U.S. Department of Justice

United States Attorney
Eastern District of New York

KAM:PKC:JHK

One Pierrepont Plaza
Brooklyn, New York 11201

Mailing Address: *147 Pierrepont Street*
Brooklyn, New York 11201

July 27, 2005

Via Facsimile and ECF
The Honorable Sterling Johnson, Jr.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Mohamed Al-Moayad, et al.
Criminal Docket No. 03-1322(SJ)

Dear Judge Johnson:

The government respectfully submits this letter in response to defendant Mohammed Al-Moayad's "eleventh-hour" request under Rule 32 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3553 to sentence him below the applicable Sentencing Guidelines range. As discussed below, because a sentence within the Guidelines is presumptively reasonable and because the Al-Moayad has failed to justify any departure from the Guidelines, his request should be denied.

I. A Guidelines Sentence Is Presumptively Reasonable

Before January 12, 2005, and in the absence of factors that would have justified a departure, a district court was bound to sentence a defendant within the range calculated under the Guidelines. On that date, however, the Supreme Court held, in United States v. Booker, 125 S. Ct 738 (2005), that certain applications of the United States Sentencing Guidelines violated the Sixth Amendment principles articulated in Blakely v. Washington, 124 S. Ct. 2531 (2004) (holding that a mandatory state sentencing scheme under which a sentence is increased based on factual findings by a judge violates the right to trial by jury). As a remedy, the Court invalidated the statutory provision that made the federal Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus making the Guidelines "effectively advisory." Booker, 125 S. Ct. at 746. Although the Guidelines are no

longer mandatory, a district court must still "consult [the] Guidelines and take them into account when sentencing." Id. at 767 (citing 18 U.S.C. §§ 3553(a)(4) & (5)). To comply with Booker, a sentencing court should first determine the applicable Guidelines sentence in the same manner as before Booker, including any departures that would be permissible under the Guidelines, and, then, after considering the Guidelines and all other factors in Section 3553(a), decide whether to apply the Guidelines sentence, or apply a non-Guidelines sentence. Id. at 111, 113. The final sentence will be subject to review by the Court of Appeals for "reasonableness." Booker, 125 S. Ct. at 765-766.

Absent highly unusual circumstances, the sentence in a criminal case should fall within the Guidelines range as determined by the Court, or be justified as a Guidelines-sanctioned departure from that range. In effect, the Guidelines should become the primary benchmark for reasonableness post-Booker. Unless sentencing courts adhere to such a benchmark, federal sentencing practices are in danger of reverting to the largely unfettered system that, before enactment of the federal Sentencing Reform Act ("SRA") in 1984, had led to widespread disparity and uncertainty in punishment among defendants with similar criminal histories who were convicted of similar crimes. See Crosby, 397 F.3d at 113-114 ("[I]t would be a mistake to think that, after Booker[], district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum.").

Congress passed the SRA in an effort to reduce such disparities. See Mistretta v. United States, 488 U.S. 361, 363-364 (1989). The SRA created the United States Sentencing Commission and authorized it to develop a system of mandatory sentencing guidelines which would minimize unwarranted sentencing disparities by establishing, consistent with statutory limits and legislative directives, the appropriate kind and severity of sentences for federal crimes. See Booker, 125 S. Ct at 761 (majority opinion of Breyer, J.) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

Fidelity to the Guidelines best accomplishes the goal of uniformity, as well as the other general sentencing goals set forth by Congress in 18 U.S.C. § 3553(a), and, therefore the Guidelines are entitled to substantial deference. See United States v. Wilson, 350 F. Supp. 2d 910, 914 (D. Utah 2005) ("Wilson I"); accord United States v. Peach, 2005 WL 352636, *4

(D. N.D. 2005) ("district courts should give the Sentencing Guidelines 'substantial weight'"); United States v. Wanning, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005) ("[T]he Guidelines must be given substantial weight even though they are now advisory [because] [t]o do otherwise is to thumb our judicial noses at Congress"). As the court reasoned in Wilson I, the Guidelines deserve deference because they are the product of an expert commission that studied the sentencing process at great length in order to fashion recommended sentences that carry out Congress's specific sentencing directives, and meet the general purposes of sentencing described by Congress in the SRA. The resulting Guidelines, Wilson I held, plainly reflect the public's will as expressed by democratically elected representatives, because Congress has repeatedly approved of the Guidelines or, in certain instances, specifically adjusted them to comply with Congressional policy decisions. The Wilson I court further observed that guided sentencing appears to have had a positive impact in deterring criminal conduct throughout the country, and thus serves the purpose of deterrence as well as punishment and fairness. For all of those reasons, the court in Wilson I determined that he will "give heavy weight to the Guidelines in determining an appropriate sentence," and "only depart from those Guidelines in unusual cases for clearly identified and persuasive reasons." Id. at 925.

Accordingly, a sentence within the Guidelines range is presumptively reasonable, and accommodates the Congressional purpose, affirmed by the Supreme Court, of obtaining fair sentences which are uniform to the extent possible. See Mares, 2005 WL 503715, at *6 ("it will be rare for a reviewing court to say that [a Guidelines sentence] is unreasonable").

II. Al-Moayad's Erroneous Assertions

Al-Moayad asserts that the Court should depart from the Guidelines on the basis of Al-Moayad's "character and history" and "the circumstances surrounding his arrest and confinement." (Def. Mot. at 1-2). In support of his request, Al-Moayad makes several factual assertions that mischaracterize his background, philanthropic activities, state of mind and beliefs, and are demonstrably false.[1]

[1] Al-Moayad also makes numerous other assertions regarding his background and activities in Yemen for which the defense offers no evidence and which the government is not in a position to challenge due to the nature and timing of these claims. See, e.g., Def. Mot. at ¶¶ 1-8, 10.

A. Al-Moayad's Involvement with "Charities" and "Education"

The defense contends that Al-Moayad was known in Yemen as "a community leader, a creator of social, educational, religious and charitable institutions." (Def. Mot. at 2.) Counsel fails to mention, however, that many of these so-called "charitable institutions" are actually well-documented terrorist front organizations that finance Al Qaeda and Hamas terrorist operations. For example, Al-Moayad was the President of the Yemeni branch of the Al Aqsa Foundation. As terrorist expert Matthew Levitt testified –- and as the defendants themselves bragged about in the Germany meetings -- Al Aqsa is one of the largest Hamas front organizations. Al-Moayad also acknowledged his involvement with several other "charities," including Interpal, which also finances Hamas. Al-Moayad's phonebook contained materials relating to the Al Haramain organization which, as Dr. Levitt testified, is one of the primary Al Qaeda front organizations that raises money for terrorist activities under the guise of "charity." Al Aqsa Foundation, Interpal and Al Haramain are all designated terrorist organizations by the United States government.

With respect to Al-Moayad's charitable bakery, the evidence at trial suggested that this bakery was used largely as a mechanism to coerce poor and hungry Yemenis to join the Islah party. According to defense witness, Mohammed Al Ansi, in order to receive bread, individuals were required to register as Islah party members. Non-members were turned away.

Finally, the fundamentalist schools run by Al-Moayad and other leaders of the Islah party, such as Abd al Majid al Zindani, served principally as tools to radicalize young Muslims. After September 11th, the Yemeni government shut down hundreds of these schools. The government viewed Zindani's Al Iman University –- which was going to serve as the model for Al-Moayad and Zayed's school that they discussed creating with the money raised in Germany –- as a "nest for terrorism" that exports and propagates terrorism. (Trial Tr. 1913.)

B. Al-Moayad's Advocacy of Peace

Counsel also argues that Al-Moayad "has constantly advocated peace and non-violence in his community in Yemen," citing the testimony of Al Moayad's and Zayed's two character

witnesses at trial.[2] (Def. Mot. at 2.) The evidence adduced at trial, however, shows that Al-Moayad was far from the advocate for peace and non-violence that defense counsel now tries to portray him as:

> - In Al-Moayad's prayer shortly before his arrest in Germany, he asked Allah to "defeat the Jews the tyrants. Defeat the Infidel Americans; dear God strike them with earthquakes, put them in their coffins, abandon them and defeat them." (Govt. Ex. T-6 at 32.)
>
> – At the "group wedding" sponsored by Al-Moayad in Yemen in September 2002, Hamas leader Mohammed Siyam bragged about a Hamas suicide operation that had occurred that day in Israel. The crowd enthusiastically shouted "God is Great" in response. In Germany, Al-Moayad clapped and laughed as the defendants and informants discussed Siyam's announcement of the suicide bombing. (Govt. Ex. T-5 at 53.
>
> – Al-Moayad admitted that he supported Bin Laden's violent jihad in Afghanistan in the 1980s and continued to support Bin Laden and Al Qaeda at least until well into the 1990s. As defense counsel Bernard Haykel testified, the radical jihadists in Afghanistan, Chechnya and elsewhere were vicious in their tactics, routinely beheading their captives.
>
> – Al-Moayad was supportive of and involved in violent jihads in Chechnya and Bosnia in the 1990s. Two mujahideen arrested in Croatia who had fought in Bosnia had links to Al-Moayad and Zindani, who is a Specially Designated Terrorist.
>
> – Al-Moayad sponsored a recruit at an Al Qaeda training camp in Afghanistan in 1999.

---

[2] Furthermore, as demonstrated at trial, Al-Moayad's "character" witnesses were neither credible nor knowledgeable about Al-Moayad's activities. Indeed, neither witness had known Al-Moayad for more than a couple of years and were, in fact, closer in age and acquaintance to Zayed than Al-Moayad. One of the witnesses, when shown the videotape of Al-Moayad and Zayed laughing about the Tel Aviv suicide bombing, insisted that the videotape was a "fake."

- Al-Moayad pledged to use the informant's money to support Al Qaeda, Hamas or anyone else in the field of jihad, which was plainly understood during the Germany meetings to refer to violent jihad.

– Al-Moayad's political party in Yemen, Al Islah, has been a chief advocate and supporter of Hamas and jihad against Israel, and has been connected to virtually every terrorist event in Yemen in the last 15 years, including the bombing in Aden in 1990 which targeted U.S. military personnel stationed there, the USS Cole bombing in 2000, and the murders of American missionaries in Jibblah and a senior political figure in Yemen in December 2002.[3]

C. Al-Moayad's "State of Mind" Regarding Hamas

The defense asserts that Hamas is legal in Yemen and that its activities are not limited to sending human bombs into crowded buses, discos and cafes, but that it also "engage[s] in extensive charitable work." (Def. Mot. at 8.) From this, the defense argues that because Al-Moayad's "state of mind [regarding Hamas] is the same as the vast majority of people in his country," he should be sentenced more leniently. Id. However, this argument ignores the fact that Al-Moayad was also convicted of conspiring and attempting to provide material support to Al Qaeda. Furthermore, whether Hamas is legal in Yemen or whether Al-Moayad's state of mind regarding Hamas tracks the mindset of other Yemenis is irrelevant.

First, Al-Moayad has been convicted of violating American law, which prohibits the provision of material support to Hamas, a designated terrorist organization. Had Al-Moayad confined his activities to Yemen, his argument might have merit. However, having chosen to solicit and obtain funds from the United States, Al-Moayad forfeited any right to claim that his

[3] Al-Moayad additionally claims that "[h]is children speak of how he disciplined them with love and how he always advised them against aggression." (Def. Mot. at 5.) However, it should be noted that in response to Al-Moayad's arrest in Germany, one of his four sons told a Yemeni newspaper that German and American interests would be in danger if Al-Moayad were delivered to the Americans, suggesting that individuals in Yemen would be upset by this event.

actions should be considered legal or otherwise legitimate because they might constitute acceptable conduct in Yemen.

Such an approach would undermine the purposes of Section 2339B and the anti-terrorism statutes. For example, according to defense expert Dr. Haykel, Al Qaeda and Bin Laden also have "massive appeal" in Yemen (Trial Tr. at 1884), and after September 11, 2001, Muslims in Yemen and elsewhere were enthusiastic supporters of Bin Laden "as a leader and symbol of Muslim resistence to the west" (Trial Tr. at 1881). Clearly, the fact that a majority of people in Yemen supported Bin Laden after 9/11 does not warrant a lesser sentence for someone who raised money for Al Qaeda from American citizens. For the same reason, Yemeni law and public opinion regarding Hamas are also irrelevant.

Second, evidence at trial demonstrated that Al-Moayad's support of Hamas went well beyond its charitable activities. In Germany, Al-Moayad said that supporting mujahideen "who need weapons, who need equipment for communications and such, and need training in any country" are "my fields." (Govt. Ex. T-4 at 39.) Also, in response to the question of whether he was aware of any specific planned operations by Hamas, Al-Moayad bragged that "each time Hamas is active and doing something, [ ] I am in constant communication with them," interlocking his fingers for emphasis. (Govt. Ex. T-4 at 41.) Needless to say, the "something" Al-Moayad was referring to was not charity; it was terrorist operations.

Finally, with respect to Al-Moayad's state of mind, it is clear based on his words and actions that he knew that what he was doing was illegal. The videotapes in Germany are replete with examples of Al-Moayad and Zayed expressing concern over eavesdropping and getting caught in the act of raising money for Hamas and Al Qaeda. For example:

> – Soon after arriving to their hotel room on the first day in Germany, Al-Moayad makes a gesture of wires coming down from his ears, signifying to the informant, that they need to be cognizant of eavesdropping. In that same conversation, Al-Moayad refers to the American donor by a code name, "Haj Hussein." (Govt. Ex. T-1 at 5-6.)
>
> – As Al-Moayad was in the process of explaining the receipts from Interpal and the "charitable" organizations that served as front organizations for Hamas, a hotel employee unexpectedly entered the room.

> Al-Moayad quickly turned the papers over to conceal their contents, and told the informants after the employee left the room that in the future, whenever someone came to the room, they should immediately change the subject to the Koran. (Govt. Ex. T-5 at 20-21.)
>
> - When discussing with the informants the possibility of training mujahideen in Yemen with weapons, communications equipment and other items, Al-Moayad explained that this was his "field," but cautioned that because of "the situation with us . . . the arrests and so and so, we must tread carefully," and suggested that the training take place in Palestine rather than Yemen. (Govt. Ex. T-4 at 40.) This was a reference to the post-9/11 crackdown by the Yemeni government on those in Yemen who were educating, training and harboring jihadists.
>
> – Al-Moayad spoke in coded language, and repeatedly reminded the informants to do the same. For example, at the beginning of the meeting on January 9th, the morning after they had agreed on codes to be used, the informant told Al-Moayad that they wanted to further discuss the topic of "training the mujahideen." Al-Moayad cut him off and said, "Change the name. . . We wrote it down yesterday, if you remember, what you wrote down yesterday in Arabic." Even before arriving in Germany, Al-Moayad told the informant to use coded language –- ie., "medical equipment" and "medical treatment" –- to refer to the jihadist cause when speaking on the telephone. (Govt. Ex. T-5 at 5.)

Al-Moayad's words and actions are the clearest indication of his state of mind. These words and actions demonstrate that Al-Moayad knew that he was engaging in criminal activity. This is why he found it necessary to guard against eavesdropping, to speak in codes, and to train mujahideen in Palestine instead of Yemen. Someone who believes that he is engaging in innocent, legal conduct has no reason to worry about getting caught.

D. Al-Moayad's Health

Al-Moayad claims that he suffers from serious chronic ailments and that "prolonged confinement has taken a heavy toll on his health." (Def. Ltr. at ¶ 12.) However, Al-Moayad's medical conditions, namely, asthma and diabetes, are not severe

and, as established at trial, have been well-managed in prison. Al-Moayad's medical conditions, therefore, are not extraordinary and do not warrant any departure from the Sentencing Guidelines in this case.

The Sentencing Guidelines provide that ordinarily neither age nor physical condition is relevant in determining a court should sentence a defendant outside the applicable guideline range. U.S.S.G. §§ 5H1.1 (age), 5H1.4 (physical condition). While recognizing that some circumstances relating to advanced age or physical infirmity may warrant a departure, the Guidelines indicate that such circumstances must be "extraordinary." U.S.S.G. § 5H1.4. Applying this standard, the Second Circuit has consistently held that departures on the bases of age and physical condition are only justified in extraordinary cases. See United States v. Lara, 905 F.2d 599, 603 (2d Cir. 1990) (departure based on age and physical condition justified only where "extraordinary" situation); United States v. Altman, 48 F.3d 96, 104 (2d Cir. 1995) (physical ailments are extraordinary only when they render a defendant seriously infirm). A defendant with a physical condition that simply needs to be monitored does not have an extraordinary physical condition warranting a downward departure. Altman, 48 F.3d at 104.

Al-Moayad's diabetes and asthma do not render him "seriously infirm" so as to warrant a departure from the applicable guidelines range. Nor is there any evidence that Al-Moayad's incarceration has resulted in any deterioration in his condition. At trial, the government presented the testimony of a diabetes specialist, Dr. Joshua Tannenbaum. Based on a review of Al-Moayad's prison health records from November 2003 to December 2004, Dr. Tannenbaum concluded, among other things, that: 1) Al-Moayad's diabetic condition was "rather mild" (Trial Tr. at 1001-02, 1004); 2) his diabetes was "extremely well controlled" in prison (id.); 3) Al-Moayad's asthma medications were "pretty standard," and he was hospitalized only twice over an entire year for his asthma (Trial Tr. at 1020, 1016); and 4) "laboratory-wise [Al-Moayad] appears to be in great shape." (Trial Tr. at 1028.) Thus, there simply is no evidence that Al-Moayad's health or medical conditions constitute an extraordinary circumstance warranting a departure from the Guidelines.

Conclusion

For all of the foregoing reasons, Al-Moayad's request that the Court depart from the applicable Sentencing Guidelines range should be denied.

Respectfully submitted,

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York

By: _____
Pamela Chen
Jeffrey Knox
Assistant United States Attorney

cc: Clerk of Court (SJ)
William Goodman, Esq.
Jonathan Marks, Esq.