IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Criminal No. JFM-10-0798**
	*	
ANTONIO BENJAMIN MARTINEZ,	*	
a/k/a Muhammad Hussain	*	

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GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS INDICTMENT AND SUPPRESS STATEMENTS AND SEIZED EVIDENCE

The United States of America, by and through its counsel, Rod J. Rosenstein, United States Attorney for the District of Maryland, and Christine Manuelian, Assistant United States Attorney for said District, hereby responds as follows to the motions filed by the defendant in the above-captioned matter to dismiss the indictment and suppress post-arrest statements and seized evidence.

The defendant has challenged the government's case on three grounds. The motions underlying two of these claims – one for discovery of information relevant to the confidential source and the undercover agent, and the other for suppression of evidence obtained from the defendant's Facebook account – were submitted to the Court under seal, and the government's response to those arguments is contained in separate filings also submitted under seal. The defendant's third claim is his allegation, without basis, that the government acted in bad faith by failing to record the initial interactions between him and the confidential source, and thus, the indictment must be dismissed and all seized evidence and post-arrest statements suppressed. The main premise behind all of the defendant's claims is that without the requested discovery (identified in his sealed motion), and as a result of the government's alleged misdeeds, the defendant has been deprived of due process and the ability to present a complete defense.

I. Summary of Evidence

A. Initial Conversations with the Confidential Source

The confidential source initially struck up a conversation with the defendant over Facebook. Facebook is an online social networking website that allows users to connect and interact with each over the Internet. Users maintain a "profile page" where they can post their thoughts, opinions, comments and activities. User can choose to limit access to their posts or make them available to the public. The defendant's profile page with his posts and comments was publicly accessible.[1]

The confidential source first communicated with the defendant via Facebook after seeing some of the defendant's public postings espousing his extremist views. For example, on September 29, 2010, the defendant publicly stated on his Facebook page: "The sword is cummin the reign of oppression is about 2 cease inshallah ta'ala YA muslimeen! don't execept the free world we are slaves of the Most High and never forget it!" On October 1, 2010, he made another public posting: "Any 1 who opposes ALLAH and HIS Prophet PEACE.Be.upon.Him I hate u with all my heart." Upon seeing these postings, the confidential source recognized the defendant's Facebook picture as someone he had seen at a mosque they both attended. As a result, on October 8, 2010, he alerted the FBI about the defendant's public Facebook postings. The confidential source was told by the FBI that he had permission to speak to the defendant and should continue to report on any activity he observed.

On October 10, 2010, the confidential source communicated with the defendant over the

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[1] The defendant's public postings formed the basis, in part, for the search warrants that were issued by Magistrate Judge Susan K. Gauvey on November 10, 2010, and January 24, 2011, authorizing seizure of all records, both public and private, associated with the defendant's Facebook account.

latter's Facebook account. The defendant told the confidential source that he wanted to go to "Pakistan or Afghanistan (a country that struggle for the sake of allah swt.)." During the conversation, the confidential source told the defendant that he recognized the defendant's Facebook photo and believed that they had met at the mosque during Ramadan. The defendant asked the confidential source where he planned to be for prayers later that day. When the confidential source indicated he was free around 5:30PM, the defendant told him to meet him at the mosque. The confidential source and the defendant saw each other at the mosque later that afternoon to attend prayers. The defendant indicated that he wanted to get together with the confidential source to talk. There was no other substantive conversation.[2]

On October 14, 2010, the defendant and the confidential source communicated again over the latter's Facebook account. The confidential source apologized for having missed seeing the defendant at the mosque since their exchange on October 10. The defendant said it was his dream to be among the ranks of the mujahideen and that he hoped Allah would open a door for him because all he thinks about is jihad.[3] On October 17, 2011, the defendant publicly posted the following on his Facebook page: "I love Sheikh Anwar al Awalki for the sake of ALLAH. A real insperation for the Ummah, I dont care if he is on the terrorist list! May ALLAH give him Kire ameen."

On October 22, 2010, after running into each other at the mosque, the defendant and the confidential source met to talk. During this meeting, the defendant spoke about his thoughts of attacking Army recruiting centers or anything military. The defendant indicated that if after such

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[2] The confidential source advised an FBI agent about this brief meeting and the October 10 chat via e-mail the next morning. This information has been provided to defense counsel.

[3] The confidential source advised an FBI agent about this communication later that day via e-mail and provided a copy of the chat. This information was provided to defense counsel.

attacks the military continued to kill Muslim brothers and sisters, the operation could be expanded to include killing U.S. Army personnel where they lived. He stated that jihad was not only in Afghanistan or Pakistan, but also in the United States. Because the defendant believed his own criminal record precluded him from purchasing a gun, he suggested that the confidential source purchase a weapon for him and indicated that he had a rifle in mind that he had seen at a store in Maryland.

On October 25, 2010, the defendant and the confidential source had a brief meeting at a gas station, at which time the defendant talked again about attacking military installations. On October 27, 2010, an FBI agent was able to fully debrief the confidential source about the defendant's statements. Later that day, after identifying the defendant by his alias, Muhammad Hussain, the agent obtained permission to formally open an investigation of the defendant.

The next day, October 28, 2010, the confidential source advised the FBI agent that the defendant wanted to meet with him that evening. At that point, the agent had not yet received authority to record the defendant's conversations. Since the agent had no information with regard to the defendant's capabilities to act on his plans, he permitted the confidential source to meet with the defendant as a matter of public safety to continue to learn as much as possible about the defendant and his intentions. In addition, the agent did not want to risk postponing a meeting that the defendant had requested and possibly jeopardize the level of trust that the defendant was beginning to exhibit towards the confidential source.

It was during his meeting with the confidential source the night of October 28 that the defendant identified the Armed Forces Career Center on Route 40 in Catonsville, Maryland, as his intended target. He also spoke about the possibility of using gas or propane tanks sold by a "brother"

he knew at a gas station. At one point during this meeting, the defendant and the confidential source were joined by another individual. The defendant spoke to this individual in general terms about his beliefs regarding jihad in an effort to obtain the individual's support. This individual was not interested and they parted ways.

The events surrounding the confidential source's intial interactions with the defendant and their unrecorded meetings of October 22, 25 and 28 were documented in contemporaneous e-mail exchanges between the confidential source and the FBI agent. The agent also wrote a report on October 27 that summarized the information he received from the confidential source earlier that day about the October 22 meeting with the defendant. In addition, the confidential source made contemporaneous notes of these early interactions. Defense counsel have been provided copies of all of these items in discovery.

B. Recorded Conversations

On October 29, 2010, the FBI agent, now the case agent, received formal authority to begin recording conversations between the defendant and the confidential source. Later that evening, the confidential source met with the defendant and engaged in the first of numerous recorded conversations.[4] Many of the intentions and beliefs expressed by the defendant during this first recorded meeting were similar, if not identical, to the intentions and beliefs he expressed to the

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[4] All conversations after October 29 involving the defendant, the confidential source and/or the undercover agent were recorded with three exceptions. The first was a brief, unplanned encounter between the confidential source and the defendant on October 30, 2010, after the defendant contacted the confidential source asking for a ride. The discussion was very general. Again, the confidential source made contemporaneous notes of the meeting, copies of which have been provided to defense counsel. The other two instances involved meetings between the confidential source and the defendant on November 1 and 27 that were being recorded; however, the recordings failed due to technical malfunctions.

confidential source during their unrecorded encounters.

During the recorded meeting on October 29, the defendant had the confidential source drive him to the Armed Forces Career Center on Route 40 and indicated that he wanted to attack the location in about a month. The defendant said he knew of someone who could provide them with weapons, and detailed how he could get on the roof, go inside, and wait for "them" (the military members) to arrive, and that he and the confidential source would then "shoot everybody in the place."[5] He stated, "before I became Muslim, I was about to join the military ... So I've been in there."[6] He discussed burning the building down to "instill fear" and to send a message that "[w]hoever joins the military, they will be killed." He also stated his belief that the Quran counselled that one must "fight those who fight against you," meaning the military.

During the course of the discussion, the defendant said he thought they could use a propane tank for the operation, but he and the confidential source would have to learn how to "rig it." He went on to state:

> Like I wish I knew how to make a car bomb ... Did you see all those cars that they had out there [referring to the recruiting center] ... As soon as they start the car [the defendant made a noise like something is blowing up and laughed] ... If you stuff the exhaust with something, like a sock or something ... the car ... it'll run, but ... all the toxic fumes will come into the inside of the car .... so if they start to drive ... they will breathe in all those fumes ... and they gonna like slowly but surely die in the car ... Just some ideas, you know what I'm saying?

Also during this meeting, the defendant referred to Anwar al-Aulaqi as his "beloved sheikh"

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[5] Quoted statements are taken from the draft transcripts of the recorded conversations, which have been provided to defense counsel in discovery.

[6] On December 4, 2009, the defendant applied at the recruiting station on Route 40 to join the Army, but after discussions with the recruiting officer, decided to postpone going forward with his application.

and described al-Aulaqi's background.[7] He made reference to "Muhammad Omar Bakri," whom he said was calling for jihad.[8] He also outlined possible getaway plans:

> If we get away unharmed ... not locked up ... we'll have to go some place. We can't just go back to our houses ... I was thinkin' that we set up some type of camp ... somewhere in the woods ... like ... the Chechyan brothers ... they was fightin' against the Russians ....when they was in the woods they had built a masjid ... maybe we could do somethin' like that ... we could take refuge in the masjid ... If they come to the masjid, we'll shoot 'em ... shoot at 'em until we die ... Just get the message across 'cause maybe by our actions, brothers will rise up, Insha'Allah ... But it's not just all up to me. You come up with some ideas, as well, because it's not just me.

The defendant mentioned that he knew of someone who was interested in "goin' for jihad," was "very knowledgeable," and would be a "good asset."

Over the course of the weeks that followed, the defendant spoke to the confidential source about his efforts to recruit at least five other people to join in his plan, including an individual whom he said had the ability to obtain weapons. The defendant met with three of these individuals while in the company of the confidential source (including the individual on October 28 referenced above). None of these individuals elected to join with the defendant. In fact, one of these individuals expressly attempted to dissuade the defendant from committing jihad. Thereafter, the defendant agreed to meet the confidential source's "Afghani brother," whom the confidential source represented would be interested in assisting the defendant. The "Afghani brother" was, in fact, an undercover FBI agent, who was introduced to the defendant on November 16 and embraced by him

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[7] On July 16, 2010, the U.S. Department of the Treasury designated Anwar al-Aulaqi a "specially designated global terrorist." Al-Aulaqi has been identified as one of the leaders of Al-Qaeda in the Arabian Peninsula (AQAP), which is on the State Department's list of designated foreign terrorist organizations.

[8] The defendat appeared to be referring to Omar Bakri Muhammad, who is the former leader of the radical Islamist group Al-Muhajiroun. His videos are available on the Internet.

as the answer to his "prayers." After discussions with the undercover agent, the defendant determined that it was wiser to use a vehicle bomb, rather than shooting soldiers face-to-face as he initially intended, as a bomb would prevent him from getting caught in a "shoot-out" with the police and allow him to continue his violent activities both here and abroad.

In the two months or so leading up to the defendant's arrest, as set forth in the recorded conversations, the defendant spoke at length to both the confidential source and the undercover agent about his anger towards America, his belief that Muslims were being unjustly targeted and killed by the American military, and his desire to commit jihad in this country to send a message that all American soldiers would be killed so long as the United States continued its "war" against Islam. For example, early in the investigation, the defendant expressed the following intentions and beliefs in recorded meetings with the confidential source:

> November 3 - "...we gonna fight against them..until they stop the oppression...fight the disbelievers until there is no more oppression and the religion is only for Allah...I don't want to talk about this no more, man. I just wanna do it...each and every Muslim in this country... knows that America is at war with Islam and they're not doing anything about it...no one is stepping up to do anything...We have to be the ones to pull that trigger. Send that message."
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> November 4 (to a potential recuirt) - "The first thing...I was gonna try to build some type of place for shelter in the wilderness somewhere...I learned how to make...cocktails [bombs]...We was gonna hit places like recruiting centers...just to send a message...that the Muslims in America are not gonna lay down while you fight against Islam and Muslims overseas...we wanted more brothers...bring more ideas to the table...how to give lectures and put 'em on YouTube and ...tell people about the truth about what's goin' on first before we attack"
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> November 4 (after being rebuffed by the potential recruit) - "I wanna still do it...In my heart, it's in there, man. It'll never go away...I believe that if the prophecy of Allah...was here... in my heart, I believe that it will be jihad...Allah against these kufars [non-believers]. That is what I believe...I have a desire to die in the cause of

> Allah...And if I go to hell for that, then I'll be happy...we blow one recruiting center up...People ain't gonna be able to...get recruited at that one...Then we hit another one, then we hit another one...there's no more recruiting centers in...Maryland. So nobody bein' recruited into the Army in Maryland. So we stop one thing then we can start on somethin' else...And just keep it movin'...So what...if it's just a little...recruiting center?...it show that the Muslims are united...are one in this war...one in this effort...I just want us to do the right thing...What he [the potential recruit] said didn't stop me. It really made me upset and disappointed, but not like...maybe I shouldn't consider it...No, man. This...is what we gotta do. Insha'Allah. Insha'Allah...Do it for jihad." (On November 7, 2010, the defendant posted a link on his public Facebook page to a Dutch YouTube video, entitled "Nasheed: Al-Qawlu Sawarim," depicting mujahideen attacking western coalition forces. The defendant's attached comment stated, "ALLAHUAKBAR!!!!!!!!," which translates to "God is great.")
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> November 10 - "...we gonna hit 'em where it hurts...We not gonna be like everybody else that chooses to bomb train stations...We are gonna go...to their stations, to their bases, to everywhere...to everywhere a soldier is. Every soldier that we see in uniform will be killed on the spot, Insha'Allah...They will be killed until they stop waging war against...Islam...We won't stop, Insha'Allah, until they kill us or they lock us up...this is for Allah...And maybe if...our brothers see that we are not killing innocent civilians, that we're fighting against the Army, we're fighting against the police, their military, their government, then more brothers 'll probably join...and maybe other brothers in other States will have courage to form their own mujahideen...Until we set foot in Jerusalem and liberate Palestine, we won't stop."

Throughout the investigation, the defendant was given multiple opportunities by both the confidential source and the undercover agent to put a stop to his planned operation, but he repeatedly expressed his desire to go forward with the attack. On November 26, 2010, the FBI arrested a young Somali man in Oregon who sought to detonate a bomb in Portland that had been provided to him by undercover FBI agents. On November 27, 2010, the defendant voiced his concerns to the confidential source about the situation in Oregon noting that he did not want the same fate to befall him and the source. However, after giving some thought to the situation, he told the confidential source the next day that he was "ready to move forward" with the attack. He reiterated his

commitment during a meeting with the undercover agent on December 2, 2010, at which time he directed the undercover agent to start preparing a vehicle bomb. Later that evening, the defendant went with the confidential source to the recruiting center and drew a diagram indicating what he believed to be the best location to park the vehicle containing the bomb.

On December 7, 2010, the defendant met with the undercover agent to learn how to operate the detonation device and inspect the vehicle to be used and the bomb components contained therein. At that time he showed the undercover agent the diagram he had drawn of the recruiting center indicating where the vehicle bomb should be parked next to the building. He also test drove the vehicle to become comfortable driving it, since he had not driven a car in a long time.

During the evening of December 7, the defendant sent the following message to the confidential source via Facebook:[9]

> In the name of Allah most gracious most merciful, praise be to Him and may He send peace and blessings to our beloved prophet Muhammad pbuh his sahaba and family Alhamdudillah! My beloved brother Alla'tala has chosen us for implementation of His deen and iam proud of sharing this time with u bcuz this is a life long journey, a journey that will require patience, sincertiy, unity, and most importanly the reliance on Allah. O my beloved brother I love u for the sake of Allah you are of me and I am of you and with the help of Allah we will be victorious inshallah may He accept us. Ameen.

On December 8, 2010, the defendant met with the confidential source in a public parking lot near the recruiting center. While waiting for the undercover agent to arrive with the vehicle containing the (inert) bomb, the defendant had the confidential source record him making a statement that he and other mujahideen would continue to fight against the oppressors until those who waged

[9] As noted in an e-mail exchange with the case agent, the confidential source did not see this message until after the defendant's arrest.

war with Islam stopped their actions. After the undercover agent arrived and gave him the keys to the vehicle, the defendant proceeded to arm the (inert) bomb in the parking lot. He then drove the vehicle to the location, parked it in front of the building, and left with the confidential source in the latter's vehicle to go to a vantage point near the center. Upon receiving a phone call from the undercover agent confirming that at least six soldiers were in the building, the defendant attempted to detonate the device, at which time he was arrested.[10]

C. Defendant's Post-Arrest Statements

Following a Miranda advisement shortly after his arrest, the defendant executed a written waiver of his rights and made a full confession to the interviewing agents, including admitting that the attack was his own idea and that he had come up with it two to three months prior to meeting the confidential source. In conformity with general FBI policy, the defendant's interview was not recorded. During the interview, the defendant made the following statements, many of which were consistent with his prior recorded statements:

- he felt he had been arrested because he was a Muslim doing what his religion had taught him to do;

- he went through with the attack because he was doing it for the right cause;

- no one influenced him towards jihad and local Imams tried to talk him out of it - he listened to online scholars, like al-Aulaqi, who spoke about the duty to wage jihad - he accepted the form of jihad that meant being passionate about armed struggle in the path of Allah;

- he was a mujahid - a "holy warrior;"

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[10] The defendant's actions on December 7 and 8 were videotaped and recorded by law enforcement on multiple media.

- he was always suspicious that this was a setup, but when he smelled the fumes from the bomb, he thought maybe it was real, and when he got into the SUV he felt certain it was the real thing;

- he parked the SUV in front of the building to give the explosion more "umph," expecting that it would level the front where the soldiers were and insure that they died;
- he suspected that the "brother" (the undercover agent) was an "agent," but he was Muslim so he trusted him and gave him the benefit of the doubt;

- he thought his act would have two possible outcomes - either he got locked up or he succeeded;

- he said he had never been in the recruiting center and did not consider attacking other military installations [this statement was contrary to the defendant's recorded statements and Army records documenting his visit to the facility in December 2009];

- he acknowledged that he wanted to be a "shaheed" [a martyr], but felt he was "not at that level yet;"

- initially he wanted to use guns in the attack and could have gotten one at Walmart [the defendant apparently smiled when he said this];

- he tried to round up other "brothers" to participate, but they did not feel the same way about jihad;[11]

- he said he would accept the consequences of his actions.

II. Defense of Entrapment

The defendant alleges in his motions that because the government having acted in bad faith and engaged in outrageous conduct, he has been deprived of evidence that would have established he was entrapped into committing the charged offenses. An entrapment defense has two prongs -

[11] This information is not only concsistent the defendant's actions and statements during the investigation, it is also consistent with evidence obtained by the government subsequent to the defendant's arrest that months before he had met with the confidential source, he had approached other individuals about his desire to attack U.S. military personnel.

government inducement and lack of predisposition on the defendant's part to commit the crime. *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). The initial burden is on the defendant to present, at trial, proof by a preponderance of the evidence that the government induced him into committing the crime. The burden then shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *United States v. Sligh*, 142 F.3d 761, 762-63 (4th Cir. 1998).

Government inducement "is a term of art: it involves elements of governmental overreaching and conduct sufficiently excessive to implant a criminal design in the mind of an otherwise innocent party." *United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993). "Solicitation, by contrast, is the provision of an opportunity to commit a criminal act." *Id*. at 778-79. "A showing of mere government solicitation is insufficient to merit an entrapment instruction because solicitation by itself is not the kind of conduct that would persuade an otherwise innocent person to commit a crime, or that would be so inducive to a reasonably firm person as likely to displace mens rea." *Sligh*, 142 F.3d at 763 (quotations and citation omitted). *See United States v. Ramos*, 462 F.3d 329, 334-35 (4th Cir. 2006) (finding no inducement where defendant was willing participant in firearms sales as demonstrated by fact that after first refusing to part with his own personal weapon, he volunteered to acquire a different firearm).

In order to establish predisposition, the government must prove that the defendant's decision to commit the crime was the product of his own disposition and not the result of government persuasion. *United States v. Sarihifard*, 155 F.3d 301, 308 (4th Cir. 1998). The focus of the predisposition inquiry is on whether the defendant possessed the necessary state of mind to commit the crime when he was initially approached. The government is not required to prove that it had a

reasonable suspicion of wrongdoing before conducting an undercover investigation. *United States v. Blevins*, 960 F.2d 1252, 1257-1258 (4th Cir. 1992) (finding sufficient evidence of predisposition based on the defendant's ready response to the inducement).

"Predisposition is not limited only to crimes 'specifically contemplated' by the defendant prior to government suggestion, but encompasses decisions to commit the crime that is 'the product of [the defendant's] own preference and not the product of government persuasion.'" *Ramos*, 462 F.3d at 334-335 (citing *United States v. Hsu*, 364 F.3d 192, 198 (4th Cir. 2004)). "'[W]hen government agents merely offer an opportunity to commit the crime and the defendant promptly avails himself of that opportunity, an entrapment instruction is not warranted.'" *Ramos*, 462 F.3d at 335 (quoting *United States v. Harrison*, 37 F.3d 133, 136 (4th Cir. 1994).

Evidence indicating predisposition can include a variety of factors such as prior experience and knowledge in the illicit activity, ready acceptance of the government's offer, or initiating the illegal transaction. *United States v. Squillacote*, 221 F.3d 542, 567 (4th Cir. 2000) (finding predisposition based on defendant's prior training and knowledge in intelligence activities, ready acceptance of the government's offer, and evidence that defendant began engaging in the illicit activities prior to coming into contact with the government agent); *United States v. Jones*, 976 F.2d 176, 181 (4th Cir. 1992) (finding predisposition where defendant initially responded positively to the invitation to commit the crime, consistently pursued the plan during further contacts with the government, and ultimately committed the offenses).

In this case, it was the defendant who proposed the idea of attacking a military recruiting center, shooting at military members, and using propane as an explosive. These proposals were noted by the confidential source in the notes he made of the unrecorded interactions. These

proposals were then reiterated by the defendant, of his own volition, during his initial recorded conversation with the confidential source on October 29, 2010, and then again throughout the course of the investigation in recorded conversations with both the confidential source and the undercover agent.

In the initial October 29 recording, the defendant spoke in a manner that clearly indicated his own personal mindset and not the suggestions or statements of others. Moreover, the conversation reflects that the defendant had previously spoken to the confidential source about these topics, thereby corroborating what the confidential source indicated had happened in the unrecorded encounters. While both the confidential source and the undercover agent pretended to share the defendant's views in their interactions with him, the defendant's criminal intent was clear from the start. There is no indication in the recorded conversations that agreement with the defendant's intent by the confidential source and the undercover agent induced the defendant to do something beyond his stated objectives. To the contrary, the defendant repeatedly made statements throughout the investigation that reflected that the attack on the recruiting center was his and his alone, which he subsequently confirmed in his post-arrest Mirandized statement. Moreover, when given multiple opportunites to back out of the operation, including the day before the actual event, the defendant continually chose to press ahead, even in the face of another individual being arrested in Oregon under similar circumstances. At one point the defendant explicitly told the confidential source that he was not being pushed into going forward with the attack saying, "I came to you about this, brother." Finally, the defendant's statements were consistent with the beliefs expressed by him in his public postings on Facebook, and to other individuals months before he discussed his intentions with the confidential source. In light of this evidence, the defendant has no basis upon which to

argue in his motions that the government may have induced him into committing the charge offense.

III. Allegations of Bad Faith and Outrageous Government Conduct as Basis to Dismiss Indictment and Suppress Evidence

The defendant claims, without basis, that the government consciously elected not to record his initial interactions with the confidential source in order to avoid creating evidence that would independently verify that he had been induced into committing the charged offenses and was not predisposed to commit them. In order to give credence to this argument, the Court would have to ignore the overwhelming recorded evidence of the defendant's predisposition and guilty state of mind:

– expressed by him, absent threats or coercion, in his first recorded conversation on October 29, during which the defendant corroborated his prior unrecorded statements to the confidential source;

– articulated by him continually, absent threats or coercion, during the 68 subsequent recorded meetings/phone conversations he had with the confidential source and undercover agent;

– displayed by him on videotape by, among other things, showing the undercover agent his diagram of the best place to park the vehicle bomb for maximum impact, arming the bomb prior to driving it to the recruiting center, showing excitement at the prospect of fulfilling his wish to harm military personnel as he was driving the vehicle bomb to the recruiting center, and, as the confidential source videotaped him at his request, talking directly to the camera about how he and other mujahideen would continue to fight against the oppressors until those who waged war with Islam stopped their actions;

– communicated by him in his own Facebook comments and postings, including comments

made prior to talking to the confidential source; and

– demonstrated by his repeated recorded rejections of the multiple opportunities presented to him to not go forward with the bombing, including his specific acknowledgment that the operation was his idea by stating to the confidential source, "I came to you about this, brother."

This evidence, in and of itself, belies any claim that recording the defendant's initial conversations with the confidential source might have provided evidence establishing that the defendant's will was overborne and he was unduly coerced into conceiving of, and committing, an attack on a military recruiting center. Moreover, the recordings, which include video throughout the investigation of the defendant exhibiting the demeanor of a person in control of his thoughts and his surroundings, are not the only evidence of the defendant's predisposition. In his post-Mirandized confession, taken after receipt of a valid waiver of rights, the defendant reiterated many of the statements he made and beliefs he expressed during the recorded meetings and phone conversations. More significantly, the defendant's postings and comments on his public Facebook page were consistent with the extremist views he expressed to the confidential source and the undercover agent.

For example, the defendant's Facebook "Friends" included two radical Islamist websites affiliated with a radical group called Revolution Muslim: Call to Islam - a United Kingdom-based online movement dedicated to the implementation of Sharia law worldwide (as stated on its website); and Authentic Tawheed - a pro-jihad group providing links on its website to materials put out by known terrorists such as Anwar al-Aulaqi.[12] On October 15, 2010, before the defendant met the

[12] On November 3, 2010, surveillance agents observed the defendant at two public locations accessing the Internet. While on the Internet, the defendant was observed viewing the Revolution Muslim website, watching a video of Osama bin Laden speaking, and watching multiple jihadist training camp-type video clips.

confidential source in person and revealed his desire to commit jihad by attacking the military, he posted the following public comment on his Facebook page: "Do you really want to spend your entire lives praying for longevity? WE were born in order to die." This posting generated a public response from one of the defendant's Facebook Friends who sought, unsuccessfully, to remind the defendant about the "balance in Islam" and that "only Allah knows when each persons number is up." On or about November 12, 2010, the defendant provided a link on his Facebook page to a YouTube video, entitled "Winds of Paradise Nasheed," that depicted mujahideen riding on horseback waving the black and white banner of al Qaeda. Along with the link, the defendant posted the following comment: "Shaheed is the goal and the women of paradise is waiting. So why are we delaying o brothers? let's meet our wives in the paradise inshallah and reap the fruits of the 1 who struggles for Allah and His deen."

A. The Defendant Cannot Establish the Exercise of Bad Faith by the Government

It is against this evidentiary backdrop that the Court must weigh the defendant's claim that his right to due process and his ability to put on a complete defense have been infringed by the failure to record his initial interactions with the confidential source. In *Arizona v. Younglood*, 488 U.S. 51, 109 S.Ct.333 (1988), the Supreme Court refused to extend the 5th Amendment right to due process to impose on law enforcement "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id*. at 58. Rather, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process," nor is due process denied if the police fail to use a particular investigative tool. *Id*. at 58-59. The Court noted that "the presence or absence of bad faith ... must necessarily turn on the

police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id*. at 56 n.1. Mere negligence on the part of the police to preserve evidence does not equate with bad faith. *Id*. at 58. *Accord Holden v. Legursky*, 16 F.3d 57, 60 (4th Cir. 1994).

The lost evidence in *Youngblood* consisted of the sexual assault victim's clothing, which the police failed to refrigerate and properly preserve for testing. As Justice Stevens aptly noted in his concurring opinion, the police

> had at least as great an interest in preserving the evidence as did the person later accused of the crime. Indeed, at that time it was more likely that the evidence would have been useful to the police – who were still conducting an investigation – and to the prosecutor – who would later bear the burden of establishing guilt beyond a reasonable doubt – than to the defendant.

Id. at 59 (Stevens, J., concurring). *See California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984) (breathylzer test results of suspected drunk drivers not suppressed because no due process violation in State's failure to retain underlying breath samples; it was more likely that the samples would have been inculpatory rather than exculpatory, there was no indication of concerted effort to destroy the evidence, and the defendant had alternative means in which to impeach the credibility of the test results).

The defendant points to nothing that establishes a conscious effort by the FBI to avoid the creation of potentially exculpatory evidence, or even negligence in failing to preserve such evidence. Nor does the defendant indicate what might have happened or have been said in the unrecorded interactions that would be dispositive of his alleged entrapment by the confidential source. Rather, the defendant tries to avoid meeting his burden of establishing bad faith by arguing in the reverse. He posits, based on his self-serving claim that he was not predisposed to commit the crime (avoiding any mention of the overwhelming evidence to the contrary), that the recordings of those initial

interactions might have provided exculpatory evidence which would then allegedly establish that the FBI acted in bad faith. This argument not only does not meet the requirements set forth in *Youngblood*, it also runs afoul of the very cases the defendant relies on his motion.

For example, in *United States v. Brimage*, 115 F.3d 73 (1st Cir. 1997), the defendant was approached by a confidential informant and asked to sell guns and participate in a robbery. None of these conversations were recorded or monitored, nor was the ensuing sting operation recorded, though it was monitored via a transmitter worn by the informant. The defendant claimed the failure to record was proof of the government's bad faith effort to avoid the creation or preservation of exculpatory evidence. The First Circuit disagreed, pointing to a number of factors that the defendant did not mention in his motion. They noted that "absent a good deal more" evidence, the fact that the individuals who could testify about what happened during the unrecorded encounters were people either on the government payroll (agents/informant), or defendants who would have had to waive their 5th Amendment right, was not "in itself enough to raise due process concerns." *Id*. at 77. Second, counsel was able to argue to the jury the issue of the government's failure to record, thus effectively challenging the credibility of the informant and the agents. *Id*. Finally, the agent's articulated reasons for not recording – protection of the confidential informant, the perceived inability to use the recording in state court, the existence of other evidence that could be relied on to convict the defendants – though characterized by the district court as "lame," were not inconsistent and not evidence of bad faith. *Id*. at 77-78. *See also United States v. Chaudhry*, 850 F.2d 851, 857 (1st Cir. 1988) (no evidence of constitutional infirmity where defendant claimed selective recording by DEA of some, but fewer than all, phone calls between him and informant; proper venue for defendant's "challenge to the completeness of the picture" was in questioning and arguing before

the jury the import of the missing recordings).

The defendant points to the failure to record his post-arrest Mirandized confession as evidence that the government engaged in selective recording throughout the investigation and thus, acted in bad faith in not recording the early encounters with the confidential source. This assertion is nonsensical for a number of reasons. First, the courts have uniformly held that the recording of statements made during custodial interrogations is not constitutionally required. *See, e.g., United States v. Meadows*, 571 F.3d 131, 147 (1st Cir. 2009); *United States v. Tykarsky*, 466 F.3d 458, 477 (3rd Cir. 2006); *United States v. Williams*, 429 F.3d 767, 772 (8th Cir. 2005); *United States v. Cardenas*, 410 F.3d 287, 296 (5th Cir. 2005); *United States v. Montgomery*, 390 F.3d 1013, 1017 (7th Cir. 2004). Generally, the FBI does not record defendant interviews. In its unpublished opinion in *United States v. Garcia*, 271 Fed.Appx 347 (4th Cir. 2008), the Fourth Circuit, relying on *Younglood*, held that the decision by the FBI not to record the defendant's post-arrest interview did not violate due process, did not infringe on the defendant's ability to present a complete defense, and did not constitute bad faith on the part of the FBI.. *Id*. at 351.

Second, this is not a case where agents were engaging in a pattern of recording some conversations and then not recording others. Beginning on October 29, 2010, the day after the defendant identified a target against which he intended to commit a violent act, and continuing up through the date of the defendant's arrest on December 8, 2010, every conversation the defendant had with the confidential source and the undercover agent, with the exception of the brief meeting on October 30, was recorded or attempted to be recorded.

Finally, the defendant asserts that he had "no reputation for being a terrorist," "no prior record of committing any terrorist-related crime," and "was not engaged in an already existing course

of terrorist conduct." Def. Motion to Dismiss at 12-13. He claims these "facts" are dispositive of his claim that recordings of the intial encounters with the confidential source may have contained evidence of the defendant's reluctance to commit the offense, and established that he did so only after being "repeatedly badgered" by the confidential source. Def. Motion at 13. These allegations are neither factually borne out by the evidence contained in the first recording on October 29 (or the recordings that followed), nor legally supported by the prevailing law on entrapment.

The Fourth Circuit has repeatedly held that a finding of specific prior contemplation of criminal conduct is not required in order to determine that the defendant was predisposed to commit the charged crime. *United States v. Osborne*, 935 F.2d 32, 37 (4th Cir. 1991) (citing *United States v. Hunt*, 749 F.2d 1078, 1085 (4th Cir. 1984)). "[T]he fact that a defendant has not previously committed any related crime is not proof of lack of predisposition." *Id*. at 37-38 (citing *United States v. Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986). "Rather, predisposition is found from the defendant's ready response to the inducement offered. It is sufficient if the defendant is of a frame of mind such that, once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion." *Id*. at 38 (citing *Hunt*, 749 F.2d at 1085).

The defendant cannot meet his burden of establishing bad faith on the part of the government by simply asserting, without any supporting evidence, that he was not predisposed to commit the crime. The recordings in this case are replete with evidence of the defendant's predisposition to take action against perceived enemies of Islam. Where a defendant "is involved in a continuing relationship with ... government agents, his state of mind may ... be assessed by later events in the relationship bearing on his attitude prior to the initial opportunity for illegal conduct." *Hunt*, 749

F.2d at 1085-86. The defendant fails to artculate how the confidential source coerced, threatened or persuaded him into committing an offense he had no intention of committing, or that there was any reluctance or unreadiness on his part to go forward with the attack on the recruiting center. As the Fourth Circuit noted in *Osborne*, "an entrapment claim can only prevail where 'the Government's deception actually implants the criminal design in the mind of the defendant.'" 935 F.2d at 38 (quoting *United States v. Russell*, 411 U.S. 423, 436, 93 S.Ct. 1637 (1973)). *See also United States v. DeVore*, 423 F.2d 1069 (4th Cir. 1970) (defendant not entrapped by government agent posing as truck driver who sought to have defendant illegally prescribe drugs for him), and *United States v. Velasquez*, 802 F.2d 104 (4th Cir. 1986) (defendants not entrapped by government agent who phoned them over 30 times before they acquiesced to agent's suggestion that one defendant acquire drugs from the other). *See also United States v. Jones*, 976 F.2d 176, 181-82 (4th Cir. 1992) (no evidence of entrapment given defendant's ready response to invitation to commit the crime, consistent pursuit of criminal plan during further contacts with the government, and ultimate commission of the offense; failure to record or monitor informant's initial conversations with the defendant did not "shock the conscience" so as to rise to level of outrageous government conduct).

Moreover, as noted earlier, the defendant points to nothing that suggests or establishes a concerted effort by the government to avoid the creation of exculpatory evidence. For example, in the case of *Miller v. Vasquez*, 868 F.2d 1116 (9th Cir. 1988), cited in the defendant's motion, it was alleged that the government had acted in bad faith by failing to collect potentially exculpatory evidence. The record contained evidence that the investigating officer had referred to the defendant in derogatory terms and had intentionally failed to collect and preserve the assault victim's blood-stained jacket. In addition, the defendant alleged that the officer had attempted to dissuade witnesses

from testifying by advising them of his criminal history and indicating that their testimony would not exonerate him. The Ninth Circuit found that this evidence raised a colorable bad faith claim that the district court had failed to address in assessing the defendant's federal habeas petition and remanded the case for further review. *Id*. at 1121. In the instant case, no evidence exists that the FBI sought to intentionally prevent potentially exculpatory evidence from being created or preserved.

B. The Government's Conduct in This Case was Not Outrageous

The defendant also claims that the government's failure to record his initial interactions with the confidential source constituted "outrageous government conduct" that violated his right to due process. In *Russell, supra*, the Supreme Court suggested, in dicta, that a situation might arise in which the conduct of law enforcement agents "was so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-32. A pluraility of the Court subsequently sought to limit a possible defense on that basis by holding in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646 (1976), that entrapment was the only defense available to a defendant who actively participated with government agents in the commission of a crime. *Id*. at 490. Justice Powell, in his concurring opinion, refused to join the plurality in limiting a predisposed defendant's ability to raise a due process violation in certain circumstances. *Id*. at 494-95 (Powell, J., concurring).

The Fourth Circuit has since recognized the viability of the outrageous conduct doctrine, though it has not directly resolved the issue left open by the opinion in *Russell*. The Court has held however, that in order for an outrageous government conduct claim to rise to the level of a due process violation, it is not enough for the official conduct to be simply offensive, *United States v. Goodwin*, 854 F.2d 33, 37 (4th Cir. 1988); it must "shock the conscience of the court." *Osborne*, 935

F.2d at 36 (citation omitted). Regardless of whether the defendant, given the evidence of his predisposition, can legitimately raise an outrageous conduct claim, it is clear that he cannot substantiate a violation of due process based on the government's conduct in this case.

The burden is on the defendant to establish outrageous government conduct. *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). "The outrageous conduct defense ... is not intended to serve as a 'device to circumvent the predisposition test in the entrapment defense.'" *Id*. at 1521 n.4 (citation omitted). Fourth Circuit Judge Paul Niemeyer echoed this conclusion while a judge in this District in his opinion in *United States v. Steinhorn*, 739 F.Supp. 268 (D.Md. 1990). As Judge Niemeyer noted, the Supreme Court's consistent rejection of the "'objective view' of entrapment, which focuses on the government's conduct instead of the defendant's motives," *Id*. at 273 (citing *Russell*, 411 U.S. at 439-50), should not be permitted "'to reemerge cloaked as a due process defense.'" *Id*. (quoting *United States v. Jannotti*, 673 F.2d 578, 607-08 (3rd Cir. 1982)).

The defendant in *United States v. Daniel*, *supra*, raised an identical argument to the defendant in this case claiming that the government's reliance on a drug addict's tip and its failure to adequately record and preserve the initial conversations between the defendant (a physician), the informant and an undercover agent constituted outrageous conduct violative of due process. The Fourth Circuit disagreed, holding that the investigative techniques used in the case were "manifestly legal." In that case, the informant had introduced the undercover agent to the defendant for the purpose of unlawfully obtaining prescriptions for controlled substances. The first two meetings with the defendant, during which he unlawfully prescribed controlled substances to the informant and the undercover agent, were not recorded. It was not until the undercover agent's third meeting with the defendant, when the agent was certain he would not be examined by the defendant, that recording

began. Not only did the court determine that the government's conduct was not outrageous, they also agreed with the district court that the defendant had failed to meet his burden of production on the issue of entrapment. 3 F.3d at 778-79.

The defendant in the case of *United States v. Feekes*, 879 F.2d 1562 (7th Cir. 1989), alleged at trial that he had been entrapped by a government informant (his fellow prison inmate) into selling heroin. The jury rejected his defense and convicted him of conspiring to smuggle heroin into the prison and other related crimes. On appeal the defendant claimed that the government had engaged in outrageous conduct by having failed to record or monitor his conversations with the informant, thereby depriving him of the evidence of what was actually said during those encounters that would have supported his entrapment defense. The Seventh Circuit found that the government's decision not to utilize electronic eavesdropping devices on the inmate informant was not outrageous given the risks involved to the investigation and to the informant if the devices were discovered. *Id*. at 1565. The court also noted that the defendant's argument was premised on the unreliability of the informant, which was an issue for the jury to consider, and which was effectively exploited at trial through cross-examination of the informant and other witness testimony bearing on the informant's credibility. *Id*.

The government does not engage in outrageous conduct even if it initiates contact with a defendant. *Pedraza*, 27 F.3d at 1523. Moreover, it is permissible for the government to suggest the illegal activity, provide supplies and expertise, and act as both a supplier and buyer of illegal goods." *Id*. at 1521 (citation omitted). "Even substantial participation by a government agent does not necessarily amount to outrageous conduct." *Id*. at 1522 (quotation omitted).

In this case, it was the defendant who proposed the commission of the criminal act. That fact

is borne out by the defendant's recorded statements from October 29, 2010, to the date of his arrest on December 8, 2010, and corroborated by the mindset he expressed in his public Facebook postings and comments. "In order for the claim of outrageous government conduct to succeed, a government agent has to initate the criminal conduct with the goal of obtaining a conviction and must draw the defendant into the illegal activity to bring about that goal." *United States v. Pitt*, 193 F.3d 751, 761 (3rd Cir. 1999).

There is no evidence that the defendant was targeted by the FBI for the purpose of drawing him into comitting an offense for which he could be arrested and prosecuted. The defendant's only basis for his claim is his supposition that the government intentionally failed to record the initial encounters with the confidential source in order to avoid the creation of exculpatory evidence. Supposition is not sufficient to establish a due process violation, nor is the failure to record all undercover contact with a defendant proof of outrageous government conduct. *See Pedraza*, 27 F.3d at 1524 n. 6 (failure to record all calls with defendant not outrageous conduct as it did not induce defendant into committing the crime, nor is conclusory allegation that missing tapes may have contained evidence that would implicate the government and prove its outrageous conduct sufficient to establish the defense). *See also United States v. Baker*, 807 F.2d 424, 426 (5th Cir. 1986) (no outrageous conduct-due process violation based on conjecture that confidential informant "could have coerced" defendant, or because government failed to record many of the conversations between defendant and the confidential informant).

Finally, in *United States v. Jones*, 13 F.3d 100 (4th Cir. 1993), the defendant claimed that the government had no basis for targeting him as a potential source of drugs, the informant's "effort to befriend him with the sole purpose of determining whether or not he had an interest in drug activity

was outrageous." The Fourth Circuit disagreed and denied the defendant's motion to dismiss the indictment. The court held that: the use of the confidential informant did not offend any consitutional guarantees (noting the "significant national interest in keeping important public institutions free of illicit drug activity);" the informant had reason to suspect the defendant's involvement in illegal drugs and, in any event, the government did not need reasonable suspicion of wrongdoing before beginning its investigation; only after the defendant broached the issue of a drug transaction did the informant begin to plan a drug buy with him; and the defendant had made no particularized showing that the government's conduct "was of such a character as to violate general standards of fundamental fairness." *Id.* at 104.

Many of the same factors are evident in this case. The government has a significant national security interest in protecting its military and civilian population. Given the suspicions raised by the defendant's comments and postings on Facebook, it was not outrageous to allow the confidential source to pursue speaking with the defendant in order to learn more about his thoughts or intentions. Given how the case unfolded after that, the FBI's tempered and cautious response leading up to its first recording of October 29 did not violate any standards of fundamental fairness.

IV. Conclusion

The defendant is not entitled to an evidentiary hearing on his claims of government bad faith and outrageous conduct, as they are unsupported by sufficiently definite, specific, detailed and non-conjectural facts. *See United States v. Cranson*, 453 F.2d 123, 126 (4th Cir. 1971). The defendant has failed to articulate any basis upon which to establish bad faith or outrageous conduct on the part of the FBI in its handling of the investigation. Nor has he articulated how his ability to put on a complete defense, through cross-examination and other means, would be diminished or impaired.

He has also failed to articulate how recordings of the initial meetings with the confidential source might have contained exculpatory evidence that would support a defense that his state of mind was diametrically opposed to his prior public postings and subsequent recorded statements. *See United States v. Matthews*, 373 Fed.Appx. 386, 389-91 (4th Cir. 2010 (unpublished) (upholding findings of District of Maryland Judge Catherine Blake that defendant failed to show government acted in bad faith by destroying surveillance footage of his traffic stop where no evidence presented to judge, other than defendant's speculation, that footage would be exculpatory, or that government acted in bad faith, or that evidence might be potentially useful).[13]

Given the overwhelming evidence the defendant has chosen to ignore, it is evident that recordings of his initial interactions with the confidential source would have yielded inculpatory, not exculpatory, evidence that would have inured to the benefit of the government in proving its case. Clearly, the FBI chose to exercise a measured and deliberative approach in assessing the defendant and his true intent, while balancing the safety of the confidential source. By any view of the facts in this case, there is no other conclusion but that the FBI employed its investigative tools in an appropriate and timely manner without prejudice to the defendant's ability to challenge the confidential source's credibility at trial or put on a complete defense.[14]

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[13] Had the initial October 22 meeting been recorded, it is highly likely the government would be responding to an allegation that the government engaged in outrageous conduct by infringing on the defendant's First Amendment right of free speech, given the defendant's assertion in his motion that prior to meeting the confidential source, he, "like a myriad of other young Muslims," did nothing more than make "militant Islamic statements" (Def. Motion to Dismiss at 12-13).

[14] The government's suppression motions are primarily based on the same allegations of bad faith and outrageous conduct raised in his motion to dismiss the indictment. The searches of the residences of the defendant's mother and stepfather were executed pursuant to their signed written consents to search. The government had obtained search warrants for the residences, but

WHEREFORE, for the reasons stated herein, the government respectfully requests that the defendant's motions to dismiss the indictment and suppress his post-arrest statements and the seized physical evidence be denied.

Respectfully submitted,

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chose not execute them after obtaining consent. Neither the defendant's mother nor his stepfather were told of the existence of the warrants. Partial searches of the residences were conducted, consistent with the consent obtained, of the areas frequented by the defendant when he stayed at those locations. The law is well-settled that the voluntary consent of a joint occupant is valid against any co-occupant, thus permitting evidence obtained in a consensual search to be used against the co-occupant. *United States v. Matlock*, 415 U.S. 164, 169, 94 S.Ct. 988 (1974).