UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-20331-CR-SCOLA/BANDSTRA(s)

UNITED STATES OF AMERICA

vs.

HAFIZ MUHAMMAD SHER ALI KHAN, et al.,

Defendants.

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GOVERNMENT'S MOTION TO EXCLUDE DEFENSE EXPERTS

The United States of America, through undersigned counsel, respectfully moves to exclude three of defendants' proposed expert witnesses: John Esposito, Alex Martinez and Anita Weiss. The issues here are not merely ones of credibility best left for cross-examination,[1] but rather of insufficient disclosures and lack of relevant subject matter expertise and "fit" with the evidence.

With trial on the horizon, and even though it is their burden to lay a foundation for admissible expert testimony in their case, the defendants have not complied with the detailed expert disclosure obligations in Fed. R. Crim. P. 16, as they have failed to disclose any actual opinions or their bases or reasons. Moreover, to the extent disclosures have been made, it is clear that the proposed testimony of these experts fails the test of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *United States v. Frazier*, 387 F.3d 1244 (11th Cir.

1 As was the case with defendants' challenges to the government's expert, Dr. Gunaratna. *See* DE 496. Notably, the defendants made no challenge, nor could they, to the adequacy of the government's Rule 16 disclosure regarding Dr. Gunaratna. As the Eleventh Circuit held in *Frazier*, simply because the government has evidence in an area does not mean that a defendant is entitled to call an expert in that area without meeting the requirements of Rule 16 or *Daubert*.

2004) (*en banc*). As the Eleventh Circuit held in *Frazier*, criminal defendants do not have a right to present expert testimony free from the legitimate demands of the adversarial system.

Legal Standards

This is precisely the kind of case where the court must exclude proposed experts whose testimony, far from helping the jury, will mislead and delay through the injection of undisclosed and unreliable opinions.[2] A district court serves a critical role as the "gatekeeper" to the admission of expert testimony. *Daubert*, 509 U.S. at 589; *Frazier*, 387 F.3d at 1258. The gatekeeping obligation set forth in *Daubert* applies with equal force to all types of proposed expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). That obligation also applies fully to a criminal defendant's proposed expert testimony, however important to the defense that testimony supposedly may be. *See, e.g.*, *United States v. Henderson*, 409 F.3d 1293, 1302-04 (11th Cir. 2005) (affirming exclusion of defendant's proposed expert testimony); *Frazier*, 387 F.3d at 1260, 1271-72 (same, emphasizing that a criminal defendant's constitutional and procedural rights do not entitle him to a lower standard for the presentation of expert opinion evidence); *United States v. Cunningham*, 194 F.3d 1186, 1196 (11th Cir. 1999) (same); *United States v. Gillard*, 133 F.3d 809, 814-16 (11th Cir. 1998) (same).

At the threshold, the defendants, like the government, must comply fully with the requirements for disclosure of proposed expert testimony. Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure requires that a defendant provide a written summary of expert opinion testimony. The summary "shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications." This Court's Local Rules and the Standing

2 At minimum, the government requests that the Court require additional disclosures from the defense and conduct a *Daubert* hearing. *Cf. United States v. Yousef*, 327 F.3d 56, 147 (2nd Cir. 2003).

Discovery Order likewise require these disclosures. *See* S.D. Fla. L.R. 88.10. If the defendant fails to comply with Rule 16, the expert may be excluded on that basis alone. *See infra.*

Once past that stage, Judge Marcus's opinion for the *en banc* Eleventh Circuit in *Frazier*, a criminal case, lays out the requirements for admitting expert testimony. The district court's gatekeeping function "inherently require[s] the trial court to conduct an exacting analysis of the foundations of expert opinions to ensure they meet the standards for admissibility under" Rule 702 of the Federal Rules of Evidence. 387 F.3d at 1260.

To determine whether expert evidence is admissible, trial courts must consider whether:

(1) the expert is qualified to testify competently regarding the matters he intends to address;

(2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*;

(3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue; and

(4) the testimony passes the Fed. R. Evid. 403 balancing test, in that its probative value must not be substantially outweighed by its unfairly prejudicial effect.

See id. at 1260, 1263 (citing *Daubert*).

The proponent of the testimony, not the party challenging it, has the burden of establishing each of these requirements. *See id.* at 1260; *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1238 n.2 (11th Cir. 2005). And each of these requirements has significance.

The first prong of the analysis – whether the expert is qualified – ensures that the proposed expert's skills and education are not merely adequate generally, but actually relate to

specific opinions he or she proposes to offer. "An expert's opinion is helpful only to the extent the expert draws on some special skill, knowledge, or experience to formulate that opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert." *United States v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991). Thus, an expert may be highly qualified to respond to certain questions and to offer certain opinions, but insufficiently qualified to respond to other, related questions, or to opine about other areas of knowledge. *See, e.g., Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir. 1997) ("When making a preliminary finding regarding an expert's qualifications under Fed. R. Evid. 104(a), the court is to examine not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.") (citations and internal quotation marks omitted).

The second prong of the analysis – the reliability of the proposed testimony – is meant to ensure that testimony from an expert, even if otherwise qualified, is sufficiently well-founded and trustworthy to be presented to the jury. In ascertaining the reliability of a particular expert opinion, courts consider (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. *See, e.g., McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (citing *Daubert*, 509 U.S. at 593-94). Where here, as here, the proposed expert testimony is not of a technical nature, but rather falls within the ambit of social science, the court need not apply these factors mechanically, but nonetheless must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the

courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kuhmo Tire*, 526 U.S. at 152. As the Eleventh Circuit has made clear, "testimony based solely on the experience of an expert [is] not [] admissible. The experts' conclusions must be based on sound scientific principles and the discipline itself must be a reliable one." *Rider v. Sandoz Pharmaceuticals*, 295 F.3d 1194, 1997 (11th Cir. 2002) (emphasis added).

In *Frazier*, the Eleventh Circuit used these principles to exclude a defense expert who sought to offer opinions based largely upon his experience. In that case, the defendant proposed expert testimony regarding the likelihood that hair or fluids would be transferred during sexual contact of the kind alleged in the indictment. The district court excluded that testimony, and the Eleventh Circuit affirmed. Judge Marcus, writing for the *en banc* court, explained that the defense did not marshal any hard evidence for the proposed opinion or peer reviews validating it. Moreover, the defense could not get away with tying the expert's opinion to his purportedly vast experience:

> Since [the expert] was relying solely or primarily on his experience, it remained the burden of the proponent of this testimony to explain how that experience led to the conclusion he reached, why that experience was a sufficient basis for the opinion, and just how that experience was reliably applied to the facts of the case. Again, "[t]he court's gatekeeping function requires more than simply 'taking the expert's word for it.'" Fed. R. Evid. 702 advisory committee's note (2000 amends.).

387 F.3d at 1245.

The third prong of the analysis – whether the proposed testimony will help the jury – asks a different question: will the expert's opinion truly aid the jury in resolving the issues genuinely before it? Expert testimony, like all evidence, must be relevant. *See* Fed. R. Evid. 401, 402.

Unlike ordinary testimony, however, expert testimony must do more; it must also "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. As the Eleventh Circuit has explained, "more stringent standards of reliability and relevance . . . are necessary because of the potential impact on the jury of expert testimony." *Allison v. McGhan Med. Co*., 184 F.3d 1300, 1309 (11th Cir. 1999). Courts therefore must "ensure that the proposed expert testimony is relevant to the task at hand [and] that it logically advances a material aspect of the proposing party's case." *Id.* at 1311 (internal quotation marks omitted) (citing *Daubert*).

The fourth and final prong of the analysis is a variation on Fed. R. Evid. 403. That rule allows a court to exclude evidence where its probative value is substantially outweighed by the risk that the evidence will confuse or mislead the jury or delay the trial by injecting collateral disputes. The rule applies to all evidence, but applies with greater force to proposed expert testimony because of weight jurors may be inclined to give testimony given in the capacity of an expert. *See Allison*, 184 F.3d at 1309; *see also Daubert*, 509 U.S. at 595 ("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.") (citation and internal quotation marks omitted).

Argument

1. The Defendants' Disclosure for Esposito Is Inadequate Under Rule 16 Because It Lacks Opinions and Bases for Opinions.

Defendants propose to call John Esposito as an expert witness on various topics relating to Islam, but do not disclose any proposed opinions, or the basis for his opinions, if any. Their Rule 16 disclosure for Esposito provides only *descriptive* information about topics and themes, not actual opinions.

Esposito is a known scholar of the Islamic faith, but has also embarked recently on a more controversial side-career of testifying on behalf of terrorist supporters. Most notably, Esposito testified for the defense in the criminal prosecution of individuals associated with the Holy Land Foundation, a purported charity that funneled thousands of dollars to violent Palestinian militants under the guise of providing humanitarian aid. The jury rejected Esposito's testimony and convicted the defendants in that case of providing material support in violation of 18 U.S.C. § 2339. *See United States v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011). Esposito was also noticed as an expert for Khalid al-M Aldawsari, who was charged with – and convicted of – a bomb plot against American targets as part of his commitment to armed jihad and martyrdom. Case No. 5:11-cr-00015-C-BG (N.D. Tex. 2012).

Esposito's proposed testimony in this case appears to cover the same ground, even though broad concepts of Islam have nothing to do with these charges against the Khans. What matters here is how these defendants, and the Pakistani Taliban, conceived of ideas such as jihad and Sharia, as prescriptions for violence. The fact that Islam generally may be a religion of peace, or that jihad could be a spiritual struggle, sheds no light on how these defendants and the Taliban applied those concepts. Moreover, the issue here is not how the defendants' conduct

comported with Islamic law, Esposito's main topic of scholarship: it is whether the defendants' conduct – whatever its justification or inspiration – violated *United States* law (specifically, §§ 2339A and B). Esposito's proposed testimony is rife with other problems, including its apparent focus on a discussion of whether the Taliban was "positive or negative" or "a good or bad thing" – a debate rightly foreclosed by Congress in § 2339B's ban on supporting designated terrorist organizations such as that group.

For these reasons, coupled with his lack of focused expertise about Pakistan,[3] Esposito's testimony appears unlikely to meet the standards of relevance and helpfulness under *Daubert*, *Frazier* and Rule 702. But there is a more immediate problem with evaluating his proposed testimony: the defendants' disclosures do not reveal any of the opinions he may offer at trial, or the bases for any opinions, contrary to Rule 16 and this Court's Rules.

As the Court is aware, Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure requires that a defendant provide a written summary of expert opinion testimony that "shall describe the witnesses' opinions [and] the bases and reasons for those opinions" (emphasis added). Simply put:

> The primary purpose of Rule[] 16(b)(1)[](C) is to prevent unfair surprise at trial and to permit the government (or in cases where the government is derelict in its duty, the defendant) to prepare rebuttal reports and to prepare for cross-examination at trial. As the Advisory Committee Note expressly states, Rule 16(b)(1)(C) is "intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim.P. 16 advisory committee's note. The requirement that a written summary of an expert's testimony must be provided "is intended to provide more complete pretrial preparation by the requesting party." *Id.* *"[M]ost important," a "summary of the bases of the expert's opinion" must be provided.* *Id.* A failure to comply with these Rules may result in the exclusion

3 The CV provided by the defendants does not identify any relevant publications regarding terrorist groups in Pakistan, let alone the activities and agenda of the Pakistani Taliban during the time frame of this case.

> of the proffered evidence. Fed. R. Crim.P. 16(d); *see United States v. Barile*, 286 F.3d 749, 758-59 (4th Cir. 2002); *United States v. Day*, 433 F. Supp. 2d 54, 57 (D.D.C. 2006).

United States v. Naegele, 468 F. Supp. 2d 175, 176 (D.D.C. 2007) (emphasis added). Courts have excluded proposed experts due to non-compliance with Fed. R. Crim. P. 16(b). *See United States v. Holmes*, 670 F.3d 589, 599 (4th Cir. 2012) (district court properly excluded defense expert where defendants failed to disclose "the bases and reasons" for his opinion); *United States v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (holding no abuse of discretion in excluding testimony because the defendant's disclosure "did not describe [the witness's] opinions beyond stating the conclusion he had reached and did not give the reasons for those opinions as required under Rule 16(b)(1)(C)"); *United States v. Johnson*, 219 F.3d 349, 358 (4th Cir. 2000) (district court did not abuse discretion in excluding defendant's expert witness based upon failure to provide required Rule 16(b)(1) disclosures; defense had failed to provide bases and reasons for opinions); *United States v. Nichols*, 169 F.3d 1255, 1267-68 (10th Cir. 1999) (district court did not abuse discretion in excluding defendant's expert witness based upon failure to provide required disclosures); *see also United States v. Hassoun et al.*, 04-60001-Cr-Cooke, Tr. of Hrg. March 16, 2007 (ordering defendants in Padilla terrorism case to provide supplemental disclosures regarding purported terrorism and Islam experts because their initial disclosures did not contain any actual opinions; experts ultimately then did not testify for the defense); *see also United States v. Petrie*, 302 F.3d 1280, 1288 (11th Cir. 2002) (affirming district court's decision to strike expert based on lack of notice).

The entirety of the defendants' disclosure of the substance of Esposito's testimony is as follows; it is replete with references to general areas he will "explain" or "opine on," but lacking

any actual opinions:

> Dr. Esposito will focus on explaining to the jury Islamic terms and concepts that are discussed in recorded evidence. The government will present in its case in chief terms such as Sharia, jihad, mujahideen, Taliban and madrassa for example. Dr. Esposito will explain these concepts within the context they are used in the recordings. Additionally he will explain concepts such as Zakat (tidings) and the religious priority of the fundamental principle in the Islamic faith. Dr. Esposito will also be able to explain actual Islamic legal concepts such as they are referenced in the recordings. He will discuss terms such as Sharia rules as to land disputes, Sharia rules and other religious and Islamic regulatory rules that are discussed in the recorded conversations. Dr. Esposito will opine on some issues raised in the telephone conversations. Issues such as in a land dispute, under Sharia law, the dispute would be resolved in a particular manner that would be favorable to Mr. Khan's current litigation and resolved in a more timely manner than the twenty plus years Mr. Khan's land dispute has been pending in the Pakistan courts.
>
> Dr. Esposito will also opine on the broader history of the Taliban movement in the region and the conceptual underpinnings of the movement. Why such a movement has garnered some degree of popular support in the past and why it no longer carries such popular support. This information will assist the jury in understanding some of the apparent contradictions in phone call participants' references to the Taliban and whether it is a good or bad thing for the local population. In sum Dr. Esposito can help place in a longer timeline on the Taliban movement showing the jury that a reference to the Taliban and its actions as positive or negative will depend upon both temporal and geographic factors. He will do this by reference to particular phone calls and discussions about the Taliban made in those phone calls.

Ex. A (containing defendants' expert disclosures).[4] This summary provides absolutely no guidance to the Court or the government about what Esposito will actually say one way or another about any of these themes.

Highlighting just one example, a disclosure that Esposito will explain concepts of Sharia "as they are used in the recordings," or that he will "opine on some issues raised in the telephone

4 The defendants provided these disclosures at 5 pm on August 6, the deadline for such disclosures and also the deadline for filing pre-trial motions. The government obviously could not file a *Daubert* motion regarding these experts by the pre-trial motions deadline, so we are filing it as expeditiously as possible after due research into these proposed experts' background.

conversations," provides no meaningful guidance, let alone complies with Rule 16. The complete failure to disclose any actual opinions (and their bases and reasons) for Esposito is especially problematic because it appears that the defense wants to use this witness to inject, under the cloak of an expert, impermissible testimony about what the defendants *meant* in their conversations – an area squarely forbidden by *Frazier* and Rule 704(b) of the Federal Rules of Evidence.

Esposito may or may not have admissible testimony to offer a jury in a case like this. At this point it appears not, but neither the Court nor the government can address that issue when defendants have failed at the threshold to comply with Rule 16. At this stage, the government has no way to challenge fully the admissibility of this proposed expert testimony, let alone to cross-examine Esposito or determine the issues on which it may need rebuttal experts. Esposito's testimony, at least as set forth in this disclosure, should be excluded.

2. Martinez Should Be Excluded as an Expert Based Upon Failure to Comply With Rule 16 and Under *Daubert*.

Defendants' disclosure for Alex Martinez, an accountant, raises the same serious concern under Rule 16, as well as larger issues about the anticipated role of this witness.

As with Esposito, the defendants failed to disclose any of the opinions (or bases for opinions) purportedly to be offered by this witness, based upon his claimed accounting expertise:

> Mr. Martinez will focus his testimony on the financial transactions. He will explain to the jury the source of each transaction, how the funds made their way to Pakistan and where the funds were dispersed. Mr. Martinez will be able to show where virtually every large transaction was deposited and withdrawn from as well as those who received the funds. He will also be able to explain the codes and other information on the Western Union transaction documents. Mr. Martinez will provide the jury with a list of individuals based upon review of the calls and how much each individual received and, where it is evidence, what the funds were sent for and how they were spent.

Ex. A. This disclosure provides no opinions at all, merely canvassing in abstract terms the subject matters about which Martinez may testify. There is no disclosure of any opinion Martinez might have, for example, about "where the funds were dispersed" for any particular transaction, let alone all. Neither does he set forth the basis of any opinion, because the opinions themselves are lacking. The disclosure therefore fails to meet even the minimum standards of Rule 16. This is not a technical nicety, as the courts cited above recognized: without such opinions, the government is denied basic information with which to prepare for cross or assess the need for additional experts or evidence of its own.

The Court should note that while the defendants' "expert" disclosure references the *U.S. v. Oscar Chapa* case, Martinez did not present any testimony in court, let alone as an expert. As to the defendants' reference to the *U.S. v. Soler* case, Martinez tellingly did not testify as an expert witness, but rather only as a summary witness. The real problem here too may be that Martinez is not, in reality, a proposed expert witness, but instead is more akin to a summary witness, testifying from the defendants' perspective about the underlying financial transactions in this case. The government has no burden under §§ 2339A or B to "trace" funds from the defendants all the way through to particular terrorists or terrorist attacks, especially on the conspiracy charges in Counts 1 and 3. That said, such summary testimony may be appropriate in some regards, assuming the defense complies with FRE 1006 and other rules, and the underlying records he addresses are admitted into evidence. But Martinez has not been noticed as a summary witness. Instead, he has been noticed as an expert, without any of the required disclosures of his opinions.

Moreover, disclosure issues aside, Martinez plainly cannot offer opinions about what the

defendants meant to do with the funds when they sent them to Pakistan, which is the fundamental issue under both statutes. That testimony is foreclosed by *Frazier* for any expert. *See also* Fed. R. Evid. 704(b) (prohibiting any expert from "stat[ing] an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or a defense"). It is equally unclear how – other than from the financial records available to both sides – Martinez (having, presumably, no personal knowledge of the Khans' activities) could discuss permissibly how the funds were spent in Pakistan. At best, he would be repeating conclusions drawn from the records that are properly made, if at all, as part of a defense closing argument, not from the witness stand. *See Frazier*, 387 F.3d at 1262-63 ("Proffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments.").

It appears doubtful, therefore, that Martinez could testify permissibly as an expert in this case. But the defendants chose to notice him up as an expert, and because the defendants' disclosure for him violates Rule 16, he should be excluded, at this stage, on that basis alone.

3. Weiss's Testimony Should Be Excluded Under Rule 16 and Under *Daubert* due to Its Irrelevancy, Her Lack of Pertinent Terrorism-Related Qualifications and her Impermissible Intrusion on the Jury's Role.

The defendants' third proposed expert, Anita Weiss, should be excluded not only on Rule 16 grounds, but also because most of her proposed testimony is facially irrelevant to this case, and on the one relevant topic about which the defense squarely identifies her opinion (the defendants' characteristics as a terrorist support cell) she is plainly unqualified and her opinion would needlessly confuse and mislead the jury.[5]

5 Weiss, like Esposito, has engaged in a side-practice of testifying for convicted violent defendants, especially with links to Pakistan. *See, e.g., United States v. Hayat*, 2007 WL 1454280 (E.D. Cal. 2006) (discussing exclusion

Most of Weiss's disclosure (*see* Ex. A) has the same deficiencies as the other experts' disclosures. The defense states repeatedly that Weiss will "contextualize" recorded conversations, but there is no summary of what opinions she will offer. That may because there are hints in the disclosure that the real purpose of her testimony would be to put the defendants' spin on recordings without them having to take the stand.[6] Opinions are the touchstone of an expert's testimony, which is why Rule 16 and the case law require meaningful disclosures of opinions, and the basis and reasons for each of them, in advance of trial. Weiss's disclosure contains more content than does Esposito's or Martinez's, but other than the solitary opinion discussed below regarding the Khans' activity as a terrorist support cell, she too falls short under Rule 16.

What content there is raises precisely the kind of issues *Daubert* and *Frazier* address. Weiss, like Esposito, may be distinguished in her field of research; as with Esposito, however, the fit between her expertise and the allegations in this case – and between her expertise and what the defendants want her to say to this jury – is simply lacking. To reiterate the Eleventh

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of portion of Weiss's testimony in defense of Pakistani-American charged with traveling to Pakistan to attend terrorist training camp contrary to § 2339A); *State v. Ahmed*, 2006 WL 3849862 (Ohio App. 2006) (noting Weiss's submission of affidavit in support of Pakistani-American convicted of quadruple murder "honor killing"). According to *Los Angeles Times* reports of the Hayat trial, Weiss had claimed in Hayat's defense that there were many religious camps in Pakistan that had nothing to do with terrorism and were more like Baptist summer camps in the United States.

6 Weiss does say at one point that she will "be able to contextualize the discussions and comments by the defendants that may appear anti-American or violent to an American jury." Suffice it to say such attempt to re-cast the defendants' own words (none of which the defense actually pinpoints in her disclosure) would run afoul of multiple prohibitions on expert (and general witness) testimony, including invading squarely the province of the jury.

If Hafiz Khan wants to take the stand to tell the jury that, when he wished death to 50,000 Americans, he did not really mean to appear anti-American, he may do so. But he cannot use an expert as his vehicle to present his state of mind or interpret his meaning during his own recorded conversations. Moreover, whether Khan's words appear anti-American to people in Pakistan is not the issue for trial; the question is whether those words demonstrate intent to support violence and knowing support of the Pakistani Taliban.

Circuit's stance, "more stringent standards of reliability and relevance . . . are necessary because of the potential impact on the jury of expert testimony." *Allison,* 184 F.3d at 1309.

Weiss's proposed testimony breaks down into three categories, as we see it. First, the defense proposes to have her discuss certain cultural issues in Swat, with a particular but not exclusive emphasis on gender issues such as "the role of women and girls in the region as it relates to education in [madrassas]," "the historic norm of the region . . . for girls not to be educated," and for girls "to be married at an early age (13-15 had been very common)." Ex. A. While more closely aligned with Weiss's expertise than other areas of her proposed testimony, the fit between such testimony and the elements of the charged offenses is thin at best. The fact that girls marry at an early age, or that young girls are sometimes educated at madrassas, would not make more probative or less probative any fact of consequence to this case. And on the topic of his madrassa in Pakistan, Khan's words were plain: children would go from his madrassa to train with the TTP leader Fazlullah to fight Americans.

Second, the defendants propose to have Weiss discuss whether the Khans' actions were "consistent with the norms" of the Swat Valley, elaborating on what those norms might be and the culture of that region. Such "norms" have no relevance. *See United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1385-86 (11th Cir. 2011) (no abuse of discretion to exclude defense expert from testifying about matters irrelevant to what the jury must decide). Khan has resided in the United States since 1994, and was never in Pakistan during the time frame of these charges; Izhar made short visits, but likewise has lived here continually.

There is a larger problem beyond factual irrelevancy, however. Whether the defendants' conduct conformed to the cultural norms of Swat is legally immaterial as a defense to violations

of our country's laws regarding terrorist support. If the defendants violated §§ 2339A or B by providing material support to the Pakistan Taliban and other militants with the requisite state of mind, it is of no moment that they did so out of adherence to the cultural legacy of their time in Swat. We are confident that most individuals in the Swat Valley would disagree that supporting terrorism is the norm, and Weiss's attempt to make broad-brush generalizations is purely speculative. *See McClain*, 401 F.3d at 1239-40 (excluding proposed medical expert who drew "speculative conclusions" unsupported by "sufficient data or reliable principles, as identified by the *Daubert* rubric"); *Frazier*, 287 F.3d at 1245 ("The expert's assurances that he has utilized generally accepted scientific methodology are insufficient. . . . As the Supreme Court [has] explained: nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."). But what is certain is that broadly-framed testimony about "norms of behavior" and customs in that region is likely to be a smokescreen for impermissible, and irrelevant, justification defenses. The Court has recognized this concern in its pre-trial rulings. *See* DE498 at 3 ("Although the Defendants' conduct may have been motivated by religious or political beliefs, the First Amendment does not protect conduct that materially supports terrorism even if that conduct is driven by a religious or political agenda.").

Making matters worse, Weiss seeks to inject into this trial topics that have no bearing on any element of the charged offenses, and are not even within the time frame of this case. For example, Weiss proposes to discuss "the effect of drone attacks and the US War in Afghanistan has had upon public perception [in Pakistan] and therefore discourse about the United States." That topic has absolutely no relevance to whether the Khans, in the United States, provided

material support overseas. Weiss's further proposed testimony about "the impact of USAID in the Swat Valley more recently and the shift in public discourse as a result," aside from being temporally ambiguous, likewise has no bearing on any element of these crimes. And her proposed opinions (whatever they may be, as they as they are unspecified) on "local customs that are deemed law in the region" again improperly injects legal concepts that have no relevance to the United States laws applicable to those – such as the Khans – within their jurisdiction. In these and many regards, Weiss's proposed testimony is prohibited by *Daubert* and *Frazier* as being unhelpful to the jury, and additionally by Rules 401 and 403 of the Federal Rules of Evidence.

Third, whatever her undoubted experience with Pakistan and gender and cultural developments there, we are aware of no writings or qualifications by Weiss regarding the features of a terrorist support cell. Yet that is the topic of the only true opinion disclosed by the defendants about her: "Dr. Weiss will opine that the defendants' actions in this case were not consistent with a terrorist cell but are in fact consistent with the norms of the region where a tribal elder has a responsibility to continue to care of his extended family and the local population even if he is abroad." Ex. A. Weiss is not regarded as an expert in terrorism, and is not qualified to offer an opinion on terrorist support cells. In stark contrast to Dr. Gunaratna and others in his field, the publications identified in Weiss's CV reveal no books or publications on the features and functions of a terrorist support cell, which is a network of overseas-based supporters who funnel money and other material support to fighters and militant sympathizers on the ground. Most of Weiss's background has little to do with terrorism per se, and there is no indication that she has ever been qualified as an expert in legal proceedings regarding terrorism

in general, the Pakistani Taliban or terrorist support cells. Weiss therefore lacks the requisite knowledge and experience to offer the specific opinion she intends to give the jury. *See, e.g., United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) (affirming in criminal case the exclusion of a proposed defense expert as unqualified); *Hudgens v. Bell Helicopters Inc.*, 328 F.3d 1329, 1347 (11th Cir. 2004) (affirming exclusion of expert due to lack of qualifications); *United States v. Paul*, 175 F.3d 906, 912 (11th Cir. 1999) (affirming exclusion of defendant's proposed expert as unqualified, despite argument that expert's testimony was essential for the jury to understand the limitations on prior testimony by a government expert on the same topic); *see also Alexander v. Smith & Nephew PLC*, 98 F. Supp. 2d 1276, 1281 & n.1 (N.D. Okla. 2000) (emphasizing that simply because a proposed expert has training and experience in a broad field does not mean that he has sufficient specialized knowledge to qualify as an expert with respect to the narrower topics about which he seeks to testify). Weiss is not qualified – as that concept is applied by *Daubert* and *Frazier* – to offer an opinion about terrorist support cells or the extent to which these defendants' activities constituted such a network.

Conclusion

For all of the foregoing reasons, the Court should exclude the testimony of three of the defendants' proposed experts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I electronically filed the foregoing with the Clerk of the Court using CM/ECF for electronic delivery to all counsel of record.

/s/ John Shipley
Assistant United States Attorney

EXPERT DISCLOSURE FOR ALEX MARTINEZ

Qualifications

Alex Martinez has been a Certified Public Accountant for over 24 years. He spent five years with the Internal Revenue Service a field agent and 19 years in public accounting. Mr. Martinez has conducted numerous field audits where his role was to follow the trail of funds from start to endpoint. He worked for Deloitte Haskins & Sells in Miami conducting audits and then moved on to work for the IRS. At the IRS he conducted field audits of over five-hundred (500) corporations and individuals including.

In his private practice, he has represented many people and corporations during Internal Revenue Service Audits including The Produce Connection, 2006 through 2008, in which he reconstructed $60 million in sales to produce an approximately $300,000.00 to two (2) shareholders. He also represented Hernan de Caril and related Corporation for 2005 through 2007 for sales of approximately $90 million dollars. He reconstructed true personal income for Mr. de Caril arriving at a $300,000.00 tax liability to the I.R.S. averting a potential criminal case. Finally, he represented Penate General Welding, 2005 through 2007, where he reverse the Excise Tax Liability assessed by the I.R.S. of $400,000.00 to $15,000.00.

Mr. Martinez has testified previously in forensic accounting environments. Some of the more recent and larger cases that he has worked follow. Oscar Chapa vs. United States from 2009 to the present. This is an on-going matter involving charges of tax evasion. Angel Soler vs. United States in May 2006 before Judge Cecilia Altonaga. This matter is called "Operation Purple Haze" in which Mr. Martinez has testified on money laundering issues. Mr. Martinez has also testified in Breto vs. Barro in February 2012 before Judge Scott M. Bernstein. His testimony involved a Dissolution of Marriage matter. And while Mr. Martinez did not testify in United States vs. Marrero because the Judge issued a Rule 29, he was instrumental in assisting the attorneys in preparation for trial during 2011 through January 2012.

Summary of Subject Matter of Expert Testimony and Opinions

Mr. Martinez will focus his testimony on the financial transactions. He will explain to the jury the source of each transaction, how the funds made their way to Pakistan and where the funds were dispersed. Mr. Martinez will be able to show where virtually every large transaction was deposited and withdrawn from as well as who received those funds. He will also be able to explain the codes and other information on the Western Union transaction documents. Mr. Martinez will provide the jury with a list of individuals based upon review of the calls and how much each individual received and, where it is evident, what the funds were sent for and how they were spent.

Basis and Reasons for Testimony

Mr. Martinez will rely upon the financial transaction records as the basis of his testimony regarding the time and content of each transaction. Further he will use the phone calls which describe where the funds were dispersed, actual receipts of some transactions, and testimony from witnesses. He will be able to show the jury the money trail from start to end point for each transaction taking into account relative exchange rates at the time of the transactions.

EXPERT DISCLOSURE FOR DR. JOHN ESPOSITO

Qualifications

Dr. John Esposito is currently a University Professor, Professor of Religion and International Affairs, Professor of Islamic Studies and Founding Director of the Prince Alwaleed bin Talal Center for Muslim – Christian Understanding at the Walsh School of Foreign Service, Georgetown University. Previously, he taught religious studies at the College of Holy Cross for 20 years. At Holy Cross, he held the Loyola Professor of Middle East Studies position, was Chair of the Department of Religious Studies, and Director of the Center for International Studies. Dr. Esposito has served as President of the Middle East Studies Association of North America and the American Counsel for the Study of Islamic Societies, Vice Chair of the Center for the Study of Islam in Democracy, and a member of the World Economics Forum's Council of 100 Leaders and as a member of the E. C. European Network of Experts on De-Radicalisation. He currently is an ambassador for the UN's Alliance of Civilizations and serves as President Elect (2012) and President (2013) of the American Academy of Religion. Dr. Esposito is a recipient of honorary doctorates from the University of Toronto, the University of Florida, and Immaculata University, the American Academy of Religion's 2005 Martin E. Marty Award for the Public Understanding of Religion, Pakistan's Hilal -i Quaid-i-Azzam Award for Outstanding Contributions in Islamic Studies, and the School of Foreign Service, Georgetown University Award for Outstanding Teaching. An expert in Islam and related topics such as Islam, Islamic law (shariah), Islamic movements, Muslim politics and global and domestic terrorism, Dr. Esposito has become the pre-eminent voice in Islamic religious studies and Islamic terminology over the past several decades. In addition to teaching religious studies for over 40 years, he is the Editor in Chief of the *Oxford Encyclopedia of the Islamic World, Oxford Encyclopedia of the Modern Islamic World, The Oxford History of Islam, The Oxford Dictionary of Islam*, and *The Islamic World: Past and Present.* Additionally, Dr. Esposito has authored over 47 books and authored or co-authored over 100 articles and book chapters on Islam, Muslim politics, Islam and terrorism, many translated into 35 languages. A complete list of his publications is attached in his curriculum vitae.

Dr. Esposito has served as a consultant and briefed US government agencies (State, Defense, Pentagon, CIA, FBI, DHS, NSA) and European and Asian governments. He has given thousands of lectures and presentations on Islam and related topics to academic, corporate, media and religious organizations in the United States, the United Kingdom, Germany, Italy, Spain, Portugal, Denmark, Sweden, Norway, Switzerland, Turkey, Pakistan, Malaysia, Singapore, Indonesia, Japan, China, and elsewhere. During his more than forty year career, he has traveled extensively and conducted research, lectured in and written on most Muslim countries from North Africa to Southeast Asia. He has been going to South Asia since 1974 and written and lectured on Pakistan, Afghanstan and the Taliban and related topics. His full curriculum vitae is attached however to summarize his education he received his Bachelor of Arts degree from St. Anthony's College in Hudson, New Hampshire 1963, his Masters' degree in Theology from St.

John's University in Jamaica, N. Y. 1966 and his Doctorate in Religion/Islamic Studies from Temple University in Phila, Pa 1974). Dr. Esposito subsequently held post-doctoral fellowships at Harvard University and Oxford University.

Summary of Subject Matter of Expert Testimony and Opinions

Dr. Esposito will focus on explaining to a jury Islamic terms and concepts that are discussed in recorded evidence. The government will present in its case in chief terms such as Sharia, jihad, mujahedeen, Taliban, and madrassa for example. Dr. Esposito will explain these concepts within the context they are used in the recordings. Additionally he will explain concepts such as Zakaat (tidings) and the religious priority of this fundamental principle in the Islamic faith. Dr. Esposito will also be able to explain actual Islamic legal concepts as they are referenced in the recordings. He will discuss items such as Sharia rules as to land disputes, Sharia rules and other religious and Islamic regulatory rules that are discussed in the recorded conversations. Dr. Esposito will opine on some issues raised in the telephone conversations. Issues such as in a land dispute, under Sharia law, the dispute would be resolved in a particular manner that would be favorable to Mr. Khan's current litigation and resolved in a more timely manner than the twenty plus years Mr. Khan's land dispute has been pending in Pakistan courts.

Dr. Esposito will also opine on the broader history of the Taliban movements in the region and the conceptual underpinnings of the movement. Why such a movement has garnered some degree of popular support in the past and why it no longer carries such popular support. This information will assist the jury in understanding some of the apparent contradictions in phone call participants' references to the Taliban and whether it is a good or bad thing for the local population. In sum Dr. Esposito can help place a longer timeline on the Taliban movement showing the jury that a reference to the Taliban and its actions as positive or negative will depend upon both temporal and geographic factors. He will do this by reference to particular phone calls and discussions about the Taliban made in those phone calls.

Basis and Reasons of Testimony

Dr. Esposito has researched and written extensively on the subject matters he will opine upon. In addition to this research he has continued to keep abreast of the subject matter by participating in efforts by US government agencies to engage Pakistani government or public in discourse. He regularly presents to various government agencies and is asked for his opinion on matters of current importance to those agencies. Agencies such as State, Defense, Pentagon, CIA, FBI, DHS, and NSA rely upon Dr. Esposito's opinions on the subject matters he will testify upon in this case. Dr. Esposito will review transcripts of phone calls in order to present an understanding of the terms contained on those calls. He will also review calls and discuss some of the history of the Taliban in the region that is covered in the calls.

EXPERT DISCLOSURE FOR DR. ANITA M. WEISS

Qualifications

Dr. Anita M. Weiss, Professor and Head of the Department of International Studies at the University of Oregon, is an influential scholar and leading expert on contemporary Pakistan society, culture, politics, and security issues. Her expertise on Pakistan spans a wide range of political, cultural and social development issues; those specifically relevant here include: religion and religious practices in Pakistan; political Islam and its impact on Pakistan; and local culture in Pakhtun society and specifically in Swat. At the University of Oregon she teaches many courses relevant to this case, including *Militant Islam, Pakistan and Afghanistan: Connecting the Problems and the Solutions*, and *South Asia: Development and Social Change*. Fluent in Urdu, Dr. Weiss has served as a consultant to the United States Department of State and other federal agencies for many years on political and social issues in Pakistan. She has published four books – with two more edited volumes forthcoming – and numerous articles and book chapters on Pakistani society. She is the Vice President of the American Institute of Pakistan Studies (a US Department of Education/CAORC supported endeavor to support the study of Pakistan in the United States) and in connection with her research, has traveled frequently to Pakistan over the past 34 years. She has conducted extensive research on the Muttahida Majlis-e-Amal (MMA) government in Khyber Pakhtunkhwa, which is charged with having opened a political space for the TTP in the province during its rule in 2002-08, and most recently in Swat January-February 2010, November 2010, and January-February 2012.

Professor Weiss has published extensively on social development, political Islam in Pakistan, and local sociocultural practices and values in Pakistan including four books: *Power and Civil Society in Pakistan* (co-editor with Zulfiqar Gilani, Oxford University Press, 2001), which analyzes changing power relations, actors and organizations in Pakistan; *Walls Within Walls: Life Histories of Working Women in the Old City of Lahore* (Westview Press, 1992, republished by Oxford University Press, 2002 with a new Preface, which won the Allama Iqbal award for best book published on Pakistan that year from the Government of Punjab), which provided her with unique insights into Pakistani norms of communicating with each other and local sociocultural practices and priorities; *Culture, Class and Development in Pakistan: The Emergence of an Industrial Bourgeoisie in Punjab* (Westview Press, 1991, republished in Pakistan by Vanguard Press, 1991), which analyzes how Pakistani culture affects economic development and, in turn, how economic development affects Pakistani culture; and editor of *Islamic Reassertion in Pakistan: The Application of Islamic Laws in a Modern State* (Syracuse University Press, November 1986, republished in Pakistan by Vanguard Press, 1987), the first book to provide a comprehensive review of the effects of Zia ul-Haq's 1979 Islamization program on Pakistan's social fabric. Two additional edited volumes are currently forthcoming, *Pathways to Power: the Domestic Politics of South Asia* (co-editor with Arjun Guneratne, Rowman & Littlefield, 2013), in which she wrote the chapter on Pakistan and highlighted the Tehrik-e-Taliban Pakistan's role in Swat, and *Development Challenges confronting Pakistan* (co-edited with Saba Gul Khattak, Kumarian Press, 2013), which brings together leading American and Pakistani scholars to identify the unique blend of structural impediments to

development and progress prevailing in Pakistan today, including the effects of politicized Islam, extremism and terrorism in Pakistan. Other recent publications include "Crisis and Reconciliation in Swat through the Eyes of Women" (in Magnus Marsden & Ben Hopkins (eds.) *Beyond Swat: History, Society and Economy along the Afghanistan-Pakistan Frontier* Hurst & Co., Columbia University Press, 2012 [forthcoming]); "Moving Forward with the Legal Empowerment of Women in Pakistan" (US Institute for Peace Special Report 305, May 2012); "Population Growth, Urbanization and Female Literacy" (in Stephen P. Cohen and others *The Future of Pakistan* Washington, DC: Brookings Institution Press, 2011, pp. 236-248); "Islamic Influence on Sociolegal Conditions of Pakistani Women" (reprinted in Magnus Marsden (ed.) *Islam and Society in Pakistan: Anthropological Perspectives* Oxford University Press, 2010, pp. 52-75); "Straddling CEDAW and the MMA: Conflicting Visions of Women's Rights in Contemporary Pakistan" (in Kenneth M. Cuno and Manisha Desai (eds.) *Family, Gender & Law in a Globalizing Middle East & South Asia* Syracuse University Press, 2009, pp. 256-284); and "A Provincial Islamist Victory in NWFP, Pakistan: The Social Reform Agenda of the Muttahida Majlis-i-Amal" (in John L. Esposito and John Voll (eds.) *Asian Islam in the 21st Century* New York: Oxford University Press, 2008, pp. 145-173). Her current research is analyzing how distinct constituencies in Pakistan, including the state, are grappling with articulating their views on Islam, modernity and women's rights, as well as exploring a range of social, political and economic challenges confronting Swat. She presented her recent work, "After the Taliban and the Megaflood: The Challenges of Reconciliation and Rebuilding Lives in Swat" at the Council on Foreign Relations in Washington, D.C. this past March, amid holding meetings with a range of policy makers including U.S. ambassadors Robin Raphael, Marilyn Chamberlin, and Cameron Munter, all to probe her opinions further on the situation in Swat. That publication is currently being finalized.

Summary of Subject Matter of Expert Testimony and Opinions

Dr. Weiss will provide a detailed overview of the origin, identity, development, ideology, geographic focus, and social impact of the Swat faction of the Tehrik-e-Taliban Pakistan (TTP), the 'Swat Taliban,' headed by Maulana Fazlullah. She will focus on this organization as it is the one relevant to this case, providing background on the TTP elsewhere in Khyber Pakhtunkhwa (KP) and FATA when relevant. She will share her firsthand knowledge of the effects the Swat TTP have had on Swat society, their interpretation of Islamic norms and sharia which Fazlullah and his followers sought to impose on Swat, their recruiting and organizing strategies, and how they were funded. She will opine upon other significant figures in the militant and political sphere of Swat such as Sufi Muhammad, Baitullah Mehsud, Pervez Musharraf, Nawaz Sharif, and his brother Shabaz Sharif, and the leaders of the Jamaat-i-Islami (JI) and the Jamiat-i-ulema (JUI) in the MMA government in KP. Dr. Weiss will discuss specific incidents that occurred in Pakistan such as specific acts of terrorism, U.S. drone attacks in the region, Pakistan Army operations, and militia operations that impacted the region and population, and local views and opinions about these incidents. These incidents are referenced in the telephone calls either directly or indirectly. This will include discussions of the impact that natural calamities have played in the Swat Valley over the past decade including the 2005 earthquake and 2010 megaflood that contributed to economic and geographic destabilization of the population as well as the political maneuvering by all parties in the region during these events. Dr. Weiss will also reference specific political events during the past several years in order to provide the jury with

context for the many political discussions the government will present as evidence in recorded phone calls. Dr. Weiss will be asked to explain the context of some of the phone calls' content as that content pertains to the politics of the day, who the players are that are being referenced, and what was occurring at the time when the call was made in order to better explain the context of that discussion. She will also address what she understands as having been popular, mainstream views of the events.

Dr. Weiss will discuss the culture of the Pakhtun region and the Swat communities. This includes but is not limited to norms of behavior for that culture, manners of speech routine to the people, idioms and sayings that are common to the people, and other related topics that help a jury understand better the context of the phone calls that will be introduced at trial. She will also be able to opine on: local customs that are deemed law in the region; the role played by the former Wali of Swat (prior to its integration into Pakistan in 1969) in governance, legal dispute resolution, and support for education in the princely state; and the impact of Pakistan federal laws in the region since the mid-1970s as it pertains to land rights and funding for schools. Dr. Weiss, for example, will point out to a jury the high priority family and extended family plays in the lives of the tribal regions of Pakhtun. She will point out that Swat had enjoyed higher rates of literacy because of the priorities of the last Wali, which are not common elsewhere in the area, and how this affected Swatis' expectations to receive an education, but how things have changed markedly since the incorporation of the Swat state in 1969. She will also comment on the extraordinary focus this culture has on discussing politics and where this behavior stems from. This will include some history of the region, the various changes in governments in the region and the historic autonomy of the local tribes. Dr. Weiss will opine on the importance of types of education in the region, the prioritization of building mosques and schools for religious education, and the role of women and girls in the region as it relates to education in these schools (*madrassas*). She will discuss how the historic norm of the region is for girls not to be educated and for them to be married at an early age (13-15 had been very common), and how this has changed in recent years. This information provides context to the jury when they are informed more about the school relevant to this case.

Dr. Weiss will tell the jury about the influence of the United States in the region and the resultant responses by the local population. For example the effect of drone attacks and the US war in Afghanistan has had upon public perception and therefore discourse about the United States. Also she will discuss the impact of USAID in the Swat Valley more recently and the shift in public discourse as a result. The public discourse she will reference and contextualize is also found on the telephone calls that will be introduced as evidence. She will be able to contextualize the discussions and comments by the defendants that may appear anti-American or violent to an American jury. Dr. Weiss will opine that the defendants' actions in this case were not consistent with a terrorist cell but are in fact consistent with the norms of the region where a tribal elder has a responsibility to continue to take care of his extended family and the local population even if he is abroad.

Basis and Reasons for Testimony

Dr. Weiss has conducted extensive field research in Pakistan for the past 34 years, which also underlies her anticipated testimony in this case. Aside from her scholarly research (see

enclosed Curriculum Vitae), the basis of her firsthand knowledge of Swat, political conditions in KP, and Pakistani sociocultural issues includes: extensive interviews with a wide range of residents of Swat (and elsewhere in Pakistan), the vast majority of whom have had family members who have either joined the Swat Taliban and/or been affected by the Swat Taliban; extensive interviews with a wide range of government personnel, local Swati political leaders, and members of the Swat jirga and other local organizations regarding the organizing, fundraising and impact of the Swat Taliban; extensive interviews with MMA members of the KP Provincial Assembly on the MMA's ideology; subsequent field research in Swat that correlated how the MMA's ideology affected the rise of the Swat Taliban and related political, social and ideological issues.