UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	Case No. 1:23-cr-55
	)	
v.	)	Judge Atchley
	)	
SEAD MILJKOVIC, *also known as* SEAD DUKIC	)	Magistrate Judge Steger
	)	

MEMORANDUM OPINION AND ORDER

The Government charged Defendant Sead Miljkovic with three counts of torture and three counts of passport fraud. Defendant now moves to dismiss the torture charges based on the statute of limitations, a lack of jurisdiction, and due process violations. [Docs. 44–46]. For the reasons explained below, Defendant's motions to dismiss will be **DENIED**.

I. FACTUAL BACKGROUND

This prosecution is unusual. Its underpinnings begin more than thirty years ago in a then war-torn Bosnia. War broke out in Bosnia after the country declared independence from the Socialist Federal Republic of Yugoslavia in 1992. Part of the war involved certain Bosnian Muslims, who opposed the country's new government and established their own self-proclaimed state in northwestern Bosnia. [Doc. 22 at ¶ 2]. These Bosnian Muslims referred to their territory as the Autonomous Province of Western Bosnia, or APZB. [*Id.*].

The APZB maintained an army. [*Id.* at ¶ 3]. During its clashes with the Bosnian Army, the APZB Army captured members of the opposition and held them as prisoners. [*Id.* at ¶ 5]. This is where Defendant Sead Miljkovic enters the picture. According to the Superseding Indictment, Defendant served in APZB's Security for Buildings and Persons, or OBL. [*Id.* at ¶ 4]. Defendant, as part of OBL, allegedly supervised and controlled some of APZB's prisoners between December 1994 and August 1995. [*Id.* at ¶ 6].

The Superseding Indictment alleges that Defendant's interactions with prisoners extended beyond mere supervision and control. Indeed, Defendant and other OBL members allegedly "inflicted severe beatings on the prisoners that created a foreseeable risk of serious bodily injury or death, including sustained beatings, beatings with instruments, and beatings causing the victims to lose consciousness or suffer other injuries." [*Id.*]. The Superseding Indictment refers to three alleged victims. Defendant, "together with others" in OBL, allegedly struck Victim 1 "severely and repeatedly on multiple occasions with instruments including a rubber baton, metal pipe, and a rifle butt." [*Id.* at ¶ 9]. Also while in Defendant's custody, Victim 1's head was allegedly pushed down towards a "knife or bayonet as if to impale his throat on the blade, causing Victim 1 to think he was going to die." [*Id.*].

The Superseding Indictment asserts similar allegations as to the second and third victims. Defendant and other OBL members allegedly beat Victim 2 "severely and repeatedly on multiple occasions with instruments including bats, spades, sticks, and the handle of a shovel" and caused him to "suffer serious injuries." [*Id.* at ¶ 11]. They also allegedly threatened to kill Victim 2 and forced him to fight other prisoners. [*Id.*]. Victim 3 allegedly faced similar experiences. According to the Superseding Indictment, Defendant and other OBL members beat Victim 3 "severely and repeatedly with instruments including a rubber baton and a shovel handle," which caused Victim 3 "to lose consciousness and think he was going to die." [*Id.* at ¶ 13].

Some twenty-eight years after his alleged tenure in OBL, the Government indicted Defendant on June 27, 2023. [Doc. 8]. The Indictment includes no allegations of torture. Instead, it contains three counts of passport fraud, which pertain to alleged false statements Defendant made in connection with efforts to renew and use his United States passport. [*Id.*]. Defendant allegedly made false statements about his last name, date of birth, and use of other names. [*Id.*].

Just over five months later, the Government filed the Superseding Indictment. [Doc. 22]. The Superseding Indictment retains the three counts of passport fraud but adds three counts of torture based on Defendant's alleged conduct during the Bosnian War. [*Id.*]. After several continuances, Defendant filed three motions to dismiss the Superseding Indictment's torture counts. [Docs. 44–46]. Those motions are now ripe for the Court's review.

II. STANDARD OF REVIEW

Defendants may challenge defects in an indictment through a pretrial motion to dismiss, provided the motion can be determined "without a trial on the merits." FED. R. CRIM. P. 12(b)(1). When ruling on a motion to dismiss, courts must generally limit their analysis to the indictment's four corners and accept its factual allegations as true. *United States v. Ferguson*, 681 F.3d 826, 831 (6th Cir. 2012); *United States v. Hann*, 574 F. Supp. 2d 827, 830 (M.D. Tenn. 2008) (citations omitted). Courts cannot use motions to dismiss as a vehicle to "find facts that make up the elements of the case" and invade the province of the jury. *United States v. Cumberland Wood and Chair Corp.*, Nos. 91-6058–60, 1992 WL 317175, at *3 (6th Cir. Oct. 27, 1992).

III. ANALYSIS

Defendant filed three dispositive motions, and each advances distinct arguments as to why the Superseding Indictment's torture counts should be dismissed. He argues that the torture counts are time-barred, suffer jurisdictional defects, and violate due process guarantees. [Docs. 44–46]. The Court will address each motion separately.

A. Statute of Limitations [Doc. 44]

The Superseding Indictment's torture counts allege violations of 18 U.S.C. §§ 2340, 2340A. Neither provision enumerates a limitations period. Defendant contends that the torture counts are subject to the five-year limitation applicable to most federal crimes, or the eight-year

limitation set forth in 18 U.S.C. § 3286(a). [Doc. 44 at 5–6]. Under either limitation, Defendant's prosecution for alleged crimes twenty-eight years after the fact would clearly be untimely. The Government, on the other hand, argues that no limitation applies pursuant to 18 U.S.C. § 3286(b). [Doc. 62 at 7]. For the following reasons, the Court concludes that the Superseding Indictment's allegations, accepted as true, would permit a jury to conclude that no statute of limitations applies and deem the torture counts timely.

Federal law dictates that all non-capital offenses are subject to a five-year limitations period, unless provided otherwise. 18 U.S.C. § 3282(a); *United States v. Harvel*, 115 F.4th 714, 719 (6th Cir. 2024). That limitations period does not apply to the torture counts because federal law provides otherwise. Indeed, 18 U.S.C. § 3286(a) provides that any offense listed in "section 2332b(g)(5)(B)" is subject to an eight-year limitations period, and that section includes the applicable torture statute, 18 U.S.C. § 2340A, among the numerous offenses it lists. 18 U.S.C. § 2332b(g)(5)(B). Whether a five or eight-year limitations period applies makes no difference as to the ultimate outcome, however. Defendant's alleged crimes occurred from 1994 to 1995, so the 2023 Superseding Indictment came long after either limitations period expired.[1]

That leaves one option to render this prosecution timely: no limitation period applies at all. The Government relies on 18 U.S.C. § 3286(b) to argue that no limitations period applies to the Superseding Indictment's torture counts. Section 3286(b) provides that a prosecution may be initiated "at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b). Congress removed the limitations period for these

[1] Though the five and eight-year limitations periods would yield the same result if applicable, the Court notes that Congress enacted the eight-year limitations period for torture offenses on September 13, 1994, which came before Defendant allegedly committed any acts of torture. Pub. L. 103-322, 108 Stat. 2021. Thus, between the five and eight-year limitations periods, only the latter could apply to Defendant's alleged conduct.

offenses on October 26, 2001, which came after Defendant allegedly committed acts of torture in 1994 and 1995 but before Section 3286(a)'s eight-year limitations period for those acts would have expired in 2002 and 2003. Pub. L. 107-56, 115 Stat. 379. Because "the extension of a limitations period before that period has run does not violate the Ex Post Facto Clause," Section 3286(b) could be applied to Defendant's alleged acts. *United States v. Knipp*, 963 F.2d 839, 844 (6th Cir. 1992). Whether Section 3286(b) applies to Defendant ultimately depends on whether his alleged acts "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b).

Section 3286(b) does not define "serious bodily injury." The term is defined elsewhere, however, in 18 U.S.C. § 1365(h)(3). That provision defines "serious bodily injury" as "bodily injury which involves (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 18 U.S.C. § 1365(h)(3). Defendant argues that his alleged conduct fails to meet this definition. He spills considerable ink discussing witness statements from the three victims identified in the Superseding Indictment. [Doc. 44 at 11–22]. These statements, in Defendant's view, demonstrate that the victims at most suffered bruising, which does not equate to a risk of serious bodily injury. [*Id.* at 7].

Defendant's reliance on these witness statements, produced in discovery, is misplaced at this stage. Motions to dismiss an indictment cannot challenge the sufficiency of the evidence, and courts generally cannot venture beyond the indictment's four corners. *Ferguson*, 681 F.3d at 831. Notwithstanding these constraints, Defendant urges the Court to consider the discovery materials. He emphasizes that the provision removing any limitations period, Section 3286(b), contains no language that limits the Court's statute of limitations analysis to the Superseding Indictment's four

corners. [Doc. 74 at 3]. It is true that Section 3286(b) lacks such language, but that does not mean the Court can disregard the well-settled standards that govern review of motions to dismiss an indictment. Standards of review for criminal motions are typically set forth in the Federal Rules of Criminal Procedure and the case law, not in substantive criminal statutes. Defendant's argument, taken to its logical conclusion, would mean that courts can abandon the governing standard of review simply because the applicable criminal statute fails to recite it. That result is untenable.

Defendant also cites the Supreme Court's decision in *Toussie v. United States*, 397 U.S. 112 (1970) to suggest that the Court can consider the victims' statements. [Doc. 74 at 4–5]. *Toussie* involved straightforward facts: the defendant failed to register for the draft when he turned eighteen, and he was indicted for failing to do so nearly eight years later. *Toussie*, 397 U.S. at 113. The Government argued that the five-year limitations period did not bar prosecution because the defendant's offense continued for each day he failed to register. *Id.* at 114. The Supreme Court disagreed and declined to characterize the defendant's failure to register as a continuing offense. *Id.* at 121–22. Though the Supreme Court reversed the trial court's denial of the motion to dismiss the indictment, *Toussie* reveals nothing about what evidence courts may consider when ruling on motions to dismiss an indictment, so the decision is of no help to Defendant.

With the victims' statements removed from consideration, the Court turns to the Superseding Indictment's factual allegations. The Government alleges that Defendant, together with others in OBL, inflicted severe and repeated beatings on prisoners with various instruments, including metal pipes, bats, and shovel handles. [*See generally* Doc. 22]. The central question is whether Defendant's conduct, as alleged in the Superseding Indictment, "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b).

Very few cases interpret Section 3286(b), let alone in the context of a motion to dismiss the indictment. The most analogous case is the Southern District of New York's decision in *United States v. Pham*, No. 12-cr-423, 2022 WL 993119 (S.D.N.Y. Apr. 1, 2022). There, the superseding indictment charged the defendant with agreeing to conduct a suicide bombing, detonating an explosive device for test purposes, and traveling to the United Kingdom to carry out the attack. *Id.* at *9. The defendant argued that his conduct did not implicate Section 3286(b), but the district court disagreed. *Id.* The superseding indictment contained "ample allegations that, if proven at trial, would permit a reasonable jury to find that the conspiracy counts satisfy § 3286(b)" because they posed a foreseeable risk of serious bodily injury. *Id.*

So too here. The Superseding Indictment's allegations may not be as inflammatory as those in *Pham*, but they are nonetheless sufficient to allow a jury to conclude that Defendant's alleged conduct "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b). Consider the Superseding Indictment's allegations that Defendant, along with others in OBL, "severely and repeatedly" beat the victims with various instruments, including metal pipes, bats, and shovel handles. [Doc. 22 at ¶ 9, 11, 13]. These allegations, if proven at trial, would allow a jury to find that Defendant's actions resulted in or created a foreseeable risk of "extreme physical pain," which is one way 18 U.S.C. § 1365(h)(3) defines "serious bodily injury." Sustained beatings with blunt instruments, which is what the Superseding Indictment alleges took place, could certainly result in or create a foreseeable risk of extreme physical pain.

The Superseding Indictment's relevant allegations are not limited to those involving beatings. Take the allegation that while in Defendant and other OBL members' custody and control, Victim 1's head was pushed down towards a "knife or bayonet as if to impale his throat

on the blade, causing Victim 1 to think he was going to die." [Doc. 22 at ¶ 9]. This claim, too, could permit a jury to conclude that Defendant's alleged conduct falls within Section 3286(b) and is not subject to any limitations period. A simulated impalement could certainly create a foreseeable risk of death, and that is precisely what the Superseding Indictment alleges occurred insofar as Victim 1 thought "he was going to die." [*Id.*]. The Superseding Indictment's allegations of severe beatings and a simulated impalement, accepted as true, could support a jury concluding that Defendant's conduct "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b).

The Sixth Circuit has interpreted Section 1365(h)(3)'s definition of "serious bodily injury" before, albeit not in the context of Section 3286(b)'s limitations provision. In *United States v. Frazier*, for example, the Sixth Circuit affirmed the defendant's conviction for assault resulting in serious bodily injury. 769 F. App'x 268, 271 (6th Cir. 2019). The victim testified that following repeated punches to the head, he briefly lost consciousness, suffered two broken bones around his eye, and experienced excruciating pain. *Id.* at 269, 271. This testimony was sufficient to support the jury's finding that the victim suffered "extreme physical pain," and Section 1365(h)(3)'s definition of "serious bodily injury" did not require "the government to prove that the victim of an assault suffered interminable pain or required a lengthy hospital stay." *Id.* at 271.

Defendant insists that cases like *Frazier* are inapposite because they do not involve review of motions to dismiss an indictment. [Doc. 74 at 2]. That *Frazier* involves review of a conviction rather than a motion to dismiss does diminish its persuasive effect. Still, the Court works with a nearly blank slate in this case, with so few cases interpreting "serious bodily injury" as it is used in Section 3286(b). Any cases that interpret Section 1365(h)(3)'s definition of "serious bodily injury," then, could prove instructive in discerning the term's outer boundaries. It is on this point

that *Frazier* offers at least some insight. The victim in *Frazier* endured repeated punches and lost consciousness, and that was enough to affirm the jury's finding of "extreme physical pain." *Frazier*, 769 F. App'x at 269, 271. Because the Superseding Indictment similarly alleges that Defendant beat the victims "severely and repeatedly," resulting in serious injuries and lost consciousness, a jury could likewise conclude after proof at trial that Defendant inflicted "extreme physical pain." [Doc. 22 at ¶ 9, 11, 13].

Even if his alleged acts "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person," Defendant argues that the Superseding Indictment's failure to include this specific language warrants dismissal of the torture counts. [Doc. 74 at 3].[2] Not so. Indictments need not "anticipate affirmative defenses," such as a statute of limitations defense. *United States v. Titterington*, 374 F.3d 453, 456 (6th Cir. 2004) (quoting *United States v. Sisson*, 399 U.S. 267, 288 (1970)). This rule holds especially true where, as in *Titterington*, "the statute defining the offenses does not contain a statute of limitations, but 'another act of Congress' does." *Id.* at 457 (quoting *United States v. Cook*, 84 U.S. 168, 178 (1872)). This structure, one where the offense's limitations period is set forth in a separate statute, confirms that time is not an essential element of the offense and obviates any need to reference timeliness in the indictment. *Id.*

The same is true here. The statutes underlying Defendant's torture charges, 18 U.S.C. §§ 2340, 2340A, do not enumerate a statute of limitations. Instead, the applicable limitations period is set forth in a different statute, 18 U.S.C. § 3286. That a different statute establishes the limitations period suggests that time is not an essential element of the torture counts, and the Superseding Indictment does not need to anticipate what functions as an affirmative defense.

[2] The Court notes that Paragraph 6 of the Superseding Indictment alleges that Defendant "inflicted severe beatings on the prisoners that created a foreseeable risk of serious bodily injury or death," and the torture counts incorporate this allegation by reference. [Doc. 22 at ¶ 6, 8, 10, 12]. Thus, the Superseding Indictment does contain language that tracks 18 U.S.C. § 3286(b), contrary to Defendant's argument.

Whether Defendant's alleged conduct "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person" is ultimately a question for the jury to decide. *Pham*, 2022 WL 993119, at *10. Defenses should only be resolved before trial "if trial on the facts surrounding the commission of the alleged offense would be of *no* assistance in determining the validity of the defense." *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976) (emphasis added) (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)). That is not the case here. To the contrary, whether Defendant committed torture could be closely intertwined with whether his conduct falls under Section 3286(b)'s no-limitation provision, so a trial on the alleged torture offenses would be of assistance in determining the validity of the statute of limitations defense.[3] If the evidence presented at trial fails to establish the prosecution's timeliness, however, Defendant may renew his statute of limitations defense in a Rule 29 motion.

1. Vagueness Challenge

Even if Section 3286(b)'s no limitations provision applies to his alleged conduct, Defendant contends that the provision is unconstitutionally vague. [Doc. 44 at 8–9]. Courts will invalidate a criminal statute on vagueness grounds "if it defines an offense in such a way that ordinary people cannot understand what is prohibited or if it encourages arbitrary or discriminatory enforcement." *United States v. Avant*, 907 F.2d 623, 625 (6th Cir. 1990) (citing *Kolender v. Lawson*, 461 U.S. 352, 355 (1983)). "Few statutes meet the void-for-vagueness threshold," however, and Section 3286(b) is not among the few. *United States v. Kettles*, 970 F.3d 637, 650 (6th Cir. 2020).

[3] As one example, acts specifically intended to inflict "severe physical pain" meet the statutory definition of torture. 18 U.S.C. § 2340(1). Meanwhile, an act that inflicts "extreme physical pain" qualifies as "serious bodily injury," which triggers 18 U.S.C. § 3286(b)'s no-limitation provision. Given the obvious similarities between "severe physical pain" and "extreme physical pain," the proof presented on Defendant's torture charges and his statute of limitations defense could overlap considerably.

Defendant's primary vagueness challenge concerns the Court's ability to evaluate Section 3286(b)'s triggering language—specifically, that the accused's conduct must create a foreseeable risk of serious bodily injury. Citing to the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015), Defendant claims that the Court cannot "meaningfully evaluate" the risk of serious bodily injury Section 3286(b) contemplates. [Doc. 44 at 8–9].

Johnson, of course, struck down the Armed Career Criminal Act's residual clause as vague. 576 U.S. at 597. That clause imposed heightened sentences for offenders with three or more prior convictions for a "violent felony," which was defined to include any felony "that involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 593. The problem with this definition, according to the Court, was that it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 597. This so-called categorical approach posed vagueness problems because "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *United States v. Davis*, 588 U.S. 445, 453 (2019).

Though unclear, Defendant appears to argue that Section 3286(b) impermissibly requires the Court to engage in a categorical approach and assess the risk of serious bodily injury the offense of torture creates in its imagined ordinary case. The Court disagrees. Section 3286(b)'s language and structure reflect a case-specific approach rather than a categorical approach. The case-specific approach, unlike the categorical approach, ignores the offense's imagined ordinary case and instead focuses on the defendant's specific conduct in committing the crime. *Id.* at 453–54. Why does this distinction matter? It matters because the case-specific approach avoids the vagueness issues the categorical approach poses. *Johnson*, 576 U.S. at 603–04 (explaining that "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct,"

meaning the defendant's specific conduct, do not present problems of vagueness because "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree" (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913))).

Neither the Supreme Court nor the Sixth Circuit has considered whether Section 3286(b) embodies the categorical or case-specific approach. Only the Southern District of New York appears to have addressed this question. Relying on the statute's language and structure, that court concluded that Section 3286(b) follows the case-specific approach. *Pham*, 2022 WL 993119, at *7–8. *Pham*'s reasoning is persuasive, and the Court will likewise find that Section 3286(b)'s language and structure reflect the case-specific approach.

Start with Section 3286(b)'s language. It states that no limitations period will apply "if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b). Two aspects of this language evince a case-specific approach. First is the provision's use of "the commission of such offense." *Id.* "Where that language appears in other statutes, the Supreme Court has concluded that Congress intended courts to conduct a case-specific analysis." *Pham*, 2022 WL 993119, at *7 (explaining that "the phrase 'an offense . . . committed' charged sentencers with considering non-elemental facts," such as the defendant's specific conduct when committing the offense (quoting *Mathis v. United States*, 579 U.S. 500, 511 (2016))). Second, Section 3286(b) uses the term "foreseeable." Questions of foreseeability are often fact-specific; they ask what consequences an individual should expect to flow from his particular conduct. *Id.* at *7, 9. The fact-intensive nature of any foreseeability inquiry further underscores Section 3286(b)'s adoption of a case-specific approach.

Section 3286's broader structure reinforces its case-specific approach. Recall that Section 3286(a) imposes an eight-year limitations period for any offense "listed in section

2332(b)(g)(5)(B)." 18 U.S.C. § 3286(a). "Section 3286(b) then identifies a subset of those offenses (the ones listed in 18 U.S.C. § 2332(b)(g)(5)(B)) and provides that if a further condition is satisfied (the creation of a foreseeable risk of death or serious bodily injury) then no statute of limitations applies." *Pham*, 2022 WL 993119, at *8. This setup, as the *Pham* court points out, "makes little sense in a categorical framework, under which only the elements of each offense, and not the particular facts, matter." *Id.* "If the inquiry were simply one of elements, there would be no reason to list the same § 2332b(g)(5)(B) offenses, with the same elements, under both subparts (a) and (b)." *Id.* Instead, what Section 3286(b) requires—for its no limitations provision to apply in lieu of subpart (a)'s eight-year timeframe—is an examination of the defendant's specific conduct in committing the offense to determine whether he created a foreseeable risk of death or serious bodily injury. This approach is very much a case-specific one.

Section 3286(b)'s case-specific approach dispenses of any vagueness problems. With that vagueness argument resolved, the Court turns to Defendant's next one. He points to various hypothetical scenarios, such as a Chinese police officer striking a Chinese protestor with a police baton. [Doc. 44 at 10]. That such conduct could qualify as serious bodily injury and forever subject an individual to prosecution does, in Defendant's view, confirm Section 3286(b)'s vagueness. The problem with Defendant's argument is that vagueness challenges "may involve consideration of hypothetical facts" only when the issues involved implicate First Amendment rights. *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001). In all other contexts, where First Amendment rights do not come into play, the defendant "bears the burden of establishing that the statute is vague as applied to his particular case, not merely that the statute could be construed as vague in some hypothetical situation." *Id.* (citing *Avant*, 907 F.2d at 625). Defendant's resort to hypothetical situations thus cannot cause the Court to invalidate Section 3286(b) as vague.

Though appearing separate from his vagueness-related arguments, Defendant's final challenge to Section 3286(b) pertains to its interplay with 18 U.S.C. § 2340, which defines torture. Section 2340(1) defines "torture" as an act "specifically intended to inflict severe physical or mental pain or suffering." 18 U.S.C. § 2340(1). Section 3286(b), meanwhile, allows for removal of the limitations period for any torture offense if its commission "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b). Defendant argues that less is required to prove a foreseeable risk of serious bodily injury than specific intent to inflict severe physical or mental pain, which means that no torture offense will be subject to a statute of limitations. [Doc. 44 at 8]. In other words, all torture offenses will trigger Section 3286(b)'s no limitations provision.

Defendant's argument misses the mark. For one, he cites no case law to suggest that Congress is unable to eliminate the limitations period for all variations of a torture offense. Thus, even if Section 3286(b)'s no limitations provision covers all torture offenses, no authority renders that scheme unlawful. If anything, the limited case law interpreting Section 3286(b) implies that this arrangement is permissible. The Eastern District of New York took no issue with applying Section 3286(b)'s no limitations provision to an attempted murder charge. *United States v. Mohamed*, 148 F. Supp. 3d 232, 236 (E.D.N.Y. 2015) (finding that Section 3286(b) applied to the defendant's attempted murder charge, where he fired shots at a military official). Every instance of attempted murder with a firearm will, as Section 3286(b) requires, create a foreseeable risk of death or serious bodily injury. This reality did not preclude the *Mohamed* court from applying Section 3286(b) to the defendant's attempted murder charge, and the same result is warranted here. Simply because Section 3286(b)'s triggering language may encompass all torture offenses does not mean it cannot be applied to remove the limitations period for Defendant's alleged acts.

When the Superseding Indictment's factual allegations are accepted as true, a jury could conclude that Defendant's alleged conduct is subject to no limitations period because it "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person." 18 U.S.C. § 3286(b). Because the application of Section 3286(b) would render this prosecution timely, and because Section 3286(b) is not unconstitutionally vague, Defendant's motion to dismiss based on the statute of limitations must be denied.

B. Jurisdictional and Due Process Challenges [Doc. 45]

Defendant moves to dismiss the torture counts for a second reason. He contends that the Torture Act, codified at 18 U.S.C. §§ 2340, 2340A, violates his due process rights. Defendant's primary due process complaint stems from the Torture Act's extraterritorial jurisdiction provision. In conferring extraterritorial jurisdiction, the Torture Act is unlike most criminal statutes, which generally limit their application to conduct occurring within the United States. *See RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 335 (2016) (citations omitted). The Torture Act is not so narrow in scope. It applies to an individual who commits torture "outside the United States" so long as he is later "present in the United States." 18 U.S.C. § 2340A(a), (b)(2).

Defendant never argues that this statutory text fails to cover his alleged conduct. Nor could he. Defendant allegedly committed acts of torture "outside the United States" in Bosnia, and he is now "present in the United States" as a resident of East Ridge, Tennessee. [Doc. 22 at ¶ 6–7]. These allegations place Defendant within the Torture Act's scope. The question that remains, however, is whether this assertion of extraterritorial jurisdiction impermissibly infringes on Defendant's due process rights.

Defendant answers this question in the affirmative. In his view, the Government may assert extraterritorial jurisdiction only when a sufficient nexus exists between the criminal conduct

alleged and the United States. [Doc. 45 at 4–5]. Because his alleged conduct occurred outside the United States and involved no United States citizens, Defendant insists that the requisite nexus does not exist in this case. [*Id.* at 5]. The Government takes a different view. It argues that satisfying the nexus test provides only one of the multiple ways in which an extraterritorial jurisdiction scheme can comport with due process requirements. [Doc. 63 at 7–8]. Some of the other ways an extraterritorial jurisdiction provision can satisfy due process guarantees, according to the Government, include when a case prosecutes a universally condemned crime or involves a statute that implements an international treaty. [*Id.*].

Not many cases address this interplay between extraterritorial jurisdiction and due process. One case that does is the Sixth Circuit's decision in *United States v. Iossifov*, 45 F.4th 899, 914 (6th Cir. 2022). *Iossifov* involved a Bulgarian defendant who had never entered the United States until he was extradited on charges for conspiring to launder money. *Id.* at 910, 914. The defendant raised a due process challenge to the money laundering statute, which confers extraterritorial jurisdiction over noncitizens when their "conduct occurs in part in the United States." *Id.* at 912, 914 (quoting 18 U.S.C. § 1956(f)). The Sixth Circuit rejected the defendant's due process challenge and relied on the significant evidence showing that his money laundering scheme "took place, at least in part, in the United States." *Id.* at 914. With some of his conduct tied to the United States, the defendant's prosecution "was not arbitrary or fundamentally unfair." *Id.*

Defendant points to *Iossifov* to suggest that the Sixth Circuit requires a nexus between the alleged conduct and the United States before extraterritorial jurisdiction may be exercised. The Court disagrees. True, the Sixth Circuit did cite cases that treat the nexus test as a due process component of extraterritorial jurisdiction. *Id.* (citing *United States v. Yousef*, 327 F.3d 56, 111 (2d Cir. 2003)). But the Sixth Circuit's reliance on those cases is unsurprising when considering the

language found in the money laundering statute at issue. In requiring a noncitizen defendant's conduct to occur "in part in the United States," the money laundering statute in effect imposed its own nexus test as a prerequisite to exercising extraterritorial jurisdiction. 18 U.S.C. § 1956(f). Some of the defendant's conduct had to be connected to the United States per the statute, so the preexisting nexus test provided a natural fit for the Sixth Circuit's due process analysis. The same is not true here. Unlike the money laundering statute, the Torture Act contains no language establishing something akin to a nexus test. It instead allows extraterritorial jurisdiction to be asserted merely when a noncitizen defendant "is present in the United States," irrespective of where his alleged conduct occurred. 18 U.S.C. § 2340A(b)(2). Because nothing in the Torture Act creates anything resembling a nexus requirement, *Iossifov* is distinguishable from this case.

Iossifov does not confine the Court to the nexus test for a second reason: nothing in the decision stands for that proposition. Nowhere in *Iossifov* does the Sixth Circuit state that the nexus test provides the sole means to determine whether an extraterritorial jurisdiction provision conforms with due process requirements. In fact, in addition to citing cases that apply the nexus test, the *Iossifov* court referenced cases that instead focus on broader inquiries of fundamental fairness and arbitrariness. *Iossifov*, 45 F.4th at 914 (citing *United States v. Murillo*, 826 F.3d 152, 156 (4th Cir. 2016)). And the court's ultimate conclusion was that the defendant's prosecution did not violate due process "because it was not arbitrary or fundamentally unfair." *Id.* Just because discussing nexus made sense in light of the money laundering statute's language does not mean *Iossifov* deemed a sufficient nexus to be an absolute prerequisite to the proper assertion of extraterritorial jurisdiction.

Iossifov may not be directly on point, but the District of Colorado's decision in *United States v. Correa* certainly is. No. 20-cr-148, 2024 WL 839360 (D. Colo. Feb. 28, 2024). That case

addressed the same issue the Court confronts here, which is whether the Torture Act's extraterritorial jurisdiction provision violates the Due Process Clause. *Id.* at *2. In answering that question, the *Correa* court acknowledged that "no case, persuasive or precedential," had done so before. *Id.* Yet the court ultimately decided, after an exhaustive survey of the relevant case law, that the Torture Act's extraterritorial jurisdiction scheme did not violate the defendant's due process rights. *Id.* at *7, 9, 11. The *Correa* court adopted the same position the Government advances in this case—namely, that extraterritorial jurisdiction may be exercised when the underlying offense is universally condemned or is criminalized pursuant to a statute that implements an international treaty, not just when there is a sufficient nexus between the defendant and the United States. *Id.* at *7, 9, 10. For the following reasons, the Court finds *Correa* persuasive and will likewise hold that the Torture Act's extraterritorial application to Defendant does not run afoul of his due process rights.

Correa began with examining cases that purportedly require a showing of nexus before extraterritorial jurisdiction can be exercised. *Id.* at *3. The Ninth Circuit, for instance, held that "there must be a sufficient nexus between the defendant and the United States" before a criminal statute may be applied extraterritorially. *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). The Second Circuit cited *Davis* approvingly and applied the same nexus test to assess the permissibility of extraterritorial jurisdiction. *Yousef*, 327 F.3d at 111. The holdings in these cases regarding the nexus test have not always been viewed in such absolute terms. Indeed, in a later published decision, the Ninth Circuit refuted any notion that *Davis* rendered a sufficient nexus an absolute prerequisite to the assertion of extraterritorial jurisdiction. *United States v. Shi*, 525 F.3d 709, 723–24 (9th Cir. 2008). It sufficed, for purposes of due process, that the charged crime was universally condemned and formed part of a statute enacted to implement a treaty. *Id.*

Shi is not alone in its reasoning. The Third Circuit and D.C. Circuit echo *Shi* in deeming these non-nexus grounds sufficient to support the exercise of extraterritorial jurisdiction. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (declining to follow *Davis* and holding that statutes may be applied extraterritorially when the charged conduct is "condemned universally by law-abiding nations"); *United States v. Ali*, 718 F.3d 929, 944–45 (D.C. Cir. 2013) (holding that due process did not require a sufficient nexus because the charged conduct's underlying statute implements an international treaty, which provides "global notice that certain generally condemned acts are subject to prosecution by any party to the treaty").

These cases demonstrate that a sufficient nexus is not always required before extraterritorial jurisdiction may be asserted. *Davis* and its progeny do not alter this conclusion. Those cases, unlike *Shi*, *Martinez-Hidalgo*, and *Ali*, "had no reason or occasion to consider whether there may be other means to satisfy due process." *Correa*, 2024 WL 839360, at *3. Consider *Yousef* as an example. That case applied *Davis*'s nexus test, but it involved facts that rendered the nexus test naturally applicable. *Yousef*, 327 F.3d at 79, 111–12. The defendants conspired to bomb numerous planes bound for the United States, so their conduct clearly entailed "an effort to inflict injury" on the United States. *Id.* at 112. In a case where a sufficient nexus was so obviously established, the court's focus on the nexus test was unsurprising. *Id.* Yet "there is no indication" that the *Yousef* court "intended to hold that nexus was the only means" to ensure an extraterritorial prosecution comports with due process. *Correa*, 2024 WL 839360, at *3.

The upshot of the case law is this: of the circuit courts to address due process challenges to extraterritorial jurisdiction provisions, they have either "(1) found nexus and stopped their analysis there" or "(2) concluded that universal condemnation or treaty implementation can also satisfy due process." *Id.* at *6. Because no binding authority deems a sufficient nexus indispensable to the

assertion of extraterritorial jurisdiction, the Court will not solely consider issues of nexus to resolve Defendant's due process challenge to the Torture Act. Instead, the Court will also consider, just as other courts have, the underlying offense's condemnation status and its relationship with international treaties to determine whether extraterritorial application of the Torture Act violates Defendant's due process rights.

1. Torture's Universal Condemnation

Multiple courts have held that a criminal statute's extraterritorial application conforms with due process when the underlying offense is universally condemned. The Third Circuit reached this conclusion in *United States v. Martinez-Hidalgo*, where the noncitizen defendant was charged with drug trafficking in international waters. 993 F.2d at 366–67. Because "the trafficking of narcotics is condemned universally by law-abiding nations," the defendant's extraterritorial prosecution did not offend due process, and no showing of a nexus was required. *Id.* at 372. The Fourth Circuit charted the same course with a noncitizen defendant who was charged with kidnapping and murdering a DEA special agent. *Murillo*, 826 F.3d at 153. Even though the kidnapping and murder occurred in Colombia, the defendant could be prosecuted in the United States because his offenses were "self-evidently criminal." *Id.* at 157. The inherently criminal nature of kidnapping and murder meant that the defendant could "have foreseen being haled into a United States court for the offenses he committed in Colombia." *Id.*

Defendant is charged with torture. Like drug trafficking, kidnapping, and murder, torture is universally condemned and self-evidently criminal. The Supreme Court has characterized torture as "repugnant to all civilized peoples," and torture is "illegal under the law of virtually every country in the world." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 262 (2018); *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005). These characterizations led the *Correa* court to

conclude that the defendant's torture prosecution satisfied due process, and the Court will follow suit in this case. *Correa*, 2024 WL 839360, at *9–10. That Defendant's alleged conduct is universally condemned "puts him on notice that his acts will be prosecuted by any state where he is found," which means that his prosecution under the Torture Act does not violate the Due Process Clause. *Shi*, 525 F.3d at 723 (citing *Martinez-Hidalgo*, 993 F.2d at 1056).

2. Treaty Implementation

Considering torture's universally condemned status, it comes as no surprise that an international treaty—the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture")—aims to outlaw torture worldwide. The United States signed on to the Convention Against Torture, and it later enacted the Torture Act to codify its obligations under the treaty. *Correa*, 2024 WL 839360, at *6. Thus, Defendant faces prosecution under a statute designed to implement an international treaty. When confronting these very circumstances in the context of other statutes, courts have decided that extraterritorial prosecutions do not infringe on due process rights.

Shi provides one example of a court reaching this conclusion. The defendant in *Shi* was charged with violence against maritime navigation after he fatally stabbed two fellow crewmembers while sailing in international waters. *Shi*, 525 F.3d at 718–19. Congress enacted the underlying statute, 18 U.S.C. § 2280, to codify the United States' obligations under the Maritime Safety Convention. *Id.* at 719. That treaty, and Section 2280 by extension, require the United States "to extradite or prosecute those who commit acts of maritime violence." *Id.* at 720. The defendant's commission of the offenses outside the United States posed no due process problems because "§ 2280 implements the Maritime Safety Convention, which expressly provides foreign offenders with notice that their conduct will be prosecuted by any state signatory." *Id.* at 723.

The D.C. Circuit likewise deemed a criminal statute's implementation of an international treaty sufficient to justify extraterritorial prosecution. *Ali*, 718 F.3d at 944. In that case, the defendant was a member of a group that seized control of a Danish-owned ship. *Id.* at 933. The defendant boarded the ship off the coast of Somalia and assumed the role of interpreter to facilitate ransom negotiations. *Id.* More than one year after receiving ransom payments, the defendant traveled to the United States, where he was indicted and arrested on charges of conspiracy to commit hostage taking. *Id.*

The defendant argued that extraterritorial application of the hostage taking statute violated his due process rights. *Id.* at 943. In rejecting this argument, the *Ali* court emphasized that the hostage taking statute codifies the United States' treaty obligations under the International Convention Against the Taking of Hostages. *Id.* And that international treaty, like the Maritime Safety Convention in *Shi*, provides "global notice that certain generally condemned acts are subject to prosecution by any party to the treaty," so the defendant's extraterritorial prosecution did not raise any due process concerns. *Id.* at 944. The D.C. Circuit made this holding clear when it stated that "the Due Process Clause demands no more." *Id.*

The dispositive facts in this case are identical to those in *Shi* and *Ali*. Indeed, like the violence against maritime navigation and hostage taking statutes in those cases, the Torture Act also implements an international treaty: the Convention Against Torture. And like the treaties implicated in *Shi* and *Ali*, the Convention Against Torture "requires any signatory state to extradite or prosecute offenders, regardless of where the offender's act occurred." *Correa*, 2024 WL 839360, at *7 (comparing language found in the Convention Against Torture and the Maritime Safety Convention). The Convention Against Torture's existence and design thus provided Defendant "with all the notice due process requires that he could be prosecuted in this country."

Shi, 525 F.3d at 724. Defendant's notice is perhaps further buttressed by the fact that Bosnia and the United States joined the Convention Against Torture as parties in 1993 and 1994 respectively, which came before his alleged acts of torture occurred. [Doc. 63 at 17, 19]; *see also* Office of the United Nations High Commissioner for Human Rights, *Ratification Status for CAT – Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, https://perma.cc/9CAW-76ZL.[4] Ultimately, because the Torture Act implements an international treaty, its extraterritorial application to Defendant does not violate his due process rights.

3. Nexus

Torture's universally condemned status, along with the Torture Act's implementation of the Convention Against Torture, suffice to bring Defendant's extraterritorial prosecution into compliance with due process requirements. The precedent on these issues is far from bountiful, however, so the Court will also consider whether there is "a sufficient nexus between the defendant and the United States." *Davis*, 905 F.2d at 248–49. Defendant maintains that no nexus exists because his alleged criminal conduct occurred entirely in Bosnia and in no way targeted the United States. [Doc. 45 at 5]. The Government, on the other hand, contends that Defendant's history of voluntary contacts with the United States—including his residence in Tennessee and status as a naturalized citizen—establish the requisite nexus. [Doc. 63 at 22].

Some courts have focused on the aim of the defendant's alleged conduct when applying the nexus test. *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir. 2011) (noting that "a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States

[4] Courts that have "previously considered whether the existence of a global treaty satisfies Constitutional due process requirements have not held that such satisfaction relies on the membership of the noncitizen's home state in the international treaty or convention." *Correa*, 2024 WL 839360, at *7. Still, the fact that Bosnia and the United States were already signatories to the Convention Against Torture could render the evidence of Defendant's notice stronger than that in *Correa*, where the defendant's home country did not sign on to the Convention Against Torture until twelve years after his alleged acts of torture occurred. *Id.*

or to U.S. citizens or interests"). Other courts have taken a broader approach, relying instead on whether the defendant's connections to the United States establish the requisite nexus to support an extraterritorial prosecution. *Correa*, 2024 WL 839360, at *10–11. *Correa* proves instructive on this point. The defendant in *Correa* allegedly committed acts of torture in The Gambia. *Id.* at *1. He argued, just as Defendant does here, that no nexus existed because his alleged acts occurred entirely outside the United States. *Id.* at *10. The *Correa* court rejected the argument and emphasized the defendant's connections with the United States that came after his alleged acts of torture: he allegedly traveled to the United States on a visa, purposefully overstayed his visa, and sought to build a life in the country. *Id.* at *1, 11. These voluntary contacts were "undeniable" and formed a sufficient nexus between the defendant and the United States. *Id.*

The Eleventh Circuit arrived at a similar conclusion in *United States v. Baston*, 818 F.3d 651 (11th Cir. 2016). After a jury convicted the noncitizen defendant of sex trafficking, the district court refused to award restitution to a victim because she was trafficked in Australia. *Id.* at 665–66. The Government appealed, arguing that 18 U.S.C. § 1596(a)(2) confers extraterritorial jurisdiction over noncitizen sex traffickers so long as they are "present in the United States." *Id.* at 666 (quoting 18 U.S.C. § 1596(a)(2)). The defendant stressed that extraterritorial application of the law to his conduct in Australia would violate due process, but the Eleventh Circuit disagreed and vacated the district court's restitution order. *Id.* at 669–71. The prosecution was constitutionally sound because the defendant resided in Florida, used a United States passport to facilitate his criminal activities, and was arrested while in New York. *Id.* at 669–70.

Both *Correa* and *Baston* support a finding of nexus in this case. Like the defendants in those cases, Defendant initiated voluntary contacts with the United States. He traveled to the United States after allegedly committing acts of torture, just as the defendant in *Correa* did, and

sought to build a life in the country as a resident of East Ridge, Tennessee. [Doc. 22 at ¶ 7]. Defendant even became a naturalized citizen of the United States in 2007, and similar to the defendant in *Baston*, he made use of a U.S. passport. [*Id.* at 5–6; Doc. 63 at 4]. Defendant was likewise arrested while present in the United States. Taken together, Defendant's years' worth of voluntary contacts with the United States show that he "used this country as a home base and took advantage of its laws; he cannot now complain about being subjected to those laws." *Baston*, 818 F.3d at 670. His actions establish a sufficient nexus with the United States such that this extraterritorial prosecution does not flout the Due Process Clause.

4. Miscellaneous Due Process Complaints

In addition to challenging the extraterritorial nature of his prosecution, Defendant asserts due process complaints that implicate the makeup of the jury and limitations on compulsory process. [Doc. 45 at 5–6]. With his alleged criminal conduct having occurred in Bosnia, Defendant contends that he will not have a jury of his peers, and the Court will be unable to subpoena necessary witnesses from Bosnia. These impediments, according to Defendant, will deprive him of a fair trial. The Court disagrees. Neither complaint warrants dismissal of the Superseding Indictment in this case.

Defendant invokes the Sixth Amendment's guarantee that all those criminally accused shall enjoy the right to "an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. That will not happen in this case, Defendant posits, because the jury will consist of Eastern District of Tennessee residents and not include Bosnians. This reading of the Sixth Amendment would render every extraterritorial prosecution unconstitutional. Extraterritorial conduct by definition occurs outside the United States, so no judicial district could produce a jury pool in conformance with Defendant's standard. That result cannot stand.

Another constitutional provision undermines Defendant's argument: Article III, Section 2, Clause 3. When a crime is "not committed within any State, the Trial shall be at such Place or Places as Congress may by Law have directed." U.S. Const. art. III, § 2, cl. 3. Congress has offered specific direction in 18 U.S.C. § 3238. That statute provides that for crimes committed "out of the jurisdiction of any particular State or district," the trial "shall be in the district in which the offender . . . is arrested or is first brought." 18 U.S.C. § 3238. Courts have cited to this statute when addressing questions of venue, and Defendant points to no binding authority that calls the statute's constitutionality into question. *See, e.g.*, *United States v. Holmes*, 670 F.3d 586, 594 (4th Cir. 2012) (explaining that Section 3238's text "establishes that venue for extraterritorial offenses 'shall be in the district in which the offender . . . is arrested or is first brought'" (quoting 18 U.S.C. § 3238)). Defendant was arrested in East Ridge, Tennessee, so venue may lie in the Eastern District of Tennessee, and his complaints regarding the jury's composition lack merit. *United States v. Sead Miljkovic*, No. 1:23-mj-155, Doc. 7 (E.D. Tenn. June 16, 2023).

Defendant's argument regarding compulsory process fares no better. He asserts that the Court's inability to subpoena witnesses from Bosnia violates his Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. To prove a violation of the Sixth Amendment's Compulsory Process Clause, the Sixth Circuit requires defendants to establish "a reasonable likelihood" that the absent witness's testimony "could have affected the judgment of the trier of fact." *United States v. Culp*, 828 F. App'x 298, 300 (6th Cir. 2020) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982)). The post-factum nature of this inquiry suggests that it should occur after the trial, not before. *United States v. Lang*, 2020 WL 759117, No. 2015-0013, at *3–4 (D.V.I. Feb. 14, 2020) (denying pretrial motion to dismiss asserting compulsory process violations because the trial had not yet taken place, which

meant the defendant had not yet been deprived of the opportunity to present allegedly favorable evidence). Defendant's trial is more than two months away, and the Court cannot predict which witnesses will appear to testify. At this stage, it would be inappropriate for the Court to dismiss the Superseding Indictment on these grounds, even assuming a compulsory process violation could be established.

That leads to another problem for Defendant: the weight of authority reflects that he in fact cannot establish a violation of his right to compulsory process. Defendant correctly observes that the Court cannot compel the attendance of witnesses who are noncitizens and located in foreign countries. 28 U.S.C. § 1783 (providing that for witnesses located in foreign countries, a court may subpoena only those who are also "a national or resident of the United States"). "It is well established, however, that convictions are not unconstitutional under the Sixth Amendment even though the United States courts lack power to subpoena witnesses, (other than American citizens) from foreign countries." *United States v. Zabaneh*, 837 F.2d 1249, 1259–60 (5th Cir. 1988). In other words, the right to compulsory process "does not ordinarily extend beyond the boundaries of the United States." *Id.* at 1260.

The Fifth Circuit is not alone in so holding. The Second and Fourth Circuits have likewise concluded that a defendant cannot allege a compulsory process violation simply because the trial court cannot subpoena foreign nationals located abroad. *United States v. Greco*, 298 F.2d 247, 251 (2d Cir. 1962) (noting that "the Sixth Amendment can give the right to compulsory process only where it is within the power of the federal government to provide it"); *United States v. Beyle*, 782 F.3d 159, 170 (4th Cir. 2015) (explaining that a court's inability "to secure the appearance of a foreign national located outside the United States" does not establish a compulsory process violation). And district courts in the Sixth Circuit have not departed from this widely held view.

United States v. Skaggs, 327 F.R.D. 165, 170, 172 (S.D. Ohio 2018) (holding that even though witnesses in Germany were beyond the court's subpoena power, "their absence at trial does not implicate the Sixth Amendment"); *United States v. Ologeanu*, No. 5:18-cr-81, 2020 WL 1676802, at *1, 3 (E.D. Ky. Apr. 4, 2020) (denying the defendant's pretrial motion to dismiss because the court's inability to procure the attendance of witnesses located abroad did not result in a compulsory process violation).

Defendant's case is no different. Certain witnesses may be located in Bosnia, but that reality does not trigger a compulsory process violation, even if those witnesses "could provide testimony that is material and favorable to the defendant." *United States v. Korogodsky*, 4 F. Supp. 2d 262, 268 (S.D.N.Y. 1998) (citations omitted). With no compulsory process violation present, Defendant's request for dismissal on that ground must be denied.

C. Vagueness Challenge [Doc. 46]

Defendant's third and final motion to dismiss contends that the Torture Act is void for vagueness. "A statute is unconstitutionally vague if it does not give a 'person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Norton v. Ashcroft*, 298 F.3d 547, 553 (6th Cir. 2002) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). But "the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions," so "no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). Because the Torture Act identifies the conduct it proscribes with a reasonable degree of certainty, Defendant's vagueness challenge fails.

Only one case has considered a vagueness challenge to the Torture Act. In that case, the indictment charged the defendant with committing several acts of torture in Liberia, which

included burning the alleged victim with a hot iron and scalding water. *United States v. Emmanuel*, No. 06-20758, 2007 WL 2002452, at *4, 15 (S.D. Fla. July 5, 2007). The defendant argued that the Torture Act's various terms were impermissibly vague, but the Southern District of Florida disagreed. *Id.* at *14–15. The court noted that the indictment's allegations, when "coupled with the statutory language contained in the Torture Statute, certainly advise the ordinary person of prohibited conduct with sufficient definiteness." *Id.* at *15. In particular, the Torture Act's specific intent requirement diminished any vagueness concerns. *Id.* The Eleventh Circuit did not address this aspect of the district court's holding on appeal, but it did note in its decision affirming the defendant's conviction that the Torture Act "contains a specific and unambiguous definition of torture." *United States v. Belfast*, 611 F.3d 783, 823 (11th Cir. 2010).[5]

The Court will follow *Emmanuel* and conclude that the Torture Act is not void for vagueness as applied to Defendant. Both the Superseding Indictment's allegations and the Torture Act's language support this conclusion. Start with the allegations against Defendant. He allegedly inflicted "severe" and "sustained" beatings with various blunt instruments. [Doc. 22 at ¶ 6]. These beatings, in turn, caused Defendant's alleged victims to "suffer serious injuries," lose consciousness, and think they were going to die. [*Id.* at ¶ 11, 13]. No vagueness problems arise so long as "reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Defendant's actions, which he allegedly took with specific intent, clear this threshold. Reasonable people would know that perpetrating severe beatings that result in serious injuries, lost consciousness, and thoughts of death could risk violating the Torture Act, which expressly prohibits acts specifically intended to inflict severe physical pain or suffering. 18 U.S.C. § 2340(1); *see Emmanuel*, 2007 WL 2002452, at *15.

[5] The defendant in *Emmanuel* was known as both Roy Belfast and Charles Emmanuel, which explains the different case styles at the district and appellate court levels. *Belfast*, 611 F.3d at 793.

The Torture Act's language similarly counsels against a finding of vagueness for two reasons. First, to be convicted under the Torture Act, a defendant must have "specifically intended" to engage in the challenged conduct. 18 U.S.C. § 2340(1). This specific intent requirement "significantly weakens any argument" that the Torture Act is unconstitutionally vague. *United States v. Anderson*, 605 F.3d 404, 413 (6th Cir. 2010). Why is this the case? It's because an individual "who does act with such specific intent is aware that what he does is precisely that which the statute forbids." *Screws v. United States*, 325 U.S. 91, 104 (1945).

Second, the Torture Act is not void for vagueness because it is not "so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct." *Anderson*, 605 F.3d at 412–13 (quoting *United States v. Baker*, 197 F.3d 211, 219 (6th Cir. 1999)). The Torture Act does not speak in complex scientific terms. *Cf. United States v. Caseer*, 399 F.3d 828, 836 (6th Cir. 2005) (noting that a regulation used "an obscure scientific term" when it referred to the controlled substance as "cathinone" without any reference to its street name of "khat"). Though some of the Torture Act's terms, such as "severe," are left undefined, its terms are comparatively "pedestrian and clear." *United States v. Lopez*, 929 F.3d 783, 785 (6th Cir. 2019) (explaining that despite the statute's failure to define "illegally or unlawfully," no vagueness issue existed because those terms "are pedestrian and clear" and have straightforward dictionary definitions).

Terms like "severe" may not be as intuitive as "illegally or unlawfully," but it is telling that "severe" is used to define torture within a Tenth Circuit pattern jury instruction. 10th Cir. Pattern Crim. Jury Instruction 3.08.6 (defining torture to include "severe mental as well as physical abuse" when applying torture as an aggravating factor under the death penalty statute). And the Fifth Circuit approved a district court's instruction, also in the death penalty context, that defined torture to require the infliction of "severe mental or physical pain or suffering." *United States v. Jones*,

132 F.3d 232, 249–50 n.12 (5th Cir. 1998) (holding that the district court's instruction "gave the jury an aggravating factor with a 'common-sense core meaning' that they were capable of understanding," which eliminated any vagueness issues). That these jury instructions borrow language directly from the Torture Act to define torture suggests that the law does not "trap the innocent" with impermissibly vague and overly obscure terms. *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995) (quoting *Grayned*, 408 U.S. at 108).

Internal memorandums from the Department of Justice do not change this conclusion. Defendant relies on two Department of Justice memorandums to provide evidence of the Torture Act's vagueness. [Doc. 46 at 4–8]. Those memorandums, Defendant emphasizes, offer competing views as to what proof of torture requires. [*Id.*]. If not even the Department of Justice can agree on what constitutes torture, Defendant posits that the Torture Act is unconstitutionally vague. Sixth Circuit precedent forecloses Defendant's argument. Vagueness challenges focus on whether Congress, not the executive branch, has crafted a statute with sufficiently definite terms. *Lopez*, 929 F.3d at 785. How the executive branch interprets a statute does not bear on the vagueness analysis. *Id.* at 787 (rejecting argument that the Department of Homeland Security's answers to "Frequently Asked Questions" about a statute rendered it vague when its text was clear). Thus, the Department of Justice memorandums Defendant cites do nothing to establish the Torture Act's vagueness.

In his final argument regarding vagueness, Defendant endeavors to distinguish *Emmanuel*. [Doc. 46 at 10]. He appears to emphasize that the defendant in *Emmanuel* was born in the United States. [*Id.*]. The *Emmanuel* court did highlight that the Torture Act, "enacted to fulfill the United States' treaty obligations with most of the countries of the world, certainly put the Defendant, *a person born in the United States*, on notice of conduct prohibited not only in this country, but in

much of the civilized world." *Emmanuel*, 2007 WL 2002452, at *15 (emphasis added). The Court cannot view this fact as essential to the *Emmanuel* court's conclusion that the Torture Act was not void for vagueness. If the defendant's birth in the United States were dispositive, then presumably all individuals born elsewhere could raise a successful vagueness challenge to any criminal statute. What seemed to matter far more to the *Emmanuel* court was that the Torture Act's language and the indictment's allegations were sufficiently definite to provide the defendant with adequate notice of the prohibited conduct. *Id.*[6] Those factors were what avoided any vagueness concerns, not the mere fact that the defendant was born in the United States.

IV. CONCLUSION

None of Defendant's arguments regarding the statute of limitations, due process, and vagueness warrant pretrial dismissal of the Superseding Indictment's torture counts. Accordingly, Defendant's motions to dismiss [Docs. 44–46] are **DENIED**.

SO ORDERED.

/s/ Charles E. Atchley, Jr.
CHARLES E. ATCHLEY, JR.
UNITED STATES DISTRICT JUDGE

[6] True, the *Emmanuel* court did mention the Torture Act's implementation of a treaty as part of its vagueness analysis. *Emmanuel*, 2007 WL 20072452, at *15. The Court already attached significance to the Convention Against Torture when addressing Defendant's general due process challenge, but the Court remains unsure what role, if any, the treaty plays in a vagueness analysis. After all, questions of vagueness focus on whether the criminal statute defines the offense with sufficient definiteness, and whether a statute was enacted to implement a treaty does not implicate the statute's textual clarity.