IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10560

UNITED STATES OF AMERICA,
Plaintiff – Appellee

v.

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

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

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
HONORABLE JORGE A. SOLIS, DISTRICT JUDGE
No. 3:04-CR-240-3

OPENING BRIEF OF DEFENDANT-APPELLANT MOHAMMAD EL-MEZAIN

JOSHUA L. DRATEL
NY BAR CARD NO. 1795954
LAW OFFICES OF JOSHUA L. DRATEL, P.C.
2 Wall Street, 3rd Floor
New York, New York 10005
Tel: 212.732.0707
Fax: 212.571.3792
jdratel@joshuadratel.com

ATTORNEYS FOR DEFENDANT-
APPELLANT MOHAMMAD EL-MEZAIN

– Of Counsel –

Joshua L. Dratel
Aaron Mysliwiec
Lindsay A. Lewis

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellant Mohammad El-Mezain certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Abdulqader, Mufid

Abu Baker, Shukri

Boyd, John W.

Cadeddu, Marlo

Cline, John D.

Cowger, Susan

Dratel, Joshua L.

Duncan, Theresa M.

El-Mezain, Mohammad

Elashi, Ghassan

Hollander, Nancy

Holy Land Foundation for Relief and Development

Huskey, Kristine

Jacks, James

Jonas, Barry

Moreno, Linda

Mysliwiec, Aaron

Natarajan, Ranjana

National Security Clinic, University of Texas School of Law

Odeh, Abdulrahman

Office of United States Attorney, Northern District of Texas

Shapiro, Elizabeth

Solis, Honorable Jorge

Westfall, Gregory B.

DATED: October 19, 2010
New York, New York

Respectfully submitted,

/s/ Joshua L. Dratel

Joshua L. Dratel
Attorney of Record for Defendant-Appellant
MOHAMMAD EL-MEZAIN

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. This case comes to the Court after two lengthy trials that have generated a lengthy record and a number of significant issues. Oral argument will assist the Court in addressing the intricacies of the record and the nuances of the controlling law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court's jurisdiction is based on 18 U.S.C. §3231. The basis for this Court's jurisdiction is 28 U.S.C. §1291. This appeal is from a Judgment entered May 28, 2009, by the Honorable Jorge A. Solis, United States District Judge, Northern District of Texas, following Mohammad El-Mezain's conviction after trial on one count charged against him in Indictment 3:04 Cr. 340 (JAS) (03), and subsequent sentencing. 20R. 470 (RE E).[1] A timely Notice of Appeal was filed May 27, 2009. 20R. 468 (RE B). Mr. El-Mezain is appealing a final order of the District Court regarding his conviction. This appeal resolves all claims between the parties.

STATEMENT OF THE ISSUES

1. Whether the District Court's denial of Mr. El-Mezain's motion for dismissal based on collateral estoppel was erroneous because the jury at his first trial, in acquitting Mr. El-Mezain on 31 of 32 counts (and deadlocking on the remaining count), including two other

[1] "RE" denotes Appellant Mohammad El-Mezain's Record Excerpts and the accompanying letter denotes the lettered tab within Mr. El-Mezain's Record Excerpts. "R." denotes the Record on Appeal, with the number preceding it indicating the volume. Also, Mr. El-Mezain adopts his co-appellants' Record Excerpts.

conspiracies that mirrored the conspiracy charged in the deadlocked count, necessarily decided against the government facts constituting an essential element of Count One.

PRELIMINARY STATEMENT AND INTRODUCTION

This Brief on Appeal is submitted on behalf of Defendant-Appellant Mohammad El-Mezain. After a ten-week trial, and 20 additional days of deliberation, the jury at his first trial in this case acquitted Mr. El-Mezain on 31 of 32 charged counts. Count 1, the conspiracy to provide material support to a Foreign Terrorist Organization (hereinafter "FTO"), namely, Hamas, was the only count on which the jury remained deadlocked.

However, under the doctrine of collateral estoppel (or "issue preclusion"), incorporated within the Fifth Amendment's protection against Double Jeopardy, the jury's verdict on all the other counts, including the functionally identical conspiracy to violate the International Emergency Economic Powers Act (hereinafter "IEEPA"), to provide "funds, goods, and services" to Hamas, as well as nine substantive IEEPA counts, nine other "material support" counts, and the related conspiracy to commit money laundering, requires that Count 1 be dismissed.

As detailed below, review of the record demonstrates that *all* of the facts

relevant to the remaining count, a conspiracy to provide "material support" to Hamas charged in Count 1, were necessarily decided by the jury's acquittal of Mr. El-Mezain – the only defendant for whom the jury at the first trial reached *any* verdict – on the other 31 counts, which foreclosed consideration of various elements of Count 1. As a result, Mr. El-Mezain's collateral estoppel motion should have been granted.

In denying Mr. El-Mezain's motion, the District Court erred in several respects, most dramatically because it mistakenly relied on *United States v. Yeager*, 521 F.3d 367 (5th Cir. 2008), for the proposition that "[e]ven if the Court found that one or more facts necessarily decided [in the acquittals at the first trial] constitute essential facts of Count 1, a problem arises because the same jury hung on Count 1." *See* 3R. 6290 (RE F) & District Court Docket Number (hereinafter "Dkt. #") 1141, 8/11/08, at 2.

By considering the deadlocked count along with the acquittals in determining whether collateral estoppel applied, the District Court made the same error the Supreme Court subsequently identified and corrected in *Yeager*, in which the Court answered in the *negative* the question presented: "whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals

under the Double Jeopardy Clause." *Yeager v. United States*, ___ U.S. ___, 129 S. Ct. 2360, 2362-63 (2009). Thus, the Supreme Court's decision in *Yeager* has vitiated a critical element of the District Court's analysis.

Also, instead of performing the *factual* analysis required for collateral estoppel, the District Court engaged in an analysis of the two conspiracies' legal *elements* – ignoring the critical distinction between ordinary Double Jeopardy jurisprudence and the principles particular to collateral estoppel. In addition, the District Court failed entirely to address other facets of Mr. El-Mezain's motion, including (a) comparison of the language of the different counts of the Indictment (which established the factual congruency of the "material support" and IEEPA conspiracies); (b) analysis of the evidence at trial, the parties' arguments, and the jury instructions (which erased any arguable distinction between the elements of the two conspiracies, even if such analysis were appropriate in this context); and (c) identification of numerous facts and issues that were necessarily decided in Mr. El-Mezain's favor, and which bore materially on essential elements of the remaining count.

Retried on the sole remaining count (with the other five co-defendants, who were retried on multiple counts for which Mr. El-Mezain had been acquitted, as well as on the Count 1 conspiracy), Mr. El-Mezain was convicted. Yet at neither

trial did the government make any distinction among the counts or the statutory allegations, but instead prosecuted the case as a unitary scheme to provide assistance to Hamas via charitable donations to the same set of Palestinian institutions in the West Bank and Gaza. In acquitting Mr. El-Mezain of the 31 counts, the jury necessarily found that Mr. El-Mezain was *not* part of any such scheme for the *entire length* of the Count 1 IEEPA conspiracy, from 1995 until 2004, which encompassed entirely the time frame and conduct alleged in Count 1.

In addition, the District Court failed to take any ameliorative steps at the second trial, and refused to grant Mr. El-Mezain a severance, or preclude *any* evidence on the issues the jury's verdict at the first trial had surely foreclosed, or even to deliver (in response to defense counsel's repeated requests) a limiting instruction on such evidence (to the extent it was properly admissible against Mr. El-Mezain's co-defendants).

Accordingly, it is respectfully submitted that the District Court's denial of Mr. El-Mezain's motion to dismiss Count One was erroneous, and should be reversed, and the Indictment against Mr. El-Mezain dismissed.

Statement of Facts

Mr. El-Mezain was indicted July 26, 2004.[2] Ultimately, the Indictment upon which he was tried contained 32 counts against him. After a three-month trial and 20-day jury deliberation, the jury acquitted Mr. El-Mezain October 22, 2007, on all counts submitted against him except Count 1, which alleged that "he conspired to provide material support and resources to a Designated Foreign Terrorist Organization ["FTO"]." *See* Dkt. #865, 10/22/07, at 1. The FTO alleged in Count 1 – as in *all* counts in the Indictment – was Hamas. *See* 3R. 5023 (Tab C).[3]

Counts 2 through 10 alleged substantive material support violations, namely that Mr. El-Mezain "provided or attempted to provide material support or resources to a [FTO]" as specified in each of those Counts. *See* Dkt. #865 at 2-4. *See also* 3R. 5030 (RE C). Count 11 charged that Mr. El-Mezain "conspired to

---

[2] This Statement of the Facts is pertinent only to Mr. El-Mezain's collateral estoppel point, which is unique to him in this case. He respectfully joins and adopts the Statement of Facts in the Briefs filed by co-defendants/co-appellants Ghassan Elashi, Shukri Abu Baker, Abdulrahman Odeh, and Mufid Abdulqader, which contain the issues common to all defendants/appellants. *See also* **post**, at POINT III.

[3] The version of the Superseding Indictment submitted to the jury (3R. 5011-5050) differed from that returned by the grand jury because the government chose pretrial to delete certain overt acts and individual counts.

provide funds, goods and services to a Specially Designated Terrorist ["SDT"]" in violation of IEEPA. Dkt. #865 at 4. Hamas was listed as the SDT in *all* the IEEPA counts. *See* 3R. 5032 (RE C).

Counts 12 through 21 charged that Mr. El-Mezain "provided funds, goods and services to a [SDT]" as specified in each of those substantive IEEPA counts. Dkt. #865 at 5-7. *See also* 3R. 5032 (RE C). Count 22 alleged that he "conspired to commit money laundering[.]" Dkt. #865 at 7. Counts 23 through 32 alleged that Mr. El-Mezain "committed money laundering" as specified in each of those counts. *Id.*, at 7-10. The underlying specified unlawful activity alleged in Counts 23-32 was alleged to have been the conduct alleged in Counts 12-21. 3R. 5040-41 (RE C).[4]

Prior to retrial, Mr. El-Mezain filed an Amended Motion to Dismiss Count 1 based on the Fifth Amendment doctrine of collateral estoppel. *See* Dkt. #1046, 6/11/08. In the alternative, Mr. El-Mezain sought either severance, or exclusion of certain evidence. *Id*. The District Court presiding at the second trial (different than at the first trial) denied the motion. 3R. 6282 (RE F).

In so doing, the District Court concluded it could not determine "[w]hat

---

[4] Counts 33-36 alleged tax violations against two of Mr. El-Mezain's co-defendants. He was not named in those Counts.

facts were necessarily decided by the Jury in its acquittal on any of Counts 2-32[,]" and that Mr. El-Mezain did not "carr[y] his burden of showing what facts were necessarily decided by the Jury in its acquittal on any of Counts 2-32." 3R. 6290 (RE F).

In addition, the District Court noted that "[e]ven if El-Mezain carried his burden of showing what facts were necessarily decided on any of Counts 2-32, and even if the Court determined that the facts necessarily decided in one or more of the acquitted counts constituted an essential element of Count 1, collateral estoppel would not apply in light of the Fifth Circuit's holding in *U.S. v. Yeager*." *Id*.

The District Court also distinguished Count 1 based on what it described as "different levels of intent in Count 1 and Count 11" – that Count 11 required "willfulness" in addition to knowledge – that "require[d] establishment of different facts." 3R. 6289 (RE F).

Mr. El-Mezain filed a timely Notice of Appeal, Dkt. #1132 (RE B), and subsequently filed a Motion to Stay Pending Interlocutory Appeal, Dkt. #1140, 8/8/08, which was denied. *See* Dkt. #1141, 8/11/08 (RE G). His Motion to Stay Trial Pending Interlocutory Appeal in this Court was also denied. Mr. El-Mezain's interlocutory appeal was held in abeyance pending the outcome of the

retrial, and was subsequently consolidated with his and his co-defendants' appeals from their convictions after retrial. Fifth Circuit Document #00511188226.

The case proceeded to retrial with all defendants, and concluded with the jury convicting Mr. El-Mezain November 24, 2008, on the sole count against him (and convicting the other defendants on all counts). 38R. 1243-1255 (RE D). Following the verdict, the District Court denied Mr. El-Mezain's application to remain at liberty pending appeal, and remanded him.[5]

Mr. El-Mezain was sentenced May 27, 2009, to a term of 15 years' imprisonment, the maximum available under §2339B. 20R. 470 (RE E). A timely Notice of Appeal from the conviction and sentence was filed May 27, 2009. 20R. 468-69 (RE B). Subsequently, June 18, 2009, the Supreme Court decided *Yeager v. United States*, ___ U.S. ___, 129 S. Ct. 2360 (2010), reversing the Circuit Court decision upon which the District Court had relied in denying Mr. El-Mezain's motion to dismiss on collateral estoppel grounds.

[5] This Court also denied Mr. El-Mezain's motion for bail pending appeal, filed after the Supreme Court's decision in *Yeager*, but expressly and only because it determined he presented a "risk of flight." Order, 9/24/08.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING MR. EL-MEZAIN'S MOTION TO DISMISS COUNT ONE ON THE GROUNDS OF COLLATERAL ESTOPPEL

The District Court's decision denying Mr. El-Mezain's motion to dismiss Count 1 – the only count remaining against him – on the grounds of collateral estoppel suffered from multiple fatal defects.[6] As detailed below, not only did the District Court expressly rely on a decision and doctrine subsequently and explicitly overruled by the Supreme Court in *Yeager*, but it also performed an incorrect analysis that focused on the legal elements of the offenses rather than the facts and evidence at the first trial.

Performing the appropriate analysis directed by the Supreme Court in *Yeager* demonstrates beyond question that collateral estoppel applies to Count 1 with respect to Mr. El-Mezain (the only appellant to whom collateral estoppel applies). As set forth below, the Trial Indictment (both in language and structure), the evidence at trial (and at retrial), the arguments by the parties to the jury, the

---

[6] The doctrine of collateral estoppel is also called "issue preclusion." *See Yeager*, 129 S. Ct. at 2372 n. 1 (Scalia, J., *dissenting*). *See also United States v. Coughlin*, 610 F.3d 89, 95 (D.C. Cir. 2010).

Court's charge to the jury, and the verdicts returned by the jury all establish conclusively that the jury necessarily decided against the government facts constituting essential elements of Count 1.

A. *The Standard of Review Is* De Novo

The standard of review of the District Court's denial of the collateral estoppel motion is *de novo*. *See United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009); *United States v. Brackett*, 113 F.3d 1398 (5th Cir. 1997). Also, since the District Court that decided Mr. El-Mezain's collateral estoppel motion was not the judge who presided over the initial four-month trial, the District Court that decided the motion is in no better position than this Court to review the record.

B. *The Applicable Principles of the Collateral Estoppel Doctrine*

As this Court has explained, "[t]he Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine." *Yeager*, 521 F.3d at 371 (citing *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970)), *rev'd on other grounds*, ___ U.S. ___, 129 S. Ct. 2360 (2009). Also, as this Court declared in *Yeager*, "[c]ollateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Id.*, citing *Ashe*, 397 U.S. at 443.

In *Ashe*, the Court recognized that "[c]ollateral estoppel is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice." 397 U.S. at 443. *Cf. Brackett,* 113 F.3d at 1398; *accord Leach*, 632 F.2d at 1339. *See also Yeager*, 129 S. Ct. at 2365-66.

While the doctrine was first developed in civil litigation, it was a fixed principle of federal criminal law for many years even before the landmark *Ashe* decision. *Ashe*, 397 U.S. at 443 (the "safeguards of the person" cannot be less than those protecting an individual in a civil suit). *See also United States v. Oppenheimer*, 242 U.S. 85, 88 (1916) (when a criminal charge has been adjudicated, it "may be pleaded to bar any subsequent prosecution").

Incorporation of collateral estoppel into the Double Jeopardy Clause is predicated on the principle that a defendant should not have to run the gauntlet a second time, or be subjected to the "hazards of trial and possible conviction more than once." *Ashe*, 397 U.S. at 447 (Black, J., concurring). Collateral estoppel protects a defendant from being "forced to live in a continuous state of anxiety and insecurity" regarding the particular issues that have already been tried, and prevents the Government from repeated attempts to subject him to "embarrassment, expense and ordeal." *Green v. United States*, 355 U.S. 184, 187 (1957). *See also Yeager*, 129 S. Ct. at 2365-66.

While clearly residing within the Fifth Amendment's protection against Double Jeopardy, collateral estoppel is a distinct right. Double Jeopardy protects a person from prosecution or punishment for the same offense. As this Court pointed out in *Yeager*,

> *Ashe,* however, limits successive prosecution of defendants, not for the same offenses but for different offenses.[] After an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge "if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution."

521 F.3d at 371, quoting *Brackett,* 113 F.3d at 1398 (emphasis supplied by the Court in *Yeager*).[7]

Accordingly, collateral estoppel applies when acquittal on one offense, Offense A, decides a factual issue essential to another offense, Offense B, such that the resolution of that factual issue in the defendant's favor bars his later

---

[7] In *Ashe*, following the defendant's acquittal for robbing one of six poker players, the government attempted to prosecute him for the robbery of another. Thus, "[d]ouble jeopardy did not bar this successive prosecution, because robbing player number 2 was not the 'same offense' as robbing player number 1." *United States v. Bailin*, 977 F.2d 270, 275-76 (7th Cir. 1992). Even though double jeopardy did not apply, the Supreme Court proceeded to consider whether Ashe's re-prosecution was barred by collateral estoppel: "*Thus, the Supreme Court held that collateral estoppel applied even though double jeopardy did not." Id*., at 276 (citing *Ashe*, 397 U.S. at 443) (emphasis added). *Accord United States v. Shenberg*, 89 F.3d 1461, 1478 (11th Cir. 1996) ("[a]lthough double jeopardy does not bar the government from reprosecuting defendants on mistried counts, estoppel principles may nevertheless apply").

prosecution on Offense B because the second jury would have to "reach[] a directly contrary conclusion" to convict the defendant. *Dowling v. United States*, 493 U.S. 342, 348 (1990) (citing *Ashe*, 397 U.S. at 445).

In this Court, collateral estoppel applies to criminal proceedings in two ways: (1) "it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution[,]" *Brackett*, 113 F.3d at 1398; and/or (2) even when the subsequent prosecution is not completely barred, "collateral estoppel will bar the introduction or argumentation of facts necessarily decided in the prior proceeding." *Id*. [citing *United States v. Deerman*, 837 F.2d 684 (5th Cir. 1988)].

The defendant bears the burden of demonstrating that the issue to be estopped was necessarily decided in the first trial. *See Dowling*, 493 U.S. at 350; *Yeager*, 521 F.3d at 371. In order to satisfy that burden, the defendant must prove that the jury's previous verdict of acquittal necessarily determined a fact that is an essential element of the estopped charge. *See Yeager*, 521 F.3d at 371; *Brackett*, 113 F.3d at 1398-1399.

As the Eleventh Circuit explained in *United States v. Ohayon*, 483 F.3d 1281 (11th Cir. 2007),

> [t]he Supreme Court defined in *Ashe v. Swenson* the

> standard that governs the defense of collateral estoppel based on a general verdict: "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case," a court must ask "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

483 F.3d at 1286, citing *Ashe*, 397 U.S. at 444 (internal quotation mark omitted). *See also Brackett*, 113 F.3d at 1398-99 (such evaluation can be an "awkward" task, since "a general verdict of acquittal does not specify the facts necessarily decided by the jury") (internal quotation marks omitted).

Mechanically, as this Court directed in *Yeager*,

> [t]o determine whether collateral estoppel bars a subsequent criminal prosecution, courts must conduct a two-step analysis: "Initially, we must decide which facts necessarily were decided in the first proceeding. Then we must consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial."

521 F.3d at 371, citing *Bolden v. Warden, W. Tenn. High Sec. Facility,* 194 F.3d 579, 584 (5th Cir.1999).

In *Yeager*, the Supreme Court instructed that "[t]o decipher what a jury has necessarily decided, . . . courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue

other than that which the defendant seeks to foreclose from consideration.'" 129 S. Ct. at 2367, *quoting Ashe*, at 444 (internal quotation marks omitted). *See also United States v. Shelby*, 604 F.3d 881, 886 (5th Cir. 2010); *Yeager*, 521 F.3d at 371; *Deerman*, 837 F.2d at 690 (court "must examine allegations of the indictment, testimony, court's instructions to the jury, and jury's verdict to consider what makes the jury's verdict coherent").

As the Court in *Ohayon* added, "[t]his inquiry 'must be set in a practical frame,'" *id.* [quoting *Sealfon v. United States,* 332 U.S. 575, 579 (1948)] (internal quotation marks omitted), and a court is not to conduct its analysis "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality[.]" 483 F.3d at 1286; *Leach*, 632 F.2d at 1340. *See also Deerman*, 837 F.2d at 690 (court should make this determination "in a realistic, rational, and practical way, keeping in mind all the circumstances"); *United States v. Mulherin,* 710 F.2d 731, 740 (11th Cir.1983) (collateral estoppel applies when "the jury could not have rationally based its verdict on any other issue than the one the appellants seek to foreclose").

Thus, the question is *not* whether it *technically* would have been possible for the jury to acquit Mr. El-Mezain on Counts 2 through 32 and still decide that he conspired to provide material to support to Hamas as charged in Count 1.

Instead, the question is whether the record in this case realistically supports such a conclusion. *Leach*, 632 F.2d at 1340. As this Court has cautioned, "[a]ny test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Garcia v. Dretke*, 388 F.3d 496, 503-04 (5th Cir. 2004).

In that context, the Court's analysis should not be a speculative search for any possible reason that the jury might have had for its verdict; it is to be conducted with "realism and rationality." *Ashe*, 397 U.S. at 444. The Court's "inquiry into the potential rationale of the first jury, then, may entail an expansive exploration of the record, but must stay within the bounds of a rational[] inquiry." *Garcia*, 388 F.3d at 504. Thus, rather than engaging in conjecture about what the jury might possibly have determined – effectively ending the collateral-estoppel analysis before it has begun – the Court should consider the most reasonable interpretation of the jury's verdict. *Ashe*, 397 U.S. at 444.

C. *The Foundation of the District Court's Decision Denying Mr. El-Mezain's Motion Has Been Fatally Undermined By the Supreme Court's Decision In* United States v. Yeager

As set forth **ante**, at 7-8, the District Court's denial of Mr. El-Mezain's motion to dismiss was premised on faulty grounds, among them the reliance on

this Court's opinion in *Yeager*, which held that the jury's failure to reach a decision on the deadlocked count could be considered in determining whether a particular fact had been necessarily decided against the government at the first trial. *See* 521 F.3d at 379. *See also* 3R. 6290 (RE F) (noting that this Court's decision in *Yeager* was binding).

However, as quoted **ante**, at 3-4, the Supreme Court expressly reversed that very part of this Court's decision in *Yeager*. 129 S. Ct. at 2362-63. *See also id*., at 2367 ("for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as [a defendant's] acquittal").

Indeed, on remand this Court directed that the remaining counts against Yeager be dismissed. *United States v. Yeager*, 334 Fed.Appx. 707, 2009 WL 3346589 (5th Cir. 2009) (on remand). *See also United States v. Ohayon*, 483 F.3d at 1288-89. Thus, a critical element of the District Court's denial of Mr. El-Mezain's motion to dismiss is now invalid.

D. *Examination of the Various Components of Collateral Estoppel Analysis Demonstrates That the Jury Necessarily Decided An Essential Element of Count 1 Against the Government*

As noted **ante**, the first step in collateral estoppel analysis is determining "which facts necessarily were decided in the first proceeding." *Yeager*, 521 F.3d

at 371. Here, review of the several components identified as relevant to collateral estoppel, *see* **ante**, at 15-16, demonstrates that all essential facts of the Count 1 conspiracy were previously decided against the government at the first trial, as the 31 acquittals established that Mr. El-Mezain neither knew nor intended that donations by the Holy Land Foundation ("HLF") to certain entities in the West Bank and Gaza were for the benefit of Hamas.

1. *The Structure and Language of the Indictment*

The Indictment's structure and language, in which the critical portions of Count 1 were explicitly incorporated in the 31 acquitted counts, compels that conclusion. *See United States v. Bowman*, 609 F.2d 12, 14 (D.C. Cir. 1979) (analysis begins with "a comparison of the factual allegations" in the counts at issue). The Indictment charged violations of three separate conspiracy statutes – 18 U.S.C. §2339B (the "material support" statute) (Count 1); IEEPA (Count 11); and money laundering (Count 22) – as well as corresponding substantive counts for each.

All three conspiracies charged the same illegal agreement – to aid Hamas by providing funds to institutions in the West Bank and Gaza – under three separate statutes. In the traditional Double Jeopardy context, which does not control here, but is instructive nonetheless in examining whether separately charged

conspiracies are in fact the same, this Court considers five factors: (1) time frame; (2) persons identified as co-conspirators; (3) the statutory offenses charged; (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). *See, e.g., United States v. Nichols*, 741 F.2d 767, 770-72 (5th Cir. 1984); *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978).

Here, that analysis establishes that the Count 1 conspiracy was in every respect the same as those for which Mr. El-Mezain was acquitted in Counts 11 and 22.

a. *The Time Frame of the Conspiracies*

For example, the time frame of the Count 1 conspiracy, from October 8, 1997, through the date of the Indictment (July 26, 2004), *see* 3R. 5023 (RE C), was *completely encompassed* by the time frame for both the Count 11 and Count 22 conspiracies, which the Indictment alleged ran from January 25, 1995 until the date of the Indictment. *See* 3R. 5032, 5037 (RE C). *See United States v. Coughlin*, 610 F.3d 89, 100 (D.C. Cir. 2010) ("in rendering a verdict on the acquitted counts, the jury necessarily decided that [the defendant] lacked

fraudulent intent during the entire period encompassed by the charged mailings – including those mailings cited in the hung counts").

b. *Persons Identified As Co-Conspirators*

This factor, too, demonstrates the congruity of the three conspiracies. The defendants are the same in all three conspiracies, and the unindicted co-conspirators' list provided by the government pretrial, 2R. 4698-4708, included hundreds of names, but did not make *any distinction at all among the conspiracies charged in the Indictment*. The only difference in categorization of the unindicted co-conspirators was their alleged relationship(s) to either Hamas or HLF.

c. *The Statutory Offenses Charged*

The three conspiracies charge different statutory offenses. However, Counts 1 and 11 were closely related in purpose and structure, as each proscribes provision of funds and financial services to organizations designated as terrorist by the U.S. *Compare* §2339B with 50 U.S.C. §1705. Also, Count 22, the money laundering conspiracy, was formally linked to the Count 11 IEEPA conspiracy, which (along with the substantive IEEPA counts) served as the predicate criminal activity for the money laundering counts. 3R. 5032 (RE C).

As this Court has explained, when two nonidentical statutes are "related" – as the material support statute (§2339B) and IEEPA undoubtedly are – this factor

weighs in favor of finding the offenses are the same. *See, e.g., United States v. Levy*, 803 F.2d 1390, 1395 (5th Cir. 1986); *United States v. Moncivais*, 213 F. Supp. 2d 704, 709 (S.D. Tex. 2001); *United States v. Ramos-Hernandez*, 178 F. Supp. 2d 713, 721-22 (W.D. Tex. 2002).

d. *The Overt Acts Alleged and Other Offense Conduct Described*

The overt acts in Counts 1 and 11 also matched, as in each conspiracy they were simply discrete payments by HLF to the same set of specified Palestinian entities[8] in the West Bank, or to HLF offices there. Moreover, those same entities were the subject of the substantive counts – on all of which Mr. El-Mezain was acquitted – corresponding to each conspiracy.

For instance, as the chart submitted as Exhibit 1 to Mr. El-Mezain's initial motion, Dkt. #1046-2 (RE L), illustrates, the Qalqilia Zakat Committee that was the subject of Overt Act 1 of Count 1 was also the subject of Overt Act 11 in the IEEPA Conspiracy (Count 11) and Overt Act 6 in the money laundering conspiracy (Count 22), as well as of Counts 9 (material support), 20 & 21 (IEEPA), and 31 & 32 (money laundering).

Likewise, the Ramallah Zakat Committee was the subject of Overt Act 7 in

---

[8] Those entities were either *zakat* committees, or charitable institutions, the history and nature of which are described in the Statement of Facts in the Brief for Appellant Ghassan Elashi (hereinafter "Elashi Brief").

Count 1 and Overt Acts 4, 9, and 12 in Count 11 (and Overt Acts 4, 9, and 11 in Count 22), as well as Counts 2 and 5 (substantive material support), Counts 12 and 16 (substantive IEEPA), and Count 23 and 27 (substantive money laundering).

As the chart establishes, the same is true for the other entities that served as recipients of aid from HLF in Count 1, all of which appear in overt acts in the material support (Count 1), IEEPA (Count 11), and money laundering (Count 22) conspiracies, and substantive material support, IEEPA, and money laundering counts, albeit alleging different transfers for some of the counts (but all closely related in time).

In addition, regarding "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," the conspiracies again dovetail precisely. Indeed, the Count 11 IEEPA conspiracy expressly incorporated not only the introductory paragraphs in the Indictment (¶¶ 1-25) – as did Count 1 – but also the *entire factual recitation* describing the Count 1 conspiracy. 3R. 5032 (RE C).

Those universally incorporated paragraphs set forth the government's unified and indivisible theory of prosecution and liability on *all* counts: that the defendants conceived and implemented a plan to assist Hamas by providing money and other property to entities the defendants knew were "operated on

behalf of, or under the control of, Hamas."

For instance, the precise "Means and Methods" for Count 1 – paragraphs 3-10 – serve as the "Means and Methods" for Count 11, too, as the *only* "Means and Methods" provided for Count 11 – other than incorporating those paragraphs from Count 1 – is a single paragraph alleging that the defendants "made regular monetary payments to zakat committees and individuals located in the West Bank and Gaza who were acting on behalf of, or under the control of," Hamas, 3 R. 5032-33 (RE C), which essentially replicates ¶ 9 of Count 1 (in the "Means and Methods" section), which alleges that defendants "wire transferred and caused to be wire transferred money from the HLF bank accounts in [N.D. Texas], to zakat committees located in the West Bank and Gaza which were acting on behalf of, or under the control of, Hamas."

Thus, the factual predicate for the Count 11 conspiracy was *exactly the same as it was for the Count 1 conspiracy*, regardless of the difference in statutory charges. The same was true for the substantive material support counts charged in Counts 2 through 10, and the substantive IEEPA charges (Counts 12-21), 3R. 5030, 5035 (RE C), as well as for the substantive money laundering counts (Counts 23-32), 3R. 5040 (RE C), and the money laundering conspiracy (Count 22), 3R. 5037 (RE C).

Other aspects of the Count 1 and Count 11 conspiracies further confirm their factually identical nature. For example,

- the illegal objective of each conspiracy (identified in each count's initial paragraph) was the same. Count 1 alleges a conspiracy to "provide material support and resources . . . to wit, currency and monetary instruments, to Hamas." 3R. 5023 (RE C). Count 11 alleges a conspiracy to "violate [IEEPA] by contributing funds, goods and services to, and for the benefit of," Hamas. 3R. 5032 (RE C);
- the designated terrorist organization – Hamas, as either an FTO (Count 1) or SDT (Counts 11 and 22) – was the same. *Id*.
- as noted above in the discussion of Overt Acts, the entities that received HLF's aid – the *zakat* committees – were the same;
- the assistance HLF allegedly provided Hamas was also the same. While Count 1 proscribed "material support," and Count 11 proscribed the provision of "funds, goods, and services," the "material support" and "funds, goods, and services" were, as reflected in each of the conspiracies (and substantive counts) the exact same: funds from HLF to the same entities in the West Bank and Gaza.

e. *The Location of Conspiratorial Conduct*

As noted above, the factual description for each conspiracy explicitly incorporated not only the Indictment's introductory section (12 pages), but also Count 1's "manner and means" (eight paragraphs). Also, as noted above, the entities that received HLF's assistance allegedly on behalf of Hamas were the same for the three conspiracies, and all located in the West Bank and Gaza.

As a result, the "places where the events alleged as part of the conspiracy took place" were precisely the same, and, indeed *all* five factors demonstrate that the Count 1 material support conspiracy was the factual and functional equivalent of the Count 11 IEEPA conspiracy (and Count 22 money laundering conspiracy) on which Mr. El-Mezain was acquitted.

As a result, it is clear the Indictment charged *the same conspiracy* under three separate statutes, as all three groups of charged offenses – material support for a Foreign Terrorist Organization ("FTO"), IEEPA, and money laundering – were based on precisely the same facts and theory. Mr. El-Mezain's acquittal on two of those conspiracies, and all of the corresponding substantive counts for all three conspiracies, establishes indisputably that the jury rejected the government's overarching theory that applied to *all* counts, including the single count on which the jury deadlocked, and necessarily found instead that Mr. El-Mezain did *not*

conspire to provide assistance to Hamas between 1995 and 2004, which includes the entire period of the conspiracy charged in Count 1 (1997-2004).

Thus, the circumstances are the same as in *Bowman*, in which the D.C. Circuit pointed out that the "charges in [the challenged count] are therefore included in the slightly broader charges in the Third Count and under well recognized principles of law an acquittal on the broader charge collaterally estops a second trial on the narrower charge arising out of the same facts." 609 F.2d at 17. *See also Madsen v. McFaul*, 643 F. Supp.2d 962, 968 (N.D. Ohio 2009) ("the carbon copy nature of the Indictment and Bill of Particulars result in an effective acquittal on all counts for the purpose evaluating this Petition"). Here, the structure and language of the Indictment compel the same conclusion.

2. *The Evidence At Trial*

Moreover, the evidence used to attempt to prove each of the three conspiracies was precisely the same. The linchpin of the government's case was the trove of hearsay documents recovered from the home of Ismail Elbarasse.[9] *All* of those documents predated January 25, 1995, the effective date of the IEEPA designation (with the FTO designation relevant to Count 1 occurring more than

[9] Those documents, and their impact on the case, are discussed at length in the Elashi Brief, at POINT II(D).

two years later, October 8, 1997), and were admitted – even though they were created prior to the inception of any conspiracy (because any such conduct was not yet illegal under either IEEPA or §2339B) – under a "joint venture" theory. *See* Transcript, October 31, 2009, at 63-64. *See also* Elashi Brief, at POINT II(D)(3) & (4).

The District Court's remarks at sentencing established beyond dispute that the pre-1995 evidence was central to the government's proof against Mr. El-Mezain. In imposing the maximum 15-year prison term on Mr. El-Mezain, the District Court provided the following rationale:

> I think the evidence shows, as I stated previously, that Mr. El-Mezain, *you were involved at the very beginning with the creation of the Hamas Palestine Committee here in the United States, and you were involved with the creation of the setting in motion the apparatus to support Hamas*. The financial arm of that was Holy Land. You were a part of that from the very beginning. *The evidence shows that you continued that even after it became illegal*.

2R. 6475 (emphasis added).

That passage, and the italicized sections in particular, demonstrate that the "beginning" to which the District Court referred was *before 1995*. Yet the jury at the first trial, by acquitting Mr. El-Mezain of Counts 11-21, which charged him with aiding Hamas from its January 25, 1995, designation, through the filing of the

Indictment in 2004, clearly *rejected* the proposition Mr. El-Mezain's pre-January 25, 1995, conduct alleged by the government – essential also to the District Court's assessment of Mr. El-Mezain's culpability on Count 1 – somehow proved his participation in a conspiracy to assist Hamas.

In addition, the jury's verdict on Count 11 established that Mr. El-Mezain did not conspire to aid Hamas *after* January 23, 1995 (the commencement of the IEEPA conspiracy charged in Count 11), through the date of the Indictment (July 26, 2004), which – again – runs the entire length of the material support conspiracy charged on Count 1 (which allegedly began October 8, 1997).

Thus, the jury at the first trial necessarily found that *none* of Mr. El-Mezain's conduct sufficed to establish his membership in a conspiracy to provide support for Hamas during the entire span of the Indictment, including the 1997-2004 covered by Count 1. Indeed, any attempted temporal distinction between the Count 1 and Count 11 conspiracies would create a false dichotomy, as the *evidence* – the dispositive element for collateral estoppel – was the same for both sets of charges, either pre- or post-January 25, 1995 (when it first became illegal to provide aid to Hamas).

Nor was there any evidence of any post-October 1997 conduct by Mr. El-Mezain that could have changed that assessment, or distinguished Count 1 from

the 31 acquitted counts. Neither the government in its summation nor the Court at sentencing pointed to any such conduct; indeed, they could not have because there was no such evidence admitted at *either* trial.

In fact, of the approximately 543 exhibits admitted at the retrial (for which dates were discernible),[10] only 71 contained evidence solely from *after* October 8, 1997, and the vast majority of those neither mentioned nor implicated Mr. El-Mezain.

As a result, the facts here stand in stark and telling contrast to those in *United States v. Shelby*, in which this Court refused to find collateral estoppel because there was a quantitative and qualitative distinction between the evidence the government presented regarding the counts on which the defendant was acquitted – alleging securities fraud in trades made in Summer 2000 – and that offered on the counts at issue, which covered different trades in Early 2000. 604 F.3d at 883 (noting the district court's observation that "'the government presented little to no evidence that Defendant Shelby made any material misrepresentations or acquired material non-public information in [Summer] 2000,

---

[10] There were 622 exhibits admitted at the retrial altogether. Many of those for which dates are unavailable predate 1995 (*i.e.*, videotapes and some Elbarasse documents), or postdate HLF's closing in 2001 (and were unrelated either to HLF or Mr. El-Mezain, but were admitted through government experts). *See* Elashi Brief, at POINTs II & III.

the dates of Shelby's acquitted counts of insider trading[,]'" while "'the government presented substantial evidence that Defendant Shelby either made material misrepresentations or acquired material non-public information' before the trades that were the subject of the Early 2000 counts"), quoting *United States v. Shelby*, 447 F. Supp.2d 750, 761-62 (S.D. Tex. 2006).

Thus, in *Shelby*, "the evidence at trial support[ed the] distinction" between the Early 2000 and Summer 2000 trades because "specifically [] Shelby's trading patterns were markedly different between the Early 2000 and Summer 2000 trades." *Id*., at 883.

Similarly, in *United States v. Coughlin*, the D.C. Circuit found the remaining mail frauds collaterally estopped – but *not* those charging subsequent false statements *after* the mail fraud ended, because "while the government had neither theory nor evidence for temporally distinguishing Coughlin's intent *during* the period from December 2003 through April 2004, it had both to support the conclusion that something new arose thereafter." *Id*., at 102 (emphasis in original).[11]

---

[11] In *Coughlin*, the Court explained that "the government submitted evidence from which a jury could have found that *thereafter* [the defendant] developed an intention to fraudulently overstate his economic losses. For example, [the defendant] testified that he did not start putting together the schedule outlining his economic damages until a few days before the May 13

As demonstrated by the analysis performed above, no such distinction can be made here between the evidence presented for the Count 1 material support and Count 11 IEEPA conspiracies. Neither different theory nor evidence nor patterns after 1997 were offered with respect to Mr. El-Mezain, and even if they were, they were nonetheless accounted for by the jury's verdict on Count 11, for which the charged conspiracy ran through October 1997 all the way to July 2004. Nor was any evidence admitted at trial specifically with respect to any particular group of charges.

Rather, this case is more like *Bowman*, in which the D.C. Circuit pointed out that the "charges in [challenged count] are therefore included in the slightly broader charges in the Third Count and under well recognized principles of law an acquittal on the broader charge collaterally estops a second trial on the narrower charge arising out of the same facts." 609 F.2d at 17.

Also, in acquitting Mr. El-Mezain on Count 11, and all the material support and IEEPA substantive counts (as well as the money laundering conspiracy in Count 22 and the related substantive counts), the jury necessarily determined in his favor any one or more of several alternative facts that constitute elements of

---

hearing." 610 F.3d at 108 (emphasis in original). No such analogous testimony or evidence existed in this case that could have restarted the conspiracy clock after October 1997.

Count 1:

(a) Mr. El-Mezain did not intend to provide material support to Hamas, or organizations "operated on behalf of, or under the control of, Hamas;"

(b) the entities to which Holy Land provided assistance were not "operated on behalf of, or under the control of, Hamas;"

(c) Mr. El-Mezain did not know that the entities to which Holy Land provided assistance were "operated on behalf of, or under the control of, Hamas;" or,

(d) Mr. El-Mezain, who acted principally as HLF's chief fundraiser, traveling extensively in the U.S., and was neither responsible for, involved in, or aware of the day-to-day operations of HLF, including identifying institutions in the West Bank and Gaza that should or did receive HLF funding, did not know the destination of the funds Holy Land provided (*i.e.*, the identity of the entities), or their particular character.[12]

Thus, the situation here also resembles that in *United States v. Larkin*, 605

[12] In addition, Mr. El-Mezain was not present at the 1993 meeting in Philadelphia that the government claimed marked the functional inception of the broad agreement to assist Hamas.

F.2d 1360 (5th Cir. 1979), which alleged a conspiracy "to commit five illegal acts." 605 F.2d at 1362. The illegal acts included, *inter alia*, embezzlement and falsifying records. *Id.* Counts 2 through 7 alleged substantive crimes involving embezzlement and falsifying records. *Id.,* at 1363.

At trial in *Larkin*, the jury acquitted the defendant on the substantive counts, but deadlocked on the conspiracy count. *Id.* Larkin moved to dismiss the remaining conspiracy count on collateral estoppel grounds. *Id*. Although this Court declined to dismiss the conspiracy count in its entirety, it agreed that collateral estoppel barred retrial on conspiracy to commit the five illegal acts charged in the substantive counts (of which Larkin was acquitted). *Id*., at 585-86.[13]

This Court explained that "Larkin may not be retried for conspiring to embezzle funds or to falsify union records by means of a scheme which form the basis for counts two through seven." *United States v. Larkin*, 611 F.2d 585, 586 (5th Cir. 1980). This Court also directed that any overt acts related to those counts be stricken. *Id.*

---

[13] Subsequent to the initial ruling in *Larkin*, the government sought rehearing because the conspiracy count included overt acts not involving conduct charged in the acquitted counts. In response, this Court issued an amended opinion striking only those overt acts corresponding to the substantive counts for which Larkin had been acquitted. 611 F.2d at 585.

Here, Mr. El-Mezain was acquitted of *all* the substantive acts relating to the Count 1 conspiracy, and was acquitted of the identical conspiracy fashioned as an IEEPA violation – Count 11 – and all the substantive IEEPA counts. Consequently, while in *Larkin* there were elements of the conspiracy that were not covered by the acquittals on the substantive counts, here that was not the case. The conspiracies and substantive counts covered the very same territory, and Mr. El-Mezain's acquittal on the latter necessarily decided the factual elements of the former. *See also Bowman*, 609 F.2d at 18 (noting "impossibility of defendant being innocent of [obstructing a witness via threats] . . . and yet being guilty of endeavoring to obstruct the same . . . witness in the discharge of his duties, when the evidence in support of the two charges is identical") (footnote omitted).

Accordingly, an analysis infused with the appropriate "realism and rationality" as directed by *Ashe* compels the conclusion that the facts that would establish the essential elements of Count 1 – whether the entities to which HLF provided financial assistance were "operated on behalf of, or under the control of, Hamas," and whether, even if they were, Mr. El-Mezain knew or intended to provide support for Hamas via those entities – were unequivocally decided against the government.

3. *The Parties' Arguments: Trial Brief, Openings, and Summations*

Similarly, the government's arguments – in opening, summation, and its Trial Brief – did not make any legal or evidentiary distinction among the groups of charged offenses. That was not surprising because, as detailed **ante**, the different statutory allegations were based on HLF's charitable assistance to the *same* enumerated group of Palestinian institutions within the very *same* time frame, with the *same* alleged goal, based on the *same* overt acts.

The Government's May 29, 2007 Trial Brief (2R. 4635-4697) further confirms that the government viewed the case as alleging a single conspiracy charged under separate statutes. For instance, the Trial Brief contended that "[t]he conspiracy surrounding this case and involving these defendants *began years before the enactment of the Executive Orders* and material support statutes at issue." 2R. 4641 (emphasis added).

Thus, again, the government's theory with respect to *all* of the charges, including the three conspiracies, was that they commenced even prior to January 25, 1995. The jury's rejection of that theory with respect to Count 11 clearly covered that same theory with respect to Count 1, which began October 1997. *See*

Coughlin, 610 F.3d at 100.[14]

Similarly, the government reiterated its indivisible theory of liability, regardless of the particular statutory offense(s) alleged, and treated IEEPA and the material support statutes as essentially the same: "[t]he new statutes and laws enacted by Executive Order 12947 and AEDPA [in which the material support sections appeared] prohibited the provision of any type of support to any component of the designated organization." 2R. 4649. *See also* 2R. 4650 ("[t]he defendants were well aware of Executive Order 12947 and AEDPA and expressed concern over the laws' application").

Nor did the government's Trial Brief make any evidentiary distinction among the groups of offenses. While the Trial Brief included a chart with cursory enumeration of the elements of the charged offenses (2R. 4653-54), the government did not make any attempt to tie any particular piece of evidence or proof to any specific group of offenses. Nor was there any attempt to indicate how

[14] Nor did the government allege that Mr. El-Mezain conspired prior to 1995, then abandoned the conspiracy prior to October 1997, only to rejoin it afterwards. Rather, the government alleged a *continuous* conspiracy without interruption. *See Coughlin*, 610 F.3d at 101 ["because the government did not suggest – either through argument or evidence – that Coughlin had previously harbored such a scheme but had abandoned it by April 30 (or that he had repeatedly abandoned and revived it in "bouncing ball" fashion), the jury's acquittal on Count Five necessarily means it found that he lacked the requisite intent prior to that time as well").

proof for any group of the charged offenses would be different from that with respect to any other.

At the first trial,[15] the government continued that unified theory of prosecution and evidence. During its opening statement, the government lumped together the material support and IEEPA counts:

> [y]ou are going to learn that the government through the Congress and the Executive Branch has determined that in order to enforce that policy anyone who's found to have committed these acts, *had transactions with a terrorist organization or given support for a terrorist organization*, is subject to conviction in a United States Court.

11R. 611-12 (emphasis added).

Also in its opening at trial, the government posited what would be uncontested at trial, and what would be the two contested issues in the case:

> [t]here are certain things that I submit and I believe will not be an issue in this trial. I wanted to touch upon those. It's not going to be an issue that HAMAS is a foreign terrorist organization and has been so designated by the United States. I don't believe it's going to be an issue that the defendants knew that. In fact, they knew it very well. I don't believe that they will contest the fact that they were well aware of the fact that HAMAS was a designated foreign terrorist organization, and as such you couldn't conduct any business with them. You couldn't provide support to them. At the end of the day and at the

[15] Unless otherwise noted, references to "trial" refer to the first trial.

> end of the trial, I expect the issue in this case to basically come down to two questions: These organizations that are named in the indictment – these zakat committees and other foundations who were the recipient of money from the Holy Land Foundation – the question will be were or are those organizations controlled by, affiliated with or operated for the benefit of HAMAS. And the second question will be did the defendants know that.

11R. 612-13.

In closing, counsel for Mr. El-Mezain agreed that those were the critical issues, and did not distinguish among the counts.[16] The jury's resounding answer as to those questions with respect to Mr. El-Mezain was "no," and that is precisely the same set of questions, with respect to precisely the same set of facts, that would be at issue with respect to Count 1.

Further merging the IEEPA and material support charges, the government in opening also linked them to a single policy strategy:

> [t]he evidence is going to show that these defendants provided *material support for a designated terrorist organization* – that is HAMAS – that they *conducted business transactions with a designated terrorist organization*, HAMAS. The evidence is going to show that this provision of the law -- which you will be

---

[16] *Cf. Coughlin*, 610 F.3d at 104 (noting that defense attorney "carefully countered the government's evidence with respect to each individual accusation of fraud or falsity, one by one. The failure to argue that everything rose and fell together was for good reason"). Here, Mr. El-Mezain's counsel pursued the opposite strategy, as did the government.

> presented Executive Order 12947 which was first issued by President Clinton and was issued because according to the order grave acts of violence committed by foreign terrorists disrupt the Middle East peace process, foreign comity and the national security of United States, and the President hereby declares an emergency to deal with that threat. The evidence will show this is a policy which has consistently been applied by both Democratic and Republican administrations. And the evidence is going to show that these defendants *engaged in these transactions* and *provided this support* for the benefit of HAMAS.

11R. 638-39 (emphasis added). *See also* 11R. 640 ("I will close by simply saying the government expects the evidence to show that these defendants and this organization were from its inception, from its creation set up as a fundraising mechanism to funnel money to the terrorist organization HAMAS, and the actions of these defendants were knowing. It was intentional and with complete knowledge on their part of what they were doing").

In its summations, the government continued its unified theory of prosecution and liability. At no point in either its initial or rebuttal summations did the government even discuss the elements of the groups of offenses, or suggest in any way that any of the evidence was limited to any particular count (other than perhaps the tax counts, with which Mr. El-Mezain was not charged).

Thus, again, this case is dispositively different from *Coughlin*, in which the

Court pointed out: "[n]or was the evidence limited to a unitary scheme; there was also evidence supporting the accusation that Coughlin made new fraudulent representations at [a subsequent] hearing." 610 F.3d at 109.

Nor can the government now argue that somehow Count 1 was not factually co-extensive with Count 11. In *Coughlin*, the Court noted that "for the government to prevail on the 'narrower scheme' theory on appeal, it must have presented the jury with the possibility of finding such a scheme at trial." *Id*., at 104, citing *Ashe*, 397 U.S. at 445; *Sealfon v. United States*, 332 U.S. 575, 579-80 (1948). *See also Bowman*, 609 F.2d at 17. *Cf. Coughlin*, 610 F.3d at 102 (finding rational distinction between acquitted and other counts because that was "consistent with the arguments the government made at trial").[17]

4. *The District Court's Charge to the Jury At the First Trial*

Also, the District Court's jury instructions (3R. 5354-5407) dispositively reinforce the unitary factual predicate of the charged conspiracies, and the

---

[17] Nor was the retrial any different, as the government failed to attempt any distinction among either the evidence or legal principles that applied to each of the groups of offenses. Rather, as it did at the first trial, the government argued a unitary theory to the jury based on the same set of facts and arguments advanced at the first trial. *See, e.g.*, 22R. 6345 (government closing, second trial) ("[n]ow, these didn't become illegal conspiracies until Hamas was designated . . ."); 22R. 6372-73 (goverment rebuttal, second trial); 21R. 211 (government opening, second trial).

inexorable conclusion that there was not any genuine difference between the factual determinations the jury was required to make with respect to the two conspiracies: Count 1, on which it deadlocked, and Count 11, on which it acquitted Mr. El-Mezain.

For example, in the Contentions of the Parties, the Court informed the jury simply that

> [t]he government contends, in the superseding indictment in this case, that all of the defendants on trial are guilty of several different federal crimes: conspiracy to provide material support to a foreign terrorist organization (Count 1); providing material support to a foreign terrorist organization (Counts 2-10); conspiracy to provide funds, goods and services to a specially designated terrorist (Count 11); providing funds, goods and services to a specially designated terrorist (Counts 12-21); conspiracy to commit money laundering (Count 22); and money laundering (Counts 23-32).

3R. 5370 (RE M).

Thus, as with every other aspect of the case, with respect to the jury charge the government did not make any effort to distinguish its evidentiary foundation for any of the groups of offenses. In addition, the Court also included a vicarious liability instruction with respect to each group of non-conspiracy counts. *See* Jury Charge at 3R. 5384, 5393-94, 5399-5400 (RE M). As a result, the jury, if it found Mr. El-Mezain to be a member of the Count 1 conspiracy, could have convicted

him of the other material support counts on that basis. Of course, it did not.

Examination of the instructions the District Court provided with respect to conspiracy generally also demonstrate the absence of any genuine difference between the factual determinations the jury was obligated to make with respect to Counts 1 and 11. For example, in its charge addressing the conspiracy charges as a group, the Court instructed the jury that in order to convict it had to conclude "[t]hat the defendant under consideration knew the unlawful purpose of the agreement and *joined in it willfully*, that is, with the intent to further the unlawful purpose[.]" *See* 3R. 5374 (RE M) (emphasis added). *See* 3R. 5378, 5387-88 (RE M) (setting forth elements for Counts 1 and 11).

Thus, as detailed **post**, at 49, and contrary to the District Court's position, Counts 1 and 11 were *not* distinguished by the "willfully" element, as the general conspiracy instruction *required it for both Count 1 and Count 11*. Thus, the jury charge, too, establishes that the government was collaterally estopped from retrying Mr. El-Mezain on Count 1.

5. *The Government's Response to Mr. El-Mezain's Severance Motion*

The government's response to Mr. El-Mezain's severance motion prior to the second trial provides even more compelling proof of the complete congruence between the evidence relating to both Count 1 and the 31 counts on which Mr. El-

Mezain was acquitted. In that response (Dkt. #1084, 6/30/08, at 2-3), the government maintained that:

> [m]ost of the evidence admitted during the first trial was admitted as proof of the existence of each of the three conspiracies alleged in the indictment. The evidence was supportive of the proof of the existence, nature and activities of each of the three conspiracies charged. While the evidence was introduced in support of the substantive counts of the indictment, it was also admitted as proof of overt acts committed in furtherance of the three conspiracies.

The government added that "[t]he amount of evidence that will (sic) admissible against the other defendants but not the defendant el-Mezain is relatively small, if not neglible[,]" *id*. at 3, arguing that:

> [t]he amount of evidence to be admitted against the defendant el-Mezain in a retrial, is the same as that admitted against the other defendants as it pertains to the conspiracy charges and the substantive counts. The only thing that is disproportional as to el-Mezain is the fact that he will only be subject to being convicted on a single count whereas his co-defendants face liability for several counts.

Id.

Consequently, the *entirety* of the government's case against Mr. El-Mezain with respect to Count One was *exactly* the same as it was against him with respect to the 31 acquitted counts – *and was on retrial against Mr. El-Mezain and the*

other defendants. The foregoing therefore clearly establishes "step two" of the requisite analysis: that "the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial."

E. *The District Court Erroneously Substituted A Double Jeopardy Legal "Elements" Analysis for the Proper* Factual *Collateral Estoppel Review*

As set forth **ante**, at 8, the District Court based its denial of Mr. El-Mezain's collateral estoppel motion in part on the claim that Counts 1 and 11 contained different legal elements, and in particular that the jury had to find Mr. El-Mezain's conduct knowing and willful on Count 11, while purportedly only *knowing* for Count 1.

However, as detailed below, that analysis is faulty because: (1) it is foreclosed by *Yeager*; (2) collateral estoppel analysis does not focus on varying *legal* elements, but rather the facts necessarily decided at the prior proceeding; and (3) any such alleged distinction in what the jury had to find for each conspiracy was rendered illusory by the jury charge.

1. *The District Court's Attempted* Mens Rea *Distinction Is Completely Foreclosed By* Yeager

As a threshold matter, the Supreme Court's holding in *Yeager* effectively precludes resort to an analysis of the *mens rea* required for Count 1 (the deadlocked count) because "a hung count is not a 'relevant' part of the 'record of

[the] prior proceeding'" and "a failure to reach a verdict cannot – by negative implication – yield a piece of information that helps put together the trial puzzle." 129 S. Ct. at 2367 (*citing Ashe v. Swenson*, 397 U.S. 397 U.S. 436, 444 (1970)). Thus, here, the elements of the deadlocked count were irrelevant, and the District Court's resort to them was improper. *See Yeager*, 334 Fed.Appx. 707 (5th Cir. 2009) (on remand).

2. *The District Failed to Perform the Analysis Applicable to Collateral Estoppel*

In addition, in concentrating on the supposedly different levels of intent required for Counts 1 and 11, the District Court confused ordinary Double Jeopardy legal analysis with the factual evaluation pertinent to collateral estoppel. Double Jeopardy focuses on the *legal elements* of an offense. If the elements of one offense are distinct from another, subsequently charged crime, Double Jeopardy does not act as a barrier to a second prosecution. *See, e.g., United States v. Dixon*, 509 U.S. 688 (1993). *See also* **ante**, at 4.

In contrast, collateral estoppel concentrates on the *facts* adduced and necessarily determined at a prior proceeding. *See Yeager*, 129 S. Ct. at 2366 (collateral estoppel precludes the government from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial"). *See also Ashe*, 397 U.S.

at 443. Thus, even though retrial on a different offense containing different elements might not be precluded under Double Jeopardy principles, it can be barred by collateral estoppel. *See* **ante**, at 12-13 & n.7.

As this Court has stated:

> [a]t least since *Sealfon* [], 332 U.S. 575 [], it has been the rule in the federal courts that the doctrine of *res judicata* applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined, *though the offenses be different.*

Wingate v. Wainwright, 464 F.2d 209, 211 (5th Cir. 1972) (emphasis added).

Also, that part of the District Court's analysis of Mr. El-Mezain's collateral estoppel motion was based *exclusively* on comparison of statutory elements, and thereby failed to set the inquiry "in a practical frame and viewed with an eye to all the circumstances of the proceedings," as required by the Supreme Court. *Yeager*, 129 S. Ct. at 2367, quoting *Ashe*, 397 U.S. at 444 (*quoting Sealfon v. United States*, 332 U.S. 575, 579 (1948)). *Accord United States v. Leach*, 632 F.2d 1337, 1341 (5th Cir. 1980).

In that context, the Supreme Court has warned against such "hypertechnical and archaic" applications of the collateral estoppel doctrine. *Ashe,* 397 U.S. at 443. Consequently, by mistakenly replacing the requisite collateral estoppel *facts* analysis with an improper and unduly limited Double Jeopardy *elements* analysis,

the District Court obscured and even missed the point: if the elements of the offenses were identical, further prosecution would be barred by Double Jeopardy. However, collateral estoppel does not require congruence of elements, but rather of the *facts* proffered to prove those elements.

For example, in *United States v. Ohayon*, the government urged the Court to deny the collateral estoppel motion because the counts did not share a common legal element. 483 F.3d at 1292. The Court rejected that argument, pointing out that for collateral estoppel purposes, "[a]n 'essential element,' as described by [*United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980)], is a factual component of an offense . . . not a legal element[.]" *Id*.

In *Yeager*, too, the Supreme Court explained that determining whether collateral estoppel applies requires a "fact-intensive analysis of the [] record[,]" 129 S. Ct. at 2370, which includes "pleadings, jury charge, or the evidence introduced by the parties[.]" *Id*., at 2368. Thus, the District Court's exclusive focus on the legal elements of the offenses did not conform with proper collateral estoppel analysis.

3. ***The District Court's Attempted* Mens Rea *Distinction Was Illusory***

In addition, even assuming *arguendo* the "elements" analysis was appropriate, the District Court's reliance on the supposedly different levels of

intent required for Count 1 compared with Count 11 was misplaced because the "willfullness" element was explicitly incorporated in *all* of the conspiracy counts, and the government never distinguished between those levels of intent at trial.

As set forth **ante**, at 43, in its omnibus general conspiracy instruction addressing the conspiracy charges as a group (Counts 1, 11 & 22), the District Court directed the jury that in order to convict it had to find that "the defendant under consideration knew the unlawful purpose of the agreement and *joined in it willfully*, that is, with the intent to further the unlawful purpose[.]" *See* 3R. 5374 (emphasis added).

Thus, in fact, the jury charge as a whole clearly included "willfully" as an element of *each* conspiracy charged, including Count 1. As a result, the District Court's conclusion that Count 1 required only that Mr. El-Mezain's conduct be performed "knowingly," while Count 11 added "willfully," does not withstand examination of the record.

The District Court was also misguided because any contention that the jury might have found the government had not proven "willfulness" beyond a reasonable doubt, without being able to reach that same conclusion about a "knowing" mental state is belied entirely by Mr. El-Mezain's acquittals on *all* the substantive "material support" charges in Counts 2-10, which were also governed

by that same "knowingly" (only) standard in Count 1.

Also, as quoted **ante**, at 38-40, the government's opening repeatedly focused the jury's attention on defendants' *knowledge* as the critical contested element in the case. It cannot now add "willfulness" to that equation. Nor did the government ever, in pretrial proceedings, submissions, the trial evidence, argument, or the jury charge, seek to draw any distinction, practical or abstract, between the "knowingly" or "wilfully" standards as they related to the evidence, Counts 1 and/or 11, or the government's theory of prosecution.

Throughout the litigation of Mr. El-Mezain's collateral estoppel claim, neither the government nor the District Court has been able to point to a single fact that would prove "wilfulness" as opposed to that which would establish conduct performed "knowingly." As the analysis performed **ante**, at 38-50, demonstrates, any such delineation is absent from the record entirely.

Thus, there was no practical distinction between the elements of Counts 1 and 11 based on the way the case was charged in the indictment, tried, and charged to the jury (in either trial). Pursuant to the District Court's instructions, Counts 1 and 11 both required "willfulness," and Mr. El-Mezain's acquittal on Count 11

therefore applies with full force to Count 1 as well.[18] Moreover, any purported difference in intent levels did not make a difference to the jury with respect to those substantive counts, which contained, as noted **ante**, at 22, the same entities listed in the overt acts set forth in Count 1 (and Count 11).

Accordingly, because Mr. El-Mezain's acquittal on 31 counts – particularly the mirror IEEPA conspiracy charged in Count 1, and substantive material support counts that tracked the material support conspiracy – necessarily decided facts constituting an essential element of the single remaining count, Count 1, it is respectfully submitted that the District Court erred in denying Mr. El-Mezain's motion to dismiss on collateral estoppel grounds.

---

[18] Also, the inclusion of "attempt" as a basis for liability within Counts 2 through 10 provided an inchoate theory of liability that mirrored Count 1 (even to the extent of including the "knowingly" standard upon which the District Court placed such reliance). *See* 3R. 5376-77, 5382. As the Court in *Ohayon* recognized, collateral estoppel existed between inchoate offenses – in that case, between a deadlocked conspiracy charge and acquittal on the attempt charge – while it might not between acquitted substantive offenses and a deadlocked conspiracy count. 483 F.3d at 1291-92. *Cf. United States v. Yearwood*, 518 F.3d 220, 228-29 (4th Cir. 2008) (conspiracy charge distinct from substantive offense, and therefore acquittal on substantive offense did not establish collateral estoppel precluding retrial on conspiracy charge). Thus, here, not only was there an acquittal on the mirror conspiracy (the Count 11 IEEPA conspiracy), there were *nine* acquitted attempted material support counts.

POINT II

THE DISTRICT ERRED IN FAILING TO TAKE ANY MEASURES TO PROTECT MR. EL-MEZAIN FROM BEING TRIED ON EVIDENCE RELATED TO ISSUES THAT THE JURY'S PRIOR ACQUITTALS HAD NECESSARILY DECIDED AGAINST THE GOVERNMENT

Prior to retrial, Mr. El-Mezain, in addition to seeking dismissal based on collateral estoppel, in the alternative also asked the District Court to take ameliorative measures to ensure he was not tried on the basis of evidence related to issues the jury at the first trial had necessarily decided in his favor. The standard of review for "decisions to admit or exclude evidence [is] for abuse of discretion." *United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005). *See also United States v. Phillips*, 219 F.3d 404, 409 (5th Cir. 2000).

In particular, Mr. El-Mezain moved for preclusion of any evidence (against him) related to the Counts on which he was acquitted, and/or for severance to avoid the inevitable prejudicial spillover, and concomitant violation of the Fifth Amendment, that would result from the introduction of such evidence at a joint trial.

During retrial, Mr. El-Mezain's counsel moved repeatedly to exclude such evidence, particularly that which related to activity occurring prior to October 8, 1997, the operative date for any liability under Count 1. *See, e.g.,* 21R. 928-29

(RE H) (Elbarasse documents); 21R. 929 (RE H) (standing objection); 21R. 1086 (RE I) (intercepted conversation in which Mr. El-Mezain was overheard); 21R. 1515-19 (same); 21 R. 4079 (testimony of John R. McBrien regarding the 1995 [IEEPA] statute and designation order and list); 21R. 3851(mistrial motion based on collateral estoppel caused by pre-1997 evidence); 22R. 6416-17 (government's summation did not distinguish between FTO and SDT designations, or the material support or IEEPA conspiracies).

When those motions, including for a mistrial, were uniformly denied, counsel requested a limiting instruction that would inform the jury it should not consider such evidence against Mr. El-Mezain. *See, e.g.,* 21R. 929 (RE H).

However, while during retrial the District Court stated it would consider such an instruction – rejecting counsel's repeated entreaties to issue such an instruction contemporaneous with admission of the challenged evidence, *see* 21R. 1518 (District Court states "[w]e will deal with the limiting instruction later"); 21R. 1519 (objection to failure to deliver the instruction at the time); 21R. 3851 (same) – ultimately the District Court refused to deliver such an instruction, even though counsel provided three alternative versions that it considered acceptable. 22R. 6027, 6029 (RE J).

In fact, the District Court manifested a fundamental misunderstanding of

collateral estoppel. In denying counsel's application to preclude at least the evidence of pre-October 1997 conduct, the District Court and counsel had this exchange:

> MR. DRATEL: The jury has already – the previous jury already found, and this is what collateral estoppel, what the principle means in this sense, is that the jury has already found that he was not a co-conspirator during that period from '95 to '97.
>
> THE COURT: I disagree that the jury found that. I know that is your argument, but I disagree that they found that. They didn't necessarily have to find that.
>
> MR. DRATEL: But in the only conspiracy charged they found him not guilty.
>
> THE COURT: But that doesn't mean that they didn't find there was a conspiracy. They could have found, as we explained, that he didn't willfully join. They didn't have to find that there was no conspiracy.
>
> MR. DRATEL: That is what I am saying. The language says ". . . join the conspiracy." There is no conspiracy on Count 1 before October 8th, 1997 as a matter of law.
>
> THE COURT: Except for what he is talking about, that they could have been in agreement and then they continued it after this particular agreement to fund Hamas as charged in Count 1. That agreement could have been in place before, and then once the law was passed they continued it. That is the point you are making.
>
> [AUSA] JACKS: Yes.

> MR. DRATEL: But they have already acquitted him of an agreement to fund Hamas.
>
> THE COURT: A different conspiracy that had different elements and different facts that go into that. I disagree. You have been stating all trial that they acquitted found he was not a member of a conspiracy. That is not true. They didn't necessarily have to find that. That is the test for both double jeopardy and collateral estoppel. They had to necessarily find that, and you can't get there. I know that is your argument, but I don't think you can get there.

22R. 6030-31 (RE J). *See also* 22R. 6046 (RE K).[19]

Thus, the District Court failed to appreciate the impact of the jury's verdict at the first trial: that Mr. El-Mezain was *not guilty* of the IEEPA conspiracy that allegedly commenced in 1995, and was the *only* conspiracy charged between 1995 and October 1997, when the material support conspiracy allegedly began. Thus, at the retrial, there was *not* any conspiracy of which Mr. El-Mezain could have been a member prior to 1997. As a result, the pre-October 1997 evidence should not have been admissible against Mr. El-Mezain.

At the conclusion of that colloquy, though, the District Court

---

[19] As discussed **ante**, at 29-30, even any post-October 1997 evidence would have been covered by Mr. El-Mezain's acquittal on Count 11's IEEPA conspiracy, which allegedly ran from January 1995 through July 2004. However, for purposes of retrial (the motion to dismiss having been denied, and having to try Count 1 again), counsel endeavored at least to limit the evidence to the Count 1 conspiracy, which could not have existed prior to October 8, 1997.

acknowledged, with respect to counsel's repeated requests for a jury instruction, that, "I will give it some thought. I know what you are getting at, and certainly I understand the issues there, and I will get back to you on that." 22R. 6031 (RE J).

Yet the District Court declined to provide any instruction at all that could guide the jury to a determination that did not involve using against Mr. El-Mezain evidence on issues necessarily decided in his favor at the first trial. Instead, rejecting counsel's proposals, *see* 22R. 6027-6029 (RE J) (noting three proposed options presented to the District Court, and reading them into record), the District Court insisted that

> with respect to [] collateral estoppel, you submitted three proposals, and the first one I had already denied because it is about evidence pre-1997, and of course that was denied across the board. And then the other two I really think are subsumed in the instructions that are given. Each of those conspiracies – well, that particular count, which is Count 1, states that each Defendant – it is a broader statement rather than just Mr. El-Mezain, but that each Defendant joined the conspiracy within the appropriate date.

22R. 6047-48 (RE K). *See also* 22R. 6046 (RE K) (objection to failure to include instruction regarding collateral estoppel).

Yet that general conspiracy instruction in no way communicated to the jury any of the limits collateral estoppel, and Mr. El-Mezain's prior acquittals, placed

on the use of certain evidence against him. As a result, the jury was free to consider against Mr. El-Mezain *all* the evidence at trial, even that which was directly related to counts and issues on which he had been acquitted, and which should have been precluded on grounds of collateral estoppel.

Thus, all the evidence relevant to the IEEPA counts, relating to the January 23, 1995, designation, or even conduct *before* that initial designation, as well as all of the evidence from that point through the end of the charged IEEPA conspiracy (the date of the July 2004 Indictment), all of which the jury had rejected in acquitting Mr. El-Mezain of the IEEPA conspiracy and substantive counts, as well as the substantive material support counts – all of which encompassed the overwhelming majority of the evidence at both trials (*see* **ante**, at 27-30) – was used improperly to convict Mr. El-Mezain on Count 1.

That evidence included *all* of the intercepted telephone calls involving Mr. El-Mezain, *all* of the videotapes on which Mr. El-Mezain appeared, *all* of the "Elbarasse documents," *all* of the telephone conversations involving and/or documents seized from Abdulhaleem Ashqar, *all* of the telephone records related to calls to and from Mr. El-Mezain, and *all* of the records of Mr. El-Mezain's personal financial transactions (as well as government expert Matthew Levitt's testimony interpreting Mr. El-Mezain's pre-1997 and even pre-1995 contacts).

See Elashi Brief, at POINT IV(D).

Indeed, as pointed out **ante**, at 30, there was a paucity of evidence admitted at trial about Mr. El-Mezain *at all* after October 8, 1997 (even if it were relevant solely to the Count 1 conspiracy, which it was not, as it was indistinguishable from the evidence on the Count 11 IEEPA conspiracy and substantive material support counts on which Mr. El-Mezain had been acquitted).

As discussed **ante**, at 14, in this Circuit preclusion of evidence is an ancillary remedy provided by the collateral estoppel doctrine. Yet the District Court ignored that element of collateral estoppel entirely, not once either precluding such evidence from admission against Mr. El-Mezain, or even alerting the jury of the distinction(s) in how it could consider such evidence with respect to Mr. El-Mezain.

The District Court's refusal to provide a limiting instruction, either simultaneous with the admission of such evidence, or at the very least in its ultimate charge to the jury, was simply inexplicable and inexcusable. As the Second Circuit held in *United States v. al Moayad*, 545 F.3d 139 (2d Cir. 2008), in which the charges involved alleged material support to Hamas and al Qaeda in the form of funds, the failure to deliver a limiting instruction to alleviate potential prejudice emanating from otherwise extraneous evidence constituted an abuse of

discretion. *Id*., at 162-163. *See also* Elashi Brief, at III(C) (discussing *al Moayad*).

Here, in a case involving similar allegations (financial support for Hamas), with similar evidence (*i.e.*, evidence of Hamas violence and rhetoric), the District Court abused its discretion by refusing altogether to provide to Mr. El-Mezain *any* remedy – whether by severance, preclusion, or a limiting instruction – for the introduction of evidence on issues the jury at the first trial had necessarily decided against the government.

Accordingly, assuming *arguendo* Count 1 survives Mr. El-Mezain's collateral estoppel claim at all, it is respectfully submitted that Mr. El-Mezain's conviction should be vacated, and a new trial ordered.

POINT III

PURSUANT TO RULE 28(i), FED.R.APP.P., MR. EL-MEZAIN JOINS IN HIS CO-APPELLANTS' BRIEFS AND POINTS TO THE EXTENT THEY BENEFIT HIM

Conclusion

For all the reasons set forth above, it is respectfully submitted that the Court should reverse Mr. Mezain's conviction, and dismiss the Indictment against him, or vacate his conviction and grant him a new trial.

Dated: 19 October 2010
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
JOSHUA L. DRATEL, P.C.
2 Wall Street, 3rd Floor
New York, New York 10005
(212) 732-0707

Attorneys for Appellant
Mohammad El-Mezain

– Of Counsel –

Joshua L. Dratel
Aaron J. Mysliwiec
Lindsay A. Lewis

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2010, I electronically filed the foregoing document with the clerk of the Fifth Circuit Court of Appeals, using the electronic case filing (ECF) system of the court. The ECF system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.

/s/ Joshua L. Dratel
Joshua L. Dratel
Attorney for Defendant-Appellant
MOHAMMAD EL-MEZAIN

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 13,318 words.

/s/ Joshua L. Dratel
Joshua L. Dratel
Attorney for Defendant-Appellant
MOHAMMAD EL-MEZAIN