THIRTY-THIRD ANNUAL

DEAN JEROME PRINCE MEMORIAL EVIDENCE COMPETITION

No. 17-2417

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

--against--

VICTORIA SPECTOR,

Respondent.

ON WRIT OF CERTIORARI TO THE

COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

RECORD ON APPEAL

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No. 17-2417

IN THE
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UNITED STATES OF AMERICA,
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--against--

VICTORIA SPECTOR,
Respondent.

Date: October 16, 2017

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is granted, limited to the following questions:

I. Whether a defendant's Sixth Amendment right to confrontation under *Crawford v. Washington* is violated by admitting an interpreter's translation into English of statements made by a defendant in a foreign language without permitting the defendant to cross-examine the interpreter.

II. Whether the Fifth Amendment's prohibition against the use or derivative use of a defendant's compelled testimony in a criminal trial applies when the testimony was compelled by a foreign sovereign and released to the public, without the United States' involvement, in the midst of the United States' investigation.

III. Whether a defendant's Fifth Amendment privilege against self-incrimination is violated by admitting, as substantive evidence of guilt in the Government's case-in-chief, evidence that the defendant remained silent when accused of criminal conduct, while the defendant was in custody but before the defendant received *Miranda* warnings.

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

----------X No. 16-1120

UNITED STATES OF AMERICA,

Appellant,

-against-

VICTORIA SPECTOR,

Defendant-Appellee.

----------X

ARGUED: February 9, 2017

DECIDED: February 22, 2017

Before: PITLER, CAPLOW, and FALK, Circuit Judges:

OPINION OF THE COURT

PITLER, Circuit Judge.

The United States brings this interlocutory appeal pursuant to 18 U.S.C. § 3731 from three rulings of the District Court. The issues before us, each of which raises a question of first impression in this Circuit, are (1) whether admitting a translation into one language of statements made by the defendant in another language, where the interpreter is not subject to cross-examination, violates the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*; (2) whether, when a defendant is compelled to make statements by a foreign sovereign, the Fifth Amendment privilege against self-incrimination requires immunity from derivative use of those statements and requires as well that the District Court conduct a *Kastigar* hearing and exclude any evidence for which the Government is unable to identify an independent source; and (3) whether, when a defendant who is under arrest but has not yet received *Miranda* warnings is silent in the face of an accusation, admitting evidence of that silence as substantive evidence of guilt violates the defendant's Fifth Amendment privilege against self-incrimination.

Procedural Background

Defendant Victoria Spector has been charged in an indictment with conspiring to provide, and providing, material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B. Spector is the Chief Executive Officer of Bank Plaza, the United States division of the National Bank of Remsen. The nation of Remsen was formed in 1952. It is located in an unstable part of the world, where governments and borders are frequently in flux. Spector, a citizen of Remsen, is accused of using her position to divert funds purported to be donations to legitimate, Remsen-based charities to a terrorist group based in Remsen and known as DRB. The group's name loosely translates to "preserve our heritage."

Defendant brought three pre-trial motions *in limine* in the District Court. First, because the interpreter present when Defendant was interviewed by federal agents is unavailable to testify at trial, Defendant moved to exclude translated statements attributed to Defendant on the ground that

she would not have the opportunity to cross-examine the interpreter. Second, in light of the widespread dissemination of a recording of testimony compelled from her by agents of her native country, Defendant moved to require the Government to establish, at a *Kastigar* hearing, an independent source for all evidence it intended to offer against her at trial. Third, Defendant moved to exclude evidence that she remained silent when an arresting officer made accusatory statements to her after she was placed under arrest but before she received *Miranda* warnings.

The District Court granted all three motions. After conducting a *Kastigar* hearing, the District Court precluded the Government from offering any evidence it developed after the recording of Defendant's compelled testimony was publicly released. The Government now appeals the District Court's rulings.[1]

Factual Background

In March of 2014, the Federal Bureau of Investigation ("FBI") opened an investigation into whether Bank Plaza was accepting funds purportedly donated to legitimate charities and redirecting them to DRB. As part of that investigation, Defendant was interviewed by the FBI on June 25, 2014. Apparently because Ms. Spector is more fluent in Remsi than she is in English, the FBI provided an interpreter, Erik Multz, who translated the interview from Remsi—Defendant's native language—to English. A Special Agent of the FBI who was present at the interview prepared a memorandum that included an essentially verbatim record of certain questions posed to Defendant and the answers she gave, all as translated by the interpreter. No audio or video recording was made of the interview. The Government is unable to locate Multz and thus cannot produce him as a witness at trial, and Defendant has never had the opportunity to cross-examine him.

Spector travelled to Remsen in 2015. While there, she was interrogated by the Remsen National Security Agency (the "RIA"). The interrogation was conducted under lawful compulsion in the presence of Defendant's counsel. Defendant provided her RIA interrogators with detailed information about the operations of Bank Plaza generally and its practices with respect to raising money for charities based in Remsen in particular. A video recording of the RIA interrogation was leaked to the press and posted to the internet some months after it took place. The recording was the subject of multiple media reports, and it was widely viewed throughout the world.

On April 11, 2016, Defendant was indicted on the charges currently pending against her. On April 15, 2016, FBI agents went to Defendant's home to execute a warrant for her arrest and a search warrant for her home. Defendant was entertaining a large group of guests when the agents arrived. The agents announced that they were there to search the house and to take Defendant into custody. Agents directed Defendant to sit in a chair away from the crowd, and two agents stationed themselves next to her while others began to search her home. One of the agents next to Defendant turned to her and said, "It's disgusting that you would help funnel money to terrorists who kill their own people and who hate the United States and would use that money to attack us. This

[1] The Government challenges the District Court's decision to require a *Kastigar* hearing, but not the District Court's finding, after holding that hearing, that the Government failed to establish an independent source for any evidence developed after the recording of the Defendant's interrogation was publicly released. Accordingly, we conclude that the Government's right to appeal from that aspect of the District Court's ruling has been waived, and we do not address the correctness of that ruling here.

country has done so much for you. Look at the life you have here. It's just shameful." The agent spoke loudly enough for many of those present to hear. Defendant, who had not yet received *Miranda* warnings, looked straight ahead and remained silent.

Analysis

A. Admissibility of Translated Statements

The Confrontation Clause prohibits admission of a testimonial statement at a criminal trial unless the defendant is afforded the opportunity to cross-examine the person who made the statement either at or before trial. *See United States v. Crawford*, 541 U.S. 36 (2004). Here, the Government seeks to offer a translation into English of statements that were made by Defendant in another language, Remsi. It is undisputed that the translated statements attributed to Defendant are testimonial, that Defendant has not had an opportunity to cross-examine the interpreter, and that the interpreter will not be available for cross-examination at trial. We therefore hold that admission of the translated statements would violate Defendant's Sixth Amendment right to confrontation.

In so holding, we reject the "language conduit theory" adopted by the majority of circuit courts and relied upon by our dissenting colleague. That theory conflates the statements of the foreign-language speaker—here, Defendant—with those of the interpreter. We hold instead, as the Eleventh Circuit has held, that a defendant's statement and an interpreter's translation of that statement are separate declarations, and that the interpreter who translated the defendant's statement is the declarant of the translation. *See United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013).

Translating statements from one language to another is not a mechanical process that yields the same result regardless of who makes the translation; rather, translation requires an interpreter to exercise independent judgment. As a result, a translation of a statement may diverge from what the original speaker intended to convey. Therefore, cross-examination of the interpreter is vital, as it provides a defendant the opportunity to evaluate the reliability and judgment of the interpreter; to determine whether the interpreter made any mistakes; to test whether the interpreter used sound judgment; and to investigate whether the interpreter has any biases that may have impaired the interpreter's judgment.

Our holding is virtually compelled by the Supreme Court's reasoning in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). In *Bullcoming*, the Supreme Court concluded that the results of a defendant's blood alcohol test could not be admitted unless the laboratory analyst who conducted the test was available for cross-examination at trial and rejected the proposition that the Government could satisfy the Confrontation Clause by providing a substitute analyst instead. In reaching this conclusion, the Supreme Court emphasized that even a laboratory analyst who merely read results generated by a machine could be subject to lapses in judgment or could lie. *Id.* If the Confrontation Clause requires a laboratory analyst who prepared a forensic report of a blood alcohol test to testify at trial, it surely affords a defendant the opportunity to cross-examine an interpreter who translated that defendant's statement, because "[t]ranslation from one language to another is much *less* of a science than conducting laboratory tests, and so much more subject to error and dispute." *United States v. Orm Hieng*, 679 F.3d 1131, 1149 (9th Cir. 2012) (Berzon J., concurring) (emphasis in original).

For these reasons, we affirm the District Court's ruling and hold that admitting translated statements attributed to Defendant by an interpreter who is not subject to cross-examination violates the Confrontation Clause.

B. Derivative Use Immunity for Statements Compelled by a Foreign Sovereign

We next consider whether the Fifth Amendment privilege against self-incrimination requires immunity from the derivative use of statements compelled by a foreign sovereign acting independently from the United States government. We hold that it does.

It has long been established that when the Government compels statements from a defendant, immunity from use and derivative use of those statements is required to protect the defendant's privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). Use and derivative use immunity provide a disinfectant that prevents compelled statements from tainting court proceedings. *See United States v. Hubbell*, 530 U.S. 27 (2000).

The Government contends that this well-settled principle should not apply when a defendant's statements are compelled by a foreign sovereign rather than by an agent of the United States. We disagree. For the following reasons, we hold that the source of compulsion is irrelevant when the United States seeks to introduce at trial evidence derived from compelled statements, and that the District Court was correct that a *Kastigar* hearing was required even under the unusual circumstances of this case.

Our decision rests upon our conclusion that the Fifth Amendment injury to a defendant occurs not at the time of compulsion, but at trial. Accordingly, it is our government, and not the authorities in Remsen, that would violate Defendant's privilege against self-incrimination if evidence derived from the statements Defendant was compelled to make to the Remsen investigators were admitted against at her trial. Indeed, the Supreme Court held long ago that statements compelled by agents of a foreign government may not be offered at trial in an American court. *See Bram v. United States*, 168 U.S. 532 (1897).

More recently, the Second Circuit, confronting facts similar to those before this Court, concluded that the Fifth Amendment requires immunity from derivative use of statements compelled by a foreign sovereign. *See United States v. Allen*, 864 F.3d 63 (2d Cir. 2017). Here, Defendant's compelled testimony was widely publicized and prosecution witnesses were most likely exposed to it. The Government's investigation, while apparently well under way, was far from complete when the recording of Defendant's interrogation in Remsen was publicly released. The District Court was therefore correct to require a *Kastigar* hearing.

We find further support for our decision in the Second Circuit's holding that constitutional rights may be implicated when federal prosecutors coordinate their investigations with non-governmental entities, such as employers, who in turn pressure defendants to make statements. *See United States v. Stein*, 541 F.3d 130 (2d Cir. 2008). Policy considerations lead us to the result we reach today as well. A holding that compulsion by a foreign government raises no Fifth Amendment concerns might encourage our government to coordinate its investigations with those of other sovereigns. The two governments might agree that the foreign sovereign would compel testimony from subjects of the investigation and then share leads derived from that testimony with their American counterparts, who—if derivative use immunity were held not to apply—would then

be free to develop those leads without consequence. Surely, even our dissenting colleague would abhor the use of such tactics to undermine a defendant's privilege against self-incrimination.

We stress that our analysis is based upon the privilege against self-incrimination and not the due process clause, as there is nothing in the record below to indicate that Defendant was subject to physical coercion or that her statements were otherwise unlawfully extracted from her involuntarily.

Finally, we reject as rank speculation the Government's contention that our holding might empower hostile foreign powers to jeopardize prosecutions pending in the United States by compelling, and then leaking, testimony from targets of investigations. We are more concerned that to rule in the Government's favor would allow a foreign power, by means of tactics like those discussed above, to dilute the protections guaranteed by the Fifth Amendment. In any event, there is no evidence here that the release of Defendant's testimony was intended to undermine her prosecution in our courts.

For all these reasons, the District Court was correct to conclude that Defendant is entitled to derivative use immunity and to require that a *Kastigar* hearing be held.

C. Admissibility of Defendant's Custodial, Pre-*Miranda* Silence

Finally, we turn to whether testimony concerning a defendant's custodial, pre-*Miranda* silence may be offered by the Government in its case-in-chief as substantive evidence of guilt. We affirm the District Court's ruling that it may not.

It is well-established that the Fifth Amendment prohibits the Government from commenting on a defendant's failure to testify at trial, *Griffin v. California*, 380 U.S. 609 (1965), from impeaching a defendant with post-arrest, post-*Miranda* silence, *Doyle v. Ohio*, 426 U.S. 610 (1976), and from introducing post-arrest, post-*Miranda* silence in the Government's case-in-chief, *Wainwright v. Greenfield*, 474 U.S. 284 (1986). But neither the Supreme Court nor this Circuit have answered the question before us today: whether use in the Government's case-in-chief of a defendant's custodial, pre-*Miranda* silence as substantive evidence of guilt violates the Fifth Amendment. We hold that it does.

In so holding, we reject the Government's argument that Fifth Amendment protections are triggered only when an individual is read the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* warnings are intended to ensure that suspects are aware of their rights before deciding whether to invoke them. But *Miranda* warnings do not themselves give rise to constitutional rights. These rights, including the right to remain silent, exist separate and apart from the reading of *Miranda* warnings. Defendant thus had a constitutional right to remain silent at the time the FBI agent made the accusatory statement, and that right would be infringed if the Government used Defendant's invocation of the right as incriminating evidence against her. Indeed, in *Miranda* itself, the Supreme Court noted "[t]he prosecution may not . . . use at trial the fact that [a defendant] stood mute or claimed his privilege in the face of accusation." *Id.* at 468.

Silence in the face of government accusation is, in any event, ambiguous. As the Supreme Court has cautioned, "a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so." *Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013). The same logic

applies with equal force when a defendant engages in post-arrest, pre-*Miranda* silence. Thus, the Government should not be permitted to use Defendant's decision to remain silent, or any inference about her underlying motive for doing so, as substantive evidence of her guilt.

The Government places great stock in the Supreme Court's holding in *Fletcher v. Weir*, 455 U.S. 603 (1982), that a defendant's constitutional rights are not violated when the Government offers evidence of post-arrest, pre-*Miranda* silence for purposes of impeachment. The Government's reliance on Fletcher is misplaced. While we acknowledge that a defendant's silence, though perhaps golden, is not completely sacred, we also note that not all evidence that may be used for impeachment is admissible in the Government's case-in-chief. Indeed, the Federal Rules of Evidence permit the Government to use for purposes of impeachment other types of evidence, such as prior convictions, that would be inadmissible if offered in the Government's case-in-chief. *See* Fed. R. Evid. 609.

Accordingly, we affirm the District Court's exclusion of evidence of Defendant's silence in the Government's case-in-chief.

Conclusion

For the reasons stated above, the decision of the District Court is AFFIRMED in all respects. The case is remanded for further proceedings consistent with this opinion.

FALK, Circuit Judge, dissenting.

Defendant Victoria Spector stands accused by a grand jury of serious crimes involving a dangerous terrorist organization. The Government's investigation of Defendant unfolded over two years and involved numerous witnesses and voluminous documents. There is no allegation, even by Defendant, that the Government did anything unlawful or in violation of Defendant's constitutional rights as it conducted its investigation. The Government did not make unavailable the interpreter it hired. The Government did not compel Defendant's testimony before the authorities in Remsen or release the recording of that testimony. The Government did not interrogate Defendant while she was in custody without providing her with the warnings required by *Miranda*. Yet, remarkably, the majority eviscerates the Government's case, preventing it from presenting evidence of Defendant's own statements or her reaction in front of her friends and family to criminal accusations and requiring it to bear the onerous burden of proving a negative: that a recording it had no hand in creating or releasing did not influence any aspect of its investigation. For these reasons, and those set forth below, I dissent.

A. Admissibility of Translated Statements

For more than a century, courts have held that when an interpreter translates a defendant's statement from one language to another, the defendant, not the interpreter, is the declarant of the translated statements. *See Guan Lee v. United States*, 198 F. 596 (7th Cir. 1912). Courts continue to reach the same conclusion, even after the Supreme Court's decision in *United States v. Crawford*, 541 U.S. 36 (2004), reasoning that an interpreter is a mere "language conduit" and not an independent declarant. *See United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012); *United States v. Vidacak*, 553 F.3d 344 (4th Cir. 2009); *United States v. Sanchez-Gondinez*, 444 F.3d 957 (8th Cir. 2006).

The majority today pronounces a categorical rule requiring that an interpreter be available for cross-examination before the interpreter's translation may be admitted at trial. This categorical approach is unwarranted. In all but the rarest circumstances, translation is mechanical and does not require close scrutiny. That is precisely why so many courts treat interpreters as conduits and do not require that they be subject to cross-examination.

The majority's categorical rule will work substantial mischief. The unavailability for trial of interpreters who translated statements during investigations, particularly complex ones, is not uncommon. Interpreters are rarely government employees and are far more frequently hired on a per diem basis. The more complex the investigation, the longer it is likely to take, and the more likely the interpreter is to have passed away, become disabled, or moved on without providing new contact information. The majority's ruling will therefore result in the exclusion of highly probative evidence in a significant number of cases.

Even if the circumstances in some cases might suggest the need for cross-examination, the majority's categorical rule goes too far. Apparently recognizing that such an inflexible rule is unnecessary and would result in excluding reliable, probative evidence, the Ninth Circuit developed a four-part test for determining whether translated statements should be considered those of the initial speaker or of the interpreter. *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991). Other circuits have likewise recognized that consideration of the facts and circumstances before the court, rather than adherence to a categorical rule, is the proper approach. *See United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012); *Sanchez-Gondinez*, 444 F.3d 957; *United States v. Lopez*, 937 F.2d 716 (2d Cir. 1991). But here, the majority's holding would exclude vital evidence without subjecting it to any scrutiny at all.

For these reasons, I would either reverse the district court's ruling and allow admission of Defendant's translated statements or remand for consideration of the factors identified in *Nazemian*.

B. Derivative Use Immunity for Statements Compelled by a Foreign Sovereign

Judges are empowered to say what the law is, not what the law should be. Yet the majority's holding that a defendant has a constitutional right to immunity from the derivative use of statements compelled by a foreign government expands the protections of the Fifth Amendment to cover contexts the framers could never have imagined, much less intended.

Clearly, the Fifth Amendment forbids admission of evidence derived from immunized testimony. Through much of our history, though, this rule was understood to apply only when the sovereign that compelled the testimony was the same sovereign seeking its admission. *See United States v. Murdock*, 284 U.S. 141 (1931) (discussing the "same sovereign" principle); *see also Feldman v. United States*, 322 U.S. 487 (1944) (before Fifth Amendment incorporation, a statement compelled under a grant of immunity by state authorities could be received in evidence in a federal criminal case). These historical antecedents lead to the conclusion that, even today, both the compelling authority and the using authority must be bound by the self-incrimination clause before derivative use immunity attaches. *See United States v. Balsys*, 524 U.S. 666 (1998).

The only support the majority musters for its decision is a recent decision of the Second Circuit, *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017). The logic of the *Allen* decision,

however, is unpersuasive. It makes little sense—and poses great risk—to burden our Government with the consequences of actions taken by a foreign sovereign. Armed with the majority's holding, a foreign government faced with an American investigation of one of its favored citizens need only "compel" the citizen's testimony and release it to the world, and then watch as our Government struggles to prove that its investigation was in no way influenced as a result.

Allen is also lacking in precedential support. The only arguably relevant case cited in *Allen* is *Bram v. United States*, 168 U.S. 532 (1897), a case decided before the dawn of the twentieth century. Moreover, although the interrogation at issue in *Bram* was conducted by a foreign law enforcement officer, there is little, if any, analysis in the decision about the impact of that fact upon the defendant's right to invoke his privilege against self-incrimination.

Even if the *Allen* decision rested on firmer ground, its holding would be distinguishable. The investigation at issue in *Allen* involved a coordinated effort between our government and investigators in the United Kingdom, and the testimony at issue there was compelled by the U.K. investigators. Here, the testimony at issue was compelled by a foreign sovereign acting independently from our government, and publicized, it seems, by a rogue actor—a terrorist group—with interests adverse to those of our government. The *Allen* court not only did not confront facts like these, it specifically distinguished them, declaring that it did not intend its holding to reach any situation where a foreign government "endeavore[d] to sabotage U.S. prosecutions by immunizing a suspect and publicizing his or her testimony." *Allen*, 864 F.3d at 88. The majority thus relies too heavily on *Allen*, which does not provide the firm support for affording Defendant derivative use immunity that the majority attributes to it.

Our Government did not compel Defendant's testimony. Moreover, there is no reason to believe that our Government even knew Defendant was being compelled to testify by a foreign sovereign, or that the testimony compelled by the foreign sovereign would be released to the public. Particularly under these circumstances, there is no basis in precedent or logic to afford Defendant immunity from derivative use of her compelled testimony. To do so would permit a foreign sovereign with interests adverse to ours to undermine important pending criminal cases. For all these reasons, I would reverse and not afford derivative use immunity or require a *Kastigar* hearing when testimony is compelled by any entity other than the federal or a state government of the United States.

C. Admissibility of Defendant's Custodial, Pre-*Miranda* Silence

The majority again improperly expands the scope of the Fifth Amendment to preclude the Government from offering evidence of Defendant's pre-*Miranda* custodial silence in its case-in-chief. The majority conveniently forgets that *Miranda v. Arizona*, 384 U.S. 436 (1966), makes clear that the right to remain silent is triggered not by custody, but by custodial interrogation. Here, it is undisputed that Defendant was not asked a single question by a law enforcement officer. She was merely subjected to an FBI agent's accusatory statement.

The plain words of *Miranda* demonstrate that admitting Defendant's pre-Miranda silence would not impermissibly force her to be a witness against herself. "[T]he warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it." *Id.* at 468. *Miranda* warnings assure the individual in custody that, should she choose to invoke her right to remain silent, her silence will not be used against her. The agents in this case

gave Defendant no such assurance. The majority implies that Defendant knowledgably invoked her right to silence after being placed in custody, but *Miranda* specifically commands us to not look to the subjective knowledge of a defendant. *Id.* Only when a government actor triggers a defendant's silence by reading *Miranda* warnings is that silence protected by the privilege against self-incrimination.

Here, the Government did nothing to induce Defendant to remain silent. The agents did not interrogate Defendant. The agents did not provide her with warnings assuring her that her silence would not be used against her. Even though, as the Government acknowledges, Defendant knew she was not free to leave, custody "by itself is not governmental action that implicitly induces a defendant to remain silent." *United States v. Frazier*, 408 F.3d 1102, 1111 (8th Cir. 2005). I would therefore decline to apply Fifth Amendment protection to custodial, pre-*Miranda* silence.

Conclusion

When agents of our Government violate a defendant's constitutional rights, consequences must follow, lest they be encouraged to do it again. The agents in this case engaged in no unconstitutional conduct. The evidence they gathered during their investigation should be received at trial. I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

INDICTMENT

-against-

Cr. No. 16-Cr-250
(T. 18, U.S.C., § 2339B)

VICTORIA SPECTOR,

Defendant.
----------X

THE GRAND JURY CHARGES:

COUNT ONE
(Conspiracy to provide Material Support to a Foreign Terrorist Organization)

In or about and between March 2013 and January 2016, both dates being approximate and inclusive, Defendant VICTORIA SPECTOR, together with others, did knowingly and intentionally conspire to provide material support and resources, as defined in Title 18, United States Code, Section 2339B(g)(4), including currency, to a foreign terrorist organization, to wit: DRB.

(Title 18, United States Code, Sections 2339B(a)(1))

COUNT TWO
(Providing Material Support to a Foreign Terrorist Organization)

In or about and between March 2013 and January 2016, both dates being approximate and inclusive, Defendant VICTORIA SPECTOR, together with others, did knowingly and intentionally provide material support and resources, as defined in Title 18, United States Code, Section 2339B(g)(4), including currency, to a foreign terrorist organization, to wit: DRB.

(Title 18, United States Code, Sections 2339B(a)(1))

Robert Ericson
ROBERT ERICSON
UNITED STATES ATTORNEY
DISTRICT OF BOERUM

Daniella A. Flores
GRAND JURY FOREPERSON
APRIL 11, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

-against-

VICTORIA SPECTOR,

Defendant.
----------X

AFFIDAVIT OF SERG BEDA IN SUPPORT OF GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTIONS IN LIMINE
16-Cr-250 (JS)

STATE OF BOERUM)
:SS:
COUNTY OF BOERUM)

I, Serg Beda, being duly sworn, declare under penalty of perjury:

1. I submit this affidavit in support of the Government's opposition to Defendant Victoria Spector's motions *in limine*.

2. I am a Special Agent of the Federal Bureau of Investigation ("FBI") and have been assigned to the Counterterrorism Division for the last ten years. As a Special Agent, I investigate alleged acts of terrorism against the United States and assist local authorities in their investigations. Since I joined the Counterterrorism Division, I have primarily investigated individuals and organizations in the United States suspected of aiding terrorist organizations aiming to harm the United States or its allies. As such, I have become very familiar with both well-known and less well-known clandestine terrorist organizations and their connections in the United States.

3. Although I have been involved from the start in the investigation that resulted in this prosecution, this affidavit includes only details related to the above-captioned case and, in particular, Defendant's pre-trial motions *in limine*.

4. I have become familiar with an underground separatist movement in the country of Remsen, known as DRB. DRB, whose name loosely translates to "preserve our heritage," is responsible for numerous acts of violence and terrorism that threaten the national security of the United States. The United States Secretary of State has designated DRB a terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. Thus, whoever knowingly provides material support or resources to DRB violates 18 U.S.C. § 2339B(a)(1).

5. Bank Plaza is the United States division of the National Bank of Remsen. The headquarters of Bank Plaza is in Boerum County. Defendant, Victoria Spector, is the CEO of Bank Plaza.

6. In March 2014, the FBI received information from an anonymous source that, at Spector's direction, Bank Plaza was funneling funds to DRB to be used for military-style training camps and to acquire arms and munitions. The source indicated that the funds directed to DRB were made to appear as if they had been donated to legitimate charities working to provide services and improve conditions for the poor in Remsen. After receiving this information, I commenced and oversaw a preliminary investigation of Bank Plaza, which included a review of various Bank Plaza records.

7. In May 2014, the FBI asked Spector to submit to an interview, and Spector agreed. Together with other FBI agents, I conducted the interview on June 25, 2014. The FBI arranged for the assistance of a certified Remsi interpreter, Erik Multz, because Remsi is Spector's native language. The FBI hired Mr. Multz from Boerum Certified Translators, Inc., a reputable professional translation service frequently used by the FBI. Mr. Multz is a qualified interpreter who passed both written and oral certification examinations offered by the state of Boerum. At Defendant's request, the interview was not recorded. FBI Special Agent Jack Malone compiled a substantially verbatim transcript of the interview.

8. Despite extensive efforts, the FBI is unable to locate Multz. Multz worked for the government-contracted translation agency for two months. Multz does not hold a U.S. passport, and all contact information the FBI has for him is outdated. Because there does not appear to be any trace of Multz in the United States, the FBI believes that he likely returned to Remsen, his home country.

9. From February to July 2015, Spector returned to her home country of Remsen. The FBI's investigation was dormant at the time Ms. Spector returned to Remsen.

10. In May 2015, an individual who had recently been fired from a position at Bank Plaza approached the FBI. The former Bank Plaza employee provided the FBI with an internal Bank Plaza memorandum that suggested Spector may have created a special unit within the bank dedicated to funneling money to one or more terrorist organizations.

11. After receiving the information described in the preceding paragraph, the FBI reopened its investigation. Several bank employees agreed to assist the FBI. As a result of this assistance and by following numerous leads derived from the assistance, the FBI collected substantial documentary evidence demonstrating that large sums of money that appeared to be donated to legitimate charities were in fact diverted to DRB through transactions Bank Plaza performed.

12. FBI agents interviewed dozens of witnesses from the bank as well as from the purportedly legitimate charitable organizations. The FBI also collected and reviewed tens of thousands of documents from multiple Bank Plaza computers as well as from the computers of the charitable organizations and the professionals—lawyers and accountants—who incorporated the organizations and prepared their public filings.

13. On August 17, 2015, news outlets reported that, during her time in Remsen, Spector was interrogated by Remsen's highest-level investigative agency, the RIA. A video recording of the interrogation was leaked to the press and posted on the Internet with English subtitles. Because of DRB's notoriety and the United States' reliance on cooperation from the Remsen government in its efforts to keep peace and protect civil liberties in a particularly troubled area of the world, news of the interrogation was reported by all major media outlets in the United States. Millions of people watched the video of the interrogation. See Exhibit 1.

14. In her statement to the RIA, Spector—while neither admitting wrongdoing nor indicating that the charities were fronts for directing funds to DRB—identified some of the charities the Government contends were in fact used to funnel money to DRB. Spector also named the individuals working in the Bank Plaza unit who were responsible for arranging for bank customers to make contributions to these charities.

15. Until DRB posted the recording of Spector's RIA interview on the internet, the FBI was not aware that an interview was conducted, that the interview was recorded, or that the recording was about to be released to the media.

16. I and other agents working with me on the investigation of Bank Plaza and DRB avoided watching the video. Upon information and belief, however, other agents and witnesses interviewed by the FBI likely did see the recording of the interview because the media coverage was so widespread.

17. Although the motive for the leak of the recording remains unclear, the FBI believes that the leaker may have been attempting to disrupt the United States' investigation of Spector. Intelligence gathered by the FBI and other U.S. national security agencies suggests that the recording of Spector's interrogation was given to DRB by Remsen officials who support DRB.

18. From August 2015 to February 2016, the FBI identified twenty-five purportedly charitable organizations based in Remsen to which Bank Plaza transferred funds. I, along with fellow agents, investigated each of these organizations. We concluded that most of them disbursed a portion of the donations they received to terrorist organizations and, in particular, to DRB. Bank Plaza disbursed these funds to DRB through a series of transactions, conducted through various accounts held in institutions in several countries, apparently in an effort to disguise their source and true purpose.

19. Through the FBI's review of internal Bank Plaza records and information gleaned from interviews with employees of the bank, the FBI developed evidence indicating that Spector knowingly participated in or directed financial transactions through which various purportedly charitable organizations channeled funds to DRB.

20. On April 11, 2016, a grand jury sitting in this district returned an indictment charging Spector with providing material support to a foreign terrorist organization and conspiring to do so. On April 14, 2016, I, together with Assistant United States Attorney Ursula Bentele, applied to

United States Magistrate Judge Miriam Bear for a warrant to search Spector's home and a warrant for Spector's arrest.

21. On April 15, 2016, at approximately 5:30 p.m., I, along with other FBI agents, arrived at Spector's home at 2491 Lorillard Place to execute these warrants. When we arrived, we observed approximately thirty cars in the driveway and on the street outside of Spector's home. We also heard a lot of noise—loud music and boisterous conversation—coming from inside the house. We knocked, entered the house, and saw approximately fifty people standing on the first floor. It appeared that a party was in progress. I observed Spector in a corner of the living room speaking to a crowd of people. The other agents and I observed numerous laptop computers and cell phones in the entryway and in the other rooms of the house. I announced that we were FBI agents and that we were there to conduct a search of Spector's house and to place Spector under arrest. We told the guests to stay where they were and to remain calm. The music stopped, and the loud conversation turned to hushed whispers.

22. A fellow agent and I moved Spector away from the crowd and asked her to sit in a chair. I directed two agents to stand on each side of her. As these agents stood next to Spector, another agent and I conducted a security sweep of the home and collected laptops, computers, cell phones, and other items pertinent to the investigation.

23. As the other agent and I were collecting and inventorying these items, I observed FBI agent Maria Amaray ("Amaray") turn to Spector, look her directly in the face, and say, "It's disgusting that you would help funnel money to terrorists who kill their own people and who hate the United States and would use that money to attack us. This country has done so much for you. Look at the life you and your family have here. It's just shameful." This comment was made within earshot of me, other agents, and many of Spector's guests.

24. Immediately after Amaray made this comment, I saw Spector looking straight ahead. Spector remained silent.

25. I then approached Spector, advised her of her rights by reading verbatim from my *Miranda* card, and formally placed her under arrest.

Serg Beda

Special Agent Serg Beda
Federal Bureau of Investigation
June 28, 2016

Exhibit 1 to Beda Affidavit

BREAKING NEWS: Financial Leader Financing Terrorists

August 18, 2015

Known terrorist group DRB took responsibility for posting a video of Remsen business leader, Victoria Spector, to the Internet. Yesterday, the group stated that it stole the video, added subtitles, and spread it over social media to "expose Spector as an ally of Western hedonism and corruption." The video depicts RIA agents interviewing Spector and has been viewed more than one million times in the last twenty-four hours.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM
----------X
UNITED STATES OF AMERICA

-against-

VICTORIA SPECTOR,

Defendant.
----------X

AFFIDAVIT OF BENJAMIN I. CAEPERS IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE TO SUPPRESS EVIDENCE
16-Cr-250 (JS)

STATE OF BOERUM)
:SS:
COUNTY OF BOERUM)

I, Benjamin I. Caepers, do hereby declare as follows under penalty of perjury:

1. I submit this affidavit in support of the Victoria Spector's motion *in limine*, and in particular her motion to exclude evidence of the statements the Government claims she made when interviewed by agents of the FBI. An excerpt of the Government's version of that interview is attached hereto as Exhibit 1.

2. I am an attorney with Caepers & Associates, and I represent Defendant, Victoria Spector.

3. Ms. Spector was interviewed by the FBI on June 25, 2014. Because Ms. Spector is more fluent in Remsi than she is in English, the FBI provided an interpreter, Erik Multz. The interview was conducted by FBI Special Agent Jack Malone. No audio or video recording was made. Agent Malone, however, claims that he prepared a substantially verbatim transcript of his questions and the translated versions of Ms. Spector's responses provided by Interpreter Multz.

4. Interpreter Multz translated Agent Malone's questions from English to Remsi and Ms. Spector's answers from Remsi to English. The translation by Interpreter Multz attributes inconsistent responses to Ms. Spector.

5. I have conducted extensive research about Remsi, Ms. Spector's native language. My research has included meetings with several bilingual speakers of Remsi and English, including Boerum University Professor of Linguistics Ana Ruma (*see* Exhibit 2 attached hereto), from whom I have learned the following:

    a. It is very difficult to translate from Remsi to English and from English to Remsi. The translation of pronouns and the distinction between singular and plural pronouns—a distinction at issue here—is particularly problematic.

    b. Remsi is a unique language, not only because it uses an alphabet unlike that of any other language, but also because the language's grammatical form is not at all similar to other Germanic languages, like English, or to romance languages, like French or Italian. For example, the Remsi language has four personal pronouns used to address a

second person, while Standard American English has only one: you. Consequently, Remsi pronouns are understood only through the context of the conversation.

c. Remsi has many idioms and homophones that are very difficult, if not impossible, to translate directly without drawing subjective inferences about the precise meaning intended by the speaker. An interpreter's understanding of a particular idiom or homophone is inevitably shaped by the interpreter's personal experiences and cultural background, which may vary by location.

d. It is very difficult to translate from Remsi to English because of the fundamental differences in the structure of the two languages. Rather than translating individual words, an interpreter translating from Remsi must first hear, understand, and internalize what was said in Remsi, and then attempt to find a way to express the same thoughts in English.

6. Even a brief examination of Exhibit 1, the excerpt of the statements attributed to Ms. Spector by the Government, reveals that something has been lost in translation. Ms. Spector is reported to have said that "I [Ms. Spector] had to give OK" to all donations being issued to the various charities with accounts at the bank, but when Agent Malone followed up by asking whether Ms. Spector "oversaw which charities the bank worked with and approved all charitable contributions the bank made," Ms. Spector is reported as having replied, "Yes, *we* did." Without the opportunity to cross-examine Interpreter Multz, Ms. Spector will be unable to question him about how he decided to translate one statement by using the pronoun "I" and another, inquiring about the very same subject, with "we" as the pronoun. This is but one example of the nuances in translation that make it critical for Ms. Spector to be afforded her right to confront Interpreter Multz at trial before Multz's translation of her statements to the FBI may be admitted.

7. My investigation has developed information indicating that, prior to the interview, Interpreter Multz had recently fled Remsen because of the activities of the very separatist group, DRB, to which Ms. Spector is accused of diverting funds. I submit that this is a persuasive indication of a bias that may well have influenced, consciously or otherwise, Multz's translations in a way that favored the Government.

For the aforementioned reasons, I respectfully urge the Court to require that the Government produce Interpreter Multz for cross-examination or preclude admission of the statements attributed to Ms. Spector in Agent Malone's transcription.

Benjamin I. Caepers

Benjamin I. Caepers, Esq.
Attorney for Defendant Victoria Spencer
June 3, 2016

Exhibit 1 to Caepers Affidavit

6/25/2014 FBI Interview Excerpt

The following are verbatim notes taken by Agent Malone, on June 25, 2014, during his interview of Ms. Spector. The interview was facilitated by the translations of Interpreter Erik Multz.

Malone: Ms. Spector, what is your position at Bank Plaza?

Spector: I am the CEO.

Malone: What do you do as the CEO?

Spector: We oversee the bank's operations.

Malone: Who oversees the bank's operations?

Spector: I do.

Malone: There is a unit within the bank that primarily engages in managing the charitable operations of the bank?

Spector: Yes.

Malone: What type of charitable work does that unit do?

Spector: It doesn't do any charitable work itself, it assists employees, account holders and other customers of Bank Plaza who want to make donations to Remsen-based charities by suggesting which charities they should donate to.

Malone: What kind of charities?

Spector: Charities from Remsen. Look, I grew up there, I lived there most of my life. People suffer there. There are no resources, there is no money, the country is poor. The people are poor. Many people in the United States from Remsen wanted to help. We just wanted to help.

Malone: That's all right Ms. Spector, I'm simply trying to grasp the functions of the bank and your involvement in them.

Spector: So, go grasp.

Malone: Do you know the names of the charities that the bank facilitated its members in making donations to?

Spector: I don't remember. There were many.

Malone: Who selected the charities that the bank's employees and customers would contribute to?

Spector: The unit did. We did.

Malone: How were the charities selected?

Spector: I made sure to very closely examine the charities to ensure that I was making contributions only to the best and hardest working. I knew the ins and outs of those charities. There is not a fact that slipped by us.

Malone: Who had the final word on which charities will be donated to?

Spector: I'm the CEO. We had the final word. We did good work, Agent, I wanted to help the Remsi people.

Malone: You said the unit recommended charities, who was in the unit?

Spector: Three people who are all originally from Remsen.

Malone: Why is it just people from Remsen?

Spector: Because we know better than others what help Remsen needs.

Malone: Where was the unit located within the bank?

Spector: It was in a suite.

Malone: Who had access to the suite?

Spector: Only Remsen people, I had access.

Malone: Is it true that all donations had to first be run by you?

Spector: I had to give OK. Of course, I want to comply with all US laws, so we made sure to keep a very good record.

Malone: So, you oversaw which charities the bank worked with and approved all charitable contributions the bank made?

Spector: Yes, we did.

Exhibit 2 to Caepers Affidavit

Email

From: Ana Ruma <ruma.ana@boerumuniversity.edu>
Sent: Friday, May 25, 2016 5:46 PM
To: Benjamin Caepers <b.caepers@caepersandassociates.com>
Subject: Translating Remsi

Mr. Caepers,

I've done a great deal of linguistic work with Remsi, and let me tell you, Remsi is like no other language. It is different from English in every respect possible—the written characters, word formation, grammatical structures of the sentence—all of it is different. Remsi is nothing like Germanic languages like English or romance languages like French and Italian.

In Standard American English, there is only one word that we use for the second person— "you." In Remsi, there are four words that differ based on gender, age and closeness of relationship. Similarly, in Standard American English, we have distinct words for "I" and "we," where Remsi has one word that may mean either depending on context.

To translate from Remsi to English, something I have done on many occasions, the translator must hear the words in Remsi, derive meaning from those words, and find the right words to portray that meaning in English. This means that a translator does not simply translate individual words; rather, the translator subjectively interprets what is being said in Remsi, before translating that interpretation to English. Such an interpretation is shaped by the interpreter's cultural background and personal experiences, not just fluency in either language.

I hope this answers your question. Please don't hesitate to reach out should you need any further assistance.

Best,
Ana

Professor Ana Ruma
Distinguished Professor of Linguistics
Boerum University
ruma.ana@boerumuniversity.edu
(718) 555-0102

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF BOERUM

– – – – – – – – – – – – – – – – – – – X

UNITED STATES OF AMERICA 16-CR-250

-against-

VICTORIA SPECTOR,

Defendant.

– – – – – – – – – – – – – – – – – – – X

August 1, 2016

TRANSCRIPT OF HEARING ON PRE-TRIAL MOTIONS

Before: The Honorable Joss Simonson, District Judge, United States District Court

APPEARANCES:

For the United States of America: Ursula Bentele
Assistant United States Attorney
250 Church Street
Boerum City, Boerum 11201

For Defendant Victoria Spector: Benjamin I. Caepers
Caepers & Associates
180 Park Avenue
Boerum City, Boerum 11201

Court Reporter: Selena P. Malloy
Eastern District Reporter Services
500 Montague Street
Boerum City, Boerum 11201

COURT: Good morning, counsel. We're here for oral argument on defendant Spector's motions in limine. I understand there are three issues presented. First, the defendant seeks to exclude a translation of an interview she provided to the FBI because the individual who served as an interpreter during the interview is unavailable to testify at trial. Second, the defendant seeks a Kastigar hearing to determine whether access to testimony she was compelled to give in Remsen tainted the prosecution's investigation. And third, the defendant seeks to preclude the Government from offering evidence of her custodial silence in its case-in-chief. Have I covered it all?

CAEPERS: That's all of it, Judge.

COURT: Good. Now, we all know about the media circus going on outside the courtroom, but I don't want that to affect our discussion here today, understood?

BENTELE: Of course, your Honor.

CAEPERS: Yes, Judge, we understand.

COURT: All right. Counselors, I've read your briefs. Let's start with the interpreter issue. Mr. Caepers, these are your client's statements. Ms. Spector was not under arrest when she made them. In fact, she made them voluntarily long before any charges were brought. Nor does there seem to be anything prejudicial about them that might outweigh their probative value. Why should I preclude the Government from offering these statements at trial?

CAEPERS: Judge, with all due respect, these are not my client's statements, they are the statements of an interpreter that have been attributed to my client.

COURT: I understand your position Mr. Caepers. Ms. Bentele, aren't you seeking to offer the statements of a declarant you are unable to produce at trial for their truth?

BENTELE: Your Honor, we acknowledge that we are offering the interpreter's translations of the defendant's statements for their truth. But we do not concede that they are the interpreter's statements, and not defendant's, because as a majority of circuits have held, an interpreter acts as a mere conduit for a defendant's statements.

COURT: All right, I think we are getting ahead of ourselves. Mr. Caepers, please start your argument from the beginning.

CAEPERS: Thank you. Judge, attached to my affidavit is Exhibit 1, which is an excerpt of the interpreter's translation of statements attributed to my client during my client's interview with the FBI on June 25, 2014. As you pointed out, the Government seeks to admit the excerpt as evidence at trial, and it is our position that the statements must be excluded. My client speaks Remsi better than English, so she communicated through an interpreter when she was interviewed by the FBI. I want to cross-examine that interpreter at trial, but the Government says it can't—or won't—produce him. To allow my client's statement into evidence without the

interpreter's testimony would violate the confrontation clause, as the Supreme Court held in Crawford.

COURT: Counsel, wait a minute—Crawford did not involve an interpreter, and at least some courts have held, even after Crawford, that the Confrontation Clause does not require the prosecution to produce an interpreter, haven't they?

CAEPERS: Some courts, including some state courts, have held that way, your Honor, but we submit that those courts were wrong. The holdings simply don't make sense. So, we ask the Court to follow the Eleventh Circuit and those state courts that have held that an interpreter who translated a statement is no mere conduit, but rather is a witness who must be produced and subjected to cross-examination. Further, the circumstances of this case in particular make it critical that Ms. Spector have an opportunity to cross-examine the interpreter. The excerpt of Ms. Spector's interview that the Government seeks to offer demonstrates that the translator inconsistently translated Ms. Spector's statements. To not require his presence before this excerpt is admitted would be a miscarriage of justice.

COURT: How so Mr. Caepers?

CAEPERS: Well, for one, when Agent Malone asked who had the final word on which charities the bank would make contributions to, the interpreter translated Ms. Spector as saying both "I" and "we" in the same response. As a second example, the interpreter translated

another of my client's statements as, and I quote, "I'm the CEO. We had the final word. We did good work, Agent, I wanted to help the Remsi people."

COURT: What's your point, Counsel? It doesn't sound so inconsistent or illogical to me.

CAEPERS: Judge, in this context, the difference between "I" and "we" can be the difference between a statement that is incriminating and one that isn't—the difference between a statement where the speaker takes personal responsibility for actions and knowledge and a statement describing an institution's acts, for which an individual may or may not herself be legally responsible. And Judge, we have consulted with a Remsi interpreter—unlike the Government, by the way, we can still find our interpreter and produce her—and we've learned that, unlike in Standard English, in Remsi, the use of personal pronouns depends on the point of view of the speaker. The fact that the interpreter switched the pronouns back and forth—even mid-sentence—without asking my client to clarify, further supports our position that something was amiss here, that the interpreter in this case was no mere conduit, and that it is critically important that my client's Sixth Amendment right to cross-examine the interpreter not be compromised.

COURT: Ms. Bentele, is Mr. Caepers right? Was the interpreter not competent to translate?

BENTELE: Quite the contrary, your Honor. The Government arranged for an interpreter who was a certified, qualified translator. He took an oath when he assumed his position, and there is no question that he is fluent in both English and Remsi. There is nothing to suggest that the interpreter mistranslated defendant's responses.

CAEPERS: Yes, except for the fact that he had been working as an interpreter for all of two months at the time of the interview.

BENTELE: Which says absolutely nothing about his qualifications and capabilities.

CAEPERS: In fact, it does. Ms. Bentele, I am sure your office would not assign this case to a prosecutor with two months of experience no matter how well she did in law school. And that's another reason we are asking the Court to require the Government to produce the interpreter to testify about his qualifications and the way he went about translating Ms. Spector's statements to the FBI in this case.

COURT: Counselors, stop arguing with each other, and present your positions to the Court. Mr. Caepers, my understanding is that many courts have held that an interpreter is merely a conduit for the foreign language speaker, and that Crawford therefore does not require that the interpreter be produced for cross-examination. Mr. Caepers, is there case law that supports your position?

CAEPERS: Yes, Judge. I respectfully urge the Court to recognize that an interpreter is not merely a "language conduit."

Interpreting requires judgment and the interpreter must make choices. There is no such thing as an objective, literal, one-to-one or word-for-word translation. Translation, in other words, is inherently subjective, and that's particularly true when the two languages at issue are as different as Remsi and English. There are even external factors that might influence a translation, such as the interpreter's cultural, socioeconomic, or regional background or his or her personal biases. Ultimately, the interpreter selects what the interpreter believes are the best words to convey what the interpreter perceives to be the speaker's meaning, and that gives the interpreter tremendous discretion and power. When the statements sought to be admitted contain discrepancies and are critical to the Government's case against the defendant, it is crucial that the interpreter be present so the defendant has the opportunity to question the interpreter.

COURT: That's all very well, Counsel, but I asked for case law.

CAEPERS: Certainly. Judge, in Charles, the Eleventh Circuit case I referred to earlier, the court explicitly rejected the so-called language conduit theory and rightly concluded that, when the Government seeks to admit translated statements, it is essentially seeking to admit the interpreter's statements and not the defendant's. Therefore, the Confrontation Clause requires that the statements be excluded unless the defense has the opportunity to

cross-examine the interpreter. It's really a simple and straightforward application of Crawford.

BENTELE: Your Honor, Charles is an outlier in which the Eleventh Circuit reached a hyper-technical result in spite of the overwhelming precedent to the contrary. The Second, Fourth, Seventh, Eighth, and Ninth Circuits have all come to the opposite conclusion. An interpreter doesn't give meaning to the words spoken by the foreign-language speaker. The speaker gives them meaning, and the interpreter is just the conduit through which the words are translated. There is no Crawford or Sixth Amendment issue here at all.

COURT: But Ms. Bentele, aren't there unique facts here, given how different Remsi and English are? Have these courts held that subjecting an interpreter to cross-examination is never required under Crawford?

BENTELE: Judge, the Ninth Circuit articulated a four-part test for resolving this issue. And under that test there is absolutely no need for the interpreter to be produced here…

CAEPERS: In fact…

COURT: Mr. Caepers, you've had your turn, and goodness knows you've gone on at some length. Now, please let Ms. Bentele finish.

BENTELE: Thank you, your Honor. Defendant said what she said, and now she is trying to walk it back.

CAEPERS: Your Honor, even if the Court chooses to follow the herd and apply the conduit theory, the Court should still require the Government to produce the interpreter under the test in Nazemian, the Ninth Circuit case Ms. Bentele just referred to.

COURT: Why?

CAEPERS: The Government supplied the interpreter, and prior to the interview, the interpreter had recently left Remsen because of oppression he faced at the hands of the same separatist group my client is accused of funding. What could be a clearer motive to mislead?

BENTELE: Your Honor, that's just wild speculation. There are no facts to support it. There is nothing nefarious about the Government providing the interpreter. We do so virtually all the time. And it's not just standard practice, it's done for the defendant's benefit. We requested the interview here, so we made the arrangements. What's more, I don't even know if the defendant would have been able to find a certified Remsi translator because so few people speak Remsi in America. And there is nothing to suggest that the interpreter had a motive to mislead or to question his qualifications.

COURT: Where is the interpreter? Why can't we solve the problem that way?

BENTELE: The Government has not been able to locate him.

CAEPERS: Oh, how convenient. The Government lost its interpreter.

BENTELE: Your Honor, we would be happy to render this issue moot if we could. The interpreter, Mr. Multz, is a foreign national, and he holds a foreign passport. We've exhausted all of our leads. He no longer resides at the address he provided when he became a certified translator, and his phone number has been disconnected. There is no foul play on our part here. Our investigators have been looking for him up until this very moment.

COURT: Thank you, counselors. Now, moving on from the first interview, let's talk about this second one. Mr. Caepers, since this is your motion, would you like to begin?

CAEPERS: Certainly, your Honor. After a tumultuous year, my client missed home. She decided to travel back to Remsen to meet her newly born niece and spend some time with her family. While she was in her home, surrounded by her family, friends, and colleagues, catching up with loved ones . . . .

COURT: When I said begin, I meant argue your motion—not hold a press conference. Get to the point, counsel.

CAEPERS: Judge, here are the salient facts. The Remsi government told my client that she wouldn't be able to return to Boerum and would be held in contempt in Remsen if she refused to submit to an interrogation. Ms. Spector then gave her fateful interview to the Remsi investigators, where she spoke under pain of contempt about her position at Bank Plaza. Your Honor, my client chose to try and comply with the law of her homeland, and she was repaid by having

her statement made public in a scandalous leak months later that undoubtedly helped guide the Government's investigation of her here.

COURT: All right, Mr. Caepers. Can you tell me about the type of information that was leaked that is the subject of your Kastigar motion? Because frankly, I am confused. We were just talking about how, in the first interview with the interpreter, the FBI interviewed your client months before her interrogation in Remsen. Regardless of whether her statement in Remsen was compelled, what is the difference between the two statements? Why does this second statement even matter?

CAEPERS: Because, your Honor, the Remsi investigators, who were from the Remsen National Security Agency, more commonly known as the RIA, asked Ms. Spector about the nature of her business—from soup to nuts. She told them about every aspect of her business dealings—the complex financial transactions she works on every day at Bank Plaza, currency trades, foreign investments, etcetera. The RIA agents also asked Ms. Spector about her specific dealings facilitating donations to Remsi charities. She told them that she began this work when several prominent members of the expat community in Boerum approached her with a desire to send money back to charities working on the ground in Remsen. Ms. Spector disclosed to the RIA agents that she took some of her best Remsi-speaking people off of traditional commercial accounts to help

facilitate these donations, and put them in a separate stand-alone unit so that they could work together. Your Honor, my client wanted to make it easier for the Remsi expats to send money back home, and she laid out the details of how she did just that. As you can see, then, your Honor, the questions RIA agents asked were far more probing, and the statement my client gave to the RIA agents was far more detailed than the statement she gave in response to the more general questions posed by the FBI.

COURT: All right, I see what you're getting at.

CAEPERS: And that's not all, your Honor. Ms. Spector told the RIA agents about special email servers, located off the Bank Plaza premises, that were used to handle the expanded Remsi email traffic. Ms. Spector, all under pain of contempt, even told the RIA agents about her extra storage unit located near the Boerum Canal where she kept unused keyboards and electronic equipment for the Remsi employees—as you know, the Remsi alphabet is a distant cousin of Cyrillic and requires special technological modifications.

COURT: Thank you, Counselor. Now, I understand that Ms. Spector disclosed quite a lot to the Remsen agents, but given that the interview was leaked by a third party, and given that the FBI's investigation was already well underway, what are your grounds for demanding a Kastigar hearing?

CAEPERS: Your Honor, our argument for a Kastigar hearing is rooted in the bedrock Fifth Amendment principle that a defendant compelled to testify is entitled to use and derivative use immunity for that testimony, no matter who did the compelling. Here—it's true—foreign RIA agents compelled Ms. Spector's testimony, but that is of no significance to Ms. Spector's Fifth Amendment rights. There is even a case clearly on point—the Second Circuit's recent decision in United States v. Allen. As in Allen, all we are asking is that Ms. Spector's Fifth Amendment rights be afforded the protection our constitution says they deserve.

COURT: All right, Mr. Caepers. Before we get much further into this, though, I want to talk a little more about Kastigar. You know, I've been doing this for over twenty years and I've never actually had a Kastigar hearing. They're incredibly burdensome, aren't they?

CAEPERS: They may be. But Kastigar hearings are intended for exactly this type of situation. At the hearing, the burden is on the Government to show that it is not using evidence against a defendant that was derived from a statement the defendant made under compulsion or coercion. While that burden may be substantial, the Supreme Court knew this when it decided Kastigar. And if Kastigar doesn't apply here, I don't know where it would.

COURT: Mr. Caepers, I also question whether the defendant was truly compelled to answer questions by the authorities in Remsen. Ms.

Spector is a prominent figure in her community, and she had an attorney by her side when she gave these statements. She wasn't tortured and she wasn't in custody. Couldn't an argument be made that she wasn't compelled for Fifth Amendment purposes?

CAEPERS: Your Honor, my client concedes that, because she had counsel, and because she was not tortured or threatened with physical harm, she may not assert that her due process rights were violated, or that her statements were involuntarily made. My client will not concede, though, that she surrendered her Fifth Amendment rights when she left the country. Even if it was the Remsen government that compelled her testimony, American officials may not violate my client's Fifth Amendment rights by introducing at trial those compelled statements or any evidence derived from them.

COURT: Understood, Mr. Caepers. But here, the statements your client gave to the authorities in Remsen were leaked and then widely publicized. Our government had nothing to do with any of that. Why should the prosecutors be put through a Kastigar hearing—and precluded from offering evidence if they do not sustain their burden—when they are blameless?

CAEPERS: Your Honor, in Allen, the Second Circuit clearly and unequivocally held that evidence derived from immunized foreign compelled testimony cannot be used against a defendant in an American criminal trial. In making its decision, the Second Circuit affirmed the fundamental principle that a defendant's compelled

testimony cannot be a brick in the wall that imprisons him. The similarity to the facts presented here is clear.

COURT: My understanding is that the source of compulsion is relevant to determining whether Fifth Amendment rights are at stake. Didn't the court in Allen note that individuals do not have a Fifth Amendment privilege when a private employer is questioning them?

CAEPERS: Judge, there have been instances where a court has found that even statements compelled by a private employer fall within the Fifth Amendment's ambit. In Stein, for example, the court held that statements compelled by a private employer were inadmissible.

BENTELE: Your Honor, I must interject. The statements in Stein were held to be inadmissible because of the Government's involvement in the private employer's investigation. Here, the Government was completely uninvolved in the interrogation of Ms. Spector in Remsen or the release of the recording of that interrogation.

COURT: Ms. Bentele, you know how I feel about interruptions in my courtroom. Yet, I admit you bring up an interesting point. Does Kastigar apply in the private employment context or not?

BENTELE: No, your Honor. Kastigar applies only to statements compelled by sovereigns, not private employers or other private parties. We contend that a Kastigar hearing should be required only when that sovereign is the United States, one of the states,

or when a situation arises like the one in Allen, where the United States is conducting an investigation in tandem with a foreign sovereign.

CAEPERS: Your Honor, should this Court find in favor of the Government, it would free the United States to work in tandem with a foreign government and allow the foreign government to compel statements from targets of prosecution without Fifth Amendment protections. The only appropriate result to reach in this case is to order a Kastigar hearing. That is the only way to be certain that no tainted evidence will be admitted.

COURT: Counselors, based on the information Ms. Spector disclosed in the interview that subsequently went viral, I'm not sure I see how we could forgo a Kastigar hearing here.

BENTELE: Your Honor, requiring the Government to prove its investigation was not influenced by testimony taken by a foreign government would run contrary to the purpose and history of the Fifth Amendment. This is by no means a situation where there is any risk of taint–the Government had reopened its investigation long before the video of Ms. Spector's interview was even released. And Kastigar provides an extraordinary remedy that imposes an overwhelming burden. The unique context here simply does not warrant that remedy.

COURT: Why would it be so burdensome? Shouldn't it be a simple process of identifying all the evidence that was gathered before

the defendant's statement was widely publicized and became available on the internet?

BENTELE: I wish it were that simple, your Honor. But we had no idea that the defendant was interrogated by the RIA, much less that a recording of the interrogation would be released. And while we had accomplished much to further our investigation, it was still in its middle stages. To ask us to explain why we took every step and how we learned everything we did after the video of the interrogation was leaked is to ask us to take on an enormous and nearly impossible task. And remember Judge, it's not only about what Government agents learned. During the Kastigar hearing, we would be required to prove that the recollections and statements of every witness we interviewed were also unaffected by statements that were widely disseminated under circumstances beyond our control. As noted by the D.C. Circuit in United States v. North, Kastigar requires a court to inquire into the content and sources of grand jury testimony, and the inquiry must proceed witness-by-witness, line-by-line, and item-by-item.

COURT: But doesn't a Kastigar hearing just put the parties in the same place they would have been if the compelled testimony had never been disclosed?

BENTELE: Proving what you are asking us to prove would be close to impossible, Judge. In Stone v. Powell, the Supreme Court held that even if a defendant is convicted and later finds that the police

gathered evidence in violation of the Fourth Amendment, such a finding cannot be used to obtain habeas relief. Here, the Government would absolutely not be left in the same place as if the compelled testimony had not occurred if forced to go through a Kastigar hearing. It would have to prove by a preponderance of the evidence that each piece of evidence gathered, each question asked of witnesses, each person interviewed, was based on an independent source. While we feel confident that such is the case, to prove it by a preponderance of the evidence when our investigation has been so extensive would be nearly impossible. Moreover, revealing every detail of our investigation could only threaten the safety of our witnesses and help the defendant prepare for trial in ways that the rules of evidence and procedure do not contemplate.

CAEPERS: Your Honor, I must interject. Remsen is an ally of the United States—this situation is exactly like the one in United States v. Allen.

BENTELE: With all due respect, this situation is nothing like Allen. In fact, it's the exact opposite. In Allen, two governments were working together toward the same goal. But here, there is reason to believe the defendant's statements were leaked by officials sympathetic to DRB. Thus, the defendant and the foreign government are working toward the same goal to the prejudice of the United States.

COURT: Counsel, keep the politics out of it.

BENTELE: Yes, your Honor. Simply put, we contend that Allen stretched existing Fifth Amendment jurisprudence to its breaking point. The dearth of authority cited in Allen demonstrates that Allen is a novel holding and that this Court need not—and indeed should not—follow it. Furthermore, the evolution of Fifth Amendment jurisprudence supports the conclusion that compulsion of statements by one sovereign does not preclude their use by another. Before the Fifth Amendment right against self-incrimination was applied to the states, compelled testimony in one state could be used at trial in another state.

COURT: Ms. Bentele, thanks for the history lesson—it's very interesting. But Fifth Amendment jurisprudence has developed extensively over the years. Notably, Miranda warnings—and I'm sure you'll be talking to me about them soon—were not a requirement not too long ago.

BENTELE: Your Honor, you read my mind. Miranda jurisprudence provides another illustration of how statements made to agents of a foreign state are treated differently. It is well-settled that, if a foreign authority elicits a confession, the confession is admissible–even if the individual was not Mirandized—so long as the confession was voluntary. In other words, when a foreign government conducts a custodial interrogation, American prosecutors may use the results, even though Miranda warnings were

never given. This precedent suggests that the scope of the Fifth Amendment privilege depends at least in part on whether it is being applied to interrogations conducted by U.S. officers or by foreign investigators over whom our government has no control. Your Honor, think about how irrational it would be to allow the actions of a hostile foreign government to force us into a burdensome Kastigar hearing. The whole idea is ridiculous.

COURT: Ms. Bentele, please. You are an officer of the court, and an AUSA to boot. Tamp it down. In any event, we've gone on for some time, and we still have one issue to get to—I will allow you each to make a final remark on the Kastigar issue.

BENTELE: Your Honor, in Allen the court explicitly noted that it was not dealing with a case where a foreign sovereign was attempting to disrupt an investigation by U.S. law enforcement by releasing compelled testimony. But unlike in Allen, here we are dealing with a rogue actor—a terrorist group—that is seeking to disrupt our legal system. That's why the Fifth Amendment should apply only when the compelling authority and the using authority are one. By requiring a Kastigar hearing regardless of the source of compulsion, this Court would essentially be providing a roadmap for any enemy of the United States who wishes to disrupt any legal proceeding to follow. Your Honor, we know that our enemies are not afraid to disrupt our way of life when they see vulnerabilities—just look at how Russia seized the opportunity to influence voters'

minds before the presidential election by creating Facebook accounts and running advertising campaigns. The Government urges this Court to deny Ms. Spector's motion for a Kastigar hearing to help protect the American legal system from foreign manipulation.

CAEPERS: Your Honor, it's funny that the Government talks about a roadmap, because that is exactly what my client gave them. Ms. Spector laid out a map and marked a metaphorical X on it for the FBI and prosecutors to follow. But my client did not provide this information voluntarily, and this Court must therefore ensure that her statements were not used to uncover any of the evidence to be admitted against her at trial. The U.S. government must demonstrate that its investigation was not sown from the seeds of a compelled statement. That is why we urge the Court to require a Kastigar hearing.

COURT: All right, thank you. Let's turn to the defendant's last motion in limine to exclude evidence of her silence at the time of arrest. I understand the Government is seeking to offer the evidence as part of its case-in-chief. Ms. Bentele, can you give me some context?

BENTELE: Of course, your Honor. Agents went to arrest the defendant at her home after she was indicted. At the time, the defendant happened to be having a party and was in the middle of speaking to her guests, who included family and friends, as well as colleagues. Upon presenting an arrest warrant for the defendant and a search

warrant for her home, the agents conducted a security sweep and a search for relevant evidence. One of the agents responsible for securing the defendant commented on her alleged involvement with siphoning money to radical separatist groups. In response to the comment, the defendant remained silent.

COURT: Okay. So, what does the Government want to use this evidence for?

BENTELE: Your Honor, the Government seeks to admit the defendant's silence in response to this comment as substantive evidence of her guilt. It is admissible as an opposing party statement under Federal Rule of Evidence 801(d)(2)(B).

COURT: Now, Ms. Bentele, just to clarify, was Ms. Spector in custody when the agent made this comment? Had she been Mirandized?

BENTELE: Well, your Honor, the agents had a warrant for her arrest and we concede Ms. Spector knew she was not free to leave. So yes, the defendant was in custody. What's critical, however, is that she was not interrogated and she had not yet been read her Miranda rights. Your Honor, this evidence is admissible as an opposing party statement because the defendant's silence constitutes a statement that is evidence of her guilt.

COURT: I'm just going to stop you right there for one moment. Mr. Caepers, do you concede that Ms. Spector's silence constitutes a statement?

CAEPERS: Yes, your Honor, which is precisely why her silence cannot be used against her. The prosecutor's focus on admissibility under Federal Rule of Evidence 801 is a red herring. The real issue here is a far more fundamental one—the Government's remarkable contention that it should be permitted to offer evidence of custodial silence, when to do so would trample my client's right against self-incrimination. Two assaults on the Fifth Amendment in one case, Judge. It's almost too much to bear.

COURT: Okay, Mr. Caepers. Take it easy. We'll get to your arguments in a minute. Ms. Bentele, why don't you continue?

BENTELE: Thank you. Your Honor, the defendant did not deny the agent's accusations or attempt to defend herself in any way. Therefore, her silence is probative evidence of her guilt. An innocent person would have done everything she could to rebut or deny the agent's charge, especially in front of her family and friends. But the defendant did the exact opposite and said nothing. The Fourth Circuit's holding in Frazier supports the proposition that because the defendant hadn't been read her Miranda rights, there was no governmental action inducing her silence.

COURT: Mr. Caepers, I'm sure you have a response.

CAEPERS: Yes, I certainly do. Your Honor, this argument is ridiculous. By remaining silent, my client did nothing more than what every American knows to do when under arrest. And that's to keep your mouth shut until you speak to your lawyer.

COURT: Ms. Bentele, that sounds pretty compelling. Do you want to respond?

BENTELE: I do. First, I just want to clarify that the agent did not interrogate the defendant or ask her a question, she only made a comment. To address Mr. Caepers's statement that the Government may never use a defendant's custodial silence against her, that's just wrong. It is well-settled that a defendant may be impeached with her silence when that silence occurred while the defendant was in custody, but before Miranda warnings were read. And that makes sense. If the arrestee hasn't been read her Miranda rights, the Government hasn't compelled the silence, so it's fair game to allow it to be used in the prosecution's case-in-chief. It's only when the Government compels or provokes the silence by telling an arrestee that she has the right to remain silent that the silence is off limits as evidence of guilt.

CAEPERS: Your Honor, just because something can be used for impeachment doesn't mean it can be used in the Government's case-in-chief. I mean…

COURT: Ms. Bentele, this whole idea of presenting evidence of custodial silence to a jury makes me uncomfortable. Is there precedent to support what you are asking me to do?

BENTELE: Yes, your Honor. A number of circuit courts have held that custodial pre-Miranda silence is admissible in the prosecution's case-in-chief.

COURT: But none from this Circuit?

BENTELE: No, your Honor. But there are also no decisions from this Circuit to the contrary.

COURT: Mr. Caepers, are you aware of any precedents that exclude this type of silence?

CAEPERS: Yes, your Honor. Numerous circuits have rightly held that this silence is strictly off limits in the prosecution's case-in-chief, including in summations. And those courts got it right. The privilege against self-incrimination is among the most fundamental rights a defendant has. Ms. Spector's silence in the face of the agent's scurrilous allegations does not somehow indicate her guilt. She merely exercised her well-known right to remain silent. Either silence is probative of nothing and should not be admitted, your Honor, or it's a statement and should be excluded as compelled self-incrimination.

COURT: Thank you counsel. You've given me a lot to think about. I will let you know when I've reached a decision.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF BOERUM

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UNITED STATES OF AMERICA 16-CR-250

-against-

VICTORIA SPECTOR,

Defendant.

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August 11, 2016

TRANSCRIPT OF DECISION ON PRE-TRIAL MOTIONS

Before: The Honorable Joss Simonson, District Judge, United States District Court

APPEARANCES:

For the United States of America:	Ursula Bentele Assistant United States Attorney 250 Church Street Boerum City, Boerum 11201
For Defendant Victoria Spector:	Benjamin I. Caepers Caepers & Associates 180 Park Avenue Boerum City, Boerum 11201
Court Reporter:	Selena P. Malloy Eastern District Reporter Services 500 Montague Street Boerum City, Boerum 11201

CLERK: United States of America versus Victoria Spector. Counsel, please note your appearances for the record.

BENTELE: Ursula Bentele for the United States. Good morning, your Honor.

CAEPERS: Benjamin Caepers of Caepers & Associates for the defendant, Victoria Spector. Good morning, your Honor.

COURT: Good morning, counselors. I have reached a decision on defendant Victoria Spector's motions. After considering the parties' memoranda of law and oral arguments, I hereby grant the defendant's motions in all respects.

I will first address the defendant's motion to exclude the statements attributed to her by the FBI in its translated version of its interview with her conducted on June 25, 2014. The Government reports that the interpreter who translated the defendant's statements cannot be located and will not be available as a witness at trial. The defendant argues that, because she had no opportunity to cross-examine the interpreter, the confrontation clause precludes the admission of statements attributed to her by that interpreter.

Under Crawford, testimonial statements of a witness absent from trial are admissible only if the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Here, it is undisputed that the translated statements are testimonial, because the interview was conducted by the FBI in

anticipation of using the defendant's statements at trial, and that the government seeks to admit the statements for their truth. It is also undisputed that the interpreter is unavailable and that the defendant has not had a prior opportunity to cross-examine him. The only question, then, is whether the interpreter is properly viewed as a witness independent from the defendant herself.

The Government urges the Court to follow the "language conduit" approach adopted by the majority of circuits that have considered the problem. This Court concludes that the "language conduit" approach is outdated and inconsistent with the modern understanding of the Confrontation Clause.

Requiring the interpreter to testify is particularly crucial in this case, where there appear to be material inconsistencies in the translation. The discrepancies in the translation of the defendant's statements relate directly to whether the defendant admitted her own personal knowledge of and involvement in certain aspects of Bank Plaza's operations or was instead merely describing the conduct of Bank Plaza as an entity. To deny the defendant the right to confront the interpreter regarding what any of her purported statements meant or what specific words or phrases she used would, accordingly, violate her constitutional right to confrontation.

Therefore, this Court holds that while the defendant is of course the declarant of her statements made in Remsi, the interpreter is the declarant of the English translation of those statements. Under Crawford then, the defendant has the right to confront the interpreter.

Moving next to Ms. Spector's request for a Kastigar hearing, the Court concludes that such a hearing is necessary to protect the defendant’s privilege against self-incrimination. The involvement of a foreign nation may render this an unusual case, but not a difficult one. This Court holds, as did the Second Circuit in Allen, that a Fifth Amendment violation occurs when American prosecutors attempt to offer evidence in American courtrooms that was derived from statements a defendant was compelled to make, even when the statements were compelled by a foreign government. The Court is especially concerned that, were it to deny defendant’s motion and allow what may be tainted testimony to be admitted, it would not only violate defendant’s rights, but would start us down a slippery slope toward a place where the right against self-incrimination is compromised in a variety of untraditional circumstances. That is a risk this Court should not and will not take.

On a final note, if the Government has indeed developed its case through its own investigative leads and techniques, and not as a result of exposure to the interrogation of the defendant by

the authorities in Remsen, the Government should be in a position to meet its burden at a Kastigar hearing.

Finally, the Court turns to another issue of first impression in this Circuit: whether it violates a defendant's Fifth Amendment rights to introduce pre-Miranda custodial silence in the prosecution's case-in-chief.

The Government urges the Court to follow precedent from the Fourth, Eighth, and Eleventh Circuits allowing admission of such evidence. Specifically, the Government urges this Court to hold that the defendant's Fifth Amendment rights would not be violated if evidence of her silence were introduced at trial because the agents had not yet Mirandized her at the time of her silence. The Court is not persuaded. Everyone is familiar with Miranda, and everyone knows about the right to remain silent once in Government custody. Accordingly, there is no logical distinction to be made between post-Miranda silence—which clearly may not be admitted—and custodial, pre-Miranda silence.

This Court is convinced, as the D.C. Circuit was in Moore, that a defendant's custodial, pre-Miranda silence may not be introduced in the prosecution's case-in-chief without violating the Fifth Amendment. It is being in custody—not receiving Miranda warnings or being questioned—that triggers the constitutional right to remain silent. To hold otherwise would put defendants like Ms. Spector in an impossible position—either speak out in

response to an accusation of wrongdoing and risk the Government using that response at trial or remain silent and risk the Government arguing that silence is probative of guilt at trial. To require her to make that decision is to force her to become a witness against herself, which is exactly what the Fifth Amendment proscribes.

For all these reasons, the translated statements from the June 25, 2014 interview and all evidence of the defendant's custodial, pre-Miranda silence are excluded. A Kastigar hearing will be held beginning two weeks from this date and continuing day-to-day until completed.

Thank you, counsel. See you in two weeks.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF BOERUM

— X

UNITED STATES OF AMERICA

ORDER

-against- **16-Cr- 250 (JS)**

VICTORIA SPECTOR,

Defendant.

— X

The Court held a hearing pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), on August 25, 2016. The Government has failed to establish that any evidence developed after the recording of the defendant's interview was released was developed free of taint. Thus, to protect defendant's privilege against derivative use of her compelled statements to incriminate her, all such evidence is excluded.

SO ORDERED.

Joss Simonson

JOSS SIMONSON
UNITED STATES DISTRICT JUDGE
September 2, 2016