UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS. CASE NO: 6:17-cr-18-Orl-40KRS

NOOR ZAHI SALMAN
_____/

ORDER

This cause is before the Court on Defendant Noor Salman's Omnibus Motion *In Limine*. (Doc. 150). The Government has filed their Response in Opposition. (Doc. 157 Upon due consideration of the parties' written submissions and the argument presented at the hearing held on January 18, 2018, the Defendant's Motion *In Limine* is granted, in part, and denied, in part.

I. BACKGROUND

Pursuant to the Case Management Scheduling Order, the parties have briefed various pretrial motions, including the instant Motion *In Limine.* On January 18, 2018, the Court held a hearing on the Defendant's motion.[1] The Court previously summarized the relevant facts pertaining to this case and will refrain from unnecessarily repeating those matters here. For ease of presentation, the Court will address each individual legal issue in subsections of this Order, including the factual context necessary to explain the Court's rulings.

II. THE ISSUES

A. Whether Mateen's Statements to "Nemo" are Admissible

[1] The transcript of the hearing was not ordered by either party. Accordingly, the Court may refer to the unofficial transcript without specifically citing to the record.

The Government contends, in pertinent part, that Defendant Salman aided and abetted Omar Mateen's ("Mateen") attempted provision and provision of material support or resources to the Islamic State of Iraq ("ISIL") in violation of 18 U.S.C. § 2339B. As the defense correctly observes in their motion *in limine*, to prove aiding and abetting, the Government must show that Defendant Salman "willfully and knowingly associated [herself] in some way with the crime, and . . . seek[s] by some act to help make the crime succeed." *Rosemond v. United States*, 134 S. Ct. 1240, 1244 (2014). Aiding and abetting "comprehends all assistance rendered by words, acts, encouragement, support, or presence." *Id.* at 1247 (citing *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993)). It is sufficient that the defendant's aid "relates to only one (or some) of a crime's phases or elements." *Id.*

Here the Government proffers several means by which Defendant Salman allegedly aided and abetted Mateen, including having created a cover story for Mateen to use in the event his mother invited him to come home to observe Ramadhan. The Government's theory is that on the eve of the Pulse Nightclub attack, Defendant Salman texted Mateen, saying "If ur mom calls say nimo invited you out and noor wants to stay home." (Doc. 150, p. 5, n.2). Salman sent a second text in which she tells Mateen, "She [Mateen's mother] asked where you were xoxo. Love you." (*Id.*). According to the Government, Defendant Salman knew the attack was imminent, knew her husband had left the home in a rented van armed with a weapon and carrying ammunition, and, fearing

the plot would be foiled by Mateen's mother asking him to come over, created the cover story.[2]

Since context is everything, the defense argues that Defendant Salman's reference to "Nemo" requires an understanding of who Nemo is and his relationship to Mateen. This is particularly so because the Defendant stated to FBI Special Agent Mayo, when he questioned her the morning of the Pulse attack, that Mateen had left home the previous night at 5:00 p.m. to have dinner with a friend named Nemo. (Doc. 184, 118:20–24). The FBI subsequently interviewed "Nemo," who provided the following information:

> He [Mateen] used to make excuses to his family that, 'I'm going to a certain place—'or, to his wife, that, 'I'm going to a certain place, and I'm going to go see Nemo.' But in fact, he would go somewhere else. . . . So, he would make excuses of coming to visit me, but he ended up going to other places. You know what I mean? And this is a statement he made to me, because he had a bad habit of—he was married, he was married, but he went behind his wife's back and did a lot of stuff on the side on whatever website… Plenty of Fish or whatever it was. Arablounge. He even mentioned Craigslist to me. Hooking up with women. Hooking up with older women.

(Doc. 150, p. 4).

The FBI did their due diligence and identified approximately ten women whom Mateen may have contacted, including three or four with whom Mateen had either had an extramarital affair or whom he attempted to engage in extramarital relations. That is, the FBI corroborated Mateen's statements to Nemo.

The defense argues that Mateen's statements to Nemo are relevant to their theory of the case. That is, the defense contends that Defendant Salman was not creating a

[2] It is unclear from the Government's theory why the failure of Mateen to respond to a request from his mother to come over for Ramadhan would have resulted in the plot being frustrated.

cover story when she sent the text messages to Mateen. Rather, Defendant Salman was simply confirming what Mateen said to her before departing their home the night before the Pulse attack—that he was going to visit his friend called Nemo. Since Mateen had previously told Salman that he was visiting Nemo, when in fact he was having or attempting to have an affair, the defense argues it stands to reason that Salman was again deceived by Mateen's reference to visiting Nemo. Additionally, the defense argues that Mateen's extramarital relations show he was deceiving Defendant Salman and had successfully maintained a secret life.

The Government opposes introduction of Mateen's out-of-court statements on several fronts. Taking the veracity or trustworthiness argument first, the Government avers that Nemo cannot testify that he actually heard Mateen tell his wife that he was going to visit Nemo, and Mateen is not a trustworthy source of information, because he lied to his family and to his wife, employed a cover story to engage in deceptive behavior, abused his wife, and murdered forty-nine people. (Doc. 157, pp. 2–3). It is axiomatic that the jury has the ultimate burden and right to decide whether to believe or reject Mateen's statement's to Nemo. The fact that Nemo did not hear Mateen falsely state to Defendant Salman that he was visiting Nemo when, in fact, he was seeing other women, goes to the weight of the evidence and not its admissibility.

The trustworthiness of Mateen's statements is borne out by the following sources: (1) Mateen was confiding infidelity to a close friend, which is akin to making a statement against one's penal interest; (2) the FBI confirmed that Mateen was in fact seeing other women, just as he confided to Nemo, and (3) Nemo had not been shown to have any reason to lie about what Mateen relayed to him. In support of their veracity argument, the

Government concedes that Mateen made up a cover story to deceive his wife. The Government's challenge to the reliability of Mateen's confession to Nemo goes to the weight the jury will assign this evidence.

Next, the Government contends that Defendant Salman's text messages show that she initiated the cover story that Mateen went to see Nemo prior to the attack, rendering Nemo's testimony concerning prior deceptive practices by Mateen irrelevant. The Government, however, interprets the facts through too narrow a lens. The mere fact that Salman writes, "If ur mom calls say nimo invited you out and noor wants to stay home" does not necessarily mean Salman concocted this excuse or "cover story." Defendant Salman told the FBI that at approximately 5:00 p.m., Mateen verbally communicated to her prior to leaving their home that he was going to have dinner with Nemo. A text message sent nearly an hour later confirming this conversation is not inconsistent with Mateen having used the tried-and-true visiting Nemo cover story to deceive his wife.

Granted, the Defendant ultimately provided three (3) statements written by FBI Special Agent Enriquez in which the Defendant describes Mateen armed with his handgun and carrying a duffle bag with ammunition when he left home the night before the attack. The accuracy and veracity of the statements attributed to Salman by the FBI are hotly contested by the defense. Ultimately the jury will be required to decide what weight to attribute to the statements memorialized by SA Enriquez. What Salman does not do in her written statements, however, is admit that she was lying when she told SA Mayo that Mateen claimed to be having dinner with Nemo that evening. Could Mateen have lied to Salman about his ultimate destination even as he departs armed with a weapon? Certainly the jury may conclude this is a reasonable possibility. Could a jury

believe that Salman—while troubled by Mateen's actions that evening, especially in light of his behavior leading up to that night—did not actually know or believe that Mateen was going to follow through on his prior threats? It is clearly within the province of the jury to accept that construction of the facts, as opposed to the construction offered by the Government.[3] In fact, Salman told SA Enriquez that as Mateen was departing their home he stated, "I will be home after prayer." (Govt. Ex. 23). Context matters, and Mateen's past deceptive practices whereby he claims to be visiting Nemo when he was otherwise engaged provides meaningful and, therefore, relevant context.

The next issue is whether Mateen's statements to Nemo run afoul of Federal Rule of Evidence 404(b).[4] The defense has briefed the interplay between the anticipated testimony and the strictures of Rule 404(b). They argue that Mateen's statements do not violate the rule, because Rule 404(b) is a rule of inclusion, meaning that other crimes, wrongs, or acts may be introduced to show motive, opportunity, intent, preparation, plan, etc. (Doc. 150, p. 5). To the extent that Rule 404(b) is a rule of exclusion, the rule precludes offering such evidence if the goal is only to prove criminal propensity. *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989). The statements attributed to Mateen

[3] In one statement prepared by SA Enriquez, Salman is attributed with having said "I knew on Saturday when Omar left the house at about 5 pm that this was the time that he was going to do something bad. I knew this because of the way he left and took the gun and backpack with ammunition to see Nemo. I knew later, when I could not get ahold of him that my fears had come true and he did what he said he was going to do. I was in denial and I could not believe that the father of my child was going to hurt other people. When I got a text message from Omar at 4 am I knew that he did what he said he was going to do." (Govt. Ex. 23).

[4] Rule 404(b) provides: (1) "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident . . . ."

are offered to show that he had a motive to lie to Salman, that Mateen formulated a plan that involved using Nemo as his cover story to deceive Defendant Salman, and that Mateen intended to conceal a secret life from his wife. The Court disagrees with the Government's assertion that the Nemo cover story previously used by Mateen violates Rule 404(b). The anticipated testimony is intended to explain why Defendant Salman may have been deceived by Mateen the evening prior to the Pulse attack and, therefore, why her text message merely confirmed that deception as opposed to being a cover story. Accordingly, the anticipated testimony is consistent with Rule 404(b) and is relevant to a material fact that is in dispute.

Finally, the Government argues Mateen's statements constitute hearsay for which there is no exception. (Doc. 157, pp. 1–2). To begin, it is undisputed that Mateen—the declarant—is unavailable in that he is dead. Next, while the defense posits why Mateen's statements may not be offered for the truth of the matter asserted, the Court rejects this argument as nonsensical. (Doc. 150, p. 7). The only purpose for offering Mateen's statements, wherein he tells Nemo that he has used Nemo as an excuse for his extramarital escapades, is it prove Defendant Salman had indeed fallen prey to this deception in the past and was its victim again on the evening of June 11, 2016. Accordingly, the statements are offered for the truth of the matter asserted by Mateen. The question then become what exception to the rule prohibiting the introduction of hearsay applies, if any.

Rule 804(b)(3) provides that a statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's

> proprietary or pecuniary interest or … to expose the declarant to civil or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Fed. R. Evid. 804(b)(3). Here Mateen's statements are not offered "to expose the declarant to criminal liability," because Mateen is dead. Rather, the statements are offered by the defense to negate intent or knowledge on the part of Defendant Salman. Accordingly, the second prong of Rule 804(b)(3) is inapplicable. To be admissible, Mateen must have believed his statements to Nemo to be true when made, because "it was so contrary to . . . [Mateen's] proprietary or pecuniary interest or . . . [because they] . . . expose[d] the declarant to civil . . . liability." *Id.* Mateen's statements to Nemo concerning extramarital affairs expose him to civil liability in the form of divorce proceedings. Mateen must have believed his statement to be true at the time he told Nemo he was cheating on his wife and using Nemo as a cover to justify his absence from home, because, if caught, Mateen faced the potential of civil liability attendant to a divorce proceeding. While corroboration is not required, the FBI has established the reliability of Mateen's admissions to Nemo by tracking down the very women with whom Mateen was involved or whom he was attempting to engage in an illicit relationship. As a result, Mateen's statements to Nemo are admissible pursuant to Rule 804(b)(3) as statements against his pecuniary interest that have the potential to expose him to civil liability.

The Defendant offers Mateen's statements under the residual exception to the rule against hearsay set forth in Rule 807, which requires the following predicate:

> Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay event if the statement is

> not specifically covered by a hearsay exception in Rule 803 or 804:
>
> > (1) the statement has equivalent circumstantial guarantees of trustworthiness;
> >
> > (2) it is offered as evidence of a material fact;
> >
> > (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
> >
> > (4) admitting it will best serve the purposes of these rules and the interests of justice.

Fed. R. Evid. 807. "Congress intended the residual hearsay exception to be used rarely, and only in exceptional circumstances." *Rivers v. United State*s, 777 F.3d 1306, 1312 (11th Cir. 2015) (citing *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1279 (11th Cir. 2009)). The residual exception "appl[ies] only when certain exceptional guarantees of trustworthiness exist and when high degrees of probativeness and necessity are present." *Id.* The Court in *Rivers* explained that "a Rule 807 analysis must consider whether the declarant's original statements now being offered in court have guarantees of trustworthiness given the circumstances under which they were first made. The fundamental question, therefor, is not the trustworthiness of the witness reciting the statements in court, but of the declarant who originally made the statements."[5] *Id*. at 1313.

The rule directs the Court to determine whether guarantees of trustworthiness "that are *equivalent* in significance to the specific hearsay exceptions enumerated in Federal

[5] The Court provides the example of testimony offered by the supervisor of a since-deceased federal agent regarding the agent's acquisition of evidence for the point that the Court considers not whether the supervisor's testimony about the agent's story contains guarantees of trustworthiness, but whether the original statements themselves made by the deceased agent contain such guarantees. *Id.*

Rules of Evidence 803 and 804" are present in the proffered statements. *Id.* at 1314. The guarantees must be equal to "cross-examined former testimony, statements under a belief of impending death, statements against interest, and statement of personal or family history." *Id.* (citing *United States v. Fernandez*, 892 F.2d 976, 980 (11th Cir. 1989)).

The Court in *Rivers* summarizes the different factors to consider when determining whether an out-of-court declaration is sufficiently trustworthy for the purposes of Rule 807:

> The probable motivation of the declarant in making the statement, the circumstances under which [the statement] was made, the knowledge and qualifications of the declarant, and the existence of corroborating evidence, among others[,] . . . the facts corroborating the veracity of the statement, . . . [and] also the circumstances in which the declarant made the statement and the incentive he had to speak truthfully or falsely, the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief, whether the declarant had "clear motivation" to lie or mislead, and whether the statement concerned facts of which the declarant had personal knowledge.

Rivers, 777 F.3d at 1315 (internal citations and quotations omitted). The Government argues that the Court may not consider the second, third, and fourth elements in the Rule 807 analysis until the Court has first satisfied the first element by finding the statements have sufficient guarantees of trustworthiness. *United States v. Lang*, 904 F.2d 618, 623 (5th Cir. 1990).[6]

In *Lang*, cited by the Government in its brief, the Court held that it was error for the trial court to admit testimony provided before the Grand Jury pursuant to the residual

[6] All decisions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). While *Lang* is not binding authority, this Court agrees with the reasoning employed by the Fifth Circuit.

exception to hearsay. *Id.* at 624. Consistent with the synopsis of authorities cited by the Eleventh Circuit in *Rivers*, the Court in *Lang* based its decision that the district court had erred by evaluating the declarant's trustworthiness. *Id.* The Court reasoned, in part, that the "trustworthiness of [declarant's] testimony is also cast in doubt by representations made to the court by . . . [defendant's attorney] concerning . . . [the declarant's] recantation of some of his grand jury testimony." *Id.* In fact, the Court observed that the declarant indicated he "felt extremely hostile towards his son [the defendant against whom the statements were offered] when he testified before the grand jury, and that he had made many statements to the grand jury that were not true." *Id.* Hence, the outcome in *Lang* is—as is always the case when construing the applicability of Rule 807—fact specific.

Turning to the facts of the instant case, the Court is informed that Mateen confided his infidelity, and his use of "visiting Nemo" as a cover for his otherwise unexplained absences from his home, approximately two years before the Pulse Nightclub attack.[7] The time frame matters in this analysis because there is no evidence to suggest that Mateen provided a false confession of infidelity to Nemo two years prior to the Pulse attack in order to manufacture a defense for Defendant Salman's later use. Had Mateen confided to Nemo in close proximity to the Pulse attack, one would question whether the statement was conveniently planted in Nemo's mind to bolster Defendant Salman's subsequent explanation to the FBI that her husband had left their home the evening prior to the attack to visit Nemo. The temporal disconnect weighs in favor of Mateen's motivation to speak the truth to Nemo.

[7] This fact was proffered by the Defense, and the Government, who has the benefit of the FBI interview of Nemo, did not refute the proffer.

Moreover, Mateen's motivation for telling his friend, Nemo, that he was cheating on his wife and was telling the Defendant that his absences were due to visiting Nemo, is obvious: Nemo needed to be aware of the subterfuge being employed by Mateen in the event Defendant Salman contacted Nemo to speak with her then-husband or in the event the phantom visits came up in conversation between Salman and Nemo. Mateen clearly possessed personal knowledge of the facts that he related to Nemo. That is, Mateen knew he was cheating on his wife, or attempting to do so, and Mateen knew he was conveying the "cover story" of visiting Nemo to his wife. Similarly, Mateen had every motive to speak truthfully to Nemo. There was no reason to make up a story of extramarital affairs other than elicit Nemo's cooperation or tacit compliance in the deception perpetrated against Defendant Salman. Finally, after Defendant Salman told the FBI that Mateen claimed to be visiting Nemo when he departed their home the evening prior to the attack, the FBI located and interviewed Nemo. Based upon that interview, the FBI tracked down a number of women that Mateen had met via various on-line services, just as he relayed to Nemo. The Court finds that Mateen's confession of extramarital affairs and deception are substantially similar to statements against one's own interest that have traditionally fallen within an exception to the rule prohibiting the introduction of hearsay. Having determined Mateen's statements possess sufficient guarantees of trustworthiness, the Court will consider the balance of the Rule 807 analysis.

The statements made by Mateen to Nemo are evidence of a material fact. That is, as previously discussed, the Government contends that Salman's text message to Mateen concerning what to say to Mateen's mother in the event she contacts him constitutes a cover story and amounts to aiding and abetting an act of terrorism. Similarly,

the Government relies upon the alleged cover story as evidence that Defendant Salman lied to the FBI by telling them that Mateen left their home to visit Nemo the evening prior to the attack. The defense asserts that the text message must be read in context, which includes the jury understanding that Mateen previously told the Defendant that he was visiting Nemo when in fact he was meeting other women for illicit purposes. There is no other evidence that the proponent can obtain through reasonable efforts—because Mateen is dead and it does not appear that any of the women Mateen pursued romantically were aware of the deception employed by Mateen—to justify his absence from the marital home. Finally, admitting this evidence will best serve the purposes of these rules and the interests of justice. In the absence of this evidence, the jury will be deprived of information that provides context for why Defendant Salman sent the text message cited by the Government as proof of knowledge and as proof of aiding and abetting an act of terrorism. Defendant Salman enjoys the right to present her defense, and the jury is entitled to know all of the relevant, material, and admissible facts. The statements made by Mateen to Nemo will be admitted.

B. Whether Defendant Salman's Medical Evaluation and Statements to Dr. Chamberlain are Admissible under Rule 803(4) or 803(6)

On February 26, 2017, pursuant to the Order entered by the Honorable Magistrate Judge Donna Ryu, Dr. John Chamberlain met with Defendant Salman over a two-day period for a total of just under 5.5 hours.[8] Magistrate Judge Ryu ordered the mental evaluation "solely for use in the courtroom . . . [provided] only to counsel, and solely for the purposes of the bail proceedings." *U.S. v. Salman*, Case No. 4:17-mj-70058-MAG

[8] Dr. Chamberlain's report was provided to this Court in connection with its review of the Defendant's conditions of pretrial release.

(N.D. Cal.). Dr. Chamberlain obtained Defendant Salman's informed consent to being evaluated and provided the following warning:

> Prior to beginning the interviews, I informed Ms. Salman I am a psychiatrist who was retained by United States Pretrial Services to conduct a psychiatric examination of her that was ordered by the Court. I explained the nature and purpose of the evaluations; that treatment services would not be provided; the limits of confidentiality; and the voluntary nature of her participations.

Id. Having obtained the Defendant's informed consent, Dr. Chamberlain proceeded to interview her and performed a number of diagnostic tests, including: The Trauma Symptom Inventory-2 (TSI-2); The Anxious Arousal Scale; The Anxious Arousal-Hyperarousal; The Intrusive Experiences Scale; Defensive Avoidance and Dissociation Scales; The Depression and Somatic Preoccupations-Pain Scales; The Minnesota Multiphasic Personality Inventory-2 (MMPI-2); The Repeatable Battery for the Assessment of Neuropsychological Status (RBANS Update); The Comprehensive Trail Making Test (CTMT); The Stroop Color and Word Test Adult Versiohn, and the TOMM. Based upon these diagnostic tests and the data reported during his interview, Dr. Chamberlain reached a number of conclusions on issues pertinent to the issue of whether conditions of pretrial release should be allowed.[9]

The Defendant retained Dr. I. Bruce Frumkin, a clinical psychologist, to render an opinion on whether Defendant Salman presents a higher rise of false confession over an average person when confronted with certain interrogation tactics. Pursuant to the

[9] Dr. Chamberlain's opinions include the nature of Ms. Salman's mental disorder, if any; whether the Defendant presents a risk of suicide; the Defendant's cognitive status; the impact of reported history of domestic violence; and what mental health treatment interventions are needed by and appropriate for Defendant Salman. Dr. Chamberlain also set forth the results of the psychological testing.

Scheduling Order imposed by this Court, the defense disclosed Dr. Frumkin's initial expert opinion on July 17, 2017, and disclosed Dr. Frumkin's supplemental expert report on August 15, 2017. When Dr. Frumkin issued his initial expert report, he had not yet received or reviewed the report prepared by Dr. Chamberlain.

In his initial expert disclosure, Dr. Frumkin reports that he evaluated Defendant Salman to assess whether she had any psychological vulnerabilities that made her more vulnerable to giving a false confession. Dr. Frumkin interviewed the Defendant for eight (8) hours and administered the following psychological tests: Comprehension of Miranda Rights (CMR); Comprehension of Miranda Rights-Recognition (CMR-R), Function of Rights in Interrogation (FRI); Wechsler Adult Intelligence Scale-IV (WAIS-IV); Minnesota Multiphasic Personality Inventory-2 (MMPI-2); Restructured Form (MMPI-2:RF); Gudjonsson Suggestibility Scale 1 (GSS 1); 16 Personality Factor (16 PF); Word Recognition Test (WRT). Dr. Frumkin also reviewed a number of materials generated during the criminal investigation. Dr. Frumkin reports the results of the diagnostic testing in his first expert report, and indicated that prior to issuing his final opinions in this matter he needed to review the report prepared by Dr. Chamberlain and to readminister the MMPI-2:RF and the 16 PF.[10]

In his second expert report, Dr. Frumkin indicates that he met again with the Defendant for three (3) hours and spent two (2) hours readministering tests. Dr. Frumkin also states that he had integrated Dr. Chamberlain's report findings and his raw psychological test data, which he lacked at the time he issued his original expert report.

[10] Dr. Frumkin specifically notes that Dr. Chamberlain administered the MMPI-2, and that he wants to review the raw psychological test data generated by Dr. Chamberlain.

Subsequent to the disclosure of Dr. Frumkin's reports, the Government filed a Motion for a *Daubert* Hearing to challenge the admissibility of Dr. Frumkin's expert opinions. The Court conducted a hearing concerning Dr. Frumkin's qualifications and the extent to which he may offer expert opinions. That hearing was held on January 5, 2018, and the Court concluded that Dr. Frumkin is qualified to render expert opinions, and detailed the scope of the opinions and the limitations imposed upon the scope of the proffered opinions that Dr. Frumkin may offer. The issue before the Court at present is whether the report prepared by Dr. Chamberlain, pursuant to Magistrate Judge Ryu's order, is admissible at trial.

The defense contends that Dr. Chamberlain's psychiatric evaluation is admissible in its entirety as a business record, pursuant to Rule 803(6), and that Defendant Salman's statements to Dr. Chamberlain are admissible statements made for medical diagnosis or treatment under Rule 803(4). (Doc. 150, p. 11). The prosecution counters that Dr. Chamberlain's report is not a business record, because it is not a record that is regularly made in the course of Dr. Chamberlain's regularly conducted business activity, as required by Rule 803(6). (Doc. 157, p. 5). The prosecution argues that Dr. Chamberlain's regularly conducted business does not include being retained by the Court (or United States Pretrial Services) to perform this type of an evaluation. During the hearing on Defendant's Motion *In Limine*, the Court expressed its view that the business records exception to hearsay does not appear to be as narrow as the prosecution professes. The Government correctly notes that the business record exception does not encompass documents prepared in anticipation of litigation. *Nobel v. Ala. Dep't of Envtl. Mgmt.*, 872 F.2d 361, 366 (11th Cir. 1989). However, the inquiry does not end with the finding that

the record was created in connection with litigation. "The touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." *United States v. Bueno*-Sierra, 99 F3d 375, 378–79 (11th Cir. 1996). Regardless, this is a bridge which need not be crossed at this time, because there is no testimony before the Court—in affidavit form or otherwise—to allow the Court to assess whether Dr. Chamberlain's creation of the report meets the business records exception.

The Defendant's second ground for admission of at least that portion of Dr. Chamberlain's report that recounts the personal, educational, and medical history obtained from the Defendant is the assertion that Defendant Salman provided this information for medical treatment. Hearsay may be offered when the declarant's statements are "made for—and is reasonably pertinent to—medical diagnosis or treatment; and describes medical history; past or present symptoms or sensations; their inception; or their general cause." Fed. R. Evid. 803(4). Statements made for purposes of medical diagnosis or treatment, which include statements describing medical history, are admissible, because "[t]he declarant's motive provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule." *In re Moore*, 165 B.R. 495, 498 (M.D. Ala. Dec. 2, 1993) (quoting *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1987)). This is because "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." *Id.* (quoting *White v. Illinois,* 502 U.S. 346 (1992)). Here, however, the Defendant's medical history was provided to Dr. Chamberlain after

she had been indicted and while being cognizant that her statement may weigh upon the issuance of bond by Magistrate Judge Ryu. Simply put, the indicia of reliability and the circumstantial guarantees of trustworthiness are absent under these circumstances, rendering Defendant Salman's statements to Dr. Chamberlain inadmissible hearsay.

The Court must also confront a procedural obstacle to admissibility that was not briefed by the parties but that was discussed during the hearing on Defendant's Motion *In Limine*. That is, the only purpose for admitting Dr. Chamberlain's report is to enable Dr. Frumkin to incorporate those findings into his analysis. Admitting a detailed psychiatric evaluation without Dr. Chamberlain explaining his methodology and the significance of his opinions or conclusions would render the document incomprehensible to the jury, making it more prejudicial than probative. As the Government observed during the hearing, the defense has not disclosed Dr. Chamberlain as an expert witness. Therefore, the defense cannot call Dr. Chamberlain to testify about his findings.[11] *See* Fed. R. Crim. P. 16(b)(1)(C). Thus, the objective tests contained in Dr. Chamberlain's report and the data derived from those tests are only admissible if Dr. Frumkin may rely upon those tests in supporting his opinions.[12]

An expert may properly rely on the opinion, or here testing and corresponding data, of another expert. *Hendrix v. Evenflo Co.*, 255 F.R.D. 568, 607 n.75 (N.D. Fla. Jan. 28, 2009). "The judicial inquiry is whether the first expert's opinion is 'of a type reasonably

[11] While treating physician typically can testify without being disclosed as an expert, Dr. Chamberlain specifically disclaimed that he was providing treatment services in the informed consent section of his report.

[12] Whereas the Defendant's statements to Dr. Chamberlain lack the indicia of reliability required to meet Rule 803(4), the tests administered by Dr. Chamberlain factor in malingering and under-representation of symptoms, rendering them reliable.

relied upon by experts in the particular field.'" *Id.* (citing Fed. R. Evid. 703). Here, Dr. Frumkin reviewed the tests administered by Dr. Chamberlain and compared them to the tests he administered to look for consistency in the Defendant's responses. Dr. Frumkin is clearly familiar with the methods employed by Dr. Chamberlain such that Dr. Frumkin is not merely blindly relying upon Dr. Chamberlain's opinions. *Id.* (citing *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 772, 732–33 (10th Cir. 1993) (excluding expert opinion where witness failed to show a basis for concluding the report was reliable or that he was familiar with the methods employed by the other expert)).

In summary, Dr. Frumkin may discuss the testing administered by Dr. Chamberlain and the data obtained from those tests. Dr. Frumkin indicated in his supplemental report that he compared Defendant Salman's results on specific tests to the testing done by Dr. Chamberlain.[13] Since Dr. Frumkin is familiar with the tests administered by Dr. Chamberlain, he may properly discuss those tests. However, Dr. Frumkin may not discuss the personal or medical history communicated by Defendant Salman to Dr. Chamberlain, since that information was not provided for treatment purposes. While the Defendant has suggested she may attempt to lay a proper business record foundation for Dr. Chamberlain's report, she is reminded that Rule 702 permits the admission of expert opinion testimony and not opinions contained in documents prepared out of court. *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994). This is due to the fact that an expert report is hearsay and does not qualify as a business record. *Ake*

[13] It is noteworthy that Dr. Frumkin did not disclose in either of his expert reports that he had relied upon any biographical information provided by the Defendant to Dr. Chamberlain in forming his opinions. At the *Daubert* hearing, Dr. Frumkin, in summarizing the basis of his opinions, observed that he reviewed the psychological testing conducted by Dr. Chamberlain—not his interview of Ms. Salman.

v. General Motors Corp., 942 F. Supp. 869, 877–78 (W.D. N.Y. 1996). The Defendant's motion is granted to the extent she seeks authority for Dr. Frumkin to rely upon the testing and test data generated by Dr. Chamberlain. To the extent the Defendant seek admission of Dr. Chamberlain's report, including reliance by Dr. Frumkin on Dr. Chamberlain's interview of Ms. Salman, the motion is denied.

C. Whether Defendant Salman's Text Messages of June 12, 2016, are Admissible

The Defendant seeks a ruling *in limine* on the admissibility of certain text messages sent to Omar Mateen and received from him during the early morning hours of June 12, 2016. (Doc. 150, p. 12). The Government has no objection to the introduction of these text messages. (Doc. 157, p. 8). Accordingly, the Defendant's motion is granted.

D. Whether Evidence of Spending Should be Excluded

Defendant Salman seeks to exclude the introduction of evidence of spending "unrelated to the Pulse nightclub attack." (Doc. 150, p. 16). According to the defense, the prosecution intends to offer evidence of spending consisting of the following: purchase of "jewelry [by Mateen for Defendant Salman] from Kay Jewelers, Silver and Gold Connection, Express, and Zales; lingerie from Victoria's Secret; and various other items, including a $75 G-Shock Casio watch." (*Id.*). The defense proffers that Mateen purchased most of these items himself, but the Defendant also used Mateen's credit card to purchase items, including the watch. (*Id.* at p. 17). The defense also proffers that the Defendant and Mateen purchased an iPad for their son. (*Id.*). The Defense argues that there is no connection between making these purchases and aiding and abetting as charged in the Indictment. (*Id.*).

During the hearing on Defendant's Motion *In Limine*, defense counsel conceded that they do not seek the exclusion of evidence concerning the purchase of the following items: a father's day card and airplane tickets; the purchase of ammunition at Walmart; the purchase of ammunition at a gun range; and the purchase of the assault rifle used in the shooting. As for the other purchases, the defense contends that the unfair prejudice of "wealth evidence" is not outweighed by its probative value. (*Id.* at p. 16) (citing *United States v. Biddix*, 2015 2015 WL 9473949, 8:14-cr-140-T-23MAP, at *9 (M.D. Fla. Dec. 29, 2015) (quoting *United States v. Hope*, 608 F. App'x 831, 838 (11th Cir. 2015)). The issue confronted by the Court in *Biddix* is whether "wealth evidence is intended to appeal to class bias or to establish a fact in issue." *Id.* at *3. Here, the Government contends that "Mateen and Salman's extravagant spending was directly related to preparing for the attack and was part of their plan to provide financial support for Salman and her son after Mateen's death." (Doc. 157, p. 9). The prosecution proffers that in June 2016, Mateen and Salman made credit card charges totaling in excess of $25,000 and cash withdrawals of over $5,500. (*Id.*). "In an eleven day period prior to the attack, they spent almost a full year's salary for the family using credit cards in Mateen's name only to avoid debtors from seeking money from Salman after his death." (*Id.*). Tax records will show that Mateen, the sole income for the family, earned $30,000 annually. (*Id.* at p. 10).

The Government argues that the evidence of excessive spending—compared to Mateen's income—is more probative than prejudicial where the Defendant told the FBI after the attack that she knew Mateen was "preparing for jihad" when he began "spending a lot of money." (*Id.*). Additionally, on June 1, 2016, approximately two weeks prior to the attack, Defendant Salman was added as a death beneficiary to Mateen's bank account,

and the prosecution argues Salman expressed concern to the agents about getting Mateen's death certificate as soon as possible. (*Id.* at pp. 10–11). While not briefed by the parties, the *Daubert* hearing concerning the opinions to be offered by Dr. Frumkin reveals the defense may seek to introduce evidence that Salman was abused by her husband. The purchase of luxury items, and the steps allegedly taken by Mateen to provide financially for his wife, are relevant to the weight to be given to the evidence of alleged spousal abuse.

The evidence of excessive spending relative to Mateen's annual income is relevant to the determination of Defendant Salman's knowledge that Mateen planned to perpetrate the instant attack. The defense will offer evidence showing Salman purchased a father's day gift and that Mateen purchased airline tickets for the family to travel home to California, with both events occurring after the Pulse attack, as evidence of Salman's lack of knowledge. Correspondingly, evidence that Mateen and Salman purchased luxury items, some of which could be resold for potentially needed cash, is relevant to demonstrate knowledge. The evidence of luxury purchases for the benefit of Defendant Salman is also relevant to the claims of alleges spousal abuse. Accordingly, the Defendant's motion to exclude this evidence is denied.

The defense also moves for the exclusion of evidence consisting of WIC records[14] and Jackson Hewitt records. (Doc. 150, p. 18). The Government argues that the WIC records are relevant to show Defendant Salman was aware of the household annual income. The prosecution contends that while Salman was receiving WIC benefits, she is

[14] WIC stands for Woman, Infants, and Children, and is a special supplemental nutrition program sponsored by the Federal Government.

making significant purchases outside of her means. The prosecution proffers the WIC records reveal Defendant Salman claiming her household income was $20,000—below their actual income. The Court is concerned that evidence concerning the receipt of welfare benefits, particularly coupled with allegations that Salman under-represented her household income, is unduly prejudicial. The Government is entitled to present evidence that Defendant Salman submitted an official document setting forth the family income in the amount stated on the WIC form without specifically revealing the document was an application for welfare. The Court has encouraged the parties to stipulate to the amount reported by Defendant Salman. In the absence of a stipulation, the Government may offer the application, redacting reference to the WIC program.[15]

E. Whether Purely Religious Evidence, Wearing "Muslim" Clothing is Admissible

The Defendant seeks to prevent the Government from presenting evidence that she was wearing "Muslim" clothing when she exited her home on June 12, 2016, to meet with a representative of the Fort Pierce Police Department. (Doc. 150, p. 19). The defense also seeks to exclude a video recording showing Mateen attending a mosque on June 8, 2016. (*Id.*). In response, the Government states it will not offer evidence that Ms. Salman was wearing "Muslim" clothing on June 12, 2016.[16] (Doc. 157, p. 11). As for the video footage of Mateen attending a mosque on June 8, 2016, the Government avers this evidence is corroborative of other information showing Mateen, the Defendant, and their

[15] The defense did not brief or articulate during the hearing the significance of the Jackson Hewitt records. To the extend Jackson Hewitt involves a government assistance program, the parties are guided by the Court's statements concerning the WIC records.

[16] The testimony presented at the hearing on Defendant's Motion to Suppress revealed Ms. Salman was wearing pajamas when she exited her apartment.

son travelled to Disney Springs on this date.[17] (*Id.*). In a statement to the FBI, Defendant Salman explained that during the Disney Springs trip, Mateen asked her if "an attack on Downtown Disney or a club" would be the most upsetting. (*Id.* at p. 12). The video corroborates Defendant Salman's statement to the FBI. While the defense is willing to stipulate that Mateen visited the mosque on this date, the Government has declined to enter into a stipulation, which is their right. The evidence related to visiting the mosque is not offered to inflame the juror's passions, and the Government may display the video footage. To the extent the defense desires a limiting instruction, they are directed to present the proposed language to opposing counsel to determine if an agreement can be reached. If no limiting or cautionary language is agreed upon, the parties may submit their competing versions to the Court for its consideration at least 24 hours before the video recording will be displayed.

F. The Video of the Pulse Night Club Attack

The Defendant offers to stipulate that forty-nine innocent people were killed by Omar Mateen on June 12, 2016. (Doc. 150, p. 21). The Government contends the video evidence of the Pulse attack and its immediate aftermath is relevant for a number of reasons. First, the Defendant is charged with aiding and abetting Mateen's provision of material support to the Islamic State, resulting in multiple deaths, and the video records demonstrate that death resulted from the provision of such support. (Doc. 157, p. 12). Secondly, the video shows how Mateen conducted the attack which corroborates Defendant Salman's statements to the FBI that Mateen targeted a club and bought a long

[17] At the hearing, the Government displayed the video and presented an exhibit (7A) depicting cellular data corroborating the timeline.

gun (depicted in the video) prior to the attack. (*Id.* at p. 13). The video further corroborates the Defendant's statement to the FBI that her husband departed the family home carrying a backpack with ammunition and was driving a rented van.

The Government has provided to the Court and to opposing counsel a DVD containing the video recording taken inside of the Pulse nightclub during the attack perpetrated by Mateen, including body camera video depicting the police responding to the scene, entering the nightclub, and assisting victims. The pertinent recordings are identified as Pulse Shooting Timeline Video, and the following body camera video recordings:[18]

> 022661; Axon Body – 0206; Axon Body – 0512; Axon Body – 0208; Axon Body - 0506; Axon Body – 0506, clip 2; Axon Body - 0208; Axon Body - 0506; Axon Body – 0506, clip 2; Axon Flex – 0266; Axon Flex – 0213; Axon Flex - 0213, clip 2; Axon Flex – 0243; Axon Flex 0307.

The defense argues that the graphic video is unduly prejudicial, particularly where, as here, she is willing to stipulate that Mateen provided material support to ISIL. (Doc. 150, p. 20). Moreover, Defendant Salman claims "the murders at the Pulse nightclub are not the gravamen of the Government's case against Salman[,] [because] [t]he Government has charged Salman, not with aiding and abetting murder or assault, but with aiding and abetting material support of terrorism." (*Id.* at p. 21). The language of the Indictment is instructive, and it reads:

> From an unknown date, but at least as early as in or about the end of April 2016, through and including on or about June 12, 2016, in the Middle District of Florida, and elsewhere, the defendant,

[18] The Government has also produced a number of still photographs which the Defendant has not sought to exclude.

NOOR ZAHI SALMAN,

> did knowingly aid and abet Omar Mateen's attempted provision and provision of 'material support or resources,' as that term is defined in 18 U.S.C. § 2339A(b)(1), including personnel and services, to a designated foreign terrorist organization, namely, the Islamic State of Iraq and the Levant, knowing that 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.
>
> In violation of 18 U.S.C. §§ 2339B(a)(1) and 2 (aiding and abetting).

(Doc. 1).

It is clear from the language of the indictment that the "deaths of multiple victims" is in fact charged offense conduct and that Defendant Salman is charged with aiding and abetting an act of terrorism resulting in multiple deaths. The deaths, or murders, are inextricably intertwined with the material support provided to a terrorism organization by in that the murders are how the agenda of ISIL is carried out. The deaths depicted in the various video recordings are not, therefore, unrelated to Defendant Salman's offense conduct.[19]

Federal Rule of Evidence 403 provides that otherwise relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403;

[19] The Government alleges Defendant Salman knew her husband watched ISIL training videos, assisted him in "casing" potential locations for an attack, was present when he purchased ammunition and an assault rifle, knew he had rented a van prior to the attack, benefited from the transfer of assets to her in anticipation of his death, and watched him leave their home the evening of the attack heavily armed. The resulting violence is, therefore, not outside the gravamen of the Government's case against the Defendant.

see also United States v. Al-Moayad, 545 F.3d 139, 159 (2d Cir. 2008). The Court in *Al-Moayad* observed that the "'probative value' of an item of evidence . . . may be calculated by comparing evidentiary alternatives." *Al-Moayad,* 545 F.3d at 159 (quoting *Old Chief v. United States*, 519 U.S. 172, 184 (1997)). The Supreme Court in *Old Chief* held "the prosecution is entitled to prove its case by evidence of its own choice." *Old Chief*, 519 U.S. at 186. This is precisely the argument made by the Government in this case. It is equally clear, however, that the trial judge may consider the defendant's willingness to stipulate and the potential for prejudice arising from the proffered evidence. *Al-Moayad*, 545 F.3d at 161 (quoting *United States v. Pepin*, 514 F.3d 193, 206–07 (2d Cir. 2008)).

Here, the Defendant is willing to stipulate that Mateen provided material support to a foreign terrorist organization and that forty-nine people were murdered on June 12, 2016, at the Pulse nightclub. In balancing the probative value of the video recordings depicting the shooting and its aftermath, the Court is mindful of the Defendant's offer to stipulate. This does not end the inquiry, however: "Evidence is admissible if relevant, and evidence is relevant if it has any tendency to prove or disprove a fact of consequence." *United States v. Patrick*, 513 Fed. App'x 882, 886 (11th Cir. 2013). The exclusion of relevant evidence pursuant to Rule 403 is an "extraordinary remedy which the district court should invoke sparingly, and the balance should be struck in favor of admissibility." *Id.* (quoting *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2010)). Because relevant evidence in criminal trials is inherently prejudicial, the rule "permits exclusion only when unfair prejudice substantially outweighs probative value." *Id.* (quoting *United States v. Merrill*, 513 F.3d 1293, 1301 (11th Cir. 2008)).

In *Patrick*, the district court excluded two video recordings depicting the "very events underlying the assault charge against Patrick," finding that "the videos are both relevant and highly probative on a number of issues of consequence, including whether Patrick committed an assault or aided or abetted in its commission, whether the victim suffered a serious bodily injury, and whether Patrick's actions were a proximate cause of those injuries." *Patrick*, 513 Fed. App'x at 887. The Court held that the defendant's concessions and the existence of live witnesses who could testify about these events were insufficient to negate or detract from the probative value of the videos. *Id.*

Similarly, in the instant case, Defendant Salman's willingness to stipulate that Mateen provided material support to a terrorist organization and that forty-nine people died as a result does not negate or detract from the probative value of the video evidence. Not only is the video direct evidence of the charged crime, the evidence corroborates a number of statements made by the Defendant to the FBI. This is important because the defense contends Salman's statements memorialized by FBI Special Agent Enriquez are unreliable. At the suppression hearing, the defense questioned why the agents did not record the Defendant's interview, and argued the duration of the interview, along with the circumstances of the interview, render the Defendant's statements unreliable. The defense retained an expert witness who will opine that Salman is susceptible to providing a false incriminatory statement. The video recordings corroborate several statements attributed to Defendant Salman by the FBI concerning her alleged involvement in Mateen's planning and preparation for the attack and her observation that Mateen departed their home the previous night armed and having indicated he would complete his plan. The defense does not stipulate that Defendant Salman's statements to the FBI

are true or accurate, and the video evidence speaks to the accuracy of her statements. While the video recordings are graphic, "the nature of the crime itself, and therefore the nature of the evidence tending to prove it, is emotionally charged . . . ." *Patrick*, 513 Fed. App'x at 888. This does not mean, however, "that the prosecution must be deprived of its most probative evidence." *Id.*

The Court makes the following findings: the Government may display to the jury the Pulse Shooting Timeline Video and the body camera recordings with the following exceptions: Axon Body 0506, depicting police officers taking positions and otherwise securing the perimeter; Axon Flex 0213, depicting police officers removing victims who appear to have expired from the nightclub; and Axon Flex 0243, showing police outside the nightclub are excluded. The body camera video described as Axon Body 0506 is cumulative to Axon Body 0208. The Axon Flex 0213 video is cumulative to the Pulse Timelapse video. The Axon Flex 0243 video is cumulative to Axon Body 0208 and Axon Body 0506. As with all rulings on motions *in limine*, the facts presented during the course of the trial may warrant reconsideration of the Court's ruling.

G. Whether 911 Calls Made by Individuals hiding Inside the Nightclub are Admissible

The Defendant seeks the exclusion of 911 emergency calls made by individuals trapped inside the Pulse nightclub as the shooting unfolded. (Doc. 150, p. 22). The Government had produced to the Court and to opposing counsel several audio files, identified as follows:

> New Clips: 16-242039, initial 43; 16-242039, part 21 no ofd; call 7 SC30, 0220 hrs.
>
> Voice clips 1 through 5.

New Clip 16-242039, further identified as initial 43, is the audio of police discussing shots fired at the Pulse nightclub. The parties did not specifically discuss this audio file in their briefing or at the hearing, and the Court will address its admissibility when and if it is offered. New Clip 16-242039, part 21 no ofd, is a recording of a victim calling 911 from the bathroom inside the Pulse nightclub and describing the fact that someone had begun shooting people. The defense objects to the 911 call as unduly prejudicial. (Doc. 150, p. 22). The Government's reply brief does not directly comment upon the relevance or admissibility of this recording. It is clear the caller's statements are hearsay, and it is unclear how a call from an understandably terrified individual is relevant to any issue in dispute. The Court will reserve ruling on the admissibility of the victim's 911 call. The Court will similarly reserve ruling on the admissibility of New Clip call 7 SC30, which is another recording of an individual who dialed 911. If the prosecution seeks to offer the call into evidence, the matter of admissibility will be discussed outside the presence of the jury, meaning prior to the commencement of court or after hours. The jury will not be kept waiting while the parties attend to foundational issues.

Voice Clips 1, 2, 3, 4, and 5 are recordings of Omar Mateen, apparently made by individuals concealed in one of the bathrooms at the Pulse nightclub. The Defendant has not sought the exclusion of these recordings; hence, the issue in not before the Court. The Court notes, however, that these statements by Mateen were made during the on-going attack. Again, the prosecution is instructed to provide advance notice to opposing counsel and to the Court of its intention to offer these recordings to allow the Court to schedule an appropriate amount of time to discuss their admissibility.

H. Whether Evidence that Ms. Salman attended a Gun Range with Mateen is Admissible

Defendant Salman argues that evidence showing she went with Mateen to a shooting range in 2014 is irrelevant to any element of the charged offenses. (Doc. 150, p. 22). The Government counters that the limited purpose for offering a photograph of Ms. Salman and Mateen at the gun range is to corroborate her statement to the FBI that she and Mateen had visited a range together. The Court agrees the photograph showing the Defendant and Mateen frequenting a gun range is relevant to corroborate her statement to the FBI, especially since the defense is challenging the accuracy and veracity of the statements memorialized by SA Enriquez. To the extent the defense desires a limiting instruction to accompany the introduction of this evidence, they are instructed to draft language and to confer with opposing counsel.

I. Whether Mateen's G4S Employment Records are Admissible

The prosecution seeks to admit evidence consisting of a record from his employment file stating that he will not use his work-provided firearm outside of work. (Doc. 157, p. 16). The Defendant avers that the firearm receipt and acknowledgement form is not relevant to any issue in dispute. (Doc. 150, p. 23). The Court sustained the Defendant's objection to the admissibility of the G4S records on the basis that the prosecution could not demonstrate Defendant Salman was aware of the restriction imposed by Mateen's employer. In order for the Government to argue that purchasing ammunition for Mateen's service weapon was unusual, the prosecution must be able to show Salman was aware that the G4S policy prevented Mateen from using the service weapon for his personal use. This evidence is absent, rendering the record irrelevant to any material issue in this case.

J. Whether Statements Made by Mateen to 911 During the Attack are Admissible

During the course of the attack at the Pulse nightclub, Mateen engaged in several telephone conversations with 911. The first communication with 911 was initiated by Omar Mateen, when he called to take credit for the shootings.[20] After Mateen placed this call, Mr. Andrew Brennan, who at the time was a Master Sergeant with the Orlando Police Department, made telephonic contact with Mateen. (Doc. 184, pp. 6, 8). Mr. Brennan served as a hostage negotiator from November 1994 until his retirement in January 2018. (*Id.* at pp. 5–6). During the early morning hours of June 12, 2016, Mr. Brennan was working an extra duty police detail for a nightclub in downtown Orlando, when he heard an officer call out regarding multiple shots fired at the Pulse nightclub. (*Id.* at p. 7). Mr. Brennan reported to the communications post at 2:30 a.m. (*Id.* at p. 8).

Mr. Brennan learned that Mateen had called 911, and he made contact with Mateen. Mr. Brennan described his purpose in calling Mateen in the following terms:

> Well, what I was trying to do was get whatever information I could to keep people safe, including the caller … you don't know if something like this is real or not or in fact at this point if I'm talking to somebody that's involved…. My job is to make sure that the people that I'm talking to and everybody else at the scene is safe.

(Doc. 184, p. 12).

In total, Mr. Brennan had three conversations with Mateen. He continued to call Mateen, because Mr. Brennan felt that "the longer I could have that person on the phone and talking, that would diminish the chances of any further violence or any shooting." (*Id.* at p. 13).[21] The second call between Mr. Brennan and Mateen begins with Mr. Brennan

[20] The Government has submitted a transcript of the call for consideration by the Court. (911 call, bates 00186061).

[21] During their first conversation, Mr. Brennan tells Mateen: "Well, I'm trying to figure out how to keep you safe and how to get this resolved peacefully, because I'm not a politician,

telling Mateen "I'm trying to help you. Ok, I'm trying to help you, tell me what's going on right now. I don't want to see anybody get injured including you." (Brennan 2, Bates 00186054). The balance of the call involves Mr. Brennan asking Mateen if he is injured and trying to convince him to come outside to resolve this peacefully. (*Id.*, Bates 00186056-57). The third call between Mr. Brennan and Mateen again involves Mr. Brennan trying to convince Mateen to come outside. (Brennan 3, Bates 00186059).

The Defendant argues that the calls between Mr. Brennan and Mateen are barred by the Sixth Amendment Confrontation Clause, which prohibits the introduction of statements by "those who 'bear testimony'" against a criminal defendant when the declarant is unavailable for cross-examination. *See Davis v. Washington*, 547 U.S. 813, 823-24 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 51 (2004)). (Doc. 150, p. 23). The defense acknowledges that a "911 call for help is not 'testimonial' in nature." *People v. Moscat*, 777 N.Y.S.2d 875, 878 (N.Y. Crim. Ct. 2004). The Fifth District Court of Appeals in Florida held that the court should consider whether a "reasonable person" in the declarant's position would "have been aware that the statements in response to the [questioner] would be available for later use in prosecuting" him. *Bartee v. State*, 922 So. 2d 1065, 1070–71 (Fla. 5th DCA 2006).

The Defendant asserts that the circumstances surrounding Mateen's call to 911, the subsequent calls by Mr. Brennen to Mateen, and Mateen's Facebook posts, demonstrate his testimonial purpose. (Doc. 150, p. 24).[22] The Government counters that

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I'm not in government. All I can do is help individuals and I'm going to start with helping you." (Brennan 1, Bates 00186051).

[22] Neither the Government nor Defendant have submitted Mateen's Facebook posts for the Court's consideration. The Government notes that the Facebook posts occurred moments before his attack. (Doc. 157, p. 17).

Mateen's statements made during the 911 call he initiated, in which he claims responsibility for the Pulse nightclub attack, are not testimonial. (Doc. 157, p. 17). Those statements were for the purpose of completing his provision of material support for ISIL and do not amount to a statement that would be used in a prosecution. (*Id.* at p. 18). As for Mateen's conversations with Mr. Brennan, the prosecution classifies them as having the primary purpose of enabling police to "meet an ongoing emergency." (*Id.*).

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court's modern Confrontation Clause jurisprudence begins with *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford involved statements made to police by Sylvia Crawford against her husband in a criminal trial emanating from a stabbing. Ms. Crawford did not testify at trial because of the state marital privilege. *Id.* at 40. The prosecutor, nonetheless, sought to introduce Ms. Crawford's recorded statement from a station house interrogation to establish that the stabbing was not in self-defense. *Id.* Ms. Crawford's husband, the petitioner, objected to the evidence on the ground that it violated his right to be "confronted with the witnesses against him." *Id.* The trial court admitted the recorded statement at trial, and the petitioner was convicted of assault. *Id.* at 40–41.

In *Crawford*, the Court held that the Confrontation Clause applies to "witnesses" who "bear testimony" against an accused. 541 U.S. at 51. The Court defined testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id*. The majority in *Crawford* expressly refrained from supplying a comprehensive definition of "testimonial statements," but found that "Statements taken by

police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52.[23] The Court ultimately held that Ms. Crawford's recorded statements from a station house interrogation were testimonial and thus could not be admitted in the absence of cross-examination.[24]

The Court re-visited the *Crawford* decision in *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006), which were decided together. Both cases involved statements to law enforcement by domestic abuse victims. In *Davis*, the victim made statements to a 911 operator during and immediately after her boyfriend attacked her. The victim in *Hammon* made statements to police after being separated from her attacker, which were recorded in an affidavit. The Court held that the statements in *Hammon* were testimonial, while the statements in *Davis* were not.

Critically, the Court announced the objective "primary purpose" test to determine the applicability of the Confrontation Clause:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822. In holding that the victim statements in *Davis* were nontestimonial, the Court distinguished that case from the facts of *Crawford*. In *Davis*, the victim "was speaking

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[23] The Court further explained that the Sixth Amendment's "primary object" is testimonial hearsay, "and interrogations by law enforcement officers fall squarely within that class." 541 U.S. at 53.

[24] Admission of such statements at trial does not violate the Confrontation Clause when the witness "was unavailable to testify, and the defendant had a prior opportunity for cross-examination." 541 U.S. at 53–54

about events *as they were actually happening*, rather than describing past events." *Id.* at 827 (citation and quotation marks omitted). Further, the *Davis* victim was facing an "ongoing emergency," and the "elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* Finally, the statements given in *Davis* were far less formal than those in *Crawford*, buttressing their nontestimonial nature. *Id.* For all these reasons, the Court found that "the circumstances of [the victim's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a *witness*; she was not *testifying*." *Id.* at 828.

Turning to *Hammon*, the Court found the statements at issue were similar to the statements given in *Crawford*, and therefore testimonial. "[T]he interrogation was part of an investigation into possibly criminal past conduct . . . ." *Id.* at 829. The officer interrogating the victim "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Id.* at 830. Although the interrogation in *Hammon* was less formal than the station house interrogation in *Crawford*, it was "formal enough that [the victim's] interrogation was conducted in a separate room, away from her husband . . . ." *Id.* The Court found the primary purpose of the *Hammon* interrogation "was to investigate a possible crime," and was thus testimonial. *Id.* ("Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial.").

The Court further refined the "primary purpose" test in *Michigan v. Bryant*, 562 U.S. 344 (2011). In *Bryant*, police responded to a possible shooting, and found Anthony Covington in a gas station parking lot with a mortal gunshot wound to the stomach. *Id.* at

349. Police asked Covington "what had happened, who had shot him, and where the shooting had occurred." *Id.* Covington stated that he had been shot by Richard Bryant through the back door of Bryant's house after a conversation. *Id.* Covington died hours later after being hospitalized. *Id.* Covington's statements were introduced at trial, and Bryant was found guilty of second degree murder. *Id.* at 350.

Finding the "primary purpose" test applicable, the Court emphasized that "all of the relevant circumstances" must be considered. *Id.* at 369. The primary purpose test is objective, and "the relevant inquiry is . . . the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id.* at 359. Therefore, courts must assess (1) the circumstances of an encounter, and (2) the parties' statements and actions to determine the primary purpose of an interrogation. *Id.* at 359–60. The Court made clear that "the statements and actions of *both* the declarant and interrogators" are relevant in ascertaining the primary purpose of the interrogation. *Id.* at 367–68.

The existence of an "'ongoing emergency' at the time of the encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 361. Whether an emergency exists is a fact-specific inquiry, and depends on whether the threat to first responders and the public has terminated. *Id.* at 363–66. Of course, the existence of an "ongoing emergency" is simply one factor to be considered in the "primary purpose" test, and the existence of an ongoing emergency is not dispositive of the testimonial nature of the inquiry. *Id.* at 366. Another important factor is the formality of the encounter. *Id.* A formal interrogation "suggests the absence of an emergency and therefore an increased likelihood that the purpose of the

interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* (citation and quotation marks omitted).

The *Bryant* Court finally decided that the interrogation's "primary purpose" was "to enable police assistance to meet an ongoing emergency," and was thus non-testimonial. *Id.* at 378. The circumstances of the interrogation involved an armed shooter, whose identity, location, and motives were unknown. *Id.* at 372. The threat in *Bryant* was more broad than those in *Davis* and *Hammon*, "and encompasse[d] a threat potentially to the police and the public." *Id.* at 373.[25] Moreover, the *Bryant* interrogation was highly informal, suggesting the interrogation's purpose was to respond to an emergency as opposed to learn facts to aid future prosecution.[26] *Id.* at 377. ("[T]he situation was fluid and somewhat confused."). The Court finally held that the "circumstances of the encounter as well of the statements and actions of Covington and the police objectively indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency,'" and Covington's statements introduced at trial were thus nontestimonial. *Id.* at 377–78.

The primary purpose of Mr. Brennan, the Orlando Police Department hostage negotiator, conversation, or interrogation, of Omar Mateen was "to enable police assistance to meet an ongoing emergency," and was thus non-testimonial. Mr. Brennan

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[25] The Court explained that, where guns are involved, the existence of an ongoing emergency is broader than in the domestic violence context where an abuser uses fists: "If an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause." *Id.* at 373–74.

[26] "The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements." *Id.*

was questioning Mateen about events as they were actually happening. Each time Mateen turned the discussion to the Islamic State's grievances with the United States, Mr. Brennan endeavored to bring the conversation back to understanding who was injured, including Mateen, and resolving the incident peacefully. Mr. Brennan's primary focus was not to establish or prove past events potentially relevant to a later criminal prosecution. Rather, his objective was to "keep people safe, including the caller."

Mateen's initial 911 call was similarly not testimonial. Mateen called 911 and stated that "I'm in Orlando and I did the shootings . . . . My name is I pledge allegiance to Abu Bakr Al-Baghdadi, of the Islamic State." (Initial 911 Call, Bates 00186061). The primary purpose of Mateen's statement was to advance the agenda of the Islamic State. He was not interrogated by law enforcement, and Mateen hung up the phone shortly after making this statement. Accordingly, the introduction of Mateen's initial 911 call and his three recorded conversations with Mr. Brennan do not offend the Confrontation Clause of the Sixth Amendment and are admissible at trial.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion *In Limine* (Doc. 150) is **GRANTED** in part and **DENIED** in part as set forth herein.

DONE AND ORDERED in Orlando, Florida, on February 20, 2018.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties