UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 09-CR-352(MJD/FLN)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	GOVERNMENT'S TRIAL BRIEF
	)	
OMER ABDI MOHAMED,	)	
	)	
Defendant.	)	

The United States of America, by and through its attorneys B. Todd Jones, United States Attorney for the District of Minnesota, Charles Kovats, Assistant United States Attorney, and William Narus, Trial Attorney, U.S. Department of Justice, hereby submits the following Trial Brief.

I. STATUS OF THE CASE

A. Trial as to the defendant Omer Abdi Mohamed is currently set for July 19, 2011, before the Honorable Michael J. Davis, Chief Judge, U.S. District Court for the District of Minnesota.

B. Estimated time for the government's case-in-chief is less than ten days.

C. The defendant is currently on pre-trial release.

D. Trial by jury has not been waived.

E. Absent any stipulations from the defendant, the government expects to call approximately 30 witnesses in its case-in-chief.

F. The Superseding Indictment contains six counts.

II. THE CHARGES

On November 17, 2009, a grand jury returned a three-count indictment charging the defendant Omer Abdi Mohamed in Count One with conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A(a); in Count Two with providing material support to terrorists, in violation of 18 U.S.C. § 2339A(a); and in Count Three with conspiring to kill, kidnap, or maim overseas, in violation of 18 U.S.C. § 956(a).

On April 21, 2011, a grand jury returned a Superseding Indictment that included three additional charges. Specifically, the defendant is charged in Counts Four, Five, and Six with possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). The Superseding Indictment alleges that the theory of culpability is based on Pinkerton v. United States, 328 U.S. 640 (1946) (coconspirator liability).

III. APPLICABLE STATUTES

A. Counts One and Two

The defendant is charged in Count One with Conspiring to Provide Material Support or Resources to Terrorists, and in Count Two with Providing Material Support or Resources to Terrorists. Title 18, United States Code, Section 2339A provides in part:

> (a) Whoever provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281,

> 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of [Title 18] . . . shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.
>
> (b) Definitions.--As used in this section– (1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

B. Count Three

The defendant is charged in Count Three with Conspiring to Kill, Kidnap, or Maim Outside of the United States. Title 18, United States Code, Section 956 provides in part:

> Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished [for any term of years or for life, if the offense is conspiracy to murder or kidnap]

C. Counts Four, Five and Six

The defendant is charged in Counts Four, Five and Six with Possessing a Firearm in Furtherance of a Crime of Violence by virtue of the possession of firearms by his conspirators in

Somalia. Title 18, United States Code, Section 924(c) provides in part:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime– (i) be sentenced to a term of imprisonment of not less than 5 years; [or] (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> (C) In the case of a second or subsequent conviction under this subsection, the person shall--
> (i) be sentenced to a term of imprisonment of not less than 25 years.
>
> . . .
>
> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and– (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

IV. ELEMENTS AND OTHER PERTINENT LAW OF THE CHARGED OFFENSES

A. Count One

1. Elements

Count 1 of the Superseding Indictment alleges that from in or about September 2007 through November 2009, the defendant conspired with others to provide material support or resources, or to conceal or disguise the nature, location, source or ownership of such

material support or resources, in preparation for, or to carry out a conspiracy to murder, kidnap, or maim outside of the United States.

To sustain the charge of conspiracy as alleged in Count One, the Government must prove two elements:

First, from in or about September 2007 through November 2009, two or more persons reached an agreement or came to an understanding to provide material support or resources, or to conceal or disguise the nature, location, source or ownership of material support or resources to be used in preparation for or in carrying out a conspiracy to kill, kidnap, or maim outside of the United States; and

Second, that the defendant voluntarily and intentionally joined in the agreement or understanding either at the time it was first reached or at some later time while it was still in effect, knowing or intending that the material support or resources provided, or concealed or disguised, were to be used in preparation for, or in carrying out, a conspiracy to murder, kidnap, or maim outside of the United States.

B. Count Two

Count 2 of the Superseding Indictment alleges that from in or about September 2007 through November 2009, the defendant provided material support or resources, or concealed or disguised the nature, location, source, and ownership of material support or

resources. To sustain the charge of conspiracy as alleged in Count Two, the Government must prove two elements:

First, that the defendant did provide or attempt to provide material support or resources, or did conceal or disguise the nature, location, source, or ownership of material support or resources; and

Second, that the defendant did so knowing that the material support or resources were to be used in preparation for or in carrying out a conspiracy to murder, kidnap, or maim outside of the United States.

The defendant may also be found guilty of Count Two even if he personally did not do every act constituting the offense if he aided and abetted the commission of providing material support or resources, or aided and abetted the concealing or disguising of the nature, location, source, and ownership of material support or resources, to a conspiracy to murder, kidnap, or maim outside of the United States.

C. Law Regarding Providing Material Support

In United States v. Hassoun, 476 F.3d 1181 (11th Cir. 2007), the Eleventh Circuit addressed the differences between the charges of Providing Material Support, in violation of 18 U.S.C. § 2339A, and a Conspiracy to Kill Outside of the United States, in violation of 18 U.S.C. § 956. There, the defendants were charged with participating in a support cell to promote violent Islamic jihad.

Id. at 1183. The district court dismissed the charge alleging that the defendants had conspired to kill outside of the United States, finding that it was multiplicitous. Id. at 1184. The Eleventh Circuit reversed, stating with respect to the difference between a 2339A charge and a 956 charge:

> [T]he government need not prove all the elements of § 956, the object offense, in order to satisfy the elements of the substantive § 2339A charge. By its elements, § 2339A criminalizes material support given "in preparation for" the object offense – clearly, the object offense need not even have been completed yet, let alone proven as an element of the material support offense. To meet its burden under 2339A, the Government must at least prove that the defendants provided material support or resources knowing that they be used in preparation for the § 956 conspiracy (assuming that, under this scenario, the § 956 conspiracy had not yet come to exist).

Id. at 1188.

Indeed, the Second Circuit's decision in United States v. Stewart, 590 F.3d 93, 119 (2d Cir. 2009), demonstrates that a conviction for providing material support to a conspiracy to kill outside the United States does not require that the defendant have committed the predicate offense of conspiring to kill outside of the United States: "[The] government need not have established beyond reasonable doubt that [the defendants] engaged in a conspiracy to kidnap or commit murder abroad [the underlying enumerated offense]; neither was charged with doing either. Instead, both were charged with and convicted of violating section 2339A." Id. at 119.

Moreover, unlike a charge of providing material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B, the charge of providing material support to a conspiracy to kill abroad does not require proof that the material support was provided to a particular organization or terrorist. See United States v. Chandia, 514 F.3d 365, 372 (4th Cir. 2008)(contrasting the elements of § 2339B with § 2339A and observing that § 2339B requires proof that the material support was provided to an organization); see also United States v. Sattar, 314 F. Supp. 2d 279, 295-296 (S.D.N.Y. 2004) ("Title 18 U.S.C. § 2339A . . . does not penalize the provision of material support or resources to an FTO, but rather makes it a crime to provide material support or resources or conceal or disguise the nature, location, or source of such material support or resources 'knowing or intending that they are to be used in preparation for, or in carrying out, a violation' of specific violent crimes-in this case, a violation of 18 U.S.C. § 956, which prohibits a conspiracy to kill or kidnap persons in a foreign country.").

D. Count Three

For Count 3, in order for defendant to be found guilty of conspiracy to murder, kidnap, or maim outside the United States as charged in the Superseding Indictment, the Government must prove each of the following elements beyond a reasonable doubt:

First, beginning in or about September 2007, and continuing through November 2009, two or more persons reached an agreement or came to an understanding to commit an act outside of the United States that would constitute the offense of murder, kidnaping, or maiming, if committed within the jurisdiction of the United States;

Second, the defendant knowingly became a member of that conspiracy;

Third, the defendant became a member of the conspiracy while he was physically within the jurisdiction of the United States; and

Four, one of the persons involved in the conspiracy performed within the United States at least one overt act for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.

E. Law Regarding Conspiracy to Kill Outside of the United States

Federal law prohibits the commission of an act at any place outside the United States that would constitute the offense of murder, kidnaping, or maiming if committed in the jurisdiction of the United States. See 18 U.S.C. § 956; United States v. Khan, 309 F.Supp.2d 789, 821-822 (E.D. Va. 2004). "Murder" is defined in 18 U.S.C. § 1111(a) as the "the unlawful killing with malice aforethought." To "kidnap" is to knowingly and unlawfully seize, confine, keep, or detain for ransom, reward, revenge, or some other benefit. It need not be proved that a kidnaping was carried out for personal monetary gain so long as it is proved that the

perpetrator acted voluntarily and intentionally, intending to gain some benefit from the kidnaping. "Maiming" is defined in 18 U.S.C. § 114 as, among other things, the cutting off or disabling a limb of another person.

F. Counts Four, Five, and Six

The defendant is charged with possession of a firearm in furtherance of a crime of violence based on the possession by his conspirators during the course of the conspiracy. Each member of a conspiracy is responsible for crimes committed by other members of the conspiracy that are within the scope of the conspiracy or reasonably foreseeable as a necessary or natural consequence of the conspiracy. Accordingly, the government submits that the following elements must be proved at trial:

The offense of possession of a firearm in furtherance of a crime of violence, as charged in Counts 4, 5, and 6, has the following two elements:

First, Salah Osman Ahmed, Abdifatah Isse, or Kamal Hassan committed a crime of violence, namely, Count 1 or Count 3, for which he could have been prosecuted in a court in the United States; and

Second, Salah Osman Ahmed, Abdifatah Isse, or Kamal Hassan knowingly possessed a firearm in furtherance of that crime.

Eighth Circuit law is settled that the Pinkerton theory of liability attaches to the substantive offense of possessing a

firearm in furtherance of a crime of violence. See United States v. Zachery, 494 F.3d 644, 647 (8th Cir. 2007).

V. STATEMENT OF THE FACTS

Starting in or about September 2007, the defendant and his conspirators formed a secretive plan in which ethnic Somali men residing in Minneapolis would return to Somalia to conduct jihad alongside Islamic extremists against the Ethiopian military present in Somalia to assist the internationally-supported Transitional Federal Government of Somalia ("TFG").

The conspiracy to kill, kidnap, and maim the Ethiopians included men in Minneapolis and men and women in Somalia. In Minneapolis, it required traveling to Somalia and funding for the trip. Once in Somalia, it included the use of safe-houses operated by members of the conspiracy. It included the issuance of AK-47s and training on the use of weapons. It included the construction of a training camp in Southern Somalia and instruction from senior members of al Shabaab, to include Shaykh Mukhtar Robow, and a senior al Qaeda operative in East Arica, Saleh Ali Saleh al-Nabhan, as documented in an al Shabaab propaganda video. In the summer of 2008, it included an ambush of Ethiopian troops by the defendant's conspirators from Minneapolis, together with senior members of al Shabaab, such as Omar Hammami. In late-October 2008, a member of the conspiracy conducted one of five coordinated suicide bombings targeting the Ethiopian Consulate office, the Somaliland

Presidential Palace, a United Nations office, and the offices of the Puntland security forces.

The government anticipates the evidence adduced at trial will prove the following facts:

A. Pre-Departure Activities

In or about September 2007, the defendant Omer Abdi Mohamed and his conspirators, to include Khalid Abshir ("Abshir"), Dahir Gure ("Gure"), Ahmed Ali Omar ("Omar"), and Shirwa Ahmed ("Shirwa Ahmed") conspired to raise money to send men to Somalia to violently oust the Ethiopian military, which had been invited into Somalia by the TFG. This core group of conspirators began to raise funds and planned to join Abshir's relative in Somalia, a senior member of al Shabaab, in the conspiracy to kill, kidnap, and maim the Ethiopians in Somalia.

During Ramadan 2007, which occurred between approximately mid-September and mid-October 2007, Salah Ahmed ("Salah Ahmed") and Kamal Hassan ("Hassan") were recruited into the group and encouraged to travel to Somalia to join in the fighting. A short time later, on October 30, 2007, Gure departed for Somalia. At some point after Ramadan, Abdifatah Isse was recruited into the conspiracy.

Throughout the fall of 2007, the defendant and his conspirators secretly began to mobilize groups of men to depart for Somalia. The group met at mosques, restaurants, and private

restaurants to plan the logistics of the trip. The group spoke by telephone with their contact in Somalia on several occasions, and were informed about the situation in Somalia. They were told that he would take care of their needs once they arrived. The group also conferred with one man who had recently returned from Somalia and stated that the men would engage in a "good jihad."

To raise money, the group solicited donations from unsuspecting members of the Somali community under false pretenses. The defendant and his conspirators went to local malls and apartment buildings to ask for money, claiming it would be used to build a mosque or to assist with relief efforts in Somalia. In fact, the money was to pay for the airfare and travel expenses of the group of men to join in the conspiracy.

The defendant and his conspirators strove to keep the plan secret, reminding members not to discuss it with anyone outside of the conspiracy, and policing entry into the group. They decided that two individuals were too young to travel in the fall of 2007, as it would draw attention from members of the community to the trip. They challenged members of the conspiracy who had planned to travel, questioning their commitment, dedication, and knowledge of both the religion and events in Somalia, before ultimately assisting them with the trip.

When the time came to buy tickets, the defendant relied on a contact he had at Amana Travel to assist with booking the tickets.

The defendant contacted Amana Travel, accompanied men to the travel agency, and paid for the tickets. The defendant and his conspirators acquired and provided to Hassan a fraudulent itinerary reflecting that Hassan would be traveling to Saudi Arabia for purpose of misleading Hassan's family about his destination. In fact, the group planned to reconvene in Dubia, United Arab Emirates, and continue to Hargeisa, Somalia, where they would be received by associates of their contact in Somalia. The defendant and Abshir planned to remain in the United States and support the men financially.

B. Travel to Somalia

On December 4, 2007, Shirwa Ahmed departed from Minneapolis to Saudi Arabia to participate in the Hajj, after which he would travel to Somalia.

On December 6, 2007, Hassan and Salah Ahmed departed Minneapolis and flew to Dubai, United Arab Emirates. The defendant and the remaining conspirators accompanied Hassan and Salah Ahmed to the airport.

On December 8, 2007, Omar and Isse left Minneapolis and met Hassan and Salah Ahmed in Dubai. All four then flew from Dubai to Hargeisa, Somalia, through Djibouti.

C. Actions in Somalia

The seven men who had left from Minneapolis in the fall of 2007 reunited at a safe-house in Southern Somalia. They were

provided weapons training and met with senior leaders of al Shabaab. At a different safe-house, the men from Minneapolis, along with other members of al Shabaab, were issued AK-47s and ammunition. They were trained how to handle and load the weapons, and with the exception of Abshir, who had become ill, the men carried the weapons with them to establish the al Shabaab training camp.

When they arrived at the camp, the men were divided into groups and began to construct the camp. Under the supervision of the leaders, they began cutting down trees and clearing brush. Salah Ahmed and Isse left the camp after several weeks and began making their way back to the United States. Shirwa Ahmed also left the camp to assist a friend, but was persuaded to return to the camp by his conspirators in Somalia.

The remaining men from Minneapolis along with other recruits were provided weapons training, religious instruction and anti-Western propaganda. The camp received visits from senior members of al Shabaab. An al Shabaab "media" crew arrived to film a propaganda video that depicted recruits training and featured an English-language recruiting appeal made by a man from Minneapolis. Robow and Nabhan appear in the video.

In mid-July 2008, after graduating from the training camp, the men from Minneapolis were assigned to a group of foreign fighters and dispatched to conduct an ambush of Ethiopian troops traveling

along a road in Somalia. The preparations and ambush were filmed by a member of the conspiracy and produced as an al Shabaab propaganda video. Senior members of al Shabaab narrate the video and a man from Minneapolis makes a speech to the camera in which he encourages more men to join them in Somalia.

In mid-October 2008, a relative of Shirwa Ahmed's received a telephone call from him in Somalia. Within approximately two weeks, on October 29, 2008, five coordinated vehicle borne improvised explosive devices ("IED") exploded in the Somali territories of Puntland and Somaliland. The bombings resulted in the death of the suicide bombers, including Shirwa Ahmed, as well as approximately 22 persons. FBI special agents retrieved the remains of Shirwa Ahmed.

VI. EVIDENTIARY ISSUES

A. Stipulations

The government has invited the defendant to stipulate to several preliminary matters including authentication and foundation for various bank records, telephone company records, and other electronic communications. The government is also seeking a stipulation to the accuracy of several foreign translations, and to the results of a fingerprint examination. Finally, the government also expects the defendant to stipulate to several well-established facts, including the international country codes for several countries and dates of certain historical events.

A stipulation is evidence introduced by both parties, so neither may complain on appeal that the evidence was erroneously admitted. United States v. Smith, 632 F.3d 1043, 1047 (8th Cir. 2011) (at trial, defendant stipulated to admission of the report. The court rejected defendant's claim that district court's admission of forensic chemists' lab report violated his right to confront adverse witnesses). Where the defendant is aware of the stipulation, and does not object to the stipulation in court, the court presumes that defendant has acquiesced in his counsel's stipulation. United States v. Robinson, 617 F.3d 984, 989-90 (8th Cir. 2010).

Should the defendant elect not to stipulate to the authentication and foundation of any FISA-derived evidence, the government intends to call an FBI agent witness familiar with the process by which such evidence is obtained from various telecommunications providers. Given (1) that the manner and means by which such communications are intercepted is classified, and (2) the Court has already determined that the FISA collection relevant to this case was lawfully conducted, the government believes no further foundation is required. For e-mail communications, the Third Circuit has found the burden of proof to be slight, and circumstantial evidence, such as “the appearance, contents, substance, internal patterns, email addresses in the headers may be

sufficient." United States v. Vaghari, 2009 WL 2245097, *8 (E.D. Pa. 2009).

B. Defendant's Statements

The defendant has been provided a copy of several audio recordings which contain his statements. The defendant should be precluded from offering these recordings, or inquiring of any witness what the defendant may have stated on any occasion.

A defendant cannot elicit his own prior statements. Fed. R. Evid. 801(d)(2)(A); United States v. Hughes, 535 F.3d 880, 882 (8th Cir. 2008) (self-serving statement of defendant not admissible as statement against interest or under residual hearsay exception). Additionally, a defendant cannot admit additional out-of-court statements, even when the government admits a portion of a defendant's out-of-court statement, because such statements are hearsay when offered by the defendant. Fed. R. Evid. 801(d)(2).

Under Federal Rule of Evidence 801(d)(2)(E), "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not hearsay. Therefore, the defendant cannot admit statements of his conspirators under Rule 801(d)(2)(E); however, the United States can do as is it is not a party under the rule. See United States v. Abbas, 74 F.3d 506, 511 (4th Cir. 1996) ("But the prosecution is not a 'party' against whom such testimony [under Rule 801(d)(2)(E)] may be tendered").

C. The Defendant's Statements During a Proffer

The government has provided notice to the defendant that the government intends to admit the statements he made during a pre-indictment proffer session with the government should the defendant or his counsel trigger a waiver of the protections of the proffer agreement.

On September 9, 2009, the defendant and his two attorney's met with the government. The parties executed a proffer agreement, which stated as follows: "[T]he government may use . . . statements made by you at the meeting and all evidence obtained directly or indirectly from those statements for the purpose of cross-examination should you testify, or to rebut any evidence, argument or representations offered by or on behalf of yourself in connection with the trial and/or sentencing, should any prosecution of yourself be undertaken." The defendant and one his attorneys signed the proffer agreement.

Although proffer statements are generally inadmissible against a defendant at trial, see Fed. R. Evid. 410, defendants may waive their rights to those protections. See United States v. Barrow, 400 F.3d 109, 116 (2d Cir. 2005). In United States v. Mezzanatto, 513 U.S. 196, 210 (1995), the Supreme Court held that a defendant could waive his rights under Rule 410 and Rule 11 as long as there is no "affirmative indication that the agreement [to waive] was entered into unknowingly or involuntarily." The Mezzanatto Court

considered only the enforcement of proffer waivers for impeachment purposes. Circuit courts that subsequently have considered the question have upheld the use of proffer waivers at trial.

Presented with nearly identical language in a proffer agreement to that used in the agreement here, the Third Circuit upheld the waiver provision of a proffer agreement in which the agreement allowed the use of the defendant's statements to rebut any evidence or arguments made on the defendant's behalf. See United States v. Hardwick, 544 F.3d 565, 569-570 (3d Cir. 2008). The defense attorney in Hardwick triggered the waiver provisions of the proffer by eliciting testimony on cross-examination that someone other than the defendant had committed the crime, which conflicted with the defendant's statements during the proffer. Id. at 570-71.

Other circuit courts have also allowed the use of statements given during a proffer. See United States v. Velez, 354 F.3d 190, 196 (2d Cir. 2004); United States v. Krilich, 159 F.3d 1020, 1025-26 (7th Cir.1998); see also United States v. Rebbe, 314 F.3d 402, 407 (9th Cir.2002) (upholding admission of proffer statements in rebuttal); United States v. Burch, 156 F.3d 1315, 1321-22 (D.C. Cir. 1998) (extending the majority opinion in Mezzanatto to allow the admission of plea statements in the case-in-chief). The Eighth Circuit has allowed for the use of proffer statements. See United

States v. Rowley, 975 F.2d 1357, 1361-62 (8th Cir. 1992)(allowing use of proffer statements for impeachment purposes).

Should the defendant make arguments or elicit testimony that is inconsistent with the statements he made during a proffer with the government or otherwise trigger the wavier of the protections of the proffer, the government will request permission to admit the defendant's statements in its case-in-chief.

D. Conspirator Statements

The government intends to offer testimony from several witnesses who will relate statements made by the defendant and his conspirators in furtherance of the conspiracy.

Declarations by one co-conspirator during the course of and in furtherance of the conspiracy may be used against another conspirator because such declarations are not hearsay. Fed. R. Evid. 801(d)(2)(E) (a statement is not hearsay if it is "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."). Rule 801(d)(2)(E) applies even if the declarant is not charged with the crime of conspiracy. United States v. Mahasin, 362 F.3d 1071, 1084 (8th Cir. 2004).

For a statement to be admissible under Rule 801(d)(2)(E), the offering party must establish that: (a) the statement was in furtherance of the conspiracy; (b) it was made during the life of the conspiracy; and (c) there is, including the co-conspirator's declaration itself, sufficient proof of the existence of the

conspiracy and of the defendant's connection to it. Bourjaily v. United States, 483 U.S. 171, 175 (1986); United States v. Hyles,521 F.3d 946, 959 (8th Cir. 2008); Mahasin, 362 F.3d at 1084. The term "in furtherance of the conspiracy" is meant to be construed broadly. United States v. Ragland, 555 F.3d 706, 713 (8th Cir. 2009). A district court need not make an explicit ruling if it substantially complied with these procedures. United States v. Fuller, 557 F.3d 859, 865 (8th Cir. 2009). Whether the offering party has met its burden is to be determined by the trial judge, and not the jury. Id. The declaration itself, together with independent evidence, may constitute sufficient proof of the existence of the conspiracy and the involvement of the defendant and declarant in it. Bourjaily, 483 U.S. at 181; Ragland, 555 F.3d at 713.

The foundation for the admission of a co-conspirator statement may be established before or after the admission of the statement. If a proper foundation has not yet been laid, the court may nevertheless admit the statement, but with an admonition that the testimony will be stricken should the conspiracy not be proved. Raland, 555 F.3d at 713. Co-conspirator statements fall within a "firmly rooted hearsay exception." Therefore, if a statement is properly admissible under Rule 801(d)(2)(E), no additional showing of reliability is necessary to satisfy the requirements of the Confrontation Clause. Bourjaily, 483 U.S. at 183-184.

Text Message Sent to the Defendant

Here, during the time period of the conspiracy, an unknown member of the conspiracy sent him a text message on July 29, 2009, the day after Salah Osman Ahmed entered a guilty plea in a public courtroom. The text message stated (without correcting grammar or punctuation): "Ahmed Slah or qanchir pleade guilty and he told them we used to hav secret meetings but he didnt tell the place and the guys thats wat he called the people he was with he didnt say names he said we collected money And flew to dubai and and from ther he went to somalia and he said that fought with ethiopian." As with other communications, a text message to the defendant from an unknown person can be admissible if "the very content of the text messages establishes by a preponderance of the evidence that the sender was a coconspirator." United States v. Engler, 521 F.3d 965, 973 (8th Cir. 2008) (upholding admission of text message from unknown conspirator before execution of warrant based on the content of the message).

E. Statements to Show Knowledge or Explain Conduct

The government expects to call FBI fingerprint examiner Shelley Sine. She will testify that she brought the "known" fingerprint card of Shirwa Ahmed to the autopsy conducted upon the body of Shirwa Ahmed on November 26, 2008. She will testify that she brought only his fingerprint card because she had information that the body was likely Shirwa Ahmed. The government will not

offer this testimony for the truth of the matter; rather, to explain why she brought only Shirwa Ahmed's "known" prints to the autopsy.

Statements are not hearsay if they are introduced to show the effect of a listener's conduct, or establish "knowledge" on the part of a listener. United States v. Roberts, 676 F.2d 1185, 1187-88 (8th Cir. 1982), cert. denied, 459 U.S. 855 (1982).

F. Refreshing Recollection and Past Recollection Recorded

A witness may not remember details of events that occurred. Witnesses experiencing a difficulty to recall information may have their recollection refreshed by any material; however, such materials are not themselves admitted into evidence. Fed. R. Evid. 612.

Additionally, a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly, is admissible as an exception to the hearsay rule. Fed. R. Evid. 803(5). Such record may be read into evidence but may not itself be received into evidence. Id.

G. Scope of Cross-Examination

A witness's use of an illegal drug is not a permissible ground for cross examination, as it does not bear on the

credibility of the witness. The Eighth Circuit has held that "illegal drug use or transactions, without more, do not show untruthfulness." Crimm v. Mo. Pac. R.R., 750 F.2d 703, 707-08 (8th Cir. 1984)(quoting United States v. Hastings, 577 F.2d 38, 41-42 (8th Cir. 1978).

The scope of a cross-examination is within the discretion of the trial court. Fed. R. Evid. 611(b). Rule 611 requires the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Id. The scope of cross-examination does not extend to matters that are irrelevant, or as to which the relevance is substantially outweighed by unfair prejudice. Fed. R. Evid. 402, 403.

H. Cross-Examination of a Defendant

A defendant who testifies at trial waives his right against self-incrimination and subjects himself to cross-examination concerning all matters reasonably related to the subject matter of his testimony. Mitchell v. United States, 526 U.S. 314, 321 (1999); Hendrickson v. Norris, 224 F.3d 748, 751 (8th Cir. 2000)

(witness, having waived fifth amendment right at prior trial, could be cross-examined with prior testimony from that trial). Also, if a defendant testifies, "his credibility may be impeached and his testimony assailed like that of any other witness." Brown v. United States, 356 U.S. 148, 154-55 (1958).

I Character Witnesses

As a general rule, character witnesses called by the defendant may not testify about specific acts demonstrating a particular trait or other information acquired only by personal observation and interaction with the defendant; the witness must summarize the reputation or opinion of the defendant as known in the community. Fed. R. Evid. 405(a); Michelson v. United States, 335 U.S. 469, 477 (1948). On cross-examination of a defendant's character witness, however, the government may inquire into specific instances of defendant's past conduct relevant to the character trait at issue. Fed. R. Evid. 405(a).

In particular, a defendant's character witnesses may be cross-examined about their knowledge of the defendant's past crimes, wrongful acts, and arrests. Michelson, 335 U.S. at 479, 481 n.18. The only prerequisites are (1) that there be a good faith basis that the incidents inquired about occurred and (2) that the incidents are relevant to the character trait at issue. United States v. McCollom, 664 F.2d 56, 58 (5th Cir. 1981); United States v. Bright, 588 F.2d 504, 512 (5th Cir. 1979).

J. Defendant's Lawful Conduct

Other than testimony from character witnesses fitting within the narrow confines of Federal Rules of Evidences Rule 404(a)(1) and 405(a), evidence offered by defendant of his lawfulness or good conduct is not admissible.

"A defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on [other] specific occasions." United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990). Evidence of the defendant's other lawful behavior is irrelevant because lawful acts do not prove an absence of unlawful acts, including those unlawful acts alleged in the indictment. See, e.g., United States v. Winograd, 656 F.2d 279, 284 (7th Cir. 1981) ("[T]he district judge correctly refused to admit the evidence on this basis because evidence that [the defendant] engaged in certain legal trades is generally irrelevant to the issue of whether he knew of other illegal trades.") (citing United States v. Dobbs, 506 F.2d 445, 447 (5th Cir. 1975)). Moreover, such evidence is improper propensity evidence and may be excluded under Rule 404. United States v. Heidecke, 900 F.2d 1155, 1162 (7th Cir. 1990) ("Proof that a defendant acted lawfully on other occasions is not necessarily proof that he acted lawfully on the occasion alleged in the indictment.") (citing United States v. Burke, 781 F.2d 1234, 1243 (7th Cir. 1985); Herzog v. United States, 226 F.2d 561, 565 (9th Cir. 1955)); United States v. Williams, 205 F.3d 23, 34 (2d

Cir. 2000) (affirming district court's decision to exclude evidence that the defendant made two innocent trips to Jamaica because such evidence was irrelevant to the question of whether the defendant's trip to Jamaica at issue involved illegal drug activity); United States v. Santos, 65 F. Supp.2d 802, 845-846 (N.D. Ill. 1999) (excluding evidence of specific acts of lawful conduct and rejecting defendant's argument that such evidence was admissible on the grounds that it generally contradicted the government's theory of what occurred).

Evidence admitted pursuant to Rule 404(a) is limited to only the "pertinent" character traits of the defendant. Absent a direct showing that certain character traits are pertinent to the facts and issues in this case, a defendant must be prohibited from offering any specific character traits in his defense. In addition, evidence admitted pursuant to Rule 405(a) is limited to a description of the subject's reputation or to a brief statement of opinion, without support from specific instances of conduct. See Advisory Committee Notes to Rule 405. To permit evidence of specific lawful conduct or good acts would be to eviscerate the carefully drafted limitations of Rules 404 and 405.

Accordingly, all evidence of the defendant's lawfulness or good conduct, except evidence offered strictly in accord with the limitations of Rules 404(a) and 405(a), should be barred.

K. Lay Witness Opinion

Opinion testimony of lay witnesses is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or to the determination of a fact in issue. Federal Rule of Evidence 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Moreover, statements are not hearsay if they are introduced to show the effect of a listener's conduct, or establish "knowledge" on the part of a listener. United States v. Roberts, 676 F.2d 1185, 1187-88 (8th Cir. 1982), cert. denied, 459 U.S. 855 (1982).

L. Expert Testimony

If specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. An expert's opinion may be based on hearsay or facts not in evidence, where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703.

The government expects to the following expert witnesses to testify at trial:

(1) Fingerprint examiner Shelley Sine who will describe the results of the fingerprint examination conducted on the body of Shirwa Ahmed;

(2) Forensic scientist Rhonda Craig who will testify regarding the DNA examinations she conducted in this case;

(3) Medical examiner Dr. (MAJ) Philip Berran, M.D. who will describe the autopsy he performed on the body of Shirwa Ahmed;

(4) ATF Special Agent Martin Siebenaler will provide his opinion that an AK-47, the weapon possessed by the defendant's conspirators, is a firearm under federal law;

(5) Terrorism expert Evan Kohlmann will testify about the political situation in Somalia from 1993 to 2008 and describe the chaotic political situation and the rise of fundamentalist Islamic political groups to include the Islamic Courts Union and al Shabaab and the response of the international community, to include Ethiopia and the African Union. To that end, Mr. Kohlmann will testify to some degree about the structure and leadership of al Shabaab and can identify for the jury several key leaders, members, and associates of al Shabaab who were encountered by the defendant's conspirators in Somalia. Mr. Kohlmann may testify about individuals associated with al Shabaab. In addition, Mr. Kohlmann will testify to the call to jihad that went out across the world in response to the presence of Ethiopian and African Union forces in Somalia and provide some background on the jihad-inspired

migration of young men to fight in foreign countries such as Somalia. He will testify to the videos released by al Shabaab for propaganda purposes to include the two videos that the government will seek to admit at trial: (1) "No Peace Without Islam" and (2) "The Ambush at Bardale."

Mr. Kohlmann will also provide expert testimony regarding the travel of men from Western countries to foreign countries in order to fight jihad. This testimony will include a discussion of the support networks, to include both financial and logistics support, the various travel routes into Somalia, and the methodologies employed by individuals leaving Western countries to fight jihad. Mr. Kohlmann will testify that he is familiar with the lecture entitled the "Constants on the Path of Jihad" by Anwar al-Awlaki.

(6) FBI SA Edward Knapp will testify about his opinion regarding the circumstances surrounding the death of Shirwa Ahmed.

M. Video Evidence

Courts have also allowed video evidence in other trials dealing with terrorism in order to help the jury understand motive and intent. See United States v. Abu-Jihaad, 630 F.3d 102, 133-34 (2d Cir. 2010)(allowing a violent jihadi video to be shown that did not depict the defendant nor his coconspirators); United States v. Stewart, 590 F.3d 93, 132-33 (2d Cir. 2009)(allowing a propaganda video featuring Osama bin Laden inciting violence into evidence). The mere fact that videos and other materials found on websites and

are widely available to the world online, does not make them irrelevant in a particular case. See United States v. Abdi, 498 F.Supp.2d 1048, 1072 (S.D. Ohio 2007)(finding jihadi images accessed by defendant were highly relevant to motive, intent and conspiracy); United States v. Kassir, No. 04-CR-356(JFK) at 7-8 (S.D.N.Y. Sept. 11, 2009)(finding that pictures of bin Laden and al-Qaeda sayings found on defendant's computer are admissible because they help establish that defendant knew al-Qaeda to be a terrorist organization); United States v. Khan, 309 F.Supp.2d 789, 815 (E.D. Va. 2007) (denying defendant's claim of ignorance of group's violent mission because materials indicating support of violence were widely available on the internet).

Here, the United States intends to admit two videos in which the defendant's conspirators are present.[1] Both videos reflect conduct that is plainly within the scope of the conspiracy.

i. Training Camp Video

The United States intends to admit a video of the activities at the training camp in Southern Somalia. A witness at trial will testify that he was present when the video was filmed and that it accurately depicts things that he saw, heard or experienced. In addition, Mr. Kohlmann will testify that the video is widely-

[1] Transcripts containing English language translations of foreign language spoken on the videos will be provided to the Court, parties, and jury at trial.

available over the internet and contains propaganda for al Shabaab, and he will identify some of the individuals depicted in the video.

ii. Ambush At Bardale Video

The government intends to admit a video of the Ambush at Bardale in which the defendant's conspirators effectuate the object of the conspiracy, that is, they carry out operations to kill Ethiopian solders walking along a road near Bardale, Somalia. Here, again, the government intends to call a witness who was present when the video was filmed and can describe what is depicted in the video. Mr. Kohlmann will testify that the video is available over the internet and contains propaganda for al Shabaab. He will also identify some of the individuals depicted in the video.

N. Audio Recordings

The government also expects to admit evidence that contains voice recordings in a foreign language. When doing so, English language transcripts will be provided to the Court, the defendant, and the jury.

In addition, the government intends to admit excerpts of an audio recording of a lecture of Anwar al-Awlaki entitled "Constants on the Path of Jihad." The government expects to elicit testimony at trial that the defendant advised his conspirators before they left for Somalia to download and listen to the lecture, which at least one of the conspirators did. Al-Awlaki reads during portions

of the lecture and then translates for the listener into English. The government is not attempting to admit the Arabic portions before they are translated by al-Awlaki, as there will be no evidence that the defendant or his conspirators understood Arabic.

O. Summary Testimony and Charts

Summary evidence is properly admitted when (1) the charts fairly summarize voluminous trial evidence, (2) they assist the jury in understanding testimony already introduced, and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary. United States v. Spires, 628 F.3d 1049, 1052-1053 (8th Cir. 2011) (defendant in drug prosecution challenged admission of summary charts of cell phone records because chart contained speculative conclusions as to who made and received certain calls; court finds any error in admission of summary charts was harmless). Summaries may include assumptions and conclusions, so long as they are based upon evidence in the record. Id.

Here, the United States intends to admit a summary of toll records. Toll records clearly qualify as business records under Rule 803(6). See United States v. Wills, 346 F.3d 476, 490 (4th Cir.2003) (cell phone records admissible under business records exception). Toll records are the type of record for which a summary under Rule 1006 is appropriate. See United States v. Gaitan-Acevedo, 148 F.3d 577, 587 (6th Cir. 1998) (“At trial, [the

agent] explained to the district court's satisfaction, his method of loading and compiling the information from computer toll records into the summary exhibit.”). The government has provided the defendant with notice of its intent to use a summary exhibit. The government intends to authenticate the underlying records pursuant to Rule 902(11). The records and certifications are available for the defendant’s inspection upon request.

The government intends to admit an organization chart under Rules 611(a) and 1006 that summarizes those involved in the conspiracy, the names used by members of the conspiracy, and the corresponding travel dates on which seven members of the conspiracy left the United States for Somalia in the fall of 2007. The evidence underlying the summary charts will be admitted into evidence through documents, such as the DMV records and TECS travel records; witnesses will testify about the names used by conspirators and their travel to Somalia.

Rule 611 allows the Court to exercise its discretion to admit charts into evidence to “make the interrogation and presentation effective for the ascertainment of the truth.” See Fed. R. Evid. 611(a). Here, the jurors will hear testimony that many of the witnesses shared a common name. To illustrate the potential for confusion, the government would cite the following: Shirwa Ahmed, Salah Ahmed, and Ahmed Ali Omar were members of the conspiracy as were Abdifatah Yusuf Isse and Abdiweli Yassin Isse; once the men

arrived in Somalia, Ahmed Ali Omar chose the name "Mustafa"; Abdifatah Isse chose "Omar"; Kamal Hassan chose "Abshir," and Khalid Abshir chose "Abdullah." Thus, a reference during a witness's testimony to "Ahmed," "Isse," or "Abshir" may cause confusion. To assist the jury in following the testimony, the government respectfully requests permission to admit a summary chart early in the case that summarizes the names, nicknames and travel dates of the conspirators in the fall of 2007 and includes photographs. See United States v. Pinto, 850 F.2d 927, 935 (2d Cir. 1988) (stating "[t]he government's summaries included the names of identified participants in the telephone conversations, the numbers used by conspirators and the addresses of several conspirators' residences, where calls were placed or received" and finding no error in allowing the charts to be admitted into evidence).

P. Authentication and Identification

Federal Rule of Evidence 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The introducing party "need only demonstrate a rational basis for its claim that the evidence is what the proponent asserts it to be." United States v. Coohey, 11 F.3d 97, 99 (8th Cir. 1993).

Q. TECS Records

The Treasury Enforcement Communication System ("TECS") is a multi-agency, limited-access law-enforcement computerized database that contains, among other things, information pertaining to international border crossings. The Ninth Circuit has held that TECS is admissible at trial as a public record pursuant to Rule 803(8). United States v. Orozco, 590 F.2d 789, 793 (9th Cir. 1979).

Here, the United States intends to admit into evidence TECS records to assist the jury in understanding the departure dates and any return dates of men who traveled to Somalia, which does not require the testimony of an expert. See United States v. Oceguerra-Aguirre, 70 Fed. Appx. 473, 478 (9th Cir. 2003) ("Oceguerra directly questioned the reliability of the TECS evidence, challenging the manner in which the information was recorded. Agent Morgan merely laid a proper foundation for the recording of the data when he testified from his personal knowledge as a custodian of the TECS records. This was not undisclosed expert testimony.").

R. Judicial Notice

Federal Rule of Evidence 201(d) provides that "(a) court shall take judicial notice if requested by a party and supplied with the necessary information." A judicially noticed fact must be one not subject to reasonable dispute in that it is (1) either generally

known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. F.R.E. 201(b). The government would ask the court to take judicial notice of the following four facts:

1. The organization known as al-Shabaab was designated a Foreign Terrorist Organization by the U.S. Department of State on February 26, 2008;

2. That Ramadan occurred between approximately September 13, 2007, and October 12, 2007.

3. The Muslim pilgrimage known as "Hajj" occurred between December 17, 2007 and December 20, 2007.

4. The following international country codes are assigned to the following countries:
   a. United Arab Emirates: 971
   b. Saudi Arabia: 966
   c. Somalia: 952

S. Use of a Firearm as a Demonstrative Exhibit

As the Court is aware, the government is required to prove that the defendant's conspirators possessed a firearm beyond a reasonable doubt in order prove Counts Four, Five and Six. To that end, the government respectfully requests permission to allow a Special Agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives to bring an AK-47 as a demonstrative exhibit at trial. Demonstrative exhibits, or replicas, may be used at trial in the "broad discretion" of the trial judge. United States v. McIntosh, 23 F.3d 1454, 1456 (8th Cir. 1994).

The government expects this demonstrative exhibit will be identified as similar in type to the firearms possessed by the defendant's conspirators at trial based on photographs shown to the defendant's conspirators by the ATF agent. The government further expects that ATF Special Agent Martin Siebenaler will testify that the demonstrative exhibit, an AK-47, is a firearm as defined by U.S. law. The firearm will, of course, be a demonstrative exhibit only and would not be present in the courtroom at any time other than during the testimony of Agent Sienbenaler. Further, the firearm will be rendered "safe" in an appropriate manner with a firearm locking device.

VII. CONCLUSION

The government is ready to begin trial on July 19, 2011.

Dated: July 14, 2011

Respectfully Submitted,

B. TODD JONES
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