UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	)	Cause No. 6:17-cr-18-Orl-40KRS
Plaintiff,	)	
vs.	)	
NOOR ZAHI SALMAN	)	
Defendant.	)	

DEFENDANT NOOR SALMAN'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNTS I AND II

Defendant NOOR SALMAN moves for judgment of acquittal on Counts I and II of the Indictment, pursuant to Federal Rule of Criminal Procedure 29(a) and the Fifth Amendment to the United States Constitution.

FACTS

On January 12, 2017, a grand jury indicted Ms. Salman by way of a two-count indictment on charges related to the Pulse Night Club shooting, a crime perpetrated by her husband, Omar Mateen. (Doc. 1). In Count I, the Government charged Ms. Salman with "aiding and abetting the attempted provision and provision of material support to a foreign terrorist organization" in violation of 18 U.S.C. § 2339A(b)(1). (Doc. 1 at 1-2).

Specifically, the Government alleged that Ms. Salman "did knowingly aid and abet Omar Mateen's attempted provision and provision of material support or resources, . . .

including personnel and services," to a "designated foreign terrorist organization, namely, the Islamic State of Iraq and the Levant." (Doc. 1 at 2) (internal citation and punctuation omitted). The Government additionally alleged that Ms. Salman committed the offense, "knowing the organization was designated as a terrorist organization, and that the organization had engaged and was engaging in terrorist activity and terrorism, and the death of multiple victims resulted." *Id.*

In Count II, the Government asserted that Ms. Salman committed obstruction of justice by "knowingly" engaging in "misleading conduct toward another person and persons, that is, Officers of the Fort Pierce, Florida, Police Department and Special Agents of the Federal Bureau of Investigation, with the intent to hinder, delay, and prevent the communication to federal law enforcement officers and judges of the United States of information relating to the commission and possible commission of a federal offense." *Id.*

The defense moved for dismissal of count two based on a lack of venue, arguing that the existence of an ongoing federal investigation in Orlando at the time the defendant allegedly made false statements to Sergeant Hall and Special Agents Mayo and Sypniewski, was insufficient to establish venue. At the time that Ms. Salman raised this argument, the defense possessed Agent Mayo's 302 and note, as well as Sergeant Hall's police report. In its reply brief, the Government argued that venue existed based on the allegedly false statements to Hall, Mayo, and Sypniewski, which impeded the federal investigation in Orlando. This Court found that, "[a]ssuming the Government establishes at trial that proceedings before a federal judge or a grand jury proceeding was intended to be affected, venue is met under the first prong of § 1512(i)." Doc. 65 at 15. The Court did not consider, as the parties did not

raise, the possibility that venue could be satisfied under any other legal theory, other than impeding the ongoing criminal investigation and grand jury proceeding. The Court did not resolve whether an FBI investigation could constitute an official proceeding under 18 U.S.C. 1512(i) for purposes of the venue motion. The Court did indicate that the Government would have to prove venue by a preponderance of the evidence as a non-essential element.[1]

The defense also moved for a bill of particulars on both counts. In its response, the Government maintained that the evidence in support of its aiding and abetting charge would fall into "three general categories": (1) Ms. Salman providing a "false cover story"; (2) Ms. Salman "casing possible locations for an attack"; and (3) Ms. Salman and Mateen engaging in "aberrant and exorbitant expenditures prior to the attack." (Doc. 208 at 4-11). The Government also averred that Salman obstructed justice by:

- "Stating to Officers of the Fort Pierce, Florida, Police Department that Mateen would not have engaged in violence unless he was protecting himself;"
- "Stating to Special Agents of the Federal Bureau of Investigation (FBI) that Mateen left their apartment on June 11, 2016, to have dinner with a friend;"
- "Stating to FBI Special Agents that Mateen had only one firearm;"
- "Stating to FBI Special Agents that Mateen was not radical or extreme in his beliefs;"
- "Stating to FBI Special Agents that she did not see Mateen with a gun when he left their residence;"

[1] At the time the defense filed its motion on venue, the defense was unaware the Government would allege that Ms. Salman initially denied authorization for a consent search before her interview by Agents Mayo and Sypniewski. The defense did not learn of this allegation before Agent's Mayo's testimony during the suppression hearing.

- "Stating to FBI Special Agents that Mateen did not access the internet at their residence and had deleted his Facebook account a long time ago; and"
- "Stating to FBI Special Agents that she was unaware that Mateen was planning to conduct a violent terrorist attack." Doc. 98 at 11-12.

Additionally, the Government stated that it intended to "argue that Salman's obstructive conduct extended to deleting text messages on her phone on the night of Mateen's attack, including one informing him of the cover story she had devised." *Id.* at 12.

The case proceeded to a jury trial. At trial, the Government adduced evidence[2] that Mr. Mateen intended to give aid to ISIS in the form of personnel and services to an organization that he knew to be a designated terrorist organization or that he knew has committed a terrorist act. To wit, the Government introduced evidence that showed Mateen (1) reviewed a news article on Russia Today on May 22, 2016, reporting that ISIS's spokesman had called for attacks in the West to be conducted by its followers; (2) viewed video on June 4, 2016, of ISIS's spokesman calling for attacks in the West; (3) obtained weapons and ammunition for use in the attack; (4) practiced and scouted possible locations for the attack; (5) swore allegiance to ISIS before the attack; and (6) described himself as an ISIS soldier during the attack.

With regard to Ms. Salman, however, the Government offered scant evidence that she possessed the requisite mens rea or committed the required actus reus to sustain a conviction on Count I. Construed in the light most favorable to the Government, the evidence showed

[2] The transcripts of the trial proceedings were not available at the time of submission. Accordingly, the undersigned counsel are relying on their recollection as well as contemporaneous notes taken during the course of trial.

that Ms. Salman knew her husband had aberrant tendencies that demonstrated a proclivity toward radicalism. That included knowledge that Mateen (1) frequently viewed Jihad websites;[3] (2) had been vocal and angry about the plight of Muslims in the Middle East; (3) would watch "violent Jihad videos" and talk about Jihad and violence; (4) looked at ISIS recruitment videos on "livelink" and listened to ISIS recruitment training music.

The evidence, construed in the light most favorable to the Government, also showed that Ms. Salman knew that Mateen intended to conduct an attack for the purpose of committing Jihad. That evidence included her hearing him ask questions like, "Where would the next attack (terrorist) make a big splash?," and "How bad would it be if a club got attacked," and "What would make people more upset an attack on Downtown Disney or a club?" She also knew he had been questioned by the FBI, spent money purchasing ammunition at Wal-Mart, had purchased a rifle, and frequented the shooting range. She also knew he made her a payable-on-death beneficiary on his bank account.

With regard to the specific attack that Mateen carried out, the Government introduced evidence that tended to show that Ms. Salman knew he left the house with a handgun and a backpack full of ammunition after relating that he was going to see "Nemo." Ms. Salman also stated that she was present when, after dining at an Arabic restaurant, Mateen drove around the Pulse nightclub and commented on "how upset are people going to be when it gets attacked."[4] Finally, evidence suggested that on Friday, June 10, 2016, late at night,

[3] This statement is contradicted, in part, by the forensic evidence, which showed that Mateen usually looked at these websites at times when he was on his phone, away at work, or in the early morning hours.

[4] The Government's forensic contradicts this, and the Government has not maintained at trial that this event occurred.

Mateen looked at a website for the Pulse nightclub[5] and said "This is my target." He also appeared to be pumped up, asked her is he "looked Spanish," and announced: "this is the one day."

MEMORANDUM OF LAW

Even in the light most favorable to the Government, the evidence presented during the Government's case-in-chief is insufficient as a matter of law to sustain Ms. Salman's conviction of the aiding and abetting charge. In addition, the obstruction of justice charge is legally untenable. Accordingly, it should grant this motion and enter judgment of acquittal as to Count I and II.

I. LEGAL STANDARD

When considering a Rule 29 motion for acquittal, the Court must "view the evidence in the light most favorable to the government." *United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir. 1989) (citing *Glasser v. United States*, 315 U.S. 60 (1942)). The Court is required to "resolve any conflicts in the evidence in favor of the Government" and "accept all reasonable inferences that tend to support the government's case." *United States v. Ward*, 197 F.3d 1076 (11th Cir. 1999) (citing *United States v. Tavlor*, 972 F.2d 1247, 1250 (11th Cir. 1992). The Government need not "exclude every reasonable hypothesis of innocence," *Sellers*, 871 F.2d at 1021, but where "evidence is equally consistent with each of several hypotheses, the law considers it proof of any one of them. And if any one of them supports a finding of innocence, the law affords a defendant the benefit of innocence." *United States v.*

[5] The Government concedes that there is no forensic evidence for this but maintains that it is possible that Mateen may have shown her the website in Google incognito mode. The Government's forensic evidence, even viewed in the light most favorable to the Government, is not consistent with the Pulse nightclub being Mateen's primary target.

Brantley, No. 8:10-CR-298-T-30MAP, 2013 U.S. Dist. LEXIS 16058, at *16 (M.D. Fla. Feb. 6, 2013) (citing *Neal v. United States*, 102 F. 2d 643, 648 (8th Cir. 1939) ("when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction").

II. THERE WAS NO EVIDENCE THAT MS. SALMAN POSSESSED THE MENS REA REQUIRED TO SUSTAIN HER CONVICTION FOR AIDING AND ABETTING.

Aiding and abetting has been described as an individual's desire to "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed.'" *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.). Put differently, a violation of 18 U.S.C. § 2(b) occurs when an individual "puts in motion or . . . causes the commission of an indispensable element of the offense." *United States v. Ubaldo*, 859 F.3d 690, 750 (9th Cir. 2017) (quoting *United States v. Causey*, 835 F.3d 1289, 1292 (9th Cir. 1987)).

In addition to taking the requisite act, the crime of aiding and abetting requires the defendant's intent to facilitate the offense' commission. *Id*. at 1248. Thus, a defendant's intent to assist in the commission of a lesser offense is usually insufficient. *Id*. "Instead, the intent must go to the specific and entire crime charged . . ." *Id*. As the Court further held, "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed'" *Id*. (citing *Nye v. Nissan v. United States*, 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d at 402).

The requirement of intent is therefore satisfied when a defendant actively engages in a criminal scheme with the full knowledge of the circumstances underlying the charged offense and the same intent as the perpetrator. *Id.* at 1248-1249; *United States v. Martinez*, 555 F.2d 1269, 1271 (5th Cir. 1977) (to be convicted of aiding and abetting under 18 U.S.C. § 2 the accused must "assist the perpetrator of the crime *while sharing in the requisite criminal intent*") (emphasis added).

For example, in *Rosemond*, the Supreme Court concluded that, in order to convict an individual for aiding and abetting a 18 U.S.C. § 924(c) charge for using a firearm "during and in relation to any crime of violence or drug trafficking crime," the Government had to prove not only that a defendant actively participated in an underlying drug trafficking or violent crime, but also that the individual had advance knowledge that a confederate would use or carry a gun during the crime's commission. *Id.* at 1243. The Supreme Court explained as follows: "An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged — so here, to the full scope (predicate crime plus gun use) of § 924(c)." *Id.* at 1249. Based on this reasoning, it held that jury instructions that relieved the Government of that burden were erroneous.

A. *Knowledge*

The evidence related to Ms. Salman's purported knowledge of Mateen's interest in Jihad is insufficient to establish aiding and abetting of material support of ISIS. Even if Ms. Salman knew that Mateen had intended to commit a "Jihad" attack, her knowledge would be insufficient to sustain a conviction, because a generic attack would not be in coordination

with or under the direction and control of ISIS. *See* 18 U.S.C. § 2339B(h) ("Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."); *see also United States v. Augustin*, 661 F. 3d 1105, 1119 (11th Cir. 2011) (defendants provided material support to terrorist organization where evidence showed that they acted "under the direction and control of Al Qaeda"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 24 (2010) (18 U.S.C. § 2339B covers advocacy performed in coordination with, or at the direction of, a foreign terrorist organization).

While the evidence suggests that Mateen intended to provide support for ISIS, the record is bereft of evidence that Salman had knowledge of his allegiance to ISIS. There is no evidence that Ms. Salman was aware that Mateen had viewed ISIS call for attack or read the Russia Today news report about the call. There is no evidence that Ms. Salman knew Mateen planned to pledge support to ISIS. There is no evidence that Ms. Salman herself viewed the call for attacks.

To establish a violation of § 2339B for Mateen for providing support in the form of personnel and services to ISIS, the Government must prove that he knew ISIS was a designated terrorist organization or had committed acts of terrorism and acted with the intent to place himself under ISIS's direction and control. For Ms. Salman, however, it is necessary also for the Government to show that she intended to further Mateen's support of ISIS. *See Nye & Nissen*, 336 U.S. at 619 (noting that an aiding and abetting defendant must "in some sort associate himself with the venture, that he participates in it as in something that he wishes to bring about, that he seek by his action to make it succeed"); *see also United States*

v. Cain, 671 F.3d 271, 303 (2nd Cir. 2012) (finding that the government must prove that "the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime").

The only evidence of Ms. Salman's knowledge regarding ISIS is that she disapproved of Mateen watching the group's videos and, on Facebook, wrote that members of ISIS were not real Muslims. That evidence is insufficient as a matter of law to establish the requisite mens rea for the charged offense. In the absence of any evidence establishing her mens rea, this Court is duty-bound to grant judgment of acquittal on Count I of the Indictment.

B. *Intent*

To be liable for the crime of aiding and abetting, a person must act "with the intent of facilitating the offense's commission." *Rosemond*, 134 S. Ct. at 1245. (citing 2 W. LaFave, Substantive Criminal Law § 13.2, p. 337 (2003)).

1. *Accepting Money/Gifts*

The Fifth Circuit concluded, in *United States v. Longoria*, 569 F. 2d 422 (5th Cir. 1978),[6] that evidence of accepting something of tangible value from someone the defendant knew was committing a crime was insufficient to sustain a conviction for aiding and abetting. In *Longoria*, the defendant, Melinda Longoria, accepted a ride from Gabriel Delgado. *Id*. at 424. Delgado told Longoria that he had marijuana in the car. *Id*. When she became nervous, upset, and aggravated, Delgado, fearing discovery at a checkpoint, "handed [Longoria] $300

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

and instructed her to keep calm." *Id*. Authorities questioned them at the checkpoint, and Longoria twice told Delgado to "shut up" after their arrest. *Id*. The Government prosecuted Longoria and Delgado for possessing marijuana with intent to distribute, and Delgado pleaded guilty. *Id*. The Government proceeded on an aiding and abetting theory against Longoria. *Id*.

The Fifth Circuit held that Longoria's actions could not constitute aiding and abetting possession with intent to distribute. *Id*. at 426. The court first noted that there was no evidence Longoria knew about Delgado's intent to distribute. *Id*. at 425. Regardless, while "a charge for mere possession would be easier to sustain," the *Longoria* Court doubted that there was "evidence of anything beyond 'negative acquiescence,'" which would not constitute aiding and abetting. *Id*.

More importantly, there was "almost no evidence to establish affirmative conduct designed to aid the distribution." *Id*. The court explained that Longoria's "acceptance of the $300, and her silence at the checkpoint perhaps establish her desire that the unknown quantity of marijuana escape detection, and that she and Delgado arrive safely in Austin." *Id*. That evidence, however, did not "establish in any way her intention to associate herself with and participate in the distribution of marijuana." *Id*. Finally, her admonitions to Delgado did not "add anything to the government's case. Choosing to take advantage of constitutional rights is not evidence of criminal activity, nor is it highly probative of criminal activity to advise another to take advantage of the same constitutional rights." *Id*. Hence, under *Longoria*, merely accepting money, even if it is hush money, cannot establish aiding and abetting, because that act does not further the offense "in any way." *Id*.

It is true that the Government adduced evidence that Ms. Salman accepted money and other items of value from Mateen. Yet, as in *Longoria*, there was no evidence that Ms. Salman knew that her acceptance of benefits or purchase of any items was in any way connected with the underlying offense. The money came from Mateen—not ISIS—and there was no evidence presented whatsoever that Ms. Salman's acceptance of benefits equated to her intent to assist Mateen in the commission of a terrorist attack on behalf of ISIS. Even if she had foreknowledge of the attack, her acceptance of benefits is more probative of a desire to support her family in its aftermath than it is of her intent to assist in its commission. At most, then, her acceptance of benefits constituted the sort of "negative acquiescence" the Fifth Circuit found inadequate in *Longoria* to sustain a conviction for aiding and abetting.

2. *Casing*

The Government also adduced evidence that it claims suggested that Ms. Salman was "casing" possible locations for an attack and driving with him to purchase ammunition. In its trial brief, the Government relies on cases of "repeated presence" at "important junctures," which, it argues, supports its theory that her presence can serve as a surrogate for her intent to assist Mateen. The Government's interpretation of these cases stretches their logic beyond the breaking point.

None of the "repeated presence" cases cited by the Government involved the wife of the perpetrator, or even an immediate family member.[7] It stands to reason that Ms. Salman

[7] The one case cited that involved an immediate family member, *United States v. Guida*, 792 F.2d 1087, 1096 (11th Cir. 1986), is readily distinguishable because the wife in that case hid her identity and that of her husband while they were passing counterfeit notes. Thus, the case involved the wife's active participation in the crime and concealment of its commission, facts that take the case well outside the ambit of "repeated presence" cases.

would be present at any number of times in the period directly before the commission of Mateen's crime—she was his wife and lived with him. If the "repeated presence" line of cases were extended to sweep in immediate family members, then brothers, sisters, wives, husbands, fathers and mothers could all become liable for aiding and abetting—solely by virtue of their association with a loved one—even in the absence of any additional indicia of their intent to aid or abet the commission of a crime. That would set a dangerous precedent. It follows that Ms. Salman's accompanying her husband while he drove past City Place, or Disney Springs provides insufficient evidence that she shared his intent to provide material support for ISIS. During the trial, the Government's own expert admitted that the alleged casing of the Pulse Nightclub did not occur. Moreover, during Ms. Salman's trial, the Government presented no evidence of her statements or reaction when Mateen allegedly made statements such as "how upset are people going to be when it gets attacked." or "This is my target."

3. *Cover Story*

The Government maintains that Salman's alleged creation of a cover story that Mateen was going out with "Nemo"—which she related to her mother-in-law after being asked if she and her husband were going to come to the mosque that night for a dinner and then directed Mateen to tell his mother—aided Mateen by helping him escape detection.

Even in the light most favorable to the Government, the action was of no aid to Mateen. As a preliminary matter, the cover story was directed at Mateen's mother, rather than law enforcement prior to the attack. There was no evidence that the cover story was presented to Mateen's mother so that she could convey it to law enforcement. In fact, when

the cover story was exposed prior to the Pulse shooting, the mother never called law enforcement but instead contacted Mateen directly. The government elicited evidence that if the mother knew something bad was going to happen, she would call law enforcement. But this evidence is of little probative value, it assumes without the Nemo story, that Mateen would have to inform her that he was intending to commit a violent attack.

Mateen's mother testified that, prior to the alleged cover story, she had never heard Mateen make extremist statements; was not particularly vigilant, after he was interviewed by the FBI; and would not have forced Mateen or Salman to come to the mosque if either had simply declined. After learning of the lie early in the evening, Mrs. Mateen merely called her son and told him to come over so that she could confront him. She did not state that she ever thought of calling the police. In fact, when she could not reach him, she went to sleep due to jet lag.

Moreover, the alleged cover story related to Matten's failure to attend a dinner at a Mosque—an event that lasted for the mother from approximately 8 pm to 10:30 pm. Mr. Mateen's attack at the Pulse occurred approximately 3 ½ to 4 hours later. Further, Mateen's mother testified that her desire was to bring her grandchildren to the event and that she would not have forced Mateen to come.

The Government nevertheless maintains that the fact that the cover story was ineffective, does not diminish its sufficiency for an act in furtherance, undoubtedly relying on the Supreme Court's in *Rosemond* that "courts have never thought relevant the importance of the aid rendered." *Rosemond*, 134 S. Ct. at 1247. The Government argues that Salman's

alleged use of a lie shows that Mateen's crime was something that she wished to bring about and thus constitutes an act in furtherance.

Notwithstanding the Government's contention, there are two equally or more plausible theories for Salman's actions, even assuming that Salman had full knowledge of what Mateen planned to do when she allegedly fabricated the story.

Where the evidence of actions purported to assist the crime, viewed in the light most favorable to the Government, "'gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,'" the Court must grant a motion for acquittal. *United States v. Morillo*, 158 F.3d 18, 22 (1st Cir. 1998) (*United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995)); *see also United States v. Brantley*, No. 8:10-CR-298-T-30MAP, 2013 U.S. Dist. LEXIS 16058, at *16 (M.D. Fla. Feb. 6, 2013) (where "evidence is equally consistent with each of several hypotheses, the law considers it proof of any one of them. And if any one of them supports a finding of innocence, the law affords a defendant the benefit of innocence."). "This is so because . . . where an equal or nearly equal theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, 'a reasonable jury must necessarily entertain a reasonable doubt.'" *Morillo*, 158 F.3d at 22 (quoting *United States v. Flores-Rivera*, 56 F.3d 319, 323 (1st Cir. 1995)).

Against this backdrop, there are two equally plausible alternatives for Ms. Salman's use of the cover story, even assuming, against the great weight of the evidence, that she is acting duplicitously with foreknowledge of Mateen's offense. That is, Ms. Salman fabricated the story to cover her knowledge of Mateen's activities, rather than to cover for Mateen.

Creating a cover story for where she believed Mateen was after he had begun his attempt of the crime benefits primarily Salman, because it prevents others from questioning whether she knew what he was going to do.

Indeed, all of Ms. Salman's subsequent actions, under the Government's theory, are most consistent with an intent to conceal of her own knowledge of the attack. The Government apparently maintains that Salman's calls to the west coast about a trip to California; her purchase of a Father's Day gift and card; her exculpatory text messages to Mateen asking him what happened and reminding him that he had work the next day; her signing her son up for school in the Fall; and her careful avoidance of the news on the night of the attack, were all an elaborate ruse to obscure her knowledge that the offense was about to occur. Finally, Salman's text message to Mateen asking him to tell his mother that he was having dinner with Nemo is also consistent with this theory, because it would be important for Salman to have the blame placed on Mateen rather than herself in order to obscure her knowledge.

Assuming that to be the case, none of those actions actually aided Mateen in the commission of the crime. Therefore, the far more likely inference from the evidence, seen in the light most favorable to the Government, is that Ms. Salman lied to her mother-in-law and asked Mateen to corroborate the lie in order to hide her own knowledge of the offense, not to aid and abet Mateen. Knowing that the offense would occur and failing to report it would certainly be morally reprehensible and would no doubt subject Ms. Salman to significant castigation. Indeed, the (false) belief that she knew about the offense *has* subjected her to

severe castigation already. Yet, that failure to report the crime is not sufficient to establish that she aided or abetted Mateen.

A second equally plausible explanation regarding the cover story based on Ms. Salman's desire to avoid attending the dinner at the Mosque with her son. As Mateen's mother established, Ms. Salman was not religious, was Americanized and only occasionally attended services at the Mosque. Thus, Mrs. Salman provided the cover story to avoid attending the services at the mosque. In this regard, Ms. Salman's statement to her in-laws that she did not have a car only underscores her own interest in not attending the service.

It very well could be that her failure to report the offense and creation of a cover story to hide her knowledge could constitute a crime, *e.g.* misprision, but it does not follow that her creation of a cover story constitutes aiding and abetting material support of terrorism. *See United States v. Williams*, 865 F. 3d 1328 (11th Cir. 2017). *Williams* is instructive in this regard. In *Williams*, the Eleventh Circuit reversed aiding and abetting failure-to-heave-to[8] convictions. The United States Coast Guard had approached a ship called the Rasputin, "which sped away as four of the crew members swiftly threw dozens of packages overboard, none of which were recovered." *Id.* at 1333. The packages contained cocaine. *Id.* Eventually, the Coast Guard caught up with the Rasputin and arrested the crew. *Id.* The Government charged the crew of the Rasputin with various drug offenses and with aiding and abetting their captain's failure to heave to under 18 U.S.C. §§ 2237(a)(1). *Id.*

[8] "Heave to" means "to cause a vessel to slow, come to a stop, or adjust its course or speed to account for the weather conditions and sea state to facilitate a law enforcement boarding." 18 U.S.C. § 2237(e)(2).

At trial, the Government argued that "the mere fact that the codefendants jettisoned packages from the Rasputin indicates that they intended to aid [the captain] by making the Rasputin lighter and therefore faster." *Id*. The Eleventh Circuit rejected that argument. It explained that, "to support its theory, the government points to nothing other than the fact that the codefendants jettisoned the packages. The government's proof is especially tenuous given that the defendants had an obvious alternative motive for their behavior—ridding the boat of contraband before law enforcement arrived." *Id*. Therefore, "[w]ithout more, no reasonable jury could find beyond a reasonable doubt that [the captain's] codefendants intended to help him evade the Coast Guard by jettisoning the packages." *Id*.

In this case, Ms. Salman had an "obvious alternative motive" for her behavior, that is, concealing her own knowledge that he might be committing a crime or to avoid attending the service at the Mosque. As in *Williams*, no reasonable jury could conclude that her intent to conceal another crime—that is, misprision—could constitute aiding and abetting of Mateen's provision of material support to ISIS. Based on the foregoing, this Court should grant the Motion for Judgment of Acquittal and acquit Ms. Salman of the aiding and abetting charge in Count I of the Indictment.

III. THE GOVERNMENT'S ALLEGATIONS OF CASING AND SPENDING DO NOT AMOUNT TO ACTS IN FURTHERANCE TO SUSTAIN SALMAN'S CONVICTION FOR AIDING AND ABETTING.

Aiding and abetting requires, in addition to knowledge, that the person take an action that contributes to and furthers the offense. *See Nye & Nissen*, 336 U.S. at 619; *Rosemond*, 134 S. Ct. at 1245. The Government maintains that Ms. Salman took actions in the form of "casing" City Place and Downtown Disney; receiving valuable property from Mateen,

including being the beneficiary of a payable-on-death account; driving Mateen to Wal-Mart, where he purchased .38 caliber ammunition; and spending on her own on sunglasses, clothing, and children's toys.

With regard to the "casing," it is important to emphasize that proof of mere presence without circumstantial evidence suggesting participation is insufficient to show an act in furtherance. *Martinez*, 555 F.2d at 1271 ("mere presence" is insufficient to sustain a conviction for aiding and abetting). It is true, as noted, that presence plus circumstantial evidence is usually sufficient to sustain a conviction. Nevertheless, as explained above, the repeated presence cases do not ordinarily involve an immediate family member, and the presence usually takes place at the scene of a crime. For instance, in an oft-cited example emanating from the First Circuit: "there are circumstances where presence itself implies participation—as where a 250-pound bruiser stands silently by during an extortion attempt, or a companion stands by during a robbery, ready to sound a warning or give other aid if required." *United States v. Martinez*, 479 F.2d 824, 829 (1st Cir. 1973).

This case does not present such circumstances. In this case, Ms. Salman's presence during Mateen's alleged scouting of City Place and Downtown Disney, are, in the light most favorable to the Government, acts of mere presence that, without corresponding circumstantial evidence, would be insufficient to establish her participation. The evidence is that these activities occurred during family trips, after visiting a sister and in the context of a shopping trip. There is no evidence that Ms. Salman knew that these were scouting activities before Mateen made his statements. Nor is there any evidence that Ms. Salman participated in discussion with Mateen regarding the viability of the locations as targets or that she

encouraged Mateen to attack one or more of the potential targets. In this regard, the Government offered no evidence concerning Ms. Salman's response to these statements, including her reaction or statements.

The Government is likely to argue that Mateen would not have made the statements in her presence if she was not aiding and abetting the attack, as in those cases regarding presence during drug deals. *See, e.g.*, *United States v. Ortiz*, 966 F.2d 707, 712 (1st Cir. 1992). Those cases are distinguishable. Unlike those cases, Salman was not present during the actual commission of a crime, but merely during alleged preparation. *See id.*

Further, because Mateen's statements are cryptic and not an expression of immediate intent, even viewed in the light most favorable to the Government, Mateen's statements are insufficient to demonstrate that Ms. Salman joined with the crime. Finally, the evidence shows that Ms. Salman is Mateen's wife and was completely dependent upon him for both her and her child's housing and financial support. Thus, his statements may have been made, without the necessity that he had joined with her, because he was confident she would not report him. Therefore, Ms. Salman's hearing those utterances, in the light most favorable to the Government, amounts to no more than mere presence without circumstantial evidence indicating participation. Her presence during that time is insufficient to sustain a conviction as a matter of law. Indeed, while the Government asserts that Ms. Salman's presence underscores her knowledge, mere knowledge is not sufficient to establish Ms. Salman's commission of the crime of aiding and abetting.

The Government argues that Mateen's purchase of expensive goods on Ms. Salman's behalf, which equaled his yearly income, constitutes aiding and abetting. The Government's

theory in this regard is that the spending was part of the criminal conduct, because it was necessary to provide for Ms. Salman after Mateen's death. The problem with this theory is that, unlike the purchase of weapons, ammunition, training time, magazines, etc., the spending on these materials does not directly further the crime. The Government's argument on this is that Ms. Salman lacked education and job skills and has no other means of support and, therefore, the spending provided a means for her to survive financially after Mateen's death. But there is no evidence that Mateen would not have conducted the attack without providing for his wife and child.

Because the spending does not directly relate to the crime, the Government needs to provide some evidence that this spending furthers the crime. The fact that Mateen's spending was in excess of what he made is evidence only that he knew he was going to die and thus he could spend like there was no tomorrow, because, for him, there was no tomorrow. Nevertheless, that does not mean that the spending furthered the crime. The Government has not presented any evidence that, in order to fulfill ISIS's direction, Mateen had to provide for his dependents before conducting an attack. Nor has the Government offered any evidence that the proceeds of the crime effectuated the purchase of items.

But even if such evidence existed, Salman's acceptance of the items would be insufficient, because "negative acquiescence" does not constitute an act in furtherance. *See Longoria*, 569 F.2d at 425; *see also United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) ("The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere negative acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is

not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture."); *Johnson v. United States*, 195 F.2d 673, 675 (8th Cir. 1952) (aiding and abetting "implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient").

Longoria is directly on point. As the Fifth Circuit reasoned, the acceptance of $300 did not establish "affirmative conduct designed to aid the distribution." In the same way, Ms. Salman's acceptance of money and other items of valuable constitutes nothing more than negative acquiescence, as opposed to affirmative conduct, and so the evidence that she received items of value is insufficient to establish the actus reus of aiding and abetting.

With regard to the evidence of Mateen's spending in preparation for the commission of the offense, there is simply no evidence that Ms. Salman ever approved of or encouraged his purchase of the AR-15, the Glock, or the associated ammunition, or any of the items purchased at the Port St. Lucie Bass Pro Shop.

With regard to the purchase of magazines at Orlando Bass Pro Shop, while Salman is present for this purchase, her presence does nothing to establish that she in any way contributed to the purchase. Furthermore, the purchase occurred during a shopping trip when they went to multiple stores, so the purchase cannot be said to be have occurred in a trip solely designed to acquire materials to be used in the attack. There is no evidence that Ms. Salman had advance knowledge that Mateen would make these purchases during the trip, and the video evidence shows that Mateen made the selection without consulting Ms. Salman. The only evidence that Ms. Salman was even aware of the purchase is that she briefly looks in the bag, where the magazines were present. A government witness testified that there was

no was no evidence that he reviewed—including a video of the trip—indicating that Ms. Salman encouraged Mateen, selected the magazines, or purchased them with a credit card in her name. Under these circumstances, there is no evidence that she joined in the purchase. The most that can be said is that she negatively acquiesced to his expenditures.

Similarly, although Ms. Salman drove to Wal-Mart, there is no evidence that she knew the purpose the trip was to purchase ammunition. Indeed, the evidence shows that *her* purpose was to purchase a child's toy and that she was only present *after* Mateen selected the ammunition for purchase. Further, the ammunition purchased was for Mateen's revolver, which had been issued to Mateen by his employer, and was not used in the attack. Therefore, the circumstantial evidence in the light most favorable to the Government does not indicate anything more than mere presence and negative acquiescence. Finally, Ms. Salman's purchases of various personal items not related to the attack with Mateen's credit card contribute nothing to the evidence that she aided or abetted his attack. Unlike the diamond ring and other valuable property, these items have no resale value so do not fall within even the Government's theory of aiding and abetting by spending.

IV. THE GOVERNMENT FAILED TO CARRY ITS BURDEN OF ESTABLISHING THAT MS. SALMAN COMMITTED OBSTRUCTION OF JUSTICE WITH RESPECT TO STATEMENTS SHE MADE TO THE FBI.

The Court should also grant judgment of acquittal on the obstruction of justice charge. The Government charges obstruction in violation of § 1512(b)(3). That is, the Indictment alleges that Ms. Salman knowingly misled the Fort Pierce Police and the FBI to prevent communication of information concerning an attack at the Pulse night to the FBI, the United States Department of Justice and United States judges. Doc. 1 at 2-3. The

Government's theory of obstruction is based on Ms. Salman's alleged false statements to Sergeant Hall of the Fort Pierce Police Department and Agents Mayo and Sypniewski of the FBI.

Title 18, U.S.C. § 1512(b)(3) criminalizes a defendant's conduct to:

> hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;

The Proposed Jury instruction concerning the § 15212(b)(3) offense provides the following elements:

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly engaged in misleading conduct toward another person;

(2) the Defendant acted with the intent to hinder, delay or prevent the communication of information to a federal law enforcement officer or judge of the United States; and

(3) such information related to the commission or possible commission of a federal offense.

In its Response to Ms. Salman's Motion for a Bill of Particulars, the Government asserts that Ms. Salman's misleading statements to law enforcement support its Obstruction charge. The Government identifies the following misleading statements:

- Stating to Officers of the Fort Pierce, Florida, Police Department that Mateen would not have engaged in violence unless he was protecting himself;

- Stating to Special Agents of the Federal Bureau of Investigation (FBI) that Mateen left their apartment on June 11, 2016, to have dinner with a friend;
- Stating to FBI Special Agents that Mateen had only one firearm;
- Stating to FBI Special Agents that Mateen was not radical or extreme in his beliefs;
- Stating to FBI Special Agents that she did not see Mateen with a gun when he left their residence;
- Stating to FBI Special Agents that Mateen did not access the internet at their residence and had deleted his Facebook account a long time ago; and
- Stating to FBI Special Agents that she was unaware that Mateen was planning to conduct a violent terrorist attack.

Doc. 98 at 11-12

Thus, the Government's theory, as articulated in its Response, is that Ms. Salman obstructed justice by providing false statements to either federal or state law enforcement.

Statements *to the FBI* with intent to prevent the communication of information to the FBI do not constitute a violation of 1512(b)(3). *See United States v. Amri*, No. 1:17-cr-50(LMB), 2017 U.S. Dist. LEXIS 120028, at *42 (E.D. Va. July 31, 2017). In *Amri*, the Government alleged that that Soufian Amri and Michael Queen violated § 1512(b)(3) by telling the FBI that the only person they knew who wanted to join ISIS was a "tall, thin, Indian man." *Id*. at *2. In fact, they knew that their friend, Haris Qamar, who did not meet that description, wanted to join ISIS. *Id*. According to count three of the indictment,

> AMRI and QUEEN engaged in misleading conduct by telling the FBI that the only person they knew who might support ISIS, or travel overseas for the purpose of joining ISIS, was a 'tall, thin, Indian' individual, and AMRI and QUEEN

> described that individual in a way that was intended to hinder, delay, and prevent the communication to the FBI, and from the FBI to a judge of the United States, of information for a search warrant, and an arrest warrant, involving Qamar's support of ISIS and Qamar's attempt to join ISIS.

Indictment at 5, *United States v. Amri*, No. 1:17-cr-50(LMB) (E.D. Va. July 31, 2017), (Doc. No. 31). At the conclusion of a bench trial, the *Amri* Court held that the conduct alleged in count three of the indictment did "not fall within the scope of § 1512(b)(3) because neither defendant engaged in misleading conduct toward the type of other person covered by the statute." *Amri*, 2017 U.S. Dist. LEXIS 120028, at *35.

Judge Brinkema recognized that the "key question" was "whether 'toward another person' includes misleading conduct directed to the same federal law enforcement officers who are being hindered, delayed, or prevented from receiving the communication about the relevant information." *Id*. at *36. The court explained that, "[a]lthough it is possible to construe the term 'another person' in isolation to mean any person besides the defendant, that reading becomes unnatural in light of the rest of the sentence." *Id*.

In ordinary English usage, it is unnatural to say that someone engaged in misleading communication toward a person with intent to prevent the communication of information to that person. "'Communicate' is not a reflexive verb, and English speakers do not ordinarily talk about a person 'communicating' information to himself." *Id*. at *36-*37. "Other provisions of the Code demonstrate that Congress knows how to criminalize lying directly to federal law enforcement officers using more conventional syntax when that is its aim." *Id*. at *37 (citing 18 U.S.C. § 1001).

The broader context of the statute also suggests that Congress did not intend § 1512(b)(3) to prohibit lying to federal law enforcement with intent to prevent the communication of information to federal law enforcement. Particularly, "the caption of the section, 'Tampering with a witness, victim, or an informant,' reinforces the conclusion that 'another person' has a more circumscribed meaning in the context of § 1512(b)(3)." *Id*.

The court explained as follows:

> The title clearly indicates that Congress' focus when enacting § 1512 was on conduct that prevented a third party from communicating pertinent information to federal authorities. Notably absent from the statute's focus on witnesses, victims, and informants is any mention of tampering with, or otherwise misleading, federal officers directly. This stands in contrast to other provisions of the Code that more generally address obstruction of justice, including 18 U.S.C. § 1503 ('Influencing or Injuring Officer or Juror Generally'); 18 U.S.C. § 1505 ('Obstruction of Proceedings Before Departments, Agencies, and Committees'); 18 U.S.C. § 1510 ('Obstruction of Criminal Investigations'); and 18 U.S.C. § 1511 ('Obstruction of State or Local Law Enforcement.'). Accordingly, the caption of § 1512 provides strong evidence that § 1512(b)(3) is not violated by directly misleading a federal law enforcement officer.

Id. at *37-*38.

In light of the statute's ambiguity, the *Amri* court considered the legislative history. It concluded that "the legislative history further demonstrates that Congress intended the statute to apply to conduct directed at persons other than federal law enforcement officers." The Senate Judiciary Committee Report accompanying the statute "plainly states that § 1512 'applies to offenses against witnesses, victims, or informants which occur before the witness testifies or the informant communicates with law enforcement officers[.]'" In other words, the committee report strongly suggests that the statute does not apply to statements made to

federal law enforcement officers, who were not mentioned, but rather to people with whom the defendant comes into contact before communication with federal law enforcement.

The Senate Report also explains that "the offense should be addressed to punishing the acts of intimidating or injuring a person because of his knowledge about the commission of a crime." *Id.* (emphasis added). In short, "Congress gave no indication that it was also focused on directly insulating law enforcement officials from misleading conduct with this Act, nor did it need to be in light of 18 U.S.C. § 1001, which prohibits making false statements to federal officials." Thus, "the legislative history offers compelling evidence that § 1512 does not encompass misleading conduct aimed directly at federal law enforcement officers."

The *Amri* court's plain-meaning interpretation of § 1512(b)(3) does not conflict with the Eleventh Circuit's decision in *United States v. Veal*, 153 F.3d 1233, 1238 (11th Cir. 1998), *overruled on other grounds by Fowler v. United States*, 563 U.S. 668 (2011). In *Veal*, the Eleventh Circuit "concluded that 'another person' is broad enough to include state and local law enforcement officers." *Amri*, 2017 U.S. Dist. LEXIS 120028, at *40-*41 (emphasis in original). This holding, however, does not undercut the *Amri* court's interpretation of § 1512(b)(3). As the *Amri* Court explains, "[m]isleading conduct toward state or local officials with the intent to prevent them from communicating relevant information to federal law enforcement officers poses the same problem Congress wanted to solve with this statute" namely, "to ensure that those with information relevant to a federal criminal investigation would not be misled . . . to withhold that information from federal investigators." *Id*. at *41.

Extending *Veal* to cover misleading conduct toward federal law enforcement "runs afoul" of the United States Supreme Court's command in *Yates v. United States*, 135 S. Ct. 1074, 1079 (2015) "to examine the context of a word to determine its unambiguous meaning." *Id*. (citing *Yates*, 135 S. Ct. at 1079, 1081-83). It also "disregards the role that the caption of the statute and the role that the word 'communication' plays in construction of the statute." *Id*. Thus, the *Amri* court concludes: "A contextual reading of the statute reveals that 'another' person does not unambiguously mean literally 'any other' person. Informed by context and legislative history, the phrase as used in § 1512(b)(3) is better understood to exclude federal law enforcement officers." *Id.*

Under *Amri*, this Court should preclude the jury from considering the statements that Ms. Salman allegedly made to FBI officials, as those statements fall outside the scope of § 1512(b)(3). Furthermore, the statements that Ms. Salman made to state police are also insufficient to sustain a conviction.

Unlike statements to FBI agents, statements made to *state police*, if false, are sufficient to constitute a violation of 1512(b)(3), provided there is a reasonable likelihood that the statements will be communicated to a federal law enforcement officer. *United States v. Chafin*, 808 F.3d 1263, 1274 (11th Cir. 2015) (holding that there must be a reasonable possibility that statements will be communication to a federal law enforcement officer); *Fowler v. United States*, 563 U.S. 668, 131 S.Ct. 2045, 2053, (2011) (to support a conviction under § 1512, "the Government must show that there was a reasonable likelihood that a relevant communication would have been made to a federal officer").

In this case, the evidence established that law enforcement killed Mateen at approximately 5:15 AM. State law enforcement had already identified Mateen at the time they arrived at Salman's residence at approximately 4:35 AM on June 12, 2016. Indeed, Mateen's identification had led law enforcement to Ms. Salman's residence.

By the time that state law enforcement arrived at the residence, the officers had already been involved in a firefight with law enforcement for an extended period of time. Thus, they knew quite well that Mateen was not being "safe" with firearms at that point and was engaged in conduct that extended far beyond defending himself. Therefore, Ms. Salman's statements would have been of no use to any subsequent investigation.

In addition, Ms. Salman's statement is not necessarily false. Prior to the shooting at the Pulse, there was no evidence that Mateen was unsafe with guns prior to the Pulse shooting or had used a firearm to commit an act of violence. On the contrary, the evidence showed he carried a firearm as a security officer, used gun cases and practiced at a shooting range. Thus, Ms. Salman's statement that he was safe with firearms was not demonstrably false.

Moreover, Sergeant Hall never testified that he communicated to Ms. Salman that there would be any federal investigation prior to her statement regarding Mateen's safety with firearms. Thus, the Government failed to establish that Ms. Salman knew there was a federal investigation or the possibility of a federal investigation at the time she made her statement to Hall.

In addition, Ms. Salman's statement that Mateen was safe with guns would not have impacted the investigation of Mateen's use of firearms.

In its Response, the Government also asserts an alternative theory for Ms. Salman's obstructive conduct. That is, it "intends to argue that Salman's obstructive conduct extended to deleting text messages on her phone on the night of Mateen's attack, including one informing him of the cover story she had devised." Doc. 98 at 12.

As discussed above, Ms. Salman's alleged "cover story" only related to Mateen's failure to attend a dinner at the Mosque which ended at approximately 10:30 PM. It did not provide him with a cover story for the time he attacked the pulse. Thus, the story was not designed to provide cover for Mateen but rather to provide an excuse for Ms. Salman to conceal her own purported knowledge or to have an excuse not to attend the event at the Mosque.

Furthermore, the deletion of Ms. Salman's texts could not have obstructed the investigation. Significantly, the deletion of the texts occurred prior to any investigation in the shooting at the Pulse and more importantly before any investigation was pending. Thus, the deletion of the text messages could not have been "toward another person." The deletion of Ms. Salman's texts concerned her communications with Mateen concerning the purported cover story regarding Nemo. Notably, Ms. Salman provided that same alleged "cover story" to Agent Mayo during her first FBI interview and provided information that was essentially equivalent to the contents of the texts.

In addition to the foregoing, a significant deficiency in the Government's prosecution of obstruction is its failure to prove the second element necessary for a conviction. That is, that Ms. Salman "acted with the intent to hinder, delay or prevent the communication of

information to a federal law enforcement officer or judge of the United States." See Doc. 208.

During the trial, the Government failed to provide evidence of such intent. Mateen was already dead at the time that Ms. Salman allegedly provided her false statements to law enforcement. At that point, she became the only subject of the Government's investigation. The Government never offered any evidence asserting how Ms. Salman's statements hindered, impeded or delayed their investigation.

In this regard, there was no evidence that Ms. Salman had knowledge that any of her statements would be communicated to other law enforcement or a judge. According to the Government, she participated in an interview process in which they allegedly and ultimately obtained truthful information from her. Concerning hindering communications to a judge, such communications related to the Government's efforts to obtain a search warrant. The Government failed to offer any evidence how Ms. Salman's actions impeded the search warrant. Although the Government went to great lengths to establish that a search warrant was obtained, it presented no evidence regarding when the application for the warrant occurred. Rather than hindering the search warrant, the evidence established that Ms. Salman executed a consent to the search of her home and her vehicle well before a warrant was issued in her case allowing such a search.

Against such a backdrop, the Government's theory of prosecution is particularly disturbing as it would allow every false statement case under § 1001 become an obstruction case. This tenet is particularly revealed in the Government's reliance on Ms. Salman's denial of knowledge as a basis for obstruction. Reliance on such a denial guarantees that the

Government will be allowed to pursue any obstruction case as long a Defendant denies culpability. Because those statements are a legally untenable factual predicate for a conviction under § 1512(b)(3), the Indictment is defective with respect to Count II and must be dismissed.

V. COUNT TWO SHOULD BE DISMISSED UNDER THE FIFTH AMENDMENT

> *Life's but a walking shadow, a poor player, that struts and frets his hour upon the stage, and then is heard no more. It is a tale . . . full of sound and fury, signifying nothing.*
>
> -William Shakespeare, Macbeth, Act 5, Scene 5, 19-28 (1603)

The Government's reliance on Ms. Salman's various statements and allegted deletion of texts to support its obstruction charge violates the Grand Jury Clause of the Fifth Amendment to the United States Constitution. The Grand Jury Clause provides in relevant part: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. The term "otherwise infamous crime" has been held to encompass felonies such as those included in the indictment in this case.

The purpose of the grand jury today is the same as it was at common law: to stand between the government and the citizen; to serve as an independent fact-finding body that ensures no criminal prosecution shall be brought unjustifiably. *Stirone v. United States*, 361 U.S. 212, 218 (1960) (the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for acts which the grand jury did not charge). To that end, the grand jury is required to determine that probable cause

exists to support every element of the offense charged, and an accused has the right to stand trial ***only upon the charge*** found by the grand jury. *See, e.g., United States v. Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999), rev'd on other grounds *United States v. Cotton*, 535 U.S. 625 (2002); *Stirone*, 361 U.S. at 218-219. The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away. *Stirone*, 361 U.S. at 219.

Count II fails to inform Ms. Salman of the conduct supporting the obstruction charge that she is accused of furthering with specificity. Although the indictment tracks the language of the statute, it fails to specifically identify which facts support obstruction. Such a result deprives Ms. Salman of her Fifth Amendment right to defend herself against the government's charges.

In *United States v. Fried*, 450 F. Supp. 90 (S.D. N.Y. 1978), the government filed a 35 count indictment, involving a scheme to secure rent subsidies. Count One charged a conspiracy, and its allegations included allegations of several items of false information and false documents that had been provided to the Department of Housing and Urban Development (HUD) in order to secure the subsidies. Counts Two through Seventeen alleged violations of 18 U.S.C. § 1001. Each count incorporated the allegations of count one by reference, then alleged that on the dates "hereinafter set forth in Counts Two through Seventeen of this Indictment," in a matter within the jurisdiction of HUD, the defendants

> unlawfully, willfully and knowingly did falsify, conceal, and cover up material facts by trick, scheme and device, and did make and abet, counsel, command, induce, procure and cause to be made false, fictitious and fraudulent statements and representations in the applications for the apartments hereinafter set forth in Counts Two through Seventeen, which

> were sent to HUD for an apartment at IPN with a rent subsidized by the United States under the 236 program.

Id. at 92. Thereafter, the indictment contained a table listing the counts, the apartment number associated with each count, and the date of occupancy.

The defendants moved to dismiss Counts Two through Seventeen, correctly pointing out that none of the counts contained an allegation of the of the specific respect in which the application was false in any specific count. The government argued that by incorporating count one by reference embraced sufficient factual assertions in which the defendants caused false information to be given. The government also asserted that specific details could be provided by a bill of particulars.

In granting the motion to dismiss, the court concluded that there is compelling reason to demand the data to be added to each count stating precisely what information in the allegedly felonious paper the government claimed to have been false with respect to that count. Each of the documents referred to could have been included in the indictment

> because the grand jurors found in it any one or more of at least six false entries. Or different grand jurors could have had different things in mind so that the requisite number never agreed on any one item as being shown to supply probable cause for the charge of willful falsity. We do not know in any instance what any one or more of the grand jurors knew or believed or voted on, or, indeed, whether the list of 16 counts was ever taken one at a time to specify what was false on each or any of them.

Id. at 93.

The court found that the defect could not be cured by a bill of particulars. "The bill will tell us only what the prosecution is prepared to charge now, not what the grand jurors, or

some or any of them, thought they were charging when they voted the indictment." *Id*. at 93-94. The court then quoted *Russell v. United States*, 369 U.S. 749, 770 (1962):

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Fried, 450 F. Supp. at 94.

Ultimately, the *Fried* court found the indictment a confused and confusing method of guiding the grand jury.

> Thus, the vice in the counts under consideration is more profound than a matter of pleading niceties. It constitutes, notwithstanding all the good intentions in the world, a confused and confusing method of purportedly guiding the grand jury. It renders impossible any acceptable degree of confidence that the grand jury genuinely knew what it was doing, and genuinely did what the Government would now tell us was done, when it agreed to the list. The right to a grand jury's solemn judgment is too important to deem it satisfied in such a conjectural fashion.

Id.

In short, there is a critical constitutional difference between an indictment which is insufficient to inform the defendant of what she will have to defendant at trial, and an indictment which is insufficient to charge that a crime occurred. The only capital or infamous crimes (felonies) for which a defendant is to be tried are the crimes that the grand jury found probable cause to believe she committed. If the grand jury considered and found the existence of facts that are sufficient to charge a crime, yet insufficient to fully apprise a

defendant of what she will have to meet at trial, the failure of the indictment to allege those facts can be constitutionally remedied by a bill of particulars. An indictment that is insufficient to charge a crime, however, cannot be constitutionally amended by any procedure other than re-submission to the grand jury.

Although factually distinguishable, the problem identified by the court in *Fried* arises in the instant case. Despite the Government's provision of a laundry list of facts supporting its obstruction charge, the Indictment does not provide any guidance as to which facts support the offense. Thus, it is impossible to ascertain what specific allegations the grand jury found supported Ms. Salman's crime. Thus, Ms. Salman is left to guess what was in the grand jurors' minds when they brought the charges against her.

It cannot be shown from this Indictment that the requisite number of grand jury members agreed that any of the Ms. Salman's alleged false statements or deletion of texts supported an obstruction charge. The grand jurors may have found that Ms. Salman committed each of the actions. However, it may also be the case that the grand jury found that one of Ms. Salman's actions supported the offense. Finally, it is also possible that the requisite number of grand jurors never agreed on any one act as being shown to supply probable cause for the charged crime. As the Indictment stands, Ms. Salman cannot determine what any of the grand jurors knew or believed or voted on, or, indeed, whether the list of various acts was ever considered individually by the grand jurors in specifying which crime she is charged with committing. The Fifth Amendment does not permit a prosecutor to simply pick and choose what the government will prove, according to the convenience of the day. It must prove that which the grand jury charged.

The unavoidable danger in this case is that the petit jury is empowered to find Ms. Salman guilty of an offense that was not found by the grand jury. As a result, Ms. Salman and this Court, will be unable to determine whether the petit jury found her guilty of obstruction based on conduct that the grand jury found to support such a charge. Here, by drafting the indictment so vaguely, the government has given itself blanket authorization to prove whatever is advantageous before the petit jury. This is precisely what the grand jury clause was intended to prevent -- subordinating a defendant's rights to the unfettered discretion of a prosecutor. The Grand Jury Clause of the Fifth Amendment prohibits such a result.

Moreover, as noted above, many, if not all of the facts, relied on by the Government do not support a charge of obstruction. It is impossible to ascertain if these facts were relied on by the grand jury in its return of the indictment.

The Fifth Amendment does not permit a prosecutor to simply pick and choose what the government will prove, according to the convenience of the day. It must prove that which the grand jury charged. The grand jury is not an insignificant formality, to be ignored whenever it suits the convenience of a prosecutor. Here, by drafting the indictment so vaguely, the government has given itself blanket authorization to prove whatever is advantageous on the day of trial. This is precisely what the grand jury clause was intended to prevent--subordinating a defendant's rights to the unfettered discretion of a prosecutor.

WHEREFORE Defendant Noor Salman requests the Court to enter a judgment of acquittal on Counts I and II of the Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 22, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing all counsel of record.

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