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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 398 (PAE)

5 SAJMIR ALIMEHMETI,  
6 a/k/a "Abdul Qawii",

7  
8 Defendant.

Conference

9 -----x  
10 New York, N.Y.  
11 September 22, 2017  
12 2:30 p.m.

13 Before:

14 HON. PAUL A. ENGELMAYER,

District Judge

15  
16 APPEARANCES

17 JOON H. KIM  
18 Acting United States Attorney for  
19 the Southern District of New York  
GEORGE D. TURNER  
Assistant United States Attorney

20 DAVID E. PATTON  
21 Federal Defenders of New York, Inc.  
22 Attorney for Defendant  
23 SYLVIE J. LEVINE  
24  
25

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1 (Case called)

2 MR. TURNER: Good afternoon, your Honor. George  
3 Turner, for the government.

4 THE COURT: Good afternoon, Mr. Turner.

5 MS. LEVINE: Good afternoon, your Honor. The Federal  
6 Defenders of New York, by Sylvie Levine, on behalf of Mr.  
7 Alimehmeti.

8 THE COURT: Very good. Good afternoon, Ms. Levine.  
9 And good afternoon to you, Mr. Alimehmeti.

10 THE DEFENDANT: Good afternoon.

11 THE COURT: Good afternoon as well to the members of  
12 the public who are here.

13 I had indicated that I would have a ruling on the  
14 pending motion to suppress on or before today's conference. It  
15 turns out to be on. I'm about to read a brief ruling into the  
16 record. Here goes.

17 The Court will rule now on defendant Alimehmeti's  
18 pending motion to suppress and for a *Franks* hearing and for  
19 disclosure of FISA orders, applications, and related materials,  
20 as well as for notice of and discovery about the use of  
21 Executive Order 12333 surveillance.

22 For your planning purposes, there will not be a  
23 written decision. I will simply issue a bottom-line order  
24 reflecting my disposition of the motion, so if the Court's  
25 reasoning here is significant, you will need to order the

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1 transcript.

2 Alimehmeti is charged with one count of providing  
3 material support to the Islamic State in Iraq and the Levant,  
4 and one count of making a false statement on a passport  
5 application.

6 I will review first the procedural background to these  
7 motions.

8 On July 21, 2016, the government gave Alimehmeti's  
9 counsel notice that it intended to rely in its case in chief on  
10 information obtained and derived from physical searches  
11 conducted pursuant to the Foreign Intelligence Surveillance Act  
12 of 1978, which I will refer to as FISA.

13 On December 9, 2016, the Court held a status  
14 conference and took up with the parties a motions briefing  
15 schedule. The defense did not indicate then an intent to file  
16 a FISA suppression motion. On December 13, 2016, the Court set  
17 a briefing schedule requiring the defense to file any Rule  
18 12(b)(3) suppression motion by January 9, 2017. On January 5,  
19 2017, the Court extended the deadline for the defendant's Rule  
20 12(b)(3) motion to January 23, 2017. On March 23, 2017, two  
21 months after that deadline had passed, the parties appeared at  
22 another status conference at which defense counsel expressed,  
23 for the first time, an intent to file a FISA suppression  
24 motion. Defense counsel represented that she had believed such  
25 a motion not to be governed by the deadline for Rule 12(b)(3)

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1 motions. On April 3, 2017, defense counsel filed a letter  
2 request for leave, under Federal Rule of Criminal Procedure  
3 12(c), to file a FISA suppression motion. On April 17, 2017,  
4 the government opposed that request. On April 25, 2017, the  
5 Court granted the request for leave to file the motion,  
6 notwithstanding its having been noticed delinquenty, and set a  
7 briefing schedule for the motion.

8 On May 15, 2017, Alimehmeti moved to suppress the FISA  
9 materials the government intends to offer at trial, for a  
10 *Franks* hearing, and to compel disclosure of the FISA  
11 application, order, and related materials. Alimehmeti also  
12 moved for notice of and discovery about the use of Executive  
13 Order 12333 surveillance.

14 On July 24, 2017, the government submitted an  
15 opposition. It was properly filed *in camera*, *ex parte*, and  
16 under seal. The government also filed an unclassified version  
17 of the same memorandum, which had been redacted to remove the  
18 classified information that was provided to the Court.

19 On August 11, 2017, Alimehmeti filed a reply.

20 The Court has thoroughly reviewed the parties'  
21 submissions, which include the FISA materials sought to be  
22 disclosed. The Court has carefully considered the issues  
23 raised therein. The Court denies Alimehmeti's motion in its  
24 entirety. The Court's reasoning is as follows.

25 Alimehmeti challenges the legality of the

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1 FISA-obtained information on a number of bases. He argues that  
2 the government could not have validly asserted that he was "an  
3 agent of a foreign power," as required by the statute. He  
4 further argues that the government could not have asserted that  
5 a "significant purpose of the FISA application was to obtain  
6 foreign intelligence," as required by the statute. He argues  
7 that the FISA application must have contained intentional or  
8 reckless material falsehoods or omissions, thus requiring a  
9 hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). He  
10 argues that required certifications were or may have been  
11 insufficient. He argues that the timing of surveillance and  
12 searches may have been improper. He argues that the government  
13 may not have utilized effective minimization procedures.  
14 Finally, Alimehmeti argues that he is entitled to additional  
15 discovery and notice regarding Executive Order 12333  
16 surveillance.

17 The Court first finds that it can properly resolve  
18 these challenges and deny disclosure without affording  
19 Alimehmeti a hearing. Where, as here, the attorney general  
20 certifies "disclosure of FISA materials or an adversary hearing  
21 would harm the national security of the United States," the  
22 Court, by statute, must "review *in camera* and *ex parte* the  
23 application, order, and such other materials relating to the  
24 surveillance as may be necessary to determine whether the  
25 surveillance of the aggrieved person was lawfully authorized

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1 and conducted," citing 50 U.S.C. Section 1806(f). Under that  
2 statute, the Court may order disclosure of FISA materials  
3 "under appropriate security procedures and protective  
4 orders,...only where such disclosure is necessary to make an  
5 accurate determination of the legality of the surveillance."  
6 If the Court "determines that the surveillance was lawfully  
7 authorized and conducted, it shall deny the motion of the  
8 aggrieved person except to the extent that due process requires  
9 discovery or disclosure." *Id.* Section 1806(g). The Second  
10 Circuit has explained that disclosure of FISA materials is "the  
11 exception and *ex parte, in camera* determination is the rule".  
12 *United States v. Stewart*, 590 F.3d 93, 129 (2d Cir. 2009).

13 In this case, the Court conducted such a review. The  
14 Court's *in camera, ex parte* review of the FISA materials  
15 permitted the Court to make an accurate determination of the  
16 legality of the challenged surveillance consistent with the  
17 requirements of due process. Disclosure and an adversary  
18 hearing are therefore not necessary.

19 The Court next finds, following a comprehensive review  
20 of the FISA materials, that the government has complied fully  
21 with the FISA warrant requirements of materials and that there  
22 is no basis in the record for a *Franks* hearing.

23 As the Second Circuit has explained, the FISA Court,  
24 in reaching a decision on a warrant application, considers  
25 "whether (1) the application makes the probable cause showing

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1 required by FISA, i.e., that the target of the warrant is a  
2 foreign power or agent thereof and that the facilities or  
3 places to be searched or surveilled are being used or are about  
4 to be used by a foreign power organization; (2) the application  
5 is otherwise complete and in the proper form; and (3) when the  
6 target is a United States person, the application's  
7 certifications are not clearly erroneous." *United States v.*  
8 *Abu-Jihaad*, 630 F.3d 102, 130 (2d Cir. 2010) (citation  
9 omitted). The Second Circuit instructs that "FISA warrant  
10 applications are subject to minimal scrutiny by the courts,  
11 both upon initial presentation and subsequent challenge." *Id.*  
12 The Second Circuit has cautioned, however, that "even minimal  
13 scrutiny is not toothless." *Id.* A district court, in  
14 assessing challenges to orders of the FISA Court, presumes  
15 valid "the representations and certifications submitted in  
16 support of an application for FISA surveillance...absent a  
17 showing sufficient to trigger a *Franks* hearing." *Id.*

18 Here, the classified materials, in this Court's  
19 assessment, easily satisfy FISA's requirements. The  
20 application properly makes the required probable cause showing.  
21 The certifications do not contain any clear errors. Alimehmeti  
22 has not made "a substantial preliminary showing that a false  
23 statement knowingly and intentionally, or with reckless  
24 disregard for the truth, was included by the affiant in the  
25 warrant affidavit, and...the allegedly false statement is

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1 necessary to the finding of probable cause." *Franks*, 438 U.S.  
2 155-56. There is therefore no need for a *Franks* hearing.

3 As to Alimehmeti's arguments regarding Executive Order  
4 12333, Alimehmeti does not direct the Court to any legal  
5 authority mandating the additional notice and disclosures he  
6 seeks. Courts have denied motions for such additional notice  
7 of discovery of surveillance techniques where defendants offer  
8 only speculation of having been subject to unlawful  
9 surveillance. For example, in this district, in the *United*  
10 *States v. El Gammal*, No. 15 Cr. 588, Judge Ramos recently  
11 denied a motion for additional discovery and notice that  
12 articulated only "suspicion" of surveillance under Executive  
13 Order 12333 and that invoked, as Alimehmeti does here, Title 18  
14 U.S.C. Section 3504, the Fourth and Fifth Amendments, and  
15 Federal Rules of Criminal Procedure 12(b)(3)(C) and  
16 16(a)(1)(E)(i). Here, just as in *El Gammal*, the Court  
17 understands the government to have complied with its notice and  
18 discovery obligations and declines to impose additional  
19 obligations at this time.

20 Similarly, in *United States v. Aref*, the Second  
21 Circuit affirmed the denial of a defendant's Section 2504  
22 motion for notice and disclosure of surveillance where the  
23 defendant "failed to state a colorable basis for his Section  
24 3504 claim" and instead "merely (1) identified representations  
25 made by unnamed sources in a newspaper article; and (2) argued



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1 that the prosecutor's pattern of objections shows that he must  
2 have been surveilled electronically." 285 F.App'x 784, 793 (2d  
3 Cir. 2008). The circuit cautioned that, "although [a] Section  
4 3504 claim need not be particularized, it may not be based upon  
5 mere suspicion but must at least appear to have a 'colorable'  
6 basis before it may function to trigger the government's  
7 obligation to respond under Section 3504." *Id.* (quoting *United*  
8 *States v. Pacella*, 622 F.2d 640, 643 (2d Cir. 1980)).

9 I am informed that I misspoke earlier at one point and  
10 inadvertently, I think, said 2504 instead of 3504. I meant  
11 3504.

12 Here, Alimehmeti does not articulate a sufficient  
13 basis for his speculation that he has been subjected to  
14 unlawful surveillance under Executive Order 12333. Therefore,  
15 the Court reaches the same conclusion as did Judge Ramos. The  
16 Court denies the motion without prejudice "to renew in the  
17 event the defense is able to bring something more concrete to  
18 the Court's attention," citing Judge Ramos in No. 15 Cr. 588,  
19 Dkt. No. 142 at page 25.

20 Accordingly, the Court denies Alimehmeti's pending  
21 motion to suppress and for additional notice of discovery.

22 That ends the Court's ruling. A bottom-line order  
23 reflecting the denial of the motion will shortly follow.

24 Having taken up that business, counsel, where do we  
25 stand?

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1 MR. TURNER: Your Honor, where we stand is, at least  
2 having spoken with defense counsel earlier, what remains in our  
3 view is setting a trial date at this point, your Honor.  
4 Pretrial briefing has been complete, both on the CIPA side as  
5 well as Rule 12, and we submit it would be appropriate to set a  
6 trial date.

7 THE COURT: Have you discussed that with opposing  
8 counsel?

9 MR. TURNER: We have, your Honor, and getting a little  
10 more specific, in our discussions earlier today, we both  
11 believed that a trial in the early part of the new year would  
12 be appropriate at this juncture and given the nature of the  
13 case, your Honor, subject to the Court's schedule, of course.

14 THE COURT: All right. Let me just confirm that with  
15 defense counsel and then we can start taking up the trial date  
16 and other mechanics.

17 Ms. Levine.

18 MS. LEVINE: That's correct, your Honor. I did speak  
19 to Mr. Turner and we also think it's appropriate at this  
20 juncture to set a trial date.

21 THE COURT: Is that based on an assessment that this  
22 case is going to trial, or that the prudent course is to set a  
23 trial date but you're not necessarily projecting that?

24 MS. LEVINE: I think at this time, it is our  
25 expectation that this case will go to trial. There are some

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1 ongoing conversations, as there always are, at precisely this  
2 juncture, and if those conversations change the route that  
3 we're taking, we'll obviously inform the Court immediately, but  
4 I think at this time it would be proper to put a date on the  
5 calendar.

6 THE COURT: OK. I'll do that. Let me ask you, before  
7 we start talking about dates and schedules, just to get an  
8 understanding, beginning with defense, we've cleared a bunch of  
9 hurdles here so far, what do you envision happening between now  
10 and trial? Are there motions *in limine* you have in mind? I'm  
11 trying to get a sense of what we will collectively need to work  
12 through beforehand, because that may bear on the trial date.

13 MS. LEVINE: Sure. I think some motions *in limine*.  
14 For example, I think there may yet be expert disclosure by the  
15 government. I don't want to speculate, but I perhaps would  
16 look to the government at this juncture. I know that they have  
17 in others of these types of cases sought to call experts and  
18 there's been litigation with regard to the experts. Obviously,  
19 that's something that I think I can contemplate now as coming  
20 up that the Court can't sort of otherwise foresee. Otherwise,  
21 I imagine it's standard motions *in limine* with regard to 404(b)  
22 applications and such.

23 THE COURT: In other words, what you're envisioning at  
24 this point is motion practice that is not unfamiliar for  
25 criminal cases, criminal cases in this district that do not

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1 implicate classification-type issues but, rather, issues that  
2 involve either expertise or limiting instructions, that sort of  
3 thing.

4 MS. LEVINE: Right, and I think I would look to  
5 Mr. Turner, if that's acceptable, to maybe elaborate on any  
6 other pretrial testimony or such that we're not aware of at  
7 this moment but may be shared shortly.

8 THE COURT: I'm trying to get a sense as well of the  
9 likely volume and complexity of what you would expect to be  
10 moving on. Let's assume that, pending what we hear from  
11 Mr. Turner, there is potentially expert testimony of the sort  
12 that you envision and that you would be moving against it.

13 MS. LEVINE: Presumably, right. Other than that, I  
14 don't know of anything at this moment to bring to the Court's  
15 attention.

16 THE COURT: In other words, from the perspective of  
17 motion practice, based on what you know now, while there would  
18 likely be some, we're not talking about the sort of volume that  
19 requires a protracted delay.

20 MS. LEVINE: I don't believe so, your Honor.

21 THE COURT: Thank you.

22 Mr. Turner.

23 MR. TURNER: Your Honor, we agree with that assessment  
24 with the CIPA-related litigation as well as the FISA  
25 suppression motion having been decided. We envision standard

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1 criminal pretrial motion practice within the spectrum of what  
2 would be considered the norm here, I think, your Honor. That  
3 will likely include expert disclosure, expert notice, as well  
4 as *in limine* briefing, but at this point, your Honor, we don't  
5 foresee something that is outside what your Honor has alluded  
6 to.

7 THE COURT: Give me a sense of when you would make  
8 whatever expert disclosures you have in mind making.

9 MR. TURNER: Your Honor, we could be prepared to make  
10 expert disclosure in the range of, say, a couple months before  
11 trial, which would seem to be in the range of what is standard  
12 practice in these types of cases.

13 THE COURT: And without holding you to it, is there  
14 anything more you could tell me about the number or areas of  
15 expertise that you have in mind?

16 MR. TURNER: Broadly speaking, your Honor, and some of  
17 this will depend, of course, on whether and to what extent  
18 there are stipulations, for example, related to the extraction,  
19 for example, of forensic data from electronic devices. That  
20 would be one potential subject of expert testimony. It is also  
21 customary, we would anticipate, in this type of case to elicit  
22 expert testimony regarding ISIS as a terrorist organization and  
23 related topics like that.

24 THE COURT: One category is more technical involving  
25 the receipt of the extraction of data; that's the sort of thing

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1 by its nature often is stipulated to but no obligation that  
2 that happen. The other one is more substantive, right, and  
3 involves, as you say, ISIS?

4 MR. TURNER: That's right, your Honor.

5 THE COURT: Any other areas of expertise that you  
6 presently envision? I'm not holding you to it. I'm just  
7 trying to get a preview.

8 MR. TURNER: Your Honor, I think at this point, those  
9 are the broad areas. Obviously, we will need some time to  
10 consider that as we prepare for trial.

11 THE COURT: Government, how long would you envision a  
12 trial would take?

13 MR. TURNER: Your Honor, and we did speak about this  
14 aspect of it as well a little bit with defense counsel earlier,  
15 we would anticipate being able to present the government's  
16 case, including opening jury addresses, within two weeks.

17 THE COURT: From jury selection through the government  
18 resting, two weeks. Are you making any assumption about the  
19 number of trial days per week?

20 MR. TURNER: Your Honor, we did have a question as to  
21 whether your Honor sits on Fridays.

22 THE COURT: My general practice is to sit long days  
23 but on Monday through Thursday and not on Friday. That's not  
24 etched in stone, and if there's a good reason to sit on Friday,  
25 I'm open to considering it, but ordinarily I prefer to give

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1 counsel Friday to catch their breath, and that obviously serves  
2 other interests in terms of my docket management, but there  
3 have been criminal cases and other cases where I've sat on  
4 Friday and am open to considering it.

5 MR. TURNER: Understood, your Honor. Thank you.

6 THE COURT: How many trial days do you envision from  
7 jury selection through the end of the government's case?

8 MR. TURNER: Again, your Honor, recognizing that some  
9 of this, with the usual caveats as to stipulations, whether  
10 custodians will need to be called, things of that nature, I  
11 think we're looking at something in the order of ten trial  
12 days.

13 THE COURT: Right, to which, then, needs to be added  
14 the defense case, closing arguments, charge and deliberations.

15 MR. TURNER: That's right, your Honor.

16 THE COURT: Ms. Levine.

17 MS. LEVINE: I think at this point, we would, for  
18 scheduling purposes, expect to ask the Court for two to three  
19 business days for a defense case.

20 THE COURT: I'm not limiting you in any way. I'm just  
21 trying to figure out where we slot this in in the calendar.

22 MS. LEVINE: Right, so that's my answer.

23 THE COURT: All right. So putting that together, and  
24 then figuring that closing arguments may be substantial and a  
25 charge and deliberations, I think we have to block at least

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1 three weeks for this, and probably to play it safe, have to  
2 assure ourselves that we have four weeks to work with. Sounds  
3 only prudent.

4 MS. LEVINE: That sounds right, your Honor.

5 THE COURT: All right. I understood from my deputy  
6 that you have some scheduling constraints.

7 MS. LEVINE: Your Honor, I unfortunately have some  
8 personal obligations in the month of January that are going to  
9 take me out of the country for some of it and out of the office  
10 for part of it, such that it would be my request that the Court  
11 not schedule the trial before February.

12 THE COURT: May I ask you, and don't take away any  
13 skepticism, because I will accommodate you, but is Ms. Shroff  
14 still trying the case with you?

15 MS. LEVINE: Yes, your Honor. Ms. Shroff and  
16 Mr. Bove, who I believe are both going to try this case, are  
17 both currently in preparation for a trial that starts Monday  
18 here in this district, but Ms. Shroff is certainly going to try  
19 this case with me.

20 THE COURT: OK. So it will be Mr. Turner and Mr. Bove  
21 and Ms. Levine and Ms. Shroff.

22 MS. LEVINE: At least.

23 THE COURT: And perhaps more. And I take it it is  
24 implicit that there is a reason why the case can't be tried  
25 before the new year. Just articulate it, because somebody



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1       apparently is going to have to move for the exclusion of time,  
2       so I'd like you to explain why you're not seeking a trial  
3       before then.

4               MS. LEVINE: Yes, your Honor. I think including the  
5       other trial that I just referenced that Ms. Shroff is committed  
6       to, I think, for the entirety of October, I have a trial the  
7       first week of December, and therefore, we landed on the  
8       beginning of next year.

9               THE COURT: All right. And you're tied up through  
10       January.

11              MS. LEVINE: I will, of course, accommodate whatever  
12       schedule the Court sets, but yes.

13              THE COURT: Here's the question. Right now it's late  
14       September. You have lots of notice of a trial if it's early in  
15       the next year. While this will conflict with part 1  
16       obligations I have, I may be able to work through it. I want  
17       to get this trial moving sooner rather than later. Would you  
18       be able to start, in effect, the last Monday in January? I  
19       realize that may or may not have you going back to back, but  
20       you have a trial partner, which is why I established it, and  
21       you would have many months between now and then to get ready.

22              MS. LEVINE: It would be my request, given that I'm --  
23       I think for me, my request would be to start the following week  
24       or even later in that week, if just a few extra days.

25              THE COURT: How about this; let me try the following.

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1 Again, I'm just throwing out ideas here.

2 MS. LEVINE: Sure.

3 THE COURT: I have had several complex cases that are  
4 by their nature both long and challenging as a matter of jury  
5 selection. I'm thinking here about several lengthy gang cases,  
6 which took many weeks and involved inflammatory facts, multiple  
7 murders and the like, and I found it useful in a couple of them  
8 to do jury selection one week and the substance of the trial  
9 beginning the Monday of the next.

10 One of the values of that is it allows us to stretch  
11 into jury selection and take all the time we need to get it  
12 right while everyone can really plan their trial lawyering, by  
13 which I mean opening statements and witnesses, with some  
14 confidence as to when that work begins. One possibility would  
15 be to do jury selection beginning the last Monday of January  
16 and then the substance of the trial beginning the following  
17 Monday. I will need to make some accommodations with respect  
18 to my part 1 obligations, but I think Mr. Alimehmeti's interest  
19 in a speedy trial has to trump that.

20 Thoughts?

21 MS. LEVINE: I can make that work.

22 THE COURT: I mean, it seems to me that that  
23 represents a fair accommodation of the interests here.

24 MS. LEVINE: I would agree with that.

25 THE COURT: If we were to, then, begin the substance

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1 of the trial, Mr. Turner, stripped away of jury selection the  
2 first Monday in February, I guess the expectation would be that  
3 the trial would presumably run through February. That would be  
4 the operating assumption, that we need to all keep that free.

5 MR. TURNER: I think that's right, your Honor.

6 THE COURT: All right. One moment.

7 Before I lock in, let me put out for bid exactly what  
8 I have in mind to make sure that everyone is comfortable with  
9 what I'm proposing. Jury selection would begin on Monday,  
10 January 29, and I expect we would be complete with jury  
11 selection sometime in the first two days, worst case three  
12 days, but in any event, we'll take care of it that week. The  
13 substance of the trial, meaning preliminary instructions and  
14 opening statements, would then begin February 5. I'm going to  
15 reserve on whether or not we would be sitting four days or five  
16 days, but you should budget your schedules accordingly.

17 Beginning with you, Ms. Levine, just making sure that  
18 works for the defense.

19 MS. LEVINE: Yes, and I appreciate the accommodation,  
20 your Honor.

21 THE COURT: Of course. Look, I'm trying to balance  
22 everybody's needs.

23 Mr. Turner, does that work for the government?

24 MR. TURNER: Yes, your Honor.

25 THE COURT: All right. There are a handful of other

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1 things, but those will be our trial dates, the 5th for the  
2 substance of the trial of February and the 29th for jury  
3 selection of January.

4 With respect to jury selection, I expect that there  
5 would be at least two issues here that would potentially  
6 complicate jury selection. One is the length of the trial,  
7 which is on the longer side. In longer trials, I have used a  
8 questionnaire that the venire submits that helps fence out  
9 people who have hardship problems beforehand, and the other  
10 issue would be the subject matter of the trial.

11 Have counsel given any thought, and I'm looking, I  
12 guess, particularly to you, Mr. Turner, because the office has  
13 done a number of cases in this broad space, to any particular  
14 issues the Court needs to be sensitive to with respect to  
15 mechanics of jury selection in a case like this?

16 MR. TURNER: Your Honor, I think the Court has hit on  
17 them. We would defer to the Court's customary and usual  
18 practices in that regard with respect to cases of this sort  
19 that your Honor has mentioned, and we certainly would have no  
20 objection to proceeding as your Honor has described.

21 THE COURT: All right. I'm just reflecting on this  
22 for a moment. In some of the gang-related cases that I've  
23 spoken about, we had a couple of cases where we usefully had a  
24 hardship questionnaire, which identified five or six hardship  
25 questions, and in effect, all the members of the venire,

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1 several hundred, came in and filled out those questionnaires.  
2 After they filled them out, counsel reviewed them and sorted  
3 them for the Court into categories beginning with jurors who  
4 had no hardship "yes" answers; jurors who had answers but where  
5 neither counsel felt that they justified being excused; the  
6 third category were people who had "yes" answers where one  
7 party felt that there was a valid justification; and the fourth  
8 category were people who had "yes" answers where both parties  
9 believed there was a valid hardship claim. We excused the last  
10 category and then sequenced jury selection beginning with  
11 category 1, and had it been necessary, we would have gone to  
12 categories 2 and 3.

13 Thinking aloud here, and we need to figure out the  
14 schedule for all this, I have in mind the notion that there may  
15 be a value in doing something like that here to at least  
16 effectively eliminate the hardship question as a major  
17 stumbling block to jury selection.

18 Any preliminary views from counsel as to that?

19 MR. TURNER: We would be amenable to that, your Honor,  
20 particularly if the Court has found it to work well in prior  
21 cases.

22 MS. LEVINE: I would echo that. I haven't seen it  
23 done, but I would defer to the Court's expertise on this.

24 THE COURT: OK. What I am likely to do is reflect on  
25 this, but I'm leaning toward doing something like that.

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1 Otherwise we wind up with an enormous amount of time spent,  
2 often with robing room conversations with individual jurors  
3 about hardship issues that were easily spotted earlier. I'd  
4 like to avoid that. How exactly the mechanics of this work in  
5 terms of dates is something that Mr. Smallman will need to work  
6 out with the jury administrator, but in all likelihood the  
7 panel would come in on someday prior to the onset of jury  
8 selection to fill out the questionnaire, and then there would  
9 need to be a little bit of time in between then so that counsel  
10 could sort the questionnaires and make their assessments and  
11 give a spreadsheet to the Court.

12 What I will ask you to do is set aside the trial dates  
13 that I have given, but be mindful that it is possible that the  
14 week before what I set aside for jury selection, the venire  
15 might be coming in to fill out the questionnaire.

16 What that means, Ms. Levine, is Ms. Shroff would then  
17 be presumably with whoever else from your office is covering  
18 for you the ones who review the questionnaires and do the  
19 sorting in conjunction with the government. But since you  
20 wouldn't be present for the jury filling out the  
21 questionnaires, it's really a back-office function, but fair  
22 warning that if we go this route and the actual human side of  
23 jury selection begins on January 29, it's entirely possible  
24 we'd need to do this the previous week.

25 MS. LEVINE: I understand that, your Honor.

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1 THE COURT: With that, I definitely want to set a  
2 check-in date with you in the fall just to make sure we're on  
3 track in every way we need to be, including, I would expect,  
4 nailing down some of the mechanic issues with respect to jury  
5 selection.

6 Other than that, though, I want to set a schedule for  
7 expert disclosure and for motion *in limine* briefing that allows  
8 us to resolve all issues amply before trial so that we're not  
9 in a scramble right before. Let's work backwards.

10 Ms. Levine, once you get expert disclosures from the  
11 government on the assumption that you are the most likely mover  
12 for motion *in limine*, how much time would you need?

13 MS. LEVINE: From the time of the expert disclosure or  
14 in advance of the trial?

15 THE COURT: How much time after getting the expert  
16 disclosure will you need to move against it and to make any  
17 other motions *in limine*? Two weeks?

18 MS. LEVINE: Two weeks sounds right.

19 THE COURT: All right. And then, Mr. Turner, assuming  
20 you get a challenge to your expert and some other familiar  
21 motion *in limine*, how long would you need to respond?

22 MR. TURNER: Two weeks, your Honor.

23 THE COURT: All right. And then I will need, let's  
24 say, a week to prepare. If I set a conference date now at  
25 which I am apt to hear argument on and review and/or resolve

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1 the motions, we need to back up the dates by about five weeks  
2 from there. One moment.

3 Let me throw out a few dates and tell me how this  
4 works for everybody. I would propose to set November 6 as the  
5 deadline for expert disclosures and 404(b) disclosures. I  
6 would then propose that any motion *in limine* be filed by the  
7 movant on Monday, November 20, trying to avoid the Thanksgiving  
8 holiday, but then any opposition to the motion *in limine* would  
9 be due Thursday, December 7. Again, I'm building in time for  
10 Thanksgiving for the party in that position, and I will then  
11 have a conference at which I will hear argument, if necessary,  
12 but in any event expect to rule on or hope to rule on the  
13 motions on December 15 at 2:30 p.m.

14 That motion *in limine* schedule applies in both  
15 directions. In other words, although I'm envisioning that the  
16 more likely motion will be made by the defense, if the  
17 government moves *in limine*, you, Mr. Turner, would be governed  
18 by the same schedule.

19 Does the schedule make sense?

20 MR. TURNER: Your Honor, may I have one moment to  
21 consult with defense counsel?

22 THE COURT: Of course.

23 MR. TURNER: Your Honor, while, of course, the parties  
24 will work with whatever schedule the Court sets, our  
25 preliminary reaction, I think, is that particularly with



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1 respect to items such as *in limine* briefing, it seems awfully  
2 early and awfully far in advance of a trial substantively  
3 beginning on February 5 to be briefing *in limine* motions as  
4 early as late November. I would have thought that sort of  
5 briefing would take place a little bit closer to trial.

6 THE COURT: Ordinarily it would, but here's the  
7 concern, which is I expect there to be more complexity in the  
8 motions here than in the average case, and I had the sense that  
9 there would be value to all in understanding what the ground  
10 rules were going into January, particularly with Ms. Levine  
11 effectively being out in January. What I'm trying to do, while  
12 being heedful of her schedule as well, is clear away all the  
13 underbrush we can so that you can prepare for trial in earnest  
14 without having what may be complex motions unresolved. That  
15 was the thought process, anyway.

16 Look, I certainly take this point descriptively, but  
17 between Ms. Levine's schedule and the inherent nature of what I  
18 suspect will be some of the complicated motions here, this  
19 seems to me prudent. I may be able to move the dates a little  
20 bit later within November, December, but I was hoping to get  
21 this resolved, in effect, before everybody scatters. I'm happy  
22 to try to move this into March if that would accommodate  
23 counsel and give you a little more time to take stock of the  
24 trial needs.

25 MR. TURNER: Your Honor, we're certainly prepared to

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1 abide by this schedule. I suppose one option could be if you  
2 pushed things back by in the range of a couple weeks and the  
3 Court were holding the conference and ruling on matters in sort  
4 of the early to early-mid part of January, which is still a  
5 month in advance of trial.

6 THE COURT: That may well work.

7 Ms. Levine, what does that do to you?

8 MS. LEVINE: That's fine, your Honor. If the  
9 conference were scheduled the first week of January, I think  
10 that would be fine.

11 THE COURT: All right. How about this, I'll have a  
12 conference and hopefully rule on Friday, January 5, at 2 p.m.

13 Mr. Turner, I take it that gives you at least some  
14 more breathing room.

15 MR. TURNER: Yes, your Honor.

16 THE COURT: And Ms. Levine, you're comfortable with  
17 that as well.

18 MS. LEVINE: Yes, your Honor. Thank you very much.

19 THE COURT: All right. One moment. Let me propose  
20 the dates which lead up to it.

21 Does anybody have a vacation I need to be sensitive  
22 to? I can work this to be sensitive to each of you.

23 MR. TURNER: Not from the government, your Honor.

24 MS. LEVINE: I've already shared with the Court my  
25 vacation schedule.

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1 THE COURT: All right. How about these dates: On  
2 November 20, any 404(b) or expert disclosures would be due.  
3 That is a Monday. On Friday, December 8, any opening motion *in*  
4 *limine* would be due, and on Friday, December 22, any opposition  
5 to any motion *in limine* would be due.

6 Does that work for you, Mr. Turner?

7 MR. TURNER: Yes, your Honor.

8 THE COURT: I take it that at least takes some of the  
9 edge off of the early schedule.

10 MR. TURNER: We do think that's a sensible schedule,  
11 your Honor.

12 THE COURT: Ms. Levine.

13 MS. LEVINE: That works well. Thank you, Judge.

14 THE COURT: All right. I'll set that schedule.

15 I also want to have another conference with you just  
16 given the complexity of the case. Why don't we do this. Let  
17 me change the date of the notice to Friday, the 17th, of  
18 November, just moving it up a little bit, and let me meet with  
19 you on November the 20th. Once the notice is in, at least that  
20 way I'll have some idea of what's coming, and it may help me in  
21 scheduling. If, for example, it appears likely that somebody's  
22 going to have a factual hearing or a motion that requires  
23 something evidentiary, I'd rather know sooner than later.

24 Mr. Turner.

25 MR. TURNER: I apologize, your Honor. One thought for

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1 your Honor's consideration is it seems conceivable that your  
2 Honor might have a better idea of whether such a hearing or  
3 arguments are going to be made after the initial motions *in*  
4 *limine* are actually presented, because they could involve  
5 issues that are not related necessarily to 404(b) or expert  
6 disclosure, but other trial-related issues.

7 THE COURT: Right. OK. Fair enough. Mr. Turner, I  
8 think what you just said makes sense, so let me do this. I'll  
9 move the notice back to November 20. We'll issue an order to  
10 sort out all the confusion, but the next conference, then,  
11 would be on December the 12th, which will allow everyone to  
12 have a few days to review what has been filed *in limine*, and  
13 that way, if there's scheduling that is prompted by what's been  
14 filed, we'll be able to take it up then. In all likelihood, an  
15 order will issue between now and then that gives you a little  
16 more concreteness as to the jury selection methodology  
17 vis-à-vis hardship questionnaires.

18 Putting aside the exclusion of time motion, which I  
19 expect is coming, does anyone else have anything to raise?

20 MR. TURNER: Your Honor, is the Court inclined to set  
21 dates at this point for either the submission of requests to  
22 charge and/or the disclosure of 3500 material?

23 THE COURT: I don't set dates for 3500 material. I  
24 admonish the government to provide 3500 material amply in  
25 enough time so that there's no bona fide claim of the need for

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1 a trial delay. Let me ask you as to the 3500 material, is  
2 there anything you can tell me about the types of witnesses  
3 you'll have that might shed light on whether anybody's got  
4 deeply voluminous material?

5 MR. TURNER: Your Honor, at this point, taking the  
6 second part of the question first, we do not anticipate  
7 particularly voluminous 3500. Witnesses will include law  
8 enforcement witnesses as well as some set of civilian  
9 witnesses. For example, your Honor, as the Court is aware,  
10 even from the charging instruments, there were law enforcement  
11 personnel who interacted with the defendant.

12 THE COURT: Right. How long in advance would you  
13 envision being prepared to produce 3500 material?

14 MR. TURNER: Your Honor, in a case as here where we  
15 don't see any reason to depart from the ordinary, we would be  
16 producing 3500 in the range of a week before trial.

17 THE COURT: Can I take that to mean a week before the  
18 jury selection part of the trial?

19 MR. TURNER: We can be prepared to produce 3500 --

20 THE COURT: Look, I'm not directing it, but it  
21 certainly would be helpful.

22 MR. TURNER: Yes, your Honor.

23 THE COURT: Obviously, there are exceptions, where  
24 there's a sensitivity or witness security or something like  
25 that, A, I'm not ordering you to do that, and of course, I'm

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1 sensitive to that, but it's useful for defense counsel's  
2 planning to know when to expect this. Why don't we say  
3 proposed requests to charge and voir dire due on January the  
4 8th. OK?

5 MR. TURNER: Very well, your Honor.

6 THE COURT: Anything further besides the exclusion of  
7 time?

8 MR. TURNER: Not from the government.

9 MS. LEVINE: Did the Court set a time for the December  
10 12 conference? I'm sorry if I missed it.

11 THE COURT: 2:30.

12 MS. LEVINE: Thank you.

13 THE COURT: All right. Anything further from you,  
14 Ms. Levine?

15 MS. LEVINE: No, your Honor.

16 THE COURT: OK. Is there an application for the  
17 exclusion of time?

18 MR. TURNER: There is, your Honor. We'd ask that the  
19 Court exclude time under the Speedy Trial Act between today's  
20 date and the conference date that's been set by the Court of  
21 December 12. We submit that the exclusion will be in the  
22 interests of justice. It will, among other things, allow the  
23 parties to prepare for trial; it will provide an opportunity  
24 for the parties to engage in discussions about a potential  
25 resolution prior to trial, and to begin preparing pretrial

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1 motion practice, your Honor.

2 Ms. Levine.

3 MS. LEVINE: No objection.

4 THE COURT: I'll exclude time between now and December  
5 12. I find that the interests of justice outweigh the  
6 interests of the public and the defense in a speedy trial.

7 To begin with, the defense counsel has asked that the  
8 trial be put over so that it doesn't begin until late January,  
9 early February specifically to accommodate the conflicting  
10 commitments of what appear to be both defense counsel. As a  
11 result, the defendant's interests are very much in favor of  
12 excluding the time to make sure that counsel are ready and  
13 prepared. Beyond that, I am mindful, as counsel are, that this  
14 is a case with a significant amount of discovery and some  
15 complex discovery. Maxing that and thinking about it from a  
16 trial usability and trial-use perspective obviously justifies  
17 an exclusion of time.

18 There will also be, I expect, considerable attention  
19 to potential motions practice. Once the government submits its  
20 expert disclosure or disclosures, the defense will then need to  
21 determine whether there's a basis for moving against that. All  
22 of these reasons, separately and together, justify the  
23 exclusion of time. And finally, both counsel have now  
24 indicated to me that at least at some level they expect there  
25 will be and already have apparently been some discussions about

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1 the possibility of a pretrial disposition. It goes without  
2 saying, but I encourage you to have fulsome discussions along  
3 those lines and to start early and often; it's always better to  
4 do that. All these reasons justify the exclusion of time.

5 Thank you. I look forward to seeing you, I guess, in  
6 person next in December. Have a good weekend.

7 MS. LEVINE: Thank you.

8 MR. TURNER: Thank you, your Honor.

9 (Adjourned)

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