

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|------------------------------------|---|-------------------|
| UNITED STATES OF AMERICA, |) | No. 18 CR 696 |
| vs. |) | |
| ASHRAF AL SAFOO, also known as Abu |) | |
| Al-Abbas Al-Iraqi, also known as |) | |
| Abu Shanab, also known as Abbasi, |) | Chicago, Illinois |
| Defendant. |) | October 31, 2018 |
| |) | 1:34 p.m. |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. M. DAVID WEISMAN, MAGISTRATE JUDGE

APPEARANCES:

| | |
|---------------------|--------------------------------------|
| For the Government: | MR. VIKAS K. DIDWANIA |
| | MS. MELODY WELLS |
| | MR. PETER S. SALIB |
| | United States Attorney's Office, |
| | 219 South Dearborn Street, Room 500, |
| | Chicago, Illinois 60604 |
| For the Defendant: | MR. GEOFFREY M. MEYER |
| | MS. MARIA TERESA GONZALEZ |
| | Federal Defender Program, |
| | 55 East Monroe Street, Suite 2800, |
| | Chicago Illinois 60603 |

PATRICK J. MULLEN
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 1412
Chicago, Illinois 60604
(312) 435-5565

1 THE CLERK: 18 CR 696-1, U.S.A. versus Ashraf Al
2 Safoo.

3 MR. DIDWANIA: Good afternoon, Your Honor. Vikas
4 Didwania and Melody Wells and Pete Salib on behalf of the
5 United States.

6 MS. WELLS: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. MEYER: Good afternoon, Judge. Geoffrey Meyer and
9 Maria Teresa Gonzalez from the Federal Defender Program on
10 behalf of Mr. Al Safoo.

11 THE COURT: Good afternoon.

12 Good afternoon, Mr. Al Safoo.

13 THE DEFENDANT: Good afternoon.

14 MS. NEELIN: Good afternoon, Your Honor. Laura Neelin
15 on behalf of pretrial services.

16 THE COURT: Good afternoon. Thank you for being here.

17 All right. We're here for a continued detention
18 hearing. Where does the Government stand on the issue?

19 MR. DIDWANIA: The Government is ready to proceed with
20 the hearing, Your Honor, and we continue to believe that
21 alongside pretrial's recommendation detention is appropriate in
22 this case.

23 THE COURT: All right. Where is the defendant on the
24 issue?

25 MR. MEYER: Judge, we are asking to proceed with the

1 detention hearing today. We believe there are conditions that
2 can be put in place.

3 THE COURT: All right. Let's start with the
4 Government's basis for detention. Risk of flight and danger to
5 the community were the two articulated bases at the last
6 hearing. I identified some case law that I asked both sides to
7 look at. Does the Government believe that danger to the
8 community remains a valid basis?

9 MR. DIDWANIA: Yes, we do, Your Honor. I'd like to
10 start with 18 U.S.C. 3142 and specifically subsection (f)
11 governing detention hearings. Under subsection (f), the Court
12 is allowed to consider both risk of non-appearance and danger
13 to the community under subsection (1) upon a motion of the
14 attorney for the Government in a case that involves, among
15 others, an offense listed in section 2332(b)(g)(5)(b). If we
16 look to that section, 2332(b)(g)(5)(b), one of the offenses
17 listed is 2339(b), which is material support to a designated
18 foreign terrorist organization, which is the charge in this
19 case.

20 THE COURT: All right. Do you agree, Mr. Meyer?

21 MR. MEYER: We do, Judge.

22 THE COURT: All right.

23 MR. DIDWANIA: Furthermore, just to finish that point,
24 Judge, there is a rebuttable presumption in this case under
25 subsection (e)(3). If we look at (e)(3), Judge, subject to

1 rebuttal by the person, it again lists --

2 THE COURT: Let's see. Do you agree?

3 MR. MEYER: We do, Judge.

4 THE COURT: All right. Let's start with rebutting the
5 presumption. How would you rebut the presumption?

6 MR. MEYER: So, Judge, we do recognize under (e)(3)
7 that there is a rebuttable presumption in this case. That
8 presumption represents a congressional determination that in
9 general there are categories of defendants charged with
10 categories of crime where Congress has determined that they are
11 more likely to continue to commit criminal acts while out on
12 bond than other offenders.

13 But that presumption is rebuttable and not mandatory
14 because Congress also recognized the fact that what is true in
15 the general is not always true in the specific, and it gives
16 the defendant the opportunity to show that his specific
17 circumstances show that he will not continue to commit or
18 engage in crime while out on bond.

19 It's important to remember that to rebut the
20 presumption the defendant need not necessarily show that they
21 are not guilty of the crimes as charged in the complaint, and
22 it is also important to remember that the defendant only has
23 the burden of production here, and that even with this burden,
24 the burden of persuasion that there are no conditions that can
25 be put in place remains squarely with the Government.

1 THE COURT: I agree with all that. So what's your
2 production?

3 MR. MEYER: So here's our production, Judge, and we're
4 working off of the two pretrial services reports that the Court
5 has received. The Court is allowed to consider any of the
6 types of evidence that it would normally consider at a hearing
7 under section 3142(g), and here all of that evidence shows that
8 the presumption shouldn't apply.

9 Mr. Al Safoo has strong family ties to the area. His
10 wife and his three young children live in Chicago as do his
11 father and two of his siblings. His mother along with other
12 siblings lives close by in the Midwest up in Michigan. Because
13 of this location close in proximity to his family members, he
14 also has strong family support. I think that came through
15 particularly in the supplemental report where pretrial services
16 discussed Mr. Al Safoo's situation with this father and Mr. Al
17 Safoo's father was able to verify all the information in the
18 report and let the pretrial services office know that they
19 speak daily. In addition to that, his family has been present
20 both at the last scheduled detention hearing and this detention
21 hearing.

22 Mr. Al Safoo is also an educated individual, and at
23 the time of his arrest he was gainfully employed. He has been
24 gainfully employed since coming to the United States ten years
25 ago as a refugee from Iraq. He's lived in the United States

1 for those last ten years, and five years ago he undertook the
2 arduous process of naturalizing to become a United States
3 citizen and completed that and was naturalized five years ago.

4 He has no criminal history and has had no contact with
5 law enforcement of any kind while he's been in the United
6 States, and he has no history of drug or alcohol abuse or any
7 sort of mental disorder.

8 The Seventh Circuit told us in United States versus
9 Dominguez, which is 783 F. 2d 702, that the burden of
10 production is not a heavy one to meet. The defendant just has
11 to put forth some evidence, and we have in this case,
12 particularly if you compare this case to the Dominguez case.

13 In that case, the defendants there met the burden of
14 production even though they were not citizens but were lawful
15 immigrants who lived in the country for the last five years,
16 had no criminal record in the United States, and were gainfully
17 employed. Only one of the defendants had a family member
18 located in the United States, but nonetheless the Seventh
19 Circuit found that because of, quote:

20 "Their economic and social stability coupled with the
21 absence of any relevant criminal conduct rebut the presumption
22 of detention."

23 We think that Mr. Al Safoo has an even greater
24 economic and social stability based on his family support here
25 in Chicago and coupled with that absence of any relevant

1 criminal conduct or anything else like a substance abuse
2 disorder that would counsel against release does rebut the
3 presumption.

4 THE COURT: I mean, I see the argument as it applies
5 to danger -- or risk of flight. How does it apply to danger to
6 the community?

7 MR. MEYER: I think in large part, Judge, the danger
8 to the community prong is addressed by the fact that he doesn't
9 have any criminal conduct in his past, and what we have to
10 remember is that this analysis is a prospective analysis. The
11 question is that if released will Mr. Al Safoo comply with the
12 conditions that this Court puts in place. This is not a
13 retrospective analysis. This is not an analysis about what
14 happened in this particular case or whether or not he's guilty
15 of the crime as charged. I think those things do become
16 relevant later on when the Court is weighing further -- when
17 the Court is weighing whether or not the Government has met its
18 burden of persuasion. But for the burden of presumption,
19 that's not an appropriate consideration.

20 THE COURT: All right. I haven't decided whether
21 you've rebutted the presumption, but let me hear from the
22 Government. Argue your case.

23 MR. DIDWANIA: Yes, Judge. We have a presentation
24 that we'd like to make, and as part of that I'll specifically
25 address the points that defense counsel raised. To just take

1 the obvious, the defendant is charged with providing material
2 support to ISIS, a foreign terrorist organization that has
3 committed attacks, violent attacks, violent jihadi attacks in
4 the United States and elsewhere. So they are a significant
5 danger here, and I want to start with the danger to the
6 community and then return to risk of non-appearance.

7 Although the Court is familiar, obviously, with the
8 complaint and the allegations there, I want to start with the
9 defendant, who he is and what he's charged with. He's charged
10 with being a leader of the Khattab Media Foundation, an
11 ISIS-affiliated group that has pledged allegiance to ISIS. The
12 pledge stated that the Khattab members would listen and obey
13 ISIS and not dispute ISIS's leaders. This pledge was made soon
14 after the defendant became a leader within Khattab.

15 His pledge, what's called a bayah, is a very
16 significant undertaking. It means that the defendant and his
17 group are submitting to ISIS and to ISIS's cause and that
18 they'll act at the direction of ISIS and will not undermine
19 ISIS. So they're declaring themselves to be the soldiers of
20 ISIS devoted to ensuring its success in the creation of a
21 caliphate, especially through violent jihad. At bottom, it
22 means that the defendant has dedicated himself to working for
23 ISIS, a virulent group dedicated to mass killings.

24 The other important point here, Judge, is timing. So
25 this is not conduct that we're talking about from a long time

1 ago, something that he dabbled in and then left and moved on
2 with his life. All the allegations in the complaint contain
3 conduct within the past year, including very recently, and all
4 of the defendant's conduct in terrorizing others on behalf of
5 ISIS, recruiting soldiers, trying to recruit lone wolves to
6 conduct attacks are within the last year. Days before his
7 arrest, Judge, defendant repledged allegiance, repledged bayah,
8 therefore, reaffirming his devotion.

9 THE COURT: And what's your basis for that?

10 MR. DIDWANIA: So, Judge, one of the things that we
11 recovered during the time of the arrest was the phone that the
12 defendant was actually using. He was on the CTA train going to
13 work. He was using a phone. Officers recovered it, and
14 pursuant to a court-authorized search warrant we have been able
15 to search some of that phone. So we have been able to recover
16 some of the communications and other information, other media
17 that was on the phone. So if I could hand up, Your Honor --

18 THE COURT: Did you provide a copy to defense counsel?

19 MR. DIDWANIA: I have, Judge.

20 MR. MEYER: We'll acknowledge receipt, Judge.

21 THE COURT: Thank you.

22 MR. DIDWANIA: Could I hand up Exhibit 1, Your Honor?

23 THE COURT: Please.

24 MR. DIDWANIA: These are communications that the
25 defendant had on a social media application that was recovered

1 from his phone. Obviously, this is all in Arabic, so I'll
2 proffer, Your Honor, a summary translation because we've just
3 been getting this information off the phone and we haven't been
4 able to prepare translations.

5 MR. MEYER: Judge, if I can interject for just a
6 moment, we certainly have received copies of these documents
7 from the Government, and we appreciate them sending them over.
8 However, as the Government just pointed out, a majority of the
9 documents they intend to produce to you today are in Arabic.
10 They have also proffered the same or what I believe are going
11 to be the same translations or summaries to us that they intend
12 to proffer to you.

13 I do not speak Arabic, and we have not had an
14 opportunity to do a deep dive on these. So I don't know how
15 much weight the Court should give to these, to these exhibits
16 without actual certified translations attached to them.

17 THE COURT: That's a fair area of inquiry. Can you
18 just identify the basis of the translation? Is this through
19 the FBI? Is this through a military source? Where is the
20 translation coming from?

21 MR. DIDWANIA: The translation is coming from FBI
22 linguists and others at the FBI who are fluent in Arabic.

23 THE COURT: All right. I think it's a fair point to
24 raise, but the rules of evidence don't even apply here. I do
25 think that doesn't mean we shouldn't have some comfort with the

1 accuracy, but based on the representation that it's from
2 linguists familiar with the language who are employed by the
3 FBI, I'm comfortable relying on that.

4 MR. MEYER: We understand that the rules of evidence
5 don't apply. I think there's a difference between suggesting
6 that the rules of evidence don't apply and having a document
7 that's fully in a foreign language submitted to the Court. I
8 understand that FBI linguists have looked over this. I think
9 there's always color and context that is part of a
10 conversation.

11 THE COURT: There very well may be. I don't know what
12 it says. It may be so obvious that any color and context
13 wouldn't matter, or it may be -- you know, my experience is
14 that especially in Arabic languages there's a lot of color and
15 context that you need to understand. But I don't know what
16 it's going to say, so let's hear him out.

17 MR. MEYER: We would just ask the Court to consider
18 that as it here, a proffer.

19 THE COURT: I will. That's a fair point.
20 Go ahead.

21 MR. DIDWANIA: And, Your Honor, we provided these
22 exhibits to defense about a week ago.

23 THE COURT: Okay.

24 MR. DIDWANIA: So in summary, in these communications,
25 Your Honor, the defendant is communicating with another social

1 media user indicating that he wants to join another group,
2 Al-Battar, which is similar to --

3 THE COURT: You mean the defendant.

4 MR. DIDWANIA: That the defendant would like to join
5 another group, Al-Battar, which is similar to Khattab Media
6 Foundation, which is the group that he's charged with
7 conspiring with. Then this other user informed us that he must
8 renew his pledge of allegiance to ISIS to join the Al-Battar
9 group. Then on October 14th, 2018, days before his arrest,
10 Your Honor, Al Safoo responded that he would certainly do so,
11 but that he would only do it on the secret chat function for
12 security reasons.

13 Now, the secret chats are end-to-end encrypted and
14 self-destruct. So Al Safoo understood the importance of
15 pledging allegiance and the possible consequences days before
16 his arrest. He understood he was personally submitting to the
17 direction and control of ISIS. He's declaring that he would do
18 ISIS's bidding, and he was sophisticated enough to know that he
19 couldn't do this over a normal chat, that he had to do it --

20 THE COURT: What's your basis to say that the secret
21 chat self-destructs and is only in existence for a period of
22 time?

23 MR. DIDWANIA: That's publicly available information
24 about the social media application, Judge, that we haven't
25 disclosed.

1 THE COURT: Okay. Continue.

2 MR. DIDWANIA: That's a significant concern. So if Al
3 Safoo were released, he could continue to engage in criminal
4 activity, sending threats, attempting to incite violence,
5 recruiting lone wolf attackers, all that were the purposes of
6 his conduct over the last year on behalf of ISIS.

7 Even more importantly, Judge, there would be no
8 ability to monitor that activity. It's happening online. It's
9 happening on an application that has encrypted communications
10 and that has communications that self-destruct. So that is --
11 there are significant concerns about danger, and I'm going to
12 walk through additional evidence about that.

13 But even putting that aside, in terms of release,
14 there's an insurmountable goal here that on release he cannot
15 be monitored in his activities. He will be engaging in these
16 activities on behalf of ISIS the way that he's done for the
17 past year over and over. We have thousands of pages of
18 transcripts in these chat rooms online, pushing out threats to
19 people around the world, attempting to recruit soldiers,
20 attempting to recruit lone wolf attackers, and there's no
21 ability to monitor that. That is a giant black hole that we
22 cannot allow.

23 THE COURT: So, Mr. Meyer, how do -- that is a concern
24 I've had because of the nature, the circumstances and nature of
25 the conduct alleged. Recognizing there's a presumption of

1 innocence, I can consider the nature and circumstances. How
2 could I fashion conditions that would address the concern that
3 counsel has just raised?

4 MR. MEYER: There are absolutely ways, Judge. Number
5 one, we're not suggesting that the Court release him on some
6 sort of unsecured recognizance bond and just let him out into
7 the community.

8 THE COURT: No, no, no. All this was done on a cell
9 phone. So, you know, as you know, sometimes people say you
10 can't have access to the Internet which is, you know -- quite
11 frankly, I'm not sure if that's even feasible in today's
12 environment, but certainly with your client's background that's
13 his area of expertise.

14 MR. MEYER: Well, there's --

15 THE COURT: So if anyone has a cell phone who's
16 willing to let him use their cell phone, how could we fashion
17 conditions to address that concern?

18 MR. MEYER: There's two things about that, Judge, that
19 I'd like to address. The first is kind of the practical
20 question that you're asking, which is how we take away his
21 access to the Internet. We have had long conversations with
22 his father, which is who we are going to propose as a
23 third-party custodian. His father is willing to have Mr. Al
24 Safoo come to the house and be on electronic monitoring and
25 home incarceration so that he cannot leave to go to and from

1 the house. Mr. Al Safoo's father is willing to get rid of all
2 electronic equipment in the house, and his family is willing to
3 pledge to the Court that they will not allow him to have access
4 to any sort of electronic device.

5 If the Court is worried about cell phone usage, my
6 understanding is that there are programs that the pretrial
7 services office can install in order to monitor what is and is
8 not allowed or what is or is not being done on certain pieces
9 of electronic equipment.

10 The point is to take away his access. Okay? I
11 realize in today's day and age that may be more difficult to do
12 than it has in the past, but it's certainly not impossible.
13 Take away his access and have him be monitored very, very
14 carefully by the pretrial services office to keep on top of
15 him.

16 Now, the second part of this that I would like to
17 address -- and this may or may not be the appropriate time, but
18 it feels like it needs to be answered at this point -- is what
19 the Government is trying to allege here. This is a
20 163-paragraph complaint that was sworn out, and there is some
21 very inflammatory content that is included in that complaint.
22 But of those 163 paragraphs, only 83 paragraphs are paragraphs
23 that Mr. Al Safoo's name appears in and that apply to him.

24 I took a look at the complaint again last night, and
25 of those 83 paragraphs, the remainder of which deal with ISIS

1 in kind of the abstract or general background information about
2 ISIS or general background information about Khattab or actions
3 that were taken by what the Government is calling unindicted
4 co-conspirators. In the remaining 83 paragraphs in which
5 Mr. Al Safoo's name appears, seven of them are general
6 information or summaries on how the investigation unfolded.
7 Five of them are about the structure of the Khattab Media Group
8 generally. Four of them are specifically about Mr. Al Safoo's
9 role in Mr. Khattab. 25 paragraphs are related to posts that
10 he made, things that he reposted, articles that he wrote, or
11 comments that he made about other people's posts on the
12 Internet. Six of them deal with the use of social media
13 accounts in violation of the terms of use of the social media
14 provider, and 36 of them are simply linking Mr. Al Safoo to the
15 use of multiple e-mail or social media accounts.

16 Now to be clear, we are not admitting or conceding any
17 of the allegations in the complaint, but to the extent that the
18 Court is considering those things under the weight of the
19 evidence it is important to understand that even if the Court
20 considers the allegations in the complaint as true, the weight
21 of evidence of material support to a terrorist organization
22 here is not strong. It is not clear at all to me that the
23 allegations that the Government has in the complaint constitute
24 material support. We think that the types of things that are
25 alleged in the complaint are wide open for a constitutional

1 challenge, and we intend to vigorously pursue that.

2 In addition, even if that constitutional challenge
3 were rejected, we feel that there are strong trial issues here
4 that we want to address in a trial situation. So I'm not sure
5 the way the Government is characterizing the information that's
6 included in the complaint does any real good to the Court
7 except to try to inflame the Court as to what they say that
8 Mr. Al Safoo did.

9 THE COURT: All right. I can assure you I'm not
10 inflamed by anything, but I have read this complaint a couple
11 times. The numeric breakdown is not -- I get your point, and
12 if you tell me that there were five times he was mentioned in a
13 much broader conspiracy, I think there's something to that.
14 This complaint is focused on your client, and each paragraph
15 where he's not named informs the -- it is informative of the
16 general conduct involved.

17 I just happen to be at paragraph 62. Your client is
18 not named there, but it talks a lot about what Khattab did and
19 the point of the organization and what they were trying to get
20 done. So the Government in the complaint has linked your
21 client to the Khattab organization in a leadership capacity.
22 I'm not making a finding, but there's strong evidence to the
23 connection.

24 MR. MEYER: And we're not saying that in a trial
25 context that wouldn't be relevant or something that we would

1 have to defend against, but this is a detention context. The
2 question before the Court is: Are there indicia of things --
3 are there things there that are going to indicate to the Court
4 that Mr. Al Safoo will not comply with conditions of bond that
5 this Court sets? I don't think that this material colors that
6 question, the ultimate question in a detention purpose.

7 What we have is someone --

8 THE COURT: I just respectfully disagree with you. I
9 don't think the inquiry is are there things to indicate to me
10 that he won't comply. The issue is can there be a condition or
11 combination of conditions to either assure his appearance or
12 protect the safety of the public. It's not an issue of whether
13 he'll comply or not. That's, I guess, implicit in the
14 analysis. But can I set a --

15 I'm getting back to the original question I had which
16 is access to the Internet. First of all, from Ms. Neelin's
17 standpoint, does pretrial services have some technology that
18 would be able to tell you if he accessed the Internet at all?

19 MS. NEELIN: Your Honor, in this district, the only
20 way we can monitor that condition would be to assure that the
21 Internet is not in the home, or any devices that can access the
22 Internet that there is a block on them. But we do not in this
23 district have a program that can monitor Internet usage.

24 THE COURT: Quite frankly, taking out a Wi-Fi server
25 does nothing to deal with digital access. So if someone came

1 in with a cell phone, unless there was some jamming mechanism
2 that pretrial services has that they borrowed from NSA or
3 someone like that, anyone who brings a cell phone in can give
4 him access to the Internet.

5 MR. MEYER: Which is why the family is willing to
6 pledge to you, Judge, that they won't or won't allow anyone to
7 come with that sort of technology into the home.

8 THE COURT: Okay. I know the father has a full-time
9 job and he's gone for extended periods of time, which is fine,
10 but under these circumstances -- and certainly I've released
11 people to parents who are working like the rest of it. But in
12 this circumstance, he won't be there for a good amount of time.

13 MR. MEYER: There is a brother who also resides in the
14 home who works overnight and would be present when Mr. Al
15 Safoo's father is not present.

16 THE COURT: All right. Let me kind of interrupt you
17 and let me finish with the Government, and then we'll come back
18 to you, Mr. Meyer.

19 Go ahead.

20 MR. DIDWANIA: So, Your Honor, we certainly agree that
21 there's just no assurance that the defendant would never have
22 access to the Internet, especially in light of his
23 sophistication, the sophistication of his background in
24 technology and the sophistication that's laid out in the
25 complaint about his use of a variety of technical means to

1 evade law enforcement over the past year, VPN's and tour
2 services and things like that.

3 So those are already concerns, but let me talk about
4 something slightly different, not his online activity, but some
5 additional information that we found on the phone. Could I
6 hand up, Judge, Exhibits 5 and 6?

7 THE COURT: Has this been provided to defense counsel?

8 MR. DIDWANIA: It has, Judge.

9 THE COURT: All right. Thank you.

10 MR. DIDWANIA: These are also items that were --

11 THE COURT: Have you gotten these?

12 MR. MEYER: I have, Judge.

13 THE COURT: Okay.

14 MR. DIDWANIA: These are also items of photos that
15 were taken from the defendant's phone that he was using at the
16 time of his arrest. With respect to Exhibit 5, Your Honor, I
17 consulted with a bomb technician at the FBI, and based on a
18 preliminary review of the photos I can proffer that it's our
19 understanding that these photos show how to mass produce
20 sleeves containing ball bearings that can then be inserted into
21 improvised exploding devices or IED's.

22 THE COURT: Have you had the Arabic translated from
23 this one diagram?

24 MR. DIDWANIA: Yes, Judge, again, a preliminary
25 translation. I don't have it in front of me, so I'll have to

1 go off of memory. It's my understanding that the Arabic that's
2 in the brackets just refers to figures, you know, Figure A,
3 Figure C. But then the Arabic starting at the top left
4 pointing to the red circle says something to the extent of a
5 detonator. Then the other Arabic, the next two are referring
6 to the combustible item that's inside, and then the last one is
7 referring to the shape that should be the ball bearing sleeve.

8 THE COURT: And this was found on the defendant's
9 phone?

10 MR. DIDWANIA: On the defendant's phone, Your Honor.

11 THE COURT: And the photographs, do you know where on
12 the phone itself?

13 MR. DIDWANIA: Unfortunately we don't have the
14 context. We're trying to understand the context for these
15 photos.

16 THE COURT: All right. Then Exhibit 6, can you review
17 that for me?

18 MR. DIDWANIA: Exhibit 6, again, I'll proffer this
19 summary translation. Our understanding is that this is the
20 front page of a manual, and it states something to the extent
21 of "workshop on the creation of cylindrical IED's."

22 THE COURT: All right. We'll delay your risk of
23 flight argument. Can you address danger to the community in
24 light of this information?

25 MR. MEYER: I can, Judge. Number one, I think as the

1 Government just conceded to you, we don't have any context for
2 these photos. There are a number of Internet-based programs
3 that automatically download photos based on protocols that are
4 set on someone's phone or on their social media account for
5 that device or that software.

6 THE COURT: And you'd agree with me those protocols
7 generally are driven by some algorithm that reflects either the
8 user's predetermined desires or use of the Internet.

9 MR. MEYER: I think that they -- as far as I'm willing
10 to go, Judge, is that they are based on whether or not the
11 person is connected to the program, and the person who is
12 receiving the downloads has no control over what other people
13 are posting on the site and what is automatically being
14 downloaded to them. This arises in a much different context in
15 other cases that we see at the Federal Defender's office.

16 THE COURT: Okay.

17 MR. MEYER: What I will say is absent from this,
18 although these images are on his phone in an unknown
19 context, there has been a thorough investigation of both his
20 home and him, and there is no allegation on the part of the
21 Government that there was ever any concrete step taken or any
22 materials present to engage in any sort of action related to
23 these photos. There was simply nothing when they executed the
24 search warrant at his house that would indicate that there was
25 an imminent danger to the community or that he was involved in

1 any type of behavior related to these photos. I think --

2 THE COURT: But you agree that imminent danger to the
3 community is not the standard that the Government needs to
4 prove.

5 MR. MEYER: No, but I think that's what they're trying
6 to imply, that there is this danger to the community that would
7 happen if this Court were to release Mr. Al Safoo. Aside from
8 photos on his phone in an unknown context, there's simply no
9 other evidence to corroborate that sort of inference.

10 THE COURT: Okay. I think if you took each piece in
11 isolation you can make that argument, but it's not taken in
12 isolation. They have a how-many-paragraph complaint that
13 outlines his relationship.

14 MR. MEYER: But nothing in that complaint deals with
15 photos of this type or specifically photos of this type on his
16 phone. There are certainly general allegations in the
17 complaint about what is supposed to be happening, but there's
18 nothing specific to him or these images on his phone.

19 THE COURT: I accept that. I think that's generally
20 correct at this point. Okay. I'm --

21 MR. MEYER: I'd like to say this, Judge.

22 THE COURT: Okay. Go ahead.

23 MR. MEYER: I think it's instructive to look at other
24 material support cases that have been brought in this district
25 in the past, particularly in the detention context, and I'm

1 referring to the Tounisi case. Pardon me for just a moment. I
2 have the citation to it. It's 13 CR 328, United States versus
3 Abdella Ahmad Tounisi. This is a case in which Magistrate
4 Judge Martin initially granted conditions of release to
5 Mr. Tounisi. The Government took an appeal to Judge Chang, and
6 Judge Chang reversed Judge Martin.

7 Now, it may seem odd that I'm citing a case in which
8 the magistrate judge was reversed, but this is the point I'd
9 like to make about that. In Judge Chang's opinion, he conceded
10 that Judge Martin was a well-respected and careful jurist, and
11 I don't think anybody here would say anything different about
12 Judge Chang other than that he is also a well-respected and
13 careful jurist.

14 So in that case you have two very highly regarded
15 judges who came to different opinions about whether or not
16 someone could be granted bond. That is by definition a close
17 case, and this case is worlds different than that case. None
18 of the things that gave Judge Chang pause in that case and led
19 him to reverse Judge Martin are present here.

20 In that case, Mr. Tounisi had not heeded family and
21 community warnings nor what, as Judge Chang said, should have
22 been a life-altering interview with the FBI. Instead -- and
23 Judge Chang found this most important of all -- Mr. Tounisi
24 after those things was traveling to Syria via Turkey in order
25 to join in, quote-unquote, the battlefields.

1 This is a very different case. There are no
2 allegations that Mr. Al Safoo was involved in an imminent plot
3 in the United States or that he was attempting to leave the
4 country to join hostilities somewhere else in the world. What
5 we have here is someone who, when you really do boil this
6 complaint down to what it is, was sitting behind a keyboard
7 with access to the Internet.

8 If you take away that access to the Internet, you have
9 imposed a condition of bond that will reasonably assure the
10 safety of the community, which is the standard. In addition to
11 that, we are prepared to propose to the Court a number of other
12 conditions, including things that I've already mentioned like
13 home incarceration, electronic monitoring, and the family is
14 willing to post a substantial amount of cash as collateral for
15 Mr. Al Safoo's release as a show of sincere faith that he will
16 abide by whatever conditions this Court imposes.

17 THE COURT: All right. I appreciate everyone's
18 presentations. I'm going to order the defendant detained.
19 I'll go over my reasons now, and then issue a written order as
20 well. Under the law, the Government has -- first of all, it's
21 by agreement and both sides acknowledge it's a rebuttable
22 presumption case.

23 The first question I have to answer is whether that
24 presumption was rebutted. As to risk of flight, I think it was
25 rebutted through the factors you've outlined, Mr. Meyer,

1 including the defendant's family ties, his employment, that he
2 is a citizen of the country, lack of criminal history, you
3 know, no abuse of alcohol or drugs in his background. I think
4 that rebuts the presumption as it applies to risk of flight.

5 But danger to the community, I find it has not been
6 rebutted. Although, Mr. Meyer, in your argument I think you
7 incorporated the other factors I just reviewed, but you also
8 noted the defendant lacks criminal history, which is true but
9 the statute doesn't talk in terms of criminal history. It says
10 if someone is charged with one of these offenses there's a
11 rebuttable presumption. It doesn't say that they have to have
12 a criminal history. So the fact that he has no criminal
13 history can't be the rebuttable factor.

14 In any event, I look at the other arguments you
15 posited as to risk of flight, and to me those do not rebut the
16 presumption -- the danger to the community based on the nature
17 and circumstances of this offense, and in particular as to your
18 client because it is -- as you noted, the crime was committed
19 through the use of technology. The alleged crime was committed
20 through the use of technology, and your client has great skill
21 in the area.

22 So the idea that danger to the community is rebutted
23 because he has no criminal history, one, I think is in tension
24 with the statutory language and construct and, two, really
25 doesn't answer the question at hand, which is how could his

1 conduct, his alleged conduct and his potential risk be
2 protected against. Simply lack of criminal history won't do
3 it, nor would any of the factors that you've identified. That
4 does not rebut the presumption in my mind.

5 But even if it did rebut the presumption, I would
6 still say that danger to the community has been established by
7 clear and convincing evidence. That evidence includes in
8 particular Exhibits 1 and 5 that the Government tendered. I
9 appreciate that things end up on people's phones that people
10 may not want to get on their phones and that they have no
11 intention of it being there.

12 In this case, I find it hard -- it is in tension with
13 the evidence in the complaint that these images related to and
14 construction of a bomb just ended up showing up there. That
15 seems in light of your client's other alleged Internet
16 connections as defined in the complaint, it seems a strange
17 circumstance that those images happened there by happenstance.
18 Therefore, that fact alone, I think if I were not to apply the
19 presumption, I would find that there's no condition or
20 combination of conditions to protect the community because
21 access to the Internet cannot be controlled.

22 I understand the family and I respect that the family
23 is willing to post property, that they're willing to serve as a
24 third-party custodian, but the ready access to the Internet in
25 the most really mundane ways you can get onto the Internet, if

1 he has to use the bathroom and takes the phone in there, no one
2 is going be there watching him. I mean, the idea that that is
3 what would need to be done to assure the safety of the
4 community, which I think it is what needs to be done, we would
5 be completely -- or I wouldn't be completely confident he
6 couldn't have access to the Internet. The only way seemingly
7 for me to assure that is by a custodial setting.

8 I also rely on the fact that the Government posited
9 evidence that the defendant was actively involved in his role
10 within the Khattab and his willingness to pledge his allegiance
11 to ISIS and that it was done in the context of being cognizant
12 of Internet technology and the ability to surveil him on the
13 Internet in the way that the message itself would be secret and
14 destructed in a period of time.

15 For all of those reasons, I find that there's no
16 condition or combination of conditions that would assure the
17 safety of the public even if the rebuttable presumption did not
18 apply. As I said, I'll issue a written opinion as well.

19 Is there anything further from the Government?

20 MR. DIDWANIA: Yes, Your Honor. I did have a brief
21 presentation on risk of non-appearance, if I could just very
22 briefly proffer the information that I was going to proffer for
23 the record on our view on why there's a risk of non-appearance.

24 THE COURT: Sure.

25 MR. DIDWANIA: One, in terms of employment, it's our

1 understanding that he has been fired or very imminently will be
2 fired from his employment. He has extensive ties overseas as
3 detailed in the pretrial report. His wife has extensive ties
4 overseas, and during an interview with the Government she
5 informed the Government that she intended to go overseas very
6 soon to see her father who was sick.

7 Finally, Judge, on February 23rd of this year, the
8 defendant had an extensive conversation with an undercover FBI
9 agent in which he indicated his desire to do nafir or to go
10 overseas to Iraq to conduct jihad on behalf of ISIS.

11 THE COURT: All right.

12 MR. DIDWANIA: I can detail that conversation,
13 obviously, if you'd like, Judge.

14 THE COURT: Mr. Meyer?

15 MR. MEYER: Judge, you've already ruled. I'm not
16 exactly sure what the point of that was, so I'm not going to
17 address it.

18 THE COURT: Okay. Certainly if there's an appeal,
19 another judge might want to hear that. I'm just trying to get
20 to the point of where we are now.

21 All right. You waived preliminary hearing, correct?

22 MR. MEYER: We did, Judge.

23 THE COURT: All right. Defendant will be remanded to
24 the custody of the United States Marshal's Service and held
25 over to appear before the district court in further proceedings

1 as necessary.

2 MR. MEYER: Judge, there was one other matter. We had
3 initially moved at the last hearing for subpoena power.

4 THE COURT: Right.

5 MR. MEYER: We have received the early discovery that
6 we requested from the Government, and that was part of our
7 agreement for waiving preliminary hearing. Based on that,
8 we're withdrawing our request now.

9 THE COURT: Okay. That will be noted on the record.
10 I know that you just submitted a protective order, is that
11 right?

12 MR. DIDWANIA: Yes, Your Honor.

13 THE COURT: So we'll get that out today.

14 MR. DIDWANIA: Thank you, Judge.

15 THE COURT: All right. Thank you very much.

16 (Proceedings concluded.)

17 C E R T I F I C A T E

18 I, Patrick J. Mullen, do hereby certify the foregoing
19 is an accurate transcript produced from an audio recording of
20 the proceedings had in the above-entitled case before the
Honorable M. DAVID WEISMAN, one of the magistrate judges of
said court, at Chicago, Illinois, on October 31, 2018.

21 /s/ Patrick J. Mullen
22 Official Court Reporter
23 United States District Court
24 Northern District of Illinois
25 Eastern Division