THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. AHMED RESSAM, Defendant.	CASE NO. CR99-0666-JCC SENTENCING ORDER

This will be the third sentence I have given Mr. Ressam. The first two were reversed, my judgment was questioned, and I was instructed to give a higher sentence. I am concerned that by explaining how that history has affected my thinking, I might distract from the real issues in this case. But for a system that relies on a judge's discretion to function, there must be confidence in that discretion. It is with that goal in mind that I offer this explanation.

Trial court judges sentence from the trenches. In my 31 years on the bench, I have handed down, in my estimation, four to five thousand sentences. These sentences resulted from countless skirmishes over guidelines, moving pleas for mercy, and grim assessments of the impacts of crimes. I have sentenced men who died in prison before their time and who posed no threat to society in their final days. I have sentenced men with mercy, only to see that mercy betrayed. And these mistakes have left scars. This robe is poor armor. So whenever I enter this courtroom,

I reflect on those scars and draw on those painful lessons to guide me. But there are trials where the fighting is so long and the battle so bloody that the trenches become a maze, and experience alone is no guide. In moments such as these, what is needed are judges who watch the battle from a high place, and can point the way forward. I am grateful for the direction that the appellate court has provided, and am honored by their confidence in my judgment henceforth.

I. INTRODUCTION

This case provokes our greatest fears. In the late 1990s, Mr. Ressam plotted a terrorist attack against the United States with the potential to kill and injure a large number of people. Because Mr. Ressam planned this act of violence and took steps to carry it out, many, including the federal government, believe that Mr. Ressam is a continuing threat and he should never see freedom again. But fear is not, nor has it ever been, the guide for a federal sentencing judge. It is a foul ingredient for the sentencing calculus.

The Court is imposing a sentence that is "sufficient, but not greater than necessary" to accomplish the goals of sentencing set forth in 18 U.S.C. § 3553(a). The Court has carefully considered the presentence report, the submissions of the parties and the § 3553(a) sentencing factors. In particular, the Court has considered the nature of Mr. Ressam's crime, his background and character, his extensive cooperation with the government, and the need to safeguard the public. Moreover, the Court has considered the Ninth Circuit's recent opinion setting forth guideposts for the Court to use in imposing a reasonable sentence. *See United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012). Considering all of those factors and viewing this case holistically over the course of 13 years, the Court finds that a reasonable sentence—indeed, a just sentence—is 37 years' imprisonment.

II. BACKGROUND

A. The Arrest and Trial of Ahmed Ressam

Mr. Ressam is an Algerian national who trained at Islamic terrorist camps in Afghanistan in the late 1990s. As part of a terrorist cell operating out of Canada, Mr. Ressam was tasked with

carrying out an operation to bomb a target within the United States. (Dkt. No. 420 at 4). That target, Mr. Ressam later admitted, was Los Angeles International Airport. (*Id*.)

In November 1999, U.S. Customs inspectors arrested Mr. Ressam as he attempted to drive a car carrying explosives from Canada into the United States. (*Id*. at 5). After his arrest, the government offered Mr. Ressam a deal in which he would plead guilty in exchange for a sentence of 25 years' imprisonment. (Dkt. No. 365 at 3). Mr. Ressam was not required to cooperate to receive the 25-year sentence. (*Id*.) Mr. Ressam rejected the plea offer and proceeded to trial, where a jury found him guilty of nine counts arising from the planned attack. (Dkt. No. 305). Mr. Ressam's most serious crime of conviction is Count 1, conspiring to commit an act of terrorism transcending national boundaries in violation of 18 U.S.C. § 2332(b)(1)(B).

B. Ressam's Post-Trial Cooperation and First Sentencing

Prior to sentencing, Mr. Ressam began cooperating with the government. (Dkt. No. 420 at 5). He signed an agreement requiring him to cooperate with federal agencies and provide testimony in court proceedings. (*Id*.) In return, the government agreed to file, and did file, a U.S.S.G. § 5K1.1 motion asking the Court to depart downward from the then-mandatory sentence set forth in the United States Sentencing Guidelines. (*Id*. at 5–6). The parties agreed to recommend a sentence of no less than 27 years. (*Id*. at 6).

Between 2001 and 2004, Mr. Ressam cooperated with the government. He testified against his co-conspirator Mokhtar Haouari. (Dkt. No. 365 at 7). During 2001, Mr. Ressam met with government agents numerous times, and in those debriefings, he identified Abu Doha, a major player in the arena of terrorist activity, and Samir Ait Mohamed, a less significant terrorist operative. This information led to Doha's and Mohamed's arrests. (*Id*. at 19). Mr. Ressam also identified 9/11 conspirator Zacarias Moussaoui from a photograph and said that he had met Moussaoui at an Afghani training camp. (*Id*. at 22). Mr. Ressam also provided the government with a first-hand account of the inner workings of Al Qaeda. (*Id*. at 14–15). He described the various Al Qaeda organizations in Afghanistan, and offered critical information about terrorist

camps, their financing, their armaments, and the cells they produced. (*Id*.) In addition to numerous debriefings with the United States, Mr. Ressam provided intelligence to the governments of Great Britain, Spain, Italy, Germany, France, and Canada. (*Id*. at 7).

By November 2004, Mr. Ressam had stopped cooperating with the United States. Mr. Ressam refused to provide testimony in the trials of Samir Ait Mohamed and Abu Doha. (Dkt. No. 465 at 12). Both Mohamed and Doha had their federal charges dismissed in August 2005. (*Id.*) Since that time, Mr. Ressam also has recanted many of his prior statements, including testimony he provided in a prior trial. (*Id.* at 12–13). Defense counsel argues that the harsh conditions of Mr. Ressam's confinement and the stress of the repeated debriefings by the United States government and the governments of other nations caused him to end his cooperation. By February 2002, Mr. Ressam was suffering from anxiety related to his cooperation, his solitary confinement, and his sentencing.

The Court held a sentencing hearing on April 27, 2005. Based on his extraordinary cooperation, Mr. Ressam requested a sentence of 150 months (12½ years). (Dkt. No. 365). The government noted that Mr. Ressam had provided valuable assistance, but requested a sentence of 35 years primarily because Mr. Ressam had stopped cooperating. (Dkt. No. 367). The Court sentenced Mr. Ressam to 22 years in prison. (Dkt. No. 382).

C. Ressam's Appeals and Second Sentencing

Mr. Ressam appealed his conviction for carrying an explosive during the commission of a felony, while the government cross-appealed arguing that the Court's sentence was substantively unreasonable. The Ninth Circuit reversed the challenged conviction, *see United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007), but the Supreme Court reinstated it, s*ee United States v. Ressam*, 553 U.S. 272 (2008). The Ninth Circuit ultimately vacated the sentence, and consistent with intervening Ninth Circuit authority, directed the Court to explicitly calculate the applicable Sentencing Guidelines range. *United States v. Ressam*, 538 F.3d 1166 (9th Cir. 2008). The Circuit Court did not reverse the sentence, but merely instructed this Court to explain its sentence

in light of intervening authority.

The Court held another sentencing hearing on December 3, 2008. (Dkt. No. 423). Prior to the hearing, the government recommended a sentence of 45 years imprisonment—10 years more than its previous recommendation. (Dkt. No. 420). During the sentencing hearing, Mr. Ressam repudiated his statements to the government during his many debriefings, which led the government to argue for a life sentence. (Dkt. No. 433 at 34). The Court again imposed a sentence of 22 years. (Dkt. No. 424).

The government appealed the sentence. A three-judge panel of the Ninth Circuit vacated the sentence, finding it to be substantively unreasonable. *United States v. Ressam*, 629 F.3d 793 (9th Cir. 2010). The Ninth Circuit granted review en banc and it affirmed the panel's decision. *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012).

Mr. Ressam is now before the Court for his third sentencing in this case.

III. DISCUSSION

In determining a reasonable sentence, the Court is charged by statute to "impose a sentence sufficient, but not greater than necessary" to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and to protect the public. 18 U.S.C. § 3553(a); *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). The Court begins by determining the "applicable Guidelines range." *Carty*, 520 F.3d at 991. The Court then considers the arguments of the parties regarding the appropriate sentence. *Id.* Then in light of the § 3553(a) factors, the Court must consider whether a departure or variance from the guideline range is warranted, and if so, the extent of the deviation. *Id.*

A. The Sentencing Guideline Range

The United States Probation Office has set forth its calculation of the applicable guideline range in a revised Presentence Report dated April 20, 2005 (the "PSR").[1] Those guidelines

[1] The November 2000 edition of the United States Sentencing Commission Guidelines Manual was used to calculate the applicable sentencing range.

calculations are grouped according to Mr. Ressam's counts of conviction, and result in a guideline range of 780 months to life imprisonment.

Mr. Ressam has disputed the guideline calculations from the outset of this case. (Dkt. No. 365 at 42–43; Dkt. No. 374 at 14; Dkt. No. 379 at 9–17; Dkt. No. 384 at 6–8; Dkt. No. 433 at 3). Because the Ninth Circuit issued a full remand for resentencing, the Court will take up Mr. Ressam's renewed objections to the guideline range as calculated by the Probation Office. *See Pepper v. United States*, 131 S. Ct. 1229, 1251 (2011) (holding that court of appeals' remand for resentencing "effectively wiped the slate clean"); *United States v. Matthews*, 278 F.3d 880, 885–86 (9th Cir. 2002) (en banc) ("On remand, the district court generally should be free to consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing, as if it were sentencing *de novo*."). The Court will first explain the guideline calculations in the PSR and then consider Mr. Ressam's objections.

1. Count 1: Committing an Act of Terrorism Transcending a National Boundary

Mr. Ressam was convicted on Count 1 for Committing an Act of Terrorism Transcending a National Boundary, in violation of 18 U.S.C. § 2332b(a)(1)(B). Under the Sentencing Guidelines, the Court is directed to use the most analogous guideline, which here is U.S.S.G. § 2K1.4, property damaged by use of explosives. Under § 2K1.4, if the offense "created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly," the base offense level is 24. Additionally, under U.S.S.G. § 3A1.4(a), "if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism," the offense level is increased by 12, and a defendant's criminal history category is increased to category VI. Thus, with an offense level 36 and criminal history category VI, the applicable sentencing range for Count 1 is 324 months to 405 months. But because § 2332b(c)(1)(E) has a statutory maximum of 25 years (300 months), the sentencing guideline range for Count 1 is 300 months. Section 2332b(c)(2) also requires that the term of imprisonment imposed for Count 1 run consecutively with any other term of imprisonment.

2. *Counts 2, 6, 7 and 8*: *Placing an Explosive in Proximity to a Terminal; Smuggling; Transportation of Explosives; and Possession of an Unregistered Destructive Device*

Pursuant to U.S.S.G. § 3D1.2 all counts involving "substantially the same harm" should be grouped together. The PSR recommends that Counts 2, 6, 7 and 8 should be grouped together in what the Court will refer to as Group 1. Those counts include:

- Count 2: Placing an Explosive in Proximity to a Terminal in violation of 18 U.S.C. § 33
- Count 6: Smuggling in violation of 18 U.S.C. § 545
- Count 7: Transportation of Explosives in violation of 18 U.S.C. § 842(a)(3)(A)
- Count 8: Possession of a Destructive Device in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871.

The PSR groups these counts because they are all related to possessing and transporting explosives in furtherance of a common criminal objective. Among the counts included in Group 1, Count 6 has the highest base offense level at 20. *See* U.S.S.G. §§ 2T3.1, 2K2.1. Three offense characteristics are applicable to Count 6: (1) a one-point upward adjustment pursuant to § 2K2.1(b)(1)(A) for committing an offense involving three to four destructive devices; (2) a two-point upward adjustment pursuant to § 2K2.1(b)(3) for committing an offense involving a destructive device; and (3) a four-point upward adjustment pursuant to § 2K2.1(b)(5) for possessing a destructive device with knowledge that it would be used or possessed in connection with another felony offense. In addition, the PSR concludes that a victim-related adjustment is applicable to Count 6: a 12-point upward adjustment pursuant to § 3A1.4(a) and (b) for committing a felony involving a federal crime of terrorism. These enhancements yield an adjusted offense level of 39 for Group 1.

3. *Counts 3, 4 and 5: Possessing False Identification Documents; Using a Fictitious Name for Admission into the United States; and Making a False Statement*

The PSR recommends that Counts 3, 4, and 5 be grouped in what the Court refers to as Group 2. Those counts include:

- Possessing False Identification Documents (Count 3), in violation of 18 U.S.C. § 1028
- Using a Fictitious Name for Admission into the United States (Count 4), in violation of 18 U.S.C. § 1546
- Making a False Statement (Count 5), in violation of 18 U.S.C. § 1001.

The PSR groups these counts because they involve the same victim and two or more acts connected by a common scheme or plan. *See* U.S.S.G. § 3D1.2(b). The Count 3 conviction for possessing false identification documents is governed by § 2L2.2, which instructs to cross-reference a more relevant sentencing guideline section if the defendant used a passport "in the commission of a felony offense, other than an offense involving violation of the immigration laws." The most analogous substantive offense is Count 1, which leads to the previously discussed guideline calculations under § 2K1.4: base offense level 24, plus a 12-point adjustment pursuant to § 3A1.4(a) for committing a felony that involved, or was intended to promote, a federal crime of terrorism. Thus, the adjusted offense level is 36 for Group 2.

4. Multiple Count Adjustment

Section 3D1.4 of the Guidelines provides that when multiple counts are divided into groups, the highest group offense-level total is increased by the total number of groups. In this instance, Group 1 has the higher offense-level total, with 39. Because there are two groups of counts, that total is increased by two, resulting in an adjusted offense level of 41 for Groups 1 and 2. The terrorism enhancement under U.S.S.G. § 3A1.4(b) requires that a defendant's criminal history category "shall be VI." The Probation Office thus found the applicable sentencing guideline range for these counts is a sentence of 360 months to life.

5. Count 9: Carrying an Explosive Device During the Commission of a Felony

Mr. Ressam was convicted in Count 9 of Carrying an Explosive Device During the Commission of a Felony, in violation of 18 U.S.C. § 844(h)(2). This statute requires the Court to impose a 10-year mandatory sentence of imprisonment to run consecutively to all other charges.

6. Summary of the Presentence Report Guideline Calculations

The term of imprisonment imposed on Count 1 is to run consecutively to the term of imprisonment imposed on Counts 2–8. The guideline range on Count 1, based on a total offense level of 36 and a criminal history category of VI, is 324 months to 405 months. By statute, however, the maximum sentence the Court may impose on Count 1 is 25 years so the revised

PSR guideline calculation is 300 months. The presentence report calculated that, based on a total offense level of 41 and a criminal history category of VI, the guideline range of imprisonment on Counts 2–8 is 360 months to life. Therefore, the combined guideline range for Counts 1–8 is 660 months to life. Finally, the sentence on Count 9 requires a 120-month mandatory consecutive sentence. The presentence report thus calculates that Mr. Ressam's sentencing guideline range is 780 months (65 years) to life imprisonment.

7. Ressam's Objections to the Sentencing Guideline Calculations

Mr. Ressam challenges the application of § 3A1.4. (Dkt. No. 455 at Exhibit A). As noted above, the PSR applies § 3A1.4 to not only Count 1, but also to Groups 1 and 2. The effect of applying § 3A1.4 enhancements on Mr. Ressam's guideline range is "draconian." James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 Law & Ineq. 51, 54 (2010). On Count 1, the primary terrorism charge of which Mr. Ressam was convicted, § 3A1.4 increases the offense level from 24 to 36 and the criminal history category from I to VI. This has the effect of increasing the sentencing range from 51 months to 63 months to a range from 324 months to 405 months. The enhanced range exceeds the maximum statutory penalty of 300 months. Where the Revised Presentence Report erred, Mr. Ressam argues, is in applying § 3A1.4 *again* to Groups 1 and 2. This second application causes an increase from a range between 87 months and 108 months on those lesser charges to a dramatically greater range of 360 months to life. Mr. Ressam argues that this produces an absurd result: a penalty of 300 months for an act of international terrorism, and, essentially, a potential life sentence for carrying a fake ID.

The Sentencing Guidelines permit double counting of a factor "when each invocation of the behavior serves a unique purpose under the Guidelines." *United States v. Nagra,* 147 F.3d 875, 883 (9th Cir. 1998); *see also United States v. Holt,* 510 F.3d 1007, 1012 (9th Cir. 2007) ("Because the two enhancements account for... distinct wrongs, it was proper, and no abuse of

discretion, for the district court to apply both to the challenged criminal conduct."). Double counting is also permitted when it is necessary to ensure that the defendant's sentence reflects "the full extent of the wrongfulness of his conduct." *United States v. Reese,* 2 F.3d 870, 895 (9th Cir. 1993).

But there are instances where double counting is improper. Impermissible double counting "occurs where one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines." *United States v. Speelman,* 431 F.3d 1226, 1233 (9th Cir. 2005) (quoting *Reese,* 2 F.3d at 895); *see also United States v. Snider,* 976 F.2d 1249, 1252 (9th Cir. 1992) (double counting is impermissible where one Guidelines provision "is akin to a 'lesser included offense' of another," yet both are applied).

That is exactly what occurred here. Mr. Ressam committed the singular act of planning and attempting to carry out a terrorist attack. While his act of attempted terrorism comprised several federal offenses, the harm from all these offenses is the same: the potential loss of life and destruction of property in the United States. This harm was fully accounted for in the terrorism adjustment applied to Count 1. The PSR double-counted that enhancement by inventing two additional hypothetical sources of harm: "unknown victims" and "societal interests." PSR at ¶ 41. This was an error. *See United States v. Pham,* 545 F.3d 712, 717 (9th Cir. 2008). The Guidelines are intended to be employed in a way that limits the significance of the formal charging decision and prevents multiple punishments for substantially identical offense conduct. *See* U.S.S.G. Ch. 3 Part D, introductory commentary. Application of § 3A1.4 to Counts 2– 8 would defeat that intention.

8. Final Guideline Calculations

The Court finds that § 3A1.4 should apply to the offense that is most closely identified with the harm that § 3A1.4 intends to punish: Count 1, for Committing an Act of Terrorism

Transcending a National Boundary. As a result, the guideline range for Count 1 remains the statutory maximum of 300 months.

For Groups 1 and 2, the Court finds that § 3A1.4 does not apply. Accordingly, the presentence report calculations for those groups are reduced by 12 levels each. After adjusting the base offense level upward pursuant to U.S.S.G. § 3D1.4 for multiple counts, the offense level is calculated at 29 with a criminal history category of I. The sentencing range for Groups 1 and 2 is therefore 87 to 108 months, which when combined with the 300 months for Count 1 and the 120 months for Count 9, produces a total guideline range of 507 to 528 months or 42 to 44 years imprisonment. This guideline range is the "initial benchmark" the Court has considered in fashioning Mr. Ressam's sentence. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

The Court exercises its discretion and imposes a sentence that is five years below the guideline range for the reasons it will now discuss.

B. The 18 U.S.C. § 3553(a) Factors

If a district court "decides that an outside-Guidelines sentence is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall v. United States*, 552 U.S. 38, 50 (2007). The Court's departure from the guideline range is based on its analysis of the § 3553(a) factors.

The Court has considered the need for the sentence to "reflect the seriousness of the offense" and "provide just punishment for the offense." 18 U.S.C. § 3553(a)(1). From the first moments of this trial, I have contemplated the horrific nature and circumstances of the offense. The Court is mindful of the brutal potential of Mr. Ressam's crime, and sentences him in complete consideration of the harm he hoped to inflict on individuals and families in this country and around the world. The Court also has considered that Mr. Ressam will likely be held in solitary confinement for the length of his sentence. The time Mr. Ressam serves will be, by any measure, very hard time. For the past seven years, he has spent 23 hours a day, alone, in an 87-square-foot cell. He leaves his cell for one hour a day for exercise, which occurs either in a tiny

windowless indoor cell or in an outdoor cage. He is not permitted to have contact visits with anyone. He lives in a world of concrete and steel and is permitted to speak to his family once a month. The Director of the Bureau of Prisons has testified before the Senate that prolonged confinement such as Mr. Ressam's raises concerns. (Dkt. No. 455 at 26). Dr. Stuart Grassian, an expert in the psychological effects of stringent conditions of confinement, has reviewed Mr. Ressam's case and concluded that he has been permanently and severely impaired by his prolonged incarceration in solitary confinement. (Dkt. No. 455-11 at 6). I have observed Mr. Ressam's condition over the past 12 years and his deterioration has been marked and stunning. The sentencing guidelines do not account for such harsh treatment, but this Court will. A lengthy sentence that also departs downward from the guidelines is therefore just punishment for Mr. Ressam's crime.

The Court is also mindful that the threat of terrorism is two-fold. It threatens our security and it challenges our values. Paramount among our values is justice for all persons, no matter how dangerous or reviled. The sentence the Court hands down today is in recognition of the gravity of both of these threats. The Court has used the maximum statutory penalties set by Congress for the most serious of Mr. Ressam's crimes as a guide in determining the length of the sentence imposed. The primary charge against Mr. Ressam, for an act of terrorism transcending national boundaries by conspiring to destroy or damage structures, carries a maximum penalty of 25 years. The charge for carrying an explosive while committing this felony carries an additional mandatory penalty of 10 years. The sentence the Court hands down today is longer than both those sentences combined.

The Court also gives consideration to Mr. Ressam's history of cooperation and the need to promote respect for the law. *See* 18 U.S.C. §§ 3553(a)(1) and (a)(2)(A). The Court gives substantial weight to the government's evaluation of Mr. Ressam's cooperation. The Court has given particular weight to Special Agent Fred Humphries' lengthy testimony about Mr. Ressam's valuable, life-saving contributions. Mr. Humphries testified that even if some of the

information Mr. Ressam provided was already known at different levels of the intelligence community, it is often impossible for a government or agency to share information without compromising the source. Summaries of Mr. Ressam's interviews provided an unclassified vehicle to spread a wide range of information around the world to people who needed to know about the operation of terrorist networks. (Dkt. No. 394 at 25). Agent Humphries testified that this information was vigorously spread. (*Id.* at 46). The value of Mr. Ressam's cooperation does not lie in uniqueness alone, but in the usefulness of that information to law enforcement worldwide. The government's attorneys now argue that because Mr. Ressam refused to testify at two trials, his cooperation was of limited value, but Agent Humphries's account of that information's usefulness has persuaded the Court that a departure is warranted.

The Court agrees with the government that the value of this cooperation must be weighed against Mr. Ressam's decision to cease cooperation in the prosecution of Abu Doha and Samir Mohamed. In 2005, the government expressed a firm belief that Mr. Ressam was not willing to cooperate further, and argued that a sentence of 35 years accounted for his failure to live up to his agreement. (Dkt. No. 394 at 97). The government now states that when it recommended a sentence of 35 years in 2005, it did so in the hope that Mr. Ressam would resume cooperation in these prosecutions. He did not. Subsequently, Mohamed, a minor Al Qaeda operative, was deported to Algeria in 2006. Abu Doha has been under house arrest in Britain for 10 years. British authorities believe that he has changed his world view and no longer believes that war and violence are appropriate means of political change. (Dkt. No. 455 Ex. 8). The government's pre-hearing recommendation of 45 years was, in effect, a 10-year punishment for the failed prosecutions. Mr. Ressam also recanted some of his prior statements between 2005 and 2008 and repudiated all prior statements at his sentencing in 2008. As a result, the government argues that a life sentence is the only appropriate sentence. But Mr. Ressam's repudiation does not erase the understanding of terrorist networks that he provided, and it does not free the men his testimony has already helped to convict. To sentence Mr. Ressam to life in prison would be to ignore that

assistance altogether. The government has given the Court no reason to believe that the termination of Mr. Ressam's cooperation has in any way endangered America or its allies.

The Court must impose a consequence for Mr. Ressam's failure to honor his commitments. The life sentence that the government recommends, however, is too harsh a punishment. First, it fails to account for Mr. Ressam's cooperation at all. Second, it is based on the assumption that his repudiation was a lucid expression of his true character. That assumption cannot stand. As I stated, the Court has observed Mr. Ressam's mental state over the past 12 years and is convinced that his repudiation was not measured obstructionism, but a deranged protest. The wisdom of solitary confinement may be open for debate, but the effect that it has had on Mr. Ressam is not. It is my solemn duty to decide Mr. Ressam's punishment, and it is my ethical responsibility not to hold him culpable for the harmful and involuntary consequences of that punishment. I will not sentence a man to fifty lashes with a whip, and then fifty more for getting blood on the whip. A sentence of 37 years promotes respect for the law by punishing Mr. Ressam for his serious crimes while providing a reward for the cooperation that Mr. Ressam provided. It is no more than what is necessary to account for his recantations.

The Court has also considered the need to protect the public from future crimes perpetrated by Mr. Ressam. 18 U.S.C. § 3553(a)(2)(C). The government has argued that Mr. Ressam's decision to stop cooperating and to recant his prior statements demonstrates his dangerousness. This analysis is incomplete. When Mr. Ressam is released he will be an old man. While it is trivially true that he may be capable of executing a terrorist attack at that age, recidivism is a function of the likelihood of reoffending, not of the ability to do so. And there are many reasons to conclude that another violent conspiracy involving Mr. Ressam is very unlikely indeed. First, Mr. Ressam has betrayed Al Qaeda, exposed its secrets, assisted in the prosecution of several members, and named over one hundred more. To suggest he would be welcomed back to the fold is ridiculous. Second, Mr. Ressam will be deported to Algeria upon his release, where he will likely face further imprisonment or constant surveillance. The State Department reports

that Algeria has been strongly supportive of counterterrorism efforts (Dkt. No. 455-5), and with his profile, Mr. Ressam would likely have great difficulty plotting an attack even if he were so inclined.

The Court has imposed a sentence that is significantly below the low end of the guideline range as the Court calculates it because doing so is necessary to satisfy the overarching statutory charge to impose a sentence that is sufficient but no greater than necessary to punish the defendant and protect the public.

C. Policy Disagreement with the Guidelines Range Calculated by the Government

The Court recognizes that there is a dispute over the correct calculation of the Sentencing Guidelines range. If the PSR's calculation of the guideline range were correct, the Court would impose the same sentence. If § 3A1.4 does apply to Groups 1 and 2, and the guideline range is 65 years to life, the Court exercises its authority to deviate from any Guidelines provision. The Ninth Circuit has held that such deviation is permitted if the court expresses a reasonable policy disagreement with a particular provision. *See United States v. Mitchell*, 624 F.3d 1023, 1030 (9th Cir. 2010) ("As the Supreme Court . . . has instructed, and as other circuits that have confronted the crack/powder variance in the sentence of a career offender have accepted and clarified in their circuit law, sentencing judges can reject *any* Sentencing Guideline, provided that the sentence imposed is reasonable.") (emphasis in original); *United States v. Henderson*, 649 F.3d 955, 960 (9th Cir. 2011) (same). Indeed, the *Ressam* en banc majority noted that at the last resentencing, the Court "did not express any policy disagreements with the Guidelines and their treatment of Mr. Ressam's crimes, as it could have under *Kimbrough*." *Ressam*, 679 F.3d at 1089.

For the reasons previously given, the Court disagrees with the policy of applying § 3A1.4 to Groups 1 and 2. Double counting of this section punishes a defendant beyond his culpability for minor counts. Charges such as use of fake identification, smuggling, possession of a

destructive device, use of a fictitious name, and false statements carry guideline ranges and statutory maximum penalties far below the 360 months to life imprisonment mandated by § 3A1.4.

Moreover, applying § 3A1.4 twice automatically skews sentences for defendants facing terrorism charges to the upper end of the statutory range, regardless of the particular defendant's acceptance of responsibility, criminal history, specific conduct, or degree of culpability, contrary to the purported goals of sentencing contained in 18 U.S.C. § 3553(a). *See* James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 Law & Ineq. 51, 57 (2010) (noting that § 3A1.4 moves a defendant to criminal history category VI, the most culpable, "with no empirical evidence that this is true or fair (under the considerations contemplated in 18 U.S.C. § 3553)"). Application of § 3A1.4 to every defendant, no matter their level of culpability, does not reflect a sentence that is "sufficient, but not greater than necessary" to accomplish the goals of sentencing. *See* 18 U.S.C. § 3553(a). Mr. Ressam is highly culpable; he took substantial steps towards carrying out a horrific crime. Those facts, however, do not erase the Court's obligation to consider all of the § 3553(a) factors in determining Ms. Ressam's sentence.

Finally, applying § 3A1.4 to groups of minor offenses can lead to those offenses playing a greater role in pretrial litigation and sentencing than the more serious terrorism charges. Such an application incentivizes prosecutors to stack lesser charges in a manner that could intimidate a defendant into accepting a plea and foregoing his day in court.

Other courts have noted that district courts possess the ability to depart when the defendant's guideline range is significantly lengthened by the prosecutor's decision to add "essentially duplicative counts, each describing the same criminal conduct." *United States v. Rahman*, 189 F.3d 88, 157 (2d Cir. 1999). In *Rahman*, the Second Circuit considered numerous defendants' sentences on seditious conspiracy and lesser charges resulting from conspiracies to bomb the United Nations, the Holland Tunnel, and the Lincoln Tunnel.

Defendant El-Gabrowny faced a 20-year statutory maximum for the seditious conspiracy, but the district court, applying U.S.S.G. § 5G1.2(d), imposed consecutive sentences on lesser charges, which resulted in a 57-year sentence. *Id.* At sentencing, the district court said that but for the requirements of § 5G2.1(d) of the then-mandatory Guidelines, it would have imposed a sentence of 33 years. *Id.*

The Second Circuit recognized that the government's decision to charge El-Gabrowny with multiple minor counts led to a sentence far above the statutory maximum for seditious conspiracy, the core offense of which he was convicted. *Id.* at 157. The court vacated the sentence and remanded for resentencing, reasoning that the district court failed to give sufficient consideration to its departure power. *Id*. at 157–58.

In reasoning that applies to the situation here, the court questioned the application of the challenged Guidelines provision:

> [T]here is no reason to think that the [Sentencing] Commission gave adequate consideration to the extent to which [defendant's] sentence could be extended by multiplication of essentially duplicative charges for a single criminal act. . . . We believe the prosecutor's ability to lengthen sentences in these circumstances simply by adding essentially duplicative counts, each describing the same criminal conduct, is a circumstance that was not adequately considered by the Sentencing Commission when it devised the formula for consecutive sentencing under § 5G1.2(d). It therefore establishes a permissible basis for downward departure.

Id. at 157. For similar reasons, the Court concludes that if the Guidelines call for application of § 3A1.4 to the counts contained in Groups 1 and 2, then a downward departure is warranted in this case.

In conclusion, by the Court's calculation, the guideline range is 507 to 528 months. Any mistake in that calculation is immaterial, because if the range were the 780 months to life that the PSR calculates, the Court would, pursuant to *Kimbrough v. United States*, 552 U.S. 85 (2007), depart to a range that reflects a more sensible and just policy application: 507 to 528 months. To the extent that the Guidelines call for application of § 3A1.4(b) to the counts contained in Groups 1 and 2, they over-represent both the seriousness of those crimes and the likelihood that the

defendant will commit other crimes, and the Court departs from the Guidelines accordingly. U.S.S.G. § 4A1.3. The Court has already explained its further variance from the 507 to 528 month range.

IV. CONCLUSION

Mr. Ressam, I'm speaking now to you personally. There is a school of thought that believes our essence is defined by our actions alone.[2] By that logic, the identity of a man, a religion, or a nation is nothing more than its history. If a nation has a history of aggression, the logic goes, it must be an aggressive nation. If a religion has a history of intolerance, it must be an intolerant religion. And if a man has a history of violence, he must be, to his core, a violent man.

These judgments overlook one thing: we can choose daily to remake that essence. A belligerent nation can choose to beat its swords into plowshares. An intolerant religion can choose to reinterpret its dogma. And a violent man can choose to work for peace. In so doing, the character of each of these things is altered and improved.

Therefore, the sentence I am imposing is 37 years of imprisonment, to be followed by 5 years of supervised release subject to standard conditions together with those additional conditions set forth in the presentence report.

DATED this 24th day of October 2012.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

[2] Jean-Paul Sartre, if anyone asks.