UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
v.	:	**No. 5:03-CR-0064-01** (Norman A. Mordue, Ch.J.)
RAFIL DHAFIR,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM FOR RESENTENCING ON REMAND

The defendant, Rafil Dhafir, will come before this Court on January 5, 2012, for resentencing on remand following appeal. See United States v. Dhafir, 577 F.3d 411 (2d Cir. 2009); see also 342 Fed.Appx. 702 (affirming conviction). Rather than decide the contested issue concerning the money laundering guideline, however – the issue that this Court addressed in its Memorandum-Decision of August 31, 2005 – the Court of Appeals remanded pursuant to United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005), for a discretionary resentencing – not necessarily tied to the Guidelines range, even after that range has been reconsidered. 577 F.3d at 415. In the interim, the Supreme Court has made clear that post-sentence developments affecting the defendant's circumstances can and should also be considered at a resentencing. See Pepper v. United States, 562 U.S. —, 131 S.Ct. 1229 (2011). Dr. Dhafir has now been incarcerated since his arrest on February 26, 2003 – a period of nearly nine years – on the sentence of 22 years that this Court imposed in late 2005. After deductions for good conduct, this is the time that someone would serve on a sentence of more than ten years.[1] Upon reconsideration pursuant to the mandate, the

[1] Eight years and eleven months equals 107 months. If they receive all the good conduct time to which they may be entitled, federal prisoners serve about 87% of the sentence imposed. See Barber v. Thomas, 560 U.S. —, 130 S.Ct. 2499 (2010). Thus, the full-term equivalent of 107 months

Court should conclude that its sentencing judgment might well be affected by a corrected Guidelines calculation, redetermine the Guidelines as discussed below, and then resentence Dr. Dhafir to a shorter term, granting a significant variance. His current Bureau of Prisons Progress Report (11/29/11) (on which PSR Add'm 4 is based) shows that he has used his time as constructively as possible during the last nine years, taking and teaching numerous educational courses. He has achieved positive reports when he has been able to work, receiving credit for volunteering and exhibiting a "positive personal character." (Prog.Rpt., at 15). The downward variance allowed on resentencing should be greater, under Pepper, than the Court granted initially.

Under the framework established in United States v. Booker, 543 U.S. 220 (2005), the defendant suggests that a sentence of time served (essentially, a ten-year term) would equal or exceed the punishment which is "sufficient but not greater than necessary" – and thus the lawful sentence – to achieve, in this case, the purposes of the criminal justice system outlined in 18 U.S.C. § 3553(a)(2). The Court might reasonably reach this conclusion in either of two ways. First, the Court could (and should) recognize that the defense guideline calculation was correct. This would lead to approximately a 35% reduction in the Guideline-suggested sentence; with a variance of only a couple of years more than previously granted, a sentence at or near time served would result. Alternatively, either adhering to its original calculation or pretermitting a recalculation (as authorized by the Second Circuit decision), the Court could (and should) grant variances on the grounds of Dr. Dhafir's age, health, good motives, atypically harsh conditions of confinement for the last five years, unwarranted sentencing disparity, and lifelong positive contributions to his

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served is obtained by this mathematical formula: 107/0.87=123. Accordingly, "time served" on a sentence of ten years would be a little less than the period for which Dr. Dhafir has already been incarcerated.

community. Those case-specific considerations should lead the Court to the sentence suggested by the defense.

A. Background. Rafil Dhafir, a naturalized U.S. citizen, respected oncologist, devoted husband, brother and uncle, and leader in the Muslim community of central New York State, was convicted and sentenced on charges arising out of his operation of a religious charity, Help the Needy ("HTN"). In direct violation of the U.S. law that enforced a United Nations-endorsed trade embargo and sanctions against the bellicose and tyrannical regime of Saddam Hussein, HTN (as did several other religiously-motivated groups, Christian and Muslim alike) raised funds to send food and medicine to Iraqi civilians between 1994 and 2003.

Dr. Dhafir was indicted on February 19, 2003, and charged with conspiracy, in violation of 50 U.S.C. § 1705(b), to evade the United States sanctions in place against Iraq which had existed by Executive Order of the President since 1990. The indictment also alleged a conspiracy to transfer funds out of the United States to promote violations of the sanctions, 18 U.S.C. § 1956(h), and twelve particular transfers for that purpose, id.(a)(2)(A). A third superseding indictment filed April 21, 2004, included additional charges: conspiring to defraud the IRS in relation to the calculation of income tax due from donors to HTN (by falsely claiming that HTN was an approved § 501(c)(3) charity), 18 U.S.C. § 371; mail and wire fraud against HTN donors involving false assurances that contributions would be tax deductible and would be spent in certain specific ways, id. §§ 1341, 1343; evasion of personal income tax by claiming deductions for his own substantial contributions to HTN, 26 U.S.C. § 7102; and a separate set of counts charging health care fraud (relating to certain Medicare billings for the administration of chemotherapy), id. §§ 1001, 1347. Following a lengthy trial in 2004, the jury convicted Dr. Dhafir on 59 of 60 counts, acquitting him of one.

On October 27, 2005, this Court imposed sentences cumulating to 22 years' imprisonment, with three years of supervised release, no fine, and $5900 in special assessments. For a variety of reasons under 18 U.S.C. § 3553(a), the Court thus imposed a sentence it believed to be five years (more than 18%) below the bottom of the applicable Guidelines range. On January 24, 2006, the court issued a memorandum and order pursuant to 18 U.S.C. § 3664(c)(5) directing payment of $865,272.76 in restitution to five recipients.

On direct appeal, Dr. Dhafir raised several issues concerning his convictions. He also challenged the calculation of the sentencing guideline range for money laundering, on which his sentence was premised. On August 18, 2009, the Court of Appeals rendered its tandem opinions. Dr. Dhafir's convictions were affirmed, 342 Fed.Appx. 702, while the sentence was vacated and remanded. 577 F.3d 411. Without deciding the defendant's argument that the money laundering guideline had been erroneously calculated, the panel nevertheless held that this Court would be free on remand to pretermit a new guideline calculation if it concluded that a particular sentence should be imposed under § 3553(a) in any event.[2] The Supreme Court denied certiorari on June 7, 2010.

B. Application of the Statutory Factors. The Court's duty, in this as at every sentencing, is to determine and impose the punishment which is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to achieve the various purposes of criminal justice in the case at hand. The Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), as explained and reinforced in Rita v. United States, 551 U.S. 338 (2007), makes that judgment readily available

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[2] Both parties petitioned for rehearing. Both petitions emphasized Supreme Court precedent holding that a correct guidelines calculation by the district court is necessary to the imposition of a reasonable sentence under the governing law. (The government contended that this Court's calculation was correct, and the sentence should therefore be affirmed. The defense argued that because the calculation was incorrect, a remand for a full resentencing was necessary.) These petitions were denied.

without the need to justify any "departure" from the U.S. Sentencing Guidelines. No sentence can lawfully be imposed unless a lesser punishment would not be "sufficient," id. § 3553(a), to accomplish the legitimate purposes of criminal sentencing, as applied to the defendant's particular case.

1. *The applicable guideline range – 18 U.S.C. § 3553(a)(4)*

This Court should decline the Court of Appeals' invitation, see 577 F.3d at 415, which is not a directive, to shortcut the resentencing by avoiding a determination of the applicable Guidelines range. After all, the statute requires this Court to at least "consider" the range pursuant to 18 U.S.C. § 3553(a)(4). A district court therefore "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall, 552 U.S. at 49. There may be an exception where the facts are complex but the outcome of a time-consuming hearing would be moot, see United States v. Cavera, 530 F.3d 180, 189 (2d Cir. 2008) (en banc), but it is better not to apply that exception to avoid a purely legal determination of the applicable range. Otherwise, the Court cannot know whether its sentence creates unwarranted disparities on a national level.

The final amended PSI, following this Court's Memorandum-Decision and Order of August 31, 2005 (Doc. 524), calculates a guidelines Offense Level of 41 and Criminal History Category of I. The resulting range would be 324-405 months. PSI Second Add'm, at 6. The Probation Officer's opinion, prior to the government's objection, was that the total offense level was 37; PSR ¶ 83, at 28. This calculation, four levels lower, was correct. The range at that level would be 210-262 months. The sentence this Court imposed at the original sentencing equals 264 months, higher than the top of the proper range.

Of all the offenses for which petitioner was convicted, the counts with the greatest impact on the sentencing guidelines determination are the international money laundering charges. As the

defense contended at the original sentencing and on appeal, the court should apply USSG § 2S1.1(a)(1) (2002 ed.), which provides that the base level is the "offense level for the underlying offense from which the laundered funds were derived, whenever (A) the defendant committed the underlying offense ...; and (B) the offense level for that offense can be determined." The government has never denied, and the Court of Appeals did not dispute, that the plain language of the applicable guideline supports the defendant's position. The parties and the Probation Officer agreed for purposes of sentencing that Dr. Dhafir had committed the underlying offense "from which the laundered funds were derived" (mail fraud, i.e., HTN's fund-raising) and that the offense level for that offense could be determined (PSR Add'm, pp. 1-2). This Court ruled, however, that because the money laundering counts were not "based on the source of the funds but rather on the offense which their transfer was intended to promote[,] ... the source of the funds is immaterial." Doc. 524, at 4. The Court thus calculated the base offense level as if Dr. Dhafir were a third-party money launderer under § 2S1.1(a)(2). But USSG § 2S1.1 does not ask whether the defendant has been convicted of a money laundering offense with a "proceeds" element, on the one hand, or one based solely on promotion of an offense, on the other. It simply asks whether the laundered funds were in fact the proceeds of an offense the defendant committed. Here, based on the evidence and the government's own theory of the case, the answer to that basic question was "yes." Accordingly, subsection (a)(1) of § 2S1.1 unambiguously applies, not subsection (a)(2).

In designing this Guideline with great care, the Sentencing Commission drew no distinction between "proceeds" money laundering and "promotional" money-laundering. Instead, it chose to focus on whether the defendant was involved in the underlying offense or was, on the other hand, a "third-party" money launderer. In United States v. Menendez, 600 F.3d 263, 267-68 (2d Cir. 2010), the Second Circuit recently discussed the structure of § 2S1.1 and agreed with the analysis ad-

vanced here by defendant Dhafir. While the Commission failed to note that there are some subsections of §1956 that focus on "promotion" of criminal activity only, and do not depend on the funds being "proceeds" of an underlying unlawful activity, it is much more likely that the Commission, had it expressly addressed such cases, would have adhered to its basic first-party/third-party distinction, and assigned them to subsection (a)(1), where (as here) the defendant had in fact committed (or intended personally to commit) the illegal activity that the laundering was designed to promote.

This Court's 2005 analysis of the base offense level to be applied as 40 rather than 37 also resulted in grouping of the money laundering conviction with the IEEPA conspiracy count, which pushed the final offense level to 41. See PSR, 2d Add'm ¶ 2, at 1. As is apparent from a comparison of the calculation contained in the original PSR (which applied § 2S1.1(a)(1) and grouped the money laundering with the fraud and tax counts) with that contained in the Second Addendum to the PSR, the selection of the incorrect base offense level and the resultant grouping of offenses led to a total offense of 41 (324-405 months), rather than of 37 (210-262 months) – a potential difference of nearly ten years' imprisonment. *Compare* PSR ¶ 83, at 28, *with* PSR, 2d Add'm ¶ 41, at 6.

Thus, this Court began its § 3553(a) analysis at the original sentencing in October 2005 four levels higher than it needed to. Although the Court ultimately imposed a sentence below the incorrectly inflated Guideline range, the reduction proceeded from an artificially high starting point. See Sent. Tr. at 39 ("Taking into account all of the required factors, the Court finds that the purposes of 3553(a) are satisfied by a sentence below that recommended by the Guidelines."). The correct range is 210-262 months, and the sentence ultimately imposed was above, not below that range.

The Second Circuit described this Court's choice of § 2S1.1(a)(2) as "avoid[ing] the odd result that Dhafir would receive a lower sentence if the laundered money was 'criminally-derived' than if it was 'legally-obtained.'" 577 F.3d at 415. But the distinction between (a)(1) and (a)(2)

drawn in the Guideline was arrived at by the Commission after a lengthy examination of all the competing policy issues involved in sentencing for the federal offense of money laundering, which covers a wide range of divergent criminal activity. See USSG appx. C, amend. 634 (2001).[3] The Commission concluded that someone who commits an offense and then "launders" the proceeds should be regarded, for sentencing purposes, primarily as having committed a somewhat aggravated form of the underlying offense. That is the paradigm (a)(1) case. Someone who launders the proceeds of another's offense, on the other hand, should be treated as a money launderer, under (a)(2).

A variance based on a policy disagreement with the Guidelines is certainly an option available to this Court at sentencing in appropriate cases. United States v. Kimbrough, 552 U.S. 85, 102-08 (2007) (affirming district court's decision to sentence less harshly because of its disagreement with the crack Guidelines); United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (justifying policy variance from child pornography guidelines in appropriate cases). Nevertheless, this Court in 2005 did not "vary" (upward) because of a disagreement with the Commission's design of the applicable Guidelines provision; instead, the Court sentenced Dr. Dhafir under a Guidelines provision which did not, on its face, apply to him. To resentence now at the same level but call it an upward variance, however, would be singularly unwarranted.

Kimbrough distinguishes between Guidelines which "do not exemplify the Commission's exercise of its characteristic institutional role," 552 U.S. at 109, and those which were formulated based on special expertise, study and national experience. The guideline at issue here stands at the polar opposite from the crack guideline in this respect. The Sentencing Commission conducted a

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[3] To the extent there is any ambiguity within the Guidelines, it involves how to apply the first party/third party distinction in cases (unlike this one) where the funds are *not* criminally derived. See Doc. 524 (Mem.-Dec.), at 5; 577 F.3d at 415. If and when such a case actually arises, there will be time enough to grapple with that question then.

comprehensive analysis of the amendment to § 2S1.1 over a period of approximately ten years. Much of its attention was focused on promotional money laundering, the specific type at issue here. See U.S. Sentencing Comm'n Money Laundering Working Group Report (1995).[4] Section 2S1.1 therefore exemplifies the Commission's "exercise of its characteristic institutional role" at its very best. Accordingly, a "Kimbrough variance" rejecting the Commission's judgment without acknowledging and justifying a rejection of its considered rationale would surely be subject to "closer review" on appeal. See Kimbrough, 552 U.S. at 109.

For these reasons, and in light of the Second Circuit's intervening Menendez decision explaining the (a)(1)/(a)(2) distinction in USSG § 2S1.1, this Court should reconsider its August 2005 sentencing ruling and hold that the "starting point" for variance – that is, the bottom of the applicable Guidelines range in this case – is 210 months, not 324 months.

2. *History and characteristics of the offender – 18 U.S.C. § 3553(a)(1) (in part)*

At the original sentencing on October 27, 2005, this Court imposed a sentence five years below what it determined to be the bottom of the Guidelines range, as a variance pursuant to Booker. Explaining this decision, the Court noted:

> In considering the 3553(a) factors, the Court recognizes that this defendant has never been involved with the criminal justice system in his 57 years. Additionally, the Court cannot overlook the highly favorable conduct of the defendant in the past. I have received many, many letters, [the] overwhelming majority of which praise the defendant for his care to his patients and to their families.
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> The defendant has had a very positive influence within the Muslim community of Central New York. He has not only been a leader with the Muslim community, but he was the moving force behind the building of the mosque in Syracuse. It is unquestioned that he gave guidance, shelter, clothing, jobs, and assisted in furthering the education of several newly arrived immigrants from the Middle East.

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[4] Available at: http://www.ussc.gov/moneylau/MONILAUN.HTM .

> The Court is not unmindful of the fact that this defendant now stands before the Court stripped of his stature within the community, never to return to his practice of medicine, and knowing that his finances and assets are [lost to him and his family].

Tr. Sent. (10/27/05), at 38-39. All of these facts remain equally true today – except, of course that the defendant is now over 63 years of age – and there are many more that justify a sentence even further from the bottom of the range.

At the original sentencing, the Court considered and gave significant weight to 41 letters from members of the community, including many of Dr. Dhafir's former patients. The expressions of affection, appreciation and support contained in those letters remain valid, and the Court should once again take them into consideration. In connection with this resentencing, the defendant is submitting another 64 new letters.[5] These reaffirm Dr. Dhafir's overwhelming positive role in the lives of others as a neighbor, co-congregant, friend, family member, co-worker and mentor.

The people whose words of support are collected in these letters are diverse. They hail from throughout the U.S. as well as from Canada, England, Germany, and Ireland. Many, of course, are from New York, Dr. Dhafir's home state. Some are doctors, like Rafil; others are nurses, teachers, activists, engineers, students, auto mechanics, artists, professors, politicians, attorneys. Some letter-writers have known Rafil almost their entire lives; many know him through a particular act of kindness or charity that he performed for them or their family. Others have never met Dr. Dhafir, but were moved to support him after witnessing the demoralizing impact that his conviction and subsequent incarceration have had on his local community. Still others – an impressive number – did not know Rafil before he was arrested, but have struck up a written correspondence with him since his incarceration began. Several others are renowned international figures. What these supporters hold

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[5] A packet containing the originals of these letters, with a table of contents indexing them, is being submitted to the Court (and served on the government) for review along with this memorandum.

in common is a deep appreciation for Dr. Dhafir and his life's work, and a heartfelt wish that he be released from imprisonment soon, so that he can resume his life of service to patients, community and family.

Perhaps the greatest gifts that Rafil Dhafir shared – and continues to share – with others were the gifts of his own labor. As a physician, Rafil was not only highly accomplished in his field of oncology, but a beloved doctor who regularly went beyond the call of duty to heal his patients. Gordon Waugh, a resident of Vernon, NY, describes in his letter the compassionate care that Dr. Dhafir provided to Gordon's ailing wife, Priscilla, for cancer. Throughout the fourteen years that Rafil treated her, Gordon writes, Rafil "always made my wife feel special .... [I]f he thought she was having a bad day he would call to check on her." Gordon's daughter, Cheri-Lee Waugh-Ellert, is also immensely grateful for the committed emotional and medical support with which Dr. Dhafir provided her mother over the years, and says that many of his patients feel the same way.

The Waugh-Ellerts' appreciation of Dr. Dhafir's professional empathy and generosity is no exception. Many former patients remember Rafil as a doctor who was sincerely invested not only in the physical, but also in the emotional and mental, well-being of his patients. Tanweerul Haq, of Tully, NY, describes with fondness the appreciation that his friend Khaja felt after Rafil treated his wife for cancer: "Khaja still remembers [Rafil] for his competent care, cheerful manner and sincere concern for his wife." The Waugh-Ellerts' experience of Dr. Dhafir's financial generosity was also typical.[6] Rafi Ziauddin, a resident of West Chester, PA whose father immigrated to the U.S. to practice medicine around the same time as Rafil did, remarks in his letter that the magnanimity that

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[6] See letters from Jean DeSocio, Rafi Ziauddin, Yaser Alkhooly, Khaled Khatib, and Azhar Ghori for additional accounts of the excellent medical care that Dr. Dhafir provided to patients, often for free or at reduced cost.

Rafil exercises in his practice is quite exceptional. In fact, as Mr. Ziauddin points out, even Dr. Dhafir's choice to establish his medical office in Rome, NY, was motivated by a prioritization of people over money. While setting up his oncology practice in Syracuse would have almost certainly have earned Rafil significantly more income, he instead decided to locate his practice in the smaller city of Rome, which was in greater need of cancer specialists. Letters from other medical practitioners and colleagues corroborate patients' accounts of Dr. Dhafir's outstanding kindness and effectiveness.

It is apparent from the 64 new character letters collected here that although Rafil's hard work as a physician was rewarded with financial and social success in America, he has never hoarded these benefits for himself. This also applies to the monetary fruits of his labor: Rafil was a noted donor to a variety of charitable causes in his local community. Friends, acquaintances, and even complete strangers in Rafil's social and religious communities never had to hesitate to ask him for help when they were in financial trouble or needed a loan for a project. If the cause was constructive, Rafil would volunteer. Ashraf Attia, a Professor of Business Administration at SUNY Oswego, was touched when Rafil helped a local K-8 school expand by lending half of the money it needed to purchase a second building. Though the Ihsan School of Excellence was not able to return any of his money for some time, Rafil remained adamant that they not worry about doing so until they were absolutely sure they could afford to. He collected the money from them three years later, without complaining and without taking any interest on the loan.

Other letters also chronicle Rafil's selfless philanthropic efforts. No request was too small – or too large – to merit his attention. One letter-writer who knew the defendant from their mosque

relates that in the religious community Rafil's reputation for munificence was "unsurpassed."[7] Dr. Dhafir sponsored mosque members who wished to complete the Hajj, the pilgrimage to Mecca that is a sacred duty to Muslims; it was Rafil who advanced the money immediately when their mosque, the Islamic Society of Central New York (ISCNY), needed a new water fountain; he was a frequent donor to charities serving the poor in Syracuse.[8] Omanii Abdullah, a professor at Syracuse University who attended ISCNY services with Dr. Dhafir for many years, knew that he could turn to Rafil for help when his stepson encountered legal troubles and needed money to hire an attorney. As was the case with the Ihsan School, Omanii could not pay Rafil back for several years, but during that time Rafil never mentioned the debt.

Based on these testaments to Rafil's local generosity, it seems natural that his philanthropic instincts should extend beyond national borders, too. Numerous letters submitted on Dr. Dhafir's behalf fully acknowledge that Dr. Dhafir's methods in operating Help the Needy were indeed illegal, but plead simply that his actions be placed in a humanitarian context. Davorka Lovrekovic is a German citizen who married an Iraqi man in the early '90s. She witnessed the devastating impact upon her husband and his family when her father-in-law died in 1994 due to lack of proper medication in the hospital where he was committed – a result (as Davorka sees it) of the economic sanctions that were then in place against Iraq. These facts, while not providing a defense, tend to explain and thus mitigate the need for punishment.

Rafil's advocates also include American, Canadian, and British citizens who, like him, made efforts to alleviate the humanitarian crisis that unfolded in Iraq in the 1990s. Many of these activists traveled to Iraq themselves during that decade to witness the effects of their countries' economic

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[7] Joseph Bailey Soule letter, at 1.

[8] Ahmed El-Kortas letter, at 1; Tanweerul Haq letter, at 1.

sanctions against Iraq.[9] Mairead Maguire, a 1976 Nobel Peace Prize laureate, visited Iraq in 1999 as a member of a Fellowship of Reconciliation interfaith delegation. Her letter recalls a stop at the Al Mansour Pediatric Hospital, where she "saw children ill and dying from malnutrition …. It was all the harder to witness this knowing that the children [we]re dying not as a result of natural disasters, but from preventable diseases, and [that] many could have been saved if only the U.S. and UK, UN-sponsored sanctions had been lifted." Irene MacInnes, a retired social worker and grandmother of nine from Vancouver, reiterates this sentiment. She visited Iraq twice over the course of the UN sanctions and, as "a mother and grandmother … kept thinking of how dreadful it must have been for the [Iraqi] parents to hopelessly watch their children dying, often in pain." Denis Halliday, who resigned from his position as United Nations Humanitarian Coordinator for Iraq in 1998 to protest the UN sanctions against that country, was moved by his experience of the devastation wrought by those sanctions to write a letter in support of Dr. Dhafir. Hans Von Sponeck, Halliday's successor as the UN Humanitarian Coordinator for Iraq, also resigned from that post because of the impact of the UN sanctions against Iraq. He, too, has submitted a letter on Rafil's behalf. It was this same massive human need in Iraq to which Rafil was responding when he began organizing the sending of money and supplies to that country in the '90s.

Although his attempts to help Iraqis did surely violate U.S. law, as the jury found, Dr. Dhafir retains a deep affection for America and its principles. "He has always spoken highly of the opportunities that the US has been able to grant him," Rafil's niece Claire Dhaffir shares in her letter.[10] Her uncle Rafil's love of this country, which has been his home for over thirty years, became

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[9] Letters by the following supporters discuss participating in such trips to Iraq: Anthony Arnove; Ed Kinane; Raid Mohammad; Susan Davies; Irene MacInnes; Michael Randle; Mairead Maguire; Hans Von Sponeck; Denis Halliday.

[10] Her branch of the family spells the surname differently.

evident to Claire, a British citizen, when he invited her to America for a visit and excitedly showed her his favorite sites in New York, Ohio, and Washington D.C. "He is very proud of being an American citizen," agrees James Evison, a close friend of Claire's. On a broader philosophical note, Raid Mohammad points out that Rafil made the conscious decision to come to the U.S. to practice medicine in the '70s even though the majority of Iraqi expatriate doctors were choosing to settle in the U.K. instead. In Raid's words, "The fact that … Rafil Dhafir chose to migrate to the US despite the deteriorating economic situation in the US [at that time] and despite its unpopularity in the Middle East indicates to me that [he] was way ahead of his peers in the sense that he was looking to live in a more progressive society."

Those very same qualities of vision and quiet strength made Dr. Dhafir an anchor for his religious community. Albaraa Salama, an engineering student at Binghamtom University who attends ISCNY, sums up a popular view of the defendant when he observes that because Rafil "had no children of his own ... he treated the entire community [in Syracuse] as his immediate family." If the Syracuse Muslim community serves as an extended family for its members, Rafil was surely one of its patriarchs, and his long absence from it during his incarceration has stung that community like the loss of a father. Many adult members of ISCNY recall fondly the friendships that they forged with Rafil when they were children and he an esteemed elder in the community. "As a youth growing up in the inner city of Syracuse he taught me the value of respecting myself and others, most importantly to serve and protect our neighbors," writes Steven Abdel-Aziz. Steven, now a successful auto mechanic, took Rafil's example to heart by becoming a mentor in his community, volunteering at the North Side Learning Center for adult literacy in Syracuse.[11]

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[11] Ashraf Attia, the professor at SUNY Oswego, also mentions that Dr. Dhafir imparted similar lessons in social responsibility to Ashraf's son, Mohamed. Since Mohamed was five years old, Rafil

For others, Rafil's impact as a teacher has been multi-generational. Nayma Kose, an attendee of the ISCNY mosque, remembers finding much-needed support and advice in Rafil after she immigrated from Kuwait to Syracuse as a teenager during the Gulf War. The two remained close friends, and Rafil was one of the first people to hold Nayma's daughter, Nur, when she was born. Nur is now 12, and although Rafil has been incarcerated for three quarters of her life, Nur still benefits from his mentoring, frequently exchanging letters with him. In writing to Nur, Nayma notes, Rafil "encourage[s] [Nur] to study hard, be patient in all of life's setbacks and most importantly to reach for all that God has to offer."[12] Despite his frequent provision of advice and firm guidance to those in need, Rafil has never been harsh or cold in his exercise of authority. The words "warmth" and "kindness" appear often in friends' and family members' descriptions of Rafil.[13] Several letters mention that Rafil's affability becomes immediately evident in his practice of affectionately hugging new acquaintances and old friends alike.[14]

Given this commitment to mentoring people of all ages, it should come as no surprise that Rafil has continued to assume community-building and counseling roles in prison. Jack and Felice Cohen-Joppa, peace activists who correspond with Rafil by mail, write that they have been "impressed with Dr. Dhafir's accounts of his efforts to help the younger men in his unit cope constructively with the frustrations and deprivations of imprisonment, and not direct their anger inappropriately at each other nor [at] prison staff…" Claire Dhaffir, Rafil's niece, also confirms that her uncle

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taught him and other members of "the younger generation how to positively contribute and give back to the society at large."

[12] Karima Johnson's letter expresses a similar wish that her three sons could benefit from Dr. Dhafir's good example at mosque.

[13] See, for instance, letters from William Yost, Azhar Ghori, Karen Quick, Mazin Dhafir, Ahmed El-Kortas, and Susan Davies.

[14] See William Yost's and Sol Salahou and H. Salawu's letters.

"has … made every effort to help his fellow inmates and to share his knowledge and compassion."

And yet, according to the letters, Rafil's grace and thoughtfulness are by no means limited to the people whom he has met. Since entering prison, Rafil has struck up correspondence with dozens of people whom he did not know, or barely knew, before beginning his sentence. Many who have submitted letters in support of Rafil for this resentencing describe forging profound and inspiring connections with Rafil through their written communications with him.[15] This man, who bears so many physical and emotional burdens in his old age, finds time each day to write letters to his scores of correspondents – letters that do not dwell on the difficulties of his own situation in prison, but rather take an active interest in the lives of others. Several letters included in the resentencing packet express appreciation for Rafil's ability to comfort and advise his correspondents even as he remains incarcerated and suffers from serious health problems. Linda Bergh, who has corresponded with Dr. Dhafir for years, was grateful for Rafil's words of concern and comfort when her husband Gary died in 2007. Jean Shaterian, who also knows Rafil only through the letters they exchange, says that Rafil has helped her throughout her own struggles with chronic pain.

Though his eternally positive attitude is indeed inspiring, most people who are in regular contact with Rafil gradually piece together the difficult realities of his daily life in prison. Nearly every letter being submitted to this Court in support of Dr. Dhafir on resentencing expresses concern about the severe conditions that he endured in the Communication Management Unit at FCI Terre Haute from 2006 through 2011. As discussed later in this memorandum, Rafil's deteriorating health, and the lack of proper medical care available to him in prison (and at the CMU in particu-

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[15] People who have come to know Rafil primarily through written correspondence, and whose support letters have been submitted for the Court's perusal along with this memorandum, include Jean Shaterian, Robert Elmendorf, Jean DeSocio, Sarah Marusek, Ed Kinane, Jack and Felice Cohen-Joppa, Rafi Ziauddin, Linda Bergh, and Elaine Donovan.

lar), are of great concern to his friends and family.[16] Exacerbating Rafil's physical ailments are the emotional challenges that he has endured, and continues to endure, under the restrictive conditions of his incarceration. Friends of the Dhafirs bear witness in their support letters to the strain that the CMU's severe communicative limitations imposed on Rafil and his family. Naima Barbour, a co-teacher with Rafil's wife Priscilla Dhafir at the Nas Learning Center in Syracuse, writes, "It grieves me to know that he is being imprisoned so far away from [his wife] with minimal communication." Dr. Mohamed Ebrahim, who has known the defendant for eighteen years, adds that, given how seriously Rafil takes his roles "as a dedicated family man, and a devout person, I can only imagine how hard it is for him to carry on all this time under these conditions."[17] Indeed, Dr. Dhafir supporters of several faiths expressed their apprehension as to his restricted opportunity to practice Islam in the CMU. Mark Briggs, a Licensed Clinical Social Worker in Jamesville, NY, writes, "The restrictions on religious activity cause extra suffering for a very religious man like Dr. Dhafir ... As a member of a church in the Christian faith and as a spiritual being, I have a special compassion for Dr. Dhafir's inability to follow the religion he has chosen and to use it to maintain and build his spirituality."

The character letters mentioned above, and the many others submitted along with this resentencing memorandum, reveal a man who was a leader of his community in many senses. Rafil nourished the human lives around him through his medical practice, through his philanthropic efforts, and through his spiritual and moral guidance. Rafil's incarceration, and the resultant loss of his many talents, have been shattering to Rafil's home community. Crippled by an increasing number

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[16] See, e.g., letters from Dr. Thomas Washburn, Katherine Hughes, and Ira Glunts.

[17] See also Ira Glunts letter at 1 for further testimony as to the central place that family and community hold in Rafil's heart, and the resultant additional suffering that he has undergone because of CMU prisoners' limited communication with the outside world.

of medical issues and by his ongoing isolation from the people that gave his life meaning, Dr. Dhafir has suffered greatly during the nearly nine years of his sentence that he has served to date. It is equally crucial to Rafil's varied communities as it is to the survival of this man, whose generosity of spirit touched so many, that he be released from prison at the earliest possible date.

As just mentioned, Dr. Dhafir's health has taken an unexpected turn for the worse in several ways in the last six years. He suffers from inguinal hernia, diabetes, limited mobility in his shoulder that has not been definitively diagnosed, fasciitis of the left foot, hypertension and elevated cholesterol, significant back pain, prostatic hypertrophy and neuropathy, incipient cataracts, and chronic gout – all of which have developed since his incarceration. His hernia condition requires additional surgery (because an initial, delayed surgical procedure in April 2011 failed in August) that has been repeatedly postponed. (These facts are elaborated in a letter from his brother, Mazin Dhafir, also a Central New York physician, as well as in correspondence from the defendant himself. The defendant's efforts to obtain detailed documentation from the Bureau of Prisons were repeatedly thwarted by bureaucratic delay and misdirection. We hope the records will finally be available before the upcoming hearing.) Mazin Dhafir emphasizes from both personal and professional experience how painful an untreated hernia can be ("excruciating … one of the most painful things I have ever endured"). Mazin is also anxious about the potential long-term effects of an untreated hernia, such as bowel obstruction, and about the general impact of increased stress due to incarceration on all of Rafil's diagnosed medical issues.

Dr. Mazin Dhafir's letter further points out that life expectancy in the Dhafir family is relatively short – none have survived past their early 70s. (Since Rafil was incarcerated, two additional brothers have died, both in their 60s (as did their parents), and Mazin himself now has prostate cancer.) While 63 is not "elderly" by normal U.S. standards, it is an advanced age among prisoners,

and the burdens of incarceration are felt far more acutely with age. The Court should increase the extent of its variance to account for the ill health and physical suffering that incarceration is exacerbating in this now 63-year-old defendant.

Finally, while the Court recommended at the time of sentencing that Dr. Dhafir be assigned to a medium security prison within a reasonable driving distance of his family (FCI Otisville, NY) – and he was in fact initially designated to a comparable facility at FCI Fairton (New Jersey) – he was summarily removed from Fairton after about a year and transferred to the Bureau of Prisons' new "Communication Management Unit" at FCI Terre Haute, Indiana. He remained in that unit for over five years, until December 23, 2011, when he was suddenly, without explanation or warning, removed from the CMU to the general population of FCI Terre Haute, still a thousand miles from home, and still in "medium" security, although (as shown in the Progress Report underlying PSR Add'm 4, at 1) he is qualified for Low security. At the CMU, there was no contact visiting (as is permitted at even high security federal prisons), and very few telephone calls were allowed. Because of the distance, virtually no family visiting is possible. He was not permitted to speak in his native language with his immigrant family (or anyone else). His freedom of worship was severely curtailed because of restrictions on group activities. All this resulted from an *ex parte* recommendation from the U.S. Attorney's office to the Bureau of Prisons describing the defendant's religious beliefs (and nothing else), to wit (as summarized in his BOP file): "AUSA: Regarded as shiek [sic] & salafi; assoc[iated] w/radical fundamentalists."[18] On this basis it was "suggested that he

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[18] In Islam, a "sheikh" (misspelled in the BOP's classification document) is an older man (perhaps the best term in English would be an "elder"), thought to have wisdom by virtue of his age and experience, and looked up to by others for advice, especially on questions with religious implications. Sometimes "sheikh" is used to mean "Islamic scholar." Properly understood, this term has no negative implications whatever. The same is true for the comment that Dr. Dhafir is "regarded as [a] salafi." A "salafi" is an adherent of the branch of Sunni Islam that looks to the "ancestors," that is,

"req[uires] monitoring of all communications." This classification was inaccurate and unfair, particularly in light of the government's insistence before this Court (which the Court accepted at trial and reiterated at sentencing) that the case had nothing to do with international terrorism or the like.[19] Yet the extraordinary and unexpected harshness of Dr. Dhafir's recent, present and potentially future conditions of confinement makes each year of his sentence (indeed, each day) significantly more punitive, and thus justifies a further downward variance in the length of the sentence.

3. *Grounds for pre-Booker departure – 18 U.S.C. § 3553(a)(5)*

At the 2005 sentencing, this Court declined to apply any Manual-based downward "departures," and the defense does not suggest that the Court use that vehicle for imposing a non-Guidelines sentence now. Nevertheless, the defendant addresses this topic briefly, suggesting that this case presents grounds for a traditional downward departure. See 18 U.S.C. § 3553(b); USSG § 5K2.0 (p.s.). For example, the defendant's altruistic motives in committing the IEEPA (sanctions) offense, coupled with the non-weapons nature of the violations, could warrant a downward departure, considering the "heartland" of USSG § 2M5.1(a)(1). See USSG §§ 5K2.0, 5K2.11 (p.s.).

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the first three generations of Moslems, as exemplary models in seeking an understanding of the faith. (The Christian equivalent would be a strict adherent to the Gospels, who looks to the lives of the original Disciples for guidance in contemporary life.) Again, the term has no political implications and does not suggest any form of antisocial conduct whatever. Finally, and similarly, the significance of the accusation that Dr. Dhafir is or was "associated with radical fundamentalists" depends on what is meant by these terms. He could be described as a "fundamentalist" only in religious terms (again, like a strict Orthodox Jew or Bible-believing Baptist). He never "associated" with "fundamentalists" in any other sense. And if the "fundamentalism" of any of his "associates" could be called "radical," it was only in the intensity and traditionalism of their religious convictions, which were and are apolitical and (perhaps most important) nonviolent and anti-terrorist.

[19] Even upon his transfer to general population, Dr. Dhafir is being treated as a "security risk" and is required to check in every two hours with a correctional officer. This baseless label even affects his access to health care. On January 5, 2012, he was in such back pain that he could not get into or out of bed, or to the commode, without assistance from three fellow inmates. Yet Health Services at first would not see him in his cell, and after other prisoners complained to the Warden would not give him medication (other than ice and Tylenol) there, stating that he was a "security risk."

Dr. Dhafir's confinement for five years in the Bureau of Prisons' highly restrictive "Communications Management Unit" could warrant a downward departure. See United States v. Carty, 264 F.3d 191, 196-97 (2d Cir. 2001) (per curiam). A defendant's advancing age and deteriorating health, factors formerly considered "ordinarily not relevant," are now, since November 2010, an encouraged basis for departure. See USSG § 5H1.1, 5H1.4 (p.s.). All of these grounds, moreover, are also highly relevant to the Court's overall non-Guidelines task of selecting the sentence which is both "sufficient" and yet "no greater than necessary."

4. *Unwarranted disparity – 18 U.S.C. § 3553(a)(6)*

Rafil Dhafir's 2005 sentence of 264 months' imprisonment was far out of proportion to average and typical sentences in comparable cases. According to the Sentencing Commission's latest quarterly statistical report (4th Quarter, 2011, thus containing preliminary data for the full fiscal year),[20] of 799 total cases for which money laundering was the "primary offense category" for sentencing purposes, only 34.2% were sentenced within the Guidelines range (as compared with 54.6% for all offenses). Another 35% received government-sponsored downward departures or variances. Notably, 28.3% of all money laundering cases received sentences below the guidelines without government support (as compared with only 16.6% for all offenses). U.S. Sent. Comm'n, Prelim. Quarterly Data Report (10/31/11), table 3. Focusing specifically on cases where USSG § 2S1.1 was the primary guideline, only 30% of sentences were within the range, while 27% were below range without government sponsorship. Id. table 5.

The median percentage decrease from the bottom of the range for all 179 variances in money laundering cases was 47.8%. Id., table 12. The median sentence length in all money laun-

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[20] See www.ussc.gov/data_and_statistics/federal_sentencing_statistics/quarterly_sentencing_updates/USSC_2011_4th_Quarter_report.pdf .

dering cases in 2011 was 29.1 months, while the median sentence in all "national defense" cases was 62.6 months. All this suggests that a sentence closely tied to the Guidelines range in this case would promote, rather than avoid, unwarranted sentencing disparity. The Court should ask itself whether Dr. Dhafir's case could actually be that much more grave and serious than the average case of its type throughout the nation, as perceived by sentencing judges generally.

A recent study looked at the sentences in all 44 IEEPA cases prosecuted between 2001 and 2007. Robert M. Chesney, "Federal Prosecution of Terrorism-Related Offenses: Convictions and Sentencing Data," 11 LEWIS & CLARK L. REV. 851, 879-80 (2007). Of these, 17 individuals had been sentenced. The mean and median sentence lengths were 84 months, and the mode was 120. For the seven convicted after trial (including Dr. Dhafir) the mean was 101 months, the median 102, and the mode 120. Id. 880.[21] In other words, the sentence in the instant case was more than twice the average length of similar cases nationally.[22]

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[21] An even more recent case further highlights the disparity issue. On January 11, 2012, five defendants were sentenced in the Western District of Missouri for IEEPA violations of the Iraq sanctions, and related offenses. United States v. Islamic American Relief Agency, et al., No. 4:07-CR-87-NKL. The longest sentence imposed (on the Executive Director of the charity) was for 58 months' imprisonment, and three co-defendants received probation. In that case, according to numerous news reports, the fiscal intermediary for most of the $1.5 million sent to Iraq was a Sudanese group which was (unbeknownst to the defendants) affiliated with al-Qaeda.

[22] A similar examination of financial "material support" cases (that is, knowingly providing funding to a foreign terrorist organization, principally prosecuted under 18 U.S.C. § 2339B) is also informative, although Dr. Dhafir was not charged with that (much more serious) offense. Of 34 such cases sentenced between 2002 and 2009, this study found that the average sentence length was 90 months, while the median was 37 months; 75% of all "material support" sentences were for 92 months or less. Only three such sentences nationally in that eight year period were for a longer term than Dr. Dhafir's. James P. McLoughlin, Jr., "Deconstructing U.S. Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations," 28 LAW & INEQUALITY 51, 107-10 (U.Minn. 2010).

5. *Purposes of sentencing – 18 U.S.C. § 3553(a)(2)*

The ultimate decision the Court must make, after "considering" all of the matters just discussed, is to find the sentence which is "sufficient, but not greater than necessary" to achieve the traditional goals of criminal punishment, which are listed in subsections (a)(2) of § 3553. The question after Booker, in other words, is whether a given sentence – such as the 22-year term originally imposed in this case – is not only "sufficient" but also whether it is truly "necessary," in the case at hand, to achieve the Congressionally-defined purposes – (A) "just punishment" in light of "the seriousness of the offense"; (B) "deterrence," both general and specific; (C) incapacitation "to protect the public"; and (D) any "needed" rehabilitation and "correctional treatment" of the offender. 18 U.S.C. § 3553(a)(2).

The nature and seriousness of Dr. Dhafir's offenses are thoroughly addressed in the PSI and the government's memorandum, and are well known to this Court. In that light, the defense acknowledges first that the sentence in this case was not imposed to rehabilitate or correct the defendant. As for deterrence, it is very unlikely that suffering a term of longer than ten years will better deter either Dr. Dhafir himself, or others similarly situated, from committing any of these sorts of violations of law – be it the willful violation of economic sanctions imposed on another country, misrepresenting the tax-exempt status of a charity, or the Medicare/ Medicaid billing violations. The fear of a ten-year sentence, coupled with loss of professional standing and financial wellbeing, is fully sufficient to deter anyone. If anything, an overlong sentence may seem an unrealistic risk to others, and thus fail to deter as well as would the more likely prospect of a shorter term. Similarly, a term perceived as excessive undermines rather than promotes respect for the law. [23] At his pre-

[23] Referencing the final statutory consideration, the need for restitution, 18 U.S.C. § 3553(a)(7), the restitution imposed in this case was affirmed on appeal. 342 Fed.Appx. at *3. The issue is

sent age, and in deteriorating health, the public does not need to be protected from Dr. Dhafir. All in all, the ten years (equivalent) already served would fully reflect the severity of the offenses.

CONCLUSION

For the same reasons this Court imposed a sentence five years below what it calculated in 2005 to be the guidelines range, and for the additional reasons outlined above, the Court should determine the Guidelines range to be 210-262 months and then grant a downward variance of at least 84 months (seven years, rather than five), permitting the defendant, Rafil Dhafir, to be released immediately to supervision or community confinement (halfway house or home confinement). Even if the guidelines range is not amended, a sentence much nearer to ten years would be sufficient to achieve all the statutory purposes of punishment, without being greater than necessary.

Respectfully submitted,

Dated: January 12, 2012

s/Peter Goldberger

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therefore not open in this remand. The Court may be interested to know, however, that Dr. Dhafir consented to the entry of judgment against him in Tax Court in the full amount of the alleged deficiency, rather than contest that matter. T.C.Dkt. 23624-06.

CERTIFICATE OF SERVICE

On January 12, 2012, I served a copy of the foregoing document on counsel for the United States by copy of electronic filing, addressed to:

Stephen C. Green, Esq.
Assistant U.S. Attorney
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__s/Peter Goldberger_____