UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -v.- SAYFULLO HABIBULLAEVIC SAIPOV, Defendant.	S1 17 Cr. 722 (VSB)

THE GOVERNMENT'S MOTIONS *IN LIMINE*

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum in support of its motions *in limine* seeking the following pretrial rulings with respect to the guilt phase at the upcoming trial of defendant Sayfullo Habibullaevic Saipov:[1]

1. Terrorist propaganda materials, including select materials recovered from two cellphones used by the defendant and publicly available statements officially released by ISIS, are admissible as direct evidence and pursuant to Rule 404(b);
2. Evidence of other violent acts undertaken by ISIS members is admissible to prove that ISIS is a racketeering enterprise engaged in racketeering activities;
3. Photographs from the scene of the defendant's attack are admissible as direct evidence;
4. The defendant's unprompted in-court statements are admissible under Rule 801(d)(2)(A);
5. The defense is precluded from arguing or cross-examining witnesses regarding the Department of Justice's policy concerning the recording of custodial post-arrest statements;
6. The defense is precluded from offering mitigating evidence during the guilt phase; and
7. The Court should take judicial notice of the State Department's designation of the Islamic State of Iraq and al-Sham ("ISIS") as a Foreign Terrorist Organization.

The Government further seeks the following pretrial rulings with respect to the penalty phase, if necessary, at the upcoming trial of the defendant:

[1] Any motions *in limine* related to evidence of the defendant's post-arrest statement are of course subject to the Court's determination of the defendant's pending motion to suppress that statement. (Dkt. No. 268).

8. The defense is precluded from arguing that the beyond a reasonable doubt standard is applicable to the weighing determination of the penalty phase;
9. The defense is precluded from offering evidence concerning the status of capital punishment in New York State;
10. Evidence of the defendant's threats to decapitate an employee at the Metropolitan Correctional Center is admissible;
11. The defense is precluded from presenting evidence or testimony concerning the potential impact of the defendant's execution on the defendant's family or others; and
12. The defense is precluded from offering comparative proportionality evidence regarding this case compared to other capital cases.

BACKGROUND

I. The Charged Offenses

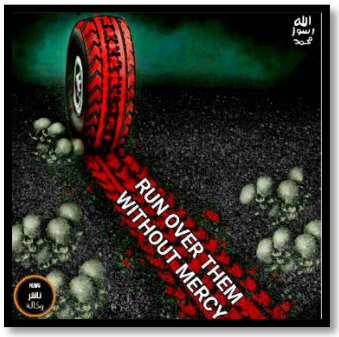
The defendant is charged in a 28-count indictment (the "Indictment") with eight counts of murder in aid of racketeering activity, eight counts of assault with a dangerous weapon and attempted murder in aid of racketeering, and ten additional counts of attempted murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), (a)(3), and (a)(5), as well as one count of providing material support to a designated Foreign Terrorist Organization ("FTO"), in violation of 18 U.S.C. § 2339B, and one count of violence and destruction of a motor vehicle resulting in death, in violation of 18 U.S.C. §§ 33(a) and 34.

II. The Defendant's Radicalization and Attack

On October 31, 2017, the defendant murdered eight people and injured more than a dozen others when he mowed them down with a truck in Manhattan. The defendant committed this attack to become a member of a notorious global terrorist organization—ISIS. The Government will prove to the jury *how* the defendant committed this attack by presenting testimony from victims,

witnesses who observed the attack, and law enforcement officers who responded. This testimony will be elucidated and corroborated through photographs and maps of the crime scene, as well as records from the defendant's phone and e-mail that evidence his preparation for the attack. The Government will prove to the jury *why* the defendant committed this attack—to become a member of ISIS—through evidence including the defendant's own statements to law enforcement and this Court, ISIS propaganda and messages recovered from the defendant's phones (including propaganda specifically calling for attacks like the one the defendant committed), and a note the defendant left at the scene of the crime.

The evidence will show that the defendant's pursuit of membership in ISIS began at least three years before his attack. Using an encrypted messaging application called Telegram, the defendant joined a chat group called *Darul Khlifa*, or, in English, Home of the Caliphate, in which group members posted hundreds of audio and video clips of ISIS propaganda, including from the then-leader of ISIS, Abu Bakr al-Baghdadi. One of the cellphones recovered from the defendant's truck after the attack contained hundreds of images related to ISIS and violent terrorism propaganda, including directives from ISIS to carry out attacks exactly the way the defendant did. One such image, for example, displayed the symbol for one of ISIS's media components, Nashir News, along with a drawing of a tire covered in blood, surrounded by skulls, with the exhortation to "[r]un them over without mercy":



In approximately 2016, in response to a call to action from ISIS leader al-Baghdadi, the defendant resolved to transition from a follower of ISIS consuming propaganda to a full member of ISIS—a soldier of the caliphate. The defendant began planning an attack in New York City. He carefully selected the location, timing, and method of the attack. Consistent with the guidance ISIS distributed through its propaganda channels, the defendant chose a large rental truck to inflict maximum harm against civilians. In the days leading up to the attack, the defendant practiced maneuvering the truck to ensure that he could hit his victims. The defendant planned to use the truck to strike victims in the vicinity of the West Side Highway and then to proceed to the Brooklyn Bridge to continue his attack. He chose to conduct the attack on Halloween because he believed there would be people out on the street. Indeed, the defendant's Internet searches reflect that two weeks before attack, the defendant searched the Internet for "Halloween in NYC." In the days and weeks leading up to the attack, the defendant continued to fuel his motivation by consuming ISIS propaganda. On the morning of the attack, for example, the defendant downloaded six audio recordings on an encrypted electronic messaging application, including a message proclaiming that "no one forcibly tells you to become a martyr, or forcibly tells you to go into battles or do military training . . . the reward of that is bigger still." (Ex. B3-T at 015153-015154).

On October 31, 2017, the defendant fulfilled al-Baghdadi's call to action and carried out his attack. That morning, the defendant went to a Home Depot in New Jersey, rented a truck, and drove it across the George Washington Bridge toward New York City. The defendant drove down the West Side Highway toward lower Manhattan and put his plan into effect. As he neared the bike path abutting the highway, the defendant sped across the barrier, and drove onto the path filled with cyclists. At a speed of approximately 65 miles per hour, he began running over his victims, including a woman visiting New York with her sisters and mother on vacation, a group of

Argentinians celebrating their 30th graduate school reunion, a New Jersey resident on a bike ride during his lunch break, and a 23-year-old native New Yorker who was struck with such force that he flew backwards approximately 50 feet. Each of these eight victims was killed, and the defendant seriously injured others, including victims who lost limbs and suffered permanent physical damage.

The next phase of the defendant's plan, to drive to the Brooklyn Bridge to continue his killing spree, was cut short when he crashed the truck into a school bus carrying special needs children in the vicinity of Chambers Street and West Street. After the defendant collided with the bus, he exited the truck with two objects in his hands that looked like guns. He yelled, in substance and in part, "Allahu Akbar," which is an Arabic phrase that translates to "god is great." The defendant was shot almost immediately by a New York City Police Department officer and taken into custody.

Law enforcement officers subsequently recovered from the vicinity of the truck, among other things, a bag containing three knives between nine and 10 inches long and a document that contained a drawing of the ISIS flag and Arabic text, which translates roughly into English as: "No God but God and Muhammad is his Prophet" and "Islamic Supplication. It will endure."—a phrase commonly used to refer to ISIS.

Law enforcement later recovered drafts of the ISIS note left at the crime scene from the defendant's home.

Law enforcement officers also recovered from inside the truck two of the defendant's cellphones (the "Saipov Cellphones"). The Saipov Cellphones collectively contain thousands of files of ISIS propaganda, including materials touting ISIS's global acts of violence and specifically calling for the lone-wolf style vehicular attack perpetrated by the defendant. This extensive collection of ISIS propaganda on the defendant's phones evidences, among other things, the defendant's knowledge of ISIS's terrorist tactics and further demonstrates that the defendant's attack was prompted by his desire to become a soldier of ISIS in response to ISIS's call for action.

After the defendant was arrested, he was taken to Bellevue hospital, where he underwent several hours of medical treatment. Beginning just before midnight, after the defendant had been cleared by medical staff, the FBI interviewed him. Throughout the eight and a half hour interview, the defendant proudly demonstrated his devotion to ISIS. He asked to display ISIS's flag in his

hospital room and told the FBI about how al-Baghdadi's call to action motivated him to commit the attack. The defendant expressed no response during this interview. To the contrary, he was proud, and said that he felt good about what he had done.

In the days after the defendant's attack, ISIS confirmed that the attack was undertaken as part of ISIS's ongoing terrorist activity, and declared that the defendant had achieved the membership status he sought: he was now "a soldier of the caliphate." ISIS's announcement was released in one of its official publications—a weekly newsletter named *al-Naba*. ISIS stated that "[o]ne of the Islamic State soldiers in America attacked on Tuesday a number of crusaders on a street in New York City." ISIS lauded the defendant's attack as "one of the most prominent attacks targeting Crusaders in America" and confirmed that the defendant committed the attack in direct response to ISIS's instruction to target citizens of the United States.

The defendant has continued to show no remorse in the months since the attack. At multiple court appearances in this case, he has remained steadfast in his support of ISIS and continued to espouse ISIS ideology. For example, during a court conference on June 22, 2018, the defendant said, among other things, that the "judgments" of the Court are "not important" to him because they were made by "weak minds." He then said that ISIS is "leading a war . . . to impose sharia [law] on earth."[2]

III. The Evidence at Trial

The Government's evidence at trial will consist of (i) witness testimony, including testimony from witnesses to the truck attack and from surviving victims of the attack; (ii) photographs from the scene of the attack; (iii) terrorist propaganda materials, including official

[2] Sharia law is Islamic law. As described below, the Government expects that terrorism expert Dr. Aaron Zelin will testify about ISIS's extreme interpretation of sharia law and its purpose of imposing such law globally.

statements released by ISIS and materials recovered from the Saipov Cellphones; (iv) evidence of Saipov's planning and execution of the attack, including evidence of Saipov's use of the Internet to research and plan the attack; (v) law enforcement testimony about Saipov's post-arrest confession (if admitted); and (vi) expert testimony. The Government anticipates calling several expert witnesses, as disclosed to defense counsel on December 9, 2019 in accordance with the Court's scheduling order. During the guilt phase of the trial, the Government anticipates calling the expert witnesses described below.[3]

Aaron Y. Zelin is an expert in militant jihadist groups, including ISIS, who has been previously qualified as an expert on these topics in three recent trials in the Southern District of New York. Consistent with his testimony in those trials, Dr. Zelin is expected to testify about ISIS's history, structure, strategic goals, and means and methods; current and historical sources of and influences on ISIS's ideology; territories that ISIS has controlled, or in which ISIS has maintained a presence; key events and figures in ISIS's history; ISIS's efforts and methods, including through the Internet, to recruit new members and facilitate their travel to join ISIS or participate in attacks in their home countries; travel routes commonly used by ISIS supporters to reach ISIS-controlled territory; and training and indoctrination that ISIS provides to recruits and

[3] The need for certain of the testimony described herein may ultimately be obviated by stipulations between the parties. For example, the Government will proposed a stipulation to the defense relating to the basic facts of attacks by ISIS that the Government intends to rely upon as evidence of ISIS's status as a racketeering enterprise and the racketeering activity in which it engages, as required to prove Counts One through 26 of the Indictment. To the extent the parties reach a stipulation on these facts, it would obviate the need for the Government to call law enforcement witnesses and victims (as described below). Similarly, the Government may not require the testimony of the medical examiners described below if the parties reach stipulations regarding the manner of death of Saipov's eight murder victims. Moreover, the parties may be able to reach stipulations that would obviate the need for custodial witnesses from service providers such as Google and T-Mobile. The Government has nonetheless included descriptions of the anticipated testimony of all of these witnesses herein for the Court's consideration.

new members. This testimony will be based on, among other things, Dr. Zelin's review of publicly-available ISIS propaganda, his monitoring of propaganda exchanged in private chatrooms devoted to ISIS, and ISIS-related material found on the Saipov Cellphones (as further detailed below).[4] Dr. Zelin is also expected to testify about the meaning of Arabic phrases contained in the evidence, such as that the phrase "It will endure" from the document recovered near the defendant's truck is a phrase commonly used to refer to ISIS, and phrases such as jihad, martyrdom, mujaheeds, kuffar, sharia law, shahada, and hijrah. Finally, Dr. Zelin is expected to testify about the meaning of certain of the defendant's in-court statements. For example, Dr. Zelin is expected to testify that ISIS uses the word *taghut*, which the defendant used to describe the Court, to refer to illegitimate leaders or false deities, and that ISIS members regularly call for the removal or targeted killing of individuals they identify as *taghut*. Dr. Zelin's testimony is relevant to, among other things, proving that ISIS is an enterprise engaged in racketeering activity, as relevant to Counts One through 26 and that ISIS is an FTO, engaged in terrorist activity, as relevant to Counts One through 27. Dr. Zelin's testimony is further important context to enable the jury to assess the Terrorist Propaganda Materials, which go directly to the defendant's radicalization, motives for committing the attack, and knowledge that ISIS is a terrorist organization.

John Northrup is an expert in accident reconstruction and crash data processing and interpretation. Mr. Northrup is expected to reconstruct the scene of the truck attack using forensic mapping software. Mr. Northrup will rely on maps, crime scene photographs, and videos from the

[4] Attached as Exhibit A is a compact disc containing the publicly-available ISIS propaganda that Dr. Zelin reviewed in connection with his anticipated testimony at trial, along with draft translations of this material. The Government previously produced this material to defense counsel along with its expert disclosures on December 9, 2019. This material includes, among other things, calls for attacks by ISIS, including "lone wolf" attacks like the attack committed by the defendant, and claims of responsibility by ISIS for terrorist attacks around the world. The Government plans to introduce this material at trial through the testimony of Dr. Zelin.

attack (all of which were produced to the defendant in discovery). Mr. Northrup is also expected to testify concerning his analysis of the crash data from Saipov's truck, and is expected to offer his expert opinion that during the attack, the defendant had fully depressed the gas pedal of the truck for the majority of the incident and the truck was traveling at approximately 65 miles per hour during the attack.

Lara Adams is an FBI analyst and an expert witness in DNA collection and evaluation, who is expected to testify that DNA matching certain victims of the attack was found on multiple locations on the truck and the school bus. Ms. Adams is also expected to testify about basic information concerning DNA testing and how the comparison in this case was obtained, and the process by which DNA reports were prepared and maintained in the normal course of the FBI's business.

Reginald V. Donaldson, Sr. is an Investigative Analyst at the U.S. Attorney's Office, who is expected to testify regarding his analysis of toll records, including the originating and terminating cell site information from the Saipov Cellphones, his cell site analysis of the Saipov Cellphones, and the approximate location of the Saipov Cellphones on October 31, 2017 and on approximately nine other dates in October 2017 when the defendant was in and around the area of the attack.

The Government additionally expects to call eight doctors from the Office of Chief Medical Examiner of the City of New York ("OCME"), each of whom examined one of the defendant's murder victims. These eight doctors will explain basic information about autopsies and how they are performed, describe the process by which an autopsy report is prepared and maintained in the normal course of the OCME's regularly conducted business, and testify regarding the results and findings of the autopsies, the nature and extent of the injuries observed, and the cause and manner

of death of each of the deceased victims of the truck attack. This testimony is necessary to establish the deaths of the eight victims who are the subject of the murder in aid of racketeering activity charges at Counts One through Eight of the Indictment, and to explain to the jury the injuries suffered by those victims as a result of the defendant's attack.

The Government will additionally present the testimony of experts in Arabic, Russian, and Uzbek, who translated communications recovered from the Saipov Cellphones and handwritten materials recovered during the course of the investigation.

Moreover, forensic examiners with the FBI's Computer Analysis Response Team or Operational Technology Division, are expected to testify regarding the forensic analysis of the defendant's electronic devices that were searched during the course of this investigation.[5]

In addition, the Government anticipates calling both law enforcement and victim witnesses regarding other ISIS attacks conducted in the United States and abroad. These witnesses will testify about the facts underlying these attacks. This testimony will be relevant to proving both the existence of ISIS as a racketeering enterprise and the racketeering activity in which it engages, as required to prove Counts One through 26 of the Indictment, and is also relevant to proving that ISIS is engaged in terrorist activity, as relevant to Count 27.

Finally, the Government anticipates that it will call several witnesses to authenticate records and introduce video surveillance of the attack. The Government expects to call witnesses from T-Mobile (regarding Saipov's phone records), the New York City Police Department

[5] The Government has provided expert notice as to these witnesses in an abundance of caution, although such notice is unnecessary as they are expected to testify principally about what was found during searches of the devices rather than any area of specialized knowledge relied upon during the course of these examinations. *See United States v. Marsh*, 568 F. App'x 15, 16-17 (2d Cir. 2014) (summary order) (finding no error in allowing lay, non-expert testimony relating to search of electronic device where witness simply "explained his training," "described" his search, and "testified to the contents of the messages retrieved from the phone").

(regarding 911 calls), Google (regarding Saipov's Google search history), and the court (regarding certified court transcripts relating to the defendant's in-court statements). In addition, the Government anticipates calling individuals who recorded the attack and provided their videos to the Government.

If a penalty phase becomes necessary, the Government anticipates introducing testimony from the surviving victims and from family members of the deceased victims of the attack. The Government also anticipates calling Bureau of Prisons employees to testify about an incident on or about December 18, 2019, during which the defendant talked about decapitating a corrections officer, as further detailed below. Additionally, the Government anticipates calling the following two expert witnesses at the penalty phase.

Dr. David King is a trauma and acute care surgeon at the Massachusetts General Hospital. The Government expects Dr. King to testify concerning the nature and extent of the deceased victims' injuries, including, for example, whether the victims consciously suffered before death after being struck by the defendant or otherwise suffered serious abuse including, but not limited to, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Dr. King's testimony is relevant to the defendant's intentional infliction of serious bodily injury (a threshold statutory factor under 18 U.S.C. § 3591(a)(2)), and the heinous, cruel, and depraved manner of committing the offense (a statutory aggravating factor under 18 U.S.C. § 3592(c)).

Scott Dodrill is an expert in the Bureau of Prisons' structure, facilities, staff, inmate designation, and inmate movement, who, if called, is expected to testify concerning the conditions of confinement for those serving life in prison for violent crimes, including the conditions at maximum security prison facilities and those under special administrative measures. With respect

to those serving life imprisonment, Mr. Dodrill is expected to testify to the various phases of their confinement, as well as the rate at which those inmates commit significant acts of violence. Mr. Dodrill's testimony is relevant to the defendant's future dangerousness (a statutory aggravating factor under 18 U.S.C. § 3592(c)), particularly to the extent the defendant argues that the anticipated future conditions of his confinement eliminate any risk to the public.

ARGUMENT: GUILT PHASE

A. Evidence of Saipov's Terrorist Propaganda Materials Is Admissible

1. Relevant Facts

At trial, the Government intends to introduce ISIS propaganda material from two sources: (1) publicly-available statements released by ISIS on its various public communications channels (the "ISIS Statements"); and (2) ISIS recordings, photographs, and videos found on the Saipov Cellphones (the "Cellphone Propaganda," and together with the ISIS Statements, the "Terrorist Propaganda Materials").[6] As described in more detail in Part A.3.a, *infra*, these materials are admissible evidence of the charged offenses.

a. The ISIS Statements

The Government anticipates that Dr. Zelin will describe that ISIS has a leadership structure that includes, among other things, an emir (or leader), a *shura* (or leadership) council, and spokespersons, who have changed over the years. Dr. Zelin will describe how this leadership established strategy for the group, and did so through public proclamations and propaganda. For example, Dr. Zelin will testify about how in April 2013, ISIS's then-emir, al-Baghdadi, announced

[6] The ISIS Statements and related draft translations are attached hereto as Exhibit A. The Cellphone Propaganda and related draft translations are attached hereto as Exhibit B. In this memorandum, the Government has described the sum and substance of the Terrorist Propaganda Materials. Moreover, the draft translations included on Exhibits A and B are preliminary and subject to revision as the Government continues to prepare for trial.

that ISIS would split from al Qaeda, become an autonomous jihadist group, and take control over Iraq and Syria. Dr. Zelin will also describe how al-Baghdadi declared the creation of an ISIS "Caliphate" in July 2014. Finally, Dr. Zelin will explain how ISIS formally announced replacements for leaders who were killed, thus retaining the group's leadership structure. For example, Dr. Zelin will testify about how, when al-Baghdadi was killed by the U.S. military in 2019, ISIS announced the elevation of a new emir, Abu Ibrahim al-Hashemi al-Qurayshi.

The Government further anticipates that Dr. Zelin will testify that ISIS operates several official media outlets, including the Amaq News Agency and the al-Furquan Foundation, and online distribution channels, such as Nashir News, through which the group, for example, posts claims of responsibility for ISIS attacks around the world. Additionally, Dr. Zelin will describe how the organization distributes official publications online, including magazines called *Dabiq*, *Rumiyah*, and *al Naba*, in which the group also praises and takes credit for attacks, and, at times, identifies its members (including, for example, the defendant's attack). Finally, Dr. Zelin will explain how ISIS operates numerous social media and encrypted messaging accounts, including Twitter accounts and Telegram channels, which the group and its affiliates use to distribute ISIS propaganda. Collectively, these ISIS official media outlets are referred to as the "ISIS Outlets" herein.

The ISIS Statements, which are included as Exhibit A, are ISIS propaganda that the group disseminated online through the ISIS Outlets. The ISIS Statements that the Government intends to introduce consist of (1) statements from ISIS leaders disseminated through the ISIS Outlets (the "Leadership Messages"); and (2) ISIS's claims of responsibility for terrorist attacks, also released through the ISIS Outlets (the "Claims of Responsibility").

ISIS Statements: Leadership Messages

The Leadership Messages that the Government will offer through the testimony of Dr. Zelin are:

- September 21, 2014 "Indeed Your Lord Is Ever Watchful" Speech: In this speech, Abu Mohammed al-Adnani, ISIS's then-spokesperson, among other things, threatened the United States, praised ISIS's terrorist acts, and exhorted ISIS followers to "rise and defend [the caliphate] from your place wherever you may be" by conducting attacks in the countries in which they lived.
- January 26, 2015 "Say Die in Your Rage" Speech: In this speech, al-Adnani "renewed the call for the unifiers in Europe and the infidel West, and everywhere, to target the Crusaders in their own backyard and wherever they are" and condemned "every Muslim who can shed a drop of Crusader blood and does not do it, whether with a device, a shot, a knife, a car or a stone, or even a kick or a punch."
- March 12, 2015 "So They Kill and Are Killed" Speech: In this speech, al-Adnani, among other things, celebrated the establishment of the Caliphate and encouraged ISIS supporters who could travel to the Caliphate to defend ISIS's territory.
- May 14, 2015 "Go Forth Whether Light or Heavy" Speech: In this speech, al Baghdadi declared, among other things, that jihad was compulsory for Muslims and demanded "every Muslim in every place to perform Hijrah to the Islamic State or fight in his land wherever that may be."

- October 15, 2015 "Say to Those Who Disbelieve You Will Be Overcome" Speech: In this speech, al-Adnani, among other things, threatened the United States with destruction and encouraged the "youth of Islam in every place" to "[r]ush forth to jihad against the Russians and the Americans, for it is the Crusaders' war on the Muslims, the war of the polytheists and atheists against the believers."
- December 26, 2015 "So Wait, We Are Waiting With You" Speech: In this speech, al Baghdadi, among other things, proclaimed that "O Muslims, fighting this war is the duty of every Muslim and no one is excused" and that "[i]t is either a walk to the battlefield or martyrdom, as there is no sense in living if we do not live under Allah's rule and under His reign."
- December 5, 2016 "And You Will Remember What I [Now] Say to You" Speech: In this speech, Abu Hassan al Muhajir, who assumed the role of ISIS's spokesman after al-Adnani died in 2016, among other things, encouraged "the soldiers of the Caliphate and its supporters all over the world" that their "blessed operations turn[ed] the scales," and exhorted ISIS followers to "attack them in their homes, markets, streets, clubs, and wherever they least expect it" and "[e]nflame the ground beneath their feet and blacken their skies so that they are busied with themselves."
- April 4, 2017 "So Be Patient. Indeed, The Promise Of God Is Truth" Speech: In this speech, al Muhajir, among other things, criticized the United States for "repeating their attack against the territories of Islam and the land of the Caliphate," declared that "martyrdom operations, with Allah's blessing and

generosity, are no longer limited to youths and not adults," and directed "supporters of the caliphate" to "target [Americans, Europeans, and Russians] at home and away from your caliphate and the home of Islam."

- June 12, 2017 "And When The Believers Saw The Companies" Speech: In this speech, al Muhajir stated, among other things, that "the brothers of the creed and faith in Europe, America, Russia, Australia and others! Your brothers in your land have been excused, so follow their example and their deeds, and know that paradise is under the shadows of the swords."
- September 28, 2017 "Sufficient Is Your Lord as a Guide and Helper" Speech: In this speech, al Baghdadi, among other things, promised that "[t]he Great attainment has been arranged by God for those who die during Jihad" and stated "soldiers of Islam and supporters of the Caliphate everywhere, maximize your attacks and target the infidel media platforms and their intellectual war centers and continue your Jihad and your blessed operations, and do not let the crusaders and the infidel stay safe in their homes."

ISIS Statements: Claims of Responsibility

The Government expects to offer testimony from Dr. Zelin regarding ISIS's Claims of Responsibility for the defendant's attack and the following addition terrorist attacks:[7]

- In November 2015, multiple attackers engaged in a coordinated campaign of shootings and bombings in Paris, France, killing approximately 130 people.

[7] In this section, the Government addresses only the ISIS propaganda concerning these attacks. As described in Part B, *infra*, the Government should also be allowed to introduce evidence of the underlying attacks, but the Government is willing to forgo this evidence if the parties can agree to an appropriate stipulation.

- In December 2015, two attackers engaged in a mass shooting and bombing of the Inland Regional Center in San Bernardino, California, resulting in the death of approximately 14 people and injury of approximately 22 others.
- In March 2016, several attackers engaged in a wave of bombings in Brussels, Belgium, in which approximately 30 people were killed.
- In June 2016, an attacker killed approximately 49 people and wounded approximately 53 others in a mass shooting at a nightclub in Orlando, Florida
- In June 2016, an attacker killed a police officer and his wife in Paris, France.
- In July 2016, an attacker drove a truck into a crowd of people celebrating Bastille Day in Nice, France, killing approximately 86 people and injuring approximately 458 others.
- In July 2016, an attacker killed approximately four people and injured another using a knife and a hatchet in a train station near Wurzburg, Germany.
- In July 2016, an attacker detonated a suicide bomb outside of a wine bar in Ansbach, Germany, injuring approximately 15 people.
- In July 2016, two attackers killed one person and took approximately five others hostage at a church in Normandy, France.
- In August 2016, an attacker tried to kill approximately two police officers with a machete in Charleroi, Belgium.
- In August 2016, an attacker detonated a suicide bomb inside a taxi cab in Strathroy, Canada.
- In September 2016, an attacker shot approximately two police officers and a bystander in Copenhagen, Denmark.

- In September 2016, an attacker stabbed approximately 10 people at a shopping mall in St. Cloud, Minnesota.
- In October 2016, an attacker stabbed and killed one person and tried to drown another in Hamburg, Germany.
- In November 2016, an attacker rammed with a car and stabbed multiple individuals on the Ohio State University campus, injuring approximately 11 people.
- In December 2016, an attacker drove a truck through a Christmas market in Berlin, Germany, killing approximately 11 people and injuring approximately 56 others. Days after the Christmas market attack, the attacker also shot at police officers in Milan, Italy.
- In March 2017, an attacker rammed pedestrians with a car near the British Parliament, killing approximately four people and injuring approximately 46 others.
- In April 2017, an attacker shot approximately three police officers and a bystander on the Champs-Élysées, in Paris, France, killing one person.
- In May 2017, an attacker detonated a suicide bomb inside an indoor arena near Manchester, England, killing approximately 23 people and injuring approximately 139 more.
- In June 2017, an attacker killed one person and took another hostage in Melbourne, Australia.

- In June 2017, attackers rammed pedestrians with a truck and stabbed others on London Bridge and in a nearby market, in London, England, killing approximately eight people and injuring approximately 48 others.
- In August 2017, an attacker stabbed and killed approximately two police officers in Brussels, Belgium.
- In August 2017, attackers drove vehicles into pedestrians in Barcelona and Cambris, Spain, killing approximately 31 people and injuring 136 others.
- In September 2017, an attacker detonated a bomb in the London subway system, injuring approximately 29 people.
- In October 2017, an attacker stabbed and killed approximately two people near a train station in Marseille, France.
- In October 2017, an attacker shot and killed approximately 58 people and injured approximately 413 others at a music festival in Las Vegas, Nevada.

b. The Cellphone Propaganda

The Government also intends to introduce evidence that the defendant was motivated by ISIS propaganda that he consumed and that was later seized from the Saipov Cellphones. Specifically, shortly after Saipov's attack, law enforcement searched the truck and recovered the Saipov Cellphones, which contained more than 6,000 propaganda images, videos, and audio recordings, including calls to commit attacks in the United States. While all of this material is probative of the defendant's motive and intent, the Cellphone Propaganda that the Government seeks to offer, and which is enclosed as Exhibit B, is a small subset of the propaganda on the Saipov Cellphones.

The Cellphone Propaganda: Audio Recordings

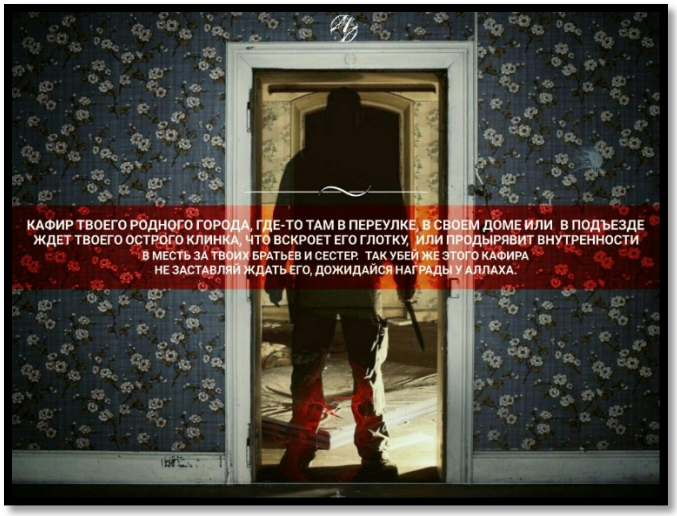
The Cellphone Propaganda contains 23 audio recordings containing ISIS propaganda, including recordings Saipov received on the morning of the attack. For example, one recording states in Russian that "[t]he tactic of the Islamic State is to attack the enemy wherever he is, looking for one of the two better things – victory or Shahada and heaven." Similarly, a second audio recording in Russian says that "We'll build a caliphate, and we'll take by assault . . . we came to you with massacre, having challenged death."

Other audio recordings discuss martyrdom jihad, and call for ISIS members and associates to commit attacks in the West. For example, on October 29, 2017, a recording was saved on one of the Saipov Cellphones (the "LG Phone"), which includes the following instructions, in Uzbek: "a caller called upon you today for Jihad, fulfill the call of Allah . . . You are in the lair of the infidels. The incumbent duty for you is to kill the infidels and lie in wait for them at every ambush. . . . Save yourself from hellfire by killing infidels." Similarly, on October 23, 2017, a recording was saved on the LG Phone, which includes an Uzbek translation of al-Baghdadi calling on the "soldiers of the caliphate" to chop the heads and pour the blood of "disbelievers and crusaders," and saying "O Allah, torment America, Russia, Iran and those who are united with them."

The Cellphone Propaganda: Images

In addition to these audio recordings, the Cellphone Propaganda includes 16 images containing ISIS propaganda that Saipov downloaded. For example, Saipov downloaded the following image on the LG Phone:

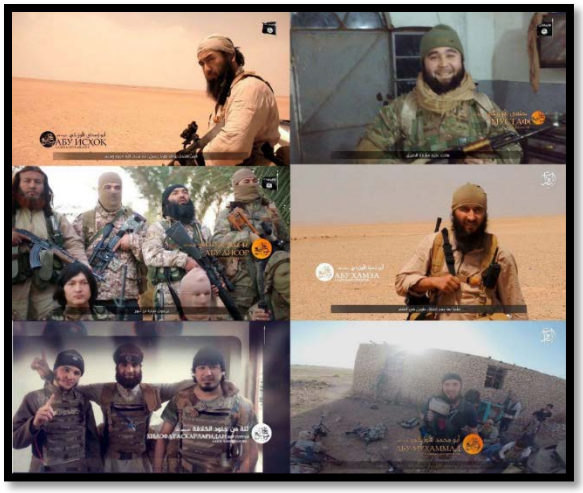
Similarly, the LG Phone contains the following image, with Russian text that, in English, calls for ISIS followers to slit the throat or belly of a "disbeliever in your hometown":



The Saipov Cellphones also contain propaganda bearing ISIS's slogans, including the image below, which says, in English, "The Islamic State shall endure!," a phrase similar to the writing on the piece of paper that Saipov had in the truck during the attack:

The second of the Saipov Cellphones (the "iPhone") is also filled with ISIS and terrorism-related images that called on ISIS followers to carry out attacks in the name of ISIS. For example, the iPhone contains the following image, which text reads, in English, "Become a jihadi," and "Those believers who carry out jihad against Allah's enemies and ensured pain and divisions for the sake of Allah shall be guided to the path of righteousness by Allah."

Moreover, the defendant also saved on the iPhone an aggregated set of images depicting armed individuals, with ISIS flags superimposed in the upper-right corner of some of the pictures:



The Cellphone Propaganda: Videos

In addition to the audio recordings and images, the Cellphone Propaganda the Government seeks to offer at trial includes eight videos reflecting ISIS ideology and terrorism propaganda.[8] These videos include calls to conduct attacks in America and elsewhere. For example, a video saved to the LG Phone on October 17, 2017 depicts men sitting at the edge of what appears to be a shallow grave containing the body of a dead man.

[8] There were approximately 90 total videos saved on the LG Phone. The Government has selected a small subset of these to introduce as trial. As discussed in the Rule 403 analysis below, the Government is not seeking to offer many of the most sensational and graphic of the videos during the course of the guilt phase at trial.

The speakers say, in Uzbek, among other things, that "Allah willing" they will "reach America" and "Sharia will rule the whole world."

Another video from the Cellphone Propaganda (the "Nice Attack Video"), features ISIS flags and media logos throughout, and speakers in the recording (speaking in Uzbek) call on listeners to, among other things, "Put your trust in Allah. Kill them by choosing whatever way is available . . . The absence of guns or tools to kill cannot be an excuse. The holy attack in Nice is a wonderful sample for you." As described below, the Government expects to prove at trial that the "holy attack in Nice" is a reference to the July 2014 terrorist attack in Nice, France, in which an ISIS attacker used a truck to run over and kill pedestrians, just like the defendant did. The Nice Attack Video then describes the Nice attacker as a "wonderful sample for you" and notes that the attacker had "rented a big truck and crushed a group of kafirs." The Nice Attack Video concludes by instructing:

> if you cannot find a bomb or a gun then, please lay in wait for an American or a French kafir and their friends. Taking the opportunity hit his head with a stone, or stab him, or crush him with your car, or throw him off a high building.

The Cellphone Propaganda: Encrypted Communications

The Government also intends to introduce, as part of the Cellphone Propaganda in Exhibit B, portions of ISIS- and terrorism-themed chats extracted from the Saipov Phones. These chats were transmitted through an encrypted messaging application called Telegram that is frequently used by followers of ISIS to distribute propaganda.

For example, the Government expects to offer translated excerpts from a Telegram group chat titled "Darul Khilafa," which translates to "Home of the Caliphate," in which dozens of chat participants share ISIS and terrorist propaganda. Although the Darul Khilafa chat spans hundreds of pages, the Government is only seeking to offer five excerpts from it during the guilt phase, in

which participants in the chat posted messages containing ISIS propaganda.[9] These excerpts, some of which were addressed to "Islamic State follower brothers," include the following:

- On October 24, 2017, a participant in the chat posted a message in Uzbek that stated, among other things, "Among believers, those who are healthy and sit idle are not going to be equal to those who carry out jihad with their goods and lives in God's way" and "God has made the level of those who carry out jihad with their goods and lives preferable than those who sit idle."
- On October 26, 2017, a participant in the chat posted a message in Russian that stated, among other things, "[m]edia activists, we thank the knights of the media service and the supporters of the assistants of the Islamic state in disseminating information in the mass media and bless their jihad in Facebook, Twitter and YouTube and in other social networks"; "[t]oday's battle of supporters of the Islamic state in the media space is no less important military battle"; and "[a]lways remember that the time has come for action and truthfulness and this is the last campaign of our enemy, after which we will invade them and will conduct our campaigns."
- On October 20, 2017, a participant in the chat posted a message in Uzbek that stated, among other things, "[d]eath and only death to those recant ISIS"; "[i]t is happened in practice when soldiers of ISIS returned to explosion and killing jobs even after confession, when they confessed and were released"; "[t]his happened

[9] As with the other parts of the Terrorist Propaganda Materials, the Government only describes above examples of the encrypted communications that it seeks to offer in its case-in-chief during the guilt phase of the trial. All of the Terrorist Propaganda that the Government seeks to offer in its case-in-chief during the guilt phase is included on Exhibit B for the Court's review.

on February of 2014 when in Northern Syria after the fight against ISIS we caught them"; and "[a]t that moment most of them confessed and all of them returned to Rokka [Raqqa, Syria]."

- On October 21, 2017, a participant in the chat posted a message in Uzbek that stated, among other things, "Any Islamic State follower who is able to fight should stop their battle in internet"; "[b]ecause of these useless battles, many mujaheeds did not kill a single heretic and are imprisoned in hands of heretics"; "I want to inform brothers except for those in Iraq, Shom countries, to attack police departments, consular centers, and military centers"; and "[t]he attack must be done on consular centers, police departments, and military bases of our desperate enemies, countries like Russia, America, Israel, Britain, and Iran, who organize layers against I.S."
- On October 23, 2017, a participant in the chat posted a message in Arabic that stated, among other things, "Islamic State is eternal. For the state to fight with heretics."

2. Relevant Law

(a) Admissibility of Evidence

Federal Rules of Evidence 401 and 402 establish the broad principle that relevant evidence is admissible at trial except as otherwise provided by the Constitution, federal statute, or Rules of Evidence. *See* Fed. R. Evid. 401, 402; *United States v. Abel*, 469 U.S. 45, 51 (1984). Rule 403 allows a trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403.

"To be relevant, evidence need not be sufficient by itself to prove a fact in issue, much less to prove it beyond a reasonable doubt." *United States v. Abu-Jihaad*, 630 F.3d 102, 132 (2d Cir. 2010). Rather, evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401; *see United States v. Gonzalez*, 110 F.3d 936, 941 (2d Cir. 1997) ("To be relevant, evidence need only tend to prove the government's case, and evidence that adds context and dimension to the government's proof of the charges can have that tendency."). Thus, evidence is often admissible "to provide background for the events alleged in the indictment" or "to enable the jury to understand the complete story of the crimes charged." *United States v. Reifler*, 446 F.3d 65, 91-92 (2d Cir. 2006) (internal quotation marks omitted); *see also United States v. Gohari*, 227 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) (evidence is admissible if it relates to conduct that: (i) "'arose out of the same transaction or series of transactions as the charged offense'"; (ii) "'is inextricably intertwined with the evidence regarding the charged offense'"; or (iii) "'is necessary to complete the story of the crime on trial.'" (quoting *United States v. Robinson*, 702 F.3d 22, 36-37 (2d Cir. 2012)). "Background evidence may be admitted to show, for example, the circumstances surrounding the events, or to furnish an explanation of the understanding or intent with which certain acts were performed." *United States v. Coonan*, 938 F. 2d 1553, 1561 (2d Cir. 1991) (internal quotation marks omitted); *See United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (articulating well-established principle that evidence is direct evidence (and not other act evidence under Rule 404(b)) if it is inextricably intertwined with the evidence of the charged offense or necessary to complete the story of the charged offense (citing *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997))); *see also* Weinstein's Federal Evidence § 404.20[2][c] (observing that evidence the absence of which "would leave a

chronological or conceptual void in the story of the crime" is "intrinsic evidence"). As the Supreme Court has recognized, in analyzing the admissibility of evidence, the trial court should make its determinations "with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case." *Old Chief v. United States*, 519 U.S. 172, 183 (1997).

Additionally, under Rule 404(b), courts "may allow evidence of other acts by the defendant if the evidence is relevant to an issue at trial other than the defendant's character and if the risk of unfair prejudice does not substantially outweigh the probative value of the evidence." *United States v. Ulbricht*, 79 F. Supp. 3d 466, 479 (S.D.N.Y. 2015). "This Circuit follows the inclusionary approach, which admits all other act evidence that does not serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011) (internal quotation marks omitted). "Rule 403 does not bar evidence of other bad acts that 'did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged.'" *United States v. Lights*, No. 15 Cr. 721 (RWS), 2016 WL 7098633, at *2 (S.D.N.Y. Dec. 5, 2016) (quoting *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990)).

Finally, Rule 403 requires the Court to evaluate whether the probative value of evidence is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Since any evidence that is probative of guilt is, by definition, prejudicial, Rule 403 is designed to reach only unfair or undue prejudice—that which "involves some adverse effect . . . beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995) (internal quotation marks omitted).

b. Relevant Elements of the Charged Offenses

The first 26 counts of the Superseding Indictment (collectively, the "RICO Counts") charge the defendant with (i) murder in aid of racketeering activity (Counts One through Eight); (ii) assault with a deadly weapon and attempted murder in aid of racketeering activity (Counts Nine through Sixteen); and (iii) attempted murder in aid of racketeering activity (Counts Seventeen through Twenty-Six). To prevail on these counts, the Government must prove that (i) ISIS was an enterprise engaged in racketeering activity; (ii) that ISIS's activities affected interstate commerce; (iii) the defendant committed a violent crime; and (iv) that the defendant committed that violent crime "for the purpose of gaining entrance . . . in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a); *see, e.g.*, *United States v. Rahman*, 189 F.3d 88, 126 (2d Cir. 1999); Modern Federal Jury Instructions-Criminal ¶ 52.07 (2017). To satisfy the last element, the Government must prove that "the defendant's general purpose in committing the crime of violence" was to gain entrance into the enterprise. *United States v. Thai*, 29 F.3d 785, 817 (2d Cir. 1994). The Second Circuit has made clear that this element does not require a showing that gaining entrance into the enterprise "was the defendant's sole or principle motive," and that the element is sufficiently proven "if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992). It is equally settled that the element should "be liberally construed to effectuate its remedial purpose." *Id.*; *see Rahman*, 189 F.3d at 127.

Count Twenty Seven (the "Material Support Count") of the Superseding Indictment charges the defendant with providing and attempting to provide material support to ISIS. To prove this count, the Government must show that the defendant provided and attempted to provide

resources or personnel (such as himself) to ISIS, knowing that ISIS was designated as an FTO or engaged in terrorist activity. *See* 18 U.S.C. § 2339B(a)(1) ("To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).").

Count Twenty Eight charges the defendant with a violation of 18 U.S.C. §§ 33 and 34, which, in pertinent part, makes it a crime to "willfully . . . with a reckless disregard for the safety of human life . . . damage[], disable[], [or] destroy[] . . . any motor vehicle which is used, operated, or employed in interstate . . . commerce" (the "Automobile Count"). As relevant here, the statute has three elements: (i) the defendant damaged, disabled, or destroyed a motor vehicle; (ii) the motor vehicle was used, operated, or employed in interstate commerce; and (iii) the defendant acted willfully, with a reckless disregard for the safety of human life. *See United States v. Kurka*, 818 F.2d 1427, 1429 (9th Cir. 1987) (noting that, with respect to a § 33 prosecution, "the willful intent relates to the damage to the vehicle, and the recklessness relates to the risk to human life").

3. Discussion

a. The Terrorist Propaganda Materials Are Admissible as Direct Evidence

The Terrorist Propaganda Materials are admissible as direct evidence of several elements of the RICO, Material Support, and Automobile Counts. As described in more detail below, the Terrorist Propaganda Materials help to demonstrate that ISIS is an enterprise within the meaning of the RICO statute; that ISIS has engaged in a pattern of racketeering activity; that a method of gaining membership into ISIS was to commit a lone wolf attack; that ISIS promoted lone wolf attacks that include indiscriminately killing others using automobiles like the defendant's truck,

which is relevant to establishing the defendant's motive; and that Saipov conducted the attack for the purpose of gaining membership into ISIS, pursuant to the guidance in the Terrorist Propaganda, because he was well aware of ISIS's structure and brutal terrorist tactics.

First, the Terrorist Propaganda Materials, when coupled with Dr. Zelin's testimony[10] and proof of the underlying attacks, *see* Part B *infra*, demonstrate that ISIS is an enterprise under the RICO statute. The statute defines an "enterprise" to include any "group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). A RICO enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit," and includes "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 580-583 (1981). With respect to "association-in-fact" enterprises, such as ISIS, the Government must demonstrate that the enterprise has at least three aspects: "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

These materials evidence ISIS and its members' "common purpose of engag[ing] in a course of conduct"—namely, establishing and protecting ISIS's Caliphate, conducting attacks in

[10] Courts in this Circuit routinely allow expert testimony (and indeed, specifically testimony from Dr. Zelin) concerning the background, structure, and activities of ISIS and other terrorist organizations. *See United States v. Farhane*, 634 F.3d 127, 159 (2d Cir. 2011) (permitting expert testimony about al Qaeda's "background" and "operation methods," and analogizing such testimony to the longstanding use of experts to discuss "organized crime families"); *United States v. Al Farekh*, 15 Cr. 268 (BMC) (E.D.N.Y. 2017) (expert testimony on al Qaeda); *United States v. El Gammal*, 15 Cr. 588 (ER) (S.D.N.Y. 2017) (expert testimony from Dr. Zelin on ISIS); *United States v. Pugh*, 15 Cr. 116 (NGG) (E.D.N.Y. 2016) (expert testimony from Dr. Zelin on ISIS); *United States v. Mustafa*, 04 Cr. 356 (KBF) (S.D.N.Y. 2014) (expert testimony on al Qaeda); *United States v. Ghayth*, 98 Cr. 1023 (LAK) (S.D.N.Y. 2014) (expert testimony on al Qaeda); *United States v. Nayyar*, 09 Cr. 1037 (RWS) (S.D.N.Y. 2012) (expert testimony on Hezbollah); *see also United States v. Ahmad Khan Rahimi*, 16 Cr. 760 (RMB) (S.D.N.Y. 2017) (expert testimony from Dr. Zelin on al Qaeda, AQAP, ISIS, and their use of lone wolf attacks).

the West if travel to the Caliphate is not possible, and killing Americans and others wherever they are vulnerable. *See Turkette*, 452 U.S. at 583; *United States v. Brady*, 26 F.3d 282, 287 (2d Cir. 1994) (holding that evidence of murders by a defendant's co-conspirators was relevant to "demonstrate the existence of the RICO enterprise"). Moreover, while an "enterprise" for RICO purposes need not have a "hierarchical structure, a chain of command, or other business-like attributes," *United States v. Applins*, 637 F.3d 59, 73 (2d Cir. 2011), the Terrorist Propaganda Materials demonstrate that ISIS has all of those things—it has designated individuals who lead and speak for the organization (*e.g.*, al-Baghdadi, al-Adnani, and al Muhajir), it has official communications channels through the ISIS Outlets, and it has the aforementioned unified purposes, *see United States v. Coonan*, 938 F.2d 1553, 1560 (2d Cir. 1991) (finding that proof that drug trafficking organization had an informal hierarchy and was engaged in common drug trafficking and murder venture helped demonstrate a RICO enterprise). Finally, the Terrorist Propaganda Materials also help to demonstrate the "longevity" required for an enterprise-in-fact under RICO. *See Boyle*, 556 U.S. at 946 (enterprise must have "longevity sufficient to permit these associates to pursue the enterprise's purpose"). These materials show that ISIS has existed for more than five years and, during that period, called for recruits such as Saipov to either travel to the Caliphate to fight or to conduct lone wolf attacks in their home nations. Thus, the Terrorist Propaganda Materials are admissible because they are probative of ISIS's structure, goals, and stability as a racketeering enterprise.

Second, the Terrorist Propaganda Materials are evidence of a "pattern of racketeering activity." To establish a pattern of racketeering activity, the Government must show that "two or more predicate acts were, or were intended to be, committed as part of the conspiracy." *United States v. Zemlyansky*, 908 F.3d 1, 11 (2d Cir. 2018) (internal quotation marks omitted). The

Terrorist Propaganda Materials evidence such a pattern in two ways: (i) each transmission of ISIS propaganda in the Terrorist Propaganda Material is probative of a separate violation of 18 U.S.C. § 2339B, and relevant to establishing a RICO predicate offense; and (ii) the Terrorist Propaganda Materials help to explain why other criminal conduct—namely the terrorist attacks conducted in ISIS's name—are predicate offenses. Initially, Section 1961 of RICO defines a predicate RICO offense to include a number of federal crimes, including violations of 18 U.S.C. § 2339B. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity" to include violations of "any act indictable under section 2332b(g)(5)(B)," which includes § 2339B). Section 2339B prohibits encouraging violent acts on behalf of a terrorist organization through dissemination of propaganda with the requisite intent. *See United States v. Abu Ghayth*, 709 F. App'x 718, 723-24 (2d Cir. 2017) ("Far from 'pure speech,' Abu Ghayth's words provided material support to Al Qaeda by spreading its message to the world and encouraging others to join its terrorist cause."). Every piece of ISIS propaganda contained in the Terrorist Propaganda Materials was disseminated to "spread[] [ISIS's] message to the world and encouraging others to join its terrorist cause." As a result, each piece of ISIS propaganda contained in the Terrorist Propaganda Materials is probative of a RICO predicate offense, and the volume of that propaganda helps to establish a pattern of racketeering activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (continuity of enterprise which consisted of state rate-making commission whose members allegedly took bribes from telephone company could be established by proof that "the alleged bribes were a regular way of conducting [the telephone company's] ongoing business, or a regular way of . . . participating in the conduct of the [rate-making board]").

Moreover, the Terrorist Propaganda Materials are also admissible with respect to the racketeering pattern element because the materials help to show that other criminal conduct

constitutes predicate offenses for purposes of the RICO Counts. In particular, a pattern of racketeering activity "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) (citation and internal quotation marks omitted). As explained in Part B *infra*, the Government intends to argue that terrorist attacks conducted on behalf of ISIS are predicate acts for purposes of establishing a pattern of racketeering activity, including conspiracy to murder, kidnap, or maim persons abroad; killing or attempted killing of officers and employees of the United States; homicides and violence against United States nationals occurring outside of the United States; use of weapons of mass destruction; terrorism transcending national boundaries; bombing of public places and facilities; providing material support to terrorists; and providing material support to terrorist organizations. (*See* Ind. ¶ 6). To explain why those attacks were part of ISIS's pattern, of racketeering activity, the Government must demonstrate, for example, that those attacks were conducted for a common purpose—*i.e.*, ISIS's desire to attack the United States and its nationals. The Terrorist Propaganda Materials prove that fact—the Leadership Messages demonstrate that the death of Americans and citizens of other Western countries was the group's purpose and the Claims of Responsibility show that ISIS viewed lone wolf attacks that resulted in such deaths as consistent with that shared goal.

Third, the Terrorist Propaganda Materials are also admissible to show that the defendant acted with the requisite motive and intent for purposes of the RICO Counts, *i.e.*, that his general purpose in committing the attack was to gain membership into ISIS, and that the defendant intended to provide material support to ISIS with respect to the Material Support Count. As detailed above, the Leadership Messages exhort followers of the group to conduct terrorist attacks,

often in Western countries. For example, in a speech in January 2015, al-Adnani called for ISIS supporters "to target the Crusader in their own backyard and wherever they are." The Cellphone Propaganda contains similar materials. For example, one of the Audio Recordings that the defendant received on the morning of his attack states that "[t]he tactic of the Islamic State is to attack the enemy wherever he is, looking for one of the two better things – victory or Shahada and heaven." One of the images calls on ISIS followers to slit the throat or belly of a "disbeliever in your hometown." In one of the Videos, ISIS encourages its followers to, among other things, "Put your trust in Allah. Kill them by choosing whatever way is available . . . The absence of guns or tools to kill cannot be an excuse. The holy attack in Nice is a wonderful sample for you," which is a reference to the ISIS truck attack in Nice, France.

The Terrorist Propaganda Materials tend to show that ISIS encourages its followers to join the organization by committing attacks wherever they are located, and that the defendant conducted the attack for that purpose. For similar reasons, the Terrorist Propaganda Materials are probative of the defendant's intent to provide material support to ISIS by committing his attack, that he did so in response to directives from ISIS, and that he subscribed to, and was motivated by, ISIS's terrorist ideology. *See United States v. Abu-Jihaad*, 630 F.3d 102, 133-134 (2d Cir. 2010) (upholding admission of jihadist videos because they were relevant to understanding defendant's "motive and intent"); *United States v. Ullah*, No. 18 Cr. 16 (RJS), Dkt. 48 (Oct. 30, 2018), at 4-5 (allowing the introduction of terrorist propaganda materials possessed by defendant as, among other things, proof of the defendant's state of mind, the defendant's motivation, the defendant's knowledge that ISIS was an FTO or engaged in terrorist activity); *United States v. Alimehmeti*, No. S1 16 Cr. 398 (PAE), Dkt. No. 96 (Jan. 5, 2018), at 15 (allowing the introduction of terrorist propaganda materials possessed by the defendant in case involving § 2339B charge in order to

provide "important background for the events alleged in the indictment[,]" and because the materials provided "essential context for the Government's allegation that [the defendant] became radicalized . . . at least in part through his exposure to and apparent enthusiasm for such materials") (internal citation and quotation marks omitted). This same proof also establishes that the defendant had the requisite scienter for the Automobile Count—which requires that a vehicle be used and destroyed with reckless disregard for human life—because it shows that Saipov intended to fulfill ISIS's call to kill when he drove the truck down the bike path and killed eight people. *See Kurka*, 818 F.2d at 1429 (noting that in a § 33 prosecution, the Government must prove that the defendant recklessly disregarded "the risk to human life").

Fourth, the Terrorist Propaganda Materials are also probative of Saipov's knowledge that ISIS was a designated FTO, and has engaged in "terrorist activity" and "terrorism," at least one of which the Government must establish for purposes of the Material Support Count. *See* 18 U.S.C. § 2339B(a)(1); *United States v. Al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011) (§ 2339B requires proof that defendant knows that "the organization he is aiding is a terrorist organization or engages in acts of terrorism"); *see also* 8 U.S.C. § 1182(a)(3)(B) (defining "terrorist activity" for purposes of § 2339B to include any unlawful activity involving the use of any "explosive, firearm, or other weapon or dangerous device . . . with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property," or "[a] threat, attempt, or conspiracy to do any of the foregoing"); 22 U.S.C. § 2656f(d)(2) (defining "terrorism" for purposes of § 2339B to include "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents"). The Cellphone Propaganda, which was found on the Saipov Cellphones, includes, among other things, accounts of ISIS's murder of civilians, military combat operations, promotion of lone-wolf attacks, and threats against the West.

For example, certain of the videos from the Saipov Cellphones that the Government intends to offer depict violent activity by ISIS members, and calls to "[k]ill them by choosing whatever way is available." Another video boasts that "Sharia will rule the whole world" and that, "Allah willing" ISIS would "reach America." The defendant's possession of such materials is proof of his knowledge that ISIS is a terrorist group that engages in terrorism and terrorist activity. *See, e.g.*, *United States v. Pugh*, 162 F. Supp. 3d 97, 114 (E.D.N.Y. 2016) (reasoning that defendant's possession of " ISIS or Jihadist propaganda on his computer or social media is potentially relevant to the charged offenses," and that "[t]he Second Circuit has regularly allowed terrorist propaganda to be admitted, particularly in the context of material support offenses, in order to prove the *mens rea* element of the offense" (citing *United States v. Kaziu*, 559 F. App'x 32, 35 (2d Cir. 2014); *Abu-Jihaad*, 630 F.3d at 133-34)); *United States v. Ullah*, No. 18 Cr. 16 (RJS), Dkt. 48 (Oct. 30, 2018), at 4 (holding that terrorist propaganda materials were probative of defendant's "knowledge that ISIS was a foreign terrorist organization or was engaged in terrorist activity, which is another element with respect to Count One, the material support count"); *United States v. Alimehmeti*, No. S1 16 Cr. 398 (PAE), Dkt. No. 96 (Jan. 5, 2018), at 17 (admitting ISIS propaganda materials because the materials "bear on whether [the defendant] had the required state of mind" and tend to demonstrate the defendant's "knowledge that ISIS was a designated FTO involved in terrorism").

Fifth, evidence that Saipov possessed the Terrorist Propaganda Materials is also inextricably intertwined with the Government's other evidence—including Saipov's post-arrest statements to law enforcement, and the recovery of materials from his truck and scene of the attack. For jurors to understand the events leading up to the attack, including Saipov's devotion to ISIS, and his desire to become a member of ISIS by committing a lone-wolf attack targeting Americans

using a truck, it is essential that the Government introduce the radical propaganda materials that ISIS disseminated and Saipov reviewed during the period of his radicalization and attack plotting, up to and including the day of attack. Saipov's immersion in the Terrorist Propaganda Materials glorifying martyrdom in the name of jihad, celebrating ISIS's military campaigns and killing of civilians, and spewing anti-U.S. sentiment, is an important aspect of the circumstances surrounding Saipov's efforts to support ISIS and is crucial to explaining the motive and intent with which he undertook the attack. *See Abu-Jihaad*, 630 F.3d at 133-34 (affirming district court's finding that the "pro-jihadist contents of the [terrorist propaganda] videos were relevant to understanding [the defendant's] motive and intent"); *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013) (holding that videos, images, and literature that defendant had "absorbed and endorsed" were admissible to establish that defendant was "inspired by terrorist rants" and "developed an anti-American animus" that culminated in his decision to travel to Yemen to join al-Qaeda); *United States v. El-Mezain*, 664 F.3d 467, 509-10 (5th Cir. 2011) (holding that material seized from defendant, "including images of violence and videos glorifying Hamas and depicting Hamas leaders, was probative of the motive or intent of the [defendant] to support Hamas"); *United States v. Jayyousi*, 657 F.3d 1085, 1108 (11th Cir. 2011) (holding that televised interview with bin Laden was properly admitted as "state of mind evidence").

Therefore, the Court should admit the Terrorist Propaganda Materials because this evidence is inextricably intertwined with the sequencing and methodology of the defendant's attack, and is also probative of ISIS's status as a RICO enterprise and its pattern of racketeering activity, the defendant's motive and intent with respect to the RICO Counts and the Material Support Count, and the defendant's knowledge regarding ISIS's status and activities under § 2339B(a)(1).

b. The Terrorist Propaganda Materials Do Not Violate Rule 403

The admission of the Terrorist Propaganda Materials, as direct evidence or pursuant to Rule 404(b), will not run afoul of Rule 403 because the probative value of the limited subset of this evidence that the Government seeks to offer is not outweighed, much less "substantially outweighed," by any risk of unfair prejudice.

The Government is only seeking to offer a small subset of the ISIS propaganda that is relevant to this case—much of which was seized from the Saipov Cellphones. In *Ullah*, which did not involve racketeering charges and therefore did not require the Government to establish that ISIS was an enterprise and engaged in a pattern of racketeering activity, Judge Sullivan found that violent terrorist propaganda did not violate Rule 403 where the Government made similar efforts to restrict its offer of proof from a much larger universe of available material.[11] ISIS has released hundreds of statements, recordings, and videos online expressing its murderous intentions towards American citizens—the Government seeks to admit only 11 Leadership Messages. Moreover, ISIS has conducted deadly attacks around the world—the Government is only seeking to introduce 26 Claims of Responsibility related to only terrorist attacks that occurred in Europe and the United States. Similarly, the Saipov Cellphones contained (i) more than 6,000 images of jihadist propaganda, of which the Government seeks to offer 16; (ii) approximately 252 audio recordings involving jihadist propaganda, of which the Government seeks to introduce 23; (iii) approximately 90 videos involving jihadist propaganda, of which the Government seeks to offer eight; and (iv) a 479-page chat containing jihadist propaganda, of which the Government seeks to introduce seven

[11] Notably, *Ullah* involved the detonation of a pipe bomb in which no one was killed and victims suffered minimal injuries, and the Government did not need to establish the racketeering-related elements at issue in Counts One through Twenty-Six. Nonetheless, Judge Sullivan found that graphic, pro-ISIS photographs and videos were not unduly prejudicial in light of the charged conduct.

pages of excerpts. The Government has sought to address concerns about potential by restricting its offer of available terrorist propaganda to that which is directly probative of elements of the charges.

While some of the Terrorist Propaganda Materials depict graphic violence, the defendant's attack was at least as violent and no more sensational. *See Roldan-Zapata*, 916 F.2d at 804 ("other act" evidence that is neither "more sensational" nor "more disturbing" than the charged crimes is not unfairly prejudicial); *see also United States v. Mercado*, 573 F.3d 138, 141-42 (2d Cir. 2009) (holding that evidence of uncharged sale of firearms was not unfairly prejudicial as it was "not especially worse or shocking than" the charged drug conspiracy); *Pugh*, 162 F. Supp. 3d at 115-16; *United States v. Mostafa*, 16 F. Supp. 3d 236, 256 (S.D.N.Y. 2014) (admitting evidence of the defendant's statements in support of Osama bin Laden and finding that, in a case where the defendant is charged with crimes relating directly to supporting bin Laden and al Qaeda, the statements were no more disturbing than the crimes charged).

. Even in cases where the charged conduct was arguably less violent or destructive than the actions featured in terrorist propaganda, courts have rejected the argument that propaganda is unfairly prejudicial under Rule 403. *See, e.g.*, *Abu-Jihaad*, 630 F.3d at 132-34 (affirming district court's admission of excerpts of jihadist propaganda videos including graphic combat scenes in case involving transmission of national defense information to terrorist group); *Mehanna*, 735 F.3d at 59-64 (rejecting 403 challenge to admission of terrorist propaganda in trial involving terrorism charges based on defendant's travel to a terrorist training camp and translation of jihadist propaganda); *El-Mezain*, 664 F.3d at 508-11 (admitting terrorist propaganda evidence in material-support case over defendant's Rule 403 challenge in case involving terrorism financing); *Alimehmeti* at 17 (rejecting defendant's Rule 403 challenge in case involving defendant who tried

to facilitate travel of another to join ISIS and finding that terrorist propaganda was admissible in material-support case "to establish [the defendant's] knowledge of ISIS's designation and its involvement in terrorism," and noting approvingly that the Government did not intend to offer depictions of "graphic violence"). Therefore, Rule 403 does not bar admission of the Terrorist Propaganda Materials.

Finally, any Rule 403 concerns arising from admitting the Terrorist Propaganda Materials can be addressed through a limiting instruction to the jury. *See Mercado*, 573 F.3d at 142 (upholding Rule 403 determination where challenged evidence was "not especially worse or shocking than the transactions charged" and district court "gave several careful instructions to the jury regarding what inferences it could draw from the admitted evidence"); *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008) (curative instruction sufficient to address any alleged prejudice created by references to terrorism in trial involving non-terrorism charges); *Abu-Jihaad*, 630 F.3d at 134 (proper limiting instruction minimizes risk of undue prejudice from admission of relevant terrorist propaganda materials); *Pugh*, 162 F. Supp. 3d at 118 ("[T]o the extent the risk of unfair prejudice arises at trial, the court will issue an appropriate limiting instruction at the appropriate time and at the request of the Defendant.").

In sum, the Terrorist Propaganda Materials are relevant to establishing Saipov's commission of the charged offenses. Any risk of unfair prejudice does not substantially outweigh the probative value of the evidence, particularly given that the Government has carefully distilled from the thousands of terrorism-related items on the Saipov Cell Phones a discrete subset of the most pertinent materials and is not seeking, at this time, to offer the most graphic among them during the guilt phase.

c. The Terrorist Propaganda Materials Are Admissible Pursuant to Rule 404(b)

The Terrorist Propaganda Materials are also admissible as Rule 404(b) evidence for several reasons.

First, with respect to all of the counts in the Indictment, the Terrorist Propaganda Materials are admissible as evidence of Saipov's motive and intent to commit the charged crimes. As detailed above, the materials reflect ISIS's hostility toward the United States and general goal of killing as many Westerners as possible in its attacks. For example, the Nice Attack Video, which features ISIS flags and media logos throughout, instructs listeners to use "whatever way is available" to kill as many Americans as possible in the name of Allah. This video and the other materials like it are highly probative of Saipov's motive and intent for carrying out the attack in this case. Indeed, courts have approved this type of evidence in similar terrorism trials. *See, e.g.*, *United States v. Rahman*, 189 F.3d 88, 118 (2d Cir. 1999) (admitting the defendant's speeches, writings, and preaching because they made motive for the crimes charged more probable); *United States v. Rahimi*, 2019 WL 5688217, at *3 (2d Cir. 2019) (evidence that defendant planted bombs in New Jersey was probative of "motive, intent, preparation, and planning in connection with his" detonation of bomb in Manhattan).

Second, also with respect to all counts in the Indictment, the Terrorist Propaganda Materials are probative of Saipov's plan and preparation. For example, in one of the Encrypted Communications from the Saipov Cellphones, the participant in the chat encourages others to prepare for attacks against America including by targeting "police departments, consular centers, and military centers." This and similar communications are relevant to explaining the steps Saipov took prior to the attack, such as renting the Home Depot truck in the weeks leading up to the attack and using the Internet to research and plan for the attack. *See, e.g.*, *United States v. Kassir*, 2009 WL 976821, at * 6 (S.D.N.Y. Apr. 9, 2009) (holding that evidence seized from Kassir's residence

that Kassir associated with terrorist groups other than al Qaeda is admissible to prove defendant's motive, intent, preparation, knowledge, and absence of mistake or accident).

Third, with respect to the RICO and Material Support Counts, the Terrorist Propaganda Materials are also probative of Saipov's knowledge of ISIS. In particular, the materials establish that Saipov was well aware of ISIS's purpose, goals, and activities. For example, some of the audio recordings from Saipov's cellphones discuss in detail ISIS's goals and expectations for its members. In one recording, al-Baghdadi calls on the "soldiers of the caliphate" to chop the heads and pour the blood of "disbelievers and crusaders," and saying "O Allah, torment America, Russia, Iran and those who are united with them." This and similar materials are highly probative of Saipov's knowledge of ISIS when he committed the charged crimes in this case. *United States v. Mostafa*, 16 F. Supp. 3d 236, 257 (S.D.N.Y. 2014) ("The defendant's statements regarding the importance of violent jihad, the use of words as a method a waging jihad, and training for jihad are directly relevant to numerous counts of charged conduct. They are probative of the defendant's knowledge of jihad, motive to support jihad, absence of mistake in taking actions that might be construed as supporting jihad, and intent to support jihad.").

B. Proof of other Violent Acts Undertaken by ISIS Members Is Admissible to Prove the Existence of the Racketeering Enterprise and its Racketeering Activities

For Counts One through 26 of the Indictment, the Government must prove that ISIS operated as an "Enterprise," defined as "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. §§ 1959(b)(2), 1961(4). The Government must also prove that the Enterprise engaged in "racketeering activity," proscribed by Section 1961, including (1) conspiracy to murder, kidnap, or maim persons abroad, in violation of 18 U.S.C. § 956(a)(1), (2) killing or attempted killing of

officers and employees of the United States, in violation of 18 U.S.C. § 1114, (3) homicides and violence against United States nationals occurring outside of the United States, in violation of 18 U.S.C. § 2332, (4) use of weapons of mass destruction, in violation of 18 U.S.C. § 2332, (5) terrorism transcending national boundaries, in violation of 18 U.S.C. § 2332b, (6) bombing of public places and facilities, in violation of 18 U.S.C. § 2332f, (7) providing material support to terrorists, in violation of 18 U.S.C. § 2339A, and (8) providing material support to terrorist organizations, in violation of 18 U.S.C. § 2339B. *See* 18 U.S.C. §§ 1959(a), 1961(1); *see also* Ind. ¶ 6 (outlining the racketeering acts committed by ISIS as charged in the Indictment). In order to meet this burden, as further detailed below, the Government is entitled to introduce evidence regarding other attacks ISIS conducted around the world, as well as details of these attacks sufficient to prove that they qualified as racketeering activity.

1. Applicable Law

The Second Circuit has consistently held that the Government may introduce evidence of criminal acts that are not substantively charged to establish background to prove the existence of a racketeering enterprise and its racketeering activity. *See, e.g., United States v. Coppola*, 671 F.3d 220, 244-45 (2d Cir. 2012); *United States v. Payne*, 591 F.3d 46, 64 (2d Cir. 2010); *United States v. Mejia*, 545 F.3d 179, 206-07 (2d Cir. 2008); *United States v. Bellomo*, 954 F. Supp. 630, 650 (S.D.N.Y. 1997) ("A RICO charge allows the government to introduce evidence of criminal activities in which a defendant did not participate to prove the enterprise element." (internal quotation marks omitted)). "Such conduct is not 'other' crime evidence subject to Fed. R. Evid. 404(b); rather, it is evidence of the very racketeering crimes charged." *Coppola*, 671 F.3d at 245. This applies even when the uncharged acts were committed by co-racketeers who are not trial defendants. *See, e.g.*, *United States v. Matera*, 489 F.3d 115, 120 (2d Cir. 2007) (referencing "numerous prior rulings of this court in which criminal acts of non-defendants, including killings,

were received to prove the existence of the criminal RICO enterprise in which the defendant participated"); *see also United States v. Vernace*, 811 F.3d 609, 617-18 (2d Cir. 2016) (violent acts that begin as personal disputes may evolve into racketeering acts when another enterprise member joins to help a fellow member); *cf. United States v. Torres*, 16 Cr. 809 (VM), 2020 WL 373981, at *6 (S.D.N.Y. Jan. 23, 2020) ("Where murder is one of the objects of the charged racketeering conspiracy, the Second Circuit has repeatedly upheld the admission of evidence of murders committed by members of the conspiracy even if the trial defendant did not participate.") (internal citations omitted)).

Moreover, evidence of uncharged acts is properly admitted also to provide background for the existence of the charged enterprise. *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) ("The trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment. Background evidence may be admitted to show, for example, the circumstances surrounding the events or to furnish an explanation of the understanding or intent with which certain acts were performed." (quoting *United States* v. *Daly*, 842 F.2d 1380, 1388 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988))). Accordingly, such "evidence of uncharged acts is routinely admitted in racketeering trials in this Circuit." *United States v. Boyle*, No. 08 Cr. 523 (CM), 2009 WL 5178525, at *16 (S.D.N.Y. Dec. 23, 2009) (citing cases).

Finally, relevant evidence of uncharged acts may nonetheless be inadmissible pursuant to Federal Rule of Evidence 403 if "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403; *see United States v. Bourne*, No. 08 Cr. 888 (NGG), 2011 WL 4458846, at *12 (E.D.N.Y. Sept. 23, 2011) ("Evidence of uncharged acts may be admissible, subject to limitations imposed by Rule[] 403 . . . ."). "In this circuit, evidence is not unduly

prejudicial when it is not 'more inflammatory than the charged crime[s].'" *United States v. Herron*, No. 10 Cr. 615 (NGG), 2014 WL 1871909, at *16 (E.D.N.Y. May 12, 2014) (quoting *United States* v. *Livoti*, 196 F.3d 322, 326 (2d Cir. 1999)). Thus, the touchstone of the prejudice analysis under Rule 403 is whether the proffered evidence of uncharged acts does "not involve conduct any more sensational or disturbing than the crimes with which [the defendant] [is] charged." *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990). Furthermore, in the racketeering context, the Second Circuit has concluded: "When a defendant engages in a criminal enterprise which involves very serious crimes, there is a likelihood that evidence proving the existence of the enterprise through its acts will involve a considerable degree of prejudice. Nonetheless, the evidence may be of important probative value in proving the enterprise." *United States* v. *Matera*, 489 F.3d 115, 121 (2d Cir. 2007).

2. Discussion

Where, as here, the Government is required to prove both the existence of an enterprise and that the enterprise engaged in racketeering activity, the Government may introduce evidence of other acts to prove both. As such, the Government should be permitted to introduce other acts of terrorism committed by ISIS members, relevant to both the enterprise itself and the racketeering activity it has committed.[12] Specifically, the Government intends to offer, among other things, testimony and evidence relating to at least five attacks ISIS has committed against Americans and Europeans. For example, the Government anticipates eliciting testimony concerning:

[12] As noted above, the Government will propose to the defense a stipulation concerning ISIS attacks around the world and subsequent ISIS claims of credit for these attacks. To the extent the parties reach agreement on a stipulation, it will obviate the need for a significant amount of this testimony.

- The June 12, 2016 fatal shooting at the Pulse nightclub in Orlando, Florida, during which the shooter called 911 and pledged allegiance to ISIS leader al-Baghdadi, and after which ISIS issued a claim of credit through Amaq News Agency.
- The December 2, 2015 fatal shooting in San Bernardino, California, after which ISIS issued a statement in Dabiq magazine praising the attack, describing it as inspired by the group, and calling on followers to carry out similar attacks in the West.
- The July 14, 2016 deadly truck attack in Nice, France, for which ISIS claimed responsibility through Amaq News Agency.
- The November 28, 2016 vehicular and stabbing attack in Columbus, Ohio, after which ISIS issued a statement through Amaq News Agency in which it referred to the perpetrator as a soldier of the Islamic State who responded to ISIS's calls to target citizens of coalition countries.
- The March 22, 2017 deadly vehicular and stabbing attack in London, England, for which ISIS claimed responsibility and described the assailant as a soldier of the Islamic State.

While this evidence is graphic by nature, its probative value is not outweighed by the danger of unfair prejudice. Coupled with the testimony from Dr. Zelin, this proves that ISIS, as an enterprise, recruits members and calls on them to carry out attacks, and its members actually carry out these attacks and ISIS claims responsibility for them—a tactic used to then recruit more members for more attacks. This proves both that ISIS operates as an enterprise and that it carries out racketeering activity. Additionally, there is no unfair prejudice, because the proof that the Government will offer will be no more "sensational or disturbing" than the proof of the defendant's

own conduct on behalf of ISIS—involving the intentional killing of eight people and injuries to others. *See, e.g.*, *United States v. Lyle*, 856 F.3d 191, 207 (2d Cir. 2017) (internal quotation marks and citation omitted); *United States v. Miller*, 116 F.3d 641, 682 (2d Cir. 1997) (evidence of uncharged murders relevant to show existence of enterprise and probative value not substantially outweighed by such evidence). Further, to avoid any danger of unfair prejudice, the Government has carefully selected among dozens of worldwide ISIS attacks to select a limited number that are directly relevant to the charged conduct because of the locations and/or nature of the attacks, and the government intends to offer very limited evidence related to each attack. The Government will not offer evidence unnecessarily emphasizing the graphic nature of any of the attacks. Moreover, in connection with its proposed instructions to the jury, the Government will offer a limiting instruction advising the jury that the evidence is being offered to prove the existence of the RICO enterprise, and may only be considered for that purpose, and that the Government does not allege that the defendant directly participated in any of those attacks. *See United States v. Mejia*, 545 F.3d 179, 206 (2d Cir. 2008) (noting that district court "expressly instructed the jury as to the limited use it could make" of evidence admitted to show the existence of a racketeering enterprise).

C. Photographs from the Scene of the Defendant's Terrorist Attack are Admissible at Trial

The Government seeks to introduce at trial a subset of photographs from the scene of the attack (the "Crime Scene Photographs").[13] The Crime Scene Photographs will include photographs of: (i) the victims at the scene of the attack; (ii) the truck after the attack; (iii) the school bus after it was struck by the truck; (iv) bicycles ridden by the defendant's victims that were hit by the truck in the course of the attack; (v) clothing worn by victims of the attack; (vi) the scene

[13] The Photographs are attached as Exhibit E. To protect the identities of the victims depicted, a subset of the Crime Scene Photographs are being filed under seal.

of the attack, depicting the West Side Highway bike path on the day of the attack; and (vii) photographs and videos of taken by bystanders during the course of the attack.

1. Applicable Law

Photographs of deceased victims in a trial such as this one are admissible so long as they have substantial probative value and are not offered for the purpose of inflaming or prejudicing the jury. *See, e.g., United States v. Salameh*, 152 F.3d 88, 122-23 (2d Cir. 1998) ("Probative evidence is not inadmissible solely because it has a tendency to upset or disturb the trier of fact." (citing *Kuntzelman v. Black*, 774 F.2d 291, 292 (8th Cir. 1985) (admission of crime scene photographs at a homicide trial is error only if the photographs are not even "arguably relevant and probative"), and *United States v. Brady*, 579 F.2d 1121, 1129 (9th Cir. 1978) (only on rare occasions when the evidence in question "is of such gruesome and horrifying nature that its probative value is outweighed by the danger of inflaming the jury" should it not be received in evidence))). As such, the Second Circuit has made plain that the fact that "photos might have been graphic does not render them unfairly prejudicial under Rule 403[.]" *United States v. Osborne*, 739 F. App'x 11, 18 (2d Cir. 2018); *see also United States v. Salim*, 189 F. Supp. 2d 93, 98 (S.D.N.Y. 2002) ("[T]he graphic or disturbing nature of a photograph alone is not enough to render it inadmissible.") (citing *United States v. Velazquez*, 246 F.3d 204, 210-11 (2d Cir. 2001)).

2. Discussion

The Crime Scene Photographs constitute direct evidence of the defendant's attack and its aftermath. The Government intends to introduce a limited number of photographs that fall into five categories of evidence. First, the Government intends to introduce photographs of bicycles the victims were riding after the defendant hit them during the attack. These photographs are relevant to prove, among other things, the force of the defendant's attack (as they show bicycles that were broken or crumpled) and the number of targets he hit (as multiple bicycles are depicted)

and, thus, the defendant's intent in carrying out the attack. The extent of damage to the bicycles additionally corroborates the anticipated expert testimony of Mr. Northrup, *see supra* pages 9-10, regarding the speed with which the defendant charged down the bike path. Second, the Government intends to introduce photographs of the school bus after the truck collided with it. These photographs are also relevant to establish the force of the defendant's attack (as they demonstrate the speed with which he was driving, and the force with which he hit the school bus). Third, the Government intends to offer a series of photographs that depict the scene of the attack (the West Side Highway bike path). These photographs are admissible to show the jury the crime scene directly after the attack, and to allow witnesses to explain their locations, actions, and vantage points throughout the course of the attack. Moreover, Mr. Northrup will rely on these photographs in reconstructing the crime scene and explaining the trajectory of Saipov's attack. Fourth, the Government intends to introduce photographs from the truck and outside the truck shortly after the attack was stopped. These photographs will show, among other things, the location of the Saipov Cellphones, the location of the paper the defendant wrote with his pledge to ISIS, and the location of the bag with knives after the attack. The photographs also corroborate law enforcement testimony concerning where the items were seized. The location of these items—which, as explained above, are proof of the defendant's motive and intent with respect to all counts in the Indictment—is directly relevant to establishing that they belonged to the defendant.

The Government also intends to introduce a limited subset of victim photographs from the scene of the attack. While these photographs are unquestionably intense, they are also important evidence of the defendant's motive and intent in carrying out the attack. They demonstrate, for example, that the defendant was carrying out directives from ISIS to kill non-believers using a motor vehicle. They are also proof of the intentional nature of the attack, as they demonstrate the

force of the attack and the impact it had on the defendant's victims. *See United States v. Salim*, 189 F. Supp. 2d 93, 99 (S.D.N.Y. 2002) ("The Government is correct in its assessment that the depiction of the nature and extent of a victim's injuries can certainly be relevant and probative of intent, particularly where the Defendant places intent in dispute at trial"). The photographs demonstrate, for example, that the defendant did not just recklessly barrel down the bike path aimlessly striking victims, but rather directly aimed at his victims with deadly force. Finally, they corroborate witness testimony—including testimony from the Mr. Northrup concerning crime scene reconstruction—about the nature, progression, and effect of the attack. *United States v. Francisco*, 642 F. App'x 40, 45 (2d Cir. 2016) (admission in murder trial of crime scene photographs showing victims' extremities was not plain error because the photographs "were relevant to corroborate the cooperating witnesses' descriptions of how the murders were carried out").

The Crime Scene Photographs are not unduly prejudicial or cumulative such that they should be excluded under Rule 403. The overwhelming majority of the photographs depicting the crime scene, truck, bicycles, and bus do not show victims, blood, or any human effects of the attack. While the limited set of victim photographs the Government seeks to admit are admittedly more graphic, their probative value is not substantially outweighed by the danger of unfair prejudice in a trial about a terrorist attack that resulted in the death of eight victims. The Second Circuit has made clear that the graphic nature of photographs does not render them unduly prejudicial. [14] *Salameh*, 152 F.3d at 122; *see, e.g.*, *Osborne*, 739 F. App'x at 18 (crime scene and autopsy photographs in murder and racketeering trial not unfairly prejudicial simply because they

[14] The Government does not seek to introduce autopsy photographs during the guilt phase but will introduce such photographs during any penalty phase through the testimony of Dr. King, described *supra* at page 12.

were graphic). In *Salameh*, involving the prosecution of Ramzi Yousef and others for bombing the World Trade Center in 1993, the Government introduced at trial thirteen photographs of six people killed in the bombing, including four photographs of facial close-ups of the victims, six photographs depicting the position of one victim at the time of death, and other victim photographs, including one of a victim, on a stretcher, who was "clearly pregnant." 152 F.3d at 122. The court determined that the photographs were probative of the nature and location of the explosion that killed the victims, and corroborated expert testimony regarding the cause of the explosion and resulting casualties and damage. *Id.* Although the Second Circuit recognized that the photographs and testimony were "shocking" and that there was a "significant amount of such evidence" admitted at trial, it held that the photographs were not unduly prejudicial given the substantial probative value. *Id.* Notably, the court came to this decision despite the defendants' offer to stipulate to death and injury—two of the issues that made the photographs in question relevant in the first place. *Id.*; *see also United States v. Wilson*, 493 F. Supp. 2d 464, 468 n.3 (E.D.N.Y. 2006) (noting in a capital case that the court permitted government to offer crime scene and autopsy photographs over defendant's objection). The same holds true here. The photographs of the victims at the crime scene are, to be sure, upsetting and graphic—but they are undeniably an essential part of the case and proof of the charges.

Finally, the Government has substantially limited the number of crime scene photographs it intends to offer in order to minimize any potential prejudice and ensure that the photographs are not cumulative of one on another or other evidence it intends to present. Even if the defense contends that it will not dispute certain of these facts (for example, the location of the attack), the Government is still allowed to prove its case by introducing evidence it chooses to present. *Old Chief v. United States*, 519 U.S. 172, 187 (1997). Put another way, evidence can still be relevant

and admissible even if the fact to which it is directed is explicitly not in dispute. *Id.* at 189 (quoting Fed. R. Evid. Advisory committee's notes); *see also Salameh*, 152 at 122 ("A criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.") .

Ultimately, in addition to corroborating witness testimony, the Crime Scene Photographs provide the only evidence of exactly how the scene and victims appeared directly after the defendant's attack, demonstrating its magnitude and devastating effects. As discussed above, the effects of the defendant's attack bear directly on his intent and motive in carrying it out. Accordingly, the Crime Scene Photographs should be admitted at trial.

D. The Defendant's Prior In-Court Statements are Admissible

The defendant has made a number of unprompted statements in open court during the course of proceedings in this matter (the "In-Court Statements"). Certain of these statements have evidenced his support for ISIS and jihad, and others have used ISIS terminology to impugn the Court and its authority. The In-Court Statements should be admitted at trial.

First, on June 22, 2018, during a status conference, the defendant, who was present with multiple defense lawyers and had the assistance of an interpreter, began to speak, and the Court cautioned him to "first speak with your lawyer" twice and to have his lawyer relay any questions to the Court. (Tr. of June 22, 2018 Conf., Dkt. 71 ("June Tr."), at 31). The defendant, in English, responded "ok" and "all right" to the Court's suggestion that he convey any statements through counsel, then took a 10-minute break to confer with counsel. *Id.* Upon returning from the break, one of the defendant's lawyers informed the Court that the defendant wanted to "very briefly address the Court," and the defendant then spoke to the Court through an interpreter. *Id.* at 32. After the defendant began speaking, the Government interrupted and asked the Court to remind the defendant that he had no obligation to say anything, had a right to remain silent, and that, if he

spoke, "anything you say can be used by the government, if it should choose to do so, in its case against you." *Id.* at 32-33. The defendant responded twice "I understand" and added that he was "not worried about this at all." *Id.* at 33. The defendant then continued his statement, and said that the Islamic State was imposing "*sharia* [law] on earth" and "is leading a war." *Id.* at 33-34. The defendant then continued that the "Islamic State is not fighting for land like some say, or like some say for oil. They have one purpose, and they're fighting to impose *sharia* on earth." *Id.* The Government then interrupted the defendant to note that it was not an appropriate forum for the defendant to discuss terrorist propaganda, particularly given the special administrative measures placed on the defendant's communications, but the Court let the defendant continue to speak. *Id.* at 34-35. When he continued, the defendant said that he did not "accept this as my judge because this is – I know the judge as *taghut*." *Id.* The Court then, again, reminded the defendant of the consequences of speaking in court, and said that future statements should be made through his lawyers. *Id.* at 35-36.

Despite the Court's repeated warnings, on November 18, 2019, the defendant again gave a statement in open court. (Tr. of Nov. 18, 2019 Conf., Dkt. 228 ("Nov. Tr.")). This time, defense counsel alerted the Court that the defendant wished to speak, and, again, the Court cautioned him that "anything that you say can be used against you by the government." *Id.* at 18-19. The Court then reminded the defendant that he was not required to say anything, and the Court suggested "that you allow your lawyers to do the talking here." *Id.* The defendant responded "I want to say something" and then proceeded to say, among other things, that the Court's orders "have absolutely nothing to do with me" because he followed the orders of Allah. *Id.*

For the reasons to follow, the In-Court Statements are admissible at trial.

1. Applicable Law

Statements made by a defendant being offered against him are admissible and excluded from the definition of hearsay. *See* Fed. R. Evid. 804(d)(2). Rule 410 places a limitation on this broad principle for certain statements made by a defendant during the course of a plea proceeding or plea negotiations. *See* Fed. R. Evid. 410. However, there is no similar protection for statements a defendant makes during the course of other in-court proceedings Particularly where, as here, the Court took great care to warn the defendant about the potential impact of his statements, and where the defendant was present with counsel and took the opportunity to consult counsel multiple times before making them.

2. Discussion

The defendant's courtroom outbursts are admissible against him as direct proof of the charged offenses. First, the defendant's statements on June 22, 2018 and November 18, 2019 are confessions of his commission of the charged conduct. For example, the defendant said on June 22 that the Islamic State was "leading a war" to impose "*sharia* [law] on earth," and later emphasized the "one purpose" of the Islamic State, which was to "impose *sharia* [law] on earth." (June 22 Tr. at 32-34). Similarly, the defendant later said that he did not recognize the Court's authority and saw it as "*taghut*," which the Government expects Dr. Zelin will explain is a term ISIS members use to refer to illegitimate or false leaders. (*See id.* at 34-35). These statements are evidence of the defendant's knowledge of ISIS's goals and his belief, following the attack, that he was a member of ISIS. The defendant's statements are also additional proof that he read and studied the propaganda materials on the Saipov Cellphones. Over a year later, on November 18, 2019, when the defendant reiterated that the Court's orders had "nothing to do with" him because he followed the orders of Allah, further stated that "things happen as the result and response to multiple occasions when Muslims all over the world, the women and the kids, are dying under the

bombs of the American government," parroting a frequent motivating theme from ISIS to justify its attacks in America and elsewhere. (Nov. 18 Tr. at 19). The defendant then repeated, similarly, that the Court was not judging anyone for the "thousands and thousands of Muslims" who were dying around the World, again evidencing that he subscribed to ISIS ideology. *Id.* at 19-20.

Moreover, the In-Court Statements corroborate the content of the defendant's post-arrest statement and the fact that he spoke to the FBI voluntarily. The defense, though the pending motion to suppress, has already challenged the voluntariness of the defendant's post-arrest confession and claimed that the Interviewing Agents have misrepresented what the defendant said. (Dkt. No. 268). To the extent the motion to suppress is denied, the Government expects the defense will nonetheless argue to the jury that the statement was not voluntary and that it cannot be relied upon because the Interviewing Agents have not accurately reported its contents. The In-Court Statements, however, go to the defendant's consistent desire to publicly proclaim his commitment to ISIS, despite his understanding that his statements may be used against him. Just as the defendant was eager to speak to the FBI about his murderous attack and his devotion to ISIS in the hours after he was arrested, he was eager to speak in court about the same. Moreover, the In-Court Statements demonstrate the defendant's commitment to ISIS and knowledge of its precepts—corroborating the FBI's report of the defendant's confession. These are thus additional reasons that the In-Court Statements are relevant and admissible.

These statements were plainly not made during the course of plea proceedings and are thus outside of the protections of Rule 410. Given that they will be offered against the defendant, they are also not hearsay. Particularly where, as here, the Court carefully apprised the defendant of his right to remain silent, and reminded the defendant that his statements could be used against him,

there is no bar to introducing his unprompted public statements at trial. In light of the probative value of the In-Court Statements, the Government should be allowed to introduce them at trial.[15]

E. The Court Should Preclude the Defense from Offering Mitigating Evidence During the Guilt Phase

While, at any penalty phase, "information may be presented as to any matter relevant to the sentence," 18 U.S.C. § 3593(c), mitigation evidence and argument is inadmissible in the guilt phase, where it can only serve to waste time, confuse the jurors about the issues before them, and prejudice the Government. Accordingly, the defense should be precluded during the guilt phase from mentioning mitigating factors during its addresses to the jury, and from asking questions eliciting evidence about any mitigating factors through cross-examination or otherwise.

1. Applicable Law

Pursuant to 18 U.S.C. §§ 3592(a) and 3593(c), the defense may present evidence on "any mitigating factor" to the jury during the course of a penalty phase, so long as the probative value of the evidence is not "outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). Statutory mitigating factors include, for example, evidence regarding a defendant's impaired capacity to appreciate the wrongfulness of his conduct, that a defendant was under unusual and substantial duress, that the defendant was a "relatively minor" participant in the offense, that another equally culpable defendant will not be punished by death, that the defendant did not have a significant prior criminal history, or that a victim consented

[15] The In-Court Statements should also be admissible at any penalty phase of trial to show the defendant's lack of remorse. The In-Court Statements are also probative of the defendant's future dangerousness. The statements include the defendant's contention that this Court is illegitimate and that he is bound only by his conception of *sharia* law. The defendant has repeatedly emphasized that he does not feel bound by the laws or authorities of this country, demonstrating that he has no regard for the rules and conditions governing his future incarceration (as he has already demonstrated at the MCC, *see infra* pages 72-73).

to the defendant's criminal conduct. *See* 18 U.S.C. § 3592(a). However, there is no parallel authority to offer such evidence during the guilt phase. Instead, the Federal Rules of Evidence govern the admissibility of evidence during the guilt phase, including Rules 402 and 403. *See, e.g.*, *United States v. Pepin*, 514 F.3d 193, 207 (2d Cir. 2008) ("First, as the district court acknowledged, Federal Rule of Evidence 403, providing that 'evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice . . .' governs admissibility of evidence at the guilt phase."); *United States v. Taveras*, 436 F. Supp. 2d 493, 513 (E.D.N.Y. 2006) (noting in capital case that "[a]t the guilt phase, Rule 403 would apply"); *United States v. Casey*, No. 05 Cr. 277 (ADC), 2013 WL 12190570, at *3 (D. P.R. Jan. 30, 2013) (noting in capital case that admissibility and balancing tests under Rules 402 and 403 are required at the guilt phase); *see also* Fed. R. Evid. 404(a)(2)(A) (allowing defendant to introduce character evidence if it is a "pertinent trait" only); *United States v. Tsarnaev*, 13 Cr. 10200 (GAO) (D. Mass. March 4, 2015), Dkt. 1528, at 11 (holding as a "general matter" that the Government's motion to exclude mitigation evidence in guilt phase was granted but reserving on precise ruling regarding specific evidence).

2. Discussion

Sentencing-phase mitigating evidence in this case has no place in the guilt phase, where it would only serve to waste time, confuse the issues, mislead the jury, and prejudice the Government. If, for example, the defense seeks to offer proof during the guilt phase concerning the defendant's upbringing in Uzbekistan, such proof is entirely irrelevant to the charges in this case and should be excluded under Rules 402 and 403. Similarly, evidence concerning the defendant's lack of criminal history, while potentially relevant at the penalty phase, has no relevance during the guilt phase and should be excluded. Accordingly, the defense should be

precluded during the course of the guilt phase of trial from making any mitigation arguments that become relevant only at any penalty phase.

F. The Court Should Preclude Cross-Examination Concerning the Department of Justice Policy Regarding a Presumption For Recording Post-Arrest Statements

At the Suppression Hearing, defense counsel extensively cross-examined two law enforcement agents (the "Interviewing Agents") about the FBI's decision to not record the defendant's post-arrest statement and whether it was contrary to then-existing Department of Justice policy (the "DOJ Policy"). At trial, the Government will not object to cross-examination regarding the Interviewing Agents' decisions to not use their cellphones to record the interview, or to defense arguments that testimony regarding the defendant's statements should be given less weight in the absence of a recording. But the defense should be precluded from cross-examination concerning the DOJ Policy and from offering any evidence regarding the same. As detailed below, the DOJ Policy expressly does not create any rights enforceable in civil or criminal proceedings and, in any event, the Policy did not require the Interviewing Agents to record the defendant's post-arrest statement because he was not in a "place of detention" at the time of the interview. As such, any questions or argument concerning the DOJ Policy would be misleading and confusing to the jury, would result in a mini-trial regarding the application of the DOJ Policy, and therefore should be precluded.

1. The DOJ Policy

The Department of Justice policy in place at the time of the defendant's arrest and post-arrest statement created a "presumption" that the "custodial statement of an individual in a *place of detention* with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded" subject to several exceptions. *See* Policy Concerning Electronic Record of Statements, May 12, 2014, attached as Exhibit G. The DOJ Policy defined the term

"place of detention" as "any structure where persons are held in connection with federal criminal charges where those persons can be interviewed." *Id.*

The DOJ Policy, using language identical to the Department of Justice Manual (the "Justice Manual") and its predecessor the U.S. Attorney's Manual (the "USAM"), did not create "any rights . . . enforceable at law by any party in any matter civil or criminal." Ex. G at 1; *see also* Justice Manual § 1-1.200; *United States v. Valentine*, 820 F.2d 565, 572 (2d Cir. 1987) (finding that defendant was not entitled to suppression of grand jury testimony based on non-compliance with Department of Justice policies); *United States v. Russell*, 916 F. Supp. 2d 305, 312 (E.D.N.Y. 2013) ("Defendant's reliance on any purported violations of the USAM is unavailing."); *Davis v. Garcia*, No. 07 Civ. 9897, 2008 WL 2229811, at *8 (S.D.N.Y. May 27, 2008); *United States v. Jackson*, No. 04 Cr. 801 (PKC), 2006 WL 59559, at *2 (S.D.N.Y. Jan. 9, 2006); *United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995) ("[T]he U.S. Attorney's Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."). The DOJ Policy further established that it was "solely for internal Department of Justice guidance" and did not "place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice." *See* Ex. G at 2; *see also United States v. Myers*, 692 F.2d 823, 846 (2d Cir. 1982) (explaining that "[n]on-compliance with internal departmental guidelines is not a ground for complaint").

2. Applicable Law

The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988) (quotation marks omitted). Thus, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment,

prejudice, confusion of the issues, the wit-ness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Rule 611(a) also directs trial courts to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to," inter alia, "avoid wasting time." Fed. R. Evid. 611(a)(2); see also Fed. R. Evid. 403. "Cross-examination is not improperly curtailed if the jury is in possession of facts sufficient to make a 'discriminating appraisal' of the particular witness's credibility." *United States v. Roldan-Zapata*, 916 F.2d 795, 806 (2d Cir. 1990).

3. Discussion

The defense should be precluded from cross-examination or argument concerning the DOJ Policy.

First, the DOJ Policy does not create any rights "enforceable at law by any party in any matter civil or criminal." *See* Ex. G at 2; *see also United States v. Wright*, 937 F.3d 8, 19 (1st Cir. 2019) (noting that "United States Department of Justice policy that requires the recording of custodial interviews conducted in a place of detention with suitable recording equipment . . . does not purport to create legal rights that may be enforced by criminal defendants"); *United State v. Ledbetter*, No. 15 Cr. 80 (ALM), 2015 WL 7017367 (S.D. Ohio Nov. 12, 2015) (denying motion to suppress post-arrest statement and finding that the DOJ Policy does not create or confer any rights on any individuals). Therefore, the DOJ Policy is irrelevant and should not be the subject of cross-examination or argument at trial.

Second, the Interviewing Agents complied with the DOJ Policy. Thus, cross-examination or argument regarding the Policy is not probative of any permissible basis for impeachment, and would therefore be outweighed by undue prejudice under Rule 403 because it would consume an inordinate amount of time, risk misleading the jury, and confuse the issues at the trial. *See* Fed. R. Evid. 403; *see also United States v. Bruce*, 550 F.3d 668, 670-74 (7th Cir. 2008) (holding, in

relevant part, that district court properly precluded questioning about compliance with state law recording policy because it would have required a "mini trial" on application of the policy).[16] The relevant portion of the DOJ Policy established a presumption of recording only in a place of detention with suitable recording equipment. *See* Ex. G at 1-3. The DOJ Policy thus does not, on its face, apply to the hospital where the defendant was interviewed following his arrest.

A recent case in this District is instructive. In *United States v. Flores*, 15 Cr. 765 (PAC), Judge Crotty precluded cross-examination at trial regarding the application of the DOJ Policy under Rule 403. There, the Government sought to rely on testimony from U.S. Drug Enforcement Administration ("DEA") agents regarding post-arrest statements made by the defendants during a flight from Haiti to the United States. The agents did not record the statements, and the defendants moved to suppress them. As here, the Court held a suppression hearing at which the agents were questioned extensively regarding the DOJ Policy, and why they did not record the defendants' post-arrest statements. Judge Crotty denied the suppression motion, and granted the Government's motion *in limine* to preclude questioning regarding the DOJ Policy during the trial. Judge Crotty concluded that, while defense counsel could cross-examine the DEA agents regarding their ability to record the post-arrest statements, "the probative value of asking about the [DOJ Policy] is

[16] In *Bruce*, the defendant was initially arrested by local police in Wisconsin and interviewed. 560 F.3d at 670. Although a Wisconsin state law arguably required the recording of the entirety of post-arrest interviews, the officers recording only a portion of the interview. *Id.* The Seventh Circuit held the district court properly precluded cross examination about the officers' compliance with the Wisconsin law. *Id.* at 673-74. The Seventh Circuit held that the state law was irrelevant in a federal prosecution and also indicated that—given that Wisconsin's recording requirement contained a number of exceptions—cross-examination about the policy would have required a "mini-trial" as to the application of the policy. *Id.* at 673-74 & n.3 ("[The defendant's] position would require the judge either to hold a mini-trial on the alleged state law violation, or to allow the parties to submit sufficient evidence to allow the jury to weigh whether there was such a violation. We do not believe that the court was obligated to go so far afield from the central issues in the case.").

outweighed by the risk of undue delay and the introduction of confusion on a collateral issue." *United States v. Flores*, 15 Cr. 765 (PAC), Tr. of Nov. 2, 2016 Conf., (attached as Exhibit I), at 8. The defendants challenged the ruling on the appeal, *see* 2018 WL 1995713, at *63-71 (Campo Flores brief), and the Second Circuit summarily rejected their argument, *United States v. Flores*, 945 F.3d 687, 729 (2d Cir. 2019) ("We have considered all of defendants' arguments on these appeals and have found in them no basis for reversal.").

As in *Flores*, the Court should preclude argument or questioning concerning the DOJ Policy under Rule 403. After presiding over the suppression hearing, the Court is well-positioned to balance the lack of probative value associated with Policy-related arguments relative to the Rule 403 concerns such cross-examination presents in the context of a jury trial. At the suppression hearing, cross-examination regarding the DOJ Policy spanned six pages of the transcript and only served to underscore that the Policy did not apply to the interview. There are fair points for the defense to make at trial, such as that the Interviewing Agents possessed smartphones capable of recording the defendant's statements. Those points are independent of the DOJ Policy, however, which created no enforceable rights for the defendant and did not apply at a hospital. As such, any questioning or argument regarding the DOJ Policy should be precluded.

G. The Court Should Take Judicial Notice of ISIS as a Foreign Terrorist Organization

The Government respectfully requests that the Court take judicial notice at trial of the designation of ISIS as an FTO, effective October 15, 2004. ISIS's designation as an FTO is an element of Count 27 of the Indictment. *See* 18 U.S.C. §§ 2339B(a)(1), 2339(a).

The Federal Rules of Evidence allow a court to take judicial notice of adjudicative facts—such as whether ISIS is, in fact, a designated FTO—when those facts "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1). Further, federal courts are required to judicially notice items published in the Federal

Register. *See* 44 U.S.C. § 1507 (providing that "[t]he contents of the Federal Register shall be judicially noticed"); *United States v. Wood*, 335 F.3d 993, 1001 (9th Cir. 2003) (holding that the district court complied with federal law by judicially noticing a rule published in the Federal Register).

As to ISIS, the relevant portions of the Federal Register include the following:

- On October 15, 2004, the U.S. Secretary of State designated al-Qa'ida in Iraq ("AQI"), then known as Jam'at al Tawhid wa'al-Jihad, as an FTO under Section 219 of the Immigration and Nationality Act and as a Specially Designated Global Terrorist under section 1(b) of Executive Order 13224. *See* 69 Fed. Reg. 61292 (October 15, 2014).

- On May 15, 2014, the Secretary of State amended the designation of AQI as an FTO to add the alias Islamic State of Iraq and the Levant ("ISIL") as its primary name. *See* 79 Fed. Reg. 27972 (May 15, 2014). The Secretary also added the following aliases to the ISIL listing: the Islamic State of Iraq and al-Sham ("ISIS"), the Islamic State of Iraq and Syria, ad-Dawla al Islamiyya fi al-'Iraq wa'sh'Sham, Daesh, Dawla al Islamiya, and Al-Furqan Establishment for Media Production. *Id.*

- On September 21, 2015, the Secretary of State added the following aliases to the FTO listing: Islamic State, ISIL, and ISIS. *See* 80 Fed. Reg. 58804 (September 30, 2014).

To date, ISIS remains a designated FTO. *See* U.S. Dep't of State, Foreign Terrorist Organizations, http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Feb. 6, 2020). Based on the foregoing, and pursuant to 44 U.S.C. § 1507 and Rule 201, the Government respectfully requests that the Court take judicial notice of the fact that the Islamic State of Iraq and al-Sham—including its aliases the Islamic State of Iraq and the Levant, the Islamic State of Iraq and Syria, ad-Dawla al-Islamiyya fi al-'Iraq wa-sh-Sham, Daesh, Dawla al Islamiya, Al-Furqan Establishment for Media Production, Islamic State, ISIL, and ISIS—is designated as an FTO, as determined by the U.S. Secretary of State and published in the Federal Register. In the recent *El Gammal* prosecution, Judge Ramos granted a similar motion *in limine* by the Government, and issued an order taking judicial notice of ISIS's designation as an FTO. Order, *United States v. El Gammal*,

No. 15 Cr. 588 (ER), Dkt. 139 (Jan. 3, 2017); *see also Alimehmeti* at 30-31 (granting Government's substantially identical motion and stating that the Court would so-order the Government's proposed order absent a stipulation).[17] A proposed order, substantially identical to the order issued in *El Gammal*, is attached as Exhibit H.

ARGUMENT: PENALTY PHASE

The Government makes the following motions *in limine* with respect to any potential penalty phase of the trial.

A. Penalty Phase Procedures

The Federal Death Penalty Act of 1994 (the "FDPA"), codified at 18 U.S.C. §§ 3591-3598, governs the procedures to be followed during the course of any sentencing phase in a capital case. The FDPA lists the statutes which are eligible for the death penalty, 18 U.S.C. § 3591, and outlines statutory mitigating and aggravating factors to be considered during any penalty phase, 18 U.S.C. § 3592. The FDPA also outlines how the parties are allowed to present proof of mitigating and aggravating factors. 18 U.S.C. § 3593(c).

More specifically, Section 3593(c) establishes that "information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under Section 3592." This broad principle is limited by the rule that "[t]he government may present any information relevant to an aggravating factor for which notice has been provided" under Section 3593(a), while "[t]he defendant may present any information relevant to a mitigating factor." *Id.* Section 3593(c) codifies that the Rules of Evidence do not

[17] Similarly, in *Ullah*, the Government moved *in limine* for the Court to take judicial notice of ISIS's designation as a FTO. *See Ullah*, Dkt. 35, at 18-20. The defendant, also represented by the Federal Defenders of New York, did not oppose the Government's motion, and the parties ultimately reached a stipulation that was introduced into evidence at trial.

apply at the penalty phase, but "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *Id.* Thus, while the FDPA allows for more evidence to be admitted than the standards under the Federal Rules of Evidence that apply during the guilt phase, the Court still has a role as the "gatekeeper of constitutionally permissible evidence" and is required to exclude unreliable or prejudicial evidence that may render the penalty phase fundamentally unfair. *See, e.g.*, *United States v. Fell*, 360 F.3d 135, 145 (2d Cir. 2004). Indeed, based on the difference in language between the FDPA, which requires the Court to exclude evidence if its "probative value is outweighed," and the Federal Rules of Evidence, which requires the Court to exclude evidence if its "probative value is *substantially* outweighed," some courts have held that the court's authority to exclude probative evidence based on possible prejudice is greater in the penalty phase than in trials generally. *See, e.g.*, *United States v. Taveras*, 585 F. Supp. 2d 327, 335-36 (E.D.N.Y. 2008) (citing the statutes and other cases).

Finally, the FDPA establishes that the burden of establishing an aggravating factor is on the government and must be established beyond a reasonable doubt, while a mitigating factor, to be proven by the defense, need only be established by a preponderance. *Fell*, 360 F.3d at 141.

B. The Court Should Preclude the Defense from Arguing that the Beyond a Reasonable Doubt Standard Applies to the Weighing Process

During the penalty phase, after a jury makes determinations regarding aggravating and mitigating factors, the FDPA mandates that the jury must determine what sentence is "justifi[ed]" under the circumstances. The beyond-a-reasonable-doubt standard does not apply, and the defense should be precluded from arguing or suggesting otherwise to the jury.

1. Applicable Law

Under the FDPA, the penalty phase has two steps—an eligibility determination and selection of the actual punishment from among the eligible penalties—which are given "differing constitutional treatment." *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998).

At the eligibility stage, the jury must make certain factual findings before it may consider imposing the death penalty. "To find [the defendant] death-eligible, the jury need find the existence beyond a reasonable doubt of at least one aggravating factor enumerated in 18 U.S.C. § 3592(c) for which [the defendant] was provided pre-trial notice, 18 U.S.C. § 3593(a)(1), (2)." *United States v. Fell*, 737 F. App'x 37, 38 (2d Cir. 2018). The jury must find, for example, that the defendant intended to kill the victim, intended to inflict serious bodily injury, or intentionally engaged in violence knowing that it posed a grave risk of death. 18 U.S.C. § 3591(a)(2)(A), (B), (C), and (D). The jury must also unanimously find beyond a reasonable doubt that at least one statutory aggravating factor is present. *Id.* § 3593(e)(2); *see also id.* § 3592(c) (enumerating aggravating factors); Dkt. 80 (notice of intent to seek the death penalty containing the relevant aggravating factors).

If the jury makes these threshold determinations, the FDPA prescribes additional procedures for the jury's selection-stage determination of the appropriate penalty. At this stage, "the government and [defense] will submit, if they so choose, information as to aggravating and mitigating factors, and the jury will determine the existence of those factors and then weigh those factors to determine if a death-sentence is justified." *Fell*, 737 F. App'x at 38.

The FDPA provides that, after making these determinations, the jury must determine what sentence is "justif[ied]" by weighing the factors that it has found. 18 U.S.C. § 3593(e). In conducting this weighing process, the jury must:

> consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death.

Id. The jury may impose a death sentence only if it unanimously agrees that the sentence is justified in light of the factors the jury has found. *Id.*

All courts of appeals to consider the issue have uniformly reached the conclusion that a jury's determination of whether a death sentence is justified based on the FDPA's weighing process is not itself a factual determination that must be made beyond a reasonable doubt. *See, e.g.*, *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013); *United States v. Runyon*, 707 F.3d 475 (4th Cir. 2013); *United States v. Fields*, 516 F.3d 923 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007); *United States v. Purkey*, 428 F.3d 738 (8th Cir. 2005). While the Second Circuit has not yet decided this issue, *see United States v. Aquart*, 912 F.3d 1, 16 n.5 (2d Cir. 2018), courts in this Circuit have found that it does not, *see United States v. Fell*, No. 01 Cr. 12 (GWC), 2017 WL 10809985, at *4-5 (D. Vt. 2017) (noting that the Second Circuit had not considered whether the weighing determination must be made beyond a reasonable doubt, but finding, consistent with all other courts of appeal, that it did not); *United States v. Wilson*, No. 04 Cr. 1016 (NGG), 2013 WL 3187036, at *2-3 (E.D.N.Y. June 20, 2013) ("To require the Government to prove that the defendant should be sentenced to death beyond a reasonable doubt is illogical and conflates the truth-seeking with balancing moral values."). As the First Circuit noted, by the time the jury reaches the weighing prescribed by Section 3593(e), it "already ha[s] found beyond a reasonable doubt the facts needed to support a sentence of death." *United States Sampson*, 486 F.3d 13, 32 (1st Cir. 2007). The jury's determination of what sentence is justified is not a finding of fact in

support of a particular sentence but rather a determination of the sentence itself, within a range for which the defendant is already eligible.

2. Discussion

Consistent with all Courts of Appeal to consider the issue, the Court should rule that the weighing process by which the jury considers whether a sentence of death is justified, set forth in 18 U.S.C. § 3593(e), does not require the jury to make this determination beyond a reasonable doubt, and preclude any misleading argument to the contrary.

As outlined above, courts have consistently come to this conclusion and it is in concert with the language of the FDPA. For example, Judge Garaufis so held in a lengthy opinion in *Wilson*. The court first noted that the "statutory text does not specify that the Government must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors (if any)." 2013 WL 3187036, at *2. The court also analyzed the "surrounding statutory language"—including the express burdens assigned by the statutory text to aggravating and mitigating factors—and found persuasive that Congress did not identify "any similar burden of proof" with regard to the weighing process. *Id.* Finally, Judge Garaufis noted that the purpose of the FDPA cut against the defendant's reading of the statute, as, contrary to burdens of proof which are employed to help a jury ascertain the relevant factors, the weighing process of the FDPA "governs a unique role of the jury: determining whether a defendant did or did not commit a crime." *Id.* As this is not a "true or not true" matter but, rather, a moral judgment that each juror must make for himself, it would be "illogical" to hold this to a beyond a reasonable doubt standard. *Id.*

There is no reason to upset this long line of cases or deviate from Judge Garaufis's logic. The Court should hold that the weighing process does not require a finding beyond a reasonable doubt and preclude the defense from arguing or suggesting otherwise.

C. The Defense Should Be Precluded from Making any Argument Concerning the Unavailability of the Death Penalty Under New York Law

The defense should also be precluded from making any argument concerning the status of the death penalty under New York state law. A state's position on the death penalty is not a proper mitigating factor under the Eighth Amendment or the FDPA, and evidence relating to the death penalty under New York law should also be precluded on prejudice grounds under Section 3593(c).

1. Applicable Law

While the FDPA takes a liberal approach to what is admissible at the penalty phase, courts have consistently held that a state's position on the death penalty is not a proper mitigating factor. *See, e.g.*, *United States v. Wilson*, No. 04 Cr. 1016 (NGG), 2013 WL 2948034, at *3-4 (E.D.N.Y. June 14, 2013) (holding that defendant may not introduce evidence of unavailability of capital punishment in New York); *see also United States v. Gabrion*, 719 F.3d 511, 521-24 (6th Cir. 2013) (*en banc*) (reversing panel decision to vacate death sentence and holding that evidence of murder's location in a state that lacked the death penalty was not proper mitigation under both FDPA and Eighth Amendment analysis); *United States v. Higgs*, 353 F.3d 281, 328 (4th Cir. 2003) (affirming district court's refusal to allow location of murder as mitigating factor); *United States v. Christensen*, 17 CR 20037 (JES), 2019 WL 1976442, at *4 (C.D. Ill. May 3, 2019) (precluding evidence during penalty phase of unavailability of death penalty in Illinois); *United States v. McCluskey*, No. 10 Cr. 2734 (JCH), 2013 WL 12328844, at *3 (D. New Mexico Nov. 12, 2013) (precluding evidence of the unavailability of the death penalty in New Mexico as a mitigating factor and noting that the court had previously ruled that abolition of the death penalty in New Mexico does not constitute mitigating evidence under the Constitution or the FDPA). Among other reasons, any such argument runs the risk that a juror will confuse whether the state law applies in a federal proceeding, and such evidence is irrelevant, as further discussed below.

2. Discussion

Any reference to the status of the death penalty in New York should be precluded, as it is both irrelevant and risks misleading the jury and confusing the issues.

In *Wilson*, the defendant argued that he should be allowed to introduce evidence concerning the unavailability of the death penalty in New York State. 2013 WL 2948034, at *3. The court rejected this argument on three grounds, each of which squarely applies here. First, the court noted that the defendant could not "identify a single court that has allowed the introduction of such evidence," and specified that the Sixth Circuit's *en banc* decision in *Gabrion* found that such evidence is "entirely irrelevant to a federal jury's sentencing determination." *Id.* The court also observed that whereas in *Gabrion* "the citizens of Michigan amended their state constitution to ban the death penalty"—and the state-law ban was still irrelevant—the unavailability of the death penalty under New York law is based on a judicial decision striking a statute. *Id.* at 4. Thus, "[t]o infer that the New York Legislature's failure to cure the defect . . . [and] reinstitute the death penalty reflects a policy decision is entirely speculative." *Id.* Finally, the court reasoned that this issue was "extremely likely to mislead and/or confuse the jury," particularly given the status of the law in New York. *Id.* (citing 18 U.S.C. § 3593(c)). Thus, the court concluded, jurors might easily "confuse the unavailability of the death penalty in New York with the propriety of capital punishment in New York." *Id.* at *4.

In sum, the Court should preclude the defense from making reference to or argument concerning the status of the death penalty in New York State at any penalty phase of trial.

D. The Government Should be Allowed to Offer Evidence of the Defendant's Threats at MCC as Proof of Future Dangerousness

In its Notice of Intent to seek the Death Penalty, the Government gave notice of "future dangerousness" as a non-statutory aggravating factor pursuant to 18 U.S.C. § 3593(a)(2). Dkt.

80.[18] The Government specified that the defendant is "likely to commit criminal acts of violence in the future such that he poses a continuing and serious threat to the lives and safety of others." *Id.* As proof of this aggravating factor, the Government should be permitted to offer evidence of the defendant's threats to decapitate a correctional officer at the MCC on or about December 18, 2019.

1. Relevant Facts

On the evening of December 17, 2019, the defendant threatened an officer at the MCC (the "Officer"). The defendant confronted the Officer about the fact that, according to the defendant, the Officer frequently awoke the defendant at night by slamming a door. During the course of this confrontation, the defendant threatened to kill the Officer. Indeed, as the defendant later admitted to the MCC's disciplinary committee (the "Committee"), he told the Officer that if the Officer dared to open the defendant's cell, in two minutes "other guys will be picking up your dead body." (Ex. J, at 5 (Committee report of Saipov's statements)).

The following day, the defendant obstructed a security camera in his cell. An MCC Supervising Officer (the "Supervising Officer") told the defendant to remove the obstruction. Still angry from the prior evening, the defendant said that he would not remove the obstruction until the Officer's head was cut off, and referred to the Officer as an animal. Again, the defendant unapologetically admitted this threat to the Committee, telling the Committee that he wanted to "cut this animal head off." (Ex. J, at 5).

The Government seeks to offer evidence of Saipov's threats through the testimony of one or more MCC employees who witnessed the defendant admit these threats.

[18] The defendant's motion to strike certain aggravating factors remains pending. To the extent the Court strikes this factor, the Government may seek to offer this evidence for another purpose or in support of a surviving aggravating factor.

2. Applicable Law

"[F]ederal courts 'have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases.'" *United States v. Wilson*, 923 F. Supp. 2d 481, 483-85 (E.D.N.Y. 2013) (quoting *United States v. Basciano*, 763 F.Supp.2d 303, 352 (E.D.N.Y. 2011)); *see also United States v. Bin Laden*, 126 F. Supp. 2d 290, 303 (S.D.N.Y. 2001) (noting that "lower courts have uniformly upheld future dangerousness as a non-statutory aggravating factor in capital cases under the FDPA"). The Supreme Court has given "broad approval of jury consideration of a capital defendant's future dangerousness, including with respect to defendants facing no prospect of release." *Wilson*, 923 F. Supp. 2d at 487.

3. Discussion

Evidence of future dangerousness is a permissible aggravating factor. *E.g.*, *Wilson*, 923 F. Supp. 2d at 483. The evidence at issue here is especially relevant because the defendant threatened to harm corrections officers *while incarcerated*. For example, in *United States v. Basciano*,

> The Government also intends to prove other acts committed by Basciano while in prison, and in some cases under SAMS, that show Basciano's continued dangerousness while in pretrial detention. These circumstances support consideration of future dangerousness, in the context of a prison environment, as an Aggravating Factor in this case.

763 F. Supp. 2d 303, 353 (E.D.N.Y. 2011).

United States v. Concepcion Sablan, is also instructive. There, the Government sought to introduce evidence that the defendant had engaged in a physical struggle with prison officers when he refused to return to his cell as proof of the defendant's future dangerousness. 555 F. Supp. 2d 1205, 1229 (D. Colorado 2007). The court admitted the evidence, finding that it was "highly relevant to proof of future dangerousness in the prison setting" because it demonstrated that, "when given an opportunity, [the defendant] may attempt to harm prison officials." *Id.* Other courts have noted that threats to prison guards and other officials similarly suffice. *See, e.g., United States v.*

Sampson, 335 F. Supp. 2d 166, 225-26 (D. Mass. 2004) ("Threats to harm prison guards and other officials are also relevant to future dangerousness."); *United States v. Grande*, 353 F. Supp. 2d 623, 640 (E.D. Va. 2005) (relevant evidence "including serious assaults on or threats to fellow inmates or corrections staff" would be admitted as to future dangerousness). Thus, for example, in *Sampson*, in reviewing a challenge to the sufficiency of the evidence regarding proof of future dangerousness, the court noted approvingly that the Government had relied, in part, on evidence of "several threats [the defendant] made to correctional officers and others after he was charged in this case." 335 F. Supp. 2d at 226 (citing *Sallahdin v. Gibson*, 275 F.3d 1211, 1231-32 (10th Cir. 2002) and *Gilbert v. Mullin*, 302 F.3d 1166, 1182 (10th Cir. 2002)). Under this authority, evidence of the defendant's threats while incarcerated are plainly admissible as proof of future dangerousness.

E. The Court Should Preclude any Testimony or Evidence about the Impact that the Defendant's Execution Would Have on the Defendant's Family

The Court should prohibit the defense from presenting evidence or testimony about the hypothetical impact that the defendant's execution would have on his family or others—particularly insofar as the evidence is offered as part of a plea for mercy.

1. Applicable Law

While relevant mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), appeals to sympathy and opinions about the appropriate sentence are not admissible in a capital sentencing proceeding, *United States v. Taylor*, 814 F.3d 340, 369-71 (6th Cir. 2016). *See United States v. Hager*, 721 F.3d 167, 194-97 (4th Cir. 2013) ("Contrary to [the defendant]'s contentions, we think that allowing a capital defendant to argue execution impact as a mitigator is improper."); *United States v. Snarr*, 704 F.3d

368, 401 (5th Cir. 2013) ("Because such evidence does not reflect on [the defendant]'s background or character or the circumstances of his crime, the Supreme Court has never included friend/family impact testimony among the categories of mitigating evidence that must be admitted during a capital trial.") (internal quotations and citations omitted); *Stenson v. Lambert*, 504 F.3d 873, 892 (9th Cir. 2007) ("[The defendant] cannot point to any federal case requiring admission of 'execution impact' testimony because there are no such cases. *Lockett* does not stand for that principle."); *United States v. Council*, No. 17 Cr. 866 (RBH), 2019 WL 3940759, at *5 (D.S.C. Aug. 21, 2019) (precluding admission of evidence of "how third parties would be affected if [the defendant] were sentenced to death and executed"). Indeed, "just as victim impact witnesses are not permitted to express a preference for death, execution impact witnesses [should] not be allowed to express a preference for life." *United States v. Con-Ui*, No. 13 Cr. 123 (ARC), 2017 WL 1410913, at *3 (M.D. Pa. April 20, 2017).

Some courts have permitted capital defendants to offer so-called execution impact evidence at the penalty phase on the theory that it is relevant to the defendant's background. *See, e.g.*, *United States v. Wilson*, 493 F. Supp. 2d 491, 506 (E.D.N.Y. 2007) (recognizing the "cases the Government cited in support of its argument" but finding that execution impact testimony from the defendant's family was relevant to defendant's "background"); *see also United States v. Christensen*, 17 Cr. 20037 (JES), 2019 WL 1976442, at *6 (C.D. Ill. May 3, 2019) (permitting execution impact evidence to the extent it related to the defendant's background "rather than merely the witnesses' desired sentence"). The more persuasive authority, however, holds that:

> The capital defendant is available to offer the jury all relevant information as to his life, background, character, and the impact any sentence will have on him. To allow testimony of the impact on third parties, however, does nothing to inform the jury on any of these matters and upsets the balance set forth in [P*ayne v. Tennessee*, 501 U.S. 808 (1991)].

Hager, 721 F.3d at 195; *see also United States v. Umana*, No. 08 Cr. 134, 2010 WL 3023498, at *15 (W.D.N.C. July 27, 2010) ("[A] logical extension of *Payne* would allow family of the defendant to testify about his life and characteristics, but prohibit them from specifically advocating against the death penalty or its likely impact on their lives.").

2. Discussion

While it is conceivable that the defendant's relatives or associates could offer admissible testimony at a penalty phase relating to the defendant's background, they should not be permitted to speculate about the impact the defendant's death would have on them. Such testimony is not probative of any specific statutory mitigating factor and cannot fairly be considered to be part of the defendant's "background" under 18 U.S.C. § 3592(a)(8).

In *Taylor*, the Sixth Circuit affirmed a district court's decision to exclude "execution impact" testimony. 814 F.3d at 369-71. The district court had noted that asking a jury to sentence a defendant to life is not "mitigating evidence" under the FDPA, and outlined other problems with such testimony including, for example, that "to ask a person to testify with any degree of certainty about the impact on one's life of an event that may happen many years in the future is simply to ask for conjecture." *Id.* at 369. Moreover, as "a matter of fairness," "[v]ictim impact witnesses are prohibited from opining on the proper sentence" because "[e]motionally charged opinions should not form the basis for a verdict in a capital case regardless of whether the opinions favor death or life." *Id.* at 369-70. The *Taylor* court reasoned that the same logic applied to execution impact testimony. *See id.* The Sixth Circuit noted that the district court was careful to allow testimony from relatives about the defendant's "character, background, and value as a human being," while precluding testimony about "the impact that his execution would have on them." *Id.*

The same analysis holds true here. Execution impact testimony is not a proper mitigating consideration. The views of the defendant's friends and family in favor of a life sentence have no

more relevance at the penalty phase than the preference of any victim for a sentence of death. Testimony from the defendant's friends and family regarding the impact of his death is squarely designed to invite the jury to consider sympathy for those friends and family members—a plainly inappropriate consideration. While the defendant may offer information relevant to his own life, background, and character, he should not be permitted to offer testimony regarding the impact of his death on any third parties.

F. The Court Should Preclude Evidence Comparing this to other Capital Cases

If a penalty phase becomes necessary, the defense should be precluded from introducing any evidence or argument comparing the defendant to other capital defendants. Such arguments and evidence have been rejected in capital cases throughout the country as irrelevant, misleading, and prejudicial, and should be precluded here, as well.

1. Applicable Law

So-called "comparative proportionality" evidence that seeks to persuade capital juries that a capital sentence ought not to be imposed because, compared to other cases, the facts of a particular case are less egregious or serious, is irrelevant and misleading to the jury. Such evidence has been disallowed at the penalty phase in death-eligible cases around the country. *See, e.g.*, *United States v. Fell*, No. 01 Cr. 12 (GWC), 2017 WL 10809985, at *3-4 (D. Vt. Feb. 15, 2017) (precluding comparative proportionality evidence and noting that the FDPA requires jurors to conduct a penalty phase "on the facts related to this offense, this defendant, and these victims only."); *United States v. Williams*, 18 F. Supp. 3d 1065, 1076 (D. Haw. 2014) ("Given that standard for 'relevance' under Section 3592(a), the court agrees with and follows the many courts that have disallowed comparative proportionality evidence at a mitigation/selection phase."); *United States v. Caro*, 461 F. Supp. 2d 459, 465 (W.D.Va. 2006) ("[A]llowing the defendant during closing argument to reference totally unrelated cases in which the death penalty was not sought or the

defendant was not sentenced to death, would lead to a confusion of the issues and mislead the jury."). This rule follows the language of the FDPA and cases interpreting the statute, which require the jury to come to its determination based solely on the facts of the case and the defendant before it.

2. Discussion

Evidence regarding other capital cases is irrelevant and runs the risk that the penalty phase will instead turn into a series of mini-trials concerning the comparator cases. For these reasons, its introduction has been rejected by courts around the country and should be similarly rejected here. For example, in *United States v. Taylor*, 583 F. Supp. 2d 923 (E.D. Tenn. 2008), the defendant sought to introduce testimony concerning (i) similar or "worse" federal capital cases where the death penalty was neither sought nor imposed, and (ii) the race of other federal capital defendants and their victims, along with the penalty-stage outcome of these cases. 583 F. Supp. 2d at 933. The court precluded the evidence, reasoning that the outcomes of other cases had "nothing to do with the defendant in this case or the circumstances of his offense or any of the mitigating factors in § 3592(a)." *Id.* at 935-36. Indeed, the court continued, the jury's "decision on life or death must turn on its understanding of this case, the offense involved, and this defendant, not on the specifics of other cases and other defendants." *Id.*; *see also United States v. McCluskey*, No. 10 Cr. 2734 (JCT), Dkt. 1418 (D.N.M. Nov. 18, 2013); *United States v. Caro*, 461 F. Supp. 2d 459, 464-65 (W.D. Va. 2006). The same analysis should control here.

CONCLUSION

For the foregoing reasons, the Government respectfully submits that the Court should grant the relief requested herein.

Dated: New York, New York
February 18, 2020

Respectfully Submitted,

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IANVULLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 18 CR 16 (RJS)

AKAYED ULLAH,

Defendant. FINAL PRETRIAL CONFERENCE

----------x

New York, N.Y.
October 23, 2018
3:12 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

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United States Attorney for the
Southern District of New York
REBEKAH A. DONALESKI
SHAWN G. CROWLEY
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FEDERAL DEFENDERS OF NEW YORK
Attorneys for Defendant
AMY GALLICCHIO
JULIA L. GATTO

ALSO PRESENT: CHIRAAYU GOSRANI, Paralegal

(Case called)

THE COURT: All right. Good afternoon.

Let me take appearances from the government.

MS. DONALESKI: Good afternoon, your Honor.

Rebekah Donaleski, George Turner, and Shawn Crowley, for the government.

THE COURT: Okay. Good afternoon to each of you.

And for the defendant?

MS. GALLICCHIO: Good afternoon, your Honor.

The Federal Defenders, by Amy Gallicchio, with Julia Gatto. And present at counsel table also Paralegal Chiraayu Gosrani, here with Mr. Ullah, who is present.

THE COURT: Yes. Okay. So good afternoon to each of you. And Mr. Ullah -- I want to make sure I'm pronouncing it correctly. So you said Ullah.

MS. GALLICCHIO: Ullah.

THE COURT: Where do you put the accent?

MS. GALLICCHIO: On the ooh. Ullah.

THE COURT: Ullah.

MS. GALLICCHIO: Yes.

THE COURT: So Mr. Ullah, good afternoon.

All right. So we're going to be commencing trial next week. This is our final pretrial conference. We've got several motions *in limine* from the parties that I want to address, and also then talk about jury selection and any other

issues that you think will be relevant to next week's trial. The goal is to have this thing running smoothly.

So I'll start with the motions *in limine*. I guess the first motions are the government's motions, one of which is to -- the government wants a ruling authorizing the government to introduce nine videos that were seized from the defendant's laptop computer. I'm advised that those videos have been edited to omit any particularly gruesome or grisly images. What I've seen doesn't look terribly grisly, so I assume they've been edited out. And so there are some objections to this, but I want to make sure that I've got what you're planning to introduce, right?

MS. DONALESKI: Yes, your Honor. We've made a few modifications since we provided the videos to your Honor, mostly at the defense's request. So we've omitted all of the audio, as we noted that we would.

THE COURT: Right.

MS. DONALESKI: And then we've briefly modified the videos to omit some of Arabic language, other than where there are English subtitles. So those are the main categories of modifications that we've made, which are *de minimis*.

THE COURT: All right. And so you're opposing that with the modifications still? I just want to make sure.

MS. GALLICCHIO: Yes. Yes, based on the arguments that we made in our motions, your Honor, I don't have anything

additional to add to that, but based on those same arguments.

THE COURT: All right. So then I'll rule.

I think that they do come in as modified as direct evidence of the defendant's motivations for the attack that's the subject of the charges in this case. I think for very similar reasons as set forth by Judge Engelmayer in *U.S. v. Alametti*, I think that's Alametti. I think that this clearly goes to defendant's state of mind; it seems to me that this is fair game for the trial. The Second Circuit in *United States v. Abu-Jihaad*, also allowed the admission of a video of this sort, since it was central to proving motive and intent.

So for those reasons, I'm going to allow it.

I think it's also, in addition to being relevant to the motivations of the defendant and the December 11th attack, it's also probative of his knowledge that ISIS was a foreign terrorist organization or was engaged in terrorist activity, which is another element with respect to Count One, the material support count.

So I am going to allow it in; I think it is certainly relevant. I think arguments that the defendant didn't see them or hadn't watched them, they were simply on his computer, I think you can argue that to the jury, but I think that that's -- I think the jury could draw inferences either way, but I don't think that's a basis for precluding.

Finally, the 403 argument, that this is more

prejudicial than probative, I'm not persuaded by that. I think certainly this is probative for the reasons I just said. And I don't think that the videos are really any more unduly prejudicial or more inflammatory, I should say, than the charges themselves. So I'm not persuaded that there's a 403 problem here.

The fact that these are going to be cumulative, that's another argument that was advanced, I don't think that that's true.

Look, the government gets to prove its case. The fact that there might be other testimony or there might be stipulations or a willingness to stipulate is not by itself a basis to preclude it. So I don't think there's a cumulative argument here that would persuade me to keep it out, all right?

So if there is a request for a limiting instruction, I'd like to see the limiting instruction. I'm not opposed to that. I think an instruction that reminds the jury that this is relevant for a couple of things, and a couple of things only, and should only be considered for those purposes, would be fine. We'll have time to talk about that when we have a charge conference. But for purposes of what's coming in at trial, I think it is admissible and the government can introduce it.

All right? Is there anything else I missed on that point or anything I needed to cover?

MS. DONALESKI: No, your Honor.

MS. GALLICCHIO: No, your Honor.

THE COURT: All right.

So the next issue is the government is asking for the Court to take judicial notice of the fact that ISIS has been designated as a foreign terrorist organization. I think you don't oppose that; correct?

MS. GALLICCHIO: That's correct.

THE COURT: All right.

MS. GALLICCHIO: Actually, I think we're entering into a stipulation as well.

THE COURT: I don't plan to get into that in jury selection, unless you want me to. But I assume if the parties can stipulate to it, then you can introduce that in your case whenever you want, but I'll leave it at that. Okay?

MS. DONALESKI: That's fine. Thank you.

THE COURT: Now, we have the defendant's motions. So the defendant has motions related to the government's expert, Aaron Zelin. Is that how it's pronounced, Zelin?

MS. DONALESKI: That's correct, your Honor.

THE COURT: Mr. Zelin testified before and the government gave notice by just sort of attaching transcripts of his prior testimony, in essence, right? And so I guess the argument is that that's not sufficient notice; that you really need to be a little more surgical and provide more in the way

of chapter and verse as to what he's going to testify about.

I think that's a fair point, actually.

Now, I don't know that the relief would be excluding the testimony altogether; I think the case law suggests that that's probably not the appropriate relief in a case like this one.

So has there been any attempt since the briefing papers to narrow or further elucidate what the testimony is going to be?

MS. DONALESKI: Your Honor, as we set forth in our papers -- and as I'm happy to make clear today -- Dr. Zelin's testimony will fall into three categories:

Number one, it largely tracks the testimony he's previously provided in other cases, such as *Gamal* and *Rahimi*; and that is, namely, the history and background and ideology of ISIS and al Qaeda.

The second category is --

THE COURT: That's almost verbatim what he's already testified about.

MS. DONALESKI: Exactly, your Honor.

THE COURT: Okay.

MS. DONALESKI: The second category is the meaning and significance of the Arabic terminology that the defendant used in the Facebook post that he posted on the morning of the attack. It's an Arabic moniker backia (ph), which is part of

an ISIS slogan, which means to remain. So Dr. Zelin will be testifying about what that word means, which echoes what the defendant said in his post-arrest statement, meaning he made that statement on Facebook in order to signify to members of ISIS that the attack had been committed in their name.

THE COURT: All right. So with respect to the first part of what you said, there is then pretty clearly a chapter and verse.

Ms. Gallicchio, are you carrying the ball on this one?

MS. GALLICCHIO: I think Ms. Gatto is going to --

THE COURT: Ms. Gatto. Okay.

So you pretty much do have chapter and verse as to what he's going to say about the background and history of ISIS, right?

MS. GATTO: Yes. I would hope that some of his testimony in other cases will not be elicited here, because I think it goes beyond issues --

THE COURT: Some of it does go beyond. For example, recruitment of people to come to the peninsula to fight, that's not what's going on here, right?

MS. GATTO: No. That issue, I think there are even more precise issues for the defense, including -- and this has been provided in our notice, not just in the transcripts, but more specifically outlined by the government. Propaganda material purportedly put out by ISIS for which the government

has no evidence that Mr. Ullah reviewed or knew about. So we're concerned about that, including speeches by ISIS leaders, which, according to the government, that ISIS leader was promoting loan wolf attacks. No connection to our case, because there's just no evidence that Mr. Ullah knew about them, not found on the computer the government has seized, etc., and a real chance of misleading the jury into thinking it is related to this case.

And there are other areas that they've noted in their expert notice to us that goes beyond this case, including ISIS's presence in Bangladesh, which is not an issue here.

We're very concerned to just rely on the fact that Dr. Zelin has testified in other trials. This one is very different than the other ones. The connection to ISIS I think even the government would concede is minimal here. The government's evidence, I'm gathering, from being in the case, will be these videos, four of which they have notified they are going to play, and nine of which they are going to introduce.

THE COURT: All right. But what about the second thing that Ms. Donaleski talked about, which is the meaning and significance of certain words that were used by your client that are also words used by or rallying cries for ISIS?

MS. GATTO: So assuming our motion to preclude Mr. Zelin's testimony is denied, I don't think we have a persuasive argument that he can't testify to something

case-specific to explain to the jury a term that they may not know. Of course we'll cross him on that. But that's really my point, your Honor, it's going well beyond case-specific information.

THE COURT: The points that you've raised just now are testimony about Bangladesh and testimony about loan wolf attacks generally.

MS. GATTO: Propaganda that Mr. Ullah has no connection to, the government has no evidence that he even knows that that exists.

THE COURT: Let me stop you there and see what the government is saying about that.

Are you eliciting testimony on those subjects?

MS. DONALESKI: So first I'd like to address the arguments about the loan wolf attack.

So first, the defendant himself committed a loan wolf attack, which is one of the types of attacks that ISIS has specifically called for.

Second, one of the videos found on the laptop used by the defendant that the government intends to play at trial is a video glorifying loan wolf attackers, like Omar Mateen, the attacker who perpetrated the Pulse nightclub shooting.

So Mr. Ullah possessed a video that glorified loan wolf attackers alongside figures like Osama Bin Laden.

So Dr. Zelin will testify to the effect of loan wolf

attacks are specifically the types of attacks that ISIS has called its followers to perpetrate if they are unable to travel aboard to fight on behalf of ISIS. The video that we intend to introduce that the defendant himself possessed is exactly the type of propaganda that inspired the defendant to commit a wolf attack.

THE COURT: You are going to elicit general testimony that is then supported by the actual video seized from defendant's computer, that's what you're saying?

MS. DONALESKI: Yes, your Honor.

I'd just like to note too that the defendant made several post-arrest statements admitting that he had watched terrorist propaganda, including videos directing him how to terrorize Americans, different ways to attack Americans, that he had viewed pro-ISIS propaganda, including a specific video entitled *The Flames of War 2*, which directed followers that if they couldn't fight abroad, that they should attack the homeland, which is precisely what Mr. Ullah did.

So Dr. Zelin's testimony will elucidate those topics which directly relate to the case, because they were found on the laptop the defendant possessed, and which were mentioned in the defendant's post-arrest statement.

THE COURT: What about the Bangladesh piece?

MS. DONALESKI: Your Honor, we don't intend to elicit testimony about the Bangladesh piece from Dr. Zelin.

THE COURT: All right.

MS. GATTO: Your Honor, I'm sorry, before we close the chapter, there was a third category that we have concerns about, which is testimony related to al Qaeda, a separate and unrelated organization to this case.

THE COURT: Testimony, in other words, contrasting the styles and methods or something else?

MS. GATTO: Or any testimony about the history of al Qaeda or al Qaeda generally. Al Qaeda is just not an organization that is involved in this case in the least. So it seems unnecessary for Dr. Zelin, who has testified at length about al Qaeda in the transcripts provided to us, to testify about al Qaeda here.

THE COURT: All right.

So what's the plan on al Qaeda?

MS. DONALESKI: So three things I'd like to note, your Honor: In his post arrest the defendant said that some of the things that inspired him were lectures he listened to by Awlaki, who's a leader of al Qaeda.

Second, he made clear in his post arrest that he had committed the attack that day on behalf of ISIS, and not on behalf of al Qaeda, because ISIS was a state, but al Qaeda was a group. Dr. Zelin's testimony with respect to who al Qaeda is, Awlaki's role in inspiring others to commit jihadist attacks, and the difference between al Qaeda and ISIS directly

relates to the defendant's post-arrest statement and, of course, the attack that he committed.

THE COURT: Okay. All right.

And you want to respond to that?

MS. GATTO: Your Honor, the government here has charged an ISIS-related case.

THE COURT: Right.

Just to provide context. What Ms. Donaleski is saying is to provide context to your client's post-arrest statements.

MS. GATTO: Here's my concern, your Honor, and I'm glad we're really airing it now to make clear boundaries for Dr. Zelin's testimony.

I think that this can really cross the line to too much. Of course, based on prior rulings in different cases, they are going to get some background in, and I understand that. But the concern is that to use that to go too far from an expert, it will be very misleading for the jury; they are going to think that this case is about something that it simply is not.

THE COURT: But I think the government's point is that there is a distinction between al Qaeda and ISIS; and that your client made statements indicating that he was acting on behalf of one and not the other. So it doesn't seem that it's going to be overinclusive; it's designed to narrow, isn't it?

MS. GATTO: I'm concerned it's not, your Honor. I'm

concerned that the additional inflammatory nature of it will mislead and prejudice the jury here.

THE COURT: Well, I'm just not sure how the jury is going to otherwise make sense of statements that were made by your client and that would be introduced -- and I think appropriately introduced -- as statements of the defendant at trial.

So look, I think part of this is going to turn on how it actually is coming in. But I think as a general matter, I'm not going to exclude the testimony with respect to the loan wolf attacks, which is then relevant to the actual video seized from the computer, and references to al Qaeda that were made by the defendant.

I think that some amount of testimony to clarify and provide context for those statements and those exhibits is appropriate. So I am going to allow that. I'm not looking for a graduate course on terrorism. This is really just to provide context in light of these charges, in light of the statements and evidence being introduced in this case. So I think some amount of expert testimony to provide context is appropriate, but I don't want to have this turn into, you know, a week on al Qaeda, right?

MS. DONALESKI: Understood, your Honor.

THE COURT: You get that. A day on al Qaeda, this is just context, okay?

So I certainly think that it's relevant. I think that there has been sufficient notice that there isn't a serious argument of prejudice. And I think with these boundaries, it should be pretty clear what's permissible and what's not permissible. And we are not going to get into Bangladesh at all.

All right. So I guess I'm going to grant the government's request with those caveats.

All right. I certainly don't think that there's a 403 argument for this, unless the expert just sort of goes overboard and then I'll stop him, I promise that. Okay?

All right. Then there is, I guess, another defense motion about pre-*Miranda* statements. But the government is indicating that they are not planning to introduce any portion of statements made by the defendant to law enforcement before he was Mirandized; correct?

MS. DONALESKI: That's correct.

THE COURT: So that's mooted as a result.

All right. So those are the issues that I had that I wanted to cover in terms of motions *in limine*.

Have I missed anything?

MS. GALLICCHIO: No, your Honor.

MS. DONALESKI: No, your Honor.

THE COURT: All right.

I sent you folks a draft of the voir dire. It's

fairly lean and purposely so. So there was some proposed questions and language that you guys had included that I've not included.

Frankly, I think that some of the general questions that I'm going to ask are going to elicit hands; we'll have followup. I think what I'm inclined to do perhaps is go through the questions, see who raises their hands to different things, and then maybe have followup in the robing room or the jury room, wherever we can get enough people around a table, to follow up with individual jurors as needed.

But I'm not too worried about people being shy, and I'm not too worried about people needing four and five variations of the same question to elicit a hand raising.

So with that, is there anything else anybody wants to say? Certainly you've preserved any objections by making your proposals. If I haven't included them, your objections are preserved; you don't need to reassert them. But if there's anything else that you think I've missed or that you want to add or discuss, I'm happy to hear it.

Ms. Donaleski.

MS. DONALESKI: Thank you, your Honor.

Three things.

First, as to the length of the trial, we expect that the government's case-in-chief will be approximately a week.

THE COURT: A week. Okay.

MS. DONALESKI: A week.

So we had intended to raise this later in the discussion with respect to the trial administration, but perhaps it's safer to tell the jury that it will be approximately two weeks, including if the Court doesn't sit on Friday.

THE COURT: So I typically would not sit on Friday. And then I should say that I have to sit on the Court of Appeals the second week, Thursday morning and Friday morning. So we could do half days those days. That's what I'm inclined to do. But the new gig is going to slightly get in the way of the trial. But it didn't seem to me this was likely to go three weeks. So I can say two and-a-half weeks and then we'll finish shorter. I want to assure people that we're not going to run into Thanksgiving; they don't need to worry about that. I'm pretty confident of that, aren't you?

MS. GALLICCHIO: Oh, yeah.

MS. DONALESKI: We are, your Honor.

THE COURT: So I guess we're not going to sit Veteran's Day, because it's a federal holiday. If it were a civil trial, I might, because I would only have to persuade a court reporter. But with marshals and everything else that comes with a criminal trial, I think we're going to not sit on Veteran's Day, okay?

MS. GATTO: Judge, I'm sorry, what were the days that

would be the half days?

THE COURT: 8th and 9th. It's a Thursday and Friday of the second week.

MS. DONALESKI: The second item, your Honor, one of our witnesses will be testifying in Spanish. So we would ask that the Court ask the jury if anyone speaks Spanish and, if they do, whether they would have any difficulty following the interpreter's translation.

THE COURT: Okay. That's a standard instruction. I'll add that.

MS. DONALESKI: Thank you, your Honor.

THE COURT: There's no other languages that are going to come up?

MS. DONALESKI: That's correct, your Honor.

THE COURT: Arabic, anything else?

MS. DONALESKI: So as your Honor knows, the Arabic -- one of the videos has Arabic subtitles, alongside English subtitles. So no one will be hearing --

THE COURT: They might be reading it. I looked at your exhibit list. Some of the exhibits are described in nonRoman alphabet. So I guess I should inquire whether somebody at least reads that stuff, right?

MS. GALLICCHIO: Yes, I think I had included a question or one of us had included a question to ask whether anyone understood, read, or spoke Arabic.

THE COURT: I don't see a downside to doing it, even though there won't likely be audio of Arabic or --

MS. GALLICCHIO: I just think also -- actually we had also asked for Bengali as well, because I think some of the Facebook posts -- I'm not sure what the government intends to introduce with respect to Facebook, but some of the Facebook screenshots that have been provided to us are in Bengali. So I would ask also if the Court could inquire of the potential jurors about their language ability with respect to Bengali.

THE COURT: All right. Do you intend to introduce exhibits that have written Bengali or spoken Bengali?

MS. DONALESKI: We do not, your Honor.

THE COURT: You do not.

If there's not going to be any exhibits, then I'm not inclined to ask it. Arabic, clearly there will be some, at least screenshots, right?

MS. DONALESKI: That's fine with the government, your Honor.

THE COURT: So I'll ask about Spanish and Arabic, whether I ask the same question twice or ask it once or tailor it to listening and understanding as opposed to reading, I'll take a crack at it.

MS. DONALESKI: Actually, I'm sorry, your Honor, but I'm just recalling that in their exhibit, one of the exhibits for the videos, where the videos are listed, they are listed

with Arabic names and written in Arabic and Bengali. So unless we want to take those names out --

THE COURT: I'm not sure why I would be -- I typically send back to the jury an exhibit list. I can't imagine why I'd be sending back an exhibit list that is in a different language with a different alphabet.

MS. DONALESKI: Your Honor, in our updated exhibit list we've just changed it to be Video 1, Video 2, Video 3. So that's no longer in our updated exhibit list.

THE COURT: So bear in mind that at the end of the day I'll be sending back an exhibit list. So what are now exhibits, I guess, 1202 through 1210, at least what I have, we're going to change those, so that it's all in --

MS. DONALESKI: That's correct, your Honor.

THE COURT: -- English and Roman alphabet. Okay.

MS. GALLICCHIO: There was an actual report that did include the Arabic name of the videos, but I think we can resolve that.

THE COURT: I assume we can resolve that. We don't have to resolve that before openings; that's something that just as long as nothing is going back to the jury room that's in a language that somebody might understand, everybody else won't, and I haven't elicited who actually might understand the language, that would be a problem. So if we are all resolved that we are not sending back anything that's got a language

other than English, that's fine. If there are other languages, then that should be the subject of a question. So right now that's Arabic and Spanish, right?

MS. DONALESKI: That's correct, your Honor.

THE COURT: Okay.

MS. DONALESKI: And the third issue we wanted to raise -- and we understand the defense consents to this -- we would request that the Court select three alternate jurors.

THE COURT: Three?

MS. DONALESKI: Given that the trial may last into the second week and that the case may garner some media attention, we think that three alternates is appropriate.

THE COURT: Okay.

Do you have a thought on two versus three alternates?

MS. GALLICCHIO: Three is fine.

THE COURT: All right.

So what does that mean in terms of who we have to qualify? I know I said I was going to qualify 32. That includes 12 jurors, two alternates, ten defense strikes, six government strikes, and one strike each for an alternate. If we're going to add another alternate, do I need to give you each an extra strike?

MS. DONALESKI: Yes. I think it's Rule 24(b)(4)(B). So we should seat 34 in the initial panel.

THE COURT: 34 or 35? It's going to be -- I'm going

to add an alternate juror and strikes to each of you. So that's three more qualified jurors.

MS. DONALESKI: That's right, your Honor. Thank you.

THE COURT: So that's 35. I'm going to remind you of that right around 2 o'clock in the afternoon when we realize that we've got to qualify three more jurors. It takes a while.

I don't mind having three alternates, if you don't. I think two will probably be enough; I'll bet you a dollar we don't lose any, but you never know.

So typically I do all the questioning and then that's my plan. However, at sidebars or in the robing room, jury room, if we're doing followups there, then I would typically allow counsel to ask questions. And I'll say, Counsel, do you have any questions? And you can direct those to a particular juror. But not in open court, I don't typically do it the way they do it in the state. Judge Baer used to do that a little bit here, where like *Inherit the Wind,* the lawyers who get to ask a lot more questions of the jurors. It's not typically the way it's done here in federal court and I don't plan to do it either, okay?

All right. So that's voir dire.

Anything else on that?

MS. GALLICCHIO: Yes, your Honor.

THE COURT: Okay.

MS. GALLICCHIO: A few things.

One minor item. Just when the Court gets to witnesses, locations, and evidence --

THE COURT: I need a list of those things, right? Do I have those?

MS. DONALESKI: We'll provide it by the end of the week, your Honor.

THE COURT: Do that as quick as you can, because I don't want to be surprised.

MS. GALLICCHIO: Right. I want to make sure that the location is identified to them, which I'm sure it will be. I know that it is mentioned --

THE COURT: The Port Authority you mean?

MS. GALLICCHIO: Yes. Just because people may not recall what this incident was. Or if people have heard about this incident, I want to make sure that their recollection is refreshed sufficiently.

THE COURT: So it's funny. I always refer to it as The Port Authority; I think most people do. The Port Authority, of course, is an entity; it's not a place. The Port Authority Bus Terminal.

MS. GALLICCHIO: Right. I think we should say "The Port Authority Bus Terminal and Train Station," because I think the incident is also -- is really -- is within the train station terminal.

THE COURT: So I think we should just agree -- let's

all agree on the language. Port Authority Bus Terminal and Train Station located at 42nd Street?

MS. GALLICCHIO: Yes, I think that makes sense.

THE COURT: It's wordy, but after that I may cut it short. I don't think they are going to be confused.

MS. GALLICCHIO: Right.

THE COURT: But that's fine. Okay.

MS. GALLICCHIO: Your Honor, then with respect to Section 8, questions specific to the case --

THE COURT: Yes.

MS. GALLICCHIO: -- we did propose several questions that the Court did not include that we would ask your Honor to reconsider including, just because of the nature of this case and sort of the sensationalism of it and the coverage, of course, that it's likely to get. I do think that we want to be very careful that we pick jurors who can be fair in this case and impartial.

So I would ask your Honor to ask additional questions with respect to the effect -- in particular, question number 22 that we had proposed, whether anyone -- whether you or any family member or any close friend have been a victim of or affected by terrorism either in this country or abroad. Additionally, some of the several questions -- the following questions that we asked: 22, 23, 24, and 25, that also go into whether anyone -- any of them or any family members or friends

had served in the military and served in particularly countries such as in the war effort against terror.

THE COURT: It seems to me those are two different points.

But with respect to the first point, which is the need to ask questions about whether people have been affected by terrorism, I assume virtually everyone in my jury pool will have been affected by terrorism. If they were alive during 9/11, I think they would raise their hands in that.

So I think the questions I've asked are designed to elicit whether anybody thinks, for whatever reason, they can't be fair and impartial in this case; I think it's going to capture anybody who would have been raising their hand to the questions you pose.

I think the question you pose is going to require virtually everybody to raise their hand. I can't imagine anybody who's not going to raise their hand to that question.

So I think I've got enough questions that are designed to elicit whether people have strong feelings that would compromise their ability to be fair and impartial. I've got a couple of questions like that. So I'm going to respectfully deny the request you've got about the questions that I've already cut out.

With respect to foreign military service or being close to someone who's served in the military, it seems to me

that that's -- to the extent that somebody feels so strongly about this that they can't be fair and impartial, I think there are questions designed to elicit that. But this is not a case about being overseas.

MS. GALLICCHIO: No.

THE COURT: So why would it matter?

MS. GALLICCHIO: Well, because I think obviously people have very strong feelings about the war on terrorism and how it's played out throughout the world.

THE COURT: But you think people who have -- I'm sorry to interrupt you. But you think people who have friends or family members in the military are more likely to have strong feelings than others?

MS. GALLICCHIO: I think they might, yes. I would think so. People who are involved in the battle, on the battlefield, or overseas, or deployed I think probably do. And that's why I think that I would like us to identify who those people are and to question their qualifications to be a juror in this case.

THE COURT: All right. I'm not going to do that. I don't know that I share that view as to whether they would have stronger feelings. And it seems to me that the questions I've already asked are going to elicit affirmative responses from people who might otherwise be biased or unable to render a fair and impartial verdict. So I'm going to respectfully deny that

one too.

Were there other points on the voir dire?

MS. GALLICCHIO: Yes, your Honor.

Then with respect to -- and I can sort of pare it down. It was question number 27, which was do you have strongly held thoughts or opinions about Muslims --

THE COURT: This is your original --

MS. GALLICCHIO: This is our original question about Muslims or about Islam. And I guess really the question would be whether they have negative opinions, because certainly there is a lot of press about Islam, about Muslims in this country, about immigration, etc. And I know the Court is not going to ask questions with regard to that, but I do think that it does generate strong feelings. So I would like to be able to identify those jurors who hold those beliefs.

THE COURT: I have a general question about whether there's anything about the race or religion that would affect your ability to be fair and impartial which I think should cover this.

MS. GALLICCHIO: Well, that question I read it as -- and I've seen it in my own experience, that being people who don't feel that they can judge others because of their own religion.

THE COURT: No, no, I have one about that. But here let me find what I'm talking about.

Okay. 37. I wouldn't mind adding religion to that. Bias or prejudice, positive or negative, based on race, national origin, ethnicity, or religion. I would say that.

Look, I don't think this is a suttled case. I don't think asking a pointed question is any more likely to elicit an affirmative response than asking this question, 37, with the addition of religion. I meant to do that; I'm sorry I didn't. Okay?

MS. GALLICCHIO: Okay.

And then finally, your Honor, with respect to function of the jury in that same section, I know the Court did ask question -- is asking a question about -- about whether Mr. Ullah will testify or not.

But I would also ask your Honor to ask questions -- there's two questions which we had proposed, 62 and 63, in our submission, about the presumption of innocence and the burden of proof. Just general questions about those principles of law and whether they can follow those principles of law.

THE COURT: I certainly give that instruction earlier.

MS. GALLICCHIO: Right. But it just goes along with, sort of, the instruction about the law on whether a defendant should testify or needs to testify or not. I think it's important to know whether jurors can follow the fundamental principles of law that a person is presumed innocent and that it's the government's burden to prove them guilty beyond a

reasonable doubt.

THE COURT: All right. I have a general question that maybe didn't make it. So I'll take a crack at that, and I'll get you something later this week.

MS. GALLICCHIO: Thank you.

THE COURT: Okay. So that's the voir dire.

So we'll start at 9:30; but I think the reality is we won't get jurors until closer to 10:30. I think we'll go till about 1, that's when I usually break for lunch. On most days we'll break for lunch at 1, so you can kind of bank on that. I expect the jury selection will take probably most of the day.

How long are the openings? How long are you anticipating your opening to be?

MS. DONALESKI: About ten minutes, your Honor.

THE COURT: Ten minutes. Okay. And?

MS. GATTO: Something like that as well.

THE COURT: Let's plan on opening and starting with a witness or two on Monday. It's hard to know how far we'll get with jury selection; sometimes you really can't know until you're in the middle of it. But let's plan on that. I don't want to lose any time unnecessarily; so be prepared to open and be prepared to have your first couple of witnesses here.

I assume you guys are already on this, but there really, I don't think, needs to be any surprises in this case. So please, government, keep defense counsel apprised of

witnesses. Sometimes orders change, we all know that. That sometimes happens. But keep it to a minimum. And when it's happening, give them plenty of advanced notice so they can sufficiently prepare for cross, know what's coming next, and be prepared at breaks to say, By the way, we want to discuss an evidentiary issue that is going to come up with the next witness.

I really don't want to have sidebars; I don't like to have the jury cooling their heels in the jury room. I want to make sure when they are here, we are absolutely hearing testimony virtually every minute of that time. That means we'll work during lunch, we'll work during breaks, we'll work before and after to resolve issues. But that goes a lot more smoothly if the government is telling defense counsel the order of witnesses, if it's changing, when it's changing, and why it's changing, and generally, I think, fronting what evidence is coming in through what witnesses. Again, I think it's best to front these things so that we can deal with issues efficiently. Okay?

MS. DONALESKI: Yes, your Honor.

THE COURT: Great.

All right. So who are your first couple of witnesses?

MS. DONALESKI: We anticipate our first few witnesses will be David Wall, one of the victims.

THE COURT: Okay.

MS. DONALESKI: Sean Gallagher, one of the first responders. And Steve Fullington, one of the FBI agents who processed the blast scene.

THE COURT: Okay. All right.

That will take us through Monday, right?

MS. DONALESKI: Yes, your Honor.

THE COURT: Okay. So you guys talk. You don't generally need to keep me apprised; I'll probably ask at the end of each day who's next, what's next, what can we expect, because that helps me also to get prepared for witnesses and to review exhibits relevant to that witness, to look at the 3500 material. But it's more important that you talk to each other, okay?

All right. Is anybody planning on using any technology during the openings?

MS. DONALESKI: No, your Honor.

MS. GALLICCHIO: No, your Honor.

THE COURT: No. Okay. So that's fine.

In terms of technology, we've got screens. I assume there's a lot that's going to be shown on screens. Are there any large screens that are going to get put up or anything?

MS. DONALESKI: No, your Honor. We'll just be showing evidence on the screen and using the Elmo.

THE COURT: Okay. So that's fine.

All right. I think that that should be pretty

straightforward.

Other issues that anybody has got?

Let's talk about clothing for Mr. Ullah.

MS. GALLICCHIO: Yes, we have an order ready for the Court to sign.

THE COURT: Okay. If you want to hand that up or send it to me --

MS. GALLICCHIO: I think we already did.

THE COURT: Oh, you did.

MS. GALLICCHIO: Oh, we're going to email it.

THE COURT: Okay. So email me that and then we'll take care of that right away. Hopefully that should be no problem.

MS. GALLICCHIO: Thank you.

THE COURT: Okay.

MS. DONALESKI: Just a couple issues, your Honor.

First, as you can tell, we have 18 witnesses. We do expect the trial will move quite quickly. And at this rate we expect to rest as soon as Thursday.

THE COURT: Thursday of the first week?

MS. DONALESKI: Yes, your Honor.

THE COURT: Okay.

MS. DONALESKI: If the summations are on Friday, would your Honor intend to sit that first Friday?

THE COURT: I hadn't planned on it, candidly, no. But

I hadn't expected that we might rest that quickly.

MS. DONALESKI: Your Honor, we've spoken with the defense, and I think our collective preference would be to sum up on Monday.

THE COURT: Okay. You can bank on that. We will not sit on Friday. I think that's the plan. I'll tell the jury we're not sitting Friday.

MS. DONALESKI: That's fine, your Honor.

THE COURT: Okay.

MS. DONALESKI: The second issue is to the extent your Honor can provide the parties a copy of the proposed request to charge sooner rather than later, we'd appreciate it. There are significant differences in the proposals the parties made with respect to Counts One and Five as a legal matter. And we do anticipate it will affect our summations, so we would just --

THE COURT: We will have a charge conference before summations for sure. There's always, I think, a philosophical question as to when you want to have the charge conference. I guess we could have it tomorrow if we wanted, but we want the benefit of knowing how the case came in. And I think we just end up doing it twice if that were the case.

So we'll have a charge conference before summations, you can bank on that. We'll make sure that happens.

But when do you think is the earliest we might have summations, Monday?

MS. GALLICCHIO: Right. We'd like to have it before, before the end of the week, the charge conference.

MS. DONALESKI: So perhaps Thursday afternoon, your Honor, or Friday morning?

THE COURT: Okay. I guess if you think it's going to go that fast, then sure. Okay.

MS. DONALESKI: And your Honor, we'd just like to put one thing on the record.

The government extended a plea offer to the defendant in June 2018 to Counts One, Two, Three, Five, and Six. And that plea offer carried a mandatory minimum of 30 years and a maximum of life, with guidelines of life. We understand the offer was conveyed to the defendant and rejected.

THE COURT: Okay. Is that accurate?

MS. GALLICCHIO: That's accurate.

THE COURT: Okay. So I'm prepared to take your representation, unless anybody thinks I should ask Mr. Ullah about that.

MS. DONALESKI: We do not, your Honor.

THE COURT: You don't either, right?

MS. GALLICCHIO: No, it's not necessary.

THE COURT: All right.

So in any event, it's on the record that a plea offer was made or extended by the government; it was conveyed by the defendant's counsel; and the defendant elected not to accept

it, as is his right.

All right. Anything else, Ms. Gallicchio, Ms. Gatto?

MS. GALLICCHIO: No, your Honor, nothing else.

THE COURT: Okay. Anything else, Ms. Donaleski?

MS. DONALESKI: No. Thank you, your Honor.

THE COURT: Are they going to do anything at the trial, these people?

MS. DONALESKI: They certainly will, your Honor.

THE COURT: All right. As a taxpayer, I hope so.

All right. So Mr. Ullah, we're going to pick up again then on Monday. So if you have questions along the way, obviously talk to your lawyers; and if you think there's something you need to bring to my attention, then tell them and they'll take it up with me. Okay?

THE DEFENDANT: Okay.

THE COURT: All right. So Mr. Weiser, am I allowing the peanut gallery to jump in here?

MR. WEISER: I'm Ben Weiser with *The Times*.

We would -- just on behalf of the press, could you ask -- would you be willing to ask the parties, particularly the government, to indicate at the end of each day who the next day's witnesses will be? This has been done.

THE COURT: I will typically ask on the record, so I think you can count on that.

MR. WEISER: Perfect. That would be great.

THE COURT: That way they are not having -- I'm not obliging them to have communications with the press. I'd rather not do that. If they want to, they can; but they may prefer to just do it in open court. I'll say, Okay, who do we have next? And they'll tell me. And that will be good enough for you.

MR. WEISER: That's exactly what we wanted.

Great. Thank you.

THE COURT: Also we should keep in mind there is a public right of access, not unchecked. I mean there are situations where it can be overcome, but I want to make sure that we are taking that seriously. So for purposes of -- I want you folks to think about this. For purposes of followup in the jury room during voir dire, in the past in cases where there has been press coverage, I would allow the press to sit in on that, and so that's what I envision doing. So everybody --

MS. DONALESKI: That's fine with the government, your Honor.

THE COURT: No objection to that?

MS. GALLICCHIO: No, your Honor.

THE COURT: The goal is just to make sure that the person who we're following up with is not tainting the rest of the jury pool if we have a concern about that. But this will not be sealed or anything like that.

MS. GALLICCHIO: I mean I guess one concern I would have is just the witness' willingness to be open.

THE COURT: Juror.

MS. GALLICCHIO: I'm sorry, the jurors' willingness to be open and candid if they think that their -- I guess the option is to do it in open court, which obviously the press would be here. But I suppose if we don't make a big deal of it --

THE COURT: I wouldn't. So what I've done in the past, and you tell me if you think it works, is it's a fairly large jury room back here. I would have counsel around the table; so I'd be at one end of the table. I'd have the chair closest to me for the juror. I'd have then facing the juror the attorneys. And then I would have, probably along the wall, clerks and press and probably just that. And I wouldn't identify anybody. The lawyers would have already been identified to the jurors during the voir dire. Maybe one of my clerks would have been. But for the most part, people along the wall will not -- the jurors can speculate, but I think they'll be focused on the question and probably won't even have within their line of sight the other people in the room. I think that that seems to be the best way to do this. If you think otherwise, you'll let me know. We have some time to tinker with that.

MS. GALLICCHIO: That's fine.

THE COURT: We may not need much in the way of follow-up voir dire, but it's hard to know.

Okay. All right. Okay. Great. Thanks very much.

If there is anything that we need to cover between now and Monday, of course, let me know and we can reconvene if we have to, okay?

Good. Thanks a lot. Have a nice day.

Let me thank the marshals, as always, and the court reporter also. Thanks.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	
-v-	S1 16-CR-398 (PAE)
SAJMIR ALIMEHMETI,	OPINION & ORDER
Defendant.	

PAUL A. ENGELMAYER, District Judge:

Defendant Sajmir Alimehmeti is charged in a two-count Superseding Indictment with (1) knowingly and intentionally providing and attempting to provide material support to a foreign terrorist organization ("FTO"), namely, the Islamic State of Iraq and al-Sham ("ISIS"), in violation of 18 U.S.C. §§ 2339B and 2; and (2) attempting to fraudulently procure a United States passport to facilitate an act of international terrorism in violation of 18 U.S.C. § 1542. Dkt. 70. Trial is set to commence January 29, 2018.

Pending before the Court are the parties' fully briefed motions *in limine*, which cover a variety of subjects. *See* Dkts. 72 ("Gov't Mot."), 74 ("Def. Mot."), 88 ("Gov't Opp."), 95 ("Def. Opp."). This decision resolves Alimehmeti's motion and most aspects of the Government's.[1] The Court also addresses, and rejects, a defense claim that the Superseding Indictment returned in late November materially changed the issues to be tried.

[1] In a separate decision, the Court will resolve the Government's motion that seeks partial courtroom closure and implementation of certain protective measures with regard to material the Government expects to produce pursuant to 18 U.S.C. § 3500 and/or *Giglio v. United States*, 405 U.S. 150 (1972).

I. Factual Background[2]

The Government anticipates proving the following at trial:

Alimehmeti is a 24-year-old native of Albania who, prior to his May 2016 arrest in this case, resided in the Bronx.

On October 24, 2014, Alimehmeti was denied entry into the United Kingdom at Manchester Airport after U.K. authorities discovered camouflage clothing and nunchucks in his luggage.

On December 18, 2014, Alimehmeti was again denied entry into the U.K. at Heathrow Airport. Afterwards, U.K. authorities seized a laptop computer and cellphone from him. Those devices contained what the Government describes as "terrorist propaganda materials." These include images of jihadist fighters and the black flag used by ISIS, multiple videos disseminated by ISIS media outlets celebrating military exploits and executions of captives, and audio files of lectures promoting jihad and martyrdom by Anwar al-Awlaki, the now-deceased leader of al Qaeda in the Arabian Peninsula. The devices also contained images of Alimehmeti making an index-finger-pointing gesture commonly used to indicate support for ISIS. Further, the devices contained records of an online chat in which Alimehmeti attempted to facilitate an ISIS supporter's travel to Syria to join ISIS by providing contact information for an ISIS member who could arrange the travel. He also displayed an ISIS flag on his apartment wall.

In spring 2015, Alimehmeti began to purchase knives and military-style gear over the internet. That September, two undercover law enforcement officers ("UC-1" and "UC-2") made

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[2] The following summary of the facts the Government intends to establish at trial is based on the allegations set forth in the Complaint on the basis of which Alimehmeti was arrested in May 2016 and the Government's memorandum of law in support of its motions *in limine*. *See* Dkts. 1, 72. The Court recites these allegations solely to provide context for the motions *in limine*.

contact with Alimehmeti through his associates. During the ensuing months, Alimehmeti participated in numerous recorded meetings with UC-1 and UC-2. During these, Alimehmeti repeatedly expressed support for ISIS, played ISIS propaganda videos, and indicated his desire to travel to Syria to join ISIS.

On October 23, 2015, Alimehmeti submitted an application for a U.S. passport. There, he claimed that he had lost his passport by leaving it on a train. During conversations with the undercover officers, however, Alimehmeti confided that his passport had not been lost, and that he instead sought a clean passport to facilitate his efforts to travel abroad to join ISIS.

Meanwhile, Alimehmeti continued to voice support for ISIS with other associates. In November and December 2015, Alimehmeti told one ISIS supporter by phone that he wished to join ISIS. He told another that he sought to radicalize other individuals in his neighborhood.

In February 2016, UC-2 introduced Alimehmeti to another undercover FBI employee ("UC-3") posing as an ISIS supporter. On May 9, 2016, UC-2 showed Alimehmeti a photograph of UC-3 indicating that UC-3 had successfully reached Syria and joined ISIS. Alimehmeti expressed his excitement and desire to be put in contact with the "connections" who had purportedly facilitated UC-3's travel.

On May 16, 2016, UC-2 told Alimehmeti that an associate of UC-3—in fact, another undercover FBI employee ("UC-4")—planned to travel to New York the following day in anticipation of flying to Syria to join UC-3. Alimehmeti indicated he would like to travel with UC-4. During the same meeting, Alimehmeti played an ISIS propaganda video showing the decapitation of a captive set to Islamic music. He stated that such videos motivated him while he exercised.

The next day, UC-2 introduced Alimehmeti to UC-4. Alimehmeti asked UC-4 how he intended to reach Syria. Alimehmeti explained that he had saved $2,500 for his own travel to join ISIS once he had obtained a passport in a different name. UC-2 then asked if Alimehmeti would assist UC-4 by taking him to obtain supplies and then accompanying him to the airport.

Alimehmeti agreed and took UC-4 to several stores. There, he helped UC-4 select and purchase supplies including boots, a cellphone, a compass, a bag, and a flashlight. Alimehmeti also advised UC-4 regarding the most secure encrypted messaging applications to use in communicating with other ISIS members. Alimehmeti then escorted UC-4 via subway to a hotel in Queens to meet with the individual who purportedly had secured UC-4's travel documents. While waiting in the hotel lobby for UC-4 to return, Alimehmeti downloaded encrypted messaging applications onto the cellphone that he had helped UC-4 purchase. He also wrote his contact information on a piece of paper and asked UC-4 to give it to the purported facilitator. At some point that day, Alimehmeti also told UC-4 that he was "ready to fucking go with" UC-4 to Syria. Following the meeting with the purported facilitator, Alimehmeti accompanied UC-4 to John F. Kennedy International Airport, where UC-4 was to begin his purported journey to Syria.

II. Procedural History

A. The Complaint and the Indictments

On May 23, 2016, a sealed Complaint was filed, on the basis of which a warrant was issued for Alimehmeti's arrest. Dkts. 1–2. On May 24, 2016, the FBI arrested Alimehmeti. A search of his apartment revealed an ISIS flag, combat knives, military-style equipment, $2,400, and a cellphone and laptop containing various forms of terrorist propaganda. The same day, the Complaint was unsealed.

On June 7, 2016, a grand jury returned Indictment 16 Cr. 398 (PAE). It charged Alimehmeti with one count of providing material support to an FTO in violation of 18 U.S.C. §§ 2339B and 2 ("Count One"); and one count of attempting to fraudulently procure a U.S. passport in violation of 18 U.S.C. § 1542 ("Count Two"). *See* Dkt. 8. On June 9, 2016, Alimehmeti entered a plea of not guilty. Dkt. 12 at 5.

On May 8, 2017, this Court granted the Government's *ex parte* motion for a protective order pursuant to the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA"). Dkt. 54. And on September 22, 2017, the Court denied Alimehmeti's motion to suppress certain evidence obtained and derived from searches conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"). Dkt. 67.

On November 28, 2017, the grand jury returned a Superseding Indictment, S1 16 Cr. 398 (PAE). It was identical in all material respects to the original Indictment, save that it modified Count Two so as now to charge Alimehmeti with attempting to fraudulently procure a U.S. passport specifically to facilitate an act of international terrorism. Dkt. 70.

B. The Motions *in Limine*

On December 8, 2017, the parties filed motions *in limine*.

Alimehmeti brings one motion: He asks the Court to preclude the Government from cross-examining Alimehmeti on his prior convictions. *See* Dkt. 74.[3]

The Government brings seven: It asks the Court to (1) preclude Alimehmeti from referring to the fact that certain materials were obtained through FISA searches; (2) admit into evidence certain terrorist propaganda materials recovered from Alimehmeti's personal devices in

[3] Alimehmeti later filed a supplemental letter alerting the Court that Alimehmeti had also once been adjudicated a youthful offender. *See* Dkt. 79.

his apartment; (3) admit evidence of Alimehmeti's receipt and dissemination of terrorist propaganda materials while detained in the Metropolitan Correctional Center ("MCC") following his arrest in this case; (4) preclude Alimehmeti from offering his own out-of-court hearsay statements; (5) preclude Alimehmeti from presenting an entrapment defense unless he proffers evidence capable of supporting such a defense; (6) take judicial notice at trial of the designation of ISIS as an FTO; and (7) implement certain protective measures relating to the testimony and section 3500 material of four undercover FBI employees. *See* Dkt. 72. The Government also filed under seal a classified motion pursuant to section 6 of CIPA providing further information in support of its argument for protective measures.

On December 12, 2017, the Court held a conference to arraign Alimehmeti on the Superseding Indictment. The Court also explored with counsel issues raised by the motions *in limine*. Relevant here, at that conference, the Government agreed to narrow in two ways the scope of its motion to admit terrorist propaganda materials that Alimehmeti had received and disseminated in the MCC. First, it agreed not to elicit at trial the identity of, or the offenses committed by, the persons with whom Alimehmeti had shared such materials, which included Ahmad Khan Rahimi, the alleged "Chelsea bomber" who was recently convicted on federal charges stemming from a September 2016 bombing in Manhattan. Second, it agreed not to establish or argue at trial that the sharing of propaganda materials in the MCC was itself a violation of any prison rule or discovery restriction.

On December 13, 2017, following up on the defense contention at the prior day's conference that the Superseding Indictment had materially expanded the issues to be tried, the Court directed the parties to file letters on that point. Specifically, the Court sought the parties' views whether, (1) before the Superseding Indictment, the defense could reasonably have

anticipated that the Government might contend in support of Count One that a reason Alimehmeti had sought to travel abroad was for the purpose of facilitating an act of international terrorism; and (2) whether evidence of such travel by Alimehmeti would have been admissible to establish that count. Dkt. 78. On December 21, 2017, the parties timely filed their responses. *See* Dkts. 80–81.

On December 21 and 22, 2017, respectively, Alimehmeti and the Government filed their oppositions to each other's motions *in limine*. *See* Dkts. 88, 92, 95.[4]

C. Alimehmeti's Counsel's Potential Conflict

On December 21, 2017, the Government also raised for the first time a potential conflict of interest arising from Alimehmeti's having allegedly shared terrorist propaganda with other inmates in the MCC—the subject of one of the Government's pending motions. It noted that Alimehmeti's counsel, the Federal Defenders of New York (FDS), concurrently also represented the two other MCC inmates (Rahimi and a defendant referred to as "Defendant-1") alleged to have participated in the sharing with Alimehmeti of terrorist propaganda material. *See* Dkt. 80. The Government urged the Court to hold a hearing pursuant to *United States v. Curcio*, 680 F.2d 881, 889–90 (2d Cir. 1982), on that issue. The Court scheduled a conference for December 22, 2017 to address issues related to the potential conflict of interest. Dkt. 82.

On December 22, 2017, the Court conducted the first phase of a *Curcio* hearing. The Court explored with counsel the ways in which FDS's representations of its two other MCC-housed clients could affect its representation of Alimehmeti if the Court admitted the evidence of sharing of terrorist propaganda materials. The Court engaged in a colloquy with Alimehmeti to

[4] With one exception: With an extension granted by the Court, *see* Dkt. 84, Alimehmeti, on December 29, 2017, filed his brief in response to the Government's classified briefing on the motion *in limine* seeking, *inter alia*, partial courtroom closure.

assure his understanding of these issues. The Court also appointed Anthony Strazza, Esq., as conflict-free counsel to consult with and advise Alimehmeti on whether or not to waive the potential conflict presented by the concurrent representation. The Court scheduled a January 2, 2017 hearing to follow up on this inquiry, in the expectation that Alimehmeti would then be in position to knowingly waive—or decide not to waive—the potential conflict.

On December 28, 2017, FDS submitted a letter stating that, regardless of whether Alimehmeti waived the potential conflict, it would have to withdraw as his trial counsel if the Court admitted the evidence of Alimehmeti's sharing of terrorist propaganda material with its other two clients. It stated that FDS "will face irreconcilable ethical obligations if the Court admits the MCC evidence at [Alimehmeti's] trial," and that, "[u]nder those circumstances, [FDS] would ask to be relieved as counsel to all three defendants [*i.e.*, Alimehmeti, Rahimi, and the third defendant] because [FDS] do[es] not 'reasonably believe' that [it] will be able to provide competent and diligent representation to each affected client.'" Dkt. 93 at 1 (quoting N.Y. Rule of Prof'l Conduct 1.7(b)(1)).

On December 31, 2017, the Government responded. It argued that potential conflicts would exist affecting FDS's representations of all three clients regardless of whether the Court admitted the MCC evidence. It argued, however, that each client's conflict was waivable and that a *Curcio* inquiry ought to be conducted as to each client by the judge responsible for that client's case. The Government argued further that FDS's bid to withdraw was premature, pending the outcome of these *Curcio* proceedings, including Alimehmeti's. *See* Dkt. 94.

On January 2, 2018, the Court conducted the continuation of the *Curcio* hearing. On questioning from the Court, Alimehmeti requested more time to discuss conflict-related issues with Mr. Strazza. The Court therefore continued the *Curcio* hearing to January 5, 2018. At the

January 2 hearing, the Court also afforded defense counsel an opportunity, *ex parte*, to elaborate concretely on the ways in which conflict-free counsel might seek to combat the MCC evidence, and to elaborate upon why FDS's multiple representations might inhibit FDS from pursuing some of these avenues.

III. Applicable Legal Standards

"The purpose of an *in limine* motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." *Hart v. RCI Hosp. Holdings, Inc.*, 90 F. Supp. 3d 250, 257–58 (S.D.N.Y. 2015) (internal quotation marks omitted). Evidence should not be excluded on a motion *in limine* unless it is "clearly inadmissible on all potential grounds." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996) (internal quotation marks omitted). A court's ruling on such a motion is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in [a party's] proffer." *Luce v. United States*, 469 U.S. 38, 41 (1984).

Several issues raised by the motions *in limine* here turn on application of Federal Rule of Evidence 403. That Rule provides that a district court may exclude "relevant evidence"—defined elsewhere as material evidence having "any tendency to make a fact more or less probable than it would be without the evidence," Fed. R. Evid. 401—if its probative value is substantially outweighed by a danger of one or more of the following: "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

IV. Analysis

The Court will first address Alimehmeti's motion; then the Government's; and then the parties' dispute whether the Superseding Indictment materially altered the issues in this case.

A. Alimehmeti's Motion

Alimehmeti seeks an order barring the Government from introducing evidence of his prior convictions, should he testify. Def. Mot. at 1–2. On September 6, 2012, Alimehmeti pleaded guilty to (1) assault in the third degree in violation of New York Penal Law § 120.00(1); (2) forcible touching in violation of New York Penal Law § 130.52; and (3) public lewdness in violation of New York Penal Law § 245.00(a). Earlier, Alimehmeti had once been adjudicated a youthful offender. *See* Dkt. 79.

Rule 609 permits impeachment by evidence of a criminal conviction where (1) the crime was a felony and, if the witness is a defendant, where the probative value of the evidence outweighs its prejudicial effect to that defendant, or (2) the crime, whether felony or misdemeanor, required the establishment of a dishonest act or false statement. Fed. R. Evid. 609(a)(1), (2). Where the conviction was a juvenile adjudication, such adjudication cannot be offered against the testifying defendant. *See* Fed. R. Evid. 609(d)(2).

The convictions here, Alimehmeti argues, are not properly received under Rule 609, because none was a felony, *see* Fed. R. Evid. 609(a)(1), and because none required proof of a dishonest act or false statement, *see* Fed. R. Evid. 609(a)(2). And, he argues, his youthful offense is inadmissible under Rule 609(d)(2). The Government, in response, states that it does not intend to seek to elicit the misdemeanor convictions or youthful offender adjudication at trial. Gov't Opp. at 2. But it reserves the right to seek leave to do so if the defense opens the door at trial to the subject. *Id.*

The Court grants Alimehmeti's motion to exclude such evidence. It is undisputed that Alimehmeti's misdemeanor convictions did not involve as an element dishonesty or a false statement. Accordingly, these are inadmissible under Rule 609. And the youthful offender adjudication is inadmissible under Rule 609(d). On the present record, there is no basis on which these could properly be admitted.

In so ruling, of course, the Court reserves the right for the Government to seek leave to offer such evidence in the event the trial takes an unexpected course. The Government is correct that under some circumstances, otherwise inadmissible criminal adjudications may be properly received on other grounds. If, for example, Alimehmeti were to offer testimony inconsistent with the existence of his prior offenses, such testimony might properly be rebutted by evidence of his convictions. *See* Fed. R. Evid. 404(a)(2)(A) ("[A] [criminal] defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it."); Fed. R. Evid. 609, advisory committee note to 1974 enactment ("Notwithstanding [subdivision (a)], proof of any prior offense otherwise admissible under Rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions."); *United States v. Weisser*, 417 F.3d 336, 346 (2d Cir. 2005) (approving impeachment on cross-examination through evidence of prior conviction "[o]nly after [the defendant] opened the door by testifying that he was not sexually interested in minors"). The Court's ruling granting Alimehmeti's motion *in limine* is premised on these doors not being opened at trial.

B. The Government's Motions

1. Reference to FISA Searches

On September 22, 2017, this Court denied Alimehmeti's motion to suppress certain evidence obtained through FISA searches. Dkt. 67. The Government now seeks an order precluding the defense from referencing at trial the fact that any piece of evidence derived from FISA searches. Gov't Mot. at 9. The defense does not object, Def. Opp. at 1, and the Court independently concludes that the order sought by the Government is warranted.

Where the Court has held lawful the process by which certain evidence was searched and/or seized, the legal authority pursuant to which the searches and or seizures were conducted is not relevant. *See United States v. Santiago*, 2 F. App'x 129, 130–31 (2d Cir. 2001) (jury charge correctly stated the law in directing jury not to consider whether it approved or disapproved of how certain properly admitted evidence was obtained); Transcript, *United States v. El Gammal*, No. 15 cr. 588 (ER), Dkt. 142 at 25 (Dec. 29, 2016) ("[T]he mere fact that some evidence was derived from a FISA-authorized search is irrelevant to any issue that the jury would have to find at trial."). Here, the Court has held lawful the receipt of the FISA evidence; the legal authority pursuant to which this evidence was obtained is, therefore, irrelevant. And permitting reference to FISA searches at trial risks unfair prejudice to both sides. It may harm the Government to the extent jurors may have negative views, or be confused, about these law enforcement techniques; it may harm the defendant to the extent jurors may infer from the fact that FISA procedures were used that the defendant has been deemed a threat to national security and is therefore more likely guilty of the pending charges.[5]

[5] Reference at trial to the fact that certain evidence was received pursuant to FISA enhances the risk that follow-on questioning, undertaken to contextualize this fact, might inadvertently reveal

Accordingly, the Court precludes any reference to or cross-examination on the fact that certain materials were obtained through FISA searches.

2. Pre-Arrest Evidence of Terrorist Propaganda Materials

The Government seeks to introduce certain pro-terrorist propaganda videos, images, audio files, and documents recovered from electronic devices seized from Alimehmeti's home. Gov't Mot. at 14. Although the Government reserves the right to alter its final list of exhibits to be offered at trial, *id.* at 19, it currently anticipates offering:

> (1) Portions of ISIS propaganda films glorifying ISIS and calling for Muslims around the world to join the cause. The videos include extensive, sometimes graphic violence. The Government represents that it will refrain from offering any footage of executions or any footage showing severed heads or mutilated bodies.
>
> (2) Images promoting jihad and ISIS without any depiction of graphic violence.
>
> (3) Portions of audio files containing lectures by al-Awlaki.
>
> (4) Portions of audio files containing music celebrating jihad, ISIS, and Osama bin Laden.
>
> (5) Pro-ISIS documents promoting ISIS and terrorism, including one depicting a group of prisoners about to be beheaded.

Id. at 17–19.

The Government argues that Alimehmeti's possession of these materials is admissible for two purposes: first, as direct evidence of his motive and intent to provide support to ISIS, and, second, to demonstrate his knowledge that ISIS was a designated FTO or a group engaged in

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classified information. While this fact is not necessary to Court's decision applying Rule 403, it points to the same conclusion.

"terrorist activity" or "terrorism," which knowledge is an element of the offense charged in Count One. *Id.* at 20–28.[6]

Alimehmeti concedes that the materials he possessed, as a general proposition, are relevant evidence. Def. Opp. at 4. Nevertheless, he urges the Court to preclude some portions of them under Rule 403 as cumulative, as unfairly prejudicial, and/or as rendered irrelevant by an anticipated stipulation. *Id.* at 5. Specifically, he argues, first, that evidence of this nature that is received ought to be limited in quantity, and in particular that the jury should not be exposed excessively to materials that depict graphic violence. *Id.* at 5–7. Second, he represents that the defense is prepared to stipulate at trial that Alimehmeti knew that ISIS was either a designated FTO or a group that engages in "terrorism" or "terrorist activity." *Id.* at 1, 4. That concession, he argues, should preclude the Government from relying on the propaganda materials he possessed to prove his knowledge that ISIS was a designated FTO or involved in terrorism. *Id.* at 4–5.

The Court will permit the materials possessed by Alimehmeti to be received at trial, subject to appropriate limitations to guard against unfair prejudice and cumulativeness at trial. This evidence is highly probative as to multiple issues at trial.

First, as Alimehmeti is charged with *knowingly* providing or attempting to provide material support, the Government must prove that Alimehmeti acted intentionally, rather than by

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[6] The Government separately states in a conclusory footnote that, if not admissible as direct evidence, Alimehmeti's possession of these materials independently would be "admissible pursuant to Rule 404(b) as other act evidence of Alimehmeti's preparation, plan, knowledge, motive, intent, absence of mistake, and lack of accident." *Id.* at 28 n.8. Because the Court here holds these materials substantially admissible as direct evidence under Rules 402 and 403, and because the Government has not developed a distinct argument under Rule 404(b), the Court declines to address here the Government's claim of an alternative basis for admission under that Rule.

mistake or accident. *See United States v. Al-Kassar*, 660 F.3d 108, 129 (2d Cir. 2011).[7] The propaganda materials bear on whether Alimehmeti had the required state of mind. Alimehmeti's possession of them suggests that he was supportive of terrorist ideology in general and of ISIS in particular. The inference logically follows that any acts of support Alimehmeti provided or attempted to provide to ISIS, including by traveling abroad himself or by facilitating the travel of another, were provided with awareness that they would tend to support ISIS, and for reasons relating to ISIS. *See United States v. Abu-Jihaad*, 630 F.3d 102, 133–34 (2d Cir. 2010) (affirming holding that "the pro-jihadist contents of the videos were relevant to understanding [the defendant's] motive and intent").

Second, such materials provide important "background for the events alleged in the indictment" and "enable the jury to understand the complete story of the crimes charged." *United States v. Reifler*, 446 F.3d 65, 91–92 (2d Cir. 2006). Here, the materials are essential context for the Government's allegations that Alimehmeti became radicalized—and thereby developed a motive and intent to provide support for ISIS—at least in part through his exposure to and apparent enthusiasm for such materials. *See United States v. Salameh*, 152 F.3d 88, 110–11 (2d Cir. 1998) (per curiam) (affirming admission of materials including videotape of bombing in part because they provided relevant background).

Third, Alimehmeti has indicated that he may pursue an entrapment defense at trial. *See infra* section IV.B.5. To the extent he does so, the propaganda materials bear, potentially quite significantly, on whether Alimehmeti was predisposed to provide material support to ISIS. Specifically, his possession of these materials tends to support an inference that as a result of his

[7] The Government need not prove, however, that Alimehmeti harbored a "specific intent to further the organization's terrorist activities." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16–18 (2010).

enthusiasm for and devotion to ISIS, Alimehmeti was "ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity to do so." *See United States v. Salerno*, 66 F.3d 544, 547 (2d Cir. 1995) (internal quotation marks omitted).

Fourth, and finally, some of these materials tend to demonstrate Alimehmeti's knowledge that ISIS was a designated FTO or involved in terrorism. Specifically, the jury may infer such knowledge from Alimehmeti's possession of materials describing or depicting acts of terrorism undertaken by ISIS. And it is no answer that Alimehmeti is prepared to stipulate that he knew ISIS was a designated FTO or engaged in terrorism, *see* Def. Opp. at 4–5, as it is well established that, ordinarily, the Government is entitled to prove its case and develop its narrative in the manner it sees fit, subject to Rule 403, notwithstanding a defense offer to stipulate. *See Old Chief v. United States*, 519 U.S. 172, 187–89 (1997); *see also Salameh*, 152 F.3d at 122 (citing *Old Chief* to admit testimony and photographs of bombing victims notwithstanding defendants' offer to stipulate to their death and injury).

To be sure, as the defense properly notes, aspects of the materials Alimehmeti possessed do implicate countervailing interests under Rule 403. In particular, as the Government's motion itself recognizes, it will be important to limit in scope the materials displayed to the jury that contain particularly graphic violence, because such imagery may create unfair prejudice in a case where the defendant is not alleged himself to have engaged in or promoted violence of this nature. Secondarily, while the volume of terrorist propaganda material that Alimehmeti possessed is properly made known to the jury, it is conceivable that the manner by which voluminous material is published to the jury could implicate considerations of delay.

At this stage, however, the Court is unable to apply these familiar principles, because the Government has not yet identified the particular exhibits of this nature that it intends to offer, or

the means by which it proposes to publish them, and the defense has not yet had an opportunity to make arguments keyed to specific aspects of the Government's offered proof. The Court thus cannot conduct a granular balancing analysis under Rule 403—*i.e.*, it cannot evaluate the materials "in their entirety" before deciding whether, for example, Rule 403 requires "approving only selected excerpts for display to the jury." *Abu-Jihaad*, 630 F.3d at 133. To avoid delay during trial, the Court expects the Government, meaningfully in advance of trial, to identify for the defense the specific exhibits of this nature it seeks to offer, so that any disputes between the parties as to the application of Rule 403 can be crystallized and resolved expeditiously.

To the extent the defense offers to stipulate to Alimehmeti's knowledge of ISIS's status as a designated FTO or involved in terrorism, such a stipulation may bear on the volume of materials possessed by Alimehmeti that are received at trial to establish this aspect of his state of mind. But, as discussed above, the Government is entitled, subject to Rule 403, to tell its story. Provided that the materials that the Government would offer to establish Alimehmeti's knowledge of ISIS's designation and its involvement in terrorism do not themselves cause unfair prejudice (*e.g.*, they do not consist of cumulative imagery of extreme violence) or material delay, the Court will not preclude the Government from using such materials to establish such knowledge on Alimehmeti's part.

The Court, of course, will instruct the jury as to the purposes for which these materials may properly be considered. The Court invites counsel to propose, in writing, instructions toward that end.

3. Post-Arrest Evidence of Sharing of Terrorist Propaganda Material

The Government also seeks to introduce evidence that, since his arrest in this case, Alimehmeti has participated in the receipt and dissemination of terrorist propaganda materials

within the MCC. The Government learned of this conduct in late November 2017, as a result of a report from an MCC inmate, referred to in the Government's submissions as Defendant-1. Although the Government represents that it continues to gather evidence, at minimum it seeks at trial to introduce evidence that:

> (1) Alimehmeti, while housed in the MCC, possessed a hard drive modified to remove his discovery materials. This drive was found to contain terrorist propaganda materials that had been produced to Rahimi in discovery in connection with Rahimi's trial. These materials were not among the discovery produced to Alimehmeti.
>
> (2) Rahimi possessed a notebook itemizing terrorist propaganda files, which included files produced in discovery to Alimehmeti and which had been present on Alimehmeti's hard drive.
>
> (3) Defendant-1 possessed a disc containing propaganda materials originating from discovery produced to Alimehmeti and Rahimi.

See Gov't Mot. at 29–31.

The Government argues that the fact that Alimehmeti received and distributed such materials is admissible under Rules 403 and 404(b). As noted, however, at the Court's suggestion, the Government has agreed at trial not to elicit Rahimi's identity or the specific offenses of which Rahimi was convicted, because associating Alimehmeti before the jury with an individual convicted of a notorious act of violent terrorism in New York City would carry obvious risks for unfair prejudice. *See* Dkt. 80 at 9 n.6. Further, the Government has agreed not to elicit evidence or argue that the sharing of propaganda materials in the MCC was a violation of any prison rule or discovery restriction. That limitation on the Government's proof also avoids unfair prejudice, insofar as such evidence would alert the jury to a separate, post-charge infraction by Alimehmeti. It also avoids the potential delay and confusion that inquiry into the propriety of such sharing would entail. Otherwise, there would likely be a need for evidence and examination of witnesses as to applicable rules and restrictions and the means by which

Alimehmeti and perhaps the other inmates were made aware of them. Such a "trial within a trial" as to whether rules were knowingly broken could also easily implicate attorney-client communications.

With those important limitations, the Court holds that evidence of Alimehmeti's receipt and distribution of propaganda materials in prison is admissible under Rule 404(b) and will be received at trial. Rule 404(b) provides:

> Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

Fed. R. Evid. 404(b)(1). But, the Rule further provides, such evidence "may be admissible"—for purposes other than a character trait or criminal propensity—to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *See* Fed. R. Evid. 404(b)(2). The Second Circuit takes an "inclusionary approach" to Rule 404(b), under which evidence of crimes, wrongs, and bad acts may be received "for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403." *See, e.g.*, *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (internal quotation marks omitted).

Tellingly, Alimehmeti's opposition brief nowhere disputes that this evidence would have a proper purpose under Rule 404(b), and rightly so. The Government does not propose to offer this evidence to show that, because Alimehmeti shared terrorist propaganda material with others in prison, it is more likely that he shared such material with others during the earlier time period covered by the Indictment. That inference, as to criminal propensity, would be prohibited by Rule 404(b). Rather, the Government seeks through this evidence to show Alimehmeti's support and commitment to ISIS. That in turn tends to show that any support he provided to ISIS during the period covered by the Indictment—whether in the form of facilitating another's travel,

facilitating his own travel, or otherwise—was provided knowingly and intentionally with the objective of helping ISIS. That Alimehmeti received and disseminated terrorist propaganda materials in the MCC is therefore probative of his knowledge and intent in undertaking the acts forming the basis of the Indictment. *See United States v. Mustafa*, 406 F. App'x 526, 528 (2d Cir. 2011) (affirming admission of 404(b) evidence that defendant had "associated with terrorist groups other than al Qaeda" because such evidence was "highly probative of [the defendant's] state of mind"). Evidence admitted for such a purpose is permissible under Rule 404(b).

As to the application of Rule 403, the factors as balanced by this Court favor admission. The intent underlying Alimehmeti's conduct during the period covered by the Indictment is squarely at issue. To establish guilt on Count One, the Government must establish, *inter alia*, that Alimehmeti knowingly and intentionally provided or attempted to provide material support to an FTO, which the Indictment identifies as ISIS. To establish guilt on Count Two as charged, the Government must establish, *inter alia*, that Alimehmeti made a false statement to secure a passport to facilitate an act of international terrorism. Apart from other lines of defense at trial, Alimehmeti can be expected to dispute whether his attempt to travel abroad or facilitate the travel of other(s) was motivated by an intention to provide support to ISIS. He has also indicated an intention to argue that, to the extent that he might be found to have taken action to provide such support, he was entrapped by the Government's undercover agents into doing so. In this context, Alimehmeti's post-offense sharing and receipt of terrorist propaganda material, including some relating to ISIS, is clearly probative, and perhaps highly so. His sending and receiving such material tends to show a durable commitment to terrorist organization(s). This conduct therefore makes it more likely that Alimehmeti's actions at issue were undertaken with the intention of assisting ISIS. And because government personnel presumably were not

involved in the prison sharing of terrorist propaganda material, this conduct tends to establish a predisposition to promote ISIS, thereby undermining any defense of entrapment.

In disputing relevance, Alimehmeti argues first that his post-arrest conduct is irrelevant to his *pre*-arrest state of mind. Def. Opp. at 10. He is at liberty to make that argument to the jury, and perhaps the jury will conclude either that Alimehmeti's sharing of propaganda within prison (if found) does not reveal a commitment at that time to ISIS or that if it does, Alimehmeti's commitment to ISIS while in prison in 2016 and 2017 bears little on his commitment to ISIS prior to his May 2016 arrest. But a rational jury could easily find the contrary. It could conclude that the assembled record, including Alimehmeti's post-arrest sharing of terrorist propaganda, reveals a steadfast, longstanding attachment to this cause, rather than a passing fancy. And the jury could also find this conduct highly probative as to the claim of entrapment, given the lack of any government inducement to so act while in the MCC. The jury would be well within its rights to find such conduct to be "independently motivated behavior" indicative of a prior predisposition to provide support to ISIS. *See United States v. Cromitie*, 727 F.3d 194, 209 & n.11 (2d Cir. 2013) (internal quotation marks omitted) (holding conduct post-dating contact with law enforcement may be admissible to show predisposition if "independent and not the product of the attention that the Government had directed at [the defendant]" (quoting *Jacobson v. United States*, 503 U.S. 540, 550 (1992))).

Alimehmeti next argues that the evidence is cumulative, because the jury will "already have seen essentially the same evidence offered for the same purpose (*i.e.*, to show the defendant's motive and intent while acting)." Def. Opp. at 11. That is wrong. Although evidence of terrorist propaganda materials possessed by Alimehmeti prior to his arrest will be before the jury, the evidence of his post-arrest dissemination and receipt of such materials has a

distinct purpose. It shows—or can be argued to show—his engagement with such materials over time (indicative of a durable commitment to terrorist organization(s)). And it can be argued to show that this commitment existed independent of his interactions with undercover officers and in an altogether new environment.

Third, Alimehmeti argues that the MCC materials, even if relevant, ought to be excluded because of countervailing factors under Rule 403, specifically, that receipt of this evidence risks undue delay and juror confusion. *Id.* at 11–13. Alimehmeti is correct that presenting the MCC materials will likely necessitate forensic testimony regarding where the files were found and the determinable circumstances as to how they were transferred among the affected computer facilities. A limited primer on what criminal discovery is and the manner in which inmates may come into contact will also presumably be needed. *See* Gov't Mot. at 36. But the Court has no reason to believe that this evidence, offered to supply context, will be time-consuming or occupy more than small fraction of a trial estimated to run two to three weeks.

As to the Rule 403 factor of unfair prejudice, although Alimehmeti is correct that proof of his sharing of terrorist propaganda materials in the MCC would reveal to the jury the fact of his pretrial incarceration, Def. Opp. at 12–13, this fact is unlikely to prove surprising to the jury given the nature of the charges here. More importantly, the Court stands ready to give a forceful limiting instruction as to this evidence, as this Court and others have done in cases in which a defendant's post-arrest statements or conduct while imprisoned is offered as substantive evidence of guilt at trial.[8] The Court is confident that such an instruction will be sufficient to

[8] For example, in *United States v. Urena and Vasquez*, S5 11 Cr. 1032 (PAE), the Court permitted evidence to be received that the defendants had verbally alerted to the arrival in the MCC of an alleged (now cooperating) co-conspirator whom they had not admitted to know. *See United States v. Delance*, 694 F. App'x 829 (2d Cir. 2017) (affirming convictions); *see also United States v. Mauro*, 80 F.3d 73, 76 (2d Cir. 1996) (affirming admission of evidence

cure any prejudice from the revelation to the jury that Alimehmeti had been incarcerated, and invites counsel to propose such an instruction.

Otherwise, however, there is no serious claim of unfair prejudice from the evidence of the defendant's trafficking in such propaganda. There is no claim that these materials are qualitatively more disturbing or shocking than the materials resident on Alimehmeti's home devices. And to the extent that Alimehmeti argues that evidence of his sharing such material with other prisoners risked unfair prejudice by associating him with wrongful uncharged conduct, the Government's agreement not to identify Rahimi or Defendant-1 (by their names or crimes) or to prove or argue that sharing such material violated a prison or discovery rule avoids this concern.[9]

Alimehmeti's most substantial argument against admission of the evidence of sharing terrorist propaganda materials within the MCC is that admitting such evidence would likely result in the withdrawal or disqualification of his FDS counsel, given FDS's longstanding and ongoing representation of Rahimi and Defendant-1 and, *inter alia,* the possibility that at trial, Alimehmeti's counsel may have an interest in developing evidence and making arguments that assign responsibility for the sharing to these other clients.[10] This, Alimehmeti notes, would

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revealing defendant's incarceration partly because court provided instruction that such evidence was to be considered "only as background information and as proof of motive").

[9] Notwithstanding this restriction on the Government's trial advocacy, the Court recognizes that the defense may conclude that it is worthwhile to identify Rahimi (and his offense) and Defendant-1 at trial, perhaps in support of the inference that these persons, with no involvement by Alimehmeti, were responsible for any sharing of the propaganda at the MCC. The defense may similarly wish to allege that these persons broke prison or discovery rules in so doing. The Court's ruling today does not restrict the defense from eliciting such proof, or consider the doors that such a line of examination might open to the Government.

[10] The Court here assumes *arguendo* that admission of the evidence of Alimehmeti's sharing of terrorist propaganda in the MCC with other FDS clients would result in FDS's withdrawal. This issue has been subject of written submissions and court colloquy and an in-progress *Curcio*

deprive him of a productive relationship with longstanding assigned counsel at FDS and result in a delay of trial while successor counsel gets up to speed. Def. Opp. at 14–16; Dkt. 93. Although the Court recognizes these costs—and expresses its appreciation to FDS for its exceptional work in this matter and counsel's evident dedication to their client Alimehmeti—the Court's judgment is that these considerations do not justify the exclusion of this otherwise admissible and potentially quite significant evidence.

At the threshold, although this point is not necessary to the Court's ruling, the Court is not fully persuaded that Rule 403—in identifying "undue delay" and "unfair prejudice" as countervailing considerations to the admission of evidence—applies to the delay in initiation of trial or the harm caused by an evidentiary ruling that forces the pretrial withdrawal of now-conflicted counsel. Alimehmeti so argues but does not supply any authority to the effect that Rule 403 is properly implicated by such matters.[11] Although the Court enjoys wide discretion in applying Rule 403, *see United States v. Gabinskaya*, 829 F.3d 127, 134 (2d Cir. 2016), the Rules of Evidence, of which Rule 403 is a part, are concerned primarily with "ascertaining the truth and securing a just determination," Fed. R. Evid. 102. Accordingly, "the concern expressed by [terms such as 'unfair prejudice' and 'undue delay'] is a concern about distortion or delay of the fact-finding process, rather than harm to interests outside of the trial, even if those outside interests are interests of someone involved in the trial." Paul F. Rothstein, *Federal Rules of Evidence*, Rule 403 (3d ed. 2017); *see also United States v. Smithers*, 212 F.3d 306, 316 (6th Cir.

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proceeding. The Court will take up this issue further with counsel and the defendant promptly following issuance of this decision.

[11] The Court has found one case supporting this position—a decision by the United States Court of Appeals for the Seventh Circuit that "the introduction of evidence that would generate a conflict of interest is subject to analysis under Rule 403." *United States v. Gearhart*, 576 F.3d 459, 464 (7th Cir. 2009).

2000) ("[T]he term 'delay' [in Rule 403] does not connote delay in the submission of motions or proffers; rather, it encompasses the prolonging of the length of the trial, and can be read properly in conjunction with the other exclusionary factors: 'waste of time, or needless presentation of cumulative evidence.'" (quoting Fed. R. Evid. 403)). Presumably for that reason, evidence treatises that address the countervailing harms cognizable under Rule 403 primarily do so in terms of their effects on the *fact-finder* at trial. *See, e.g.*, 1 *McCormick on Evidence* § 185 at nn.51–65 (7th ed. 2016). Here, of course, the Court has already held that the MCC evidence will not compromise the jury's fact-finding. On the contrary, this evidence, though acquired relatively late in the pretrial process, is a consequential part of the Government's anticipated case.

The Court nevertheless assumes *arguendo* that it is permitted—either under Rule 403 or under the Court's inherent supervisory power[12]—to consider the adverse consequences on Alimehmeti as to the delay of the trial's start and as to the disruption of his representation, and to exclude such evidence if these factors outweigh its probative value. While not minimizing these adverse impacts, the Court's judgment is that the value of the evidence at issue to the truth-seeking process is not outweighed, let alone substantially, by these harms.

First, and foremost, for the reasons noted, the evidence at issue—Alimehmeti's sharing of terrorist propaganda materials with other persons in the months and year following his arrest—is both highly probative and potentially highly consequential to central issues at trial. Exclusion of

[12] *Cf. Link v. Wabash R.R.*, 370 U.S. 626, 630–31 (1962) (discussing courts' "'inherent power' . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"); *Wheat v. United States*, 486 U.S. 153, 160 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

this evidence in the service of his continued representation by FDS would deprive the jury of relevant, probative evidence in derogation of the search for truth in this important case.

And as for the harm side of the ledger, the decision to admit the MCC evidence will not leave Alimehmeti without able counsel. Assuming this ruling results in FDS's withdrawal, the Court will appoint highly able successor counsel. Such counsel will not labor under any potential conflict.[13] The Court will also assure in appointing any successor counsel that such counsel is available to try this case on as prompt a timetable as possible, consistent with adequate preparation. Successor counsel will also have the benefit of FDS's considerable work product, knowledge capital, and briefing. The Court expects that during the transition to new counsel, FDS would work closely to guide successor counsel on the significant aspects of this case that are uncompromised by the newly acquired MCC evidence.

Finally, to the extent that considerations of fairness and fair play are germane, the Court observes that any delay here is attributable only to Alimehmeti. Although the Government's allegations remain unproven, the evidence as to the presence of Rahimi's discovery on Alimehmeti's hard drive, and of Alimehmeti's discovery or summaries of it in the possession of Rahimi and Defendant-1, provides a substantial basis on which to infer that Alimehmeti at least played a role in the sharing of terrorist propaganda material within the MCC. To be sure, Alimehmeti may not have known that FDS represents the other two inmates or even that one of his two trial lawyers had been Rahimi's trial counsel. And he presumably did not envision that the sharing of these records, if discovered, might create a conflict for his trial counsel. But, as

[13] Although the admission of evidence of the sharing of terrorist propaganda in prison presents the most obvious conflict, the Government fairly notes that even if this evidence were excluded, there would still be other arguable bases for asserting a conflict among FDS's representations, meriting, at least, a *Curcio* proceeding as to each of Alimehmeti, Rahimi, and Defendant-1.

among trial participants, the present predicament lies exclusively at his doorstep. The Government, by contrast, immediately notified Alimehmeti's counsel upon learning of the sharing of the propaganda materials within the MCC. *See* Dkt. 94. And the Government, reasonably soon thereafter, notified the Court of a potential conflict. *See* Dkt. 80. The Government likewise appears to be moving with dispatch to complete a forensic analysis of the computer evidence at issue. Thus, although the point is not determinative of the Court's balancing analysis, the Court is mindful that the party that is the proponent of the evidence in question, the Government, has clean hands.

In sum, in view of the substantial probative value of the MCC evidence, the Court holds that the value of this evidence outweighs the assembled countervailing interests, whether considered under Rule 403 or pursuant to the Court's supervisory authority. The Court will therefore receive at Alimehmeti's trial evidence of the sharing of terrorist propaganda material within the MCC between Alimehmeti and the other two FDS-represented inmates. The Court accordingly grants the Government's *motion in limine* to admit such material.[14]

4. Alimehmeti's Out-of-Court Statements

The Government argues next, as a general proposition, that Alimehmeti "should not be permitted to offer his own out-of-court statements . . . unless and until [he] establishes that [such a] statement is admissible pursuant to a hearsay exception or provision of law." Gov't Mot. at 40. This motion is unproductive at this juncture. The Court fully intends to assure compliance by both parties with the Federal Rules of Evidence. If and when counsel for Alimehmeti forms

[14] More fine-tuned assessments of admissibility at trial as to particular aspects of such evidence may need to be made later, including after a forensic analysis or analyses of these materials is complete. The Court's ruling is without prejudice to Alimehmeti's right to argue that particular aspects of the Government's trial evidence on this point are inadmissible.

an intention to elicit his own statements, the Court expects that counsel will alert the Court in advance, so as to permit the Court to assess whether the statement in question falls within an exception to the hearsay rule or is admissible pursuant to the rule of completeness, under which statements may be admitted as "necessary to explain [an admitted portion of the defendant's statement], to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion," *United States v Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (internal quotation marks omitted). But no such notice has been given and there is as yet no crystallized dispute.

The Court therefore denies this motion as premature. This ruling is without prejudice to the Government's right later to challenge admission of statements by Alimehmeti that the defense seeks to offer.

5. Entrapment Defense

The Government next argues that "there is no factual basis to support an entrapment defense in this case," and that the Court should "preclude the defendant from asserting the defense unless and until he proffers evidence to support it, which he cannot." Gov't Mot. at 50. The Court denies this motion.

"[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 63 (1988). "[A] defendant hoping to assert the entrapment defense bears the burden of establishing inducement by a preponderance of the evidence." *United States v. Brand*, 467 F.3d 179, 190 (2d Cir. 2006). If the defendant meets that burden, "[t]he burden then shifts to the government to show that the defendant was predisposed

to commit the crime beyond a reasonable doubt." *United States v. Gagliardi*, 506 F.3d 140, 149 (2d Cir. 2007).

"The question of entrapment is generally one for the jury, rather than for the court." *Mathews*, 485 U.S. at 63; *accord United States v. Kopstein*, 759 F.3d 168, 181 (2d Cir. 2014). A defendant is entitled to an entrapment instruction if there "exists evidence sufficient for a reasonable jury to find in [the defendant's] favor." *Mathews*, 485 U.S. at 63. In determining whether to provide such an instruction, "the trial judge must consider the evidence in the light most favorable to the defendant." *United States v. Anglada*, 524 F.2d 296, 298 (2d Cir. 1975). At this stage, therefore, the Government must persuade the Court that no matter how the facts may unfold at trial, no reasonable juror could conclude that Alimehmeti was entrapped.

While the Court will entertain argument at the end of the evidence as to whether or not the evidence supports an entrapment defense so as to warrant giving an entrapment instruction, the Court is unpersuaded, based on the parties' proffers of the evidence, that it is inconceivable that the trial evidence will be able to support such an instruction.

With respect to inducement, whether or not Alimehmeti was "already an established ISIS supporter," Gov't Mot. at 48, the Government acknowledges that an undercover agent asked Alimehmeti to assist another undercover agent in preparing for his journey to Syria, *id.* at 7. On the basis of the parties' proffers, therefore, it appears that defense can at least colorably argue that the Government "initiat[ed] or "solicit[ed]" an aspect of the conduct alleged to constitute material support for ISIS. *See United States v. Dunn*, 779 F.2d 157, 159 (2d Cir. 1985).

And with respect to predisposition, as to which the burden of proof beyond a reasonable doubt would ultimately be on the Government, the Court—without the benefit of a full trial record—cannot determine conclusively that the evidence will permit only the conclusion that

Alimehmeti was predisposed to provide material support to ISIS. It may be that, at trial, the Government adduces, as it forecasts, "an array of evidence" predating or independent of Alimehmeti's contacts with law enforcement that demonstrate his "radicalization, his support for terrorist ideology and particularly ISIS, and his desire to travel, and help others travel, to ISIS-controlled territory." Gov't Mot. at 42. But the Court cannot find these facts now. To choose just one example, as to the Government's claim that Alimehmeti attempted to facilitate the travel of an ISIS supporter as early as 2014, *id.* at 43, the defense "strongly dispute[s]" this claim and the Government's characterization of these events, Def. Opp. at 31–32. Pending trial, the Court cannot resolve whether there is evidence on which the jury could find for the defense on this point. Because the evidence may ultimately permit a non-"frivolous" entrapment defense, *Kopstein*, 759 F.3d at 181–82 (internal quotation marks omitted), the Court denies the Government's motion.

This decision, however, does not dictate how the Court will ultimately instruct the jury as to the availability of an entrapment defense. If the defense chooses to pursue the defense but the evidence adduced is legally insufficient to support it, the Court will consider instructing the jury that entrapment is not an available defense in this case. *See, e.g.*, *United States v. Absolam*, 305 F. App'x 786, 788–89 (2d Cir. 2009).

6. Judicial Notice of ISIS as FTO

Alimehmeti is charged in Count One with providing material support to a designated FTO in violation of 18 U.S.C. § 2339B. Dkt. 70. The Government asks that the Court take judicial notice at trial of the designation of ISIS as an FTO. Gov't Mot. at 52. The defense has indicated that it is willing to stipulate to ISIS's designation as an FTO, obviating a need for judicial notice. Def. Opp. at 1.

The Court encourages the parties so to stipulate. Failing an adequate stipulation on this point, the Court will grant the Government's motion and so-order the Government's proposed order attached to its brief as Exhibit A. Gov't Mot. at Ex. A; *see* Order, *United States v. El Gammal*, No. 15 Cr. 588 (ER), Dkt. 139 (Jan. 3, 2017).

7. Protective Measures

As indicated above, the Court will address the propriety of courtroom closure and other protective measures in a separate decision.

C. The Effect of the Superseding Indictment

Independent of the pending motions, defense counsel has suggested that the Superseding Indictment modifying Count Two materially altered the issues to be tried. Although the defense does not claim prejudice, argue that the timing of the Superseding Indictment contravened a deadline, or seek concrete relief, the Court nevertheless, in the interest of assuring a complete record, addresses this contention.

As noted, the Superseding Indictment leaves Count One unchanged. But as to Count Two, which alleges a false statement in an application for a passport in violation of 18 U.S.C. § 1542, the Superseding Indictment adds one allegation: that the purpose for which Alimehmeti sought a new passport was to "facilitate the provision of personnel, including himself, to ISIS." This allegation introduces a new element, the satisfaction of which would increase Alimehmeti's sentencing exposure from 10 to 25 years' imprisonment.[15]

[15] A criminal defendant is exposed to a greater maximum sentence where he makes a false statement in a passport application specifically so as to "facilitate an act of international terrorism." 18 U.S.C. § 1542.

The defense argues that, before the Superseding Indictment, Alimehmeti's purpose in seeking to travel was not within the scope of the charges in this case. And, it suggests, the Government's intention to argue that Alimehmeti had acted with such a purpose had not been suggested by the Complaint on which he was arrested, the original Indictment, or the Rule 16 discovery. *See* Dkt. 81 at 1.

On its review of these materials, the Court rejects the defense's contention as highly unpersuasive. The Court finds that the Superseding Indictment did not materially change the issues in this case. Rather, its modification of Count Two made an issue that was already front and center in the case the subject of a potential sentence enhancement.

Most important, the initial Indictment squarely put at issue Alimehmeti's purpose in traveling to the United Kingdom. It alleged, in connection with Count One, that Alimehmeti "did knowingly and intentionally provide 'material support or resources,' as that term is defined in Title 18, United States Code, Section 2339A(b), to wit, personnel (*including himself*) and services, to a foreign terrorist organization, and attempt to do the same . . . ." Dkt. 8 (emphasis added). This language announced plainly that Alimehmeti's material support, as charged, included providing himself as "personnel . . . to a foreign terrorist organization," rather than exclusively providing assistance to ISIS while remaining within the United States. It alone put the defense on notice that the Government intended to prove and argue, at least in connection with Count One, that a goal of Alimehmeti's in traveling abroad—and therefore a purpose of his in securing a new passport—was to facilitate the provision of himself as personnel to ISIS. And the Complaint on which Alimehmeti had previously been arrested was in accord, making clear that Alimehmeti in fact did travel abroad and intended to do so again. It alleged that Alimehmeti had taken two trips to the United Kingdom in 2014, *id.* ¶ 7, and had "admitted" that he "wanted a

new passport because he believed traveling on his old passport, which had rejection stamps from his two 2014 trips to the United Kingdom—would raise suspicions during his planned travels," *id.* ¶ 16. Accordingly, it alleged, consistent with the subsequent Superseding Indictment, that he had "attempted to fraudulently obtain an additional United States passport, because he believed that doing so would facilitate his own travel overseas." Dkt. 1 at ¶ 6.

The Court therefore rejects any claim of unfair surprise. At all times since the return of the original Indictment, Alimehmeti has been on notice of—and had a clear incentive to seek to disprove at trial—the Government's allegation that Alimehmeti's foreign travel was intended at least in part to provide himself as personnel to an FTO. The Superseding Indictment, by adding that allegation to Count Two, did not add that contention to the case. It merely gave Alimehmeti an additional incentive to prepare to meet the Government's evidence on that point.

CONCLUSION

For the foregoing reasons, the Court resolves the pending motions *in limine* as set forth herein. The Clerk of Court is respectfully directed to terminate the motions pending at Dkts. 72 and 74.

SO ORDERED.

Paul A. Engelmayer
United States District Judge

Dated: January 5, 2018
New York, New York

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

May 12, 2014

MEMORANDUM FOR THE ASSOCIATE ATTORNEY GENERAL AND
THE ASSISTANT ATTORNEYS GENERAL FOR THE
CRIMINAL DIVISION
NATIONAL SECURITY DIVISION
CIVIL RIGHTS DIVISION
ANTITRUST DIVISION
ENVIRONMENT AND NATURAL RESOURCES DIVISION
TAX DIVISION
CIVIL DIVISION

DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
ADMINISTRATOR, DRUG ENFORCEMENT ADMINISTRATION
DIRECTOR, UNITED STATES MARSHALS SERVICE
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES
DIRECTOR, BUREAU OF PRISONS

ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Policy Concerning Electronic Recording of Statements

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

This policy is solely for internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights or benefits, substantive or procedural,

enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor does it place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

I. Presumption of Recording. There is a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded, subject to the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

a. Electronic recording. This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.

b. Custodial interviews. The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody. Interviews in non-custodial settings are excluded from the presumption.

c. Place of detention. A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff's station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

d. Suitable recording equipment. The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:

(i) an electronic recording device deemed suitable by the agency for the recording of interviews that,

(ii) is reasonably designed to capture electronically the entirety of the interview.

Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content.
With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

e. Timing. The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.

f. Scope of offenses. The presumption applies to interviews in connection with all federal crimes.

g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.

h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. *See* 18 U.S.C. § 2511(2)(c). Covert recording in fulfilling the requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

II. Exceptions to the Presumption. A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.

b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.

c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.

d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

III. Extraterritoriality. The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview – whether the subject is in foreign custody, U.S. custody, or not in custody – outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

IV. Administrative Issues.

a. Training. Field offices of each agency shall, in connection with the implementation of this policy, collaborate with the local U.S. Attorney's Office to provide district-wide joint training for agents and prosecutors on best practices associated with electronic recording of interviews.

b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.

V. Effective Date. This policy shall take effect on July 11, 2014.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -v.- SAYFULLO HABIBULLAEVIC SAIPOV, Defendant.	**ORDER** S1 17 Cr. 722 (VSB)

HON. VERNON S. BRODERICK, District Judge:

WHEREAS, the United States of America, by Geoffrey S. Berman, United States Attorney for the Southern District of New York, Amanda Houle, Matthew Laroche, Sidhardha Kamaraju, and Jason A. Richman, Assistant United States Attorneys, of counsel, have filed a motion requesting that the Court take judicial notice at trial of the designation of the Islamic State of Iraq and al-Sham—including its aliases the Islamic State of Iraq and the Levant, the Islamic State of Iraq and Syria, ad-Dawla al-Islamiyya fi al-'Iraq wa-sh-Sham, Daesh, Dawla al Islamiya, Al-Furqan Establishment for Media Production, Islamic State, ISIL, and ISIS—as a foreign terrorist organization ("FTO"), as determined by the United States Secretary of State and published in the Federal Register, and has been designated a FTO since October 15, 2004;

THEREFORE, the Government's motion is GRANTED, and the Court hereby takes judicial notice that the Islamic State of Iraq and al-Sham—including its aliases the Islamic State of Iraq and the Levant, the Islamic State of Iraq and Syria, ad-Dawla al-Islamiyya fi al-'Iraq wa-sh-Sham, Daesh, Dawla al Islamiya, Al-Furqan Establishment for Media Production, Islamic State, ISIL, and ISIS—is a designated FTO, and has been since October 15, 2004.

SO ORDERED:

_____ _____

HONORABLE VERNON S. BRODERICK Date
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 15 Cr. 765 (PAC)

EFRAIN ANTONIO CAMPO FLORES and
FRANQUI FRANCISCO FLORES DE FREITAS,

Defendants.

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New York, N.Y.
November 2, 2016
10:10 a.m.

Before:

HON. PAUL A. CROTTY,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
EMIL J. BOVE III
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Attorneys for Defendant Floresde Freitas
DAVID M. RODY
ELIZABETH A. ESPINOSA
MICHAEL D. MANN

ALSO PRESENT:

HUMBERTO GARCIA
MERCEDES AVALOS
Spanish Interpreters

(In open court)

THE COURT: Good morning. I'm glad we're all together. It took a little bit of extra doing.

(Case called)

MR. BOVE: Good morning, your Honor. Emil Bove and Brendan Quigley for the government. We have here with us Special Agent Sandalio Gonzalez and Peter Calabrese from my office.

MR. JACKSON: Good morning, your Honor. Randall Jackson, John Zach and Joanna Wright for defendant Efrain Campo Flores.

MR. RODY: Good morning, your Honor.

Dave Rody, Mike Mann, and Elizabeth Espinosa for Mr. Franqui Flores.

THE COURT: Has everybody been briefed now on the timing of the jury selection?

MR. JACKSON: Yes, your Honor.

MR. BOVE: Yes, Judge.

THE COURT: Now there's a problem. We have a lot -- we're going to have over a hundred potential jurors.

THE DEPUTY CLERK: 94 is the number.

THE COURT: Approximately a hundred. Which we want to have in the courtroom. So this is a public proceeding. The public has a right to attend. I don't want to have the public mixed with the jury pool. Anybody have any suggestions?

MR. JACKSON: Your Honor, it might make sense to ask the press to adopt the last row of the courtroom and any standing room that is after that and then allow the jurors to fill in to the seats that are in front of that.

THE COURT: I'm just looking at the audience, Mr. Jackson. It's bigger than one row. How about an overflow room?

MR. JACKSON: An overflow room makes a lot of sense to us, your Honor, if it's available to the Court.

THE COURT: Mr. Rody.

MR. RODY: Fine with us, your Honor.

THE COURT: Mr. Bove?

MR. BOVE: Sounds good, Judge.

THE COURT: Can we get an overflow?

THE DEPUTY CLERK: I'm sure we can. We'll work on it.

THE COURT: Anything anyone wants to bring up this morning? I'm going to go through my in limine rulings.

MR. BOVE: No, your Honor. Thank you.

MR. JACKSON: No, your Honor.

MR. RODY: No, your Honor.

THE COURT: Okay.

I have read the parties' motions in limine and considered all of the arguments they have raised. I'm going to rule now on the in limine motions.

With regard to the defendants' in limine motions,

motions in limine. First of all, I'll deal with the security measures.

Defendants' request with regard to security measures at trial are granted in part and denied in part. I have consulted with the U.S. Marshal. I have concluded that the security screening procedures upon entrance of the building are sufficient to guarantee safety. Accordingly, there will be no metal detectors outside the courtroom. The defendants are in custody. We'll have a full complement of marshals with the defendants so that no additional U.S. marshals will be required. I note that the Supervising Deputy U.S. marshal will be monitoring courtroom security with visits from time to time. I will allow two Court Security Officers to attend the sessions of the court.

The protected witnesses will be allowed to testify using a pseudonym. Defendants' request that no ban be placed on courtroom artists ability to sketch witnesses is denied. I am satisfied that there are serious safety concerns for certain testifying witnesses and believe allowing them to testify using the pseudonyms and without recording is necessary for their protection and the protection of their families.

With regard to in limine motion No. 1 by the defendants. The defendants' request to exclude evidence or argument showing that the defendants have wealth or a lifestyle supported through illegitimate income. That application is

denied. The government has represented that it does not intend to introduce evidence relating to the sources of the defendants' wealth or argue that the defendants supported themselves through illegitimate means because they had a lifestyle beyond their legitimate income. The government will be allowed to attempt to prove that the defendants had access to and the ability to procure private aircraft. That is probative of the defendants' participation in the charged conspiracy and their ability to facilitate the dispatch of cocaine.

With respect to in limine motion No. 2. The defendants' request that CS-1 be precluded from offering testimony regarding the identity of the white powdery substance is denied. CS-1 may properly offer lay witness opinion testimony that the substance was cocaine. The Committee Notes to the 2000 amendment to Rule 701 state that a lay witness may "testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established." CS-1 has familiarity with cocaine, and he saw, touched, and smelled the substance. Ingestion is not required for CS-1 to offer his lay opinion.

The request with regard to CS-2 that he be precluded from offering testimony regarding the identity of the white powdery substance is granted. CS-2 does not have the same familiarity with cocaine as CS-1, and he only testified that he

only saw the substance.

With regard to in limine motion No. 3. Defendants' request to preclude the government from introducing any references to FARC, or the Fuerzas Armadas Revolucionarias de Colombia, please excuse my Spanish, in the defendants' postarrest statement, that application is denied. FARC is said to be the source of supply for the cocaine at issue here. Campo so states in his talk with Gonzalez and in his earlier conversation with CS-1. The government will be allowed to refer to FARC as a paramilitary organization operating in Colombia, Venezuela, and Ecuador that is one of the largest producers of cocaine in the world, but the government will not refer to FARC as "designated foreign terrorist organization." The statements allowed are probative of the source of supply and of the defendants' capability to procure cocaine, and such probative value is not substantially outweighed by a risk of unfair prejudice.

Defendants' request to preclude the government from offering statements made by CW-1 is denied. The government may introduce through Special Agent Gonzalez certain limited statements made by CS-1 to provide background and context for the jury. The government may not elicit any statements by CW-1 to Gonzalez which are listed in footnote 12 at page 18 of the government's opposition to the defendants' motions in limine.

Special Agent Gonzalez may testify that CW-1 contacted

Special Agent Gonzalez that he gave instructions to CW-1; that CW-1 provided a picture of the October 2015 meeting in Honduras and that CW-1 said that he did not record the meeting. This testimony my include the following subjects: One, in early October 2015, CS-1 reported to Agent Gonzalez via BBM that CW-1 had been contacted regarding potential cocaine transactions involving Venezuelan nationals; two, on October 3, CW-1 reported to Agent Gonzalez via BBM that one or more Venezuelans were coming to meet him -- meet with him that day near Lago de Yojoa about a drug trafficking venture; and three, CW-1 informed Agent Gonzalez that the Venezuelans with whom he had met had requested that he send representatives to Venezuela.

In limine motion No. 4. Defendants' request to preclude admission of certain statements on the recordings made during the October 23, 2015 meeting in Venezuela is denied. Statements and references to war, jail, and the upcoming political campaign and donations are probative of defendants' motive to engage in conspiracy and their knowledge of the object of the scheme, and they are not unduly prejudicial. If the government seeks to introduce the trial statements beyond those identified by the government, the defendants can object at that time.

Now with regard to the government's motions in limine. In limine No. 1. For the reasons I denied defendants' third motion in limine, I grant the government's request to certain

limited nonhearsay statements of CW-1 to provide background and context for the investigation.

Motion in limine No. 2. As previously indicated on the defendants' second motion in limine, I grant the government's request to allow CS-1 to testify that the white powdery substance he examined at the meeting of October 27, 2015 is cocaine, and I deny the government's request to allow CS-2 to testify as to what the substance was.

In limine No. 3. The government's request to introduce evidence regarding defendants' activities between May and August of 2015 to obtain weapons is granted. This is direct evidence that is relevant and probative of the charged conspiracy, and it is not unduly prejudicial.

Motion in limine No. 4. The government's request for exclusion of questioning regarding the DOJ's May 12, 2014 policy concerning electronic recording of statements is granted. The defendants may ask about the DEA's agents ability to record the defendants' custodial statements and the reasons for not doing so, but the probative value of asking about the DOJ recording policy is outweighed by the risk of undue delay and the introduction of confusion on a collateral issue.

No. 5. The government's request that the defendant not be allowed to admit self-serving portions of their prior statements to the extent that they would not be otherwise admissible pursuant to a hearsay exception is denied without

prejudice. The government's blanket request does not identify which statements it seeks to exclude. In these circumstances it is not possible to determine whether those statements should be considered at the same time as any admitted portions of the evidence.

In limine motion No. 6. The appropriate security measures for trial have already been addressed.

No. 7. The government's request that the defendants be precluded from introducing an entrapment defense is denied. The government's request is certainly premature. With regard to Bruton v. United States, the Supreme Court held in Bruton v. United States that the Sixth Amendment's confrontation clause precludes the admission of a nontestifying codefendant's implication of a defendant. The government will redact certain specified material in Mr. Flores de Freitas's confession to address this issue. The Court invites the parties to submit appropriate limiting instructions to the jury.

With regard to sealing of the motion papers, I now turn to the question of sealing portions of the briefing on the government's motions in limine. The parties should file the briefs they submitted for in camera review with the following redactions:

Exhibits B, C and D to the government's motion in limine;

Sensitive information contained in the government's

motion regarding security measures and references to such sensitive information in the defendants' opposition, including pages 38 and 39;

References to Rule 404(b) evidence that the Court has not ruled on, including pages 3, 4, 39 and in footnote 12 of the government's motions, and pages 16 through 23 and 41 of the defendants' opposition.

I note I have received your requests to charge but -- I did not receive a verdict form. So if you want to submit a verdict form we'll consider that as well.

Mr. Ovalles advises me that I did submit a verdict form. I haven't seen it yet. So you've complied with that request.

Marlon, what time do you estimate we'll get together again?

THE DEPUTY CLERK: Well we estimate to receive the hardship questionnaires around 11:30 a.m., maybe sometime before then. I expect we should resume or reconvene at around that time.

THE COURT: 11:30.

MR. JACKSON: Your Honor, brief question about the questionnaires.

THE COURT: Yes.

MR. JACKSON: Will the Court be delivering the copies of the questionnaires to the parties in advance of us

reconvening or in advance of us -- in advance of the jury pool coming in?

THE COURT: Well, what I normally do is after we've gone through all the questions that you've submitted questions on, I have my own questions, we've blended them together. I ask questions. And then I ask the jurors after we have the twelve, we've gone through them, ask them to review the separate background information. Do you have a copy?

I give each juror the -- what is your name? What is your date of birth? Where were you born?

Is that what you're referring to, Mr. Jackson?

MR. JACKSON: No, your Honor. I just know that they're receiving the questionnaires.

THE COURT: The hardship questionnaires?

MR. JACKSON: The hardship questionnaires, your Honor. So I just was curious procedurally is the Court going to -- are we going to come in and get a chance to look at the written questionnaires before the jurors actually come in or will we be looking at them at the same time that the jurors come in?

THE COURT: Marlon, what's the answer to that? I think you'll be looking at them before.

THE DEPUTY CLERK: We were planning on making copies and handing copies to counsel of those hardship questionnaires that claim hardship. Those that do not claim hardship we were not planning on making copies of those.

THE COURT: So I guess you see it will be pile A, which will be the people who don't claim a hardship; and pile B where the people ask to be excused. That's what you're going to see. You're going to see everybody who doesn't claim hardship. They will be part of the people who are sent upstairs.

Does that clarify?

MR. RODY: I think I'm following on what Mr. Jackson said. The question is: Who is determining to excuse people for hardship? Is the jury clerk doing that downstairs or will that be done by your Honor up here?

THE COURT: That's a good question.

MR. RODY: And would we get a chance to look at those hardship responses to determine whether those are valid and warranted, excusable?

THE COURT: Yes. I want you to look at the hardship questionnaires because those are people who are asking to be excused. The people who don't ask to be excused, Mr. Rody, will be here in the courtroom.

MR. RODY: Sure.

THE COURT: I guess it's my intention that you'll look at the people who are claiming hardship to make sure, in fact, it's a legitimate claim.

MR. RODY: I think that was the question.

THE COURT: Is that the trick question, Mr. Jackson?

I'm sorry it took me so long to understand the question.

MR. JACKSON: I think I phrased it somewhat unartfully, but that was part of it. And your Honor answered the other part. So, thank you.

THE COURT: So the jurors will not be up here while you're reviewing the hardship, people who have responded affirmatively to the hardship questionnaire. Right, Marlon?

THE DEPUTY CLERK: I'm sorry, Judge. I was not paying attention.

THE COURT: I frequently have this problem.

So the parties will see the hardship questionnaires and people claiming hardship before they see the jurors.

THE DEPUTY CLERK: Yes.

THE COURT: And then the ones that we agree there's a hardship, they will be excused downstairs. If we don't agree that there's a hardship or somebody disagrees as to the claim of hardship, we'll bring them upstairs.

MR. RODY: That's great. Thanks, Judge.

THE COURT: Anything else?

MR. JACKSON: No. Thank you, your Honor.

THE COURT: Now, are the marshals going to keep Mr. Campo Flores and Flores de Freitas close by?

(Pause)

THE COURT: We'll keep the defendants on the fifth floor -- fourth floor.

I want to make sure it's all right with you, that nobody raises an objection that the public has been excluded. We'll put the members of the public in an overflow courtroom for the jury selection.

MR. BOVE: No objection from the government, your Honor.

MR. JACKSON: We have no objection, your Honor.

MR. RODY: No objection, Judge.

THE COURT: Make those arrangements now.

MR. RAYMOND: Nate Raymond with Reuters, a member of the media.

I just want to make sure that the overflow room, sometimes things aren't mic'd up well. So if, when jurors are being questioned, if it's possible to make sure they are given a mic so people can hear what they're responding to. That will be my one concern with the overflow room.

THE COURT: Jurors are not mic'd. They're not going to be mic'd.

MR. RAYMOND: It's going to be hard then to observe and report on the voir dire process if we're not in the courtroom.

THE COURT: Let me think about that.

What do you think about a live feed into the press room.

MR. RAYMOND: That's the same issue that with the

mic'ing. It's all the same system.

I have been in past trials. I have seen a mic passed around to jurors. That was doable. That might solve that issue. You're concerned about space in this courtroom. But I just want to raise that as an issue.

THE COURT: How many members of the working press are going to attend?

We'll see about getting a mic.

And then as soon as the jurors are whittled down to appropriate size so that you could have your own bench we'll try to get the press into the courtroom maybe at a back bench. Okay. Thank you very much.

MR. NEUMEISTER: Judge, Larry Neumeister with the Associated Press.

Are you saying the press is not allowed in the courtroom? Like, no one from the press is allowed in the courtroom during the voir dire?

THE COURT: I'm saying the jurors are allowed in the courtroom. But the jurors are going to be numerous, so numerous that there won't be enough seats for the press.

MR. NEUMEISTER: There has to be at least representatives of the press, even if it's a small pool. The press cannot be totally excluded from the courtroom.

THE COURT: You wouldn't be excluded. You'd be in the overflow room.

MR. NEUMEISTER: We have to be inside the courtroom. There has to be representatives inside the courtroom. There's plenty of legal precedent for this. I'm surprised the prosecutors aren't pointing that out. It could totally foul the trial.

THE COURT: Okay. Thank you.

(Recess pending jury selection)