TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Page

Constitutional Provisions

Statutes

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

Appellee,

-against- **18-943**

MUHANAD MAHMOUD AL-FAREKH,

Defendant-Appellant.

----------X

BRIEF FOR DEFENDANT-APPELLANT

JURISDICTIONAL STATEMENT

(i) Jurisdiction was conferred in the United States District Court for the Eastern District of New York by the filing of a nine-count Indictment under docket 15-CR-268 charging appellant Muhanad Mahmoud Al-Farekh with violating 18 U.S.C. §§ 844(f)(1) (use of explosives), 18 U.S.C. § 2332(b)(2)(conspiracy to murder United States nationals), 18 U.S.C. § 2332a(a)(1) (conspiracy to use a weapon of mass destruction), 18 U.S.C. § 2332a(b) (conspiracy to use a weapon of mass destruction by a United States national), 18 U.S.C. § 2332f(a)(2) (conspiracy to bomb a government facility), 18 U.S.C. § 2339A(a)(conspiracy to provide material support to terrorists), 18 U.S.C. § 2339A(a) (provision and attempted provision of material support to terrorists), 18 U.S.C. § 2339B(a)(1) (conspiracy to provide material

support to a foreign terrorist organization) and 18 U.S.C. §§ 844(f)(1)(provision and attempted provision of material support to a foreign terrorist organization).

(ii) Jurisdiction is conferred in this Court pursuant to 28 U.S.C. §1291 and Rule 4(b) F.R.A.P. This is an appeal from a judgment of the District Court (Cogan, J.) entered March 22, 2018 convicting appellant, after a jury trial, of the nine counts submitted and sentencing him to 40 years on Count 1, 45 years on Counts 2, 3, 4, and 5 and 15 years on Counts 6, 7, 8, and 9, all counts to run concurrently with each other for a total of 45 years imprisonment. The court imposed a five-year term of supervised release on each count, also to run concurrently and the mandatory $900 assessment. This is an appeal from a final order disposing all issues between the parties.

ISSUES PRESENTED

1. Whether the lower court committed reversible error when it a) permitted the government to file its motions pursuant to the Classified Information and Protection Act (CIPA) *ex parte* and b) determined, after *in camera, ex parte,* review that any information withheld from classified summaries was not helpful to the defense?
2. Whether the identification testimony of witness [redacted] should have been suppressed as the product of impermissibly suggestive identification procedures?

3. Whether reversible error was committed when the lower court admitted, over appellant's relevance and hearsay objections, the out of court statements of purported co-conspirators?
4. Whether the lower court abused its discretion when it admitted, without proper authentication, handwritten letters found on a USB drive?
5. Whether appellant was denied his right to present a defense when the lower court precluded him from using a Department of Justice Report when cross examining the FBI fingerprint examiner?
6. Where there was an inadequate factual basis for any such opinions, did the lower court abuse its discretion when it permitted Lorenzo Vidino to opine that there is no accepted profile of a potential jihadist and that there is a logical route of travel a person from the West would use to make contact with al-Qaeda?
7. Whether appellant was denied a fair trial when the lower court permitted the witness Evan Kohlmann to summarize various jihadist lectures and then permitted the government to play for the jury prejudicial and inflammatory lectures and videos?
8. [redacted]

9. Whether the probative value of a video depicting a "controlled detonation" was substantially outweighed by its prejudicial impact?
10. Whether the appellant was denied his right to a fair and impartial jury when the lower court denied his motion for a mistrial during jury deliberations?
11. Whether the 45-year sentence imposed on appellant was substantively unreasonable?

PRELIMINARY STATEMENT

Pursuant to 18 U.S.C. §3742(a), appellant Muhanad Mahmoud Al-Farekh appeals from a judgment imposed by the United States District Court for the Eastern District of New York (Cogan, J.) entered March 22, 2018 convicting him, after a jury trial, of all nine counts of the Indictment and sentencing him to an aggregate term of imprisonment on 45 years, five years of supervised release and the mandatory $900 assessment.

STATEMENT OF FACTS

Introduction

Appellant Muhanad Mahmoud Al-Farekh, was born in 1985 in Houston, Texas. He was raised primarily in Abu Dhabi and attended college at the University of Manitoba in Canada. On January 8, 2015 a one-count Complaint was filed in the United States District Court for the Eastern District of New York

charging him with conspiracy to provide material support to terrorists. (Dkt. 1).[1] It was alleged that in 2007, while appellant was a college student at the University of Manitoba he agreed to travel to Pakistan and be trained to engage in violent *jihad*. On April 2, 2015 appellant was transferred from the custody of the government of Pakistan to United States custody and transported to the Eastern District of New York. An indictment returned on May 28, 2015 charged the same offense. (Dkt. 16). Then, on January 6, 2016 a nine-count superseding indictment was filed. In addition to four material support for terrorism charges, five counts charged appellant with involvement in a January 19, 2009 explosion outside of Forward Operating Base (FOB) Chapman in the Khost region of Afghanistan. Another superseding indictment was filed on January 5, 2017 (A21).

[1] "Dkt." Refers to the docket number assigned to the document in the District Court. Numerals preceded by "T" refer to the trial transcript. Numerals preceded by "VD" refer to the individual voir dire that occurred during jury deliberations. Numerals preceded by "A" refer to Appellant's Appendix. Numerals preceded by "SA" refer to the separately filed Sealed Appendix. "PSR" refers to the Presentence Report, filed under seal.

PRE-TRIAL PROCEEDINGS

The CIPA Motions

On February 29, 2016, the Government filed a motion pursuant to Section 2 of the Classified Information and Procedures Act (CIPA). It represented that some information ordinarily discoverable might be classified. (Dkt. 44). An *ex parte* motion pursuant to CIPA was filed on June 27, 2016. (Dkt. 48). Appellant opposed the motion on substantive grounds and because it was filed *ex parte*. (Dkt. 51). On August 23, 2006 the court granted the government's motion in its entirety (A27). It found that the classified summaries that the government proposed to disclose to cleared defense counsel were sufficient and that any withheld material was not helpful to the defense. A second CIPA motion, also filed *ex parte*, was granted on May 24, 2017 (A33).

The Rule 15 Deposition

On November 8, 2016 the government filed a motion to take the deposition of an overseas witness pursuant to Fed.R.Crim.P. 15. The witness had allegedly identified appellant's photograph as depicting a person known as "Abdullah al-Shami", a member of al-Qaeda. (Dkt. 62). [redacted]

[redacted] On August 10, 2017 the lower court denied the motion to suppress the witness's photo identification holding that the procedures utilized were not unduly suggestive. (Order: A39, p. 6-7).

Motions *In Limine*

Prior to and during trial the parties made several motions *in limine* regarding evidentiary issues. To the extent that they are relevant to this appeal, the facts concerning each motion will be set forth *infra*. and in the legal argument.

THE TRIAL

The Government's Case

A. Appellant as a Student at the University of Manitoba

In 2006, 21-year-old appellant Muhanad Mahmoud Al-Farekh was a student at the University of Manitoba. The "funny and affable" Muhanad was active in the Muslim Students Association (MSA). (T. 559). It was through that organization that he met fellow student and government witness Yousef Soufi (T. 505, 509).

[2] *United States v. Wade*, 338 U.S. 218 (1967).

Like many his age, appellant wore his hair long. (G.Ex. 1101 photo on appellant's Minnesota drivers' license). Soufi eventually met fellow students Maiwand Yar and Ferid Iman through the MSA but rarely interacted with either (T. 511-13).

The young men regularly exchanged emails that sometimes addressed issues in Islam. On March 16, 2006 Ferid Imam sent an email to over a dozen people, including Appellant, Yar and Soufi. The email contained a link to what Imam described as a "good lecture" a lecture by Anwar al-Awlaki, a controversial Muslim cleric. (G. Ex. 801, A545). Many Muslims listed to his primarily historical lectures (T. 561). There was no evidence however that appellant read Imam's email, utilized the link or listened to the lecture. And while Soufi overheard appellant and others discuss al-Awlaki and his ideas, he never actually observed appellant viewing any of al-Awlaki's lectures. (T. 560, 569, 575). Moreover in a July 27, 2016 interview with the FBI Soufi did not state that appellant had ever listed to any of al-Awlaki's lectures (T. 1363)

In early July 2006 there was an email exchange between Ferid Imam and Yar concerning another al-Awlaki lecture (T. 580-581 referencing G.Ex. 804 and 806, A546, A 548). Imam sent another link to an al-Awlaki lecture to Imad Salim, Maiwand Yar, Yousef Soufi and appellant Al-Farekh (T. 582). On February 18, 2007 appellant informed his family about how they might obtain the al-Awlaki lecture "The Hereafter" (T. 585; G.Ex. 819, A551). A government witness

acknowledged that there were far more emails sent and received by the young men than what the government chose to offer at trial (T. 595).

In December of 2006, appellant, Yar, Imam and Soufi were among 100 students from Canada who made the pilgrimage, or Hajj, to Mecca in Saudi Arabia (T. 524). The experience made them closer (T. 527). During the trip Soufi and the others, shaved their heads in accordance with religious rituals. (T. 531-533). [3]

In 2006 certain anti-Muslim cartoons were published in the Danish press. Muslims all over the world were upset (T. 568). Soufi claimed that during this period Ferid Imam stated that he had a difficult time empathizing with the victims of terrorist attacks "and he might have mentioned the victims of 9/11 in particular." (T. 537). On cross examination, Soufi retreated, stating that he was unsure whether Imam mentioned 9/11. And when Soufi later spoke to the government about Imam's alleged statement he made no mention of 9/11. (T. 565, 1364).

During Soufi's testimony the government played a homemade video recovered from the unallocated space on a thumb drive (T. 849-50; G.Ex. 503). The data was created on or about February 24, 2007 (T. 850). Soufi identified appellant sitting at a computer monitor. While there, the first few seconds of a

[3] Soufi also testified that Muslims may use a plant based dye to color their hair but only after it begins to turn gray or white. (T. 533)

video produced by the "Islamic Army in Iraq" appears on a computer screen. (T. 543-50 referencing G.Ex. 503). After a few seconds, the video ends (T. 568).

Soufi last saw appellant, Yar and Imam at a Muslim event where, according to Soufi, appellant seemed "preoccupied" and made an "atypical" comment about the food being served. (T. 535).

In early 2007 Appellant notified officials at the University of Manitoba that he needed to leave school for family reasons and requested a tuition refund (T. 583-584; G.Ex. 816 and 817, A549, A550). On March 6, 2007 appellant, Yar and Imam boarded an Air Canada flight with an itinerary that ended in Karachi, Pakistan (T. 337, 854-858). Appellant, Ferid Imam and Maiwand Yar entered Pakistan at Karachi International Airport on March 8, 2007 (T. 754-757). Neither Yar nor Imam have re-entered Canada since March of 2007 (T. 756).

On March 12, 2007, appellant sent an email to his family stating that he liked Pakistan and was looking for an appropriate university to attend (T. 585; G.Ex. 821, A 553). On May 14, 2007 an email to appellant's account from "reem" requested a message (T. 590, G.Ex. 823). Two weeks later the "reem" account received an email originating at the Karlu Composing Center in Pakistan. (T. 594, A554). The email is from "Saifullah". The author apologizes for not being in touch and assures the recipients that he is well and learning a lot. (*Id*.). Appellant's family did not respond to this email.

Ahmed Yar, ("Ahmed") the older brother of Maiwand Yar, testified that he had never met appellant Al-Farekh. Nor had he ever interacted with him. (T. 596-97, 668). Ahmed had little contact with his brother Maiwand in 2006 and 2007 although he did speak with him after the latter returned from hajj. (T. 602-03, 675).

The Yar family received an undated email from Maiwand (T. 603). It was admitted over appellant's hearsay and relevance objections. (G.Ex. 1201, A486; Decision: A49-A55). Maiwand writes that he left the country with two friends to "help my brothers and sisters" who lack food. He asks the recipients to re-pay two student loans (G. Ex. 1201, A 486). The Yar family was "85% happy" that Maiwand chose to help the poor but they were "15%" concerned about his overall well-being. Ahmed testified that while Islam does encourage repayment of debts before death, he believed Maiwand's concern about debts evidenced an intention to return to Canada and continue his education. (T. 609, 683, 692, 723).[4]

Two days later, Maiwand, telephoned from Pakistan and left a message on the family's answering machine. He stated simply "I am where I want to be" (T. 610). Concerned, Ahmed traveled to Peshawar, Pakistan in April 2007 (T. 611-12, 680-681). The registry of the Lahore Hotel reflected that Maiwand, Ferid

[4] As government witness Evan Kohlmann would later testify a Muslim need not re-pay debts if he is intending to engage in violent *jihad* (A383).

Imam and appellant checked in on March 14, 2007 and departed on March 17, 2017 (T. 618, 688; G. Ex. 1414-T).

Ahmed proceeded to the main office of the Dawa-e-Tabligh, an organization that coordinates charity work and keeps a log of who volunteers. (T. 673, 689-90). Ahmed could find no record that his brother had been there (T. 637, 734).

Following his return home, Ahmed made several attempts to contact his brother. For two years he heard nothing. Then in April 2009 a lengthy letter, apparently from Maiwand, arrived at Ahmed's mother's house. (T. 639, G. Ex. 1202, A487-A496). It was admitted over appellant's hearsay and relevance objections. (Decision: A49-A55).

Maiwand states there will always be a group "fighting jihad against their enemies until the day of judgment." (T. 646). He notes that there will be "astray sheiks [who] follow what the Government tell them to follow." (T. 648). He asserts that it is the obligation on (sic) every Muslim to fight those that have entered the Muslims lands. Referring to al-Qaeda and Taliban, "their purpose is to apply the rulings of Allah but people call them terrorists…" (T. 651). The author closes the letter expressing hope that the family moves back to Pakistan and asks that they not tell the government about his letter (T. 660-61). Neither appellant nor Imam are mentioned.

Ahmed sent the telephone number of Nasser, a relative in Peshawar, to the address listed on the envelope (T. 663). Shortly thereafter the family spoke with Maiwand via telephone (T. 664). He was "open" in the telephone call and agreed to meet with Ahmed in Pakistan. (T. 700-02, 710). He said nothing about appellant or Ferid Imam (T. 709) One week later, Nasser informed Ahmed that Maiwand wanted a second call (T. 712). Ahmed called the number. A man answered and said that Maiwand was no longer alive (T. 666, 712-13).

B. Cooperating Witnesses

i. Sufwan Murad

Thirty-nine-year-old Sufwan Murad[5] joined al-Qaeda in 2007 for the purpose of fighting "infidels", particularly those in the United States (A68). To join, Murad paid $16,000 to an al-Qaeda coordinator. That person facilitated his travel to Waziristan where he eventually linked with al-Qaeda members. (A68).

Murad's first assignment after training was as assistant director of guesthouses. (A78e). His true desire, however, was to fight militarily in Afghanistan (A230). On two occasions he was deployed to Afghanistan where he engaged in military operations (A81). Murad even videoed an armed attack by Taliban and al-Qaeda fighters on a local Afghan center. (A85-A86).

[5] [redacted] The witness testified via a Rule 15 deposition. [redacted]

Following his tours in Afghanistan, Murad returned to Waziristan. He assumed the position of deputy in the family affairs wing working as the driver for Haji Mohammed ("Haji"). Haji distributed money given to him by al-Qaeda commanders to families in need, various brigades and to members of the Jurists Committee. (A89).

In 2010 Murad left al-Qaeda and turned himself in to authorities in Pakistan (A93, A126, A232). He faced criminal charges and a possible life term in his home country (A126-27, A233). The charges included joining a foreign militia and plotting *jihad*, joining al-Qaeda, money laundering and participation in military actions, (A479-80). If also charged by American authorities he faced a possible life term that could be served in a place such as Guantanamo (A233-34). Murad realized that cooperation with both governments could be a way out (*Id*.).

Murad entered a deal with his home government. In exchange for a guilty plea, he was promised a ten-year prison sentence. In fact he was released after only two years (A127,A242). Upon release his government paid his university tuition and gave him periodic cash payments. By the time of the instant trial Murad had been paid an additional $30,000 in stipends (A242). The United States government was similarly generous. The U.S. government promised not to prosecute Murad for any crimes disclosed during his testimony (A244-45).

Murad testified that the military wing of al-Qaeda included an external operations brigade that targeted the United States, Europe and the West in general. While working as Haji's driver, Murad met Abdul Hafeez al-Somali who was head of external operations (A96). Haji met Hafeez periodically to deliver a stipend (A97). In 2009 Abdul Hafeez was killed in an air raid (A98-99). According to Murad, his replacement was a man named Abdullah al-Shami (A100, A125). Murad did not know how al-Shami came to be in al-Qaeda or any of his prior positions in that organization (A193). When questioned by American officials in 2017, he stated that al-Shami was not part of any brigade (A200).

It was the government's theory that al-Shami was in fact the appellant Muhanad al-Farekh. The "identification" was based upon the two (2) purported occasions in 2009 or 2010 when Murad claimed that he had seen al-Shami while Haji was delivering a stipend (A170). On the first occasion, in 2009 or 2010 Murad drove Haji to al-Shami's location and parked behind another automobile. Haji exited the car. Murad remained inside the car. At about the same time the man Murad said was al-Shami exited the car in front. He and Haji stood about 15 meters away talking. (A101-A103; A170-71). Murad could not hear their conversation (A180). After less than 10 minutes, Murad and Haji drove off. (A171).

Murad claimed that there was a second occasion when he saw al-Shami and Haji engage in conversation. However, he remembered none of that viewing's details. (A106-A107, A171, A177, A178).[6]

Murad gave various, inconsistent descriptions of al-Shami. In November 2010 he described him as having a fair complexion, a groomed beard and long straight hair that was not black (A105). In another November 2010 interview he told authorities that al-Shami was 33-34 years old, 5 foot three inches tall, looked European and had "medium light" skin that was both white and red. (T.1365, 1367). In that same November 2010 interrogation he stated that al-Shami had long blond, slightly brownish fine straight hair (T. 1365).

Murad testified that he was told that al-Shami was an American of Syrian origin. (A114). In November 2010, however, Murad told authorities in his home country that while he did not know al-Shami's nationality he spoke Arabic extremely well (A193). In none of his nine meetings with American officials did Murad states that he knew that al-Shami was American (T. 1367).

[6] During pre-trial interviews Murad sought to embellish his contacts with al-Shaml. When questioned by U.S. government officials in 2017 Murad stated that he actually met al-Shami on five occasions and that the two exchanged greetings in Arabic (T. 1367). In April 2015 he told American officials that he had met al-Shami on 5-6 occasions and that he spoke Arabic, Pashto and English (T. 1365).

During interrogations in his home country in 2011 Murad assisted in the creation of a computer-generated sketch of the person he knew as Al-Shami. The sketch, he testified, was 80% accurate. (A104, A109; Sketch: G.Ex. 100, A482). He acknowledged that he might have been shown photographs before assisting in the creation of the sketch. (A108). Among the photographs shown to Murad in his home country was Government's Exhibit 101-B, the photograph contained on appellant's Minnesota drivers' license. (A483). Murad did not know when he was shown that photo. (A110). He identified that photograph as depicting Abdullah al-Shami (A110, A112). On the rear of G.Ex. 101-B , Murad wrote "Abdullah Al-Shami..in charge of external operations…he is from Syria, originally from Syria. I surrendered myself and he was still there. He speaks English and Pashto. And he's between 32 to 35 years of age. I met him around the year 1429. Islamic calendar. And he became in charge after the death of Abdul Hafeez and then – Saleh al-Somali." (T. 907-908). [7]

During numerous interviews Murad was shown other photographs of appellant Al-Farekh and failed to make any identification (A115). For example, on April 7, 2015, he was shown Defendant's Exhibit 1, (A483a) a photograph of appellant, and could make no identification (A101, A157).[8] When shown

[7] The Islamic year 1429 converts to 2008 in the Gregorian calendar (T. 908).
[8] Appellant's Appendix includes only the front side of the photograph and not the written notations on the rear that are in Arabic.

Defendant's Exhibit 3 (A483b), also a picture of appellant he stated that it resembled Abu Ibrahim Al-Daghistani, a man with an amputated finger (A159-A160)). On April 7, 2015 when American officials showed him a profile picture of appellant, Defendant's Exhibit 4, (A483c) Murad made no comment. In fact when shown that same photograph at trial he stated that "I still don't recognize" the person. (A161).

Sometime in 2014 or 2015, Murad was shown Defendant's Exhibit 5 (A484) another version of G.Ex. 101-B, the photo of appellant that Murad identified as al-Shami. Contrary to his sworn assertion at trial that he was "100% confident" that the person in G.Ex. 101-B (appellant) was al-Shami he told authorities that he "had not seen" that person adding "I don't know him". (A162). Murad sought to explain that blatant contradiction by asserting that on that day "my memory or my mood was not in its best…" (A163).

Murad was aware of two people who went by the name Abdullah al-Shami (A222). The second one was Syrian and also worked in external operations (253). After an injury he was transferred to a different brigade and was later killed (A224, 201, A253-54).

ii. Zarein Ahmedzay

Zarein Ahmedzay and his co-defendants were part of an unrelated 2009 plot to set off explosives in the New York City subway system. The plan was called off

after FBI agents stopped his co-defendant's car on the George Washington Bridge and later conducted a search of Ahmedzay's home. In 2010 Ahmedzay pled guilty to conspiracy to use a weapon of mass destruction among other offenses. (T. 986, 1100, 1114). Facing a sentence of life, he decided to enter into a cooperation agreement. (T. 1087, 1104). He hoped to receive a sentence of 6-7 years, or time served (T. 1105).

Ahmedzay never met appellant Al-Farekh. Nor did he have any knowledge of appellant's purported activities. When shown appellant's photograph, he could not make an identification (T. 987, referencing G.Ex. 101-B).

In 2006 Ahmedzay and friends Adis Medunjanin and Najibullah Zazi became convinced that it was their duty to engage in violent *jihad*. (T. 990-994, 997). The three traveled to Peshawar, Pakistan. They eventually found someone who guided them to Waziristan. (T. 1005, 1007). They were told that the best was to contribute to *jihad* was to go back to the United States and carry out an attack there (T. 1009-10, 1021-1025).

Ahmedzay took part in weapons training. One of his three trainers was named Yousef. Yousef was a Black man who seemed to be from the United States. He identified the photograph on G.Ex. 103, the Manitoba Drivers' license of Ferid Imam as the trainer Yousef. (T. 987, 1012, G. Ex. 103). Yousef told Ahmedzay that he had been there for about a year and had hoped to fight in

Afghanistan (T. 1013-16, 1025). Ahmedzay returned to the United States in January 2009 and was ultimately arrested for the aborted plot described *supra*. (T. 1030).

C. The FOB Chapman Incident and Forensic Evidence

On January 19, 2009 a truck bomb exploded outside the north entrance gate of Forward Operating Base (FOB) Chapman in the Khost region of Afghanistan (T. 51, 59-60). Investigation revealed that two trucks were involved in the attack. The first exploded but the second, later referenced as the vehicle-borne improvised explosive device (VBIED) did not. The unexploded VBIED was impaled in a hole created by the first explosion (T. 63). A local Afghan soldier at the scene lost vision in one eye. Fortunately, there were no other serious injuries. (T. 64, 769-774, 776). Had the second truck exploded individuals within 3000 feet of the device would have been exposed to blast pressure, thermal effect and fragmentation (T. 816). Licata additionally testified that he created a video of a "controlled detonation" that would approximate the damage caused had the TNT in the VBIED exploded (T. 786, G.Ex. 504). It was received in evidence over appellant's Fed.R.Evid 403 objection. (Dkt. 144; A56-A57).

Former Army reservist Daniel Camden, the team leader of the Explosive Ordnance Unit (EOD) responded to the scene. He mounted water charges inside the VBIED which, when detonated, disrupted the firing circuit and rendered the

device safe (T. 96). Due to the lateness of the hour, evidence collection did not begin on January 19. (T. 97, 136). The VBIED was left in position overnight apparently guarded by members of the Afghan National Army (T. 138, 158). It could not be determined whether anyone accessed the VBIED overnight (T. 136).

The first task the following day, January 20, was to download boxes of explosive material from the VBIED/truck onto trailers. (T. 98, 101, 147), G. Ex. 667-668). That evidence was neither bagged nor labelled. It was simply stacked as they came off the VBIED and placed on trailers (T. 140, 143, 144 148). Accordingly, investigators could not later determine where on the truck a particular box or piece of evidence originated. Several people participated in this task. But there was no record kept of their identities (T. 136). A total of fourteen metal boxes of explosives were removed from the truck. (Camden: T. 109, 163; Chief Arlene Breitbard: T. 168).

The contents of the VBIED were taken to an ammunition supply point inside nearby FOB Salerno. There was no record of the time of day that the material arrived there. (T. 196-197). Each of the 14 boxes contained a large amount of homemade explosive (HME). In some boxes the HME was of sandy texture. In others it was tacky (T. 168-170). Submerged in the HME were booster charges made of the explosive PETN. Each individual booster charge was wrapped inside tan packing tape. (T. 114-115, 119, 161-162, 173; G.Ex 620 and 621) The

investigators cut the tape, exposing the PETN which was then poured out. (T. 228-229; G.Ex. 639, 641 and 642). This left the packing tape. It was placed in evidence bags and given to the combined explosive exploitation cell ("CEXC") (T.119). Because no log was kept, it could not later be determined from which booster charge a piece of tape came or even which box of explosives the tape originated (T. 146-47, 229).

The bags containing the tape were shipped to Bagram and forensic investigator Craig Coppok (T. 263). There was no record kept of the identity of the person(s) who handled the tape between the time it left Salerno and its arrival at Bagram. (T. 191). Coppock was not aware of any photographs of the evidence taken upon arrival (T. 298). Coppok unraveled the bulk pieces of brown packing tape and cut the tape into numerous pieces. Coppok applied chemicals and raised 102 latent impressions (T. 268; Government Exhibits 301-A through 301-I). Coppock did no comparisons.

During the HME sifting process at Salerno on January 20 Camden found a human hair. (T. 145, 158). Upon discovery he notified Chief Arlene Breitbard. (T. 166). Contradicting Camden, Breitbard testified that it was she herself, and not Camden, who discovered each of the five human hairs found during evidence collection (T. 171, 198-99; Government Exhibit 637: photograph depicting the human hairs recovered) (T. 172). Neither Camden nor Breitbard could state from

which of the 14 boxes of explosives the hairs originated. (T. 145, 158, 204, 207-08). The envelopes containing the hairs were sent to Bagram for further analysis (T. 145, 175).

On April 2, 2015, more than six years after the FOB Chapman explosion, appellant was placed into the custody of United States law enforcement and transported to the Eastern District of New York. (T 1332-40) A set of Major Case prints were taken from him on June 9, 2015. (T. 319-327).

FBI Fingerprint Examiner Karen Sibley was assigned to perform the fingerprint comparison. Sibley acknowledged that it is a subjective process, subject to human error (T. 476-77).[9] An opinion stating that an identification is a "match" "to the exclusion of all others" has never been tested by empirical research (T. 479). Rather, an "identification" is labeled as such when an examiner is personally satisfied that there are sufficient points of agreement between the known print and latent impression. Examiners have disagreed on purported identifications (T. 481). In fact in this case one latent print that had been classified

[9] Prior to trial, appellant stated an intention to confront Sibley with a Justice Department Report on the case of Brandon Mayfield who was erroneously linked through FBI fingerprint comparison, to the March 11, 2004 Madrid, Spain terrorist attack. (Dkt. 140-1). Appellant argued that he should be able to use that Report to challenge the reliability of Sibley's findings. The lower court precluded use of the report on Fed.R.Evid. 403 grounds. (A56-A57).

as “inconclusive” was on later examination excluded from being appellant’s (T. 477).

Sibley deemed twenty-seven of the 102 impressions found by Coppock to be prints of value (T. 447). She opined that eighteen of them were Appellant’s (T. 447). All were on the adhesive side of the brown packing tape (T. 457). Nine of the twenty-seven latent impressions, while of value, were made by someone else, not Appellant. Two of them were on the adhesive side of the tape (T. 457).

Kimberly Reubush an examiner at the Terrorist Explosive Device Analytical Center (TEDAC) examined the hairs recovered at the scene. She opined that the hair denominated Q 17.7 came from a Caucasian. The hair was brown with artificial orange dye on its surface (T. 390-92).

FBI examiner Constance Fisher performed a mitochondrial DNA analysis on the recovered hair. Unlike nuclear DNA, a mitochondrial DNA sequence is not unique to the individual; all maternal relatives will share it. (T. 348, 351, 59-60). Even some people not maternally related will share that same sequence. (T. 372). Mitochondrial DNA comparisons can 1) exclude a person, 2) be inconclusive or 3) not exclude a person (T. 352). In those situations where a person cannot be excluded, a statistical analysis is performed to determine the size of the pool of people with the same mitochondrial DNA sequence (T. 355-56).

In 2009, the witness received hair samples logged by Breitbard and performed a mitochondrial analysis on each. Seven years later, in 2016 she was provided with a sample of Appellant's mitochondrial DNA. Appellant was definitively excluded as the source of four of the hairs. (T. 359-61.) With respect to one of the hairs, Q.17.7, appellant could not be excluded as the source (T. 361, 385). There could be tens of thousands or even millions of people, in addition to appellant, who could have been the source of the hair. (T. 384).

D. The Handwritten Letters

On September 4, 2015, while on the U.S. Embassy compound in Kabul, FBI Legal attache John Dalziel was handed a USB drive and other computer media. (T. 895, G.Ex. 700). He did not know where the materials originated or how they came to be given to the FBI. The drive was sent to the FBI in New York and analyzed. Among thousands of files of many types on that USB drive were about 50 pages of JPEG, or image, files. (T. 949).

The JPEG files consist of images of handwritten notes on lined paper that appeared as if it had been ripped from a notebook (T. 916, 947). An FBI handwriting expert could only state that appellant "may have" prepared some of the nonobliterated English writing in the questioned letters. (T. 974, 981; Def't. Ex. 7). These JPEG files were admitted over appellant's authenticity objection. (See

Dkt. 118, p. 2; and T. 918, 1242-43 referencing G.Ex. 701-719 and 701-T to 719-T).[10]

Most of the letters contain a date from 2013. Some are signed with the name "Abdullah al-Shami". On a few that name is followed by a reference to the "Abu Bakr Battalion" (T. 920). The letters address a variety of the author's concerns. These include the author's safety and security and a plea for more regular communications (T. 922-23, 926, 929-930). On one letter the author expresses a desire to go to Syria because the situation where he was "is very confusing" and that the Taliban "don't really have a need for us." (T. 927). In a letter written entirely in Arabic the author requests housing assistance, explaining that his landlord might sell the house in which he was living. (T. 932, G. Ex. 701).

E. Opinion Evidence

i. Lorenzo Vidino

The government notified appellant that it intended to call Lorenzo Vidino PhD. as an expert in Islamic extremism. Vidino would opine that there is no typical profile of someone who is susceptible to radicalization (Dkt. 148, p. 4). Appellant moved to preclude that opinion evidence. (Dkt. 158, p. 1-3). The trial court ordered a *Daubert* hearing to determine admissibility.

[10] The "T" exhibits consist of typed versions of the handwritten letters and translations of those portions of the letters that were in Arabic (T. 919). Copies of the letters are contained in the Appendix at A497-A544.

a. The Daubert Hearing

Lorenzo Vidino is a professor at George Washington University's program on extremism. (A265, A269). His articles have been peer reviewed and he reviews 3-4 articles per year (A271-A274). He has personally interviewed about 30 jihadists and read studies conducted by others (A285).

Vidino testified that there is no accepted definition of the term "radicalization". (A280). Rather, it "is the term of art used by academic and policy makers to describe the process that an individual undergoes when embraces (sic) extremist ideology." (A275). Academics in his field commonly disagree about whether a person is "radical". (A267).

There is no accepted profile of a person who might be susceptible to radicalization (A275). There need not be direct contact with a terrorist organization. A person may be isolated or become radicalized along with a small group of friends. (A276).

Vidino's opinions on the radicalization process have not been verified through application of the scientific method. (A280-81). There has been no testing through use of control groups to determine whether there are in fact certain variables that might make someone more susceptible to becoming radicalized.(*Id*.). Nor are there any other accepted diagnostic tools (A288). Vidino admitted that there is an error rate but could not quantify it (A286).

The court overruled appellant's objection and permitted the proffered testimony. The court acknowledged that the evidence "has little probative value and little prejudicial impact". But if jurors were asking themselves why someone from appellant's background would join al-Qaeda then Vidino's testimony was "appropriate." (A298-A301).

b. Trial Testimony

Dr. Vidino testified that al-Qaeda is a hierarchical organization which sees the United States as the main enemy of Islam (T. 1145-46, 1168). It is secretive and uses compartmentalization (T. 1195). Al-Qaeda members are recruited from all over the world as its message is spread through the production of readily accessible videos and lectures (T. 1164, 1166). Among the most popular are the hundreds of hours of lectures given by Anwar al-Awlaki, an American of Yemeni descent (T. 1176, 1200). Al-Awlaki became prominent in the late 1990's as a conservative, mainstream Muslim (T. 1202). He did not start advocating violence until after 2006-2007 and was not designated a terrorist by the State Department until 2010. (T. 1205-06). A 2005 lecture called "Constants on the Path of Jihad" urged Muslims from all over the world to join the struggle. (T. 1224).

Recruits with American or British passports are particularly valuable (T. 1173, 1223). It is not uncommon for a recruit to travel to Pakistan without a prior direct contact with the organization (T. 1154-56). According to Vidino such

people would simply go to a mosque and try to strike up a conversation with the right person (T. 1156)

When the prosecutor asked Vidino whether there was a "logical route" one would take from the West to join al-Qaeda, appellant objected as beyond the scope of the government's expert notice. The court overruled the objection (A307-A310). Vidino then testified:

> There's different ways but I would say the most common way would be people would be flying from the west, sometimes using – flying through different cities, not taking the most direct route to avoid security and then land in one of the big airports in one of the big cities in Pakistan, whether it be Karachi or Lahore or Islamabad, after making contact with some gatekeepers from al-Qaeda, facilitators, recruiters and make their way to the FATA.

(A311).

According to Vidino "[p]eople who radicalize come from all walks of life and all kinds of backgrounds." There is no commonly accepted definition of the term "radicalization." *(*A314-A315).

ii. Evan Kohlmann

Evan Kohlmann was called by the government to summarize various jihadist lectures contained on links in emails previously introduced. (A329-30). Appellant objected, stressing that with one exception there was no evidence that appellant

watched any videos or downloaded any lecture (A330; A337-39; Dkt. 161). The objection was overruled. (A335-A343).

Since 1998 Evan Kohlmann has been collecting information from a variety of sources about "Sunni jihadist" organizations such as al-Qaeda and the Islamic State. (A350). Government's Exhibit 801 (A545), a March 16, 2006 email from Ferid Imam to appellant and several others contained a link to the website "Aswat al Islam". That site contains several of Anwar al-Awlaki's lectures that were available for download (A353-54 referencing G.Ex. 1001). One of the lectures is entitled "It's a War Against Islam" released in 2003. Kohlmann stated that in al-Awlaki's opinion U.S. police raids on Islamic Centers were attacks on Islam (A355-57).

On July 8, 2006 Ferid Imam sent an email to Maiwand Yar informing him that the lectures they had listed to were no longer available on "uponsunnah". Appellant was not a recipient of that email. (G.Ex. 804; A546). That site contains links to several of al-Awlaki's sermons including "Constants on the Path of Jihad", the most widely discussed al-Awlaki lecture. Screenshots of that site were admitted over appellant's objection (A361, G.Ex. 1010 and 1011). The main point of the five-hour lecture, Kohlmann testified, was that jihad must continue whether or not there is a commander or an Islamic State. (A376). Maiwand Yar's letters to his family, Kohlmann testified, contained remarkably similar views as

those expressed by al-Awlaki in "Constants on the Path of Jihad (A381-83 referencing G.Ex. 1201 and 1202).

On February 18, 2007 appellant sent an email to members of his family suggesting "The Hereafter" and providing a link to the website salaattime.com (A 551). According to Kohlmann, in "The Hereafter" al-Awlaki spoke of the punishments that would be inflicted on Muslims who do not live up to their obligations. (A366-67). Kohlmann summarized two other lectures on the site, "Allah is Preparing for Victory" and "Life of the Prophet". (A370-73).

Over appellant's relevance and Fed.R.Evid. 403 objections (Dkt. 161), the court permitted the government to play an excerpt from a video produced by the Islamic Army in Iraq entitled "Lee's Life of Lies". It illustrates jihadi attacks on United States military vehicles (A388). The government argued it was relevant because G.Ex. 503, shows appellant at a computer screen when the opening of a video and the words "Islamic Army in Iraq" appears. Appellant is also heard to say, "It's good" and the words "Lee's Life". (G.Ex. 503). The homemade video concluded seconds later. Referring to the video, defense counsel stated

> …there is a soldier in a helmet in an open turret on the top of the Humvee that then gets blown to bits…The idea of presenting videos of American soldiers being killed to the jury to me is the essence of unfair prejudice.

(A388). The lower court permitted the government to play two excerpts finding the video "highly probative". They depict two U.S. military vehicles being blown up and deaths of U.S. soldiers (A384-390; G.Ex. 506.1 and 506.5).

The Defense Case

Appellant called no witnesses. However, counsel did read into the record a lengthy stipulation recounting inconsistent statements made by the witnesses Murad and Soufi. (A476-A481).

Jury Deliberations and Motion for Mistrial

On the morning on September 28, 2017, the second day of deliberations, Juror Number 2 reported a contact with appellant's father. She stated that on the prior evening, she and a few other jurors were in the elevator. A man she recognized as appellant's father, stepped into the elevator and stated to the group "I have not seen –I have not kissed my son for ten years." (A456-57). An individual *voir dire* determined that four jurors were present when appellant's father made that remark. A fifth juror, Juror Number 4, was told about the incident. After further proceedings the court discharged the four jurors in the elevator but denied appellant's motion to excuse Juror 4 as well. The case proceeded, over objection, with 11 jurors. (A439-41).

The Verdict

On September 29, 2017 the jury returned its verdict convicting appellant of each of the nine counts contained in the Indictment. (T. 1717-1718).

The Presentence Report

a. The Advisory Guideline Term

The Probation Department determined the advisory Guideline prison range to be life imprisonment. The total offense level was calculated to be 61. However pursuant to Chapter 5, Part A, all offense levels in excess of 43 are treated as if they were level 43 (PSR ¶ 88).

Appellant has no prior contacts with the criminal justice system and would ordinarily be placed in Category I. However, as per U.S.S.G. § 3A1.4(b), the terrorism enhancement, appellant was placed in Category VI. (PSR ¶ 91). With an offense level of 43 and a Criminal History Category of VI, the Guideline prison range is life (PSR ¶ 111).

b. Appellant's History and Characteristics

Appellant Muhanad Mahmoud Al-Farekh was born on October 15, 1985. He was just 21 years old when he left Canada in 2007 and 28 years old when taken into American custody in 2015. Although an American citizen by birth, he was primarily raised in the Abu Dhabi in the United Arab Emirates (PSR ¶ 96). His father works in the oil and gas industry. His mother is a teacher. His father suffers

from a variety of disorders including bi-polar disorder. The PSR notes that appellant "shares a close relationship with his parents." (*Id.*). Appellant attended the University of Manitoba from 2004 until 2007. He has no history of substance abuse (¶¶ 104-105).

Since his incarceration appellant has been housed in solitary confinement and under Special Administrative Measures (SAMs) that greatly restrict communications with other human beings. He told the Probation officer that these conditions have affected his ability to concentrate, caused memory loss and disrupted sleep. Appellant suffers from depression and anxiety (PSR ¶ 103).

Defense Sentencing Submission

Appellant filed letters from family setting forth their experiences with him. He also submitted his own letter to Judge Cogan. (Defense Sentencing Submissions: Dkt. 183, 184, 186). In his letter appellant told the court that he did not believe in violence, "especially when it is inspired by religion." Appellant told the court that he recognized that some young Muslims "could be drawn into *jihad*". That path, however, "is risky, foolhardy and most fundamentally wrong."

THE SENTENCING

On March 13, 2018 the parties appeared for sentencing. The court noted appellant the letters from appellant and his family. However it was concerned that appellant's letter was "not an enthusiastic acceptance of responsibility or remorse."

(A574). While the court determined that it would not impose the maximum term, it imposed a sentence of 45 years or 540 months. Under its own calculation that would make appellant approximately 67 years old when released. (A576).

SUMMARY OF ARGUMENT

The trial court committed errors that require that the judgment be vacated and a new trial ordered. The court's consideration of the government's CIPA motions *ex parte* was erroneous given that appellant had trial counsel with security clearance. [redacted].

Various evidentiary errors denied appellant a fair trial. These include the erroneous admission of purported co-conspirator statements, handwritten notes that were not properly authenticated, improper opinion evidence and the presentation of inflammatory and prejudicial lectures and videos. In addition, counsel was improperly prohibited from using a Department of Justice Report to confront the government's fingerprint expert. Appellant was denied his right to a fair and impartial jury when the court refused to discharge a Juror who was aware of improper contact.

Finally, the 45-year sentence imposed on appellant, a young man with no prior criminal involvement, was excessive.

ARGUMENT

POINT I

REVERSIBLE ERROR WAS COMMITTED WHEN THE LOWER COURT ADJUDICATED THE GOVERNMENT'S MOTIONS PURSUANT TO THE CLASSIFIED INFORMATION AND PROCEDURES ACT *EX PARTE*.

On February 29, 2016, the government filed a motion for a conference pursuant to Section 2 of the Classified Information and Procedures Act. At that March 1, 2016 conference the government stated its intention to file a motion pursuant to Section 4 of CIPA "as there may be some classified discovery" (T. March 1, 2016, , Dkt 45, p. 3). On June 27, 2016, the government filed its CIPA motion *ex parte, in camera* and under seal (Dkt. 48, 50).

In papers dated July 11, 2016, appellant Al-Farekh opposed the government's motion. He objected to the *ex parte*, nature of the proceedings. He further argued that because counsel had obtained security clearance, they should have access to the government's motion. (Dkt. 51, p. 7, 10).

On August 23, 2016 the lower court granted the government's motion in its entirety. (A27). In concluded that *ex parte* proceedings were proper and additionally concluded that the government's classified summaries of the classified source documents satisfied the government's discovery obligations. The withheld material, the court found, was "not helpful to the defense." (A32). On April 28,

2017 the government filed a second, *ex parte* motion pursuant to CIPA § 4. (Dkt. 97). That motion was granted on May 24, 2017 (A33).

Section 4 of CIPA permits the government to delete, summarize or substitute specified items of classified information ordinarily disclosable. Such deletions may be made only "upon a sufficient showing" that full production would pose a reasonable danger to national security. 18 U.S.C. § App. 3 § 4. In the context of a criminal case, the deletions or substitutions authorized by CIPA must be accomplished "in a way that does not impair the defendant's right to a fair trial." *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008). The common law source of the privilege set forth in CIPA , the state secrets privilege, must give way when the evidence at issue "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). CIPA "is not intended to affect the discovery rights of a defendant.". H.R. Rep. No. 96-831, pt. 1 at 27 (1980).

To grant the government its requested CIPA relief whether by deletion or, in this case, the substitution of summaries, a district court must determine 1) whether the information at issue is classified, 2) whether the information is discoverable, 3) whether the state secrets privilege applies and finally 4) whether the deleted or substituted information is helpful to the defense. Reversible error was committed

herein when the lower court made its CIPA determination during *ex parte* proceedings.

The CIPA § 4 Motion Should Not Have Been Determined *Ex Parte*

This Court reviews for abuse of discretion the district court's application of CIPA. *United States v. Abu-Jihad,* 630 F.3d 102, 140 (2d Cir. 2010).

Ex Parte proceedings, especially in criminal cases, are exceedingly disfavored. By their very nature, *ex parte* proceedings impair the integrity of the criminal justice system. "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights…No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." *United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 55 (1993).

It is in light of the foregoing that application of CIPA must be viewed. When the government seeks to make deletions to or provide summaries of otherwise discoverable material

> [t]he court may permit the United States to make a request for such authorization in the form of a written statement to be inspected by the court alone.

18 U.S.C. app. 3 § 4. Clearly, § 4 authorizes *ex parte* submissions. But it does not mandate them. Had Congress chosen to require *ex parte* submissions in CIPA applications it had the power to do so by using the word "shall" or "must" instead

of "may". Courts themselves are not free to read such mandatory language into the CIPA statute. *Cf. United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994). (Courts are not free to read language into a statute.).

This Court has sanctioned *ex parte* proceedings in CIPA cases. *Aref,* 533 F.3d at 81 and *Abu-Jihad,* 630 F.3d at 143. However, in the instant case and contrary to *Aref* and *Abu-Jihad*, appellant was represented by counsel who had obtained the appropriate security clearance. They were prohibited from disclosing classified information to anyone absent compliance with CIPA §§ 5 and 6. Given that fact, there was no justification for denying them the opportunity to have access to the government's motion so that an effective argument could be made for further disclosure.

As the Sixth Circuit had noted,

> The defendants and their counsel, who are in the best position to know whether information would be helpful to their defense, are disadvantaged by not being permitted to see the information—and thus to assist the court in its assessment of the information's helpfulness.

United States v. Amawi, 695 F.3d 457, 471 (6th Cir. 2012). This case covered a span of eight years and several geographic locations. It is likely that the relevance or materiality of a particular piece of information would not be readily apparent except to someone with intimate knowledge of the facts. *Alderman v. United States*, 394 U.S. 165, 182 (1969) (observing than an advocate with intimate

knowledge of facts are in the best position to determine whether something is relevant).

Should this Court find the lower court's rulings to be procedurally proper, it should nonetheless conduct its own *in camera* review of the source documents. CIPA § 4 provides that

> [i]f the court enters an order granting relief following such an *ex parte* showing, the entire text of the statement of the United States shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

18 U.S.C. app 3 §4. Consistent with § 4 appellant respectfully requests that this Court conduct its own evaluation of the summaries vis a vis the source documents and make an independent determination as to whether any exculpatory and/or "helpful" information was withheld from the defense.

POINT II

[redacted] IDENTIFICATION OF APPELLANT BY THE WITNESS [redacted] SHOULD HAVE BEEN SUPPRESSED AS THE PRODUCT OF A SUGGESTIVE PROCEDURE

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

> [redacted]

[redacted]

[redacted]

[redacted];

[redacted]

[redacted]

POINT III

REVERSIBLE ERROR WAS COMMITTED WHEN THE LOWER COURT ADMITTED, OVER APPELLANT'S RELEVANCE AND HEARSAY OBJECTIONS, THE OUT OF COURT STATEMENTS OF PURPORTED CO-CONSPIRATORS.

The government moved *in limine* to admit three written communications from alleged co-conspirators Ferid Imam and Maiwand Yar to their respective families. (Dkt. 137). Appellant objected to their admission (Dkt. 150). He argued that the letters, made to non-coconspirators, constituted inadmissible

hearsay and were irrelevant (Dkt. 150). He further argued that even if admissible, any marginal probative value of the letters was outweighed by the danger of prejudice. (*Id*.) The lower court overruled appellant's objections in a written decision. (A49-A57).

The court separated the statements into three categories. The first category included those where Imam or Yar requested that family members take specific actions on his behalf. For example, Ferid Imam told his family to pay his debts and to pray for him. (A485). Yar also requested that his family pay his debts and "make dua (pray) for [him]" (A486). . The second category of were characterized by the lower court as statements wherein the men apologized to their family, engaged in religious discourse or encouraged their family to "support them and their cause." The third and final category of statements are those in which the alleged co-conspirator states an intention to wage *jihad*. Only Yar's statements, contained in Government's Exhibits 1201 (A486) and 1202 (A487-496) fell into this last category.

The court found statements falling into the first two categories, did not constitute hearsay as they were not being offered for their truth. The statements were relevant as to appellant because the views expressed by Yar and Imam make it "arguably more likely that appellant held similar extremist views." (A55). The third category of statements, Yar's stated intention to join the *jihad*, were

admissible for their truth, the court held, as statements in furtherance of the conspiracy, Fed.R.Evid 801(d)(2)(E) or as declarations against penal interest, Fed.R.Evid. 804(b)(3).

The lower court's ruling constituted an abuse of discretion warranting reversal and a new trial. *United States v. Tropeano*, 252 F.3d 653, 657 (2d Cir. 2001)(non-constitutional admissibility issues reviewed for abuse of discretion). The first two categories of statements although not admitted for their truth, were plainly irrelevant and prejudicial. The statements in the third category, which were admitted for their truth, were not coconspirator statements as defined in Fed.R.Evid. 801(d)(2)(E). Nor were the declarations against penal interest, Fed.R.Evid. 804(b)(3).

1. Statements Not Admitted for Their Truth

> For out of court statements to be received in evidence for purposes other than their truth the proponent must satisfy Federal Rules of Evidence 401 and 403, that is (1) the non-hearsay purpose for which the evidence is offered must be relevant and (2) the probative value of the evidence for this non-hearsay purpose must not be outweighed by the danger of unfair prejudice.

United States v. Paulino, 445 F.3d 211, 217 (2d Cir. 2006) citing *Ryan v. Miller*, 303 F.3d 231, 252-53 (2d Cir. 2002) and *United States v. Reyes*, 18 F.3d 65, 70 (2d Cir. 1994). *See also United States v. Harwood*, 998 F.2d 91, 97 (2d Cir. 1993)(statements admitted for the fact that they were made are only admissible if

the mere fact that they were made is relevant to some issue in the case). The greater the likelihood of prejudice resulting from the jury's misuse of the statement, the greater the justification needed to introduce the out of court statement for something other than its truth. *Reyes*, 18 F.3d at 70. The mere identification of a non-hearsay purpose is insufficient if the jury is likely to consider the statement for its truth with resultant prejudice. *Reyes*, 18 F.3d at 70. This Court has identified several factors that should be considered when making the foregoing determination:

> (i) Does the background or state of mind evidence contribute to the proof of defendant's guilt? (ii) If so, how important is it to the jury's understanding of the issues? (iii) Can the needed explanation of background or state of mind be adequately communicated by other less prejudicial evidence or by instructions? (iv) had the defendant engaged in a tactic that justifiably opens the door to such evidence to avoid prejudice to the government?

Id.

The "state of mind" statements made by Ferid Imam and Maiwand Yar did not "contribute" to proof of Muhanad Al-Farekh's guilt. *Id*. Fed.R.Evid. 401 instructs that evidence is "relevant" if (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and, (b) the fact is of consequence in determining the action. The issue for the jury to determine in this case was whether appellant Al-Farekh left Canada with the intent of joining *jihad*.

Yar's and Imam's letters contribute nothing. Appellant is not mentioned in the writings by name or otherwise. Indeed, there is no evidence that appellant was even associating with Yar in January 2009 when G.Ex. 1202, the nine-page letter, was delivered to Yar's family. Yar's and Imam's instructions or commands to their respective families regarding debts and Yar's 2009 ruminations on how he believed that Islam compelled violent *jihad* did not make it more or likely that appellant Al-Farekh intended to engage in *jihad*.

The lower court held that the views expressed by Yar and Imam were relevant because it "makes it arguably more likely that [appellant Al-Farekh] held similar view" (A55). Assuming *arguendo* that the writings had marginal relevance on that point, the same point could have been made and was in fact made through less prejudicial means. *Id.* For example, government witness Soufi claimed that appellant had listened to the lectures of Anwar al-Awlaki.(T. 560, 569, 575). Appellant himself recommended one of al-Awlaki's lectures, "The Hereafter" to his family. (A551). According to the government he urged others to watch the video "Lee's Life of Lies". (G.Ex. 503). These items of evidence had some arguable connection to appellant Al-Farekh. Imam's and Yar's letters to their family did not.

The minimal probative value of the letters was substantially outweighed by the danger of "unfair prejudice, confusing the issues, [and] misleading the jury,"

Fed.R.Evid 403. Particularly prejudicial was G.Ex. 1202, (A487-A496) the nine-page letter Yar sent to his family in January 2009. It is not an exaggeration to say that it celebrates acts of terrorism. Yar tells his family that

> there will always remain a group fighting Jihad against these enemies until the day of judgment …
>
> In our time it is an obligation on every Muslim to fight those that have entered Muslim lands (Ex. Afghanistan, Palastine (sic)…This is the reason why I didn't ask for permission and didn't tell you because I knew the answer I was going to get.
>
> Referring to Al-Quida and Taliban their only purpose is to apply the rulings of Allah (swit)
>
> …the body of the mujahid does not decompose until the day of judgment.
>
> So I tell you if you truly believe me, those are all lies the media say about the mujahideen.

G.Ex. 1202, A488, A490, A491, A492). Further adding to the prejudice was the testimony of Evan Kohlmann. He was permitted to opine, over appellant's objection, that the sentiments expressed by Yar are "remarkably similar" to those expressed by the deceased cleric Anwar al-Awlaki. (A382). These were Yar's statements, not appellant's. Their admission could only have confused, and prejudiced, the jury.

Given the letters' nonexistent connection to appellant Al-Farekh and the inflammatory rhetoric contained in G.Ex. 1202, it was an abuse of discretion for

the lower court to admit them at trial. *United States v. Al-Moayad*, 545 F.3d 139, 160-161 (2d Cir. 2008).

2. Statements Admitted for Their Truth

The third category statements, admitted for their truth, were statements made by Maiwand Yar in the undated email (G.Ex. 1201; A486) and the nine-page letter sent in 2009 (G.Ex. 1202; A487-A496). From them, it could be inferred that Yar left Canada to engage in *jihad* and did, in fact join al-Qaeda. The court identified examples of them as follows:

> I chose the path in which Allah has guided me. I have left the country already with two of my friends to help my brothers and sisters. (G.Ex. 1201, A486)
>
> "[These [jihadists] are the best people in the world…And I tell you this from experience because I have spend (sic) time with them" (G.Ex. 1202,)
>
> "…and I swear by Allah from the experience I have here [meaning fighting *jihad]* (G.Ex. 1202,)
>
> In Pakistan I can keep contact with you guys and even visit you sometimes." (G.Ex 1202)

For the reasons stated *supra*., the statements were inadmissible because they were irrelevant. While the sentiments expressed therein may have correctly reflected Yar's intent in 2009 they were not probative of appellant Al-Farekh's in 2007 and were, therefore, irrelevant. *Harwood*, 998 F.2d at 97.

Even if deemed relevant the statements were inadmissible hearsay. They were not admissible as declarations against interest or as non-hearsay coconspirator statements.

a. Statements Against Interest

Fed.R.Evid. 804(b)(3) allows for the admission of statements against a declarant's proprietary, pecuniary or penal interest if the declarant is unavailable as a witness. The statement is admissible if it is a statement that

> (A) A reasonable person in the declarant's position would have made only if the person believed it to be true when made because, it had so great a tendency…to expose the declarant to civil or criminal liability; and
>
> (B) Is supported by corroborating circumstances that clearly indicate its trustworthiness , if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

In assessing whether a statement falls within the Rule, the district court must first determine "whether a reasonable person in the declarant's shoes would perceive the statement as detrimental to his or her own penal interest." *United States v. Gupta*, 747 F.3d 111, 127 (2d Cir. 2014) citing *United States v. Saget*, 377 F.3d 223, 231 (2d Cir. 2004). The question must be answered considering all relevant circumstances. *Williamson v. United States*, 512 U.S. 594, 604 (1994). Only those portions of the statement that are self-inculpatory are admissible even if those statements are part of a longer narrative. *Williamson*, 512 U.S. at 600-601.

Thus, each part of the hearsay statement must be separately parsed and must be self-inculpatory. *United States v. Tropeano*, 252 F.3d, 653, 658 (2d Cir. 2001).

Government Exhibit 1201 (A486), the undated email where Yar states that he has left "to help my brothers and sisters" is not self-inculpatory. His plan, as he told his family, was to help the poor not to engage in *jihad*:

> We live a life of ease while our brothers and sisters are suffering so much without food…we have to understand that when our brothers and sisters are in need we have to leave everything and help them.

Statements that are not sufficiently self-inculpatory are inadmissible under the exception. *United States v. Vegas*, 27 F.3d 773, 782 (2d Cir. 1994)(statement "I know who gave me the drugs…They [referring to defendants] didn't give me the drugs" not sufficiently inculpatory). There is nothing in Yar's email that would have led any reasonable person to believe that it was detrimental to his penal interests. *Id*.; *See also United States v. Yildiz*, 85 Fed.Appx. 239, 242 (2d Cir. 2004) (summary order); *United States v. Jackson*, 335 F.3d 170, 179 (2d Cir. 2003).

Other factors take both letters outside the ambit of Rule 804(b)(3). Both were sent to Yar's family. The *jihadist* rhetoric in Exhibit 1202 aside, it is clear from the letters that Yar loved and trusted his family. He would not expect that they would give the letter to the authorities and expose him to criminal liability. Contrary to the lower court's observation, there is no indication that Yar believed

that G.Ex. 1202 could have been intercepted by law enforcement. Yar had apparently decided to engage in violent *jihad*. He was not thinking about a criminal prosecution in Canada or the United States. Accordingly, the statements are not admissible under the exception

b. Coconspirator Statements

Before admitting an out of court statement as non-hearsay pursuant to Fed.R.Evid. 801(d)(2)(E), a court must be satisfied that the statement falls within the definition contained in that Rule. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). To qualify for admission,

> a court must find (1) that there was a conspiracy, (2) that its members included the declarant and the party against whom the statement is offered and (3) that the statement was made during the course of and in furtherance of the conspiracy.

United States v. al-Moayad, 545 F.3d 139, 173 (2d Cir. 2008). To be in furtherance of the conspiracy the statements "must be such as to prompt the listener..to respond in a way that promotes or facilitates the carrying out of criminal activity. *Maldonado-Rivera*, 922 F.2d at 958. These can include statements that provide reassurance or seek to induce a coconspirator's assistance, or which serve to foster trust or cohesiveness. *Id.* at 959. A finding as to whether a proffered statement was made in furtherance of the conspiracy must be supported

by a preponderance of the evidence. *Gupta*, 747 F.3d at 125 *See also United States v. Thai*, 29 F.3d 785, 814 (2d Cir. 1994).

The various statements set forth in G.Ex. 1201 and 1202 were made by Yar to his own family not to other alleged coconspirators. While statements made to individuals who are not members of the conspiracy can fall within Rule 801(d)(2)(E), the scope of the "in furtherance" requirement is narrower. The communication must be "factually intertwined" with the charged offenses, *United States v. Stratton*, 779 F.2d 820, 829 (2d Cir. 1985) and designed to help the coconspirators achieve the conspiracy's goals. *United States v. Rivera*, 22 F.3d 430, 436 (2d Cir. 1994). Thus, a simple narrative made to a non-conspirator will not meet the "in furtherance" requirement. *United States v. Birnbaum*, 337 F.2d 490, 495 (2d Cir. 1964).

None of the subject statements would have prompted members of Yar's family to do anything that might aid the conspiracy. The lower court observed that Yar's suggestion that the family move to Pakistan amounted to "encouragement and recruitment of others to support jihadist values and members of al-Qaeda." (A55). That conclusion is not supported by the text of the letter. Yar tells his family that they should return to Pakistan because under Yar's interpretation of Islam, Muslims should not "live around kufar [non-believers]". At no time does Yar suggest that they too engage in jihad or support al-Qaeda.

Should the family move the immediate benefit to Yar was simply that he could "keep contact with you guys and even visit you sometimes." (G.Ex. 1202, p. 8.). This is not something "designed to help the coconspirators achieve the conspiracies goals." *Rivera*, 22 F.3d at 436.

3. Admission of the Statements was not Harmless.

Erroneously admitted evidence is less likely to be harmless if the prosecution emphasizes it during summation. *Zappulla v. New York*, 391 F.3d 462, 471 (2nd Cir. 2004) citing *Arizona v. Fuliminante*, 499 U.S. 279 297-298 (1991). The prosecutors did so here. The prosecutor argued that because Yar and Imam had been successful in joining al-Qaeda it was likely that appellant was also successful. He then quoted extensively from Yar's 2009 letter:

> THE PROSECUTOR: Now this letter continues to tell his family why he left. He says, starting in the middle of the first line, 'in our time it is an obligation on every Muslim to fight those that have entered the Muslim lands, for example, Afghanistan and Pakistan and fights(sic) those who have apostate from this deen, for example, all the Muslim governments…'
> Now this is a lot like the message that Evan Kohlmann told you yesterday that Anwar al-Awlaki delivers in his lectures. This obligation of jihad is like a fard prayer on fasting Ramadan, meaning its compulsory..And [Yar] says referring to al-Qaeda and Taliban, 'their only purpose is to apply the rulings of Allah but people call them terrorists and other things…I tell you this from experience because I have spent time with them…'

(T. 1431-32). Yar's letter, he argued "is reflective of Muhanad Al-Farekh's mindset when he left Canada in 2007 to travel to Pakistan." (T. 1432). In his rebuttal summation, the prosecutor emphasized it again. The language in Yar's letter, he argued, was "unambiguous and showed that all three young men left Canada with the intent to engage in jihad and to join al-Qaeda or the Taliban." (T. 1553).

The remaining evidence did not overwhelmingly establish appellant's guilt. The fingerprint evidence was challenged by the defense on two grounds. First, the investigators at the scene could not identify where a piece of tape had specifically originated. (T. 146-47). In addition they kept no records as to each person who handled the evidence as it travelled from Chapman to Salerno to Bagram. (T. 191). Second in its cross examination of Examiner Sibley, the defense established that the "identification" was not the product of objective science but subjective opinion. (T. 476-479). The mitochondrial DNA evidence had only slight probative value because, as the technician admitted, millions of people could have been the source of the recovered hair. (T. 384-85). The "identification" evidence given by Sufwan Murad was patently unreliable. Murad made a photo identification under confusing, suggestive circumstances. And that identification was based upon two fleeting encounters with al-Shami years earlier.

Given the foregoing the erroneous admission of the emails and letter undoubtedly had a "substantial and injurious effect or influence in determining the

jury's verdict". *Kotteakos v. United States*, 328 U.S. 750, 756 (1946). It warrants reversal and a new trial.

POINT IV

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT ADMITTED, WITHOUT PROPER AUTHENTICATION HANDWRITTEN LETTERS FOUND IN A USB DRIVE

To be admissible, physical evidence must be properly authenticated. Fed.R.Evid. 901(a); *United States v. Maldonado-Rivera*, 922 F.2d 934, 957 (2nd Cir. 1990), *cert. denied* 501 U.S. 1211 (1991). Evidence of authentication must be sufficient to enable a reasonable juror to find that "the matter in question is what the proponent claims." Fed.R.Evid. 901(a); *United States v. Ruggerio*, 928 F.2d 1289, 1303 (2nd Cir.), *cert. denied* 502 U.S. 938 (1991). It may be established by "[t]estimony of a *witness with knowledge*…that a matter is what it is claimed to be." Fed.R.Evid. 901(b)(1) (Emphasis added). The USB drive that allegedly contained handwritten letters from "Abdallah al-Shami" was not properly authenticated. No witness had personal knowledge of the USB drive's seizure or the circumstances under which it was created. Its admission was, therefore, an

abuse of discretion. *United States v. Maldonado-Rivera*, 922 F.2d at 957 (authentication reviewed for abuse of discretion).

When determining whether a document is authentic, courts must consider the circumstances surrounding its recovery. *United States v. Harvey*, 117 F.3d 1044, 1049 (7th Cir. 1997); *United States v. Arce*, 997 F.2d 1123, 1128 (5th Cir. 1993). In this case no information was presented concerning the recovery of the USB drive. Former FBI agent John Dalziel testified that for a period he was the FBI's Legal Attache in Kabul, Afghanistan. On September 4, 2015 he received a USB drive (G.Ex. 700) and other computer media while outside the Chancery Building in Kabul (T. 895-96). The identity of the party who gave the drive to Dalziel is a mystery. Dalziel himself did not know where the materials originated (T. 896). He simply secured the materials and transported them himself to the FBI's offices in New York City (T. 896). FBI Agent John Ross who analyzed the USB drive had had no personal knowledge about either its recovery or how the JPEG files came to be on it.

Fed.R.Evid. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Since neither Dalziel or Ross had personal knowledge about where the USB drive originated or how it was created, they could not properly authenticate it. *Positive Black Talk, Inc. v. Cash Money Records*, 394 F.3d

357, 375-376 (5th Cir. 2004)(employee familiar with process of creating "mailers" could not authenticate document allegedly sent during a specific mailing).

The lower court did not address the mysterious circumstances surrounding the USB drive's recovery. It relied instead on the testimony of FBI handwriting expert Gabriel Watts that appellant "may have" prepared the English writings appearing on G.Ex. 702-719. (A39-A40; T. 974). While handwriting comparisons can provide the requisite authentication ,Fed.R.Evid. 901(b)(3), here there wasn't a firm identification but rather a "may have". That a witness opined that appellant "may have" prepared some of the writings on the JPEG files does not overcome the mystery surrounding its "discovery".

Admission of the letters was not harmless. *Kotteakos v. United States*, 328 U.S. 750, 756 (1946). The author of the letters acknowledges that he is a member of the "Abu Bakr Battalion" and requested that the recipient use al-Qaeda mail (G.Ex. 702-T, 705-T; A500, A507). He expresses concern for his safety and a desire to go to Syria (G.Ex. 709-T, 711-T, 715; A518, A523). In its summation the government emphasized that the letter proved that appellant was Abdallah a-Shami and that Sufwan Murad was accurate in his identification

> Your heard testimony from a member of a-Qaeda [Murad] who identified Muhanad Al-Farekh using the kunya or alias Abdullah a-Shami, as someone who

> received a-Qaeda's monthly stipend for is external operations brigade. And the evidence was shown [in the letters] that years later, in 2013…Muhanad Al-Farekh was hiding out in Waziristan, reclusive, obsessed with secrecy and fearing his own death.

(T. 1406). Later in the summation, the prosecutor told the jury that the letters, with its reference to al-Qaeda mail was "a clear admission by Abdullah a-Shami, by Muhanad Al-Farekh that he is a member of al-Qaeda." (T, 1463). The letters, therefore, had a "substantial and injurious effect of jury's verdict." *Id*. *See also Zappulla v. New York*, 391 F.3d 462 (2d Cir. 2004). This Court should vacate the judgment and order a new trial.

POINT V

APPELLANT WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE LOWER COURT PRECLUDED HIM FROM UTILIZING A REPORT TO CROSS EXAMINE THE GOVERNMENT'S FINGERPRINT EXPERT

Whether grounded in the Fifth Amendment's Due Process Clause or the Sixth Amendment's Confrontation Clause, it is well-settled that a criminal defendant has the right to present a defense. *Crane v. Kentucky*, 476 U.S. 683, 687 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Included in that right is the opportunity to challenge the integrity of law enforcement's investigation into

the offense charged. This is so because where "the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work till diminish it." *Kyles v. Whitley*, 514 U.S. 419, 448-449, n. 15 (1995). Appellant was denied that right when the lower court precluded him from utilizing a March 2006 Report of the Justice Department's Office of the Inspector General on the FBI's handling of the Brandon Mayfield case. (Report, Dkt. 140, Appendix #1, hereinafter "Report").

On March 11, 2004 terrorists detonated a bomb on several commuter trains in Madrid, Spain. 200 people were killed, and 1,400 others injured. The Spanish National Police (SNP) recovered fingerprints on a bag of detonators. The FBI Laboratory provided assistance. An FBI Examiner who conducted a side-by-side review concluded that one of the images, LFP 17, was the fingerprint of Brandon Mayfield, an attorney in Portland, Oregon (Report, p. 1). According to the FBI Brandon, a Muslim, "had contacts with suspected terrorists" (Report, p. 2). The SNP did the same comparison and reached a negative conclusion (*Id*.). Then, on May 19, 2004 the SNP informed the FBI that it had positively identified LFP 17 as the fingerprint of a different person, an Algerian named Ouhnane Daoud. Confronted with this identification, the FBI withdrew its identification of Mayfield. (Report, p.3).

The Office of the Inspector General identified several factors that contributed to the misidentification. The Report concluded that "the [FBI] examiners committed error in the examination procedure and that the misidentification could have been prevented through a more rigorous application of several principles of latent fingerprint examination." (Report, p. 6). For example, the examiners engaged in "circular reasoning" moving "backward" from the known prints of Mayfield to the latent image. Having found 10 points of similarity between the latent image and Mayfield, the examiners then found "murky or ambiguous" details that they also termed similar. (Report, p. 7).

The lower court precluded use of the Mayfield report finding that there was no "connection between the Mayfield case and this one…and the potential for confusion and undue prejudice" substantially outweighed any probative value. (A47-A48). That determination was constituted an abuse of discretion. *United States v. Yousef*, 327 F.3d 56, 128 (2d Cir. 2013) (preclusion of evidence reviewed for abuse of discretion).

There are remarkable similarities between the procedures utilized in Mayfield and the instant case. Appellant, a Muslim, was in U.S. custody, charged with a terrorism offense before the comparison was conducted. Mayfield is a Muslim who, according to the FBI, had contacts with terrorists. FBI Examiner Karen Sibley conducted a side by side comparison of the latent images and

appellant's fingerprints (T. 429). The same process was used in Mayfield (Report, p. 1). In this case there were ten points of similarity between the known prints and latent images. (T. 485). The same was true in Mayfield (Report, p. 7). The identification here was "confirmed" by another examiner as it was in Mayfield. (T. 480, Report, p. 3).

Use of the Report would have made appellant's cross examination of Sibley far more effective. The thrust of appellant's cross examination of Examiner Sibley was that fingerprint examination is not an objective science. Rather "identifications" are subjective, and mistakes are made even when proper procedures are followed. (T. 476-79). But Ms. Sibley countered that "research has shown latent fingerprint examinations are accurate in reaching accurate and reliable conclusions." (T.477). At that point appellant should have been able to confront Ms. Sibley with a government report that found that even when proper procedures are followed, subjective factors can lead to conclusions that are far from reliable.

The error, one of constitutional dimension, was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The conclusion that 18 latent images lifted from the tape on the VBIED were made by appellant was the centerpiece of the prosecution's case. (Summation:1438-1443). The only other evidence connecting appellant to the FOB Chapman incident was

the mitochondrial DNA profile of the hair that was found. But as the DNA expert herself admitted, millions of people could have that same profile. (T. 384). The government argued that the fingerprint evidence corroborated other evidence, including Murad's assertion that appellant was al-Shami. (T. 1555). This Court should reverse the judgment of conviction and order a new trial.

POINT VI

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT PERMITTED WITNESS VIDINO TO OPINE 1) THAT THERE IS NO PROFILE OF A POTENTIAL JIHADIST AND 2) THAT THERE IS A LOGICAL TRAVEL ROUTE FOR THOSE SEEKING TO JOIN AL-QAEDA

George Washington University Professor Lorenzo Vidino was called by government to testify, *inter alia*, on the subject of "radicalization". Among other matters he was permitted to opine that there are no variables which would make a person more or less susceptible to being radicalized. Appellant objected to that opinion evidence arguing that it failed to satisfy the requirements on Fed.R.Evid. 702 or, alternatively should be excluded under Fed.R.Evid. 403.

At a hearing outside the presence of the jury, the witness acknowledged that he had not utilized the scientific method. (A280-81) His theory has never been tested. (*Id*.). While he acknowledged the existence of an error rate, he could not quantify it. (A286). The lower court nonetheless overruled appellant's objection.

While finding that Vidino's testimony "ha[d] little probative value" the court held that it was nonetheless admissible under Fed.R.Evid. 702. (A299-A301).

Vidino was also permitted to testify, also over objection, that there is a common route of travel followed by individuals from the West who wish to join al-Qaeda. (A307-310; A311).

Admission of both opinions constituted an abuse of discretion warranting reversal and a new trial. *Kumbo Tire Ltd. V. Carmichael*, 526 U.S. 137, 142 (1999)(admission of expert testimony reviewed for abuse of discretion); *Amorgianos v. Nat'l. Railroad Passenger Corp.*, 303 F.3d 256, 264 (2d Cir. 2002) (same).

1. Determining Admissibility Under Rule 702

While appellate review of Rule 702 determinations is deferential, the United States Supreme Court has made clear that a district court is compelled to perform a critical "gatekeeping" function. *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 505 U.S. 579, 589, n.7 (1993). The Rule 702 gatekeeping function is especially significant because an expert opinion "can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595. Thus, it is "crucial" that an expert's analysis be reliable at every step of the Rule 702 gatekeeping process. *Amorgianos*, 303 F.3d at 267. *See also McCorvey v. Baxter Healthcare Corp.,* 298 F.3d 1253, 1257 (11th Cir. 2002)

2. Testimony Regarding a Terrorist Profile

"While an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability… [C]aselaw plainly establishes that one may be considered an expert but still offer unreliable testimony." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004). Professor Vidino possesses an impressive resume. However, his opinion in this case was not reliable because 1) they lacked a proper factual foundation and 2) they were not the product of reliable methodology.

Professor Vidino opined that there is no profile of a potential terrorist; that such people come from all walks of life and backgrounds. But Vidino provided no facts to back up that assertion. Vidino himself interviewed no more than 30 people who had become radicalized. (A285). He provided no information on their background or other characteristics. He did not set up control groups (A281). With respect to the individuals he did interview, he did not utilize any widely accepted diagnostic tools. (A268). While Vidino claimed that his opinion is shared by others in his field, the record is bereft of any facts upon which those other academics, including Vidino, relied. This is significant because, as Vidino acknowledged, that there is not even an accepted definition of "radicalization". (A280). Accordingly, the other "experts" who allegedly share Vidino's opinion could very well be working with a different definition of who is or who is not a

"radical". Where, as here, "'an expert opinion is based on data, a methodology or studies that are simply inadequate to support of the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of the unreliable opinion testimony." *Nimely v. City of New York*, 414 F.3d 381 396-397 (2d Cir. 2005) quoting *Amorgianos*, 303 F.3d at 266.

Other *Daubert*/Rule 702 factors also weigh against admissibility. "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593. The reliability of Vidino's opinion, - that potential terrorists come from all walks of life – *has never been tested* for accuracy. (A280-81). Vidino acknowledged the existence of an error rate but could not quantify it (A286). Vidino's articles have been subject to peer review and he reviews articles submitted to him by others. But there was no evidence that his articles on radicalization or, more specifically, his proffered opinion about the lack of any jihadist profile have been peer reviewed. (A271-74).

Finally, to be admissible under Rule 702, the court must determine that the proffered opinion "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702(a). Testimony is properly characterized as "expert" only if it concerns matters that the average juror is not capable of

understanding on his or her own." *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir 2008).

The issue before the trier of fact was whether the appellant Muhanad Al-Farekh left Canada for Pakistan in March 2007 in order to engage in jihad. That anyone from any background might do so does not make it more likely that appellant Al-Farekh did so.

If this Court finds that the lower court did not abuse its discretion when it held that the evidence was admissible under Rule 702, it should nonetheless have been excluded under Fed.R.Evid. 403. As the lower court correctly found, the probative value of the proffered testimony was slight. But contrary to the lower court's determination, that slight probative value was substantially outweighed by the prejudice to Mr. Al-Farekh. The lower court admitted worthless "expert" testimony that was without a factual basis. That the jury might wonder why someone from appellant's background would become radicalized is not a reason to admit baseless expert testimony.

3. Testimony Concerning Routes Travelled

Over appellant Al-Farekh's objection, (A307-A310) Professor Vidino was permitted to testify that there is a common route of travel used by those in the West who intend to join al-Qaeda in Pakistan/Afghanistan. That route, he testified, consists of flights through several cities with an arrival at an airport in one of

Pakistan's larger cities such as Karachi, Islamabad or Lehore. According to Vidino the individuals would then make their way to Peshawar, Pakistan's "gateway" to Afghanistan. Flights directly to Peshawar, Vidino opined, are disfavored as they might arouse suspicion. (A311).

Appellant objected to that testimony on two grounds. First, that opinion was not among those contained in the government's Fed.R.Crim.P. 16 (a)(1)(G) notice. Second, it lacked an adequate foundation under Rule 702. (A307-A310) The court's rejection of those objections, (T 1152) was an abuse of discretion.

Fed.R.Crim.P. 16 (a)(1)(G) provides that at the defendant's request the government must provide to the defendant "a written summary of any testimony that the government intends to use under Rule 702…" That summary "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." In response to appellant's Rule 16 objection the government pointed to a sentence in their September 11, 2017 letter to defense counsel. It stated that Vidino would testify that in 2006 and 2007 "new recruits came to Pakistan from Western countries and were able to join al-Qaeda." (A307; quoting from September 11, 2017 letter). The lower court held that from the foregoing "notice" appellant should have known that Vidino would opine that recruits followed a particular route to Pakistan from the West. That conclusion is, however, not supported by the record. The "notice" did not even purport to set

forth the bases, if any, of Vidino's opinion, as required by the Rule 16. Lacking that notice, appellant could not effectively rebut Vidino's assertions that there is a common route of travel used by al-Qaeda recruits.

Vidino's opinion was also inadmissible under Rule 702. There was no showing that it was based on "sufficient facts". Fed.R.Evid 702(b). His self-serving claim that his opinion was based upon interviews with 100 or so recruits is plainly inadequate. *Nimely v. City of New York*, 414 F.3d at 396-397. (opinion evidence must be based on sufficient data). The government may argue that counsel could have probed the issue on cross-examination. However, it is the proponent of expert testimony that bears the burden of demonstrating compliance with Rule 702 by a preponderance of the evidence. *Daubert*, 509 U.S. at 593, n.10. In this case the government failed to do so, and the lower court's contrary decision was an abuse of discretion.

4. The Error Was Not Harmless

An error is harmless only if it is "highly probable" that it did not contribute to the verdict. *United States v. Forrester*, 60 F.3d 52 64 (2d Cir. 1995), citing *United States v. Tussa*, 816 F.2d 58, 67 (2nd Cir. 1987). Error going "to the heart of a critical issue is less likely to be harmless…Moreover, even if an appellate court is without doubt that a defendant is guilty, there must be a reversal if the error is sufficiently serious." *Id*.

The government argued in summation that jihadists come from all walks of life, including appellant's middle-class background. (T. 1425). The prosecutor further argued that appellant followed a rote to Peshawar that is commonly used by al-Qaeda recruits. (T. 1420). Vidino's opinions, improperly characterized as "expert" undoubtedly bolstered the prosecutor's speculative arguments. Reversal is required.

POINT VII

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT 1) PERMITTED THE WITNESS EVAN KOHLMANN TO "SUMMARIZE" CERTAIN VIDEOS AND LECTURES AND 2) PERMITTD THE GOVERNMENT TO PLAY EXCERPTS FROM VIOLENT VIDEOS AND LECTURES.

Some of the emails sent or received by appellant Al-Farekh, Ferid Imam and/or Maiwand Yar prior to their departure from Canada contained links to various websites. Some of those websites contained links to lectures given by Anwar al-Awlaki. Over appellant's relevance and Fed.R.Evid. 403 objections, (Dkt. 161), government witness Evan Kohlmann was permitted to summarize the contents of some of those lectures even those with no connection to appellant. In addition, the government was permitted to play for the jury, also over objection, excerpts from two of al-Awlaki's lectures and a violent video produced by the

Islamic Army in Iraq entitled "Lee's Life of Lies". Finally, Kohlmann was permitted to improperly comment upon Maiwand Yar's 2009 letter to his family. These Fed.R.Evid. 403 errors were an abuse of discretion. *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005).

1. The Emails and Links

G.Ex. 801 (A545) is a March 16, 2006 email from Ferid Imam to eight individuals including appellant, Maiwand Yar and government witness Yousef Soufi. The subject line, apparently written by Ferid Imam is "Anwar al-Awlaki!" The email contains a link to the website "Asnat Al-Islam". That website contains, in turn, a link to an al-Awlaki lecture entitled "It's a War Against Islam" that Ferid Imam says is "very good" (*Id*.). There was no evidence that appellant Al-Farekh ever utilized that link, visited that website, listened to that lecture or even opened Ferid Imam's email. Notwithstanding the foregoing, Evan Kohlmann was permitted to describe that lecture, testifying that al-Awlaki claimed that police raids of Muslim Centers in the United States were an attack on Islam and not legitimate law enforcement (A357).

Government Exhibits 805 (A547) and 820 (A550) are emails sent by Ferid Imam on July 16, 2006 and February 19, 2007, respectively, to several individuals, including appellant. They contain a hyperlink to lectures by al-Awlaki about

Ramadan. Once again, no evidence was presented that appellant himself utilized those links or even read Imam's email. (A363-A364).

Appellant's connection to G.Ex. 804 (A546) is even more tenuous. It was sent by Maiwand Yar to Ferid Imam, and no one else, on July 8, 2006. In it Yar tells Imam "[t]hose lectures we listened to at Omar's place by Anwar al-Awlaki doesn't work on uponsunnah no more." (A546). Over appellant's objection the Court admitted a screenshot of the "uponsunnah.com" website (G.Ex. 1010). Contained on that website is a link to a series of lectures given by Anwar al-Awlaki. One of them "Constants on the Path of Jihad" was admitted into evidence, again over appellant's objection. (G.Ex 1011). Kohlmann summarized that lecture for the jury as follows

> Jihad continues regardless of whether or not there is a commander. Some Muslims believe that you can't wage a physical jihad unless there's a commander, and there's a head of state, and there's a state and all that…Anwar al-Awlaki in his interpretation he says that no, you don't need to wait for there to be a commander. You don't need to wait for there to be an Islamic state…
>
> Another constant is that jihad is not dependent on a particular land. In other words, if you're living in a country where there's no violent jihad taking place right now, you're still obliged. If there's some -- another land, somewhere else, and there's a jihad going on you're obliged to take part and include in taking part in your own backyard.

(A376). Two excerpts from "Constants on the Path of Jihad were later played for the jury (A384; G.Ex. 1012A and 1012B).[12]

There was no evidence that appellant Al-Farekh reviewed or listened to any of the foregoing lectures summarized by Kohlmann. Yet Kohlmann was permitted to summarize them in a way that bolstered the government's theory of the case, i.e. that appellant believed he had a duty to engage in *jihad*. Given the lack of any connection to appellant, the danger of prejudice substantially outweighed any probative value. *United States v. Harvey*, 991 F.2d 981, 996 (2d Cir. 1993)(relevance of defendant's possession of adult X-rated tapes substantially outweighed by prejudicial effect where defendant charged with possession of child pornography); *See also United States v. Al-Moayad*, 545 F.3d 139, 160-61 (2d Cir. 2008); *United States v. Schiff*, 612 F.2d 73, 80-81 (2d Cir. 1979).

On February 18, 2007 appellant sent an email to his family recommending that they obtain an al-Awlaki lecture entitled "The Hereafter" and referring them to a website "salattime" that he believed contained some other lectures. (G.Ex. 819,

[12] In response to appellant's objection, the government argued that Yousef Soufi testified that appellant listened to "Constants on the Path of Jihad" during the Hajj trip. Soufi actually testified that while he may have overheard appellant discuss al-Awlaki's ideas, he never actually observed him viewing any of them (T. 560, 569, 575). Moreover when interviewed by the police about appellant he made no mention of appellant listening to those lectures (T. 1363).

A551). The cover page of the "salattime" website was admitted over objection. (A364, G.Ex. 1004). Kohlmann the summarized "The Hereafter":

> [It is] a detailed description and sermon about the punishments that will be afforded on this Muslims who fail to live up to their obligations as faithful Muslims and also detailed awards that will be given in --- after the day of judgment…According to the Hereafter one of the ways that one can avoid the punishment of hellfire, one of the ways one can be rewarded on the day of judgment, is if you are martyred. If you become a Shaheed, in the cause of Islam.

(A366-A367). The site referenced in Government's Exhibit 1004 also contained a link to the a-Awlaki lecture "Allah is Preparing Us for Victory". Kohlmann summarize it, in part, as follows:

> Anwar al-Awlaki argued that…those who persevere against the current set of circumstances where Islam is under threat, those who stay steadfast and who continues to fight for Islam, those are the people who will be rewarded by God. And that those who fail to stay steadfast, even in these difficult times will not be rewarded.

(A370). Of course, there was no evidence that appellant shared al-Awlaki's sentiments. Thus, while these last two lectures have a connection, albeit a tenuous one, to appellant Al-Farekh their slight probative value was nonetheless substantially outweighed by their prejudicial impact.

2. Lees Life of Lies

A homemade video introduced as Government's Exhibit 503 depicts appellant sitting at a computer screen. He is seem watching the first few seconds of a video produced by the "Islamic Army in Iraq". Appellant is heard saying "it's good" and "Lee's Life". The homemade video concludes after a few seconds. There is no evidence that appellant viewed the production. Appellant moved to preclude the video as inflammatory and prejudicial. (T. 1313; Dkt. 161). Among other things the video depicts

> …a [U.S.] soldier in a helmet in an open turret on the top of the Humvee that then gets blown to bits…The idea of presenting videos of American soldiers being killed to the jury to me is the essence of unfair prejudice.

(A388). After viewing it the court overruled the objection finding the video probative. It permitted the government to play two excerpts. Both depict vehicles containing U.S. personnel being blown up by roadside bombs. In addition the court permitted Kohlmann to tell the jury that the video contains "a variety of different scenes, again, of roadside bombings, sniper attacks, other graphic footage, close up footage of attacks on U.S. personnel inside of Iraq." (A401).

Admission of this evidence was an abuse of discretion. Evidence that appeals to a jury's sympathies and connects a party to a "highly charged public issue" must be carefully evaluated before it is admitted under Rule 403." 1 Weinstein's Evidence P403(03) at 403-16-403-17 (1980). *See also United States v. Al-Moayad*, 545 F.3d

at 160-161. It was at best unclear as to whether appellant watched the video, let alone agreed with any of the actions depicted. Its admission served no other purpose than to evoke sympathy and to inflame the jury against him. Moreover, showing the video was unnecessary since the court permitted Kohlmann to testify that it contained graphic acts of violence against U.S. soldiers. *Al-Moayad*, 545 F.3d at 160 (noting that when a court conducts a Rule 403 analysis it should consider evidentiary alternatives).

This Court and other courts have found no abuse of discretion under Rule 403 in the admission of terrorist propaganda in material support cases where the evidence is relevant to prove a disputed fact such as the defendant's state of mind and/or the existence of a conspiracy. *See United States v. Mehanna*, 735 F.3d 32, 59-64 (1st Cir. 2013); *United States v. El-Mezain*, 664 F.3d 467, 508-511 (5th Cir. 2011); *United States v. Abu Jihad*, 630 F.3d 102, 133-134 (2d Cir. 2010) affirming *United States v. Abu-Jihad*, 553 F.Supp.2d 122, 128-129 (D.Conn. 2008); *United States v. Hammoud*, 381 F.3d 316, 340-342 (4th Cir. 2004); *United States v. Salameh*, 152 F.3d 88, 110-111 (2d Cir. 1998). However, in each of those cases there was a direct relationship between the defendant and each piece of challenged material. In *Mehanna*, the defendant himself circulated a video depicting a beheading and had read or viewed all the challenged materials. *Mehanna* 735 F.3d at 59-60. The defendant in *Abu Jihad* visited the websites that were introduced. *Abu Jihad* 553

F.Supp.2d at 128-129. The scenes of violence shown to the jury in *El-Mezain* were found on the computers used by the defendants. *El-Mezain*, 644 F.3d at 507-05. In *Hammoud*, the *Hizbollah* videos were found in the defendant's apartment. *Hammoud*, 381 F.3d at 340-342. Finally, *United States v,. Salameh* was a multi-defendant trial. This Court held that terrorist materials in the possession of one of the defendants were properly admitted at a joint trial. *United States v. Salameh*, 152 F.3d at 111. Here there is no proof that appellant Al-Farekh viewed "It's a War Against Islam", "Constants on the Path of Jihad" and/or the lectures about Ramadan. And while appellants' connection to "The Hereafter" and "Lees Life of Lies" is less tenuous there is no proof that he listened to them or adopted the views expressed in each.

3. Maiwand Yar's Letters

As argued *supra*., Maiwand Yar's letter to his family were inadmissible hearsay in that they were neither statements in furtherance of the conspiracy not declarations against interest. Additional error was committed when the lower Court permitted Kohlmann to opine that the thoughts expressed by Yar were "remarkably similar" to those expressed by Anwar al-Awlaki. (A382).

Expert testimony should not reiterate arguments based upon inferences that can be drawn by layperson or those that can be advanced in summation. *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994); *In Re Zyprexa Liability*

Litigation, 489 F.Supp.2d 230, 283 (E.D.N.Y. 2007). In his summation the prosecutor was free to argue that the views expressed in Yar's letter were similar to al-Awlaki's. The subject did not need an "expert's" help.

4. This Court Should Review The *Ex Parte* Submission Concerning Kohlmann.

On September 14, 2017 appellant moved for release of *Brady* and/or *Giglio* material concerning the witness Evan Kohlmann (Dkt. 152). On September 19, 2017, before Evan Kohlmann testified, the government responded to the motion in an *ex parte*, classified filing. (T. 1074; Dkt. 160, letter memorializing *ex parte* filing). On the following day the court stated that it had reviewed the material the government had submitted. It found that they "are not material to either cross-examining Mr. Kohlmann or to any other issue in this case." The court therefore found it unnecessary to enter a classified order as the materials were deemed not discoverable. (A259-A260). Consistent with CIPA § 4 it is respectfully requested that this Court conduct its own review of the Kohlmann materials and determine whether information "helpful" to the defense has been withheld.

POINT VIII

[redacted]

[redacted]

[redacted]

[redacted]

POINT IX

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT ADMITTED, OVER APPELLANT'S OBJECTION, A CONTROLLED DETONATION OF AN EXPLOSIVE DEVICE.

Government's Exhibit 504 is an approximately two-minute video, prepared by the government, depicting a "controlled detonation" of a car bomb. The explosion takes place in a field. There are cardboard figures mixed in with various vehicles. The car bomb explodes, destroying the vehicles and engulfing the scene in flames. At trial, the explosion was repeated twice, once in real time and a second time in slow motion. (T. 786-789). The lower court had overruled appellant's objection to the video, finding it to be probative of the amount of damage that the VBIED might have caused had it exploded (A56).

The admission of the evidence was an abuse of discretion as its prejudicial impact far outweighed its probative value. *United States v. Al-Moayad*, 545 F.3d 139, 160-161 (2d Cir. 2008). Contrary to *United States v. Cromite,*, 727 F.3d 194 (2d Cir. 2013), relied upon by the lower court, in this case there was an actual device that was recovered and analyzed. That the VBIED recovered here would have caused enormous damage had it exploded was not an issue that was contested at trial. Moreover, Agent Licata himself testified that its destructive force would have been "catastrophic" to anyone within 3000 feet. (T. 815-16). The video was,

therefore, cumulative. Its admission could only have had the effect of inflaming the jury's passions against the appellant and denied him a fair trial.

POINT X

APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY WHEN THE LOWER COURT DENIED HIS MOTION FOR A MISTRIAL

The Sixth Amendment to the United States Constitution provides that persons accused of crimes "shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." *U.S. Const.Amend.VI.* "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 721-722 (1961) quoting *In re Oliver*, 333 U.S. 257 (1948). To satisfy the Constitution, a verdict

> must be based solely upon the evidence developed at trial. *Cf. Thompson v. City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.

Irvin v. Dowd, 366 U.S. at 722. (internal citation included).

Because a juror's verdict must be based on the evidence and nothing else, any improper behavior that may tend to influence their decision "is, for obvious reasons, presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954) (juror questioned by FBI agent about possible bribe attempt). Appellant Al-Farekh was deprived of his right to an impartial jury when the lower court refused to declare a mistrial and allowed a juror who had been exposed to improper and presumptively prejudicial contact to continue as a deliberating juror.

The relevant facts are as follows. On the morning of September 28, 2017, the second day of jury deliberations, Juror Number 2 reported a contact with appellant's father to the Court's Deputy. With the consent of the parties the court conducted an individual *voir dire*. (A422). Juror Number 2 was the first. He told the Court that on the previous evening five or so jurors entered an elevator. A man jurors recognized as appellant's father got in. (A456-57). The man stated "I have not seen – I have not kissed my son for ten years. It's not right that I cannot kiss my son." (*Id*.). As the jurors left the building, Juror Number 2 noticed that the man was still looking at them. The court asked Juror Number 2 whether he could put aside what had happened and continue deliberations. He responded:

> I sort of hesitate to answer that because I felt like from what the person told us that sort of offers information that's relevant to the case…

When the court asked how it was relevant, Juror Number 2 replied:

> So he has not seen his son for ten years, and we have the testimony in the case that that person, the defendant, has not crossed any borders using his passport since leaving Canada.
>
> THE COURT: Well, if I asked you to exclude what he told you from your deliberations, are you able to do that?
>
> THE JUROR: Yes. I'm able to do that.
>
> THE COURT: Are you sure of that?
>
> THE JUROR: Yes.

(A458).

Juror Number 12 reported that three or four jurors got into the elevator. Appellant's father "jumped in with us". His comment to them was "'You know, it's been ten years since I kissed my son, why can't I kiss my son?'". The man, the juror further reported "was slow about waiting (sic) down the block". When asked if the experience would affect deliberations, Juror 12 replied "No, I don't think so". (A459-A461).

Juror Number 3 reported that on the previous evening, a man entered the elevator. "He said something about his son he hasn't seen for like seven years. That was it" (A463). The court asked whether the contact would have any impact on the juror's deliberations. The Juror replied "Not at all." (A464).

Juror Number 4 was next. The juror told the court that from what he understood "the father of the defendant [was] in the elevator I think with one of the jurors." He knew of the incident because another juror told him about it but "I don't know exactly who said it." (A465). Someone had said that they saw the defendant's father in the elevator and "rode down with him, but I don't know if there was anything said between them." (*Id*.). In response to the court's question the juror said that what was said to him "wouldn't have any impact on my reaching a verdict." (A466).

Juror Number 11 told the court that while in the elevator a gentleman said "'Can you believe they haven't let me kiss my son. I haven't seen him in ten years." And we got out of the elevator and that was it.'" (A471). Asked whether the experience would impact her deliberations, the Juror stated "I don't think so." (A472).

Jurors 1, 5, 6, 7, 8, 9 and 10 reported no contact (A466-470). Nor did the three alternate jurors (A472).

Appellant moved for a mistrial (A432). He argued first that the four jurors who were in the elevator with appellant's father were, as Juror Number 2 recognized, exposed to facts that were intertwined with the proof at trial. Counsel argued that Juror Number 2 specifically stated that

> Mr. Al-Farekh's father talked about how seeing or kissing [his son] in ten years and there's been evidence from the Government about the border and Canada that Mr. Al-Farekh hadn't been back in ten years…[it's] also undercutting a part of our defense theory that we squarely presented to the jury being that there is no evidence that Mr. Al-Farekh was not in contact with his family and that his family wasn't fine with him being in Pakistan.

(A429-430). Appellant moved to excuse Juror 4 as well. Although not in the elevator, he was apprised of the incident:

> We don't know what information was conveyed to that juror and there's – there's a probability that if he heard their discussion, that other jurors may have heard such discussion and maybe not have disclosed it but who knows. But it's another aspect of I think the presumed prejudice from this unfortunate situation.

(A433). Even if he was not present for the contact Juror 4 would see that fellow jurors had been replaced. He would likely assume it was because of some contact by appellant's father. In this terrorism case that contact could have been "bribery to threats of violence, intimidation. There's a whole gamut", counsel stated (A437-38). Counsel stated that appellant would not consent to an 11-person jury as required by Fed.R.Crim.P. 23(b)(2). Rather, because Juror 4 had also been tainted, the number of untainted jurors would be reduced to ten, thus requiring a mistrial. (*Id*.).

The government joined the motion to excuse the four jurors who had been in the elevator but opposed appellant's motion to excuse Juror 4 (A437-A439). The

court acceded to the parties joint request to dismiss the four jurors in the elevator but denied appellant's motion to excuse Juror 4 and, accordingly, appellant's motion for a mistrial. The court noted that the remaining jurors would be instructed that they should not give any consideration as to why some of the jurors had been replaced (A439). It then found that there was "good cause" to proceed with an eleven-person jury, emphasizing the complexity and length of the case (A440).

The remaining jurors were summoned to the courtroom. The court instructed them as follows:

> I don't want you to speculate in any way about who some of the jurors are no longer deliberating with you, might have been replaced by other jurors. That should not enter into your discussion at all. Don't even mention it. All I'll tell you about that is, neither the government, nor the defendant did anything wrong about that. So it has nothing to do with any of the parties there. Sometimes these things happen in the course of a trial,

(A444).

The court's refusal to dismiss Juror Number 4 and grant a mistrial was an abuse of discretion warranting reversal and a new trial. *United States v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011), citing *United States v. Smith*, 426 F.3d 567, 571 (2d Cir. 2005)(decisions to deny a mistrial reviewed for abuse of discretion).

Juror 4 was told, apparently by another juror, that appellant's father had initiated an inappropriate contact with them. He was then questioned about it during a *voir dire*. At its conclusion four of his fellow jurors were discharged. Given the sequences of events the conclusion is inescapable that Juror 4 connected the contact between appellant's father and the jurors' dismissal. Thus, there was a very real danger that he thought that his fellow jurors were somehow compromised, or even threatened. That inference is especially strong in this case where much of the evidence was inflammatory and involved violence.

In *Remmer*, a juror in a criminal trial was approached by someone offering money in exchange for a favorable verdict. The juror reported the incident to the trial judge who informed the prosecuting attorneys. An FBI investigation ensued. It concluded without charges being filed. The defense never learned of the matter until after a guilty verdict had been returned. The Supreme Court vacated the judgment recognizing that

> the sending of an FBI agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the FBI *or anyone else* looking over his shoulder.

Remmer v. United States, 347 U.S. at 229 (emphasis supplied).

Even more so than the FBI interview at issue in *Remmer* a statement by the family member of a defendant the government claims is a leader of Al-Qaeda "is bound to impress the juror and is very apt to do so unduly." *Remmer v. United States*, 347 U.S. at 229.

The presumption of prejudice required by *Remmer* may be rebutted, but only where the extra-record information or contact was harmless. *Farhane*, 634 F.3d at 168-69 (citing cases). That inquiry is "objective" and focuses on two factors: 1) the nature of the information or contact at issue and 2) its probable effect on a hypothetical average juror. *Id.* at 169. The contact here was not harmless. Juror 4 could have easily surmised that the jurors in the elevator were being cornered and then intimidated. As argued *supra*., given the nature of this case, an average Juror would necessarily experience fear or anger. Neither emotion has a place during deliberations. That the juror told the court that he could be fair (A466) is insufficient. That may have been his subjective belief. But it is the objective, circumstances that warranted Juror 4's discharge. *Id*. This Court should vacate the judgment of conviction and order a new trial.

POINT XI

THE 45 YEAR SENTENCE WAS SUBSTANTIVELY UNREASONABLE.

This Court's review of the reasonableness of a district court's sentence "encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008). When undertaking substantive review, this Court determines whether the district court abused its discretion. *Id*. While reasonableness review is deferential, this Court remains guided by the parsimony clause of 18 U.S.C. § 3553(a). That section mandates that sentencing courts "impose a sentence sufficient but not greater than necessary to comply with" the factors set forth in 18 U.S.C. § 3553(a)(2). *United States v. Douglas*, 713 F.3d 694, 700 (2d Cir. 2013) citing *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010). A sentence that is within or below the range as calculated under the advisory United States Sentencing Guidelines is not presumed to be reasonable. *United States v. Dorvee*, 616 F.3d at 182-183, citing *United States v. Cavera*, 550 F.3d at 189.

The law is clear that "if a district court were explicitly to conclude that two sentences equally served the statutory purpose of § 3553, it could not ... impose the higher" of the two. *United States v. Ministro-Tapia,* 470 F.3d 137, 142 (2d Cir.2006).

The 45 year prison term imposed herein was unreasonable harsh even given the extremely serious nature of the crimes committed. According to the court's own calculations it would require that appellant remain incarcerated until he is 67 years old.

In contemplation of sentencing appellant submitted several letters attesting to his kindness and humanity. (Dkt. 183, 184 and 186). They have one thing in common: that appellant is a kind, caring person. His friend Omar Akel describes appellant as

> a simply man, a sweetheart who would not hurt anyone…Mohannad is absolutely kind…what he did was wrong and should not be dismissed at all but the best approach is to help him understand where he went wrong and get a punishment that will not completely destroy his life.

Appellant's brother Ibrahim describes him as "kind, caring and compassionate" recalling how appellant intervened when he was bullied in school. Muhanad "has always been loving and affectionate to his brother and sister", his mother writes. Even while incarcerated his letters have a "soothing and calming effect" on the family. Mr. Al-Farekh's own letter shows a transformation. He told Judge Cogan that

> [v]iolence – especially when it is inspired by religion – is foreign to everything I believe in. Once a single act of violence is justified, it becomes that much easier to justify a second and a third and eventually to reach a point where it never stops.

> While I do not believe in violence, I do understand how young Muslims could be drawn into jihad and violence such as has been the unfortunate norm in much of the Middle East for the past 18 years…It is my view that following such a path is risky, foolhardy and most fundamentally wrong…I believe that the path to violent jihad is not one that represents a proper understanding of the teachings of the religion of Islam.

The court gave little weight to appellant's letter noting that appellant spoke about others, not himself. But as defense counsel pointed out appellant could have been hesitant to portray the letter as describing his own transformation because he intended to appeal his conviction and could face a re-trial. In any event, it is highly unlikely that a hardened *jihadist* would publicly criticize violent *jihad* as appellant did in his letter. Appellant's letter does not in any way diminish the seriousness of the offense or the need for substantial punishment. But it does show he is a person with humanity who has a potential to be a loving, caring person in the community.

The 45-year sentence would result in appellant spending the vast majority of his remaining years in prison under onerous conditions. Given all of the circumstances the sentence is substantively unreasonable.

CONCLUSION

WHEREFORE, for all the foreign reasons this Court should issue an order vacating the judgment of conviction and ordering a new trial, or, alternatively, remanding for resentencing and granting such other and further relief as this Court deems just and proper.

Dated: February 12, 2019

Respectfully submitted

/s/ Robert J. Boyle
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Attorney for Appellant

CERTIFICATION

This brief is in compliance with this Court's typeface requirements in that it has been prepared in Times New Roman 14 Point. It is not in compliance with this Court's length requirements in that it is 21, 813 words. However, on February 7, 2019 this Court granted appellant's motion for leave to file a Brief of no more than 24000 words.

/s/ Robert J. Boyle
ROBERT J. BOYLE

SPECIAL APPENDIX

TABLE OF CONTENTS

SPA-1

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
Muhanad Mahmoud Al Farekh

JUDGMENT IN A CRIMINAL CASE

Case Number: 15cr00268-BMC

USM Number: 85795-053

Sean Maher, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) 1 through 9 of the Superseding Indictment (S-2)
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§844(f)(1);	Use of Explosives	1/19/2009	1ss
18 U.S.C. §2332(b)(2)	Conspiracy to Murder United States Nationals	1/19/2009	2ss
18 U.S.C. §§2332a(a)1;	Conspiracy to use a Weapon of Mass Destruction	1/19/2009	3ss

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☑ Count(s) underlying indictment & counts ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/13/2018
Date of Imposition of Judgment

Digitally signed by Brian M. Cogan
Signature of Judge

BRIAN M. COGAN U.S.D.J.
Name and Title of Judge

3/20/2018
Date

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §2332a(b)	Conspiracy to use a Weapon of Mass Destruction by U.S. National.	1/19/2009	4ss
18 U.S.C. §§2332f(a)2;	Conspiracy to Bomb a Government Facility.	1/19/2009	5ss
18 U.S.C. §2339A(a)	Conspiracy to Provide Material Support to Terrorists.	10/1/2014	6ss
18 U.S.C. §2339A(a)	Provision and attempted Provision of Material Support to Terrorists.	10/1/2014	7ss
18 U.S.C. §§2339B(a)1;	Conspiracy to Provide Material Support to a Foreign Terrorist Organization.	10/1/2014	8ss
18 U.S.C. §§844(f)(1);	Provision and attempted Provision of Material Support to a Foreign Terrorist Organization.	10/1/2014	9ss

SPA-3

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1: 40 years
Counts 2, 3, 4 and 5: 45 years
Counts 6,7,8 and 9: 15 years (All counts to run concurrently with each other for a total of 45 Years)

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 Years concurrent on all counts.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPA-6

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

SPECIAL CONDITIONS OF SUPERVISION

1. No Firearms, ammunition or any destructive devices.

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 900.00	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SPA-8

DEFENDANT: Muhanad Mahmoud Al Farekh
CASE NUMBER: 15cr00268-BMC

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 900.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.