No. 09-10560

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEFAND DEVELOPMENT, also known as HLF,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, NO. 3:04-CR-0240 (HON. JORGE A. SOLIS)

BRIEF FOR THE UNITED STATES

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Consolidated with No. 08-10664
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SHUKRI ABU BAKER; MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; MUFID ABDULQADER; ABULRAHMAN ODEH,
Defendants-Appellants.

Consolidated with No. 08-10774
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MOHAMMAD EL-MEZAIN,
Defendant-Appellant.

Consolidated with No. 10-10590
UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,
v.
HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,
Defendant-Appellant-Cross-Appellee.

Consolidated with No. 10-10586
UNITED STATES OF AMERICA,
Plaintiff,
v.
SHUKRI ABU BAKER,
Defendant.
NANCY HOLLANDER,
Appellant.

STATEMENT REGARDING ORAL ARGUMENT

The government agrees that oral argument may be helpful to the Court in addressing the issues presented by this appeal.

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No. 09-10560

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UNITED STATES OF AMERICA,

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HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, et al.,

Appellants.

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BRIEF FOR THE UNITED STATES

JURISDICTION

These are appeals from convictions in a criminal case. The district court, which had jurisdiction under 18 U.S.C. § 3231, entered its judgments as to appellants El-Mezain (R. 20/470), Odeh (R. 45/1593), and Abdulqader (R. 37/152) on May 28, 2009; and as to appellants Holy Land Foundation (HLF) (R. 3/7387), Elashi (R. 30/142), and Baker (R. 15/155) on May 29, 2009.[1] El-Mezain filed a timely notice

[1] The electronic record on appeal consists of 48 pdf files. One is the docket sheet, 46 are named "holyland 1" through "holyland 46," and the last is named (continued...)

of appeal on May 27, 2009 (R. 20/4068); Elashi, Baker, and Abdulqader filed timely notices of appeal on May 28, 2009 (R. 32/1519; 17/1533; 38/1582); and Odeh filed a timely notice of appeal on May 29, 2009 (R. 45/1604). This court has jurisdiction as to those appellants under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Court lacks jurisdiction of HLF's appeals from its criminal judgment and from the district court's May 24, 2010 order, in that the notices of appeal, though timely, were not authorized by HLF. R3/7399. This jurisdictional question is developed fully in the government's separately filed appeal and cross appeal brief as to issues unique to HLF. If the Court does have jurisdiction of HLF's appeals, it rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in permitting two Israeli witnesses to testify under pseudonyms, without disclosing their true names to the defense.

2. Whether the district court abused its discretion in its evidentiary rulings,

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[1](...continued)
"Holyland Supp." References to the docket sheet are shown as "DS/__" where the blank is the page number. References to the 46 files are shown as "R__/__" where the first blank is the number in the filename and the second is the page number. References to the Holyland Supp. file are shown as "SR/__," where the blank is the page number. All page references are to the bates-stamped numbers in the lower right corners.

including admitting lay opinion testimony under Rule 701, admitting Palestinian Authority documents under the residual exception to the hearsay rule (Fed. R. Evid. 807), and admitting Palestine Committee documents as coconspirator statements under Rule 801(d)(2)(E).

3. Whether the district court abused its discretion in refusing to exclude evidence under Fed. R. Evid. 403.

4. Whether the district court abused its discretion in admitting lay and expert opinion testimony.

5. Whether the district court abused its discretion in denying appellants' request for a Letter Rogatory to the government of Israel.

6. Whether the district court abused its discretion in protecting classified information from unauthorized disclosure by permitting disclosure of classified FISA intercepts to appellants' cleared counsel but only declassified summaries to appellants.

7. Whether the search and seizure of HLF's property pursuant to an Office of Foreign Assets Control blocking order and a subsequent search warrant violated the Fourth Amendment.

8. Whether appellant Elashi's prior conviction for conspiracy to deal in the property of Mousa Abu Marzook, a specially designated terrorist, was the same

conspiracy for double jeopardy purposes as the conspiracies for which he was convicted in this case.

9. Whether the jury's acquittal of appellant El-Mezain on one conspiracy count at a prior trial collaterally estops the government from retrying El-Mezain on a different conspiracy count (on which the jury was unable to reach a verdict at the first trial) with a lower *mens rea* requirement than the acquitted conspiracy.

10. Whether the district court committed reversible error in instructing the jury regarding the First Amendment.

11. Whether the government intentionally provoked a mistrial.

12. Whether in imposing sentence the district court erred (1) by applying the terrorism adjustment under U.S.S.G. § 3A1.4, and (2) in determining the value of the funds laundered under U.S.S.G. § 2S1.1.

STATEMENT OF THE CASE

In July, 2004, a federal grand jury in the Northern District of Texas returned a 42-count sealed indictment against HLF and seven of its officers charging them with violations of various terrorism-related criminal provisions, tax-related crimes, conspiracy to commit money laundering, and various acts of money laundering. A superseding indictment was filed in November, 2005. R. 3/5011. The superseding indictment charged all defendants with conspiracy to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1) (Count 1); providing material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1) (Counts 2-10); conspiracy to provide funds, goods, and services to a Specially Designated Terrorist (SDT), in violation of 50 U.S.C. §§ 1701-1706 (Count 11); providing funds, goods, and services to an SDT, in violation of 50 U.S.C. §§ 1701-1706 (Counts 12-21); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 22); money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A) (Counts 23-32); and a forfeiture allegation. R. 3/5011. The superseding indictment also charged Baker and Elashi with conspiracy to file false tax returns of a tax-exempt organization, in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 371 (Count 33); and filing false tax returns of a tax-exempt organization, in violation of 26 U.S.C. § 7206(1) (Counts 34-36). R. 3/5042-47.

The case went to trial on July 24, 2007 before the Honorable A. Joe Fish and a jury. The jury acquitted El-Mezain on all counts except Count 1 (conspiracy to provide material support to a foreign terrorist organization) and hung on all counts as to all other appellants. R. 3/5440.

The case was reassigned to the Honorable Jorge Solis. The government dismissed the charges against Odeh and Abdulqader other than the three conspiracy counts (Counts 1, 11, and 22). R. 3/7034. The case went to trial before Judge Solis and a jury in September 2008. Following six weeks of trial, the jury convicted all appellants on all the remaining charges. R. 3/7079.

On May 27, 2009, the district court sentenced Baker and Elashi to 65 years' imprisonment, to be followed by three years of supervised release. R. 17/1539; R. 30/142. The court sentenced Abdulqader to 20 years' imprisonment, to be followed by three years of supervised release. R. 38/1584. The court sentenced Odeh and El-Mezain to 15 years' imprisonment, to be followed by three years of supervised release. R. 45/1593; R. 20/470. The court sentenced HLF to one year of probation. R. 3/7387. The court imposed a judgment of forfeiture of $12.4 million jointly and severally on all appellants except El-Mezain. *See, e.g.*, R. 38/1590. These appeals followed.

STATEMENT OF FACTS

I. Introduction

Appellant Holy Land Foundation (HLF) is a non-profit corporation based in Richardson, Texas, that was founded and operated for the purpose of raising money for the Palestinian terrorist group Hamas. The individual appellants were HLF's founders, officers, and fund-raisers. From the founding of Hamas and HLF in the late 1980s, HLF supported Hamas by raising millions of dollars for the movement and distributing proceeds to Hamas-controlled entities in the West Bank and Gaza. In 2001, the government designated HLF as a Specially Designated Global Terrorist and Specially Designated Terrorist and blocked all transactions involving its property.[2]

II. Hamas

Hamas, also known as the Islamic Resistance Movement, is a militant Palestinian organization founded in 1987 in order to destroy the state of Israel and to create an Islamic state in its place. R. 4/3665; GX Hamas Charter 1. Effective January 24, 1995, the President in Executive Order 12947 (issued pursuant to the International Emergency Economic Powers Act (IEEPA)) declared Hamas to be a Specially Designated Terrorist (SDT), making it illegal for anyone in the United

[2] The designation of HLF was upheld by the D.C. Circuit, which found "ample" evidence that HLF gave money to entities controlled by Hamas after Hamas was designated in 1995. *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003).

States to engage in any unlicensed transactions with Hamas. R. 4/3842-43; 50 U.S.C. §§ 1701-1706; 31 C.F.R. § 595.201. In 1997, the State Department listed Hamas as a Foreign Terrorist Organization. R. 4/3847. Under 18 U.S.C. § 2339B, it is a crime for anyone within the United States or subject to its laws to provide material support to Hamas. Hamas's designation as a terrorist organization continues to the present.

Hamas pursues its goal of destroying Israel and replacing it with an Islamic state through violent jihad. R. 4/3698; GX Hamas Charter 1. Hamas is organized into three distinct but overlapping wings – a military wing, a political wing, and a social wing. R. 4/3675-76. The military wing carries out suicide bombings and other terrorist attacks, the social wing provides social services to build grassroots support for Hamas, and the political wing governs the organization and formulates policies and strategy. *Id.* at 3772-75, 3812-15, 3836-3838. While Hamas glorifies the violent attacks carried out by its military wing, it also emphasizes its social welfare efforts, including indoctrinating youth in Hamas ideology and providing a political, social, and charitable network to build the movement's base of support. *Id.* at 3719-3720; 3811. To that end, Hamas operates myriad social institutions, including schools, hospitals, libraries, sports clubs, and mosques. R. 4/3813-14; 3822-25. Hamas also provides support for the families of suicide bombers and others killed or captured in carrying out Hamas operations. R. 4/3811-12. Hamas funds its social programs

through charitable institutions, such as "zakat" committees and charitable societies (hereinafter "social committees") that Hamas controls, and that comprise the core its social infrastructure. R. 4/3825-26.[3] Hamas-controlled social committees collect donations and distribute the proceeds as directed by the movement's political leadership. R. 4/3826-27; 3832-33. Hamas gets the majority of its funding through charitable donations collected abroad and funneled through its social committees. R. 4/3839. Hamas's foreign fund-raising organizations and its social committees are a critical part of the social and charitable infrastructure that support the overall Hamas movement, including its terrorist activities. R. 4/3839.

III. HLF

Appellant Ghassan Elashi incorporated the Occupied Land Fund in California in 1989. R. 4/4189-92; GX Sec of State CA-1. Appellants Shukri Abu Baker and Mohammad El-Mezain were co-founders. R. 4/4195. In 1991, the corporation was renamed as HLF, and it moved to Texas the following year. R. 4/4191-92. Since HLF's founding, Elashi, El-Mezain, and Baker, together with codefendant Haitham Maghawri,[4] were the principal officers and directors of HLF until the present. R.

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[3] "Zakat" refers to a kind of charity that practicing Muslims are required to donate from their income. R. 4/3826; 7/7896.

[4] Maghawri and codefendant Akram Mishal have never been arrested for the charges in this case, and they remain fugitives.

4/4200. Appellant Abdulrahman Odeh managed HLF's New Jersey office. R. 4/4201-02. Appellant Mufid Abdulqader was a prominent speaker and performer at HLF fundraising events. R. 4/4791.

IV. The Palestine Committee Establishes HLF To Raise Funds For Hamas.

Hamas arose out of an older, international Islamist organization known as the Muslim Brotherhood, and Hamas considers itself the Muslim Brotherhood's Palestinian branch. R. 4/3678, 3683-86, 3749-50. In order to raise funds and otherwise support its operations, Hamas looked outside of the Palestinian areas to individuals and organizations around the world that were sympathetic to its mission. R. 4/3839. The International Muslim Brotherhood directed that Muslim Brotherhood chapters around the world, including in the United States, establish "Palestine Committees" in order to provide support for Hamas from abroad. GX Elbarasse Search 5, at 14. In the early 1990s, the head of the Palestine Committee in the United States was unindicted coconspirator Mousa Abu Marzook, then chief of Hamas's political wing (who later became its deputy political chief under current Hamas leader Khalid Mishal). R. 4/4306-07; R. 34/1161.[5]

Through a search of the Virginia home of Palestine Committee member and

[5] Marzook was designated as an SDT in 1995. R. 4/3844. The current Hamas political chief, Khalid Mishal, was also designated as an SDT in 2003. Mishal is the half-brother of appellant Mufid Abdulqader. R. 7/5670.

unindicted co-conspirator Ismail Elbarasse,[6] the government obtained a number of Palestine Committee records, including the Committee's by-laws, organization chart, and other documents. *See, e.g.*, GX Elbarasse Search 5, 7, 10. Those documents, together with documents obtained from the home of another unindicted co-conspirator, Abdelhaleen Masan Ashqar,[7] identify Marzook as the leader of the Palestine Committee, and appellants Shukri Abu Baker, Mohammad El-Mezain, and Ghassan Elashi as members. R. 4/4307-12; GX Elbarasse Search 10; GX Ashqar Search 1. The documents state that the purpose of the Palestine Committee was to set up and supervise organizations in the United States in order to provide "strong support for their tool and striking wing, the Islamic Resistance Movement (Hamas)." GX Elbarasse Search 5, at 14-15. The Committee established three principal organizations under its umbrella to support Hamas, each with a distinct role. One of those organizations was HLF, and its stated purpose was to raise funds for Hamas. GX Elbarasse Search 5, at 14. The other two organizations were a think tank called

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[6] Ismail Elbarasse shared a bank account with Mousa Abu Marzook from which they financed Palestine Committee enterprises such as HLF. R. 4/4226-28; GX IE Marzook Bank Acct 1, 2.

[7] Ashqar was convicted of obstruction of justice and criminal contempt for obstructing a grand jury investigating financial support for Hamas. The Seventh Circuit affirmed his conviction and application of a terrorism enhancement to his sentence because his obstruction was intended to promote a federal crime of terrorism. *United States v. Ashqar*, 582 F.3d 819, 825 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1722 (2010).

the United Association for Studies and Research (UASR) and a media and propaganda organization, the Islamic Association of Palestine (IAP). The Palestine Committee designated HLF as the "official organization" for providing financial and charitable support for "the homeland people in the occupied territories." GX Elbarasse Search 7. The Committee controlled HLF by drawing up its general strategy, appointing its board, and approving its plan, budget, and employees. *Ibid.* The Committee's documents confirm that HLF was established and operated in accordance with instructions from the Muslim Brotherhood's leadership to "[c]ollect donations for the Islamic Resistance Movement." *Ibid*.

The Elbarasse documents also included the Palestine Committee's annual report for the year 1989-1990, which concluded with a statement that the Palestine Committee's focus was "support for the emerging . . . Hamas movement." R. 4/4324; GX Elbarasse Search 13. The report referred to the efforts of the organizations under the Committee's direction, including the IAP, UASR, and HLF. The report boasted among its achievements the fact that HLF had raised more than $700,000 "to support the steadfastness of the people in the inside," and that most of that money had been delivered. R. 4/4323; GX Elbarasse Search 13.

HLF's status as the official Hamas fundraising organization in the United States was further confirmed by a report authored by the Palestinian Authority – the rival of

Hamas for leadership in the Palestinian territories. The report named HLF, as well as the other Palestin Committee organizations (UASR and IAP) identified in the Elbarasse documents, as part of "Hamas financial resources worldwide." R. 7/7748; GX PA 2.

V. Appellants' Ties To Senior Hamas Leaders

HLF and the individual appellants had extensive personal and financial relationships with Hamas leaders, especially Marzook.[8] Before his designation as an SDT in 1995, Marzook engaged in numerous financial transactions with HLF, as well as with appellants Baker, Elashi, and El-Mezain individually, that totaled in the hundreds of thousands of dollars. GX Payments Between Marzook/Defendants. HLF also transferred $250,000 in 1988 to the Swiss bank account of a for-profit company that was owned and operated by Hamas financier Khari al-Agha. R. 4/3770; 4493-97; GX Payments to K&A Trading. Khari al-Agha was also involved around the same time in even larger transactions with Marzook. R. 4/4499-4501. Telephone records showed that Marzook called appellant El-Mezain 52 times in a four-year period beginning in 1989. GX Marzook/Defendants Phone Calls. In 1994, Hamas leader

[8] Marzook's wife is Nadia Elashi, cousin of appellant Ghassan Elashi. R. 4/4470. In 2006, Ghassan Elashi was convicted of, among other charges, conspiracy to violate IEEPA based on transactions between Marzook, Nadia Elashi, and Ghassan Elashi's company InfoCom, and this Court affirmed. *See United States v. Elashyi,* 554 F.3d 480 (5th Cir. 2008).

Khalid Mishal called El-Mezain and invited him to a meeting in Turkey. R. 7/5978-79.

Hamas leadership reaffirmed HLF's role as the exclusive Hamas fund-raising arm in America, under the direction of Marzook and the Palestine Committee, when a dispute arose in 1994 between HLF and another institution called the Al-Aqsa Educational Fund managed by Ashqar. R. 4/4661; 7/6770. FBI surveillance of Baker and Ashqar revealed that Ashqar's organization and HLF were in conflict over which entity should get money raised by Hamas leader Jamil Hamami during a U.S. fund-raising program put together by Ashqar. R. 4/4665. Marzook intervened in HLF's favor by writing a letter to Ashqar stating that he should step aside until Marzook came to the United States to resolve the problem personally. R. 4/4678; GX Ashqar Wiretap 3. The Committee eventually resolved the dispute by deciding that the funds Hamami raised would go to HLF, thereby preserving HLF's status as the official Hamas fund-raising arm in America. R. 4/4682-83; GX Ashqar Wiretap 4.

HLF's fund-raising events featured prominent Hamas leaders and Hamas ideology. HLF had a stable of overseas speakers that it would present at its events, either live or via conference call. R. 7/5630-31. A list of HLF's overseas speakers, modified as late as 1999, included several well-known Hamas leaders. R. 7/5644-46, 6509-10. The phone and fax numbers for many of the speakers on the list were the

same numbers used by an official Hamas spokesperson in correspondence with a United States Senator. R. 7/5666-69. Many of HLF's overseas speakers were also listed in Marzook's personal address book, seized by the government in 1995. R. 7/5653-5656. Appellants Baker, Elashi, and El-Mezain were in Marzook's book as well. R. 4/4523.

Mohamed Shorbagi, HLF's representative in the state of Georgia, testified at trial and confirmed that Baker, El-Mezain, and Elashi were Hamas insiders and that HLF's purpose was to raise funds for Hamas. R. 7/6787-88. Shorbagi, who pleaded guilty to providing material support to Hamas through the HLF, testified that he worked closely with El-Mezain to raise funds for the HLF, which then funneled the money to Hamas through Hamas-controlled charitable entities in the West Bank and Gaza, both before and after Hamas's designation. R. 7/6735, 6775, 6786-87, 6792, 6795. According to Shorbagi, HLF was, in fact, part of Hamas. R. 7/6792.

Shorbagi attended closed-door break-out meetings at conferences of the Muslim Arab Youth Association (MAYA) during which Hamas leaders advocated providing support to Hamas by giving money to Hamas-controlled entities. R. 7/6696, 6732-37. Shorbagi described a 1994 closed meeting headed by Khalid Mishal and Marzook, both of whom were senior leaders of Hamas and later Specially Designated Terrorists, at which Mishal discussed the participants' roles as Hamas supporters. R. 7/6732-35.

Baker, El-Mezain, and Elashi, as well as Ashqar, also attended the meeting. R. 7/6732-33. Marzook organized break-out groups according to the field in which the supporters worked: a media group, a political group, and a money group. R. 7/6735. Marzook headed the political group. R. 7/6736-37. Appellant El-Mezain was in charge of the money group, which was responsible for collecting donations and delivering the proceeds to Hamas organizations in Gaza and the West Bank. *Ibid.*

VI. HLF And Hamas Ideology

Between 1992 and 2001, HLF took in approximately $56 million in donations. R. 7/6553. HLF's fund-raising appeals communicated the message that giving to HLF was a way to support Hamas and its cause. R. 7/5632-33. Prior to Hamas's designation as a terrorist organization, the IAP's magazine called openly for readers to support Hamas and "perform jihad with your money" by donating to HLF. GX Illa Filistine 2, at 9.[9] HLF's fund-raising events emphasized Hamas themes such as jihad, the heroism of Hamas martyrs, opposition to peace agreements with Israel, and virulent anti-Semitism. R. 7/5632-33. Some of the checks HLF received specified in the memo line that they were intended for the "Palestinian Mujahideen," another name for Hamas's military wing, and HLF received letters from donors indicating their intent to support Hamas by giving to HLF. R. 4/4828, 4830-32. One woman enclosed

[9] The IAP also published the Hamas charter in English. R. 4/3691.

with her contribution a letter requesting Hamas publications and pledging additional contributions "in support of the blessed Islamic Uprising in Palestine." R. 4/4834-35. Baker wrote back assuring her that her contributions to HLF would support jihad and that the IAP had promised to send her the Hamas books she had requested. R. 4/4834-35. HLF kept in its files a 1996 letter from a contributor stating that the enclosed contribution was for "relief supplies and weapons to crush the hated enemy," and HLF solicited further contributions from that individual. R. 4/4836-39.

Appellants lauded Hamas's violent attacks as well as its social efforts. Baker published a poem praising Hamas that ended with the line, "[W]e will not accept other than Hamas." R. 5/4709. Abdulqader performed in skits in which he played the role of a Hamas terrorist murdering a Jewish civilian. R. 4/4786-87. The FBI recorded a 1995 conversation between Odeh and El-Mezain in which Odeh exulted in a "beautiful operation" that a Hamas suicide bomber had recently carried out, killing several Israeli soldiers. GX El-Mezain Wiretap 4.

VII. The Oslo Accords and the Philadelphia Conference

In September 1993, the United States hosted the signing of the historic Oslo Accords between Yasser Arafat's Palestine Liberation Organization and Israel. R. 4/3737-39. The agreement involved mutual recognition – Israel recognized the Palestinian National Authority (PA), headed by Arafat, as the legitimate representative

of the Palestinian people, and the PLO recognized the right of Israel to exist and renounced terrorism. *Ibid.* The Accords initiated a peace process through which the PA came to control areas of Gaza and the West Bank from which Israel withdrew. R. 4/3742.

Hamas opposed the Accords and conducted attacks in an attempt to undermine them. Hamas viewed the Accords and the peace process as obstacles to its goal of destroying Israel and creating an Islamic state in all the territory Hamas claimed. R. 4/3743-44.

In October 1993, a month after the signing of the Accords on the White House lawn, members of the Palestine Committee gathered in Philadelphia to discuss how Hamas's support network in the U.S. should proceed in light of the Accords. R. 4/4569-70. Baker was involved in planning the meeting. R. 4/4574; GX Ashqar Wiretap 1. Appellants Baker, Elashi, and Abdulqader were present. *See* GX Philly Meeting Summary. The FBI clandestinely recorded the meeting. R. 4/4570.

Palestine Committee leader Omar Ahmed stated that the meeting was "called for by the Palestine Committee" to "study the situation in light of the latest developments in the Palestinian arena, its effects and impact on our work here in America." R. 7/6081. Another speaker at the meeting emphasized that the Committee's organizations, including HLF, "should be in complete harmony" with the

overall purpose of Hamas. R. 4/4606-07.

Baker agreed that the organizations should support Hamas's strategic goal of "derailment" of the Oslo Accords. GX Philly Meeting 6E. But he and others (including Ashqar) suggested that, because in the United States the authorities and public opinion increasingly recognized Hamas as a terrorist group, it was necessary to change their public message to conceal their alignment with Hamas. GX Philly Meeting 6E, 5E. Baker recognized that Hamas's classification as a terrorist organization under U.S. law would create a "legal obstacle" to supporting Hamas, GX Philly Meeting 6E, and accordingly the support organizations needed to practice deception. GX Philly Meeting 7E, 12E. Moreover, attendees at the meeting recognized that HLF had already been exposed as a Hamas charity. R. 4/4631; GX Philly Meeting 13E, 5E.[10] Baker repeatedly emphasized that "war is deception," and that the committee must "deceive [the] enemy." GX Philly Meeting 7E. In a discussion about how to present themselves publicly to Americans, Baker said, "I cannot say to him that I'm Hamas." GX Philly Meeting 8E. After Baker emphasized the need for the organizations to lie and deceive to conceal their connections to Hamas, Omar Ahmed told the participants to "learn from [their] masters" in HLF. GX

[10] The parties stipulated that "[a]s of the date of the Philadelphia meeting, the HLF ha[d] been publicly named in a newspaper article as being associated with Hamas." R. 4/4631.

Philly Meeting 12E.

Baker's recommendation that the Committee's members and organizations use deception and tradecraft applied to the meeting itself. Baker urged the attendees not to say the word "Hamas" explicitly, but instead to refer to "sister Samah" (Hamas spelled backwards). R. 4/4599, 4603.[11] Baker also provided a cover story, instructing that, "[i]n case someone inquired," the attendees should say the meeting was a joint session of HLF and IAP. R. 4/4598-4600.

Consistent with their marching orders from the Philadelphia conference, appellants lied about their associations with Hamas. Abdulqader falsely stated to the FBI that he had no affiliation with HLF and didn't know anyone there prior to 1995, though credit card records showed he had been raising funds for HLF for years prior to 1995, and a video tape showed him being introduced by Baker in 1990 at an event where he performed Hamas songs. R. 4/4785-86. Baker denied in a deposition that Marzook had any relationship or involvement with HLF, other than a single early contribution. R. 4/4693-94. Baker filed a declaration in litigation related to the designation of HLF as an SDT in which he denied he had "any connection whatever

[11] In a sworn declaration submitted in a civil lawsuit, Baker stated that the term "Samah" was nothing more than a whimsical play on words and not intended to disguise anything. R. 4/4601. In closing argument, however, Baker's counsel conceded that in making that statement, as well as in denying any connections to Hamas, Baker had not been "forthcoming." R. 7/9545.

to Hamas," because "I reject and abhor Hamas." R. 4/4699-4700. El-Mezain also swore in a deposition that he had only a slight relationship with Marzook, that they spoke "[m]aybe once a year," but telephone records showed that Marzook called El-Mezain 52 times in a four-year period. R. 4/4540-41.

VIII. The Social Committees

After Hamas was designated as an SDT and an FTO in 1995 and 1997, respectively, the tone and language of the conferences, publications, and speakers HLF supported began to change in order to limit exposure of HLF's affiliation with Hamas. R. 7/6775-6777. In the years following the new terrorism laws until HLF itself was designated in 2001, HLF sent much more of its money to its own offices or representatives in the Palestinian areas. R. 7/6775. However, HLF continued supporting the same organizations and institutions that it supported prior to the designation. R. 7/5597-98, 6775, 6793, 6798.

The indictment charged post-designation transactions with seven West Bank social committees: The Islamic Charity Society (ICS) of Hebron, the Jenin Zakat Committee, the Nablus Zakat Committee, the Ramallah Zakat Committee, the Tulkarem Zakat Committee, the Islamic Science and Culture Committee, and the Qalqilia Zakat Committee (the "Indictment Committees"). R. 3/7051-64. Financial records showed that HLF transferred more than four million dollars to the Indictment

Committees.[12] All of those committees were under the control of Hamas and were an integral part of the Hamas social infrastructure. The government at trial established that fact from numerous, mutually corroborating sources of evidence.

a. The Ashqar and Elbarasse documents, as well as the Philadelphia meeting transcript, reflect the Palestine Committee's close monitoring of the growing Hamas infiltration of and control over social committees in the West Bank and Gaza, including many of the Indictment Committees. The earliest document, a "work paper" on the roles of the Muslim Brotherhood and Hamas, discussed the extent of the "Islamic presence" in the Nablus, Jenin, and Tulkarem Committees, as well as ICS Hebron, all of which are Indictment Committees. R. 7/7098-7100; GX Ashqar Search 5.

A 1991 letter addressed to "brother Shukri" (appellant Shukri Baker) showed that Hamas had increased its control of some of the Indictment Committees. The letter contained a table listing a number of committees, identifying some of their leaders,

[12] HLF transferred $1,674,594 to ICS Hebron, $366,585 to Tulkarem Zakat Committee, $494,252 to Ramallah Zakat Committee, $295,187 to the Qalqilia Zakat Committee, $475,715 to the Nablus Zakat Committee, $554,400 to the Jenin Zakat Committee, and $485,468 to the Islamic Science and Culture Committee. GX Payments to IC Hebron; GX Payments to Tulkarem Zakat; GX Payments to Ramallah Zakat; GX Payments to Qalqilia Zakat; GX Payments to Nablus Zakat; GX Payments to Jenin Zakat; GX Payments to Islamic SC. As those exhibits show, while much of that money was transferred prior to Hamas's designation, HLF continued sending substantial sums to the Indictment Committees following the designation.

and specifying the extent to which they were "ours." The letter informed Baker that the Jenin Committee was "guaranteed," and that they "ha[d] gained more control" of the Ramallah Committee, and "all of it is ours." GX Elbarasse Search 22 at 4. The letter further informed Baker that "[a]ll" of the ICS Hebron and Ramallah Committees were "ours;" and that all of the Qalqilia Committee was "ours and it is guaranteed." *Ibid.*

At the Philadelphia meeting, Palestine Committee member Muin Shabib presented a report on the extent to which various zakat committees and other organizations belonged to Hamas. R. 7/7051; GX Philly Meeting 13E. The Shabib report mentioned several of the Indictment Committees, including the Nablus, Jenin, Tulkarem, Qalqilia, and Ramallah zakat committees. The report indicated that Hamas control of some committees was extensive and growing, especially the Ramallah committee, which was "ours, including its management and officers." R. 7/7052-54; GX Philly Meeting 13E.

b. Hamas insider and HLF representative Shorbagi testified that several of the Indictment Committees and their leaders were Hamas. He was well-positioned to obtain information on Hamas control of such institutions, having attended closed-door meetings with top Hamas leaders that focused on delivering money to "organization[s] controlled or founded by Hamas in the occupied territories." R. 7/6737. Shorbagi

testified that the Nablus, Jenin, Ramallah, and ICS Hebron committees belonged to Hamas. R. 7/6747-48.

c. The government introduced documents and other evidence demonstrating a web of connections linking the committees' leaders with Hamas, as well as with HLF and the individual appellants. For example, the government introduced a videotape, found in HLF's office and referred to at trial as the "tent video," that depicts an interview with Hamas activists who had been deported from Israel to Lebanon. R. 7/7080; GX HLF Search 70. The Hamas symbol flashes on the screen throughout the video. R. 7/7081. The video shows several individuals introducing themselves to the camera and identifying what social committee they represent, including Fuad Abu Zeid who announces that he is from the Jenin Zakat Committee. R. 7/7083. Shorbagi, the former HLF representative who pleaded guilty to supporting Hamas through HLF, also testified that Abu Zeid was a Hamas leader who headed the Jenin committee. R. 7/7083, 6762. The letter to Shukri Baker listing a table of committees and the extent to which they were "ours" stated that the Jenin Zakat Committee was "[g]uaranteed, by virtue of Mohammad Fuad Abu Zeid's position." GX Elbarasse Search 22. An expert witness from the Israeli Security Agency also testified that Abu Zeid was a senior Hamas leader and member of the Jenin Zakat Committee. R. 7/8049-50. Abu Zeid was also on the HLF overseas speakers list, his name and telephone number were

found in Marzook's address book, he was identified as a prominent Hamas activist in a book about Hamas found in appellant Odeh's office, and he was mentioned in a conference speech by Hamas leader Khalid Mishal. R. 7/5662, 7106-7108.

As another example, Abdel Khaleq Natshe was one of the senior members of Hamas in the West Bank and was a leader of one of the Indictment Committees, ICS Hebron. R. 7/8178. The government played a videotape, seized from the ICS Hebron by the Israeli military (see paragraph (f) below), depicting a youth summer camp ceremony in 2001 in which Natshe appears and a woman introduces him as the head of Hamas in Hebron. R. 7/8225-26; GX ICS Hebron 12. The letter to Shukri states that all of ICS Hebron is "ours" because it "has Abdel Khalik al Natshe and Hashem al Natshe, our people." R. 7/7169; GX Elbarasse Search 22. Both Abdel Khalik Natshe and Hashem al Natshe appear in Marzook's phone book. R. 7/8179-80. Shorbagi testified that Abdel Khalik Natshe was a Hamas leader who oversaw the zakat charity in Hebron. R. 7/6762-63. A 1994 letter from HLF addressed to ICS Hebron regarding a $43,000 contribution for "martyrs' families" notes "[p]lease notify brother Abdel Khaliq al-Natsheh of the arrival of the amount and deliver it to their committee." R. 7/8252; GX InfoCom Search 13, at 70.

Leaders and members of the other Indictment Committees had similar connections with Hamas and appellants, as documented in the Elbarasse, Ashqar, and

Philadelphia meeting reports on social committees, the HLF overseas speakers list and other HLF records and correspondence, Marzook's address book, the "tent video" of Hamas deportees and other videos, bank accounts and other documents seized from the committees, and other exhibits. The government introduced summary exhibits for each Indictment Committee that listed the committee's leaders and/or members and noted their Hamas links, with reference to the underlying admitted exhibits. *See* GX Jenin Zakat Summary, GX Nablus Zakat Summary, GX ICS Hebron Summary, GX Tulkarem Zakat Summary, GX Qalqilia Zakat Summary, GX Ramallah Zakat Summary, GX Islamic S&C Summary.

d. The government called an expert witness on Hamas, Dr. Matthew Levitt,[13] who testified that leaders of the Ramallah and Jenin Zakat Committees had been implicated in supporting terrorist attacks, purchasing weapons, and other activities in support of Hamas's military wing. R. 4/3836.

f. In response to a major terrorist attack in 2002, the Israeli Defense Forces

[13] The Supreme Court recently quoted Levitt's book, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad*, in rejecting a First Amendment challenge to the material support statute. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (quoting Levitt's conclusion that Hamas "[m]udd[ies] the waters between its political activism, good works, and terrorist attacks" by using "its overt political and charitable organizations as a financial and logistical support network for its terrorist operations"). The Court, relying on Levitt and other sources, including findings of Congress, recognized that terrorist groups such as Hamas "systematically conceal their activities behind charitable, social, and political fronts." *Ibid*.

(IDF) launched a military operation called Operation Defensive Shield, during which the IDF seized documents and other items from various social committees in the West Bank, including several of the Indictment Committees. R. 4/6872. The IDF found Hamas documents and Hamas propaganda inside the committees' premises, including Hamas political literature and internal Hamas documents, posters of Hamas suicide bombers, videotapes showing children praising or acting out Hamas attacks, postcards of Hamas martyrs, and keychains with pictures of Hamas leaders. *E.g,* GX ICS Hebron 1, 2, 6, 7, 11, 12; GX Jenin Zakat 1, 6; GX Nablus Zakat 1, 2, 3.

g. The IDF also seized documents from the Palestinian Authority's Ramallah office during Operation Defensive Shield that indicated Hamas control of the Ramallah Zakat Committee. A Palestinian Authority report stated that the Ramallah Zakat Committee transferred money from overseas to Hamas, and that its principal leaders and members belonged to Hamas. R. 7/7737-41; GX PA-8. Another Palestinian Authority memorandum stated that the Ramallah Zakat Committee's leaders and members were activists in or associated with Hamas. GX PA-9.

h. The government called an expert witness from the Israeli Security Agency, who testified under the pseudonym "Avi." R. 7/7845, 7848-49. Avi had spent years studying and documenting Hamas's control of social committees in the West Bank and Gaza. R. 7/7851-57. Avi explained how Hamas came to control the Indictment

Committees, as well as the Israeli government's treatment of the committees throughout that time. *E.g.*, R. 7/7904-07. Avi also identified the Hamas members, including members of the military wing, and other Hamas connections among the leadership of the committees. *E.g.*, R. 7/8049-55. Avi described the documents and other evidence the IDF had seized from the committees (which had already been introduced into evidence) and explained how that evidence showed Hamas control of the committees. *E.g.*, R. 7/8091-94. Based on all of that evidence and his years of investigation and experience, Avi testified that Hamas controlled each of the Indictment Committees and that they formed a part of Hamas's social infrastructure in the West Bank. *E.g.*, R. 7/8114, 8125.

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion in protecting the identities of two Israeli witnesses, one of whom testified as an expert. That decision was based on specific information establishing a grave threat to the witnesses' safety if their identities were revealed. The district court's decision to withhold the witnesses' true identities from appellants did not materially hinder appellants' ability to conduct an effective cross-examination, because appellants had sufficient information regarding the witnesses' professional backgrounds, as well as the underlying records that the expert relied on in reaching his conclusions, to challenge the witnesses' expertise and

credibility.

2. The district court did not abuse its discretion in its rulings related to hearsay evidence.

a. The testimony of former HLF representative and Hamas supporter Mohamed Shorbagi that HLF was part of Hamas and that four of the Indictment Committees belonged to Hamas was based on his personal knowledge rather than on hearsay. Shorbagi was closely involved with appellants and with Hamas leaders in raising funds for Hamas and sending it to Hamas-controlled entities in the Palestinian territories. Shorbagi's experience and familiarity with Hamas's support network was sufficient to support the district court's finding that he had sufficient personal knowledge of Hamas, HLF, and the social committees they supported to admit his testimony that the committees were controlled by Hamas.

b. The district court properly admitted documents that the IDF seized from the Palestinian Authority (PA) headquarters in Ramallah under the "residual exception" to the hearsay rule in Fed. R. Evid. 807. The PA documents, which established that HLF was part of Hamas's worldwide financial network and that the Ramallah Zakat Committee was controlled by Hamas, carried the same indicia of reliability as public records and reports that are generally admissible under the public records exception under Fed. R. Evid. 803(8).

c. The Elbarasse and Ashqar Search documents were properly admitted as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). The evidence, both in the documents themselves and independent of them, established that appellants Baker, Elashi, and El-Mezain were members of the Palestine Committee, which established and oversaw HLF for the purpose of providing support to Hamas. The documents, including the Palestine Committee's by-laws, organization chart, reports, and other records, were admissible as co-conspirator statements because they were created to record and to guide the activities of HLF and the Palestine Committee in furtherance of the joint venture.

As this Court and other circuits have held, out-of-court statements by a defendant's co-conspirators are admissible under Fed. R. Evid. 801(d)(2)(E) if made during and in furtherance of a common enterprise, whether lawful or unlawful. The Rule is based on agency principles: those who engage in a joint venture are deemed to be each others' agents, so the declaration of one in furtherance of the venture is considered the declaration of all. Given its agency rationale, a court need only find a common enterprise, not a criminal conspiracy, before admitting statements under the Rule.

3. The district court did not abuse its discretion under Fed. R. Evid. 403 in admitting evidence related to Hamas's terrorist activities and agenda because the

evidence's probative value was not substantially outweighed by the potential for unfair prejudice. Most of the evidence appellants allege was unfairly prejudicial came from HLF's own computers or files or from those of the committees HLF supported. Hamas materials obtained from HLF or the committees were highly probative in establishing that those entities were tools of Hamas rather than independent charitable institutions as the defense claimed. Other evidence challenged by appellants was relevant to provide context necessary to the jury's understanding of the evidence, or was relevant for other valid reasons. The district court's analysis of the potential for unfair prejudice was careful and well-considered. The district court excluded any evidence related to al-Qaeda, even though such materials were found in HLF's and the committees' records. The court's admission of Hamas-related materials was consistent with rulings in other terrorism cases, which have permitted evidence of terrorism-related materials where they tend to prove a defendant's knowledge, intent, and motive.

4. There was no error in the district court's admission of opinion testimony. The court properly permitted a Treasury Department official to testify that the Office of Foreign Assets Control (OFAC) does not typically designate as terrorists front groups or component parts of a terrorist organization. That testimony did not constitute a legal opinion that trampled on the prerogative of the court. Rather, the

official's testimony properly rebutted, as a factual matter, appellants' assertion that OFAC's failure to designate the social committees was substantive proof that the committees were not controlled by Hamas.

Nor did the court err in permitting FBI agents, who were not qualified as experts, to testify regarding the meaning of certain terms in the context of the conversations or documents in which they were used. The testimony did not require any specialized reasoning process or training, and it was accordingly within the district court's discretion to permit lay witness testimony regarding those matters.

The court did not abuse its discretion in admitting testimony from Hamas expert Matthew Levitt regarding the depth and significance of appellants' personal and financial contacts with Hamas leaders. The inner workings of senior Hamas leadership are not within the grasp of the average juror, and the district court properly found that Levitt's expert testimony would be helpful to the jury.

There was no error in the district court's decision to admit testimony by a former National Security Council official regarding the United States government's interest in promoting the Oslo Accords and the Middle East peace process. The evidence was introduced for a proper purpose and not to signal to the jury the importance of convictions in the case. The position of the United States government regarding Oslo was relevant to understanding the evolution of appellants' strategies

for supporting Hamas, as discussed at the Philadelphia meeting, from open alignment with Hamas to a more deceptive approach designed to conceal HLF's true purpose of derailing the peace process.

5. The district court's refusal to issue a letter rogatory to the government of Israel requesting access to all materials seized from the Indictment Committees was not an abuse of discretion. Appellants' motion was probably filed too late to do any good. Moreover, the district court correctly found that appellants' request was unlikely to result in the discovery of further material information. Avi testified that he had already provided all the relevant material seized from the Indictment Committees, without regard to whether the material indicated Hamas control or otherwise. Based on that testimony, it was within the district court's discretion to deny the letter rogatory motion on the ground that it was not likely that relevant evidence would be obtained through that process.

6. The district court did not abuse its discretion in issuing orders designed to protect the classified content of FISA intercepts from unauthorized disclosure. Under the orders, appellants' cleared counsel had access to all of the FISA intercepts, as well as declassified summaries in English of intercepts deemed pertinent at the time of capture, and declassified English translations of intercepts the government intended to introduce at trial. Appellants had access to the summaries, the intercepts the

government intended to introduce, as well as the entire content of four of the eight FISA subjects. The district court's orders further provided a procedure permitting defense counsel to identify particular categories of the underlying classified intercepts, such as by date or by telephone number, that the government would review, declassify, and disclose to appellants. In imposing those procedures, the district court carefully balanced appellants' rights against the government's compelling interest in protecting national security. The orders in question were well within the district court's wide latitude to deal with thorny problems of national security in the context of criminal proceedings.

7. The district court correctly denied appellants' motion to suppress evidence obtained from HLF's property after it was blocked in connection with HLF's designation as a Specially Designated Terrorist. The actions of the Office of Foreign Assets Control (OFAC) in blocking the property of designated terrorists are reasonable under the Fourth Amendment because the government's paramount interest in stopping the flow of terrorist financing outweighs appellants' asserted privacy claim. Even if the Fourth Amendment's warrant requirement did apply in this context, OFAC's actions would nevertheless be justified by the "special needs" doctrine. Obtaining a warrant in the terrorism financing context is impractical in light of the wide variety of property interests and transactions subject to IEEPA blocking orders.

Moreover, the government cannot know in advance where all such assets are located. Finally, imposing a warrant requirement would make it difficult or impossible for the government to prohibit future transactions with blocked entities, and would seriously undermine the United States' effective conduct of foreign relations and defense of national security. Even if OFAC's actions violated the Fourth Amendment, the independent source exception to the exclusionary rule applies because the government subsequently obtained a search warrant that did not depend on any information obtained through OFAC's actions. Finally, the good faith exception to the exclusionary rule also prevents suppression of the evidence.

8. Appellant Elashi's prior conviction for conspiracy to deal in the property of Specially Designated Terrorist Mousa Abu Marzook was not the same conspiracy for double jeopardy purposes as the conspiracies charged in this case. This Court's five-factor test for determining whether conspiracies involve the same agreement indicates that the conspiracies here were separate. Elashi's prior conviction was for joining a small conspiracy consisting of members of the Elashi family, Elashi's company, and Marzook regarding a single investment agreement that allowed Marzook to make periodic payments through Elashi's company to Marzook's wife. The prior conspiracy had very little or nothing to do with HLF, Hamas, the Palestine Committee, or social committees in the West Bank and Gaza.

9. The collateral estoppel component of the Double Jeopardy Clause does not bar El-Mezain's reprosecution after a mistrial for conspiracy to provide material support to a terrorist organization. A jury's verdict does not raise a collateral estoppel bar unless it necessarily determines a fact that is an essential element of another offense. Here, the conspiracy charge on which El-Mezain was acquitted – conspiracy to provide funds, goods, and services to a SDT, in violation of IEEPA, carries a more rigorous intent element (willfulness) than the conspiracy charge on which the jury hung – conspiracy to provide material support to a terrorist organization, which requires only that the defendant act knowingly. Here, there was a reasonable explanation for the jury's verdict that did not involve a determination of any fact necessary to the hung count. That explanation is that the jury found that the government failed to prove that El-Mezain acted willfully, with the specific intent to violate the law. Such a finding is consistent with the trial record and with El-Mezain's defense at the first trial, where El-Mezain emphasized HLF's efforts to comply with the law and the reasonableness of its belief that only giving to separately designated entities was prohibited. Thus, the acquittal does not raise a collateral estoppel bar to El-Mezain's retrial on the material support conspiracy.

10. The district court correctly instructed the jury regarding the First Amendment. The instruction correctly explained that the jury could not convict

appellants solely on the basis of their beliefs, expressions of their beliefs, or associations. The instruction also correctly told the jury that the First Amendment does not provide a defense when a defendant uses speech to conduct illegal activity such as knowingly providing material support to Hamas. The First Amendment does not require, as appellants contend, that the court must instruct the jury that it may only use appellants' speech as evidence of intent. If appellants' speech constitutes part of the offense, such as Abdulqader's performances that were intended to raise funds for Hamas, the First Amendment does not preclude the jury from convicting appellants on the basis of such speech.

11. Appellants' claim that the Double Jeopardy Clause prohibited the second trial is without merit because, as the district court found, appellants consented to the district court's declaration of a mistrial after the jury failed to reach a verdict on most counts. Appellants have failed to show that the prosecution intentionally submitted unadmitted and demonstrative exhibits for the jury's deliberations in order to provoke a mistrial.

12. The district court correctly calculated appellants' Sentencing Guidelines ranges. It did not err in applying the terrorism enhancement, because there ample evidence that appellants provided large sums over many years to a terrorist organization while they were aware of and shared in the organization's goals. The

district court also correctly calculated the value of laundered funds to include some funds that HLF donated to legitimate entities because, as the court found, those donations furthered the conspiracy by concealing HLF's true criminal purpose.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Allowing Two Witnesses To Testify Under Pseudonyms.

A. Standard Of Review

A district court's limitations on a defendant's cross-examination of a prosecution witness are reviewed for abuse of discretion. *United States v. Bryant*, 991 F.2d 171, 175 (5th Cir. 1993). "The Supreme Court has recognized that trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examinations based on among other things, . . . the witness' safety." *United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

B. Background

Before the first trial, the government moved to allow two officials from Israel to testify without disclosing their true names. R. 10/1357-59. One witness, "Avi," is a legal advisor employed by the Israeli Security Agency ("ISA"), Israel's domestic intelligence service. *Id.* at 1417. The other witness, "Major Lior," is an officer in the Israeli Defense Forces ("IDF"). *Ibid.* The government's motion explained that Avi

would testify as an expert on social committees and their connections to Hamas. *Id.* at 1419. Major Lior would testify as a fact witness to authenticate documents the government obtained from the IDF. *Id.* at 1420. The motion contended that disclosure of those witnesses' true identities would endanger their safety, and that their true names were classified under Israeli and United States law. *Id.* at 1422. In support of the motion, the government submitted classified affidavits from the ISA, IDF, and FBI. *Id.* at 1417. Judge Fish found that disclosure of the witnesses' names "would pose a threat to [their] safety and would harm national security," and permitted the witnesses to testify under pseudonyms. *Id.* at 4286; R. 2/4917.

The government provided to defense counsel approximately twenty volumes of material containing the primary source documents and other information Avi relied on in formulating his opinions regarding the committees and their Hamas connections, as well as a report Avi created summarizing the results of his research related to the committees. R. 6/2391-92, 2483, 2528; R. 7/8532-8538.[14] The government's

[14] The volumes included documents that the IDF had seized from social committees during Israeli military operations, as well as expert reports, Israeli police reports, and other documents arising out of Israeli government investigations of the committees' activities and collected for use in a case in Israel involving material support for Hamas. R. 7/8532-8537. Following Avi's testimony at the second trial, in a hearing requested by defense counsel, Avi denied appellants' contention that he had cherry-picked documents favorable to the prosecution and testified that he had produced all material documents he had assembled in investigating and researching the committees. R. 7/8533-35. The district court credited his testimony. R. 7/8558-

(continued...)

production went well beyond the ordinary requirements of expert witness discovery, in recognition of the unusual situation created by the need to protect Avi's identity. R. 29/5040.

Judge Fish held a *Daubert* hearing, during which defense counsel cross-examined Avi regarding his experience investigating the committees and the sources he relied on for his conclusions. R. 6/2475-2529. Judge Fish found that Avi was qualified to testify as an expert on the relationship between Hamas and the social committees. *Id.* at 2528-29.

Before the second trial, the appellants sought reconsideration of Judge Fish's decision to allow the witnesses to testify under pseudonyms, in the form of a motion to compel discovery of Avi's and Major Lior's true names. R. 29/6364-77. Judge Solis denied the motion. R. 32/146-53. Judge Solis found that disclosure of the names would "pose a danger to the safety of the witnesses and their families" and would "jeopardize national security." *Id.* at 150. He also found that the appellants had failed to establish that disclosure of the witnesses' names was "reasonably likely" to "lead to evidence helpful to their cases." *Id.* at 152. Judge Solis noted that the government had provided "significant information" regarding "the witnesses' employment, their nationalities, and their backgrounds," and the appellants had "ample

[14](...continued)
59.

opportunity" to cross-examine Avi at the *Daubert* hearing and at trial regarding his background, the "credibility of his research," and whether his testimony was biased. *Id.* at 153.

Avi and Major Lior again testified under pseudonyms at the second trial. During closing argument, appellants attacked Avi's credibility on the ground that the jury could not trust an anonymous witness from Israeli intelligence. R. 7/9649-50. At appellants' request, the court instructed the jury that, "in determining the credibility or weight to give to [Avi's] testimony," it could consider the fact that Avi had "testified under an assumed name." R. 17/1105-06.

C. Discussion

The Supreme Court has recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 316-317 (1974). But "[i]t does not follow, of course, that the Confrontation Clause . . . prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Indeed, the Court has noted that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15,

20 (1985) (*per curiam*). A trial court is permitted to restrict the scope of a defendant's cross-examination of a witness, provided the restrictions do not "effectively . . . emasculate the right of cross-examination itself." *Id*. at 19 (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)). Accordingly, trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . the witness' safety." *Van Arsdall*, 475 U.S. at 679; *accord Tansley*, 986 F.2d at 886.

In *Smith*, the Supreme Court held that, in the absence of any justification for withholding the information, the Confrontation Clause generally requires that the defendant be permitted to cross-examine a prosecution witness regarding his actual name and address, so that the jury has sufficient knowledge of who the witness is to properly weigh his testimony and credibility. *Id*. at 131-32. However, when the government establishes that there is an actual threat to a witness if his identity is disclosed, the trial court may, consistent with the Confrontation Clause, exercise its discretion to prevent disclosure of the witness's name, address, or other identifying information. *See id.* at 133-34 (questions tending to endanger personal safety of a witness go beyond proper bounds of cross-examination) (White, J. concurring); *see also United States v. Contreras*, 602 F.2d 1237, 1239-40 (5th Cir. 1979) ("A well-recognized limitation on the right to cross-examine a witness occurs when

disclosure of the information sought would endanger the physical safety of the witness or his family."); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) ("[W]here there is a threat to the life of the witness, the right of the defendant to have the witness' true name, address and place of employment is not absolute."). Courts have permitted restricting disclosure of a witness's true name when the government has made an adequate showing of a threat to the witness and where there is enough other information about the witness's background to allow for effective cross-examination. *See, e.g., United States v. Celis*, 608 F.3d 818, 830-34 (D.C. Cir. 2010) (protective order allowing government witnesses to testify under pseudonyms, and limiting disclosure of their true identities, did not violate appellants' confrontation rights); *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991) (no confrontation clause violation in permitting witness to testify without divulging his true name); *United States v. Rangel*, 534 F.2d 147, 148 (9th Cir. 1976) (same); *Siegfried v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992) (testimony under a fictitious name at a preliminary hearing did not violate the defendant's right of confrontation). In several cases upholding a district court's refusal to require disclosure of a witness's address, this Court has repeatedly recognized that risks to a witness's safety can justify restrictions on disclosure of the witness's identifying information. *Contreras*, 602 F.2d at 1239-40 (reasonable fear for Drug Enforcement Administration agent's safety justified refusal

to require disclosure of home address); *United States v. Alston*, 460 F.2d 48, 50-54 (5th Cir. 1972) (federal narcotics agent not required to disclose home address where reasonable fear of safety to witness and his family existed); *United States v. Crockett* 506 F.2d 759, 762-763 (5th Cir. 1975) (government's strong reason to believe witness's life in danger justified refusal to disclose address); *United States v. Mesa*, 660 F.2d 1070, 1075-1076 (5th Cir. 1981) (confrontation rights not violated by court's failure to conduct *in camera* hearing before refusing to order disclosure of witness's address).

The district court acted within its discretion in protecting the true identities of Avi and Major Lior. First, both Judge Fish and Judge Solis specifically found that disclosure of the witnesses' identities would gravely endanger their lives and their families. R. 10/4286; R. 2/4917; R. 32/150. As both judges noted, the government's evidence established that terrorist organizations, including Hamas, actively seek out the true identities of ISA agents and their families to compromise their work and to target them for kidnaping or assassination. R. 10/1437; R. 32/148, 153. Websites sympathetic to those organizations publish sketches and descriptions of ISA officers so they can be targeted, and one such site offers a reward for information revealing the true identity of an ISA officer. R. 10/1392. IDF officers such as Major Lior face similar threats – indeed the kidnaping of IDF soldiers by terrorist groups including

Hamas has in recent years led to major military confrontations. *Id.* at 1422.[15] Because of these threats, the true identities of the witnesses are classified under Israeli and United States law, and unauthorized disclosure is a criminal offense in both countries. *Id.* at 1422-23; R. 32/152. The appellants have not seriously contested any of that evidence, either in district court or on appeal.[16] It is therefore undisputed that disclosure of the witnesses' true identities would pose a real and significant threat to the witnesses and their families. *See United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969) (where the government establishes that the threat to the witness is "actual" and "not a result of conjecture," then the "the right of the defendant to have the witness' true name, address and place of employment" may be limited).

Second, the district court correctly found that disclosure of the witnesses' identities was not likely to materially aid appellants' cross-examination. The court found that appellants' expressed hope that knowledge of the witnesses' true identities might enable them to "find[] some evidence that will undermine [the witnesses']

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[15] A videotape seized from one of the Indictment Committees shows a masked Hamas man with a rifle in his hands describing attacks on Israeli intelligence agents and plans to infiltrate Israeli intelligence. GX Nablus Zakat 6.

[16] Appellants suggest (Elashi Br. 22-23) that the danger could have been mitigated by disclosing the witnesses' identities only to defense counsel with security clearances. However, defense counsel intended to use the witnesses' true names in order to investigate their backgrounds, and such an investigation would create a risk of compromising the witnesses' identities.

credibility or experience" was too speculative and generalized to outweigh the government's need to protect the information. R. 32/151; *see also United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986) (no confrontation clause violation where the defendant "asserted no particularized need" for disclosure of the witness's residence and workplace). Appellants' inability to identify any potentially fruitful avenues of investigation if they knew the witnesses' real names is not surprising in the circumstances of this case. Because the witnesses' real names are classified in Israel, no one – other than those specifically authorized by the Israeli government to have access to the information – should know the witnesses' true names as connected to their professions. And anyone who did have that information would be prohibited under Israeli law from revealing it. Accordingly, an investigation using those names was unlikely to reveal any information related to their professional activities. Because both witnesses' testimony in this case involved matters arising exclusively from their professions, an investigation based on the witnesses' true names was not reasonably likely to lead to a more effective cross-examination. Any suggestion that the defense would have unearthed impeachment material if they had learned the witnesses' identities is mere speculation.

Finally, the district court correctly found that appellants had sufficient information regarding the witnesses' backgrounds to conduct an effective cross-

examination. R. 32/153. As this Court has recognized, "the critical question is . . . whether or not the defendant has been given sufficient opportunity to place the witness in his proper setting." *Alston*, 460 F.2d at 52 (internal citations and quotation marks omitted). The information provided by the government did just that. The district court noted that "[d]efendants have had access to significant information regarding these witnesses," including information related to their "employment, nationalities, and their backgrounds." R. 32/153. Appellants were able to place the witnesses in their "proper setting" as agents of the security apparatus of the Israeli government who had been involved in military, intelligence, and law enforcement efforts targeting Hamas. That information provided fertile ground for cross-examination as to the witnesses' motivation for testifying, far more than anything likely to have been disclosed through an investigation using the witnesses' names.

In addition, when appellants submitted before trial a list of questions they intended to ask Avi and Major Lior regarding their backgrounds (including military service, employment history, education, membership in or support for settlers' groups, etc.), the government agreed that the witnesses would answer such questions. R.3/7357-68. The government also agreed that Avi would answer further questions regarding his work on Hamas's financing, including questions regarding his consultations with the Treasury Department and the FBI, and that appellants could

conduct broad questioning with regard to any bias on Avi's part. R. 6/2766; R. 3/7357-68; R. 6/2529-34. Moreover, with respect to Avi, the government provided the defense with the underlying information on which his opinion was based, none of which was classified. Armed with that information, the appellants were able to cross-examine the witnesses effectively and in detail, and to place the witnesses in their "proper setting" by putting their backgrounds – in particular their status as Israeli military or security agents who operated against Hamas – and their potential biases before the jury.

The government also represented that it would "meet its obligations under *Jencks* and *Giglio*." R. 2/2766; *see also* R. 29/5412 (defense counsel noting that the government had "produced a substantial amount of Jencks material for its ISA expert witness"). In that regard, the government requested that the Israeli Security Agency and the Israeli Defense Force search their personnel and other employment files for any negative information pertaining to these witnesses, and they found none.

Appellants contend (Elashi Br. 31-33) that protection of the witnesses' identities prevented defense counsel from conducting an independent investigation of the witnesses, which might have discovered that they had a reputation for lying, that they were affiliated with pro-Israeli settler groups, or that Avi had no law degree. To the extent that appellants' contention is limited to their inability to conduct an *out of court*

investigation (since nothing prevented them from cross-examining the witnesses as to those matters), their claim does not implicate the Confrontation Clause, and any deprivation must rise to the level of a due process violation. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) ("[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination ... The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony."); *United States v. Edmondson*, 659 F.2d 549, 551 (5th Cir. 1981). In any event, it was within the district court's discretion to find that appellants' interest in such a speculative search for hidden biases was outweighed by the need to protect the witnesses' lives. Even if appellants, with the benefit of the witnesses' names, had discovered facts suggesting the witnesses were biased, it is not clear that would have made much difference to the jury, which could already place the witnesses in their proper setting as agents of the Israeli government – the hated enemy of Hamas. And Avi's law degree was a matter of tangential importance, because his expert status was based on his experience investigating and researching Hamas and the social committees, rather than on his education. R. 6/2484.

Appellants argue further (Elashi Br. 27, 31-32) that they were deprived of a

meaningful opportunity to challenge Avi's qualifications as an expert witness, a situation they claim is unprecedented. However, as noted above, appellants were afforded a full opportunity to explore and to challenge Avi's research and his experience at the *Daubert* hearing. Because Avi did not use his real name in connection with that research and experience, disclosure of Avi's name was not likely to have been of material use to appellants' cross-examination on that issue. Moreover, protection of a government expert witness's identity without disclosure to defense counsel is not unprecedented. A police officer from El Salvador has been permitted to testify under a pseudonym as an expert on the MS-13 criminal gang, without disclosure to the defense of his true identity, in at least three separate prosecutions of co-defendant MS-13 members in Maryland. *See United States v. Ayala*, 601 F.3d 256, 274 (4th Cir. 2010) ("the government called three experts . . . [including] a police officer from El Salvador, appearing under a pseudonym for his own protection"), *cert. denied*, 131 S. Ct. 262 (2010); *United States v. Zelaya*, 336 Fed. Appx. 355, 357-58 (4th Cir. 2009) (unpublished), *cert. denied*, 130 S. Ct. 2341 (2010); *United States v. Ramos Cruz et al.*, 8:05-cr-00393-DKC (D. Md. 2008).[17] The Fourth Circuit in *Zelaya* rejected the defendant's contention that his inability to learn the true name of the El Salvadoran witnesses violated his confrontation rights. 336 Fed. Appx. at 357-58.

[17] Ramos-Cruz's challenge to the decision protecting the identity of the El Salvadoran expert is on appeal before the Fourth Circuit (No. 08-4647).

There is no reason for a different result here.[18]

Appellants contend (Elashi Br. 34-35) that Avi should not have been permitted to testify because his testimony was cumulative of testimony from another expert, Jonathan Fighel, whose identity was not classified, that the government could have called instead. In fact, as the government argued below, Avi's testimony was not cumulative of the testimony Fighel would have offered because Avi's expertise was broader in scope. R. 10/2883-85. Moreover, as the district court found, whether Avi's testimony was merely cumulative of other evidence is a separate question from whether protection of Avi's identity prevented appellants from conducting an effective cross examination. R. 10/4282-83. There is no question that Avi's testimony was relevant and helpful to the jury. Therefore, because the government established that the threat to the witness was real and that appellants were able to cross examine him effectively without learning his identity, the district court was within its discretion to permit his testimony and withhold his identity, without regard to whether another

[18] Regardless of whether the district court's decision to protect the witnesses' identity is analyzed as a reasonable restriction on cross-examination under *Van Arsdall* or a balancing of the government's need to protect classified information against the defendant's right to prepare his defense under the Classified Information Procedures Act, *see United States v. Abu Ali*, 528 F.3d 210, 247 (4th Cir. 2008), the result is the same. The district court was within its discretion to protect the witnesses' identity because of the grave risk of harm in the event of disclosure, and because appellants had sufficient information regarding the witnesses' professional backgrounds to cross examine them effectively.

expert might have been able to present some of the same information.

Appellants rely (Elashi Br. 28-31) on the D.C. Circuit's recent decision in *United States v. Celis*, 608 F.3d 818 (2010). That case does not support their position. In *Celis*, the court *rejected* the defendants' contention that a protective order allowing government witnesses to testify under pseudonyms, and limiting disclosure of their true identities, violated their confrontation rights. 608 F.3d at 830-33. The protective order prevented defense counsel from investigating the witnesses' true identities unless, a few days prior to their testimony, counsel demonstrated that such an investigation was necessary for their cross-examination, and the court of appeals found that to be an "appropriate balancing of interests in the relevant case-specific context." *Id.* at 833. In reaching that conclusion, the court did not say that the trial court *must* strike that particular balance, and the court made clear that the appropriate balance depends on the particular circumstances in each case. *Id*. at 830-32.

Moreover, there are important differences between this case and *Celis.* The protected witnesses in *Celis* testified "about their own involvement" in drug trafficking with the defendants, while Avi and Major Lior did not testify regarding personal interactions with appellants. And there was no suggestion in *Celis* that appellants were provided with pretrial information regarding the witnesses' background, employment, or research. *See Washington v. Walsh*, No. 08-cv-6237,

2010 WL 423056 at *8 (S.D.N.Y. Feb. 5, 2010) (withholding from the defendant the true identities of testifying undercover detectives who bought drugs from defendant did not violate his confrontation rights, in part because "the detectives' biases, if any, were apparent because they were law enforcement officers"). Finally, the order in *Celis* permitted investigation using the true names only if the defendants made a particularized showing of necessity, and here the district court found that appellants failed to make such a showing. R. 32/152.

United States v. Fuentes, 988 F. Supp. 861 (E.D. Pa. 1997), is distinguishable for similar reasons. In that case, the court permitted a confidential informant who brokered a drug sale from the defendants to a DEA agent to testify under a pseudonym, but required the government to disclose the informant's true identity to the defense. Applying a "case-specific analysis which takes into account the array of factual circumstances," *id.* at 864, the court determined that disclosure was necessary in part because the informant's testimony was "particularly vital" as to whether the defendants intended to sell drugs. *Id.* at 866-67. A case involving a confidential informant who was a party with the defendants to the relevant criminal transactions is a different circumstance from an expert witness whose government affiliation and research sources are known to appellants, who had no personal involvement with appellants, and whose testimony was corroborated by other evidence regarding Hamas

control of the social committees.

In a much more closely analogous case than *Celis* or *Fuentes*, a district judge in the Northern District of Illinois permitted ISA agents to testify under pseudonyms, without disclosing their identities to the defense, in a prosecution for providing material support to Hamas. *See United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923-24 (N.D. Ill. 2006) (ISA agents could testify under pseudonyms at suppression hearing without disclosing identities to defense); *id.*, Minute Order, 03-CR-978 (N.D. Ill. Aug. 29, 2006) (same as to trial testimony).[19] The district court in *Marzook* rejected the defendant's contention that he was entitled to the agents' true identities in order to investigate their backgrounds, reasoning that the agents "are known in their professional capacities by their pseudonyms only." Minute Order at 3 (R. 10/1391) (citing *United States v. Lonetree*, 35 M.J. 396, 410 (CMA 1992) (Sentelle, J.) (affirming nondisclosure of identity of an intelligence officer, because the officer's "real world setting and environment" could be better ascertained by his pseudonym and professional background rather than by anything connected with his true identity)).

In any event, any error was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681-84. Avi's testimony was relevant to show that Hamas controlled the

[19] The minute order is available at R. 10/1389-94.

Indictment Committees that appellants supported, but the government presented numerous other sources of evidence on that point. First, the government's evidence established overwhelmingly that the mission and purpose of HLF was to raise funds for Hamas. That fact is itself powerful evidence that the committees to which HLF gave so much money were also part of Hamas. In addition, as set forth more fully above in Part VIII in the Statement of Facts, the government provided ample additional evidence, independent of Avi's testimony, establishing Hamas control of the Indictment Committees. That evidence included mutually corroborating documents from the Ashqar and Elbarasse searches, including a letter addressed to Baker naming specific committees and their leadership and discussing the extent to which the committees were "ours." GX Elbarasse Search 22; Ashqar Search 5. Those documents were corroborated by the report given at the Philadelphia meeting on the extent to which various committees belonged to Hamas. R. 7/7051; GX Philly Meeting 13E. Hamas insider and HLF representative Shorbagi also testified that several of the Indictment Committees and their leaders were Hamas leaders. R. 7/6747, 6762. The evidence also established a web of connections between leaders and members of the Indictment Committees, Hamas, and HLF, as shown in the government's summary exhibits for each Indictment Committee (with reference to the underlying admitted exhibits). Hamas expert Matthew Levitt testified that leaders of

the Ramallah and Jenin zakat committees had provided support for Hamas terrorist attacks. R. 4/3836. The Hamas documents, posters, videos, postcards, key chains, etc. that the IDF seized from the committees (admitted into evidence pursuant to Major Lior's testimony, before Avi testified) further established Hamas control of the committees. *See, e.g.,* GX ICS Hebron 1,2,6,7,11,12; GX Jenin Zakat 1,6; GX Nablus Zakat 1,2,3,6. The Palestinian Authority documents stated that the Ramallah Zakat Committee was controlled by Hamas. GX PA 8, 9. In light of that evidence, even if the jury gave no weight to Avi's testimony, it would have found that the committees funded by HLF were controlled by Hamas.

II. The District Court Did Not Abuse Its Discretion In Its Rulings Related To Hearsay Evidence.

A. Standard of Review.

The Court reviews a decision to admit or to exclude evidence for abuse of discretion. *United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005).

B. The District Court Properly Admitted Shorbagi's Testimony.

1. Background.

The government introduced testimony from Mohamed Shorbagi, HLF's representative in Georgia, who had previously pleaded guilty to providing material support to Hamas through HLF. R. 7/6791-93. Shorbagi testified generally that he participated with appellants in supporting Hamas by raising funds for HLF to be sent

to Hamas-controlled institutions in Palestine. R. 7/6735, 6775, 6786-87, 6792, 6795. Shorbagi also testified that four of the Indictment Committees were part of Hamas, and that a number of the leaders of those committees were Hamas members. *Id.* at 6747, 6762-68, 6782-85.

Appellants objected generally to Shorbagi's testimony on the ground that he was improperly testifying on matters beyond his personal knowledge, relying instead on information he had heard from others or learned from media such as newspapers or websites. R. 7/6680-81. The government responded that Shorbagi's testimony established his membership in a close-knit group of individuals and organizations involved in supporting Hamas, and therefore he had established his personal knowledge of facts that were common knowledge within that group. *Id.* at 6682-83. The court responded that such knowledge could be the basis of admissible testimony, but that the government needed to "lay a predicate" to establish his knowledge and to ensure that it did not come from the media or from hearsay statements. *Id.* at 6684-85. The court sustained hearsay objections where Shorbagi's knowledge was shown to be based on the media, *see, e.g., id.* at 6658, 6661, while permitting him to testify on the basis of knowledge obtained from his close association with appellants and others involved in supporting Hamas, *see, e.g., id.* at 6712-14.

2. Discussion.

Fed. R. Evid. 602 requires that, for testimony to be admissible, the proponent must introduce sufficient evidence to support a finding that the witness has personal knowledge of the matter. The evidence establishing personal knowledge "may, but need not, consist of the witness' own testimony." *Ibid.* A non-expert witness may testify in the form of opinions or inferences that are "rationally based on the perception of the witness." Fed. R. Evid. 701. "All knowledge is inferential, and the combined effect of Rules 602 and 701 is to recognize this epistemological verity but at the same time to prevent the piling of inference upon inference to the point where testimony ceases to be reliable." *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990).

Appellants contend (Elashi Br. 38-42) that Shorbagi's testimony regarding the social committees and HLF's being part of Hamas was inadmissible because it was based on hearsay rather than on Shorbagi's personal knowledge. In advancing that claim, appellants rely heavily (Elashi Br. 39) on a single sentence in which Shorbagi stated that his knowledge of who controlled the social committees was based on "newspapers," "Hamas leaflets," "the website of Hamas," and "talking among friends." R. 7/6746-47. However, Shorbagi immediately clarified that by "friends," he meant people who were involved with him in supporting Hamas and its subordinate organizations such as HLF and the Islamic Association of Palestine. *Id.* at 6747.

Understood in context with the rest of Shorbagi's testimony, that statement makes clear that Shorbagi's knowledge regarding the committees came from his close association over many years with appellants and other supporters of Hamas, including Marzook and other acknowledged Hamas leaders. Shorbagi was well-positioned to observe over the years which other persons and organizations were treated and regarded as part of Hamas by Hamas's leaders and supporters.

Such close familiarity with Hamas's support network is sufficient to establish Shorbagi's personal knowledge that HLF and the committees belonged to Hamas. *See United States v. Mandujano*, 499 F.2d 379, 379 (5th Cir. 1974) ("[A] trial court has some latitude in permitting a witness on direct examination to testify as to his conclusions, based on common knowledge or experience."); *United States v. Espino*, 317 F.3d 788, 797 (8th Cir. 2003) ("While the ordinary rule confines the testimony of a lay witness to concrete facts within his knowledge or observation, the [c]ourt may rightly exercise a certain amount of latitude in permitting a witness to state his conclusions based upon common knowledge or experience."); *Agfa Gavaert, A.G. v. A.B. Dick Co.*, 879 F.2d 1518, 1523 (7th Cir. 1989) ("All perception is inferential, and most knowledge social . . . [k]nowledge acquired through others may still be personal knowledge within the meaning of Fed. R. Evid. 602.").[20]

[20] Appellants dismiss (Elashi Br. 39 n.25) *Mandujano* on the ground that the (continued...)

Shorbagi's testimony was more than sufficient to establish his personal knowledge regarding Hamas, HLF, and the social committees. Shorbagi grew up in Gaza, was involved in Islamic institutions there, and knew the man who became the main Hamas leader in his city. R. 7/6716-17. After coming to the United States, Shorbagi became involved with individual appellants, HLF, and other individuals and organizations that raised money and published media on behalf of Hamas. *Id.* at 6764-74. He eventually became the HLF representative in Georgia. *Id.* at 6786-87. Shorbagi knew each of appellants except Odeh. *Id.* at 6648, 65-66. In 1994, Shorbagi attended a closed meeting with appellants El-Mezain, Baker, and Elashi, as well as Ashqar, Muin Shabib, and the two heads of Hamas's political wing Mousa Abu Marzook and Khalid Mishal. *Id.* at 6734-37. Mishal spoke to the attendees regarding their roles as supporters of Hamas, and Marzook divided the attendees into breakout groups to further organize their work. *Ibid*. The breakout groups included a money group, headed by El-Mezain, that discussed raising money and delivering it to organizations controlled by Hamas in the West Bank and Gaza. *Ibid.* Shorbagi

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[20](...continued)
testimony it permitted regarding the meaning of certain words used in drug transactions is not analogous to Shorbagi's testimony about the committees. But the point is not that the testimony is on similar topics, but rather that a trial court has discretion to permit a witness to testify regarding matters that at some point originated from interactions with other people, provided it is based on sufficient experience in the relevant community. 499 F.2d at 379.

traveled with El-Mezain and Elashi on fund-raising trips featuring Hamas speakers, and he was involved in HLF's dispute with Ashqar's rival fund-raising organization. *Id.* at 6768-71. Shorbagi testified that Baker told him that, following Hamas' designation, they would no longer send money to individuals in Shorbagi's home town (where Shorbagi personally knew the Hamas leader, *id.* at 6717-18), but instead would send money to HLF's Gaza office for further distribution to the same charities they had supported before. *Id.* at 6775. Shorbagi described how, following the designation, Hamas's supporters referred less explicitly to Hamas, used code words to discuss Hamas, and were aware that their phones were being monitored. *Id.* at 6777-78. All of this evidence showed that Shorbagi had personal knowledge of the matters to which he testified based on his status as a Hamas insider who was closely involved with appellants and others in providing support to Hamas from the United States.

Even if appellants were correct that Shorbagi's knowledge came only from "conversations with friends" rather than the totality of his experiences as a Hamas supporter, those conversations – including, for example, statements by El-Mezain, Khalid Mishal, Marzook, and other Hamas leaders at a meeting discussing supporting Hamas through Hamas-controlled charities, R. 7/6734-37, – are not hearsay because they qualify as coconspirator statements under Rule 801(d)(2)(E). *See* Part II(C)

below.

Finally, any error in admitting hearsay testimony by Shorbagi was harmless. The government introduced numerous sources of evidence, independent of Shorbagi, that HLF's purpose was to support Hamas and that the Indictment Committees (of which Shorbagi mentioned only four) were controlled by Hamas. *See* Part I above.

C. The District Court Properly Admitted The Palestinian Authority Documents Under Rule 807.

1. Background.

The government introduced three Palestinian Authority (PA) documents that the Israeli military seized from the PA headquarters in Ramallah during Operation Defensive Shield in 2002. One document is a signed memorandum on the sources of Hamas financing. The memorandum describes Hamas's international fund-raising practices and lists a number of international organizations that form part of Hamas' financing network. The memorandum lists "Hamas financial resources worldwide," and the list includes HLF. It also refers to the other Palestine Committee organizations (UASR and IAP) identified in the Elbarasse documents. R. 7/7748; GX PA 2.

The other two documents are PA memoranda regarding the Ramallah Zakat Committee, which is one of the Indictment Committees. One report, GX PA 9, is written on PA Palestinian General Security letterhead and is signed by a PA Major

whose title is "Director of Operations." The report identifies certain Ramallah Zakat Committee leaders and members as activists in or associated with Hamas. GX PA-9. The third PA document is a report stating that the Ramallah Zakat Committee transferred money from overseas to Hamas, and that its principal leaders and member belonged to Hamas. R. 7/7737-41; GX PA-8. The district court admitted the PA documents under Federal Rule of Evidence 807, the residual exception to the hearsay rule. R. 7/6851.

2. Discussion.

Federal Rule of Evidence 807 provides that extrajudicial statements may be admitted if, among other things, the statements have "equivalent circumstantial guarantees of trustworthiness" to those of statements admissible under the other exceptions to the hearsay rule in Rule 803. The rule is designed to provide the courts with the "flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies." *Nowell v. Universal Elec. Co.,* 792 F.2d 1310, 1314-15 (5th Cir.1986).

Rule 807 permits admission of hearsay evidence that is "not specifically covered" by other exceptions but has "equivalent circumstantial guarantees of trustworthiness," if the court determines that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is

offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." The residual exception should be used sparingly, and the proponent bears the burden of establishing that the statement has similar indicia of reliability as the traditional hearsay exceptions. *See United States v. Phillips*, 219 F.3d 404, 419 n.23 (5th Cir. 2000); *see also United States v. Walker*, 410 F.3d 754, 758 (5th Cir. 2005) (stating that whether the statement has guarantees of trustworthiness equivalent to the other hearsay exceptions is the "lodestar of the residual hearsay exception analysis"). "[A] district court has considerable discretion in applying the residual exception which a court of appeals will not disturb absent a definite and firm conviction that the court made a clear error of judgment in weighing the relevant factors." *Nowell*, 792 F.2d at 1315.

The district court did not clearly err in admitting the PA documents because they carry the same indicia of reliability as public records and reports that are generally admissible under Fed. R. Evid. 803(8). Government reports and data collections have long been considered admissible at criminal trials. *See, e.g., White v. United States*, 164 U.S. 100, 102-103 (1896) (jail records admissible); *United States v. Dumas*, 149 U.S. 278 (1893) (statement of account from Postmaster General). The public records exception is grounded in the recognition that such records and reports

are generally reliable. *See Ohio v. Roberts*, 448 U.S. 56, 66 n.8 (1980) (noting that the public records exception "would seem to be among the safest of the hearsay exceptions"), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004); *see also United States v. Quezada*, 754 F.2d 1190, 1193 (5th Cir. 1985) (presuming trustworthiness of public documents).

The PA documents are public reports that ordinarily would be admissible under the public records exception in Rule 803(8). The government did not seek to admit them on that basis because, due to diplomatic complications created in part by the lack of a mutual legal assistance treaty and also by the fact that Hamas currently has substantial control over the PA, the government was unable to obtain certification or a witness to establish the foundation for the exception. *See* R. 3/5155; 7/6848-49. But that diplomatic difficulty does not alter the presumptive reliability of the PA documents as public records. Accordingly, the district court did not err in admitting them under Rule 807, because they have equivalent guarantees of trustworthiness as one of the "safest" of the traditional hearsay exceptions. *Cf. United States v. Wilson*, 249 F.3d 366, 375-76 (5th Cir. 2001) (upholding admissibility of foreign bank records under the residual exception, because they had equivalent trustworthiness to business records records, even though there was no custodian to establish their admissibility as business records), *overruled on other grounds*, *Whitfield v. United States*, 543 U.S.

209 (2005). The admission of documents that, but for diplomatic difficulties unrelated to the documents' reliability, would be admissible under a well-established hearsay exception is consistent with the residual exception's purpose of providing courts flexibility to admit evidence that is as reliable as the traditional exceptions but, for reasons unrelated to reliability, is not encompassed by them.

Appellants contend (Elashi Br. 46) that the PA documents were not reliable because, according to a government expert witness, the PA was corrupt. But that testimony referred to the PA's corruption in its own financial matters and had nothing to do with the reliability of its reports regarding Hamas financing sources or Hamas control of the Ramallah Zakat Committee. Nor does the PA's alleged motive of discrediting the zakat committees undermine the documents' reliability, because there is no evidence that the documents were intended to be made public. The PA had a strong incentive to collect and internally report accurate information regarding Hamas. Moreover, as the district court found, the documents were not created in anticipation of a legal proceeding. R. 7/6851. Finally, the district court correctly found that appellants' objections regarding one of the documents' lack of formal letterhead and another's lack of a signature go more to the weight of the documents than to their admissibility. Appellants' objections do not undermine the circumstantial guarantees of trustworthiness that these kinds of public reports possess. The basis of that

trustworthiness is that governments rely on accurate reports, especially reports regarding threats and enemies, in conducting their affairs. *See Wilson*, 249 F.3d at 375-76 (defendant's concerns about unreliability, inaccuracy, and incompleteness of foreign bank records, though "not insubstantial," went to weight rather than admissibility because of inherent reliability of records that the foreign banks relied on in conducting their business).

Appellants contend (Elashi Br. 45) that the PA documents are inadmissible against a criminal defendant under Rule 803(8)(C) because they are "factual findings resulting from an investigation made pursuant to authority granted by law." However, the facts recorded in the PA memoranda are more akin to reporting regarding the routine "activities of the office or agency," or "matters observed" that the agency had "a duty to report," which are admissible against criminal defendants under Rule 803(8)(A), and (B), rather than to formal factual findings following a specific, legally-authorized investigation that are covered by Rule 803(8)(C). The PA documents reflect the PA's ongoing efforts to monitor the sources of Hamas financing and Hamas's control of the local Ramallah Zakat Committee, which represent a regular "activity" of that agency, as opposed to conclusive, official factual findings following a legal investigation that are governed by Rule 803(8)(C). *See United States v. Mena*, 863 F.2d 1522, 1531-32 (11th Cir. 1989) (cautioning against an "overly broad"

reading of Rule 803(8)(C) that mischaracterizes an agency's "routine activity" as an "investigation" yielding "factual findings," because the rule is designed to allow admission of official reports as long as they were prepared for purposes independent of specific litigation). The PA documents are not tantamount to factual findings resulting from an official investigation within the meaning of Rule 803(8)(C).

Finally, appellants contend (Elashi Br. 47-48) that the PA documents were not admissible because the names of two of the declarants and addresses of all three were unknown. Rule 807 requires that, in order to "provide the adverse party with a fair opportunity to prepare" to meet the evidence, the proponent must provide advance notice of its "intention to offer the statement and the particulars of it, including the name and address of the declarant." However, the notice requirement "must be interpreted flexibly." *United States v. Evans*, 572 F.2d 455, 489 (5th Cir. 1978). This Court and other courts of appeals have upheld admission of evidence in circumstances where providing the address of the hearsay declarant is not possible. *See Nowell*, 792 F.2d at 1311, 1314-15 (admitting testimony under residual exception where declarant was deceased); *Dartez v. Fireboard Corp.*, 765 F.2d 456, 460-63 (5th Cir. 1985) (same); *United States v. Medico*, 557 F.2d 309, 313-16 (2d Cir. 1977) (upholding the district court's admission of evidence under the residual hearsay exception where declarants were unidentified bystanders); *but see United States v. Mandel,* 591 F.2d

1347, 1368-69 (4th Cir.) (holding that the declarants' unidentified status precluded compliance with the notice provision and rendered the statements inadmissible under Rule 807), *overruled en banc on other grounds*, 602 F.2d 653 (1979). Accordingly, where, as here, the government has provided advance notice of its intent to introduce the documents under the residual exception and a detailed description of those documents, the government has substantially complied with Rule 807's notice requirement and the failure to provide the declarant's name or address, where such information cannot be obtained, does not preclude admission of the documents. For this reason, this Court has recognized that evidence may be admissible under the residual exception even if it is impossible for the offering party to provide the name and address of the declarant. *See Hicks v. Charles Pfizer & Co. Inc.*, 466 F. Supp. 2d 799, 810 (E.D. Tex. 2005) (holding that proponents' "inability to provide the names and addresses of the declarants" was "not fatal, in view of their substantial compliance with the notice provisions of Rule 807").

In any event, any error in admitting the PA documents was harmless in light of the strength of the government's case. The government offered overwhelming evidence, independent of GX PA-2, that HLF was part of Hamas's international fundraising network, including the Palestine Committee documents obtained from the Elbarasse and Ashqar searches, statements by Baker and other Palestine Committee

members at the Philadelphia meeting, Shorbagi's testimony, appellants' financial transactions and other ties with Marzook and other Hamas leaders, and the pro-Hamas message of HLF's fundraising appeals. The other two PA documents stating that Hamas controlled the Ramallah Zakat Committee were harmless for similar reasons. The Ramallah Zakat Committee was only one of the seven Indictment Committees, and there were, as noted above, numerous other sources of evidence establishing that the Indictment Committees were part of the Hamas social network.

D. The District Court Correctly Admitted The Elbarasse And Ashqar Documents As Coconspirator Statements Under Rule 801(d)(2)(E).

1. Background

Through a search of the Virginia home of Palestine Committee member and unindicted co-conspirator Ismail Elbarasse, the government obtained a number of Palestine Committee records, including the Committee's by-laws, organization chart, and other documents. *See, e.g.*, GX Elbarasse Search 5, 7, 10. The Elbarasse documents also included a 1991 letter addressed to "brother Shukri" containing a table listing a number of the Indictment Committees, identifying some of their leaders, and specifying the extent to which they were "ours." GX Elbarasse Search 22. The government obtained similar documents from the home of another unindicted coonspirator, Abdelhaleen Masan Ashqar. The Ashqar documents contain similar records outlining the membership and responsibilities for the individuals and

organizations working under the rubric of the Palestine Committee, and discussing the extent of the "Islamic presence" in the Indictment Committees. *See, e.g.*, GS Ashqar Search 1, 5. The district court admitted the Elbarasse and Ashqar documents as co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E).

Appellants contend (Elashi Br. 49-65) that the district court erred in admitting these documents because (1) there was insufficient evidence that the statements in the documents were made during the course and in furtherance of a conspiracy; and (2) at the time most of the documents were created the appellants' joint venture to support Hamas was not yet unlawful. Appellants are mistaken on both counts.

2. Ample Evidence Established That The Elbarasse And Ashqar Documents Were Created During And In Furtherance Of The Conspiracy Or Joint Venture.

Federal Rule of Evidence 801(d)(2)(E) authorizes the admission of "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." To admit a co-conspirator's statement, a trial court must first find, by a preponderance of the evidence, that a conspiracy existed and that the defendant and declarant were members of it. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). While the out-of-court statement may itself be considered in making this determination, the court must also find independent evidence of the conspiracy. *United States v Sudeen*, 434 F.3d 384, 390 (5th Cir. 2005); Fed. R. Evid. 801(d)(2). In determining whether

evidence qualifies as a co-conspirator statement, the court may consider the statement itself and is not required to examine further the reliability of the statement or the availability or non-availability of the declarant. *See Bourjaily*, 483 U.S. at 183-84.

As the jury found, not merely by a preponderance, but beyond a reasonable doubt – appellants were members of a joint venture and conspiracy to provide material support to Hamas by collecting donations to the HLF in the United States and distributing those funds to Hamas-controlled entities in the West Bank and Gaza. The venture was coordinated by appellants and their coconspirators on the Palestine Committee who directed and coordinated the actions of HLF and other organizations and individuals. The existence of that conspiracy was established by multiple sources of evidence, including the Elbarasse and Ashqar documents, the Philadelphia meeting, the co-conspirators' personal and financial relationships with senior Hamas leaders, and the testimony of co-conspirator Shorbagi. *See supra,* Statement of Facts, Parts III-VII.

There was ample evidence that the declarants of the statements in the Elbarasse and Ashqar documents were part of this conspiracy and that the statements were made in furtherance of it. The documents themselves, which include the Palestine Committee's by-laws, organization chart, reports, phone and address lists, and other records, indicate that they were created to record and to guide the activities of the

Palestine Committee. *See, e.g.*, GX Elbarasse search 5, 7, 10; Ashqar Search 1. The documents also specifically identify appellants HLF, Baker, El-Mezain, and Elashi as partners in the Palestine Committee joint venture. R. 4/4307-11; GX Elbarasse Search 10; GX Ashqar Search 1. The documents establish that HLF was the Palestine Committee's official fund-raising organization for the purpose of collecting donations for Hamas, and they specifically provide that the Palestine Committee would govern HLF's activities and that HLF would report to the Committee. GX Elbarasse Search 7; 13.

The evidence from the documents themselves is corroborated by other, independent evidence of the conspiracy. The independent evidence includes the Philadelphia meeting of the Palestine Committee, attended by Baker, Elashi, Abdulqader, Ashqar, and Elbarasse. Co-conspirator Shorbagi further confirmed that HLF was part of Hamas. R. 7/6792. The intercepted phone calls showing that Marzook had intervened in a dispute between Ashqar and Baker to ensure that HLF would get the funds raised by a Hamas leader also corroborated the existence of the Palestine Committee joint venture. GX Ashqar Wiretap 3, 4. The extensive personal and financial ties between appellants, Ashqar, Elbarasse, and Marzook provided further circumstantial evidence that they were associated together. *See supra*, Statement of Facts Part V. All of this evidence was more than sufficient to establish

that the authors of the Palestine Committee reports and records obtained from Elbarasse and Ashqar were co-conspirators with appellants and that those reports and records were created in furtherance of that conspiracy. The district court did not abuse its discretion in admitting the documents on that basis.

Appellants' reliance (Elashi Br. 53-56) on *United States v. Al Moayad*, 545 F.3d 139 (2d Cir. 2008), is unavailing. The court in *Al Moayad* excluded documents on the ground that there was "no independent evidence" showing that the defendants or the declarants were members of a conspiracy to support Hamas or Al-Qaeda, other than general ties to individual Hamas leaders. *Id.* at 174-75. The court noted further that "neither defendant was shown to be a Hamas figure or even a 'member' of Hamas." *Id.* at 175 n.27. Here, by contrast, there was direct testimony from Shorbagi that appellants were "Hamas figure[s]," as well as multiple sources of evidence that they were involved, together with the declarants of the documents, in the Palestine Committee's effort to support Hamas.

3. A "Conspiracy" Under Rule 801(d)(2)(E) May Include A Lawful Joint Venture.

This Court has squarely held that co-conspirator statements made during and in furtherance of a lawful common plan are admissible under Rule 801(d)(2)(E): "[T]he conspiracy or agreement [need not] be criminal in nature; it may be in the form of a joint venture." *United States v. Saimiento Rozo*, 676 F.2d 146, 149 (5th Cir. 1982) (in

drug importation case, logbook and navigation chart admitted based on the "joint venture of sailing [the ship]"); *United States v. Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979) (same). This Court recently reiterated that principle in a third-party appeal by one of appellants' unindicted co-conspirators. *United States v. Holy Land Foundation For Relief and Development*, 624 F.3d 685, 694 (5th Cir. 2010) ("One can qualify as a 'joint venturer' for the purposes of Rule 801(d)(2)(E) merely by engaging in a joint plan – distinct from the criminal conspiracy charged – that was non-criminal in nature."). This Court's sister circuits agree that "the term 'conspiracy,' when used in this context, does not ... refer solely to unlawful combinations." *United States v. Weisz*, 718 F.2d 413, 433 (D.C. Cir. 1983); *see also, e.g., United States v. Jackson*, 627 F.2d 1198, 1216 (D.C. Cir. 1980) ("What must be proved ... is merely that a combination existed between the third parties and the defendant."); *United States v. Russo*, 302 F.3d 37, 45 (2d Cir. 2002) ("the objective of the joint venture ... need not be criminal at all"); *United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988) ("common enterprise need not have an illegal objective"), *overruled on other grounds*, *Guam v. Ignacio*, 10 F.3d 608, 612 n.2 (9th Cir. 1993); *Virgin Islands v. Brathwaite*, 782 F.2d 399, 403-04 (3d Cir. 1986) (evidence "need not show that the combination ... was criminal or otherwise unlawful" (internal quotation marks omitted)).[21]

[21] *Accord United States v. Peralta*, 941 F.2d 1003, 1007 (9th Cir. 1991); (continued...)

As the D.C. Circuit recently explained, Rule 801(d)(2)(E) "is not limited to unlawful combinations" because it is "based on concepts of agency and partnership law" and "embodies the long-standing doctrine that when two or more individuals are acting in concert toward a common goal, the out-of-court statements of one are ... admissible against the others, if made in furtherance of the common goal." *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006).

Appellants urge (Elashi Br. 58-59) the Court to abandon this well-established principle because the concepts of agency and partnership that undergird it "fit poorly with the theoretical underpinnings" of the co-conspirator exception. In appellants' view, the co-conspirator exception has no basis in agency but is instead based on the difficulty of obtaining evidence against secret criminal conspiracies. However, the co-conspirator exception's grounding in the law of agency is firmly established in the case law:

> It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them.

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[21](...continued)
United States v. Bucaro, 801 F.2d 1230, 1231 (10th Cir. 1986); *In re Japanese Products*, 723 F.2d 238, 262-63 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); *United States v. Coe,* 718 F.2d 830, 835-36 & n.3 (7th Cir. 1983); *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976).

Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 249 (1917); *accord Anderson v. United States*, 417 U.S. 211, 218 n. 6 (1974); *United States v. Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943) (Hand, J.); *United States v. Perholtz*, 842 F.2d 343, 356 (D.C. Cir. 1988); *see also Jackson,* 627 F.2d at 1219 (equating "conspiracy" with "agency relationship"); Fed. R. Evid. 801(d)(2)(E) (classifying co-conspirator statement as "[a]dmission by [a] party opponent").

This agency rationale also explains why a "conspiracy" under the Rule need not be criminal:

> If the appropriate basis for admitting the statements of a confederate is that his participation in a common enterprise with the defendant makes him an agent of the accused, then the goal or objective of the common enterprise would appear to be irrelevant. The critical inquiry is simply whether the confederate ['s] ... statements were made 'during the course and in furtherance of' the common enterprise.

Layton, 855 F.2d at 1399; *accord Hitchman*, 245 U.S. at 249; *Coe*, 718 F.2d at 835; *Trowery*, 542 F.2d at 626-27. Or, put another way, there is no reason to think that "partners in crime" can speak for each other, but partners in other sorts of joint ventures cannot.[22]

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[22] Rule 801(d)(2)(E)'s application in civil cases further underscores the point – as does its legislative history: "While the [R]ule refers to a coconspirator ... [it] is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator ... even though no conspiracy has been charged." Rule 801(d)(2)(E) advisory committee note (emphasis added); *see United States v. Cryan*, 490 F. Supp. 1234, 1240 (D.N.J.) (because co-conspirator rules "do not derive from (continued...)

Appellants contend (Elashi Br. 62-64) that even if the Rule applies to lawful joint ventures, it should not apply in this case because the appellants and declarant had in common nothing more than a generalized Islamist ideology. To be sure, the conspiracy charged in this case was broad and included many individuals and several organizations. Nevertheless, the evidence showed that these co-conspirators acted in concert with a single goal – to support Hamas – under the direction of Hamas leadership and the Palestine Committee. Moreover, as demonstrated in the Philadelphia meeting, the joint venturers adopted the clandestine tactics of secrecy and deception that are common in criminal conspiracies even before the purpose of their conspiracy became illegal. The co-conspirators recognized that their venture was likely to become criminal, so they took steps to ensure that the conspiracy could continue undetected after it became a crime. *See* GX Philly Meeting 6E. It is difficult to think of a more fitting candidate for application of Rule 801(d)(2)(E) to a lawful joint venture than a venture whose members recognize its imminent transformation into a criminal scheme and adjust their tactics accordingly.

III. The District Court Properly Admitted Evidence Under Fed. R. Evid. 403.

A. Standard of Review

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[22](...continued)
the 'law of conspiracy' or the 'law of crime' but rather from notions of vicarious responsibility ... [they] apply equally in civil cases and in criminal cases in which no conspiracy is charged"), *aff'd*, 636 F.2d 1211 (3d Cir. 1980).

When reviewing an alleged violation of Federal Rule of Evidence 403, which prohibits unfairly prejudicial testimony, this Court "afford[s] an especially high level of deference" to the district court's decision. *United States v. Fields*, 483 F.3d 313, 354 (5th Cir. 2007). The "wide discretion" that district courts generally enjoy for evidentiary determinations "is particularly true with respect to Rule 403 since it requires an on-the-spot balancing of probative value and prejudice." *Management Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008). A district court's decision on Rule 403 grounds is disturbed rarely and only when there has been a clear abuse of discretion. *Fields*, 483 F.3d at 354. Where the defendant fails to object, review is for plain error. *United States v. Fernandez*, 559 F.3d 303, 316 (5th Cir. 2009).

B. Background

Before trial, appellants filed a motion in limine seeking to prevent the government from introducing any evidence of acts of terrorism or violence by Hamas or any other terrorist organization, on the ground that such evidence would be unfairly prejudicial under Fed. R. Evid. 403. R. 2/3278. The government responded that it should be permitted to offer limited evidence of certain specific terrorist acts by Hamas when those attacks were relevant to the circumstances and context of the other evidence the government would present. R. 3/3435-37. Conversely, the government sought to limit appellants' introduction of evidence relating to violence and injustices

committed by the Israeli government against Palestinians, while appellants argued that such evidence was necessarily part of the context of the case and also admissible to prove the bias of Israeli witnesses. R. 4/3565-67. The district court heard argument and carefully considered the parties' Rule 403 arguments, particularly with regard to pictures and videos of Hamas and al-Qaeda terrorists (including Osama bin Laden) found in the social committees' premises and in HLF's computers. R. 4/3473-74, 80-81, 3499-3504. The district court granted appellants' motion with respect to Osama bin Laden and al-Qaeda, but found that the probative value of evidence related to Hamas on HLF's computers and from the committees outweighed the risk of unfair prejudice. R. 4/3514-18.

C. Discussion.

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Unfair prejudice "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged," or "an undue tendency to suggest decision on an improper basis." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (internal quotation marks omitted). "However, to warrant exclusion, the danger of unfair prejudice . . . must *substantially* outweigh the probative

value of the evidence." *Fields*, 483 F.3d at 354 (emphasis in original). The scope of Rule 403 is "narrow," and its application "must be cautious and sparing." *Ibid.* The Rule is generally "limited to excluding matter[s] of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *Ibid.* (quoting *United States v. Pace*, 10 F.3d 1106, 1116 (5th Cir.1993)).

Appellants renew their challenges to evidence related to Hamas violence and other allegedly unfairly prejudicial evidence, arguing that the district court abused its discretion in admitting the evidence under Rule 403. Appellants contend that the challenged evidence was gratuitous, with no purpose other than an attempt to poison the jury. Overall, there was very little evidence of Hamas violence introduced over the course of nearly two months of trial. Moreover, when viewed in context, all of the challenged evidence was relevant to the issues at trial, and its probative value was not substantially outweighed by the risk of unfair prejudice.

Much of the evidence related to Hamas violence challenged by appellants came from the Indictment Committees or from HLF's own computers or other records. There was no abuse of discretion in admitting Hamas-related material that came from HLF's records, or from the committees that HLF supported. The key question in the case was whether those institutions were affiliated with Hamas or were independent, purely charitable entities. The fact that ostensibly charitable institutions possessed

materials glorifying Hamas was highly probative on that question.

For example, appellants challenge (Elashi Br. 68-69) brief testimony by Avi about Hamas's bombing of a discotheque. R. 7/8471. That testimony was relevant because, as Avi explained, a computer disk seized from one of the Indictment Committees (GX ICS Hebron 10) included a poster of the Hamas terrorist who had carried out the discotheque bombing. The same image was also found on HLF's computers. *See* GX HLF Search 43, 51, 79. Appellants challenge three videos of school ceremonies in which Palestinian children were dressed in suicide vests, but those videos were probative for similar reasons. GX GOI 1; GX Jenin Zakat 1; GX Demonstrative 10. Each of the videos was obtained from a committee funded by HLF, and they were relevant to demonstrate the character of those committees as Hamas affiliates and to support the expert testimony on that point. R. 4/3818; R. 7/7696. The fact that one ceremony took place in 2004 and another in 2007 does not undermine their relevance, particularly in the absence of evidence that the committees had been transformed in a few years from independent charities to sponsors of schools glorifying suicide bombing.

A videotape depicting a Hamas rally (GX InfoCom Search 68), in which Hamas demonstrators burned American and Israeli flags was relevant for the same reasons. The tape came from HLF's offices, and even though it was partially recorded over by

the opening ceremony of the Hebron library financed by HLF, the tape remains probative because it shows that HLF, supposedly a charitable entity unaligned with Hamas, either had employees or worked with people who possessed such material. R. 7/7200.

Thus, the district court properly concluded that the videos, posters, and other evidence related to Hamas (but not al-Qaeda) obtained from the committees, and corresponding material from HLF's computers or offices, was sufficiently probative of the key disputed questions in the case as to outweigh the risk of unfair prejudice. *See United States v. Salim*, 189 F. Supp. 2d 93, 98 (S.D.N.Y.2002) ("[T]he graphic or disturbing nature of a [piece of evidence] alone is not enough to render it inadmissible. Rather, the analysis hinges upon whether the [item] is relevant to the resolution of some disputed point in a trial or otherwise aids a jury in a factual determination."). The fact that the computer images may have been viewed or downloaded by HLF personnel other than appellants does not negate the probative value.[23] HLF was itself a defendant and co-conspirator, and evidence of the material viewed at work by its employees is relevant to show the motive and intent of appellants, who were HLF's leaders and founders. *See United States v. Abu Jihaad*, – F.3d – , 2010 WL 5140864,

[23] The material seized from New Jersey could definitively be connected to appellant Odeh, because he was the only employee in that office. Moreover, the fact that the same or similar material was found on multiple HLF computers indicated a climate of support for Hamas within the organization.

*4 n.12, *23 (2d Cir. Dec. 20, 2010) (admitting videos depicting an execution and suicide truck bombing, as well as materials, including Osama Bin Laden's *fatwa* against America, from a website defendant visited, even though government could not prove defendant saw the materials, because the inflammatory potential of the evidence was outweighed by probative value in establishing motive and intent of the conspiratorial agreement).

Other evidence appellants challenge was relevant and admissible to provide necessary context and background to the evidence and issues in the case. For example, appellants object to Avi's brief discussion of a Hamas bombing on Passover. R. 7/8236. That bombing was the impetus for Israel's Operation Defensive Shield. Evidence of the attack provided context for discussion of that operation, and it was an appropriate response to defense counsel's elicitation of testimony regarding Palestinian casualties inflicted by the Israelis during Defensive Shield. *See* R. 7.8389.[24] Levitt's description of the aftermath of a Hamas bombing (to which no contemporaneous objection was made) was similarly relevant to provide context to his description of the structure and history of Hamas. R. 4/3786-87. The demonstrative photograph (GX Demonstrative 13) of a bus bombing Levitt described was relevant

[24] Before the trial, defense counsel agreed that the suicide bombings that provoked Operation Defensive Shield were "part of the story" that the jury should hear. R. 4/3507.

for similar reasons. The photograph was not particularly graphic, and Levitt's description was brief and unemotional. R. 4/3785-86. Even potentially prejudicial evidence may properly be admitted to provide the jury with relevant background information and allow the jury to place the evidence in context. *United States v. McKeeve*, 131 F.3d 1, 13-14 (1st Cir. 1997) (permitting evidence regarding why Libya was sanctioned by the government in export violation prosecution because "[t]rials are meaty affairs, and appellate courts should not insist that all taste be extracted from a piece of evidence before a jury can chew on it.").[25]

It is not the case that the jury needed to know nothing about Hamas other than that it had been designated. Appellants characterized evidence from the Philadelphia conference and elsewhere as tending to show at most that they shared a generally Islamist political perspective, but not the violent, terrorist agenda of Hamas. Accordingly, material from HLF computers or files or from the social committees that indicated sympathy with or approval of Hamas violence was highly probative to rebut that defense. Moreover, appellants' belief that Hamas's violent activity was irrelevant merely because they were not specifically charged with carrying out or directly supporting violent attacks is inconsistent with the Supreme Court's recent recognition

[25] Defense counsel, in seeking to admit evidence of Israeli mistreatment of Palestinians, agreed that the jury could not be provided with an accurate picture of relevant events if all violence were "air brush[ed]" out. R. 4/3471.

that the violent and nonviolent activities of terrorist groups such as Hamas are inextricably related. *Humanitarian Law Project*, 130 S. Ct. at 2725-27 (rejecting the contention that "it is possible in practice to distinguish material support for a foreign terrorist group's violent activities and its nonviolent activities").

The alleged unfairly prejudicial testimony by Shorbagi was also probative. Shorbagi briefly mentioned Hamas kidnapping and killing of Israeli soldiers in 1992 because the Israeli government responded to those attacks by deporting hundreds of Hamas members to Lebanon. Shorbagi and others, including HLF, became involved in providing aid to the deportees and their families. R. 7/6700-03. Shorbagi's statement that he was afraid of retaliation by Hamas if he returned to Gaza was relevant to explain the protection against deportation that he had obtained in his plea agreement. R. 7/6960.

Appellants challenge (Elashi Br. 74) evidence related to Iraq and Saddam Hussein. That evidence came from HLF's own records, and it showed they supported families of "martyr[s]" who had no financial need because they were also receiving support, as HLF's records stated, from Saddam. R. 7/7250-52. The evidence tended to undermine the defense's claim that HLF provided aid based purely on need.

The prosecutor's question to a defense expert regarding his relationship with the Muslim Legal Defense Fund – which funded appellant Elashi's defense – was an

attempt to show the expert's bias. R. 7/8637-38. Moreover, since the witness denied any relationship, the allegedly prejudicial "evidence" consisted of a question by counsel, which is unlikely to have had any prejudicial effect in light of the court's instruction that statements by lawyers are not evidence. R. 17/1108.

Finally, appellants object (Elashi Br. 75-76) to admission of the Elbarasse and Ashqar search documents. Those documents were certainly prejudicial, as they showed that HLF was established by the Palestine Committee, of which Elashi, Baker, and El-Mezain were members, for the purpose of supporting Hamas. But all probative evidence is prejudicial in that sense, and there is no basis for a claim that the documents were *unfairly* prejudicial within the meaning of Rule 403.

The district court's analysis of Rule 403 issues in this case was careful and well-considered. The district court excluded on Rule 403 grounds video tapes that were distributed to Hamas supporters (including Shorbagi) showing Hamas interrogations of alleged collaborators. R. 7/6779-82. The district court also excluded any mention of al-Qaeda or Osama bin Laden, despite the fact that bin Laden images were found on HLF computers and among the material the IDF seized from the social committees. R. 4/3510-16. The district court reaffirmed its determination that any mention of bin Laden or al-Qaeda was automatically disallowed, even when the defense "opened the door" by attempting to establish that the Muslim Brotherhood, of which bin Laden

and other al-Qaeda leaders had been members, was a non-violent organization. R. 7/8679-8683. The court also ordered the government to redact a caption stating "Arab-America 9/18/01" from on an image obtained from an HLF computer showing the burning of an American and Israeli flag, on the ground that was "just too close to 9/11." R. 7/7812. The district court also excluded on the basis of Rule 403 any evidence showing that HLF had been designated as a SDT in 2001, despite a misleading impression created by the defense's elicitation of testimony that HLF's parallel institutions in other countries had been designated in that period. R. 4/7349.

Appellants' description (Elashi Br. 67) of the evidence in this case as "gut-wrenching" is exaggerated. The images were not gory or graphic. The witnesses' testimony regarding Hamas attacks was brief and unemotional. Although the evidence undeniably placed Hamas in an unfavorable light, none of it suggested that appellants personally participated in violent acts.

Finally, admission of these materials was entirely consistent with rulings in other terrorism-related cases. Courts have routinely admitted evidence of videos or other terrorism-related materials in such cases to prove the defendants' knowledge, intent, and motive. *See, e.g.*, *United States v. Hammoud*, 381 F.3d 316, 342 (4th Cir. 2004) (affirming admission of tapes belonging to defendant that depicted Hizballah military operations and rallies because they were probative of his knowledge of

Hizballah's unlawful activities and his motive in raising funds for Hizballah); *Abu Jihaad*, 2010 WL 5140864, at *4 n.12, *23 (truck bombing video and al-Qaeda material from a website defendant visited admissible to show motive and intent); *see also United States v. Abdi*, 498 F. Supp. 2d 1048, 1071-72 (S.D. Ohio 2007) (admitting images from al Qaeda websites found on defendant's computer and dissertation exhorting reader to prepare for jihad against infidels as probative of intent and motive in case alleging material support of terrorism).

United States v. Al Moayad, 545 F.3d 139 (2d Cir. 2008), does not assist appellants. In *Al Moayad*, the district court admitted highly emotional victim testimony describing a Hamas suicide bombing in Israel. The only evidence linking the defendants to the bombing was the fact that a Hamas representative had predicted the attack during a speech at a wedding the defendants attended. *Id*. at 147, 160. The evidence was relevant only to show that the defendants knew Hamas engaged in terrorist activity, a point the defendants did not dispute. *Id.* at 160. Here, however, as set forth above, the challenged evidence had greater probative value on the disputed issues of whether appellants and the committees they supported were connected with Hamas. The challenged evidence either came from appellants' computers or other files, was obtained from social committees supported by appellants, or otherwise established appellants' motive and intent to provide material support to Hamas.

In addition, the testimony in *Al Moayad* was a highly emotional account by a victim of the bombing, whose cousin was killed in the attack, and his extended account of the event, including the experiences and plans he shared with his cousin, had nothing to do with the narrative or substance of the rest of the government's case. 545 F.3d at 160. In this case, the challenged evidence was far less emotionally charged than a personal tragedy recounted by a grieving victim, and it was closely connected to the substance of the government's case establishing appellants' and the committees' support for the overall mission of Hamas, including its terrorist activities.

IV. The District Court Did Not Abuse Its Discretion In Admitting Opinion Testimony.

A. Standard of Review.

This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Griffin*, 324 F.3d 330, 347 (5th Cir.2003). Even if the district court abuses its discretion in admitting or excluding evidence, the Court will affirm unless "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." *United States v. Yanez Sosa,* 513 F.3d 194, 201 (5th Cir. 2008).

B. Discussion

Appellants contend (Elashi Br. 79-84) that the district court erred in admitting certain opinion testimony from (1) Treasury Department official John McBrien, (2) FBI agents Burns and Miranda, (3) Hamas expert Matthew Levitt, and (4) former

National Security Council staffer Steven Simon. The district court did not abuse its discretion in admitting any of that evidence, and there is no reasonable possibility that any errors contributed to appellants' convictions.

1. McBrien

An important theme of appellants' defense was the fact that the Indictment Committees were not separately designated as terrorist organizations by the Treasury or State Departments. The defense theory was that, if the Indictment Committees were under the control of Hamas, the Treasury Department would have designated them as such, and therefore Treasury's failure to do so was substantive proof that the committees were not connected to Hamas. *See, e.g.,* R. 7/9563-70; *see also id.* at 9566-67 (arguing to the jury that the Indictment Committees "aren't controlled by Hamas . . . [a]nd the Treasury Department told you that by not putting – never putting a single one of the zakat committees and charitable societies on the [designation] list").

To rebut that erroneous contention, the government presented testimony from John McBrien, the associate director of the Office of Foreign Assets Control (OFAC) at the Treasury Department. McBrien explained that OFAC lacked the resources to designate every separate front organization, and that there were diplomatic, intelligence, and other factors that sometimes led to a determination not to designate

even known front groups. R. 7/7337; R. 7/7280. Accordingly, OFAC issues guidelines for charities that make clear OFAC's position that its list does not purport to designate every sub-group, component part, or front organization of a designated terrorist, and therefore transactions with entities not on the list may still violate the law if designated parties have interests in the non-designated actors or in the transactions. R. 7/7287. McBrien testified that, in OFAC's view, donations to an entity that is itself not designated but that is owned, controlled, or acting on behalf of a designated entity, are prohibited under OFAC's regulations. R. 7/7293-96.

That testimony did not, as appellants contend, invade the province of the trial judge by opining on a core legal issue. Rather, McBrien's testimony addressed a relevant question of *fact* – whether OFAC's failure to designate the Indictment Committees established that the committees were not part of, controlled by, or acting on behalf of Hamas. Appellants advanced the argument from the beginning of trial that, if the Indictment Committees were part of Hamas, they would have been designated. *See* R. 4/3593. Appellants also argued that they relied on the list of designated entities in determining to whom they could legally send money, and therefore the failure to designate the committees proved that they did not willfully violate the law. R. 4/3638-39. In light of those arguments, there was no error in introducing evidence establishing that OFAC, in conformity with its policies and

applicable regulations, could not attempt to separately designate every front group and, accordingly, donations to undesignated groups under the control of a designated terrorist were prohibited.

Nor did McBrien's testimony exceed the scope of proper lay witness testimony. McBrien's testimony regarding OFAC's practice of not designating every terrorist front organization and its conclusion that donating to such a group is unlawful regardless of designation was simple, straightforward, and not based on a "process of reasoning which can be mastered only by specialists in the field." *United States v. Cooks*, 589 F.3d 173, 180 (5th Cir. 2009). Rather, McBrien's testimony regarding OFAC's practices derived from his "past experience formed from firsthand observation." *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008). For that reason, appellants' reliance on *United States v. Riddle*, 103 F.3d 423 (5th Cir. 1997), is misplaced. Moreover, the lay witness in *Riddle* testified for two and a half days regarding his opinion that specific complex banking transactions involving the defendant violated banking regulations and prudent practices, and that the defendant's alleged wrongdoing caused the failure of the bank. *Id.* at 428-29. McBrien, by contrast, did not offer any opinion as to the specific transactions or committees involved in this case, nor did he explain the application of technical regulations to complex transactions. McBrien simply explained at a high level of generality why

OFAC's non-designation of an entity does not necessarily mean that the entity is not controlled by a terrorist group or that donating to it would be lawful. That testimony did not exceed the scope of lay testimony nor did it invade the court's province. And even if the district court abused its discretion in permitting McBrien to testify as to OFAC's view of the regulation, the error was harmless. McBrien's statements that, in general, donating to an undesignated entity that is controlled by Hamas is unlawful was plainly correct. Moreover, his testimony did not directly address whether the government carried its burden of proving that the specific committees funded by appellants actually were part of Hamas and that appellants knew it.[26]

2. Burns and Miranda

Appellants also contend (Elashi Br. 85-89) that FBI agents Burns and Miranda exceeded the scope of permissible lay testimony by testifying on matters based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See* Fed. R. Evid. 701 (lay witness may testify in the form of opinions or inferences which are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c)

[26] To the extent appellants claim that McBrien's testimony should have been admitted only as expert testimony, appellants suffered no prejudice. Appellants do not contend McBrien would not have been qualified as an expert on OFAC's practices, and there was no unfair surprise from the government's failure to disclose the alleged expert testimony, because the government disclosed the fact and basic subject matter of McBrien's testimony as early as May, 2007. R. 2/4433.

not based on scientific, technical, or other specialized knowlege within the scope of Rule 702"). "[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *Yanez Sosa*, 513 F.3d at 200 (internal quotation marks omitted).

Appellants object to testimony by the agents in which they explained the meaning of certain terms used by appellants or their coconspirators, such as "Islamist" or the distinction between "inside [the Palestinian territories]" and "outside." *E.g.*, R. 4/4640, 4259-62. In doing so, the agents were not relying on specialized training to provide a general definition of technical jargon or coded words used, for example, in the drug trade; rather, the basis for the agents' explanations was the particular context of the conversation or document at issue. *See* R. 4/4259-60 ("*In this context*, the inside is used to mean inside the Palestinian Territories.") (emphasis added); R. 4/4640 ("What are the Islamists, *as referenced in this case*?") (emphasis added). The investigating agents' understanding of that context came from common sense applied to first-hand knowledge of the investigation – it did not require or rely on processes of reasoning available only to specialists in the field. The same is true of the agents' testimony regarding the relationship between Hamas and the Muslim Brotherhood, R.

7/7723-25, the goals of the Palestine Committee in holding the Philadelphia meeting and in seeking control of the social committees, R. 7/7096, and the green Hamas headbands worn by demonstrators, R. 7/7165-66.[27] In all of those instances, the agents discussed or summarized a particular document or exhibit in the context of their knowledge of the larger investigation, rather than in reliance on specialized reasoning processes or training. Accordingly, it was within the district court's discretion to admit such testimony under Rule 701.

3. Levitt

The government's first witness was Hamas expert Matthew Levitt, who provided an overview of the rise of Hamas and the important role played by Hamas's social wing in advancing its mission. Appellants do not challenge that testimony on appeal. Later in the trial, the government called Levitt again. R. 7/6491. The purpose of Levitt's second testimony was to explain the relative availability of public access to senior Hamas leaders such as Marzook, Khalid Mishal, and Khari al-Agha over time, so that the jury could understand the significance of appellants' telephone contacts and financial transactions with those leaders, as documented in previously admitted exhibits. Levitt testified generally that, based on his research, telephone and

[27] Agent Burns was careful not to opine regarding headbands that she could not identify. R. 7/7166. Avi confirmed, without objection, the use of green headbands as a Hamas symbol. R. 7/8239-40

other personal contact with Hamas's senior leadership was not publicly available and that the level of personal and financial contacts between appellants and those leaders suggested a relationship of trust among them. R. 7/6500-05. Appellants contend (Elashi Br. 92) that Levitt's second testimony was improper, because it concerned matters "well within the grasp" of the average juror and invaded the jury's prerogative of deciding for itself the inferences to draw from the evidence.[28]

Appellants provide no support for their surprising assertion that the inner workings of Hamas leadership, their accessibility by telephone, and the breadth and extent of their financial dealings with others are matters within the knowledge of the average juror. Without Levitt's testimony, the jurors would have difficulty assessing the significance of the evidence of appellants' contacts with Marzook and other Hamas leaders – they may have assumed that contact information for those leaders was available to anyone, especially prior to the designation, or that those leaders engaged in a wide range of arms-length business deals with third-parties with whom they did not necessarily have a close relationship. Thus, there was nothing improper in Levitt's expert testimony explaining that, in his experience, such contacts and transactions with Marzook and other Hamas leaders were unusual at that time and generally limited to persons that the leaders trusted and with whom they cooperated in supporting Hamas.

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[28] Appellants opted not to cross-examine Levitt following his second testimony. R. 7/6515-16.

4. Simon

Appellants further contend (Elashi Br. 92-97) that Steven Simon, who served on the National Security Council during the Clinton Administration, gave opinion testimony that was improper, irrelevant, and unfairly prejudicial. That contention is without merit.

Simon testified regarding the United States's role in promoting peace between Israel and the Palestinians, and he explained why that goal, and in particular the success of the Oslo process, was important to United States foreign policy interests. R. 7/6259-65. The position of the United States government, and American opinion more generally, regarding the Oslo Accords and the subsequent peace process were important aspects of the context in which appellants and others on the Palestine Committee determined how their United States-based organizations, including HLF, could best support Hamas and its goal of derailing that process. At the Philadelphia Conference, which took place a month after the signing of the Oslo Accords at the White House, a major topic of discussion was how the participants could maintain harmony with Hamas's goal of derailing Oslo while avoiding, through deception, public relations and legal problems that would arise if they were perceived to be working contrary to the American government's efforts to promote peace. GX Philly Meeting 6E, 5E. The defense contended that opposition to Oslo and the other views

expressed at the Philadelphia meeting were widely held, mainstream political opinions based on sympathy for the plight of Palestinians, and therefore the Philadelphia meeting did not indicate appellants' alignment with Hamas or any need to conceal those opinions or that alignment from the American public or government. R. 7/9548-50. It was therefore relevant and proper for the prosecution to introduce evidence regarding the United States government's support for the Oslo process.

Furthermore, it was not unfairly prejudicial for Simon to note that one reason for the government's support of the peace process was to remove a source of Arab resentment against the United States and thereby reduce the threat of future terrorist attacks. *See United States v. McKeeve*, 131 F.3d 1, 13-14 (1st Cir. 1997) (in prosecution for violating sanctions on exporting goods to Libya, evidence of why Libya had been placed under sanctions was permissible to provide relevant background and context). There is no foundation for appellants' contention (Elashi Br. 96-97) that this highly general testimony, which did not address appellants' specific conduct, somehow "sent the jury a message" that it should convict, regardless of the law, in order to prevent a terrorist attack.

Appellants' challenges to opinion testimony, whether considered in isolation or cumulatively, do not constitute reversible error. In light of the ample evidence showing that HLF was established to support Hamas through donations to Hamas-

controlled entities in the West Bank, the alleged errors in admitting opinion testimony were harmless.

V. The District Court Did Not Abuse Its Discretion In Denying A Letter Rogatory.

A. Standard of Review.

This Court reviews a district court's decision not to issue a letter rogatory for abuse of discretion. *United States v. Liner*, 435 F.3d 920, 924 (8th Cir. 2006).

B. Background.

During Operation Defensive Shield in 2002, the IDF confiscated documents from several social committees in the West Bank, as well as from the Palestinian Authority headquarters in Ramallah. The documents included posters, postcards, and key chains depicting Hamas martyrs, internal Hamas communiques, and videotapes taken from committees supported by HLF.

In late 2005, the Israeli government provided copies of many of these materials to the prosecution. The government produced that material, consisting of approximately 20 volumes, to the defense in April 2006. Those volumes represented material that Avi, a legal advisor to the Israeli Security Agency, considered relevant to the ISA's analysis of the activities of the committees. Avi selected the materials from the underlying universe of everything the Israeli government seized from the committees for purposes of research and analysis, rather than for purposes of this case.

Nor did he discriminate between material that suggested Hamas control of the committees and material that indicated otherwise. Avi left out only material he considered purely administrative, such as utility bills, payments to suppliers, student progress reports, etc. R. 7/8533-35.

At both trials, a number of exhibits from those materials were admitted into evidence, authenticated through the testimony of Major Lior, and used by the government's experts to support their testimony that the committees were part of the social infrastructure of Hamas.

In January 2007, defense counsel requested that the government produce a wide variety of records in the possession of the Israeli government, including all materials seized from the Indictment Committees. R. 3/5612-14. The government responded that it had already produced most of the material it had obtained from the Israeli government, including everything that was discoverable. The government's letter advised defense counsel that if they wished to obtain further documents from the Israeli government, they had the option to request a letter rogatory[29] from the court. R. 3/5609-10.

Appellants did not ask for a letter rogatory until April 2008 – more than a year

[29] 28 U.S.C. § 1781(b) permits the transmittal of a letter rogatory or request from a tribunal in the United States to a foreign or international tribunal, officer, or agency.

later. The government did not oppose the motion, although the government noted that, "[g]iven the short time left before trial, the defense's motion is likely too late." R. 3/5601. The court did not rule on the request before trial.[30]

During the trial, the district court held a hearing to consider appellants' contention that Avi had cherry-picked documents favorable to the prosecution from the Defensive Shield material and that his testimony had relied on important information that had not been disclosed to the defense. Avi testified that he had produced all material documents he had assembled in investigating and researching the committees, favorable to the prosecution or otherwise, and the district court credited his testimony. R. 7/8558-59. The district court also explained why it had not issued the letter rogatory. First, the court noted that appellants' motion was untimely. R. 7/8556; *see also* R. 7/6855-6858. Second, the court did not believe the process was likely to yield any information helpful to the defense. R. 7/8556 ("[B]ased on what has been stated here, I don't know that there is anything there that would warrant authorizing a fishing expedition.").

C. Discussion.

A district court has authority to issue letters rogatory, including in criminal

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[30] It appears that the court did not rule on appellants' motion before trial because it believed the motion was rendered moot by a denial of appellants' *ex parte* request for funding to pay experts who would assist in their review of the material. *See* R. 7/6855-58, 8556.

cases. *United States v. Rosen*, 240 F.R.D. 204, 215 (E.D. Va. 2007). It is "settled that the decision to issue letters rogatory lies within a court's sound discretion." *Ibid.* "In general, where the relevancy or materiality of the [evidence] sought is doubtful, the court should not grant an application for letters rogatory," but instead should issue such letters only when it is "necessary and convenient." *Ibid*. (internal citations and quotation marks omitted).

The district court was within its discretion not to issue the letter. First, as the court noted, appellants' motion was filed "late in the process." R. 7/8556. The government advised appellants to consider seeking a letter rogatory in January 2007, but they did not make their request until April 2008. Although at that point several months still remained before trial, it was probably too late. The letter rogatory process is slow. The Supreme Court has described it as "complicated, dilatory and expensive." *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court,* 482 U.S. 522, 531 (1987) ("Letters of request for judicial assistance from courts abroad in securing needed evidence have been the exception, rather than the rule."); *see also Rosen*, 240 F.R.D. at 215 ("delay attends the letters rogatory process and counsels against issuance"). In these circumstances, it was within the court's discretion to find that the lengthy letter rogatory process, followed by translation and review of the material, could not be completed without delaying the trial. *See United States v. Aggarwal*, 17

F.3d 737, 742 (5th Cir. 1994) (court did not abuse its discretion in denying as untimely a motion to depose foreign witnesses filed a month before trial).

In addition, the district court properly found, based on Avi's testimony, that appellants' desire to review the underlying Defensive Shield material amounted to a "fishing expedition" because Avi's production provided them access to the relevant material, both favorable and unfavorable to the government's case. R. 7/8556-59. Avi's testimony on that point was not clearly erroneous, and the district court was entitled to rely on it in determining that appellants had not been denied access to material information.

Finally, any error was not prejudicial. Appellants were able to present their perspective on the political orientation of the social committees (which was the subject of the proposed letter rogatory) through the testimony of former Consul General Abington. *See* Elashi Br. 99 n.50. In the event that through the letter rogatory process appellants had been able to discover that the committees had some materials suggesting independence from Hamas, it is unlikely to have affected the jury's finding, based on multiple sources of evidence, that the committees were controlled by Hamas.

VI. The District Court Did Not Abuse Its Discretion In Denying Appellants' Motion For Declassification Of All FISA Intercepts.

A. Standard of Review.

A district court's rulings pursuant to the Classified Information Procedures Act

(CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app. 3 §§ 1-16), are reviewed for abuse of discretion. *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990); *United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir. 2008).

B. Background

Between April 2005 and March 2006, the government produced to defense counsel intercepted calls and facsimiles obtained through surveillance authorized under the Foreign Intelligence Surveillance Act (FISA). The government produced all of the intercepts from eight different FISA subjects, five of whom were defendants in this case. The production consisted of an electronic version of every intercepted call or fax in its entirety, together with summaries, written in English, of calls that analysts identified as "pertinent" to the intelligence investigation at the time of capture (known as "tech cuts"). Because the calls were classified, the government produced them pursuant to a protective order issued by the district court that restricted access to the classified material to defense counsel with security clearances. By October 2006, the government had declassified all of the written, English "tech cut" summaries for all eight FISA subjects, as well as the entire content of the intercepts from four of the eight subjects (including appellants Odeh and Abdulqader). The government also produced to the defense, in declassified form, all of the calls or intercepts that it intended to introduce at trial. R. 2/2123. Thus, prior to trial, defense counsel had

access to all of the underlying calls, as well as to written English summaries of calls deemed pertinent to the investigation. All of the summaries and all of the calls to be introduced at trial, as well as the underlying calls from four of the eight FISA subjects, were declassified and could be shared with appellants. R. 2/2112-13.

Appellants jointly moved for an order compelling the government to declassify the remaining classified FISA intercepts in their entirety so that defense counsel could share them with their clients. The government responded that the FISA intercepts could not be declassified, consistent with national security, without conducting a thorough declassification review. The review process could not practically be accomplished for all of the remaining classified FISA intercepts because of their enormous volume. R. 2/2130. Accordingly, the government proposed that defense counsel review the declassified summaries of pertinent calls with their clients in order to identify particular categories of calls, such as by date or by phone number, that the government would then review and declassify. R. 2/2517. The district court found that procedure to be appropriate under CIPA, because it protected the government's interest in preventing disclosure of classified information in a way that did not materially hinder the defense from preparing for trial. R. 2/2519-2522.

Instead of using the procedure approved by the court, appellants repeatedly sought reconsideration of the court's decision. R. 2/4892. The district court denied

their claims in at least four separate written orders. R. 2/4888 (citing previous orders). Finally, on July 7, 2007, the district court issued an order reiterating that it had allowed defense counsel to use "the same approaches used by the government to identify relevant classified information: use (1) the summaries of intercepts and (2) other criteria, such as phone numbers or the names of parties involved in communications, to identify potentially relevant intercepts." R. 2/4891. The court noted that, for more than eighteen months, defense counsel had "drag[ged] their feet" and refused to use the procedures available to them, choosing instead to "pursu[e] a seemingly never-ending string of motions rehashing the same issues." *Id.* at 4891-92. The court explained further that the defendants and their attorneys had "unfettered personal access to the four lines of FISA intercepts that have been completely declassified," in addition to the summaries, and that the defendants could also "discuss their independent recollections" of their actions and communications in identifying calls to submit for declassification. R. 2/4893. However, "the defendants chose, for more than eighteen months, not to participate in the process of searching for and identifying exculpatory intercepts and requesting their declassification." R. 2/4893. The court accordingly denied appellants' motion to obtain access to all of the still-classified intercepts.

C. Discussion.

CIPA safeguards "the government's privilege to protect classified information from public disclosure" in criminal proceedings, *Abu Ali*, 528 F.3d at 245 (citing *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006)), and does so "in a way that does not impair the defendant's right to a fair trial." *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008) (quoting *United States v. O'Hara*, 301 F.3d 563, 568 (7th Cir. 2002)). CIPA's framework permits courts to authorize the government, upon a proper showing, to eliminate or limit disclosure of "classified information" that it otherwise would produce under discovery rules. *See* 18 U.S.C. app. 3 § 4.[31] CIPA reflects the court's parallel authority under Rule 16(d)(1) to issue protective orders denying or restricting discovery for good cause, including to protect national security information. *Aref*, 533 F.3d at 78.

CIPA grants district courts broad authority to enter protective orders "to protect against the disclosure of any classified information." 18 U.S.C. app. 3 § 3; *see* S. Rep. No. 96-823, at 6, reprinted in 1980 U.S.C.C.A.N. 4294, 4299-4300 ("The details of each [protective] order are fashioned by the trial judge according to the circumstances of the particular case."). A common feature of protective orders under this provision

[31] "Classified information" is defined, in pertinent part, as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security." 18 U.S.C. app. 3 § l(a).

is to require counsel to undergo background checks to obtain a security clearance for access to classified information. *See, e.g.*, *Abu Ali*, 528 F.3d at 248-49; *In re Terrorist Bombings*, 552 F.3d 93, 125-26 (2d Cir. 2008). Finally, CIPA "vests district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings." *Abu Ali*, 528 F.3d at 247.

The procedure approved by the district court for declassifying FISA intercepts was a proper exercise of that broad discretion. The district court issued a protective order pursuant to Section 3 of CIPA. The practical result of that order was that cleared defense counsel could review classified material, but they could not share it with appellants, who did not have (and obviously would not be given) security clearances. That situation created a "thorny problem" with respect to the classified FISA intercepts – they were far too voluminous to be reviewed and declassified in time for trial. The district court's approved procedure – in which defense counsel could share with their clients the declassified summaries of "pertinent" calls and the contents of the four declassified FISA intercepts to identify relevant categories of calls for declassification – was a proper balance of the government's interest in preventing wholesale disclosure of classified information without unduly restricting appellants' ability to prepare for trial.

Appellants do not dispute the impracticality of conducting a declassification

review of the enormous volume of FISA intercepts at issue, but instead contend that the government did not have a genuine interest in preventing an *en masse* release of the FISA intercepts to appellants. However, contrary to appellants' view, the district court correctly recognized that it lacked the authority to grant appellants unfettered access to classified material. *See, e.g., Abu Ali*, 528 F.3d at 253 (explaining that courts have no authority to "consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security") (citation and internal quotation omitted). Rather, in evaluating the government's privilege to protect classified information, the district court was required to "balance this 'public interest in protecting the information against the individual's right to prepare his defense.'" *Id*. at 247 (quoting *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc)). Accordingly, the district court correctly recognized that the government's (and the public's) compelling interest in protecting classified information justified procedures limiting its disclosure. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988) (recognizing government's "compelling interest"); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (noting that "no governmental interest is more compelling than the security of the Nation"); *cf. United States v. Bin Laden*, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999) (stating in terrorism case that it would be "practically impossible to remedy the damage of an unauthorized disclosure *ex post*");

United States v. Rezaq, 156 F.R.D. 514, 524 (D.D.C. 1994) (there was simply "no reason to think that [the] defendant can be entrusted with national secrets"), *vacated in part on other grounds*, 899 F. Supp. 697 (D.D.C. 1995).

Appellants claim (Elashi Br. 109) that "[d]isclosing to appellants the contents of their own statements could not possibly endanger national security." However, as the district court noted, "if information could not become classified after it has been communicated by individuals, then the only classified information that could exist would be documents created by the government itself." R. 2/2520. Moreover, as the government explained below, there were many other participants on the calls with appellants who were or could become subjects of intelligence or criminal investigations, and if those participants learned the specific contents of the recorded intercepts they might take steps to thwart ongoing and future investigations. R. 2/2130.[32]

Courts have recognized the government's legitimate interest in classifying a

[32] Even the mere appearance that classified information was disclosed to the appellants could have hurt national security. *See CIA v. Sims*, 471 U.S. 159, 175 (1985) ("The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.") (quoting *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980) (*per curiam*)); *Snepp*, 444 U.S. at 512-513 & nn.7-8 (noting that unless the government has adequate mechanisms to prevent unauthorized disclosures, potential sources of classified information may be unwilling to provide such information).

terrorism suspect's own statements and in conducting a declassification review before the suspect may access them. *See, e.g., Mohamed v. Gates*, 624 F. Supp. 2d 40, 42-44 (D.D.C. 2009). Appellants fail to cite any examples of a terrorism defendant being granted access to classified or sensitive information, and in fact the cases are to the contrary. *See, e.g.*, *United States v. Paracha*, 2006 WL 12768, at *4 (S.D.N.Y. Jan. 3, 2006) (referencing CIPA protective order denying defendant charged with providing material support to al Qaeda access to classified information); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002) (discussing court's various CIPA protective orders precluding terrorism defendant's access to classified information); *United States v. Bin Laden*, 58 F. Supp. 2d 113, 121-22 (S.D.N.Y. 1999) (al Qaeda defendants barred from access to classified information).

Appellants contend (Elashi Br. 108-09) that the government's privilege in protecting against disclosure of classified information was not properly invoked because it was not personally asserted by the appropriate department head, as required by *Aref*. *See* 533 F.3d at 80. Even though the identity of the government official claiming privilege here was not the head of the appropriate department as *Aref* requires, the government set forth the basis for the classification and the harm to national security that could arise should the classified information be revealed. There was therefore an adequate foundation for the court to determine the existence of "a

reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged." *Aref*, 533 F.3d at 80. This Court has not adopted the requirement, recently announced by *Aref*, that the department head must invoke the privilege in the CIPA context, and the government's invocation of CIPA protection in this case took place prior to that decision. Accordingly, as in *Aref* itself, there is no reason to remand this case solely to have the appropriate department head assert the state secrets privilege. *See United States v. Stewart*, 590 F.3d 93, 132 (2d. Cir. 2009); *Aref*, 533 F.3d at 80.

In any event, the Second Circuit was wrong in *Aref* in holding that, when the Government invokes CIPA Section 4 to exempt material from discovery in a criminal case, the applicable privilege is the state-secrets privilege. Significantly, the Fourth Circuit has correctly declined to follow the reasoning of *Aref* with regard to a CIPA issue. *See United States v. Rosen*, 557 F.3d 192, 198 (4th Cir. 2009). As the Supreme Court made clear in *United States v. Reynolds*, 345 U.S. 1, 12 (1953), in federal criminal proceedings, the Government cannot invoke the state secrets privilege to deprive a defendant of evidence material to his defense and yet proceed with the prosecution anyway. In part, this is because the state secrets privilege is absolute; disclosure of information covered by the privilege cannot be ordered by a court, regardless of the need of the private party litigant. *See Reynolds*, 345 U.S. at 11. By

contrast, various courts of appeals have ruled that the government can invoke a "classified information privilege" (also called in some cases a "national security privilege") in order to protect national security sensitive information from disclosure to the defendant in criminal proceedings. Unlike the state secrets privilege, the privileges that are available to protect classified information must yield to a judicial determination that the information at issue is "helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1953); *see United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (applying *Roviaro* standard to determining whether a criminal defendant is entitled to classified information); *see also United States v. Klimavicius Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (same); *United States v. Varca*, 896 F.2d 900, 905 (5th Cir.) (same); *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985) (en banc) (same); *United States v. Pringle*, 751 F.2d 419, 427-428 (1st Cir. 1984) (same). Thus, when the Government invokes CIPA procedures to protect classified information, it is relying upon a classified information privilege, not the state secrets privilege, and the unique procedures mandated by the Supreme Court for the latter in *Reynolds* are not applicable.

As for appellants' side of the balance, appellants' interests were protected by counsel with security clearances working on their behalf. *See Abu Ali*, 528 F.3d at 254

(noting the significance of having cleared counsel available). In *In re Terrorist Bombings*, the Second Circuit held that a terrorism defendant's interest in access to discoverable classified information was "slight" when that information was made available for preparing his defense through production to his attorneys. 552 F.3d at 125-26. The court explained that "production of materials to a party's attorney alone falls within the common meaning of 'discovery,'" *id.* at 126, and such production was "perfectly appropriate and valid" under the relevant standards for protecting classified information under CIPA, *id*. In this case, defense counsel, some of whom had been working on HLF-related matters since 2001, were well-versed in the relevant facts. Armed with the English summaries, declassified FISAs, and appellants' recollection of their own communications, defense counsel were well equipped to identify potentially useful calls to submit for declassification.

Even if the protective orders were improvidently issued, however, the defense was not prejudiced by appellants' lack of access to the withheld information. As noted, the district court's order allowed appellants to seek declassification of any particular communications that they wished to obtain. Appellants were themselves parties to the communications, and their recollections could be aided by defense counsel, the summaries, the completely declassified FISA subjects, and the declassified calls the government intended to introduce. Moreover, appellants

Abdulqader, Odeh, and Elashi were especially unlikely to have been prejudiced, since the FISA intercepts targeting Abdulqader and Odeh were completely declassified, and Elashi was not a FISA subject.

VII. The Seizure And Search Of HLF's Property Did Not Violate The Fourth Amendment.

A. Standard of Review.

On appeal of the denial of a motion to suppress, this Court reviews factual findings for clear error and legal conclusions de novo. *United States v. Jones*, 421 F.3d 359, 361 (5th Cir. 2005). The Court views the evidence in the light most favorable to the prevailing party and indulges all inferences in favor of the district court's denial of the motion. *United States v. Polk*, 118 F.3d 286, 296 (5th Cir. 1997).

B. Background.

In December 2001, the Office of Foreign Assets Control (OFAC) designated HLF as a Specially Designated Terrorist and Specially Designated Global Terrorist under Executive Orders 12947 and 13224, respectively, and the International Emergency Economic Powers Act (IEEPA). IEEPA authorizes the President to declare a national emergency with respect to any extraordinary threat to the "national security, foreign policy, or economy of the United States" if that threat "has its source in whole or substantial part outside the United States." 50 U.S.C. § 1701(a). Once the President has declared such an emergency, he may, among other powers, block or

otherwise prohibit exercise of any rights with respect to any property in the United States in which a foreign country or foreign national has an interest. *Id.* § 1702(a)(1)(B).

On January 23, 1995, President Clinton issued E.O. 12947, which blocked all interests in property involving individuals or organizations, specifically including Hamas, that engaged in terrorist activities that threatened the Middle East peace process. In E.O. 13224, the President declared a national emergency with respect to threats of terrorism more generally, and blocked transactions related to specifically-identified individuals and entities including Hamas.

Immediately following its designation of HLF in December 2001 as an SDT and SDGT based on HLF's relationship with Hamas, OFAC issued an order blocking all of HLF's property. R. 2/1391-98, 4146. OFAC secured and inventoried HLF's property at its offices in Texas, New Jersey, California, and Illinois. R. 2/2454, 4146. FBI agents provided security but did not otherwise participate in seizing the property. *Id.* at 2454.

In April 2002, the FBI applied to a federal magistrate judge in the Northern District of Texas for a warrant to search the HLF property seized by OFAC. The 50-page affidavit in support of the warrant set forth evidence, including FBI surveillance of the Philadelphia meeting and HLF records found pursuant to a separate search

warrant for Elashi's computer company InfoCom, that HLF had provided material support to Hamas. R. 2/1426, 1433-37, 1456-57. While the affiant (FBI Agent Burns) noted that she had consulted with OFAC, R. 2/1416, the affidavit did not refer to any evidence obtained from the HLF property OFAC had blocked and seized, except for the following paragraph:

> 87. I have reviewed OFAC Blocked Property Inventories for the four HLF locations referenced herein. Those inventories indicate that OFAC seized various materials from the four HLF locations, to include the following: desks, files, books, binders, computers, telephones, fax machines, miscellaneous documents and various other items that the HLF used to facilitate its activities. As noted, the HLF's primary office was located in Richardson, Texas, and the other offices targeted by OFAC and subject to this affidavit performed regional responsibilities related to fund-raising and propaganda distribution.

R. 2/1458.

Magistrate Judge Stickney issued a warrant to search the HLF property OFAC had seized. The FBI executed the warrant and obtained evidence from HLF's files and computers.

Appellants moved to suppress the evidence, arguing that OFAC's warrantless seizure of their property violated the Fourth Amendment. The district court denied the motion. The court found that OFAC's seizure was analogous to a warrantless administrative search, which the Supreme Court has permitted in closely regulated industries. The court reasoned that the system of regulation created by IEEPA and the

related executive orders for monitoring and preventing terrorism financing justified OFAC's warrantless seizure of the property of an entity engaged in that activity. R. 2/4150. The court also found that, even if OFAC's actions violated the Fourth Amendment, the good faith exception to the exclusionary rule would prevent suppression of the evidence, because OFAC reasonably relied in good faith on the authority granted by IEEPA to block property. *Id.* at 4150-51. Finally, the court concluded that the good faith exception also applied to the FBI's search pursuant to the search warrant. *Id.* at 4151-52.

C. Discussion.

Appellants contend (Baker Br. 38-53) that the district court erred in denying their motion to suppress.[33] Appellants are incorrect. The evidence obtained from HLF's property was properly admitted. First, OFAC's blocking order was reasonable under the Fourth Amendment and did not require a warrant because the government's paramount interest in stopping the flow of terrorist financing far outweighs appellants' privacy interest. Second, OFAC's entry onto HLF's premises and seizure of its property were justified under the "special needs" exception to the warrant requirement. Third, even if OFAC's actions violated the Fourth Amendment, the independent

[33] Appellants raise this argument, together with their FISA claims, in the classified Baker brief, but the government's response on this issue does not involve any classified information.

source exception to the exclusionary rule applies because the government subsequently obtained a search warrant that did not depend on any information obtained through OFAC's actions. Finally, the good faith exception to the exclusionary rule prevents suppression of the evidence.

1. OFAC Blocking Orders Are Reasonable Under The Fourth Amendment.

To the extent appellants claim that a warrant is required before OFAC may issue a blocking order,[34] that claim has no merit. The OFAC blocking order issued in this case required the holders of HLF's property, including bank accounts and real property, to freeze such property as was in their possession or control at the time of the order, as well as property that later came into the holders' possession. R. 2/1391-98; *see also Holy Land Foundation for Relief and Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 64 (D.D.C. 2002). The Fourth Amendment does not require that OFAC obtain a warrant before issuing such an order.

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v.*

[34] It is unclear whether appellants' claim of a Fourth Amendment violation extends to the blocking order itself, or is limited to OFAC's physical entry into HLF's premises and removal of its property.

Knights, 534 U.S. 112, 118-19 (2001) (quotation marks and citation omitted). An action will be deemed reasonable under this test "as long as the circumstances, viewed objectively, justify the action." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (quotation marks, citation, and alteration omitted).

In the context of a normal criminal investigation, Fourth Amendment reasonableness generally requires a warrant. The Supreme Court has made clear, however, that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 775 (1989); *see also United States v. Flores Montano*, 541 U.S. 149, 155 (2004) (warrantless, suspicionless vehicle searches reasonable in light of the government's "paramount interest in protecting the border"); *Knights*, 534 U.S. at 119 (warrantless, suspicionless probationer search reasonable in light of government's interest in "rehabilitation and protecting society").

IEEPA blocking orders easily survive scrutiny under the "reasonableness" balancing test. It is difficult to conceive of a governmental interest more weighty than preventing the flow of funds and support to international terrorist organizations. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010) (recognizing that "the Government's interest in combating terrorism is an urgent objective of the highest

order" and that interest includes prohibiting any contributions to foreign terrorist organizations). In the context of IEEPA blocking orders, the government's actions are narrowly-tailored to serve that interest: the President must expressly declare a national emergency, and the agency must assemble a specific factual basis for designating an individual or organization in connection with that emergency (as reflected in the administrative record that is subject to judicial review). Moreover, the availability of a post-seizure judicial review process provides adequate protection for the individual's interests, in light of the compelling government interest on the other side of the balance. *See Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 159-64 (D.C. Cir. 2003).

Imposing a warrant requirement in this context makes little sense in light of the President's extraordinary powers in the foreign affairs arena. *See Regan v. Wald*, 468 U.S. 222, 242 (1984). Those powers are at their pinnacle where, as here, the President acts pursuant to an express delegation of authority from Congress. *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (executive action in such circumstances is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.") (quotation marks and citation omitted)).

For these reasons, courts have recognized that IEEPA blocking orders are

reasonable under the Fourth Amendment without a warrant. *See Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F. Supp. 2d 34, 48 (D.D.C. 2005) (IEEPA blocking order "does not create a cognizable claim under the Fourth Amendment"); *see also Holy Land Foundation*, 219 F. Supp. 2d at 78-79, 84 (holding that freezing HLF's accounts did not implicate the Fourth Amendment, and denying preliminary injunction on HLF's claim that OFAC's seizure of its property violated the Fourth Amendment, because, although HLF had stated a claim, it had not shown a substantial likelihood of success on the merits "in light of the strong arguments advanced by the Government in support of its position."); *but see KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F. Supp. 2d 857, 872-85 (N.D. Ohio 2009) (holding that OFAC blocking order is subject to Fourth Amendment warrant requirement and that special needs exception does not apply). A finding of reasonableness would also be consistent with the President's long-recognized power to use blocking orders to respond to international emergencies, and the Supreme Court's decisions upholding such actions (under both IEEPA and its predecessor, the Trading With the Enemy Act) without suggesting that they give rise to Fourth Amendment concerns. *See, e.g. Wald*, 468 U.S. at 232-33; *Dames & Moore*, 453 U.S. at 674; *Orvis v. Brownell*, 345 U.S. 183, 187-88 (1953); *Propper v. Clark*, 337 U.S. 472, 481-82 (1949).

2. OFAC's Entry Into HLF's Premises And Seizure Of Its Property Fall Under The "Special Needs" Exception.

OFAC's entry into HLF's premises and seizure of HLF's property were justified by the "special needs" exception to the warrant requirement. *See Al Haramain Islamic Foundation, Inc. v. U.S. Dept. of Treasury,* 2009 WL 3756363, *11-*15 (D. Or. Nov. 5, 2009) (No. CIV.07-1155-KI) (OFAC's warrantless seizure of assets of SDGT was reasonable under the "special needs" exception.). This exception applies where (1) the primary purpose of the search or seizure is beyond ordinary criminal law enforcement; and (2) the circumstances of the case make the warrant and probable cause requirements of the Fourth Amendment impracticable. *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Chandler v. Miller*, 520 U.S. 305, 313 (1997); *see also Cassidy v. Chertoff*, 471 F.3d 67, 82 (2d Cir. 2006) ("special needs" exception justifies warrantless trunk searches on public ferries, in order to prevent "large-scale terrorist attacks"); *MacWade v. Kelly*, 460 F.3d 260, 271-72 (2d Cir. 2006) (special needs exception authorizes warrantless bag searches on subway for anti-terrorism purposes).

The purpose of OFAC blocking orders under IEEPA is not ordinary criminal law enforcement but rather protection against the threat posed by financing of international terrorism, which is the cause of the national emergency declared in E.O. 13224. *See In re Sealed Case*, 310 F.3d 717, 745-46 (FISA Ct. Rev. 2002) (protecting the nation against terrorists directed by foreign powers is distinguishable from

ordinary crime control for purposes of special needs analysis). Moreover, obtaining a warrant in this context would be impracticable. OFAC could not describe the items to be seized with sufficient particularity, as a warrant requires, because OFAC generally does not know and cannot discover at the time of blocking the location of all of the assets that it seeks to block. *Al Haramain*, 2009 WL 3756363 at *13 (citing declarations by OFAC director). In addition, such property may be located anywhere in the world, and it is not clear that a court would have jurisdiction to issue warrants for the broad range of assets in question. *Ibid.* Finally, OFAC often must act quickly to prevent asset flight. *Ibid.* Accordingly, a warrant requirement "would interfere to an appreciable degree with the [] system" for imposing economic sanctions during a national emergency pursuant to Congressional authorization and "the delay inherent in obtaining a warrant would make it more difficult . . . to respond quickly to evidence of misconduct." *Griffin*, 483 U.S. at 876.

Appellants' reliance (Baker Br. 48-50) on *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), is misplaced. In that case, the Supreme Court upheld the warrantless seizure of automobiles in partial satisfaction of income tax assessments, but concluded that a warrant was required to seize books and records inside the corporation's office. *Id.* at 354-58. However, the Court made clear that the government's interest in that case "involve[d] nothing more than the normal

enforcement of the tax laws." *Id.* at 354. *G.M. Leasing* therefore has no application where the seizure is not based on ordinary law enforcement but on the government's "special needs" in the context of combating international terrorist financing pursuant to a Presidential finding of a national emergency as authorized by IEEPA.

3. The Independent Source Exception Applies.

Under the independent source doctrine, evidence seized pursuant to a search warrant may be admissible even when that evidence had previously been discovered during an illegal search. *Murray v. United States*, 487 U.S. 533, 536-541 (1988).[35] The independent source doctrine is premised on the notion that, when there is an independent source for challenged evidence, law enforcement should be placed in no worse a position than if the unlawful conduct had not occurred. *Id*. at 537. In applying the independent source doctrine to the facts at hand, the Court in *Murray* stated that "[t]he ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here." *Id*. at 542. "This would not have been the case," the Court continued, "if

[35] Although the government below did not refer to the "independent source" doctrine by name, it explicitly argued that the search was reasonable because it was undertaken pursuant to a search warrant that was independent of and untainted by OFAC's seizure. R. 2/2459-60. In any event, this Court may affirm on any ground supported by the record. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir. 1997).

the agents' decision to seek the warrant was prompted by what they had seen during the initial entry or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." *Ibid*. (footnote omitted).

Even if OFAC's initial seizure violated the Fourth Amendment, the independent source doctrine precludes exclusion of the evidence here because the FBI's search was conducted pursuant to a warrant that was independent of OFAC's actions. As noted above, the FBI did not participate in OFAC's seizure of HLF's property, except to provide security. Neither OFAC nor the FBI inspected documents, reviewed materials, examined computers, or otherwise investigated HLF's property, and the collection and storage of the property was executed by third-party contractors. R. 2/2451-52. Accordingly, there was no indication that anything that was seen during or following OFAC's blocking and seizure of the property prompted the FBI's decision, four months later, to seek a warrant. Moreover, it is clear that no information obtained pursuant to OFAC's actions affected the Magistrate's decision to issue the warrant. The only information derived from OFAC's actions was the paragraph referring to an inventory, which stated the unsurprising fact that HLF's property included typical office materials such as computers and books. R. 2/1458. That paragraph had no effect on the ample evidence of probable cause set forth elsewhere in the affidavit, nor could it have affected the Magistrate's decision. *See United States*

v. Karo, 468 U.S. 705, 719-721 (1984) (a warrant based on probable cause absent tainted information in the warrant affidavit provides an independent source for the discovery of evidence).

4. The Good Faith Exception Applies.

Even if the warrant were found to be deficient, the "good faith" exception to the exclusionary rule would apply. *United States v. Leon*, 468 U.S. 897, 914-15 (1984). Under that exception, evidence should not be suppressed where, as here, the issuing court did not rely on a deliberately or recklessly false affidavit and the affidavit was not so deficient as to make reliance on it unreasonable. *See ibid*. If the evidence were deemed to derive from OFAC's seizure rather than the FBI's, the good faith exception applies there as well, because OFAC seized the property in good faith reliance on the authority of IEEPA. *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (good faith exception applies when law enforcement relies on statute later found unconstitutional).[36]

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[36] As the government argued below, some of the individual appellants, particularly Abdulqader and Elashi, could not establish a reasonable expectation of privacy in the materials seized from HLF's offices, while other individual appellants could establish such an expectation as to only some of the material. R. 2/2461-64; *see United States v. SDI Future Health Inc.*, 568 F.3d 684, 698 (9th Cir. 2009) ("[E]xcept in the case of a small business over which an individual exercises daily management and control, an individual challenging a search of workplace areas beyond his own internal office must generally show some personal connection to the places searched and the materials seized."). The district court did not reach the standing question or

(continued...)

VIII. Elashi's Prior Conviction For Conspiracy To Deal In The Property Of SDT Marzook Was Not The Same Conspiracy For Double Jeopardy Purposes As The Conspiracies Charged Here.

A. Standard Of Review.

This Court reviews *de novo* whether Elashi's prior conviction for conspiracy to deal in the property of Mousa Abu Marzook, a specially designated terrorist, was the same conspiracy for double jeopardy purposes as the conspiracies for which he was convicted in this case. *United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009).

B. Background

In 2003, a federal grand jury charged appellant Elashi, together with two of his brothers, with conspiracy to transact in the property of Specially Designated Terrorist Mousa Abu Marzook, in violation of IEEPA. Prior to Marzook's designation in 1995, Marzook loaned $250,000 to Infocom, Elashi's Texas-based computer company. Infocom recorded Marzook's loans on its books as loans from Marzook's wife, Nadia Elashi (cousin of appellant Ghassan Elashi), and Infocom made periodic interest payments to Nadia. Those interest payments continued following Marzook's designation, until September 2001 when OFAC issued a blocking order directing Infocom's banks to freeze funds in which Marzook had an interest. Elashi was

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[36](...continued)
make relevant factual findings. In the event that this Court determines that evidence should have been suppressed, the Court should remand to the district court to consider the standing issue in the first instance.

convicted based on the post-designation interest payments to Nadia, because, as the evidence established, he knew that those payments represented the proceeds of an investment that in fact belonged to Marzook. *See United States v. Elashyi*, 554 F.3d 480, 490-91, 498-500 (5th Cir. 2008) (describing the transactions and evidence of Marzook's continued interest).

Elashi was initially indicted on the charges in this case in 2004. He did not raise any double jeopardy claim based on his prior indictment for the InfoCom conspiracy until near the end of the second trial, on October 10, 2008. R. 17/853. The district court denied the motion, finding that the prior prosecution involved a different, narrower conspiracy than the one charged here. R. 7/5900-01. Elashi now appeals that ruling, contending that his prior conviction for the InfoCom conspiracy precludes his prosecution on the conspiracy and substantive counts in this case, except for the tax counts.

C. Discussion.

To determine whether conspiracy charges in different indictments are the same for double jeopardy purposes, the Court considers five factors: "(1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offense charged that indicates the nature and scope of the activity that the government sought to punish

in each case; and (5) places where the events alleged as part of the conspiracy took place." *United States v. Delgado*, 256 F.3d 264, 272 (5th Cir. 2001). No single factor is determinative. *Ibid*.; *see also United States v. Calabrese*, 490 F.3d 575, 578-81 (7th Cir. 2007) (explaining, in upholding a RICO conspiracy indictment that encompassed a substantial portion of a prior one, that a single pattern of criminal activity could underlie overlapping conspiracies that are nevertheless separate crimes for double jeopardy purposes). The ultimate goal of the inquiry is to determine whether there was more than one agreement. *United States v. Stricklin*, 591 F.2d 1112, 1125 (5th Cir. 1979).

Considered as a whole, the *Delgado* factors indicate that the conspiracy to deal in the property of Specially Designated Terrorist Marzook charged in the prior prosecution was a different agreement from the conspiracies to provide material support to Hamas under IEEPA and 18 U.S.C. § 2339B charged in this case.

a. *Time*. The period covered by the IEEPA and money laundering conspiracies in the prior prosecution was from August 1995 to July 2001. While that period substantially overlaps with the time periods involved in this case, this Court has held that conspiracies are not necessarily the same even when the time period of one conspiracy is wholly contained within the time period of another. *See United States v. Futch*, 637 F.2d 386, 390-91 (5th Cir. Unit B, 1981).

b. *Persons Acting As Coconspirators*. This case involves many more co-conspirators than the prior prosecution, including, most obviously, appellants Abu Baker, El-Mezain, Abdulqader, and Odeh, who were not alleged to be coconspirators in the previous indictment. Although Elashi's coconspirators in the prior prosecution – Bayan, Basman, and Nadia Elashi; Marzook; and Infocom – were also co-conspirators in this case, they played different roles in the different conspiracies. This case involved Elashi's actions as a founder and officer of HLF and his and his co-conspirators' connections with HLF, Hamas, and the Palestinian social committees, while the smaller conspiracy charged in the prior prosecution was largely a family affair among the Elashis (and their cousin-by-marriage Marzook) and their company, InfoCom.

c. *Statutory Offenses.* The IEEPA conspiracy charged in the prior prosecution was charged as a violationof the general conspiracy statute, 18 U.S.C. § 371, while the IEEPA conspiracy in the current prosecution is charged as a violation of IEEPA's conspiracy provision, 50 U.S.C. § 1705.[37] The material support conspiracy in the current prosecution also involves a separate statutory offense, 18 U.S.C. § 2339B, from the one charged in the prior conspiracy. In addition, the prior prosecution charged transactions with a different Specially Designated Terrorist (Marzook) than

[37] Among other differences, the IEEPA conspiracy statute carries a higher maximum penalty (20 years) than Section 371 (five years).

the SDT charged in this case (Hamas).

d. *Overt Acts*. The overt acts charged in the prior prosecution are plainly distinct from the overt acts alleged in this case. The prior prosecution charged Elashi and his codefendants with returning money to Marzook that Marzook had previously provided them. *Elashyi*, 554 F.3d at 490-91. In this case, Elashi and his codefendants are charged with a different and far broader range of transactions – transferring funds received from donors to Hamas-controlled entities in the West Bank – in order to support a different designated terrorist (Hamas rather than Marzook).

e. *Places*. The prior prosecution and this case involved different places. The overt acts in the prior prosecution were domestic transfers from Infocom's bank accounts to Nadia Elashi's. R. 34/891-893. The overt acts charged here were international transfers from HLF to Hamas-controlled entities in the West Bank. The conspiracy in this case was far broader geographically – the conspirators raised funds and conducted other activities in various locations throughout the United States and abroad.

On balance, these factors indicate separate conspiracies. The prior prosecution was a limited conspiracy, involving a single investment agreement among the Elashi family to allow Marzook to make periodic payments through InfoCom to his wife. It had very little or nothing to do with HLF, Hamas, the Palestine Committee, or social

committees in the West Bank and Gaza. The conspiracy charged in this case is a much broader agreement with a different and much broader purpose, namely to provide support to Hamas by collecting donations to HLF and distributing those funds to Hamas-controlled social committees in the West Bank.

Elashi contends (Elashi Br. 123) that the government effectively conceded that the two conspiracies were the same for double jeopardy purposes by arguing, when it sought to admit evidence of the InfoCom/Marzook transactions in the current case, that those transactions were "intrinsic" to the current case. However, the government's use of the term "intrinsic" does not equate to a concession that there was only a single conspiracy. Two conspiracies may involve an identical overt act – which would be "intrinsic" to both conspiracies – without becoming the "same offense" for double jeopardy purposes. *See Calabrese*, 490 F.3d at 579 ("Even if the predicate acts in the previous and present prosecutions were identical and the enterprises were under common control, separate prosecutions might not be barred. If a defendant drives two of his friends to an intersection where there are two banks, and each friend robs one of the banks, the driver could be prosecuted twice for two different offenses of aiding and abetting bank robbery, even though he drove only once."). In any event, the government quickly admitted that it should have used the term "relevant" rather than "intrinsic." R. 3/6865. The government's initial description of the transactions as

intrinsic does not alter the fact that the Elashi brothers' agreement with Marzook to transfer money through InfoCom to Nadia was a separate agreement from the far more expansive conspiracy to support Hamas through the HLF and its donations to West Bank charities that was charged here.

IX. Collateral Estoppel Does Not Bar Retrial Of El-Mezain.

A. Standard of Review

The application of the collateral estoppel component of the Double Jeopardy Clause is reviewed *de novo*. *See United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997). In reviewing the district court's ruling on El-Mezain's double jeopardy motion, this Court considers the facts developed at appellants' trial in the light most favorable to the government. *United States v. Deerman*, 837 F.2d 684, 685 (5th Cir. 1988). The district court's factual findings supporting its legal conclusions are reviewed for clear error. *See Garcia v. Dretke*, 388 F.3d 496, 500 (5th Cir. 2004).

B. Background

Following the first trial, the jury hung on Count One (as to all defendants), charging a conspiracy to provide material support to Hamas, in violation of 18 U.S.C. § 2339B. It acquitted El-Mezain on the other counts, including the IEEPA conspiracy charged in Count 11.

On June 11, 2008, El-Mezain sought dismissal of Count One on collateral

estoppel grounds, arguing that the jury – through its acquittals on the other counts – necessarily decided against the government all the issues that underlay Count One. The district court denied the motion on two independent grounds. R. 3/6282-6291. First, the court reasoned that, because "Count 11 requires willful conduct, whereas Count 1 requires only the lesser knowing standard," the jury could rationally have grounded its verdict in a fact – that El-Mezain did not act willfully, with the specific intent to violate the law – that was not a necessary element of Count One. R. 3/6287-88. Second, the court found that, even if El-Mezain were correct that the acquittal necessarily determined a fact essential to Count One, that would be inconsistent with the jury's failure to reach a verdict on that count. R. 3/6290. In reliance on this Court's decision in *United States v. Yeager*, 521 F.3d 367 (5th Cir. 2008),[38] the district court determined that collateral estoppel did not apply when the jury's inconsistent conclusions make it impossible to decide what the jury necessarily determined. R. 3/6290.

C. Discussion

"[T]he Double Jeopardy Clause incorporates the doctrine of collateral estoppel." *Dowling v. United States*, 493 U.S. 342, 347 (1990) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). "Collateral estoppel completely bars a subsequent prosecution only when

[38] The Supreme Court reversed *Yeager* the following year. *Yeager v. United States*, 129 S. Ct. 2360 (2009)

a fact 'necessarily determined' in the first prosecution is an essential element of the offense charged in the subsequent prosecution." *United States v. Brackett*, 113 F.3d 1396, 1399 (5th Cir. 1997). "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980) (internal quotation marks and citation omitted). For that reason, the defendant bears "the burden of demonstrating that the factual issue allegedly barred by collateral estoppel 'was actually decided in the first proceeding.'" *Garcia*, 388 F.3d at 501 (quoting *Dowling*, 493 U.S. at 350).

A "general verdict of acquittal does not specify the facts 'necessarily decided' by the jury"; instead, a general verdict "merely indicates that the government has failed to convince the jury, beyond a reasonable doubt, of at least one essential element of the substantive offense." *Brackett*, 113 F.3d at 1399, 1400; *see United States v. Garza*, 754 F.2d 1202, 1209 (5th Cir. 1985) ("By returning a general verdict of not guilty... the jury did no more than announce that it was not convinced beyond a reasonable doubt of at least one essential element"); *see also Santamaria v. Horsley*, 133 F.3d 1242, 1246 (9th Cir. 1998) (en banc) ("an acquittal is not a finding of any fact"). As this Court has summarized, "[w]here there is more than one possible reason for the jury's verdict, and the court without extrasensory perception ... cannot say that

any one is necessarily inherent in the verdict, the doctrine of collateral estoppel is inapplicable." *Garcia v. Dretke*, 388 F.3d at 502 (quoting *United States v. Irvin*, 787 F.2d 1506, 1515-16 (11th Cir. 1986)).

As the district court correctly held, El-Mezain has failed to carry his burden of showing that the jury necessarily determined any fact that is an essential element of the conspiracy to provide material support to a foreign terrorist organization charged in Count One. El-Mezain's argument rests on the claim that the IEEPA conspiracy (Count 11) on which he was acquitted, and the Section 2339B conspiracy on which the jury hung are "functionally identical." But the two conspiracy counts differ in at least one significant, and dispositive, respect: Count 11 requires "knowing" and "willful" conduct, whereas Count One requires only the lesser "knowing" standard. On its face, therefore, the jury's acquittal of El-Mezain on the IEEPA conspiracy count does not "necessarily determine" any element necessary to support a conspiracy conviction under Section 2339B. Moreover, it was reasonable in light of the instructions, evidence, and arguments in this case for a jury to have acquitted on the conspiracy requiring the more demanding intent standard while also finding that the lesser standard was met for a separate conspiracy charge.

The jury instructions clearly set forth the intent elements of the two conspiracies. Count 11 (the "IEEPA conspiracy") charged a conspiracy to provide

funds, goods, and services to a Specially Designated Terrorist, in violation of 50 U.S.C. §§ 1701-1707. Section 1705 provides that "whoever willfully violates any license, order or regulation issued under this title" commits a crime. The jury was instructed that the elements required to prove the IEEPA conspiracy included "that the defendant under consideration knowingly *and willfully* became a member of the conspiracy with the intent to further its unlawful purpose." R. 3/5387 (emphasis added). The IEEPA conspiracy instruction referred the jury to the definitions of "knowingly" and "willfully" provided elsewhere in the instructions. The instructions defined "knowingly" as meaning "that the act to which it refers was done voluntarily and intentionally, and not because of mistake or accident." R. 3/5369. The instructions stated that "willfully" means "that the act to which it refers was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with a bad purpose either to disobey or disregard the law." R. 3/5369.

Count One (the "material support conspiracy"), on the other hand, charged a conspiracy to provide material support to a foreign terrorist organization under 18 U.S.C. § 2339B(a)(1). That section provides that "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," commits a crime. *Id.* The jury was instructed that the elements of a material support conspiracy include "that the defendant under consideration

knowingly became a member of the conspiracy with the intent to further its unlawful purpose." R. 3/5378 (emphasis added). The material support conspiracy instruction further explained the intent element as follows:

> The second element requires you to find that when a defendant joined the conspiracy to provide material support or resources to a designated terrorist organization, he did so "knowingly." To do so, you must find beyond a reasonable doubt that (1) the defendant under consideration agreed to provide material support or resources to Hamas, and (2) the defendant under consideration either knew that Hamas was designated by the United States government as a foreign terrorist organization, or he knew the organization has engaged in or engages in terrorist activity.

R. 3/5378-79.

Based on the evidence that the government presented, and the defenses jointly urged by the defendants, it is clear that the jury did *not* necessarily decide that El-Mezain "was not part" of a "unitary scheme to provide assistance to Hamas via charitable donations to the same set of Palestinian institutions in the West Bank and Gaza." El-Mezain Br. 5. Rather, the jury reasonably could have determined that El-Mezain agreed to provide material support to Hamas with knowledge that it was a terrorist organization, but that he did not do so willfully – with a bad purpose to disobey the law – because he believed that supporting Hamas by donating to charities that were not themselves designated by the government was lawful.

That conclusion is consistent with the trial record. At trial, the government presented powerful evidence that El-Mezain was part of a conspiracy to support

Hamas by donating to social committees the conspirators knew were controlled by Hamas. Appellants, however, spent a significant portion of their case trying to persuade the jury that they did not believe it was illegal to support the committees. They argued that, while Hamas was a designated terrorist organization, the committees identified in the indictment were not separately designated. During cross-examination, the defense elicited testimony from government witnesses to the effect that the Treasury Department could have separately designated any organization they believed was controlled by Hamas, but had not done so. *See, e.g.*, R. 6/668-69. They argued strenuously during closing that not one of the Indictment Committees was designated during the time period of the indictment, and that this showed that appellants had no way of knowing that it was illegal to donate to them. R. 4/1820, 1939, 2046-51.[39]

The defense emphasized appellants' efforts to comply with the law in good faith. They pointed out that HLF had hired John Bryant, a former Congressman who testified at trial, to meet with the FBI and other government officials to seek guidance from the government as to how they could perform charitable work in Palestine in compliance with the law. They referred to recorded statements in which appellants indicated their intent not to donate to designated entities. R. 4/1819-20. And, at closing argument, defense counsel made these points with specific reference to the

[39] On appeal, appellants maintain that they believed it was only illegal to donate to an entity if it was separately designated. *See* Elashi Br. 13 n.11

jury instructions' definition of "willful" conduct, and specifically argued that the government had not proved that appellants had acted willfully. R. 4/1914; 2050-51. Counsel for El-Mezain called the instruction defining "willfully" an "important instruction," and quoted it for the jury. R. 4/1894. Then he urged the jury to

> Think about all Holy Land did to make sure that it was on the right side of the law. Hired an excongressman lawyer, Mr. Bryant, to navigate the territory and find out what we do. Are we doing anything wrong? They went to the government to learn that . . .
>
> They studied the law and the [designation] list . . . They didn't provide aid to any designated organizations once the law was in effect, and they made wholly transparent in-kind and monetary transfers through banks.
>
> . . .
>
> Mr. Bryant told you, all the government had to do is tell them don't deal with these Zakat Committees. The government didn't tell them that. Wouldn't tell them that.

R. 4/1895-96.

The jury, therefore, rationally could have believed that El-Mezain knowingly joined a conspiracy to support Hamas, in that he voluntarily agreed and intended to send money to the benefit of Hamas through HLF and the social committees. At the same time, the jury could have accepted the defense's argument that he did not do so willfully because he did not believe it was unlawful to support Hamas through donations to undesignated committees. Thus, El-Mezain cannot carry his burden to

show that the jury necessarily decided against the government the question of whether he knowingly conspired to provide support to Hamas.

El-Mezain argues at length that the government presented a unitary theory – that its arguments and evidence did not distinguish between the IEEPA and material support conspiracies. Nowhere does he explain how that fact, even if true, negates the possibility that the jury rested its acquittal on the willfulness element, in accord with the defense's own evidence and argument, and with the jury charge's distinction between knowing and willful conduct. In short, because the acquitted conspiracy has an element that the material support conspiracy lacks, it was El-Mezain's burden to show that, in the context of the facts and arguments presented in the case, the jury's acquittal could not have been based on the element that the conspiracies do not have in common. He has not come close to meeting that burden.

El-Mezain contends (Br. 17-18) that the "foundation" of the district court's denial of his double jeopardy motion has been undermined by the Supreme Court's decision in *Yeager v. United States*, 129 S. Ct. 2360 (2009). El-Mezain is incorrect. In *Yeager*, the Supreme Court held that where a jury acquits on some counts and fails to agree on other counts, the fact that the jury failed to reach a verdict on some of the counts does not deprive the acquittals of their preclusive effect. The Court reasoned that for double jeopardy purposes, a jury's inability to reach a verdict on certain counts

is "a nonevent." 129 S. Ct. at 2367. It is true that the district court relied on this Court's decision in *Yeager* (as it should have, since that decision was binding until it was reversed by the Supreme Court) in concluding that the hung jury on Count One made it impossible to determine what facts the jury found. R. 3/6290. However, that conclusion was only one of two independent, alternative grounds for the district court's denial of the motion.

Contrary to El-Mezain's contention (Br. 45-46), the primary basis for the district court's decision – that El-Mezain could not prove that the acquittal was based on the government's failure to prove an element other than willfulness – is unaffected by *Yeager*. The district court's determination that the jury rationally could have acquitted El-Mezain based on the government's failure to prove that he had acted willfully did not in any way rely on the fact that the jury hung on Count One. The court's decision was therefore entirely consistent with *Yeager*.

El-Mezain argues (Br. 43, 48-49) that any distinction between the intent requirements for the material support and IEEPA conspiracies was "illusory" because, in a discussion of the concept of conspiracy in general, the court instructed the jury that the defendant must have joined the conspiracy "willfully, that is, with the intent to further the unlawful purpose." R. 3/5374. However, that general instruction does not undermine the district court's denial of the double jeopardy motion.

First, as the district court found, to the extent there is a conflict between the intent element set forth in the general definition of conspiracy and the intent element described in the instruction for the specific count, the specific term controls over the general term. R. 3/6289. That is particularly true here where the instruction on the material support count explained in detail the meaning of "knowingly" as applied to that count. R. 3/5378-79. Second, even if the material support conspiracy instruction had unambiguously (albeit erroneously) required a finding of willfulness, that would not affect the court's analysis of the preclusive effect of the acquittal on the IEEPA conspiracy. As *Yeager* establishes, the jury's failure to reach a verdict on the material support conspiracy was a nonevent for collateral estoppel purposes. 129 S. Ct. at 2367. Accordingly, El-Mezain cannot rely on the fact that the jury hung on the Count One conspiracy – regardless of the jury instructions on that count – to prove that the acquittal in Count 11 must have rested on an element other than willfulness.

Contrary to El-Mezain's contention (Br. 33-35, 42-43), his acquittal on the substantive material support counts does not preclude his retrial on the material support conspiracy. The acquittals on the substantive counts did not preclude conviction on the conspiracy, because the jury could rationally have acquitted El-Mezain on the basis of his not having personally made or authorized the money transfers to the Indictment Committees. Such personal involvement is not required for

conviction on a conspiracy count.

As El-Mezain points out, the court gave a *Pinkerton* instruction that permitted the jury to convict El-Mezain on the substantive counts based on the actions of a coconspirator. However, that instruction was permissive rather than mandatory. *See* R. 3/5384, 5393-94, 5399-5400 ("[I]f you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, other members of that conspiracy committed the [substantive crimes] in furtherance of . . . that conspiracy, then you *may* find the defendant under consideration guilty.") (emphasis added). This Court has approved the use of permissive or discretionary *Pinkerton* instructions. *United States v. Thomas*, 348 F.3d 78, 84-85 (5th Cir. 2003). When such an instruction is given, an acquittal on a substantive count does not preclude retrial on the corresponding conspiracy, because the jury logically may have exercised its discretion not to convict the defendant based on the acts of a co-conspirator.

El-Mezain's contention (Br. 52-59) that the collateral estoppel doctrine required the district court to exclude evidence at the second trial is incorrect for the same reason. Because a reasonable jury could have acquitted him based on the willfulness element, there was no basis at the second trial for excluding evidence that was relevant to the charge that he knowingly conspired to support Hamas in 1997, even if that evidence reflected conduct that occurred before that date.

X. The District Court Correctly Instructed The Jury On The First Amendment.

Appellants claim (Abdulqader Br. 12-23) that the district court's instructions on the First Amendment failed to inform the jury of the limited purposes for which it could consider appellants' protected speech, thereby permitting the jury to convict them on the basis of such speech. As explained below, the district court's instructions correctly stated the law and ensured that appellants were convicted for providing material support to a terrorist organization and not for possessing or expressing pro-Hamas opinions.

A. Standard of Review.

This Court reviews jury instructions for abuse of discretion. *United States v. Daniels*, 281 F.3d 168, 183 (5th Cir. 2002). The Court will not reverse "unless the instructions taken as a whole do not correctly reflect the issues and law." *United States v. Simmons*, 374 F.3d 313, 319 (5th Cir. 2004).

B. Discussion.

The district court's First Amendment instruction began by quoting the material support statute's provision that "[n]othing in this section shall be construed or applied as to abridge the exercise of rights guaranteed under the First Amendment." R. 17/1122. The instruction then quoted the First Amendment and explained:

> This amendment guarantees to all persons in the United States the

> right to freedom of speech, freedom of religion, and freedom of association. Because of these constitutional guarantees, no one can be convicted of a crime simply on the basis of his beliefs, his expression of those beliefs, or his associations. The First Amendment, however, does not provide a defense to a criminal charge simply because a person uses his associations, beliefs, or words to carry out an illegal activity. Stated another way, if a defendant's speech, expression, or associations were made with the intent to willfully provide funds, goods, or services to or for the benefit of Hamas, or to knowingly provide material support or resources to Hamas, as described in the indictment, then the First Amendment would not provide a defense to that conduct.

Ibid.

Appellants claim that instruction was error because, under the facts of this case, the jury could only consider appellants' pro-Hamas speech as evidence of intent, but the instruction gave the impression that the speech itself could constitute criminal conduct. *See* R. 7/9398-99 (objecting to the instruction).

"The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). Moreover, freedom of speech does not "bar prosecution of one who uses a public speech . . . to commit crimes." *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999). As the *Rahman* court noted, "[n]umerous crimes under the federal criminal code are, or can be, committed by speech alone." *Ibid*. Conspiracy to provide material support to a terrorist organization is such a crime. *Ibid.* (conspiracies generally committed through speech). The Supreme Court has

recently made clear that the First Amendment does not prevent the government from criminalizing providing material support to terrorism, even when that support takes the form of speech. *Humanitarian Law Project*, 130 S. Ct. at 2724-25.

The district court's First Amendment instruction was consistent with those principles. The instruction properly made clear that appellants could not be convicted on the basis of beliefs, expressions, or associations that were independent of any criminal conduct. R. 17/1122. The instruction also properly informed the jury that the First Amendment does not provide a defense where appellants' expression was used or intended to be used to provide material support to Hamas. *Ibid*.

Abdulqader contends (Br. 14-17, 22) that the instruction should have stated that the jury could only consider his speech as evidence of intent, because his performances did not "constitute an offense or incitement to imminent lawless action." *Id.* at 17. Abdulqader is mistaken. He was charged with conspiring to provide material support to Hamas, and one of his roles in the conspiracy was to motivate audiences to contribute funds to HLF by performing pro-Hamas songs and plays. *See, e.g.* GX Mushtaha Search 1. As Abdulqader points out, such performances are, in the abstract, protected by the First Amendment. But if those performances are knowingly conducted in furtherance of a conspiracy to provide material support to Hamas, they are criminal conduct and the First Amendment does not prevent the jury from

considering it as such. *See Humanitarian Law Project*, 130 S. Ct. at 2724-25; *Rahman*, 189 F.3d at 117 (conspiracy is typically accomplished through words); *United States v. Salameh*, 152 F.3d 88, 112-12 (2d Cir. 1998) (evidence of defendant's political views admissible to "prove the existence of the bombing conspiracy"). The court's instructions accordingly drew the proper distinction between protected speech and criminal conduct.

Rahman is not to the contrary. *Rahman* approved the admission of evidence of the defendant's opinions expressing hostility to the United States in part because the district court instructed the jury that it could use that material only as evidence of intent. 189 F.3d at 118. However, those opinions were not part of the conspiracy, and the court made clear that the First Amendment did not limit the jury's consideration of speech that "constituted the crime of conspiracy." *Id.* at 117. The instructions here were consistent with *Rahman*, in that they made clear a person may not be convicted on the basis of beliefs, speech, or associations, but there is no First Amendment defense when a person uses words to carry out illegal activity, with the intent to provide material support to a terrorist organization.

Any error in the instruction was harmless in the context of the rest of the court's instructions, which made clear that the jury could only convict appellants if they willfully or knowingly joined a conspiracy to provide material support to Hamas.

Moreover, at closing argument, the government repeatedly argued that appellants' speech was relevant only to show intent, which is the principle that appellants assert should have been explicit in the instruction. R. 7/9473 ("[F]reedom of speech is an incredible right that we have here in the United States. But the Defendants aren't charged with what they said. They are charged for what they did, and that is sending money to Hamas."); *see ibid.* ("They are perfectly right to say, 'I support Hamas.' But when they start giving money to Hamas, then what they said can and will be used against them to determine their intent."); R. 7/9734.[40]

XI. The Government Did Not Intentionally Provoke A Mistrial.

A. Standard of Review

"[T]he trial court's finding of manifest necessity for a *sua sponte* declaration of mistrial is to be upheld if the court exercised sound discretion in making that determination." *United States v. Bauman*, 887 F.2d 546, 549 (5th Cir. 1989) (internal quotation marks omitted). The court of appeals affords the trial judge's mistrial order

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[40] Amici Humanitarian Law Project et al. challenge (Br. 15-26) the court's instructions related to the substantive material support counts. That claim is not raised by any parties to the case, and is therefore not properly before the Court. In any event, the claim appears to be based on a mistaken reading of the instructions. Amici allege that the jury instructions on the substantive material support counts required a finding that appellants knowingly provided material support "to the entity listed in that count," when the instruction should have stated "to Hamas through the entity listed in that count." Br. 9-10. However, the court's charge to the jury as filed contains the language "to Hamas through the entity" that amici claim was left out. R. 3/7008 (Docket Entry 1246).

the "highest degree of respect," because the judge is "most familiar with the events that compromised the trial." *Id.* at 549-50. Any factual findings underpinning the district court's determination of "manifest necessity" are reviewed for clear error. *United States v. Campbell*, 544 F.3d 577, 581 (5th Cir. 2008).

B. Background.

Following the first trial before Judge Fish, the jury deliberated for 19 calendar days over a four-week period without reaching a verdict. On October 18, 2007, the jury sent out a note stating that it had reached a verdict, but only as to some counts and some defendants. R. 8/7393. The note also stated that the jury did not believe that further deliberations would produce any more unanimous decisions. *Ibid.* Judge Fish brought all parties to the courtroom and read the jury's verdict form. The form indicated a not guilty verdict on all counts for appellant Abdulqader, not guilty on all counts except Count One as to El-Mezain, not guilty on all counts excepts Counts One and 11 as to Odeh, and no verdicts as to other appellants. *Id.* at 7394-98.

Judge Fish then polled the jury, and three of the jurors stated that the verdict form did not represent their verdicts. R. 8/7398-99. Judge Fish instructed the jury to return to the jury room to determine whether further deliberations might resolve the disagreement. *Id.* at 7400-01. The jury later sent another note, stating that 11 of the 12 jurors agreed that further deliberations would not be productive. *Id.* at 7401.

Counsel for El-Mezain and Abdulqader then asked that the court poll the jurors again regarding their verdicts as to El Mezain and Abdulqader specifically. *Id.* at 7402-03. The court stated that there was an "overwhelming indication" that further deliberations would not be productive, but agreed to poll the jurors again to clarify whether there were any unanimous verdicts. *Id.* at 7403. Counsel for El-Mezain stated, "I think we all agree, as we did on Thursday, that we don't think further deliberation is fruitful. We just want to see whether we have an actual verdict as to some of the defendants." *Id.* at 7403.

Counsel for Elashi then asked whether the court would declare a mistrial as to the defendants for whom there had been no verdicts, and the court stated "I think that is the only choice I have." R. 8/7404. Counsel stated, "We agree. I wanted to be clear." *Ibid.*

The court then polled the jurors again, and the result was that all jurors concurred in the not guilty verdicts for El-Mezain (except for Count One), but there were no unanimous verdicts as to any other appellants. R. 8/7406-09. The court then entered the verdicts as to El-Mezain, and declared a mistrial as to El-Mezain on Count One and as to all other appellants on all other counts. *Id.* at 7411-12. The court noted that the result was "the government has the option of bringing this prosecution again." *Id.* at 7412. No one objected to the court's declaration of a mistrial. *Ibid.*

Appellants filed a motion to dismiss the indictment on double jeopardy grounds. Appellants alleged that the government had committed misconduct by including some demonstrative and non-admitted exhibits with the evidence submitted for the jury's deliberations. Appellants claimed further that, if not for the misconduct, the jury would have acquitted all defendants and that, in those circumstances, permitting a retrial would violate Double Jeopardy. R. 35/6392-93. In response, the government argued that there was manifest necessity for the mistrial, that appellants had consented to it, that there was no credible evidence that the inclusion of some demonstrative and non-admitted exhibits had been anything other than an inadvertent mistake, or that the jury would have acquitted everyone in the absence of that mistake. R. 3/5910-11.

The district court (Judge Solis) denied the motion. R. 3/6141-45. The court found that all appellants, including Abdulqader, had consented to the mistrial. *Id.* at 6142-43. The court also found that there was no evidence to support appellants' claim that the prosecution knew an acquittal was likely and had deliberately submitted the extraneous exhibits in order to provoke a mistrial. R. 3/6144.

C. Discussion

Appellants renew (Abdulqader Br. 23-41) their contention that they did not consent to a mistrial, that any consent was induced by deliberate government misconduct, and that their retrial was barred by double jeopardy. Appellants are

incorrect. The district court correctly found that appellants consented to the mistrial, and that the government did not commit intentional misconduct.

In general, double jeopardy bars retrial of a defendant following a trial court's *sua sponte* declaration of a mistrial, unless the mistrial is justified by "manifest necessity." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). However, when the defendant consents to the mistrial, double jeopardy does not bar reprosecution. *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997). Such consent can be either express or implied: "If a defendant does not timely and explicitly object to a trial court's *sua sponte* declaration of a mistrial, that defendant will be held to have impliedly consented to the mistrial and may be retried in a later prosecution." *Ibid.*; *see also United States v. Nichols*, 977 F.2d 972, 974-975 (5th Cir. 1992).

Appellants contend (Abdulqader Br. 32-33) that they did not consent to the mistrial. That contention is inconsistent with the record and the district court's finding. R. 3/6142-43. When the district court announced its intention to declare a mistrial, counsel for Baker and Elashi expressly agreed with the mistrial. R. 8/7403-04. Counsel for Odeh acquiesced by saying nothing. Counsel for Abdulqader stated: "I would make a specific request to poll jurors as to my client. I think clearly he has the most to lose from mistrying this case, and I think that at least is warranted based on the facts." *Id.* at 7402-03. That statement does not amount to an objection to a

mistrial or a "suggest[ion of] an alternative course." Br. 33. Rather, as the district court found, counsel's statement "consented to the mistrial with the condition that the judge poll the jurors with respect to her client." R. 3/6142. The judge polled the jurors as she requested. R. 8/7407-09. Then, following the poll, the court declared a mistrial and no defense counsel voiced any objection. *Id.* at 7412. The district court's finding that appellants consented to the mistrial was not clearly erroneous.[41]

Appellants' consent to the mistrial is fatal to their double jeopardy claim, unless they can establish that the prosecution, in order to avoid an acquittal, intentionally provoked appellants to seek or consent to a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982) ("[P]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."). "Retrial is not barred even where the prosecution engages in intentional misconduct that seriously prejudices the defendant," *United States v. Wharton*, 320 F.3d 526, 532 (5th Cir. 2003), but only when the prosecutor's conduct was "intended to terminate the trial," *ibid*.

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[41] Even if appellants did not consent, there is no question that there was manifest necessity for the mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (hung jury is the "prototypical example" of manifest necessity). The jury had been deliberating for 19 days and had been given an *Allen* charge. The district court's finding that further deliberation would not be productive was plainly correct, and several defense counsel expressly agreed with that finding. R. 3/7403-04.

Government "blunder," even "gross negligence" resulting in a defendant's successful motion for mistrial is insufficient to bar a retrial. *United States v. Singleterry*, 683 F.2d 122, 124-25 (5th Cir. 1982); *United States v. Oseni*, 996 F.2d 186, 188 (7th Cir. 1993). Moreover, even if the prosecutor acts improperly, so long as his intent is to prevail at the trial and not to terminate it, a retrial is not barred on double jeopardy grounds. *Singleterry*, 683 F.2d at 124-25. The Seventh Circuit has stated correctly that it is not enough that there was error, that the error was committed by the prosecutor, and that it was deliberate prosecutorial misconduct – the misconduct must have been committed for the purpose of preventing an acquittal. *United States v. Catton*, 130 F.3d 805, 807-08 (7th Cir. 1997).

The district court considers the objective facts and circumstances when determining whether the prosecutor intended to terminate the trial. The district court's finding that the prosecutor did not intend to provoke a mistrial is a finding that must be upheld unless it is clearly erroneous. *Singleterry*, 683 F.2d at 124-25.

As the district court correctly found, the record does not support appellants' assertion that the government deliberately submitted the extraneous exhibits because it wished to avoid an acquittal by causing a mistrial. R. 3/6144. Appellants point to no evidence suggesting that the government believed there would be acquittals at the time it submitted its exhibits; in fact, both the strength of the government's case

(which featured much of the same evidence presented in the second trial) and appellants' repeated motions for mistrials, which the government did not join, suggest the contrary. R. 6/1166-67, 1403-05,1682, 2988; *see Wharton*, 320 F.3d at 532 (government opposition to defendant's motions for mistrial indicates government did not affirmatively provoke mistrial). Appellants contend (Br. 40-41) that the government later discovered that an acquittal was likely based on statements by a juror who was dismissed during deliberations. However, as the district court found, the juror's comments suggested only that the jury was divided – they did not indicate an inevitable acquittal. R. 3/6144 n.1. Nor did the jurors' questions regarding whether they had extraneous material "put the government on notice" that it had submitted such material. As Judge Solis found, the jury's questions caused neither Judge Fish nor defense counsel to voice any concern regarding extraneous exhibits, because, at that time, "no one believed the jury had those exhibits in its possession." R. 3/6144 n.2. Finally, the district court correctly found that the government's denials that it had given non-admitted or demonstrative exhibits to the jury did not establish that the government acted intentionally, because those denials were at least as likely to reflect "the prosecution's conviction (albeit erroneous) that it had submitted only proper exhibits." *Id.* at 6144. Thus, the record does not establish that the government's submission of extraneous exhibits to the jury was anything other than unintentional,

and appellants have not come close to showing that the district court's finding in that regard was clearly erroneous.

XII. Appellants' Sentences Were Properly Computed.

A. Standard of Review.

This Court reviews the district court's interpretation and application of the Sentencing Guidelines *de novo* and its factual determinations for clear error. *United States v. Charon*, 442 F.3d 881, 886-87 (5th Cir. 2006).

B. Terrorism Enhancement.

In the presentence reports (PSR), the Probation Office recommended (*e.g.* Baker PSR) that appellants receive a 12-level enhancement and placed appellants in criminal history category VI, pursuant to Sentencing Guideline Section 3A1.4, which applies "[i]f the offense is a felony that involved or was intended to promote a Federal crime of terrorism." The application notes to this section identify a "federal crime of terrorism" per the definition in 18 U.S.C. § 2332b(g)(5), which states that "the term Federal crime of terrorism means an offense that - (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of [one of a list of offenses including] 2339B." The second requirement is automatically met as appellants were all convicted of a violation of 18 U.S.C. § 2339B.

Appellants objected to the PSRs on the ground that their offense was not calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. *See* Elashi Addendum to PSR at 5-6. The district court rejected that argument, and found that appellants established HLF to support Hamas, and that the evidence at trial, including videotapes of fund-raising functions, wiretapped conversations, and documents all established that appellants supported Hamas's mission, including its terrorist activities. *See, e.g.*, R. 15/203 (Baker).

Appellants contend (Elashi Br. 127-28) that the district court clearly erred in applying the terrorism enhancement, because there was "no evidence" that they committed the offenses "to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Appellants ignore the overwhelming evidence presented at trial proving that they established and operated HLF for the purpose of providing funds to Hamas, a group dedicated not only to influencing the conduct of government by intimidation or coercion, but ultimately to destruction of the government of Israel by violence. GX Hamas Charter 1. The evidence also established that each of the appellants was aware of Hamas's political goals, had close ties to senior Hamas leadership, and personally shared Hamas's political purposes. *See, e.g.*, GX Philly Meeting 5E, 6E, 9E (Baker and Elashi in

discussions of derailment of Oslo Accords); GX El-Mezain Wiretap 4 (Odeh and El-Mezain discussing a "beautiful" Hamas suicide bombing); GX Mushtaha Search 1 (Abdulqader performing at an HLF fundraising event as a Hamas character who kills an Israeli civilian). The district court did not clearly err. *See Hammoud*, 381 F.3d at 356 (evidence supported terrorism enhancement where defendant provided material support to a terrorist organization, had close connections with its officials, and was well aware of its terrorist activities and goals).

C. Money Laundering Calculation.

The Probation Office calculated the value of the laundered funds, under U.S.S.G. § 2S1.1(a)(2), as $16,672.793.95, which represented the value of all money that HLF transferred out of the United States between 1995 and 2001. *See, e.g.*, Baker PSR at ¶ 28, 30. The Probation Office acknowledged that $4 million of that amount was not proven to have gone to Hamas-controlled entities. PSR Addendum (Baker) at 3-4. Nevetheless, the Probation Office recommended including the full amount as the value of laundered funds, because the evidence showed that the mission and purpose of HLF was to support Hamas, and HLF's international transfers to non-Hamas entities was done in furtherance of the conspiracy because they helped conceal HLF's true agenda. *Ibid.* The district court agreed, finding that even HLF's transfers to legitimate entities were in service of its "sole purpose" of supporting Hamas. R.

15/215.

Appellants contend (Elashi Br. 128) that the district court's calculation was clearly erroneous in that it included transfers to entities that "the jury did not find" to be controlled by Hamas. Contrary to appellants' contention, the district court may include relevant conduct beyond the jury's finding under U.S.S.G. § 2S1.1, *see Charon*, 442 F.3d at 889, and appellants do not otherwise contend that the district court's finding that all of HLF's international transfers were in furtherance of its goal of supporting Hamas was clearly erroneous.

CONCLUSION

For the foregoing reasons, appellants' convictions and sentences should be affirmed.

Respectfully submitted,

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January 28, 2011

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

On January 26, 2011, the Court granted the government leave to file briefs not to exceed 75,000 words. I hereby certify that this brief contains 41,206 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 28, 2011.

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FIFTH CIRCUIT
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No 09-10560 Cons/W 08-10664,et al USA v. Mohammad El-Mezain,et al

USDC No. 3:04-CR-240-3
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USDC No. 3:04-CR-240-7
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The following pertains to your brief electronically filed on January 28, 2011. (AS TO Case Numbers 09-10560, 08-10664, 08-10678, & 08-10774)

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Sincerely,

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