

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

- against - :

(S15) 98 CR 1023 (LAK)

ADEL ABDEL BARY, :

Defendant. :

SENTENCING MEMORANDUM FOR ADEL ABDEL BARY

Preliminary Statement

This Memorandum is respectfully submitted in advance of the sentencing of Adel Abdel Bary to provide your Honor with information relevant to Mr. Bary's sentencing. I have reviewed the Pre-sentence Investigation ("PSR") with Mr. Bary and our objections have been submitted to the Department of Probation in a separate letter with copies to the Government.

The U.S. Government concedes that Adel Abdel Bary did not participate in the bombings of the U.S. Embassies in Nairobi, Kenya and Dar es Salam, Tanzania, the core events of this prosecution.

There is no evidence ... establishing that Bary assisted in planning for or in carrying out the bombings themselves, or counseled, commanded, induced or procured the bombings. Moreover, the Government is not aware of any evidence suggesting that Bary ever ... participated in operations on behalf of [Egyptian Islamic Jihad] or al Qaeda.

Govt. Letter to Hon. Lewis A. Kaplan, Sept. 29, 2014 (“Govt. Post-Plea letter”) at 3-4 (footnote omitted, emphasis added). The conduct in the Information Mr. Bary has pleaded guilty to consists entirely of post-event conduct.

This sentencing Memorandum discusses the Government’s stated reasons for Mr. Bary’s Indictment and the Government’s subsequent decision to dismiss the Indictment against Mr. Bary – including 224 counts of murder. The primary purpose of this Memorandum is to give your Honor information about Mr. Bary.

Mr. Bary has never been a jihadist. In fact, he has always taken a position against the use of violence. He was and remains an Egyptian nationalist. Tortured by the Mubarak regime in the 1980s, he was committed to helping others escape his fate and to the overthrow of the Egyptian rulers.

The measure of the distinction between jihadists and Mr. Bary is best illustrated by Mr. Bary’s response to the August 1998 “threat fax,” issued by the Egyptian Islamic Jihad (EIJ, or al-Jihad).¹ In July 1998, al-Jihad learned that six of its members had been kidnapped by the U.S. Central Intelligence Agency (“CIA”) in Albania and Bulgaria and rendered to Egypt where they were tortured. Al-Jihad responded by fax on August 4,

¹ The Indictment abbreviates the group of people who it refers to as the “Egyptian Islamic Jihad” as “EIJ.” The convention adopted in this Memorandum is to refer to this group as “al-Jihad” or the “al-Jihad group.” As explained in greater detail in the expert reports submitted herewith, the inmates imprisoned in Egypt after the assassination of President Anwar Sadat in 1981 were divided politically. The followers of Sheikh Omar Abdel Rahman became known as the Egyptian Islamic Group (EIG), while those opposed to Rahman’s leadership were identified as the Jihad Group of Egypt (JGE), or as the U.S. Government refers to them, EIJ. The translations of these names are very similar and thus risk confusion. The transliteration of the group formed by Rahman’s followers is al-Gama’a; the transliteration of the name attached to those who opposed Rahman’s leadership is al-Jihad.

1998 with a threat against America: “We would like to inform the Americans that in short, their message has been received and that they should read carefully the reply that will, with God’s help, be written in the language that they understand.”

After receiving a copy of this fax, Mr. Bary wrote a statement explicitly opposing the threat and the use of violence and stating he would never agree to unite with bin Laden or his goals. Mr. Bary wrote:

Dr. [Zawahiri] must know that this Fatwa hurts the best interest of the company. Sharia never told us to kill a human being just because of nationality, American, French, or others, for a simple reason: in every country there are Muslims bearing nationality of that country, that is without mentioning the method, besides to what is well know that the Religion forbids the killing of children, women, elderly, and the civilians and the unarmed.

If I find out that any action was done in association with the contractor [bin Laden], I will never deal with the company or with the Dr. again.

Honestly saying; our problem is with the regime in Egypt. Our problem has nothing to do with the ideas of the contractor, and everybody agrees to that.

In respect to the office, I see this office as the right path at this period of time, and I will depend on my own self, let them take their equipment, even if they take the place, I had decided to change the place, and have a new start.

Honestly saying; this group has problems and is confused, and I’m not willing to do work in this manner.

Even the statement I read, the one that came to me by fax, it was bad, because it didn't explain the circumstances, so the reader can understand.

I complained many times about this way the speech is formulated, but my complaint went in vain.

In my opinion, openness with the West and explaining our cause is better than the threatening and Antar challenging language [Antar; Antarah Ibn Shaddad, was a poet and warrior] the truth of the matter known to everyone is that the company does not have the power on earth to make any threat. (Enough is enough).

Can the Dr. tell us right now that if this company has any work budget? Is there any action? Everything is disabled, and people are sick and tired of it, our problems didn't finish yet, and as they are saying; our company is converted into an agency of media and propaganda.

There is an eminent need to review and change these miscalculations, we should learn and make a good use of knowledge, especially after the handling of brothers from Albania for extradition, and the rest is yet to come.

What did we provide to the families and to the prisoners? ... we are facing big problems that make us to think wisely and focus only on the media work abroad at this time and dawa [teaching Islam] work inside Egypt, and explain our cause to the whole world to refute/rebut the terrorism accusation against us.

Adel²

² KRA-2132-7 is attached as Exhibit A in its original Arabic and its translation.

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. Explained in greater detail below, this document was not provided to Mr. Bary's lawyers in the United Kingdom, his defense counsel in this Court, or the United States Department of Justice until Spring 2014.

Mr. Bary admits that his conduct is a violation of U.S. law, and he has pled guilty and accepts responsibility for his actions. While he steadfastly continues to adhere to a position of anti-violence, and denies advance knowledge of the Embassy bombings, he acknowledges that his conduct after the fact rightly subjects him to punishment.

The sentencing process requires your Honor to undertake an individualized assessment of the defendant and the offenses of conviction based on the facts presented. *Gall v. United States*, 552 U.S. 38, 50 (2007). In determining an appropriate sentence, your Honor "may consider, without limitation, any information concerning the background, character and conduct of the defendant..." USSG § 1B1.4 (2014). Moreover, when considering Mr. Bary's accountability for the conduct of others, your Honor must first determine the scope of the criminal activity Mr. Bary agreed to jointly undertake. *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995); USSG § 1B1.3, comment. (n.2) (2014). The purpose of this Sentencing Memorandum is to provide to your Honor with information concerning Mr. Bary's background and conduct to enable your Honor to fashion a sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a).

Mr. Bary's Conduct

On August 7, 1998 two truck bombs exploded at the American Embassies in Nairobi, Kenya and Dar es Salam, Tanzania. The explosions killed 224 people and wounded thousands more. The next day Radio France in Paris, France, Al Jazeera in Doha, Qatar, and the Associated Press in Dubai, United Arab Emirates, received faxes claiming responsibility for the bombings and threatening future acts of violence.

Mr. Bary and 16 others were indicted for crimes related to the Embassy bombings. Specifically, Mr. Bary was indicted on five conspiracy and 279 substantive counts, including 224 counts of murder. In its Post-Plea letter, the Government explained that Mr. Bary was originally charged with the substantive counts based on a number of considerations including that copies of the claims of responsibility faxes were recovered from Mr. Bary's office with his fingerprints on them. The Government has conceded that it cannot confirm when the faxes were sent, nor can it establish when Mr. Bary touched the faxes, transferring his fingerprints to them. The claim of responsibility faxes recovered from Mr. Bary's office bear timestamp markings in the header (called a "fax signature") dated August 7, 1998 at approximately 4:53 am. Fax signatures are generated by the sending machine. This information is only accurate if the sending fax machine is programmed to display the correct date and time. Therefore, the accuracy of the date and time information contained in the claims of responsibility faxes recovered from Mr. Bary's office could only be verified by a physical examination of the sending machine. The Government has conceded that it does not possess, and therefore cannot test the accuracy of, the fax machine that sent the claim of responsibility faxes to Mr.

Bary's office. Moreover, the Government has acknowledged that it does not know where the sending machine was located when the claim of responsibility faxes were sent, and because the faxes lack any time zone information, it is impossible to confirm the date and time they were transmitted.

The evidence of when the claim of responsibility faxes were received by Mr. Bary is thrown into further doubt by a fax receipt recovered with the claims of responsibility in Mr. Bary's office that contained fax header information indicating that the documents were received at the office on August 26, 1998, weeks after the bombings. Thus, with two different timestamps and no verification of the source, location, or time zone from which the faxes were sent or received, no evidence exists to prove when these faxes were actually received by Mr. Bary.

The charges in the Indictment were also based, in part, on Mr. Bary's possession of what has been referred to as the "threat fax." This fax is a statement issued by the Information Office of the Jihad Group in Egypt. The statement is about al-Jihad members who had been kidnapped by the CIA in Albania and Bulgaria and rendered to Egypt, where they were tortured, and some were executed. The date on the threat fax recovered from Mr. Bary's office was August 4, 1998. The statement was published in the newspaper Al-Hayat on August 6, 1998, one day before the Embassy bombings. When Mr. Bary was indicted, the Government believed Mr. Bary's possession of the threat fax was proof that Mr. Bary had advance knowledge of the Embassy bombings committed by al-Qaeda. There is no evidence to support that inference.

When Mr. Bary received the threat fax, he wrote a statement explicitly opposing the threat and the use of violence. (*See* KRA 2132-7, inserted in full on p. 3, *supra*, and submitted as Exhibit A.) The Government was not aware of the existence of this document at the time the Indictment was filed or at the time Mr. Bary's extradition was sought from the United Kingdom. For reasons unknown, several boxes of documents seized in 1998 were not provided to Mr. Bary's lawyers in the United Kingdom, his defense counsel in this Court, or the United States Department of Justice until March 2014, after repeated requests had been made by Mr. Bary's defense counsel and the Government of the U.S. to obtain all of the original documents seized in 1998 from the Government of the U.K. This document was discovered during a review of the newly provided materials once they were received from the U.K. The document was found inside a bag of documents seized from Mr. Bary's office that had remained sealed since it was seized in London in 1998. The bag was unsealed in the United Attorney's Office in presence of counsel and federal law enforcement agents on July 16, 2014. This newly found document establishes Mr. Bary's opposition to violence and attacks on the West and highlights his continuing concern for the plight of the people of Egypt.

On September 19, 2014, Mr. Bary entered a guilty plea before your Honor. The essence of the conduct Mr. Bary pleaded guilty to consists of transmitting the claims of responsibility via international fax to the press. Mr. Bary's plea was pursuant to a plea agreement entered into between Mr. Bary and the Government. For his part in sending faxes after the bombings that claimed responsibility and contained a future threat, Mr. Bary pled guilty to an Information that charged him with both a conspiracy and a

substantive offense in violation of 18 U.S.C. §844(e) and a conspiracy pursuant to 18 U.S.C. § 371 to violate a law of the United States, namely 18 U.S.C. § 2332(a)(1). As part of the plea agreement, the Government agreed to dismiss the Indictment against Mr. Bary.

The maximum penalty for each of the two Section 844(e) charges is 10 years imprisonment; the maximum penalty for his violation of Section 371 is five years. Thus, the maximum sentence that can be imposed on Mr. Bary is 25 years in prison. There is no mandatory minimum sentence for any of these offenses.

Both before and after his arrest, Mr. Bary wrote and spoke out against those who advocated and participated in violence. Mr. Bary has never met Usama bin Laden. He has had no military training. He has always opposed killing or harming innocent civilians based on their nationality, religion or political beliefs. Mr. Bary truly regrets his actions. In his letter to your Honor, Mr. Bary writes:

If I could go back in time, I would never have helped the al-Jihad group with actions such as facilitating communications knowing now that innocent people could possibly have been harmed as a result. For this I am truly and deeply sorry.

See Letter from Adel Abdel Bary to the Hon. Lewis A. Kaplan, Dec. 23, 2014, and translation, submitted as Exhibit B.

Conspiracy Law

In order to prove the existence of the two conspiracies to which Mr. Bary has pled guilty, “the government must present some evidence from which it can reasonably be inferred that [Mr. Bary] knew of the existence of the scheme[s] alleged ... and knowingly

joined and participated in [them].” *United States v. Giraldo*, 80 F.3d 667, 673 (2d Cir.1996) (internal quotation marks omitted), (*quoting United States v. Sanchez Solis*, 882 F.2d 693, 696 (2d Cir.1989)). *See United States v. Diaz*, 176 F.3d 52, 97 (2d Cir. 1999); *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994); *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir.1984). The conspiratorial agreement “may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement.” *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997) (citing *United States v. Gordon*, 987 F.2d 902, 906 (2d Cir. 1993)). Once the existence of a conspiracy has been proved, “it does not take overwhelming proof to link additional defendants to it.” *Id.* (citing *United States v. Casamento*, 887 F.2d 1141, 1156 (2d Cir.1989)). All it takes, therefore, to establish Mr. Bary’s membership in the conspiracies is “proof of purposeful behavior aimed at furthering the goals of the conspiracy.” *Id.* (citing *United States v. Torres*, 901 F.2d 205, 220 (2d Cir.1990)). Moreover, this proof can be established “through circumstantial evidence.” *United States v. Gordon*, 987 F.2d at 907.

Mr. Bary’s opposition to the use of violence to achieve political and social goals is not inconsistent with his plea of guilty to the conspiracies to convey messages to and from the media on behalf of al-Jihad, to kill United States nationals outside the United States, and to make threats of future violence. Mr. Bary admits that he knew the goals of each conspiracy, that he purposefully sent the faxes and that his acts furthered the conspiracies’ goals no matter how personally abhorrent the means of the conspiracies were to him. Under the law of conspiracy, this is sufficient to hold him criminally

responsible because: (1) he knew of the goals of the conspiracy, if by no means other than reading fatwas issued in 1996 and 1998; (2) he agreed, at least in part, with one of the goals of each conspiracy, *i.e.*, the overthrow of the Egyptian regime, even if he disagreed with the methods advanced; and (3) he furthered the conspiracies by transmitting the claims of responsibility, which included threats of future violent conduct. *See generally United States v. Eppolito*, 543 F.3d 25, 47-48 (2d Cir. 2008). “[T]he government must show that each alleged member [of the conspiracy] agreed to participate in what he knew to be a collective venture directed toward a common goal. The coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan. The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes.” *United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (internal citations omitted).³

Mr. Bary has pleaded guilty to sending the claim of responsibility faxes *after* the bombings. Mr. Bary did not plan the bombings, participate in the attacks, or have knowledge of the bombings in advance. Because these faxes furthered the goals of the

³ Mr. Bary’s opposition to violence set him apart from his co-conspirators, but his actions in furtherance of the conspiracies would defeat any argument that could credibly be advanced that he withdrew from the conspiracies after his response to threat fax. To support a withdrawal defense, Mr. Bary would have the burden to prove that his writing “affirmatively established that he disavowed his criminal association with the conspiracy” and that its publication effectively “communicated his withdrawal to the co-conspirators.” *United States v. Minicone*, 960 F.2d 1099, 1108 (2d Cir. 1992) (internal citations omitted). Insofar as there is no such affirmative evidence to support a withdrawal defense, Mr. Bary’s “participation in [the] conspiracy is presumed to continue until the last overt act by any of the conspirators.” *United States v. Greenfield*, 44 F.3d 1141, 1150 (2d Cir. 1995) (internal quotation marks and alteration omitted) (quoting *United States v. Panebianco*, 543 F.2d 447, 453 (2d Cir. 1976)).

conspiracies, under U.S. law, Mr. Bary is liable for the crimes charged in the Information, despite the fact that he did not support the use of violence or all of the objectives of the conspiracies.

Procedural History

United Kingdom authorities arrested Mr. Bary on September 23, 1998. He was released after approximately five days, without being charged in connection with the Embassy bombings.⁴ In July 1999, he was charged by the U.S. Government with 279 substantive counts, including murder, and five conspiracies: conspiracy to murder U.S. nationals, conspiracy to murder internationally protected persons, conspiracy to destroy U.S. buildings (two counts – one for each embassy building), and conspiracy to kill U.S. nationals outside of the United States.

At the request of the United States Department of Justice, the London Metropolitan Police arrested Mr. Bary, and an extradition request by the United States Government was lodged. Mr. Bary opposed extradition in the courts of the United Kingdom, the House of Lords, and the European Court of Human Rights. Mr. Bary lost his final appeal in August 2012. Mr. Bary was ordered extradited and arrived in the Southern District of New York on October 6, 2012.

Background Information

The charges in this case were filed in 1999. In the intervening 15 years, scholars and policy makers have learned a great deal about what is often termed “political Islam.”

⁴ The Government of the United Kingdom has never charged Mr. Bary with any terrorism related crime.

While we have no dispute with the facts regarding the commission of the Embassy bombings contained in the indictment of Mr. Bary, many of the assumptions and “facts” – particularly about the relationships between al-Qaeda and Egyptian individuals and groups believed to be true in 1999 – have now been called into question.

Attached to this Memorandum as Exhibit C is an expert report written by Fawaz Gerges, Ph.D., a professor of international relations and the holder of an endowed chair at the London School of Economics (“Gerges Report”). Professor Gerges has researched and written about Islamist and jihadist movements in the Middle East for decades.⁵ He states that there is “a tendency among some observers to neglect substantive differences and nuances among radical Islamist activists and lump nationalist groups like al-Gama’ and al-Jihad with transnational militants and terrorists like al-Qaeda Central founded by bin Laden and lead [sic] by al-Zawahiri.” Gerges Report at 5, ¶ 13.

Also attached to this submission, as Exhibit E, is an expert report prepared by Marc Sageman, M.D., Ph.D. (“Sageman Report”). Dr. Sageman is a former Case Officer with the CIA, who was assigned to Afghanistan in the 1980s. Dr. Sageman describes the evolution of his own learning on the topic of political Islam.

After the horrors of the 1998 East Africa Embassy bombings and the September 11 2001 attacks on New York and Washington, it was reasonable to prematurely connect the dots and see a much larger and well-organized conspiracy against the West, lumping every anti-American Islamist into one big entity that we called al Qaeda. Indeed, I confess that I made this error in my first book, as I listed Mr. Bary as belonging to the central staff of al Qaeda in the appendix. My mistake was to rely on news reporting at the time that had the

⁵ Professor Gerges’ *curriculum vitae* is provided as Exhibit D.

tendency to lump all Islamists together into al Qaeda. I apologize for this error. The past ten years (since the publication of my book) has revealed a much more nuanced view of political Islam. Indeed, my participation in the U.S. Intelligence Community for most of the past decade, where I reviewed all classified intelligence covering this threat, taught me that these perspectives and sound bites are wrong.⁶

Dr. Sageman is also a psychiatrist, and his report assesses Mr. Bary's mental health and potential for future dangerous, which he concludes is unlikely.⁷

The reports of these experts are respectfully submitted to provide your Honor with an updated and accurate understanding of Mr. Bary's relationship with al-Jihad. Mr. Bary never had any relationship with al-Qaeda.⁸

The Government correctly describes Mr. Bary as someone who would "facilitate communications between and among [al-Jihad members]." Govt. Post-Plea letter at 4. This is something Mr. Bary readily admits. Sageman Report at 5.

The Government incorrectly describes Mr. Bary as a "senior member of EIJ who interacted directly with EIJ leadership during the months leading up to the bombings." Govt. Post-Plea letter at 5, 7. Both expert reports explain how Mr. Bary was associated with EIJ (JGE or al-Jihad), but was not a member of the leadership of the organization, and how by 1997 Mr. Bary's relationship with the leadership of al-Jihad had deteriorated. See Sageman report at 17-20. Gerges Report at 39, ¶99.

⁶ Sageman Report at 38.

⁷ Dr. Sageman's *curriculum vitae* is provided as Exhibit F.

⁸ The reports of Professor Gerges and Dr. Sageman make reference to discovery produced by the Government in this prosecution. These materials are not attached to this Memorandum due to their volume. We would be pleased to provide your Honor and the Government with copies of any documents referenced in the reports.

The representation in both expert reports of Mr. Bary's role in al-Jihad is corroborated by the Government's concession that none of its "cooperating witnesses, who were themselves former members of al Qaeda ... including a cooperating witness who interacted with numerous members of EIJ – identified a photograph of Bary and none is aware of any individual who went by Bary's true name or any of his aliases." Govt. Post-Plea Letter at 5 n.4. The Government acknowledges that their evidence demonstrates the on-again, off-again nature of Mr. Bary's connection to al-Jihad by showing that "at time Bary had fallen from the good graces of EIJ leadership or was not viewed favorably by other al-Jihad members located outside of London," and "suggest[ing] that not everyone in EIJ trusted Bary or thought he should continue to be part of EIJ." *Id.* at 7. The Government also concedes there is evidence that "prior to the August 1998 bombings, Bary questioned his association with EIJ and its ties to al Qaeda." *Id.* The evidence of Mr. Bary's disassociation is clear. For example, in May 1997, Mr. Bary wrote to one of the members of the leadership of al-Jihad:

I cannot take your behaviours anymore and I cannot be the only worker in a company full of directors. I consider myself waived from any commitment with you and I will not be doing any of the company's work until I speak with the Mr. with whom I made my agreements that you renounced from your part. Please do not contact me anymore before solving the problem between myself and your friend, the member of the Advice council.

Gerges Report at 39, ¶ 99.

In sum, the Government's characterization of Mr. Bary as a "long-time, loyal member of EIJ," Govt. Post-Plea Letter at 4, is not supported by its own evidence or the current understanding of political Islamic movements in the 1980-1990s.

Adel Abdel Bary's Background

Mr. Bary is 54 years old. He is an Egyptian citizen, born and raised in Cairo. His father was an accountant; his mother stayed home to raise him and his four siblings. His first language is Arabic, but he has taught himself to speak, read and write in English. Mr. Bary's parents raised him in a traditional, non-politicized Muslim household. He attended University and earned a Baccalaureate in Law and a Masters in Law, and passed the Egyptian Lawyer License Exam.⁹

He supported his family with various business ventures until he was admitted to practice law. In the early 1980s, Mr. Bary started an import/export business selling goods such as clothing, antiques and perfumes. In the late 1980s, Mr. Bary and his brother opened a poultry business. It started as a small operation which involved Mr. Bary and his brother driving into the country to buy live chickens at markets outside of Cairo that they would transport to the city and sell out of a shop near their home in the Shubra District of Cairo. The business was successful. Over time the business grew to the point where the brothers were bringing three tons of live chickens into Cairo daily

⁹ In Egypt, students receive professional degrees through their undergraduate universities. A separate law school degree is not required to practice law. A Masters in Law is an additional degree, much like an LLM in the United States. The Lawyer License Exam is necessary to practice law. It is equivalent to a state bar examination in the United States.

and were servicing both retail and commercial customers. Mr. Bary and his brother expanded the business to include a dairy store next to the poultry shop. From 1987 until 1991, when he sought asylum in the United Kingdom, Mr. Bary practiced law in Egypt. He primarily represented people who were prosecuted for opposing the Egyptian government.

During this period, Mr. Bary and his wife had three children – a daughter and two sons born in 1986, 1988 and 1990, respectively.

Imprisonment and Torture in Egypt

Mr. Bary's first arrest was in 1982, when he was 22 years old, a University student and engaged to marry. His offense was providing shelter to Muntasser Zayat who was wanted by the Egyptian police because he was an outspoken critic of the Mubarak government. Mr. Zayat would later become Mr. Bary's law partner.

When the police came to arrest Mr. Bary, he was not home. The police took his father and brother into custody in his place. Mr. Bary's family was apolitical. Their only offense was their relationship to him. The police came late at night, broke down the door and dragged the men, still in pajamas, out of the house in the presence of Mr. Bary's young nieces and nephews. They handcuffed the men and stepped on them as they forced them into the car.¹⁰ Mr. Bary soon surrendered himself to the police. His father was held for approximately one month and his brother was detained for three months. Mr. Bary's father and brother were both tortured. Mr. Bary was never tried. He was held

¹⁰ See letter from Mona Abdel Bary (sister) to the Hon. Lewis A. Kaplan, submitted as Exhibit G.

in prison until 1984. When he was finally released, he married and returned to his university studies.

When he was first arrested, he was locked alone in a room with no windows. He only knew the time of day by the different calls to prayer. Mr. Zayat, who was his cellmate, witnessed the torture first-hand. He saw soldiers remove Mr. Bary's clothing "except for what covered his private parts and the soldiers threw cold water on his body in a very cold weather in the months of November, December and January of 1982 [sic]."¹¹ At one point, the prison guards took the badly beaten Mr. Bary to his brother. Mr. Bary was so severely disfigured from the beatings that his brother did not recognize him.¹² The letters from Mr. Zayat and Mr. Bary's brother are eyewitness accounts of the torture Mr. Bary endured. His sister, Afaf, saw with her own eyes the scars on Mr. Bary from the torture and how it had cut off the circulation in one of his feet.¹³

From 1982 until 1991, Mr. Bary was repeatedly arrested, imprisoned, tortured, and released. Electric shocks were administered across his body, including inside his mouth. He was suspended by his wrists or ankles for long periods of time. He was burned with cigarettes on his lips and nipples. His genitals were electrically shocked, burned and stuck with sharp pencils.

¹¹ See letter from Muntasser Zayat to the Hon. Lewis A. Kaplan, submitted as Exhibit H.

¹² See letter from Abdel Mageed Abdel Bary (brother) to the Hon. Lewis A. Kaplan, submitted as Exhibit I.

¹³ See letter from Afaf Mohamed Abdel Mageed Abdel Bary (sister) to the Hon. Lewis A. Kaplan, submitted as Exhibit J.

When Mr. Bary's mother and sisters would go to the prison to visit Mr. Bary, his father and brother, the guards would report that all three were dead.

The torture Mr. Bary experienced at the hands of Egyptian authorities was sadly far from unique. Professor Gerges' report is replete with references to the use of torture by the Egyptian Government. "Torture was the rule, not the exception."¹⁴

Mr. Bary still bears the scars from the torture he suffered in the prisons of Egypt. Not all of Mr. Bary's wounds are physical. As discussed *infra*, Mr. Bary continues to struggle with the mental health effects as well.

Flight from Egypt and Asylum in London

In 1991, Mr. Bary became part of a team of Egyptian lawyers that represented Sayed Nosair, an Egyptian-born American citizen accused in New York State court of killing Rabbi Meir Kahane.¹⁵ Egyptian authorities initially refused to allow Mr. Bary to leave the country. He was subsequently only allowed to leave Egypt with the clear understanding from the Egyptian authorities that if he left he could not return. The United States granted Mr. Bary a multi-entry Visa for the period from January 8, 1991 through January 7, 1992.¹⁶ In the summer 1991, Mr. Bary traveled from New York to Jeddah, Saudi Arabia for the Hajj (Islamic pilgrimage).

¹⁴ See, e.g., Gerges Report at 36, ¶ 90 & n.61; 37, ¶ 92; and 43, ¶ 106.

¹⁵ Nosair was acquitted of murder in State court but convicted of a weapon possession charge. In 1995, Nosair was convicted in Federal Court of seditious conspiracy, 18 USC 2384, murder in aid of racketeering, 18 USC 1959 and other charges, 93 Cr. 181 (MBM).

¹⁶ OEMB0122331

Knowing that he could not return to Egypt after the Hajj, Mr. Bary traveled to Pakistan to study and to inquire about a possible work opportunity. Mr. Bary was in Pakistan for approximately three weeks before his scheduled return to New York to continue his work on the Nosair case. While in Pakistan, Mr. Bary contracted malaria. In September 1991, en route back to New York, Mr. Bary became extremely ill during a scheduled layover in London. The United Kingdom granted him an emergency Visa to seek medical care.¹⁷ Mr. Bary was granted admission to the United Kingdom on September 9, 1991.¹⁸

Mr. Bary applied for political asylum in the United Kingdom on September 19, 1991.¹⁹ Mr. Bary's application for asylum was supported by Amnesty International,²⁰ who named Mr. Bary a "prisoner of conscience."²¹ The United Kingdom granted him refugee status on March 30, 1993, and in 1997 he was granted leave to remain in the U.K. indefinitely as a refugee.²²

Mr. Bary's Activities in London

Mr. Bary's early years in London were exceptionally difficult for him. His wife and children remained in Cairo, he did not have a job, he did not speak English, and he

¹⁷ Bary Asylum 0022

¹⁸ OEMB0122360

¹⁹ Bary Asylum 0024

²⁰ Bary Asylum 0033

²¹ The term "Prisoner of Conscious" is used by Amnesty International when it determines that the person has never participated in or advocated for the use of violence. For example, Nelson Mandela was not considered Prisoner of Conscious.

²² Bary Asylum 0044, Bary Asylum 0055

rarely attended the Mosque. He was emotionally lost. He was alone, trying to recover from malaria and the physical and emotional consequences of the torture he had endured. He spent most days on the telephone with his family in Egypt and most nights at a café in Leicester Square talking with the shop owners who he befriended. He was living off of public assistance and in government provided housing. He occasionally took English classes in an effort to learn the language. In 1993, Mr. Bary's wife and three children were finally given permission to join him in London.

Slowly, Mr. Bary started to get back on his feet. Mr. Bary, his wife, and children, adapted to a new life together in a new country and western culture. Mr. Bary became an active parent who was involved with his children's education. In a letter to your Honor, one of his children's teachers recounts how Mr. Bary was "keen that [his children] all did well, showing no preference based on their gender."²³ He returned to handling legal matters on behalf of victims of the Egyptian government. He began associating with the Egyptian ex-patriot community and used his legal skills and social network to help newcomers from Egypt settle in London. He helped them find housing, and arrange for child-care, medical services, and employment. On occasion, Mr. Bary acted as a mediator in domestic relations matters. Mr. Bary and his wife regularly took strangers into their home and provided them with shelter and sustenance until they could acclimate and manage on their own. Mr. Bary and his wife had three more children – another son and two more daughters – in 1994, 1998, and 1999, respectively – making them the

²³ See letter from Angela Piddock, Dec. 10, 2014, to the Hon. Lewis A. Kaplan, submitted as Exhibit K.

parents of six. Mr. Bary's youngest daughter was not yet born when he was arrested in connection with the Embassy bombings.

In 1996, Mr. Bary founded the International Office for the Defense of the Egyptian People (IODEP), an organization whose purpose was to work for human rights and political change in the Egyptian regime. IODEP's Founding Statement stated, in part, that its objectives were:

[T]he exposure of the [Egyptian] regime's aggression on the Egyptian people's beliefs, dignity, freedom and prosperity;

[T]he relation of the lies and propaganda of the regime's media in their claims of observance of human rights and the fighting of administrative and financial corruption in the country; to expose all kinds of conspiracy planned by the regime against the Egyptian people;

[T]o influence domestic and international public opinion in order to pressurize the Egyptian regime to lift their oppression and injustice;

[T]he arrangement of conferences, symposiums, lectures and peaceful marches wherever feasible in order to achieve the goals of the Office in its defense of the oppressed Egyptian nation; [and]

[T]o issue bulletins and communiqués to cover the crimes and violations of the regime and to present the activities of the Office in its legitimate humanitarian mission.²⁴

Mr. Bary rented office space for IODEP on Beethoven Street in London. IODEP was not connected to or a part of al-Jihad. The Founding Statement makes no reference

²⁴ The IODEP Founding Statement (OEMB0157417-18), is submitted at Exhibit L. *See also* Sageman Report at 13.

to, nor ties itself to al-Jihad, or any other organization. As stated by the Founding Statement, IODEP was an organization committed to “delivering its humanitarian message for the legitimate defense of the Egyptian people.” Mr. Bary also used the IODEP office space as a meeting place for the expatriate community to discuss how to be better Muslims. These meetings were open to the public and included discussions of non-violence.

In 1997, Mr. Bary met Khalid Al-Fawwaz, a Saudi national living with his family in London. Al-Fawwaz was fluent in English and helpful to Mr. Bary and his family. Al-Fawwaz translated for the Bary’s, drove them to doctors’ appointments and took them shopping. They became good friends. Al-Fawwaz was a director of the London chapter of a Saudi dissident group called the Advice and Reform Committee (“ARC”). ARC’s Constitution, which appointed Al-Fawwaz as the Director, was witnessed by bin Laden. Mr. Bary has never met bin Laden, and has never spoken to him.

Mr. Bary and Al-Fawwaz decided to start a newsletter for Middle Eastern immigrants from which they hoped to profit. Their new venture was entirely separate from their respective work for IODEP and ARC. The plan was to produce a useful Arabic newsletter with feature articles to help new arrivals from various parts of the Middle East assimilate in London. They sold advertisements and wrote most of the articles themselves, focusing on subjects relating to an immigrant’s daily life in London. For example, one issue featured an article on the process of Halal certification. There were also articles about children’s education and women’s fashion, written by Mr. Bary’s wife. They called the newsletter *Addaleel*, which means “The Guide.” *Addaleel* took

over IODEP's office space on Beethoven Street and Mr. Bary moved IODEP into smaller quarters in the same building.

In addition to his work on IODEP and *Addaleel*, Mr. Bary gained a reputation as a media contact for journalists who wanted an "insider's" account of events within the various Islamic dissident groups in London. Western Journalists learned that Mr. Bary had been a lawyer in Egypt and was a refugee living in London with political asylum. Often, journalists also needed reliable middlemen who spoke both English and Arabic to make introductions to figures in the Islamic community, such as Zawahiri.

Mr. Bary cultivated a relationship with Phil Rees, a journalist for the BBC.²⁵ In a letter to your Honor, Mr. Rees writes that he "came to meet Adel Abdul Bary in 1997/1998 who at the time had set up a small office in which he was attempting to access, collate and disseminate information of Islamic interest general. His particular focus of interest and concern was his own country, Egypt."²⁶ Mr. Rees recounts that he "visited [Mr. Bary's] office many times, and spent many hours in interesting debates and discussions with him." *Id.* In early 1998, Mr. Bary agreed to work with Mr. Rees on a documentary about the growth of political Islam in the Middle East which would have included travel to Afghanistan and Pakistan, however the program was unexpectedly cancelled just before their trip. Mr. Rees writes in his letter to your Honor that from their many discussions, his assessment of Mr. Bary is that "he clearly considered the brutal

²⁵ Phil Rees is now a journalist with Al Jazeera in Doha, Qatar. His letter to your Honor, dated Dec. 31, 2014, is submitted as Exhibit M.

regime of the Egyptian state as the main focus of his interest. There was no manifestation of what has come to be called ‘Global Jihad’ as part of [Mr. Bary’s] perspective.” *Id.* at 3.

After the Embassy bombings, Al Jazeera twice invited Mr. Bary to participate in television interviews about the bombings and the state of Arab politics. The first was for a program called “Opposite Direction.” It took place at the Al Jazeera headquarters in Doha about one month after the Embassy bombings. Mr. Bary was a panelist, along with the late Dr. Ahmed Al Baghdadi, then Director of the Political Science Department at the University of Kuwait. Mr. Bary’s second Al Jazeera appearance took place in London in March 1999 on a program called, “The Islamic Groups Abroad.” Mr. Bary was a panelist along with Saad Jabbar, an expert in British and International Law. Fouad Allam, the former Vice President of the Egyptian State Security (a Colonel in the Egyptian Police) participated as a panelist by telephone. During the program, Mr. Bary and Col. Allam engaged in a heated exchange in which Mr. Bary revealed that Col. Allam had been one of this torturers in Egypt. Col. Allam denied Mr. Bary’s accusation. In both interviews Mr. Bary expressed his opposition to the use of violence.

Al-Jihad in London

London in the mid-1990s was a haven for emigrants fleeing their Middle Eastern homelands because of persecution based on their opposition to the prevailing regimes in their native countries. Dissidents from Egypt, Libya, Syria, Tunisia, Morocco, Saudi

²⁶ See letter from Phil Rees, Dec. 31, 2014, to the Hon. Lewis A. Kaplan, submitted as Exhibit M.

Arabia, and Algeria all sought refuge in London. These groups were not necessarily unified by ethnicity or political goals.²⁷

In 1994, Ayman Zawahiri, a leader of al-Jihad, contacted Mr. Bary. They had met in prison in 1982. After they were released, the law office where Mr. Bary worked with Mr. Zayat often performed legal work on Zawahiri's behalf. Zawahiri left Egypt in the mid 1980s, at which point they lost all contact. It was not until Zawahiri wrote to Mr. Bary in 1994 asking for legal help, that Mr. Bary was back in contact with Zawahiri.

Zawahiri asked for Mr. Bary's legal help in recovering a significant amount of money Zawahiri had invested in a British company, which had ended up being a scam. Zawahiri granted Mr. Bary a power of attorney to recover his investment. Mr. Bary made an initial attempt to help Zawahiri, but soon after, another Egyptian ex-patriot, Hani Sebai (a member of al-Jihad's Founding Council), took over the matter.

Mr. Bary developed a working relationship with al-Jihad, but he was never a member of al-Jihad's Founding Council (its governing body), nor did he hold a position of authority within its structure. Mr. Bary provided al-Jihad with media services in London. Mr. Bary was not, however, Al-Jihad's main media outlet. Al-Jihad published its own magazine, *Al Muhajedin*,²⁸ and also issued press releases, without Mr. Bary's involvement, from Yemen and Afghanistan, such as the threat fax discussed *supra*.

Mr. Bary's disagreements with al-Jihad and its leadership were apparent as early as 1995, when some al-Jihad members sided with the Algerian Groupes Islamiques

²⁷ See Sageman Report at 10.

²⁸ *Id.* at 5.

Armes (“GIA”) – a group that had pursued a policy of indiscriminate violence against civilians in the name of jihad. After receiving a fax recounting the GIA’s most recent massacre, Mr. Bary wrote an editorial published in *Addaleel* expressing his opposition to GIA’s violence. Mr. Bary wrote, in part:

Addaleel received, by fax, a statement issued by what is known as the Armed Islamic Group in Algeria. The statement contained a number of crimes that were [grave enough] to make the forehead wrinkle and the horrors of which would cause children to become old.

The criminals have described themselves in terms unprecedented in recent history, as being amongst the Islamic movements. What kind of Islamic movement is this that speaks with such vulgarity in its communications? What kind of Islamic movement is this that deems the Muslim masses infidels, apostates and hypocrites? Simply because they do not ascribe to their ideas and their savagery?

Addaleel, Oct. 10, 1997. (The complete *Addaleel* is submitted as Exhibit N, in Arabic and translated.

In response to his editorial, supporters of GIA threatened to kill Mr. Bary. Although in time al-Jihad withdrew its support of GIA, Mr. Bary’s condemnation of its indiscriminate violence set him apart from al-Jihad’s view that “jihad is the legitimate means and the divine path for implementing God’s law.”²⁹

As al-Jihad’s goals became less focused on the overthrow of Mubarak, and more aligned with the transnational jihadists, tensions erupted between al-Jihad members and Mr. Bary. More than once, Mr. Bary resigned. More than once, al-Jihad Founding Council members accused Mr. Bary of theft and being insufficiently religious. As Dr.

²⁹ *Id.* at 12.

Sageman noted, Mr. Bary was accused of “embezzle[ing] the funds from [al-Jihad] that was supposed to go to its media office in London to fund his own IODEP project.”³⁰ Mr. Bary was told to travel to Afghanistan to meet with Zawahiri, but he refused to go. Sometime between late October and mid-November 1997, Mr. Bary received an official letter of reprimand from al-Jihad’s leadership that suspended him from taking any action on behalf of al-Jihad until further notice.³¹ A temporary rapprochement of sorts followed in early 1998 after Zawahiri wrote, “we did an investigation and [Mr. Bary] is not a thief and the brothers need to respect that.”³²

On February 23, 1998, bin Laden, Zawahiri, Rafai Taha (a member of al-Gama’a’s Shura council), and three others, issued a fatwa announcing the creation of “The International Islamic Front for Jihad against the Jews and the Crusaders.” The fatwa proclaimed “The judgment to kill Americans and their allies, both civilian and military, is the individual duty of every Muslim able to do so, and in any country where it is possible to liberate Al-Aqsa Mosque and the Holy Mosque from their grip, and to expel their armies from all Islamic territory, defeated and incapable of threatening any Muslim.”³³

This declaration of jihad immediately generated waves of protest. Within two months, al-Gama’a forced Taha to withdraw his signature. Al-Jihad’s Founding Council was shocked at Zawahiri’s signature on the document without consultation and convened an emergency meeting of the Founding Council. Because Mr. Bary was not on the

³⁰ *Id.* at 5.

³¹ *Id.* at 7.

³² *Id.* at 21.

³³ *Id.*

Founding Council, he was not invited to attend, nor was he privy to the discussions.³⁴

While many in the group called for Zawahiri's resignation, he ultimately retained control of al-Jihad. In late June 1998, Zawahiri wrote to Mr. Bary requiring that he promise not to engage in any media activities on behalf of al-Jihad without Zawahiri's permission.

Mr. Bary temporarily complied.³⁵

**Mr. Bary's Arrest and Pretrial Detention
in the United Kingdom and the Southern District of New York**

In July 1998, al-Jihad learned of the six members in Albania and Bulgaria who had been kidnapped by the CIA and rendered to Egypt. Al-Jihad responded with the August 4, 1998 "threat fax," which Mr. Bary denounced, as previously discussed.

On August 7, 1998 two truck bombs exploded at the American Embassies in Nairobi, Kenya and Dar es Salam, Tanzania, respectively, resulting in the death of 224 people and the wounding of thousands more.

Mr. Bary has been in custody on these charges continuously since July 11, 1999. Mr. Bary has strived to make productive use of his time. The United Kingdom prison system originally categorized Mr. Bary as a Category B prisoner with access to education, the gym, and the ability to socialize with other prisoners. However, immediately after September 11, 2001, he was reclassified and transferred to a special

³⁴ *Id.* at 21-22.

³⁵ *Id.* at 23-24.

unit with greater restrictions.³⁶ While there have been some disciplinary infractions, none have been identified as serious.³⁷

While incarcerated, Mr. Bary did not waver from his position against violence, in fact he was known for his views. Gareth Peirce, Mr. Bary's solicitor in the United Kingdom, describes how "without one iota of perceived benefit for [himself] over many years," Mr. Bary has met one-on-one with various young Muslim men who he has encountered in the prison system.³⁸ Ms. Peirce knows of these encounters from both sides. Not only has Ms. Peirce represented Mr. Bary for more than a decade while he was imprisoned in the United Kingdom, (and she remains an active participant in his defense team presently), she and her firm have also served "as lawyers for a number of these young men." She reports that Mr. Bary made it clear to them that he was concerned about them because he "disapprov[es] of their activities, including activities directed at the UK or the West generally, all of which [Mr. Bary] considered to be un-Islamic." *Id.* Ms. Peirce is not relating mere one-time encounters. Mr. Bary, she reports, has "followed through with careful, painstaking explanation of why those activities were based on a wrong interpretation of Islam." *Id.*

Ms. Peirce's letter also describes that while in prison in the U.K., Mr. Bary met with an Islamic cleric who was part of that government's "approved 'deradicalisation'

³⁶ *Id.* at 35.

³⁷ *Id.* at 36.

³⁸ See letter from Gareth Peirce, Solicitor, Dec. 22, 2014, to the Hon. Lewis A. Kaplan ("Peirce letter"), submitted as Exhibit O.

programme,” but who concluded that Mr. Bary “did not in fact need to attend that programme because of the maturity of thought in relation to Islam that he already possessed.” *Id.*

Likewise, two members of British Parliament have written to your Honor on behalf of Mr. Bary, describing the kind of person Mr. Bary was known to be as a prisoner in the U.K.³⁹ They write; “Mr. Bary was known a the time this all began some 14 years ago as someone who argued a counter extremist line. Because he stuck his neck out criticizing extremism he was on the receiving end of much personal criticism from a fashionable current of those years.”

Ms. Peirce’s letter also reports that while in prison in the United Kingdom, Mr. Bary discovered an artistic talent as a painter. His works combine his background, faith, the history of his homeland, and his world-views, in images that depict subjects including dance, fashion, diversity, and human forms and relationships.⁴⁰ Mr. Bary has won multiple awards for his artwork,⁴¹ and has donated many pieces to HHUGS, a UK registered charity, Helping Households Under Great Stress. HHUGS has printed several of Mr. Bary’s works as postcards, selling and auctioning them to raise funds. A sample of the postcards and a letter to your Honor from Marie Fally, HHUGS’ Operations Manager, are submitted as Exhibit Q.

³⁹ See letter from John McDonnell MP and Jeremy Corbyn MP, Nov. 28, 2014, to the Hon. Lewis A. Kaplan, submitted as Exhibit P.

⁴⁰ See Peirce letter at 3.

⁴¹ See sample of certificates and awards earned by Adel Abdel Bary for artwork, submitted as Exhibit R.

While incarcerated in the U.K., Mr. Bary had regular contact with his family. His sixth child, a daughter, was born in 1999. She has never lived with her father. In the U.K., Mr. Bary's family regularly visited him, however since Mr. Bary's arrival at the MCC in October 2012, there have been only telephone calls, emails and letters. Although Mrs. Bary can communicate with her husband, she misses him terribly. Mr. Bary's wife writes to your Honor that in spite of his absence, her husband has been a source of constant support to her and the children. She has become a women's clothing designer; the children born to them in London are still in school.⁴² A family friend, and journalist, writes, despite their long separation, Mr. Bary "is a very strong presence in this family... This is a man whose family love him and who keep their house always in readiness for his eventual return...[A]t religious feast time his place is there and he is uppermost in all their thoughts."⁴³

Mr. Bary's Physical and Mental Health

Mr. Bary's medical problems, according to the review of prison records performed by Dr. Sageman, are consistent with the torture he experienced in Egypt as a young man. Mr. Bary was suspended from the ceiling by his ankles for extended periods of time causing his feet to swell to the point that incisions were required to drain out the fluids. The wound became gangrenous and to this day his feet constantly hurt, which makes walking for more than 20 minutes painful. The pain in his shoulder girdle is also likely

⁴² See letter from Ragaa Abdel Bary (wife), Dec. 4, 2014, to the Hon. Lewis A. Kaplan, submitted as Exhibit S.

⁴³ See letter from Victoria Brittain, Dec. 1, 2014 to the Hon. Lewis A. Kaplan, submitted as Exhibit T.

the result of being suspended upside down, as are his problems with numbness in his thumbs and the fingers of both hands. Mr. Bary's nose was repeatedly broken, and as a result, his breathing is impaired. He gets frequent upper respiratory tract infections and is currently being treated with two inhalers for asthma.⁴⁴

Mr. Bary's mental health is more disturbing. Dr. Sageman's opinion is that Mr. Bary "[REDACTED]"
[REDACTED]
[REDACTED] ..."⁴⁵

Mr. Bary has been treated for [REDACTED] since shortly after his arrival in London, in 1991. Shortly after his arrival, he sought treatment from the Medical Foundation for the Care of Victims of Torture in London.⁴⁶ The Foundation's records document his history of mental illness.⁴⁷

Mr. Bary's medical records document consistent diagnoses by various mental health professionals of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁴⁸ His

⁴⁴ Sageman Report at 32, 33, 35, 42.

⁴⁵ *Id.* at 42.

⁴⁶ Now called Freedom From Torture.

⁴⁷ *See* records from the Medical Foundation for the Care of Victims of Torture, submitted as Exhibit U.

⁴⁸ *See* Sageman Report at 31.

medical records further indicate that throughout his incarceration, Mr. Bary's mental state has consistently deteriorated during periods of isolation.

Soon after his arrival at the MCC, Mr. Bary was prescribed the [REDACTED]

[REDACTED]

[REDACTED]

Sentencing Guidelines

The Presentence Report discusses the applicable Federal Sentencing Guidelines calculation at ¶ 5 and concludes that using the November 1, 1998 Guidelines Manual, the base offense level applicable to the three offenses to which Mr. Bary has pled guilty, after giving credit for acceptance of responsibility is 58. Because the offenses involved terrorism, the criminal history category is deemed to be VI, and the guidelines range would be life in prison. Because the total statutory maximum for the offenses of conviction is 25 years imprisonment, pursuant to USSG § 5G1.2(d) the applicable Sentencing Guideline range is 25 years. Mr. Bary has no objected to this calculation.

In light of *United States v. Booker*, 543 U.S. 220 (2005), we call to your Honor's attention 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. It starts with the premise of the federal sentencing guidelines. When Congress created the United States Sentencing Commission, the Commission set out to "review and rationalize the federal sentencing process." USSG § 1A1.2 (2014). To that end the Commission "attempted to reconcile the differing perceptions of the purposes of criminal

⁴⁹ *Id.* at 35.

punishment.” USSG § 1A1.2 (p.s.) (2014). The Commission concluded that while most people agree that the ultimate goal of punishment is “the control of crime ... [s]ome argue that appropriate punishment should be defined primarily on the basis of the principle of ‘just deserts’ [where] punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical “crime control” considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.” *Id.* In an effort to reconcile these competing points of view, the Commission developed the Sentencing Guidelines with which we are now all very familiar “by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice.” *Id.* The Commission staff “analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission’s guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.” *Id.*

The terrorism enhancement found at USSG § 3A1.4(b) is not, however, a product of that empirical data-driven analysis. Originally, there was no such enhancement contemplated by the Guidelines. Prior to November 1, 1995, the Sentencing Guidelines addressed international terrorism by providing that it was an acceptable ground for an upward departure. The policy statement appearing in USSG § 5K2.15 (1994) provided that “[i]f the defendant committed the offense in furtherance of a terroristic action, the

court may increase the sentence above the authorized guideline range.” In Section 120004 of the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the Commission to provide an appropriate enhancement for any felony that involved or was intended to promote international terrorism. The Commission complied by inserting the enhancement scheme that appears at USSG § 3A1.4. *See* U.S.S.C. Amendment 526 (effective Nov. 1, 1995). The 1995 version of the enhancement, however, was limited to felonies that involved only international terrorism. One year later, Congress “require[d]” the Commission to implement Section 730 of the Antiterrorism and Effective Death Penalty Act of 1996 by amending the enhancement “so that the adjustment in §3A1.4 (relating to international terrorism) applie[d] more broadly to a ‘Federal crime of terrorism,’ as defined in 18 U.S.C. § 2332b(g).” *See* U.S.S.C. Amendment 539 (effective Nov. 1, 1996).⁵⁰

When sentencing guidelines are adopted by the Commission as the result of congressional direction, rather than reasoned analysis by the Commission, the Second Circuit in *United States v. Tutty*, 612 F.3d 128, 131 (2d Cir. 2010), has determined that a district court “committed procedural error when it concluded that it could not consider a broad, policy-based challenge” to the guideline at issue. As the Second Circuit suggested in *United States v. Dorvee*, 616 F.3d 174, 184-85 (2d Cir. 2010), when the Commission’s guidelines are not based on “data about past sentencing practices” and the Commission

⁵⁰ The November 1, 1996 effective date of this enhancement was the result of the Commission’s authority to make temporary emergency amendments to the guidelines. Amendments adopted on an emergency basis must be repromulgated in the next amendment cycle in order to become permanent. USSG § 3A1.4 was repromulgated and made permanent as of November 1, 1997. *See* U.S.S.C. Amendment 565 (effective Nov. 1, 1997).

did not use an “empirical approach” to formulating a guideline and “act[ed] instead at the direction of Congress,” a sentencing court can, “in the exercise of its broad discretion, take into account the ‘unusual provenance’ of the Guidelines.” *Id.* at 188. Thus, it has held that it “was entirely proper” for a defendant as to whom the district court had applied the 16 level enhancement for a prior crime of violence appearing in USSG § 2L1.2(b)(1)(A)(ii), to “ask the District Court to consider that the ... enhancement prescribed by the Sentencing Commission ‘was not derived from any empirical study of sentencing data or recidivism’ and ‘was enacted by the Sentencing Commission with little deliberation and no empirical justification.’” *United States v. Bonilla*, 618 F.3d 102, 110 (2d Cir. 2010), *citing Cf. United States v. Aguilar-Huerta*, 576 F.3d 365, 367-68 (7th Cir.2009).

It should also be noted, that Mr. Bary’s conduct is readily distinguishable from the other defendants that your Honor and the Honorable Leonard B. Sand have sentenced for their participation in the Embassy bombing conspiracies.

We make no request for a variance from the Guidelines as calculated in the plea agreement and by the Department of Probation. We are obligated, however, to bring to your Honor’s attention all factors potentially relevant to the derivation of the Guidelines applicable to this case.

Future Dangerousness

Mr. Bary has spent his life advocating *against* the use of violence, limiting the likelihood that he poses a threat of future dangerousness. Dr. Sageman’s opinion, to “a reasonable degree of certainty based on [Mr. Bary’s] personal history, prison history and

my evaluation is that he will not become physically dangerous.”⁵¹ Mr. Bary has no history of personal violence, while at liberty or incarcerated, and his writings all make clear that his faith and his politics oppose violence against innocents. While there is little doubt that Mr. Bary will continue “his human rights advocacy against the present Egyptian government” and its persecution of dissidents, there is nothing to suggest that he would do so by associating with violent fanatics.⁵²

As Messieurs McDonnell and Corbyn wrote in their letter to your Honor, “A man like Mr. Bary is part of an older generation who can now say that they warned younger men in the UK of the wrong direction they were being led down, and are very likely now to be listened to in the Muslim community. We are certain that far from being a risk to the UK Mr. Bary can be a positive influence for our troubled Muslim youth.”⁵³

He has learned the hard way, and as he has said to your Honor, if he could turn back time, he would never have done anything to help the people who brought such destruction and hurt to innocent people when they bombed the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.

Designation Request

We respectfully request that your Honor recommend to the Bureau of Prisons that Mr. Bary be designated to a facility at the appropriate security level in the North East region. Mr. Bary’s family regularly visited while he was in custody in the United

⁵¹ See Sageman Report at 42.

⁵² *Id.*

⁵³ See Letter from McDonnell Corbyn, Exhibit P

Kingdom. It would be much easier for Mr. Bary's family to visit him in the Northeast region rather than another part of the United States.

Conclusion

We respectfully submit that Adel Abdel Bary played a post-event role in a crime of unspeakable magnitude. We offer this submission so that your Honor can have a complete picture of Mr. Bary. Nothing we can say and no amount of regret that Mr. Bary has expressed can undo the pain suffered in Nairobi and Dar es Salem. In formulating an appropriate sentence we simply ask your Honor to consider that Adel Abdel Bary is a unique human being, who has repeatedly expressed his opposition to the use of violence.

Dated: New York, New York
January 2, 2015

Respectfully submitted,



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