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APPENDIX A

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No. 20-6194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 20, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FNU JOHN SADIQULLAH, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: SUTTON, Chief Judge; COLE and READLER, Circuit Judges.

CHAD A. READLER, Circuit Judge. Following a jury trial, Fnu "John" Sadiqullah was convicted of two conspiracy counts: conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958, and conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c). On appeal, Sadiqullah primarily argues that those convictions were not supported by sufficient evidence. He also alleges an instructional error and a sentencing disparity. As none of Sadiqullah's challenges have merit, we affirm.

BACKGROUND

Sadiqullah immigrated to the United States from Afghanistan. Taking up residence in Lexington, Kentucky, Sadiqullah began driving a taxi for a company operated by Lahoucine Elkohli. Sadiqullah later recruited several other men, also natives of Afghanistan, to work as drivers for Elkohli.

Elkohli frequently borrowed money from his drivers, sometimes framing the loans as investment opportunities. And sometimes, Elkohli did not repay those loans. Having failed to secure full repayment from Elkohli on his own accord—as Elkohli recently relocated to Florida—Sadiqullah turned to Mahmoud Shalash, a local imam with a reputation for helping members of the Islamic community with their financial issues. Sadiqullah conveyed to Shalash that Elkohli owed him money and that he would "kill [Elkohli] if [he] [got] ahold of him."

As luck (in this case, bad luck) would have it, while Sadiqullah was in contact with Shalash, the FBI was investigating Shalash for money laundering. To further its investigation of Shalash, the FBI had elicited the participation of "Thomas Smith," an undisclosed FBI informant who engaged in a number of recorded transactions and meetings with Shalash. Initially, the scope of Shalash and Smith's relationship was limited to money laundering. Shalash, however, later inquired into Smith's propensity to engage in other criminal matters. Shalash explained to Smith that he had previously loaned a friend money to open a restaurant but had not been repaid. Shalash asked whether Smith could help him collect on the loan, indicating that he did not care if the collection efforts resulted in his friend's death. Smith expressed his willingness to help Shalash get repaid, even through means of violence, if necessary.

From these discussions, Shalash believed that Smith could also help Sadiqullah collect what he was owed from Elkohli. On April 30, Shalash met Smith at a motel in Lexington. The meeting was recorded. Shalash told Smith about the money Elkohli owed the taxi drivers, and that "[i]f [the drivers] get ahold of [Elkohli]," who had relocated to Florida, "they'll kill him." Shalash then called Sadiqullah and asked him to come to the motel, relaying that he had a "brother up here" who could help. Upon his arrival, Sadiqullah reiterated to Smith that Elkohli owed him (and others) money, but had fled with his family to Florida. Due to some tension with the other drivers,

Sadiqullah explained, he had not been provided with Elkohli's new address. Smith suggested that Shalash sit down with the other drivers and that Sadiqullah smooth things over in an effort to obtain Elkohli's address. Once Smith could locate Elkohli, he could begin his collection efforts by kidnapping and killing Elkohli. Smith explained that he would "take [Elkohli] and do what we want to do with him until he pays the tab."

Smith and Sadiqullah continued their conversation, outside of Shalash's presence:

> Smith: Do you care what happens to this guy to get your money back?
>
> Sadiqullah: No, we don't care. We want him [to] die.
>
> Smith: You want him dead?
>
> Sadiqullah: Yeah, we want him [to] die, you know, like because he made us die.

Sadiqullah further explained that Elkohli's actions hurt the drivers both financially and emotionally. Sadiqullah elaborated on the hardships he and the others faced, relaying that if, for example, "someone can kill [Elkohli] for $10,000, we all four will pay someone $10,000."

When Shalash returned to the conversation, Smith conveyed that once he received Elkohli's address, he would travel to Florida to kidnap Elkohli's wife and daughter in an effort to force Elkohli to pay. Sadiqullah informed Smith that Elkohli also had a son who lived in Lexington, and implied that Elkohli's son would be the most effective target for the kidnapping because Elkohli "love[s] his son." Smith responded that he would kidnap the son, beat him, and then send pictures to Elkohli accompanied by the message that "if we don't have our money within two days, you're going to find body parts of this kid all over the place." Sadiqullah voiced some hesitation over the possibility of Elkohli potentially filing kidnapping charges. But Smith and Shalash reassured Sadiqullah that no such charges would be filed.

As the conversation was wrapping up, the topic returned to Smith's compensation. Smith clarified that his services were "not free" and explained that if he recovered the money, Smith would be entitled to 25% of those funds. Shalash compared the arrangement to that of a lawyer's contingency fee, in that Smith would be paid once he achieved his objectives. Sadiqullah confirmed that he had Smith's phone number and stated he would be in touch once he met with the other drivers.

Sadiqullah's involvement in the scheme soon escalated. Two days after his meeting with Smith, Sadiqullah spotted Elkohli in Lexington. Sadiqullah followed him to a tire store Elkohli operated and alerted the other drivers to meet him there. He also called Smith. Smith testified that Sadiqullah explained that he had located Elkohli and his son at a tire store and that he and the other drivers would hold Elkohli until Smith could arrive to "do whatever . . . to get his money." Smith told Sadiqullah not to harm Elkohli. Smith then notified the FBI.

At the tire store, the drivers demanded immediate repayment from Elkohli and threatened to harm both him and his son. Elkohli assured the drivers that he had arranged a meeting with his bankruptcy attorney to discuss repaying the drivers. Elkohli and his son then left the store. Smith, as directed by the FBI, contacted Sadiqullah. Sadiqullah informed Smith that Elkohli was no longer with the drivers and that he did not know Elkohli's current whereabouts. Sadiqullah also conveyed that he was content with the scheduled meeting with Elkohli's attorney and directed Smith not to act until Sadiqullah had the opportunity to speak with the other drivers.

The FBI placed Elkohli and his son in protective custody, and arrested Shalash, Sadiqullah, and one of the other drivers. Shalash pleaded guilty to conspiracy to commit kidnapping and money laundering and was sentenced to 24 months in prison. Sadiqullah took his case to trial.

A jury convicted Sadiqullah of conspiracy to commit murder for hire and conspiracy to commit kidnapping. The district court sentenced Sadiqullah to 106 months in prison, below his applicable Guidelines range. The court later denied Sadiqullah's motion for judgment of acquittal or, alternatively, a new trial. This timely appeal followed.

ANALYSIS

Sufficiency of the Evidence. Sadiqullah argues that the government failed to present evidence sufficient to support a conviction for conspiracy to commit murder for hire, *see* 18 U.S.C. § 1958, or conspiracy to commit kidnapping, *see* 18 U.S.C. § 1201(c). In light of the jury's verdict, however, Sadiqullah faces a "very heavy burden" on appeal. *United States v. Ledbetter*, 929 F.3d 338, 351 (6th Cir. 2019) (citation omitted). After "viewing the evidence in the light most favorable to the prosecution," Sadiqullah's sufficiency challenge fails if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Childs*, 539 F.3d 552, 558 (6th Cir. 2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

1. To prove a conspiracy to violate the murder-for-hire statute, the government had to show that: (1) Sadiqullah conspired to use an interstate facility "with intent that a murder be committed" in consideration for "anything of pecuniary value" to be paid to the killer; (2) Sadiqullah knowingly and voluntarily joined the conspiracy; and (3) a member of the conspiracy performed an overt act. *See* 18 U.S.C. § 1958(a); *United States v. Cordero*, 973 F.3d 603, 616 (6th Cir. 2020). Sadiqullah first questions the government's evidence that he entered into an agreement to commit a murder for hire. An agreement is the hallmark of any conspiracy. To prove that an agreement existed, the government had to show that two or more parties shared a mutual intent to carry out the conspiracy's main objective, here, that Smith would be paid in

exchange for killing Elkohli. *See United States v. Amawi*, 695 F.3d 457, 476 (6th Cir. 2012) (noting that "the government need not prove that each defendant knew every detail of" the conspiracy, only that "each defendant adopted the conspiracy's main objective"). And the agreement need not be "formal"; rather, "a tacit or mutual understanding among the parties" will suffice. *Ledbetter*, 929 F.3d at 351 (quoting *United States v. Gardiner*, 463 F.3d 445, 457 (6th Cir. 2006)).

The government presented sufficient evidence that Sadiqullah and Shalash agreed to hire Smith to murder Elkohli. Chief among that evidence were the audio recordings of the April 30 meeting between Sadiqullah, Shalash, and Smith. During that meeting, Sadiqullah expressed his interest in having Smith kill Elkohli, with Smith to be paid for his services. Sadiqullah repeatedly stated, "[w]e want [Elkohli] [to] die." At trial, Shalash explained that he introduced Sadiqullah to Smith because Sadiqullah expressed a desire to kill Elkohli for failing to repay Sadiqullah, and because Shalash believed Smith had the means to force repayment. By facilitating the meeting, Shalash testified that he was forming an agreement with Sadiqullah to hire (and pay) Smith to kidnap and do "whatever it takes" to retrieve Sadiqullah's money from Elkohli.

Sadiqullah resists this conclusion on three grounds. One, he says there was no mutual understanding or shared intent as to whether Smith would commit murder or merely a kidnapping. True, Shalash testified that he and Sadiqullah formed an agreement for Smith to "kidnap [Elkohli's] son," whereas Smith testified that the agreement was to "kill[] [Elkohli]." But there was sufficient evidence at trial from which a reasonable jury could conclude that Sadiqullah and Shalash intended—and agreed—to have Smith commit both crimes: kidnapping and killing Elkohli. To the extent the testimony conflicts in some respects, we must resolve the conflict in the government's favor. *See Cordero*, 973 F.3d at 614.

Two, Sadiqullah argues that, at most, any agreement existed only between himself and Smith, demonstrating a fundamental flaw in the government's evidence in that a conspiracy cannot exist based solely on an agreement between a defendant and a government informant. *See id.* at 617; *United States v. Deitz*, 577 F.3d 672, 681 (6th Cir. 2009). Even so, evidence of Sadiqullah's conversations with Smith could be used to establish the existence of a conspiracy between Sadiqullah and others. *Cordero*, 973 F.3d at 617. And here, recordings of the April 30 meeting could support the conclusion that Sadiqullah and Shalash intended to hire Smith for the purpose of obtaining Sadiqullah's money from Elkohli and ultimately killing Elkohli. That the government voluntarily dismissed Shalash's charge for conspiracy to commit murder for hire as part of a plea agreement to avoid trial does not foreclose the jury from finding Sadiqullah guilty of that charge at trial. *Cf. United States v. Crayton*, 357 F.3d 560, 565 (6th Cir. 2004) (noting that even the "acquittal of all but one co-conspirator . . . does not necessarily indicate that the jury found no agreement to act").

Finally, Sadiqullah asserts that he did not intend or agree to pay anything of pecuniary value to Smith in exchange for killing Elkohli, a required element of a murder-for-hire offense. *See* 18 U.S.C. § 1958. But the record includes sufficient evidence for the jury to have concluded otherwise. For instance, Sadiqullah stated in a recorded conversation that he (and the other drivers) would be willing to pay $10,000 to have Elkohli killed: "If someone can kill him for $10,000, we all four will pay someone $10,000." Likewise, Sadiqullah, Shalash, and Smith discussed a 25% fee Smith would be entitled to should he recover Sadiqullah's money from Elkohli. During that conversation, Smith explained that "if we collect, 200,000 of your money, we're taking 25%. It's just the way it is." Shalash clarified that Smith would be paid only after Smith succeeded in carrying out the agreed-upon plan (which, as already noted, would likely result in Elkohli's

murder). Especially as Smith had no personal stake in Elkohli's death other than in a murder-for-hire context, it was not unreasonable for the jury to infer that Sadiqullah and Shalash intended to pay Smith for carrying out the plan. To be sure, the agreement could have been more explicit. But even vague statements in that regard can be sufficient to uphold a murder-for-hire conspiracy. *See Cordero*, 973 F.3d at 614–15 (holding statements that the killer would "receive 'probably more' than $20,000" and that he would not "'do it for peanuts'" were sufficient to satisfy the pecuniary-value element); *United States v. Moonda*, 347 F. App'x 192, 199 (6th Cir. 2009) (holding the alleged hit man's trial testimony regarding a defendant's intent to pay him was sufficient to satisfy the pecuniary-value element). All told, these statements, when considered together, and when viewed in the light most favorable to the government, provide evidence from which a jury could fairly conclude that Sadiqullah and Shalash promised to pay Smith something of pecuniary value should Smith succeed in murdering Elkohli. *See Cordero*, 973 F.3d at 614–15.

2. The evidence was likewise sufficient for the jury to convict Sadiqullah of conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(c). To convict Sadiqullah of that offense, the government was required to show that: (1) Sadiqullah had an agreement to kidnap, abduct, seize, or confine another person for ransom, reward, or other benefit, involving travel in or the use of an instrumentality of interstate commerce; (2) Sadiqullah knowingly and voluntarily joined the conspiracy; and (3) a member of the conspiracy performed an overt act. 18 U.S.C. § 1201(c); *United States v. Small*, 988 F.3d 241, 252 (6th Cir. 2021). At trial, the government presented evidence that Sadiqullah and Shalash formed an agreement during the April 30 meeting to have Smith kidnap Elkohli or his son. An audio recording of the meeting revealed that, at multiple points, Sadiqullah not only agreed with the plan to have Smith commit a kidnapping, but also contributed to the plan by offering Elkohli's son as a potential target.

Sadiqullah challenges the sufficiency of the government's evidence in two respects. First, he contends that any purported agreement was conditioned on the participation of the other drivers. True, at one point, Sadiqullah did relay to Smith that he must speak with the other drivers prior to Smith taking action. Sadiqullah now argues that he understood this instruction to mean that he would contact Smith only if the other drivers agreed to the plan. That interpretation, while perhaps plausible, is undermined by the fact that at no point did Sadiqullah or Shalash expressly condition the existence of their conspiracy on the participation of the others. And Sadiqullah's interpretation likewise is at odds with Shalash's trial testimony. Shalash testified that he and Sadiqullah were set to speak with the drivers to discuss (1) obtaining Elkohli's address and (2) providing each driver with the opportunity to join the (already formed) conspiracy. Shalash further clarified that should a driver not agree to join, nothing of consequence would occur to the conspiracy as Shalash and Sadiqullah's agreement would remain intact. Thus, when read in the light most favorable to the government, these statements allowed a jury fairly to conclude that Sadiqullah and Shalash agreed to recruit the other drivers into the existing conspiracy, rather than condition the agreement on their joining.

Second, Sadiqullah argues that his words and actions upon confronting Elkohli at the tire store undermine the existence of an agreement to commit kidnapping. After he and the drivers confronted Elkohli and Elkohli in turn agreed to arrange a meeting with his bankruptcy attorney, Sadiqullah says he demonstrated his disinterest in Smith's assistance. True, in subsequent calls, Sadiqullah both refused to provide Smith with either Elkohli's or his son's address and told Smith to not take any action until Sadiqullah had discussed the plan with the drivers. Those expressions, however, were seemingly too little and too late, considering that they occurred only after Sadiqullah (1) formed a conspiratorial agreement on April 30, and (2) acted on that agreement by

calling Smith to explain that he had "captured" Elkohli and to ask Smith to "come and get him." In other words, because there is sufficient evidence in the record to show that Sadiqullah formed a conspiracy, Sadiqullah's later actions cannot function to undermine or negate that already existing conspiracy. At best, this evidence could cast some doubt on Sadiqullah's intent to form a conspiratorial agreement, but "[a]ll conflicts in the testimony are resolved in favor of the government, and every reasonable inference is drawn in its favor." *United States v. Vasquez*, 560 F.3d 461, 469 (6th Cir. 2009). To the extent those statements could be characterized as an effort to abandon or withdraw from the conspiracy, Sadiqullah did not raise that affirmative defense in the district court. *See Smith v. United States*, 568 U.S. 106, 110–11 (2013) (noting the burden of proving withdrawal from a conspiracy falls on the defendant). Nor, at all events, has he demonstrated that he took an affirmative action to "disavow or defeat the purpose" of the conspiracy, *id.* at 113 (quotations omitted), as opposed to "[m]ere cessation of activity," which is not sufficient to establish withdrawal, *United States v. Bucio*, --- F. App'x ---, 2021 WL 2030077, at *4 (6th Cir. May 21, 2021) (quoting *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991)). Sadiqullah and Shalash formed an agreement by which Smith would kidnap Elkohli (or his son); any subsequent statements at most reflect Sadiqullah ceasing his earlier activity, not a formal withdrawal from the conspiracy. *See Smith*, 568 U.S. at 112–13.

Entrapment Instruction. Sadiqullah next claims that the district court erred in denying his request that the jury be instructed on the affirmative defense of entrapment. We review the district court's determination for an abuse of discretion. *United States v. Anderson*, 605 F.3d 404, 411 (6th Cir. 2010). A district court abuses its discretion in this setting when it fails to give an instruction that is "(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to

give it substantially impairs the defendant's defense." *United States v. Theunick*, 651 F.3d 578, 589 (6th Cir. 2011) (quoting *United States v. Franklin*, 415 F.3d 537, 553 (6th Cir. 2005)).

To be entitled to an entrapment instruction, Sadiqullah had to present evidence of "(1) government inducement of the crime, and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct." *United States v. Demmler*, 655 F.3d 451, 456 (6th Cir. 2011) (brackets omitted) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). As to the first prong, government inducement requires "something more than merely affording an opportunity or facilities for the commission of the crime," *United States v. Poulsen*, 655 F.3d 492, 502 (6th Cir. 2011) (quotations omitted), such as the government exerting excessive pressure upon the defendant or taking advantage of the defendant's alternative, non-criminal motive, *see United States v. Sutton*, 769 F. App'x 289, 297 (6th Cir. 2019). We disagree with Sadiqullah that Smith's suggestion that he kidnap Elkohli is evidence of government inducement. *See United States v. Summers*, 238 F. App'x 74, 76 (6th Cir. 2007) ("Government agents do not entrap by merely presenting the opportunity to engage in criminal activity."). Even if Smith first suggested a kidnapping, to show entrapment, Sadiqullah must also show some manner of pressure or persuasion by the government. *See Sutton*, 769 F. App'x at 298. None exists here. Far from the government exerting excessive pressure or persistent persuasion, it was Sadiqullah, in fact, who followed up on Smith's suggestion with one of his own: that Smith kidnap Elkohli's son.

All told, because Sadiqullah failed to present sufficient evidence of entrapment, the district court did not abuse its discretion in denying his request for a jury instruction. *See Poulsen*, 655 F.3d at 503 (holding that when there is "no government inducement, we not examine the issue of predisposition").

Sentencing Disparity. Finally, Sadiqullah argues that he was improperly sentenced to a disproportionate term of imprisonment. We review the district court's sentencing decision for an abuse of discretion. *United States v. Presley*, 547 F.3d 625, 629 (6th Cir. 2008). And we presume that sentences within the Guidelines range are reasonable. *See United States v. Pirosko*, 787 F.3d 358, 374 (6th Cir. 2015). Moreover, "a defendant attacking the substantive reasonableness of a *below*-guidelines sentence has an even heavier burden to overcome." *United States v. Elmore*, 743 F.3d 1068, 1076 (6th Cir. 2014).

As grounds for establishing a sentencing disparity, Sadiqullah contrasts his 106-month sentence with the 24-month sentence imposed upon Shalash. According to Sadiqullah, that variation runs afoul of 18 U.S.C. § 3553(a)(6)'s command that a sentencing judge "avoid unwarranted sentence disparities." Section 3553(a)(6), however, "is not concerned with disparities between one individual's sentence and another individual's sentence, despite the fact that the two are co-defendants." *United States v. Simmons*, 501 F.3d 620, 623 (6th Cir. 2007). Rather, by its terms, § 3553(a)(6)'s focus is on "defendants with similar records who have been found guilty of similar conduct," *id.*, which, in practice, we have understood to counsel against "*national* disparities between defendants with similar criminal histories convicted of similar criminal conduct." *United States v. Wright*, 991 F.3d 717, 720 (6th Cir. 2021) (citation omitted). Sadiqullah has identified no such national disparity. Nor is Shalash similarly situated; unlike Sadiqullah, he accepted a plea agreement as well as responsibility for his crimes, avoiding a trial.

The district court, it bears adding, imposed a below-Guidelines sentence, stating that it was "mindful of sentencing disparities" and that it recognized that "similarly situated defendants should be punished similarly." So while Sadiqullah disagrees with the district court's balancing of the sentencing factors, it is both the case that the court had disparities in mind at sentencing,

and that the court sentenced Sadiqullah at a level below that set by the Guidelines. No abuse of discretion occurred.

* * * * *

Sadiqullah also argues that the cumulative effect of the district court's errors renders his trial fundamentally fair. But as no error occurred below, we reject that argument, and affirm the district court's judgment. *See Ledbetter*, 929 F.3d at 365.

APPENDIX B

No. 20-6194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 19, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FNU JOHN SADIQULLAH, Defendant-Appellant.	)	O R D E R

BEFORE: SUTTON, Chief Judge; COLE and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s Deborah S. Hunt

Deborah S. Hunt, Clerk

[*]Judge Thapar recused himself from participation in this ruling.

So be thinking about that before I come back.

What do you want to take, 25 minutes?

MS. LAWSON: Yes. That would be great.

THE COURT: I'll see you back here about 5:00.

(A recess was taken from 4:32 p.m. to 5:02 p.m.)

THE COURT: All right. Parties and counsel are convened outside the presence of the jury for our jury instruction conference. I sent a set of these out last night, or rather my trusty clerk did, who was still working long after I had gone to sleep.

But let's look at the first 12. These are -- the first 11, rather. 1 through 9 are boilerplate instructions dealing with the burden of proof, the duties of jurors, how to weigh evidence and consider credibility.

Is there any objection to any of the Instructions 1 through 9, Ms. Anderson?

MR. BOONE: None from the United States.

THE COURT: Ms. Lawson?

MS. LAWSON: Judge, I don't think so.

THE COURT: All right.

Mr. Oakley?

MR. OAKLEY: No, ma'am, Your Honor.

THE COURT: All right. 10 and 11 are kind of introductory instructions. Objections to 10 or 11?

MS. ANDERSON: Your Honor, in sentence one of Instruction

Number 10, we thought it would help to avoid juror confusion to state that the defendants have each been charged "with the same two crimes."

THE COURT: All right.

MS. LAWSON: Judge, I actually have no objection to that, I think it explains --

THE COURT: It clears it a little better.

Any objection, Mr. Oakley?

MR. OAKLEY: No, Your Honor.

THE COURT: I'll make that insertion "with the same two crimes."

11?

MS. ANDERSON: No objection, Your Honor.

THE COURT: Ms. Lawson?

MS. LAWSON: No, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: No, Your Honor.

THE COURT: All right. I've already given you a heads up about Instruction Number 12, the conspiracy kidnapping.

The United States?

MS. ANDERSON: I have a few points I would like to bring up on this instruction. Specifically, I don't know where the paragraph is now, but one paragraph starts with "the completed crime of kidnapping would require proof beyond a reasonable doubt of the following three elements."

I don't believe that the word "completed" is necessary there, and I also think that it does tend to breed confusion given that the instruction before and later in this instruction, the Court will instruct that the crime does not have to be completed.

So to state there that the completed crime, it just -- it kind of confuses as to whether the elements need to be met or don't.

THE COURT: So they don't have to kidnap somebody in order to be convicted of conspiracy to kidnap.

MS. ANDERSON: Exactly, Your Honor.

THE COURT: I think this was just to point out, you know, you have to know what the kidnapping crime is.

MS. ANDERSON: Sure.

THE COURT: Yes. Do you have any opposition to it just being the crime of kidnapping? By the way, that was your instruction.

MS. ANDERSON: I was going to say -- I said to my cocounsel, Andy, this morning, I'm going to take offense to something he put in there. So he's aware of this.

MR. BOONE: It's my fault.

THE COURT: Actually, I think it"s probably better without it.

Do you have any objection, Ms. Lawson?

MS. LAWSON: I like "the completed crime of kidnapping,"

but it could breed some confusion, Your Honor. I can't say that I disagree on that.

THE COURT: Okay.

Mr. Oakley?

MR. OAKLEY: I like it as well, but I'll defer to Your Honor.

THE COURT: Nobody is going to argue anybody got kidnapped, so I think we're safe on that. All right.

MR. OAKLEY: Did you want to bring up the definition on that one?

THE COURT: Anything else?

MS. ANDERSON: The next instruction, Instruction Number 13, defines --

THE COURT: Wait. Anything else on 12?

MS. ANDERSON: Yes, this is about 12.

Instruction 13 defines facility of interstate commerce. Instruction 12 does not define facility or instrument of interstate commerce. In other words, the definition is in the later instruction as opposed to the first time the jury would see it.

THE COURT: All right. Should we say interstate commerce will be defined later in Instruction Number 2., or do you want me to read it twice?

MS. ANDERSON: Either way is fine. It just comes later in time, so for the jury's understanding of the concept, they will

not have it defined until later.

THE COURT: No. In 12, it says interstate commerce means commerce or travel between --

MS. ANDERSON: Yes, Your Honor. The next one, the facility of interstate commerce, that is defined in Instruction 13 and not in Instruction 12.

THE COURT: Okay.

MS. ANDERSON: Slight point. But if you just move that one to Instruction 12, it would --

MS. LAWSON: Well, I think the reason -- there is a method to your madness, Your Honor. There is no facility of interstate commerce in the kidnapping, so I think that instruction is absolutely appropriate.

MS. ANDERSON: Well, Your Honor, there is an instrumentality of interstate commerce that was used here. It says use the mail or any means, facility or instrumentality of interstate commerce.

THE COURT: I don't know that it matters, but I guess it never hurts to define something more thoroughly. So if there's no objection, I'll put it in there.

It's just these are really, really long instructions. And if we don't think the jury needs to hear it, or if it renders it wrong, I don't want to say any more than I have to.

MS. ANDERSON: Agreed. I was just suggesting that we probably define it up front.

THE COURT: So you think just define it in 12?

MS. ANDERSON: Yes.

THE COURT: Okay. Instead of 13?

MS. ANDERSON: Yes.

THE COURT: Okay. Candace, you've got it?

LAW CLERK: Got it.

THE COURT: We'll define it in 12 rather than 13.

MS. ANDERSON: I have nothing else as to 12, Your Honor.

THE COURT: Okay. All right.

Ms. Lawson?

MS. LAWSON: Judge, I don't think I have anything in regards to 12 either.

THE COURT: All right.

Mr. Oakley?

MR. OAKLEY: 12 is fine, Your Honor.

THE COURT: Okay. So we're going to define facility of interstate commerce in 12.

How about 13? I'm not going to define it again.

MS. ANDERSON: That's fine with me. There appears to be a typo. In the first paragraph it says, "the government must prove both of the following."

THE COURT: It should be "all."

MS. ANDERSON: Yes, correct. The reason I think that may have actually made sense is that, unlike Instruction Number 12, this instruction embeds the conspiracy elements into the

substantive offense elements. I find that inconsistent with Instruction 12, which breaks them apart.

And so it would be our position that, like Instruction 12, this instruction break out the conspiracy elements from the murder for hire elements. Of course, I think that's how the Sixth Circuit Pattern Instruction is typically written with conspiracies, so to be consistent with that.

THE COURT: We kind of combined the Ninth Circuit with the Sixth to try to make it more readable.

MS. LAWSON: I was going to say, Judge, I think that is that way mainly just because of the nature of that offense. I quite frankly -- mine is included in there as well. And honestly, I used the Department of Justice manual to get that one, because there's really not many out there in terms of an instruction on murder for hire.

THE COURT: So you all just want to go with the Sixth Pattern?

MS. ANDERSON: We think it's more consistent to pull out the two elements of a conspiracy from the substantive elements of murder for hire.

And I think this may be even more important, because your later instruction shows that this murder for hire subject does not require an overt act, whereas the prior one does.

THE COURT: That's correct.

MS. ANDERSON: So having only two elements pulled out will

help the jury to understand that is not something that is required for this conspiracy, whereas it is in the kidnapping conspiracy.

THE COURT: Okay.

Then, Ms. True, you don't have any objection to the one the United States tendered?

MS. LAWSON: I don't think that I do, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: That's fine, Judge.

THE COURT: Okay. We're going to substitute the United States' instruction. This is going to be 13.

MS. ANDERSON: Thank you, Your Honor.

THE COURT: All right.

14 -- Mr. Oakley, you didn't have any trouble with that one, did you?

MR. OAKLEY: Uh-uh.

THE COURT: 14.

MS. ANDERSON: No objection.

THE COURT: Ms. Lawson?

MS. LAWSON: None, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: None, Judge.

THE COURT: 15.

MR. BOONE: No objection, Your Honor.

THE COURT: Ms. Lawson?

MS. LAWSON: None, Your Honor.
THE COURT: Mr. Oakley?
MR. OAKLEY: No, Your Honor.
THE COURT: 16.
MS. ANDERSON: No objection, Your Honor.
THE COURT: Ms. Lawson?
MS. LAWSON: None, Your Honor.
THE COURT: Mr. Oakley?
MR. OAKLEY: None, Your Honor.
THE COURT: 17.
MS. ANDERSON: No objection, Your Honor.
THE COURT: Ms. Lawson?
MS. LAWSON: None, Your Honor.
THE COURT: Mr. Oakley?
MR. OAKLEY: No problem, Judge.
THE COURT: All right.
Now, the rest of these are all pattern. And I guess now through 18 through 22, are there any objections? People who aren't on trial. People didn't know everything about the crime they had agreed to commit. Defendants' state of mind and dates of the indictment.
Any objection?
MS. ANDERSON: No objection, Your Honor.
MS. LAWSON: No, Your Honor.
THE COURT: Mr. Oakley?

MR. OAKLEY: Those are fine, Your Honor.

THE COURT: Okay.

22 is just an introductory instruction.

23, the defendants then will not testify or present evidence, so that one will be altered. And that's pattern.

Any objection?

MS. ANDERSON: None for the United States.

MS. LAWSON: None, Your Honor.

MR. OAKLEY: No, Your Honor.

THE COURT: All right.

24, I need your help there, if we need to keep that in or if it's not necessary.

MS. LAWSON: Judge, we're going to suggest that that actually stay in there, and we include that it applies to the informant and the agents. I think those are the only two that I can recall that Mr. Boone stated was it your understanding, which is lingo for in your opinion, and I think that's important.

THE COURT: Any objection, Ms. Anderson?

MS. ANDERSON: No, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: I support that as well.

THE COURT: Okay. We'll put the informant and the agent in there.

All right. Thomas Smith, the paid informant, Instruction

25, any objection?

MS. ANDERSON: Your Honor, that second sentence there, I think it's pretty standard. But this is a unique case where the informant was not paid in advance of or in exchange for information. He was paid subsequent to providing the information, the case being closed.

My only suggestion here is to remove the two words "in exchange" from that second sentence, so that it reads "you have also heard that he received money from the government for providing information."

MS. LAWSON: Judge, I think the "in exchange" should stay said. I get paid after I do my services. It's in exchange for the services created or done.

THE COURT: Yes. You can argue whether it's true -- the issue is, is the information truthful. That's where you're all going with it. I think you can argue -- it just says information. United States can argue truthful information or help in its investigations. I'll just leave it as it is. It's this pattern. I'll overrule the United States' objection.

Any other objections?

MS. ANDERSON: No, Your Honor.

MS. LAWSON: No, Your Honor.

THE COURT: 25, done. Okay.

26, cooperating witnesses, cooperating defendants' testimony.

Ms. Anderson?

MS. ANDERSON: No objection.

THE COURT: Ms. Lawson?

MS. LAWSON: No objection.

THE COURT: Mr. Oakley?

MR. OAKLEY: No objection, Judge.

THE COURT: The young witness, 27.

MS. ANDERSON: No objection, Your Honor.

MS. LAWSON: No objection.

MR. OAKLEY: No objection.

THE COURT: All right. I don't know if we need 28.

MR. OAKLEY: It really only applies to my client, and I'm going to ask that you remove it.

THE COURT: All right. Okay. Anybody else?

MS. ANDERSON: No, Your Honor. That sounds like that's it.

THE COURT: Okay.

Ms. Lawson?

MS. LAWSON: No. I think it ought to be removed as well, Your Honor. I don't think there's been anything about 404(b) evidence.

THE COURT: Mr. Oakley, I know that you were just -- I think you were joking a minute ago, but just for the record.

MR. OAKLEY: Yes, please take it out.

THE COURT: Okay. Thank you.

In 29, we've seen the spellings of Pashto -- I don't know if I'm pronouncing it correctly -- spelled with both an o and a u.

Can the interpreter tell us which, or are both are appropriate?

THE INTERPRETER: O would be more appropriate.

THE COURT: O is more appropriate, then we'll change it to o, unless anybody objects.

Ms. Anderson?

MS. ANDERSON: No, that's what we were going to say, to change Pashto. But also it's -- I don't know if it's a single conversation or multiple conversations. I don't know if you want to change the plural there. It says "a conversation in the Pashto language." It was kind of --

THE COURT: I think they were plural, didn't we have more than one?

MS. ANDERSON: I think so. You considered a whole day a conversation.

THE COURT: Yeah. We'll make that plural and we will change Pashto to an o. Thank you. We looked it up and we just didn't get much of a resolution.

Okay. The rest of the instructions are all Pattern Instructions on how the jury should deliberate, how they should submit questions to the Court. Telling them not to look outside for evidence. The unanimity of the verdict.

Are there any objections to Instructions 30 through 39?

MS. ANDERSON: None, Your Honor.

THE COURT: Ms. Lawson?

MS. LAWSON: I do not think so, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: No, Your Honor.

THE COURT: There are a couple of minor changes I'm going to make. Because we use jury numbers rather than names, wherever it says to sign their name, I'm going to change affix your juror number to the form.

And there is one time that, in reading these instructions, depending on how glazed over the jurors are by the time I get to the end, in telling the jurors not to consider anything that they have seen outside the courtroom, if you look at Instruction Number 32 on page 36, sometimes I simply paraphrase that instruction and emphasize to them, you can't look at anything else except what you saw and heard in this courtroom and the evidence you were given.

But I will emphasize that rather than trying to tell them the little things they can't do, and like my grandchildren figure out how to weave between those.

MS. LAWSON: Yeah. If you give rules, they will typically figure out how to break them.

THE COURT: How to get around it. I will read some of it and I will reference them to the written instruction, but I'm

really going to emphasize, if you look outside what you saw and heard in this courtroom, you violated your oath as jurors.

So may I have your permission to do that, Ms. Anderson?

MS. ANDERSON: Yes, your Honor.

THE COURT: Ms. Lawson?

MS. LAWSON: Yes, Your Honor.

THE COURT: Mr. Oakley?

MR. OAKLEY: Yes, ma'am.

THE COURT: Does anybody have an additional instruction that they would request?

Ms. Anderson?

MS. ANDERSON: Yes, Your Honor. We think this is missing the venue instruction. While most events did occur in the Eastern District, there was the fact that the phone calls reached into Indianapolis. That's our interstate nexus. I want make sure that the venue instruction is included. That's Instruction 3.02.

THE COURT: Has anybody challenged venue?

Ms. Lawson, you aren't challenging venue?

MS. LAWSON: No.

THE COURT: I don't think the jury knows what venue is.

MS. ANDERSON: I agree with that, Your Honor.

THE COURT: So do you think we need that if we don't have a challenge?

MS. LAWSON: I had in my instructions just because those

are the facts, but I don't think anybody's contested it.

THE COURT: If nobody's contesting --

MS. LAWSON: I'm not going to make a legal argument that they have haven't proved their case because something happened in Indianapolis.

THE COURT: Mr. Oakley?

MR. OAKLEY: If you want -- we've already taken judicial notice of it. If you want to let them know that --

THE COURT: Well, I'll put it in the judicial notice instruction. I'll just say the Court has determined or taken judicial notice that jurisdiction and venue lie within the Eastern District of Kentucky.

MS. ANDERSON: That would be great, Your Honor.

THE COURT: How about that? Okay. We'll just add that there. I thought nobody's really challenging that here and sometimes there is a question that the Court has to resolve.

MS. ANDERSON: You're right. It's just standard for us to have it.

THE COURT: Okay.

Anything else for the United States?

MS. ANDERSON: No, Your Honor.

THE COURT: Okay.

Ms. Lawson, do you have any other instructions you would like for the Court to add?

MS. LAWSON: Judge, the only one that we have in ours that

is not in yours, and this is why I despise trying to figure out jury instructions, is we included an entrapment instruction, an entrapment defense. Which I think, in going through the case as we've heard it so far, I think the entrapment defense is -- quite frankly, I don't know that I want to argue it a ton, but I feel like that is something that maybe some of our jurors could fall back on if they are struggling with the facts.

I this what we have heard fits this instruction, especially considering there's no evidence that many of these men were -- their character and reputation speaks differently than the actions that are described. The idea of committing the crime originated with or came from the government.

THE COURT: Well, in this case, wasn't it really Mr. Shalash's idea? I mean, the informant is there trying to get Shalash to launder money, if you believe all this testimony. He's there. He's there. Shalash is not going to do it, so they start about him collecting a debt for Shalash.

MR. OAKLEY: Your Honor, I would point out that one conversation between the CHS and John, where the whole kidnapping issue comes up and John questions, he has reservations like, what? And the government agent says, look, I'm American, I know how to do it here, you sort of don't have to worry about it.

I think the entrapment defense is appropriate still.

THE COURT: Well, but wait a minute. If you look at who

came up with calling John and bringing all this, you know, I've got these two other guys, they need some help, they have been ripped -- I mean, the government agent doesn't know who John Sadiqullah is.

MR. OAKLEY: He is interested. He does put the pressure on Mahmoud though to get the other Afghans involved.

Now, Mahmoud does reach out to John. He is the one that knows John and contacts John. But Mr. Smith is anxious to get more people involved.

THE COURT: All right.

Ms. Lawson do you want to add anything?

MS. LAWSON: I would agree with that, Your Honor. I mean, Shalash does mention, before John ever comes into the picture, that he has stolen from these other Afghani men.

And Shalash makes the flippant statement of, if they find him, they will kill him. And the CH in turn says, why don't you call up your Afghani brothers, bring them along. Actually, he's the one that kind of says, that will save me some money because I'm not going to have to pay my men to go down and find him. I can just use these Afghani brothers to get the money back.

THE COURT: All right.

Ms. Anderson?

MS. ANDERSON: Well, first as to Mr. Hadi, he never spoke with the government informant, so there is no entrapment

defense here for Mr. Sadiqullah Hadi.

As to Mr. Sadiqullah, as Your Honor has already mentioned, he came into that meeting at the invitation of Mr. Shalash. And during that conversation, expressed his willing -- that he wanted him to die. And the informant says do you mean die? And he says yeah, die.

So I don't think that that in any way suggests that the informant put that -- planted that in his head and entrapped him.

My fear is we are going to be presenting the jurors with a defense that isn't even legally permissible, so that gives them -- that puts something into their head that isn't even legally permissible under these facts.

THE COURT: You know, I just don't think this instruction is appropriate. I will overrule the request for including it.

In this case, I do not think the evidence shows that the government induced the crime, the invitation of Mr. Shalash questioning about how this guy might help them collect the debt.

Now, you know, when they talk about manner and means, the defendant doesn't seem like he requires -- required a lot of convincing or arm twisting or like that was anything out of the realm of his imagination.

You know, I don't think that the defendant was overcome by government persuasion or was induced in the nature of

persuasion in a way that we typically see entrapment. I think you can still argue that there was no agreement at all. But to say they were entrapped almost means you have to admit the agreement.

MS. LAWSON: That's why I hate jury instructions because it's very difficult for me. I was well aware of that, but....

THE COURT: As I hear your defense, you're saying he never agreed.

MS. LAWSON: He never agreed.

THE COURT: They never agreed to anything.

MS. LAWSON: I understand.

THE COURT: Maybe if the crime had been committed, entrapment, I mean, if the completed crime of kidnapping or murder had been committed, it might look more like entrapment, but I just don't see this as a case where an entrapment instruction is appropriate. So I will overrule your objection.

Any other instructions you would request?

MS. LAWSON: No, Your Honor. I think that's it.

THE COURT: Anything else, Mr. Oakley?

MR. OAKLEY: No, Judge.

THE COURT: Well, we'll get this together. I think we'll get them fixed up tonight, but we'll have hard copies for you tomorrow.

Have you looked at the verdict form? There's one separately for each defendant. I wanted to avoid any possible

confusion so I didn't even put them on the same page.

MS. LAWSON: I have no objection to these.

MR. OAKLEY: They are fine with me.

MS. ANDERSON: No objection from the United States either.

THE COURT: Okay. All right. We'll get these to you, they will available electronically tonight. We'll have hard copies for everybody tomorrow.

I instruct last. You are welcome to use the instructions, as you anticipate the Court will instruct you, to illustrate your arguments, but I'm going to be watching you real hard so don't misrepresent what that instruction might be.

Let me tell you what I'm thinking and you fill in the blanks. I'm hoping to tell the jury when we get them here at 10, assuming we can all get here at 10, that we're going to go straight through. We're going to take snacks, we're going to order their lunch and have it here at 1:00.

That gives us three hours for closing arguments, instruction and breaks. So in order to fit it in into that, these instructions can take me about 45 minutes. So backing out that, that's two hours and 15 minutes. Take a break out of that.

How do you think your argument can fit in?

MR. BOONE: I had been thinking about an hour, total, reserving about 15, 20 for rebuttal out of that.

THE COURT: Okay.

MR. BOONE: If that's incompatible --

THE COURT: How much were you thinking?

MS. LAWSON: I would hope that I would be able to do 45 minutes, Your Honor.

THE COURT: Mr. Oakley, do you think you can do 45?

MR. OAKLEY: Judge, I like to be in and out. 30 minutes should be enough for me.

THE COURT: I'm kind of trying to get worst-case scenario. I know if you hear something -- that's two and a half hours, that ought to put us right where we need to be.

If you all are using -- if you go over a little bit, Mr. Oakley goes under, but that gives the defense about an hour and a half total. And then you can have your 15, 20 minutes for rebuttal. Just tell me what you need tomorrow, Mr. Boone.

So does that sound like a reasonable plan? That way the jury should have the case at or around 1:00. Their lunch will be here so we don't have to waste time doing that. I'll have the clerk give them their menus when they get here tomorrow. We'll try to have enough snacks to keep them from passing out in the meantime.

Now, another thing that I do is with smoking jurors. It hasn't been a problem. But when jurors are excused to deliberate, if we have smokers on the jury, I try to permit reasonable but minimal smoking breaks.

During a smoking break, I would have one Court Security

Officer enter the jury room and be sure the jurors do not deliberate while the smoking jurors are taking a break.

The smoking jurors would be escorted outside for a smoke break. They would be escorted and guarded by a Court Security Officer to make sure that they do not deliberate while they are out smoking. Then, of course, we'll put them all back together and leave. We're going to try to avoid that, but sometimes it's a problem. So I just try to head it off before I get there.

What says the United States?

MS. ANDERSON: We have no problem with that procedure.

THE COURT: Ms. Lawson?

MS. LAWSON: Sounds great.

THE COURT: Mr. Oakley?

MR. OAKLEY: Sounds good.

THE COURT: All right.

Is there anything else that we could take up for the greater good tonight, Ms. Anderson?

MS. ANDERSON: Nothing from the United States.

THE COURT: Ms. Lawson?

MS. LAWSON: Nothing, Your Honor.

MR. OAKLEY: No, Your Honor. Thank you.

MS. LAWSON: Thank you.

THE COURT: Okay. Thank you all for hanging in here tonight. We'll get these ready for you and I'll see you in the

morning.

And be sure that we have phone numbers where we all get in touch with each other. The clerk will take all the information. If the weather is worse that we expect, we may have to alter our schedule tomorrow. Thank you very much.

(Proceedings adjourned at 5:31 p.m.)

C E R T I F I C A T E

I, Linda S. Mullen, RDR, CRR, do hereby certify that the foregoing is a correct transcript from the record of proceedings in this above-entitled matter.

/s/Linda S. Mullen — December 21, 2020
Linda S. Mullen, RDR, CRR — Date of Certification
Official Court Reporter

I N D E X

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