IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISON

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	No. 17 CR 236
JOSEPH JONES,	)	Judge Andrea Wood
ED SCHIMENTI,	)	
Defendants.	)	

ED SCHIMENTI'S AND JOSEPH JONES' RESPONSE TO GOVERNMENT'S CONSOLIDATED MOTIONS IN LIMINE

Now Comes Defendant, EDWARD SCHIMENTI, by his attorney JOSHUA B. ADAMS, and Stephen F. Hall, and JOSEPH JONES, by his attorney PATRICK E. BOYLE, and respectfully files this response brief in objection to the government's motions in limine. In support of their objections, Mr. Schimenti and Mr. Jones state as follows.

I. Mr. Schimenti and Mr. Jones are entitled to the entrapment defense

1. Legal Standard

"Entrapment generally is an issue for the trier of fact 'and the government must prove predisposition or the lack of government inducement beyond a reasonable doubt in order to defeat it.'" *United States v. Garcia*, 2018 WL 6171794, *2 (N.D. IL. Nov. 26, 2018)(quoting *United States v. Blitch*, 773 F.3d 837, 844 (7th Cir. 2014), as amended on denial of reh'g and reh'g *en banc* (Jan. 27, 2015)). Mr. Schimenti and Mr. Jones are entitled to present the "defense of entrapment to the jury if the evidence is such that a rational jury could infer that he was entrapped into committing the crime." *Id.*; see

also *United States v. Evans*, 924 F.2d 714, 716 (7th Cir. 1991) (citing *Mathews v. United States*, 485 U.S. 58, 63 (1988)).

When the issue of entrapment is raised before trial, the court must accept the defendant's factual proffer as true. *Mayfield*, 771 F.3d at 420. To obtain a jury instruction on entrapment and shift the burden of disproving entrapment to the government, the defendant must proffer evidence on both elements of the defense: (1) inducement and (2) lack of predisposition. *Id.* at 440. However, this initial burden of production is "not great," and an entrapment instruction is warranted if the defendant proffers "some evidence" that the government induced him to commit the crime and he was not predisposed to commit it. *Id.*

In other words, "[a]lthough more than a scintilla of evidence of entrapment is needed before instruction on the defense becomes necessary, the defendant need only point to evidence in the record that would allow a rational jury to conclude that he was entrapped." *United States v. McGill*, 754 F.3d 452, 457 (7th Cir. 2014).

2. Mr. Schimenti and Mr. Jones have made a sufficient showing to warrant an entrapment instruction

A. Neither Mr. Schimenti nor Jones had a predisposition to aid an FTO

The Seventh Circuit utilizes a five part test in order to determine an individual's predisposition:

> (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government.

United States v. Mayfield,771 F.3d 417, 435 (7th Cir. 2014). No one single factor controls. However, the most significant is "whether the defendant was reluctant to commit the offense." *Id;* citing *United States v. Pillado*, 656 F.3d 754, 766 (7th Cir. 2011). "In short, a person who resists his baser urges is not "predisposed" simply because he experiences them." *Mayfield*, 771 F.3d at 436 (citing *Jacobson v. United States*, 503 U.S. 540, 555 (1992)). Predisposition "refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means." *Id.*

Here, the government tracked and surveilled Mr. Schimenti and Mr. Jones for close to two years prior to his arrest. Moreover, the government watched Mr. Schimenti's social media posts since January 2015 when the CHS first approached the FBI. During that entire time, neither Mr. Schimenti nor Mr. Jones ever expressed a willingness to conduct any violence. Prior to the government's introduction of a confidential informant, neither Mr. Schimenti nor Mr. Jones ever took any affirmative steps to assist an FTO. They never researched on their computers how to make explosives, or how cell phones can work as detonators. Plainly put, they only actively assisted once the CHS entered the scene. Mr. Schimenti had been the moderator of a Facebook message group that had been sympathetic to ISIS. At no time did Mr. Schimenti solicit or inquire about the possibility of meeting anyone offline and providing material support to any FTO. This only started once prompted by government agents. It is extremely unlikely Mr. Schimenti or Mr. Jones would have committed the instant offense without government inducement.

The Seventh Circuit holds that a "defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is *likely* that if the

government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation." *Mayfield*, 771 F.3d at 436 (citing *United States v. Hollingsworth*, 22 F.3d 1196, 1203 (7th Cir. 1993)).

It is not as if Mr. Schimenti or Mr. Jones had the independent means to commit this act. They have no special training, do not know anyone affiliated with any FTO, and most importantly, had no experience of political violence outside of vicariously watching foreign videos posted by unknowns on the internet. Ed posted frequently on Facebook to voice his support for ISIS. The fact that he never solicited anyone to help him take substantive action is probative of the predisposition prong of the entrapment. The government will surely point to Mr. Schimenti's affinity for ISIS videos and ISIS media that is rampant on his social media. However, this is all protected speech, ho matter how morally objectionable it may seem. Supporting distasteful, objectionably horrible groups is in and of itself not a crime. In fact, it is protected by the Constitution. *See* Const., Amend. 1. Mr. Schimenti's prolific social media presence is insufficient to establish predisposition.

Perhaps the most relevant evidence as to predisposition is the fact that agents tried to get Mr. Schimenti to engage in violence in December 2015. When he and Mr. Jones met with UC1 ("Omar") at a hotel room, the UC1 asked Mr. Schimenti if he wanted to "rock it out" and commit violence. Mr. Schimenti became irate, stormed out of the meeting and told Jones he never wanted to see those people again. Undeterred, the government regrouped, streamlined its efforts, and waged a second assault on Mr. Jones approximately 5 months later in 2016.

B. Mr. Schimenti and Mr. Jones can establish government inducement

The Seventh Circuit holds that "[t]he government's inducement does not always need to be 'extraordinary' to satisfy the inducement element; even minor government inducements may be sufficient in some cases." *Mayfield*, 771 F.3d at 433-34 (quoting *United States v. Plowman*, 700 F.3d 1052, 1057 (7th Cir.2012) (second internal quotation marks omitted)); *Pillado*, 656 F.3d at 765–66 (to the same effect).

Moreover, "the touchstone of an illegitimate inducement is that it creates a risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's persuasion. The conduct of the government's agents need not be "extraordinary" to create this risk. As we explained in *Pillado*, "subtle, persistent, or persuasive" conduct by government agents or informants may qualify as an illegitimate inducement." 656 F.3d at 765. *Pillado* also cautioned against "taking the adjective 'extraordinary' out of context to divine a new legal standard." *Id.* at 765–66.

Here, the government engaged in a concerted effort of the span of 18 months that included not only one CHS, but 5 undercover officers, and two separate schemes. The inducement need not be extraordinary. The subtle requests by the government, including the introduction of a CHS whose backstory involved his family trapped in Syria, played to both Mr. Schimenti's and Mr. Jones' emotions. The CHS subtly, persistently and persuasively gained their trust, through their devotion to Islam, their family's situation, and the fact that Mr. Schimenti and the CHS were the only Muslims at their work. Eventually, when the CHS asked Mr. Schimenti and Mr. Jones to help obtain cell phones, they felt compelled to do so. This is based on the close bond they formed, at least in Mr. Schimenti's mind. Ed helped the CHS because he saw him as a man outside of his

homeland, and without anyone to assist this refugee. When the CHS asked for help, Ed and Joseph felt compelled to do so.

II. The Court should deny Government's remaining Motions in Limine

1. Motions on Jury Nullification and Reasonable doubt and punishment

Mr. Jones and Mr. Schimenti state these motions should be denied as moot. The court will instruct the jury with respect to jury nullification and as to the definition of reasonable doubt. Moreover, counsel does not intend to argue the potential penalty each defendant faces.

2. The court should deny government's motion to bar evidence of motivation for investigation or prosecution

This information is essential to Mr. Schimenti and Mr. Jones' case. While counsel will not engage in improper conduct before this honorable court, the government's request is overly burdensome and hampers Mr. Schimenti and Mr. Jones' Sixth Amendment right to counsel. Predisposition will most likely be one of the most contested issue at trial. After all, the government has listed numerous social media posts by Mr. Schimenti in an attempt show his predisposition and predilection for ISIS and violence. Therefore, Mr. Schimenti's statements to UC1 and his conduct in the December 2015 meeting, when agents first attempted to get him assist an FTO are exceptionally relevant and material to the predisposition question.

Counsel is entitled to ask the government agents about Mr. Schimenti's Mr. Jones' reluctance to commit an act of violence and statements regarding their knowledge that traveling overseas to support an FTO is a crime.

3. The court should deny the government's motion to bar evidence of outrageous government conduct

Similar to the previous request, counsel does not agree to the outer limits of the government's request. If taken to its logical extreme, this motion could limit all of Mr. Schimenti and Mr. Jones' relevant inquiry into the CHS' motivation and the issue of predisposition. Cross examination topics such as behavior, motives, and biases of government witnesses are always relevant. Counsel suggests that rather than imposing blanket rulings made prior to any witness testimony, these issues should be dealt with at trial as they arise with the specific witness.

CONCLUSION

Based on the foregoing, Mr. Schimenti and Mr. Jones respectfully request this honorable court deny the government's motion in limine and permit an entrapment instruction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joshua B. Adams, an attorney, certify that in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR5.5, and the General Order on Electronic Case Filing (ECF), the following document: DEFENDANTS' RESPONSE TO GOVERNMENT'S MOTIONS IN LIMINE, was served on, May 13, 2018, to all parties of record via the CM/ECF system.

s/ Joshua B. Adams
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