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2 UNITED STATES COURT OF APPEALS  
3  
4 FOR THE SECOND CIRCUIT  
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7  
8 August Term, 2011  
9

10 (Argued: February 10, 2012 Decided: November 5, 2012)

11  
12 Docket No. 10-3916-cr  
13

14  
15 UNITED STATES OF AMERICA,  
16

17 *Appellee,*  
18

19 -v.-  
20

21 AAFIA SIDDIQUI,  
22

23 *Defendant-Appellant.\**  
24  
25

26  
27 Before:

28 WESLEY, CARNEY, *Circuit Judges*, MAUSKOPF, *District Judge.\*\**  
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30 Defendant-Appellant Aafia Siddiqui appeals her criminal  
31 convictions, entered after a jury trial in the United States  
32 District Court for the Southern District of New York  
33 (Berman, J.), for attempted murder of United States  
34 nationals, attempted murder of United States officers and  
35 employees, armed assault of United States officers and  
36 employees, assault of United States officers and employees,  
37 and use of a firearm during a crime of violence. She also  
38 challenges her sentence of eighty-six years' imprisonment.  
39 Siddiqui contends that the district court erred in a number

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\*The Clerk of the Court is respectfully directed to amend the caption to conform with the above.

\*\*The Honorable Roslynn R. Mauskopf, of the United States District Court for the Eastern District of New York, sitting by designation.

1 of ways. We address five of Siddiqui's arguments here:(1)  
2 that Count One of the indictment was deficient because the  
3 Attorney General failed to timely issue a required  
4 certification for prosecution under 18 U.S.C. § 2332, and  
5 because the statutes underlying Counts Two through Seven do  
6 not apply extraterritorially in an active theater of war;  
7 (2) that the district court committed reversible error by  
8 admitting, under Federal Rule of Evidence 404(b), documents  
9 allegedly found in her possession at the time Afghan  
10 officials took her into custody; (3) that the district court  
11 erred in allowing her to testify in her own defense despite  
12 a request from defense counsel to preclude her from doing so  
13 because of her alleged mental illness; (4) that the district  
14 court erred in allowing the government to rebut her  
15 testimony with un-Mirandized statements she gave to FBI  
16 agents while hospitalized at Bagram Airfield because those  
17 statements allegedly were not voluntary; and (5) that the  
18 district court erred in applying the terrorism enhancement  
19 under section 3A1.4 of the United States Sentencing  
20 Guidelines. We address Siddiqui's remaining arguments in an  
21 accompanying summary order.

22  
23 AFFIRMED.  
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27 \_\_\_\_\_  
28 DAWN M. CARDI (*Chad L. Edgar, on the brief*), Dawn  
29 M. Cardi & Associates, New York, NY, for  
30 *Defendant-Appellant*.

31 JENNA M. DABBS, Assistant United States Attorney  
32 (*Christopher L. Lavigne, Jesse M. Furman,*  
33 *Assistant United States Attorneys, on the*  
34 *brief*), for Preet Bharara, United States  
35 Attorney for the Southern District of New  
36 York, New York, NY, for *Appellee*.  
37  
38 \_\_\_\_\_  
39

40 WESLEY, *Circuit Judge*:

41 Defendant-Appellant Aafia Siddiqui appeals from a  
42 judgment of the United States District Court for the

1 Southern District of New York (Berman, *J.*) entered on  
2 September 23, 2010, convicting her after a jury trial of one  
3 count of attempted murder of United States nationals in  
4 violation of 18 U.S.C. § 2332(b)(1); one count of attempted  
5 murder of United States officers and employees in violation  
6 of 18 U.S.C. § 1114(3); one count of armed assault of United  
7 States officers and employees in violation of 18 U.S.C. §§  
8 111(a)(1) and (b); one count of using a firearm during a  
9 crime of violence in violation of 18 U.S.C. § 924(c); and  
10 three counts of assault of United States officers and  
11 employees in violation of 18 U.S.C. § 111(a)(1). The  
12 district court sentenced her principally to 86 years'  
13 imprisonment. Siddiqui urges this Court to reverse her  
14 convictions and, failing that, to vacate her sentence. We  
15 address five of the arguments that Siddiqui raises on appeal  
16 here and the remaining issues in an accompanying summary  
17 order.

## 18 **I. BACKGROUND**

### 19 **A. Offense Conduct**

20 Around dusk on July 17, 2008, Afghan National Police  
21 ("ANP") detained Aafia Siddiqui, a United States-educated  
22 Pakistani national, in Ghazni City, Afghanistan, on

1 suspicion of attempting to attack the Governor of Ghazni.  
2 When police took her into custody, Siddiqui possessed, among  
3 other things, various documents that discussed the  
4 construction of weapons, referenced a "mass casualty  
5 attack," and listed a number of New York City landmarks.  
6 Afghan authorities brought Siddiqui to an ANP facility for  
7 questioning. Later that evening, the Governor of Ghazni  
8 delivered the materials found in Siddiqui's possession to  
9 the United States Army.

10 The following morning, the United States dispatched a  
11 team to the ANP facility with the objective of interviewing  
12 Siddiqui and ultimately taking her into American custody.  
13 The team-most dressed in military fatigues-consisted of two  
14 FBI agents and members of a military special forces unit.  
15 Afghan officials brought the team to a poorly lit room  
16 partitioned by a yellow curtain. The room was crowded with  
17 Afghan officials, and unbeknownst to the Americans, Siddiqui  
18 was sequestered unrestrained behind the curtain.

19 The presence of a large number of Afghan officials led  
20 members of the American team to believe that they had been  
21 brought to the room to discuss the terms of their access to  
22 Siddiqui. One of the team members, a Chief Warrant Officer,

1 moved to a chair near the curtain dividing the room. After  
2 quickly glancing behind the curtain and seeing nothing, he  
3 set down his M-4 rifle and turned to engage the Afghan  
4 officials in conversation. Moments later, Siddiqui gained  
5 control of the rifle, aimed it at members of the American  
6 team, shouted, and fired. The team's interpreter lunged at  
7 and struggled with Siddiqui. As the interpreter wrestled  
8 with her, the Chief Warrant Officer drew his sidearm and  
9 shot Siddiqui in the stomach.

10 Team members then attempted to restrain Siddiqui, who  
11 was fiercely resisting and screaming anti-American  
12 statements. One witness recalled Siddiqui stating, "I am  
13 going to kill all you Americans. You are going to die by my  
14 blood." Another recounted that Siddiqui yelled "death to  
15 America" and "I will kill all you motherfuckers."

16 Eventually, the Americans were able to subdue Siddiqui  
17 enough to begin to render emergency medical aid to her.  
18 After providing preliminary treatment at the scene, the  
19 Americans transported her to a number of military bases in  
20 Afghanistan to undergo surgery and receive further care. On  
21 July 19, 2008, American forces moved Siddiqui to Bagram  
22 Airfield to recuperate.

1           While recovering at Bagram, Siddiqui was guarded by an  
2 FBI team. She was tethered to her hospital bed in soft  
3 restraints. During the course of her stay at Bagram,  
4 Siddiqui provided a number of incriminating, un-Mirandized  
5 statements to two members of the security team. In  
6 particular, she (1) asked about the penalty for attempted  
7 murder; (2) stated that she had a number of documents in her  
8 possession at the time of her arrest and recognized some of  
9 them when shown to her; (3) said that she had picked up a  
10 rifle with the intention of scaring the American team and  
11 escaping; and (4) noted that "spewing" bullets at Americans  
12 was a bad thing.

13           The government filed a sealed criminal complaint  
14 against Siddiqui in the Southern District of New York on  
15 July 31, 2008. On August 4, 2008, the government  
16 transferred Siddiqui to the United States for prosecution.  
17 A month later, Siddiqui was indicted.

## 18 **B. Pre-Trial**

19           Soon after the indictment was filed, the district court  
20 ordered that Siddiqui undergo psychiatric evaluations of her  
21 competence to stand trial. In a report issued on November  
22 6, 2008, Dr. Leslie Powers opined that Siddiqui was not

1 currently competent, citing, among other things, Siddiqui's  
2 reports of visual hallucinations. Later, Dr. Powers revised  
3 her assessment, finding that Siddiqui was malingering to  
4 avoid prosecution. Other experts arrived at the same  
5 conclusion, although one expert commissioned by the defense  
6 opined that Siddiqui was not competent. The district court  
7 held a competency hearing on July 6, 2009. After canvassing  
8 the relevant evidence, the court found Siddiqui competent to  
9 stand trial.

10 In advance of trial, the district court ruled on a  
11 number of motions, some of which are relevant here.  
12 Siddiqui first moved to dismiss all of the counts of the  
13 indictment. As to Count One, Siddiqui claimed that the  
14 Attorney General failed to timely issue the required written  
15 certification that her offense (attempted murder of United  
16 States nationals) "was intended to coerce, intimidate, or  
17 retaliate against a government or a civilian population."<sup>1</sup>  
18 18 U.S.C. § 2332(d). Siddiqui also contended that Counts  
19 Two through Seven, charging violations of 18 U.S.C. §§ 1114,  
20 111, and 924(c), should be dismissed because the statutes do  
21 not have extraterritorial application under the

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<sup>1</sup>The certification was filed on the same day as the indictment.

1 circumstances of her case. The district court denied  
2 Siddiqui's motions.

3 The district court also considered the government's  
4 motion in limine to admit certain documents and other  
5 evidence recovered from Siddiqui at the time of her arrest  
6 by Afghan officials. These documents, some of which were in  
7 Siddiqui's handwriting and bore her fingerprints, referred  
8 to attacks on the United States and the construction of  
9 various weapons. The court found this evidence admissible  
10 pursuant to Federal Rule of Evidence 404(b) to show  
11 Siddiqui's "motive, intent, identity, and knowledge." In  
12 finding the documents admissible, the court rejected the  
13 argument that the evidence would cause Siddiqui unfair  
14 prejudice, concluding that the documents were no more  
15 sensational than the crimes charged. The court also noted  
16 that it would instruct the jury that the documents were not  
17 to be considered as propensity evidence.

### 18 **C. Trial**

19 At trial, the government presented six members of the  
20 American interview team who testified that Siddiqui gained  
21 control of the Chief Warrant Officer's rifle and fired at  
22 them. Three more witnesses who did not directly observe the



1 shooting testified that they heard M-4 rifle shots. A  
2 government expert testified that the fact that no gunpowder  
3 residue was found on the curtain hanging in the room did not  
4 necessarily indicate that an M-4 had not been fired because  
5 someone standing between the curtain and the weapon could  
6 have absorbed the residue. The government also introduced  
7 the 404(b) documents discussed above.<sup>2</sup>

8 The defense put forth a forensic metallurgist who,  
9 based on the lack of forensic evidence of a discharge of a  
10 M-4 rifle at the crime scene, testified that he did not  
11 believe an M-4 had been fired in the room. In particular,  
12 he found it implausible that someone could discharge an M-4  
13 rifle in a room without bullet fragments or gunpowder  
14 residue being recovered by authorities. The defense also  
15 introduced deposition testimony of an ANP officer that when  
16 Siddiqui was arrested she possessed documents describing how  
17 to make explosive devices, among other things, and that  
18 while in Afghani custody she made anti-American statements  
19 and asked not be turned over to the United States. He also

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<sup>2</sup>The district court gave a limiting instruction to the jury, informing them that they could not consider the documents as proof that Siddiqui was predisposed to commit the crimes charged. The district court made clear that the documents could only be considered to the extent they demonstrated Siddiqui's motive, intent, or knowledge.

1 stated that he saw an American soldier walk behind the  
2 curtain prior to hearing shots fired, although he did not  
3 directly observe the shooting.<sup>3</sup> Significantly, the officer  
4 testified that he observed a technician remove two rifle  
5 shells from the scene.

6 Against the advice and over the objection of her  
7 attorneys, Siddiqui took the stand to testify in her own  
8 defense.<sup>4</sup> Though her testimony at times lacked focus, she  
9 was able to provide her version of the events that  
10 transpired on July 18, 2008. According to Siddiqui, she was  
11 sitting behind a curtain in a room at the ANP facility when  
12 she heard American voices. She feared being taken into  
13 American custody and peeked through an opening in the  
14 curtain with the hope of finding an escape route. Siddiqui  
15 testified that she was then shot from multiple directions.

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<sup>3</sup>The government elicited admissions from the officer that he previously gave inconsistent statements to American investigators.

<sup>4</sup>Defense counsel viewed this as a disastrous decision, and went so far as to make an application to the court to prevent Siddiqui from testifying. In their view, Siddiqui suffered from diminished capacity, such that she did not appreciate the risks inherent in testifying. Further, based on previous outbursts during the proceedings, they feared that Siddiqui would "turn the [trial] into a spectacle," thus alienating the jury and damaging her prospects for acquittal. Prior to Siddiqui's testimony, the defense held an ex parte conference with the judge where they aired their concerns. The judge then opened the courtroom to the public, and Siddiqui indicated on the record that she understood (1) that testifying was a significant decision, and one that her counsel had unanimously recommended against; (2) that her testimony had to be relevant; (3) that if she veered off into tangential topics the court may stop her testimony; and (4) that by testifying she would be subject to an intense cross-examination aimed at undercutting her testimony.

1 She stated that she never picked up, aimed, or fired an M-4  
2 rifle at the Americans.

3 Siddiqui claimed that she could not confirm that she  
4 possessed documents at the time of her arrest in Afghanistan  
5 because she was "in a daze." JA 2371. She stated that the  
6 bag in which the documents were found was not hers but  
7 rather was given to her. When confronted with the document  
8 referencing mass casualty attacks and listing New York City  
9 landmarks, Siddiqui testified that it was a "possibility"  
10 that the document was in her own handwriting. JA 2372.

11 After the defense rested, the government presented its  
12 rebuttal case. Two FBI agents who were members of  
13 Siddiqui's security detail during her recovery at Bagram  
14 recounted several incriminating statements that Siddiqui  
15 made to them. Before receiving this testimony, the district  
16 court held a hearing to determine whether Siddiqui gave  
17 these un-*Mirandized* statements voluntarily.<sup>5</sup> At that  
18 hearing, the two FBI agents testified, as did Siddiqui. The  
19 district court determined that Siddiqui's statements were  
20 voluntary.

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<sup>5</sup>The court conducted this voluntariness inquiry prior to admitting Siddiqui's testimony, and the government asked Siddiqui about her statements during its cross-examination in an attempt to impeach her. On cross-examination, she denied she made the statements.

1           On February 3, 2010, the jury returned a guilty verdict  
2 on all counts of the indictment. The district court  
3 sentenced Siddiqui on September 23, 2010. In addition to a  
4 number of other enhancements, the court applied the  
5 terrorism enhancement pursuant to U.S.S.G. § 3A1.4. In  
6 applying the enhancement, the court found that Siddiqui's  
7 offense was calculated to influence the conduct of the  
8 government by intimidation, namely, attempting to frustrate  
9 the interview team's efforts to detain her. Further, based  
10 on a number of anti-American statements Siddiqui made before  
11 and at the time of the shooting, the court determined that  
12 Siddiqui's conduct was calculated to retaliate against the  
13 United States government. The district court sentenced  
14 Siddiqui principally to 86 years' imprisonment and five  
15 years of supervised release.

16           Siddiqui timely appealed her convictions and sentence.

## 17                           **II. DISCUSSION**

### 18           **A. Denial of Siddiqui's Motion to Dismiss the Indictment**

19           Siddiqui raised below, and now reasserts, several  
20 challenges to the indictment. According to Siddiqui, the  
21 district court should have dismissed Count One, which  
22 charged a violation of 18 U.S.C. § 2332, because the United

1 States Attorney General did not timely issue the  
2 certification required by 18 U.S.C. § 2332(d). She also  
3 argues that the remaining counts are deficient because the  
4 underlying statutes do not apply extraterritorially in an  
5 active theater of war. We disagree.

6 Section 2332(d) provides that “[n]o prosecution for any  
7 offense described in this section shall be undertaken by the  
8 United States except on written certification of the  
9 Attorney General . . . [that] such offense was intended to  
10 coerce, intimidate, or retaliate against a government or  
11 civilian population.” Siddiqui relies on speedy trial  
12 principles to conclude that a prosecution is commenced at  
13 the time of arrest or the filing of formal charges. But  
14 Siddiqui’s argument here encounters an obstacle: the  
15 original complaint on which Siddiqui was arrested did not  
16 charge a violation of § 2332. The first instrument to do so  
17 was the indictment, which was filed the same day the  
18 Attorney General issued the § 2332(d) certification.

19 Siddiqui has an answer to the problem. She points out  
20 that the statute requires certification prior to a  
21 prosecution for an “offense *described* in this section.” 18  
22 U.S.C. § 2332(d) (emphasis added). In her view, the

1 Attorney General is required to issue the certification  
2 before an accusatory instrument describing facts that could  
3 constitute a violation of § 2332 is filed, regardless of  
4 whether that instrument actually charges a violation of  
5 § 2332. Siddiqui reasons that because the criminal  
6 complaint filed on July 31, 2008 described conduct  
7 proscribed by § 2332, the Attorney General's certification  
8 filed the day of the indictment was untimely.

9 Siddiqui's argument offers an unusual reading of what  
10 appears to be straightforward statutory language—a reading  
11 that would undercut the very purpose of the provision.  
12 Section 2332(d)'s requirement that the Attorney General  
13 issue a certification before "prosecution for any offense  
14 described in [§ 2332] *shall be undertaken*" is most naturally  
15 read as a requirement that the Attorney General issue the  
16 certification either at the time of or before the filing of  
17 the first instrument charging a violation of § 2332. This  
18 view furthers the purpose of § 2332(d)—namely, ensuring that  
19 the statute reaches only terrorist violence inflicted upon  
20 United States nationals, not "[s]imple barroom brawls or  
21 normal street crime." See H.R. Conf. Rep. 99-783, at 87,  
22 *reprinted in* 1986 U.S.C.C.A.N. 1926, 1960.

1 Under Siddiqui's interpretation of the provision, the  
2 Attorney General would have to issue the certification any  
3 time someone engaged in conduct that could be covered by the  
4 statute. This would deprive the Attorney General of the  
5 opportunity to sort through the facts of each case to  
6 determine if it merited certification—and prosecution—under  
7 the statute. More simply put, Siddiqui's interpretation  
8 would undercut § 2332(d)'s primary objective. Accordingly,  
9 the district court did not err in denying Siddiqui's motion  
10 to dismiss Count One of the indictment.

11 Siddiqui next contends that Counts Two through Seven of  
12 the indictment should be dismissed because the charging  
13 statutes—18 U.S.C. §§ 1114,<sup>6</sup> 111,<sup>7</sup> and 924(c)<sup>8</sup>—do not have  
14 application extraterritorially "in an active theater of  
15 war." This argument is without merit.

16 "Congress has the authority to 'enforce its laws beyond  
17 the territorial boundaries of the United States.'" *United*  
18 *States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting

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<sup>6</sup>18 U.S.C. § 1114 prohibits the murder or attempted murder of any United States officer or employee while such officer or employee is engaged in, or on account of, his or her official duties.

<sup>7</sup>18 U.S.C. § 111 punishes those who assault, resist, oppose, impede, intimidate, or interfere with a United States officer or employee while he or she is engaged in, or on account of, his or her official duties.

<sup>8</sup>18 U.S.C. § 924(c) prohibits the use of a firearm during the commission of a crime of violence.

1 *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The  
2 ordinary presumption that laws do not apply  
3 extraterritorially has no application to criminal statutes.  
4 *United States v. Al Kassar*, 660 F.3d 108, 118 (2d Cir.  
5 2011). "When the text of a criminal statute is silent,  
6 Congressional intent to apply the statute extraterritorially  
7 must 'be inferred from the nature of the offense.'" *Id.*  
8 (quoting *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

9 The statutes underlying Counts Two through Seven apply  
10 extraterritorially. Subsequent to the filing of Siddiqui's  
11 brief, we held that 18 U.S.C. § 1114 applies  
12 extraterritorially. *Al Kassar*, 660 F.3d at 118. We  
13 reasoned that "the nature of the offense-protecting U.S.  
14 personnel from harm when acting in their official  
15 capacity-implies an intent that [the statute] apply outside  
16 of the United States." *Id.* We see no basis for expecting  
17 Congress to have intended to limit these protections to U.S.  
18 personnel acting within the United States only. For the  
19 same reason, § 111 applies extraterritorially. *See United*  
20 *States v. Benitez*, 741 F.2d 1312, 1316-17 (11th Cir. 1984);  
21 *see also United States v. Hasan*, 747 F. Supp. 2d 642, 685-86  
22 (E.D. Va. 2010). Like 18 U.S.C. § 1114, the nature of the



1 offense-protecting United States officers and employees  
2 engaged in official duties from harm-implies a Congressional  
3 intent that § 111 apply outside of the United States. See  
4 *Al Kassar*, 660 F.3d at 118.

5 As for § 924, which criminalizes the use of a firearm  
6 during commission of a crime of violence, every federal  
7 court that has considered the issue has given the statute  
8 extraterritorial application where, as here, the underlying  
9 substantive criminal statutes apply extraterritorially.  
10 See, e.g., *United States v. Belfast*, 611 F.3d 783, 815 (11th  
11 Cir. 2010); *United States v. Ahmed*, No. 10 Cr. 131 (PKC),  
12 2012 WL 983545, at \*2 (S.D.N.Y. March 22, 2012); *United*  
13 *States v. Mardirossian*, 818 F. Supp. 2d 775, 776-77  
14 (S.D.N.Y. 2011). We see no reason to quarrel with their  
15 conclusions.

16 Siddiqui's argument that the statutes, even if  
17 generally extraterritorial, do not apply "in an active  
18 theater of war" is unpersuasive.<sup>9</sup> As the government points

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<sup>9</sup>Indeed, this argument is premised on a misreading of a number of cases. Siddiqui contends that international law "allow[s] an occupying force to try unlawful belligerents only in a military commission," see Siddiqui Br. 66, and thus extraterritorial application of the statutes at issue would run afoul of the general presumption that Congress intends its statutes to comport with international law. But the portion of *Ex parte Quirin*, 317 U.S. 1, 30 (1942), that Siddiqui cites merely stands for the more pedestrian observation that unlawful combatants, unlike lawful combatants, may be subjected to trial before a military commission. Moreover, the case Siddiqui cites for the proposition that "[a]t least one court has expressed reservation about

1 out, it would be incongruous to conclude that statutes aimed  
2 at protecting United States officers and employees do not  
3 apply in areas of conflict where large numbers of officers  
4 and employees operate. The district court appropriately  
5 denied Siddiqui's motion to dismiss Counts Two through Seven  
6 of the Indictment.

7 **B. Admission of Documents under Federal Rule of Evidence**  
8 **404(b)**  
9

10 The district court admitted documents allegedly found  
11 in Siddiqui's possession that explained the construction and  
12 use of various weapons and described a "mass casualty  
13 attack" on a number of New York City landmarks for the  
14 purpose of demonstrating Siddiqui's knowledge, motive, and  
15 intent. Siddiqui argues that her defense—that she never  
16 picked up and fired the Chief Warrant Officer's  
17 rifle—removed those issues from the case and thus admission  
18 of the documents was improper.

19 A district court's evidentiary rulings encounter  
20 trouble on appeal only where the district court abuses its  
21 discretion. *United States v. Mercado*, 573 F.3d 138, 141 (2d

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extending the extraterritorial reach of § 1114 into Afghanistan because of the sensitive state of the relationship between the two nations," see Siddiqui Br. 65-66, does not mention § 1114 at all. Instead, the case addressed whether federal courts had jurisdiction to afford habeas corpus relief and the protection of the Suspension Clause to aliens held in Executive detention at Bagram Airfield. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

1 Cir. 2009). A district court abuses its discretion when  
2 its evidentiary rulings are "arbitrary and irrational." *Id.*  
3 But even when an evidentiary ruling is "manifestly  
4 erroneous," the defendant will not receive a new trial if  
5 admission of the evidence was harmless. *Cameron v. City of*  
6 *New York*, 598 F.3d 50, 61 (2d Cir. 2010).

7 Federal Rule of Evidence 404(b) provides that evidence  
8 of a defendant's prior crimes, wrongs, or other acts cannot  
9 be used to prove that a defendant was a bad fellow and most  
10 likely remains one—that he has a criminal nature or  
11 propensity and the acts in question are consistent with his  
12 nature or tendency towards crime. However, this type of  
13 evidence may be admissible for other legitimate purposes,  
14 such as demonstrating motive, opportunity, identity, intent,  
15 and knowledge. *Id.* Under our "inclusionary" approach, all  
16 "other act" evidence is generally admissible unless it  
17 serves the sole purpose of showing a defendant's bad  
18 character. *United States v. Curley*, 639 F.3d 50, 56 (2d  
19 Cir. 2011).<sup>10</sup>

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<sup>10</sup>Of course, the strictures of Federal Rules of Evidence 401, 402, and 403 still apply to Rule 404(b) evidence. The evidence must be relevant to an issue in dispute, and its probative value must outweigh the risk of unfair prejudice. See *United States v. Colon*, 880 F.2d 650, 656 (2d Cir. 1989).

1           A defendant may, however, forestall the admission of  
2 Rule 404(b) evidence by advancing a theory that makes clear  
3 that the object the 404(b) evidence seeks to establish,  
4 while technically at issue, is not really in dispute. See  
5 *United States v. Colon*, 880 F.2d 650, 656 (2d Cir. 1989).  
6 For example, a defense theory that the defendant did not  
7 commit the charged act effectively removes issues of intent  
8 and knowledge from the case. See *id* at 657; *United States*  
9 *v. Ortiz*, 857 F.2d 900, 904 (2d Cir. 1988). Siddiqui's  
10 defense was just that—"I didn't fire the M-4."

11           But even assuming that Siddiqui's defense theory  
12 effectively removed any issue of her intent or knowledge,  
13 the documentary evidence remained relevant to demonstrate  
14 Siddiqui's motive. Motive has been variously defined as  
15 "the reason that nudges the will and prods the mind to  
16 indulge the criminal intent," *United States v. Benton*, 637  
17 F.2d 1052, 1056 (5th Cir. 1981) (internal quotation marks  
18 omitted); "the rationale for an actor's particular conduct,"  
19 *United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010); and  
20 "an emotion or state of mind that prompts a person to act in  
21 a particular way," Charles Alan Wright and Kenneth W.  
22 Graham, Jr., *Federal Practice and Procedure: Federal Rules*

1 of Evidence § 5240. "Although it does not bear directly on  
2 the charged elements of a crime, evidence offered to prove  
3 motive is commonly admitted." *United States v. Salameh*, 152  
4 F.3d 88, 111 (2d Cir. 1998). And unlike issues of knowledge  
5 and intent, the defendant's motive—an explanation of *why* the  
6 defendant would engage in the charged conduct—becomes highly  
7 relevant when the defendant argues that he did not commit  
8 the crime.

9 For instance, in *Salameh*, the defendants were charged  
10 with a conspiracy to bomb the World Trade Center. *Id.* at  
11 108. The district court admitted documents possessed by the  
12 defendants that "bristled with strong anti-American  
13 sentiment." *Id.* at 111. On appeal, we found those  
14 documents admissible to demonstrate the conspiracy's motive.  
15 *Id.*

16 Here, the documents the government introduced pursuant  
17 to Rule 404(b) detail, among other things, the construction  
18 of fertilizer and plastic explosives. One document in  
19 particular discusses radioactive bombs, biological weapons,  
20 and chemical weapons. That document also contains the  
21 phrase "mass casualty attack" and lists a number of New York  
22 City landmarks, including Grand Central Terminal, the Empire

1 State Building, the Statute of Liberty, and the Brooklyn  
2 Bridge. Taken together, these documents, which were in  
3 Siddiqui's possession at the time Afghan officials took her  
4 into custody<sup>11</sup> and some of which were in her handwriting,  
5 supply a plausible rationale for why Siddiqui would fire a  
6 rifle at the American interview team, namely, she harbored  
7 an anti-American animus. This motive was relevant to the  
8 ultimate issue in dispute at trial-whether Siddiqui picked  
9 up and fired the M-4 rifle at the American interview team.  
10 Accordingly, the district court did not abuse its discretion  
11 in admitting the documents pursuant to Rule 404(b).<sup>12</sup>

12 But even if we agreed with Siddiqui that the district  
13 court abused its discretion in admitting the documents, that  
14 would not end the matter. There would remain the question

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<sup>11</sup>In her brief, Siddiqui appears to contend that the government was required to call Afghan witnesses who were present at Siddiqui's arrest to confirm this fact. We disagree. There was more than sufficient evidence to establish that the documents were in Siddiqui's possession at the time of her arrest. Some were in her handwriting, and some bore her fingerprints. Moreover, on the day of her arrest, Afghan officials delivered the documents to American military authorities, which also tends to corroborate that Siddiqui possessed the documents when arrested by Afghan authorities.

<sup>12</sup>Although Siddiqui often characterizes the admitted documents as "adverse and prejudicial," "incendiary," and "powerful, prejudicial, and damning," she never argues in her briefs that the evidence should have been excluded under Federal Rule of Evidence 403 on a theory that its probative value is substantially outweighed by a danger of unfair prejudice. As such, the argument is waived. See *Tolbert v. Queens College*, 242 F.3d 58, 76 (2d Cir. 2001); see also *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), *vacated on other grounds by*, 521 U.S. 1114 (1997).

1 of whether the error was harmless. An evidentiary error is  
2 harmless "if the appellate court can conclude with fair  
3 assurance that the evidence did not substantially influence  
4 the jury." *United States v. Cadet*, 664 F.3d 27, 32 (2d Cir.  
5 2011) (internal quotation marks omitted). Several factors  
6 bear on the inquiry: whether the evidence was tied to "an  
7 issue that [was] plainly critical to the jury's decision";  
8 "whether that [evidence] was material to the establishment  
9 of the critical fact or whether it was instead  
10 corroborat[ive] and cumulative"; and "whether the wrongly  
11 admitted evidence was emphasized in arguments to the jury."  
12 *Curley*, 639 F.3d at 58 (internal quotation marks omitted).  
13 But the most critical factor is "the strength of the  
14 government's case." *Id.* (internal quotation marks omitted).

15 Here, although the government by its own admission  
16 "repeatedly referenced the documents introduced at trial,"  
17 Government Br. 37, the jury also had ample testimony before  
18 it regarding anti-American statements Siddiqui made at the  
19 time of the shooting from which it could conclude that  
20 Siddiqui harbored an animus towards the United States. And  
21 most importantly, the strength of the government's case was  
22 overwhelming. Among other evidence, *six* members of the

1 American interview team testified that Siddiqui gained  
2 control of the Chief Warrant Officer's rifle and fired at  
3 them. Another three government witnesses who did not  
4 observe the shooting testified that they heard M-4 rifle  
5 shots. Moreover, after Siddiqui testified, the government  
6 introduced the testimony of two FBI agents who had  
7 interviewed Siddiqui. According to those agents, Siddiqui,  
8 among other things, (1) asked what the penalty for attempted  
9 murder was; and (2) noted that "spewing" bullets at  
10 Americans was a bad thing.

11 Siddiqui counters that her forensic expert's opinion  
12 that an M-4 rifle had not been fired in the room effectively  
13 neutralized the government's case against her. However,  
14 this forensic expert's testimony was undermined by one of  
15 Siddiqui's own witnesses, who testified that two rifle  
16 shells were recovered from the room, and by a government  
17 expert's testimony that the absence of certain forensic  
18 evidence from the room was not necessarily inconsistent with  
19 the firing of a weapon.

20 Siddiqui also asserts that our decision in *United*  
21 *States v. Colon*, 880 F.2d 650 (2d Cir. 1989), requires us to  
22 grant her a new trial. She argues that *Colon* mandates that



1 we assess the strength of the government's case without  
2 reference to the government's cross-examination of Siddiqui  
3 or the incriminating statements she made at Bagram and that  
4 *Colon* requires a new trial because the admission of the  
5 documents forced her to testify and she was harmed by doing  
6 so. We disagree.

7 In *Colon*, the defendant was charged with heroin  
8 distribution. *Id.* at 652. His defense was that he did not  
9 engage in the charged act. *Id.* at 658. Nevertheless, the  
10 district court admitted evidence concerning two prior  
11 instances in which the defendant had sold heroin to  
12 demonstrate knowledge and intent—an obvious error. *Id.* at  
13 656. The defendant then testified, and, in the words of his  
14 counsel, "the [Assistant] U.S. Attorney made a jackass out  
15 of him." *Id.* at 661 (brackets in original). Specifically,  
16 the cross-examination cast doubt on the defendant's  
17 credibility and delved deeply into the circumstances  
18 surrounding the defendant's prior involvement with heroin.  
19 *Id.* Because the record in *Colon* demonstrated that the  
20 defendant's case was badly damaged by the erroneous  
21 admission of the evidence, and because the defense may have  
22 felt that there was no alternative but to have the defendant

1 testify as a result, we granted the defendant a new trial.  
2 See *id.* at 661-62.

3 Here, we need not resolve the issue of whether *Colon*  
4 necessitates that we measure the strength of the  
5 Government's case without reference to either Siddiqui's  
6 cross-examination or the admission of the incriminating  
7 statements she made at Bagram. Even without that evidence,  
8 the government's case against Siddiqui can only be fairly  
9 characterized as devastating.

10 We also disagree with Siddiqui's claim that *Colon*  
11 requires a new trial because the admission of the 404(b)  
12 evidence forced her to testify and her defense was badly  
13 damaged by that testimony. Unlike in *Colon*, the  
14 introduction of the 404(b) evidence here did not necessitate  
15 Siddiqui's testimony from an objective, strategic  
16 standpoint. The 404(b) evidence was somewhat cumulative on  
17 the issue of whether Siddiqui harbored an anti-American  
18 animus, given that numerous witnesses testified as part of  
19 the government's case-in-chief that she made anti-American  
20 statements during the shooting incident. Further, even  
21 after the introduction of the 404(b) evidence, defense  
22 counsel advised Siddiqui not to testify, we presume in large

1 part because her testimony would open the door to the  
2 admission of the incriminating statements she made while  
3 recovering at Bagram. *Colon* does not allow a defendant to  
4 make an otherwise harmless error harmful based on her simple  
5 assertion that the error compelled her to testify.

6 **C. Denial of Defense Counsel's Application to Keep Siddiqui**  
7 **from Testifying**

8  
9 It is well established that criminal defendants have  
10 the right to testify in their own defense. *Rock v.*  
11 *Arkansas*, 483 U.S. 44, 49 (1987); see *Brown v. Artuz*, 124  
12 F.3d 73, 76 (2d Cir. 1997). "This right . . . is . . .  
13 essential to due process of law in a fair adversary  
14 process." *Bennett v. United States*, 663 F.3d 71, 84 (2d  
15 Cir. 2011) (internal quotation marks omitted). That is  
16 because "the most important witness for the defense in many  
17 criminal cases is the defendant himself," and he has the  
18 "right to present his own version of events in his own  
19 words." *Rock*, 483 U.S. at 52. The ultimate decision to  
20 testify remains at all times with the defendant; defense  
21 counsel, though charged with an obligation to apprise the  
22 defendant of the benefits and risks of testifying, cannot  
23 make the decision, regardless of tactical considerations.  
24 *Brown*, 124 F.3d at 77-78.

1 Siddiqui's counsel does not challenge these clearly  
2 established principles. Instead, she urges us to craft an  
3 exception to the general rule, arguing that in some cases a  
4 defendant may be competent to stand trial yet incompetent to  
5 exercise her right to testify without the approval of  
6 defense counsel.

7 In support of her argument, counsel relies heavily on  
8 the Supreme Court's decision in *Indiana v. Edwards*, 554 U.S.  
9 164 (2008). There, the Court held that a state may  
10 determine that a defendant who is competent to stand trial  
11 may nonetheless be incapable of representing himself at  
12 trial and may thus insist that the defendant have trial  
13 counsel. *Id.* at 167. The Court noted that a mentally ill  
14 defendant may not possess the ability to execute tasks such  
15 as organizing a defense, arguing points of law, and  
16 questioning witnesses. *Id.* at 176-77. It further observed  
17 that a prolonged spectacle could result from such a  
18 defendant representing himself, and that spectacle would  
19 undercut the Constitution's goal of providing a fair trial.  
20 *Id.* at 177.

21 Counsel's reliance on *Edwards* is misplaced. First, as  
22 three other circuits have recognized, *Edwards* holds that a

1 court may require that trial counsel appear on behalf of a  
2 mentally ill defendant, not that it must do so. See *United*  
3 *States v. Turner*, 644 F.3d 713, 724 (8th Cir. 2011); *United*  
4 *States v. Berry*, 565 F.3d 385, 391 (7th Cir. 2009); *United*  
5 *States v. DeShazer*, 554 F.3d 1281, 1290 (10th Cir. 2009).

6 But even if *Edwards* mandated trial courts to require trial  
7 counsel for a discrete group of mentally ill defendants, the  
8 case still would have no application here. Common sense  
9 dictates that the mental capacity needed to conduct an  
10 entire trial is much greater than the mental capacity  
11 required to play the more limited role of witness on one's  
12 own behalf. Moreover, the defendant's right to air her  
13 version of events before a jury is "more fundamental to a  
14 personal defense than the right of self-representation."  
15 *Rock*, 483 U.S. at 52. As such, *Edwards* does not  
16 significantly support, let alone compel, the conclusion that  
17 a district court may prevent a mentally ill defendant from  
18 testifying on her own behalf if defense counsel moves to  
19 keep the defendant off the stand.

20 We question whether the Constitution permits a finding  
21 that a criminal defendant is competent to stand trial, yet  
22 incompetent to determine whether to testify on her own

1     behalf. But we need not decide that question today. Here,  
2     the district court went to extraordinary lengths to ensure  
3     that Siddiqui understood the implications of testifying and  
4     had the capacity to testify. Even were we to discern any  
5     daylight between the standards governing a defendant's  
6     capacity to stand trial and those for assessing her capacity  
7     to determine whether to testify (and then, actually to  
8     testify), we would find no reason to upset the district  
9     court's implicit determination that Siddiqui did in fact  
10    have the requisite capacity to make the latter decision  
11    here. That Siddiqui's choice to testify—like many  
12    defendants' decisions to testify—was a poor one, does not  
13    alter our analysis. See *Brown*, 124 F.3d at 77-78.

14    **D. Voluntariness of Siddiqui's un-Mirandized statements at**  
15    **Bagram**

16             Siddiqui contends that the district court erred in  
17    finding that the incriminating, un-Mirandized statements she  
18    gave to two members of the FBI security team while she was  
19    hospitalized at Bagram Airfield were voluntary and thus  
20    could be used in the government's rebuttal case after  
21    Siddiqui testified. Prior to Siddiqui's testimony, the  
22    court held a hearing to determine the voluntariness of the  
23    statements. At that hearing, the two FBI agents testified,  
24

1 and the district court's ruling credited their testimony.  
2 Their testimony established the following.

3 During the course of her stay at Bagram, Siddiqui was  
4 tethered to her bed in soft restraints to prevent her  
5 escape.<sup>13</sup> The agents endeavored to meet Siddiqui's needs as  
6 best they could and never denied her access to the restroom,  
7 food, water, or medical attention. Further, Siddiqui had  
8 access to a medical call button that allowed her to contact  
9 the hospital's medical staff directly; therefore, she was  
10 not entirely dependent on the agents to meet her basic  
11 needs. Although Siddiqui was at times in pain and  
12 medicated, she was coherent, lucid, and able to carry on a  
13 conversation.

14 Special Agent Angela Sercer spent the most time with  
15 Siddiqui. She would arrive in the morning and stay  
16 approximately eight hours in Siddiqui's room. Upon  
17 arriving, she would ask Siddiqui if she wanted to talk; if  
18 Siddiqui indicated she did not, Sercer would remain quietly  
19 in the room as a member of Siddiqui's security detail.

---

<sup>13</sup>These soft restraints, made of terry cloth and cotton, provided Siddiqui a fair range of mobility. In fact, the restraints provided such mobility that Siddiqui was able to remove them. After Siddiqui removed the restraints, the agents positioned the straps such that it was impossible to remove the strap on one hand with the other. The restraints were loose enough to allow her to read, drink, and wash, and were removed when Siddiqui required use of the washroom.

1 Although the topic of the July 18th shooting did come up,  
2 Sercer's primary objective was to gather intelligence  
3 related to another investigation of Siddiqui commenced years  
4 earlier. Siddiqui was generally receptive to speaking with  
5 Sercer and indicated that she enjoyed their discussions.  
6 Special Agent Bruce Kamerman spent significantly less time  
7 with Siddiqui. Although he was not initially tasked with  
8 interviewing Siddiqui, supervisors instructed Kamerman to  
9 "continue the dialog" when Siddiqui made unsolicited  
10 incriminating statements to him. Siddiqui never indicated  
11 to Kamerman that she was unwilling to talk. Neither agent  
12 gave Siddiqui *Miranda* warnings.

13 Statements taken from a defendant in violation of  
14 *Miranda* may not be introduced by the government during its  
15 case in chief. *United States v. Douglas*, 525 F.3d 225, 248  
16 (2d Cir. 2008). But because a defendant "must testify  
17 truthfully or suffer the consequences," the government may  
18 introduce un-*Mirandized* statements to impeach the  
19 defendant's testimony. *Id.* (internal quotation marks  
20 omitted). The government cannot, however, introduce a  
21 defendant's involuntary statements. *See, e.g., Mincey v.*  
22 *Arizona*, 437 U.S. 385, 397-98 (1978); *see also United States*



1 v. *Khalil*, 214 F.3d 111, 121-22 (2d Cir. 2000). Because  
2 Siddiqui testified at trial, the government was free to  
3 introduce the statements she made at Bagram Airfield so long  
4 as those statements were voluntary.

5 The government bears the burden of demonstrating that  
6 the defendant's statements were voluntary. See *United*  
7 *States v. Capers*, 627 F.3d 470, 479 (2d Cir. 2010); *United*  
8 *States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991). To  
9 determine whether a defendant's statements were made  
10 voluntarily, courts look to the totality of the  
11 circumstances surrounding the statements. *Anderson*, 929  
12 F.2d at 99. "Relevant factors . . . include the accused's  
13 age, his lack of education or low intelligence, the failure  
14 to give *Miranda* warnings, the length of detention, the  
15 nature of the interrogation, and any use of physical  
16 punishment." *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d  
17 Cir. 1989). A defendant's mental vulnerability also bears  
18 on the analysis. See *Colorado v. Connelly*, 479 U.S. 157,  
19 164 (1986).

20 A number of decisions have assessed the voluntariness  
21 of a defendant's statements where the defendant was in  
22 medical distress. For example, in *Mincy*, 437 U.S. at 398-

1 400, the Supreme Court held that a defendant's statements to  
2 police were involuntary where the defendant (1) arrived at  
3 the hospital a few hours before the interrogation "depressed  
4 almost to the point of coma"; (2) suffered "unbearable"  
5 pain; (3) was unable to think coherently; (4) was  
6 "encumbered by tubes, needles, and [a] breathing apparatus";  
7 (5) expressed his desire that the interrogation cease  
8 numerous times to no avail; and (6) was falling in and out  
9 of consciousness. By contrast, courts tend to view a  
10 hospitalized defendant's statements as voluntary where the  
11 defendant was lucid and police conduct was not overbearing.  
12 See *Khalil*, 214 F.3d at 121-22; *Pagan v. Keane*, 984 F.2d 61,  
13 63 (2d Cir. 1993); *Campaneria*, 891 F.2d at 1019-20.

14 We review the factual findings underpinning the  
15 district court's voluntariness determination for clear error  
16 while subjecting the ultimate conclusion that a defendant's  
17 statements were voluntarily to *de novo* review. See *Khalil*,  
18 214 F.3d at 122; see also *United States v. Pettigrew*, 468  
19 F.3d 626, 633 (10th Cir. 2006); *United States v. Bell*, 367  
20 F.3d 452, 460-61 (5th Cir. 2004). Doing so, we find no  
21 error in the district court's determination that Siddiqui's  
22 statements were voluntary. Although no *Miranda* warnings

1 were given and Siddiqui was kept in soft restraints for the  
2 duration of her hospital stay, the agents' conduct was not  
3 overbearing or abusive. To the contrary, the agents  
4 endeavored to meet her basic needs. Siddiqui conversed  
5 freely with the agents, and when she indicated that she did  
6 not want to engage in conversation, Special Agent Sercher sat  
7 quietly in her room. Further, Siddiqui is highly educated,  
8 having earned her undergraduate degree from Massachusetts  
9 Institute of Technology and a doctorate from Brandeis  
10 University. Most importantly, just as in *Khalil, Pagan*, and  
11 *Campaneria*, Siddiqui was lucid and able to engage the agents  
12 in coherent conversation despite the pain attendant to her  
13 injury.

14 Thus, the district court did not err in allowing the  
15 government to introduce the statements Siddiqui made while  
16 recuperating at Bagram Airfield to rebut her trial  
17 testimony.

18 **E. Application of the Terrorism Enhancement to Siddiqui's**  
19 **Sentence**

20  
21 Finally, we address Siddiqui's challenge to the  
22 district court's application of the terrorism enhancement  
23 under U.S.S.G. § 3A1.4. The enhancement increases by twelve  
24 the defendant's offense level and elevates the defendant's

1 criminal history category to category six if the defendant's  
2 offense "is a felony that involved, or was intended to  
3 promote, a federal crime of terrorism." *Id.* A "federal  
4 crime of terrorism" is an offense that "is calculated to  
5 influence or affect the conduct of government by  
6 intimidation or coercion, or to retaliate against government  
7 conduct"; and is a violation of any one of a number of  
8 enumerated statutes, including 18 U.S.C. §§ 1114 and 2332.  
9 U.S.S.G. § 3A1.4 app. n. 1; 18 U.S.C. § 2332b(g)(5).

10 The district court found that Siddiqui's offenses were  
11 calculated to influence or affect government conduct and  
12 that they were calculated to retaliate against government  
13 conduct. As to the former, the court determined that  
14 Siddiqui's offenses were "calculated to influence or affect  
15 by intimidation the government's fulfillment of its official  
16 duties including, among other things, the interview team's  
17 efforts to interview . . . and . . . detain her." JA 2848.  
18 The court, pointing to statements Siddiqui made while in  
19 Afghan custody, determined that Siddiqui began scheming to  
20 avoid transfer to American custody on July 17, 2008, and  
21 that the scheming came to fruition when Siddiqui gained  
22 control of the Chief Warrant Officer's rifle and fired at  
23 the American interview team.

1           In support of the latter finding, the district court  
2 highlighted testimony regarding various anti-American  
3 statements Siddiqui made while in custody. In the court's  
4 estimation, these statements demonstrated Siddiqui's intent  
5 to retaliate against the United States government.

6           Siddiqui argues that the district court erred in applying  
7 the enhancement. She claims that application of both the  
8 terrorism enhancement and the Guidelines' official victim  
9 enhancement resulted in impermissible double counting. She  
10 also contends that her conduct was not "calculated," as  
11 required by the plain language of the enhancement.  
12 According to Siddiqui, long-term planning is a necessary  
13 condition to finding that a defendant's offense was  
14 "calculated."

15           Siddiqui's contention that the district court committed  
16 error in applying both the official victim enhancement and  
17 the terrorism enhancement is devoid of merit. "[A] district  
18 court calculating a Guidelines sentence may apply multiple  
19 [enhancements] based on the same underlying conduct,"  
20 especially where "each of the multiple [enhancements] . . .  
21 serves a distinct purpose or represents a discrete harm."  
22 *United States v. Maloney*, 406 F.3d 149, 152, 153 (2d Cir.

1 2005). The terrorism and official victim enhancements both  
2 address discrete harms resulting from Siddiqui's conduct—the  
3 official victim enhancement "deals with the selection of  
4 victims based on their status as government employees," and  
5 the terrorism enhancement addresses those acts that are  
6 calculated to influence government conduct or to retaliate  
7 against a government. *In re Terrorism Bombings of U.S.*  
8 *Embassies in East Africa*, 552 F.3d 93, 153 (2d Cir. 2008).  
9 Accordingly, application of both the terrorism and official  
10 victim enhancements does not constitute impermissible double  
11 counting. *See id.*

12 Resolution of Siddiqui's challenge to the district  
13 court's finding that her offense was "calculated" merits  
14 more discussion. As previously noted, for the terrorism  
15 enhancement to apply, the defendant's offense must be  
16 "calculated to influence or affect the conduct of government  
17 by intimidation or coercion, or to retaliate against  
18 government conduct." 18 U.S.C. § 2332b(g)(5)(A) (emphasis  
19 added). When we interpret the Guidelines, we "giv[e] the  
20 words used their common meaning." *United States v. Stewart*,  
21 590 F.3d 93, 137 (2d Cir. 2009). "Calculated" means  
22 "planned—for whatever reason or motive—to achieve the stated

1 object." *Awan*, 607 F.3d at 317; see *Stewart*, 590 F.3d at  
2 137 ("The conventional meaning of 'calculated' is 'devised  
3 with forethought.'").

4 Many courts (including this one) interpret "calculated"  
5 as nearly synonymous with intentional. See *Stewart*, 590  
6 F.3d at 137; see also *United States v. Chandia*, 675 F.3d  
7 329, 333 n.3 (4th Cir. 2012); *United States v. El-Mezain*,  
8 664 F.3d 467, 571 (5th Cir. 2011); *United States v.*  
9 *Jayyousi*, 657 F.3d 1085, 1115 (11th Cir. 2011). Thus, "if a  
10 defendant's purpose in committing an offense is to  
11 'influence or affect the conduct of government by  
12 intimidation or coercion, or to retaliate against government  
13 conduct,'" application of the terrorism enhancement is  
14 warranted. See *Stewart*, 590 F.3d at 137 (emphasis added)  
15 (quoting 18 U.S.C. § 2332b(g)(5)(A)). Where, however,  
16 "there is no evidence that the defendant sought to influence  
17 or affect the conduct of the government," the enhancement is  
18 inapplicable. *Id.* (internal quotation marks omitted).

19 Most cases applying the terrorism enhancement have  
20 involved conduct that spanned a significantly greater length  
21 of time than the conduct here. See, e.g., *Awan*, 607 F.3d at  
22 310-11; *United States v. Salim*, 549 F.3d 67, 70-71 (2d Cir.

1 2008); *In re Terrorist Bombings*, 552 F.3d at 103-05 (2d Cir.  
2 2008); *United States v. Meskini*, 319 F.3d 88, 90-91 (2d Cir.  
3 2003). Relying on this observation, Siddiqui argues that  
4 "calculation," as used in the enhancement, incorporates a  
5 long-term planning requirement. We disagree. That long-  
6 term planning is present in many of the cases applying the  
7 terrorism enhancement does not make it a condition necessary  
8 to finding that a defendant's offense was calculated to  
9 influence government conduct or to retaliate against a  
10 government. Instead, the terrorism enhancement is  
11 applicable where a defendant acts according to a  
12 plan-whether developed over a long period of time or  
13 developed in a span of seconds-with the object of  
14 influencing government conduct or retaliating against a  
15 government.

16 The day before the shooting incident here, Siddiqui  
17 repeatedly implored Afghan police officials not to turn her  
18 over to American forces. Siddiqui gained control of an M-4  
19 rifle and fired on the American interview team attempting to  
20 take her into United States custody the following day.  
21 Under these circumstances, the district court did not



1 clearly err<sup>14</sup> in its determination that Siddiqui's offense  
2 was calculated to influence government conduct-i.e, the  
3 United States' attempts to take Siddiqui into custody-by  
4 intimidation or coercion.

5 We also find that the district court did not clearly  
6 err in determining that Siddiqui's offense was calculated to  
7 retaliate against the United States. While in Afghan  
8 custody prior to the shooting incident, Siddiqui referred to  
9 the United States as invaders, and when queried about the  
10 bomb-making documents found in her possession, Siddiqui  
11 indicated that the target of those bombs were "the  
12 foreigners." See JA 3022. What's more, shortly after  
13 firing on the American interview team, Siddiqui stated: "I  
14 am going to kill all you Americans. You are going to die by  
15 my blood"; "death to America"; and "I will kill all you  
16 motherfuckers." Taken as a whole, this evidence provides a  
17 sufficient factual basis for the district court's conclusion  
18 that Siddiqui's offense was calculated to retaliate against  
19 the United States.

20

---

<sup>14</sup>We decline Siddiqui's invitation to apply a searching *de novo* review here. Because the district court's finding on this score is factual, clear error review is appropriate. See *Salim*, 549 F.3d at 79; see also *El-Mezain*, 664 F.3d at 571.

