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David Patton  
Executive Director and  
Attorney-in-Chief

April 28, 2017

**BY FACSIMILE**

Honorable Richard M. Berman  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

**Re: United States v. Rahimi  
16 Cr. 760 (RMB)**

Dear Judge Berman:

We write in response to the Government's letter of April 24, 2017 ("April 24 Letter"), which seeks to involve the Court in an issue that does not even exist—a competency determination for our client Ahmad Khan Rahimi. *See* Ex. A.

The Government's request should be denied. First, the Government itself concedes that there is no "basis for questioning the defendant's competency in any respect." Ex. A at 1; *see* 18 U.S.C. § 4241(a). Second, the April 24 Letter must be disregarded because it discloses information that the Government learned only from plea negotiations and runs afoul of Fed. R. Crim. P. 11(c)(1)'s prohibition on judicial involvement in plea discussions.

**I. Background**

The Government's April 24 Letter has left us no choice but to further involve the Court in what is, in fact, simply a matter of plea negotiation. We provide context below regarding the issues discussed in the letter. Mindful of the strictures of Rule 11(c)(1)—which forbids "[t]he court [from] participat[ing] in [plea] discussions"—we provide the minimum amount of information necessary to give the Court the background information required to decide the issues before it.

The parties have been engaged in ongoing plea negotiations, which included the February 3, 2017 meeting alluded to in the Government's letter. *See* Ex. A at 1. It was in that meeting that we raised Mr. Rahimi's mental and physical health as factors calling for a plea offer. Specifically, we asked that the plea offer reflect Mr. Rahimi's mental and physical health, including his being shot eleven times, his limited life-longevity, brain injuries and/or post-traumatic stress disorder.



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On April 13, 2017, the Government, explicitly referencing plea discussions, asked about "concerns that seemed to relate to [Mr.] Rahimi's competency at the time of the charged conduct and/or to stand trial," and asked if the evaluation was in progress or completed. *See* Ex. B (Email from Government to Defense Counsel, dated Apr. 13, 2017). The Government also noted that it "ha[d] no independent basis to doubt [Mr.] Rahimi's competency in any respect." *Id.*

We promptly informed the Government that their characterization was wrong:

We continue to have Mr. Rahimi examined, but to be clear, during our meeting, which was pursuant to Rule 11, to discuss a possible disposition in the case, we never communicated that we expected to raise an issue of competency. We are (and have always been) concerned that Mr. Rahimi has significant mental health issues and that your office should consider those issues for purposes of plea discussions. We still expect to present you with a report setting forth those concerns in greater detail and will ask that you consider them in your charging and plea decisions. But at this time, we don't expect [to] challenge his competency. We will, of course, let you know if that changes.

Ex. C (Email from Defense Counsel to Government, dated Apr. 17, 2017) (emphasis added).

Nonetheless, a week later, the Government inexplicably wrote to the Court, once again mischaracterizing facts discussed in a Rule 11 meeting. *See* Ex. A. The letter also misled the Court by selectively quoting portions of Defense Counsel's April 17, 2017 email (which is quoted in full above). The letter left the Court with a false impression that (i) we had an intent to challenge Mr. Rahimi's competency, and (ii) the parties' discussions regarding Mr. Rahimi's mental health were made in a context other than Rule 11 plea discussions. *Compare* Ex. A, with Ex. C. And, most egregiously, the letter asked the Court to make a competency determination and order the Defense to complete Mr. Rahimi's mental health examination "as soon as is practicable," while fully noting that there was no basis to do so. Ex. A at 1-2; *see also* Ex. B.

## **II. The Government's request for a competency determination is baseless and should be denied.**

Upon motion by a party or *sua sponte*, a court may issue a determination regarding a defendant's competency to stand trial. 18 U.S.C. § 4241(a); *United States v. Arenburg*, 605 F.3d 164, 171 (2d Cir. 2010). To grant such a motion, there must be "reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a). The opposite is true here.



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The Government concedes that “[it] is *not aware of any basis for questioning the defendant’s competency in any respect.*”<sup>1</sup> Ex. A at 1 (emphasis added); see also Ex. B (stating the same). And, the Defense has raised no such issue. Nor does anything in the record indicate any basis for questioning Mr. Rahimi’s competency. See *Falu v. United States*, 308 F. Supp. 1051, 1052 (S.D.N.Y. 1969), *aff’d*, 421 F.2d 687 (2d Cir. 1969) (no competency determination warranted where “not a single evidentiary fact . . . even suggest[ed] that petitioner might have been so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense. To the contrary, petitioner intelligently answered all questions put to him by the Court; the Court expressed its belief that petitioner was in good health; and petitioner’s alert counsel never requested a judicial determination of mental competency.”) (citation and quotation marks omitted). As such, the Government’s request has no basis in law or in fact and must be denied.<sup>2</sup>

III. Fed. R. Crim. P. 11(c)(1) erects a wall between the Court and parties to encourage plea discussions, which the government knowingly pierced.

The Government’s letter is problematic not only because it requests a competency determination for which there is no basis, but also because it improperly discloses confidential information learned during plea negotiations and involves the Court in the parties’ plea discussions, in contravention of Fed. R. Crim. P. 11.

Rule 11(c)(1) provides in no uncertain terms that “[t]he court must not participate in these discussions.” See *United States v. Paul*, 634 F.3d 668, 671 (2d Cir. 2011). The prohibition on judicial involvement in plea discussions is a long-standing one and is of paramount importance to encouraging resolution of criminal proceedings while ensuring that a defendant’s indelible right to a fair trial is protected. See *United States v. Davilia*, 133 S. Ct. 2139, 2146 (2013); *United States*

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<sup>1</sup> The Government admits that this Court need not make a competency determination if the “examin[ation]” Defense Counsel is seeking is one other than an evaluation of Mr. Rahimi’s competency to stand trial. Ex. A at 1-2. That is precisely the case: the “examin[ation]” referenced in Defense Counsel’s April 17 email is being conducted pursuant to the parties’ plea discussions—a fact that has been made clear to the Government, despite its recently feigned confusion. See Ex. C.

<sup>2</sup> To this end, the Government’s unfounded request for a competency determination is yet another instance of prosecutors in this case likely running afoul of the New York Rules of Professional Conduct, e.g., sending a federal agent to take a DNA sample from Mr. Rahimi outside the presence of counsel and generating prejudicial publicity beyond the bounds of the Rules. See N.Y. Rules of Prof’l Conduct R. 3.1 (prohibiting prosecutors from pursuing non-meritorious claims and contentions, i.e., those lacking a non-frivolous “basis in law and fact”); see also Def. Memo. of Law in Supp. of Mot. for Change of Venue, Dkt. 49, dated Apr. 5, 2017, at 20 n. 15; Def. Reply Memo. of Law in Further Supp. of Mot. for Change of Venue, Dkt. 54, dated Apr. 25, 2017, at 7.



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*v. Burnside*, 588 F.3d 511, 520 (7th Cir. 2009) (“Excluding the judge from the plea discussions serves three purposes: it minimizes the risk that the defendant will be judicially coerced into pleading guilty, it preserves the impartiality of the court, and it avoids any appearance of impropriety.”) (citation and quotation marks omitted). A related hallmark of plea negotiations is that they are, as a general matter, confidential. *See United States v. Ross*, 588 F. Supp. 2d 777, 781 (E.D. Mich. 2008) (recognizing “requirement that guilty plea discussions may enjoy some measure of confidentiality”); *see also United States v. Orlandez-Gamboa*, 320 F.3d 328, 332 (2d Cir. 2003) (emphasizing that “[f]ree communication is needed” to encourage effective plea bargaining).

The prudent policy judgment of the courts and Congress that plea negotiations remain confidential and that judicial involvement in such discussions be curtailed until a plea agreement is final,<sup>3</sup> is further reflected in the Federal Rules of Evidence, which forbid statements made during plea negotiations from being admitted into evidence. *See Fed. R. Crim. P. 410(a)(3)-(4); Orlandez-Gamboa*, 320 F.3d at 331-32 (“[P]rotection of the defendant from the prejudice that would result from the admission of plea negotiations is . . . not [] an end in itself but [] a safeguard necessary for the promotion of frank discussion, without which plea bargaining cannot be successful.”).

By sending to the Court its April 24 Letter, the Government violated Rule 11 confidentiality. Disclosing information gleaned only through plea discussions runs afoul of the wall that Congress had good public policy reasons to erect. *See United States v. Pena*, 720 F.3d 561, 571 (5th Cir. 2013); *see also Orlandez-Gamboa*, 320 F.3d at 331-32. This is especially so when defense counsel both flagged the piercing and reiterated that competency was not being raised. *See Ex.C. See United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (“[B]oth to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process, the most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.”) (citation omitted).

\* \* \*

For the foregoing reasons, and particularly because the Government’s April 24 Letter on its face confirms there is no basis for a competency determination, the Court should deny the Government’s requests.

<sup>3</sup> *See* Rule 11 advisory committee’s note (1974 amendment); *see also Pena*, 720 F.3d at 572.



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United States District Judge

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Thank you for your time and consideration of this matter.

Respectfully submitted,

/s/  
David E. Patton, Esq.  
Peggy Cross-Goldenberg, Esq.  
Sabrina Shroff, Esq.  
Meghan J. Gilligan, Esq.  
FEDERAL DEFENDERS OF NEW YORK  
52 Duane Street, 10th Floor  
New York, New York 10007  
Tel.: (212) 417-8738/-8732/-8713/-8727  
*Attorneys for the Defendant*

(Enclosures)

cc: Mr. Ahmad Rahimi (via mail)  
Government counsel (via email)









U.S. Department of Justice

United States Attorney  
Southern District of New York

The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

**REQUEST TO BE FILED UNDER SEAL**

April 24, 2017

**Via Facsimile**

The Honorable Richard M. Berman  
United States District Judge  
Southern District of New York  
Fax: 212-805-6717

Re: **United States v. Ahmad Khan Rahimi,**  
**16 Cr. 760 (RMB)**

Dear Judge Berman:

The Government respectfully submits this letter to request, pursuant to Title 18, United States Code, Section 4241, that the Court make a determination regarding the defendant's competency to stand trial.

In early February 2017, defense counsel expressed concerns to the Government about the defendant's mental health. On April 13, 2017, defense counsel indicated via email that they were "continu[ing] to have Mr. Rahimi examined," and that they "are (and have always been) concerned that Mr. Rahimi has significant mental health issues . . . ." The defense has not provided notice of a defense pursuant to Rule 12.2, and counsel indicated in the April 13 email that they "don't expect [to] challenge" the defendant's competency "at this time."

Other than the representations of defense counsel, the Government is not aware of any basis for questioning the defendant's competency in any respect. In light of counsel's expressed concerns, however, the Government respectfully submits that the Court should make a determination relating to the defendant's competency to stand trial. See 18 U.S.C. §§ 4241(a)-(b), 4247(b)-(d); cf. *United States v. Arenburg*, 605 F.3d 164, 165 (2d Cir. 2010) ("[D]istrict courts operate under an independent statutory obligation to revisit a defendant's competence, *sua sponte*, if there is 'reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent.'" (quoting 18 U.S.C. § 4241(a))). To the extent the "examin[ation]" referenced by counsel relates to the defendant's competency to stand trial, the Government requests that counsel be directed to have the report completed and disclose



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it to the Court and the Government as soon as is practicable so that the Court can decide whether it is necessary to have the defendant examined by an independent expert to facilitate a competency determination pursuant to Section 4241. Finally, because this letter contains sensitive information relating to communications between the parties regarding the defendant's health, the Government respectfully requests that this letter be maintained under seal.

Respectfully submitted,

JOON H. KIM  
Acting United States Attorney

By: /s/  
Emil J. Bove III  
Andrew J. DeFilippis  
Shawn G. Crowley  
Nicholas J. Lewin  
Assistant United States Attorneys  
(212) 637-2444 / 2231 / 1034 / 2337

Cc: Defense Counsel  
(Via Email)

*Exhibit B*



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***Exhibit B***

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Rahimi

Bove, Emil (USANYS)

to:

Peggy Cross-Goldenberg, Sabrina Shroff, Meghan Gilligan

04/13/2017 03:59 PM

Cc:

"Crowley, Shawn (USANYS)", "DeFilippis, Andrew (USANYS)", "Lewin, Nicholas (USANYS)"

Hide Details

From: "Bove, Emil (USANYS)" <Emil.Bove@usdoj.gov>

To: Peggy Cross-Goldenberg <Peggy\_Cross-Goldenberg@fd.org>, Sabrina Shroff <Sabrina\_Shroff@fd.org>, Meghan Gilligan <Meghan\_Gilligan@fd.org>

Cc: "Crowley, Shawn (USANYS)" <Shawn.Crowley@usdoj.gov>, "DeFilippis, Andrew (USANYS)" <Andrew.DeFilippis@usdoj.gov>, "Lewin, Nicholas (USANYS)" <Nicholas.Lewin@usdoj.gov>

Counsel:

At our meeting on February 3, Mr. Patton described some concerns that seemed to relate to Rahimi's competency at the time of the charged conduct and/or to stand trial, and mentioned possibly getting an evaluation done. Could you please let us know if that has been done, or is in the process of being done? If not, although we have no independent basis to doubt Rahimi's competency in any respect, we will likely raise the issue with the Court prior to the next conference in an abundance of caution.

Thanks,  
Emil

Emil Bove  
Assistant United States Attorney  
United States Attorney's Office  
Southern District of New York  
One St. Andrew's Plaza  
New York, New York 10007  
(212) 637-2444 (t)  
(347) 668-2048 (c)  
(212) 637-0097 (f)

Exhibit C



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***Exhibit C***

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Re: Rahimi 

Sabrina Shroff to: Bove, Emil (USANYS)  
Cc: "DeFilippis, Andrew (USANYS)", Meghan Gilligan, "Lewin, Nicholas (USANYS)",  
Peggy Cross-Goldenberg, "Crowley, Shawn (USANYS)"

04/17/2017 01:06 PM

Dear Govt. Counsel,

We continue to have Mr. Rahimi examined, but to be clear, during our meeting which was pursuant to Rule 11, to discuss a possible disposition in the case, we never communicated that we expected to raise an issue of competency. We are (and have always been) concerned that Mr. Rahimi has significant mental health issues and that your office should consider those issues for purposes of plea discussions. We still expect to present you with a report setting forth those concerns in greater detail and will ask that you consider them in your charging and plea decisions. But at this time, we don't expect challenge his competency. We will, of course, let you know if that changes.

With best regards,  
Sabrina P. Shroff  
Assistant Federal Defender  
Federal Defenders of New York, Inc.  
Southern District of New York  
52 Duane Street, 10th Floor  
New York, N.Y. 10007  
(o) 212 417 8713  
(f) 212 571 0392

"Bove, Emil (USANYS)"

Counsel: At our meeting on February 3, Mr...

04/13/2017 03:59:19 PM

From: "Bove, Emil (USANYS)" <Emil.Bove@usdoj.gov>  
To: Peggy Cross-Goldenberg <Peggy\_Cross-Goldenberg@fd.org>, Sabrina Shroff  
<Sabrina\_Shroff@fd.org>, Meghan Gilligan <Meghan\_Gilligan@fd.org>  
Cc: "Crowley, Shawn (USANYS)" <Shawn.Crowley@usdoj.gov>, "DeFilippis, Andrew (USANYS)"  
<Andrew.DeFilippis@usdoj.gov>, "Lewin, Nicholas (USANYS)" <Nicholas.Lewin@usdoj.gov>  
Date: 04/13/2017 03:59 PM  
Subject: Rahimi

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Counsel:

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Thanks,  
Emil

Emil Bove  
Assistant United States Attorney  
United States Attorney's Office  
Southern District of New York



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