No. 14-15205-CC

# In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*,

v.

SAMI OSMAKAC,
*Defendant-Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 8:12-CR-45-T-35AEP-1

## UNCLASSIFIED, REDACTED BRIEF OF THE UNITED STATES

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March 18, 2016

*United States v. Sami Osmakac*
No. 14-15205-CC

## Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Sami Osmakac's principal brief, the following persons have an interest in the outcome of this case:

1. Elm, Donna Lee, Federal Public Defender;
2. Fernandez, Rafael, Esq.;
3. Hall, Alec F., Office of the Federal Public Defender;
4. Krigsman, Cherie L., Assistant United States Attorney;
5. Militello, Paul L., Esq.;
6. Tragos, George E., Esq.; and
7. Vaughn, Charles P., Esq.

No publicly traded company or corporation has an interest in the outcome of this appeal.

## Statement Regarding Oral Argument

The United States agrees with Osmakac that oral argument is not necessary in this case.

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## Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The court entered the judgment against Sami Osmakac on November 5, 2014, Doc. 354, and Osmakac timely filed a notice of appeal on November 17, 2014, Doc. 363. *See* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal, *see* 28 U.S.C. § 1291, and authority to examine Osmakac's challenge to his sentence, *see* 18 U.S.C. § 3742(a).

## Statement of the Issues

I. Did the district court abuse its discretion by denying Osmakac's motions for disclosure of FISA materials?

II. Did the district court abuse its discretion by denying Osmakac's motion for a mistrial based on a single comment in the prosecutor's rebuttal argument, where the court's jury instructions corrected the prosecutor's inadvertent misstatement of the law and, given the overwhelming independent evidence of Osmakac's guilt, the prosecutor's comment could not have prejudicially affected Osmakac's substantial rights?

III. Did the district court plainly err at sentencing by failing sua sponte to reduce Osmakac's sentence based on sentencing-factor manipulation?

## Statement of the Case

Promising a "second 9/11" and "payback" for Osama bin Laden, Sami Osmakac obtained the materials he needed to carry out a two-pronged terrorist attack at a pub and a casino in Tampa, Florida. On the night of the planned attack, he went to a local motel, donned a suicide vest, slung a bag of grenades over his shoulder, and familiarized himself with a handgun and an AK-47. He recorded a martyrdom video and went outside to load a car bomb into the trunk of his Honda Accord. Unbeknownst to Osmakac, the FBI was recording everything, the explosives and grenades were inert, and his martyrdom video would be broadcast only in a courtroom. At trial, the jury rejected his entrapment defense and convicted him on a terrorism-related charge and a firearms charge. He now challenges the district court's denial of his motions for disclosure of classified Foreign Intelligence Surveillance Act (FISA) materials and the court's refusal to grant a mistrial during the prosecutor's rebuttal closing argument. He also claims—for the first time on appeal—that the court erred by not reducing his sentence based on sentencing-factor manipulation.

### *Course of Proceedings*

In February 2012, a federal grand jury returned a two-count indictment charging Osmakac with attempting to use a weapon of mass destruction, in

violation of 18 U.S.C. § 2332a(a)(2)(A), and illegally possessing an unregistered firearm, in violation of 26 U.S.C. § 5861(d). Doc. 10.

Osmakac proceeded to trial, Docs. 293–94, 297–99, 301, 303–04, 307, 310, and the jury found him guilty on both counts, Doc. 312. The district court subsequently sentenced him to concurrent terms of 480 months' imprisonment on count one and 120 months' imprisonment on count two. Doc. 354. This appeal followed. Doc. 363.

## *Statement of the Facts*

### 1. The Offense Conduct[1]

#### a. Osmakac is radicalized and travels for jihad.

As early as December 2010, Osmakac demonstrated a commitment to Islamic extremism. In telephone conversations covertly recorded pursuant to FISA, Osmakac discussed his beliefs with fellow extremist Russell Dennison. *See* Doc. 378 at 117–26; Doc. 379 at 20–21; Doc. 380 at 89, 139–51; *see, e.g.,* Gov't Trial Exs. 161.1A–B, 162.1A–B, 163.1A–B. During one of their conversations, Osmakac complained that he had received negative comments about videos he had made, remarking that his critics would understand his message when "the black flags come on top of everybody's head and the head

[1]This section of our brief is drawn exclusively from evidence presented at Osmakac's trial.

flies off … ."[2] *See* Doc. 380 at 140. In another conversation, in January 2011, Osmakac and Dennison spoke about two articles in *Inspire* magazine, al-Qaeda's official English-language online magazine. Doc. 380 at 142–51; Gov't Trial Exs. 160A, 161.1A–B, 162.1A–B. Osmakac told Dennison that he had just read a "beautiful" article by Sheik Anwar al-Awlaki that reflected Osmakac's thoughts and beliefs.[3] Doc. 380 at 143, 149–51, 156; Gov't Trial Ex. 160A. In the article, al-Awlaki contended that Muslims in the West have the right to steal money from non-Muslims to raise money for jihad. Doc. 380 at 150–51; Gov't Trial Ex. 160A. The second *Inspire* article was about an al-Qaeda operative who had managed to rejoin al-Qaeda after his release from Guantanamo. Doc. 380 at 157–58; Gov't Trial Ex. 160B.

In the meantime, Osmakac was working at a Tampa-area pharmacy and saving his earnings. *See* Doc. 382 at 58–59, 70–71. In March 2011, he abruptly left that job and, without telling his family, travelled overseas to engage in violent jihad. *Id.* He attempted to go to Afghanistan to fight America and its allies but was turned away because he didn't have the proper travel documents.

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[2]Islamic political movements involved in armed conflict often use black flags, and Islamic extremists believe that when the caliphate is reestablished, violators of Islamic law will be beheaded. Doc. 380 at 138, 141.

[3]Al-Awlaki was a member of al-Qaeda and an extremist cleric who assisted in the production of *Inspire.* Doc. 380 at 174.

*Id.* at 59–60, 71–72. He encountered the same problem when he then attempted to get to Iraq through Turkmenistan and Syria. *Id.* After two weeks, he returned to the United States and moved to Illinois. *Id.* at 60–61, 70–71.

In the summer of 2011, Osmakac was outside a mosque in Naperville, Illinois, when a leader of the mosque passed by and said hello. Doc. 380 at 112–13. Osmakac refused to extend greetings to the man, declaring that he would not acknowledge an "infidel" who "support[ed] the American government against Osama bin Laden."[4] *Id.* at 113. Referencing the Quran, Osmakac said that he had the right to kill the man and other mosque leaders and that he was allowed to take their money and their women. *Id.* at 113–14.

**b. Osmakac solidifies his plans for a "second 9/11."**

Osmakac returned to Tampa and, in late September 2011, he met a man working as a confidential source (CS)[5] for the FBI. Doc. 375 at 86; Doc. 381 at 13; Doc. 382 at 70–71. The CS operated a store that sold trinkets and food items from the Middle East, and Osmakac began working for him. Doc. 375 at 86; Doc. 382 at 71. From November 2011 to January 2012, the CS made numerous recordings during which Osmakac discussed his plans to commit a

[4]United States forces had killed bin Laden in Pakistan on May 2, 2011. *See, e.g., In re Sept. 11 Litig.*, 931 F. Supp. 2d 496, 502 (S.D.N.Y. 2013).

[5]In the district court, the parties referred to the source as the "CHS."

terrorist attack. *See, e.g.,* Gov't Trial Exs. 101.2A–101.6B; 101.8A–B; 102.1A–B; 104.1A–B; 105.1A–105.2B; 106.2A–B; 107.1A–107.2B.

On November 30, 2011, Osmakac spoke at length about *sharia* (Islamic law) being the "only way," characterizing democracy and other forms of government as systems for the infidels. Doc. 379 at 46, 57–62, 67, 69; Gov't Trial Exs. 101.8A–B. The CS chastised Osmakac for trying to buy guns from drug dealers in St. Petersburg, and Osmakac responded that, although he was concerned about being under surveillance, millions of people had guns. Doc. 379 at 23–25, 32–35, 38, 41–42, 45. (Osmakac had, in fact, been under physical surveillance, by car and aircraft, after he attempted to buy guns. *See* Doc. 377 at 172–73; Doc. 378 at 82–87; *see also* Doc. 375 at 106–07. ) The CS mentioned his friend Amir (an undercover FBI agent),[6] *id.* at 40, and asked Osmakac if he was ready to move forward with his plan, *id.* at 71. Osmakac replied, "I am going to stick to it. There is no going back, I put the belt on, and there is nobody stopping me … ." *Id.* at 71.

The CS said that he would contribute $2000 towards the expenses for the attack, plus whatever he owed Osmakac for his salary, and that he would help Osmakac get other items, including two suicide belts. *See* Doc. 379 at 23, 73.

[6]The undercover agent's identity was protected in this case. *See* Doc. 217. We refer to him throughout the Statement of Facts as "Amir," the alias he used during the investigation and the trial. Doc. 375 at 64–66.

Osmakac said that if another "brother" didn't join him in the attack, he would use both belts and "put one on [his] leg if [he had] to." *Id.* at 73. The CS asked whether Osmakac was going to target a location at random, reminding Osmakac that he had previously promised not to attack a mall. Doc. 379 at 81–83. In response, Osmakac whispered something about "recruit, recruiting." *Id.* at 83. The CS said that he would reach out to Amir, and Osmakac told him to "get the belts." *Id.* at 91.

Osmakac, however, failed to meet with Amir as planned on December 5, 2011, because, he told the CS about two weeks later, agents had been following him. Doc. 375 at 103–04; Doc. 379 at 103, 110–11, 121; Gov't Trial Exs. 105.1A–105.2B. Based on earlier discussions, the CS asked whether Osmakac's friend, Abdullah, was still involved in the plan, and Osmakac said that, although he and Abdullah had spoken about the attack two years earlier, Abdullah had become afraid to go through with it. *See* Doc. 379 at 103–04. Abdullah, Osmakac said, had suggested that they attack an armed-forces recruiting center and kill two or three people, but Osmakac had told him that they could do something "more beneficial." *Id.* at 108.

On December 19, 2011, Osmakac talked to Amir on the phone. Doc. 375 at 107–08; Gov't Trial Exs. 108A–B. Osmakac said that the FBI was

monitoring his phone, and, in code, he discussed buying weapons from Amir. *See* Doc. 375 at 114, 123–24; Doc. 377 at 150–53.

Osmakac told the CS later that day that he was "changing his plan" to attack a bigger target—a "gay night club" with "300 or 400 people." Doc. 379 at 126; Gov't Trial Exs. 106.2A–B. Osmakac said, "it's gonna be, it's gonna be, a second 9/11 [UI]." Doc. 379 at 128–29. He said that he was going to shoot a hostage every 30 minutes until his Muslim sisters and brothers were released from Guantanamo and elsewhere. *See id.* at 134–135; Gov't Trial Ex. 106.2A–B. The authorities, he explained, would have "three days to do all that," and if they didn't comply, he would shoot the hostages, film it, and smile. *See* Gov't Trial Ex. 106.2B at 9.

Two days later, on December 21, 2011, Osmakac met with Amir and told Amir that he wanted "one AK at least … [m]aybe a couple of Uzi cause they're better to hide."[7] Doc. 375 at 124–25, 132–33; Doc. 377 at 162; Gov't Trial Exs. 109A–B. Osmakac then said that he wanted the "long magazines" for the AK-47 and the Uzis, "ten grenades, minimum," and a suicide belt. *Id.* at 133, 155. Osmakac said that he thought he could carry about 25 pounds of explosives and that he wanted a blast that went "all the way" around. *Id.* at

[7]Amir testified that AK-47s and Uzis are assault rifles and that an Uzi is a smaller weapon and therefore easier to hide. Doc. 375 at 154.

133–36. He said that he might need refresher training for the AK-47 and that he definitely needed instruction for the other items. *Id.* at 137.

When Osmakac reiterated his concern about being followed, Amir asked if he had done something to draw law enforcement's attention. Doc. 375 at 142–43, 145. Osmakac explained that he had travelled to Turkmenistan and the Turkey-Syria border but had been kicked out and had had to return to the United States. *Id.* at 145–47. He said that he had stayed with a "brother" in Illinois and that he had been involved in a dispute with the "board and the imams" of a local mosque who were preaching that jihad was not a part of Islam, adding that they had reported him to the FBI. *Id.* at 146–47.

After meeting with Amir, Osmakac spoke to the CS about the plans for the attack, including the cost of the guns and explosives. Doc. 379 at 141–52; Gov't Trial Exs. 110.4A–B, 113.3A–B, 113.4A–B. Osmakac then said that, if four people joined him, he would attack the four bridges in the Tampa Bay area, which would leave 2 to 3 million people "sitting ducks." *Id.* at 154–55. Osmakac said, "I'm thinking like put, put some strong stuff in the trunk so the whole bridge will … collapse." Doc. 379 at 156. The CS explained that the attack would hurt Muslims along with Christians and Jews, and Osmakac, who said that he was getting "excited," replied that if a Muslim was killed, it was the Muslim's fault because he wasn't "supposed to live there." *Id.* at 157,

160. Osmakac also suggested that they sell his passport to someone who wanted to come to the United States to carry out an attack. *See id.* at 153–54.

Osmakac met Amir again on December 23, 2011, and they discussed the items that Osmakac wanted for the attack. Doc. 375 at 165–68, 177; Gov't Trial Exs. 111A–B. Osmakac suggested that they go to a warehouse so that Amir could train him without being detected by law enforcement. Doc. 375 at 165–68, 177; Gov't Trial Exs. 111A–B. When Amir asked Osmakac for a down-payment on the items, Osmakac said that he had $500 from his salary and that the CS would pay the balance. *Id.* at 177, 189.

As they discussed the cost of the items, Osmakac said:

> I know like, Afghanistan they make IEDs for like five dollars. I know over there it's a lot cheaper, but how much will it cost to fill up like two trunks…if I could get two, three rental cars from somewhere to fill up like two trunks with like explosives…

Doc. 375 at 179. "Trunks of cars?" Amir asked. "Yeah," Osmakac said, explaining that he would also need a remote detonator. *Id.* Osmakac said that he hadn't mentioned the car bombs before because he knew that explosives were difficult to obtain and that brothers "overseas" had been "busted" when they had tried to acquire large quantities of explosives. *Id.* at 180.

Amir said that he might be able to provide explosives for one car bomb, but that it would be difficult to get more without drawing unwanted attention.

Doc. 375 at 180. Amir asked whether Osmakac wanted to use the bomb to "knock down a building" or "just people," and Osmakac said that he hadn't decided yet but that it would be better if buildings collapsed because "it's more terror in their hearts." *Id.* at 183–84. In response to Amir's questions, Osmakac clarified that he wanted a high-intensity bomb because it ripped flesh better. *Id.* at 185. They agreed on a price of $2500 for the guns and explosives, and Osmakac said that he was thinking about using "fake names" to get phones for himself and for Amir. *Id.* at 188–90; Doc. 376 at 14–15.

They discussed making a martyrdom video, and Osmakac asked Amir if he could get a *shahada* flag (a black flag imprinted with the Arabic testimonial of faith), but Amir said that he could not. Doc. 375 at 181–82; Doc. 380 at 138–40. Osmakac said that he had been avoiding the mosques because they had been "promoting democracy." Doc. 375 at 191. He also mentioned that he had gone to South St. Petersburg to try to buy some guns from drug dealers, and that he planned to ask the "brother" who had told him about the guns to join him in "the big *hijrah*"—the suicide mission. *Id.* at 195–97; Doc. 378 at 82–88.

On December 27, 2011, Osmakac told the CS that he needed to get a different car and "disappear" from law enforcement the day before the attack. Doc. 379 at 162–89; Gov't Trial Exs. 115.1A–B, 115.2A–B, 115.3A–B. The CS

suggested that, if Osmakac wasn't completely ready, he shouldn't move forward with the attack, but Osmakac said that the agents were never going to let go of him. Doc. 379 at 181.

On New Year's Day, Osmakac and Amir met, and Osmakac said that he had an old Honda Accord that he could use for the car bomb. Doc. 376 at 17–18, 22–24; Gov't Trial Exs. 118A–B. Osmakac told Amir that he would carry out the attack at about 7:00 p.m., because he had to wait for "the right timing." Doc. 376 at 25. Osmakac asked about the range of the cellphone detonator, and when Amir explained that it worked like a regular cellphone, Osmakac replied:

> That's good. Cause I want to do something. Something terrifying. Like one day, one night, something going to happen. Then six hours later somewhere else.

*Id.* at 25–26. He explained that he wanted to use the suicide vest "where there's a lot of people" and take hostages. *Id.* at 26. Law enforcement, he said, would take him seriously because he would have already killed people. *Id.*

Amir then said that Osmakac could still change his mind, but Osmakac responded:

> There's no going back. We all gonna' die, man. … So, why not die the Islamic way.

Doc. 376 at 27, 137.

They discussed the size of the car bomb, and Osmakac said that he wanted a fully automatic AK-47. Doc. 376 at 28–31, 138–39. Concerned that the suicide vest might be too heavy, Osmakac asked Amir to make it a little lighter. *Id.* at 31.

Osmakac explained that the CS would give Amir the funds for the operation, including Osmakac's salary. Doc. 376 at 33, 140; Doc. 378 at 97–98. The surveillance agents, he believed, had "backed off," so he was ready to move forward whenever Amir could deliver the materials. Doc. 376 at 34.

Osmakac said that "after all this money they spending for Homeland Security and all this, this gonna be crushing them, man, this gonna' terrify them." Doc. 376 at 35. He said that he would have "love[d] to go for the army people, but their bases [were] so locked up." *Id.* at 36. He explained that he had spoken to a "brother" about driving an 18-wheeler into the Pentagon but that he didn't have the funds for such an attack. *Id.* at 59. Osmakac mentioned his desire to blow up Tampa-Bay-area bridges and "crush the whole economy" but complained that nobody wanted to help him do it. *Id.* at 41–42. He said that he had wasted his time "debating" and trying to "inspire" people. *Id.* at 40. He also told Amir how to find a website where the "brothers from Afghanistan" post their daily operations. *Id.* at 32–33; Doc. 380 at 170–73.

Amir suggested that Osmakac go ahead without the car bomb, but Osmakac insisted that he wanted to do the "car thing." Doc. 376 at 45. Osmakac asked about detonating the suicide vest, and Amir explained that it would be equipped with a flip switch. *Id.* at 46–49, 139–40. Osmakac explained that he wanted to be able to detonate the vest and hit as many people as he could. *Id.* at 50–52.

Osmakac told Amir to make sure that he left no evidence on the bomb, just in case law enforcement disrupted his plan. Doc. 376 at 58. Amir asked Osmakac why he needed to carry out the second part of the attack, and Osmakac explained that he wanted to kill people first and then demand the release of prisoners. *Id.* at 60–61. And, he said that, if the authorities didn't release the prisoners, he would shoot a hostage and film it. *Id.*

Osmakac also asked Amir to get him a handgun, preferably a Glock-19 (because he had fired one before), just in case somebody tried to stop him after he had parked the car bomb. Doc. 376 at 99. Amir said that he would text Osmakac when everything was ready. *Id.* at 111–12, 146–47.

**c. January 7, 2012: Vowing to avenge Osama bin Laden's death, Osmakac prepares to attack a crowded pub and casino.**

On January 7, 2012**,** Amir sent a text message to Osmakac indicating that he was ready to deliver everything, and he left a note at the CS's store

advising Osmakac to meet him at a local Days Inn at 7:00 p.m. *See* Doc. 376 at 147–49; *see also* Doc. 375 at 87–88; Gov't Trial Ex. 12. Osmakac told the CS that day that he hadn't slept well and that he had been unable to film the martyrdom video the day before at the mosque, but that he would do it later. Doc. 379 at 213–15, 222; Gov't Trial Ex. 120.2A–B.

Osmakac met Amir that evening at the Days Inn, and they drove around for a while and discussed Osmakac's plan. Doc. 375 at 88–89; Doc. 376 at 150–51; Gov't Trial Exs. 121A–B. Worried that they were being followed, Osmakac asked Amir to load one of the guns he had brought, but Amir refused, telling Osmakac to "forget [the attack] for now" and "wait a little while … when things cool down." Doc. 376 at 153–58, 193–94. Osmakac, however, continued talking about the attack, and he mentioned that he had intended to record a martyrdom video. *See id.* at 158–61, 194. Moments later, Amir again suggested that Osmakac should reconsider, but Osmakac told Amir to take him to the motel and show him how to use the guns and explosives. Doc. 376 at 162–63, 165; Doc. 378 at 76–78.

Amir told Osmakac that he wanted to pull over and show him the car bomb, explaining that the explosives weighed 100 pounds but that the bags of nails he had attached to the bomb had made it even heavier. Doc. 376 at 166, 173. As they tried to find a secluded place to pull over, Osmakac said that he

planned to use the guns, grenades, and suicide vest when he "hit up" the Hard Rock Casino and took hostages. *Id.* at 166–170. (This was the first time Osmakac had mentioned that the casino was a target. *Id.* at 194–95.) He explained that he would detonate the car bomb at a club in an area known for nightlife because there weren't "as many police" there. *See id.* at 171.

Osmakac mentioned again that he was concerned about being followed, and Amir said that they should wait a day or two. Doc. 376 at 171–74; Doc. 378 at 79–80. Amir reiterated that he would "rather just wait" if Osmakac believed they were being followed, but Osmakac replied, "No[,] I think we lost them … I don't think this opportunity is gonna come much cause we don't lose them many times … ." Doc. 376 at 174; Doc. 378 at 80.

Amir found a place to pull over, and he showed Osmakac the car bomb in the trunk. Doc. 376 at 124–25, 175, 180–81; Court's Ex. 2 (photograph of assembled car bomb as shown to jury, Attachment 1). The detonator included typewritten instructions taped on the inside lid. Doc. 378 at 64; Gov't Trial Ex. 1D (Attachment 2). Once again, Amir said that Osmakac shouldn't go forward with the attack if he wasn't mentally prepared. Doc. 376 at 182–83; Doc. 378 at 80. Osmakac told Amir that he felt good and that he planned to go to the Hard Rock Casino after he detonated the car bomb and kidnap "a hundred [people], force them in a big room there." Doc. 376 at 183–86; Doc. 378 at 80.

Osmakac then said that he planned to listen to one of Sheik al-Awlaki's lectures later that day, and he began discussing his martyrdom video. Doc. 376 at 186–87. He said that they should turn up the volume of the television in the motel room when they made the video and that he would speak in English, German, and Albanian. *Id.* at 187, 195–96. Osmakac said that he had the camera with him, and he asked Amir to deliver the video to the CS. Doc. 376 at 187–88, 196; Doc. 377 at 33; Gov't Trial Ex. 10. After the attack, Osmakac explained, law-enforcement officials would say that he had been "crazy," but when the video was released, it would be like a "slap in the face." Doc. 376 at 188. Osmakac said that if they were pulled over, he would identify himself using the "white boy name…Steve Meyer."[8] Doc. 376 at 190. When they got to the motel, Osmakac again mentioned that he wanted to "record the video." *Id.* at 191.

The two men went into the motel room, which had been outfitted with a hidden video-recording device. Doc. 376 at 196–99; Gov't Trial Exs. 122.1A–B, 123.1A–B. Amir showed Osmakac the items he had brought, including the grenades, an ammunition belt and magazines, and the AK-47 rifle, and he demonstrated how to use them. Doc. 376 at 203–12; Gov't Trial Exs. 2, 4, 7B. Amir showed Osmakac the suicide vest, which was equipped with a flip-switch

[8]Osmakac had told Amir at an earlier meeting that he had used the alias "Steve Meyer" in the past. Doc. 376 at 67, 141.

detonator and was constructed of eight cylindrical tubes containing (inert) explosives that were attached to a wide belt with suspenders. Doc. 376 at 213–15; Doc. 377 at 10–12; Gov't Trial Exs. 7A, 123.1.Osmakac donned the suicide vest and ammunition belt, slung the bag of grenades over his shoulder, and told Amir that he was going to throw a grenade first to shock everyone. Doc. 377 at 13–14; Gov't Trial Ex. 123.1 at 20:47:35.

Osmakac said that after the car bomb was loaded into his car, he was going to come back to the hotel room and get all the other items and take them to the rental car (that Amir supposedly had obtained using a fake name), and then drive to the casino. Doc. 377 at 15–17, 31–32. He removed the various items from his body and practiced putting them back on again. Doc. 377 at 23–26; Gov't Trial Ex. 123.1 at 20:55:45.

Osmakac then asked Amir: "So, wanna make the video, do you wanna do it now?" Doc. 377 at 27; Gov't Trial Ex. 123.1 at 20:59:15. Amir continued to show Osmakac how to use the items he had brought, and Osmakac said that he "need[ed] the number … to call" to detonate the car bomb. Doc. 377 at 28–30. Amir said he would show Osmakac how to arm the car bomb and asked him if he wanted to wear all the gear when he made the video. *Id.* at 30. Osmakac warned Amir that they had to be quiet, said, "Okay, let's do this,"

and showed Amir how to use his video camera. Doc. 375 at 89–90, 97; Doc. 377 at 30–31, 33–38; Gov't Trial Ex. 123.1.

Osmakac selected several items to be displayed in the video. Doc. 375 at 98–99. He sat cross-legged on the floor of the hotel room, with a .45 caliber handgun in his right hand, an ammunition belt strapped around his waist, and a fully automatic AK-47 rifle propped up behind him. *Id.* at 98; Gov't Trial Exs. 124A–B.

*See* Gov't Trial Ex. 124A.

Amir, who had not told Osmakac what to say, held the camera while Osmakac made a short test video. Doc. 375 at 98; Doc. 377 at 38–39, 41. Osmakac looked into the camera and said, in part:

> For those of you who know me already from my previous videos, there's no need for me to get into any details. …We will go after every one of the, their kindergartens, their shopping centers, their night clubs, their police stations, their courthouses and everything. Until we have an Islamic state the whole world, that was once Islamic will be the [][Caliphate] and then until we revenge every Muslim death.

Doc. 377 at 38–39.

Osmakac stopped, asked Amir to check the quality of the recording, and then he recorded his eight-minute martyrdom video, speaking in three languages, without looking at notes:

> … This is brother Abdul Sami []. This video is to all the Muslim youth and to all the Muslims worldwide. This is a call to the truth. … And this is payback for [UI] Sheikh [] Osama Bin Laden, [][May God have mercy upon him] and [UI] Sheikh []Anwar Awlaqi and his son …
>
> . . .
>
> … How many apostates [][] leaders allow 500,000 troops in the Arabian Peninsula? Filthy Kuffar [] uncircumcised redneck [] [infidel] man raping my sisters. And we just lag behind and sit back and we see it at the shopping center and we smile at them. The only time we should smile is when they bleed.
>
> . . .
>
> So Khalid Bin Walid, [][][][May God be pleased with him], said …, it is not food and drink that brought us out of our homes. It is that we are people that love to drink blood and we've heard that you Kuffar [] Americans and Romans have the sweetest blood on the earth and we're coming for your blood, and we're coming for your women's blood and we're coming for your children's blood.
>
> . . .

> My beloved brothers in Germany and elsewhere. … [W]hen I lived in Germany, I was until I was 13 years old. Together, we mugged these faggot German infidels, Germans, Russian infidels, Albanian infidels, all non-Muslims—we mugged them. We beat them, kicked them. … They were afraid of us. They were terrorized by us Muslims.
>
> . . .
>
> This is not World War 1, World War 2. This is not World War 3; this is not World War 4. This is jihad until the next day. … So wake up. Stop with this Kurdistan, Turkey, Albania, Kosovo, Bosnia, Afghanistan thing. …. Stop. Come together. We only have one flag.
>
> . . .
>
> Brothers and sisters in Albania, in Kosovo, and in Bosnia. …Pick up your handgun and your pistol and show them, direct them to Allah and fire that bullet.
>
> My beloved brothers. In Afghanistan … . We're going to annihilate them. We're going to hunt them down. We're going to mutilate them. Piece by piece. Everywhere where they go….they won't have any peace….

Doc. 375 at 91–98; Doc. 377 at 39, 41; Gov't Trial Exs. 124A–B.

After he had finished the video, Osmakac said that he hoped to have breakfast in heaven the next day and that Muslims would rule the planet once again: "We wanna secure victory; we want [][martyrdom]; we don't wanna die in bed or a car accident." Doc. 377 at 44, 49.

Amir then gave Osmakac the key to the get-away rental car, and Osmakac drove it to a Starbucks in the Hyde Park area of Tampa. Doc. 377 at

49–52; Doc. 380 at 216–18. Amir waited at the motel until Osmakac returned, parking his car next to Amir's truck. Doc. 377 at 49–53, 57–58; Gov't Trial Exs. 123.3A–B. After a brief discussion inside the motel room, they went outside to load the bomb into Osmakac's car. Doc. 377 at 57–58. Amir gave Osmakac the unloaded pistol and a magazine, and Osmakac loaded it and put it in his car. Doc. 377 at 61–62; Doc. 379 at 245–26. As Osmakac walked around to get into Amir's truck, he tossed his old phone into the bushes. Doc. 377 at 62–65; Doc. 380 at 196, 198; Gov't Trial Ex. 19A.

Amir explained how to arm the car bomb, and Osmakac said that 15 minutes should be enough time for him to get to the "Irish pub" in Hyde Park, near the Starbucks, where he planned to detonate the bomb. *See* Doc. 377 at 63–67, 72–77; Gov't Trial Exs. 121.2A–B. They talked about disposing of the cellphone that Osmakac planned to use to trigger the detonator, and Osmakac said that he wanted to warn his relatives who frequented nightclubs to make sure they weren't near the explosion. Doc. 377 at 72–75. Amir then gave Osmakac a key to the motel room where they had left the guns, ammunition, and suicide vest. *Id.* at 73.

They got out of Amir's truck and began transferring the bomb to Osmakac's car. Doc. 377 at 78–80. The bomb was heavy, so Amir had to disassemble the major components first. *Id.* at 80. A hidden camera recorded

Osmakac lifting components of the bomb out of Amir's truck and putting them into the trunk of his car. Doc. 377 at 79; Gov't Trial Ex. 126.4. Amir helped Osmakac hook up the inert explosives to the detonator, and they closed the trunk. Doc. 377 at 80–82; Doc. 378 at 46–48; Doc. 379 at 247–48; Gov't Trial Exs. 54D–E. The two men said their goodbyes, Amir drove away, and agents arrested Osmakac. Doc. 377 at 81–82; Doc. 379 at 236.

In a post-arrest interview, an FBI agent asked Osmakac what he had been thinking as he had prepared for the attack. Doc. 379 at 236–37. Osmakac replied, "Islam." Doc. 379 at 237.

**2. The Pertinent District-Court Proceedings**

**a. The FISA Proceedings**

On February 17, 2012, two weeks after Osmakac had been indicted, the United States notified the district court and Osmakac that, pursuant to 50 U.S.C. §§ 1806(c) and 1825(d), it intended "to offer into evidence, or otherwise use or disclose … information obtained or derived from electronic surveillance or physical search conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1812 and 1821-1829." Doc. 20. Over the following nine months, the United States provided Osmakac with numerous FISA interceptions. Doc. 107 at 2.

After receiving these materials, Osmakac filed a motion for "Disclosure of *Brady*, *Giglio*, Rule 16 and Jencks Material." Doc. 96. He then followed up with a series of motions seeking disclosure of all FISA materials, including the underlying FISA applications and orders and information related to any FISA event. Docs. 98, 100, 121 (collectively, "the FISA motions").

The United States opposed Osmakac's motions, filing both unclassified and classified briefs and relevant classified documents, Docs. 107, 132, 137, and it submitted an unclassified "Declaration and Claim of Privilege of the Attorney General of the United States," Doc. 132-1. In that declaration, the Attorney General stated that "it would harm the national security of the United States to disclose or hold an adversarial hearing with respect to FISA materials," and he explained that the United States would submit to the district court a classified declaration of an FBI official that would detail the specific facts supporting his claim of privilege. *Id.* at 2–3. Based on the facts set forth in that classified declaration, the Attorney General stated that unauthorized disclosure of the classified FISA materials could reasonably be expected to cause serious damage to the national security of the United States. *Id.* at 3.

**CLASSIFIED INFORMATION REDACTED**

The district court conducted an *in camera, ex parte* review of the FISA materials and denied Osmakac's motions, concluding that the electronic

surveillance and physical searches were lawfully authorized and had been conducted in compliance with FISA. Doc. 141. The court found that each FISA application contained facts establishing probable cause to believe that the target of the FISA surveillance or search was an agent of a foreign power, that each of the facilities, places, premises or property subject to the FISA surveillance or search was or was about to be owned, used, possessed by, or was in transit to or from, an agent of foreign power, and that the property to be searched contained foreign intelligence information. *Id.* at 3–4; 50 U.S.C. §§ 1801(b)(2), 1805(a)(2)(A) and (a)(2)(B), 1824(a)(2)(A), (2)(B) and (3)(B). Moreover, the court found that each application contained all the required statements and certifications and that none of the certifications for a target who was a United States person was clearly erroneous. Doc. 141 at 4. The court found that the FISA materials were well organized and readily understood and it did not require the assistance of the defense to make an accurate determination of the legality of the surveillance and searches. *Id.* at 6. "Thus," the court concluded, "there is no valid, legal reason for disclosure of any of the FISA materials to Osmakac." *Id.*

**b. The Closing Arguments**

Defense counsel told the jury in his closing argument that Osmakac had lacked the requisite intent to carry out the charged crimes and that the FBI had

taken advantage of him. *See* Doc. 382 at 143–45, 163–64. According to defense counsel, Osmakac's low I.Q. and "severe" mental disease had made him especially susceptible to the FBI's supposed efforts to control him. *Id.* at 163. In support of that theory, Osmakac's counsel repeatedly argued that the jury could find a reasonable doubt based on the United States' failure to present certain evidence, including the CS's and Russell Dennison's testimony and additional pre-November 2011 recorded phone conversations. *Id.* at 145–46, 151–52, 158–60, 164. Defense counsel also argued that the jury should consider that the United States had not offered FBI agents' reports and surveillance logs into evidence. *Id.* at 160.

In rebuttal, the prosecutor told the jury that defense counsel had asked them to ignore the evidence in the case and throw it out the window "in favor of baseless speculation." Doc. 382 at 165–66. The prosecutor then argued:

> You've seen enough during this trial to know that there are rules of evidence, that there are rules about what kind of evidence can be entered in a case and what can't.
>
> [Defense counsel] asked you to speculate about why reports weren't entered, about why surveillance logs weren't entered, about why certain agents did or did not testify. All of those are things that are, unfortunately, not part of your consideration. The Judge makes those sorts of determinations if evidence is offered.

Doc. 382 at 165–66.

Defense counsel objected and, at sidebar, argued that the prosecutor's comments were improper because it was a "fact that lack of evidence can be a reason for reasonable doubt." Doc. 382 at 166. The prosecutor responded that she had made a proper argument because "reports and surveillance logs" are not admissible evidence. *Id.* at 166–67. Defense counsel countered that the jury could find a reasonable doubt based on "anything" that it believed was material to its deliberations that the United States hadn't offered and that it was improper for the prosecutor to tell the jury that the court had ruled against the admissibility of the missing evidence. *Id.* at 167.

Defense counsel asked the district court to instruct the jury that the prosecutor had erred and that it could consider the absence of evidence. Doc. 382 at 167. The prosecutor asked for an opportunity to correct her statement, but she maintained that it was proper to argue that the jury should not be concerned about agents' reports and logs, and the court agreed that those items could not properly be offered for the jury's consideration. *Id.* Defense counsel responded that the court could still advise the jury that it could generally consider a lack of evidence during their deliberations. *Id.*

The district court told the prosecutor to move on and that it would consider giving the jury a curative instruction. Doc. 382 at 168. After the closing arguments had concluded, the court revisited the issue, observing that

the prosecutor had told the jury, among other things, that the court had made determinations about the admissibility of agents' testimony. *Id.* at 180–84. This, the court concluded, had been an erroneous statement; the prosecutor acknowledged that she had inadvertently mentioned agents' testimony but she argued that a curative instruction should remedy her mistake. *Id.* at 184–86. Defense counsel moved for a mistrial, the court denied his motion, and defense counsel suggested language for a curative instruction. *Id.* at 186–87.

The next morning, the district court advised the parties that it would instruct the jury that what the lawyers say is not evidence and that reasonable doubt may arise from the evidence, from a lack of evidence, or from a conflict in evidence. Doc. 383 at 3. Defense counsel, while preserving his motion for mistrial, stated that the court's proposed instructions were acceptable. *Id.* at 3–4. The court then explained that it had reviewed the transcript of the prosecutor's argument and that it was confident that the curative instruction would sufficiently address Osmakac's concerns. *Id.* at 4.

The district court then instructed the jury, among other things, that it must follow the law as the court gave it, it was the United States' burden to prove Osmakac guilty beyond a reasonable doubt, and that a reasonable doubt could "arise from the evidence, from a lack of evidence, or from a conflict in

the evidence." Doc. 383 at 9–10. The court also told the jury that anything the lawyers said was not evidence.[9] *Id.* at 10.

**c. Osmakac's Sentencing**

Before sentencing, the United States Probation Office prepared a PSR, recommending a base offense level of 24, under USSG §2K1.4(a)(1)(B), because the offense "involved the … attempted destruction of a … place of public use … ." PSR ¶ 35. The probation office then increased Osmakac's base offense level to 33, based on a cross-reference to section 2K1.4(c)(1), because he had been convicted of an offense intended to cause death or serious bodily injury. PSR ¶ 37. Next, the probation office applied a 12-level enhancement under section 3A1.4(a), because the offense had involved, or was intended to promote, a federal terrorism crime. PSR ¶¶ 38–41. This yielded an adjusted offense level of 45, which the probation office reduced by two levels based on guidelines commentary capping offense levels at 43. PSR ¶¶ 38–41; *see Commentary,* Sentencing Table, Chapter 5, Part A.

Because Osmakac had been convicted of terrorism-related offenses, the probation office determined that his criminal-history category was VI. PSR ¶¶

[9]At the beginning of the trial, the district court also had instructed the jury that, at the end of the trial the court would explain the law it must follow to reach its verdict. Doc. 375 at 32. In addition, the court had told the jury that the statements of the lawyers were not evidence. *Id.* at 32–33.

42–45. With a total offense level of 43, and criminal-history category VI, Osmakac's guidelines range was life imprisonment. PSR ¶¶ 38–41, 42–45, 129–30.

Osmakac objected to the PSR and contended that the district court should depart downward from the guidelines range based on sentencing entrapment. Doc. 360 at 96–97 (PSR Addendum). The United States responded that controlling precedent foreclosed Osmakac's request for a sentencing-entrapment departure, citing *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998). Doc. 360 at 93. The United States also listed various examples of evidence showing Osmakac's predisposition to commit terrorism, and it contended that there was no evidence of government misconduct, "much less outrageous government misconduct." *Id.* at 93–94.

At sentencing, the district court addressed Osmakac's factual objections to the PSR and then turned to his objections to the guidelines calculations. Doc. 384 at 19–31. This exchange followed:

> THE COURT: With respect to the calculation of the guidelines, there is an assertion that there's a sentencing entrapment departure that should apply in the case. The Government cites legal authority that the Eleventh Circuit doesn't recognize such a departure. Does the defense have any contrary legal authority?
>
> DEFENSE COUNSEL: If the Court will indulge me. I recognize that the Eleventh Circuit in the *Sanchez* case has stated that as a matter of law has rejected sentencing entrapment, and it

> also goes on to speak about sentencing factor manipulation. And it has some -- I think this case may have some factual distinctions that may apply, but I recognize that the Eleventh Circuit's opinion right now is that there is no such thing.
>
> THE COURT: Well, then you preserve your objection?
>
> DEFENSE COUNSEL: That's what I want to do.
>
> THE COURT: It is so noted, but the Eleventh Circuit doesn't recognize it and if you would like to argue for a change in the law in that regard, you're free to assert that on appeal.
>
> DEFENSE COUNSEL: Thank you, Your Honor.
>
> THE COURT: Is there a specific factual distinction that you think you need to put on the record so it's preserved?
>
> DEFENSE COUNSEL: Well, Your Honor, in this case, our position is that all the Defendant wished to procure on his own were guns, according to the statements that -- on the transcripts, that he went down to St. Petersburg to buy some guns, and that the Government introduced weapons of mass destruction, and therefore, this matter should only be with regards to the count with regards to the unlawful possession of the guns and that the weapons of mass destruction was a sentencing entrapment by the Government in order to increase the Defendant's sentence.
>
> THE COURT: All right. Thank you.

Doc. 384 at 31–33.

The district court overruled Osmakac's objection to the 12-level terrorism enhancement and determined that, with a total offense level of 43 and criminal-history category of VI, Osmakac's guidelines range was life imprisonment. Doc. 384 at 33–34.

Osmakac then called Dr. Valerie McClain, a forensic psychologist, who testified that Osmakac suffered from "major depression, recurrent psychotic disorder and also from Post Traumatic Stress Disorder." Doc. 384 at 38–39. Several character witnesses also testified for Osmakac and submitted letters of support. *Id.* at 35, 42–52; *see* letters attached to PSR.

Both parties argued in support of their respective sentencing recommendations. Doc. 384 at 71–79. Osmakac's counsel requested a sentence of no more than 20 years. *Id.* at 78. The prosecutor contended that the psychologists and psychiatrists who had spent the most time with Osmakac had not found that he had a significant mental disorder,[10] and the fact that Osmakac spoke three languages (Albanian, German, and English) and was learning a fourth (Arabic) demonstrated that he did not suffer from a borderline I.Q. *Id.* at 54–56. Pointing to Osmakac's strict adherence to particular religious practices and beliefs, the prosecutor also argued that the evidence had not demonstrated that he was unusually susceptible to inducement. Doc. 384 at 57; *see, e.g.,* Doc. 382 at 91–92 (Osmakac had quit working at his family's bakery because pork was sold there); Doc. 382 at 93–94

[10]At trial, the United States called Dr. Montalbano, a forensic psychologist, in its rebuttal case to address Osmakac's claim that he suffered from a mental disorder. Doc. 382 at 11–96. Dr. Montalbano spent 17 hours with Osmakac and diagnosed him with persistent low-grade depression and acculturation difficulties. *Id.* at 19, 33–34.

(Osmakac was estranged from family because he disapproved of how they practiced Islam).

The district court imposed concurrent sentences of 480 months' imprisonment on count one and 120 months' imprisonment on count two. Doc. 354; Doc. 384 at 79–80. Osmakac's counsel stated that he had no objections to the sentence or the manner it was imposed. Doc. 384 at 81.

***Standards of Review***

I. This Court reviews for an abuse of discretion a district court's decision not to disclose FISA materials. *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987); *see also United States v. El-Mezain*, 664 F.3d 467, 567 (5th Cir. 2011); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005).

II. This Court reviews for an abuse of discretion a district court's denial of a motion for mistrial. *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009). This Court reviews de novo a claim of prosecutorial misconduct during closing arguments. *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006).

III. Ordinarily, this Court reviews for an abuse of discretion a district court's decision whether to reduce a sentence based on sentencing-factor manipulation. *United States v. Haile*, 685 F.3d 1211, 1223 (11th Cir. 2012). But here, because Osmakac did not make a sentencing-factor manipulation

argument in the district court, this Court should review his claim only for plain error. *See United States v. Olano*, 507 U.S. 725, 731–32, 113 S. Ct. 1770, 1776 (1993); *United States v. Aguillard*, 217 F.3d 1319, 1320 (11th Cir. 2000). Under plain-error review, there must be (1) an error, (2) that is plain, and (3) affects substantial rights. *Olano*, 507 U.S. at 731-32, 113 S. Ct. at 1776. When these three factors are met, this Court may exercise its discretion and correct the error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 732, 113 S. Ct. at 1776.

## Summary of the Argument

I. The district court did not abuse its discretion by concluding that disclosure of the FISA materials to Osmakac was not necessary to make an accurate determination of the legality of the surveillance or any searches. Indeed, the FISA statute does not allow the district court to even consider such disclosure unless it has concluded that it cannot accurately determine the legality of the FISA collections based on an *ex parte, in camera* review. Here, however, because the court concluded, based on its *ex parte*, *in camera* review that the executive-branch FISA certifications were not clearly erroneous, that the FISA applications established probable cause, and that the FISA collections were properly minimized, Osmakac cannot meet his burden of showing that the district court abused its discretion by denying his motions.

II. The district court did not abuse its discretion by denying Osmakac's motion for a mistrial based on the prosecutor's single, inadvertent misstatement of law in her rebuttal closing argument. The comment, which was part of an otherwise fair response to defense counsel's argument that the jury should consider the absence of certain evidence, including hearsay, was promptly remedied by the court's instructions that the lawyers' statements are not evidence and that the jury could find a reasonable doubt based on a lack of evidence. Moreover, Osmakac's claim must fail because, given the overwhelming evidence against him, he has not met his burden of showing that, but for the prosecutor's comment, there is a reasonable probability that the outcome of his trial would have been different.

III. The district court did not plainly err at sentencing by failing sua sponte to reduce Osmakac's sentence based on sentencing-factor manipulation. Although it is not clear that this Court even recognizes sentencing-factor manipulation as a legitimate challenge to a sentence, Osmakac has not met his burden on appeal of showing that the court erred, much less plainly erred, in denying him relief on this basis. There is no evidence demonstrating that the government engaged in the requisite "extraordinary" or "sufficiently reprehensible" conduct in the undercover-sting operation targeting Osmakac so as to warrant a reduction for sentencing-factor manipulation. To the contrary,

the record establishes that Osmakac was interested in carrying out a terrorist attack long before he encountered any government agents and that he spurned the CS's and undercover agent's repeated suggestions that he call off the attack, choosing instead to assemble all the items necessary to detonate a car bomb at a crowded nightclub and then to take hostages and detonate more explosives at a nearby casino.

## Argument and Citations of Authority

### I. The district court did not abuse its discretion by denying Osmakac's motions for disclosure of FISA materials.

Osmakac contends that the district court erred by failing "to permit disclosure of the FISA materials" to him. Osmakac's brief at 6, 8–17. He identifies those items as "materials presented to the Foreign Intelligence Surveillance Court (FISC)," and he acknowledges that he relied only upon the statutory provisions of FISA and did not make any constitutional arguments for relief. *Id.* at 9–10. Moreover, he concedes that the district court appears to have followed the correct procedures in declining to permit disclosure in this case, but he claims that the certifications submitted in support of a FISA application are categorically insufficient to support such a decision and that the court erred in concluding that the certifications were not "clearly erroneous." *Id.* at 16–17. As we explain below, however, the record demonstrates that

appearances are what they seem—the district court followed the correct procedures and properly determined that disclosure of the FISA materials is not warranted.

## A. Overview of FISA

Congress enacted FISA in 1978 to regulate certain government surveillance conducted for foreign intelligence purposes. The statute created the FISC and empowered it to grant or deny government applications for surveillance or searches targeting a foreign power or an agent of a foreign power for the purpose of obtaining foreign-intelligence information. *See* 50 U.S.C. § 1801 *et seq.* Foreign intelligence information includes information relating to "the ability of the United States to protect against ... sabotage, international terrorism, or ... clandestine intelligence activities by ... a foreign power or by an agent of a foreign power[.]" 50 U.S.C. § 1801(e); *United States v. El-Mezain*, 664 F.3d 467, 563–64 (5th Cir. 2011).

To obtain an order under FISA, the United States must establish, *inter alia*, probable cause to believe that the target of the electronic surveillance or physical search is a foreign power or an agent thereof and that the facilities or places at which the surveillance or search is directed are being used or are

about to be used by the target.[11] 50 U.S.C. §§ 1804(a)(3), 1823(a)(3).[12] The United States must also establish that the "minimization procedures" that it will employ are reasonably designed to minimize the acquisition and retention, and prohibit the dissemination, of nonpublic information concerning "United States persons," consistent with the government's need to obtain, produce, and disseminate foreign-intelligence information. 50 U.S.C. §§ 1801(h), 1805(c)(2)(A), 1824(c)(2)(A), 1821(4). In addition, FISA requires that the United States include in its application a written certification from a high-ranking executive-branch official that the electronic surveillance or physical search seeks "foreign intelligence information," that a "significant purpose" of the surveillance or search is to obtain foreign-intelligence information, and that the information cannot reasonably be obtained by normal investigative means. 50 U.S.C. §§ 1804(a)(6), 1823(a)(6).

If satisfied that a FISA application has met the statutory requirements, and if the reviewing FISC judge makes the necessary findings, the judge may

[11]Thus, Osmakac's motions to discover FISA materials are evaluated using FISA's probable-cause standard, not the probable-cause standard applicable to criminal warrants. *See, e.g., El-Mezain*, 664 F.3d at 564.

[12]The provisions of FISA that address surveillance and physical searches are in most relevant respects parallel and almost identical. *See* 50 U.S.C. §§ 1801–1812 (surveillance); 50 U.S.C. §§ 1821–1829 (physical searches).

issue an order authorizing the surveillance or search. 50 U.S.C. §§ 1805(a), 1824(a).

FISA also permits the United States to use in a criminal prosecution information obtained or derived from FISA-authorized electronic surveillance or physical searches, provided that advance authorization is obtained from the Attorney General, *see* 50 U.S.C. §§ 1806(b), 1825(c), and that proper notice is given to the court and to each "aggrieved person" against whom the information is to be used, *see* 50 U.S.C. §§ 1806(c), 1825(d).

An aggrieved person, upon receiving notice, may seek, as Osmakac did, discovery of the FISA applications or orders and other materials relating to FISA surveillance or searches. 50 U.S.C. §§ 1806(f), 1825(g). Upon receipt of such a motion, the district court in which the FISA-obtained or derived evidence is to be used must determine whether the electronic surveillance or physical search was "lawfully authorized and conducted." *Id.* The United States may respond by filing a declaration from the Attorney General stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. §§ 1806(f), 1825(g).

If the Attorney General files such a declaration, as he did here, the district court must review the FISA materials *ex parte* and *in camera* and may order disclosure of "portions" of the FISA materials "*only where such disclosure*

*is necessary* to make an accurate determination of the legality of the surveillance [or search]." *Id.* (emphasis added). Thus, the propriety of any disclosure of any portions of the FISA materials to the defendants or defense counsel cannot be considered unless and until the court has first concluded that it is unable to make an accurate determination of the legality of the collection after reviewing the government's submissions (and any supplemental filings that the court may request) *in camera* and *ex parte*. *See United States v. Daoud*, 755 F.3d 479, 481–82 (7th Cir. 2014), *cert. denied* 135 S. Ct. 1456 (U.S. Feb. 23, 2015); *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987).

If, however, the district court is able to assess the legality of the FISA collection based on its *in camera*, *ex parte* review of the materials the United States has submitted, then the court may not order disclosure of any of the FISA materials to the defense, unless due process otherwise requires. *See* 50 U.S.C. §§ 1806(g), 1825(h); *Daoud*, 755 F.3d at 483; *Badia,* 827 F.2d at 1464; *United States v. Duggan*, 743 F.2d 59, 78 (2d Cir. 1984). Federal courts have consistently held that FISA anticipates that an *in camera, ex parte* process is the rule, with disclosure and an adversarial hearing the rare exception.[13] *See Abu-*

[13]Indeed, as Osmakac recognizes on page 4 of his brief, every district court but one that has addressed a motion to disclose or to suppress FISA

*Jihaad*, 630 F.3d at 129; *United States v. Stewart*, 590 F.3d 93, 129 (2d Cir. 2009); *Duggan*, 743 F.2d at 78; *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982); Doc. 132 at 15–18. And FISA warrant applications are subject only to "minimal scrutiny by the courts," whether upon initial presentation in the district court or on appeal. *Abu-Jihaad*, 630 F.3d at 130 (quoting *Duggan*, 743 F.2d at 77).

### B. The district court correctly withheld the FISA materials from Osmakac.

As this Court will see from its examination of the classified exhibits submitted to the district court, there is nothing extraordinary about the FISA-authorized electronic surveillance and physical searches in this case. The materials are well-organized for *in camera, ex parte* review, and they are fully and facially sufficient to allow this Court to conclude that the district court did not abuse its discretion in declining to disclose them to the defense. *See Abu-Jihaad,* 630 F.3d at 129 (conducting its own *ex parte, in camera* review and remarking that district court had found review of FISA materials to be "relatively straightforward and not complex"); *Belfield,* 692 F.2d at 147

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materials has assessed the legality of the challenged FISA collection based on its own *ex parte, in camera* review, *see, e.g., El-Mezain*, 664 F.3d at 566 (quoting district court's statement that no court has ever held an adversarial hearing to assist the court)—and the Seventh Circuit soundly reversed the one district court that found otherwise, *Daoud*, 755 F.3d 479.

(concluding that "[t]he determination of legality" of FISA surveillance was "not complex"); *see also El-Mezain*, 664 F.3d at 563–67.

In evaluating the legality of the FISA collection, this Court should determine whether the district court correctly concluded that: (1) when the target is a United States person, the executive-branch certification submitted in support of the FISA application is not clearly erroneous; (2) the FISA application established probable cause; and (3) the FISA collection was properly minimized. *See Abu-Jihaad*, 630 F.3d at 130–31; *Duggan*, 743 F.2d at 77; *see also* 50 U.S.C. §§ 1806(f), 1825(g).

***(1) The certifications complied with FISA.***

Certifications submitted in support of a FISA application should be "subjected only to minimal scrutiny by the courts." *United States v. Campa,* 529 F.3d 980, 993 (11th Cir. 2008) (quoting *Badia*, 827 F.2d 1458, 1463 (11th Cir. 1987)). When a FISA application is presented to the FISC, "[t]he FISA Judge, in reviewing the application, is not to second-guess the executive branch official's certification that the objective of the surveillance is foreign intelligence information." *Duggan*, 743 F.2d at 77. Likewise, Congress intended that the district court is to have no greater authority to second-guess the executive-branch's certifications than has the FISA judge. *Id.; Campa*, 529 F.3d at 993. If a United States person is a target, the reviewing court must

determine whether the certifications are "clearly erroneous." *Campa*, 529 F.3d at 994; 50 U.S.C. §§ 1805(a)(4), 1824(a)(4). In making that determination, the court reviews the statement contained in the application explaining the basis for the certification and any other information furnished in connection with the application. *Id.*

**CLASSIFIED INFORMATION REDACTED**

As the classified materials demonstrate, the district court (and the FISC) correctly determined that the FISA certifications at issue here were not clearly erroneous.

***(2) The applications established that probable cause existed.***

The district court also correctly determined that the FISA applications contained facts establishing probable cause. Doc. 141 at 3–4, 7. As the Fifth Circuit has explained, the FISA probable-cause standard "is different from the standard in the typical criminal case because, rather than focusing on probable cause to believe that a person has committed a crime, the FISA standard focuses on the status of the target as a foreign power or an agent of a foreign power." *El-Mezain*, 664 F.3d at 564.

**CLASSIFIED INFORMATION REDACTED**

Even if the FISA collections in this case had not been lawfully authorized, the "good faith" exception to the exclusionary rule would apply

because the federal agents reasonably relied on the probable-cause determination of a neutral judicial officer, embodied in the FISC's orders. *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 (1984); *United States v. Ning Wen,* 477 F.3d 896, 897–88 (7th Cir. 2007) (applying good-faith exception to claim that FISA surveillance violated Fourth Amendment).

***(3) The FISA collections were properly minimized.***

**CLASSIFIED INFORMATION REDACTED**

***(4) The district court did not violate Osmakac's right to confrontation.***[14]

Osmakac claims that the district court violated his Sixth Amendment right to confrontation by denying him access to the FISA materials. Osmakac's brief at 17. He raises this issue, however, only in a one-sentence conclusory statement, without citing any authority or developing his argument. *See id.* He, therefore, has abandoned that issue. "[A]n appellant's simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes [this Court from] considering the issue on appeal." *Singh v. United States Attorney Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009); Fed.

[14]Although Osmakac acknowledges on pages 9–10 of his brief that he did not raise a constitutional claim below, the United States sua sponte addressed various constitutional arguments, including the claim that FISA violates the confrontation clause, in its opposition to Osmakac's FISA motions. *See* Doc. 132 at 29. The district court also addressed that issue in its order, concluding that FISA did not violate Osmakac's Sixth Amendment right to confrontation. Doc. 141 at 8.

R. Crim. P. 28(a)(9) (appellant's brief must contain "appellant's contentions *and the reasons for them*, with citation to *the authorities* and parts of the record on which the appellant relies") (emphases added).

In any event, Osmakac's claim fails on the merits. Numerous courts have held that FISA's *in camera* and *ex parte* procedures are adequate and withstand constitutional scrutiny. *See, e.g., El-Mezain*, 664 F.3d at 567; *United States v. Damrah*, 412 F.3d 618, 624–25 (6th Cir. 2005); *United States v. Isa*, 923 F.2d 1300, 1306–07 (8th Cir. 1991); *Badia*, 827 F.2d at 1462–65; *United States v. Ott*, 827 F.2d 473, 476–77 (9th Cir. 1987); *Belfield*, 692 F.2d at 148–49. In *Isa,* the Eighth Circuit explicitly rejected a Sixth Amendment confrontation-clause challenge to FISA. 923 F.2d at 1306–08. That court observed that "[c]ourts often conduct *in camera* reviews in criminal proceedings when[] [] the defendant's right of confrontation is subordinated to competing interests of society, and that [t]he governmental interests in gathering foreign intelligence are of paramount importance to national security." *Id.* at 1307 (internal quotation marks and citations omitted). After all, the right of confrontation is "not absolute," and "may ... bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1045 (1973); *see, e.g., Maryland v. Craig*, 497 U.S. 836, 844, 110 S. Ct. 3157, 3163 (1990) (confrontation clause does not guarantee "criminal

defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial" (emphasis in original)). Accordingly, the Eighth Circuit concluded that, in light of the protections FISA provided to ensure a fair trial and the substantial societal interests at stake, FISA's *in camera, ex parte* review process did not violate the Sixth Amendment.

In sum, the record establishes that the district court did not abuse its discretion in denying Osmakac's motions to disclose FISA materials. He, therefore, is entitled to no relief based on this argument.

## II. The district court did not abuse its discretion by denying Osmakac's motion for a mistrial based on a single comment in the prosecutor's rebuttal argument because the court's jury instructions corrected the inadvertent misstatement of the law and, given the overwhelming independent evidence of Osmakac's guilt, the prosecutor's comment did not prejudicially affect Osmakac's substantial rights.

Osmakac claims that the district court erred by not granting his motion for mistrial when the prosecutor made a single, passing comment in her rebuttal closing argument that misstated the law. *See* Osmakac's brief at 17–26. Osmakac acknowledges that the prosecutor's statement was an "isolated" and "unintentionally broad" misstatement of the law and that the court, at his request, gave the jury a curative instruction, but he contends that the prosecutor's comment nevertheless prejudicially affected his substantial

rights. *Id.* at 22–23, 25. The record in this case, however, demonstrates that the court's instructions soundly addressed the prosecutor's sole errant comment and that there is no possibility, given the overwhelming evidence of Osmakac's guilt, that, but for that comment, the outcome of his trial would have been any different.

To be entitled to a new trial based on prosecutorial misconduct, "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006) (internal quotation marks omitted). A statement prejudicially affects the defendant's substantial rights "when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different." *Id*. This Court examines whether prosecutorial misconduct was prejudicial to the defendant's substantive rights by examining the conduct in the context of the entire trial and in light of any curative instruction. *United States v. O'Keefe*, 461 F.3d 1338, 1350 (11th Cir. 2006); *cf. Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986) (in 28 U.S.C. § 2254 action, prosecutor's misstatement of law did not render trial fundamentally unfair given obscurity of improper implication, trial judge's clear instructions, and overwhelming evidence of guilt). Moreover, "because the statements of counsel are not evidence, the district court may rectify improper prosecutorial

statements by instructing the jury that only the evidence in the case is to be considered." *United States v. Jacoby*, 955 F.2d 1527, 1541 (11th Cir. 1992).

Notwithstanding Osmakac's claim that the prosecutor's comment cut to the heart of his defense, *see* Osmakac's brief at 24–25, neither the comment, nor the implication arising from it, was so pronounced or prejudicial that it permeated the entire atmosphere of the trial and, therefore, warrants reversal. *See United States v. Elkins*, 885 F.2d 775, 787 (11th Cir. 1989). Rather, in making a fair response to defense counsel's claim that the jury could find a reasonable doubt based on the absence of evidence of agents' reports and surveillance logs—inadmissible hearsay—the prosecutor told the jury that the district court determines the admissibility of such evidence and also inadvertently suggested that the court had made rulings pertaining to the admissibility of agents' testimony. Doc. 382 at 165–66, 184–86; *cf. United States v. Young*, 470 U.S. 1, 12–13, 105 S. Ct. 1038, 1045 (1985) (observing that "if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction").

Defense counsel promptly objected, and the prosecutor moved on. Doc. 382 at 166, 168. The prosecutor made the single, isolated comment after eight days of trial, against a backdrop of overwhelming evidence of Osmakac's guilt,

including hours of incriminating audio- and video-recordings establishing his predisposition—indeed, profound commitment—to engage in violent jihad and commit a horrific terrorist attack.

Moreover, at the close of arguments, the district court properly instructed the jury regarding the scope of "reasonable doubt"—including language that Osmakac had requested—and it reiterated its earlier instruction that what the lawyers say is not evidence. Doc. 375 at 32–33; Doc. 383 at 9–10. This Court presumes that the jury followed the district court's curative instructions. *United States v. Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005).

Thus, in light of the overwhelming evidence against Osmakac, the jury's outright rejection of Osmakac's entrapment defense, and the court's instructions to the jury (1) that a reasonable doubt could "arise from the evidence, from a lack of evidence, or from a conflict in the evidence," (2) that attorney comments did not constitute evidence or instruction on law, and (3) that the jury was required to apply the law as the court described it, Doc. 383 at 9–10, the prosecutor's sole errant remark could not have prejudicially affected Osmakac's substantial rights. *See Eckhardt*, 466 F.3d at 947; *United States v. Mock*, 523 F.3d 1299, 1302 (11th Cir. 2008) ("[B]ecause the statements made in closing are not evidence, the district court may rectify improper prosecutorial statements by instructing the jury that only the evidence in the

case is to be considered.") (internal quotation marks omitted)); *United States v. Brooks,* 460 F. App'x 903, 905 (11th Cir. 2012) (rejecting claim that prosecutor's misstatement of law of entrapment prejudicially affected defendant's substantial rights in light of district court's correct instructions); *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir. 1998) ("When a district court issues a curative instruction, [this Court] will reverse only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition.") (internal quotation marks omitted).

Accordingly, Osmakac has failed to demonstrate that the district court abused its discretion by denying his motion for a mistrial, and this Court should deny him relief on this argument.

## III. The district court did not plainly err at sentencing by failing sua sponte to reduce Osmakac's sentence based on sentencing-factor manipulation.

Osmakac asks this Court to conclude that the district court erred by "failing to consider a downward departure based on sentencing factor manipulation," even though he never asked the court to reduce his sentence on that basis. *See* Osmakac's brief at 7, 26; *see* Doc. 384 at 31–33. Instead, the record demonstrates that Osmakac requested only that the court depart downward based on sentencing entrapment, *see* Doc. 384 at 31–33, an argument that he concedes on page 27 of his brief is squarely foreclosed by this

Court's decision in *United States v. Sanchez*, 138 F.3d 1410, 1414 (11th Cir. 1998). Because Osmakac has not met his burden of showing that the court plainly erred in imposing a guidelines-range sentence that also was less than the statutory-maximum penalty of life imprisonment, this Court should not grant him relief from his sentence.

Osmakac claims that he raised sentencing-factor manipulation at his sentencing, but the record shows that his counsel mentioned those three words only once, in passing, as he discussed *Sanchez*:

> … I recognize that the Eleventh Circuit in the *Sanchez* case has … rejected sentencing entrapment, and it also goes on to speak about sentencing factor manipulation. And it has some -- I think this case may have some factual distinctions that may apply, but I recognize that the Eleventh Circuit's opinion right now is that there is no such thing.

Doc. 384 at 32. The district court agreed that this Court does not recognize sentencing entrapment and asked whether defense counsel wanted to add anything to his objection for purposes of preserving it for appeal. Doc. 384 at 32. In response, Osmakac's counsel claimed that, because the United States had introduced weapons of mass destruction into the case, "sentencing entrapment" had increased Osmakac's sentence. Doc. 384 at 32–33. At no point did defense counsel indicate that he was seeking a reduction based on sentencing-factor manipulation or that the court had misunderstood his objection to the guidelines calculations. *See generally* Doc. 384. And defense

counsel's acknowledgment that *Sanchez* precluded his argument, *see* Doc. 384 at 32, demonstrates that he was making only a sentencing-entrapment claim.

Thus, contrary to Osmakac's claim, *see* Osmakac's brief at 27, 29, that the district court's ruling is "unclear," the record unambiguously demonstrates that the court denied the precise relief that Osmakac had requested—a reduction based on sentencing entrapment. *See* Doc. 384 at 31–33; *see also* Doc. 360 at 96–97. Accordingly, because Osmakac failed to raise sentencing-factor manipulation in the district court, this Court should review his claim here only for plain error warranting relief. *See United States v. Aguillard*, 217 F.3d 1319, 1320 (11th Cir. 2000). But as we explain below, he cannot show any error.

Sentencing-factor manipulation occurs when "the government's manipulation of a sting operation" introduces factors that determine a defendant's sentence (such as increased drug amounts) that is so objectionable that the district court may choose to filter it out of the sentencing equation. *Sanchez*, 138 F.3d at 1414. This Court, however, has explained that "the standard for sentencing factor manipulation is high." *United States v. Ciszkowski,* 492 F.3d 1264, 1270 (11th Cir. 2007). Indeed, "to bring sting operations within the ambit of sentencing factor manipulation, the government must engage in extraordinary misconduct." *Id*. at 1271. While not rising to the level that would require reversal of a conviction, "sentencing factor manipulation would

simply reduce the sentence applied" to a defendant's conduct. *Id.* at 1270. The party raising the defense bears the "burden of establishing that the government's conduct is sufficiently reprehensible to constitute sentencing factor manipulation." *Id.* at 1271.

It is not even clear, however, that this Court's precedent recognizes sentencing-factor manipulation as a legitimate challenge to a sentence, because it has never applied the theory to vacate a sentence. *United States v. Docampo*, 573 F.3d 1091, 1097–98 (11th Cir. 2009) ("We have not yet recognized a defense of sentencing factor manipulation or permitted its application to a defendant's sentence ...."); *see also, United States v. Dixon*, No. 14-13405, 2015 WL 5472500, at *5 (11th Cir. Sept. 18, 2015), *cert. denied*, 2016 WL 280906 (U.S. Jan. 25, 2016); *United States v. Holland*, 503 F. App'x 737, 746 (11th Cir. 2013); *United States v. Haile,* 685 F.3d 1211, 1223 (11th Cir. 2012); *Ciszkowski*, 492 F.3d at 1272 (Ed Carnes, J., concurring). Instead, this Court has held that the following scenarios did not rise to the level of sentencing-factor manipulation: (1) the use of a large quantity of fictitious drugs in a sting operation, *Sanchez*, 138 F.3d at 1413–14; (2) a confidential informant providing a defendant with a firearm equipped with an internal silencer, the possession of which triggered a mandatory 30-year minimum sentence, *Ciszkowski*, 492 F.3d at 1269–71; and (3) DEA agents initiating a conversation about guns and

offering to supply cocaine and marijuana in a reverse-sting operation, *Haile*, 685 F.3d at 1223–24.

Like the facts in *Sanchez, Ciszkowski,* and *Haile*, the facts in this case do not rise to the level of extraordinary misconduct necessary to show sentencing-factor manipulation. Here, the evidence showed that Osmakac had been interested in carrying out violent attacks long before he met the informant and undercover agent. *See, e.g.,* Doc. 379 at 103–04; Doc. 380 at 139–45; Doc. 382 at 58–60. Indeed, he had travelled overseas to conduct violent jihad and had attempted to buy guns from drug dealers in the Tampa Bay area. Doc. 379 at 23–25, 32–35; Doc. 382 at 58–60. And, although the undercover-sting operation involved a paid informant and the undercover agent delivered guns and explosives to Osmakac, it was Osmakac who had independently compiled the list of items he needed for his terrorist attack ("one AK … a couple of Uzi[s] … long magazines … ten grenades … a belt," Doc. 375 at 132–33, 155), including—much to the FBI's surprise—enough explosives for two car bombs. Doc. 275 at 179–80. It was Osmakac who brought a videocamera with him on January 7, 2012, to make a martyrdom video, and it was Osmakac who decided what to display in the video and what to say—in three different languages. Doc. 375 at 98–99, Doc. 376 at 186–87, 191, 195–96; Doc. 377 at 27, 30–31, 33–38; Doc. 379 at 213–15. Rather than being subjected to

extraordinary government misconduct, Osmakac spurned the CS's and agent's repeated suggestions that he postpone, scale back, or abandon his plan, *see e.g.,* Doc. 376 at 27, 137, 158, 162–63, 165; Doc. 379 at 181, and insisted instead on going forward with his plan to murder innocent civilians, at a bar and a casino on a busy Saturday night, in order to "revenge every Muslim death" and deliver "payback" for Osama bin Laden, Doc. 375 at 91–97; Doc. 377at 38–39; Gov't Trial Exs. 124A–B.

For Osmakac to claim on appeal that his "only activity that was free from government influence that arguably represents a crime was his attempt to purchase firearms," Osmakac's brief at 29, is simply to ignore the overwhelming evidence to the contrary. Entrapment was the primary issue at trial, and the jury was able to watch and listen to the CS's and undercover agent's interactions with Osmakac; jurors were able to observe Osmakac's demeanor and see how keenly he participated in the charged crimes.

Moreover, given the high standard for establishing "sufficiently reprehensible" government conduct to constitute sentencing-factor manipulation, *see Ciszkowski,* 492 F.3d at 1271, Osmakac's argument that the CS and the agent in this case engaged in sentencing-factor manipulation must fail, as their conduct was well within the norm for an undercover-sting operation, *see id.; United States v. Cromitie,* 727 F.3d 194, 227 (2d Cir. 2013)

(rejecting claim of sentencing-factor manipulation in undercover-sting operation that tested how far defendants would go in committing acts of terrorism when principal defendant readily expressed inclination to commit acts of terrorism and codefendants promptly joined plot); *United States v. Hammadi*, 737 F.3d 1043, 1049–50 (6th Cir. 2013) (rejecting claim of sentencing-factor manipulation in case involving undercover terrorism-sting operation in which defendants took money and weapons from CS and transported them, ostensibly to aid terrorists in Iraq); *United States v. Govan*, 293 F.3d 1248, 1251 (11th Cir. 2002) (observing that "there is nothing wrong with the government attempting to strengthen its case for conviction" in undercover-sting operation).

Thus, because Osmakac has identified no controlling opinion establishing that the circumstances here constitute sentencing-factor manipulation, even if the court had erred, that error would not be plain. *See United States v. Ramirez-Flores*, 743 F.3d 816, 822 (11th Cir. 2014). And, even if he were able to satisfy the first three prongs of the plain-error standard, he has not shown that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Olano,* 507 U.S. at 732, 113 S. Ct. at 1776. The evidence amply supported the jury's verdict, Osmakac stands convicted of horrendous crimes involving the intended murders of scores of

innocent human beings, and the district court imposed a guidelines-range sentence that was also less than the statutory-maximum penalty of life imprisonment.

The district court, therefore, did not err by failing sua sponte to reduce Osmakac's sentence based on sentencing-factor manipulation.[15]

[15]To the extent that Osmakac seeks to bolster his sentencing-manipulation claim with a mental-health argument, *see* Osmakac's brief at 29, his claim still fails because sentencing-factor manipulation focuses on the government's conduct rather than the defendant's characteristics, *see Sanchez*, 138 F.3d at 1414.

## Conclusion

The United States requests that this Court affirm the judgment and sentence of the district court.

Respectfully submitted,

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## Certificate of Service

I certify that a copy of this brief and the notice of electronic filing was sent by CM/ECF on March 18, 2016, to:

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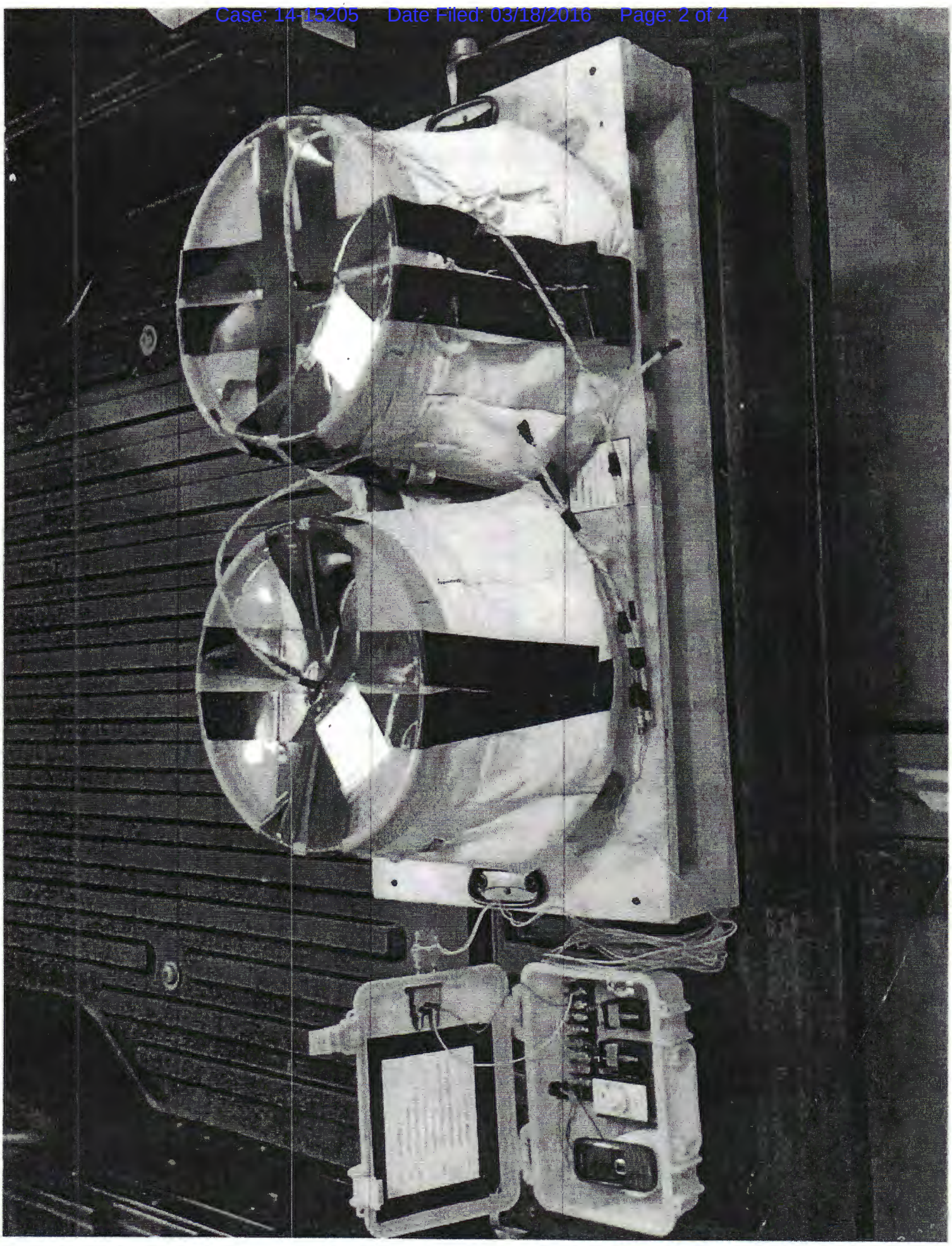
gkpr/no 3/14/16

# Attachment 1



# Attachment 2


Step 1 Turn on phone
Step 2 Turn timer to time needed
Step 3 Move toggle switch to A (arm)
If light is on DO NOT hookup blasting cap
and start over at Step 1
Step 4 Hookup blasting cap to plugs on outside of box
When timer gets to zero the light will come on
and device is armed
Step 5 Call phone 813-546-3104
NOKIA
OFF
A
S