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 RELIEF AND DEVELOPMENT, also known as HLF,

Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of Texas
Case No. 3:04-CR-240-4 (Jorge Solis, J.)

OPENING BRIEF OF APPELLANT GHASSAN ELASHI (WITH COMMON ISSUES)

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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,

Defendants-Appellants.

CONSOLIDATED WITH No. 08-10774

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MOHAMMAD EL-MEZAIN,

Defendant-Appellant.

CONSOLIDATED WITH No. 10-10590

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT,

Defendant-Appellant-Cross-Appellee.

CONSOLIDATED WITH No. 10-10586

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHUKRI ABU BAKER, Defendant, NANCY HOLLANDER,

Appellant.

CERTIFICATE OF INTERESTED PERSONS
UNITED STATES v. EL-MEZAIN, No. 09-10560

The undersigned counsel of record for appellant Ghassan Elashi 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

Hollander, Nancy

Holy Land Foundation for Relief and Development

Huskey, Kristine

Jacks, James

Jonas, Barry

Junker, Walter

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

Palmer, Joseph F.

Shapiro, Elizabeth

Solis, Honorable Jorge

Tigar, Michael E.

Westfall, Gregory B.

DATED: October 19, 2010

Respectfully submitted,

/s/ John D. Cline
John D. Cline
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STATEMENT REGARDING ORAL ARGUMENT

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

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The district court entered judgment against appellant Ghassan Elashi on May 29, 2009. 30 R.142.[1] Elashi filed his notice of appeal on May 28, 2009. 32 R.1519. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The government prosecuted the Holy Land Foundation for Relief and Development ("HLF"), three of its former officers (including Elashi), a former employee, and a performer at fundraising events for providing charitable support--food, school supplies, monthly stipends, and the like--to Palestinians in the West Bank through local zakat (or "charity") committees that, according to the government, Hamas controlled. There was no evidence that HLF provided funds directly to Hamas or that its funds were used (or intended to be used) to support suicide bombings or other violence. The key factual issues at trial were (1) whether Hamas in fact controlled the zakat committees, and, if so, (2) whether the defendants knew of the Hamas control and acted willfully, which the district court

[1] Citations to the record on appeal ("R.") are in the following format: The first number represents the "Holyland" folder number in the electronic record provided to counsel, and the second number represents the "USCA5" number in the lower right-hand corner of each page of the electronic record.

defined in part as with a "bad purpose either to disobey or disregard the law." 3 R.6992.

A first trial produced a hung jury on most counts, acquittals as to one defendant, and no convictions. At a second trial before a different judge, the jury returned guilty verdicts on all counts. The district court sentenced Elashi to 65 years in prison. He presents the following issues on appeal:

1. Did the district court violate Elashi's right to due process and to confront the witnesses against him by permitting the government to present two witnesses, including a key expert witness, without requiring disclosure of the witnesses' names to the defense?

2. Did the district court err in admitting prejudicial hearsay, including (a) testimony by a cooperating witness, based entirely on newspapers, leaflets, the internet, and talk among his friends, that Hamas controlled HLF and the zakat committees through which HLF made donations; (b) documents seized by the Israeli military from the Palestinian Authority headquarters, which--based on unnamed "Western Sources," "Israeli sources," and "western security organizations"--state, among other things, that HLF is among Hamas' worldwide funding sources; and (c) documents, many of them by unknown authors, written before it was unlawful to support Hamas, admitted under the purported "lawful joint venture" variant of the co-conspirator exception to the hearsay rule?

3. Did the district court abuse its discretion by refusing to exclude under Fed. R. Evid. 403 inflammatory evidence of little or no probative value, including graphic evidence of violence committed by Hamas, videotapes of Palestinian children playing the role of suicide bombers in school performances, and a videotape from HLF's files with a fragment showing demonstrators burning the American flag?

4. Did the district court abuse its discretion by (a) permitting OFAC official Robert McBrien--testifying as a lay witness--to offer legal opinions about the meaning of a key regulation and related matters; (b) permitting FBI Agents Lara Burns and Robert Miranda to offer opinions not rationally based on their perceptions on subjects involving specialized knowledge, without requiring them to be qualified as experts; (c) permitting government expert Matthew Levitt to opine about the significance of appellants' contacts with Hamas officials; and (d) permitting former National Security Council staff member Steven Simon to testify about the danger Hamas violence poses to vital United States interests, including increasing the risk of another terrorist attack on this country?

5. Did the district court err in failing to rule on (and thus effectively denying) appellants' pretrial motion for a letter rogatory to the Government of Israel requesting defense inspection of items the Israeli military seized from the zakat committees?

6. Did the district court err under Fed. R. Crim. P. 16(a)(1)(B)(i) by denying appellants access to their own statements intercepted under the Foreign Intelligence Surveillance Act ("FISA")?

7. Did the district court err with respect to FISA by (a) refusing to order disclosure of the underlying applications and orders, (b) refusing to suppress the intercepted communications under the Fourth Amendment, and (c) refusing to hold a *Franks* hearing?

8. Does the cumulative effect of the district court's errors require reversal?

9. (a) Do Elashi's conviction and sentencing on IEEPA and money laundering conspiracies in a previous, separate federal prosecution create a Double Jeopardy bar to his prosecution in this case for the charged material support, IEEPA, and money laundering conspiracies?

(b) If Elashi's second prosecution for the same conspiracy offenses violated the Double Jeopardy Clause, must his conviction on substantive material support, IEEPA, and money laundering charges be reversed because the district court gave a *Pinkerton* instruction and the jury returned a general verdict?

10. Did the district court err in sentencing Elashi (a) by applying the terrorism adjustment under U.S.S.G. § 3A1.4, and (b) in determining the value of the funds laundered under U.S.S.G. § 2S1.1?

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW.

The grand jury indicted appellants July 26, 2004. 10 R.139. The indictment--as superseded before trial--charged conspiracy to provide material support to Hamas (18 U.S.C. § 2339B(a)(1)); substantive material support offenses; conspiracy to violate the International Emergency Economic Powers Act ("IEEPA") (18 U.S.C. § 371, 50 U.S.C. §§ 1701-1706); substantive IEEPA offenses; conspiracy to commit money laundering (18 U.S.C. § 1956(h)); substantive money laundering offenses; and, as to Baker and Elashi, conspiracy to file false tax returns and substantive false tax return offenses (26 U.S.C. § 7206(2)). 3 R.5011.

Trial began July 24, 2007 before the Honorable A. Joe Fish. After eight weeks of evidence and twenty days of deliberations, the jury returned a partial verdict October 22, 2007. It acquitted El-Mezain on all charges except Count 1 (conspiracy to provide material support to Hamas). It initially acquitted Abdulqader on all counts, but one juror changed her mind when polled and thus the jury hung 11-1 for acquittal on all counts as to him. The jury hung on all counts as to all other appellants. 3 R.5440.

Following the partial verdict, the case was reassigned to the Honorable Jorge Solis. The government later dismissed all charges against Odeh and Abdulqader

except Counts 1, 11, and 22 (conspiracies to provide material support to Hamas, to violate IEEPA, and to commit money laundering). 3 R.7034 (revised indictment).

After extensive motions practice, including interlocutory appeals from the district court's rulings on double jeopardy issues, jury selection for the retrial began before Judge Solis September 4, 2008, and trial began September 22. After six weeks of evidence and nine days of deliberations, the jury found appellants guilty on all counts in which they were charged. 3 R.7079.

The district court sentenced appellants May 27, 2009. Elashi was sentenced to 65 years in prison and ordered to forfeit $12.4 million. 30 R.142.[2] Baker was sentenced to 65 years in prison and a $12.4 million forfeiture. 17 R.1539. Abdulqader was sentenced to 20 years in prison and a $12.4 million forfeiture. 38 R.1584. Odeh was sentenced to 15 years in prison and a $12.4 million forfeiture. 45 R.1593. El-Mezain was sentenced to 15 years in prison. 20 R.470. HLF was sentenced to a year of probation and ordered to forfeit $12.4 million in the form of a money judgment and several million dollars held in bank accounts. 3 R.7387.

All defendants timely appealed. The individual appellants are incarcerated.

[2] The $12.4 million forfeiture was imposed jointly and severally on Elashi, Baker, Abdulqader, Odeh, and HLF. *E.g.*, 30 R.149. Because El-Mezain was acquitted on money laundering conspiracy in the first trial, he was not subject to forfeiture.

II. STATEMENT OF FACTS.

Baker founded HLF (initially called the Occupied Land Fund) in 1988 in Indiana. 4 R.4189, 4198. HLF moved to California and, in the early 1990s, to Dallas. Although HLF distributed humanitarian aid in the United States and other countries, its primary mission was providing assistance to Palestinians living under Israeli occupation in the West Bank and Gaza. According to the former United States Consul General in Jerusalem, HLF had a "good reputation" for "low overhead costs and for projects of assistance that went to needy Palestinians." 7 R.9186. No one disputed the humanitarian crisis that HLF sought to alleviate; even prosecution expert Matthew Levitt recognized the plight of the Palestinians as "desperate." 4 R.3863-67.[3] In early December 2001, the Treasury Department designated HLF a terrorist organization, seized its assets, and put the charity out of business.[4]

As relevant here, HLF distributed humanitarian aid to Palestinians through local charitable organizations known as zakat committees or charitable societies.[5]

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[3] As Levitt acknowledged, "[T]hroughout the period of the occupation the Israeli government has consistently failed to provide essential services to the Palestinians." 4 R.3867. The United Nations, the United States, and NGOs such as HLF sought to provide those services.

[4] HLF challenged the designation unsuccessfully. *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp. 2d 57 (D.D.C. 2002), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

[5] Although there are differences between zakat committees and charitable societies, 7 R.9277, we refer to them collectively as zakat committees.

The government did not contend that HLF provided funds directly to Hamas or that its funds were used (or intended to be used) to support suicide bombings or other violence.[6] Rather, the government's theory was that Hamas controlled the zakat committees that HLF used and that by distributing humanitarian aid through those committees, HLF helped Hamas win the "hearts and minds" of the Palestinian people. The indictment alleged transactions with seven zakat committees, all located in the West Bank: the Qalqilia Zakat Committee; the Islamic Charity Society of Hebron; the Tolkarem Zakat Committee; the Nablus Zakat Committee; the Ramallah Zakat Committee; the Jenin Zakat Committee; and the Islamic Science and Culture Committee. 3 R.7051, 7053-54, 7056-59, 7061-62, 7064.

Baker served on the HLF board, as secretary, and as chief executive officer until the government closed the charity in December 2001. 4 R.4198, 4201. Elashi joined the HLF board in the late 1980s and served at times as secretary, chief financial officer, treasurer, and chairman. 4 R.4191, 4193, 4195, 4201. Elashi also founded and helped run InfoCom, a computer company based first in California and then in Texas. 4 R.4198-4200. El-Mezain joined the HLF board in the late 1980s and served for a period as chairman and president. 4 R.4191, 4193. He stepped down as chairman in 1999 and opened HLF's San Diego office. 4

[6] *E.g.*, 7 R.9424 (government closing: "No one is saying that the defendants themselves have committed a violent act" or that the HLF funds went directly to buy a suicide belt or bomb).

R.4201. Odeh ran HLF's New Jersey office from early 1994 until the organization closed. 4 R.4201-05. Abdulqader belonged to a band that performed at HLF events (among other places), and he sometimes served as a volunteer for the organization. 4 R.4325-35.

In 1987, Palestinians revolted against the Israeli occupation in an uprising known as the first Intifada. Hamas emerged during the Intifada as a popular offshoot of the Muslim Brotherhood, an Islamic organization founded in Egypt in 1927. Hamas' main political rival was Fatah, a secular organization headed by Yasser Arafat. 7 R.7561-62, 9162-63, 9193. Hamas resisted the occupation at first through small-scale violence directed against Israeli soldiers. By the mid-1990s, however, Hamas had conducted several suicide attacks against Israeli civilians inside Israel.

In September 1993, Arafat and Yitzhak Rabin, Prime Minister of Israel, signed what became known as the Oslo accords. 7 R.9162-63. The accords contemplated the creation of a limited Palestinian governing authority. Many Palestinians opposed the accords, believing that they did not go far enough in establishing Palestinian sovereignty. Hamas was among the Palestinian organizations that opposed the Oslo accords. 7 R.9198-9200. Under the accords and follow-on agreements, the Palestinian Authority ("PA") was created and given

power to administer some aspects of portions of the West Bank and Gaza. 7 R.9163-64. Throughout the period at issue, Fatah controlled the PA.

In October 1993, soon after the Oslo accords, Baker, Elashi, and other prominent American Muslims met at a hotel in Philadelphia. *E.g.*, 4 R.4578-84. The FBI secretly recorded the meeting. GX Philly Meeting 1-18; 4 R.4584-86. The attendees discussed a range of subjects, including their opposition to the accords, the role of Hamas in resisting the Israeli occupation, and HLF's function in providing assistance to the Palestinian people. *See id*. Baker emphasized that HLF "must act as an American organization which is registered in America and which cares for the interests of the Palestinian people. It doesn't cater to the interests of a specific party. Our relationship with everyone must be good, regardless." 7 R.5380. Baker declared that HLF "must stay on its legal track as far as charitable projects are concerned without going after a sentiment that could harm the foundation legally . . . ." 7 R.5381. He added: "We shouldn't take part in any illegal transactions." 7 R.5382.

The United States first banned financial support for Hamas on January 25, 1995, when President Clinton issued Executive Order 12947 under IEEPA. 60 Fed. Reg. 5079 (Jan. 25, 1995).[7] The Executive Order implemented the ban by

[7] Thus, the earliest unlawful conduct alleged in the indictment is January 25, 1995. 3 R.7055, 7060. It was undisputed that appellants' conduct before that date did not violate any federal criminal law. As the government conceded in its

naming Hamas a Specially Designated Terrorist ("SDT"). 7 R.7283, 7301. E.O. 12947 gave the Treasury Department authority to designate additional SDTs, including "persons determined . . . to be owned or controlled by, or to act for or on behalf of, any of the foregoing persons," including Hamas. E.O. 12947, § 1(a)(iii), 60 Fed. Reg. at 5079; 7 R.7301-02. The designation process serves two critical functions: as the head of Treasury's Office of Foreign Assets Control ("OFAC") explained, designation of an entity "alert[s] the world to [its] true nature" and "cut[s] it off from the U.S. financial system." DX 1052; 7 R.7306.[8]

Beginning with the designations of Hamas and others in January 1995, the Treasury Department maintained a public list of all designated persons and entities, including SDTs and FTOs. 7 R.7277-78, 7302. The list included persons and entities designated because they were determined to be "owned or controlled by, or to act for or on behalf of" Hamas. 7 R.7305. Hamas and several Hamas officials appeared on the Treasury Department list. But the government never designated as an SDT or FTO (and placed on the list) any of the zakat committees, or anyone

(continued…)

opening statement, "[I]t didn't become illegal to support Hamas or to fund Hamas until 1995." 4 R.3563.

[8] The United States further criminalized financial support for Hamas on October 8, 1997, when the State Department designated it a Foreign Terrorist Organization ("FTO") and thus brought it within the prohibitions of 18 U.S.C. § 2339B. Because El-Mezain was acquitted in the first trial on all counts but the conspiracy to violate § 2339B (Count 1), October 8, 1997 marked the earliest date on which his conduct could be found unlawful.

connected with the zakat committees. 4 R.3860-62; 7 R.7344. The Treasury Department thus never formally determined--and "alert[ed] the world"--that those committees were "owned or controlled by, or . . . act[ed] for or on behalf of" Hamas.[9]

In February 1995, shortly after E.O. 12947 designated Hamas an SDT, Elashi (on behalf of HLF) and representatives of other American Muslim organizations met at the Treasury Department in Washington, D.C. with the head of OFAC and other Treasury officials. HLF and the other organizations sought guidance on "the new executive order and its implications for charitable giving by American Muslims." 7 R.7298, 7312-15. The Treasury officials responded that the Department "was not going to make a determination for them as to who they could or couldn't send money to beyond the entities already listed in Executive Order 12947." 7 R.7315. The Department declined to provide a list of approved entities--a so-called "white list." 7 R.7352-54. The Treasury officials referred Elashi and the other attendees to a White House press release about E.O. 12947, which stated that the Executive Order was "intended to reach charitable contributions to *designated organizations* to preclude diversion of such donations

[9] The Treasury Department indisputably has the authority and the ability to designate zakat committees as SDTs. In August 2007, for example, Treasury designated the al-Salah Society--a Gaza zakat committee--as an SDT based on its relationship with Hamas. DX 1052; 7 R.7342. Treasury also separately designated a number of Hamas leaders. 7 R.7342-43.

to terrorist activities." GX OFAC 4 (emphasis added); *see* 7 R.7319-20.[10] As noted, the West Bank zakat committees were not among the "designated organizations."

In a call that the government secretly recorded on April 23, 1996, Baker and Elashi discussed the possibility that the Treasury Department might designate and list the zakat committees. Baker emphasized that if Treasury placed the committees on the list, HLF could no longer distribute charity through them. GX Baker Wiretap 11; 7 R.7053-56. Baker told Elashi that if the committees were designated, "[Y]ou have to abide by the law," and Elashi--though determined to speak out publicly against any such designation--responded, "Well, I'm gonna abide by the law because I won't be able to make a transfer. I know that." 7 R.7504-05. Even after this conversation, which FBI language specialists reviewed around the time it occurred, the government did not designate the zakat committees as SDTs or FTOs.[11]

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[10] Robert McBrien, an OFAC official who attended the 1995 meeting, testified that Treasury would "ordinarily" have said that the list is not exhaustive and "the prohibitions are not limited to the list." 7 R.7315. But that description of what the Department "ordinarily" would have done is at odds with the White House press release, which McBrien recalled discussing at the meeting. Remarkably, the Treasury Department claims not to possess *a single document* relating to this crucial, high-level meeting. The attendance list introduced at trial--GX InfoCom Search 55--was seized from HLF. 7 R.7317-18.

[11] Baker and Elashi were not alone in believing that the Treasury Department had to designate a zakat committee before contributions to it would be unlawful. Referring to Treasury's designation of the al-Salah Society in August 2007,

Reports appeared occasionally in the media that the government was investigating HLF for supporting Hamas. 7 R.8498. In late 1997, HLF retained lawyer (and former Congressman) John W. Bryant to address the reports with the government. 7 R.8497. In 1998 and 1999, Bryant met with officials from the State Department, the FBI (on three occasions), and the Israeli Embassy. In each instance, he asked if HLF should do anything differently. No one cautioned him that HLF should not deal with the zakat committees. 7 R.8498-8505.[12]

Edward Abington was the United States Consul General in Jerusalem from 1993 to 1997--the de facto United States ambassador to the PA. 7 R.9123, 9126-27. Abington served thirty years as a foreign service officer, from 1970 through 1999, and before that he worked for the CIA. 7 R.9124-25. He testified that as Consul General he visited the West Bank zakat committees and received regular briefings about Hamas. He never heard of any link between Hamas and the committees. 7 R.9164-65, 9193, 9231-32, 9302-03.

(continued…)

prosecution expert Matthew Levitt wrote: "The new U.S. designation criminalizes American donations to al-Salah and officially informs banks and donors of the organization's ties to and activities on behalf of Hamas." 4 R.4062; DX1054. According to the government's trial theory, by contrast, donations to al-Salah had been "criminalized" since 1995, when Hamas was first designated, even though al-Salah had not been separately designated.

[12] Bryant sought, and was denied, meetings with Department of Justice officials (including Attorney General Reno) and with Secretary of State Madeleine Albright. 7 R.8505.

Other facts as well tended to undermine the prosecution's theory that Hamas controlled the zakat committees. Most of the committees predated Hamas, some by decades. The committees were licensed and audited throughout their existence by the entity governing the West Bank--Jordan before 1967, the Government of Israel ("GOI") from 1967 until the Oslo accords, and the PA thereafter--all of which were bitter enemies of Hamas. *E.g.*, 7 R.7471-89, 7560-68, 9185; DX1065, 1070; GX InfoCom Search 28. And the United States Agency for International Development--which had strict instructions not to deal with Hamas--provided funds over many years to zakat committees named in the indictment, including the Jenin, Nablus, and Qalqilia committees. 7 R.9168-73, 9180-85; DX102, 1074, 1076. That USAID funding continued after the government closed HLF and even after the indictment in this case. 7 R.9183-85; DX1076. In 2004, for example, the year HLF was indicted, USAID provided $47,000 to the Qalqilia zakat committee. DX1074.

The government sought to show in several principal ways that Hamas controlled the zakat committees, that appellants knew of the Hamas control, and that appellants acted willfully. First, it produced an anonymous expert, "Avi," who claimed to be a lawyer from the Israeli Security Agency ("ISA"). Neither the defense nor the jury learned Avi's true name. Avi opined, based on criteria he

selected, that Hamas controlled the committees named in the indictment. *E.g.*, 7 R.7998-8008 (describing criteria).

Second, the government presented the testimony of cooperating witness Mohamed Shorbagi, who had been caught committing a massive fraud (unrelated to HLF) against his employer and had pled guilty. Shorbagi had never been to the West Bank, and he had not been to Gaza since 1991. 7 R.6620-27, 6808-09. Nonetheless, he testified over objection, based on what he had read on the internet and in newspapers and leaflets and heard in conversation with friends, that Hamas controlled four of the West Bank zakat committees. 7 R.6746-48, 6776, 6798.

Third, the government offered three documents that the Israeli Defense Force ("IDF") seized from the PA headquarters in 2002 during a military incursion into the West Bank known as Operation Defensive Shield ("ODS"). GX PA 2, 8, 9. The documents--two of which had unnamed authors who, in turn, relied on unnamed sources--purported to describe the Hamas fundraising network, and identified HLF and the Ramallah Zakat Committee as parts of that network. Judge Fish excluded the PA documents in the first trial, but Judge Solis admitted them over objection.

Fourth, the government relied on documents, some with unnamed authors, seized from the homes of two men--Ismail Elbarasse and Abdel Haleem Ashqar--neither of whom worked for HLF. *E.g.*, GX Elbarasse Search 22; GX Ashqar

Search 5; 7 R.7095-7100, 7145. According to the government's interpretation of those documents, all of which predated the designation of Hamas in 1995, they showed the authors' belief that HLF was a fundraising arm of Hamas and Hamas controlled certain of the West Bank zakat committees.

Finally, the government pointed to ambiguous comments at the 1993 Philadelphia meeting (in which persons other than Baker and Elashi referred to some of the West Bank zakat committees as "ours"), to the fact that some persons associated with the committees were identified as Hamas adherents, and to other documents as evidence that Hamas controlled the committees. *E.g.*, 7 R.7051-54, 7129, 7145-46; GX Philly Meeting 13.

We discuss the facts further below in connection with particular issues.

SUMMARY OF THE ARGUMENT

1. Over defense objection, the district court permitted the government to present two Israeli witnesses--its key expert and a significant foundational witness--who testified using pseudonyms. The court barred the defense from eliciting the witnesses' names on cross-examination, and it refused to order disclosure of the names--which were classified at the request of the GOI--even to defense counsel, all of whom had security clearances, a need to know, and a secure room in which to store classified information.

This case marks the first time any American court has allowed a prosecution expert to testify without disclosing his name at least to defense counsel, and one of only a handful of occasions when *any* prosecution witness has been permitted to testify without disclosing his identity to the defense. As the Supreme Court declared decades ago, such a procedure "effectively . . . emasculate[s] the right of cross-examination itself." *Smith v. Illinois*, 390 U.S. 129, 131 (1968). The district court's unprecedented rulings violated appellants' Fifth Amendment right to due process and their Sixth Amendment right to confront the witnesses against them.

2. Over objection, the district court admitted three categories of highly prejudicial hearsay: (1) testimony from cooperating witness Shorbagi--based on newspapers, leaflets, the internet, and talk among his friends--that Hamas controlled HLF and the West Bank zakat committees to which HLF donated money and charitable goods; (2) documents that the IDF seized from PA headquarters that portrayed HLF and the Ramallah zakat committee as part of Hamas' fundraising apparatus; and (3) documents seized from the homes of Elbarasse and Ashqar that, according to the government, portrayed HLF as Hamas' fundraising arm in the United States and suggested that Hamas controlled certain of the West Bank zakat committees. The hearsay did not fall within any exception, and the district court erred in admitting it.

3. The district court erred under Fed. R. Evid. 403 by admitting unfairly prejudicial evidence that had little or no probative value. The evidence included testimony and exhibits about Hamas suicide bombings, testimony about Hamas killing collaborators with Israel, a videotape of demonstrators stomping on and burning American flags, and violent images that HLF employees encountered (but did not download or otherwise save) when browsing the internet. And the court admitted a wealth of other highly prejudicial evidence with little or no relevance to the charges in this case.

4. The district erred repeatedly in its rulings on opinion testimony under Fed. R. Evid. 701 and 702. Over objection, the court allowed OFAC official Robert McBrien--presented as a lay witness--to offer legal opinions on the core issues in the case. It permitted FBI Agents Lara Burns and Robert Miranda--also presented as lay witnesses--to opine on matters far beyond the scope of permissible lay opinion under Rule 701. The court allowed government Hamas expert Matthew Levitt to opine about inferences to be drawn from the fact of appellants' telephone and other contacts with Hamas figures (without evidence of the *content* of those contacts)--a matter well within the jurors' knowledge, for which expert testimony was inappropriate. And it permitted the government to call former National Security Council staff member Steven Simon to testify about the "vital United States interests" that Hamas violence threatens, including (according to

Simon) increasing the risk of another 9/11-style attack on the United States homeland. Simon's testimony about the potential impact of Hamas violence on this country was both irrelevant and unfairly prejudicial.

5. The district court erred in failing to grant appellants' motion for a letter rogatory to the GOI requesting permission for defense counsel to examine the thousands of items that the IDF seized from the West Bank zakat committees during ODS. The failure to issue the letter denied the defense crucial evidence and permitted the prosecution to present a misleading picture of the zakat committees with no possibility of defense rebuttal.

6. Over almost ten years, the government intercepted thousands of the appellants' conversations under the purported authority of FISA. Rule 16 requires the government to "disclose to *the defendant*" any "relevant . . . recorded statement by the defendant." Fed. R. Crim. P. 16(a)(1)(B)(i) (emphasis added). Despite the plain command of Rule 16, the government (with the district court's approval) refused to disclose to appellants the overwhelming majority of their FISA statements, on the basis that those statements--*to which appellants themselves were parties*--were classified. The government's alternatives to compliance with Rule 16 did not overcome the prejudice from denying appellants access to their statements. The district court erred in refusing to require the government to assert

the state secrets privilege properly and in failing to determine whether the statements were material.

7. Under Fed. R. App. P. 28(i), Elashi adopts the summary of argument with respect to errors concerning FISA set forth in the Opening Brief for Defendant-Appellant Shukri Abu Baker.

8. As set forth above, the district court committed a series of errors, any one of which, standing alone, requires reversal of Elashi's conviction. But even if the Court were to find those errors harmless individually, their cumulative effect--bearing directly on the key disputed issues in the case--denied a fair trial. Elashi was convicted based on the testimony of an anonymous expert witness, the hearsay testimony of a well-rewarded cooperator, the admission of highly prejudicial hearsay documents, gratuitous evidence of Hamas violence, improper lay and expert opinion, and a range of other inadmissible evidence, and he was denied access to the items the GOI seized from the zakat committees and to his own recorded statements. The combination of those errors requires reversal.

9. In a previous, separate prosecution in the Northern District of Texas, the government convicted Elashi for two conspiracies that substantially overlap three of the conspiracies of which he was convicted in this case. The second prosecution of Elashi for the same offenses violated his rights under the Fifth Amendment Double Jeopardy Clause and requires reversal of his convictions for

conspiracy to provide material support to Hamas, conspiracy to violate IEEPA, and conspiracy to commit money laundering. And because the district court gave a *Pinkerton* instruction (over objection) and the jury returned a general verdict, Elashi's conviction on most substantive counts must be reversed as well.

10. The district court sentenced Elashi to 65 years in prison--effectively a life sentence. That sentence rested on two key errors in determining the appropriate range under the Sentencing Guidelines: application of the terrorism adjustment under U.S.S.G. § 3A1.4 and calculation of the value of the funds laundered under U.S.S.G. § 2S1.1. If the Court does not reverse Elashi's conviction outright, it should vacate his sentence and remand for resentencing under a correct guidelines calculation.

ARGUMENT

I. THE DISTRICT COURT ERRED IN BARRING THE DEFENSE FROM LEARNING THE NAMES OF A KEY GOVERNMENT EXPERT AND A SECOND GOVERNMENT WITNESS.

Over defense objection, the district court permitted the government to present two witnesses--its key expert and a significant foundational witness--who testified using pseudonyms. The court barred the defense from eliciting the witnesses' names on cross-examination. It refused to order disclosure of the names even to defense counsel, all of whom had security clearances, an obvious need to know the information, and access to a secure room in which to store and work with classified information. The district court's rulings violated appellants' Fifth

Amendment right to due process and their Sixth Amendment right to confront the witnesses against them.

A. Standard of Review.

This Court reviews Confrontation Clause issues de novo. *See, e.g., United States v. Martinez-Rios*, 595 F.3d 581, 584 (5th Cir. 2010); *United States v. Tirado-Tirado*, 563 F.3d 117, 122 (5th Cir. 2009). It similarly reviews asserted violations of due process de novo. *See, e.g., United States v. Burns*, 526 F.3d 852, 859 (5th Cir. 2008); *United States v. Williams*, 343 F.3d 423, 439 (5th Cir. 2003).

B. Background.

Before the first trial, the government moved for leave to present two witnesses under pseudonyms and to withhold their true names from the defense, including both the defendants themselves *and defense counsel*. According to the government, one witness worked for the Israeli Security Agency ("ISA") and the other for the IDF. 10 R.1357. The government noticed the ISA witness--who used the pseudonym "Avi"--as an expert on Hamas financing and related subjects, including "Hamas' closed support community, which includes fundraising organizations and charitable institutions operating in the territories." 10 R.1096-97; *see id.* at 1419-20, 1424-27. The IDF witness--who used the pseudonym "Major Lior"--was to testify about the process by which soldiers under his command seized documents from West Bank zakat committees and other

institutions during an Israeli military operation known as "Operation Defensive Shield." 10 R.1420, 1427-28.

The defense opposed the government's motion on Fifth and Sixth Amendment grounds. 10 R.2691, 2709-12. The defense also pointed out that the ISA expert's testimony was cumulative of expert testimony the government had noticed from Matthew Levitt and Jonathan Fighel. 10 R.2696-2701. Judge Fish granted the government's motion on the basis that the names of the two witnesses are classified and disclosure of their identities could place them or their families in danger. 10 R.4279, 4284-86; 2 R.4917.[13] At the first trial, both witnesses testified using pseudonyms. Neither the defense nor the jury learned their true names.

Before the second trial, the defense moved for disclosure of the two witnesses' names. 29 R.6364, 6366-70. Judge Solis denied the motion. Applying the state secrets privilege under *United States v. Aref*, 533 F.3d 72, 79-80 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1582 (2009), the district court found that the names were "relevant" but declined to find them "material." 32 R.149-53.[14] The court based this conclusion on the "Catch-22" rationale that the defense--which did not

[13] The identities of Avi and Major Lior were classified because they constitute "foreign government information"--that is, information provided by the GOI to the United States government "with the expectation that the information [is] to be held in confidence." Exec. Order 13292, §§ 1.1(c), 1.4(b), 1.6(e), 6.1(r), 68 Fed. Reg. 15315, 15317, 15318, 15331 (Mar. 28, 2003); *see* 10 R.4284-86.

[14] As discussed in Part VI.C. below, *Aref* holds that government efforts to withhold classified information from discovery must be analyzed under the state secrets privilege.

have the witnesses' names--could not specify the evidence it would discover if the names were disclosed. *Id*. at 151-52. And the court held that, even if the defense could establish materiality, the "balance of equities lies in the Government's favor; Defendants' interest in obtaining the names of the witnesses is outweighed by the Government's need to keep the information secret." *Id*. at 152-53.

Appellants gave notice under § 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3, § 5, that they reasonably expected to disclose the witnesses' names on cross-examination at trial. 29 R.6088. Although the district court acknowledged again that the names were relevant, it ruled them inadmissible without explanation and without following the procedures that CIPA § 6 requires. 15 R.167-68.

Avi and Major Lior testified at the second trial, as they had at the first, using pseudonyms. As before, neither the defense nor the jury learned their true names. Major Lior served as a foundational witness for a series of documents that the IDF seized from West Bank zakat committees and the PA headquarters in armed ODS raids beginning in 2002. Avi was the government's principal expert witness linking the zakat committees to Hamas and otherwise advancing the government's theory of prosecution.

C. The District Court Erred in Barring the Defense from Obtaining the Witnesses' Names.

In *Alford v. United States*, 282 U.S. 687 (1931), the Supreme Court unanimously reversed a conviction where the trial court had refused to permit the defense to elicit on cross-examination where an important prosecution witness lived. After noting that "[c]ross-examination of a witness is a matter of right," the Court declared that "[i]ts permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood"; that "the jury may interpret his testimony in the light reflected upon it by knowledge of his environment"; and that "facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased." *Id*. at 691-92. Because determining where the witness lived "was an essential step in identifying the witness with his environment, to which cross-examination may always be directed," the Court found that the trial court had violated the defendant's right of confrontation by prohibiting the inquiry. *See id*. at 692-94.

In *Smith*, the trial court permitted an informant to testify under an assumed name, much as Avi and Major Lior did here, and it sustained objections to questions about the witness' true name and his address. Relying on *Alford*, the Supreme Court reversed the conviction. The Court observed that "when the credibility of a witness is in issue, the very starting point in 'exposing falsehood

and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation." 390 U.S. at 131 (footnote omitted).

No decision since *Smith* has permitted an expert witness in a criminal case to testify for the prosecution anonymously. And although courts have on rare occasions permitted the prosecution to present fact witnesses without requiring disclosure of their names in open court, in most of those cases the witness' name has been disclosed to the defense so that an adequate investigation of the witness' credibility can be undertaken. *See, e.g., United States v. Maso*, 2007 U.S. App. LEXIS 25255, at *8-*13 (11th Cir. Oct. 26, 2007) (unpublished); *Siegfriedt v. Fair*, 982 F.2d 14, 17-19 (1st Cir. 1992); *Clark v. Ricketts*, 958 F.2d 851, 855 (9th Cir. 1992); *United States v. Fuentes*, 988 F. Supp. 861, 863-67 (E.D. Pa. 1997); *Alvarado v. Superior Court*, 5 P.3d 203, 218 (Cal. 2000).[15]

[15] The government relied below on two cases from this Court, neither of which supports its position. 10 R.1434-35. In *United States v. Contreras*, 602 F.2d 1237 (5th Cir. 1979), the witness--an undercover DEA agent (not an expert)--"testified on direct examination as to his name, age, past and current employment, qualifications, geographical area of assignment, and duties as special agent for the DEA," and on cross-examination about "the alias he had used while working on this case." *Id*. at 1239. The only information the defense could not elicit was the agent's "prior and present address, his social, political and civic associations, and his business interests and possible financial troubles." *Id*. Similarly, in *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972), this Court affirmed a conviction where an undercover agent--again, not an expert--provided his true name, alias, and background information except for his home address. *See id*. at 50-51.

The D.C. Circuit's recent decision in *United States v. Celis*, 608 F.3d 818 (D.C. Cir. 2010), shows a typical balancing of interests when a court confronts concerns about the security of prosecution witnesses. The prosecution in that case--a multi-defendant narcotics conspiracy--sought to present a number of Colombian witnesses with pseudonyms and to withhold their identities from the defense. The government's motion set out "in vivid detail" the concerns with witness safety that motivated the request. *Id*. at 829. As far as the opinion reflects, none of the witnesses were experts. *See id*. at 830 & n.5. The district court granted the motion in part. It permitted the witnesses to testify under pseudonyms, but it required disclosure of their true names to defense counsel a few days before their testimony, and it permitted counsel to disclose the true names to their clients. In addition, the district court ensured the defense had adequate time after receiving each name to investigate the witness. *See id*. at 830.

The D.C. Circuit rejected defendants' argument that the district court's approach violated their Fifth and Sixth Amendment rights. The court of appeals stressed that the district court had "allow[ed] defense access to the true identities of the protected witnesses days before their testimony and, when shown to be necessary for those purposes, allowed investigation using these true identities in the United States and Colombia." *Id*. at 833.

The district court's analysis in *Fuentes* is also illuminating. The government in that case sought to withhold the true identity of a key (non-expert) witness (known as "Lozano") from the public and from the defense. It persuaded the district court that "disclosure of Lozano's identity would likely place him and his innocent family members in serious danger" and "compromise ongoing D.E.A. investigations." 988 F. Supp. at 863. The court thus agreed to permit Lozano to testify using his pseudonym. *See id*. at 867. But the *Fuentes* court rejected the government's request that Lozano's identity be withheld from the defense. After reviewing the relevant Confrontation Clause principles, the court found that the government's approach would

> foreclose[] any possibility of defendants' meaningful investigation into Lozano's background, and it requires the defendants to rely exclusively on the government for information about Lozano. It also leaves the defense with no way of testing the veracity or completeness of the Government's disclosures. This complete reliance on the prosecution is, in our view, inimical to our adversary process and to the checks on government prosecution embedded in our constitutional framework.

Id. at 865.

Not even the government's disclosure of significant information about Lozano removed the need for disclosure of his true name. Although the court found that the disclosures "certainly assist the defense because they provide impeachment evidence," it declared:

> These disclosures . . . do not alter the Government's sole control over the informational flow or the defendants' inability to test the veracity or completeness of the Government's disclosures. Furthermore, the defense has no means of testing Lozano's reputation for truthfulness (or lack thereof) in his community. *See* Fed. R. Evid. 608. Also foreclosed is the defendants' ability to investigate possible prior bad acts here and in Colombia which would impugn his veracity. *See id*. In sum, even with these disclosures Lozano remains only who the Government says he is, and as for his life of at least thirty years before 1981 [when he became an informant], he remains largely a phantom.

Id. at 866. Accordingly, the court ordered the government to provide Lozano's true name to defense counsel. It added that counsel "may, of course, reveal Lozano's true identity to their clients. They may also reveal the identity to one investigator who will labor on behalf of all the defendants in investigating Lozano's background. The defendants and the investigator, however, are to reveal this information only as required by the investigation," on pain of contempt of court. *Id*. at 867.[16]

The same constitutional concerns that led the courts in *Celis* and *Fuentes* to require disclosure of witnesses' true names to the defense exist here. Without the names of Avi and Major Lior, the defense could not investigate them. As Avi put

[16] One district court permitted several ISA agents to testify anonymously at trial about obtaining a confession from the defendant. *See United States v. Salah*, 412 F. Supp. 2d 913, 923-24 (N.D. Ill. 2006) (suppression hearing testimony); *id*., Minute Order (N.D. Ill. Aug. 29, 2006) (trial testimony). For the reasons stated above, *Salah* was wrongly decided. In addition, the case is distinguishable in at least two respects. First, none of the ISA agents in *Salah* testified as an expert. Second, Salah himself had dealt with the agents face to face during his detention in Israel and thus presumably had at least some information about them. Appellants had no contact with Avi or Major Lior other than seeing them in court.

it on cross, "You cannot research me." 7 R.8272. For example, the defense could not present opinion and reputation evidence about the witnesses' character for untruthfulness, *see* Fed. R. Evid. 608(a); *Alford*, 282 U.S. at 691, or investigate prior acts that might undermine their veracity, Fed. R. Evid. 608(b), or develop other impeachment evidence, *see Alford*, 282 U.S. at 691-92.[17] The defense could not pursue these and "countless [other] avenues of in-court examination and out-of-court investigation," *Smith*, 390 U.S. at 131, without knowing the witnesses' names. The government and the GOI witnesses retained "sole control over the informational flow," and appellants could not "test the veracity or completeness of the Government's [and witnesses'] disclosures." *Fuentes*, 988 F. Supp. at 866.

Nor could the defense effectively challenge Avi's purported expertise without knowing his name. One of the most powerful lines of attack on an expert's credibility is to show that he has misstated his experience, education, or training. The defense could not even begin to investigate these matters without knowing Avi's name.[18] It was forced to accept his account of his credentials and expertise

[17] For example, with the true identities of Avi and Major Lior, the defense might have found evidence that they had engaged in official or unofficial anti-Palestinian conduct, or that they had expressed anti-Palestinian sentiments. Or they might be affiliated with Israeli settler groups that are attempting to obtain as much of the West Bank and Gaza as possible for Israel at the expense of the Palestinians. Such evidence (among other possible examples) would be valuable in showing bias.

[18] Avi claims (to cite one example) to have a law degree from Tel Aviv University. 7 R.7847-48. If the defense had been given his name, it would have

with no meaningful ability to challenge his claims. This was particularly so because Avi has published no scholarly work in peer reviewed journals and has given no public lectures, and thus has never been subject to any scholarly critique--or at least none that the defense could find without knowing his name. *E.g.*, 7 R.7855, 8275-77.[19]

The district court gave no weight to appellants' Fifth and Sixth Amendment rights and did not consider protective measures such as those adopted in *Celis* and *Fuentes*. The court appears to have believed that the witnesses' names could be withheld, even from defense counsel, simply because the United States government had classified them as an accommodation to the GOI. That view reflects a fundamental misunderstanding of the constitution and the adversarial system. As the Supreme Court declared a half-century ago, "'[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its

(continued…)

checked that claim. Without his name, the defense (and the jury) had to simply take his word for that and other aspects of his background. No other expert that we are aware of has had the luxury of reciting his purported credentials to the jury with absolute confidence that the opposing party could not check them.

[19] The government cited only one case in the district court involving an expert witness, *Carhart v. Ashcroft*, 300 F. Supp. 2d 921 (D. Neb. 2004) (cited at 10 R.1438). But *Carhart* is a civil case, and thus does not implicate the Sixth Amendment right of confrontation, and in that case the expert's identity was disclosed to counsel for the parties and their direct employees. *See id*. at 923.

governmental privileges to deprive the accused of anything which might be material to his defense.'" *Jencks v. United States*, 353 U.S. 657, 671 (1957) (quoting *United States v. Reynolds*, 345 U.S. 1, 12 (1953)); *see, e.g., United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (L. Hand, J.).

CIPA reflects this principle. The legislative history makes clear that the defendant "should not stand in a worse position, because of the fact that classified information is involved, than he would without this Act." S. Rep. No. 96-823, at 9, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4294, 4302; *see United States v. Libby*, 467 F. Supp. 2d 20, 24 (D.D.C. 2006). Although the statute prescribes pretrial procedures for determining whether the defense will be permitted to disclose classified information at trial, *see* CIPA §§ 5, 6, it does not change the standard for admissibility of classified evidence at trial--the rules of evidence apply to classified evidence just as they do to other evidence, *see, e.g., United States v. Libby*, 453 F. Supp. 2d 35, 39-44 (D.D.C. 2006).[20] If a district court determines pretrial that a particular item of classified information is relevant and admissible, the government may propose an unclassified substitution for the classified

[20] Even if (contrary to *Libby* and the legislative history of CIPA) the state secrets privilege addressed in *Aref* applied to the *admissibility* of classified information, rather than merely to the *discovery* of classified information, the district court erred in barring the defense from cross-examining Avi and Major Lior about their names. Under the standards addressed in Part VI.C. below, the names were "helpful or material to the defense, i.e., useful to counter the government's case or bolster a defense." *Aref*, 533 F.3d at 80 (quotation omitted).

information, which the district court must accept if it provides the defendant with "substantially the same ability to make his defense as would disclosure" of the classified information. CIPA § 6(c). If the district court rejects the government's proposed substitution, the government may bar disclosure of the information, but the district court must then impose an appropriate sanction. CIPA § 6(e)(2); *see, e.g., United States v. Fernandez*, 913 F.2d 148, 155-64 (4th Cir. 1990).

The district court ignored these procedures. Even though it found the witnesses' true names relevant, and even though it is obvious that the names are otherwise admissible, the court refused to complete the CIPA process. It did not call upon the government to propose substitutions for the names under CIPA § 6(c) or take the further steps that CIPA contemplates if no adequate substitutions are proposed. 15 R.166-68. In short, the district court abdicated its responsibility to protect appellants' Fifth and Sixth Amendment rights through the procedures that CIPA prescribes. That was error of constitutional magnitude.

The district court's order permitting Avi and Major Lior to testify anonymously would be wrong even if they were the only witnesses available to the prosecution for the matters in question. But in Avi's case, the government noticed another other expert--Jonathan Fighel--to cover precisely the same subjects. 2 R.216-17, 230-32, 977-78; 3 R.5816. According to the government's notice, Fighel, a retired Israeli military officer, was prepared to testify "about specific

Hamas affiliated zakat committees which were funded by the Holy Land Foundation, to include" the committees named in the indictment and others. 2 R.977; *see also* 10 R.2696-2701 (defense shows that Avi's proposed testimony is cumulative of Fighel and Levitt); 3 R.6544 (Fighel listed on government's second trial witness list); 4 R.3520 (government states that it would present either Fighel or Avi).[21] Fighel's identity is not classified, and the defense was able to investigate his training, experience, and background much as it could any other expert. Rather than call Fighel, however, the government insisted on calling a particular GOI witness whose identity the GOI refused to reveal to the defense. As the district court put it to the government, "You chose to bring in this expert witness. That was your choice." 7 R.9366. The appellants, with their liberty at stake, should not have been forced to pay for that choice with their fundamental rights of confrontation and due process.

D. The Government Cannot Prove the Errors Harmless Beyond a Reasonable Doubt.

The Supreme Court has specified the harmless error inquiry for the preclusion of cross-examination in violation of the Confrontation Clause: "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the

[21] The government provided some 20 volumes of material that (according to the government) supported Fighel's opinion about the zakat committees. The defense had the material translated at enormous expense.

error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Given the surpassing importance of Avi's expert testimony to the prosecution's case, the government cannot establish that the district court's error in permitting him to remain anonymous was harmless. The government relied on Avi--togther with the Shorbagi testimony and the PA documents discussed below--to provide the critical link between Hamas and the West Bank zakat committees during the indictment period. In other respects as well, Avi testified in almost word-for-word conformity with the government's theory of prosecution. The government's repeated references to Avi in its closing and rebuttal arguments confirm his importance. 7 R.9420-21, 9487-89, 9494-96, 9498, 9502-04, 9506, 9736-38.[22] The district court's refusal to order disclosure, at least to defense counsel, of the true names of Avi and Major Lior requires reversal.

II. THE DISTRICT COURT ERRED IN ADMITTING HIGHLY PREJUDICIAL HEARSAY EVIDENCE.

Over objection, the district court admitted three categories of highly prejudicial hearsay: (1) testimony from cooperating witness Mohamed Shorbagi--based on newspapers, leaflets, the internet, and talk among his friends--that Hamas

[22] The district court instructed the jury that it could consider the fact that Avi testified "under an assumed name" in assessing his credibility and the weight to give his testimony. 17 R.1105-06. But that instruction was no substitute for the investigation and potential impeachment that would have resulted from disclosure of his name.

controlled HLF and the West Bank zakat committees to which HLF donated money and charitable goods; (2) documents that the IDF seized from PA headquarters that portrayed HLF and the Ramallah zakat committee as part of Hamas' fundraising apparatus; and (3) documents seized from the homes of Elbarasse and Ashqar that, according to the government, portrayed HLF as Hamas' fundraising arm in the United States and the West Bank zakat committees as controlled by Hamas. The hearsay did not fall within any exception, and the district court abused its discretion in admitting it.

A. Standard of Review.

This Court reviews decisions to admit or exclude evidence for abuse of discretion. *See, e.g., United States v. Walker*, 410 F.3d 754, 757 (5th Cir. 2005); *United States v. Phillips*, 219 F.3d 404, 409 (5th Cir. 2000). It reviews the interpretation of the Rules of Evidence de novo. *See United States v. Gewin*, 471 F.3d 197, 200 (D.C. Cir. 2006).

B. The Shorbagi Testimony.

The prosecution did not call Shorbagi at the first trial. He testified at the second trial under a plea and cooperation agreement. He admitted sending money to Hamas; cheating his employer out of $610,000, in a scam unrelated to HLF; cheating on his taxes; and lying to the FBI. In return for his cooperation against appellants and others, the government permitted him to plead guilty to a single

count of providing material support to Hamas. Shorbagi received a 92-month sentence, and his plea agreement provides the possibility of a further sentence reduction based on his continued cooperation. 7 R.6931-55.

Shorbagi was born in the Gaza Strip and lived there until he was eighteen. In 1982, he moved to the United States, where he has lived ever since, with occasional visits to Gaza. Shorbagi has never been to the West Bank, where all of the zakat committees at issue in this case are located.[23] His last visit to Gaza was in 1991, more than four years before the first transaction alleged in the indictment. 7 R.6620-27, 6794-98, 6808-09.

Over objection,[24] the district court permitted Shorbagi to testify that Hamas controlled four of the West Bank zakat committees through which HLF made charitable donations: the Nablus, Jenin, Ramallah, and Hebron committees, 7 R.6746-48, 6776, 6798; that Hamas controlled three entities in Gaza to which HLF gave money, 7 R.6761-62, 6776; that several Palestinians associated with West Bank zakat committees were Hamas leaders, 7 R.6762-63, 6766-68, 6782-85; and that HLF was part of Hamas, 7 R.6792.

[23] Although Gaza and the West Bank are separated by only a few miles of Israeli territory, checkpoints and other travel restrictions make it difficult for Palestinians to pass from one to the other.

[24] *E.g.*, 7 R.6680-86, 6745-48, 6761-63, 6768, 6776, 6783-84, 6792.

Shorbagi had no personal knowledge of *any* of these matters. He based his testimony entirely on hearsay: "newspapers," "Hamas leaflets," the Hamas website, and "from talking among friends." 7 R.6746-47.

The district court admitted Shorbagi's testimony in the apparent belief that this Court recognizes a "common knowledge" exception to the hearsay rule. 7 R.6684. That is wrong. Neither this Court nor the rules of evidence recognize any such exception.[25]

The closest the rules come to a "common knowledge" hearsay exception is the exception for "reputation as to events of general history important to the community or State or nation in which located." Fed. R. Evid. 803(20). But the government did not invoke Rule 803(20) in seeking admission of Shorbagi's testimony. 7 R.6680-86. Nor did it attempt to lay a foundation for that exception. The language of Rule 803(20) imposes several requirements for its use. First, "by use of the term 'history' some requirement of substantial age is imposed." John W. Strong, 2 *McCormick on Evidence* § 322 at 339 (5th ed. 1999); *see* 5 *Weinstein's Federal Evidence* § 803.22[2][b], at 803-130 (2d ed. 2010) (same). Second, the

[25] In the district court, the government cited *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974). 10 R.4795. But *Mandujano* merely holds that the district court did not err in permitting an experienced undercover narcotics officer to testify that the word "stuff" is used on the street to refer to narcotics. *See* 499 F.2d at 379. That common-sense ruling certainly does not support the admission of Shorbagi's wide-ranging opinions concerning matters on which he lacked personal knowledge.

exception applies only when the proponent establishes "'a general consensus in the community, an assertion of the group as opposed to one or a few of its constituents. The fact that the information has been considered by and was subject to the general scrutiny of the community is an essential guarantee of reliability for the exception.'" *Blackburn v. UPS, Inc.*, 179 F.3d 81, 100 (3d Cir. 1999) (quoting 3 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* 1699 (7th ed. 1998)).

The government established no such foundation here. The alleged relation between Hamas, HLF, and the West Bank zakat committees is not a matter of "substantial age"; the relevant transactions with the committees were less than fifteen years old (and in a number of instances less than ten years old) at the time of trial. Those transactions thus were not a matter of "history," as Rule 803(20) requires. And far from testifying to a "general consensus in the community," Shorbagi cited only "newspapers," Hamas sources, and "talking among friends" as the basis for his testimony. 7 R.6746-47. He had never even been to the principal relevant "community"--the West Bank--and he had not been to Gaza since 1991. And Shorbagi's testimony was not in the form of "reputation," as Rule 803(20) requires; he testified to hotly disputed matters as established facts, based on hearsay sources.

The government also suggested that Shorbagi could testify about the alleged relation between Hamas, HLF, and the West Bank zakat committees as lay opinion testimony under Fed. R. Evid. 701. 7 R.6683-84. But Shorbagi's testimony about these matters was not "rationally based on the perception of the witness," as the rule requires. Fed. R. Evid. 701(a); *see, e.g.*, *United States v. Garcia*, 413 F.3d 201, 211-13 (2d Cir. 2005); *Washington v. Department of Transportation*, 8 F.3d 296, 300 (5th Cir. 1993). Shorbagi instead channeled hearsay on matters about which he had no personal knowledge. Moreover, Shorbagi's testimony was not "helpful to a clear understanding of [his] testimony or the determination of a fact in issue," Fed. R. Evid. 701(b), because it consisted of "'meaningless assertions which amount[ed] to little more than choosing up sides,'" *United States v. Dotson*, 799 F.2d 189, 192 (5th Cir. 1986) (quoting Advisory Committee Note); *see Garcia*, 413 F.3d at 213-14. And Shorbagi's testimony relied on "specialized knowledge"--albeit not *personal* knowledge--and thus was inadmissible under Rule 701(c). *See Garcia*, 413 F.3d at 215-17.

Because Shorbagi's testimony was hearsay not within any exception and was not based on personal knowledge, Fed. R. Evid. 602, its admission was a patent abuse of discretion. And that error affected appellants' "substantial rights." Fed. R. Evid. 103(a); *see, e.g.*, *United States v. Taylor*, 210 F.3d 311, 314 (5th Cir. 2000); *United States v. Lowery*, 135 F.3d 957, 959 (5th Cir. 1998). The

government's reliance on Shorbagi in closing demonstrates his importance. The prosecutors repeatedly cited his testimony that Hamas controlled the West Bank zakat committees, that HLF was part of Hamas, and that particular persons were Hamas leaders. *E.g.*, 7 R.9489, 9492, 9495, 9499-9501, 9741-42. It argued that Shorbagi "of course" would know these asserted facts because "this is where he is from. He is the exact type of local population that Hamas would target when they want certain people to know who they were and certain people not to know." 7 R.9489.[26]

C. The Palestinian Authority Documents.

Over objection,[27] Judge Solis reversed Judge Fish's ruling from the first trial and admitted for their truth three documents that (according to Major Lior) the IDF seized from Fatah headquarters in Ramallah in 2002. GX PA 2, 8, 9; 7 R.6888. Judge Solis found the documents admissible under Fed. R. Evid. 807, the residual exception to the hearsay rule. That ruling was an abuse of discretion that affected appellants' substantial rights.

1. Background.--According to Major Lior, the IDF seized GX PA 2, 8, and 9 in April 2002 from the Fatah building in Ramallah. 7 R.6888. There is

[26] It is hard to know what the government meant by the phrase "exact type of local population" in reference to Shorbagi. He had never been to the West Bank, where all the zakat committees in the indictment were located, and he had not been to Gaza since 1991.

[27] *E.g.*, 2 R.4812; 3 R.5840; 7 R.6838-39, 6850; 29 R.5420-23.

no evidence about where in the building the documents were found or the circumstances under which they were prepared.

GX PA 2 is an undated memorandum with an illegible signature titled "Who is financing Hamas." The memorandum--which is based on unnamed sources, including "Western Sources," "Israeli sources," and "western security organizations"--purports to detail Hamas' worldwide funding. Under the heading "Hamas Financial Resources Worldwide," it lists "The Holy Land Fund" located in Texas. GX PA 2 at 5. The memorandum asserts that "Hamas collects approximately 10% of its force [from the United States] through donations, and the sale of newspapers and Zakat funds." GX PA 2 at 4. According to the memorandum, five percent of the funds provided to Hamas go for weapons and explosives and the remainder is used for Hamas' social network, including day care centers, schools, medical facilities, sports teams, and "mosque committees." The memorandum adds, "It is not a coincidence that Hamas officials tend to search for suicide operatives among their schools students or their sport groups and teams." GX PA 2 at 4. The memorandum contains no letterhead indicating that it was written under the auspices of the Palestinian Authority. 7 R.7780-82.

GX PA 8 is a document with an unnamed author dated May 22, 2000. The translated portion (pages 31 and 32) discusses the Ramallah Zakat Committee--the zakat committee at issue in a number of counts. The document asserts that "[t]he

most important active members" of the committee are all associated with Hamas. GX PA 8 at 32. It adds that "[t]hrough our follow up, it was determined that the committee transfers funds from overseas to Hamas." *Id*.

GX PA 9 is a December 22, 2001memorandum on PA Palestinian General Security letterhead signed by Major Khalid Abu-Yaman, as "Director of Operations." It too discusses the Ramallah Zakat Committee and asserts that "[o]fficials and members of this committee are associated with Hamas Movement and some of them are activists in the Movement." GX PA 9 at 2.

Judge Fish excluded the PA documents when the government offered them under Rule 807 in the first trial. 6 R.2673-74. Judge Solis reversed course and admitted them. Judge Solis found that the PA documents satisfied the reliability requirement of Rule 807 because they were seized from PA offices, "at least two appear to have some kind of letterhead," and it did not look like they were "prepared in advance for something like this." 7 R.6851.

2. Rule 807.--Rule 807 excludes from the hearsay rule statements "not specifically covered by Rule 803 or Rule 804 but having 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 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.

Fed. R. Evid. 807; *see, e.g., United States v. Ricardo,* 472 F.3d 277, 286-87 (5th Cir. 2006); *Walker,* 410 F.3d at 758. In addition, "[A] statement may not be admitted under [Rule 807] unless the proponent of it makes known to the adverse party [before trial] . . . the name and address of the declarant." Fed. R. Evid. 807.

This Court has declared that Rule 807 "is to be used only rarely, in truly exceptional cases." *Phillips,* 219 F. 3d at 419 n.23 (quotation omitted); *see, e.g., Walker*, 410 F.3d at 757. Before admitting evidence under Rule 807, the district court must find that the declarant "was particularly likely to be telling the truth when the statement was made." *Phillips*, 219 F.3d at 419 n.23 (quotation omitted).

The government did not come close to meeting the stringent requirements of Rule 807. First, the PA documents *are* "specifically covered by Rule 803." Rule 803(8)(C) provides an exception for "records . . . of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness." But the exception applies *only* "in civil actions and proceedings and *against the Government* in criminal cases." Fed. R. Evid. 803(8)(C) (emphasis added). Thus, the exception that "specifically cover[s]" the PA documents bars their admission against a criminal defendant. It would eviscerate the limitation Congress placed in Rule 803(8)(C) to permit admission of public records against a criminal defendant under Rule 807.

Second, the government did not establish that the PA documents have "circumstantial guarantees of trustworthiness" that are "equivalent" to those in other hearsay exceptions. Major Lior's testimony provided no assurance that the PA documents were trustworthy. He did not attest to the provenance of any of the documents, nor could he describe the circumstances under which they were created. He merely testified that, according to soldiers under his command, the PA documents were seized from the Fatah building in Ramallah. 7 R.6888.

To establish the necessary "circumstantial guarantees of trustworthiness," the government relied on its assertion that Yasser Arafat's PA had an incentive to report reliably on its bitter rival Hamas. 7 R.6848-49. The government presented no evidence in support of this assertion, and what evidence exists is to the contrary. The PA under Arafat was "infamously corrupt," according to prosecution expert Matthew Levitt. 4 R.4021; *see* 7 R.7782-83. The PA competed with the zakat committees and other non-governmental organizations (such as HLF) to deliver social services to needy Palestinians. The corrupt PA had a powerful motive to skew the information it received--or even manufacture information--to portray the zakat committees in the worst possible light to gain control over funding sources. The government offered no reason to conclude that the declarants in the PA documents were "particularly likely to be telling the truth when the statement[s] w[ere] made." *Phillips*, 219 F.3d at 419 n.23 (quotation omitted). And even if the

government had provided such evidence with respect to any PA declarants (which it did not), it offered no basis for concluding that the unnamed sources on which those declarants relied--including "Western Sources," "Israeli sources," and "western security organizations"--were "particularly likely to be telling the truth."

Third, the government did not establish, and the district court did not find, that the PA documents were "more probative on the point for which [they were] offered than any other evidence which [the government] could procure through reasonable efforts." As discussed above, the government had at its disposal at least one expert--Fighel--who could have addressed the relation (if any) between Hamas, HLF, and the Ramallah zakat committee.

Fourth, the government did not establish, and the district court did not find, that "the general purposes of [the rules of evidence] and the interests of justice will best be served by admission of the [PA documents] into evidence." The rules have as their ultimate purpose "that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. It does not serve this purpose to admit with no opportunity for cross-examination damaging statements by unnamed declarants associated with Hamas' mortal enemy, based on unknown sources of information.

Fifth, the government did not provide the names of two of the declarants in the PA documents or the addresses of any of them. Rule 807 makes it an express precondition to admissibility that this information be provided, so that the party

against whom the hearsay is offered can investigate and attempt to interview the declarant.

This Court has emphasized that the proponent of evidence under Rule 807 "has a heavy burden to come forward with indicia of both trustworthiness and probative force." *Phillips*, 219 F.3d at 419 n.23 (quotation omitted). The government did not satisfy this burden, nor did it satisfy the Rule's other requirements. The district court abused its discretion in admitting the PA documents.

3. Prejudice.--The PA documents introduced through Major Lior--along with the Avi and Shorbagi testimony--provided key evidence on central issues in the case: the alleged relation between Hamas and HLF and between Hamas and the West Bank zakat committees. Agent Burns discussed GX PA 2, 8, and 9 in her testimony on redirect and read substantial portions of them aloud to the jury. 7 R.7736-48. Avi relied on GX PA 2, 8, and 9 in his testimony. 7 R.8001-02, 8119-8124. The government used them to cross-examine former Consul General Edward Abington. 7 R.9287-92. The government confirmed the importance of the documents by emphasizing them in its closing argument. Citing GX PA 2, it declared that "[t]here is another government"--the PA--that identified HLF as "being part of Hamas." 7 R.9454. And it cited GX PA 8 and 9 in arguing that Hamas controlled the Ramallah zakat committee. 7 R.9501. The erroneous

admission of those documents affected Elashi's "substantial rights." Fed. R. Evid. 103(a).

D. The Elbarasse and Ashqar Documents.

The district court admitted under Rule 801(d)(2)(E)--the so-called co-conspirator exception to the hearsay rule--documents seized from the homes of Elbarasse and Ashqar.[28] The documents were created before 1995, when it became illegal to support Hamas, and thus they could not have been in furtherance of any conspiracy, which is an agreement to pursue an unlawful object or a lawful object by unlawful means. Nor did the government establish the elements of the "lawful joint venture" theory, under which some courts have extended Rule 801(d)(2)(E), contrary to its plain language and underlying theory. The erroneous admission of the Elbarasse and Ashqar documents affected appellants' substantial rights and thus requires reversal.

1. Background.--In 2004, the FBI executed a search on Elbarasse's home in northern Virginia. 4 R.4186, 4223-24. Elbarasse--who did not testify at trial--was shown to have shared a bank account in the early 1990s with Hamas official Mousa Abu Marzook, from which $100,000 was paid to HLF in 1992. 4 R.4227-28. He also helped found the Islamic Association for

[28] For convenience, we refer to these as the Elbarasse and Ashqar documents. The government did not establish, however, that the two men personally authored any of the documents.

Palestine--an organization with which HLF cooperated and to which Baker, Elashi, and El-Mezain had links--and attended the October 1993 Philadelphia meeting. 4 R.4222-25, 4591. The FBI found 50 boxes of documents in Elbarasse's home. 4 R.4228. At trial, the government sought to introduce a number of Elbarasse documents. All pre-dated the designation of Hamas in January 1995, and many had unknown authors. The defense objected to the Elbarasse documents as hearsay. *E.g.*, 4 R.4230-33 (continuing objection), 4234; 17 R.717-23, 839-42, 956-57.[29]

Documents found at Elbarasse's home portray HLF as the fundraising arm of the so-called "Palestine Committee," which, according to the government, was established in the United States by the Muslim Brotherhood in part to support Hamas through the Palestinian zakat committees. For example, GX ES 7, an anonymous document dated April 2, 1991, describes the structure and purpose of the Palestine Committee and lists HLF as "the official organization which represents the financial and charitable aspect to support the homeland people in the occupied territories." The document cites an instruction from the "International Shura Council and Office of Guidance" to "[c]ollect[] . . . donations for the Islamic Resistance Movement from the Ikhwan and others."

[29] The hearsay Elbarasse exhibits are GX Elbarasse Search ["ES"] 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 31, 32, 35, and 41.

GX ES 8, an anonymous, handwritten, undated document titled "Occupied Land Fund Report," purports to describe various HLF activities, including a visit by "Brother Shukri" to "the inside" and a trip to Great Britain by "Brother Ghassan." GX ES 35, an anonymous document dated October 1, 1992, and addressed to the "Masuls" of the Palestine Committee, praises the "pioneering role played by the Hamas Movement" and reports on Hamas activities, including attacks on Israeli soldiers and the killing of collaborators.

GX ES 22, an anonymous, handwritten document dated July 14, 1991 and addressed to "[d]ear brother/Shukri," lists West Bank and Gaza zakat committees and charitable organizations (including the ones named in the indictment) and identifies the extent to which they are "ours." GX ES 22 at 4. The document asserts, for example, that the Jenin Zakat Committee is "[g]uaranteed"; that "[a]ll" of the Ramallah Zakat Committee "is ours"; that "[a]ll" of the Qalqilia Zakat Committee "is ours and it is guaranteed"; and that "[a]ll" of the Islamic Charitable Society of Hebron "is ours." Other Elbarasse documents are to similar effect. The government presented no evidence that the appellants ever saw any of the Elbarasse documents.

The Elbarasse documents identify Ashqar as affiliated with the Palestine Committee. In December 1993, the FBI conducted a "sneak and peek" search of Ashqar's home. 4 R.4308-09. The government photographed a number of docu-

ments in the course of the search. At trial, it offered certain of the Ashqar documents into evidence. The defense objected on hearsay grounds, among others. 4 R.4309-10, 4396-97 (continuing objection), 4414-15 (continuing objection); 7 R.5816-25, 5908-14; 17 R.725, 839-42, 956-57.[30] The district court overruled those objections. *E.g.*, 4 R.4414-15; 7 R.5824-25, 5912-14.

The Ashqar documents, like the Elbarasse documents, predated the 1995 Hamas designation and contained prejudicial and inadmissible hearsay, much of it by anonymous declarants. GX AS 1, for example, lists "[i]mportant phone and fax numbers"for the "Palestine section/America" and the "Palestine section/Outside America," including entries for appellants Elashi, Baker, and El-Mezain. GX AS 5 is an undated, anonymous document titled "A suggested work paper on: Re-arranging the Frame of Work on the Inside." The document outlines roles for the Muslim Brotherhood, Hamas, and other entities. Under the heading "Social and Charitable Work," the document describes the "Islamic presence" in several of the zakat committees at issue in this case, including the Nablus, Tolkarem, and Jenin committees and the Charitable Society in Hebron. Other Ashqar search documents are similar. As with the Elbarasse documents, the government presented no evidence that the appellants ever saw any of the Ashqar documents.

[30] The hearsay Ashqar exhibits are GX Ashqar Search ["AS"] 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, and 15.

At the close of the government's case, the defense moved to strike the alleged co-conspirator statements. 7 R.8492-93; 17 R.1064. The district court denied the motion. 7 R. 8493.

2. Rule 801(d)(2)(E).--Rule 801(d)(2)(E) defines as nonhearsay "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). The proponent of evidence under the coconspirator rule must establish the following elements by a preponderance of the evidence: (1) a conspiracy existed; (2) the declarant and the person against whom the declaration is offered were members of that conspiracy; and (3) the statement was made during the course and in furtherance of that conspiracy. *See, e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). In determining whether the proponent has met its burden of proof, "[t]he contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." Fed. R. Evid. 801(d)(2); *see, e.g.*, *United States v. Sudeen*, 434 F.3d 384, 390-91 (5th Cir. 2005); *United States v. Richards*, 204 F.3d 177, 202-03 (5th Cir. 2000).

The Second Circuit's decision in *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008), analyzes the co-conspirator exception under circumstances analogous to this case. The government charged the defendants in *Al-Moayad* with

providing material support to Hamas and al Qaeda. Among other things, Al-Moayad was involved in efforts to provide charity to Palestinians in the occupied territories. *Id*. at 145-51. The government convinced the district court to admit as co-conspirator statements a "mujahadin form," which listed the defendant as sponsoring a mujahidin fighter to attend an al Qaeda training camp; a videotape of a speech by Hamas figure Mohammed Siam (whom the government also featured in this case, *e.g.*, 4 R.4681-82, 4692-93) at a wedding in Yemen hosted by the defendant; and a "last will and testament" seized from a Yemeni man by Croatian authorities. *See* 545 F.3d at 155-57, 172-76.

The Second Circuit found that the district court erred in admitting each of these documents under Rule 801(d)(2)(E). Concerning the mujahidin form, the court observed:

> Contrary to the government's contention, the record fails to demonstrate Al-Moayad's "longstanding participation in a conspiracy to provide material support to Al Qaeda," other than some indication that Al-Moayad had a relationship with Bin Laden sometime in the past. The form itself, given that it provides no information about Abu Jihad's relationship with Al-Moayad other than the fact that he wrote Al-Moayad's name as his recommender, is not competent proof of their joint involvement in a conspiracy. Indeed, we do not know if Al-Moayad even knew Abu Jihad, or was aware that Abu Jihad listed him on the form. The district court had virtually no basis for admitting the mujahidin form for its substance as a co-conspirator statement.

Id. at 173-74.

The Second Circuit reached a similar conclusion on the Siam wedding video. It declared that "[n]o independent evidence showed that either defendant was involved in a joint conspiracy with Mohammed Siyam, other than their general ties to Hamas." *Id*. at 175. In a footnote, the court observed that "although defendants admitted ties to individuals who were leaders in Hamas, such as Siyam and Khaled Meshal, neither defendant was shown to be a Hamas figure or even a 'member' of Hamas." *Id*. at 175 n.27. The court noted that "[t]he video itself was some evidence of a connection between defendants and Siyam, showing that the defendants helped organize a wedding at which Siyam spoke and referred to a suicide bombing. However, these facts standing alone fall well short of meeting the criteria discussed above for the admission of evidence under Rule 801(d)(2)(E)." *Id*. at 175.

The court of appeals found as well that the last will and testament seized in Croatia did not constitute a co-conspirator statement. The court found that "[t]he government's evidence, including the will itself, was insufficient to establish that Al-Moayad and the individual from whom the will was seized were engaged in a shared criminal activity, even a general conspiracy to support Al-Qaeda. The district court therefore clearly erred in admitting the will as substantive evidence." *Id*. at 176.

For the reasons outlined in *Al-Moayad*, the district court should not have admitted the Elbarasse Search and Ashqar Search exhibits under Rule 801(d)(2)(E). The government did not establish as to any of those exhibits that a conspiracy existed, that the (in many instances anonymous) declarant and the appellants were members of that conspiracy, or that the statements in the document were made during the course and in furtherance of that conspiracy. *See, e.g.*, *Bourjaily*, 483 U.S. at 175-76; *Al-Moayad*, 545 F.3d at 173.

3. The "Lawful Joint Venture" Theory.--In addition to the government's failure to establish the elements of the co-conspirator exception for the reasons stated in *Al-Moayad*, Rule 801(d)(2)(E) did not apply to the Elbarasse and Ashqar exhibits for another reason: those documents (with the apparent exception of GX ES 21) were created before January 25, 1995, when the United States designated Hamas a terrorist organization. The government thus could not establish the existence of a conspiracy at the time the statements were made, because conspiracy requires an agreement to commit an unlawful act or to commit a lawful act by unlawful means[31]--in the government's words, "an agreement among two or more people basically to do something wrong." 7 R.9508. As the

[31] *See, e.g., Beck v. Prupis*, 529 U.S. 494, 501-02 (2000) (civil conspiracy); *Iannelli v. United States*, 420 U.S. 770, 777 (1975) (criminal conspiracy); *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1194 (5th Cir. 1995) (civil conspiracy; applying Texas law); *United States v. Burroughs*, 876 F.2d 366, 370 (5th Cir. 1989) (criminal conspiracy).

government conceded, "[I]t didn't become illegal to support Hamas or to fund Hamas until 1995." 4 R.3563; *see* 7 R.9510 (government closing--"Now, these didn't become illegal conspiracies until Hamas was designated . . . ."), 9724-25 (government rebuttal).

To get around the restriction of Rule 801(d)(2)(E) to statements by *co-conspirators* in furtherance of a *conspiracy*, the government argued that Rule 801(d)(2)(E) applies to statements in furtherance of a "lawful joint venture." The lawful joint venture theory rests on "concepts of agency and partnership law." *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006). Under this approach, what one joint venturer says during and in furtherance of the venture constitutes an admission of the other joint venturers under Rule 801(d)(2)(E).

For several reasons, this Court should reject the "lawful joint venture" theory. First, by its plain terms Rule 801(d)(2)(E) applies only to a "*coconspirator* of a party during the course and in furtherance of *the conspiracy*." Fed. R. Evid. 801(d)(2)(E) (emphasis added). Both the common law roots of Rule 801(d)(2)(E) and its legislative history confirm that it uses the term "conspiracy" in its ordinary sense, to mean an agreement to achieve unlawful ends or lawful ends by unlawful means. Only by ignoring the text of the rule and its history can the words "conspirator" and "conspiracy" be read to include *lawful* joint venturers. *See* Ben

Trachtenberg, *Coconspirators, "Coventurers," and the Exception Swallowing the Hearsay Rule*, 61 Hastings L.J. 581, 599-608 (2010).

Second, the "concepts of agency and partnership law" on which the lawful joint venture theory purportedly rests, *Gewin*, 471 F.3d at 201, fit poorly with the theoretical underpinnings of the co-conspirator exception. As the Advisory Committee Note to Rule 801(d)(2)(E) makes clear, "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Fed. R. Evid. 801, Advisory Committee Note; *see* Trachtenberg, *supra*, 61 Hastings L.J. at 627-29. The co-conspirator exception exists not because conspirators are agents of each other, but as a practical recognition that conspiracies are difficult to prosecute because they operate in secret to conceal criminal conduct. *See id*. at 633-34; *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979). Even if the difficulty of prosecuting *conspiracies* justifies admitting potentially unreliable evidence with no opportunity for cross-examination, no such systemic difficulty accompanies the prosecution of lawful joint ventures and thus no comparable relaxation of the rules is justified in that context. *See* Trachtenberg, *supra*, 61 Hastings L.J. at 636-37.

Third, if the lawful joint venture theory depends on "concepts of agency and partnership law," as the D.C. Circuit suggests, then it should be measured by the

hearsay exception directed specifically to an agency relationship, Fed. R. Evid. 801(d)(2)(D). That provision defines as nonhearsay "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Rule 801(d)(2)(D) precisely defines the extent to which statements of agents may be treated as admissions by their principals. *See, e.g., United States v. Saks*, 964 F.2d 1514, 1525 (5th Cir. 1992); *Blanchard v. Peoples Bank*, 844 F.2d 264, 267 n.7 (5th Cir. 1988). Courts should not stretch Rule 801(d)(2)(E) past the breaking point as a means of circumventing the restrictions that Congress placed on such vicarious admissions.

Two of this Court's decisions--*United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), and *United States v. Saimento-Rozo*, 676 F.2d 146 (5th Cir. 1982)--appear to apply the lawful joint venture theory under Rule 801(d)(2)(E). But both cases could have been decided under ordinary co-conspirator exception principles, and thus the references to the lawful joint venture theory should be considered dictum or at least confined to the facts of those cases. In *Postal*, the government stopped a boat carrying thousands of pounds of marijuana. The crewmen were charged with conspiracy to import the drugs and other offenses, and the government offered the boat's logbook. The logbook was obviously admissible under Rule 801(d)(2)(E) as a statement in furtherance of the importation

conspiracy. *See* Trachtenberg, *supra*, 61 Hastings L.J. at 614 n.190, 624 n.259 (discussing *Postal*). Instead of this approach, however, the Court declared that "the agreement [underlying Rule 801(d)(2)(E)] need not be criminal in nature," found that "the voyage was a 'joint venture' in and of itself apart from the illegality of its purpose," and concluded that the logbook was non-hearsay under Rule 801(d)(2)(E). *Postal*, 589 F.2d at 886 n.41.

The sole support *Postal* cited for the proposition that "the agreement need not be criminal in nature" is the following sentence from the Senate Report accompanying Rule 801(d)(2)(E): "'While [this] rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for purposes of this rule even though no conspiracy has been charged.'" 589 F.2d at 886 n.41 (quoting S. Rep. No. 1277, 93d Cong., 2d Sess. 24, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7073). But the quoted statement means only that "despite the explicit inclusion of the word 'conspiracy' in [Rule 801(d)(2)(E)], the drafters did not intend to limit the scope of the [rule] to charged conspiracies. Under Rule 801(d)(2)(E), a 'conspiracy' may be uncharged, but it still must be a conspiracy." Trachtenberg, *supra*, 61 Hastings L.J. at 607; *see id*. at 607-08 (cases cited in Senate Report to support the quoted sentence all involve *illegal* joint enterprises); *United States v. Elashi*, 554 F.3d 480, 503 (5th Cir. 2008) (uncharged conspiracy

suffices for Rule 801(d)(2)(E)), *cert. denied*, 130 S. Ct. 57 (2009). The Committee's reference to a "universally accepted doctrine" confirms this reading of the Report; in 1974, when the Report was written, the lawful joint venture theory had yet to be invented, while it was "universally accepted" that the conspiracy underlying the co-conspirator exception did not have to be charged.

This Court followed *Postal* in *Saimento-Rozo*, which involved similar facts. The defendants in *Saimento-Rozo* were crewmen of a boat loaded with 71,000 pounds of marijuana. The government offered the boat's logbook and navigation chart under Rule 801(d)(2)(E) as statements of a joint venturer. The Court found sufficient evidence that the defendants and the declarant were engaged in the joint venture of sailing the boat. It noted that the boat "could not operate without the active assistance of a crew," and it concluded that "the log book and the navigation chart were properly admitted as statements made in furtherance of the joint venture." *Id.* at 149-50. The Court observed in passing--citing only *Postal*--that the "conspiracy or agreement" underlying Rule 801(d)(2)(E) need not be "criminal in nature; it may be in the form of a joint venture." *Id*. at 149. As in *Postal*, this was dictum; the crewmembers were engaged in a conspiracy to import marijuana, and the logbook and chart obviously were made in furtherance of that conspiracy.

Neither *Postal* nor *Saimento-Rozo* compels this Court to adopt the lawful joint venture theory, particularly outside the narrow facts of those cases. For the

reasons described above, the Court should reject that theory and apply Rule 801(d)(2)(E) as it was intended and has been traditionally understood. Because appellants and the declarants in the Elbarasse and Ashqar documents were not engaged in any "conspiracy" when the declarants prepared the documents, Rule 801(d)(2)(E) does not apply and the documents should have been excluded as hearsay.

4. The "Lawful Joint Venture" Theory, if It Exists, Does Not Apply Here.--Even if the lawful joint venture theory existed under Rule 801(d)(2)(E), it would not apply here. To invoke the theory, the government had to establish by a preponderance of the evidence that the appellants were engaged in a joint venture with the pre-January 25, 1995 declarants whose out-of-court statements the government offered. "A 'joint venture' is by definition a 'business undertaking by two or more persons engaged in a single defined project.'" *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 263 (5th Cir. 2002) (Dennis, J., concurring in part and dissenting in part) (quoting *Black's Law Dictionary* 843 (7th ed. 1999)); *see, e.g., Walker v. Messerschmitt Bolkow Plohm GmBH*, 844 F.2d 237, 241-42 (5th Cir. 1988).

The government did not present sufficient evidence--particularly evidence independent of the out-of-court statements themselves, as Rule 801(d)(2) requires--to establish that the declarants in the Elbarasse and Ashqar documents were

engaged in a joint venture with appellants. The government's evidence showed at most that some appellants shared with some declarants a deep concern for the plight of Palestinians, a desire to end the Israeli military occupation of the West Bank and Gaza, and a preference for an Islamist approach to Palestinian governance. But those shared views are too general to create a joint venture or other agency relationship. *See Al-Moayad*, 545 F.3d at 173-76. If common views and goals at this level of generality sufficed under Rule 801(d)(2)(E), then members of the National Rifle Association, or the right to life movement, or even the Republican or Democratic Parties could be found to constitute joint venturers, such that a statement by one member in furtherance of the group's common goals would become an admission by all the others. *See* Trachtenberg, *supra*, 61 Hastings L.J. at 635-36, 642-43, 645-48.

The district court's application of the lawful joint venture theory was particularly flawed with respect to the anonymous declarants in the Elbarasse and Ashqar documents.[32] In affirming the admission of a statement by an unnamed declarant under Rule 801(d)(2)(D)--which, like the lawful joint venture theory under Rule 801(d)(2)(E), rests on agency principles--this Court declared: "It should not be understated, however, that while a name is not in all cases required, a

[32] *See, e.g.*, GX ES 1, 5, 7, 8, 11, 12, 13, 14, 17, 18, 19, 22, 41; GX AS 5, 7, 14, 15; *see also* 4 R.4234, 4255, 4272, 4293, 4316, 4318, 4321, 4336 (objecting on this basis); 7 R.5820-22 (same).

district court should be presented with sufficient evidence to conclude that the person who is alleged to have made the damaging statement is in fact a party or an agent of that party for purposes of making an admission within the context of Rule 801(d)(2)(D)." *Davis v. Mobil Oil Exploration & Producing Southeast, Inc.*, 864 F.2d 1171, 1174 (5th Cir. 1989).

In *Davis*, the court found sufficient evidence that the unnamed declarant was an agent of Mobil in light of specific testimony from the plaintiff and two other witnesses that the declarant was a Mobil employee. *See id.* at 1173-74. Similarly, in *Saimento-Rozo* the court found sufficient evidence of agency where the unknown declarant had written in the boat's log and navigation chart and thus was "inescapabl[y]" a member of the crew engaged in the joint venture of sailing the boat. 676 F.2d at 149-50 & n.3. Here, by contrast, there was insufficient evidence--and no evidence at all independent of the out-of-court statements themselves, as Rule 801(d)(2) requires--to establish an agency relationship between the anonymous declarants and the appellants.

5. Prejudice.--The government emphasized the Elbarasse and Ashqar documents throughout the case. In opening it described them as "very important." 4 R.3563. It presented extensive testimony about them, principally through FBI Agents Burns and Miranda.[33] It used those documents extensively to

[33] *E.g.*, 4 R.4233-78, 4292-4325, 4336-48, 4364-67, 4386-93, 4401-03, 4447-60, 4497-98, 4547-61, 4632-34, 4700-01, 4772-73, 4786-89; 7 R.5735-36,

cross-examine the defense expert on Islam, Dr. John Esposito, and defense witness Wafa Yaish. 7 R.8668-72, 8686-8709, 9028-35, 9040. In closing it argued, based on the Elbarasse documents, that the Palestine Committee (to which appellants allegedly were connected) was "Hamas in America," 7 R.9431-35, and it cited the Elbarasse and Ashqar documents repeatedly, 7 R.9436, 9438, 9449, 9451, 9453-54,9458-60, 9462, 9471-72, 9479, 9484-85, 9503, 9511. In rebuttal it again referred to those documents. 7 R.9728-29, 9755-57. And it argued--echoing its opening statement--that the Elbarasse documents are "some of the most compelling and important documents" in the case and will be "studied and discussed by analysts and scholars for years to come because of what they show." 7 R.9727. Given the government's emphasis on the Elbarasse and Ashqar documents, their erroneous admission affected Elashi's substantial rights. *See* Fed. R. Evid. 103(a).

III. THE DISTRICT COURT ERRED IN REFUSING TO EXCLUDE EVIDENCE UNDER FED. R. EVID. 403.

The district court erred under Fed. R. Evid. 403 by admitting unfairly prejudicial evidence that had little or no probative value. The evidence included testimony and exhibits about Hamas suicide bombings, testimony about Hamas killing collaborators with Israel, a videotape of demonstrators stomping on and

(continued…)

5760-61, 5778-83, 5811, 5813, 5825-38, 5943-47, 5950-54, 5958-62, 5965-72, 5975-76, 6039-48, 6148-76, 7033-34, 7049-50, 7095, 7098, 7100, 7108, 7120-24, 7129-30, 7145-46, 7150-51, 7168, 7175, 7180-85, 7189-92, 7221-24, 7727-28, 7878-81, 7906, 8067, 8113, 8166, 8172, 8225-26.

burning American flags, and violent images that HLF employees encountered (but did not download or otherwise save) when browsing the internet. And the court admitted a wealth of other highly prejudicial evidence with little or no relevance to the charges in this case. The erroneous admission of this evidence requires reversal. *See, e.g., Al-Moayad,* 545 F.3d at 159-64.

A. Standard of Review.

This Court reviews rulings under Fed. R. Evid. 403 for abuse of discretion. *See, e.g., United States v. Caldwell,* 586 F.3d 338, 341 (5th Cir. 2009); *United States v. Polasek*, 162 F.3d 878, 883 (5th Cir. 1998); *United States v. Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993). In criminal cases, the Court's review of Rule 403 rulings "is necessarily heightened. As the Supreme Court has instructed, evidence in criminal trials must be 'strictly relevant to the particular offense charged.'" *United States v. Anderson*, 933 F.2d 1261, 1268 (5th Cir. 1991) (quoting *Williams v. New York,* 337 U.S. 241, 247 (1949)). "The admission of irrelevant facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict." *United States v. Hays*, 872 F.2d 582, 587 (5th Cir. 1989) (quotation omitted). The Court reviews Rule 403 issues for plain error where no objection is made.

B. The District Court Admitted Inflammatory Evidence with Little or No Probative Value.

The government did not contend--and certainly did not prove--that Elashi or the other appellants funded (or intended to fund) Hamas violence. Nonetheless, the district court permitted the government to introduce gut-wrenching evidence of Hamas' violent acts and other, similarly prejudicial matters. This inflammatory evidence was certain to infuriate the jury and had little, if any, relevance to the charges; even the district court acknowledged that all the jury needed to know about Hamas was that it had been designated a terrorist organization. 7 R.6782.

1. Evidence Concerning Hamas Violence.--The Hamas evidence that the district court erroneously admitted included the following:

- Testimony from Hamas expert Matthew Levitt that Hamas includes "metal objects, usually nuts and bolts, sometimes marbles" in suicide bombs to increase the carnage and that Hamas has tried soaking the metal fragments in cyanide to make them more lethal. 4 R.3777-82. The government introduced through Levitt, its first witness, a photograph of the aftermath of a suicide bombing of a bus and had him describe the scene. 4 R.3785-86; GX Demonstrative 13. Levitt testified to his own observations of the aftermath of a suicide bombing in Jerusalem: "There

were children's shoes all over the place. There was still blood on the floor. The roof was gone. The stores were destroyed." 4 R.3786-87.[34]

- Testimony from Shorbagi about Hamas killing Palestinians who collaborated with Israel. 7 R.6659-60. The district court overruled defense objections to this testimony and denied a motion for mistrial. 7 R.6660, 6671.
- Testimony from Shorbagi about Hamas kidnapping and killing Israeli soldiers. 7 R.6700-01, 6964-66. The district court overruled defense objections to this testimony. 7 R.6701, 6965-66.
- Testimony from Shorbagi that he did not want to return to Hamas-controlled Gaza because he might be killed as a result of his testimony. 7 R.6979-82. The district court overruled defense objections to this testimony. *Id*.
- Testimony from Avi about suicide bombings that preceded ODS in 2002. 7 R.8242, 8471-72. Avi testified, for example, that at a discotheque in Tel Aviv a suicide bomber "blow himself with 22 youths, youngsters that were killed." 7 R.8242. He testified that shortly before ODS, on "the

[34] Rule 403 must be applied with particular care to experts such as Levitt and Avi. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (quotation omitted).

evening Passover, a suicide bomber entered the Park Hotel, killing 32 Israeli citizens." 7 R.8471. When the prosecutor pressed for details, Avi added that "Israeli society was shocked from this event. This was many, many Israeli citizens that were killed at that time at that special event, and it was a holiday, it was a holiday." 7 R.8471-72. The district court overruled objections to this testimony, 7 R.8242, 8471-72, and denied a motion for mistrial, 7 R.8493-94.

- Images recovered from the Temporary Internet Files ("TIF") of HLF computers in Dallas, New Jersey, and Chicago of the aftermath of Hamas suicide bombings. GX HLF Search 47, 50, 51. None of the images came from a computer traceable to Elashi, and only the New Jersey images (GX HLF Search 50) had any arguable connection to any individual appellant. The images were not downloaded or otherwise intentionally saved; they were automatically stored when the computer user browsed the web page on which they appeared. 7 R.7830. Thus, for example, if a person viewing the internet clicked on the IDF website, and the site displayed a photo of Hamas founder Sheik Yassin, the computer would download the photo (and the rest of the webpage) automatically into the temporary internet files. 7 R.7838-39. The district court overruled objections to the exhibits. 4 R. 3510-14; 7 R.7809-13. To exacerbate the

prejudicial impact of GX HLF Search 47, 50, and 51, the government showed photos of suicide bombings included in those exhibits to Avi and had him describe them. 7 R.8103-04. The district court overruled defense objections, *id*., and it denied a motion for mistrial based on the government's emphasis on "violence, violence, violence," 7 R.8185-86.

The government exploited this inflammatory evidence in closing argument. It described in detail Hamas' indiscriminate suicide bombing. It declared that Hamas "tr[ies] to increase the destruction by adding screws and bolts and nails to the explosives so they can increase the carnage." 7 R.9416. It displayed GX Demonstrative 13, the photograph of the aftermath of a bus bombing. 7 R.9417. It showed the jury a photo of a suicide bombing scene from the TIF files of an HLF Chicago computer (GX HLF Search 51) and declared that "[t]his is the HLF's own material." 7 R.9417. It concluded by exhorting the jury: "Don't let the Defendants deceive you into believing that they did what they did to support widows and orphans. The reality is that by supporting Hamas, they helped create widows and orphans. Find them guilty." 7 R.9512. The district court denied a defense mistrial motion based on the government's repeated, gratuitous invocation of violence. 7 R.9578.

2. Other Unfairly Prejudicial Evidence.--The government did not stop at evidence of Hamas violence. At every turn it sought to poison the jury

with inflammatory evidence that had scant bearing on appellants' guilt or innocence. For example:

- The district court admitted over objection three videos of Palestinian school ceremonies in which children played the role of terrorists, including suicide bombers complete with suicide belts. None of the videos came from HLF's files. One video--GX GOI 1--showed a kindergarten graduation ceremony at the Islamic Society of Gaza in July 2001. The government played GX GOI 1 twice for the jury. 4 R.3818-22; 7 R.8031-33. A second video--GX Demonstrative 10--showed a 2007 ceremony at the Islamic Complex in Gaza. 7 R.7696-7701, 7863-64; *see* 17 R.1055-56. The third video--GX Jenin Zakat 6--showed a girls' summer camp ceremony in 2004 at the Jenin Zakat Committee. 7 R.6842, 6848, 6851, 8071-72. There was no evidence that the appellants attended or even knew about these ceremonies.[35] The Islamic Complex and Jenin Zakat Committee ceremonies occurred years after HLF closed, and the Islamic Society of Gaza ceremony occurred a few months before

[35] A still image from GX GOI 1 appeared in the temporary internet files of an HLF computer in Chicago. GX HLF Search 51. But there is no evidence any of the individual defendants ever saw the video or even had access to the Chicago computer, and--as described above--no evidence that an HLF employee in Chicago did anything more than browse an internet page containing the video.

that date and had no direct connection to HLF. The videos had minimal relevance and were outrageously prejudicial.[36]

- Avi testified about events that occurred years after HLF closed (and even years after the indictment in this case), including the 2006 PA parliamentary election, in which Hamas won a victory that (according to Avi) it attributed to its social and charity work; the civil war that followed, in which Hamas drove Fatah out of Gaza and Fatah gained control of the West Bank; the decision of Fatah in 2007 to close down all West Bank zakat committees, remove "activists" from those committees, and reorganize them; and Hamas' complaints about those actions. 7 R.7914-19. Despite voicing doubts about the relevance of this testimony, the district court overruled defense objections, 7 R.7915-16, and denied (by not deciding) motions for mistrial and to strike the testimony and instruct the jury to disregard it, 7 R.7919-22, 7950-66.
- The district court admitted GX InfoCom Search 68, a videotape found among items HLF had stored at InfoCom. Much of the videotape

[36] GX GOI 1 and GX Demonstrative 10 were introduced for the limited purpose of showing the basis for expert opinion. 4 R.3818-19; 7 R.7696. For those exhibits, therefore, the standard of Fed. R. Evid. 703 applies: the exhibits should not have been admitted unless "their probative value in assisting the jury to evaluate the expert's opinion substantially outweigh[ed] their prejudicial effect." Fed. R. Evid. 703. Under that standard, these exhibits were even more clearly inadmissible than under Rule 403.

depicted the opening of a library that HLF funded in the West Bank city of Hebron. 7 R.7549.[37] At the beginning, however, was an unrelated fragment showing demonstrators (whom Agent Burns opined were associated with Hamas) burning American flags. (Evidently the unnamed person hired to film the library opening used a tape that included video of the demonstration, a portion of which was not taped over by the opening.) When found at InfoCom, the videotape had a note, which requested two copies of the tape and added: "There is a demonstration at the beginning. I don't want it." 7 R.7164. Despite the irrelevance of the flag-burning fragment and its patently unfair prejudice, the district court admitted it over objection because (according to the court) the video was "an HLF record." 7 R.7001; *see* 7 R.6998-7002, 7159; 17 R.958-59. The government played the flag-burning fragment for the jury and had Agent Burns comment on it. 7 R.7163-66. In arguing for a mistrial, the defense noted the jurors' visible emotional reaction to the flag-burning. 7 R.7202. The court denied the motion. 7 R.7203.

[37] Ironically, at the library ceremony a representative of PA Chairman Yasser Arafat gave a speech, and Baker spoke by telephone and praised Arafat. There was no mention of Hamas. 7 R.7551-53. It is hard to imagine how HLF's funding of a library for which Fatah claimed credit helped Hamas win Palestinian hearts and minds.

- On redirect of Agent Miranda, the government asked whether Saddam Hussein had praised Hamas. The district court sustained an objection to this obviously improper question, 7 R.6457, but denied a defense motion for mistrial, 7 R.6462-65. The court directed the government to approach the bench before mentioning Saddam Hussein again. Undeterred, the government--without approaching the bench--elicited that some of the families that HLF supported in the West Bank had separately received stipends from "Iraq or Saddam Hussein." 7 R.7255; *see id*. at 7252-54. The district court denied a motion for mistrial. 7 R.7258.
- On cross-examination of defense expert Dr. John Esposito, the government asked whether he had heard of the "Muslim Legal Defense Fund." Dr. Esposito testified that he had heard of the organization; that he had not contributed to it or spoken on its behalf; and that all he knew about its purpose was "what the words communicate." 7 R.8637. That should have been the end of the questioning. But the government pressed on about the purpose of the organization, culminating in this: "Q. . . . Do you know that the Muslim Legal Defense Fund is to pay attorneys fees for . . . certain persons?" When Dr. Esposito repeated his answer--that he would have expected that based on the organization's name--the government asked: "And to pay attorney fees for the Defendants in this

case." 7 R.8637-38. The prosecutor's question was irrelevant, inflammatory, and deliberately misleading: as the government knew, the Muslim Legal Fund of America has funded the defense only of Elashi; counsel for the other defendants have been paid under the Criminal Justice Act. The defendants moved for a mistrial based on the improper question, and the court denied the motion. 7 R.8770-71.

- Over objection,[38] the government introduced videotapes of suicide bombings, photographs and posters of suicide bombers, and documents relating to suicide bombings that the IDF allegedly seized from West Bank zakat committees between 2002 and 2004.[39] Because those items were seized one to three years after HLF closed, and for the reasons discussed in Part IV below, they had little probative value. But they were highly inflammatory and prejudicial, particularly in conjunction with the other evidence of violence that the government introduced. The government emphasized the materials seized from the zakat committees in closing. 7 R.9488-89, 9496-9503.

- Over objection under Rule 403 (as well as hearsay objections), 17 R.724-25, 842, 956-57, the government introduced the Elbarasse and Ashqar

[38] *E.g.*, 3 R.5856-57; 4 R.3477-82, 3486-87; 7 R.6838-60, 8105-06, 8142-43.

[39] GX ICS Hebron 1-12; GX HLF Hebron 1; GX Jenin Zakat 1-7; GX Nablus Zakat 1-7; GX Qalqilya Zakat 1; GX Tulkarem Zakat 1-7, 9, 10; and GX al-Isla 1.

documents. Those documents were highly (and unfairly) prejudicial, for the reasons discussed above. They had little probative value, because (1) they were unauthenticated--the government showed that they had been found in the homes of Elbarasse and Ashqar, but did not establish who wrote them, for what purpose, or under what circumstances; (2) in many instances the declarants are unknown; (3) the documents are hearsay and thus the statements they contain were not subject to cross-examination; (4) there was no evidence appellants ever saw the documents, much less adopted the statements they contain; and (5) the documents predate the designation of Hamas as a terrorist organization.

C. The District Court Abused Its Discretion.

The district court abused its discretion in admitting the evidence described above. The unfair prejudice from the evidence far outweighed its minimal probative value.

Al-Moayad--which the defense cited repeatedly to the district court--is particularly instructive. The government charged the defendant in that case with providing material support to Hamas (and al Qaeda). The defendant asserted entrapment, which focused the trial on his predisposition. *Al-Moayad*, 545 F.3d at 154. He denied supporting Hamas and contended that the organization he headed provided humanitarian aid to Palestinians. At trial, the government presented three

pieces of particularly inflammatory evidence: a recorded speech by Mohammed Siam at a wedding the defendant attended, in which Siam celebrated a soon-to-occur Hamas suicide bus bombing in Tel Aviv; testimony by a bus passenger describing the Tel Aviv bombing; and testimony about a witness' experience at an al Qaeda training camp. *Id*. at 147-48, 152-53, 155-57. The district court overruled the defendant's objections to this evidence under Rule 403.

The court of appeals held that the district court erred in admitting the evidence. As to the bus bombing testimony, the court found that evidence "highly charged" and "emotional" and of "minimal evidentiary value." *Id*. at 160. The court found significant that "[t]he defendants were not charged with planning or carrying out the Tel Aviv bus bombing. Indeed, the government did not introduce any evidence connecting [the defendants] to that or any other terrorist act, other than the fact that Siyam mentioned the Tel Aviv incident during his speech at the group wedding." *Id*. It noted that "the government's extended presentation of [the bus passenger's] testimony, supplemented by photos and video, amounted to a blatant appeal to the jury's emotions and prejudices." *Id*. at 161.

The court similarly found the testimony about the al Qaeda training camp--which had no connection to the defendants--was "highly inflammatory and irrelevant, and should not have been permitted by the district court." *Id*. at 163. The Second Circuit was troubled that the district court "summarily and without

comment" overruled the defendant's Rule 403 objection, without making "the required conscientious assessment of the testimony's prejudicial effect in comparison with its probative value, without which we have no adequate basis for deferring to the district court's judgment." *Id*. at 162 (quotation omitted).

The district court here committed the same errors as in *Al-Moayad*. The court gave little indication that it performed a "conscientious assessment"--or any assessment at all, in most instances--of the "prejudicial effect" of the evidence outlined above "in comparison with its probative value." Because the court failed to undertake the required balancing, it did not recognize that the evidence was "highly charged" and "emotional" and of "minimal evidentiary value." *Id*. at 160. It did not take account of a fact the *Al-Moayad* court found significant: that the defendants were not charged with "planning or carrying out" any terrorist act or shown to have had any connection at all with such acts. *Id*. The district court overlooked that the government's repeated invocation of violence and other inflammatory evidence--from suicide bombings to the killing of collaborators to the burning of American flags to Saddam Hussein's support for Hamas--"amounted to a blatant appeal to the jury's emotions and prejudices." *Id*. at 161.

Here, as in *Al-Moayad*, "the defendants were charged with conspiring to . . . and providing material support to Hamas . . . but not with violent terrorist acts like the deadly bus bombing." *Id*. at 166. The testimony, videotapes, and photographs

thus had little (if any) probative value. But the prejudicial impact of that evidence is obvious; "[t]here can be little doubt that in the wake of the events of September 11, 2001, evidence linking a defendant to terrorism in a trial in which he is not charged with terrorism is likely to cause undue prejudice." *Id*. (quotation omitted). The district court abused its discretion in admitting the evidence.

IV. THE DISTRICT COURT ERRED IN ITS RULINGS ON ISSUES INVOLVING OPINION TESTIMONY.

The district erred in its rulings involving opinion testimony under Fed. R. Evid. 701 and 702. Over objection, the court allowed OFAC witness McBrien to offer legal opinions on the core issues in the case. It permitted FBI agents Burns and Miranda--presented as lay witnesses--to testify to matters beyond of Rule 701. The court allowed government Hamas expert Matthew Levitt to opine about inferences to be drawn from appellants' contacts with Hamas leaders--a matter for which expert testimony was inappropriate. And it permitted the government to call former NSC staff member Steven Simon to testify about the "vital United States interests" assertedly threatened by Hamas violence--a matter both irrelevant and unfairly prejudicial.

A. Standard of Review.

This Court reviews the admission or exclusion of lay opinion testimony and expert testimony for abuse of discretion. *See, e.g., United States v. Brito*, 136 F.3d 397, 412 (5th Cir. 1998). To the extent appellants did not object to rulings on

opinion testimony under Rules 701 and 702, review is for plain error. *See*, *e.g.*, *United States v. Gonzalez-Rodriguez*, 2010 U.S. App. LEXIS 19574, at *16 (5th Cir. Sept. 21, 2010).

B. McBrien's Testimony About the Law.

A key issue was the significance of the Treasury Department's failure to list the West Bank zakat committees as SDTs or FTOs. To address this point, the government called OFAC official McBrien to testify at the second trial (he did not appear at the first trial). The government presented McBrien as a lay witness; it neither gave notice under Fed. R. Crim. P. 16(a)(1)(G) that he would testify as an expert, nor satisfied the requirements of Fed. R. Evid. 702 with respect to his testimony. Over objection,[40] the government placed OFAC regulations into evidence and had McBrien opine on the meaning of the provision concerning charitable donations, 31 C.F.R. § 595.408. *E.g.*, GX OFAC 5; 7 R.7293-96, 7357-58. McBrien concluded his redirect with this legal opinion based on a hypothetical question:

> Q. You know that a zakat committee is connected to Hamas.
>
> A. Yes.
>
> Q. Can you give to that zakat committee simply because the zakat committee itself does not appear on the list of specially designated nationals?

[40] 7 R. 7215-16, 7282, 7290-95, 7357, 7361. Appellants moved for a mistrial based on aspects of McBrien's testimony. 7 R.7431.

A. No, you may not. It is prohibited.

7 R.7361-62.[41]

This and other Courts have held that witnesses--lay or expert--may not testify to legal conclusions. *See, e.g., United States v. Griffin*, 324 F.3d 330, 348 (5th Cir. 2003) (error to permit state agency employee to "testif[y] to her own interpretation of the law"); *United States v. Riddle*, 103 F.3d 423, 428-29 (5th Cir. 1997) (error to permit bank examiner testifying as lay witness to opine on meaning of banking regulations and OCC policy); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) ("[C]ourts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law."); *see also, e.g., Cameron v. New York*, 598 F.3d 50, 62 & n.5 (2d Cir. 2010) (lay and expert witnesses "may not present testimony in the form of legal conclusions" (quotation omitted)); *United States Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.*, 582 F.3d 1131, 1150-51 (10th Cir. 2009) (district court erred in permitting expert to testify about meaning of regulation); *Federal Aviation Administration v. Landy*, 705 F.2d 624, 632 (2d Cir.

[41] It is far from clear that this opinion is correct. Section 595.408 purports to prohibit charitable contributions to an entity (whether or not designated) "acting for or on behalf of, or owned or controlled by, a specially designated terrorist." 31 C.F.R. § 595.408(a). But E.O. 12947--the source of authority for the regulation--contemplates that such entities will themselves be designated and placed on the Treasury Department list. E.O. 12947, § 1(a)(iii); *see* 7 R.7301-05, 7308-11. The Treasury regulation circumvents the designation process, with its protections both for the entity at issue and for potential donors.

1983) (testimony from former FAA employee about meaning of FAA regulations "would invade the province of the court to determine the applicable law and to instruct the jury as to that law").

McBrien's testimony about the meaning of § 595.408 and other provisions of law violated the rule laid down in these cases. *Riddle* illustrates the point. In that case--a bank fraud prosecution--a bank examiner testifying as a lay witness explained the meaning of an OCC regulation, described OCC policies, and opined on "prudent" banking practices. *See* 103 F.3d at 428. This Court found that these and other aspects of the examiner's testimony exceeded the scope of proper lay witness testimony under Rule 701. *See id*. at 429. McBrien's lay testimony was similarly inadmissible.

Riddle is particularly striking because it was decided when this Court allowed lay witnesses to opine based on "specialized knowledge." *Id*. at 428. In 2000, three years after *Riddle* was decided, Rule 701 was amended to prohibit lay opinion testimony that is "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c); *see, e.g., United States v. York*, 600 F.3d 347, 360-61 (5th Cir.), *cert. denied*, 2010 U.S. LEXIS 6529 (U.S. Oct. 4, 2010); *United States v. Lopez-Moreno*, 420 F.3d 420, 438-39 (5th Cir. 2005) (King, J., concurring). The amendment served "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through

the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701, 2000 Advisory Committee Note. McBrien's testimony was based on such "specialized knowledge"; both his legal opinions and his testimony about other matters--including his explanation for why OFAC failed to designate the zakat committees, *e.g.*, 7 R.7280-81, and his opinion concerning the due diligence that a charity should perform, *e.g.*, 7 R.7284-85--rested on his specialized knowledge of OFAC's policies, procedures, and regulations. That testimony did not "fall[] within the realm of knowledge of the average lay person," *Caldwell*, 586 F.3d at 348, and thus it exceeded the scope of permissible lay opinion under Rule 701(c), *see, e.g.*, *United States v. White*, 492 F.3d 380, 399-404 (6th Cir. 2007) (testimony of Medicare fiscal intermediary witnesses required specialized knowledge and was inadmissible under Rule 701).

The Tenth Circuit's decision in *Pilatus* also shows the error in admitting McBrien's legal opinions. *Pilatus* was a civil suit arising from a plane crash. A key legal issue was compliance with an FAA regulation requiring procedures for restarting an engine in flight. *See* 582 F.3d at 1149-50. An expert testified about the meaning of the regulation. The district court included the FAA regulation verbatim in its instructions, *see id*. at 1150-51, just as the district court's instructions here quoted the relevant portion of § 545.408, *see* 17 R.1133.

The court of appeals held that the expert's testimony about the regulation violated Rule 702. It declared that "[t]o the extent [the expert] was explaining the content of the regulation, he was merely repeating the jury instruction. Nothing about the regulation suggests explanation by an expert was required, and such testimony also violates the rule against experts testifying as to the law governing the jury's deliberations." 582 F.3d at 1151. Similarly here, McBrien's testimony about § 595.408 invaded the province of the court in instructing the jury on the law. That McBrien was a lay witness rather than an expert (as in *Pilatus*) makes the error "all the clearer," *Cameron*, 598 F.3d at 62 n.5, because (as noted above) Rule 701(c) bars lay opinion testimony based on "specialized knowledge."

C. The Burns and Miranda Opinion Testimony.

The government presented Agents Burns and Miranda as lay witnesses, to testify about "components of the case." 3 R.6543. It did not notice either agent as an expert under Fed. R. Crim. P. 16(a)(1)(G) or qualify them as experts under Fed. R. Evid. 702. In keeping with their non-expert role, a portion of the agents' testimony consisted of introducing documents, wiretaps, and videotapes, and charts summarizing their contents. But Burns and Miranda ranged far beyond summarizing voluminous evidence. Over objection,[42] they offered opinions that were not "rationally based on the perception of the witness," were not "helpful" to

[42] *E.g.*, 4 R.4239-40, 4259, 4262, 4640; 7 R.6015, 6020, 6022-23, 7001, 7013-19, 7096-08, 7114-16, 7159-60, 7723-25.

the jury, and were based on "specialized knowledge." Fed. R. Evid. 701(a)-(c). The opinions thus exceeded the scope of permissible lay testimony. For example:

- Shortly after playing a snippet from the 1993 Philadelphia meeting in which Baker stated, "In the past [HLF] gave the Islamists $100,000 and we gave the others $5,000," Agent Burns defined "Islamist" as "the Defendants. That would be people with the Muslim Brotherhood, supporting Hamas, like that." 4 R.4640; *see id*. (objection overruled). This opinion was particularly damaging because it was misleading. Dr. Esposito, an expert on Islam and the Muslim Brotherhood, explained that "Islamist" means "one who is Islamically-oriented, religiously oriented," and can include a range of views from the mainstream to violent extremism. 7 R.8603, 8674-76. The term "Islamist" appeared repeatedly in the evidence, magnifying the prejudicial impact of Burns' improper opinion. *E.g.*, 7 R.7111-13, 7127-29; GX AS 5.
- The government asked Agent Burns whether it mattered "[f]or the purposes of your investigation" if the appellants received salaries from HLF. The district court overruled a defense objection. Burns responded that it did not matter, because "[c]onsistent with what we have seen in the Hamas charter, the Islamic Resistance Movement was just that, a

movement. The motivation to support that movement did not derive from finances or being paid." 7 R.5554.

- The government asked Agent Burns "why is it important in this case that we have shown . . . to the jury" pre-designation transactions between HLF, Mousa Abu Marzook, and others the government identified with Hamas. The district court overruled a defense objection. Burns responded: "I found it necessary in my investigation to look at the beginning of the Holy Land Foundation and the beginning of Hamas and to examine all connections between the Holy Land Foundation and Hamas, the Islamic Center of Gaza, those entities. Whether or not those connections pre-existed the designation does not change the fact that they had those connections. The individuals as we saw in Philadelphia noted that they were going to be seen as terrorists and needed to conceal their activities from the American public. After that time finding--." The district court overruled another defense objection, and Agent Burns continued: "After that time, it became difficult to find instances where they overtly in American eyes praised Hamas. *So you have to go back to before they were actually concealing their activities to find their true intent*." 7 R.5555-56 (emphasis added).[43]

[43] In addition to exceeding the scope of permissible lay opinion testimony under Rule 701, this and Burns' other testimony about appellants' intent violated

- Agent Miranda opined that Baker's brother, Jamal Abu Baker, "used the Hamas name Jamal Issa." 7 R.6020. Miranda also "interpreted" apparently innocuous telephone calls between the Baker brothers to include references to Jamal speaking with Hamas leader Khaled Mishal shortly before the Israelis tried to assassinate him in 1997, to Jamal consulting with Hamas, and to Jordan expelling the Hamas leadership in 1999. 7 R.6014-20; *see* 7 R.6015, 6020, 6022-23 (objections overruled).
- Agent Burns opined that the flag-burning demonstration shown on GX Infocom Search 68 involved Hamas. 7 R.7165; *see id*. at 7001 (objection overruled). Agent Burns' opinion linking the demonstration to Hamas heightened the unfair prejudice from the videotape, discussed above.
- Agent Burns offered other opinions that were not rationally based on her perception or helpful to the jury and that involved specialized knowledge. For example, Burns identified the unnamed speaker on a tape as a "leader in the U.S. Muslim Brotherhood." 4 R.4239-40; *see id*. at 4240 (objection overruled). She opined on the meaning of "inside" and "outside" in an Elbarasse document. 4 R.4259-60. She defined the term "guidance office" in the same document as "the international Muslim

(continued…)

the prohibition in Rule 704(b) against expert opinion on whether the defendant had the mental state constituting an element of the offense. *See, e.g., Gonzalez-Rodriguez*, 2010 U.S. App. LEXIS 19574, at *27-*28.

> Brotherhood's guidance office. . . . They issue general orders and resolutions that Muslim Brotherhood members worldwide are supposed to adhere to." 4 R.4262; *see id*. (objection overruled).[44] Agent Burns opined on the "purpose" for which the attendees at the Philadelphia meeting "contin[ued] to operate in America"--namely (in Burns' opinion) "[b]ecause they wanted to continue their fundraising here for the ultimate support of the movement," which Burns defined as Hamas. 7 R.5544-45; *see id*. at 5545 (objection overruled). She identified various persons as "key leaders" of the zakat committees. *E.g.*, 7 R.7012-13, 7018-19; *see id*. at 7013-17 (objections overruled). She described what she interpreted as efforts by the so-called Palestine Committee "to take control of" the zakat committees. *E.g.*, 7 R.7096-97; *see id*. at 7096-98, 7114-16 (objections overruled). And she opined on the development of the Hamas social wing and the relation between Hamas and the Muslim Brotherhood. 7 R.7723-25; *see id*. at 7724 (objection overruled).

This testimony was improper under Fed. R. Evid. 701. The line Rule 701(c) draws between lay opinion testimony and expert testimony "turns on whether the testimony falls within the realm of knowledge of the average lay person."

[44] Dr. Esposito--an expert on the Muslim Brotherhood--contradicted Agent Burns' lay opinion. Dr. Esposito denied the existence of a central Muslim Brotherhood authority that could issue binding directives to branches in various countries. 7 R.8610-11.

Caldwell, 586 F.3d at 348; *see, e.g., Lopez-Moreno*, 420 F.3d at 438-39 (King, J., concurring). None of the Burns and Miranda testimony summarized above was "within the realm of knowledge of the average lay person." Nor was the testimony "rationally based on the perception of the witness" or "helpful" to the jury, as required under Rules 701(a) and (b). The district court thus erred in admitting the Burns and Miranda opinions. *See, e.g., Garcia*, 413 F.3d at 210-17 (DEA agent's testimony inadmissible under Rule 701); *cf. United States v. Cruz*, 363 F.3d 187, 192-97 & n.2 (2d Cir. 2004) (error for district court to permit DEA agent, who was not noticed as an expert, to opine on meaning of certain phrases).

D. Levitt's Second Testimony.

After presenting Levitt early in the trial as an expert on Hamas, the government recalled him to opine on the significance of pre-designation contacts between appellants and Hamas figures. This testimony--to which appellants objected repeatedly, 7 R.6492, 6494, 6497, 6499, 6513-14; 17 R.932--violated the fundamental requirement that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, and served merely to give the government an advance summation delivered through a purportedly impartial expert. *See, e.g., United States v. Mejia*, 545 F.3d 179, 191-

93, 194-96 (2d Cir. 2008). The district court's decision to permit the testimony was error. 7 R.6397, 6492, 6494, 6497, 6499, 6513-14.[45]

The government presented evidence through Agents Burns and Miranda that a telephone book seized from Marzook in 1995 contained numbers for Elashi, Baker, and El-Mezain, GX Marzook Phonebook; that calls had been made between numbers associated with Elashi, Baker, and El-Mezain and numbers associated with Hamas figures between 1989 and 1993, GX Marzook Defendant Phone Calls; and that HLF engaged in financial transactions in the late 1980s and early 1990s with Marzook and Khari al-Agha, whom Levitt connected to Hamas in his first testimony.

The government then recalled Levitt. It had him opine that the presence of appellants' numbers in Marzook's phone book was "significant." Levitt added: "This is personal and direct evidence of a relationship. These people are in his personal literally black book." 7 R.6494.

Levitt next opined (without explaining how he knew) that the telephone numbers of Marzook and other Hamas leaders were not publicly available. He testified that if "just someone from the public" called the public number for Hamas,

[45] The government did not provide notice of Levitt's second testimony under Fed. R. Crim. P. 16(a)(1)(G) until October 8, 2008, six days before his testimony and many months after the deadline for expert notices. *See* 17 R.932-36; 3 R.6544 (pretrial witness list does not mention Levitt's second testimony). The government presented no comparable testimony from Levitt or anyone else at the first trial.

"they are not likely to get the senior leaders of an organization, any organization, Hamas or some other organization. The boss isn't going to pick up the public phone that is listed on a letter. You wouldn't get me if you called my office picking up the phone directly either." 7 R.6496-99.

Turning to appellants' pre-1995 phone contacts with Marzook and other Hamas figures, Levitt opined that "[t]he fact that there are connections with so many Hamas leaders is not coincidental, cannot be coincidental." 7 R.6499. Following more objections, he continued: "[A]ll of the research I have done on Hamas, including on many of these leaders, I have never heard or seen of anybody just being able to call them up and being able to reach out," with the exception of the Hamas spokesman. 7 R.6500.

Levitt next addressed the pre-1995 financial transactions involving HLF, Marzook, and al-Agha. He opined, "What is significant is you have a significant financial connection," 7 R.6502, and he added that the transactions "indicate[] not only a financial relationship but a relationship of trust. I mean, this is significant money," 7 R.6505.

After reviewing additional evidence, Levitt summed up for the government: "There is a totality of different types of contacts which are beyond circumstantial or coincidental. What you have here is individuals who are in contact of various types with all kinds of Hamas officials and supporters, suggesting some type of

relationship." 7 R.6511-12. Levitt concluded by downplaying the fact that the contacts dwindled after January 1995, when it became unlawful to support Hamas. *E.g.*, 7 R.6512 ("It is what one would expect to find.").

This testimony was improper under Rule 702, because it did not "assist the trier of fact." The jury was perfectly capable of determining for itself, with the benefit of the parties' closing arguments, what inferences to draw from the evidence. It did not need Levitt to tell it that the presence of appellants' numbers in Marzook's phone book suggested a personal relationship, or that the Hamas leaders were hard to get on the phone (like "any organization, Hamas or some other organization"), or that the telephone contacts between appellants and Hamas figures "cannot be coincidental," or that financial transactions may suggest a "relationship of trust." These were all matters "well within the grasp of the average juror" and thus not a proper subject of expert testimony. *Mejia*, 545 F.3d at 194. The government used Levitt's purported expert testimony to obtain "an additional summation by having [him] interpret the evidence," *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987), and to put the imprimatur of an expert on the inferences it wanted the jury to draw.

E. Simon's Testimony About Hamas' Threat to Vital United States Interests.

Over objection, the government called Steven Simon--who served on the National Security Council staff under President Clinton, 7 R.6254-55--to testify

about the dangers Hamas violence presents to this country's vital strategic interests. Among those dangers, Simon opined, is an increased risk of a terrorist attack on the United States homeland. Simon's testimony was irrelevant and unfairly prejudicial.[46]

1. Background.--The government did not call Simon in the first trial. On its second trial witness list, the government listed him as a lay witness and described his proposed testimony: "Mr. Simon will testify about the reasons why Hamas was designated as a terrorist organization by the United States Government." 3 R.6544. The defense moved to preclude Simon's testimony under Rule 403. 3 R.6784; *see id*. at 6108-11. In response, the government reiterated that Simon would address "the foreign policy and military and economic reasons that animated the executive order that is at issue here." 7 R.6109. It explained that the testimony was relevant "because it is important for the jury to understand why the United States has an interest here. A terrorist organization has a focus on a geographic region that is far away from the United States, and it is important for [the jurors] to be able to tie the concerns that animated the designation of Hamas so that they understand why this case is relevant to them." *Id*.

[46] The government did not present Simon as an expert, *e.g.*, 3 R.6544, and his testimony exceeded the scope of permissible lay opinion under Rule 701 for the reasons explained above.

The district court was skeptical. It accepted as "generally . . . true" that "[t]he law is the law, and why the law was enacted is totally irrelevant." 7 R.6111. It "sustain[ed] th[e] objection as to the reasons why" Hamas was designated. 7 R.6118. But the district court quickly retreated from that ruling and ultimately allowed the government to repackage Simon's testimony as an explanation of "why the Oslo process and peace in the region is important to the United States interests"--which, as the defense pointed out, was "the same thing." 7 R.6118-19. The defense lodged a continuing objection to Simon's testimony. 7 R.6251-52.

Simon testified that the United States had a "vital strategic interest" in promoting peace between Israel and the Palestinians. According to Simon, the United States' role in promoting peace helped it remain on good terms with Arab states in the region, which was important for several reasons: to ensure our supply of Arab oil, to maintain military bases in Arab countries, and to obtain Arab assistance in controlling Iran's nuclear proliferation. Simon opined that Hamas' terrorist acts interfered with the United States-backed peace process and thus jeopardized our interest in winning Arab support. 7 R.6259-65.

The government concluded Simon's direct with this question: "Why is it that we in the United States should care about an organization like Hamas that is trying to undermine the Middle East peace process?" 7 R.6265. Simon responded in part: "The problem now, and we all know this since 9/11, is not just that the

U.S. has powerful interests in maintaining a secure supply of oil, but we now know that people from there who are angry at the United States are motivated and capable of coming over here and hurting us quite badly. . . . So, you know, *to the extent that the United States can remove one cause of resentment against America, we reduce the threat against the United States correspondingly*." 7 R.6266 (emphasis added). Simon thus linked Hamas terrorism with 9/11 and future attacks on the United States homeland through the following logic: United States participation in the Israel-Palestinian peace process reduces Arab resentment against this country; Hamas violence interferes with the peace process; Hamas violence thus hampers this country's effort to reduce Arab resentment; and that resentment may produce further attacks on the homeland.

At the conclusion of Simon's testimony, the defense made--and the district court denied--a motion for mistrial. 7 R.6282-83.

2. Simon's Opinions Were Irrelevant and Prejudicial.--Simon's opinions about United States interests threatened by Hamas violence were irrelevant. That testimony was merely a backdoor way of impressing upon the jury the importance of the laws banning support for Hamas. The Simon testimony thus flouted the rule that the jury may not consider the wisdom of the law it is asked to apply. This rule is manifested in standard jury instructions,[47] and--more pertinently

[47] *E.g.*, Fifth Circuit Pattern Instructions 1.01 ("You must follow the law as I explain it to you whether you agree with it or not."), 1.04 ("You have no right . . .

here--in the principle that the defendant in a material support prosecution cannot challenge the basis for designating a group as an FTO or an SDT.[48] Just as the rule means that the jury may not nullify because it believes a law is misguided, it also means that the jury may not apply the law more severely because it believes the law serves important United States interests. As the defense predicted, Simon's testimony sent the jury a message that contradicted this basic principle: that it should "convict because this is so important to the United States, regardless of what the law is." 7 R.6118-19.

The unfair prejudice from Simon's testimony far outweighed its nonexistent probative value. It was bad enough that the government, through Simon, portrayed Hamas (and thus appellants' alleged conduct) as a threat to the United States' supply of Middle Eastern oil and its interest in maintaining military bases in Arab countries and preventing Iran from developing nuclear weapons. But it was

(continued…)

to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.").

[48] *See, e.g., United States v. Afshari*, 426 F. 3d 1150, 1155-56 (9th Cir. 2005) ("Under § 2339B, if defendants provide material support for an organization that has been designated as a terrorist organization . . . they commit the crime, and it does not matter whether the designation is correct or not."); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 171 (E.D.N.Y. 2008) ("Congress has provided that the *fact* of an organization's designation as an FTO is an element of § 2339B, but the *validity* of the designation is not.") (emphasis in original, quotation omitted).

beyond the pale to present testimony that support for Hamas could lead to more 9/11-style terrorist attacks on this country. The testimony appealed directly and improperly to the jurors' fears and prejudices.

F. The Errors Affected Appellants' Substantial Rights.

This litany of errors affected appellants' substantial rights. Through McBrien the government instructed the jury on a key point of law. Through Agents Burns and Miranda it presented opinions on a range of significant subjects without having to notice or qualify the agents as experts. Through Levitt the government obtained an advance summation in the guise of expert testimony. And through Simon it suggested to the jury that a not guilty verdict could damage prospects for Middle East peace, breed resentment against the United States, permit Iran to go nuclear, and provoke further terrorist attacks against this country.

V. THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION FOR LETTER ROGATORY.

The district court erred in failing to grant appellants' motion for a letter rogatory to the GOI. The failure to issue the letter denied the defense crucial evidence and permitted the prosecution to present a misleading picture of the zakat committees that the defense could not rebut.

A. Standard of Review.

This Court reviews the denial of a motion for issuance of a letter rogatory for abuse of discretion. *See United States v. Liner*, 435 F.3d 920, 924 (8th Cir.

2006). Here, however, the district court never ruled on the motion and thus did not exercise its discretion. Review should be de novo.

B. Background.

During ODS, the IDF seized more than 2000 boxes of material from the zakat committees and other locations in the West Bank. 7 R.6900-01. The IDF placed the seized materials in a warehouse at an Israeli military base. It permitted the prosecutors in this case and prosecution experts Levitt and Avi to review the materials. 4 R.4008-10. From among the thousands of items seized from the zakat committees, the government and its experts selected a handful of posters and other exhibits related to Hamas. 7 R.6858-59, 8525-26, 8532-35, 8538-39.[49] The government offered these exhibits to support its contention that Hamas controlled the committees. 7 R.9488-89, 9496-97, 9499-9504 (government closing).

Unlike the prosecutors and their experts, the defense did not have access to the warehouse of seized items; the defense saw only those items the prosecution selected to support the government's case. 7 R.6844-45. The defense thus had no means, absent assistance from the court, to inspect the universe of items seized from the zakat committees to determine whether--as the government's selected exhibits implied--Hamas posters and other Hamas items dominated the committees

[49] GX ICS Hebron 1-12; GX HLF Hebron 1; GX Jenin Zakat 1-7; GX Nablus Zakat 1-7; GX Qalqilya Zakat 1; GX Tulkarem Zakat 1-7, 9, 10; GX al-Isla 1.

or, by contrast, whether items relating to Fatah and other Palestinian factions were equally or more prevalent.[50] If the committees displayed Fatah posters alongside the Hamas posters that the government brought to court, that would negate the inference of Hamas control the government asked the jury to draw.[51]

On April 1, 2008, more than five months before the second trial, the defense moved the district court for a letter rogatory to the appropriate Israeli authority to permit defense counsel to review the materials seized from the zakat committees. 3 R.5580. The government took no position on the request. 3 R.5599.[52] The district court failed to rule on the motion, despite repeated reminders that it was

[50] Former Consul General Abington--*the only witness who had actually visited a zakat committee*--testified that on those visits he saw a mixture of Hamas and Fatah posters, including "always" a photograph of Arafat. 7 R.9214-15. Abington's testimony suggests that the government and its experts skewed the sample of seized items it selected to create the impression that only Hamas items were present.

[51] Government witnesses referred to several indexes of the seized documents prepared by the GOI. Levitt brought with him a partial index that, he testified, the GOI had given him in confidence. 4 R.3996. The court declined to order production of the Levitt index. 4 R.3724-30, 3992-4006. Major Lior referred to a complete index of all items seized. 7 R.6875. But Lior did not bring the index with him and thus could not produce it. 7 R.6898. Avi referred to "indexes" of the seized items that he had reviewed. 7 R.8007. He claimed that, according to the indexes, items seized from the committees related solely to Hamas, and not to Fatah or other factions. *Id*. The defense moved for production of the indexes under Fed. R. Evid. 612, but the government denied having them, and the district court did not order production. 7 R.8045-46, 8079-81. Thus, the defense never obtained an index from which it could determine whether the IDF had seized items relating to Fatah and other non-Hamas factions from the zakat committees.

[52] The government filed its response to the motion on April 18, 2008. 3 R.5599. The defense filed its reply--which completed briefing on the motion--on April 29, 2008, four and a half months before the second trial began. 3 R.5626.

pending.[53] As a result, the defense never reviewed the seized material, and the jury saw only the items that the government and its experts selected.

C. Failure to Issue the Letter Rogatory Was Error.

The district court's failure to issue the letter rogatory was error. A letter rogatory is the proper means of obtaining information in the possession of a foreign country. *See* 28 U.S.C. § 1781(a)(2), (b)(2); *United States v. Reagan*, 453 F.2d 165, 171-72 (6th Cir. 1971). Defendants' motion was in the proper form. The government took no position on--and thus did not oppose--the motion. 3 R.5599. The defense reminded the district court repeatedly that the motion was pending. The court had no basis for failing to grant the motion.

D. The Error Was Prejudicial.

The court's failure to issue the letter rogatory prejudiced the defense. Avi testified that he relied on the nature of the items found at the zakat committees as one ground for his conclusion that Hamas controlled them. 7 R.8005-08, 8064-67, 8090-96, 8101-02, 8104-13, 8135-37, 8141-46, 8174, 8218-26, 8232-42, 8246-60. In closing, the government turned repeatedly to the seized items to argue that Hamas controlled the zakat committees. *E.g.*, 7 R.9488-89, 9496-9502. If the defense had been permitted to inspect the seized items and present materials

[53] *E.g.*, 3 R.5856 n.5; 4 R.3506-07, 3730, 4153; 7 R.6844, 6855-58, 8455-56, 8555-59.

associated with Fatah and other factions, this argument would have been weakened or eliminated entirely.

VI. THE DISTRICT COURT ERRED IN REFUSING TO REQUIRE PRODUCTION TO THE APPELLANTS OF THEIR OWN STATEMENTS.

Over a period of almost ten years, the government intercepted and recorded thousands of appellants' conversations under the purported authority of FISA. Rule 16 requires the government to "disclose to *the defendant*" any "relevant . . . recorded statement by the defendant." Fed. R. Crim. P. 16(a)(1)(B)(i) (emphasis added). Despite the plain command of Rule 16, the government refused to disclose to appellants the vast majority of their FISA statements, on the basis that those statements--*to which the appellants themselves were parties*--were classified. The government's alternatives to compliance with Rule 16--discussed below--did not overcome the prejudice from denying appellants access to their own statements. The district court erred in refusing to require compliance with Rule 16.

A. Standard of Review.

This Court reviews discovery orders for abuse of discretion. *See, e.g.*, *United States v. Garcia*, 567 F.3d 721, 734 (5th Cir.), *cert. denied*, 130 S. Ct. 303 (2009); *United States v. Cuellar*, 478 F.3d 282, 293 (5th Cir. 2007) (en banc), *rev'd on other grounds*, 553 U.S. 550 (2008). The Court "review[s] de novo the interpretation and application of the state secrets doctrine and reviews[s] for clear

error the district court's underlying factual findings." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 2010 U.S. App. LEXIS 18746, at *16 (9th Cir. 2010) (en banc).

B. Background.

Between 1994 and 2003, the government intercepted tens of thousands of appellants' conversations under FISA.[54] The majority of the conversations were in Arabic, a language that neither the prosecutors nor Agents Burns and Miranda speak. 4 R.4158-59. The government thus had Arabic-speaking FBI "language specialists" review the calls. Based on feedback and instructions from the agents, the language specialists determined which calls were "pertinent." 4 R.4160. Calls that the language specialists deemed pertinent were summarized in English, and the language specialists prepared verbatim transcripts of a subset of those calls. Calls that the language specialists deemed non-pertinent were not translated or summarized, unless the agents specifically identified them by date or otherwise. 4 R.4161-62.

[54] The government intercepted calls to and from El-Mezain's phone from 1994 through 2003. It intercepted calls to and from Baker's phone from 1994 or 1995 until 2001. It intercepted calls to and from Abdulqader's home and work phones for about eight months, with gaps, and it intercepted calls to and from Odeh's home phone for a comparable period. It intercepted calls to and from HLF's phones from 2000 until December 2001. 4 R.5021, 5140. The interception occurred 24 hours per day, seven days per week. 4 R.5140. Although the government did not intercept calls to and from Elashi's phones, its taps on the other phones intercepted a number of his conversations.

In all, the language specialists prepared approximately 9600 summaries in English. 4 R.5023, 5141. That represented *about ten percent* of the total intercepted calls. 4 R.156. Thus, tens of thousands of Arabic calls were never summarized or transcribed in English.

The government classified the intercepted calls.[55] In 2005, it provided the classified recordings to defense counsel, and in 2006 it declassified--and thus made available to appellants, as well as to counsel--the English summaries representing roughly ten percent of the calls.[56] But the government refused to disclose to appellants their own statements. This presented defense counsel with significant practical problems. None of the defense lawyers speaks Arabic. Under ordinary circumstances, counsel would have provided the Arabic recordings to their clients and asked them (with guidance of counsel) to look for exculpatory or otherwise significant statements. But because the recordings were classified, the defense could not pursue this logical alternative. Nor, to the extent counsel could discern the meaning of the classified Arabic conversations, could counsel even discuss them with their clients.

[55] The government later declassified the relatively small number of calls intercepted by the wiretaps on the Odeh and Abdulqader phones. But it kept classified the calls on the Baker, El-Mezain, and HLF phones, including calls on those phones in which Odeh and Abdulqader participated.

[56] The summaries prepared by the FBI language specialists proved unreliable. Comparison of the summaries with verbatim transcripts that the government later produced revealed what Judge Fish called "disturbing" inaccuracies. 10 R.3207; *see* 10 R.3140-62 (examples of inaccuracies).

Defense counsel attempted to retain Arabic translators with the appropriate security clearances to review the Arabic conversations. Early in the case, the defense hired a cleared translator in Texas, but he lost his clearance (and thus his ability to review classified discovery) shortly after he became available. Counsel then secured the services of two part-time translators in Washington, D.C., to whom they shipped batches of calls through the Court Security Officer. The defense eventually abandoned the use of the D.C. translators because the process was unwieldy and produced little useful information at a high cost.

The defense moved repeatedly to compel the government to produce the Arabic recordings to "the defendants," as Rule 16(a)(1)(B)(i) requires, and not merely to the non-Arabic speaking cleared defense counsel. *E.g.*, 10 R.1171, 4303, 4963; 29 R.6251-52 (renewing prior motions), 6258 (same), 6365, 6373-75. In each motion counsel outlined the extraordinary burden that the classification of defendants' own Arabic statements had placed on the defense. *E.g.*. 10 R.1173-76, 4305-09, 4964-68.

The district court denied the motions. 2 R.4887; 10 R.2623, 3207, 4325; 32 R.155 (adopting prior orders and denying renewed motion). It found sufficient that the government had (1) declassified and permitted appellants to review the English summaries that the language specialists had prepared of ten percent of the total calls, (2) declassified transcripts and recordings of several hundred complete

conversations that the government contemplated using at trial; and (3) offered to consider declassifying particular calls that the defense identified.[57]

Because of the absurdity of classifying the appellants' own statements, particularly when (as here) the fact and means of the interception had been publicly disclosed, the defense asked that the district court (1) require the government to provide an explanation for its assertion of the state secrets privilege for the FISA recordings and (2) review a representative sample of the purportedly classified communications. 29 R.6375 n.13, 6681; *see, e.g., United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) ("[T]he Court should determine if the assertion of privilege by the government is at least a colorable one."). The district court gave no indication that it conducted such an inquiry. 32 R.155.

C. Rule 16 Required Production to Appellants of Their Own Statements.

1. Rule 16 and the State Secrets Privilege.--Rule 16 requires the government to "disclose to the defendant" any "relevant . . . recorded statement by the defendant." Fed. R. Crim. P. 16(a)(1)(B)(i). "The requirement that statements

[57] This offer had little practical value. The government refused to declassify large blocks of conversations, and the more limited declassification requests that it accepted in some instances took weeks or months to complete. *E.g.*, 29 R.6447-49. Moreover, without being able to understand Arabic or discuss the content of calls with their clients, defense counsel had little ability to pinpoint particular calls that might contain especially useful information. To the extent the district court's reliance on these alternatives can be considered "substitutions" for purposes of CIPA § 4, they plainly did not afford appellants "substantially the same ability to make [their] defense as would disclosure" of the statements. CIPA § 6(c).

made by the defendant be relevant has not generally been held to create a very high threshold. Generally speaking, the production of a defendant's statements has become practically a matter of right even without a showing of materiality." *Yunis*, 867 F.2d at 621-22 (quotation omitted). Appellants' statements recorded under FISA indisputably fall within the scope of Rule 16(a)(1)(B)(i). *See, e.g., Davis v. United States*, 413 F.2d 1226, 1231 (5th Cir. 1969).

Courts have held that the government can invoke the state secrets privilege to limit disclosure of material that would otherwise be discoverable under Rule 16. *See, e.g., Aref*, 533 F.3d at 79-80; *United States v. Mejia*, 448 F.3d 436, 455 (D.C. Cir. 2006); *Yunis*, 867 F.2d at 622-23. The government must satisfy two requirements to invoke the privilege. First, the claim must be "'lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.'" *Aref*, 533 F.3d at 80 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)); *see, e.g., Mohamed*, 2010 U.S. App. LEXIS 18746, at *25; *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141-42 (5th Cir. 1992).[58] "This certification is fundamental to the government's claim of privilege," because it "ensure[s] that the privilege is invoked no more often or extensively than necessary." *Mohamed*, 2010 U.S. App. LEXIS 18746, at *25.

[58] The state secrets privilege applies far more narrowly in criminal cases than in civil cases such as *Mohamed* and *Bareford*. *See Mohamed*, 2010 U.S. App. LEXIS 18746, at *17 n.3. But the procedural requirements for invoking the privilege are the same in both contexts.

Second, the government must show that "there is '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 (quoting *Reynolds*, 345 U.S. at 8) (ellipsis in original); *see, e.g., Mohamed*, 2010 U.S. App. LEXIS 18746, at *29-*30. The court may not merely rubber-stamp the executive branch claim. Rather, it must examine state secrets assertions "with a very careful, indeed a skeptical, eye." *Id*. at *30 (quotation omitted).

The district court misunderstood this aspect of the privilege. Judge Fish (in orders Judge Solis adopted, 32 R.155) declared that the court "d[id] not have the power to require the government to declassify documents." 2 R.4889. The court overlooked that it *does* have the power to determine whether the government has properly invoked the state secrets privilege. *See Mohamed*, 2010 U.S. App. LEXIS 18746, at *31 ("[A]n executive decision to *classify* information is insufficient to establish that the information is privileged. . . . Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role, which the Supreme Court has admonished 'cannot be abdicated to the caprice of executive officers.'" (quoting *Reynolds*, 345 U.S. at 9-10)).[59]

[59] Careful judicial scrutiny of assertions of the state secrets privilege is particularly important in criminal cases, to ensure that the government does not use classification as a litigation tactic. *See, e.g.,* Joshua L. Dratel, *Sword or Shield? The Government's Selective Use of Its Declassification Authority for Tactical*

If the government properly invokes the state secrets privilege, the court must determine whether the statements are "helpful or material to the defense, i.e., useful to counter the government's case or to bolster a defense." *Aref*, 533 F.3d at 80 (quotation omitted). Statements that are "helpful or material" must be produced, despite the assertion of the privilege. "To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under [*Brady*] to disclose exculpatory information." *Id*. "[I]nformation can be helpful without being 'favorable' in the *Brady* sense." *Mejia*, 448 F.3d at 457.

2. The Government Did Not Invoke the Privilege Properly.-- The government did not properly invoke the state secrets privilege with respect to appellants' FISA statements.

First, to our knowledge "the head of the department which has control over the matter"--the Attorney General--did not assert the privilege *at all*, much less "after actual personal consideration by that officer." *Aref*, 533 F.3d at 80 (quotation omitted). In some cases involving classified information, courts have, on a one-time basis, "excuse[d] the Government's failure to comply" with the "head of the department" requirement. *Id*. But here, where the classification of

(continued…)

Advantage in Criminal Prosecutions, 5 Cardozo Pub. Law, Policy & Ethics J. 171, 175-79 (2006) (giving examples).

appellants' conversations is so patently frivolous, and so obviously calculated to give the government an unfair advantage, it is hard to imagine that any high Department of Justice official, acting in good faith, would assert the state secrets privilege to prevent appellants from reviewing their own statements.[60]

Second, the government did not show "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 (quotation omitted). Nor *could* the government make such a showing. Disclosing to appellants the contents of their own statements could not possibly endanger national security. This is not a case, as in *Yunis*, where "the government's security interest in the conversation[s] lies not so much in the contents of the conversations, as in the time, place, and nature of the government's ability to intercept the conversations at all." 867 F.2d at 623. In the course of declassifying and presenting at trial some of the intercepted communications, the government disclosed the fact and means of the surveillance,

[60] Such an assertion is particularly unlikely now, in light of DOJ's recently adopted policies for invoking the privilege. Those policies are designed to "strengthen public confidence that the U.S. Government will invoke the privilege in court only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent necessary to safeguard those interests." Memorandum from the Attorney General re: Policies and Procedures Governing Invocation of the State Secrets Privilege at 1 (Sept. 23, 2009). The memorandum is available at http://www.justice.gov/opa/documents/state-secrets-privileges.pdf.

including the persons whose phones were monitored and the duration of the monitoring.[61]

Because the government did not properly invoke the state secrets privilege, the district court erred in refusing to require production to appellants of their own statements. And because the government cannot show that the improper withholding of the statements from appellants--effectively withholding them entirely from the defense--"might not have had a substantial influence on the jury," the Court should vacate the convictions and order a new trial. *United States v. Ible*, 630 F.2d 389, 397 (5th Cir. 1980).

3. Materiality.--If the Court finds--contrary to the preceding argument--that the government properly invoked the state secrets privilege, it should direct the district court to determine whether the withheld statements are "helpful or material to the defense."

Yunis recognized the difficulty a defendant will have showing the helpfulness of evidence he cannot review. *See* 867 F.2d at 624. The court

[61] The government asserted below that disclosure of appellants' own statements to them might harm national security because (1) the prosecutors and agents had not reviewed many of the conversations and did not know what they contained, and (2) the disclosure might impede ongoing investigations in some unspecified way. 10 R.1201-02. But the government cannot show "a reasonable danger" of harm to national security based on its ignorance of whether such harm will occur. And the government's professed concern about hampering other investigations--to the extent it had any substance at all--could have been addressed with a protective order.

mitigated this problem in two ways. First, it required only that a defendant explain with "some specificity . . . what benefit he expects to gain from the evidence" he seeks. *Id.*; *cf. United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004) (in *Brady* context, defendant's lack of direct access to witnesses means that "he cannot be required to show materiality with the degree of specificity that applies in the ordinary case"). Second, both the district court and the court of appeals reviewed the requested evidence in camera. *See Yunis*, 867 F.2d at 624-25; *see also Aref*, 533 F.3d at 80 (court of appeals "carefully reviewed the classified information"); *Mejia*, 448 F.3d at 457 ("[I]n the absence of a district court finding as to whether the withheld material meets the standard articulated in *Yunis I*, we have examined the documents de novo . . . .").

Appellants have satisfied the *Yunis* "some specificity" requirement. They sought statements--like the April 23, 1996 conversation between Baker and Elashi quoted above--that would show their intent to comply with the law, or their belief that they *were* complying with the law (a belief, for example, that HLF could lawfully contribute to the zakat committees because OFAC had not designated them), or their intent (in Baker's words at the Philadelphia meeting) that HLF "care[] for the interests of the Palestinian people" and not "cater to the interests of a specific party." 7 R.5380. Such statements would have been admissible as nonhearsay under Fed. R. Evid. 801(c) to show appellants' state of mind. *See, e.g.*,

United States v. Brown, 459 F.3d 509, 528 n.17 (5th Cir. 2006) (defendant's email admissible as nonhearsay under Rule 801(c) "to reveal [his] state of mind, i.e., his belief that the side deal had been entered into and confirmed by Fastow"); *United States v. Parry*, 649 F.2d 292, 294-95 (5th Cir. 1981) (exclusion of defendant's out-of-court statements erroneous because offered to prove his knowledge, rather than for the truth of the matters asserted).

If this Court determines that the government properly invoked the state secrets privilege, it should remand to the district court with instructions to review the withheld conversations for helpfulness. This review will require the services of cleared Arabic translators (unless appellants are permitted to participate), and it can be conducted either by the district court itself or initially by counsel with the translators' assistance. If the district court determines, following this review, that appellants' statements were helpful to the defense (and thus should have been disclosed to appellants despite invocation of the state secrets privilege), it can then conduct the appropriate harmless error analysis under *Ible*.

VII. THE DISTRICT COURT ERRED WITH RESPECT TO FISA.

Under Fed. R. App. P. 28(i), Elashi adopts the argument at Parts VII and VIII of the Opening Brief for Defendant-Appellant Shukri Abu Baker.

VIII. THE CUMULATIVE EFFECT OF THE ERRORS REQUIRES REVERSAL.

As the preceding parts demonstrate, the district court committed a series of errors, any one of which, standing alone, requires reversal of Elashi's conviction. But even if the Court were to find those errors harmless individually, their cumulative effect--focusing as they do on the key disputed issues--"yield[ed] a denial of the constitutional right to a fair trial." *United States v. Valencia*, 600 F.3d 389, 429 (5th Cir.) (quotation omitted), *cert. denied*, 2010 U.S. LEXIS 6171 (U.S. Oct. 4, 2010); *see, e.g., United States v. Labarbera*, 581 F.2d 107, 110 (5th Cir. 1978); *see also Al-Moayad*, 545 F.3d at 178 (reversing material support conviction based on cumulative error). Elashi was convicted based on the testimony of an anonymous expert witness, the hearsay testimony of a well-rewarded cooperator, the admission of highly prejudicial hearsay documents, gratuitous evidence of Hamas violence, improper lay and expert opinion, and a range of other inadmissible evidence, and he was denied access to his own FISA statements and to the items seized from the zakat committees. The combination of those errors produced a trial unrecognizable by standards of contemporary fairness.

IX. ELASHI'S CONVICTION VIOLATED HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

In a previous, separate prosecution in the Northern District of Texas,[62] the government convicted Elashi for two conspiracies that substantially overlap three of the conspiracies of which he was convicted in this case. *See Elashi*, 554 F.3d at 498-500, 510 (affirming conviction in previous case). The second prosecution of Elashi for the same offenses violates his rights under the Fifth Amendment Double Jeopardy Clause and requires reversal of his convictions for conspiracy to provide material support to Hamas, conspiracy to violate IEEPA, and conspiracy to commit money laundering. And because the district court gave a *Pinkerton* instruction and the jury returned a general verdict, Elashi's conviction on most substantive counts must be reversed as well.

A. Standard of Review.

This Court reviews de novo a district court's denial of a motion to dismiss on double jeopardy grounds. *See, e.g., United States v. Delgado*, 256 F.3d 264, 270 (5th Cir. 2001); *United States v. Deshaw*, 974 F.2d 667, 669 (5th Cir. 1992).

[62] *United States v. Bayan Elsahi, et al.*, CR No. 3:02-CR-052-R (N.D. Texas) (judgment entered November 7, 2006), *aff'd*, 554 F.3d 480 (5th Cir. 2008), *cert. denied*, 130 S. Ct. 57 (2009).

B. Background.

On November 7, 2006, the United States District Court for the Northern District of Texas (Lindsay, J.) entered judgment of conviction against Elashi on various charges, including conspiracy to violate Executive Order 12947, in violation of 18 U.S.C. § 371, 50 U.S.C. §§ 1701-1705, and 31 C.F.R. § 595 et seq. ("the IEEPA conspiracy") and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) ("the money laundering conspiracy"). 34 R.864-65. The IEEPA conspiracy and the money laundering conspiracy arose from alleged transactions involving InfoCom Corporation, Mousa Abu Marzook, and Nadia Elashi. *See Elashi*, 554 F.3d at 490-91 (describing transactions). Those conspiracies allegedly began in August 1995 and continued until July 2001. 34 R.889-93, 897-98.

The indictment in this case charged Elashi with (among other offenses) conspiracy to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1), 34 R.1157-75; conspiracy to violate Executive Order 12947, in violation of 50 U.S.C. §§ 1701-1706 and 31 C.F.R. § 595.201 *et seq*., 34 R.1178-80; and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), 34 R.1183-85. Those conspiracies allegedly began in January 1995 (or, for the material support conspiracy, October 1997) and continued until the indictment in July 2004. *See* 34 R.1169, 1178, 1183.

On October 8, 2008, over objection--including a double jeopardy objection, 7 R.5726, 5728--the government introduced evidence of the same alleged transactions involving InfoCom, Marzook, and Nadia Elashi that formed the basis for the IEEPA conspiracy and the money laundering conspiracy on which Elashi was convicted in his previous trial. 7 R.5839-73; GX Infocom Bank Account 5, 6, 7, 8, 9, 10; GX InfoCom Aging Report 1, 2, 3. When Elashi's counsel requested a limiting instruction under Fed. R. Evid. 404(b) concerning this evidence, 7 R.5875, the government argued in part:

> Your Honor, the Government disagrees that this is a 404(b) issue. *This activity is intrinsic to all of these activities.* The evidence in this case has shown that these Defendants, these companies that they set up, are all intermingled, if you will--common directors, common employees, common--The evidence shows that InfoCom was used to store Holy Land Foundation records. A lot of Holy Land Foundation records were there.
>
> There is the commonality of Mousa Abu Marzook, who the evidence shows was an unemployed graduate student, and he is depositing hundreds of thousands of dollars in these entities and then that money is being funneled back to him. *And all of these relationships are part of this arrangement or this conspiracy among these individuals to carry out the activities of the Holy Land Foundation and the activities of others associated with it.*

7 R.5876 (emphasis added).

Elashi moved for dismissal of Counts 1, 11, and 22 on double jeopardy grounds. 7 R.5894, 8491-92, 9306-07; 34 R.851. Although the district court acknowledged that the issue was a "relatively close call," it denied the motion

because the earlier case involved a "more narrowly defined, more specific agreement between . . . fewer individuals tha[n] are involved here." 7 R.5900-01. The court admitted evidence of the Marzook/InfoCom transactions under Rule 404(b) and gave a limiting instruction. 7 R.5903-07, 6210-11.

C. Counts One, Eleven, and Twenty-Two Are Barred By Double Jeopardy.

The district court erred in refusing to dismiss Counts 1, 11, and 22. Elashi's conviction on the IEEPA conspiracy and the money laundering conspiracy in the prior trial barred prosecution on the conspiracy charges a second time in this case. *See, e.g., Deshaw*, 974 F.2d at 673-75 (double jeopardy barred successive conspiracy prosecutions); *United States v. Levy*, 803 F.2d 1390, 1394-97 (5th Cir. 1986) (same); *United States v. Nichols*, 741 F.2d 767, 770-72 (5th Cir. 1984) (same); *United States v. Moncivais*, 213 F. Supp. 2d 704, 706-10 (S.D. Tex. 2001) (same); *United States v. Ramos-Hernandez*, 178 F. Supp. 2d 713, 717-22 (W.D. Tex. 2002) (same).

The Fifth Amendment Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction." *Brown v. Ohio*, 432 U.S. 161, 165 (1977) (quotation omitted). When both prosecutions are for conspiracy, this Court considers five factors to determine if the offenses are "the same" for double jeopardy purposes: (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." *Delgado*, 256 F.3d at 272; *see, e.g., Nichols*, 741 F.2d at 770-72; *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978). "If a defendant comes forward with a prima facie nonfrivolous double jeopardy claim, then the burden of establishing that the indictments charge separate crimes is on the government." *Delgado*, 256 F.3d at 270; *see, e.g., Deshaw*, 974 F.2d at 670; *Levy*, 803 F.2d at 1393-94; *Ramos-Hernandez*, 178 F. Supp. 2d at 718.

All five factors support a double jeopardy bar here. Those factors establish (1) that the IEEPA conspiracy on which Elashi was convicted in his first trial is the same offense for double jeopardy purposes as the material support and IEEPA conspiracies for which he was convicted in this trial, and (2) that the money laundering conspiracy on which Elashi was convicted at his first trial is the same offense as the money laundering conspiracy for which he was convicted in this trial.

1. Time.--The IEEPA and money laundering conspiracies for which Elashi was convicted in his first trial allegedly began in August 1995 and ended in July 2001. 34 R.889-93, 897-98; *Elashi*, 554 F.3d at 490-91. The IEEPA and money laundering conspiracies in this case allegedly began in January 1995

and ended in July 2004. 34 R.1178, 1183. The material support conspiracy allegedly began in October 1997 and ended in July 2004. 34 R.1169. Thus, the two conspiracies on which Elashi was convicted in his first trial span almost the same period as the three conspiracies for which he was convicted in this case. *See* 34 R.923-24 (government concedes that the "time period" in the conspiracies is "similar"). This factor weighs heavily in favor of finding that the first trial conspiracies are the same offense as the conspiracies in this case for double jeopardy purposes. *See, e.g., Moncivais*, 213 F. Supp. 2d at 708; *Ramos-Hernandez*, 178 F. Supp. 2d at 719.

2. Co-conspirators.--Elashi's alleged co-conspirators in the IEEPA conspiracy and the money laundering conspiracy were Bayan Elashi, Basman Elashi, Mousa Abu Marzook, Nadia Elashi, and InfoCom. *See* 34 R.889-93, 897-98. Those same persons and InfoCom are alleged to be co-conspirators in the three conspiracies at issue here, several of them in more than one capacity. 10 R.4825, 4826, 4828, 4829.[63] Thus, *every one* of the alleged co-conspirators in

[63] Marzook is listed as a co-conspirator in this case as a "leader[] of the HAMAS Political Bureau and/or HAMAS leader[] and/or representative[] in various Middle Eastern/African countries." 10 R.4828. Nadia Elashi and InfoCom are listed as co-conspirators in this case as "other individuals/entities that Marzook utilized as a financial conduit on behalf and/or for the benefit of HAMAS." 10 R.4829. Bayan and Basman Elashi and InfoCom are listed as co-conspirators in this case as "members of the US Muslim Brotherhood's Palestine Committee and/or its organizations," 10 R.4825-26, and, in Basman's case, as an HLF employee, director, officer, and/or representative, 10 R.4829; *see* 4 R.4955-56, 6151-52.

Elashi's prior case was also an alleged co-conspirator here. Although not all of the alleged co-conspirators in this case were alleged to be co-conspirators in Elashi's prior case, "the fact that there are fewer parties named in [the prior] indictment does not weigh in favor of multiple agreements"; what matters is that several of the "central characters"--including Elashi, his brothers Bayan and Basman, his cousin Nadia, Marzook, and InfoCom--are the same in the two cases. *Moncivais*, 213 F. Supp. 2d at 709; *see, e.g., Deshaw*, 974 F.2d at 674; *Levy*, 803 F.2d at 1395.

3. Statutory Offenses Charged.--The IEEPA conspiracy in the prior case charged the same statutory offense as the IEEPA conspiracy in this case. Both counts allege a conspiracy to violate Executive Order 12947; both rely on IEEPA, 50 U.S.C. §§ 1701 et seq.; both rely on the same provisions in Title 31 of the Code of Federal Regulations; and both rely on the general federal conspiracy statute, 18 U.S.C. § 371. *Compare* 34 R.889-93 *with* 34 R.1178.[64] Similarly, the money laundering conspiracy in the prior case and the money laundering conspiracy in this case both rely on 18 U.S.C. § 1956(h), and both cite violations of IEEPA as the underlying unlawful activity. *Compare* 34 R.897-98 *with* 34 R.1183.

[64] The IEEPA conspiracy count in the prior case explicitly cites 18 U.S.C. § 371, while Count 11 of the indictment in this case does not. *Compare* 34 R.891 *with* 34 R.1178. Even though Count 11 does not cite § 371, however, it necessarily rests on that statute; the specific IEEPA conspiracy provision--50 U.S.C. § 1705(b)--was not effective until 2007, long after the conduct at issue here. *See* Pub. L. 110-96, § 2(a), 110th Cong., 1st Sess., 121 Stat. 1011, 1011 (Oct. 16, 2007).

See also 34 R.923-24 (government concedes that "some of the statutes" in the two cases are "similar").

Only the material support conspiracy in the indictment in this case (Count 1) lacks a precise statutory analog in the prior case. The absence of a statutory match between the material support conspiracy and the prior IEEPA conspiracy, however, does not preclude finding that the two conspiracy counts charge the same offense. *See, e.g., Moncivais*, 213 F. Supp. 2d at 707, 709. Indeed, where the two nonidentical statutes are "related"--as IEEPA and the material support statute undoubtedly are--this factor weighs in favor of finding that the offenses are the same. *See, e.g., Levy*, 803 F.2d at 1395; *Moncivais*, 213 F. Supp. 2d at 709; *Ramos-Hernandez*, 178 F. Supp. 2d at 721-22.

4. Overt Acts or Other Description of the Offense.--Although the overt acts charged in the IEEPA conspiracy and the money laundering conspiracy from the prior case are not the same as the overt acts charged in the three conspiracies at issue here, they span similar time periods (1995 through 2001) and are of a similar character (transfers of money). Both indictments contain allegations concerning Executive Order 12947, the designation process, and the designation of Marzook as an SDT in August 1995. *Compare* 34 R.876-78, 890-91 *with* 34 R.1160-61. And, according to the same government counsel who tried the prior case against Elashi, the alleged Marzook/InfoCom/Nadia Elashi

transactions at issue in that case are "intrinsic" to the conspiracies charged in this case. Indeed, according to government counsel, "all of these relationships are part of this arrangement or this conspiracy among these individuals to carry out the activities of the Holy Land Foundation and the activities of others associated with it." 7 R.5876.

Levy is instructive. There, as here, the prior conspiracy (the "A" conspiracy) shared no overt acts with the second conspiracy (the "K" conspiracy). This Court observed that "[t]he disparity between the overt acts would, at first blush, indicate the existence of two separate conspiracies." 803 F.2d at 1395. But the Court made clear that such a superficial comparison of the two conspiracies would not suffice: "In assessing a motion to dismiss on double jeopardy grounds . . . a court must look not only at the acts alleged in the two indictments, but also at the acts admitted into evidence at the trial or at any hearing. The court must review the entire record and take a commonsense approach in determining the substance of each alleged conspiracy." *Id*.

Upon such "commonsense" review, the *Levy* court found that at the trial on the "A" conspiracy, the government "introduced evidence concerning virtually all the overt acts charged in the 'K' indictment." *Id*. Although the government contended that the overt acts from the "K" indictment had been introduced under Fed. R. Evid. 404(b) at the "A" trial, this Court found that the relationship between

the acts alleged in the two conspiracy charges "raises an inference that only one agreement existed" and thus that the conspiracy counts charged the same offense for double jeopardy purposes. 803 F.2d at 1396; *see Nichols*, 741 F.2d at 772 (introduction under Rule 404(b) of acts underlying one conspiracy charge at trial of another conspiracy charge "tends to prove the existence of one conspiracy").

The *Levy* analysis is directly on point here. At trial in this case, the government introduced--just as it did in *Levy*--all of the transactions that make up the overt acts alleged in the IEEPA conspiracy and the money laundering conspiracy on which Elashi was convicted in the prior case. *Compare* 34 R.892-93, 898 *with* GX Infocom Aging Report 3 and GX Infocom Bank Account-5, -6, -7, -8, -9, -10. Unlike in *Levy*, however, where the government at least argued that the overt acts from one conspiracy were extrinsic to the other--and thus admissible, if at all, under Rule 404(b)--the government here argued expressly that the overt acts from the conspiracies on which Elashi stands convicted do *not* fall under Rule 404(b) because they are "intrinsic" to the conspiracies charged in this case. 7 R.5875-76. Thus, the *Levy* analysis applies with particular force here.

5. Places.--All of the conspiracies at issue here--the two in the first case and the three here--are alleged to have occurred "in the Dallas Division of the Northern District of Texas." 34 R.891, 897, 1169, 1178, 1183.[65] The

[65] Four of these five counts--all except the money laundering conspiracy from the prior case--include the boilerplate "and elsewhere."

headquarters of the two principal institutions involved--InfoCom in the prior case, HLF in this one--were located in Richardson, Texas, across the street from each other. All of the financial transactions that constitute the overt acts in the five conspiracies originated in Richardson. *See* 34 R.923-24 (government concedes that the "location or place where the activity is alleged to have occurred" is "similar" in the two cases). This factor too weighs heavily in favor of finding that the IEEPA and money laundering conspiracies on which Elashi stands convicted are the same offenses as the material support, IEEPA, and money laundering conspiracies for which he is now on trial. *See, e.g., Ramos-Hernandez*, 178 F. Supp. 2d at 720-21.

* * * *

As this analysis demonstrates, the material support and IEEPA conspiracies in this case (Counts 1 and 11) are the same offense for double jeopardy purposes as the IEEPA conspiracy on which Elashi was convicted in the prior case (Count 13). The money laundering conspiracy in this case (Count 22) is the same offense as the money laundering conspiracy on which Elashi was convicted in the prior case (Count 24). Accordingly, the Court should reverse Elashi's convictions on Counts 1, 11, and 22 under the Double Jeopardy Clause and direct the district court to dismiss those counts.

D. In Light of the *Pinkerton* Instruction, the Court Should Reverse Elashi's Conviction on All Substantive Counts Except the Tax Counts.

Because the district court gave *Pinkerton* instructions for the substantive material support, IEEPA, and money laundering counts[66] and the jury returned a general verdict,[67] the dismissal of the three conspiracy counts requires reversal of the substantive material support, IEEPA, and money laundering counts. *See, e.g.*, *United States v. Howard*, 517 F.3d 731, 736-37 (5th Cir. 2008).

The *Pinkerton* instructions were not harmless beyond a reasonable doubt. Elashi did not participate personally in many of the transactions charged in the indictment. For that reason, the government called the jury's attention to the instruction in closing. 7 R.9509. The government also referred in closing to the InfoCom payments to Marzook and his wife. 7 R.9761-62.[68] Under these circumstances, the jury's verdict on the substantive counts may well have rested on the conspiracy counts coupled with the *Pinkerton* instruction. Those counts must be reversed. *See Howard*, 517 F.3d at 736-37.

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[66] 17 R.1119, 1131, 1138-39, 1145. Those instructions permitted the jury to find Elashi guilty on a substantive count if it found him guilty on the corresponding conspiracy count and found that, while he was a member of the conspiracy, another conspirator committed the substantive offense in furtherance of, and as a foreseeable consequence of, the conspiracy. The defense objected to the *Pinkerton* instructions. 7 R.9333-36, 9493.

[67] 17 R.1205-16.

[68] Elashi objected in advance to these references, 7 R.9717, and moved for mistrial on double jeopardy grounds after the government's rebuttal, 7 R.9768-69.

X. THE DISTRICT COURT ERRED IN SENTENCING ELASHI.

The district court sentenced Elashi to 65 years in prison--effectively a life sentence. That sentence rested heavily on two key errors in determining the appropriate range under the Sentencing Guidelines: application of the terrorism adjustment under U.S.S.G. § 3A1.4 and calculation of the "value of the laundered funds" under U.S.S.G. § 2S1.1(a)(2). 30 R.153-54.[69] If the Court does not reverse Elashi's conviction outright, it should vacate his sentence and remand for resentencing under a correct guidelines calculation.

A. Standard of Review.

This Court reviews the district court's "interpretation or application of the Sentencing Guidelines . . . de novo." *United States v. Harris*, 597 F.3d 242, 250 (5th Cir. 2010) (quotation omitted). It reviews factual findings for "clear error. There is no clear error if the district court's finding is plausible in light of the record as a whole." *Id*. (quotation omitted); *see Elashi*, 554 F.3d at 508.

[69] At Elashi's sentencing, the district court incorporated the Guidelines rulings it had made during the Baker and El-Mezain sentencings. The relevant portions of Baker's sentencing appear at 15 R.192-203, 214-15. The relevant portion of El-Mezain's sentencing appears at 22 R.6447-48. Elashi objected to the terrorism adjustment and the value of funds laundered calculation by written objections to the PSR and orally at sentencing. *E.g.*, 15 R.192-96, 198-202, 211 (Baker objections); 30 R.153-54 (incorporating other defendants' objections).

B. The Court Erred in Calculating Elashi's Guidelines Range.

1. The Terrorism Adjustment.--The terrorism adjustment in § 3A1.4 had a dramatic impact on Elashi's sentence: it increased his offense level by twelve levels, and it moved him from criminal history category II to category VI. The district court erred in applying the adjustment. 15 R.196-97, 202-03; 30 R.153.

Section 3A1.4 applies to a felony offense that "involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4. Application Note 1 to § 3A1.4 provides that "Federal crime of terrorism is defined at 18 U.S.C. § 2332b(g)." Section 2332b(g)(5), in turn, defines "Federal crime of terrorism" as an offense that (1) "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and (2) "is a violation of" certain specified statutes. 18 U.S.C. § 2332b(g)(5)(A), (B). The government failed to satisfy the first prong of this definition.

As with any upward Guidelines adjustment, the government had the "burden of proving by a preponderance of the relevant and reliable evidence," *United States v. Rodriguez*, 523 F.3d 519, 524 (5th Cir.), *cert. denied*, 129 S. Ct. 624 (2008), that Elashi committed the alleged offenses "to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The government failed to meet that burden; it presented no evidence that

Elashi acted with the requisite intent. In the absence of such proof, the § 3A1.4 adjustment does not apply. *See, e.g., United States v. Stewart*, 590 F.3d 93, 138-39 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1924 (2010); *United States v. Chandia*, 514 F.3d 365, 375-76 (4th Cir. 2008), *on appeal after remand*, 2010 U.S. App. LEXIS 19178 (4th Cir. Sept. 14, 2010) (unpublished).

2. The Value of the Funds Laundered.--The district court clearly erred in calculating the "value of the laundered funds" under U.S.S.G. § 2S1.1(a)(2). 30 R.153; *see* 15 R.214-15. The amount the PSR found (at ¶ 29) and the district court adopted--$16,672,793.95--represents every penny HLF wired out of the country between 1995 and 2001, regardless of destination and purpose. In other words, this amount includes funds sent to places other than the West Bank and Gaza (to Bosnia, for example, and Chechnya) and to zakat committees and other entities in the West Bank and Gaza that the jury did not find to be acting on behalf of, or under the control of, Hamas. The Court should require the district court on remand to redetermine the "value of laundered funds."

C. The Court Should Vacate Elashi's Sentence.

The district court's errors in calculating Elashi's guidelines require that his sentence be vacated and the case remanded for resentencing. The guidelines are the "starting point and the initial benchmark" for the district court's sentencing decision. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (quotation

omitted). If (as here) that "starting point" is decades higher than it should be, it is impossible to say that the district court would have imposed the same sentence starting from the correct--and far lower--guidelines level. For that reason, the district court's incorrect guidelines calculation requires resentencing. *See, e.g.*, *United States v. Munoz-Camarena*, 2010 U.S. App. LEXIS 18453, at *4-*6 (9th Cir. Sept. 3, 2010).[70]

CONCLUSION

For the foregoing reasons, the Court should reverse Elashi's conviction. If the Court does not reverse Elashi's conviction, it should vacate his sentence and remand for resentencing.

DATED: October 19, 2010

Respectfully submitted,

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[70] Moreover, if the district court were to impose a 65-year sentence on Elashi after calculating the guidelines correctly, that sentence would be substantively unreasonable. The substantive unreasonableness issue can be addressed following resentencing if necessary.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 31,265 words.

/s/ John D. Cline
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th of October, 2010, a copy of the foregoing was filed using the Court's ECF system, which will serve counsel for all other parties to the case.

/s/ John D. Cline
John D. Cline