UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

UNITED STATES OF AMERICA PLAINTIFF

vs. CRIMINAL ACTION NO.: 1:11CR-13-R

MOHANAD SHAREEF HAMMADI DEFENDANT

UNITED STATES' PRETRIAL MEMORANDUM

The United States submits the following Pretrial Memorandum in the above-styled criminal case.

I. STATUTES INVOLVED AND ELEMENTS OF OFFENSE

Defendant Mohanad Shareef Hammadi is charged in Counts 1, 2, 4, 6, and 8, of the Superseding Indictment with attempting to provide material support or resources to terrorists, in violation of Title 18, United States Code, Section 2339A. The elements for this offense are as follows:

1. The defendant provided, or attempted to provide, material support or resources; and

2. The defendant did so knowing or intending that such support or resources would be used in preparation for or in carrying out one of the following offenses:

   (A) Murder of a United States officer or employee in violation of Title 18, United States Code, Section 1114;

   (B) Conspiracy to kill a United States National in violation of Title 18, United States Code, Section 2332(b); and

(C) Conspiracy to use a weapon of mass destruction in violation of Title 18, United States Code, Section 2332a(a).

Defendant Mohanad Shareef Hammadi is charged in Counts 3, 5, 7, and 9, of the Superseding Indictment with attempting to provide material support or resources to a designated foreign terrorist organization, al-Qaida in Iraq, in violation of Title 18, United States Code, Section 2339B. The elements for this offense are as follows:

1. The defendant knowingly provided or attempted to provide, material support or resources to a Foreign Terrorist Organization;
2. The defendant knew that the organization was designated a Foreign Terrorist Organization or that the organization had engaged in or was engaging in terrorist activity or terrorism; and
3. The offense occurred in whole or in part within the United States.

Defendant Mohanad Shareef Hammadi is charged in Count 10 of the Superseding Indictment with conspiring to knowingly transfer, receive, possess, or export surface-to-air missile launcher systems, in violation of Title 18, United States Code, Section 2332g. The elements for this offense are as follows:

1. The defendant knowingly transferred, received, possessed, or exported;
2. Any device designed or intended to launch or guide a rocket or missile that is guided by any system designed to enable the rocket or missile to seek or proceed toward energy radiated or deflected from an aircraft or toward an image locating an aircraft or otherwise direct or guide the rocket or missile to an aircraft; and

3. The offense occurred in or affected interstate or foreign commerce.

Defendant Mohanad Shareef Hammadi is charged in Counts 11 and 12 of the Superseding Indictment with knowingly making a false statement in an application required by immigration laws and regulations, in violation of Title 18, United States Code, Section 1546(a). The elements for this offense as follows:

1. The defendant knowingly made a false statement under oath or penalty of perjury;
2. The false statement was material;
3. The defendant made the statement voluntarily and intentionally; and
4. The defendant made the statement in an application, affidavit, or other document required by immigration laws or regulations

II. STATEMENT OF FACTS

A. Investigation

The Bowling Green office of the FBI's Louisville Division initiated an investigation of Waad Ramadan Alwan, which, beginning in 2010, utilized a Confidential Human Source (CHS). The CHS met with Alwan and recorded their meetings and conversations beginning in August 2010. The CHS represented to Alwan that he was working with a group to ship money and weapons to Mujahadeen in Iraq. Mujahadeen generally refers to Muslim fighters or warriors engaged in jihad. From September 2010 to January 2011, Alwan participated in deliveries of weapons and money that he believed were destined for terrorists in Iraq. In January 2011, Alwan recruited Hammadi, a fellow Iraqi refugee living in Bowling Green, to assist in these material support operations.

Hammadi is an Iraqi national who resided in Bowling Green, Kentucky. He entered the United States on or about July 20, 2009, under refugee status. Beginning in January 2011, and

continuing until his arrest in late May 2011, Hammadi participated with Alwan in money and weapons deliveries that he believed were destined for terrorists in Iraq, including al-Qaida in Iraq. Hammadi also detailed to the CHS his prior activities as an insurgent in Iraq, including his prior participation in IED attacks against U.S. troops in Iraq.

After his arrest on May 25, 2011, Hammadi waived his *Miranda* rights and was interviewed by the FBI. During the interviews, Hammadi admitted to his participation in the purported material support operations involving weapons and money that occurred between January and May, 2011. Hammadi also admitted his involvement in insurgent activities while living in Iraq, including his membership in an insurgent group and his participation in various attacks on U.S. troops in Iraq.

B. Weapons and Money Shipments

In mid-January 2010, Alwan told the CHS that he believed he could recruit Hammadi to assist in their ongoing weapons and money shipments to Iraq. Alwan told the CHS that Hammadi was an experienced former insurgent from Iraq.

On January 25, 2011, the CHS, with Alwan present, met with Hammadi for the first time. Hammadi told the CHS about his experiences as an insurgent and using Improvised Explosive Devices (IED's) while living in Iraq. During that same meeting the CHS told Hammadi about the shipments of money they were sending to Iraq. The CHS told Hammadi that the money was being sent to the Mujahidin. The CHS explained that the money would be hidden in cars that were being shipped to Iraq and that they would sometimes send $200,000 or $300,000. The CHS further explained that each operation involved loading money into cars and would only take about 10 minutes.

Count 1 charges Hammadi with attempting to provide material support and resources to terrorists (Section 2339A) on January 27, 2011. The shipment included money. The money purported to be $100,000 in stacks of cash and $5,000 for the driver of the tractor-trailer. On January 27th, the CHS took Hammadi and Alwan to a tractor-trailer with a hidden compartment and showed them how to access it. They then placed what purported to be $100,000 in the hidden compartment. They also placed $5,000 in the cab of the tractor-trailer as payment for the driver.

Counts 2 and 3 relate to a weapons and money shipment on February 16, 2011. Count 2 charges a violation of Section 2339A and Count 3 charges a violation of Section 2339B. The shipment included two rocket-propelled grenade launchers, two machine guns, two cases of C4 plastic explosives, two sniper rifles, and money. The money purported to be five bundles of $100 bills and $5,000 for the driver. On the previous day, February 15, 2011, Hammadi and Alwan went to a storage facility in Bowling Green, Kentucky, to prepare the weapons for delivery the following day. Video cameras inside the storage unit captured Alwan and Hammadi handling the weapons and placing them in duffle bags. On February 16, 2011, Hammadi met with Alwan and the CHS to discuss the weapons that would be shipped. The CHS specifically told Hammadi and Alwan that "these weapons are not being sent only to al Qaida, they are going to all the Mujahidin." At this meeting they also discussed "Strelas," a reference to the name of a Russian-made, portable, shoulder-fired, surface-to-air missile launcher. Hammadi discussed his familiarity with Strelas and his experience with them in Iraq, and then they discussed shipping Strelas in future operations.

Counts 4, 5, and 10 relate to a weapons and money shipment on March 16, 2011. Count 4 charges a violation of Section 2339A, Count 5 charges a violation of Section 2339B, and Count 10 charges a violation of Section 2332g. The shipment included two Stinger surface-to-air missile launcher systems, and money. On March 15, 2012, the CHS met with Hammadi and Alwan to discuss a shipment for the following day. The CHS advised that they would do a test run with two Stinger missile launchers and that, if successful, they could send 20 or 30 in the next shipment. Later that day, Hammadi and Alwan went to the Bowling Green storage facility and prepared the Stingers by placing them in ski bags for delivery the next day. They were again captured on video as they handled the weapons. On March 16, 2011, Hammadi and Alwan picked up two Stinger missiles from the storage facility and delivered them to the tractor trailer. Hammadi and Alwan were also captured on video as they loaded the missile launchers into the tractor-trailer and concealed them in hidden compartments inside the truck. They also loaded bundles of cash in the compartment and placed $5,000 in the cab for the driver.

Counts 6 and 7 relate to a weapons and money shipment on April 21, 2011. Count 6 charges a violation of Section 2339A and Count 7 charges a violation of Section 2339B. This shipment included one case of C4 plastic explosives, a box containing twelve hand grenades, and money. Prior to the operation, the CHS and Hammadi discussed the weapons in the shipment. On April 21, 2011, Hammadi and Alwan were captured on video as they loaded the weapons into the compartments in the tractor-trailer.

Counts 8 and 9 relate to a weapons and money shipment on May 25, 2011. Count 8 charges a violation of Section 2339A and Count 9 charges a violation of Section 2339B. This shipment included three machine guns, three rocket-propelled grenade launchers, and two cases of C4 plastic explosives. Hammadi and Alwan were captured on video as they removed the

weapons from the storage unit. Hammadi and Alwan were later arrested as they approached the tractor-trailer to stash the weapons.

C. False Statements Regarding Immigration Matters

Counts 11 and 12 charge Hammadi with making false statements with respect to an application required by United States immigration laws. Hammadi immigrated to the United States in 2009. He initially traveled from Iraq to Syria, and while in Syria, he applied for refugee status under the U.S. Refugee Admission Program. On March 1, 2009, Hammadi signed a form entitled "Sworn Statement of Refugee Applying for Admission to the United States" (Refugee Application). Question 4 of that form reads as follows:

> 4. Have you ever:
>
> a. engaged in, conspired to engage in, or incited, sabotage, kidnaping, assassination, hijacking, or any other form of terrorist activity?
>
> - - -
>
> c. provided support, including housing, transportation, communications, funds, documents, weapons or training for any person or organization that has ever engaged in or conspired to engage in sabotage, kidnaping, assassination, hijacking, or any other form of terrorist activity?
>
> d. Been a representative or member of a terrorist organization or a member of a group which endorses terrorist activity?

On the signed form, Hammadi checked "no" for each of the boxes next to parts a, c, and d of that question. Hammadi's application was subsequently granted and he later arrived in the United States on or about July 20, 2009.

On December 14, 2010, in Bowling Green, Kentucky, Hammadi completed an Immigration Form I-485, Application to Register Permanent Residence or Adjust States (Form I-485). The I-485 Form includes the following question:

> 15. Have you EVER:
>
> a. Served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerilla group, militia, or insurgent organization?

Hammadi checked "no" for this question.

Each of the immigration forms discussed above was made under oath or penalty of perjury and was signed by the defendant.

In both recorded conversations with the CHS, and post-arrest interviews with law enforcement agents, Hammadi detailed his prior experiences as an insurgent in Iraq, including his prior participation in attacks on U.S. troops in Iraq. For example, on various occasions Hammadi discussed with the CHS his participation in improvised explosive device (IED) attacks on U.S. troops in Iraq and also detailed the command structure of the terrorist group he belonged to in Iraq prior to coming to the United States. Hammadi provided similar information to law enforcement after his arrest.

III. SUBSTANTIVE ISSUES OF LAW

1. Entrapment Defense

Entrapment is a complete defense to a criminal charge, on the theory that "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of that crime so that the Government may prosecute." *Jacobson v. United States*, 503 U.S., 540, 548 (1992). A valid entrapment defense has two related elements: (1) government inducement of the crime, and (2) the defendant's lack of predisposition to engage in the criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988). Under Sixth Circuit case law, in order for the defendant to be entitled to an entrapment instruction, the defendant must come forward with evidence to support both elements of the defense. *United States v. Khalil*, 279 F.3d 358, 364 (6th Cir. 1990).

The Supreme Court has held that "mere solicitation to commit a crime is not inducement." *Sorrells v. United States*, 287 U.S. 435, 451 (1932). Nor does the government's use of artifice, stratagem, pretense, or deceit establish inducement. *Id.* The Sixth Circuit has held that merely presenting the defendant the opportunity to engage in illegal conduct is not entrapment. *United States v. Nelson*, 922 F.2d 311, 317 (6th Cir. 1990). The inquiry focuses on whether the defendant "was an unwary innocent, or instead, an unwary criminal who availed himself of the opportunity to perpetrate the crime." *Mathews*, 485 U.S. at 63. A defendant who claims that he was entrapped opens himself to "an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. *Sorells*, 287 U.S. at 451.

The Sixth Circuit has held that the following factors are relevant in determining whether a defendant was predisposed to commit an offense: "the character or reputation of the defendant, including any prior criminal record; whether the suggestion of criminal activity was initially made by the Government; whether the defendant was engaged in criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducements or persuasion; and the nature of the inducement or persuasion supplied by the Government." *United States v. Moore*, 916 F.2d 1131, 1137 (6th Cir. 1990)(*quoting United States v. McLernon*, 746 F.2d 1098, 1112 (6th Cir. 1984)).

Additionally, although some circuits recognize a defense of derivative or indirect entrapment, the Sixth Circuit, in *United States v. Black*, 1994 U.S. App. LEXIS 16878, stated that "[a]s a legal matter, we have previously held that 'the doctrine of entrapment does not extend to acts of inducement on the part of a private citizen who is not a government official.'" *United States v. Lee*, 694 F.2d 649, 654 (6th Cir.), *cert. denied*, 460 U.S. 922 (1987). "Only when the proof shows that the 'inducement is initiated by government or by private citizens

acting as their agents upon their instructions or directions' will there be an entrapment defense. *McLernon*, 746 F.2d at 1109.

III. EVIDENTIARY ISSUES

1. Defendant's Statements

The Defendant has been provided reports from his post-arrest interviews with the FBI, as well as audio recordings of consensually recorded conversations. The government will introduce many of the inculpatory statements; however, the Defendant should be precluded from offering these recordings, or inquiring of any witness what the Defendant may have stated on other occasions, where such statements would be hearsay and not subject to an exception.

Self-exculpatory statements made in an interview are not admissible even though inculpatory statements made during the same interview have been introduced by the prosecution. Fed. R. Evid. 801(d)(2)(A); *U.S. v. Shaver*, 89 Fed.Appx. 529 (6th Cir. 2004); *United v. McDaniel*, 398 F.3d 540 (6th Cir. 2005). The doctrine of completeness does not require the admission of exculpatory statements because the hearsay rule is not trumped by the rule of completeness. *Shaver*, 89 Fed. Appx. at 533. Thus, there is no requirement that the United States offer any exculpatory statements made by defendant Hammadi in any statement, interview, or conversation, nor may defendant Hammadi himself introduce any such statements.

2. Co-conspirator Statements

The United States intends to offer statements made by co-defendant and co-conspirator Waad Ramadan Alwan. Beginning in January 2011, a conspiracy to provide material support to terrorists developed between co-defendant Alwan and defendant Hammadi. In September 2010, co-defendant Alwan began assisting an individual that he believed was part of a network

supporting al Qaida in Iraq and other insurgents in Iraq. The individual was actually a confidential human source ("CHS") utilized by the Federal Bureau of Investigation. From September 2010 through January 2011 co-defendant Alwan loaded and stashed weapons and money in hidden compartments on trucks that he believed were bound for al Qaida and other insurgents in Iraq to fight against U.S. troops. During the course of these material support operations, co-defendant Alwan later suggested that his friend, defendant Hammadi, might be interested in assisting with future operations. Alwan advised the CHS that Hammadi, like Alwan, was also a former insurgent in Iraq before coming to the United States and previously participated in attacks on U.S. forces in Iraq. On January 24, 2011, Alwan and the CHS discussed Hammadi's participation in their operations and Alwan advised of what he had discussed with Hammadi. The CHS then met with Hammadi for the first time on January 25, 2011, and explained the purpose of the money and weapons shipments. Defendant Hammadi then participated in his first material support operation with the CHS and co-defendant Alwan on January 27, 2012. On that date, he assisted co-defendant Alwan and the CHS to hide money in a truck that he believed was being delivered to insurgents in Iraq fighting United States forces. Following the January 27th, 2012, operation, defendant Hammadi participated in four other operations, which are charged in Counts 1 through 10, to provide money and/or weapons to Iraqi insurgents and al-Qaida.

During the course of the undercover operation, the CHS wore a recording device when speaking with co-defendant Alwan and defendant Hammadi. Video cameras were also located in a storage facility and in the cab and trailer of a tractor-trailer truck. The United States intends to introduce portions of the recorded conversations between and among Hammadi, Alwan, and the CHS. Regarding conversations between only Alwan and the CHS, the United States intends

to introduce conversations beginning on January 24, 2012, as this is the date when the conspiracy between co-defendant Alwan and defendant Hammadi began.

In the Sixth Circuit, the trial judge alone is responsible for deciding whether statements by co-conspirators are admissible, and that the question of admissibility should not be submitted to the jury. *See, e.g., United States v. Mitchell*, 556 F.2d 371, 377 (6th Cir. 1977). Instructions that the jury may only consider a co-conspirator's statement if the jury first finds that a conspiracy existed and that the defendant was a member of it have repeatedly been held to be "altogether unnecessary." *See, e.g., United States v. Enright*, 579 F.2d 980, 986-87 (6th Cir. 1978). Accord, *United States v. Swidan*, 888 F.2d 1076, 1081 (6th Cir. 1989). The judge should not advise the jury of the government's burden of proof on the preliminary question of admissibility, or the judge's determination that the government has met its burden. *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979). Instead, the judge should admit the statements, subject only to instructions on the government's ultimate burden of proof beyond a reasonable doubt, and on the weight and credibility to be given statements by co-conspirators. *Id.*

In *United States v. Wilson*, 168 F.3d 916 (6th Cir. 1999), the court elaborated on the district judge's responsibility for deciding whether co-conspirators' statements are admissible. "Before a district court may admit statements of a co-conspirator, three factors must be established: (1) that the conspiracy existed; (2) that the defendant was a member of the conspiracy; and (3) that the co-conspirator's statements were made in furtherance of the conspiracy. This three-part test is often referred to as an Enright finding." *Id*. at 920, citing *United States v. Monus*, 128 F.3d 376, 392 (6th Cir. 1997) and *United States v. Enright*, 579 F.2d 980, 986-87 (6th Cir. 1978). The party offering the statement carries the burden of proof on these factors by a preponderance. *Wilson*, 168 F.3d at 921, citing *Bourjaily v. United States*, 483

U.S. 171, 176 (1987). The district court may consider the hearsay statements themselves in deciding whether a conspiracy existed. *Wilson*, 168 F.3d at 921, citing *Bourjaily*, 483 U.S. at 181 and Fed. R. Evid. 801 (advisory committee note on 1997 amendment to Rule 801). The district judge's ruling on the statements' admissibility under Fed. R. Evid. 801(d)(2)(E) is generally reviewed for clear error, but if an evidentiary objection is not made at the time of the testimony, the ruling is reviewed for plain error. *Wilson*, 168 F.3d at 920, *citing United States v. Gessa*, 971 F.2d 1257, 1261 (6th Cir. 1992) (en banc) and *United States v. Cowart*, 90 F.3d 154, 157 (6th Cir. 1996).

3. Use of Interpreter During Defendant's Interview

The United States will be introducing portions of the defendant's post-arrest interviews with the FBI. FBI agents interviewed the defendant with the assistance of a certified FBI Arabic interpreter. Generally, an interpreter is viewed as an agent of the party for whom they interpret and the translation may be considered a party-admission that qualifies as "not hearsay." *See United States v. Herrera-Zuleta*, 937 F.2d 614 (9th Cir. 1991); *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985). Unless there are circumstances that negate a presumption of agency, interpreters are considered agents if they have sufficient capacity to act as interpreters and there is no apparent motive to misrepresent what is said. *See United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991); *United States v. Beltran*, 761 F.2d 1 (1st Cir. 1985). The competency of an interpreter is established through the interpreter's trial testimony that the interpreter had no trouble communicating with the party and the party had no apparent problem understanding the interpreter. *Beltran* at 1.

4. Translated audio recordings

The Government expects to admit evidence that contains voice recordings of the defendant, the co-defendant, and the CHS. When doing so, English language transcripts will be provided to the Court, the defendant, and the jury. The Government intends to call linguists that listen to the recordings and prepared verbatim English transcripts of the conversations. It is permissible to allow an English language jury to evaluate evidence of a tape recorded conversation in a foreign language solely through the use of a properly authenticated English language transcript. *United States v. Font-Ramirez*, 944 F.2d 42, 49 (1st Cir. 1991). Accordingly, courts have long approved the introduction into evidence of English transcripts for recordings conducted in foreign languages. *United States v. Rengifo*, 789 F.2d 975, 983 (1st Cir. 1991); *United States v. Cruz*, 765 F.2d 1020, 1024 (11th Cir. 1985) (permitting English language jury to consider translated transcripts as substantive evidence); *United States v. Ulerio*, 859 F.2d 1144, 1145 (2nd Cir. 1988) (admitting English language translations into evidence and allowing jury to retain the transcripts during their deliberations). With regard to consensually recorded conversations between the CHS, the defendant, and the co-defendant, the government intends to introduce versions of the recording which are clipped for content and duration. These clips will focus on the evidence relevant to the government's case in chief. The conversations will be properly authenticated prior to the introduction of the transcripts.

5. Admission of Photographs and Videos

The government will move to admit photographs and videos. All that is necessary to admit a photo or video is that it is a fair and accurate depiction of what it purports to be. F.R.E. 901(b)(1). The seven part test for authentication of a tape is not required. *United States v. McIntyre*, 836 F.2d 467, 470 (10th Cir. 1988). For video recordings with audio components, it

is not necessary to call a participant in a taped conversation to authenticate the tape, the technician who made the tape can authenticate it. *United States v. Barone*, 913 F.2d 46, 49 (2d. Cir. 1990); so either method is a permissible way to authenticate a tape recording. *United States v. White*, 116 F.3d 903, 911, 921 (D.C. Cir. 1997). Absent a showing of bad faith or tampering, the government need only show as a matter of reasonable probability the possibilities of misidentification and adulteration have been eliminated. *Id* .

For example, in a prosecution for conspiracy to distribute methamphetamine, a district court did not abuse its discretion in ruling that admission of a videotape alleged to show the defendant taking a toolbox containing methamphetamine from a vehicle outside the coconspirator's auto body shop was supported by sufficient evidence identifying the image on tape as defendant's to satisfy the foundational requirements of rule of evidence; the FBI agent's testimony identifying the image on tape as defendant's was corroborated by his observation of the defendant in court before his testimony. *United States v. Zepeda-Lopez*, 478 F.3d 1213 (10th Cir. 2007).

In another example, a videotape of a meeting between a defendant and undercover agents in a motel room was admissible without demonstrating formal foundational elements. It was established that the recording equipment was functioning properly and that the person who made the tape was sufficiently skilled in operation of recording equipment, undercover agent who was present at meeting testified to process by which tape was made and stated that it accurately reflected what transpired at meeting, no evidence was presented suggesting that videotape had been altered, erased, or edited in any manner, parties recorded on tape were identified, and there was no suggestion that statements and activities recorded were other than voluntary. *United States v. Roach*, 28 F.3d 729 (8th Cir. 1994).

Generally, when the government seeks admission into evidence of taped conversations, it is required to prove the competency of the operator of the recording equipment, the fidelity of the recording equipment, the absence of material alterations in relevant portions of the recording, and the identity of the speakers. *United States v. Hughes*, 658 F.2d 317 (5th Cir. 1981). Federal agent established requisite "minimal familiarity" with defendant's voice to permit him to identify it on recorded conversation between defendant and co-conspirator, and thus agent properly authenticated his identification of defendant, in prosecution for cocaine-related offenses; agent testified that he listened to conversation on same day that he arrested defendant, and later that day, he spoke with defendant during his arrest and post-arrest interview, each of which connected defendant's voice to his identity. *United States v. Recendiz*, 557 F.3d 511 (7th Cir. 2009).

Finally, tapes of conversations between defendant and co-conspirators were properly authenticated, where extensive testimony was presented by agents of the Federal Bureau of Investigation who wired the coconspirators with the recording devices; the agents testified to their training and experience in the use of recording devices, the type of equipment used, the procedures used to wire the coconspirators, the chain of custody of the tapes, the transcription of them, and other details concerning the preparation of the tapes. *United States v. Gorel*, 622 F.2d 100 (5th Cir. 1979).

6. Other Video Evidence

The United States intends to admit one video as evidence that was viewed by the Defendant both during the course of the conspiracy and in his meetings with the CHS. The video is a video recording of an actual vehicle borne improvised explosive device (VBIED) explosion that killed and injured U.S. troops in Iraq. During the course of his conversations with

the CHS, Hammadi acknowledged remembering the attack and described his knowledge of similar attacks. Courts have allowed video evidence in other trials dealing with terrorism in order to help the jury understand motive and intent. *See United States v. Abu-Jihaad*, 630 F.3d 102, 133-34 (2d Cir. 2010)(allowing a violent jihadi video to be shown that did not depict the defendant nor his coconspirators); *United States v. Stewart*, 590 F.3d 93, 132-33 (2d Cir. 2009)(allowing a propaganda video featuring Osama bin Laden inciting violence into evidence); *United States v. Abdi*, 498 F.Supp.2d 1048, 1072 (S.D. Ohio 2007)(finding jihadi images accessed by defendant were highly relevant to motive, intent and conspiracy); *United States v. Kassir*, No. 04-CR-356(JFK) at 7-8 (S.D.N.Y. Sept. 11, 2009)(finding that pictures of bin Laden and al-Qaeda sayings found on defendant's computer are admissible because they help establish that defendant knew al-Qaeda to be a terrorist organization); *United States v. Khan*, 309 F.Supp.2d 789, 815 (E.D. Va. 2007) (denying defendant's claim of ignorance of group's violent mission because materials indicating support of violence were widely available on the internet).

7. Scope of Cross-Examination

The scope of a cross-examination is within the discretion of the trial court. Fed. R. Evid. 611(b). Rule 611(b) requires the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *Id.* The scope of cross-examination does not extend to matters that are irrelevant, or as to which the relevance is substantially outweighed by unfair prejudice. Fed. R. Evid. 402, 403.

The defendant should not be permitted to utilize reports of interview as though they are *Jencks* materials written or adopted by the witness. The United States may call witnesses in which reports of interview were provided to the defense. It would be improper for the defense to cross examine the witnesses with the reports because they are not *Jencks* materials written or adopted by the witness.

8. Defendant's Lawful Conduct

Other than testimony from character witnesses fitting within the narrow confines of Federal Rules of Evidences Rule 404(a)(1) and 405(a), evidence offered by defendant of his lawfulness or good conduct is not admissible.

"A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on [other] specific occasions." *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990). Evidence of the defendant's other lawful behavior is irrelevant because lawful acts do not prove an absence of unlawful acts, including those unlawful acts alleged in the indictment. *See, e.g., United States v. Winograd*, 656 F.2d 279, 284 (7th Cir. 1981) ("[T]he district judge correctly refused to admit the evidence on this basis because evidence that [the defendant] engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades.") (*citing United States v. Dobbs*, 506 F.2d 445, 447 (5th Cir. 1975)). Moreover, such evidence is improper propensity evidence and may be excluded under Rule 404. *United States v. Heidecke*, 900 F.2d 1155, 1162 (7th Cir. 1990) ("Proof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment.") (*citing United States v. Burke*, 781 F.2d 1234, 1243 (7th Cir. 1985); *Herzog v. United States*, 226 F.2d 561, 565 (9th Cir. 1955)); *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000) (affirming district court's decision to exclude evidence that the defendant made two

innocent trips to Jamaica because such evidence was irrelevant to the question of whether the defendant's trip to Jamaica at issue involved illegal drug activity); *United States v. Santos*, 65 F. Supp.2d 802, 845-846 (N.D. Ill. 1999) (excluding evidence of specific acts of lawful conduct and rejecting defendant's argument that such evidence was admissible on the grounds that it generally contradicted the government's theory of what occurred).

Evidence admitted pursuant to Rule 404(a) is limited to only the "pertinent" character traits of the defendant. Absent a direct showing that certain character traits are pertinent to the facts and issues in this case, a defendant must be prohibited from offering any specific character traits in his defense. In addition, evidence admitted pursuant to Rule 405(a) is limited to a description of the subject's reputation or to a brief statement of opinion, without support from specific instances of conduct. *See* Advisory Committee Notes to Rule 405. To permit evidence of specific lawful conduct or good acts would be to eviscerate the carefully drafted limitations of Rules 404 and 405.

Accordingly, all evidence of the defendant's lawfulness or good conduct, except evidence offered strictly in accord with the limitations of Rules 404(a) and 405(a), should be barred.

9. Lay Witness Opinion

Opinion testimony of lay witnesses is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or to the determination of a fact in issue. Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Moreover, statements are not hearsay if they are introduced to show the effect of a listener's conduct, or establish "knowledge" on the part of a listener. *United States v. Roberts*, 676 F.2d 1185, 1187-88 (8th Cir. 1982), *cert. denied*, 459 U.S. 855 (1982); *United States v. Saccoccia*, 58 F.3d 754, 780 (1st Cir. 1995) ("Although a witness is generally not permitted to testify about his subjective interpretations of what has been said by another person, he may do so if his opinion is rationally based on his perception and is helpful either to an understanding of his testimony or to the determination of a fact in issue. *See United States v. Cox*, 633 F.2d 871, 875 (9th Cir.1980)"); *United States v. Lizardo*, 445 F.3d 73, 83 (1st Cir. 2006) ("A witness may also testify about his subjective interpretation of a conversation in which he is participating as long as "his opinion is rationally based on his perception and is helpful either to an understanding of his testimony or to the determination of a fact in issue.").

10. Judicial notice

Federal Rule of Evidence 201(d) provides that "(a) court shall take judicial notice if requested by a party and supplied with the necessary information." A judicially noticed fact must be one not subject to reasonable dispute in that it is (1) either generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. F.R.E. 201(b). The government would ask the court to take judicial notice of the following facts:

1. The organization known as al-Qaida in Iraq was designated a Foreign Terrorist Organization by the U.S. Department of State on December 17, 2004, and re-designated on January 11, 2012.

11. Use of weapon as exhibit

The government is required to prove that the defendant and his co-conspirator handled multiple types of weapons during the course of the operations charged in the Superseding Indictment. To that end, the government respectfully requests permission to allow a Special Agent with the F.B.I. to bring the inert weapons in as a demonstrative exhibit at trial. Demonstrative exhibits, or replicas, may be used at trial in the "broad discretion" of the trial judge. *United States v. McIntosh*, 23 F.3d 1454, 1456 (8th Cir. 1994).

12. Expert testimony

If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. An expert's opinion may be based on hearsay or facts not in evidence, where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703.

The government expects the following expert witnesses to testify in its case-in-chief:

(1) Bruce Hoffman, Georgetown University, Walsh School of Foreign Service

(2) Supervisory Special Agent Richard Stryker, FBI Laboratory Explosives Unit

(3) Robert Antoone, certified FBI linguist

(4) Nermine Elias-Samuel, certified FBI linguist

IV. JURY INSTRUCTIONS

See attached.

V. VOIR DIRE

See attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the forgoing was sent electronically on this August 14, 2012, to counsel of record for defendant, Mohanad Shareef Hammadi.

/s/
Michael A. Bennett
Bryan R. Calhoun
Lawrence Schneider