IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal No.: 1:16-CR-143-LO |
| | ) | |
| MOHAMAD JAMAL KHWEIS, | ) | |
| | ) | |
| Defendant. | ) | Hearing: April 12, 2017 |

**GOVERNMENT'S RESPONSE IN OPPOSITION**
**TO DEFENDANT'S MOTION TO SUPPRESS**

The United States of America, by and through its attorneys Dana J. Boente, United States Attorney, Dennis M. Fitzpatrick, Assistant United States Attorney, and Raj Parekh, Trial Attorney, Counterterrorism Section, National Security Division, United States Department of Justice, hereby files this response to the Defendant's Motion to Suppress. For the reasons set forth in this Opposition, and based on the evidence to be adduced at a hearing in this matter, the United States respectfully requests that the Court deny the motion to suppress.

## I. INTRODUCTION

On January 5, 2017, a federal grand jury returned a three-count superseding indictment charging Mohamad Jamal Khweis ("Khweis" or "the defendant") with (1) conspiring to provide material support or resources to the Islamic State ("ISIS") in violation of 18 U.S.C. § 2339B, (2) providing material support or resources to ISIS, also in violation of 18 U.S.C. § 2339B, and (3) possessing, using and carrying firearms in violation of 18 U.S.C. § 924(c)(1)(A).

Khweis is a 27-year-old natural born United States citizen who successfully traveled overseas in December 2015 and joined ISIS in Syria and Iraq. Before doing so, the defendant – a

long-time Fairfax County, Virginia resident who studied criminal justice in college and has always resided in the United States – resigned from his job, sold his personal vehicle, created a new email account to purchase one-way airline tickets and make overseas travel arrangements, and used multiple social media platforms and programs to securely and privately communicate with ISIS in order to accomplish his goal of joining the notorious terrorist organization. Through the defendant's admissions,[1] his conduct, and electronic images discovered on his electronic media, the defendant's knowledge and commitment to ISIS is beyond dispute.

Contrary to the defendant's claims in his opening brief, this is not a person who frightens or breaks down easily. After contacting an ISIS facilitator for the purpose of being smuggled into Syria, notwithstanding a warning that he would need to look out for land mines and bombs on the road near the Turkish-Syrian border, the defendant continued onward, undeterred, and ultimately arrived at an ISIS safe house in Raqqa, Syria. It was at this point that he was asked by an ISIS member during the intake process if he wanted to be a suicide bomber, to which he responded, "yes."

The defendant's constitutional rights were respected. Government officials acted lawfully and responsibly towards the defendant, and with the handling of the defendant's investigation. After the defendant's apprehension in northern Iraq on March 14, 2016, the defendant was explicitly informed of his ability to obtain the advice of a lawyer on repeated occasions, and he voluntarily declined each opportunity. The totality of the circumstances – the characteristics of the defendant and the conditions of his arrest and detention – demonstrate that

[1] For example, the defendant explained to the Federal Bureau of Investigation ("FBI") that he learned about the November 2015 ISIS terrorist attacks in Paris, France, and the fact that ISIS released a video of a caged Jordanian pilot being burned to death, before he voluntarily decided to travel to ISIS-controlled-territory.

he understood the consequences of every choice he made. The defendant acted deliberately, consciously, and thoughtfully during the planning of his trip to join ISIS, and his conduct while in Syria and Iraq, including his time while in Kurdish custody, demonstrate that he was fully aware of the choices that he made and the attendant consequences of those choices.

Consider the following actions undertaken by the defendant: (1) he lied to his family upon departing the United States; (2) he embarked on a circuitous route to Turkey in order to avoid detection; (3) he communicated with ISIS sympathizers and recruiters by way of multiple social media programs and platforms to surreptitiously facilitate his entry into the ranks of ISIS; (4) he traveled from north to south Turkey to meet with ISIS couriers who secreted him into Syria with three other ISIS recruits; (5) he went through an intake and screening process with ISIS, which included expressing the role he would like to serve with ISIS, providing biographical information, and having his blood type tested; and, (6) he completed ISIS-directed religious training that lasted nearly a month with each sermon ending with "may God destroy America."

**A. December 2015 through March 2016 – Khweis Travels and Joins ISIS**

On or about March 14, 2016, Kurdish Peshmerga military forces detained the defendant near Sinjar Mountain within the Kurdish-controlled territory in northern Iraq. The defendant voluntarily submitted to Peshmerga authority upon traveling into Kurdish-controlled territory after leaving a *katiba*[2] in the ISIS-controlled city of Tal Afar, located in northwestern Iraq. When he was detained, the defendant also possessed three mobile phones, SIM/memory cards, his Virginia driver's license, two bank cards, and various denominations of United States dollars, Turkish Lira, and Iraqi Dinar.

[2] *Katiba* is a term that can be used to refer to an ISIS neighborhood or military battalion.

In a *Mirandized* interview, the defendant admitted, after providing oral and voluntary consent for the FBI to search his phones and SIM/memory cards (collectively, the "electronic media"), that he possessed and owned the electronic media seized by the Peshmerga. An examination of that electronic media yielded, among other things, images of the World Trade Center burning on September 11, 2001; ISIS fighters; the black flag of ISIS, again with ISIS fighters; Abu Bakr al-Baghdadi;[3] Anwar al-Awlaki;[4] and images of ISIS members using and carrying different types of weapons, all of which appeared to be stored on the electronic media as a result of web browsing. It is beyond dispute that the defendant knew he was joining a violent terrorist organization.


[3] On or about, July 5, 2014, in a rare public address within a mosque in Mosul, Iraq, al-Baghdadi declared the Islamic State a caliphate and he anointed himself the caliph, or leader, of the organization. The objective of the terrorist organization is the forcible acquisition of land for the stated goal of creating an Islamic State without recognizing any national boundaries. ISIS seeks to accomplish its goals through the commission of various criminal acts and acts of terror against the United States and the world community, and by recruiting and accepting new members from across the globe, including the United States.

[4] Anwar al-Awlaki was a key leader of Al Qaeda in the Arabian Peninsula, a foreign terrorist organization. He used the Internet to post sermons and blog entries in which he justified conducting violent jihad against the United States, United States citizens, and United States military personnel, and attempted to radicalize and recruit followers to engage in violent jihad. On or about September 30, 2011, al-Awlaki was killed in Yemen.

Additionally, there are numerous stored images showing maps of Turkey, Syria, and Iraq, and a combination of all three including maps outlining the battle lines in Syria, maps showing the border area between Turkey and Syria, maps focusing on the Gaziantep region,[5] Google Maps images of specific areas of Gaziantep, and isolated portions of other parts of Syria, including Aleppo and Raqqa – cities inhabited by ISIS. Among other things, the defendant admitted that he used one of his phones to contact ISIS recruiters while he was in Turkey. The defendant further admitted that he used a phone to view extremist videos produced by ISIS.

Throughout the interviews, the defendant made admissions concerning his involvement with ISIS, often followed by his own justifications for his conduct, arguably to mitigate or

[5] Gaziantep is the city in the south of the Republic of Turkey near the Syrian border where the defendant admitted traveling for the purpose of gaining entry to ISIS-controlled territory.

exculpate his involvement with ISIS. For example, the defendant was inspired to join ISIS because he saw that they had established an Islamic caliphate and were in the process of expanding it. The defendant admitted that he knew that Abu Bakr al-Baghdadi is the Emir or leader of ISIS, and further stated that he viewed al-Baghdadi's speeches before traveling to Syria.

The defendant admitted first acquiring an interest in traveling to Syria to join ISIS in mid-2015. The defendant stated he contacted ISIS-affiliated social media accounts to gain information and discuss his desire to travel to Syria to join ISIS. The defendant admitted that he conducted online research on ways to travel to Syria and read materials online that contained recommendations on who to contact to get smuggled across the Syrian-Turkish border to get into Syria. The defendant departed the United States in December 2015, and his travel included a stop in London before eventually continuing on to the Netherlands Turkey.

The defendant admitted during *Mirandized* interviews that he possessed firearms while residing in ISIS safe houses, but he minimizes his conduct by claiming he simply possessed firearms for benign purposes such as moving them out of the way. However, the defendant made several admissions during *Mirandized* interviews concerning the role of firearms in the ISIS conspiracy including, but not limited to: (1) frequently viewing ISIS “military” videos before he traveled to ISIS-controlled territory, including footage of ISIS fighters engaging the group's various enemies in Syria and Iraq, as well as videos of ISIS conducting terrorist operations; (2) stating he was aware before he traveled to ISIS-controlled territory that ISIS is a terrorist group and that they conducted firearms-related terrorist attacks against countries that “helped” ISIS's opponents; (3) stating he understood that military/weapons training was a possibility in his progression through the ISIS ranks; (4) stating he thought he was destined for military training because he didn't have any skills to offer ISIS; (5) stating firearms were openly present in every

safe house in which the defendant resided; (6) stating he resided with ISIS fighters who came from and left for the battlefield; (7) stating he knew some of the ISIS trainees with whom the defendant resided underwent sniper training. Further, the defendant's electronic media contained images of ISIS fighters possessing, using and carrying weapons.

During *Mirandized* interviews, when FBI Special Agents showed a short video that was found on one of the defendant's devices depicting individuals holding rifles and black flags, the defendant stated that the video was sent to him by another ISIS member, who claimed to be shown in the video footage. A screen shot of that video, taken directly from the defendant's phone, is set forth below:


The defendant also admitted that he burned his laptop computer and destroyed two additional mobile phones prior to his detention – further evidence that this is a defendant who is strategic.

**B. Consular Visits with the Defendant**

The first United States Government official to see the defendant upon his arrival in Erbil on March 15, 2016 was a U.S. Department of State ("State Department") Consular Officer. The purpose of the first visit was to check on the defendant's well-being and to provide him with a fact sheet of certain procedural rights, including the right to legal counsel, to provide a list of attorneys practicing in or near Erbil, Iraq (the same region in which the defendant was in Kurdish custody), and to obtain a Privacy Act Waiver to enable the U.S. Consulate in Erbil to

communicate with the defendant's family, friends, attorney (if he chooses to retained one), members of the media, employer, and others. The Consular Officer observed that the defendant appeared very stressed, but otherwise the defendant reported being treated well and eating and sleeping. He did not allege any mistreatment whatsoever by the Kurdish authorities in Erbil. The defendant also falsely claimed he left his passport in the glove compartment of the taxi. The defendant did not remember the name of the taxi company nor could he remember the names of any hotels that he claimed to have stayed in while overseas.

Perhaps most importantly, in addition to the Fact Sheet (*see* Def. Mot. Ex. 1), **the defendant was provided a list of lawyers who practice in the Kurdistan region of Iraq**, which is where the defendant was being held until June 8, 2016. Additionally, the Consular Officer explicitly told the defendant after he provided the list of attorneys to him, that the defendant would probably want an attorney, and recommended to the defendant that he obtain an attorney, given the defendant's status as an arrestee in Kurdish custody.

The defendant was seen again by a separate State Department Consular Officer on April 5, 2016. The defendant appeared in good health, was dressed casually, and wore flip flops. He smoked a cigarette during the meeting, and noted that while he is in good health, he was having difficulty using the restroom and experiencing both stomach issues and constipation. Prison officials told the Consular Officer that he was visited by a doctor regarding those issues, and would be visited by another doctor the next day. In addition to the Fact Sheet, the defendant was yet again provided with a list of local lawyers. After the defendant confirmed that he did not have a lawyer at present and does not have a lot of money, a Kurdish prison official stated that a public defender **could be appointed to him free of charge if needed**. The defendant, yet again,

did not heed the advice of another individual explicitly telling him that he was welcome to seek the advice of counsel.

The defendant was visited a third time on April 23, 2016. The Consular Officer observed that the defendant appeared in good health and was dressed casually. In addition to the Fact Sheet, the defendant was provided with a list of local lawyers for the third time since March 15, 2016. During this visit, the Consular Officer informed the defendant that his mother hired an attorney on his behalf in Alexandria, Virginia. At this point, the defendant decided to add the attorney on an updated Privacy Act Waiver form. Other than experiencing stomach issues and difficulty using the restroom on an intermittent basis, for which the defendant indicated he has been visited by a prison doctor, the defendant stated that he has no further complaints about his treatment and did not request any additional consular assistance. The Consular Officer's final visit with the defendant was on May 19, 2016. The Consular Officer noted that the defendant appeared in good health and was dressed casually. Among other things, the defendant stated he was in good health and does not need consular assistance. The defendant signed a new passport application during this visit.

**C. Kurdish Interviews with the Defendant**

As noted above, Peshmerga forces apprehended the defendant near Sinjar, Iraq on March 14, 2016. The transport of the defendant from his seizure point to Erbil, Iraq took place over the course of one day on March 14, 2016, when the defendant was transferred to the custody of the Kurdish Counter Terrorism Directorate ("CTD") in Erbil.[6] The defendant remained in the custody of CTD until he was transferred to the FBI on June 8, 2016.

[6] The defendant's repeated statements that he was held in "secret detention" is belied by numerous facts present in this case. *See* Def. Mot. at 1, 17, 25-26, 36-37, 46, and 48. First, the defendant's apprehension and detention was promptly disclosed to the U.S. Consulate in Erbil

The defense has been aware since at least last year that Kurdish CTD officials interviewed the defendant on a number of occasions while he was in their custody, and in turn, produced reports summarizing those interviews. For example, as set forth in a Kurdish investigative report that was produced to the defense on December 15, 2016, in response to initial questioning, without any U.S. interrogator present, the defendant stated: (1) he was smuggled into Syria with the help of ISIS facilitators in Turkey; (2) he was later transferred to Mosul and lived at an ISIS safe house; and, (3) he participated in a Sharia course for several weeks while with ISIS. All of the Kurdish interview reports in the government's possession have also been disclosed to the defense. The defendant himself, of course as a participant, has been aware of the Kurdish CTD interviews since March 14, 2016.

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and State Department officials. Second, during the defendant's March 15, 2016 consular visit, he specifically declined to add anyone, other than his parents, to his Privacy Act Waiver form. He had the option of adding the general public, media, Members of Congress, clergy, friends, etc. to whom he would consent for information about his detention to be released, but he declined. Third, on March 16, 2016 (in addition to numerous open source media articles describing his apprehension and detention), the Kurdistan Region Security Council released a publicly available statement over social media announcing that Khweis "is in the Kurdistan Region being questioned by relevant security authorities and is provided the care afforded to him under international and local law." @KRSCPress: https://twitter.com/krscpress/status/ 710077319143096320 (last visited Mar. 24, 2017). Fourth, Kurdish authorities made the defendant available for a Kurdish television media interview on March 17, 2016, which was conducted at the detention facility and publicly available on the Internet – hardly the formula for keeping his detention "secret": http://www.kurdistan24.net/en/news/ bf92b765-a474-4f3b-8dcd-d90446a60f9c/EXCLUSIVE-interview-with-the-American-born-ISIS-fighter (last visited Mar. 24, 2017). Fifth, Red Cross officials visited the defendant at the detention facility itself on multiple occasions. Sixth, the defendant's family members wrote him letters, copies of which the government disclosed to the defendant months ago, listing the precise detention facility on the addressee line. One of those letters, dated April 18, 2016, even states "**if** you need a lawyer, his name is John K. Zwerling" (emphasis provided). That the defendant did not want, and in fact voluntarily declined, for others to know where he was detained was his choice at the time, and it is meritless to now suggest that his detention was somehow a "secret."

"[T]he law is settled that statements taken by foreign police in the absence of *Miranda* warnings are admissible if voluntary." *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003) (citations omitted). Courts' refusal to apply an exclusionary sanction reflects the limited deterrent benefit from excluding trustworthy evidence obtained by foreign sovereigns, "because the United States cannot dictate the protections provided to criminal suspects by foreign nations," *United States v. Abu Ali*, 528 F.3d 210, 227 (4th Cir. 2010) (citations omitted), and "the exclusionary rule has little or no effect upon the conduct of foreign police." *United States v. Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971) (per curiam). The defendant cannot avail himself of the exceptions to this established line of jurisprudence (voluntariness and joint venture-related arguments) for the reasons explained *infra*.

**D. Intelligence-Gathering Interviews**

The defendant was interviewed for intelligence-gathering purposes 11 times by United States government personnel between March 15, 2016 and April 10, 2016 while he was in Kurdish custody. The interviews were led by the then-Assistant Legal Attaché for the FBI ("the FBI ALAT") in Erbil, Iraq, and attended by a State Department law enforcement official, a cultural advisor from the State Department, one Kurdish CTD official, and for a limited number of interviews, two Department of Defense personnel. All of the intelligence-gathering sessions were focused on topics consistent with national security priorities. Specifically, the overriding purpose of those interviews were on obtaining information about threat streams, possible imminent attacks, and other topics that would assist the United States in disrupting terrorist attacks.

The defendant was treated respectfully throughout the intelligence-gathering interviews. The interviews occurred in a well-lit office at the detention facility that was approximately 20

feet by 12 feet in size and with comfortable surroundings, including two couches, a large desk, coffee table, chair, and lacking any prison bars. During the interview sessions, the door to the office remained open and interviewers offered the defendant comfort breaks, soda, snacks, bottled water, and cigarettes upon request. He was often observed smiling, laughing, appearing engaged, answering all questions and willingly volunteering information to assist the interviewers. He received prompt medical care and attention from Kurdish officials for any health issues, such as stomach discomfort and/or constipation.

On April 10, 2016, the U.S. intelligence-gathering interviewing team completed its final interview of the defendant. The team did not divulge to the defendant that an entirely separate FBI law enforcement team would be arriving in Erbil to conduct additional interviews. None of the defendant's statements to the intelligence-gathering team, or the topics discussed with the intelligence-gathering team, were communicated to the FBI's law enforcement team. The law enforcement team waited approximately ten days before approaching the defendant, and the law enforcement team took several steps to ensure that the *Mirandized* interviews were separated in time, personnel, and location from the intelligence-gathering interviews.

The intelligence-gathering statements are inadmissible during the government's case-in-chief. However, the government may seek to lawfully use the statements made by the defendant during the intelligence-gathering interviews for cross-examination, impeachment and/or rebuttal purposes should the defendant elect to testify at trial. *See Harris v. New York*, 401 U.S. 222 (1971) (statement inadmissible against a defendant in the prosecution's case-in-chief because of lack of the procedural safeguards required by *Miranda* may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attach the credibility of the defendant's trial testimony). As the Supreme Court explained in *Harris*, "[t]he shield provided by Miranda

cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id*. at 226.

**E. Attenuation Period**

At the conclusion of the intelligence-gathering interviews, an entirely separate, walled-off team of United States government personnel traveled from the Washington, D.C. area to Erbil, Iraq to determine whether the defendant was willing to knowingly waive his *Miranda* rights and voluntarily speak to two FBI agents who had never spoken to or met him. The walled-off FBI agents were not exposed to the substance of any statements made during the intelligence-gathering interviews, and thus, they were completely unaware of what admissions, if any, the defendant made. Similarly, the walled-off FBI agents did not know what statements, if any, the intelligence-gathering interviewers made to the defendant. Furthermore, to add yet an additional layer of precaution, the undersigned prosecutors were also walled-off from the intelligence-gathering interviews. Thus, any legal advice that the undersigned prosecutors may have given to the walled-off FBI agents was not, and could not have been, based upon any statements that the defendant or the interviewers made during the intelligence-gathering interviews. In fact, the walled-off FBI agents and the undersigned prosecutors did not know the content of those statements, and refrained from reviewing the FBI reports regarding those statements, until *after* the defendant made his initial appearance in this district on June 9, 2016.

The attenuation period lasted between April 11, 2016 until April 20, 2016. The defendant was not interviewed during this period, nor did the ALAT visit with him. Other attenuation steps sought by the FBI, and ultimately granted following extensive deliberation by Kurdish CTD (who controlled all aspects of the defendant's detention while he was in Kurdish custody, including procedural matters), included changing the interview room location for the *Mirandized*

interviews. Additionally, the Kurdish official who attended the FBI-led intelligence-gathering interviews did not participate in any of the April 2016 *Mirandized* interviews, and thus, there was no overlap of personnel on either the U.S. or Kurdish side. At all times, including during the attenuation period, Kurdish CTD officials treated the defendant extremely well, as the defendant himself acknowledged during his interviews. As summarized in an FBI report regarding the April 10, 2016 intelligence-gathering interview:

> KHWEIS stated he was in good condition and did not have any physical or medical issues. He stated that he met with the ICRC earlier that day that also checked on his physical condition. KHWEIS was in a positive mood and appeared happy to see the interviewers. He explained how he asks guards daily to speak with US interviewers because he remembers additional intelligence of value and wants to share it with US interviewers immediately in order to identify possible ISIL threats. KHWEIS was not handcuffed and appeared comfortable around CTD personnel and interviewers. He smiled and laughed regularly during the interview. He was engaged, answered all questions, and willingly volunteered additional information to assist interviewers. During the interview, he was provided water, Coca Cola, a chocolate bar, Pringles, and a granola bar.

**F. Law Enforcement Interviews**

Approximately ten days passed before two walled-off FBI agents met with Khweis for the first time on April 20, 2016 at the Kurdish CTD. From that point onwards, the defendant was interviewed by United States government personnel on six separate occasions, and before each interview, the defendant knowingly and voluntarily waived his *Miranda* rights orally and in writing. Two of these interviews – May 3 and 9, 2016 – were brief. The final interview occurred on an aircraft during the defendant's transport back to the United States on June 8, 2016. The interviews conducted on April 20, 21 and 23, 2016, were comprehensive.

On each of those six occasions, the defendant was informed of his right to counsel, that he does not need to speak with the agents just because he has spoken with others in the past, that he has the right to talk to a lawyer for advice before the agents ask him any questions, and that anything he says can be used against him in court, among other rights that were explained to

him. *See* Ex. 1. Moreover, **the defendant was explicitly told before each of the four *Mirandized* interviews conducted by the FBI that his family in the United States had retained a United States-based attorney on his behalf**. Notwithstanding the fact that this information is reflected at the outset of all of the relevant FBI interview reports (to which the defense has had access since June 2016), the defendant's motion to suppress omitted any references to it.

1. The April 20, 21 and 23, 2016 *Mirandized* Interviews

The walled-off FBI agents conducted three separate *Mirandized* interviews in April 2016 with the defendant on April 20, 21, and 23. During those interviews, the defendant, after being informed of his rights verbally and in writing, voluntarily told the FBI numerous details about his surreptitious travel from the United States to ISIS-controlled territory, and how he provided services and gave himself to ISIS. Critically, the defendant was read aloud a comprehensive "Advice of Rights" (*Miranda*) form verbatim on each day, asked if he understood the form and his rights, and asked if he was willing to speak to the agents without an attorney present. He agreed to voluntarily sign the form each time after reading it himself. *See id*.

Because of the defendant's unique situation, the agents provided enhanced warnings to the defendant. On each day before questioning began, the agents advised the defendant orally and in writing that, although he is not in the United States, United States laws provide him with certain rights in his dealings with the FBI agents. The defendant was also informed that an American-trained attorney is available to him, but (given that he was in Kurdish custody at the time), the agents' ability to provide the defendant with access to him may be limited by the decisions of the local authorities. The defendant was verbally informed on each day before questioning began that his family in the United States had retained a United States-based

attorney on his behalf. On each day, the defendant responded that he understood his rights, voluntarily waived those rights orally and in writing, and repeatedly affirmed that he wished to speak to the interviewing agents without an attorney present. Furthermore, the defendant was told that, if he decides to answer questions without a lawyer present, that he has the right to stop answering at any time. In fact, even *after* he decided to add an attorney to an updated Privacy Act Waiver form on April 23, 2016 (the third *Mirandized* interview), which occurred during a meeting with a State Department Consular Officer minutes *before* he met with the walled-off agents on that day (at the time, the agents were completely unaware that the defendant had updated his Privacy Act Waiver form to add an attorney), the defendant waived his rights orally and in writing yet again.

The government seeks to admit statements made by the defendant during all three April 2016 *Mirandized* interviews in its case-in-chief.

2. The May 2016 *Mirandized* Interviews

On May 3 and May 9, 2016, in the presence of Kurdish officials while the defendant was still in Kurdish custody, the defendant was interviewed by law enforcement officials from the State Department. The defendant was *Mirandized* and presented with the same "Advice of Rights" form, which he acknowledged verbally and in writing that he understood, and he again agreed to answer questions without a lawyer present notwithstanding the fact that he was informed of his right to remain silent and right to counsel. *Id.*

During both of these interviews, the State Department law enforcement officials showed the defendant photos and asked whether he could recognize any of the individuals given the time he spent with ISIS in Syria and Iraq. The defendant recognized some of the individuals, including an individual that he was certain he knew from his time in ISIS-controlled territory. At

this time, however, the government does not anticipate using any of the statements that the defendant made during the May 2016 interviews in its case-in-chief.

3. The June 2016 *Mirandized* Interview

The defendant voluntarily participated in one final *Mirandized* interview on June 8, 2016 aboard a United States government aircraft en route to the United States. The interview was conducted by one of the walled-off FBI agents who participated in the April 2016 *Mirandized* interviews and another FBI agent who was also completely unaware of the content of any statements the defendant made during the intelligence-gathering interviews. As was the case for all of the prior law enforcement interviews, the defendant was read aloud an "Advice of Rights" form (*Miranda*) verbatim, asked if he understood the form and his rights, and asked if he was willing to speak with the interviewing agents without an attorney present. The defendant responded in the affirmative and agreed to voluntarily sign the form after reading it himself. *Id*. Furthermore, the defendant was advised yet again that his family in the United States had retained a United States-based attorney on his behalf.

After the defendant waived his rights, he voluntarily provided information about a social media account that he created in Turkey before he was surreptitiously smuggled into Syria, and information about an individual that he knew from his time in ISIS-controlled territory. The defendant also made a number of self-serving exculpatory statements that were previously disclosed to the Court in another pleading and in search warrant applications. The government seeks to admit statements made by the defendant during the June 8, 2016 *Mirandized* interview in its case-in-chief.

## II. THE UNITED STATES DID NOT VIOLATE ANY STATUTORY OR CONSTITUTIONAL PROMPT PRESENTMENT RIGHTS IN THIS CASE

The defendant's entire prompt presentment argument rests on a finding by the Court that there was an improper "working arrangement" between Kurdish authorities and the United States government to delay the defendant's presentment before a United States Magistrate Judge for the purpose of extracting a confession from the defendant. The "working arrangement" analysis fails for several reasons: (1) the defendant was lawfully "arrested" by Kurdish authorities with no U.S. involvement and remained exclusively in Kurdish custody until June 8, 2016; (2) the defendant was lawfully "arrested" by Kurdish authorities and was detained pursuant to violations of foreign law; (3) no U.S. charges were lodged against the defendant until May 11, 2016, which objectively places this case outside of the 18 U.S.C. § 3501(c) analysis for interviews conducted prior to May 11, 2016; (4) the FBI had no control or decision-making authority with any aspect of the defendant's Kurdish custody; and, (5) even if the Court finds that the FBI influenced the Kurdish custody decision-making, the FBI's conduct did not rise to the level of control over the Kurdish decision-making and the influence was not done with an improper purpose, *i.e.*, delaying presentment before a United States Magistrate Judge in order to extract a confession. *See United States v. Bin Laden*, 132 F. Supp. 2d. 198, 209-210 (S.D.N.Y. 2001) (no improper working arrangement found where defendant's interrogation "dominated" by U.S. personnel for eight hours a day for 12 consecutive days while in Kenyan custody.)

"The requirements of § 3501 are implicated only in the case of a prisoner who is arrested or detained for a federal crime and, thus, is in federal detention at the time the challenged detention is made." *United States v. Fullwood*, 86 F.3d. 27, 31 (2d. Cir. 1996) (citing *United States v. Alvarez-Sanchez*, 511 U.S. 350, 358 (1994)). The defendant was not arrested or detained on a U.S. federal charge until, at the earliest, May 11, 2016. Furthermore, in order to

establish a Kurdish-FBI "working arrangement" to undermine the defendant's "prompt presentment" rights, the evidence must demonstrate that "the [non-federal] officials are acting for, and under the direction of, federal agents under circumstances which fairly warrant the conclusion that the custody is federal in substance." *Carpenter v. United States*, 264 F.2d 565, 571 (4th Cir. 1959) citing *Anderson v. United States*, 318 U.S. 350 (1943). Absent this improper "working arrangement" the defendant's prompt presentment argument fails. *See, e.g.*, *Alvarez-Sanchez*, 511 U.S. at 359-360 ("improper collaboration" between federal and state officers undertaken to delay federal presentment leads to suppression in federal court of any resultant confession.); *United States v. Abu Ali*, 528 F.3d. 210, 227 (4th Cir. 2008) (affirming trial court that no "working arrangement" existed between U.S. and Saudi government where "no credible evidence that the Saudis held, or continued to hold, [Abu Ali] so that United States officials could evade their constitutional duties."); *Bin Laden*, 132 F. Supp. 2d at 209 ("In part because courts are reluctant to discourage cooperation between agencies, the mere fact of federal participation in an investigation does not suffice to establish an improper "working arrangement.").

The United States government, primarily working through one FBI Special Agent who was on assignment on the ground in Erbil, Iraq, had no "working arrangement" with Kurdish authorities designed to undermine the defendant's right to a prompt presentment before a United States Magistrate Judge. The U.S. had zero involvement with the defendant's apprehension outside of ISIS-controlled territory in northern Iraq on March 14, 2016. Later that same day, Kurdish authorities transferred the defendant to Erbil, where he was held in the exclusive custody and control of the Kurdish CTD until June 8, 2016. The FBI opened a national security/terrorism investigation concerning the defendant's conduct when it learned of his arrest

on March 14, 2016. At the same time, Kurdish authorities pursued their own investigation against the defendant under the laws of the Kurdistan Regional Government ("KRG"). While a small selection of United States government email communications in this case reflect pressure placed on the FBI by Kurdish authorities to bring the investigation to a premature conclusion, these communications simply, at best, create "mere suspicion or conjecture" of an improper collusion between the governments to undermine the defendant's prompt presentment rights. *United States v. Coppola*, 281 F.2d 340, 344 (2d Cir. 1960) ("The Supreme Court's decision in [*Anderson v. United States*, 318 U.S. 350 (1943)] makes plain that the mere fact that two or more agencies have the same crime or the same suspects on their books and that they are cooperating to achieve a solution does not make one the agent of the other and thus responsible for the others acts.")

This section addresses: (a) the defendant's burden of proof to establish a *McNabb-Mallory* and "working arrangement" violation; (b) relevant facts concerning the defendant's arrest and detention; (c) the law of prompt presentment and *McNabb-Mallory*; (d) how a valid *Miranda* waiver serves as a concurrent waiver of prompt presentment; and (e) the law of a "working arrangement" and the lack of any factual basis that Kurdish authorities and the United States colluded to deprive the defendant of his right to prompt presentment.

**A. Legal Standard**

The defendant "bear[s] the burden of establishing that [Kurdish] custody was improperly used to circumvent the rigors of Rule 5(a)" and 18 U.S.C. § 3501(c). *Bin Laden*, 132 F. Supp. at 209 citing *Alvarez-Sanchez*, 511 U.S. at 359; *see also Tillotson v. United States,* 231 F.2d 736, 738 (D.C. Cir. 1956) ("The burden of showing unreasonableness of delay in arraignment rests upon the defendant . . . ."); *United States v. Boche-Perez,* 755 F.3d 327, 336

(5th Cir. 2014) ("The defendant has the burden of demonstrating a *McNabb-Mallory* violation.").

Furthermore, mere suspicion of a collusive arrangement is insufficient. *Bin Laden*, 132 F. Supp. 2d at 209. The defendant has the burden to "show that the Government made deliberate use of [Kurdish] custody to postpone their presentment requirements." *Id*. Identifying an improper "working arrangement" must be based on objective facts, "not mere suspicion or conjecture." *Coppola*, 281 F.2d at 344 ("Mere words however, such as exchange of information, cooperation, collaboration, or even "working arrangement" do not carry within themselves any solution to the difficult problems of federal-state relations here involved.")

**B. Relevant Facts Regarding Arrest and Detention.**

Kurdish Peshmerga forces apprehended the defendant near Sinjar Mountain in northern Iraq in the early morning hours on March 14, 2016. No United States government personnel was involved in the apprehension, arrest, or detention of the defendant until June 8, 2016, at which point the FBI took custody of the defendant from Kurdish authorities pursuant to an arrest warrant issued by a Magistrate Judge in the Eastern District of Virginia on May 11, 2016. Between March 14, 2016, and June 8, 2016 (86 days), the defendant remained in the custody of Kurdish officials pursuant to foreign law, not U.S. law. In fact, upon releasing custody of the defendant in June 2016, Kurdish authorities required the FBI's ALAT to sign documents accepting the defendant's custody and belongings from the Kurdish authorities. *See* Ex 2. Translated, the pertinent language of the defendant's release from Kurdish custody states:

> Date: 06/08/2016. Document of handing over an indicted person. **At the orders of the Chancellor of the Security Council of the Kurdistan Region**, the indicted Muhammad Jamal Khwas, AKA Khweis, who is an American citizen, **was handed over to the representative of the FBI** at the General Consulate of the United States of America in Erbil (emphasis provided).

Erbil is the capital of the KRG in northern Iraq. Erbil hosts, on assignment, a limited number of United States personnel, including State Department representatives and one FBI Special Agent who serves as an ALAT. FBI "LEGAT's" (Legal Attachés) or ALAT's serve abroad under the authority of the U.S. Chief of Mission at United States Embassies. The LEGAT/ALAT's core mission is establishing and maintaining liaison with principal law enforcement and security services in designated foreign countries with appropriate respect for local law and jurisdiction. This liaison enables the FBI to conduct its responsibilities in combating international terrorism, organized crime, cybercrime, and general criminal matters. In particular, LEGAT liaison activities are essential to the successful fulfillment overseas of the FBI's lead federal law enforcement mission to prevent terrorist attacks against citizens and interests of the United States. The Legal Attaché program provides for a prompt and continuous exchange of information with foreign law enforcement and security agencies and coordination with U.S. federal law enforcement agencies that have jurisdiction over the matters under investigation. The FBI's foreign-based personnel also assist foreign agencies with requests for investigative assistance in the United States to encourage reciprocal assistance in counterterrorism, criminal, and other investigative matters.[7]

The FBI has an important mandate to investigate international terrorism in foreign countries as part of its mission to protect the national security of the United States. This mission necessarily requires coordination with foreign governments. The defendant strains to make a case that the FBI's coordination with its Kurdish partners in this case was actually *improper* collusion or collaboration to undermine the defendant's rights. The FBI did not

[7] FBI International Operations, https://www.fbi.gov/about/leadership-and-structure/international-operations (last accessed Mar. 23, 2017).

collude with the Kurdish government to deprive the defendant of his right to a prompt presentment, nor delay presentment in order to extract a confession. The FBI's coordination with the Kurdish authorities was expected, and absolutely necessary and proper, in order for each government to expeditiously investigate a United States citizen, who became an ISIS member and willing suicide bomber in-waiting, and who joined a vicious terrorist organization at war with the host custodial entity. The actions taken in this case are perfectly consistent with the FBI's overseas mission in investigating terrorism crimes, and the coordination undertaken with the Kurdish authorities is expected and proper under the FBI's LEGAT responsibilities. Critically, the Fourth Circuit explicitly recognized this point in rejecting a broad application of the joint venture doctrine in *United States v. Abu Ali*, 528 F.3d. 210, 230 n. 5 (4th Cir. 2008) ("[S]uch a broad per se holding could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope.").

The defendant was detained by Kurdish authorities for 58 days before a criminal complaint was lodged against him in the U.S. District Court for the Eastern District of Virginia. The FBI arrested the defendant in Iraq 28 days after the issuance of the arrest warrant. The defendant's terrorism-related conduct alleged in this case was unknown to the FBI prior to his apprehension on March 14, 2016. Accordingly, the FBI and Kurdish authorities were required to undertake their respective investigations from scratch when he was apprehended in Iraq on that day. *See United States v. McDaniel*, 441 F.2d 1160, 1161 (4th Cir. 1971) (no Rule 5(a) violation "where the FBI questioning occurred during a period of reasonable investigation to determine whether federal charges should be brought."); *United States v. Vita*, 294 F.2d 524, 530 (2d Cir. 1961) (The Supreme Court has not "forbidden the police to investigate crime" under *McNabb-Mallory*) (internal citation omitted). *See also United States v. Leviton*, 193 F.2d

848, 854 (2d Cir. 1951)("[E]ach case involving the McNabb rule must . . . be decided without resort to a semanticism that obscures the facts out of which it arises."); *Boche-Perez*, 755 F.3d at 338 (5th Cir. 2014) ("Finally, in applying *McNabb–Mallory*, a district court should not resort to a 'semanticism that obscures the facts' of a case.") (citing *Leviton*, 193 F.2d at 854).

During the defendant's Kurdish detention, United States government personnel met with him 17 times for either intelligence-gathering or investigative purposes. For each of those contacts, United States personnel had to request permission from Kurdish authorities to see the defendant. On each occasion of the U.S. personnel visits with the defendant, the Kurdish officials controlled the location, the date, the time of day, the length of the visit, and all other circumstances related to the visit. Evidence elicited at a hearing on this matter will demonstrate that the United States had no control or decision-making authority regarding the logistics of these visits. This fact is initially demonstrated by a communication cited by the defendant. *See* Def. Mot. at 6. The FBI ALAT in this case describes his lack of control over the defendant's custody and the physical evidence in a March 15, 2016 communication (one day after Kurdish authorities seized the defendant):

> We were advised that Mohammad Khweis was arrested by the Peshmerga and turned over to Erbil CTD. **We obtained permission** to interview him. When we arrived at CTD, **we were escorted** into Gen [] office. He advised us **that no US personnel would have access to him** no[r] **would we have access to the phones.** He was upset with a recent issue where no information was shared with them by US personnel holding an ISIS[] subject in Iraq. Peshmerga were being attacked with chemical weapons and the US was not sharing intelligence. After discussing the situation with him, **he agreed to provide me access** to the detainee **for 1 hour** . . . . (emphasis added.)

In fact, FBI summaries of the very same intelligence-gathering interviews that the defendant cites in his motion (*see* Def. Mot. at 8-9) clearly state that, in one instance, "[t]he interview was terminated by host nation" and in another instance, "[t]he host nation had to

terminate the interrogation due to other mission requirements." The evidence in this case will clearly demonstrate that the Kurdish authorities' control over the defendant's custody was continually exerted. The Kurdish CTD did not delegate decision-making authority regarding the defendant's custody or his belongings (such as his seized electronic media) to the FBI.

The FBI ALAT stationed in Erbil at the time of the defendant's Kurdish arrest was the lone assigned FBI representative in Erbil. He was responsible for the coordination of many matters in Erbil touching on U.S. law enforcement and intelligence matters. The ALAT was also the sole point of contact for the FBI on the ground in Erbil conducting this investigation. The ALAT had no unique or special authority in Erbil. The ALAT's conduct was circumscribed by the laws of the host foreign partner. The entire Kurdistan Regional Government exists within a hierarchy of decision-making authority. Although serving an important function, it is sheer folly to suggest that one FBI Special Agent had the authority or the ability to control the actions of senior members of the Kurdistan Regional Government.

**C. The Defendant's Presentment was Not Unreasonably Delayed**

Absent the defendant's "working arrangement" theory, there is no violation of the prompt presentment rule in this case because the United States had no defendant to "present" until, at the earliest, May 11, 2016, when a Magistrate Judge in the Eastern District of Virginia signed a criminal complaint and issued a warrant for the defendant's arrest. The United States had no "obligation to act" prior to the issuance of the arrest warrant in this case. *Alvarez-Sanchez*, 511 U.S. 350 at 358 (1994). The Supreme Court carefully parsed 18 U.S.C. § 3501(c), noting that the operative word in the statute is "delay," which consequently presumes some "obligation to act." *Id*. Prior to May 11, 2016, the United States government had no

obligation to act, nor any ability, to bring the defendant before a United States Magistrate Judge.

The FBI formally arrested the defendant and took custody of him from Kurdish authorities on June 8, 2016. The delay from May 11, 2016 to June 8, 2016, was reasonable based on several factors, including (1) securing the defendant's travel documents to leave Iraq, and (2) coordinating the logistics of the defendant's, and the agents', safe and appropriate travel from Iraq to the Eastern District of Virginia. The prompt presentment statute addresses reasonable delays "considering the means of transportation and the distance to be travelled." 18 U.S.C. § 3501(c). Delay related to the transportation of the defendant is reasonable. *See, e.g.*, *United States v. Yunis,* 859 F.2d 953, 957, 969 (D.C. Cir. 1988) (time needed to transport defendant from Mediterranean Sea to Washington, D.C. found to be reasonable); *United States v. Purvis*, 768 F.2d 1237, 1239 (11th Cir. 1985) (finding delay reasonable when "a large part of the delay was necessitated by the fact that the arrest was made so far from port on the high seas.").

"A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise." FED. R. CRIM. P. 5(a)(1)(B). Violations of Rule 5(a) can result in the exclusion of statements obtained from a defendant prior to his presentment to a magistrate. *See McNabb v. United States,* 318 U.S. 332, 341 (1943) (explaining that suppression, although not constitutionally required, was motivated by "considerations of justice not limited to the strict canons of evidentiary relevance"); *Mallory v. United States,* 354 U.S. 449, 455 (1957) (interpreting "without unnecessary delay" to mean that "the delay must not be of a nature to give opportunity for the extraction of a confession.").

In light of these decisions, the rule requiring prompt presentment of a defendant after arrest became known as the "*McNabb-Mallory* rule."[8] "Under the so-called *McNabb-Mallory* rule, the Supreme Court has required suppression of confessions obtained after 'unnecessary delay' between arrest and arraignment." *Yunis,* 859 F.2d at 967. However, while it is certainly unreasonable to delay presentment in order to obtain a confession, *Mallory*, 354 U.S. at 455, or to delay presentment simply for the sake of delay, courts should not reflexively find other causes of delay to be unreasonable. *See, e.g.*, *Boche-Perez*, 755 F.3d. 327 at 336; *United States v. Garcia-Hernandez*, 569 F.3d 1100, 1106 (9th Cir. 2009) ("We have been careful not to overextend McNabb-Mallory's prophylactic rule in cases where there was a reasonable delay unrelated to any prolonged interrogation of the arrestee."). Even if the Court finds that the 28-day delay between May 11, 2016 to June 8, 2016 was unreasonable, the only statements that are implicated are the *Mirandized* statements that the defendant made on June 8, 2016 during his transport to the United States.

In *Corley v. United States,* 556 U.S. 303 (2009), the Supreme Court held that Section 3501(c) eliminated the *McNabb-Mallory* rule for statements given within six hours of arrest, but, when a statement is made after the six-hour period, the court must determine whether the delay was reasonable. In determining the reasonableness of a delay, the court should consider, among other things, "the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer." 18 U.S.C. § 3501(c).[9]

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[8] The Omnibus Crime Act of 1968 modified the *McNabb-Mallory* Rule, establishing a six-hour "safe harbor" for delays. *See* 18 U.S.C. § 3501(c).

[9] The plain language of this statute is addressed towards domestic based prosecutions and arrest/detention scenarios. It is pellucidly clear from the plain language of the statute that

As noted above, the delay between May 11, 2016 to June 8, 2016 is attributable to factors related to the lawful and safe transport between Iraq and the Eastern District of Virginia. The logistics of this transport included arranging for the appropriate U.S. Government aircraft to conduct the travel, coordinating with Kurdish authorities and other foreign partners for permission to depart, land, and refuel, and arranging for U.S. Government personnel to undertake the trip. Transporting a prisoner charged with a terrorism offense from Iraq to the United States cannot be conducted haphazardly. S*ee Boche-Perez,* 755 F.3d 327 at 337 *(*"*McNabb-Mallory* does not require law enforcement officers to drop everything and rush to the magistrate when doing so would imperil public safety.") (citation omitted).

**D. The Defendant's Repeated Voluntary Waivers of his *Miranda* Rights also Served as a Waiver of his Speedy Presentment Right**

The defendant was apprised verbally and in writing of his *Miranda* warnings on six separate occasions before he was questioned and before he returned in the United States. The defendant acknowledged understanding his rights each time, and voluntarily waived his rights each time. Although not specifically addressed in the Fourth Circuit, other circuit courts have treated a valid *Miranda* waiver as a concurrent waiver of the right to a speedy presentment: "We find that appellant, by validly waiving his *Miranda* right to silence and an attorney, and by agreeing to speak with the police, has thereby also waived any *Mallory* right to be brought before

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Congress did not anticipate foreign application of the statutory prompt presentment requirements. *See Abu Ali*, 528 F.3d at 226 ("Of course, any prompt presentment guarantee applies only to actions undertaken by domestic authorities."). The Fourth Circuit then explains that Abu Ali bootstraps the prompt presentment argument by raising the "illicit working arrangement" argument. *Cf. Bin Laden*, 132 F. Supp. 2d. at 209 ("Although the court has found no cases which discuss the application of the working arrangement analysis to cooperation between the United States government and a foreign government, the purpose of the rule . . . seems equally applicable in the international context.").

a magistrate 'as quickly as possible.'" *Pettyjohn v. United States,* 419 F.2d 651, 656 (D.C. Cir. 1969).

The D.C. Circuit has explained that a *Miranda* waiver also functions as a waiver of speedy presentment inasmuch as "one of the purposes of appearing before a magistrate is to have the defendant's rights explained to him-rights now explained in a *Miranda* warning." *United States v. Salamanca,* 990 F.2d 629, 634 (D.C. Cir. 1993) (when an accused validly waives his *Miranda* rights, he also waives his right to presentment without unnecessary delay). A number of other circuits have also held that, by voluntarily agreeing to speak to law enforcement after having been advised of the rights to remain silent and to an attorney, a defendant necessarily waives the right to be brought before a magistrate as quickly as possible. *See, e.g., United States v. Barlow,* 693 F.2d 954, 959 (6th Cir. 1982) ("waiver of one's *Miranda* rights also constitutes a waiver under *McNabb-Mallory*"*); United States v. Indian Boy X,* 565 F.2d 585, 591 (9th Cir. 1977) ("the strong policy this court has in following the rule that the waiver of [*Miranda* rights]. . . also constitutes a waiver of' right to speedy presentment); *United States v. Howell,* 470 F.2d 1064, 1067, n. 1 (9th Cir. 1972) *(Miranda* warning "operated to waive the requirements of Rule 5(a) and *Mallory*"*); O'Neal v. United States,* 411 F.2d 131, 136-37 (5th Cir. 1969) (same); *United States v. Duvall,* 537 F.2d 15, 24 n.9 (2d Cir. 1976) (noting weight of authority); *but see United States v. Keeble,* 459 F.2d 757, 759 (8th Cir. 1972), *reversed on other grounds,* 412 U.S. 205 (1973).

The Supreme Court's decision in *Corley, supra,* did not change the analysis that a valid *Miranda* waiver may also serve as a valid waver of the right to speedy presentment. Although the *Corley* majority noted that the defendant in that case had waived his *Miranda* rights (556 U.S. at 311), and the dissenting opinion also noted the *Miranda* waiver issue *(id*. at 327-28), the

majority opinion did not address, much less decide, the significance of that waiver. Nor was there any reason for the Supreme Court to address the issue, because the government did not argue that Corley's *Miranda* waiver foreclosed his prompt-presentment claim. At most, the issue was lurking in the record in *Corley*. But the Supreme Court has expressly directed lower courts not to treat its opinions as having decided issues that are merely lurking in the record. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.,* 543 U.S. 157, 170 (2004); *Webster v. Fall,* 266 U.S. 507, 511 (1925).

While *Corley* may have implications for the question whether, and if so what circumstances, a valid *Miranda* waiver operates to waive the right of prompt presentment, the only *post-Corley* cases to address this question, of which we are aware, have held that a *Miranda* waiver still constitutes a waiver of prompt presentment:

> We therefore do not read *Corley* as effectively overruling our precedents holding that a waiver of *Miranda* rights is a waiver of the right to prompt presentment. Rather, the issue is one that "merely lurk[s] in the [*Corley*] record, ... [not] ruled upon, [and] ... not to be considered as having been so decided as to constitute precedent[]," since the "judicial mind was not asked to focus upon, and the opinion did not address, the point at issue . . . ."

*Brown v. United States,* 979 A.2d 630, 637 (D.C. 2009); *see also United States v. Hector,* 2013 WL 2898078 at *13 (N.D. Ga. Jan. 29, 2013) *(post-Corley:* "the Court sees no choice other than to find that Defendant's multiple *Miranda* waivers vitiated any prompt presentment problem"), report and recommendation adopted in part and rejected on other grounds, 2013 WL 2898099 (N.D. Ga. June 11, 2013); *United States v. Phillips,* 2015 WL 2341981, at *9 (W.D. La. May 13, 2015, *aff'd* 2016 WL 4394545 (5th Cir. Aug. 17, 2016) (same). The United States submits that the decision in *Corley,* therefore, did not disturb the prevailing view that a valid *Miranda* waiver serves as a concurrent waiver of speedy presentment.

**E. The FBI ALAT and the Kurdish Authorities did Not Have an "Illicit Working Arrangement" to Undermine the Defendant's Right to a Prompt Presentment**

In light of the circumstances surrounding the defendant's apprehension, *i.e.*, a heretofore unknown United States citizen apprehended near the battle lines in northern Iraq leaving ISIS-controlled territory, the subsequent arrest and detention by Kurdish authorities and the concurrent Kurdish and U.S. investigations did not create an "illicit working arrangement" with the intention of undermining the defendant's right to a prompt presentment before a United States Magistrate Judge. *Abu Ali*, 528 F.3d 210, 226 (4th Cir. 2008). *See also United States v. McDaniel*, 441 F.2d. 1160, 1161 (4th Cir. 1971) ("We also agree that Rule 5(a) is not applicable in a case such as this, where the F.B.I. questioning occurred during a period of reasonable investigation to determine whether federal charges should be brought.").

The central flaw in the defendant's "prompt presentment" argument is that the defendant was not "arrested and held" on a federal charge until, at the earliest, on or about May 11, 2016. *Alvarez-Sanchez*, 511 U.S. at 358. The Supreme Court clarified the issue succinctly:

> If a person is arrested and held on a federal charge by "any" law enforcement officer – federal, state, or local – that person is under "arrest or other detention" for purposes of § 3501(c) and its 6-hour safe harbor period. If, instead, the person is arrested and held on state charges, § 3501(c) does not apply, and the safe harbor is not implicated. This is true even if the arresting officers (who, when the arrest is for a violation for a state law, almost certainly will be agents of the state or its subdivisions) believe or have cause to believe that the person also may have violated federal law.

*Id*. The FBI began and continued its investigation of the defendant with the objective understanding that he was being held exclusively under the lawful authority of Kurdish officials. The United States had no obligation whatsoever to present the defendant to a United States Magistrate Judge before, at the earliest, on or about May 11, 2016, because they had no one to present. Critically, "[T]he fact that the [Kurds] eventually elected to defer to the American

prosecution does not establish the existence of an improper arrangement." *Bin Laden*, 132 F. Supp. at 211 (citing *Alvarez-Sanchez*, 511 U.S. at 359); *United States v. Rowe*, 92 F.3d 928, 932 (9th Cir. 1996).

Although the facts and circumstances of *Bin Laden* present a "closer . . . call" of a working arrangement than the case at hand, *Bin Laden* is analytically helpful to a resolution here. Defendant Odeh was detained in Pakistan on August 7, 1998, for alleged use of a false passport. Odeh was held exclusively in Pakistani custody until August 14, 1998, at which point he was transported to Kenya. From August 15-27, 1998 – 12 consecutive days – Odeh was interrogated in Kenya. The interrogation was "dominated" by U.S. authorities with Kenyan law enforcement present. *Bin Laden*, 132 F. Supp. 2d at 210. At some point on or after August 25, 1998, the United States government decided to charge Odeh after the United States Attorney for the Southern District of New York conferred with then-Attorney General Janet Reno on August 25, 1998.[10] *Id*.

In *Bin Laden*, the court found no "working arrangement" between the FBI and Kenyan authorities, even though the entire Kenyan 12-day detention was "dominated" by the U.S. interrogation. *Bin Laden* relies on several factors which are also identified in this case to reject the "working arrangement" analysis: (1) Khweis was taken into the exclusive custody of Kurdish authorities; (2) the FBI ALAT in Erbil believed he did not have authority to make an arrest of the

[10] The *Bin Laden* prosecutor's consultation with the Assistant Attorney General is an important factor in determining when federal charges in an international terrorism investigation may be filed. In 2006, the Department of Justice created the National Security Division led by an Assistant Attorney General, which has final authority over charging decision in crimes related to terrorism and counterterrorism. *See* United States Attorneys' Manual ("USAM") § 9-2.136 - *Notification, Consultation, and Approval Requirements for International Terrorism Matters.* https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.136.

defendant (this is also objectively true, *see* fn. 10); (3) Khweis was brought into an office or conference room at the Kurdish detention facility without any restraints by Kurdish authorities nearly every time he was brought for interviews with the FBI (as a general matter of prisoner transport, walking an alleged ISIS member without restraints is not something the FBI would typically do); and (4) the defendant was not fingerprinted, no DNA swab was conducted, nor was a booking photograph taken of the defendant by the FBI while the defendant was in Kurdish custody (which would normally be standard FBI practice upon the arrest of a defendant). In addition, Kurdish authorities – and not the FBI – transported Khweis to and from every U.S. interview session. Furthermore, all U.S. personnel were limited by the Kurdish control with respect to the time, place, and duration of each interview with Khweis. *See Coppola*, 281 F.2d at 343 (finding no improper collaboration where the arrangements for the defendant's arrest and detention were "exclusively planned and executed by the Buffalo police without any suggestion or participation by the F.B.I."), quoted in *Bin Laden*, 132 F. Supp. 2d at 210. Under the analysis and factors set forth in *Bin Laden*, the defendant cannot establish that there was an improper working relationship between the United States and Kurdish authorities in this case.

As the Fourth Circuit identified in *Abu Ali*, "any prompt presentment guarantee applies only to actions undertaken by domestic authorities." 528 F.3d at 226. However, the Court also tacitly agreed that the defendant can craft a prompt presentment issue if he is apprehended outside the United States by a foreign sovereign and he proves an "illicit working arrangement" to undermine his prompt presentment before a federal magistrate. *Id*. On substance, however, the Fourth Circuit rejected the "working arrangement" argument in *Abu Ali*, finding that the United States law enforcement did not collaborate in Abu Ali's arrest or detention. *Id*. at 227.

Courts use various phrases to describe the "working arrangement" analysis as applied to the prompt presentment rule: "improper collaboration," *Alvarez-Sanchez*, 511 U.S. at 359-360; "illicit working arrangement" and "improper collaboration," *Abu Ali*, 528 F.3d at 226-27; "improperly conspiring," "improperly collaborating" and "deliberate use of [foreign] custody to postpone their presentment requirements," *Bin Laden*, 132 F. Supp. 2d at 209; "state custody designingly utilized to circumvent Rule 5," *United Sates v. Chadwick*, 415 F.2d 167, 171 (10th Cir. 1969); "actual collusion," *United States v. Espino*, 442 Fed. Appx. 330 (9th Cir. 2011); and, "a deliberate intent to deprive [the defendant] of [his] federal procedural rights," *United States v. Michaud*, 268 F.3d 728, 735 (9th Cir. 2001). The overriding consistent factor is the improper purpose of the working arrangement. The working arrangement must be driven by a desire to undermine the defendant's right to a prompt presentment.

Coordination in international terrorism between U.S. officials and foreign authorities is unquestionably a desired expectation. *Abu Ali*, 528 F.3d. at 229 fn. 5. *See also United States v. Chadwick*, 415 F.2d 167, 171 (10th Cir. 1969) ("Active cooperation between state and federal authorities in the enforcement of criminal laws . . . should be encouraged . . . ."). The FBI faces difficult diplomatic and investigative challenges when a U.S. citizen is apprehended in a war zone after joining a terrorist organization. Courts have historically recognized the "difficult problems" facing inter-governmental law enforcement efforts. *Coppola*, 281 F.2d 340, 344 (2d Cir. 1960) ("Mere words however, such as an exchange of information, cooperation, collaboration, or even "working arrangement" do not carry within themselves any solution to the difficult problems of federal-state relations involved here.").

The defendant attempts to rely upon an assorted collection of email communications to factually demonstrate that there was an improper or illicit working arrangement between the

United States and Kurdish authorities to delay prompt presentment for the purpose of extracting a confession. However, the facts demonstrate that the FBI had no control whatsoever in the arrest, transport, or subsequent detention of the defendant. Until the defendant was released to U.S. custody on June 8, 2016, he remained at all times in Kurdish custody under their authority. The FBI ALAT had no actual or perceived control over the Kurdish authorities. The FBI ALAT had no discretion in the time, place or duration of his meetings with the defendant. Absent (1) the element of control; and (2) an improper or illicit purpose by the FBI, the "working arrangement" analysis fails in this case.

An example of the Kurdish control over the detention and the logistics of U.S. engagement with the defendant is found in the April 2016 *Mirandized* interviews with the defendant. Although U.S. requested that the defendant's electronic media be placed in the interviewing room on the first day of the *Mirandized* interviews to ensure they could pose questions to the defendant about those items, Kurdish officials did not comply with the request. Not until the second day, on April 21, 2016, did the Kurdish officials provide the walled-off FBI agents access to those items. Furthermore, while the agents may have preferred to conduct the interviews alone, Kurdish officials insisted on a translator/interpreter to be in the room for all of the *Mirandized* interviews in the event any issues arose given that the defendant was in Kurdish custody, and therefore, their position was that he was sole responsibility the Kurdish CTD.

At best, the email communications relied upon by the defendant shed light on the "difficult problems of [government to government] relations" in the context of the particular facts of this case. *Coppola*, 281 F.2d at 344. The defendant cannot satisfy his burden on this issue because "to bring a case within this rule there must be facts, as there were in *Anderson*, not mere suspicion or conjecture." *Id*. *See also United States v. Leviton*, 193 F.2d 848, 854 (2d Cir.

1951) ("[E]ach case involving the McNabb rule must be decided without resort to a semanticism that obscures the facts out of which it arises."). Because there was no United States government misconduct in this case, and because the defendant remained in the lawful custody of Kurdish authorities until June 8, 2016, the United States did not deny the defendant his right to a prompt presentment before a United States Magistrate Judge.

## III. THE DEFENDANT VOLUNTARILY (1) CONSENTED TO THE SEARCH OF HIS DEVICES; (2) WAIVED *MIRANDA*; AND (3) SPOKE WITH THE FBI

### A. General Voluntariness Analysis

The three issues that have been raised by the defendant in this section share a common feature of voluntariness. The key voluntariness concept is the principle that courts must look to the "totality of the circumstances" in determining voluntariness. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Arizona v. Fulminate*, 499 U.S. 279, 285-86 (1991). Similarly, Fourth Amendment waivers (*i.e.*, consent) must also be voluntary under a totality of the circumstances test. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). No one factor is dispositive.[11] Generally speaking, totality of the circumstances addresses the characteristics of the accused (*e.g.*, age, maturity, education, intelligence, experience, comfort level, willingness or unwillingness to

[11] Coercive elements are notably absent in this case. Nonetheless, statements have been held to be voluntary even when some seemingly coercive factors were present. *See, e.g., United States v. Jacques,* 744 F.3d 804, 812 (1st Cir. 2014) (agents exaggerated the evidence and minimized the gravity of the suspected offense); *United States v. Cardenas,* 410 F.3d 287, 295 (5th Cir. 2005) ("Such basic police procedures as restraining a suspect with handcuffs have never been held to constitute sufficient coercion to warrant suppression."); *Carter v. Thompson,* 690 F.3d 837, 844 (7th Cir. 2012) (questioning a juvenile over fifty-five hour period); *United States v. Stokes,* 631 F.3d 802, 809 (6th Cir. 2011) (placed in a small room, handcuffed to a chair, and interviewed over the course of several hours in the very early morning, promise to relay cooperation to the prosecutor); *United States v. New,* 491 F.3d 369, 374 (8th Cir. 2007) ("influence of medications, the 'psychological implications' of his circumstances, and his physical helplessness in a strange location.").

engage with the officer) as well as the conditions faced by the defendant when he engaged with law enforcement (*e.g.*, officer's conduct; number of officer's present; visible weapons; duration; location and comfort level of the environment; whether the defendant was provided breaks, water or nourishment; the length of the questioning; the repeated and prolonged nature of the questioning; whether the police or the accused initiated the dialogue; and the use or absence of physical punishment, such as the deprivation of food or sleep.). *See generally United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (en banc).

Police coercion is a "necessary predicate" to a finding of involuntariness. *Colorado v. Connelly*, 479 U.S. 157 (1986). Coercion is anathema to voluntariness, and coercion is demonstrated when the defendant's "will is overborne." *Schneckloth*, 412 U.S. at 225. "Because the police activity used to elicit an incriminating statement must be coercive before a statement will be held to be involuntary, it is not surprising that 'very few incriminating statements, custodial or otherwise, are held to be involuntary.'" *United States v. Williamson*, 706 F.3d 405, 415 (4th Cir. 2013) (citations and quotations omitted).

As noted in the introduction, the defendant is a strategic, committed, and resourceful individual. At age 26, he surreptitiously planned and organized his trip from Fairfax County, Virginia to ISIS-controlled territory in Syria. His level of sophistication is evident in the fact that he made it from his couch in Alexandria to an ISIS safe house in Raqqa in about two weeks. In doing so, this natural born U.S. citizen and college-educated defendant, who studied criminal justice and completed a Certificate/Administration of Justice program approximately two years before he was apprehended in Iraq, used multiple devices and social media platforms to secretly communicate with ISIS recruiters while he was overseas and on his way to becoming a member

of one of the most notorious and violent terrorist organizations on the planet – an organization that the defendant knew conducts terrorist operations and terrorist acts.

Any suggestion that this defendant was mistreated or subject to coercive conditions during his time in Kurdish CTD custody is entirely baseless. The discovery provided to the defendant in this case explains that he was treated well while in Kurdish custody. While most inmates in the CTD facility share a room, the defendant was given his own cell with access to a bathroom; he was never punished during his time there and was permitted to meet with Red Cross officials (in addition to State Department Consular Officers) who visited on multiple occasions; he was allowed more time outside than other inmates, which amounted to five times per day; he received 3 meals per day and received additional portions upon request; he was provided bottled water because he did not want to drink the same water as the other inmates. Moreover, the defendant was provided a mattress, blanket, pillows, plates and glasses – all items that were often not available for the other inmates. When he asked for medical treatment for his stomach and/or constipation issues, Kurdish authorities promptly provided medical care and treatment, including visits to an outside hospital. In fact, the defendant often acted assertively with his Kurdish jailers. The defendant was at times verbally aggressive towards prison staff and yelled at them over such mundane matters as cigarettes.

The defendant attempts to characterize certain statements made to him by the FBI ALAT as having a coercive effect. *See* Def. Mot. 8-10. The ALAT's statements include, *inter alia*, telling the defendant that he could not make any promises, that he may not be charged, and that he may not return to the United States. First, these are precisely the types of statements that are not coercive. Had the FBI ALAT promised the defendant that he would be released from another foreign entity's custody if he agreed to provide intelligence-related information – a

decision entirely outside of the FBI's control given that the defendant was not in U.S. custody – the defendant would now be arguing that he only spoke to the FBI because he was specifically promised something in return. Second, numerous documents previously turned over to the defense indicate that there was a strong possibility, if not certain, that Kurdish authorities were preparing to prosecute the defendant in their own court system. Given that distinct possibility, the FBI ALAT's statements that "he could not make any promises" and the defendant "may not return to the United States" seems entirely accurate and appropriate.

Moreover, the defendant makes the factually inaccurate argument that, by March 19, 2016 "[i]n reality, however, contrary to the lead FBI Interrogator's representations, a charging decision had already been made . . . ." *Id*. at 10. The defense is well aware, and the documents turned over in discovery clearly show: (1) the U.S. Department of Justice authorizes charging decisions in national security investigations; (2) the undersigned prosecutors were walled-off from the intelligence-gathering interviews and were in no position to recommend, let alone fully evaluate, whether federal charges could and should be lodged against the defendant in March 2016; and, (3) that the U.S. Department of Justice continued to evaluate the evidence in this case in late April and early May 2016.

Furthermore, entirely omitted from the defendant's motion is the fact that he was observed smiling, laughing, appearing engaged, and often willingly volunteering information to assist the interviewers during the intelligence-gathering interviews. The defendant also failed to mention that he was provided water, soda, snacks, and cigarettes when requested. Likewise, the April 2016 *Mirandized* interviews were conducted in a professional and respectful manner, and the defendant often smiled and laughed while speaking freely in a conversational tone of voice with the agents. The defendant appeared well-rested and alert. He was well-groomed and

wearing clean clothing. The defendant was never under the influence of alcohol, drugs or other medications that would have rendered him unable to comprehend his rights. When asked about his treatment in Kurdish CTD custody, he stated he was being treated well and receiving plenty of food and water. As noted in an FBI report summarizing the defendant's March 26, 2016 intelligence-gathering interview:

> He was asked if he had any problems and he stated he was good, except he was constipated. The KRG was present and was addressing his medical condition. KHWEIS said he ate meals that the Kurds provided which consisted of rice, beans, meat, and bread. KHWEIS remembered his father had similar stomach issues. KHWEIS stated he was being treated well. KHWEIS was not handcuffed and had no visible physical injuries. He smiled and laughed often during the interview. He appeared engaged, answered all questions, and willingly volunteered information to assist interviewers. During the interview, he was provided water, Coca Cola, a chocolate bar, and cigarettes when requested.

None of the FBI agents who engaged with the defendant were overbearing. For example, the agents were dressed in casual civilian clothes; they were not visibly armed; they spoke in normal conversational tones; they frequently inquired of the defendant's well-being; they afforded the defendant time to eat, rest, and offered him opportunities to use the facilities.

The defendant never had any visible signs of abuse or injury during any of the interviews, nor did he have any visible signs of injury on June 8, 2016 when the FBI took custody of him from Kurdish authorities and performed an examination from head to toe.[12] The defendant was informed of his right to remain silent before each and every *Mirandized* interview, and the FBI informed him on no less than four separate occasions, before questioning began, that his family had retained a United States-based attorney on his behalf and that he was under no obligation to speak with them. Under the totality of the defendant's circumstances, the defendant's will was

[12] Photographs of that examination are available to the Court *in camera* should the defendant suddenly allege, in response to this filing, that he was mistreated or injured.

not "overborne." He freely and voluntarily made his own decisions throughout his overseas detention.

**B. The Defendant Voluntarily Consented to the Search of his Electronic Media**

Under the Fourth Amendment, a search conducted without a warrant issued upon a showing of probable cause is "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). A search conducted pursuant to valid consent is one such exception to the Fourth Amendment's general warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Trulock v. Freeh*, 275 F.3d 391, 401 (4th Cir. 2001) (citation omitted). A lawful, warrantless consent search must be knowing and voluntary, and the determination of whether consent was voluntary is based on the totality of the circumstances. *United States v. Buckner*, 473 F.3d 551, 554 (4th Cir. 2007) (citations omitted); *United States v. Boone*, 245 F.3d 352, 361 (4th Cir. 2001) (citations omitted). The government has the burden of establishing valid consent to search, which it must show by a preponderance of the evidence. *Buckner*, 473 F.3d at 554. Consent given while in custody may still be voluntary. A written waiver provides "strong proof" of voluntariness. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). *See Boone*, 245 F.3d at 361–62 (citations omitted). Furthermore, the Fourth Circuit has recognized that "[w]ritten consent supports a finding that the consent was voluntary." *Id.* at 362 (citation omitted).

The defendant first gave the FBI ALAT verbal consent to search his phones and SIM/memory cards on March 15, 2016 – which was only the second day of his detention in Iraq and the first day of the U.S. intelligence-gathering interviews. The defendant provided verbal consent for the ALAT to search his electronic media yet again during his visit on April 7, 2016. To the extent the defendant argues in his forthcoming Reply that he refused to execute a written

consent to search form on either occasion, such an argument is squarely foreclosed under established Fourth Circuit precedent. *See Lattimore*, 87 F.3d at 651 (holding that the defendant gave verbal consent to search even though he hesitated prior to signing a written consent form and noting that "a refusal to execute a written consent form subsequent to a voluntary oral consent does not act as an effective withdrawal of the prior oral consent.").

The defendant argues that, because the government charged him under seal on May 11, 2016, the FBI ALAT's statement to a State Department Consular Officer on May 16, 2016 that "a decision has not been made yet whether he [Khweis] will be returned to the US" was, according to his motion, "of course inaccurate." Def. Mot. at 13, 42. The defendant further stated "[w]hile certainly law enforcement officers can lie to suspects, the lies must not amount to coercion." *Id.* at 42. The defendant is well aware from the discovery provided in this case that there is not a kernel of truth to his argument. Maligning the character and credibility of a sworn FBI official who was entrusted to serve in a critically important overseas capacity on behalf of the United States is not something the government takes lightly, particularly when the accusations are devoid of any facts. The following documents were provided by the government in discovery before the defendant's motion was filed: (1) an email chain from May 12, 2016 involving the FBI ALAT and the undersigned prosecutors in which the FBI ALAT indicates that a high-ranking Kurdish official still needs to approve the defendant's transfer of custody to the FBI; (2) an email dated May 16, 2016 in which the FBI ALAT indicates that Kurdish authorities have requested additional information from the U.S. Department of Justice, and noting that the same high-ranking Kurdish official still needs to approve the transfer; (3) an email dated May 19, 2016 in which the FBI ALAT reports that he plans to meet with a high-ranking Kurdish official in the near future to determine whether the information provided by the U.S. Department of

Justice is sufficient to approve transfer of the defendant to the FBI; and (4) an email dated May 25, 2016 – 9 days after the email cited by the defendant – in which the FBI ALAT informs the FBI that he "will have an answer in 48 hours on **whether** they [Kurdish authorities] **will turn him [Khweis] over to us** . . . ." (emphasis provided). The defendant's claim to the contrary is entirely unsupported by the record.

The defendant emphasizes and incorrectly relies upon a Magistrate Judge's Report & Recommendation in a case arising out of the Western District of North Carolina in which the Court deemed that the defendant's consent to search his phones was not voluntary (a case that, to date, has never been cited by any other court in the country). *See* Def. Mot. at 39-40; *United States v. Hernandez*, 2015 WL 5007821 (W.D.N.C. July 28, 2015). Khweis states that "the most concerning factor" for the Court was that the defendant provided consent while he was in custody. Def. Mot. at 40. However, in the penultimate line of the decision, the Court wrote, "[s]pecifically, ***the overarching Miranda violation*** while Defendant was detained at the police station ***is most concerning in this matter***" (emphasis provided). *Hernandez*, 2015 WL 5007821 at *9. The defendant in that case specifically asked for a lawyer and the police failed to provide him one. *Id*. at *5. Additionally, the Court noted that "[i]n this matter, Defendant speaks only Spanish, and it is unclear his level of education or his familiarity with the criminal justice system." *Id*. at *8.

In this case, which involves an English-speaking natural born United States citizen who studied criminal justice in college and executed a sophisticated plan to travel overseas and join ISIS, the defendant never once asked for an attorney during the intelligence-gathering interviews. Instead, the defendant stated the following on March 18, 2016 – a mere few days after his apprehension:

KHWEIS was adamant that he wanted to cooperate with interviewers, emphasizing that he knew he was entitled to an attorney but deliberately never asked for one due to his desire to cooperate.

Furthermore, even after the defendant was *Mirandized*, he provided both oral and written consent on April 21, 2016 for the FBI to search and examine the contents of his electronic media. *See* Ex. 3. Moreover, the defendant's consent was provided *after* the defendant was informed on two separate occasions, including on that same day, that he has a right to remain silent and that his family had retained a United States-based attorney on his behalf. The form is explicit:

> I, Mohamad Khweis, have been asked to give my consent to a search. I have also been informed of my right to refuse to consent to such a search . . . I consent that search may be for any purpose, and that the search may include the examination of computer data and the use of forensic review techniques. I consent to the search occurring at any time, for any length of time, and at any location.

*Id.* By voluntarily signing the form, the defendant agreed to "relinquish any constitutional right to privacy in these electronic devices and any information stored on them" and he agreed, as the form clearly states, that "[t]his written permission is given by me voluntarily. I have not been threatened, placed under duress, or promised anything in exchange for my consent. I have read this form, or it has been read to me, and I understand it." *Id*. *See also Butler*, 441 U.S. 369 at 373; *Boone*, 245 F.3d at 362 (citation omitted).

Put simply, the defendant cannot advance any reasonable argument that he did not consent to a search of his electronic media, nor can he establish that his consent was coerced or involuntary. The defendant verbally consented to the search on three separate occasions, and acknowledged his consent in writing even after he was *Mirandized* and explicitly informed of all of his rights, including the right to remain silent and the right to consult with an attorney. The defendant's arguments to the contrary are entirely meritless and unsupported by the record.

**C. The Defendant's *Miranda* Waivers were Voluntary, Intelligent, and Knowing**

Whether a suspect has voluntarily, knowingly, and intelligently waived his rights under Miranda is examined by the "totality of the circumstances surrounding the interrogation." *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *see also United States v. Robinson*, 404 F.3d 850, 860 (4th Cir. 2005). The Fourth Circuit has articulated a two-step inquiry. First, a court must find that "the relinquishment of the right 'must have been voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception,'" *United States v. Shanklin*, 2013 WL 6019216 at *3 (E.D. Va. Nov. 13, 2013) (quoting *United States v. Cristobal*, 293 F.3d 134, 139 (4th Cir. 2002)). Second, the district court must find that the waiver was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* (quoting *Cristobal*, 293 F.3d at 140).

As previously noted, the defendant waived his *Miranda* rights orally and in writing numerous times. The objective facts demonstrate that those waivers were made voluntarily, knowingly, and intelligently and "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran,* 475 U.S. at 421. The defendant understood exactly what he was doing when he executed those waivers.

The mere presence of some potentially coercive factors does not necessarily render a *Miranda* waiver involuntary. For example, a *Miranda* waiver was deemed voluntary, where

> [p]rior to his arrest, Shi spent four days in a storage compartment where he had been kept by the crew. Still, the district court found that upon his release from the compartment, Shi appeared coherent and alert. Indeed, the district court credited the agents' description of Shi's demeanor as "cocky" and "not timid at all." In addition, Shi was allowed access to a bathroom before the agents escorted him to the dining area to read him the warnings.

*United States v. Shi,* 525 F.3d 709, 728 (9th Cir. 2008). *See also Berghuis*, 560 U.S. at 386 (waiver valid notwithstanding three-hour interrogation while seated in straight back chair); *United States v. Medunjanin*, 752 F.3d 576, 588 (2d Cir. 2014) (waiver valid notwithstanding comments regarding expense of the defendant's attorney); *United States v. Vallar*, 635 F.3d 271, 284 (7th Cir. 2011) ("arrest[] at [defendant's] home at 6:30 a.m. by officers with weapons drawn, [defendant] handcuffed for about an hour while agents searched his home, and [defendant] taken to the police station and forced to listen to audio tapes implicating him in the alleged conspiracy before he received and waived his *Miranda* rights and provided the post-arrest statement he seeks to suppress" voluntarily, knowingly, and intelligently waived his Miranda rights); *United States v. Gaddy*, 532 F.3d 783, 788 (8th Cir. 2008) (intoxication and fatigue are relevant factors, but did not make waiver involuntary); *United States v. Burson*, 531 F.3d 1254, 1258 (10th Cir. 2008) (waiver valid despite defendant's claim that it was involuntary because he was exhausted and high on methamphetamine).

The facts and circumstances of this case plainly demonstrate that the defendant was never coerced into waiving his *Miranda* rights. For all three April 2016 *Mirandized* interviews, the walled-off FBI agents and Kurdish translator wore casual (non-uniformed) clothes, such as khakis and button-down shirts. The Kurdish translator did not ask any questions or interject during any of the interviews. Neither the FBI agents nor the translator visibly displayed any weapons throughout all of the interviews. The interviews were conducted in a professional and respectful manner, and the defendant often smiled and laughed while speaking freely in a conversational tone of voice with the agents. The interviews were conducted in a well-lit conference room approximately 18 feet by 15 feet in size. The defendant sat without restraints in a chair facing the doorway. He had no visible signs of abuse or injury. The door remained open

during the entirety of the interviews. He was well-groomed and wearing clean clothing. When asked about his treatment in Kurdish CTD custody, he stated he was being treated well and receiving plenty of food and water. His only comment regarding his physical well-being was dealing with a constipation issue, for which he had received treatment from a physician. In sum, the defendant appeared to be well-rested and alert.

The agents properly identified themselves to the defendant before any questioning began, using their true names and informing him orally and in writing that they work for the FBI, including displaying FBI credentials to him. The defendant was offered, and accepted, food, water, soda, and cigarettes throughout the interviews. He was also offered breaks throughout the interviews. The agents' interview reports even list the precise times that the defendant was read his *Miranda* rights, including the precise times that he signed the waiver forms before each of the three interviews. The agents' meticulous logs also memorialized other notable events, such as the precise times that he asked for and accepted cigarettes, soda, tea, and other snacks.

The defendant's claim that his waiver was involuntary given his, *inter alia*, detention in Kurdish custody is baseless. For example, on June 8, 2016, *after* the defendant knew he was no longer in Kurdish custody and was on an aircraft en route to the United States without any Kurdish personnel present, the defendant voluntarily waived his *Miranda* rights yet again. The defendant did so even after he knew, since at least April 20, 2016, that his family had retained an attorney on his behalf in the United States. As an additional precautionary measure, the FBI reminded him of that fact before he signed yet another *Miranda* waiver on June 8, 2016. When the defendant wished to conclude the interview while he was airborne, the FBI agents immediately stopped asking him questions and adhered to his request. But what's even more incredulous about the defendant's voluntariness claims is that, even after that interview

concluded, he approached the agents on his own accord and asked to speak with them, before finally deciding to conclude the interview again. This is a defendant who wanted to talk, who knew exactly what he was doing, and is now engaging in a futile attempt to rewrite his history.

The evidence amply demonstrates that the defendant's *Miranda* waiver was knowing and intelligent. The sole focus of this analysis is whether the defendant understood that any statements he made could be used against him, and this understanding is presumed upon the giving of *Miranda* warnings to a suspect: "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Colorado v. Spring,* 479 U.S. 564, 574-76 (1987). Here, the fact that the defendant understood his rights is buttressed by the defendant's background and his conduct during the interviews.

First, and perhaps most significantly, the defendant was advised of and waived his *Miranda* rights six separate times. *See, e.g., Yunis,* 859 F.2d at 959 (Agents "repeatedly asked Yunis, as each warning was read to him, whether Yunis understood the warning. According to both agents, Yunis consistently answered that he did understand.").

Second, a brief review of the defendant's background demonstrates that he is neither unsophisticated nor uneducated. He, therefore, was not susceptible to misunderstanding either his rights or his legal predicament. At the time of his detention in Iraq, the defendant was a college-educated 26-year-old. He was born in the United States, has always resided in the United States, and speaks, reads, and writes English without any issues. By his own admission, he studied criminal justice in college. Furthermore, he completed a Certificate/Administration of Justice program in or about March 2014. He surreptitiously navigated overseas to ISIS-controlled territory, and was technologically savvy enough to use a number of mobile

applications that are designed to purportedly conceal his identity, location, or browsing history in furtherance of his criminal scheme and conduct. His overseas travel activities were methodically planned and designed to achieve his ultimate goal – giving himself to ISIS. Needless to say, this defendant knew exactly what he was doing.

Equally strong evidence that the defendant's waivers were knowing and intelligent can be found in his conduct during the interviews. *See Butler,* 441 U.S. 369 at 373 (police may infer a knowing and intelligent waiver "from the actions and words of the person interrogated"). As an initial matter, the defendant's intelligence was quite evident throughout his time with the agents. For example, he discussed how he used multiple social media platforms and programs to secretly communicate with ISIS. *Compare Young v. Walls,* 311 F.3d 846 (7th Cir. 2002) (IQ 56; intelligence "sufficient if the suspect has enough mental capacity to make decisions in daily life"); *Moore v. Dugger,* 856 F.2d 129, 134-35 (11th Cir. 1988) (valid waiver by mentally handicapped defendant with IQ of 62 and functional intellectual capacity of 11-year-old when defendant appeared calm, responsive, and able to understand questions and acknowledged at trial that informed of right to counsel). The defendant consistently presented himself as an alert and engaged conversationalist. He never expressed or exhibited any inability to understand the meaning of the *Miranda* warnings on any of the six occasions when he received and waived them.

**D. The Defendant's Custodial Statements Were Voluntary**

The defendant's decision to talk to the agents was voluntary. The sole focus of the "voluntariness" inquiry is whether the statement was the product of government coercion. *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986). *See, e.g., Dickerson v. United States,* 530 U.S. 428, 434 (2000) (collecting cases); *Arizona v. Fulminante,* 499 U.S. 279, 285-89 (1991).

"If his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). The focus is on whether the confession was obtained by using means "so offensive to a civilized system of justice that they must be condemned." *Miller v. Fenton,* 474 U.S. 104, 109 (1985). In this case, there is no evidence that the defendant's "will [was] overborne and his capacity for self-determination critically impaired because of coercive police conduct." *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (citation and internal quotation marks omitted). Indeed, as discussed above, the atmosphere in which the defendant spoke was far from hostile. During the interviews, the defendant was not restrained; he was provided water, soda, snacks, tea, cigarettes, and afforded the opportunity to take comfort breaks; and the agents did not force him to talk, coerce him, or promise him anything in exchange for his statements. Moreover, the agents reminded the defendant of his *Miranda* rights before questioning began on each occasion. The defendant repeatedly acknowledged and waived his rights.

Under these non-coercive conditions, the defendant's statements should not be suppressed. "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington,* 431 U.S. 181, 187 (1977); *see also Michigan v. Tucker,* 417 U.S. 433, 459 n.23 (1974) ("completely voluntary confessions may, in many cases, advance the cause of justice and rehabilitation").

The length of the interview process here did not render the statements involuntary. In the absence of any evidence that the agents were coercive or overbearing during the interviews, the duration of the interviews would not, by itself, render any resulting statements involuntary. Courts considering challenges to lengthy interrogations have explained that it is not the lapse of time that is relevant to the inquiry of voluntariness, but rather the use of time to employ coercive

police tactics or third degree practices. *See, e.g., United States v. Marrero,* 450 F.2d 373, 376 (2d Cir. 1971) ("It is not the lapse of time but the use of the time . . . to employ the condemned psychologically coercive . . . practices which is proscribed by the cases."); *Smith v. United States,* 390 F.2d 401, 403 (9th Cir. 1968) ("The determining factor is not the amount of time elapsing between arrest and confession, but rather the nature of police activities during this period."). Accordingly, lengthy interrogation sessions have been deemed to have been voluntary. *See, e.g., Yunis,* 859 F.2d at 960-61 (extensive questioning during nine interrogation sessions over four days did not render confession involuntary); *United States v. Van Metre,* 150 F.3d 339, 348 (4th Cir. 1998) ("somewhat lengthy" 55-hour detention did not render confession involuntary because officers did not threaten or harm suspect, and suspect was not held in seclusion, was not subject to continuous and unrelenting questioning, and was not denied food or rest); *Reese v. Delo,* 94 F.3d 1177, 1183-84 (8th Cir. 1996) (confession to murders voluntary, despite defendant's alleged mental impairments, when defendant repeatedly given *Miranda* warnings, questioned intermittently over two days, provided food, drink and bathroom breaks, and interviews were not excessive in length).

## IV. THE GOVERNMENT FOLLOWED *MIRANDA* AND ITS PROGENY IN ITS INTERVIEWS; *MISSOURI v. SEIBERT* IS NOT IMPLICATED

### A. The Defendant's *Miranda* Waiver was Valid

As explained above, and based on the evidence that the government will adduce at the hearing, the defendant validly waived his *Miranda* rights.

### B. Relevant Law and Factors

The *Miranda* Court, itself, acknowledged that, under appropriate circumstances, an unwarned interview does not invalidate a subsequent *Miranda* waiver:

> We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.

*Miranda,* 384 U.S. at 496. Subsequently, the Supreme Court has addressed the impact of a defendant's un-*Mirandized* statements in response to police interrogation on the admissibility of a subsequent, *Mirandized* confession. *See Oregon v. Elstad,* 470 U.S. 298 (1985); *Missouri v. Seibert,* 542 U.S. 600 (2004).

*In Elstad,* the Supreme Court addressed the admissibility of a warned statement given by a suspect after the police had already obtained an unwarned statement from him in violation of *Miranda*. Specifically, a police officer, who had just arrested a teenage burglary suspect, told the suspect that the officer "felt" that the suspect was involved in a burglary; the suspect then admitted that he had been present at the commission of the crime. *Elstad,* 470 U.S. at 301. Approximately one hour later, at the police station, the defendant was advised of his *Miranda* rights and waived them. He then confessed – to the original officer and another officer – to committing the burglary. *Id.* The *Elstad* defendant sought to suppress his confession on two grounds: (1) that it was the "tainted fruit" of the prior un-*Mirandized* statement and (2) that the psychological impact of having "let the cat out of the bag" created a lingering compulsion that rendered subsequent statements involuntary. *Id*. at 303-04, 310-11. The Supreme Court rejected both arguments.

As to the first ground, the Supreme Court declined to extend the "fruits" doctrine to violations of *Miranda. Id*. at 307-09. As to the second ground, the Court rejected the argument that the psychological impact of having "let the cat out of the bag" compromised the

voluntariness of a subsequent informed waiver. *Id*. at 311-12. The Supreme Court stated that to accept such an argument would "effectively immunize[] a suspect who responds to *pre-Miranda* warning questions from the consequences of a subsequent informed waiver," which would come at a high cost to legitimate law enforcement activity but add little desirable protection to an individual's interest in not being required to incriminate himself. *Id*. at 312.

The Supreme Court held that "[a] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." *Id*. at 314. The Supreme Court explained that a defendant's provision of incriminating statements before being administered the *Miranda* warnings does not, in the absence of "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," result in such a degree of psychological coercion that any subsequent administration of the warnings will be ineffective. *Id*. at 309, 313. The Court, therefore, concluded that "absent deliberately coercive or improper tactics in obtaining the initial statement," an unwarned admission does not give rise to any presumption that subsequent, warned statements were involuntary. *Id*. at 314.

In *Seibert,* the Court revisited *Elstad*, this time in the context of a deliberate two-step interrogation technique that was designed to undermine the *Miranda* warnings. 542 U.S. at 604 (plurality opinion). Seibert was awakened by police officers at 3 a.m., arrested, taken to the police station, and left alone in an interview room for 15 to 20 minutes. *Id*. An officer then questioned the defendant for 30 to 40 minutes, occasionally squeezing the defendant's arm and repeating incriminating questions to force a confession from her. *Id*. at 604-05. When the defendant finally confessed to committing a crime, she was given a 20 minute break. *Id*. at 605. A second officer then entered the interview room, turned on a tape recorder, gave the defendant

*Miranda* warnings, obtained a waiver, reminded the defendant of her earlier confession, and then obtained another confession. *Id*.

The plurality concluded that *post-Miranda* statements made in the context of successive unwarned and warned questioning are admissible only when "it would be reasonable to find that in th[e] circumstances the warnings could function 'effectively' as *Miranda* requires." *Id*. at 611. The plurality identified several facts present in that case that indicated that the *Miranda* warnings could not have functioned effectively: (1) the unwarned interrogation was "systematic, exhaustive, and managed with psychological skill"; (2) the warned questioning followed the unwarned questioning by only 15-20 minutes; (3) the warned questioning took place in the same location as the unwarned questioning; (4) the same officer conducted both interrogations; and (5) the officer did nothing to dispel the defendant's probable misimpression that the warned interrogation was merely a continuation of the unwarned interrogation and that her unwarned inculpatory statements could be used against her. *Id*. at 616 (plurality opinion). The plurality reasoned that, in light of these factors, the *Miranda* warnings were ineffective, because "[i]t would have been reasonable [for the defendant] to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Id*. at 616-17 (plurality opinion).

Concurring in the judgment, Justice Kennedy provided the fifth vote for holding the post-warning statements to be inadmissible. Justice Kennedy stated that the plurality's objective test "cuts too broadly" because it would apply regardless of whether a two-stage interrogation had been deliberately undertaken to circumvent *Miranda*. *Seibert*, 542 U.S. at 621-22 (concurring). Instead, Justice Kennedy favored "a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the

*Miranda* warning." *Id*. at 622 (concurring). Absent a "deliberate two-step strategy," in Justice Kennedy's view, the admissibility of post-warning statements should be governed by *Elstad*. *Id*. (concurring). "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." *Id*.

Justice Kennedy provided examples of curative measures "designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* waiver." *Id*. For example, "a substantial break in time and circumstances before the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." *Id*. As noted by the Fourth Circuit, Justice Kennedy's opinion represents the judgement of the Court. *See United States v. Mashburn,* 406 F.3d 303, 308 (4th Cir. 2005) ("In *Seibert,* Justice Kennedy concurred in the judgment of the Court on the narrowest grounds . . . . Justice Kennedy's opinion therefore represents the holding of the *Seibert* Court . . . .").

The defendant also acknowledges that Justice Kennedy's concurrence is "treated as the Court's holding." Def. Mot. at 44. However, the defendant incorrectly implies that both of the above-described suggested curative measures must be undertaken, as Justice Kennedy undeniably used the word "[a]lternatively" in his opinion and not "[s]econdly." *Compare Seibert*, 542 U.S. at 622 (concurring) *with* Def. Mot. at 45, 47.

Justice Kennedy did not articulate how a court should determine whether an interrogator had used a deliberate two-step strategy calculated to undermine a *Miranda* warning. *Capers,* 627

F.3d at 478. Courts have determined that both objective and subjective factors should be considered in making this determination. The Fourth Circuit in *Mashburn* did not reach that issue, as the defendant "conceded that the question-first strategy was not deliberately employed by the agents . . . ." 406 F.3d 303, 309 n.5 (4th Cir. 2005). The Second Circuit analyzes objective factors and other Circuits have looked to both "objective evidence and any available subjective evidence" to make that determination. *Id*. (citing *United States v. Williams,* 435 F.3d 1148, 1159 (9th Cir. 2006); *United States v. Street,* 472 F.3d 1298, 1314 (11th Cir. 2006) ("In deciding whether the agents used the 'question first' tactic against Street, we consider the totality of the circumstances including 'the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements.'")).

Accordingly, this Court should review the totality of the circumstances surrounding the interrogations in order to determine that a two-step interrogation technique was not deliberately used to undermine the *Miranda* warning. The government has the burden to prove, by a preponderance of the evidence, that such a technique was not employed. *Capers,* 627 F.3d at 480. Here, the evidence – both subjective and objective – convincingly establishes that the intelligence-gathering interviews of the defendant were not conducted in order to undermine the efficacy of the *Miranda* warnings to be given in subsequent warned interviews. Furthermore, even assuming, *arguendo*, the government's interrogation tactics implicate the concerns expressed in *Seibert,* the government took sufficient steps to attenuate any possible adverse impacts.

1. The Subjective Factors Show No Deliberate Effort to Circumvent Miranda

Upon his apprehension by Peshmerga forces in Iraq, United States government officials sought to question the defendant, a suspected terrorist and ISIS member who traveled from the United States, in order to obtain any actionable, national security-related, intelligence information that he might have. Based on what was known to those officials at the time of the defendant's apprehension, or shortly thereafter, there was ample reason to believe he had such actionable intelligence information. The purpose of conducting the initial, un-*Mirandized* intelligence-gathering interviews, therefore, was to obtain actionable intelligence – not to undermine the validity of a subsequent *Miranda* waiver. *See, e.g.*, *United States v. Thomas,* 664 F.3d 217, 223 (8th Cir. 2011) (unwarned interview preceding warned interview not intended to circumvent *Miranda,* where police "asked questions to establish probable cause, not to circumvent *Miranda* warnings."); *United States v. Nunez-Sanchez,* 478 F.3d 663, 668 (5th Cir. 2007) (fact that federal agents initially approached and questioned individual suspected of being illegal immigrant in possession of ammunition without administering *Miranda* warnings, and obtained admission of illegal status in response, did not render involuntary suspect's subsequent formal confession, obtained after administering *Miranda*; there was no evidence of deliberate attempt to employ two-step strategy to undermine *Miranda* warning).[13]

[13] The government notes that the Second Circuit has stated that "[t]he only legitimate reason to delay intentionally a *Miranda* warning until after a custodial interrogation has begun is to protect the safety of the arresting officers or the public." *Capers,* 627 F.3d 470. Even if the intelligence interviews exceeded the traditional public-safety inquiry concerning imminent plots or threats, *see New York v. Quarles*, 467 U.S. 649, 656 (1984) (recognizing "public safety" exception to *Miranda*, where law enforcement officials engage in custodial interrogation that is "reasonably prompted by a concern for the public-safety"), that would not establish a *Seibert* violation. *Capers,* which addressed a domestic postal-theft investigation, did not contemplate and thus does not cast doubt on the "legitimacy" of the use of an un-*Mirandized* interview to gather national-security related intelligence information in the context of a suspected terrorist who is apprehended overseas. The practice of overseas interrogations for purposes of intelligence

Conducting an un-*Mirandized* interview to focus on questions relevant to the national security of the United States is, unquestionably, legitimate. *Cf. United States v. Ghailani,* 733 F.3d 29, 49 (2d Cir. 2013) (no violation of constitutional right to a speedy trial where defendant was held for over two years by the Central Intelligence Agency because "proceedings were permissibly and reasonably delayed by weighty considerations relating to national security"). Here, the decision to conduct intelligence-gathering interviews was the product of the unique circumstances present (*e.g.*, a United States citizen apprehended in Iraq upon leaving ISIS-controlled territory and after having been away from his home country for three months), as was the decision to conduct subsequent *Mirandized* interviews that were intended to be separated in time, personnel, and setting from the intelligence-gathering interviews. This process was designed to enable the United States government both to protect its national security interests and to subsequently pursue a criminal investigation of the defendant, using all the tools that would otherwise be available, including *Mirandized* interviews.

Furthermore, because the purpose of the intelligence-gathering interviews was to explore fully the defendant's knowledge of any relevant national security intelligence information, a wide-ranging inquiry concerning the defendant's background, travel, and associates, not limited to imminent threats or plots, was required. While the intelligence interviews may have been neither brief nor casual, their purpose, nonetheless, was not to elicit incriminating statements, and certainly not to elicit them so that a future *Miranda*

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gathering has been the subject of widespread discussion and debate between the Executive Branch and the Congress, among others. *See, e.g., Lebron v. Rumsfeld,* 670 F.3d 540, 551-52 (4th Cir. 2012) (affirming the District Court's dismissal of plaintiff Padilla's civil claim alleging, among other things, coercive interrogations in violation of the Fifth and Eighth Amendments). The Second Circuit did not enter that debate or address those issues in the *Capers* opinion, which involved two-step questioning in a wholly different factual context.

warning would be of limited efficacy. *Compare Seibert,* 542 U.S. at 621 (exhaustive interview managed with psychological skill was part of a deliberate strategy to undermine *Miranda* warnings given thereafter). Rather, the purpose of the intelligence-gathering interviews, in this case, was to explore the defendant's travel, background, his association with terrorists, and his knowledge about any terrorist plots against the United States and elsewhere. As the FBI ALAT stated in an April 13, 2016 email: "Khweis has a lot more to say about the details of what he did, which would be fantastic information. I just had to get **all of the exigent threat and foreign fighter info** and then start the attenuation period due to KRG imposed deadlines" (emphasis provided). This contemporaneous communication reinforces two important facts about the investigation: (1) the FBI ALAT intended the intelligence-gathering interviews to be focused on threat-specific information; and (2) he had absolutely no control over the Kurdish authorities while the defendant was in their custody.

The efforts to maintain the separation between the intelligence-gathering interviews and the *Mirandized* interviews, which would ensure that the *Mirandized* interviews could not involve a "cross examination" based on the defendant's un-*Mirandized* statements, are compelling evidence that there was no deliberate effort to undermine the *Miranda* warnings in this case. *See United States v. Straker,* 800 F.3d 570, 618 (D.C. Cir. 2015) ("Equally importantly, the FBI agents did not refer back to the prior Trinidadian interrogations in an effort to elicit the same confessions."); *see also United States v. Miller,* 441 Fed. Appx. 804, 807 (2d Cir. 2011) (no deliberate effort to evade *Miranda* where the agent who conducted the *Mirandized* interview was aware of some of the defendant's statements at the un-*Mirandized* interview, and understood that the defendant had "confessed" at that interview). The FBI also took steps to ensure that the

*Mirandized* interviews took place in a different setting than the prior intelligence-gathering interviews and with wholly different personnel. *Compare Seibert,* 542 U.S. at 615, 621 (the same agent conducted a continuous interview).

The FBI's actions demonstrate that the government did not subjectively intend to employ a questioning strategy that was designed to undermine the *Miranda* warnings at the time that they were given. Under Justice Kennedy's controlling analysis in *Seibert,* this establishes that there was no deliberate effort to undermine *Miranda* and therefore that the voluntariness principles of *Elstad,* 470 U.S. 298, should apply. Under that standard, the defendant's motion to suppress should be denied because there can be no serious dispute that the defendant was read his *Miranda* rights before each of the subsequent interviews, and knowingly, intelligently, and voluntarily waived those rights; and, thereafter, made voluntary statements.

2. The Objective Factors also Show No Deliberate Effort to Circumvent *Miranda*

The objective considerations also demonstrate that there was no deliberate effort to undermine the efficacy of the *Miranda* warning given to the defendant. First, entirely different United States government personnel conducted the *Mirandized* interviews and the un-*Mirandized* interviews. *Straker,* 800 F.3d at 618 (waiver valid where, "there was a sharp discontinuity of police personnel, and the FBI did not 'treat[] the second [interrogation] as continuous with the first.'"). Additionally, an entirely different Kurdish official participated in the April 2016 *Mirandized* interviews with the defendant (and no Kurdish personnel were present for the June 8, 2016 *Mirandized* interview, which occurred while the defendant was being transported to the United States).

Second, the interviewing agents specifically told the defendant that they did not know what, if anything, he had said in the prior interviews. *Compare Seibert,* 542 U.S. at

620-621 (interrogating officer confronted the defendant in the *Mirandized* interview with her prewarning statements "and pushed her to acknowledge them") (Kennedy, J., concurring), and *Capers,* 627 F.3d at 484 (while not to the same degree as *Seibert,* the *Mirandized* interview was "essentially a cross- examination using information gained during the first round of interrogation"), *with Jackson,* 608 F.3d at 104 (finding no deliberate two-step strategy where, among other things, the prior admission was not used as a "lever" to induce a statement).

Third, the *Mirandized* interviews began approximately 10 days after the intelligence-gathering interviews ended. This is a significant separation in time, far exceeding the separation in other circumstances where courts have found that the government did not employ a deliberate two-step procedure. *See, e.g., Bobby v. Dixon,* 565 U.S. 23 (2011) (no deliberate effort to undermine *Miranda;* interval of four hours); *Carter,* 489 F.3d at 533 (no deliberate effort; interval of approximately thirty minutes); *United States v. Miller,* 441 Fed. Appx. 804, 807 (2d Cir. 2011) (no deliberate effort; interval of two and one-half hours); *United States v. Cummings,* 764 F. Supp. 2d 480, 514 (E.D.N.Y. 2011) (no deliberate effort; interval of approximately six hours).

Fourth, the agents specifically informed the defendant that even if he had spoken to others in the past, he did not have to speak to the interviewing agents. This warning was specifically designed to make clear to the defendant that despite any prior statements, he was still in a position to assert his right to silence in this instance. No such warnings were given in *Seibert, Capers,* or *Williams.*

An analysis of the totality of these objective factors, therefore, as well as the subjective factors discussed above, establishes that the agents in this case did not use a deliberate "two-

step" strategy designed to undermine the defendant's *Miranda* rights. Accordingly, the defendant's *Mirandized* statements are admissible if they were voluntarily made, pursuant to *Elstad,* 470 U.S. 298 (1985); *see Seibert,* 542 U.S. at 622.

3. Even Assuming, *Arguendo*, that a Deliberate Two-Step Strategy Was Utilized, Sufficient Curative Measures Were Taken to Render the Warnings Valid

For the reasons explained above, it is the government's position that a deliberate two-step strategy was not utilized here, and, as such, *Seibert* is inapplicable to the present case. However, even assuming, *arguendo*, that the Court concludes that a deliberate two-step strategy to circumvent *Miranda* had been employed, the inquiry would then shift to whether "curative measures [were] taken before the post-warning statement [was] made." *Seibert,* 542 U.S. at 622 (Kennedy, J., concurring). Justice Kennedy's concurrence gave examples of curative measures that "allow[] the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn." *Id*. As a threshold matter, the government notes that some of the same objective factors set forth above would also qualify as curative measures that were designed to, and did, ensure that a reasonable person in the defendant's position would understand the import and effect of the *Miranda* warnings and subsequent waivers.

There was a substantial break in time between the last intelligence interviews and the first law enforcement interview – a 10 day period. There was also a substantial break in circumstances. The agents who conducted the *Mirandized* interviews were different from those who had conducted the intelligence-gathering interviews. They were walled-off and completely unaware of any statements the defendant made during the intelligence-gathering interviews. Additionally, the *Mirandized* interviews were conducted in a different location than the intelligence-gathering interviews. The defendant was informed, no less than on six separate occasions, of his right to remain silent, his right to have an attorney with him during questioning,

that he did not need to speak with the interviewing agents just because he spoke to others in the past, that they are starting anew, etc. *See supra*. Additionally, before each and every FBI-led *Mirandized* interview, the defendant was told that his family in the United States had retained a United States-based attorney on his behalf.

In sum, these measures were sufficient to inform the defendant of the import and effect of the *Miranda* warnings. "Under *Seibert,* this significant break in time and dramatic change in circumstances created 'a new and distinct experience,' ensuring that [defendant's] prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing . . . ." *Bobby,* 132 S. Ct. at 32.

## CONCLUSION

For the foregoing reasons the defendant's arguments are without merit and his motion to suppress should be denied in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 2017, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will send an electronic copy to all counsel of record in this matter.

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