UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:17-cr-18-Orl-40KRS

NOOR ZAHI SALMAN

JOINT PROPOSED JURY INSTRUCTIONS

The United States of America, by Maria Chapa Lopez, United States Attorney for the Middle District of Florida, through the undersigned attorneys, and the defendant, through her undersigned attorneys, file the following joint jury instructions, as well as the parties' positions on certain jury instructions, specifically the preliminary instructions, proposed instructions 4, 7, 10, and 11, defense proposed instruction 1, and defense proposed limiting instructions 1, 2, and 3. The parties respectfully reserve the

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right to propose any additional instructions at the conclusion of the case that may be warranted based on the evidence.

Respectfully submitted,

For the government:

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

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Charles D. Swift, Esquire (counsel for Defendant)

Linda Moreno, Esquire (counsel for Defendant)

Fritz Scheller, Esquire (counsel for Defendant)

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NOOR ZAHI SALMAN

PRELIMINARY INSTRUCTIONS

Members of the Jury:

Now that you have been sworn, I need to explain some basic principles about a criminal trial and your duty as jurors. These are preliminary instructions. At the end of the trial I will give you more detailed instructions.

Duty of jury:

It will be your duty to decide what happened so you can determine whether the Defendant is guilty or not guilty of the crime charged in the indictment. At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you even if you do not agree with the law.

What is evidence:

You must decide the case solely on the evidence presented here in the courtroom. Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion. Some evidence proves a fact indirectly, such as a witness who saw wet grass outside and people walking into the courthouse carrying wet umbrellas. Indirect evidence, sometimes called circumstantial evidence, is simply a chain of circumstances that proves a fact. As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind and should give every piece of evidence whatever weight you think it deserves.

What is not evidence:

Certain things are not evidence and must not be considered. I will list them for you now:

- Statements and arguments of the lawyers. In their opening statements and closing arguments, the lawyers will discuss the case, but their remarks are not evidence;

- Questions and objections of the lawyers. The lawyers' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because a lawyer's question suggests that it is. For instance, if a lawyer asks a witness, " you saw the Defendant hit his sister, didn't you?" – that question is no evidence whatsoever of what the witness saw or what the Defendant did, unless the witness agrees with it.

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, then the question may be answered or the exhibit received. If I sustain the objection, then the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and not try to guess what the answer would have been.

Sometimes I may order that evidence be stricken and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider that evidence.

Some evidence is admitted only for a limited purpose. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and no other.

Credibility of witnesses:

In reaching your verdict, you may have to decide what testimony to believe and what testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- The opportunity and ability of the witness to see or hear or know the things testified to;

- The witness's memory;
- The witness's manner while testifying;
- The witness's interest in the outcome of the case and any bias or prejudice;
- Whether other evidence contradicted the witness's testimony;
- The reasonableness of the witness's testimony in light of all the evidence; and
- Any other factors that bear on believability.

I will give you additional guidelines for determining credibility of witnesses at the end of the case.

Rules for criminal cases:

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the Defendant is presumed innocent until proven guilty. The indictment against the Defendant brought by the government is only an accusation, nothing more. It is not proof of guilt or anything else. The Defendant therefore starts out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. The Defendant has no burden to prove her innocence or to present any evidence, or to testify. Since the Defendant has the right to remain silent and may choose whether to testify, you cannot legally put any weight on a defendant's choice not to testify. It is not evidence.

DEFENDANT'S REQUESTED INSTRUCTION INSTEAD OF THE PREVIOUS PARAGRAPH:

Second, the burden of proof is on the government ***for the entire*** case. The Defendant has no burden to prove her innocence or to present any evidence, or to testify. Since the Defendant has the right to remain silent and may choose whether to testify, you cannot legally put any weight on a defendant's choice not to testify. It is not evidence.

DEFENDANT'S ANNOTATIONS AND COMMENTS

A jury could wrongly interpret the first sentence of this paragraph as implying that, at the very end of the case, the burden is no longer with the government. Defendant proposes this amendment to eliminate any possible confusion.

The government objects to this modification of the Eleventh Circuit Pattern Jury Instructions as unwarranted.

Third, the government must prove the Defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that the level of proof required is high.

Conduct of the jury:

Our law requires jurors to follow certain instructions regarding their personal conduct in order to help assure a just and fair trial. I will now give you those instructions:

1. Do not talk, either among yourselves or with anyone else, about anything related to the case. You may tell the people with whom you live and your employer that you are a juror and give them information about when you will be required to be in court, but you may not discuss with them or anyone else anything related to the case.

2. Do not, at any time during the trial, request, accept, agree to accept, or discuss with any person, any type of payment or benefit in return for supplying any information about the trial.

3. You must promptly tell me about any incident you know of involving an attempt by any person to improperly influence you or any member of the jury.

4. Do not visit or view the premises or place where the charged crime was allegedly committed, or any other premises or place involved in the case. And you must not use Internet maps or Google Earth or any other program or device to search for a view of any location discussed in the testimony.

5. Do not read, watch, or listen to any accounts or discussions related to the case which may be reported by newspapers, television, radio, the Internet, or any other news media.

6. Do not attempt to research any fact, issue, or law related to this case, whether by discussions with others, by library or Internet research, or by any other means or source.

DEFENDANT'S REQUESTED ADDITIONAL INSTRUCTION:

7. Because of the publicity this case has received, there is the potential that people will approach you to speak about the case. You should not speak to them. If anyone attempts to speak with you about the case, please report that to me.

The government has no objection to this addition.

In this age of instant electronic communication and research, I want to emphasize that in addition to not talking face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, Internet chat, chat rooms, blogs, or social-networking websites such as Facebook, My Space, or Twitter.

You must not provide any information about the case to anyone by any means whatsoever, and that includes posting information about the case, or what you are doing in the case, on any device or Internet site, including blogs, chat rooms, social websites, or any other means.

You also must not use Google or otherwise search for any information about the case, or the law that applies to the case, or the people involved in the case, including the Defendant, the witnesses, the lawyers, or the judge. It is

important that you understand why these rules exist and why they are so important:

Our law does not permit jurors to talk with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict. Only you have been found to be fair and only you have promised to be fair – no one else is so qualified.

Our law also does not permit jurors to talk among themselves about the case until the court tells them to begin deliberations, because premature discussions can lead to a premature final decision.

Our law also does not permit you to visit a place discussed in the testimony. First, you can't be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that neither party may have a chance to correct. That is not fair.

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. Also, the law often uses

words and phrases in special ways, so it's important that any definitions you hear come only from me, and not from any other source. It wouldn't be fair to the parties for you to base your decision on some reporter's view or opinion, or upon other information you acquire outside the courtroom.

These rules are designed to help guarantee a fair trial, and our law accordingly sets forth serious consequences if the rules are not followed. I trust that you understand and appreciate the importance of following these rules, and in accord with your oath and promise, I know you will do so.

Taking notes:

Moving on now, if you wish, you may take notes to help you remember what witnesses said. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you so that you do not hear other answers by witnesses. When you leave the courtroom, your notes should be left in the jury room. Whether or not you take notes, you should rely on your own memory of what was said. Notes are to assist your memory only. They are not entitled to any greater weight than your memory or impression about the testimony.

Course of the trial:

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it

comes in. Next, the Defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor argument.

The government will then present its witnesses, and counsel for the Defendant may cross-examine them. Following the government's case, the Defendant may, if she wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and I will instruct you on the law. After that, you will go to the jury room to decide your verdict.

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MIDDLE DISTRICT OF FLORIDA
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v. CASE NO. 6:17-cr-18-Orl-40KRS

NOOR ZAHI SALMAN

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

PROPOSED JURY INSTRUCTION NO. 1
B2.2
The Duty to Follow Instructions and the Presumption Of Innocence When a Defendant Does Not Testify

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against a Defendant isn't evidence of guilt. The law presumes every Defendant is innocent. The Defendant does not have to prove her innocence or produce any evidence at all. A Defendant does not have to testify, and if the Defendant chose not to testify, you cannot consider that in any way while making your decision. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

PROPOSED JURY INSTRUCTION NO. 2
B3
Definition of "Reasonable Doubt"

The Government's burden of proof is heavy, but it doesn't have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

PROPOSED JURY INSTRUCTION NO. 3
B4
Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

PROPOSED JURY INSTRUCTION NO. 4
B5
Credibility of Witnesses

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

DEFENDANT'S REQUESTED ADDITION TO THIS INSTRUCTION:

In evaluating a witness's memory, I note the following considerations. Memory is not an exact recording of past events and witnesses may misremember events and conversations. Scientific research has established:

- that human memory is not at all like video recordings that a witness can simply replay to remember precisely what happened;
- that when a witness has been exposed to statements, conversations, questions, writings, documents, photographs, media reports, and opinions of others, the accuracy of their memory may be affected and distorted;
- that a witness's memory, even if testified to in good faith, and with a high degree of confidence, may be inaccurate, unreliable, and falsely remembered; thus, human memory can be distorted, contaminated, or changed, and events and conversations can even be falsely imagined;
- that distortion, contamination, and falsely imagined memories may happen at each of the three stages of memory: acquisition (perception of events); storage (period of time between 30 acquisition and retrieval); and retrieval (recalling stored information).

DEFENDANT'S ANNOTATIONS AND COMMENTS

This instruction has been adapted from the preliminary jury instructions issued by the Honorable Judge Mark W. Bennett of the Northern District of Iowa. *See United States v. Lawrence*, No. 15-69-MWB at *29 (N.D. Iowa Oct. 26, 2015) (instructions to the jury).

The government objects to this modification of the Eleventh Circuit Pattern Jury Instructions as unwarranted, argumentative, and without legal basis.

PROPOSED JURY INSTRUCTION NO. 5
B6.1
Impeachment of Witnesses Because of Inconsistent Statements

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

PROPOSED JURY INSTRUCTION NO. 6
B7
Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

PROPOSED JURY INSTRUCTION NO. 7
S2.1 (*Modified*)
Confession or Statement of a Single Defendant

If the Government offers evidence that a Defendant made a statement or admission to ***a law enforcement officer*** ~~someone after being arrested or detained~~, you must consider that evidence with caution and great care.

You must decide for yourself (1) whether the Defendant made the statement, and (2) if so, how much weight to give to it. To make these decisions, you must consider all the evidence about the statement – including the circumstances under which it was made.

ANNOTATIONS AND COMMENTS
See United States v. Clemons, 32 F.3d 1504, 1510 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1801, 131 L. Ed. 2d 728 (1995).

The government's recommended modifications are in strike through and bold italics. The recommended modifications are based on the facts in this case and are consistent with the instruction given in Clemons.

DEFENDANT'S REQUESTED ADDITIONAL INSTRUCTION:

In determining whether any such statement is reliable and credible, consider factors bearing on the voluntariness of the statement. For example, consider the age, gender, training, education, occupation, and physical and mental condition of the defendant, and any evidence concerning his treatment while under interrogation if the statement was made in response to questioning by government officials, and all the other circumstances in evidence surrounding the making of the statement.

After considering all this evidence, you may give such weight to the statement as you feel it deserves under all the circumstances. If you determine that the statement is unreliable or not credible, you may disregard the statement entirely.

DEFENDANT'S ANNOTATIONS AND COMMENTS

10th Cir. Pattern Jury Instructions (Criminal 2011 ed.), Instruction 1.25. Defendant contends that her statements at issue in this case were involuntary. The jury must independently consider evidence of voluntariness. *Lego v. Twomey*, 404 U.S. 477, 486 (1972). Defendant submits that the instruction above more adequately instructs the jury in this case.

The government objects to this modification of the Eleventh Circuit Pattern Jury Instructions as unwarranted. The Eleventh Circuit Pattern Jury Instruction already instructs the jury to consider all the circumstances under which a statement was made. Further emphasis of any particular factors would unfairly suggest to the jury that some factors are entitled to more weight than others, when in fact, the jury must decide how to evaluate the circumstances.

PROPOSED JURY INSTRUCTION NO. 8
S5
Note-taking

You've been permitted to take notes during the trial. Most of you – perhaps all of you – have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

PROPOSED JURY INSTRUCTION NO. 9
B8
Introduction to Offense Instructions

The indictment charges two separate crimes, called "counts," against the Defendant. Each count has a number. You'll be given a copy of the indictment to refer to during your deliberations.

Count One of the indictment charges that the Defendant aided and abetted the attempted provision and provision of material support to a foreign terrorist organization.

Count Two of the indictment charges that the Defendant obstructed justice.

PROPOSED JURY INSTRUCTION NO. 10
O91.2 (*Modified*)
Providing Material Support or Resources
to Designated Foreign Terrorist Organization
18 U.S.C. § 2339B

S11 (*Modified*)
Attempt(s)

S7 (*Modified*)
Aiding and Abetting; Agency
(Count One)

It's a Federal crime for anyone to knowingly ***aid and abet the provision or attempted provision of*** ~~provide~~ material support or resources to a foreign terrorist organization, knowing that the organization is a designated terrorist organization or has engaged or engages in terrorist activity or has engaged or engages in terrorism.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) Omar Mateen knowingly provided, or attempted to provide, material support or resources to the Islamic State of Iraq and the Levant;

(2) the Defendant knowingly aided and abetted Omar Mateen in providing, or attempting to provide, material support or resources to the Islamic State of Iraq and the Levant;

(3) the Defendant did so knowing that the Islamic State of Iraq and the Levant was a designated terrorist organization OR engaged or engages in terrorist activity OR engaged or engages in terrorism; and

(4) One of the jurisdictional requirements are met.

(5) If you find the Defendant guilty of Count One, you must then determine whether the Government has proven beyond a reasonable doubt that death resulted from the provision or attempted provision of material support.

ANNOTATIONS AND COMMENTS (for O91.2)

18 U.S.C. § 2339B provides:

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, and, if the death of any person results, shall be imprisoned for any term of years or for life. 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 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).

Maximum sentence: Fifteen (15) years and applicable fine. If death results, this offense may be punished by life in prison. Of course, an instruction on this additional element should be given if necessary.

"Terrorism" is defined in 22 U.S.C. § 2656f(d)(2).

An additional instruction will be necessary if the material support or resources is the provision of personnel: the provision of personnel is unlawful if the personnel are provided "to work under [the] terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of [the] organization." 18 U.S.C. § 2339B(h).

The bracketed terms in the definition of "material support or resources" (training and expert advice or assistance) have been found impermissibly vague by the Ninth Circuit. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1134-36 (9th Cir. 2007). In addition, the term "service" was found to be

impermissibly vague because it encompasses training and expert advice or assistance. *Id*. at 1136.

The mens rea requirement is met if the government proves that the donor defendant knew that the organization was a designated terrorist organization, that the organization engaged in terrorist activity, or that the organization engaged in terrorism. *Id*. at 1130.

The government's recommended modifications are in strike through and bold italics. The recommended modifications are based on the facts in this case and are consistent with the statute and case law cited in the 11th Circuit Pattern Jury Instructions Annotations and Comments.

ANNOTATIONS AND COMMENTS (for S11)

Instruction taken from *United States v. McDowell*, 250 F.3d 1354, 1365 (11th Cir. 2001).

First Element – Provision or Attempted Provision of Material Support or Resources

The government has alleged that Omar Mateen provided or attempted to provide "material support or resources," that is, personnel and services, to the Islamic State of Iraq and the Levant.

You can find that Omar Mateen *attempted* to provide material support or resources to the Islamic State if the government proves the following elements:

(1) Omar Mateen knowingly intended to commit the crime of providing material support or resources to the Islamic State of Iraq and the Levant; and

(2) Omar Mateen's intent was strongly corroborated by his taking a substantial step toward committing the crime.

A "substantial step" is an important action leading up to committing of an offense – not just an inconsequential act. It must be more than simply preparing. It must be an act that would normally result in committing the offense.

The term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or

include oneself), and transportation. Medicine or religious materials are not included.

The term "personnel" means one or more persons, which can include Omar Mateen himself. The provision of personnel is unlawful if the personnel are provided to work under the terrorist organization's direction or control. ***The attempted provision of personnel is unlawful if the person intended and attempted to provide personnel to work under the terrorist organization's direction or control. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives are not considered to be working under the terrorist organization's direction and control.***

The government's recommended additions are in bold italics. The recommended modifications are based on the statute and on United States v. Farhane, 634 F.3d 127, 152 (2d Cir. 2011) ("When a person supplies himself as the bomber or pilot or doctor sought by the terrorist organization, he provides – or certainly attempts to provide – material support in the form of personnel ***as soon as he pledges to work under the direction of the organization****.") (emphasis added).*

DEFENDANT'S REQUESTED INSTRUCTION INSTEAD OF THE PREVIOUS PARAGRAPH:

The term "services" means work commanded or paid for by another. The term "personnel" means furnishing one or more persons, which can include Omar Mateen himself. The provision of personnel or services is unlawful if the personnel or services are provided under the terrorist organization's direction or control. If you find that Omar Mateen acted entirely independently to advance the Islamic State of Iraq and the Levant's goals in conducting his attack on the Pulse nightclub, you must find the Defendant not guilty of aiding and abetting his attack.

Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives are not considered to be working under the terrorist organization's direction and control.

DEFENDANT'S ANNOTATIONS AND COMMENTS

The Defense requests amending this paragraph to clarify the definition of services and that the direction and control requirement also applies to "service." *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 23 (2010).

The government objects to the defendant's requested paragraph as unwarranted, argumentative, and without legal basis.

Government's Requested Instruction: Second Element – Aiding and Abetting

It's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime. ***A Defendant can aid and abet another through words or actions, and a Defendant's participation need be only slight to aid and abet another person in committing a crime.***

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

ANNOTATIONS AND COMMENTS (for S7)

18 U.S.C. § 2 provides:

(a) whoever commits an offense against the United States or, aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

See United States v. Broadwell, 870 F.2d 594, 607 (11th Cir. 1989), *cert. denied*, 493 U.S. 840, 110 S. Ct. 125, 107 L. Ed. 2d 85 (1989). *See also United States v. Walker*, 621 F.2d 163 (5th Cir. 1980), *cert. denied*, 450 U.S. 1000, 101 S. Ct. 1707, 68 L. Ed. 2d 202 (1981).

The government's recommended modification is in bold italics. "In proscribing aiding and abetting, Congress used language that 'comprehends all assistance rendered by words, acts, encouragement, support, or presence,' —even if that aid relates to only one (or some) of a crime's phases or elements." Rosemond v. United States, 134 S. Ct. 1240, 1246-47 (2014) (quoting Reves v. Ernst & Young, 507 U.S. 170, 178 (1993)).For these reasons, "[o]ne need not participate in an important aspect of a crime to be liable as an aider and abettor; participation of 'relatively slight moment' is sufficient." United States v. Bowen, 527 F.3d 1065, 1078 (10th Cir. 2008). "Even mere 'words or gestures of encouragement' constitute affirmative acts capable of rendering one liable under this theory." Id.; see also United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010) ("One can aid and abet another through use of words or actions to promote the success of the illegal venture."); United States v. Ibarra-Diaz, 805 F.3d 908, 933 (10th Cir. 2015) (quoting United States v. Rufia, 732 F.3d 1175, 1190 (10th Cir. 2013)); see also United States v. Bowen, 527 F.3d 1065, 1078 (10th Cir. 2008); United States v. Samuels, 521 F.3d 804, 811 (7th Cir. 2008) (quoting United States v. Folks, 236 F.3d 384, 389 (7th Cir. 2001)).

The Defense objects to use of the word "slight" in the government's proposed modification. The word "slight" also does not appear in the Eleventh Circuit's model jury instructions. The Government relies on a Tenth Circuit decision that the Eleventh Circuit has neither cited nor adopted. In contrast, the Eleventh Circuit Court of Appeals has limited the use the word "slight" to conspiracies, but, in the subsequent paragraph of the same opinion, did not characterize participation in aiding and abetting as

"slight." See United States v. Conner, 153 F. App'x 600, 602 (11th Cir. 2005). As such, the Government's characterization is more appropriate in a Rule 29 motion than as a revision to the pattern instruction.

Defendant's Requested Instruction: Second Element – Aiding and Abetting

It's possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime and commits an act which contributes to and furthers the offense. ***A Defendant can aid and abet another through words or actions.***

DEFENDANT'S ANNOTATIONS AND COMMENTS

The defendant's recommended modification is in bold italics. Aiding and abetting requires that the Defendant contribute to and further the offense. *See United States v. Williams*, 865 F.3d 1328, 1347 (11th Cir. 2017) (quoting *United States v. Camacho*, 233 F.3d 1308, 1317 (11th Cir. 2000)).

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with

or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

DEFENDANT'S REQUESTED ADDITIONAL INSTRUCTION:

To find that Defendant intended to aid and abet Omar Mateen, you must find that Defendant specifically intended to aid and abet Omar Mateen's material support of ISIL. You must also find that Defendant had advance knowledge of the circumstances that constituting Omar Mateen's material support of ISIL, including that Omar Mateen provided or attempted to provide service or personnel to ISIL, and that death would likely result. If you do not find that Defendant had advance knowledge of the circumstances constituting Omar Mateen's material support of ISIL, you must find Defendant not guilty.

DEFENDANT'S ANNOTATIONS AND COMMENTS

See United States v. Williams, 865 F.3d 1328, 1347 (11th Cir. 2017); *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014).

The government objects to the defendant's requested paragraph as unwarranted, and without legal basis. "A culpable aider and abettor need not perform the substantive offense, need not fully know of its details, and need not even be present." United States v. Pepe, 747 F.2d 632, 665 (11th Cir. 1985). As to the defendant's contention that she needed to know that death would likely result for her to be found guilty of Count One, that statement is flatly incorrect as death is an Apprendi factor to be found by the jury upon finding her guilty, not a stand-alone element of the offense. Further, the language

used by the defendant to describe to the jury the intent required to aid and abet another's crime is not superior to that used in the Eleventh Circuit Pattern Jury Instructions.

Third Element – Knowledge of Foreign Terrorist Organization

The term "designated terrorist organization" means an organization designated by the Secretary of State as a foreign terrorist organization, as provided in 8 U.S.C. § 1189. ***The Islamic State of Iraq and the Levant is a designated terrorist organization.***

The term "engage in terrorist activity" means, among other things, to commit terrorist activity, which includes (1) seizing and threatening to kill or injure any individual to compel a governmental organization or someone else to do or abstain from doing any act; or (2) using or threatening to use an explosive, firearm, or other weapon or dangerous device with the intent to endanger, directly or indirectly, the safety or one or more individuals. The activity must be unlawful under the laws of the place where it is committed (or if it had been committed in the United States, would be unlawful under the laws of the United States or any State).

The term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.

The government's recommended additions are in bold italics. The recommended modifications are based on the statute and the facts of this case.

Fourth Element – Jurisdiction

The government must prove beyond a reasonable doubt that at least one of the following jurisdictional requirements have been satisfied:

(1) The Defendant is a national of the United States;

(2) The offense occurred in whole or in part within the United States; or

(3) The Defendant aided and abetted any person who was a national of the United States.

The term "national of the United States" means a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

The government's recommended additions are in bold italics. The recommended modifications are based on the statute and the facts of this case.

Fifth Element – Death Resulted

If you find the Government has proved elements one through four beyond a reasonable doubt, then you have found the Defendant guilty of Count One. If you so find, you must then consider whether the Government has proven beyond a reasonable doubt that death resulted from the provision or attempted provision of material support.

The government's recommended additions are in bold italics. The recommended modifications are based on the statute and the facts of this case.

PROPOSED JURY INSTRUCTION NO. 11
Obstruction of Justice[1]
18 U.S.C. § 1512(b)(3)
(Count Two)

It's a federal crime for anyone to obstruct justice by engaging in misleading conduct to hinder the communication of information regarding the commission of a federal offense to federal law enforcement officers or judges.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly engaged in misleading conduct toward another person;

(2) the Defendant acted with the intent to hinder, delay or prevent the communication of information to a federal law enforcement officer or judge of the United States; and

(3) such information related to the commission or possible commission of a federal offense.

The term misleading conduct means any one of the following:

(1) knowingly making a false statement;

(2) intentionally omitting information from a statement and thereby causing a portion of such a statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; or

(3) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered or otherwise lacking in authenticity.

[1] There is no Eleventh Circuit Pattern Jury Instruction for this offense. The proposed jury instruction is a modification of the Seventh Circuit's Pattern Jury Instruction.

As to the Defendant's intent to hinder, delay, or prevent the communication of information to federal officials, the Government must show that the communication of the information to a federal official was reasonably likely. The Government does not need to prove the Defendant knew the offense was a federal offense.

ANNOTATIONS AND COMMENTS

From the annotations and comments to the Eleventh Circuit pattern jury instruction for 18 U.S.C. § 1512(b)(1), Instruction O59.2: [While there is no pattern instruction for 18 U.S.C. § 1512(b)(3), it is important to note that the Eleventh Circuit has reiterated its holding that, unlike section 1512(b)(2), section (b)(3) does not require that a federal investigation be initiated or that an official proceeding be ongoing. *United States v. Ronda*, 455 F.3d 1273, 1288 (11th Cir. 2006). Thus, *Arthur Andersen* is irrelevant to section 1512(b)(3).]

SEVENTH CIRCUIT COMMITTEE COMMENT

Section 1515 of Title 18 does not specify that omitted information needs to be "material." However, the district court may wish to include a materiality requirement, as materiality is included with regard to the other clauses in the definition of misleading conduct.

As to the final paragraph of the government's proposed instruction, the statute is clear that a defendant need not know that the federal government is investigating the offense. See 18 U.S.C. § 1512(g)(2) ("In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance . . . that the judge is a judge of the United States or that the law enforcement officer is an office or employee of the Federal Government . . . .") Instead, there must be a "reasonable likelihood" that at least one of the false communications by the defendant was made to, or would have been communicated to, a federal law enforcement officer, regardless of the defendant's intent with respect to that communication. Fowler v. United States, 563 U.S. 668, 677-78 (2011). In addition, the government need not prove that the defendant knew the offense or investigation was federal in nature. United States v. Veal, 153 F.3d 1233, 1252 (11th Cir. 1998) ("§ 1512(b)(3) does not require that a defendant know the federal nature of the crime about which he provides information because the statute criminalizes

the transfer of misleading information which actually relates to a potential federal offense."), abrogation on other grounds recognized United States v. Chafin, 808 F.3d 1263, 1274 (11th Cir. 2015).

DEFENDANT'S FIRST REQUESTED ADDITIONAL INSTRUCTION:

Defendant requests that this Court submit a unanimity instruction on the obstruction of justice charge to be drafted after the government presents evidence.

For example:

"In order for Defendant to be found guilty of Count 2, you must all agree that one or more of the following statements was misleading conduct intended to hinder, delay or prevent the communication of information to a federal law enforcement officer or judge of the United States," followed by a list of statements the government contends constituted obstruction.

DEFENDANT'S ANNOTATIONS AND COMMENTS

See United States v. Thomas, 612 F.3d 1107, 1130 (9th Cir 2010); *United States v. Ferrara*, 1984 U.S. App. LEXIS 14241, *3-4, 738 F.2d 440 (6th Cir. 1984).

The government objects to the defendant's requested paragraph as unwarranted, argumentative, and without legal basis. If a jury is confronted with divergent factual theories in support of the same ultimate issue, courts generally have held that the unanimity requirement is met as long as the jurors are in agreement on the ultimate issue (even though they may not be unanimous as to the precise theory)." United States v. Lee, 317 F.3d 26, 36 (1st Cir. 2003); see also United States v. Verbitskaya, 406 F.3d 1324, 1334 (11th Cir. 2005) (concluding "that the district court did not need to instruct the jury to unanimously agree on which theory supported the verdict"). The following is an example given by the Supreme Court to illustrate these principles:

> *Where, for example, an element of robbery is force or the threat of force, some jurors might concluded that the defendant used a knife to create the threat; others might conclude he used a gun. But that*

> *disagreement – a disagreement about means – would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.*

Richardson, 526 U.S. at 817.

DEFENDANT'S SECOND REQUESTED ADDITIONAL INSTRUCTION:

To establish venue for obstruction of justice, the government must prove by a preponderance of the evidence that Defendant intended to affect an official proceeding in the Middle District of Florida (whether or not pending or about to be instituted).

Unlike all the other elements that I have described, this is a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that Defendant intended to affect an official proceeding in the Middle District of Florida.

Remember that all the other elements I have described must be proved beyond a reasonable doubt.

As used here, an "official proceeding" means a proceeding before a Federal grand jury.

DEFENDANT'S ANNOTATIONS AND COMMENTS

In the Court's ruling on Defendant's motion to dismiss Count Two for lack of venue, the Court noted that the government would have to prove venue by a preponderance of the evidence. Doc. 65; *see also* 18 U.S.C. § 1512(i). The Court did not resolve the issue of whether an FBI investigation could be an official proceeding, but Defendant submits, based on the plain language of the statute and the weight of authority, that an FBI investigation is not an official proceeding. *See* 18 U.S.C. § 1515(a)(1)(A)-(D); *United States v. McDaniel*, No. 2:13-CR-0015-RWS-JCF, 2013 U.S. Dist. LEXIS 187658, at *35 (N.D. Ga. Oct. 1, 2013) (collecting cases).

The government objects to the defendant's requested paragraph because it has no legal basis. In the first instance, venue is proper in this district under both prongs of 18 U.S.C. § 1512(i), meaning that the government may prove either that this is "the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred" or both. Thus, the defendant's proposed instruction is incorrect. Further, an official proceeding also includes proceedings before federal judges and the FBI investigation into the Pulse Night Club shooting, not just proceedings before a federal grand jury. United States v. Gonzalez, 922 F.2d 1044 (2d Cir. 1991).

PROPOSED JURY INSTRUCTION NO. 12
B9.2
On or About a Particular Date; Knowingly

You'll see that the indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the offense occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

PROPOSED JURY INSTRUCTION NO. 13
B10.2
Caution: Punishment
(Single Defendant, Multiple Counts)

Each count of the indictment charges a separate crime. You must consider each crime and the evidence relating to it separately. If you find the Defendant guilty or not guilty of one crime, that must not affect your verdict for any other crime.

I caution you that the Defendant is on trial only for the specific crimes charged in the indictment. You're here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

PROPOSED JURY INSTRUCTION NO. 14
B11
Duty to Deliberate

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

PROPOSED JURY INSTRUCTION NO. 15
B12
Verdict

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the marshal. The marshal will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

DEFENDANT'S ADDITIONAL PROPOSED JURY INSTRUCTION NO. 1

PRELIMINARY INSTRUCTION TO BE GIVEN TO THE ENTIRE PANEL BEFORE JURY SELECTION

It is important that you discharge your duties without discrimination, meaning that bias regarding the race, color, religious beliefs, national origin, sexual orientation, gender identity, or gender of the [plaintiff,] defendant, any witnesses, and the lawyers should play no part in the exercise of your judgment throughout the trial.

Accordingly, during this voir dire and jury selection process, the lawyers may ask questions [or use demonstrative aids] related to the issues of bias and unconscious bias. You must decide the case solely on the evidence and the law before you and must not be influenced by any personal likes or dislikes, opinions, prejudices, sympathy, or biases, including unconscious bias. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention.[2] Like conscious bias, unconscious bias, too, can affect how we evaluate information and make decisions.[3]

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[2] Definitions modified by combining writings and comments by Harvard Professor Mahzarin Banaji.

[3] http://faculty.washington.edu/agg/pdf/Kang&al.ImplicitBias.UCLALawRev.2012.pdf.

DEFENDANT'S ANNOTATIONS AND COMMENTS

These instructions were created by a committee of judges and attorneys in the Western District of Washington to address the issue of implicit or unconscious bias. See Unconscious Bias, United States District Court, Western District of Washington, http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Feb. 21, 2018). The committee cites to the following as the source from which they adapted the instruction: "Model Ninth Circuit Criminal Instruction 1.1 (modified). Criminal Instruction 1.1 is similar to Model Civil Instruction 1.1B."

The government objects to the defendant's requested instruction as unwarranted.

DEFENDANT'S PROPOSED LIMITING JURY INSTRUCTION NO. 1[4]

The government will present evidence relating to Ms. Salman and Mateen's income and spending. The evidence will include lawful purchases made by Mateen that exceeded his income. You may only use this evidence for the purpose of determining whether such expenditures were in excess of his earnings. You may not use this evidence as proof of a morally repugnant habit of spending in excess of earnings, or that Ms. Salman was a bad person for incurring such debt.

The government objects to the defendant's requested paragraph as unwarranted, argumentative, and without legal basis. The government does not seek the admission of the spending evidence solely for the purpose of showing that the expenditures were in excess of his and Salman's income. Instead, the evidence should also be admitted as proof of aiding and abetting, Ms. Salman's knowledge and intent, and as corroboration of her statements to the FBI. The government does not and will not argue that the spending evidence will show that Ms. Salman is a bad person or has morally repugnant habits. The risk of a jury making such a leap is drastically increased by giving such a limiting instruction.

[4] Rule 105 of the Federal Rules of Evidence provides, "If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly." Fed. R. Evid. 105.

DEFENDANT'S PROPOSED LIMITING JURY INSTRUCTION NO. 2

The government will present evidence showing Mateen attended a mosque on June 8, 2016. You may only use this evidence to track Mateen's location. You may not use this evidence to connect the religion of Islam or the lawful practice of visiting a mosque, to any violent ideology (i.e., terrorism) or violent acts (i.e., Mateen's attack on the Pulse Night Club).

The government objects to the defendant's requested paragraph as unwarranted. The government does not and will not argue the religion of Islam is connected to a violent ideology, nor that Mateen's visit to the mosque was linked to his attack. The risk of a jury making such a leap is drastically increased by giving such a limiting instruction.

DEFENDANT'S PROPOSED LIMITING JURY INSTRUCTION NO. 3

The government will present evidence showing Ms. Salman lawfully went to a gun range in 2014 and possessed a gun range card at some point in time. You may only use this evidence to the extent the government alleges it corroborates Ms. Salman's statements to the FBI. This evidence cannot be used to prove that Ms. Salman is a violent individual, or that Ms. Salman was aware of all of Mateen's visits to a gun store or gun range, apart from the discrete time in 2014.

The government does not object to this proposed limiting instruction.