1
2 **UNITED STATES COURT OF APPEALS**

3 **FOR THE SECOND CIRCUIT**

4 August Term, 2010

5 (Argued: February 7, 2011 Decided: September 21, 2011)

6 Docket Nos. 09-1051-cr(L); 09-1057-cr(Con); 09-3972-cr(Con)

7 -x
8
9 **UNITED STATES OF AMERICA,**
10
11 **Appellee,**
12
13 **-v.-** **09-1051-cr**
14
15 **MONZER AL KASSAR a/k/a ABU MUNAWAR a/k/a**
16 **EL TAOUS, LUIS FELIPE MORENO GODOY, TAREQ**
17 **MOUSA AL GHAZI,**
18
19 **Defendants-Appellants.**
20
21 -x
22
23 Before: DENNIS JACOBS, Chief Judge,
24 PETER W. HALL, Circuit Judge,
25 SHIRA A. SCHEINDLIN, District Judge.[*]
26
27
28 Appeals by three defendants from their criminal
29 convictions, following jury trials in the United States
30 District Court for the Southern District of New York

[*] The Honorable Shira A. Scheindlin, of the United States District Court for the Southern District of New York, sitting by designation.

(Rakoff, J.), for conspiring to kill U.S. officers, to acquire and export anti-aircraft missiles, and to provide material support to a known terrorist organization. Two defendants were additionally convicted of money laundering and conspiring to kill U.S. citizens. Defendants argue on appeal that federal subject-matter jurisdiction is lacking, that their due process rights were violated, that exculpatory evidence was improperly excluded, and that the evidence of a conspiracy among them was legally insufficient. As to the conviction for conspiring to acquire and export anti-aircraft missiles, defendants argue that the statute does not criminalize conspiracy, that the jury was improperly instructed on the statute's scienter requirements, and that the defendants' conduct falls within the statute's exception for conduct authorized by the U.S. government. As to the conviction for conspiring to knowingly support a terrorist organization, defendants argue that the statute violates due process by not requiring that the support be intended to further specifically criminal activities.

Affirmed.

1 FOR APPELLANTS: Roger Lee Stavis
2 Gallet Dreyer & Berkey LLP
3 New York, NY
4 (for Monzer al Kassar and Luis Felipe
5 Moreno Godoy)
6
7 Marc Antony Agnifilo
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10 (for Tareq Mousa al Ghazi)
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12 FOR APPELLEE: Brendan R. McGuire
13 (Boyd M. Johnson III, Jesse M. Furman, *on*
14 *brief*)
15 On Behalf of Preet Bharara
16 U.S. Attorney's Office,
17 Southern District of New York
18 New York, NY
19
20
21 DENNIS JACOBS, Chief Judge:
22
23 Defendants Monzer al Kassar, Luis Felipe Moreno Godoy,
24 and Tareq Mousa al Ghazi appeal their criminal convictions,
25 entered after jury trials in the United States District
26 Court for the Southern District of New York (Rakoff, J.),
27 for conspiring to kill U.S. officers, to acquire and export
28 anti-aircraft missiles, and to knowingly provide material
29 support to a terrorist organization. Al Kassar and Godoy
30 were also convicted of conspiring to kill U.S. citizens and
31 of money laundering. Defendants argue on appeal that
32 federal subject-matter jurisdiction is lacking, that their
33 due process rights were violated, that exculpatory evidence

was excluded, and that the evidence of a conspiracy among them was legally insufficient. As to the conviction for conspiring to acquire and export anti-aircraft missiles, defendants argue that the statute does not criminalize conspiracy, that the jury was improperly instructed on the statute's scienter requirements, and that the defendants' conduct falls within the statute's exception for conduct authorized by the U.S. government. As to the conviction for conspiring to knowingly support a terrorist organization, defendants argue that the statute violates due process by not requiring that the support be intended to further specifically criminal activities.

Affirmed.

BACKGROUND

Since the 1970s, the U.S. government has suspected Monzer al Kassar, a Spanish national and resident, of illegal arms trafficking. United States v. al Kassar, 582 F. Supp. 2d 488, 491 (S.D.N.Y. 2008) ("Al Kassar I"). In 2005, the Drug Enforcement Administration ("DEA") set up a sting operation to apprehend him for selling arms illegally.

1 To this end, the DEA sent Samir Houchaimi, a
2 confidential informant, to locate Tareq Mousa al Ghazi, a
3 known associate of al Kassar, and set up a meeting with al
4 Kassar. Houchaimi went to Lebanon, where al Ghazi lived,
5 and won his trust over several months. Houchaimi told al
6 Ghazi that he was in the weapons trade, asked to meet with
7 al Kassar, and gave al Ghazi a fake end-user certificate[1]
8 for Nicaragua supplied by the DEA. Houchaimi asked al Ghazi
9 to arrange a meeting with al Kassar, and al Ghazi agreed.
10 Al Kassar arrived at the arranged meeting in Beirut
11 holding the end-user certificate Houchaimi had given to al
12 Ghazi. The meeting was fruitful, ending with al Kassar
13 inviting Houchaimi to his mansion in Spain to further
14 discuss the Nicaraguan arms deal.
15 At the meeting in Spain (in February 2007), Houchaimi
16 introduced al Kassar to "Carlos" and "Luis"--two undercover
17 DEA agents posing as members of FARC (a left-wing Colombian
18 terrorist organization)--and al Kassar introduced his
19 associate, Luis Felipe Moreno Godoy. The DEA agents told al
20 Kassar they were interested in buying weapons for FARC's use

[1] An end-user certificate is an official government document authorizing a sale of particular weapons to a particular end-user. It is required to conduct a legal international weapons sale.

1 against the U.S. military in Colombia. They gave al Kassar
2 a list of weapons they wanted, which included anti-aircraft
3 missiles ("SAMs"). Al Kassar agreed to negotiate.

4 Over the next several months, in the presence of Godoy
5 and al Ghazi, al Kassar negotiated an arms deal with the two
6 DEA agents.[2] The negotiators discussed at length FARC's
7 intent to use the weapons against Americans and U.S. assets.
8 When al Kassar left the room during a break in negotiations,
9 al Ghazi advised the DEA agents how to negotiate effectively
10 with al Kassar. At the end of March, 2007, when the parties
11 had agreed to basic terms (including the sale of SAMs),
12 Godoy took the DEA agents to an Internet café and helped
13 them transfer a down payment (€100,000) to a bank account
14 controlled by al Kassar.

15 The next day (after confirming receipt of the down
16 payment), al Kassar again met with the DEA agents to discuss
17 details. Before the meeting, al Ghazi again counseled the
18 DEA agents on how best to secure the sale. At the meeting--
19 again in the presence of Godoy and al Ghazi--al Kassar gave
20 the DEA agents schematics for the SAMs he was selling and

[2] The negotiations were conducted primarily in Spanish, but al Kassar translated for al Ghazi and Houchaimi. Many of the meetings were secretly recorded by Houchaimi.

explained how he planned to smuggle the weapons into Colombia through a cargo ship destined for Suriname (with al Kassar, as usual, translating for al Ghazi).

In May 2007, al Kassar and Godoy facilitated a meeting between the DEA agents and the captain of the ship that would smuggle the weapons. Before the meeting, the DEA agents wired another payment ($135,000) to a bank account controlled by al Kassar. Afterward, al Kassar and Godoy visited arms factories in Bulgaria and Romania to secure the weapons.

In June 2007, the DEA agents agreed to meet al Kassar and Godoy in Bucharest to make final payment. Al Kassar stayed in Spain, however, and sent Godoy and al Ghazi to pick up the money. Pursuant to valid arrest warrants and in coordination with the DEA, Romanian authorities arrested al Ghazi and Godoy in Bucharest. The same day, Spanish authorities arrested al Kassar at the Madrid International Airport; he was carrying fake end-user certificates for the FARC weapons and documents confirming final arrangements to ship the weapons from Romania to Suriname. A search of al Kassar's mansion yielded documents establishing his and Godoy's participation in other arms deals and confirming

that al Kassar controlled the bank accounts into which the DEA agents had wired money.

Godoy and al Ghazi were extradited here from Romania in October 2007. During the flight, al Ghazi agreed to waive his Miranda rights and admitted to the DEA agents that: (1) he knew al Kassar was selling weapons, including SAMs, to FARC; (2) he knew that FARC was a terrorist organization, which planned to use the weapons to kill Americans; and (3) he facilitated the deal because he was promised a €125,000 commission. In June 2008, al Kassar was extradited here from Spain.

Once in the United States, the defendants were indicted on four counts:

> [1] Conspiracy to kill U.S. citizens in violation of 18 U.S.C. § 2332(b).
>
> [2] Conspiracy to kill U.S. officers and/or employees in violation of 18 U.S.C. §§ 1114, 1117.
>
> [3] Conspiracy to acquire and export SAMs in violation of 18 U.S.C. § 2332g.
>
> [4] Conspiracy to provide material support to a known terrorist organization in violation of 18 U.S.C. § 2339B.

Al Kassar and Godoy were also indicted on a fifth count:

> [5] Money laundering in violation of 18 U.S.C. § 1956.

The district court denied defendants' motion to dismiss the indictments for violation of due process. Al Kassar I, 582 F. Supp. 2d at 498. The district court likewise denied their motions (after hearings) to admit classified information related to prior and contemporaneous interactions with Spanish intelligence agents, allegedly for the benefit of the United States. United States v. Al Kassar, 582 F. Supp. 2d 498, 500 (S.D.N.Y. 2008) ("Al Kassar II"). The district court concluded that the proffered classified information was irrelevant, needlessly confusing, or inadmissible prior acts evidence. Fed. R. Evid. 402-405.

Al Ghazi's trial was severed when he was hospitalized a week before the scheduled trial. Al Kassar and Godoy were convicted by a jury on all five counts. Al Ghazi was tried several months later and convicted of conspiring to kill U.S. officials, to acquire and export SAMs, and to provide material support to a known terrorist organization. Al Ghazi was acquitted of conspiring to kill U.S. citizens. Al Kassar and Godoy were sentenced in February 2009 to 30 years and 25 years respectively. Al Ghazi was sentenced in July 2009 to 25 years.

The defendants timely appealed their convictions, but do not contest the sentences.

DISCUSSION

On appeal, the defendants challenge their convictions on the following grounds:

[I] The government lacked jurisdiction to prosecute because of an insufficient nexus between their actions and the United States.

[II] The government's investigation constituted "outrageous conduct" in violation of their due process rights.

[III] The district court erred in denying their motion to introduce exculpatory classified evidence.

[IV] The convictions under 18 U.S.C. § 2332g (acquiring and exporting SAMs) must be overturned because: the statute does not criminalize conspiracy; the jury was improperly instructed as to scienter; the defendants' actions fall under the statute's exception for authorized conduct; and there was insufficient evidence of conspiracy.

[V] The convictions under 18 U.S.C. § 2339B (aiding a known terrorist organization) must be overturned because: the statute requires that the aid be intended to support the illegal activities of the terrorist organization, or, in the alternative, the statute violates the Fifth Amendment's Due Process Clause by not requiring such intent.

Al Ghazi challenges his conviction on a sixth ground:

1 [VI] There was insufficient evidence he conspired
2 with al Kassar or Godoy to kill U.S. officers
3 and materially aid a known terrorist
4 organization.
5
6 The Sections in this opinion correspond to these
7 arguments.
8

9 **I**

10 The defendants argue that federal subject-matter
11 jurisdiction is lacking because: First, there is an
12 insufficient nexus between their conduct and the United
13 States for U.S. law to apply to them; second, any nexus that
14 does exist was created by the DEA agents, not the
15 defendants.
16

17 **A**

18 In a challenge to subject-matter jurisdiction, we
19 review a district court's factual findings for clear error
20 and its legal conclusions de novo. APWU v. Potter, 343 F.3d
21 619, 623-24 (2d Cir. 2003). "[A]s a general proposition,
22 Congress has the authority to 'enforce its laws beyond the
23 territorial boundaries of the United States.'" United
24 States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) (quoting
25 EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). The

presumption that ordinary acts of Congress do not apply extraterritorially, see Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173 (1993), does not apply to criminal statutes. United States v. Bowman, 260 U.S. 94, 98 (1922); see also Yousef, 327 F.3d at 86. When the text of a criminal statute is silent, Congressional intent to apply the statute extraterritorially must “be inferred from the nature of the offense.” Bowman, 260 U.S. at 98.

Four of the five counts on which the defendants were convicted--conspiracy to kill U.S. nationals, conspiracy to acquire and export SAMs, conspiracy to aid a known terrorist organization, and money laundering--contain explicit provisions applying them extraterritorially. See 18 U.S.C. § 2332(b); id. § 2332g(b); id. § 2339B(d); id. § 1956(b)(2). Although the conspiracy to kill U.S. officers or employees count, id. §§ 1114, 1117, contains no explicit extraterritoriality provision, the nature of the offense--protecting U.S. personnel from harm when acting in their official capacity--implies an intent that it apply outside of the United States. The provision protects U.S. employees, and a significant number of those employees perform their duties outside U.S. territory. District

courts in our Circuit have applied it so, as have courts in other circuits. See, e.g., United States v. Benitez, 741 F.2d 1312, 1317 (7th Cir. 1984) (applying §§ 1114, 1117 extraterritorially); United States v. Bin Laden, 92 F. Supp. 2d 189, 202 (S.D.N.Y. 2000) (applying § 1114 extraterritorially). We join them and conclude that §§ 1114 and 1117 apply extraterritorially.

When Congress so intends, we apply a statute extraterritorially as long as doing so does not violate due process. Yousef, 327 F.3d at 86. "'In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.'" Id. at 111 (quoting United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990)). For non-citizens acting entirely abroad, a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests. See United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987) ("Protective jurisdiction is proper if the activity threatens the

1 security or government functions of the United States.”);
2 see also Yousef, 327 F.3d at 112; Davis, 905 F.2d at 249.
3 The defendants’ conspiracy was to sell arms to FARC
4 with the understanding that they would be used to kill
5 Americans and destroy U.S. property; the aim therefore was
6 to harm U.S. citizens and interests and to threaten the
7 security of the United States. The defendants observe that
8 this Court has never before found a sufficient
9 jurisdictional nexus based on a sting operation taking place
10 entirely outside the United States and involving solely
11 foreign citizens. But the geographical location of an
12 undercover investigation is irrelevant to the sufficiency of
13 the jurisdictional nexus. If an undercover operation
14 exposes criminal activity that targets U.S. citizens or
15 interests or threatens the security or government functions
16 of the United States, a sufficient jurisdictional nexus
17 exists notwithstanding that the investigation took place
18 abroad and focused only on foreign persons.
19 The defendants argue that, even if these U.S. laws
20 apply to them in theory, in practice such application is
21 “fundamentally unfair” because their conduct was so far
22 removed from any U.S. interest or person. True, the

1 defendants' conduct never came close to harming any U.S.
2 person or property, but this is irrelevant for conspiracy
3 offenses, which often result in no palpable harm.
4 Jurisdictional nexus is determined by the aims of the
5 conspiracy, not by its effects.

6 Finally, the defendants argue that, nexus aside, U.S.
7 jurisdiction is fundamentally unfair because they lacked
8 fair warning that their conduct exposed them to U.S.
9 criminal prosecution. We disagree. The idea of fair
10 warning is that "no man shall be held criminally responsible
11 for conduct which he could not reasonably understand to be
12 proscribed." <u>Bourie v. City of Columbia</u>, 378 U.S. 347, 351
13 (1964) (internal quotation marks omitted). Fair warning
14 does not require that the defendants understand that they
15 could be subject to criminal prosecution *in the United*
16 *States* so long as they would reasonably understand that
17 their conduct was criminal and would subject them to
18 prosecution somewhere. The defendants were not ensnared by
19 a trap laid for the unwary. Supplying weapons illegally
20 (<u>i.e.</u>, without legitimate end-user certificates) to a known
21 terrorist organization with the understanding that those
22 weapons would be used to kill U.S. citizens and destroy U.S.

property is self-evidently criminal; and their deliberate attempts to avoid detection suggested the defendants so understood.

B

In the alternative, the defendants argue that any jurisdictional nexus was created entirely by acts of the DEA agents who "manufactured" jurisdiction over the defendants in violation of due process.

"[T]he 'manufactured jurisdiction' concept is properly understood not as an independent defense," but as a collection of three distinct defense theories: (1) outrageous government conduct in violation of due process; (2) entrapment; and (3) a failure by the prosecution to prove an essential element of the crime. United States v. Wallace, 85 F.3d 1063, 1065-66 (2d Cir. 1996). The defendants raise the outrageous conduct defense as an independent basis for overturning their convictions, and it is discussed in Section II. Here, we reject the entrapment and unproven-element theories.

1

Since each defendant's entrapment argument was rejected by a jury, no defendant can prevail on appeal unless he was entrapped as a matter of law, *i.e.*, he has proven that: (1) the government originated the criminal design, (2) the government suggested the design to the defendant and induced him to adopt it, and (3) the defendant had no predisposition to engage in the criminal design prior to the government's inducement. *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992); *United States v. Rahman*, 189 F.3d 88, 131 n.16 (2d Cir. 1999).

It is uncontested that the government originated the illegal arms deal and induced the defendants' participation with money and political ideology. However, it cannot be said as a matter of law that the defendants lacked a predisposition to conspire to illegally sell arms to known terrorists. The defendants' knowledge of how to procure and smuggle arms suggests experience in the trade; and their positive reaction to the idea that the arms would be used to kill Americans and harm U.S. interests suggests a predisposition to support and participate in that goal. A reasonable jury thus could have concluded that the

defendants were predisposed to commit the crimes for which they were convicted. This may have been a close call, especially with respect to al Ghazi, but it was a call for the jury to make.

2

The unproved-element theory of manufactured jurisdiction is that if the government unilaterally supplies an essential element of a crime, the government has in effect failed to prove that element as to the defendant. See generally United States v. Archer, 486 F.2d 670 (2d Cir. 1973). In Archer, the case that originated this theory, undercover federal agents sought to transform a state crime into a federal offense by having the defendant participate in a call which, without his knowing, was interstate. Id. at 672-74. In the years since Archer, we have limited it. See, e.g., Wallace, 85 F.3d at 1065; United States v. Keats, 937 F.2d 58, 64-65 (2d Cir. 1991). Now, even if the government initiates an essential element of a crime, jurisdiction is not manufactured if the defendant "then takes voluntary actions that implicate the [government-initiated] element." Wallace, 85 F.3d at 1066.

1 Here, the DEA agents initiated an arms transaction with
2 the defendants by posing as terrorists and requesting SAMs
3 (and other weapons) from the defendants for use in killing
4 Americans. But the defendants responded to this request by
5 conspiring among themselves to acquire and sell these
6 weapons to what they believed was a terrorist organization
7 with knowledge that the weapons would be used to kill
8 Americans. Creating an opportunity for a defendant to
9 engage in criminal conduct does not violate the Constitution
10 and does not constitute a "manufacture" of jurisdiction--or
11 of any of the elements required to obtain a conviction for
12 that criminal conduct. See United States v. Schmidt, 105
13 F.3d 82, 91-92 (2d Cir. 1997). The government did not
14 manufacture jurisdiction because every element of the crimes
15 of conviction was established by evidence of voluntary
16 action by the defendants.
17 The defendants contend that the DEA agents created the
18 jurisdictional nexus with the United States by injecting the
19 notion that the weapons were going to FARC for use against
20 Americans. While it is true the DEA agents lied to the
21 defendants, this does not make the nexus artificial or
22 invalid. Sting operations, by nature, involve lies told to

the target. The defendants were convicted of conspiring to sell SAMs to what they believed was a terrorist organization for use against Americans, and that is what they conspired to do. That their conspiracy was never going to succeed is irrelevant. (It is to be hoped that all such schemes are foredoomed one way or another.)

For these reasons, we conclude that the United States has jurisdiction to prosecute the defendants.

II

The defendants argue that the DEA agents' pervasive involvement in the weapons deal amounted to outrageous government conduct violative of their rights to due process under the Fifth Amendment. They also argue that the district court erred by not holding a hearing on this issue.

A

Whether to dismiss an indictment for outrageous government conduct is a legal question, which we review de novo. United States v. Cuervelo, 949 F.2d 559, 567 (2d Cir. 1991). Government involvement in a crime may in theory become so excessive that it violates due process and

requires the dismissal of charges against a defendant even if the defendant was not entrapped. Rahman, 189 F.3d at 131; see also United States v. Russell, 411 U.S. 423, 431-32 (1973) ("[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."). But see Hampton v. United States, 425 U.S. 484, 490 (1976) (plurality) ("If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."). Unlike entrapment, which focuses on the defendant's predisposition, outrageous government conduct focuses on the conduct of the government agents. United States v. Myers, 692 F.2d 823, 836 (2d Cir. 1982).

To establish a due process violation on this ground, a defendant must show that the government's conduct is "so outrageous that common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction." Schmidt, 105 F.3d at 91; see also Rahman, 189

1 F.3d at 131 (government action must shock the conscience to
2 sustain a due process violation); <u>United States v. LaPorta</u>,
3 46 F.3d 152, 160 (2d Cir. 1994) (government action must
4 “reach a demonstrable level of outrageousness before it
5 could bar conviction” (internal quotation marks omitted)).
6 This is a “very heavy” burden in light of our “well-
7 established deference to the Government’s choice of
8 investigatory methods.” <u>Rahman</u>, 189 F.3d at 131.
9 Generally, to be “outrageous,” the government’s involvement
10 in a crime must involve either coercion or a violation of
11 the defendant’s person. <u>Schmidt</u>, 105 F.3d at 91; <u>Myers</u>, 692
12 F.2d at 837. It does not suffice to show that the
13 government created the opportunity for the offense, even if
14 the government’s ploy is elaborate and the engagement with
15 the defendant is extensive. <u>Schmidt</u>, 105 F.3d at 91; <u>Myers</u>,
16 692 F.3d at 837. Likewise, feigned friendship, cash
17 inducement, and coaching in how to commit the crime do not
18 constitute outrageous conduct. <u>Myers</u>, 692 F.2d at 837-39.
19 The defendants allege no coercion, intimidation, or
20 physical force by the DEA agents. Instead, they argue that
21 the following facts amount to outrageous government conduct:
22 (1) no conspiracy existed among the defendants prior to the

1 government's request for weapons, (2) the government "lured"
2 the defendants into the illegal arms deal by first offering
3 an arms deal that was legal, and by befriending al Ghazi and
4 winning his trust over a long period, (3) al Ghazi exhibited
5 some hesitation and apprehension about the illegal weapons
6 deal, (4) the government involved the defendants in a wide
7 variety of illegal activities, and (5) the government
8 induced the crimes using political rhetoric and money.

9 None of these actions, either separately or in
10 combination, rises to the legal standard of outrageous.
11 First, the absence of a conspiracy prior to government
12 involvement shows only that the government created the
13 opportunity for illegal conduct. See LaPorta, 46 F.3d at
14 154-55, 160-61 (finding no due process violation where
15 defendant was convicted of arson for fire he set only after
16 an undercover agent asked him to); Schmidt, 105 F.3d at 92
17 (creation of opportunity to commit a crime is not outrageous
18 government conduct); Myers, 692 F.2d at 837 (same). Second,
19 neither the lawful arms proposal nor the winning of trust
20 renders the government's involvement coercive or outrageous;
21 these are commonplace and often necessary tactics for
22 infiltrating criminal enterprises. Third, transient

hesitation provides no basis for an excessive involvement claim unless the government coerces the defendant, and no coercion was applied here. Myers, 692 F.2d at 837-39. Fourth, the large number of laws violated by the arms deal is irrelevant to whether the government's involvement was excessive; if anything, it further supports the inference that the defendants had notice that their conduct was illegal. Fifth, financial and ideological inducements are not outrageous conduct. See id. at 837-38 (even extremely large financial inducements do not rise to the level of due process violations).

While the sting operation in this case was elaborate and prolonged, there was no coercion or physical force, and nothing done was outrageous or a shock to the conscience.

B

The defendants argue that the district court improperly denied them a pre-trial hearing on their jurisdictional and due process defenses. They cite Cuervelo for the proposition that in the context of such defenses, "[m]ost often, conducting a hearing is the preferred course of action in cases where disputed factual issues exist." 949

F.2d at 567. However, "[n]othing in Cuervelo requires a district court to conduct a hearing every time a defendant alleges outrageous government misconduct." LaPorta, 46 F.3d at 160. Where, as here, there are no material facts in dispute related to the alleged government misconduct, no hearing is necessary. Id. We therefore conclude that the district court did not err in denying the defendants' motion for a hearing on these issues.

III

The defendants challenge their convictions on the further ground that the district court improperly refused to admit classified evidence relating to past and contemporaneous contact between the defendants and Spanish intelligence officials, allegedly for the benefit of the United States. In a written opinion, the district court ruled that the evidence of past contacts was irrelevant and confusing under Federal Rules of Evidence 401 and 403, and amounted to inadmissible prior acts evidence under Federal Rules of Evidence 404 and 405. Al Kassar II, 582 F. Supp. 2d at 500. The district court excluded the defendants' subsequent proffer of evidence relating to contemporaneous

contacts with Spanish intelligence on similar grounds, reasoning that its potential for confusion vastly outweighed any probative value. The defendants argue that these rulings denied them their constitutional right to present a complete defense, and also constituted legal error under the Federal Rules of Evidence. We reject both contentions.

A

Criminal defendants are "entitled by the Constitution to a meaningful opportunity to present a complete defense." Wade v. Mantello, 333 F.3d 51, 57 (2d Cir. 2003); see also Clark v. Arizona, 548 U.S. 735, 769 (2006) (holding that the right to present a complete defense is "a matter of simple due process"); Taylor v. Illinois, 484 U.S. 400, 408 (1988) (holding that criminal defendants have the right to "put before a jury evidence that might influence the determination of guilt" (internal citations and quotation marks omitted)). At the same time, this right is subject to "reasonable restrictions." Wade, 333 F.3d at 58. State and federal rules of evidence may restrict evidence "to assure both fairness and reliability in the ascertainment of guilt

1 and innocence." Id. (quoting Chambers v. Mississippi, 410
2 U.S. 284, 302 (1973)).

3 The defendants argue that the denial of their requests
4 to offer the classified evidence prohibited them from
5 arguing, by way of a defense, that they had no intention of
6 completing the illegal arms deal. However, the defendants
7 presented this exact defense at their trials. True, the
8 excluded evidence might have marginally reinforced their
9 defense; but because it was neither compelling nor integral
10 to their defense theory, its exclusion does not amount to a
11 constitutional violation.
12
13 **B**

14 Even if the exclusion of their proffered evidence did
15 not amount to a constitutional violation, defendants argue
16 that it was legal error. Construing their argument as a
17 challenge to the district court's evidentiary ruling, we
18 review it for abuse of discretion, reversing only if we find
19 manifest error. United States v. Miller, 626 F.3d 682, 687-
20 88 (2d Cir. 2010). Rule 403 determinations command especial
21 deference because the district court is in "the best
22 position to do the balancing mandated by Rule 403." United

1 States v. Stewart, 590 F.3d 93, 133 (2d Cir. 2009) (internal
2 quotation marks omitted). So long as the trial court
3 "conscientiously balanced the proffered evidence's probative
4 value with the risk for prejudice," we will reverse its
5 conclusion "only if it is arbitrary or irrational." United
6 States v. Awadallah, 436 F.3d 125, 131 (2d Cir. 2006). Even
7 manifest error does not require reversal if the error was
8 harmless, Miller, 626 F.3d at 687-88, that is, if we can
9 conclude with fair assurance that the evidence would not
10 have substantially influenced the jury. United States v.
11 Jackson, 301 F.3d 59, 65 (2d Cir. 2002). We see no
12 reversible error.

13 The vast majority of the classified evidence proffered
14 by the defendants does not relate to the particular
15 conspiracies for which they were convicted. Instead, it
16 consists of prior good acts performed by the defendants
17 allegedly for the good of the United States; thus, it
18 constitutes prior act evidence used to "prove the character
19 of a person in order to show action in conformity
20 therewith." Fed. R. Evid. 404(b). Such prior act evidence
21 is inadmissible under Federal Rule of Evidence 404(b) for

1 that purpose, id., as the district court properly concluded.
2 Al Kassar II, 582 F. Supp. 2d at 500.
3 Nor is the evidence admissible as proof of habit under
4 Rule 406, as the district court also properly concluded.
5 Id. at 501. A habit is "semi-automatic"--it involves a
6 "person's regular practice of meeting a particular kind of
7 situation with a specific type of conduct, such as the habit
8 of going down a particular stairway two stairs at a time."
9 Fed. R. Evid. 406 (1972 Proposed Rules). The defendants'
10 prior acts are not habitual in that way (or any other way),
11 nor would the few isolated prior acts proffered by the
12 defendants constitute a habit even if they were. U.S.
13 Football League v. Nat. Football League, 842 F.2d 1335, 1373
14 (2d Cir. 1988) (three or four prior acts over a long period
15 are not sufficient to establish a habit).
16 The district court also excluded the proffered evidence
17 under Rule 403, finding that any minimal probative value of
18 the prior acts was outweighed by the likelihood of jury
19 confusion. Al Kassar II, 582 F. Supp. 2d at 500. This was
20 not manifest error. Leaving aside the defendants'
21 mischaracterization of the proffered evidence on appeal, its
22 probative value was properly discounted, as most of it

1 related to wholly different events that took place many
2 years earlier and "would require a trial within a trial
3 before the jury could determine whether there was any
4 meaningful analogy at all." Id.[3] And the trial judge was
5 rightly concerned that, to the extent any of the evidence
6 could be construed to relate to the charged conspiracies,
7 the jury would find it extremely confusing, if not
8 incomprehensible.

9 Because we conclude that the defendants' proffered
10 evidence is inadmissible under Rule 404 and that the
11 district court did not commit manifest error by excluding it
12 under Rule 403, we reject the defendants' evidentiary
13 challenge to the exclusion.

14

15 **IV**

16 The defendants challenge their convictions for
17 conspiring to acquire and export SAMs in violation of 18
18 U.S.C. § 2332g on four grounds: [A] their conduct was not

[3] The defendants argue on appeal that, in a case charging conspiracy to kill United States nationals, officers, and employees, the district court's evidentiary rulings "prevented [the defendants] from countering [the Government's] one-sided, biased version of the facts." This argument was not made to the district court. We express no view whether, had defendants made this argument, the evidence would have been admissible on this theory.

illegal under § 2332g because the statute does not criminalize conspiracy; [B] their conduct was not illegal under § 2332g because it was authorized by an agency of the United States; [C] the statute's scienter requirement was improperly omitted from the jury instruction; and [D] the evidence was legally insufficient to convict them.

A

The defendants contend that 18 U.S.C. § 2332g does not criminalize conspiracy. We review de novo questions of statutory interpretation. L-3 Commc'ns Corp. v. OSI Sys., Inc., 607 F.3d 24, 27 (2d Cir. 2010).

The relevant wording of § 2332g states:

> (a)Unlawful Conduct. . . . it shall be unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use [SAMs].
>
> . . .
>
> (c) Criminal Penalties. . . . Any person who violates, or attempts or *conspires* to violate, subsection (a) shall be fined not more than $2,000,000 and shall be sentenced to a term of imprisonment not less than 25 years or to imprisonment for life.

18 U.S.C. § 2332g(a), (c) (emphasis added). The plain text of subsection (c) penalizes conspiring to acquire and export

1 SAMs. The defendants argue, however, that the conspiracy
2 language does not appear under the "unlawful conduct"
3 heading, so that the statute does not make conspiring
4 unlawful. This reading isolates the unlawful conduct
5 section of the statute from the rest of the act, and it
6 renders the conspiracy language in the "criminal penalties"
7 section not just superfluous but self-refuting; in this way
8 the defendants' reading violates two canons of
9 interpretation: we read statutes as a whole, with no
10 section interpreted "in isolation from the context of the
11 whole Act," United States v. Kozeny, 541 F.3d 166, 171 (2d
12 Cir. 2008) (internal quotation marks omitted); and we
13 interpret statutes "to give effect, if possible, to every
14 clause and word," Duncan v. Walker, 533 U.S. 167, 174
15 (2001), and to "avoid statutory interpretations that render
16 provisions superfluous." United States v. Anderson, 15 F.3d
17 278, 283 (2d Cir. 1994).
18 More broadly, we interpret statutes "to give effect to
19 congressional purpose." Johnson v. United States, 529 U.S.
20 694, 710 n.10 (2000). The text of the Intelligence Reform
21 and Terrorism Prevention Act of 2004 states that the purpose
22 of what is now § 2332g is "to combat the *potential* use of

weapons that have the ability to cause widespread harm to United States persons and the United States economy . . . and to threaten or harm the national security or foreign relations of the United States." Pub. L. No. 108-458, Title VI, § 6902, 118 Stat. 3638, 3769-70 (2004) (emphasis added). The defendants' interpretation of the statute would undermine this purpose; in contrast, our interpretation--that the statute criminalizes conspiracies to acquire SAMs--furthers this purpose of combating the *potential* use of these weapons. We conclude that 18 U.S.C. § 2332g criminalizes conspiracies to acquire and export SAMs.

B

The defendants argue that their conspiracy to acquire and export SAMs constituted action authorized by the United States under 18 U.S.C. § 2332g(a)(3) because it was done under the guidance and inspiration of the DEA agents. We disagree.

Again, we review de novo questions of statutory interpretation. L-3 Commc'ns Corp., 607 F.3d at 27. The defendants rely on the exclusion of government conduct from the general prohibition of 18 U.S.C. § 2332g:

> Th[e prohibition on acquiring and exporting SAMs] does not apply with respect to . . . conduct by or under the authority of the United States or any department or agency thereof or of a State or any department or agency thereof; or conduct pursuant to the terms of a contract with the United States or any department or agency thereof or with a State or any department or agency thereof.

18 U.S.C. § 2332g(a)(3). The defendants argue that (though they didn't know it) the DEA authorized their conduct when its agents asked the defendants to sell them SAMs. As the defendants concede, this interpretation would effectively foreclose sting operations as an enforcement technique; but they argue that Congress uses an express "sting provision" in statutes if it intends that sting operations be allowed. See, e.g., 18 U.S.C. § 1956(a)(1) (criminalizing money laundering whenever the defendant *believed* the money involved resulted from unlawful activity even when the money was secretly lawfully procured through a sting operation).

Section 2332g (as we held, supra) criminalizes conspiracies to acquire and export SAMs. We decline to read the statute simultaneously to ban sub silentio one of the few effective ways for the government to combat such conspiracies. See United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000) (holding that we interpret statutes to prevent absurd results).

1 Nor can it be said that a sting operation "authorizes"
2 the criminal conduct it exposes. The fact that undercover
3 government agents support an illegal act as part of a sting
4 operation does not "authorize" that act or otherwise make it
5 legal. The defendants' analogy to the federal money
6 laundering statute is inapt; money laundering is a unique
7 crime because it requires not only that the defendant
8 believe the money involved is tainted by prior illegal
9 activity, but also that the money *in fact be so tainted*. It
10 is this second requirement that necessitates the statute's
11 explicit sting exception: The exception is required not
12 because a sting operation secretly authorizes a defendant's
13 transactions involving illegally obtained money (it
14 doesn't), but because the sting operation secretly uses
15 money that was legally obtained. 18 U.S.C. § 2332g does not
16 share this second requirement--it criminalizes unauthorized
17 conduct related to *all* SAMs, not just those tainted by some
18 prior criminal transaction--so there is no need for an
19 explicit sting exception. Similar statutes, which
20 categorically criminalize the unauthorized acquisition and
21 sale of a particular object (regardless of whether that
22 object is tainted by prior illegal activity) have been read

to allow for detection by sting operations notwithstanding the absence of an explicit sting provision. See, e.g., United States v. Wallace, 532 F.3d 126, 127 (2d Cir. 2008) (affirming conviction for sale of cocaine to confidential informant under the Controlled Substance Act despite its exception for sales authorized by law and its lack of a sting provision).

We conclude that the acquisition and export of SAMs (or a conspiracy with that aim) at the behest of a government agent acting undercover does not constitute "conduct by or under the authority of the United States or any department or agency thereof" and is therefore criminalized by 18 U.S.C. § 2332g.

C

The defendants argue that the jury charge on the § 2332g conspiracy count erroneously omitted the scienter requirement for the underlying offense of acquiring and exporting SAMs. We disagree.

A jury instruction is erroneous if it "[misleads] the jury as to the correct legal standard or [does] not adequately inform the jury on the law." United States v.

1 Goldstein, 442 F.3d 777, 781 (2d Cir. 2006). The defendants
2 objected to the § 2332g jury instruction before the district
3 court, but on different grounds from those they now advance
4 on appeal, and the district court accommodated the
5 defendants' first objection. Because the defendants'
6 present objection was not made before the district court, we
7 review the instruction for plain error, reversing only where
8 (1) the instruction was erroneous, (2) the error was plain
9 (i.e., obvious), (3) the error prejudiced the defendants'
10 substantial rights, and (4) that prejudice affected the
11 fairness, integrity, or public reputation of the judicial
12 proceeding. United States v. Joyner, 313 F.3d 40, 45 (2d
13 Cir. 2002); see also United States v. Johnson, 529 F.3d 493,
14 501-02 (2d Cir. 2008) (reserving plain error only for "those
15 circumstances in which a miscarriage of justice would
16 otherwise result" (internal quotation marks omitted)). An
17 erroneous instruction is prejudicial unless "it is clear
18 beyond a reasonable doubt that a rational jury would have
19 found the defendant guilty absent the error." Goldstein,
20 442 F.3d at 781.
21 A conspiracy conviction under § 2332g requires two
22 distinct findings as to scienter. First, the defendant must

1 *intend* to agree to participate in the conspiracy (i.e., it
2 is not enough that the defendant participated unwittingly or
3 joined under the mistaken impression that the conspiracy
4 involved some other, legal activity). See United States v.
5 Morgan, 385 F.3d 196, 206 (2d Cir. 2004) ("Conspiracy is a
6 specific intent crime: To be guilty of conspiracy, there
7 must be some evidence from which it can reasonably be
8 inferred that the person charged with conspiracy knew of the
9 scheme alleged in the indictment and knowingly joined and
10 participated in it." (internal quotation marks omitted)).
11 Second (in this case), the *aim* of the conspiracy must be to
12 "*knowingly* produce, . . . acquire, transfer, . . . receive,
13 possess, import, export, . . . use, or possess and threaten
14 to use [SAMs]" (i.e., the conspirators cannot just happen to
15 acquire an SAM while intending to acquire some other weapon
16 or object). 18 U.S.C. § 2332g(a)(1) (emphasis added); see
17 also Ingram v. United States, 360 U.S. 672, 678 (1959)
18 ("Conspiracy to commit a particular substantive offense
19 cannot exist without at least the degree of criminal intent
20 necessary for the substantive offense itself.") (internal
21 quotation marks and alterations omitted). To be accurate, a

1 jury instruction on a § 2332g conspiracy must convey both of
2 these scienter requirements.

3 The district judge gave the following jury instruction:

> 4 Count Three charges both defendants with
> 5 conspiring to acquire and export antiaircraft
> 6 missiles. In order to sustain its burden of proof
> 7 with respect to this charge as to a given
> 8 defendant, the government must prove beyond a
> 9 reasonable doubt each of the two elements: First,
> 10 the existence of the charged conspiracy, as
> 11 further described below; and second, that the
> 12 defendant you are considering intentionally joined
> 13 and participated in the conspiracy during the
> 14 applicable time period in order to further its
> 15 unlawful purpose.
> 16
> 17 . . .
> 18
> 19 The conspiracy alleged in Count Three,
> 20 however, is materially different from the
> 21 conspiracies alleged in Counts One and Two.
> 22 Specifically, in order to satisfy the first
> 23 element of Count Three, the government must prove
> 24 beyond a reasonable doubt that the purpose of the
> 25 conspiracy was to acquire and export explosive or
> 26 incendiary rockets or missiles guided by a system
> 27 enabling the rockets or missiles to seek aircraft.

28 In reviewing a jury instruction, we "examine not only
29 the specific language that the defendant challenges but also
30 the instructions as a whole to see if the entire charge
31 delivered a correct interpretation of the law." United
32 States v. Bala, 236 F.3d 87, 94-95 (2d Cir. 2000) (internal
33 quotation marks omitted). A defendant "has no right to
34 demand that required factual findings be stated in any

1 particular number of elements," and when an offense has
2 ramified elements, a jury instruction need not separately
3 delineate each element so long as "when viewed as a whole,
4 [it] adequately instruct[s] the jury as to all factual
5 findings required to support conviction." United States v.
6 Quinones, 511 F.3d 289, 315 (2d Cir. 2007); see also United
7 States v. Conway, 73 F.3d 975, 980 (2d Cir. 1995) ("[The]
8 trial judge retains extensive discretion in tailoring jury
9 instructions, provided that they correctly state the law and
10 fairly and adequately cover the issues presented.").

11 The district court's jury instruction here included
12 both scienter requirements, though they were not delineated
13 as independent elements. As to the first, the instruction
14 required the jury to find that the defendant "intentionally
15 joined and participated in the conspiracy." As to the
16 second, the instruction required the jury to find "that the
17 purpose of the conspiracy was to acquire and export [SAMs]."
18 This adequately conveyed the knowledge requirement for the
19 underlying substantive offense; if the jury found that the
20 defendants intentionally joined a conspiracy that had as a
21 purpose to acquire and export SAMs, then the jury also found

1 that the defendants knew the purpose of that conspiracy was
2 to acquire and export SAMs.

3 Viewed as a whole, the jury instruction "adequately
4 instructed the jury as to all factual findings required to
5 support conviction." Quinones, 511 F.3d at 315. Therefore,
6 the instruction did not mislead the jury and was not
7 erroneous, let alone plainly so.

8

9 **D**

10 Finally, the defendants argue that the evidence
11 presented by the prosecution was legally insufficient to
12 establish that they conspired with each other to acquire and
13 export SAMs.

14 We review de novo challenges to criminal convictions
15 based on insufficiency of evidence; however, in assessing
16 the evidence, we apply the same deferential standard as the
17 district court, viewing the evidence in the light most
18 favorable to the government, drawing all reasonable
19 inferences in the government's favor, and resolving all
20 questions of credibility in the government's favor. United
21 States v. Abu-Jihaad, 630 F.3d 102, 135 (2d Cir. 2010).

To overturn a conviction for insufficiency of the evidence, a defendant must establish that, after construing the evidence in the light most favorable to the prosecution, there is an element of the crime of conviction that no rational jury could have found beyond a reasonable doubt. United States v. Hassan, 578 F.3d 108, 122 (2d Cir. 2008). Knowledge of a conspiracy or proximity to it is by itself insufficient to prove that a defendant joined the conspiracy. United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997). Still, the government may prove a defendant's involvement in a conspiracy through circumstantial evidence, such as the defendant's presence at critical moments of the conspiracy, lack of surprise when discussing the conspiracy with others, possession of items important to the conspiracy, and making of false exculpatory statements or otherwise exhibiting consciousness of guilt. Id.; In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 113 (2d Cir. 2008); United States v. Rodriguez, 392 F.3d 539, 544 (2d Cir. 2004).

The defendants argue that the district court erroneously allowed the prosecution to rely on evidence that they engaged in other arms transactions with the informants

to overcome the lack of evidence that they conspired with each other to acquire and export SAMs. We disagree and conclude that there was sufficient evidence that the defendants conspired with each other to acquire and export SAMs.

A conspiracy violation of § 2332g requires three elements: (1) the defendants intended to agree (2) with each other, not just with undercover agents, (3) to knowingly acquire and export SAMs. See Desimone, 119 F.3d at 223 ("Because a conspiracy requires the participation of at least two culpable co-conspirators, it follows that a person who enters into such a conspiratorial agreement while acting as an agent of the government, either directly or as a confidential informant, lacks the criminal intent necessary to render him a *bona fide* co-conspirator." (brackets, internal citations, and internal quotation marks omitted)).

At trial, the government presented evidence of the following: (1) Al Kassar negotiated a sale of SAMs to the DEA agents in the presence of al Ghazi and Godoy, translating for al Ghazi as needed; (2) al Ghazi confessed to working with al Kassar and Godoy to sell SAMs to the DEA agents in order to make a profit; (3) in the presence of

1 Godoy and al Ghazi, al Kassar provided the DEA with
2 schematics of SAMs and explained how the missiles could be
3 used to shoot down American helicopters; (4) Godoy and al
4 Kassar facilitated a meeting between the DEA agents and the
5 captain of the cargo ship that was to smuggle SAMs into
6 Suriname; (5) Godoy forwarded emails to al Kassar from the
7 DEA agents, which discussed al Kassar's agreement to sell
8 SAMs to the DEA agents; (6) al Kassar and Godoy traveled to
9 factories that produced SAMs after meeting with the DEA
10 agents; (7) al Ghazi advised the DEA agents on how to
11 successfully negotiate the weapons deal with al Kassar, with
12 knowledge that the deal included SAMs; (8) Godoy and al
13 Ghazi traveled to Romania to pick up the final payment for a
14 sale of weapons that included SAMs.

15 Taken in the light most favorable to the prosecution
16 and drawing all reasonable inferences and credibility
17 determinations in its favor, we conclude that this evidence
18 was legally sufficient for a rational jury to conclude that
19 each of the three defendants intentionally conspired with
20 each other to knowingly acquire and export SAMs.

21 Having rejected all of the defendants' challenges, we
22 affirm their convictions under 18 U.S.C. § 2332g.

V

The defendants challenge their convictions under 18 U.S.C. § 2339B (prohibiting material support for a known terrorist organization), arguing in the alternative that the district court misinterpreted the statute's scienter requirements, or the statute is unconstitutional under the Fifth Amendment. We review de novo questions of a statute's interpretation and constitutionality. United States v. Pettus, 303 F.3d 480, 483 (2d Cir. 2002).

In relevant part, § 2339B states:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both . . . . To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism.

18 U.S.C. § 2339B(a)(1). The statute thus imposes two express scienter requirements: that the aid be intentional and that the defendant know the organization he is aiding is a terrorist organization or engages in acts of terrorism. Id. The statute is silent as to whether the defendant must intend that his aid support the terrorist aims of the organization.

1 The defendants argue that this specific intent
2 requirement should be read into the statute and that the
3 district court committed reversible error in failing to so
4 instruct the jury. This argument is foreclosed by Holder v.
5 Humanitarian Law Project, 130 S. Ct. 2705 (2010) ("Law
6 Project"). As Law Project interpreted § 2339B, it does not
7 require the government to show that a defendant who
8 supported a terrorist organization (which might do other
9 things) intended to aid its specifically terrorist aims:
10 "Congress plainly spoke to the necessary mental state for a
11 violation of § 2339B, and it chose knowledge about the
12 organization's connection to terrorism, not specific intent
13 to further the organization's terrorist activity." Id. at
14 2717. We therefore reject the defendants' request that we
15 read this scienter requirement into the statute.
16 The defendants argue, in the alternative, that absent
17 this scienter requirement the statute violates the Fifth
18 Amendment's Due Process Clause in two ways: [i] by
19 criminalizing mere membership, and [ii] by criminalizing a
20 status insufficiently connected to illegal activity to
21 satisfy the "personal guilt" requirement of due process.
22 See Scales v. United States, 367 U.S. 203, 224-25 (1961) (a

law criminalizing mere membership in an organization, even one that advocates illegal activity, violates Due Process); id. ("[G]uilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the . . . personal guilt" requirement of due process.).

Law Project, which upheld § 2339B against the claim that it unconstitutionally criminalized mere membership, also forecloses these arguments.[4] 130 S. Ct. at 2730 ("[§ 2339B] does not penalize mere association with a foreign terrorist organization. . . . What [it] prohibits is the act of giving material support. . . . Our decisions scrutinizing penalties on simple association or assembly are therefore inapposite."). We therefore reject the defendants' argument that the statute's lack of a specific intent requirement amounts to the criminalization of mere membership.

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[4] Law Project construed this as a First Amendment, not Fifth Amendment, challenge, but its reasoning applies equally to challenges under either Amendment.

Law Project also concluded that the aid prohibited by § 2339B (whether accompanied by specific intent to further the organization's terrorist activity or not) is intimately associated with criminal activity. Id. at 2729 ("Congress and the Executive, however, have concluded [that] . . . the designated foreign terrorist organizations are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.") (internal quotation marks omitted). The "personal guilt" requirement of the Due Process Clause is therefore satisfied by the knowing supply of material aid to a terrorist organization.

For these reasons, we conclude that the district court's jury instruction was correct and that 18 U.S.C. § 2339B does not violate the Fifth Amendment, notwithstanding that no proof is required that a defendant intend his aid to support the terrorist activity of a terrorist group.

VI

Al Ghazi challenges the legal sufficiency of the evidence that he conspired with al Kassar and Godoy to kill U.S. officers and to materially support a known terrorist organization. 18 U.S.C. §§ 1114, 1117, 2339B. The standard

1 of review for this challenge is set out above in Section
2 IV.D. Under that standard, we reject al Ghazi's challenge.
3 At trial, the government presented evidence of the
4 following: (1) al Ghazi told the DEA agents he knew al
5 Kassar was negotiating a weapons deal with FARC; (2) al
6 Ghazi told the DEA agents he knew FARC was a terrorist
7 organization; (3) al Ghazi told the DEA agents he knew the
8 weapons deal included SAMs; (4) al Ghazi told the DEA agents
9 he knew FARC intended to use the weapons they were buying to
10 kill U.S. military personnel; (5) al Ghazi told the DEA
11 agents he facilitated the weapons deal to get a commission;
12 (6) al Ghazi was present during key negotiations in the
13 weapons deal, with al Kassar translating for him when
14 Spanish was spoken; (7) al Ghazi stayed at al Kassar's
15 mansion during the negotiations with no apparent purpose
16 other than to participate in them; (8) al Ghazi advised the
17 DEA agents how to successfully complete the weapons deal
18 with al Kassar; (9) al Kassar told the DEA agents that al
19 Ghazi was instrumental to his decision to negotiate with
20 them; and (10) al Ghazi went to Romania for the purpose of
21 receiving the final payment for the weapons that al Kassar
22 sold to the DEA agents, which included SAMs. Taken in the

light most favorable to the prosecution and construing all inferences and credibility determinations in its favor, this evidence is sufficient for a reasonable jury to conclude that al Ghazi intentionally agreed with al Kassar and Godoy to acquire SAMs and other weapons, and to sell them to an organization he knew engaged in terrorism and which he knew would use those weapons to kill U.S. personnel.

We therefore reject al Ghazi’s insufficiency challenge.

CONCLUSION

For the reasons discussed above, the judgments of the district court are **AFFIRMED**.