No.

In The
Supreme Court of the United States

JOSEPH JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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Questions Presented

Whether this Court's review of the entrapment doctrine is necessary to:

(1) resolve the circuit split that has created no less than four disparate tests in the federal courts of appeals to evaluate an essential element of the entrapment defense: the accused's predisposition to commit the offense;

(2) restore the essential, original purpose of the entrapment defense—to prevent the Government from manufacturing criminals—which has been frustrated by the disparate and unguided approaches by the United States courts of appeals; and

(3) determine an issue of exceptional national importance, that is, if the First Amendment places any limitations on the Government's ability to rely on the accused's wholly protected speech as evidence of their predisposition to commit the charged offense.

List of Parties

All parties appear in the caption of the case on the cover page.

Related Cases

- *United States v. Joseph Jones*, No. 1:17-cr-236-1, U.S. District Court for the Northern District of Illinois. Judgment imposed on March 3, 2021. Judgment entered on March 12, 2021.
- *United States v. Joseph Jones*, No. 21-1482, U.S. Court of Appeals for the Seventh Circuit. Judgment entered on August 18, 2023. Petition for rehearing *en banc* denied on October 16, 2023.

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Opinions Below

The opinion of the U.S Court of Appeals for the Seventh Circuit is reported at 79 F.4th 844 and reprinted in Appendix A.

The memorandum opinion and order of the U.S. District Court for the Northern District of Illinois denying petitioner's motions for acquittal and new trial is not reported and is reprinted in Appendix B.

The order of the U.S Court of Appeals for the Seventh Circuit denying rehearing en banc is not reported and is reprinted in Appendix C.

Jurisdiction

The district court entered final judgment and sentence on March 12, 2021. A copy of the final judgment and commitment order appears in Appendix D.

The Seventh Circuit affirmed Mr. Jones' conviction on August 18, 2023. A copy of the Seventh Circuit's opinion appears in Appendix A.

The Seventh Circuit denied Mr. Jones' petition for rehearing en banc on October 16, 2023.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provision Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

This case results from the government's multi-year surveillance of Edward Schimenti's and Joseph Jones' social media posts. R. 1. After reviewing their posts about the Islamic State, the FBI decided to insert undercover agents into both Mr. Schimenti's and Mr. Jones' lives. R. 1, ¶ 34. After years of prompting without any results, the government's agents convinced Mr. Jones into a single act of material support for terrorism: giving old cell phones and a ride to the airport to an undercover confidential human source working for the government.

1. Key persons and organizations

Name	Role
Joseph Jones	Defendant
Edward Schimenti	Co-defendant
Omar 1	Pseudonym of undercover agent No. 1.
Bilal Sharif	Pseudonym of undercover agent No. 2
Abdulhakeem	Pseudonym of undercover agent No. 3
Omar 2	Pseudonym of undercover agent No. 4
Muhamed	Confidential human source from Iraq working undercover for the Government
Cassandra Carnwright	Lead investigating FBI agent. Acted as handler for Muhamed.
Islamic State in Iraq & Syria (ISIS)	Designated terrorist organization operating in Syria and western Iraq.

2. Mr. Jones' activities before government agents contacted him

Mr. Jones was raised in a military family as a Christian. In 2007, when he was 25 years old, he converted to Islam. Tr. 2312. As part of his conversion and continued practice of his faith, Mr. Jones studied books and online discussions on Islam. Tr. 2311-2313. Eventually, Mr. Jones continued his education by enrolling at Harold Washington College in Chicago. Tr. 2314:23-5. As part of an English class in the 2014 fall semester at

Harold Washington, students were tasked with writing an essay on any controversial topic of their choice for the final assignment of the term. Tr. 2319:25 to 2320:7.

At the time, Mr. Jones was interested in the "Arab Spring," a series of pro- democratic protests and uprisings that had recently swept through the Middle East and North Africa. Tr. 2319:22–24; 2321:13–15. Although initially inspired by these movements, Mr. Jones became deeply concerned by the violent reaction of various regimes and the continued fighting in the region. Tr. 2322:1–3. Mr. Jones was horrified by the unrestrained and indiscriminate violence against civilians by the Assad regime in Syria. Tr. 2322:9–18. As a result, Mr. Jones focused on that issue and possible responses for his English term paper, titled "Should Muslims be allowed to establish an Islamic State?" Tr. 2320:8–9, 2324:14–18.

Mr. Jones continued his religious study of Islam, focusing primarily on questions of faith. However, due to current events, what was at first only a spiritual journey inevitably raised political questions about the role of Islam in society. Tr. 2326:3–19. Mr. Jones's studies included participating in various online discussions concerning these spiritual and political issues. Tr. 2332:9 to Tr. 2338:11.

In these debates, Mr. Jones never advocated for or supported what he believed could be fairly described as terrorism or war crimes. He often argued against or questioned the practice of targeting civilians in the turmoil that followed the Arab Spring. He never believed that he was discussing these topics with anyone engaged in foreign fighting—a belief he still holds and for which there is no evidence to the contrary. Before interacting with Government agents, Mr. Jones never expressed a desire to travel overseas or fight—either on behalf of his faith or in any other capacity. He did not have a passport and still has never applied for one. Mr. Jones is a father with young children. He would never leave them, take them from the life they have known, or willingly put them in harm's way.

Nothing in his academic research and spiritual discussions would suggest any predisposition to do or support violence, let alone terrorism.

The record reflects that as early as January 2015 (Tr. 744:19-10), the FBI opened a preliminary investigation into Mr. Jones because of the opinions he expressed online. Tr. 523:6-21, 529:10 to 530:4. Then, in April 2015, a full investigation into Mr. Jones began, based on his friendship with Edward Schimenti. The FBI began to monitor Mr. Jones, using both ground and aerial surveillance to record his every move. Eventually, the FBI targeted Mr. Jones on social media platforms such as Twitter and Google+, using undercover agents and Confidential Human Sources (CHS) in numerous attempts to draw Mr. Jones into conversations to see if he had any desire to engage in some form of support for terrorism. Mr. Jones had no such desire and never responded to these attempts. At no time during this surveillance did the FBI observe Mr. Jones commit *any* crime. Tr. 525:18 to 527:6.

After several months of surveillance and several failed attempts to lure Mr. Jones online, the FBI adopted a new strategy. Without observing any change in Mr. Jones's behavior or circumstances, agents sought authorization for a "full investigation" that included helicopter surveillance and agents on the ground and online monitoring his activity. Tr. 527:7-20.

In July 2015, after a string of failed attempts to engage Mr. Jones online, the FBI applied to target Mr. Jones with an "Undercover Platform." In this application, the FBI claimed that Mr. Jones "had online associations with individuals who are known to be members of ISIL." There remains no support for this claim anywhere in the record. In its application, the FBI expressed doubt about whether Mr. Jones would be willing to provide support to a terrorist organization. *Id.* The application was approved, and the FBI launched the next phase in its strategy against Mr. Jones after the tragic death of his friend, A.J. Richard, in July 2015.

3. Mr. Jones' activities after government agents made contact with him

On September 1, 2015, at the direction of the FBI, the Zion Police Department contacted Mr. Jones and requested that he come to the police station under the pretense that he was wanted for questioning in the death of Mr. Richard. Mr. Jones informed the officer on the phone that he did not have any information regarding the passing of his friend and respectfully declined several requests to meet with the police. However, at the direction of the FBI, Zion police threatened to arrest Mr. Jones at his place of employment if he did not come to the police station. To avoid public embarrassment, Mr. Jones reluctantly complied. The Zion police then picked up Mr. Jones from his house, brought him to the station, and instructed him to wait in the lobby.

While waiting in the lobby, Mr. Jones was approached by an undercover FBI agent known as Omar ("Omar 1"). As part of the FBI's ruse, Omar 1 posed as a disgruntled citizen who Zion police had stopped because he "looked Muslim" and forced to accompany them to the station for questioning. Omar 1 claimed to be visiting from Florida (Tr. 2349:24), appeared to be of Indo-Pakistani descent, and wore a large, Muslim-style beard and traditional dress. Tr. 321:20-23. In their own words, the FBI's goal was to present Omar 1 "as a particularly devout, observant Muslim complaining that he had been racially profiled or religiously profiled, and that led to an unfair traffic stop." Tr. 536:20-24. The FBI believed that Mr. Jones "would be particularly sympathetic to someone with that grievance." Tr. 536:9-23. The FBI explained that this grievance of being religiously or racially profiled would be a "talking point" for Omar 1 to use with Mr. Jones. Tr. 536:11. In the end, Mr. Jones empathized with Omar 1's plight and agreed to exchange phone numbers so that he could later confirm that Omar 1, a fellow Muslim, had made it out of the police station safely. Tr. 2349:2-21.

Because Omar 1 claimed to be visiting from Florida, Mr. Jones felt obliged by Islamic custom to ensure he was safe while a guest in Chicago. Tr. 2349:22 to Tr. 2350:3. So, Mr. Jones reached out to Omar 1 and texted him to make sure he had left the station safely.

TR. 10:6-7. Their conversation proceeded via text message until Omar 1 asked Mr. Jones whether he had "any good videos or websites that he could go to." Tr. 2352:3-4. In response, Mr. Jones sent Omar 1 a video entitled "Islamaphobia" and another entitled "Identity," which processes living with a Muslim identity while living in the West because he believed Omar 1 would be interested in the video after what happened to him at the police station. Tr. 2352:10-16.

In response, Omar 1 sent a video entitled "Radical Islamic Clarity, Praises ISIS, Condemns Christians," which (unsurprisingly) praised ISIS and was critical of Christianity—subjects the two had not previously discussed and which Mr.

Jones had not requested from Omar 1. Tr. 2353:1-6. Later, Omar 1 invited Mr. Jones to begin using Surespot, an encrypted messaging service that Omar 1 believed necessary to prevent "filthy kuffar messing with [him] because of [his] beliefs in Allah's plans." Tr. 2355:17-20. Before this time, Mr. Jones had never used Surespot or any encrypted communication: he didn't even know what encryption was. Tr. 2355:1-4.

During later conversations, Mr. Jones asked Omar 1 if "there were any brothers I could build and learn with." R. 1, ⁋ 37. Omar 1 told Mr. Jones there was an individual named Bilal, who, unbeknownst to Mr. Jones, was also an undercover agent. According to Omar 1, Bilal was a very knowledgeable brother. R. 1, ⁋ 37 Later, Omar 1 began discussing current events and raised the subject of Muslim children killed by Israeli soldiers recently. Tr. 2361:1-5. Omar 1 then asked Mr. Jones if he could email videos of the Islamic State. R. 1, ⁋ 38. Jones responded that he had plenty of videos and sent them to Omar 1. R.1

Then, on October 24, 2015, Omar 1 told Mr. Jones Bilal would be traveling through Chicago. R. 1, ⁋ 41. On October 30, 2015, Omar introduced Bilal to Jones and Schimenti. R. 1, ⁋ 42. Around this time, Omar 1 and Bilal began turning conversations towards "preparing for war" or "doing what is needed to support." Over the next month, Jones and Omar 1 shared videos and news stories posted on publicly available internet sources.

See Id., ⁋⁋ 44, 45. During Jones and Omar 1's text conversations, Jones expressed conflict about whether joining the Islamic State would align with his belief in Islam. Tr. 563:16-17. Specifically, when Omar 1 asked Mr. Jones why he would not travel to live in the Islamic State, Mr. Jones responded that he would be "worried about his family" and that he was "not sure" because "he needs more knowledge and clarity." Tr. 563:13-19.

Also, in late 2015, a third undercover government agent, Abdulhakeem, while discussing the study of the Arabic language with Mr. Jones, the topic of "hijrah," or migration or immigration, and asked whether Mr. Jones was thinking about leaving the country with his family. Tr. 924:20 to 926:9. Mr. Jones responded, "I want my family out of this place. It is terrible to live and raise kids here." Tr. 926:15-16. When Abdulhakeem asked Mr. Jones, "Do you have a passport and how soon do you plan to leave," he responded, "I have no funds and I have not made any plans." Tr. 926:21-25. In December 2015, Omar 1 told Mr. Jones that he had participated in an Islamic State training camp and that he would share pictures with Jones. R. 1, ⁋ 47. Omar 1 further stated he and Bilal would be in the northern Illinois area that month. R. 1, ⁋ 48. On December 29, 2015, Omar 1, Bilal, Jones, and Schimenti met in Waukegan, R. 1, ⁋ 49. At the meeting, the undercover agents showed Jones and Schimenti videos of Omar 1 training with weapons in desert conditions and discussed ISIS. Tr. 990:23-25; R. 1, ⁋ 50. Omar 1 and Bilal asked if Jones and Schimenti would pledge "bayat" to ISIS and commit acts of violence. Tr. 332:9- 15; Tr. 1173. When the discussion turned to these subjects, Mr. Schimenti left the meeting abruptly, followed by Mr. Jones. Tr. 332:9-15; See R.1.

Two months later, Omar 1 and Mr. Jones continued to talk about ISIS, the Islamic State, and travel overseas. Still, Mr. Jones resisted the initial efforts from these undercover agents and discussed whether this was what Islam preached. On February 6, 2016, Jones sent Omar 1 a link to a video posted on an open-sourced internet site. R. 1, ⁋ 53-54. Two days later, on February 8, Omar 1 texted Mr. Jones and stated, "I'm looking

for the ISIS Islamic state flag … if I find one you want me to get you one?" R. 1, ⁋ 55. Jones responded yes.

Eventually, on February 21, 2016, Omar 1 told Jones he obtained an ISIS flag and that he would be in Jones's area the week of March 7, 2016. R. 1, ⁋ 60. On March 11, 2016, Omar 1 gave Jones the ISIS flag. R. 1, ⁋ 61. On May 12, 2016, Omar 1 told Jones that he and Bilal had plans to depart from O'Hare to join the Islamic State. R. 1, ⁋ 63.

On June 16, 2016, Bilal met with Jones. R. 1, ⁋ 66. Bilal explained to Jones his purported ISIS facilitation network. Bilal stated he worked with Individual A, who assisted people in traveling from the United States to Syria. R. 1, ⁋ 66. During this meeting, Bilal showed Jones pictures of Omar 1, Bilal, and Individual A, supposedly traveling from the United States to the Middle East. R. 1, ⁋ 67.

Omar initiated the discussion of either providing material support or traveling to fight for a foreign terrorist organization on numerous occasions. Tr. 566:9-1; 765:6 to 766:13. On other occasions, agents attempted to induce Mr. Jones to attend a weapons training camp. Tr. 477:13-22. On another, an agent explicitly offered Jones assistance in traveling to join a foreign terrorist organization. Tr. 577:5-13. On yet other occasions, agents suggested that he and Mr. Jones "rock it out"—that is, perform a violent attack in the homeland. Tr. 483:10 to 484:19; 489:15 to 490:1. None of these suggestions were entertained or adopted by Mr. Jones.

When agents asked, "What's stopping you from going [overseas to aid terrorist forces]?" Jones answered with uncertainty: "I just feel like am not sure. I need more knowledge and clarity" (Tr. 563:16-19); when agents praised the 2015 terrorist attacks in Paris, Jones was skeptical but diplomatic: he said, "I'm not condemning. I just want to understand it," (Tr. 564:8-9) and asked agents what they think the Prophet Muhammad's opinion of the attacks would be (Tr. 564:19- 24).

When undercover agents asked Mr. Jones his opinion of another undercover agent's request that Jones travel to support terrorists, Jones noted that the agent's suggestions were illegal and said, "We haven't done anything nor plan on being involved in anything. Just trying to be good Muslims and Americans" (Tr. 565:10- 12). Mr. Jones never took any steps to support terrorists by traveling himself: for example, he never obtained a passport or made any plans to travel during the several years he was under government surveillance. Tr. 577:14-22; 529:7 to 530:5.

The government employed yet another undercover agent to communicate with Mr. Jones. This time, "Omar 2" spoke with Mr. Jones through text message. Specifically, on April 22, 2016, Jones sent Omar 2 a picture of Mr. Schimenti holding the ISIS flag supplied by Bilal. R. 1, ⁋ 69. Omar 2 also stated he wanted to travel to ISIS-controlled territory. Mr. Jones introduced Omar 2 to Bilal to help with Omar 2's travel. R. 1, ⁋ 72. Mr. Jones did not make the initial suggestion of criminal activity. As Muhamed testified, he initially approached Jones and Schimenti with the idea of sending cellphones to his imaginary brother in ISIS. Tr. 1474:1-7, 1459:3.

4. Edward Schimenti "meets" Government agent Muhamed

After several months of reviewing his social media presence, the Government also conducted physical surveillance on Mr. Schimenti. Tr. 319, 320. Despite having four undercover agents interact with both Mr. Jones and Mr. Schimenti, the FBI introduced a Confidential Human Source (CHS) to Mr. Schimenti, who was "more authentically from Iraq … to possibly develop better rapport." Tr. 403:4–7. Special Agent Carnwright told the jury that the CHS, known as "Muhamed," was a "very patriotic individual, very law enforcement friendly." Tr. 405:9–10. Agent Carnwright served as Muhamed's handler during this investigation.

Pointedly, when discussing the payments made to Muhamed, the government asked if the FBI paid Muhamed. Agent Carnwright testified that "no we did not." Tr. 410:20–22.

Special Agent Carnwright did tell the jury that "all the money provided to Muhamed was to afford for any costs incurred to him throughout the course of the investigation." Tr. 411:1–3. The FBI also purchased a car for Muhamed, which Agent Carnwright described as a "junker." Tr. 411:22.

The government asked whether the FBI paid Muhamed for expenses after the conclusion of the investigation. Tr. 411:25. Special Agent Carnwright testified that the FBI paid for "him to move his residence." Tr. 412:1–4. The government elicited testimony that the total amount of money paid to Muhamed had been $16,000. Tr. 412:10.

The FBI planted Muhamed at Mr. Schimenti's job to pose as a devout Muslim. Tr. 413. Muhamed started this job on November 14, 2016. Tr. 414:6. Eventually, Muhamed and Mr. Schimenti developed a friendship and began to spend time together outside of work. Tr. 417:9. During these meetings, the FBI encouraged Muhamed to develop a backstory. Tr. 419:12. In all, Muhamed portrayed himself as a stranger in a strange land. He was alone in the United States. Muhamed created the story of a fake brother living in Syria who went to fight for ISIS. Tr. 420:1-4.

5. The crime

In January 2017, Muhamed told Mr. Schimenti he wanted to travel to Syria himself and join ISIS with his brother. Tr. 420:20. The FBI created fictitious text messages between Muhamed and his non-existent brother Ahmed to create the ruse that Muhamed needed Mr. Schimenti's help to return to Syria and fight with ISIS. Tr. 421:10–14. Muhamed told Mr. Schimenti that his brother needed certain items, such as cell phones or camping bags, and had to get in physical shape before he left. Tr. 422–423.

On March 4, 2017, Mr. Schimenti and Muhamed went to a gym, ate lunch together, and visited a phone store. Tr. 434. Muhamed bought cell phones at that phone store, and Mr. Schimenti purchased a cell phone charger for those phones. Tr. 435. Muhamed told

Mr. Schimenti these phones were for Muhamed's brother and fellow ISIS fighters to help with drone strikes. Tr. 436.

On March 26, 2017, Mr. Jones introduced Muhamed to Bilal. Tr. 438. Before this meeting, Mr. Jones gave Muhamed two cell phones. Tr. 438. Three days later, on March 29, Mr. Schimenti bought five more cell phones for Muhamed. Tr. 446.

Finally, on April 7, 2017, Mr. Jones and Schimenti met with Muhamed for a goodbye meal before dropping him off at the airport. Tr. 447. Mr. Schimenti and Mr. Jones were arrested approximately a week later.

6. Post-trial revelations

On June 20, 2019, a jury convicted Mr. Jones and Mr. Schimenti of providing material support to a terrorist organization. R. 191. Several months after the jury's verdict, the government disclosed that the FBI had paid Muhamed a total of $50,000 in cash for his work on Mr. Schimenti's and Mr. Jones's case. R. 1. In response to this revelation, the defense filed a Motion for Order to Show Cause, and the court held an evidentiary hearing on December 2, 2019. R. 243. At that hearing, Agent Carnright testified that she had discussed with the prosecutors the possibility of paying Muhamed after the case had finished. RTSC, at 29.

After the hearing, the government made yet another belated disclosure to the defense. It submitted a spreadsheet called an "expense tracker" that Agent Carnright created that detailed payments to Muhamed. R. 249. This spreadsheet included payments for housing, stipends, "per diems," and a $5,575 payment for "amount service" prior to trial. This was in the same category used for the $50,000 cash payment. R. 249, at 2.

Ultimately, the district court denied both Defendants' Motions for New Trials. R. 291. On March 3, 2021, the district court sentenced Mr. Jones to 144 months imprisonment. R. 293. On April 9, 2021, the district court sentenced Mr. Schimenti to 162 months imprisonment. R. 308.

7. Appeal

On direct appeal, Mr. Jones argued that (1) the Government failed to prove beyond a reasonable doubt that government agents did not induce Mr. Jones to provide material support for terrorism and that Mr. Jones was predisposed to commit this crime and that (2) Mr. Jones was entitled to a new trial based on the newly discovered evidence. The Seventh Circuit affirmed Mr. Jones' conviction and held that he had not been entrapped, nor was the newly discovered sufficient to grant a new trial.

Following the decision, Mr. Jones filed a petition for rehearing *en banc* arguing that the Seventh Circuit's determination that he had not been entrapped required the full court's review for two reasons. First, because the panel decision held that the evidence in the case was in equipoise, the court's precedent required Mr. Jones' acquittal. Second, Mr. Jones argued that the decision conflicted with the protections of the First Amendment, the precedent of this Court, and that of the Seventh Circuit where it relied nearly exclusively on constitutionally protected speech as evidence of Mr. Jones' predisposition to commit a crime.

The Seventh Circuit denied the petition.

Reasons for Granting the Petition

This Court has firmly recognized the common law defense of entrapment since its decision in *Sorrells v. United States,* 287 U.S. 435 (1932). The availability of entrapment as a defense is required "for the ends of justice" because the Government cannot "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.,* at 451, 442. This Court's review of the common law defense of entrapment, and specifically the evaluation of an accused's predisposition, is necessary for three reasons.

First, the varied application of the common-law defense of entrapment by the lower circuits has created a circuit split. The lower courts currently apply no less than four different tests when evaluating whether the accused was predisposed to commit the charged crime. This legal morass cannot be resolved without this Court's instruction.

Second, the current application of the entrapment doctrine by the lower circuits, particularly in cases like Petitioner's where the Government used a sting operation, has eliminated the original purpose of the defense, which is to prevent the Government from manufacturing criminals.

Finally, and perhaps most significantly, this Court's review of the issue is necessary because the entrapment doctrine as applied here places an unconstitutional burden on the accused's First Amendment rights. The question presented is of exceptional importance, and one of first impression for this Court. The entrapment doctrine—whose intended purpose was to prevent Government overreach—has instead permitted the Government to use wholly protected First Amendment speech both as the reason to initiate sting operations and as the primary evidence at trial to prove the accused was predisposed to commit the induced crime. Allowing the Government to rely, as it did in the instant case, on protected speech as evidence of predisposition leads to consequences disconnected from this Court's existing First Amendment jurisprudence.

1. This Court should grant certiorari to resolve the circuit-split regarding the appropriate test lower courts should apply when a defendant raises an entrapment defense.

This Court has firmly recognized the common law defense of entrapment since its decision in *Sorrells v. United States,* 287 U.S. 435 (1932), where it recognized the repugnance of Government action that "implant[s] in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

Although a principal element in the defense of entrapment is the accused's predisposition to commit the crime, the federal circuit courts have come to no agreement on how to evaluate this subjective element since it was first introduced in *Sorrells*. *See United States v. Russell*, 411 U.S. 423, 433 (1973). The disagreement between the circuit courts has created a confused and tangled web of conflicting tests to determine the accused "predisposition." As discussed below, there are no less than four disparate analyses employed by the circuits to answer the same question: was the accused predisposed to commit the crime? This legal morass can only be rectified by this Court's intervention.

1.1. The confusion in the circuit courts regarding the application of the entrapment defense requires this Court's direction, specifically as to the appropriate test for "predisposition."

Adhering to the original guidance in *Sorrells*, this Court and the federal appeals courts have consistently held that such a defense involves two elements, (1) the conduct of the government agent; and (2) an "appropriate and searching inquiry into [the accused's] own conduct and predisposition" as bearing on his claim of innocence. *Sherman v. United States*, 356 U.S. 369, 373 (1958) (quoting *Sorrells,* 287 U.S. at 451). Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was here, the dispositive issue becomes "whether the Government can prove beyond reasonable doubt that the accused was disposed to commit the criminal act prior

to first being approached by Government agents." *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992). Even though a principal element in the defense of entrapment is the accused's predisposition to commit the crime, the lower courts significantly disagree as to how to analyze this element. *See United States v. Russell*, 411 U.S. 423, 433 (1973); *Sorrells*, 287 U.S. at 451. This case is ripe for this Court's review given that there are four different tests analyzing predisposition, which has in turn led to the current disparate and enigmatic application of the entrapment defense across Federal Courts.

1.1.1. The "positionality"/*Mayfield* test

Two years after this Court's most recent entrapment analysis in *Jacobson v. United States*, then-Chief Judge Posner of the Seventh Circuit wrote in *United States v. Hollingsworth*, 27 F.3d 1196, 1199–1201 (7th Cir. 1994), that *Jacobson* required the consideration of the accused's "positionality" to determine whether the defendant was had the requisite predisposition.

Under this test, predisposition requires more than just willingness to commit the charged offense. It also considers the actual ability of the defendant to commit the offense. *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) ("The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation.") In theory, Judge Posner's "positionality" test would prevent the conviction of those defendants who do not actually possess the skills, intellect, financial resources, or basic competence to commit the crimes they are charged with, in the absence of significant inducement by government agents. *See* Sahar Aziz, *Race, Entrapment, and Manufacturing "Homegrown Terrorism*," 111 Geo. L.J. 381, 412 (March 2023) ("a defendant may receive a more impartial analysis if a judge determines that because the defendant was hapless, young, naïve, socially isolated, and

bombastic, he simply could not have committed the offenses but for an FBI operative's leading role, planning, and substantial assistance").

Some twenty years after Judge Posner's opinion in *Hollingsworth,* the Seventh Circuit added to the positionality test in *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). In *Mayfield*, the court did not dispose of the positionality requirement, but added an additional five factors that determine whether the accused was predisposed to commit the crime: 1) the defendant's character or reputation; 2) whether the government initially suggested the criminal activity; 3) whether the defendant engaged in the criminal activity for profit; 4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and 5) the nature of the inducement or persuasion by the government. *Id.*, at 435. The Seventh Circuit stressed there was a significant conceptual overlap between the two elements of entrapment: "The character and degree of the inducement—and the defendant's reaction to it—may affect the jury's assessment of predisposition." *Id.,* at 437.

1.1.2. The five-factor test

The First, Sixth, Ninth, and Tenth Circuits use a five-factor test to determine whether the accused was independently predisposed to commit the charged offense. As a further testament to the disagreement between the circuits, even those that apply a five-factor test cannot agree on the factors that should apply.

The Ninth Circuit has explicitly rejected the "positionality" of predisposition, while applying a five-factor test that appears otherwise identical to the Seventh Circuit's. *See United States v. Thickstun,* 110 F.3d 1394, 1398 (9th Cir. 1997). Similar to the Seventh Circuit's test, but without the "positionality" feature, the First, Sixth, and Ninth Circits assess the following factors: (1) the defendant's character or reputation including any prior criminal record; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether

the defendant evidenced a reluctance to commit the offense that was overcome by repeated government persuasion; (5) the nature of the inducement or persuasion by the government. *See United States v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998) ; *United States v. Silva*, 846 F.2d 352, 355 (6th Cir. 1988) *United States v. Busby*, 780 F.2d 804, 807 (9th Cir. 1986).

Meanwhile, the Tenth Circuit applies a similar, but not identical, five factor test, which includes: (1) prior illegal acts; (2) the defendant's desire to profit; (3) his eagerness to participate in the crime; (4) his ready response to the government's inducement offer; and (5) his demonstrated knowledge or experience in criminal activity. *United States v. Duran*, 133 F.3d 1324, 1335 (10th Cir. 1998).

1.1.3. The three-factor test

The Second and Third Circuits use a three-factor test that allows the Government to show predisposition by using evidence of (1) an existing course of criminal conduct similar to the crime for which the defendant is charged; (2) an already formed design on the part of the accused to commit the crime for which he is charged; or (3) a willingness to commit the crime for which he is charged as evidence by the accused's ready response to the inducement. *See United States v. Brunshtein*, 344 F.3d 91, 101–02 (2d Cir. 2003); *accord United States v. Gambino*, 788 F.2d 938, 944 (3d Cir. 1986); *United States v. Lakhani*, 480 F.3d 171, 179 (3d Cir. 2007). Illustrating the disagreement of the circuits regarding the correct analysis of predisposition under *Sorrells* and its progeny, the Second Circuit has explicitly rejected the Seventh Circuit's positionality factor. *United States v. Cromitie*, 727 F.3d 194, 217 (2d Cir. 2013).

1.1.4. The case-by-case analysis

Finally, the Fourth, Fifth, Eighth and Eleventh Circuits make a case-by-case determination as to whether the accused was predisposed to commit the charged offense.

These tests provide little guidance as to what the inquiry regarding predisposition constitutes. *See, e.g., United States v. Brown,* 43 F.3d 618, 624 (11th Cir. 1995) (stating the predisposition inquiry "asks the jury to consider the defendant's readiness and willingness to engage in the charged crime absent any contact with the government's officers or agents"); *United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991) (holding predisposition is determined by "the defendant's ready response to the inducement offered."). These circuits' reliance on "readiness" does not clarify the issue, and merely appears to substitute one subjective word for another.

Further evidencing the need for direction by this Court, the Eleventh Circuit has explicitly rejected *any* "factor" test as an insufficient analysis of predisposition. *Brown*, 43 F.3d at 625. Thus, whenever the entrapment defense is raised in these circuits, neither the parties nor the courts have any guidance as to how they should present and evaluate the predisposition element.

1.2. The decision in the Petitioner's case conflicts with this Court's opinion in *Jacobson,* further evidencing the lower court's need for instruction.

Here, the Seventh Circuit erroneously rejected Mr. Jones' argument that he was entrapped as a matter of law. The lower court erred because the evidence it relied on to prove inducement and predisposition is at odds with this Court's decision in *Jacobson.*

In *Jacobson*, the defendant raised the defense of entrapment and this Court reversed the defendant's conviction, holding that the Government failed as a matter of law to prove that Jacobson was predisposed to commit the charged offense. *Jacobson*, 503 U.S. at 553. The defendant had ordered child pornography from an adult bookstore three months before it became a federal crime to do so. *Id.*, at 542–44. After finding the defendant's name on the bookstore's mailing list, the government repeatedly sent him fake leaflets and other solicitations from fictional organizations promoting the idea that child pornography is acceptable, that efforts to ban it were illegitimate, and offering various items for sale.

Id. at 543-48. Only after this campaign continued for more than two years did Jacobson finally order a publication from one of the government's catalogs, and federal agents arrested him. *Id.* This Court reversed his conviction, holding that Jacobson's "ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime." *Id.*, at 553.

As in *Jacobson*, the lower court erroneously relied on evidence of predisposition that the legal transfer of material was "at most indicative of certain personal inclinations." *Id.* at 551. The Seventh Circuit's analysis of Petitioner's predisposition amounted to summation of the evidence of his personal beliefs about ISIS, which included, among other things, social media posts, talking about and sharing ISIS materials with others, and posting the ISIS flag. *Id.*, 856–57. Indeed, the Seventh Circuit appears to have reasoned that the mere fact that Mr. Jones held certain personal beliefs prior to the investigation, and that he did not amend those personal beliefs while under the influence of Government agents, proved his predisposition to provide material support beyond a reasonable doubt. *United States v. Jones*, 79 F.4th 844, 857 (7th Cir. 2023) (relying on the facts that Mr. Jones "consistently demonstrated his independent interest in ISIS" and his views of ISIS did not change). Regardless of the consistency of Mr. Jones' views about ISIS across time or their distastefulness, fact of the matter is that the possession and dissemination of information about radical views is not a crime.

Thus, as in *Jacobson*, the Government's evidence of Mr. Jones' predisposition amounted to only legal speech and actions. As this Court held, evidence of predisposition to do what is lawful is not, by itself, sufficient to show a predisposition to do what is illegal, "for there is a common understanding that most people obey the law even when they disapprove of it." *Jacobson*, 503 U.S. at 551. Even if Mr. Jones were to publicly announce a philosophical affinity for the actions of ISIS abroad, this evidence, pursuant to

Jacobson, cannot support even an inference that he would commit a crime. In short, the evidence shows that, before his initial exposure to the investigation, Mr. Jones was no more predisposed to provide material support to ISIS than an *Ocean's Eleven* super-fan would be to rob a casino.

Moreover, the decision in the instant case conflicts with the Seventh Circuit's own precedent, where it failed to consider Mr. Jones' positionality or his reluctance to commit the offense as evidenced by his repeated refusals to travel to Syria and provide cells phones. *See United States v. Jones*, at 852, 857 ("A defendant's reluctance to commit the offense is the most important consideration.") (citing *Mayfield*, 771 F.3d at 437); *Mayfield*, 771 F.3d at 438 (a defendant is predisposed to commit the charged crime "if he was ready and willing to do so and likely would have committed it without the government's intervention, or actively wanted to but hadn't yet found the means.").

The Seventh Circuit's decision contradicts this Court's essential holding in *Jacobson* that prevents evidence of lawful activity, by itself, from showing predisposition. The *Jones* decision is a testament to the confusion in the lower courts because it conflicts with *Jacobson*, the tests established in other circuits, and even the Seventh Circuit's own prior decisions, and thus requires this Court's review.

1.3. Confusion reigns in the lower courts due to the lack of a clearly articulated standard.

Given the variance in how the federal circuit courts have analyzed predisposition, this case represents a straight-forward circuit split, ripe for review. The split has resulted in significant confusion and explicit disagreement between the circuits, with the various circuit courts applying, creating, tweaking, and recreating their own entrapment and predisposition tests. Petitioner urges this Court to grant the instant petition so that this Court can adopt a test that better protects citizens from overzealous "sting operations" and upholds the original purpose of the entrapment doctrine, as discussed below. Because predisposition was the deciding factor for Jones' entrapment defense, this case presents

the Court with an ideal opportunity to resolve the split and bring clarity to the essential common-law defense of entrapment.

2. The recent application of the entrapment defense by the circuit courts has emptied it of the intended goal of preventing the Government from manufacturing crime.

This Court has firmly recognized the common-law defense of entrapment since its decision in *Sorrells v. United States*, 287 U.S. 435, 451 (1932). The purpose behind this defense is to prevent the Government from transforming innocent individuals into criminals by inducing the commission of a crime. *Jacobson v. United States*, 503 U.S. 540, 548, 112 S. Ct. 1535, 1540 (1992); *Sherman v. United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 820 (1958) (the function of law enforcement "does not include the manufacturing of crime"). The "most important function of the doctrine, the one that the Supreme Court has repeatedly affirmed, is to ensure that people who are not predisposed to commit a crime are not transformed into criminals by the government." *United States v. Pillado*, 656 F.3d 754, 765 (7th Cir. 2011) (citing *Sorrells*, 287 U.S. at 442, and *Sherman,* 356 U.S. at 372).

With the deluge of communication that now occurs over the internet, the Government's methods of investigation since this Court's landmark decision in *Jacobson* have changed significantly. Now that social media use has climbed sharply, government operatives investigating domestic terrorism have predominantly identified their targets online through a covert surveillance unit. *See* Aziz, *supra*, at 394. The instant case is just one example. Here, the Government began surveilling Mr. Jones and Schimenti in 2015 based on their social-media posts and several months later "launched a full-scale investigation using undercover agents." *United States v. Jones*, 79 F.4th 844, 848 (7th Cir. 2023).

The Government's subsequent pursuit of Mr. Jones lasted 18 months, culminating in his acquiescence in 2017 into providing two cell phones to a confidential Government

informant supposedly on his way to join ISIS. *Id.*, at 849, 854. Upon the success of the Government's campaign, it used Mr. Jones' same social media postings to prosecute Mr. Jones and establish his predisposition to commit a crime that only came to fruition after it was suggested repeatedly by the Government during its 18-month pursuit of Mr. Jones. *Id.* at 849–50.

Of significant concern, the district court and the Seventh Circuit both relied on these social media posts—all of which consisted of wholly protected speech under the First Amendment—as evidence of Mr. Jones' predisposition. *Id.* at 856. Mr. Jones' case illustrates the danger of allowing the government to use protected speech to target a person for investigation, and then use that person's beliefs—not actions—as evidence of his predisposition to commit a crime.

Under this subjective rule, the defense of entrapment has been eviscerated to varying degrees depending on the circuit the case is heard in. The message the lower courts are sending is that any person who dares to publicize views the government dislikes may be targeted for prosecution solely based on these beliefs. If the government initiates a sting operation and eventually succeeds in inducing their target to violate the law, as occurred here, the defendant will never be able to prove entrapment. As the Seventh Circuit held in the instant case, "Jones' *statements* support a finding that he was likely to take affirmative steps to support ISIS if given the opportunity." *Id.* (emphasis added) As former FBI agent Michael German explains:

> Today's terrorism sting operations reflect a significant departure from past practice. When the FBI undercover agent or informant is the only purported link to a real terrorist group, supplies the motive, designs the plot and provides all the weapons, one has to question whether they are combatting terrorism or creating it.[1]

[1] Timothy McGrath, *The FBI is Entrapping Americans and Charging Them as Terrorists, According to a New Report*, WORLD (July 21, 2014, 12:47 PM), https://perma.cc/HVD3XB7T.

Moreover, Muslim-Americans like Mr. Jones are not the only ones affected by government manufacture of crime and the subsequent inability to raise a successful entrapment defense. Under the current application of the predisposition element, one can easily see how overzealous government agents of any political persuasion could go undercover in effort to induce commission of a crime, then point to the content of the target's protected speech on the internet as evidence of predisposition, thus ensuring that the entrapment defense will provide no relief.

A few hypotheticals may be useful to clarify the danger:

Example 1, *the Second Amendment protector*. Suppose a man posts a messages and videos on his Facebook page urging his elected officials not to curtail Second Amendment Rights in the wake of a mass shooting in the man's community. A group of ATF agents see the Facebook posts and decide to go undercover as manufacturers and distributors of federally banned "ghost-gun" kits, which the agents are eager to sell to the man.[2] The man repeatedly declines, insisting he is happy with the firearm he currently owns. After months of cajoling, insisting that the Government is hellbent on taking his guns and leaving him with no protection, the agents finally persuade the man to furnish the cash to purchase the ghost-gun kit, at which point the agents make the arrest.

Example 2, *the Catholic immigration rights activist.* An immigrant-rights activist working near the U.S.–Mexico border is a vocal critic, via her internet YouTube channel,

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[2] While not identical to Petitioner's hypothetical scheme, it is notable that federal courts did eventually reign in an ATF program which had officers go undercover as Chicago hustlers to persuade men with previous criminal records to attempt to rob fake "stash houses" filled with guns and drugs. *See United States v. Brown,* 299 F. Supp. 3d 976 (N.D. Ill. 2018); https://www.law.uchicago.edu/key-moments-fake-stash-house-litigation (last visited Jan. 3, 2024).

Recognizing the absence of a clearly articulated definition of entrapment that would prevent such abuses, the litigants in the stash-house cases obtained relief on the theory that ATF agents targeted black men on Chicago's south side disproportionately to similarly situated groups, in violation of the equal protection clause. *Id.* Petitioner certainly admires the creativity and ingenuity of the litigants in the stash-house cases, but the fact that the entrapment defense was seen as a dead end, under those facts, reveals the dramatic failure of this Court's current entrapment jurisprudence. *See Brown,* 299 F. Supp. 3d at 1007–08. The glaring absence of a clearly articulated standard that adequately protects citizens against overzealous and outrageous government conduct leaves most targets with no such remedy.

of ICE, Border Patrol, and immigration authorities in general. Her mission is to advocate for the rights of immigrants and prevent the deportation of otherwise law-abiding migrants, a mission she believes is informed by her deep Catholic faith. ICE officials decide to dress two of their agents up as Catholic priests who share the same attitude, so much so that they would be willing, for a modest fee, to conduct sham wedding ceremonies to fraudulently obtain papers for migrants at risk of deportation. Although the activist initially refuses to participate in the scheme, these "priests" begin to play on the activist's Catholic faith, repeatedly asking her, "Would Jesus turn his back on the poor and down-trodden?" Some twelve months later, shortly after non-undercover ICE agents perform a raid resulting in the deportation of some of her community members, the activist finally acquiesces, seeing the scheme as necessary for living up to her religious beliefs. The agents then arrest her.

Under the current application of the entrapment doctrine, in both of these hypothetical examples, evidence of the accused's disposition consists of the same social-media content that led the Government to target these individuals. *See United States v. Russell,* 411 U.S. 423, 433 (1973) (reiterating that "the principal element in the defense of entrapment was the defendant's predisposition to commit the crime"). As to the Government's repeated offers, persuasion, and blatant attempts to play on the target's fears, sympathies, religious beliefs, and anxieties, these would be irrelevant to predisposition under nearly all the circuits' current tests. In each example, the crime appears to be "the product of the *creative* activity" of law-enforcement officials, who provided the idea, the means, and the opportunity. *See Sherman,* 356 U.S. at 372. However, as in the Petitioner's case, the Government would have an abundance of "relevant" social media postings by each of the accused stating their extreme positions to introduce at trial as evidence of their

predisposition.[3] Given these circumstances, the entrapment defense, as currently applied, is essentially foreclosed as an avenue for relief.

The entrapment doctrine exists because "stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search" when law enforcement is the one to manufacture the crime. *Sherman*, 356 U.S. at 372. What Petitioner's case and the above examples illustrate is that under the current approach to predisposition, the Government is able to manufacture a crime and then prove the accused was predisposed by relying on their internet communication. In counterterrorism prosecutions of Muslims, in *all* the 26 cases in which defendants raised an entrapment defense at trial, the government was successful in persuading judges and juries that Muslims' purportedly extremist speech was sufficient evidence of predisposition. *See* Aziz, *supra*, at 421.

This Court's current entrapment jurisprudence provides the government with a powerful toolkit to suppress dissent and quell legitimate criticism by targeting outspoken government critics in coercive entrapment schemes. The consequence of this is that these government tactics subvert the original purpose of the entrapment doctrine, thus posing a threat to justice, the legitimacy of government investigations and prosecutions, and liberty of *all* citizens, not just those with distasteful views. It is time for this Court to revisit the entrapment defense because the combination of the current predisposition test and the government's modern, coercive investigation tactics have resulted in the complete subversion of the intended purpose of this doctrine.

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[3] It is worth noting here that these hypothetical entrapment schemes are distinguishable from typical "controlled drug purchases" performed by DEA and FBI agents. Police perform "controlled drug purchases" when they reasonably suspect that the person has or is engaged in criminal behavior, not when the person's free speech on the internet suggests they may be persuaded to violate the law if induced. The Government is not known to set up "controlled drug purchases" based on peoples' social-media criticism of the war on drugs, or even speech praising drug cartels. Thus, the hypothetical examples detailed above, as well as the all-too-real schemes used by the FBI in its domestic counterterrorism program, are all readily distinguishable from "controlled drug purchases."

3. The question of how to balance the demands of the First Amendment with the defense of entrapment is one that cannot be resolved without this Court's review, and is one of first impression, both for this Court, and the one below.

In addition to the circuit split regarding the application of the of the entrapment doctrine, this case also presents a related question of critical importance to our constitution and our liberty: Does the First Amendment place any limitation upon the government's use of protected speech in criminal prosecutions where the entrapment defense is raised?

In domestic terrorism cases, including the one at bar, the evidence of predisposition often amounts to reliance solely on the accused's subversive, unpopular beliefs as evidenced by their speech. *See Jones*, 79 F.4th at 856. This results in a dilemma of exceptional importance in cases where the entrapment defense is at issue. The case before the Court demonstrates how the executive branch's overzealous investigation and prosecution of post 9-11 domestic-terrorism offenses, particularly under the "material support" statute, has had and will continue to have a chilling effect upon Americans' freedom of speech and religious expression. This Court should grant this petition to determine whether the reliance on protected speech as evidence of predisposition to commit a criminal offense violates the First Amendment and chills speech. This Court's guidance on this constitutional issue is necessary to determine whether the First Amendment imposes additional requirements when protected speech is the Government's main evidence of predisposition and therefore the accused's guilt.

"When the government seeks to punish speech based on its content, the First Amendment typically imposes stringent requirements. This ensures that the government, even when pursuing compelling objectives, does not unduly burden our Nation's commitment to free expression." *Counterman v. Colorado*, 143 S. Ct. 2106, 2119 (2023) (Sotomayor, J., concurring). Here, the Seventh Circuit permitted the Government to use Mr. Jones' protected speech as evidence of his predisposition to commit a crime without placing any requirements on its direct relevance to the charged crime or the intention

behind the speech. *See id.* (holding that even when speech is outside the bounds of First Amendment protection because it involves true threats, the government must still prove the defendant had a subjective understanding of the statements' threatening nature).

Specifically, in evaluating whether Petitioner was predisposed to provide material support to ISIS, the Seventh Circuit relied on the following "actions" by Mr. Jones prior to Government contact:

- he regularly *shared* ISIS propaganda, including the "violent Flames of War recruitment video";
- he *watched* that recruitment video with Mr. Schimenti;
- he made *comments praising* ISIS;
- he made *comments speculating* about ISIS's plans to attack different cities;
- he made *comments expressing distrust* of nonbelievers in Islam.

See Jones, 79 F.4th at 856. The court further relied on Mr. Jones's "actions" after Government contact as evidence of his predisposition:

- he *thought* about moving to Syria to live under the Islamic State prior to meeting the informants;
- he willingly *took the ISIS flag* and was excited to have the flag;
- he *shared photos of himself and the flag* on social media as a show of support for ISIS;
- he *shared pro-ISIS materials* with his ex-girlfriend and a member of his mosque.

Id. at 857.

As illustrated by the above lists, the Seventh Circuit's determination that Mr. Jones was predisposed to provide material support to ISIS almost exclusively relied not only on actions that were legal but were constitutionally protected by the First Amendment. *See Jacobson*, 503 U.S. at 551 ("Evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common

understanding that most people obey the law even when they disapprove of it.") Thus, because the entrapment defense is essentially reliant on the Government's ability to prove predisposition, Mr. Jones' lawful, wholly protected speech was the reason for his conviction.

Moreover, when Mr. Jones prompted the Seventh Circuit to evaluate the consequences of the Government's reliance on protected speech, the lower court declined to provide any meaningful analysis, stating "we know of no authority—and Jones has identified none—supporting Jones's view that the First Amendment shields from consideration statements he made that shine substantial light on his intent and predisposition to commit the crime." *Jones*, 79 F.4th at 856. As such, the present case provides this Court with the perfect vehicle to determine whether relevant, wholly protected speech can be used to establish predisposition and the accused's guilt, or requires courts to impose more stringent requirements under the First Amendment.

In *Counterman,* this Court recently reiterated the great importance of placing limits on the criminalization of speech, even for true threats, which is speech that is *not* protected under the First Amendment:

> This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer "wide[ ] of the unlawful zone." The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats.

Counterman 143 S. Ct. at 2116 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). The First Amendment thus required the State to show not only that the defendant's statements were objectively threatening, but also that the defendant was *subjectively* aware of their threatening nature. This additional requirement, held the Court, "offers enough breathing space for protected speech without sacrificing too many of the benefits of enforcing laws against true threats." *Id.* at 2119.

It is inconsistent with the spirit of the First Amendment that Mr. Jones' statements, which are protected under the First Amendment, warranted no similar analysis to that in *Counterman*. In *Counterman* this Court seriously considered the constitutional ramifications of threatening, unprotected speech, where by contrast the First Amendment interest here is even greater because the speech at issue is wholly protected. It is of the utmost importance for the Court to consider the constitutional interest in free expression and the chilling effects of using protected speech both to target individuals for investigatio, and then to use that evidence as predisposition to commit a crime during prosecution. As the Court's analysis in *Counterman* reiterated, it is essential to balance the need for prosecution against the possible chilling effect of using speech as evidence in a prosecution. The need for a similar analysis here is even more crucial because Mr. Jones' speech was protected under the First Amendment, and this Court has never analyzed the consequences of allowing protected speech as evidence of predisposition in entrapment cases.

The social and policy ramifications of permitting protected statements as evidence of predisposition, with no further qualification, are far reaching. As illustrated by Mr. Jones' own speech, much of which was on social media, "the risk of overcriminalizing upsetting or frightening speech has only been increased by the internet." *Counterman*, 143 S. Ct. at 2122. Yet the Seventh Circuit did not consider the constitutional interest in free expression when it relied on Mr. Jones's First Amendment-protected statements as evidence that he was predisposed to commit a crime.

Additionally, allowing lower courts to construe protected speech as evidence of predisposition likely will, and indeed has, led to religious and racial disparities in who the government targets in these coercive and invasive "sting operations." *See Trial and Terror*, The Intercept (June 14, 2023). Since 9-11, the government has prosecuted 992 people for domestic terrorism related offenses, most under the same "material

support" statute used in this case. *Id.* Among them, over half of those convicted have been affiliated with an Islamic group, with 230 expressing support for ISIS, 167 for Al Qaeda, 54 for the Taliban, and 54 for Al Shabab. *Id.* In other words, despite being only 1.1 percent of the United States' population, Muslim Americans have accounted for over half of post 9-11 federal terrorism-related prosecutions. Serious questions regarding both the First Amendment's guarantee of freedom of religious expression and the Fourteenth Amendment's guarantee of equal protection of the law are raised by allowing the government to disproportionately target Muslim Americans with what the government calls "sting operations," but could also be described as "entrapment schemes."

Moreover, there is a chicken-or-the-egg dilemma at play as well. If the government can construe First Amendment-protected speech as evidence of predisposition to commit a terrorism-related offense, thus giving the government the authority to initiate a coercive and invasive "sting operation", the government is free to disproportionally target members of a minority religion in those operations based on the content of their protected speech and beliefs.

In other words, unless this Court weighs in on this issue, the government can seize upon constitutionally protected religious speech to target a minority religious group, based solely upon the content of that speech. Doing so would be contrary to our most fundamental civil liberties, namely, freedom of speech, freedom of religion, and the equal protection of laws. Furthermore, such Government targeting runs contrary to the well-established principle that the Government cannot single out certain speech for censorship based solely on the content of the speech itself. *See R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003); *Snyder v. Phelps*, 562 U.S. 443 (2011). Under this Court's current entrapment jurisprudence, the operation of the Government's post 9-11 domestic counterterrorism apparatus functions in practice like a content-based restriction upon free speech.

This Court should grant this petition because, as far as Petitioner is aware, the Court has never had occasion to consider whether the First Amendment provides additional requirements when the government introduces protected speech as evidence of a defendant's predisposition to commit a serious crime. In the absence of specific First Amendment requirements for such evidence, the Government has developed a sweeping domestic counterterrorism apparatus that regularly seizes upon the content of citizens' protected speech on the internet, of which Petitioner's case is just one example. This Court has a responsibility to clarify whether the First Amendment provides citizens additional protection against the Government's usage of lawful speech at trial as evidence of predisposition to commit a crime that the Government itself manufactured.

Conclusion

For the reasons stated above, petitioner respectfully requests that the Court grant the petition for certiorari.

Respectfully Submitted,

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Note: Law clerk Hank T. Stillwell provided substantial and invaluable assistance to counsel in preparing this petition.

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 21-1482 & 21-1672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH D. JONES and EDWARD SCHIMENTI,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:17-cr-236 — **Andrea R. Wood**, *Judge*.

ARGUED NOVEMBER 1, 2022 — DECIDED AUGUST 18, 2023

Before ROVNER, BRENNAN, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. A jury convicted Joseph Jones and Edward Schimenti of providing material support to the terrorist organization ISIS. In returning guilty verdicts, the jury rejected an entrapment defense advanced by Jones. The district court, in denying a post-trial motion for acquittal, likewise rejected his contention that the evidence showed that the government overstepped and induced his commission of the

offense. Because the district court properly instructed the jury on the elements of entrapment, we owe the jury's ultimate determination meaningful deference and in the end agree with the district court's denial of Jones's motion for acquittal.

We likewise agree with the district court's denial of Jones and Schimenti's motion for a new trial based on a revelation that emerged after trial regarding a substantial payment the government made to a confidential source shortly after the jury convicted both defendants. What happened raises many questions, but, like the district court, we cannot conclude an earlier disclosure of a planned or contemplated post-trial payment would have resulted in the jury acquitting Jones or Schimenti. All of this leads us to affirm.

I

A

The trial evidence supplies the operative facts, which we set forth (as we must) in the light most favorable to the government. See *United States v. Leal*, 72 F.4th 262, 267 (7th Cir. 2023).

Joseph Jones and Ed Schimenti are childhood friends who lived near Chicago. Both men are practicing Muslims and members of the same mosque. In early 2015 the FBI began surveilling Jones and Schimenti based on their pro-ISIS social media posts that praised the organization, threatened nonbelievers of Islam, and glorified violent recruitment videos. Jones interacted on Google Plus with videos depicting violent beheadings and fatal stabbings. On his personal page, he wrote the "Islamic State wants a world ruled by the law of Allah. … Jihad for the kufar [non-believers] with blind corrupt hearts." Schimenti, too, posted on Google Plus to convey

his desire for Islamic rule, writing, "May Allah reward this fierce mujahideen [jihad fighter] who uses his life, body, and earthly might to make Allah's law govern all. May Allah reward him for striking fear in the hearts of the taghut [non-believers]."

After several months of physical and online surveillance, the FBI found no evidence of criminal activity but remained concerned about the pro-ISIS content in Jones's and Schimenti's ongoing posts. So in September 2015, the Bureau launched a full-scale investigation using undercover agents and a confidential human source.

The FBI began by initiating contact between Jones and an undercover agent going by the name "Omar." The contact arose in staged circumstances. The Bureau instructed local law enforcement to bring Jones to a police station under the guise of asking him questions about the recent death of his friend. Omar then initiated conversation with Jones in the station's waiting room by expressing his frustration at being profiled because he was a Black Muslim, an identity Jones shared. The FBI instructed Omar neither to discuss ISIS nor to ask for Jones's contact information, but only to open the door to a conversation to "identify [Jones's] true intent and understand what [he] truly want[s] to do." After discussing their shared identity, Jones asked Omar for his phone number and the two began a friendship.

B

Jones pursued a relationship with Omar and then with other undercover agents that unfolded over the next 18 months. Although the government kept in contact with Jones over that period using its multiple agents, it was Jones—and

not the agents—who drove the relationship forward. Following the meeting at the police station in September 2015, Jones and Omar continued to communicate by text message. Their early conversations began with general discussions about Islam.

At Jones's initiation, the communications eventually turned to radical Islam. He shared ISIS propaganda videos with Omar, to which Omar responded by thanking him and asking if he had more. After establishing their mutual support for ISIS—and repeatedly referring to Omar as his "brother"—Jones continued sending videos, including the violent ISIS recruitment video "Flames of War," which he had previously watched with Ed Schimenti in 2014. Seeing an opportunity to get more information about Jones's intent to commit a material support offense, Omar asked Jones whether he ever thought about traveling to Syria. Jones texted back: "Every night and day."

As their relationship progressed, Jones asked Omar whether he knew other "brothers" that he could "learn and build with"—a request to meet other ISIS supporters. Omar responded by introducing Jones to "Bilal," another undercover FBI agent posing as an ISIS travel facilitator. Omar indicated that Bilal could help people travel to Syria, something Omar said he planned to do. Bilal told Jones that he could help fund Jones's trip to Syria to support ISIS, but Jones never took him up on that offer.

Jones continued his friendships with the undercover agents, and on October 30, 2015, Omar and Bilal met Jones in person at a restaurant in Waukegan. Jones invited his close friend Schimenti to join them, and the four shared a meal.

Communications continued and two months later Omar, Bilal, Jones, and Schimenti met again in a hotel room in Gurnee, near Chicago. During that meeting Bilal showed Jones and Schimenti a video of Omar completing firearms training in a desert. Bilal then offered to help Jones and Schimenti perform a violent act, ostensibly on behalf of ISIS, telling them: "If you want to rock out right now, we gonna rock out right now." Neither of them accepted the offer, but Jones expressed his interest in the training video and recognized that Omar was actively preparing to become an ISIS fighter.

At that same December 2015 hotel meeting, Bilal put a question to Jones and Schimenti: "When we say who you with, you guys are on the same page right?" The two responded "alhumdulillah," meaning "all praises to Allah"—an enthusiastically strong "yes" indicating their support of ISIS's mission. But the meeting soured when Bilal followed up by asking Jones and Schimenti whether they had pledged "bay'ah," or allegiance to ISIS. Schimenti was upset by the question and left the room without responding, prompting Jones to explain that Schimenti worried that Bilal and Omar were federal agents. For his part, Jones did not answer Omar's question about swearing loyalty to ISIS, but more generally told Omar and Bilal that he wanted to keep in touch.

While Schimenti discontinued his relationship with Omar and Bilal following this meeting at the hotel, Jones kept his word and stayed in touch. Indeed, Jones continued to initiate communications and exchange pro-ISIS messages with both Omar and Bilal. In February 2016 Omar told Jones that he planned with Bilal's help to travel to Syria, to which Jones responded, "Brother, I wish I was going with you." Omar asked

Jones whether he wanted an ISIS flag to show his support. Jones readily accepted the flag and displayed it within his home while also sharing photos of himself with the flag on social media. After Omar departed, Jones contacted Bilal to ask for updates and pictures of Omar in Syria. He thanked Bilal for his help, writing, "May Allah reward you also."

During this time Jones additionally continued to seek and build ISIS connections on his own, independent of Omar and Bilal. In August 2016 Jones met a person on a pro-ISIS website also using the name "Omar." Unbeknownst to Jones, this second Omar, who we will call Omar 2, was an undercover FBI agent. During their online chat, Jones told Omar 2 that there was a "ferry getting brothers to the land of truth near us" and that "[s]ome brothers made hijra in May," referring to Bilal's facilitation of Omar's travel. In response to Omar 2's interest in traveling to Syria, Jones then took the step of introducing him to Bilal. When Bilal asked Jones for more information about Omar 2, Jones assured Bilal that Omar 2 was a "trustworthy brother" who "understands the religion the way we do." Jones eventually organized an in-person meeting in Gurnee between himself, Bilal, and Omar 2, after which Omar 2 purportedly traveled to Syria with Bilal's help.

In the ensuing months Jones and Schimenti continued to publicly and privately express pro-ISIS sentiments, including to peers at their mosque, that concerned the FBI. Given Schimenti's distrust of Bilal and Omar, the FBI devised a plan to introduce yet another player into the mix to reestablish contact with Schimenti through a new, more trusted source. The Bureau did so by introducing a confidential informant named "Muhamed" to Schimenti. In November 2016 Muhamed, a

native of Iraq, started working at the same company as Schimenti, and he and Schimenti soon became friends.

A few weeks into their friendship, Muhamed told Schimenti that he had a brother who lived in Syria and fought for ISIS. To assess Schimenti's own interest in providing material support, Muhamed expressed his desire to one day join his brother in the ISIS army. Schimenti responded positively and offered to help Muhamed, and the two began lifting weights together at Schimenti's gym to prepare Muhamed for battle in ISIS ranks. Muhamed also told Schimenti that he could provide help by giving him cell phones, explaining that ISIS used cell phones to create improvised explosive devices, or IEDs, as weapons and, in some instances, as defense mechanisms to avoid drone strikes.

Early the next year, in February 2017, Schimenti introduced Muhamed to Jones. Schimenti described Jones as a "trusted brother" who had "helped two other brothers travel overseas," referring to Jones's connection with Bilal, the FBI agent posing as a travel facilitator, and Jones's role in sending Omar and Omar 2 to Syria. Muhamed responded to the introduction by reiterating not only his desire to travel to Syria, but also his need for cell phones, again offering an opportunity to provide material support to ISIS based on the demonstrated interest displayed by Jones and Schimenti.

Jones and Schimenti readily accepted that offer. In March 2017 Jones gave Muhamed three phones, and Schimenti gave him six. Jones later testified before the grand jury that at the time he gave the cell phones to Muhamed, he did so of his own "free will" with the "hope it kills many of them" or "eight people." When Muhamed offered to reimburse the cost of the phones, Jones declined, stating he was excited enough

to receive the "ajr," or heavenly reward in Islam, for his acts. As part of his support for Muhamed's travel, Jones introduced him to Bilal, like he had previously done with Omar 2, and the three worked together to coordinate his departure.

A month later, in April 2017, Jones, Schimenti, and Muhamed met one last time. After sharing a meal, Jones and Schimenti drove Muhamed to O'Hare airport, where they believed he would be traveling to Syria with the nine cell phones they had given him to use as makeshift bombs in his role as an ISIS fighter. Before saying goodbye, Schimenti asked Muhamed to send a video of him killing someone when he arrived in Syria.

The FBI arrested Jones and Schimenti five days later.

C

A federal indictment followed, focusing on the provision of cell phones for use as IEDs by ISIS fighters and charging Jones and Schimenti with providing material support to a terrorist organization in violation of 18 U.S.C. § 2339B(a)(1). The indictment also charged Schimenti with making materially false statements to the FBI during his post-arrest interview in violation of 18 U.S.C. § 1001(a)(2).

Jones and Schimenti moved before trial to introduce an entrapment defense against the terrorism charges, and the district court allowed the defense to proceed to the jury. At trial, then, it became the government's burden to show beyond a reasonable doubt that the elements of the defense were not met. See *United States v. Mayfield*, 771 F.3d 417, 439 (7th Cir. 2014) (en banc) (explaining that once the defense of entrapment is at issue, "established entrapment doctrine places the

burden squarely on the government to disprove the defense beyond a reasonable doubt").

Trial began in May 2019 and continued for almost three weeks. The jury heard testimony from 15 witnesses, including terrorism experts, the undercover agent Bilal, the confidential human source Muhamed, FBI Agent Cassandra Carnright (who coordinated Muhamed's role), a member of Jones and Schimenti's mosque, and both their family and friends. Jones also testified in his own defense to explain why he believed the government had entrapped him. The jury received more than 100 exhibits, which were primarily recorded conversations and text messages between the defendants and the government's confidential informant, Muhamed, and the undercover agents Omar and Bilal.

The judge instructed the jury on the elements of the charges and the entrapment defense. Two days later the jury returned a guilty verdict on all counts.

D

A few pieces of evidence came to light after trial regarding the FBI's payments to Muhamed, the confidential human source who befriended Schimenti and who Schimenti later introduced to Jones. At trial Muhamed had testified to receiving some reimbursements for living expenses. And he stated that he did not expect to receive any additional compensation for his work. But the government later disclosed that the FBI, within approximately one month of the trial concluding, paid Muhamed an extra $50,000—effectively a bonus—for his role in the case. Jones and Schimenti reacted with alarm and suspicion to learning this information in the immediate wake of trial. The district court reacted with similar surprise,

promptly ordering discovery and an evidentiary hearing to get to the bottom of what led to this post-trial payment.

The case agent, Cassandra Carnright, filed an affidavit and testified at the hearing, with Jones and Schimenti cross-examining her. The FBI later supplied additional records showing the breakdown of its living-expense payments to Muhamed that revealed some discrepancies with the government's previous disclosures about the payments.

Jones and Schimenti invoked Federal Rule of Criminal Procedure 29 and sought a judgment of acquittal on the basis that they were entrapped as a matter of law. In the alternative, they moved for a new trial under Federal Rule of Criminal Procedure 33 based on the newly discovered evidence related to the FBI's payments to Muhamed. They also argued that a new trial was warranted because the district court limited the cross examination of certain FBI witnesses.

The district court denied the motions and affirmed the convictions of both defendants. Sentencing then followed, with Jones receiving 144 months' imprisonment and Schimenti 162 months.

II

Jones challenges the district court's denial of his Rule 29 motion for acquittal of his material support conviction under 18 U.S.C. § 2339B(a)(1). He contends that the government fell short of proving beyond a reasonable doubt that it did not entrap him. Schimenti does not challenge his conviction on this ground.

A

"Entrapment is a defense to criminal liability when the defendant was not predisposed to commit the charged crime before the intervention of the government's agents and the government's conduct induced him to commit it." *Mayfield*, 771 F.3d at 420. These two elements of the entrapment defense—predisposition and inducement—are "conceptually related but formally and temporally distinct." *Id*. To meet its burden of proving that the defendant was not entrapped, the government must establish beyond a reasonable doubt "*either* that the defendant was predisposed to commit the crime *or* that there was no government inducement." *Id.* at 440 (emphasis in original).

Inducement occurs when a government agent's conduct "creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's persuasion." *Id.* at 434. This element entails more than the government's mere solicitation, suggestion, or offer of an "ordinary" opportunity to commit the crime. *Id.* Rather, "inducement means government solicitation of the crime *plus* some other government conduct." *Id.* (emphasis in original). Such "plus" factors include "repeated attempts at persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward beyond that inherent in the customary execution of the crime, [and] pleas based on need, sympathy, or friendship." *Id*. at 435. The presence or absence of any one factor is not conclusive. The proper inquiry requires consideration of all facts and circumstances, with the ultimate question being whether an "otherwise law-abiding person would take the bait." *Id.* at 434.

Predisposition "refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means." *Id.* at 436. This element stems directly from the principles animating the entrapment doctrine: "A legitimate sting takes an actual criminal off the streets" rather than "deflect[ing] law enforcement into the sterile channel of causing criminal activity and then prosecuting the same activity." *Id.* (citation omitted).

By its very nature the predisposition inquiry "is chiefly probabilistic, not psychological." *Id.* at 428. Several factors inform a defendant's likelihood of committing the charged offense:

- the defendant's character or reputation;
- whether the government initially suggested the criminal activity;
- whether the defendant engaged in the criminal activity for profit;
- the nature of the inducement or persuasion by the government; and
- whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion.

United States v. Anderson, 55 F.4th 545, 552 (7th Cir. 2022) (citing *Mayfield*, 771 F.3d at 435). A defendant's reluctance to commit the offense is the most important consideration. See *Mayfield*, 771 F.3d at 437. Notice the relationship of this factor to the element of inducement: "Reluctance can prompt further

efforts at government persuasion that can rise to the level of inducement." *Anderson*, 55 F.4th at 553.

Predisposition also has a temporal dimension. "The defendant's predisposition is measured at the time the government first proposed the crime." *Mayfield*, 771 F.3d at 438. But that limitation does not mean that evidence arising after a defendant meets a government agent cannot be considered. "Other evidence of the defendant's conduct after the initial contact by the government's agents," we have explained, "may be relevant to the determination of predisposition," particularly because law enforcement often has little evidence predating contact. *Id.* at 437. Given the relationship between predisposition and inducement, we have cautioned that such "evidence must be considered with care" because "the defendant's later actions may have been shaped by the government's conduct." *Id.* But where the government has proven that a defendant's "predisposition was independent and not the product of the attention that the Government had directed" toward him, post-contact evidence can support a conclusion that the defendant would have likely committed the crime on his own and was therefore predisposed. *Jacobson v. United States*, 503 U.S. 540, 550 (1992).

B

Entrapment was Jones's primary defense from the beginning. He raised it early in the case, and the district court agreed to instruct the jury on the elements of the defense at trial. Neither Jones nor Schimenti challenge any aspect of that instruction on appeal. The issue before us is whether the district court committed legal error in denying Jones's post-trial motion for acquittal under Rule 29.

In doing so, the district court emphasized the heavy burden Jones faced in overturning the jury's verdict. From there the district court took great care reviewing the trial evidence, determining that, while some evidence supported Jones's position, a reasonable jury could have found both that he was predisposed to support ISIS and not induced by the government to commit the material support offense. The court pointed to evidence on which the jury could have relied to find that Jones voluntarily—without undue pressure from the government—bought and gave the cell phones to Muhamed intending them to be used as IEDs to further ISIS's ongoing fighting in Syria. The district court therefore concluded that Jones had not been entrapped as a matter of law and denied his motion for acquittal.

C

Federal Rule of Criminal Procedure 29 requires a district court, on a defendant's motion, to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." While we owe no deference to the district court's assessment of the trial evidence, we do owe deference to the jury's verdict. See *United States v. Foy*, 50 F.4th 616, 622 (7th Cir. 2022); *United States v. Garcia*, 37 F.4th 1294, 1302 (7th Cir. 2022).

Indeed, our review proceeds as it would in an appeal in which a criminal defendant challenges the sufficiency of the government's trial evidence. See *Leal*, 72 F.4th at 267. We must "evaluate whether, when viewed in the light most favorable to the Government, the record evidence is 'sufficient ... to permit a jury to determine beyond a reasonable doubt that the defendant was not entrapped.'" *Garcia*, 37 F.4th at 1302 (alteration in original) (quoting *United States v. Barta*, 776 F.3d 931,

936–37 (7th Cir. 2015)). We will set aside Jones's conviction "only where the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt," a standard we have described as "nearly insurmountable." *Leal*, 72 F.4th at 267 (citations omitted).

Having taken our own fresh look at the trial evidence, we conclude that the district court was right to reject Jones's motion for acquittal.

1

We begin with inducement. Some evidence introduced at trial supports Jones's argument that he was induced—but it is not our role to reweigh the evidence. See *Garcia*, 37 F.4th at 1302. When viewed in the light most favorable to the government, we see a sufficient basis to support the jury's finding that the government agents did not induce Jones to provide material support to Muhamed on behalf of ISIS.

Start with the evidence of the FBI agents' interactions with Jones. Several of the government's witnesses testified to taking care to maintain a responsive, and not affirmative, stance in their interactions with Jones. Agent Carnright used the term "mirroring" in her testimony to describe this behavior. The approach, as the term mirroring implies, allowed Jones to shape and advance his relationships and next steps with the government agents—all to make it less likely that their interactions amounted to repeated persuasion or undue pressure. The jury's ability to see the recorded conversations and text messages further enabled them to determine whether the agents' accounts were, in fact, credible.

We can put the point in more concrete terms. A reasonable jury could have interpreted the dynamic between Omar and

Jones, for instance, as one where Omar followed Jones's lead and not the other way around. Omar let Jones bring up ISIS in their early text conversations, asking Jones for more violent videos only after Jones sent the first pro-ISIS link. Similarly, Omar introduced Jones to a new undercover agent, Bilal, only after Jones asked Omar if he could meet other "brothers" to "learn and build with"—a clear request to meet other ISIS sympathizers. Omar also offered to give Jones an ISIS flag in response to Jones's demonstrated interest in Omar's travel abroad, an offer Jones readily accepted.

Muhamed likewise testified that he followed the FBI's instruction not to directly ask Jones to do anything, but instead to more passively offer the opportunity to provide support if Jones seemed receptive. Indeed, the FBI did not even introduce Muhamed to Jones—Schimenti did. And Schimenti, as Jones's close friend, took this step because he knew that Muhamed wanted to travel to Syria and that Jones, through Bilal, would be willing and able to help him do so. That is exactly what Jones did, and a reasonable jury could have relied on this evidence to conclude Jones had a desire to materially support ISIS that arose untainted by the government's involvement.

The trial evidence also permitted a finding that Jones took many acts on his own, without undue influence or pressure from government agents. Consider foremost his testimony to the grand jury. Jones told the grand jury under oath that he gave Muhamed the cell phones of his own "free will" in hopes that "it kills many of them" or "eight people." In no way did he suggest during his grand jury testimony that he did so to submit to pressure exacted by Muhamed or anyone else. The trial evidence also showed that Jones, of his own volition,

contacted his former girlfriend with a request to supply the cell phones after receiving the initial invitation from Muhamed to procure them for ISIS. The jury had ample evidence showing that the government agents did not do anything other than offer Jones a chance to provide support to ISIS in response to Jones's own representations to that effect.

Jones urges a different analysis by focusing on the duration of the government's investigation, seeing it as an 18-month campaign designed to wear him down by persistently nudging him toward the commission of a crime. By Jones's account, the FBI was not willing to stop pressing him until he relented and took a step to provide material support to ISIS. He views the government's conduct as analogous to the entrapment the Supreme Court determined occurred in *Jacobson v. United States*, 503 U.S. 540 (1992). While Jones's counsel has advanced these arguments with great clarity and rigor, we see no infirmity in the jury's rejection of the entrapment defense.

Yes, the FBI pursued Jones and Schimenti for a meaningful length of time. But the length of the investigation does not, on its own, lead to the conclusion that no reasonable jury could have rejected Jones's entrapment defense. "[T]here is no per se rule regarding the number of contacts or length of relationship it takes to constitute inducement. Each case, and each entrapment defense, must be judged on its own facts." *Barta*, 776 F.3d at 937–38. This is why "entrapment is a question for the jury, not the court"—because the jury is best suited to make such findings of fact. *Mayfield*, 771 F.3d at 439.

The jury here could have found that the FBI's investigation took substantial time for good reason. Agent Carnright testified that the Bureau opened its investigation upon seeing clear indicators on social media sites that Jones and Schimenti

were avid ISIS sympathizers—with both defendants expressing approval of the violence the terrorist organization employed to advance its mission. The FBI reasonably wanted to know more about Jones and Schimenti: Did their sympathies with ISIS extend beyond a personal viewpoint and evince any present intent or risk of them supporting the group, either by providing resources or traveling to Syria to join the fight? The only way to glean that answer was to take proactive steps to discern Jones and Schimenti's intentions, hence the Bureau's use of informants to befriend and communicate with both defendants. The trial evidence showed—and a reasonable jury could have found—that all of this occurred in steps that took time, with the FBI taking sufficient care all along the way to ensure their informants were acquiring information, not aggressively pressing either defendant to commit a crime.

A more distinct disconnect warrants emphasis. Jones sees the trial evidence as showing a campaign of persistent pressure being imposed by the FBI to commit a crime. It is possible to read aspects of the evidence that way. For example, Jones repeatedly expressed his reluctance to travel to Syria himself, and he declined to join Omar and Bilal in "rock[ing] it out" in a violent attack on behalf of ISIS. And at trial Jones testified that he supplied the cell phones because "there had been four or five people that came into [his] life trying to get [him] to provide some form of material support to ISIS," so that when Muhamed finally asked him for cell phones in March 2017, he delivered them because he believed "God has got to be putting all these people in [his] life for a reason."

But it is equally possible to view the trial evidence another way—that Jones voluntarily made his own choice to move beyond sympathy and agreement with ISIS to affirmatively

supporting the organization by supplying cell phones for use as IEDs in Syria, all despite some episodic pressure imposed by the FBI. And that evidentiary reality—of the trial evidence being amenable to different findings—is what precludes us from being persuaded that the government failed to prove that Jones was not induced to provide material support to ISIS.

Nor do we see *Jacobson* as lending much support to Jones. Though the government conceded inducement in *Jacobson*, the facts provide important instruction. Keith Jacobson received persistent mailings from six fake entities, almost all of which expressly encouraged him to engage in illegal conduct. When he finally accepted an offer to buy illicit child pornography two and a half years after the government started its campaign, he was arrested. See 503 U.S. at 543–47. The Supreme Court observed that Jacobson's predisposition to commit the crime was not independent from the government's inducement, and so concluded that he had been entrapped. See *id.* at 550.

The FBI's conduct here is much less intrusive than that in *Jacobson*, or at least the jury could have so concluded. The government provided sufficient evidence illustrating a patient and prolonged investigation. A jury could conclude that Jones made willing and voluntary decisions to accept the government's overtures, though they occurred over a long period of time. So we cannot conclude that Jones was induced as a matter of law.

2

That brings us to predisposition. Much like inducement, it is not enough for Jones to argue that his version of events is

possible. That is the central teaching of *Mayfield*. See 771 F.3d at 439 ("[T]he subjective basis of the defense makes entrapment a fact question for the jury to decide 'as part of its function of determining the guilt or innocence of the accused.'" (quoting *Sherman v. United States*, 356 U.S. 369, 377 (1958))). To be acquitted of his material support conviction, Jones must show no rational jury could have concluded that the government carried its burden. See *Leal*, 72 F.4th at 267. We cannot get there.

Return to the beginning—to Jones's pro-ISIS social media posts that led to the government's investigation in the first place. Jones regularly shared ISIS propaganda, including the violent Flames of War recruitment video. Jones and Schimenti watched this video together well before any contact by government informants. Jones also made comments praising ISIS, speculating about ISIS's plans to attack different cities, and expressing distrust of any nonbelievers in Islam. The jury did not have to reach far to view Jones's statements as supporting a finding that he was likely to take affirmative steps to support ISIS if given the opportunity.

Jones urges us to see his social media posts as speech protected by the First Amendment and thus beyond any consideration in a criminal prosecution. Not so. That the First Amendment allowed Jones to express agreement with ISIS's messaging, mission, and means of accomplishing its objectives does not mean the speech was off limits for what it reveals about his predisposition to commit crime. In *Jacobson*, the Supreme Court held that "[e]vidence of predisposition to do what once was lawful is not, *by itself*, sufficient to show predisposition to do what is now illegal." 503 U.S. at 551 (emphasis added). That observation explains why Keith

Jacobson's legal purchase of child pornography before Congress made the acquisition of such material a crime did not, alone, prove that he was predisposed to later buy it illegally. But we know of no authority—and Jones has identified none—supporting Jones's view that the First Amendment shields from consideration statements he made that shine substantial light on his intent and predisposition to commit the crime, especially given the other evidence giving import to that intent.

Indeed, evidence arising after Jones's initial government contact with Omar at the police station in September 2015 is consistent with Jones's views before that date, thereby further allowing a jury to find predisposition. As a legal matter, we have clarified that, while predisposition is measured at the time the government first offers the opportunity to commit the offense, "evidence of the defendant's conduct after the initial contact by the government's agents … may be relevant to the determination of predisposition" so long as that evidence is "considered with care" given the risk that "the defendant's later actions may have been shaped by the government's conduct." *Mayfield*, 771 F.3d at 437. The consistency we see in the evidence is important to that care we must take in our assessment. Jones's consistent statements and actions across time make the case for predisposition, untainted by government involvement, much stronger.

Consider the post-2015 evidence of Jones's character and reputation. At trial Jones chose to take the witness stand and testify in his own defense. He told the jury that he had thought about moving to Syria to live under the Islamic state before he met any government informants. In response to Omar's offer of the ISIS flag, Jones testified that he "willingly

took the ISIS flag," "was excited to have the flag," and shared photos of himself with it on social media because he wanted "other people to see [him] with the flag" as a show of support for ISIS. Jones's ex-girlfriend and a member of his mosque testified that he shared pro-ISIS materials with them separately from any interactions with Omar, Bilal, or Muhamed.

Evidence of Jones's motivations to commit the offense further show his pro-ISIS enthusiasm. No better example than the sworn, counseled testimony Jones conveyed to the grand jury. In no uncertain terms, he told the grand jurors that he gave Muhamed the cell phones of his own "free will" in hopes that "it kills many of them" or "eight people." Jones also declined reimbursement for the phones when Muhamed offered it because he was instead excited to receive the "ajr," or heavenly reward in Islam, for his acts. The jury reasonably could have viewed these statements as evidence of Jones's independent predisposition to commit the material offense.

Notice, too, that the trial evidence shows no meaningful reluctance by Jones to support ISIS. See *Garcia*, 37 F.4th at 1304 (explaining that prior reluctance to engage in the offense of conviction heavily informs the predisposition inquiry). To the contrary, Jones consistently demonstrated his independent interest in ISIS, including the violent means employed by the organization to advance its mission. Jones never cut off communication with Omar and Bilal or affirmatively disavowed support for ISIS. When Jones did decline to respond to Bilal's invitation to formally pledge allegiance to ISIS in December 2015, he nevertheless made plain his support of the organization's mission and told Omar and Bilal that he wanted to keep in touch. He followed through with that promise by

continuing to communicate with them despite Schimenti's (correct) instincts that they were government agents.

In no way did Jones's views of ISIS change at the end of 2015. He maintained an active social media presence, including by affirmatively seeking interactions with members of the ISIS community online. This is exactly how he found and befriended the undercover agent Omar 2. When Omar 2 expressed an interest in traveling to Syria, Jones not only connected him with Bilal, but vouched for him as a "trustworthy brother" that Bilal should help. And Bilal did facilitate Omar 2's travel, as far as Jones knew, after Jones arranged for them to meet in person and create a plan. Jones's later decision to connect Muhamed with Bilal, after supplying him with cell phones, further reinforces Jones's ongoing commitment to advancing ISIS's mission.

Considered collectively and viewed in the light most favorable to the government, the evidence before and during the investigation was sufficient for a jury to conclude that Jones was independently predisposed to provide material support to ISIS.

* * *

What makes a case like this challenging is that it is easy to see a jury going either way on entrapment. But that reality is precisely why the law empowers the jury to decide, placing the burden on the government to prove beyond a reasonable doubt that it did not entrap Jones. Our role on appeal is to ask whether any rational jury could have found that the government carried this burden. Like the district court, we believe the answer is yes: evidence in the record supports the jury's

conclusion that Jones was not entrapped, so his material-support conviction stands.

III

Jones and Schimenti both appeal the district court's denial of their motion for a new trial under Rule 33 in light of the government's post-trial disclosures that, within three weeks of the trial concluding, the FBI paid Muhamed a $50,000 cash bonus for his assistance as a confidential informant.

A

Here is what happened. At trial the government called Muhamed to testify about his interactions with Jones and Schimenti. He began with some personal background, explaining that he was born in Iraq and moved to the United States in 2014 after working five years for the United States Department of Defense in Iraq. Muhamed stated that his first contact with the FBI came in 2016, when agents interviewed him after learning that he displayed an ISIS flag on his car. That encounter led in time to Muhamed agreeing to assist the FBI's counterterrorism efforts by serving as an informant on national security matters.

Turning to the events that culminated in Jones's and Schimenti's arrests in April 2017, Muhamed testified that he pressured neither defendant to buy cell phones for use as IEDs by ISIS in Syria. To the contrary, Muhamed emphasized that he sought only to adhere to the FBI's direction to limit his interactions to what the Bureau calls "mirroring"—the practice of echoing messaging advanced in the first instance by Jones and Schimenti, avoiding any affirmative steering, and thereby allowing each defendant to make his own choices about any next steps in the relationship. By Muhamed's

account, this approach culminated in both defendants affirmatively choosing to supply cell phones for use as IEDs.

On direct and cross examination, Muhamed acknowledged his potential biases, testifying that the FBI paid him living expenses for fuel, a cheap car, parking, and moving costs, with the Bureau also assisting him with his green card application. He insisted that he neither expected nor sought further compensation from the FBI for his cooperation, however. Agent Carnright offered consistent testimony and estimated these expense payments to Muhamed totaled $16,000.

What transpired after trial is what most concerns Jones and Schimenti. About one month after the jury returned guilty verdicts, the FBI paid Muhamed a $50,000 bonus. More than three months later, in October 2019, the government disclosed this payment to Jones and Schimenti—a revelation that took them, and the district court, by surprise.

Recognizing the gravity of the government's post-trial disclosure, the district court granted Jones and Schimenti's motion for an evidentiary hearing and ordered discovery. Agent Carnright supplied an affidavit and testified at the hearing. She stated that the FBI had contemplated making a bonus payment before the arrests in 2017 but decided based upon a pretrial discussion she had with an Assistant United States Attorney to postpone any payment until after trial. Agent Carnright insisted that she shared none of this information, including the prospect of a future payment, with Muhamed.

Following the hearing, the FBI also supplied defense counsel new records showing a more detailed breakdown of the $16,000 in payments it made before trial to Muhamed. These itemized records revealed that the government's pretrial

disclosures were neither complete nor accurate. Recall that Agent Carnright testified at trial that the FBI paid Muhamed $16,000 to cover "any costs incurred to him throughout the course of the investigation." Muhamed testified similarly at trial, stating that the FBI reimbursed him "only for fuel, car—I mean, not fancy car, just cheap car—for parking, for moving out from my old apartment after the case." But the new report showed that the $16,000 stipend included, among other things, a $1,200 down payment on a car, three car payments of $400 each, a $925 security deposit, payments for three months of rent totaling $2,775, and nonspecific "per diem" expenses totaling $2,130. And perhaps most concerning to Jones and Schimenti, the FBI's post-trial report also showed $5,575 paid for what it called an "amount service"—an undefined description connoting some sort of bonus, as the Bureau used the same words to describe the $50,000 post-trial payment to Muhamed.

At no point has the government explained why it did not take more care before trial to ensure a complete and accurate disclosure of the financial support provided to Muhamed. The best explanation, though hardly acceptable, seems to be oversight and sloppiness.

B

Invoking Rule 33, Jones and Schimenti requested a new trial, arguing that the government's failure to fully and accurately disclose these actual and planned payments limited and impaired their defense efforts at trial. They contended the jury may have reached a different outcome had they known the government had already paid Muhamed one bonus of $5,575 and had plans to pay him another bonus ten times larger in the immediate wake of trial. Both defendants

believed they could have used this information to undermine Muhamed's and the government's credibility and thereby advance their entrapment defense by exposing everyone's true incentive of doing everything possible to coerce them into committing a material support offense.

The district court did not mince its words in describing its reaction to learning of these post-trial developments, making plain that it found "the Government's belated and at times contradictory disclosures regarding the FBI's payments to Muhamed troubling." In the end, however, the district court determined that any disclosure shortcomings did not rise to the level of meeting Rule 33's demanding standard for a new trial. What mattered most to the district court was the strength of the government's case against Jones and Schimenti. Seeing no likelihood of acquittal, the district court denied the motion for a new trial.

C

Rule 33 authorizes district courts to "vacate any judgment and grant a new trial if the interest of justice so requires." Our review is limited to assessing whether the district court's ruling reflected an abuse of discretion. See *Foy*, 50 F.4th at 622.

To receive a new trial based on newly discovered evidence, Jones and Schimenti must show "that the evidence 'came to their knowledge only after trial; could not have been discovered sooner had due diligence been exercised; is material and not merely impeaching or cumulative; and would probably lead to an acquittal in the event of a retrial.'" *United States v. Eads*, 729 F.3d 769, 780 (7th Cir. 2013) (quoting *United States v. Ryan*, 213 F.3d 347, 351 (7th Cir. 2000)).

Recognize at the outset, just as the district court did, that "the $50,000 payment itself does not constitute newly discovered evidence because it had not occurred at the time of trial." So we could not order a new trial based on the bonus payment alone. The primary hurdle for Jones and Schimenti, then, is showing that they likely would have been acquitted had they known about the potential for Muhamed's post-trial bonus and had they received a more complete and accurate accounting of the $16,000 living-expense payments. See *id.*

We have a difficult time seeing how a pretrial disclosure from the government that the FBI planned to pay Muhamed a $50,000 bonus after trial would have created a likelihood of a different outcome. Foremost, the district court found no evidence in the government's post-trial disclosures of "an express agreement between Muhamed and the FBI that he would be paid." Even more, the district court found "the most likely scenario to have been that Agent Carnright intentionally avoided any mention of a potential post-trial payment to Muhamed so that it would not have to be disclosed to defense counsel." Nothing Jones and Schimenti have presented on appeal calls these findings into question.

On this record, and in full alignment with the district court, we find it unlikely that any pretrial disclosure about a planned or contemplated payment of a $50,000 bonus to Muhamed would have changed the jury's ultimate guilt determinations.

The post-trial disclosure of the itemized expense report falls short for similar reasons. No doubt the evidence is impeaching, at least to some degree. But, as the district court observed, this was not a case hinging on credibility determinations, as much of the evidence presented to the jury consisted

of recorded conversations and statements Jones and Schimenti posted online. The single unrecorded conversation that Jones and Schimenti raise, where they contend that Muhamed appealed to Schimenti's emotions to encourage him to help Muhamed travel to Syria, is not enough on its own to show that acquittal would have been likely had the disclosures been made earlier. And Jones and Schimenti had a full and fair opportunity to, and did, cross-examine Muhamed about this conversation at trial.

To the extent Muhamed's credibility was at issue, we agree with the district court that the itemized report is cumulative. The government had already disclosed that Muhamed received $16,000 for his services, a total that is not called into question by the new report disclosed after trial. And the jury heard Agent Carnright's testimony that Muhamed received immigration assistance in exchange for his work, including substantial help with his green card application. In our view, it is unlikely that the new, more detailed evidence of the FBI's payments to Muhamed would have tipped the scales in favor of acquittal. The jury already considered substantial evidence tending to impeach Muhamed's motives in returning the guilty verdicts. We agree with the district court's denial of the Rule 33 motion.

IV

One brief issue remains. Jones contends that the district court improperly entered a protective order restricting his cross-examination of government witnesses while also wrongly denying his Rule 33 motion challenging that decision. We see no abuse of discretion.

At trial the government moved for a protective order to prevent the disclosure of certain witnesses' true identities—all to protect the witnesses and their families and to preserve the integrity of the FBI's ongoing counterterrorism efforts. The district court entered the requested order, explaining that given the protected information's low probative value, the FBI's national security concerns justified the restriction.

The district court denied Jones's later Rule 33 motion challenging the protective order, explaining that the information was not material to Jones's case and that he was therefore not prejudiced by its exclusion. On appeal Jones insists that the suppressed information is material to his entrapment defense because the agent he wanted to question had expressed in an email that the lengthy investigation into Jones was like "beating a dead horse" given the many months that passed without evidence of a crime. Jones would have liked to cross-examine this witness to learn more about the witness's view of the investigation and any persuasive tactics the FBI may have used.

We review the decision for an abuse of discretion. See *Foy*, 50 F.4th at 622. The law affords district courts broad authority to impose reasonable limits on cross-examination to prevent "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The FBI sought to protect its witnesses and the integrity of its investigative processes in a widely publicized terrorism trial. Jones has failed to show that, contrary to the district court's finding, cross-examination would have yielded material evidence or that the evidence was otherwise unavailable to him from other witnesses. Indeed, a centerpiece of Jones's entrapment defense was that the FBI persisted in its investigation for

18 months and that he did not relent until it succeeded in pushing him into the commission of a crime. With that position already presented to the jury, we cannot conclude the district court's ruling had any impact on the trial's outcome.

For these reasons we AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 17-cr-00236
v.	)	
	)	Judge Andrea R. Wood
JOSEPH D. JONES and EDWARD SCHIMENTI	)	
	)	

MEMORANDUM OPINION AND ORDER

Joseph Jones and Edward Schimenti (together, "Defendants") were the subjects of a Federal Bureau of Investigation ("FBI") investigation lasting more than two years that involved several undercover agents and a fictitious terrorist network claiming association with the Islamic State in Iraq and Syria ("ISIS"). Both Defendants subsequently were indicted on charges of conspiring to provide material support to a terrorist organization—specifically, trying to provide equipment and personnel to ISIS—in violation of 18 U.S.C. § 2339B(a)(1). Schimenti was also charged with knowingly making materially false statements to the FBI involving international terrorism, in violation of 18 U.S.C. § 1001(a)(2), based on his post-arrest interview. A jury convicted Defendants of all charges. Defendants now seek judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29 or, alternatively, a new trial pursuant to Federal Rule of Criminal Procedure 33. (Dkt. Nos. 248, 249.) For the following reasons, the Court denies Defendants' motions.

BACKGROUND

Jones and Schimenti, two childhood friends residing in the Chicago area, were found guilty after a jury trial of providing material support to a terrorist organization, namely, ISIS, in violation of 18 U.S.C. § 2339B(a)(1) ("Count One"). Schimenti was also convicted of knowingly making materially false statements involving international terrorism to the FBI during his post-

arrest interview, in violation of 18 U.S.C. § 1001(a)(2) ("Count Two"). In considering their post-trial motions pursuant to Rules 29 and 33, the Court begins with an overview of the trial.

Jury selection in this case began on May 28, 2019 and continued through May 31, 2019. Two and a half weeks later, the parties gave closing arguments. In between, the jury heard testimony from 15 witnesses and saw more than one hundred exhibits admitted into evidence. The witnesses included: Jamil Jaffer, an expert on terrorism; Cassandra Carnright, the FBI case agent for the investigation; Hamath Muhamad, a congregant at Defendants' mosque; Kelly Turnipseed, Schimenti's ex-girlfriend; Abdulhakeem (pseyduonym), an undercover FBI agent; Bilal Sharif (pseudonym,) an undercover FBI agent; Muhamed, the FBI's confidential human source;[1] Rateesha Darden, Jones's former girlfriend; Victor Rodriguez, an FBI explosives expert; Thad Boertje, an FBI agent who interviewed Schimenti following his arrest; Marc Sageman, a terrorism expert retained by Defendants; J'Laine Johnson, Schimenti's aunt; Bernetta Jones, Jones's mother; Keara Jones, Defendant Jones's wife; and Joseph Jones, testifying in his own defense. Among the exhibits accepted into evidence were numerous covert recordings of Jones and Schimenti interacting with individuals who unbeknownst to them were working with the FBI as undercover agents and informants. The jury both heard the recordings and were provided transcripts of the conversations. After considering this evidence during two days of deliberations, the jury returned its guilty verdicts on June 20, 2019.

I. Testimony from Government Agents

Several FBI agents testified at trial regarding the investigation that led to the indictment of Jones and Schimenti. The first agent to testify was Cassandra Carnright, an FBI agent

[1] Generally, a "confidential human source" is a civilian undercover source (like a confidential informant) who works with the FBI but is not an FBI agent.

assigned to a counterterrorism squad focusing on "homegrown violent extremism inspired by ISIS."[2] (Trial Tr. ("Tr.") 250.) Carnright was a "source handler" of the FBI's confidential human source, Muhamed, and eventually served as the "case agent" for the investigation—that is, the person responsible for the overall management of the investigation. (Tr. 252.) Her testimony provided an overview of the FBI's investigation, which began as a result of online postings by Jones and Schimenti that promoted violence and expressed support for ISIS. (Tr. 253–319.) The FBI surveilled Jones and Schimenti and sent undercover employees and Muhamed, the confidential human source, to engage them. (Tr. 319–20.)[3]

Carnright testified regarding numerous recordings between the undercover agents and Defendants. The first undercover agent, "Omar" (a pseudonym), was introduced to Jones at a police station. (Tr. 321.) Omar pretended to be a devout Muslim who was being detained for transporting cigarettes across state lines. (*Id.*) Jones formed a friendship with Omar, shared ISIS videos with him, and asked to be connected with other "brothers." (Tr. 323.)

Subsequently, the FBI introduced Jones to another undercover agent, "Bilal." (Tr. 328.) On October 30, 2015—about two months after Jones met Omar at the police station—Jones and Schimenti met in person with Bilal and Omar. (Tr. 328–29.) In mid-December 2015, the FBI received a false allegation that Schimenti was involved in a terrorist attack in Switzerland; in response, the FBI interviewed Schimenti and Jones and imaged Schimenti's home computer. (Tr. 330–31.) Soon thereafter, on December 29, 2015, Jones, Schimenti, Omar, and Bilal met again.

[2] Because Carnright provided an overview of the entire FBI investigation, the Court describes her testimony in greater detail than that of other witnesses. Nonetheless, in ruling on Defendants' motions, the Court reviewed the entire record and bases its decision on the entirety of the evidence at trial, not just the sections excerpted here.

[3] The FBI distinguishes between undercover employees and "online covert employees." But both are FBI agents assuming false identities and for purposes of this opinion the Court refers to both as undercover agents.

Omar and Bilal asked Jones and Schimenti about pledging allegiance to ISIS; in response, Schimenti became visibly upset and left the meeting. (Tr. 332.) As Bilal later testified at trial, Jones ended up leaving the meeting with Schimenti, but he also asked Omar and Bilal to keep in touch with him. (Tr. 1006.) And Omar and Bilal did keep in touch with Jones. Ultimately, Omar told Jones that he would be traveling to join ISIS with Bilal's help. (Tr. 333.) This, of course, was not true. But the FBI wanted to establish Bilal as a "facilitator" who could help people travel to join ISIS and also determine whether Jones was interested in traveling to support ISIS. (*Id.*) Before he left for his "travel" to support ISIS, Omar delivered an ISIS flag to Jones, who kept it in his home. (Tr. 349–51.)

After Omar "traveled" to join ISIS, Jones came into contact with another undercover FBI agent, also going by the name "Omar" ("Omar 2") (Tr. 351.) Jones told Omar 2 that there was a "ferry getting brothers to the land of truth near us" and that "[s]ome brothers made hijra in May," referring to Bilal helping Omar to travel to support ISIS. (Tr. 353.) Jones introduced Omar 2 to Bilal so that Omar 2 could also travel to support ISIS. (*Id.*)

The FBI also introduced Muhamed to Schimenti. (Tr. 402.) Muhamed obtained a job with Schimenti's employer, spoke with Schimenti at work, and began meeting with Schimenti outside of work in December 2016. (Tr. 413–18.) Shortly thereafter, Muhamed began establishing a "legend" (that is, a fake backstory), which was that he had a brother named Ahmed who lived in Syria to fight for ISIS. (Tr. 419–20.) Muhamed eventually told Schimenti that he wanted to travel to fight for ISIS with his brother, and Schimenti offered to help. (Tr. 421–22.) Muhamed told Schimenti that he needed cell phones that ISIS fighters would use to avoid drone strikes and to create improvised explosive devices. (Tr. 424–26.)

In late February 2017, Schimenti introduced Muhamed to Jones. (Tr. 426.) Schimenti described Jones to Muhamed as a "trusted brother" who had "helped two other brothers travel overseas." (Tr. 427.) Both Schimenti and Jones obtained phones to give to Muhamed. (Tr. 438–47.) The evidence at trial showed that Schimenti and Jones both understood that the phones would be used for bombs. (*Id.*) Jones introduced Muhamed to Bilal to facilitate Muhamed's travel to fight for ISIS. (Tr. 437–38.) On April 7, 2017, Schimenti, Jones, and Muhamed met for a final meal. (Tr. 447.) Then, they dropped Muhamed off at the airport, where they understood he would travel to Syria to support ISIS. (*Id.*) Schimenti asked Muhamed to send him a video of him killing someone when he arrived. (*Id.*) Five days later, on April 12, 2017, Jones and Schimenti were arrested. (Tr. 448.)

Bilal testified at trial consistently with the above. (Tr. 976–1072; 1112–90.) He also discussed in greater detail the meeting on December 29, 2015, when Bilal, Omar, Jones, and Schimenti met in a hotel room. (Tr. 990.) According to Bilal, he and Omar showed Jones and Schimenti a video of Omar training to shoot guns in desert conditions. (Tr. 991–92.) Bilal told Defendants, "If you want to rock out right now, we gonna rock out right now." (Tr. 998.) Bilal testified that the purpose of this statement was to offer to help Jones and Schimenti with anything they might be planning, but not to ask them to do anything. (Tr. 999.) At the meeting, Jones indicated that he knew Omar wanted to "shoot out to Syria" to support ISIS. (Tr. 1001–02.) When Bilal asked, "When we say who you with, you guys are on the same page, right?," Defendants responded with "alhumdulillah." (Tr. 1002.) Bilal testified that the purpose of his question was to verify that Defendants knew Bilal and Omar were ISIS facilitators, and further that the phrase "alhumdulillah" is the equivalent of a very strong "yes" among Muslims. (*Id.*) The meeting took a turn when Bilal asked, "So you know when you get into the B and

everything else," and then clarified that by "B" he meant "bay'ah," the pledge of allegiance to ISIS. (Tr. 1002–03.) Shortly thereafter, Schimenti became upset, and he and Jones left the meeting. (Tr. 1003–04, 1006.) Jones told Bilal that Schimenti thought Bilal and Omar were "all over the feds," which Bilal interpreted to mean that Schimenti thought they were FBI agents. (Tr. 1029.) As it turned out, Schimenti's suspicions were more or less correct.

Another undercover FBI agent, Abdulhakeem, also testified. (Tr. 858–974.) According to Abdulhakeem, in October 2015, he struck up a relationship with Jones online and portrayed himself as an ISIS sympathizer. (Tr. 859–65.) Eventually, Abdulhakeem offered to help Jones travel to join ISIS, writing, "I can help you. Just let me know when you are ready. The brothers, we were able to ferry thousands of people." (Tr. 899.) Jones did not take Abdulhakeem up on his offer. (*Id.*) But the two continued to correspond after this interaction. (Tr. 900–09.)

After Schimenti was arrested, he was interviewed by two FBI agents. Agent Boertje, one of the interviewers, testified at trial. A video and audio recording of the interview was submitted into evidence, and clips from the interview were played for the jury. (Tr. 1805–30.) During the interview, Schimenti was advised on multiple occasions that making false statements was a crime; he also waived his right to have an attorney present. (Tr. 1807–08.) Schimenti made several statements during the interview that other evidence showed to be false, including denying that he knew people who supported ISIS, falsely describing Muhamed's purpose for traveling, denying that he knew why Muhamed had multiple cell phones, and providing a false reason for why Muhamed had gathered the cell phones, among other things. (Tr. 1809–30.) The Government also called Victor Rodriguez, an FBI explosives expert, who testified that the cell phones Defendants gave to Muhamed could be used in the production of improvised explosive devices. (Tr. 1739–46.)

II. Muhamed's Testimony

Muhamed also testified at trial. He explained that he was born in Iraq and had worked for the United States Department of Defense in Iraq between 2004 and 2009. (Tr. 1220–22.) He moved to the United States in 2014 as a refugee. (Tr. 1221.) Muhamed testified that he first spoke to the FBI in the summer of 2016 when FBI agents came to his home to interview him about a report that he had an ISIS flag on his car. (Tr. 1223.) Subsequently, Muhamed followed up with the FBI, told an FBI supervisor that he loved to work with the government and was a law enforcement supporter, interviewed with the FBI, and began working as a confidential human source. (Tr. 1224–25.) Muhamed further testified that he never asked the FBI for anything in exchange for his cooperation, the FBI never offered him anything in exchange for his cooperation, and he did not expect to get anything for his cooperation. (Tr. 1225.) According to Muhamed, the FBI had given him some money but only for fuel, a cheap car, parking, and moving out from his old apartment after the case. (Tr. 1226.)

Muhamed's testimony also included more detail about how he got a job at Schimenti's workplace and built a relationship with him. (Tr. 1227–39.) Muhamed explained that he developed a "legend" as an ISIS sympathizer and told Schimenti that his brother was an ISIS member and that he wanted to travel to join his brother and fight for ISIS. (Tr. 1239–63.) He described how Schimenti responded to his desire to travel to ISIS by first telling Muhamed about Jones and Bilal and then introducing Muhamed to Jones. (Tr. 1265–67, 1281–91.) Muhamed testified that he received phones from Defendants and told Defendants that the phones would be used to make bombs. (Tr. 1308–16.) He also stated that he and Schimenti used coded language to refer to the phones, calling them "clothes" and referring to a phone store as a "clothes donation place." (Tr. 1345–46.) Muhamed specifically testified that Jones knew the phones

would be used to make bombs and was even excited that they would be used for this purpose. (Tr. 1393.) Muhamed further provided details regarding how Jones and Schimenti helped him to "travel" to Syria, culminating in giving him a ride to the airport. (Tr. 1397–1403.) Throughout his testimony, Muhamed consistently stated that he never asked Jones or Schimenti to do anything to help him.

Although almost all of the exchanges between Muhamed and Defendants were recorded (and the recordings played for the jury), a few were not. One such exchange occurred on February 6, 2017, when Muhamed told Schimenti at work that he was sad and fearful for his family and brother and that he wanted to return home to join his brother. (Tr. 1529–30.) Schimenti responded by hugging Muhamed. (Tr. 1531.) Because Muhamed did not record conversations at Schimenti's workplace, this exchange was not recorded. (Tr. 1532.) Two days later, Schimenti mentioned Jones to Muhamed for the first time. (Tr. 1533.)

III. Expert Testimony

The Government presented expert testimony from Jamil Jaffer, a law professor and executive director of a national security think tank who teaches in national security and counterterrorism law. (Tr. 62.) Jaffer provided the jury with an overview of ISIS, including their terroristic activities, history, propaganda and recruitment strategies, and other tactics. (Tr. 75–249.) For their part, Defendants presented expert testimony from Marc Sageman, a researcher in the field of political violence and terrorism, who provided additional information on terrorism and ISIS, emphasizing the social media and online aspects of ISIS's activities. (Tr. 2048–2173.)

IV. Jones's Testimony

Jones testified in his own defense at trial, largely acknowledging the truth of the factual allegations made by the FBI agents but suggesting that he had been entrapped by the FBI. (Tr.

2309–2693.) He testified that the FBI wore him down with their multiple attempts to solicit his involvement in providing support for terrorism. (Tr. 2340–41.) He stated that after meeting Muhamed, he felt that God must be placing these people in his life for a reason, because he kept meeting people who wanted him to support ISIS. (Tr. 2341.) Jones maintained that the FBI undercover agents and Muhamed had pressured, suggested, and asked him to materially support ISIS in various ways (including trying to travel to Syria, obtain weapons training, and facilitate the travel of others to Syria). In contrast, the Government's witnesses uniformly insisted that they never asked Defendants to do anything but only sought to uncover their intentions.

Notably, Jones also testified before the grand jury in this matter, and Boertje read substantial portions of the grand jury testimony into the record at trial. In his grand jury testimony, Jones acknowledged that he knew Muhamed wanted to go to Syria to join ISIS and that he introduced Muhamed to Bilal for that purpose. (Tr. 1782.) Jones also admitted that he provided three phones to Muhamed, one of which he gave Muhamed after he knew that the phones would be used to make bombs. (Tr. 1784.) Jones also testified that he said that he hoped the bombs would kill people and that he knew supporting ISIS was against the law. (Tr. 1784, 1800.)

V. Post-Trial Evidence and Testimony

Also pertinent to Defendants' post-trial motions is certain evidence disclosed after trial that Defendants claim calls into question the credibility of key Government witnesses. Specifically, eight days after the jury returned its verdicts, the FBI paid Muhamed $3,000 in cash for his services. (Jones's Post-Trial Mot., Ex. 1, Expense Tracker, Dkt. No. 249-1.) Two weeks later, on July 12, 2019, the FBI paid Muhamed an additional $47,000 in cash. (*Id.*) No information regarding a potential post-trial payment had been disclosed to Defendants prior to

trial. As discussed below, Carnright has acknowledged that she considered making a request to FBI management for Muhamed to be paid earlier in the investigation, and even raised the possibility with one of the Assistant United States Attorneys on the case, but the attorney told her "to wait until after the resolution of the case." (Aff. of Cassandra Carnright ("Carnright Aff.") ¶ 4, Dkt. No. 235.) When Defendants learned of the post-trial payment, they successfully petitioned the Court to order discovery and an evidentiary hearing. At the hearing, Carnright testified that she never informed Muhamed that he would be paid for his participation in the FBI investigation until she made the first $3,000 payment. (Show Cause Hr'g Tr. 32–33, Dkt. No. 250.)

LEGAL STANDARDS

Defendants have filed post-trial motions under both Rule 29 and Rule 33. Rule 29 requires the Court to enter a judgment of acquittal where the evidence presented at trial "is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "[A] defendant seeking a judgment of acquittal faces a 'nearly insurmountable hurdle' . . . [but] 'the height of the hurdle depends directly on the strength of the government's evidence.'" *United States v. Garcia*, 919 F.3d 489, 496–97 (7th Cir. 2019) (citations omitted). Great deference is owed to the jury's determination: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, ***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). While the evidence is viewed in the light most favorable to the Government, Defendants need not establish that no evidence supports their convictions. *Id.* at 320. "A properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317.

Defendants have also moved for a new trial under Rule 33. Under that Rule, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. The Seventh Circuit has cautioned that Rule 33 motions should be granted only in "the most extreme cases." *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998) (internal quotation marks omitted); *see also United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) (explaining that jury verdicts in criminal cases are "not to be overturned lightly."). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable . . . The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989) (quoting *United States v. Martinez*, 763 F.2d 1297, 1312–13 (11th Cir. 1985).

The legal standard for granting a Rule 33 motion depends on its foundation. When a motion is based on withheld evidence, the defendant must demonstrate a "reasonable probability" that he or she would have been acquitted but for the error. *See United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995). The Supreme Court has defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). In contrast, a defendant moving for a new trial based on newly discovered evidence must show that the new evidence "probably would have led to acquittal." *United States v. O'Malley*, 833 F.3d 810, 813 (7th Cir. 2016). "[T]he 'interest of justice' requires a new trial if additional evidence (1) was discovered after trial, (2) could not have been discovered sooner through the exercise of due diligence, (3) is material and not merely impeaching or cumulative, and (4) probably would have led to acquittal." *Id.*

DISCUSSION

I. New Trial Based on *Batson*

Defendants first seek a new trial based on *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* prohibits racial discrimination in jury selection, holding that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. Jones is Black, and Schimenti is described by his counsel as "mixed race, and approximately one-quarter African-American." (Schimenti Post-Trial Mot. at 10, Dkt. No. 248.) During jury selection, the Government used its peremptory strikes to remove the only two Black jurors then remaining on the venire. (Jury Selection Tr. 684, 686.) Defendants challenged the Government's peremptory strikes pursuant to *Batson*, the Court overruled their objections, and Defendants now claim that the ruling was an error that requires a new trial.

The Court evaluates a *Batson* challenge to the use of a peremptory strike through a three-step analysis: first, the defendant must make a *prima facie* showing of discriminatory motive on the part of the prosecutor; if the defendant does so, then the prosecutor must provide a race-neutral reason for the challenged strike; and finally, if the prosecutor provides a race-neutral reason, the defendant must demonstrate "that the proffered justification was pretextual" or "otherwise establish that the peremptory strike was motivated by a discriminatory purpose." *United States v. Stephens*, 421 F.3d 503, 510 (7th Cir. 2005) (citing *Batson*, 476 U.S. at 98). "To survive a *Batson* challenge, unlike a challenge for cause, a peremptory strike need not be based on a strong or good reason, only founded on a reason other than race or gender." *United States v. Brown*, 34 F.3d 569, 571 (7th Cir. 1994) (emphasis omitted).

During jury selection, Defendants contended that the Government's decision to strike the only two remaining Black jurors even though the questioning of those jurors did not elicit any obviously disqualifying facts established a *prima facie* violation. (Jury Selection Tr. 704–05.)[4] The Court agreed, and thus the burden shifted to the Government to provide a race-neutral reason for the strikes. The Government was able to do so. One of the two potential jurors had a previous negative experience with prosecutors because his brother was imprisoned and, more importantly, he had a close friend from childhood who left the country to join ISIS in Turkey and was killed there. *(Id.* at 705–06.) The other potential juror acknowledged that he had listened to an episode of the radio program "This American Life" which (according to the juror's account) discussed a government employee developing a relationship with members of a mosque and encouraging them to commit crimes. (*Id.* at 34.) The juror expressed that he found it distasteful for covert government agents to encourage Muslims to commit crimes and that he might hold a bias on that basis. (*Id.* at 35.) The juror's concerns closely tracked Defendants' entrapment theory, which was that the FBI crossed a line by encouraging them to commit crimes. The Court concluded that the Government had met its burden of providing race-neutral reasons for its strikes.

The Court then proceeded to the third step of the *Batson* analysis, where Defendants had the burden of demonstrating purposeful discrimination by the Government. The Court found the Government's explanation for striking the jurors persuasive and concluded that Defendants had not met their burden. Specifically, the Court noted that the juror who described the use of confidential sources as distasteful expressed concern about entrapment of Muslims—the exact question at issue in Defendants' entrapment defense. (*Id.* at 750.) Similarly, the Court found that

[4] The venire included other Black potential jurors, who were excused for cause and based on hardship. (Jury Selection Tr. 743–44.)

the Government had a sufficient race-neutral basis to strike a juror who personally knew a person who had traveled to fight for ISIS and was killed doing so. (*Id.* at 750–51.)

Although Defendants renew their *Batson* challenge, they offer no new arguments in their post-trial motion. Instead, Defendants reiterate an earlier argument that the Court should compare the stricken jurors to other jurors on the venire. In particular, one juror not stricken by the Government expressed a concern about government surveillance in the form of surveillance of cell phones and social media. (*Id.* at 49.) However, that juror also stated that she would tend to start off giving testimony from law enforcement officers a little more weight than that of other witnesses and that she could keep an open mind. (Tr. 50–51.) In sum, the "comparator" juror stated only general concerns about Government surveillance, while the stricken juror who heard the "This American Life" podcast raised a specific concern regarding tactics for infiltrating Muslim communities very similar to the tactics actually employed by the government agents in this case. Similarly, the juror who had personal experience with a friend who traveled to fight for ISIS was stricken not based on general feelings regarding the matters involved in this case but rather based on a specific, personal experience that bore a clear resemblance to things he would hear about at trial.

In the end, the Court stands by its prior ruling at trial that Defendants have failed to establish purposeful discrimination by the Government. To the contrary, the Court finds the Government's race neutral reasons for striking the two Black venire members offered by the Government to be reasonable. There was no *Batson* violation.

II. Judgment of Acquittal Based on Entrapment Defense

Defendants also seek judgments of acquittal under Rule 29. In so doing, Defendants do not argue that the Government failed to prove the elements of the charged crimes; instead, they

contend that the Government failed to meet its burden of rebutting their entrapment defense. "Entrapment is a defense to criminal liability when the defendant was not predisposed to commit the charged crime before the intervention of the government's agents and the government's conduct induced him to commit it." *United States v. Mayfield*, 771 F.3d 417, 420 (7th Cir. 2014). The entrapment defense consists of two elements: (1) lack of predisposition and (2) government inducement. See *id.* "[T]he two elements of the entrapment defense are formally distinct but related in the sense that inducement is evidence bearing on predisposition: the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime in question." *Id.* at 430 (internal quotation marks omitted). Entrapment is "a fact question for the jury to decide 'as part of its function of determining the guilt or innocence of the accused.'" *Id.* at 439 (quoting *Sherman v. United States*, 356 U.S. 369, 377 (1958)). At trial, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the criminal act before he was approached by government agents, or that the defendant was not induced to commit the crime. *Id.*

A. Predisposition

The Government may rebut entrapment by proving that the defendant was predisposed to commit the crime. *See Mayfield*, 771 F.3d at 428. To demonstrate predisposition here, the Government must show that Defendants were "ready and willing to [commit the charged crime] and likely would have committed it without the [G]overnment's intervention, or actively wanted to but hadn't yet found the means." *Id.* at 438. The Government must further demonstrate that this predisposition existed "prior to the [G]overnment's attempts to persuade [Defendants] to commit the crime." *Id.* at 436. Nevertheless, Defendants' conduct after they encountered government agents may be relevant to their predisposition; this kind of indirect proof is often

important because direct evidence of belief and intent is often unavailable. *Id.* at 437. A defendant has not been entrapped merely because they lacked the means to commit a crime until the government provided them; however, there must be some likelihood that the person would have gone on to commit the crime even if the government had not intervened. *United States v. Hollingsworth*, 27 F.3d 1196, 1202–03 (7th Cir. 1994). The Court evaluates several non-exhaustive factors in considering predisposition: "the defendant's character or reputation; whether the crime was originally suggested by the government; whether the defendant engaged in criminal conduct for profit; whether there was evidence that the defendant was reluctant to commit the crime; and the nature of the government's persuasion." *United States v. Chapman*, 804 F.3d 895, 903 (7th Cir. 2015) (citation omitted).

1. Defendant Jones

Turning first to Jones, he clearly supported ISIS, talked to others about ISIS, and was excited to receive ISIS propaganda and materials. He eagerly received an ISIS flag from an undercover agent, taking it to an Illinois beach to photograph himself with it. (Tr. 1776–78.) He also shared ISIS propaganda with others, including the video Flames of War, which is a recruitment video targeted at western audiences. (Tr. 93, 97, 2516–17.) He posted an ISIS execution video on his Google Plus page and sent it to an undercover agent. (Tr. 2527–29.) And he shared ISIS propaganda with a member of his mosque. (Tr. 770–75.) Jones testified that he was supportive of ISIS and that he had thought about moving to Syria or Iraq to live in the Islamic State. (Tr. 2512, 2524–25.)

On the other hand, there is no evidence in the record that Jones ever tried to provide material support to terrorist organizations or engage in any kind of politically or religiously motivated violence prior to the Government's involvement. He also did not engage in the crime

for profit. Early on, Jones demonstrated reluctance to provide material support to ISIS. For example, in an early text conversation with Omar, Jones discussed the frustrations of living as a Muslim in America and stated that he felt ready to leave the country, but he was not ready to go because he was worried about his family and was not sure if it was the right thing to do. (Tr. 563.) As Omar "traveled" to fight for ISIS, he wrote to Jones, "I wish you were taking this journey with me too. However, I trust in the plans that Allah has made for all of us. We may not be leaving together, but I feel we will be together at the end of the day because brother Bilal has a safe and secure way for us meeting again." (Tr. 577.) Similarly, Bilal introduced the idea to Jones that, as an ISIS facilitator, he could obtain money to allow Jones to take action in support of ISIS, but Jones never acted on that possibility. (Tr. 1128.) Government agents further suggested that Jones "rock it out," which could be interpreted as performing a violent attack. (Tr. 483.) But Jones never took any steps to carry out a violent attack. In short, Jones has presented substantial evidence that he was reluctant to provide material support to ISIS, considering how long the FBI's agents worked him and the multiple angles they took in giving him opportunities to act in support of terrorism.

Further, because predisposition "is chiefly probabilistic, not psychological"—dealing with the likelihood that a person would have actually committed the crime they were charged with—the absence of evidence that Jones engaged with actual ISIS members is relevant to his predisposition. *Mayfield*, 771 F.3d at 428. And here, the Government presented no evidence that Jones ever interacted with anyone actually affiliated with ISIS, although Jones interacted online with someone named "Nazeer Khannk," who asked Jones if he had pledged allegiance to ISIS (Jones responded that he had not) and asked if he was interested in traveling to the Islamic State. (Tr. 2514.)

Yet the Court must weigh whether a reasonable jury could have found that Jones had a predisposition to provide material support to a terrorist organization. The Court finds that it could. The evidence that could have persuaded a reasonable jury that Jones was predisposed to support ISIS includes his displaying of an ISIS flag and sharing of ISIS propaganda. His eager response to the ISIS flag is also relevant here. More broadly, the record shows that Jones sought interaction with other ISIS supporters online and attempted to connect with people who shared his beliefs. While those activities may have been protected speech and association under the First Amendment, *see Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1026 (7th Cir. 2002) ("[Defendants] may, with impunity, become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas. Section 2339B prohibits only the provision of material support . . . to a terrorist organization."), the jury could consider those actions as evidence of Jones's state of mind.[5]

There was sufficient evidence in the record for the jury to conclude that Jones was interested in becoming involved in the secret world of ISIS facilitators that the FBI manufactured. He maintained a relationship with his new friends, even as it became clear that they were involved in providing support for ISIS. And ultimately, he decided to use the network that he believed to exist to provide support to ISIS. Reviewing the evidence in the light most favorable to the Government and drawing reasonable inferences in the Government's favor, as required under Rule 29, the Court concludes that a reasonable jury could have found that Jones was predisposed to provide material support for terrorism.

[5] And indeed, the jury was instructed that Defendants could not be convicted of a crime based only on their beliefs, expressions of those beliefs, or associations, but that their speech could be considered to establish the elements of an offense or their motives or intents. (Jury Instr. at 36, Dkt. No. 189.)

2. Defendant Schimenti

The Court next considers the evidence of Schimenti's predisposition. Similar to Jones, Schimenti frequently shared ISIS propaganda videos and posted comments supportive of ISIS on Google Plus. He also conversed with family members, a member of his mosque, and his then-girlfriend in support of ISIS. (Tr. 773–79, 830–31, 2191, 2197–2200.) His former girlfriend testified at trial that Schimenti discussed his desire to travel abroad to fight for ISIS on a weekly basis. (Tr. 845.) Jones testified that Schimenti expressed an interest in traveling to join ISIS (although Jones also testified that Schimenti "wasn't serious about that"). (Tr. 2574.) Perhaps most alarmingly, both Schimenti's former girlfriend and Jones testified that Schimenti expressed an interest in attacking the Great Lakes Naval Base. (Tr. 842–45, 2573–74.) Considering that Schimenti expressed a desire to attack a naval base and to travel to support ISIS, combined with his enthusiastic support for ISIS, a reasonable jury could have found that Schimenti was predisposed to provide material support to a terrorist organization.[6]

B. Inducement

The Government can also rebut the entrapment defense by showing that Defendants were not induced to commit the crime. Inducement "means government solicitation of the crime plus some other government conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the government's efforts." *Mayfield*, 771 F.3d at 434–35. "Other government conduct" may include "repeated attempts at persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward beyond that inherent in the customary execution of the crime, pleas based on need, sympathy, or friendship."

[6] For the same reasons, a reasonable jury could have found that Schimenti was predisposed to knowingly make materially false statements to the FBI involving international terrorism. Although in his post-trial motion, Schimenti does not develop the argument that he was entitled to a judgment of acquittal on Count Two, the Court addresses the issue for the sake of completeness.

Id. at 435. Inducement also encompasses "any other conduct by government agents that creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's efforts." *Id.* However, that "government agents initiated contact with the defendant, suggested the crime, or furnished the ordinary opportunity to commit it is insufficient to show inducement." *Id.* at 434.

1. Defendant Jones

The Court notes several examples in the evidentiary record where the Government initiated and sustained extensive contacts with Jones, including the development of several (fake) friendships. Omar, the first undercover agent planted by the FBI, posed as a victim of police discrimination and harassment. (Tr. 320–21.) Omar 2, who met Jones online, commiserated with Jones regarding anti-Muslim "harassment" against Schimenti and told Jones that, as a Black Muslim who faces discrimination in Chicago, he would be welcomed by Islam. (Tr. 943, 947–48.) Omar 2 further told Jones, "It doesn't matter what race you are. It is the belonging that really matters. And in our case, our identity is Islam and alhamdulillah for that." (Tr. 930–31.) Ultimately, Jones viewed Muhamed's entrance into his life as the final sign that God wanted him to act in support of ISIS. On this point, Jones testified at trial that the FBI placed, "four or five people . . . trying to get me to provide some form of material support to ISIS in different ways." (Tr. 2340.) Jones also testified that he was coerced into this scheme from the beginning, when the Zion Police Department threatened to arrest him if he did not come in for questioning, setting him up to be introduced to Omar. (Tr. 2343–44.)

At the same time, however, a reasonable jury could find the Government's evidence to be consistent with a different narrative. Jones testified that he voluntarily spoke to the police officers at the Zion Police Department and that he was free to leave. (Tr. 2348–49.) Carnright,

like the FBI agents, testified that the goal of their interactions with Jones was to "identify the individual's true intent and understand what they truly want to do." (Tr. 320–21.) A reasonable jury could have inferred that the FBI agents did not persuade Jones to commit a crime but instead "mirrored" his communications. (Tr. 537–38, 695–99.) After all, the FBI agents were careful not to directly ask Jones to do anything, and Jones was introduced to Bilal only after asking Omar if there were brothers he could "learn and build with." (Tr. 325–29.) Further, when Jones gave cell phones to Muhamed to be used for bombs, he said "I hope it kills many of them" or "eight people." (Tr. 1784.) Jones also testified before the grand jury that he chose to provide cell phones to Muhamed and to introduce Muhamed to Bilal, and was not pressured or forced to do so. (Tr. 1799–1800.) Jones further testified that he knew that engaging with or providing support to ISIS was against the law. (Tr. 1800.)

The Court must review the evidence in the light most favorable to the Government and make all reasonable inferences in the Government's favor. Doing so, the Court concludes that a reasonable jury could have found that Jones was not induced to commit the crime. Ultimately, "[e]ach case, and each entrapment defense, must be judged on its own facts." *United States v. Barta*, 776 F.3d 931, 938 (7th Cir. 2014). Here, the jury had the opportunity to judge the facts; Jones's defense team argued vigorously to the jury that the FBI crossed a line in its interactions with Jones; the jury rejected that argument.

2. Defendant Schimenti

Turning next to Schimenti, he also points to evidence in the record that the FBI exploited his loneliness and vulnerability for the purpose of inducing him to act. The record shows that Muhamed formed a friendship with Schimenti, at one point even telling Schimenti that he was a "gift from god," the one good thing about Muhamed's life in America. (Tr. 1473.) Further, Bilal

told Schimenti that he was "ready to explode" for the sake of Allah; Bilal testified at trial that the meaning of this was to act in a jihadi context. (Tr. 1163–65.) On the other hand, the record contains evidence that Muhamed did not ask Schimenti to bring him phones. (Tr. 1242, 1313, 1345, 1388–90.) Instead, he told Schimenti that his brother had asked him (that is, Muhamed) for phones. The record contains evidence that Schimenti volunteered to take the actions to provide support to a terrorist organization. (*E.g.* Tr. 1308, 1313, 135.) Again reviewing the evidence in the light most favorable to the Government, a reasonable jury could have found that Schimenti was not induced to provide material support for terrorism.[7]

III. New Trial Based on Belated Disclosure of Witness Payments

Defendants also ask this Court to grant them a new trial under Rule 33 based on the discovery post-trial that Carnright's trial testimony regarding the FBI's pre-trial payments to Muhamed was misleading (if not actually false) and that after the trial, the Government paid Muhamed $50,000 for his assistance.

On October 23, 2019, the Government for the first time disclosed to Defendants that the FBI paid Muhamed $50,000 following the jury's guilty verdict. (Defs.' Mot. to Continue Post-Trial Mots. ¶ 2, Dkt. No. 231.) The revelation was made by e-mail, just two days before Defendants were due to file briefs in support of their post-trial motions. The Government's email disclosure to Defendants' counsel did not include any information about the payment other than the amount and that it had been made after the guilty verdict. Accordingly, Defendants filed a motion asking the Court to require additional discovery from the Government regarding the

[7] Similarly, to extent Schimenti's Rule 29 motion is directed to Count Two, a reasonable jury could have concluded that Schimenti was not induced to knowingly make materially false statements involving international terrorism to the FBI. The record does not indicate that Schimenti was pressured, pushed, or otherwise coerced into making such false statements; during that interview, he knew that the FBI agents were FBI agents and chose to lie to them.

FBI's payments to Muhamed and to hold an evidentiary hearing to develop a record for purposes of post-trial motions and any additional relief that may be necessary. The Court granted the request.

In response to the Court's order, the Government initially filed a sworn affidavit from Carnright. In her affidavit, Carnright attested that "[her] intention to pay Muhamed was notional until officially requested and concurred upon by FBI Management," which did not happen until after the trial was complete. (Carnright Aff. ¶ 4.) She further stated that, "[a]t no time during the investigation, to include the trial, did [she] ever submit a request for payment nor did [she] discuss with FBI Chicago or with FBI Headquarters how much money [she] would ultimately request to pay Muhamed." (*Id.*) However, Carnright admitted that she had a conversation prior to trial with an Assistant United States Attorney working on the case, during which she raised the possibility of paying Muhamed and that the attorney advised her "to wait until after the resolution of the case."[8] (*Id.*) According to Carnright, Muhamed was not informed until after the trial that he would be compensated financially for his participation in the investigation; instead, he "was given exact reimbursement for expenses incurred at the request of the FBI." (*Id.* ¶¶ 7–8.)

At the evidentiary hearing on December 2, 2019, Carnright, who was the sole witness, provided additional testimony regarding approximately $16,000 that the FBI paid Muhamed prior to trial as well as the $50,000 post-trial payment. Prior to trial, the Government disclosed that the FBI had made payments to Muhamed; at the hearing, defense counsel acknowledged that they previously could have, but did not, seek a breakdown of these expenses. (Show Cause Hr'g

[8] At the subsequent evidentiary hearing, Carnright clarified that she was advised by the Assistant United States Attorney not to compensate Muhamed for his participation in the investigation until after the trial, and that she made this inquiry around early 2017—before Jones and Schimenti were arrested. (Show Cause Hr'g Tr. 30–31.)

Tr. 23–24.) Carnright, testifying under oath, revealed that the pre-trial payments to Muhamed included a $8,680 relocation "stipend" that was not tied to any reimbursement for specific expenses but instead was intended to allow Muhamed to relocate apartments. (*Id.* at 25–26, 34.) She also testified that Muhamed never asked her for money, she took no steps before the end of trial to get approval for the $50,000 payment, and she never told Muhamed that he would be paid further for his work. (*Id.* at 45–47.) Carnright claimed that she came up with the amount of the payment but needed to submit a request to her supervisors to get the payment approved. (*Id.* at 31–32.)

That was not the end of the Government's belated disclosures. Following the evidentiary hearing, the Government produced an "expense tracker" prepared by Carnright and itemizing the dates and amounts of the payments to Muhamed. The expense tracker appears to show that Muhamed's stipend included, among other things, a down payment of $1,200 for a car, three car payments of $400 each, a security deposit of $925, payments for three months of rent totaling $2,775, and a month's worth of "per diem" expenses totaling $2,130. (Jones's Post-Trial Mot., Ex. 2, Expense Tracker, Dkt. No. 249-2.) The spreadsheet also reflects $5,575 for "amount service" prior to trial—the same category used for the $50,000 post-trial payment and not attributable to any specific reimbursement. (*Id.*)

The Court finds the Government's belated and at times contradictory disclosures regarding the FBI's payments to Muhamed troubling. At trial, Carnright told the jury that Muhamed's post-investigation expenses were "for him to move his residence." (Tr. 412.) But she did not mention that the FBI had subsidized three months of rent or helped Muhamed buy a second car. Furthermore, at trial, Carnright testified that the FBI did not pay Muhamed for working with them. (Tr. 410.) Instead, according to Carnright, the FBI merely gave Muhamed

some money "to afford for any costs incurred to him throughout the course of the investigation." (Tr. 410–11.) And of course, she never mentioned any intention to pay Muhamed for his services after the trial was complete.

Furthermore, Carnright initially testified at trial that the FBI's payments to Muhamed reflected reimbursements for expenses. In her post-trial affidavit, she did not budge on this point, stating that, prior to the $50,000 post-trial payment, "Muhamed was given exact reimbursement for expenses incurred at the request of the FBI as previously disclosed to the Court." (Carnright Aff. ¶ 8.) But Carnright's testimony at the post-trial evidentiary hearing and the belatedly produced expense tracker suggest that her prior testimony was not entirely accurate. In fact, Muhamed was given around $8,600 in a lump-sum payment, which consisted of a month of per diem payments, payments for the purchase and financing of a second car, and three months of rent.

The post-trial revelations regarding payments to Muhamed also implicate his testimony at trial that the Government gave him money "only for fuel, car—I mean, not fancy car, just cheap car—for parking, for moving out from my old apartment after the case." (Tr. 1226.) Muhamed further testified that he had not asked the FBI for anything in exchange for his cooperation, they had not offered him anything, and he did not expect to get anything. (Tr. 1225.) But Defendants would argue that the circumstances surrounding the $8,600 lump sum payment that Muhamed received and other unaccounted-for expenses in Carnright's expense tracker suggest that perhaps he did have a reason to believe that he would be paid following a guilty verdict. Further, the Court considered giving a "caution and great care" jury instruction about witnesses who receive benefits connected to their testimony. The Court might have reached a different conclusion regarding the propriety of such an instruction, if it had complete information regarding the nature

of the pretrial stipend that Muhamed received and Carnright's intention to pay Muhamed following the trial.

The question is whether Defendants are entitled to a new trial based on the post-trial revelations. When a Rule 33 motion is based on newly discovered evidence, the defendants "must demonstrate that the evidence '(1) came to their knowledge only after trial; (2) could not have been discovered sooner had due diligence been exercised; (3) is material and not merely impeaching or cumulative; and (4) would probably lead to an acquittal in the event of a retrial.'" *United States v. Eads*, 729 F.3d 769, 780 (7th Cir. 2013).

As an initial matter, the $50,000 payment itself does not constitute newly discovered evidence because it had not occurred at the time of trial. Evidence that did not exist until after the trial does not "constitute evidence upon which a new trial could be based." *United States v. Bolden*, 355 F.2d 453, 461 (7th Cir. 1965). A jury commits no error by failing to consider evidence that is not yet in existence. *See United States v. Hall*, 324 F.3d 720, 723 (D.C. Cir. 2003) ("[e]vents and transactions occurring after the trial obviously could not have been the subject of testimony at the trial."). Despite Defendants' suggestion that the $50,000 payment was a foregone conclusion before Muhamed testified and that it strains credulity that Muhamed would not have known about the plan to pay him, the Court cannot reach that conclusion based on the record before it. Muhamed had not received the $50,000 payment prior to the conclusion of the trial, nor is there any evidence of an express agreement between Muhamed and the FBI that he would be paid. Indeed, the Court finds the most likely scenario to have been that Carnright intentionally avoided any mention of a potential post-trial payment to Muhamed so that it would not have to be disclosed to defense counsel.

That leaves the evidence of Carnright's intention to seek a $50,000 payment for Muhamed and the details of the $16,000 in pre-trial payments. Defendants contend that Carnright's plan to pay Muhamed $50,000 came to their attention only after trial and could not have been discovered sooner using due diligence. The Court agrees. The Government represented prior to trial that it would provide Defendants with information regarding "any benefits exclusive of employment benefits, that the witnesses may have received for this participation in this investigation." (Gov't Reply to Def.'s Objs. to Protective Order at 2, Dkt. No. 116.) But the Government did not provide Defendants with information regarding Carnright's inquiry about paying Muhamed or disclose that Muhamed had received pre-trial payments that arguably went beyond mere reimbursements. Thus, the Court concludes that Defendants have established that the plans to request a $50,000 payment for Muhamed and the circumstances around it (including the breakdown of the $16,000 payment) came to Defendants' awareness only after trial and could not have been discovered using due diligence, particularly given the Government's assurances that it would disclose information relevant to benefits that the witnesses "may have received."[9]

The Court next considers whether this newly discovered evidence, if available at trial, would have been material or merely impeaching or cumulative. The payments to Muhamed arguably implicate Carnright's and Muhamed's credibility, but not of the ultimate question of Defendants' guilt or innocence. If known, the evidence might have given the jury reason to

[9] The Government suggests that because the payments to Muhamed before trial were not benefits and Carnright never told Muhamed to expect future benefits, the Government did not err in failing to disclose the information. This Court disagrees. Of course, whether the information would have been admitted into evidence is a matter separate from whether it should have been disclosed to the defense. The Court can imagine arguments for at least some of the information to be excluded. But the Court never got the chance to consider the propriety of allowing the jury to hear the details of the pretrial payments or Carnright's plans for a post-trial payment.

question whether Muhamed had a financial motive for his actions. This, in turn, might have caused members of the jury to view Muhamed's testimony with greater skepticism. But Defendants have not identified any particular testimony given by Muhamed that they claim was exaggerated or outright false—other than his motives for testifying. Given that the jury did hear evidence regarding pretrial payments to Muhamed, even if some of the detail may have been omitted to inaccurate, and the speculative nature at least at the time of trial, of any post-trial request for payment to Muhamed, the Court cannot conclude that the additional information would have been material and not cumulative.

Notably, this is not a case whether the parties presented competing testimony about what Muhamed said or did and was asked to determine which witness was telling the truth. Instead, most of the interactions between Muhamed and Defendants were recorded and played for the jury so that the jurors could interpret the events themselves. Defendants rely on Muhamed's testimony that he did not ask Defendants to do anything and avoided injecting certain topics into their conversations, his description of the "many" conversations that were not recorded, and the overall extent of the Government's alleged entrapment scheme. But the jury did not need to rely on Carnright's or Muhamed's descriptions of what happened between the government agents and Muhamed, on the one hand, and Jones and Schimenti, on the other hand, to determine whether Defendants were entrapped. Instead, they could listen to and watch recordings of nearly every important interaction at issue in this case themselves. The jury even heard directly from Jones, who testified about many of the same events as the Government witnesses. Having reviewed this evidence, the jury found that neither Defendant was entrapped. As discussed above, there were ample facts in the record from which the jury could reach that conclusion. Defendants were able

to put on a substantial entrapment defense without the withheld evidence; the jury weighed Defendants' arguments and found against them.

Defendants' argument also fails because the Court cannot find that the newly discovered evidence would probably lead to an acquittal in the event of a retrial. The newly discovered evidence might weaken the Government's case and complicate their narrative that Muhamed participated in the investigation based solely on his patriotism. But it does not rise to the level of probable acquittal. The Court notes that the jury did hear evidence calling into question the purity of Muhamed's motives for participating in the FBI investigation. At the time of the investigation, Muhamed was a legal refugee with permission to work; he became a legal permanent resident only after he started working with the FBI. (Tr. 405–06.) Carnright testified at trial that the FBI helped Muhamed with his green card application—Muhamed asked the FBI why his application was taking so long, and the FBI inquired with the Department of Homeland Security. (Tr. 407.) Carnright further testified that the Department of Homeland Security had "misinformation" that Muhamed was a member or supporter of ISIS (which the FBI corrected) and that Muhamed's fingerprints were registered with the Department of Defense, delaying his immigration application (which the FBI helped to resolve.) (Tr. 407–08.) And the FBI arranged for a United States customs officer to come to a meeting where Muhamed was present to confirm to Muhamed that his application was being processed and was on the right track. (Tr. 1758–62.) In light of this substantial evidence tending to impeach Muhamed's motives regarding the investigation, the Court finds it even less likely that testimony regarding the possibility of a financial reward would have swayed the jury's decision.

Rule 33 motions are properly granted only in "the most extreme cases." *United States v. Linwood*, 142 F.3d 418, 422 (7th Cir. 1998) (internal quotation marks omitted). The newly

discovered evidence in this case may cast the Government in a poor light, but this is not such an extreme case that a new trial is justified.

IV. Defendants' Remaining Challenges

Defendants raise several additional arguments in their post-trial motions. First, they argue that the Court wrongfully granted the Government's motion for a protective order, which they claim prevented the defense from "asking any questions about the witnesses' participation in past or pending investigations or undercover operations" and "asking any questions regarding any FBI undercover program." (Gov't Mot. for Protective Order at 6, Dkt. No. 104; Order on Mot. for Protective Order, Dkt. No. 121.) Defendants contend that this protective order was wrongly granted because it prevented them from adequately investigating and cross-examining witnesses. However, the Court may impose "reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

This case was a terrorism-related criminal matter that received significant media coverage. FBI Assistant Director for Counterterrorism Michael C. McGarrity filed a classified declaration describing the risks witnesses would face if their identities were disclosed. Similarly, unnecessarily disclosing information regarding the FBI's undercover programs could endanger agents involved in other investigations. Defendants protest that such a threat "must be actual and not a result of conjecture" to form the basis for a protective order. *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969). But the Court finds that the Government met this standard here. Further, Defendants do not compellingly argue that the protective order impeded them from obtaining material information about the alleged benefits Muhamed received for his participation

in the FBI investigation. To the contrary, the Government specifically acknowledged that it ***would*** produce any such information notwithstanding the entry of the protective order.

Defendants also contend that they should have been allowed to call additional FBI investigators to the witness stand to examine them regarding their opinions on the merits of the investigation. Discovery produced to Defendants indicated that certain FBI agents may have expressed frustration among themselves because Defendants were slow to engage in criminal acts in support of terrorism (or so Defendants would have argued). One agent, for example, characterized a meeting with Jones as "[b]eating the dead horse known as Jones." (Tr. 654.) However, the agent's personal opinion of whether continued investigation of Jones would bear fruit does not speak to the guilt or innocence of Jones or Schimenti, and would have carried the risk of confusing the jury. Accordingly, the Court properly excluded the evidence.

Finally, Defendants contend that the cumulative effect of trial errors deprived them of their right to a fair trial, but they do not elaborate on this argument. The Court does not find that any alleged errors, considered individually or together, require a new trial. Each Defendant further states that they incorporate, assert and preserve the pleadings and motions, written and oral, made before, during, and after trial by their codefendant. The Court evaluates their post-trial motions as jointly made and adopted, but will not revisit every argument that Defendants made before, during, and after trial. It is Defendants' responsibility to specifically and substantively raise the issues that they ask this Court to decide.

CONCLUSION

For the above reasons, Defendants' motions for judgment of acquittal or, alternatively, a new trial (Dkt. Nos. 248, 249) are denied.

ENTERED:

Dated: February 18, 2021

Andrea R. Wood
United States District Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 16, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

CERTIFIED COPY
A True Copy
Teste:
Deputy Clerk
of the United States
Court of Appeals for the
Seventh Circuit

No. 21-1482

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH D. JONES,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cr-00236-1

Andrea R. Wood,
Judge.

O R D E R

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on September 29, 2023. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing *en banc* is therefore DENIED.

UNITED STATES DISTRICT COURT

Northern District of Illinois

UNITED STATES OF AMERICA
v.
JOSEPH D. JONES

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:17-CR-00236(1)

USM Number: 52022-424

Patrick Eamon Boyle
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) 1 of the superseding indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18:2339B.F Providing Material Support Or Resources To Terrorists	04/07/2017	1s

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)

☒ All remaining counts 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.

March 3, 2021
Date of Imposition of Judgment

Signature of Judge
Andrea R. Wood, United States District Judge

Name and Title of Judge

March 12, 2021
Date

DEFENDANT: JOSEPH D JONES
CASE NUMBER: 1:17-CR-00236(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
144 months as to count 1 of the superseding indictment.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that Defendant be designated to FCI Pekin or FCI Oxford.

☒ 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 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 2:00 pm 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 _____ at_____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSEPH D JONES
CASE NUMBER: 1:17-CR-00236(1)

MANDATORY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3583(d)

Upon release from imprisonment, you shall be on supervised release for a term of:
five (5) years as to Count 1 of the superseding indictment.

The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☒ (1) you shall not commit another Federal, State, or local crime.

☒ (2) you shall not unlawfully possess a controlled substance.

☐ (3) you shall attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, if an approved program is readily available within a 50-mile radius of your legal residence. [Use for a first conviction of a domestic violence crime, as defined in **§ 3561(b)**.]

☐ (4) you shall register and comply with all requirements of the Sex Offender Registration and Notification Act **(42 U.S.C. § 16913)**.

☒ (5) you shall cooperate in the collection of a DNA sample if the collection of such a sample is required by law.

☒ (6) you shall refrain from any unlawful use of a controlled substance AND submit to one drug test within 15 days of release on supervised release and at least two periodic tests thereafter, up to 104 periodic tests for use of a controlled substance during each year of supervised release. [This mandatory condition may be ameliorated or suspended by the court for any defendant if reliable sentencing information indicates a low risk of future substance abuse by the defendant.]

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C § 3563(b) AND 18 U.S.C § 3583(d)

Discretionary Conditions — The court orders that you abide by the following conditions during the term of supervised release because such conditions are reasonably related to the factors set forth in **§ 3553(a)(1)** and **(a)(2)(B), (C), and (D);** such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in **§ 3553 (a)(2) (B), (C), and (D);** and such conditions are consistent with any pertinent policy statement issued by the Sentencing Commission pursuant to **28 U.S.C. 994a**.
The court imposes those conditions identified by checkmarks below:

During the period of supervised release:

☒ (1) you shall provide financial support to any dependents if you are financially able to do so.

☐ (2) you shall make restitution to a victim of the offense under **§ 3556** (but not subject to the limitation of **§ 3663(a)** or **§ 3663A(c)(1)(A)**).

☐ (3) you shall give to the victims of the offense notice pursuant to the provisions of **§ 3555**, as follows:

☒ (4) you shall seek, and work conscientiously at, lawful employment or, if you are not gainfully employed, you shall pursue conscientiously a course of study or vocational training that will equip you for employment.

☐ (5) you shall refrain from engaging in the following occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in the following specified occupation, business, or profession only to a stated degree or under stated circumstances; (if checked yes, please indicate restriction(s)) .

☒ (6) you shall not knowingly meet or communicate with any person whom you know to be engaged, or planning to be engaged, in criminal activity and shall not:

☐ visit the following type of places: .

☒ knowingly meet or communicate with the following persons:

Any persons who are, or claim to be, associated with a foreign terrorist organization (as defined in 8 U.S.C. §1189), or who are, or claim to be, involved with violent acts, or advocating for acts of violence; and, communicating with any persons who are located outside of the United States without prior approval of the Probation Office, giving exception to family members and persons previously identified by the Probation Office.

☒ (7) you shall refrain from ☐ any or ☒ excessive use of alcohol (defined as ☒ having a blood alcohol concentration greater than 0.08; or ☐), and from any use of a narcotic drug or other controlled substance, as defined in **§ 102** of the Controlled Substances Act (**21 U.S.C. § 802**), without a prescription by a licensed medical practitioner.

☒ (8) you shall not possess a firearm, destructive device, or other dangerous weapon.

☒ (9) ☒ you shall participate, at the direction of a probation officer, in a substance abuse treatment program, which may include urine testing up to a maximum of 104 tests per year.

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☐ you shall participate, at the direction of a probation officer, in a mental health treatment program, and shall take any medications prescribed by the mental health treatment provider.

☐ you shall participate, at the direction of a probation officer, in medical care; (if checked yes, please specify: .)

☐ (10) (intermittent confinement): you shall remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling [no more than the lesser of one year or the term of imprisonment authorized for the offense], during the first year of the term of supervised release (provided, however, that a condition set forth in **§3563(b)(10)** shall be imposed only for a violation of a condition of supervised release in accordance with **§ 3583(e)(2)** and only when facilities are available) for the following period .

☐ (11) (community confinement): you shall reside at, or participate in the program of a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of supervised release, for a period of months.

☐ (12) you shall work in community service for hours as directed by a probation officer.

☐ (13) you shall reside in the following place or area: , or refrain from residing in a specified place or area: .

☒ (14) you shall not knowingly leave from the federal judicial district where you are being supervised, unless granted permission to leave by the court or a probation officer. The geographic area of the Northern District of Illinois currently consists of the Illinois counties of Cook, DuPage, Grundy, Kane, Kendall, Lake, LaSalle, Will, Boone, Carroll, DeKalb, Jo Daviess, Lee, McHenry, Ogle, Stephenson, Whiteside, and Winnebago.

☒ (15) you shall report to the probation office in the federal judicial district to which you are released within 72 hours of your release from imprisonment. You shall thereafter report to a probation officer at reasonable times as directed by the court or a probation officer.

☒ (16) ☒ you shall permit a probation officer to visit you ☒ at any reasonable time or ☐ as specified: ,
☒ at home ☒ at work ☒ at school ☒ at a community service location
☒ other reasonable location specified by a probation officer

☒ you shall permit confiscation of any contraband observed in plain view of the probation officer.

☒ (17) you shall notify a probation officer within 72 hours, after becoming aware of any change in residence, employer, or workplace and, absent constitutional or other legal privilege, answer inquiries by a probation officer. You shall answer truthfully any inquiries by a probation officer, subject to any constitutional or other legal privilege.

☒ (18) you shall notify a probation officer within 72 hours if after being arrested, charged with a crime, or questioned by a law enforcement officer.

☐ (19) (home confinement)

☐ (a)(i) (home incarceration) for a period of __ months, you are restricted to your residence at all times except for medical necessities and court appearances or other activities specifically approved by the court.

☐ (a)(ii) (home detention) for a period of __ months, you are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities pre-approved by the probation officer.

☐ (a)(iii) (curfew) for a period of __ months, you are restricted to your residence every day.

☐ from the times directed by the probation officer; or ☐ from __ to __.

☐ (b) your compliance with this condition, as well as other court-imposed conditions of supervision, shall be monitored by a form of location monitoring technology selected at the discretion of the probation officer, and you shall abide by all technology requirements.

☐ (c) you shall pay all or part of the cost of the location monitoring, at the daily contractual rate, if you are financially able to do so.

☐ (20) you shall comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by you for the support and maintenance of a child or of a child and the parent with whom the child is living.

☐ (21) (deportation): you shall be surrendered to a duly authorized official of the Homeland Security Department for a determination on the issue of deportability by the appropriate authority in accordance with the laws under the Immigration and Nationality Act and the established implementing regulations. If ordered deported, you shall not remain in or enter the United States without obtaining, in advance, the express written consent of the United States Attorney General or the United States Secretary of the Department of Homeland Security.

☒ (22) you shall satisfy such other special conditions as ordered below.

☒ (23) You shall submit your person, property, house, residence, vehicle, papers [computers (as defined in 18 U.S.C. 1030(e)(1)), other electronic communications or data storage devices or media,] or office, to a search conducted by a United States Probation Officer(s). Failure to submit to a search may be grounds for revocation of release. You shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer(s) may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and

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that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

☐ (24) Other:

SPECIAL CONDITIONS OF SUPERVISED RELEASE PURSUANT TO 18 U.S.C. 3563(b)(22) and 3583(d)

The court imposes those conditions identified by checkmarks below:

During the term of supervised release:

☐ (1) if you have not obtained a high school diploma or equivalent, you shall participate in a General Educational Development (GED) preparation course and seek to obtain a GED within the first year of supervision.

☒ (2) you shall participate in an approved job skill-training program at the direction of a probation officer within the first 60 days of placement on supervision.

☐ (3) you shall, if unemployed after the first 60 days of supervision, or if unemployed for 60 days after termination or lay-off from employment, perform at least hours of community service per week at the direction of the probation office until gainfully employed. The total amount of community service required over your term of service shall not exceed hours.

☐ (4) you shall not maintain employment where you have access to other individual's personal information, including, but not limited to, Social Security numbers and credit card numbers (or money) unless approved by a probation officer.

☐ (5) you shall not incur new credit charges or open additional lines of credit without the approval of a probation officer unless you are in compliance with the financial obligations imposed by this judgment.

☐ (6) you shall provide a probation officer with access to any requested financial information requested by the probation officer to monitor compliance with conditions of supervised release.

☐ (7) within 72 hours of any significant change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments, you must notify the probation officer of the change.

☐ (8) you shall file accurate income tax returns and pay all taxes, interest, and penalties as required by law.

☐ (9) you shall participate in a sex offender treatment program. The specific program and provider will be determined by a probation officer. You shall comply with all recommended treatment which may include psychological and physiological testing. You shall maintain use of all prescribed medications.

- ☐ You shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the United States Probation Office. You shall consent to the installation of computer monitoring software on all identified computers to which you have access and to which the probation officer has legitimate access by right or consent. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. You shall not remove, tamper with, reverse engineer, or in any way circumvent the software.
- ☐ The cost of the monitoring shall be paid by you at the monthly contractual rate, if you are financially able, subject to satisfaction of other financial obligations imposed by this judgment.
- ☐ You shall not possess or use at any location (including your place of employment), any computer, external storage device, or any device with access to the Internet or any online computer service without the prior approval of a probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system
- ☐ You shall not possess any device that could be used for covert photography without the prior approval of a probation officer.
- ☐ You shall not view or possess child pornography. If the treatment provider determines that exposure to other sexually stimulating material may be detrimental to the treatment process, or that additional conditions are likely to assist the treatment process, such proposed conditions shall be promptly presented to the court, for a determination, pursuant to **18 U.S.C. § 3583(e)(2),** regarding whether to enlarge or otherwise modify the conditions of supervision to include conditions consistent with the recommendations of the treatment provider.
- ☐ You shall not, without the approval of a probation officer and treatment provider, engage in activities that will put you in unsupervised private contact with any person under the age of 18, and you shall not knowingly visit locations where persons under the age of 18 regularly congregate, including parks, schools, school bus stops, playgrounds, and childcare facilities. This condition does not apply to contact in the course of normal commercial business or unintentional incidental contact
- ☐ This condition does not apply to your family members: [Names]
- ☐ Your employment shall be restricted to the judicial district and division where you reside or are supervised, unless approval is granted by a probation officer. Prior to accepting any form of employment, you shall seek the approval of a probation officer, in order to allow the probation officer the opportunity to assess the level of risk to

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the community you will pose if employed in a particular capacity. You shall not participate in any volunteer activity that may cause you to come into direct contact with children except under circumstances approved in advance by a probation officer and treatment provider.

☐ You shall provide the probation officer with copies of your telephone bills, all credit card statements/receipts, and any other financial information requested.

☐ You shall comply with all state and local laws pertaining to convicted sex offenders, including such laws that impose restrictions beyond those set forth in this order.

☐ (10) you shall pay to the Clerk of the Court any financial obligation ordered herein that remains unpaid at the commencement of the term of supervised release, at a rate of not less than 10% of the total of your gross earnings minus federal and state income tax withholdings.

☒ (11) you shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the prior permission of the court.

☐ (12) you shall pay to the Clerk of the Court $ as repayment to the United States of government funds you received during the investigation of this offense. (The Clerk of the Court shall remit the funds to (list both Agency and Address.)

☐ (13) if the probation officer determines that you pose a risk to another person (including an organization or members of the community), the probation officer may require you to tell the person about the risk, and you must comply with that instruction. Such notification could include advising the person about your record of arrests and convictions and substance use. The probation officer may contact the person and confirm that you have told the person about the risk.

☒ (14) You shall observe one Reentry Court session, as instructed by your probation officer.

☒ (15) Other: ☒ You shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the United States Probation Office. You shall consent to the installation of computer monitoring software on all identified computers to which you have access with the exception of devices owned or controlled by third parties to which Defendant requires access for purposes of employment or comparable reasons. With respect such devices owned or controlled by third parties, Defendant is required to notify the Probation Office in advance so that any potential risk can be assessed and any appropriate recommendation to the Court may be made. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. You shall not remove, tamper with, reverse engineer, or in any way circumvent the software.

☒ The cost of the monitoring shall be paid by you at the monthly contractual rate, if you are financially able, subject to satisfaction of other financial obligations imposed by this judgment.

☒ You shall not possess or use any device with access to any online computer service at any location (including place of employment) without the prior approval of a probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system.

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CRIMINAL MONETARY PENALTIES

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

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00	$.00	$.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.

☐ 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 .

☐ the interest requirement for the is modified as follows:

☐ The defendant's non-exempt assets, if any, are subject to immediate execution to satisfy any outstanding restitution or fine obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** 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.

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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 $100 due immediately.

☐ balance due not later than , or

☐ balance due 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 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

Case Number Defendant and Co-Defendant Names (including defendant number)	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if Appropriate**

See above for 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) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.