

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 6:17-cr-18-Orl-40KRS

NOOR ZAHI SALMAN

**UNITED STATES' TRIAL BRIEF ON THE
ATTEMPTED PROVISION AND PROVISION OF
PERSONNEL OR SERVICES UNDER 18 U.S.C. § 2339B**

The government submits this trial brief on the issue of Omar Mateen's attempted provision or provision of personnel or services to the Islamic State of Iraq and the Levant ("ISIL").

On January 12, 2017, a grand jury in the Middle District of Florida, Orlando Division, indicted the defendant for: (a) aiding and abetting the attempted provision and provision of material support to a foreign terrorist organization, that is, ISIL, in violation of 18 U.S.C. §§ 2339B(a)(1) and 2 (Count One); and (b) obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3) (Count Two). Doc. 1. To prove the defendant guilty of Count One of the Indictment, the government must prove that Omar Mateen attempted to provide or provided material support to ISIL.

The indictment alleges that Omar Mateen *both* attempted to provide and provided material support in the form of both personnel (himself) and

services. Thus, the jury may find either that Mateen attempted to provide or provided material support to ISIL. Pursuant to 18 U.S.C. § 2339B(h),

No person may be prosecuted under this section in connection with the term “personnel” unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

See also Holder v. Humanitarian Law Project [hereinafter *HLP*], 561 U.S. 1, 24 (2010) (holding that § 2339B does not criminalize “independent activity in support of a terrorist group” as “service” to the group).

As to Omar Mateen’s attempt to provide material support, the government need only prove that (1) he knowingly intended to commit the crime of providing material support to ISIL; and (2) that his intent was strongly corroborated by his taking a substantial step towards committing the crime. *See* 11th Cir. Pattern Jury Instructions (Criminal 2016 ed.), Special Instruction 11. Under an attempt theory as to personnel, the government need not prove that Mateen was directed or controlled by ISIL but rather only that he intended provide himself to work under ISIL’s direction or control and

took a substantial step towards doing so. “When a person supplies himself as the bomber or pilot or doctor sought by the terrorist organization, he provides – or certainly attempts to provide – material support in the form of personnel *as soon as he pledges to work under the direction of the organization.*” *See U.S. v. Farhane*, 634 F.3d 127, 152 (2d Cir. 2011) (emphasis added).

In *Farhane*, the Second Circuit upheld a conviction for attempted provision of material support based on a doctor’s pledge of allegiance to al Qaeda, combined with his giving contact information where he could be reached if he was needed. “[The defendant’s] oath of allegiance to al Qaeda evidenced more than “mere membership” in that terrorist organization. . . . [The defendant’s] purpose in swearing bayat [allegiance] was to formalize his promise to work as a doctor under the organization's direction and control.” *Id.* at 150.

Similarly, “[h]ere, there is no question that [Mateen] was providing himself to work under the direction and control of [ISIL], the jury [will hear] him solemnly swear to do so.” *Farhane*, 634 F.3d at 152. Additionally here, Mateen took substantial steps that corroborated his intent, including carrying out a mass attack in the name of ISIL. As to the attempted provision of services to ISIL, Mateen’s violent attack was also a substantial step towards providing services to ISIL (though clearly the attack itself also proves the

completed crime of the provision of material support in the form of services to ISIL).¹

Under the theory that Mateen provided material support to ISIL, not just attempted to do so, the evidence that the government will present at trial will amply demonstrate that Mateen acted at the direction or control of ISIL or that he provided a service to ISIL. First, Mateen repeatedly pledged his allegiance to ISIL before and during his attack, while making demands for U.S. airstrikes to stop. Second, prior to his attack, Mateen watched a video by ISIL calling for “soldiers” in America to commit violent attacks during Ramadan; Mateen also read multiple articles describing this same video and also describing ISIL’s interest in attacks in the United States as retaliation for U.S. airstrikes. Mateen then acted in accordance with the direction in the video, committing an attack in America during Ramadan, exactly as directed by ISIL, providing personnel or services (or both) to ISIL.² Finally, ISIL then claimed Mateen’s attack and held it out to other potential recruits in propaganda as an example to be followed. These facts are more than enough

¹ This Brief summarizes some, but not all, of the expected evidence in this case. The United States reserves the right to make additional or different arguments, depending upon the evidence that is introduced at trial.

² Indeed, ISIL has called for its supporters to conduct attacks of any kind at any time in any place where ISIL supporters are located. Even if Mateen or other supporters followed those general deadly directives, that would be sufficient to find that an attacker was acting at the direction, and/or was attempting to act at the direction, of ISIL.

to establish that Mateen provided material support to ISIL. *See U.S. v. Augustin*, 661 F.3d 1105, 1119-20 (11th Cir. 2011) (addressing conspiracy to provide personnel).

In *Augustin*, the Eleventh Circuit upheld a conviction for conspiring to provide material support under similar circumstances. “Each of the defendants then took an oath, with [the FBI informant] first (at [one of the defendant’s] prompting), reading it for them, and then the group members repeating along the second time through and substituting their own names in the relevant places. . . . [The informant] announced that the alliance between Al Qaeda and the Moors was now official, but stated ‘we are not controlling the Moors ... [y]ou have your leader here.’ The defendants applauded.” 661 F.3d at 1113-4. Following their oath, the defendants photographed government buildings at the direction of the FBI informant, whom the defendants believed to be an al Qaeda operative.

The defendants challenged their convictions by arguing that they had acted “entirely independently of the foreign terrorist organization.” *See id.* at 1119 (quoting 18 U.S.C. § 2339B(h)). The Court found that they worked under the direction or control of Al Qaeda for two primary reasons: (1) the defendants volunteered themselves to serve under the direction or control of al Qaeda by taking an oath of allegiance to al Qaeda; and (2) the defendants then

acted in accordance with what they believed al Qaeda wanted them to do. *Id.* at 1119-20. Further, the Court rejected the defendants' argument that they acted "*entirely*" independently of al Qaeda because they had volunteered themselves to work under the group's direction or control. *Id.* at 1119 (emphasis the Court's).

Similar to the defendants in *Augustin*, Mateen pledged his allegiance to ISIL, thus volunteering himself to serve under the terrorist group's direction or control. Further, Mateen provided services to ISIL by carrying out an attack at their direction. Electronic evidence demonstrates that Mateen viewed ISIL propaganda and materials related to the propaganda to determine precisely what kind of action ISIL was seeking. Then, he acted in accordance with that direction, committing a violent attack in the United States during Ramadan. Mateen's pledge of allegiance further demonstrates that his attack was committed at the behest of ISIL, which then accepted Mateen's allegiance. Further, the evidence completely belies any argument that Mateen acted *entirely* independently of ISIL; in fact, he acted at and consistently with the command of ISIL and performed an attack that they sought.

Nothing in *HLP* supports a different result. In *HLP*, the Court considered a challenge to the constitutionality of § 2339B by civil plaintiffs who wanted to provide various types of support to two organizations that had

been designated as terrorist organizations. 561 U.S. at 14-15. As to the provision of personnel or services, the Court held that § 2339B is constitutional because it “avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.” *Id.* at 36. Neither *HLP* nor the statute require “direct link” to a foreign terrorist organization, that is, there is no requirement for two-way communication between Mateen and ISIL. *U.S. v. Mehanna*, 735 F.3d 32, 50 (1st Cir. 2013) (upholding conviction of defendant who travelled to Yemen to obtain training from al Qaeda but was unsuccessful in contacting anyone associated with the group).

Mateen’s attack was not “independent advocacy,” nor was it advocacy of any kind. *Id.* at 26 (Material support “most often does not take the form of speech at all.”). Further, Mateen’s attempted provision or provision of material support was clearly “directed to, coordinated with, or controlled by” ISIL, as demonstrated most clearly by his (accepted) pledge of allegiance and his action in accordance with ISIL’s commands. *See also U.S. v. Elshinaway*, 2017 WL 876484, *6, *8-10, *12 (D. Md. Mar. 6, 2017) (defendant’s pledge of allegiance to ISIL combined with his conduct were sufficient to reject dismissal on First and Fifth Amendment grounds); *U.S. v. Nagi*, 254 F. Supp. 3d 548, 559-60 (W.D.N.Y. 2017) (denying a motion to dismiss on First

Amendment grounds in light of the defendant’s “pledge to support Abu Bakr al-Baghdadi, the leader of ISIL” combined with actions including “buying combat gear” and “going to a shooting range”); *U.S. v. Wright*, 2018 WL 504396, *9 (D. Mass. Jan. 22, 2018) (appeal currently pending) (defendant’s pledge of allegiance to ISIS and fact that he followed instructions from the group sufficient to comply with § 2339B(h)). **In conducting his attack, Mateen was acting under ISIL’s direction or control by acting in accordance with their command to commit attacks without having in-person contact with them.**

Thus, under any theory charged by the government, whether the attempted provision of material support or the provision of it, whether personnel or services, the government will present sufficient evidence for the jury to find the defendant guilty of aiding and abetting Mateen.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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