jam in North Carolina and no departure would have
17 been warranted, I, in any event, having reviewed the record,
18 declined in my discretion to depart on that basis.

19 Finally, we reach the issue which is now presented by
20 the Second Circuit's remand today, that is, Mr. Carty urges
21 that he is entitled to a downward departure for prison
22 conditions that occurred in the Dominican Republic while he was
23 awaiting his transfer on his arrest in these cases. Having
24 reviewed the entire record and having given consideration to
25 all that has been submitted, and I recognize fully my authority

1 to downwardly depart on this ground, that is, I agree with the
2 Second Circuit that the Sentencing Commission has not
3 categorically proscribed consideration of this factor and that
4 conditions of presentence confinement, in fact, as the Second
5 Circuit pointed out, may be so severe as to take a particular
6 case outside the heartland of the applicable guidelines under
7 Koon, I now have reviewed the entire record recognizing that I
8 do have such authority and having reviewed the record, which
9 includes the fact that the defendant was involved in a very
10 serious series of crimes over a period of years involving
11 substantial quantities of narcotics in North Carolina and in
12 New York with others, that the defendant, who was given the
13 opportunity to enter into an arrangement that would have given
14 him potentially a 5K1.1 letter, fled to the Dominican Republic,
15 he willfully acted in a way that supported a finding of
16 obstruction of justice, a finding which the Second Circuit has
17 already held to be correct, I find that in the totality of
18 these circumstances and recognizing the defendant has gone
19 through that hardship, but I also found earlier and I do find
20 today that he should be certainly given credit for the time he
21 served while he was incarcerated in the Dominican Republic,
22 that in my discretion, and recognizing my full authority, I
23 decline to grant him a downward departure on this basis. But I
24 do again give him credit for the time he served and will
25 indicate that to the Bureau of Prisons. I'm referring to the

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1 time that he served in the Dominican Republic prison.

2 The bottom line of all of this is that I decline in my
3 discretion to grant him a downward departure as a result of his
4 incarceration with adverse conditions which I do fully
5 recognize which took place in the Dominican Republic and
6 accordingly I do now sentence the defendant as I indicated
7 earlier and I repeat today to the middle of the guideline range
8 of 262 to 327 months, and I remand the defendant to the custody
9 of the Bureau of Prisons for a term of 290 months to be
10 followed by a term of five years of supervised release.
11 Supervised release is to be subject to the mandatory conditions
12 that the defendant not commit another federal, state or local
13 crime, that the defendant not illegally possess a controlled
14 substance, the defendant shall not possess a firearm or
15 destructive device, the defendant shall refrain from the
16 unlawful use of controlled substances, the defendant shall
17 submit to one drug test within 15 days of his placement on
18 supervised release and at least two unscheduled drug tests
19 thereafter as directed by the probation officer. He's also
20 subject to the standard conditions of supervision 1-13 with a
21 special condition that the defendant comply with any and all
22 directives of the INS regarding deportation proceedings, and
23 that the defendant participate in an educational and/or
24 vocational program.

25 The defendant is to report to the nearest Probation

1 Office within 72 hours of his release from custody. The
2 supervision of his supervised release will be conducted in the
3 district of his residence. I am not imposing a fine because I
4 do not find that he has the ability to pay a fine and as I
5 indicated earlier, the fine range is 25,000 to ten million
6 dollars and I do not find that he has the ability to pay even
7 the low end of that fine range, but I do impose the mandatory
8 special assessment of 150 dollars which is 50 dollars for each
9 count.

10 My sentence here is imposed for the reasons that I
11 indicated earlier and which I repeat. The sentence is in
12 recognition that crimes that the defendant has been involved
13 are very serious crimes. The sentence is designed to deter
14 this defendant and others and to protect the public. As I
15 indicated earlier, there were no outstanding counts. I again
16 advise the defendant that he has a right to appeal this
17 sentence or any part thereof and should he determine to do so,
18 Mr. Stewart, I ask you to tell the defendant if you're
19 available, if so, again to assist him in any such appeal, and
20 if you are not an available and he cannot afford counsel, I
21 will appoint counsel to represent him on any such appeal free
22 of charge.

23 That is the sentence of the Court. Anything further?

24 MR. STEWART: No, your Honor.

25 THE COURT: Mr. Esseks?

1 MR. ESSEKS: No, your Honor.

2 THE COURT: Thank you.

3 (Record closed)

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