

1 FRANK R. UBHAUS, CA STATE BAR NO. 46085
CHRISTIAN E. PICONE, CA STATE BAR NO. 218275
2 BERLINER COHEN
TEN ALMADEN BOULEVARD
3 ELEVENTH FLOOR
SAN JOSE, CALIFORNIA 95113-2233
4 TELEPHONE: (408) 286-5800
FACSIMILE: (408) 998-5388
5 frank.ubhaus@berliner.com
christian.picone@berliner.com
6

7 ATTORNEYS FOR DEFENDANT ALY MOHSEN

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO OFFICE

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 ALY MOHSEN,
15 Defendant.

CASE NO. CR 03-0095-02 WBS

DEFENDANT ALY MOHSEN'S REPLY TO
THE GOVERNMENT'S SENTENCING
MEMORANDUM AND REQUEST FOR AN
EVEIDENTARY HEARING REGARDING
RESTITUTION

16
17 I. INTRODUCTION

18 As early as December, 2003, the government recognized in its discussions with the
19 undersigned and in its proposed plea agreement that Aly Mohsen's involvement in this matter
20 warranted a three-level departure for his role in the offense pursuant to the provisions of USSG
21 §3B1.1.2(a) and (b); at that time, the government agreed that Aly Mohsen's role fell between that
22 of a minimal participant under Subsection (a) and a minor participant under Subsection (b).¹
23 There have been no new facts uncovered between 2003 and the present with respect to Aly
24 Mohsen's role in this matter to warrant a determination that Aly's role was anything other than
25 that which the government recognized in December, 2003; i.e., somewhere between a minimal
26

27
28 ¹To be fair, at that time, the government took the position, as it does today, that there should be a three-
level upward adjustment for substantial interference pursuant to the provisions of USSG 2J1.2(b)(2).

1 and a minor participant. At that time, the government also recognized that a sentence of
2 probation with home detention would not be inappropriate with respect to Aly Mohsen.

3 The government's current effort to have a prison term imposed on Aly Mohsen is
4 unwarranted and unjust.

5 The government seeks to impose significant penalties on Aly Mohsen that are not
6 warranted under the facts of this case nor are they warranted under applicable sentencing laws.

7 II. GROUPING RULES REQUIRE THAT THE COURT GROUP COUNT 9 WITH
8 COUNTS 5 THROUGH 8 AND 19.

9 The government ignores case law and a plain reading of USSG §2.J1.3 n.5 to claim that
10 the court should group count 9 separately from counts 5 through 8 and 19. In, *United States v.*
11 *Weissman* 23 F.Supp.2d. 187 (S.D.N.Y 1998), defendant Jerry Weissman provided testimony at
12 two hearing that were part of the same proceeding. This resulted in his multiple convictions for
13 perjury and obstruction of justice. Specifically, Mr. Weissman testified at a deposition before
14 staff counsel for a Senate subcommittee. Thereafter, he testified before the Senate
15 subcommittee. The perjury charges related to his testimony at the deposition and his testimony
16 before the Senate subcommittee. The government's position (not to group the multiple counts of
17 perjury) in *Weissman* was soundly rejected by the court. In a similar situation, the government,
18 in the instant case, is again arguing for the court to group separately multiple counts of perjury.
19 Faced with the fact that the holding in *Weissman* is against its position, the government is left
20 with arguing that *Weissman* is, "at best persuasive authority." (See Government's Sentencing
21 Memorandum Page 7, line 7.)

22 In a situation similar to *Weissman*, Aly Mohsen admitted his guilt for giving false
23 testimony at a deposition and for giving false testimony at an evidentiary hearing. Both Messrs.
24 Mohsen and Weissman gave testimony at a deposition and, thereafter, give similar testimony at
25 fact-finding hearings. The court in *Weissman* found that the perjury convictions should be
26 grouped together because each was part of the same proceeding. In determining to group the
27 perjury convictions together, the court stated:

28 ///

1 Weissman may therefore be analogized to a defendant in a civil
2 case who commits perjury in a pre-trial deposition and then does it
3 again at the trial. I do not know of any case considering whether
4 these stages of a civil case should be considered "separate
5 proceedings" under USSG § 2J1.3(d)(1)n5. If such a case were
6 presented to me, with the two instances of the defendant's civil
7 litigation perjury made the subject of separate counts in a criminal
8 indictment, I would be inclined to hold that the counts involved
9 "the same victim" (the plaintiff) and "two or more acts ...
10 constituting part of a common scheme or plan" (depriving the
11 plaintiff of his civil remedy), and group the counts under USSG §
12 3D1.2(b). *Id.* at 193.

13 The government attempts to bolster its claim that Aly Mohsen's perjury convictions
14 should not be grouped together by quoting *United States v. Bradach* 949 F.2d 1461 (7th Cir.
15 1991). Factually, *Bradach* does not help the government anymore than *Weissman*. In *Bradach*,
16 Defendant James Bradach, owner of an Insurance Agency, devised a scheme whereby he would
17 periodically issue checks to Everett Hetrick, James Phillips, and Paul Gjebre. The four agreed
18 that if they were questioned by law enforcement officers or at legal proceedings they would
19 provide a false explanation for the payments. Specifically, they would explain the payments as
20 compensation for business and professional services and for assistance with a health care credit
21 card venture. The three payment recipients reported the payments as "income" on their tax
22 returns, even though they had never worked for defendant.

23 In 1987, Hetrick, Phillips and Gjebre testified before a federal grand jury that was
24 investigating payments being made to Lake County Commissioners. At the grand jury
25 proceeding each of the three men supplied the previously agreed upon lie regarding the purpose
26 of the payments. Phillips and Hetrick were each indicted and tried at separate trials for their
27 false declarations before the grand jury. At each trial, Bradach gave the false explanation of the
28 payments while he was under oath. Phillips was acquitted of one count and convicted on
another. Hetrick was acquitted. Phillips was subsequently retried, and once again, Bradach
testified falsely. Phillips was again convicted on the remaining count. *Id.* at 1462-3.

The court noted that because of the timing of the offense, 1987, the court could not
separately group the perjury convictions. For some unexplained reason the government believes
that *Bradach* supports its position that Aly Mohsen's perjury convictions should be separately

1 grouped. However, a simple review of the facts of *Bradach* shows that the government is wrong.
2 Bradach testified multiple times at his co-defendants' separate criminal trials. USSG s 2J1.3 n.5
3 states: "Separate Proceedings," ... includes different proceedings in the same case or matter ...
4 and proceedings in separate cases or matters (e.g. separate trials of codefendants) ..."

5 The court's reasoning in *Bradach*, that but for *ex post facto* issues, Mr. Bradach's
6 grouping would have been different does not apply to Aly Mohsen's sentencing. Aly Mohsen
7 did not testify in "separate proceedings." The cases cited above and by the government support
8 the position that count 9 should be grouped with counts 5 through 8 and 19.

9 III. ALY MOHSEN NEVER VIOLATED AN ORDER ISSUED BY JUDGE ALSUP
10 REGARDING CONTACT WITH AMR MOHSEN.

11 The government, throughout the sentencing process, argued for a two-level enhancement
12 for obstruction of justice based on its assertion that Aly Mohsen had violated an "order" issued
13 by Judge Alsup. That argument has now been reduced to a cryptic: "[s]etting aside the question
14 of whether these contacts violated any of Judge Alsup's directives ..." (See Government's
15 Sentencing Memorandum Pages 7-8, lines 25 and 1.)²

16 The government claimed throughout the report writing process (and during pretrial
17 proceedings) that Aly Mohsen violated Judge Alsup's order that he not have contact with Amr
18 Mohsen. Like the obstruction of justice claim regarding the June 7, 2004, collect telephone call,
19 the government never sought to indict Aly Mohsen on contempt charges nor did they seek to
20 revoke his bond. In its Sentencing Memorandum, the government now claims that Mohsen
21 violated the court's directives instead of the court's order³. However, this issue was briefed
22 extensively with the probation department.

24 ²The contacts that the government claims violated Judge Alsup's "directive," include a
25 visit to the Santa Rita jail following the funeral of Mohsen brother's mother and a number of
26 telephone calls that Amr Mohsen made to Aly Mohsen. The visit at Santa Rita Jail include over
a half dozen members of the Mohsen family including children and siblings.

27 ³It is interesting that the government now calls Judge Alsup's nonexistent order a
28 "directive." According to *Webster's II New Riverside University Dictionary*, 1984 Houghton
Mifflin Co., directive means an order or instruction especially one issued by a government or
military unit.

1 In an April 14, 2006, letter from the United States Attorney to Probation Officer Flores,
2 the government claimed that Aly Mohsen's bond specifically prohibited him from discussing the
3 case with any other witnesses or codefendant outside the presence of counsel. Once presented
4 with a copy of Aly Mohsen's bond sheet the government backed off its false claim.

5 The government's next line of attack was to claim, falsely, that on March 29, 2004, Judge
6 Alsup ordered that Aly Mohsen not have contact with Amr Mohsen. The government based this
7 claim on a hearing that Aly Mohsen did not attend. Judge Alsup stated that he would sign an
8 order limiting Amr Mohsen's contact to his attorneys, wife and children, if the government
9 provided such an order. (See Reporter's Transcript of Proceedings dated March 29, 2004, page
10 33, lines 17 through 23.) An order was never issued nor was Aly Mohsen ever given notice of
11 any such order.

12 Despite extensive efforts to misrepresent the record, the government appears to have
13 finally recognized that it was simply wrong—Aly Mohsen never violated any order issued by
14 Judge Alsup. Having failed in that attempt to obtain an increase for obstruction of justice, the
15 government now seizes on an isolated comment taken out of context which did not and could not
16 influence the course of justice in this case. Well before the telephone conversation on which the
17 government relies, Amr Mohsen had raised with Judge Alsup the issue of his competence to
18 proceed and he had been examined by two qualified psychologists in connection with that issue.
19 More importantly, at no time during the June 7, 2004, telephone conversation did Aly Mohsen
20 ever suggest that Amr Mohsen feign or fabricate psychiatric symptoms; rather, Aly Mohsen
21 stressed the need to get hospitalization where Amr Mohsen could receive appropriate care and
22 appropriate medication. The government's claim that this telephone conversation represents an
23 effort on Aly Mohsen's part to obstruct justice holds no more water than the government's claim,
24 previously made to the probation officer, that Aly Mohsen violated the conditions of his bond or
25 a court order. In neither case do the facts warrant an upward adjustment, and the court should
26 ignore the government's request.

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

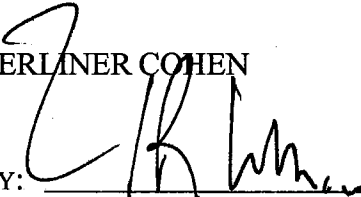
IV. A RESTITUTION AWARD IS NOT APROPRIATE IN THIS MATTER.

The government aptly points out that the Mandatory Victim Restitution Act does not apply to Aly Mohsen's case. However, the government still seeks an unidentified amount of restitution. Aly Mohsen opposes an order for restitution. If the court is inclined to issue such an order, Aly Mohsen respectfully requests that the court hold a restitution evidentiary hearing.

V. CONCLUSION

For the reason submitted to the court in our original sentencing memorandum and in this reply, we respectfully request that the Court sentence Aly Mohsen to five years probation, upon the conditions that he serve six months in home detention and perform 1,000 hours of community service.

DATED: DECEMBER 6, 2006

BERLINER COHEN
BY: 
FRANK R. UBHAUS
CHRISTIAN E. PICONE
ATTORNEYS FOR ALY MOHSEN