

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

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 UNITED STATES OF AMERICA, :
 :
 v. : Criminal No. 15-2716-TJS
 :
 MOHAMED ELSHINAWY, :
 :
 Defendant. :
 :
 - - - - - x December 22, 2015

 Baltimore, Maryland

DETENTION HEARING

BEFORE: THE HONORABLE STEPHANIE A. GALLAGHER, Judge

APPEARANCES: CHRISTINE MANUELIAN, Esq.
 Office of the U.S. Attorney
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 On Behalf of the Government

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KEYNOTE: “---” indicates inaudible in the transcript.

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1 P R O C E E D I N G S

2 (Whereupon, at 3:32 p.m., the proceeding began.)

3 THE CLERK: The Honorable Stephanie A. Gallagher
4 presiding.

5 THE COURT: Good afternoon. Please be seated.
6 Ms. Manuelian?

7 MS. MANUELIAN: Good afternoon, Your Honor. We are
8 here for a detention hearing in United States versus Mohamed
9 Elshinawy. Case Number is 15-2716TJS.

10 THE COURT: Thank you. Mr. Balter?

11 MR. BALTER: Good afternoon, Your Honor. Joseph
12 Balter from the Federal Public Defender Office along with Doug
13 Miller on behalf of Mohamed Elshinawy.

14 THE COURT: All right. And are we ready to proceed
15 with the hearing?

16 MR. BALTER: We are, Your Honor.

17 MS. MANUELIAN: Yes, Your Honor.

18 THE COURT: Ms. Manuelian?

19 MS. MANUELIAN: Your Honor, I assume that you have
20 already had an opportunity to take a look at the complaint
21 affidavit. And I don't want to belabor the information that
22 is laid out in significant detail in that affidavit. I just
23 wanted to highlight a couple things for the Court.

24 Obviously we are moving for detention based on
25 flight risk as well as danger to the community. It is, I

1 think, very clear from the affidavit that through some
2 excellent investigative work, the FBI was essentially able to
3 interrupt this Defendant's long-term planning with respect to
4 utilizing funds that he was receiving directly from ISIL
5 operatives for some sort of nefarious activity, whether it was
6 an attack or whether it was causing destruction or something
7 along those lines.

8 The information that we obtained via search warrants
9 from various social media applications indicated that he had a
10 clear intent to participate and join ISIL. He expressed his
11 desire to go and live among the members of the Islamic State.
12 And the only reason he had not done that to date, at least
13 prior to when he was initially questioned by the FBI in July
14 of this year, was because he had some of his own planning that
15 he wished to undertake.

16 His communications with his associates, one of whom
17 had -- we were able to delineate in the affidavit was clearly
18 a member of ISIL and an ISIL operative by his own
19 conversations that we were able to obtain over social
20 media -- were very clear. He pledged his allegiance early in
21 2015, the Defendant to ISIL. Communicated that information to
22 the operative, which was one of his childhood friends.

23 We know that he had traveled to Egypt and had
24 returned for a lengthy period of time, returning -- in 2012,
25 returning sometime in late 2014. During a period of time when

1 there was a lot of upheaval in Egypt and many people were
2 seeking to flee. It was the period that we all refer to as
3 the Arab Spring.

4 There are questions about -- the Defendant, when he
5 met with the FBI initially in July, and essentially provided
6 some information that was accurate or appears to be accurate
7 but some information that was clearly not accurate.

8 Left out many details about what his true intentions
9 were, what he was undertaking, the amount of money that he
10 received from ISIL was very clear that we interrupted whatever
11 was going on in the scheme of things in terms of his
12 communications with ISIL and his assistance and material
13 support to them.

14 That material support was provided numerous ways in
15 terms of providing various methods of communication via social
16 media, via e-mail accounts, via pay-as-you-go phones that we
17 were able to determine through subpoenaed information was
18 indicating potential use by overseas actors.

19 Those accounts for the phones, the e-mails and the
20 like were opened under aliases clearly in an effort by this
21 Defendant to try and cover his tracks. There were a number of
22 phones that he never revealed he was using or obtained. He
23 never revealed that to the FBI.

24 It was through very significant investigative work
25 that a lot of the layers were able to be peeled back to find

1 out that in fact he was obtaining various phones and utilizing
2 various methods of communications, much of which the law
3 enforcement cannot necessarily see the substance of.

4 And this is part of the reason why the Government
5 has serious concerns about this Defendant being let go under
6 any conditions of release, because he will very easily be able
7 to duplicate and restart any communications with ISIL
8 operatives outside the detection of law enforcement.

9 The means that he was using in this case were
10 obviously done so that law enforcement could not detect what
11 he was up to, and in some instances he was successful in being
12 able to conceal information from the FBI.

13 The communications, Your Honor, I think with his
14 brother that are outlined in the complaint affidavit, are a
15 very clear indication of how this -- what this Defendant's
16 true intentions were.

17 And though he may try to articulate -- I am sure
18 Mr. Balter may argue that this was, that he was, the Defendant
19 was in fact being truthful when he said he was trying to scam
20 ISIS to obtain money just for his own personal use, that is
21 directly controverted by his attempts to recruit his brother
22 during the timeframe that he claims he was simply scamming
23 ISIL.

24 If he were actually serious or if he were really
25 attempting to scam ISIL there would be no reason for the

1 necessity of the ways in which he tried to conceal his
2 communications and he certainly wouldn't be talking about the
3 fact that he pledged his allegiance to ISIL, that he wanted to
4 live among the Islamic State, that he wanted to commit
5 Jihad -- all of these conversations that I think are
6 summarized, which he had with his brother. Not with another
7 ISIL operative but his own family member.

8 I think that seriously undercuts what might, at some
9 point in time, be his defense, that he was being allegedly
10 truthful with the FBI. It took many months of investigation
11 after his initial meetings with FBI agents to peel the layers
12 back, as I previously mentioned, and actually get to the
13 bottom of what was really going on, and what this Defendant
14 was doing.

15 He is a serious flight risk. He is obviously
16 looking at significant time under the charges that he is
17 facing. He obviously -- we know from the information that we
18 obtained via warrant that his desire is to go overseas, to
19 join his friend, and to be with members of the Islamic State.

20 So he has every incentive to flee the jurisdiction
21 of this Court and could easily do so and skip over one of the
22 borders before the Government would be able to track him down.

23 So he is a serious flight risk but I think more so
24 than that, he is a danger to the community given his pattern
25 of conduct during the course of this year and given how he

1 has -- the information or the way in which he tried to pull
2 the wool over the eyes of the FBI when initially confronted
3 about his activities.

4 So for those reasons, Your Honor, we would request
5 that he remain detained pending trial.

6 THE COURT: Mr. Balter?

7 MR. BALTER: Thank you very much, Your Honor. Your
8 Honor, just by way of introduction, I think it deserves to be
9 said at this point that this, in terms of the underlying
10 charges here, this is a very, very unusual case.

11 In terms of cases of material support of terrorism,
12 what we are generally talking about is one of two things. One
13 is that an individual may, in furtherance of terrorism, may be
14 involved in some kind of actual plotting of some kind of
15 violent activity, either an attack in which arms are used, an
16 attack in which some kind of explosives are used. The type of
17 actual, aggressive attack against human beings.

18 The other way in which material support is generally
19 shown is in the context of perhaps giving some kind of
20 financial support to a terrorist organization. That is the
21 heartland of cases that the courts have -- in which the courts
22 have considered these matters related to material support of a
23 terrorist organization.

24 What we have here is something totally different.
25 The crux of the information that the Government has presented

1 about what Mr. Elshinawy did is that he simply received some
2 money, and it was a relatively small amount.

3 The Government claims that it was about \$8,000.
4 There was some dispute as to whether or not in fact there
5 was -- he had told them about all the money. He certainly
6 readily acknowledged to them that there were two large
7 transfers that, hey, he had received. And he gave them an
8 explanation of what was happening, was that this was a scam
9 that was going on.

10 As he was an individual who was short of funds.
11 There was an opportunity for him to perhaps get some money.
12 It may have been an ill-conceived idea but the only plan that
13 there was, if any, was for him to get money and not do
14 anything in exchange for that.

15 And that is a critical difference between this and
16 other cases that have been charged along these lines. I think
17 we have to look at this entire case and the strength of the
18 case in that context.

19 I think it is important to remember that
20 Mr. Elshinawy is charged by complaint at this point with not
21 providing material support alone but simply at this point
22 attempting to provide material support.

23 And the reason why it is significant that the
24 Government has charged this as an attempt at this point is
25 because of the fact that they couldn't establish even probable

1 cause to show that there had been any material support.

2 What he did in simply getting these funds or
3 receiving these funds -- didn't give any material support to
4 ISIS or any other terrorist organization.

5 And the important difference in the elements that
6 they would have to prove if it went to trial is, first of all,
7 that there was a specific intent. The statute that he is
8 charged under, if it weren't an attempt under 2339(b), simply
9 has a mental standard of knowingly. That he might know that
10 something was about to happen.

11 By charging an attempt, of course, and it is
12 boilerplate in the law on this and it is in the --- penal
13 code, is an attempt requires specific intent to accomplish
14 something in the way of material support. And that is clearly
15 lacking.

16 The other element of intent that is clearly lacking
17 is that there was some kind of substantial step toward
18 achieving what that ultimate goal was, and there was clearly
19 no substantial step. They followed him constantly, I am sure,
20 for a period of at least six months.

21 If the Court looks, distills what the timeline of
22 this case is, the Government alleges in the affidavit that
23 they became aware of what they call a nefarious transfer in
24 June of 2015. If the Court is also aware, Mr. Elshinawy was
25 at liberty for the next six months, and there were several

1 instances in which law enforcement intervened, and we submit
2 to try to catch him at something or to try to get more
3 information that would sustain a charge and they just weren't
4 able to.

5 We know in June of 2015, on the 28th, there was a
6 Western Union transfer of \$1,000 to Mr. Elshinawy. All right?
7 And the way the Government characterized this in their
8 affidavit was that they became aware of the fact that this was
9 going to happen, and then after the transfer was made, they
10 apparently conducted surveillance, they saw Mr. Elshinawy go
11 into a convenience store near his home.

12 They saw him obtain the funds. They followed him to
13 a bank where a deposit was made. They learned that there was
14 \$800 of the \$1,000 apparently deposited.

15 And what this set in -- what this began at that
16 point was from what we can only infer, in light of the fact
17 that they suspected terrorist activity, is constant
18 surveillance, which was conducted over the next six months.

19 Now I would infer, Your Honor, that most likely the
20 suspicion and the surveillance of Mr. Elshinawy went back much
21 further than June of 2015. The Government isn't telling us
22 when he actually became suspicious. They are simply telling
23 us when they became aware that, that transfer was taking
24 place.

25 The affidavit alleges that there was a Paypal

1 transfer that took place three months earlier in March of '15.
2 I don't know if that was -- they were aware of that
3 beforehand. I don't know what their level of intelligence was
4 but we certainly know it most likely went back before June 28
5 to the extent that they were ready to go at that point by
6 basically devoting extensive resources toward his
7 surveillance.

8 We know that there was -- he was involved in a
9 vehicle stop two days after June 28. And while it doesn't say
10 this in the affidavit, I would be amazed if that wasn't a stop
11 that was set up for the purpose of seeing if a stop could be
12 made, what they could find on Mr. Elshinawy's person.

13 What he might be carrying in his vehicle, what he
14 might be carrying on his person, anything that they might be
15 able to find that would link him to their suspicion that there
16 was terrorist activity.

17 It is very, very clear that there was nothing found.
18 There was nothing -- no allegation that anything of any type
19 of significance was located. The affidavit did say that after
20 the arrest was made, they continued to follow him, which of
21 course establishes that there must have been some type of
22 coordination between the agents who were investigating this
23 case and the local police who may have generated the stop.

24 The agents, I am sure, wanted to disguise the fact
25 that the Government agents were behind it so they wouldn't be

1 tipping Mr. Elshinawy off to the fact that he was a subject of
2 their surveillance. But it is clear that is what the case
3 was.

4 So at this point, I think the Court has to infer
5 that every conceivable investigative tool that the FBI uses to
6 track down terrorists was being used. I would anticipate that
7 there were warrants that were issued to track his car. I
8 would anticipate that there were, to the extent possible, that
9 there were Title III warrants to intercept his phone calls.

10 I would anticipate that there were observations that
11 were being made of everywhere he went. They started
12 the -- they may have already started the process they were
13 going after every social media outlet he was connected with,
14 every bank account, looking for evidence in which he was
15 taking that money that he was receiving and spending it in
16 some way that would further terrorism.

17 And what is clear from this affidavit for a period
18 of six months they didn't put together a shred of evidence
19 that he was doing anything to materially aid any type of
20 terrorism, be it ISIS or any other terrorist organization.
21 All they had was an individual who was receiving these funds
22 from somebody from allegedly from an ISIS functionary and
23 taking it for his own use.

24 And that is exactly what he told them. They went to
25 see him on July 17. So he had been -- they had obviously been

1 conducting surveillance of him at least through the 28th of
2 June at that point, so for several weeks. The agents went to
3 interview him.

4 There was a noncustodial interview at his home.
5 They confronted him with some of the evidence. They asked him
6 whether or not he had received the monetary transfer. He
7 indicated that he did, and not only that, he voluntarily gave
8 the agents his computers. I believe they looked at the
9 computers there.

10 They took the computers with them. He showed them
11 the place on his computer where they would find evidence of
12 the fact that he had received the money, the money payments.
13 I believe it was the Paypal payments. He gave them the
14 password to his computer. They took that computer away.
15 There is the allegation that he wasn't completely truthful.
16 We haven't seen, you know, any reports with regard to that
17 meeting.

18 It is all in terms of conclusory statements that the
19 agents are making at this point. But I certainly, you know,
20 wouldn't be surprised if there was room for misunderstanding
21 about what they asked him but for the most important
22 information they asked him about, did you obtain this
23 information? He acknowledged it. He indicated that he had
24 been in contact with a childhood friend. He indicated that he
25 had referred him to someone from ISIL, and yes, he had

1 received that money and he also said that he was -- that the
2 purpose of getting the money was not terrorism but because of
3 the fact that he was planning on scamming them out of the
4 money.

5 Three days later, they return to see him again.
6 There is a second interview, and the Government makes much of
7 the fact that he hadn't admitted to every single transfer.

8 There was no motivation he would have had to say,
9 yes, one transfer and not the next. I infer it was the kind
10 of situation there were multiple transfers. He admitted to at
11 least three of them. There is a question about the other two.

12 The significance of the fact that he didn't admit to
13 all of that is very slight. What is most significant is again
14 the fact that he did. He told them what his motivations were.
15 And he was absolutely cooperative with them.

16 I think the Court at this point also has to take
17 into account the fact that there was not an arrest made either
18 at that point or the day before when he had supposedly
19 admitted to the agents that he had in fact received this money
20 from individuals identified as being from ISIS shows that the
21 Government couldn't have considered him to be a threat at that
22 point.

23 They couldn't have considered him to be a threat to
24 public safety. He was out and about, going his way. I am
25 sure that they were conducting surveillance on him 24/7. And

1 to the extent that reduced whatever the risk was that may be
2 significant, but they also would have seen that he was doing
3 nothing to create a risk to anyone.

4 He worked as a paperboy. He delivered papers by
5 throwing papers on people's porches. He was out and about.
6 There wasn't that quantum of evidence that showed that he was
7 a threat.

8 Similarly with regard to him being a flight risk.
9 They knew exactly where he was. He obviously was not going
10 anywhere. The proof is in the pudding to the extent that six
11 months went on in which there was never any question about
12 where he was going to be.

13 And the Government knew the lion's share of
14 everything that is in that affidavit from the time that they
15 first spoke to him. Now they may have had other motivations
16 in terms of either wanting to see where he went, whom he tried
17 to talk to, who the individuals were he was in contact with.

18 There was nothing of significance in terms of
19 certainly anybody he talked to within the United States.
20 There was nothing of significance of showing he tried to buy
21 guns. There is nothing to show that he tried to buy
22 explosives. Anything that would be used to carry out any type
23 of terrorist attack.

24 There was no communications other than these chats
25 that they keep referring to, which were not specific in any

1 way from what I have seen. And again, we are relying at this
2 point on Government interpretations of what was said in
3 Arabic.

4 I note some of the nomenclature that was used by the
5 agents in the way it was described in terms of whether or not
6 something was operational frankly sounds more like something
7 when we hear from an FBI agent because that is the way they
8 refer to whether or not individuals who are planning some type
9 of activity are actually going to do something.

10 And so I would doubt that was something translated
11 from the original Arabic but in any event it is just talk.
12 There is just nothing there that is specific. The
13 investigation went on. We went to the point they executed a
14 search warrant on October 9. There is no indication anything
15 came out of that search warrant at all.

16 Just like there was nothing that came out of those
17 computers that proved anything when he voluntarily gave it to
18 them without notice back in July.

19 After the search warrant was executed, they sent him
20 a target letter. They didn't go out an arrest him. They sent
21 him a target letter. Mr. Elshinawy, you are the target of a
22 federal investigation. Please get yourself a lawyer or apply
23 to have a lawyer appointed for you, which he did within a
24 matter of days.

25 He applied for a lawyer under the CJA Act. The

1 federal public defender was appointed. Myself and Mr. Miller
2 were immediately in contact with Mr. Elshinawy. He made
3 arrangements to come to our office. We contacted the
4 Government to let him know we were in a position to be able to
5 talk with them. Communications went back and forth for some
6 time.

7 Every time we reached out to reach Mr. Elshinawy, he
8 was always available to come and confer with us and to talk to
9 us, and quite frankly before the arrest of him was made on
10 December 11, the last communication between the Government and
11 the defense was a message that the defense had sent over to
12 the Government.

13 And while that doesn't say anything in itself with
14 regard to flight risk, it does say that the communications
15 were going on during this whole period of time and nothing had
16 happened during this whole period that showed that there is
17 any level of increase in risk than there was six months ago,
18 nine months ago or whatever period of time it was when the
19 Government started this investigation.

20 And Your Honor, I think it is within that context
21 that the Court has to consider whether or not there are
22 conditions that can be set that will ensure the safety of the
23 community and will ensure that Mr. Elshinawy makes his court
24 appearances. Mr. Elshinawy continues to enjoy the presumption
25 of innocence like every American citizen does.

1 He is an American citizen. He was born in this
2 country. His parents are of Egyptian origin. He was brought
3 back to Egypt and was raised in Egypt and was educated in
4 Egypt, and several years ago he returned to this country. He
5 married an American citizen. He has been a law-abiding
6 citizen. He comes into this court without a criminal record.

7 What goes part and parcel with the presumption of
8 innocence he enjoys is that the Bail Reform Act says that the
9 Court should be issuing conditions of release unless no
10 condition of release will assure that he will make his court
11 appearances and will not be a danger to the community.

12 And this is an unusual recommendation that I have to
13 make. And what I am going to recommend to the Court is we
14 stay with the tried and true. I would request that the
15 Government put on the record exactly what the investigative
16 and surveillance techniques they utilized for the last six to
17 nine months were because they obviously worked in making sure
18 that Mr. Elshinawy did not go anywhere or that the American
19 public in any way was placed at risk.

20 We know that those conditions exist. I can only
21 infer and speculate what they are but they did work. And so
22 we will consent to any type of condition that the Government
23 wants. If the Government wants Mr. Elshinawy to consent to
24 the entry of another Title III warrant so that all his
25 telephones are being tapped, we will agree to that.

1 If the Government wants us to consent to an order
2 for another GPS tracker to be placed on his car, we will
3 consent to that. The only thing that I would recommend that
4 hasn't come up yet is we will obviously consent to an
5 electronic location monitor being placed on his ankle so that
6 he would be able to be tracked in that additional way.

7 So I suppose what I am suggesting then is that
8 Government surveillance plus Court-ordered location
9 monitoring. But I challenge the Government to explain how it
10 can be that they let this man remain at liberty for this
11 period of time, and all of a sudden he becomes a risk?

12 And Your Honor, I can only infer this, and again it
13 is something -- the public concern at this point is very
14 legitimate and very real for all Americans. We know on
15 December 2 there was an act of alleged terrorism that took
16 place on the other side of the country, which has created an
17 incredible level of concern by all Americans.

18 And there can be no denying that is a legitimate
19 concern. On the other hand, Mr. Elshinawy, like every other
20 person charged in our court system, has the right to have his
21 case individually adjudicated, and the fact that we are
22 concerned about something that happens somewhere else can't be
23 the triggering mechanism for why he should be detained.

24 And again I don't think there is any lack of
25 coincidence here that it was just days after San Bernadine

1 took place, in which the Government chose, well, now is the
2 time that we have to arrest Mr. Elshinawy, and now all of a
3 sudden every risk that we thought was under control, they
4 obviously did, is no longer under control.

5 I don't think one follows the other. So for that
6 reason, Your Honor, the pre-trial report indicates where
7 Mr. Elshinawy was living. I ask the Court to issue an order
8 allowing him to be released on a condition that he go back
9 home with an electronic monitor, and I think that the
10 Government then will resume whatever level of surveillance and
11 monitoring they had, and the ends of justice will be met in
12 that way. Thank you.

13 THE COURT: How do you respond, Mr. Balter, to the
14 Government's allegation that they were not adequately able to
15 monitor him because according to the communications they did
16 intercept, he was taking steps to conceal certain
17 communications over social media and otherwise?

18 MR. BALTER: Your Honor again, I think those
19 allegations in the affidavit are of a totally conclusory
20 nature. And that is why the only thing I can respond to --
21 they knew 90 percent of all this information six months ago.
22 Whatever that risk was, it wasn't so much that they felt, when
23 he said, I got money from ISIS, they had to arrest him right
24 then and there.

25 I mean, one could say that is shocking. I mean,

1 one's reaction could be, wait a minute. Somebody said they
2 were getting money from ISIS and you didn't just arrest them
3 right on the spot? That is a legitimate inquiry.

4 But that having been the case, and that having been
5 made the calculation by the Government on several occasions,
6 and then having made the assessment that, wait, nothing is
7 going on here, which is creating such as a risk that we can't
8 leave him out with the type of surveillance and monitoring
9 that we have, answers the question by itself.

10 It is now self-serving for the Government to say
11 there are all these risks and we can't monitor them. If that
12 was the case, how did we get through the last six months?
13 Nothing has changed. What has changed is San Bernadine. What
14 didn't change is what was going on with him.

15 THE COURT: Thank you. Ms. Manuelian?

16 MS. MANUELIAN: Your Honor, I would venture to guess
17 that if we arrested the Defendant on the spot after we spoke
18 with him in July, Mr. Balter would be here saying, where is
19 the evidence, Judge? Where is the evidence that connects this
20 individual to ISIL?

21 It took another six months for the FBI to actually
22 peel the layers back and find the evidence that brings us into
23 court today. I hear a lot of speculating and assumptions made
24 by Mr. Balter but he has not actually really addressed the
25 crux of the evidence that we have laid forth in this

1 complaint.

2 And let me just say one thing, Your Honor. The Bail
3 Reform Act, as I read it, doesn't put an obligation upon law
4 enforcement to go ahead and continue to monitor and take steps
5 to surveil and otherwise follow a Defendant who is now in the
6 custody of the U.S. Marshal Service.

7 The Bail Reform Act provides that there are
8 conditions that can be imposed in which to guarantee the
9 safety to the community and make sure that the Defendant
10 appears in court.

11 That does not include the FBI taking part in
12 fulfilling those conditions that would render the Defendant
13 not a flight risk or that would ameliorate his danger to the
14 community. And part and parcel to what is going on here is
15 the fact that the FBI, thanks to this Defendant taking steps
16 to conceal what he was doing, did not have the adequate
17 information to ascertain the substance of what he was doing
18 with ISIL, the phones that he was using, the e-mail accounts
19 that he was using.

20 The chat applications that he was employing, all at
21 the direction of the ISIL operatives with whom he was
22 communicating, and we know in August after he was visited by
23 or spoke to the FBI, he is telling his brother, in
24 communications over social media, I have been uncovered, I
25 have been revealed. And he was taking steps to lay low

1 because he knew that the FBI was onto him in some form or
2 fashion.

3 So I have to point out -- let me just address very
4 quickly a number of things that Mr. Balter raised. First of
5 all, this is not an usual case. What is unusual about this
6 case, as opposed to other material support cases, is this is a
7 Defendant who actually received money from ISIL as opposed to
8 lone wolves who are out there exercising their sympathy with
9 ISIL and wanting to do something to support the cause.

10 This individual is directly communicating with ISIL
11 operatives overseas. The material support that has been
12 provided: Right now in the complaint, he is charged simply
13 with attempted material support because the money he received,
14 which was \$8,700, \$3,500 of which he concealed from the FBI,
15 that money was -- he obtained by his own admission, received,
16 to utilize in connection with causing destruction or
17 committing some sort of terrorist attack that ISIL could claim
18 responsibility for.

19 He also provided himself has personnel. That is
20 material support under 2339(b). He sought to recruit his
21 brother, and those communications are outlined in the
22 complaint, to join the Islamic State. He also provided means
23 and methods of communication which, is providing material
24 support.

25 He provided e-mails under aliases that could be used

1 or accessed by his associates. He provided pay-as-you-go
2 phones and phone numbers when asked. As a matter of a fact,
3 his childhood friend specifically asked for an unattributable
4 phone number, and that is identified in the criminal complaint
5 affidavit.

6 He utilized and downloaded various applications for
7 which he could communicate covertly at the instruction of ISIL
8 operatives. He also provided financial services, some of
9 which is outlined in the criminal complaint affidavit.

10 A facility in which it could appear as though he
11 were shipping articles or items to individuals overseas
12 through Paypal when in point of fact he wasn't shipping
13 anything. That was the method by which they could get the
14 money to him, which is a very significant thing for ISIL to
15 try to get money into the United States to try to commit
16 terrorist acts over here.

17 So the substantial step that he took with respect to
18 the money was the way in which he allowed for these
19 individuals to get the money here but beyond that he actually
20 provided material support. And obviously this case is going
21 to be going forward to indictment in a few weeks, and
22 Mr. Balter is well aware of that.

23 We have discussed when the Government anticipates it
24 will be returning an indictment. This is just a criminal
25 complaint but it lays out a significant amount of the evidence

1 that the Government has.

2 We prevented this individual from undertaking
3 whatever acts he was seeking to do. And I also have to point
4 out that we also charge in this criminal complaint obstruction
5 of agency proceedings as well as the false statement given
6 what he was trying to do and sort of stringing the FBI along.

7 While at the same time of going ahead and
8 communicating with his associates to tell them that he had to
9 lay low and take extra security precautions because he had
10 been uncovered.

11 I have to make one mention about the computer, and
12 we do highlight this. He gave a laptop that the FBI could do
13 nothing with. And that frankly is very consistent with this
14 individual trying to take steps to not reveal the full extent
15 of his activities for ISIL.

16 That laptop had an operating system on it that
17 doesn't store any information so there is nothing that could
18 be obtained from that, and the Defendant knew it.

19 I have to say, however, that in October, when the
20 search warrant was executed, that is how we found out that he
21 was still in communication with ISIL operatives from what was
22 on his phone and that is how we found out that he was still in
23 communication with the individual we ultimately determined to
24 be his brother and we were able to secure those social media
25 discussions with his brother through a search warrant as a

1 result of following up on what we seized on October 9.

2 THE COURT: During the search warrant of the house
3 you recovered the phone, and that is where the communications
4 came from?

5 MS. MANUELIAN: Yes, Your Honor. We saw that he was
6 still in contact with two individuals, one of whom had ISIL
7 related -- appears to be an ISIL operative who had a lot of
8 ISIL propaganda on the account that we ultimately searched.

9 And then the other account, of course, was with his
10 brother, and that is how we got all these conversations that
11 clearly undercut the Defendant's story that he gave to the FBI
12 about committing a scam.

13 And I also have to point out that he is not legally
14 married to the woman he lives with. They have never been
15 married. She is, I think, they have a religious understanding
16 and she represents herself to be his wife but they are not
17 legally married under U.S. law.

18 THE COURT: Let me just ask the other question that
19 I know Mr. Balter would ask. What explains the delay from the
20 Government's perspective between the May execution of the
21 search warrant and October and the eventual arrest of
22 Mr. Elshinawy in December?

23 MS. MANUELIAN: Your Honor, we were still working on
24 amassing our evidence. When that search warrant occurred, we
25 learned that we -- we identified a number of other phones, we

1 identified these other individuals, whose accounts we were
2 able to secure through search warrants. So the investigation,
3 we were still uncovering evidence that was going to show that
4 the Defendant was not being truthful and that there was more
5 to what he was doing with ISIL than he had revealed to us.

6 The entire last six months has essentially been
7 piecing together a criminal case on this Defendant because he
8 did not reveal information to us and we did not know how
9 to -- it was very difficult for us to ascertain exactly what
10 he was doing and what devices he was using to communicate with
11 ISIL operatives.

12 Mr. Balter makes this conclusory statement that we
13 have all this information in front of us. Frankly, if we did,
14 we would have arrested this gentleman a long time ago but we
15 didn't. The case has been slowly built over the course of the
16 last six months to get us to the point where we are right now,
17 and it has nothing to do with the timing of San Bernadine.

18 It has everything to do with where we are at this
19 point in time with respect to our ability to have moved
20 forward on the criminal charges.

21 There are also other issues that caused some delay
22 because as you well know, in these matters, we have to
23 coordinate with many other law enforcement and intelligence
24 agencies, and so there were some issues with us, with the
25 timing of how we could proceed.

1 But primarily the focus of what we were trying to do
2 was to build the various pieces of evidence that would support
3 the charges in this case and ultimately we -- the Government's
4 intent is in moving forward with an indictment, to present an
5 indictment that charges actually material support.

6 We charge this at this point in time because it is
7 the criminal complaint and we are going to go ahead and piece
8 together the rest of the case, which hopefully that indictment
9 will be presented to the grand jury in the next few weeks.

10 And Your Honor, obviously whatever concerns there
11 were about what Mr. Elshinawy was doing in the last six months
12 since we last saw him in July, obviously there were steps that
13 the FBI took to ensure the safety of the community. At this
14 point in time, however, the FBI is not in charge of ensuring
15 the safety of the community and ensuring that this Defendant
16 is not a flight risk.

17 This Defendant is now in the custody of the U.S.
18 Marshals, and under any other terms and conditions of release,
19 which would be supervised by pretrial services, not by the
20 FBI -- there is nothing that is going to guarantee the safety
21 of the community.

22 We will not be able to determine what it is he is
23 doing with any other pay-as-you-go phones, with e-mails, with
24 laptops, with any other ways in which he can communicate or
25 try to get others to communicate for him. And he certainly

1 has every incentive to flee the jurisdiction of the court.

2 MR. BALTER: Your Honor, let me just add a couple
3 points. First of all, with regard to this notion of fleeing,
4 when the Federal public defender was first appointed and we
5 had conversations with the Government, there were frank
6 discussions about what the Government was contemplating in
7 terms of charges.

8 Mr. Elshinawy knew what type of charges and what
9 kinds of penalties were possible --

10 THE COURT: At what point were you?

11 MR. BALTER: This occurred -- I believe it was
12 slightly after the execution of the search warrant. So my
13 guess is, I think, I don't know the exact dates. I think it
14 would have been mid to late October. And so we have been
15 representing -- there was a CJA order or rather an --

16 (Pause)

17 THE COURT: I understand that Mr. Balter made the
18 point that he didn't flee from October to now.

19 MR. BALTER: That is correct, Your Honor. And
20 obviously to the extent that I was suggesting that the
21 Government could continue with their surveillance, I
22 understand that the Court cannot impose that obligation on the
23 Government. But I think that it is indicative of the fact
24 that Mr. Elshinawy, by the assessment of the Government, was
25 not a flight risk, was not a risk to public safety in a way

1 that he presented an imminent threat.

2 To the extent that the Court is concerned, as I
3 indicated, about whether or not he will make his appearances
4 in court, I think that making the requirement that he have
5 electronic monitoring is a perfectly reasonable one, and I
6 would ask and recommend that be added to it.

7 So with those, with that said, I would simply make
8 the recommendation that the Court order conditions of release
9 with electronic monitoring, and hopefully if the Government
10 will take whatever steps that are necessary to monitor
11 Mr. Elshinawy's whereabouts and the safety of the community.

12 MS. MANUELIAN: Judge, I just want to correct one
13 thing on the record. Mr. Balter says that obviously the
14 Government didn't think that Mr. Elshinawy was a concern or a
15 threat. That is just not true. And as I said, there were
16 steps that were taken to ensure the safety of the community
17 over the course of the last six months since learning of the
18 information that ultimately brought the agents to
19 Mr. Elshinawy's doorstep to start in July.

20 I just want that to be clear on the record because
21 it is absolutely false that the FBI or the Government was not
22 concerned about his threat. We took steps to ensure that was
23 addressed.

24 THE COURT: Thank you.

25 (Long pause)

1 THE COURT: All right. I thank both sides for their
2 presentations. Let me explain my order and the reasons for
3 it. I have issued an order of detention in the State. First,
4 this is a case in which the Government may properly seek
5 detention. The Defendant is charged under Sections 18 United
6 States Code Section 2339(b) (a) (1), 18 United States Code 1505
7 and 18 United States Code Section 1001.

8 Based on the Government's proffer there is probable
9 cause to believe the Defendant committed the charged offenses.
10 I found by a preponderance of the evidence from the
11 information produced at the hearing that there is a serious
12 risk that the Defendant will not appear, although ultimately I
13 do conclude that there could potentially be conditions to
14 ameliorate the flight risk.

15 But I find by clear and convincing evidence from the
16 information produced at the hearing that the Defendant poses a
17 risk to the safety of other persons in the community, and by
18 clear and convincing evidence that there is no condition or
19 combinations of conditions to reasonably assure community
20 safety.

21 Specifically I am relying on the following: First,
22 the nature of the offense, and in particular when I refer to
23 the nature of the offense, I mean those communications with
24 his brother in August that indicate efforts to conceal
25 communications from law enforcement and used some type of

1 mechanism that cannot be monitored by law enforcement.

2 In a case of this nature, that causes some
3 significant public safety concerns. Second, the strength of
4 the evidence against the Defendant. Third, the fact that
5 there apparently is still unverified background information in
6 the Defendant's pretrial report, which I find to be an issue
7 both in terms of safety to the community and in terms of
8 potential flight risk.

9 Fourth, significant foreign ties, which present
10 flight risk, although I do believe conditions such as
11 potentially a substantial bail could help ameliorate the
12 flight risk issue but again that would not help with respect
13 to the danger to the community.

14 And finally pretrial service's recommendation of
15 detention. So for all those reasons, I have issued an order
16 of detention in this case. Is there anything further that we
17 can address in this matter today?

18 MS. MANUELIAN: No, Your Honor. Thank you.

19 MR. BALTER: No, Your Honor. Thank you.

20 THE COURT: We need a preliminary hearing date, I
21 guess.

22 MS. : I think it was waived, Your Honor.

23 MS. MANUELIAN: Yes, Your Honor. It has been
24 waived.

25 THE COURT: Oh, it was --- already? All right,

lcj

34

1 thank you.

2 THE CLERK: All rise. This honorable Court now
3 stands in recess.

4 (Whereupon, at 4:24 p.m., the hearing adjourned.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the duplicated electronic sound recording of the proceedings in the above-entitled matter.

Laura C. Jackson 05-02-2017

Laura C. Jackson Date
Transcriber