

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

CASE NOS. 6:11-cr-277-Orl-31GJK
6:12-cr-63-Orl-31GJK

v.

MARCUS DWAYNE ROBERTSON,

Defendant.

_____ /

MARCUS DWAYNE ROBERTSON'S SENTENCING MEMORANDUM

Defendant, MARCUS DWAYNE ROBERTSON ("ROBERTSON"), by and through his undersigned attorney, hereby submits his Sentencing Memorandum and states as follows:

INTRODUCTION

1. ROBERTSON, a Muslim scholar, will come before this Court on April 30, 2015 to be sentenced for constructive possession of a firearm by a convicted felon and conspiracy to file a false income tax refund claim. ROBERTSON respectfully seeks a time served sentence that constitutes a downward variance from the advisory guideline range sentence recommended by the United States Probation Office and sought by the United States Attorney's Office. However, if the Court accepts the advisory guideline calculations advocated by ROBERTSON, a time served sentence would fall within the recommended sentencing range. ROBERTSON bases this request on several sentencing factors that are set forth below.

18 U.S.C. 3553(a)

The mandate of 18 U.S.C. § 3553(a) is, of course, for the court to "impose a sentence sufficient, but not greater than necessary, to comply" with the purposes of sentencing set forth in

the second paragraph of that same statute. In *United States v. Hunt*, 459 F.3d 1180, 1182 (11th Cir. 2006), the court summarized the now often-quoted factors that a sentencing court must consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (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;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established [. . .by the Sentencing Commission];
- (5) any pertinent [Sentencing Commission] policy statement . . .;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

As recognized by Judge Tjoflat in *United States v. Glover*, 431 F.3d 744, 752-753 (11th Cir. 2005), in some cases the Guidelines may have little persuasive force in light of some of the other §3553(a) factors:

Although "judges must still consider the sentencing range contained in the Guidelines, . . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)]." *Id.* at 787 (Stevens, J., dissenting). Indeed, as one district judge has already observed, the remedial majority in *Booker* direct[s] courts to consider all of the § 3553(a) factors, many of which the guidelines either reject or ignore.

In *Hunt*, the court rejected "any across-the-board prescription regarding the appropriate deference to give the guidelines." 459 F.3d at 1184. Instead, a "district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in

calculating the defendant's sentence." 459 F.3d at 1185. The reasoning in *Hunt* is consistent with the United States Supreme Court's decision in *Rita v. United States*, 127 S.Ct. 2456, 2465 (2007), where the court recognized that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."¹

It is clear now that most below-Guidelines sentences do not require the court to find an unusual factor or circumstance that is unique to the defendant. Indeed, to require an unusual factor or something unique to the defendant is to give priority to the Guidelines and to ignore the holdings in *Hunt* and *Rita*:

There have been suggestions in some recent appellate decisions that a district court may not vary from the guidelines unless it finds some factor unusual or unique to the defendant warranting the variance. It is difficult to see the basis for such a rule - which sounds very much like the old departure standard -- in *Booker* or § 3553(a). Moreover, such a rule improperly elevates the guidelines above the other factors set forth in § 3553(a). In essence, it makes the guidelines the objective measure of the sentence, and disallows any other sentence unless the court is able to explain why the guideline sentence is wrong. The district courts' limited departure authority did not save the guidelines in *Booker*, see 543 U.S. at 234-35, and if appellate restriction of sentencing discretion continues such that the new system begins to resemble the old, another disruption may be in the offing.

See United States v. Cull, 446 F. Supp. 2d 961, 966 (E.D. Wis. 2006). *See also United States v. Wallace*, 458 F. 3d 606, 613 (7th Cir. 2006).

THE NATURE AND CIRCUMSTANCES OF THE OFFENSE

The Defendant stands convicted of constructive possession of a firearm by a convicted felon and conspiracy to file a false income tax refund claim. He pleaded guilty to the first offense and was convicted of the second offense after a bench trial. A brief discussion of the nature and

¹In his concurring opinion in *Rita*, Justice Stevens put it this way: "I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory." *Rita*, 127 S.Ct. at 2474.

circumstances of each offense, along with ROBERTSON's federal sentencing guideline calculations, are set forth below.

Possession of a Firearm By a Convicted Felon (6:11-cr-277-Orl-31GJK)

ROBERTSON plead guilty to this charge based upon the following facts:

Dauood Hadad, the chief security officer of the mosque that ROBERTSON was the prayer leader at provided sworn testimony that not only was he the licensed owner of the firearm at issue but that ROBERTSON did not ask for the firearm.

Hadad needed a safe place to store the firearm during a mosque-sponsored youth camping trip. Hadad further stated that in around October 2010 he attended a weekend camping trip/youth retreat for the children of the mosque, Masjid Ihsaan. He rode to the campsite in a van that Tony Osias had borrowed from ROBERTSON. Hadad was carrying the firearm at issue along with an extra ammunition magazine. ROBERTSON drove to the campsite in a Saturn automobile that was owned by Monyel Edwards. At some point during the evening, Hadad stored the firearm and magazine in the vehicle in which ROBERTSON had driven because he did not want to leave these items in the van to which children had access. ROBERTSON was required to leave the campsite the next morning for mosque-related duties and he drove the Saturn automobile in which the firearm and magazine were stored.

Thereafter, Hadad regained possession of the firearm and ammunition but from time to time would leave these items at the home where they were located upon execution of the search warrant on August 23, 2011. This home was co-leased by ROBERTSON and Hadad from 2010 to 2102. On or around June 8, 2011, ROBERTSON gave the firearm to his neighbor and personal assistant Monyel Edwards, an honorably discharged U.S. Navy veteran, when they were

investigating a possible ongoing home invasion in their neighborhood. After their investigation, Edwards returned the firearm to ROBERTSON.

ROBERTSON had previously been convicted of felony offenses in the United States District Court for the Eastern District of New York (Violent Crime in Aid of Racketeering), the State of New York (Criminal Possession of a Weapon), and the Commonwealth of Pennsylvania (Aggravated Assault).

ROBERTSON respectfully asserts that only one of his prior felony convictions constituted a “crime of violence” (the federal RICO conviction) and that all of his prior convictions and sentences occurred over fifteen years prior to the commencement of the instant offenses. In this regard, ROBERTSON contends that the crime of aggravated assault under Pennsylvania law does not constitute a “crime of violence.” (See Application Note 1 of the Commentary to U.S.S.G. § 2K2.1, Application Note 1 of the Commentary to U.S.S.G. § 4A1.1, and Application Note 1 of the Commentary to U.S.S.G. § 4B1.2; *see also United States v. Duran*, 696 F.3d 1089 (10th Cir. 2012))

Thus, ROBERTSON contends that his Adjusted Offense Level for his conviction in Case No.: 6:11-cr-277-Orl-31GJK should be Level 20 [U.S.S.G. § 2K2.1(a)(4)(A)] and that his Criminal History should be a Category I.

Conspiracy to File a False Tax Refund Claim (6:12-cr-63-Orl-31GJK)

ROBERTSON was also charged with conspiracy to file a false claim for an income tax refund and following a bench trial, the Court determined that based upon the evidence presented at trial, including ROBERTSON’s testimony, ROBERTSON was guilty of conspiring with Jonathan Jimenez (“Jimenez”) to file the false tax return in order to obtain a \$5,587.00 tax refund.

Mr. ROBERTSON asserts that his Adjusted Offense Level U.S.S.G. § 2B1.1 for engaging in the conspiracy to file a false claim for refund (Case No. 6:12-cr-63-Orl-31GJK) is a Level 8 and that his Criminal History Category is I.

Sentencing Guidelines When the Offenses are Grouped

Under U.S.S.G. § 3D1.4 the combined offense level of the offenses of conviction, without considering the applicability of the terrorism enhancement which is discussed in detail below, is a Level 20. Furthermore, as set forth above, Mr. ROBERTSON's criminal history category should be II.

Accordingly, Mr. ROBERTSON respectfully contends that the Court should determine that his advisory guideline sentencing range is 33-41 months. Since Mr. ROBERTSON has been incarcerated in pretrial and pre-sentencing detention since August of 2011, a sentence of imprisonment falling within this guideline range should result in Mr. ROBERTSON's immediate release by the Court.

Non-Applicability of the Terrorism Enhancement

In order for the terrorism enhancement contemplated by U.S.S.G. § 3A1.4 to apply in this case, the Government must prove by a preponderance of the evidence that ROBERTSON committed a felony offense "that involved, or was intended to promote, a federal crime of terrorism. *United States v. Jayyousi*, 657 F.3d 1085, 1114 (11th Cir. 2011). Thus, under the circumstances of this case, the Government must present clear, competent, and admissible evidence that, as part of the offenses of conviction, Mr. Robertson was involved with or intended to promote activities that were "calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct *and* was a violation of at least one of the several crimes enumerated in 18 U.S.C. § 2332b(g)(5)(B). *Id*; see also *United States v.*

Garey, 546 F.3d 1359, 1361 (11th Cir. 2008). ROBERTSON respectfully submits that the Government has not and cannot present such evidence as it relates to his offense conduct in these combined cases.

Although a defendant need not be convicted of a federal crime of terrorism in order for the terrorism enhancement to apply, this Court must identify which of the enumerated offenses set forth in 18 U.S.C. § 2332b(g)(5)(B) that ROBERTSON intended to promote, articulate that how his conduct satisfied each of the elements of the specific crimes or crimes and otherwise satisfied the guideline's definition of a federal crime of terrorism, and support its conclusion by a preponderance of the evidence with facts from the record. *Garey*, 546 F.3d at 1361 .

At the outset, it must be noted that neither of the indictments in the cases under consideration by the Court contain any allegations that the ROBERTSON or anyone else were involved with, or intended to promote, a federal crime of terrorism. Moreover, it is axiomatic that there was no "crime of terrorism" committed by ROBERTSON or anyone else as part of the instant combined cases. Therefore, in order for the enhancement to apply the Government has the burden to demonstrate by and preponderance of the evidence that ROBERTSON's act of conspiring to file a false claim for an income tax refund and/or relevant conduct to that offense was "intended to promote" a "federal crime of terrorism."

The Government contends that Jimenez, ROBERTSON's tax fraud accomplice received from ROBERTSON:

- martial arts training;
- firearm and knife training;
- instruction on reading the Quran; and
- instruction on learning and mastering the Arabic language.

The Government has not presented any evidence to support these contentions and, more importantly, none of these activities or statements relating thereto can be construed to be in furtherance of the conspiracy that ROBERTSON was convicted of. In other words, the statements made by ROBERTSON's tax fraud co-conspirator, Jimenez, attributing certain statements to ROBERTSON, were not made during the course of the tax fraud conspiracy nor were such hearsay statements made in furtherance of such conspiracy.

Whenever the prosecution offers declarations made by a co-conspirator, it must show that the declarations were made during the course and in furtherance of the conspiracy. "A statement made by a co-conspirator during the course and in furtherance in of the conspiracy is admissible as non-hearsay under Fed.R.Evid. 801(d)(2)(E). A district court must make factual findings in determining whether co-conspirator declarations are admissible because they were made during the course and in furtherance of the conspiracy and such findings are reviewed under the clearly erroneous standard. *United States v. Byron*, 910 F.2d 725, 734 (11th Cir. 1990). Not all statements made by co-conspirators can be considered to have been made in the course and in furtherance of the conspiracy.

"Narrative declarations" are not admissible as declarations made in furtherance of a conspiracy. *United States v. Blakely*, 960 F.2d 996 (11th Cir. 1992); *United States v. Beale*, 921 F.2d 1412, 1422 (11th Cir. 1991); *United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988). Narrative declaration have never been considered to be made in furtherance of the conspiracy where the declarant was merely telling the witness what had occurred; he in no way was attempting to draw the witness into the conspiracy or otherwise further it." *See generally United States v. Posner*, 764 F.2d 1535, 1537-38 (11th Cir. 1985)

The requirement that a co-conspirator statement be made “during the course” of a conspiracy is likewise a product of the drafters’ decision to base Rule 801(d)(2)(E) on the agency theory. The drafters thus stated their intent that the Rule be “consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved.” *United States v. Perez*, 989 F.2d 1574, 1579 (10th Cir. 1990) In light of the Court’s expressed concern that conspiracy prosecutions not be further broadened, a court must carefully ascertain the nature and extent of a conspiracy in determining whether statements can properly be viewed as made during its existence. *Id.* As is true with the “in furtherance” requirement, a strict construction of the “in the course of” requirement is mandated by the Supreme Court’s warning any increased broadening of the already expansive federal conspiracy law. *Id.* The rationale for this is that the conspirator can only be said to be speaking on behalf of his co-Defendants if he was speaking at the time of and in connection with their joint project. *Id.*

A excellent treatment of conspiracy law is found in *United States v. Sarro*, 742 F.2d 1286 (11th Cir. 1984). There the defendant was convicted of conspiring to transport stolen paintings. On appeal, the Eleventh Circuit noted that “the Government must prove an agreement to commit an unlawful act.” The court found that the defendant was in the room during the discussions concerning the criminal arrangements. Moreover, the Government was able to demonstrate that the defendant had a close association with the other co-conspirators. However, the defendant’s conviction was reversed because the court simply could not find that the Government had shown that the defendant “intend[ed] to join, or associate himself with the objectives, of the conspiracy.” *Sarro*, 742 F.2d at 1297

Here, no showing has been made by the Government that any agreement ever existed to commit or otherwise promote acts of terrorism between any of the participants in these cases. Moreover, ROBERTSON was not present during most, if not all, of the conversations between Jimenez and the FBI confidential informant (“CHS”) relied on by the Government and did not have knowledge of any criminal arrangement relating to terrorism.

ROBERTSON’s tax fraud co-conspirator was an at-risk youth with a history of mental problems, drug use, and an unstable home life. Jimenez was previously shot in the head and had been prescribed Keppra, an anti-psychotic medication. Thereafter, he had been placed in five different mental health treatment facilities. Finally, Jimenez admitted to using PCP and marijuana regularly.

The evidence in this cases demonstrates that ROBERTSON attempted to provide Jimenez with a safe environment that modeled a functional lifestyle. ROBERTSON helped Jimenez improve his vocabulary and taught him how to better read English and Spanish so that Jimenez could eventually find more suitable employment. ROBERTSON encouraged Jimenez to go to martial arts classes so that he would become more disciplined. ROBERTSON provided Jimenez with hot meals so that he could develop a healthy diet and nutritious eating habits. ROBERTSON taught Jimenez how to dress like an adult and to utilize proper manners and etiquette, such as addressing other man as “Sir.” ROBERTSON encouraged Jimenez to complete his GED, to obtain a driver’s license, and to learn a skill so that he could become employable.

It was a goal of ROBERTSON’s to properly guide Jimenez’s development so that one day he might be ready to go to Mauritania to further his Islamic education, learn Arabic, and memorize the Quran, as ROBERSON himself had done and as he had helped other young men do. ROBERTSON was constantly attempting to determine whether Jimenez was ready to travel

to Mauritania for the aforementioned purposes. Eventually, he decided that Jimenez was too dysfunctional to do so and ROBERTSON notified his colleagues that he did not recommend Jimenez for study in West Africa. Instead, ROBERTSON encouraged Jimenez to go on the religious retreat known as *umra* in the hopes that the experience would have a positive effect on Jimenez's mindset and attitude.

On numerous occasions, ROBERTSON advised Jimenez to leave his preoccupation with *jihad*. In fact, at ROBERTSON's urging Jimenez stopped using the names *Jihad* and *Mujaahid* and used the name *Ya Ya* (Arabic for John the Baptist). ROBERTSON constantly counseled Jimenez that the pen is mightier than the sword and that the *jihads* he was hearing about in the media were nationalistic or ethnic wars and not the utopian Islamic ideal of *jihad* referred to in religious literature.

In the long run, Jimenez became too much for ROBERTSON to handle:

On **June 16, 2011** (from telephone surveillance recordings) ROBERTSON explains to Mustafa Al Hanafi (in New York) that Jimenez has been sneaking off in the middle of the night and acting very suspicious. ROBERTSON states he thinks that Jimenez has a "drug problem" again. ROBERTSON tells Mustafa that he opened up his house to Jimenez but cannot let Jimenez stay with him any more now that he knows that Jimenez is "going out like that."

On **June 17, 2011** (from telephone surveillance recordings) ROBERTSON explains to Mustafa that he cannot let Jimenez stay at the mosque any longer because ROBERTSON can't trust him and it might bring harm to the community. ROBERTSON states to Mustafa that Jimenez had exposed his family to danger. He further states that he is very serious about security issues concerning his family particularly since he travels so frequently to many different countries, has involvement with Homeland Security and the FBI, and "doesn't need no dum-dum

playing stupid games.” Mustafa asks ROBERTSON what he wants to do with Jimenez. At this juncture, ROBERTSON is not sure but he does know that he does not want to play any more games. During this same telephone call, Mustafa asks ROBERTSON if he wants to send Jimenez to Mauritania or *umra*. ROBERTSON states that no matter where Jimenez goes he will be able to find what he is looking for as the easiest place to find drugs is in Mecca (*umra*). Mustafa goes on to recount a conversation he had with Jimenez wherein he admonished Jimenez and told him that he was twenty-five (25) and that he would have to be a man sooner or later. Mustafa stated that he understands why ROBERTSON wants to send Jimenez to *umra* and Mauritania because “we all make mistakes” and Jimenez does need to “get outta here.” Mustafa says that he has doubts about sending Jimenez to Mauritania and ROBERTSON says that Jimenez should just make *umra* because he may screw up Mauritania.

ROBERTSON tells Mustafa that he just did not want to throw Jimenez away. ROBERTSON said that he told Jimenez to go make *umra* because it may change his life but that there are no miracle cures in Islam. ROBERTSON further explains that internal changes take place every moment of one’s life as part of *jihad* (spiritual struggle). Mustafa says he is really skeptical of Jimenez because it does not make a difference where he goes and gives an example of an acquaintance who went to Mauritania and got a woman pregnant in only a couple of weeks there. ROBERTSON says that he does not want Jimenez to stay here any longer as he will destroy himself, that they cannot continue to be his “babysitters,” that they should be stricter with him, and that the “least harmful thing” would be to send him out there and hopefully he would grow up. Finally, ROBERTSON advises Mustafa that even though he sent Jimenez down to be with ROBERTSON in Florida, ROBERTSON was sending him back to Mustafa.

ROBERTSON also says that he cannot imagine Jimenez sitting down to memorize the Quran anywhere since he was incapable of doing it when he was with ROBERTSON.

On **June 18, 2011** (from telephone surveillance recordings) a man named Bigraa (Abduraheem Diego) tells ROBERTSON that he is bothered by the fact that ROBERTSON put Jimenez up down there “straight from the heart” and that for Jimenez to do something like that is “no good.” ROBERTSON urges Bigraa not to run Jimenez away. Bigraa tells ROBERTSON that he thinks that Jimenez has a “sickness.” ROBERTSON says that Jimenez “loves us and respects us” but that he has a problem. ROBERTSON says he thinks Jimenez has a “drug problem” and a “dick problem.” ROBERTSON urges Bigraa not to drive Jimenez away because he’ll go to those “knuckleheads.”

On **June 23, 2011** (from telephone surveillance recordings) Jimenez tells Mustafa that he needs to “get out of here” because he is feeling sick. Jimenez says he sees the reality of getting out of here and that he misses all the “brothers.” He says when he was with [ROBERTSON] and his kids he was doing so well.

On **June 26, 2011** (from telephone surveillance recordings) Jimenez tells Mustafa that he needs to “get on that plane and get out of here” because even his Mom was asking him what is wrong with him. Mustafa tells Jimenez that ROBERTSON loved Jimenez and wanted to see him excel and that Jimenez broke his heart. Jimenez says he loves ROBERTSON too which is why he is scared to even call ROBERTSON. Mustafa says that ROBERTSON wanted to set Jimenez up, but now he has to send him back. Jimenez asks Mustafa if it is too late. Mustafa mentions a parable about a man seeking repentance after wrongfully killing ninety-nine people and, because of that parable, Mustafa will not say it is too late for Jimenez.

On **June 29, 2011** (from telephone surveillance recordings) Mustafa talks with Lillian Mobley, Jimenez's mother, who thanks Mustafa and his friend in Orlando [ROBERTSON] for helping keep Jimenez on the right track. Mustafa tells her that "we gotta help one another." She says that they were treating Jimenez like a little brother, that he is doing well, and that he needs to stay on the right track. Mustafa says that he wants to but that sometimes the environment is too strong and that Jimenez cannot resist the temptations. She tells Mustafa that she was grateful to Mustafa for hooking her son up with such "unbelievable" people including his friend in Orlando.

On **July 1, 2011** (from telephone surveillance recordings) ROBERTSON tells Mustafa to tell Jimenez not to call ROBERTSON any more. Mustafa tells ROBERTSON that Jimenez was a "waste of time." But ROBERTSON responds by saying that he was not a waste of time because Jimenez benefitted from their time together . However, ROBERTSON goes on to say to Mustafa that the "whole thing" is that they are not Jimenez's father, that he does not have a father, that he does not look up to any one, and that he does his own thing. ROBERTSON tells Mustafa that they "tried," that they did what they could do, and that anything else would be "over stepping" Jimenez's rights as a grown man. ROBERTSON further explains that they did everything for him and that he cannot think of anything else that they can do so that it was time for him to move on and move forward. ROBERTSON says that Jimenez is a grown man even though he acts like a teenager.

On **July 6, 2011** (from telephone surveillance recordings) Bigraa tells ROBERTSON that Jimenez is hanging out with some "crackheadass niggas." ROBERTSON says that he tried his best and that Jimenez "gotta do his thing." Bigraa wonders out loud how much help "a brother needs." ROBERSTON says that they are not going to kill themselves over Jimenez.

On **July 11, 2011** (from telephone surveillance recordings) Mustafa left a message on ROBERTSON's voicemail stating that the "young man" [Jimenez] ran away, disappeared and that Mustafa has "fully cut the guy off."

On **July 25, 2011** (from telephone surveillance recordings) ROBERTSON explains to Mustafa that he is not sending Jimenez over there because people with stronger foundations get banged out in that situation and "he ain't ready to do none of that. However, ROBERTSON says if Jimenez wants to make *umra*, then he can go make *umra*. Mustafa tells ROBERTSON that Jimenez has "hooked up" with some "crackhead dude who was talking about being a good boxer and top trainer." ROBERTSON explains to Mustafa how people like Jimenez always find the "muck" and the "gutter" no matter where you take them and that they will bring that back to you. ROBERTSON tells Mustafa that he treated Jimenez like a son.

On **August 4, 2011** (from telephone surveillance recordings) Dauood Blake (in Mauritania) asks ROBERTSON about the "young brother" [Jimenez] who was coming to Mauritania. ROBERTSON tells Dauood Blake that he did not want to send Jimenez to Mauritania without testing him first. ROBERTSON further states to Blake that he brought Jimenez down to Florida but that he was "sneaking around, using drugs", staying out all night, fighting, and hanging out with non-Muslims and "crackheads." ROBERTSON says that he is not going to put some *fitna* (trial, hardship) on Blake like that.

On **August 20, 2011** (from telephone surveillance recordings) Mustafa informs ROBERTSON that Jimenez is still bugging him about going to Mauritania. The two of them talk about Jimenez's drug use and that a change of environment might do him some good so that he could clean himself up. Mustafa says that it seems like Jimenez really wants to learn but that if he is in an environment with distractions, he falls victim to them. ROBERTSON responds by

telling Mustafa to inform Jimenez that they could talk about it some more after *Ramadan* but that nothing is happening before *Ramadan*.

ROBERTSON was arrested on **August 23, 2011** and taken into custody where he has remained to this date.

The telephone conversations recounted above do not demonstrate ROBERTSON's involvement in or promotion of a federal crime of terrorism. Rather, these conversations demonstrate nothing more than the concern by ROBERTSON and others for Jimenez's well-being.

Finally, when fleshing out the facts of these cases, one cannot help but to notice the role the Government took by and through its paid CHS to encourage and promote violence and criminal behavior. In one of the first undercover recordings, we find the CHS teaching ROBERTSON's tax fraud co-conspirator, Jimenez, military nomenclature and tactics. On January 31, 2011, the CHS secretly recorded the dialogue below between himself and Jimenez:

CHS: Listen there's a...there's an acronym, you have to learn this...

JIMENEZ: Okay.

CHS: SMEAC. S..M..E..A..C..., okay?
Situation, right. The Mission, The Execution, The Admin. And Logistics
and the Control

JIMENEZ: Yo akh (brother) you gotta write that down for me man, so I can
memorize that stuff

CHS: I'm gonna teach you man. I'm surprised Abu Taubah [ROBERTSON]
isn't teaching you these little things you gotta learn. You know? But,
um... we're going to do it right, you know? And when it comes time,
we be ready for it

Prior to this conversation, the CHS recorded himself establishing his role in Jimenez's life as, among other things, his drug dealer. On January 24, 2011, the CHS told Jimenez that he

likes him. The CHS then told Jimenez that he was Jimenez's "cool uncle" who would take him out and buy him weed. On January 29, 2011, the CHS recorded himself encouraging violent *jihad*:

CHS: My goal? Make *umra*, go get purified, go overseas, and get busy.

JIMENEZ: Oh man! You straight. That's a one-way ticket. Akh.

CHS: You know? Cause I want to start fresh, and whatever happens after that I'm ready to go.

JIMENEZ: You know, it's deep that you're telling me this. You know I've been thinking about that lately, about asking Allah to die as a martyr man, as a *shaheed* (martyr) in *jihad*. You know? Cause they said, what's better than making *Hajj* (pilgrimage) is the one who fights in the cause of Allah. Even if you don't get to do it and Allah knows that you would've got on that battlefield and did it, you get rewarded with that.

CHS: So, in your personal opinion, do you think you're ready for that?

JIMENEZ: To be honest, NO.

CHS: Are you getting ready for it.

JIMENEZ: I'm getting ready for it, but I'm not (UI). I ain't ready for it.

CHS: You ain't there yet?

JIMENEZ: Nah, I ain't gonna fake the funk.

On another occasion when pressed by the CHS as to when he would be ready for violent *jihad*, Jimenez replied that he would be ready for ten or fifteen years.

THE HISTORY AND CHARACTERISTICS OF THE OFFENDER

Mr. Robertson's Upbringing

ROBERTSON was born in the late 1960's to Clarence and Mable Robertson. Both of his parents were educators and community leaders holding positions in government their entire careers. His father is retired from the Brooklyn, New York District Attorney's Office. He recently (April 18, 2015) was honored with the Outstanding Citizen Award by Brooklyn's Medgar Evers College where he had previously served as Vice-President. His mother, Mable Robertson, retired as the long-time Principal of P.S. 399, also in Brooklyn.

ROBERTSON grew up in a home where education and dedication to the community was strongly encouraged. ROBERTSON, and all three of his siblings have served in the Armed Forces. His oldest brother, Alonzo, served in Army intelligence, the CIA, and then spent fifteen (15) years in the NSA. His brother, Malcolm, and his spouse both served in Iraq. Finally his youngest brother, Martin, was in the military police with the Army.

ROBERTSON's parents, though now retired, are still active in their community. They celebrate their fiftieth wedding anniversary this year. However, ROBERTSON's father is presently in ill-health awaiting hip surgery.

Mr. Robertson's Family

Mr. ROBERTSON is currently married to two women under Islamic law. He and his first wife, Zulaika, have been together since 1991 and are the parents of nine (9) children. He and his second wife, Itisha Wills, have been together since 2006 and their relationship has produced three (3) children. Mr. ROBERTSON has three (3) additional children from prior relationships. However, all of ROBERTSON's children live with him with the exception of his oldest

daughter, Sharifa, who has a full scholarship to the University of Chicago and only visits Florida on school breaks.

Mr. ROBERTSON's nine (9) year old son, Hud Alonzo, suffers from a genetic development issue known as Chiari 5 Malformation and his eleven (11) year old son, Yunus Alonzo, suffers from Asperger's Syndrome. In addition, his wife, Zulaika, broke her back in a car accident in 2013.

Mr. Robertson's Military Service

Mr. ROBERTSON served in the United States Marine Corps from 1989 until his honorable discharge in 1994. While in the Marines, Mr. ROBERTSON was part of an elite counter-terrorism operations group of Marines known as the Second Force Reconnaissance Company.

Mr. Robertson's Prior Assistance to the United States

The Government acknowledges that ROBERTSON has provided extensive assistance to the authorities. Although it denies or cannot confirm that ROBERTSON undertook certain activities on its behalf, it acknowledges the following and ROBERTSON will testify concerning his other activities *in camera* at the sentencing proceedings:

- 1) ROBERTSON testified for the Government at a federal trial in 1999;
- 2) From 2004-2007, under the express authority of the FBI Joint Terrorist Task Force ("JTTF"), ROBERTSON performed these inherently dangerous activities:
 - a) He was an extraterritorial confidential source that was sent to Mauritania performing a role that can only be defined as "espionage." *See* 18 U.S.C § 793;
 - b) He served as a confidential source in domestic terrorism investigations from Atlanta to Los Angeles, wherein he was provided with actual authority to, inter alia: possess firearms in order to maintain his cover and fulfill the objectives set for him by the JTTF

Although ROBERTSON is not interested in exposing classified activities, he would like the Court to have a true picture of his service to his country. Therefore, he is reluctantly prepared to testify concerning the activities in which he engaged on behalf of the United States that the Government contends did not occur or cannot be documented.

In formulating a reasonable sentence a sentencing judge must consider “the history and characteristics of the defendant” within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that the defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to USSG § 5K1.1 (“non-5K cooperation”). Section 3553(a)(1), in particular, is worded broadly, and it contains no express limitation as to what “history and characteristics of the defendant” are relevant. This sweeping provision presumably includes the history of a defendant’s cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation. *United States v. Fernandez*, 443 F.3d 19, 35 (2nd Cir. 2006).

Because the cooperation that the Defendant provided to the UNITED STATES OF AMERICA continued long after his prior New York federal conviction, because he has not ever received any credit or sentencing concessions for said cooperation, and notwithstanding the lack of a government motion under USSG § 5K1.1, the Court should consider this cooperation in fashioning an appropriate sentence for the Defendant under the circumstances of the instant cases.

Safety Issues for ROBERTSON and Family

When ROBERTSON became a confidential source in 1991 and then again in 2004, he was given an express guarantee of anonymity and protection for life. Since ROBERTSON’s

release from federal custody in 1995 on more than one occasion the Government has had to intervene on attempts to Defendant's life.

In 1997 or 1998 the United States Marshal's Service learned about threats to ROBERTSON's life and he and his family were relocated immediately and given new identities. Shortly after they relocated, ROBERTSON discovered that his previous residence had been the object of arson. Then again in 1998, ROBERTSON was advised that his new residence was "not safe." He was encouraged to and then, upon agreeing, instructed how to "quietly disappear."

In 2006, ROBERTSON was told by gang intervention workers in California that there was "money on his head" because he was a suspected undercover operative.

In 2011, ROBERTSON was informed by Tony Osias and Dorian Mohammed, two associates, on separate occasions and neither knowing that the other had informed him, that they had been approached on individual occasions and warned to stay away from ROBERTSON because he was soon to be murdered. Both were given judicial and Government documents from unknown sources that showed that ROBERTSON had been a confidential informant and had assisted the Government. Because Dorian Mohammed worked as a security officer at the local mosque where ROBERTSON preached, he was told to "look the other way when they come."

Mr. Robertson's Accomplishments

With the exception of his involvement in the offenses of conviction, ROBERTSON has been a model citizen since his release from imprisonment in 1995. He has continuously aided the authorities to the best of his ability.

ROBERTSON is an educator who teaches Muslim youth how to be Muslim and still be Western in their outlook. He teaches Muslim parents how to communicate their traditional Islamic values with their Western Islamic children. Most importantly, ROBERTSON promotes

the idea that being Muslim does not have to mean being anti-American. (ROBERTSON has submitted to the Court voluminous correspondence from students that demonstrates how he has helped them and affected their lives in a positive manner.)

ROBERTSON has authored eight (8) books and eight (8) audio books for children and students that give practical lessons regarding Islamic lifestyle for Westerners. ROBERTSON has also authored a book on medical terminology.

Severe and Outrageous Mistreatment of Mr. Robertson While in Pretrial Detention

Mr. ROBERTSON has been in pretrial detention since August of 2011. For the majority of that time, he has been detained in solitary confinement at the John E. Polk Correctional Facility. The cell he was housed in for many, many months was extremely small, had no window and thus provided inadequate ventilation and daylight, was illuminated twenty-four hours a day resulting in sleep deprivation, and had inadequate bathroom facilities such as a “Chinese” toilet which was under twenty-four hour observation. The cell was in close proximity to the main doors of the jail so that there were constantly slamming doors and shaking cell doors day and night.

In addition to this gross, inhuman treatment Mr. ROBERTSON was subjected to in solitary confinement, he has had the skin literally removed from his ankles as a result of the mandatory use of leg irons without any penal justification.

Finally, Mr. ROBERTSON has consistently been denied the right to possess and read religious literature either because it was taken from him and discarded by jail officials or the jail denied his family and attorney the ability to bring religious materials to him in the jail.

In light of the foregoing mistreatment, Mr. ROBERTSON respectfully submits that the Court should consider such mistreatment as the basis for a downward variance from the advisory

guideline range in the event that Mr. ROBERTSON needs such a variance to receive a time served sentence of incarceration.

By way of example only, ROBERTSON would point the Court to military ruling wherein Private First Class Bradley E. Manning was given a sentence reduction specifically for mistreatment in a military prison cell during the court martial proceedings surrounding his leak of classified information.

CONCLUSION

Based on all of the foregoing and on the additional matters to be presented *ore tenus* at the sentencing proceeding, Defendant, MARCUS DWAYNE ROBERTSON, respectfully requests a time served sentence of incarceration to be followed by the minimum length of supervised release deemed appropriate by the Court.

DATED this 24th day of April, 2015

Respectfully submitted,

/s/ Daniel N. Brodersen
DANIEL N. BRODERSEN
The Brodersen Law Firm
533 N. Magnolia Avenue
Orlando, Florida 32801
Telephone: (407) 649-0007
Fax: (407) 649-0017
Email: brodersend@gmail.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court via the CM/ECF System on this 24th day of April, 2015 and was therefore provided by electronic means to counsel for the UNITED STATES, AUSA Roger B. Handberg, United States Attorney's Office, 400 West Washington Street, Suite 300, Orlando, Florida 32801.

/s/ Daniel N. Brodersen
Attorney