UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:17-cr-00018-ORL-40KRS

NOOR ZAHI SALMAN,

Defendant.

DEFENDANT'S TRIAL BRIEF

Pursuant to this Court's order, Defendant, Noor Salman, provides the following trial brief regarding theories of aiding and abetting and the direction and control requirement of 18 U.S.C. § 2339B.

I. Introduction

On January 12, 2017, Salman was arrested in the Northern District of California. The Indictment charged her with aiding and abetting Omar Mateen with material support of terrorism, in violation of 18 U.S.C. §§ 2339B(a)(1)-(2), and with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

The aiding and abetting charge reads as follows:

Count One

> From an unknown date, but at least as early as in or about the end of April 2016, through and including on or about June 12, 2016, in the Middle District of Florida, and elsewhere, the defendant, NOOR ZAHI SALMAN, did knowingly aid and abet Omar Mateen's attempted provision and provision of "material

> support or resources," as that term is defined in 18 U.S.C. § 2339A(b)(l), including personnel and services, to a designated foreign terrorist organization, namely, the Islamic State of Iraq and the Levant, knowing that the organization was designated as a terrorist organization, and that the organization had engaged and was engaging in terrorist activity and terrorism, and the death of multiple victims resulted.

II. Aiding and abetting material support of a terrorist organization

The Government has charged Salman with aiding and abetting Mateen's provision of material support to ISIL under 18 U.S.C. § 2339B. Under Eleventh Circuit case law, the elements of aiding and abetting are that "(1) the substantive offense was committed by someone; (2) the defendant committed an act which contributed to and furthered the offense; and (3) the defendant intended to aid in [the substantive offense's] commission." *United States v. Williams*, 865 F.3d 1328, 1347 (11th Cir. 2017) (quoting *United States v. Camacho*, 233 F.3d 1308, 1317 (11th Cir. 2000)).

A. Proof of the substantive offense, including § 2339B's "direction and control" requirement

To establish the first element of aiding and abetting, the Government must show that Mateen (the principal) committed the underlying offense of material support of a terrorist organization, in violation of 18 U.S.C. § 2339B, as charged. The Government specifically alleges Mateen materially supported ISIL by providing services and personnel and that the support resulted in the loss of life. The general elements of § 2339B are that Mateen (1) knowingly provided material support (2) to a designated terrorist organization and (3) loss of life occurred. 18 U.S.C. § 2339B(a)(1).

The knowledge requirement of the first element requires the Government to "'prove beyond a reasonable doubt, first, that the [Mateen] acted voluntarily and intentionally and not

because of mistake or accident. Second, the government must prove that [Mateen] knew that [the FTO] had been designated by the Secretary of State as a "foreign terrorist organization" or that he knew that it had conducted or engaged in "terrorist activity"' or terrorism." *United States v. Ahmed*, 94 F. Supp. 3d 394, 430 (E.D.N.Y. 2015) (quoting *United States v. Paracha*, No. 03 CR. 1197 (SHS), 2006 U.S. Dist. LEXIS 1, 2006 WL 12768, at *30-31 (S.D.N.Y. Jan. 3, 2006)).

The "material support" prong of the first element requires the Government to show that Mateen provided material support. Material support includes "any property, tangible or intangible, or service, including . . . personnel." 18 U.S.C. § 2339A(b)(1). The statute defines providing "personnel" as providing

> 1 or more individuals (who may be or include himself) *to work under [a] 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.*

18 U.S.C. § 2339B(h) (emphasis and paragraph break added).[1]

In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court analyzed the statute's provisions regarding services and personnel.[2] The Court found, first, that

[1] Courts have described § 2339B(h) as definitional. *See, e.g.*, *United States v. Pugh*, No. 15-CR-116 (NGG), 2015 U.S. Dist. LEXIS 170271, at *28 (E.D.N.Y. Dec. 21, 2015).

[2] In *Humanitarian Law*, A group of nonprofits sought a declaratory judgment that § 2339B could not prohibit training designated terrorist organizations how to pursue their goals peacefully. *Id.* The plaintiffs argued that the statute was impermissibly vague, because they "could not tell," for instance, if "'political advocacy' on behalf of Kurds living in Turkey and Tamils living in Sri Lanka" was permissible. *Id.*

the statute's language encompassed both illegal acts and otherwise legal acts. *Id.* at 16-17. Thus, the character of the act was immaterial. In finding the proscription against otherwise lawful acts of speech constitutional, the Court excluded from the statute's proscription mere membership in a terrorist organization and independent acts on behalf of a terrorist organization. *Id.* at 23. Similar to "personnel," "service" "refers to concerted activity." *Id.* at 24. The Court explains:

> if independent activity in support of a terrorist group could be characterized as a "service," the statute's specific exclusion of independent activity in the definition of "personnel" would not make sense. Congress would not have prohibited under "service" what it specifically exempted from prohibition under "personnel." . . . [A] person of ordinary intelligence would understand the term "service" to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.

Id.

The Court, thus, extended § 2339B(h)'s "direction and control" requirement for "personnel" to the umbrella term "service." If "service" could include actions not controlled by a terrorist organization, then any activity generally solicited by the organization would fall within the statute's proscription, prohibiting independent activity that served the organization's stated goals. Accordingly, § 2339B does not encompass "any activities not directed to, coordinated with, or controlled by foreign terrorist groups." *Id.* at 36. The Court, however, left unanswered "difficult questions of exactly how much direction or coordination is necessary for an activity to constitute a 'service,'" finding their resolution unnecessary to the determination of the plaintiffs' claims. *Id.* at 24-25.

In the wake of *Humanitarian Law*, the Eleventh Circuit has considered what constitutes sufficient direction and control to charge a defendant for providing service or personnel only once—in *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011). In *Augustin*, without further defining what constituted direction and control, the court determined that the defendants' meeting with a person they believed to be an Al Qaeda representative, swearing an oath of allegiance to him, and following his instructions to photograph and videotape buildings as potential targets was sufficient to constitute the direction and control required for a conspiracy to violate § 2339B by providing personnel and services. *Id.* at 1121.

Similarly, in *United States v. Nagi*, 254 F. Supp. 3d 548, 560 (W.D.N.Y. 2017), the court found that swearing an oath, purchasing firearms, and training, *in combination with* traveling to Turkey with the intent to join ISIS was sufficient to establish the defendant's attempt to place himself under the direction and control of a foreign terrorist group. *See also United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 176 (E.D.N.Y. 2008*)* ("[A] defendant does not have the right to act as an employee of [a designated] organization and engage in work, no matter how apparently benign."); *United States v. Farhane*, 634 F.3d 127, 150 (2d Cir. 2011) (affirming a conviction for attempted violation of § 2339B when the defendant's "purpose in swearing [an oath of allegiance to Al Qaeda] was to formalize his promise to work as a doctor under the organization's direction and control."). These cases are notable because they turn not only on allegiance to and general direction from a terrorist organization but also the defendants' intent to place themselves under the terrorist organization's direction and control. All of these cases contain the common denominator of contact or attempted contact with representatives of designated organizations in satisfaction of the control requirement.

The last two elements § 2339B are straightforward. The second element simply requires the Government to prove that the Secretary of State had designated the organization to which the defendant had provided material support as a foreign terrorist organization (FTO) before the alleged provision of support. *See United States v. Warsame*, 537 F. Supp. 2d 1005, 1023 (D. Minn. 2008). The final element requires the Government to prove that death directly resulted from material support of a terrorist group.

B. Proof of an act that contributed to and furthered the offense.

To establish the second element of aiding and abetting, the Government must show that "the defendant committed an act which contributed to and furthered the offense." *Williams*, 865 F.3d at 1347. Although a jury can consider mere presence along with other evidence, mere presence alone "is not sufficient to uphold a conviction for aiding and abetting. . . ." *United States v. Seabrooks*, 839 F.3d 1326, 1333 (11th Cir. 2016). Accordingly, "[p]roof that a defendant was merely associated with a criminal, or that defendant was present at the scene of a crime is not, without more, sufficient to sustain a conviction for aiding and abetting a criminal venture." *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978).[3]

Likewise, merely accepting money or a gift, even as a payment for silence, does not contribute to or further an offense, so it cannot constitute aiding and abetting under Eleventh Circuit law. *See id.* at 425.[4] In *Longoria*, the former Fifth Circuit held that a defendant's

[3] Courts in the Eleventh Circuit are bound by Fifth Circuit law in cases before October 1, 1981. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

[4] The Eleventh Circuit has held receiving funds can be part of the evidence for aiding and abetting fraud or a conspiracy to commit fraud, but, in such cases, the defendant received the proceeds of the unlawful scheme. *E.g.*, *United States v. Fuertes*, No. 15-12928, 2018 U.S. App. LEXIS 1900, at *13 (11th Cir. Jan. 23, 2018).

accepting $300 in hush money and exercising her constitutional right to remain silent at a border patrol checkpoint did not constitute "affirmative conduct designed to aid the distribution" of marijuana or "establish in any way her intention to associate herself with and participate in the distribution of marijuana." *Id.*

C. Proof that the Defendant intended to aid in the substantive offense's commission

To establish the third element of aiding and abetting, the Government must show that the defendant intended to aid the underlying offense. *Williams*, 865 F.3d at 1347. This intent element requires the Government to show that "the defendant shared the criminal intent of the principal(s)" *United States v. Leonard*, 138 F.3d 906, 909 (11th Cir. 1998). "An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged" against the principal. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014). In the words of Judge Learned Hand, "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Id.* (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). Accordingly, to establish intent, the Government must show that the defendant "actively participate[d] in the commission of the crime 'with full knowledge of the circumstances' that constitute the whole offense." *United States v. Robinson*, 16-17547, 2017 WL 6062881, at *2 (11th Cir. Dec. 8, 2017) (quoting *Rosemond*, 134 S. Ct. at 1248-49).

In *Rosemond*, the government charged the defendant with participating in an armed drug sale under 18 U.S.C. §924(c). *Rosemond*, 134 S. Ct. at 1248. The Supreme Court held that "[a]n active participant in a drug transaction has the intent needed to aid and abet a §924(c)

violation when he knows that one of his confederates will carry a gun" and still chooses to participate. *Id.* at 1249. The defendant must be aware of the full *scope* of the plan—"that the plan calls not just for a drug sale, but for an armed one." *Id.* Further, the defendant's knowledge of the entire plan must be "advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice." *Id.* As the Court explained, "[w]hen an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense." *Id.*

Rosemond requires, in this case, that the Government prove Defendant shared Mateen's intent and knew about the entire offense. Specifically, the Government must show that Defendant had the intent to help Mateen provide material support to ISIL and knew that Mateen would place himself under ISIL's direction and control and that death would result.

Respectfully submitted,

s/ Charles Swift
Charles D. Swift, Pro Hac
Texas Bar No. 24091964
Pro Hac Attorney for Noor Salman
833 E. Arapaho Rd., Suite 102
Richardson, Texas 75081
(972) 914-2507

Linda Moreno
Linda Moreno, P.A.
Florida Bar No. 0112283
Attorney for Noor Salman
511 Avenue of the Americas, No. 312
New York, New York 10011
(813) 247-4500

CERTIFICATE OF SERVICE

On February 19, 2018, I electronically filed the forgoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all attorneys of record.

/s/ Charles D. Swift
Charles D. Swift, Pro Hac Attorney for Noor Salman
Constitutional Law Center for Muslims in America
833 E. Arapaho Rd., Suite 102
Richardson, TX 75074
cswift@clcma.org
(972) 914-2507