

1 JON M. SANDS
Federal Public Defender
2 District of Arizona
850 W. Adams, Suite 201
3 Phoenix, Arizona 85007
Telephone: (602) 382-2700
4

5 KRISTINA L. SITTON, #023467
GERALD A. WILLIAMS, #013115
6 Asst. Federal Public Defenders
Attorneys for Defendant
7 kristina_sitton@fd.org
gerald_williams@fd.org
8

9 IN THE UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 United States of America,
12 Plaintiff,
13 vs.
14 Elton Simpson,
15 Defendant.
16

No. CR-10-055-PHX-MHM

**DEFENDANT'S TRIAL
MEMORANDUM**

17 Defendant, through counsel, submits the following as his Trial
18 Memorandum pursuant to the Court's Order. Defendant maintains his plea of not
19 guilty and will argue to the Court that he did not commit the offense listed in the
20 Indictment.

21 **I. FACTS**

22 *A. Defendant's Background*

23 Born in Illinois, Mr. Simpson moved to the Phoenix area and converted
24 to the Muslim religion at a young age.

25 *B. The Investigation*

26 For unknown reasons, the Government began investigating Mr.
27 Simpson in 2006 by recording conversations between him and Dabla Deng, an
28 informant who was paid \$132,000 by the FBI to gather information on Mr. Simpson.

1 The Government has disclosed recordings of conversations between Mr. Deng and
2 Mr. Simpson, gathered through the use of a body wire. Overall, the investigation
3 includes 225 compact discs that cover 327 days of conversations between Mr. Deng
4 and Mr. Simpson in the period between March of 2007 and November of 2009.
5 Most consist of conversations between Mr. Deng and Mr. Simpson regarding the
6 Muslim religion, various daily events and their favorite eating establishments. The
7 Government's evidence supporting the charge will include snippets of six (6)
8 recordings, for a total of 17 minutes and 31 seconds of dialogue over the course of
9 well over 1500 hours of conversation.

10 The recordings do not contain even one instance wherein Mr. Simpson
11 speaks about or even implies he knows anything about, believes in, is affiliated with,
12 has connections to or wishes to fight with al-Shabaab, the Somalian foreign terrorist
13 organization mentioned in the Government's trial memorandum. There is likewise
14 no evidence wherein Mr. Simpson referenced Osama Bin Laden or his call for
15 individuals to support jihad in Somalia.

16 The Government states in its memo that a "frequent topic" of
17 conversation between Mr. Deng and Mr. Simpson "was jihad and the obligation to
18 fight jihad overseas." The defense has found no evidence of these "frequent"
19 conversations while perusing the body wires. Thus far, the Government has failed
20 to show even one instance where Mr. Simpson mentions "violent jihad" in Somalia.
21 That phrase is one made up by the Government, likely because it is aware that the
22 word jihad in the Muslim religion does not necessarily imply violence. Instead,
23 jihad signifies a struggle between two forces. Muslims use the word "jihad" to
24 signify one of three types of struggles: 1. An internal struggle to maintain faith, 2.
25 The struggle to improve the Muslim society, or 3. The struggle in a holy war. In
26 fact, the prophet Muhammad characterized an armed struggle to be a "little jihad"
27
28

1 but considered the spiritual, individual version of holy war, otherwise known as the
2 war within a Muslim person, as the “great jihad.” For example, fornication is
3 prohibited by the Muslim culture. When a member of the Muslim faith sees a
4 woman who is attractive, that individual suffers a jihad, an internal struggle between
5 his faith and his desire.

6 C. *The alleged offense*

7 On May 27, 2009, Mr. Simpson told Mr. Deng, “We need to go to
8 Somalia. We can make it to the battlefield. It’s time to roll.” Nearly eight months
9 later and just two weeks after Umar Farouk Abdulmutallab attempted to blow up a
10 plane in Detroit on Christmas Day, agents arrived at Mr. Simpson’s house to stop
11 him from proceeding to South Africa, where he had enrolled in school to study
12 Islam. Agents have verified that Mr. Simpson purchased a ticket to South Africa
13 and also that he had a visa allowing him to travel to South Africa. (The distance
14 from South Africa to Somalia is roughly 2300 miles and would require travel
15 through several countries. This is longer than the distance between San Diego,
16 California and Jacksonville, Florida, which is about 2100 miles.)

17
18 Agent Hebert testified under oath at the grand jury proceeding and
19 described his contact with Mr. Simpson on January 7, 2010, as follows:

20 Throughout the conversation, we had basically *intimated* to him that we
21 knew he had talked to others on other occasions about traveling not
22 only to South Africa but also to Somalia. Even though we asked in
round about ways, [Mr. Simpson] continued to deny any sort of
discussions of traveling to Somalia.

23 Towards the end of the conversation, I specifically said, “I want a ‘yes’
24 or ‘no’ answer. **Have you discussed traveling to or are you planning
to travel to Somalia?**”

25 [Mr. Simpson] said, “No.”

26 . . .

27 . . .

28 . . .

1 **II. APPLICABLE LAW**

2 The Government misstates the law the Court must follow in arriving at its
3 verdict.

4 *A. 18 U.S.C. §1001*

5 In order for the defendant to be found guilty of this charge, the
6 government must prove each of the following elements beyond a reasonable doubt:

- 7 1. First, the defendant made a statement,
8 2. Second, that statement was false,
9 3. Third, the defendant acted willfully, that is deliberately and with
10 knowledge that the statement was untrue,
11 4. Fourth, the statement was material to the government agency's
12 activities or decisions, and
13 5. Fifth, the matter is within the jurisdiction of the federal investigating
14 agency.
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16 *United States v. Jiang*, 476 F.3d 1026, 1029 (9th Cir. 2007) *citing United States v.*
17 *Camper*, 384 F.3d 1073, 1075 (9th Cir. 2004). *See also* 9th Circuit Model Jury
18 Instruction 8.66.

19 A statement is material if it could have influenced the agency's
20 decisions or activities.

21 If a question is ambiguous, it is up to the trier of fact to determine
22 whether the defendant understood the question as the government did and answered
23 falsely. *United States v. Culliton*, 328 F.3d 1074, 1078 (9th Cir. 2003). The trier
24 of fact determines which of the plausible interpretations of an ambiguous question
25 the defendant comprehended and responded to. *Id.*, *United States v. Matthews*, 589
26 F.2d 442, 445 (9th Cir. 1978).
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1 Other courts have found that a defendant's intent to mislead the agency
2 is required, simply being untrue or incorrect is not enough. *United States v. Lange*,
3 528 F.2d 1280 (1976).

4 2. *International Terrorism and 18 U.S.C. § 2331*

5 The remainder of 18 U.S.C. §1001 states as follows: “[i]f the offense
6 involves international or domestic terrorism (as defined in section 2331), imprisoned
7 not more than 8 years, or both.

8 There is no controlling law in the 9th Circuit as to what evidence the
9 Government must show to prove that the false statement “involves international
10 terrorism” in order to increase the maximum sentence to eight years and the
11 applicable Guideline range from 0-6 months to 46-57 months in the case of an
12 individual with no criminal history like Mr. Simpson. However, it is very clear that
13 the Government must prove more than just an investigation into international
14 terrorism for this part of the statute to apply. When interpreting a statute, if the
15 plain meaning of the statute is unambiguous, that meaning is controlling and the
16 Court of Appeals will not examine the legislative history as an aid to interpretation
17 unless the legislative history clearly indicates that Congress meant something other
18 than what it said. *Zuress v. Donley*, 606 F.3d. 1249 (9th Cir. 2010); *See also INS*
19 *v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213, n. 12, 94
20 L.Ed.2d 434 (1987) (holding that when plain language appears to settle a question,
21 only clearly expressed contrary intention in legislative history may overcome “strong
22 presumption” that Congress expresses its intent through the language it chooses).

24 The plain language of the statute increases the maximum term of
25 imprisonment to eight years “If the *offense* involves international or domestic
26 terrorism (as defined in section 2331).” This statute is completely unambiguous.
27 The statute clearly criminalizes a false statement that itself involves domestic or
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1 international terrorism. Nowhere in the statute is even a suggestion that only an
2 investigation involving terrorism is required. The Court should use the plain
3 language of the statute when deciding Mr. Simpson's guilt or innocence.

4 In order to fulfill the statutory definition of "international terrorism,"
5 conduct must satisfy a three-prong test of the statute. 18 U.S.C. § 2331. The first
6 prong is that the conduct must "involve violent acts or acts dangerous to human life
7 that are a violation of the criminal laws of the United States or any State." 18 U.S.C.
8 § 2331(1)(A). The second prong is that the violent or criminal activity "appears to
9 be intended" to "intimidate" or "coerce" any civilian population or government. 18
10 U.S.C. § 2331(1)(B). The third prong requires that the activities "occur primarily"
11 outside of the United States or "transcend boundaries in the means by which they are
12 accomplished." 18 U.S.C. § 2331(1)(C)

13 "International terrorism," by definition, requires the investigation of
14 activities that constitute crimes." See *United States v. Sarkissian*, 841 F.2d 959, 965
15 (9th Cir. 1988) (citing 50 U.S.C. § 1801(c)(1) (1988), the statute providing the
16 definition of "international terrorism" under FISA, which included language
17 substantially similar to the statutory definition of terrorism under 18 U.S.C. § 2331
18 (1)). Conduct could "involve" "violent acts," without the actual conduct being
19 violent or criminal in nature. *Boim v. Quranic Literacy Institute*¹, 291 F.3d 1000,
20 1009 (7th Cir. 2002). Because, taken literally, "involving violent acts" could
21
22

23 ¹There were three 7th Circuit decisions involving the plaintiffs in *Boim*. See *Boim v. Quranic Literacy Institute*
24 (*Boim I*) 291 F.3d 1000 (7th Cir. 2002) (the defendants sought an interlocutory appeal to a 7th Cir. Panel, seeking
25 to overturn a the district court's determination that providing financial assistance to a terrorist is an act of
26 international terrorism. The 7th Circuit panel affirmed the district court's determination); *Boim v. Quranic Literacy*
27 *Institute (Boim II)* 511 F.3d 707 (7th Cir. 2007) (after *Boim I*, the case resumed in district court, and the jury
28 assessed jointly and severally liable for \$52 million in damages against all defendants. The damages were trebled
and attorneys' fees added. In *Boim II*, the defendants appealed the final judgment; the panel vacated the judgment
and directed the district court to redetermine liability.); *Boim v. Holy Land Foundation (Boim III)* 549 F.3d 685 (7th
Cir. 2008) (After *Boim II*, the plaintiff petitioned for a rehearing en banc; the full court granted the petition to
consider the elements of the suit under 18 U.S.C. § 2333) in *Boim III*.)

1 Copy of the foregoing transmitted
2 by ECF for filing this 22nd day
of October, 2010, to:

3 CLERK'S OFFICE
4 United States District Court
Sandra Day O'Connor Courthouse
5 401 W. Washington
Phoenix, Arizona 85003

6 MICHAEL MORRISSEY
7 Assistant U.S. Attorney
8 United States Attorney's Office
Two Renaissance Square
9 40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408

10 Copy mailed to:

11 ELTON SIMPSON
12 Defendant

13 s/ S. B.
14 S. B.

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