

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	Criminal Case No. 1:16-cr-162
v.)	
)	Hon. Gerald B. Lee
YUSUF ABDIRIZAK WEHELIE.)	
)	Sentencing Hearing: July 14, 2017
Defendant.)	

**POSITION OF THE UNITED STATES WITH RESPECT TO AN
UPWARD SENTENCING DEPARTURE**

The United States of America, by and through its attorneys, Dana Boente, United States Attorney for the Eastern District of Virginia, John T. Gibbs, Assistant United States Attorney, in accordance with the United States Sentencing Commission, Guidelines Manual (“U.S.S.G.” or the “Guidelines”) § 6A1.4, and the Federal Rules of Criminal Procedure 32(h), files this Position of the United States with Respect to an Upward Sentencing Departure for the defendant, Yusuf Wehelie. The United States submits that, given the facts of this case, an upward departure is warranted. This would be so whether the increase above the Guideline range is characterized as an upward departure, or a variance sentence. In either case, such an increase would be appropriate, and would be justified by the facts in this case.

I. FACTUAL BACKGROUND

The FBI’s investigation of the defendant was driven, in large part, by evidence collected that showed that the defendant aspired to travel overseas to join the Foreign Terrorist Organization, the Islamic State of Iraq and the Levant (“ISIL”). To further the investigation, an undercover FBI employee (“UCE-1”) was introduced to the defendant in December 2015. Over the course of just

a few meetings with UCE-1, the defendant, a convicted felon, expressed a willingness to help UCE-1 move firearms across state lines. On February 18, 2016, the defendant did just that by transporting four Cobray, M-11 9mm automatic pistols with can-style suppressors and eight 20 round magazines from Maryland into Virginia. This is the offense of conviction.¹

UCE-1 and the defendant also had discussions about jihad and potentially traveling overseas to ISIL. Long before the defendant came to the attention of the FBI, he had developed an interest in joining ISIL. In a recorded conversation on March 30, 2016, the defendant told UCE-1 that in 2013, Wehelie told his mother that he would travel to “Dar Ul Islam, Dar ul Iraq and sham” (Attachment A at p. 2). The defendant’s fascination with ISIL was at least in part based on their propensity for violence. For example, in February 2016, the defendant told UCE-1 that he supported ISIL because they told the truth. He further stated that ISIL showed their might like real Muslims and stated that they (meaning ISIL) would kill 100 people right in front of you and be proud of it. (Transcript of Detention Hearing Attached at p. 13).

During that same meeting on March 30, 2016, the defendant told UCE-1 that when he traveled overseas he would go straight to training and he expected to become a martyr and to escape the punishment of the grave. (Attachment B at p.p. 1-2). The defendant also asked if UCE-1 would assist him in traveling overseas. The defendant and the UCE watched an ISIL video together, and the defendant expressed a desire to travel overseas to help the cause. He said that he wanted to travel to Libya and join ISIL in Libya.

During the March 30, 2016 meeting, UCE-1 asked the defendant what he would do if he could not travel overseas. The defendant responded by laying out a very detailed plan for a domestic terrorist plot here in the United States. The defendant described how he would go about

¹ The maximum statutory penalty for a violation of 18 USC 922(g) is ten years in prison. The Presentence Report calculates the defendant’s guideline sentence at 37-46 months in prison.

attacking a US Armed Forces Recruiting Station. The defendant said he would visit a recruiting station and inquire about enlisting, all with the intention of getting the military personnel comfortable with him. He said that he would return at a later date to commit the attack. According to the defendant, he wanted to cause a lot of damage and “empty the clip.” He specifically identified a Marine Corps Recruiting Station as an ideal target. PSR at ¶47. These comments become even more troubling because a US Armed Forces Recruiting Station is located less than one mile from the location where the defendant delivered the weapons in Springfield, Virginia. During the recorded conversation on March 30, 2016, while describing why recruiting stations were a desirable target, the defendant specifically mentioned Springfield (Attachment B at p. 3). During this conversation with UCE-1, the defendant also talked about committing an attack using a grenade or a belt that could take out 20 people.

Critically, the details of this plot came solely from the defendant. UCE-1 contributed nothing other than asking the defendant what he would do if he were to be prevented from traveling overseas to join up with ISIL. At that point, the defendant could have disavowed ISIL. He could have told UCE-1 that if he were to be stopped from traveling, he would abandon this notion of joining up with ISIL. But instead, the defendant laid out a plan that was chilling in its specificity, that also involved guns, and that was designed to inflict maximum casualties. The defendant’s sentence should reflect this conduct.

II. AN UPWARD DEPARTURE IS APPROPRIATE IN THIS CASE

Given the egregious nature of the plot that the defendant described in March 2016, an upward departure from the Sentencing Guidelines is appropriate. The Guidelines specifically contemplate such an approach. USSG §1B1.4 provides that, “[i]n determining the sentence to impose within the guideline range, **or whether a departure from the guidelines is warranted,**

the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See, 18 USC §3661.” (Emphasis added). USSG §5K2.0(a)(1)(A) then lists the grounds for departure and notes that, “[t]he sentencing court may depart from the applicable guideline range if – there exists an aggravating or mitigating circumstance...of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”² That is plainly true in this case. The defendant’s comment about committing a terrorist attack in a military recruiting station is undoubtedly an aggravating factor. And it was not taken into account by the guidelines in this case. In fact, the defendant would still be facing the same 37-46 month sentence if he had been arrested as soon as he transported the four guns.

Simply put, the guideline calculation in this case was arrived at by looking only at the defendant’s conduct in being a felon in possession of firearms. While the defendant’s comments in March 2016 are referenced at paragraph 47 of the pre-sentence report, they had no impact on the final guideline calculation. An upward departure would take this aggravating circumstance into consideration, and would be consistent with Application Note 5 to USSG §5K2.0 which states that, “[d]epartures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing.”

Mechanically applying the final guideline calculation in this case without any consideration for the comments that the defendant made to UCE-1 in March 2016 would be inconsistent with the goal of making an individualized assessment of this defendant. See, Koon

² USSG §5K2.14 Public Welfare (Policy Statement) states, “If national security, public health or safety was significantly endangered, the court may depart upward to reflect the nature and circumstances of the offense.” Clearly §5K2.14 provides yet another basis to justify an upward departure in this case. Similarly, USSG §8C4.3 provides, “If the offense constituted a threat to national security, an upward departure may be warranted.”

v. United States, 518 U.S. 81, 113 (1996)(“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”).

Appellate courts are very deferential when sentencing courts impose sentences beyond what the guidelines call for. See, United States v. Whitley, 544 F. App'x 154, 159 (4th Cir. 2013)(“When reviewing sentences that are outside the defendant's advisory guidelines range, imposed either by departure or by variance, we consider whether the district court ‘acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range.’ United States v. Hernandez–Villanueva, 473 F.3d 118, 123 (4th Cir.2007). In undertaking this analysis, we ‘must defer to the trial court and can reverse a sentence only if it is unreasonable, even if the sentence would not have been the choice of the appellate court.’” United States v. Evans, 526 F.3d, 155, 160 (4th Cir. 2008) (emphasis omitted)).

There is also nothing about this crime, being a felon in possession of firearms, to prevent the Court from departing upward. In United States v. Bellamy, 263 F.3d 448 (4th Cir. 2001), the defendant was convicted of possessing a firearm by a convicted felon, and illegal possession of a firearm in a school zone. Despite a prescribed guidelines range of 51-63 months, the court departed upward a total of eight levels and sentenced Bellamy to 137 months in prison. Bellamy at p. 450. On appeal, the defendant claimed, among other things, that the trial court judge had failed to give adequate notice of the fact that he was contemplating an upward departure. The Fourth Circuit found that there was sufficient notice of a potential upward departure due to the

fact that the PSR and the government brief had both noted that “an upward departure may be warranted” for brandishing a firearm. Bellamy at p. 455.

Yet there is no problem related to notice in the instant case. On April 24, 2017, the Court issued a Notice of Possible Upward Departure in the case (Dkt. 39), and gave the parties four days to respond with their positions, or, in the alternative, the opportunity to seek a continuance if they needed more time to respond. On April 25, 2017, the defense filed an unopposed motion to continue, and the Court postponed the sentencing until June 9, 2017 (Dkt. 43). The defendant has been afforded ample notice that an upward departure is a possibility in this case.

In United States v. Torres, 281 Fed. App’x. 245 (4th Cir. 2008)(Unpublished opinion), the defendant was found guilty of possessing ammunition by a convicted felon in violation of 18 USC 922(g). The sentencing judge departed upward and sentenced Torres to 100 months in prison. On appeal, Torres claimed that he did not have adequate notice that the court would consider an upward departure at sentencing, and also, that the judge had erroneously based the decision for an upward departure on prior arrests that did not result in convictions. Torres at p.p. 248-249. The Fourth Circuit determined that Torres had been provided with sufficient notice that he might be subject to an upward departure because the government had requested such a departure in its objections to the presentence report. The Court also found that any error by the trial court related to Torres’s prior convictions was harmless because the district court “relied primarily on Torres’ extensive criminal history, including probation violations, revocations and history of assaulting law enforcement officers.” Torres at p. 249.

III. A VARIANCE IS ALSO APPROPRIATE IN THIS CASE

Although the Court has provided proper notice to the defendant that it is contemplating an upward departure at sentencing, it is important to note that if the Court wished to do so, it could also impose a sentence above what the guidelines call for through a variance. In Gall v. United States, 552 U.S. 38, 128 S. Ct. 586 (2007), the Supreme Court instructed that the sentencing court should calculate the sentencing Guidelines range, permit the government and the defendant “an opportunity to argue for whatever sentence they deem appropriate,” consider all of the § 3553(a) factors, and finally pronounce a sentence taking into account all of the relevant factors. Id. at 596-97. The Gall Court further instructed that, in the event that the sentencing court decides to impose a variance sentence, the court “must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.” Id. (noting that a “major departure should be supported by a more significant justification than a minor one.”).

Similarly, in United States v. Spencer, 848 F.3d 324 (4th Cir. 2017), the Fourth Circuit noted that in evaluating a variance sentence, it engages in a two-step process. First, it determines if the district court made a procedural error such as improperly calculating the guideline range or failing to explain the sentence. If no procedural errors occurred, the court then moves on to consider its substantive reasonableness under a deferential abuse of discretion standard, “[w]hile a district court’s explanation for the sentence must “support the degree of the variance,” Gall at 50, 128 S.Ct. 586, it need not find “extraordinary circumstances” to justify a deviation from the Guidelines, Gall at 47, 128 S.Ct. 586. Rather, because district courts are “in a superior position to find facts and judge their import,” all sentencing decisions—“whether inside, just outside, or significantly outside the Guidelines range”—are entitled to “due deference.” Gall at 41, 51, 128 S.Ct. 586. United States v. Spencer, 848 F.3d 324, 327 (4th Cir. 2017).

IV. A SENTENCE ABOVE THE GUIDELINE RANGE THAT RECOGNIZES THE SERIOUSNESS OF THIS CONDUCT IS APPROPRIATE IN THIS CASE

A. 18 U.S.C. Section 3553(a) Factors

After calculating the appropriate Guidelines range, “the court must ‘determine whether a sentence within that range . . . serves the factors set forth in § 3553(a) and, if not, select a sentence [within statutory limits] that does serve those factors.’” United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006) (quoting Green, 436 F.3d at 455). As noted previously, the statutory maximum for this offense is ten years in prison. Title 18, United States Code, Section 3553(a)(1) provides that, in determining a sentence, courts must consider the nature and circumstances of the offense, as well as the history and characteristics of the defendant. Additional factors outlined in Section 3553(a)(2) include the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant. 18 U.S.C. § 3553(a)(2)(A)-(C).

B. Argument

The recommended guidelines sentence in this case is 37-46 months of imprisonment. However as noted previously, that guideline range would apply if the defendant had never told UCE-1 about his ideas for committing a domestic terror attack. A sentence above that Guideline range would be appropriate to reflect the seriousness of the offense, the characteristics of the defendant, the critical need to deter this type of conduct, and the defendant’s clear knowledge of and intent to commit the harms he inflicted.

Seriousness of the Offense

The defendant's actions were quite serious. Despite being a convicted felon, he willingly acceded to UCE-1's request to help him move firearms across state lines. These were not any type of firearm – they were high-powered, automatic weapons capable of firing up to 1,200 rounds per minute. The defendant took possession of those weapons and then drove them by himself from Maryland into Virginia.

In addition, he did all of this in the context of his discussions with the UCE about wanting to get a gun for himself. And *those* discussions preceded his threatening comments about wanting to get an AK-47 and “empty the clip” during an attack on a military recruiting station if he was prevented from traveling overseas to join ISIL. The defendant made those threatening comments just a few weeks after he possessed the four high-powered firearms. And significantly, his plan to attack a military recruiting station also involved the use of firearms. Clearly the defendant was not at all deterred by his felony conviction from possessing and using firearms. And, in fact, the defendant was ordered detained in this case, in large part, due to these very chilling comments.

It also bears noting that the defendant's comments about committing a domestic attack here in the United States were consistent with what ISIL had been telling its followers to do in the months and years prior to March 2016. See, “New ISIS video instructs followers to attack targets in the west,” at <http://www.cbsnews.com/news/new-isis-video-instructs-followers-to-attack-targets-in-the-west/>; See also, “ISIS Urges Sympathizers to kill U.S. Service Members It Identifies on Website,” at https://www.nytimes.com/2015/03/22/world/middleeast/isis-urges-sympathizers-to-kill-us-service-members-it-identifies-on-website.html?_r=0. These reports were from January and March 2015, respectively, and they were not unique. ISIL's atrocities were

widely reported in the media, and the calls for attacks in the west understandably received a great deal of attention in the U.S. and Europe.

The fact that the defendant told the CHS that, if he were to be prevented from leaving the United States, he would commit exactly the type of attack that ISIL had been encouraging for years is incredibly telling. It indicates that the defendant followed, and was aware of, ISIL's most disturbing messages, that he supported those goals, and that he was a threat to take precisely the actions that ISIL was urging its followers to take. Given all of this information, this was a serious offense that requires a stiff sentence.

Need for Adequate Deterrence

The defendant's actions in this case justify a stiff sentence to deter him from making the same bad choices in the future, as well as to deter other convicted felons who may be tempted to possess firearms, and to threaten to use firearms in criminal acts. It is clear the defendant knew that as a convicted felon he was prohibited from possessing firearms. In fact, when the defendant sought UCE-1's help in getting a gun, he told UCE-1 that his cousin could hold the gun because his cousin did not have a criminal conviction. PSR at ¶18. Clearly the defendant was aware that, as a convicted felon, he was a prohibited person, yet he still knowingly and willingly possessed firearms illegally. The defendant also expressed a willingness to possess firearms in the future when he told UCE-1 about his plan to attack a military recruiting station and "empty the clip." A strong sentence is required to demonstrate to the defendant the seriousness of this offense, and to deter him from doing something similar in the future.

In addition, a firm sentence will help achieve the goals of general deterrence, by demonstrating to other convicted felons who may be tempted to possess firearms, and to make threats that involve firearms, that this sort of offense will be met with a severe punishment.

Similarly-Situated Defendants

It is difficult to find cases of similarly-situated defendants, because there do not appear to be many instances that involve felons in possession of firearms where those same felons made such detailed and troubling threats. This is precisely why an upward departure is warranted, because this case lies outside the heartland of this type of offense.

In its previously filed Position of the United States with Respect to Sentencing (Dkt. 36) at p.p. 8-9, the government set forth instances involving felons in possession of firearms who were sentenced *within* the guidelines. While those sentences were undoubtedly appropriate, they did not involve the type of additional, aggravating factor that is present in this case. In order to take account of that aggravating factor, an above-guidelines sentence is appropriate.

Characteristics of the Defendant

The defendant's characteristics likewise favor an upward departure and a stiff sentence. He has exhibited a long-standing proclivity to ignore and violate the law. Following his burglary conviction in 2010, the defendant was sentenced to a suspended sentence and 2 years of probation. However, the defendant violated the terms of his probation by failing to report as instructed, and by continuing to smoke marijuana while he was participating in substance abuse treatment. Ultimately, the defendant was found to be in violation of his probation. Even after that violation, he submitted an additional urine sample that tested positive for marijuana. PSR at ¶52. Given the defendant's poor performance previously while on supervision, a sentence at the upper end of the Guideline Range is appropriate.

Of even greater concern, the defendant's comments regarding wanting to support ISIL were extensive and troubling. While we do not know what actions the defendant would have taken to further those aims, we have reason to believe his comments were more than puffery. The

conversations occurred over an extended period of time, were to multiple people and involved multiple options. Most disturbing of all, the defendant devised a backup plan which consisted of conducting attacks in support of ISIL in the United States should he be prevented from traveling. This attack plan involved strategic thinking in terms of target selection, method of attack and a ruse plan to gain access to the target location. The United States Government has an obligation to take threatening statements like the ones made by the defendant seriously and does not have the luxury of waiting to see if individuals follow through on their stated intentions. That is why the moment that a determination was made to prevent the defendant from traveling to Minnesota, he was arrested on this gun charge. At the time of the arrest, the exact nature of the trip to Minnesota was unknown. With its proximity to the Canadian Border, the FBI could not risk the possibility of the defendant departing the United States.

The FBI could also not risk the possibility of an attack in the United States. The defendant had already told UCE-1 that if he were prevented from traveling to join ISIS, he would focus on committing a domestic attack here in the United States. If the defendant had simply been turned away from his trip to Minnesota, the defendant would have known that the government would likely not allow him to travel overseas. At that point, given the fact that the defendant had already committed a felony offense, and given what he had said about his plan of attack if he could not travel, the government had little choice but to arrest the defendant in the interest of public safety.

The defendant should be imprisoned for a sufficient period of time to provide just punishment for the offense, to afford adequate deterrence to criminal conduct, and to protect the public from further crimes of the defendant.

ATTACHMENT A

Recording date – 3/30/2016

YW = Yusuf Wehelie

UC = UCE #1

[UI] = unintelligible

Begin at 1:20:27

YW: You know ,I'm having a hard time with my house you know. I don't got nothin really goin on for me you know? So..My dad was goin on me, they just...from their [UI], they just want to be down you know [UI]. Like,

UC: Aaahhhhh

YW: inside the crib you know. I ain't doin shit.

UC: See ,that's the other thing man.

YW: So I'm down tryin. I'm really down tryin to get the heck out. But, I'm just in a corner. You feel me? I'm just stuck.

UC: So let me ask you this...Worst case scenario, we get you on a boat and you go. Do you think they will like...

YW: Nah, cause I talked to my dad...You know, you know...they probably wouldn't, they never would. And plus they would... You know I talked to my dad and he knows I bang with them. And he's just like..man if you want to do jihad.you think of jihad, then go do it. be a martyr. go ahead, be a man. I want you to chase your dreams...like...

UC: So he's fine with it?

YW: Yeah...he basically...yeah...he basically doesn't have a problem with it, just don't be a talker. You know. Straight up..be a real man...just don't be a talker. Just don't be those talker guys.. Who are walkin around here bein hot, talkin about going...you know...

UC: That's what I'm sayin about being careful.

YW: Yeah

UC: You know you say the wrong thing...

YW: yup. No they never say nothin. They know I love them. they know. I told my mom in 2013 that I was goin to Dar Ul Islam, Dar ul Iraq and sham...like straight up. [UI] Who are they? That was before they were even in the news and shit. They see them on the news and they said, oh you definitely...you think those are your boys and stuff.

UC: Right

YW: And I'm like, hell yeah. Like [UI].....Don't you want to help your country? And I'm like... I don't care about Somalia, Somalia is not where I [UI]. I never heard of it...[UI]

UC: Are you already done?

YW: Yeah, this is done. I just need to open your phone.

UC: Yeah, oh hell yeah. The button on this is weird man.

YW: but yeah Um... they actually, you know those Shabaab dudes? You ever heard of em? Al Shabaab in Somalia?

UC: Yeah

YW: Yeah, they're under Al-Qaeda and such.

UC: But they're not with us.

YW: No they're not with us. [UI] Al-Qaeda is terrible, bro. Al-Qaeda just takes [UI]. They flipped up the script, man they..they terrible. Like the ones in Syria? Those guys are Kafrs. They're Kafrs bro. AQ. I'm not saying all of them are just the ones in Syria are. Those are the ones they kill us. They kill anyone who moves us. They want to remove the land from [UI]. You feel me. Like...So you against it. Over in AQ Yemen, we work together. They work with us. In Africa, they work with us. We cool. You know. But the ones in Syria, they acting out. The ones in Somalia too. The ones in Somalia...Some dudes from Shabaab, they [UI] 20 dudes. Some old head in my grandmother's area. I'm with my brothers, I'm with the real ones. I made bayat you know. I'm with the brothers. And then Shabaab started tryin to go kill them, you know. Huntin them down.

UC: So have you done that yet? Have you made Bayat?

YW: Oh yeah. To myself in my room. Yeah, just...That's all you need though. Just once I go there, definitely.

END at 1:23:10

ATTACHMENT B

Transcript of March 30, 2016 (02:30:29 – 02:37:22)

Recorded on 03/30/2016

YW = Yusuf Wehelie

UC = UCE #1

[UI] = Unintelligible

Begin at 02:30:29

YW: It's only eight minutes [followed by some Video Audio] So yo, this is not that long, so if you wanna listen to it.

UC: So this is the one that ...

YW: When he stamped them in, yeah... that's when he stamped them in.

UC: So this is the one that made you want to do it.

YW: Oh yeah, cause he really knew which right and he was telling me which Jannah, which group is the right one, ya know, from the Koran Sunnah... and I always loved him cause he was always like, he always spoke the truth, ya know, he was never scared and the whole world was chasing him right now, ya know.

UC: You know brother, in everything we do, there's always, uh, two sides to look at, one, is, ya know, why are you doing it?

YW: Yep.

UC: And then there's always, what next?

YW: Yeah.

UC: So, you kinda told me why you doing it. And the what next is, you know, how are you going to get there? Okay, we got that, so now let's talk about the what if. So, what if you get there, what are you going to do?

YW: Going straight to training. [UI] I'm there to like, really, I was thinkin about it too, they're saying brothers who don't, don't expect too much, ya know, and you're respected, if you're a man and you want to do it, you can go live in society, you wanna join? Alright, you join the

Army? Don't expect to live past a year or two... They tell you that. That's like the most beautiful thing if you hear that, you know, you can imagine you sacrifice yourself for Allah, ya know, I'm just doing it for myself, I'm not trying to be selfish, I wanna to go to Jannah, I wanna skip the [UI], the punishment or the grave, I wanna skip the 50,000 years when Allah, before the Judgment Day, Allah makes everyone, resurrects them and he just brings the Sun on top of everyone's heads, and Allah is so mad at everyone ya know all of a sudden these people are [UI], for 50,000 years, people are just standing, so imagine for 50,000 years you are standing ya know.

UC: [UI]

YW: For 50,000 years you're just standing, even the people that know they are going to the hellfire, they're like man, I'm just trying to go to hell, ya know like let's just get this over with, 50,000 years and the punishment of the grave, and now you're going to hell, you know like, we all have a chance going to Hell, so that's the best thing, which is also the best jihad, the best deed to Allah is to sacrifice yourself for him, ya know, and the best shahid is the one who jumps into the frontline with no armor on ya know, that makes Allah laugh, that makes Allah smile, ya know, wow, this is my slave, he really, he really loves me, ya know, he really, he really sacrificed everything ya know, he put all his trust into me. He wants to sacrifice his life for me, to fight for me ya know.

UC: So let me ask you this, and it kinda goes toward dedication, so what if, you can't get on the boat? And you can't go, and you're stuck here? Then what?

02:33:30

YW : And if I'm really stuck here... then, I'm gonna go out.

UC: How are you going to do that?

YW : You just [UI] talk to you and maybe get a one k fully ya know, a clip or two, and then go on in a spot, spray.

UC: Grab a AK-47 and...

YW: Get to work.

UC: Go to work.

YW: Go to work, kill as much people as I can [UI].

UC: If you had to pick a place, where would it be?

YW: I would say, I would like the recruitment centers.

UC: Recruitment centers? Why the recruitment centers?

YW: There's a bunch of soldiers there.

UC: Why there instead of someplace else that's...

YW: Cause I think that would be less security and more damage I can do. If I'm gonna do that I want to do a lot of damage and I don't want to get one guy, I want to get like 20 of them or something ya know, like I don't want to, it would be nice if more people, we could go to a nice spot ya know, like a really strategic place, but you know this area, it's basically impossible, ya know, so nothings impossible, but it's very difficult, other than that, that's in any shopping center, ya know, you just catch those niggas just sitting in there ya know, in Springfield, you see them chilling in there, hey what's up? Come there one day, come in one day, act like I'm cool, [UI] a sign up ya know, show my face ya know, [UI] sign up, they're like okay, next time they see me open arms, next time just, I don't know, like nothing [UI] it's gone, it's the whole spot gone.

UC: Just empty the clip.

YW: Just empty the clip, everyone [UI] at me.

UC: Which recruitment center? Army, Air Force, Navy, where?

YW: Anyone, especially I would love to catch Marines, I hate those guys.

UC: Why the Marines?

YW: Cause they think they so tough, they think they're so bad, ya know they think they're number one and that's the number one so called badass right? Like the toughest American [UI] from all those guys are the Marines.

UC: Yeah.

YW: Those mother fu**ers... pu**ies.

UC: You see that's the kind of thing umm, ya know [UI] was talking about [UI], how dedicated are you, cause I'm telling you man, this is the next level sh*t.

YW: Oh yeah, it is, it's actually next level, but I love it, I really, I'm telling you, I love it.

UC: You just don't know how, how much man, how much I have to, you have no idea man.

YW: I bet, I bet bro.

UC: For me to go from where I was to doing this and then how we me.

2:36:00

YW: [UI] Allah, Allah is one, it's the truth, if you want the truth Allah will make a way for you.

UC: So, so plan A, get you on a boat, plan B.

YW: Maybe if the boat doesn't work, maybe try to like, I don't know, maybe a plane, ya know, get a nose ring, ear ring, tatted up, go out all out.

YW: If that, [UI] then yeah, plan C is guaranteed, and my cousins are down so will probably be us three running up in the spot.

UC: Your cousins are down with it too? They can't get on the boat?

YW: If they can't, oh yeah, we're doing it, we're doing it inshallah, even if, we even think even if inshallah [UI], a grenade, even a belt ya know.

UC: Hey now, if you want grenades now, you wanna, what kind of belt you want, you want a vest or a belt?

YW: Not that it matters, just cause ya know when you're in those types of moments, when you're in there and you're outnumbered and you're about to get shot, and you're about to ya know, just let me take out 20 while I'm gone.

UC: Now I'll tell you this, you pray for rain, you gotta deal with the mud, so if you're asking for me to get you some, some straps like that?

YW: Yeah.

UC: I can get it.

YW: Yeah, I want that, I want that, but Inshallah, if I get to plan C, cause I still wanna go over there, still wanna marry a bad girl, get a concubine ya know...

End at 02:37:22

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA	:	
	:	
-vs-	:	Case No. 1:16-cr-162
	:	
YUSUF A. WEHELIE,	:	
Defendant.	:	
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DETENTION HEARING

July 13, 2016

Before: Ivan D. Davis, Mag. Judge

APPEARANCES:

Brandon L. Van Grack and John T. Gibbs,
Counsel for the United States

Cadence Mertz, Counsel for the Defendant

The Defendant, Yusuf A. Wehelie, in person

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1 NOTE: The case is called to be heard at 2:37 p.m. as
2 follows:

3 THE CLERK: The United States of America versus Yusuf
4 Abdirizak Wehelie, case number 16-mj-302.

5 MR. VAN GRACK: Good afternoon, Your Honor. Brandon
6 Van Grack and John Gibbs on behalf of the United States.

7 THE COURT: Good afternoon.

8 MS. MERTZ: Good afternoon, Your Honor. Cadence
9 Mertz on behalf of Mr. Wehelie.

10 THE COURT: Good afternoon. This matter is before
11 the Court on a joint preliminary and detention hearing. Are
12 the parties ready to proceed?

13 MS. MERTZ: Yes, Your Honor.

14 MR. VAN GRACK: Yes, Your Honor. An indictment was
15 obtained earlier today. And so, I believe the only matter
16 before the Court is a detention hearing. And the Government is
17 in fact seeking detention.

18 THE COURT: Okay.

19 MS. MERTZ: Your Honor, for the record, we have been
20 informed of that indictment and I have not seen it.

21 THE COURT: All right. Have both parties received a
22 copy of the Pretrial Services report in this matter?

23 MR. VAN GRACK: Yes, we have, Your Honor.

24 MS. MERTZ: Yes, Your Honor.

25 THE COURT: Does either party dispute the accuracy of

1 the information that is contained in that report?

2 MS. MERTZ: No, Your Honor.

3 MR. VAN GRACK: We do not, Your Honor.

4 THE COURT: The Court will adopt as factually
5 accurate the information that is contained in the Pretrial
6 Services report.

7 Is the Government relying on the Pretrial Services
8 report, or would you like to call a witness or introduce any
9 other further information?

10 MR. VAN GRACK: Yes, Your Honor, we are relying on
11 the report. In addition, we will be calling a witness.

12 THE COURT: All right. You may proceed.

13 MR. VAN GRACK: At this time the Government will call
14 Special Agent Richard Gaylord.

15 NOTE: The witness duly affirms.

16 RICHARD GAYLORD, called by counsel for the United
17 States, first duly affirming, testifies and states:

18 DIRECT EXAMINATION

19 BY MR. VAN GRACK:

20 Q. Would you please state your name, and spell your last name
21 for the record.

22 A. My name is Richard Gaylord. G-a-y-l-o-r-d.

23 Q. And where are you currently employed?

24 A. I'm employed at the FBI Washington Field Office.

25 Q. And what is your current title?

1 A. I'm a special agent.

2 Q. And how long have you been a special agent?

3 A. For 12 years.

4 Q. And which squad do you serve in at the Washington Field
5 Office?

6 A. I currently serve on CT5.

7 Q. What does CT stand for?

8 A. CT stands for counterterrorism.

9 Q. And how long have you served in the counterterrorism
10 squad?

11 A. I have been on that squad for two years.

12 Q. And can you briefly describe your duties with the
13 counterterrorism squad.

14 MS. MERTZ: Your Honor, we would stipulate to his
15 expertise.

16 THE COURT: So stipulated.

17 BY MR. VAN GRACK: (Continuing)

18 Q. Special Agent Gaylord, are you familiar with the facts of
19 this case?

20 A. I am.

21 Q. What is the basis for your familiarity?

22 A. I am the case agent for the investigation. I have spoken
23 to other agents who have worked on the investigation. I have
24 spoken to undercover law enforcement officers who have
25 participated in the investigation. I have reviewed the

1 evidence and I have listened to recordings made during the
2 investigation.

3 Q. Special Agent Gaylord, if you wouldn't mind, if you
4 wouldn't mind speaking up.

5 A. Yes, sir.

6 Q. Thank you. Do you see the defendant in court today?

7 A. I do.

8 Q. Can you please describe what he is wearing and what he is
9 sitting -- where he is sitting.

10 A. He is sitting at the table to my left in a green jumpsuit.

11 MR. VAN GRACK: May the record reflect that the
12 witness has identified the defendant?

13 THE COURT: The record will so reflect.

14 BY MR. VAN GRACK: (Continuing)

15 Q. As part of your investigation, did you prepare an
16 affidavit in support of a criminal complaint in this case?

17 A. I did.

18 Q. At this time I'm showing you what has been marked as
19 Government's Exhibit 1.

20 Do you recognize that document?

21 A. I do.

22 Q. And what is that document?

23 A. That is the affidavit in support of a criminal complaint
24 and arrest warrant.

25 Q. I would ask you to turn to page 6 of Government's

1 Exhibit 1.

2 Is there a signature on that page?

3 A. Yes, there is.

4 Q. Is that your signature?

5 A. It is.

6 Q. Is the information contained in Government's Exhibit 1 a
7 true and accurate reflection of the facts as you knew them when
8 the affidavit was executed?

9 A. It is.

10 MR. VAN GRACK: At this time, Your Honor, the
11 Government would move Government's Exhibit 1 into evidence.

12 MS. MERTZ: No objection, Your Honor.

13 THE COURT: So admitted.

14 BY MR. VAN GRACK: (Continuing)

15 Q. Are you aware of the citizenship for the defendant?

16 A. I am.

17 Q. And what is his citizenship?

18 A. He is a United States citizen.

19 Q. And where was he born?

20 A. He was born in the United States, in Virginia.

21 Q. And his age?

22 A. He is 25.

23 Q. At any attempt in your -- at any point in your
24 investigation, did the defendant attempt to obtain a firearm?

25 A. He did.

R. Gaylord - Direct

8

1 Q. When?

2 A. In January of this year.

3 Q. And who did he attempt to acquire the firearm from?

4 A. In conversations with one of our undercover law
5 enforcement officers he requested assistance in obtaining a
6 firearm.

7 Q. And can you describe what occurred in that attempt.

8 A. In that attempt he asked our undercover law enforcement
9 officer if he would help Mr. Wehelie in getting a firearm for
10 himself and his cousin.

11 Q. And did the defendant indicate why he wanted his cousin to
12 obtain the firearm?

13 A. Because his cousin does not have a felony conviction and
14 would be able to maintain the firearm.

15 Q. And did the defendant indicate in that communication with
16 the undercover law enforcement officer that in fact that weapon
17 would be for both him and his cousin?

18 MS. MERTZ: Your Honor, objection, leading.

19 MR. VAN GRACK: Your Honor, I will rephrase.

20 BY MR. VAN GRACK: (Continuing)

21 Q. Special Agent Gaylord, was this conversation between the
22 defendant and the undercover law enforcement officer recorded?

23 A. It was.

24 Q. Have you listened to that recording?

25 A. I have.

1 Q. What statements did the defendant make about that gun?

2 A. The defendant said it would definitely be for both of us.

3 Q. Did in fact the undercover law enforcement officer obtain
4 a weapon for the cousin?

5 MS. MERTZ: Again, objection, leading.

6 A. He did --

7 THE COURT: Overruled.

8 A. He did not.

9 BY MR. VAN GRACK: (Continuing)

10 Q. At any point in your investigation did you learn whether
11 the defendant in fact fired a weapon?

12 A. I did.

13 Q. Can you describe the circumstances under which you learned
14 that.

15 MS. MERTZ: Objection, Your Honor, relevance.

16 MR. VAN GRACK: Your Honor, there's --

17 THE COURT: This is a detention hearing. If he fired
18 a weapon, that could be -- the Court could reasonably infer he
19 may be dangerous. Overruled.

20 A. The defendant said he had fired an AK-47 while he was in
21 Yemen.

22 BY MR. VAN GRACK: (Continuing)

23 Q. At any point in your investigation did you learn whether
24 the defendant in fact possessed a firearm?

25 A. He did.

1 Q. And can you describe how he became -- had came into
2 possession of that firearm.

3 A. During a conversation with the undercover law enforcement
4 officer the defendant was asked if he would transport the
5 weapons on behalf of the undercover.

6 Q. And when did that conversation occur?

7 A. January of 2016.

8 Q. And was that conversation recorded?

9 A. It was.

10 Q. Have you listened to that conversation?

11 A. I have.

12 Q. And what were the firearms that were involved in that
13 offer?

14 A. The firearms were four Cobray MAC 11 machine guns.

15 Q. And what is the -- are you aware of the capabilities of
16 the MAC 11?

17 A. Yes. They are capable of firing up to 1,200 rounds per
18 minute.

19 Q. And does the MAC 11 go by another name or have some sort
20 of slang term associated with it?

21 A. There are multiple. It is a machine gun.

22 Q. And did in fact the defendant accept the undercover law
23 enforcement's offer to transport those firearms?

24 A. He did.

25 Q. And can you describe the circumstances under which he

1 transported those firearms.

2 A. In February of 2016 the defendant traveled to Baltimore,
3 Maryland and met with a second undercover law enforcement
4 officer. At that time he was given the four Cobray MAC 11s.
5 And then he placed them in a bag, concealed them with
6 additional towels and purses to further hide what would be in
7 the bag, and then loaded them into his vehicle and drove down
8 to Fairfax County, Virginia.

9 Q. And was that interaction in the Baltimore hotel room
10 recorded?

11 A. It was.

12 Q. Have you listened to that recording?

13 A. I have.

14 Q. And what occurred after the defendant arrived in Virginia?

15 A. He provided the weapons to another undercover law
16 enforcement officer in a parking lot in Fairfax County,
17 Virginia.

18 Q. And was that interaction recorded?

19 A. It was.

20 Q. And have you listened to that recording?

21 A. I have.

22 Q. Was the defendant paid anything for this transaction?

23 A. He was paid \$300.

24 Q. You mentioned multiple undercover law enforcement
25 officers. At what point did the defendant first interact with

1 a law enforcement officer, undercover law enforcement officer?

2 A. He first met the undercover law enforcement officer in
3 December of 2015.

4 Q. And this is the undercover officer who he attempted to
5 obtain a gun for his cousin?

6 A. Correct.

7 Q. Did they engage in communications beyond December of 2010?

8 A. They did.

9 Q. And what were the topics of those discussions?

10 A. They discussed illegal activity as well as jihad.

11 Q. And what -- were those conversations recorded?

12 A. They were.

13 Q. Have you listened to those conversations?

14 A. I have.

15 Q. What did the defendant say about jihad?

16 A. The defendant said he loved to jihad and had spoken about
17 it with others.

18 Q. Did at any point the defendant specifically talk to the
19 undercover law enforcement officer about engaging in jihad?

20 A. He did. He spoke to the undercover about potentially
21 providing more materials to the "brothers overseas." And then
22 the defendant asked the undercover if he would help him in
23 traveling.

24 Q. At any point in their conversation were terrorist groups
25 discussed?

1 A. There were.

2 Q. Which groups were discussed?

3 A. ISIS, otherwise referred to as ISIL.

4 Q. And what does ISIS stand for?

5 A. ISIL stands for the Islamic State in The Levant.

6 Q. And what did the defendant say about ISIL or ISIS?

7 A. He -- when he first heard from the undercover that they
8 were talking about ISIS, he became visibly excited and shed a
9 tear.

10 Q. Did the defendant say anything else about ISIL?

11 A. He was very supportive. He said he liked that they would
12 kill a hundred people and be proud of it.

13 Q. Did the defendant indicate when he first developed his
14 feelings towards ISIL?

15 A. Yes. He said he started following ISIL in 2012.

16 Q. And did the defendant discuss whether he associated people
17 who are supporters of ISIL?

18 A. He did. He's spoken with others who he said were down.

19 Q. And all of these conversations with respect to ISIL, were
20 these conversations recorded?

21 A. They were.

22 Q. Have you listened to those recordings?

23 A. I have.

24 Q. At any point did the defendant discuss violence associated
25 with ISIL?

1 A. He has.

2 Q. And what did the defendant say about violence and ISIL?

3 A. In addition to being proud that they'd kill 100 people,
4 the defendant was watching a video with one of the undercover,
5 in the recording you could hear the undercover say that the
6 person snapped his neck. And the defendant laughed and said,
7 yes.

8 Q. And was this interaction recorded?

9 A. It was.

10 Q. Have you listened to that recording?

11 A. I have.

12 Q. And the undercover law enforcement officer, is that the
13 original law enforcement officer that you discussed from
14 December 2015?

15 A. Correct.

16 Q. At any point did the defendant discuss providing support
17 for ISIL?

18 A. Yes.

19 Q. And what did the defendant discuss in terms of that
20 support?

21 A. The defendant asked the undercover if at some point when
22 "the time is right," he would help him to travel.

23 Q. Did the defendant make any other comments about traveling
24 to ISIL?

25 A. He did. He had said that he would -- he desired to travel

1 to Libya, first Tunisia and then ultimately Libya.

2 Q. And did the defendant indicate why he wanted to travel to
3 Libya and Tunisia to join ISIL?

4 A. The defendant thought he would fit in more there and that
5 the government, U.S. government would not be watching that area
6 as closely as say the Middle East.

7 Q. Why did the defendant believe or state that he believed he
8 would be better able to fit in Libya and Tunisia?

9 A. He said it was because he was black.

10 Q. At any point did the defendant indicate what would happen
11 if he was unable to travel to Libya to join ISIL?

12 A. Yes.

13 Q. And what did the defendant say he would do if he was
14 unable to travel to Libya?

15 A. In conversations with the undercover law enforcement
16 officer there is a plan laid out of potentially traveling by
17 boat. And if not by boat, by plane.

18 And then the defendant said if he could not leave, he
19 would potentially conduct an attack here in the U.S.

20 Q. Did the defendant discuss what type of attack would occur
21 in the United States?

22 A. He did.

23 Q. And what did the defendant say about that attack?

24 A. He said he would attack a military recruiting station.

25 Q. And did he discuss the specifics as to how he would attack

1 a military recruiting station?

2 A. He did. He stated that he would first go in and pretend
3 to enlist in the military so that they would become more
4 comfortable with him, and then he would go back in and shoot up
5 the place.

6 Q. Did the defendant indicate that there are other means in
7 which he would kill members of the military at the recruiting
8 station?

9 A. He mentioned potentially getting explosives.

10 Q. Was that conversation that you just relayed recorded?

11 A. It was.

12 Q. Have you listened to that conversation?

13 A. I have.

14 MR. VAN GRACK: Your Honor, at this time we have no
15 more questions for Special Agent Gaylord.

16 THE COURT: Cross-examination.

17 MS. MERTZ: Thank you, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. MERTZ:

20 Q. Agent Gaylord, you mentioned that the first contact with
21 your agent and Mr. Wehelie was in December of 2015, correct?

22 A. Correct.

23 Q. How did that contact come about?

24 A. That had come about while Mr. Wehelie was with somebody
25 else in meeting and doing some potential illegal activity.

1 Q. What illegal activity?

2 A. Moving cigarettes from -- untaxed cigarettes from Virginia
3 to Maryland.

4 Q. And the undercover agent was involved in the moving of
5 cigarettes?

6 A. He was not involved in that, no.

7 Q. He met Mr. Wehelie during that incident?

8 A. Yes.

9 Q. And did he befriend Mr. Wehelie?

10 A. He did.

11 Q. He continued the contact with Mr. Wehelie?

12 A. He did.

13 Q. He did that intentionally?

14 A. He did.

15 Q. And did he continue to call Mr. Wehelie on his phone?

16 A. He did.

17 Q. And he continued to text message with him?

18 A. Yes.

19 Q. And reach out to him maybe on Facebook?

20 A. I'm not sure if it was on Facebook, but he did continue to
21 reach out.

22 Q. And about how often would he reach out to Mr. Wehelie?

23 A. I cannot say.

24 Q. Were other agents reaching out to Mr. Wehelie as well?

25 A. I don't believe so.

1 Q. And this contact went on for approximately two months
2 based on the timeline in your affidavit; is that correct?

3 A. Correct.

4 Q. And after Mr. Wehelie delivered the guns from one agent to
5 another agent in February of 2016, did the FBI arrest him?

6 A. They did not.

7 Q. And that was five months ago, correct?

8 A. Correct.

9 Q. Did the agent make any attempt to ascertain Mr. Wehelie's
10 state of mind before he attempted to befriend him and contacted
11 him on a regular basis?

12 A. He did not.

13 Q. Did he make any attempt to determine whether or not Mr.
14 Wehelie was suffering from any kind of mental illness at that
15 time?

16 A. He did not.

17 Q. Whether or not he had any kind of substance abuse
18 addictions?

19 A. He did not.

20 Q. He didn't make any attempt to determine whether or not Mr.
21 Wehelie was in a fragile state of mind?

22 A. No.

23 Q. Did he attempt to ascertain whether or not Mr. Wehelie was
24 struggling for money?

25 A. No.

1 Q. But he did offer to pay Mr. Wehelie money at times?

2 A. He did.

3 Q. And on how many occasions did he offer to pay Mr. Wehelie
4 money?

5 A. I believe he paid him once in cash for the drugs, and then
6 he provided him a phone.

7 Q. I'm sorry, what was the last part?

8 A. He provided him a telephone.

9 Q. So there were two instances on which the agent paid Mr.
10 Wehelie apart from the gun incident; is that right?

11 A. No, that was the gun incident.

12 Q. I'm sorry?

13 A. The \$300, the first payment, was for that.

14 Q. And then he also -- the agent also paid Mr. Wehelie for
15 drugs and for a phone?

16 A. Drugs?

17 Q. I'm sorry, did you --

18 A. No.

19 Q. Let me -- let me back up. How many occasions did the
20 agent pay Mr. Wehelie money?

21 A. He paid him twice.

22 Q. And one was for the guns and one was for a phone?

23 A. One was with a phone. There was no cash with the phone.
24 He provided him a phone instead of cash.

25 Q. What was the first instance of payment about?

- 1 A. It was about the guns.
- 2 Q. How much money did he pay Mr. Wehelie?
- 3 A. \$300.
- 4 Q. And when was that?
- 5 A. That was March -- or February 23.
- 6 Q. And what was the other instance of payment? What date?
- 7 A. That was -- I don't really recall the exact date of that
- 8 payment. That is when he was provided a cellular telephone.
- 9 Q. And was that February of 2016?
- 10 A. I don't believe so.
- 11 Q. January?
- 12 A. I believe it was January.
- 13 Q. January of 2016 he paid Mr. Wehelie money?
- 14 A. He provided -- he provided him a cellular telephone.
- 15 Q. He did not pay him any cash?
- 16 A. No.
- 17 Q. What kind of phone did he provide him?
- 18 A. I believe it was a Samsung Galaxy.
- 19 Q. Was it new?
- 20 A. It was.
- 21 Q. What's the approximate value of that phone?
- 22 A. I believe it may be around \$600.
- 23 Q. On the first instance when the agent met Mr. Wehelie, was
- 24 anybody else present?
- 25 A. Yes.

1 Q. Who else was present?

2 A. There were multiple others present.

3 Q. Could you identify them, please.

4 MR. VAN GRACK: Your Honor, we would object to the
5 relevance of the other individuals involved in that initial
6 meeting. There are other national security and law enforcement
7 sensitivities here, and we question its relevance in terms of a
8 conversation that was recorded. And the agent actually relayed
9 the contents of that, of those recordings.

10 THE COURT: Counsel.

11 MS. MERTZ: Your Honor, I have two responses. One is
12 that the Government opened the door to this line of questioning
13 by going into great detail on these alleged recorded phone
14 calls and who said what. And these are phone -- these are
15 phone calls and meetings with multiple individuals present.

16 And it is relevant to detention whether or not Mr.
17 Wehelie was agreeing with what other people were saying or
18 whether or not -- and other people were instigating
19 conversation.

20 THE COURT: How do you -- why do you need to know who
21 those other people were to determine that answer to that
22 question?

23 MS. MERTZ: Fair enough, Your Honor, I'll move on.

24 BY MS. MERTZ: (Continuing)

25 Q. So there were multiple other people present?

- 1 A. Yes.
- 2 Q. Were they all FBI agents?
- 3 A. No.
- 4 Q. Were some of them confidential informants?
- 5 A. They were not confidential informants of the FBI.
- 6 Q. And where did that first meeting take place?
- 7 A. In Fairfax County, Virginia.
- 8 Q. Where specifically?
- 9 A. At a storage location.
- 10 Q. Whose storage location?
- 11 A. I do not know.
- 12 Q. Was that meeting set up at the behest of the FBI?
- 13 A. It was.
- 14 Q. What was the purpose of that meeting?
- 15 A. To introduce an undercover employee to Mr. Wehelie.
- 16 Q. And yet this was the FBI's first meeting with him?
- 17 A. Yes.
- 18 Q. So you knew you were targeting Mr. Wehelie?
- 19 A. Yes.
- 20 Q. Was that -- and was that first meeting recorded on
- 21 December 10?
- 22 A. I do not -- I believe it was, but I know we have the
- 23 statement of the undercover employee.
- 24 Q. And the other people present were civilians?
- 25 A. There were other law enforcement.

1 Q. In paragraph 7(a) of your affidavit you make a reference
2 to something called a notional scenario. Is that another term
3 for hypothetical?

4 A. Yes.

5 Q. So that paragraph describes a series of facts that were
6 posed by the FBI agent hypothetically?

7 A. Yes.

8 Q. In a conversation with Mr. Wehelie?

9 A. Correct.

10 Q. And none of those facts actually every occurred?

11 A. No, they did not.

12 Q. Did the FBI make any effort to determine whether or not
13 Mr. Wehelie was telling the truth when he said he'd fired a
14 weapon before?

15 A. We did not. There did not seem to be any way to actually
16 verify whether on his time in a foreign country we could or
17 could not tell he fired a weapon.

18 Q. Did the FBI make any effort to ascertain whether or not
19 Mr. Wehelie had ever possessed a weapon before?

20 A. Again, we could not verify that time. However, we did
21 verify that he was in Yemen at the time when he stated.

22 Q. And he has family in Yemen, that's correct? Or he had at
23 the time?

24 A. At the time, yes.

25 Q. His brother in fact?

1 A. Correct.

2 Q. And that December 22 conversation, how was that recorded?

3 A. Digitally. We had a digital recorder.

4 Q. And you make reference to this term "whole K." Can K be
5 used as slang for other things on the street?

6 A. I can't say exactly what K could or could not be used for.

7 Q. You've never heard it used as a term for Special K, the
8 drug?

9 A. I have heard that.

10 Q. And have you ever heard it used as a term for a kilo, such
11 as a quantity of drugs?

12 A. I have.

13 Q. So it could be slang for something other than a gun?

14 A. However, Mr. Wehelie used it in terms of attacking a
15 military location. He said, get a whole K fully loaded.

16 Q. And that, again, is in the context of the hypothetical
17 scenario posed by the FBI agent?

18 A. No. That was in Mr. Wehelie's hypothetical of what would
19 happen if he could not travel.

20 Q. And in paragraph 7(b) you refer to this conversation on
21 January 21. How was that phone conversation recorded?

22 A. We have audio and video.

23 Q. And I'm sorry, was that an in-person meeting or a
24 telephone?

25 A. The 21st was in person.

1 Q. And were other people present?

2 A. Yes.

3 Q. How many other people were present?

4 A. One person joined them briefly.

5 Q. I'm sorry?

6 A. One person joined them briefly.

7 Q. Was that person law enforcement?

8 A. He was.

9 Q. And in that conversation, did Mr. Wehelie make any
10 monetary offer to purchase a weapon?

11 A. I do not recall him making an offer to purchase one. He
12 inquired how much one would cost.

13 Q. But he did not offer to pay a certain amount to buy one?

14 A. No.

15 Q. And there's nothing in your affidavit about any follow-up
16 conversation about him purchasing his own weapon?

17 A. Correct.

18 Q. And there was no conversation, future -- further
19 conversation about him purchasing a weapon for himself, was
20 there?

21 A. For himself, no.

22 Q. Returning to the conversation on February 18. How was
23 that conversation recorded?

24 A. We have audio and visual -- audio and video recordings.

25 Q. And how many people were present at that meeting?

1 A. Which meeting?

2 Q. The meeting on February 18.

3 A. Which location?

4 Q. Sorry, I will turn your attention to paragraph 8(a).

5 A. Okay.

6 Q. And that appears to be at a hotel room in Baltimore,

7 Maryland?

8 A. Uh-hmm.

9 Q. How many people were present at that meeting in the hotel
10 room?

11 A. Two.

12 Q. Besides Mr. Wehelie?

13 A. No, one besides Mr. Wehelie.

14 Q. Okay. And that's UC 2?

15 A. Correct.

16 Q. And who had proposed the idea that Mr. Wehelie transport
17 four guns?

18 A. UCE 1.

19 Q. So it was his idea?

20 A. Yes.

21 Q. And the guns involved in paragraph 8(a) had been rendered
22 inoperable?

23 A. Yes.

24 Q. Had the FBI ever fired those guns to ascertain whether or
25 not they were operable?

1 A. I cannot say whether anybody at the FBI had. I had not.

2 Q. So you don't know if they were ever operable?

3 A. I do not.

4 Q. And after the one FBI agent gave the four guns to Mr.

5 Wehelie, he then drove them to a second FBI agent waiting in

6 Springfield, Virginia; is that correct?

7 A. He drove them to another undercover law enforcement

8 officer.

9 Q. All right. So the only transfer that Mr. Wehelie

10 accomplished was from one FBI agent to another FBI agent?

11 A. Yes.

12 Q. And after he delivered the guns, the FBI agent paid him

13 money, correct?

14 A. On a separate meeting, yes.

15 Q. On a separate meeting. But they did not arrest him?

16 A. No.

17 Q. Did the -- you do say in here that you followed,

18 surveilled Mr. Wehelie on his trip from Baltimore to

19 Springfield, correct?

20 A. Yes.

21 Q. And did you follow him or somebody follow him the entire

22 way?

23 A. Yes.

24 Q. Did he stop at all?

25 A. No.

1 Q. Was anybody else involved in the transfer besides Mr.
2 Wehelie? Was there anybody else with him in the car?

3 A. No.

4 Q. And he never trans -- he never switched cars or anything
5 like that?

6 A. No.

7 Q. Was anybody -- how many agents were waiting for him in
8 Springfield?

9 A. He met with one person.

10 Q. And after that transfer on February 18, five months ago,
11 did the agent reach out to Mr. Wehelie again?

12 A. The agent that he dropped him off to, no.

13 Q. Did the undercover agent number 1, as he referred to in
14 your affidavit, reach out to Mr. Wehelie again?

15 A. Yes.

16 Q. How many times would you say he reached out to Mr. Wehelie
17 after that?

18 A. Numerous. They had --

19 Q. For how long?

20 A. For several months.

21 Q. And after that date, February 18, Mr. Wehelie did not make
22 any further attempts to purchase a firearm; is that right?

23 A. Correct.

24 Q. And there is no record that he has ever purchased a
25 firearm?

1 A. No.

2 Q. And other than that occasion and the instance in paragraph
3 7(a) in Yemen, there is no evidence he's ever possessed any
4 other firearm, is there?

5 A. No.

6 Q. And your agents searched Mr. Wehelie's family's home last
7 week; is that correct?

8 A. Yes.

9 Q. They find any firearms?

10 A. No.

11 Q. And in response to the undercover agent's attempts to
12 reach out to Mr. Wehelie after February 18, would it be fair to
13 say that Mr. Wehelie stopped responding to him?

14 A. Yes.

15 MS. MERTZ: Nothing further, Your Honor.

16 THE COURT: Any redirect?

17 MR. VAN GRACK: Your Honor, just a few.

18 REDIRECT EXAMINATION

19 BY MR. VAN GRACK:

20 Q. Just now defense counsel asked whether after February 18
21 the undercover law enforcement officer, UCE 1, reached out to
22 the defendant. Do you recall that question?

23 A. Yes.

24 Q. Did in fact after February 18 UCE 1 communicate with the
25 defendant?

1 A. Yes.

2 Q. And in those communications, did the defendant and the law
3 enforcement officer have any discussions about ISIL?

4 A. Yes.

5 Q. In that period of time, is that the period of time in
6 which the defendant discussed going to a military recruiting
7 center and shooting individuals?

8 A. Yes, it was. That's also the time when he was showing the
9 videos to the undercover.

10 Q. And during that period of time until the day he was
11 arrested, was the defendant under surveillance?

12 A. Yes.

13 Q. And how would you describe that surveillance?

14 A. Constant and daily.

15 Q. And could you tell the Court -- when was the defendant
16 arrested?

17 A. July 7.

18 Q. And can you tell the Court why the defendant was arrested
19 on July 7?

20 A. The defendant was traveling.

21 Q. Where was the defendant traveling to?

22 A. To Minneapolis.

23 Q. And why did the defendant -- why did the FBI decide to
24 arrest the development -- arrest the defendant as he was
25 traveling to Minneapolis?

1 A. We did not know if this was the first part of any other
2 travel. We had no idea where his destination was, ultimate
3 destination was.

4 MR. VAN GRACK: No more questions, Your Honor.

5 THE COURT: All right.

6 MS. MERTZ: Your Honor, if I may, briefly.

7 THE COURT: They have the obligation. So they get
8 the last word.

9 MS. MERTZ: Thank you, Your Honor.

10 THE COURT: Agent Gaylord --

11 THE WITNESS: Yes, sir.

12 THE COURT: -- if you know, to the best of your
13 understanding, did Mr. Wehelie -- who did Mr. Wehelie believe
14 he was dealing with when he was dealing with the three
15 undercovers?

16 THE WITNESS: To the best of my knowledge, based on
17 the recordings and the conversation I overheard, he believed he
18 was dealing with somebody who may potentially help him travel
19 to Syria or to Libya and join ISIS.

20 THE COURT: So you have no information in your
21 possession that would suggest that Mr. Wehelie believed he was
22 dealing with FBI agents?

23 THE WITNESS: No, sir.

24 THE COURT: You have no information in your
25 possession that would suggest that Mr. Wehelie when he moved

1 the four firearms or machine guns from Undercover 2 to
2 Undercover 3, that he had any information in his possession
3 that would suggest that he knew those weapons were inoperable?

4 THE WITNESS: No.

5 THE COURT: Thank you. Does the Court's questions
6 elicit any other questions from counsel?

7 MR. VAN GRACK: No more questions from the
8 Government, Your Honor.

9 MS. MERTZ: Just one question, Your Honor.

10 RE CROSS-EXAMINATION

11 BY MS. MERTZ:

12 Q. Was the -- when Mr. Wehelie transferred the weapons, was
13 that understood to be in connection -- what was the purpose of
14 that purchase, to his knowledge?

15 A. There was no purpose laid out to him. He was just asked,
16 and he agreed.

17 Q. And it had nothing to do with alleged terrorism or
18 anything like that?

19 A. No.

20 MS. MERTZ: Thank you.

21 THE COURT: Agent Gaylord, you may step down.

22 NOTE: The witness stood down.

23 THE COURT: The Government have anything further?

24 MR. VAN GRACK: No, we do not, Your Honor.

25 THE COURT: Government have argument?

1 MR. VAN GRACK: Yes, Your Honor. The primary basis
2 for the Government seeking detention is the danger to the
3 community.

4 As the Court just heard from Special Agent Gaylord's
5 testimony, the representations made by the defendant are of the
6 most serious type of danger. It's an individual who spoke
7 about not just supporting ISIS, not just encouraging others to
8 support ISIS, but actually discussing a plan that he had
9 thought through of traveling to join ISIS, as well as a plan
10 that if that travel failed, that he would in fact engage in
11 terrorist activity in the United States.

12 Again, not just a random shooting, but a plan to go
13 to a specific location, a military recruiting center, and how
14 he would dupe the individuals in that military recruiting
15 center into thinking that this was someone who was actually
16 seeking to be recruited.

17 In this -- the United States would argue this is the
18 most serious type of danger in light of what's occurred in
19 Orlando, San Bernardino, these are the types of comments and
20 actions that we must as a community and the United States take
21 seriously. In those instances, there is often comments and
22 questions about what signs were there, what indicators did we
23 have as a community that this individual was going to engage in
24 violence.

25 And the United States submits that the testimony from

1 Special Agent Gaylord indicates that these are the types of
2 indicators and signs. This is an individual who sought to
3 obtain a firearm for himself. In fact, he sought to obtain it
4 through another individual to conceal his potential possession.
5 That's the cousin that Special Agent Gaylord referred to
6 earlier.

7 It's someone who has violated the law in the past.
8 Someone who for \$300 was willing to violate the law again.

9 In addition to you have someone who made statements
10 about supporting ISIL, showed videos, enjoyed, was brought to
11 tears in emotion when asked whether he was a supporter of ISIL.
12 And again, relayed specific plans that he had in mind in order
13 to provide support for ISIL.

14 In addition to the dangerous aspect, the United
15 States submits that we have a very serious offense, a ten-year
16 felony in which the evidence is overwhelming. As heard in the
17 testimony and in the complaint, the evidence are recordings and
18 individuals who specifically corroborate that the defendant
19 took possession of the weapons, knew what the weapons were, and
20 transported them across state lines.

21 We also have, as relayed in the Pretrial Services
22 report, an indication that in fact he was a felon and had a
23 felony on his record.

24 And the final point that the Government would raise
25 is, as relayed in the Pretrial Services report, you have an

1 individual with a history of nonappearance for his -- the
2 felony that is identified, it is a statutory burglary that he
3 was sentenced to three years imprisonment, suspended,
4 conditioned on going to behavior and probation. And the
5 defendant violated that probation. As discussed, there were
6 four instances in which the defendant failed to appear in front
7 of the Probation officer.

8 There is also another instance reported in the report
9 in which the individual -- the defendant failed to appear in
10 court, and I believe there was a bench warrant out for his
11 arrest.

12 And then the final comment that the Government would
13 make at this time is in the report there is a representation
14 that his family would be willing to host him and watch over him
15 as a condition of release. And the United States submits that
16 all of the conduct that was just described, not just in the
17 report but the evidence described in court, occurred while the
18 defendant was with his family, either living with his family,
19 or near his family, or when he was spending a significant
20 amount of time with his family.

21 And so, that gives the Government no comfort and
22 should give the community no comfort that that in fact would
23 allow the defendant to meet whatever conditions defense counsel
24 would believe are sufficient.

25 THE COURT: Thank you.

1 MS. MERTZ: Thank you, Your Honor. Notwithstanding
2 the Government's attempt to portray Mr. Wehelie with -- or
3 paint him with all of the fervor and furor that's been going on
4 in the country for the last few weeks, Mr. Wehelie is charged
5 with being a felon in possession. He is not charged with any
6 charges relating to terrorism.

7 Having now had a chance to --

8 THE COURT: Is it your position that this Court is
9 only supposed to consider, in making a determination on the
10 safety of the community, the current charges against him?

11 MS. MERTZ: Absolutely not, Your Honor. However, I
12 would suggest that the weight of some of the Government's
13 evidence may be belied by the charge that they are bringing in
14 this case.

15 Mr. Wehelie, as the Probation officer's report
16 states, was not with his family for the last year. He is now
17 of recently with his family again.

18 He -- Mr. Wehelie is a United States citizen. He
19 graduated from Lake Braddock High School. Has he struggled in
20 the last few years? Yes, he has. He's been smoking too much
21 pot, and he has had a really difficult time trying to get a job
22 because of his prior felony. Which he has a prior felony, and
23 that makes it very difficult in this country to get a job.

24 But he has been trying to turn his life around. He
25 has achieved two years of college. He is somebody who loves

1 his family. His entire -- two of his sisters and his parents
2 are here today in support of him, and they would welcome the
3 opportunity to vouch for him.

4 There are ample allegations by the Government that he
5 has made statements about violence, but there is no evidence
6 that he has a history of violence. He has no convictions for
7 violence.

8 He has not possessed a weapon to the Government's
9 knowledge. The Government searched his home and they did not
10 find any weapons.

11 When he was traveling, what the Government didn't
12 mention is that he was going to stay with his aunt for a
13 basketball tournament. He is a basketball player. He played
14 for his high school team and he played for Hood College for a
15 year.

16 He does acknowledge that he has struggled with
17 substance abuse, and he would acknowledge that he has struggled
18 with unemployment, and that those things have caused him some
19 turmoil for the last year or two. But he would seek substance
20 abuse treatment and mental health treatment, and he would
21 certainly submit to electronic monitoring and to the
22 custodianship of his parents.

23 But he is not a risk of flight. The Government has
24 seized his passport. And he is -- the Government has not
25 alleged that he has done anything other than have loose

1 conversations at the instigation of the FBI.

2 So we would submit that he should be released at this
3 time and that there are conditions that can both secure his
4 appearance before this Court -- I would point out that the
5 prior failures to appear are seven -- six years old when he was
6 still a teenager. And he did complete the probation that the
7 Government has made -- has raised, he completed that
8 successfully ultimately.

9 So we would ask this Court to consider conditions
10 which would permit him to be released to the custodianship of
11 his family who are here today and are willing to change their
12 work schedule so that one of -- his parents are willing to
13 change their work schedule so that one of them can always be at
14 home with him.

15 And we would ask the Court that if the Court is
16 considering doing that, that we would submit that he would --
17 he would readily agree to attend substance abuse treatment and
18 mental health counseling at the Court's -- the direction of the
19 Probation officer to assist him.

20 THE COURT: Well, Mr. Wehelie, obviously, is a risk
21 of flight based on the four -- or three failures to appear to
22 court appearances in the past, as well as the four failures to
23 appear before his supervising Probation officer.

24 However, the Court believes there may be a
25 combination of conditions of release that could reasonably

1 assure his appearance at future court proceedings, that being
2 him being in the custody of his parents, GPS monitoring
3 perhaps.

4 The Court is more concerned with the safety of the
5 community. The Court will adopt as its own the assessments of
6 nonappearance and danger as set forth in page 5 of the report.

7 Based on the nature of the instant offense -- the
8 Court understands that he is only at this juncture been charged
9 with being a felon in possession of firearms. The types of the
10 firearms that he was in possession of causes this Court
11 significant concerns.

12 The agent in his testimony referenced these firearms
13 as machine guns capable of firing up to 1,200 rounds a minute.
14 He possessed four of them, provided them to someone he believed
15 may have been trying to assist ISIS themselves. He didn't
16 believe these individuals were FBI agents. He had no basis to
17 believe that these weapons were inoperable. His knowledge at
18 the time is important -- or his lack of knowledge thereof is
19 important as well.

20 The fact that he had no previous criminal history is
21 a double-edged sword. In fact, an individual who has a history
22 of crimes of violence, this Court may understand why more they
23 would want to join an organization such as ISIL that conducts
24 themselves in such a way as to behead individuals and to burn
25 individuals alive.

1 An individual who has absolutely no criminal history,
2 this Court finds it extremely difficult why such an individual
3 would want to join such an organization.

4 So the nature of the instant offense in and of itself
5 is strong. But the facts and the statements by Mr. Wehelie
6 underlying the instant offense, statements he made to three
7 undercover officers while conducting or committing the instant
8 offense in regards to wanting to join ISIL, wanting to join to
9 travel join ISIS, if he couldn't join ISIS, what he would
10 actually do, commit attacks in the United States of America,
11 cause this Court significant concerns.

12 Obviously, it causes the Court even more concerns
13 when he's making these statements while he's under the
14 influence of a mood-altering drug.

15 It also causes this Court, in combination with the
16 fact that assessment of danger number three, unknown mental
17 health status -- with an individual who has an unknown mental
18 health status or possibly an unknown mental health status
19 talking about committing jihad either over in Yemen, or Libya,
20 or Iraqi, and Syria, or in the United States, causes this Court
21 even more concern.

22 It says an unknown mental health status, but the
23 people who know him best, his parents and his sister, believe
24 he does have an underlying mental health issue.

25 Without that having been taken care of, and the fact

1 that he is around transporting weapons, this Court concludes
2 that there are no combination of conditions of release that
3 would reasonably assure the safety of the community.

4 Therefore, Mr. Wehelie will be detained prior to
5 further proceedings. He is remanded to the custody of United
6 States Marshals.

7 MS. MERTZ: Thank you, Your Honor.

8 NOTE: The hearing concluded at 3:20 p.m.

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14 C E R T I F I C A T E o f T R A N S C R I P T I O N

15

16 I hereby certify that the foregoing is a true and
17 accurate transcript that was typed by me from the recording
18 provided by the court. Any errors or omissions are due to the
inability of the undersigned to hear or understand said
recording.

19 Further, that I am neither counsel for, related to,
20 nor employed by any of the parties to the above-styled action,
and that I am not financially or otherwise interested in the
outcome of the above-styled action.

21

22

23

24

25

/s/ Norman B. Linnell
Norman B. Linnell
Court Reporter - USDC/EDVA