UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
……

UNITED STATES OF AMERICA

Sentencing Memorandum

-against-

Case No. 04-CR-402 (TJM)

YASSIN MUHIDDIN AREF and
MOHAMMED MOSHARREF HOSSAIN
……

Context for the Argument

On February 10, 2005, Lynne Stewart was convicted in the United States District Court for the Southern District of New York for conspiring to tamper, hinder, impede and obstruct the lawful and legitimate functions of United States Department of Justice and the Bureau of Prisons (Count 1), conspiracy to provide and conceal material support to terrorist activity (Count 4), providing and concealing material support to terrorist activity (Count 5), making knowingly materially false statements to the United States Department of Justice and the Bureaus of Prisons (Count 6) and making false, fictitious and fraudulent statements to the United States Department of Justice and the Bureaus of Prisons (Count 7). (See Exhibit "A" hereto) According to the government, Ms. Stewart was a central "hub" to transfer the desires of convicted World Trade Center terrorist Sheikh Omar Abdel Rahman to Middle Eastern terrorist groups and their leaders which had a goal of toppling Egypt's secular government. (See government's sentencing memorandum at page 1-2) The indictment alleges that in the face of specific and direct agreements by Ms. Stewart and United States Bureaus of Prisons (which operates as an agency to the United States Department of Justice), Ms. Stewart covered up jail communications with Sheikh Rahman, and transferred in public forums with knowledge of their use for terrorist

purposes specific information that she understood were part of "an armed struggle" (See government Sentencing memorandum at page 3). The convictions of Ms. Stewart involved specific jury findings that her actions were done knowingly, that she actively participated without anyone approaching her or presenting temptation. She was found to have voluntarily assumed the role of transferor of messages from the Sheikh to violent groups, and she had a highly informed educated understanding of the consequences of her conduct. (See government memorandum at pages 4-6)

Lynne Stewart, was charged and convicted of the same offense as Mohammed Mosharref Hossain. Lynne Stewart was highly educated, a lawyer by profession. There was no claim that someone smarter and more worldly than her cajoled, encouraged or worked on her to take the actions that she took. It was proven that she did it on her volition. Stewart was found to have committed the offenses with the knowledge that what she was doing was to accomplish particular goals.

Lynne Stewart faced the same sentencing guidelines that are now faced by Mohammed Hossain including acceleration of the Category I Criminal History category to Category VI, and the same guideline statutory range (See Government Sentencing Memorandum at pages 5 –16) Ms. Stewart was white female lawyer who suffered from physical ailments at the time of her sentencing. Mohammed Mosharref Hossain is a high-school educated pizza maker.

Ms. Stewart was sentenced by United States Southern District Judge John G. Koeltl to 28 months in prison, rejecting the government's argument for a guideline sentence, the same argument made by the government with respect to defendant Hossain. Mohammed Mosharref Hossain should be sentenced to no more than Lynne Stewart.

Prior to July 2003, the government was not conducting an investigation of Mohammed Mosharref Hossain. Mohammed Hossain was not out committing any crimes nor contemplating the commission of a crime. He was living his life.

Mohammed Hossain was born in Bangladesh. In the 1980's, as a young man, he made his way to India, and from India attempted unsuccessfully numerous times to reach America. He was hired on to a Romanian ship and worked as a seaman on the Romanian ship for 2 years. During a visit to the Connecticut ports over 20 years ago, he left the ship to America. He eventually found his way to the Capital District in the early 1980's and started out over twenty years ago as a dishwasher in a Colonie diner. He worked extensive hours saving his money, eventually going to work at a pizzeria in Albany. He learned the pizza trade sufficient that he became partners with a man running a pizza parlor on Central Avenue in Albany, and eventually broke off and purchased his own pizza business next to the Washington Avenue Armory in Albany.

The presentence report correctly recounts that he was married and then divorced in the early 1990's. He then married a second time to a social worker (unlicensed in the United States) also from Bangladesh. The two have six children, and both work full time in the pizza business, his wife cooking and cleaning and he cooking and delivering pizzas. And as he saved money and refused to borrow, he began buying depressed properties in the City of Albany at auctions, fixing them up himself, learning the fix up trade by going to presentations at Home Depot, and developing basic skills in fixing up apartments.

Mohammed Hossain and his wife support ten people. In the flat live he and six children. His elderly mother in-law lives with them and is taken care of by he and his wife. His younger

brother, who is mentally disabled, lives with them and accompanied Mohammed during the day downstairs in the pizza parlor.

When the government sent Malik into Mohammed Hossain's business, Mohammed Hossain was living the life of a good person. Had the government never sent Malik into Mohammed Mosharref Hossain's life, Mohammed Hossain would not ever be known as "defendant Hossain", and he would be living a full life - as presented by the evidence - with family, a pizza parlor, and renovating run-down houses into apartments. The government acknowledged - indeed agreed at numerous junctions - that Mohammed Hossain was not a target of their sting efforts. But that is not apparent by Malik calling and meeting Mohammed Hossain on over fifty occasions, few, if any, initiated by Mohammed Hossain. Had the government known the actual words spoken by Mohammed Mosharref Hossain to the CW from the first meeting on July 28, 2003 until December 10, 2003, it would not or should not have pressed Mohammed Mosharref Hossain into dealing with Malik.

Below are extracts of foreign language translations between the CW and Mohammed Mosharref Hossain that the government did not begin translating until about ten months later in its operation:

> MH: Muslims are over a billion, **we don't need the Jihad of killing, beating. But what we need is that, submit ourselves to complete on the path of God…**
>
> CW: Yes…
>
> MH: To our offspring, to our children… those are our Muslim brother, brothers… to let them follow our path… and keep on telling them to follow
>
> CW: Yes…
>
> MH: **If you are doing inside the home…these are not the work done in the path of God. Stop this, stop this, do**

good work. Go and say prayer on time. Do certain job at time… do certain job. Do this kind of Jihad --

[October 20, 2003]

MH: So, that - that things is - is clear indication even though enemy, we cannot kill them like a coward. We have to let them elect their fight. As you see, in Badr and all of those battles, we had faith. If they have more soldiers, they have less, it doesn't matter, **have more power in your faith.**

[November 20, 2003]

MH: **I am a true citizen of this country. I am one of the best citizen in this country. I am teaching my children behave. I am a businessman. I am a house owner. I have nothing to do with anything else. This is my country.**

[August 7, 2003]

MH: And then, and then you just hate from your heart is a lowest kind of quality. **This person - these people work with you, that's not good, just stay away from them. That is the quality I am talking about**.

[November 2, 2003]

CW: You and I have common thinking.

MH: **You're thinking is different**. Perhaps I -

CW: You love God in a different way, I love in another way. There are so many ways.

MH: [Laughs] This is your idea. Your idea is

CW: .**My method is different, your style is different**

MH: **Mine is different. But I don't believe in your method, that why I don't take that path**.

[December 5, 2003]

CW: What the Saudis did with the World Trade Center? In your opinion, was it good or bad?

MH: **This - of course, this was bad. This was bad. Do you understand that?**

[August 7, 2003]

MH: It was bad because - I'll tell you. You are in possession of something good.

CW: Right.

MH: You want to sell this to me, understand?

CW: Uh-huh.

MH: If you want to sell to me, how will you treat me?

CW: Right.

MH: You'll shake hands with me, visit, offer a cup of tea - because you'll be getting money from me right? In other words, when you sell this thing, you want to profit. If we are true Muslims, and want to spread our Islam throughout the world, we can't frighten others like this. Now people say "Look, it's a Muslim!" "Oh, this is a Muslim! He's very cruel - he'll kill us!" "Watch out - it's a Muslim!" So before we even say what we wanted to, you'll run away. Understand? Just as if I came here and after greeting you, began abusing you. You'll say "Man, what are you doing?" If I say, "It's prayer time, it's time for this or that" etc., you'll say "Get out from here!" So how will you sell your product? You'll have frightened me away. No! **You should invite me politely, have me sit down, offer me some tea, and then say "Look, I have this excellent product." Understand? We should have a good relationship with the unbelievers. Then, because of our goodness, Islam will spread, and continue spreading.**

[August 7, 2003]

MH: Against Islam - this - this most likely, my heart says. Otherwise, my brother, let me tell you, this like Usama bin Lad - Laden, like that kind of guy, who know the Koran, who know the Hadeeth - the Prophet, may God's peace and blessings be upon him, repeatedly says, **"If some one person kill one human being, as he kill whole mankind. If he who save one mankind, like he save the whole world.**

[August 7, 2003]

Instead of understanding these words as having been spoken, the government received and acknowledges it received false translations or interpretations of the conversations from the Malik. Malik would characterize the conversations falsely to Agent Coll, who then made decisions on how to proceed based upon the false interpretations. The government continued to have Malik work on Mohammed Hossain.

Mohammed Mosharref Hossain who had never borrowed a dollar in his life, who had never been convicted of a crime in his fifty years of living, who enjoyed his family and his work and his faith, found himself dealing with Malik, engaging in activities he had never contemplated before. While the jury did not find entrapment - and though defendant Hossain, through counsel continues to believe that this is entrapment - Mohammed Mosharref Hossain was worked over by Malik. Malik used religion, money, and persuasion, and he was able to convince Mohammed Mosharref Hossain to do business with him. Malik did not present to Mohammed Mosharref Hossain with clarity the illegality of his work, always being vague and always adding presentation to the conversation that would assure Mohammed Mosharref Hossain would not receive a clear picture. Unlike Lynne Stewart's case where an educated person began an informed self-initiated course of conduct, Mohammed Hossain was pressed upon to commit acts he was not otherwise contemplating. It cannot be forgotten that Malik was an expert at deception, trained and then supervised by FBI agents. Mohammed Hossain was a high school graduate who made and delivered pizzas. Malik informed Mohammed Mosharref Hossain that the work he did - referring to selling "ammunition" - was "not illegal" - specifically, the CW stated as follows: "Whatever I'm doing, **I'm not doing anything wrong, nor am I breaking any law.**" [December 5, 2003 conversation] After over six months of Malik offering money to Mohammed Hossain - a man who struggled everyday to run a business and support a family of

five children at the time - and after assurances to Mohammed Hossain by Malik that the business he engaged in was legal, Mohammed Hossain agreed to borrow money from Malik, or, as found by the jury - "launder" money. The government did not discover a criminal engaged in criminal activity; it deliberately set out to create one.

SENTENCING PARAMETERS

This sentencing memorandum reviews the state of the sentencing laws following United States v. Booker, 543 U.S. 220 (2005) and the prevailing methodology in the Second Circuit which requires that the Court consider **all** of the factors enumerated in 18 U.S.C. §3553(a). See, e.g., United States v. Crosby, 397 F.3d 103, 114 (2nd Cir., 2005). The sentencing guidelines carry no more weight than any other factor, and no longer control or constrain the Court's discretion in sentencing.

In the case of Mohammed Mosharref Hossain, the guidelines calculations constitute the least meaningful of the relevant sentencing factors. Although the guidelines must still be considered, they are demonstrably overwhelmed by the other factors listed in §3553(a): (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to further the stated purposes of sentencing (just punishment, affording adequate deterrence to criminal conduct; protecting the public from further crimes of the defendant, and providing the defendant with needed education or vocational training and medical care); and (3) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. A guidelines sentence with respect to Mohammed Mosharref Hossain would be off the charts and would ignore all of the factors that implement 18 U.S.C. §3553(a) directive that a sentencing be sufficient, but not

greater than necessary. As such, only a non-guidelines sentence can constitute a just punishment for Mohammed Mosharref Hossain in this case.

The Supreme Court's decision in Booker heralded the end of the federal Guidelines as a mandatory element of sentencing. Booker, 543 U.S. at 226. The threshold substantive holding was joined by a "remedial" opinion that severed the sections of the Sentencing Reform Act (hereinafter "SRA"), which made the Guidelines mandatory, 543 U.S. at 245-246, and left the Guidelines themselves in place as just another of the seven considerations listed in 18 U.S.C. §3553(a) that a sentencing court must consider in determining a sentence that is "sufficient but not greater than necessary to comply with the purposes [of sentencing] set forth in" §3553(a)(2). See Simon v. United States, 361 F.Supp.2d 35, 39, 47 (E.D.N.Y. 2005).

The courts have since defined the term "consideration" which district courts must afford the Guidelines. In United States v. Fleming, 397 F.3d 95 (2nd Cir., 2005), the Second Circuit relied on analogous provisions and cases (i.e., 18 U.S.C. §3583(e)) in holding that, for purposes of appellate review, the cases "take a deferential approach and refrain from imposing any rigorous requirement of specific articulation by the sentencing judge." Fleming, 397 F.3d at 99 (footnote omitted). The Court in Fleming also refused to adopt the dictionary definition of "consider" ("to reflect on: think about with a degree of care or caution"), 397 F.3d at 100, and instead provided the following analysis:

> . . . our context is that of experienced district judges, familiar with both the substantive content of relevant law and procedural requirements, who face the daunting task of administering heavy caseloads. In this context, we continue to believe that no specific verbal formulations should be prescribed to demonstrate the adequate discharge of the duty to "consider" matters relevant to sentencing. As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.

Fleming, 397 F.3d at 100.[1]

Thus, sentencing judges must still consider the Guidelines (see 18 U.S.C. §3553(a)(4)), but nothing in 3553(a) provides any instruction, or reason, to treat those now-advisory guidelines as more controlling of the final sentencing decision than any of the other 3553(a) factors the court must "consider". United States v. Lake, 419 F.3d 111, 114 (2nd Cir., 2005), explaining United States v. Crosby, 397 F.3d 103, 111 (2nd Cir., 2005). Likewise, the Court does not conduct an analysis to determine whether Mohammed Mosharref Hossain should be accorded a formal "downward departure", because as Crosby explicitly recognized, there is a distinction between a "departure" and a sentence outside the Guidelines range:

> We think it advisable to refer to a sentence that is neither within the applicable Guidelines range nor imposed pursuant to the departure authority in the Commission's policy statements as a "non-Guidelines sentence" in order to distinguish it from the term "departure." A "departure," in the jurisprudence of the mandatory Guidelines regime, meant a sentence above or below the applicable Guidelines range when permitted under the standards governing departures. A "departure" was not a sentence within the applicable Guidelines range, but it was nonetheless a "Guidelines sentence," i.e., imposed pursuant to the departure provisions of the policy statements in the Guidelines, as well as the departure authority of subsection 3553(b)(l).

397 F.3d at 112 n.9. See also Booker, 543 U.S. at 301 (Stevens, J., dissenting in part) ("there can be no 'departure' from a mere suggestion"). Thus, the Court need not formally decide whether certain circumstances qualify for departure: "close questions may sometimes arise as to the precise meaning or application of a policy statement authorizing a departure, and a judge who has considered policy statements concerning departures need not definitively resolve such questions if the judge has fairly decided to impose a non-Guidelines sentence." Crosby, 397 F.3d

[1] The Court in Crosby did not eviscerate the substance of "consider" altogether: "[i]n order to fulfill this statutory duty to 'consider' the Guidelines, a sentencing judge will normally have to determine the applicable Guidelines range. A judge cannot satisfy this duty by a general reference to the entirety of the Guidelines Manual, followed by a decision to impose a 'non-Guidelines sentence'." 397 F.3d at 111.

at 112. See also United States v. Canova, 412 F.3d 331, 358 n.28 (2d Cir. 2005).

Accordingly, consistent with the decisions and opinions in Booker, Crosby, and Fleming, and their progeny, Mr. Hossain seeks a non-Guideline, non-custodial sentence based on evaluation of the factors set forth in §3553(a).

A. Proposed Methodology for Sentencing In Light of Booker and Crosby

While the Court in Booker provided almost no guidance to district courts with respect to post-Booker sentencing except to note that §3553(a) "remains in effect, and sets forth numerous factors that *guide* sentencing[,]". Booker, 543 U.S. at 261. The Second Circuit in Crosby and subsequently has offered more guidance, although without prescribing formal rules or directing that district courts apply any particular formula. Crosby, 397 F .3d at 110, 114 n.13. In addition, district courts since Booker have developed a process for sentencing in the post-Booker context.

1. Section 3553(a) Requires a Sentence "Sufficient But Not Greater Than Necessary" to Accomplish the Stated Purposes of Sentencing

The focal point is the instruction in the introductory paragraph of §3553(a), which directs that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." See United States v. Underwood, 2006 WL 305468, at *6 (S.D.N.Y. Feb. 8, 2006); United States v. Fisher, 2005 WL 2542916, at *7-8 (S.D.N.Y. Oct. 11, 2005); United States v. Hawkins, 380 F.Supp. 2d 143, 159 (E.D.N.Y. 2005); Simon v. United States, 361 F. Supp.2d at 39, 47.

Subsection 2, in turn, enumerates the following purposes:

> (2) the need for the sentence imposed -
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. §3553(a)(2).

In this case, each of the above §3553(a)(2) criteria weigh overwhelmingly in Mr. Hossain's favor, thereby making the appropriate and reasonable sentence here one that is "sufficient but not greater than necessary".

2. Post-Booker Sentencing Requires Consideration of the Seven Factors Set Forth In §3553(a) Without Any Special Deference to the Guidelines

The Guidelines (as advisory) do not occupy any superior position among the seven factors listed in §3553(a) that a court must consider in imposing sentence. See United States v. Rattoballi, 432 F.3d 127, (2nd Cir., 2006) ("[a] sentence must reflect consideration of the balance of the §3553(a) factors; unjustified reliance upon any one factor is a symptom of an unreasonable sentence"). Indeed, §3553(a) does not provide any hierarchy, and if the order in which they appear is any indication, the Guidelines and the attendant policy statements - only two of the seven criteria - rank but fourth and fifth, respectively. As Justice Scalia noted in his dissent from the "remedial" opinion in Booker, "[t]he statute provides no order of priority among all those factors, but since the three just mentioned [§3553(a)(2)(A), (B) & (C)] are the fundamental criteria governing penology, the statute - absent the mandate of §3553(b)(l) - authorizes the judge to apply his own perceptions of just punishment, deterrence, and protection of the public even when these differ from the perceptions of the Commission members who drew up the Guidelines." 543 U.S. at 304-305 (Scalia, J., dissenting in part). See also Simon, 361 F. Supp.2d at 40.

Since Crosby, the Second Circuit has provided more explicit structure and directive for §3553(a). In Rattoballi, the Court restated that "[n]o longer are the Sentencing Guidelines mandatory; district courts are now simply under a duty to consider them, along with the other factors set forth in 18 U.S.C. §3553(a)." Rattoballi, 437 F.3d at 131, citing Booker, 543 U.S. at 261; Crosby, 397 F.3d at 110. See also Fernandez, 443 F.3d at 26.[2] Thus, as the Court in Crosby explained, "[n]ow, with the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." 397 F.3d at 111. See also Simon v. United States, 361 F. Supp.2d at 40 (E.D.N.Y., 2005) [explaining why Court will afford equal, but not greater, weight to Guidelines vis-a-vis the other factors in §3553(a)].

The Court in Crosby acknowledged the profound change in sentencing argued by Booker: "the change will affect the decision-making process of every district judge in determining every sentence, even though the change in process might often not produce a change in result." 397 F.3d at 116. See also 397 F.3d at 106-07 (noting that Booker "will affect a large number of cases confronting the district judges of this Circuit almost daily,."); Simon v. United States, 361 F. Supp.2d at 40 ("the greater the weight given to the Guidelines, the closer the Court draws to committing the act that Booker forbids a Guideline sentence based on facts found by a preponderance of the evidence by a judge [citations omitted] ... Such a regime threatens a defacto mandatory sentence") (citations omitted).

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[2] Previously, in Toohey, the Court noted that its earlier remand in that case had been for the purpose of directing "the District Court to consider all [of the] §3553(a) factors in deciding whether to impose a Guidelines **or non-Guidelines** sentence." 448 F.3d at 545, *citing* United States v. Toohey, 132 Fed.Appx. 883, 887 n.3 (2nd Cir., 2005) (emphasis added by Court). *See also* id., at 547 (upon most recent remand, District Court "then should 'consider the Guidelines and all of the other factors listed in section 3553(a)' in order to determine" the appropriate sentence); United States v. Bliss, 430 F.3d 640, 652 (2nd Cir., 2005), *citing* Crosby, 397 F.3d at 110-12.

As Crosby reaffirms, in post-Booker sentencing, "[t]he sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." 397 F.3d at 112. See also Canova, 412 F.3d at 358-59; United States v. Gordon, 2006 WL 1675921, at * 1 (S.D.N.Y. Jun. 16, 2006). In fact, nearly fifteen years ago, Judge Weinstein remarked in United States v. Concepcion, 795 F. Supp. 1262 (E.D.N.Y. 1992), that a mandatory Guidelines system "does not allow courts to give meaningful consideration to all of the factors listed in Section 3553(a). Because those factors do not count as relevant data under the terms of the Guidelines, a sentencing court can bring them to bear in its Guidelines calculations only in relatively trivial ways." 795 F. Supp. at 1278.

Booker has now enabled sentencing courts to give the entirety of §3553(a) full meaning, see also Booker, 543 U.S. at 296 & n.15 (Stevens, J., dissenting in part), as all of the traditional sentencing factors regain relevance and importance in informing the sentence imposed by a district court.

3. Pre-Existing "Departure" Jurisprudence Is Not Determinative In Fashioning An Appropriate Post-Booker Sentence

The concept of "departures" is no longer relevant, except as it informs the calculation of a Guidelines range — but not the sentence itself. See, e.g., United States v. Brady, 417 F.3d 326, 336 (2nd Cir., 2005) (noting that merely because a District Court's decision to depart did not conform to the requirements under the Guidelines, that did not make the sentence "unreasonable"); Canova, 412 F.3d at 358-59; United States v. Selioutsky, 409 F.3d at 118 & n.7. See also United States v. Bliss, 430 F.3d at 652.

Such information is also relevant to sentencing pursuant to the provisions of 18 U.S.C. §3661, which directs that "[n]o limitation shall be placed on the information concerning the

background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." See also United States v. Concepcion, 795 F. Supp. at 1281 ("court should explore all relevant sources of information as mandated by §3661").

Consequently, resort to pre-existing "departure" jurisprudence is not a prerequisite for a non-Guidelines sentence for Mr. Hossain that does not include lengthy incarceration (even though substantial downward grounds also exist in this case). Here, it is respectfully submitted that, upon consideration of all of the factors listed in §3553(a), a punishment that fits the crime, as well as constitutes a sentence "sufficient but not greater than necessary" to accomplish the purposes of sentencing is, a non-Guidelines sentence with minimal imprisonment.

4. Review of the Factors Enumerated In §3553(a) Demonstrates That Mohammed Mosharref Hossain Should Be Sentenced to Minimal Imprisonment[3]

Examination of the §3553(a) criteria in the context of this case compels the conclusion that Mr. Hossain should receive a non-Guidelines sentence that includes minimal imprisonment. Four of the §3553(a) factors, other than the advisory Guidelines and their policy statements [§3553(a)(4) & (5), respectively], are relevant:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed [to satisfy the four enumerated purposes of sentencing];
>
> (3) the kinds of sentences available;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

[3] As of the scheduled date of the February 12, 2007 sentencing, Mohammed Mosharref Hossain will have served 146 days in custody.

As detailed below, within §3553(a)(2), all four objectives of sentencing - summarized as retribution, deterrence, incapacitation, and rehabilitation - weigh decisively in Mr. Hossain's favor, and in favor of a minimal custodial sentence. In fact, many of the issues discussed below relate to more than one §3553(a) factor, and/or purpose of sentencing in §3553(a)(2).

(a) The Complete Inapplicability of the Guidelines Calculations for Mr. Hossain

Regardless of the calculations in the pre-sentence report, the advisory Guidelines level and range for Mr. Hossain are so draconian and disproportionate that they do not provide the slightest framework within which to craft the appropriate sentence. Indeed, even in the advisory Guidelines context, there are multiple grounds for departure, which also double as grounds for eschewing the advisory Guidelines altogether. Those grounds will be presented in the context of the other §3553(a) factors, but also amply demonstrate why the advisory Guidelines, although they must be "considered," cannot serve as **any** type of benchmark for Mr. Hossain's sentence.

Indeed, in United States v. Canova, the Second Circuit cited Booker, 541 U.S. at 263, for the proposition "that post-Booker sentencing contemplates consideration of Guidelines to serve goals of 'avoiding unwarranted sentencing disparities' and 'proportionality." 412 F.3d at 351. Here, focus on the Guidelines would represent a myopic view of sentencing that would vitiate those twin post-Booker purposes of the Guidelines.

Mr. Hossain's sentencing presents circumstances that defies the categorization inherent in a system of Guidelines designed to cover generic cases and fact patterns. See, e.g., Rattoballi, 2006 WL 1699460, at *6 ("[w]e appreciate that 'the guidelines are still generalizations that can point to outcomes that may appear unreasonable to sentencing judges in particular cases"), quoting Jiménez-Beltre, 440 F.3d at 518 (emphasis removed by Court in Rattoballi). Cf id. ("[n]evertheless, on appellate review, we will view as inherently suspect a non-Guidelines

sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants").

In United States v. Fairclough, 439 F.3d 76, 80 (2nd Cir., 2006) (per curiam), the Court upheld as "reasonable" a sentence twice as long as the advisory Guidelines range. Obviously, the sentencing process is symmetrical. Thus, a sentence dramatically below the advisory Guidelines range would also be "reasonable" under the appropriate circumstances. As detailed below, those circumstances pertain here with respect to Mr. Hossain.

(b) The Nature and Circumstances of the Offense and Mr. Hossain's History and Characteristics

As stated at the beginning of this memorandum, Mohammed Mosharref Hossain came to this country with nothing in his pockets and minimal language skills. Mohammed Mosharref Hossain worked and struggled to learn the language and survive in this foreign land, without ever once breaking a law. Among the dozens of letters received from Capital District residents in support of leniency for Mohammed Hossain annexed hereto as Exhibit "B", is a letter from a New York State Assistant Attorney General who had lunch once or twice per week at Little Italy Pizzeria for over ten years:

> Mr. Hossain is an honest, hard-working individual … never committed any crimes, and paid taxes that many small businessmen skirt or avoid … he is a model of integrity and an outstanding asset to the Albany community, as evidenced by his family life, religious activities, small pizzeria … he gives everyone the benefit of a doubt, and neither hates nor harbors ill will toward anyone.

[*Exhibit "B" - letter from New York State Assistant Attorney General Joseph Koczaja*] Another letter from Mary E. Kivlen, an Averill Park resident who has known Mohammed Mosharref Hossain for over fifteen years, describes his character in a letter also annexed at Exhibit "B" as follows:

> He is a hard working citizen here in the Albany, New York area, running his business and helping others that are in need … He has helped young people, lost and out of work, he's fed them, gave them hope and helped them to get back on their feet … and are now making a better life for themselves, just because he took the time to talk to them, to listen to them, and help them find their way. I only know this man as a kind and caring person, reaching out to help others … Mohammed was always a very proud citizen of this community and this country.

[*Exhibit "B" - letter from Mary E. Kivlen*] A letter from Cleo Junco, the owner of the building containing Little Italy Pizzeria, states the following regarding Mohammed Mosharref Hossain:

> Through the years, I have seen Mohammed Hossain and his wife work very hard in their business. During this same time, they have raised a family of six children, who are very well-behaved, educated and hard working. Not only have we been business associates, but also our families have become friends with one another.

[*Exhibit "B" - letter from Cleo N. Junco*] The overwhelming theme to the letters received and attached at Exhibit "B" reflect that Mohammed Mosharref Hossain was an extremely caring individual and an asset to the community at large.

Perhaps most compelling are the letters from Mr. Hossain's wife and children, annexed hereto as Exhibit "C".

(c) Mr. Hossain's Offense Conduct Falls Considerably Outside the "Heartland" for the Offenses of Conviction

Mr. Hossain's conduct does not present a typical or "heartland" case of "material support" for a terrorist organization [in this case Jaish-e-Mohammed ("JEM")].[4] In the

[4] This issue relates to the sentencing factors set forth in *§3553(a)(l)* & (a)(2)(A), including "the nature and circumstances of the offense" and "provid[ing] just punishment for the offense." The above "heartland" analysis also serves as a basis for a downward departure for Mr. Hossain. 18 U.S.C. §2339(A) & (B). The Introduction to the advisory Guidelines explicitly authorizes "heartland" departures, explaining that

> [t]he Sentencing] Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted

U.S.S.G., Introduction, Ch. 1, Part A, 4(b) (2000), at 6.24.

Presentence report, it is reported that "there was no evidence linking Hossain to terrorist groups or any information demonstrating an affiliation with or orientation toward terroristic ideology" (Government's Presentence Report at paragraph 67) Mr. Hossain is not a member or associate of JEM, or any other such organization. There was no evidence at trial that he shares any of JEM's goals or philosophy, or sanctioned its methods. In fact, the only testimony relating to Mr. Hossain's knowledge of JEM was that he believed them to be a musical group. The government presented a translator, Saeda, who testified that a "qawwali" – the understanding of JEM articulated by Mohammed Hossain to Malik's reference to JEM - is a "group[s] that sing religious-like hymns, religious music" and that it was the translator's understanding from the conversation on February 3, 2004 that defendant Hossain believed JEM to be "a musical group of some kind". [Transcript at 216] Malik, the other party to the sole conversation about JEM, when questioned by defense counsel as to whether defendant Hossain believed JEM to be a musical group, replied "Yes, sir." [Transcript at 905-906] When Agent Coll was asked if defendant Hossain believed JEM to be a "musical group", the response by Agent Timothy Coll was "Absolutely, yes." [Transcript at 695-696] It is apparent that Malik recognized at the time – and Agent Coll recognized later - that Mohammed Hossain did not "know" as of February 3, 2004 anything about JEM or anything that it did.

Mr. Hossain did not supply money or material support to JEM. He did not participate in, plan, know of, or assist any specific terrorist operation, activity or fictional attack. Nor was there evidence that his conduct contributed to any specific terrorist act, much less any tangible harm to any person. Malik provided minimal information about JEM that was unclear and it is unclear

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In addition, the Second Circuit has explicitly authorized and endorsed "heartland" departures when appropriate. *See, e.g.*, United States v. Milikowsky, 65 F.3d 4, 7 (2nd Cir., 1995); United States v. Skinner, 946 F.3d 176, 179 (2nd Cir., 1991). *See also* United States v. Koon, 518 U.S. at 81.

that Mr. Hossain was even aware of the fictitious plot required under §2339A, to which Mr. Hossain was charged with providing "material support."

In this context, the Supreme Court's opinion in Koon is instructive. "The severity of the misconduct, its timing, and the disruption it causes" are factors which influence a district court's determination whether the conduct in a particular case makes it atypical. 518 U.S. at 100. Despite Mr. Hossain's lack of involvement in any violent or terrorist activity, in the PSR he has been saddled with two extraordinarily punitive enhancements applied in terrorism-related eases: (I) the "victim-related adjustment" under §3A1.4(a), that raises the offense level from a 26 to a 38 (see PSR at ¶74); and (2) the "horizontal" enhancement that propels Mr. Hossain's Criminal History Category from 1 (0 points) to VI (PSR at ¶85).

This divergence between Mr. Hossain's conduct and the typical nature of the offense conduct contemplated by these Guidelines also merits relief via a non-Guidelines sentence that includes minimal imprisonment.[5]

(d) Mr. Hossain's Offense Conduct Needs to Be Assessed From a Pre-September 11, 2001 Perspective

As this Court instructed the jury, this case had nothing to do with the events of September 11, 2001. Nonetheless, it must be recalled that all of Mr. Hossain's conduct occurred after the twin towers of the World Trade Center were attacked. As the letters annexed at Exhibit "B" demonstrate, several community residents have concern about the zealousness of the sting with respect to Mr. Hossain, as well as whether or not he believed he committed a crime, and that he

[5] For purposes of calculating the advisory Guideline, it should also be remedied by a downward departure. *See* United States v. Restrepo, 936 F.2d 661, 667 (2nd Cir., 1991) (downward departure may be justified when "an offense level has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense"). *See also* United States v. Koczuk, 166 F.Supp.2d 757, 763-764 (E.D.N.Y. 2001). Moreover, the impact of the government's charging decision(s) can also be the basis for a "heartland" downward departure, and should be here. As the Guidelines, at Pt. A.4, instruct, "a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power." *See also* United States v. Gamez, 1 F.Supp.2d 176 (E.D.N.Y. 1998).

should not be sentenced with reference to post-9/11 consequences. As a local attorney wrote:

> I feel that he [Hossain] was caught up in the climate of fear that enveloped this country after 9/11. I don't believe that he ever was or ever will be a threat to anyone…. the climate of fear affecting all Americans … have, I am afraid, caused a miscarriage of justice.

[*Exhibit "B" - letter from Michael Lynch*] A second grade teacher from Schenectady, New York raised the following concern:

> Though I am mindful of the fact that we as a nation are susceptible to a terrorist attack at any time, it seems as if this atmosphere of apprehension has directly affected our sense of liberty and justice.

[*Exhibit "B" - letter from Marie Drislane*] A software engineer from Niskayuna, New York, while acknowledging that he does not know or have any personal connection to Mohammed Hossain, shares the following thoughts:

> … the trial and the circumstances of this affair have frightened me. From where I see things I'm very worried that as a community we don't over-react to our fears. It seems like, through history, we get ourselves whipped up into hysteria and then inflict the cruelest, most draconian punishments against whatever ethnic group is new to the neighborhood, only to look back on history and wince at what we've done.

[*Exhibit "B" - letter from Joe Pliss*] An Averill Park woman wrote the following in a request for leniency for Mohammed Mosharref Hossain:

> From the time I first heard about the arrests of Mohammed Hossain and Yassin Aref, I was concerned about whether our current fears in this country had interfered with our system of fairness justice.

[*Exhibit "B" - letter from Priscilla Fairbank*] Two residents of Niskayuna, New York shared their concerns as follows:

> We urge you not to use post 9/11 extremes in deciding on the sentence and to consider the prior behavior of Mr. Hossain and the nature of his entrapment. Without the government and Mr. Malik, Mr. Hossain would have continued to be a law abiding person.

[*Exhibit "B" - letter from Taras Shepelavy and Julianne Shepelavy*] As if the dozens of letters

from random citizens regarding these concerns were not sufficient, the various editorials written by local newspapers annexed to Yassin Aref's sentencing memorandum speak volumes about the public concern.

(e) Mr. Hossain's Entire Character Must Be Considered

It is a picture of the entire person that stands before the Court at sentencing. As Judge Glasser noted in United States v. Nuzzo,

> [t]he "characteristics" of the defendant are never conveyed by the cold print of a sentencing transcript. The persona of a defendant standing before a sentencing judge is very rarely, if ever, articulated in imposing sentence, but surely plays a role in the delicate and serious process of determining the appropriate sentence and when capable of articulation is an accepted factor to be considered in that determination. See, e.g., United States v. Lara, 905 F.2d 599 (2nd Cir., 1990).

2006 U.S. Dist. LEXIS 6098 (E.D.N.Y. Feb. 13, 2006). *See also* United States v. Kloda, 133 F.Supp.2d 345 (S.D.N.Y. 2001) (father and daughter who filed false tax returns for their business were entitled to downward departure in part because of needs of daughter's small children, because a judge must sentence "without being indifferent to a defendant's plea for compassion, for compassion also is a component of justice").

Mr. Hossain's offense represents a radical contrast to his personal history, a fact that is relevant to §3553(a)(l) ("the nature and circumstances of the offense and the history and characteristics of the defendant"), as well as to any need for specific deterrence under either §3553(a)(2)(B) & (C), and justifies a non-Guidelines sentence.[6] Mohammed Mosharref

[6] Alternatively, Mr. Hossain's offense conduct satisfies the standard for a downward departure for "aberrant conduct" under the advisory Guidelines. Under revisions to the Guidelines effective November 1, 2000, an "aberrant behavior" departure is available if the offense conduct constituted "a single criminal transaction that was committed without significant planning, was of limited duration, and represented a marked deviation from an otherwise law abiding life." The Second Circuit interprets this to mean that "[t]he Sentencing Commission specifically rejected a rule that would have allowed a departure for aberrant behavior only in a case involving a single act that was spontaneous and seemingly thoughtless. . .. The Commission saw the need to define aberrant behavior more flexibly and to slightly relax the 'single act' rule." United States v. Gonzalez, 281 F.3d 38,47 (2nd Cir., 2002).

Hossain's character came through not just in letter-testimonials, but in his conversations with Malik:

> MH: Muslims are over a billion, **we don't need the Jihad of killing, beating. But what we need is that, submit ourselves to complete on the path of God…**
>
> CW: Yes…
>
> MH: To our offspring, to our children… those are our Muslim brother, brothers… to let them follow our path… and keep on telling them to follow
>
> CW: Yes…
>
> MH: **If you are doing inside the home…these are not the work done in the path of God. Stop this, stop this, do good work. Go and say prayer on time. Do certain job at time… do certain job. Do this kind of Jihad --**

[October 20, 2003]

> MH: So, that - that things is - is clear indication even though enemy, we cannot kill them like a coward. We have to let them elect their fight. As you see, in Badr and all of those battles, we had faith. If they have more soldiers, they have less, it doesn't matter, **have more power in your faith.**

[November 20, 2003]

> MH: **I am a true citizen of this country. I am one of the best citizen in this country. I am teaching my children behave. I am a businessman. I am a house owner. I have nothing to do with anything else. This is my country.**

[August 7, 2003]

> MH: And then, and then you just hate from your heart is a lowest kind of quality. **This person - these people work with you, that's not good, just stay away from them. That is the quality I am talking about**.

[November 2, 2003]

> CW: You and I have common thinking.

MH: **You're thinking is different**. Perhaps I -

CW: You love God in a different way, I love in another way. There are so many ways.

MH: [Laughs] This is your idea. Your idea is

CW: .**My method is different, your style is different**

MH: **Mine is different. But I don't believe in your method, that why I don't take that path**.

[December 5, 2003]

CW: What the Saudis did with the World Trade Center? In your opinion, was it good or bad?

MH: **This - of course, this was bad. This was bad. Do you understand that?**

[August 7, 2003]

MH: It was bad because - I'll tell you. You are in possession of something good.

CW: Right.

MH: You want to sell this to me, understand?

CW: Uh-huh.

MH: If you want to sell to me, how will you treat me?

CW: Right.

MH: You'll shake hands with me, visit, offer a cup of tea - because you'll be getting money from me right? In other words, when you sell this thing, you want to profit. If we are true Muslims, and want to spread our Islam throughout the world, we can't frighten others like this. Now people say "Look, it's a Muslim!" "Oh, this is a Muslim! He's very cruel - he'll kill us!" "Watch out - it's a Muslim!" So before we even say what we wanted to, you'll run away. Understand? Just as if I came here and after greeting you, began abusing you. You'll say "Man, what are you doing?" If I say, "It's prayer time, it's time for this or that" etc., you'll say "Get out from here!" So how will you sell your product? You'll have frightened me away. No! **You**

should invite me politely, have me sit down, offer me some tea, and then say "Look, I have this excellent product." Understand? We should have a good relationship with the unbelievers. Then, because of our goodness, Islam will spread, and continue spreading.

[August 7, 2003]

MH: Against Islam - this - this most likely, my heart says. Otherwise, my brother, let me tell you, this like Usama bin Lad - Laden, like that kind of guy, who know the Koran, who know the Hadeeth - the Prophet, may God's peace and blessings be upon him, repeatedly says, **"If some one person kill one human being, as he kill whole mankind. If he who save one mankind, like he save the whole world.**

[August 7, 2003]

5. Mr. Hossain's Medical Condition Requires a Minimal Jail Sentence In Order That He Receive the "Needed Medical Care. .. In the Most Effective Manner"

(a) Mr. Hossain's Significant Health Problems Create a Risk That He Will Not Survive a Lengthy Prison Sentence

Mr. Hossain suffers from two serious medical problems - diabetes and hypertension. Mr. Hossain was in treatment with a primary care physician who worked with him to develop a multi-faceted treatment approach that combines medication and behavior and diet modification. As a consequence of this constellation of conditions, Mr. Hossain requires regular access to specialized health care and monitoring that would be severely compromised if delivered in a prison setting. Since his incarceration, he had been hospitalized two (2) times for complications related to his diabetes, including kidney problems. Mr. Hossain, his wife, and their children, as well as his doctors, all share the concern that incarceration would represent a death sentence.

(b) Medicine as Practiced in the Bureau of Prisons Aims to Meet Only Minimal Standards of Care That Are Compromised By the Institutional Selling In Which That Care Is Delivered

While the government always claims that the Bureau of Prisons ("BOP") can manage any

medical problem, government studies and press reports have chronicled the inability of the BOP to provide adequate medical care for inmates. Compounding the problems, recently the BOP has focused on cutting health care costs in federal prisons. See GAO report, Containing Health Care Costs for an Increasing Inmate Population, GAO/T-GGD-00-l 12, Apr. 6, 2000. Inadequate medical care has been cited as the number one problem reported by inmates in the federal prison system. CHAPTER IV: WOMEN AND MEN IN CRIMINAL JUSTICE, 84 Geo. L.J. 1778 (May 1996).

Medical care provided by the Bureau of Prisons is the lowest standard of care. That is not to say that in individual cases the health care provider may not be concerned with the welfare or well-being of his or her patient, but rather that when there is competition between the twin goals of meeting inmate health care needs and preserving security within the prison population, security prevails. It is respectfully submitted that such measures would deprive Mr. Hossain of the vigilant monitoring and treatment necessary to control the progression of his diabetes and hypertension. Since incarcerated on October 10, 2006, Mr. Hossain has developed kidney stones as a result of high blood glucose levels, as well as the onset of diabetic retinopathy. With time, if the background diabetic retinopathy becomes more severe, the macula area can become involved, leading into a condition known as diabetic maculopathy, and the amount of central vision that is lost varies from person to person. Further, the combination of diabetes and hypertension is known to cause severe kidney damage without adquate treatment, and can lead to complete and total kidney failure and death. Those serious yet avoidable risks to Mr. Hossain's health justifies a non-Guideline, minimal jail sentence.

(c) Section 3553(a) (2) (B) - Mr. Hossain's Needs for Regular, Attentive Medical Care Can Be Met Only Though a Minimal Incarceration Sentence

Section 3553(a)(2)(D) requires that in fashioning a sentence that is "sufficient, but not

greater than necessary," the Court shall consider "the need for the sentence imposed to provide the defendant with needed. . . medical care. . . in the most effective manner." Simon v. United States, 361 F.Supp.2d 35, 43 (E.D.N.Y. 2005). As detailed above, Mr. Hossain needs close monitoring that can be met only through a sentence that permits him to have access to specialists, and in particular his own doctor with whom he has not only developed a critical doctor-patient relationship, but who is also familiar with his case and treatment. Keeping a man in his late fifties with diabetes and hypertension out of prison is vastly more reasonable than confinement that does not begin to offer anything like the level of monitoring and preventive care he will need to survive. United States v. Carmona-Rodriguez, 2005 WL 840464, at *4 (S.D.N.Y. 2005) (stating that Booker [543 U.S. at 259, and §3553(a)(2) "require judges to impose sentences that. effectively provide the defendant with needed medical care").

Accordingly, it is respectfully submitted that Mr. Hossain's medical conditions, in tandem with the mandate of §3553(a)(2)(D), compel a non-Guidelines sentence that includes a minimum term of imprisonment.

(d) For Purposes of Calculating the Advisory Guidelines, Mr. Hossain's Diabetes and Hypertension Warrant a Substantial Downward Departure

Mr. Hossain's physical condition, especially his diabetes and hypertension, warrant a downward departure pursuant to U.S.S.G. §5H 1.4 (physical condition). At 52, Mr. Hossain is nearly elderly by correctional standards, and courts applying the Guidelines in the pre-Booker era have granted downward departures for older people who are suffering from a variety of medical conditions. See United States v. Riccardi, 1998 WL 635882 (S.D.N.Y. 1998) (downward departure warranted in part because of defendant's health problems including "coronary artery disease, hypertension, elevated lipids, obesity and depression"); United States v. BlarekIl, 7 F.Supp.2d 192, 212 (E.D.N.Y. 1998) (downward departure warranted where court

concluded that the defendant had "an extraordinary and unpredictable impairment" because he had been HIV positive for 15 years although he had not developed discernable AIDS-related symptoms); United States v. Gigante, 989 F. Supp. 436 (E.D.N.Y. 1998) (Mafia boss granted substantial departure (262 months to 144) due to poor health (heart) and advanced age (69 years old)); United States v. Roth, 1995 WL 35676 (S.D.N.Y. 1995) (downward departure warranted under §5H 1.4 because defendant was 63 years old and suffered from a progressive incurable debilitating neuro-muscular disease); United States v. Velasquez, 762 F. Supp. 39, 40 (E.D.N.Y. 1991) (life-threatening cancer warranted downward departure).

Accordingly, when imprisonment poses a "substantial risk to the defendant's life," a downward departure is appropriate.

6. Mr. Hossain's Age and Low Risk of Recidivism Justify a Non-Guidelines Sentence

Mr. Hossain's age, and his corresponding non-existent danger of recidivism implicate four sentencing factors. Section 3553(a)(2)(C), which focuses on the need "to protect the public from further crimes of the defendant," is explicitly directed toward recidivism. The remaining three are §3553(a)(2)(A) (just punishment and promoting respect for the law), §3553(a)(2)(B) (deterrence), and §3553(a)(2)(D) (need for most effective medical care).

(a) Mr. Hossain's Age Puts Him At Greater Risk In Prison

Mr. Hossain is currently 51 years old, and will be 52 by the time of sentencing on February 12, 2006. As the literature now makes clear, older inmates (defined in the vast majority of jurisdictions as those more than 55 years of age) have a far more difficult time in prison. A review of Correctional Health Care, 2004 Edition (hereinafter "Correctional Health"), a publication by the Department of Justice and National Institute of Corrections address the age issue. It is subtitled Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill

Inmates.[7] It is respectfully submitted that pages 8-11 (as well as the cover and title pages) are relevant to Mr. Hossain's sentencing. [8]

For example, at page 8, Correctional Health reports that

> several important factors seem to speed the aging process for those in prison. These factors include the amount of stress experienced by new inmates trying to survive the prison experience unhanned; efforts to avoid confrontations with correctional staff and fellow inmates; financial stress related to inmates' legal, family, and personal circumstances . - -

Exhibit 69, at 8.52[9]

These factors "create … excessive stress for elderly inmates living in large state prison populations, often producing illness and debilitation as manifestations of decomposition." Exhibit 69, at 10 (citation omitted). As a result, it is not surprising, as Correctional Health reports, that "[t]he few reliable longitudinal studies of elderly inmates that have measured group-specific and overall health and functional status reveal accelerated signs of aging and deterioration of health among state inmates age 50 or older." Id. at 9.

Such a factor, previously irrelevant and inappropriate to sentencing, has since Booker been the basis, pursuant to analysis of the §3553(a) factors, for a non-Guidelines sentence below the advisory Guidelines range. See also Simon v. United States, 361 F.Supp.2d 35 (E.D.N.Y. 2005).[10]

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[7] The publication in its entirety is available online at http://www.nicic.orglDownloads/PDF/2004/0 18735 .pdf.

[8] While *Correctional Health* generally refers to state correctional institutions and inmates, there is not any indication that the problems suffered by elderly inmates in federal facilities - and particularly those who are first-time offenders - are materially different than those discussed in *Correctional Health*.

[9] Mr. Hossain, at 52, nearly qualifies as "elderly" for purposes of this analysis under the definition provided by *all* 49 state correctional agencies that responded to *Correctional Health's* inquiry on the subject. *See* Exhibit 69, at 9.

[10] Even under the mandatory Guidelines system, age served as the basis for downward departure in extraordinary situations. *See, e.g.*, United States v. Roth, 1995 WL 35676, at *1 (S.D.N.Y. Jan. 30, 1995) (63-year old defendant with neuromuscular disease had "profound physical impairment" warranting downward departure).

As a result, a defendant's age may warrant a lower sentence if, because of his age, the resulting sentence is greater than necessary to reflect the seriousness of the offense. See United States v. Lewis, 406 F.3d 11, 21-22 (Pt Cir. 2005) (remanding for re-sentencing because district court expressed concern that the guideline sentence of 319 months amounted to a life sentence for a 38-year old defendant).

Here, it is respectfully submitted that Mr. Hossain's age and precarious medical condition all combine to warrant a non-Guidelines sentence that includes minimal prison.

(b) Mr. Hossain Does Not Present a Realistic Risk of Recidivism

Even considering the issue, however, defendants over forty (40) years of age present a dramatically reduced danger of recidivism. That fact, when considered together with Mr. Hossain's long history as a law-abiding citizen, renders §3553(a)(2)(C) - the need to protect the public from any further crimes by the defendant - essentially irrelevant in this case. See United States Sentencing Commission, Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines, at 12 ("[r]ecidivism rates decline relatively consistently as age increases" from 35.5% for those under age 21 to 9.5% for those over age 50) (available at http://www.ussc.gov/publicat/Recidivism_General .pdf. See also United States v. Lucania, 379 F.Supp.2d 288, 297 (E.D.N.Y. 2005) ("[p]ost-Booker courts have noted that recidivism is markedly lower for older defendants"); Simon v. United States, 361 F. Supp.2d at 40 ("[t]he Guidelines' failure to account for this phenomenon [dramatically reduced recidivism rates for older offenders] renders it an imperfect measure of how well a sentence protects the public from further crimes"); Nellum, 2005 WL 300073, at *2 ("[t]he likelihood of recidivism by a 65 year old is very low"); Daniel Glaser, Effectiveness of A Prison and Parole System, 36-37 (1964); P.B. Hoffman & J.L. Beck, Burnout — age at release from prison and recidivism," 12 J.

Crim.Just. 617 (1984).

(c) The Goal of Deterrence Does Not In Any Way Require A Jail Sentence, as the Collateral Consequences Mr. Hossain Will Suffer As a Result of His Conviction Provide Sufficient Specific and General Deterrence

Deterrence is addressed expressly in §3553(a)(2)(B) and implicitly covered in §3553(a)(2)(A). Regarding specific deterrence, Mr. Hossain is a 51-year non-violent offender with no history of drug or alcohol abuse.

Moreover, the investigation, prosecution, and trial in this case have taken a demonstrable toll on Mr. Hossain, his health, and his family. No one reviewing the consequences of his conduct - loss of his livelihood, two years of immersion in the federal criminal justice system as a defendant, and the degeneration of his health - could or would view those as salutary, or worth the risk of criminal conduct. Nor, in that context, would anyone need convincing that imprisonment would not be required for Mr. Hossain to have received sufficient punishment.

(d) Sentencing in the Second Circuit Since Booker

Examining sentences in the Second Circuit generally since Booker also compels the conclusion that the advisory Guidelines yield to the other §3553(a) factors in determining the sentence. The United States Sentencing Commission has been tracking sentences since Booker, and the most recent statistics, *Sentencing Commission Special Post-*Booker *Coding Project* (Data Extraction as of June 1, 2006) (available at http://www.ussc.gov/Blakely/PostBooker), demonstrate that in the District Courts within the Second Circuit, there have been more sentences imposed below the advisory Guidelines range than in any other Circuit - 11.4 percent pursuant to a formal Guidelines departure, and another 13.9 percent "otherwise below the Guideline range."[11] In the Northern District of New York, the figures were 7.5 percent as a result of

[11] All figures discussed herein exclude government-sponsored departures.

downward departures and 6.5 percent "otherwise below the Guideline range." *See Special Post-*Booker *Coding Project,* at 16.[12] Nationally, before Booker, in 2003, 7.5 percent of all sentences were below the Guidelines range from departures or otherwise. In 2004, before the June decision in Blakely v. Washington, 542 U.S. 296 (2004), the total was 5.2 percent; and after booker the amount was 12.4 percent (3.2 percent and 9.2 percent, respectively). By contrast, in the Second Circuit the figures were 16.0 percent in 2003 and 13.6 percent in 2004 *(pre-Blakely).* As noted above, the post-Booker breakdown for the Second Circuit is 25.3 percent (11.4 percent and 13.9 percent). *See Special Post-*Booker *Coding Project*, at 7-8, 16.[13]

Historically, the Second Circuit has had a lower percentage of sentences within the Guidelines range generally (including all cases). While the national figures in 2003 and 2004 (pre-Blakely), respectively, were 69.4% and 72.2% of sentences within the Guidelines range, and 61.9% (2005 post-Booker), sentences within the Guidelines range in the Second Circuit are at 49.6 percent in 2005 (post-Booker), down from 63.2 percent (2003), and 63.8 percent in 2004 (pre-Blakely). For the first half of 2006, the number of sentences within the Guidelines range was 50.5 percent. Id.

Thus, sentences outside the Guidelines range in the courts within the Second Circuit are now essentially as common than those within the range (50.5 percent of sentences within the

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[12] Only the Eastern District of New York figures for sentences "otherwise below" the advisory Guidelines range within the Second Circuit were greater, 9.6 percent for downward departures and 22.4 percent were "otherwise below the Guideline range" *Id.* The District of Connecticut has a higher percentage of sentences below the advisory Guidelines (27.2%) than the Southern District, but 13.6% have been the result of formal Guidelines departures, with 13.6% attributable to sentences "otherwise below the Guidelines range." *Id.*

[13] In its March 2006 *Final Report on the Impact* of United States v. Booker *on Federal Sentencing* (hereinafter "Final Booker Report"), the United States Sentencing Commission's statistics established that post-Booker there has been an increase in sentences below the calculated advisory Guidelines range (not including government-endorsed downward departures). Final Booker Report, at 77. Many of the below-range sentences are based largely on the defendant's criminal history. While a criminal history score that overstates the defendant's record exists as a basis for downward departure, it also "consistently appears as one of the four most commonly cited reasons for the imposition of a below-range sentence under Booker*[.]" id.* at 78. Less frequently, sentencing courts have cited family ties and circumstances. *Id.* at 79. Courts are also more likely under Booker to explain how the specific purposes of sentencing would be better served by a below- range sentence. *Id*

Guidelines range, and 49.5 percent outside the range) - with sentences above the range accounting for only 1 percent of those outside the range.

(e) Justice Kennedy's Challenge Regarding Sentencing Policy

In the context of the financial cost of maintaining a person in prison, and the resources that cost diverts from other public priorities, Justice Kennedy cautioned that "[w]hen it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long." He concluded that "[o]ur resources are misspent, our punishments are too severe, our sentences too long." *Id.*

Justice Kennedy's sentiments are also fully consistent with 18 U.S.C. §3582(a)'s requirement that a sentencing court "recognize [that] imprisonment is not an appropriate means of promoting correction or rehabilitation." The Second Circuit figures since Booker (and, to a certain extent, even before Booker) reflect that reality, and establish that the District Courts possess the discretion to impose appropriate and "reasonable" sentences below the applicable Guidelines range. "The Guidelines must be interpreted in light of the traditions and purposes of sentencing in imposing the most *rational* sentences the system will permit." United States v. Osei, 107 F.3d 101, 104 (2nd Cir., 1997), *quoting* United States v. DeRiggi, 893 F. Supp. 171, 174 (E.D.N.Y.), *aff'd* 72 F.3d 7 (2nd Cir., 1995) (emphasis added by the Court in Osei).

In that context, the Court in Osei also quoted from Judge Leval's dissent in United States v. Kinder, 64 F.3d 757, 772 (2nd Cir., 1995) (Leval, J., dissenting), cert. denied, 516 U.S. 1121 (1996) to emphasize that

> the general statutory mandate governing the imposition of sentences, 18 U.S.C. §3553(a), directs courts to fashion a rational harmonious sentencing policy, furthering the enumerated goals of sentencing.

107 F.3d at 104.

Booker enhances that capacity to "fashion a rational and harmonious sentencing policy," and provides, via the factors set forth in §3553(a), the vehicle for "furthering the enumerated goals of sentencing." Here, as demonstrated above, it is respectfully submitted that a sentence that is both "harmonious" and "rational," and which furthers the "enumerated goals of sentencing," requires a non-Guidelines sentence.

As Justice Kennedy observed, despite a convicted defendant's illegal conduct, "[sjtill, the prisoner is a person; still, he or she is part of the family of humankind." See also Koon v. United States, 518 U.S. 81, 113 (1996) ("[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue").

7. Increasing Mr. Hossain's Criminal History Category From Category I to Category VI Grossly Overstates His Criminal History

The enhancement that assigns Mr. Hossain to Criminal History Category VI, resulting from the enhancement found in §3A1.4(b) of the advisory Guidelines, constitutes a gross overstatement of his criminal history because otherwise he would be in Category I. (See PSR at ¶85) The enhancement also undermines the structure of the Guidelines, and the role and purpose of the Criminal History category in maintaining individualized sentencing determinations.

Thus, even under a Guidelines calculation, there should be a substantial "horizontal" downward departure with respect to Mr. Hossain's Criminal History Category. In addition, even without a formal departure on that ground, the distortion created by §3Al .4(b) provides further compelling justification for a non-Guidelines sentence based on the factors set forth in §§3553(a)(1), 3553(a)(2)(A), (a)(2)(B) & (a)(2)(C).

As the Introductory Commentary to Chapter Four of the Sentencing Guidelines (entitled "Criminal History and Criminal Livelihood"), states, "[t]he Comprehensive Crime Control Act sets forth four purposes of sentencing. (See 18 U.S.C. §3553(a)(2).) **A defendant's record of past criminal conduct is directly relevant to those purposes.** A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment." (Emphasis added).

The statute to which the Introductory Commentary referred, 18 U.S.C. §3553(a), directs that the sentencing court, "in determining the particular sentence to be imposed, shall consider - (1) the nature and circumstances of the offense and the history and characteristics of the defendant[.]" 18 U.S.C. §3553(a)(l) (emphasis added). See also Castillo v. United States, 530 U.S. 120, 126 (2000) (noting that "[t]raditional sentencing factors often involve … characteristics of the offender, such as recidivism[,]" and citing the mandatory nature of §3553(a), as well as that under §4A1.1 of the Guidelines, the "sentence [is] based in part on defendant's criminal history").

Here, that balance between the offense and the offender has been irremediably disrupted by the classification of Mr. Hossain in Criminal History Category VI. In addition to ignoring the mandate of §3553(a)(1), and overstating Mr. Hossain's Criminal History score as much as possible under the Guidelines (from zero to the maximum), the enhancement precludes any retention of individualized sentencing of Mr. Hossain, because it effectively removes from advisory Guidelines consideration the only axis that integrates a defendant's background and history into the advisory Guidelines equation.[14]

[14] Justice Breyer, who chaired the Sentencing Commission, recounted the "trade-offs" that were part of the initial Sentencing Commission's compromises in formulating the Guidelines and their framework, including how the Criminal History Category was designed as the sole element that considered *offender* characteristics:

The only means of complying with the dictates of §3553(a)(l), is by departing downward based on Mr. Hossain's personal characteristics, and/or imposing a non-Guidelines sentence ground in the other sentencing factors listed above. Because the exclusion of consideration of the defendant's background and history in the ordinary advisory Guidelines calculation is typically offset by the Criminal History score, it is respectfully submitted that here the imbalance created by assigning Mr. Hossain to Criminal History Category VI can be rectified only by a substantial "horizontal" downward departure. See, e.g., Czernicki v. United States, 270 F.Supp.2d 391, 393 (S.D.N.Y. 2003) (JGK) (downward departure granted upon a finding that the Criminal History Category had overstated the defendant's criminal history).

In the alternative, the automatic placement of Mr. Hossain in Category VI should be remedied by a non-Guidelines sentence that accounts for the other §3553(a) factors that greatly outweigh the arbitrary application of the absolute and extreme horizontal Guidelines enhancement applied via §3A1.4(b). *See also* Final Booker Report, at 78 (excessive Criminal History Category constitutes one of the four most common reasons *post*-Booker for non-

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> [o]ne important area of such compromise concerns "offender" characteristics. The Commission extensively debated which offender characteristics should make a difference in sentencing; that is, which characteristics were important enough to warrant formal reflection within the Guidelines and which should constitute possible grounds for departure. Some argued in favor of taking past arrest records into account as an aggravating factor, on the ground that they generally were accurate predictors of recidivism. [] Others argued that factors such as age, employment history, and family ties should be treated as mitigating factors. []
>
> [e]ventually, in light of the arguments based in part on considerations of fairness and in part on the uncertainty as to how a sentencing judge would actually account for the aggravating and/or mitigating factors, the Commission decided to write its offender characteristics rules with an eye towards the Parole Commission's previous work in the area. [I As a result, the current offender characteristics rules look primarily to past records of convictions. They examine the frequency, recency, and seriousness of past crimes, as well as age, treating youth as a mitigating factor. The rules do not take formal account of past arrest records or drug use, or the other offender characteristics which Congress suggested that the Commission should, but was not required to, consider. [I In a word, the offender characteristics rules reflect traditional compromise.

See Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1 (Fall 1988), at 19-20 (footnotes omitted).

Guidelines sentences imposed below the calculated range).

8. The Combination of Grounds Compels Either a Downward Departure, or a Non-Guidelines Sentence, for Mr. Hossain

Also, even if any or all of the above-listed grounds for downward departure are insufficient on their own, together they compel downward departure for Mr. Hossain, as the combination of individual factors can collectively warrant departure. See, e.g., United States v. Mateo, 299 F. Supp.2d 201 (S.D.N.Y. 2004); United States v. Allen, 250 F. Supp.2d 317 (S.D.N.Y. 2003); United States v. Bruder, 103 F. Supp.2d 155, 190 (E.D.N.Y. 2000).

In fact, the Guidelines themselves contemplate such departures. The Commentary to §5K2.0 instructs that:

> [t]he [Sentencing] Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.

Commentary, §5K2.0, U.S.S.G.

While the Commentary to §5K2.0 adds that "the Commission believes that such cases will be extremely rare[,]" it is respectfully submitted that this constitutes an "extraordinary case" in which, either separately or combined, the above-discussed factors compel a substantial downward departure for Mr. Hossain.

The combination of factors is also relevant to the evaluation of the pertinent §3553(a) factors. Even if they do fit within the narrow grounds for departures under the Guidelines, they nevertheless certainly are within the far broader ambit of the factors set forth in § 3553(a), and individually and/or collectively warrant a non-Guidelines sentence below the range previously imposed.

9. A Non-Jail Sentence is Certainly Available for Mr. Hossain

In addition, regarding "the kinds of sentences available" [§3553(a)(3)], a non-Guidelines sentence is certainly available for Mr. Hossain, whose counts of conviction do not include any mandatory minimum terms. Accordingly, analysis of the factors in §3553(a) certainly justifies a non-Guidelines sentence. Such a sentence would be in accordance with §3553(a): "sufficient, but not greater than necessary" to achieve the purposes of sentencing.

Viewed in the context of *all* of the factors listed in *§3553(a),* Mr. Hossain's medical condition, his personal history and background, and the nature of his offense conduct, whether reaching the level of a departure, or simply justifying a sentence outside the advisory Guidelines, make a sentence that does not include imprisonment wholly just and appropriate, and, in compliance with the directive in §3553(a), "sufficient but not greater than necessary" to achieve the goals of sentencing.

Indeed, in light of the impact any incarceration will have on Mr. Hossain's health, the *only* factor militating in favor of imprisonment are the advisory Guidelines themselves. There is no other rationale for committing Mr. Hossain to prison.

Accordingly, for all the reasons set forth above, it is respectfully submitted that due to, inter alia, Mr. Hossain's serious and life-threatening medical problems, the fact that his offense conduct was demonstrably outside the "heartland" for the offenses of conviction, the lack of any genuine threat of recidivism or need for specific or general deterrence, and the absence of any criminal record until the government sent Malik into his life, a sentence that does not include incarceration be imposed upon Mr. Hossain because it would be "sufficient, but not greater than necessary" to achieve the enumerated purposes of sentencing.

In the end, the government admitted that it induced Mohammed Mosharref Hossain to engage in the acts. It admitted that it could not establish his predisposition by prior conduct or prior similar activities, and was left with one angle of proof: that Mohammed Mosharref Hossain readily accepted the offer. This was not, however, a ready acceptance comparable to typical ready acceptance crimes like prostitution, where there is a solicitation by a prostitute and an acceptance. There is immediacy. Here, however, the government's agents worked on Mohammed Mosharref Hossain to get him to act, not for minutes, but for almost six (6) months before he had any dealings that could possibly constitute an offense. Malik used religion and money and reassurances to Mohammed Hossain, all with the goal to get Mohammed Hossain to commit an offense.

Lynne Stewart, was charged and convicted of the same offense as Mohammed Mosharref Hossain. Her conduct, however, was found to be different and volitional and informed. Mohammed Mosharref Hossain's was not. Lynne Stewart faced the same sentencing guidelines that are now faced by Mohammed Hossain including acceleration of the Category I Criminal History category to Category VI, and the same guideline statutory range (See Government Sentencing Memorandum at pages 5–16) Ms. Stewart was white female lawyer who suffered from physical ailments at the time of her sentencing. Mohammed Mosharref Hossain is a high-school educated pizza maker. He didn't seek out Malik; Malik sought him out. Mohammed Mosharref Hossain did not propose criminal plans with Malik; he resisted in significant and strong statements to Malik. He acted in the fashion he did only after Malik had worked him over. Malik had softened him up and a much smarter, much craftier Malik, managed by experienced FBI agents, were able to get a pizza maker to help them, and thereby become a criminal.

Ms. Stewart was sentenced by United States Southern District Judge John G. Koeltl to 28 months in prison, rejecting the government's argument for a guideline sentence, the same argument made by the government with respect to defendant Hossain. Mohammed Mosharref Hossain should be sentenced to no more than Lynne Stewart.

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Respectfully submitted,

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