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16 UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA
18 SOUTHERN DIVISION

19 UNITED STATES OF AMERICA,
20
21 Plaintiff,
22
23 v.

24 OYTUN MIHALIK,
25
26 Defendant.

CR No. 11-00833(A)-JST

**DEFENDANT OYTUN
MIHALIK'S SENTENCING
MEMORANDUM; EXHIBITS**

Sentencing Date: February 15, 2013
Time: 8:30 a.m.

Before the Honorable
Josephine Staton Tucker

REDACTED VERSION

27 **TO THE HONORABLE JOSEPHINE STATON TUCKER, UNITED**
28 **STATES DISTRICT COURT JUDGE AND TO UNITED STATES ATTORNEY**
29 **ANDRÉ BIROTTE JR. AND ASSISTANT UNITED STATES ATTORNEY**
30 **JUDITH A. HEINZ:**

31 Defendant Oytun Mihalik, by and through her attorneys of record Alan Eisner
32 and Errol Stambler, hereby files her Sentencing Memorandum and Exhibits. Ms.
33 Mihalik's position is based upon the factual basis to her plea, the Pre-sentence Report
34 ("PSR"), the attached Sentencing Memorandum and Exhibits, and upon any oral

1 argument that may be presented at the time of the sentencing hearing pursuant to Federal
2 Rules of Criminal Procedure, Rule 32(c)(1).

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Respectfully submitted
KESTENBAUM EISNER & GORIN LLP

Dated: February 5, 2013

_____/s/_____
ALAN EISNER
Attorney for Defendant
OYTUN MIHALIK

Dated: February 5, 2013

_____/s/_____
ERROL STAMBLER
Attorney for Defendant
OYTUN MIHALIK

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[REDACTED]

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**
3 **STATEMENT OF THE CASE**

4 On August 29, 2011, defendant Oytun Mihalik was charged in a Criminal
5 Complaint with making False Statements in violation of 18 U.S.C. §1001(a)(2). The
6 Complaint alleged that she provided false information regarding three money orders she
7 sent to Pakistan, over a one month period, totaling \$2,050 dollars. On August 30, 2011
8 Ms. Mihalik was indicted on that same charge – the Indictment including the allegation
9 that the false statements were made in a manner involving international terrorism as
10 defined in 18 U.S.C. § 2331. On December 21, 2011 the government filed a four count
11 First Superseding Indictment. Counts One through Three allege providing Material
12 Support to Terrorists (one count for each money order sent), in violation of 18 U.S.C. §
13 2339A; Count Four alleges False Statements, in violation of 18 U.S.C. §1002(a)(2).

14 On August 10, 2012 Ms. Mihalik pled guilty pursuant to Plea Agreement. Under
15 that agreement, the parties stipulated to a base offense level of twenty-seven, pursuant to
16 2A2.1(a)(2); a 12-level adjustment under 3A1.4 for a crime intending to promote
17 terrorism; and three-level reduction for acceptance of responsibility, pursuant to
18 3E1.1(a),(b), for a total offense level of 36. The terrorism enhancement under 3A1.4
19 also increases a defendant’s criminal history to level VI. The plea agreement
20 contemplates and states: “the defendant can argue that a variance from the otherwise
21 applicable advisory guideline sentencing range is appropriate given consideration of
22 relevant factors under 18 U.S.C. §3553(a) [and] argue that a downward departure from
23 Criminal History Category VI is appropriate given the facts of this case. (Plea
24 Agreement, ¶¶ 16-18).

25 Probation similarly determines that the total offense level under the Guidelines is
26 36, with a Criminal History Category VI, and recommends a sentence of 180 months,
27
28

1 which is the 15-year statutory maximum for Count one, the count of conviction.¹

2 The government has recommended a sentence of 12 years imprisonment, [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Defendant requests a sentence of 24-months. Defendant recognizes that this
6 sentence is substantially less than both the government and probation's recommendation.
7 Defendant further recognizes that this crime is serious and the court's sentence must
8 address the seriousness of the crime, respect for the law, and afford adequate deterrence.
9 Nonetheless this case is particularly unique, and the offense was committed under
10 unusual and mitigating circumstances.

11 Ms. Mihalik's total monetary contribution was \$2,050 dollars. She sent the
12 money orders over a one-month period of time, when she had just been separated and
13 living apart from her husband. She stopped her support, and in fact stopped contact with
14 the person whom she believed she was sending the money to, on her own, prior to
15 detection and prior to intervention by law enforcement. This one-month period was a
16 tumultuous period in Ms. Mihalik's life. Besides being recently separated from her
17 husband, she had recently become aware that her mother may have lung cancer. It was
18 during this time that she was informed of her brother's pilgrimage to Pakistan, and was
19 informed of a website where she could contact the group where he intended to travel.
20 Through this website she began an email exchange with a person identifying himself as
21 Ebu Bera,² and communicated with him in substantial part in an attempt to insure that
22 her brother would be received and treated well at his destination.

23 Additionally, Ms. Mihalik's actions, despite the email exchanges with Ebu Bera,
24 were not wholly ideologically motivated. As evidenced by emails she sent just one year

25 _____

26 ¹ The otherwise advisory guideline range is 324-404 months.

27 ² Ebu Bera is the name he refers to himself as in the e-mail communications, but he is referred to
28 by various names in the discovery including Ebu Bera and Zekeriya Cifti; the name he used to
receive the payments from Oytun is Inayatullah or Natullah.

1 prior, she had also donated money to the Kurban Foundation, funds that went to support
2 Turkish soldiers and their families – a group that would be philosophically opposed to
3 the supposed group to whom she sent funds.

4 The actual destination of the funds and the actual use of the funds defendant sent
5 is also unclear. Ebu Bera claimed at one time that the funds were needed to pay off a
6 car, and at another time were used to fix his home, and yet at another time used for flood
7 relief. A reading of the emails themselves reveals that Ms. Mihalik was being solicited,
8 and even manipulated, by the person identifying himself as Ebu Bera. In sum, this
9 woman who has lead an extremely law abiding life in her then 38 years, committed this
10 crime under a unique and mitigating set of circumstances that this Court is asked to
11 consider in imposing her sentence.

12
13 **II**
14 **AN APPLICATION OF TITLE 18 U.S.C. § 3553(A) FACTORS**
15 **WARRANTS A SENTENCE OF 24 MONTHS**

16 The overriding principle and basic mandate of Section 3553(a) requires district
17 courts to impose a sentence “sufficient, but not greater than necessary,” to comply with
18 the four purposes of sentencing set forth in § 3553(a)(2) which are:

- 19 (a) retribution (to reflect seriousness of the offense, to promote respect for
20 the law, and to provide “just punishment”);
21 (b) deterrence;
22 (c) incapacitation (“to protect the public from further crimes”); and
23 (d) rehabilitation (“to provide the defendant with needed educational or
24 vocational training, medical care, or other correctional treatment.)

25 The factors which this Court must consider pursuant to Title 18 U.S.C. § 3553(a)
26 are the following:

- 27 (1) the nature and circumstances of the offense and the history and
28 characteristics of the defendant;
(2) the need for the sentence imposed;
(3) the kind of sentences available;
(4) the sentencing range established for the applicable category of offense
committed, including the (now non-mandatory) guideline range;
(5) any pertinent policy statement issued by the Sentencing Commission;
(6) the need to avoid unwarranted sentencing disparity; and
(7) the need to provide restitution where applicable. 18 U.S.C. §
3553(a)(1)-(7).

1 **A. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE**
2 **SUPPORT A MITIGATED SENTENCE**

3 Oytun has acknowledged her wrongdoing, [REDACTED]
4 [REDACTED] (*Exhibit A*). She
5 has no criminal history prior to this case, either in the United States (*Id.*, ¶ 31), or in
6 Turkey (*Exhibit B*).

7 In her plea, Oytun has admitted to her e-mail exchange and sending funds to
8 Pakistan, as well as awareness that Ebu Bera was involved with an organization that was
9 associated with the Taliban. However, an understanding of the circumstances in her life
10 prior to her one month e-mail communication with Ebu Bera, it is clear that Oytun was
11 not singularly motivated by a passionate radical ideology. Oytun had even made
12 previous donations to the Turkish Armed Forces (*Exhibit C*), a military group opposed
13 to both Al-Qaeda and the Taliban. As documented below, Oytun’s month-long
14 aberrational conduct seems to have been more motivated by her own confused and
15 conflicted mental state and her love and anxiety about her brother Onur.

16 **1. At The Time Of The Offense, Oytun Was Just Beginning A Separation**
17 **From Her Husband**

18 Oytun met her second and current husband, Errol, in 2007. In discussing her
19 marriage with psychiatrist Dr. Richard Romanoff, Ph.D. (see Report of Dr. Romanoff –
20 *Exhibit D*; C.V. of Dr. Romanoff – *Exhibit E*) she described Errol as “financially
21 irresponsible, and ... a heavy drinker, who became more verbally abusive when
22 intoxicated,” all traits that she did not see in him until after they were married. (*Exhibit*
23 *D*, p. 11). Their marriage also encountered difficulties over Oytun’s “efforts to become
24 pregnant through in vitro fertilization.” (*Id.*). She explained to Dr. Romanoff that “this
25 was an extremely stressful and difficult period of time for her, and ... she felt no support
26 at all from her husband.” (*Id.*).

27 Oytun “did eventually become pregnant, though she said, ‘something bad
28 happened one day, I had some kind of allergic reaction.’ She said that she lost the

1 pregnancy, and felt completely ignored by Errol, describing this period of time as ‘a
2 nightmare’ for her.” (*Id.*).

3 As the stress in the marriage continued, Ms. Mahalik finally “in December of
4 2010...decided to move out to her own apartment, ‘for a trial separation.’” *Id.* She
5 rented a place to stay at Homestead Suites, at 5990 Corporate Avenue, Cypress, CA
6 90630, as confirmed by Rick Orozco, an employee of Homestead Suites. (*Exhibit F*).

7 At this time, Oytun was also anxious about her mother’s chronic cough which she
8 had noticed during her previous trip to Turkey. (*Exhibit A.*) Oytun’s worries would
9 unfortunately later prove justified as a pulmonary examination of her mother would
10 reveal a serious lung ailment. (*Exhibit G*). A week after moving out from her husband,
11 and while dealing with these anxieties, she received a phone call from her brother Onur.
12 (*Exhibit D*, p. 11).

13
14 **2. Immediately Following the Separation From Her Husband, Oytun**
15 **Learned That Her Brother, With Whom She Was Extremely Close,**
16 **Would Be Traveling On A Pilgrimage To Pakistan.**

17 Oytun grew up with two older brothers, Onat, who was eight years older than her,
18 and Onur, who was four years older than her. (*Exhibit D*, p. 5). While Oytun was never
19 particularly close with Onat, her relationship with Onur was the opposite. (*Id.*, p. 6). In
20 discussions between her and Dr. Romanoff about her brothers, Dr. Romanoff even
21 noticed that “[h]er demeanor then changed dramatically when she began discussing her
22 middle brother Onur” after discussing Onat. (*Id.*, p. 6). About Onur, Oytun stated that
23 “[h]e was always there for me, there’s a lot of respect between us, he has a genius mind,
24 he never studies, but he’s a genius...” (*Id.*, p. 7).

25 A week after the separation between Oytun and her husband began in December,
26 2010, Onur “called from Istanbul, telling her that he was also separating from his wife,
27 and then abruptly told her that he was planning to travel ‘to Pakistan or some place, to
28 one of those areas where everyone is struggling,’ in order to further his studies of
Islam.” (*Id.*, p. 11). Dr. Romanoff elaborates on the aftermath of this phone call:

1 “She said that upon hearing this information she was ‘shocked and
2 devastated,’ and ‘I couldn’t sleep for thirty-six hours, I called work, I said I
3 couldn’t come in, I felt I’d lost my brother, that I’d never see him again, I
4 was crying.’ She again discussed how much she loved her brother and,
5 while crying during our session said, ‘you have to understand, he’s a great
6 person, he has a great mind, he’s not like other people.’ Following up on
7 her above noted comment that her brother was traveling to this area in order
8 to pursue his religious studies she said, ‘I’ve always wanted to understand
9 my brother’s perspective, even though I can’t, because he has a genius
10 mind, so I can’t really understand, so I began exploring, why was he doing
11 this, I had no idea, I began listening to people on YouTube, I began
12 listening to courses on religion, on Islam, on Allah; my brother was sending
13 e-mails to me, he was calling me, he told me to tell my mother and father,
14 he was not calling his brother, who was there, but me, he was putting all the
15 burden on me, to tell our parents.’”

16 (*Id.*, p. 11-12).

17 **3. Oytun Was Referred To The cihadmedia.com Website In Order To**
18 **Contact Her Brother, Which Resulted In 31 Days Of Activity, After**
19 **Which She Voluntarily Terminated All Electronic Communications**
20 **and Payments**

21 In a flurry of activity over the course of 31 days, from December 20, 2010, to
22 January 20, 2010, Oytun exchanged 33 e-mails with a man, Ebu Bera, whom she met
23 through a website which she was referred to after finding out her brother was travelling
24 to Pakistan. (*Exhibit H*). During those 31 days, she sent him three payments totaling
25 \$2,050 (\$750 on December 21, 2010; \$600 on December 29, 2010; and \$700 on January
26 11, 2011). (*Id.*) Following this flurry of activity, Oytun voluntarily ceased
27 communicating with the individual and ceased sending payments.

28 The e-mails themselves raise more questions than answers. It is not clear from
any of the e-mails who specifically is fighting, who is being fought, where the fighting is
occurring, and if fighting is even happening. There is no mention of a specified enemy,
a specified location, or a specified plan. While the e-mail communications do contain
references to “jihad,” “infidels,” and “mujadeen,” none of the communications mention
any international type of attack or express any anti-American sentiment. In fact,
America is never even mentioned in the e-mails other than Oytun’s explaining the origin
of her cell phone number. (*Exhibit H*, Bates 2387, E-mail No. 4.)

1 The purpose of the funds is equally unclear. In an e-mail sent on January 9, 2011,
2 Ebu Bera mentions using the money sent by Oytun to buy “a car for the operations.”
3 (*Exhibit H*, Bates 2375, E-mail No. 22.) Ebu Bera does not provide any additional
4 information regarding these “operations.” Eleven days and ten e-mails later, the vehicle
5 debt was still being addressed in Oytun’s final e-mail. (*Exhibit H*, Bates 2373, E-mail
6 No. 33.)

7 When Ebu Bera was later interviewed, he explained to the FBI that he himself
8 was being used by an individual named Abdurraham, and he had only a dim recollection
9 of his communications with Oytun:

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 (*Exhibit I*, Bates 3308, 3310.)

20 Ebu Bera’s bare remembrance of communications with Oytun strongly contrasts
21 the language used in the e-mails, in which Oytun is lavishly praised for her
22 contributions, with Ebu Bera even asking at one point if he can refer to Oytun as his
23 mother (in what must have been an emotionally powerful message to a woman whose
24 only pregnancy resulted in a miscarriage). (*Exhibit H*, Bates 2375, E-mail No. 24.) The
25 emotional impact of the e-mails was also clearly enhanced by the references to her
26 brother’s arrival, with Ebu Bera expressing that he was “very delighted that [her brother
27 was] coming over here.” (*Exhibit H*, Bates 2387, E-mail No. 2.)

28 Given Oytun’s state of mind at the time she initiated these communications, her

1 separation from her husband, her worries about her mother, and her worries about and
2 interest in her brother's life, these e-mails, laden with praise and encouragement, found
3 an easy prey. After 31 days, however, Oytun snapped out of her lulled days, ceased all
4 communication, and ceased sending payments. Her bank records from Turkey provide
5 further support that no further payments were made after this cessation. (*Exhibit J.*)

6 When explaining her motivations to Dr. Romanoff, she acknowledged receiving
7 "motivational vers[es] form the Koran" from Ebu Bera and that those verses "motivated
8 me to donate, that I was loaning money to God, and I felt very good about giving, I
9 mean spiritually, that's what I was feeling." (*Exhibit D*, p. 12.) She continued, though,
10 "I didn't want them to think that I was only checking on my brother, but I was hoping
11 that through the money they'd make sure he was okay, that he'd be taken care of, so I
12 sent money three times." (*Id.*) When she "finally...received confirmation that her
13 brother was actually there... 'I remember I was feeling so relieved, that he was safe.'
14 (*Id.*)

15 Oytun has since acknowledged her wrongdoing and expressed her apologies,
16 writing to the Court:

17 "The day that I plead guilty; looking around the courtroom, prosecutors, the
18 American flag, everything seemed so surreal. The reality of my great loss
19 overwhelmed in my heart, and the seriousness of the crime made me feel
20 very low, ashamed, and miserable in front of everybody. That was my
21 farewell to the country that I truly love very much. I'm deeply sorry."

22 (*Exhibit A.*)

23 **B. THE HISTORY AND CHARACTERISTICS OF THE DEFENDANT
24 SUPPORT A MITIGATED SENTENCE**

25 Oytun was born in 1972 in Istanbul, Turkey. (PSR, ¶ 36.) As stated previously,
26 she has no criminal history prior to this case, either in the United States (*Id.*, ¶ 31), or in
27 Turkey (*Exhibit B*). Her father, who is now 79 years old, works as a pharmacist, while
28 her mother, who is now 69 years old, is a housewife. (*Id.*, ¶ 36.) Her oldest brother
Onat is a medical doctor while her other brother Onur now "works in a plant
manufacturing eye solutions for cataract surgeries." (*Id.*, ¶ 37.)

1 Oytun described herself growing up as “a bit above average” student who had “no
2 history of any behavioral difficulties.” (*Exhibit D*, p. 7.) She was particularly involved
3 “in professional horseback riding, over a period of about ten years” that required six
4 days of training per week. (*Id.*, p. 9.) Following in the footsteps of her father, she
5 pursued a career as a pharmacist, obtaining degrees both in Turkey and the United
6 States. She graduated from the University of Istanbul in 1997, received a Master’s
7 Degree in Pharmaceutical Marketing and Healthcare Administration from Long Island
8 University in 2002, obtained her National Pharmacy Equivalency Certification in 2003,
9 became a registered pharmacist in New Jersey in 2005, received a California State Board
10 of Pharmacy Diploma in 2006, and then obtained a limited license in New York from
11 2006 to 2009. (*Exhibit K*; see PSR, ¶ 45-48.)

12 Oytun’s employment history is exemplary. She was employed as a pharmacist at
13 CVS in Norwalk, CA from October 29, 2007, to January 23, 2011. (*Exhibit L*.)
14 Previously, she had worked as a pharmacist in stores both in Hemet, Banning, and San
15 Bernardino, CA, from 2004 to 2007. (PSR, ¶ 50.) Prior to that, she had worked as a
16 pharmacist at a Duane Reade Pharmacy in New York, NY from 2002 to 2005. (PSR, ¶
17 51.) Although Oytun has been living in the United States for approximately fifteen
18 years, she still makes an effort to maintain close relationships with her parents. (PSR, ¶
19 38.)

20 Oytun’s motivation for sending the funds was not singular, but instead confused
21 and conflicted. [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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(*Exhibit D*, p. 17.)

Those closest to her have written letters to the Court expressing their support (*Exhibit M*). Below are some extracts from those letters that highlight Oytun’s caring and respectful nature.

Melda Akin, Oytun’s mother, writes:

“My daughter Oytun, by showing respect, affection and concern to her family all throughout her life has earned the love and commendation of all of us and has acquired an unchangeable spot in our hearts and has become our lives spirits and life spring....

“Throughout her education duration she has attained (educational) achievements in the best schools and has been known as a honest, help giver and studious student. Not only in educational grounds, but also in social life she has been loved by her friends. She has attained (high) achievements throughout many years of (participation) in horse-riding sport. She has adopted the modern Western life style but in the same time was brought up as a young individual who has obtained the spiritual contemporary values....

“By obtaining the required education and career [(spelling edited)] achievements level both in Turkey and in the United States of America, where she loves at least as much as she loves Turkey, my daughter has been our source of pride all the times.” (*Exhibit M*.)

Errol Mihalik, Oytun’s husband, writes:

“I have never met such a remarkable individual and completely in love with her. Every day, as human beings, we make small and at times crucial mistakes that bestow on us regrets that may last days or even the rest of our lives. I know my wife is pleading guilty for her charges, and her actions pertaining to her charges are completely out of character....

“Oytun is loyal, honest, considerate, and supportive wife who has the ability to relate to others using another person’s perspectives. Her positive energy is refreshing, and it inspires me to better myself.” (*Exhibit M*.)

Miriam Cervantes, a pharmacy technician who worked with Oytun, writes:

“She is always being pleasant, kind, and enthusiastic...She is a very hard working person with a huge heart. She is and always will be a very important part of my life.” (*Exhibit M*.)

1 **C. OYTUN'S REQUESTED SENTENCE IS IN LINE WITH OTHER**
 2 **TERRORISM CASES INVOLVING SIMILAR OR MORE**
 3 **EGREGIOUS CONDUCT**

4 All terrorism cases are serious. Nonetheless, courts have shown great discretion
 5 in imposing mitigated sentences and sentences far below the advisory guideline range
 6 when warranted. In fact, mitigated sentences have been imposed where the conduct was
 7 much more committed, severe and threatening than in the instant case. Following is a
 8 sampling of terrorism cases in which mitigated sentences or sentences substantially
 9 below the advisory guidelines were ordered:

10 Case Name	10 Case Summary	10 Sentence
11 <i>Hamdan v. United States</i> 12 696 F.3d 1238, 1240 (D.C. Cir. 13 2012) 14 (Note: District of Columbia 15 Circuit recently vacated his 16 conviction after determining 17 that his conduct was not 18 considered an offense during 19 the relevant time period of 20 1996-2001)	21 Defendant was an Al Qaeda driver, 22 who worked at Al Qaeda training 23 camps, and eventually become the 24 driver of and personal assistant to 25 Osama Bin Laden.	26 66 months
27 <i>United States v. Abdallah,</i> 28 Case No. 2:08-cr-0094-NVW 29 (Exhibit N)	30 Defendant participated in fundraising 31 for designated terrorist organization 32 Holy Land Foundaiton for Relief & 33 Development and lied about his 34 participation to the FBI.	35 18 months
36 <i>United States v. Abdoulah,</i> 37 Case No. 01CR3240-W 38 (Exhibit O)	39 Defendant assisted the September 11, 40 2001, hijackers in arriving in San 41 Diego.	42 Time Served (after about a 43 year in 44 custody)
45 <i>United States v. Abdow,</i> 46 Case No. 09-292 JMR/SRN 47 (Exhibit P)	48 Defendant obstructed FBI 49 investigation into the recruitment of 50 young men in the United States to 51 train and fight for extremist groups in 52 Somalia.	53 4 months 54 incarceration, 55 4 months 56 house arrest
57 <i>United States v. Akl, et al.</i> 58 Case No. 3:10CR251 59 (Exhibit Q)	60 Husband and Wife co-defendants 61 were involved in scheme to send 62 hundreds of thousands of dollars to 63 the terrorist group Hizballah over the 64 course of almost a year.	65 Husband: 75 66 months; 67 Wife: 40 68 months

1	<i>United States v. Ali</i> Case No. 02CR2912-L	Co-defendants conspired to distribute heroin and hashish for the purpose of providing material support to terrorist group Al-Qaeda, and travelled internationally in support of that conspiracy.	57 months each
2	<i>United States v. Durrani</i> Case No. 02CR2912-L (Exhibit R)		
3			
4			
5	<i>United States v. Al-Arian</i> Case No. 8:03-CR-77-T-30TBM (Exhibit S)	Defendant conspired to make or receive contribution of funds, goods or services to or for the benefit of the terrorist group Palestinian Islamic Jihad.	57 months
6			
7			
8	<i>United States v. Al-Hanooti</i> Case No. 08CR20083-1 (Exhibit T)	Defendant entered into an illegal business relationship for oil with Saddam Hussein's government.	12 months and a day
9			
10	<i>United States v. Christianson</i> , 586 F.3d 532 (7th Cir. 2009)	Two co-defendants who were member of the domestic eco-terrorist organization Earth Liberation Front committed \$424,361 worth of damage at a facility belonging to the U.S. Forest Service.	24 months and 36 months
11			
12			
13	<i>United States v. Hupper</i> Case No. 1:08-cr-20410-PCH (Exhibit U)	Defendant provided \$20,000 to terrorist group Hamas and made a false passport application.	46 months
14			
15	<i>United States v. Wright, et al.</i> Case No. 1:12-cr-00238-DDD (Exhibit V)	Co-defendants conspired to bomb an Ohio bridge.	received 11 and a half years, other two co-defendants received 8 years each
16			
17			
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In a recent case, *United States v. Issa et al.*, Case No. 09CRIM1244, three men pled guilty to terrorism charges involving “a plot to move numerous shipments of cocaine across two continents to support Al Qaeda and two other terrorist organizations.” (*Exhibit W*). Prosecutors sought the maximum sentence of 15 years for each of the defendants. (*Id.*) Instead, “[t]wo defendants received about five years each, while the third received just 46 months.” (*Id.*) Judge Barbara S. Jones, in explaining her reasoning, stated, “It seems clear to me that this defendant was not ideologically motivated....And this, to me, makes a difference...and is relevant to whether or not he is looking to commit further crimes and be a danger.” (*Id.*)

1 Oytun, meanwhile, was never actively involved in the supposed group that she
2 sent money to. Her conduct, while serious, was limited to three payments over a 31 day
3 period, behavior that she voluntarily terminated before any detection by law enforcement.
4 The specific organization she contacted is not listed on the United States' list of
5 designated terrorist organizations. Unlike many of the defendants in comparable cases,
6 Oytun never travelled to another country to assist any terrorist organization, never
7 participated in any attack, never even participated in the planning of any attack, never
8 expressed any anti-American sentiment in her e-mail communications, and was not
9 motivated by ideology. As Federal District Judge Jones stated when sentencing
10 individuals involved in shipping cocaine to support Al-Qaeda, the motive behind the
11 conduct makes a big difference. As discussed previously, Oytun's motivations were not
12 ideological in nature. Since her arrest, she has not made any ideological defense of any
13 terrorist organization, and has even proclaimed in her letter to the Court her love for this
14 country and all that it has offered her. In comparison to the above-cited cases, where
15 defendant's conduct occurred over many months, involved active participation in
16 terrorism activities, and involved material support of known terrorist organizations in
17 substantial amounts, Oytun's conduct is significantly less severe. This Court is asked to
18 consider the comparative conduct and sentences in the cases noted above.

19
20 **D. SECTION 3553(A) FACTORS CONCERNING THE NEED FOR**
21 **THE SENTENCE IMPOSED**

22 The next factors under §3553(a) concern the need for a particular sentence. The
23 mandatory principle of §3553(a) is a limiting one: the sentence must be "*sufficient, but*
24 *not greater than necessary*,"³ to satisfy:

25 (2) the need for the sentence imposed - - (A) to reflect the seriousness of the
26 offense, to promote respect for the law, and to provide just punishment for
27 the offense; (B) to afford adequate deterrence to criminal conduct; (C) to
28 protect the public from further crimes of the defendant; and (D) to

³ The *Adelson* court noted "necessary is the operative word. *Adelson*, 441 F.Supp. 2d at 515.

1 provide defendant with the needed educational or vocational training,
2 medical care, or other correctional treatment in the most effective manner.

3 18 U.S.C. §3553(a)(2)(emphasis added).

4 Courts across the country have recognized that they must honor this parsimonious
5 provision. See.e.g., *Carty*, 520 F.3d at 991; *United States v. Spigner*, 416 F.3d 708, 711
6 (8th Cir. 2005).

7
8 **1. THE SERIOUSNESS OF THE OFFENSE**

9 Certainly a crime that poses a potential threat of harm to our country, or injury to
10 our military or persons who represent our country, is indeed the most serious of crimes.
11 Neither the defense nor defendant herself will minimize the severity of crime at issue.
12 However, as discussed previously, several extraordinary factors are relevant in
13 determining the seriousness of this offense.

14 Oytun’s total monetary contribution to Ebu Bera was \$2,050. This is not a
15 significant sum. The funds were sent on three (3) occasions during only a one-month
16 period of time. Oytun’s conduct was thus limited in duration. Also, Oytun did not send
17 any addition funds after January 2011. The record shows no further criminal conduct
18 after that date. Oytun therefore stopped her participation on her own, without
19 intervention from law enforcement.

20 Oytun participated in the offense at a vulnerable period in her life. She had
21 separated from her husband at this time and had move out of their home. She had
22 recently returned from Turkey where it became apparent that her mother was ill and may
23 have had lung cancer. She was informed that her brother was making a pilgrimage to
24 Pakistan from Turkey during this time. She has a close relationship with her brother and
25 was concerned for his safety. She was directed by Kerim (her close friend in Turkey and
26 her brother’s business partner) to the specific website in order to contact a person or
27 persons in the group in Pakistan where she was advised that her brother was traveling.

28 Oytun sent these funds and communicated with Ebu Bera, at least in part, to assist

1 her brother in traveling safely and so her brother would be treated well at his destination.
2 Oytun writes: “I am getting in contact with you through my brother... who is now on
3 the road to be able to come to you (Bates 2388, E-mail No. 1); My brother is on the road
4 at this time, he is coming to join you (Bates 2387, E-mail No. 2); I presume my brother
5 hasn’t arrived there yet (Bates 2383, E-mail No. 10); My brother is on the way, he will
6 come to be with you, god willing, but I suppose he hasn’t arrived yet (Bates 2374, E-
7 mail No. 29).” (*Exhibit H.*)

8 It is unclear how the funds that Oytun send were used, but it is apparent they were
9 not used for violent purposes. In the email communication Ebu Bera states that the
10 funds were needed to buy some things for his house (*Exhibit H*, Bates 2382), and at
11 another point he states he must pay off a car that he had purchased. (*Exhibit H*, Bates
12 2373) In his statement to authorities, Ebu Bera states that the money Oytun sent was
13 used for flood relief. (*Exhibit H*, Bates 3310). In her emails Oytun also discusses
14 providing medication, and the fact that her family has a pharmacy, indicating a desire to
15 help sick people in the area. (*Exhibit H*, Bates 2387-88).

16 Ebu Bera uses dramatic and emotional language in his email conversations, and it
17 is clear that Oytun is being solicited by the use of religion, the quotation of Koran
18 verses, and by appeals of emotion and desperation by Ebu Bera: “Dear mother, there is a
19 debt for this car of mine. The man is distressing me. Continually asking me what
20 happened to his money. Actually I bought this car relying on a brother, because he said
21 he will give me money. As I soon as I bought the car, now the man does not answer my
22 calls and mails. Is that how far humanity goes? ... I will either give the car back or a door
23 needs to open for me to find relief regarding financial matter. Mother, I love you.
24 Mother, take care...” Ebu Bera addresses Oytun as “mother” in an obvious appeal to
25 pry on her emotions, which she responds to due to her vulnerable state. Oytun is
26 obviously being solicited.

27 Though the crime at issue is indeed serious, this Court is asked to consider the
28 amount of Oytun’s financial support, the limited time period of her conduct, and the fact

1 that she ceased the conduct on her own prior to it being found out by law enforcement.
2 Oytun's emotional state at the time of her actions, her relationship with her brother and
3 fear for his safety, are all circumstances to be considered.
4

5 **2. THE NEED TO PROVIDE JUST PUNISHMENT**

6 18 U.S.C. §3553 mandates that the court consider the need for the sentence
7 imposed or provide just punishment for the offense. 18 U.S.C. §3553(a)(2)(a). In order
8 to determine whether a punishment is "just," a number of factors need to be considered.
9 A "just" punishment is punishment that fits the crime." *Simon v United States*, 361 F.
10 Supp. 2d 35, 43 (E.D. New York 2005). The punishment should not be unreasonably
11 harsh under all of the circumstances of the case. *See United States v. Wilson*, 350
12 F.Supp. 2d 910 (D. Utah 2005)(citing S. Rep. 98-255, 1984 U.S.C.C.A.N. 3182, 3258-
13 59). Certainly, a defendant can be punished by means other than incarceration.

14 In the instant case, Oytun has been in custody since August 2011 – a total of 18
15 months. Along with her guilty plea she agreed to judicial removal from the United
16 States, an action that renders her permanently inadmissible to the United States. This is
17 the country where she has lawfully resided for the past 18½ years. She went to graduate
18 school and obtained her professional degree here, learned and practiced her profession
19 here, paid taxes here, got married here and led a lawful life here. In her letter to the
20 court Oytun acknowledges the magnitude of her loss:

21 "I know I did wrong. Everything that I worked for; 16 years of my crime-
22 free, honest living, all of my accomplishments and my dreams are swept
23 away as a result of my actions during a very emotionally disturbed period.
24 I'm facing very harsh consequences such as losing my residency, my three
25 pharmacy state licenses that I worked very hard to get, the opportunity to
26 raise my children in this country and contributing to the community
27 through my hard work as a pharmacist at CVS." (*Exhibit A.*)

28 As Oytun recognizes more than anyone, here conviction in this case will cost her
more than just her liberty.

1 his attendance of a jihadist training camp and firing weapons at the camp, and for
2 obstructing justice with his false statements. *Id.* at 305. The district court found that the
3 terrorism enhancement applied, yielding a guideline range of 210 to 262 months. *Id.*
4 “But the court thought the case called for a downward departure under § 4A1.3 or (in the
5 alternative) a variance under 18 U.S.C. § 3553(a). ‘Sabri Benkahla is not a terrorist,’ the
6 court stated. [Citation.] He ‘has not committed any other criminal acts’ and his
7 likelihood of doing so upon release is ‘infinitesimal.’The court thus treated Benkahla
8 as having a Category I criminal history and sentenced him to 121 months.” *Id.* at 305-
9 306. The Fourth Circuit affirmed the sentence.

10 Like the defendant in *Benkahla*, Oytun has not committed any other criminal acts,
11 either in the United States (PSR, ¶ 31), or in Turkey (*Exhibit B*), and is unlikely to do so
12 in the future. The facts of this case and Oytun’s personal history make this case
13 particularly appropriate for a downward departure to Criminal History Category I.

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V
CONCLUSION

21 The offense committed by Oytun in this case is serious, and she has
22 acknowledged that seriousness in her letter to the Court. As has been discussed
23 throughout this memorandum, however, her conduct was nevertheless limited both in
24 scope and duration. The e-mail communications lasted only 31 days, before she
25 voluntarily terminated them, and her material support was limited to three payments
26 totaling \$2,050. The circumstances that led Oytun to commit this offense were not so
27 much ideological in nature, as much as her dealing with the anxieties of her separation
28 from her husband, her mother's illness, and her brother making this dangerous trip to

1 Pakistan. Her motivation for sending the funds were mixed, confused and conflicted.
2 Oytun has shown no propensity towards criminal conduct and in fact, led an entirely
3 law abiding life prior to this offense. She has tried to make amends through her guilty
4 plea, her remorseful letter to the court, [REDACTED]. She
5 is not likely to offend in the future. She has and will continue to suffer greatly for her
6 conduct, even if only by her eventual deportation from the United States, the country
7 that she had lived in her entire adult life and had come to love. For the reasons set
8 forth in this memorandum, the defense respectfully requests that this Court impose a
9 sentence of 24 months incarceration.

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Respectfully submitted
KESTENBAUM EISNER & GORIN LLP

Dated: February 5, 2013

_____/s/
ALAN EISNER
Attorney for Defendant
OYTUN MIHALIK

Dated: February 5, 2013

_____/s/
ERROL STAMBLER
Attorney for Defendant
OYTUN MIHALIK

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TABLE OF EXHIBITS

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Exhibit D	[REDACTED]
Exhibit E	Dr. Romanoff CV
Exhibit F	Interview of Rick Orozco
Exhibit G	Oytun’s Mother’s Medical Report
Exhibit H	[REDACTED]
Exhibit I	[REDACTED]
Exhibit J	[REDACTED]
Exhibit K	Oytun’s Degrees and Licenses
Exhibit L	Oytun’s CVS employment
Exhibit M	Letters of Support
Exhibit N	<i>United States v. Abdallah,</i>
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Exhibit Q	<i>United States v. Akl, et al.</i>
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Exhibit U	<i>United States v. Hupper</i>
Exhibit V	<i>United States v. Wright, et al.</i>
Exhibit W	<i>United States v. Issa et al.</i>
Exhibit X	[REDACTED]
Exhibit Y	[REDACTED]
Exhibit Z	[REDACTED]