IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10560

UNITED STATES OF AMERICA,
Plaintiff – Appellee
v.
MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; SHUKRI ABU BAKER; MUFID ABDULQADER; ABDULRAHMAN ODEH; HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,
Defendants – Appellants

Consolidated with No. 08-10664

UNITED STATES OF AMERICA,
Plaintiff – Appellee
v.
SHUKRI ABU BAKER; MOHAMMAD EL-MEZAIN; GHASSAN ELASHI; MUFID ABDULQADER; ABULRAHMAN ODEH,
Defendants – Appellants

Consolidated with No. 08-10774

UNITED STATES OF AMERICA,
Plaintiff – Appellee
v.
MOHAMMAD EL-MEZAIN,
Defendant – Appellant

Consolidated with No. 10-10590

UNITED STATES OF AMERICA,
Plaintiff – Appellee – Cross-Appellant
v.
HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, also known as HLF,
Defendant – Appellant – Cross-Appellee

Consolidated with No. 10-10586

UNITED STATES OF AMERICA,
Plaintiff
v.
SHUKRI ABU BAKER,
Defendant
NANCY HOLLANDER,
Appellant

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

BRIEF FOR DEFENDANT-APPELLANT, MUFID ABDULQADER

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendant – Appellant, Mufid Abdulqader, certifies that the following listed persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. This representation is made so that that 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, Walt

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

Westfall, Gregory B.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Abdulqader requests oral argument. This case comes to the Court after two lengthy trials that have generated a lengthy record[1] and a number of significant issues. Oral argument will assist the Court in addressing the intricacies of the record and the nuances of the controlling law.

[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. The second number represents the "USCA5" number in the lower right-hand corner of each page of the electronic record.

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STATEMENT OF JURISDICTION

Defendant-Appellant, Mufid Abdulqader appeals a judgment of the United States District Court for the Northern District of Texas, Dallas Division. Jurisdiction in the district court was predicated on 18 U.S.C. § 3231. The district court entered judgment against Abdulqader on May 28, 2009. Abdulqader timely filed a notice of appeal on May 28, 2009. *See* 18 U.S.C. § 3742. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Issue I:

Did the District Court Err in Giving a First Amendment Instruction That Misstated the Law as Applied to the Facts of the Case?

Issue II:

Did the District Court Err in Denying Defendants' Motion to Dismiss on Double Jeopardy Grounds?

Issue III:

Defendant-Appellant Abdulqader adopts the issues and arguments of his co-Defendants-Appellants.

STATEMENT OF CASE

Abdulqader adopts the Statement of the Case of Defendant-Appellant Ghassan Elashi. In addition, Abdulqader submits the following supplemental statement of the facts:

Abdulqader was neither an employee, nor a board member of the Holy Land Foundation ("HLF"). 7R.5296-97. Rather, the charges against him were based upon (1) his participation in musical and dramatic performances by the Al Sakhra (later Al Nojoum) Palestinian folk band[2]; and (2) his volunteer work for HLF after he moved to Dallas in approximately 1995. 4R.4332, 4785; 9R.14112. At the time of all of the acts alleged in the Superseding Indictment, Abdulqader was employed full-time as a civil engineer first in Oklahoma, and later with the City of Dallas, Public Works Department. 4R.4168; 7R.5297; 9R.14107.

While working full-time as a civil engineer, Abdulqader engaged in volunteer work for HLF and other Islamic and non-Islamic community organizations. Abdulqader assisted HLF and other Islamic organizations with volunteer fundraising. 9R.10718, 14117. For HLF, he also manned telephones during telathons and helped deliver emergency supplies following the Oklahoma City bombing. 9R.14113.

[2] In addition to the performances, videotapes of which were introduced at trial, the band also performed at cultural festivals and weddings and recorded and sold music CDs. 9R.10351, 14109-10.

As an HLF volunteer, Abdulqader had no signing authority and could not and did not sign wire transfer authorizations or checks. 9R.14131. He had no involvement in determining how HLF monies were used, or in deciding which organizations were to receive money or which orphans were to be sponsored. 9R.14131. Abdulqader was not an incorporator or a board member of HLF. 7R.5297. Abdulqader did not attend HLF board meetings or have a key to the HLF office, or have a desk, computer, email address or telephone number associated with HLF. 7R.5297; 9R.14130-31.

At the first trial, the jury heard evidence for nine weeks. At the close of evidence, representatives of both sides conferred regarding which exhibits had been admitted. 35R.6392-6496. After compiling an agreed list of admitted exhibits, each side gathered its own original exhibits and gave them to court staff for provision to the jury. 35R.6415-16. Neither side examined the exhibits of the other before they were sent back. 35R.6415-16. Even so, before the exhibits went back to the jury, the defense confirmed with the prosecution that the demonstrative exhibits were not included. 35R.6415-16. In spite of its assurances to the contrary at that time, it turned out that prosecution had provided the jury with approximately 100 pages of demonstrative and non-admitted exhibits. 35R.6417-96.

On September 20, 2007, the jury began deliberating and on September 26th, sent a note questioning whether it had demonstrative exhibits. 3R.5431

As the defense learned after trial, this note was prompted by disagreements among jurors as to whether they could consider the non-admitted and demonstrative exhibits as substantive evidence. 35R.6417-19.

Among the demonstrative exhibits erroneously sent back to the jury were: (1) exhibit created by a government expert depicting the "Hamas Structure" had been created by Hamas (35R.6417-19); (2) a twenty-page set of prosecution demonstrative PowerPoint slides entitled "HLF-Hamas Connections" showing arrows pointing from the photographs of the defendants and the names of certain American Muslim faith-based organizations to the Hamas and Muslim Brotherhood logos and the names of alleged Hamas leaders (35R.6430-49); (3) a set of PowerPoint slides with defendants' photographs and arrows drawn to various alleged Hamas leaders as well as pages listing by date events the government deemed important and including the names of persons and entities—including zakat committees—alleged by the government to be tied to Hamas with the Hamas logo beside each name (35R.6452-65); and (4) An exhibit entitled "Hamas Charity Wing – the early '90s" showing a map of the world with a dollar sign and the notation "HLF" positioned over the United States with an arrow pointing to the Islamic Relief Committee in Palestine and boxes indicating HLF support of Hamas activities and various Hamas activists, martyrs, prisoners and deportees (35R.6451). The PowerPoint slides were "[v]iewed as the truth by some

[jurors], due to the Hamas symbols." 35R.6417-19. The Foreperson indicated that as to certain of these exhibits, "[i]nstead of remembering witness testimony and using evidence," some jurors used the demonstratives "as the truth." 35R.6417-19.

Non-admitted exhibits the government provided to the jury included a translation of an intercepted fax and an intercepted call that purported to show HLF connections with Hamas leaders. 35R.6475-90. The jury reviewed and considered these exhibits as substantive evidence. 35R.6417-19. Interestingly, with regard to the intercepted call on the subject of the ritual Muslim animal slaughter and feast days, "some [jurors] thought code was being spoken." 35R.6417-19. Other non-admitted exhibits provided to the jury included a photograph and a diagram with the defendants' photographs under the HLF and Islamic Association For Palestine logos. 35R.6494-95. One non-admitted exhibit, a VHS videotape, sported a yellow Post-It note upon which the government had written "No. translation. [Defendant-Appellant Mufid] Abdelqader kissing Hamas leader Mahmoud Zahar." 35R.6492. One of the non-admitted exhibits given to the jury purported to be a Palestinian Authority report and stated in part, "All of the above [Ramallah zakat committee members] are considered Hamas activists and we have files at our end." 35R.6471-74. In addition, this hearsay report opined, "[t]he Committee is managed by Hamas, however it achieves that through crafty means. Its main

function is to transfer funds from overseas to the Hamas Movement locally." 35R.6471-74.

Upon receiving the September 26th jury note regarding the demonstrative exhibits, counsel for the defense again asked the prosecutors for unequivocal confirmation that the government had not improperly sent such exhibits to the jury. 35R.6415-16. After receiving—for the second time—the government's assurances that none of its demonstrative exhibits had gone to the jury, the parties agreed to an erroneous supplemental jury instruction. 3R.5429-30. The instruction misled the jury into believing that it could consider non-admitted and demonstrative exhibits—most created by the government to illustrate its theory of the case—as substantive evidence. 3R.5429-30. The instruction read as follows: "In response to your note inquiring if the demonstrative exhibits are in the jury room . . . you are instructed as follows: The demonstrative exhibits are not in the jury room. All of the exhibits in evidence are in the jury room." 3R.5429-30.

The jury returned to its deliberations. Several weeks later, on October 18, 2007, the jury indicated that it had reached a verdict as to all counts on one defendant and as to some counts on two other defendants. As to the other three defendants, the jury indicated that it remained deadlocked. 3R.5435. A Magistrate Judge received the verdicts in the district court's absence, sealing them for four days at the government's request pending the return to Dallas of

members of the prosecution team and then-presiding District Judge the Hon. A. Joe Fish. 3R.5440. When they were unsealed on October 22, 2007, the verdict sheets reflected that one defendant (Abdulqader) had been acquitted on all counts, another (El Mezain) had been acquitted on all but one count, and a third (Odeh) had been acquitted on all but two counts. 8R7397. Abdulqader's verdict sheet showing acquittals on all counts was signed and dated October 1, 2007, three weeks before the court took the verdicts. 35R.5883-91.The jury was hung on all counts as to the three remaining defendants. 8R.7394, 7397.

The district court then polled the jurors. Three jurors indicated disagreement with the verdicts. 8R.7398-99. The district court asked the jury to retire to the jury room to determine "whether there is the possibility that further deliberations might produce a unanimous decision on any of these counts." 8R.7400. Shortly thereafter, the jury sent a note stating "[e]leven out of twelve jurors have agreed that further deliberations will not change the results." 8R.7406.

The district court and counsel then conferred. 8R.7400-06. Defense counsel expressed concern about ambiguity and confusion surrounding the reading of the verdicts and polling and requested that the court make further inquiry of the jurors. 8R.7400-06. The government opposed any further inquiry and advocated for a mistrial. 8R.7402. Ultimately, one juror refused to affirm the acquitted counts for Abdulqader and two refused to affirm the acquitted

counts for Odeh. All twelve jurors reaffirmed El Mezain's acquitted counts. 8R.7407-09. Without further inquiry, the district court entered a judgment of acquittal on those thirty-one counts against El Mezain and declared a order of mistrial on the remaining hung count against El Mezain and on all other counts for all other defendants. 8R 7409-12. The first trial thus resulted in no guilty verdicts.

Later, the district court granted the parties permission to interview any willing juror. Upon interviewing several jurors, including the foreperson, the defense learned that the jury had in its possession during deliberations multiple government demonstrative exhibits that were not supposed to go back. 35R.6417-19.The defense also learned that what separated jurors favoring conviction—including those who ultimately disavowed the verdicts—from jurors who voted to acquit was that "conviction" jurors credited the demonstrative and non-admitted exhibits. 35R.6417-19. Upon learning of the presence of the exhibits during deliberations, the defendants sought and obtained an order preserving the exhibits in the custody of the court. 3R.5452-53. The defendants subsequently moved to dismiss the Superseding Indictment on double jeopardy grounds, seeking an evidentiary hearing. 35R.6392-6495, 6898. The motion to dismiss was denied by the district court. 3R.6141-45. The defendants sought reconsideration, which was granted in part and denied in

part. 35R.6988. Defendants interlocutorily appealed both orders.[3] 35R.6985; 7028. Defendants then moved the district court to stay trial pending appeal but the motion was denied. 35R.7170. They subsequently filed a motion with this Court to stay trial. That motion was also denied. Jury selection commenced in the second trial on September 4, 2008.

[3] The appellate case numbers associated with those interlocutory appeals are 08-10664 and 08-10678.

SUMMARY OF ARGUMENT

1. The district court erred in giving a First Amendment instruction that misstated the law applicable to the facts of this case. The charge should have instructed the jury that the defendants' speech, expression or association could only be used as evidence of intent. Instead, the instruction advised the jury that it could convict Abdulqader on the basis of his unpopular speech if made with the intent to help Hamas. The error was not harmless because so much of the evidence against Abdulqader involved protected speech, expression and associations.

2. The district court erred in not dismissing the Superseding Indictment on double jeopardy grounds. Abdulqader did not consent to a mistrial and even if he did, his consent was invalid because it was induced by fraud or mistake of fact. In any event, there was no manifest necessity to declare a mistrial. The government engaged in misconduct by providing to the jury approximately 100 pages of demonstrative and non-admitted exhibits and then knowingly permitting the district court to given an erroneous instruction to the jury advising them to consider those exhibits as substantive evidence. Under those circumstances, double jeopardy barred retrial.

ARGUMENT

I. The District Court Erred in Giving a First Amendment Instruction that Misstated the Law as Applied to the Facts of the Case:

A. Standard of Review

A properly objected-to instruction is reviewed for abuse of discretion. *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005) *citing United States v. Daniels,* 281 F.3d 168, 183 (5th Cir.2002). However, this Court reviews *de novo* whether an instruction misstated an element of a statutory crime. *United States v. Patterson*, 431 F.3d 832, 837(5th Cir. 2005). The Court must consider the jury instruction as a whole and determine whether it is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them. *Id. citing United States v. Guidry*, 406 F.3d 314, 321 (5th Cir. 2005) (quotations omitted). If the district court erred, then the government bears the burden of showing the error was harmless beyond a reasonable doubt. *Patterson*, 431 F.3d at 837. An error that affects the outcome of the district court's proceedings, and thus the defendant's substantial rights, is not harmless. *United States v. Pineiro,* 410 F.3d 282, 285 (5th Cir.2005) (citing *United States v. Olano,* 507 U.S. 725 (1993)).

B. Governing Law

While the First Amendment to the United States Constitution guarantees freedom of expression and association, those freedoms are not limitless.

Courts have explored the contours of the First Amendment's protections in the context of a criminal prosecution. One category of cases in which the First Amendment does not afford protection involves the use of words to carry out an illegal purpose. Courts have long recognized that when the words themselves are the crime, the First Amendment is inapplicable:

> The use of a printed message to a bank teller requesting money, coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof.

United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982).

Relatedly, when speech or advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" it is not protected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Thus, when a defendant instructs or advises others to violate the United States Tax Code, the defendant's speech is entitled to no Constitutional protection. *United States v. Phipps*, 595 F.3d 243 (5th Cir. 2010); *United States v. Fleschner*, 98 F.3d 155, 158-59 (4th Cir. 1996); *United States v. Rowlee,* 899 F.2d 1275, 1280 (2d Cir.1990).

When the evidence shows that a defendant engaged in unprotected speech to incite imminent lawless action, a First Amendment jury instruction is thus not warranted. *Rowlee*, 899 F.2d at 1280. Nor is a First Amendment

instruction appropriate when a defendant's words themselves are the instrumentality a crime. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

Even when speech is protected by the First Amendment, it may be still be admissible in a criminal case as evidence of motive or intent. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993). When such evidence is admitted, though, the jury must be instructed as to the limited use it may make of it in order to guard against improper prejudice. *See United States v. Rahman*, 189 F.3d 88, 117-18 (2nd Cir. 1999).

In *Rahman*, the defendant appealed the government's admission against him of inflammatory speeches, writings and preachings in a prosecution charging various offenses in connection with a plot to engage in terrorist acts in New York. *Id.* The Second Circuit noted that although the expressions of the defendant did not themselves constitute crimes, they did constitute evidence of his motive to engage in the charged acts. *Id.* Rejecting the defendant's argument that admission of such evidence violated his rights under the First Amendment, the Second Circuit relied upon the fact that the district court "explained to the jury the limited use it was entitled to make of the material received as evidence of motive." *Id.* at 118. Moreover, the district court instructed the jury "that a defendant could not be convicted on the basis of his beliefs or the expression of them-even if those beliefs favored violence" and that the defendant could

only be found guilty if the evidence proved he committed the crime charged in the indictment. These instructions, according to the Second Circuit, "properly protected against the danger that Abdel Rahman might be convicted because of his unpopular religious beliefs that were hostile to the United States." *Id.*

The material support statute, 18 U.S.C. § 2339(B), contains an express rule of construction that precludes application of the statute so as to abridge the exercise of a person's First Amendment rights. 18 U.S.C. § 2339(B)(i). A recent decision of the Supreme Court provides some guidance regarding what types of speech and association the statute cannot reach. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010). A person may "speak and write freely about [designated foreign terrorist organizations]." *Id.* at 2722-23. The material support statute does not prohibit people from "becoming members of [a designated foreign terrorist organization] or impose any sanction on them for doing so." *Id.* at 2723. In short, "[t]he statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group." *Id.* at 2730.

At the time of second trial, Abdulqader stood charged with conspiracy to provide material support to a foreign terrorist organization (Count 1 of the Superseding Indictment); conspiracy to provide funds, goods and services to a specially designated terrorist (Count 11 of the Superseding Indictment); and conspiracy to commit money laundering (Count 22 of the Superseding

Indictment).[4] 3R.7034-73. On January 25, 1995, the United States first banned financial support for Hamas and named Hamas a Specially Designated Terrorist ("SDT"). 60 Fed. Reg. 5079 (Jan. 25, 1995); 7R.7283, 7301. The United States designated Hamas a Foreign Terrorist Organization ("FTO") on October 8, 1997. Accordingly, the earliest commencement date of any of the charged conspiracies is January 25, 1995. 3R.7044, 7055, 7060. Prior to that date, it was not illegal to support Hamas financially or otherwise. 4R.3563.

C. The Speech, Expression and Associational Evidence at Issue

Much of the evidence against Abdulqader at the second trial consisted of videotapes of musical and dramatic performances – many with Islamic or anti-Israeli themes and a few referencing Hamas.[5] Most of those tapes dated from the late 1980s or early 1990s – years and in some cases a decade before Hamas was designated a terrorist organization.[6] Out of the just over a dozen

[4] Counts 2-10, 12-21 and 23-32 had earlier been dismissed by the district court. 3R.5051; 38R.501.

[5] Two of the videotapes show similar versions of a skit in which Abdulqader plays a "Hamas" character while another person plays a "Zionist." GX ES 32; GX MS 1. The characters engage in a lengthy call-and-response debate over which has the right to disputed land. At the end of each skit, the Hamas character kills the Zionist character. These videotapes date from and 1988 and 1990, five and seven years prior to the designation of Hamas as an FTO. 7R.5244-45, 5255.

[6] Video exhibits in which Abdulqader appears include Government Exhibit ("GX") Mushtaha Search ("MS") 1 dated 1990 (7R.5244-45); GX MS 7 dated 1988 (7R.5242); GX MS 8 dated 1988 or 1989 (7R.5256); GX MS 11 dated 1988 (7R.5774); GX HLF Search 71 dated 1990 (7R.5263; GX HLF Search 71 dated 1991 (7R.5263); GX HLF Search 112 dated 1996 (7R.5269), GX HLF Search 114 dated 1996 (7R.5550); GX HLF Search 124 dated post-designation of Hamas as an FTO; GX HLF Search 125 dated 1994 (7R.5267); GX HLF Search 127 dated 1992 (4R.4779-80); GX Infocom Search 56 dated 1991 (7R.5257); GX

videotapes, apparently only three -- GX HLF Search 112, GX HLF Search 114 and GX HLF Search 124 post-date the January, 1995 designation of Hamas as an SDT.

As discussed *supra*, speech is not protected by the First Amendment when the words themselves constitute an offense, or when the words are intended to incite imminent lawless action. Prior to January, 1995, providing financial support to Hamas was not a crime. Thus, even assuming arguendo that every musical and dramatic performance depicted in the pre-1995 tapes could be construed as advocating that the audience give financial support to Hamas (which they do not), by operation of law, no pre-1995 performances could constitute an offense or incitement to imminent lawless action.

The performances in the post-1995 videotapes are also protected by the First Amendment. GX HLF Search 112 which dates from 1996 shows Abdulqader standing on stage with other band members. He reads a note handed up to him from "the womens' committee." The note states that the women's committee "send[s] a greeting from the bottom of the hearts to our captive Sheikh Ahmad Yassin" and to other Hamas leaders, Dr. al-Rantisi and Dr. Mousa Abu Marzook. GX HLF Search 112. On its face, reading a note written by another in which greetings are sent to leaders of an SDT does not

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Maya Conference dated 1992 (7R.9476); and GX Elbarasse Search ("ES") 32 dated 1988 (7R.5255).

incite imminent lawless action, nor are the words themselves a crime. *See Humanitarian Law Project*, 130 S.Ct. at 2722-23.

In GX HLF Search 114 dated 1996, Abdulqader is shown in one of two clips singing backup to soloist. GX HLF Search 114. The song references "the lions of sacrifice" and other Islamic themes. There is no mention of Hamas or Israel. *Id.* In the second clip, Abdulqader is standing silently next to another band member who sings a song referencing Ahmad Yassin, the Hamas founder. *Id.* In GX HLF Search 124, clip C, the band, including Abdulqader is shown on screen for ten seconds, singing in unison "…and be safe all the time" in front of a poster that says "Support the Islamic Association of Palestine." GX HLF Search 124. As with the pre-1995 videos, none of Abdulqader's performances on the post-1995 videos could be construed as inciting imminent lawful action. Moreover, being present while another person sings about an SDT is not a crime. *See Humanitarian Law Project*, 130 S.Ct. at 2722-23.

In addition to the videotapes, the government also admitted certain associational evidence. The government witnesses testified as to the family relationships of Abdulqader and other defendants. Special Agent Robert Miranda testified that Abdulqader is the half-brother of the current head of Hamas, Khalid Mishal. 7R.5998. He also testified that Abdulqader's sister is married to one of the sons of another Hamas leader, Mohammed Siam.

7R.5999. He testified that Akram Mishal, a former Holy Land Foundation employee, is the cousin of Abdulqader and Khalid Mishal. 7R.6007. Then, these family relationships were summarized once more for the jury in government's demonstrative exhibit 6 entitled "HLF's familial relationships to Hamas leaders overseas" and associated testimony. 7R.6199-6200. Putting aside the question of whether a non-volitional familial relationship can properly be considered as evidence of a defendant's intent, being related to a leader of a terrorist organization is not a crime. *See Humanitarian Law Project*, 130 S.Ct. at 2722-23.

D. The District Court's First Amendment Instruction Was Erroneous

At second trial of this matter, the district court gave the following instruction:

FIRST AMENDMENT

> Title 18, United States Code, Section 2339(B)(i), the statute under which Defendants are charged in Count 1 of the Indictment provides:
>
> > Nothing in this section shall be construed or applied as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.
>
> The First Amendment to the United States Constitution provides:
>
> > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

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

17R.1122.

The instruction that ultimately was given to the jury was different from both the First Amendment instruction proposed by the defendants and the amendment to that instruction offered by the government at the charge conference. At the conference, the government asked the district court to include in the First Amendment instruction the following language: "However, you may consider a person's speech in determining their intent—that is, if they acted knowingly or willfully." 7R.9331.

Defendants objected to the district court's final version of the First Amendment instruction:

> And also the First Amendment instruction, the last sentence is not an accurate statement of the law. It makes it seem

> like the speech itself is the crime, which it is not. The Government's proposed language is an accurate statement of the law, which is very different than the Court's last sentence. The Government's statement essentially is that speech can be used to determine intent. The Court said if the speech is used with the intent to do something, it is not a Defense, and that is not the law.
>
> That is an inaccurate statement of the law. So if the Court is going to put something like that in there, we would propose the Government's, which tracks the instruction from *Suleiman* case and goes to *Wisconsin v. Mitchell*, the Supreme Court case.

7R.9398. Counsel for Abdulqader reiterated the objection:

> MS. CADEDDU: Well, I just want to reiterate that, Your Honor, because this instruction is something that is critically important for me. That last sentence if you read it, "Stated another way, if the Defendant's speech, expression, or associations were made with the intent to willfully provide goods or services to or for the benefit of Hamas, or to knowingly provide material support or resources to Hamas, as described in the indictment, then the First Amendment would not provide a defense to that conduct."
>
> And the conduct we are talking about, the subject of the sentence is speech, and what I am concerned about is that the jury could convict based on speech that is intended to help Hamas, even if there was actually no material support provided.

7R.9399.

The second to last sentence of the First Amendment instruction given by the district court paraphrases *Barnett* cited *supra*. *Barnett*, 667 F.2d at 842 ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."). However, *Barnett* is inapposite because it dealt with a factual scenario involving "us[e] of the printed word in encouraging and counseling others in the commission of a

crime," something that is not at issue here. *Id.* at 843. The last sentence of the district court's instruction is quite simply an incorrect statement of the law. It instructs the jury that a defendant's speech, expression, or associations are themselves a crime, so long as the defendant made them intending to provide provide funds, goods, services, or material support or resources to Hamas. The instruction is thus an incorrect statement of the intent element of the crimes charged. Unlike in *Rahman*, in this case, the instruction did not correctly inform the jury as to the limited use it was permitted to make of defendants' protected speech, expression. *Rahman*, 189 F.3d at 117-18.

Taken together, the last two sentences of the First Amendment instruction given by the district court not only did not properly protect against the danger that Abdulqader might be convicted because of his unpopular beliefs regarding the Palestinian-Israeli conflict, but they actually encouraged the jury to convict on the basis of his speech, expression or associations.

E. The Error Was Not Harmless

As discussed *supra*, the majority of the evidence specific to Abdulqader consisted of musical and dramatic performances. Many of the songs and skits expressed violent or anti-Israeli sentiments. Because so much of the evidence against Abdulqader consisted of these videotapes, it was critically important that the jury be instructed correctly regarding his First Amendment rights and the limited use the jury could make of his protected speech, expressions and

associations. As in *Rahman*, here there was a heightened danger that the jury would convict Abdulqader because of his expression of inflammatory sentiments. Indeed, that is precisely what occurred. The district court's instruction did nothing to mitigate that danger, but instead heightened it. As a result, Abdulqader, who, before the verdicts were voided on polling, was initially acquitted on all counts in the first trial when the district court gave a proper First Amendment instruction, was then convicted at the second trial on substantially the same evidence. This is compelling proof that the error was not harmless. 3R.5371; 35R.5883-91.

II. The District Court Erred in Denying Defendants' Motion to Dismiss on Double Jeopardy Grounds

A. Standard of Review

This Court reviews de novo the denial of a motion to dismiss on Double Jeopardy grounds. *United States v. Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir. 1995); *United States v. Brown*, 571 F.3d 492, 497 (5th Cir. 2009).

B. Governing Law

The general rule in American jurisprudence is that a prosecutor is entitled to only one opportunity to compel a defendant to stand trial. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). This rule serves the salutary purpose of protecting a defendant's "valued right to have his trial completed by a particular tribunal." *Id.* at 503 (quoting *United States v. Jorn*, 400 U.S. 470, 484 (1971)). This

right has such value because repeated prosecutions of an individual for the same offense subject him to "embarrassment, expense and ordeal and compel[] him to live in a continuing state of anxiety and insecurity, as well as enhanc[e] the possibility that even though innocent he may be found guilty. *Jorn*, 400 U.S. at 479.

Balanced against this valuable right, however, is the public's interest in "fair trials designed to end in just judgments." *Id.* at 480. Thus, the Double Jeopardy Clause does not automatically bar reprosecution once jeopardy has attached. *See Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). In *Kennedy*, the Supreme Court set out the framework to be applied to determine when double jeopardy bars retrial after a mistrial has been declared. When a defendant elects to move for a mistrial, the government is not barred from re-trying him unless "the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Kennedy*, 456 U.S. at 672. Similarly, when a defendant consents to a mistrial, there is also no bar to reprosecution. *United States v. Dinitz*, 424 U.S. 600, 607 (1976). When a defendant objects to a mistrial however, re-trial will be barred under the Double Jeopardy Clause unless there was "manifest necessity" to declare the mistrial. *Kennedy*, 456 U.S. at 672.

Courts have articulated a number of factors to be considered in determining whether there was manifest necessity to declare a mistrial, including:

> (1) [T]he source of the difficulty that led to the mistrial-i.e., whether the difficulty was the product of the actions of the prosecutor, defense counsel, or trial judge, or were events over which the participants lacked control; (2) whether the difficulty could have been intentionally created or manipulated for the purpose of giving the prosecution an opportunity to strengthen its case; (3) whether the possible prejudice or other legal complications created by the difficulty could be "cured" by some alternative action that would preserve the fairness of the trial; (4) whether the record indicates that the trial judge considered such alternatives; (5) whether any conviction resulting from the trial would inevitably be subject to reversal on appeal; (6) whether the trial judge acted during the "heat of the trial confrontation"; (7) whether the trial judge's determination rests on an evaluation of the demeanor of the participants, the "atmosphere" of the trial, or any other factors that similarly are not amenable to strict appellate review; (8) whether the trial judge granted the mistrial solely for the purpose of protecting the defendant against possible prejudice; (9) whether the evidence presented by the prosecution prior to the mistrial suggested a weakness in the prosecution's case (e.g., a witness had failed to testify as anticipated); (10) whether the jurors had heard enough of the case to formulate some tentative opinions; (11) whether the case had proceeded so far as to give the prosecution a substantial preview of the defense's tactics and evidence; and (12) whether the composition of the jury was unusual.

Walck v. Edmondson, 472 F.3d 1227, 1236 (10th Cir. 2007) (quoting 5 Wayne R. Lafave et al., Criminal Procedure § 25.2(c) n.18 (2d ed.1999)). Other factors may include "the length of trial, the complexity of the issues involved and the length of deliberations." *United States v. Gordy*, 526 F.2d 631, 635-36

(5th Cir. 1976). "In addition, the trial judge's communications with the jurors are particularly significant." *Id.* The government has the burden of proving manifest necessity. *Kennedy* at 679.

Generally, a court's determination that manifest necessity warranted a mistrial is accorded substantial deference on appeal. *United States v. Bauman*, 887 F.2d 546 (5th Cir. 1989).; *Cherry v. Director, State Board of Corrections*, 635 F.2d 414, 418 (5th Cir. 1981). However, the trial judge's discretion will be given strictest scrutiny when "there is reason to believe that the prosecutor is using the superior resources of the [government] to harass or to achieve a tactical advantage over the accused." *United States of America ex rel Lovinger v. Circuit Court for the 19th Judicial Circuit, Lake County, Illinois*, 652 F. Supp. 1336 (N.D. Ill. 1987). *See also Cherry*, 635 F.2d at 419; *Abdi v. State of Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984).

There has been much litigation over what constitutes "consent" to a mistrial. Indeed, there is a conflict among the circuits regarding the standard to be applied to determine when failure to object to the declaration of a mistrial may be construed as consent. A number of circuits engage in "careful examination of the totality of circumstances, to ensure a defendant's consent is not implied when there is a substantial question of whether the defendant did, in fact, consent." *United States v. Gantley*, 172 F.3d 422, 428 (6th Cir. 1999); *see also Love v. Morton*, 944 F. Supp. 379, 384-85 (D.N.J. 1996) (collecting cases). In

other circuits, including the Fifth Circuit, if the defendant has a *meaningful opportunity* to object and fails to do so, consent to the mistrial is implied. *Love*, 944 F. Supp. at 385 n. 6; *United States v. Palmer*, 122 F.3d 215 (5th Cir. 1997).

Another issue that has arisen in other circuits is whether consent to a mistrial induced by fraud or mistake of fact is effective consent at all. Regarding the issue of consent this Court has held, in reliance upon *Dinitz*, 424 U.S. at 607, that when a defendant consents to the district court's declaration of a mistrial, there is no double jeopardy bar to re-prosecution. *Bauman*, 887 F.2d at 549. The rationale for this rule is that the defendant at all times "retain[s] primary control over the course to be followed . . .." *Kennedy*, 456 U.S. at 676 *quoting Dinitz*, 424 U.S. at 609. Thus, a defendant's consent to a mistrial reflects his informed decision—after weighing the costs and benefits—to forego his right to have the trial completed by that tribunal. A problem arises, however, when the defendant's decision to consent to a mistrial is not an informed one because of fraud or mistake of fact in the attendant circumstances.

The Tenth Circuit addressed the issue of consent induced by mistake or fraud in *United States v. Martinez*, 667 F.2d 886, 889 (10th Cir. 1981). The Court affirmed a district's court finding that a defendant's consent to a mistrial is "no consent at all" when "the defendant was induced or led into confessing, stipulating to, or agreeing to a mistrial motion without the benefit of all the facts." *Id.* In *Martinez*, the judge, prosecutors and court staff conducted a secret

meeting at which the judge expressed concern that there as an atmosphere of intimidation in the courtroom caused by some of the defendant's supporters and suggested that he could provoke defense counsel into moving for a mistrial. *Id.* at 888. The next day, the government informed the defense that it would withdraw its opposition to an earlier-made defense mistrial motion, without disclosing the occurrence of the meeting. *Id.* The defense then joined in the government's mistrial motion. *Id.* The Tenth Circuit held that retrial was precluded under those circumstances noting, "[i]t stands to reason if prosecutorial or judicial conduct is designed to avoid an acquittal of a defendant and motivates the request for or acquiescence in a declaration of a mistrial, retrial is precluded." *Id.* at 889.

To find that consent is not valid when it has been induced by fraud or mistake is consistent with *Dinitz*, and *Kennedy*, since a defendant who consents to a mistrial because he is misinformed about the relevant facts by definition has not "retain[ed] primary control over the course to be followed." *Kennedy*, 456 U.S. at 676 *quoting Dinitz*, 424 U.S. at 609. Because the determinative principle is informed choice, a defendant cannot give effective consent when he lacks the benefit of all the relevant facts. Under such circumstances, the defendant is deemed not to have consented and retrial is precluded.

Relatedly, the Second and Seventh Circuits have suggested that the rule of *Kennedy* should be extended to address concealed prosecutorial misconduct

that is not apprehended until after trial. *United States v. Wallach*, 979 F.2d 912 (2nd Cir. 1992); *United States v. Pavloyianis*, 996 F.2d 1467, 1473 (2nd Cir. 1993); *United States v. Catton*, 130 F.3d 805 (7th Cir. 1995).

In *Wallach*, the defendant was convicted after a jury trial and he appealed. His conviction was reversed on the basis that the prosecution should have known that a government trial witness gave false testimony. *Wallach*, 797 F.2d at 913. The defendant then filed a motion to dismiss on double jeopardy grounds and the district court denied the motion. *Id.* The defendant appealed the district court's decision. The Second Circuit discussed the rationale of *Kennedy* at length in its opinion. The Court stated:

> If jeopardy bars a retrial where a prosecutor commits an act of misconduct with the intention of provoking a mistrial motion by the defendant, there is a plausible argument that the same result should obtain when he does so with the intent to avoid an acquittal he then believes is likely.

Id. at 916. The Court continued:

> That aspect of the *Kennedy* rationale suggests precluding retrial where a prosecutor apprehends an acquittal and, instead of provoking a mistrial, avoids the acquittal by an act of deliberate misconduct. Indeed, if *Kennedy* is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict.

Id. The Second Circuit determined that on the facts of *Wallach*, there was no double jeopardy bar precluding retrial because the evidence against the

defendant was strong and the government had reason to anticipate conviction. *Id.* Moreover, the Court found that the record did not show that the government engaged in deliberate misconduct. *Id.*

In *Catton*, 130 F.3d at 806 (7th Cir. 1997), the Seventh Circuit adopted a similar construction of *Kennedy* in addressing the defendant-appellant's double jeopardy claim. In *Catton*, the defendant was charged with having presented false loss claims under a federal crop insurance program. *Id.* The government's expert testified that he had spoken to an employee at a seed company that supplied the defendant and others who explained that another grower in a nearby area had not sustained any crop losses during the time period for which the defendant had submitted a claim. *Id.* In fact, the government expert lied about having talked to a seed company employee; he had obtained the information about the other grower from an inspector from the Department of Agriculture. *Id.* To complicate matters further, the Department of Agriculture Inspector himself lied to the government's expert when he said the other grower had sustained no crop loss during the relevant period. In fact, the grower had sustained losses similar to those of the appellant. *Id.* On appeal after conviction, the Seventh Circuit reversed and remanded for a new trial in large part on the basis that the government expert's concealment of the identity of the person to whom he had spoken denied the defense access to material exculpatory information. *Id.*

On remand, the defendant filed a motion to dismiss the indictment on double jeopardy grounds, arguing that the prosecutor concealed the role of the Department of Agriculture inspector because he knew that otherwise the jury was likely to acquit. *Id.* In an opinion authored by Chief Judge Posner, the Seventh Circuit opined:

> Confined to cases in which the defendant is goaded into moving for a mistrial, whether the motion is granted or denied, *Kennedy* would leave a prosecutor with an unimpaired incentive to commit an error that would not be discovered until after the trial and hence could not provide the basis for a motion for mistrial, yet would as effectively stave off an acquittal and thus preserve the possibility of a retrial.

Id. at 807. The *Catton* court noted that concealed misconduct must "have been committed for the purpose of preventing an acquittal that, *even if there was enough evidence to convict, was likely if the prosecutor refrained from the misconduct*." *Id.* at 808 (emphasis added). Although it deemed the circumstances in the case "suspicious," the Court ultimately affirmed the district court's denial of the motion to dismiss because Catton had failed to request an evidentiary hearing. *Id.* at 808. The Court noted that it was the defendant's burden to ask for a hearing in order to probe the motives of the prosecutor and the Department of Agriculture inspector. *Id.*

In summary then, the Double Jeopardy Clause bars retrial when a defendant (1) is goaded into moving for a mistrial; (2) objects to a mistrial and there was no manifest necessity to declare the mistrial; (3) consents to a

mistrial, but consent was induced by fraud or mistake of fact; or (4) when a prosecutor engages in concealed misconduct with the intent to avoid an acquittal that he believes is likely. In this case, each of the three latter grounds supports reversal of the judgment and dismissal.

C. The District Court Erred in Denying Defendants' Motion to Dismiss on Double Jeopardy Grounds

Abdulqader did not expressly or impliedly consent to a mistrial and there was no manifest necessity to declare a mistrial. The verdict sheet from the first trial acquitting Abdulqader of all counts as well as other evidence in the record demonstrate that the jury was not truly deadlocked and would have affirmed the acquittal verdict but for the government's misconduct. Even if his statements to the district court could be construed as consent, such consent was not valid because it was induced by fraud or mistake of fact. Finally, even if Abdulqader consented, the Double Jeopardy Clause still bars retrial under *Kennedy* because the government's acts of misconduct were done for the purpose of avoiding an acquittal that the prosecutors believed likely.

1. Abdulqader Did Not Consent to a Mistrial and There Was No Manifest Necessity to Declare One

Abdulqader did not consent to the mistrial. On October 22, 2007, when Judge Fish unsealed the verdict sheets and read them into the record, the verdict sheets reflected that Abdulqader had been acquitted on all counts, and two other defendants had been acquitted on most counts. 8R.7394-98. Judge

Fish then polled the jurors individually, asking each one, "is this your verdict?" 8R.7398-99. Three jurors indicated disagreement with the verdicts by responding "no" to Judge Fish's polling question. 8R. 7398-99. Judge Fish then returned the jury to the jury room to caucus regarding whether further deliberations would be productive while the court and defense counsel repaired to chambers. 8R.7400.

In chambers, counsel for the government lobbied for a mistrial, stating "I just think that a mistrial is inevitable, and I don't know that you could ever unravel this thing where it makes sense." 8R.7402. In response, defense counsel objected:

> Mr. Dratel: Back to the notes. On the undecided counts or decided counts, if it's only undecided we have a verdict that has integrity. If it's undecided, we have an issue. As to the defendants, what if they are undecided on a question as to Mr. El Mezain but they are as to Mr. Mufid Abdulqader? He's already acquitted –
>
> Ms. Cadeddu: Your honor, I would make a specific request to poll jurors as to my client. I think clearly he has the most to lose from mistrying his case, and I think that at least is warranted based on the facts.
>
> THE COURT: Well, it seems to me that the polling of the jury did probably produce an ambiguous result . . ..

8R.7402-03. Thus, Abdulqader's counsel indicated her disagreement with the course of granting a mistrial as to her client and suggested an alternative course.

Application of the relevant factors to the facts of this case demonstrates that there was no "manifest necessity" to declare a mistrial. The government

clearly was the source of the difficulty that led to the mistrial and the difficulty gave the prosecution an opportunity to strengthen its case. 35R.6417-19. The jury had in hand during deliberations a minimum of nineteen government exhibits that were either admitted for demonstrative purposes only or were *never* admitted at all.

Considered in toto, the demonstrative and non-admitted exhibits gave the jury a roadmap to the government's theory of the case in the most inflammatory, prejudicial manner possible. The government helpfully simplified all the linkages it wished the jury to make by putting Hamas logos next to the name of every individual and organization that the government alleged to be connected to Hamas. 35R.6423-95. The jury reviewed the exhibits and considered them during deliberations. 35R.6417-19. The jurors favoring conviction relied upon these wrongfully-provided exhibits. 35R.6417-19. Indeed, that a juror considered the demonstrative exhibits as substantive evidence appeared to have been the deciding factor that divided those who favored conviction from those who favored acquittal. 35R.6417-19.

Had the government advised the defense or the district court that it improperly sent back to the jury demonstrative exhibits and non-admitted exhibits, the court could have instructed the jury that these exhibits were not in evidence, could not be considered and the court could have removed them from the jury room. The defense inquired of the government at the outset of

deliberations whether it had made certain that the government's demonstrative exhibits were not included among the exhibits sent back to the jury. 35R.6415-16. The government stated that it had. 35R.6415-16. Upon receiving the July 26, 2007, jury question regarding demonstrative exhibits, the government unequivocally stated that it had given no demonstrative exhibits to the jury. 35R.6415-16. The defense relied upon this answer in agreeing to the court's response to the jury's question. 35R.6415-16. Due to the government's bald assurances that it had not sent any demonstrative exhibits into the jury room during deliberations, the district court erroneously instructed the jury to consider these exhibits as substantive evidence.

Any conviction resulting from the trial would inevitably have been subject to reversal on appeal. "When jurors consider material not introduced into evidence, the conviction must be reversed unless it is clear that the material was not prejudicial." *United States v. Renteria*, 625 F.2d 1279, 1284 (5th Cir. 1980) (citing *Farese v. United States*, 428 F.2d 178, 180 (5th Cir. 1970)). This rule is intended to safeguard the defendant's right to a fair trial:

> Our rules of evidence are designed to exclude from consideration by the jurors those facts and objects which may tend to prejudice or confuse. . . . It is therefore necessary that all evidence developed against an accused come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

Farese, 428 F.2d at 179-80 (internal quotations omitted). Put another way, the "defendant is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980).

Nineteen demonstrative and non-admitted exhibits were improperly given to the jury. At least ten demonstrative exhibits were not supposed to be given to the jury for deliberations and should not have been considered as substantive evidence. *Cf. United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000). The remaining exhibits were never admitted into evidence and were seen by the jury for the first time during deliberations. As discussed *supra* these exhibits were prejudicial as they were relied upon by the jurors who leaned toward conviction. 35R.6417-19. They contained the government's entire theory of the case and were presented to the jury as substantive evidence. For these reasons, had any conviction resulted from the trial, it inevitably would have been subject to reversal on appeal.

In summary, the record reflects that the demonstrative and non-admitted exhibits made the difference and that the main factor separating conviction jurors from acquittal jurors was that conviction jurors credited these exhibits as substantive evidence of the defendants' guilt. 35R.6417-19. The prosecution caused the mistrial by providing the jury with demonstrative and non-admitted exhibits. That misconduct was compounded when it denied

having done so, thus inducing the defendants to consent to the district court instructing the jury to consider all exhibits in the jury room as substantive evidence. The government had a weak case, as demonstrated by its inability to obtain convictions even after sending the jury a host of highly prejudicial documents. The declaration of a mistrial gave the government a windfall as a result of its own misconduct. The government used this tactical advantage to recalibrate its case for the second trial. After consideration of all the factors, there was no manifest necessity for the mistrial. Indeed, as in this case, prosecutorial misconduct that leads to a mistrial "of some tactical benefit to the government" is "precisely th[e] sort of evil" the manifest necessity doctrine was intended to resist. *Abdi*, 744 F.2d at 1503.

2. Even if Abdulqader's statements to the district court could be construed as consent, his consent was not valid because it was induced by fraud or mistake of fact.

In the conference that followed the reading of the verdicts in the first trial, the government sought a mistrial. 8R.7402. The government did not, however, disclose to the district court or defense counsel that the jury had received non-admitted and demonstrative exhibits. 8R.7402. Ignorant of the fact that the jury had these exhibits—and indeed relying on the government's unequivocal denial that any extraneous exhibits had gone back—Abdulqader still expressed disagreement with the government's proposal of a mistrial and suggested an alternative course. 8R.7402-03. When the parties returned to the

courtroom, after further polling, the court simply declared a mistrial and released the jury members from service without inquiry of the defendants as to possible objections or other alternatives. 8R.7409-10.

Had the defendants and their counsel been made aware that the jury had before it non-admitted and demonstrative exhibits that they were then instructed to consider as substantive evidence, Abdulqader would not have consented to the declaration of a mistrial. Thus, in this case, as in *Martinez*, even assuming Abdulqader consented, his consent was "no consent at all" because it was induced without benefit of all the facts.

3. The government engaged in concealed misconduct with the intent to avoid an acquittal that it believed likely and thus retrial was barred

Under *Kennedy*, *Wallach* and *Catton*, retrial is precluded when the prosecution engages in concealed misconduct for the purpose of avoiding an acquittal that it believes likely. The record in this case demonstrates that the prosecution engaged in misconduct both by providing demonstrative and non-admitted exhibits to the jury and by concealing that fact from the district court and the defendants when the jury inquired about them. In addition, the prosecution had ample reason to believe an acquittal was likely.

As discussed in detail *supra*, the government sent back to the jury in the first trial more than 100 pages of non-admitted and demonstrative government exhibits. Those exhibits set out as fact the government's theory of its case

including its view of the connections between the defendants and Hamas leaders and the HLF and other entities the government contended were tied to Hamas. Even if the government's provision of these exhibits was inadvertent, the events of September 26, 2007 put the government on notice that it had provided demonstrative and non-admitted exhibits to the jury.

On September 26, 2007, the jury sent out the following question: "A jury member wants to know if the demonstrative exhibits are in the jury room. He does not believe that the power points and some other exhibits are demonstratives and not actual evidence." 3R.5431 It then sent out two more notes in quick succession. The first indicated that the jury was having problems deliberating. 3R.5432. The second was a note from a juror asking to be excused. 3R.5433. In response to Note 4, the court interviewed the juror who stated:

> And you know when the court reporter come in there and that's when I asked her again, is this all of this evidence. Yeah. You can't do this. This is not evidence. Everything in the boxes, the first day that she came, is all of this evidence. We had a problem over just that.

8R.7353.

Thus, on September 26, 2007, the government knew from the jury note regarding demonstratives and the juror interview transcript that some jury members believed they had demonstrative exhibits. When the defendants sought confirmation that the government had not sent back its demonstratives,

government denied having done so. 35R.6415-16. As a result, the district court instructed the jury that everything it had in the jury room was in evidence and could be considered in deliberations. 3R.5429-30. At no time, during the ensuing three weeks of deliberations did the government advise the defense or the district court that it had sent demonstrative and non-admitted exhibits back to the jury, or even that this possibility existed.

The prosecution did not so advise the district court or the defendants because by this time, it apprehended that an acquittal was likely. Moreover, the prosecution knew that there was little likelihood that the presence of the demonstrative and non-admitted exhibits would be discovered. In the Northern District of Texas, the local rules preclude counsel from contacting jurors after completion of their service without consent of the presiding judge. Consent is rarely given and counsel for the government had no reason to believe this case would be an exception. N.D.TX. L.CR.R. 24.1.

In his interview with the district, the dismissed juror had also expressed his frustration with deliberations. Discussing interactions with fellow jurors, he told Judge Fish that he favored convicting the defendants: "When you got a few that already has their mind made up. Even particular, me. I did – I'll say this to you. Okay, what I did was I went everything guilty." 8R.7354. He then went on to express frustration and conflicts with a bloc of three or four pro-acquittal jurors:

> But then it started getting personal. When you go in there and try to make a point and they sit up there and say no, where you going to show that up. They don't even have a clue where Hamas started from, because they don't even want to hear it. They want to hear nothing about terrorism. They don't want to hear that. But when you got three or four that already has their mind made up, it's not served.

8R.7354-55. He explained that part of the problem was that he believed that certain exhibits—that we now know were the extrinsic demonstrative and non-admitted exhibits—were in evidence, while the pro-acquittal bloc disagreed:

> The things we have in the juryroom is evidence. And when you bring up the evidence, they talk it down. They got their own opinion. It's like Hamas. This is not Hamas. Show where me where this is stated it's Hamas . . ..

8R.7353.

Under the rule of *Kennedy* and its progeny, the Double Jeopardy Clause bars retrial of Abdulqader. The prosecution engaged in misconduct for the purpose of prejudicing the possibility of an acquittal that it believed—indeed knew—was likely. As discussed in *Wallach* and *Catton*, there is no principled basis upon which to deny application of the *Kennedy* rule to cases in which government misconduct remains undiscovered until after trial. For this reason, reversal of Abdulqader's conviction and dismissal of the Superseding Indictment is warranted.

III. Abdulqader Adopts the Points of Error and Arguments of other Defendants-Appellants

Pursuant to FED. R. APP. P. 28(i), Defendant-Appellant Abdulqader

expressly adopts the entire briefs of Defendants-Appellants Ghassan Elashi and Shukri Abu Baker. In addition, Abdulqader adopts the issues and arguments raised in the other Defendants-Appellants' briefs to the extent they benefit him.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons stated herein, Abdulqader respectfully requests that the Court reverse the Judgment and Sentence, dismiss the Superseding Indictment, and award such other and further relief to which he may be justly entitled.

Respectfully submitted this 19th day of October, 2010,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of October, 2010, I electronically filed the above Brief of Defendant-Appellant Mufid Abdulqader using the Fifth Circuit's electronic case filing system, which will send a notice of filing to all counsel of record.

/s/ Marlo P. Cadeddu
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DEFENDANT, MUFID ABDULQADER

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32, counsel certifies that this brief complies with type-volume limitations.

1. Exclusive of portions excepted by FED. R. APP. P. 32 and 5TH CIR R. 32, this brief contains 9695 words printed in a proportionally spaced typeface.

2. This brief is printed in a proportionally spaced, serif typeface, using Garamond 14-point font in the text and Garamond 12-point font in footnotes, produced by Word 2007 software.

3. Counsel provides an electronic version of this brief in PDF format to the Court.

4. Counsel understands that a material misrepresentation in completing this certificate or circumvention of the type-volume limitations in FED. R. APP. P. 32 and 5TH CIR. R 32 may result in the Court's striking the brief and imposing sanctions against counsel.

/s/ Marlo P. Cadeddu
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United States Court of Appeals

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No. 09-10560 Cons/W 08-10664, et. al. USA vs. Mufid Abdulqader
USDC No. 3:04-CR-240-8
USDC No. 3:04-CR-240-7
USDC No. 3:04-CR-240-4
USDC No. 3:04-CR-240-3
USDC No. 3:04-CR-240-2
USDC No. 3:04-CR-240-1

The following pertains to your brief electronically filed on October 19, 2010.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

When filing documents electronically, please use lead number 09-10560 to docket events.

Sincerely,

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