UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:22-cr-392 (DLF)**
	)	
ABU AGILA MOHAMMAD	)	
MAS'UD KHEIR AL-MARIMI,	)	
Defendant.	)	

MR. AL-MARIMI'S RESPONSE TO
GOVERNMENT'S OMNIBUS MOTION *IN LIMINE*

Abu Agila Mohammad Mas'ud Kheir Al-Marimi submits this response to the arguments raised in the government's omnibus motion *in limine*. *See* ECF No. 525.

I. Decedent names, photographs, and citizenship

The government seeks the admission of a series of photographs of the decedents in this case. Regardless of the government's plan to introduce such evidence, use of photographs in the guilt phase of a trial is inappropriate in a case of this type. If the government seeks to introduce only select photographs, then the undue focus on particular photos or victims is inappropriate and irrelevant. If, on the other hand, it seeks to introduce photos of every victim, the overwhelming presentation of 270 photographs would be unduly prejudicial. Mr. Al-Marimi opposes the introduction of such evidence under Rule 403.

Even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; *see United States v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000) (citing

Old Chief v. United States, 519 U.S. 172, 179 (1997)). The availability and probative utility of available "evidentiary alternatives" must inform the "probative value" of evidence under Rule 403. *Old Chief*, 519 U.S. at 184 (noting the advisory committee notes to Rule 403 state the "availability of other means of proof" is an appropriate consideration).

The defense does not dispute the significance of Pan Am 103 or the loss of life that resulted. Nonetheless, victim photographs are not relevant to an element of the charged crimes. Susanna Rychlak, *I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials*, 69 VAND. L. REV. 1423, 1431–32 (2016) ("A photo depicting a murder victim while alive often has no relevance."). The government must show that these individuals died as a result of the incident, but it already proposes to introduce witness testimony that passengers were alive and died in the accident. Not only is the death-resulting element best proved by such witness testimony, a photo of an individual while alive does not prove that the individual died. It merely shows an individual at a time they were alive. Because the introduction of each photograph will require authentication by a witness who can testify that it fairly and accurately depicts the decedent at a particular time, the witness testimony is the best evidence of that victim's life and his or her tragic death.

The prejudicial effect of many photos of deceased victims far outweighs any marginal probative value. A collection of 270 individuals who died in the incident is more prejudicial than probative. To be clear, the photographs themselves are not expected to be particularly gruesome or inappropriate. But the volume and significance of the photos create prejudice in the aggregate. If the government intends to introduce over 250 photographs of individuals who died on Pan Am 103, whether by showing all the photos at one time or by showing them one at a time, there can be no question that the presentation will be emotionally overwhelming for the jurors.

The same is true regarding victim names and citizenship. The government indeed has an obligation to prove this information. But it can do so in a way to reduce and minimize the inherent prejudice. There is a significant difference between introducing a document, which concisely lists the names of victims and their respective nationalities, and a recitation of each name and country.

Even if the government does not intend to introduce hundreds of photos, select photographs of victims can still be unfairly prejudicial. In *United States v. O'Neal*, admission of a victim photo was found to be plain error because it had “minimal probative value” and risked encouraging sympathy for one witness’s perspective. 742 F. App’x 836, 841 (5th Cir. 2018). The photograph depicted the victim at the courthouse with her 16th birthday cake. While the court noted the age was related to a fact at issue in the case, that was outweighed by concern over sympathy for the alleged victim. The photo risked an assumption by the jury that the victim was more deserving of sympathy than the defendant. *Id. See also United States v. Jones*, 24 F. App’x 968 (10th Cir. 2001) (admitting victim photo when relevant to disputed appearance but admonishing the government that “a five-year old photograph of the victim seated with his mother . . . needlessly pushes the prosecutorial envelope, and could, if coupled with errors not present here, jeopardize a conviction”).

Finally, the government appears to cite *Old Chief v. United States* to show that any evidence is admissible, as long as it makes its argument more compelling. But the portion of the opinion referenced merely stands for the proposition that the layering of details may provide context to the government's argument that a mere stipulation does not, and that having that context allows a juror to take comfort in her verdict. *Old Chief*, 519 U.S. at 187–88. While the case acknowledges that the whole may be greater than the sum of the parts, those parts must, nonetheless, be admissible evidence. *Old Chief* does not stand for the proposition that the government is entitled to introduce evidence that is otherwise inadmissible under the rules of evidence, especially at this stage the case.

This is especially so because of the bases the government relies on to use such evidence. *See* ECF 525, at 3. The guilt phase of the trial is not the appropriate time to argue the "catastrophic effect the Defendant's actions had on people in the airplane and on the ground below" or "the breath of the destruction caused by the Defendant's actions." *Id.* This argument lays bare the risk of prejudice inherent in this evidence: it is openly suggested that the jury should convict the defendant, not because the evidence proves each and every element of the offense, but because the offense itself was so very devastating. *See United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 n.22 (E.D. Va. 2003) ("Because there will not be a penalty phase, and the events of September 11 will not be the focus of this case, the Court finds that the probative value of . . . photographs of the victims of the September 11 attacks would be substantially outweighed by the danger of unfair prejudice to the defendant[.]"), *aff'd* *in part, vacated in part, remanded,* 365 F.3d 292 (4th Cir. 2004), *opinion amended on reh'g,* 382 F.3d 453 (4th Cir. 2004), and *aff'd in part, vacated in part, remanded,* 382 F.3d 453 (4th Cir. 2004).

While the prejudice here may not be the same as with other photographs, it is critical to return to Rule 403's balancing test. Here, the probative value is nonexistent or nearly so, and it is necessarily outweighed by the clear prejudice.

II. Mr. Al-Marimi's family

In other cases, the government frequently seeks to use a defendant's monitored jail calls to establish attempted obstruction, admissions of guilt, or other evidence probative of criminality. Here, the government does not have any such evidence, despite the close monitoring of Mr. Al-Marimi's communications. Instead, it seeks to offer his calls with his family and his family's (denied) visa applications to corroborate mundane biographic details in his alleged confession that do not relate to this crime, or any crime.[1] These out-of-court statements clearly are offered for their truth. The Court should exclude this evidence under Rules 801 and 403.

First, as the defense previously argued, the accurate identification of Mr. Al-Marimi's family members in the alleged confession would have only marginal relevance and limited probative value. Indeed, while the Court previously stated it "might be fair" for the government to corroborate "personal details within the statement," it simultaneously acknowledged "this is tough, because a lot of it doesn't seem really relevant." 6/1/26 Tr. at 89–90. The identities of Mr. Al-Marimi's family

[1] The government to date has not identified any of the recorded jail calls or U.S. visa applications as trial exhibits.

members are not secret information that only Mr. Al-Marimi would know, so it would be unremarkable if that information was accurately repeated in the alleged confession. Limited corroboration of that sort would not make it more probable that the statement was a reliable confession as opposed to a researched forgery. It also bears repeating that the information does not concern the charged crimes.

At the same time, any marginal probative value is substantially outweighed by the likely detrimental effects of the evidence. The calls would have to be authenticated and translated, necessitating additional review by interpreters and additional witnesses at trial. The jury might also become confused due to not understanding why they're watching the calls, or speculate about what is being said and why the government is playing the recordings, imagining more probative value than exists.

The issues are more significant with respect to the family members' ages. The government does not refer to any statements about age, instead asserting that "the individuals appear of an age consistent with their dates of birth as provided" in the alleged confession. ECF 525, at 4. This is not corroboration at all. Even if a layperson could identify a stranger's age within a decade—a questionable assumption for adults, and particularly for adults from a different racial and ethnic background—no one can identify a person's *birth year* based only on his or her appearance. Any marginal probative value the calls might have with respect to the family members' stated names matching those recorded in the alleged confession does not extend to unverified and speculative guesses about their ages. Accordingly, Mr. Al-Marimi objects to any discussion by the government or its witnesses of Mr. Al-Marimi's family members' apparent ages as corroboration for the alleged confession.[2]

Finally, because the government has not identified any specific statements or conversations, it is difficult to address how the adopted-admission hearsay exemption in Rule 801(d)(2)(B) could apply. Regardless, the government's present arguments fall short. The government argues that Mr. Al-Marimi's continued conversations with family members following their supposed self-identifications manifests his adoption of those statements. In essence, it argues his silence and failure to correct the statements satisfies the requirements for the exemption; it does not identify any expressed agreement, verbal or nonverbal, or any identifying statements by Mr. Al-Marimi himself.

A person's silence provides only weak evidence of agreement, and perhaps none at all if the statements are not ones that would normally be objected to. *See* Fed. R. Evid. 801, advisory committee's notes ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue."); *United States v. Williams*, 445 F.3d 724, 735 (4th Cir. 2006) (agreeing failure to respond was not tacit or adoptive admission because "the question was not accusatory"). Here, the government has not shown that Mr. Al-Marimi heard, understood, or had an opportunity to correct any supposed identification. Even if he did, Mr. Al-Marimi would have recognized his family and known who he was talking

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[2] If the Court permits the government to present evidence of the recorded calls with Mr. Al-Marimi's family, the defense reserves the right to be heard on the form of that presentation following review of the specific recordings. Such review is necessary to identify potential prejudicial effects and how they might be reduced.

to, so it is not the case that he otherwise would have objected and interrupted the conversation.[3] The government's unpublished cases address different circumstances in which parties expressly agreed with statements as they were made, *United States v. Williams*, 750 F. App'x 959 (11th Cir. 2019), or failed to object to statements inculpating them that would normally prompt a denial, *United States v. White*, 681 F. App'x 589 (9th Cir. 2017). Mr. Al-Marimi's continued participation in the conversations at most manifests a belief that he was talking to family he recognized, not that the names of any of his family members were accurately stated.

III. Libya's acceptance of responsibility

The government has argued, without authority, that the Court should permit it to introduce evidence on rebuttal that Libya accepted responsibility for the Pan Am 103 explosion by (1) entering into a settlement agreement in 2008 with the United States, *see* Exhibit B, and (2) issuing a letter in anticipation of that settlement agreement in 2003, *see* Exhibit A. The defense assumes that the government seeks admission of this evidence in rebuttal should Mr. Al-Marimi elicit evidence that other individuals or groups are responsible for Pan Am 103. The Court should deny the government's motion pursuant to Rules 408 and 403.

First, it is important to understand the broader picture that led to the 2008 agreement and the 2003 letter. In 1992, after international attention focused on Libya's potential involvement in carrying out the attack,

the UN Security Council passed Resolution 748, which instructed

[3] The question is not whether the statements are true, or whether Mr. Al-Marimi was in fact talking to his family. What matters is whether Mr. Al-Marimi manifested agreement or a belief that the identifications were true. Fed. R. Evid. 801(d)(2)(B).

> member states to impose sanctions on Libya. The embargo covered a host of prohibitions: air links were to be cut, the supply of parts or servicing to Libyan aircraft was to be banned, and the provision of arms-related material, advice and assistance was to be prohibited. Member states were also to reduce levels of Libyan diplomatic representation and to ban all Libyan Arab Airlines offices from operating on their soil. Furthermore, they were to expel or deny entry to all Libyan nationals suspected of terrorist involvement. A special sanctions committee was formed that was tasked with reviewing the measures in the resolution every 120 days. . . . Things got even worse the following November, when the Security Council passed Resolution 883, which provided for the freezing of Libyan assets abroad and banned the export to Libya of selected equipment for downstream operations in the energy sector.

See Alison Pargeter, *Libya: The Rise and Fall of Qaddafi* 156 (2012). Thereafter, Libya was almost completely isolated. *Id.* at 157. By the end of the 1990s, the sanctions were devastating Libya's economy. *Id.* at 171–72. Inflation averaged 35%. *Id.* at 172. The energy sector, which had long been the "mainstay" of Libya's economy, was being strangled because Libya was unable to get parts for equipment. *Id.* at 171-72. Schools, hospitals, and roads were in disrepair. *Id.* at 173.

According to Ms. Pargeter, Qaddafi "desperately needed a way out": "The exhausted Colonel knew that the key to extricating himself from this mess was to hand over the Lockerbie suspects, thereby securing the lifting of the international embargo that was strangling the country and grinding down the all-important energy sector, which was crying out for US technical expertise". *Id.* at 176.

After Qaddafi turned Megrahi and Fhimah over for trial in the Netherlands, the "UN suspended the sanctions that had tied Qaddafi's hands for almost a decade". *Id.* at 179. But the U.S. government refused to restore relations with Libya until Libya paid compensation to the families of the victims of Pan Am 103 and "publicly accept responsibility for its officials". *Id.* at 181. Qaddafi's high-ranking officials "concluded that Libya had no choice but to comply with the demands". *Id.* "[T]he country could not afford another period of isolation, and []working with the US was the only way to its rehabilitation". *Id.*

As a result of this pressure, Qaddafi agreed to pay $10,000,000 to each of the Pan Am 103 victims' families. Under the agreement, the compensation was to be paid out after UN and US sanctions against Libya were removed and Libya was removed from the U.S. Department of State's state sponsors of terror list. *Id.* at 182. Additionally, senior Libyan officials made clear after Megrahi was convicted that:

> Libya would not countenance any acceptance of responsibility for the bombing. Yet the regime was shrewd enough to understand that it had to come up with something to appease the Americans. So it was that Tripoli finally agreed to the wording of a letter in which it admitted responsibility for the actions of its officials, but not for the bombing itself.

Id. The statement of acceptance in the August 2003 letter, issued more than two years after Megrahi was convicted, reads:

> In that context [referring to resolving the remaining issues of the UN Security Council resolutions] and out of respect for international law and pursuant to the Security Council resolutions, Libya as a sovereign State:
>
> - Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials.

Ex. A at 1.

Libyan officials made clear in their public statements that "they had purchased the lifting of the sanctions", not admitted guilt. *See* Pargeter, *Libya: The Rise and Fall of Qaddafi* 183. A senior Libyan official told the BBC in February 2004, "We thought it was easier for us to buy peace." *Id.* It is these circumstances—the complex negotiations between the UN, the US, and other international actors—that gave rise to the "acceptance" statement in Exhibit A and the settlement in Exhibit B.

Second, the government has not offered any details of its plans or theories of admissibility. It is not clear, for example, whether the government seeks to offer this evidence if Mr. Al-Marimi presents only non-Libyan alternate suspects or submits evidence of non-Libyan alternate suspects in addition to other Libyan suspects. Should the government offer those details in its reply, Mr. Al-Marimi will have to respond if and as needed in a sur-reply.

Third, and critically, the law precludes the government's efforts either way. Rule 408 excludes negotiations to settle disputed claims to prove or disprove, among other things, the validity of the claim. *See, e.g.*, *United States v. Davis*, 596 F.3d 852, 859 (D.C. Cir. 2010) ("Rule 408 bars not only evidence of settlement offers, but also '***statements made in compromise negotiations.***'") (emphasis added). Such evidence is inadmissible in both civil and criminal cases. *See* Fed. R. Evid. 408, advisory committee's notes on 2006 amendment ("statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation").

It is irrelevant that Mr. Al-Marimi was not a direct party to the 2008 settlement. Rule 408 and its caselaw do not support a reading that the rule requires exact parity of the parties. *See, e.g.*, *C & E Services, Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 319–20 (D.D.C. 2008) ("The very policy underlying Rule 408 would be defeated if it did not operate to preclude the admissibility of settlement discussions in a case involving another party or another claim."); *In re MSTG, Inc.*, 675 F.3d 1337, 1344 (Fed. Cir. 2012) ("The rule is clear by its text and history that it covers not only settlements and negotiations between the parties to the lawsuit, but also settlements and negotiations involving a third party."); *Hudspeth v. C.I.R.*, 914 F.2d 1207, 1213 (9th Cir. 1990) ("Rule 408 does apply to situations where the party seeking to introduce evidence of a compromise was not involved in the original compromise."); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (discussing Rule 408 "[i]n the context of settlements between a litigant and a third party").

Rather, what matters is the existence of negotiations to resolve a disputed claim and society's strong interest in promoting and protecting settlements. *See McInnis*, 765 F.2d at 247 (noting "such evidence is of questionable relevance on the issue of liability or the value of a claim, since settlement may well reflect a desire for peaceful dispute resolution, rather than the litigants' perceptions of the strength or weakness of their relative positions"). Here, Ms. Pargeter's evidence cited above makes clear that the 2003 "acceptance statement" was made during compromise negotiations. The government thus improperly seeks to admit evidence of a settlement as well as statements made during negotiations about that claim.

There is also no doubt that the government intends to offer this evidence to show Libya's liability for the Pan Am 103 explosion. *See* ECF 525 at 6 ("If the defense pursues that theory, the government will put on a rebuttal case showing that, although investigators initially pursued all substantial leads, they were reasonable to ultimately settle on the Libyan government as the entity responsible. The Libyan government's acceptance of responsibility, including its historically large settlement payment, will be part of the evidence the government will offer during that rebuttal case."). Rule 408 prohibits such a use. *See, e.g.*, *Davis*, 596 F.3d at 860 ("The problem for the government is that it wanted to use Hammock's testimony as evidence of Davis's knowledge of his own guilt, which is to say his 'liability.'").

Even if Rule 408 were not directly applicable here, Rule 403 would require the evidence's exclusion because any probative value the 2008 settlement and 2003 letter have is substantially outweighed by the unfair prejudice to Mr. Al-Marimi and the confusion of the issues such evidence would trigger. Should the Court allow the government to admit this evidence, Mr. Al-Marimi would have to introduce in detail the circumstances summarized above that led to Qaddafi agreeing to the letter and the settlement. Such an exercise would substantially risk distracting the jury from the issue at hand: whether the government can prove beyond a reasonable doubt that *Mr. Al-Marimi* did the acts the government has charged him with.

Thus, under Rules 408 and 403, the Court should deny the government's motion *in limine* on this point.

IV. Public authority, alibi, and insanity defenses

The government asks the Court to preclude the defense from raising evidence and arguments that would have required prior notice under the criminal rules and this Court's scheduling orders, such as alibi, insanity, or public authority.

The defense is aware of the rules and the schedule set in this case and does not intend to raise the above defenses.

With respect to public authority, the government's position is that the alleged acts of Mr. Al-Marimi and others were in fact authorized by the Libyan government. Given the government's case theory, it is impractical and unreasonable to demand that the defense not present or discuss evidence relating to that alleged authorization. Mr. Al-Marimi opposes the government's request on that limited basis. If the government believes any specific presentation or evidence crosses a line, it may object at that time.

V. Character evidence

The government raises a non-specific challenge to Mr. Al-Marimi's ability to present character evidence other than that permitted by the federal rules of evidence. Again, the defense is aware of the rules and will abide by them. The defense opposes an abstract and amorphous prohibition on "improper character evidence" simply because the scope of such a ruling is not clear. The government may contemporaneously object if it believes the presentation of any evidence runs afoul of Rules 403, 404, and 405.

Only two specific topics appear in the government's brief: evidence regarding Mr. Al-Marimi's "affiliation with certain religious or social organizations" and "his connection to and concern for his family[.]" ECF 525, at 8. The defense does not plan to present evidence about the former. If that changes, the defense will timely present a case for the admissibility of such evidence. Regarding the latter, it is impossible to square the government's request here with its own plan to present evidence about the identities of Mr. Al-Marimi's family members, *in the form of his personal and casual conversations with his family*. If the Court permits the government to delve into Mr. Al-Marimi's "admirable family life" in this way, then the defense must at least be permitted to discuss and contextualize the same evidence the government uses to minimize its prejudicial effects. *See* Fed. R. Evid. 106 (permitting introduction by adverse party "of any other part—or any other statement—that in fairness ought to be considered at the same time" as "all or part of a statement"); *United States v. Washington*, 12 F.3d 1128, 1137 (D.C. Cir. 1994) (noting "application of the rule of completeness is a matter for the trial judge's discretion"); *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986).

VI. Evidence and argument towards jury nullification

The government seeks to preclude evidence and argument on a range of topics it deems pertinent only to jury nullification. Again, the defense is aware of the law and will abide by it.[4] *See, e.g.*, *United States v. Wilkerson*, 966 F.3d 828, 835 (D.C. Cir. 2020) (ruling that courts have a duty to "'forestall or prevent'" nullification "if it can be done without 'interfer[ing] with guaranteed rights or the need to protect the secrecy of jury deliberations'") (quoting *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1987)).

Here too, however, the government's request sweeps too broadly. Alongside

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[4] Of course, the practice of nullification was accepted in the Founding era, and courts have recognized that it remains an unavoidable byproduct of the jury trial system. *See generally United States v. Woody*, 336 F.R.D. 293, 311–39 (D.N.M. 2020); *United States v. Polouizzi*, 687 F. Supp. 2d 133, 167–208 (E.D.N.Y.) (Weinstein, J.), *as amended* (Feb. 11, 2010), *vacated*, 393 F. App'x 784 (2d Cir. 2010).

plainly irrelevant topics such as current U.S. foreign policy and comparisons to current events, the government seeks to prohibit any discussion and argument about the age of this case and the decades of delay leading up to Mr. Al-Marimi's indictment. These topics are inextricably linked with the issues surrounding the genesis of the alleged confession, a key piece of evidence that filled critical holes in the government's case and spurred the prosecution of Mr. Al-Marimi. They also infuse issues relating to evidence preservation, a topic the government intends to explore though several archival witnesses. The defense must be permitted to address those topics as they relate to the alleged confession, its reliability, and the reliability of other evidence. The passage of time is also relevant to explain to the jury the limitations on Mr. Al-Marimi's investigation or the loss or absence of potentially exculpatory evidence. The government has not identified any authority prohibiting such arguments, which flow directly from the timeline of this case and the practical realities of investigative work.

VII. References to punishment

The government's request to preclude references to the potential penalties if Mr. Al-Marimi is convicted substantially overlaps with its arguments about jury nullification evidence. Again, the defense is aware of the law and will abide by it. *See, e.g.*, *Shannon v. United States*, 512 U.S. 573, 579 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'") (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)); *but see supra* n.4.

That said, the government does not justify or explain its leap from prohibitions on presenting the jury with sentencing information, such as the range of penalties that might be imposed following a conviction, to forbidding such innocuous and unobjectionable comments as "this case has serious consequences." ECF 525, at 11. Certainly, none of the government's authorities concerned such language. *See id.* at 577–78, 586–87 (1994) (rejecting jury instruction referencing involuntary commitment following NGI verdict; noting "jurors are not informed of mandatory minimum or maximum sentences" or "probation, parole, or the sentencing range accompanying a lesser included offense"); *Rogers*, 422 U.S. at 37 (jury recommended "extreme mercy" unprompted); *United States v. Broxton*, 926 F.2d 1180, 1183 (D.C. Cir. 1991) (affirming district court's refusal to inform the jury about the mandatory minimum sentence); *United States v. Frank*, 956 F.2d 872, 878 (9th Cir. 1991) (civil commitment following NGI verdict).

While undersigned counsel do not plan to use the phrases that concern the government, the law would permit it if we did. "Although sentencing is not the jury's business, and in the normal course the jury is not even told what the range of possible sentences is, jurors have some sense of what are grave crimes, likely to be punishable by substantial prison sentences[.]" *United States v. Ambrose*, 740 F.2d 505, 510–11 (7th Cir. 1984); *see also Teague v. Scott*, 60 F.3d 1167, 1173 (5th Cir. 1995) (approving of defense closing statements that "were intended to remind jurors that this case concerned an alleged crime and the potential consequences to the defendant"). The government may object if it believes phrasing has crossed a line.

Respectfully submitted,

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