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

GOVERNMENT'S TRIAL BRIEF ON AIDING AND ABETTING

In January 2017, a grand jury in the Middle District of Florida indicted the defendant for: (a) aiding and abetting the attempted provision and provision of material support to a foreign terrorist organization, that is, the Islamic State of Iraq and the Levant, in violation of 18 U.S.C. §§ 2339B(a)(1) and 2; and (b) obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). Doc. 1.

I. Overview of Aiding and Abetting

Aiding and abetting does not define a crime, but "simply makes punishable as a principal one who aids or abets the commission of a substantive crime." *United States v. Walker*, 621 F.2d 163, 166 (5th Cir. 1980). "In order to prove that the defendant aided and abetted an offense, the government must establish that: (1) someone else committed the substantive offense; (2) the defendant committed an act that contributed to and furthered the offense; and (3) the defendant intended to aid in the commission of the offense." *United States v. Cruickshank*, 837 F.3d 1182, 1189 (11th Cir. 2016).

In other words, the United States does not need to establish that the defendant in this case was the one who provided, or attempted to provide, material support. *See id.* (noting that the United States must establish that "someone else committed the substantive offense"). To the contrary, "[a] culpable aider and abettor need not perform the substantive offense, need not fully know of its details, and need not even be present." *United States v. Pepe*, 747 F.2d 632, 665 (11th Cir. 1985). The United States only needs to prove that the defendant assisted on some aspect of Omar Mateen's offense:

> In proscribing aiding and abetting, Congress used language that "comprehends all assistance rendered by words, acts, encouragement, support, or presence," —even if that aid relates to only one (or some) of a crime's phases or elements.

Rosemond v. United States, 134 S. Ct. 1240, 1246-47 (2014) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993)); *see also United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015) ("Indeed, 'only some affirmative participation which at least encourages the principal offender to commit the offense' is required.") (quoting *United States v. Frorup*, 963 F.2d 41, 43 (3d Cir. 1992)).

In making that showing, the United States does not have to prove why the defendant decided to aid and abet her husband. Whether the defendant participated "with a happy heart or a sense of foreboding," the defendant can be found guilty so long as she "knowingly elected to aid in the commission of a peculiarly risky form of offense." *Rosemond*, 134 S. Ct. at 1250 ("The law does

not, nor should it, care whether he participates with a happy heart or a sense of foreboding. Either way, he has the same culpability, because either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense."); *see also United States v. Winston*, 687 F.2d 832, 835 (6th Cir. 1982) ("Requiring a participant in a criminal venture to have a stake in the outcome of the crime would limit severely the reach of the aiding and abetting offense[.]").

Nor does the United States have to prove that the defendant participated in an important aspect of the crime: "'[o]ne need not participate in an important aspect of a crime to be liable as an aider and abettor; participation of relatively slight moment is sufficient.'" *United States v. Ibarra-Diaz*, 805 F.3d 908, 933 (10th Cir. 2015) (quoting *United States v. Rufia*, 732 F.3d 1175, 1190 (10th Cir. 2013)); *see also United States v. Seabrooks*, 839 F.3d 1326, 1333 (11th Cir. 2016) (finding that a defendant aided and abetted another's possession of a stolen firearm where the defendant's involvement consisted of sitting in the front passenger seat of a car, having stolen firearms handed to him, placing them in the car, and "cho[osing] to remain" in the car "throughout th[e] episode"); *United States v. Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008) (same as *Ibarra-Diaz*); *United States v. Samuels*, 521 F.3d 804, 811 (7th Cir. 2008) ("'relatively slight moment'") (quoting *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001)).

"'Even mere words or gestures of encouragement constitute affirmative acts capable of rendering one liable under this theory.'" *Ibarra-Diaz*, 805 F.3d at 933 (quoting *Rufia*, 732 F.3d at 1190); *see also United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010) ("One can aid and abet another through use of words or actions to promote the success of the illegal venture.").

The United States may prove that the defendant aided and abetted by either direct or circumstantial evidence. *See United States v. Pantoja-Soto*, 739 F.2d 1520, 1525 (11th Cir. 1984).

II. Aiding and Abetting in this Case

As provided by the 11th Circuit Pattern Jury Instructions, "finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it." 11th Circuit Pattern Jury Instructions, Spec. Instr. 7 (2016). The United States expects that the evidence at trial will show that the defendant in this case "intentionally associated with or participated" with her husband in the crime charged in Count One of the Indictment. The United States expects that evidence of such aiding and abetting will fall into three general categories.[1]

[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.

First, the defendant directly participated by assisting Mateen in concealing the plan from his family on the night of the attack. Specifically, while Mateen was en route to Orlando from the couple's home in Fort Pierce on the night of the attack, the defendant formulated a false cover story for Mateen and told Mateen's mother that he was out to dinner with a friend known to Mateen's family. The defendant then texted Mateen to use this cover story when he talked with his mother, and Mateen followed her instructions. Later that night, Mateen told his mother the same cover story to assist him in avoiding detection prior to and during his attack. Further, the defendant deleted text messages related to this cover story from her cell phone. Then, immediately following the attack, the defendant initially used the same lie when speaking to law enforcement agents concerning Mateen's whereabouts.[2]

Creating such a cover story, and executing it, is a classic example of aiding and abetting. *See, e.g.*, *Cruickshank*, 837 F.3d at 1190 (finding sufficient

[2] In determining whether the defendant aided and abetted, the jury is not limited to considering evidence that occurred prior to the commission of the crime. "Although generally proof showing one to be an aider and abettor relates to events occurring before the charged crime of the perpetrator, evidence of acts subsequent to the commission of the crime is competent to prove a common design, and is significant in evaluating the conduct prior to the commission of the offense of one charged as an aider and abettor." *Government of Virgin Islands v. Navarro*, 513 F.2d 11, 16 (3d Cir. 1975). In this case, the defendant's actions in obstructing the investigation "pointedly demonstrate that the defendant[] approved of" Mateen's "conduct and give rise to an inference that [s]he[] shared his criminal purpose[.]" *Id.*

evidence to support a conviction based on conspiracy and aiding and abetting theories where a defendant, among other things, "came up with a cover story for the authorities"). Jury verdicts of aiding and abetting have routinely been upheld where, as here, a defendant engaged in dishonest conduct or made false statements to promote the success of a criminal venture. *See, e.g.*, *United States v. Guida*, 792 F.2d 1087, 1096 (11th Cir. 1986) (wife aided and abetted her husband in passing counterfeit notes where the wife, who passed no notes herself, was holding items that were purchased with the counterfeit notes and lied to a salesperson, which "[a]rguably . . . was an attempt to hide her identity and that of her husband while they were passing counterfeit notes"); *United States v. Trevino*, 560 F.2d 194, 195 (5th Cir. 1977) (defendant's attempt to take the key to the trunk from the driver and hide it after the driver told an agent that he did not have one "amply supports the inference" that the defendant was aiding and abetting a drug offense).

Second, the defendant participated with Mateen in casing possible locations for an attack, including City Place and Disney Springs, and in driving him to purchase ammunition. By itself, such conduct constitutes aiding and abetting.[3] *See, e.g.*, *United States v. Moreland*, 574 Fed. Appx. 89, 92 (3d Cir.

[3] It also constitutes an attempt. *See, e.g.*, *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986) (concluding that "reconnoitering of the object of a crime and the collecting of the instruments to be used in that crime, together,

2014) (driving others to pick up ammunition on the way to the robbery as one piece of evidence supporting a conviction); *United States v. Orris*, 86 Fed. Appx. 82, 86 (6th Cir. 2004) (driving another "to several locations to scout out a location for the robbery" as one piece of evidence supporting a conviction); *United States v. Davis*, 306 F.3d 398, 409 (6th Cir. 2002) ("picking out the banks to be robbed" as one piece of evidence supporting a conviction).

The fact that the defendant's participation involved multiple episodes is significant. "Although presence alone is insufficient to support a conviction, presence is a factor to consider, and presence plus other circumstantial evidence may be sufficient." *United States v. Sellers*, 871 F.2d 1019, 1022 (11th Cir. 1989) (citation omitted). In this case, such "other" evidence includes the fact that the defendant and Mateen visited more than one location for a possible attack and discussed them together and that they participated together in multiple purchases of items that were to be used in the attack, including the ammunition where she was the driver.

"Evidence of *repeated presence* suggests . . . [the defendant in this case] was not present by accident, but rather participated in and facilitated the" crime of providing, and attempting to provide material support. *See Mercado*, 610 F.3d at 848. Indeed, the jury can reasonably infer that the defendant aided and

---

can constitute a substantial step")

abetted based upon her "repeated presence at important junctures of" the crime. *See United States v. Paone*, 758 F.2d 774, 776 (1st Cir. 1985). Given the terrible magnitude of what Mateen was intending, it would have been far too dangerous for Mateen to have someone repeatedly present who was not a participant in the offense:

> When assessing sufficiency challenges in criminal cases, we have remarked, time and again, that factfinders may draw reasonable inferences from the evidence based on shared perceptions and understandings of the habits, practices, and inclinations of human beings. Thus, jurors are neither required to divorce themselves from their common sense nor to abandon the dictates of mature experience. **Jurors can be assumed to know that criminals rarely welcome innocent persons as witnesses to serious crimes and rarely seek to perpetuate felonies before larger-than-necessary audiences.**

United States v. Ortiz, 966 F.2d 707, 712 (1st Cir. 1992) (citations omitted) (emphasis added); *see also United States v. Baker*, 98 F.3d 330, 338-39 (8th Cir. 1996) (finding sufficient evidence that a defendant aided and abetted another in possessing ricin for use as a weapon and stating that the "jury could have reasonably inferred from the evidence that, had Wheeler been merely an innocent bystander, he would not have assisted Oelrich and Henderson or listened to their discussions about using ricin to kill people").

Such a conclusion is further supported by the personal relationship between the defendant and Mateen. It was no accident that Mateen trusted his

wife to assist him in these efforts. "While innocent association with those involved in illegal activities can never form the sole basis for a conviction, the existence of a close relationship between a defendant and others involved in criminal activity can, as a part of a larger package of proof, assist in supporting an inference of involvement in illicit activity." *Ortiz*, 966 F.2d at 713 (citation omitted).

This case presents a good example. The existence of a relationship between the defendant and Mateen helps to explains why he confided in her about the crime, why she agreed to assist him, and why she participated on multiple occasions. Accordingly, the jury may rely upon evidence of the defendant's relationship with Mateen to assist in supporting an inference of the defendant's involvement in illicit activity and in countering any suggestion that the defendant was an "innocent" bystander. *See, e.g.*, *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (concluding that "there is circumstantial evidence wholly adequate to support the finding of the jury that Moncharsh aided and abetted in the commission of those offenses," including, among other things, "that his family was the chief owner of the business, that he was the manager of it, that his chief subordinates were his brothers-in-law"); *Ortiz*, 966 F.2d at 713 (noting that defendant was brother-in-law of another defendant).

Third, the defendant and Mateen engaged in aberrant and exorbitant expenditures prior to the attack, with dual purposes of equipping Mateen to commit an attack and giving the defendant financial security following Mateen's death. Specifically, the defendant and Mateen purchased over $9,000 worth of jewelry, including a diamond ring set, a gold charm, and one-carat diamond solitaire earrings, clothing, $1,200 worth of electronics, $1,800 for an AR-15 assault rifle, $550 for a Glock firearm, magazines, and ammunition, among other items.

Financial records confirmed that, in the weeks leading up to the attack, the defendant and Mateen engaged in dramatically increased spending compared to their prior spending. The defendant and Mateen had a modest household income—Mateen earned approximately $30,000 annually, and the defendant cared for their child full-time. In light of their limited financial resources, their monthly average expenditures prior to June 2016 were only about $1,500.

But, within an 11-day period preceding the attack, the defendant and Mateen jointly spent and withdrew approximately $30,500—more than a full year's salary for the family—through $25,000 in purchases made on credit and via $5500 cash withdrawals. Further, less than two weeks before the attack, the defendant and Mateen went to a bank where Mateen held an account in his

name and added the defendant as a payable-on-death beneficiary to the account, giving her access to the funds in the account only if Mateen died.

In an interview with the FBI, the defendant admitted that she recognized that these purchases, among other things, were "a green light for Omar to do an act of violence." The United States expects that the evidence at trial will establish that the massive spike in June demonstrates that the defendant and Mateen were acting in concert with each other to exhaust Mateen's resources and credit prior to his death. As noted above, there were dual purposes for the spending, including both equipping Mateen to commit an attack and giving the defendant financial security following Mateen's death.

Either of those purposes constitutes aiding and abetting. With respect to purchasing ammunition and firearm magazines, it is well established that assisting a defendant in obtaining the items to be used to commit a crime constitutes aiding and abetting. *See, e.g.*, *United States v. Moore*, 786 F.2d 1308, 1314 (5th Cir. 1986) (finding sufficient evidence that a defendant conspired and aided and abetted in an extortion where the defendant, among other things, "went to Houston with her husband to buy shopping bags and sample cases for use in the extortion"); *see also Moreland*, 574 Fed. Appx. at 92 (noting that defendant drove others to pick up ammunition used in the robbery and purchased it himself); *United States v. Estes*, 87 Fed. Appx. 364, 365 (5th Cir.

2004) (noting that defendant "accompanied others to steal . . . a necessary ingredient in the manufacture of methamphetamine").

As for providing financial security to the defendant, it is equally well established that efforts to encourage a defendant to commit a crime – whether by words alone or action – constitute aiding and abetting. *See, e.g.*, *United States v. Surtain*, 519 Fed. Appx. 266, 277 (5th Cir. 2013) (finding sufficient evidence to support a conviction for aiding and abetting use of fire to commit obstruction based upon the timing of the defendant's five minute telephone call with the perpetrator, his motive to destroy the evidence, and use of a "burner" phone, because "the jury could have found beyond a reasonable doubt that Moss, at minimum, gave words of encouragement to Samuels in violation of the federal aiding-and-abetting statute"); *Centeno*, 793 F.3d at 387 (holding that defendants' presence as part of a group that attacked a victim was sufficient to treat them as aiders and abettors, because their presence, among other things, "encouraged their friends to proceed in the assault").

In this case, the United States expects that the evidence will establish that the defendant knew of her husband's plan for attack, in part, based upon the aberrant spending in June 2016 and that the large amount of spending in that month encouraged both the defendant and Mateen "to intentionally associate[] with or participate[] in the crime." 11th Circuit Pattern Jury Instructions, Spec.

Instr. 7. For the defendant's part, the spending was an inducement for her to participate, and it encouraged her to assist in concealing the crime and aiding the defendant in its execution. *Cf. United States v.* Cartlidge, 808 F.2d 1064, 1065 (5th Cir. 1987) ("We hold that – when actions that would have constituted the crime of aiding and abetting consist of silence and providing warnings when needed – promises of such assistance, assurances of ability to provide protection against law enforcement interference, and supplying information against a convenient time for the operation, coupled with acceptance of payment for these services, supplied sufficient evidence to show more than mere preparation and to prove an attempt to aid and abet in a federal crime."). For Mateen's part, the defendant's participation in the spending encouraged Mateen to commit the crime, because it showed that his wife supported his criminal activities, that another person agreed with his goals and was willing to help make them a reality, and that his family would have tangible assets they could use after he was dead or arrested (which gave him some "peace of mind").

Whether considered separately or together, the pieces of evidence discussed in this Brief (and the other evidence that is expected to be introduced at trial) establish that the defendant aided and abetted Mateen's provision, and attempted provision, of material support.

III. The Jury Does Not Need to Be Unanimous On What Constitutes Aiding and Abetting.

The jury does not have to agree on which of the defendant's actions constitutes aiding and abetting. "[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson v. United States*, 526 U.S. 813, 817 (1999). As the United States Supreme Court has held:

> In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Schad v. Arizona, 501 U.S. 624, 631-32 (1991) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmum, J., concurring)).

The Eleventh Circuit has reached the same result: "jurors need not unanimously agree on the underlying facts that make up a particular element of the offense, such as which of several possible means a defendant used to commit that element, so long as they unanimously agree that the government has proven the element beyond a reasonable doubt." *United States v. Weiss*, 539 F. Appx. 952, 956 (11th Cir. 2013); *see also United States v. Dawson*, 428 F. Appx. 933, 934 n. 1 (11th Cir. 2011) ("The unanimity requirement applies to the jury's finding that the government has proved an element of the crime alleged, but not to the

question of 'which of several possible means the defendant used to commit an element of the crime.'") (citing *Richardson*, 526 U.S. at 817).

In other words, "if a jury is confronted with divergent factual theories in support of the same ultimate issue, courts generally have held that the unanimity requirement is met as long as the jurors are in agreement on the ultimate issue (even though they may not be unanimous as to the precise theory)." *United States v. Lee*, 317 F.3d 26, 36 (1st Cir. 2003); *see also United States v. Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005) (concluding "that the district court did not need to instruct the jury to unanimously agree on which theory supported the verdict"). The following is an example given by the Supreme Court to illustrate these principles:

> Where, for example, an element of robbery is force or the threat of force, some jurors might concluded that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement – a disagreement about means – would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Richardson, 526 U.S. at 817.

These principles apply to aiding and abetting. *See, e.g.*, *Davis*, 306 F.3d at 414 ("The same reasoning [in *United States v. Kim*, 196 F.3d 1079 (9th Cir. 1999)] holds in this case, and although there may have been various means by which Defendant aided and abetted in the underlying offenses for which he was

convicted, no unanimity instruction with regard to these various means was necessary."); *Kim*, 196 F.3d at 1083 (holding that "it was not necessary for the jurors in this case to unanimously agree on a specific classification of" the defendant's conduct or "for them to specify which conduct led them to conclude" that the defendant aided and abetted; rather, "[a]ll that was necessary was a unanimous decision that Kim knowingly and intentionally helped Park in the possession of stolen goods").

Applied in this case, these principles establish that the jury only needs to determine whether the United States has proven beyond a reasonable doubt the elements of Count One. The jury does not have to agree unanimously on which facts justify that result or which prong of aiding and abetting has been proven.[4] *See, e.g.*, *United States v. Mitchell*, 346 Fed. Appx. 281, 284 (9th Cir. 2009) (stating that "the jury is not required to agree on the specific acts that constitute aiding and abetting"); *Whitting v. United States*, 38 Fed. Appx. 623 n. 1 (1st Cir. 2002) (per curiam) (rejecting the assertion "that a jury must

[4] Even assuming *arguendo* that the jury were required to agree unanimously on a particular aiding and abetting theory, the Court could simply provide a general unanimity instruction and need not include a special interrogatory in the verdict form on this point. *See United States v. Griffin*, 705 F.2d 434, 437 (11th Cir. 1983) ("Special verdicts in criminal jury trials are generally disfavored."); *United States v. Russo*, 166 F. Appx. 654, 660–61 (3d Cir. 2006) (holding that "special verdict sheets are generally disfavored in criminal trials" and that typically "a general unanimity instruction will suffice").

unanimously agree upon the applicable prong of the aiding and abetting statute").

Respectfully submitted,

MARIA CHAPA LOPEZ
United States Attorney

By:

s/ James D. Mandolfo
James D. Mandolfo
Assistant United States Attorney
Florida Bar No. 96044
400 N. Tampa Street, Ste. 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: James.Mandolfo@usdoj.gov

s/ Sara C. Sweeney
Sara C. Sweeney
Assistant United States Attorney
USA No. 119
400 W. Washington Street, Ste. 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: Sara.Sweeney@usdoj.gov

U.S. v. NOOR ZAHI SALMAN **Case No. 6:17-cr-18-Orl-40KRS**

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:

Charles D. Swift, Esquire (counsel for Defendant)
Linda Moreno, Esquire (counsel for Defendant)
Fritz Scheller, Esquire (counsel for Defendant)

s/ Sara C. Sweeney

Sara C. Sweeney
Assistant United States Attorney
USA No. 119
400 W. Washington Street, Suite 3100
Orlando, Florida 32801
Telephone: (407) 648-7500
Facsimile: (407) 648-7643
E-mail: Sara.Sweeney@usdoj.gov