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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. SOHIEL OMAR KABIR, et al., Defendants.	ED CR No. 12-00092(B)-VAP TRIAL MEMORANDUM Trial Date: August 12, 2014 Trial Time: 8:30 a.m. Location: Courtroom of the Honorable Virginia A. Phillips

The United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and undersigned counsel, hereby submits its trial memorandum.

I.

STATUS OF THE CASE

A. Defendants Sohiel Omar Kabir ("KABIR") and Ralph Kenneth Deleon ("DELEON") are charged in a Second Superseding Indictment ("SSI") with five counts of conspiracy: (1) conspiring to provide material support to terrorists in violation of 18 U.S.C. § 2339A; (2) conspiring to provide material support and resources to Al-Qa'ida, a designated foreign terrorist organization ("FTO"), in violation of 18 U.S.C. § 2339B; (3) conspiring to commit murder, kidnapping, or maiming overseas, in violation of 18 U.S.C. § 956(a); (4) conspiring to receive military-type training from Al-Qa'ida in violation of 18 U.S.C. § 371; and (5) conspiring to kill officers and employees of the United States Government, in violation of 18 U.S.C. § 1117. (SSI, Docket Number ("Dkt. No.") 223).

B. Trial in this matter is set for August 12, 2014, in the Courtroom of the Honorable Virginia A. Phillips, at 8:30 a.m. Trial by jury has not been waived.

C. The government expects its case-in-chief to last approximately 20 trial days.

D. At this time, the government anticipates calling approximately 38 witnesses in its case-in-chief, including the witnesses identified on the government's witness list that was filed with the Court on July 28, 2014. (Dkt. No. 505). This approximation does not include witnesses the government identified on its witness

list as custodians of records who may testify as to the foundation of business records the government will seek to introduce at trial.[1]

E. A copy of the SSI is attached to this trial memorandum.

II.

GOVERNING STATUTES

A. Count One: 18 U.S.C. § 2339A (Conspiracy to Provide Material Support to Terrorists)

Section 2339A states, in pertinent part:

> Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [certain enumerated crimes, including sections 956, 1114, and 2332] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

B. Count Two: 18 U.S.C. § 2339B (Conspiracy to Provide Material Support to a Foreign Terrorist Organization)

Under § 2339B,

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both[.] . . . To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality

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[1] On August 5, 2014, the government filed its notice of intent to offer evidence pursuant to Rule 902(11) of the Federal Rules of Evidence. (Dkt No. 534.) By admitting the records referenced in the Notice, the government will not have to call most, if not all, of the custodians of records to testify at trial for foundational purposes.

> Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).
>
> "The term 'terrorist organization' means an organization designated as a terrorist organization under Section 219 of the Immigration and Nationality Act." 18 U.S.C. § 2339B(g)(6).[2] There is jurisdiction over violations of § 2339B(a) if "an offender is a national of the United States . . . or an alien lawfully admitted for permanent residence." 18 U.S.C. § 2339B(d).[3]
>
> "Material Support or Resources" is defined for § 2339A and § 2339B, to include any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1).

C. <u>Count Three: 18 U.S.C. § 956(a) (Conspiracy to Commit Murder, Kidnapping or Maiming Overseas)</u>

Under § 956,

> (a)(1) Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special

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[2] The Secretary of State so designated Al-Qa'ida, the FTO alleged in the SSI, in 1999.

[3] As the SSI expressly alleges, Kabir is a United States citizen and Deleon is a citizen of the Philippines and lawful permanent resident of the United States. (SSI ¶¶ 1-2.)

> maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).

D. Count Four: 18 U.S.C. § 371 (Conspiracy to Receive Military-Type Training from Al-Qa'ida)

Under § 371, "[i]f two or more persons conspire either to commit any offenses against the United States . . . and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. 18 U.S.C. § 371.

Under § 2339D,

> Whoever knowingly receives any military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act as a foreign terrorist organization shall be fined under this title or imprisoned for 10 years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (c)(4)), that the organization has engaged or engages in terrorist activity (as defined in section 212 of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

Under § 2339D(c),

> (1) the term "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction (as defined in section 2232a(c)(2)).

18 U.S.C. § 2339D(c).

E. Count Five: 18 U.S.C. § 1117 (Conspiracy to Murder Officers and Employees of the United States)

18 U.S.C. § 1117 provides:

> If two or more persons conspire to violate section 1111, 1114, 1116, or 1119 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

Under Section 1114,

> [w]hoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished[.]

18 U.S.C. § 1114.

III.

ELEMENTS OF THE CHARGED OFFENSES

A. Count One: 18 U.S.C. § 2339A (Conspiracy to Provide Material Support to Terrorists

The elements of Conspiracy to Provide Material Support to Terrorists, in violation of 18 U.S.C. § 2339A, as alleged in Count One of the SSI are:

First, beginning in or about August 2010 and continuing up to and including on or about November 16, 2012, there was an agreement between two or more persons to provide material support or resources; and

Second, the defendant became a member of the agreement knowing of its object and intending that such support or resources be used in preparation for or in carrying out one or more of the following offenses:

(1) a violation of Section 956(a) of Title 18 of the United States Code, which prohibits conspiring to kill, kidnap, or maim a person at a place located outside of the United States;

(2) a violation of Section 1114 of Title 18 of the United States Code, which prohibits killing or attempting to kill an officer or employee of the United States, including members of the uniformed services, while the officer or employee was engaged in or on account of the performance of official duties; or,

(3) a violation of Sections 2332(a) and (b) of Title 18 of the United States Code, which prohibit killing, or attempting, or conspiring to kill, a national of the United States while the national is outside of the United States.

See Ninth Circuit Model Criminal Jury Instructions, No. 8.20 (2010 ed.); 18 U.S.C. § 2339A(a).

Under 2339A(b)(1), the terms "material support or resources" include personnel, which can include defendants themselves. See 18 U.S.C. § 2339A(b)(1).

The definition of a conspiracy is set forth in Ninth Circuit Model Criminal Jury Instructions Number 8.20, which provides:

> A conspiracy is a kind of criminal partnership, that is, an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was actually committed.
>
> For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you

> agreeing as to the particular crime which the conspirators agreed to commit.
>
> One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

See Ninth Circuit Model Criminal Jury Instructions, No. 8.20 (2010 ed.).

B. Count Two: 18 U.S.C. § 2339B (Conspiracy to Provide Material Support to a Foreign Terrorist Organization)

The elements of Conspiracy to Provide Material Support to a Designated FTO, namely Al-Qa'ida, in violation of 18 U.S.C. § 2339B, as alleged in Count Two of the SSI are:

First, beginning in or about August 2010 and continuing up to and including on or about November 16, 2012, there was an agreement between two or more persons to provide material support or resources to a designated FTO;

Second, the defendant became a member of the conspiracy knowing of its object and intending to help accomplish it;

Third, the defendant knew that Al-Qa'ida was a designated FTO or had engaged or was engaging in terrorist activity or terrorism; and,

Fourth, defendant was a national or lawfully admitted permanent resident of the United States or the offense occurred in whole or in part in the United States.

See Ninth Circuit Model Criminal Jury Instructions, No. 8.20 (2010 ed.); 18 U.S.C. § 2339B(a).

Under 2339A(b)(1), the terms "material support or resources" include personnel, which can include defendants themselves. See 18 U.S.C. § 2339A(b)(1). No person can be convicted for a violation of this statute in connection with providing personnel unless that person has knowingly conspired to provide an FTO with one or more individuals (who may include the defendant) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the FTO to advance its goals or objectives are not considered to be working under the FTO's direction and control. See 18 U.S.C. § 2339B(h).

In order for an organization to qualify as an FTO, the organization must have been designated as such by the Secretary of State through a process established by law. Al-Qa'ida was so designated by the Secretary of State throughout the period covered by the SSI.

The term "terrorist activity" includes any activity that, if it had been committed in the United States, would be unlawful under the laws of the United States or any State and that involves a threat, attempt, or conspiracy to use any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety

of one or more individuals or to cause substantial damage to property. See 8 U.S.C. § 1182(a)(3)(B).

The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents. See 18 U.S.C. § 2339B, citing 22 U.S.C. § 2656f.

C. Count Three: 18 U.S.C. § 956(a) (Conspiracy to Commit Murder, Kidnapping or Maiming Overseas)

The elements of Conspiracy to Commit Murder, Kidnapping, or Maiming Overseas, in violation of Section 956(a) of 18 U.S.C. § 956(a), as alleged in Count Three of the SSI are:

First, that beginning in or about August 2010 and continuing up to and including on or about November 16, 2012, there was an agreement between one or more other persons to murder, kidnap, or maim another person at a place outside the United States;

Second, that the defendant willfully joined the agreement with the intent to further its purpose;

Third, that the defendant was within the jurisdiction of the United States when he conspired; and,

Fourth, that during the existence of the agreement, one of the conspirators committed at least one overt act within the jurisdiction of the United States to effect any object of the agreement.

See Ninth Circuit Model Criminal Jury Instructions, No. 8.20 (2010 ed.); 18 U.S.C. § 956(a)(1); United States v. Wharton, 320 F.3d 526, 537-38 (5th Cir. 2003).

The government must prove that the defendant entered into an agreement with at least one other person to murder, kidnap, or maim

another person at a place outside the United States. "Murder" is the unlawful killing of a human being with malice aforethought. To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life. See 18 U.S.C. § 1111. To "kidnap" means to unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away and hold for ransom or reward or otherwise any person against his will. See 18 U.S.C. 1201. To "maim" means to intentionally deprive of the use of some part of the body or to mutilate, disfigure, or disable. See 18 U.S.C. § 114.

The term "outside the United States" means any place outside the States of the United States, the District of Columbia, and the territories and possessions of the United States, including the territorial sea and the overlying airspace. See 18 U.S.C. § 5; 49 U.S.C. § 40102(a)(46).

D. Count Four: 18 U.S.C. § 371 (Conspiracy to Receive Military-Type Training from Al-Qa'ida)

The elements of Conspiracy to Receive Military-Type Training from Al-Qa'ida, in violation of 18 U.S.C. § 371, as alleged in Count Four of the SSI are:

First, beginning in or about August 2010 and continuing up to and including on or about November 16, 2012, there was an agreement between two or more persons to commit at least one crime as charged in the indictment;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it; and,

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

See Ninth Circuit Model Criminal Jury Instructions, No. 8.20 (2010 ed.).

The term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge. See 18 U.S.C. § 2339A(b)(2).

E. Count Five: 18 U.S.C. § 1117 (Conspiracy to Murder Officers and Employees of the United States)

The elements of Conspiracy to Murder Officers and Employees of the United States, in violation of 18 U.S.C. §§ 371 and 1117, as alleged in Count Five of the SSI are:

First, there was an agreement between two or more persons to kill officers or employees of the United States (including any member of the uniformed services) while such officer or employee was engaged in or on account of the performance of official duties;

Second, defendant became a member of the conspiracy knowing of its object and intending to help accomplish it; and,

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

Murder is the unlawful killing of a human being with malice aforethought. To kill with malice aforethought means to kill either deliberately and intentionally or recklessly with extreme disregard for human life.

See Ninth Circuit Model Criminal Jury Instructions No. 8.20 (2010 ed.) [Conspiracy – Elements (modified to reflect SSI]; Ninth Circuit

Model Criminal Jury Instructions No. 8.108: Murder - Second Degree (2010 ed.); United States v. Croft, 124 F.3d 1109, 1122-23 (9th Cir. 1997) (where indictment omits premeditation allegation, indictment read to allege a conspiracy to commit second degree murder); 18 U.S.C. §§ 1111, 1114, 1117.

IV.

GOVERNMENT'S OFFER OF PROOF

At trial, the United States intends to prove the following facts, among others:

KABIR is a naturalized United States Citizen who was born in Kabul, Afghanistan, and resided in Pomona, CA, until he departed the United States in December 2011. KABIR served in the United States Air Force from 2000 to 2001. DELEON is a lawful permanent resident of the United States and a citizen of the Philippines who resided in Ontario, California. In 2010, KABIR influenced DELEON and another man, Miguel Alejandro Santana Vidriales ("Santana"), to convert to Islam and introduced DELEON and Santana to radical and violent Islamic doctrine.

On or about December 28, 2011, KABIR traveled from the United States to Germany where he remained until July 2012, when he relocated to Afghanistan. While in Afghanistan, KABIR continued to communicate with DELEON and Santana and encouraged them to join him in Afghanistan. Among other things, KABIR told DELEON and Santana that he made contacts in Afghanistan and that upon their arrival the three men would join the "Students," referring to the Taliban, before joining the "professors," referring to Al-Qa'ida.

In February 2012, an FBI confidential human source ("CHS") met DELEON and Santana. The three discussed radical Islamic views and

Deleon informed the CHS of their plan to travel overseas to engage in violent jihad. DELEON and the CHS believed that the CHS would travel overseas with them. In conversations with the CHS, DELEON and Santana discussed potential targets for violent attacks overseas including American military personnel and bases. DELEON and Santana made numerous statements to the CHS regarding their intention to engage in violent jihad. For instance, DELEON said that he wanted to be on the front lines or use explosives and Santana said that he wanted to be a sniper. In July 2012, Santana told the CHS that there were Al-Qa'ida camps in Afghanistan and that he wanted to join Al-Qa'ida. Also in July 2012, DELEON told the CHS that they were with the Taliban and that afterward they would join "AQ." DELEON believed that the Taliban was fighting for the right cause.

In September 2012, DELEON recruited Arifeen David Gojali ("Gojali"), a United States citizen and resident of Riverside, California, to join the conspiracy to travel overseas for the purpose of engaging in violent jihad against Americans and others. During the course of the investigation, the CHS made numerous audio and video recordings of DELEON, Santana, and Gojali and other recordings of their conversations with KABIR, discussing their intention to travel overseas to commit violent jihad.

DELEON, Santana, and Gojali continued to communicate with KABIR and discussed their plans to meet KABIR in Afghanistan. KABIR advised them of routes to travel to Kabul and informed them that he had made arrangements for the group to join the Taliban and that he had contacts with Al-Qa'ida.

While in the United States, DELEON, Santana, and Gojali took several steps to prepare for their intended travel to Afghanistan,

including participating in physical exercise, paintball activities, and shooting M16 and AK-47 style assault rifles and other firearms at shooting ranges in Los Angeles. In addition, DELEON, Santana, and Gojali obtained valid passports in order to travel to Afghanistan. In July 2012, Santana renewed his Mexican passport. On November 14, 2012, Gojali obtained a United States passport. In order to raise money for their travel, DELEON withdrew from college, obtained a refund of his tuition money, and sold his car.

On November 6, 2012, KABIR informed DELEON that he was leaving on a one-way mission and that a person would be waiting at the airport in Kabul to meet DELEON and the others upon their arrival. When DELEON asked whether KABIR's trip involved the third letter of the alphabet and the fourth number (referring to C4, an explosive), KABIR responded "Inshallah" and explained that he was given the choice.

DELEON, Santana, and Gojali planned to travel to Afghanistan to join KABIR in November 2012. To avoid detection, DELEON, Santana, and Gojali developed cover stories, which they discussed with KABIR, and planned to drive to Mexico and fly from Mexico City to an intermediate destination en route to Afghanistan. In November 2012, while in the Central District of California, DELEON, Santana, and Gojali purchased airline tickets to fly from Mexico City to Istanbul, Turkey. DELEON asked an individual to drive them to Mexico and told the individual that he would receive heavenly rewards for aiding DELEON and the others.

On November 16, 2012, the FBI arrested DELEON, Santana, and Gojali as they rode in a car departing an apartment in Chino, California, intending to drive to Mexico. Thereafter, United States

military personnel captured KABIR in Afghanistan and later relinquished him to the FBI pursuant to an arrest warrant issued in this case.

V.

EVIDENTIARY AND LEGAL ISSUES

A. Exhibits

At trial, the government intends to introduce various types of evidence, including: (1) audio and video recordings; (2) screen captures from the Internet and defendants' social media accounts, including Facebook and Tumblr, and items posted or linked to those account; (3) digital evidence from computers, thumb drives, and cellular phones; (4) Facebook messages, e-mails, text messages, and other electronic messaging; (5) photographs and videos; (6) physical evidence; and (7) business records.

Authentication of trial exhibits is generally a matter for the jury. See Fed. R. Evid. 104(b) and 901(a). The Federal Rules of Evidence treat authenticity and identification under Rule 901 as simply "a special aspect of relevancy." Fed. R. Evid. 901(a) (Advisory Committee Notes). Under Rule 901, the condition or fact to be satisfied is whether there is sufficient evidence that the item proffered is what the proponent claims. See United States v. Whitworth, 856 F.2d 1268, 1283 (9th Cir.), cert. denied, 489 U.S. 1084 (1989). When proffered evidence is challenged on grounds of authenticity or identification, the evidence should be admitted once the government makes a prima facie showing of authenticity. See United States v. Black, 767 F.2d 1334, 1342 (9th Cir. 1985).

As stated in Black, the trial judge's decision is simply whether "sufficient proof has been introduced so that a reasonable

juror could find in favor of authenticity or identification." Id. The credibility or probative force of the evidence offered is, ultimately, an issue for the jury. See id. (citing 5 J. Weinstein & M. Berger, Weinstein's Evidence, § 901(a)(1), at 901-17 (1983)). As these Rules establish, the requirement of authentication prior to admissibility "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See United States v. Salcido, 506 F.3d 729, 733 (9th Cir. 2011) (court held government properly authenticated the videos and images under Rule 901 by presenting detailed evidence as to the chain of custody, specifically how the images were retrieved from the defendant's computers).

1. Audio and Video Recordings

At trial, the government expects to introduce numerous audio and video recordings of KABIR, DELEON, Santana, and Gojali in which they discuss, among other things, their intention to travel overseas and their plans to join various groups, including the Taliban and Al'Qa'ida, to ultimately commit violent jihad.

All duly admitted recorded conversations must be played in open court.[4] The foundation that must be laid for the introduction into evidence of recorded conversations is a matter largely within the discretion of the trial court. There is no rigid set of foundational requirements. Rather, the Ninth Circuit has held that recordings are sufficiently authenticated under Fed. R. Evid. 901(a)

[4] Allowing jurors to take into the jury deliberation room recorded conversations that were not played in open court is structural error requiring automatic reversal if a defendant objects to allowing the jurors to have the un-played recordings in the jury room. United States v. Noushfar, 78 F.3d 1442, 1444-45 (9th Cir. 1996).

if sufficient proof has been introduced "so that a reasonable juror could find in favor of authenticity or identification," which can be done by "proving a connection between the evidence and the party against whom the evidence is admitted" and established by both direct and circumstantial evidence. United States v. Matta-Ballesteros, 71 F.3d 754, 768 (9th Cir. 1995), modified by 98 F.3d 1100 (9th Cir. 1996).

Witnesses may testify competently as to the identification of a voice on a recording. A witness's opinion testimony in this regard may be based upon his having heard the voice on another occasion under circumstances connecting it with the alleged speaker. See Fed. R. Evid. 901(b)(5); United States v. Torres, 908 F.2d 1417, 1425 (9th Cir. 1990) ("Testimony of voice recognition constitutes sufficient authentication.").

Recorded conversations are competent evidence even when they are partly inaudible, unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy. United States v. Rrapi, 175 F.3d 742, 746 (9th Cir. 1999). A lay witness may explain unfamiliar terms contained in a recorded conversation, even when such matters are central to the facts at issue. Fed. R. Evid. 701; United States v. Freeman, 498 F.3d 893, 904-05 (9th Cir. 2007).

The recordings contain out-of-court statements by defendants and the CHS. Rule 801(c) of the Federal Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). However, statements by a party opponent, such as the defendants, are

admissible non-hearsay, as are statements which are not being admitted for the truth of the matter asserted but rather to show the effect on the person who heard the statement. Fed. R. Evid. 801(c), (d)(2)(A); see also United States v. Valerio, 441 F.3d 837, 844 (9th Cir. 2006) (informant's statements on a recording are admissible to give context to defendant's statements).

Moreover, a defendant's statement is admissible only if offered against him; a defendant may not elicit his own prior statements. Fed. R. Evid. 801(d)(2)(A); United States v. Fernandez, 839 F.2d 639 (9th Cir. 1988). When the government admits a portion of a defendant's prior statement, the defendant may not put in additional out-of-court statements by him because such statements are hearsay when offered by the defendant. Fed. R. Evid. 801(d)(2); Fernandez, 839 F.2d at 640; United States v. Ortega, 203 F.3d 675, 681-2 (9th Cir. 2000) (defendant prohibited from eliciting his own exculpatory statements during cross examination of government agent).

Further, it is entirely proper to admit segments of a recording and adverse parties are not entitled to offer additional statements just because they were recorded and the proponent has not offered them. United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996). The "rule of completeness" set forth in Fed. R. Evid. 106 is applicable where one party seeks to introduce a misleadingly tailored snippet of a statement that creates a misleading impression by being taken out of context. See United States v. Vallejos, 742 F.3d 902, 905 (9th Cir. 2014); United States v. Liera-Morales, __F.3d__, 2014 WL 3563356 (9th Cir. July 21, 2014). The Rule does not render evidence admissible which is otherwise inadmissible under the hearsay rules. Collicott, 92 F.3d at 983. Accordingly, "non-

self-inculpatory statements are inadmissible even if they were made contemporaneously with other self-inculpatory statements." Ortega, 203 F.3d at 682 ("[S]elf-inculpatory statements, when offered by the government, are admissions by a party-opponent and are therefore not hearsay, see Fed. R. Evid. 801(d)(2), but the non-self-inculpatory statements are inadmissible hearsay.").

Moreover, as this Court noted in its July 1, 2014, order denying KABIR's motion to apply the rule of completeness to oral statements, "[t]o the extent Kabir seeks to apply the rule to recorded oral statements, out-of-court statements, recorded or otherwise, are nevertheless hearsay and only admissible subject to an exception to the hearsay rule." (emphasis in original) (citing United States v. Mitchell, 502 F.3d 931, 964 (9th Cir. 2007) (observing that a defendant's exculpatory statements made during interviews with law enforcement were hearsay outside any exception, and therefore properly excluded – notwithstanding the rule of completeness)) (Dkt No. 404.)

2. Physical Evidence

The government will introduce several items of physical evidence, including items seized from defendants' at the time of their arrests and items obtained from searches conducted pursuant to Court-authorized search warrants. As noted above, Fed. R. Evid. 901(a) provides that, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must provide evidence sufficient to support a finding that the item is what the proponent claims it is." Accordingly, Fed. R. Evid. 901(a) only requires the government to make a prima facie showing of authenticity or identification "so that a reasonable juror could

find in favor of authenticity or identification." United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir. 1991) (quoting United States v. Blackwood, 878 F.2d 1200, 1202 (9th Cir. 1989) (per curiam)). The authenticity of proposed exhibits may be proven by circumstantial evidence. See United States v. King, 472 F.2d 1, 9-11 (9th Cir. 1972).

To be admitted into evidence, a physical exhibit must be in substantially the same condition as when the crime was committed. Fed. R. Evid. 901. The Court may admit the evidence if there is a "reasonable probability the article has not been changed in important respects." United States v. Harrington, 923 F.2d 1371, 1374 (9th Cir. 1991) (quoting Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960)). This determination is to be made by the trial judge and will not be overturned except for clear abuse of discretion. Factors the Court may consider in making this determination include the nature of the item, the circumstances surrounding its preservation, and the likelihood of intermeddlers having tampered with it. Gallego, 276 F.2d at 917.

In establishing chain of custody as to an item of physical evidence, the government is not required to call all persons who may have come into contact with the piece of evidence. Harrington, 923 F.2d at 1374. Moreover, a presumption of regularity exists in the handling of exhibits by public officials. Id. Therefore, to the extent that alleged or actual gaps in the chain of custody exist, such gaps go to the weight of the evidence rather than to its admissibility. Id.

3. Internet Communications

Internet communications, including Facebook messages, emails, and social media captures, must, like other types of evidence, be authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Under Fed. R. Evid. 901(b)(4), a document may be authenticated by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." The government need only make a "prima facie showing of authenticity" such that "a reasonable juror could find in favor of authenticity or identification," and establish a connection between the proffered evidence and the defendant." United States v. Tank, 200 F.3d 627, 630 (9th Cir. 2000) (quotation omitted) (court properly admitted transcript of Internet chat room discussion of child pornography).

Emails may be authenticated by a statement from the author or recipient, or by "the e-mail address from which it originated; comparison of the content to other evidence; and/or statements or other communications from the purported author acknowledging the e-mail communication that is being authenticated." Fenje v. Feld, 301 F. Supp. 2d 781, 809 (N.D. Ill. 2003), aff'd, 398 F.3d 620 (7th Cir. 2005); see also United States v. Siddiqui, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (email authenticated by address associated with defendant, testimony of party replying to email, and context of email).

Emails, Facebook messages and text messages may also be authenticated through "various traditional common law methods such as the reply doctrine, distinctive characteristics, chain of

custody, or process and system." Graham, M., 7 Handbook of Federal Evidence § 901:9, Rule 901(b)(9): Process or System; Computer Records, Faxed Documents, E mail, Text Message, Web Site (available on Westlaw) (collecting cases). A party challenging the authenticity of email evidence bears the burden of submitting evidence to show that materials have been fabricated or modified. See Monte v. Ernst & Young, 330 F. Supp. 2d 350, 359 (S.D.N.Y. 2004).

4. Photographs and Videos

The government intends to introduce evidence of photographs and video tapes of the defendants at firing ranges, passport offices and consulates, and with each other. These photos and videos were made by the CHS, law enforcement agents, and through court-authorized collection. Witnesses will be able to confirm the dates, times, and methods of recording the audio, video, or photographs, as well as, when relevant, the locations of photographs and additional distinct characteristics pertaining to the items of evidence to establish authenticity.

"Photographs are most commonly authenticated under Rule 901(b)(1) by a witness with knowledge who testifies that the photograph accurately represents the scene depicted at the relevant time." Mueller and Kirkpatrick, 5 Federal Evidence § 9:23 (4th Ed.) Demonstrative evidence – Photographs and videotapes (available on Westlaw). See also, People of Territory of Guam v. Ojeda, 758 F.2d 403, 407 (9th Cir. 1985) (witness need only establish that photograph "is an accurate portrayal"). Photographs can also be authenticated under Fed. R. Evid. 901(b)(9) through the "silent witness doctrine" by showing the process by which the photograph or

video was made and that it was reliable. Mueller and Kirkpatrick, supra. Photographs can also be authenticated by content and circumstances under Fed. R. Evid. 902(b)(4). U.S. v. Stearns, 550 F.2d 1167, 1171 (9th Cir. 1977) (even where direct foundation testimony is lacking, contents of photograph itself, together circumstances or indirect evidence "may serve to explain and authenticate a photograph sufficiently").

5. Business Records

The government intends to authenticate some of its documentary evidence by means of Fed. R. Evid. 902(11), which permits self-authentication of business records. Specifically, on August 5, 2014, the government filed its notice of intent to offer evidence pursuant to Rule 902(11) of the Federal Rules of Evidence. (Dkt No. 534.)

A document is admissible as a business record if two foundational facts are established: (a) the document was made or transmitted by a person with knowledge at or near the time of the incident recorded, and (b) the document was kept in the course of a regularly conducted business activity. See Fed. R. Evid. 803(6); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990); Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 717 (9th Cir. 1990). It is established that computer records are covered by this exception to the rule against hearsay. E.g., United States v. Catabran, 836 F.2d 453, 457-58 (9th Cir. 1988).

In determining if these foundational facts have been established, the court may consider hearsay and other evidence not admissible at trial, specifically business records declarations. See Fed. R. Evid. 104(a) and 1101(d)(1); Bourjaily v. United States,

483 U.S. 171, 178-179 (1987). The foundation for business records may be established either through a custodian of records or "other qualified witness." The phrase "other qualified witness" is broadly interpreted to require only that the witness understand the record keeping system. See Ray, 930 F.2d at 1370; Childs, 5 F.3d at 1334. "There is no requirement that the government establish when and by whom the documents were prepared." Ray, 930 F.2d at 1370; United States v. Huber, 772 F.2d 585, 591 (9th Cir. 1985) ("[T]here is no requirement that the government show precisely when the [record] was compiled.").

Records of regularly conducted activity that would be admissible under Fed. R. Evid. 803(6) do not require extrinsic evidence of authenticity as a condition precedent to admissibility, if they are accompanied by a written declaration of a custodian of record certifying that the record: (1) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) was kept in the course of the regularly conducted activity; and (3) was made by the regularly conducted activity as a regular practice. Fed. R. Evid. 902(11). The government has made the business records declarations available to the Court by means of its notice of intent to offer evidence pursuant to Rule 902(11). (Dkt No. 534.) The government will not be seeking to introduce those declarations as evidence and requests that the Court make the determination as to admissibility of the pertinent trial exhibits pursuant to Fed. R. Evid. 104(a).

6. Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original, or (2) under the circumstances, it would be unfair to admit the duplicate instead of the original. See Fed. R. Evid. 1003. If the underlying documents are admitted in evidence, charts or summaries may be presented for the purpose of explaining facts disclosed by those documents. Charts or summaries are not in and of themselves evidence or proof of any facts. See Fed. R. Evid. 1006; United States v. Catabran, 836 F.2d 453, 458 (9th Cir. 1988); Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984).

B. Co-Conspirator Statements

Declarations by one co-conspirator during the course of and in furtherance of the conspiracy may be used against another conspirator because such declarations are not hearsay. See Fed. R. Evid. 801(d)(2)(E). Further, statements made in furtherance of a conspiracy were expressly held by the Supreme Court in Crawford v. Washington, 541 U.S. 36, 56 (2004) to be "not testimonial" such that their admission does not violate the Confrontation Clause. Thus, the admission of co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E) requires only a foundation that: (1) the declaration was made during the life of the conspiracy; (2) it was made in furtherance of the conspiracy; and (3) there is, including the co-conspirator's declaration itself, sufficient proof of the existence of the conspiracy and of the defendant's connection to it. See Bourjaily v. United States, 483 U.S. 171, 173, 181 (1987).

The government must prove by a preponderance of the evidence that a statement is a co-conspirator declaration in order for the statement to be admissible under Fed. R. Evid. 801(d)(2)(E). Bourjaily, 483 U.S. at 176; United States v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987). Whether the government has met its burden is to be determined by the trial judge, and not the jury. United States v. Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

The trial court has discretion to determine whether the government may introduce co-conspirator declarations before establishing the conspiracy and the defendant's connection to it. United States v. Loya, 807 F.2d 1483, 1490 (9th Cir. 1987). It also has the discretion to vary the order of proof in admitting a co-conspirator's statement. Id. The court may allow the government to introduce co-conspirator declarations before laying the required foundation under the condition that the declarations will be stricken if the government fails ultimately to establish by independent evidence that the defendant was connected to the conspiracy. Id.; see also United States v. Spawr Optical Research, Inc., 685 F.2d 1076, 1083 (9th Cir. 1982); Fleishman, 684 F.2d at 1338.

It is not necessary for the defendant to be present at the time a co-conspirator statement was made for it to be introduced as evidence against that defendant. See Sendejas v. United States, 428 F.2d 1040, 1045 (9th Cir. 1970). Rather, to be admissible under Fed. R. Evid. 801(d)(2)(E) as a statement made by a co-conspirator in furtherance of the conspiracy, a statement must "further the common objectives of the conspiracy," or "set in motion transactions that [are] an integral part of the [conspiracy]." United States v.

Arambula-Ruiz, 987 F.2d 599, 607-08 (9th Cir. 1993); United States v. Yarbrough, 852 F.2d 1522, 1535 (9th Cir. 1988). Such statements are admissible whether or not they actually result in any benefit to the conspiracy. Williams, 989 F.2d at 1068; United States v. Schmit, 881 F.2d 608, 612 (9th Cir. 1989). Courts have interpreted the "in furtherance of" requirement broadly and have considered, among others, the following co-conspirator declarations as being made "in furtherance of the conspiracy":

- Statements made to keep a conspirator abreast of a co-conspirator's activity, to induce continued participation in a conspiracy, or to allay the fears of a co-conspirator (United States v. Arias-Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993));
- Statements seeking to control damages to an ongoing conspiracy (Garlington v. O'Leary, 879 F.2d 277, 283 (7th Cir. 1989)); and
- Statements that refer to another conspirator as the boss, the overseer, or "sir" (United States v. Barnes, 604 F.2d 121, 157 (2d Cir. 1979)).

As the Court correctly recognized in its June 11, 2014 Order, the Ninth Circuit has held that statements by persons acquitted of conspiracy may nonetheless be admitted under the co-conspirators' statement exception to the hearsay rule set forth in Fed. R. Evid. 801(d)(2)(E). See United States v. Peralta, 941 F.2d 1003, 1007 (9th Cir. 1991); see also United States v. Layton, 855 F.2d 1388, 1399-1400 (9th Cir. 1988) (finding statements made by a party to an agreement were admissible under Fed. R. Evid. 801(d)(2)(E), notwithstanding the fact the venture could not be prosecuted as a criminal conspiracy because it had a lawful objective).

Consequently, the Court correctly concluded that: "[DELEON's] statements as a co-conspirator may be introduced against [KABIR], even if [DELEON] is found to have been entrapped by the CS and acquitted." (Dkt No. 357.)

C. Expert Testimony

If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. Expert opinion may be based on hearsay or facts not in evidence, where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may also provide opinion testimony even if it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704.

The government intends to call Evan F. Kohlmann, to testify at trial regarding various topics, including: (1) the history and context of the Al-Qa'ida, the Taliban in Afghanistan, and Islamic extremism (or the "global jihadi movement"); (2) the use of various social and internet media by Islamic terrorist organizations; and (3) key terms, concepts, and phrases used in this context. As the Court found in its Order, Kohlmann is qualified by his training and experience in international terrorism, with a focus on Islamic extremism, to testify as an expert on these topics, and his testimony may help the jury understand the definitions, significance, and context of various names, organizations, terms, and practices that are important to the government's theory of the case. (Dkt Nos. 275; 433.) Pursuant to this Court's order dated July 7, 2014, the government will not seek to introduce testimony

from Kohlmann regarding "homegrown terrorist" or "contemporary extremist" profiles or their application to this case. (Dkt No. 433.)

D. Opinion Testimony of Law Enforcement Agent

An experienced government agent may provide opinion testimony even if that opinion is based in part on information from other agents familiar with the issue. United States v. Andersson, 813 F.2d 1450, 1458 (9th Cir. 1987); United States v. Golden, 532 F.2d 1244, 1248 (9th Cir. 1976). An experienced government agent may testify as to his opinions and impressions of what he observed. As the court in United States v. Skeet, 665 F.2d 983, 985 (9th Cir. 1982), stated:

> Opinions of non-experts may be admitted where the facts could not otherwise be adequately presented or described to the jury in such a way as to enable the jury to form an opinion or reach an intelligent conclusion. If it is impossible or difficult to reproduce the data observed by the witnesses, or the facts are difficult of explanation, or complex, or are of a combination of circumstances and appearances which cannot be adequately described and presented with the force and clearness as they appeared to the witness, the witness may state his impressions and opinions based upon what he observed.

Ultimately, opinion testimony by non-experts is "a means of conveying to the jury what the witness has seen or heard." Id.

Courts have admitted opinion testimony by law enforcement agents on a number of issues, such as: (1) the modus operandi of drug traffickers, United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987) (holding that district court properly admitted law enforcement officer's expert testimony on the modus operandi of narcotics traffickers, including use of "stash pads" for drugs); (2) the use of guns by drug traffickers, United States v. Perez, 116

F.3d 840, 848 (9th Cir. 1997); and (3) a defendant's apparent attempt to avoid surveillance, Andersson, 813 F.2d at 1458. An experienced narcotics agent's opinion testimony may be based in part on information from other agents familiar with the issue. United States v. Beltran-Rios, 878 F.2d 1208, 1213 n.3 (9th Cir. 1989).

Further, under Ninth Circuit law, opinion testimony by law enforcement officers is not necessarily expert testimony within the meaning of Fed. R. Evid. 16(a)(1)(G). In United States v. VonWillie, 59 F.3d 922 (9th Cir. 1995), for instance, the Ninth Circuit held that the district court properly admitted testimony by a law enforcement agent that drug traffickers commonly used weapons "to protect their drugs and to intimidate buyers" as lay testimony. Id. at 929. The Court found that the officer's observations, based on his experience "during prior drug investigations" . . . "are common enough and require such a limited amount of expertise, if any, that they can, indeed, be deemed lay witness opinion." Id. Therefore, law enforcement opinion testimony should be admitted here, if offered by the government.

E. Cross-Examination of Defendants

A defendant who testifies at trial waives his Fifth Amendment right against self-incrimination and subjects himself to cross-examination concerning all matters reasonably related to the subject matter of his testimony. See, e.g., Ohler v. United States, 529 U.S. 753, 759 (2000) (citing McGautha v. California, 402 U.S. 183, 215 (1971), vacated in part on other grounds, 408 U.S. 941 (1972) ("It has long been held that a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct

examination")). A defendant has no right to avoid cross-examination on matters which call into question his claim of innocence. United States v. Miranda-Uriarte, 649 F.2d 1345, 1353-54 (9th Cir. 1981).

The scope of a defendant's waiver of the privilege is co-extensive with the scope of relevant cross-examination. United States v. Cuozzo, 962 F.2d 945, 948 (9th Cir. 1992); United States v. Black, 767 F.2d 1334, 1341 (9th Cir. 1985) ("What the defendant actually discusses on direct does not determine the extent of permissible cross-examination or his waiver. Rather, the inquiry is whether 'the government's questions are reasonably related' to the subjects covered by the defendant's testimony.").

F. Impeachment

While Fed. R. Evid. 607 provides that the "credibility of a witness may be attacked by any party, including the party calling the witness," a party may not call a witness as a pretext for impeaching his credibility and thus present the jury with evidence that would be inadmissible but for the impeachment. See United States v. Gomez-Gallardo, 915 F.3d 553, 555 (9th Cir. 1990) (holding that the government improperly called a witness "for the primary purpose of impeaching him"); United States v. Peterman, 841 F.2d 1474, 1479 n.3 (10th Cir. 1988) (noting that "[e]very circuit has said evidence that is inadmissible for substantive purposes may not be purposely introduced under the pretense of impeachment"); see also McCormick on Evidence; 1 McCormick on Evidence § 38 (7th ed. 2013) (parties may not "impeach a witness as a 'mere subterfuge' or for the 'primary purpose' of placing before the jury substantive evidence which is otherwise inadmissible"); 27 Wright's Fed. Prac. & Proc. Evid § 6093, Rule 607, Who May Impeach a Witness, n.5 (2d ed.

2014) (explaining that Fed. R. Evid. 607 relates to all means of attacking credibility, e.g., character, conviction, prior inconsistent statement, bias, and contradiction).

This exception to Fed. R. Evid. 607, while most frequently raised by defendants to challenge impeachment by the government, also allows this Court to preclude the defense from impeaching its own witnesses. See United States v. Libby, 475 F. Supp. 2d 73, 83-84 (D.D.C. 2007) (precluding the defense from calling reporter for sole purpose of impeaching her, where the "risk of the jury misusing the statement" . . . was "unduly prejudicial to the government."); United States v. Lattin, 108 F.3d 1374 (4th Cir. 1997) (unpublished). The policy underlying Fed. R. Evid. 607 is the same policy that animates all of the relevance rules, which is to promote accurate fact-finding. See Fed. R. Evid 102. To ascertain whether a party is "simply calling a witness solely to impeach [him], many courts attempt to discern the primary purpose for the witness's testimony." Libby, 475 F. Supp. 2d at 82 (citing United States v. Gilbert, 57 F.3d 709, 711-712 (9th Cir. 1995)).

One method of evaluating the primary purpose is to conduct a Rule 403 analysis, weighing the testimony's impeachment value against its tendency to prejudice the opposing party unfairly or to confuse the jury. See id.; United States v. Ince, 21 F.3d 576, 580 (4th Cir. 1994), United States v. Buffalo, 358 F.3d 519, 523 (8th Cir. 2004). In other words, the court in determining whether a party's witness's testimony is admissible, "or on the contrary is a mere subterfuge to get before the jury substantive evidence which is otherwise inadmissible" . . . the court should "weigh the testimony's impeachment value against its tendency to prejudice [the

opposing party] unfairly or to confuse the jury." United States v. Ince, 21 F.3d 576, 580 (4th Cir. 1994) (internal quotes omitted). "The application of the 'mere subterfuge' or 'primary purpose' doctrine focuses on the content of the witness's testimony as a whole. If the witness's testimony is useful to establish any fact of consequence significant in the context of the litigation, the witness may be impeached." When the primary purpose is to impeach the witness, then it is not allowed by the law. See Libby 475 F. Supp. 2d at 83, citing United States v. Johnson, 802 F.2d 1459, 1466 (C.A.D.C. 1986).

G. Entrapment

The government expects that one or more defendants in this case may attempt to assert a defense (or make arguments) that they were entrapped by government authorities. The Court has considered this issue and concluded that defendants may not to "refer to or discuss the concept of 'entrapment' in opening statements." (Dkt No. 357.) The Court ruled that defendants may, however, introduce evidence that could support an instruction on entrapment, so that the Court can consider "whether an instruction on the entrapment defense is appropriate and supported by the law and the evidence." Id.

Moreover, the Court ruled that evidence regarding "derivative entrapment" as to KABIR is inadmissible because "[t]he derivative entrapment defense is not available to either of the Defendants." Id. The Court's order correctly noted that the Ninth Circuit does not recognize "derivative entrapment" as a defense. See United States v. Emmert, 829 F.2d 805, 808 (9th Cir. 1987) (citations omitted) ("The entrapment defense is only available to defendants who were directly induced by government agents."). Accordingly,

KABIR may not introduce evidence or make arguments that would support a theory based on derivative entrapment.

The elements of an entrapment are: (1) the government induced defendant to commit the crime; and (2) defendant was not predisposed to commit the crime. See United States v. Si, 343 F.3d 1116, 1125 (9th Cir. 2003); United States v. Gurolla, 333 F.3d 951, 951-52 (9th Cir. 2003). Before presenting the issue of entrapment to the jury, however, a defendant must present some evidence of both inducement and lack of predisposition. In this case, however, the government expects that neither defendant will be able to introduce evidence that the government pressured him to commit the alleged offenses or that he was at all reluctant to engage in the charged crimes. Rather, the proof at trial will show that both defendants voluntarily entered the charged conspiracies, and that they did so without any reluctance. See United States v. Williams, 547 F.3d 1187, 1198-99 (9th Cir. 2008) (noting that "ready and willing" participation in a crime "counts heavily against" an entrapment defense).

As to inducement, "[m]ere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement." United States v. Manarite, 44 F.3d 1407, 1418 (9th Cir. 1995) (internal quotation marks omitted); United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 n.10 (9th Cir. 1977) ("[M]ere solicitation is not enough to show entrapment."); United States v. Marcello, 731 F.2d 1354, 1357 (9th Cir. 1984) ("It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." (quoting Sorrells v. United

States, 287 U.S. 435, 441 (1932)). As noted by the court in Reynoso-Ulloa, "[t]he defense of entrapment, while protecting the innocent from the government creation of a crime, is unavailable to a defendant who, motivated by greed and unconcerned about breaking the law, readily accepts a propitious opportunity to commit an offense." 548 F.2d at 1338. Here, there is no indication, either in the government's evidence or in the defendants' proffers, that defendants experienced "repeated and persistent solicitation" to commit the alleged offense. See United States v. Simas, 937 F.2d 459, 462 (9th Cir. 1991).

As to predisposition, courts assess five factors when determining whether a defendant was an otherwise innocent individual in whom the government implanted a criminal design: (1) the character and reputation of the defendant, including any prior criminal record ; (2) whether the suggestion of criminal activity was initially made by the government; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense, overcome only by repeated government inducement or persuasion; and (5) the nature of any inducement by the government. United States v. Marbella, 73 F.3d 1508, 1512 (9th Cir. 1996). Although none of the listed factors is controlling alone, the most important factor "is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated government inducement." Id.

Here, critically, as the Court observed in its June 11, 2014 order, the evidence indicates that both defendants conspired to commit violent jihad long before their initial contact with the CHS. Accordingly, the government expects that there will be

insufficient evidence to entitle defendants to have the issue of entrapment presented to the jury. United States v. Spentz, 653 F.3d 815 (9th Cir. 2011) ("[A] defendant is not entitled to have the issue of entrapment submitted to the jury in the absence of evidence showing some inducement by a government agent and a lack of predisposition by the defendant." (internal quotation marks omitted)).

H. Evidence Relating to the Circumstances of KABIR's Capture

On March 20, 2014, this Court issued an order denying KABIR's motion for disclosure of the identities of the military personnel who conducted his interrogations. (Dkt No. 251.) In its order, the Court noted that KABIR may not introduce his out-of-court hearsay statements, memorialized in the Tactical Interrogation Reports, in his cross-examination of the government's witnesses because doing so would violate Fed. R. Evid. 801 and 804, citing United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (affirming exclusion of inadmissible hearsay from questions during cross-examination).[5] (Dkt No. 251.)

In a separate order, issued on May 5, 2014, this Court also denied KABIR's request for an order requiring the government to serve subpoenas on his interrogators and on the agents who arrested him in Afghanistan. (Dkt. No. 279.) The Court concluded in that order that the testimony KABIR sought to elicit—his post-capture statements to interrogators—would not constitute "prior consistent statements" under Fed. R. Evid. 801(d)(1)(B) because KABIR's

[5] In the same Order, the Court also denied KABIR's motion for disclosure of "all electronic and telephonic transmission information in the possession of the NSA, the DEA, the FBI, and the ICE to which Defendant was a party." (CR 251.)

statements to these witnesses occurred after he had developed a motivation to fabricate. Id.

Accordingly, as the Court has concluded in its Orders, Kabir's post-capture statements constitute inadmissible hearsay and may not be introduced at trial. See United States v. Gonzalez, 533 F.3d 1057, 1061 (9th Cir. 2008). This Court also reiterated its previous ruling that "evidence regarding any injuries Defendant [KABIR] allegedly suffered at the time of his capture by U.S. military personnel or his arrest by the FBI agents is not admissible during the trial of this case, as it has no relevance to the issues to be tried." (Dkt. No. 279.) This Court further ruled that if KABIR testified or offered evidence of any neurological or medical deficit, that testimony or evidence "cannot (and need not) refer to the cause of any deficits." Id. In addition to barring the testimony on relevance grounds, this Court also found that evidence that KABIR suffered injuries at the hands of military personnel or FBI agents, would be barred under Fed. R. Evid. 403 because "the danger of confusion to the jury, waste of time, and undue prejudice substantially outweighs [the] tenuous probative value [of such testimony] to any issue in this case." Id.

I. Irrelevant Evidence

A defendant's right to present evidence in support of his defense is not without limits. See Greene v. Lambert, 288 F.3d 1081, 1090 (9th Cir. 2002). "[W]ell-established rules of evidence permit trial judges to exclude evidence" that is irrelevant, lacking in foundation, or when "its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." See Holmes v. South Carolina, 547

U.S. 319, 326 (2006). Rule 401 defines "relevant evidence" as evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Rule 402 provides that only relevant evidence is admissible at trial. See Fed. R. Evid. 402.

Moreover, even evidence that is deemed relevant may not be admissible where "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Prejudice does not mean detriment to a party's case, but rather, undue tendency to suggest a decision on an improper basis, or to influence the outcome of the trial by improper means. See United States v. Anderson, 741 F.3d 938, 950 (9th Cir. 2013). In determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, the court must determine, even if the evidence is taken as true, whether the value of that evidence outweighs the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. See United States v. Evans, 728 F.3d 953, 964 (9th Cir. 2013).

Where evidence has marginal probative value, even a modest risk of undue delay or confusion will justify excluding the evidence under Rule 403. See United States v. Espinoza-Baza, 647 F.3d 1182, 1190 (9th Cir. 2011). Evidence that does not go to the element of the offense has low probative value. See United States v. Gonzalez-Flores, 418 F.3d 1093, 1098 (9th Cir. 2005).

1. Specific Information Concerning Recording Devices

Defendants should not be permitted at trial to inquire of witnesses regarding the specific details of the recording and electronic surveillance devices that were used during the investigation of this case. While the government does not object to general questions regarding the type of recording captured (e.g, video versus audio), the Court should preclude inquiry about the devices themselves, as well as the locations where the devices were concealed. That information is irrelevant to any issues at trial and its disclosure would seriously impair the ability of law enforcement to conduct future investigations.

Indeed, there is no credible theory in which the defense could legitimately claim that information regarding the recording and electronic surveillance devices, or the locations in which they were concealed, is relevant to any issue in this case. As noted, the government does not object to limited questions about the type of recording as may be necessary for foundation or context. However, specific inquiry about the devices utilized or the locations where they were hidden has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." See Fed. R. Evid. 401. To the extent defendants may challenge the content of the recordings, that has nothing to do with the devices or the locations where they were hidden.

Moreover, several courts have extended the Supreme Court's "informer's privilege," as set forth in United States v. Roviaro, 353 U.S. 53, 59 (1957), to cover investigative techniques, including traditional and electronic surveillance. Specifically, courts have

extended the law enforcement privilege to the following: (1) the location of a surveillance post from which police observed a drug transaction, United States v. Harley, 682 F.2d 1018, 1020 (D.C. Cir. 1982); United States v. Green, 670 F.2d 1148, 1155 (D.C. Cir. 1981); (2) the type and location of the microphone used to record conversations later admitted as evidence in a criminal case, United States v. Van Horn, 789 F.2d 1492, 1507-08 (11th Cir. 1986); (3) the location of microphones used to record conversations later admitted as evidence in a criminal case, United States v. Cintolo, 818 F.2d 980, 1001-03 (1st Cir. 1987); (4) information relating to a global positioning system ("GPS") device attached to a defendant's car during a criminal investigation, United States v. Rose, 2012 WL 1720307, at *1-4 (D.Mass May 16, 2012); and (5) technology used to locate an aircard connected to the defendant's laptop computer that was used to locate and arrest the defendant, United States v. Rigmaiden, 844 F. Supp. 2d 982 (D.Ariz. 2012).

In addition, the mere fact that the device may be known to the public does not mitigate any concern regarding disclosure of details about the device. As the court noted in Barnard v. United States Dep't of Homeland Security, 598 F. Supp. 2d 1, 23 (D.D.C 2009), "there is no principle . . . that requires an agency to release all details of a technique simply because some aspects are known to the public." Similarly, in Rigmaiden, the district court rejected the defendant's argument that the law enforcement privilege is inapplicable "because modern surveillance technology is widely understood." 844 F. Supp. 2d at 995. There, the Court stated, "Even if some of the technology were publicly available, the precise technology used by the FBI in this case and the precise manner in

which it was used, if disclosed, would educate the public and adversaries of law enforcement on how precisely to defeat FBI surveillance efforts." Id.

Thus, as several courts have recognized, disclosure of information regarding law enforcement's devices and the locations of those devices raises a real possibility of revealing sensitive information that could cause harm to the national security interests of the United States, including ongoing investigations that utilize the same recording or electronic surveillance devices. Given that information of the devices or the locations where they were concealed has no relevance to this case, the Court should find that the law enforcement privilege and preclude the introduction of such evidence at trial.

2. Unrelated Investigations

The investigation of this case utilized several FBI agents and a CHS. As expected, at least some of these individuals were involved in unrelated investigations into criminal activity. At trial, defendants may attempt to introduce evidence or inquire into the substance of those unrelated investigations.

Introduction of such evidence at trial should not be permitted because a factual inquiry about unrelated cases is not relevant to this case and would not be appropriate. Indeed, the circumstances involving those unrelated investigations have no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." See Fed. R. Evid. 401.

Moreover, to the extent defendants may attempt to argue that the unrelated investigations are relevant to this case, the Court

should preclude introduction of that evidence based on the law enforcement privilege. Importantly, discussion of the unrelated cases, some of which may be ongoing, could potentially jeopardize and harm the investigations by disclosing details of law enforcement's efforts to investigate the criminal activity.

3. References to Defendants as "Kids"

At trial, defendants may attempt to introduce evidence or argument that they were "young kids," or place before the jury improper and irrelevant evidence about defendants' ages. Any attempt to refer to defendants as "young" or "kids" would be improper. Indeed, all of the defendants were over the age of 21 when they committed the underlying conduct that formed the basis for the charges. Defendants' ages are not relevant to any element of the charges or any defense to the charges. Thus, the Court should preclude reference or argument to any such evidence. See United States v. Gallagher, 99 F.3d 329, 333 (9th Cir. 1996) (district court's preclusion of evidence proffered by defendant not erroneous or abuse of discretion where evidence was irrelevant to charges); see also United States v. Fernandez, 497 F.2d 730, 736 (9th Cir. 1974).

Moreover, even if the Court were to conclude that references to defendants' ages would somehow be relevant to the issues for trial, the Court should nonetheless exclude that evidence under Federal Rule of Evidence 403. As discussed above, evidence concerning the ages of defendants have no probative value to any fact material to this case. Indeed, if defendants are allowed to present such evidence, there is a high risk that the jury will decide this case based on emotion rather than on defendants' guilt or innocence.

Furthermore, permitting defendants to introduce such evidence would also run the risk that the jury would be distracted from the central issue, that is, whether defendants are guilty of the charges in this case. The evidence should therefore be excluded to avoid such confusion of the issues.

Finally, defendant may not introduce otherwise irrelevant evidence at trial in the hopes of encouraging jury nullification. See United States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997) ("Jury nullification . . . is to be viewed as an 'aberration under our system.'"); see also United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("A trial judge . . . may block defense attorneys' attempts to serenade a jury with the siren song of nullification"); United States v. Trujillo, 714 F.2d 102, 106 (11th Cir. 1983) ("[N]either the court nor counsel should encourage jurors to violate their oath [to follow the law]. We therefore join with those courts which hold that defense counsel may not argue jury nullification during closing argument.").

4. Punishment

It has long been the law that it is inappropriate for a jury to consider or be informed of the consequences of their verdict. See Rogers v. United States, 422 U.S. 35, 40 (1975). In United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991), the Ninth Circuit stated:

> To inform the jury that the court may impose minimum or maximum sentence, will or will not grant probation, when a defendant will be eligible for parole, or other matters relating to disposition of the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.

quoting Pope v. United States, 298 F.2d 507, 508 (1962). The Ninth Circuit Model Jury instructions specifically instructs juries that "the punishment provided by law for this crime is for the court to decide. You may not consider punishment . . . ." See Ninth Circuit Model Criminal Jury Instructions, No. 7.4 (2010 ed.). The possible punishments for the offenses charged in this matter are irrelevant to the jury's role as fact finder, and any reference to punishment should be precluded. "The jury should base its verdict on the facts presented at trial, rather than on speculation about the effect of a given verdict on the defendant and on society." Frank, 956 F.2d at 883.

J. Character Witnesses

Pursuant to Federal Rule of Evidence 405, defendants may call witnesses to testify regarding their reputation by testimony in the form of an opinion from a witness. See Fed. R. Evid. 405. Under Rule 405, however, should defendants call witnesses to testify regarding their good character, the Court may allow the government to conduct "an inquiry into relevant specific instances of the person's conduct." Id. Accordingly, should defendants call character witnesses to testify at trial, the government intends to question defendants' witnesses concerning specific instances of defendants' conduct, including their conduct in this case.

K. Reciprocal Discovery

To the extent that there exists reciprocal discovery to which the government is entitled under Fed. R. Crim. P. 12.1, 12.2, 16(b), or 26.2 that defendants have not produced, the government reserves the right to seek to have such materials excluded at trial. See

United States v. Young, 248 F.3d 260, 269-70 (4th Cir. 2001) (upholding exclusion under Rule 16 of audiotape evidence defendant did not produce in pretrial discovery where defendant sought to introduce audiotape on cross-examination of government witness not for impeachment purposes, but as substantive "evidence in chief" that someone else committed the crime).

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