UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-v.- : 11 Cr. 581 (JFK)

ROBERT LEE MILES, :
a/k/a "Robert Lee,"

:

Defendant.

:

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MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA
IN OPPOSITION TO THE DEFENDANT'S OMNIBUS MOTION

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Defendant.	:	

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA
IN OPPOSITION TO THE DEFENDANT'S OMNIBUS MOTION

The Government respectfully submits this memorandum of law in opposition to the omnibus motion of Robert Lee Miles, the defendant.

PRELIMINARY STATEMENT

On July 11, 2012, the defendant requested to file a motion with respect to an "innocent possession" defense, and a motion to suppress "certain statements." (Transcript of July 11, 2012 Conference ("Tr."), enclosed herewith as Exhibit ("Ex.") A, 2:11-3:5.) Although the defendant was indicted more than a year ago and is on his third court-appointed attorney, the Government did not oppose the defendant's request, and the Court set a schedule for these motions. (Tr. 4:24-6:1.)

On August 1, 2012, the defendant served an omnibus motion, seeking more than a dozen forms of relief, beyond what he had informed the Government he intended to file when he conferred with the Government prior to the July 11 conference and beyond what he requested to file at the July 11 conference. In a thirty-two page memorandum of law ("Def. Mem."),

supported by two declarations and more than twenty exhibits, numbering hundreds of pages, the defendant seeks:

1. dismissal of the indictment under the so-called innocent possession defense, or, in the alternative, an order permitting the jury to consider such a defense;

2. dismissal of the indictment on the ground of entrapment by estoppel and/or entrapment, or, in the alternative, an order permitting the jury to consider these defenses;

3. suppression of the handgun he possessed;

4. suppression of post-arrest oral statements;

5. suppression of a post-arrest written statement;

6. suppression of the call log and contents of the defendant's cellular telephone;

7. preclusion of the contents of the defendant's cellular telephone;

8. preclusion of recorded phone calls from Rikers Island;

9. an order for a bill particulars listing the recorded phone calls from Rikers Island that the Government intends to introduce at trial, transcripts of those recordings, and the bases for the admission of those recordings;

10. an order precluding the Government from introducing evidence about the defendant's criminal record or the details of his prior arrests or convictions, even if he testifies;

11. an order precluding the Government from referring to the defendant, in form or substance, as a "felon" or "convict";

12. an order for a bill of particulars listing all convictions that the Government believes establish that the defendant is subject to a mandatory minimum fifteen year sentence under the Armed Career Criminal Act; and

13. an order for early production of 3500 material.

These myriad motions should be denied, without a hearing. Each is meritless, premature, or both.

ARGUMENT

I. THE SO-CALLED INNOCENT POSSESSION DEFENSE IS NOT A BASIS TO DISMISS THE INDICTMENT

The defendant's asserts that an "innocent possession" defense requires dismissal of the indictment. (Def. Mem. 9-16.) This assertion is wrong for three independent reasons. First, there is no innocent possession defense. Second, even if there were an innocent possession defense, it would not apply here, even accepting, for purposes of this motion, the defendant's alleged facts. And finally, even if there were an innocent possession defense, and even if it applied on the defendant's alleged facts, dismissal of the indictment would not follow, because the defense, if it exists at all, is an affirmative defense.

A. There Is No Innocent Possession Defense

There is no innocent possession defense under federal law. Statutory construction "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *United States* v. *Albertini*, 472 U.S. 675, 680 (1985) (internal quotation marks omitted). Where the statute's language is "'plain, the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)); *see also Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Here, the defendant is charged with violating Section 922(g)(1) of Title 18 of the United States Code. That subsection provides, in pertinent part, that it "shall be unlawful for any person," "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," to "possess in or affecting

commerce, any firearm or ammunition." Under the plain language of the statute, there is no innocent possession. Possession is the crime.

The penalty provision applicable to a violation of Section 922(g)(1) and legislative history are in accord. In setting forth the pertinent penalty (which is increased for an individual, like the defendant, who has previously been convicted of certain offenses, *see* 18 U.S.C. § 924(e)), Congress used the word "knowingly." 18 U.S.C. § 924(a)(2) (referring to an individual who "knowingly violates" the prohibition against possession). This contrasts with certain other penalty provisions with respect to firearms offenses, which describe the requisite mental state as acting "willfully." *E.g.*, *id.* § 924(a)(1)(D). As Chief Judge Preska recognized in rejecting the argument that the defendant asks this Court to accept, "[t]he difference between acting willfully and acting knowingly is crucial." *United States* v. *Gregg*, No. 01 Cr. 501 (LAP), 2002 WL 1808235, at *5 (S.D.N.Y. Aug. 6, 2002). This is so because "when a criminal statute requires that a defendant act willfully, the statute requires that the defendant act with a 'bad purpose.'" *Id.* (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)). "But when a statute only requires that a defendant act knowingly, as does section 922(g), the defendant only need know the facts that constituted the offense. . . . Thus, to violate section 922(g), a felon only must know that he possesses a gun; his purpose in doing so, whether good or bad, is irrelevant." *Id.* (citation omitted).

Moreover, "Congress' choice of words . . . is significant, as evidenced by the legislative history of the statute." *Gregg*, 2002 WL 1808235, at *6. "An early version of section 924(a) included a willfulness requirement for all violations of the statute. Many legislators, however, felt that for the most serious offenses, including gun possession by felons, the government should not have to prove that the defendant had any intent to violate the law. As a result, the mens rea

was reduced to knowledge. The Firearms Owners' Protection Act, 17 Cumb. L. Rev. 585, 615-17, 647-48 (1987)." *Id.*; *see also*, *e.g.*, 114 Cong. Rec. 13868-69 (1968) (statement of Senator Russell Long, who introduced legislation, explaining that the proposed law would "simply set[] forth the fact that anybody who has been convicted of a felony . . . is not permitted to possess a firearm").

Multiple circuit courts agree. The Ninth Circuit rejected the innocent possession defense in *United States* v. *Johnson*, 459 F.3d 990 (9th Cir. 2006). The court analyzed the statute's text, stated that "Congress knows how to create an affirmative defense when it wishes to do so," and explained:

> [T]ellingly, Congress has provided for an affirmative defense in the context of a criminal charge quite similar to the present one. *See* [18 U.S.C.] § 931(b) (providing for an affirmative defense against a charge that a violent felon has purchased or otherwise come into ownership or possession of body armor; felon can show that he obtained prior written certification from an employer, that use of such body armor is necessary for the safe performance of lawful business activity, and that the use and possession by the defendant were limited to the course of such performance).
>
> Congress has also written into a federal statute the very kind of innocent possession defense that [the defendant] asks us to now write into the felon-in-possession statute. *See id.* § 1466A(e) (providing for an affirmative defense against the charge of knowingly possessing a visual depiction of a minor engaging in sexually explicit conduct; defendant may show that he possessed fewer than three such depictions, that he took reasonable steps to destroy the depictions or reported the matter to law enforcement, and that he provided law enforcement with access to the depictions). And in yet another statute, Congress has provided for an affirmative defense where the defendant simply had good intentions. *See id.* § 1512(d) (providing for a defense against a charge of witness tampering where the defendant's "conduct consisted solely of lawful conduct and that the defendant's sole *intention* was to encourage, induce, or cause the other person to testify truthfully" (emphasis added)).

> That no such defense is provided for § 922(g) strongly suggests that no such defense was intended.

Id. at 997 (emphasis in original). The court further explained that "the proposed defense would invite perjury and thus unduly increase the government's burden in litigating these cases." *Id.* It also "would thwart congressional purpose." *Id.* at 998.

The Fourth Circuit rejected the innocent possession defense in *United States* v. *Gilbert*, 430 F.3d 215 (4th Cir. 2005). The court held that Section 922(g) "in no way invites investigation into why the defendant possessed a firearm or how long that possession lasted." *Id.* at 218. Indeed, "such an inquiry would undermine the statutory scheme governing felon-in-possession offenses, which expressly avoids inquiring into the motive of a felon caught possessing a firearm." *Id.* The court also explained that an "innocent possession" defense was highly subject to abuse because "a felon might plausibly assert it in any case where the purpose and duration of his firearm possession are known only to him." *Id.*

The First Circuit also rejected the "innocent possession" defense, first in *United States* v. *Teemer*, 394 F.3d 59 (1st Cir. 2005), and then again in *United States* v. *Mercado*, 412 F.3d 243 (1st Cir. 2005), which reaffirmed *Teemer*. In doing so, the First Circuit, like the Ninth and Fourth Circuits, engaged in an analysis of the language and purpose of Section 922(g):

> Neither the language of the felon-in-possession statute, nor its evident purpose[,] encourage the court to develop defenses that leave much room for benign transitory possession. The statute bans possession outright without regard to how great a danger exists of misuse in the particular case. Indeed, one piece of legislative history of an ancestor statute says that the aim was "to prevent the crook and gangster, racketeer and fugitive from justice from being able to purchase or in any way come in contact with firearms of any kind."

Teemer, 394 F.3d at 64 (footnote and citation omitted). Even recognizing that "there are circumstances that arguably come with the letter of the law [of Section 922(g)] but in which

conviction would be unjust," thee court ruled that the "innocent possession" defense could "easily . . . be misused." *Id.* at 64.

Other circuits have also rejected defendants' attempts to read an "innocent possession" defense into Section 922(g). *United States* v. *Baker*, 508 F.3d 1321, 1325 (10th Cir. 2007) (The defendant "argues . . . that his motive in possessing the ammunition is (or should be) relevant to the crime charged. Specifically, he contends that if a defendant obtains ammunition innocently, with no illicit purpose, and takes adequate measures to rid himself of it as promptly as reasonably possible, he cannot be convicted under § 922(g). . . . In our view, however, that is precisely what Congress envisioned by prohibiting knowing, as opposed to willful, possession of ammunition."); *United States* v. *Hendricks*, 319 F.3d 993, 1007 (7th Cir. 2003) (affirming decision not to give an "innocent possession" jury charge, holding that apart from a justification defense in which the defendant must show "evidence of an imminent threat of death or bodily injury," no other related defense is available to Section 922(g)); *see also United States* v. *Deleveaux*, 205 F.3d 1292, 1298 (11th Cir. 2000) ("To establish that a defendant acted 'knowingly,' the prosecution is not required to prove that the defendant knew that his possession of a firearm was unlawful. . . . The prosecution need show only that the defendant consciously possessed what he knew to be a firearm."); *United States* v. *Parker*, 566 F.2d 1304, 1306 (5th Cir. 1978) (it is "immaterial" that possession of the firearm is "momentary").

Among the circuit courts to have reached the issue, only one has held to the contrary. In *United States* v. *Mason*, 233 F.3d 619 (D.C. Cir. 2000), the District of Columbia Circuit recognized an "innocent possession" affirmative defense, but limited the defense to cases in which the defendant can demonstrate "(1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory—*i.e.*, in light of the circumstances

presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible." *Id.* at 624. The court held that this "defense to a § 922(g)(1) charge is necessarily narrow," *id.*, and that the case before it—where evidence showed that the defendant found a gun in an area with children and picked it up to bring it to a police officer, *id.* at 620—"presents a close call," and therefore a jury instruction should have been given, *id.* at 625.

In *Mason*, the prosecution agreed that there was an innocent possession defense. 233 F.3d at 623. The text of the statute, its purpose, and legislative history are all to the contrary. In arguing that this Court should nevertheless follow *Mason*—rather than the uniform rejection of the proposed defense by other circuit courts—the defendant notes that in *United States* v. *Dixon*, 548 U.S. 1 (2006), the Supreme Court assumed that the common-law affirmative defense of duress was available, although the pertinent statute was silent in this respect. (Def. Mem. 11-12 (citing *Dixon*, 548 U.S. at 13-14).) But the *Dixon* Court was not asked to determine whether a duress defense existed. Rather, it was asked to determine its scope, assuming that it existed. *Dixon*, 548 U.S. at 13-14 ("[a]ssuming that a defense of duress is available to the statutory crimes at issue, . . . we must determine what that defense would look like" (footnote omitted)). In any event, the assumption that such a defense existed—an assumption neither side challenged—was premised on the principle that one may fairly assume that Congress legislates against the backdrop of established common-law affirmative defenses, absent evidence to the contrary. The Supreme Court explained that "we can safely assume that the 1968 Congress was familiar with . . . the long-established common-law rule" regarding duress. *Id.* at l3-14; *see also id.* at 13 n.6 ("it would be unrealistic to read th[e] concern with the proliferation of firearm-based

violent crime as implicitly doing away with a defense as strongly rooted in history as the duress defense, *see, e.g.*, 4 W. Blackstone, Commentaries on the Laws of England 30 (1769).").

The defendant's proposed defense is not a "common-law rule," much less a "long-established" one "strongly rooted in history." Moreover, as discussed above, there is evidence that Congress considered—and rejected—the statutory scheme that the defendant would have this Court assume against the statute's silence. *See, e.g.*, *Gregg*, 2002 WL 1808235, at *6.[1]

The defendant also argues that there are benefits to allowing an innocent possession defense. (Def. Mem. 14-15.) One could debate whether that is so. But regardless of the answer, "'[w]hether, as a policy matter, an exemption [to a statute] should be created is a question for legislative judgment, not judicial inference.'" *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (quoting *United States* v. *Rutherford*, 442 U.S. 544, 559 (1979)). This is particularly true given that the proposed defense is incompatible with the wording of Section 922(g). *See United States* v. *McGrath*, 60 F.3d 1005, 1009 (2d Cir. 1995)

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[1] The defendant does not engage with the legislative history of the statute that he is charged with violating. Rather, he cites two state cases to suggest that Congress legislated against the backdrop of an innocent possession defense. (Def. Mem. 12-13.) He does not provide any reason to conclude that Congress was aware of these two state cases. In any event, they are irrelevant. The first, *People* v. *La Pella*, 272 N.Y. 81 (1936), construed the word "possession" in a state statute to allow a jury charge that the defendant would not be guilty if, as he claimed, he found a pistol and quickly delivered it to the police. *Id.* at 83. The two-paragraph decision did not rest on the common law. The second, *People* v. *Persce*, 204 N.Y. 397 (1912), affirmed a conviction under state law for possessing a slingshot. It did not approve an innocent possession defense. On the contrary, the court held that "[i]f we give to the statute under consideration a rational interpretation it becomes clear that the carrying or possessing of a slungshot even without proof of specific ulterior criminal intent are within the character of acts which the legislature may thus condemn." *Id.* at 402.

Nor does it matter whether in New York (or any other state) "innocent possession is a valid defense." (Def. Mem. 13.) In passing federal law, Congress found state gun control laws to be "inadequate to bar possession of firearms from those most likely to use them for unlawful purposes." 114 Cong. Rec. 14774 (1968). Section 922(g), by its plain language, does not incorporate state law. Contrary to the defendant's implicit suggestion (Def. Mem. 13), its meaning does not turn on the state in which a defendant commits his crime.

("[T]he role of the court is to give effect to the [felon in possession] legislation Congress has passed, not to legislation it might pass if it further studied the question."); *see also Gilbert*, 430 F.3d at 219 (the proposed defense "would . . . rewrite the statute"). The Court should apply the law as written by Congress.

B. Even If There Were An Innocent Possession Defense, It Would Not Apply Here

For the reasons set forth above, there is no innocent possession defense. But even assuming *arguendo* that there were, it would not apply here, even accepting as true, for purposes of this motion, the defendant's alleged facts.

"A federal court may preclude a defendant from presenting a defense when 'the evidence in support of such a defense would be legally insufficient.'" *United States* v. *Williams*, 389 F.3d 402, 405 (2d Cir. 2004) (quoting *United States* v. *Villegas*, 899 F.2d 1324, 1343 (2d Cir. 1990)). Even in *Mason*, the court recognized that a defense of "innocent possession" can only be presented where the defendant's actions "demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct." 233 F.3d at 624.

The Second Circuit "has not decided whether such a defense exists." *United States* v. *Harrington*, 370 F. App'x 216, 218 n.1 (2d Cir. 2010). It has strongly suggested, however, that any such defense—if it exists at all—must be exceedingly narrow. In *United States* v. *Paul*, 110 F.3d 869, 872 (2d Cir. 1997), the Court hypothesized:

> Cases may be imagined where application of the statute would be at least highly problematic. For example, a person might observe a police officer's pistol slip to the floor while the officer was seated at a lunch counter. Picking the weapon up and immediately handing it to the officer would seem a questionable case for application of section 922(g) even if the helpful bystander had a felony conviction.

However, the Court did not need to decide, and did not decide, whether such a hypothetical would violate the statute—rather than just be a "questionable" choice for prosecution—because in the case at hand, the defendant's possession "was not so fleeting as to extend the statute beyond its arguable limits." *Id.*

In *United States* v. *Williams*, 389 F.3d 402 (2d Cir. 2004), the Second Circuit again rejected the applicability of an "innocent possession" defense on the facts presented, without deciding whether such a defense exists. The Court held that the defendant's alleged facts—that he took a gun from a friend's cousin (so that this other person would not "get in trouble") and then started "the process of dumping the gun"—was insufficient. *Id.* at 405. In a footnote, the Court held that the facts presented also fell outside of the scope of the "innocent possession" defense set forth in *Mason*. *Id.* at 405 n.4. The Court so ruled without endorsing *Mason*, and without any discussion about whether this proposed defense was consistent with the statute's language and purpose, or with the decisional law of the Supreme Court or other courts.

Similarly, in *United States* v. *White*, 552 F.3d 240 (2d Cir. 2009), the Second Circuit held that even assuming *arguendo* an innocent possession defense could be raised, it could not be raised by the defendant at hand, who "did not possess the shotgun for mere seconds." *Id.* at 248. The defendant testified that he took a loaded shotgun from his girlfriend, who had pointed it at him, brought it to another room and began unloading it so that a child in the house would not get a hold of the gun, and was arrested before he finished removing the shells from the shotgun. *See id.* at 243-44. The Court held that this possession—holding the gun long enough to bring it to another room—was too long to merit a "fleeting" or "innocent possession" instruction, even if one did exist. *See id.* at 249 ("Since [the defendant] failed to adduce sufficient evidence that he possessed the shotgun only for as long as necessary to vitiate a potential threat to [a] child, he

was not entitled to a jury instruction on fleeting possession as we have, in dicta, previously discussed it, or on innocent possession as we might define it.").

Here, the defendant does not allege that he found a weapon in a public place, picked it up to avoid harm to others, and promptly sought to bring it to authorities. *Cf. Mason*, 233 F.3d at 620. Nor does the defendant allege that he took fleeting possession of a weapon in a private place to avoid a threat to another person. *Cf. White*, 552 F.3d at 249. Rather, according to the defendant, solely for financial gain, he "agreed to take" a handgun from a "friend" in an "apartment," left the apartment with the handgun, and entered the public subway "[b]ecause it was cold outside and I wanted to get the gun to the police station." (Declaration of Robert Lee Miles, dated August 2, 2012 ("Miles Decl."), ¶¶ 4, 7-8.) In other words, the defendant (a) chose to possess a handgun not to avoid potential harm to others, but for pecuniary gain, and (b) chose to remove that handgun from a private residence and carry it on public transit. Even accepting these facts as proffered—and there is substantial reason to doubt the defendant's proffer—they are a far cry from the facts of *Mason*. Even if this Court were to read an "innocent possession" defense into the statute (and it should not), it is inconceivable that Congress would have intended such a defense to cover a situation where a defendant intentionally takes possession of a firearm for money, and then brings that firearm out of a private residence and into a public area. *See, e.g.*, *Barrett* v. *United States*, 423 U.S. 212, 218 (1976) (Congress's purpose was "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous."); *United States* v. *Dillard*, 214 F.3d 88, 93 (2d Cir. 2000) ("The prohibition of gun possession by previously convicted criminals seeks to protect society by reducing the risk of violence that may result from the possession of guns by persons inclined to crime.").

Moreover, the defendant does not allege that upon finding a police officer on the subway, he immediately handed over the handgun. Rather, the defendant acknowledges that he did not. (*See* Miles Decl. ¶¶ 10-15; Def. Mem. 21 (if not for the "stop and frisk" of the defendant, "police officers would not have recovered the weapon [he] was carrying").). *Cf. Gregg*, 2002 WL 1808235, at *6 (the defendant's "desire to receive a five hundred dollar reward for the gun does not excuse his failure to turn the gun over to the authorities at the first reasonable opportunity").

In short, even accepting the defendant's version of the facts, his conduct was both insufficiently "innocent" and lacks the immediacy that an innocent possession defense, even assuming *arguendo* that one exists, would require.

C. Even If There Were An Innocent Possession Defense, And Even If It Applied Here, Dismissal Of The Indictment Would Not Follow

There is no innocent possession defense, and even assuming *arguendo* that there were, it would not apply here, even accepting as true, for purposes of this motion, the defendant's alleged facts. But even if there were an innocent possession defense, and even if it applied on the defendant's alleged facts, dismissal of the indictment would not follow. The "innocent possession" defense, if it exists at all, is an affirmative defense. *See, e.g.*, *White*, 552 F.3d at 249 (the "affirmative defenses cited by [the defendant]," including innocent possession, "lacked sufficient foundation in the evidence" for a jury charge to be given); *Mason*, 233 F.3d at 625 ("it will be up to the jury to assess the evidence and to determine whether . . . [the defendant] took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible"). An indictment need not "anticipate affirmative defenses." *United States* v. *Sisson*, 399 U.S. 267, 288 (1970). The defendant's invocation of the innocent possession defense is not a basis for dismissal of the indictment.

II. NEITHER THE ENTRAPMENT BY ESTOPPEL NOR ENTRAPMENT DEFENSE IS A BASIS TO DISMISS THE INDICTMENT

Just as he asserts that an "innocent possession" defense requires dismissal of the indictment, the defendant asserts that two other defenses require dismissal of the indictment—entrapment by estoppel, and entrapment. (Def. 16-19.) This assertion is wrong for similar reasons.

A. The Entrapment By Estoppel Defense Does Not Apply, And In Any Event Is Not A Basis To Dismiss The Indictment

i) Applicable Law

The "so-called 'public authority' defense . . . divides into two closely-related, but slightly different, forms." *United States* v. *Giffen*, 473 F.3d 30, 39 (2d Cir. 2006). One, the actual public authority defense, "exists where a defendant has in fact been authorized by the government to engage in what would otherwise be illegal activity." *Id.* The second form of the defense, usually called entrapment by estoppel, bars the Government from prosecuting a person for his criminal conduct "when the government, by its own actions, induced him to do those acts and led him to rely reasonably on his belief that his actions would be lawful by reason of the government's seeming authorization." *Id.* at 41; *see also United States* v. *Gil*, 297 F.3d 93, 107 (2d Cir. 2002) (entrapment by estoppel defense arises "where a government agent authorizes a defendant 'to engage in otherwise criminal conduct . . . and the defendant, relying thereon, commits forbidden acts in the mistaken but reasonable, good faith belief that he has in fact been authorized to do so.'" (quoting *United States* v. *Abcasis*, 45 F.3d 39, 43 (2d Cir. 1995))).

The defense requires an affirmative assurance from the Government that the proscribed conduct is permissible. *United States* v. *Abcasis*, 445 F.3d 39, 43 (2d Cir. 1995). Consequently, a defendant seeking to establish entrapment by estoppel "'must put forth an affirmative representation by a government official that his conduct was or would be legal.'" *Giffen*, 473

F.3d at 43 n.13 (quoting *United States* v. *Pardue*, 385 F.3d 101, 108-09 (1st Cir. 2004)). Application of the entrapment by estoppel defense must be exercised with "great caution" and "'great reluctance,'" and only when the use of the doctrine "'does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation.'" *United States* v. *Corso*, 20 F.3d 521, 528 (2d Cir. 1994) (quoting *United States* v. *Browning*, 630 F.2d 694, 702 (10th Cir. 1980)).

ii) Discussion

The defendant does not allege an "affirmative representation by a government official that his conduct was or would be legal" under federal law. Rather, the defendant references "state and local officials[']" descriptions of local programs. (Def. Mem. 17-18.) Implicitly recognizing that this is insufficient, the defendant notes that "absent from the materials promoting and discussing New York gun amnesty programs is any sort of warning that participants might be subject to prosecution by the *Federal* government." (Def. Mem. 17 (emphasis in original).) Underlying this statement—and the defendant's argument as a whole—is the assumption that absent such a warning, federal authorities may not prosecute the defendant. That is backwards. The entrapment by estoppel defense requires an "affirmative representation" that proscribed conduct "was or would be legal," not an affirmative representation that the proscribed conduct was against the law. *See Giffen*, 473 F.3d at 43 n.13 ("The fact that the officials did not volunteer an observation that the conduct was illegal does not reasonably support [the defendant's] concluding that his conduct was being authorized."); *see generally Cheek* v. *United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *Barlow* v. *United States*, 32 U.S. 404, 411 (1833) ("It is a common

maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally; and it results from the extreme difficulty of ascertaining what is, *bonâ fide*, the interpretation of the party; and the extreme danger of allowing such excuses to be set up for illegal acts, to the detriment of the public.").

Moreover, the defendant's argument, if accepted, would seriously "interfere with underlying government polic[y]" and "unduly undermine the correct enforcement of a particular law.'" *Corso*, 20 F.3d at 528 (internal quotation marks omitted). The defendant does not allege that federal authorities prepared the various "materials" upon which he allegedly relied. At bottom, the defendant's argument reduces to the assertion that if a state or local authority announces a policy, and in doing so, does not affirmatively inform individuals that they remain subject to federal law, the U.S. Department of Justice may not prosecute a violation of federal law where the defendant alleges that he was following the state or local policy. The Supremacy Clause does not countenance such a claim, which would turn federalism on its head, empowering local authorities to complicate severely or prevent entirely enforcement of federal law by announcing that certain conduct is legal under state or local law while failing (intentionally or unintentionally) to note that federal law remains unchanged. The impact of such a claim, if accepted, would be profound, affecting everything from firearm prosecutions, to drug prosecutions, to immigration prosecutions.

In any event, entrapment by estoppel is "an affirmative defense," for which the burden of proof "is on the defendant." *United States* v. *Sash*, 444 F. Supp. 2d 224, 229, 230 (S.D.N.Y. 2006) (citing *Abcasis*, 45 F.3d at 43). Even if entrapment by estoppel were an available defense on the defendant's alleged facts—and it is not—it is no basis for dismissal of the indictment.

B. The Entrapment Defense Is Not A Basis To Dismiss The Indictment

The defendant spends the bulk of the pertinent section of his brief discussing entrapment by estoppel, but also asserts, without analysis, that he has a valid entrapment defense. (Def. Mem. 17.) The Government disagrees, but in any event, entrapment, too, is an affirmative defense on which the defendant bears the burden of proof. *E.g.*, *United States* v. *Williams*, 23 F.3d 629, 635 (2d Cir. 1994). Regardless of the merits of the defendant's proffered defense, it is no basis for dismissal of the indictment.[2]

III. OFFICERS HAD PROBABLE CAUSE TO ARREST THE DEFENDANT

The defendant asserts that the gun he possessed must be suppressed because officers lacked probable cause to arrest him for crossing between subway cars, and therefore lacked authority to frisk him, which lead to discovery of the firearm. (Def. Mem. 20-21.) According to the defendant, this is so because the pertinent state law only prohibits crossing between subway cars when a train is moving, and in his case, the train was not moving. (Def. Mem. 20.) This argument fails under the plain language of state law. It is also wrong on the facts.

Title 21, New York Compilation of Codes, Rules, and Regulations, Section 1050.9(d), provides:

> No person may ride on the roof, platform between subway cars or on any other area outside any subway car or bus or other conveyance operated by the authority. No person may use the end doors of a subway car to pass from one subway car to another

[2] The Government reserves the right to move to preclude this affirmative defense and for the jury to be charged to ignore references to it in defense counsel's statements in the event that the defendant does not demonstrate sufficient a factual predicate at trial to warrant a jury instruction. *See Paul*, 110 F.3d at 871 (a court "is under no duty to give the requested jury charge" where the "evidence is insufficient as a matter of law to establish the defense"); *United States* v. *Balkany*, 468 F. App'x 49, 51 (2d Cir. 2012) ("The District Court did not err in refusing to give an entrapment charge because [the defendant] failed to present any evidence that the government 'induced' him to commit the crimes charged."); *United States* v. *Absolam*, 305 F. App'x 786, 788 (2d Cir. 2009) (affirming conviction and approving of jury instructions where court charged that the entrapment defense did not apply on the facts).

> except in an emergency or when directed to do so by an authority conductor or a New York City police officer.

N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.9(d). The defendant states that the prohibition in the first sentence above—regarding where a person may "ride"—applies only when a subway car or bus or other conveyance is moving. (Def. Mem. 20.) The defendant says this is so because the word "ride" implies that the object on which an individual has placed himself must "in motion." (*Id.*) Accordingly, under the defendant's reading of the law, a police officer would have to wait to remove someone who was sitting on the roof of a subway car until the subway car is moving (which would make removing the individual both difficult and dangerous). The defendant offers no support for such a strained interpretation, other than that a certain dictionary defines "ride" to mean to "travel over a surface." (*Id.*)

In any event, the defendant was not subject to arrest for violating the prohibition on riding on the roof or outside of a subway car. He was subject to arrest for crossing between subway cars, the prohibition set forth in the second sentence above: "No person may use the end doors of a subway car to pass from one subway car to another except in an emergency or when directed to do so by an authority conductor or a New York City police officer." N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.9(d). This sentence does not contain the word "ride" or any other implicit or explicit reference to movement. The defendant argues that this omission is irrelevant, because this sentence "should be read together with the first sentence." (Def. Mem. 20.) But the sentences are separated by a period and two spaces. There is nothing that indicates that the first sentence modifies the second.

The defendant also argues that his interpretation "is consistent with the regulation's purpose of promoting the physical safety of individuals who ride the subway," because when a "train is halted at the platform, there is little concern that an individual will be physically harmed

by passing through the subway's end doors." (Def. Mem. 20.) Even assuming that this is the regulation's sole purpose—a proposition for which the defendant offers no support—the defendant's argument is flawed. Unless individuals can anticipate precisely when a train will start moving, and there is no risk that individuals will fall off of the narrow space between subway cars when a train is stationary, prohibiting movement between cars is the only way to ensure passengers' welfare. In any event, whatever the merits of the defendant's theory of subway safety, where a statute or regulation is "plain, the sole function of the courts is to enforce it according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241 (internal quotation marks omitted).

The defendant cites *Hernandez* v. *City of New York*, No. 00 Civ. 9507 (RWS), 2004 WL 2624675 (S.D.N.Y. Nov. 18, 2004), in support of his reading of the pertinent regulation, suggesting that that case held that a train must be in motion for a defendant to violate the prohibition against crossing between cars. (Def. Mem. 20.) But *Hernandez* contains no analysis of the regulation; that the defendant there admitted crossing between cars while the train was moving does not mean that the regulation requires that the train be moving. *Cf. Chevalier* v. *City of New York*, No. 11 Civ. 1511 (GWG), 2011 WL 4831197, at *2 (S.D.N.Y. Oct. 12, 2011) ("Chevalier does not dispute that he walked between subway cars in violation of 21 N.Y. C.R.R. § 1050.9(d) or that he was observed doing so. Since Defendants had probable cause to arrest Chevalier, their motion to dismiss is granted.").[3]

For the foregoing reasons, the defendant's claim fails as a matter of law, and it should be denied, without a hearing. In the event that the Court disagrees, however, the Government

[3] Indeed, as regular riders of the New York City subway know, subway cars contain stickers on their doors warning individuals that they may not cross between cars. The stickers make no mention of the train moving.

expects that at a hearing, the evidence would show that the train that the defendant was on was moving during at least a portion of the time when the defendant crossed between cars.

IV. THE DEFENDANT'S MOTION TO SUPPRESS ALL POST-ARREST STATEMENTS SHOULD BE DENIED AS MOOT

The defendant asserts that all of his post-arrest statements must be suppressed because he does not recall having been advised of his *Miranda* rights. (Def. Mem. 21-23; Miles Decl. ¶ 17.)[4] The defendant does not acknowledge or distinguish among various post-arrest statements in seeking suppression. For clarity of analysis, the Government believes that it may be useful to place the defendant's post-arrest statements into two categories: (1) oral statements made in connection with questions regarding weapons or contraband posed in connection with frisking the defendant, and (2) oral statements and a written statement made at the precinct. While the Government believes that the public safety exception to *Miranda* may apply to the first category, *see New York* v. *Quarles*, 467 U.S. 649 (1984), and that evidence indicates that the defendant was advised of his *Miranda* rights before making statements in the second category (and the defendant alleges only that he cannot recall whether this happened (Miles Decl. ¶ 17)), the Government does not intend to use any such statements in its case in chief at trial. The defendant's motion should accordingly be denied as moot.[5]

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[4] Although it makes no difference to the disposition of the defendant's motion, to avoid any future confusion, the Government notes that in making this motion the defendant refers to certain "[h]andwritten notes, apparently made by the police officers who arrested [the defendant]," provided in redacted form in discovery. (Def. Mem. 22.) These notes were taken by an Assistant United States Attorney during separate interviews of each of the two pertinent police officers; they were not made by, nor have been reviewed by, the police officers.

[5] The Government reserves the right to seek to impeach the defendant with his statements should he elect to testify. *See, e.g.*, *United States* v. *Douglas*, 525 F.3d 225, 248 (2d Cir. 2008). The Government also reserves the right to seek to impeach the defendant with his post-arrest pre-*Miranda* failure to tell officers timely that he was bringing a firearm to the precinct. *See Brecht* v. *Abrahamso*n, 507 U.S. 619, 628 (1993); *Fletcher* v. *Weir*, 455 U.S. 603, 607 (1982) (per curiam); *United States* v. *Reynolds*, 27 F. App'x 60, 62 (2d Cir. 2001).

V. THE DEFENDANT'S MOTIONS TO SUPPRESS OR PRECLUDE THE CONTENTS OF HIS CELLPHONE ARE MERITLESS

The defendant asserts that this Court should suppress the call log, call records, and all other contents of his cellphone on two grounds. Neither has merit.

First, citing Federal Rules of Evidence 401, 402, and 403, the defendant asserts that the contents of his cellphone are irrelevant and/or prejudicial and thus must be "suppressed," and encloses dozens of pages of printouts from his cellphone, including numerous explicit photographs. (Def. Mem. 23-24; Miles Decl. Ex. D.) This motion is both improper and premature. As an initial matter, it conflates what was provided in discovery with what the Government will seek to admit at trial. The Government produced to the defendant the complete contents of his cellphone under Federal Rule of Criminal Procedure 16(a)(1)(E)(iii), as property "obtained from or [that] belongs to the defendant." Although the Government could have merely permitted the defendant "to inspect and to copy or photograph" the phone, *see* Fed. R. Crim. P. 16(a)(1)(E)(ii), in the interest of efficiency and consistent with the Government's general practice in this district, the Government instead produced to the defendant the complete contents of the phone. In doing so—which was not legally required and was of assistance to the defendant—the Government did not represent that it would seek to introduce all such contents at trial, including explicit photographs of third parties, nor did the defendant confer with the Government before including those photographs in his motion.

In any event, regardless of the defendant's word choice, his motion is not a motion to "suppress." It is a motion in *limine* under the Federal Rules of Evidence. The Court has neither set a date for trial nor set a date for motions in *limine*, the Government has not filed its motions in *limine*, and the parties have not conferred regarding whether any anticipated motions in *limine*

might be mooted. Irrespective of its merits, the defendant's motion should be denied as premature, without prejudice.[6]

Second, the defendant asserts that all records and content obtained from his cellphone must be suppressed under the Fourth Amendment. Unlike the defendant's first motion, this one is not premature. It is, however, meritless.

On December 9, 2011, the defendant, assisted by counsel, Paul J. Madden, Esq., met with an Assistant United States Attorney, a Senior Special Agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), and two investigators with the New York County District Attorney's Office, for a proffer session. During this proffer session, the defendant was asked whether he consented to the ATF reviewing and seizing the contents of his cellphone. The defendant, after being permitted to consult with his counsel, in front of all present, agreed. The same day, the Government transmitted an email to Mr. Madden, enclosed herewith as Exhibit B, memorializing the defendant's agreement:

> [B]y this email, I confirm that Mr. Miles provided oral consent during the proffer for law enforcement to search the cellphone recovered from him in connection with his arrest, and to review and seize any information therein. Please be advised that, pursuant to the proffer agreement, any information recovered during this search may be used for any purpose, including against Mr. Miles in this or any other case. Please let me know immediately if Mr. Miles does not consent, in which case we will obtain a search warrant.

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[6] The defendant's filing of this and other certain other motions discussed herein is in tension with the defendant's refusal to provide reciprocal discovery on the ground that, according to defense counsel on the same day when the defendant served his motions, "I do not know at this time if there will be a trial much less what I intend to introduce as evidence at trial. Moreover, there is no trial date nor has the Government or the defense sought a trial date," and therefore the Government's request "is premature." In the event that the Court entertains at this time the defendant's motions under the Federal Rules of Evidence or for materials or information as if trial were imminent, the Government respectfully requests that the Court order the defendant to provide reciprocal discovery.

(Ex. B.) Subsequently, on January 30, 2012, the Government produced the contents of the defendant's cellphone under Federal Rule of Criminal Procedure 16(a)(1)(E)(iii), as noted above.[7] These contents were produced under a cover letter, enclosed herewith as Exhibit C and previously reproduced to the defendant's current counsel, in which the Government stated:

> The Government hereby supplements the discovery previously provided in the above-captioned matter with a CD containing the results of a search of the defendant's cellular telephone, executed pursuant to the oral consent provided by the defendant during our last meeting with him, and subsequently confirmed with you. If you wish to inspect, copy the contents of, or photograph the phone itself (or any other property seized from the defendant), please let me know.

(Ex C.)

The defendant does not deny that any of this occurred. Nor does the defendant say whether he spoke with his former counsel (or sought to speak with anyone else in the proffer room) before he filed the current motion. Nor did the defendant confer with the Government, which could have provided the email excerpted above, and put the defendant in contact with his former counsel, before he filed the current motion. Instead, the defendant merely alleges that he "do[es] not remember" whether he provided consent. (Miles Decl. ¶ 23.) This is not sufficient to warrant a hearing (much less suppression), because the defendant's allegation, even if credited, does not warrant what he seeks.

An evidentiary hearing is required only where "the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *United States* v. *Watson*, 404

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[7] In the pertinent portion of his brief, the defendant lists the materials he believes were taken from his cellphone, including "[r]ecords logging phone calls to and from [this phone]." (Def. Mem. 25 (citing Miles Decl. Ex. B).) These records were obtained through subpoena, not review of the defendant's cellphone. Even if the defendant's motion had merit—and it does not—these records are not subject to suppression.

F.3d 163, 167 (2d Cir. 2005). The defendant's affidavit does not meet this standard. *See, e.g.*, *United States* v. *Jass*, 331 F. App'x 850, 955 (2d Cir. 2009) (affirming denial of hearing where the defendant "did not allege that arresting officers failed to advise him of his *Miranda* rights; he claimed only that he could not 'remember' receiving a *Miranda* warning"); *United States* v. *Kuznetsov*, 442 F. Supp. 2d 102, 111 (S.D.N.Y. 2006) (denying hearing where the defendant alleged he had "'no recollection of what [he] now know[s] to be [his] '*Miranda* rights'" (alterations in original; citation omitted)); *United States* v. *Arthur*, No. 01 Cr. 276 (VM), 2002 WL 523254, at *5 (S.D.N.Y. Apr. 5, 2002) (denying hearing where the defendant alleged "I have no recollection of being read my rights"); *United States* v. *Love*, 859 F. Supp. 725, 735 (S.D.N.Y.) (denying hearing where the defendant "merely alleges that he cannot recall whether or not he was read his *Miranda* rights"), *aff'd*, *United States* v. *Roberts*, 41 F.3d 1501 (2d Cir. 1994). In the event that the Court disagrees and concludes that a hearing is warranted, the Government expects that the evidence will show that the defendant, with counsel and multiple others present, provided consent for the ATF to review and seize the contents of his cellphone.

VI. THE DEFENDANT'S VARIOUS OTHER MOTIONS SHOULD BE DENIED

In addition to the motions discussed above, the defendant moves for several additional orders. None was mentioned by the defendant at the July 11 conference. Each should be rejected.

First, the defendant moves to "suppress[]" all recorded phone calls placed from Rikers Island under Federal Rules of Evidence 401, 402, 403, and 404(b), to the extent those calls were placed by individuals other than the defendant, irrespective of whether the defendant authorized those calls and irrespective of the content of those calls. (Def. Mem. 26-28.) Just as with the first variation of the defendant's motion to suppress the contents of his cellphone, this is a motion in *limine*, not a motion to "suppress," and it conflates the Government's production of

materials under Federal Rule of Criminal Procedure 16—here, subsection (a)(1)(B)(i)—with what the Government will seek to introduce at trial. A trial date has not yet been set, the Government is still reviewing evidence, and the Government has not yet decided which evidence it will seek to admit at trial, assuming that the defendant proceeds to trial. Consistent with the Government's practice, the Government will provide an exhibit list to the defendant in advance of trial (although there is no requirement that the Government do so, *see, e.g.*, *United States* v. *Prince*, 618 F.3d 551, 562 (6th Cir. 2010)), in the event that there is a trial. The Government will also file notice under Federal Rule of Evidence 404(b) timely in advance of trial, in the event that the Government intends to introduce evidence under that rule. The defendant will have ample time to object to the Government's evidence both before trial and during trial. His motion should be denied, without prejudice.

Second, the defendant seeks an order that the Government produce, no later than "four weeks before trial," a "bill of particulars containing a list of recordings [of prison calls] on which it seeks to rely, as well as transcripts of those recordings." (Def. Mem. 28.) But the recordings are in English. Neither the defendant nor his counsel needs transcripts to understand the recordings (nor, for the same reason, has the Government had the recordings transcribed). In any event, a bill of particulars is required only "where the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused." *United States* v. *Torres,* 901 F.2d 205, 234 (2d Cir. 1991). The defendant does not contend—nor reasonably could he—that he is not aware of the "specific act[] of which he stands accused." Rather, he appears to seek a bill of particulars so that he may preview certain of the Government's evidence before trial. That is not permitted. *See, e.g*, *United States* v. *Sindone*, No. 01 Cr. 517 (MBM), 2002 WL 48604, at *1 (S.D.N.Y. Jan. 14, 2002) ("A defendant may not use a bill of particulars

as a general investigative tool. Nor may he use a bill of particulars to preview the government's evidence or trial strategy, or to require the government to specify the minutiae of how it will prove the charges. The stakes in a criminal case are high, and temptations of perjury, subornation and intimidation are ever present. Accordingly, the government is not required to turn over information that will permit a defendant to preview the government's case and tempt him to tailor proof to explain it away, or see to it that the government's proof is not presented." (citations omitted)).

A comparison of the sole case cited by the defendant, *United States* v. *Bortnovsky*, 820 F.2d 572 (2d Cir. 1987) (per curiam) (Def. Mem. 28), with this case proves the point. In *Bortnovsky*, multiple defendants were indicted in twelve counts with mail fraud, conspiracy to defraud the United States, and violating the Racketeer Influenced and Corrupt Organizations Act, arising from "a scheme to defraud . . . through the submission of false and inflated insurance claims." 820 F.2d at 573. On appeal, the Second Circuit concluded that a bill of particulars should have been ordered because the defendants were insufficiently aware of "the dates of the fake burglaries and the identity of [pertinent] fraudulent documents." *Id.* at 574. In other words, the defendants were insufficiently aware of acts charged to have been part of the crimes of which they stood accused. *See id.* at 575. Not so here. The defendant is well aware of his specific conduct that is alleged to have violated the law, including the date, location, and context, as his omnibus motion demonstrates.

At the close of the next section of his brief, the defendant further asserts that in the event the Government seeks to introduce at trial any recorded prison calls, the Government should provide the defendant in advance with written "grounds for admitting those recordings into evidence." (Def. Mem. 32.) This one-sentence assertion is made without citation or explanation.

The Government is unaware of any obligation to provide a defendant with a written document setting forth the bases for its admission of evidence (any more than the defendant has an obligation to do the same with respect to evidence he may seek to introduce).[8]

In the event that this matter proceeds to trial and the Government seeks to introduce recorded prison calls, such recordings will be included on the Government's exhibit list, and in the event that the Government seeks to introduce a transcript of a recording as an aid to the jury, that transcript will be made available to the defendant along with the Government's other exhibits.

Third, the defendant moves to (1) preclude the introduction of evidence about the defendant's criminal record or any details of his prior arrests or convictions, even if he testifies, and (2) preclude the Government from describing the defendant "in form or substance, as a 'felon' or 'criminal.'" (Def. Mem. 29-31.) These are classic motions in *limine*. They are unauthorized and premature, and should be denied accordingly, without prejudice. The Court should defer evidentiary rulings until they are properly presented—after a trial date is set, the defendant elects to proceed to trial, the Government files its notice, if any, under Federal Rule of

[8] In our adversarial system, so long as it adheres to the requirements of Rule 16, the Government is not required to preview its case, any more than the defendant, regarding his Rule 16 obligations, *see* Fed. R. Crim. P. 16(b), is required to do the same. *See, e.g*, *Sindone*, 2002 WL 48604, at *1. Indeed, in the *Brady* context, courts have uniformly rejected such a claim, even where the evidence involved millions of pages. *See United States* v. *Ohle*, No. S3 08 Cr. 1109 (JSR), 2011 WL 651849, at *4 (S.D.N.Y. Feb. 7, 2011) (denying new trial; "Both the Government and defense counsel had equal access to this database. Thus, the defendants were just as likely to uncover the purportedly exculpatory evidence as was the Government. Moreover, as a general rule, the Government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence."), *aff'd*, 441 F. App'x 798 (2d Cir. 2011); *United States* v. *Warshak*, 631 F.3d 266, 297-98 (6th Cir. 2010) (rejecting claim "that the government shrugged off its obligations under *Brady* by simply handing over millions of pages of evidence and forcing the defense to find any exculpatory information contained therein"); *United States* v. *Skilling*, 554 F.3d 529, 576 (5th Cir. 2009) (rejecting claim "that the government's open file, which consisted of several hundred million pages of documents, 'resulted in the effective concealment of a huge quantity of exculpatory evidence'"), *vacated in part on other grounds sub nom. Skilling* v. *United States*, 130 S. Ct. 2896 (2010).

Evidence 404(b), the parties confer regarding proposed stipulations and anticipated motions in *limine*, and the parties file motions in *limine*.

Fourth, the defendant requests a "bill of particulars listing [the defendant's] previous 'violent felony' or 'serious drug offense' convictions" that the Government believes subject him to a mandatory minimum sentence." (Def. Mem. 31.) This request is baseless. As discussed above, the defendant does not assert—nor reasonably could he—that he is not aware of the "specific act[] of which he stands accused." *Torres*, 901 F.2d at 234. Moreover, whether the defendant is subject to a mandatory minimum sentence under the Armed Career Criminal Act is a question for this Court at sentencing, not the jury at trial. *See United States* v. *Harrington*, 370 F. App'x 216, 220 (2d Cir. 2010) ("[T]his Court has affirmed that it is a role for the district court, not a jury, to find the predicate felony convictions before sentencing a defendant as an armed career criminal." (citing *United States* v. *Massey*, 461 F.3d 177, 179 (2d Cir. 2006); *United States* v. *Estrada*, 428 F.3d 387, 390 (2d Cir. 2005))). In any event, although the Government believes that defense counsel, who has been provided with a copy of the defendant's criminal history record, is qualified to determine which of the defendant's eight prior felony convictions count under the Armed Career Criminal Act, the Government nevertheless previously informed counsel of the pertinent convictions.[9] No more is required.

Finally, although not mentioned in the body of his brief, in its conclusion, the defendant seeks early production of 3500 material in the event that this matter proceeds to a hearing. (Def Mem. 32.) As explained above, no hearing is warranted. In any event, the defendant provides no legal support for his request. 18 U.S.C. § 3500 does not require the production of a witness's

[9] As defense counsel noted at a June 11 conference in this matter, "I have had discussions with the government regarding my client's criminal history which is a key component in this situation. He's been charged as an armed career offender." (Transcript of June 11, 2012 Conference, enclosed herewith as Exhibit D, at 2:11-14.) Defense counsel did not confer further with or ask questions of the Government before filing the instant motion.

statements until after that witness testifies. However, the Government intends to adhere to its customary practice of producing 3500 material on the Friday before a hearing (assuming the hearing begins on a Monday), or by 12:00 p.m. the day before a hearing (assuming the hearing begins on a day other than a Monday). This practice will allow the defendant adequate time to prepare for cross-examination of Government witnesses in the event that there is a hearing.

CONCLUSION

For the foregoing reasons, the defendant's motions should be denied.

Dated: New York, New York
August 29, 2012

Respectfully submitted,

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