U.S. Department of Justice

United States Attorney
Eastern District of New York

SDD:SPN
F. #2014R00158

271 Cadman Plaza East
Brooklyn, New York 11201

November 24, 2014

TO BE FILED UNDER SEAL

BY HAND DELIVERY

The Honorable Roanne L. Mann
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. [redacted]
Criminal Docket No. 14-612

Dear Judge Mann:

The government writes to advise the Court that the above-referenced defendant intends to waive indictment and plead guilty to an information on November 25, 2014. On that date, the government intends to file an information charging the defendant with providing material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B, and receipt of military-type training from a foreign terrorist organization, in violation of 18 U.S.C. § 2339D. The defendant intends to plead guilty to that information pursuant to a cooperation agreement with the government.

For the reasons set forth below, the government respectfully moves the Court to close the courtroom for this proceeding; seal the transcript of the proceeding; approve the use of the name "John Doe" in place of the defendant's true name on the Court's public docket; and seal this letter and any order the Court enters in connection with this motion. In addition, the government further respectfully requests that: (1) a public hearing on this motion be scheduled for November 24, 2014; (2) the Court's public calendar reflect that the government has filed a motion for courtroom closure, along with the time and place of the hearing; (3) the public docket sheet in this matter reflect that a motion for courtroom closure has been filed, as well as the date, time and place of the hearing on the motion; and (4) the docket sheet and the Court's calendar for the dates of the hearing and the change-of-plea proceeding not include the defendant's name or list the pending charges, but rather use the caption United States v. John

Doe. The government respectfully requests that, after holding a public hearing, the Court enter the enclosed proposed order regarding courtroom closure and sealing. Finally, the government requests that, in a sealed courtroom, the Court hold a change-of-plea proceeding for the defendant.

I. Background

The defendant is a United States citizen who left the United States in June 2014 to join the Islamic State of Iraq and the Levant ("ISIL"), which has been designated by the Secretary of State as a foreign terrorist organization since May 15, 2014, pursuant to Section 219 of the Immigration and Nationality Act. The defendant provided assistance to ISIL and its terrorist activities, as detailed below.

The defendant is approximately 25 years old, and was raised in Brooklyn, New York, where he resided until June 2014. On or about June 5, 2014, based on information indicating that the defendant may have been considering traveling to Syria to support ISIL, investigators from the FBI's Joint Terrorism Task Force ("JTTF") visited him at his residence in Brooklyn. During a brief consensual interview, the defendant stated to the agents, in sum and substance and in part, that he was interested in events in Syria and generally supported "rebel groups" who were fighting against the Syrian government. The defendant also claimed that he lacked the resources to travel to Syria, and that he did not know what he would do if he got there. According to airline records, on June 12, 2014, the defendant boarded a [redacted] flight from JFK [redacted] by way of Istanbul, Turkey. Investigators determined that the defendant did not board his connecting flight in Turkey, and made his way from Istanbul to Syria after his arrival in Turkey.

On or about October 31, 2014, the defendant sent an e-mail to the FBI in which he stated, in sum and substance and in part, that he was overseas and wanted to come home. More specifically, the defendant stated, in pertinent part:

> I'm an American who's trying to get back home from Syria. The FBI has a file on me and I can verify who I am with random information you ask me. . . . I've coordinated a way to get to the border . . . in Turkey and near . . . Syria . . . by use of civilian smugglers. My problem is that I need a pickup from trusted sources because I'm without passport. It was taken, and they won't give it back. . . . If someone can pick me up safely from across the border before [Kurdish forces] get to me, then I'll be 100% in the right hands. . . . Please help. I had a week [sic] thought out letter, but it's too risky to have it saved on my device. I'll try to write to you soon in full explanation. But right now my window is closing. [redacted]

> [redacted] I just want to get back home. All I want is this extraction, complete exoneration thereafter, and have everything back to normal with me and my family. . . . Please help me get home. . . . [redacted] I'm fed up with this evil. But please first coordinate our extraction as soon as possible.

The defendant also provided the name of a JTTF Task Force Officer who had interviewed him and his own social security number to authenticate that the message was indeed from him. In addition, the defendant requested that the U.S. government deliver to his family "a letter of promise of complete exoneration for them to submit to a lawyer by today." He concluded, "I'm doing my best to come back and give back to my government what trust I violated."

On November 3, 2014, the defendant made his way to a U.S. consulate office in Turkey, near the border with Syria, and asked to speak to officials from the U.S. government. During a meeting with a [redacted] assigned to the consulate, the defendant stated, in sum and substance and in part, that he had joined and worked for ISIL. More specifically, the defendant stated that, after arriving in Syria in or about the summer of 2014 and making contact with ISIL, he had served as a guard at an ISIL headquarters building, subsequently served in an administration and inventory position, and was then assigned to teach other ISIL members how to use computer software. The defendant further stated that he carried a firearm in connection with his service to ISIL.

On November 6, 2014, Magistrate Judge Marilyn D. Go signed an arrest warrant based on a complaint charging the defendant with providing material support to a foreign terrorist organization in violation of Title 18, U.S.C., § 2339B. On November 7, 2014, the defendant departed Turkey for the United States following a deportation order from the Turkish authorities. On November 8, 2014, following his arrival at John F. Kennedy International Airport, the defendant was placed under arrest by law enforcement agents. The defendant was informed of, and waived, his Miranda rights. Immediately thereafter, the defendant began providing information about his terrorist activities to the FBI. [redacted]

On November 12, 2014, the defendant was presented on the complaint before United States Magistrate Judge Marilyn D. Go. The government and counsel for the defendant requested, and Judge Go authorized, a closed courtroom proceeding for purposes of the presentment. Subsequent to his presentment, the defendant has continued to provide information to the government about his and others' activities, [redacted]

Public disclosure of the defendant's arrest and deportation to the United States, or of his agreement to cooperate with the government, would jeopardize the government's ability to make use of the defendant's information due to the flight of terrorist operatives and/or the destruction of evidence. Moreover, should the defendant continue to provide information to the government, and should his past or present provision of information to the FBI become known to the public, the defendant and his family might be subject to retaliation by members of ISIL or its affiliates or sympathizers.

The complaint in this case was filed under seal. Because the defendant was transported to the United States shortly after he reached the consulate office in Turkey, to the government's knowledge, the fact of his arrest is not publicly known. Closure will permit the government to continue meeting with the defendant to learn more information about the activities of his terrorist associates and to continue investigating those activities without alerting targets of the investigation or otherwise jeopardizing the safety of the defendant or the defendant's family members.

II. Analysis

In United States v. Alcantara, 396 F.3d 189 (2d Cir. 2005), the Second Circuit set forth the procedures to be followed before a district court may close a proceeding. The court explained as follows:

> [A] motion for courtroom closure should be docketed in the public docket files maintained in the court clerk's office. The motion itself may be filed under seal, when appropriate, by leave of court, but the publicly maintained docket entries should reflect the fact that the motion was filed, the fact that the motion and any supporting or opposing papers were filed under seal, the time and place of any hearing on the motion, the occurrence of such hearing, the disposition of the motion, and the fact of courtroom closure, whether ordered upon motion of a party or by the Court sua sponte. Entries on the docket should be made promptly, normally on the day the pertinent event occurs.

Id. at 200 (citations omitted). This letter constitutes the motion contemplated in Alcantara.

The Second Circuit in Alcantara also reiterated that "[b]efore excluding the public from [plea and sentencing] proceedings, district courts must make findings on the record demonstrating the need for the exclusion." Id. at 192. It observed that "[t]he power to close a courtroom where proceedings are being conducted during the course of a criminal prosecution . . . is one to be very seldom exercised, and even then only with the greatest

caution, under urgent circumstances and for very clear and apparent reasons." Id. at 192 (quoting United States v. Cojab, 996 F.2d 1401, 1405 (2d Cir. 1993)).

The Second Circuit has identified "four steps that a district court must follow in deciding a motion for closure." United States v. John Doe, 63 F.3d 121, 128 (2d Cir. 1995). First, the district court must identify, through specific findings, whether there exists "a substantial probability of prejudice to a compelling interest of the defendant, government or third party." Id. The Circuit has provided specific, illustrative examples of such compelling interests, including the defendant's right to a fair trial, the privacy interests of the defendant, victims or other persons, "the integrity of significant government activities entitled to confidentiality, such as ongoing undercover investigations or detection devices," and danger to persons or property, id., as well as protection of the secrecy of grand jury matters and an ongoing criminal investigation. United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) (upholding sealing portion of plea agreement to protect investigation). With respect to danger to persons, the Second Circuit has held that evidence of a direct threat, though powerful evidence of danger, is not "a strict condition precedent to a district court's granting of a closure motion." Doe, 63 F.3d at 130. Moreover, according to the Second Circuit, "[t]he problem of retaliatory acts against those producing adverse testimony is especially acute in the context of criminal organizations . . ." Id. With respect to the integrity of significant government activity, such as grand jury and criminal investigations, the Second Circuit has highlighted the concern that public proceedings and documents exposing a cooperating witness could alert "potential targets of the investigation," cause the witness "to be reluctant about testifying," and expose innocent subjects of the investigation to "public embarrassment." Haller, 837 F.2d at 88.

Second, where a substantial probability of prejudice is found, the district court must consider whether reasonable alternatives to closure can protect the compelling interest. Doe, 63 F.3d at 128. Third, the district court must decide whether the prejudice to the compelling interest overrides the qualified First Amendment right of access. Id. Finally, if the determination is made that closure is warranted, the Court must devise a closure order that is narrowly tailored to protect the compelling interest. Id. It should be noted that the law does not require that closure be "the least restrictive means available to protect the endangered interest." Id. (citing Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)).

Here, as is evident from the information set forth above, a public proceeding under a case caption using the defendant's true name would result in the substantial probability of prejudice to compelling interests of the defendant and the government. In particular, a public plea proceeding would prejudice a compelling interest of the government in attempting to obtain information potentially relevant to the national security of the United States, and a compelling interest of the government and the defendant in protecting the defendant and the defendant's family. As noted above, the Second Circuit has expressly identified danger to persons and property and integrity of criminal investigations as compelling interests that can warrant closure of the courtroom and sealing of transcripts and agreements. Doe, 63 F.3d at

128 (citing United States v. Raffoul, 826 F.2d 218, 226 (3d Cir. 1987)); In re Herald Co., 734 F.2d 93, 100 (2d Cir. 1984); Haller, 837 F.2d at 87.

Based on the information set forth above, it is also apparent that no reasonable alternatives to closure of the courtroom exist that would adequately protect the compelling interests of the government and the defendant. The defendant must appear in a courtroom for the purpose of conducting the waiver of indictment and plea proceeding and any public notice that the defendant is appearing in this district to plead guilty to terrorism charges would be likely to garner significant attention.

Finally, the government submits that the prejudice to compelling interests described above far outweigh the qualified First Amendment right of the public and the media to access the proceedings. The government's investigation concerns matters of national security, and secrecy may be necessary to permit the government to exploit any information provided. Moreover, by ordering that the government disclose the transcript of the proceedings as required by Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), 18 U.S.C. § 3500 and/or Rule 16 of the Federal Rules of Criminal Procedure and requiring the parties to move to unseal the transcript once the likely prejudice to their compelling interests no longer outweighs the qualified right to access, the Court can narrowly tailor the closure.

Accordingly, the government respectfully requests that, after holding a public hearing, the Court enter the proposed order, which contains findings reflecting: (a) the substantial probability that a public proceeding would prejudice the compelling interests identified above; (b) the lack of reasonable alternatives to courtroom closure; and (c) that the prejudice to the compelling interests overrides the qualified right of the public and the media to access the proceedings.

III. Conclusion

The government respectfully requests that the Court file this letter under seal and hold a public hearing, without publicly referencing the substance of this sealed letter, on the motion to close the courtroom for the arraignment proceeding. In order to comply with Alcantara's notice requirements, the government requests that: (1) the Court's public calendar reflect that the government has filed a motion for courtroom closure, along with the time and place of the hearing; (2) the public docket sheet in this matter reflect that a motion for courtroom closure has been filed, as well as the date, time and place of the hearing on the motion; and (3) the docket sheet and the Court's calendar for the dates of the hearing and the arraignment not include the defendant's name or list the pending charges, but rather use the caption United States v. John Doe. Finally, the government respectfully requests that, after holding a public hearing, the Court enter the enclosed proposed order regarding courtroom closure and sealing.

Based on conversations with the Court, it is the government's understanding that the Court is available to conduct the hearing on this motion at 9:00 a.m. on Tuesday, November 25, 2014. Because it would not make sense to produce the defendant in an open courtroom under such circumstances, the government respectfully submits that his presence is not necessary for the hearing on the motion. Counsel for the defendant join in the motion to close the courtroom and all motions and applications contained herein.

Respectfully submitted,

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