

United States Court of Appeals For the First Circuit

No. 18-1039

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID WRIGHT,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

Michael Tumposky, with whom Jessica Hedges, James Haynes, Forest O'Neill-Greenberg, and Hedges & Tumposky, LLP were on brief, for appellant.

Randall E. Kromm, Assistant United States Attorney, with whom Andrew E. Lelling, United States Attorney, and Pamela Gaulin, Harvard Law School, were on brief, for appellee.

August 28, 2019

BARRON, Circuit Judge. Beginning sometime in 2014, David Wright, Nicholas Rovinski, and Usaamah Rahim -- Wright's uncle -- engaged in discussions about the Islamic State of Iraq and Syria ("ISIS"), which the United States has designated as a Foreign Terrorist Organization under § 219 of the Immigration and Nationality Act. See 8 U.S.C. § 1189; 80 Fed. Reg. 58,804, 58,804 (Sept. 30, 2015).¹ The discussions allegedly involved a "high-profile" ISIS spokesperson and concerned a plot to fulfill a fatwa (ISIS decree) issued by "ISIS leaders" to behead Pamela Geller -- an American citizen living in this country -- for insulting the Prophet Mohammed. The discussions also concerned plans to kill police officers in the United States and to establish a "martyrdom" cell in this country.

Federal Bureau of Investigation ("FBI") agents electronically monitored the three men's communications, including through surveillance conducted pursuant to the Foreign Intelligence Surveillance Act ("FISA"). See 50 U.S.C. § 1801. On June 2, 2015, after FBI agents intercepted a call between Rahim and Wright, they confronted Rahim at a bus stop. Rahim then drew

¹ The Islamic State of Iraq and the Levant was officially designated as a Foreign Terrorist Organization in December 2004, but the Secretary of State amended its designation in September 2015 to reflect the fact "that the Islamic State of Iraq and the Levant uses the additional aliases the Islamic State, ISIL, and ISIS." Id. Both parties refer to the organization as "ISIS," so we do as well.

a thirteen-inch knife, which led the agents to shoot him when he refused to drop it. He died from his injuries.

Less than a month later, Wright was indicted for conspiracy to provide material support to ISIS, in violation of 18 U.S.C. §§ 2339B(a)(1)-(2) ("Count One"); conspiracy to obstruct justice, in violation of 18 U.S.C. § 371 ("Count Two"); and obstruction of justice, in violation of 18 U.S.C. §§ 1519 and 2 ("Count Three"). An April 2016 superseding indictment added a count for conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) and (c) ("Count Four"); and another February 2017 superseding indictment added a count of obstruction of justice, in violation of 18 U.S.C. § 1519 ("Count Five").

Following a fourteen-day trial, the jury convicted Wright on all counts. The District Court sentenced Wright in December 2017 to twenty-eight years' imprisonment and lifetime supervised release. The District Court sentenced Wright to a total of twenty years' imprisonment on Counts One, Three, and Five, to be served concurrently with a sentence of five years' imprisonment on Count Two. The District Court sentenced Wright to eight years' imprisonment on Count Four to be served consecutively with the twenty-year prison sentence for Counts One, Two, Three, and Five.

Wright now appeals his convictions. We affirm Wright's convictions on Counts Two through Five. We vacate his conviction on Count One.

I.

We begin by considering Wright's challenges to the District Court's order that denied various pretrial motions to suppress evidence. Wright does not make a clear argument as to how his challenge to the District Court's denial of each of these motions to suppress relates to each of his convictions. Nevertheless, we proceed on the understanding that the evidence implicated in each motion would, if suppressed, affect his convictions on all counts.

"In reviewing a challenge to the district court's denial of a motion to suppress, we view the facts in the light most favorable to the district court's ruling, and review the district court's findings of fact and credibility determinations for clear error." United States v. Peake, 804 F.3d 81, 86 (1st Cir. 2015) (internal quotation marks omitted). We review legal issues, including preserved constitutional claims and a district court's determination of whether the government exceeded the scope of a warrant, *de novo*. See id.; United States v. Brown, 669 F.3d 10, 19 (1st Cir. 2012); United States v. Volungus, 595 F.3d 1, 4 (1st Cir. 2010).

A.

We first address Wright's challenge to the District Court's denial of his motion to suppress the fruits or derivatives of any electronic surveillance that the FBI conducted pursuant to FISA. On appeal, Wright argues only that the District Court "should have suppressed the evidence obtained under FISA's emergency provision" (the "Emergency Provision") -- insofar as any evidence was so obtained -- "because that portion of the statute is unconstitutional or, in the alternative, must be construed narrowly."

1.

FISA is a federal statute. It establishes, as relevant here, a mechanism by which federal law enforcement officers may obtain a judicial order that authorizes the use of electronic surveillance within the United States when a "significant purpose" of the surveillance is the collection of "foreign intelligence information." 50 U.S.C. § 1804(a)(6)(B).

Typically, the process is initiated by the submission of an application, which must be approved by the Attorney General of the United States (the "Attorney General"), to the Foreign Intelligence Surveillance Court ("FISC") for review by one of its judges. Id. § 1804(a). In response to such an application, FISC judges may issue an ex parte order that authorizes electronic surveillance after making, among other things, a finding of

probable cause that the target of the surveillance is a foreign power or agent of a foreign power. Id. § 1805(a)(2).

Orders may approve surveillance that targets United States persons for up to ninety days. Id. § 1805(d)(1). Orders that approve surveillance that targets non-United States persons may do so for up to 120 days. Id.

The statute also includes an emergency authorization provision. See id. § 1805(e). The Emergency Provision permits the Attorney General to authorize electronic surveillance without prior judicial approval if the Attorney General "reasonably determines that an emergency situation exists with respect to the employment of surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained" and there is a factual basis supporting issuance of an order. Id. § 1805(e)(1)(A)-(B). The Emergency Provision requires that the Attorney General inform the FISC of its decision to employ emergency surveillance and submit an application for a judicially approved order, from the FISC, pursuant to the regular procedure "as soon as practicable," but no later than seven days after the Attorney General grants the emergency authorization. Id. § 1805(e)(1)(D).

Information collected through surveillance that has been authorized by the Attorney General pursuant to the Emergency Provision can be used in certain "proceeding[s]."Id.

§ 1805(e)(5). However, such information can be so used only "with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person." Id.

2.

On June 12, 2015, the government filed a notice of intent "to offer into evidence, or otherwise use or disclose," as relevant here, "information obtained or derived from electronic surveillance . . . conducted pursuant to [FISA]." The notice of intent made no reference to the Emergency Provision.

Wright thereafter filed a motion to compel discovery of evidence obtained pursuant to FISA. The District Court denied the motion. The District Court did so after concluding that FISA "seems to contemplate the filing of . . . an 'ill-informed motion to suppress.'"

Wright then filed a motion to disclose or suppress such evidence, in which he "renew[ed] and incorporate[d] by reference his motion to compel discovery." In that motion, Wright identified a number of independent and alternative bases for suppression.

In support of his motion, Wright argued that FISA's general requirement that the acquisition of foreign intelligence information need only be a "significant purpose" of the search or surveillance -- and thus need not be the "primary purpose" -- renders searches and surveillance under that statute

violative of the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution. See 50 U.S.C. § 1804(a)(6)(B).

The government filed a memorandum in opposition to Wright's motion to suppress. The memorandum provided an overview of the FISA surveillance process, which included a reference to the Emergency Provision. The memorandum did not, however, indicate that the government had relied on the Emergency Provision. Rather, the memorandum argued, in response to Wright's suppression motion, simply that the government had complied with FISA's requirements throughout its surveillance. The memorandum also responded to Wright's federal constitutional argument concerning FISA's general "significant purpose" requirement, along with the other arguments for suppression that he had advanced, none of which, as we have noted, concerned the Emergency Provision.

The District Court held a status conference shortly after these filings were made, at which it asked the parties a series of general questions about FISA. One of those questions was whether the Emergency Provision, as described in the government's memorandum, raised any federal constitutional issues. The District Court specifically stated, "I'm not talking about this case, I'm talking about generally."

Wright then filed a memorandum of law, in which he addressed the Emergency Provision. Wright first contended that the Emergency Provision violated the Fourth Amendment. He relied

on United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297 (1972) [hereinafter "Keith"], to contend that the Emergency Provision is constitutionally deficient because it does not require judicial approval of surveillance before it begins. See id. at 316-17 ("Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates.").

Wright argued in the alternative that, to avoid constitutional problems, the Emergency Provision must be construed narrowly. With respect to that latter contention, Wright pointed out that, although Title III of the Omnibus Crime Control and Safe Streets Act, which authorizes surveillance without prior judicial approval in "emergency situation[s]," enumerates the specific "danger[s]" and "activities" that constitute an "emergency situation," see 18 U.S.C. § 2518(7)(a), FISA does not. Wright argued that the Emergency Provision should be construed to permit the Attorney General to authorize emergency surveillance without prior judicial approval only "when he has evidence that there is an imminent threat to life, where the surveillance would assist in the protection of that life, and where a warrant cannot be obtained in time to stop this imminent threat to life."

The government filed a response to Wright's memorandum concerning the Emergency Provision. The government argued that the Emergency Provision was constitutional. The government submitted, shortly after filing that response, ex parte filings of classified materials to the District Court.

The District Court denied Wright's motion. The District Court explained that its "de novo review reveal[ed] that the government attorneys here have throughout acted with scrupulous regard for the rights of the defendant Wright and have conducted themselves with utmost fidelity within the limited powers accorded them under [FISA]." The District Court stated that it did not "agree with each of the government's characterizations, especially their perception of the imminence of threat posed by the defendant Wright and his co-conspirators." Nonetheless, the District Court stated that it found that the "government attorneys ha[d] followed the established procedures" under FISA with "scrupulous care." The District Court thus concluded that "[t]here [was] here no basis to consider the suppression of evidence."

3.

On appeal, Wright abandons the argument that he made below that concerned FISA's general "significant purpose" requirement. We also agree with the government that Wright has waived for lack of development any argument that FISA surveillance in this case is unconstitutional because of the ex parte nature of

the surveillance authorization decisions under FISA, and the resulting inability of Wright to know which evidence, if any, was used to justify the initiation of any surveillance, or which, if any, evidence was obtained pursuant to any such surveillance. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). Wright does not, for example, challenge the District Court's observation that the statute contemplates the filing of "an ill-informed motion to suppress." Rather, on appeal Wright raises only the two arguments that he raised below, first challenging the facial constitutionality of the Emergency Provision and, then, second, arguing that the provision "need be narrowly construed."

We thus start with Wright's contention on appeal that the Emergency Provision on its face violates the Fourth Amendment, because it permits electronic surveillance without prior judicial approval. In his brief to us on appeal, as in his memorandum below, Wright relies on Keith to advance that argument. In particular, Wright stresses that Keith holds that electronic surveillance in domestic security matters may require an appropriate ex ante warrant procedure. See Keith, 407 U.S. at 316-17.

But, Wright does not acknowledge that Keith expressly limits its holding to "only the domestic aspects of national security" or that Keith "express[es] no opinion as to [] the issues which may be involved with respect to activities of foreign powers

or their agents." Id. at 321-22, 324. Nor does Wright confront the fact that the United States Supreme Court has more recently characterized Keith as having "implicitly suggested that a special framework for foreign intelligence surveillance might be constitutionally permissible." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013) (citing Keith, 407 U.S. at 322-23).

In addition, despite the facial nature of his challenge, Wright does not develop any argument that surveillance conducted pursuant to the Emergency Provision is unconstitutional no matter the circumstances involved, notwithstanding that, in ordinary law enforcement contexts, exigent circumstances may sometimes justify a warrantless search. See Kentucky v. King, 563 U.S. 452, 460 (2011) ("One well-recognized exception [to the warrant requirement] applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." (internal quotation marks omitted)). Yet, insofar as Wright means to bring a facial challenge to the Emergency Provision based on the mere fact that it permits the authorization of electronic surveillance without prior judicial approval, he must, as the government points out, explain why -- even in dire situations -- advance judicial approval is always required. See City of Los Angeles v. Patel, 135 S. Ct. 2443, 2450-51 (2015) (noting that the "proper inquiry" for "facial

challenges to statutes authorizing warrantless searches" is whether the "searches that the law actually authorizes" are "unconstitutional in all applications").

We note in this regard that Wright appears to acknowledge that there are some exigent circumstances in which the authorization of electronic surveillance without prior judicial approval -- pursuant to the Emergency Provision or otherwise -- is constitutionally permissible. Wright argues, for example, that, to avoid constitutional problems, the Emergency Provision should be construed in the same narrow fashion that he contends that other emergency authorization statutes have been construed, such as the emergency provision in Title III, 18 U.S.C. § 2518(7)(a); see, e.g., Nabozny v. Marshall, 781 F.2d 83, 85 (6th Cir. 1986); United States v. Capra, 501 F.2d 267, 277 (2d Cir. 1974), and the emergency provision in the Stored Communications Act, 18 U.S.C. § 2702(b)(8); see, e.g., In re Application of United States for a Nunc Pro Tunc Order for Disclosure of Telecomm. Records, 352 F. Supp. 2d 45, 47 (D. Mass. 2005). Given these concessions that the Emergency Provision can be constitutionally applied in some circumstances, we reject Wright's Fourth Amendment-based facial challenge. See Patel, 135 S. Ct. at 2450-51.

Wright does appear to press an alternative argument. He contends that the Fourth Amendment requires that the Emergency Provision be construed to permit the Attorney General's emergency

authorization "power [to] be employed [only] in narrow circumstances." Specifically, he contends, as he did below, that the Emergency Provision would be constitutional only if the statutory phrase, "emergency situation," 50 U.S.C. § 1805(e)(1)(A), were construed to require "evidence that there is an imminent threat to life, where the surveillance would assist in the protection of that life, and where a warrant cannot be obtained in time to stop this imminent threat to life."

But, even assuming that the Emergency Provision must be so narrowly construed, notwithstanding that it authorizes the collection of foreign intelligence information, Wright makes no argument that the government could not have met this standard for an "emergency situation." He also makes no argument that any evidence traceable to the use of the emergency procedure in particular would have been prejudicial to him if not suppressed. Nor does he develop any argument as to why he should be excused from having to make such arguments. Indeed, as we have noted, Wright does not adequately develop a challenge to the District Court's conclusion that the statute encompasses the filing of "an ill-informed motion to suppress." Accordingly, we reject Wright's narrow-construction challenge, too. Zannino, 895 F.2d at 17; see also United States v. Mohamud, 843 F.3d 420, 438 n.21 (9th Cir. 2016) (declining to reach defendant's facial challenge to FISA for lack of explanation as to why suppression should be required in

his case); United States v. Posey, 864 F.2d 1487, 1491 (9th Cir. 1989) ("[W]e think it clear that appellant may not make a facial challenge to the FISA without arguing that the particular surveillance against him violated the Fourth Amendment . . . Even if he is correct that the FISA's language might be applied in ways that violate the Fourth Amendment, he must show that the particular search in his case violated the Fourth Amendment. Appellant cannot invalidate his own conviction on the argument that others' rights are threatened by FISA." (emphasis in original)).²

B.

We now turn to Wright's challenge to the portion of the District Court's order that denied his motion to suppress evidence obtained from the search of his electronic devices. The relevant facts, to which the parties agree, are as follows.

² Wright also points out that the FISA Emergency Provision permits the Attorney General to authorize warrantless surveillance for up to seven days, see 50 U.S.C. § 1805(e)(1)(D), whereas the analogous provision in Title III only authorizes warrantless surveillance for up to forty-eight hours, see 18 U.S.C. § 2518(7). Insofar as Wright means to argue that this "longer-term, warrantless wiretapping" violates the Fourth Amendment, Wright makes no argument that any evidence in his particular case was obtained pursuant to surveillance without judicial approval that was conducted for more than forty-eight hours or as to how he can bring a facial challenge to this aspect of the FISA Emergency Provision without making a showing that some evidence in his case was so obtained and was prejudicial to him. See Mohamud, 843 F.3d at 438 n.21; Posey, 864 F.2d at 1491. Nor does he argue that he was wrongly denied access to the information that might support such an argument. Accordingly, we see no reason to address this aspect of Wright's facial challenge to the Emergency Provision.

During the early morning of June 3, 2015, an FBI agent filed an application for a search warrant for Wright's apartment. The affidavit that accompanied the application included two attachments. One of the attachments described Wright's apartment ("Attachment 2"). The other attachment identified the property subject to seizure ("Attachment A"). Attachment A included a list of specific "items," including "[a]ll computer hardware, computer software, gaming equipment, computer-related documentation, and storage media" and noted that "[o]ff-site searching of these items shall be limited to searching for the items described [previously]."¹ (Emphasis added).

A federal magistrate judge issued a warrant based on the application. The Magistrate Judge identified the "property to be searched" in that warrant as Wright's apartment as described in Attachment 2 and the "property to be seized" as the property listed in Attachment A.

FBI agents seized Wright's electronic media devices pursuant to the warrant. The agents also later searched those media devices for evidence.

Wright argues that the plain text of the warrant precluded the search of the electronic media devices that were seized. This contention turns on the proper construction of the warrant, so our review is *de novo*. See Peake, 804 F.3d at 86.

We conclude that the warrant is most naturally read to contemplate the search of Wright's electronic devices after their seizure. See id. at 87 (explaining that "search warrants and affidavits should be considered in a common sense manner, and hypertechnical readings should be avoided" (internal quotation marks omitted)). The warrant expressly cross-references Attachment A in describing the property that may be seized. Attachment A, in turn, expressly provides for the "[o]ff-site searching of" electronic media devices. Thus, the warrant -- by virtue of its cross reference to Attachment A -- is best read to authorize not only the seizure, but also the search of the devices at issue, as expressly contemplated by the text of Attachment A. See United States v. Baldyga, 233 F.3d 674, 683 (1st Cir. 2000) As a result, Wright's contention that, in light of Riley v. California, 134 S. Ct. 2473 (2014), we may not infer that an authorization to seize an electronic device necessarily includes the authorization to search that device is beside the point.

c.

Wright challenges one other portion of the District Court's order that denied his various motions to suppress. That portion of the order concerns Wright's motion to suppress statements that he made to law enforcement agents at his home on June 2, 2015.

Wright contends that the District Court erred by denying this motion to suppress, because the government violated his federal constitutional due process rights by failing to record the interview in which he made the statements. As the government notes, however, Wright cites no authority to support his alleged entitlement under the federal Constitution to a recorded interview. In fact, we have previously held to the contrary. See United States v. Meadows, 571 F.3d 131, 147 (1st Cir. 2009) ("[T]here is no federal constitutional right to have one's custodial interrogation recorded.").

Wright does attempt to ground his claim in a United States Department of Justice policy that requires the recording of custodial interviews conducted in a place of detention with suitable recording equipment. But, that policy does not purport to create legal rights that may be enforced by criminal defendants. See United States v. Craveiro, 907 F.2d 260, 264 (1st Cir. 1990) (holding that "the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party"). Thus, that policy supplies no basis for overturning the portion of the District Court's order that denied Wright's suppression motion with respect to the statements that he made to law enforcement.

II.

We turn our attention now to Wright's challenge of the District Court's handling of an unplanned interaction that occurred between a juror and an FBI agent at a restaurant while the trial was ongoing. Here, too, Wright is less than clear in identifying the convictions to which this challenge pertains. We nonetheless proceed on the understanding that, like his challenges to the District Court's order denying his suppression motions, he means for this challenge to implicate each of his convictions.

While a district court must make an "adequate inquiry" into non-frivolous claims of juror bias or misconduct, United States v. Ortiz-Arrigoitia, 996 F.2d 436, 442 (1st Cir. 1993), the district court has "broad discretion to determine the type of investigation [that] must be mounted." United States v. Boylan, 898 F.3d 230, 258 (1st Cir. 1990). See also United States v. Ramirez-Rivera, 800 F.3d 1, 41 (1st Cir. 2015) ("[T]he trial judge is vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct occurred and whether it was prejudicial.").

We review the adequacy of a district court's investigation of -- and response to -- evidence of potential juror bias or misconduct for abuse of discretion, "recogniz[ing] that the district court has wide discretion in deciding how to handle and how to respond to allegations of juror bias and misconduct

that arise during a trial." United States v. Tejeda, 481 F.3d 44, 52 (1st Cir. 2007) (internal quotation marks omitted). We review a district court's findings that a juror is credible and that the jury is impartial for clear error. See United States v. Burgos-Montes, 786 F.3d 92, 110-11 (1st Cir. 2015).

A.

The relevant facts, as found by the District Court, are as follows. Juror 25 encountered one of the FBI agents who had been sitting at the government's counsel table during trial at a restaurant over a weekend while the trial was ongoing. Juror 25 and the FBI agent exchanged pleasantries but did not discuss the case.

When the agent was ready to leave his table, wait staff informed him that someone had already paid for his meal. Wait staff suggested to the agent that the person who had paid for his meal was sitting at a table in the restaurant other than the one at which Juror 25 had been seated.

The government informed the District Court of this matter on the Monday morning after the encounter. Both parties agreed to the District Court's proposal to question Juror 25 about the incident.

The District Court questioned Juror 25 in the presence of the parties. Juror 25 admitted to seeing the FBI agent and to exchanging pleasantries with him. He stated that there was no

discussion of the substance of the case. He also stated that he had paid the agent's bill and explained, after being asked why he had done so, that there was "no reason, we like to pay it forward, so he happened to be there and that's what we did."

Juror 25 also told the District Court that he had mentioned to about seven jurors that morning that he had seen the agent over the weekend. He noted, however, that he did not tell any of those jurors that he had paid the agent's bill at the restaurant. Juror 25 also stated that he had, pursuant to the District Court's instructions at the outset of the trial, not "expressed any opinions about the substance of the case to [his] fellow jurors."

The District Court excused Juror 25 from the trial and instructed him not to say anything about the matter to his fellow jurors. At that point, Wright's counsel asked that the District Court question the remaining jurors about what Juror 25 had told them. The District Court declined to do so. The District Court instead asked all the jurors at the outset of that day's proceedings whether they had "heard, read, or seen anything at all concerning the substance of [the] case," whether they had "[d]iscussed the substance of the case with anyone," and whether "anyone [had] discussed the substance of the case in [their] presence," since they had recessed the previous Thursday. When

each juror answered, "No," the trial then proceeded without objection.

B.

Wright emphasizes that "any unauthorized communication between any person who is associated with the case . . . and a juror would have the potential for being prejudicial," unless the communication is completely unrelated to the case or is "shown to be harmless." United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992). But, nothing in the record suggests -- nor does Wright contend -- that the communication between Juror 25 and the FBI agent was "about the case." See id. ("In those instances where it is shown that there was a communication about the case, the communication would be deemed prejudicial unless shown to be harmless." (emphasis added)); United States v. Sampson, 486 F.3d 13, 41 (1st Cir. 2007) ("We have attached significance before to the fact that a juror's casual *ex parte* communication did not concern the substance of the case, and we think it is appropriate to continue to follow that *praxis*." (citing United States v. Angiulo, 897 F.2d 1169, 1185 (1st Cir. 1990))).

In any event, the District Court dismissed the only juror who had "an unauthorized communication [with] someone associated with the case." Id. Nor was any wrongdoing or bias on the part of any juror besides Juror 25, whom the District Court excused, alleged. Moreover, Wright does not suggest that, even if Juror 25

gave the other jurors a detailed account of his encounter with the FBI agent, the other jurors actually became biased against him.

Thus, the cases on which Wright relies in contending that it was an abuse of discretion for the District Court not to have questioned the other jurors about the incident at the restaurant are inapt. See United States v. Resko, 3 F.3d 684, 688-693 (3d Cir. 1993) (allegation that jurors had deliberated prematurely); United States v. Gaston-Brito, 64 F.3d 11, 13 (1st Cir. 1995) (allegation of an ex parte communication between a government agent and jurors); Government of the Virgin Islands v. Weatherwax, 20 F.3d 572, 578 (3d Cir. 1994) (allegation that jurors may have read an inaccurate newspaper article about the case); United States v. Lara-Ramirez, 519 F.3d 76, 87 (1st Cir. 2008) (allegation that Bible in jury room tainted proceedings); United States v. Paniagua-Ramos, 251 F.3d 242, 250 (1st Cir. 2001) (allegation from defendant's sister that two jurors had been seen conversing with the prosecutor during trial); United States v. Zimny, 846 F.3d 458, 464, 467-68 (1st Cir. 2017) (allegation that jury was exposed to extraneous prejudicial blog post and comments and had engaged in premature deliberations).

Wright's reliance on cases in which district courts took more steps to investigate concerns about juror taint than the District Court took here, see, e.g., United States v. Ortiz-Arrigoitia, 996 F.2d 436, 443 (1st Cir. 1993), also cannot help

his argument. Those cases simply support the notion that "[t]he trial court has wide discretion in how it goes about this inquiry." Tejeda, 481 F.3d at 52.

III.

We come, then, to the first of Wright's challenges to the District Court's jury instructions. Wright first challenges the instruction that the District Court gave about the permissive inferences that the jury could make in determining whether Wright had the intent necessary for him to be found guilty on any count that required a finding of intent. This challenge, like each of the challenges that we have thus far considered, appears to take aim at each of his convictions.

In reviewing preserved challenges to jury instructions, we "consider de novo whether an instruction embodied an error of law, but we review for abuse of discretion whether the instructions adequately explained the law or whether they tended to confuse or mislead the jury on the controlling issues." United States v. Ackell, 907 F.3d 67, 78 (1st Cir. 2018) (quoting United States v. Gray, 780 F.3d 458, 464 (1st Cir. 2015)). We assume favorably to Wright that his challenge alleges an error of law in the instruction. But, even assuming our review is de novo, Wright's challenge fails.

The relevant instruction was as follows:

I will tell you that the law provides that you may infer that a person intends the natural and probable consequences of what they say and do. Now when I say you may infer it, what that means is you could draw that conclusion, but you need not, that's left to you as the jury. You look at all the evidence to see whether the government [proved], because they've got to prove this -- this is essential [--] Mr. Wright's intent beyond a reasonable doubt.

(Emphasis added).

We have upheld instructions that allow for permissive inferences regarding intent. See, e.g., Lannon v. Hogan, 719 F.2d 518, 521-22 (1st Cir. 1983) (holding that the instruction, "you may infer or conclude that a person ordinarily intends the natural and probable consequences of acts knowingly done," did not contain constitutional error) (collecting First Circuit cases deciding the same). In fact, the First Circuit pattern jury instructions expressly include the language, "You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or omitted."

Pattern Jury Instructions for the District Courts of the First Circuit § 4.18.1343 (2019).

But, as Wright points out, the District Court's instruction here does not track that pattern jury instruction word for word. The instruction instead states that the jury was permitted to "infer that a person intends the natural and probable consequences of what they say and do." (Emphasis added).

Wright asserts that, in deviating from the pattern instruction in this way, the District Court's instruction "improperly highlighted just one aspect of the case, the Defendant's words, to the exclusion of all the other evidence on this crucial point [of Wright's intent]." And, Wright contends, the instruction -- by highlighting his "words" -- undermined his entire defense at trial, which was "that, even though [Wright] said and wrote much of what the Government claimed he said and wrote, he did not intend to support ISIS, obstruct justice, or commit an act of violence."

Wright's reading of the instruction, however, is not a fair one. The instruction allows the jury to infer intent from both Wright's words and his conduct ("what they say and do"), and the instruction expressly states that the jury must "look at all the evidence." (Emphases added). For these reasons, the instruction is not like the one found to have been erroneous in United States v. Rubio-Villareal, 967 F.2d 294 (9th Cir. 1992), the out-of-circuit precedent on which Wright relies.

Rubio-Villareal addressed an instruction "which told the jury it could infer knowledge from two isolated facts -- that the defendant was the driver and that cocaine was concealed in the body of the vehicle." Id. at 298. By contrast, the District Court's instruction did not permit the jury to infer intent from such isolated facts. Thus, the instruction neither "effectively

told the jury in this case that the judge thought there was sufficient evidence to convict the defendant" nor "focused the jury on some rather than all the facts," as the instruction in Rubio-Villareal did. Id. at 299. In fact, the instruction stated that the jury must consider "all the evidence." (Emphasis added). We therefore reject Wright's challenge to this jury instruction.

IV.

Having dispensed with Wright's challenges that target his convictions generally, we now focus on Wright's challenges that concern only his convictions on specific counts -- namely, Counts One and Four. We begin with Wright's challenges to his conviction on Count One. The challenges concern, respectively, the sufficiency of the evidence to support the conviction on Count One and the District Court's instruction on the elements of the offense underlying that conviction. We then will turn, in Part V, to Wright's challenges to his conviction on Count Four. Those challenges concern, respectively, the sufficiency of the evidence to support his conviction on that Count and the District Court's jury instruction on the elements of the offense underlying that conviction.

A.

To understand Wright's challenge to the sufficiency of the evidence for his conviction on Count One, it is necessary, first, to provide some background about the elements of the offense

of conviction and the understanding of the parties and the District Court as to what those elements required the government to prove. We then need to explain in further detail the aspects of the government's case for convicting Wright of that offense that he contends were not supported by sufficient evidence. Finally, we will explain why, given the arguments that Wright presses, his sufficiency challenge to his conviction on Count One fails.

1.

Wright was convicted on Count One of violating 18 U.S.C. § 2339B. "[T]o prove a violation [of § 2339B], the government must establish that a defendant (1) knowingly provided or attempted or conspired to provide material support (2) to a foreign terrorist organization (3) that the defendant knew had been designated a foreign terrorist organization or had engaged in terrorism." United States v. Dhirane, 896 F.3d 295, 303 (4th Cir. 2018), cert. denied sub nom., Jama v. United States, 139 S. Ct. 1207 (2019) (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 16-17 (2010)). 18 U.S.C. § 2339B goes on to define "material support or resources" as "any property, tangible or intangible, or service, including," among other things, "personnel (1 or more individuals who may be or include oneself)." Id. § 2339B(g)(4) (defining

"material support or resources" in accordance with the definition used in 18 U.S.C. § 2339A(b)(1)).

The indictment alleged that, in violation of § 2339B, Wright conspired to provide "material support or resources" in the form of "services and personnel" to ISIS. At trial, however, the government argued only that, in connection with the co-conspirators' plot to kill Geller and police officers in the United States, Wright engaged in a conspiracy to provide "personnel" -- himself and potential recruits -- and not "services" to ISIS.

The government limited its case at trial to the "personnel" theory of liability. The government did so on the understanding that the jury should be in agreement, in the event that the jury returned a guilty verdict, as to the particular type of "material support or resources" -- i.e., "personnel" or "services" -- that Wright had conspired to provide.

With regard to "personnel," § 2339B provides that:

No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) 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 foreign terrorist organization to advance its goals or objectives shall not be considered to be

working under the foreign terrorist organization's direction and control.

Id. § 2339B(h).

Wright's counsel argued to the District Court, that, under the definition of "material support or resources" provided in § 2339A(b)(1), "personnel . . . is an example of a type of service." Neither § 2339A nor § 2339B provides a definition of "service." But, the Supreme Court, in the course of construing § 2339B, has noted that "a person of ordinary intelligence would understand the term 'service' to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization." Holder, 561 U.S. at 24 (emphasis added). Thus, drawing on Holder and the contention that "personnel is an example of a type of service," Wright's counsel requested that, despite the government's representation that it would press at trial only the "personnel" and not the "services" theory of Wright's criminal liability set forth in the indictment, the District Court "still instruct the jury that material support implies coordination."

The District Court agreed with Wright's counsel on this point. The government did not object. In consequence, the issue of whether the plot to kill Geller and the police officers that Wright was charged with conspiring to carry out was undertaken "in coordination with" ISIS, along with the issue of whether that plot was undertaken "at the direction of ISIS," became key issues at trial.

2.

The "at the direction of" and "in coordination with" theories "provide alternative, independently sufficient grounds for" sustaining the conviction with respect to the "material support or resources" element of the conspiracy offense at issue. United States v. Gaw, 817 F.3d 1, 5 (1st Cir. 2016) (quoting United States v. Cruz-Arroyo, 461 F.3d 69, 73 (1st Cir. 2006)). We have no need to address, however, whether there was sufficient evidence to convict Wright on the theory that he conspired to be part of a plot that was carried out "at the direction of" ISIS. That is because we reject Wright's contention that there was insufficient evidence for a rational jury to find beyond a reasonable doubt that Wright conspired to carry out a plot to kill Geller and others "in coordination with" ISIS. See id. ("[A]dequate proof of one [of two alternative theories of criminal liability] obviates any need for proof of the other." (quoting Cruz-Arroyo, 461 F.3d at 73)).

Our review of Wright's sufficiency challenge is de novo. See United States v. Ocean, 904 F.3d 25, 28 (1st Cir. 2018) (citing United States v. Ramírez-Rivera, 800 F.3d 1, 16 (1st Cir. 2015)). In undertaking that review, "[w]e view all the evidence, credibility determinations, and reasonable inferences therefrom in the light most favorable to the verdict in order to determine whether the jury rationally could have found that the government

established each element of the charged offense beyond a reasonable doubt." United States v. Valdés-Ayala, 900 F.3d 20, 30 (1st Cir. 2018) (internal quotation marks and punctuation marks omitted). In overcoming this "formidable standard of review," United States v. Loder, 23 F.3d 586, 589 (1st Cir. 1994), "[d]efendants challenging convictions for insufficiency of evidence face an uphill battle on appeal," United States v. Hernandez, 218 F.3d 58, 64 (1st Cir. 2000).

3.

To make the case that the evidence sufficed to support the conspiracy conviction at issue on the basis of an "in coordination with" theory of criminal liability, the government argues as follows. First, it contends that the evidence supportably showed that Wright's uncle and alleged co-conspirator, Rahim, communicated with a "Mr. Hussain" about the plot to kill Geller and others. The government further argues that the evidence supportably showed that this "Mr. Hussain" was at the time living in an ISIS-controlled territory in Syria and was a "high-profile" member of ISIS. The combination of this evidence, the government asserts, was legally sufficient to establish that Rahim and "Mr. Hussain" were conspiring to kill Geller and others "in coordination with" ISIS. The government thus contends that, so long as the evidence sufficed to show that Wright was part of that conspiracy to carry out that plot, the evidence sufficed, as a whole, to

support Wright's conviction for conspiring to provide "material support or resources" to ISIS on a "coordination" theory.

Wright asserts on appeal that, "[a]t best, the Government has shown that the plan was inspired by" (emphasis added) publicly available ISIS videos and documents, "but independent of, ISIS." In making this blanket assertion as to what the record shows about "the plan" and its connection to ISIS, though, Wright fails to engage with any of the evidence that we have just discussed that concerned "Mr. Hussain's" involvement in the plot at issue and "Mr. Hussain's" ties to ISIS. Instead, Wright merely makes a conclusory contrary characterization of the evidence as a whole with respect to ISIS's connection to the plot.

Such a conclusory assertion is not the kind of developed argument about the insufficiency of the evidence that Wright must make to succeed on his sufficiency challenge. It fails to address the evidence that the government points to in its brief to show that the evidence sufficed to prove that the plot at issue -- independent of whether Wright was a part of it -- was undertaken "in coordination with" ISIS.

By contrast, the evidence that the government introduced included, among other things, records of electronic communications between Rahim and Hussain, expert testimony that explained who Hussain was and what his ties to the ISIS organization were, and tweets that, the government contends, a jury rationally could find

were authored by Hussain and showed his substantial involvement in developing and facilitating the plot at issue. Because Wright addresses none of this evidence, we deem waived for lack of development any challenge to the sufficiency of the evidence to support this critical aspect of the government's case for satisfying the "coordination" requirement, concerning, as it does, the nature of the plot in which Wright is charged with having been a participant. See United States v. Benevides, 985 F.2d 629, 633 n.6 (1st Cir. 1993) ("[W]e decline to engage in speculation or to forge beyond the line of argument that defendant has explicitly pursued in his appeal.").

We recognize that Wright does also appear to advance the argument that there was insufficient evidence that he "coordinate[d] his efforts with members of the [ISIS]." In so arguing, Wright focuses on the fact that the government "failed to present any evidence of communication between the Defendant and any ISIS member regarding the plan." Wright stresses in this regard that the evidence showed at most that he simply downloaded publicly available videos and documents produced by ISIS. He then argues that evidence of that conduct cannot suffice to prove that he conspired to carry out the plot at issue "in coordination with" or, for that matter, "at the direction of" ISIS.

But, these contentions about what the evidence showed regarding Wright's own conduct relate merely to what the evidence

showed about the role that he played in the plot in which he is charged with having been a participant. Those contentions thus fail to provide a basis for rejecting the government's argument on appeal that the evidence supportably showed that Rahim and "Mr. Hussain" were engaged in a plot to kill Geller and others "in coordination with" ISIS.

To be sure, there does remain the question of whether the evidence was insufficient to show that Wright had the requisite intent and knowledge that the conspiracy that he was alleged to have joined was of such a kind. See United States v. García-Pastrana, 584 F.3d 351, 377 (1st Cir. 2009) (noting that the requisite mental state for conspiracy is "knowledge of the basic agreement" and "an intent to commit the underlying substantive offense" (quoting United States v. Brandon, 17 F.3d 409, 428 (1st Cir. 1994))). And, because Wright separately contends that the evidence did not suffice in that regard, we must address that question as well. As we next explain, though, we are not persuaded by Wright's argument that the evidence was lacking on that separate score.

As the government points out, Wright was charged as a co-conspirator in the plot to kill Geller and the police officers "in coordination with" ISIS and thus as a co-conspirator in a plot to "provide" what the parties agreed § 2339B treats as "material support or resources" to that terrorist organization. Wright is

therefore wrong to suggest that, merely because the government failed to put forth any evidence of communication between him and a member of ISIS, he could not be convicted of the conspiracy offense with which he was charged. The Supreme Court has squarely rejected the argument that the government is required to prove that a defendant charged with conspiring to provide material support in violation of 2339B had the specific intent to further the terrorist organization's activities. See Holder, 561 U.S. at 16-17 ("Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." (emphasis added)). Nor does the fact that Wright was charged with conspiring to commit that offense require the government to have made that showing. See United States v. Piper, 35 F.3d 611, 615 (1st Cir. 1994) (noting that a defendant who "intentionally agrees to undertake activities that facilitate commission of a substantive offense, but who does not intend to commit the offense himself" may be convicted of conspiracy).

Wright also appears to contend that his sufficiency challenge has merit because the evidence was insufficient to show that he knew the nature of "Mr. Hussain's" involvement in the plot. But, even assuming, favorably to Wright, that the government was required under conspiracy law to make such a showing, compare

García-Pastrana, 584 F.3d at 377 (1st Cir. 2009) (noting that the requisite mental state for conspiracy is "knowledge of the basic agreement") with Ocean, 904 F.3d at 31 (concluding that a defendant need not know all the details of a conspiracy to be found guilty as a conspirator), we conclude that the evidence sufficed.

The government's evidence on this score included the recording and transcript of a May 26, 2015 call between Rahim and Wright, which supportably showed that Rahim recounted to Wright that he had received an encrypted document from "Mr. Hussain" with research on Geller, as well as Wright's response that "I gotta see that [document]." The government also presented testimony from Wright's co-conspirator Rovinski, who recounted that Wright, Rahim, and Rovinski had pledged their support to ISIS's leader, al-Baghdadi, and that their plot to kill Geller and others was intended to fulfill ISIS's stated goals. In the face of that evidence, we see no basis to conclude that there was insufficient evidence from which a rational jury could find that Wright knew not only about "Mr. Hussain's" involvement in the plot but also about his ties to ISIS. Thus, this aspect of Wright's sufficiency challenge lacks merit, too.

B.

Having rejected Wright's sufficiency challenge on Count One, we now consider his preserved challenge to the District

Court's jury instruction on that count.³ The jury instruction that Wright challenges was as follows:

The support must be "material," which means it's got to make some sort of difference, not a major coup necessarily, but it's got to make some difference to the goals, plans, strategy, tactics of this foreign terrorist organization, in this case it's ISIS. And there's got to be -- what they do -- and again this is all part of this terrorist connection, what they plan to do has -- the specific language I want to use is that it has to be "conduct done in coordination with or at the direction of the foreign terrorist organization."

Now the coordination -- and the reason that the government has to prove that is to prevent, um, the law from applying [to] some random act, just a random act of violence and then ISIS latches onto that and says, "Oh, yeah, those were our soldiers," or something like that. They have to -- the conspiracy has got to be, um, cognizant of and acting in coordination -- it doesn't have to be direct orders, but in coordination with the strategy, the tactics of the foreign terrorist organization, in this case ISIS. Well, that's the first question.

(Emphasis added).

Wright contends that this instruction, by virtue of the underlined language, permitted the jury to find that he conspired

³ The government does not dispute that Wright preserved this objection below. The government does, however, argue that Wright's challenge to this instruction should be deemed waived for lack of development on appeal. We do not agree with the government's characterization of Wright's briefing on appeal, in which he sufficiently ties his legal argument to the errors preserved below. We thus proceed to address his instructional challenge on the merits.

to provide "material support or resources" to ISIS merely by having coordinated with ISIS's publicly available strategy and tactics, while acting independently of the terrorist organization itself. As Wright puts it, the District Court's expansive definition of "coordination" in the underlined language quoted above permitted the jury to convict him based on a finding that he acted with "mere awareness of the desires of the terrorist organization, delivered indirectly," without also finding that there had been any "communication between the Defendant and any ISIS member regarding the plan" or other any other "actual connection to the terrorist group." Wright further contends that this flaw in the instruction constituted reversible error.

Wright's challenge to this instruction is not merely that its wording is confusing. It is a contention that the instruction misstated the relevant law, so our review is *de novo*. See Ackell, 907 F.3d at 78.

In undertaking that review, we first explain why the instruction was in error. We then turn to a consideration of whether the error was harmless, first by determining the standard for assessing whether an error of this type is, in fact, harmless, and then by explaining why the applicable harmless error standard has not been satisfied by the government here.

1.

The government does not make any contention that, even if the instruction says what Wright says it does, it is a correct statement of the law. Instead, the government argues only that Wright misreads it.

The government focuses on the fact that the instruction begins with a statement that "[the conduct] has to be . . . done in coordination with or at the direction of the foreign terrorist organization." The government argues that this initial statement should be read to qualify the District Court's subsequent explanation of "coordination" as "coordination with the strategy, the tactics of the foreign terrorist organization." Thus, according to the government, the jury would have understood, taking the instructions as a whole, that it had to find that the "coordination" was with ISIS itself and not merely with its publicly available strategy and tactics.

But, we do not agree with the government's proposed reading of the instruction. The statement that "coordination" could be merely "coordination with the strategy, the tactics of the foreign terrorist organization" is preceded by a sentence that began, "Now the coordination." That same preceding sentence then goes on to "explain the reason that the government has to prove that."

In context, then, the instruction's key statement that describes "coordination" to be merely with the "strategy" and "tactics" of ISIS, rather than with the terrorist organization itself, is most naturally read as defining the same "coordination" that the District Court mentions in its initial statement that "[the conduct] has to be . . . done in coordination with or at the direction of the foreign terrorist organization." Most naturally read, this more detailed definition of the kind of coordination that is required displaces the stricter requirement of "coordination with . . . the foreign terrorist organization" itself that the instruction earlier sets forth. See United States v. Pizarro, 772 F.3d 284, 300 (1st Cir. 2014) (opting for the "most natural reading of [a] passage" in a jury instruction, "particularly in light of" other statements made by the District Court); United States v. Latorre-Cacho, 874 F.3d 299, 305 (1st Cir. 2017) (concluding "that the instructions as a whole did not suffice to disabuse the jury of the misimpression about what it needed to find that had been created by the erroneous part of the instructions").

The government does contend that such a reading of the instruction fails to account for the portion of it that elaborates on what constitutes "coordination" and that states that "it doesn't have to be direct orders." The government argues that the statement at issue thus "could logically have been heard as merely

providing examples of conduct falling short of 'direct orders' (i.e., coordination with the organization regarding strategy or tactics)" that would suffice to show "coordination." The government thus contends that this portion of the instruction should be read to merely clarify that "coordination" need not rise to the level of "direct orders."

But, the statement in the instruction that "it doesn't have to be direct orders," even if properly read to clarify that "coordination" need not take the form of "direct orders," was still problematic. The statement cannot be read to say that "coordination" must be with the terrorist organization itself rather than with the organization's strategy and tactics, if merely publicly available. Thus, we conclude that, given the way that the words of the instruction juxtapose certain conduct that could suffice as "coordination" with certain conduct that could not, the instruction is most naturally read to state that "it" -- on the government's reading, "coordination" -- could be "with the strategy, the tactics of the foreign terrorist organization" and so need not be with the organization itself. See, e.g., Febres v. Challenger Caribbean Corp., 214 F.3d 57, 64 n.8 (1st Cir. 2000) (opting for a "phrase's more natural reading" in a jury instruction).

The conclusion that the instruction should be read as Wright urges us to read it finds additional support in another

portion of the instruction. That portion supports Wright's proposed reading by setting forth one "example" of the type of conduct that might fall outside the statute's ambit: "a random act of violence [that] then ISIS latches onto." (Emphasis added). By ruling out only that one example, the instruction implicitly suggests what the displacing definition of "coordination" suggests: that a jury may deem a defendant to have acted "in coordination with" a terrorist organization based merely on a finding that the defendant had operated in parallel to that organization.

The government does not cite -- nor do we know of -- any authority to support such an expansive construction of the "material support or resources" element of the offense. Nor does the government develop any argument that, insofar as it is so read, the instruction still properly stated the law of what constitutes "coordination." We thus conclude that, at least given the arguments presented to us, Wright has adequately made the case that the instruction on Count One with respect to the definition of "coordination" constitutes legal error.

2.

Of course, "[e]ven an incorrect instruction to which an objection has been preserved will not require us to set aside a verdict if the error is harmless." United States v. Sasso, 695 F.3d 25, 29 (1st Cir. 2012) (citing United States v. Argentine,

814 F.2d 783, 788-89 (1st Cir. 1987)). The determination of whether the erroneous instruction was harmless turns in part on whether the flaw in it was of a constitutional dimension. We thus start by considering that issue.

a.

An instruction that relieves the government of its burden of proving beyond a reasonable doubt an element of the offense violates the Due Process Clause of the Fifth Amendment to the Constitution. See Patterson v. New York, 432 U.S. 197, 210 (1977). Such an instruction is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). The government bears the burden, moreover, of showing that an instruction that is constitutionally flawed is harmless. See United States v. Sepulveda-Contreras, 466 F.3d 166, 171 (1st Cir. 2006).

The government does not explain how -- if we conclude that the instruction says what Wright contends that it says -- we could reach any conclusion other than that it reduced the government's burden to prove one of the theories that the parties themselves agreed was necessary to prove the "material support or resources" element of the conspiracy charge at issue. After all, the government makes no argument that an instruction that permitted

Wright to be convicted merely for having coordinated with the "strategy" and "tactics" of ISIS properly described the "coordination" that it agreed had to be proven, in the event that "direction" was not. Accordingly, we proceed on the understanding that this instructional error is a constitutional one and thus triggers the harmless error standard for errors of that magnitude.

The government submitted both the "coordination" and "direction" theories of the "material support or resources" element to the jury. As the government rightly notes, nothing in the government's presentation of the case "force[d] or urge[d]" the jury "to decide the case on the theory [implicated by the flawed instruction]." See United States v. Skilling, 638 F.3d 480, 483 (5th Cir. 2011). Thus, when applying the demanding harmless error standard for constitutional errors, we are required to affirm the conviction if the evidence for either theory of guilt -- "coordination" or "direction" -- was so "overwhelming . . . that the jury verdict would have been the same absent the error." Neder, 527 U.S. at 17; see United States v. Zhen Zhou Wu, 711 F.3d 1, 30 (1st Cir. 2013) (citing Neder, 527 U.S. at 17; Hedgpeth v. Pulido, 555 U.S. 57 (2008)).

The government makes no argument, however, that it met the harmless error standard for a constitutional error with respect to the "in coordination with" theory of guilt, which is the theory that the flawed instruction described. See United States v.

Rodríguez-Marrero, 390 F.3d 1, 18 (1st Cir. 2004) (noting that we may deem any harmless error argument not briefed by the government as waived). The only respect in which the government even touches on the harmlessness of the instruction is its contention that "[a]ny possibility that Wright would have been prejudiced by any confusion caused by this instruction, moreover, is lessened by the government's closing argument . . . that the evidence showed that he acted at 'the direction of' ISIS, and not merely in coordination with ISIS." We thus confine our harmless error analysis to determining whether the government has met its burden to show that the evidence that Wright participated in the plot "at the direction of" ISIS was "overwhelming," see Neder, 527 U.S. at 17, as it must be to render harmless the constitutional error caused by the instruction.

b.

The government argued to the jury at trial -- and argues to us on appeal -- that the evidence of "Wright's avowed intent to attack Geller to fulfill the fatwa established that he was acting 'at the direction' of ISIS." To make that case, the government relied heavily on Rovinski's testimony to show that Wright had pledged allegiance to ISIS's leader and that Rovinski, Rahim, and Wright were making a plan to kill Geller and others to fulfill ISIS's fatwa in the hopes of attaining "martydom." But, such evidence is solely based on a government cooperator's testimony,

which is a type of evidence that is rarely deemed to be overwhelming on its own. See United States v. Melvin, 730 F.3d 29, 39 (1st Cir. 2013) (rejecting the government's argument that the "evidence of the defendant's guilt was so overwhelming as to render the [error] benign" where "[t]his proposition relied[ed] heavily on [a cooperating witness's] testimony"); see also, e.g., United States v. Ramirez-Rivera, 800 F.3d 1, 33 (1st Cir. 2015) (finding a constitutional error not harmless where "the only other evidence connecting [the defendant] to anything illegal was the testimony of the cooperators, which they provided in exchange for leniency in their own cases"); United States v. Ocasio-Ruiz, 779 F.3d 43, 48 (1st Cir. 2015) (finding an error not harmless where "the government's cooperating witness . . . gave the only evidence tying [the defendant] to the [crimes]").

Moreover, Wright testified extensively at his trial that he was simply engaged in an "ISIS role-play fantasy" to "escape [his] real life at the time," in which he was "morbidly obese" and "playing video games all day." Wright did admit in his testimony that he "said a lot of things that sound[ed] like [he] w[as] really in support of ISIS," but Wright also testified that these statements were nothing more than "trash-talking" and "trolling." Wright testified, for example, that he never intended to support ISIS or to carry out ISIS's "plan" to kill Geller and police officers.

Consistent with this aspect of Wright's testimony, we note, Wright also offered expert testimony from a neuropsychologist. She testified that Wright had "significant elements of a personality disorder." She also testified that Wright had a fragile ego, used language to impress other people, and had an unrealistic perception of who he was and impaired personal relationships.

To be sure, "the jury [may have chosen] to credit the accounts of the cooperating witness[] over the admittedly self-serving testimony of the defendant." United States v. Ofray-Campos, 534 F.3d 1, 28-29 (1st Cir. 2008). But, "[Wright's] countervailing testimony on his own behalf is a factor in conducting the harmless error analysis." Id. Taking account of that factor here, we conclude that a rational jury could have found from this evidence that Wright could have been simply "role-playing" with respect to following ISIS's direction. We thus cannot find the constitutional error in the instruction to have been harmless beyond a reasonable doubt, because the evidence to which the government points to make that showing fails to show that there was "overwhelming" evidence that Wright had conspired to kill Geller and others "at the direction of" ISIS. And that is so, even if we were to assume that -- as the government contends

-- intending to fulfill a publicly made ISIS decree constitutes acting "at the direction of" ISIS.⁴ See Neder, 527 U.S. at 17.

v.

Wright next challenges his conviction on Count Four for conspiracy to commit an act of terrorism transcending national boundaries. See 18 U.S.C. § 2332b(a)(2) and (c). Wright challenges this conviction -- just as he challenged his conviction on Count One -- both on sufficiency grounds and in consequence of an allegedly erroneous jury instruction. We begin with his sufficiency challenges.

A.

Entitled, "Acts of terrorism transcending national boundaries," § 2332b(a)(2) provides that whoever "conspires" "to commit an offense under [18 U.S.C. § 2332b(a)(1)] . . . shall be punished under [18 U.S.C. § 2332b(c)]." 18 U.S.C. § 2332b(a)(2). Section 2332b(a)(1), in turn, provides in relevant part that "[w]hoever, involving conduct transcending national boundaries . . . , kills, kidnaps, maims, commits an assault

⁴ Wright also challenges his conviction on Count One based on the District Court's refusal to give a clarification that it is "legal to join, associate, advocate, and even praise a terrorist organization." Because we vacate and remand Wright's conviction on Count One on the ground that the instruction that the District Court did give on "material support or resources" was erroneous, we have no occasion to consider whether Wright's proposed instruction -- insofar as it would attach to the District Court's erroneous instruction -- was required.

resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States . . ." shall be subject to specified punishments. Id. § 2332b(a)(1)(A). The statute defines "conduct transcending national boundaries" to mean "conduct occurring outside of the United States in addition to the conduct occurring in the United States." Id. § 2332b(g)(1).

Wright premises his sufficiency challenges on the argument that, under § 2332b(a)(1), the "[a]ct of terrorism" must be one "involving conduct transcending national boundaries." See § 2332b(g)(1). He contends, first, that the "conduct transcending national boundaries" must be "substantial" and that the only evidence of "conduct transcending national boundaries" that the government sufficiently proved at trial is not "substantial." For that reason, Wright contends that the evidence put forward to satisfy the "transcending national boundaries" requirement is not sufficient. Wright then separately contends that, because he was convicted as a conspirator under 18 U.S.C. § 2332b, the requirements of conspiracy law obliged the government "to prove that [Wright] knew and intended that the plan to kill would involve conduct transcending national boundaries." Yet, he contends, the evidence at trial was not sufficient to permit a rational juror to so find.

We review Wright's preserved Count Four sufficiency challenges de novo. See Ocean, 904 F.3d at 28. As we did when

reviewing Wright's Count One sufficiency challenges, "we view all the evidence, credibility determinations, and reasonable inferences therefrom in the light most favorable to the verdict in order to determine whether the jury rationally could have found that the government established each element of the charged offense beyond a reasonable doubt." Valdés-Ayala, 900 F.3d at 30 (internal quotation marks and punctuation marks omitted).

1.

We start with Wright's contention concerning the failure of the government to prove that the "conduct transcending national boundaries" was "substantial." We are not persuaded.

Even if we were to agree that the "conduct" must be "substantial" to constitute "conduct" within the meaning of the statute's "conduct transcending national boundaries" requirement, the evidence that the government put forth at trial sufficed. To see why, recall that, in countering Wright's sufficiency challenge to his conviction on Count One, the government argued that it introduced sufficient evidence that Rahim was plotting with a "Mr. Hussain" to kill Geller and others. That is significant for present purposes, because, in countering Wright's sufficiency challenge to his conviction on Count Four, the government contends that this same evidence sufficed to show that the conspiracy was to commit a killing "involving conduct transcending national boundaries," because there was evidence sufficient to show both

that "Mr. Hussain" was involved in the plot to kill Geller and others and that "Mr. Hussain" was overseas during that involvement.

The government's evidence on the latter score included a British foreign intelligence expert's testimony and social media records, which the government contends supportably showed that "Mr. Hussain" was in fact a British national, Junaid Hussain. The government then proceeds to point out that it introduced certified border-crossing records to supportably show that Junaid Hussain -- who, other evidence supportably showed, also went by the moniker, Abu Hussain -- had never traveled to the United States. The government thus contends that a rational jury could find from this body of evidence, taken as a whole, that Hussain's conduct in connection with the plot -- exchanging information about the plot to kill Geller with Rahim -- took place overseas and that the plot "involv[ed] conduct transcending national boundaries."

Notably, Wright does not appear to contend otherwise. In fact, Wright at one point appears to concede that "the jury may have been legally entitled to infer from these facts that 'abuhussain' was overseas." We thus proceed on the understanding that the evidence was sufficient to establish that "Mr. Hussain" was involved in the plot to kill Geller and others and that Mr. Hussain's involvement took place overseas. But, for that reason, Wright's sufficiency challenge has little merit.

The government points out that the District Court found that the evidence of Hussain's involvement in the plot was significant enough to deem him a co-conspirator, and Wright does not challenge that finding on appeal. That evidence, we agree, sufficed to show that Hussain did not merely "communicate" with Rahim but provided him with research and guidance on the plot to kill Geller, and Wright does not argue otherwise. Thus, we agree with the government that the evidence of Hussain's involvement in the plot at issue sufficed to show that the "conduct transcending national boundaries" was "substantial" under any reasonable interpretation of that term.

2.

We turn now to Wright's other sufficiency challenge to his conviction on Count Four. Here, he contends that the evidence was lacking to permit a rational juror to find him guilty of conspiring to commit the underlying offense, given what he contends are the requirements of conspiracy law.

But, Wright misapprehends conspiracy law, insofar as he contends that the government had to prove not only that the evidence showed that he intended to join a plot that he knew was to commit a killing involving "conduct transcending national boundaries," but also that he intended that the killing would involve such extra-territorial conduct. Conspiracy law simply imposes no such proof requirement on the government. Piper, 35

F.3d 611 at 615 (noting that a defendant who "intentionally agrees to undertake activities that facilitate commission of a substantive offense, but who does not intend to commit the offense himself" may be convicted of conspiracy).

There does remain the question of whether the evidence sufficed to show that, in joining the conspiracy, Wright knew that the plot was to kill Geller and others in a manner "involving conduct transcending national boundaries." But, while Wright contends that there was not sufficient evidence on that score, we disagree.

As the government points out, it introduced sufficient evidence of "Wright's knowledge that Rahim was communicating with Hussain about their plans [to kill Geller] and awareness that Abu Hussain was overseas." The government's evidence on this score included copies of two "Islamic State e-books" that Wright had shared with Rahim that listed Hussain as a member of ISIS living in Syria. The evidence also included the recording and transcript of the May 26, 2015 call between Rahim and Wright in which Rahim told Wright that "Mr. Hussain" had information that one of Wright's friends was attending ISIS training in Syria, from which, the government contends, a rational jury could infer that Wright must have known that Hussain was overseas.

In response, Wright merely states, without further explanation, that "there is no evidence that he agreed or intended

that any plan to kill would be conducted, in significant part, by someone overseas." But, this cursory statement is inadequate to satisfy Wright's burden to explain why the evidence that the government identifies on appeal was legally insufficient to show the requisite knowledge. See Zannino, 895 F.2d at 17. We thus reject Wright's sufficiency challenge to his conviction on Count Four.⁵ See Benevides, 985 F.2d at 633 n.6.

B.

We now consider Wright's preserved challenge to the District Court's jury instruction on Count Four. The relevant instruction was as follows:

Well, the first two steps are exactly the same, the government has to prove that Mr. Wright was part of a conspiracy, as I have

⁵ Wright also argues that the District Court erred in denying his motion for a new trial because, even assuming that the government established a legally sufficient circumstantial case on Count Four, the evidence that the plot "involv[ed] conduct transcending national boundaries" lacked probative force. "[T]he decision to grant or deny a new trial is committed to the sound discretion of the district court," United States v. Andrade, 94 F.3d 9, 14 (1st Cir. 1996) (quoting United States v. Soto-Alvarez, 958 F.2d 473, 479 (1st Cir.), cert. denied, 506 U.S. 877 (1992)), and the denial of a motion for a new trial is reviewed for manifest abuse of that discretion, Gaw, 817 F.3d at 10. The remedy of a new trial based on the weight of the evidence is to be "sparingly used, and then only where there would be a 'miscarriage of justice'" if the verdict were left in place. United States v. Rothrock, 806 F.2d 318, 322 (1st Cir. 1986) (quoting United States v. Indelicato, 611 F.2d 376, 387 (1st Cir. 1979)). Wright points to the fact that the evidence of overseas conduct was minimal and suspect, but his argument is cursory at best, and he makes no attempt to satisfy this "miscarriage of justice" standard or meet the demands of the deferential abuse-of-discretion standard. Therefore, this argument also fails.

defined that to you. Second, they have to prove -- and the specific intent here, the specific intent is different, but they've got to prove specific intent, they've got to prove it beyond a reasonable doubt. Here the specific intent has got to be to commit acts of terrorism transcending national boundaries

Second, because it requires, um, transcending national boundaries, in this one there has to be conduct that they're planning within the United States, the conspirators, and there also has to be conduct outside the United States, somewhere, anywhere outside the national boundaries of the United States. The conduct? Now the conduct can be communication of some sort, encouragement, direction, but it's got to be conduct outside the United States

Now one or more members of the conspiracy, and the government says the conspiracy is at least Wright, Rahim, and Rovinski, they've got to know about the foreign, um, communication, or direction, or encouragement, or the foreign conduct related to what they're doing, and it doesn't mean that Wright has to know specifically because you see if one is a conspirator, not every conspirator has to know everything every other conspirator is doing. Conspiracy is like a partnership and if one of the -- once they're a partnership, the things that the partners do in furtherance of the conspiracy is attributed to all the partners.

But at least they've got to show that that Wright was -- that Wright himself, the person who's on trial here, that he reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries, that has this terrorist connection as I've just defined it to you.

(Emphasis added).

1.

Wright first argues that the District Court erroneously instructed the jury that "conduct" can mean mere communication. He contends that the "conduct [transcending national boundaries] must be, in some way, criminal." Again, we "consider de novo whether an instruction embodied an error of law." Ackell, 907 F.3d at 78.

Wright develops no argument as to why the "conduct transcending national boundaries" to which the statute refers must in and of itself be criminal. Moreover, although the instruction does list "communication" as one example of "conduct," it immediately emphasizes that such communication "[has] got to be conduct outside the United States." This language tracks the statute's definition of "conduct transcending national boundaries." See id. § 2332b(g)(1) ("'[C]onduct transcending national boundaries' means conduct occurring outside of the United States in addition to the conduct occurring in the United States."). Therefore, we see no legal error in the District Court's instruction on "conduct transcending national boundaries."

2.

Wright also argues that the District Court erred by refusing to instruct the jury, as he requested, that it needed to find that he intended that the "act of terrorism" to be committed would involve "conduct transcending national boundaries." We

review the District Court's refusal to give an instruction requested by the defendant for abuse of discretion and will "only reverse if the proposed instruction is '(1) substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concern[ed] an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.'" United States v. Belanger, 890 F.3d 13, 32 (1st Cir. 2018) (quoting United States v. González-Pérez, 778 F.3d 3, 15 (1st Cir. 2015)) (alteration in original). "The burden is on the defendant, as the proponent of the theory, to identify evidence adduced during the trial that suffices to satisfy this standard." United States v. Ramos-Paulino, 488 F.3d 459, 462 (1st Cir. 2007) (citing United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988))).

The District Court began its instruction with a statement that the jury was required to find Wright's "specific intent . . . to commit acts of terrorism transcending national boundaries." Wright makes no argument that this statement in and of itself failed adequately to inform the jury of the intent that he contends that it was required to find that he had. Wright contends, instead, that the District Court's instruction as a whole

failed to do so, because of a subsequent portion of the instruction.

That portion of the instruction described conduct that Wright need not "know specifically" for a jury to find him guilty as a conspirator. That portion of the instruction also stated that the government "[has] got to show that . . . Wright himself . . . reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries." Wright contends that, in consequence of these statements, this portion of the instruction implied that proof of his mere knowledge that the plot was to commit an "act of terrorism" involving conduct "transcending national boundaries" -- rather than proof that he intended that the "act of terrorism" to be committed would involve conduct "transcending national boundaries" -- was sufficient to convict him of the conspiracy charge that he faced. Thus, Wright contends, the District Court's instruction failed to "substantially cover[]" his requested instruction with respect to his intent.

But, the District Court's statement concerning the level of knowledge of the conduct "transcending national boundaries" that Wright needed to have did not purport to displace its previous instruction that the jury needed to find that Wright had "the specific intent . . . to commit acts of terrorism transcending national boundaries." In fact, consistent with that conclusion,

we note that, elsewhere in the instructions, as the government points out, the District Court summarized conspiracy law by stating that "for every conspiracy, he's got to have a specific intent, and the government's got to charge what the specific intent is, and this is important. . . . He's got to have that specific intent."

We must consider the instructions as a whole. See United States v. Richardson, 225 F.3d 46, 54 (1st Cir. 2000). Wright acknowledges that proof of intent is a distinct requirement for this offense from proof of knowledge -- given that Wright was charged with a conspiracy offense. We thus do not see how the instructions regarding the knowledge requirement can fairly be read to displace or water down the District Court's separate instructions on intent, which Wright does not contend were, in and of themselves, erroneous.

Insofar as Wright means to argue that the wording of the instruction was "confusing" on this point, because the jury might not differentiate between the "intent" and "knowledge" requirements, he did not raise that specific argument below. Thus, our review would be only for plain error, but Wright develops no argument as to how he could meet that standard. See United States v. Prieto, 812 F.3d 6, 17 (1st Cir. 2016).

The District Court, as we have noted, did make a statement in which it instructed the jury that Wright did not need

"to know specifically" about "the foreign conduct." Wright appears to contend that, independent of his challenge to the instruction based on how it described the element of "intent," this statement by the District Court about what Wright needed to "know specifically" was erroneous. He appears to contend, in this regard, that this statement was likely to confuse the jury as to whether Wright himself needed to know that the terrorist act to be committed would involve conduct that "transcended national boundaries."

But, insofar as Wright does mean to advance that argument regarding the "knowledge" element, he cannot do so successfully. At trial, Wright only objected to the District Court's "specific intent" instruction, and did not raise any concerns about the District Court's instruction as it pertained to what he was required to know. Consequently, even if Wright does mean to raise this argument about the "knowledge" instruction on appeal, our review would be only for plain error. See Prieto, 812 F.3d at 17. But, once again, Wright develops no argument as to how he could meet that standard.

Nor do we see how he could. As the government points out, the instruction regarding what he needed to "know specifically" followed a discussion of particular types of conduct that would qualify as "conduct transcending national boundaries," and a conspirator need not be proven to have known all the details

of a conspiracy. Ocean, 904 F.3d at 31. Moreover, immediately after instructing the jury as to what Wright did not need to "know specifically," the District Court correctly stated that the government needed to show that Wright "reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries." We thus cannot say that, when the instructions are "considered as a whole," the portion of the instruction that concerned what Wright had to "know specifically" constituted a "clear and obvious" error. See id. (describing the plain error standard in the context of jury instructions).

VI.

For the foregoing reasons, we affirm Wright's convictions on Counts Two through Five, and we vacate Wright's conviction on Count One and remand for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
 v.)
 DAVID DAOUD WRIGHT) Case Number: **1: 15 CR 10153 - 001 - WGY**
) USM Number: 96674-038
) Jessica Diane Hedges & Michael Tumposky
) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) 1ss, 2ss, 3ss, 4ss & 5ss after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC § 2339B(a)(1)	Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization	08/31/15	1ss
18 USC § 371	Conspiracy to Obstruct Justice	06/02/15	2ss
18 USC § 1519	Obstruction of Justice	06/02/15	3ss
18 USC § 2332b(a)(2)	Conspiracy to Commit Acts of Terrorism Transcending National	08/31/15	4ss

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/19/2017

Date of Imposition of Judgment

/s/ William G. Young

Signature of Judge

The Honorable William G. Young
Judge, U.S. District Court

Name and Title of Judge

12/20/2017

Date

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: **1: 15 CR 10153 - 001 - WGY****ADDITIONAL COUNTS OF CONVICTION**

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
15 USC § 1519	Boundaries Obstruction of Justice	06/02/15	5ss

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1: 15 CR 10153 - 001 - WGY

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 28 year(s)

20 years on Counts 1ss, 3ss and 5ss; 5 years on Count 2ss and 8 years on Count 4ss. Counts 1ss, 2ss, 3ss and 5ss to run concurrently with each other and Count 4ss to run consecutively with Counts 1ss, 2ss, 3ss and 5ss.

The court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1: 15 CR 10153 - 001 - WGY

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

life

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
6. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1:15 CR 10153 - 001 - WGY

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1: 15 CR 10153 - 001 - WGY

SPECIAL CONDITIONS OF SUPERVISION

1. You must not knowingly have any contact, direct or indirect, with Pamela Geller.
2. You must participate in a mental health treatment program as directed by the Probation Office.
3. You shall be required to contribute to the costs of evaluation, treatment, programming, and/or monitoring (see Special Condition #1), based on the ability to pay or availability of third-party payment.

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1: 15 CR 10153 - 001 - WGY

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 500.00	\$	\$	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ 0.00	\$ 0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: DAVID DAOUD WRIGHT

CASE NUMBER: 1: 15 CR 10153 - 001 - WGY

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 500.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States Court of Appeals For the First Circuit

No. 18-1039

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID WRIGHT,

Defendant, Appellant.

Before

Howard, Chief Judge,
Kayatta, and Barron, Circuit Judges

ORDER OF COURT

Entered: October 25, 2019

Appellee United States' Petition for Rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Cynthia A. Young
B. Stephanie Siegmann
Randall Ernest Kromm
Michael Tumposky
Jessica D. Hedges
James E. Haynes
Jeffrey J. Pyle

United States v. Wright, 285 F.Supp.3d 443 (2018)

285 F.Supp.3d 443
United States District Court, D. Massachusetts.

UNITED STATES of America,

v.

David WRIGHT, Defendant.

CRIMINAL ACTION NO. 15-10153-WGY

|

Signed 01/22/2018

Synopsis

Background: Following his conviction by jury trial for conspiracy to provide material support to a designated foreign terrorist organization and obstruction of justice, defendant moved for new trial.

Holdings: The District Court, [Young](#), J., held that:

[1] evidence was sufficient to establish that defendant more likely than not participated in a conspiracy, as required for admissibility of alleged coconspirators' statements;

[2] alleged coconspirators' statements were statements in furtherance of a conspiracy;

[3] alleged coconspirators' statements prior to terrorist organization's order to kill American journalist did not predate formation of relevant conspiracy;

[4] defendant's arrest and confession did not terminate conspiracy;

[5] sufficient evidence supported finding that defendant acted in coordination with foreign terrorist organization;

[6] District Court's instruction that jury could infer that defendant intended natural and probable consequences of his words did not impermissibly invade province of jury or shift burden of proof to defendant; and

[7] sufficient evidence supported finding of overseas conduct required to support conviction for acts of terrorism transcending national boundaries.

Motion denied.

West Headnotes (26)

[1] **Criminal Law**

🔑 [Judgments or orders](#)

Hearsay exception allowing admission of evidence of a final judgment of conviction is not a rule of exclusion. [Fed. R. Evid. 803\(22\)](#).

[2] **Criminal Law**

🔑 [Judgments or orders](#)

Hearsay exception for judgment of previous conviction applies to foreign convictions. [Fed. R. Evid. 803\(8\)](#).

[3] **Criminal Law**

🔑 [Judicial acts, proceedings, and records](#)

Certified foreign conviction of individual who allegedly assisted defendant with terrorism plot was admissible under public records exception to hearsay rule in trial for conspiracy to provide material support to a designated foreign terrorist organization.  [18 U.S.C.A. § 2339B\(a\)\(1\)](#); [Fed. R. Evid. 803\(8\)\(A\)\(i\)](#).

[4] **Criminal Law**

🔑 [Judicial acts, proceedings, and records](#)

Evidence of convictions may be admitted, under hearsay exception for judgment of previous convictions as public records, to prove facts including, but not limited to, dates and the length of the sentence. [Fed. R. Evid. 803\(8\)](#).

[5] **Criminal Law**

🔑 [Grounds for New Trial in General](#)

Criminal Law

United States v. Wright, 285 F.Supp.3d 443 (2018)

 **Weight and sufficiency of evidence in general**

A new trial is warranted only where there would be a miscarriage of justice or where the evidence preponderates heavily against the verdict. [Fed. R. Crim. P. 33\(a\)](#).

[6] Criminal Law

 **Discretion of court as to new trial**

The decision to grant or deny a new trial is committed to the sound discretion of the district court. [Fed. R. Crim. P. 33\(a\)](#).

[7] Criminal Law

 **Furtherance or Execution of Common Purpose**

Criminal Law

 **Weight and sufficiency**

For statement to be admissible under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy, the proponent of such a statement must prove, by a preponderance of the evidence, that the declarant and the defendant were members of a conspiracy when the statement was made, and that the statement was made in furtherance of the conspiracy. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[8] Criminal Law

 **Competency**

In determining whether proponent of statement has met its burden of establishing that statement is admissible under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy, District Court may consider hearsay and other inadmissible evidence, including the very statement seeking admission. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[9] Criminal Law

 **In general; existence of conspiracy**

Knowledge of every other coconspirator and every detail of the conspiracy is not a prerequisite to coconspirator statement admissibility under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[10] Criminal Law

 **Weight and sufficiency**

Evidence was sufficient to establish that defendant more likely than not participated in a conspiracy, as required for alleged coconspirators' statements to be admissible in terrorism trial under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy, even though defendant had not personally met with and spoken to the coconspirators; evidence established that defendant and coconspirators planned to kill American journalist in allegiance to known terrorist organization and assisted coconspirator's travel to Syria, and that coconspirator who subsequently attacked police officers and was killed communicated with and received assistance from other coconspirators in connection with the plot.  [18 U.S.C.A. § 2339B\(a\)\(1\)](#); [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[11] Criminal Law

 **In general; existence of conspiracy**

Statements may be admissible under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy regardless of whether the conspiracy furthered is charged or uncharged. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[12] Criminal Law

 **Character of acts or declarations**

United States v. Wright, 285 F.Supp.3d 443 (2018)

Alleged coconspirators' statements regarding travel to Syria to join terrorist organization were statements in furtherance of conspiracy to provide material support to known terrorist organization, as required to be admissible in terrorism trial under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy.

 18 U.S.C.A. § 2339B(a)(1); Fed. R. Evid. 801(d)(2)(E).

[13] **Criminal Law**

 Furtherance or Execution of Common Purpose

For purposes of hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy, essential purpose of a conspiracy may encompass different means and methods over time. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[14] **Criminal Law**

 Acts and declarations made prior to formation of conspiracy

Alleged coconspirators' statements regarding providing support to terrorist organization, made before terrorist organization issued order to kill American journalist, did not predate formation of relevant conspiracy, and thus were admissible under hearsay exception for statements of coconspirators made in furtherance of conspiracy; although the means of the support changed over time, statements related to the same essential purpose as later statements, i.e., providing aid to the organization.  18 U.S.C.A. § 2339B(a)(1); Fed. R. Evid. 801(d)(2)(E).

[15] **Criminal Law**

 Character of acts or declarations

Defendant's arrest and confession of certain activities to FBI did not terminate conspiracy to provide support to known terrorist organization,

and thus alleged coconspirators' statements made after defendant's arrest and confession were admissible, in terrorism trial, under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy; defendant disputed allegation that he made incriminating statements to the FBI, indicating that he did not make a full confession, and prison letters sent to coconspirators tended to show that defendant had not communicated his affirmative disavowal of the conspiracy.  18 U.S.C.A. § 2339B(a)(1); Fed. R. Evid. 801(d)(2)(E).

[16] **Conspiracy**

 Duration

Conspiracy

 Withdrawal

Conspiracy

 Presumptions and burden of proof

Once a conspiracy's existence has been established, the law presumes that the conspiracy continued, and that a conspirator continued to participate, unless he makes an affirmative showing that the conspiracy was abandoned or terminated, or that he withdrew from it.

[17] **Conspiracy**

 Withdrawal

To establish that accused has withdrawal from a conspiracy or that the conspiracy has been abandoned, typically, there must be evidence either of a full confession to authorities or a communication by the accused to his coconspirators that he has abandoned the enterprise and its goals.

[18] **Criminal Law**

 Weight and sufficiency

The determination of whether a coconspirator's statement is in furtherance of the conspiracy, for purposes of hearsay exception for statements

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made by the party's coconspirator during and in furtherance of the conspiracy, is, like the determination of the existence of a conspiracy, a preliminary question of fact resolved by the trial judge who must apply a preponderance-of-the-evidence standard. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[19] Criminal Law

🔑 [Furtherance or Execution of Common Purpose](#)

While there is no precise formula for determining whether a coconspirator's statement advances a conspiracy for purposes of hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy, a statement generally is considered to be in furtherance of the conspiracy as long as it tends to promote one or more of the objects of the conspiracy; it need not be necessary or even important to the conspiracy as long as it can be said to advance the goals of the conspiracy in some way. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[20] Criminal Law

🔑 [Character of acts or declarations](#)

Alleged coconspirator's statements, posted on social media website, were more likely than not made in furtherance of conspiracy to support known terrorist organization, as required for the statement to be admissible in terrorism conspiracy trial under hearsay exception for statements made by the party's coconspirator during and in furtherance of the conspiracy; posting appeared designed to advance the conspiracy's objectives, recruit new members, or promote the social media account itself, which in turn helped promote the conspiracy and recruit members.  [18 U.S.C.A. § 2339B\(a\)\(1\)](#); [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#).

[21] Conspiracy

🔑 [Particular crimes](#)

War and National Emergency

🔑 [Crimes and criminal prosecutions](#)

Advocacy performed in coordination with, or at the direction of a foreign terrorist organization is a form of "service" and a violation of statute criminalizing knowingly providing material support or resources to a foreign terrorist organization, or attempt or conspiring to do so; "in coordination with," or "at the direction of," does not require a direct link to the foreign terrorist organization.  [18 U.S.C.A. § 2339B](#).

[22] Conspiracy

🔑 [Particular Conspiracies](#)

Sufficient evidence supported finding that defendant acted in coordination with foreign terrorist organization, as required to support conviction for conspiracy to knowingly provide material support or resources to a foreign terrorist organization; defendant and his coconspirators pledged their allegiance to the organization and were working under its direction and control to pursue its objectives, they followed the organization's instruction and conspired to kill American journalist in the United States, defendant admitted that he agreed with the organization and believed it was justified in what it was doing, and he encouraged coconspirator to pursue martyrdom as instructed by the organization's statements.  [18 U.S.C.A. § 2339B](#).

[23] Criminal Law

🔑 [Intent and malice](#)

Criminal Law

🔑 [Shifting burden of proof](#)

District Court instruction that jury could infer that terrorism conspiracy defendant intended the natural and probable consequences of his words did not impermissibly invade the province of the jury or shift the burden of proof to the defendant; Court reminded jury that it was up to them to

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evaluate the evidence of intent.  18 U.S.C.A.
§ 2339B.

[24] War and National Emergency

 Crimes and criminal prosecutions

Sufficient evidence supported finding of overseas conduct as required to support conviction for acts of terrorism transcending national boundaries; evidence established that defendant's coconspirator communicated with member of terrorist organization located in Syria, about killing American journalist, and member gave coconspirator encrypted documented related to plot to kill the journalist.  18 U.S.C.A. § 2332b(g).

[25] War and National Emergency

 Crimes and criminal prosecutions

The conduct occurring overseas is not required to be criminal to support conviction for acts of terrorism transcending national boundaries.

 18 U.S.C.A. § 2332b(g).

[26] War and National Emergency

 Crimes and criminal prosecutions

Phrase "involving conduct transcending national boundaries" as used in statute criminalizing acts of terrorism transcending national boundaries, is a jurisdictional element, rather than a substantive conduct element with a mens rea.  18 U.S.C.A.
§ 2332b(g).

Attorneys and Law Firms

*447 B. Stephanie Siegmann, U.S. Attorney's Office, Boston, MA, Gregory R. Gonzalez, U.S. Department of Justice, Washington, DC, for United States of America.

MEMORANDUM OF DECISION

YOUNG, D.J.

Let me explain this sentence to you, Mr. Wright. In one sense this case follows a familiar arc—they've got graphs of all these things, there was superb law enforcement activity here to protect us all, your case came on reasonably promptly for trial, fair procedures throughout, a guilty verdict on overwhelming evidence, and a severe sentence. But if I stop there, I have not fully explained the reason for the sentence and we miss out on the larger issues, and they seem to me to be these[.]

You are not a monster, yet you embrace a monstrous evil. You stand before this Court a convicted terrorist, no doubt in my mind about that. You've got to live with the fact that you sent your uncle out there to be killed, laughing and chortling in the hope obviously that he would kill or maim someone else. That's on your conscience.

...

[T]rials matter, and jury trials matter especially, they really are both a test *448 and a celebration of a free people governing themselves. Thomas Jefferson said, "The jury is the greatest anchor humankind has ever conceived for holding the government to the principles of its Constitution." And so it is here.

For the first time I, as a presiding officer, as a citizen, came to understand what it meant to be "radicalized." A couple of clicks on the computer, the dark web, and all this material is there. And like the jurors—and the government properly provided me with the full record of the evidence and I have reviewed all of it before this hearing, I have sat and watched with horrified fascination, and I admit it, the monstrous evil that you embraced.

Now ISIS is just about done, it's about to be relegated to the dust bin of history, forgotten and reviled, and whatever you say now that's what you chose[.]

[A]t the same time we are a society awash in vicarious violence and ... the evidence here ... ha[s] the hideous attraction of a snuff video. And there's [sic] always going to be restless young men in search of a cause. You made

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the wrong choice, a terrible choice, and in my mind you made it knowingly and this sentence reflects it. But I cannot sentence you without acknowledging that we're not going to arrest our way out of this situation. There's [sic] going to be other young men, restless, on the web—ISIS will be gone—looking for a cause.

...

I have searched my conscience as to what we do about that, and the best I can come up with is ... the life's work of Justice Sandra Day O'Connor, who challenges us to understand American democracy. [T]hat's a challenge, that's where heroism and self-sacrifice and struggling against the odds ... goes on day by day.

Court's Remarks, Transcript of **David Wright's** Sentencing Hearing at 53:4–55:5, United States v. Wright, No. 15-cr-10153 (D. Mass. Dec. 19, 2017), ECF No. 417.

On October 18, 2017, a jury convicted the defendant **David Wright** ("Wright") of five counts including conspiracy to provide material support to a designated foreign terrorist organization and obstruction of justice. Wright moved for a new trial pursuant to [Rule 33 of the Federal Rules of Criminal Procedure](#). This Court DENIED Wright's motion on December 18, 2017. Electronic Order, ECF No. 407. This memorandum explains the Court's reasoning for that and other trial-related decisions.

I. BACKGROUND

On February 15, 2017, a federal grand jury charged Wright with conspiracy to provide material support to a designated foreign terrorist organization and aiding and abetting in violation of  [18 U.S.C. § 2339B\(a\)\(1\)](#) and [18 U.S.C. § 2](#) ("Count 1"); conspiracy to obstruct justice in violation of [18 U.S.C. § 371](#) ("Count 2"); obstruction of justice and aiding and abetting in violation of [18 U.S.C. § 1519](#) and [18 U.S.C. § 2](#) ("Count 3"); conspiracy to commit acts of terrorism transcending national boundaries in violation of  [18 U.S.C. § 2332b\(a\)\(2\)](#) and  (c) ("Count 4"); and obstruction of justice in violation of [18 U.S.C. § 1519](#) ("Count 5"). See Second Superseding Indictment, ECF No. 171.

Wright's trial began on September 18, 2017 and ran until October 17, 2017. During the thirteen-day trial,

the government presented evidence that Wright conspired with several individuals, including his uncle, Usaamah Abdullah Rahim ("Rahim"), co-defendant Nicholas Rovinski ("Rovinski"), and others to support the Islamic *449 State of Iraq and Syria ("ISIS"). The government contended that Wright recruited Rahim and Rovinski in efforts to organize a terrorist cell in Massachusetts. Evidence showed that the group initially planned to join ISIS in Syria, but then changed course when ISIS issued a fatwa against American journalist Pamela Geller ("Geller"). Rovinski testified that, at that point, Wright, Rahim, and Rovinski conspired to behead Geller pursuant to that fatwa. Much of their planning, communication, and recruiting efforts took place via the internet, where Wright distributed ISIS propaganda, researched various weapons, managed a Twitter account advocating pro-ISIS beliefs, and chatted with other ISIS supporters. One of these individuals, Zulfi Hoxha ("Hoxha"), was an individual living in the United States whom Wright successfully encouraged to travel to Syria and join ISIS. Other individuals with whom Rahim communicated included an individual seemingly located in Turkey whose online moniker was "abu3antar" ("Abu Antar"), as well as a shadowy individual who operated numerous Twitter accounts under the name "Abu Hussain al-Britani" ("Abu Hussain"). Evidence was presented showing that this second individual was in fact Junaid Hussain, an ISIS member in Syria.

On the morning of June 2, 2015, Rahim called Wright and told him that he planned to attack law enforcement officers on behalf of ISIS. Wright encouraged Rahim to do so, instructing him to destroy his electronic devices before the attack. Shortly thereafter, Rahim attacked several police officers in a Roslindale parking lot and was killed. After learning of this incident, Wright erased the data on his computer by restoring it to its original factory settings. Law enforcement officers arrested Wright later that day, searched his home, and conducted a lengthy interview with him.

The jury convicted Wright on all counts. Wright moved to set aside the verdict and ordered a new trial on November 2, 2017. Def. Wright's Mot. New Trial ("Def.'s Mot."), ECF No. 393. The government opposed the motion. Gov't Opp'n Def.'s Mot. ("Gov't Opp'n"), ECF No. 395. This Court DENIED the motion on December 18, 2017. Electronic Order, ECF No. 407.

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II. PRE-TRIAL RULING

Prior to trial, the government sought to introduce the certified conviction in a court of the United Kingdom (U.K.) of one Junaid Hussain of “Causing [a] Computer to Perform [a] Function with Intent to Secure Unauthorized Access” in the United Kingdom to support the inference that this British citizen is Abu Hussain, a U.K. born terrorist and “hacker,” who assisted Wright with the alleged terrorist plot, and the subject of a telephone call between Wright and Rahim on May 26, 2015. Gov’t’s Opp’n to Def.’s Mot. in Lim. Exclude Crim. Conviction of Junaid Hussain 1 (“Gov’t’s Opp’n Mot. Lim.”), ECF No. 260.

Wright moved in limine to exclude the criminal conviction of Junaid Hussain on the grounds that no exception to the rule against hearsay applied. Def.’s Mot. in Lim. Exclude Crim. Conviction of Junaid Hussain 1 (“Def.’s Mot. Lim.”), ECF No. 250. Specifically, Wright contended: (i) [Federal Rule of Evidence 803\(22\)](#) is the only exception under which this Court could admit the foreign conviction of Junaid Hussain, and (ii) the foreign conviction of Junaid Hussain is not a public record within the meaning of [Federal Rule of Evidence 803\(8\)](#). Def.’s Mot. Lim. 2. In response, the government argued that the conviction of Junaid Hussain was admissible under either [Rule 803\(8\)](#) as a public record or [Federal Rule of Evidence 807](#), the residual exception to the rule against [*450](#) hearsay. Gov’t’s Opp’n Mot. Lim. 1. There was no dispute that Junaid Hussain’s conviction was properly authenticated. Def.’s Mot. Lim. 1.

This Court DENIED the motion on September 15, 2017, Electronic Order, ECF No. 318, and will explain its ruling below.

A. [Rule 803\(22\)](#) is not a Rule of Exclusion

[1] [Rule 803\(22\)](#) provides that “[e]vidence of a final judgment of conviction” is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, if, among other requirements, “(C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.” [Fed. R. Evid. 803\(22\)](#).

Both parties appear to agree that [Rule 803\(22\)](#) does not apply here. [See](#) Def.’s Mot. Lim. 1 (stating that the conviction is not against the defendant); Gov’t’s Opp’n Mot. Lim. 1 (implicitly conceding the inapplicability of [Rule 803\(22\)](#) by arguing that [Rule 803\(8\)](#) or [Rule 807](#) applies instead). Therefore, the only issue left here is whether the inapplicability of [Rule 803\(22\)](#) excludes the application of other hearsay exceptions.

Without citing any authorities, Wright argues that [Rule 803\(22\)](#) is “[t]he only possible vehicle for the admission” of prior convictions and because [Rule 803\(22\)](#) “on its face excludes third party convictions,” Junaid Hussain’s conviction is inadmissible. Def.’s Mot. Lim. 2. This Court disagrees.

In [Olsen v. Correiro](#), 189 F.3d 52 (1st Cir. 1999), the First Circuit refused to interpret [Rule 803\(22\)](#) as an affirmative bar of certain final judgments excepted from the rule. [Id.](#) at 62–63 (“Evidence of a final judgment that does not fall within [[Rule 803\(22\)](#)] could still be admissible, either because it is not being offered for the truth of the matter asserted or because it falls within some other hearsay exception.” (citing [Hinshaw v. Keith](#), 645 F.Supp. 180, 182 (D. Me. 1986) (“[Rule 803\(22\)](#) is not a rule of exclusion, but rather an exception to the broad exclusionary rule known as the hearsay rule.”)); [Hancock v. Dodson](#), 958 F.2d 1367, 1372 (6th Cir. 1992) (noting that guilty pleas inadmissible under [Rule 803\(22\)](#) may still be admissible under other hearsay exceptions); [United States v. Breitkreutz](#), 977 F.2d 214, 221 (6th Cir. 1992) (holding a judgment and commitment order admissible under [Rule 803\(8\)](#) as a public record even though it is inadmissible under [Rule 803\(22\)](#)). In sum, this Court agrees with the government that [Rule 803\(22\)](#) is not a rule of exclusion.

B. Applicability of [Rule 803\(8\)](#)

[Rule 803\(8\)](#) provides that “[a] record or statement of a public office” is not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness, if “(A) it sets out: (i) the office’s activities ... or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.” [Fed. R. Evid. 803\(8\)](#). Before the 2011 amendments restyling the language of [Rule 803](#),¹ [Rule 803\(8\)\(A\)](#) specified “the activities of the office

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or agency,"  [United States v. Romero](#), 32 F.3d 641, 650 (1st Cir. 1994), which is functionally equivalent *451 to current Rule 803(8)(A)(i). The current Rule 803(8)(A)(iii) is functionally equivalent to the provision formerly styled as Rule 803(8)(C), which applied to "factual findings resulting from an investigation made pursuant to authority granted by law."  [Nipper v. Snipes](#), 7 F.3d 415, 417 (4th Cir. 1993).

Wright alleges that Rule 803(8) does not apply for three different reasons: (i) Rule 803(8) does not apply to foreign convictions; (ii) convictions are not public records within the meaning of Rule 803(8); and (iii) Rule 803(8) applies only if convictions are offered "to prove facts such as dates or the length of a criminal sentence." Def.'s Mot. Lim. 2 (quoting  [Breitkreutz](#), 977 F.2d at 221).

1. Foreign Convictions

[2] First, Wright incorrectly cites  [United States v. \\$125,938.62](#), 537 F.3d 1287 (11th Cir. 2008), to support the proposition that foreign convictions are not within the meaning of public records under Rule 803(8). Def.'s Mot. Lim. 2. In  [\\$125,938.62](#), the government introduced the defendants' prior foreign conviction to show facts described in the conviction in addition to the conviction itself.  537 F.3d at 1290. The Eleventh Circuit observed that while the foreign conviction was admissible under Rule 803(22), the district court erred in admitting the factual findings articulated in the foreign judgment of conviction under what was then called Rule 803(8)(C).  [Id.](#) at 1292 (explaining that "Rule 803(8)(C), by its plain language, does not apply to judicial findings of fact" and thus "none of the relevant facts found in the judgment of conviction were admissible"). The Eleventh Circuit did not discuss the significance of a foreign conviction. See  [id.](#) The Court was also silent on whether the foreign conviction would be admissible under Rule 803(8) as a public record if offered to show only the fact of conviction. See  [id.](#)

The government correctly distinguishes  [\\$125,938.62](#) from the case at issue because here, it introduced Junaid Hussain's foreign conviction to show only the fact of conviction, not the factual findings contained in the conviction. Gov't's Opp'n

Mot. Lim. 4. In addition, the foreign nature of the conviction in  [\\$125,938.62](#) was not the reason that Rule 803(8) did not apply.  537 F.3d at 1292. Thus, Wright is incorrect to draw the conclusion that Rule 803(8) does not apply to foreign convictions.

2. Office Activities and Factual Findings

Second, Wright argues that convictions are not public records within the meaning of Rule 803(8) because Rule 803(8) does not apply to judicial findings of fact. Def.'s Mot. Lim. 2. Rule 803(8) "draws a distinction" between a public office's activities and "factual findings from a legally authorized investigation." [United States v. Murgio](#), No. 15-CR-769(AJN), 2017 WL 365496, at *7 (S.D.N.Y. Jan. 20, 2017).

In  [Olsen](#), the First Circuit ruled that a party's prior manslaughter conviction was admissible under what was then called Rule 803(8)(A) to show a sentence of time already served.  189 F.3d at 63 ("When offered to show the fact of conviction rather than underlying guilt 'a judgment readily fits the public records exception.' " (quoting 4 Mueller & Kirkpatrick, [Federal Evidence](#) § 472, at 660 (2d ed. 1994))).

But cf.  [Nipper](#), 7 F.3d at 417-18 (holding that "judicial findings of fact are not public records within the meaning of Rule 803(8)(C)," noting that "when the drafters of the Federal Rules of Evidence wanted to allow the admission of judgments or their underlying facts, they did so expressly").

 [Nipper](#) is distinguishable from  [Olsen](#). In  [Olsen](#), the First Circuit ruled a prior conviction *452 was admissible to prove a sentence of time already served as a public record for office or agency activities under the old Rule 803(8)

(A).  189 F.3d at 63. In  [Nipper](#), the Fourth Circuit ruled a prior court order inadmissible to prove a party's prior wrongdoings under the old Rule 803(8)(C) because that subsection does not apply to judicial fact finding.  7 F.3d at 418. Because these two cases reached different results based on different grounds,  [Olsen](#) is not contradictory with  [Nipper](#).

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[3] Wright fails to recognize that  [Nipper](#) and  [Olsen](#) concern different evidentiary rules. Def.'s Mot. Lim. 2.

 [Olsen](#) does not stand for the proposition that judicial determinations are not public records under what was then called [Rule 803\(8\)\(C\)](#). [Rule 803\(8\)\(C\)](#) is immaterial here.

 [Olsen's](#) holding is under what was then called [Rule 803\(8\)\(A\)](#).² Accordingly, this Court follows  [Olsen](#) to rule that the certified foreign conviction of Junaid Hussain is admissible within the meaning of public records under [Rule 803\(8\)\(A\)\(i\)](#).

3. Facts that Can Be Proved Under [Rule 803\(8\)](#)

Finally, Wright alleges that “convictions are admissible under [Rule 803\(8\)](#) as public records only if offered ‘to prove facts such as dates or the length of a criminal sentence.’” Def.'s

Mot. Lim. 2 (quoting  [Breitkreutz](#), 977 F.2d at 221). In

 [Breitkreutz](#), the government introduced a judgment and commitment order of a third party to bolster the credibility of a witness.  977 F.2d at 215. The Sixth Circuit affirmed the district court's decision to admit the judgment and commitment order under [Rule 803\(8\)](#) as a public record.

 [Id.](#) at 221 (holding that “the admission of the judgment and commitment order for purposes of establishing the date and length of [a third party's] sentence was entirely proper and resulted in no unfair prejudice to the defendant”). In

 [United States v. Wilson](#), 690 F.2d 1267 (9th Cir. 1982), the Ninth Circuit noted that an “adequately authenticated” judgment and commitment order is admissible “in its entirety” under [Rule 803\(8\)](#) as a public record.  [Id.](#) at 1275

n.2. The judgment and commitment order was inadmissible under [Rule 803\(22\)](#) in both  [Breitkreutz](#) and  [Wilson](#), though for different reasons. Compare  [Breitkreutz](#), 977 F.2d at 221 ([Rule 803\(22\)](#) not applicable because the previous conviction of a third party was “not offered to prove a fact essential to sustain the judgment”), with  [Wilson](#), 690 F.2d at 1275 ([Rule 803\(22\)](#) not applicable because the conviction was related to a misdemeanor instead of a felony). The Sixth Circuit noted that with respect to the admissibility of a prior conviction “introduced to prove facts such as dates or the length of a criminal sentence,” there

was “no meaningful distinction” between the judgment and commitment orders in  [Breitkreutz](#) and  [Wilson](#) under [Rule 803\(8\)](#).  [Breitkreutz](#), 977 F.2d at 221.

[4]  [Breitkreutz](#) does not stand for, as construed by Wright, the proposition that “convictions are admissible under [Rule 803\(8\)](#) as public records only if offered ‘to prove facts such as dates or the length of a criminal sentence.’” Def.'s Mot. Lim. 2 (quoting  [Breitkreutz](#), 977 F.2d at 221) (emphasis added).

 [Breitkreutz](#) does not include any language indicating that Court *453 intended to limit the admissibility of prior convictions under [Rule 803\(8\)](#) to show only dates or the length of a criminal sentence. As correctly argued by the government, the term “such as” means that convictions may be admitted to prove facts including, but not limited to, dates and the length of a sentence. Gov't's Opp'n Mot. Lim. 3.

Here, the government introduced Junaid Hussain's prior conviction solely to prove the fact that this individual was previously convicted in the United Kingdom for the offense of “Causing [a] Computer to Perform [a] Function with Intent to Secure Unauthorized Access.” That's all. The fact of that conviction, standing alone, was competent circumstantial evidence from which others might think that individual was a computer facile “hacker.” This, coupled with evidence that Junaid Hussain had fled the United Kingdom and Abu Hussain's full moniker was Abu Hussain al Britani is enough for the jury reasonably to conclude they were hearing about one and the same individual.

III. MOTION FOR A NEW TRIAL

[5] [6] Under [Rule 33 of the Federal Rules of Criminal Procedure](#), a trial court “may vacate any judgment and grant a new trial if the interest of justice so requires.” [Fed. R. Crim. P. 33\(a\)](#). A new trial is warranted “only where there would be a miscarriage of justice” or “where the evidence preponderates heavily against the verdict.”  [United States v. Merlino](#), 592 F.3d 22, 32 (1st Cir. 2010) (quoting [United States v. Wilkerson](#), 251 F.3d 273, 278 (1st Cir. 2001)). “[T]he decision to grant or deny a new trial is committed to the sound discretion of the district court.”  [United States v. Andrade](#), 94 F.3d 9, 14 (1st Cir. 1996) (quoting  [United States v. Soto-Alvarez](#), 958 F.2d 473, 479 (1st Cir. 1992)).

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Wright advanced three arguments in support of his motion: (i) the Court erred in admitting various statements as nonhearsay coconspirator statements under [Rule 801\(d\)\(2\)\(E\) of the Federal Rules of Evidence](#), (ii) the Court's jury instructions on material support, intent, and transcending national boundaries were incorrect, and (iii) the verdict on Count 4 was against the weight of the evidence. Def.'s Mot. 1. This Court addresses each argument in turn.

A. Coconspirator Statements

[7] [8] [Rule 801\(d\)\(2\)\(E\)](#) provides that statements “made by the party's coconspirator during and in furtherance of the conspiracy” are not hearsay and are thus admissible against that party. [Fed. R. Evid. 801\(d\)\(2\)\(E\)](#). “The proponent of such a statement must prove, by a preponderance of the evidence, that the declarant and the defendant were members of a conspiracy when the statement was made, and that the statement was made in furtherance of the conspiracy.” [United States v. Ciresi](#), 697 F.3d 19, 25 (1st Cir. 2012). A court's determination of whether this burden has been met “is known in this circuit as a [Petrozziello](#) ruling.” [United States v. Mitchell](#), 596 F.3d 18, 23 (1st Cir. 2010). In making its determination, the Court may consider “hearsay and other inadmissible evidence, including perhaps the very statement seeking admission.”  [United States v. Drougas](#), 748 F.2d 8, 29 (1st Cir. 1984) (quoting  [United States v. Martorano](#), 557 F.2d 1, 11 (1st Cir. 1977)). The First Circuit has held that a trial court may conditionally admit the co-conspirator statements and make its final [Petrozziello](#) determination that a conspiracy existed after the government rests.  [United States v. Ciampaglia](#), 628 F.2d 632, 638 (1st Cir. 1980). This Court concluded that the various alleged and overlapping conspiracies were proved by a preponderance of the evidence.

*454 Wright contended that the Court erred in admitting certain statements made by Abu Hussain, Abu Antar, and Hoxha, arguing that the statements do not qualify as coconspirator statements under [Rule 801\(d\)\(2\)\(E\)](#) and thus constitute inadmissible hearsay. Wright cited four bases for his claim of error, and the Court considered each of them.

[9] [10] Wright first argued that the “independent, nonhearsay” evidence was insufficient to establish the existence of a conspiracy between Wright and the various declarants.

Def.'s Mot. 3. As noted above, the Court may indeed consider hearsay and in fact “any evidence whatsoever.”

 [Bourjaily v. United States](#), 483 U.S. 171, 178, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Such evidence was sufficient for the Court to conclude that Wright more likely than not participated in a conspiracy to provide material support to ISIS with Abu Hussain, Abu Antar, and Hoxha. For example, the government presented evidence that Wright, Rahim, and Rovinski planned to kill Geller in allegiance to ISIS, see 9/21/17 Trial Tr. at 10:7–16, 17:9–21:23, and encouraged and assisted Hoxha's travel to Syria, id. at 37:14–39:5, Exs. 57, 317, 379. The evidence also showed that Rahim communicated with and received assistance from Abu Hussain and Abu Antar in connection with the plot to kill Geller and in traveling to Syria. See Exs. 57, 57A, 356. Though Wright claims that “undisputed” evidence showed that he had never personally met or spoken to Abu Hussain and Abu Antar, Def.'s Mot. 2–3, the fact that Wright may not personally have known these individuals does not compel the conclusion that no conspiracy existed. Knowledge of every other coconspirator and every detail of the conspiracy is not a prerequisite to coconspirator statement admissibility. See

 [United States v. Cruz-Rodriguez](#), 541 F.3d 19, 28 (1st Cir. 2008) (observing that conspiracy may be proven “without showing that (1) each conspirator knew of or had contact with all other members; (2) each conspirator knew of all the details of the conspiracy or participated in every act in furtherance of it; or (3) the conspiratorial ‘cast of characters’ remained intact throughout the duration of the entire enterprise”).

Second, Wright claims that many of the [Rule 801\(d\)\(2\)\(E\)](#) statements regarding travel to Syria were inadmissible because they were “untethered” to the specific conspiracies charged or “suggested” by the government, which (as Wright asserts) relate only to activities planned within the borders of the United States. Def.'s Mot. 5–6. Wright relies on  [United States v. Piper](#), 298 F.3d 47 (1st Cir. 2002), in which the First Circuit held that certain statements should not have been admitted under [Rule 801\(d\)\(2\)\(E\)](#) because they did not further the conspiracy.  Id. at 56. In  [Piper](#), the charged conspiracy involved an agreement to distribute drugs supplied by the defendant. In this context, the First Circuit explained, a conversation between the distributor and an undercover agent indicating “an attempt to persuade [the agent] to purchase drugs from a source other than the [defendant]” was not in

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furtherance of and in fact was “antithetic to” the charged conspiracy.  [Id. at 55](#). Wright argues that any plan to travel to Syria is likewise “an unrelated venture” that is separate from the charged conspiracies and thus cannot support the statements’ admissibility. Def.’s Mot. 6. The Court disagreed.

[11] [12] [13] Though the Court notes that statements may be admissible under [Rule 801\(d\)\(2\)\(E\)](#) “regardless of whether the conspiracy furthered is charged or uncharged,” [United States v. Lara](#), 181 F.3d 183, 196 (1st Cir. 1999), it need not address any potential uncharged conspiracy because *455 the statements here were clearly related to and in furtherance of the conspiracies charged. Statements relating to the planned travel to Syria, unlike the inadmissible statements in  [Piper](#), were not “designed to frustrate” the conspiracy to provide material support to ISIS.  [Piper](#), 298 F.3d at 55. On the contrary, traveling to Syria to join ISIS quite naturally advances such a conspiracy. Further, the First Circuit has explained that the “essential purpose” of a conspiracy may encompass different means and methods over time. [United States v. Mehanna](#), 735 F.3d 32, 56 (1st Cir. 2013) (concluding that a conspiracy’s shift in focus “from Pakistan to domestic attacks and then to Yemen did not rob it of its essential purpose: waging jihad against the United States”). Here, the “essential purpose” of Wright’s agreement with his co-conspirators—to provide material support to ISIS—remained the same, even if the means of providing that support changed over time. Whether the conspirators were planning to travel overseas to join ISIS, or plotting to commit an attack on Geller in the United States, they were serving the same basic purpose of providing material support to ISIS. Thus, the statements about traveling to Syria are admissible nonhearsay.

Third, Wright argued that the statements offered by the government and admitted under [Rule 801\(d\)\(2\)\(E\)](#) all occurred outside of the conspiracy’s duration. According to Wright, the conspiracy began “for purposes of [Rule 801](#)” on May 6, 2015, when ISIS issued the order to kill Geller, and ended on June 2, 2015, the day he was arrested and spoke with the FBI. Def.’s Mot. 6. Any statements made before or after that time period, Wright claims, could therefore not have been made “during” the conspiracy and are inadmissible. [Id. at 7](#).

[14] The argument as to statements made prior to May 2015 has no merit for the same reasons as those stated above. Evidence at trial showed that Wright and Rahim had discussed providing support to ISIS as early as June 2014, [see](#) Ex. 5, and though the means of that support may have evolved over time, these statements related to the same “essential purpose” as later statements—providing aid to ISIS. They accordingly do not “predate the formation of the relevant conspiracy” and are admissible. [Mehanna](#), 735 F.3d at 57.

[15] [16] [17] Statements made after June 2, 2015 were also admissible because the mere facts of Wright’s arrest and confession of certain activities to the FBI did not terminate the conspiracy. Once a conspiracy’s existence has been established, “the law presumes that the conspiracy continued, and that [a conspirator] continued to participate, unless he makes ‘an affirmative showing’ that the conspiracy was abandoned or terminated, or that he withdrew from it.” [United States v. Mangual-Santiago](#), 562 F.3d 411, 422 (1st Cir. 2009) (quoting  [Piper](#), 298 F.3d at 53). “Typically, there must be evidence either of a full confession to authorities or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals.”  [United States v. Juodakis](#), 834 F.2d 1099, 1102 (1st Cir. 1987). Wright’s own testimony disputing that he made incriminating statements to the FBI on that date indicates that he did not make a full confession during his June 2015 interview. [See](#) 10/11/17 Trial Tr. at 105:17–108:10. Further, the government introduced prison letters sent to Wright by Rovinski in August 2015, the contents of which tend to show that Wright had not communicated his affirmative disavowal of the conspiracy. [See](#) 9/21/17 Trial Tr. at 62, Exs. 73–74. Though Wright argues that he “neither spoke nor acted in furtherance of the conspiracy *456 after the date of his arrest,” Def.’s Mot. 7, that lack of action does not suffice. As a result, statements made through August 2015 were made during the course of the conspiracy and were admissible under [Rule 801\(d\)\(2\)\(E\)](#).

Fourth and lastly, Wright argued that none of the [Rule 801\(d\)\(2\)\(E\)](#) statements were made in furtherance of the conspiracy because the statements failed to “advance the objectives of the charged conspiracy to kill in the United States.” Def.’s Mot. 8. In particular, Wright points to several of Abu Hussain’s Twitter postings, such as those in which Abu Hussain refers to a “CyberCaliphate” and a potential drone strike, one statement in which he announces, “I’m back again Obama,”

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see Ex. 400, and his statements commenting on Rahim's death, see Ex. 119.

[18] [19] The determination of whether a coconspirator's statement is in furtherance of the conspiracy is, like the determination of the existence of a conspiracy, a "preliminary question of fact ... resolved by the trial judge" who must apply a preponderance-of-the-evidence standard.  [Piper](#), 298 F.3d at 54. While "there is no precise formula for determining whether a coconspirator statement advances a conspiracy," a statement generally "is considered to be in furtherance of the conspiracy as long as it tends to promote one or more of the objects of the conspiracy."  [Id.](#) It "need not be necessary or even important to the conspiracy ... as long as it can be said to advance the goals of the conspiracy in some way."  [Id.](#) (quoting  [United States v. Martinez-Medina](#), 279 F.3d 105, 117 (1st Cir. 2002)).

[20] Applying a preponderance-of-the-evidence test, Abu Hussain's statements on Twitter were more likely than not made in furtherance of the conspiracy. The First Circuit has affirmed this finding where the statements at issue "were seemingly made for such purposes as recruiting new members into the conspiracy or passing information between conspirators."   [United States v. Shea](#), 211 F.3d 658, 668 (1st Cir. 2000). Here, Abu Hussain's Twitter postings all appear designed to advance the conspiracy's objectives, recruit new members, or promote the Twitter account itself (which in turn helps to promote the conspiracy and recruit members). These goals are particularly apparent in the statements posted after Rahim's death, in which Abu Hussain explains that Rahim's plan was to behead Geller, wishes for his martyrdom, and provides an address for Geller along with the direction to "GoForth." See Exs. 119–20. As a result, the statements were nonhearsay and admissible as coconspirator statements under Rule 801(d)(2)(E).

B. Jury Instructions

Wright argued that the Court committed three errors in its instructions to the jury. First, he argued that the Court erred "when it instructed the jury that coordination with the tactics and strategy of ISIS was sufficient and when it refused to instruct the jury on [Wright's] requested instruction limiting the concept of material support," in connection with Count

1. Def.'s Mot. at 13. Second, he argued that the Court erred when it instructed the jury that it could infer Wright intended " 'the natural and probable consequences' of his words," also in connection with Count 1. [Id.](#) at 17. Third, he argued that the Court erred when "it instructed the jury that overseas 'conduct' can mean mere communication and when it refused to instruct the jury that the Defendant needed to intend that the killing involve overseas conduct to support a conviction," with regards to Count 4. [Id.](#) at 9.

The Court will address each argument in turn.

*457 1. Definition of Material Support

As part of the jury instructions for Count 1, conspiracy to provide material support, this Court instructed the jury as follows:

Under the law there's two ways you can provide such support, either through services or through personnel, and the way the government has framed this case, and they're going to argue to you, that the conspiracy here was to provide personnel, people. What people? Well, at a minimum the three conspirators, Mr. Wright, Mr. Rahim, and Mr. Rovinski. To provide themselves as personnel to support a foreign terrorist organization, specifically ISIS. And the government alleges that the support is planning to murder Pamela Geller, murder police officers and other people, constitute themselves as a martyrdom cell and a conspiratorial cell within our society. But the specific support is providing themselves, the three of them, and seeking to recruit others for—in order to provide this support to a foreign terrorist organization.

The support must be "material," which means it's got to make some sort of difference, not a major coup necessarily, but it's got to make some difference to the goals, plans, strategy, tactics of this foreign terrorist organization, in this case it's ISIS. And there's got to be—what they do—and again this is all part of this terrorist connection, what they plan to do has—the specific language I want to use is that it has to be "conduct done in coordination with or at the direction of the foreign terrorist organization."

Now the coordination—and the reason that the government has to prove that is to prevent, um, the law from applying some random act, just a random act of violence and then ISIS latches onto that and says, "Oh, yeah, those were

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our soldiers,” or something like that. They have to—the conspiracy has got to be, um, cognizant of and acting in coordination—it doesn’t have to be direct orders, but in coordination with the strategy, the tactics of the foreign terrorist organization, in this case ISIS. Well, that’s the first question.

10/17/17 Trial Tr. at 28:12–29:24.

Wright argued that this Court “erred when it instructed the jury that coordination with the tactics and strategy of ISIS was sufficient” to prove Wright provided material support “and when it refused to instruct the jury on [Wright’s] requested instruction limiting the concept of material support.” Def.’s Mot. 13.

[21]  [Section 2339B](#) makes it unlawful to “knowingly provide[] material support or resources to a foreign terrorist organization, or attempt[] or conspire[] to do so.”  [18 U.S.C. § 2339B\(a\)\(1\)](#). “[T]he term ‘material support or resources’ has the same meaning given that term in section 2339A”  [Id. at § 2339B\(g\)\(4\)](#). Under section 2339A, “‘material support or resources’ means any property, tangible or intangible, or service”  [18 U.S.C. § 2339A\(b\)\(1\)](#). “[A]dvocacy performed in coordination with, or at the direction of” a foreign terrorist organization is a form of “service” and a violation of  [section 2339B](#). [Mehanna, 735 F.3d at 49](#) (quoting  [Holder v. Humanitarian Law Project, 561 U.S. 1, 24, 130 S.Ct. 2705, 177 L.Ed.2d 355 \(2010\)](#)). “[I]n coordination with, or at the direction of” does not require a “direct link” to the foreign terrorist organization. [Mehanna, 735 F.3d at 50](#).

Wright argued that “the notion that mere awareness of the desires of the terrorist organization, delivered indirectly, is sufficient to show coordination or direction, is simply incorrect.” Def.’s Mot. 14–15.

*458 [22] The Court disagreed. The Court’s instructions were proper. It correctly instructed the jury that the government had the burden of proving that Wright and his coconspirators acted “in coordination with or at the direction of the foreign terrorist organization.” 10/17/17 Trial Tr. at 28–29; see  [Holder, 561 U.S. at 25–33, 130 S.Ct. 2705](#);

[Mehanna, 735 F.3d at 50](#). Here, the government proved that Wright and his coconspirators pledged their allegiance to ISIS and were working under its direction and control to pursue its objectives. See, e.g., 9/20/17 Trial Tr. at 122–24; 9/21/17 Trial Tr. at 20–22, 32. The evidence showed that Wright, Rahim, and Rovinski followed ISIS’s instructions and conspired to kill Geller in the United States. See Exs. 118, 119, 246–47, 303, 310; 9/20/17 Trial Tr. at 122–24; 9/21/17 Trial Tr. at 20–22, 32. In addition, during his interview on June 2, 2015, Wright admitted that “he agreed with ISIS” and believed “they were justified in what they were doing” and was aware of ISIS’s instructions and intended to follow them. 9/22/17 Trial Tr. at 124–27. The evidence also showed that on the morning of June 2, 2015, Wright encouraged Rahim to pursue martyrdom as instructed by ISIS’ statements. See Exs. 5, 5A. The evidence meets the coordination element as required under  [Section 2339B](#).

2. Inference of “Natural and Probable Consequences”

As part of its instructions to Count 1, the Court explained that:

[T]he law provides that you may infer that a person intends the natural and probable consequences of what they say and do. Now when I say you may infer it, what that means is you could draw that conclusion, but you need not, that’s left to you as the jury. You look at all the evidence to see whether the government, because they’ve got to prove this—this essential, Mr. Wright’s intent beyond a reasonable doubt.

10/17/17 Trial Tr. at 27:18–28:1.

Wright argued that the Court erred in instructing the jury that it could infer that Wright intended the “natural and probable consequences” of his words because in doing so, the Court “invaded the province of the jury to determine what inferences are reasonable.” Def.’s Mot. 17.

[23] The Court’s instruction did not invade the province of the jury or shift the burden of proof to the defendant because

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the Court reminded the jury that it was up to them to evaluate the evidence of intent. 10/17/17 Trial Tr. at 27–28. The Court instructed that the jury could “infer that a person intends the natural and probable consequences of what they say and do,” but that they need not. *Id.*; see  [Ulster County Court v. Allen, 442 U.S. 140, 156, 99 S.Ct. 2213, 60 L.Ed.2d 777 \(1979\)](#);  [Hardy v. United States, 691 F.2d 39, 42 \(1st Cir. 1982\)](#). “[T]he instruction does no more than pose a permissive inference.”  [Hardy, 691 F.2d at 42](#).

3. Definition of “Conduct”

Regarding Count 4, the Court instructed the jury as follows:

Now the second question is different, it sounds similar, but it's different and it requires the government to prove different things, and that is conspiracy to commit acts of terrorism transcending national boundaries.

Well, the first two steps are exactly the same, the government has to prove that Mr. Wright was part of a conspiracy, as I have defined that to you. Second, they have to prove—and the specific intent here, the specific intent is different, but they've got to prove specific intent, they've got to prove it beyond a reasonable doubt. Here the specific ***459** intent has got to be to commit acts of terrorism transcending national boundaries.

Now the government has additional things to prove in this Number 2 and here's what they are. It's not just some general crime that could perhaps help ISIS, its [sic] specific crimes and here they are.

Under the law the plan has got to be, um, it punishes someone who kills, kidnaps, maims, commits an assault resulting in serious bodily injury or assaults with a dangerous weapon to any person within the United States, those are the crimes. Now of course conspiracy doesn't mean that the people did those things, the conspiracy means that they've got to be planning to do one or more of those specific crimes.

Second, because it requires, um, transcending national boundaries, in this one there has to be conduct that they're planning within the United States, the conspirators, and there also has to be conduct outside the United States, somewhere, anywhere outside the national boundaries of

the United States. The conduct? Now the conduct can be communication of some sort, encouragement, direction, but it's got to be conduct outside the United States.

Third—and so you see for this one somebody in connection with ISIS has got to know something about these three folks or this cell and there has to be some sort of connection there, the government's got to prove, because, as Congress used the language, this has to be the type of terrorism that transcends national boundaries.

Now one or more members of the conspiracy, and the government says the conspiracy is at least Wright, Rahim, and Rovinski, they've got to know about the foreign, um, communication, or direction, or encouragement, or the foreign conduct related to what they're doing, and it doesn't mean that Wright has to know specifically because you see if one is a conspirator, not every conspirator has to know everything every other conspirator is doing. Conspiracy is like a partnership and if one of the—once they're a partnership, the things that the partners do in furtherance of the conspiracy is attributed to all the partners. But at least they've got to show that Wright was—that Wright himself, the person who's on trial here, that he reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries, that has this terrorist connection as I've just defined it to you.

And then lastly for this one, not for Question 1, which only requires the conspiracy, the plotting, but for Question 2, the government has to prove that one of the conspirators, at least one of the conspirators, actually did something, did something to make the conspiracy come about. We call it the “overt act,” but that's legal talk. You don't need that. You just need to know it's not enough that they plot it, it's not enough that they conspired in all the manner that I've described, but then one of the conspirators, at least one has to do something to make the conspiracy come about. That's Question 2.

10/17/2017 Trial Tr. at 29:25–32:21.

Wright argues that mere communications are not sufficient to constitute overseas conduct, but rather that “the conduct must be, in some way, criminal.” Def.'s Mot. 10.

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[24] [25] The Court disagreed.  [Title 18 of the United States Code, section 2332b\(g\)](#) defines “conduct transcending national boundaries” as “conduct occurring outside of the United States in addition to *460 the conduct occurring in the United States.”  [18 U.S.C. § 2332b\(g\)](#). As such, the conduct that occurred overseas is not required to be criminal. Here, there was evidence to show that Rahim communicated with Abu Hussain, an ISIS member located in Syria, about killing Geller. During trial, Wright admitted that Abu Hussain gave Rahim an encrypted document related to Geller's beheading. 10/12/17 Trial Tr. at 49–50. Therefore, the government proved that there was conduct transcending national boundaries, as defined in  [section 2332b\(g\)](#).

In addition, Wright argued that the instructions did not properly reflect the government's burden of proving that Wright intended that the killing involve overseas conduct to support a conviction under Count 4, in accordance with  [section 2332b](#). See Def.'s Mot. 11. The Court did in fact instruct the jury that the government had the burden of proving that the conspirators specifically intended to “commit acts of terrorism transcending national boundaries” and that Wright “reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries.” 10/17/17 Trial Tr. at 30–32.

[26] Nevertheless, a plain reading of the statute suggests that there is no mens rea requirement for the government to prove. The phrase “involving conduct transcending national boundaries” is a jurisdictional element that makes the defendant liable under the specific statute, as opposed to any other criminal statute. Furthermore, an analysis of the legislative history of  [section 2332b](#) also supports the notion that the phrase is a jurisdictional element, rather than a substantive conduct element with a mens rea. The Conference Report on the Antiterrorism and Effective Death Penalty Act of 1996, which enacted  [section 2332b](#), states in relevant part that “[t]here will be federal jurisdiction [if]... at least part of the conduct occurred outside of the United States.” H.R. Rep. No. 104–518, at 120; H.R. Rep. No. 104–518, at 120 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 944, 953.

The Court's instructions on Count 4 were proper.

C. Sufficiency of the Evidence

Wright argued that the evidence was insufficient to support his conviction on Count 4. See Def.'s Mot. 20. He claimed that “the evidence that the agreed-upon killing involved overseas conduct lacked probative force.” Id. This argument lacked merit. The evidence presented at trial showed that Wright and his coconspirators knew that the conspiracy involved conduct that transcended national boundaries. The government proved that Wright and his coconspirators were in communication with multiple people overseas who were part of ISIS.

1. Evidence that Wright Spoke to the “Mujahideen”

The government presented substantial evidence that Wright and his coconspirators were in communication with people overseas. Wright admitted to an FBI cooperator that he and his coconspirators had spoken to ISIS fighters in Syria, otherwise known as the “Mujahideen.” See Ex. 51. Wright told the FBI cooperator that the “Mujahideen” in Syria had told them that they could not release the names and addresses of other ISIS fighters located in the United States. Id.

2. Rahim's Contacts Abroad

Wright also acknowledged to the FBI that “Rahim did in fact have a contact overseas following his pledging bayah to the Islamic State or allegiance to the Islamic State.” 9/25/17 Trial Tr. at 16. The evidence showed that Rahim had been in contact with people located overseas—Abu Antar and Abu Hussain. See Exs. 356, *461 377–79. According to the messages between Abu Antar and Rahim, Rahim asked Abu Antar for help traveling overseas and joining ISIS. See Ex. 356, 9/28/17 Trial Tr. at 32–33. Abu Antar gave Rahim a phone number with a Turkey country code to call. Id. Rahim contacted Abu Hussain directly at around the same time as he communicated with Abu Antar. 9/28/17 Trial Tr. at 30–34.

Based on an ISIS book that Wright, Rovinski, and Rahim shared with each other, the person who used Abu Hussain's Twitter account lived overseas “in the Islamic State.” See Ex. 214 at 98. The postings on the account and other evidence confirmed that Abu Hussain talked to Rahim about beheading Geller in May 2015. See Exs. 57A, 119.

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Lastly, the evidence at trial also permitted the reasonable inference that Junaid Hussain, a citizen of the United Kingdom who traveled to Syria in August of 2013 and became a member of ISIS, was also Abu Hussain. Rahim had informed Wright that he had been in contact with a person named “Mr. Hussain” and had received encrypted files from this person regarding Geller’s beheading. Ex. 57A at 3–4. Twitter accounts linked to Junaid Hussain were also linked to Abu Hussain. 10/10/17 Trial Tr. at 12, 15–16, 18–21; Exs. 119, 367, 378, 400.

Based on these communications, a jury could properly infer (i) that Rahim was communicating with Abu Hussain and Abu Antar, who were located overseas near Turkey; (ii) that Junaid Hussain and Abu Hussain were the same person; (iii) that Junaid Hussain was also located overseas; (iv) that Rahim communicated with these individuals about joining ISIS and beheading Geller; and (v) that Wright was made aware of these communications.

IV. SENTENCING

At the close of a lengthy sentencing hearing on December 19, 2017, this Court sentenced Wright to 28 years in custody. Electronic Clerk’s Notes, ECF No.409. Brief mention ought be made of two aspects of the sentencing.

A. Applying the Advisory Sentencing Guidelines

Because this court varied downward from the Sentencing Guideline range, it failed rigorously to focus on the (higher) advisory range and adopted a guideline range of 30 years to life in its Judgment and Commitment Order. The government, however, had argued for an unequivocal guideline of life imprisonment.

The government believes that the applicable guideline for a “conspiracy to kill persons” in violation of  18 U.S.C. § 2332b(a)(2) is  USSG § 2A1.5 (Conspiracy or Solicitation to Commit Murder), not § 2A6.1, which only pertains to “Threatening or Harassing Communications; Hoaxes; False Liens.”  Section 2332b(a)(2) criminalizes three types of offenses—“threats, attempts, and conspiracies.” While the Guidelines do list 2A6.1 as the statutory reference for  Section 2332b(a)(2), that guideline provision appears only to refer to

“threats” and not to conspiracies or attempts to kill, assault, kidnap, or damage real or personal property. See  USSG § 2A6.1 (repeated use of term “threats” but no references to conspiracies or attempts to kill or commit serious assault).

Indeed, the very last sentence of  Section 2A6.1 makes clear that it is designed only to cover conduct related to threats; it states that the seriousness of the offense “depends upon the defendant’s intent and the likelihood that the defendant would carry out the threat.” See  § 2A6.1 (Background paragraph). Nowhere in *462 the discussion of the punishment is there any discussion about the harm caused by a conspiracy or attempt to kill a person.

The defendant was not convicted of making threats or communicating threats to an intended victim. Thus, the government requests that the Court apply the guideline that best fits the conviction, which charged the defendant with conspiracy “to kill and maim persons within the United States in violation of the laws of Massachusetts and New York.” See United States v. Almeida, 710 F.3d 437, 441 (1st Cir. 2013) (applicable guideline should be based “on conduct charged in the indictment.”). The most analogous guideline is  Section 2A1.5 (Conspiracy or Solicitation to Commit Murder). In accordance with  USSG § 2A1.5 the base offense level is 33. There are no specific enhancements in  Section 2A1.5 but the terrorism enhancement would then increase the offense level to 45 and defendant’s criminal history category to category VI resulting in a guideline range of life.

Alternatively, because Wright is charged with conspiring to kill persons and  18 U.S.C. § 2332b indicates that the punishment for conspiracies shall be the same as the amount of imprisonment that would have applied had the offense been completed, Section 2X1.1 could also be used. Indeed, the Guidelines appear to require this in cases like these where the offenses involved a conspiracy.  USSG § 1B1.2(a) (“If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense.”). Section 2X1.1 provides that the base offense for Count 4 shall be the same as the base offense level from the guideline for the substantive offense (first degree murder guideline

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—  USSG § 2A1.1) where violations of  18 U.S.C. § 2332b are charged. If  Section 2A1.1 is used, the defendant's base offense level would be 43 and the terrorism enhancement would increase his offense level by twelve levels. Accordingly, defendant's maximum sentence under  Section 2A1.1 would also be life.

Gov't's Sentencing Mem. 9–11, ECF. No. 399 (footnote omitted).

In retrospect, the Court concludes that the government's guideline analysis is correct. It's too late to correct the

Judgment of course, see  Fed. R. Crim. P. 35(a), and it makes little practical difference as the Court varied downward (and would have to the same degree even had it adopted the government's guideline analysis before imposing sentence). Still, a decent respect for the careful arguments of counsel deserves this acknowledgment. Moreover, should the sentence become the subject of further proceedings, I need acknowledge that the extent of the variance ought to be measured from the advised life term, not from a 30 year low-end advisory sentence.

B. “Our society is not afraid of ideas, we’re committed to the belief that we have better ideas.”

No judge is ever satisfied that he or she has done “justice.” This is especially true when sentencing another human being. Justice is a goal for which we constantly strive. All we can say is that we conscientiously reach out for justice.

Here, as the remarks leading off this opinion demonstrate, I was at pains to explain that Wright's sentence was but a small piece of a larger societal problem and that Wright—misguided and dangerous as he was—required a severe but nuanced penal sentence. I cannot definitively say that Wright's sentence was “just,” but *463 this much I know to be true. Whatever the advisory Sentencing Guidelines may say, reflexively to “lock-em-up”—a life sentence for every properly convicted terrorist is not just. It's not even a strategy. It reflects fear more than justice.

“We are not afraid,” Court's Remarks, Transcript of Richard Reid's Sentencing Hearing, United States v. Reid, No. 1:02-cr-10013 (D. Mass. Jan. 30, 2003), ECF No. 191, yet we

surely recognize that “[t]errorist speech on the internet poses a threat worldwide,” Alexander Tsesis, Foreword, Terrorist Incitement on the Internet, 86 Fordham L. Rev. 367, 367 (2017). Sadly, it poses an equal threat to cherished First Amendment values. Compare Raphael Cohen-Almagor, The Role of Internet Intermediaries in Tackling Terrorism Online, 86 Fordham L. Rev. 425 (2017); Alexander Tsesis, Social Media Accountability for Terrorist Propaganda, 86 Fordham L. Rev. 605 (2017) with David S. Han, Terrorist Advocacy and Exceptional Circumstances, 86 Fordham L. Rev. 487 (2017); Andrew Koppelman, Entertaining Satan: Why We Tolerate Terrorist Incitement, 86 Fordham L. Rev. 535, 542 (2017).³

Sensitive to these concerns, I posed to Wright the alternative course—the road not taken:

Have you ever heard of Humayun Khan, Captain Humayun Khan, First Infantry Division, fought and died for the men he marched among? You come from Everett. Have you ever heard of the 54th Massachusetts? A young man from Everett served in that regiment. Or the 9th? The 10th Cavalry? The 24th Infantry?⁴ And I don't need military examples, there's heroism throughout this society, building, shaping American democracy.

Have you ever heard of Crispus Attucks?

THE DEFENDANT: No.

THE COURT: Have you heard of Frederick Douglass?

THE DEFENDANT: Yes.

THE COURT: Harriet Tubman? Leila Robinson? Martin Luther King? Thurgood Marshall? And I don't have to go back to history. And you've acknowledged it—you know you have acknowledged it, everyone has treated you with the utmost fairness, and you're right to acknowledge it.

There's [sic] heroes right here in this courtroom, I can name them for you, people who love this country, not in some sort of blind authoritarian way, but who look at that flag and have an understanding, a nuanced understanding of the republic for which it stands. Ms. Seigmann. Mr. Gonzalez. [the prosecutors] Mr. Tumposky. Ms. Hedges. [defense counsel] And every single one of the jury that carefully

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considered this evidence and convicted you. Those are the heroes.

...

Think about this. Two days from now everyone will have forgotten about this. There's going to be other things on the news. It will all be forgotten. But some things endure. 28 years from now—I'll be gone, but there'll be a judge sitting *464 here in this courtroom and we won't care about her faith or lack of faith, we won't care what race she is, but she'll be younger than I am and she'll be stronger than I am and she'll be so much smarter than I am, and she will sit here and reach out for justice. That flag will still fly here and we will yet be free.

[And] in the hearts of all Americans, all Americans who know the story, [there] will shine the name of Humayun Khan, combat infantryman. Think about that. That's the sentence of the court. Stand him down, Mr. Officer.

Transcript of **David Wright's** Sentencing Hearing at 55:6–57:4.

The next day, pursuant to one of the rare “C” pleas afforded to an individual in this District, see United States v. Aegerion Pharm., Inc., No. CR 17-10288-WGY, 280F.Supp.3d 217, —, 2017 WL 5586728 (D. Mass. Nov. 20, 2017), I imposed the agreed-upon 15 year sentence on Rovinski, Wright's co-conspirator (who had testified against him). During the course of that hearing, Rovinski's counsel, William W. Fick, neatly summed up the issue:

[T]he government and law enforcement face a very vexing problem today about what to do about online radicalization, young people looking for a cause, and what happens when they [latch] onto an odious and dangerous and violent cause, and, you know, one can certainly understand, stepping back, that it's very difficult for the government and law enforcement to know both who might go operational, who might stay within the realm of ideas.

...

I recognize the challenge that law enforcement faces, these are very serious crimes, these are very dangerous ideas, and so some measure of punishment is necessary here.

Transcript of Nicholas Rovinski's Sentencing Hearing at 10:2–10:10, 12:16–12:19, United States v. Rovinski, No. 1:15-cr-10153 (D. Mass. Dec. 20, 2017), ECF No. 418.

The Court responded:

I tried to say yesterday, and I did so inartfully, what you, Mr. Fick, have managed to say more succinctly and more accurately, that this is a problem beyond individual defendants who seek to put these ideas into action. Our society is not afraid of ideas, we're committed to the belief that we have better ideas, ideas that allow all people the chance both to participate and realize their full potential and, um, have an equal and just and respectful place in society, and the one thing—and I'm sure I did not do this well yesterday, but I did try to address what you raised, that outside the law enforcement, which has been superb here in this case, ... we need something, something that's internet-attractive to young people to convey those ideas and to convey the self-sacrifice, the heroism, the daily requirement of what it means to be a citizen in a republic [I]t is all of our responsibility as Americans to see that the truly magnificent system that we have, a system that is borne out in this proceeding in so many ways, um, resonates in the hearts and minds of ... “restless young people.”

Id. at 16:19–17:18.

Just as the men of the 54th Massachusetts stormed Fort Wagner to strike down the abomination of slavery, so today countless Americans from all walks of life live and breathe and bring to radiant reality the core ideas of the founders.

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These folks all have a dream—a dream worth celebrating.
Will we do it?

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Footnotes

- 1 Fed. R. Evid. 803 advisory committee's note to 2011 amendment ("These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.").
- 2 The government, however, misconstrues  [United States v. Romero, 32 F.3d 641 \(1st Cir. 1994\)](#), to stand for the proposition that the conviction is a statement of the public agency. Gov't's Opp'n Mot. Lim. 3.  [Romero](#) did not involve a criminal conviction; rather, it involved the State Department's declaration that a vessel was stateless.  [Romero, 32 F.3d at 649–50](#). What  [Romero](#) does stand for, is that the old Rule 803(8)(A) applies to "a statement by a public agency setting forth a routine activity of that agency."  [Id. at 650](#).
- 3 "Any citizen of a liberal society might have a legitimate reason to read the recruitment literature of ISIS. No one can think intelligently about the challenge of Islamic radicalism, or of any other illiberal ideology, without spending at least a little time thinking about it from the inside. More generally, one cannot think intelligently about evil without entertaining evil points of view. The fearless, open character that liberal society seeks to cultivate cannot worry about whether one is permitted to look at this or that." [Ibid.](#) (footnote omitted).
- 4 The "Buffalo Soldiers."

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United States District Court, D. Massachusetts.

UNITED STATES of America,
v.
David WRIGHT, Defendant.

CRIMINAL ACTION NO. 15-10153-WGY

|
Signed 12/28/2016

Attorneys and Law Firms

[B. Stephanie Siegmann](#), [Nadine Pellegrini](#), U.S. Attorney's Office, Boston, MA, Gregory R. Gonzalez, U.S. Department of Justice, Washington, DC, for Unites States of America.

[Jessica Diane Hedges](#), [Michael L. Tumposky](#), Forest J. O'Neill-Greenberg, Hedges & Tumposky, LLP, Boston, MA, [Linda G. Moreno](#), Linda Moreno P.A., Tampa, FL, for Defendant.

ORDER AND MEMORANDUM

[YOUNG](#), D.J.

*1 After a comprehensive and thorough review of the classified materials filed in this case, this Court rejects each of the contentions raised by the defendant Wright and denies each of his motions (ECF Nos. 87, 103, 104, 105, 106) challenging such investigatory procedures. This action thus confirms the denial of the motions to suppress (ECF Nos. 103, 104, 105, 106) already provisionally denied after hearing.

In reaching this result, the Court has followed the better practice and conducted its own de novo review, according no weight to the prior actions of the FISA judge(s). Although some courts have noted that "FISA warrant applications are subject to 'minimal scrutiny by the courts,' ... upon ... challenge,"  [United States v. Abu-Jihad](#), 630 F.3d 102, 130 (2d Cir. 2010) (quoting  [United States v. Duggan](#), 743 F.2d 59, 77 (2d Cir. 1984)), others have applied a heightened scrutiny—reviewing the FISA Court's probable cause determinations de novo, see, e.g., [United States v. Turner](#), 840 F.3d 336, 340 (7th Cir. 2016); [United](#)

[States v. Rosen](#), 447 F.Supp.2d 538, 545 (E.D. Va. 2006). The reasoning for applying a more stringent standard is persuasive, "especially given that the review [of a FISA warrant application] is ex parte and thus unaided by the adversarial process." [Rosen](#), 447 F.Supp.2d at 545 (collecting Fourth Circuit precedents applying de novo review to FISA materials). The certifications in the FISA application(s), however, are presumed valid. See id.

It is appropriate to remark that this de novo review reveals that the government attorneys here have throughout acted with scrupulous regard for the rights of the defendant Wright and have conducted themselves with utmost fidelity within the limited powers accorded them under the Foreign Intelligence Surveillance Act,  50 U.S.C. §§ 1801–85.¹ It is equally appropriate to observe that almost no one will believe me.

Why this sad state of affairs? It is an amalgam of the government's seemingly obsessive over classification coupled with the media's shallow reporting and an equally shallow public awareness of or interest in what is actually happening.

First over classification—no one disputes the government's appropriate interest in the classification of actual intelligence data. Here, however, the government has thrown a cloak of secrecy over the most basic procedures of the FISA Court. The result has not been to enhance the authority of that court but rather to call its judgments into question and to treat its important functions with a certain disdain. See, e.g., [Mystica M. Alexander & William P. Wiggins, A Domestic Consequence of the Government Spying on Its Citizens: The Guilty Go Free](#), 81 Brook. L. Rev. 627 (2016); [Scott A. Boykin, The Foreign Intelligence Surveillance Act and the Separation of Powers](#), 38 U. Ark. Little Rock L. Rev. 33 (2015); [Maxwell Palmer, Does the Chief Justice Make Partisan Appointments to Special Courts and Panels?](#), 13 J. Empirical Legal Stud. 153 (2016); [Karly Jo Dixon, Note, The Special Needs Doctrine, Terrorism, and Reasonableness](#), 21 Tex. J. C.L. & C.R. 35, 47–57 (2015). Reducing the classification of procedural safeguards imposed by the FISA Court would go a long way toward restoring confidence in its decisions.

*2 Some months ago, I heard on the radio that the FISA Court had never turned down a government warrant

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application. “This can’t be true,” I thought, since over the past three years I had never once granted a single Title III wiretap application in the form sought by the government. “If it is,” I thought, “that court is in the bag with the executive branch.”

Now, having exercised judicial authority within FISA’s precincts, I am prepared to acknowledge how shallow was my reaction. Here, in relevant part, is the actual report made by the Department of Justice pursuant to sections 107 and 502 of FISA:

During calendar year 2015, the Government made 1,499 applications² to the Foreign Intelligence Surveillance Court (hereinafter “FISC”) for authority to conduct electronic surveillance and/or physical searches for foreign intelligence purposes. The 1,499 applications include applications made solely for electronic surveillance, applications made solely for physical search, and combined applications requesting authority for electronic surveillance and physical search. Of these, 1,457 applications included requests for authority to conduct electronic surveillance.

One of these 1,457 applications was withdrawn by the Government. The FISC did not deny any applications in whole, or in part. The FISC made modifications³ to the proposed orders in 80⁴ applications. Thus, the FISC approved collection activity in a total of 1,456 of the applications that included requests for authority to conduct electronic surveillance.

2016 Att'y Gen. Ann. Rep. 1–2. The government appears to refrain from formally submitting to the FISA Court applications it doubts that court will accept and, even then, 80 such formal submissions were substantially modified (probably narrowed). This is not so different from my own practice of reviewing draft warrant applications and sending

them back to be narrowed where appropriate—all before formal application is made (and counted).

Not surprisingly, the press reports simplified things. Here is a representative sample: “US spy court rejected zero surveillance orders in 2015.” Dustin Volz, U.S. spy court rejected zero surveillance orders in 2015, Reuters News, May 2, 2016, <http://www.reuters.com/article/us-usa-cybersecurity-surveillance-idUSKCN0XR009>. In fairness, the seventh paragraph of this story stated “The court modified 80 applications in 2015, a more than fourfold increase from the 19 modifications made in 2014.” *Id.* This crucial seventh paragraph, however, appears not to have made it onto the airwaves, thus eliminating the important nuance.

^{*3} Reporting for the same year, the Administrative Office of the United States Courts says simply, “[Nationwide] [n]o wiretap applications were reported as denied in 2015.” Admin. Office U.S. Courts, Wiretap Rep. 2015, Dec. 31, 2015, <http://www.uscourts.gov/statistics-reports/wiretap-report-2015>. It is only when one looks at the accompanying tables that it is revealed, for example, that of the 25 wiretap warrants authorized in 2015 in the District of Massachusetts, a full 40% were amended, *i.e.* almost certainly narrowed by the presiding judge. See id. at Wire 2.

While respecting privacy and national security concerns, the obligation appears to devolve upon the courts themselves to explain—both case by case and in the aggregate—how daily they patrol the boundaries of the Fourth Amendment to our Constitution. The press will not publish, broadcast, or analyze the fine print. To continue as we are is to deny our citizens an understanding of the doctrine of separation of powers and sap the vitality of fundamental constitutional values.

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Footnotes

- ¹ Conferring this encomium does not mean I agree with each of the government’s characterizations, especially their perception of the imminence of the threat posed by the defendant Wright and his co-conspirators. I do not. What is important, however, is the scrupulous care with which government attorneys have followed the established procedures. There is here no basis to consider the suppression of evidence.
- ² In keeping with the Department’s historical reporting practice, the number of applications listed in this report refers to applications that were filed in signed, final form pursuant to Rule 9(b) of the Foreign Intelligence Surveillance Court Rules

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of Procedure. A “denial” refers to a judge’s formal denial of any such an application; it does not include a proposed application submitted pursuant to Rule 9(a) of the Foreign Intelligence Surveillance Court Rules of Procedure for which the government did not subsequently submit a signed, final application pursuant to Rule 9(b).

- 3** A “modification” includes any substantive disparity between the authority requested by the Government in a final application filed pursuant to Rule 9(b) and the authority granted by the FISC. It does not include changes made by the government after the submission of a proposed application submitted pursuant to Rule 9(a).
- 4** In addition to the 80 orders modified with respect to applications made during the reporting period, the FISC modified one order for an application after first granting authorization. The FISC also modified one order for an application made in a prior reporting period during the current reporting period.

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