

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
:
UNITED STATES OF AMERICA
:
- v. -
:
ADEL ABDEL BARY,
:
Defendant.
:
----- X

S15 98 Cr. 1023 (LAK)

GOVERNMENT’S SENTENCING MEMORANDUM

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PRELIMINARY STATEMENT

On September 19, 2014, Adel Abdel Bary (the “defendant” or “Bary”) pled guilty to Superseding Information S15 98 Cr. 1023 (LAK) (the “Information”), which charged him with two counts of transmitting a threat to kill, injure, and intimidate an individual and to destroy a building and property by means of explosives, in violation of Title 18, United States Code, Sections 844(e) and (n), as well as with one count of conspiring to murder United States nationals, in violation of Title 18, United States Code, Section 371. As part of his plea agreement, the defendant agreed that (i) the United States Sentencing Guidelines (the “Guidelines” or “U.S.S.G.”) recommend that he be sentenced to 25 years’ imprisonment, and (ii) he neither would seek a sentence outside of this stipulated Guidelines range nor suggest that the Court *sua sponte* consider a sentence outside of the stipulated Guidelines range.¹ As a result, the parties appear before the Court for sentencing in agreement that the appropriate sentence for Bary – after consideration of both the Guidelines and the sentencing factors enumerated in Title 18, United States Code, Section 3553(a) (“Section 3553(a)”) – is 25 years’ imprisonment.

Bary stands before this Court convicted for his role in support of the terrorist organizations, Egyptian Islamic Jihad (“EIJ”) and al Qaeda, both of which directed Muslims throughout the world to kill Americans wherever they may be found. Specifically, Bary was a trusted member of EIJ for at least four years before and, until his arrest, after the bombings of August 7, 1998. He was committed to the murderous goals of that organization and fulfilled a critical role for it. From his position in London, he served as an intermediary to the Western media and facilitated communications between EIJ and al Qaeda leadership in Afghanistan and their Western-based supporters. And he continued to help spread the terrorizing message of EIJ

¹ A copy of Bary’s plea agreement is annexed hereto as Exhibit A.

and al Qaeda even after the bombings, including disseminating the claims of responsibility that contained threats of future attacks against United States civilians, military personnel, and property.

The Guidelines call for a sentence of 25 years' imprisonment, and the United States Probation Office (the "Probation Office") has recommended a 25-year sentence.² That is the sentence that justice requires, and that is the sentence that should be imposed.

FACTUAL BACKGROUND³

Bary participated in – and has pled guilty to – conspiring to kill United States nationals, and conveying messages to and from the media on behalf of Usama Bin Laden and Ayman al Zawahiri, the leader of EIJ at the time, and the current leader of al Qaeda. As set forth in more detail below, Bary was a long-time, loyal member of EIJ, which was a terrorist organization dedicated to the forceful overthrow of the Egyptian government and to violent opposition of the United States, in part, for its support of the government of Egypt. *See, e.g.*, PSR ¶ 26. By February 1998, EIJ effectively had merged with al Qaeda and publicly and unambiguously joined with al Qaeda in targeting United States civilians and military personnel for terrorist attacks. *Id.* Bary's principal role in EIJ and for al Qaeda was to communicate with the media on behalf of the organizations' leaders, and to facilitate communications between and among his co-conspirators. *Id.* In that role, which Bary fulfilled for at least four years while residing in London, Bary assisted in the dissemination of the claims of responsibility for the bombings,

² The Probation Office's Presentence Investigation Report, dated December 22, 2014, is referred to herein as the "Presentence Report" or "PSR."

³ This factual background is intended to supplement the more-detailed discussion of Bary's offense conduct contained in Amended Criminal Complaint 99 Mag. 1212, a copy of which is annexed hereto as Exhibit B, as well as the description set forth in the Presentence Report.

which included threats of future attacks, and arranged interviews for Zawahiri and Bin Laden, among others, both before and after the 1998 bombings. *See* PSR ¶¶ 44-46.

I. Bary Was an Established Member of EIJ and an Associate of Al Qaeda

A. Physical Evidence Recovered During Operation Challenge

Evidence recovered from Bary's residence, and an office that he shared with co-conspirator Khalid al Fawwaz located at 1A Beethoven Street in London, establishes that Bary had been a member of EIJ for years before the August 1998 bombings, and in that capacity interacted directly with EIJ leadership, including Ayman al Zawahiri (then leader of EIJ) and Ibrahim Eidarous (the head of EIJ's London cell). This evidence includes documents recovered from Bary's residence, which consist of correspondence between and among EIJ members located in London and abroad, as well as several audio cassette tapes that contained recorded speeches of Zawahiri. *See, e.g.*, Exhibit C (March 10, 1997 letter from Muntaser Al-Zayyat in which he pledges "to confirm my affiliation with the Islamic Jihad movement in Egypt under the leadership of Dr. Ayman Al-Zawahiri. I join as a soldier and a servant.");⁴ Exhibit D (undated letter from the "Islamic Youth Movement" and addressed to "brother Ayman al Zawahiri and the other brothers involved with the publishing of 'Al Mujahidoun magazine'"); Exhibit E (January 25, 1995 "Administrative Decision" issued by Zawahiri expelling another member of EIJ); Exhibit F (TNT express receipt for a package that was sent from "Tarik" in Tirana, Albania, to "Mr. Adel").⁵

⁴ It bears noting that the author of this letter, Muntaser Al-Zayyat, who stated that it "has always honored me to belong to the Jihad movement as one of its soldiers and one of its servants," is the same individual who submitted a character letter on behalf of the defendant in connection with this sentencing proceeding. *See* Def. Exh. H.

⁵ Tarik is believed to be one of the EIJ members in Albania whose June 1998 arrest and extradition to Egypt resulted in Zawahiri's issuance of the August 6, 1998 EIJ threat to the United States. *See infra* Point II.

In addition to the foregoing, the search of Bary's residence recovered several copies of a publication entitled "Al Mujahidoun," which describes itself as a "Publication of the Jihad Group in Egypt." *See, e.g.*, Exhibit G (Al Mujahidoun pamphlet entitled "The Forbidden Word").⁶ The Al Mujahidoun publication makes clear EIJ's violent and anti-American mission. For example, in a June 6, 1996 interview with Zawahiri memorialized in Exhibit G, Zawahiri declared that one of EIJ's primary goals is "uprooting the regime in Egypt and those supporting the enemies of Islam in America and Israel." Exhibit G at 1. Zawahiri proceeded to encourage his followers to violence, described favorably a thwarted terrorist attack against "Jewish terrorists and against Israeli Ambassador's guard," and noted that Israel "belongs to the fully corrupt and tyrannical America." *Id.* at 14.

Evidence recovered from other London locations in September 1998 further establishes both Bary's role in EIJ and his affiliation with EIJ and its leader, Ayman al Zawahiri. For example, the search of Bary's shared offices at 1A Beethoven revealed that in May 1994, Zawahiri granted Bary the power of attorney to resolve certain business matters for him in London. *See* Exhibit H (Power of Attorney). Then, in 1996, Zawahiri temporarily appointed Bary as the leader of the London cell until he was replaced upon Eidarous's arrival in 1997. *See* Exhibit I (Letter from Zawahiri instructing Bary to "take charge of work in your country," *i.e.*, the United Kingdom).

Similarly, correspondence from Eidarous to EIJ senior leadership (including Zawahiri) discussed a dispute between Bary and another London-based member of EIJ. *See, e.g.*, Exhibit J (October 29, 1997 letter from Eidarous to Zawahiri); Exhibit K (June 28, 1998 fax from

⁶ In addition, electronic versions of different issues of the Al Mujahidoun – which appeared to be incomplete drafts – were recovered on electronic media recovered from Bary's office at 1A Beethoven.

Zawahiri to Ezzat directing Bary to prepare a clear letter to assure EIJ leadership of his commitment to EIJ and its goals). Another document recovered from Eidarous's car, dated in July 1998, purports to be a handwritten document from Bary addressed to Zawahiri in which Bary reaffirms his "commitment to the general objective of my brothers, my commitment to follow all orders that are issued by the Administration," and a further assurance that Bary "will not talk to the press or publish anything without first obtaining Zawahiri's permission." *See* Exhibit J (July 1998 handwritten letter).

These documents, however, also show that, at times, Bary had fallen from the good graces of EIJ leadership and was not viewed favorably by other EIJ members located outside of London. For example, there is substantial correspondence concerning a rift in EIJ leadership worldwide, with its various members siding with or against Bary. In addition, the documents suggest that not everyone in EIJ trusted Bary or thought that he should continue to be a part of EIJ. In each instance, though, the dispute was resolved in Bary's favor, and Bary was permitted to remain an active member of EIJ provided that he reaffirmed his commitment to EIJ and its goals.

Similarly, there is some evidence that, prior to the August 1998 bombings, Bary questioned his association with EIJ and its ties to al Qaeda. *See* Def. Exh. A. In an undated, unaddressed letter, Bary appeared to express some concern with a recent public statement made by Zawahiri. It is unclear to whom this letter was addressed or whether Bary actually sent or showed it to anyone. The contents of the letter, however, suggest that Bary did not (at the time he drafted it) support EIJ's anti-American ideology or its association/alliance with Usama Bin Laden (referred to as "the Contractor" in the letter). Bary threatened to break ties with EIJ if they continued to associate with al Qaeda, and expressed his concern that, if they continued to do

so, they would be considered terrorists. Based on the substance of that letter, it appears to have been written some time after the arrests of EIJ members in Albania (an event that is specifically referenced in the body of the letter) but prior to the bombings.

Despite this moment of doubt, Bary nevertheless appears to have decided to continue to support EIJ and al Qaeda, which brings into some question the sincerity of the views expressed in the aforementioned document. Specifically, even after the tragic events of August 7, 1998, and EIJ's clear alliance with al Qaeda, Bary continued to associate with his co-conspirators in London. Among other things, physical surveillance observed Bary continue to meet and interact with Fawwaz and Eidarous. And, most tellingly, Bary admitted to sending the claims of responsibility (and the threats of future violence they contained) after the August 7 bombing (and therefore after the undated letter) in furtherance of the very conspiracy that he questioned in that letter.

Lastly, correspondence recovered from 1A Beethoven and other locations shows that Bary continued to act as a conduit for communications between the media and his co-conspirators, including Zawahiri and Bin Laden, even after the bombings had occurred.⁷ Several of the documents recovered during the September 1998 searches in London show that Bary served as a public relations facilitator, conveying messages to and from the media on behalf of, among others, Usama Bin Laden and Ayman Zawahiri. *See, e.g.*, Exhibit M (March 1997 letter from al Jazeera to Bary); Exhibit N (undated letter from al Jazeera confirming details of a trip to interview Zawahiri); Exhibit O (August 1998 letter regarding questions for Zawahiri). For example, numerous letters from major news agencies (*e.g.*, ABC News and the Associated Press)

⁷ Following his arrest in September 1998, Bary falsely disclaimed any knowledge of association with members of EIJ, which in and of itself indicates that Bary recognized that his affiliation with this terrorist organization was criminal.

were recovered from 1A Beethoven. *See, e.g.*, Exhibit P (August 13, 1998 letter from AP to Bary); Exhibit Q (August 23, 1998 letter from CBS to Bary). The substance of those letters indicated that Bary – even after the August 7 bombings – actively was working to facilitate communications with Zawahiri and Bin Laden. *Id.* For example, in a September 1998 letter, Eidarus informed Zawahiri that Bary was prepared to accompany some reporters to Afghanistan to meet with Zawahiri and Bin Laden. *See* Exhibit R (September 12, 1998 letter).

B. Physical Surveillance of Bary and His Co-Conspirators

Physical surveillance conducted of Bary and his co-conspirators confirms Bary's close ties with Eidarus and his association with EIJ. Among other things, Bary was repeatedly observed meeting with Eidarus. During some of these meetings, law enforcement observed Bary and Eidarus use multiple forms of public transportation (*i.e.*, to avoid being followed) to travel to various public telephone kiosks. While Eidarus would enter the kiosk and make telephone calls, Bary engaged in counter-surveillance measures to ensure that they were not followed or surveilled.

Toll records show that several of the calls made on these trips were to the UBL satellite phone in Afghanistan, which was used by senior al Qaeda and EIJ leadership to communicate from Afghanistan with al Qaeda and EIJ members throughout the world. In each instance, Eidarus was the individual who made the telephone calls while Bary remained outside of the kiosk. Telephone cards recovered in September 1998 from garbage bins outside of 1A Beethoven also show that the phone cards were used repeatedly to contact the UBL satellite phone from public telephones in the months leading up to the bombings.

C. Toll Records and Other Evidence of Phone Connectivity

Toll records also provide strong circumstantial proof of Bary's involvement in the conspiracy to kill Americans. For example, during the period from February 1998 to September 1998, toll records reflected more than 200 outgoing calls and more than 120 incoming calls from Bary's cellular telephone to telephone numbers used by Eidarous. *See* Exhibit S (Summary phone chart). These same toll records also demonstrated substantial connectivity with telephone numbers associated with Khalid al Fawwaz during this same time period.⁸

Other evidence demonstrated Bary's connections to his various co-conspirators throughout the relevant period. For example, Bary's telephone number was found in address books recovered from the residences of Eidarous and Fawwaz, as well as from address books of other members of EIJ. Similarly, the personal organizer of al Qaeda's then second-in-command, Abu Ubaidah al Banshiri (himself a very senior member of EIJ) was recovered following Abu Ubaidah's death in 1996. That personal organizer contained Bary's home telephone number in London.

II. The Murders of U.S. Nationals, If Not the Bombings Themselves, Were Foreseeable to Bary

Bary was in London on August 7, 1998, when the embassies were bombed. While there is no evidence, to the Government's knowledge, that Bary assisted in the bombings themselves, or counseled, commanded, induced or procured the bombings, there is ample evidence to support a finding that he reasonably could have foreseen that death would result from the conspiracies in which he was an active participant.

⁸ Toll records show that telephone numbers associated with Bary (including those for the office at 1A Beethoven) had limited contact with telephone numbers used by co-defendant Anas al Liby as well.

As described above, evidence recovered from Bary's residence, and an office he shared with his co-conspirator Khalid al Fawwaz located at 1A Beethoven Street in London, establishes that Bary was a long-time member of EIJ who interacted directly with EIJ leadership, including Ibrahim Eidarous (then head of EIJ's London cell) and Ayman al Zawahiri (then leader of EIJ). *See, e.g.*, Exhibit H (May 1994 correspondence granting Bary power of attorney for Zawahiri); Exhibit I (1996 appointment of Bary as head of EIJ's London cell); Exhibit L (July 1998 reaffirmation of Bary's commitment to EIJ's goals and Zawahiri). Given EIJ's increasingly violent anti-American rhetoric, therefore, Bary's affiliation with EIJ alone put Bary on notice that one of the objectives of this conspiracy was to murder U.S. nationals.

A. Possession and Knowledge of the 1996 Declaration of Jihad and 1998 Fatwa

The evidence also establishes that copies of Bin Laden's August 1996 declaration of jihad and the jointly issued February 1998 fatwa – whose signatories included Bin Laden and Zawahiri, among others – directing Muslims to kill Americans, “civilian and military alike,” “wherever they may be found” were recovered both from Bary's residence and from 1A Beethoven.⁹ This is significant because both of the February 1998 fatwas recovered from these locations – one of which bore Bary's fingerprint – were dated February 12, 1998, which was eleven days before the EIJ and al Qaeda publicly announced this fatwa in a London-based newspaper. *Compare* Exhibit T (February 12, 1998 fatwa recovered from Bary's residence) *with* Exhibit U (February 1998 fatwa published on February 23, 1998 in *al Quds al Arabi* newspaper).

Other evidence supports Bary's knowledge of the February 1998 fatwa prior to its publication in the newspaper. Specifically, toll records of the relevant London-based telephone numbers (*i.e.*, those of Fawwaz, Eidarous, and Bary) demonstrate that on February 22 and 23,

⁹ In addition, one of the multiple versions of the August 1996 declaration of jihad recovered from the residence of Bary's co-conspirator, Khalid al Fawwaz, bore Bary's fingerprints.

1998, there was extensive phone connectivity between and among Fawwaz and the UBL satellite telephone on the one hand, and Fawwaz, Eidarous, and Bary on the other hand. *See* Exhibit V (Summary phone chart).¹⁰ As noted above, the first public dissemination of the fatwa occurred on February 23, 1998, when it was published in a London-based, Arabic-language newspaper.

The timing of the calls to and from Bary's telephone, when viewed in conjunction with the telephone calls between Fawwaz, the UBL satellite phone, and the newspaper, are strong circumstantial evidence that Bary knew of the fatwa's publication before it ultimately was published.

Even assuming Bary did not have foreknowledge of the contents of the February 1998 fatwa, Bary certainly was aware of EIJ's objective to kill Americans prior to the bombings themselves. For example, in July 1998, Bary reaffirmed his commitment to EIJ's "general objective" and committed to follow all orders that were issued by EIJ leadership. *See* Exhibit L (July 1998 letter from Bary to Zawahiri). This letter was dated more than four months after the February 23 publication of the 1998 fatwa. As such, in reaffirming his commitment to EIJ, Bary unambiguously committed himself to EIJ's stated goal of killing Americans, civilian and military alike, wherever they may be found.

B. The August 4, 1998 EIJ Threat to America

In addition to copies of the August 1996 Declaration of Jihad and the February 1998 fatwa, U.K. law enforcement recovered from Bary's office another document that clearly set forth EIJ's intentions to strike at American interests. Specifically, on August 6, 1998, one day before the August 7, 1998 bombings of the embassies, the London-based newspaper *al Quds al*

¹⁰ During his post-arrest interview with British law enforcement, Bary admitted that the telephone number ascribed to "Bayoumi" on Exhibit V actually was Bary's cellular telephone. This statement is corroborated by, among other things, entries contained in Eidarous and Fawwaz's phone books.

Arabi published a statement issued by Zawahiri on behalf of EIJ. In that statement, Zawahiri threatened to retaliate against the United States in a “language they will understand” in response to the arrests of several EIJ members in Albania. A document containing the substance of the published August 6 threat, but which was dated August 4, 1998 and bore a fax header indicating that it was received on August 4, was recovered from Bary’s office and bore his fingerprint. *See* Exhibit W (August 4 EIJ threat).

C. The Claims of Responsibility Were Recovered from Bary’s Office

Lastly, a set of documents found by the British police in late September 1998 at 1A Beethoven, which bore Bary’s and Eidarous’s fingerprints, supports the inference that Bary knew of EIJ’s plans to kill Americans. Specifically, British police found copies of claims of responsibility for the bombings issued by the “Islamic Army for the Liberation of the Holy Places,” which claims were sent from London to several media outlets on August 8, 1998, the day after the bombings. These documents identify accurately the home countries of the individuals who carried out the bombings, indicating that the author of these claims was a trusted member of the bombing conspiracy. These documents also bear fax headers stating that they were faxed between 4:53 a.m. and 4:56 a.m. on August 7, 1998. Other evidence indicates that they were faxed to London from Baku, Azerbaijan. Thus, if these claims of responsibility were faxed at the times indicated on them, they were sent hours before the bombings themselves, which occurred at about 10:30 a.m. on August 7th. The claims themselves, however, were not publicly distributed until approximately noon on the following day, August 8, 1998.¹¹

¹¹ As noted in the Government’s September 29, 2014 letter to the Court, the header information on the claims of responsibility would have been applied by the originating fax machine (*i.e.*, the fax machine that transmitted the claims to London). The Government does not have that originating fax machine. The Government also has not, to date, identified other evidence that corroborates the times of transmission listed on the faxed claims, such as toll records. Nor does

D. Bary's Plea Allocution Makes Clear That Bary Was an Active and Knowing Participant in a Conspiracy to Murder United States Nationals

Of course, Bary's plea allocution eliminates any doubt as to his participation in al Qaeda and EIJ's conspiracy to kill Americans, both military and civilians, during the months leading up to the bombings themselves. In the course of his plea allocution, Bary explicitly admitted his guilt as to each count set forth in the Information. *See* Exhibit X (09/19/2014 Plea Tr.) at 26-30. Among other things, Bary admitted that he "agreed with one or others, including al Zawahiri and Eidarous, . . . to kill American citizens anywhere in the world, either civilian or military," and that he joined the conspiracies charged in the information "knowingly and with the intention, knowing . . . of this conspiracy's objective to kill American citizens." *Id.* at 31. Thereafter, Bary admitted that in furtherance of al Qaeda and EIJ's conspiracy to kill Americans, "one or more of [his] coconspirators associated with al Qaeda bomb[ed] the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, thereby killing 224 people." *Id.* at 29.

DISCUSSION

As the Court is aware, the sentencing process involves three steps: (i) material factual disputes must be resolved; (ii) the Sentencing Guidelines range must be calculated; and (iii) in light of the facts, the Guidelines, and Section 3553(a) factors, an appropriate sentence must be imposed. As to the facts, the defendant admitted, under oath, all of the relevant facts that bear upon his sentence, and his plea allocution is thoroughly corroborated by the evidence of record. In his objections to the Presentence Report, the defendant does not dispute any facts that would affect either his Guidelines offense level or his Criminal History Category. Rather he concedes all of the relevant facts that bear upon the appropriate sentence in this case. This is not

the Government have the ability to determine when, prior to the September 1998 recovery of the claims, Bary's fingerprints came to be on the claims of responsibility.

surprising. The defendant's sworn plea allocution alone provides a sufficient factual basis for the imposition of the agreed-upon sentence of 25 years' imprisonment. Moreover, his plea allocution is entirely consistent with and corroborated by the other evidence. Nevertheless, the Government addresses each of the defendant's factual objections, most of which are without merit. *See infra* Part I.

In addition, the Government objects to any suggestion by Bary that the terrorism enhancement set forth in Section 3A1.4 of the Guidelines should not apply to him. Not only is this argument contrary to the terms of the parties' plea agreement, such a suggestions finds no support in the law or the facts of this case. *See infra* Part II.B

Finally, as to the Section 3553(a) factors, each of these strongly supports the imposition of a 25-year sentence. Bary's plea reflects what the evidence in hand indicates he did. He pled to conspiring to kill United States nationals in the months leading up to the bombings, and conveying messages to and from the media on behalf of Bin Laden and Zawahiri, among others, both before and after the bombings. He also pled to making the threats contained in the claims of responsibility, and to conspiring to make those threats. These are crimes that call out for a sentence of 25 years' imprisonment after consideration of the Section 3553(a) factors. Specifically, conspiring to kill Americans is a crime that threatens the lives of Americans both domestically and internationally, and there are few (if any) crimes more serious. *See* 18 U.S.C. § 3553(a)(1). A Guidelines sentence in this case therefore will reflect the seriousness of the offense, and provide just punishment for Bary's crimes. *See* 18 U.S.C. § 3553(a)(2)(A). Importantly, a sentence at the statutory maximum will send a clear message of deterrence – both to Bary and others – that threatening the safety of U.S. civilians and conspiring to harm U.S. civilians will be punished severely, and that the Government will ensure that those who engage

in these types of activities are brought to justice. *See* 18 U.S.C. § 3553(a)(2)(B). Lastly, a 25-year sentence will ensure that this defendant has spent most of his adult life in prison and will ensure that he is incapacitated from engaging in other criminal behavior until at least his early sixties. *See* 18 U.S.C. § 3553(a)(2)(C).

Each of these legitimate objectives of the sentencing statute is directly implicated in this case – just punishment, deterrence, and the need to protect the public. While the defendant did not himself participate in violence, the role he played in the conspiracy was a critical one. Terrorist organizations seek to accomplish their political objectives by instilling terror through violent acts. And the violent acts of terrorists cannot further the goals of a terrorist organization unless the public understands who was responsible for the violence and what they hoped to accomplish through such violence.

Here, Bary was responsible not only for distributing the claims of responsibility for a pair of horrific bombings and the threats of future violence, but he also helped the leaders of al Qaeda and EIJ maintain an open line of communication to the Western world. And he did so knowing full well the murderous aims of the organizations for which he worked.

I. There Is No Disputed Issue of Material Fact that Bears Upon the Appropriate Sentence in this Case

On December 23, 2014, the defendant filed his formal objections to the Presentence Report.¹² The Government addresses each of those objections in turn below. In summary, however, the Court either should reject each of the defendant’s objections as without basis in fact, or find that the alleged disputed issue of fact has no bearing on the defendant’s sentence.

¹² The defendant’s letter transmitting those objections (“Def. PSR Ltr.”) bears the date of December 22, 2014, but it does not appear to have been transmitted to the Probation Office and the Government until December 23, 2014.

A. Defendant's First Objection: Paragraph 26

The Court should reject the defendant's objections to the description of EIJ set forth in that paragraph. There is nothing misleading about the description provided and the "20 years of development and change[] in al-Jihad" have no bearing upon the conspiracies charged in the Information. There is ample evidence to demonstrate that, during the time period referenced in paragraph 26, Ayman al Zawahiri was the leader of EIJ. The defendant's claim that "[t]he al-Jihad group had no interest in or animosity toward the United States," Def. PSR. Ltr. at 1, is belied both by the evidence as well as the defendant's own plea allocution. *See, e.g.*, Exhibits T and U (February 1998 fatwa issued by, among others, EIJ, and directing its followers to kill Americans, civilian and military alike wherever they may be found); Exhibit W (August 4, 1998 threat to retaliate against the United States "in a language they will understand"); Exhibit X at 31 (09/19/2014 Plea Tr.) (describing agreement with EIJ senior leadership to kill American citizens anywhere in the world).

The Government does not dispute that Bary was not a member of the "founding counsel" [*sic*] of EIJ, and the Government further notes that there is no statement that Bary was a member of such a body in Paragraph 26. Accordingly, this objection should be rejected.

The Court should also reject the defendant's claim that there was no "'merger' of al-Jihad with al Qaeda until long after Mr. Bary was incarcerated in the United Kingdom." Def. Ltr. at 1-2. The February 1998 fatwa, which was signed by both Zawahiri on behalf of EIJ and Usama Bin Laden on behalf of al Qaeda, unambiguously announced the unification of these two terrorist groups and the formation of the "International Islamic Front for Jihad against the Jews and the Crusaders." *See* Exhibits T and U.

The Government does not contend that Bary was a "member" of al Qaeda. But that is beside the point. There is ample evidence to conclude that Bary was "associated with" al Qaeda

and, more importantly, that he was a member of the Bin Laden-led conspiracies to which he has pleaded guilty. Among other things, the extensive phone connectivity between Bary and Fawwaz (himself a senior member of al Qaeda) and to a lesser extent Anas al Liby, *see* Exhibit S, the physical surveillance of Bary interacting with Fawwaz, Bary's possession of both the August 1996 Declaration of Jihad (signed only by Usama Bin Laden) and the February 1998 fatwa, and Bary's admission that he "arranged to transmit the messages from media personnel to *my coconspirators*, including Al Zawahiri and Usama Bin Laden." Exhibit X at 31. In addition, Bary admits to distributing the claims of responsibility for al Qaeda's August 7, 1998 bombings of the U.S. embassies with knowledge of the threats of future attacks involving explosives. *Id.* Accordingly, the Court should reject this objection.

B. Defendant's Second Objection: Paragraph 31

The Court should reject this objection. The defendant admits that he does not "dispute any of the information contained in this paragraph." Def. PSR Ltr. at 2. The defendant's proposed amendments to the paragraph are not supported by any competent evidence and have no bearing upon the defendant's crimes or the sentence that he should receive. Moreover, there is ample evidence to dispute Bary's claim that Fawwaz's only connection to the 1A Beethoven Street office was "for the publication of Addaleel." Lastly, Fawwaz's connections to the 1A Beethoven Street office or the other addresses set forth in this objection are immaterial to the defendant's culpability.

C. Defendant's Third Objection: Paragraph 34

The Court should reject this objection in its entirety as there is ample evidence to support a finding that Bary "had advanced knowledge of the planned publication of the 1998 fatwah." As described above, each of the February 1998 fatwas recovered from Bary's residence and his office bore a date of February 12, 1998 – eleven days prior to the February 23, 1998 publication

of the fatwa. *Compare* Exhibit T (February 1998 fatwa recovered from Bary's residence) *with* Exhibit U (February 23, 1998 publication of the fatwa). In addition, the toll analyses performed on February 22 and February 23 provide strong circumstantial evidence that Bary and Eidarous had foreknowledge of the February 1998 fatwa's publication on February 23, 1998. *See* Exhibit V (summary phone charts for calls on February 22 and 23, 1998).

Moreover, this objection has no bearing on Bary's guilt or the length of the sentence he should receive. As described above, in July 1998, Bary reaffirmed his commitment to the "general objective" of EIJ. Given that the February 1998 fatwa made clear that EIJ's goals entailed the murder of U.S. civilians and military personnel, Bary clearly had notice of the violent, anti-American objective of the conspiracy to murder U.S. nationals to which he pleaded guilty.

D. Defendant's Fourth Objection: Paragraph 36

The Court should reject this objection. The evidence clearly establishes that an August 4, 1998 version of EIJ's August 1998 threat to retaliate against the United States was recovered from Bary's office, as the Probation Office correctly concludes. The fact that the version recovered from Bary's office bore not only a signature date, but also a fax header, of August 4, demonstrates that the document predated the August 6, 1998 publication of that threat.

The remainder of the defendant's objection on this point has no bearing on the accuracy of the Probation Office's conclusion in paragraph 36, and therefore should be rejected.

E. Defendant's Fifth Objection: Paragraph 44

The Court should reject this objection. The Probation Office does not conclude that Bary was a member of EIJ's Founding Council, and therefore Bary's claim that he "was not a member of the Founding Counsel of al-Jihad (EIJ)" is of no moment. Moreover, there is ample evidence to establish that Bary was a "senior member" of EIJ. As set forth in detail above, the evidence

makes clear that Bary was a long-standing member of EIJ who had direct access to EIJ's leadership, including Zawahiri and Eidarous.

Moreover, whether Bary was a senior member of EIJ is immaterial to the sentence to be imposed as neither the Government nor the Probation Office has recommended that a leadership enhancement should apply.

The Government agrees that the reference to "August 7" should be eliminated from the second sentence of paragraph 44, and would propose inserting "Beginning on August 8, 1998 . . ."

F. Defendant's Sixth Objection: Paragraph 45

The Government proposes that the first sentence of paragraph 45 be amended as follows: "Evidence retrieved from ADEL ABDEL BARY's property included an August 4, 1998 threat issued by Egyptian Islamic Jihad, as well as the claims of responsibility for the August 7, 1998 bombings of the U.S. Embassies in East Africa. The fax headers on all three of those documents indicated that they had been received sometime before the bombings occurred."

The Government disputes Bary's claim that it does not have any reliable evidence about when Mr. Bary received the February 1998 fatwa. Nor does it have any bearing on the contents of Paragraph 45, which makes no conclusions as to when Bary received the February 1998 fatwa described therein.

Moreover, while the version of the fatwa recovered from Bary's office had multiple dates on it, the version recovered from his residence bore only a single date – February 12, 1998. Moreover, and as described above, the toll records reflect a flurry of telephone activity between and among Bary and his co-conspirators both on the day before and on the day of the publication of the February 1998 fatwa.

G. Defendant's Seventh Objection: Paragraph 46

The Court should reject this objection. The additional information contained in Bary's "objection" to Paragraph 46 does not bear upon the accuracy of the statement contained therein. Moreover, the defendant points to no competent evidence to support the claims. In any event, the additional information does not bear upon a fact that is material to sentencing.

H. Defendant's Objections Related to His Personal and Family Data, Education, and Employment History

The Government does not dispute any of Bary's objections to Paragraphs 89 and 90. In addition, the Government does not object to the proposed spelling of "Addaleel." The Government objects to the additional information that Bary requests be added to the Presentence Report.

The Government has no information to confirm or deny Bary's comments regarding Paragraph 103.

II. There Is No Dispute That the Guidelines Support a Sentence of 25 Years' Imprisonment and That Such a Sentence Is Appropriate Here

A. The Parties and the Probation Office Agree As to the Calculation of the Guidelines

As noted above, the defendant pled guilty pursuant to a plea agreement with the Government, *see* Exhibit A (plea agreement), which this Court approved in a written Order, *see* D.I. 1739. Under the terms of that agreement, the parties agreed that the applicable Guidelines offense level is 58, and that the defendant's Criminal History Category is VI. *See* Exhibit A (plea agreement) at 3. In arriving at those calculations, the parties specifically agreed that the terrorism enhancement pursuant to U.S.S.G. § 3A1.4(a) (*i.e.*, the so-called "terrorism enhancement") applied. *See id.*; *see also* Def. Mem. at 34 ("Mr. Bary has no object[ion] to this calculation."); PSR ¶ 5 (setting forth the parties' stipulated Guidelines range).

In making its independent determination of the Guidelines offense level in this case, the Probation Office concluded – consistent with the parties’ plea agreement – that the total offense level is 58, *see* PSR ¶ 74, and the Criminal History Category is VI, *see* PSR ¶ 78. In so finding, the Probation Office, like the parties, concluded that an enhancement pursuant to U.S.S.G. § 3A1.4(a) is appropriate under the facts of this case. PSR ¶ 67.

Accordingly, there is no dispute between the parties or between either party and the Probation Office as to the appropriate Guidelines calculation here. Accordingly, the Government respectfully requests that the Court adopt the Probation Office’s Guidelines calculation, to which the parties have stipulated.

B. There is No Dispute That 25 Years’ Imprisonment Is the Appropriate Sentence Here

Despite the parties’ agreement that neither party will seek, or suggest that the Probation Office of the Court *sua sponte* consider, a sentence outside of the stipulated Guidelines range of 25 years’ imprisonment, Bary nevertheless felt “obligated” to direct the Court’s attention to “a general infirmity in the calculation of the advisory sentencing guidelines in terrorism cases recognized by the Second Circuit as worthy of discussion in other contexts.” Def. Mem. at 34, 37. Because the defendant explicitly has stated that he does not seek a variance or a non-Guidelines sentence under the legal precedents cited in his memorandum, and because the defendant has agreed not to suggest the Court consider a sentence below 25 years’ imprisonment, the Court should decline Bary’s invitation to opine on the Second Circuit’s view of enhancements irrelevant to this case. Neither of the cases cited by the defendant relates to the terrorism enhancement, and the Second Circuit has never suggested that the concern articulated in *Dorvee* should be considered in the terrorism context. *Cf. United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (specifically endorsing the rationality of the terrorism enhancement).

Congress and the Sentencing Commission rightly have concluded that those who seek to further the goals of terrorist organizations – as Bary has admitted doing – represent a particularly grave threat to society, and therefore should be deterred, punished, and incapacitated for a longer period of time.

Notwithstanding the foregoing, the defendant’s musings on the potential impact of *Dorvee* do not in any way affect the applicability or propriety of Section 3A1.4 to the facts of this case. Indeed, *Dorvee* simply reaffirmed the principle that district courts must accurately calculate the Guidelines range as a first step in fashioning a sentence: “in light of the Sentencing Commission’s relative expertise, sentencing courts must consult [the] Guidelines and take them into account when sentencing.” *Id.* at 188 (quoting *United States v. Booker*, 543 U.S. 220, 245, 264 (2005)). Only after this calculation is complete can a sentencing court proceed to consider whether the resulting Guidelines range is appropriate in a particular case. *See, e.g., United States v. Chow*, 441 Fed. App’x. 44, 45 (2d Cir. Nov. 21, 2011) (“Nothing in *Dorvee* precludes application of the § 2G2.2 enhancements to the calculation of the Guidelines range from which a court may then vary. Nor does *Dorvee* condition application of § 2G2.2 enhancements on heightened findings.”). Similarly, *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2010), the other Second Circuit case cited by Bary, is also irrelevant. This is so because the *Tutty* court specifically rejected the argument that enhancement at issue in *Dorvee* (*i.e.*, Section 2G2.2) should be inapplicable to all but the most egregious cases. 612 F.3d at 131.

The facts of this case – in which the defendant has admitted to participating in a conspiracy that resulted in the deaths of 224 individuals – plainly establish the propriety of applying the terrorism enhancement, for Guidelines calculations purposes, to Bary’s crimes.

III. The Statutory Sentencing Factors Support a Sentence of 25 Years' Imprisonment

Just as the Sentencing Guidelines support a sentence of 25 years' imprisonment, *see supra* Part II, so too does each of the relevant Section 3553(a) factors. The defendant's efforts in his memorandum to minimize the scope of his crimes and the nature of his involvement in the charged conspiracies are without merit. Bary participated in – and has pled guilty to – conspiring to kill United States nationals, and to conveying messages to and from the media on behalf of Bin Laden and Zawahiri, among others, in furtherance of that conspiracy. He has also pled guilty to making the threat of future attacks contained in the claims of responsibility disseminated after the August 1998 bombings, and to conspiring to make those threats. These are crimes of the most serious nature, and Bary's willingness to continue to engage in such crimes after witnessing the devastation and death inflicted by the bombings demands the imposition of a serious sentence both to punish Bary for his crimes and to protect the public from him. In view of the defendant's admissions, and the overwhelming evidence of his guilt, the Government respectfully submits that the parties' stipulated sentence of 25 years' imprisonment is appropriate here.

As set forth above, the evidence established that the defendant was a long-time member of EIJ and an associate of al Qaeda. By his guilty plea, the defendant admitted that, commencing at least as early as February 1998 (*i.e.*, six months prior to the bombings) he knowingly and willfully joined a conspiracy to kill American citizens anywhere in the world, whether they be civilian or military. *See* Exhibit X (09/19/2014 Plea Tr.) at 31. In addition, the defendant specifically admitted that the conspiracy he joined resulted not only in the August 7, 1998 bombings, but also the deaths of 224 individuals. The sentence imposed must be designed to deter other individuals from engaging in conduct of this nature – conduct that has devastating

and far-reaching effects on the individual victims and the families who survived them. As the Probation Office noted in its conclusion that a 25-year sentence was appropriate:

During the time when the Egyptian Islamic Jihad, along with Al Qaeda, was planning bombing attacks against two U.S. embassies abroad, the defendant had direct interactions with at least one Egyptian Islamic Jihad leader. The bombings which took place on August 7, 1998, resulted in the death of 224 people, both military and civilians, and caused injuries to more than 4,500 people. Bary, whose princip[al] role was to communicate with the media on behalf of the Egyptian Islamic Jihad and Al Qaeda leaders, disseminated the claims of responsibility for the bombings to media organizations in different parts of the world. These claims also included threats of future attacks against Americans.

PSR at 25 (sentencing recommendation).

By his own admission, the conspiracy that the defendant joined resulted in hundreds of deaths. The threats that he disseminated were intended to instill fear in thousands more. Bary's willingness to distribute these threats of future pain and suffering demonstrate his depraved indifference to human life and an utter disregard for the laws of the United States and the safety of its citizens.

Against this backdrop, the defendant's submission repeatedly claims that Bary "has always opposed killing or harming innocent civilians based on their nationality, religion, or political beliefs." Def. Mem. at 9. In that vein, the defendant argues that he agreed, at least in part, with only "one of the goals of each conspiracy, *i.e.*, the overthrow of the Egyptian regime." Def. Mem. at 11. But that is not the conspiracy to which the defendant pled. Moreover, the evidence and his own sworn statements are starkly to the contrary.

As the defendant himself admitted, he agreed with Zawahiri and Eidarous "to kill American citizens anywhere in the world, either civilian or military," and he "entered into this agreement knowingly and . . . knowing . . . of this conspiracy's objective to kill American

citizens.” Exhibit X (02/19/2014 Plea Tr.) at 31. It was a direct consequence of that agreement, Bary admitted, that 224 individuals were killed in the August 7, 1998 bombings. Thus, it defies logic for Bary to argue now that he was opposed to “al-Jihad’s threatened violence,” or that in spite of joining this conspiracy “he did not support the use of violence or all of the objectives of the conspiracies.” Def. Mem. at 5, 12.¹³

And while the defendant seeks to make much of the undated, unaddressed letter that was recovered from his residence in September 1998, his actions on behalf of EIJ speak louder than the words on that paper. *See* Def. Exh. A; Def. Mem. at 5 (“This document, translated from a writing recovered from Mr. Bary’s Beethoven Street office, establishes Mr. Bary’s opposition to al-Jihad’s threatened violence). Time and again, Bary was presented with the opportunity to renounce EIJ and its violent ways. And time and again, he declined to do so and always returned to the fold. When Zawahiri endorsed the February 1998 fatwa calling for the murder of U.S. civilians and military alike, Bary notes that several members of EIJ were angered by this endorsement and did not support it. But after learning of the 1998 fatwa and its murderous directive, Bary did not break ranks with EIJ. Instead, in July 1998, he reaffirmed his commitment to the terrorist organization and its general objectives.¹⁴ The same holds true with

¹³ Equally unavailing is Bary’s claim that he “played a post-event role in a crime of unspeakable magnitude.” Def. Mem. at 39. That statement focuses only on a portion of the defendant’s criminal conduct. As described in detail above, the defendant’s affiliation with, and membership in, EIJ spanned several years. *See supra* pages 3 to 8. Indeed, the defendant admitted that his criminal conduct went beyond the post-bombing transmission of faxes, and that the conspiracy of which he was a part predated the bombings.

¹⁴ At several points in his memorandum, the defendant seeks to minimize his commitment to, or role within, EIJ. For example, in connection with EIJ’s support for the February 1998 fatwa in which EIJ, al Qaeda, and other terrorist organizations publicly called upon their followers to kill American civilians and military personnel wherever they could be found, *see* Exhibit T, Bary implies that he was neither privy to, nor involved in, the decision to support the fatwa. *See* Def. Mem. at 28-29. In that vein, Bary argues that “[b]ecause Mr. Bary was not on [EIJ’s] Founding

his conduct in the wake of the August 4 EIJ threat and the August 7 bombings. While this draft of a letter may reflect some, possibly fleeing, ideological hesitation, his post-bombing conduct makes clear how Bary resolved that doubt: in support of the violent, anti-American conspiracy that is al Qaeda and EIJ. As the Probation Office notes:

The bombings of two U.S. embassies, that were planned and executed without concern for the thousands of people who stood to lose their lives was atrocious. Although we have no information to suggest that Bary had any involvement in the planning of the bombings and we know he did not specifically participate in the bombings, it is hard to overlook his actions following the bombings. Knowing that the bombings caused so many deaths, injuries, and damage, Bary, instead of denouncing these actions, continued in his role to communicate with the media on behalf of Egyptian Islamic Jihad and Al Qaeda leaders. The communications not only announced their claims of responsibility, but they included additional threats for future attacks. We believe that Bary's pivotal role in assisting these terrorist organizations to communicate and disseminate information, along with his own conduct of threatening the U.S., warrants a substantial term of imprisonment.

PSR at 25 (sentencing recommendation).

Lastly, the defendant's sentencing submission focuses heavily on the wrongs that he claims he suffered at the hands of the Egyptian government. *See, e.g.*, Def. Mem. at 16-25. He seeks to justify, in some regards, his actions based upon his long-standing anger toward the Egyptian regime. But this personal history, even if credited, does not warrant a sentence below 25 years. His frustration with, and anger toward, an Egyptian regime that purportedly wronged him does not explain or justify his knowing and willful involvement in a conspiracy to murder

Council, he was not invited to attend, nor was he privy to the discussion.” Def. Mem. at 28-29. But the evidence weighs heavily against such an argument. *See supra*.

U.S. nationals or the pain and suffering that he and his co-conspirators have caused to the victims of these conspiracies.¹⁵

CONCLUSION

Accordingly, for the foregoing reasons, the Government respectfully submits that the agreed-upon, Guidelines sentence of 25 years' imprisonment is sufficient but not greater than necessary to achieve the legitimate, statutory goals set forth in Section 3553(a). Specifically, such a sentence is appropriate in view of the gravity of the offense, promotes respect for the law, and provides just punishment for this serious offense. In addition, such a sentence will deter others who may be similarly situated to the defendant from engaging in similar criminal conduct, and protect the public from a defendant who has admitted to conspiring to kill Americans.

Respectfully submitted,

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¹⁵ Victim-impact statements, which detail the pain and suffering that has resulted from the crimes of the defendant and his co-conspirators, are being filed separately with the Court.