IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 1:25-CR-143
	)	
MOHAMMAD SHARIFULLAH	)	
	)	
Defendant.	)	

MR. SHARIFULLAH'S MEMORANDUM IN SUPPORT OF HIS POSITION REGARDING DISPUTED JURY INSTRUCTIONS

Mohammad Sharifullah, by counsel, submits the following memorandum regarding the Defendant's Position Regarding Disputed Jury Instructions in accordance with this Court's Scheduling Order. *See* ECF No. 29. The parties have jointly filed proposed Jury Instructions for which there is no disagreement. *See* ECF No. 180. The government has offered 16 additional instructions to which Mr. Sharifullah objects, and Mr. Sharifullah has provided 19 instructions which the government has opposed.[1] ECF Nos. 181, 182. In support of his position, Mr. Sharifullah states as follows:

ARGUMENT -GENERAL INSTRUCTIONS

I. G-1 (Inference of Regularity)

The government has tendered an "Inference of Regularity" instruction. This instruction is inapposite to any material issue of fact at issue. The "presumption of regularity" shifts the burden to the opposing party to establish proof of irregular or illegal conduct. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting in context of selective prosecution discovery request

[1] The defense offers support for some of Mr. Sharifullah's disputed instructions, but not all, but maintains that all additional instructions should be filed.

presumption supports lawfulness of prosecutorial discretion). The government seeks to introduce this instruction to alleviate its burden to authenticate evidence at trial. But the presumption does not allow the government to shift the burden as to authentication, and it does not apply to hearsay in business records.

Authentication required to establish that an item of evidence is relevant pursuant to Federal Rule of Evidence 901 is governed by Rule 104(b). *United States v. Branch*, 970 F.2d 1368, 1370-71 (4th Cir. 1992). Rule 104(b) states that "[w]hen the relevance of evidence depends on whether a fact exists,"—such as whether wire-twist evidence was originally obtained as a component of an improvised bomb—"proof must be introduced sufficient to support a finding that the fact does exist." Fed. Rule Evid. 104(b).

Hearsay statements contained within a business record "are not evidence of information the records custodian knows nothing about." *United States v. Browne*, 834 F.3d 403, 411 (3d Cir. 2016); *accord United States v. Pendergrass*, 47 F.3d 1166, 1995 WL 56673 at *5 (4th Cir. 1995). If "the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is to no avail." Fed. R. Evid. 803(6), advisory comm. n. (1972 proposed rule). Because the government seeks to use this instruction to shift the burden of authentication to the defense, contrary to the Federal Rules of Evidence, the Court should reject this instruction.

II. G-2 vs. D-2 (Presumption of Innocence)

The parties have submitted competing instructions that differ solely with respect to the third paragraph, highlighted in **bold** below. The third paragraph of the government's tendered "Presumption of Innocence – Burden of Proof" instruction, reads as follows:

> **It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt.**

The defense has provided the following third paragraph to the instruction on "Presumption of Innocence, Burden of Proof, and Reasonable Doubt":

> **To establish a defendant's guilt, the government's evidence must exclude any reasonable doubt as to the defendant's innocence. A "reasonable doubt" may arise either from the evidence or from a lack of evidence. You must remember that a defendant is never to be convicted on mere suspicion or conjecture.**

First, it is important to note that the Fourth Circuit has "emphasize[d]" that it "doesn't forbid such instructions [on reasonable doubt]." *United States v. Smith*, 2023 WL 1433639, at *1 n.2 (4th Cir. Feb. 1, 2023); *accord United States v. Walton*, 207 F.3d 694, 696-97 (4th Cir. 2000) (en banc). Second, "[w]hile judges and lawyers are familiar with the reasonable doubt standard, the words 'beyond a reasonable doubt' are not self-defining for jurors." *Victor v. Nebraska*, 511 U. S. 1, 26 (1994) (Ginsburg, J., concurring in part and concurring in judgment).

The government's instruction gives no meaning to the term "reasonable doubt." But "[t]he purpose of jury instructions is to instruct the jury clearly regarding the law to be applied in the case." *United States v. Lewis*, 53 F.3d 29, 34 (4th Cir. 1995). Although such an instruction on reasonable doubt is not always required, "in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension." *Hopt v. People*, 120 U.S. 430, 440 (1887).

The defendant's instruction provides an explanation of the term that is well grounded in case law. *See, e.g.*, *Victor*, 511 U.S. at 20 (affirming instruction that distinguished reasonable doubt from "doubt arising from mere possibility, from bare imagination, or from fanciful conjecture"); *Jackson v. Virginia*, 443 U.S. 307, 315, 317 n.9 (1979) (reasonable doubt can arise "from the evidence or lack of evidence[,]" and standard requires jury unanimously "to reach a subjective

state of near certitude of the guilt of the accused"); *Hopt*, 120 U.S. at 440-41 ("The evidence must satisfy the judgment of the jurors as to the guilt of the defendant, so as to exclude any other reasonable conclusion."); *United States v. Reives*, 15 F.3d 42, 43 (4th Cir. 1994) (affirming instruction that reasonable doubt "may arise either from the evidence or from a lack of evidence'); *Moore v. United States*, 271 F.2d 564, 568 (4th Cir. 1959) ("evidence creating a mere probability of guilt or giving rise to a mere suspicion or conjecture of guilt is not sufficient"). For this reason, we ask the Court to give the defense instruction.

III. G-3 v. D-3 & D-7 (Witness Credibility Generally, Defendant as Witness)

The parties have submitted competing instructions from O'Malley and Sand. While both sets of instructions accurately state the law on witness credibility generally, Mr. Sharifullah's instruction provides a clearer explanation to the jury regarding the context that can be considered when assessing the witnesses' testimony.

IV. G-4 vs. D-6 (Prior Inconsistent Statements)

The defense takes issue only with the second paragraph in the government's proposed instruction, which is as follows:

> **If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you may think it deserves.**

The defense's proposed instruction, with removal of the second paragraph[2] should be adopted by this Court because the defendant's instruction clearly explains the law as to the import of impeachment admitted under Federal Rule of Evidence 613.

The second (bolded) paragraph in the government's instruction is a "*falsus in uno, falsus in omnibus*" instruction, which means that a witness who is not credible as to one fact may be disbelieved as to other facts. Although there is some tension among the circuits, the Fourth Circuit has stated that "[c]ourts disfavor such an instruction and prefer general instructions on witness credibility." *United States v. Jackson*, 69 F. App'x 630, 632 (4th Cir. 2003). It also seems particularly inapt in this case given the nature of the evidence and the anticipated testimony at trial.

IV. G-5 (False Exculpatory Statements)

The Court should not give this instruction because it would be confusing and is premised on specific false statements that relate to the specific crime at issue rather than an overarching inchoate conspiracy. The Fourth Circuit has approved this instruction when a defendant made specific false exculpatory statements in relation to the charged offense. *See United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981) (affirming instruction in case where defendant convicted of stealing a money order falsely denied forging an endorsement on the money order, denied selling it, and denied knowing the owner). But "general denials of guilt later contradicted are not considered exculpatory statements" that would "justif[y] the giving of this jury instruction." *Id.*

In this case, the government apparently seeks this instruction based upon Mr. Sharifullah's failure to admit to building explosives. *See* ECF 111 at 6 (government argument that defendant

[2] On reflection, the second paragraph of Mr. Sharifullah's proposed instruction ("If a witness subsequently makes statements out of court that are….") is unnecessarily confusing and thus can be admitted.

minimized role because he "made no statements regarding building explosive devices"). In this context, the instruction is not warranted for four reasons. First, even if Mr. Sharifullah's DNA was found on wire twists, the government has identified no qualified expert in forensic biological evidence or DNA transfer who could testify to the significance of DNA on such evidence. Second, Mr. Sharifullah was never confronted with the specific question of whether his DNA would be present on bomb components. Third, even if he had specifically denied that his DNA would appear on bomb components, that denial would not necessarily reflect consciousness of guilt given the ease with which DNA can be transferred from surface to surface. Fourth, none of this has anything to do with consciousness of guilt of the charge in this case, an overarching conspiracy to provide material support to ISIS-K between 2016 and 2025.

V. G-6 (Disjunctive Proof)

The defense has no specific objection to his instruction as such, but it may be less confusing if, instead of giving this instruction, the Court specifically explains that proof may be in the disjunctive when the language of the indictment frames alternative means conjunctively.

VI. G-7 v. D-11 (Statute Defining Offense Charged)

The most significant difference is that the defense instruction states "The statute also provides for an enhancement if the death of any person results from the offense charged."

The parties also slightly differ on the description of the statutory mens rea. The defense instruction states: "To violate this paragraph, a person must have knowledge that the organization is an organization designated as a terrorist organization through a process established by law, or that the organization has engaged or engages in terrorist activity as defined by law."

The government's description states: "To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined [by law]), that

the organization has engaged or engages in terrorist activity (as defined [by law]) …, or that the organization has engaged in or engages in terrorism (as defined [by law] ….

Both parties have sought to reflect that 18 U.S.C. § 2339B requires proof of knowledge of DTO status, or that an organization engages in conduct defined in INA § 212(a)(3)(B), or engages in conduct defined in the Foreign Relations Authorization Act, § 140(d)(2).

As discussed more fully with respect to Government Instruction 13, in which the government has reproduced significant portions of the Federal Code, these fine distinctions will be entirely lost on the jury. We respectfully request that the Court simplify these instructions as much as possible.

VII. G-8 vs. D-12 (Elements of Charged Offense)

The defense's proposed instruction is superior for three reasons. First, the government's instruction includes the disjunctive "found in the United States" language from § 2339B(d)(1)(C), which is legally inapplicable here. Mr. Sharifullah was arrested abroad and brought to this district by the FBI; he was not "found" for purposes of the statute.

Second, the government describes the first element as two or more persons entering an "agreement that had as its objective providing material support or resources to a foreign terrorist organization," which makes ambiguous who was supposed to be the provider. The defense's version makes clear that the objective is for the defendant to provide material support. *See* Indictment, ECF 18 at 5 (charging that defendant "did conspire to provide 'material support or resources' … namely, personnel (including himself) and services, to a foreign terrorist organization."). Relatedly, the government's instruction says that no proof "that the defendant acted with specific intent to further the terrorist activities of the organization" is required. While true, that statement is confusing because conspiracy is a specific intent crime. *See United States v.*

Al Kassar, 660 F.3d 108, 126 (2d Cir. 2011) (conspiracy under 18 U.S.C. § 2332g); *see also Ocasio v. United States*, 578 U.S. 282, 288 (2016) (general conspiracy).

Third, and most importantly, the defense instruction correctly frames the death-resulting enhancement. The government's version asks the jury only whether "a victim's death resulted from the commission of this offense" which is described in the language of § 2339A, "provid[ing] material support or resources to terrorists." The defense instruction instead requires that death "proximately resulted from the material support the defendant conspired to provide" — properly tethering causation to the specific material support at issue and ensuring the jury focuses on whether Mr. Sharifullah's own conspiratorial conduct was a proximate cause of death, not simply whether death occurred generally. That limitation is essential to an accurate description of the enhancement.

VIII. G-9 v. D-13 (Existence of an Agreement)

Mr. Sharifullah's instruction, although similar to the government's, is preferable because it clearly identifies the charged conspiracy as one "to commit the crime of providing material support to a foreign terrorist group." The government's instruction, by contrast, is less clear because it identifies the charged conspiracy to "violate some law by means of some common plan or course of action as alleged in Counts One." The proposed language does not clearly instruct that the charged conspiracy in Count One is limited to an agreement for Mr. Sharifullah to provide material support to a foreign terrorist organization.

IX. G-10 v. D-14 (Membership)

The only difference between the two proposed instructions is the bold paragraph in the defendant's instruction:

You may only convict the defendant of a count if you find that the government has proven beyond a reasonable doubt that the defendant was a member of the particular conspiracy charged in the indictment.

The defense inadvertently failed to provide that this language comes from a portion of Judge Widener's opinion that was joined by both other judges on the panel, Judge King and Judge Duncan, in *United States v. Sullivan*, 455 F.3d 248, 259 (4th Cir. 2006) (Widener, J., concurring and dissenting). In that case, the district court instructed the jury that the government was required to prove that the defendant "was a member of the conspiracy charged in the indictment. And if they don't prove that, then you got to find him not guilty, even if you find that he was a member of some other conspiracy not charged in the indictment…. [p]roof that a Defendant was a member of some other conspiracy is not enough to convict unless the Government also proves beyond a reasonable doubt that the Defendant was a member of the conspiracy charged in the indictment." *Id.* Although the language in bold is not in the standard O'Malley instruction, it is a correct statement of the law. *See Kotteakos v. United States*, 328 U.S. 750, 772 (1946); *United States v. Goss*, 329 F.2d 180, 184 (4th Cir. 1964).

X. G-11 v. D-16 (Acts and Declarations)

On review, the parties' instructions are materially similar. However, the defense does not believe that this instruction should be provided in this case given the absence of any identified conspirators whose statements would be admissible pursuant to Federal Rule of Evidence 801(d)(2)(E).

XI. G-12 (Success of Conspiracy Immaterial)

This instruction is confusing in this case given the government's allegation that a death resulted from the charged offense. While the government is not required to prove that a substantive object of the conspiracy was accomplished, it is required to prove that a death resulted from the

charged conspiracy in order for that statutory enhancement to apply. Given the nature of this charge, and the other instructions which specify what the government needs to prove in order to establish guilt on the charged conspiracy to provide material support, the Court should not provide this instruction.

XII. G-13 (Designated Foreign Terrorist Organization, Terrorist Activity, Terrorism).

This instruction is unnecessarily lengthy, confusing, and includes definitions that have no bearing in this case, such as that terrorist activity includes the use of biological and chemical agents and nuclear weapons. In a jury instruction for lay jurors, there is little reason to distinguish between terrorist activity as defined in the INA from terrorism as defined in another statute. How about:

> The term "foreign terrorist organization" has a particular meaning under this statute. In order for an organization to qualify as a "foreign terrorist organization," the organization must have been designated as such by the Secretary of State through a process established by law.
>
> At all times relevant to the indictment, ISIS-K was so designated by the Secretary of State.
>
> The statute also applies if a person knowingly provides material support to an organization that he knows has engaged or engages in unlawful sabotage, assassination, bombings, or politically-motivated violence against civilians.

This language seeks to summarize the definitions of "terrorism" in 22 U.S.C.S. § 2656f(d)(2) and "terrorist activity" in 8 U.S.C.S. § 1182(a)(3)(B)(iii).

XIII. G-14 v. D-18 (Material Support)

The defense's proposed instruction is preferable because it does what a jury instruction is supposed to do: neutrally state the law. The defense instruction quotes the statutory definition of "material support or resources" directly from 18 U.S.C. § 2339A(b)(1), without editorializing or commentary, and leaves the application of that definition to the jury. The government's instruction,

by contrast, departs from the statute's text in several ways that are argumentative rather than definitional.

XIV. G-15 (Deliberate Ignorance)

This instruction is inappropriate given that Mr. Sharifullah is charged with conspiracy, which is a specific intent offense (even though a substantive violation of § 2339B does not require proof of specific intent). *See Ocasio v. United States*, 578 U.S. 282, 288 (2016) (general conspiracy requires specific intent). Because the element of conspiracy requires specific intent to join the conspiracy, the deliberate ignorance instruction is inappropriate. *See United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990) ("One cannot be deliberately ignorant (in order to convict for the knowledge element) and still have the purpose of engaging in illegal drug activities. Therefore the instruction was inappropriate for an offense which requires a specific purpose by the defendant."); *Pierre v. Att'y Gen. of U.S.*, 528 F.3d 180, 188 (3d Cir. 2008) (noting that "specific intent cannot be proven through evidence of willful blindness"); *United States v. Samaria*, 239 F.3d 228, 239-40 (2d Cir. 2001) (noting that deliberate ignorance could not establish defendant's specific intent to participate in the crimes charged"), *abrogated on other grounds by United States v. Huezo*, 546 F.3d 174 n.1 (2d Cir. 2008).

Moreover, the Fourth Circuit has warned that a "deliberate ignorance" instruction is a highly disfavored instruction given its potential for abuse:

> The willful blindness instruction is[]… an unstable rule, because judges are apt to forget its very limited scope. A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is willful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

United States v. Ruhe, 191 F.3d 376, 384–85 (4th Cir. 1999) (citing *United States v. Jewell,* 532 F.2d 697 (9th Cir.1976)). Accordingly, the Fourth Circuit has held that "the deliberate blindness instruction is only proper in rare circumstances." *Id.* at 385; *see also United States v. Farrell*, 921 F.3d 116, 145 (4th Cir. 2019) ("[w]e have observed that a proposed instruction concerning the willful blindness doctrine should be handled with caution.").

XV. G-16 v. D-19 (Resulting in Death and Verdict Form)

The difference between the parties instructions will likely be resolved by the Court's resolution of the pending motion for advanced ruling on whether proof of proximate cause is required for the death resulting element of § 2339B. And, while the competing verdict forms are similar, the defense submits that there is no need to list every single alleged victim of the HKIA attack, and that simply asking the jury whether at least one death of a U.S. servicemember or Afghan civilian resulted from the alleged conspiracy is preferable.

XVI. D-1 (Pretrial Publicity)

There was a substantial amount of pretrial publicity when Mr. Sharifullah was brought to the United States *See* ECF No.116. Indeed, the President specifically commented on the case in a Joint Address to Congress on March 4, 2025,[3] and other politicians likewise commented on the case, including Senator Deb Fischer.[4] Under these circumstances, an instruction about pretrial publicity is warranted.

XVII. D-4 (Absence of a Witness)

The government is uniquely in the position of adducing testimony from witnesses who have personal knowledge of Mr. Sharifullah and his family's treatment while in the custody of

[3] https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-4,
[4] *See,* https://www.fischer.senate.gov/public/index.cfm/2025/3/delivering-justice-for-the-abbey-gate-bombing-victims

ISI. Indeed, in many other cases involving defendants who were held by foreign partners overseas, the government obtained testimony from foreign nationals with personal knowledge of the defendant's treatment. The government's failure to present such witnesses in this case is a notable exception. Accordingly, this instruction is warranted in this case.

XVIII. D-5 (Witness Credibility – Bias and Hostility)

This is a standard instruction that advises the jury how to assess witnesses who may be biased. In particular, this instruction may be warranted with respect to the Polish journalist, in light of her previous testimony. The Court should provide this instruction.

uisition, this instruction should be provided if the evidence is admitted at trial.

XIX. D-10 (Prior Statement by Defendant, Voluntariness)

Even if the Court admits Mr. Sharifullah's confession, the question of "voluntariness must be submitted to the jury." *United States v. Buie*, 538 F.2d 545, 547 (4th Cir. 1976). Accordingly, in accordance with 18 U.S.C. § 3501(a), the Court should admit "relevant evidence on the issue of voluntariness" and provide this instruction.

XX. D-15 (Single or Multiple Conspiracies)

This instruction reflects the standard language from 2 O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, § 31:09, and should be given to the jury given the nature of the charged conspiracy in this case. The government charged Mr. Sharifullah with a single, overarching conspiracy spanning from approximately 2016 through March 2025 encompassing geographically and temporally distinct attacks: the June 20, 2016 attack on Nepalese embassy guards in Kabul, Afghanistan; the August 26, 2021 attack at Hamid Karzai International Airport ("HKIA") in Kabul; and the March 22, 2024 attack at Crocus City Hall in Moscow, Russia. The

existence of multiple conspiracies as opposed to a single conspiracy is typically a jury question, and should be given in this case.

XXI. D-17 (Proximate Cause)

This instruction may be incorporated into a specific instruction in connection with the death resulting instruction, depending on the Court's resolution of the pending motion.

CONCLUSION

Based on the reasons set forth above, Mr. Sharifullah respectfully asks that this Court enter an order (1) rejecting the Government's Proposed Instructions accepting Mr. Sharifullah's Proposed Instructions.

Respectfully submitted,
MUHAMMAD SHARIFULLAH

By counsel,

_____/s/_____

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