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6
7 UNITED STATES DISTRICT COURT
8 DISTRICT OF ARIZONA

9 United States of America
10 Plaintiff,
11 v.
12 Elton Simpson,
13 Defendants.

CR-10-055-PHX-MHM
**GOVERNMENT'S TRIAL
MEMORANDUM**

14
15 I. Government's Case In Chief

16 The government anticipates calling four witnesses at trial; three FBI agents and Dabla Deng,
17 who had many contacts with defendant while acting as an informant for the FBI. The three FBI
18 agents are 1) Jeff Hebert, 2) Lance Turner, and 3) Wyatt Storm. The government will also play
19 excerpts from approximately 6 recording of meetings that defendant had with Dabla Deng.

20 As of 2009, FBI Phoenix had an open criminal investigation into whether defendant, and
21 certain of his associates, might travel to foreign countries, in particular Somalia, to fight jihad.
22 On February 26, 2008, Secretary of State Rice designated "al-Shabaab" as foreign terrorist
23 organization pursuant to section 219 of the Immigration and Nationality Act. As of 2009, al-
24 Shabaab was engaged in a fighting targeting all aspects of the Transitional Federal Government,
25 the government of Somalia established in 2004 under international auspices. Al-Shabaab has
26 declared has its ultimate goal the imposition of Sharia, or strict Islamic law, throughout Somalia.
27 In May, 2009, Osama Bin Laden released an audiotape entitled "Fight On, Champions of
28 Somalia," calling on individuals to support jihad in Somalia.

1 During meetings between defendant and Deng, a frequent topic was jihad and the
2 obligation to fight jihad overseas. On July 31, 2007, in a recorded conversation, defendant
3 spoke about fighting the kaffir (non believers) for Allah, while “going out” from America,
4 “because the brothers in like Palestine, and stuff they need help.” Defendant noted that “just
5 the whole thing is how you get there, though,” and spoke about “wherever the Muslims are at,”
6 but first “Palestine” because of Jewish oppression of Muslims; defendant also spoke of
7 Afghanistan and Iraq. Defendant specifically criticized those people who “don’t believe that
8 they should be over there fighting.” On the subject of fighting, when Deng stated that “I know
9 we can do it man. But you got to find the right people that,” defendant stated “Gotta have
10 connects.”

11 On May 29, 2009, in a recorded conversation, defendant stated in part:

12 Defendant: *Akee, it’s time to go to Somalia, brother.*

13 Deng: Insha’ Allah.

14 Defendant: Eh, we know plenty of brothers from Somalia, akee.

15 Defendant stated that if the “kuffar” are “fighting against us it’s because they don’t
16 want us to establish sharia.” Defendant and Deng discussed connections with Somalia, and
17 defendant stated:

18 *It’s time (singing). I’m telling you, man. We gonna make it to the battlefield, akee, its*
19 *time to roll.*

20 At that point Deng agreed he could leave America; defendant advised Deng on how to pay for
21 his travel by selling his car, “that’s a plane ticket right there. Bye-bye America.”

22 On June 17, 2009 defendant met with Deng again, and talked about his having sent to an
23 associate a link discussing “the permissibility of doing the martyrdom operations,” about “how
24 they gonna use the car with bombs on it;” according to defendant, after he sent the link, the FBI
25 visited the person he sent the link.

26 On October 23, 2009, in a meeting with Deng and Roberto Yong, defendant stated:

27 *me and Yahya was talking about uh, me going to South Africa and then, uh, I make my*
28 *way up to Somalia, and uh, he said, he said, what if you go to Somalia and you waiting*

1 The FBI showed defendant pictures of Roberto Yong, John Sabari, and Saabir Nurse.
2 Defendant acknowledged knowing those individuals, and that the group got together, but stated
3 that the FBI should not have a concern about the group. As the FBI agents were shaking
4 defendant's hand, and preparing to leave, defendant asked agents about Hassan Abu Jihad.
5 Specifically, defendant asked about the status of Abu Jihad's appeal of his federal conviction.
6 Abu Jihad was convicted in March, 2008 in federal district court in Connecticut, in United States
7 v. Abu Jihad, CR 07-057-MRK, of providing material support to terrorists and of
8 communicating national security information to persons not entitled to receive it. Abu Jihad had
9 been sentenced on April 3, 2009 to ten years in prison for communicating national security
10 information count, after the district court granted a post verdict motion of acquittal on the
11 material support count. On January 7, 2010, after asking about Abu Jihad, defendant stated he
12 was concerned about Abu Jihad's future. Defendant and Abu Jihad knew each other from Abu
13 Jihad's previous time in Phoenix; Abu Jihad had been arrested in Phoenix in March, 2007 on the
14 federal charges leading to his conviction.

15
16 II. Elements of the Offense

17 Excluding the element that defendant's statement involved international terrorism, the
18 elements of a false statement are:

- 19 1) A statement
20 2) falsity
21 3) materiality
22 4) agency jurisdiction

23 *United States v. Jiang*, 476 F.3d 1026, 1029 (9th Cir. 2007).

24 In the case at bar, the false statement offense is a lesser included of the offense of false
25 statement involving international terrorism, as the indictment charged an additional element –
26 that defendant's statement:

1 involved international and domestic terrorism, in that defendant falsely stated to Special
2 Agents of the FBI that he had not discussed traveling to Somalia, when in fact
3 defendant had discussed with others, on or about May 29, 2009 and thereafter,
traveling to Somalia for the purpose of engaging in violent jihad.

4 (CR 3). The statute itself, 18 U.S.C. § 1001, provides that one who makes a false statement:
5 shall be fined under this title, imprisoned not more than 5 years, *or if the offense*
6 *involves international or domestic terrorism* (as defined in section 2331), imprisoned
not more than 8 years, or both.

7 (emphasis added.) In turn, 18 U.S.C. § 2331(1) states that the term “international terrorism”
8 means activities that—

9 (A) involve violent acts or acts dangerous to human life that are a violation of the
10 criminal laws of the United States or of any State, or that would be a criminal violation
if committed within the jurisdiction of the United States or of any State;

11 (B) appear to be intended—

12 (i) to intimidate or coerce a civilian population;

13 (ii) to influence the policy of a government by intimidation or coercion, or

14 (iii) to affect the conduct of a government by mass destruction, assassination, or
15 kidnapping; and

16 (C) occur primarily outside the territorial jurisdiction of the United States, or transcend
17 national boundaries in terms of the means by which they are accomplished, the persons
they appear intended to intimidate or coerce, or.... [where perpetrators seek asylum]

18 Legislative history makes clear why Congress added the international terrorism provisions to
19 Section 1001. *See* 150 Cong. Rec. S 11997, stating:

20 *S11997 James Jarboe, Section Chief, Counterterrorism Division, Domestic Terrorism,
21 FBI; and James Reynolds, Chief, Terrorism and Violent Crime Section, Criminal Division,
22 Department of Justice. H.R. 3209 was reported by the House Judiciary Committee on
23 November 29, 2001. The Judiciary Committee issued Report No. 107-306 for H.R. 3209 on
24 the same day. H.R. 3209 was unanimously approved by the House of Representatives on
25 December 12, 2001.

26 A provision similar to 6702 also was introduced as H.R. 1678 in the 108th Congress by
27 Representative Lamar Smith on April 8, 2003. H.R. 1678 was the subject of a hearing
28 before the House Subcommittee on Crime, Terrorism, and Homeland Security on July 10,
2003. Witnesses included Susan Brooks, the U.S. Attorney for the Souther District of
Indiana; James McMahan, Superintendent, New York State Police; and Danny Hogg, a
target of a war-time hoax about a family member serving in Iraq. H.R. 1678 was ordered
reported by the House Judiciary Committee by voice vote on May 12, 2004. The Judiciary
Committee issued Report No. 108-505 for H.R. 1678 on May 20, 2004. The key provisions
of section 6702 also were introduced as S. 2204 by Senator Hatch on March 11, 2004.

**Subtitle H, section; 84348;843486703, Increased Penalties for Obstruction of Justice
in Terrorism Cases, this section increases from 5 years to 8 years the penalty for**

1 **obstruction of justice in terror investigations. It also instructs the Sentencing**
2 **Commission to increase the guidelines range for making false statements in relation to**
3 **a terrorism investigation. A provision similar to section ;84404;844046703, albeit**
4 **increasing the penalty to 10 years instead of just 8, has in the past been included as**
5 **part of the above-described anti-hoax bills.**

6 (Emphasis added.) Put simply, where the prosecution proves that defendant's material false
7 statement in an ongoing terrorism investigation, relates to, in the language of Section
8 2331(1)(A),(B), and (C), violent acts intended to intimidate a civilian population or a
9 government, which occur outside the territorial jurisdiction of the United States, then the
10 additional element of false statement involving international terrorism is satisfied.

11 At trial, the government's proof will be that, at the time defendant made his false
12 statement, he was being investigated by the FBI regarding his potential plan to do exactly
13 what he lied about – go fight jihad in Somalia. The activities defendant discussed with Deng
14 and others, but lied about to the FBI, satisfy Section 2331's definition of international
15 terrorism. The statements were material to the FBI's mission of disrupting and deterring
16 international terrorism, even if the FBI agents knew that defendant's statements denying
17 having discussed travel to Somalia, were false, as defendant's denial made necessary further
18 investigation and assessment of defendant, including efforts to prevent his departure from the
19 United States, and investigation of the threat posed by others with whom defendant had
20 discussed traveling to Somalia. *See United States v. Gaudin*, 515 U.S. 506, 512
21 (1995)(whether statement is material depends on what decision an agency was trying to
22 make). *See also United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009), where the Court,
23 dealing *not* with Section 1001 but with the U.S.S.G. §3A1.4, noted that:

24 The government counters that obstructing an investigation into a crime can be one
25 way of promoting that crime. Thus, intent to obstruct an investigation is enough, at
26 least where obstructing the investigation promotes the crime. We agree. Promoting
27 a crime includes helping and encouraging that crime, and one way of furthering a
28 crime is to try to prevent the government from finding out about it.

Id. at 826. In *Ashqar*, Ashqar had refused, despite a grant of immunity, to provide testimony
to a grand jury investigating Ashqar's role "as a communication and financial conduit for the

1 terrorist organization Hamas.” *Id.* at 821-22. In the case at bar, defendant could have
2 chosen not to speak with FBI about his plans. Instead, he chose to make false statements
3 involving his own activities, relating to the FBI’s investigation of international terrorism.
4 Those actions meet the elements of the crime charged in the indictment.

5 Respectfully submitted this 20th day of October, 2010.

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9 s/ Michael T. Morrissey
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12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on October 20, 2010, I
14 electronically transmitted the attached
15 document to the Clerk’s Office using the
16 CM/ECF System for filing:

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