S. AMANDA MARSHALL, OSB #95347
United States Attorney
District of Oregon
ETHAN D. KNIGHT, OSB #99298
PAMALA R. HOLSINGER, OSB #89263
Assistant United States Attorneys
ethan.knight@usdoj.gov
pamala.holsinger@usdoj.gov
1000 SW Third, Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Facsimile: (503) 727-1117
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA	**Case No. 3:10-CR-00475-KI**
v.	
MOHAMED OSMAN MOHAMUD,	**GOVERNMENT'S TRIAL MEMORANDUM**
Defendant.	

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The United States of America, by S. Amanda Marshall, United States Attorney for the District of Oregon, and through Ethan D. Knight and Pamala R. Holsinger, Assistant United States Attorneys, respectfully submits this Trial Memorandum in this case.

I. Case Status

On November 26, 2010 defendant was arrested and charged in a criminal complaint with one count of Attempted Use of a Weapon of Mass Destruction, in violation of Title 18, United States Code, Section 2332a(a)(2)(A). Defendant was arrested after he attempted to detonate what he believed to be truck bomb at Portland's annual Christmas tree lighting ceremony at Portland's Pioneer Courthouse Square. On November 29, 2010, defendant was indicted by a grand jury with a single count of Attempted Use of a Weapon of Mass Destruction, in violation of Title 18, United States Code, Section 2332a(a)(2)(A).

A pretrial conference is currently scheduled for December 4, 2012. Trial is scheduled to begin on January 15, 2013. The parties expect that it will last fifteen to twenty trial days.

II. Statement of Facts

At 5:50 p.m. on November 26, 2010, defendant and a man known to him as Hussein pulled into a dark, empty parking lot near Portland's Union Station. Hussein parked the car and handed defendant a cell phone. As the two sat in the front seat of the dimly lit Chevy, Hussein began reading a number out loud while defendant frantically entered it into the phone's keypad. Defendant believed that calling the number would detonate a massive bomb that he had just helped park next to Pioneer Courthouse Square, where thousands of people were assembling for Portland's annual Christmas tree lighting ceremony. In a moment defendant claimed he had been thinking about since he was fifteen, he finished dialing the number. Nothing happened.

Hussein told him to step out of the car and dial again. Defendant stepped out of the passenger side of the car into the darkness and dialed the number for a second, final time. The bomb did not detonate. Defendant was taken into custody.

It took only minutes for defendant to attempt to detonate what he believed was an enormous, 1800-pound truck bomb. Defendant's conduct on November 26, 2010, however, was the culmination of a process that began years before his arrest. It was during this period that defendant became radicalized to such a startling degree that he became willing to commit chilling acts of violence in the name of Islamic extremism.

On February 8, 2009, a then seventeen year-old defendant sent an e-mail in response to Islamic terrorist Samir Khan's call for authors for his fledgling publication *Jihad Recollections*. Khan, as he once wrote, was "Al Qaeda to the core." He and defendant exchanged e-mails, and defendant volunteered to write at least one article for the magazine each month "and more if needed." The February 8, 2009 e-mail was just the beginning of defendant's relationship with Khan. Between February and August of 2009, defendant and Khan exchanged approximately 150 e-mails. The nature of the contacts between Khan and defendant varied, but consistently centered on one unifying theme: the consumption and creation of material devoted to the cause of radical, violent Islamic jihad.

Until his death in September 2011, Samir Khan was one of the world's most notorious English-speaking Islamic terrorists. Khan lived in the United States until 2009, when he left for Yemen. Khan published *Jihad Recollections* and, while in Yemen, *Inspire* magazine. *Jihad Recollections* was an online publication intended to be the "first Jihadi magazine in English." *Inspire* was the official magazine of Al Qaeda in the Arabian Peninsula. Khan was killed by an

unmanned aerial drone aircraft while traveling with noted terrorist Anwar Al-Awlaki in Yemen in September 2011. Khan's influence was integral in Al Qaeda's efforts to reach out to English speaking jihadists living in Western countries to encourage them to commit "lone wolf" style attacks.

In the spring of 2009, defendant poured himself into his work on *Jihad Recollections*. At one point in their ongoing correspondence, Khan even had to tell defendant to moderate his message. In a February 22, 2009 e-mail Khan sent in response to defendant's submission of pictures with his first proposed article, Khan told defendant: "We don't need to show the 9/11 images though. That might give the impression that we're telling people to train for something in particular. The magazine will have a disclaimer that we are not training or recruiting people for [terrorism]."[1] On March 17, 2009, defendant e-mailed Khan looking for "links to all the 9/11 martyr vid." On June 1, 2009, defendant told Khan and others about his interest in "revisiting the global jihad media effort."

Defendant's own words to Khan make clear that he knew his relationship with Khan was serious. In response to Khan's question about where defendant lived, defendant wrote: "if I told you that you may find me out or more importantly someone else, so its best not to say as I would jeopardize a lot of ppl." Defendant did not simply collect and distribute terrorist propaganda, he was also a published author of this material. Defendant ultimately published three articles in *Jihad Recollections* in 2009 under the name Ibnul Mubarak (a pseudonym defendant frequently

[1] Quotations of e-mails and chat room postings are set forth in their original form except for redactions and Arabic translations, and may include grammatical or typographical errors. Additionally, the translation of Arabic words in e-mails, chat room postings, and undercover meetings is set forth in brackets where the Arabic would otherwise appear.

used online) and a fourth under the name Abu Talha. He was proud of his work and later described it to Hussein and to Hussein's partner, a man known to him as Youssef.

Defendant's first article for *Jihad Recollections* was published in April 2009. Entitled *Getting in Shape Without Weights*, the piece offered tips on preparing for violent jihad. Preparing militarily, he said, includes the need to "exercise the body and to prepare it for war . . . ." Defendant wrote that the "Mujahid . . . must fulfill the obligation of preparing himself physically for jihad . . ." and that it is necessary to train "in order to damage the enemies of Allah as much as possible."

In June 2009 defendant's second piece was published. This piece, entitled *Preparing for the Long Night*, discussed physical and mental preparation for jihad and provided recommended exercises to help the reader ready themselves to "break the enemy's will." In the article, defendant discussed the practice of "our brothers in Afghanistan" as they ambush American helicopters "only to return and finish off wounded American soldiers."

Finally, in August 2009 defendant published two articles. The first, published under the name Ibn al Mubarak and titled "Assessing the Role and Influence of As-Sahab Media," was devoted to the role of Al Qaeda's media wing, As-Sahab. The defendant praised As-Sahab's releases prior to 9/11 "which made them quite well known" and "recruited a large number of fighters in the Islamic Emirate of Afghanistan." The second article published in August by the defendant in this issue of *Jihad Recollections* was published under the name Abu Talha and was entitled *The Raison D-etre for Europe's Potential of Jihadi Assault*. In this article, defendant described how "Europe owes the Muslim Ummah equal to or more than the United States in terms of the crimes they have committed" and "in one front you fight America and NATO on

Muslim soil . . . and you attack Europe at home." He went on to describe how "Jihadi groups can operate more undetected in Europe" because the Muslim population was not as integrated as in America and was not under as much surveillance.

Defendant knew that his articles were intended to advance the cause of violent jihad. On April 22, 2009, defendant typed out a message to the entire *Jihad Recollections* staff: "I really liked the idea of incorporating Shaikh Usama [Osama Bin laden] . . . really clarifying our beliefs towards him as a brother and our stance of support, which makes the magazine officially an American 'AL QAEDA' magazine." On April 24, 2009, shortly after the publication of the April 2009 issue of *Jihad Recollections*, defendant sent another e-mail to Khan and his staff in which he quoted a blog entry about *Jihad Recollections*: "If I were an alarmist, I'd started ringing the bells feverishly. This is no longer a freedom of speech issue, it has become a national security issue. These guys are openly promoting al-Qaida in the United States in a highly nuanced and appealing way. . . . This is the most advanced thinking that I've seen in English about how to push the global jihadist movement to the next level in the English speaking West." Defendant responded to this comment in his e-mail to Khan: "look kuffar really terrorized now hahahha."

As the summer of 2009 came to a close, defendant's extremist views were pushing him closer to action. On August 7, 2009, defendant e-mailed Samir Khan and his staff and told them he was unavailable to write for the fourth issue of *Jihad Recollections*, but he hoped to "personally meet you all in jannah [paradise] inshAllah." Defendant later told Hussein and Youssef that he stopped writing for *Jihad Recollections* because he planned to travel: "I was supposed to do the cover story. . . . Like 9-11 case or something like that . . . . I told them I'm

gonna be going away for a while. . . . I can't be doing this [writing for *Jihad Recollections*] right now. But [god willing] I'll get back in touch when I can. And that's what I had my whole ordeal I couldn't go and then Samir, I lost contact with him for a little bit. And then I looked on Internet and he's in Yemen, God willing I hope everything is good with that brother, you know. I was very happy for him and that's another sign from Allah[.]"

On August 31, 2009, a friend and associate of defendant named Amro Al-Ali sent him an e-mail from Yemen. The e-mail contained a link regarding a religious school in Yemen. In the coming months, Al-Ali would send defendant increasingly detailed e-mails designed to facilitate defendant's travel to Yemen to train for violent jihad. Al-Ali is a Saudi-based national who lived in Portland, Oregon in 2007 and 2008. Until his capture, Al-Ali was also a wanted international terrorist. On October 18, 2009, Interpol, the International Criminal Police Association, issued a "Red Notice" for Al-Ali on behalf of the Saudi Arabian government stating that Al-Ali had "helped the Al Qaeda division in Yemen and other countries by providing them with foreign fighters to carry out terrorist attacks against western and tourists interests." On January 4, 2011, Interpol again issued the same notice for Al-Ali. In January 2011 the Saudi Arabian government also announced that Al-Ali was one of its "47 most wanted terrorists linked to Al-Qaida." The Saudi government has since publicly confirmed that Al-Ali is in custody.

On the same August day in 2009 that defendant was contacted by Al-Ali, his father, Osman Mohamud Barre, called the Portland office of the FBI. Barre told the FBI that he was worried about his son. FBI Special Agent Isaac DeLong met with Barre in person. Barre said that he was concerned because he had recently seen information that Somali youth in Minnesota had been recruited to go overseas to commit acts of terrorism. Barre told DeLong that defendant

called him that day and told him that defendant was leaving to go to Yemen to study Islam and that defendant had a visa and a plane ticket. Concerned that defendant may be attempting to travel, Barre contacted defendant's mother and they traveled to her residence where they discovered that defendant had taken his passport.

Barre told agents that defendant was still a child and that he did not know what he was doing. Barre told DeLong that he did not want defendant to get "brainwashed." Barre also told DeLong that he did not know anyone specifically who would have influenced his son's desire to travel to Yemen. DeLong told Barre not to tell defendant that he had contacted the FBI. The next day Barre called DeLong. Barre told DeLong that defendant acknowledged that he wanted to travel to Yemen to study Islam, and showed his father an application for Dar Ul-Hadith, a school in Sanaa, Yemen. According to Barre, he told defendant about his concerns that he had been brainwashed, but defendant told Barre that he was not hiding anything.

In the fall of 2009, defendant was on the campus of Oregon State University in Corvallis, Oregon, where he was enrolled as a freshman engineering student. During his time at Oregon State, defendant engaged in many of the typical activities of a nineteen year-old college student: studying, drug and alcohol use, and socializing with his peers. This existence bore a striking contrast to defendant's persistent, but often hidden, adherence to radical Islamic ideology. Defendant was, in effect, leading a double life.

At the same time he was engaging in the fairly typical activities of a college student, defendant was making a concerted effort to conceal his radical jihadi ideology from friends and family. He explained this to Hussein and Youssef during one of their later meetings: "so when I come here I made a different image. . . . Other people they're they're thinking oh this guy he

gave up his ideas he's he's in college now. . . . I had to cover you know, stay low. It's for security cus there's no way you know like uh if I had been continuing that I don't think you know, you guys right now we could have talked. . . . I had to like stay undercover you know. And then after a year people they get convinced, okay this he's he's normal again. So now, [Praise be to God] it's good." Defendant's own writings, taken from a diary in his campus apartment after his arrest further confirm his duplicity: "you are: hiptster muslim . . . no signs of extremism," "when ever you come home show gangster/party face," and "do not show extremism."

On November 9, 2009, a man named Bill Smith sent an e-mail to defendant. Bill Smith is the pseudonym of an FBI confidential source who contacted defendant by e-mail at the direction of the FBI. It was Smith's role to help the FBI assess defendant. By the time of their last communication in August 2010, the two had exchanged forty-four e-mails. The two never met in person or called one another. On November 9, 2009, Smith reached out to defendant telling him that he saw an online post he wrote and that he [Smith] wanted to "help rid the occupiers from Palestine." In only his second response to Smith on November 13, 2009, defendant wrote: "I would advise you move to a more populated Muslim area. For security be more careful, it's a good thing you talked to me because you can tricked into saying something that will get you into trouble for nothing. . . . But don't put yourself out there. There are lot of spies." Smith responded to this e-mail by telling defendant: "I envision joining others who have the same desire. If we can get the west preoccupied with problems,and struggles here, them they will be less involved in Palestine."

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Defendant continued to communicate with Smith. In a December 1, 2010 e-mail, Smith wrote: "It looks like there has been some action against the west in the last few weeks. I sometimes wonder who is getting these guys set up. i cant tell you how easy it should be to bring any community here in the west to its knees." The defendant continued to provide Smith advice–instead of ignoring him or questioning his apparent support of violence. In response to the December 1 e-mail, defendant–displaying a savvy for counter-surveillance that he displayed with Samir Khan and with Hussein and Youssef–wrote: "brother, I don't think you should talk about such issues, especially online. How is you eeman though, how is your situation." Defendant wrote a similar e-mail on January 5, 2010: "im not saying don't talk about it, I am just saying not online, just find some brothers who share your views and talk with them but remember that you have to be cautious, you don't want to get arrested for just talking."

The two exchanged roughly twenty more e-mails after the January 5, 2010 exchange; these later e-mails cover a range of topics, including defendant's desire to travel overseas. The last direct exchange between the two occurred on May 13, 2010, when Smith thanked defendant for sending him information about the "propaganda of the crusaders" about Afghani use of the poppy crop to support jihad. The final contact between them occurred on August, 1, 2010, when defendant forwarded Smith and a number of other individuals (including Al-Ali) an e-mail about boycotting Danish products because of a Danish film that criticizes the Prophet Mohammed.

About three weeks after defendant first heard from Smith, Al-Ali contacted defendant again. On December 3, 2009, Al-Ali sent defendant a cryptic e-mail, this one from inside the northwest frontier province of Pakistan, close to Afghani border. It read:

salamz bro

> it's me (Al-Ali), I made it 2 OMRA, [praise be to god] if u wanna come, theres a bro that will contact u about the proper paperwork u need 2 come... I cant go online 4 a while,, I hope 2 see u soon
>
> abu abdallah

"OMRA" refers to a pilgrimage to the Ka'bah, a sacred Muslim site that is located in Mecca, Saudi Arabia. The term "OMRA" as used in this e-mail message, however, was not referring to a location in Saudi Arabia. Al-Ali had traveled from Yemen to Pakistan between August and December 2009 and the e-mail described above was sent to defendant to notify him that Al-Ali had joined others involved in terrorist activities. This e-mail was an invitation for defendant to join him.

Defendant wasted no time in getting back to Al-Ali. On December 5, 2009, as the fall semester came to a close, he wrote: "yes that would be wonderful, just tell me what I need to do [God willing]. always wanted to see the ka'bah."

On December 12, 2009, Al-Ali, still in Pakistan, replied:

> hey
>
> check this email
>
> jvjv003@hotmail.com
>
> pass is the same as the email except theres an = between the name and numbers

A few minutes later defendant received another e-mail message from Al-Ali telling him to contact "abdulhadi."

Defendant knew about Al-Ali's terrorist ties. Defendant frequently discussed Al-Ali during the meetings with Hussein and Youssef. When Youssef–posing as a terrorist–identified

himself as an associate of Al-Ali's, defendant was not surprised. Rather, he asked Youssef how they met. During his interactions with the Hussein and Youssef, defendant also made frequent reference to Al-Ali. In one conversation, defendant described how Al-Ali would provide cover for his travel to Yemen:

> [A]s you know, brother Amru, you know, told me to come over here, you know and study you know. Then I have a legitimate, you know, length to stay there. I want to get a three month visa, you know, stay there until I can, you know, and I had a, me and another brother . . . but my plan was just to be gone a week and a half and just you know find the right people . . . you know, be somewhere when they cannot capture you. That was my plan [God willing] and brother Amru, I'm also, I knew that he had connection you know[.]

During another meeting, defendant offered an additional comment about his plan for Yemen and contacts with Al-Ali:

> Hussein: Were you going to school in Yemen or were you gonna...
>
> Mohamud: . . . I was going to say I was going to school in Iman University. . . . And then from there you know, you can [God willing] you know, and Amro was waiting for me. He was waiting for me like a year . . . . He would always you know update me, hey are you coming, what's what's the deal? . . . He's still there.

Defendant's devotion to jihad persisted into the new year. On January 24, 2010, defendant sent an e-mail to a friend who was living in Saudi Arabia. Defendant, responding to his friend's statement that the friend was going to Makkah (the holy city of Mecca), wrote: "oh nice, make lots of [prayer] for me, make [prayer] that I will be the one to open Al Quds and make [prayer] that I will be a martyr in the highest chambers of paradise."

In the spring of 2010, defendant was also active on extremist websites and forums. In May defendant tried to access Jamia Hafsa Urdu Forum (JHUF). JHUF openly supports violent jihad. When defendant initially discovered that the site was closed to unregistered users, he sent

an e-mail on May 23, 2010 to the site administrators that read: " my beloved brothers, I would like to request to join your forum as you have closed uregistration. Hoping maybe there is some benefit in me doing so and to expand my expand my islamic networks and feeling of like minded ikhwa, may Allah guide you and make your days full of honor and eeman." Defendant subsequently got a password and on June 24, 2010, posted a response to a message on a forum that read: "Osama bin laden: 'If America kills a prisoner of Islam, Al Qaeda will excute each prisoner of the U.S." Defendant responded: "may allah protect you ya usama."

On June 14, 2010, defendant and his parents arrived at Portland International Airport so defendant could catch a flight to Kodiak, Alaska, ostensibly to travel to Alaska for a summer job in the fishing industry. When defendant attempted to check in for his flight he was advised by Alaska Airlines personnel that he would be unable to fly. Defendant and his parents left the ticket counter and were standing in the concourse talking amongst themselves when they were approached by FBI Special Agents Bradford Petrie and Chris Henderson.

After a short conversation on the concourse, defendant and his parents followed the agents to a conference room where they talked in more detail about defendant. In a 30- to 40-minute conversation dominated mostly by defendant's father, the group spoke in more detail about defendant's situation. Defendant's father spoke first explaining that defendant had just finished his first year at Oregon State University and he and defendant's mother had brought defendant to the airport to catch a flight to Alaska for a fishing job for the summer. Defendant's father explained that last year his son had expressed the desire to travel to Yemen for "religious study." Defendant's father stated he recognized the danger involved in such a trip and consequently had taken defendant's passport. Defendant's father also stated he thought is was necessary to notify the FBI and felt that this was the reason his son was on the "no-fly" list.

When defendant was asked about his intended travel to Yemen, he stated that while he did express a desire to go to Yemen, he never had an airline ticket or visa. Defendant was asked if he knew someone in Yemen and he responded that he had been in touch with someone he knew as "Amer," a name used by Al-Ali. Defendant stated that "Amer" was a Saudi national who at one point was living in the United States. Defendant did not give any further details about "Amer." In response to a question from the agents, defendant said that he only looks at NBA.com and his OSU online portal on his computer. Defendant said he never viewed anything "radical."

Defendant's father provided the FBI further information about the defendant's travel and reiterated his belief that his call to the FBI prompted his son being on the "no-fly" list. Notwithstanding Barre's protestations at the airport about his son being unfairly targeted, defendant later made clear to Hussein and Youssef that he was in fact planning on using the trip to Alaska as a springboard to travel to Yemen: "I made a plan that I was going to work there [Alaska] . . . make that money and then I was going to still come to Yemen." During his later contact with the Hussein and Youssef, defendant spoke about his parents' contact with the FBI. He pointedly said that they had betrayed him by going to the FBI.

On June 25, 2010, defendant posted a message on another online forum, AMEF, praising its work for their help creating English translations of Al Qaeda recordings. Ansar al-Mujahideen Forum (AMEF) was a radical website devoted to promulgation of Al Qaeda material to English-speaking extremists. The site has been used to distribute this material, and was even used by the Pakistani Taliban to distribute exclusive video of Faisal Shazad's failed effort to

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bomb Times Square in May 2010. According to information retrieved from defendant's computer, he had been visiting the site since at least March 23, 2010.

In the summer of 2010, defendant also remained active in extremist chat rooms and websites, including Dawnoftheummah.com. Dawnoftheummah.com was an English-language jihadi forum that required users to be formally registered with the site. The tenor of many of defendant's postings were unmistakable in their advocacy of violent jihad. On June 25, 2010, he suggested leaving suspicious packages in urban locations to create mass hysteria. On June 24, 2010, he posted a comment in which he appears to create a "hit list" of those who offended ALLAH: "im working on a huge project to et names down of those who have offended Allah and his messenger and who have insulted or attacked islam, just like the fbi has a list I wanted to collect all the names of those denmark cartoonists,presidents, interior ministers, etc." After posting the comment, another user asked defendant what the list was intended for. Defendant responded: "I wanted to publish it just to put it out there inshallah, ill put a disclaimer on it but anyone can do with it whatever they plz."

Defendant did not like the Danish. At one point he even told Hussein and Youssef: "Denmark was, was one country that we hated, like so much . . . they're so arrogant about it. . . . I want to grab their neck, you know, and just tell them that I, you know, be careful, you know. . . . We almost got a ticket for Denmark one time. We were, we thought about it one time. . . . Let's buy a ticket for Denmark, you know . . . . with the area. We can, you know, can, can be as, you know, like uh just be a normal civilian you know? And we can figure something [God willing] out you know[.]"

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On June 23, 2010, an FBI employee posing as a terrorist named Youssef, e-mailed defendant purporting to be an associate of Al-Ali. The initial purpose of this undercover contact was to assess defendant's intentions. Defendant started a dialogue, and in a follow-up e-mail Youssef asked defendant what he could do to "help the brothers." That same day, and with an apparent understanding of what Youssef meant when he asked if he could "help the brothers," defendant explained that he could not travel. He wrote: "I have been betrayed by myfamily, i was supposed to travel last year but Allah had decreed that I stay here longer than my heart desired. i am trying to find a way to go. . . . pray for me that allah will free my passage from the lands of the polytheists."

The two continued to exchange e-mails and ultimately agreed to meet in person on July 30, 2010. Defendant wanted to make sure Youssef was a terrorist and not a government agent. A few days before the meeting, defendant wrote Youssef: "of course I will have a set a questions for you when we meet about your aqeeda to makes sure you are not a spy yourself. . . . How did you get my email and if amr [Al-Ali] did give you my email then how do you know him and describe him to me if you really do know him. Only as a precaution brother no hard feelings."

On July 30, 2010, the first face-to-face meeting between defendant and Youssef took place in Portland. At approximately 11:30 a.m., the two met in downtown Portland. They walked a few blocks to a nearby hotel. As they walked down the street, Youssef asked defendant what he had done over the course of his life to prove himself as a good Muslim. Defendant responded that he had written articles which had been published in *Jihad Recollections*. Youssef asked defendant to send him copies of the articles he had written.

Defendant asked Youssef how he obtained his "truthbespoken" e-mail address. Youssef stated that he received defendant's e-mail address from the "ijtimeat," loosely translated from Arabic as "council." Defendant asked if Youssef had been in contact with Al-Ali. Youssef said he may have met Al-Ali overseas but that it was only in passing. Youssef gave a general physical description of Al-Ali, but, in an effort to ensure that defendant did not contact Al-Ali about him, stressed that he received defendant's contact information from the "ijtimeat." Youssef asked defendant if he could travel and mentioned that it might be difficult for defendant to support the cause overseas if he was on the no-fly list.

Youssef asked what defendant would do "for the cause." Without hesitation, defendant answered the question: Defendant said he initially wanted to wage war in the U.S. Later on, defendant read one of the Hadiths and had a dream. In the dream, defendant said he traveled to Yemen and received training. Afterwards, he was sent to Afghanistan to lead an army against the infidels. Youssef said this was a good dream, but said that defendant must be careful. Defendant said he wanted to introduce some brothers to Youssef. Youssef said he should not tell anyone about him or this meeting to protect defendant and himself.

Youssef again asked what defendant would do for the cause. Defendant said he "could do anything." Youssef said he could not tell him what to do, that it had to come from his own heart and Allah. Youssef identified the following options: (1) pray five times a day and spread Islam to others; (2) continue studying and get an engineering or medical degree so he could help the brothers overseas; (3) raise funds for the brothers overseas; (4) become "operational;" and (5) become a "shaheed" (martyr). As they stood in the hotel lobby, defendant immediately, and

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without prompting from Youssef, said he wanted to be "operational." However, defendant explained that he did not know how and he would need training.

When asked to elaborate on what he meant by being operational, defendant said he wanted to put an explosion together and went on to say he has heard of brothers putting stuff in a car, parking it by a target, and detonating it. Youssef indicated he would be able to help out with this type of operation by introducing defendant to a brother who was an expert in explosives. Youssef asked defendant to do some research about possible targets. Youssef concluded the meeting by saying he would contact defendant via e-mail and see him again in approximately four weeks. The entire meeting lasted approximately thirty minutes.

It has been well documented that the July 30, 2010 meeting was not recorded due to a depleted battery on the government's recording device. The recording device used on July 30 did not record because it was inadvertently turned on the night before the meeting, thus causing the battery to run down before the meeting began.

Notwithstanding the fact that the July 30 meeting was not successfully recorded, there is, of course, no evidentiary requirement that it be recorded. Recording undercover operations creates additional evidence of a given event, but it is up to the jury to determine the weight or reliability of any evidence presented by the parties. This case is no different. The jury will assess the reliability of the evidence the government offers regarding the July 30 meeting. In addition to offering the testimony of Youssef, the government will offer the testimony of other witnesses who also overheard portions of the July 30 meeting.

Defendant maintained his active online presence in the jihadi community during the summer of 2010. On August 11, 2010, defendant received an e-mail from the site administrator

of IslamicAwakening.com telling him that a poem he posted, "The Dear Martyr Whose Story I shall tell" was removed because it ran afoul of a site rule that read in pertinent part: "Do not post anything that may incriminate you for "glorifying" or "inciting terrorism." Defendant quickly responded to the admonishment with apparent sarcasm: "what a brave guy you are."

On August 19, 2010, defendant and Youssef met for a second time in Portland. Youssef met defendant downtown and, after picking up food, they walked to the same hotel where they met on July 30, 2010. This time, when they arrived at the hotel, they went directly to a room. In the hotel room, Youssef introduced defendant to a second FBI undercover employee who called himself Hussein. Hussein held himself out to be an experienced operative working with Youssef and an expert in explosives. After some preliminary discussion, defendant told Youssef and Hussein when he began thinking about violent jihad:

> Well, when I was fifteen you know I had a, I was - I made [a special prayer for guidance] about whether I should you know. . . . should go you know and make jihad in a different country or to make you know like an operation here you know like, something like Mumbai. You know, it would be simple you know you could get some weapon you know. So I made [a special prayer for guidance] and it was like when I was fifteen so, I had a dream that night, and in my dream you know I saw the mountains of Yemen . . .

Youssef later asked defendant when he started thinking about the mujahideen. Defendant said that it was when he turned fifteen, and he explained that during Ramadan someone told him about the martyrs and the virtues, and defendant "didn't even have to hear anything else you know." Elaborating, defendant said: "This is a decision that I made and if, if this [the truth], you know . . . and if you don't sacrifice your own kids, when will victory come you know. There has

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to be sacrifice before you know any progress is made anywhere; anything." During the meeting, defendant also alluded to his plan to travel to Yemen.

The parties continued to talk. Defendant described the target he had identified to Youssef and Hussein:

> Basically it's [Pioneer Square] like, Portland is like the main meeting when they have events everybody comes up there you know? So they have a, on the 26th of November . . . they have a Christmas lighting and some 25,000 people that attend. You know the streets are packed. I thought, I thought if you could help me you know to have a, to have a you know a truck [if God will], you know so that they could you know refrain. If you understand what I'm saying to you? . . . A truck with, you know, explosives [God willing].

The conversation continued:

> Youssef: but um, and this, this is again, what's in your heart? So I'm just bringing it to your mind? You know there's gonna be a lot of children there.
>
> Defendant: Yeah I mean that's what I'm looking for.
>
> Youssef: For kids?
>
> Defendant: No, just for, in general just a huge mass that will, you know like for them you know to be attacked in their own element with their families celebrating the holidays. And then for later on to be saying, this was them for you to refrain from killing our children, women . . . so when they hear all their families killed in such a such a city they will say you know because of what your actions you know they will stop you know. And it's not fair they should do that to people and not feeling it, The sheikh Usama you know (UI) he said [I swear to Allah the Great], you know he swore by Allah you know, [that America will not even dream of security].

Hussein told defendant that he loved his idea but that he could leave anytime he wanted. Hussein asked defendant about the law enforcement presence at the event, to which defendant replied:

> Is that . . . in Portland? Not really. They don't see it as a place where anything will happen. People say you know, why, would anybody want to do something in Portland, you know. It's on the west coast, it's in Oregon; and Oregon's like you know, nobody really thinks about it. If we're like LA or something it's different so . . .

Hussein asked defendant if he thought about an attack when he was fifteen years old. Defendant again mentioned that he had originally thought about conducting an attack similar to the Mumbai attack by teaming up with some "brothers." He said that because he had been a rapper and he could obtain a pistol or AK (AK47 assault rifle).

Curious, Youssef asked defendant to further describe the tree lighting ceremony. Defendant continued:

> They bring a big Christmas tree and sit it in the middle of the square. And all the people gather . . . the mayor gives a speech and you know all the people are there. And they bring their you know families you know. This is their holiday . . . people come for this lighting then at 5:30 sharp . . . so I was thinking that would be the perfect time you know . . . .

As defendant explained his plans further, Hussein interrupted:

> So are you telling me that you don't mind driving it and, and blowing it up while you in it?
>
> Defendant: Yeah, I don't mind that. That, that, that I mean if, if I wasn't in it then you know then they'll look for me and I would have to have some way to leave the country you know[.]

A short time later, Youssef and Hussein confronted defendant about the significance of what he was suggesting, repeatedly reminding defendant how difficult the operation would be. Again, the two asked him how long he had been thinking about this. Defendant responded:

> Since I was fifteen you know I, since I was fifteen I thought about all this things before . . . .

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> Youssef: And you're not worried?
>
> Defendant: Because if you were to going to [Paradise] you wouldn't have to worry, right?

Youssef asked defendant how long he had been thinking specifically of an attack on Pioneer Square, and defendant said since Youssef and defendant had talked before. Defendant said that he looked around at a couple of places, looked to see where a vehicle could be placed and where the most people were and he decided that Pioneer Square was the best place. The undercover employees did not have any prior knowledge of Pioneer Square.

Defendant cooly offered a rationale for the attack, discounting any potential concerns that he might have following through with the attack:

> Yes, I will push the button because [my brother], every day we see . . . .
>
> Youssef: Allah [UI] Allah is looking at you right now.
>
> Defendant: Allah [may He be glorified and exalted] is always looking at me, but imagine every day we see you know in Arab, you know, newspapers and news you know our people are killed you know. So for us to see that you know it would be a smile from me to see them in the same . . . you know, you know what I like, what makes me happy? You know, what I like to see? Is when I see the enemy of Allah then they are you know their bodies are torn everywhere. Like, like when I see the pictures.

As they sat in the room, Youssef continued to push defendant about the seriousness of killing thousands of people:

> We want to make sure that it's, you know, it's in your heart, you know. If we get all the way there and you're like, uh oh. . . . but even if that happens, we'll be disappointed but you always have a choice. You understand? With us you always have a choice.

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The group then left the hotel room and drove to Pioneer Square. They walked around the square and defendant explained where the people and the Christmas tree would be during the ceremony, where he was thinking about driving, and potential obstructions to the vehicle. As the summer evening settled over the square, Hussein asked what defendant would have done if he had never met he and Youssef. Defendant explained that one of his plans was to leave the country without graduating and go visit his friend in Saudi Arabia. Defendant implied that from Saudi Arabia he would then try to meet the right people. Defendant also said that Al-Ali told defendant to come overseas and study, which would give him a legitimate reason to travel.

On September 7, 2010, defendant met with Youssef and Hussein for the third time. That evening, Youssef met defendant downtown and the two picked up food before going to a hotel in Portland where they met Hussein. Prior to the meeting, Youssef sent defendant an e-mail imploring him to think about the course of action he had set: "a bomb is a serious matter. . . . this attack must come from your heart dear brother," he wrote. Undeterred, six days later defendant responded: "the traffic light is green lol."

When the meeting began, Youssef told defendant that he had showed the "council" defendant's work. He told him that they were impressed and did not want defendant to be a martyr yet because he had skills that would be useful to the brothers overseas. Rather, they suggested, defendant should go through with his plan, but then leave the country after the attack instead of martyring himself. For security reasons, the FBI suggested this alternative to a martyrdom operation. Youssef again told defendant that his participation in the plan was solely his decision: "This is your choice, it's what in your heart, we can't tell you what's in your heart."

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A short time later, Youssef asked defendant which option would he chose if he were presented with the following two choices related to the operation that they had discussed: (1) Defendant could become a martyr by driving a van to the attack site and completing the attack, or (2) Defendant could park the vehicle, leave the area, make a cellular telephone call and "the same thing happens." According to Youssef, he and defendant would then travel someplace and stay for a few days before traveling overseas. Defendant said that he preferred the second option because he believed that martyrdom required the "highest level of faith." He was concerned that after living in the United States and attending college he may not have that "high faith."

Youssef and Hussein asked defendant to find the ideal place to park the truck informing him that it could be up to a block away and still be effective. They also told him that the bomb would be in a van. Defendant stated that he would find a place to park it. When he found the parking spot, defendant said that he would send an e-mail to Youssef stating that he "found his keys." Hussein also asked defendant if he was willing to purchase some components for the bomb. Defendant agreed. Hussein asked him to buy one Utiliteck Mechanical Programmable Timer, two Nokia prepaid cellular telephones, one heavy-duty toggle switch and one heavy duty 9-volt snap connector. Additionally, following up an earlier phone call between Youssef and defendant, the UCEs spoke with defendant about finding his own apartment where they could meet and "hide out" for a few days after the attack. They gave defendant $2700 in cash to cover the cost of this apartment and $110 for the bomb components that Youssef and Hussein asked defendant to buy and send to them.

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Hussein then asked defendant how many people would be at the Christmas tree lighting event. Defendant replied:

> Hm, they say 25,000 but I'm guessing more like 12,000, 15,000. . . . a lot of people, and the streets are packed and also it's black Friday that day. So all the, it doesn't even have to be at Pioneer Square. The whole area is, is all gonna be packed. They're gonna be shopping at Pioneer Square, they're gonna be shopping, the, the whole place is, there's a mall.

The group continued to discuss logistics for the attack. They then talked with defendant about Youssef staying in Corvallis with defendant for a few days after the attack before leaving the country. Hussein said that they would get papers for defendant to leave, and asked him again if he wanted to leave. Defendant said that he always wanted to leave because he did not like living in the United States. Defendant later explained that he was thinking about flying to join the brothers after finishing his job in Alaska during the preceding summer. However, defendant said that he was unable to travel to Alaska because he was on the "no-fly" list. The meeting ended and Youssef left the hotel with defendant. As they walked outside into the rain, Youssef talked to defendant about the strength of the car bomb:

> And when you dial that phone number, I'm telling you, when you look at all of this you can park the car probably two blocks this way or this way, or that way, all of this is going to be gone.
>
> Defendant: Really?
>
> Youssef: Yeah. It's, when you see, when you see what he builds.
>
> Defendant: Wow, like two blocks?
>
> Youssef: Yeah.
>
> Defendant: Wow, that's amazing.

On September 30, 2010, the FBI received a box sent by defendant. Inside the box were a series of components that Hussein and Youssef had asked defendant to buy, including: a heavy-duty toggle switch, a package of stereo phone jacks, and a right-angle phono plug. Inside the box, defendant had also included a pack of gum and a note that read: "Good Luck With UR Stereo System Sweetie. Enjoy the Gum."

On October 3, 2010, the group met in Corvallis, Oregon. Youssef picked up defendant and they traveled to a hotel where Hussein was waiting. Defendant told Youssef and Hussein that he had picked a good location to park a vehicle near Pioneer Square. He then described a fifteen-minute parking spot near the square. He outlined a plan in which, if the space was taken, one of them could drive around the block until the spot opened up. Defendant then used a piece of paper to describe the plan in better detail. Hussein said that it seemed like defendant had chosen a good location, but that he should have three spots in mind in order to ensure a successful operation. Youssef asked that defendant do some detailed research including photographs, marked maps and escape routes. Youssef explained that the plan was for Hussein and defendant to drive the van to the location. After they parked the vehicle, Youssef would pick them up and drive them away. Hussein asked defendant to rent a storage unit for them to hide the van and the bomb components.

Hussein described the conditions in the area to which defendant would travel after the attack. It would, he said, be harsh and that the studying and training would be difficult. Hussein also told him that the trip there would be difficult, and he would not be able to contact his family. Defendant stated that he still wanted to go. Hussein asked defendant to send them passport photographs to help in getting him out of the country. Hussein asked defendant about

what he was going to say to his family since he was going to be away for such a long time. Defendant said that he did not plan to tell his family that he would be traveling overseas.

The parties continued to discuss planning for the attack. Hussein asked defendant if he knew of a remote location to test the detonation mechanism of the explosive device. Defendant said he had some locations in mind and asked about the detonation device. Hussein told him that the device would be detonated using a cellular telephone. Towards the end of the meeting, defendant continued to show his enthusiasm for the planned attack: "it's gonna be a firework display . . . a spectacular show . . . New York Times will gives it two thumbs up."

On November 4, 2010, Youssef and Hussein picked up defendant at a Starbucks coffee shop in Corvallis. After a brief conversation, the group drove to a remote location in Lincoln County, Oregon. Defendant was told that the purpose of this was to test the functioning of an explosive device. He was also told that the device he would use in his planned attack was similar to the one they were going to test but that it would be significantly larger and hundreds of times more powerful.

As they drove into increasingly rural terrain, defendant discussed the details of the planned attack. Using his computer, defendant showed Hussein pictures of parking spots he had found for the van near Pioneer Square. He also gave them a computer thumb drive which he indicated contained information pertaining to the attack. The drive contained a number of files including: Google street-view photographs of three areas near Pioneer Square, a photograph titled "bikegallery_meetingarea.png"; highlighted Google Maps images showing routes in and out of downtown Portland; and a document listing directions from Corvallis to Pioneer Square and from downtown Portland back to Corvallis. In this last document, defendant included

detailed instructions about how the group would ensure they were able to park in one of the spots. During the ride, the group also discussed what defendant wanted to do after the attack and his past efforts to travel overseas for violent jihad. Defendant told Hussein that when he took a family trip to the United Kingdom he tried to obtain a visa to go to Pakistan, and he said that Al-Ali was in Pakistan at the time. Defendant said,

> I went there with family but I, my intention was to, I was trying to get a visa to Pakistan. And (Al-Ali) was there at that time, and I was trying to set something up, I was close, you know, but it didn't work out 'cause uh, my passport had not been valid for six months . . . so I couldn't get the visa.

Defendant later talked more about the group of like-minded brothers he was friends with, most of whom had since traveled overseas. Defendant said that at that time, "(Al-Ali) was trying to get us all to go to Yemen, and I was telling everybody, let's, let's go there you know . . . ." Later, defendant was unequivocally clear about his intent: "I, I, like I tried maybe three times to reach jihad . . . ."

The group finally pulled up to a remote clearing in the hills of Lincoln County. When they arrived at the designated location, Hussein showed defendant an inert explosive device–used so that defendant would not have control of an actual live explosive–concealed in a blue backpack. Hussein explained that the device contained several of the components previously provided by defendant, including the cellular telephones he had purchased in September. He and defendant then placed the inert device in a location previously arranged by the FBI and got back into the car to drive to a spot a little over a mile away where they would detonate the bomb. While Youssef and Hussein drove defendant to the location where they

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planned on detonating the device, bomb technicians surreptitiously replaced the inert device with a live explosive device.

On the way to the location, defendant spoke of the corrupting influence of the United States. Americans, defendant said, are "the most evil people." Once the group reached the location, Hussein showed defendant how to detonate the device. Defendant then used a cellular telephone to perform the actions he had been told would trigger the device. Seconds later, the bomb technicians detonated the live device leading defendant to believe he had caused the device to explode. The three stood and watched a plume of dust and debris rise into the air after the explosion. They then got in the car and began the journey back to Corvallis.

During the drive back to Corvallis, the group discussed the attack. Youssef asked defendant if he was capable of looking at the bodies of those who will be killed in the explosion. Defendant replied emphatically: "I want to see, you remember when 9-11 happened when those people were jumping from skyscrapers? . . . I thought that was awesome." Youssef told defendant that he was going to see body parts and blood. Defendant responded, "I want to see that, that's, that's what I want for these people." He continued, "I want whoever is attending that event to be, to leave either dead or injured."

On the way back, the group also discussed whether defendant wanted to make a video of himself setting forth his rationale for the attack. Defendant decided to make the video, and as they made the late afternoon trip back into Corvallis, he wrote out what would become his videotaped statement. When they arrived back at defendant's apartment, defendant made a video

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setting forth his rationale for the upcoming attack. Shortly before he started recording, Youssef told defendant, "it's up to you Mohamud." Defendant still elected to make the video. In preparation for the video, defendant changed his clothes, telling him he wanted to dress "Sheik Osama style" and put on a white robe and a white and red headdress. He then put on a camouflage jacket. Youssef then filmed defendant as he read a written statement on camera:

> [I take refuge in Allah from Satan the accursed; in the name of Allah the merciful, the compassionate; all praise be to Allah, we praise him, we seek his assistance and forgiveness. We take refuge in Allah from the evil of our souls and from the sins of our acts. He who Allah guides there is none to lead him astray, he has none to guide him alright. I bear witness that there is no god but Allah alone, he has no associate. As for hereafter], This is a message [God willing] to those who have wronged themselves and the rights of others. From the Americans and others. A dark day is coming your way [with the permission of Allah the glorified the exalted]. For as long as you threaten our security, your people will not remain safe. As your soldiers target our civilians, we will not fail to do so. Did you think that you could invade a Muslim land, and we would not invade you, but Allah will have soldiers scattered everywhere across the globe. To those doubting the victory of Allah's [the glorified the exalted] then we say there's a lesson in the USSR for you, and also in the events going on in Afghanistan. Their power is not except propaganda on the tongues of people. To those Muslims who reside amongst the [infidels] we say to them, [What has stop, what has stopped you from fighting in the cause of Allah] What has stopped you from fighting in the cause of Allah [and the raising of the banner of "no god but Allah"?]. Because living here is a sin. To my parents, who held me back from Jihad in the cause of Allah. I say to them, [by Allah] if you-if you make alliance with the enemy, then Allah [the glorified the exalted] will ask you about that on the day of judgment, and nothing that you do can hold me back except of the [predestiny] of Allah [the glorified the exalted], and [God willing], you will see the victory of (UI) the victory of Islam, and I pray to Allah's [the glorified the exalted] you as well are guided. . . . And finally I wanted to finish with a-with a poem that I wrote for the Mujahadeen across the globe. It is from your brother to his brothers.

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> You stand in my eyes as a white distant pearls who have forsaken their desires and the life of this world. I sit here, cold cement numbing my feet. The world once (UI) stood honored under Allah and his rule. The Muslims most noble and a mujahid hold on to Jihad to continue our rule. But we fell into Dunia [material life] and united no more as the pagan's rejoiced invading our shores. Our honor merely memories of times before and the centuries raced on as our power regressed. While the humans fell in darkness, suicidal depressed, the Christians and Jews have finally established their rule. In the hot burning desserts, the wind still blew as a few bright faces looked up at the moon. Ramadan had begun and their faith renewed. So carry on oh brothers, and march on ahead to meet your creator and lie on silk beds, and the martyr's don't die, so don't say they're dead. Explode on our (UI). Explode on these [infidels]. Alleviate our pain. Assassinate their leaders, commanders, and chiefs from your brother to his brothers a poem in brief.

On November 18, 2010, Youssef and Hussein met defendant for the sixth time. The two picked up defendant at his apartment and drove to a storage unit that he had rented to store some of the bomb components. After they arrived, defendant gave Hussein a key to the unit. After checking the storage unit, the group headed up Interstate 5 to a hotel in Portland. During the drive, Youssef asked defendant what he would be doing if he had not met them. Defendant said that he had intended on traveling to Yemen after making money during his Alaska trip. When they arrived at the hotel, the three continued to discuss his plan for the November 26, 2010 attack. Using his laptop computer, defendant showed Hussein the parking spots for the bomb that were on the thumb drive he had given Youssef and Hussein on November 4th. When they were done looking at the computer, they left the hotel room.

The group then went directly to Pioneer Square where they discussed defendant's proposed parking spots for the bomb. Defendant matter-of-factly told Hussein and Youssef that he did not like the parking spot in front of the watch shop as much as the others because it was a

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block away and the blast might not cause as much damage. He told them that he liked the parking spot in front of another nearby store because there was a light-rail stop across the street from that location, and defendant told them that he could place a camera in the van with a view of the stop. Defendant explained that the camera would feed live footage to his laptop and he would wait until a train arrived before detonating the bomb in order to cause more casualties. While at the square the group timed the walk from the square to the rendezvous location that defendant had identified earlier. After leaving the square, the UCEs drove to Corvallis and dropped defendant off at his apartment. On the way, defendant talked more about the attack and the crowds that would be at the square the day of the tree lighting, indifferent to the potential loss of life. Defendant told Hussein and Youssef about the proximity of Pioneer Place Mall, saying that he hoped it would collapse from the blast. Calmly, he went on to point out: "We might even get the mayor...I think that the mayor's gay, so we can get him[.]" The prospect of detonating a bomb at the location he just visited appears only to have ignited defendant's enthusiasm: "I'm excited," he said. Indeed, in the early evening hours of November 19, defendant, from his personal computer, downloaded two videos from the Internet depicting the tree lighting ceremonies from 2007 and 2008.

On November 23, 2010, Hussein met defendant at his apartment in Corvallis and drove him to the storage unit. During this meeting, defendant helped Hussein load items from the storage unit into Hussein's vehicle. Included among these items were two barrels, a gasoline can, electrical wires and a large box of screws. Hussein told defendant that these things would be used in the construction of the bomb.

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Defendant gave Hussein reflective traffic markers, hard hats, safety glasses, a reflective vest and reflective gloves which, during the November 18, 2010 meeting, Youssef had requested defendant track down for the planned attack. Just three days before the attack, defendant appeared to be increasingly confident and in control. As they drove, defendant told them that they would wear the reflective gear and use the traffic markers when they parked the van. If they were approached by anyone, defendant stated that he would talk on their behalf because he had previously worked at a "public works" company. As they walked from the square to meet up with Youssef, they would drop the reflective clothing in a garbage can. If defendant had any anxiety just days before the attack, he was not showing it. During the meeting, defendant stated that he felt "good" and "calm."

At noon on November 26, 2010, Youssef picked up defendant at a friend's house in Beaverton. The two drove defendant to a Portland hotel where they waited for Hussein. After Hussein's arrival, the group left the hotel to look at the bomb which was parked at a nearby location. The bomb itself was inside the back of a late-model, white, full-size van. It was inert and constructed by law enforcement bomb technicians. It was made of six 55-gallon drums containing inert material, inert detonation cord, inert blasting caps, and about a gallon of diesel. In the front seat of the van, there was a detonation mechanism which consisted of a cellular telephone, a 9-volt battery, an arming switch and a phone jack plug.

Standing in the cool November air, Hussein opened up the side of the van exposing the bomb to defendant and Youssef. Defendant leaned inside to take a look as the odor of diesel filled the air. After looking at the bomb, defendant stepped back and with a smile on his face remarked that the 1800-pound bomb was "beautiful." The group then returned to the hotel.

Before leaving, Hussein again asked defendant if he was sure he wanted to go through with the attack. Defendant twice replied that he was sure he wanted to go ahead with the attack. While they were in the room, a television broadcast coverage of the tree lighting ceremony, now only hours away. Local news coverage reported that approximately 25,000 would be at the tree lighting event. Defendant smiled and told the others that he was pleased with the size of the crowd. At 4:45 p.m., Hussein left the hotel to wait for Youssef and defendant. Youssef and defendant got in an SUV, picked up Hussein and all three drove to the van. Youssef dropped Hussein and defendant back in the parking lot with the van and left the area. As dusk fell, the two set out for Pioneer Courthouse Square.

Hussein and defendant drove to the location at Yamhill and Sixth Street by Pioneer Courthouse Square that defendant had previously picked out as a place to park the van. Unbeknownst to defendant, the FBI and Portland Police Bureau ensured that the street and parking spot were open as the van traveled down Yamhill Street. Driving slowly down the crowded street, Hussein parked the van. After the van was parked, defendant then attached the blasting cap to the device. Hussein turned on the phone and asked defendant to flip the toggle switch, which he did. The bomb, defendant believed, had been armed.

As Christmas music played in the square, Hussein and defendant stepped out of the van, put on their hard hats, and walked to meet Youssef at Southwest 10th and Salmon. Youssef picked up defendant and Hussein and the three drove to Union Station, the train station, to drop off Youssef. Hussein and defendant then drove to a parking lot near Union Station. Hussein pulled into the lot, parked, and Hussein gave defendant the phone that purportedly would detonate the bomb.

Hussein started to read the phone number to defendant but defendant appeared so eager that he started to read and dial the number off the paper Hussein was holding faster than Hussein could recite it. After he dialed, the FBI confirmed that the call went through and that the inert bomb did not detonate. Hussein then suggested that defendant step out of the car and try it again where the signal might be better. Defendant called the number again. He was taken into custody shortly thereafter. As defendant was being driven in the darkness down Front Avenue to the Multnomah County Detention Center, he yelled "Allahu Akhbar" and began violently kicking the agents and an officer inside the car, forcing them to stop the vehicle until defendant could be restrained. Inside defendant's pocket was a printed e-mail message from Al-Ali containing an address and phone number in Yemen that read: "use this address Haddah Al-Madeenah As-sakaniah ST. 24 House 11 712646577. Let me know when ur arrival date."[2]

III. Elements of the Offense

Defendant is charged with violating Section 2332a(a)(2)(A) of Title 18 of the United States Code. The indictment alleges, in pertinent part, that defendant, "without lawful authority, knowingly attempted to use a weapon of mass destruction, specifically a destructive device or explosive bomb, against a person or property within the United States, and the mail or a facility of interstate commerce was used in furtherance of the offense[.]"

To satisfy its burden of proof, the government must establish each of the following elements beyond a reasonable doubt:

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[2] Attached as Exhibit 1 for the Court's assistance is a timeline that summarizes what the government has identified as important dates in the investigation of defendant's case.

First, that the defendant knowingly attempted to use a weapon of mass destruction;

Second, that the defendant knowingly[3] did so against a person or property within the United States and the mail or any facility of interstate or foreign commerce was used in furtherance of the offense.

A. Attempted Use of Weapon of Mass Destruction

The first element that the government must prove beyond a reasonable doubt is that the defendant knowingly attempted to use a weapon of mass destruction.

1. Attempt

Under Ninth Circuit Model Jury Instruction 5.3 (Attempt), attempt is defined as conduct that constitutes a substantial step towards the commission of that crime. The Ninth Circuit has held that a "substantial step" must be an objectively manifested act that demonstrates the firmness of the criminal intent. "To constitute a substantial step toward the commission of a crime, the defendant's conduct must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *United States v. Goetzke*, 494 F.3d 1231, 1235–36 (9th Cir. 2007). "'Mere preparation' to commit a crime 'does not constitute a substantial step.'" *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987)). "The difference between making preparations and taking a substantial step toward the commission of a crime is one of degree." *Id.* "'[I]t is not enough that the defendant have

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[3] The Tenth Circuit has held that "knowingly" applies to both elements of the crime. *United States v. McVeigh*, 153 F.3d 1166, 1194 (10th Cir. 1998) ("we conclude that § 2332a(a)(2) request the government to prove that McVeigh (1) knowingly used, or attempted or conspired to use, a weapon of mass destruction, and (2) knowingly did so against persons in the United States."), *limited on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000).

intended to commit a crime. There must also be an act, and not any act will suffice.'" *Id.* (quoting Wayne R. LaFave, 2 *Subst. Crim. L.* § 11.4 (2d ed. 2003)).

> We have explained that a suspect crosses the line separating preparation from attempt when his actions "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." Although the suspect's conduct "need not be incompatible with innocence to be punishable as an attempt, it must be necessary to the consummation of the crime and be of such a nature that a reasonable observer, viewing it in context, could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to commit the [substantive offense]." To put it in slightly different terms, to constitute a "substantial step," the action in question must be "strongly corroborative of the firmness of a defendant's criminal intent."

Id. (internal citations omitted).

In *United States v. Pariseau*, the defendant was charged with attempted possession with intent to distribute methamphetamine, and the court found that prior travel arrangements to pick up drugs, similar prior concealment methods, and the fact that the defendant had possessed drugs in the past were substantial steps in attempting to possess and distribute drugs. 685 F.3d 1129, 1130 (9th Cir. 2012). The court noted that

> [i]n determining what substantial steps were taken toward committing the substantive crime, "the finder of fact may give weight to that which has already been done as well as that which remains to be accomplished," because that prior conduct may "be of such a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with a design to violate [the underlying] statute."

Id. (quoting *United States v. Scott*, 767 F.2d 1308, 1312 (9th Cir. 1985)).

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While the Ninth Circuit has not yet addressed attempt relative to an attempt to violate 18 U.S.C. Section 2332a, other circuits have done so. In *United States v. Yussef*, the Second Circuit found substantial steps in attempting to bomb U.S. aircraft overseas when the defendant

> acting alone or with his co-conspirators: (i) rented an apartment in a suburb of Manila for the purposes of manufacturing bombs therein; (ii) purchased chemicals suitable for the manufacture of bombs; (iii) manufactured bombs, timers, and related devices; (iv) detonated a bomb in a movie theater in Manila; and (v) detonated a bomb on a Philippine airliner, killing one passenger.

327 F.3d 56, 134 (2d Cir. 2003). The Second Circuit applied a standard comparable to the Ninth Circuit, requiring that "for a defendant to have taken a 'substantial step' he must have engaged in more than 'mere preparation,' but may have stopped short of 'the last act necessary' for the actual commission of the substantive crime." *Id.*

In *United States v. Nichols*, the Tenth Circuit reasoned that Terry Nichols' conviction for conspiring to bomb the Alfred P. Murrah Federal Building in Oklahoma City was "more akin to attempt" because of "the allegations of overt acts stated in the indictment." 169 F.3d 1255, 1274 (10th Cir. 1999). The court cited Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.4(c), at 530 (2d ed. 1986) noting that "[U]nder attempt law it must be shown that the defendant has taken. . . a 'substantial step' toward commission of the crime. . . ." *Id.* The court similarly recognized that overt acts were part of the attempt offense of the crime in 18 U.S.C. § 2332a. *Id.*

Finally, the Fifth Circuit in *United States v. Polk* found substantial steps in attempting to bomb the IRS building in Austin, Texas, when

> Polk sought the assistance of others to carry out his plans of destroying government property and killing and/or injuring federal

> employees; took or caused to be taken photographs of the IRS buildings; studied the IRS building to the point of indicating where bombs should be placed so that the building would be brought down; and initiated and participated in several meetings in which Polk "ordered" the materials necessary to carry out the planned bombing.

118 F.3d 286, 292 (5th Cir. 1997). Like the Ninth Circuit, the Fifth Circuit defined an attempt to violate 18 U.S.C. 2332a as requiring proof "that the defendant (1) intended to commit the underlying offense, and (2) took a 'substantial step' beyond mere preparation, toward committing that crime." *Id.* at 291. The Fifth Circuit found sufficient evidence to sustain the verdict because the jury had been presented with recorded conversations of the defendant discussing the bomb plot with an informant. *Id.* at 292 & nn.3–4.

In this case, the jury will hear and see evidence that this defendant took numerous substantial steps towards the commission of this crime. Defendant planned the explosion, he identified the target, he planned out and practiced the routes, he conducted surveillance, he purchased parts, and he armed the bomb after guiding it to the final target. Moreover, defendant unquestionably took a substantial step towards detonating the truck bomb on November 26, 2010, when he punched a telephone number into a phone that he believed would detonate a bomb.

2. Weapons of Mass Destruction

According to 18 U.S.C. § 2332a(c)(2)(A) "Weapons of Mass Destruction" include, in pertinent part: (a) a destructive device, which is any explosive, incendiary, or poison gas bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter ounce, mine, or similar device, or any type of weapon which will, or may be readily converted to, expel a projectile by the action of an

explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and any combination of parts intended for use in converting any device into any destructive device and from which a destructive device may be readily assembled.

The government will introduce evidence at trial that defendant believed that the inert explosive device that he attempted to detonate was a "Weapon of Mass Destruction" as that term is defined in 18 U.S.C. § 2332a(c)(2)(A). Defendant's inability to carry out the bombing or the fact that the bomb was inert does not affect defendant's culpability under 18 U.S.C. § 2332a(c)(2)(A). As the government has separately addressed in its Motion In Limine to Preclude Defendant from Arguing Impossibility as a Defense, impossibility is no defense to the crime of attempt. *United States v. Williams*, 553 U.S. 285, 300 (2008)*; United States v. Karaouni*, 379 F.3d 1139, 1145 (9th Cir. 2004), citing *United States v. Steward*, 16 F.3d 317, 320 (9th Cir. 1994).

3. Without Lawful Authority

The government is not required to prove beyond a reasonable doubt that defendant lacked lawful authority to detonate a weapon of mass destruction. In *United States v. Wise*, 221 F.3d 140 (5th Cir. 2000), the defendants were charged with conspiring to use, attempting to use, and threatening to use, a WMD in violation of Section 2332a. The indictment, however, made no reference to the phrase "without lawful authority." The defendants alleged that the "without lawful authority" phrase was an element of a Section 2332a violation the government must prove beyond a reasonable doubt.

The Fifth Circuit disagreed. The court concluded that "the phrase 'without lawful authority' in Section 2332a is an exception that modifies the term 'person;' as such, it constitutes

an affirmative defense rather than an essential element." *Wise*, 221 F.3d at 150. It relied, in part, on the "'well-established rule of criminal statutory construction that an exception set forth in a distinct clause or provision should be construed as an affirmative defense and not as an essential element of the crime.'" *Id.* at 148 (quoting *United States v. Santos-Riviera*, 183 F.3d 367, 370–71 (5th Cir. 1999)). As a practical matter, however, the government's evidence will demonstrate that defendant lacked any lawful authority to possess a weapon of mass destruction.

B. Target of the Offense

The second element of the charge involves the target of the offense. The government must prove beyond a reasonable doubt that the defendant knowingly attempted to use a weapon of mass destruction against a person or property within the United States and the mail or any facility of interstate or foreign commerce was used in furtherance of the offense. 18 U.S.C. § 10. The term "foreign commerce" includes commerce with a foreign country. 18 U.S.C. § 10.

1. The Commerce Clause and 18 U.S.C. § 2332a(a)

As initially enacted in 1994, Section 2332a(a) did not expressly include any reference to interstate commerce. The following year, the Supreme Court decided *United States v. Lopez*, 514 U.S. 549 (1995), striking down the "Gun-Free School Zones Act" because it exceeded Congress's authority under the Commerce Clause. Thereafter, in 1996, Congress amended Section 2332a(a), adding language that required a nexus to interstate commerce. *See* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, § 725(1)(C) (1996). Then in 2000, the Supreme Court decided *United States v. Morrison*, 529 U.S. 598 (2000), striking down a provision within the "Violence Against Women Act" on the ground that the statute did not regulate an activity that substantially affected commerce. In the "Intelligence

Reform and Terrorism Prevention Act of 2004," Congress again amended the Section 2332a(a) commerce language by adding four interstate or foreign commerce bases for jurisdiction, so as to leave no doubt that the statute was intended to reach as far as the Constitution permits. *See* Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. 108–458, § 6802(a)(1) (2004).

The constitutionality of the original version of Section 2332a(a) was challenged in the wake of *Lopez*. For example, the defendants in *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998), challenged their convictions for conspiring to use a WMD by arguing that the statute violated the Commerce Clause. In *Viscome*, the defendants had conspired to kill by planting, and attempting to detonate, a bomb in a truck. *Id*. at 1371. The court differentiated *Lopez* by looking to the Congressional findings underlying Section 2332a. In drafting the statute, Congress articulated the enormous threat posed to national and global commerce by the use, or threatened use, of WMD. *Id*. The early legislative history of Section 2332a states as follows:

> The Congress finds that the use and threatened use of weapons of mass destruction . . . gravely harms the national security and foreign relations interests of the United States, seriously affects interstate and foreign commerce, and disturbs the domestic tranquility of the United States.

Id. (quoting H.R. Rep. No. 102-405, at 46 (1991) (Conf. Rep.)).

Giving deference to these Congressional findings, the court concluded that Congress acted within its Commerce Clause authority. *Id.* As applied to the conspiracy to blow up a truck, the court found it sufficient that the truck was the subject of an interstate lease. *Id*. at 1371 n.15. *See also United States v. McVeigh*, 940 F. Supp. 1571 (D. Colo. 1996), *aff'd on other grounds*, *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999).

As defendant repeatedly made clear, he intended to detonate the bomb in an effort to kill people and damage property surrounding Pioneer Courthouse Square. In furtherance of the offense–notably during his contact with the Hussein and Youssef–defendant used the mail when he shipped bomb components and his passport photos to Hussein and Youssef. Finally, defendant frequently used e-mail to communicate with individuals throughout the investigation. E-mail is a facility of interstate or foreign commerce.

IV. Entrapment

Defendant has indicated that he intends to raise entrapment as a defense. Once a defendant has made a sufficient showing to support an entrapment instruction, the government must prove beyond a reasonable doubt that the defendant was not entrapped. *Ninth Circuit Model Criminal Jury Instructions* 6.2 Entrapment (2010). To do so, the government must prove either: (1) The defendant was predisposed to commit the crime before being contacted by the government agent; or, (2) The defendant was not induced by the government agents to commit the crime. The government is not required to prove both. For example, the entrapment defense is unavailable if a defendant is predisposed to commit a crime, regardless of whether the defendant was induced. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995) (citing *United States v. Smith*, 924 F.2d 889, 898 (9th Cir. 1991)). Similarly, if the defendant fails to establish inducement, any evidence showing lack of predisposition is irrelevant. *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991).

The Supreme Court first recognized and applied the entrapment defense in 1932. *Sorrells v. United States*, 287 U.S. 435 (1932). The entrapment defense is rooted in the notion that "Congress could not have intended criminal punishment for a defendant who has committed

all the elements of a proscribed offense but was induced to commit them by the Government." However, the defense is not based upon the "authority of the Judicial Branch to dismiss prosecutions for what it feels to have been 'overzealous law enforcement.'" *United States v. Russell*, 411 U.S. 423, 435 (1973). Mere deceit on law enforcement's part will not defeat a prosecution, because entrapment does not occur unless the government "actually implants the criminal design in the mind of the defendant" *Id.* at 434–35. Further, simply affording the opportunity or facilities to commit the offense is not entrapment. *United States v. Poehlman*, 217 F.3d 692, 697 (9th Cir. 2000) (quoting *Sorrells*, 287 U.S. at 441).

A. Predisposition

Predisposition is a "defendant's willingness to commit an offense *prior* to being contacted by government agents." *Poehlman*, 217 F.3d at 698. Evidence of predisposition may be developed both before and after the government engages the defendant. The government's evidence of predisposition, therefore, falls into two categories: (1) preinvestigation evidence developed prior to the defendant's contact with government agents, and (2) evidence developed during the course of the investigation. See *Jacobson v. United States*, 503 U.S. 540, 550 (1992). Preinvestigation statements likely "indicate a state of mind untainted by . . . inducement" and are therefore relevant to show predisposition. *Poehlman*, 217 F.3d at 704. But evidence developed during the course of the investigation may also be used to prove predisposition. *United States v. Thickstun*, 110 F.3d 1394, 1397 (9th Cir. 1997).

The Ninth Circuit considers five factors when determining whether a defendant was predisposed to commit an offense:

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(1) the character or reputation of the defendant, including any prior criminal record;

(2) whether the government initially made the suggestion of criminal activity;

(3) whether the defendant engaged in the criminal activity for profit;

(4) whether the defendant evidenced reluctance to commit the offense that was overcome by repeated government inducement or persuasion; and

(5) the nature of the inducement or persuasion supplied by the government.

United States v. Williams, 547 F.3d 1187, 1198 (9th Cir. 2008). No single factor is controlling, but "the defendant's reluctance to engage in criminal activity is the most important." *Id.* Additionally, in instances "where the defendant is simply provided with the opportunity to commit a crime . . . the ready commission of the criminal act amply demonstrates the defendant's predisposition." *United States v. Jones*, 231 F.3d 508, 518 (9th Cir. 2000) (citing *Jacobson*, 503 U.S. at 549–50). The government can present evidence that is probative of these factors, regardless of whether that evidence was developed before or after the government's initial contact with the defendant. *Thickstun*, 110 F.3d at 1397.

Evidence obtained solely from the government (i.e., through undercover agents) may be used to show the defendant's predisposition. For instance, in *McClelland*, the defendant unsuccessfully argued that the evidence was insufficient to show his predisposition because it all came from the government informant. The *McClelland* court further reasoned that the jury could infer predisposition after assessing the credibility of the informant and the recorded conversations. *McClelland*, 72 F.3d at 722.

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1. Defendant's Character and Reputation

The Ninth Circuit has broadly defined what type of "character" evidence may be used to prove predisposition. Character evidence that is used to prove predisposition, however, is materially different from character evidence as that term is interpreted under Fed. R. Evid. 404. Evidence of a defendant's character and reputation in the form of otherwise innocuous statements or writings can be used to prove a defendant's predisposition. In *United States v. McDavid*, 396 F. App'x 365, the Ninth Circuit considered "specific evidence that [defendant] McDavid had become radicalized, believed that nonviolent protests were ineffective, and was undaunted by the possibility of accidental deaths from his actions" as evidence that the defendant was predisposed to commit the underlying offense. *United States v. McDavid*, 396 F. App'x 365, 369 (9th Cir. 2010) (unpublished).

Even evidence of a defendant's familiarity with language or ideas associated with the charged offense can be used as evidence of predisposition. *United States v. Nobari*, 574 F.3d 1065, 1082 (9th Cir. 2009) (fact that defendant "was intimately familiar with the lingo of the pseudoephedrine trade," may also suggest a character that is predisposed to commit the offense); *see also United States v. Mendoza-Prado*, 314 F.3d 1099, 1102 (9th Cir. 2002) (defendant's conversations demonstrating prior familiarity with the drug trade supported a finding that defendant was predisposed).

A defendant's statements and conduct that occur once the criminal transaction with government agents is underway is also admissible to prove predisposition. *United States v. Lorenzo*, 43 F.3d 1303, 1306 (9th Cir. 1995) (citing *United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994). In *Lorenzo*, the court permitted the government to put on evidence that the

defendant "was well versed in the world of drug transactions: He advised [the government agent] and another person about how to avoid and detect surveillance officers. He stated that his supplier had been with him for fifteen years. He knew several cocaine suppliers. He stated he could get a better price for [the government agent] than another dealer. He offered to sell marijuana as well as cocaine. Lastly, he had an alternate buyer for the marijuana." *Id.*

There is significant "character" evidence from both before and after defendant's initial contact with FBI undercover employees that is relevant to determining predisposition. Defendant was first contacted by individual identified as Bill Smith on November 9, 2009. Defendant was first contacted by the undercover agents by e-mail on June 30, 2010. Prior to these contacts, defendant demonstrated a consistent, abiding devotion to violent jihad. As described in Sections II.A.–II.D. above, defendant's postings on jihadi web forums, writings, and statements in e-mails also support this conclusion. Defendant published four articles in the online magazine *Jihad Recollections*. Defendant also viewed and read a considerable amount of electronic media that indicate a familiarity with the "lingo" of violent jihad. While viewing this material in and of itself is protected, noncriminal activity, when examined in the context of an entrapment defense it is relevant "character" evidence as it reveals defendant's state of mind.

Defendant also made repeated but unsuccessful attempts to arrange travel to Yemen for the purpose of training for violent jihad. While defendant may claim that those efforts were simply for the purpose of exploring opportunities for religious study, his comments and the evidence suggest otherwise. These efforts reflect his state of mind prior to contact with government agents. Like the court in *McDavid*, which allowed evidence of the defendant's radicalization to be presented to show a character that favored finding predisposition, a

reviewing court will likely uphold the admission of a wide range of evidence illustrating defendant's path to radicalization and lack of concern about the victims of his actions. *See McDavid*, 396 F. App'x at 369.

Defendant's statements to Hussein and Youssef in the course of the investigation also illustrate his character and his predisposition to comment the offense. At a minimum, these statements indicate a "familiar[ity] with the lingo" of violent jihad similar to the defendant's familiarity with the drug trade in *Nobari*, and suggests a character that may be predisposed to commit the charged offense. *See Nobari*, 574 F.3d at 1082. In some respects this analogy understates defendant's understanding of radical jihadist propaganda and terminology: He was not simply "familiar with the lingo" of jihad, he created it. More striking, however, are defendant's statements that he had been thinking about violent jihad since he was fifteen, and that he had originally thought about committing a Mumbai-style attack. Defendant's statements in extremist chat rooms statements also indicate his support for violent jihad. These statements include: suggesting leaving suspicious packages in urban locations in the United States to create mass hysteria and indicating he was creating a "hit list" of those who have offended Allah or insulted Islam in order to publish the list. These statements and defendant's other written statements are indicative of a character associated with violent jihad that long predates his interactions with FBI undercover employees.

2. Initial Suggestion of Criminal Activity

Whether the government or the defendant makes the initial suggestion of the criminal activity is relevant to determining predisposition. The mere fact that a government agent suggests the initial criminal activity is not dispositive. *Williams*, 547 F.3d at 1198.

In this case, the government did not initially suggest the criminal activity at issue. The government did not suggest that defendant stage a bombing of the Christmas tree lighting ceremony at pioneer Courthouse Square. That was his idea. At the July 30, 2010 meeting, the FBI undercover employee asked what defendant would do "for the cause," and defendant responded that he wanted to "wage war" in the United States. The undercover asked the question again, and defendant responded that he "could do anything." The undercover then listed five alternative ways of helping the cause, ranging from prayer or studying to becoming operational or becoming a martyr. This list, which included several lawful options, was not suggestive or specific. Defendant immediately responded that he wanted to be "operational," and when asked by the agent to elaborate on what he meant by "operational" defendant said he wanted to put an explosion together, possibly a vehicle bomb. Thus, defendant initially suggested the specific criminal act at issue–attempted use of a weapon of mass destruction–a fact that favors finding for the government on the issue of predisposition.

Even if the FBI undercover employee's mention of becoming "operational" was viewed as a suggestion of criminal activity (notwithstanding the fact it was made *after* defendant said he wanted to "wage war" in the United States), defendant's immediate interest in becoming operational supports the government's position that he was predisposed to commit the crime.

3. Profit Motive

Although financial profit has traditionally played a role in assessing predisposition in more routine criminal cases other motives are equally if not more compelling. In some cases, evidence of motivation "by a strongly held . . . ideology" may be an even stronger indication of predisposition than a profit motive. *McDavid*, 396 F. App'x at 369.

There is no indication that defendant was motivated by profit to commit the charged offense. To the contrary, this is a case where "strongly held ideology" appears to be the sole motivating factor for commission of the crime. The evidence shows that defendant was motivated by ideology rather than profit, which supports his predisposition to commit the attack.

4. Reluctance to Commit the Criminal Offense

"A defendant's reluctance to engage in criminal activity is the most important factor to consider in deciding the issue of predisposition." *Mendoza-Prado*, 314 F.3d at 1102. Evidence that the defendant never expressed reluctance about committing the criminal offense, or that he was eager to participate, is the most important of the five factors in determining whether a defendant was predisposed to commit an offense. For example, in *Williams*, 547 F.3d at 1198, the government presented evidence that the defendant "was ready and willing at all times to participate in the robbery." Even when agents repeatedly said he could decline to participate in the robbery, the defendant responded: "I'm ready to do it tomorrow! Like I said, all I gotta do is get the car. If push comes to shove I'll use my own car." *Id.* The court found the fact that the defendant needed no persuasion from the government agent to enter into the conspiracy "count[ed] heavily against his entrapment argument." *Id.*

Similarly in *Soderman*, 429 F. App'x 663, at 666, the court considered evidence that throughout the government's thirteen-month engagement with the defendant he consistently expressed his desire to commit the crime and never expressed disgust or disinterest in the criminal activity. *United States v. Soderman*, 429 F. App'x 663, 666 (9th Cir. 2011) (unpublished). In *Nobari*, 574 F.3d at 1082, the defendant's conversations with government agents suggested that he "was ready and willing to 'do business' with the government,"

supporting the court's finding that "the evidence leaves . . . no doubt that he was predisposed to commit the offenses." The court also focused on the lack of reluctance in *Jones* in finding predisposition. Although Jones, a convicted felon, was hesitant about retrieving his guns from a pawn shop, his reluctance was predicated on his lack of money to pay for the firearms rather than reluctance to commit an illegal act. *Jones*, 231 F.3d at 518.

Demeanor is also relevant to predisposition. In *Thickstun*, the trial judge remarked:

> I believed as I watched and as I listened that Mrs. Thickstun knew exactly what she was doing. I really can't think of another case that I have had recently where the words of a defendant struck me as forcefully as did the verbal demeanor, tone of voice—this sort of thing—and the words that were exchanged between Ms. Thickstun and the revenue agent when they first communicated with one another over the telephone. I was frankly amazed at the receptivity that was expressed there.

Thickstun, 110 F.3d at 1398. Even though this evidence of the defendant's enthusiasm to commit the crime only emerged after her contact with the government agent, the court held that it was permissible for the jury to rely on it to find that she was predisposed to commit the crime prior to her contact with the government agent. *Id.*

Defendant never expressed any reluctance about the plan to detonate a vehicle bomb in Portland. To the contrary, he enthusiastically embraced the very plan that he designed throughout the investigation, even more so as November 26 drew closer. The only "reluctance" defendant displayed during his interactions with Hussein and Youssef occurred when he was skeptical about Youssef's legitimacy at the time of their first contact. The FBI undercover employees repeatedly confronted defendant about the significance and difficulty of the attack and told him that "this is your choice," but defendant was unwavering in his commitment.

Defendant did not even express reluctance about the gruesome results of his planned attack: "You remember when 9-11 happened when those people were jumping from skyscrapers? . . . I thought that was awesome. I want to see that [referring to body parts and blood], that's that's what I want for these people. I want whoever is attending that event to be, to leave either dead or injured." Defendant's enthusiasm and lack of reluctance show that defendant was predisposed to attempt an act of violence like the crime charged.

5. Nature of the Inducement

Inducement is described as any government conduct "creating a substantial risk that an otherwise law-abiding citizen would commit an offense." *Williams*, 547 F.3d at 1197 (quoting *Davis*, 36 F.3d at 1430). The government induces a crime when it creates a special incentive for the defendant to commit the crime. *Poehlman*, 217 F.3d at 698. This may be done through "government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *Davis*, 36 F.3d at 1430. However, a defendant is "not entrapped simply because she could not have committed the crime without government assistance." *Thickstun*, 110 F.3d at 1396.

Incentives, encouragement, and assistance from government agents do not necessarily induce a defendant to commit an offense for purposes of an entrapment defense. For example, in *McClelland*, 72 F.3d at 723, the government agent repeatedly pushed the defendant to make decisions whenever the defendant displayed hesitation or doubt. Moreover, the agent took steps to increase the chances that the defendant would choose to commit the crime, such as offering to defer payment. *Id.* Despite the "frequent" and "serious" pressure the agent employed, the court

found that the prodding was not as severe as making threats or offering cash incentives, making it a "close call" whether the government carried its burden with respect to inducement, but upholding the guilty verdict base on evidence that the defendant was predisposed to commit the offense. *Id.* *See also United States v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993) (absent threats or cash incentives, defendant was not induced even though the government agent initiated all of the contacts defendant attempted to steer the agent toward legal methods of obtaining weapons.) *Id.*

The government's supposed "inducement" of defendant did not rise to the level of pressure exerted in either *McClelland*, 72 F.3d at 723 or *Garza-Juarez*, 992 F.2d at 908, where the courts still found predisposition. Any encouragement given defendant must be balanced against his stated desire to put together an explosion during his first meeting with the undercover agent. The government provided defendant with the means of carrying out the attack, but this opportunity by itself is not inducement, much less inducement reaching a level that precludes a finding of predisposition. *Poehlman*, 217 F.3d at 697.

B. Inducement

While inducement is relevant to predisposition, it is also analyzed as the second prong of entrapment *if* the jury determines that government has failed to show defendant was predisposed to commit the offense. An improper inducement "consists of an opportunity plus something else–typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive." *Poehlman*, 217 F.3d at 701 (citations omitted).

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The Ninth Circuit has stated that "even very subtle governmental pressure, if skillfully applied, can amount to inducement." *Id*. at 702. In *Poehlman*, the Ninth Circuit determined the government induced the defendant to cross state lines for the purpose of engaging in sex acts with a minor. Similarly, in *Sorrells*, the agent portrayed himself as a World War veteran who had served in the same division as the defendant. The Supreme Court determined the agent took advantage of the defendant's sentiment "aroused by reminiscences of their experiences as companions in arms in the World War." *Sorrells*, 287 U.S. at 441. *See also Jacobson v. United States*, 503 U.S. 540, 552 (1992) (finding the government induced the defendant to obtain child pornography as part of a call to arms to fight against censorship and for individual rights).

Defendant was not induced to commit the charged offense. As a threshold matter, there is no evidence that the government did anything that "creat[ed] a substantial risk that an otherwise law-abiding citizen would commit an offense." *Williams*, 547 F.3d at 1197 (quoting *Davis*, 36 F.3d at 1430). Defendant was not persuaded, bribed, or otherwise talked into committing the offense. Defendant claims that the government used "sophisticated efforts used to induce Mr. Mohamud" to commit the charged offense. But there was nothing sophisticated about the undercover employees' interactions with defendant. No action was undertaken by the government or undercover agents that possibly would convince an otherwise law-abiding citizen to attempt to kill thousands of people. Defendant is highly intelligent and sophisticated in the lingo and extremist ideology that supports violent jihad. As he said in the first meeting, he wanted to become operational and detonate a bomb. He just needed help doing it.

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C. Vulnerability

In his discovery motions, defendant has claimed that he was uniquely vulnerable to suggestions from government agents. The Ninth Circuit has held that vulnerability is a factor relevant to entrapment because a particularly vulnerable defendant is more apt to be induced to commit a crime. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 656 (9th Cir. 2006); *see also United States v. Dozal-Bencomo*, 952 F.2d 1246, 1251 (10th Cir. 1991) (recognizing that vulnerability is one of several factors relevant to predisposition). This does not mean, however, that defendant is entitled to a specific jury instruction that highlights this factor, as vulnerability may be addressed by counsel during closing arguments. *See, e.g.*, *United States v. Squillacote*, 221 F.3d 542, 568-69 (4th Cir. 2000) (affirming trial court's denial of a special instruction on vulnerability, noting counsel was able to fully present his theory in closing argument). There is no evidence that this defendant suffered from a physical or mental condition, such as the case in *Sandoval-Mendoza*, that rendered him uniquely vulnerable to any persuasion or support he received from government agents.

D. The Entrapment Instruction

"A defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonably jury could find entrapment." *Mathews v. United States*, 485 U.S. 58, 62 (1988). In the Ninth Circuit, the defendant only needs "slight evidence" on both elements of the entrapment defense in order to present his defense to the jury. *United States v. Gurolla*, 333 F.3d 944, 956 (9th Cir. 2003). This evidence is sufficient to get the instruction even if it is of "doubtful credibility." *Id*. at 955. Despite the atmospherics of defendant's case, under the law he is not entitled to the instruction without an adequate showing. If a record

contains no evidence of inducement, a district court may properly deny the defendant's request for an entrapment instruction. *Simas*, 937 F.2d at 462. A district's court decision to preclude the defense is reviewed *de novo*. *Gurolla*, 333 F.3d at 952 n.8.

E. Requested Jury Instruction

The defense of entrapment calls upon the jury to examine whether a defendant was predisposed to commit the crime charged. Simply being predisposed to violate the laws generally will not suffice. *Jacobson v. United States*, 503 U.S. 540, 550 (1992). Once there is evidence sufficient to trigger the need for a jury instruction on an entrapment defense, the court should provide the jury with some guidance as to how specific a defendant's predisposition must be: while a defendant must have more than a simple predisposition to commit crimes generally, the government need not convince the jury that the defendant was predisposed to commit the precise crime charged in the indictment.

The Ninth Circuit has rejected challenges to jury instructions offering guidance on predisposition, when those instructions have identified the government's burden as one that demonstrates that a defendant was predisposed "to commit crimes such as are charged." *United States v. Makhlouta*, 790 F.2d 1400, 1405 (9th Cir. 1986); *see also United States v. Varela*, 993 F.2d 686, 688–89 (9th Cir. 1993) (affirming a jury instruction that defined a predisposed person as one who is "ready, willing and able to commit a crime"). Other circuits have expressly rejected defense requests to more narrowly define predisposition.

The Sixth Circuit rejected a defendant's argument that the government had to prove that he was predisposed to commit every element of the offense charged. *United States v. Al-Cholan*, 610 F.3d 945, 950 (6th Cir. 2010). The court explained that such a "narrow and hyper-technical

view of predisposition," was contrary to the law. *Id.* Instead, the proper standard for analyzing predisposition evidence asks if such evidence is "near enough in kind to support an inference that [the defendant's] purpose included offense of the sort charged." *Id.* Defendant's past conduct need not be "precisely the same as that of which the defendant is being prosecuted." *Id.*, citing *United States v. Brand*, 467 F.3d 179, 200 (2d Cir. 2006) (additional internal citations omitted); *see also United States v. Hackley*, 662 F.3d 671, 682 (4th Cir. 2011) ("predisposition is not limited only to crimes specifically contemplated by the defendant prior to government suggestion") (internal citations omitted); *United States v. Cecil*, 96 F.2d 1344, 1349 (10th Cir. 1996) (rejecting defense claim that court erred in giving a jury instruction on predisposition that did not require government to prove defendant was predisposed to distribute the quantity of drugs alleged in the indictment).

As a consequence of these decisions, and to remain consistent with instructions approved by the Ninth Circuit, any jury instruction on predisposition should advise the jury as follows:

A defendant is predisposed to commit the crime charged if you find evidence near enough in kind to support an inference that his purpose included offenses of the sort charged. *Brand*, 467 F.3d at 200.

As a result the government, in its proposed jury instructions, proposes that, if the Court determines to instruct the jury regarding entrapment in defendant's case, it provide uniform instruction 6.2 with the above-described language.

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V. Evidentiary Issues

A. Predisposition Evidence

Defendant has taken the position that evidence that he was not engaging in criminal activity or activity related to the underlying offense before being contacted by government agents is discoverable, and therefore presumably relevant, admissible evidence at trial. This sweeping proposition is not supported by law and the Court should reject it when it assesses questions of admissibility. In analyzing entrapment in the context of discovery, defendant has taken the position that because he had "diverse friendship groups, normal work and study schedules, and social activities supporting a lack of predisposition" he is entitled to all evidence in the government's possession of his noncriminal activities because that information would support a lack of predisposition. (Def.'s Mem. in Supp. of First Mot. to Compel 3, ECF No. 27.)

The government is not alleging that defendant never engaged in "normal" activities. Indeed, the government is aware of defendant's deliberate attempts to appear normal while hiding his support of violent jihad, as demonstrated by defendant's writings, statements, and actions. Rather, as discussed in the statement of facts, the government acknowledges that defendant behaved "normally" in many facets of his life while intentionally pursuing violent jihad. To this end, the government has provided a substantial amount of discovery in the form of e-mails, text messages, and phone calls relating to defendant's social activities, personal behavior, and other behaviors that are not within Rule 16 or *Brady*.

The absence of criminal activity does render evidence of this fact admissible. In *United States v. Scarpa*, 897 F.2d 63 (2d Cir. 1990), the defendant was convicted of various RICO, extortion, and narcotics offenses. The defendant and his "crew" were known to spend a lot of

time at the "Wimpy Boys Club," but the evidence indicated that the topic of drugs was never mentioned there. Local law enforcement had conducted electronic surveillance at the club for months. The defendant requested access to the surveillance tapes:

> arguing that the absence of incriminating statements during the period in which he allegedly led the Crew was relevant to establish the absence of the activity alleged. The district court refused to order disclosure of the tapes, agreeing with the government that they contained conversations which were "either wholly innocuous or involve[d] criminality that has nothing to do with the crimes charged in this case."

897 F.2d at 67. The Second Circuit affirmed the refusal to turn the evidence over to the defendant, holding:

> [a] defendant may not seek to establish his innocence, however, through proof of the absence of criminal acts on specific occasions. . . . The absence of drug conversations is consistent with testimony by the cooperating witnesses that drugs were never discussed inside the Club. Thus, the district court appropriately refused to order disclosure of the tapes. *See United States v. McElroy*, 697 F.2d 459, 464 (2d Cir. 1982) ("Rule 16 thus does not cover oral statements unrelated to the crime charged or completely separate from the Government's trial evidence.").

897 F.2d at 70 (citations omitted); *see also United States v. McClintock,* 748 F.2d 1278, 1287 (9th Cir. 1984) (tape recording of witness showing business not always engaged in a fraudulent practice not exculpatory); *United States v. Gambino,* 818 F. Supp. 541, 552 (E.D.N.Y. 1993) (the very irrelevance of statements does not make them relevant; evidence of surveillance showing noncriminal activities not discoverable unless defendant charged with ceaseless criminal conduct). In this case, defendant is not alleged to have engaged in "ceaseless criminal conduct," and thus evidence of his noncriminal activities is not discoverable and not relevant.

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In *United States v. Hedgcorth*, 873 F.2d 1307 (9th Cir. 1989), the defendant was charged with involvement in the firebombing of two cars and the attempted firebombing of a house. He attempted to introduce evidence to show that he was a "'thoughtful,' 'peaceable mercenary' who was betrayed by the random acts of reckless colleagues." *Id.* at 1313. The district court excluded evidence that the defendant was an operator of a respectable mercenary school and a participant in high-level intelligence work for the government. The Ninth Circuit held that such evidence was inadmissible character evidence:

> [t]he trial court properly held such evidence inadmissible to the extent it was offered to show that [the defendant] was a "patriotic," "pro-government" individual unlikely to engage in acts of terrorism.

Id. The court also held that the district court properly excluded evidence of the defendant's writings offered to show his "peaceful mercenary philosophy," noting that it had "no bearing on his state of mind during offenses committed years later." *Id*. Therefore, this Court should preclude defendant from offering remote acts of noncriminal activity, and strictly limit evidence of noncriminal acts during the relevant time period to those activities that relate to predisposition.

B. Hearsay

1. Defendant's Prior Statements–Rule 801(d)(2)

The government will seek to offer defendant's prior statements which are found in various e-mails, writings, online postings, text messages, and phone calls. A statement is not hearsay if the statement is offered against a party and is the party's own statement in either an individual or representative capacity. Fed. R. Evid. 801(d)(2); *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981).

As a preliminary matter, the proponent must offer evidence to show that a document in question is what he claims it is to establish the relevancy of documentary evidence. *See* Fed. R. Evid. 901(a). Rule 901(a) requires the government to make only a prima facie showing of authenticity "'so that a reasonable juror could find in favor of authenticity or identification.'" *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985) (internal citations omitted). Authenticity may be based entirely on circumstantial evidence, including "[appearance, contents, substance . . . and other distinctive characteristics" of the writing. Fed. R. Evid. 901(b)(4). "'A document . . . may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him.'" *United States v. Console*, 13 F.3d 641, 661 (3d Cir. 1993) (internal citation omitted). A letter shown to have been mailed in reply to a previous mailing, moreover, is authenticated without more. *United States v. Reilly*, 33 F.3d 1396, 1407–08 (3d Cir. 1994) ("Where letters fit into a course of correspondence or a progressive course of action, proof of the letter's relationship to these events can authenticate any of the letters.").

In defendant's case, the government will seek to admit various e-mails, writings, online postings, text messages, and phone calls all of which contain defendant's words or writings. The government will offer evidence that these statements were indeed created by defendant. However, when the government offers some of the defendant's prior statements, the door is not thereby opened to the defendant to put in all of his out-of-court statements, because when offered by the defendant, the statements are hearsay. *Burreson*, 643 F.2d at 1349. The only limitation of this principle is the "doctrine of completeness" which has been applied by some courts to require

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that all of a defendant's prior statements be admitted where it is necessary to explain an admitted statement, to place it in context or to avoid misleading the trier of fact. Fed. R. Evid. 106.

2. The Rule of Completeness

Fed. R. Evid. 106 partially codifies the common-law rule of completeness, which states that when a party introduces a writing or recorded statement or only part of a writing or recorded statement, an adverse party may require him to introduce at that time any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously. Rule 106 authorizes the adverse party to require the proponent of evidence in the form of writing or recorded statement to introduce *at the time* offered into evidence any other part or any other written or recorded statement.

The rule is based on "two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." Fed. R. Evid. 106, Advisory Committee's Note. For example, in *United States v. Tomlin*, 64 F.3d 667 (9th Cir. 1995), the court found that redacted sections of a police report containing defendant's statements denying knowledge of the guns and bullets was "self-serving hearsay" and was not admissible under Rule 106 and the rule of completeness. Fed. R. Evid. 106. Additionally, in *United States v. Stockett*, 270 F. App'x 600 (9th Cir. 2008) (unpublished), the court held that the district court did not violate Rule 106 or the rule of completeness by redacting the audiotape recording made by an FBI agent because "the redaction did not take matters out of context or create a misleading impression."

The Ninth Circuit construes the rule very narrowly: "Rule 106 does not render admissible otherwise inadmissible hearsay," *United States v. Mitchell*, 502 F.3d 931, 965 n.9 (9th Cir.

2007), and unless the out-of-court statements fall within one of the hearsay exceptions, the statements are inadmissible regardless of the rule of completeness and Rule 106. *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) ("Because Zaidi's out-of-court statements to Kehl do not fall within an exception to the hearsay rule, they are inadmissible, regardless of Rule 106."). For example, in *United States v. Blanco*, 168 F.3d 502, 502 (9th Cir. 1999), the court held that the district court did not abuse its discretion when it refused to admit certain tape recordings because the tapes were "hearsay evidence, notwithstanding the Rule of Completeness." Also, in *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988) (per curiam), the court observed that "[i]t seems obvious defense counsel wished to place [the defendant's] statement to [the officer] before the jury without subjecting [the defendant] to cross-examination, precisely what the hearsay rule forbids."

Admitting evidence under the rule of completeness and Rule 106 requires that the additional evidence serve to correct a misleading impression of a prior statement created by the adverse party by taking the original statement out of context. *Id.* For example, in *United States v. Normand*, 16 F. App'x 719 (9th Cir. 2001) (unpublished), the court found that when the district court admitted partial recordings of two telephone calls between defendant and his girlfriend in support of a witness tampering charge, Rule 106 and the rule of completeness did not require admission of the recording of a conversation between the two on a different date which was allegedly part of the same larger conversation. Additionally, when a confession is introduced at trial, "[t]he rule of completeness is violated . . . only where admission of the statement in its edited form distorts the meaning of the statement or excludes information

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substantially exculpatory of the declarant." *United States v. Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982).

The rule of completeness does not require that the government play all of the approximately 100 hours of the undercover recordings involving defendant. Such a requirement would undermine one of the central tenants of the rule: to avoid wasting the Court's time. The case law interpreting the rule makes very clear that the rule is designed to avoid the presentation of evidence that is truly out of context. Defendant's ability to make a different argument because the government has played all of the material is a different issue than cases interpreting the rule contemplate. The case law does not support the proposition that any time there is a case with voluminous undercover recordings, the government must play them all.

3. Defendant's Self-Serving Hearsay Is Inadmissible

The government anticipates that defendant may attempt to elicit his own self-serving statements through the admission of his e-mails, phone calls, writings, text messages, or through the testimony of other witnesses. However, these self-serving statements are inadmissible hearsay and do not fall under any exception to the hearsay rule. Thus, for the reasons set forth in part in Sections 1 and 2 above, the Court should preclude defendant from presenting "self-serving hearsay" which the government cannot cross-examine. *See Fernandez*, 839 F.2d at 640 (upholding exclusion of post-arrest statement denying crime and noting that defendant could have introduced denial by taking stand and testifying). If defendant wants to introduce his own self-serving statements, he may testify and be cross-examined.

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C. Expert Testimony

The government plans to call two expert witnesses at trial: Evan Kohlmann and Jeremy Springer. Mr. Kohlmann is an expert on Islamic terrorism. Mr. Springer is a computer forensic expert who works for the FBI. The Court has scheduled a hearing on November 28 and 29 to hear testimony and argument related to the parties' expert witnesses.

1. Legal Authority

Under Federal Rule of Evidence 702, the district court must act as gatekeeper to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The district court's gatekeeping role under Fed. R. Evid. 702 extends to nonscientific expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). In addition to the factors listed in Fed. R. Evid. 702, such as experience and education, the district court can and should consider other factors, such as whether the expert witness's relevant views have been published or subjected to peer review. *Daubert*, 509 U.S. at 593–94.

A trial judge has considerable leeway when determining the reliability of an expert's proposed testimony. *Kumho Tire Co.*, 526 U.S. at 153; *see also Daubert*, 509 U.S. at 594 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one."). "Lack of certainty is not, for a qualified expert, the same thing as guesswork." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010). In addition, Fed. R. Evid. 702 is "construed liberally" when the trial judge is determining the reliability and "admissibility of [proposed expert] testimony based on some 'other specialized knowledge'" that is not scientific knowledge. *United States v. Hankey*, 203 F.3d 1160, 1167–68 (9th Cir. 2000). The Ninth Circuit has also recognized that with some proffers of

nonscientific testimony, "reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it." *Id.* at 1169. Peer review may not always be available when a subject is relatively new. *Primiano*, 598 F.3d at 565.

In addition to granting the district court leeway with the "ultimate reliability" determination, the district court has "broad latitude when it decides *how* to determine reliability[.]" *Kumho Tire Co.*, 526 U.S. at 142. In other words, the judge has the discretion to decide whether a separate proceeding is necessary to determine the reliability of the witness's qualifications or his methodology. *Id.* at 152. Given the numerous factors and methods available to determine an expert's reliability, the trial judge's decision to admit expert testimony is reviewed for abuse of discretion. *United States v. Freeman*, 498 F.3d 893, 900–01 (9th Cir. 2007).

Finally, all evidence admitted at trial must be relevant to a material fact and have "probative value." Fed. R. Evid. 402, 403; *Daubert*, 509 U.S. at 597 (requiring that all expert testimony be "relevant to the task at hand"). Expert testimony is relevant and probative when it helps the jury understand other evidence or assists the jury with its fact-finding function. Fed. R. Evid. 702; *see also Daubert*, 509 U.S. at 591–92 (requiring expert testimony to have a "connection to the pertinent inquiry").

2. Evan Kohlmann

a. Expert Qualifications

Evan Kohlmann is one of the world's leading experts on Islamic terrorism. He specializes in tracking Al Qaeda and other contemporary terrorist movements. He holds a degree in International Politics from the Edmund A. Walsh School of Foreign Service

(Georgetown University), and a Juris Doctor (professional law degree) from the University of Pennsylvania Law School. He is also the recipient of a certificate in Islamic studies from the Prince Alwaleed bin Talal Center for Muslim-Christian Understanding (CMCU) at Georgetown University. He currently works as a senior partner at Flashpoint Global Partners, a New York-based security consulting firm. He also serves as an on-air analyst for NBC News in the United States. He is the author of the book *Al-Qaida's Jihad in Europe: the Afghan-Bosnian Network* (Berg/Oxford International Press, London, 2004) which has been used as a teaching text in graduate-level terrorism courses offered at such educational institutions as Harvard University's Kennedy School of Government, Princeton University, and the Johns Hopkins School of Advanced International Studies (SAIS).

Beginning in approximately 1997, Mr. Kohlmann has traveled overseas to interview known terrorist recruiters and organizers and to attend underground conferences and rallies; he has reviewed thousands of open-source documents; and he has amassed one of the largest digital collections of terrorist multimedia and propaganda in the world. The open-source documents in his collection include sworn legal affidavits, original court exhibits, video and audio recordings, text communiqués, eyewitness testimonies, and archived Internet websites. He has testified on eleven occasions as an expert witness on subjects related to Islamic terrorism in jurisdictions beyond the United States–including the United Kingdom, Denmark, Australia, and Bosnia-Herzegovina. He has testified twice as an expert witness in U.S. civil cases, *Gates v. Syrian Arab Republic* and *Amduso v. Sudan* before the U.S. District Court for the District of Columbia. He has also testified as an approved expert witness in United States federal and military courts in twenty-four criminal cases; including:

- *United States v. Sabri Benkhala* (Eastern District of Virginia, 2004)
- *United States v. Ali Timimi* (Eastern District of Virginia, 2005)
- *United States v. Uzair Paracha* (Southern District of New York, 2005)
- *United States v. Ali Asad Chandia* (Eastern District of Virginia, 2006)
- *United States v. Yassin Aref* (Northern District of New York, 2006)
- *United States v. Sabri Benkhala* (Eastern District of Virginia, 2007)
- *United States v. Rafiq Sabir* (Southern District of New York, 2007)
- *United States v. Emaddedine Muntasser* (District of Massachusetts, 2007)
- *United States v. Hassan Abu Jihaad* (District of Connecticut, 2008)
- *United States v. Mohammed Amawi et al.* (Northern District of Ohio, 2008)
- *United States v. Salim Hamdan* (Guantanamo Bay Military Commissions, 2008)
- *United States v. Ali Hamza al-Bahlul* (Guantanamo Bay Military Commissions, 2008)
- *United States v. Mohamed Shnewer et al.* (District of New Jersey, 2008)
- *United States v. Oussama Kassir* (Southern District of New York, 2009)
- *United States v. Syed Haris Ahmed* (Northern District of Georgia, 2009)
- *United States v. Ehsanul Sadequee* (Northern District of Georgia, 2009)
- *United States v. Pete Seda et al.* (District of Oregon, 2010)
- *United States v. Betim Kaziu* (Eastern District of New York, 2011)
- *United States v. Daniel Boyd et al.* (Eastern District of North Carolina, 2011)
- *United States v. Barry Walter Bujol Jr.* (Southern District of Texas, 2011)
- *United States v. Tarek Mehanna et al.* (District of Massachusetts, 2011)
- *United States v. Patrick Nayyar* (Southern District of New York, 2012)
- *United States v. Adis Medunjanin* (Eastern District of New York, 2012)
- *United States v. Anes Subasic* (Eastern District of North Carolina, 2012)

In *United States v. Uzair Paracha*, Federal District Judge Sidney Stein held a *Daubert* hearing on his qualifications as an expert witness and issued a ruling concluding: "Evan Kohlmann has sufficient education, training, and knowledge to be qualified as an expert, and… Kohlmann's methodology—that is, his process of gathering sources, including a variety of original and secondary sources, cross-checking sources against each other, and subjecting his opinions and conclusions to peer review—is sufficiently reliable to meet the standards for admissibility of expert testimony set by the Federal Rules of Evidence."

Likewise, in *United States v. Hassan Abu Jihaad*, Federal District Judge Mark Kravitz held a *Daubert* hearing on Mr. Kohlmann's qualifications as an expert witness and issued a ruling concluding, "Mr. Kohlmann is certainly qualified to provide expert testimony...

Mr. Kohlmann is qualified by means of his education, training, background, and experience to testify as an expert on terrorism... Mr. Kohlmann has conducted first-hand interviews of several leaders of terrorist organizations and has reviewed reams of information about al Qaeda... and the other subjects on which he will offer testimony. Indeed... it is apparent that these subjects are Mr. Kohlmann's life work, and he has, therefore, acquired a considerable amount of information and documentation on these subjects... Mr. Kohlmann's work receives a considerable amount of peer review from academic scholars and others, and by all accounts, Mr. Kohlmann's work is well regarded."

Similarly, during *United States v. Syed Haris Ahmed*, Federal District Judge William S. Duffey Jr. held a *Daubert* hearing on Mr. Kohlmann's qualifications as an expert witness, and noted in his published ruling, "Kohlmann has developed an understanding of terrorist organization structures, operations, and membership, allowing him to speak with authority about Al-Qaeda in Iraq, Lashkar-e-Taiba, and Jaish-e-Mohammed. His research and experience have provided him a base of understanding far greater, and far more sophisticated, than of the Court or of jurors... A person lacking Kohlmann's advanced knowledge of JeM and LeT essentially would not be able to recognize the information on Khan's hard drive as information that might link a person to JeM or LeT."

Most recently, on February 4, 2011, the U.S. Second Circuit Court of Appeals issued a formal ruling regarding the admissibility of Mr. Kohlmann's testimony during *United States v. Rafiq Sabir* (2007): "Kohlmann has, in fact, been qualified as an expert on al Qaeda and terrorism in a number of federal prosecutions... Kohlmann's proposed expert testimony had a

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considerable factual basis... We conclude that the district court acted well within its discretion in concluding that Kohlmann's testimony satisfied the enumerated requirements of Rule 702... Such testimony was plainly relevant to mens rea." Mr. Kohlmann is uniquely qualified to testify as an expert in defendant's case.

b. Summary of Mr. Kohlmann's Testimony

Defendant is alleged to have attempted to detonate a truck bomb in the name of Islamic extremism. Defendant's motive, intent, and predisposition to commit the offense were informed by his intimate relationship with Islamic extremism. Mr. Kohlmann's testimony will be based on his comprehensive review of discovery material in defendant's case and statements of defendant that Mr. Kohlmann has located through his own investigation. Based upon these factors, Mr. Kohlmann is expected to testify that defendant closely fits the profile of a "homegrown terrorist" or "contemporary violent extremist." Mr. Kohlmann's testimony will address the following areas in defendant's case:

- Defendant's planning aimed at traveling abroad to join foreign terrorist organizations, attending training camps, and/or achieving imminent acts of physical violence;
- Defendant's pre-existing connections to known extremist groups and accused terrorists;
- Defendant's adoption of a hardline sectarian religious perspective, often identified with the "Salafi-Jihadi" or Takfirir" School (evidenced by the possession and/or distribution of extremist ideological materials);
- Defendant's use of coded language and attempts at logistical subterfuge (i.e., attempts by defendant to secret or hide his activities);
- Defendant's deliberate collections and/or redistribution of terrorist propaganda; and

- Defendant's viewing of Internet websites run by or on behalf of international terrorist organizations.

Mr. Kohlmann's testimony will methodically analyze the material he reviewed in the broader context of each of these six categories and present these findings to the jury.

c. Mr. Kohlmann's Testimony Is Relevant and Helpful to the Jury

Expert testimony is necessary in this case to help the jury understand the evidence. Mr. Kohlmann is uniquely positioned to explain to the jury the global jihadi movement and how defendant fits within that movement. The probative value of Mr. Kohlmann's testimony, therefore, outweighs any potential prejudice. Mr. Kohlmann's expertise enables him to describe in detail the evidentiary significance of a multitude of items discovered during the investigation that were either possessed or created by defendant and that relate to radical Islamic and extremist organizations and media.

These items would likely not be readily identifiable as being linked to extremism by a lay person. Moreover, even if these items were identifiable to the lay person as containing some evidentiary significance, Mr. Kohlmann is best situated to explain their meaning. In this respect, Mr. Kohlmann can provide a contextual analysis concerning certain evidence when such amplification will be helpful to the jury. This evidence includes: defendant's writings, including published and unpublished material; defendant's postings on Internet websites and forums; defendant's e-mails to associates; the contents of defendant's hard drive; and, defendant's statements to undercover agents in the case.

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For example, a representative number of defendant's writings, web postings, and statements to Hussein and Youssef (the UCEs) discuss the As-Sahab Media Foundation. To the lay person, this reference would be meaningless. As Mr. Kohlmann can explain, the As-Sahab Media Foundation is the official media wing of Al Qaeda the goal of which is to "propound the nature and goals of the worldwide jihad against America" and plays a critical role in the promulgation of Al Qaeda propaganda in the English-speaking world. In one instance, defendant played a video for Hussein and Yousef–without their prompting–during one of their meetings called *High Hopes*. Mr. Kolhlmann will testify that this video is also referred to as *Knowledge Is for Acting Upon*, Al Qaeda's official retelling of the events of 9/11, complete with never-before-seen footage of key 9/11 conspirators. This is just one example of how the testimony of Mr. Kohlmann will be helpful to the jury in understanding the evidence.

Another example of how Mr. Kohlmann's testimony will be helpful to the jury in understanding the evidence is his knowledge of Samir Khan. The evidence will show that between February and August 2009, defendant and Khan exchanged approximately 150 e-mails. The nature of the contacts between Khan and defendant varied, but consistently centered on one unifying theme: the consumption and creation of material devoted to the cause of radical, violent Islamic jihad. Mr. Kohlmann will explain to the jury who Samir Khan is and why his contacts with defendant are significant. Until his death in September 2011, Samir Khan was one of the world's most notorious English-speaking Islamic terrorists. Khan lived in the United States until 2009, when he left for Yemen. Khan published *Jihad Recollections* and, while in Yemen, *Inspire* magazine. *Jihad Recollections* was an online publication intended to be the "first Jihadi magazine in English." *Inspire* was the official magazine of Al Qaeda in the Arabian Peninsula.

Khan was killed by an unmanned aerial drone aircraft while traveling with noted terrorist Anwar Al-Awlaki in Yemen in September 2011. Khan's influence was integral in Al Qaeda's efforts to reach out to English-speaking jihadists living in Western countries to encourage them to commit "lone-wolf" style attacks. Mr. Kohlmann's expert testimony is necessary in this case to help the jury understand this evidence.

Mr. Kohlmann will testify about the international movement and effort to recruit individuals to act on their own in the name of Al Qaeda or other terrorist organizations to commit violence in the United States or overseas. Mr. Kohlmann's testimony will also include information that assists the jury in understanding the defining characteristics, ideologies, and other unique attributes of "contemporary violent extremists" or "homegrown terrorists" and determining whether defendant's behavior and actions prior to November 26, 2010, are in fact consistent with those of a "homegrown terrorist." This testimony is relevant to ascertaining issues relating to intent, motive, and predisposition. By comparison, the testimony that Mr. Kohlmann would provide is similar to that provided by experts in organized crime cases. Experts are routinely permitted to testify regarding the unique attributes of gangs, drug conspiracies, and organized crime. *See United States v. Abu-Jihaad*, 553 F. Supp. 2d 121, 124 (D. Conn. 2008); *United States v. Amuso*, 21 F.3d 1251 (2d Cir. 1994). In fact, courts have held that Mr. Kohlmann's testimony is analogous to this type of gang and organized crime testimony. *See, e.g., United States v. Paracha,* 2006 WL 12768, at *21 (S.D.N.Y. Jan. 3, 2006).

Mr. Kohlmann's testimony will help the jury understand the evidence which will establish that defendant sought to align himself with the values and objective of extremist organizations, including Al Qaeda. That defendant patterned his conduct after a "homegrown

terrorist" is highly probative to the central issues in the case, namely defendant's motive, intent, and predisposition.

3. Jeremy Springer

a. Expert Qualifications

Jeremy Springer is a Computer Forensic Examiner employed by the FBI. Mr. Springer was hired by the FBI in 2006 as an Information Technology Specialist. He served in that position until 2008, at which time he began training for his current position which he assumed in a full capacity in 2010. Mr. Springer's duties in this position generally include the examination of physical evidence under a documented quality assurance program that includes annual proficiency testing, technical peer and administrative reviews, and adherence to standard operating procedures. More specifically, Mr. Springer regularly conducts computer forensic examinations on computer evidence, carries out research and development activities, and assists in search and seizure operations. Mr. Springer is certified to perform forensic examinations on Windows and Linux systems and associated media.

Prior to working for the FBI, Mr. Springer worked as a Senior Systems Engineer at BAE systems in Portland, Oregon. Prior to that he worked for the UNISYS Corporation and Tybrin Corporation as a Network consultant and analyst under contract with the Department of Defense. He has a degree in Business and Information Systems and extensive, relevant technical training reaching back more than decade.

b. Summary of Mr. Springer's Testimony

Mr. Springer performed a forensic examination of an imaged copy of defendant's hard drive taken from his laptop computer during the search of defendant's apartment on

November 26, 2010. Mr. Springer will testify as to what his forensic examination entailed and how items are stored and recovered from a computer hard drive forensically. Mr. Springer will testify regarding his forensic analysis of defendant's hard drive and his identification of numerous items of evidence he located. These items of evidence are identified in the government's exhibit list and include videos, documents and various items found in the Internet cache. Mr. Springer will also testify that during his forensic analysis he located a number of items on the hard dive of defendant's computer that were separately identified by government expert Evan Kohlmann. The forensic reports of Mr. Springer's findings have been provided to defense in discovery.

D. Stipulations

The government and the defense are attempting to work out stipulations as to the foundation of certain items of evidence and business records. In the event the government and defense are not able to agree, the government will provide the names of additional witnesses it intends to call in its case-in-chief and expert witness summary(ies) if required.

E. Demonstrative Exhibits

The Court has discretion under Fed. R. Evid. 611(a) to admit demonstrative charts–which are not admitted into evidence–as testimonial aids, including during opening statements. The Rule authorizes the Court to "exercise reasonable control over the mode . . . of . . . presenting evidence so as to (1) make the . . . presentation effective for the ascertainment of the truth, [and] (2) avoid needless consumption of time." When using the charts, however, it may be necessary to implement three precautionary measures, that is, the Court should (1) examine the charts out of the presence of the jury to decide that the contents will be

supported by the proof; (2) refuse to admit the charts into evidence; and (3) instruct the jury that although the charts may be published to the jury during testimony, they are presented as a matter of convenience and a juror should disregard them to the extent the juror finds they are not accurate. *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984).

In the present case, the government intends to use demonstrative charts. The government will produce these charts to defendant and the Court prior to their use.

F. Jury Selection

The government is not filing a separate voir dire at this time. The government is working, in consultation with the defense, to prepare a jury questionnaire. Until the questionnaire is finalized, the government does not know what, if any, additional voir dire questions we will have for the Court.

G. Limited Cross-Examination of Witnesses to Be Recalled

The government requests an order in limine limiting the cross-examination of government witnesses testifying more than once at trial to the scope of direct examination. This case resulted from a complex and lengthy investigation with two different FBI undercover employees. The government expects to offer testimony through the two undercover employees (Youssef and Hussein) through more than one appearance for purpose of an orderly presentation of evidence at trial. There were seven recorded undercover meetings with the two undercover employees and defendant. Some of those meetings Youssef was alone for a portion of the meeting and Hussein was alone with defendant for a portion of the same meeting. The government intends to call each UCE for the portion of each meeting that is pertinent and for which the UCE was present. The government seeks to avoid confusion that would result if each

undercover employee testified during a single appearance at trial about all seven of the recorded undercover meetings with defendant in which he participated. The government therefore requests that cross-examination of government witnesses testifying more than once be limited to the subject of direct examination.

The Court may allow sequential presentation of testimony pursuant to Federal Rule of Evidence 611(a). *United States v. Butera*, 677 F.2d 1376, 1381 (11th Cir. 1982). In *United States v. Jackson*, 549 F.2d 517, 528–29 (8th Cir. 1977), the court permitted the government to recall a witness from time to time in order to present matters in chronological order. Each time the witness testified, he was subject to cross-examination only on the subject matter of that appearance as well as the issue of credibility. On the witness's final appearance, he was subject to full cross-examination covering all his trial testimony. The Eighth Circuit approved and commended this procedure as a "way to clearly present an organized factual recital in an extended conspiracy trial." *Jackson*, 549 F.2d at 529.

VI. Classified Information–CIPA Section 8

The government does not intend to offer any classified evidence at trial. The government is attempting to identify any additional issues relating to classified information pretrial pursuant to the Classified Information Procedures Act (CIPA) and bring them to the Court's attention for appropriate rulings. 18 U.S.C. app. 3, § 8. If defendant seeks to elicit classified information through cross-examination of government witnesses at trial, the government will invoke Section 8(c) of CIPA. At this stage of the proceedings in this case, the government believes that Section 8 of CIPA continues to be relevant for the Court's consideration of potential trial testimony.

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As the Court is already aware, Section 8 prescribes additional protections and procedures governing the introduction of classified information into evidence. *Id.* at § 8. Section 8(c) provides a procedure to address the problem presented at a proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information. S. Rep. No. 96-823, at 11 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 4294, 4304. Specifically, under Section 8(c), the government may object to any question or line of inquiry that may require the witness to disclose classified information that was not previously held to be admissible. 18 U.S.C. app. 3 at § 8(c).

In a process that has already been employed in defendant's case, following an objection, the court "shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information." *Id.* In effect, this procedure supplements the notice provision under Section 5 and the hearing provision in Section 6(a) to cope with situations that cannot be handled effectively by those sections, such as where the defense counsel does not realize that the answer to a given question will reveal classified information. S. Rep. No. 96-823, at 11, 1980 U.S.C.C.A.N. at 4304–05.

Dated this 23rd day of October 2012.

Respectfully submitted,

S. AMANDA MARSHALL
United States Attorney

s/ Ethan D. Knight
ETHAN D. KNIGHT, OSB #99298
PAMALA R. HOLSINGER, OSB #89263
Assistant United States Attorneys
(503) 727-1000

TIMELINE OF EVENTS

United States v. Mohamed Osman Mohamud

February 2009	Defendant begins e-mail contact with Samir Khan
April 2009	Defendant's article *Getting in Shape Without Weights* published in *Jihad Recollections*
June 2009	Defendant's article *Preparing for the Long Night* published in *Jihad Recollections*
August 2009	Defendant's article *Getting in Shape Without Weights* published in *Jihad Recollections*
August 31, 2009	Amro Al-Ali e-mails defendant information about Yemeni school
August 31, 2009	Defendant's father contacts FBI about his son
November 9, 2009	"Bill Smith" begins contact with defendant
December 3, 2009	Al-Ali e-mails defendant and invites him to "OMRA"
December 5, 2009	Defendant responds to Al-Ali's e-mail: "just tell me what I need to do"
May–June 2010	Defendant posts a number of comments on extremist Islamic websites
June 14, 2010	Defendant interviewed at Portland International Airport with his parents after unsuccessful effort to fly to Alaska
June 23, 2010	FBI undercover agent known as Youssef e-mails defendant pretending to be an associate of Al-Ali
July 26, 2010	Defendant e-mails Youssef and asks if Al-Ali provided his [defendant's] contact information
July 30, 2010	First meeting between Youssef and defendant in Portland
August 19, 2010	Second meeting between defendant and Youssef and undercover agent known as Hussein in Portland
September 7, 2010	Third meeting between defendant and Youssef and Hussein in Portland
September 30, 2010	FBI receives a box mailed by defendant of bomb components
October 3, 2010	Fourth meeting of the group in Corvallis
November 4, 2010	Fifth meeting of the group in Corvallis and Lincoln, County, Oregon, where defendant detonates "test" bomb
November 18, 2010	Sixth meeting of the group in Corvallis and Portland
November 23, 2010	Seventh meeting of the group in Corvallis
November 26, 2010	Day of the tree lighting ceremony in Portland and final meeting of the group. Defendant arrested after trying to detonate bomb concealed in van next to Pioneer Courthouse Square.