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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 UNITED STATES OF AMERICA,)

No. CR 03-0095 WBS

13 Plaintiff,)

14 UNITED STATES' REPLY TO
15 DEFENDANT ALY MOHSEN'S
SENTENCING MEMORANDUM

16 v.)

17 ALY MOHSEN,)

Hrg. Date: December 8, 2006
Time: 10:30 a.m.
Court: Hon. William B. Shubb
Courtroom D, 15th Floor

18 Defendant.)

19 The defendant Aly Mohsen is scheduled to be sentenced on December 8, 2006 at
20 10:30 a.m. The United States previously filed its Sentencing Memorandum on December
21 1, 2006. The United States now submits this Reply to the defendant's Sentencing
22 Memorandum in order to address issues raised in that pleading. As set forth in more
23 detail below and in its Sentencing Memorandum, the United States continues to
24 recommend that the Court sentence Aly Mohsen to 21 months' imprisonment.

25 **DISCUSSION**

26 The defendant Aly Mohsen disagrees with the PSR's and the government's
27 calculation of the Guidelines, as well as with the recommendation that he be sentenced to
28 21 months' imprisonment. The United States addresses each of these issues below.

1 **A. The Guidelines Calculations in the PSR are Correct.**

2 The defendant Aly Mohsen has objected to every Guideline enhancement set out in
3 the PSR. Moreover, he argues that the PSR should have reduced his offense level by an
4 additional three (3) points for his allegedly minor/minimal role in the offense. The United
5 States has addressed each of the defendant's major arguments in this regard in its
6 Sentencing Memorandum. It writes further here to address additional issues raised by the
7 defendant in his own sentencing memorandum.

8 1. **An Obstruction of Justice Enhancement is Appropriate.**

9 The United States set forth in some detail in its Sentencing Memorandum why an
10 obstruction enhancement is appropriate. The defendant argues that this Court should not
11 impose such an enhancement for several reasons. For example, he argues that — because
12 Amr had already been evaluated prior to the brothers' June 7, 2004 conversation and
13 because Aly had been provided with the reports of those examinations — Aly was simply
14 giving legitimate medical advice to his brother. *See* Def's Sent. Mem., at 10–12.
15 However, this argument fails to adequately explain the part of the conversation cited by
16 the United States and the PSR, *i.e.*, “The second thing that you need to do is to buy time
17 to fire those sons of bitches . . . You need to go to the hospital . . . Be admitted to the
18 hospital . . . Six months in the hospital.” There is no legitimate explanation for this
19 colloquy. Simply put, advising someone to “buy time” to fire one's lawyers by “go[ing]
20 to the hospital” does not constitute legitimate medical advice.

21 Further, Aly suggests that an obstruction enhancement is inappropriate because
22 Amr was already contemplating an insanity defense prior to the June 7 conversation.
23 *See* Def's Sent. Mem., at 12. However, the fact that Amr may have come up with the idea
24 to feign insanity on his own does not absolve Aly of his later obstructive conduct.

25 2. **The Defendant's Conduct Constituted a “Substantial Interference.”**

26 The defendant Aly Mohsen's conduct also constituted a “substantial interference
27 with the administration of justice.” In his sentencing memorandum, the defendant simply
28 ignores the fact that the evidentiary hearing held by Judge Alsup and the lengthy opinion

1 written by Judge Alsup would either have been avoided altogether or have been
2 abbreviated (thus preventing “unnecessary expenditure of . . . court resources”) if Aly had
3 simply told the truth about his participation in the creation of the fraudulent Notebook.

4 Amazingly, Aly argues that his criminal activities actually *saved* court resources by
5 “reduc[ing] the litigation time and expense which would otherwise have occurred in the
6 patent litigation.” Def’s Sent. Mem., at 14; *see also id.* (arguing that, if not for early
7 termination of the case based on the fabricated 1988 Notebook, “it is entirely likely that
8 the patent litigation, like most patent cases, would have gone on for far longer and
9 consumed far more resources of both the court and the parties”). This argument misses
10 the point entirely. The point is not that more court resources would have been consumed
11 if Aly Mohsen had not participated in creating the fraudulent 1988 Notebook. The point
12 is that Aly Mohsen’s conduct resulted in the expenditure of *unnecessary* court resources.

13 3. **The Defendant is not Entitled to a Minor/Minimal Role Adjustment.**

14 The United States wrote at length in its Sentencing Memorandum as to why Aly
15 Mohsen is not entitled to a reduction for minor/minimal role. *See USA’s Sent. Mem.*, at
16 9–11. The defendant has raised no new issues in his own sentencing memorandum that
17 warrant a response. Accordingly, the United States simply incorporates the arguments it
18 made in its previously filed pleading.¹

19 4. **Aly Mohsen’s Perjury Occurred in “Separate Proceedings.”**

20 Again, the United States wrote at length in its Sentencing Memorandum as to why
21 Aly Mohsen’s testimony occurred in “separate proceedings.” *See USA’s Sent. Mem.*, at
22 6–7. The defendant raised no issues in his sentencing memorandum that warrant a
23 response. Accordingly, the United States simply incorporates the arguments it made in its
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26 ¹In his sentencing memorandum, the defendant refers to his aborted plea agreement.
27 However, the government is simply not bound by prior plea offers. Further, it is undersigned
28 counsel’s understanding that the plea agreement to which the defendant refers occurred *prior* to
the return of the indictment charging Aly Mohsen with an additional instance of perjury in the
May 2000 evidentiary hearing and *prior* to Aly Mohsen’s obstructive conduct.

1 previously filed pleading.

2 * * *

3 For all of the reasons set forth above, in the United States' Sentencing
4 Memorandum, and in the PSR, this Court should find that Aly Mohsen's final adjusted
5 offense level (after acceptance of responsibility) is *level 16*, which results in a Guidelines
6 range of 21 to 27 months' imprisonment.

7 **B. A Probationary Sentence is not Appropriate.**

8 In his sentencing memorandum, Aly Mohsen offers several grounds in support of
9 his requested sentence of probation, including the following:

- 10 • the nature of his participation in the offense, Def's Sent. Mem., at 17;
- 11 • his health, *id.* at 17–18;
- 12 • the “collateral consequences” that he has already suffered and the
13 “collateral impact” of his incarceration, *id.* at 18;
- 14 • the “cultural influences of Egyptian families,” *id.* at 18–19;
- 15 • his “community activities and military service,” *id.* at 19; and
- 16 • the benefit to the public that would result from his community service
during a term of probation, *id.* at 19–20.

17 The defendant argues that, under 18 U.S.C. § 3553(a), these factors warrant a
18 sentence of probation. The United States addresses these factors *seriatim*.

19 1. **Nature of the Offense.**

20 Throughout Aly Mohsen's sentencing memorandum, he downplays his role in the
21 offense conduct, placing ultimate blame on his brother for every crime that Aly
22 committed along the way. From suggesting that Aly backdated the 1988 Notebook based
23 on his innocent belief that he and “his brother had previously discussed . . . in a general
24 way the information contained in the notebook,” Def's Sent. Mem., at 4, to claiming that
25 he believed that his later deposition testimony merely amounted to “authentication” of the
26 entries in the 1988 Notebook, *id.*, Aly fails to acknowledge that, at critical junctures, *he*
27 was the one who was presented with the choice of either doing the right thing or the
28 wrong thing, and that *he* chose to do the wrong thing.

1 Further, Aly's suggestion that he was *not* put on notice that something had
2 seriously gone awry after his May 1999 deposition testimony, *id.* ("Aly heard nothing
3 about the dispute for over a year and *forgot about it.*" (emphasis added)) is disingenuous
4 at best. At Amr Mohsen's trial, this Court watched the excerpts from Aly Mohsen's
5 deposition that were played for the jury. After having experienced such a withering
6 cross-examination, no person with any smarts could have walked out of that deposition
7 and then simply "forgot about it" (especially in light of the fact that the deponent here
8 was a medical doctor who had given depositions in other cases). The evidence that this
9 Court has heard clearly suggests that the Mohsen brothers consulted at length about all
10 aspects of Aly Mohsen's activities. The clear conclusion to be drawn from the facts
11 presented to this Court is that Aly Mohsen knew very well *what* his brother needed him to
12 say in his testimony and *why* he needed him to say it.

13 2. **Health.**

14 The fact that Aly Mohsen may suffer from various physical ailments is not an
15 appropriate ground for departure or mitigation. There is no indication that the Bureau of
16 Prisons will not be able to adequately monitor and address Aly Mohsen's condition.
17 Indeed, as a doctor himself, he will be well-positioned to describe his ailments and
18 medical history to the BOP doctors in order to obtain the best care possible.

19 3. **Collateral Consequences.**

20 The government disagrees that any collateral consequences suffered by Aly
21 Mohsen should form the basis for a probationary sentence. While atypical or
22 extraordinary collateral consequences may be a basis for such a sentence in some
23 circumstances, they are an inappropriate basis in this case. The defendant has been
24 convicted of perjury and obstruction of justice. Individuals convicted of similar crimes
25 commonly are unable to continue in the line of work in which they were engaged prior to
26 their conviction. While it cannot be disputed that the defendant's convictions have
27 limited and will limit his employment opportunities, this situation is not at all unique.

28 Other courts have held that collateral consequences of conviction arising from or

1 affecting one's job are not permissible bases for departures under the Guidelines. *See,*
2 *e.g., United States v. Crouse*, 145 F.3d 786, 790–91 (6th Cir. 1998) (loss of business not
3 unusual; departure not warranted); *United States v. Hoffer*, 129 F.3d 1196, 1204 (11th Cir.
4 1997) (loss of medical license did not warrant departure). The United States submits that
5 the principle enunciated in this prior case law is just as applicable now that the Guidelines
6 are advisory.² Simply put, the consequences that the defendant faces as a result of his
7 convictions are typical and ordinary; they are faced by every white collar defendant who
8 engages in this type of conduct. Such consequences are intrinsic to a conviction for these
9 offenses, and they do not warrant sentencing Aly Mohsen to a sentence of probation.

10 4. **Cultural Influence.**

11 The defendant has cited no authority for the proposition that factors such as “the
12 cultural influence of Egyptian families” which “led to his blind support of his brother”
13 can properly be taken into account either in determining the appropriate Guidelines range
14 or in arriving at a reasonable sentence pursuant to § 3553. (With respect to the
15 calculation of the Guidelines, the Guidelines expressly prohibit taking race, national
16 origin, and socioeconomic status into account in sentencing. *See* U.S.S.G. § 5H1.10.)
17 Further, by suggesting that he should receive a lighter sentence because “my brother made
18 me do it,” Aly Mohsen comes dangerously close to failing to accept personal
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20
21 ²The defendant claims that “[t]he sentencing court is now *required* to consider factors that
22 the Guidelines effectively prohibited from consideration.” Def’s Sent. Mem., at 9. In support of
23 this position, the defendant cites the concurring/dissenting opinion of Judge Wardlaw in *United*
24 *States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (en banc). Judge Wardlaw, however, was
25 joined in that opinion by only three other circuit judges. *See id.* at 1086. In any event, at most,
26 *Booker* now simply *allows* the sentencing court to consider such factors. *See United States v.*
27 *Montgomery*, 462 F.3d 1067, 1071 (9th Cir. 2006) (“Under the advisory Guidelines the district
28 court *can*, in every case, consider factors that were either discouraged or outright prohibited
pre-*Booker*.”) (emphasis added); *Ameline*, 409 F.3d at 1093 (“[D]istrict courts *may* even consider
factors that were precluded from consideration altogether prior to *Booker*.”) (emphasis added)
(Wardlaw, J., concurring in part and dissenting in part). The United States respectfully submits
that none of the factors cited by the defendant in his sentencing memorandum constitute the basis
for a probation sentence.

1 responsibility for his actions in this case.

2 In any event, Aly Mohsen does not address the fact that the only cultural value that
3 seems to have prevailed over him was loyalty to family; he simply ignores the fact that the
4 Egyptian culture — like perhaps every other culture on Earth — also values truth-telling
5 and honesty. What is missing from Aly Mohsen’s account of his crimes is an explanation
6 of how he was able to utterly disregard these latter cultural values (in his own words, to
7 “forget” about his perjured deposition testimony) while slavishly serving his brother’s
8 interests. In the end, Aly Mohsen’s fallback on “cultural values” ignores the fact that he
9 was given a real choice in this case: Protect his brother. Or tell the truth. People are not
10 automatons. That choice was a real choice. Unfortunately for him and for, Aly Mohsen
11 made the wrong decision. But that choice cannot be excused or mitigated by resting
12 blame on “cultural values.” Nor does Aly’s “cultural influence” explanation address his
13 role in actively coaching his brother to feign insanity to “buy time” during the criminal
14 case. Aly’s obstructive telephone call to Amr undermine his latest after-the-fact attempt
15 to defend his own indefensible criminal conduct.

16 5. **Community Activities and Military Service.**

17 The defense also suggests that a sentence of probation is appropriate based on Aly
18 Mohsen’s volunteer work and military service. However, U.S.S.G. § 5H1.11 provides
19 that “military, civic, charitable, or public service; employment-related contributions; and
20 similar prior good works are not ordinarily relevant in determining whether a departure is
21 warranted.” The “ordinarily relevant” language “indicates that the [Sentencing
22 Commission] intended these factors to play a part in some cases, albeit a limited number.”
23 *United States v. Garza-Juarez*, 992 F.2d 896, 913 (9th Cir. 1993). In order to qualify for
24 the departure, the factor must be present to an extraordinary degree. *See, e.g., United*
25 *States v. Anders*, 956 F.2d 907, 912–13 (9th Cir. 1992). Laudably, Aly Mohsen appears to
26 be active in his community and to be a supportive and loving husband and father. He has
27 also served this country by enlisting in the military. However, these activities do not
28 present the sufficiently unusual circumstances that warrant a sentence of probation.

1 believes that this is more than a reasonable estimate of the loss to QuickTurn that was a
2 “direct[] and proximate[]” result of Aly Mohsen’s crimes. 18 U.S.C. § 3663(a)(2).
3 Indeed, based on Aly Mohsen’s conduct, QuickTurn/Cadence would likely be entitled to
4 an even greater amount (*e.g.*, the *entire* \$1.3 million amount related to QuickTurn’s
5 investigation regarding the fraudulent notebooks, or, at a minimum, the additional costs
6 associated with questioning Aly Mohsen at the evidentiary hearing). Given this
7 exceedingly reasonable estimate of the injury suffered by QuickTurn as a result of Aly
8 Mohsen’s actions, this Court should order the defendant to pay restitution in the amount
9 of \$4,536.74 to Cadence.

10 **CONCLUSION**

11 Based on the Guidelines calculations, the nature and circumstances of the offense
12 conduct, and all of the factors set out in 18 U.S.C. § 3553(a), the United States repeats its
13 recommendation that this Court sentence the defendant Aly Mohsen to 21 months’
14 imprisonment, a three-year term of supervised release, a \$5,000 fine, \$4,536.74 in
15 restitution, and a \$700 special assessment.

16 DATED: December 5, 2006

Respectfully submitted,

17 KEVIN V. RYAN
18 United States Attorney

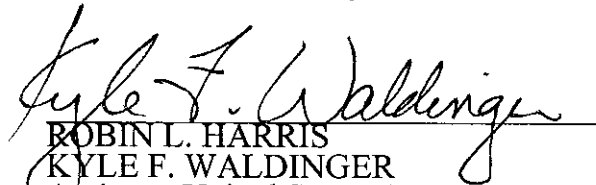
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Exhibit 1