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17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE DISTRICT OF ARIZONA

19
20 United States of America,
21 Plaintiff,
22 v.

23 Ryan Phillip Schlesinger,
24 Defendant.
25
26

CR 18-02719-TUC-RCC (BGM)

**MOTION FOR INFORMATIVE
OUTLINE AS TO CERTAIN
AGGRAVATING FACTORS**

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1 Defendant Ryan Phillip Schlesinger, by and through counsel, respectfully moves
2 this Court for an order directing the government to provide an informative outline of the
3 “substantial planning and premeditation” statutory aggravating factor and all non-
4 statutory aggravating factors it intends to introduce in the event of a penalty phase in
5 this case. The United States opposes this motion.
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7 **PROCEDURAL HISTORY**

8
9 On November 30, 2018, the government filed a complaint against Mr.
10 Schlesinger charging him with the killing of a Deputy U.S. Marshal in violation of 18
11 U.S.C. §§ 1111, 1114. ECF No. 1. On December 27, 2018, the government secured an
12 indictment charging Mr. Schlesinger with one count of first-degree murder of a federal
13 officer (18 U.S.C. §§ 1111, 1114); three counts of attempted murder of a federal officer
14 (18 U.S.C. §§ 1113, 1114); four counts of assault on a federal officer with a deadly or
15 dangerous weapon (18 U.S.C. § 1111(a)(1) & (b)); and five counts of discharging a
16 firearm in further of a crime of violence (18 U.S.C. § 924(c)). ECF No. 26. The
17 government filed a Superseding Indictment on September 30, 2020, which charged the
18 same offenses. ECF No. 192. If convicted of Counts 1 and 9 of the Superseding
19 Indictment, Mr. Schlesinger faces a possible sentence of death.
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23 The Superseding Indictment alleges three statutory aggravating factors:

- 24 1. Mr. Schlesinger “[c]ommitted the offense after substantial planning and
25 premeditation to cause the death of a person (18 U.S.C. § 3592(c)(9));”
26

2. Mr. Schlesinger [c]ommitted the offense against a Federal public servant and law enforcement officer while he was engaged in the performance of his official duties, because of the performance of his official duties, and because of his status as a public servant (18 U.S.C. § 3592(c)(14)(D));” and
3. Mr. Schlesinger “[i]ntentionally killed or attempted to kill more than one person in a single criminal episode (18 U.S.C. § 3592(c)(16)).”

ECF No. 192 at 6.

On September 8, 2020, the government filed a notice of intent to seek the death penalty (NOI), which it amended on October 2, 2020. ECF Nos. 187, 194. The NOI lists the statutory aggravating factors alleged in the indictment and adds two non-statutory aggravating factors:

1. **Victim Impact.** Ryan Phillip Schlesinger caused injury, harm, and loss to Deputy United States Marshal C.W., as well as to his family, friends, and co-workers, as evidenced by his personal characteristics as an individual human being and the impact of his death upon him and his family, friends, and co-workers. 18 U.S.C. § 3593(a); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).
2. **Future Dangerousness.** Ryan Phillip Schlesinger poses a continuing danger to others in that he is likely to commit criminal acts of violence in the future that would constitute a continuous and serious threat to the lives and safety of others, as evidenced by at least one or more of the following:
 - a. **History of antagonism and threatening behavior.** Ryan Phillip Schlesinger has engaged in a continuous pattern of antagonist and threatening behavior towards law enforcement and persons in positions of authority including repeated threats of violence and stalking.
 - b. **Continuing pattern of violence.** Ryan Phillip Schlesinger has engaged in a continuing pattern of violence, threatened violence,

1 and attempted violence, including but not limited to the crimes
2 alleged in the Superseding Indictment.

- 3 c. **Lack of remorse.** Ryan Phillip Schlesinger has demonstrated a
4 lack of remorse for the murder of Deputy United States Marshal
5 C.W., as evidenced by his statements and actions during the course
6 of and following the commission of the offense.

7 ECF No. 194 at 3-4.

8 **DISCUSSION**

9 **A. Legal Principles**

10 The Federal Death Penalty Act (FDPA) divides capital sentencing proceedings
11 into two phases. In the first phase, known as the “eligibility phase,” the government
12 “must prove, beyond a reasonable doubt, any one of the statutory intent factors provided
13 in [18 U.S.C. §] 3591(a)(2) and any one of the statutory aggravating factors provided in
14 [18 U.S.C. §] 3592(c).” *United States v. Bourgeois*, 423 F.3d 501, 506-07 (5th Cir.
15 2005); *see also United States v. Mills*, 446 F. Supp. 2d 1115, 1120 (C.D. Cal. 2006). If
16 the jury finds the government has carried its burden with respect to both findings,
17 sentencing proceeds to the “selection phase.” *Mills*, 446 F. Supp. 2d at 1120. At this
18 phase, the jury may consider non-statutory aggravating factors for which the
19 government has given notice and which the jury finds unanimously and beyond a
20 reasonable doubt. *Id.* It must also consider evidence of any mitigating factor that any
21 juror has found to exist by a preponderance of the evidence. *Id.* The jury must then
22 determine “whether all the aggravating factor or factors found to exist sufficiently
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1 outweigh all the mitigating factor or factors found to exist to justify a sentence of death,
2 or, in the absence of a mitigating factor, whether the aggravating factor or factors alone
3 are sufficient to justify a sentence of death.” 18 U.S.C. § 3593(e). If they do not, the jury
4 may not impose a sentence of death.
5

6 The government’s discretion to define non-statutory aggravating factors is
7 limited by several principles. First, “due process requires that information submitted as
8 aggravating genuinely narrow the class of persons eligible for the death penalty.” *United*
9 *States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998). “[A]ggravating circumstances must
10 be construed to permit the sentencer to make a principled distinction between those who
11 deserve the death penalty and those who do not.” *Lewis v. Jeffers*, 497 U.S. 764, 776
12 (1990).
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15 Second, “the district court functions as a gatekeeper to limit the admission of
16 useless and impermissibly prejudicial information.” *Jones*, 132 F.3d at 240. “The
17 Court’s screening of aggravating factors is essential in channeling, directing and limiting
18 the sentencer’s discretion to prevent arbitrary and capricious imposition of the death
19 penalty.” *United States v. Solomon*, 513 F. Supp. 2d 520, 526 (W.D. Pa. 2007); *see also*
20 *id.* (“If the aggravator has only a tangential relationship to a determination of who is
21 more worthy of receiving a sentence of death, it should be excluded from the sentencer’s
22 review”).
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1 Third, “the statute limits the scope of aggravating factors to those for which prior
2 notice has been given by the prosecution.” *Jones*, 132 F.3d at 240. The FDPA provides
3 that the government may rely on a given aggravating factor at the selection phase only
4 if, “a reasonable time before the trial,” the government provides the defendant with
5 notice of its intent to do so. 18 U.S.C. § 3593(a); *see also Bourgeois*, 423 F.3d at 507.
6 “[A]t a minimum, due process requires a defendant to receive sufficient notice of
7 aggravating factors to enable him to respond and to prepare his case in rebuttal.” *United*
8 *States v. Wilson*, 493 F. Supp. 2d 364, 377 (E.D.N.Y. 2006); *see also United States v.*
9 *Kaczynski*, 1997 WL 34626785, at *18 (E.D. Cal. Nov. 7, 1997) (same); *United States*
10 *v. Rodriguez*, 380 F. Supp. 2d 1041, 1057 (D.N.D. 2005) (calling a defendant’s ability
11 to defend his case a “hallmark[]” of due process).

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15 Moreover, the Constitution guarantees criminal defendants “a meaningful
16 opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 485
17 (1984). “This opportunity would hardly be ‘meaningful’ if the defense were forced to
18 confront sentencing phase evidence without any notice of what that evidence might be.”
19 *United States v. Llera Plaza*, 179 F. Supp. 2d 464, 472 (E.D. Pa. 2001); *see also United*
20 *States v. Duncan*, 2008 WL 656036, at *5 (D. Idaho Mar. 6, 2008) (same). As one court
21 has explained: “Absent further revelations by the government, Defendant may be forced
22 to defend against these allegations for the first time during the prosecutor’s case-in-chief
23 at sentencing. This raises the specter of unfair surprise and potentially prejudices
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1 Defendant's ability to defend against the government's efforts to impose the death
2 penalty." *Rodriguez*, 380 F. Supp. 2d at 1057.

3
4 Therefore, numerous courts have found that "[i]n order for the government's
5 evidence to be subjected to the crucible of meaningful adversarial testing, the [notice of
6 intent], in conjunction with the indictment, must inform the defendants of the theories
7 and facts that the government will use to establish each aggravating factor." *Llera Plaza*,
8 179 F. Supp. 2d at 472; *see also, e.g., Duncan*, 2008 WL 656036, at *5. Citing the
9 commands of due process, and relying on their "inherent authority," courts frequently
10 order the government to provide defendants, ahead of sentencing, with more than the
11 bare minimum notice required by the FDPA. *See, e.g., United States v. Glover*, 43 F.
12 Supp. 2d 1217, 1222 (D. Kan. 1999). These courts direct the government to provide
13 additional information about the evidence it will use to establish its aggravating factors,
14 consistent with the defendant's right to a "meaningful" opportunity to meet the
15 allegations against him. *See, e.g., United States v. Jacques*, 2011 WL 1675417, at *29
16 (D. Vt. May 4, 2011), *overruled in part on other grounds*, 684 F.3d 324 (2d Cir. 2012);
17 *Glover*, 43 F. Supp. 2d at 1222; *United States v. Montgomery*, 10 F. Supp. 3d 801, 830
18 (W.D. Tenn. 2014) (listing cases); *Rodriguez*, 380 F. Supp. 2d at 1058; *Kaczynski*, 1997
19 WL 34626785, at *19; *Wilson*, 493 F. Supp. 2d at 376; *United States v. Karake*, 370 F.
20 Supp. 2d 275, 280-81 (D.D.C. 2005); *United States v. Gooch*, 2006 WL 3780781, at *23
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1 (D.D.C. Dec. 20, 2006); *United States v. Lujan*, 2008 WL 11359151, at *23 (D.N.M.
2 June 26, 2008).

3
4 Requiring the government to provide advance notice serves the additional
5 function of facilitating a trial court’s “gatekeep[ing]” function. *Jones*, 132 F.3d at 240.
6 By mandating disclosure up front, the court can make reasoned, deliberate choices as it
7 “screen[s]” the government’s aggravation evidence, which is “essential in channeling,
8 directing and limiting the sentencer’s discretion to prevent arbitrary and capricious
9 imposition of the death penalty.” *Solomon*, 513 F. Supp. 2d at 526; *see also United States*
10 *v. Hammer*, 2011 WL 6020157, at *3 (M.D. Pa. Dec. 1, 2011) (same).

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13 The additional information typically takes the form of an “informational outline,”
14 *Hammer*, 2011 WL 6020157, at *2, or “informative outline,” *United States v. Bin Laden*,
15 126 F. Supp. 2d 290, 304 (S.D.N.Y. 2001); *see United States v. Diaz*, 2007 WL 4169973,
16 at *3 n.1 (N.D. Cal. Nov. 20, 2007) (“In the interest of protecting defendants’ right to
17 prepare an adequate defense, most federal district decisions have required an
18 informative outline of the underlying facts the government plans to use to prove the
19 aggravating factors indicated in Section 3593(a).”). This outline informs the defendant
20 of “the general nature of the evidence [the government] will seek to introduce in support
21 of the threshold findings and specified aggravating factors.” *Hammer*, 2011 WL
22 6020157, at *3; *see also United States v. O’Reilly*, 2007 WL 4591856, at *5 (E.D. Mich.
23 Dec. 28, 2007).

Moreover, the government cannot avoid providing an informative outline simply by arguing that its sentencing information has been disclosed in discovery:

Contrary to the government’s suggestion, the fact that the precise acts and/or events may have been disclosed in the course of discovery does not obviate the need for a more specific notice. Even if the government has provided Defendant with documents detailing specific acts, the government has not yet indicated which acts and/or events it intends to use at sentencing. In fact, the characterization of the discovery provided as extensive lends further support for requiring the government to identify the particular acts upon which it will rely. Extensive discovery could make it difficult for Defendant to ascertain which precise discovery will be used against him.

Rodriguez, 380 F. Supp. 2d at 1057-58; *see also Kaczynski*, 1997 WL 34626785, at *19 (same); *Diaz*, 2007 WL 4169973, at *5 (“Merely referring to a range of several hundred pages (or thousands in some cases) in discovery is not an informative outline. . . . [T]oo much is left to guesswork. Notice means notice. It does not mean a scavenger hunt for clues in discovery, including in redacted pages.”).

B. Request for informative outline.

Together, the indictment and the notice of intent identify three statutory and three non-statutory aggravating factors on which the government intends to rely at sentencing. ECF No. 192 at 6; ECF No. 194 at 2-4. The indictment’s descriptions of the statutory factors are limited to a bare recitation of the language of § 3592(c), and the NOI’s descriptions of the non-statutory factors contain only generalizations. Because these pleadings do not provide sufficient information to satisfy Mr. Schlesinger’s due process right to advance notice—and because the Court cannot exercise its gatekeeper function

1 based on these bare-bones pleadings—the Court should order the government to produce
2 an informative outline.

3 **1. Substantial Planning and Premeditation (Statutory)**

4
5 The indictment lists three separate statutory aggravating factors: (1) substantial
6 planning and premeditation, (2) killing or attempting to kill more than one person, and
7 (3) offense against a federal officer. ECF No. 192 at 6. With respect to the substantial
8 planning and premeditation aggravator, the indictment and NOI fail to provide notice
9 adequate to satisfy due process.¹

10
11 The government alleges that Mr. Schlesinger “committed the offense after
12 substantial planning and premeditation to cause the death of a person,” but does not
13 provide any details about the purported planning and premeditation. ECF No. 192 at 6
14 (citing § 3592(c)(9)). Mr. Schlesinger cannot meaningfully contest this factor—and the
15 Court cannot screen the evidence pertaining to it—without additional information about
16 how the government intends to prove “substantial planning and premeditation.” The
17 Court should direct the government to produce an informative outline with respect to
18 this factor. *See, e.g., Hammer*, 2007 WL 6020157, at *3 (ordering the government “to
19 provide Defendant with Informational Outlines of the information it plans to present in
20 support of . . . the statutory aggravating factor of substantial planning and
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26 ¹ Mr. Schlesinger is not challenging the sufficiency of the government’s notice of the
other two statutory aggravators, although he intends to challenge the applicability of
these aggravators to his case at the appropriate time.

premeditation.”); *United States v. Con-Ui*, No. 3:CR-13-123, 2016 WL 9331115, at *18 (M.D. Pa. Jan. 28, 2016) (ordering the government to identify the witnesses and exhibits it intended to introduce to support the factor of substantial planning and premeditation).

2. Non-statutory Aggravating Factors

a. Victim impact evidence

The NOI alleges Mr. Schlesinger “caused injury, harm, and loss to Deputy United States Marshal C.W., as well as to his family, friends, and co-workers, as evidenced by his personal characteristics as an individual human being and the impact of his death upon him and his family, friends, and co-workers.” ECF No. 192 at 6. The notice does not identify the family, friends, and co-workers harmed by Deputy C.W.’s death nor does it identify the harm the government alleges Mr. Schlesinger caused.²

² It is worth contrasting the NOI in this case with the NOI filed in *United States v. Ciancia*, 2:13-cr-00902-PSG-1 (C.D. Cal.). For the victim impact aggravating factor, the *Ciancia* NOI read:

[(C)(1)] As reflected by victim Transportation Security Administration Officer Gerardo Hernandez's personal characteristics as an individual human being and the impact of the victim's murder on his family, friends, and colleagues, defendant PAUL ANTHONY CIANCIA caused loss, injury, and harm to the victim and the victim's family, friends, and colleagues, including but not limited to the following:

a. Characteristics of the Victim

Defendant PAUL ANTHONY CIANCIA caused the death of Transportation Security Officer Gerardo Hernandez, a 39-year old husband, father, and

1 “That the range of human suffering—whether physical, emotional, or
2 economic—is vast goes without saying.” *Bin Laden*, 126 F. Supp. 2d at 304; *see also*
3 *Wilson*, 493 F. Supp. 2d at 378 (“The category of ‘victim impact’ is vast.”); *United*
4 *States v. Green*, No. CRIM. A. 5:06CR-19-R, 2008 WL 4000870, at * 21(W.D. Ky.
5 Aug. 26, 2008) (same). Accordingly, an “oblique reference to victims’ ‘injury, harm,
6 and loss,’ without more, does nothing to guide [Mr. Schlesinger’s] vital task of preparing
7 for the penalty phase of trial.” *Bin Laden*, 126 F. Supp. 2d at 304. It also necessarily
8 hampers this Court’s performance of its gatekeeping role in considering any
9 objections to this problematic aggravator.
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14 employee with the Transportation Security Administration, who enjoyed a strong
15 relationship with his family and co-workers.

16 *b. Impact of the Offense on the Family of the Victim*

17 The family of victim Transportation Security Administration Officer Gerardo
18 Hernandez has suffered severe and irreparable harm including, but not limited
19 to, emotional distress, grief, loss of companionship, and loss of emotional and
20 financial support.

21 *c. Impact of the Offense on the Colleagues of the Victim*

22 The victim’s colleagues within the Transportation Security Administration have
23 suffered substantial and irreparable harm including, but not limited to, emotional
24 distress, grief, loss of companionship, and loss of service.

25 *United States v. Ciancia*, 2:13-cr-00902-PSG-1 (C.D. Cal.), ECF No. 59 at 4-5 (Jan. 2,
26 2015). Although the *Ciancia* notice was far more detailed than the notice in this case,
the government nonetheless agreed to submit an informational outline with additional
detail as to the victim impact aggravating factor. *United States v. Ciancia*, 2:13-cr-
00902-PSG-1 (C.D. Cal.), ECF No. 203 at 15-16 (Aug. 17, 2015).

1 Faced with similarly conclusory notices, courts in other cases have ordered the
2 government to “more specifically articulate the nature of this aggravator.” *Glover*, 43 F.
3 Supp. 2d at 1225. The *Glover* court, directed the government to specify “which members
4 of the [victim’s] family have suffered, the nature of their suffering, and the nature of the
5 ‘permanent harm,’” for example “whether members of the family sought counseling or
6 other medical treatment, such as hospitalization, and whether and to what extent
7 members of the family suffered financial harm.” *Id.*; see also, e.g., *United States v.*
8 *Cooper*, 91 F. Supp. 2d 90, 111 (D.D.C. 2000) (“[T]he government shall amend its
9 notice of intent . . . to include more specific information concerning the extent and scope
10 of the injuries and loss suffered by each victim, his or her family members, and other
11 relevant individuals, and as to each victim’s ‘personal characteristics’ that the
12 government intends to prove.”); *United States v. Pleau*, 2013 WL 1673109, at *4 (D.R.I.
13 Apr. 17, 2013) (ordering government to “provide an outline of its victim impact
14 evidence”); *United States v. Talik*, 2007 WL 4570704, at *9 (N.D. W. Va. Dec. 26,
15 2007) (same); *Llera Plaza*, 179 F. Supp. 2d at 475 (same); *Duncan*, 2008 WL 656036,
16 at *8 (same); *Green*, 2008 WL 4000870, at *20 (same); *O’Reilly*, 2007 WL 4591856, at
17 *5 (same); *United States v. Williams*, No. 4:08-CR-00070, 2013 WL 1335599, at *40
18 (M.D. Pa. Mar. 29, 2013).

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24 “The propriety of providing a defendant with such information is further
25 underscored by the particular danger of eliciting an emotional reaction inherent in victim
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1 impact evidence.” *United States v. Casey*, No. CR 05-277 (ADC), 2013 WL 12190487,
2 at *2 (D.P.R. Mar. 1, 2013); *see also United States v. O'Driscoll*, 203 F. Supp. 2d 334,
3 340 (M.D. Pa. 2002) (“The presentation of victim impact evidence can be problematic
4 because of the potential for emotional outbursts during the testimony of family
5 members.”). Victim impact testimony has “unsurpassed emotional power . . . on a jury.”
6 *United States v. Johnson*, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005). One federal
7 judge has described such testimony as “the most forceful, emotionally powerful, and
8 emotionally draining evidence that [he has] heard in any kind of proceeding in any case,
9 civil or criminal, in [his] entire career as a practicing trial attorney and federal judge
10 spanning nearly 30 years.” *Id.*

14 Given the “heightened degree of reliability” required of fact-finding in capital
15 cases, courts have recognized that defendants in death cases have a special need to know
16 of the government’s aggravating evidence well in advance of sentencing:

18 [T]he mantra that “death is different” really applies here. Presenting
19 information about victim impact to a jury that has convicted a defendant
20 of a capital crime is different than presenting such information to a judge
21 months after a trial is completed and at a time when the parties (and jury)
22 are no longer exhausted from trial and no longer have frayed nerves from
23 deliberations.

24 *Gooch*, 2006 WL 3780781, at *23; *see also Montgomery*, 10 F. Supp. 3d at 830 (same).
25 This Court, like those courts, should therefore “order the Government to outline the type
26 and scope of the ‘loss, injury, and harm’ suffered by each victim, his or her family

1 members, and other individuals as relevant, and the ‘personal characteristics’ of each
2 victim that it intends to prove.” *Gooch*, 2006 WL 3780781, at *23.

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4 **b. Future dangerousness.**

5 The NOI also alleges Mr. Schlesinger “poses a continuing danger to others in that
6 he is likely to commit criminal acts of violence in the future that would constitute a
7 continuous and serious threat to the lives and safety of others.” ECF No. 194 at 6. As
8 an initial matter, the NOI is deficient because it does not indicate how the government
9 will attempt to show Mr. Schlesinger would be dangerous in a prison context. If Mr.
10 Schlesinger is convicted of a capital offense, the only available punishments are death
11 or life in prison without parole. As such, the government may rely on future
12 dangerousness only if it can demonstrate Mr. Schlesinger would be dangerous in prison.
13 *See Montgomery*, 10 F. Supp. 3d at 840 (“[T]he Government cannot argue that the jury
14 should consider Defendant’s potential future dangerousness in non-prison settings.”);
15 *Cooper*, 91 F. Supp. 2d at 111 (“[T]he government’s evidence should be limited to
16 Cooper’s future dangerousness within the context of serving a life sentence in the
17 custody of the Bureau of Prisons.”); *Llera Plaza*, 179 F. Supp. 2d at 487-88 (“[I]f there
18 is a sentencing phase, the jury will be instructed that it is to evaluate the defendants’
19 ‘future dangerousness’ in the context of life imprisonment, and the government will be
20 requested to limit its sentencing phase evidence to that which is relevant to a context of
21 life imprisonment.”). The government should therefore be required to produce an
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1 informative outline describing the evidence that suggests future dangerousness in a
2 prison context. Such an outline will provide Mr. Schlesinger a meaningful opportunity
3 to present a complete defense and empower the Court to act as a gatekeeper against
4 admission of “useless and impermissibly prejudicial information.” *Jones*, 132 F.3d at
5 240.
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7 The NOI is also insufficiently specific with respect to each of the three
8 components of future dangerousness that it identifies:
9

10 **i. History of antagonism and threatening behavior.**

11 The NOI alleges Mr. Schlesinger poses a danger of future violence based on the
12 claim he “has engaged in a continuous pattern of antagonist and threatening behavior
13 towards law enforcement and persons in positions of authority including repeated threats
14 of violence and stalking.” ECF No. 194 at 3. The NOI does not identify the behaviors
15 the government alleges support this subfactor or the persons at whom the behaviors were
16 targeted.
17

18 More specificity is required for Mr. Schlesinger to investigate not only the
19 behaviors upon which the government will rely to prove this factor but also the novel
20 assertion that “antagonist and threatening behavior” proves a person will present an
21 unreasonable risk of future violence in prison. *See Pleau*, 2013 WL 1673109, at *4
22 (“[N]ot all disciplinary infractions are sufficiently serious to be relevant to the capital
23 sentencing decision. Indeed, mere ‘threatening words’ directed at correctional officers
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1 are not probative of future dangerousness.”) (citation omitted); *United States v. Grande*,
2 353 F. Supp. 2d 623, 639-640 (E.D. Va. 2005) (excluding evidence that, while
3 incarcerated, defendant threw his food tray through door slot, and evidence that he
4 participated in disturbance with other prisoners in jail involving banging on bars and
5 writing graffiti on walls. Such evidence “does not speak to” defendant’s “tendency to
6 commit criminal acts of violence.”). The government should be required to provide: (1)
7 a comprehensive list (that limits the proposed introduction of evidence to those acts
8 specifically referenced) of every incident the government will introduce to prove this
9 subfactor; (2) the names of witnesses and summary of testimony; and (3) a list of all
10 documents, exhibits, and other evidence the government intends to introduce. *See Con-*
11 *Ui*, 2016 WL 9331115, at *18.

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15 **ii. Continuing pattern of violence.**

16 The NOI alleges Mr. Schlesinger has engaged in a continuing pattern of violence
17 but provides no description of the acts of violence that contribute to the alleged
18 “continuing pattern.” Instead, the NOI blandly alleges Mr. Schlesinger “has engaged in
19 a continuing pattern of violence, threatened violence, and attempted violence, including
20 but not limited to the crimes alleged in the Superseding Indictment.” ECF No. 194 at 6.
21 These allegations are inadequate for several reasons.

22 First, the NOI’s use of “including but not limited to” leaves open the possibility
23 that the government will attempt to introduce evidence of alleged acts of violence other
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1 than the crimes alleged in the Superseding Indictment. If the government intends to do
2 so, it should be required to disclose, well ahead of trial, what those acts are. *See United*
3 *States v. Lujan*, 530 F. Supp. 2d 1224, 1271 (D.N.M. 2008) (“By using the term ‘at
4 least,’ the [future dangerousness] factor creates ambiguity as to whether the Government
5 will present evidence of additional sub-factors. The Government must therefore submit
6 an informative outline of the general nature of the evidence it plans to use to prove future
7 dangerousness.”).

10 Second, if the government intends to rely on unadjudicated misconduct to prove
11 this aggravator (as it must since Mr. Schlesinger has no criminal history), it must provide
12 as much detail as possible regarding that misconduct so that the defense can prepare to
13 meet the allegations. Evidence of “a defendant’s unadjudicated prior criminal activity”
14 requires careful scrutiny. Given “the potential problems with the reliability of such
15 evidence and the risk that it may mislead, courts have been careful to require the
16 government to fully disclose all of the unadjudicated misconduct that it plans to
17 introduce as sentencing phase evidence.” *Llera Plaza*, 179 F. Supp. 2d at 474. Early
18 disclosure of this kind allows courts to “assess the reliability of the evidence” and
19 “evaluate the time and complexity involved in its presentation.” *United States v. Davis*,
20 912 F. Supp. 938, 949 (E.D. La. 1996); *see also United States v. Sanders*, 2014 WL
21 2612502, at *1 (“In particular, the Government must specify the acts it intends to rely
22 upon to establish that Defendant ‘engaged in a continuing pattern of violence, attempted
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1 violence, and threatened violence, against his former wife and stepson’ and any other
2 unadjudicated misconduct evidence it intends to use against Defendant during the
3 penalty phase of trial in order to more fully enable Defendant to prepare his case, as well
4 as to provide the Court with some frame of reference for ruling on objections to the
5 death penalty notice.”); *Glover*, 43 F. Supp. 2d at 1227-28 (“[T]he government is
6 directed to amplify its notice by providing a written list identifying the particular
7 unadjudicated acts that it will seek to introduce during sentencing on this factor, as well
8 as the dates of the unadjudicated acts . . . [and] list the witnesses and exhibits the
9 government intends to present to prove the unadjudicated acts.”); *see also Kaczynski*,
10 1997 WL 34626785, at *19 (ordering the government to produce “a written description
11 of all unadjudicated misconduct that it seeks to introduce during sentencing on [future
12 dangerousness].”); *Hammer*, 2011 WL 6020157, at *3 (ordering government to provide
13 defense with “Informational Outlines of the information it plans to present in support of
14 . . . the non-statutory factor[] of future dangerousness.”). Mr. Schlesinger cannot
15 meaningfully contest this subfactor—and the Court cannot screen the evidence
16 pertaining to it—without additional information about how the government intends to
17 prove it. Thus, the government should be required to provide (1) a comprehensive list
18 (that limits the proposed introduction of evidence to those acts specifically referenced)
19 of every incident the government will introduce to prove this subfactor; (2) the names
20 of witnesses and summary of testimony; and (3) a list of all documents, exhibits, and
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1 other evidence the government intends to introduce. *See Con-Ui*, 2016 WL 9331115, at
2 *18.

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4 **iii. Lack of remorse.**

5 The government fails to identify any specific statement or comment that it alleges
6 supports a finding that Mr. Schlesinger lacks remorse. Instead, as with the previous
7 aggravators, the government blandly asserts his alleged lack of remorse is “evidenced
8 by his statements and actions during the course of and following the commission of the
9 offense.” ECF No. 194 at 4. This description is wholly inadequate.

11 “Lack of remorse is a subjective state of mind, difficult to gauge objectively since
12 behavior and words don’t necessarily correlate with internal feelings.” *Glover*, 43 F.
13 Supp. 2d at 1226. Without knowing exactly what evidence the government intends to
14 introduce, therefore, Mr. Schlesinger cannot prepare to rebut his alleged statements or
15 conduct—which may, in context, reflect states of mind that are less “difficult to gauge.”

17 Moreover, lack of remorse is “particularly ambiguous” in a criminal context
18 because “guilty persons have a constitutional right to be silent, to rest on a presumption
19 of innocence and to require the government to prove their guilt beyond a reasonable
20 doubt.” *Id.* Lack-of-remorse evidence therefore “has a substantial possibility of
21 encroaching on [a] defendant’s constitutional right to remain silent.” *Cooper*, 91 F.
22 Supp. 2d at 113. In light of this “substantial possibility,” Mr. Schlesinger must be able
23 to move before trial to exclude any lack-of-remorse evidence that “implicate[s] his
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1 constitutional right to remain silent.” *United States v. Nguyen*, 928 F. Supp. 1525, 1542
2 (D. Kan. 1996). He cannot do so, however, unless he has notice of the exact evidence
3 the government intends to introduce to establish lack of remorse. The government
4 should therefore be required to produce an informative outline on this subfactor. *See*,
5 *e.g.*, *Kaczynski*, 1997 WL 34626785, at *20.

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CONCLUSION

To protect Mr. Schlesinger’s right to notice and to ensure this Court can properly perform its gatekeeping role, the Court should order the government to produce an informative outline detailing the evidence it intends to use to establish the “substantial planning and premeditation” statutory aggravating factor and all non-statutory aggravating factors in the event of a penalty phase in this case.

DATED: April 16, 2021.

Respectfully Submitted,

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Copy of the foregoing served electronically to:
Erica L. Seger and Sarah Bullard Houston on this 16th day of April, 2021.