UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 18-cr-152

JEREMY J. RYAN,

Defendant.

OMNIBUS PRETRIAL SUBMISSIONS:
VOIR DIRE, JURY INSTRUCTIONS, AND MOTIONS IN LIMINE

Jeremy Ryan, by counsel files this comprehensive response to the Court's voir dire and jury instructions, plus 7 motions in limine. Part A addresses the proposed voir dire, including the Court's specific questions. Part B raises particular objections to the jury instructions and a brief allusion to the prior arguments (DE 68 & 103) to preserve the arguments made about the proper reading of § 2332i. Part C covers the motions in limine. Those motions each have their own sub-point heading for ease of reference. The "meaty ones" appear first and those that are pro forma for preservation follow.

The motions are:

1. Motion for a written summary of the government's experts;

2. Motion for the government to disclose its computer exhibits;

3. Motion for the government to disclose all of Ryan's statements that it intends to introduce at trial;

4. Motion for the government to identify the target of Ryan's intention to cause death or serious bodily injury;

5. Motion for attorney-conducted voir dire;

6. Motion to preclude the introduction of 404(b) evidence;

7. Motion to instruct on reasonable doubt.

A. Voir Dire: Objections and Proposals.

1. DE 169-1:1. The "Statement of the Case" should the fact that he's being charged with nuclear terrorism and engaging in a prohibited transaction involving nuclear materials. This is for three reasons: one, these are the statutes' actual titles; two, using some but not all the elements as shorthand titles unnecessarily invites confusion; and three, we want to identify jurors who have heard of this case or have preconceptions about its content. While some (from around Madison) may have heard of "Segway Jeremy," others are more likely to have heard the news reports about this, and they were initially concerned with reports of "nuclear terrorism." This will help us identify those with preconceptions. It will also feed into question number 2 and (we hope) provoke responses.

2. **DE 169-1:2.** We agree with mentioning "Segway Jeremy" and to flag the activity. We would also ask that the Court read the witness list, in case anyone knows any of the potential witnesses.

3. **DE 169-1:3.** After question 9, there should be an indication that the payment was in bitcoin to see if anyone has a strong feeling about using crypto-currency.

4. **DE 169-1:5.** The voir dire ought to include questions about suicide because the government can meet elements in each charge by showing that Ryan intended to kill himself. Attitudes towards suicide vary. Some see it as a mental health issue. Some see it as a moral failing, an act of cowardice. For many religious faiths, it is a sin. For some States, it remains either a crime by statute or a common law crime.

The defense proposes the following voir dire questions about suicide.

> "This case will involve the topic of suicide. Do any of you have strong feelings about suicide? [Sidebar.] Would this affect your ability to be fair and impartial to both sides in this case."

B. Jury Instructions: Objections & Proposals.

1. **DE 169-3:7.** Element (2) should remain because the statute requires it, the superseding indictment charges it, and the Court's Order (DE 165:12) implies as much.

2. **DE 169-3:7.** The defense acknowledges that this Court disagrees with its interpretation of the statute for element (3). For appellate preservation purposes, it proposes that element (3) read, "The defendant intended to use the radioactive material to cause the death of, or serious bodily injury to, another person." The reasoning here is set forth at length in its filings at DE 68 and 103. This Court considered the reasoning, was unpersuaded, and ruled against the defense's interpretation. There is no reason to rehash the issue in toto here. Instead, the defense flags it to preserve it for appeal.

3. **DE 169-3:8.** Element (2) shouldn't refer to "nuclear waste" because it's not in the statute or the superseding indictment. Instead, the term "nuclear byproduct material" should take its place. *See* 18 U.S.C. § 831(g)(2).

5. **DE 169-3:8.** Element (2) should include between the words "defendant" and "intentionally" the words "without lawful authority." Both the statute and the superseding indictment use those words.

6. **DE 169-3:9.** The first line's use of the word "radioactive" should be replaced with "nuclear." Count 1 is the "radioactive" charge, and Count 2 is the "nuclear" charge.

7. **DE 169-3:9.** The definition of "nuclear material" is effectively unnecessary because Polonium-210 is the only substance in the case and it meets

the "nuclear byproduct material" definition only. Po210 is not among the weapons-grade types of plutonium and uranium.

8. **DE 169-3:10.** The unanimity instruction should cover the intended target of any intention to cause serious bodily injury death. That is, to convict the jury should be unanimous as to whether Ryan intended to cause serious bodily injury or death to himself or, instead, to another human being. The defense relies upon its readings of §§ 2332i(a)(1)(A) and 831(a)(1)(B) as set forth in its dismissal motion briefing. (*See* DE 68, 103, 141, & 160.)

9. **DE 169-3:11-12.** The agency liability instructions on this page and the next can be deleted.

C. Motions in Limine

1. Motion for a written summary of the government's experts' testimonies.

The government has noticed five experts. And as it stands, the defense cannot adequately prepare for his testimony without a written summary of their testimony and the basis for their testimony. *See* Fed. R. Crim. P 16 & Fed. R. Evid. 705. To be very clear, we are not moving for a *Daubert* hearing or arguing that the experts are not truly experts; the defense is simply arguing that we need more. Lest the defense be branded hypocrites, we acknowledge that the government is entitled to more from the defense. This case looked like it would and should settle, and to save money we did not instruct our experts to produce a report until it was very clear that no plea could be reached. The defense anticipates giving the government a fuller picture by January 10.

Under Rule 16(a)(1)(G) the government must provide a "written summary" of the expert testimony it intends to introduce. This obligation isn't satisfied by merely providing the defense with a "list of topics" that the witness will cover. *United States v. Duvall*, 272 F.3d 825, 828–29 (7th Cir. 2001). Rather, "[t]o help the defendant prepare for trial, the disclosure must summarize what the expert will actually say about those topics." *United States v. Williams,* 900 F.3d 486, 488–89 (7th

Cir. 2018). In *Williams* the Seventh Circuit was clear that the demands of Rule 16(a)(1)(G) applies to testimony of experts like Lindeman.

> The "written summary" requirement of Rule 16(a)(1)(G) applies to "any testimony that the government intends to use under Rule[ ] 702," and Rule 702 governs both experts who offer an opinion and those who don't. And in defining the phrase "written summary," we have stated broadly and unequivocally that Rule 16(a)(1)(G) "requires a summary of the expected testimony, not a list of topics." Neither the rule nor our interpretation of it suggests that "written summary" means something different for non-opinion experts.

Williams, 900 F.3d at 489 (citation omitted). The standard is simple and straight forward: the government must provide a summary of what the experts will testify to—a list of topics will not cut it.

As it stands, and as the Court can see from the government's notices, all the government provides is a list of topics. We are told in the initial notice that Kuhne and Blankenship will

> discuss generally what radioactivity and Polonium-210 are, and more specifically the impacts and effects radiological material has on human beings, what qualifies as a lethal dose of Polonium-210, and why Polonium-210 is such a dangerous substance. Their opinions are based on extensive research, work experience and education–Dr. Kuhne has a PhD is Radiological Health Sciences and Dr. Blankenship has a PhD in Chemistry.

(*See* DE 148.) That's not a summary. That's a list of topics. The same is true of Neil Lee and Doug Raubal. For them, we have this:

> They will opine that certain data, including but not limited to messages, images, and videos, were located on computers and other electronic devices seized from the defendant. They will also testify about internet searches conducted by the defendant. Their opinions are based on their training and experience in the extraction of data from mobile phones, electronic media, and computers, their familiarity with the process for extracting data, and their personal extraction of data from electronic devices seized from the defendant.

(*See id.*) And when it comes to David Whitlow, it's about the same:

> The government intends to call David S. Whitlow, an FBI Special Agent with the Weapons of Mass Destruction Directorate in Huntsville, AL. He will testify about what the dark web is, how one goes about getting on the dark web, the onion router (TOR), and what types of items are for sale on the dark web. Specifically, he will address the availability of radioactive and nuclear material such as Polonium-210 on the dark web.

(*See id.*) It is simply a list of topics. Lest, there be any doubt about whether that cuts it under Rule 16 and the Circuit's precedent, here is what the Seventh Circuit found *did not* meet the demands of Rule 16:

> Detective Erk will identify code language, the manner in which methamphetamine is distributed, tools of the trade in the distribution of methamphetamine, street prices of methamphetamine and the manner in which "cut" is added to methamphetamine to increase the amount of profit in the methamphetamine business. Detective Erk will also testify concerning amounts of methamphetamine an individual might have for distribution, as opposed to personal use.

Duvall, 272 F.3d at 828. There is little (bordering nothing) additional provided in the government's notices than what the Seventh Circuit has previously found does not comply with Rule 16.

Thus, consistent with the demands of Rule 16(a)(1)(G) and the Seventh Circuit's decision in *Williams,* the defense moves for an actual summary of the government's expert testimony. In sum and again to be very clear, the defense is not moving to strike these experts, they are certainly qualified to testify as experts within their chosen fields. The defense is simply moving for a summary of his testimony and the basis for it under Rule 16 and Rules 703 and 705.

2. Motion for early production of the government's computer-data exhibits.

An absolutely massive amount of data was seized from Ryan's various devices. This is impossible to get a full handle on. To eliminate the need for a recess or a continuance during trial, the defense asked for early disclosure of the government's exhibits. The government has agreed to try and turn over its exhibits by January 14, which will allow the defense time to look into anything that it may need context or clarification from the devices. The defense realizes that trial prep is tedious and things come up and it will not squawk if the exhibits come on the

15th, but the defense needs to know what will be introduced from the computers with sufficient time to prepare.

As far as a legal basis for this request, the Court, of course, maintains the inherent authority to regulate trial disclosures. Courts have broad discretion when ordering when parties must disclose their exhibits. *See, e.g., United States v. Prince*, 618 F.3d 551, 562 (6th Cir. 2010); *United States v. Desage*, 2017 U.S. Dist. LEXIS 28739, at *5 (D. Nev. Mar. 1, 2017) (ordering government to disclosure exhibit list 30 days before trial); *United States v. Falkowitz*, 214 F. Supp. 2d 365, 392 (S.D.N.Y. 2002) (citing cases). Some courts (two in the Eastern District of Wisconsin) make the parties exchange exhibit and witness lists weeks before trial. Here, the defense is simply asking for a week's notice before trial. This will permit the defense the time to check the government's exhibits and root out any objection or clarification before trial and keep the defense from having to ask for a continuance.

3. Motion to identify portions of Ryan's interview that will be introduced.

The government has not noticed any portion of Ryan's interview or his hundreds of jail calls (that it has handed over) that it plans to play for the jury. It would have had to have given notice weeks ago to work out any problems with the transcripts and fights over the Rule of Completeness. This trial decision could have been made for many practical or strategic reasons.

In the defense's second-to-last trial, *United States v. Stands Alone,* the government opted for a similar strategy only to have the interviewing agent walk through the interview but not place. That is within the government's rights. However, Ryan's interview is over four hours long and his phone calls and visits likely span over a hundred hours. We cannot be prepared to make arguments under the Rule of Completeness about additional statements that have to be put into evidence, either by playing Ryan's statement or cross-examining the agent. The benefit of the early A/V disclosure is that these issues are hammered out early, but if the government is going to bypass that and just have Ryan's statements come in through the agent, then the defense has the right to flag early and have the Court rule upon (before trial and not at sidebar) what additional statements have to come in. Here is the legal basis for the claim.

The Rule of Completeness provides that when one party introduces in evidence a part of a recording or writing, his opponent "'may require the introduction . . . of any other part . . . which ought in fairness to be considered contemporaneously with it.'" *See, e.g., United States v. Paladino,* 401 F.3d 471, 476 (7th Cir. 2005) (citations omitted). The Rule is not limited to obvious cases like the oft-cited example in the Seventh Circuit: it "would be accusing the Biblical David of blasphemy for saying, 'There is no God,' his full statement being, 'The fool hath said in his heart, there is no God.'" *United States v. LeFevour,* 798 F.2d 977, 981 (7th Cir. 1986). Rather, the Rule applies far beyond requiring a party to introduce a full sentence (over a partial one) in the name of completeness. The text of the Rule itself provides for introducing "any other part" of the recorded statement or even "any other writing or recorded statement" that in fairness should be considered at the same time. Fed. R. Evid. 106. Thus, "[u]nder the doctrine of completeness, another writing or tape recording is required to be read [or heard] if it is necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding." *United States v. Sweiss*, 814 F.2d 1208, 1211–12 (7th Cir. 1987). Put another way, "[t]o lay a sufficient foundation at trial for a rule of completeness claim, the offeror need

only specify the portion of the testimony that is relevant to the issue at trial and that qualifies or explains portions already admitted." *Id*. at 1212.

Additional guidance for how this applies in practice comes from the Advisory Committee Notes, which explain: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." Thus, Rule 106 allows parties to responsively and contemporaneously (during either cross-examination or the next major phase of the trial) introduce additional evidence that would correct a misleading impression caused by the introduction of a truncated version of a statement.

In the leading Supreme Court discussion about the Rule, the Court noted that the common-law rule of completeness underlies Rule 106 and, for a definition of the common-law rule, cited Wigmore's summary: "The opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171 (1988) (citing Wigmore, Evidence in Trials at Common Law (1978)). Thus, "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of

another portion, *the material required for completeness is ipso facto relevant and therefore admissible under Rules 401 and 402*." *Id.* at 172. (emphasis added). Properly understood, the application of Rule 106 extends beyond correcting misleading impressions; rather than being so limited, it is animated by interests of fairness—a much broader principle than mere accuracy of the quoted portion, *i.e.*, plucking a misleading phrase out of a sentence or more. *See Paladino*, 401 F.3d at 476 ("Asked at the deposition about his knowledge of the invested money, he said: 'I learned that this money that's been coming in was investment money, *and I was totally surprised because I assumed this whole time that this was trade money*.' *The government put a period after 'investment money' and deleted the rest of Paladino's answe*r." (emphasis added)).

Anticipating the government's argument from the *Stands Alone* trial, one final point should be emphasized. The Seventh Circuit has recognized that under Rule 106, otherwise inadmissible evidence is admissible if it is necessary to correct a misleading impression. *See LeFevour*, 798 F.2d at 981. Indeed, the Court noted: "If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106… or, if it is inadmissible [because of privilege], the misleading evidence must be excluded

too." *Id.* Thus, to be clear, courts allow Rule 106 to trump the exclusionary rules of evidence

- "[O]therwise inadmissible evidence may be admissible under Rule 106 to correct a misleading impression or else the misleading evidence must be excluded." *United States v. Reese*, 666 F.3d 1007, 1019 (7th Cir. 2012) (citing *LeFevour*, 798 F.2d at 981).

- "Even if the fact allocution would be subject to a hearsay objection, that does not block its use *when it is needed to provide context for a statement already admitted*." *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (emphasis added).

- "[The Rule] may be invoked to facilitate the introduction of otherwise inadmissible evidence." *United States v. Bucci*, 525 F.3d 116, 133 (1st Cir. 2008).

In sum, the question is whether in fairness to Ryan the post-arrest statements that the government plans to use need additional information to qualify or explain the portions already admitted. *See Sweiss*, 814 F.2d at 1211–12.

Ryan has given (as an understatement) a ton of statements in his interview and on the phone and many of his very demining statements are the product of some back and forth, with allusions and qualifications from earlier statements that he made. In order to have a smooth trial and for the defense to know what precise statements it needs to bring in to qualify and explain and give context to the

statement admitted, the defense is entitled to know the statements that the government intends to introduce for admission.

4. The government should disclose the identity of Ryan's target.

Walking into trial, the defense is preparing to rebut the fact that Ryan was intending this to kill himself with the Po-210. That is, Ryan is a fabulist and this backup plan would never materialize, so it wasn't likely that he was actually going to do it and he can't be convicted under either statute. If the government is arguing that Ryan was actually going to use this substance to poison another, then the defense geared towards a never-materialized suicide attempt would be irrelevant. The defense has retained experts and has other witnesses who would be subpoenaed for what would (if the government is alleging murder) a non-issue. That is, if Ryan was going to actually kill another, it wouldn't matter if he said it was for suicide. The government should have to disclose its theory of who the intended target is.

5. Motion for attorney-conducted voir dire.

The right to a fair and impartial jury is a cornerstone of American jurisprudence. U.S. Const. amend. VI. Many, in fact, consider *voir dire* "the most significant part of any trial." Herald Price Fahringer, "*Mirror, Mirror on the Wall…*": *Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 197 (1993). And others declare that there is no aspect of a trial more important to the ultimate outcome than the jury selection. *See, e.g.*, Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 575 (1985). ("Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings…"); Fahringer, *supra* at 197 ("Acknowledged expert in the field believe that eighty-five percent of cases litigated are won or lost when the jury is selected.").

When it comes to jury selection in federal court, Rule 24(a) provides that attorneys be involved in the *voir dire* process by either conducting the *voir dire*, asking follow up questions, or by providing a list of follow-up questions to be asked by the court. *See* Fed. R. Crim. P. 24(a)(1) – (2). Although Rule 24 gives trial courts broad discretion to regulate the jury selection process, the Supreme Court has recognized that adequate *voir dire* is critical to the protection of a defendant's Sixth Amendment right to a fair trial. For example, in *Morgan v. Illinois*, the Court

emphasized: [P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. *Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." 504 U.S. 719, 729-30 (1992). The Court continued: "Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *Id.*

While Rule 24 gives wide discretion to the trial court, *voir dire* may have little meaning if it is not conducted, at least in part, by counsel. After all, it is the parties, rather than the court, who are immersed in the nuances of the case and most aware of its strengths and weaknesses. In this case and as discussed below, follow-up questions will be critical, and they will necessarily have to be tailored to the juror's answer. And those answers are more likely to be truthful if asked by an attorney instead of a judge. Thus, allowing for attorney-conducted *voir dire* will be more time efficient and more likely to provide a fair and unbiased jury than *voir dire* that is simply conducted by the Court. On that point, it's worth stressing the words of former United States District Court Judge Mark Bennett, when he explained that because attorneys know the case better, they "are in the best position to determine how explicit and implicit biases among potential jurors might affect the outcome,"

and they have greater incentive to develop strategies to ferret out these biases. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions,* 4 HARV. L. & POL'Y REV. 149, 160 (2010).

Judge Bennett isn't the only one to recognize that reality. The Fifth Circuit has similarly recognized that even the most diligent judge will not be as familiar with the nuances of the case as the parties and therefore will not have the same insights as to what questions or follow-ups are necessary: "[W]e must acknowledge that *voir dire* examination in both civil and criminal cases has little meaning if it is not conducted by counsel for the parties. *A judge cannot have the same grasp of the facts, the complexities and nuances as the trial attorneys entrusted with the preparation of the case*. The court does not know the strength and weaknesses of each litigant's case. *Justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice of which the juror himself may be unaware until certain facts are revealed.*" *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) (emphasis added). Indeed.

Here, as it is in any case, the parties are in the best position to determine what sorts of questions are required to adequately determine juror bias. If the proper questions are asked, peremptory challenges will be made based upon a

thorough examination of juror responses to questioning, ensuring a fair and impartial jury. *See United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (recognizing that if the right to peremptory challenges is "not to be an empty one," *voir dire* must allow sufficient inquiry into the background and attitude of jurors to enable defendants to intelligently exercise their peremptory challenges). Experience teaches that especially in a case like this, general questions about whether a juror can be fair and impartial are inadequate because a prospective juror is not "so alert to his own prejudices." *Id.* (quoting *Swain v. Alabama,* 380 U.S. 202, 219 (1965)). Indeed, research indicates that jurors are more likely to respond truthfully to questions posed by an attorney than those posed by a judge, whom they perceive as an authority figure. *See* Susan E. Jones, *Judge vs. Attorney-Conduced Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & Hum. Behav. 131 (1987).

Similarly, in one of the largest empirical studies of *voir dire*, funded by the U.S. Department of Justice, researchers found that in the employment context, the degree of self-disclosure varies based on the interviewer's perceived status within the employment organization. Frank P. Andreano, *Voir Dire: New Research Challenges Old Assumptions*, 95 ILL. B.J. 474, 475 (Sept. 2007) (citing Deirdre Golash, *Race, Fairness, and Jury Selection*, 10 BEHAV. SCI. & L., 155-177 (1992)). As a result, employees were more willing to self-disclose to interviewers within their own

hierarchical level rather than to more authoritative superiors. *Id.* It follows that research concerning employees would have a similar finding with jurors, and it supports the contention that individual attorneys are best suited to uncover honest responses from prospective jurors during *voir dire*. This body of research also reveals one of the biggest concerns regarding judge-conducted *voir dire*: that "during a judge-conducted *voir dire*, jurors attempted to report not what they truly thought or felt about an issue, but instead what they believed the judge wanted to hear." *Id.* That's because most jurors are sensitive to "social comparison information" and therefore are reluctant to deviate from the socially acceptable response. Robert M. Arkin, et. al., *Social Anxiety, Self-Presentation, and Self-Serving Bias and Casual Attribution*, 38 J. OF PERSON. & SOC. PSY. 23 (1980). In short, the higher the status of the person asking the questions the more likely the juror is to give the answer that he or she believes that the questioner wants to hear. If a judge asks the question, you get the socially appropriate answer. If an attorney asks the question, you may get something closer to the truth. And the parties are entitled to truthful answers from the potential jurors.

Beyond that, it's worth noting two important points in support of allowing attorney-conducted *voir dire*. First, it's not unusual for courts to allow for some attorney-conducted *voir dire* in high-profile cases. In notorious cases, it is more

common for *voir dire* to be conducted equally by judge and attorney or for *voir dire* to be conducted primarily by attorneys than it is in routine cases. Paula L. Hannaford-Agor, *When All Eyes Are Watching: Trial Characteristics and Practices in Notorious Trials*, 91 American Judicature Society 198 (2008). And second, studies have shown that there is no significant increase in jury selection times in cases that involved attorney-conducted *voir dire* from those that did not. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men And People With Green Socks*, 78 Chi Kent L Rev. 1179, 1185 (2003) (citing 1994 memorandum of survey of federal judges conducted by Federal Judicial Center).

Beyond the fact that high-profile cases often feature attorney conducted *voir dire* and that it will not increase the amount of time spent selecting a jury, another reason for attorney-conducted *voir dire* is the necessity of inquiring of the jury on their views on gender, race, religion, ethnicity, and any other biases they may have, explicit or implicit. *See* generally Sommers & Ellswroth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSY. PUB. POL'Y & L. 201 (2001). A wealth of research has demonstrated that "[b]ias is largely unconscious and often at odds with conscious beliefs."[2] The Implicit

Association Test (IAT), a social psychology test taken by over fourteen million people, has found that "[s]eventy-five percent of those who have taken the race IAT have demonstrated implicit racial bias in favor of Whites."[3] Without attorney directed *voir dire*, addressing jurors' views on the sensitive subjects like mental illness, peremptory challenges are more likely to rely on stereotypes than a juror's actual ability to remain and decide the case impartially—to do so with integrity. "Integrity" is, of course, fundamental to "the constitutional concept of trial by jury." *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). Nothing is so essential to the "integrity" of the jury right as the requirement that "verdict[s] 'must be based upon the evidence developed at the trail'" in light of "calm and informed judgment," rather than upon pre-existing bias, prejudgment, or passion. *Id*.

To that end, the Supreme Court in in *Pena-Rodriguez v. Colorado*, recognized the obligation of courts "to confront racial animus" and that "the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*." 137 S. Ct. 855, 867–68 (2017). The Court also emphasized that the

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[2] Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 860 (2015).

[3] Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C.L. REV. 1555, 1572 (2003).

"familiar and recurring evil" of racial bias, if left unaddressed, "risk[s] systematic injury to the administration of justice." *Id*. at 868. If bias isn't adequately explored during *voir dire*, the situation that arose in *Pena-Rodriguez*—a juror expressing racial, religious, ethnic, or mental-health related animus during deliberations—is much more likely to arise.

When those aspects of a juror's character are disclosed in *voir dire* everyone benefits. The failure of jurors to disclose potential bias impugns the fairness and integrity of the trial process, and it threatens public faith in the fundaments of our justice system. Not only does the social science research support the defense's premise that jurors will disclose more relevant information in attorney-conducted *voir dire* rather than judge-conducted *voir dire* but also the best way to avoid those potential pitfalls and provide Ryan his constitutional right to a jury that is not biased against him is to allow attorneys to conduct *voir dire*. From the defense's perspective, there are several major areas of concern in jury selection in this case, including: exposure to pretrial publicity; pro-law enforcement bias; strong feelings about nuclear terrorism and the dark web; and strong feelings about mental illness, including suicide.

This is an unusual case and Ryan cuts an unusual figure with both his desire for the media and the disclosure of facts about this case in the media. For that

reason, the defense (and the Court) cannot simply rely on the Court's questioning prospective jurors about whether they agree that they can be fair. Instead, the defense is requesting a brief amount of time to voir dire the jury about its biases and prejudices about the case. This could be accomplished by allowing thirty minutes per side.

There are a lot of issues in this case that could cause a potential jury some reservations or bias. That is undeniable—we're dealing with allegations of nuclear terrorism, the dark web, and suicide. The chances are that few (bordering none) of the jurors will open up about how they truly feel about these topics. The studies and authority cited above should convince the Court of that, but if there is any thought that that doesn't happen in the Western District the defense offers this anecdotal piece of argument. In the *Howard* trial, the defense asked for attorney conducted voir dire. During that trial, the court asked if anyone had strong views on the topic of child pornography or child sexual assault and *no one* raised a hand. That defies reason: everyone has views and they should uniformly and strongly condemn it. But given the authority dynamics at play there, the jury was silent. Ryan (as every defendant does) deserves better.

6. Motion to exclude 404(b) evidence.

The government has given no 404(b) notice and so that should put the matter to rest. But to flag certain evidence that has no probative value and the defense feels would fall under 404(b), the defense cites the following: any mention of Ryan's cocaine use; his prior convictions; the amount of money he spent on Bitcoin; and any mention of factitious disorder or Munchausen.

7. Motion for jury instruction on definition of "reasonable doubt."

The defense requests the inclusion of a "reasonable doubt" instruction in a separate paragraph immediately following the "BURDEN OF PROOF" instruction in the introductory instructions. (*See* DE 169-2:2.) The defense proposes the Third Circuit Court of Appeals Model Criminal Jury Instruction 3.06, which includes the following definition:

> Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the lack of evidence, or from the nature of the evidence.

Ryan makes this proposal for purposes of appellate review. It is settled circuit law that the district court should not instruct the jury on reasonable doubt's definition. *See, e.g., United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993).

Dated at Madison, Wisconsin, this 6th day of January, 2020.

Respectfully submitted,

Jeremy J. Ryan, Defendant

/s/ Peter R. Moyers
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