IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

FILED UNDER SEAL

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO.: 2:15-CR-472
	)	
DYLANN STORM ROOF	)	

MOTION TO PRECLUDE TESTIMONY OR TO PERMIT REASONABLE CROSS-EXAMINATION AND RESPONSIVE EVIDENCE

The defendant, through counsel, moves to preclude the proposed summary testimony of Special Agent Joseph Hamski, or in the alternative, to permit reasonable cross-examination and responsive evidence to this witness. The government intends to use Mr. Hamski to tie together its case by presenting a timeline of the defendant's activity leading up to the offense. The Court's order in Dkt. No. 793 suggests that, although the government will have an opportunity through Mr. Hamski to present – again – its contention that the defendant is simply a cold, calculating killer whose every action pointed inexorably toward the Emanuel AME Church attack, the defense will be precluded from challenging this presentation or placing the defendant's actions in their proper context.[1]

[1] We leave for another day the Court's characterization of our cross-examination of Ms. Sanders, other than to note our disagreement with it on factual and legal grounds. We believe the Court's account in Dkt. No. 793 (at pp. 4-5) contributes further to the need for remedial measures discussed in our filing at Dkt. No. 789.

We do not intend, as the Court has incorrectly assumed, to cross-examine or introduce evidence regarding "the defendant's childhood." Nor do we wish to engage any "far-ranging discussion of his life history and mental health."[2] Rather, we seek – and have sought so far – only to address aspects of the defendant's state of mind and personal characteristics that bear on the intent elements of the offenses charged, and to respond to the government's evidence and argument that relate to these elements. To date, the government has introduced evidence covering the period from the defendant's self-proclaimed racial awakening around the time of the Trayvon Martin verdict on July 13, 2013, through the federal government's belated rejection of his application to purchase a firearm on June 29, 2015. We seek simply to address factors in the defendant's life during those two years that bear on the *government's* characterizations of his behavior and affect as it relates his intent to commit the charged crimes.[3] The Court's failure to permit this violates the rules of evidence and the Fifth, Sixth, and Eighth Amendments to the United States Constitution.

ARGUMENT

We observe that the Court has cited the same case law in its order that we cited in our motion. Thus, we believe we are on firm ground in asserting the relevance of the

[2] Nor do we seek to challenge the voluntariness of the confession. Our point is that the government's characterization of the defendant during the confession is inaccurate. Specifically, we hope to establish that the government's characterization – that he was "calm" or "showing no real emotion" – is an unreliable guide for the jury's decision regarding intent.

[3] We do not seek to establish a "lack of volitional control," nor is this required to rebut an intent element.

cross-examination we seek to conduct and the evidence we seek to admit.[4] The key points of disagreement appear to be when rebuttal is permitted and what increment of relevant evidence is admissible. The Court's view seems to be that rebuttal is permitted only when the defendant makes a full challenge to the charges and if the proffered questions or evidence amount to a complete refutation of an element of an offense. We are aware of no precedent in this regard, and the Court's order cites none. Relevant evidence under Fed. R. Evid. 401 is defined as evidence that "has *any* tendency to make a fact [of consequence to the action] more or less probable than it would be without the evidence." We seek to ask questions about, and offer proof of, facts that tend to make the formation of specific intent less probable.

It is the essential function of the defense to put the government to its proof. If the defense questioning or evidence – in combination – creates a reasonable doubt, that is sufficient to produce an acquittal. No individual question or exhibit need accomplish this on its own. More to the point here, as the government noted in its opening statement,

[4] *United States v. Worrell*, 313 F.3d 867 (2002), for instance, appears to authorize lay witness testimony about a defendant's mental state on the issue of intent. *See* 313 F.3d at 872 ("However, the district court did not prohibit Worrell, who testified in his own defense, from telling the jury that he suffered from 'bipolar disorder and inter[mittent] explosive disorder,' J.A. 254, that when he does not take his medication, he does not 'really think about what [he is] doing before [he does] it,' J.A. 255, and that, prior to writing the first letter to Theresa, he had been taken off of his medication. In fact, Worrell's attorney emphasized this point during his closing argument, suggesting to the jury that Worrell's 'case would not be in front of you if it were not for the fact that, as Mr. Worrell testified, that he was taken off of his medication' and that 'there were no letters submitted to you that were threatening while he was on his medication.'").

"we who labor here seek only the truth." That truth includes any information that may bear on the defendant's state of mind as it pertains to intent.[5]

To the extent that this aspect of the litigation presents – as the Court opined – a difficult needle to thread, the Court should err on the side of permitting the proffered questioning and testimony. The defendant's constitutional rights to due process, to present a defense, to challenge the government's case and cross-examine its witnesses, and to a fair and reliable proceeding[6] outweigh possible government concerns under Fed. R. Evid. 403. In this regard, the jury is presumed to follow the Court's instructions, and will undoubtedly make a reasoned determination of the defendant's guilt based on the evidence. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Francisco*, 35 F.3d 116, 119 (4th Cir. 1994).[7]

[5] We note here the important difference between insanity, competency, and mental state, which the Court appears to conflate. Insanity involves a claim that the defendant is not responsible for his actions because of a psychiatric episode. Competency involves a claim that the defendant cannot understand the proceedings or assist his counsel. Intent involves specific states of mind, such as negligence, recklessness, and malice aforethought. A defendant may be sane, competent and still unable to form, or simply not have formed, the intent required under a particular statute.

[6] It bears emphasizing here that much of the government's evidence in this phase of the trial will be considered at the sentencing phase, as well. It creates imbalance and unfairness if the government is permitted to introduce that evidence totally unrebutted, when the defense is prepared to offer relevant, admissible evidence bearing on elements of the offenses. *See also* Dkt. No. 789 at 5 n.2.

[7] The questions we intend to ask, and the evidence we seek to admit, are neither inflammatory nor prejudicial. They are rather mundane, though they bear on issues of great importance in the case.

A. Mr. Hamski's Summary Exhibit

Mr. Hamski's summary exhibit, which we understand to be an outline of his testimony, covers virtually all aspects of the guilt-phase case. We believe he will discuss the defendant's internet research about black-on-white crime, his internet and phone research about potential targets, his visits to various sites of significance in South Carolina, his photographs and videos, the GPS evidence reflecting his travel, his financial and phone records, his purchases in preparation for the offense, and his statements about it – all over a two-year period, beginning in 2013 and culminating shortly after the shootings. The exhibit omits, however, information related to the defendant's state of mind and personal characteristics that the government collected, and which we believe bears on his state of mind at the time of the crime and on the characterizations made by the government about him in relation to the crime. Through our cross-examination, we seek to provide that information.

B. Proposed Cross-Examination of Mr. Hamski

We propose to ask Mr. Hamski about the following subjects, all of which were uncovered during the government's own investigation of the crime, and which we submit would have been included in any unbiased and fairly-constructed summary exhibit.

1. The defendant's withdrawal from society and extreme social isolation (2013-15). This addresses the defendant's demeanor when interacting with others, including the survivor witnesses and the agents who took his confession. It also addresses intent, including "reckless and wanton" conduct, and other aspects that rely on a defendant's perception.

2. The defendant's Googling of "black on white crime" in response to the Trayvon Martin case (2013). This is res gestae, as it explains the genesis of the offense. It also bears on intent and the "because of" element of the hate crimes counts.
3. The defendant's well-documented preoccupation with imaginary or exaggerated health concerns, including lymphatic cancer, a thyroid disorder, and Hashimoto's disease (2015). This addresses the defendant's ability to form intent, because it demonstrates that his anxieties, motivations and decision-making are both atypical and irrational.
4. The defendant's inability to sustain long-term employment (2015). This addresses intent, especially premeditation/deliberation.
5. The defendant's manifestation of incapacitating depression in an anonymous email exchange with a retired psychologist, Dr. Thom Hiers. This addresses both the defendant's demeanor and intent, and in particular his supposed premeditation and deliberation at a key point in Mr. Hamski's timeline – the defendant's trips to Charleston in late February, 2015.
6. The defendant's previous arrests for possession of a Schedule III narcotic, his involvement with drugs, and his possession of other firearms-related gear (February-April, 2015). These address intent, because they illustrate how the defendant would have understood the law and consequences. They also reflect on his demeanor.

7. The defendant's sudden efforts to reach out to former childhood acquaintances through social media (May 2015). These address intent, because they show his desperation and tenuous connection to reality. They also address demeanor, because they show his social awkwardness and lack of awareness of how others are likely to perceive him.
8. The defendant's financial condition and homelessness (May 2015). This addresses intent, because it reflects the defendant's inability to cope with a 21-year-old adult's most basic life tasks.
9. The defendant's own statements that his life was "horrible" and "falling apart" (May 2015). This addresses both the defendant's demeanor and intent, particularly premeditation/deliberation.

We realize that the Court will have to evaluate the proposed testimony in light of Mr. Hamski's direct testimony. We urge the Court to consider this background in doing so. We are also prepared to make a more detailed *ex parte* proffer, should that be of assistance.

C. Defense Evidence

The defense may present the following witnesses in its case. In light of the Court's order in Dkt. No. 793, we now request that the Court rule on the admissibility of these witnesses' testimony. We also request that the Court address the admissibility of this evidence separately from the proposed cross-examination of Mr. Hamski, as these present somewhat different issues which should not be conflated.

1. **James Grayson Hicks**

Mr. Hicks would testify that he was previously employed as a Personal Banker at First Citizens Bank in downtown Columbia, SC. He had at least three encounters with the defendant as a customer of the bank where Mr. Hicks worked. During the these encounters, Mr. Hicks noticed unusual behavior, confusion about simple questions, and that the defendant signed his name very slowly and printed his name in block letters, making the signature look like it was written by a child. This addresses the defendant's demeanor and his ability to form the required specific intent necessary for the charged offenses.

2. **Thomas Hiers, Ph.D.**

Dr. Hiers would testify that he is a retired child psychologist. He received his Ph.D. from the University of South Carolina and served as the Executive Director of the Charleston/Dorchester Community Mental Health Center until his retirement. In February of 2015, Dr. Hiers saw a post on Craigslist by a young man wanting someone to go to Charleston with him for a historical tour. The ad said "No Jews, queers, or n_____s." The ad included a photograph of the young man, which allowed Dr. Hiers to later identify the person placing the ad as Dylann Roof.

Being taken aback by the blunt message, Dr. Hiers attempted to reach out to the defendant through Craigslist. The defendant continued to communicate his biases to the defendant through their communication. Dr. Hiers suggested that the defendant (who remained anonymous) consider different ways of looking at the world, and offered to pay him $0.25 per TED talk he watched on-line. The defendant responded by thanking Dr.

Hiers for the suggestion and said Dr. Hiers seemed like a nice man, but said he could not take the suggestion because "I am in bed, so depressed I cannot get out of bed. My life is wasted. I have no friends even though I am cool. I am going back to sleep."

Dr. Hiers then contacted a very experienced professional colleague in Columbia about meeting with the defendant. Dr. Hiers attempted to arrange a lunch meeting between his colleague and the defendant, but the defendant never responded. As noted above, this episode addresses both the defendant's demeanor and intent, particularly premeditation/deliberation, at a key point in Mr. Hamski's timeline.

3. Clark's Pest Control Employees

Brian Fanning would testify that he is a manager of the landscaping division at Clark's and interacted with the defendant in the morning and afternoon each day when the defendant worked at Clark's. The defendant worked at Clark's for approximately two months in 2014 (from late March to early June) and for less than two months in 2015 (from mid-April to late May). Mr. Fanning would testify that the defendant was extremely quiet; it was like pulling teeth to get him to give more than a one-word answer. Even when he did give a longer answer, it would take the defendant a long time to provide an answer of any kind.

Brock Pack would testify that he was a crew leader at Clark's and supervised the crew on which the defendant worked both times he worked at Clark's. Mr. Pack observed that the defendant often spaced or zoned out while working. One day, while working on a house by the lake, the defendant was edging around the rocks by the lake. There was no fence and Mr. Pack noticed that the defendant was edging three houses down from the

house they were working on. Mr. Pack had troubled getting the defendant's attention and had to get in front of the defendant to get him back on the right property.

Mr. Pack would testify that the work crew went to lunch together most every day. If the crew sat down for lunch before the defendant, the defendant would go sit somewhere else by himself, even though the rest of the crew was sitting together. The only time the defendant would sit with the crew was when he sat down first and the crew sat next to him.

Mr. Pack had a hard time knowing when the defendant was joking because he said everything in a monotone voice and would not crack a smile when joking.

Mr. Pack would testify that the defendant often wore two shirts and had his pants rolled up at the bottom with his socks pulled high. The defendant seemed to have no interests outside of work.

John Patton would testify that he was a co-worker of Dylann Roof's at Clark's. Mr. Patton tried to get to know the defendant, but it was hard to do so because it was difficult to get answers from the defendant that were more than a word or two. The defendant told Mr. Patton that he was only working because his dad made him. Mr. Patton also observed the defendant when he was working on the yard three houses down from the yard they were supposed to be working on. Mr. Patton observed that the defendant fell asleep virtually any time he was stationary, even when he was in the truck for only 2 or 3 minutes on the way to the next job. Mr. Patton also observed the defendant sitting on his own at lunch.

Mr. Patton once asked the defendant about hobbies and the defendant said he did not do anything; he just went home and sat in his room. Mr. Patton asked if the defendant played video games and the defendant responded, "No, I literally look at the walls."

All of the co-worker witnesses address demeanor, because they comment on the defendant's odd presentation, and intent, because they address his ability to focus on simple tasks.

CONCLUSION

This cross-examination and evidence is relevant to material issues at this stage of the defendant's trial, and must in fairness be admitted to put the government's case and its characterizations of the defendant's behavior in their proper perspective. We believe the jury will benefit from hearing both the cross-examination and the defense evidence, and is capable of fairly evaluating them. They should therefore be allowed.

Respectfully submitted,

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