IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. 16-CR-6071FPG

EMANUEL L. LUTCHMAN,

Defendant.

GOVERNMENT'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM

The United States of America, by and through its attorneys, James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York, and Brett A. Harvey, Assistant United States Attorney, hereby makes and files its response to the sentencing memorandum of the defendant, EMANUEL L. LUTCHMAN.

On January 20, 2017, the defendant filed a sentencing memorandum in which he argues that (1) the three-level reduction under Sentencing Guidelines § 2X1.1(b)(2) applies to the offense of conviction and reduces the defendant's total offense level to 34, and (2) this Court should impose a non-Guidelines sentence of 120 months imprisonment. For the reasons set forth herein, the government respectfully opposes both arguments.

A. Inapplicability of Sentencing Guidelines § 2X1.1(b)(2)

As detailed in the Pre-Sentence Investigation Report (PSR), the base offense level for the offense of conviction – conspiracy to provide material support and resources to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1) – is 26, pursuant to Sentencing Guidelines § 2M5.3(a). The government and the defendant agree that the two-level

increase under Sentencing Guidelines § 2M5.3(b)(1)(E) applies because the offense of conviction involved the provision of material support and resources with the intent, knowledge or reason to believe they are to be used to commit or assist in the commission of a violent act, and that the 12-level increase under Sentencing Guidelines § 3A1.4(a) applies because the offense of conviction involved or was intended to promote a federal crime of terrorism.

As detailed in the plea agreement, the government and the defendant disagree about the applicability of the three-level reduction under Sentencing Guidelines § 2X1.1(b)(2) to the offense of conviction. In the PSR, the United States Probation Office concluded that, based on the facts of this case, the three-level reduction under Section 2X1.1(b)(2) does not apply. The government agrees with this conclusion and asks the Court to adopt this finding.[1]

Sentencing Guidelines § 2X1.1(b)(2) provides that, in conspiracy cases not covered by a specific offense guideline, a three-level reduction from the base offense level applies "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." The relevant question with regard to the applicability of Section 2X1.1(b)(2) is "whether the *conspiracy* 'ripened into a substantially completed offense' or 'came close enough to fruition.'" United States v. Downing, 297 F.3d 52, 62 (2d Cir. 2002) (quoting United States v. Amato, 46 F.3d 1255, 1262 (2d Cir. 1995)) (emphasis in original). "In most prosecutions for conspiracies . . ., the substantive offense was substantially completed or was

1 The government does not concede that Sentencing Guidelines § 2X1.1(a) applies to conspiracies under 18 U.S.C. § 2339B. Even if Section 2X1.1(a) applies, however, the three-level reduction under Section 2X1.1(b)(2) does not apply for the reasons set forth in this submission.

interrupted or prevented on the verge of completion by the intercession of law enforcement authorities . . . In such cases, no reduction of the offense level is warranted. Sometimes, however, arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense." U.S.S.G. § 2X1.1, Background.

Whether law enforcement has infiltrated or detected a conspiracy is not dispositive in determining whether the three-level reduction under Section 2X1.1(b)(2) applies to a particular case "because that section determines punishment based on the *conduct* of the defendant, not on the probability that a conspiracy would have achieved success." United States v. Medina, 74 F.3d 413, 418 (2d Cir. 1996) (emphasis in original). The Second Circuit has stated that "'near accomplishment of the criminal object normally poses enough risk of actual harm, and reveals enough culpability' to defeat 'the reduction available for conspiracies . . . that have not progressed very far.'" Id. (quoting United States v. Chapdelaine, 989 F.2d 28, 36 (1st Cir. 1993)). "[W]hat matters under the Guidelines is that [the defendant] and his co-conspirators were 'about to complete' the crime, not that they were 'about to succeed.'" Medina, 74 F.3d at 418. "Whether a reduction under Section 2X1.1 is warranted it a fact-specific inquiry, and courts have upheld the denial of a reduction even though a defendant had not reached the 'last step' before completion of the substantive offense." United States v. Brown, 74 F.3d 891, 893 (8th Cir. 1996).

In this case, the facts show that the defendant was about to complete the New Year's Eve attack when law enforcement agents intervened and arrested him. As detailed in the plea agreement and PSR, the defendant and his co-conspirator, Abu Issa Al-Amriki, a recruiter and external attack planner for ISIL in Syria, hatched the plot to commit the New Year's Eve attack on or about December 25 and 26, 2015. The defendant agreed to conduct the attack to prove his allegiance to ISIL, and enable him to later gain membership in and join ISIL on the battlefield

overseas. Over the following four days, the defendant took numerous steps necessary to fulfill the plan and actually carry out the attack. Specifically, the defendant selected a target location, determined the manner and means of the attack, purchased weaponry and supplies for the attack (with the assistance of Individual C), and recorded the bayah (meaning oath or allegiance) video that Al-Amriki directed him to make so that ISIL could publicize and claim responsibility for the attack. As of the time of his arrest on December 30, 2015, all that remained to successfully carry out the attack was for the defendant to show up at the target location the next day. The sole reason the defendant did not arrive at the target location and accomplish the attack was due to the intervention of law enforcement agents.

Contrary to the defense arguments, this is not a case where the government "orchestrated several actions" by the defendant. As detailed in the factual basis of the plea agreement and the PSR, it was the defendant, together with Al-Amriki, who came up with the plan to conduct the New Year's Eve attack. While Individual C provided the funds to purchase the weapons and supplies, it was the defendant who conceived of the means and manner of the attack, and the specific weapons and supplies that would be used to commit the attack. At the Wal-Mart on December 29, 2015, the defendant chose the weapons and supplies from the store shelves. In addition, the evidence in this case shows that the defendant had access to another machete from a friend. The government recovered photographs, taken in early November 2015 (almost two months before the conspiracy and well before the defendant even met Individual C), from the defendant's smartphone depicting a knife and the defendant holding a machete.[2] Although the defendant was ultimately unsuccessful in getting a machete from his friend, this evidence shows

2 The photographs, and a page from the telephone extraction showing the dates those photographs were created, are attached hereto as Exhibit 1.

that the defendant took action independent of Individual C to obtain a weapon for the attack and undercuts the defendant's argument that he would not have been able to accomplish the attack without the assistance of Individual C.

The rest of the defendant's arguments on the applicability of Section 2X1.1(b)(2) lack merit because they focus, not on the defendant's conduct in this case, but on the fact that the conspiracy never would have come to fruition because Individual C was a cooperating witness who would not have followed through with the plan. Such arguments must fail under the law in this Circuit. See Medina, 74 F.3d at 418 (stating that Section 2X1.1(b)(2) "determines punishment based on the *conduct* of the defendant, not on the probability that a conspiracy would have achieved success").

In any event, it is unnecessary for this Court to decide the applicability of Section 2X1.1(b)(2) because it does not affect the Sentencing Guidelines range. As noted in the plea agreement, the defendant's Sentencing Guidelines range is 240 months imprisonment, regardless of whether Section 2X1.1(b)(2) applies to the facts in this case. Under these circumstances, this Court need not decide the issue. See United States v. Bermingham, 855 F.2d 925, 931 (2d Cir. 1988) (holding "disputes about applicable guidelines need not be resolved where the sentence falls within either of two arguably applicable guideline ranges and the same sentence would have been imposed under either guideline range"); see also United States v. Borrego, 388 F.3d 66, 69 (2d Cir. 2004) (stating "we have applied the reasoning in *Bermingham* in various other contexts, noting that when the dispute at issue has no bearing on the determination of the sentence duration, district courts need not rule on disputes concerning offense level adjustments, the appropriate offense guideline, and appropriate criminal history category") (citations omitted).

B. <u>Defense Request for Non-Guidelines Sentence</u>

Contrary to defendant's arguments, a Guidelines sentence in this case would not be "greater than necessary" to comply with the objectives set forth at Title 18, United States Code, Section 3553(a). As detailed in the government's sentencing memorandum, the facts and circumstances of this case fully support a sentence of **240 months imprisonment**.

The defendant minimizes the seriousness of the offense in this case. Although the defendant did not plan to use a firearm to commit the attack, he did obtain knives and a machete to use to kill innocent civilians. As this Court is aware, there have been innumerable terrorist attacks, and other types of mass casualty incidents, in the United States and elsewhere in the world over the last several years. While many of those attacks involved firearms, many of them involved weapons as simple as knives and machetes. The incidents involving the use of knives and machetes, like the incident before this Court, are no less lethal and reprehensible because the perpetrators chose to use simple weaponry. As detailed in the plea agreement and PSR, the defendant read an online document created by an ISIL member, which specifically stated that a kitchen knife would be sufficient to kill non-believers and described various killing methods, including the use of swords and knives. ISIL instructs its followers to use such simple weapons because they are easier to obtain than firearms and explosives. In this case, the knives and machete were easy for the defendant to obtain at the local Wal-Mart. In contrast, the defendant was prohibited from possessing a firearm due to his prior violent felony conviction for Robbery 2°, so gaining access to a firearm would have been much more difficult. In any event, the gravamen of a terrorism offense is the intention of the perpetrator(s) to kill innocent civilians – regardless of what method they choose to use.

The characterization of the defendant as an "aggressive panhandler" by the owner of the targeted restaurant/bar does not alter the analysis in this case. The owner undoubtedly did not know that the defendant was a convicted violent felon who had previously served a five-year prison term, that the defendant was a fervent online supporter of ISIL, or that the defendant had formed the plan to attack the restaurant/bar with Abu Issa Al-Amriki, an actual recruiter and external attack planner for ISIL in Syria. The government submits that, had the owner known these facts at the time of the defendant's arrest, he more than likely would not have made the same characterization of the defendant.

The defendant cites the sentences in three other material support cases – United States v. Morgan (North Carolina), United States v. Davis (Georgia), and United States v. Wolfe (Texas) – as a basis for a 10-year sentence in this case. It is difficult to compare these cases because the parties are not privy to the underlying facts and circumstances of those cases, and there are numerous reasons why the government would enter a particular plea agreement with a defendant, some of which have nothing to do with the facts in the specific case. In any event, the above-referenced cases are readily distinguishable from this case. For example, each of these cases involved an individual who was seeking to travel overseas to join ISIL. None of them involved a conspiracy with an ISIL attack planner to commit a terrorist attack in the United States. Moreover, as the defense concedes, these cases were prosecuted at a time when the statutory maximum penalty for a material support charge was 180 months imprisonment. The defendant committed his crime in December 2015, after the statutory maximum was increased by Congress to 240 months imprisonment. The defendant offers no legal authority for the proposition that a change in the statutory maximum penalty can cause an unwarranted sentencing disparity for defendants sentenced after the change in the law.

As this Court is aware, the government previously prosecuted the case of United States v. Elfgeeh, 14-CR-6147EAW, in this District. The defendant in that case, Mufid Elfgeeh,[3] was charged with several offenses, including three counts of attempted material support of a designated foreign terrorist organization (ISIL), attempted murder of federal officers, and firearms offenses. Elfgeeh ultimately pled guilty to three counts of attempted material support of ISIL, which involved his efforts to send three individuals (including two cooperating witnesses and an individual in Yemen) to join and fight with ISIL in Syria. The Court sentenced Elfgeeh, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, to a term of 270 months imprisonment. Unlike the defendant in this case, Elfgeeh did not plead guilty to any offenses involving an ISIL-directed plot to commit a terrorist attack in the United States. In any event, the government submits that a 240-month term of imprisonment in this case would be consistent with the 270-month term of imprisonment imposed on Elfgeeh.

It is apparent from the details in the PSR that the defendant has a history of mental health issues. There has been no claim in this case, however, that the defendant failed to comprehend the nature and gravity of his criminal acts. In fact, the evidence shows that the defendant fully understood what he was doing and why he was doing it. The content of the defendant's two Facebook accounts and Google+ account shows that the defendant was a zealous supporter of ISIL and its terrorist ideology. As detailed in the plea agreement and PSR, those accounts contained expressions of support for ISIL, imagery relating to ISIL (including images of beheadings, one of which depicted a decapitated body and a person standing over the body holding a blood-stained sword), and propaganda videos and digital documents relating to ISIL

3 On October 23, 2015, the defendant posted a video on Facebook relating to the prosecution of Elfgeeh (entitled "NY Store Owner Funds ISIS"), along with the comment in support of Elfgeeh, which read "May Allah free this brother that was arrested in Rochester ny where im Allaahumma ameen."

and violent jihad. In December 2015, the defendant found a way to locate and communicate with Abu Issa Al-Amriki, an ISIL recruiter and attack planner in Syria, and proceeded to formulate the plan for the New Year's Eve attack through online communications with Al-Amriki. While it is unknown whether the defendant would have had the capability to travel overseas and join ISIL at some point in the future, the attack he planned to commit in the name of ISIL was simple and attainable. After devising the plan, the defendant recruited/attempted to recruit co-conspirators (Individuals A, B and C), and easily obtained the weaponry and supplies necessary to successfully execute the attack. After the final preparations were completed, the defendant made the bayah video, which he intended to send to ISIL so the organization could publicize and claim responsibility for the attack.

As the government noted in its sentencing memorandum, the defendant's mental instability is not a mitigating factor warranting a lenient sentence from the Court. Rather, the government submits these issues do not diminish the defendant's culpability, but make it more likely that he would have actually carried out the New Year's Eve attack. A person like this defendant – a convicted violent felon who supports ISIL, ascribes to an extremist ideology and is open to overtures from an overseas terrorist organization to commit an attack – is precisely the type of person that would agree to and actually commit a terrorist attack on American soil.

Based on the foregoing, the government respectfully requests that the Court deny the defendant's application for a non-Guidelines sentence and sentence the defendant to the statutory maximum of **240 months imprisonment** and a lifetime term of supervised release.

DATED: Rochester, New York
January 25, 2017

Respectfully submitted,

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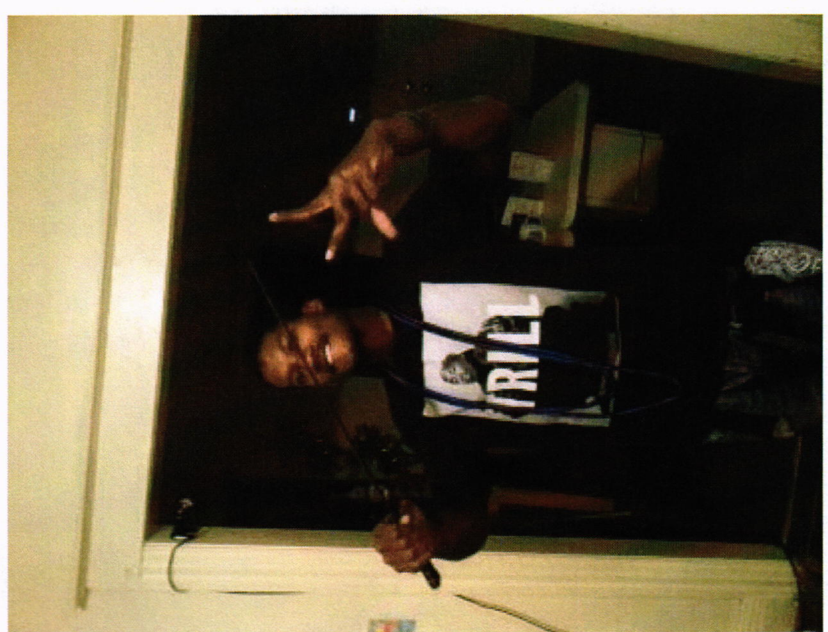

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