

# 17-291-cr

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**In the United States Court of Appeals  
for the Second Circuit**

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United States of America,

Appellee,

v.

Emanuel L. Lutchman,

Defendant-Appellant.

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On Appeal from the United States District Court  
For the Western District of New York

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**BRIEF FOR APPELLEE  
UNITED STATES OF AMERICA**

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**COMBINED STATEMENT OF JURISDICTION  
AND STATEMENT OF THE CASE**

The district court (Geraci, J.) had subject matter jurisdiction under 18 U.S.C. § 3231, by reason of Defendant-Appellant Emanuel L. Lutchman's guilty plea pursuant to a plea agreement to a one-count Information charging him with the crime of conspiracy to provide material support to a designated foreign terrorist organization in violation of Title 18, United States Code, Section 2339B(a)(1). (Docket Item No. 19).<sup>1</sup>

The district court sentenced Lutchman to a term of imprisonment of 20 years, the maximum under the statute. (A 98). The Judgment in a Criminal Case, a final judgment that disposes of all parties' claims, was entered on January 30, 2017. (A 103-108). Lutchman timely filed a Notice of Appeal on January 30, 2017. (A 109). This Court has jurisdiction to review Lutchman's conviction pursuant to 28 U.S.C. § 1291, and to review his sentence pursuant to 18 U.S.C. § 3742(a).

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<sup>1</sup> References to "A" are to pages of the Appendix filed by Lutchman with his brief. References to "Docket Item No." are to documents and Orders entered on the district court docket. References to "PSR" are to paragraphs or pages of the Presentence Investigation Report, revised on January 13, 2017, and filed with this Court under seal.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court should enforce Lutchman's knowing and voluntary waiver of his right to appeal the sentence.
2. Whether Lutchman's sentence was procedurally and substantively reasonable.

## STATEMENT OF RELEVANT FACTS

### I. The Offense Conduct

In late 2015, Emanuel Lutchman was living in Rochester, New York, and he held multiple social media accounts which he used to express his support for the Islamic State and Iraq and the Levant ("ISIL"), a group he knew was a designated foreign terrorist organization and that had engaged in and was engaging in, terrorist activity and terrorism. (A 13; A 35; A 37; PSR ¶ 25). Lutchman used his social media accounts to post imagery, propaganda videos, and digital versions of documents relating to ISIL and violent jihad. (A 13; A 37; PSR ¶ 24). Lutchman had watched videos online which glorified terrorism in support of Islam including videos relating to ISIL and Anwar al-Awlaki, the deceased leader of al-Qa'ida in the Arabian Peninsula ("AQAP"). (*Id.*). Lutchman maintained a digital collection of documents relating to terrorism and terrorist groups including all the issues of "Inspire," an online propaganda

machine published by AQAP and documents designed to provide guidance to individuals seeking to travel overseas to engage in violent jihad or engage in “lone wolf” terrorist attacks in the United States and elsewhere. (*Id.*).

In December 2015, Lutchman had obtained an online document written by an ISIL member in Syria providing guidance to ISIL supporters who were seeking to travel overseas to join ISIL. (A 13; A 38; PSR ¶ 26). The document explained how to prepare for violent jihad and how to use security measures while traveling in order to avoid detection by law enforcement. (*Id.*). The document also included sections about killing the “kuffar” (meaning non-believers or infidels) in their own land and described different killing methods. (*Id.*). According to the document, ISIL had ordered all those living in the land of the kuffar to rise up and kill the non-believers at their doorsteps, emphasizing that, if one has pledged allegiance to ISIL, then it is a religious duty to obey this order. (A 13; PSR ¶26). The document further contained contact information for another ISIL member in Syria referred to as “Abu Issa Al-Amriki.” (A 14; A 39; PSR ¶ 26).

On December 25, 2015, Lutchman initiated direct communications with Al-Amriki who identified himself as an ISIL member living in Syria. (A 14; A 39; PSR ¶ 27). Al-Amriki described to Lutchman what it was like in the

Islamic State, and stated that being with ISIL was a “dream come true.” (A 14; PSR ¶ 27). Lutchman expressed his hatred for everything in America and declared his intention to make “hijra” (meaning migration or journey to join ISIL overseas) and to leave America, which Lutchman described as the land of the kuffar. (A 14; A 39; PSR ¶ 27). Al-Amriki noted that the Syrian borders were closed but that they should reopen within a few months, and asked Lutchman whether Lutchman had someone within ISIL who could vouch for him. (*Id.*). Al-Amriki told Lutchman that if he did not have someone who could vouch for him, then Lutchman would have to prove himself and prove that he was one of them (ISIL). (*Id.*). Lutchman indicated that he did not want to go back to prison and that he did not possess the funds to bear arms but was anticipating that funds would be coming soon. (A 14; PSR ¶ 27). Al-Amriki instructed Lutchman that all he had to do was to plan an attack on New Year’s Eve (2015) or whenever he can, and kill a number of “kuffar.” (A 14; A 40; PSR ¶ 27). Al-Amriki told Lutchman to carry around a weapon and “if something happens kill them all.” (A 14; PSR ¶ 27). Lutchman responded that he was arranging an operation with a “brother.” (*Id.*).

Al-Amriki advised Lutchman to write something prior to the operation and give it to an ISIL member so that after the attack, the ISIL member could

post it online to announce Lutchman's "bayah" (meaning oath of allegiance). (A 14; A 40; PSR ¶ 28). Al-Amriki told Lutchman that Lutchman's being "behind enemy lines" made Lutchman closest to ISIL's hated enemy (the United States) and that Lutchman had the chance to do what ISIL wished it could do. Lutchman told Al-Amriki that he had a couple of "brothers" that want to make hijra and plan an attack. (*Id.*). Al-Amriki continued to encourage Lutchman to complete the attack and told Lutchman to show ISIL his seriousness, stating "New years is here soon. Do operations and kill some kuffar." (A 14; A 41; PSR ¶ 28).

In late December 2015, Lutchman was communicating with individuals A and B, both of whom, unbeknownst to Lutchman, were cooperating with the Federal Bureau of Investigation ("FBI"). (A 15; A 41; PSR ¶ 29). Lutchman expressed his strong support of ISIL and his desire to travel overseas to join ISIL. (A 15; A 41-42; PSR ¶ 29). Lutchman discussed with Individuals A and B his online communications with Al-Amriki and the plan to commit an attack on the United States on New Year's Eve 2015. (A 15; A 42; PSR ¶ 29). Individual A later arranged for Lutchman to meet with Individual C who, unbeknownst to Lutchman, was also cooperating with the FBI. (*Id.*).

On December 27, 2015, in a series of communications, Al-Amriki asked how Lutchman's operation was progressing. (A 15; A 42; PSR ¶ 30). Lutchman responded that he had "brothers" ready and planning the operation. (*Id.*). Al-Amriki suggested that Lutchman and the other participants make videos before the operation, which ISIL could post on the Internet. (*Id.*). Al-Amriki stated that Allah had given Lutchman a chance to come closer to Allah by killing a few thousand on New Year's and "helping brothers." (A 15; PSR ¶ 30). Lutchman indicated to Al-Amriki that he was ready to make his sacrifice, that he had been watching videos to prepare and that there was no turning back from his path. (A 15; A 43; PSR ¶ 30). When Al-Amriki reiterated that Lutchman and the "brothers" should make videos to post after the operation, Lutchman responded, "I hear and obey." (A 15; PSR ¶ 30).

Later that same date, Lutchman asked Al-Amriki what would be the best target for the operation. (A 15; A 43; PSR ¶ 31). Al-Amriki told Lutchman to find the most populated area(s) and kill as many people as possible. (*Id.*). Al-Amriki reiterated to Lutchman that after the operation's completion, he would vouch for Lutchman and the other participants in the attack and he would start sending "brothers" to ISIL in Libya. (*Id.*). Lutchman responded that Libya would be "good for us." (*Id.*).

On December 28, 2015, Lutchman met with Individual C for the first time. (A 15; A 43; PSR ¶ 32). Lutchman recounted some of his communication with Al-Amriki (including the plan to find the most populated area(s) and kill as many people as possible). (A 15-16; A 44; PSR ¶ 32). Lutchman stated that his real intention was “to do an act, to get to hijra.” (A 16; A 44; PSR ¶ 32). Lutchman indicated his desire to execute the plan so they could be “in and out” noting that they should make it “quiet and simple” so they could go about doing what they need to do to make hijra. (A 16; PSR ¶ 32). Lutchman repeated his hatred for the United States and his desire to live under the caliphate. (A 16; A 44; PSR ¶ 32). Lutchman told Individual C that his connection with ISIL (Al-Amriki) was established and that they just had to demonstrate their allegiance to ISIL. (*Id.*). Lutchman confirmed he was “ready to lose [his] family.” (A 16; PSR ¶ 32).

In a series of communications on December 28, 2015, Lutchman reported to Al-Amriki that he had met with one of the two brothers from Oklahoma (Individual C) and was waiting to hear from one of the other brothers. (A 16; A 44; PSR ¶ 33). Al-Amriki instructed Lutchman not to share any of the details of the operation with him and to get the videos of the brothers ready and forward them before the operation. (A 16; PSR ¶ 33). Lutchman agreed to do so. (*Id.*).

Al-Amriki further told Lutchman that even were the New Year's operation unsuccessful, he would vouch for Lutchman and his associates. (A 16; A44; PSR ¶ 33). Lutchman responded that it would be best if they were sent to Libya. (A 16; A 44-45; PSR ¶ 33).

In the evening of December 28, 2015, Lutchman met with Individual C and, during the meeting, stated that he wanted to target a club or a bar and proposed kidnapping a couple of people and killing them. (A 16; A 45; PSR ¶ 34). Lutchman stated that they would have to wear masks during the operation to avoid being caught by law enforcement. (*Id.*). As Lutchman and Individual C drove by Merchant's Grill in Rochester, Lutchman identified that location as a potential target of the attack. (*Id.*). Lutchman further indicated that they would use knives during the attack and indicated that he had a friend who had a machete. (*Id.*).

On the following date, December 29, 2015, Lutchman had a telephone conversation with Individual A and advised Individual A that he was about to call his friend so they could pick up a machete. (A 16; A 46; PSR ¶ 35). When Individual A observed that they were only two days away from New Year's Eve, Lutchman responded that they needed to get gloves, masks, and zip ties for the attack. (*Id.*). Lutchman also noted during his December 29, 2015, conversation

with Individual A that he had already selected Merchant's Grill as a target. (*Id.*). Sometime after this telephone conversation, Lutchman attempted, unsuccessfully, to obtain a machete from at least one other individual in the Rochester area. (A 16-17; A 46; PSR ¶ 35).

During the evening of December 29, 2015, Lutchman and Individual C went to the Walmart on Hudson Avenue in Rochester to buy weapons and supplies for the attack. (A 17; A 46; PSR ¶ 36). They purchased two black ski masks, two knives, a machete, zip ties, duct tape, ammonia, and latex gloves. (*Id.*). Individual C paid for the items but Lutchman stated he would reimburse Individual C. (A 17; A 46-47; PSR ¶ 36). After making the purchases, Lutchman confirmed the location of the attack as Merchant's Grill and discussed how they would select and abduct a victim. (A 17; A 47; PSR ¶ 36). Lutchman indicated that the operation was a "go" and that any victim would have to be killed. (*Id.*). Lutchman also discussed with Individual C making a video before the operation in which they would explain their rationale for the attack and swear bayah or their allegiance to ISIS's leader, Abu Bakr al-Baghdadi. (*Id.*).

That same date, Lutchman had continued communications with Al-Amriki where Lutchman discussed his suspicion of Individual B, stating that he thought something was not right with him. (A 17; A 47; PSR ¶ 37). Al-Amriki

counseled Lutchman to be careful and not to stop anyone's jihad. (A 17; A 48; PSR ¶ 37). Later that evening, Lutchman sent a communication to Al-Amriki stating that he had just left Individual C and that Lutchman was going to read an interpretation of the Quran and get his head and soul ready for the operation. (*Id.*). He again confirmed with Al-Amriki that they were conducting the operation as planned. (*Id.*).

On December 30, 2015, Lutchman engaged in further communications with Al-Amriki. (A 17; A 48; PSR ¶ 38). Al-Amriki asked Lutchman how he was doing and Lutchman responded that he was thinking about the things that distract him, his obedience with submission to Allah and what he had to do to remain focused. (*Id.*). Al-Amriki told Lutchman that doing something for "ummah" (meaning the Islamic community) brings one closer and that a trip to jihad is equal to fifty "hajj" (meaning the Islamic pilgrimage to Mecca). (A 17-18; A 48; PSR ¶ 38).

That same date, Lutchman met with Individual C and during that meeting Lutchman made a video in which he pledged allegiance to ISIL and its leader, Abu Bakr al-Baghdadi, and stated that ISIL was going to establish the caliphate in the land of Islam. (A 18; A 49; PSR ¶ 39). In reference to the planned New Year's Eve attack, Lutchman stated that "the blood that you spill of the Muslims

overseas, we gonna spill the blood of the kuffar,” and asked Allah to “make this a victory.” (*Id.*). After making this video, law enforcement agents arrested Lutchman and recovered the items purchased at Walmart from Lutchman’s residence, including the machete, knives, ski masks, and zip ties. (*Id.*). Lutchman’s video containing his pledge of allegiance to ISIL was recovered from his smart phone. (*Id.*).

## **II. The Plea**

On August 11, 2016, 26 year-old Lutchman stood with counsel before the Hon. Frank, P. Geraci, Jr., United States District Judge, took an oath, waived indictment and, pursuant to the terms of a written plea agreement, admitted that in December 2015, he had knowingly conspired with others, including an individual by the name of Abu Issa Al-Amriki, to provide material support and resources consisting of personnel and services to ISIL which Lutchman knew was a designated foreign terrorist organization. (A 12; A 26-64). Specifically, Lutchman admitted to coordinating a New Year’s Eve attack at a local bar in Rochester, New York, where, using knives and a machete, he planned to abduct people and kill them in order to prove himself to Al-Amriki and to ISIL in order to gain ISIL membership. (A 36).

At the plea proceeding's outset, Lutchman noted that he attended school up to ninth grade and that he was taking medication such as Zyprexa and Zoloft for voices and mood swings. (A 28). Lutchman acknowledged that the medications did not affect his ability to understanding the plea proceedings and that he had a chance to review the plea agreement with counsel prior to that court proceeding. (A 29). Lutchman advised the court that he was satisfied by counsel's representations. (*Id.*).

After explaining the rights that Lutchman was giving up by entering the guilty plea and the elements of the offense charged, the court turned to the factual basis for the plea. (A 34). According to Lutchman, he had read the factual basis contained on pages 3 through 9 of the plea agreement and that he had the opportunity to review the factual basis "word-for-word." (*Id.*). In addition, Lutchman affirmed that he agreed with each and every fact set out in paragraph 4 of the plea agreement. (A 35). The district court had the Assistant United States Attorney summarize the many paragraphs containing the factual basis for the plea agreement, stopping at various points to make sure that Lutchman understood and agreed with the recitation of the facts. (A 36-50).

During the plea proceedings, the district court reviewed the advisory sentencing Guidelines with Lutchman. (A 50-56). The district court noted that

within the plea agreement, the government maintained that the correct Guidelines calculation did not include application of USSG § 2X1.1(b)(2) but that Lutchman maintained the applicability of USSG § 2X1.1(b)(2). (A 51-52). The district court advised Lutchman that “whether or not ultimately the total offense level is 37 or 34, based upon the combination of the criminal history category of VI, do you understand that this would involve a sentencing range under the Guidelines of a term of imprisonment of 240 months imprisonment, or 20 years imprisonment?” (A 54). Lutchman replied that he did understand. (*Id.*).

Finally, the district court inquired whether Lutchman understood that he would be waiving his right to appeal or collaterally attack any component of a sentence that fell within the Guidelines range or less. (A 57). Lutchman affirmed that he understood, that there was nothing about the plea agreement he did not understand and that he had no questions for either his counsel or the court. (*Id.*). Lutchman thereafter pled guilty to the charge of conspiracy to provide support to a foreign terrorist organization. (A 59).

### **III. Sentencing**

At sentencing, over Lutchman’s objection, the district court declined to apply USSG § 2X1.1(b)(2). (A 68). The district court noted that the Application

Note “indicates that in prosecutions of this sort, interrupted or prevented, on the verge and act on the verge of completion, that this reduction would not apply. The Court finds that to be the case here, in that but for the intervention of law enforcement in this case, the defendant would have completed all the acts for this particular offense.” (A 67-68 (quoting USSG § 2X1.1 (comment.(backg’d.)). Accordingly, the district court determined “as a matter of law that § 2X1.1 and the three level reduction based upon that application of that guideline is not applicable in this case and that Probation properly did not include that reduction.” (A 68). The district court noted Lutchman’s acknowledgment that regardless of the applicability of that Guideline, “the maximum sentence in this case of 20 years could still apply.” (A 67).

The government advocated for a sentence for 240 months and argued that Lutchman was a convicted, violent felon who was a zealous and ardent supporter of the Islamic State. (A 69). The government noted the seriousness of the offense and explained that Lutchman sought contact with Al-Amriki and formulated the plan for the attack prior to any government involvement. (A 69-70). While the attack was not sophisticated, Lutchman developed it on his own without prodding or influence from the government. (A 75).

Lutchman's counsel argued for a sentence less than 20 years noting that no attack happened, that the actions lasted a month and that the government exaggerated the risk of danger. (A 76). Lutchman's counsel argued that the district court should consider Lutchman's mental health as a factor – that Lutchman was “easily susceptible” to ISIL, and that he had bipolar disorder and was severely depressed. (A 80). As Lutchman's counsel was arguing Lutchman's mental health as a “mitigating factor,” the district court interrupted and confirmed that counsel was “not advocating that Mr. Lutchman did not understand the consequences of his acts at the time.” (A 79). Lutchman's counsel responded, “No, we are not saying that, Judge.” (*Id.*). The district court continued “And he's additionally not indicating his mental health in any way preventing him from understanding these proceedings as far as his acknowledgment of his responsibility for this crime?” (*Id.*). Lutchman's counsel responded, “Correct.” (*Id.*).

Lutchman's counsel noted that Lutchman had had several mental hygiene arrests that made him susceptible to joining an organization that would provide him with a sense of worth. (A 80). According to counsel, it was during Lutchman's first prison sentence when he converted to Islam and joined a radical group of people studying the Quran. (*Id.*). Counsel further noted

Lutchman's "chaotic" background and lack of structure and education. (A 81). Finally, counsel indicated that Lutchman was prepared to denounce radical Islam and that the arrest was a good thing for Lutchman in that it taught Lutchman the error of his ways. (A 82).

Lutchman then himself spoke, denouncing the Islamic State. (A 84). Lutchman apologized to the bar owner and the community for causing emotional and mental damage and apologized to his family. (*Id.*). He indicated that his goal after he finished serving his sentence would be "to combat the extremism and radicalism within my region." (A 84-85). "I can take this to help other Muslim youth and young adults that's Muslim when they feel the same way that I felt before I was incarcerated – the hopelessness, you know." (A 85).

The district court addressed Lutchman and reviewed Lutchman's prior admissions and plea: that Lutchman had contacted a known recruiter for ISIL based in Syria, that, with direction from the recruiter, the plan was to use knives and a machete in the name of ISIL to attack the Merchant's Grill on New Year's Eve, and that Lutchman was directed to, and did produce, a video in advance of the attack so that ISIL could take credit for the attack. (A 86-89). The district court opined that "but for the work of law enforcement...that attack at the Merchant's Grill on New Year's Eve would have occurred." (A 90). The district

court noted that Lutchman acknowledged in his letter to the court prior to sentence that he possessed a different world view then but was now prepared to renounce his involvement with ISIL. (*Id.*).

The district court considered Lutchman's background and noted that Lutchman had a criminal history including an offense involving a "threat with a knife" and that he "had a long history of mental health issues, including multiple personality disorder and depression" and "a history of attempts at suicide in the past." (A 92). The district court noted that while the mental health history provided some explanation for Lutchman's conduct, "it doesn't excuse it." (A 93).

According to the district court, "there are a lot of really chilling things that happened in this case." (A 93). While Lutchman's plan was "crude," "it is a plan that would have had its intended purpose, and that is an act of terrorism, which is use of violence and threats to intimidate or coerce for political purposes, and it did that in Rochester on December 31st of 2015." (A 95). The district court recounted how when the revelation of the plot led to the cancellation of fireworks that had been planned to ring in the New Year. (*Id.*). "What that demonstrates is that people feared to be out in the streets, and the city had to take actions to prevent that fear." (*Id.*). According to the court, "I am convinced

that this would have occurred watching that video that was taken just the day before, December 31, 2015, ...which could have done a tremendous damage to individuals had you been allowed to carry out your act in that bar.” “This was, as I stated, I think the real deal and would have been and could have been very devastating to this community.” (A 96).

The district court examined Lutchman’s history and characteristics and noted that his history of violence and mental issues went “both ways,” stating that Lutchman did not appear to appreciate the extent of his criminal conduct over the years from the robbery of a cab driver to his menacing offense in 2015. (A 97). “When you combine substance abuse and mental health issues and ideologies such as the radical Islam doctrines in this case, that really is a potential for tremendous disaster.” (*Id.*). The court noted the seriousness of the offense and the need to promote respect for the law and provide adequate deterrence to both the defendant and others. (*Id.*). “The word has to get out there that people engaged in this activity have a price to pay, and that’s to have – by threatening communities, forfeited their right to live as free people in our society.” (A 97-98). The court stated, “We have to protect the public from further crimes from the defendant and from others, and the only sentence in this

case that does that is the maximum sentence in this matter of 20 years imprisonment, or 240 months imprisonment.” (A 98).

When the district court stated that it was imposing a sentence of 20 years, the district court stopped and asked “What’s funny, Mr. Lutchman, about this? Is there anything funny about this?” (A 98). Lutchman replied “Yes.” (*Id.*). The following exchange occurred:

The Court: What’s funny?

Lutchman: You just sentenced me to 240 months.

The Court: That’s 20 years.

Lutchman: 20 years? 20 years?

The Court: Okay. You earned it.

Lutchman: I earned it?

The Court: You earned it.

Lutchman: If I earned it, then long live Abu al-Baghdadi.

The Court: Okay.

Lutchman: (Speaking in foreign language). You think because I’m gonna be incarcerated there aint gonna be more rise up? You think? You think how many Muslims been slaughtered. You think that? I’m living for (speaking foreign language). My paradise is in my heart. If you lock me away, it be a house of worship. If you was to kill me, it would be martyrdom. And if you was to exile me, it be a (speaking foreign language). So I don’t car

20 year, I'm gonna do that. I'm ready to go. Ready to go.

(A 98-99).

As the district court continued to impose sentence, Lutchman continued to interrupt, speaking in a foreign language and proclaiming "Long live Abu Bakr al-Baghdadi." (A 100). The district court noted that Lutchman obviously was trying to fool the court in his letter regarding his contrition and that Lutchman "still obviously believes in a very radical..." to which Lutchman replied "Yeah, I do." (*Id.*). When the sentencing proceeding concluded, Lutchman warned that "There's gonna be more of us," and then he swore at the court. (A 102).

This appeal followed.

### **SUMMARY OF THE ARGUMENT**

Lutchman knowingly and voluntarily pled guilty to the offense of conspiring to provide material support to ISIL. During his plea, Lutchman admitted to communicating with Abu Issa Al-Amriki, a known ISIL recruiter based in Syria in December 2015. Lutchman further admitted that on Al-Amriki's direction, he planned and coordinated an attack to happen on New Year's Eve at the Merchant's Grill in Rochester, New York, where he, along with others, would kidnap and kill people using knives and a machete. The goal

of the attack was to strike terror in the name of ISIL so that Lutchman could prove himself and gain entry into the terrorist organization.

Despite Lutchman's claims to the contrary, the appellate waiver contained within the plea agreement he entered into with the government is neither unusual nor unorthodox. Lutchman waived his right to appeal any sentence that fell within the Guidelines range of 240 months, the maximum statutory sentence, or less. The district court reviewed the waiver with Lutchman and Lutchman indicated he fully understood; nothing renders the waiver unenforceable and, accordingly, Lutchman's current appeal should be dismissed.

In any event, the sentence should be affirmed. The district court did not err in denying the application of the downward adjustment in USSG § 2X1.1(b)(2) when the attack was on the verge of completion before it was interrupted by law enforcement. Moreover, for Lutchman, a homegrown terrorist who developed a crude yet effective plan to instill fear in a community in the name of ISIL, and who revealed his true allegiance to ISIL leader Abu Bakr Al-Baghdadi after his sentence was imposed, a sentence of 20 years is neither shockingly high nor shockingly low and is within the district court's broad sentencing discretion.

## ARGUMENT

### I. Lutchman's Sentencing Challenge Is Barred By the Valid and Enforceable Appeal Waiver

#### A. Governing Law and Standard of Review

##### 1. Appeal Waivers

A defendant's waiver of the right to appeal a sentence is presumptively enforceable. *United States v. Arevalo*, 628 F.3d 93, 98 (2d Cir. 2010). Exceptions to this presumption "occupy a very circumscribed area of [this Court's] jurisprudence." *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000). This Court will refuse to enforce a waiver "only in very limited situations, 'such as when the waiver was not made knowingly, voluntarily, and competently, when the sentence was imposed based on constitutionally impermissible factors, such as ethnic, racial or other prohibited biases, when the government breached the plea agreement, or when the sentencing court failed to enunciate any rationale for the defendant's sentence.'" *Arevalo*, 628 F.3d at 98, quoting *Gomez-Perez*, 215 F.3d at 319. Thus, "[a] violation of a fundamental right warrants voiding an appeal waiver," but "other meaningful errors are insufficient[.]" *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). For example, an appeal waiver may be unenforceable where a district court abdicated its sentencing responsibilities and sentenced a defendant in a manner

the plea agreement did not anticipate. *United States v. Woltmann*, 610 F.3d 37, 40 (2d Cir. 2010).

“Rule 11 sets forth requirements for a plea allocution and is designed to ensure that a defendant’s plea of guilty is a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Zhang v. United States*, 506 F.3d 162, 168 (2d Cir. 2007) (internal quotation marks and citation omitted). “Rule 11 violations that are not objected to at the time of the plea are subject to plain error review under Rule 52(b) of the Federal Rules of Criminal Procedure.” *United States v. Youngs*, 687 F.3d 56, 59 (2d Cir. 2012) (citing *United States v. Vonn*, 535 U.S. 55, 62-63 (2002)). As a general matter, an appellant claiming plain error must establish (1) that there was, in fact, error, (2) that the error was “clear or obvious, rather than subject to reasonable dispute,” and (3) that the error prejudicially affected his “substantial rights,” *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks and citations omitted), and in addition, (4) “because relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings,” *Vonn*, 535 U.S. at 63 (quotation marks, citation and alteration omitted).

Accordingly, when the plain-error standard applies, obtaining direct appellate relief for a Rule 11 violation “will be difficult [for a defendant] to get, as it should be.” *United States v. Dominguez Benitez*, 542 U.S. 74, 84 n.9 (2004) (citing *United States v. Raineri*, 42 F.3d 36, 45 (1st Cir. 1994) (Boudin, J.) (“[J]ust as there are many fair trials but few perfect ones, so flaws are also to be expected in Rule 11 proceedings”)). Plain error relief “is to be ‘used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.’” *United States v. Young*, 470 U.S. 1, 15-16 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

## **B. Discussion**

Lutchman’s challenge to the reasonableness of the sentence is plainly barred by the appellate waiver provision where Lutchman waived his right to appeal from a sentence of 240 months or less. Nevertheless, Lutchman now baldly asserts that this particular appellate waiver is unenforceable, relying on this Court’s decisions in *United States v. Goodman*, 165 F.3d 169 (2d Cir. 1999), and *United States v. Rosa*, 123 F.3d 94 (2d Cir. 1997).

The appeal waiver in this case is easily distinguishable from those in *Rosa* and *Goodman*. In *Rosa*, this Court noted its concern with an appeal waiver that waived the right to appeal a sentence within or below “the applicable Sentencing

Guidelines range as determined by the Court” holding that such a waiver “may subject a defendant to a sentence vastly greater than he, or possibly even the Government, could have anticipated.” *Rosa*, 123 F.3d at 99-100. Moreover, the waiver was “complex” and may be more “confusing” for a defendant, implicating the “knowing and voluntary” inquiry into a plea proceeding more than a standard plea. *Id.* at 101. Despite its concerns, this Court upheld the waiver in *Rosa*.

In *Goodman*, the appeal waiver was “ even broader” than the one in *Rosa*, “purport[ing] to deny the defendant any appellate challenge not only to the selection of an applicable guideline range but also to any upward departure from that range, as long as the statutory maximum is not exceeded.” *Goodman*, 165 F.3d at 174. In its “close look,” this Court noted four aspects that it found rendered the appeal waiver unenforceable. *Id.* at 174-175. First, the defendant received very little benefit in exchange for her plea of guilty in that she had pled guilty to one count of mail fraud and the government conceded that this was the only one of Goodman's alleged activities that it believed it could prove if the case went to trial. *Id.* at 174. Second, Goodman did not receive any downward adjustments the government had agreed to recommend at sentencing. *Id.* Third, it was unclear from the record whether Goodman understood the waiver

provision when the district court suggested at the plea allocution, contrary to the language of the agreement, that Goodman would retain the right to appeal her sentence if it concluded that either an upward departure or an offense level different from the stipulated level was appropriate. *Id.* Finally, this Court noted the substantial discrepancy between the sentence imposed-thirty months in prison-and the predicted sentencing range-ten to sixteen months. *Id.* at 174-175. “In light of all of these circumstances, we will not enforce the broad form of waiver in this case, one that would subject the defendant to ‘a virtually unbounded risk of error or abuse by the sentencing court.’” *Id.* at 175 (quoting *Rosa*, 123 F.3d at 99).

This case presents none of these factors. First, there is nothing unorthodox about the language of the appellate waiver here itself. The waiver expressly states that if the sentence falls within or is less than the Sentencing Guidelines range of 240 months, then Lutchman would waive his right to appeal or collaterally attack the sentence. “An ordinary appeal waiver provision waives the defendant’s right to appeal sentence falling within a range explicitly stipulated within the agreement itself.” *Rosa*, 123 F.3d at 98. Here, there was no guesswork by either party as to what the ultimate Guideline exposure would be. “The standard agreement allows him, in advance, to evaluate the predicted range and

assess in an informed manner whether he is willing to accept the risk that he will receive a sentence in the upper part of the range and be unable to appeal.” *Id.* at 99.

Lutchman errantly avers, without providing a record basis, that “[t]he government did not drop any additional counts nor did it agree not to prosecute him for any additional criminal conduct.” (Lutchman Brief, at 23). In this regard, unlike in *Goodman*, the government never conceded (nor does it concede now) that the count to which Lutchman pled was the only one of Lutchman’s activities it could have proved at trial. Furthermore, unlike in *Goodman*, Lutchman did receive the adjustment for acceptance of responsibility he bargained for, had the opportunity to argue for further reduction under USSG § 2X1.1(b)(2), and had the opportunity to argue for a non-Guidelines sentence.

Next, not only was the appeal waiver clear but Lutchman affirmed under oath at his plea colloquy that he understood the terms of the waiver. (A 57). Despite Lutchman’s efforts to argue, for the first time now, that somehow his mental state prevented him from knowingly and voluntarily entering this plea, or prevented him from understanding the appellate waiver, the record evinces otherwise. Finally, at the time of the agreement and at the time of sentencing, the parties understood that the Guidelines calculation yielded a sentence

recommendation that was the statutory maximum. The plea bargain was clear from the outset -- a sentence of 20 years or less -- without the right to appeal.

## **II. In Any Event, the Sentence Was Reasonable**

Were this Court to determine that the plea agreement's appeal waiver cannot be enforced, it should nevertheless affirm the sentence imposed as reasonable.

### **A. Governing Law and Standard of Review**

Sentences imposed by the district courts are reviewed by this Court for "reasonableness." *United States v. Booker*, 543 U.S. 220, 260-262 (2005). Reasonableness review has both procedural and substantive dimensions. *United States v. McIntosh*, 753 F.3d 388, 393-394 (2d Cir. 2014) (per curiam).

USSG § 2X1.1(b)(2) provides for a downward adjustment to a defendant's base offense level for conspiracy "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for their successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." The relevant question is "whether the conspiracy 'ripen[ed] into [a] substantially completed offense[]'" or "'c[a]me close enough to fruition.'" *United States v.*

*Downing*, 297 F.3d 52, 62 (2d Cir. 2002) (quoting *United States v. Amato*, 46 F.3d 1255, 1262 (2d Cir. 1995)). “In most prosecutions for conspiracies..., the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities.... In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense.” USSG § 2X1.1, comment.(backg’d.).

A sentencing court’s findings of fact are reviewed for clear error and its legal determinations *de novo*, “giving due deference to its application of the Sentencing Guidelines to the facts.” *Downing*, 297 F.3d at 60, quoting *United States v. Berg*, 250 F.3d 139, 142 (2d Cir. 2001)).

“Once we have determined that the sentence is procedurally sound, we then review the substantive reasonableness of the sentence, reversing only when the trial court’s sentence ‘cannot be located within the range of permissible decisions.’” *United States v. Dorvee*, 616 F.3d 174, 179 (2d Cir. 2010) (quoting *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*)). The district court is in a “superior position to find facts and judge their import under § 3553(a),” *Gall v. United States*, 552 U.S. 38, 51 (2007), and in the same vein,

this Court has recognized that there is no precise single sentence that will constitute the only reasonable sentence in a given case, *United States v. Jones*, 531 F.3d 163, 173-74 (2d Cir. 2008). Thus, the precise sentence chosen by the district court, if within lawful bounds, is reviewed only for an abuse of discretion. *Gall*, 552 U.S. at 51. This highly deferential standard “provide[s] a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). “In determining whether the district court has considered the appropriate factors outlined in 18 U.S.C. § 3553(a), this Court has never required “robotic incantations” by the sentencing judge, *United States v. Brown*, 514 F.3d 256, 270 (2d Cir. 2008), and, in the absence of record evidence suggesting otherwise, this Court will presume that the district court has faithfully discharged its duty to consider the § 3553(a) factors, *Brown*, 514 F.3d at 264. Accordingly, review by an appellate court is expressly not an invitation for “tinkering with any sentence that appellate judges simply do not like,” *id.*, and this Court should not substitute its own judgment for that of the sentencing judge, *United States v. Florez*, 447 F.3d 145, 158 (2d Cir. 2006) (finding the weight to be given to any particular § 3553 factor is a matter firmly committed to the

discretion of the sentencing judge and is beyond appellate review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented).

## **B. Discussion**

### **1. The Sentence Was Procedurally Reasonable**

Lutchman argues now, as he did at sentencing, that the substantive offense here was not on the verge of completion, noting that he was arrested not at the moment before the attack, but on the day before. In addition, Lutchman claims that he could not have, or would not have, accomplished any substantive attack without the assistance of the government informants and thus the district court should have reduced his base offense level by three levels pursuant to USSG § 2X1.1(b)(2). Lutchman is wrong.

In this case, the facts show that Lutchman was about to complete the New Year's Eve attack when law enforcement agents intervened and arrested him on December 30, 2015. (A 13-18; PSR ¶¶ 26-39). Sometime on or about December 25 and 26, 2015, Lutchman and his co-conspirator, Abu Issa Al-Amriki, an ISIL recruiter and attack planner based in Syria, together hatched the plot to commit the New Year's Eve attack. (A 13-14). Lutchman agreed to conduct the attack in order to prove his allegiance to ISIL and to enable him to gain membership

in and join ISIL on the battlefield. (A 14). Over the course of the next four days, Lutchman took numerous steps to fulfill the plan and actually carry out the attack. (A 15-18; PSR ¶¶ 29-30). From selecting the Merchant's Grill as the target to determining the manner and means of the attack, from purchasing the weaponry and supplies (with the assistance of Individual C) to video recording the bayah (meaning oath or allegiance) that Al-Amriki directed him to make so that ISIL could publicize and claim responsibility for the attack, Lutchman took all the necessary steps to carry out the New Year's Eve attack. (*Id.*). All that remained was for Lutchman to show up at the Merchant's Grill on New Year's Eve and the sole reason he did not arrive there to accomplish the attack was due to the intervention of law enforcement agents.

Contrary to Lutchman's arguments, there is sufficient evidence to support the district court's finding that Lutchman could have and would have accomplished any substantive attack even without the assistance of the government informants. While Individual C provided the funds to purchase the weapons and supplies, it was Lutchman who conceived the manner and means of attack and the specific weapons and supplies that would be used in that attack. At the Wal-Mart on December 29, 2015, it was Lutchman who chose the weapons and supplies from the store shelves. (A 16-17; PSR ¶¶ 35-36). During

his plea colloquy, Lutchman in his own words explained why he chose certain items like the zip ties (“to bind individuals”) and the ammonia (so “the law enforcements wouldn’t be able to find the DNA”). (A 46-47). Furthermore, photographs recovered from Lutchman’s smartphone, that were taken in early November 2015, depicted a knife and Lutchman holding a machete. (WDNY Docket No. 16-cr-6071, Docket Entry No. 32 (Government’s Response to Defendant’s Sentencing Memorandum), Exhibit 1). In other words, the pictures showed Lutchman’s ability to access the materials he needed to carry out the attack.

While “[i]t may be unlikely, or even impossible, for a conspiracy to achieve its ends once the police have detected or infiltrated it...that circumstance is not dispositive in determining whether a three-level reduction is warranted under section 2X1.1(b)(2), because that section determines punishment based on the conduct of the defendant, not on the probability that a conspiracy would have achieved success.” *United States v. Medina*, 74 F.3d 413, 418 (2d Cir. 1996). Thus, the fact that Lutchman himself may have been a “scrawny” individual with a history of self-harm rather than violence against others who would otherwise need to rely on the government’s help to complete the substantive offense (Lutchman’s Brief, at 31), is of no moment. “Many pre-existing

circumstances may doom a conspiracy, without rendering the conspirators any less culpable for their acts.” *Medina*, 74 F.3d at 418. The fact that Lutchman’s plot with Al-Amriki was monitored by law enforcement “from an early stage” does not make him and Al-Amriki any less accountable. *Id.* at 418-419.

Finally, the district court noted at sentencing Lutchman’s own understanding that application of § 2X1.1(b)(2) would not yield any impact on the ultimate Guidelines’ calculation of 240 months. (A 67). “A reviewing court ...need not select between two arguably applicable guidelines ranges if it is satisfied that the same sentence would have been imposed under either guideline range.” *United States v. Bermingham*, 855 F.2d 925, 935 (2d Cir. 1988). In this regard, even had USSG § 2X1.1(b)(2) been applied, Lutchman’s Guidelines’ exposure would still be 240 months, due to his criminal history category of VI.

## **2. Lutchman’s Sentence Was Substantively Reasonable**

Lutchman argues that given his severe mental illness, a sentence of 20 years is greater than necessary. (Lutchman Brief, at 33). According to Lutchman, his outburst at sentencing “apparently laughing as he misunderstood the court’s sentence, and then snapping, interrupting the court repeatedly, in English and another language – is a strong indication of mental instability.” (Lutchman Brief, at 34). While acknowledging he committed a serious crime

meriting a “significant punishment,” Lutchman implores that a term of incarceration of 20 years is “unreasonably long.” (Lutchman Brief, at 37).

There are few crimes as serious as the offense of conviction here: conspiring to provide material support to a known terrorist organization. Specifically in this instance, the plot developed by Lutchman was to attend a local bar on New Year’s Eve and to stab, kidnap, and kill people using knives and a machete. As the district court noted, but for law enforcement’s intervention, “this was the real deal” and “[p]eople were going to die at the Merchant’s Grill on New Year’s Eve.” (A 93). Lutchman had taken “a lot of steps” to bring the plan to fruition, including reaching out to individuals in Syria, and choosing the target and acquiring the supplies and filming his oath of allegiance. (A 94-95). Although the plan was interrupted by law enforcement, Lutchman nevertheless accomplished the plan’s goal “to create fear in a community and in people.” (A 95). Consistent with the factors set forth in 18 U.S.C. § 3553(a), the district court’s sentence reflected the seriousness of the offense, promoted respect for the law, and afforded adequate deterrence to both the defendant and others. As the district court stated, “[t]he word has to get out that people engaged in this activity have a price to pay, and that’s to have – by threatening communities, forfeited their right to live as free people in our

society.” (A 97-98). Given the threat of home-grown terrorists like Lutchman, the 20-year sentence was not unreasonable.

The district court did consider Lutchman’s mental health when it imposed the sentence of 20 years, noting that the combination of factors including Lutchman’s mental health, his prior criminal history and his substance abuse with his radical religious beliefs resulted in “a potential for tremendous disaster.” (A 97). Lutchman’s outburst at sentencing exposed Lutchman’s real character - - a cunning and calculating radicalized individual who was just trying to “fool” the court into thinking he had changed and who had lied to the district court when he had originally stated that he was renouncing ISIL. (A 100). Lutchman showed his true colors by shouting his allegiance to Abu Bakr al-Baghdadi and by threatening that “[t]here’s gonna be more of us.” (A 102).

Accordingly, the district court did not abuse its considerable sentencing discretion and this Court should affirm the sentence.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed in all respects.

Dated: March 12, 2017, Rochester, New York.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

CA # 17-291-cr

-v-

EMMANUEL L. LUTCHMAN,

Defendant-Appellant.

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I, TIFFANY H. LEE, Assistant United States Attorney for the Western District of New York, hereby certify that the foregoing brief complies with this Court's Local Rule 32.1(a)(4)(A) 14,000 word limitation in that the brief is calculated by the word processing program to contain approximately 8,025 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

*s/Tiffany H. Lee*

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TIFFANY H. LEE

Assistant U.S. Attorney

**AFFIDAVIT OF SERVICE**

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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-v-

EMMANUEL L. LUTCHMAN,

Defendant-Appellant.

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STATE OF NEW YORK     )  
COUNTY OF ERIE       ) ss:  
CITY OF BUFFALO       )

The undersigned hereby certifies that he is an employee of the United States Attorney's Office for the Western District of New York and is a person of such age and discretion as to be competent to serve papers.

That on March 12, 2018, he mailed the attached **Brief** for Appellee, United States of America, by placing an original and five copies in an envelope addressed to the United States Court of Appeals for the Second Circuit and one copy to Appellant, at the place and address stated below, and by entrusting said envelope and contents to Federal Express.

Addressee: United States Court of Appeals     (1 original and 5 copies)  
                  Second Circuit  
                  Attn: Catherine O'Hagan-Wolfe  
                  Clerk of the Court  
                  40 Foley Square  
                  New York, New York 10007

Allegra Glashausser, Esq.                     (1 copy, regular mail)  
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Further, pursuant to 2d Cir. Local Rule 25.1 (effective January 20, 2010), that on March 12, 2018, she electronically filed the attached **Brief** for Appellee, United States of America, which had been found to be virus free using Trend Micro, with the Second Circuit Court of Appeals using its CM/ECF which would then electronically notify the parties listed below.

Allegra Glashausser, Esq.

*s/Laura Rogers*  
\_\_\_\_\_  
LAURA ROGERS

Sworn to before me this  
12th day of March, 2018

*Monica J. Richards*  
\_\_\_\_\_  
**MONICA J. RICHARDS**  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires 11-25-2018